

STATEMENT

CALLING FOR THE CREATION OF A SPECIAL TRIBUNAL FOR THE PUNISHMENT OF THE CRIME OF AGGRESSION AGAINST UKRAINE

President Putin's decision to launch attacks on Ukraine poses a grave challenge to the post-1945 international order. He has sought to replace the rule of law and principles of self-determination for all peoples by the use of force. The whole world needs to be made aware of the act of aggression he has instigated and the atrocities he has ordered.

There are currently three main ways under international law that President Putin's actions can be subjected to the scrutiny of the world.

Already the Ukrainians have started proceedings before the International Court of Justice (ICJ) in The Hague. Ukraine's argument - and the basis for the ICJ's jurisdiction - is that Russia is subjecting Ukraine to a false claim of genocide, and Ukraine should not be subjected to another state's military operations on its territory based on an abuse of the Genocide Convention. Other states can intervene in the proceedings before the Court, which will convene hearings next week on Ukraine's application for provisional measures of protection against Russia.

The European Court of Human Rights (ECtHR) in Strasbourg can also investigate Russia's actions. On 25 February Russia was suspended from its rights of representation in the Committee of Ministers and in the Parliamentary Assembly of the Council of Europe. However, Russia remains a member of the Council of Europe and a party to the European Convention on Human Rights and can be held to account under it for its violation of human rights. This can happen if, after exhausting national recourse to justice, a citizen of Ukraine (or any individual victim) appeals to the Court that their rights have been violated or if any of the Council of Europe states (acting alone or collectively) make an inter-state application citing breaches of the Convention. This week the European Court ordered interim measures of protection in a case lodged by Ukraine against Russia.

Following the referral by thirty-nine states of the situation in Ukraine to the International Criminal Court in the Hague (ICC), the ICC Prosecutor has now opened an investigation into current events in Ukraine.

The ICC has powers to investigate any acts of genocide, war crimes and crimes against humanity committed on the territory of Ukraine. However, the ICC cannot exercise its jurisdiction with regard to the crime of aggression if the act of aggression is committed by a state that is not party to the Statute of that Court, unless the Security Council refers the matter to the Court. Since Russia has not ratified that Statute and would exercise its veto in the Security Council against a referral, that Court cannot, as things presently stand, investigate crimes of aggression against Ukraine.

The ICC will be able to hold individuals responsible for the crimes that it deals with where there is specific evidence linking them to particular acts and policies. However, it may in certain cases be easier to establish responsibility for the waging of an aggressive war which is so clearly a gross violation of the United Nations Charter.

So to complement the actions now underway before the ICC, ICJ and ECtHR we propose the creation of a special tribunal with a limited focus on the crime of aggression, which cannot be addressed by the three other courts. The Special Tribunal for the Punishment of the Crime of Aggression against Ukraine can be set up with speed. During the second world war, nations met in London in 1942 to draft a resolution on German war crimes, which led, at the end of the conflict, to the creation of an International Military Tribunal and the Nuremberg trials.

To help beat back President Putin's heinous attempts to destroy peace in Europe, it is time for us to create such a Special Tribunal. By doing so we act in solidarity with Ukraine and its people, and signal our resolve that the crime of aggression will not be tolerated, and that we will leave no stone unturned in bringing to an end the terrible events we are now seeing, thereby ensuring that those who have unleashed such horrors are subject to personal accountability under the criminal law, so that justice can be done.

The Special Tribunal should be constituted – on the same principles that guided the allies in 1942 – to investigate the acts of violence by Russia in Ukraine and whether they constitute a crime of aggression. Countries should agree to grant jurisdiction arising under national criminal codes and general international law to a dedicated criminal tribunal, and confer on such a tribunal jurisdiction to investigate both the perpetrators of the crime of aggression and those who have materially contributed to or shaped the commission of that crime.

We commend to governments the attached draft declaration for the establishment of the Special Tribunal.

DECLARATION ON A SPECIAL TRIBUNAL FOR THE PUNISHMENT OF THE CRIME OF AGGRESSION AGAINST UKRAINE

The undersigned, representing the governments of []:

Whereas the decision by the Russian Federation to launch attacks on Ukraine poses a grave challenge to the post-1945 international order, one premised on the idea of the rule of law and principles of self-determination for all peoples and the prohibition of the use of force;

Whereas sanctions and financial measures, while necessary, cannot address that challenge alone;

Whereas international law has, at least since the end of the Second World War, provided for individual criminal responsibility for those who plan, prepare, initiate or execute wars of aggression;

Whereas the United Nations General Assembly has “deplore[d] in the strongest terms the Russian Federation’s aggression against Ukraine in violation of Article 2, paragraph 4 of the United Nations Charter”;

Whereas the conduct of Russia's military operations appears to have given rise to the commission of war crimes and crimes against humanity on the territory of Ukraine;

Whereas the International Criminal Court has jurisdiction to investigate and, as appropriate, prosecute war crimes, crimes against humanity and genocide committed on the territory of Ukraine;

Whereas, thirty-nine States Parties to the Statute of the International Criminal Court have referred the situation in the Ukraine to the International Criminal Court; and whereas the ICC Prosecutor has decided to open investigations with respect to this situation;

Whereas the International Criminal Court does not at present have jurisdiction to investigate and, as appropriate, prosecute the crime of aggression committed on the territory of Ukraine;

Whereas international solidarity is necessary to uphold the rule of law and the principles of the United Nations Charter, including the prohibition on the use of force, and to protect Ukraine and the fundamental rights of its people, end the violence, and bring the perpetrators to justice;

Recalling the international law prohibiting war crimes, crimes against humanity and the crime of aggression, as well as the Inter-Allied Declaration signed at St James's Palace London on 13 January 1942;

Recalling the developments in international criminal law over the past eighty years;

Recalling that the ICC Statute recognises that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes",

- (1) Support all ongoing investigations into and proceedings arising out of Russia's military invasion of Ukraine, including those before the International Court of Justice, International Criminal Court and European Court of Human Rights;
- (2) Welcome and support the exercise of jurisdiction by the International Criminal Court over any war crimes, crimes against humanity and genocide that may be perpetrated on the territory of Ukraine;
- (3) Resolve, in a spirit of international solidarity, to grant jurisdiction arising under national criminal codes and general international law to a dedicated international criminal tribunal that should be established to investigate and prosecute individuals who have committed the crime of aggression in respect of the territory of Ukraine, including those who have materially influenced or shaped the commission of that crime;
- (4) Recognise that the exercise of jurisdiction by this tribunal over the crime of aggression shall be complementary to and supportive of the exercise of jurisdiction by the ICC over other international crimes.

SIGNATORIES

Rt. Hon Gordon Brown, former Prime Minister of the United Kingdom

Professor Dapo Akande, Professor of Public International Law, University of Oxford, Member of the UN International Law Commission (2023-2027)

Mykola Gnatovskyy, Professor of International Law, Taras Shevchenko National University of Kyiv, former President of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (2015–2021)

Murray Hunt, Director, Bingham Centre for the Rule of Law, British Institute of International and Comparative Law, Visiting Professor in Human Rights Law, University of Oxford

Professor Philip Leach, Professor of Human Rights Law, Middlesex University

Professor Philippe Sands QC, Professor University College London, Barrister Matrix Chambers

Paul Auster, New York, Writer

Professor Laurence Boisson de Chazournes, University of Geneva

Sir Nicolas Bratza, former President of the European Court of Human Rights

Professor Olga Butkevych, President of the Ukrainian Association of International Law

Professor Volodymyr Butkevych, former judge of the European Court of Human Rights

Javier Cercas, Barcelona, Writer

Benjamin Ferencz, former Prosecutor Nuremberg Military Tribunal

Don Ferencz, former Chair of the Global Institute for the Prevention of the Crime of Aggression

Hon Yves Fortier QC, Montreal

Stephen Fry, London, Writer

Professor Timothy Garton Ash, Oxford

Richard Goldstone, former Chief Prosecutor International Criminal Tribunal for the former Yugoslavia and former Judge Constitutional Court of South Africa

Siri Hustvedt, New York, Writer

Baroness Helena Kennedy QC, London

Professor Catherine Kessedjian, Paris

Patrick Lawrence QC, London, barrister

Professor Margaret Macmillan, Toronto & Oxford

Professor Virginia Mantouvalou, UCL

Professor Aline Miron, Anger University

Howard Morrison, former ICC judge

Professor Egbert Myjer, former Judge of the European Court of Human Rights
(elected in respect of the Netherlands) (2004-2012)

Professor Dr. Angelika Nußberger, Professor of Law, University of Cologne; former
Vice-President, European Court of Human Rights (2017-2019)

Michael O'Boyle, former Registrar, European Court of Human Rights (2006-2015)

Sir Shridath Ramphal QC, Guyana

Paul Reichler, Washington DC

Professor Helene Ruiz Fabri, Director, Max Planck Institute Luxembourg

Professor Yuval Shany, Hebrew University Jerusalem

Anjolie Singh, Delhi

Professor Christian Tams, Germany

Professor Jean-Marc Thouvenin, Secretary General of the Hague Academy of
International Law, Professor, University of Paris-Nanterre

Professor Kimberley Trapp, University College London

Professor Farhana Yamin, University of Arts, London