

Mr. Karim A. A. Khan QC

Prosecutor of the International Criminal Court (ICC)

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Milan, March 29, 2022

Object: investigation into war crimes in Ukraine - appeal from ItaliaStatodiDiritto¹

Mr. Chief Prosecutor,

ItaliaStatodiDiritto is an Italian Association made up of lawyers, university professors and former magistrates.

As supporters of "good law practise" we are closely following the work of Your Office, aimed at clarifying the qualification of many increasingly serious facts that have been occurring in Ukraine since 2013. In December 2020, when the then Prosecutor Fatou Bensouda announced the conclusion of the preliminary examination in relation to what had happened in the previous six and a half years, we were particularly struck by the numbers released, and in particular by the evidence of the crimes of which thousands of people had become victims.

This was after the Prosecutor's Office of the International Criminal Court had stated, during the preliminary examination, that it had benefited from the cooperative efforts of the Ukrainian authorities, including the provision of detailed information on investigations and prosecutions, concerning conducts relevant to the jurisdiction of the Court, initiated by state authorities at the national level, in relation to alleged crimes committed by all parties to the conflict. Similar information, with regard to national proceedings initiated by the Russian Federation concerning the Ukraine situation, had already been taken into account in the preliminary assessment of the Office for which you are now in charge.

Unfortunately, there is no widespread knowledge of what exactly happened in Ukraine before the dramatic armed aggression that is currently taking place: yet, if it had been possible to fully appreciate in time what happened in the Crimea, in the Donbass and during the "Euromaidan" protests, and if a public trial had been held to

¹This document was drawn up by a working group made up of the following ItaliaStatodiDiritto members: Laura Bertolè Viale (formerly advocate general at the Court of Appeal of Milan as well as a member of the Italian delegation at the 1998 Rome Conference for the adoption of the International Criminal Court); Elisabetta Mentasti (lawyer, counsel Studio Chiomenti); Dino Rinoldi, (full professor of international law at the Catholic University of Milan); Guido Camera (criminal lawyer, chairman of ItaliaStatodiDiritto).

ascertain the responsibility of the perpetrators of serious crimes, we would probably have arrived at the present moment with less surprise, perhaps even preventing the precipice. Nonetheless the results of the prompt intervention of the International Criminal Court in 2011, upon UN Security Council stimulus, at the time of the violent repression of demonstrations in the Libya of the dictator Gaddafi, are certainly not comforting. We are well aware of the difficulties encountered in activating the jurisdiction of the International Criminal Court; however, we would have hoped not to have to wait for the occurrence of the successive and tragic crimes committed since last February - including armed aggression against a sovereign state, a conduct that only for formal grounds cannot be directly prosecuted - for public opinion to realise how important the role of the Court can be for peace and world order.

In this perspective, we have also warmly welcomed the referral proposed by numerous States (41 to date), including Italy, which has allowed the rapid passage to the investigation phase also in relation to crimes committed since 2013, for which, as mentioned, at the end of 2020 the Prosecutor of the International Criminal Court had already declared that it had concluded the preliminary phase, finding concrete elements to proceed for crimes against humanity as well as war crimes. As you are well aware, the referral involves the decision of States *"to refer the situation in Ukraine to the Prosecutor of the International Criminal Court with a view to requesting the Prosecutor to investigate any acts integrating war crimes, crimes against humanity and genocide, potentially committed on the territory of Ukraine from 21 November 2013 onwards, including the current allegations of commission of crimes taking place throughout the territory of Ukraine, thereby requesting the Court to exercise its jurisdiction with respect to the scope of acceptance [of the Court's jurisdiction] by Ukraine"*. We also appreciated, Mr. Chief Prosecutor, your decision to carry out the investigation on the ground, going to Ukraine to gather evidence, in full respect of the principles of the rule of law, and to want to make the voice of Justice - which must be safeguarded even, and perhaps more, in the case of war events - strongly heard in the name of the protection of human dignity, although you did not hide the "myriad of obstacles" that the investigation in Ukraine entails.

The passage to the investigation stage allows - as you know better than us! - the issuing of the measures provided for in Article 58 of the Rome Statute (issue by the Pre-Trial Chamber of an arrest warrant or a comparison order). On the basis of the information already collected for the period 2013-2020, and that which has been collected since February, we hope that these precautionary measures can be adopted as soon as possible, in full respect of the principles of independence, legality and universal justice that distinguish the International Criminal Court, whose birth was a conquest for world peace, since "there is no peace without justice". These are indispensable and most opportune preconditions for the earliest possible trial of these very serious acts and for helping to end the conflict by arresting those responsible for criminal conduct. The attacks on the civilian population and the bombing of non-

military targets such as residential areas, supermarkets and hospitals, which were carried out on a large scale and in an organised manner, cannot be regarded as random. The equally organised deportation of the civilian population to Russia should also be mentioned; and the rape of the civilian population, possibly followed by murder to conceal the facts, cannot but be considered a heinous weapon of criminal prevarication. There have been very serious episodes of torture or inhuman and degrading treatment carried out by the occupiers against Ukrainian prison workers, who were not willing to cooperate with the enemy, as well as similar conduct directed against prisoners during their transport from occupied prisons. The use of chemical weapons (in particular white phosphorus bombs, of which we recall the precedent set by the United States in Fallujah, Iraq, in 2004) and biological weapons, as well as cluster bombs, would be a serious violation of international covenant norms, which can now also be considered as principles of general international law. And let us pose a question: what about the document drawn up by the Organisation for the Prohibition of Chemical Weapons (S/1943/2021 of 12 April 2021) containing 'Second report by the investigation and identification team pursuant to paragraph 10 of decision C-SS-4/D.3 "Addressing the threat from chemical weapons use" Saraquib (Syrian Arab Republic) - 4 February 2018)?

In connection with the establishment of a liability in this respect, it is significant the proof of the liability not only of the material perpetrator of the acts, but also of his hierarchical superiors. As you know, Article 28 of the Statute of the Court of Justice lays down two conditions for the liability of a 'commander': the first is that the accused is formally a military commander or that he acted as a *de facto* military commander; the second is that the armed forces are under his actual command, authority and control. The omissive conduct relevant to the attribution of criminal responsibility occurs when the person has failed to exercise adequate control over the armed forces under his command, or has failed to take necessary and reasonable measures within his power to prevent the commission of the crime, or to suppress it, or to submit the matter to the competent authorities for investigation and prosecution. As regards the subjective element, the intent consists in the fact that the accused knew, or at least should have known, of the criminal acts that the forces under his control were about to commit.

With respect to the current Ukrainian affair, the top state authority of the Russian Federation, President Putin, has publicly vindicated the invasion - euphemistically baptised a "special military operation" - reiterating its intention to continue. As far as the single crimes are concerned, we believe that the indicated criteria for the attribution of criminal responsibility should be applied, also going back up the chain of command to the highest levels of the military and political hierarchy (in this sense, we refer to: M.G. Giammarinaro, *"Building Peace through Law. The International Criminal Court role"*, in *"Giustizia insieme"* (on line), 18 March 2022). This could obviate the need for the establishment of an umpteenth special Court,

competent to judge *ex post* on the crime of aggression, as typified by Article 8 bis of the Rome Statute but not usable in the case by the International Criminal Court for lack of jurisdictional link (see C. Meloni, "How to deal with the Russian aggression of Ukraine with the instruments of international (criminal) law", in "Sistema Penale/SP" (on line), 19 March 2022). And on the conduct in question one cannot but be reminded of the intervention of the United States of America and Great Britain, together with Australia and Poland, against Iraq, motivated by the non-existent threat of the use by that regime of 'weapons of mass destruction'.

We are well aware of the many difficulties that your work may encounter on the path we are hoping for; however, this is an opportunity to show that law cannot be annihilated by force and usurpation. At the same time, we believe that the disclosure to the public of the results of the investigative work carried out by the Prosecutor's Office in Ukraine since 2013, together with the results of the investigation into the events of 2008 in Georgia - which many people have all too quickly forgotten about and whose dramatic nature could now be better understood than in the past, thus regaining topicality - could enable the world's public opinion to form a truly informed opinion about the events that are taking us to the brink of a third world war.

We conclude our appeal with a thought by Aharon Barak, former President of the Israeli Supreme Court: "*Democracy guarantees us, as judges, independence and impartiality. The fact that we are not required to give evidence against our judgments makes us stronger against the fluctuations of public opinion. And the real test of this independence and impartiality comes in situations of war and terrorism. It is precisely at such times that we judges must hold fast to fundamental principles and values*".

We believe that your work, and that of the Court, at this dramatic moment in history, is a formidable tool for demonstrating that, even in war, the international principles of the rule of law cannot be brutally trampled underfoot.

Please accept the assurance of our highest esteem and our best wishes for your work.

Avv. Guido Camera
(Chairman of ItaliaStatodiDiritto)

