

Seminar on the Special Tribunal for the Crime of Aggression against Ukraine
– what role for regional organisations such as the Council of Europe?
10 April 2024

Introductory remarks by

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I am honoured to chair the first panel today in which we will be discussing the role of the Council of Europe in the establishment of a Special Tribunal for the Crime of Aggression against Ukraine. I will introduce the panellists in just a moment, but I will first say a few words to set the scene. Those of you who have been involved in the discussions in the Core Group are, of course, aware of the discussions of the various models by which the special tribunal may be established. Professor Kreß has just given us a magnificent tour de force, setting out the possibilities and the options which are before us. Of course, we have had discussions about the establishment of an international tribunal or an internationalised or hybrid tribunal. There have also been discussions around the possibility of establishing the tribunal somehow through the UN, perhaps with the endorsement of the UN General Assembly, or possibly on the basis of a multilateral treaty. But now discussions are focussing on using a regional organisation, this organisation, the Council of Europe.

The pursuit of accountability for international crimes through tribunals established by regional organisations is, of course, not new. Indeed, there are many examples which we can draw from. It is also worth noting that the possibility of prosecuting the crime of aggression through a tribunal that is established by a regional organisation is also not without precedent. If the special tribunal was to be established through the Council of Europe, it would not, in fact, be the first treaty that provides for the possibility of prosecuting the crime of aggression through a tribunal established by a regional organisation. The African Union, in the [Malabo Protocol](#) which amended the Protocol on the Statute of the African Court of Justice and Human Rights – although not yet in force – already included the crime of aggression within the statute of a tribunal that may come to exist on a regional basis.

There are a range of questions that arise with regard to the use of regional tribunals for the pursuit of international criminal justice. I will just set out four questions and leave the panellists to answer those questions.

The first question is probably not a legal one and resonates partly with the question that Professor Kreß ended with. It is a question regarding the legitimacy of the project. Are regional tribunals to be seen as less legitimate? Is there something taken away from the pursuit of accountability for international crimes

if such accountability takes place on a regional basis? In the African context, there have been a number of tribunals tasked with prosecuting international crimes that have been proposed or established by or with the assistance of regional organizations. One can think of the Malabo Protocol that I referred to and the tribunal that prosecuted former Chadian President Hissene Habre. Indeed, at the moment there are proposals for more such tribunals with the discussions underway regarding a tribunal to be established by sub-regional group ECOWAS with the Gambia. So, at least in that context, perhaps the answer is no, regional tribunals should not necessarily be seen as less legitimate, and in fact might even be seen as preferable.

The second question is a legal one, concerning how such a tribunal ought to be created. This question goes to what legal architecture is needed in terms of establishing the Special tribunal itself, in terms of its composition, and the critical question of the definition of the crime that the tribunal will be charged with prosecuting.

The third question that arises is one which is perhaps internal to the organisation in question: to what extent does the regional organisation have the legal competence to participate in the pursuit of international criminal justice? Although the answer to this question begins with the internal law of the organisation, that answer also depends on consideration of the general law of international organisations. Providing an answer involves looking at how the law of international organisations enables us to interpret the constitutive instrument of the organisation and to think about its competence.

The fourth question that arises in this context concerns the legal consequences that flow from the creation of the tribunal or any tribunal through a regional organisation. To what extent does it make a difference creating a tribunal in this way? Many of you will have in mind the discussions that have already been ventilated and reventilated on immunities and other questions.

These are the questions that face us in this panel, and we have an excellent group of people to discuss these questions. Let me introduce them all before I then give the floor to them one by one, and I will go in the order that they appear from my right.