

Research Briefing

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24 March 2022

Ukraine crisis: Recognition, military action and international law



Summary

- 1 Russia launches military action against Ukraine
- 2 Recognition of the Donetsk People's Republic and the Luhansk People's Republic as independent states
- 3 Russian military action in Ukraine

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Summary

On 21 February 2022, Russian President Putin announced Russia would formally recognise the areas of the Donbas under the control of Russian-backed separatist forces, as independent sovereign states.

President Putin then signed Executive Orders [recognising the self-declared independence of the Donetsk People's Republic \(DPR\) and the Luhansk People's Republic \(LPR\)](#). Russia then signed Treaties of Friendship, Cooperation and Mutual Assistance with the leaders of those regions.

Russia also announced it would deploy forces to undertake “peacekeeping” in the DPR and LPR. On 24 February, [Putin announced the beginning of a “military operation” in Ukraine](#). While Putin said it was a special military operation in Donbas and Russia would not occupy Ukraine, [the Ukrainian Government has said Russia has begun a full scale assault on the country](#).

Putin's announcement of military operations

On 24 February 2022, Russian President Vladimir Putin announced [Russia would launch a 'special military operation' against Ukraine](#).

In his televised address, Putin argued the following legal grounds for this action:

- in accordance with Article 51 (Chapter VII) of the UN Charter (self-defence)
- in execution of the treaties of friendship and mutual assistance with the Donetsk People's Republic and the Luhansk People's Republic, ratified by the Federal Assembly on February 22.

The President said the purposes were to “protect people who, for eight years now, have been facing humiliation and genocide perpetrated by the Kiev regime.” He also said Russia would “seek to demilitarise and denazify Ukraine”. Putin also said that Russia did not plan to occupy Ukrainian territory.

Relevant international law and reactions

The relevant international law applicable to Russia's military action is outlined in the briefing. The international response to Russia's February 24 military action was still being announced at the time of writing. This will be updated as further comments and reactions on the legal aspects of Russia's military action are available.

Prohibition of force, self-defence, and aggression

Many international responses to the events in Ukraine have condemned Russia's military action as a violation of international law and the UN Charter. For example,

[Article 2\(4\) of the UN Charter](#) states:

- All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

President Putin had previously said troops would be deployed [to perform "peacekeeping"](#). The UN Secretary General [expressed his concern](#) at the use of this phrase, stating it was a "perversion of the concept of peacekeeping" and that "they are not peacekeepers at all."

This briefing explains the international rules on the prohibition of force, self-defence, acts of aggression, and other specific legal agreements that apply to the crisis in Ukraine. It also covers the international legal framework that applies to Russia's recognition of the self-declared Donetsk People's Republic (DPR) and the Luhansk People's Republic (LPR).

Case at the International Court of Justice

On 26 February 2022, [Ukraine initiated proceedings against Russia at the International Court of Justice](#), calling for the Court to rule on Russia's military action and declare that Russia had no legal basis for its invasion of Ukraine. This case is in addition to [another legal complaint Ukraine made to the Court on 16 January 2017](#), which is still ongoing at the ICJ.

On 16 March 2022, the [ICJ made an Order](#), legally binding on both parties, for provisional measures before it made any final decision in the case.

The Court indicated the following provisional measures that:

1. The Russian Federation shall immediately suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine;
2. The Russian Federation shall ensure that any military or irregular armed units which may be directed or supported by it, as well as any organisations and persons which may be subject to its control or direction, take no steps in furtherance of the military operations;
3. Both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve.

Developments on international crimes

On 28 February 2022, the ICC [Prosecutor announced his intention to proceed with opening an investigation as soon as possible](#).

Following [referrals of the situation in Ukraine by State Parties to the Rome Statute](#), the Prosecutor was technically able to open an investigation immediately.

In response, [the Prosecutor announced](#) on 2 March 2022 that he would immediately proceed with active investigations and that work on the collection of evidence has now commenced.

In a separate, but similar, development, the UN Human Rights Council also [established its own Commission of Inquiry into the situation in Ukraine](#).

Updates

This briefing was updated on 24 March 2022 to include developments on the case at the International Court of Justice, the investigation at the International Criminal Court, and proposals for a Special Tribunal to prosecute the crime of aggression.

1 Russia launches military action against Ukraine

On 21 February 2022, Russian President Putin announced Russia would formally recognise the areas of the Donbas under the control of Russian-backed separatist forces, as independent sovereign states.

President Putin signed Executive Orders [recognising the self-declared independence of the Donetsk People's Republic \(DPR\) and the Luhansk People's Republic \(LPR\)](#). Russia then signed Treaties of Friendship, Cooperation and Mutual Assistance with the leaders of those regions.

Russia also announced it would deploy forces to undertake “peacekeeping” in the DPR and LPR.¹ On 24 February, [Putin announced the beginning of a “military operation” in Ukraine](#).² While Putin said it was a special military operation in Donbas and Russia would not occupy Ukraine, the Ukrainian Government has said Russia has begun a full scale assault on the country.³

This briefing outlines the international legal framework that applies to Russia's recognition of the self-declared independent areas, and international law related to these developments.

¹ [“Putin orders Russian forces to “perform peacekeeping functions” in eastern Ukraine's breakaway regions”](#), Reuters [online], 22 February 2022 (accessed 24 February 2022).

² President of Russia, [“Address by the President of the Russian Federation”](#), 24 February 2022 (accessed 24 February 2022).

³ [“Ukraine conflict: Russian forces invade after Putin TV declaration”](#), BBC News [online], 24 February 2022.

2 Recognition of the Donetsk People's Republic and the Luhansk People's Republic as independent states

2.1 Secession and international law

In 2014, separatists in parts of the Donetsk and Luhansk regions in east Ukraine undertook unofficial referendums and self-declared the independent states of the Donetsk people's Republic and the Luhansk People's Republic.⁴ These votes and declarations were condemned as incompatible with Ukraine's sovereignty and territorial integrity by the West, and remain unrecognised by all states apart from Russia.



Source: Stiftung Wissenschaft und Politik, April 2019

The legality of unilateral secession from a state is not always clear in international law. Generally, entities within an existing state do not have the right to secede unilaterally, and there is no right to external self-

⁴ See, for example, “[Results show 96.2 percent support for self-rule in east Ukraine region: RIA](#)”, Reuters, 12 May 2014, (accessed 24 February 2022); “[Ukraine separatists declare independence](#)”, Al-Jazeera, 12 May 2014, (accessed 24 February 2022).

determination (independence) if there is full internal self-determination (ie, the full participation of minority populations in civil and political life).⁵

But there is no single legal test which determines whether a secession is legal or not, and the issue of legality or otherwise tends to depend heavily on the facts of each case.

In general terms, state practice suggests that unilateral secession is not absolutely prohibited by international law but this right is very limited, because it contradicts the important principle of territorial integrity of states.

For example, in the *Secession of Quebec* case, the Supreme Court of Canada took the view that “[a] right to external self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises only in the most extreme cases and, even then, under carefully defined circumstances...”⁶

The Court also highlighted when secession has been effective in international law:

A right to secession only arises under the principle of self-determination of peoples at international law where "a people" is governed as part of a colonial empire; where "a people" is subject to alien subjugation, domination or exploitation; and possibly where "a people" is denied any meaningful exercise of its right to self-determination within the state of which it forms a part. In other circumstances, peoples are expected to achieve self-determination within the framework of their existing state.⁷

In the Friendly Relations Declaration, a declaration on principles of international law, the principle of self-determination was limited in the following way:

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.⁸

⁵ See *International meeting of experts on further study of the concept of the rights of peoples: Final Report and Recommendations*, UNESCO, 22 February 1990, SNS-89/CONF.602/7.

⁶ *Secession of Quebec*, (1998) 2 SCR 217 at para 123.

⁷ *Secession of Quebec*, (1998) 2 SCR 217, para 154.

⁸ *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, UNGA Res 2625 [XXV], 24 October 1970, Principle V.

2.2

Recognition and statehood in international law

Recognition is the act of one state formally or informally recognising an entity as a state. Recognition can also refer to the recognition of a government or representatives of a state as the legitimate or lawful representative of that state and its people. The relevant use of the term in this context refers to the recognition of statehood.

Although recognition can be a good indicator of statehood, there are theoretical arguments as to whether recognition is either: (1) a formal legal requirement for statehood; (2) a legal obligation or “duty” to recognise a state once the criteria for statehood are met; or, (3) simply confirms a legal status that is already present.⁹

In any case, the international legal criteria for statehood are often attributed to the 1933 [Montevideo Convention on the Rights and Duties of States](#) – a treaty between American states that sets out criteria for statehood in Article 1.

Those criteria include:

- a permanent population;
- a defined territory;
- government; and
- capacity to enter into relations with the other states.¹⁰

Even though these criteria derive from a treaty between American states, they have been referred to internationally by states and scholars as representing the main criteria for statehood in international law. But others have suggested not all these criteria are necessary, or that other factors may need to be considered to properly achieve the status of statehood.¹¹

One main indicator that a nation has achieved this statehood is recognition by other states. When recognised by another state, a government demonstrates its “capacity to enter into relations with other states”, as suggested as one of the requirements for statehood. It also demonstrates the political independence of that state.

Based on past practice, most states seem to prefer the view that “recognition is a declaration or acknowledgement of an existing state of law and fact, legal personality having been conferred previously by operation of law.”¹²

⁹ See, for example, James Crawford, *Brownlie's Principles of Public International Law*, 2019, Chapter 6.

¹⁰ Article 1, Montevideo Convention on the Rights and Duties of States.

¹¹ See, for example, James Crawford, *Brownlie's Principles of Public International Law*, 2019, Chapter 5.

¹² James Crawford, *Brownlie's Principles of Public International Law*, 2019, Chapter 6.

According to this view, recognition is largely a political act that does not necessarily determine the status of a state in and of itself. However, the role that recognition plays in any legal status of statehood is far from settled, and largely depends on the circumstances of each entity achieving statehood. This, in turn, also suggests that the precise “moment” a state achieves statehood is also undefined.

2.3 The duty of non-recognition

An important limitation on the ability of states to recognise a state or territory is the duty of non-recognition. This refers to situations where there is a legal obligation on states not to recognise a state or territory in certain circumstances.

The main international legal rules that apply here include a state’s right to territorial sovereignty and territorial integrity, and the prohibition of force in international law. The UN General Assembly agreed such principles in its [Declaration on Friendly Relations](#),¹³ a number of principles that apply to the rights and duties of states. This Declaration is now largely viewed as reflecting customary international law.

In particular, the Declaration contains the principle that:

.. States shall refrain in their international relations from the threat of use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.¹⁴

This obligation is also reiterated in Article 2(4) of the UN Charter.

When expanding on this principle, the international community also declared that every state has a duty to not recognise territorial changes by force:

The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognised as legal.¹⁵

As well as these particular legal obligations, under the law of State Responsibility, the general rights and duties of states when it comes to breaches of international obligations have developed according to state practice. These rules are set out by the International Law Commission’s (ILC)

¹³ UNGA Res 2625(XXV), [Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations](#), (24 October 1970) UN Doc A/RES/2625 (XXV), Annex.

¹⁴ Ibid, Annex, Principle 1.

¹⁵ UNGA Res 2625(XXV), [Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations](#), (24 October 1970) UN Doc A/RES/2625 (XXV), Annex

[Articles on State Responsibility](#), which were adopted by the UN General Assembly.¹⁶

The ILC's articles outline a specific obligation of non-recognition in Article 41. This is that no state shall recognise a situation created by a serious breach of a peremptory norm of international law as lawful, nor shall states render aid or assistance in maintaining that situation.

A serious breach of a peremptory norm of general international law involves a gross or systematic failure by the responsible state to fulfil that obligation, according to Article 40.

Notable peremptory norms of international law include the prohibition of force, or the prohibition of genocide. This means that any unlawful use of force or act of genocide should not be recognised as lawful, and states should not render aid or assistance to maintaining such situations.

The International Court of Justice has also recognised duties of non-recognition. For example, in the [Construction of a Wall](#) Advisory Opinion,¹⁹ when the Court found that Israel's construction of a wall around Occupied Palestinian Territories was a violation of fundamental international law principles, the Court also recognised the following duties on all states not to recognise this illegal situation:

Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end.

It was the “character and importance of the rights and obligations involved” that seemed to be the Court's basis for this duty of non-recognition.

Peremptory norms / jus cogens

A peremptory norm of international law¹⁷ is a rule that is considered so important by the international community that it has a special status where no derogation from that rule is permitted – and any treaty that is inconsistent with such a rule, or attempts to contract out of such a rule, is void.¹⁸

¹⁶ UNGA Res 56/83, [Responsibility of States for Internationally Wrongful Acts](#), (28 January 2002) UN Doc A/RES/56/83, Annex.

¹⁷ Also known as having *jus cogens* status.

¹⁸ See, Vienna Convention on the Law of Treaties (adopted 23rd May 1969, entered into force 27th January 1980) 1155 UNTS 331, Articles 53 and 64.

¹⁹ [Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory](#) (Advisory Opinion of 9 July 2004) [2004] ICJ Rep 136,

2.4

Consequences of Russian recognition of Donetsk and the Luhansk People's Republics

The international reaction to Russia's recognition of the Donetsk and the Luhansk People's Republics has revealed several arguments relating to the legality of this act.

A significant number of states have viewed Russia's recognition of these regions alone as violations of international law, with some declaring the recognition as a violation of Ukraine's sovereignty and territorial integrity. Others more broadly argue it amounts to a violation of the UN Charter alongside an act of aggression.²⁰

Whether or not the attempted change of territory in Ukraine amounts to an illegal 'acquisition' of territory by force, it does seem to be widely argued by states and commentators that this does amount to a violation of Ukraine's territorial integrity, the principle of non-intervention, and perhaps even the prohibition of force in international law.

Some have pointed out (before Russia's military action on 24 February) that Russia's involvement in the east of Ukraine and the Donbass may amount to a breach of the prohibition of force in particular – a peremptory norm of international law. For example, Dr Diane Desierto, Professor of Law and Global Affairs at Notre Dame Law School, said on 22 February:

All of the unilateral actions to use military force are now being taken without any reference to the United Nations Security Council, and certainly without any qualms about complying with the Charter of the United Nations on its foundational *jus cogens* principles of territorial sovereignty, the prohibition against the use of force, the principle of non-intervention, and Charter duties to respect human rights and cooperate with the United Nations and all its Members in respecting human rights.²¹

Dr Desierto argues that such violations of a peremptory rule of international law would give rise to the duty of non-recognition under Article 41 of the ILC's Article on State Responsibility, as outlined above.²² In other words, no state shall recognise the situation, nor shall states render aid or assistance in maintaining that situation.

Although the act of recognising these territories does not, in itself, change the legal status of the region in international law – it may in fact also be a violation of international law because of the use of force that has led to this situation.

²⁰ A collection of initial responses by states and non-state groups has been collated by Dr Alonso Gurmendi, Assistant Professor of International Law at Universidad del Pacifico in Peru, [on Twitter](#).

²¹ Diane Desierto, "[Non-Recognition](#)", EJIL Talk!, 22 February 2022 (accessed 24 February 2022).

²² Diane Desierto, "[Non-Recognition](#)", EJIL Talk!, 22 February 2022 (accessed 24 February 2022), and see also the comments by other experts on this post.

There remains to be an authoritative determination of Russia's initial involvement in the east of Ukraine, prior to its February 24 military action, and so the applicability of some of these legal arguments is still to be determined. But these are the clearest arguments currently put by states and commentators as to the international legal implications of Russia's act of recognition.

3 Russian military action in Ukraine

3.1 Russia's legal justifications

Putin's announcement of military operations

On 24 February 2022, Russian President Vladimir Putin announced [Russia would launch a 'special military operation' against Ukraine](#).²³

In his televised address, Putin argued the following legal grounds for this action:

- in accordance with Article 51 (Chapter VII) of the UN Charter (self-defence)
- in execution of the treaties of friendship and mutual assistance with the Donetsk People's Republic and the Luhansk People's Republic, ratified by the Federal Assembly on February 22.

The President said the purposes were to “protect people who, for eight years now, have been facing humiliation and genocide perpetrated by the Kiev regime.” He also said Russia would “seek to demilitarise and denazify Ukraine”. Putin also said that Russia did not plan to occupy Ukrainian territory.

Putin's speech also seemed to justify the action on the basis of previous western interventions in other states, claiming the US and its allies were an “empire of lies”. Putin insinuated western nations were “potential aggressors” stating “there should be no doubt for anyone that any potential aggressor will face defeat and ominous consequences should it directly attack our country.”

When referring to what he called “NATO's expansion to the east”, Putin said “We cannot stay idle and passively observe these developments.” He accused NATO and the West of crossing Russia's red line on military cooperation with Ukraine.²⁴

When addressing any potential responses to Russia's actions, Putin said:

I would now like to say something very important for those who may be tempted to interfere in these developments from the outside. No matter who tries to stand in our way or all the more so create threats for our country and

²³ President of Russia, “[Address by the President of the Russian Federation](#)”, 24 February 2022 (accessed 24 February 2022).

²⁴ For further detail on Russia's red line, see the Commons Library Briefing Paper: [Russia's “Red Line”](#), Commons Library Briefing Paper CPB-9401, 18 February 2022.

our people, they must know that Russia will respond immediately, and the consequences will be such as you have never seen in your entire history. No matter how the events unfold, we are ready. All the necessary decisions in this regard have been taken. I hope that my words will be heard.

3.2

International law on the use of force: developments

The relevant international law applicable to Russia’s military action is outlined below. The international response to Russia’s February 24 military action was still being announced at the time of writing. This section will be updated as further comments and reactions on the legal aspects of Russia’s military action are available.

Prohibition of force

[Article 2\(4\) of the UN Charter](#) states:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

The prohibition is also found in customary international law, which comes from the same common principle outlawing the use of force in international relations.²⁵ Indeed, declarations of the UN General Assembly seem to show the customary prohibition largely reflects, in its essence and wording, the prohibition outlined in Article 2(4).²⁶

President Putin had previously said troops would be deployed to perform “peacekeeping”.²⁷ The UN Secretary General expressed his concern at the use of this phrase, stating it was a “perversion of the concept of peacekeeping.”²⁸ He said:

When troops of one country enter the territory of another country without its consent, they are not impartial peacekeepers.

They are not peacekeepers at all.²⁹

²⁵ See, [Case Concerning Military and Paramilitary Activities in and against Nicaragua \(Nicaragua v USA\)](#) (Merits), Judgment of 27 June 1986, [1986] ICJ Rep 14 at paras [174]–[178].

²⁶ See, for example, UNGA Res 2625(XXV), [Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations](#), (24 October 1970) UN Doc A/RES/2625(XXV), Annex, Principle 1. (PDF)

²⁷ “[Putin orders Russian forces to “perform peacekeeping functions” in eastern Ukraine’s breakaway regions](#)”, Reuters [online], 22 February 2022 (accessed 24 February 2022).

²⁸ United Nations Secretary General, “[Secretary-General’s opening remarks at press encounter on Ukraine](#)”, 22 February 2022 (accessed 24 February 2022).

²⁹ Ibid.

Self-defence

The right of states to use self-defence is recognised in Article 51 of the UN Charter, which states:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

When purporting to be acting in self-defence, Russia wrote to the UN Security Council as required by Article 51 to report that it was exercising this right.³⁰ This letter [did not expand upon any of the reasons or justifications for this purported use of self-defence](#) beyond annexing the full text of President Putin's TV address from 24 February.

While Putin cited self-defence as grounds for the February 24 military action, such grounds are only valid when in response to an 'armed attack'. Putin did not cite or allege any specific armed attack in his address, and Ukraine has continued to deny any non-defensive military action beyond its borders.³¹

UK Foreign Secretary Liz Truss called the action an "an unprovoked, premeditated attack against a sovereign democratic state".³²

Dr Marko Milanovic, Professor of Public International Law at the University of Nottingham School of Law, comments that Putin's argument for self-defence seems like an argument for pre-emptive self-defence, because there is no evidence of an armed attack against Russia from Ukraine.³³ But he says most international lawyers agree that "any such theory of pre-emption is categorically incompatible with Article 51".³⁴

Milanovic also suggests Russia cannot use collective self-defence to support the self-declared Republics of Luhansk and Donetsk, because these entities are not states capable of claiming such a right.³⁵

³⁰ [Letter dated 24 February 2022 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General](#), 24 February 2022, UN Doc S/2022/154.

³¹ Serhiy Takhmazov, "[Ukrainian soldiers report intensified front-line shelling, fear 'provocations'](#)", Reuters [online], 21 February 2022 (accessed 24 February 2022).

³² Foreign, Commonwealth, and Development Office, "[Foreign Secretary statement on Ukraine situation: 24 February 2022](#)", 24 February 2022.

³³ Marko Milanovic, "[What is Russia's Legal Justification for Using Force against Ukraine?](#)", EJIL Talk! [online], 24 February 2022.

³⁴ Marko Milanovic, "[What is Russia's Legal Justification for Using Force against Ukraine?](#)", EJIL Talk! [online], 24 February 2022.

³⁵ Marko Milanovic, "[What is Russia's Legal Justification for Using Force against Ukraine?](#)", EJIL Talk! [online], 24 February 2022.

Further, any use of self-defence must be both proportionate to any armed attack, and necessary to respond to it.³⁶ These requirements are also closely related to the international humanitarian law norms (or laws of war) relating to the means and methods of warfare, including the prohibition of the targeting of civilians.³⁷

Even if evidence of an armed attack could be established, it is unclear whether Russia's aims to "demilitarise and denazify Ukraine" would be a necessary and proportionate use of force in any case.³⁸

Specific guarantees and legal instruments

Several specific international agreements also apply to the current situation. For example, the [1994 Budapest Memorandum](#).³⁹ This memorandum was adopted by Russia, the US, and the UK, to offer security guarantees to Ukraine in connection with Ukraine's accession to the Nuclear Non-Proliferation Treaty.

There is some disagreement as to whether this created specific legal obligations – while some suggest it is not a formal treaty,⁴⁰ some international experts suggest this might not be the case, or at least that the true legal status may be more nuanced.⁴¹

In any case, in the Memorandum, the US, UK, and Russia assured Ukraine they would:

- Respect the independence and sovereignty and the existing borders of Ukraine.
- Refrain from the threat or use of force against the territorial integrity or political independence of Ukraine.
- Refrain from economic coercion against Ukraine.
- Commit to seek action through the UN Security Council to provide assistance to Ukraine, if Ukraine were the victim of an act of aggression, or a threat of aggression involving nuclear weapons.

³⁶ See, for example, the decisions of the International Court of Justice in: [Case Concerning Military and Paramilitary Activities in and against Nicaragua \(Nicaragua v USA\)](#) (Merits), Judgment of 27 June 1986, [1986] ICJ Rep 14 at 94; and [Legality of the Threat or Use of Nuclear Weapons](#), Advisory Opinion of 8 July 1996, [1996] ICJ Rep 226, at 245.

³⁷ This briefing paper will not cover the international legal aspects of the laws of war or international humanitarian law at this time.

³⁸ Marko Milanovic, "[What is Russia's Legal Justification for Using Force against Ukraine?](#)", EJIL Talk! [online], 24 February 2022.

³⁹ [Memorandum on security assurances in connection with Ukraine's accession to the Treaty on the Non-Proliferation of Nuclear Weapons](#) (adopted and entered into force 5 December 1994) 3007 UNTS 167. (PDF)

⁴⁰ See, for example, Aaron Blake, "[What the Budapest Memorandum means for the U.S. on Ukraine](#)", The Washington Post [online], 1 February 2022 (accessed 24 February 2022);

⁴¹ Thomas D. Grant, "[The Budapest Memorandum and Beyond: Have the Western Parties Breached a Legal Obligation?](#)", EJIL Talk!, 18 February 2015 (accessed 24 February 2022).

- Commit not to use nuclear weapons against a non-nuclear states except in the case of an attack against themselves, their territories, or their allies.
- Consult with each other in the event that these commitments are under question.

3.3

Case before the International Court of Justice

On 26 February 2022, [Ukraine initiated proceedings against Russia at the International Court of Justice](#), calling for the Court to rule on Russia's military action and declare that Russia had no legal basis for its invasion of Ukraine.⁴² This case is in addition to [another legal complaint Ukraine made to the Court on 16 January 2017](#), which is still ongoing at the ICJ.⁴³

Jurisdiction issues

For the Court to have jurisdiction over a dispute in accordance with the Statute of the ICJ (ICJ Statute), the parties to a dispute must have consented to the Court's jurisdiction through one of the following means:

- A Special agreement
 - According to the Court, parties to a case may come to an agreement that a particular dispute may be brought to the Court. This is based on Articles 36(1) and Article 40 of the Statute of the ICJ.
- Agreements provided for in treaties and conventions
 - Article 36 (1) of the ICJ Statute also provides that the jurisdiction of the Court includes matters specially provided for in treaties and conventions in force. The website of the ICJ contains a list of treaties and conventions that confer jurisdiction on the ICJ over disputes relating to that treaty. The wording of such jurisdictional clauses may vary, and could also include alternative methods of dispute settlement before a dispute is brought to the ICJ.
- Compulsory jurisdiction
 - The ICJ also has jurisdiction over legal disputes where states have accepted its compulsory jurisdiction, by making a declaration that

⁴² [Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide \(Ukraine v. Russian Federation\)](#), International Court of Justice; see also, International Court of Justice, "[Ukraine institutes proceedings against the Russian Federation and requests the Court to indicate provisional measures](#)", Press Release No. 2022/4, 27 February 2022.

⁴³ [Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination \(Ukraine v. Russian Federation\)](#), International Court of Justice.

they recognise such jurisdiction in the type of legal disputes it consents to in accordance with Article 36 (2)-(5) of the ICJ Statute. A list of states who have accepted the Court's compulsory jurisdiction, and their declarations outlining the type of disputes they accept under this jurisdiction, is available on the ICJ's website.

- Forum prorogatum
 - *Forum prorogatum* is a rule where a state can accept the jurisdiction of the Court to hear a case which has been brought against it, where that state has not already recognised the jurisdiction of the Court before that case was brought.

While both Russia and Ukraine are entitled to appear before and complain to the ICJ, neither Ukraine nor Russia have accepted the [compulsory jurisdiction of the Court](#).⁴⁴

Because of this, for any legal dispute between the two states to be brought before the Court, it must be based upon a special agreement or pre-existing treaty obligation that provides for the ICJ's jurisdiction.

One such treaty is the Genocide Convention, where Article 9 provides that any disputes between the parties to the Convention relating to the interpretation, application or fulfilment of the Convention shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.⁴⁵

It is on this basis that Ukraine has made legal arguments to the Court.⁴⁶

Ukraine's argument

Ukraine argued that Russia has falsely claimed that acts of genocide have occurred in the Luhansk and Donetsk regions of Ukraine, and has used that allegation as a basis for its so-called "special military operation". In its [application to the Court](#), Ukraine "emphatically denies" that such genocide has occurred⁴⁷ and has submitted the Application "to establish that Russia

⁴⁴ International Court of Justice, "[Declarations recognizing the jurisdiction of the Court as compulsory](#)", accessed 18 March 2022.

⁴⁵ [Convention on the Prevention and Punishment of the Crime of Genocide](#) (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277.

⁴⁶ International Court of Justice, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, [Application Instituting Proceedings filed in the Registry of the Court on 26 February 2022](#), 26 February 2022. At para 11, on jurisdiction, Ukraine argued: "A dispute has ... arisen relating to the interpretation and application of the Genocide Convention, as Ukraine and Russia hold opposite views on whether genocide has been committed in Ukraine, and whether Article I of the Convention provides a basis for Russia to use military force against Ukraine to "prevent and to punish" this alleged genocide."

⁴⁷ International Court of Justice, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, [Application Instituting Proceedings filed in the Registry of the Court on 26 February 2022](#), 26 February 2022, para 9.

has no lawful basis to take action in and against Ukraine for the purpose of preventing and punishing any purported genocide”.⁴⁸

Ukraine’s main legal argument was as follows:

Ukraine claims that the Russian Federation’s declaration and implementation of measures in or against Ukraine in the form of a “special military operation” declared on 24 February 2022 on the basis of alleged genocide, as well as the recognition that preceded the military operation, is incompatible with the Convention and violates Ukraine’s right to be free from unlawful actions, including military attack, based on a claim of preventing and punishing genocide that is wholly unsubstantiated.⁴⁹

Because the Genocide Convention does not itself govern the rules on the use of force in international law, Ukraine has argued that Russia does not have any legal basis to use such force under the Genocide Convention. Ukraine’s aim here is to have the Court rule on the legality of Russia’s actions by using Russia’s invocation of Genocide as the basis of its dispute and bring the matter under the Genocide Convention. As outlined below, the Court has accepted that this is a plausible basis of jurisdiction for this stage of the case, but will examine the argument in more detail in later stages.

Russia’s argument

Russia [did not appear at the oral hearing on 7 March 2022](#).⁵⁰ But Russia did submit a written legal argument to the Court, arguing that the Court should not have jurisdiction over this situation, because it does not fall within the scope of the Genocide Convention. Russia argued:

... the fact is that the Convention does not provide a legal basis for any military operation or recognition of a State simply because they are beyond its scope of application.⁵¹

Russia’s legal arguments to the Court reiterated extracts of President Putin’s TV address from 24 February, repeating claims of acting in self-defence and in support of the Donetsk and the Luhansk People’s Republics.⁵²

⁴⁸ International Court of Justice, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, [Application Instituting Proceedings filed in the Registry of the Court on 26 February 2022](#), 26 February 2022, para 3.

⁴⁹ International Court of Justice, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, [Application Instituting Proceedings filed in the Registry of the Court on 26 February 2022](#), 26 February 2022, para 26.

⁵⁰ International Court of Justice, [“Conclusion of the public hearing on the Request for the indication of provisional measures submitted by Ukraine”](#), Press Release No. 2022/8, 7 March 2022.

⁵¹ International Court of Justice, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, [“Document \(with annexes\) from the Russian Federation setting out its position regarding the alleged “lack of jurisdiction” of the Court in the case”](#), 7 March 2022, para 13.

⁵² International Court of Justice, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, [“Document \(with annexes\) from the Russian Federation setting out its position regarding the alleged “lack of jurisdiction” of the Court in the case”](#), 7 March 2022, paras 15-16.

But Russia also argued that its recognition of these Republics was in accordance with the international right of self-determination:

The recognition of the Donetsk and Lugansk Peoples' Republics is a sovereign political act of the Russian Federation. It is related to the right of self-determination of peoples under the United Nations Charter and customary international law as reflected in the statements of the President of the Russian Federation and the Permanent Representative of the Russian Federation to the United Nations, who in this regard specifically quoted from the principle of self-determination of peoples as reflected in the 1970 Declaration of Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.⁵³

When addressing Ukraine's invocation of the Genocide Convention, Russia argued that the Convention could not apply, even where Russian authorities, including President Putin, had alleged that genocide was occurring in Ukraine as a justification for its actions. Russia said:

A reference to genocide is not equal to the invocation of the Convention or the existence of a dispute under it, since the notion of genocide exists in customary international law independently of the Convention. It also exists in national legal systems of States including in the Russian Federation and Ukraine. There are no references to the Convention in the statement of the President of the Russian Federation to which the Government of Ukraine refers.⁵⁴

This suggestion that a reference to genocide does not necessarily invoke the Genocide Convention was addressed by the court, as outlined below.

Court's Order on Preliminary Measures

On 16 March 2022, the [ICJ made an Order](#), legally binding on both parties, for provisional measures before it made any final decision in the case.⁵⁵

The Court indicated the following provisional measures that:

- The Russian Federation shall immediately suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine;
- The Russian Federation shall ensure that any military or irregular armed units which may be directed or supported by it, as well as any

⁵³ International Court of Justice, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, "[Document \(with annexes\) from the Russian Federation setting out its position regarding the alleged "lack of jurisdiction" of the Court in the case](#)", 7 March 2022, para 17.

⁵⁴ International Court of Justice, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, "[Document \(with annexes\) from the Russian Federation setting out its position regarding the alleged "lack of jurisdiction" of the Court in the case](#)", 7 March 2022, para 20.

⁵⁵ *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Provisional Measures, [Order of 16 March 2022](#).

organisations and persons which may be subject to its control or direction, take no steps in furtherance of the military operations ;

- Both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve.

On the question of jurisdiction, the Court reiterated its position that it is able to indicate provisional measures only if there appears to be, *prima facie*, a basis on which its jurisdiction could be founded, but it does not need to definitively determine that it has jurisdiction as to the merits of the case altogether. The Court was satisfied that, at this stage of the case, there was enough for it to be satisfied that there was a *prima facie* basis for jurisdiction, and that there appeared to be a dispute between the parties relating to the interpretation, application or fulfilment of the Genocide Convention.⁵⁶

Although the Court noted that it could not take a decision on Ukraine's claims and arguments in the case, the ICJ did make an initial assessment about the lawfulness of the basis for Russia's military action. The Court said that it did not have evidence substantiating Russia's claim that genocide had been committed by Ukraine.⁵⁷ The Court also expressed doubt over the legality of Russia's use of force. In full, the Court said:

59. The Court can only take a decision on the Applicant's claims if the case proceeds to the merits. At the present stage of the proceedings, it suffices to observe that the Court is not in possession of evidence substantiating the allegation of the Russian Federation that genocide has been committed on Ukrainian territory. Moreover, it is doubtful that the Convention, in light of its object and purpose, authorizes a Contracting Party's unilateral use of force in the territory of another State for the purpose of preventing or punishing an alleged genocide.

60. Under these circumstances, the Court considers that Ukraine has a plausible right not to be subjected to military operations by the Russian Federation for the purpose of preventing and punishing an alleged genocide in the territory of Ukraine.⁵⁸

When considering that Ukraine has this plausible right not to be subject to military operations, the Court warned that this "is of such a nature that prejudice to it is capable of causing irreparable harm."⁵⁹ The Court further warned that further military operations could have damaging effects and

⁵⁶ *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Provisional Measures, [Order of 16 March 2022](#), paras 35-49.

⁵⁷ *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Provisional Measures, [Order of 16 March 2022](#), paras 59.

⁵⁸ *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Provisional Measures, [Order of 16 March 2022](#), paras 59-60.

⁵⁹ *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Provisional Measures, [Order of 16 March 2022](#), para 73.

there was urgency in ensuring no further rights are prejudiced before the Court is able to make a final decision in this case:

74. Indeed, any military operation, in particular one on the scale carried out by the Russian Federation on the territory of Ukraine, inevitably causes loss of life, mental and bodily harm, and damage to property and to the environment.

75. The Court considers that the civilian population affected by the present conflict is extremely vulnerable. The “special military operation” being conducted by the Russian Federation has resulted in numerous civilian deaths and injuries. It has also caused significant material damage, including the destruction of buildings and infrastructure. Attacks are ongoing and are creating increasingly difficult living conditions for the civilian population. Many persons have no access to the most basic foodstuffs, potable water, electricity, essential medicines or heating. A very large number of people are attempting to flee from the most affected cities under extremely insecure conditions.

76. In this regard, the Court takes note of resolution A/RES/ES-11/1 of 2 March 2022, of the General Assembly of the United Nations, which, *inter alia*, “[e]xpress[es] grave concern at reports of attacks on civilian facilities such as residences, schools and hospitals, and of civilian casualties, including women, older persons, persons with disabilities, and children”, “[r]ecogniz[es] that the military operations of the Russian Federation inside the sovereign territory of Ukraine are on a scale that the international community has not seen in Europe in decades and that urgent action is needed to save this generation from the scourge of war”, “[c]ondemn[s] the decision of the Russian Federation to increase the readiness of its nuclear forces” and “[e]xpress[es] grave concern at the deteriorating humanitarian situation in and around Ukraine, with an increasing number of internally displaced persons and refugees in need of humanitarian assistance”.

77. In light of these circumstances, the Court concludes that disregard of the right deemed plausible by the Court (see paragraph 60 above) could cause irreparable prejudice to this right and that there is urgency, in the sense that there is a real and imminent risk that such prejudice will be caused before the Court makes a final decision in the case.⁶⁰

Next steps

These provisional measures are binding on both parties. At a UN Security Council meeting on 17 March 2022, the ambassador for Ukraine has [asked the Security Council to enforce the ICJ’s Order](#):

I encourage the Security Council members to exercise their duty, envisaged by Article 94, paragraph 2, of the United Nations Charter, to make recommendations or decide upon measures to be taken in the case of Russia’s failure to comply with the obligations incumbent upon it under the judgment rendered by the Court.⁶¹

⁶⁰ *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Provisional Measures, [Order of 16 March 2022](#), paras 74-77.

⁶¹ UN Security Council, 8998th meeting, 17 March 2022, [UN Doc S/PV.8998](#).

[Article 94 of the UN Charter](#) provides for an obligation on Members of the UN to comply with a decision of the International Court of Justice in any case it is a party to. Article 94(2) allows a party to have recourse to the Security Council where the other party fails to perform obligations under a decision of the Court, and allows the Security Council to make recommendation or impose measures to give effect to the judgment. But the Security Council is not bound under Article 94 of the Charter to adopt any measures, and in any case any enforcement measures are still subject to the rules providing Russia with a veto over any non-procedural matters.⁶²

In practice, at the time of writing the hostilities in Ukraine have not ceased after the ICJ's Order, and Russia has continued its use of force against Ukraine. The Court will continue its deliberation and hearing of the case, but no further details on the timeline for these proceedings have been released.

3.4 Aggression and other international crimes

Recognition of Russia's actions as aggression

Some states have called Russia's military action on 24 February 2022 an act of aggression. For example, the EU,⁶³ the UK,⁶⁴ and the US.⁶⁵

[NATO Secretary-General Jens Stoltenberg also said:](#)

This is a blatant violation of international law. An act of aggression against a sovereign, independent and peaceful country.⁶⁶

Russia [vetoed](#) a draft Security Council resolution on 25 February that would have "deplored in the strongest terms the Russian Federation's aggression against Ukraine".⁶⁷ [This draft](#), co-sponsored by 81 member states, stated that Russian aggression against Ukraine was in violation of article 2, paragraph 4 of the UN Charter and demanded that Russia immediately withdraw all its military forces from Ukraine. In addition to the Russian veto, 11 members voted in favour of the text and three members abstained (China, India and the United Arab Emirates).

⁶² [Article 27](#), UN Charter.

⁶³ EU Commission, "[Press Statement of President Charles Michel of the European Council and President Ursula von der Leyen of the European Commission on Russia's unprecedented and unprovoked military aggression of Ukraine](#)", 24 February 2022.

⁶⁴ Foreign, Commonwealth, and Development Office, "[Foreign Secretary statement on Ukraine situation: 24 February 2022](#)", 24 February 2022.

⁶⁵ US, White House, "[Statement by President Biden on Russia's Unprovoked and Unjustified Attack on Ukraine](#)", 23 February 2022.

⁶⁶ NATO, "[Press briefing by NATO Secretary General Jens Stoltenberg following an extraordinary meeting of the North Atlantic Council](#)", 24 February 2022.

⁶⁷ "[Russia blocks Security Council action on Ukraine](#)", UN News, 26 February 2022.

An emergency special session of the UN General Assembly, called under the Uniting for Peace procedure,⁶⁸ took place on 28 February 2022.⁶⁹

Following statements by countries in the emergency special session, on 2 March 2022 the General Assembly voted on [a resolution similar to one vetoed by Russia in the Security Council](#).⁷⁰

This was the first time the Security Council had adopted a Uniting for Peace resolution in 40 years.

The General Assembly's [Resolution](#) was titled "Aggression against Ukraine". Among other statements, it said that the General Assembly:

1. Reaffirms its commitment to the sovereignty, independence, unity and territorial integrity of Ukraine within its internationally recognized borders, extending to its territorial waters;
2. Deplores in the strongest terms the aggression by the Russian Federation against Ukraine in violation of Article 2 (4) of the Charter;
3. Demands that the Russian Federation immediately cease its use of force against Ukraine and to refrain from any further unlawful threat or use of force against any Member State;
4. Also demands that the Russian Federation immediately, completely and unconditionally withdraw all of its military forces from the territory of Ukraine within its internationally recognized borders;
5. Deplores the 21 February 2022 decision by the Russian Federation related to the status of certain areas of the Donetsk and Luhansk regions of Ukraine as a violation of the territorial integrity and sovereignty of Ukraine and inconsistent with the principles of the Charter;
6. Demands that the Russian Federation immediately and unconditionally reverse the decision related to the status of certain areas of the Donetsk and Luhansk regions of Ukraine;
7. Calls upon the Russian Federation to abide by the principles set forth in the Charter and the Declaration on Friendly Relations;
8. Calls upon the parties to abide by the Minsk agreements and to work constructively in relevant international frameworks, including in the Normandy format and Trilateral Contact Group, towards their full implementation;
9. Demands all parties to allow safe and unfettered passage to destinations outside of Ukraine and to facilitate the rapid, safe and unhindered access to humanitarian assistance for those in need in Ukraine, to protect civilians,

⁶⁸ For an overview of the Uniting for Peace process at the UN, see: Security Council Report, [Security Council Deadlocks and Uniting for Peace](#), (opens PDF), October 2013; UN Audio-Visual Library of International Law, [Uniting for Peace procedure and history](#), October 2008; Asia-Pacific Centre for the Responsibility to Protect, [The Powers of the UN General Assembly to Prevent and Respond to Atrocity Crimes: A Guidance Document](#), 29 April 2021.

⁶⁹ UN General Assembly, [11th Emergency Special Session](#), 28 February 2022.

⁷⁰ UNGA Res ES-11/1 *Aggression against Ukraine*, 2 March 2022, UN Doc [A/RES/ES-11/1](#).

including humanitarian personnel and persons in vulnerable situations, including women, older persons, persons with disabilities, indigenous peoples, migrants and children, and to respect human rights;

10. Deplores the involvement of Belarus in this unlawful use of force against Ukraine, and calls upon it to abide by its international obligations

141 states voted in favour of the Resolution, with 5 voting against, 35 abstentions, and 12 states absent or not voting. Those voting against were Belarus, North Korea, Eritrea, Russia, and Syria. The full voting record [is available on the UN Website](#).⁷¹

Aggression in international law

As well as prohibiting the threat or use of force between states, international law also prohibits the specific act of ‘aggression’.

The [definition of aggression](#) was agreed by the UN General Assembly in 1974.⁷² The General Assembly declared in Article 1 of the definition that aggression is the use of armed force by a state against the sovereignty, territorial integrity, or political independence of another state, or in any other manner inconsistent with the UN Charter.

Article 3 of the definition lists some of the acts that could amount to aggression as including:

- Invasion, occupation, or annexation of another state’s territory.
- Bombardment of another state’s territory.
- Blockades of ports or coasts.
- Attacks by one armed force against another.
- In situations where there is an agreement between two states that provides for the presence of forces within the territory of the receiving state. A use of force in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement.
- Allowing a state’s own territory to be used to launch such attacks by another state against a third state.
- The sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out armed acts of such gravity as to amount to the acts listed above, or its substantial involvement therein.

Aggression is also recognised as a crime in international law. The UN General Assembly definition, in Article 5 states:

2. A war of aggression is a crime against international peace. Aggression gives rise to international responsibility.

⁷¹ UN Digital Library, [Aggression against Ukraine: resolution / adopted by the General Assembly](#), Voting Record of 2 March 2022.

⁷² UNGA Res 2214(XXIX), [Definition of Aggression](#) (14 December 1974) UN Doc A/RES/3314(XXIX).

3. No territorial acquisition or special advantage resulting from aggression is or shall be recognised as lawful.⁷³

Jurisdiction over aggression at the International Criminal Court

The [Rome Statute of the International Criminal Court](#), which gives rise to individual criminal responsibility, also recognises the modern definition of aggression in Article 8 bis.⁷⁴

The ICC cannot exercise jurisdiction over the crime of aggression unless both the victim and the aggressor state has ratified and accepted the Court's jurisdiction over that crime.⁷⁵

Russia signed but did not become a full party to the International Criminal Court and withdrew from the process of joining the ICC in full in 2016.⁷⁶ Ukraine is also not a member state, but did submit a declaration in 2015 [to accept the jurisdiction of the Court](#) over any acts of genocide, crimes against humanity or war crimes that may be committed within the territory of Ukraine since 20 February 2014 onwards.⁷⁷ The Prosecutor of the ICC [noted that this does not apply to the crime of aggression](#), and that the crime of aggression cannot apply to the current situation, when he said on 25 February:

... my Office may exercise its jurisdiction over and investigate any act of genocide, crime against humanity or war crime committed within the territory of Ukraine since 20 February 2014 onwards.

Any person who commits such crimes, including by ordering, inciting, or contributing in another manner to the commission of these crimes, may be liable to prosecution before the Court, with full respect for the principle of complementarity. It is imperative that all parties to the conflict respect their obligations under international humanitarian law.

My Office has also received multiple queries on the amendments to the Rome Statute with respect to the crime of aggression, which came into force in 2018, and the application of those amendments to the present situation. Given that neither Ukraine nor the Russian Federation are State Parties to the Rome Statute, the Court cannot exercise jurisdiction over this alleged crime in this situation.⁷⁸

⁷³ UNGA Res 2214(XXIX), [Definition of Aggression](#) (14 December 1974) UN Doc A/RES/3314(XXIX), Annex.

⁷⁴ [Rome Statute of the International Criminal Court](#) (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, since amended. (PDF)

⁷⁵ See [Rome Statute of the International Criminal Court](#) (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, since amended, Article 15 *bis* and Article 15 *ter*. (PDF)

⁷⁶ "[Russia withdraws from International Criminal Court treaty](#)", BBC News [online], 16 November 2016 (accessed 24 February 2022).

⁷⁷ Ukraine, [Letter Dated 8 September 2015 from the Minister of Foreign Affairs of Ukraine to the Registrar of the International Criminal Court](#), 8 September 2015.

⁷⁸ International Criminal Court, "[Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine](#)", 25 February 2022.

New investigations

On 28 February 2022, the ICC [Prosecutor announced his intention to proceed with opening an investigation as soon as possible](#) into other crimes possibly committed in Ukraine, such as war crimes or crimes against humanity.⁷⁹

Following [referrals of the situation in Ukraine by State Parties to the Rome Statute](#),⁸⁰ the Prosecutor was technically able to open an investigation immediately.

In response, [the Prosecutor announced](#) on 2 March 2022 that he would immediately proceed with active investigations and that work on the collection of evidence has now commenced.⁸¹

In a separate, but similar, development, the UN Human Rights Council also [established its own Commission of Inquiry into the situation in Ukraine](#). This Commission of Inquiry is mandated to:

- investigate all alleged violations and abuses of human rights and violations of international humanitarian law, and related crimes;
- establish the facts, circumstances, and root causes of any such violations and abuses;
- make recommendations, in particular on accountability measures, all with a view to ending impunity and ensuring accountability.⁸²

Because of its focus on human rights abuses, as well as investigating allegations of international crimes, the scope of the Commission's investigation is wider, but overlaps with, the ICC investigations into international crimes in Ukraine.

Calls for a Special Tribunal on Aggression

Led by former Prime Minister Gordon Brown, a number of politicians and experts signed a combined statement and declaration [calling for a "special tribunal for the punishment of the crime of aggression against Ukraine"](#).⁸³

⁷⁹ International Criminal Court, "[Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine](#)", 28 February 2022.

⁸⁰ UK Foreign, Commonwealth, and Development Office, "[UK leads call for ICC to investigate Russia's war crimes](#)", 2 March 2022.

⁸¹ International Criminal Court, "[Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation](#)", 2 March 2022.

⁸² UN Human Rights Council, "[Human Rights Council establishes an Independent International Commission of Inquiry to investigate all alleged violations of human rights in the context of the Russian Federation's aggression against Ukraine](#)", 4 March 2022.

⁸³ [Statement Calling for the Creation of a Special Tribunal for the Punishment of the Crime of Aggression against Ukraine](#), 4 March 2022; see also, "[A criminal tribunal for aggression in Ukraine](#)", Chatham House [online], 4 March 2022.

The statement directs states to adopt the proposed declaration, which gives support to establishing an international tribunal by agreeing:

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.⁸⁴

The exact legal basis for the tribunal is not specifically proposed by the declaration, but some experts discussed possible legal arguments at the launch of the declaration at an online event hosted by Chatham House on 4 March 2022.⁸⁵

Labour party leader Sir Keir Starmer [announced his support for the idea of a special tribunal](#), calling for the Prime Minister to support the prosecution of aggression in this way.⁸⁶ When [asked about the possibility at the Foreign Affairs Select Committee](#), Foreign Secretary Liz Truss told the Committee that she was “willing to look at” the option.⁸⁷

But support for the proposal has not been unanimous among experts. Some international legal experts, such as Professor Kevin Jon Heller,⁸⁸ have expressed doubts about the proposal. For example, Professor Heller detailed practical and legal concerns with the establishment of such a tribunal. While agreeing that President Putin and others may have committed the crime of aggression, he suggests:

A Special Tribunal would not find it easier to prosecute Russian officials for aggression than a national court. A Special Tribunal is not necessary to affirm the unacceptability and criminality of aggression. And a Special Tribunal would be no less obligated than a national court to honour the personal immunity of people like Putin and Lavrov.⁸⁹

The International Court of Justice, in the [Arrest Warrant](#) case, had indicated that the immunities of state officials would not apply before certain international criminal courts:

an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VII of the

⁸⁴ [Statement Calling for the Creation of a Special Tribunal for the Punishment of the Crime of Aggression against Ukraine](#), 4 March 2022, Declaration para 3.

⁸⁵ [“A criminal tribunal for aggression in Ukraine”](#), Chatham House [online], 4 March 2022.

⁸⁶ [“Keir Starmer calls for Nuremberg-style war crimes tribunal for Putin”](#), The Independent [online], 7 March 2022.

⁸⁷ Foreign Affairs Committee, Work of the Foreign, Commonwealth and Development Office, [4 March 2022, HC 518](#), Qq 641-646.

⁸⁸ Professor of International Law and Security at the University of Copenhagen's Centre for Military Studies and Professor of Law at the Australian National University.

⁸⁹ Professor Kevin Jon Heller, [“Creating a Special Tribunal for Aggression Against Ukraine Is a Bad Idea”](#), *Opinio Juris*, 7 March 2022.

United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention. The latter's Statute expressly provides, in Article 27, paragraph 2, that “[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person”.⁹⁰

But Professor Heller [suggests that the immunity issue is not resolved in international law](#), that there are gaps in the legal explanations for this judgement, and could still provide a legal hurdle for the actual arrest and detention of possible defendants by states before being presented to the Tribunal.

Experts such as Dr Carrie McDougall⁹¹ and Tom Dannenbaum⁹² note the position of several international legal decisions which have indicated that immunities of heads of states or ministers do not apply before international courts and tribunals,⁹³ and suggest that although these court decisions have been controversial among some international lawyers, they nevertheless provide some legal weight to this conclusion.⁹⁴

Alternative legal views, from Professor Dapo Akande for example, suggest that there could be an answer to this immunity issue in Ukraine's right of self-defence or as a measure of self-help. Dapo Akande suggested an argument whereby, as a measure of self-defence or self-help, Ukraine could be delegating its own jurisdiction to an international tribunal to prosecute aggression.⁹⁵

Further Reading

- Professor Kevin Jon Heller, [“Creating a Special Tribunal for Aggression Against Ukraine Is a Bad Idea”](#), Opinio Juris, 7 March 2022.
- Carrie McDougall, [“Why Creating a Special Tribunal for Aggression Against Ukraine is the Best Available Option: A Reply to Kevin Jon Heller and Other Critics”](#), Opinio Juris, 15 March 2022.

⁹⁰ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, [Jurisdiction. Judgment of 14 February 2002](#), [2002] ICJ Rep 3, para 61.

⁹¹ Melbourne Law School, University of Melbourne.

⁹² Assistant Professor of International Law at the Fletcher School of Law and Diplomacy.

⁹³ See, [“A criminal tribunal for aggression in Ukraine”](#), Chatham House [online], 4 March 2022, from 39min 22 seconds.

⁹⁴ Carrie McDougall, [“Why Creating a Special Tribunal for Aggression Against Ukraine is the Best Available Option: A Reply to Kevin Jon Heller and Other Critics”](#), Opinio Juris, 15 March 2022; Tom Dannenbaum, [“Mechanisms for Criminal Prosecution of Russia's Aggression Against Ukraine”](#), Just Security, 10 March 2022.

⁹⁵ See, [“A criminal tribunal for aggression in Ukraine”](#), Chatham House [online], 4 March 2022, from 39min 22 seconds.

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