

# Proactive Release

24/09/2023

The following Cabinet papers and related Cabinet minutes have been proactively released by the Minister of Foreign Affairs

Title	Reference
<b><i>Cabinet Minute of Decision – Report of the Cabinet External Relations and Security Committee: Period Ended 7 April 2023</i></b>	CAB-23-MIN-0119
<b><i>Cabinet External Relations and Security Committee – Minute of Decision – Ukraine: Holding Russia to Account: New Zealand’s International Legal Strategy</i></b>	ERS-23-MIN-0017
<b><i>Ukraine: Holding Russia to account: New Zealand’s International Legal Strategy</i></b>	

Some parts of this information release would not be appropriate to release and, if requested, would be withheld under the Official Information Act 1982 (the OIA). Where this is the case, the relevant sections of the OIA that would apply have been identified. Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

Key to OIA redaction codes:

- 6(a): to avoid prejudicing the security or defence of New Zealand or the international relations of the New Zealand Government;
- 6(b)(i): to protect the passing of information from another government on a confidential basis;
- 6(b)(ii): to protect the passing of information from an international organisation on a confidential basis;
- 6(c): to prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial;
- 9(2)(g)(i): to protect the free and frank expression of opinions by departments;
- 9(2)(g)(ii): to protect officers and employees from improper pressure or harassment;
- 9(2)(f)(iv): to protect the confidentiality of advice tendered by Ministers of the Crown and officials;
- 9(2)(h): to maintain legal professional privilege; and,
- 9(2)(j): to avoid prejudice to negotiations.



# Cabinet

## Minute of Decision

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*This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.*

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### **Report of the Cabinet External Relations and Security Committee: Period Ended 7 April 2023**

On 11 April 2023, Cabinet made the following decisions on the work of the Cabinet External Relations and Security Committee for the period ended 7 April 2023:

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Minister of Foreign Affairs

ERS-23-MIN-0017 **Ukraine: Holding Russia to Account: New Zealand's  
International Legal Strategy**  
Portfolio: Foreign Affairs

CONFIRMED

Rachel Hayward  
Secretary of the Cabinet

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Minister of Foreign Affairs



# Cabinet External Relations and Security Committee

## Minute of Decision

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### Ukraine: Holding Russia to Account: New Zealand's International Legal Strategy

Portfolio Foreign Affairs

On 4 April 2023, the Cabinet External Relations and Security Committee:

- noted** that on 14 November 2022, Cabinet agreed in principle to draw down \$700,000 in the Vote Foreign Affairs 2022/23 Multi-Category Expenses and Capital Expenditure appropriation *Act in the world to build a safer, more prosperous and more sustainable future for New Zealand MCA* to support New Zealand's intervention in the International Court of Justice (ICJ) [CAB-22-MIN-0503];
- agreed** to provide \$700,000 of the funds referred to in paragraph 1 above to support New Zealand's intervention in Ukraine's case, including the making of written and oral submissions as required throughout the life of the case, with no impact on the operating balance or net core Crown debt;
- noted** that based on the current progress of the *Ukraine v Russia* ICJ case, approximately \$660,000 of these funds are unlikely to be required before June 2023;
- agreed** to an in-principle expense transfer of up to \$660,000 from 2022/23 to 2023/24, to enable New Zealand's legal team to continue to make future submissions throughout the life of the case and work swiftly in response to the demands of the Court, as follows:

	Sm – increase/(decrease)			
	2022/23	2023/24	2024/25	2025/26 & Out years
<b>Vote Foreign Affairs Minister of Foreign Affairs</b>				
Multi-Category Expenses and Capital Expenditure: Act in the world to build a safer, more prosperous and more sustainable future for New Zealanders MCA.				
Departmental Output Expense: Delivery of New Zealand's foreign policy (funded by revenue Crown)	(0.660)	0.660	-	-

- authorised** the Minister of Finance and the Minister of Foreign Affairs to jointly agree the final amount to be transferred, following the completion of the 2022/23 audited financial statements, with no impact on the operating balance and/or net core Crown debt across the forecast period;

- 6 **noted** that on 14 November 2022, Cabinet agreed in principle to draw down \$1.300 million to support the International Criminal Court (ICC), funded by the reduction in the Emergency Budget Support tagged contingency;
- 7 **noted** that officials recommend a split transfer of the funds set aside between the ICC Office of the Prosecutor and the ICC Trust Fund for Victims;
- 8 **agreed** to provide \$1.300 million of funding from Vote Foreign Affairs 2022/23 set aside by Cabinet for the support package for Ukraine and the ICC, with no impact on the operating balance or net core Crown debt, with \$1.300 million to be allocated as follows:
- 8.1 making a further \$1.000 million contribution to the ICC's Office of the Prosecutor (OTP) fund in FY 2022/23;
- 8.2 making a further \$300,000 contribution to the ICC Trust Fund for Victims (TVF) fund in 2022/23.

Janine Harvey  
Committee Secretary

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**Present:**

Rt Hon Chris Hipkins (Chair)  
Hon Carmel Sepuloni  
Hon Kelvin Davis  
Hon Grant Robertson  
Hon Michael Wood  
Hon Andrew Little  
Hon David Parker  
Hon Ginny Andersen

**Officials present from:**

Office of the Prime Minister  
Officials Committee for ERS



Office of the Minister of Foreign Affairs

Cabinet External Relations and Security Committee

## **Ukraine: Holding Russia to account: New Zealand's international legal strategy**

### **Proposal**

- 1 This paper outlines New Zealand's legal strategy to hold Russia accountable for its actions in Ukraine and provides a report back with further detail for the in-principle funding approved by Cabinet in November 2022 to support New Zealand's intervention in the International Court of Justice (ICJ), and the work of the International Criminal Court (ICC).

### **Relation to government priorities**

- 2 Continuing to provide legal support for Ukraine in the face of Russia's aggression defends the rules-based international order which underpins New Zealand security and prosperity and ensures that Russia is held accountable for its actions.

### **Executive Summary**

- 3 Russia's aggression against Ukraine is a flagrant and egregious breach of international law and threatens the integrity of the rules-based system, a system on which New Zealand relies for security and prosperity. New Zealand's international legal support helps defend that system from Russia's challenge as well as providing tangible support to Ukraine's diplomatic and legal strategy.
- 4 The failure of the United Nations Security Council, thwarted by Russia's veto, to respond when Russia invaded Ukraine for the purposes of territorial conquest and assimilation led many countries to act outside the UN system and adopt their own independent sanctions. For New Zealand, it was important that such a significant step was balanced by an active increase in support for UN institutions.
- 5 Despite Russia's actions, the foundational international legal guardrails continue to hold. The ICJ "World Court", has been hearing a case brought by Ukraine against Russia and in its preliminary orders found overwhelmingly in Ukraine's favour. Under the ICJ Rules, third countries have the right to intervene on questions of law before the Court, s6(a), s9(2)(h)
- 6 New Zealand has long been concerned about the mounting credible evidence of war crimes and crimes against humanity in Ukraine. The ICC's recent arrest warrants against President Putin and the Russian Children's Commissioner, Maria Lvova-Belova for their role in the abduction of Ukrainian children to Russia, demonstrates the critical role of the ICC in achieving accountability for the widespread and

systematic impacts of Russia's illegal war. New Zealand's continuing support will assist the ICC in The Hague to ensure all atrocities are thoroughly investigated and those responsible are held to account.

- 7 In November 2022, Cabinet agreed in principle<sup>1</sup> to support New Zealand's intervention at the ICJ and provide additional funding to the ICC. This paper provides detail as required and seeks agreement to:
  - 7.1 Confirm \$700,000 of funding set aside by Cabinet to support New Zealand's intervention in the ICJ and approve an in-principle expense transfer of the residual amount to FY2023/24;
  - 7.2 Confirm \$1,300,000 to support the ICC.
- 8 All of the options proposed in this paper have been assessed against the Strategic Framework agreed by Cabinet in June [CBC-22-MIN-0034].<sup>2</sup>

## Background

- 9 In response to Russia's wider-scale invasion of Ukraine on 24 February 2022, New Zealand has provided assistance to Ukraine across three broad pillars: diplomatic (including legal), military, and economic (including humanitarian and a bespoke Russia sanctions regime). As a small state, New Zealand's interests are best served by an international rules-based system that upholds accountability when aggressors violate agreed rules. New Zealand has a longstanding commitment to addressing violations through the established mechanisms of the United Nations.
- 10 Russia's war prompted New Zealand to take action outside of those traditional UN institutions, by creating a bespoke sanctions regime when Russia's veto paralysed the global security architecture and precluded any ability of the United Nations Security Council to act.
- 11 But other parts of the UN system are working well – particularly its legal institutions. New Zealand's legal accountability efforts have provided balance to our response by demonstrating our commitment to core multilateral institutions, through both New Zealand's intervention at the ICJ and financial support to the ICC. A full Cabinet history of those decisions is set out at Annex A.

### *New Zealand's case in the ICJ*

- 12 The ICJ is the principal judicial organ of the UN and the most significant remaining 'guardrail' functioning effectively in response to Russia's invasion. By falsely alleging that Ukraine was engaged in genocide in order to justify its illegal war of aggression, Russia exposed itself to the ICJ's jurisdiction under the Genocide Convention. The early stages of the case have gone overwhelmingly in Ukraine's favour, s6(a), s9(2) (h)

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<sup>1</sup> CAB-22-MIN-0503.

<sup>2</sup> Updated by ERS on 14 March 2023 (ref CAB MIN)

- 13 Under the ICJ Rules, third countries have the right to intervene on questions of law before the Court, and in doing so can reinforce core rules of international law  
s9(2)(h)

s6(a), s9(2)(h)  
s6(a), s9(2)(h)

- 14 ICJ cases are significant undertakings – New Zealand has only appeared at the court in three previous cases since the court's inception (against France on Nuclear weapons in two cases; and Japan on Whaling). s9(2)(h)

Like any significant litigation, there are associated costs which cannot be absorbed in the Ministry of Foreign Affairs and Trade (MFAT) baselines, particularly with the Court sitting in The Hague. New Zealand's legal team currently consists of lawyers from MFAT's Legal Division and Crown Law, as well as experienced international Counsel. In 2021/22, the total costs of preparing and filing New Zealand's intervention for filing in The Hague was \$71,321.25. To date, in FY 2022/23, \$39,560.50 has been incurred to cover Counsel fees and associated costs

s6(a), s6(b)(i), s9(2)(h) While difficult to predict, Annex B sets out the possible costs for the remaining phases of the case.

- 15 To enable New Zealand's legal team to continue to make future submissions throughout the life of the case and work swiftly in response to the demands of the Court, I recommend Cabinet:

15.1 Agree to provide \$700,000 of funding approved in principle by Cabinet<sup>3</sup> in the Vote Foreign Affairs 2022/23 Multi-Category Expenses and Capital Expenditure appropriation *Act in the world to build a safer, more prosperous and more sustainable future for New Zealand MCA* to support New Zealand's intervention in the ICJ.

15.2 Approve an in-principle expense transfer of up to \$660,000 by the Minister of Finance and the Minister of Foreign Affairs for any remaining funds not spent on the ICJ intervention by the end of this financial year from 2022/23 to 2023/24 in the Vote Foreign Affairs Multi-Category Expenses and Capital Expenditure appropriation *Act in the world to build a safer, more prosperous and more sustainable future for New Zealand MCA*.

- 16 This funding is expected to fund the life of the case, as set out at Annex B.

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<sup>3</sup> CAB-22-MIN-0503 Paragraph 13.



*New Zealand's support to the ICC*

- 17 While the ICJ focuses on the responsibility of the Russian state for its actions, the ICC has criminal jurisdiction over individuals (including Russian political leadership figures) who may have committed war crimes and crimes against humanity in Ukraine.
- 18 The ICC under the leadership of Prosecutor Karim Khan has moved quickly to focus its efforts in Ukraine. s6(a)

the situation in Ukraine has demonstrated the vital role the Court plays in upholding international law and making individuals criminal responsible for atrocities. s6(a)

- 19 In March 2022, New Zealand joined 40 other countries in referring the situation in Ukraine to the Court, allowing it to immediately open an investigation into war crimes and crimes against humanity taking place in Ukraine. New Zealand subsequently committed its largest voluntary contribution to the ICC, after the Ukraine investigation was added to the ICC's already stretched caseload. To date New Zealand has contributed a total of \$1,315,000 to the ICC, made up as follows:

19.1 \$715,000 to support the ICC's Office of the Prosecutor (OTP) Trust Fund for Advanced Technology and Specialized Capacity, focussed on i) advancing the ICC's technological capability for the collection, analysis and processing of evidence; (ii) providing enhanced psycho-social support to witness and survivors as well as a broader measure of support for witness protection and (iii) improving the ICC's capacity with respect to investigations into crimes of sexual and gender-based violence and crimes against children. New Zealand joined many states parties (including close partners) in responding to the Chief Prosecutor's calls for additional funding, providing the OTP with a much needed cash injection at a time when it is facing unprecedented challenges and cases.

19.2 \$600,000 to the ICC's Trust for Victims Trust Fund (TVF) which delivers reparative justice to victims of grave atrocity crimes, through physical and psychosocial rehabilitation and material support. New Zealand's 2022 contribution to the TVF demonstrated New Zealand's support for a victim-centred approach to international criminal justice. New Zealand was one of 45 state contributors in 2022. Our proportionally significant contribution has been well received and commented on by a wide range of ICC state parties s6(a)

- 20 In addition, New Zealand has contributed to the secondment of a NZDF senior military adviser s6(a)

. The ICC continues to note its great appreciation to New Zealand for s9(2)(g)(ii) contribution to the Prosecutor's office.

- 21 New Zealand's support for the ICC assisted the OTP to send its largest ever deployment team to Ukraine since the ICC's establishment, with the ICC issuing arrest warrants less than a year later. On 17 March, the ICC announced a significant step forward in its investigations into Ukraine, laying indictments against Russian President Vladimir

Putin and his Commissioner for Children's Rights, Maria Lvova-Belova with further indictments anticipated s9(2)(h)

- 22 The ICC's commendable progress toward individual accountability for war crimes in Ukraine clearly sends the message that there will be no impunity for war crimes committed in Ukraine. Future Russian indictments by the ICC will continue to attract significant public attention, including toward New Zealand support for these efforts.
- 23 Of the further \$1,300,000 approved in-principle funding for the ICC, I recommend:
  - 23.1 Making a further **\$1,000,000 contribution to the ICC's Office of the Prosecutor fund** in FY 2022/23 which will go toward the following priority areas:
    - 23.1.1 Operationalising the ICC OTP field presence in Ukraine s6(b)(ii), s6(c), s6(b)(i)
    - 23.1.2 Supporting the effective use of digital evidence in trials before the Court, s6(b)(i), s6(b)(ii), s6(c)
    - 23.1.3 Support the collection of forensic evidence s6(b)(i), s6(b)(ii), s6(c)
    - 23.1.4 Provide enhanced psycho-social support to witness and survivors, as well as broader additional witness protection and support measures and dedicated and specialised capacity with respect to investigations into crimes of sexual and gender-based violence and crimes against children.
  - 23.2 Making a further **\$300,000 contribution to the ICC Trust Fund for Victims (TFV) fund in 2022/23**. The TFV plays a vital role in supporting victims of crimes committed under the ICC's jurisdiction through the provision of emotional and practical support, financial assistance and advocacy, similar to the role Victim Support plays in New Zealand. The TFV also implements reparation orders by the Court to financially assist victims and their families toward rehabilitation and reintegration.

*New Zealand's support for other accountability efforts, including the crime of aggression*

- 24 As well as utilising permanent established mechanisms such as the ICC and ICJ, Ukraine is seeking to make the most of widespread support for its cause, by creating

new Russia specific legal accountability mechanisms, including a register to document damages caused by Russia and a special tribunal for the crime of aggression in Ukraine.

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

s6(a)

26 One particular Ukraine legal proposal which is receiving particular attention<sup>4</sup> is the creation of a special international tribunal with jurisdiction over the crime of aggression in Ukraine. The special tribunal would seek to exercise jurisdiction over the crime of aggression (i.e. the act of waging a war of aggression in contravention of the UN Charter) and would target the Russian leaders who took the decision to invade i.e. President Putin and those closest to him. The ICC does not have jurisdiction over this crime in the Russia-Ukraine context because Russia is not a member of the ICC.

27 s6(a), s9(2)(h)

28 s6(a)

the EU has recently announced support for a s6(a) interim model in the form of an International Centre for the Prosecution of the Crime of Aggression in Ukraine based in the Hague.

29 The centre will be embedded in an established EU joint investigation team<sup>5</sup>  
s6(a)

30 s6(a)

*Ratification of the crime of aggression in New Zealand*

31 In September 2021, Cabinet agreed<sup>6</sup> that New Zealand would not ratify and incorporate the ICC's crime of aggression into domestic law in the immediate future, a decision

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<sup>4</sup> s6(a), s6(b)(i)

<sup>5</sup> Led by Lithuania, Poland and Ukraine, supported by EuroJust.

<sup>6</sup> LEG-21-MIN-0126.

which remains under periodic review, with officials due to report back to the Minister of Foreign Affairs by the end of 2023.

32 s6(a), s9(2)(h), s9(2)(g)(i)

33 s6(a), s9(2)(g)(i)

s6(a), s9(2)  
(h)

### **Financial Implications**

34 No additional funding is required to support options identified in this paper. The costs outlined will be met from existing baselines of the Ministry of Foreign Affairs and Trade.

### **Legislative Implications**

35 None

### **Human Rights**

36 This paper raises no inconsistencies with the New Zealand Bill of Rights Act 1990 or the Human Rights Act 1993. The proposals in this paper will have a positive flow on effect in relation to accountability for human rights violations in Ukraine.

### **Consultation**

37 This Cabinet paper has been consulted with DPMC, Treasury, Ministry of Defence, Ministry of Justice, Crown Law and the New Zealand Defence Force.

### **Communications**

38 The Minister of Foreign Affairs and the Attorney General have already announced New Zealand's intervention in Ukraine's ICJ case. There are no upcoming appropriate opportunities for ICJ announcements on the horizon, particularly as the case is ongoing.

39 Once confirmed by Cabinet I will look for appropriate opportunities to announce the decision regarding further funding to the ICC, including as part of any package of future announcements.

### **Proactive Release**

40 This Cabinet paper can be proactively released within 30 days of decisions being confirmed by Cabinet, with appropriate redactions for content that is legally privileged and or may compromise operational or national security interest.



## Recommendations

The Minister for Foreign Affairs recommends that the Committee:

- 1 **Note** that on 14 November 2022 Cabinet agreed in principle to draw down \$700,000 in the Vote Foreign Affairs 2022/23 Multi-Category Expenses and Capital Expenditure appropriation *Act in the world to build a safer, more prosperous and more sustainable future for New Zealand MCA* to support New Zealand's intervention in the ICJ.
- 2 **Agree** to provide \$700,000 of funds set aside by Cabinet to support New Zealand's intervention in Ukraine's case including the making of written and oral submissions as required throughout the life of the case, with no impact on the operating balance or net core Crown debt.
- 3 **Note** that based on the current progress of the *Ukraine v Russia* ICJ case, approximately \$660,000 of these funds are unlikely to be required before June 2023.
- 4 **Agree** to an in-principle expense transfer of up to \$660,000 from 2022/23 to 2023/24 to enable New Zealand's legal team to continue to make future submissions throughout the life of the case and work swiftly in response to the demands of the Court.

<b>Vote Foreign Affairs Minister of Foreign Affairs</b>	<b>2022/23</b>	<b>2023/24</b>	<b>2024/25</b>	<b>2025/26 &amp; Out years</b>
Multi-Category Expenses and Capital Expenditure: Act in the world to build a safer, more prosperous and more sustainable future for New Zealanders MCA.				
Departmental Output Expense: Delivery of New Zealand's foreign policy. (funded by revenue Crown)	(0.660)	0.660	-	-

- 5 **Authorise** the Minister of Finance and the Minister of Foreign Affairs to jointly agree the final amount to be transferred, following completion of the 2022/23 audited financial statements, with no impact on the operating balance and/or net core Crown debt across the forecast period.
- 6 **Note** that on 14 November 2022 Cabinet agreed in principle to draw down \$1,300,000 to support the ICC, funded by the reduction in the Emergency Budget Support tagged contingency.
- 7 **Note** that officials recommend a split transfer of the funds set aside between the ICC Office of the Prosecutor and the ICC Trust Fund for Victims.
- 8 **Agree** to provide \$1,300,000 of funding from Vote Foreign Affairs 2022/23 set aside by Cabinet for the support package for Ukraine and the ICC, with no impact on the operating balance or net core Crown debt, with \$1,300,000 to be allocated as follows:

- 8.1 Making a further \$1, 000,000 contribution to the ICC's Office of the Prosecutor (OTP) fund in FY 2022/23.
- 8.2 Making a further \$300,000 contribution to the ICC Trust Fund for Victims (TVF) fund in 2022/23.

Authorised for lodgement

Hon Nanaia Mahuta

Minister of Foreign Affairs

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## Annex A:

### History of Cabinet and Ministerial approvals for ICJ and ICC

Date	Event
26 March 2022	MFA announced during a UK led Ministerial meeting on support for the ICC following the Ukraine referral, a \$315,000 contribution to the ICC to support its urgent resource needs
11 April 2022	Cabinet agreed to earmark \$500,000 for funding the legal pillar of New Zealand's support to international legal initiatives that would hold Russia to account for its aggression in FY 2022/21 (CAB-22-MIN-0131).
6 and 29 May 2022	The Minister of Foreign Affairs and Attorney General agreed that New Zealand should seek to intervene in Ukraine's case against Russia in the ICJ allocating \$100,000 of those funds to prepare New Zealand's intervention for the 2021/22 financial year with remaining funds to go to the ICC (Submission: <i>Aotearoa New Zealand's support for Ukraine through legal accountability mechanisms</i> , dated 13 April 2022.)
June 2022	New Zealand made a voluntary contribution of \$715,000 to the ICC's Office of the Prosecutor (OTP) fund, fulfilling the earlier commitment made by the Minister of Foreign Affairs to the ICC (\$315,000) and increased by a further \$400,000 from the funding allocated by Cabinet toward legal accountability initiatives.
27 June 2022	<p>In line with the Strategic Framework for New Zealand's support to Ukraine, Cabinet agreed (CAB-22-MIN-0243):</p> <ul style="list-style-type: none"> <li>to contribute a further \$600,000 to the ICC's Trust Fund for Victims in the 2021/22 financial year from Ministry of Foreign Affairs and Trade departmental underspend;</li> <li>to the ICC Chief Prosecutor's specific request for the secondment of s9(2)(g)(ii) as a senior military adviser to support the Prosecutor's investigation into war crimes in Ukraine, based in the Hague for up to two years.</li> <li>to transfer \$2million from 2021/22 to 2022/23 in the Multi-Category Expense and Capital Expense appropriation: 'Act in the world to build a safer, more prosperous and more sustainable future for New Zealanders' (the MCA) to be utilised for future support to Ukraine, to be determined based on Ukraine's needs, as assessed against the Strategic Framework Criteria.</li> </ul>

14 November 2022	<p>Cabinet agreed (CAB-22-MIN-053):</p> <ul style="list-style-type: none"><li>• in principle that \$700,000 of the \$2million expense transfer be used to support New Zealand's work in the ICJ case against Russia, subject to a report back with further detail on New Zealand's contribution and detailed costings.</li><li>• in principle to a further contribution of \$1,300,000 to the ICC to support its work, subject to a report back with further detail on what New Zealand's contribution would entail, and detailed costings.</li></ul>
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**Annex B:**

**Estimated Costs for Remaining Phase of *Ukraine v Russia* ICJ case**

s9(2)(g)(i), s9(2)(f)(iv), s9(2)(h)

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