CAHDI Seminar on the Special Tribunal for the Crime of Aggression against Ukraine - what role for regional organisations such as the Council of Europe?
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State of play of discussions in the Core Group Working Group on Cooperation

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Thank you, Chair. Dear colleagues, I think you are all too aware of the saying that where there are two lawyers, there are at least three opinions. So, what can you expect of a room with more than 100 international lawyers? I think we agree on three things and those are the most important ones, namely that, first, the Russian aggression, as Professor Kreß so eloquently stated this morning, is one of the gravest breaches of international law in Europe since the Second World War. Two, that the Russian leadership is accountable, and therefore criminally liable for that. And three, that states, such as Ukraine and a group of states, have the power, if not the duty, to hold them accountable. On that basis, I think the discussions should focus on results.

In the Core Group, we have had extensive discussions on the main building blocks of the tribunal, and some of them have already been mentioned. But those discussions have also taken up quite a lot of our time. What this means is that some of the more technical aspects, the nuts and bolts of the future tribunal, were getting less attention. We felt, particularly as a potential host state of the tribunal, that these issues deserved more intensive scrutiny. That is why we came up with this idea of a working group. It is a working group on cooperation, not a negotiating forum. It is very informal, and we do not prepare any decisions, drafts, etc. However, we do examine topics which are of importance to the tribunal. Indeed, without state cooperation, there will not be an effective tribunal with effective investigations and prosecutions. Moreover, without the ability of states to cooperate smoothly with the tribunal, its legitimacy could be significantly damaged. Our experience with different tribunals has shown that some of these issues need to be covered in advance. As you know all too well, with the ICC this has been left to voluntary cooperation with states, often ad hoc, and that leads -

sometimes - to a "not in my backyard" approach. Given the difficulties that can be anticipated with this tribunal, it is all the more important that we cover some of these in advance.

The working group has dealt with several issues already even though we only started in autumn last year. We first focused on extradition and surrender to the tribunal and the cooperation elements of that. We then spent several sessions on trials in absentia, and that is where I will focus some of my remarks today, before we move on to cooperation with international bodies followed by other elements such as witness protection. So just a few words on our discussions on trials in absentia. As you know, this is not a very common model for international tribunals. And in fact, we have only had two examples of fully international tribunals holding full trials in absentia: The Nuremberg one, where Martin Bormann was convicted in absentia, even though he was already dead by that time, and the Special Tribunal for Lebanon (STL), where one suspect was convicted, even though we did not know whether the convicted was dead or alive. It is a complicated model. It has a bad reputation among public international lawyers, and it is not common in some national systems, notably those with common law heritage. However, there are good reasons to look seriously at the options such a model presents, and I think we should move away from these simplistic representations of trials in absentia, as national systems show that this can produce credible, solid, convictions in compliance with international law, which serve the interests of victims, truth-finding, and the international community as a whole.

This was underlined by the International Criminal Court in its recent decision of the pre-trial chamber in the *Kony* case, where the pre-trial chamber withdrew some of its earlier reluctance on in absentia hearings of the pre-trial chamber, pointing in particular to these interests of truth-finding, victims, and the international community as a whole. Given the conflict we are dealing with, the gravity of the crimes, and not least the role of the Russian Federation, I think it will be inevitable that we seriously consider this model. Second, I would like to point to the fact that our discussion showed that in absentia trials are not an all-or-nothing model. There are different variations, both at the international and national level where the nuances merit examination. There is the model in which the ICC can, or will take up, of limited in absentia proceedings before a pre-trial chamber, where you can have a confirmation of charges hearing without the suspect. That could lead to a presentation of evidence, hearing of witnesses, and, possibly, to arrest warrants. We have seen that model with the ICC, Article 61 of the Rome Statute, and also the ICTY. There is a second model of simplified procedures where you have

a skeleton trial which is expedited and will lead to a finding of guilty or not guilty verdict but with a right to retrial. Finally, there is the full in absentia model, as followed by the STL.

For all three models, I think clear human rights considerations apply, and we have examined those in quite some detail with very useful examinations and contributions from various members of the Core Group. First, if focusing on the notification requirements, which are quite stringent but still take the special circumstances of the case into account, I think we can find a tailored approach for this future tribunal. Secondly, we discussed the right to retrial, which is an absolute must in the case of in absentia proceedings. We also looked at the modalities of such a right. You will recall that the STL at the beginning was challenged on this aspect, and both the trial chamber and the appeals chamber ruled that the defense lawyers should not worry with the argument that there was no reason to doubt that the international community would take care of this. In hindsight, such an open-ended promise was either a bit short-sighted, or overly optimistic, in my opinion.

For this future tribunal therefore, we should have more concrete arrangements and having it embedded in the Council of Europe or linked to the Council of Europe would be a first good step towards ensuring that. Secondly, with proceedings in absentia, we found, and we benefited from presentations by experts, including the former President of the STL, Judge Ivana Hrdličková, that it is very important to foresee a procedure or develop arguments and discussions on this far in advance. What are the rights of the defense, of the prosecution, what can be challenged, which body of the tribunal will rule on that, within which time frame, and so forth. Particularly in *in absentia* proceedings, defense lawyers are keen to show that they are doing absolutely everything possible for their clients, even if they cannot be in touch with them to obtain instruction. However, that will also mean that there may be more pressure on the tribunal and the proceedings than is usually the case. Thirdly, it is very important to ensure that the trial proceeds not only in full compliance with human rights requirements, but also proceeds on a very efficient basis within certain time frames. I think the experience of the STL shows that if you do not set out the ground rules on this particular component in advance, then you may create certain perverse incentives to drag out the trial, appeals, connected proceedings, and so forth. Almost *ad aerternam* because, naturally, the people working there have an incentive in prolonging their position. I will leave it at that. Thank you.