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Contribution at the 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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Thank you. Today, I would like to speak about the powers of the Council of Europe to possibly conclude an international treaty that might be the basis of a tribunal, speaking to the two, more technical, legal questions that Prof. Akande asked in the beginning. My first topic is the treaty-making power (or treaty-making capacity) of the Council of Europe. The Statute of the Council of Europe does not contain any provision on treaty-making powers, therefore we have to rely on the general rules and legal principles on this question.

The treaty-making power of any given international actor (be it a state, an international organisation, a business actor) is often seen as a corollary, as an "attribute", as an "inherent capacity" or as a consequence, of the international legal personality of that actor. The details of this relationship create a lot of questions. What is sure is that if an entity or actor has no international legal personality, then it cannot conclude an international treaty.

This means we first of all have to identify the international legal personality of the Council of Europe. The Council of Europe's Statute of 5 May 1949 does not explicitly say that the Council of Europe is an international legal person. However, this is not unusual because it is quite an old organisation. In 1949, it was typical for organisations' statutes not to contain this level of detail. For example, the founding document of the United Nations Charter does not contain any provisions on the organisation's international legal personality (as opposed to its legal capacity in the domestic law of its members: Art. 104 of the UN Charter). In contrast, the newer organisations such as WTO, have an explicit provision on international legal personality (Art. VIII(1) first part, of the WTO Agreement).

The international legal personality of the United Nations was established in the classic advisory opinion by the International Court of Justice, the *Reparation for Injuries Suffered in the Service*

of the United Nations opinion of 1949, which responded to the assassination of a UN Special Envoy for Palestine. Here, famously, the International Court of Justice made the argument that the United Nations must, by necessary implication, also enjoy international legal personality, because otherwise it could not perform its functions.

This is now the famous implied powers argument, and I quote the court in full. The Court says that the UN *'could not carry out the intentions of its founders if it was devoid of international personality. It must be acknowledged that its Members,* ***by entrusting certain functions to it****, with the attendant duties and responsibilities,* ***have clothed it with the competence required to enable those functions to be effectively discharged****. Accordingly, the Court has come to the conclusion that the Organization is an international person'.* (para. 179 of the opinion, emphasis added). This means the legal personality of the United Nations exists by necessary implication.

We are now more than 60 years later. A broad strand in scholarship (among this Professor Akande) says that there *is* a presumptive personality of international organisations. If they are working continuously and have an established infrastructure, we can presume their international legal personality unless there are indications to the contrary.

For example, in the case of the OSCE, there are indications to the contrary, but not with regard to the Council of Europe. Therefore, it seems uncontroversial that the Council of Europe **enjoys international legal personality**. This also means that the Council potentially enjoys treaty-making power, even if nothing in the statute that says anything about treaty-making power of the Council of Europe.

A good starting point is in Article 6 of the Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations (of 1986), even though this treaty never entered into force. I would not go as far as suggesting that this rule reflects a customary rule, but it does make a very sensible starting point. Article 6 says that 'the capacity of an international organisation to conclude treaties is **governed by the rules** of that organization.' This wording has been very carefully chosen by the International Law Commission, who drafted the provision, to deliberately leave it a bit open to accommodate for doctrinal controversies. This considered, the 'rules' of the organisation are not only the statute, but also the practice or any secondary law produced by that organisation. These are also, of

course, open to interpretation, bringing us back to the principle of implied powers. The preamble of the Vienna Convention of 1986 that I mentioned, notes that 'international organizations possess the capacity to conclude treaties, which is **necessary** for the exercise of their functions and the fulfilment of their purposes.'

Once more, we here see the implied powers argument.

This means that our real question is: What is the mandate of the Council of Europe? What are the purposes of the Council of Europe? And to what extent is a treaty making power necessary? At this point, there is one other sacrosanct principle of the law of international organisations which comes to the fore: the **principle of specialty** or *competence d'attribution*. This essentially says that organisations employ those competences that have been given to it by the creators. There is, of course, through the life of the organisation, a dynamic in this and the mandate can evolve. If we look at the preamble of the Statute, the mandate of the Council of Europe is 'the pursuit of peace based upon justice', and to safeguard the 'rule of law'. It is true that the mandate does not mention anything on criminal law, criminal tribunals and so forth, but I think that a tribunal that seeks accountability for the crime of aggression, as Professor Kreß has laid out, clearly falls into the mandate of peace based upon justice, and rule of law. This leaves two key points to make.

First, I already said that the mandate can evolve, but this is not limitless. The organisation itself may not amend its founding document and itself create new powers. In other words, it cannot go *ultra vires*. And even though this concept is complicated, it encapsulates the basic idea that the organisation remains dependent on the member states that founded it. It also means, that there is, in theory, a distinction between *interpreting* the statute (even if dynamically) and developing its powers on the one side, and *amending* the statute, i.e., revising it, which would – generally speaking – not be allowed for the organisation to do by itself (unless such a limited amending power is entrusted to the organisation or body, for example the International Whaling Commission is empowered to revise the Schedule which is an integral part of the Whaling treaty). This tension between mere 'development' and 'legal amendment/change' is a typical and very important feature of all international organisations. It is a fundamental tension between the sovereignty of the member states that founded it, and powers transferred to the organisation. They have created the organisation because they want the organisation to perform functions that they cannot do alone, meaning there is wiggle room, *per se*, for the organisation

to develop. So, I do not really see a problem in accepting that the Council of Europe, being an international legal person, also enjoys treaty-making powers as a matter of principle.

But that does not mean that it can conclude *any* type of treaty with any substance and any structure. Critically, the treaty has to remain within the confines of the subject matter of the mandated activities. And here I would say a treaty on a tribunal does fall in the subject matter of the activities.

Second, the substance of any treaty has to fit to the **intensity and type** of powers that the Council of Europe enjoys. This is where one may find some doubts because, unlike the UN Security Council, who has the power to make binding law unilaterally by adopting binding resolutions under Article 25 of the Charter of the United Nations, the Council of Europe does not have equally broad or intense powers. One could argue that the Security Council was empowered to create the Yugoslavia and Ruanda tribunals under Chapter VII of the UN Charter because it possesses true enforcement powers under the Charter in the first place. Therefore, I suspect that should there be *any* room for discussion, it would concern whether a treaty that seeks to create a tribunal would be covered by the type or intensity of powers that the Council of Europe enjoys. At this point, we need to examine carefully which type of powers notably the Committee of Ministers has developed (and which have been accepted by the Member States) in order to assess whether a treaty making power would correspond to them. We have in the past seen a dynamism of powers that have accrued to the organs of the Council beyond the text of the Statute and which have been accepted by the Member States. Examples are the active role of the Assembly in the admission of new members or where the Committee of Ministers has developed new tasks beyond the text of the Statute, e.g., in the statutory resolutions on the Congress of Local and Regional Authorities and on partial and enlarged agreements, the 1994 Declaration on compliance with commitments accepted by member States of the Council of Europe or the 2020 Complementary procedure between the Committee of Ministers and the Parliamentary Assembly in response to a serious violation by a member State of its statutory obligations. Moreover, I do not see problems with regard to the specific issue area of international criminal justice being capable of falling into the mandate of the Council of Europe. Thank you very much!