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**Informal Conference
of the Ministers of Justice of the Council of Europe
“Towards Accountability for International Crimes Committed in Ukraine”**

Speech by Michael O’Flaherty
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Chairperson, Ministers, Secretary-General, Excellencies, dear colleagues,

Thank you for the invitation to take part in this important meeting. Thank you also for giving me the opportunity, again, to express deep solidarity with the people of Ukraine. The recent and continuing large scale Russian attacks remind us of the urgency and importance of the issues we are discussing.

The Council of Europe has been instrumental in holding Russia to account for its war of aggression. It showed leadership by promptly excluding Russia from membership. It took concrete measures such as with the establishment of the Register of Damage, as a first step towards an international compensation mechanism. It supported the process of establishing an appropriate judicial frame to try the crime of aggression, in line with the Reykjavik Declaration. In addition, of course, it has helped the Ukrainian justice system to prosecute international crimes in accordance with the relevant international standards. I am glad that my predecessor and I have played our role in the support delivered to Ukraine by Council of Europe institutions. I pledge my continued engagement as a matter of high priority.

Allow me also to express appreciation for the range of recent Ukraine-related accountability initiatives by international partners, including the work of the European Commission and of EUROJUST, especially the establishment of a Joint Investigation Team, as well as the operation of the International Centre for the Prosecution of the Crime of Aggression Against Ukraine; the International Criminal Court investigations; the fact-finding by the United Nations Human Rights Monitoring Mission in Ukraine; the UN Commission of Inquiry; the OSCE

Moscow Mechanism and the work of ODIHR; as well as other efforts on the part of States and civil society.

Colleagues, it is not for me to have a view on the form of tribunal that may be established to try the crime of aggression or the nature of its institutional affiliations. Where I do have a role is in pointing out core human rights perspectives that should inform its work. In that spirit this morning I offer four considerations that apply to any form of international criminal accountability process.

My first consideration draws from my own thirty years of engagement around these issues, first in the negotiations for adoption of the Rome Statute, then with the UN peacekeeping and human rights programmes in numerous countries and, more recently in the efforts of the EU regarding the aggression against Ukraine. From these experiences I recall that very few of the human rights issues that confront us now are novel – they have engaged attention of decision makers for decades that have resulted in often wise policy outcomes. It is important to draw on that experience. We can avoid “reinventing the wheel” with highly participatory deliberations that draw on the expertise of all those organisations I mentioned a moment ago. And I would urge that a consultative place at the table be given to the relevant highly skilled civil society organisations. This will for instance, be particularly important regarding the issue of whether trials *in absentia* may be permitted.

My second point concerns trials *in absentia*. This matter has drawn considerable debate since it carries with it such profound human rights considerations. As you consider how to address it there is little experience to draw on. Judicial pronouncements on the matter have focussed on national or domestic proceedings. For international practice we have just the experience of the Nuremberg Tribunal and the Special Tribunal for Lebanon – as well, of course, as the negotiations for the Rome Statute, which ultimately did not include provision for such trials.

Trials *in absentia* raise concerns regarding respect for the fair trial rights of the accused.

However, it would be incorrect to argue that a trial *in absentia* is inherently unfair. There are also considerations in favour of conducting such trials. When the accused refuses to appear then there is a risk that justice will not occur, leaving victims unvindicated. And, trials *in absentia* can provide an opportunity

to present evidence to the public, to preserve the quality of evidence and ensure that victims and witnesses receive redress. As Judge Ivana Hrdličková, former President of the Special Tribunal for Lebanon, put it in 2016,

“At its core international criminal justice aims to do much more than to punish individual perpetrators of crimes if they are found guilty. *In absentia* trials are a way of allowing the international community to pursue justice for grave crimes without permitting the absence of the accused to hamper its aims, and to fight against impunity.”

In the context of the aggression against Ukraine, if it were to be concluded that *in absentia* trials might be permissible it would of course be essential to address the guarantees identified by the European Court of Human Rights and the United Nations Human Rights Committee. At a minimum, these require:

- To ensure that every reasonable effort is made to bring the proceedings to the attention of the accused persons.
- That defendants due process rights are assiduously protected, including rights of appeal.
- That, in cases where the defendant was unable to participate, that later retrial opportunities are provided. In this regard, the European Court of Human Rights found that the refusal to reopen proceedings conducted in the accused's absence, without any indication that the accused has waived his or her right to be present during the trial, is a “flagrant denial of justice”.

For my third point I turn to the role of civil society in documenting international crimes. It is a fact that the first responders to arrive at the scene of international crimes often come from civil society. They, typically at great personal risk, are the first documenters of atrocity. We must value this essential role. As the Coalition for the International Criminal Court recently put it,

“These inspiring human rights defenders lead efforts to guarantee that all victims have access to justice and redress in every situation, wherever they are. Civil society’s unwavering commitment compels States, the ICC and other international bodies, to prioritise the fight against impunity. Their dedication keeps the fight for justice alive. Without them, the pursuit of global justice would falter”.

Of course, civil society and all other criminal data gatherers need to follow international best practice. In this regard I would encourage us all to make full use of such methodological tools as recent guidelines of EUROJUST and the ICC, as well as the ever-evolving guidance and practice of the UN Commissions of Inquiry and Fact-finding Missions.

Authorities who engage with civil society must also adhere closely to best practice. One consideration that must be uppermost for them is respect for the humanitarian principle of DO NO HARM. Respect for this principle requires assiduous attention at every stage of international criminal process, from primary investigation up to and following the conclusion of criminal proceedings.

As my fourth and final point I turn to the specific issue of support for victims and witnesses in international criminal proceedings. Again here, much has been learned in the past two decades in the context of the work of the ICC and ad-hoc international tribunals.

Beyond the principle I have just referred to of Do No Harm, it is necessary:

- to integrate a proper role for victims in proceedings in full respect for their human rights,
- to engage with them in culturally appropriate ways,
- to avoid re-traumatisation,
- to offer physical and psycho-social supports.
- And it is no less important to appoint victim and witness support staff who are well trained and adequately resourced.

In conclusion, allow me a personal remark on the context for international criminal accountability. A long time ago I gave evidence in the trial of the then President of Liberia, Charles Taylor, charged with crimes against humanity perpetrated in Sierra Leone. Ultimately, he was found guilty and sentenced to life in prison. It gave me much satisfaction that my own testimony contributed to his conviction. However, in subsequent years I came to appreciate that the greatest satisfaction derived not solely from the outcome of individual trials but from the multiple justice initiatives for Sierra Leone – judicial and non-judicial - that were implemented over a decade. It was in the breadth of this pursuit of accountability that that country was set solidly on the path to a better future. It is in this spirit that I encourage us to maintain a broad focus in our support for

the delivery of justice in Ukraine and to recognise that our commitment needs to be for the long term.

Thank you.