

European Law Students' Association (ELSA) and ELSA Alumni
Statement and Call for Action on Ukraine:

*Protecting the Rule of Law through the enforcement
of the norms and principles of International Law*



“A just world in which there is respect for human dignity and cultural diversity”

Brussels, 4 March 2022

In particular, and *without prejudice* to other frameworks of International Law not addressed in this statement, the following norms and principles are applicable law in the armed conflict launched by the Russian Federation against Ukraine:

1. The use of military force against the political independence and the territorial integrity of another State is permitted *only if* there is an authorization to use military force under Chapter VII of the UN Charter or in self-defense under Article 51 of the UN Charter, or when the territorial State is genuinely and freely exercising its consent to the use of force by other States in its territories. None of these situations applies to the Russian Federation's invasion of Ukraine, which falls squarely in the definition of **aggression** provided by UN General Assembly resolution 3314 of 1974 (cf. [Definition of Aggression General Assembly resolution 3314 \(XXIX\) \(un.org\)](#)). In the face of the Russian veto in the UN Security Council⁷, the UN General Assembly has taken action to condemn the aggression through a "Uniting for Peace" resolution adopted by an overwhelming majority of States on 2 March 2022⁸, which provides additional legal basis for relevant countermeasures against the aggressor States.
2. Necessary and proportionate **countermeasures** (commonly known as **sanctions**) shall be adopted by any State or group of States, as recently decided by the Council of the European Union and by certain States (e.g. Australia, Canada, New Zealand, Japan, UK and USA). Targeted sanctions must be directed against those legal entities and individuals who may be connected with the targeted violations of International Law and shall always aim to spare the civilian populations. The main purpose of targeted sanctions shall be to increase the costs for the continuation of internationally wrongful acts (i.e. the aggressive war) so that they may come to an end. Economic and business-related interests shall not prevail over the imperative to adopt the most effective and efficient sanctions, including financial measures. Proportionate sanctions shall be instrumental to end the armed invasion.
3. In addition to remedies under the law of State responsibility, International Law provides that the principle of **individual criminal responsibility** applies when the most serious crimes of international concern (namely, *genocide, crimes against humanity, war crimes and the crime of aggression*) are perpetrated, regardless of the official capacity of the alleged perpetrator, as affirmed in Nuremberg Principle III⁹, which is part of customary International Law since 1946¹⁰. Therefore, "*recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes*"¹¹, States can take appropriate measures to detect, investigate, prosecute and bring to justice persons allegedly responsible for the crime of aggression (or "crimes against the peace" in the Nuremberg Statute), war crimes, crimes against humanity or genocide committed in Ukraine.
4. Although Ukraine is not a State Party to the Rome Statute, in 2015 it accepted the **jurisdiction of the ICC** under article 12(3) of the Rome Statute in respect of any crime against humanity, war crimes or acts of genocide allegedly committed on its territories since November 2013. Following the acceptance of the Court's jurisdiction, a preliminary investigation was launched, which reported more than 3,000 civilian casualties as well as thousands of wounded civilians had occurred in a situation qualified as international armed conflict due to the direct or indirect intervention of the Russian Federation¹². As such, the current situation of armed conflict between the Russian Federation and Ukraine since 24 February 2022 is a *continuum* of the previous situation and the article 12(3) acceptance of jurisdiction by Ukraine entails that all war crimes, crimes against humanity and acts of genocide perpetrated on its territories – including Crimea and the Donbass – fall within the automatic jurisdiction of the ICC, regardless of the nationality of the alleged perpetrator.

⁷ [Russia vetoes U.N. Security action on Ukraine as China abstains | Reuters.](#)

⁸ <http://www.undocs.org/en/A/ES-11/L.1>.

⁹ cf. [Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, 1950.](#)

¹⁰ cf. [United Nations Principles for the Nuremberg Tribunal, 1946 - Resolution - \(icrc.org\).](#)

¹¹ Rome Statute of the International Criminal Court (ICC), Preamble, 6th para. (17 July 1998).

¹² ICC, Office of the Prosecutor, Report on Preliminary Examination Activities 2020 (14 December 2020), para. 276 (www.icc-cpi.int/itemsDocuments/2020-PE/2020-pe-report-eng.pdf) and Report cited above at footnote 2.

5. Concerning the **crime of aggression**, the Kampala Amendments to the Rome Statute in its Article 15*bis* provide that nationals of States Not Parties to the Statute are exempted from the jurisdiction of the Court on aggression: This restrictive jurisdictional provision was a concession to requests from the United States, which may now paradoxically shield leader(s) of the Russian Federation from the ICC's jurisdictional intervention on the crime of aggression. However, the Prosecutor of the ICC may establish that war crimes or crimes against humanity committed in the framework of an aggressive war, which would meet the gravity threshold of Article 8*bis* of the Rome Statute, can be qualified as an *aggravating factor* within the meaning of Article 78(1) of the Statute itself: This finding may guide the Prosecutor to prioritize the investigation of alleged atrocities.
6. In respect of war crimes, crimes against humanity or genocide, it must be underscored that the individual criminal responsibility for such crimes extends not only to the immediate perpetrators, planners and instigators, but also to those who are exercising effective control over subordinates and fail to take effective measures to prevent or repress the crimes in question under the principle of **command responsibility** or "Responsibility of the Commander and other Superiors" defined in Article 28 of the Rome Statute¹³. Therefore, the President/Commander-in-Chief and other high-ranking leaders are subjected to the jurisdiction of the ICC and may be held accountable.
7. While the Russian Federation and Ukraine are parties to the UN Charter of 1945, they have *not yet* ratified the Rome Statute of the ICC of 1998. Yet, Ukraine accepted the jurisdiction of the ICC through a constitutional amendment adopted by the Verkhovna Rada (Parliament) in 2016 and entered into force in 2019¹⁴ and through two *ad hoc* declarations lodged by the Executive with the ICC in 2014 and 2015 under Article 12(3) of the Rome Statute. At this stage, Ukraine should ratify without delay the Rome Statute of the ICC in order to exercise its sovereign right as State Party to the first and only permanent jurisdiction over international crimes. All States Parties to the Rome Statute (123 States including all EU Member States) must cooperate fully with the ICC.
8. While assessing the current situation we call for the ratification of the Rome Statute of the ICC by all States that have not done so, including the Russian Federation and the United States of America. A universal ICC will be instrumental to "a just world". We call the European Union as one of the ICC's strongest supporters to lead this process together with all EU Member States as Parties to the Rome Statute.

Call for Action:

In light of the serious violations of the rule of law in Ukraine and the collective referral by 39 States¹⁵, including all EU Member States, of the Ukrainian situation to the Court's jurisdiction, we call on the States Parties to the Rome Statute to provide effective support, including additional resources, to the ICC Prosecutor for the implementation of his statutory mandate, starting with the investigation into crimes in Ukraine allegedly committed by leaders of the Russia Federation and the Republic of Belarus.

Moreover, we also call upon all the ELSA partners in NGO Coalitions and academic institutions, all members and alumni of ELSA in 44 European countries, as well as everyone who supports ELSA's vision of "*A Just World in which there is respect for human dignity and cultural diversity*" to give effect to this vision by:

1. broadly disseminating the above information on the norms and principles applicable to the current situation;

¹³ See, for all, OTTO TRIFFTERER, "Article 28: Responsibility of Commanders and Other Superiors" in OTTO TRIFFTERER/KAI AMBOS (EDS), COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, 3rd ed, Beck-Hart-Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 1056-1106.

¹⁴ See Article 124 (6th para.), Constitution of Ukraine, available in English at www.constituteproject.org/constitution/Ukraine_2016.pdf?lang=en.

¹⁵ [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 \(icc-cpi.int\)](http://www.icc-cpi.int/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. advising all relevant authorities and organs of States, International Organizations, NGOs and other private entities to respect and uphold these norms and to contribute actively to their enforcement; and
3. presenting the above listed points on legal and jurisdictional matters to the Prosecutor of the ICC, Representatives to the General Assembly of the United Nations and the Assembly of States Parties of the ICC.

Signed: The European Law Students' Association (ELSA) and ELSA ALUMNI

Acting by ELSA's commitment to the United Nations, its Bodies and Agencies¹⁶ and inspired by the historic contribution of ELSA to the establishment of the International Criminal Court¹⁷ – both at the preparatory committee meetings for the establishment of a permanent ICC and during the Rome Diplomatic Conference of 1998, and during the ratification process of the Rome Statute.

¹⁶ ELSA is an NGO with consultative status with the UN Economic and Social Council, the UNESCO, UNICEF, UNICRI and within the Council of Europe.

¹⁷ At the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, organized by the United Nations at FAO Headquarters in Rome from 15 June to 17 July 1998, the European Law Students' Association had the largest NGO delegation accredited to the conference, with 84 law students and young lawyers making contributions to all the teams and working groups of the Coalition for the ICC (CICC), of which it was a Steering Committee member. See also F. BENEDETTI, K. BONNEAU, J. WASHBURN, *NEGOTIATING THE INTERNATIONAL CRIMINAL COURT: NEW YORK TO ROME, 1994-1998*, Martinus Nijhoff, Leiden, 2014, p. 73.