



13 April 2022

Minister of Foreign Affairs

For information by

22 April 2022

Aotearoa New Zealand's support for Ukraine through legal accountability mechanisms

BRIEFING Decision Submission

PURPOSE To brief you on the international legal accountability processes underway to hold Russia accountable for its actions in Ukraine, with recommendations for Aotearoa New Zealand's support

Tukunga tūtohua – Recommended referrals

Prime Minister

For information by

22 April 2022

Attorney-General

For information by

22 April 2022

Taipitopito whakapā – Contact details

NAME	ROLE	DIVISION	WORK PHONE
Victoria Hallum	Divisional Manager	Legal Division	s9(2)(a)
Andrew Williams	Unit Manager	Legal Division	s9(2)(a)

Mā te Tari Minita e whakakī – Minister's Office to complete

<input type="checkbox"/> Approved	<input type="checkbox"/> Noted	<input type="checkbox"/> Referred
<input type="checkbox"/> Needs amendment	<input type="checkbox"/> Declined	<input type="checkbox"/> Withdrawn
<input type="checkbox"/> Overtaken by events	<input type="checkbox"/> See Minister's notes	

Comments

Pito matua – Key points

- Russia's aggression against Ukraine, and what is flowing from it, poses the biggest challenge to the current rules-based international order based on the United Nations Charter since it was established in 1945. Having a Permanent Member of the Security Council pursue an illegal war of aggression in the face of widespread international condemnation poses a fundamental challenge to the effectiveness and legitimacy of United Nations and its institutions.
- If left unchecked, Russia's actions will cause lasting damage to the foundational rules on peace, security and the use of force.
- For this reason Aotearoa New Zealand should, in concert with others, take action across the international system to respond to Russia's aggression against Ukraine. This includes ensuring accountability for Russia's breaches of international law, individual accountability for international crimes committed, as well as defending and protecting the fundamental international law principles (peace and security, international humanitarian law and international human rights law) impacted by Russia's action.
- International legal accountability efforts fall broadly into two categories:
 - *Individual criminal responsibility*: efforts to hold individuals (leaders, government officials, military commanders and soldiers) accountable for war crimes, crimes against humanity and potentially genocide; and
 - *State responsibility*: efforts to hold Russia as a state accountable for aggression and other breaches of international law such as international humanitarian law and human rights law.

Individual Criminal Responsibility

- Individual criminal responsibility places the legal responsibility for criminal acts on individuals – that regardless of the policy or position of a state – the international community considers certain actions such as war crimes and crimes against humanity to amount to criminal conduct on an individual level. It is no defence for an individual to argue they were simply following orders.
- There are a range of international efforts to ensure that individuals responsible for war crimes and crimes against humanity are held to account, including:
 - Ukraine: the Prosecutor-General in Ukraine is leading efforts under Ukraine's domestic criminal law to investigate and prosecute crimes.
 - The International Criminal Court (ICC) is investigating the situation in Ukraine following a referral from New Zealand and 41 other countries. New Zealand has announced a contribution of EUR200,000 / NZD315,000 to support the Court (NZD200,000 from existing funding and NZD115,000 to be drawn from the funding earmarked by Cabinet for supporting international legal frameworks on 11 April).
 - A range of third state initiatives (predominately in neighbouring countries based on their domestic law) to investigate and potentially prosecute war crimes

domestically.^{1 s6(a), s9(2)(g)(i)}

Officials will continue to monitor but we anticipate there will be a number of credible initiatives, particularly initiatives focused on gathering and preserving evidence.

- For New Zealand, given our geographical distance, and lack of direct connection to the conflict, it is appropriate that we have prioritised our support for the ICC. As the permanent international court charged with responsibility for the most grave crimes of concern to the international community, action by the ICC has several significant benefits. All 123 parties to the Court have an obligation to cooperate with the Court in the investigation and prosecution of crimes, including the arrest and surrender of offenders. For example, if a person is indicted by the Court, they are effectively under a near global travel ban. While Russia and Ukraine are not parties to the Court, Ukraine has accepted the ICC's jurisdiction to investigate crimes committed on its territory.
- A prosecution by an international court such as the ICC sends a strong signal of the international community's opprobrium and, given its independence and wide support, cannot be easily dismissed by Russia as a politically-motivated national prosecution.
- While our initial contribution to the ICC is significant, we recommend that officials allocate remaining funding through the MFAT's Multilateral Initiatives Fund process to support initiatives which will reinforce and contribute to the investigation and prosecution of war crimes and crimes against humanity in Ukraine, whether through the ICC² or other complementary efforts. At the end of June, officials propose to use any remaining funds to make a further un-tagged contribution directly to the ICC.

International State Responsibility

- In addition to mechanisms to hold individuals responsible for criminal acts, it is equally important that Russia as a state is held accountable for its actions, particularly its aggression and breaches of international humanitarian law.
- The International Court of Justice (ICJ) is the principal judicial organ of the United Nations and is the most significant remaining "guardrail" to uphold respect for the international rule of law, particularly given the failure of the UNSC to act.
- The most significant initiative to with potential to hold Russia accountable is a case that Ukraine is pursuing against Russia in the ICJ.^{s9(2)(h)}

This means that it could be taken to the ICJ under the dispute settlement provisions of the Genocide Convention, which both Ukraine and Russia are a party to. The ICJ has held an initial hearing and issued the equivalent of a number of injunctions (known as "provisional measures"). The case is now moving to its substantive phase with^{s6(a), s6(b)(i)}

¹ Note: Under the International Crimes and Criminal Court Act 2000, New Zealand does have universal jurisdiction for international crimes (crimes committed outside New Zealand). Were an alleged perpetrator found in New Zealand, New Zealand would have the option to pursue a domestic prosecution or hand the individual over to the International Criminal Court.

² Note: Funding to the ICC would be untagged, but contributors can have a reasonable expectation that any contribution the ICC to do its work Ukraine.

- s9(2)(h)

- Under Article 63 of the Statute of the International Court of Justice, third countries have the right to “intervene” on questions of law before the court. Intervening countries have the ability to make submissions to the court of the legal questions and may use their intervention to support the case of a primary party. New Zealand took this legal path when we intervened in the Australia’s case against Japan on Whaling in 2013.

- s6(a), s6(b)(i)

So far France, Lithuania, Latvia and Estonia have announced they will intervene. We understand ^{s6(a), s6(b)(i)}

s9(2)(g)(i)

s6(a), s6(b)(i)

- s6(a), s6(b)(i)

- s9(2)(h)

— s9(2)(h)

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- s9(2)(h)

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s9(2)(h)

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Deborah Geels
for Secretary of Foreign Affairs and Trade

Proactively Released by the Ministry of Foreign Affairs and Trade

Tūtohu – Recommendations

It is recommended that you:

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|----|---|-----------------|
| 1 | Note that Cabinet has agreed to earmark \$500,000 of funding for support to international legal initiatives to hold Russia to account for its aggression, of which \$115,000 has been committed already to support for the International Criminal Court (ICC). | Yes / No |
| 2 | Note there are range of mechanisms being established that could be utilised to hold individuals criminally responsible for war crimes and crimes against humanity, but to date our efforts have focused on support for the ICC. | Yes / No |
| 3 | Note Ukraine has initiated proceedings against Russia in the International Court of Justice (ICJ) and is seeking support in the form of third party interveners. | Yes / No |
| 4 | Agree, ^{s6(a), s6(b)(i), s9(2)(h)} | Yes / No |
| 5 | Note that ^{s9(2)(h)} | Yes / No |
| 6 | Agree that ^{s9(2)(h)} | Yes / No |
| 7 | Direct ^{s9(2)(h)} | Yes / No |
| 8 | Note ^{s9(2)(h)} | Yes / No |
| 9 | Note that after the pre-announced support for the ICC and ^{s9(2)(h)} | Yes / No |
| 10 | Direct officials to allocate remaining funds to support initiatives which will reinforce and contribute to the investigation and prosecution of war crimes and crimes against humanity in Ukraine, whether through the ICC or other complementary efforts. | Yes / No |
| 11 | Refer a copy of this submission to the Prime Minister and Attorney General. | Yes / No |

Hon Nanaia Mahuta
Minister of Foreign Affairs / Minita Take Aorere

Date: / /