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NOTE

From: Presidency
To: Council

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Subject: Council conclusions on the fight against impunity regarding crimes committed in connection with Russia's war of aggression against Ukraine
- Approval

Following the submission by the Presidency of the above-mentioned draft Council conclusions, the Working Party discussed the text at meetings on 30 September and 26 October 2022.

On 23 November 2022, the Permanent Representatives Committee confirmed that there was agreement on the text as set out in the Annex to this note. The Committee also agreed that the text, once approved by the Council, should be published in the *Official Journal*, and decided to submit the file to the Council, so as to allow the Council to approve the conclusions.

In light of the foregoing, the Council is invited:

- to approve the conclusions as set out in the Annex to this note.

[- Text as agreed by Coreper -]

Council conclusions on the fight against impunity regarding crimes committed in connection with Russia's war of aggression against Ukraine

I. Introduction

Immediately after the start of the armed attack, on 24 February 2022, the European Council condemned in the strongest possible terms Russia's unprovoked and unjustified war of aggression against Ukraine, which is a gross violation of international law and of the principles of the UN Charter and is causing massive loss of life and injury to civilians.

On 1 and 2 March 2022, 39 States Parties to the Rome Statute of the International Criminal Court ('Rome Statute'), including all Member States of the European Union, made a referral to the International Criminal Court (ICC), asking the ICC Prosecutor to investigate the situation in Ukraine. On 2 March 2022, the ICC Prosecutor announced that he had proceeded to open an investigation into the situation in Ukraine on the basis of the referrals received. Subsequently, four other States Parties referred the situation in Ukraine to the ICC, bringing the total number of States Parties having done so to 43.

In its conclusions of 24 and 25 March 2022, the European Council stated that 'Russia is directing attacks against the civilian population and is targeting civilian objects, including hospitals, medical facilities, schools and shelters. These war crimes must stop immediately. Those responsible, and their accomplices, will be held to account in accordance with international law'.

In its conclusions of 30 and 31 May 2022, the European Council urged Russia to stop its indiscriminate attacks against civilians and civilian infrastructure immediately. It stated that ‘the atrocities being committed by Russian forces and the suffering and destruction being inflicted are unspeakable’. The European Council also stated that it commends all those helping to gather evidence and to investigate war crimes and the other most serious crimes, and that it supports the intensive work of the Prosecutor of the International Criminal Court in this respect. It also welcomed the work being carried out by Ukraine’s Prosecutor General with financial and capacity-building support from the European Union and its Member States. It welcomed the establishment of a Joint Investigation Team coordinated by Eurojust, whose role has been reinforced, and the ongoing operational support provided by Europol.

In its conclusions of 23 and 24 June 2022, the European Council underlined that ‘Russia, Belarus and all those responsible for war crimes and the other most serious crimes will be held to account for their actions, in accordance with international law’.

In its conclusions of 20 and 21 October 2022, the European Council stated: ‘War crimes committed against Ukrainians, of which there is growing evidence, and the continuous destruction of civilian infrastructure are a gross violation of international law. The European Union reiterates its firm commitment to holding Russia, and all perpetrators and accomplices, to account, and its strong support for the investigations by the Prosecutor of the International Criminal Court. The European Council acknowledges Ukraine’s efforts to secure accountability, including for the crime of aggression against Ukraine. It invites the High Representative and the Commission to explore options so that full accountability can be ensured.’

Further, in its conclusions of 20 and 21 October 2022, the European Council invited the Commission to present options in line with EU and international law aimed at using frozen assets to support Ukraine’s reconstruction. The European Council recalled in this context its conclusions of 30 and 31 May 2022. The reconstruction of Ukraine would also benefit victims of crimes committed in Ukraine.

The Rome Statute of the International Criminal Court ('Rome Statute') recalls that 'the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation'.

In accordance with international law,¹ the primary responsibility for investigating and prosecuting those responsible for core international crimes, as referred to in Article 5 of the Rome Statute, lies with the States.

Council Decision 2011/168/CFSP² recalled that the serious crimes within the jurisdiction of the International Criminal Court are of concern to the international community as a whole and to the Union and its Member States in particular, and confirmed the determination to put an end to the impunity of the perpetrators of those crimes by taking initiatives or measures to ensure the implementation of the principle of complementarity at national level and by enhancing international cooperation to ensure their effective prosecution.

The European Union and its Member States should take all the necessary measures, as a matter of urgency, to ensure that those who commit core international crimes in Ukraine are investigated, prosecuted and held responsible in court.

The European Council has already welcomed the decision by the Prosecutor of the International Criminal Court to open an investigation. The competent authorities of various Member States have also started investigations into core international crimes allegedly committed in Ukraine.

¹ See the Rome Statute of the International Criminal Court, the Convention on the Prevention and Punishment of the Crime of Genocide of 1948; the four Geneva Conventions of 1949 and the three Additional Protocols; The Hague Convention of 1954 and its Second Additional Protocol; the International Convention for the Suppression and Punishment of Apartheid of 1976; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984; the International Convention for the Protection of all Persons from Enforced Disappearances of 2006.

² Council Decision 2011/168/CFSP of 21 March 2011 on the International Criminal Court and repealing Common Position 2003/444/CFSP (OJ L 76, 22.03.2011, p. 56).

In order to ensure successful investigations and prosecutions of core international crimes, enhanced cooperation and coordination between all competent authorities at international and national levels are necessary, notably to collect, store and secure evidence that may subsequently be relied on in court.

Eurojust and Europol are crucial actors in the area of freedom, security and justice. Both Agencies have expertise and experience to support investigations and prosecutions of cross-border crimes, including core international crimes and related criminal offences, and are prepared, within their respective mandates, to contribute to the effective exchange of the evidence collected. Eurojust and Europol coordinate their respective roles and activities in support of investigations on core international crimes.

Regulation (EU) 2022/838 of the European Parliament and of the Council amending Regulation (EU) 2018/1727 as regards the preservation, analysis and storage at Eurojust of evidence relating to genocide, crimes against humanity, war crimes and related criminal offences was adopted on 30 May 2022.³

A Joint Investigation Team was established on 25 March 2022, with the assistance of Eurojust, with the aim of coordinating the investigations into all crimes committed by Russia during the war against Ukraine. The Joint Investigation Team seeks to enhance judicial cooperation among the competent authorities involved in the investigation and prosecution of core international crimes at national and international level. The Joint Investigation Team initially comprised Ukrainian, Lithuanian and Polish judicial authorities, and was later joined by judicial authorities from Estonia, Latvia, Slovakia and Romania. On 25 April 2022, the Office of the Prosecutor of the International Criminal Court also announced its involvement in the JIT as a participant.

In order to facilitate the analysis of information relating to possible evidence on core international crimes, Europol has set up the dedicated Analytical Project on Core International Crimes.

³ OJ L 148, 31.5.2022, p. 1–5.

Due attention should also be paid to the situation of the victims of core international crimes. Justice should be delivered to them.

The European Network of Contact Points for the Investigation and Prosecution of Genocide, Crimes against Humanity and War Crimes ('Genocide Network') has important expertise in the area of core international crimes. It is of great assistance in facilitating the exchange of information, knowledge, experience and best practices amongst national practitioners.⁴

On 21 September 2022, Eurojust, the Genocide Network and the Office of the Prosecutor at the ICC published guidelines for civil society organisations entitled 'Documenting international crimes and human rights violations for criminal accountability purposes'.

On the ground in Ukraine, the EU Advisory Mission Ukraine (EUAM Ukraine) provides support to the Ukrainian authorities. The mandate of EUAM Ukraine was amended on 13 April 2022⁵ to provide support to Ukrainian authorities involved in the investigation and prosecution of international crimes through strategic advice and training. The Mission cooperates closely with the International Criminal Court in this field and takes part in the activities of the Atrocity Crimes Advisory Group.

In view of the above, the Council has adopted the following conclusions:

⁴ Council Decision 2002/494/JHA of 13 June 2002 setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes (OJ L 167, 26.6.2002, p.1); Council Decision 2003/335/JHA of 8 May 2003 on the investigation and prosecution of genocide, crimes against humanity and war crimes (L 118, 14.5.2003, p. 12).

⁵ Council Decision (CFSP) 2022/638 of 13 April 2022 amending Decision 2014/486/CFSP on the European Union Advisory Mission for Civilian Security Sector Reform Ukraine (EUAM Ukraine), OJ L 117, 19.4.2022, p. 38–39.

II. The Council calls on the Member States:

- a) to adopt the necessary legislative measures in order to:
 - i) fully implement the definition of core international crimes and modes of liability enshrined in the Rome Statute;
 - ii) allow the exercise of universal jurisdiction or other forms of domestic jurisdiction over core international crimes committed abroad; and
 - iii) enable close judicial cooperation with the International Criminal Court and, to the extent permitted by national law, with other investigative or accountability mechanisms, such as the Independent International Commission of Inquiry on Ukraine established by the UN Human Rights Council, including, where appropriate, within the framework of a joint investigation team.
- b) to support the Ukrainian Prosecutor General's Office in order to enhance Ukraine's capabilities to investigate and prosecute core international crimes in line with international standards.
- c) to consider participating actively in the rotation model coordinated by the International Criminal Court.
- d) to strengthen judicial cooperation between Member States, and with Ukraine, other third countries as well as the International Criminal Court, in order to ensure the successful investigation and prosecution of core international crimes, including by supporting the international initiative for the negotiation of a multilateral treaty for mutual legal assistance and extradition in domestic prosecution of atrocity crimes.

- e) to facilitate the use of joint investigation teams between the competent authorities of the Member States and other stakeholders, such as the International Criminal Court, in order to enhance judicial cooperation in individual cases and the successful investigation and prosecution of core international crimes at national and international level.
- f) to cooperate with the Atrocity Crimes Advisory Group and to facilitate, where relevant, close coordination between the Atrocity Crimes Advisory Group and the Joint Investigation Team established between Ukraine and some Member States.
- g) to strengthen cooperation with EU stakeholders such as Eurojust, Europol, the European Judicial Network, the Genocide Network, EUAM Ukraine, and the Network of National Experts on Joint Investigation Teams ('JITs Network'), in order to enhance the successful investigation and prosecution of core international crimes.
- h) to further strengthen EUAM Ukraine capacities by seconding national experts with relevant expertise.
- i) to continue to provide adequate legal, operational and financial support for the creation and proper functioning of specialised units dedicated to the investigation and prosecution of core international crimes at national level within authorities competent in matters of law enforcement, prosecution, mutual legal assistance and collection of victims' testimonies, as well as, where relevant, within immigration services.
- j) to inform national judicial authorities investigating core international crimes about the competences given to Eurojust by Regulation (EU) 2022/838, and emphasise the assistance that can be provided by both Eurojust, in cooperation with the Genocide Network, and Europol in order to quickly and efficiently cross-check information and detect potential links between cases investigated in different Member States.

- k) to streamline the collection and sharing of information between relevant authorities and stakeholders that come into contact with war crime victims, building upon the expertise developed, in particular, by the Exclusion Network of the European Union Agency for Asylum, the Genocide Network and the EU Victims' Rights Platform.
- l) to dedicate adequate resources to capacity-building and training activities for national authorities involved in identifying the victims and witnesses of core international crimes.
- m) to engage with civil society organisations, including through the EU Victims' Rights Platform, specifically to enhance information-sharing and outreach efforts towards victims and affected communities.
- n) to promote, where appropriate, the cooperation with civil society organisations in the collection of evidence of core international crimes and facilitate, to the extent permitted by national law, the admissibility of such evidence in court.
- o) to raise awareness among the Ukrainian refugee community of the possibility of giving testimony in Member States regarding the core international crimes they may have been victims and/or witnesses of, while considering their vulnerable position and need for support.
- p) to strengthen the participation, information, support to and protection of victims of core international crimes in criminal proceedings, as provided for by Directive 2012/29/EU on victims' rights, including by exchanging experiences and best practices in relation to victims' support and protection.

III. The Council calls on the Commission:

- a) to continue cooperating closely with the Presidency of the Council, the European External Action Service, the General Secretariat of the Council and the International Criminal Court in order to ensure coordination of the activities of the Union and, where possible, of the Member States in support of accountability efforts led by the Prosecutor General's Office of Ukraine.
- b) to continue its work within the Victims' Rights Platform to raise awareness about the need of ensuring the provision of support and protection to victims of core international crimes, in accordance with their specific needs and in line with the Victims' Rights Directive.
- c) to support specialised training and capacity-building activities for law enforcement, judicial authorities and other relevant authorities, building upon the work and expertise of existing entities such as the European Judicial Training Network (EJTN), the European Union Agency for Law Enforcement Training (CEPOL), EUAM Ukraine and existing training programmes developed by the Genocide Network.
- d) to enhance the financial, logistical, technical and substantive support available to Member States in their efforts to efficiently investigate and collect evidence of core international crimes, including by increasing the funding to joint investigation teams.
- e) to promote the exchange of best practices, knowledge and expertise through the Genocide Network, including by exchange programmes and study visits of practitioners, and allocate adequate resources for that purpose.
- f) to continue supporting national and international investigative and evidence-gathering mechanisms, specifically with respect to battlefield evidence.

IV. The Council calls on Eurojust:

- a) to continue taking the necessary measures in order to swiftly implement Regulation (EU) 2022/838, with a view to preserving, analysing and storing evidence of the core international crimes mentioned in that Regulation in a central storage facility.
- b) to continue to provide material and guidance on how to collect and transmit evidence of core international crimes.
- c) to further enhance, where possible, the cooperation with third countries, with a view to facilitating the collection and exchange of evidence of relevant core international crimes, in accordance with the applicable legal framework.

V. The Council calls on Eurojust and Europol:

- a) to further enhance the cooperation between these two Agencies, based on their complementary roles and operational capabilities in supporting core international crime investigations, and in accordance with their respective mandates while aiming to avoid a duplication of efforts, so as to be able to provide even better assistance to Member States in the investigation and prosecution of core international crimes.
- b) to inform the Council on the state of play and future steps in their cooperation as regards the investigation and prosecution of core international crimes.

VI. The Council calls on the Genocide Network:

- a) to continue developing its expertise in the area of core international crimes.
- b) to continue facilitating the exchange of information, knowledge, experience and best practices amongst national practitioners, in accordance with its mandate.

VII. The Council calls on EUAM Ukraine:

- a) to continue developing its support to the Ukrainian authorities in order to facilitate the investigation and prosecution of core international crimes.
- b) to further enhance the cooperation with Europol, Eurojust and CEPOL to provide training on and direct support the investigation and prosecution of core international crimes in Ukraine.

VIII. The Council calls on the relevant institutions of the European Union:

- a) to continue, and further improve, providing assistance to Ukraine in an efficient manner.
- b) to continue to provide support to the Member States in their efforts to collect evidence of core international crimes efficiently, while exploring potential synergies and avoiding duplication.
- c) to increase efforts in countering disinformation and attempts to rewrite history.

IX. The Council calls on Ukraine:

to accede to the Rome Statute.
