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Role of Regional Organizations in the Pursuit of International Criminal Justice

Contribution to the Seminar of the Special Tribunal for the Crime of Aggression against Ukraine:
What Role for Regional Organizations Such as the Council of Europe?
Organized on the Margin of the 66th CAHDI Meeting - Strasbourg, 10 April 2024

1. Good morning Excellencies, Colleagues, Dear Friends - It is an honor and privilege to be here today to speak on the margin of CAHDI's 66th Meeting and contribute to the important discussion on the Special Tribunal for the Crime of Aggression against Ukraine - and specifically addressing the issue of what roles regional organizations, such as the Council of Europe, can play to ensure accountability. I would like to thank the Secretariat of CAHDI, as well as the other co-sponsors of the event, for their kind invitation to speak.
2. Today, I would like to share some thoughts on how special regional organizations have assisted the pursuit of international criminal justice and ensured accountability for gross violations of international criminal law. I would like to make three points.
3. First, since the creation of the International Military Tribunal (IMT) in Nuremberg - which played a foundational role in the prosecution of gross violation of international criminal law – there have been several attempts by the international legal community to bring to justice perpetrators of gross violation of international criminal law. The effort to address violations of international criminal law and curb impunity (and at the same deal with immunity) culminated with the creation of the International Criminal Court (ICC) – a permanent international court with prospective and general jurisdiction over specific crimes and open to all countries. In between the IMT and the ICC, and indeed also in parallel with the ICC, there have been numerous attempts to prosecute gross violations of international criminal law via special, ad hoc, processes.

4. Special (or ad hoc) tribunals are flexible institutions created for a specific purpose, generally to address a vacuum, in accountability. They are generally posterior, created to address a particularly egregious violation of international criminal law.
5. Some essential features may be considered when examining special tribunals. First of all, how are they created? What was the instrument that created the special tribunal? Was it created by Treaty - a bilateral treaty, or a multilateral treaty - or was it a resolution of an international organisation? What is the applicable law? Is it national law? Is it international law? Or is it maybe a mix of the two? What is their jurisdiction in terms of *ratione personae*, *ratione materiae*, *ratione temporis*, and *ratione loci*? Where were they established, and how are they staffed? Is the staff, including adjudicators and prosecutors, international or domestic?
6. A specific kind of special tribunals are the so-called hybrid tribunals. These are interesting because they adopt a mix of domestic and international law elements, including in terms of the applicable law, the nationality of judges, and the nationality of staff members.
7. The two most famous examples of special tribunals are the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Both are precursors of the International Criminal Court, and both were created by a resolution of the United Nations (UN) Security Council, acting under Chapter VII of the UN Charter, making them binding on all UN member states.¹ In sum, several examples of special tribunals exist, each with its unique yet predictable features.
8. This brings me to my second point: special tribunals can generally be distinguished between international and domestic tribunals, depending on how they were created. An international tribunal is a tribunal based directly on international law and created through an international legal mechanism. For example, the ICTY and the ICTR were created by Security Council resolutions, and they are considered international tribunals. International special tribunals may also be created by an agreement with the United Nations and the country concerned. For example, the Special Court for Sierra Leone was created in January 2002 by an agreement between the UN and Sierra Leone. The Security Council, acting under its Chapter VI powers, mandated the UN Secretary

¹ Respectively Security Council Resolution 827/1993 of 25 May 1993, Doc. S/RES/827 (1993) (available [here](#)) and Security Council Resolution 955/1994 of 8 November 1994, Doc. S/RES/955 (1994) (available [here](#)).

General to negotiate the creation of this Special Tribunal.² The Special Court for Sierra Leone was the first hybrid court to try a former head of State, Charles Taylor. To do so, the Court moved the trial to The Hague.

9. Conversely, some tribunals are created through national law. For example, the Extraordinary Chambers in the Courts of Cambodia (ECCC) were formed through national law within the country's judicial system. The ECCC was also created through an act of the United Nations. A General Assembly Resolution authorised the UN Secretary General to negotiate an agreement with the government of Cambodia with the view of establishing a criminal tribunal.³ The ECCC was created by the Cambodian government and the UN, and it is independent of them. It was a Cambodian court with international participation that applied international standards.
10. The form a tribunal takes – whether international or national – is significant for many reasons. In the specific context of the creation of a Special Tribunal for the Crime of Aggression against Ukraine there are at least two important reasons. First, in relation to the applicability of functional immunity, which is generally considered inapplicable before international criminal courts, but possibly applicable in the domestic context. Second, because of possible existing limitations in the Ukrainian legal system related to the creation of special criminal chambers. The creation of an international tribunal on the model of the ICTY or ICTR, is highly unlikely at present. A domestic tribunal may raise other kinds of difficulties.
11. This brings me to my third, and final, point: there are several international tribunals that have been created through regional organisations that could serve as examples for the creation of a special tribunal in the context of the Crime of Aggression against Ukraine. I have so far described examples of international special tribunals created through the UN, however, there are also several relevant examples of international tribunals created at the regional level, via an agreement between a State and a regional organization that could provide a meaningful framework/blueprint for the case at issue here.

² Security Council Resolution 1315/2000 of 14 August 2000, Doc. S/RES/1315(2000) (requesting the Secretary General to negotiate an agreement with the Government of Sierra Leone to create and independent special court).

³ Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea (ECCC Agreement, available [here](#))

12. I would like to briefly focus on three. There are examples of regional organization that have been or are involved in the creation of special criminal tribunals, aimed at prosecuting specific crimes and each with specific and limited jurisdiction *ratione materiae, ratione personae, ratione temporis, ratione loci*.
13. The first special tribunal that created in a regional setting is the Extraordinary African Chambers (EAC). This is a very interesting example because it is a tribunal that was established under an agreement between the African Union and Senegal to try international crimes committed in Chad between 1982 and 1990, during the power of the Chadian President, Habré. For this reason, it is also at times referred to as the 'Habré Tribunal.' Habré was the first former Head of State to be convicted of human rights abuses in the court of another nation. He was found guilty in 2013. The creation of the EAC was not a simple one. Habré was first indicted in Senegal, where he lived, in 2000, but the Senegalese courts ruled that he could not be tried there. After several international legal vicissitudes probably known to you, Senegal asked the African Union (AU) to recommend a course of action. In 2006, the AU called on Senegal to prosecute former President Habré. The Court of Justice of the Economic Community of West African States (ECOWAS) also ruled in 2010 that Senegal could not hold trial in this matter through local courts only, and requested the creation of a special tribunal. Further to that, Senegal agreed to the creation of an *ad hoc* tribunal in collaboration with the AU and Chad. The judges of the tribunal were appointed by the AU, and came from elsewhere in Africa. Chad waived any claims to immunity that Habré would have had in 2002. Article 3 of the EAC Statute provided that the EAC "shall have the power to prosecute and try the person or persons most responsible for crimes and serious violations of international law, customary international law and international conventions ratified by Chad, committed in the territory of Chad during the period from 7 June 1982 to 1 December 1990." The EAC is an important example of a special international tribunal created in agreement between the AU and Senegal to try crimes committed in Chad.
14. The second example of a special tribunal created by agreement between a country and an international organization pertains to the Kosovo* Specialist Chambers and Special Prosecutor's

Office in Kosovo*.⁴The Kosovo Specialist Chambers were established pursuant to an international agreement between Kosovo and the European Union, created through an exchange of letters between the Kosovo President and the High Representative of the EU in 2014.⁵ The KSC is interesting because it is staffed by international personnel and includes 18 international judges, appointed by the Head of EU Commission on Security and Defense policy mission. Moreover, in addition to the EU, it is funded by other contributing states, including Canada, Norway, Switzerland, Türkiye, and the US. Thus, in addition to the EU, several other states also participate. The agreement was ratified by the Kosovo Assembly, a constitutional amendment of the law of Kosovo, the Specialist Chambers, and the Special Prosecutor's Office. These Chambers are temporary in nature and have a special mandate and jurisdiction over crimes against humanity, war crimes, and other crimes under Kosovo law, committed between 1998 and 2000 by or against citizens of Kosovo or the Federal Republic of Yugoslavia. The KSC is based in The Hague.

15. The third example relates to a Tribunal the establishment of which is currently being discussed. In the context of The Gambia, ECOWAS and The Gambia have created a Technical Committee to begin the process of creating a hybrid court, at the request of The Gambia and in the aftermath of the 2022 Truth, Reconciliation and Reparation Commission. This instrument is still being negotiated, but the understanding is that the proposal is to create a special hybrid chamber and a hybrid prosecutor.
16. In sum, and to conclude, there are several examples of special tribunals. Each tribunal is unique and targets specific situations. Special tribunals are inherently flexible instruments. Moreover, flexible and ad hoc tribunals also exist at the regional level and are created by agreement between a regional organization and the state concerned. The existence of past successful examples supports the idea of creating an ad hoc Tribunal for Ukraine. Creating a Tribunal would work especially well within the context of the Council of Europe, a regional multilateral organization with a varied and numerous memberships, which would also provide substantial legitimacy to the Tribunal. Additionally, using a mechanism that also includes an Enlarged Partial Agreement, similar to the

* Note by the Council of Europe Secretariat: 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.

⁵ For information on the Kosovo Specialist Chambers & Specialist Prosecutor's Office, see [here](#).

one used to create the Register of Damage for Ukraine, would provide additional legitimacy to a new instrument. Indeed, while the war in Ukraine is unprecedented, and raises unprecedented issues, there are options that we can take from existing precedents, which can provide a meaningful mechanism for accountability. There are no legal impediments to create such a special tribunal based on an agreement between the Council of Europe and Ukraine. Action by a regional organisation would not be illegitimate or unprecedented. Indeed, to address the situation at hand, we look at the precedents that exist and learn. To create a new and unique mechanism, we can look at prior special tribunals and select the specific elements that are needed to create an instrument fit for purpose. We have precedents, and international law provides support for the creation of such a special tribunal.

17. Thank you, and of course, I will be happy to take any question.