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AN ALTERNATIVE TO ZOMBIEING:  
LAWFARE BETWEEN RUSSIA AND UKRAINE AND THE FUTURE  
OF INTERNATIONAL LAW

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ABSTRACT

*Lawfare, the purposeful use of law as a weapon of war, has been an integral feature of the Russia-Ukraine conflict. Russia has used lawfare to complicate Ukraine's response to its invasion of Crimea and the Donbas, most famously through use of "little green men" to create plausible deniability for its military actions. Ukraine has launched a novel and highly public "Lawfare Project," filing cases before the International Court of Justice, European Court of Human Rights, International Tribunals on the Law of the Sea, and World Trade Organization, with an investigation by the International Criminal Court also underway. This lawfare strategy has bolstered the legitimacy of Ukraine's cause, delegitimized Putin, garnered Western support for the war, cost Russia billions, and helped keep China on the sidelines. Lawfare between Russia and Ukraine has tremendous implications for the use of lawfare in armed conflict and the future of international law itself.*

INTRODUCTION

Lawfare, the purposeful use of law as a weapon of war, has been an integral part of the Russia-Ukraine conflict since 2014. Russia has cloaked its justification for invading Ukraine in the language of domestic and international law. It used "little green men" to create legal ambiguity and complicate Ukraine's response while invading Crimea in 2014. In response, Ukraine launched a "Lawfare Project" against Russia. Its strategy has involved lawsuits under both public and private international law. Since 2014, it has generated landmark legal rulings and victories including an International Court of Justice (ICJ) order for Russia to cease hostilities,

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isolation of Russia in the World Trade Organization (WTO), two victories in the International Tribunal for the Law of the Sea (ITLOS), and \$8 billion in arbitration damages.

Ukraine proudly advertises its Lawfare Project on a government website, available in English and Ukrainian, to bolster its legitimacy and garner international support.<sup>1</sup> The website explains that hybrid warfare is “not so much about open hostilities, but about the economy, propaganda, bribery, intimidation, and zombieing. At the same time, one of the key areas of confrontation is the legal one.”<sup>2</sup> The website asserts that, in the legal domain, where both sides have no weapons and proportionate weight, Ukraine is “fighting quite well.”<sup>3</sup>

Indeed, unlike zombies, Ukraine’s lawfare strategy is very much alive. Ukraine’s lawsuits harm Russia’s reputation in the international community and give states legal ammunition to sanction Russia. Lawfare between Russia and Ukraine will change the future of international law and armed conflict. To explain how and why, this paper proceeds in four parts. Part I briefly defines lawfare. Part II briefly reviews Russia’s lawfare against Ukraine. Part III analyzes how Ukraine has weaponized public and private international law against Russia. Part IV assesses what lawfare between Russia and Ukraine means for the future of war, and the role of international law within it.

## I. WHAT IS LAWFARE?

In 2001, then-Colonel Charlie Dunlap argued that lawfare would become part of modern warfare and introduced the term to the American legal academy.<sup>4</sup> Dunlap’s primary example was the human shields that violent non-state actors employed against U.S.-led forces in Iraq and Afghanistan. Twenty years later, recognizing that lawfare had increased in sophistication and frequency, Jill Goldenziel defined lawfare as the purposeful use of law against a particular adversary “with the goal of achieving a particular strategic, operational, or tactical objective,” or “to weaken the legitimacy of an adversary’s particular strategic, operational, or tactical objectives,” or to strengthen the legitimacy of one’s own.<sup>5</sup> Goldenziel delineates five types of

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<sup>1</sup> LAWFARE, at [www.Lawfare.gov.ua/](http://www.Lawfare.gov.ua/) (last visited June 6, 2022).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> CHARLES J. DUNLAP, JR., LAW AND MILITARY INTERVENTIONS: PRESERVING HUMANITARIAN VALUES IN 21ST CONFLICTS 4 (Nov. 29, 2001), <https://people.duke.edu/~pfeaver/dunlap.pdf> [<https://perma.cc/FB6P-3FHY>]. Dunlap later became a Major General and then a law professor at Duke.

<sup>5</sup> Jill I. Goldenziel, Jill I. Goldenziel, *Law as a Battlefield: The U.S., China, and the*

lawfare. Battlefield exploitation lawfare involves exploitation of an adversary's law-abidingness, such as using human shields.<sup>6</sup> Instrumental lawfare involves using law to achieve a military objective that might otherwise be accomplished using violence, such as using sanctions.<sup>7</sup> Proxy lawfare involves filing lawsuits against an adversary proxy, such as a corporation like Huawei that represents China's interests.<sup>8</sup> Institutional lawfare involves creating laws or legal institutions to achieve a national objective.<sup>9</sup> Information lawfare involves using the language of law to undermine an adversary's legitimacy or bolster one's own.<sup>10</sup>

State and non-state actors employ lawfare inside and outside armed conflict to advance their national interests. China is the world's most advanced practitioner of lawfare. *Falu zhan*, or "legal warfare," is one of the "three warfares" that have been pillars of Chinese military thought since 1963.<sup>11</sup> Although the United States has no official lawfare strategy, NATO, Israel, and other states have permanent personnel devoted to lawfare, and the United Kingdom considers it an critical part of its military planning.

Although lawfare is on the rise, it had not been a major feature of interstate armed conflict until the Russia-Ukraine war. No state before Ukraine had publicly flaunted a "Lawfare Project." The conflict has involved all five types of lawfare. Ukraine's legal battles with Russia foreshadow how lawfare will shape the future of war, before, during, and after armed conflict.

## II. RUSSIAN LAWFARE AGAINST UKRAINE

Russia made the opening salvo in its legal war with Ukraine. Russia premised its 2014 invasion of Crimea on the use of lawfare. On February 23, 2014, Ukraine's parliament voted to remove pro-Russian President Victor Yanukovich. Protests ensued. On February 27, "little green men" invaded Ukraine. They wore Russian military-style uniforms, but without the

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*Global Escalation of Lawfare*, 106 CORNELL L. REV. 1085, 1087 (2021).

<sup>6</sup> ORDE F. KITTRIE, *LAWFARE: LAW AS A WEAPON OF WAR* 287-288 (Oxford Univ. Press 2016).

<sup>7</sup> *Id.*, at 11.

<sup>8</sup> See John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 889, 132 Stat. 1636, 1917; Complaint at 10, *Huawei Techs. USA, Inc. v. United States*, 440 F.Supp.3d 607 (E.D. Tex. 2020) (No. 4:19-cv-00159), 2019 WL 1076892.

<sup>9</sup> Goldenziel, *supra* note 5, at 1100.

<sup>10</sup> *Id.*; see generally Jill I. Goldenziel, *Information Lawfare: Messaging and the Moral High Ground*, 12 J. OF NAT'L. SEC. L. AND POL'Y 233 (2022).

<sup>11</sup> Goldenziel, *supra* note 5, at 1092.

distinctive insignia that international law requires of combatants. These men stormed the Crimean parliament and raised the Russian flag, occupied government buildings, and seized the peninsula in a nearly-bloodless coup. The occupation soon spread to the Donbas, and bloodletting began.

Russia engaged in battlefield exploitation lawfare by denying it had sent the little green men, claiming they were local self-defense forces. Only on April 7, 2014, did Putin admit that they were Russian Special Forces, but he maintained that only locals were fighting in the Donbas. Using lawfare helped avoid escalation. Conventional forces would have likely provoked a kinetic response by Ukraine and international involvement. Instead, Russia's lawfare put Ukraine in a bind. If Ukraine had fired on the little green men, Russia could have denied involvement and claimed Ukraine was targeting civilians. The little green men obfuscated the line between international and non-international armed conflict, further complicating the legality of military actions by Ukraine or international actors.

Russia also engaged in institutional lawfare to justify its military actions. On the day after the little green men arrived in Crimea, the Duma introduced a draft law to allow Russia to legally incorporate regions of neighboring states following controlled referenda.<sup>12</sup> Weeks later, in an election with heavy Russian interference, the majority of Crimeans voted to join Russia. Russia then engaged in "passportization," distributing passports to increase the Russian population in Crimea.<sup>13</sup> In April 2014, the Duma allowed Russia to grant citizenship to foreign nationals based on historical, cultural and linguistic principles. This law granted automatic citizenship to populations of contested regions that met these criteria—like the Donbas. In 2022, this institutional lawfare set the stage for Russia's invasion and supported Putin's rhetoric that Ukraine and its people are part of Russia.

Russia's institutional and instrumental lawfare undermine the international legal regimes designed to prevent human rights violations and unrestricted war.<sup>14</sup> Russian lawfare is part of a broader state strategy that views international law as a Western tool of domination and therefore attempts to subvert it whenever possible.<sup>15</sup>

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<sup>12</sup> See Venice Comm'n, On Whether Draft Federal Law No. 462741-6 on Amending the Federal Constitutional Law of the Russian Federation on the Procedure of Admission to the Russian Federation and Creation of a New Subject Within the Russian Federation Is Compatible with International Law, Opinion 763/2014, 2 (Mar. 21, 2014).

<sup>13</sup> *Id.* at 38–39.

<sup>14</sup> Mark Voyger, *Russian Lawfare – Russia's Weaponization of International Law and Domestic Law: Implications for the Region and Policy Recommendations*, 4 J. BALTIC SEC. 38 (2018).

<sup>15</sup> See THOMAS D. GRANT, *AGGRESSION AGAINST UKRAINE: TERRITORY, RESPONSIBILITY AND INTERNATIONAL LAW*, 171-97 (2015).

### III. UKRAINE'S LAWFARE PROJECT

Ukraine “legal confrontation” tactics span the legal, psychological, and information realms of war that play out far beyond the battlefield.<sup>16</sup> Ukraine’s three-pronged lawfare approach employs public and private international tribunals while using its own domestic courts to prosecute war criminals.

#### *A. Public International Lawfare*

Ukraine has launched a coordinated assault on Russia using public international law. As of this writing, it has filed two cases at the ICJ, and two arbitrations before ITLOS. An International Criminal Court (ICC) investigation is also underway, as well as efforts to isolate Russia in the WTO.

#### 1. International Court of Justice

Ukraine has used the ICJ to undermine Russia’s legitimacy through instrumental and information lawfare. Ukraine first filed against Russia in the ICJ in 2017, alleging that Russia’s actions in eastern Ukraine and Crimea violated the International Convention for the Suppression of the Financing of Terrorism (ICSFT) and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).<sup>17</sup> Ukraine argues that Russia failed to adequately prevent and counter terrorist financing during its occupation, supplied arms to proxy forces in the Donbas who targeted civilians and shot down a commercial airliner, and engaged in a campaign of “cultural erasure” in Crimea including suppression of the Crimean Tatar and Ukrainian languages, forced disappearances, and murder.<sup>18</sup> Russia participated in the case, and the Court rejected Russia’s preliminary objections and assumed jurisdiction. Hearings on the merits are pending.

In March 2022, the ICJ granted Ukraine provisional measures in another case involving two factual disputes: whether Ukraine is committing genocide, and whether Russia has the authority to use force, including the killing of civilians, to enforce the Genocide Convention accordingly. The

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<sup>16</sup> LAWFARE, at [www.Lawfare.gov.ua/](http://www.Lawfare.gov.ua/) (last visited June 6, 2022).

<sup>17</sup> Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukr. v. Russ.), (Int’l. Ct. Justice, April 8, 2022).

<sup>18</sup> *Id.*

Genocide Convention states that the ICJ shall hear disputes between Contracting Parties related to the “interpretation, application or fulfilment” of the Genocide Convention, including those relating to a state’s responsibility for genocide. Russia asserts that Ukraine is committing genocide against almost four million ethnic Russians, and that it has the right to act to prevent genocide and punish Ukraine accordingly. Ukraine argues that Russia has misused the concept of genocide, which “degrades and defiles the object and purpose of the Genocide Convention, and undermines the solemn commitments made by all Contracting Parties to prevent and punish actual causes of genocide.”<sup>19</sup> Ukraine stresses “its rights not to be subject to a false claim of genocide, and not to be subjected to another State’s military operations on its territory,” based on abuse of the Genocide Convention. Russia did not participate in the ICJ hearings on provisional measures, in part because its legal team quit in protest of the invasion, but sent a letter asking the ICJ to dismiss the case.<sup>20</sup> Within eighteen days of Ukraine’s application, the ICJ held hearings, and ruled in Ukraine’s favor, with only the Russian and Chinese judges abstaining. The Court unanimously ordered Russia to cease its military actions immediately and avoid aggravating the dispute.

The ruling enabled the “outcasting” of Russia by the international community.<sup>21</sup> President Biden subsequently invoked the ruling to warn Xi Jinping that he would be in violation of the ICJ’s order if China gave arms to Russia.<sup>22</sup> Moreover, an unprecedented forty-two states have officially expressed interest in intervening in the ICJ case, including seven states who have never appeared before the Court in a contentious case.<sup>23</sup> The decision of the United Nations’ main judicial body that Russia’s continued use of force is illegal will likely hold significant weight in future decisions by international bodies and international courts to act against Russia.<sup>24</sup>

## 2. International Tribunal for the Law of the Sea

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<sup>19</sup> Memorial of Ukraine, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ (Mar. 7, 2022))*, at 2.

<sup>20</sup> Harold Koh, “Inside Biden’s Effort to Restore the Liberal International Order,” iCourts Public Lecture, University of Copenhagen, June 13, 2022.

<sup>21</sup> See generally Oona Hathaway, *Outcasting: Enforcement in Domestic and International Law*, 121 *YALE L. J.* 252 (2011).

<sup>22</sup> *Id.*

<sup>23</sup> See Jill I. Goldenziel, Sean Michael Blochberger, and Tyler Graham, *Weapon of the Weak: State Power Dynamics in the International Court of Justice*, forthcoming 2023.

<sup>24</sup> See Andreas Kulick, *Provisional Measures After Ukraine v. Russia*, 12 *J. OF INT’L DISP. RESOL.* (2022) available at <https://doi.org/10.1093/jnlids/idac012>.

Ukraine has filed two complaints against Russia before ITLOS, both involving instrumental lawfare. In *Case Concerning the Detention of Three Ukrainian Naval Vessels*, Ukraine argues that Russia violated the UN Convention on the Law of the Sea (UNCLOS) by firing on and detaining three Ukrainian vessels and twenty-four servicemen in 2018.<sup>25</sup> In granting provisional measures ordering Russia to release the vessels and crew, the Tribunal determined that Ukraine's claims are at least plausible. Russia eventually complied. In the *Dispute Concerning Coastal State Rights Arbitration*, filed in February 2018, Ukraine claimed that Russia had violated its rights to hydrocarbon and living resources in the Black Sea, Sea of Azov, and Kerch Strait; violated its rights in the Kerch Strait through illegal construction that threatens navigation and the environment; failed to cooperate with Ukraine to address pollution at sea, and violated Ukraine's rights and its own duties regarding underwater cultural heritage.<sup>26</sup> In January 2020, the Tribunal rejected Russia's objections and assumed jurisdiction over all of Ukraine's claims except determination of sovereignty over Crimea. At the heart of both arbitrations is the question of sovereignty over the Sea of Azov and Kerch Strait, which remains unclear under international law. Neither tribunal has jurisdiction to decide sovereignty, but their eventual judgments will have implications for future determination of sovereignty. The lawsuits may thus achieve Ukraine's objective of improving its territorial or maritime claims, without military action.

### 3. International Criminal Court

Ukraine engaged with the ICC for the first time because of its lawfare strategy. While Ukraine is not a member of the ICC, in 2015, it lodged a declaration granting the ICC jurisdiction over war crimes, genocide, and crimes against humanity that are committed on its territory, retroactive to the time of Russia's invasion and subsequent annexation of Crimea.<sup>27</sup> Although Russia is not a member of the ICC, the Office of the ICC Prosecutor can still investigate Russian officials for crimes committed on Ukraine's soil. The ICC prosecutor launched an investigation against Russia for war crimes in Ukraine in March 2022, upon referrals by forty-three states—the largest-

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<sup>25</sup> Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukr. v. Russ.), Case No. 26, Order of May 25, 2019.

<sup>26</sup> Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukr. v. Russ.), Case No. 2017-06, PCA Case Repository, Preliminary Objections, Award (Perm. Ct. Arb. 2020).

<sup>27</sup> The ICC does not have jurisdiction over the crime of aggression in this situation since neither Ukraine nor the Russian Federation are parties to the Rome Statute.

ever number of state referrals.<sup>28</sup> It sent a forensic and investigative team to Ukraine in May.<sup>29</sup> Many organizations are also working to collect war crimes evidence.<sup>30</sup> Smartphones and technology that can help Ukrainians safely collect and preserve evidence to the standards of international courts may bring justice faster than past ICC cases, which have taken decades.

#### 4. World Trade Organization

Lawfare between Russia and Ukraine in the WTO has spurred novel legal interpretation and trade isolation of Russia. In 2019, a WTO dispute settlement panel issued a landmark ruling invoking the national security exception of GATT Article XXI for the first time.<sup>31</sup> The panel held that Russia's actions blocking trade between Ukraine, Kazakhstan, and the Kyrgyz Republic that transited through Russia were consistent with the national security exception due to the existence of an "emergency in international relations" resulting from Ukraine's political unrest in 2014. The United States sided with Russia in the dispute, sharing the position that measures taken by members for national security purposes are non-justiciable.<sup>32</sup> However, Ukraine, the United States, and twelve other countries quickly pivoted and used the national security exception against Russia, revoking WTO agreements and Russia's Most Favored Nation status.<sup>33</sup>

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<sup>28</sup> *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*, INT'L. CRIM. CT. (Mar. 2, 2022), available at <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states> (As of April 2022, 43 states had submitted referrals).

<sup>29</sup> *ICC Prosecutor Karim A.A. Khan QC Announces Deployment of Forensics and Investigative Team to Ukraine, Welcomes Strong Cooperation with the Government of the Netherlands*, INT'L. CRIM. CT. (May 17, 2022), at <https://www.icc-cpi.int/news/icc-prosecutor-karim-aa-khan-qc-announces-deployment-forensics-and-investigative-team-ukraine>.

<sup>30</sup> Roman Romanov, *'The Hour These Hostilities Began': Ukrainians Mobilize to Document War Crimes*, JUST SEC. (Apr. 26, 2022), at <https://www.justsecurity.org/81263/the-hour-these-hostilities-began-ukrainians-mobilize-to-document-war-crimes>.

<sup>31</sup> World Trade Organization, *DS512: Russia—Measures Concerning Traffic in Transit*, 26 Apr. 2019.

<sup>32</sup> William Alan Reinsch, *The WTO's First Ruling on National Security: What Does It Mean for the United States?* Center for Strategic and International Studies, April 5, 2019, available at <https://www.csis.org/analysis/wtos-first-ruling-national-security-what-does-it-mean-united-states> (last visited June 19, 2022).

<sup>33</sup> Cathleen D. Camino-Isaacs and Liana Wong, *Invasion of Ukraine: Russia's Trade Status, Tariffs, and WTO Issues*, Congressional Research Service, March 18, 2022.



### B. Private International Lawfare

Ukraine has weaponized its corporations and the law by backing investor-state arbitrations against Russia. Ukraine has encouraged Ukrainian investors to pursue claims under the 1998 Russia-Ukraine Bilateral Investment Treaty (BIT) and coordinated at least some of their legal strategies. According to Ukraine's Lawfare Project website, Ukrainian investors have filed eleven investment arbitration claims against Russia.<sup>34</sup> Several claimants are state-owned entities. Ukraine filed submissions supporting the claimants in six of the arbitrations. The arbitrations are confidential, but details are available from secondary sources.<sup>35</sup> The investors demand compensation for Russia's illegal seizure of investments within Crimea, including banking operations, an airport, petrol stations, real estate, a wind farm, and electric power stations. For the Tribunals to have jurisdiction under the BIT, the property must be in Russian territory. However, the tribunals could not concede that Crimea is part of Russia, which would be contrary to Ukraine's interests. They instead interpreted International Humanitarian Law to find that the investments were made in Russian-occupied territory, or territory over which Russia had "effective control."<sup>36</sup>

Investor-state arbitration tribunals do not have jurisdiction to determine whether the occupation itself is illegal. However, repeated findings by international tribunals that Russia has occupied Crimea, and engaged in illegal conduct there, publicizes Russia's outlaw status, undermines Putin's purported annexation of Crimea, and reinforces Ukraine's legitimacy before the international community. Applying information lawfare, Ukraine has widely broadcast details of these "confidential" arbitrations as part of its Lawfare Project.<sup>37</sup> Findings that Russia has "effective control" over Crimea—and therefore the obligation to respect local laws and international human rights law—will also strengthen Ukraine's legal arguments elsewhere. Ukraine can build on these decisions to make arguments about atrocities

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<sup>34</sup> Eric Chang, *Lawfare in Crimea: Weaponizing International Investment Law and the Law of Armed Conflict Against Russia's Occupation of Ukraine*, THE ARMY LAWYER (forthcoming 2022).

<sup>35</sup> *Id.*

<sup>36</sup> *Oschadbank v. the Russian Federation*, PCA Case No. 2016-14, PCA Case Repository, Award (Nov. 26, 2018); see Cosmo Sanderson, *Ukrainian state entity prepares Crimea claim*, GLOBAL ARB. REV. (Jan. 6, 2021), available at <https://globalarbitrationreview.com/ukrainian-state-entity-prepares-crimeaclaim>. On "effective control," see Hague Regulations of 1907, Art. 42; Fourth Geneva Convention (1949); see also *id.*

<sup>37</sup> See Lawfare Project, <https://lawfare.gov.ua/news> (last visited June 19, 2022).

committed in violation of international humanitarian law under circumstances of Russia's "effective control."

Even before the 2022 invasion, the arbitration tribunals held Russia responsible for \$8 billion in damages, with billions more pending. Russia did not participate in the first nine arbitrations, but submitted letters to the Tribunals contesting jurisdiction. Russia has since chosen to contest them, revealing its fear of Ukrainian lawfare. While Russia is notoriously difficult to enforce arbitration awards against, early awards proved enforceable. While \$8 billion did not deter Putin from invading Ukraine, decades of lawsuits are sure to arise out of the current conflict. Hundreds of billions of dollars in damages can change the cost-benefit analysis of a conflict and deter future aggression by Russia and other states.

### C. Ukraine's Domestic Lawfare

Ukraine has also begun prosecuting Russian soldiers in its domestic courts. In May 2022, Ukraine's prosecutor general announced that investigating and prosecuting war crimes is her "main agenda."<sup>38</sup> As of this writing, Ukrainian courts have convicted three Russian soldiers of war crimes.<sup>39</sup> The convictions helped Ukraine publicize Russia's wartime atrocities.<sup>40</sup> Russia's lawfare reprisal has been to start "Nuremberg 2.0" show trials in the Donbas for "foreign mercenaries," sentencing two to death as of this writing.<sup>41</sup>

Ukraine may choose to prosecute Russian troops under the crime of aggression, providing a valuable precedent for international use of the offense. States parties to the Rome Statute of the ICC activated the crime only in 2018, and the ICC prosecutor has yet to charge anyone with it.<sup>42</sup> Ukraine has the crime of aggression in its domestic law and allows trials in absentia.<sup>43</sup> If Ukraine successfully prosecutes and convicts Russians using the crime of

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<sup>38</sup> Valerie Hopkins, *A Ukrainian Court Convicts a Russian Soldier of War Crimes and Sentences Him to Life in Prison*, N.Y. TIMES (May 23, 2022), available at <https://www.nytimes.com/2022/05/23/world/europe/russian-soldier-war-crimes-guilty.html>.

<sup>39</sup> Sergey Vasiliev, *The Reckoning for War Crimes in Ukraine Has Begun*, FOREIGNPOLICY.COM, Jun. 17, 2022, available at <https://foreignpolicy.com/2022/06/17/war-crimes-trials-ukraine-russian-soldiers-shishimarin/>.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Alexander Komarov and Oona Hathaway, *Ukraine's Constitutional Constraints: How to Achieve Accountability for the Crime of Aggression*, JUST SEC. (Apr. 5, 2022), at <https://www.justsecurity.org/80958/ukraines-constitutional-constraints-how-to-achieve-accountability-for-the-crime-of-aggression/>.

<sup>43</sup> Criminal Code, 2022 (Art. 437) (Ukr.).

aggression, the ICC could draw on Ukrainian court decisions in its jurisprudence. Twenty countries that have the crime of aggression in their domestic law also have universal jurisdiction, and Ukrainian practice and jurisprudence could influence theirs as well.

#### IV. THE FUTURE OF LAWFARE AND THE INTERNATIONAL ORDER

Ukraine's lawfare victories have given it some immediate gains. Every day that Russia continues to fight, it violates a binding international court order. Each Ukrainian legal victory sets a standard that can serve as a basis for other legal and diplomatic actions.<sup>44</sup> The ongoing ICC investigation might deter some Russian forces from committing atrocities. Ukraine's lawfare can undermine Russia's legitimacy and give the international community more reason to endorse sanctions or punishments against Russia and Russian officials.<sup>45</sup> Russia's attempts to defend itself also show that it still cares about its own perceived legitimacy in the eyes of the world.<sup>46</sup>

Ukraine's lawfare strategy may eventually pay off monetarily. The ICJ can award damages to Ukraine, in addition to the billions it has already received from arbitral tribunals. Although Russia may not agree to pay, the judgments could be enforced in jurisdictions where Russia has assets separate from diplomatically immune property, including property owned by Russian officials or clandestinely owned by its intelligence service. Ukraine could also pursue proxy lawfare against Russia under laws like the Global Magnitsky Act, which allows the United States to freeze assets of human rights abusers.<sup>47</sup> Lawfare could thus hit the kleptocrats and oligarchs who support Putin. Ukraine's legal victories may also serve as the basis for eventual reparations. Unlike sanctions, legal action could help compensate people most harmed by Russia's military actions by financing eventual reconstruction and development.

Lawfare as practiced by Russia and Ukraine is likely to become the norm. The precedents that they have and will set, in and out of court, will

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<sup>44</sup> See, e.g., Elena Chachko and J. Benton Heath, *A Watershed Moment for Sanctions? Russia, Ukraine, and the Economic Battlefield*, 116 AJIL 135 (2022).

<sup>45</sup> See Kristen Eichensehr ed., *Contemporary Practice of the United States: Biden Administration Imposes Sanctions and Seeks to Cement Alliances to Counter China and Russia*, 115 AJIL 536 (2021).

<sup>46</sup> *Ukraine to Confront Russia at Int'l. Court of Justice on Monday*, REUTERS (Mar. 4, 2022), at <https://www.reuters.com/world/ukraine-confront-russia-intl-court-justice-monday-2022-03-04/>.

<sup>47</sup> The Global Magnitsky Human Rights Accountability Act, Title XII, Subtitle F of P.L. 114- 328; 22 U.S.C. §2656.

become a model for the future of war. International tribunals are being forced to make novel interpretations of the Genocide Convention, CERD, ICSFT, International Humanitarian Law, the GATT, and other international treaties. ITLOS's interpretations of UNCLOS will set the stage for determination of sovereignty in the Sea of Azov and Kerch Strait. Although these tribunals' rulings do not create precedent, they have unquestionable influence that future tribunals cannot ignore.<sup>48</sup>

Ukraine's lawfare is also part of its whole-of-society approach to war. Long before all Ukrainians were forced to fight or flee, Ukraine pressed its corporations into service in the legal war. Ukraine used its arbitration strategy, which required arbitration tribunals to find that Russia has "effective control" over Crimea and the occupied Donbas, to brand Russia's actions as illegal and set a standard for further legal proceedings against Russian atrocities. These arbitration cases will also continue to squeeze Russia financially for decades as Ukraine recoups the costs of war. Billions in damages and legal costs—exponentially multiplied—can change the calculus of war and deter future belligerents.

Lawfare between Russia and Ukraine also sets a precedent for any future conflict with China. Lawfare is a fundamental pillar of China's military strategy, and lawfare between China and the United States and its allies has been escalating for years.<sup>49</sup> China already engages in lawfare strategies similar to Russia's, passing domestic laws to justify political and military actions, using "little blue men" in its maritime militia, and claiming that features in the South China Sea are an essential and historic part of China.<sup>50</sup> China is surely watching Russia-Ukraine lawfare closely. If Ukraine succeeds in exacting billions of dollars of legal claims against Russia, China will factor that into its own military calculus. China will watch closely to see if Russian instrumental lawfare succeeds. China will also analyze the success of Ukraine's information lawfare strategy, reviewing how each lawsuit plays out in the international press and before the Russian and Chinese people. China cares deeply about the perceived legality and legitimacy of its actions in the eyes of the world and its own people. China fears ideas that can mobilize its people against the legitimacy of the government.<sup>51</sup> If legal actions are one of them, China will modify its own strategies accordingly.

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<sup>48</sup> See Harlan Grant Cohen, *Theorizing Precedent in International Law*, in ANDREA BIANCHI ET AL., *INTERPRETATION IN INTERNATIONAL LAW*, 2015.

<sup>49</sup> See generally Goldenziel, *supra* note 5.

<sup>50</sup> *Id* at 1102-3.

<sup>51</sup> Gary King, Jennifer Pan, and Margaret E Roberts, *How Censorship in China Allows Government Criticism but Silences Collective Expression*, 107 AM. POL. SCI. REV. 1 (2013).

Most immediately, Ukraine's lawfare strategy is creating a multiplier effect on other international efforts to hold Russia accountable. The UN General Assembly passed a resolution calling for the immediate withdrawal of Russian forces.<sup>52</sup> The UN Human Rights Commission has expelled Russia and launched an independent commission of inquiry into Russia's human rights violations.<sup>53</sup> The ECtHR has already issued a provisional order directing Russia to cease hostilities and refrain from attacking civilians and civilian property.<sup>54</sup> Ukraine has filed ten additional applications against Russia in the ECtHR.<sup>55</sup> Ukraine is also behind more than 8,500 individual applications to the ECtHR, along with one by the Netherlands, most of which regard the 2014 downing of Malaysia Airlines flight MH17 by a Russian Buk missile over the Donetsk region.<sup>56</sup> The Council of Europe has expelled Russia.<sup>57</sup> Eleven EU countries have launched domestic war crimes investigations against Russia.<sup>58</sup> Regional organizations and states have issued a web of sanctions.<sup>59</sup> Ukraine is cooperating with interested parties seeking to launch an International Claims Commission to resolve mass claims arising from the conflict.<sup>60</sup> Legal scholars have proposed other measures to call Russia to account, including creating new international tribunals.<sup>61</sup> Each

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<sup>52</sup> G.A. Res. ES-11/1 (Mar. 2, 2022).

<sup>53</sup> G.A. Res. 49/1 (Mar. 7, 2022).

<sup>54</sup> European Court of Human Rights Press Release 073, Decision of the Court on Requests for Interim Measures in Individual Applications Concerning Russian Military Operations on Ukrainian Territory (Apr. 3, 2022).

<sup>55</sup> *Law Confrontation with Russian Federation: Cases*, at <https://lawfare.gov.ua/> (last visited June 19, 2022); Armed Conflict, ECHR Press Unit, Factsheet – Armed Conflicts, EUROPEAN COURT OF HUMAN RIGHTS (Apr. 2022).

<sup>56</sup> Ukr. and Neth. v. Russ., App Nos. 8019/16, 43800/14 and 28525/20 (2022).

<sup>57</sup> Eur. Consult. Ass., Consequences of the Aggression of the Russian Federation Against Ukraine, 1428ter Meeting (Mar. 16, 2022), available at [https://search.coe.int/cm/pages/result\\_details.aspx?objectid=0900001680a5d7d9](https://search.coe.int/cm/pages/result_details.aspx?objectid=0900001680a5d7d9); G.A. Res. ES-11/3 (Apr. 7, 2022).

<sup>58</sup> Radio Free Europe, EU Justice Official Says War Crimes in Ukraine 'Will Not Go Unpunished,' (May 21, 2022), available at <https://www.rferl.org/a/ukraine-war-crimes-eu-justice/31861367.html> (last visited Jun. 20, 2022)

<sup>59</sup> See, e.g., Exec. Order No. 14068, 87 Fed. Reg. 14,381 (Mar. 15, 2022); European Commission Press Release Statement 22/1286, Press statement by President von der Leyen on the EU's response to the Russian aggression against Ukraine (Feb. 22, 2022).

<sup>60</sup> Chiara Giorgetti, Markiyany Kliuchkovsky and Patrick Pearsall, *Launching an International Claims Commission for Ukraine*, JUST SEC. (May 20, 2022), at <https://www.justsecurity.org/81558/launching-an-international-claims-commission-for-ukraine/>.

<sup>61</sup> See, e.g., Komarov and Hathaway, *supra* note 47.

successive effort by Ukraine and the international community will rely on prior legal decisions for guidance.

#### CONCLUSION

As the precedential, financial, and reputational value of Ukraine's lawfare strategy compounds, lawfare can have a significant effect on the outcome of war. Each additional legal proceeding delegitimizes Putin's cause and bolsters international efforts to sanction Russia. Russia has lost many lawyers since the 2022 invasion, and its ability to contest these cases may be weakened for a considerable time. Ukraine thus has an opening to seize and maintain the initiative in the legal domain and, in the process, to advance its strategic goals.

Legal battles will continue long after kinetic fighting ends. Only time will tell whether Russia's lawfare will bolster the legitimacy of Putin's actions in the places where Russia's narrative of the conflict still holds sway: Russia, China, and many parts of the developing world.<sup>62</sup> Meanwhile, Ukraine's ability to undermine Russia's legitimacy in international tribunals is helping Ukraine garner Western support.

As Professor Harold Koh stated in his oral argument for Ukraine at the ICJ, "President Putin's short game is force. The world's long game is law."<sup>63</sup> Lawfare between Russia and Ukraine will set legal and historical precedents for the use of lawfare before, during, and after armed conflict. While many zombie stories end with the collapse of civilization, a successful Ukrainian lawfare strategy can strengthen the international legal order.

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<sup>62</sup> Jill Goldenziel, "The Russia-Ukraine Information War Has More Fronts Than You Think," *FORBES.COM*, (Mar. 31, 2022), available at <https://www.forbes.com/sites/jillgoldenziel/2022/03/31/the-russia-ukraine-information-war-has-more-fronts-than-you-think/> (last visited June 20, 2022).

<sup>63</sup> Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ), Public Hearing (Mar. 7, 2022).