



STATEMENT FOR IMMEDIATE RELEASE – March 10, 2022

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## **New York City Bar Association Urges Prompt Investigation of Potential Russian War Crimes in Ukraine**

### **Recommends UN and Ukraine Establish *Ad-hoc* Tribunal on Crime of Aggression by Russian Federation**

#### **EXECUTIVE SUMMARY**

The New York City Bar Association (City Bar) deplores the ongoing illegal invasion of Ukraine by the Russian Federation and expresses its profound concern for the invasion’s devastating impact upon civilian populations in Ukraine.<sup>1</sup> As noted in the City Bar’s initial statement on the subject,<sup>2</sup> the invasion violates foundational principles of international law and is a clear breach of the Charter of the United Nations.<sup>3</sup> Of increasing concern to the City Bar is the conduct of Russian Federation forces in carrying out Russia’s brutal invasion of Ukraine; which, according to multiple credible reports, appears to include significant violations of international humanitarian law and potential war crimes against civilian populations across the country. The City Bar also urgently calls upon the United Nations General Assembly to recommend that an *ad-hoc* tribunal be created between the United Nations and the Government of Ukraine on the Crime of Aggression as warranted by the Russian Federation’s ongoing illegal invasion of Ukraine.

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<sup>1</sup> While this statement addresses the illegal conduct of the Russian Federation in perpetrating its current invasion of Ukraine beginning on February 24, 2022, a “preface” to the current invasion was the Russian Federation’s annexation of The Crimea, coupled with the Russian-sponsored offensive in The Donbas region of Ukraine in March 2014.

<sup>2</sup> New York City Bar Association, Feb. 25, 2022, *Statement on Russian Federation’s Invasion of Ukraine*, <https://www.nycbar.org/media-listing/media/detail/russian-federations-invasion-of-ukraine>. (All websites last visited March 10, 2022.)

<sup>3</sup> Article 2.4 of the U.N. Charter, prohibits the “use of force against the territorial integrity or political independence of any State.”

## FACTS AND RESPONSE

Since launching the invasion of Ukraine on February 24, 2022, Russian Federation forces have attacked densely populated urban centers with airstrikes and indiscriminate heavy weapons fire.<sup>4</sup> The bombardment of Kharkiv, Kherson, Chernihiv, Mariupol, and Kyiv are of particular concern, as large numbers of civilian casualties have been reported and confirmed by independent organizations, including the Office of United Nations High Commissioner for Human Rights (OHCHR), which confirmed 1,123 civilian casualties in Ukraine between February 24 and March 5, 2022, with 364 killed, including 25 children, and 759 injured (with the actual number of civilian casualties likely to be significantly higher-especially in Government controlled territory).<sup>5</sup> Subsequent reports indicate not only that the number of civilian casualties continues to grow, but that Russian forces are using indiscriminate and therefore illegal weapons, including cluster bombs and thermobaric weapons, to terrorize civilian populations.

The City Bar condemns the Russian Federation's apparent targeting of civilians (including, most recently, civilians attempting to flee conflict zones on foot or by car), as well as residential buildings, schools, day care centers, hospitals and other non-military facilities across Ukraine. In addition, we condemn attacks on the city council building in Kharkiv, a television tower in Kyiv, the Babyn Yar Holocaust Memorial in Kyiv, and Zaporizhzhia nuclear power plant in southern Ukraine, which may constitute war crimes and violations of the Russian Federation's obligations under international humanitarian law to discriminate between military and civilian targets and to use only proportionate force to accomplish legitimate military objectives.<sup>6</sup>

Based on credible reports, the City Bar:

- Calls on the Russian Federation and its forces to end their indiscriminate and disproportionate bombardment of civilian populations and facilities, to cease its illegal use of cluster bombs and thermobaric weaponry, to refrain from all attacks on civilians seeking to flee conflict zones, and to comply with their obligations under international humanitarian law;
- Notes with urgent concern the mass displacement of civilian populations caused by the conflict and the besiegement of urban centers by Russian forces.<sup>7</sup> We urge the Russian Federation, and

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<sup>4</sup> These acts and their consequences are extensively documented by independent press and media, eyewitness accounts and visual images on television and social media, as well as closed circuit surveillance, satellite reconnaissance and geo-location data. See, e.g., <https://www.amnesty.org/en/latest/news/2022/03/ukraine-russian-dumb-bomb-air-strike-kills-civilians-in-chernihiv-new-investigation-and-testimony/>; <https://www.wsj.com/articles/russian-forces-target-ukrainian-civilian-areas-as-missile-hits-central-kharkiv-11646124675>; <https://www.theguardian.com/world/2022/mar/02/researchers-gather-evidence-of-possible-russian-war-crimes-in-ukraine>.

<sup>5</sup> See UN News, *Ukraine: UN chief calls for safe passage from conflict zones, rights body records 1,123 civilian casualties, WHO outlines health concerns*, March 6, 2022, <https://news.un.org/en/story/2022/03/1113372>.

<sup>6</sup> The International Humanitarian Law Database on Customary International Law published by the International Committee on the Red Cross states in Rule 6, "Civilians are protected against attack, unless and for such time as they take a direct part in hostilities." Available at [https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1\\_rul\\_rule6](https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1_rul_rule6).

<sup>7</sup> The Office of the United Nations High Commissioner of Refugees has reported that the number of refugees fleeing Ukraine has exceeded two million people and is expected to reach as many as four million during the conflict.

all parties to the conflict, to create and maintain humanitarian corridors that will permit civilians to flee areas of heavy conflict for areas of safety;

- Commends countries in the region, most notably Poland, Hungary, Slovakia, Romania, and Moldova, that are hosting large numbers of refugees at great economic and political cost. The City Bar urges all relevant stakeholders to ensure that they comply with their obligations under international refugee and asylum law and international human rights law— including the obligation not to discriminate against any person, whether or not a Ukrainian citizen, seeking refuge from the conflict;<sup>8</sup>
- Welcomes the united action of the international community, in particular United Nations General Assembly Resolution A/ES-11/L.1, in response to the Russian Federation’s illegal invasion of Ukraine and its illegal conduct in prosecuting the invasion and its operations;<sup>9</sup> and
- Commends the United Nations Human Rights Council for condemning the Russian Federation’s aggression against Ukraine and establishing an independent mechanism to investigate and document alleged war crimes and crimes against humanity committed during the conflict.<sup>10</sup>

## URGENT NEED FOR ACCOUNTABILITY

In view of the illegality of the invasion of Ukraine by the Russian Federation and the credible reports of illegal conduct of Russian forces during the prosecution of the invasion, it is essential that both responsible commanders and senior government officers be held accountable for violations of international humanitarian law and any war crimes that are committed by Russian forces during the course of the invasion and any succeeding occupation. The decision by the Office of the Prosecutor of the International Criminal Court (ICC) to open a full investigation into alleged atrocities committed in Ukraine, following the petition by 39 nations that are a party to the Rome Statute, is a welcome and necessary development to ensure accountability.<sup>11</sup>

The City Bar calls on all parties to the conflict and the international community to continue to support the work of the ICC.<sup>12</sup> This includes through executing arrest warrants issued by the ICC, to ensure that violations of applicable law, including alleged war crimes, are investigated,

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<sup>8</sup> See Universal Declaration of Human Rights, Art. 14(1); 1951 Convention relating to the Status of Refugees and its 1967 Optional Protocol relating to the Status of Refugees.

<sup>9</sup> General Assembly resolution A/ES-11/L.1, *Aggression Against Ukraine*, A/ES-11/L.1 (1 March 2022), <https://documents-dds-ny.un.org/doc/UNDOC/LTD/N22/272/27/PDF/N2227227.pdf?OpenElement>.

<sup>10</sup> See *Human Rights Council to establish Commission of Inquiry on Ukraine*, March 4, 2022, <https://news.un.org/en/story/2022/03/1113292>.

<sup>11</sup> Ukraine is not a party to the Rome Statute; however, it did accept that the ICC has jurisdiction over crimes committed on its territory beginning in November 2013. Art. 8, 2(b) of the Rome Statute of the ICC, defines "war crimes" within the ICC's subject matter jurisdiction to include: "...(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated...."

<sup>12</sup> The City Bar has long advocated for the ICC and its jurisdiction, even though the United States of America is not a party to the Rome Statute. See, e.g., *Reaffirming Support For The International Criminal Court*, April 21, 2020, <https://www.nycbar.org/media-listing/media/detail/support-for-the-international-criminal-court>.

documented, and prosecuted. The City Bar also urges all domestic judicial forums with potential jurisdiction (including universal jurisdiction) over any alleged war crimes committed in Ukraine to investigate and prosecute those responsible for violations of international law.

Because the ICC does not have jurisdiction over the crime of aggression in the context of the Ukraine invasion, the City Bar urges the international community and the United Nations General Assembly to recommend the establishment of an ad hoc or hybrid tribunal to investigate and prosecute the Russian Federation's alleged crimes of aggression against Ukraine.<sup>13</sup>

The City Bar further welcomes the decision by the International Court of Justice (ICJ) to expeditiously hear a petition submitted by Ukraine in relation to the Russian Federation's claim that its invasion of Ukraine is based on its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide. The City Bar hopes that the ICJ, which began public hearings on March 7<sup>th</sup>, 2022, will quickly issue provisional measures rejecting that improper claim and requiring the Russian Federation to immediately end its illegal invasion of Ukraine.

## CONCLUSION

The situation for civilians impacted by the Russian Federation's illegal invasion of Ukraine continues to deteriorate by the hour. The City Bar demands that the Russian Federation end its aggression against a peaceful neighbor and cease its use of illegal tactics in carrying out its invasion of Ukraine, which may amount to war crimes and crimes against humanity. The Russian Federation must immediately comply with its obligations under international humanitarian law and international human rights law to protect the civilian population in Ukraine. The international community must ensure that those responsible for the most serious of international crimes in Ukraine are ultimately held accountable, including by establishing an *ad-hoc* or hybrid tribunal, through consultations between the United Nations and the Government of Ukraine, to investigate and prosecute the crime of aggression committed by the Russian Federation.

March 10, 2022

Council on International Affairs

Mark A. Meyer, Chair

Rule of Law Task Force

Stephen L. Kass, Chair

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<sup>13</sup> The crime of aggression was first prosecuted at the International Military Tribunal at Nuremberg. It was agreed to be within the jurisdiction of the International Criminal Court's Statute in 1998, when the statute was concluded. However, the definition and conditions for the ICC's exercise of jurisdiction over the crime were not finalized until 2010, with activation of jurisdiction agreed to in 2017, effective 2018. Unfortunately, the jurisdiction is limited in that it does not cover the nationals of states not parties to the Rome Statute (such as Russian nationals). However, the definition of the crime is now endorsed by the 123 states that are parties to the ICC's Rome Statute, and many more states after the Nuremberg trials endorsed that tribunal's formulation of the crime. Thus, there is a solid foundation for the crime within international law. For the definition of the crime, *see* Rome Statute of the International Criminal Court, Art. 8*bis*.

**About the Association**

*The mission of the New York City Bar Association, which was founded in 1870 and has approximately 24,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world. [www.nycbar.org](http://www.nycbar.org)*