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Lawfare in Ukraine: Weaponizing International Investment Law and the Law of Armed Conflict Against Russia's Invasion

by Eric Chang



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Cover: Volodymyr Zelensky visits Mykolaiv and Odessa regions on June 18, 2022, amid infrastructure ruins and civilian and military deaths
(President of Ukraine)

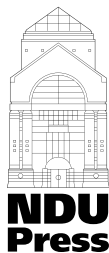
Lawfare in Ukraine

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By Eric Chang

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Executive Summary

This paper explores Ukraine's innovative use of international investment law to hold Russia financially liable for damages arising out of its 2014 invasion and occupation of Crimea, and how this use of “lawfare” strategy can be further leveraged considering Russia's renewed military invasion of Ukraine in 2022.

Following Russia's initial 2014 invasion of the Crimean Peninsula, Ukraine decided not to use its military forces to directly confront Russian forces. Instead, Ukraine opted for a deliberate and systematic use of *lawfare*, broadly defined as the use of the law as a substitute for traditional military means to achieve an operational objective. Ukraine focused on a particular area of law—international investment law—as a legal means to “wage war” against Russia. Ukraine's lawfare response to Russia's incursion presents a unique and instructive case study of a belligerent State's systematic use of legal means—including the leveraging of the law of armed conflict (LOAC)—as a weapon in an ongoing international armed conflict in the Great Power competition (GPC) context.

International investment law is a specialized subset of public international law, and its defining feature is a unique dispute resolution forum known as investor-State dispute settlement (ISDS), which has allowed private Ukrainian investors to file international arbitration claims directly against Russia for damages arising out of Russia's 2014 invasion and subsequent occupation of Crimea. These claims allege Russia's breach of treaty protections to Ukrainian investments in various industry sectors. The initial arbitration awards have uniformly found Russia liable, issuing damages collectively worth billions of U.S. dollars (USD). These awards are accruing compounding legal interest, which will increase indefinitely until paid, settled, or until Russia withdraws from Crimea. Of equal significance, these investment claims have creatively leveraged LOAC principles to allow the Ukrainian investors to avail themselves of the ISDS forum and, ultimately, accomplish Ukraine's lawfare objectives.

The impact of the investment claims is incontestable: as Russia itself has implicitly admitted, the awards are exacting a very real financial toll. Just as importantly, there is a normative value in the awards' implicit criticism of Russia's occupation, and in the very fact that Ukraine is countering an aggressive military action through a peaceful mode of dispute resolution. Ukraine has astutely integrated these points into its strategic communications efforts.

Russia's ongoing efforts to invade and occupy the remainder of Ukraine opens the way for additional investment claims, leading to further potential financial exposure orders of magnitude greater than that already incurred in Crimea. Given the very wide range of possible investment

claim scenarios, these claims can effectively be seen as a backdoor mechanism for war reparations. Investment awards will materially augment other sanctions imposed by the United States and its allies, adding to Russia's overall financial and economic punishment.

The United States should learn from and support Ukraine's lawfare strategy. As a narrow goal, the United States should engage in opportunistic lawfare engagements against Russia wherever possible. This could include U.S. Treasury assistance to make sanctioned Russian assets available for enforcement by Ukrainian investors. The perceived legitimacy of seizing ill-gotten gains from kleptocratic oligarchs and Russia's Central Bank and distributing these to Ukrainian investors could provide the political support needed to pass such aggressive sanctions and convince U.S. allies to do the same.

Finally, Ukraine's successful lawfare strategy highlights the lack of a similar unified national strategy in the United States. There is a mounting argument for the United States to adopt such an approach, incorporating law and lawfare into a whole-of-government approach that already leverages other instruments of national power.¹

Introduction: The Biggest Land-Grab in Europe Since World War II

On February 24, 2022, Russia began a major land invasion of Ukraine, with Russian military forces quickly moving toward the capital city of Kyiv.² This followed a steady Russian military buildup near the Ukrainian border beginning in December 2021,³ with Russian forces reaching full combat strength by mid-February 2022.⁴ Months of diplomatic efforts by the United States and its allies failed to defuse the mounting crisis.⁵

Russia's military movements have drawn broad international condemnation, including from the European Union (EU) and the United States.⁶ For the time being, however, the main deterrent options appear to be economic rather than military. While the United States has undertaken to supply Ukraine with arms and shored up North Atlantic Treaty Organization (NATO) defenses, it has ruled out putting boots on the ground in Ukraine.⁷ The United States, Allies, and partners have also levied heavy sanctions on Russia's banking system.⁸ The United States also moved to impose sanctions on the Gazprom-owned Nord Stream 2 pipeline and its corporate officers, while Germany simultaneously halted certification of the project.⁹ These sanctions supplemented those levied by the Joseph Biden administration following Russia's April 2021 military buildup, which also served to punish Russia for its SolarWinds cyber hacking operations, as well as its efforts to influence the 2020 U.S. Presidential election.¹⁰

This renewed invasion fully lays bare President Vladimir Putin's territorial ambitions vis-à-vis Ukraine, and perhaps further reveals his intentions for the rest of Russia's so-called "near abroad." This decades-long ambition was punctuated by military activity at various junctures, including an earlier undisguised military buildup near the Ukrainian border in April 2021 and, of course, the 2014 invasion of Ukrainian Crimea.¹¹ The Crimean invasion was a watershed event: Russia's military operations were skillfully camouflaged, took less than 2 weeks to accomplish, and involved minimal bloodshed and loss of life.¹² By any measure, the swiftness and efficiency of the biggest land-grab in Europe since World War II¹³ (superseded only by the current invasion) was a remarkable military achievement.¹⁴ Following the dramatic events of 2014, Russia engineered Crimea's purported secession from Ukraine and reunification with Russia via a local Crimean referendum. The United Nations (UN) General Assembly unequivocally rejected the referendum and Russia's claims to Crimea and Ukraine, condemning Russia's actions as an illegal annexation, prohibited by international law.¹⁵ Prior to recent events, this now 8-year-old occupation had settled into an uneasy status quo, a situation that was shattered when Russia began its invasion in February 2022.

Beyond Putin's territorial ambitions (stemming from his well-reported lament of the fall of the Soviet Union¹⁶) and his demands relating to NATO expansion, there is a complex and interconnected historical relationship with Ukraine as a whole. This relationship is perhaps most succinctly captured by Zbigniew Brzezinski's oft-cited adage "without Ukraine, Russia ceases to be an empire, but with Ukraine suborned and then subordinated, Russia automatically becomes an empire."¹⁷ Mr. Putin has cultivated his own unique version of this imperial view, having gone so far as stating in 2008 that Ukraine is "not even a country."¹⁸

Due in part to Crimea's majority ethnic Russian population (broadly sympathetic to Russia), and a desire not to escalate the violence, Ukraine did not respond to the 2014 invasion by military force, and Ukrainian armed forces present in Crimea were specifically ordered not to take action against the Russian military forces.¹⁹ Another reason for Ukraine's military inaction was its belief at the time that its military was significantly weaker compared with Russia's armed forces.²⁰

However, far from passively accepting its fate in Crimea, Ukraine actively countered Russia's military incursion with unconventional, nonmilitary methods. This included, for example, creating a major water shortage in the peninsula by cutting off the flow of the North Crimean Canal. This dam effectively shut off Crimea's main source of water, and, combined with a recent drought, has sent Crimea back to pre-1960s environmental conditions, when much of the region was an arid steppe.²¹ Elsewhere, Ukraine took a more conventional, kinetic approach to Russia's subsequent invasion of the Donbas region in eastern Ukraine. That conflict was marked by immediate armed fighting between the belligerent States before settling into a static line of contact, with on-and-off ceasefire agreements under the Minsk II agreement.²²

Chief among its unconventional activities, Ukraine has engaged in a concerted campaign of legal proceedings against Russia before various international fora, including ISDS arbitration claims brought by Ukrainian investors against Russia. Ukraine's strategy presents a unique and instructive case study of perhaps the most systematic deployment of lawfare in an ongoing international armed conflict.

The Use of Lawfare in International Armed Conflicts and the Competition Continuum

Ukraine's lawfare strategy is best understood in a larger international context. Defining the concept of *lawfare*, and widening the aperture to review other examples, helps place Ukraine's strategy in this context, wherein lawfare is increasingly integrated into modern international

armed conflicts and becoming a regular feature of competition below (and in addition to) armed conflict within the competition continuum.²³

The modern effort to identify and define lawfare was advanced in large part by Major General Charles J. Dunlap, Jr., USAF (Ret.), who initially defined the term as “the use of law as a weapon of war,”²⁴ later updating his definition to “the strategy of using—or misusing—law as a substitute for traditional military means to achieve an operational objective.”²⁵ This updated definition (which this article adopts) views lawfare as a neutral, effects-based operation, wherein legal means are used to apply pressure against a military adversary, potentially forcing that adversary to defend itself in multiple arenas.²⁶

Academic scholarship on lawfare is relatively recent, with still-evolving attempts to map the contours of the concept and arrive at a consensus on its typology. Lawfare is broadly understood in two different ways. One view, termed *instrumental lawfare*, defines lawfare as a normatively neutral term, focusing on the use of legal tools to achieve the same or similar effects as those traditionally sought from conventional kinetic military action.²⁷ In this view, lawfare can encompass both the use and misuse of law to achieve an operational objective. General Dunlap’s updated definition falls into this category.²⁸ A second view defines lawfare in an exclusively pejorative sense to describe a misuse or wrongful manipulation of the law and legal systems (to include violation of the same) in order to achieve strategic military or political ends.²⁹ This negative definition of lawfare has also been called “compliance-leverage disparity lawfare,” referring to the use of law designed to gain an advantage that such law—often LOAC—and its processes may exert over an adversary.³⁰ The Taliban’s exploitation of LOAC to gain military advantage, described below, is an example of such compliance-leverage disparity lawfare.³¹

This article adopts the instrumental definition of lawfare, using General Dunlap’s updated definition, which encompasses both positive and negative uses of the law as a substitute for traditional military means to achieve an operational objective. Including both positive and negative uses presents a more complete and actionable definition around which the United States and its allies can develop a coordinated strategy. The instrumental definition focuses on the *effects* of the legal means applied as opposed to the *means* used: this is in large part because real-world legal activities are so wide-ranging. This plasticity of means is a key feature in observed lawfare activities, which are limited only by the creativity of the actors who deploy them. Finally, instrumental lawfare generally envisages the deployment of legal activities in international armed conflict scenarios as a substitute or complement to kinetic action and taken against a belligerent State and/or competitor in competition just below armed conflict. As will be discussed below, the actor is usually—but not always—another belligerent State and/or competitor.

Indeed, many instances of lawfare are performed by non-State actors, but ultimately benefit a belligerent State and/or competitor's operational or policy objectives.

As noted, lawfare encompasses an astonishingly diverse array of legal activities. One example is the use of sanctions by the United States in 2003 that prevented the Iraqi air force from acquiring new aircraft and spare parts and which so debilitated Iraq's airpower that not a single aircraft rose in opposition to the coalition air armada. This instrumental use of the law, in the form of sanctions, was arguably as effective as any outcome from traditional aerial combat.³² Another example of instrumental lawfare involves the Russian cargo vessel *MV Alaed*, which in June 2012 was at sea carrying helicopter gunships bound for Syria, to be delivered to Bashar al-Asad's regime. The United Kingdom (UK) sought to stop the ship but was wary of the risks of forcibly intercepting a Russian ship. Instead, the UK applied legal pressure on the ship's insurer, London's Standard Club, to withdraw the ship's insurance on the basis that the cargo violated international sanctions. As a result, the *MV Alaed* returned to Russia with its undelivered cargo.³³

Compliance-leverage disparity lawfare describes the misuse of legal mechanisms, including violations of the law, to achieve a military objective.³⁴ Such activities are described as nefarious or wrongful. A well-documented example is the Taliban's placement of military assets within or around schools, religious sites, and hospitals, with the aim of either deterring attacks or being able to accuse the United States and its allies of harming innocent civilians and sites protected under international law. This exploitation of LOAC obliged the United States to adopt targeting standards more stringent than those required by international law. Thus, for the Taliban, lawfare served as a substitute for conventional air defenses.³⁵

Palestine provides a salient example of a State that, like Ukraine, has adopted a systematic use of lawfare. In 2011, the president of the Palestinian Authority (PA), Mahmoud Abbas, published an op-ed in the *New York Times* in which he cogently laid out the PA's lawfare strategy:

*Palestine's admission to the United Nations [as a Member State] would pave the way for the internationalization of the conflict as a legal matter, not only a political one. It would also pave the way for us to pursue claims against Israel at the United Nations, human rights treaty bodies and the International Court of Justice.*³⁶

Like Ukraine vis-à-vis Russia, the PA faces an overwhelming military adversary in Israel. The PA has responded to this inequality of arms with a systematic lawfare campaign, primarily by seeking and obtaining non-Member State status at the UN in 2012. Doing so, Palestine unlocked

a full suite of legal tools available to States under public international law, which it then systematically leveraged against Israel. Most notable among the dozens of international treaties and organizations joined, Palestine gained membership in the International Criminal Court (ICC), opening the way for the ICC to investigate alleged Israeli crimes committed against Palestinians.³⁷ The PA's lawfare strategy was so successful that, in July 2013, Israel agreed to release 104 Palestinian prisoners in exchange for a 9-month hiatus, during which the PA agreed to refrain from pursuing its lawfare campaign of joining international organizations and treaties, including the ICC.³⁸

The People's Republic of China (PRC) provides the most prominent example of a State's unified and doctrinal lawfare effort. The PRC has long adopted its Three Warfares (*san zhong zhanfa*) doctrine as part of its overall national and military strategy,³⁹ overtly exploiting existing legal regimes and processes to constrain adversary behavior, contest disadvantageous circumstances, confuse legal precedent, and maximize advantage in situations related to its core interests.⁴⁰ As far back as 1996, then-President Jiang Zemin affirmed that the PRC must be "adept at using international law as a 'weapon' to defend the interests of our state and maintain national pride."⁴¹ This approach to lawfare is decidedly exploitative: a 2005 publication by a high-ranking People's Liberation Army officer concludes that LOAC should not be viewed as an inviolable set of boundaries, but rather as a weapon to achieve such objectives as manipulating the perceptions of the international community.⁴² (As discussed below, this exploitative use of LOAC arguably goes beyond a standard *realpolitik* view of international law, as China's lawfare efforts violate accepted norms of international law.)

The PRC's lawfare efforts revolve mainly around territorial and sovereignty issues, implicating maritime, aviation, cyber, and outer space law.⁴³ In the maritime and aviation realm, the PRC has asserted a sovereign right over military sea passage and overflight within the Exclusive Economic Zone (EEZ) extending 200 nautical miles from its coastal baseline. The concept of the EEZ, established in the UN Convention on the Law of the Sea (UNCLOS, to which the PRC is a signatory), allows coastal states to maintain control over natural resources off their coasts; however, it does not recognize a so-called "securitization" right to control the default navigational and overflight freedoms associated with the high seas. Under the prevailing majority view (adopted by the United States and its allies), the freedom of navigation of military ships and aircraft is not explicitly limited in the EEZ.⁴⁴ Nevertheless, the PRC has pressed on, leveraging its UNCLOS membership to push for its interpretation of the EEZ. The PRC's activities have been described as a "lawfare strategy to misstate or misapply international legal norms to accommodate its anti-access strategy."⁴⁵ Relying on this selective interpretation of international

law, the PRC has routinely interfered with U.S. military passage in the EEZ, including aggressive interference with U.S. military ships and aircraft.⁴⁶ What is notable about the PRC's efforts is that it is working within the legal framework of UNCLOS to gradually change the interpretation of the EEZ in its favor—whereas the United States, as a non-signatory to UNCLOS, arguably enjoys less leverage to further solidify the prevailing interpretation of the EEZ.⁴⁷

The PRC's other major lawfare effort relates to its claims to the South China Sea, where it is advancing the concept of the so-called nine-dash line. In contrast to its EEZ posture, the PRC's claims to the South China Sea do not rely on UNCLOS—and indeed could not, as the treaty cannot possibly support its ambiguous historical assertions to sovereignty over the area. The nine-dash line demarcates roughly 90 percent of the South China Sea as belonging to China. The PRC has never clarified the exact extent of its claim—whether the nine-dash line represents a claim to all islands within the line, whether it is a sovereign boundary covering all enclosed waters and land features, or some other set of historic rights to the maritime space; even the position of the line has changed over time. Instead, the PRC deliberately chose to ignore UNCLOS and adopted a strategy of ambiguous legal-historical claims, coupled with *de facto* implementation via, *inter alia*, interfering with neighboring States' fishing and hydrocarbon exploration rights and constructing artificial islands.⁴⁸ The Philippines challenged the PRC's claim, initiating an arbitration in 2013 under the dispute settlement procedures of UNCLOS (the PRC decided not to appear at these proceedings). In 2016, the Permanent Court of Arbitration in The Hague delivered an award which categorically rejected any Chinese historic claims to the South China Sea. The Tribunal held, *inter alia*, that UNCLOS comprehensively governs the rights to maritime areas in the South China Sea; thus, to the extent that the PRC's nine-dash line is a claim of “historic” rights, it is invalid, because any historic rights the PRC may have had were extinguished when it signed onto UNCLOS.⁴⁹ Putting aside the success or failure of its efforts, the PRC's positions on its EEZ and nine-dash line both represent textbook applications of its Three Warfares doctrine to advance its interests—Indo-Pacific hegemony—without triggering a conventional military conflict.

In contrast to Ukraine, Palestine, and the PRC, the U.S. approach to lawfare has been largely ad hoc. Moreover, some of the most successful and dramatic examples of U.S. lawfare have not been directly spearheaded by the U.S. Government directly, but rather by private citizens. U.S. litigation pursuant to the Anti-Terrorism Clarification Act (ATCA) provides one such example. ATCA litigation involves Federal civil claims brought by victims of terrorist attacks against banks alleged to have provided material support to known terrorist organizations.⁵⁰ The United States is not a direct party to these lawsuits; rather, the U.S. Congress, by enacting

the ATCA statute, has effectively harnessed the help of private individuals in fighting terrorist activities. Another similar example is the Federal litigation arising out of the terrorism exception to the Foreign Sovereign Immunities Act (FSIA).⁵¹ The FSIA is a statute that generally holds foreign States immune from suit in U.S. courts; however, a terrorism exception removes this sovereign immunity and creates a Federal cause of action for U.S. nationals, Armed Forces members, and others to sue States that have supported acts of terrorism resulting in personal damages.⁵² The statute was successfully used to hold Iran accountable for the October 23, 1983, truck bombing in Beirut that killed 241 Marines, resulting in a 2003 judgment⁵³ and the subsequent seizure of some USD 2 billion in Iranian assets.⁵⁴ The success of the private civil litigation efforts stands in remarkable contrast to the U.S. Government's military inaction against Iran.

Ukraine's lawfare strategy should be understood and evaluated within this context of the proliferating and creative use of legal mechanisms as a weapon against military adversaries and competitors.

Ukraine's Lawfare Strategy

Like the PA's approach, Ukraine's strategy is notable for the public way it has been deployed. The Ukrainian government, through its Ministry of Justice, has been outspoken about its strategy of lawfare, going so far as publishing an informational Web site broadcasting its "Lawfare Project" against Russia. The Web site makes clear that the Ukrainian government is coordinating a comprehensive "legal confrontation" against Russia:

[O]ne of the key areas of confrontation is the legal one. The legal front is inconspicuous, but extremely important. Its key feature is that there is no noticeable disproportion in weight with the enemy. It is not subject to force-sharing agreements. Where there are no weapons, there is international law, sanctions and a tribunal. In the West, "legal war" received a special term—lawfare. And on this front, Ukraine (state bodies and state-owned enterprises) is fighting quite well.

*We are moving from the sometimes chaotic hit-skip tactics to a well-thought-out, comprehensive and coordinated legal defense of our rights and interests, and for this purpose we have involved leading foreign legal advisers who help to develop a strategy for legal confrontation.*⁵⁵

In the immediate aftermath of Russia's invasion of Crimea, Ukraine launched a legal blitzkrieg against Russia, including several inter-State proceedings before the European Court of Human Rights (ECtHR),⁵⁶ an ad hoc proceeding under the dispute settlement procedures of UNCLOS,⁵⁷ a proceeding before the International Court of Justice,⁵⁸ and three consultations at the World Trade Organization.⁵⁹ Ukraine further lodged two declarations under Article 12(3) of the Rome Statute of the International Criminal Court, voluntarily accepting the jurisdiction⁶⁰ of the ICC in order to allege crimes committed in Crimea from November 21, 2013, to February 22, 2014, and from February 20, 2014, onward.⁶¹ The Office of the Prosecutor of the ICC opened preliminary investigations in response to both declarations. Beyond the Ukrainian government's direct involvement as a party in these proceedings, over 8,500 individual applications relating to the conflict in Crimea and eastern Ukraine have been submitted to the ECtHR.⁶² (Ukraine continued its legal proceedings in the aftermath of the February 2022 invasion, filing further cases against Russia at the ICJ and the ECtHR.⁶³)

In addition to the actions launched directly by the Ukrainian government, individual Ukrainian investors in Crimea have utilized the ISDS system (discussed in greater detail in the section below) to file several investment claims against Russia, collectively seeking billions of USD in compensation. Significantly, the Ukrainian government has expressly encouraged Ukrainian investors to file these investment claims against Russia and appears to be coordinating at least some of the claims. Commenting on one such investment claim, the former Ukrainian Prime Minister, Arseniy Yatseniuk, stated:

State-owned Oschadbank of Ukraine has filed a claim against the Russian Federation to the tune of about UAH [Ukrainian hryvnias] 15 billion to compensate the damage and loss inflicted by the Russian Federation's illegal annexation of Crimea and the consequent losses by Oschadbank of revenue and property in Ukrainian territory, which [includes] the Autonomous Republic of Crimea. . . .

*I also urge all other Ukrainian state-run companies to follow the example of state-owned Oschadbank of Ukraine to make Russia accountable and recover losses caused by the illegal annexation of Crimea from Russia.*⁶⁴

This very public statement by the head of Ukraine's government amounted to an express call to action to wage a legal war against Russia's occupation of Crimea.

The Weapon: The Bilateral Investment Treaty Between Russia and Ukraine

The Ukrainian investors' claims against Russia are filed pursuant to the bilateral investment treaty (BIT) between Russia and Ukraine, signed in 1998 (hereafter the Russia-Ukraine BIT).⁶⁵ Bilateral investment treaties are international agreements⁶⁶ negotiated between two sovereign States to encourage foreign investment flows between the parties. To that end, BITs grant mutual guarantees and protections for investors of each State that invests in the territory of the other State (the State that welcomes the foreign investor is known as the "host State"). The substantive protections in BITs thus commit host States to a certain level of conduct and protections vis-à-vis the foreign investors who invest in their territory. Today, there are over 3,300 BITs in force globally,⁶⁷ creating a vast, interconnected network of investment treaties among hundreds of States. Together, these BITs form the backbone of modern international investment law.

BITs contain several specific substantive protections for investors. These include, for example, protections against a host State's arbitrary expropriation of investments without compensation to the investor; the guarantee of fair and equitable treatment (FET), which prescribes a minimum standard of behavior by host States toward foreign investors; and the guarantee of full protection and security (FPS), which obliges host States to grant nondiscriminatory treatment and, notably, to protect investments from both violent actions and interference by armed groups. Many BITs also contain so-called most-favored nation (MFN) clauses, which require a State that is a party to one investment treaty to provide investors with treatment no less favorable than the treatment it provides to investors under other investment treaties it has entered. MFN clauses thus create further intricate interrelationships between otherwise discrete BITs.

Arguably the most unique feature of BITs is the integration of the ISDS system, which creates an international dispute resolution forum that grants investors the right to file international arbitration claims directly against host States, when the latter are alleged to have breached treaty protections. The originality and importance of ISDS cannot be overstated: host States agree to waive sovereign immunity, allowing private individuals and corporations to file claims directly against foreign sovereign States in a neutral international forum. This ability is unique in public international law as there are very few venues available for individuals to sue sovereign States directly. The host State (always the respondent in a claim filed by the investor, who is always the claimant) agrees to have a private arbitration tribunal adjudicate the investment claim brought by the investor. These tribunals are normally composed of three tribunal

members: each party (the investor and the host State) appoints one member; the third member, the president of the tribunal, is selected by the two party-appointed members, ensuring a neutral and impartial chief member who chairs the tribunal and can provide a tie-breaking vote. Tribunal members are private individuals and usually selected from an exclusive international community of senior law practitioners and academics. Depending on the specific terms of a given BIT, these arbitrations may be ad hoc or administered by international institutions such as the International Centre for Settlement of Investment Disputes, based in Washington, DC; the Permanent Court of Arbitration in The Hague, in the Netherlands; or by the International Chamber of Commerce, based in Paris, France. In the case of the Russia-Ukraine BIT, the dispute resolution clause provides a choice of arbitration administered by the Arbitration Institute of the Chamber of Commerce, in Stockholm, Sweden, or ad hoc arbitration pursuant to the UN Commission on International Trade Law Arbitration Rules (a set of arbitration rules developed by the UN Commission on International Trade Law, widely used in ad hoc arbitrations without a supervising arbitration institution).⁶⁸

Under most BITs, investors are not required to first resolve their disputes through local courts in the host State before filing a BIT claim. By removing the dispute to an international forum outside of the host State, investors are guaranteed a fair process, adjudicated by an impartial and neutral tribunal. As such, the parties enjoy equality of arms within this legal process; the Ukrainian Ministry of Justice partly alludes to this advantage when it affirms that there is “no noticeable disproportion in weight with the enemy.”⁶⁹ Tribunals can award damages against the respondent host State; in turn, these arbitration awards can be enforced in any jurisdiction where respondent assets are found, pursuant to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention.⁷⁰ Investment treaty arbitration awards thus benefit from the same key advantage ordinary commercial arbitration awards enjoy over domestic court judgments, which is the ease of recognition and enforcement of the awards around the world via operation of the New York Convention. (The New York Convention has been signed by nearly every State in the world, ensuring worldwide enforceability of arbitration awards. By contrast, there exists no analogue for the multilateral recognition and enforcement of domestic court judgments.) Most sovereign States today possess sizable assets outside of their own territories, often in the form of sovereign wealth funds; State-owned shipping, airline, and/or oil and energy interests; commercial bank accounts; as well as commercial property. Despite residual difficulties specific to enforcing against sovereign States, investors can, and do, recover on favorable investment arbitration awards on a regular basis.

These unique features—the private, impartial nature of investment treaty arbitral tribunals and the ability to financially recover against host States—make investment treaty arbitration an attractive forum for private Ukrainian investors to seek legal recourse for losses resulting from the Russian invasion and occupation of Crimea. Ukraine has leveraged these very same features as a legal riposte to Russia's actions.

Leveraging LOAC and the Law of Occupation

From a military law perspective, Ukraine's strategy is even more remarkable because it separately leverages the international law of occupation and other LOAC principles to achieve its lawfare objectives. This section discusses the investment treaty cases in detail, as well as their innovative application of these international law principles.

There are currently eleven known investment treaty claims filed by Ukrainian investors against Russia.⁷¹ The investors allege Russia's illegal seizure of various investments located in Crimea, such as banking operations, an airport, petrol stations, real estate, wind farms, and electrical power stations. All the claims have been filed pursuant to the Russia-Ukraine BIT. Russia declined to participate in the first nine arbitration proceedings (like China's decision not to participate in the UNCLOS arbitration) but submitted written letters to the tribunals stating that it did not recognize the tribunals' jurisdiction.⁷² The nine tribunals proceeded without Russia's participation and, applying the principle of *iura novit curia*, ruled that they had a duty to satisfy themselves that they had jurisdiction over the claims. All the proceedings are confidential, and the tribunals' decisions have not been published; however, critical details of the cases have been revealed through press reports.

Russia's invasion of Crimea created a highly unusual situation under international law: Ukrainian businesses in Crimea suddenly found themselves in Russian occupied territory, thus opening the way to leverage the Russia-Ukraine BIT because, under the treaty, a Ukrainian investment must be in the territory of the host State (that is, Russia). Numerous Ukrainian investors, and Ukraine itself, immediately recognized that the potential change in Crimea's territorial status created a unique opportunity to bring investment claims against Russia. The investors quickly and shrewdly leveraged international law and LOAC principles to file claims pursuant to the Russia-Ukraine BIT. By the same token, sufficient ambiguity in the change in Crimea's territorial status also produced an immediate preliminary jurisdictional hurdle: namely, whether occupied Crimea is indeed considered part of Russian territory within the meaning of the Russia-Ukraine BIT. This jurisdictional issue arose because a basic premise underpinning every BIT is that investors from one State may only assert investment claims related to investments

made within the territory of the other (host) State. Under normal circumstances, a Ukrainian investor could only assert a claim against Russia in relation to investments located within Russia—whereas here, the investments are all located in Crimea, which Ukraine and the international community have consistently asserted is *de jure* part of Ukraine. In the case of the Russia-Ukraine BIT, Article 1 clearly requires investments to be in the territory of the host State—that is, a Ukrainian investment must be in Russian territory:

“Investments” shall denote all kinds of property and intellectual values, which are put in by the investor of one Contracting Party on the territory of the other Contracting Party in conformity with the latter’s legislation;

“Territory” shall denote the territory of the Russian Federation or the territory of the Ukraine and also their respective exclusive economic zone and the continental shelf as defined in conformity with the international law.”⁷³

To get around this challenge, the Ukrainian investors have argued that their Crimean investments were made within Russian *occupied* territory and, therefore, fall within the scope of the Russia-Ukraine BIT—while not conceding that Crimea is legally part of Russia. The first decisions on jurisdictions were issued in February 2017 in two related arbitration proceedings, *Aeroport Belbek v. Russia*, and *PrivatBank v. Russia*, that were heard by a single tribunal before the Permanent Court of Arbitration in The Hague. In *Aeroport Belbek*, the claimants—the owner and operator of a private airport near Sevastopol—filed a USD 15 million claim alleging that the airport was unlawfully expropriated by Russia.⁷⁴ In *PrivatBank*, the lead claimant was formerly Ukraine’s biggest private bank; the USD 1 billion-plus claim alleged Russia’s seizure of all its assets, including 337 banking branches in Crimea.⁷⁵ On February 24, 2017, the tribunal issued two Interim Awards on jurisdiction, finding that it had jurisdiction in both proceedings, letting them proceed to the next procedural stage.⁷⁶ According to press reports, the tribunal found it had jurisdiction, agreeing with the claimants’ position by concluding that “an occupying power may be held responsible under a BIT for its conduct in the occupied territory.”⁷⁷

Tribunals in other cases reached the same result. The *Oschadbank* tribunal also upheld its jurisdiction, concluding that the Russia-Ukraine BIT extends to territory over which either State exerts “effective control.”⁷⁸ As discussed below, the term *effective control* is a term of art in the law of occupation. Thus, relying on the law of occupation, the *Oschadbank* tribunal focused on the *de facto* “effectiveness” of Russia’s occupation of Crimea, rather than its *de jure* status, to find that Crimea is within Russian territory.

In *Everest Estate LLC and others v. Russia*, the tribunal similarly held that the Russia-Ukraine BIT applies to investments made in “the other contracting State’s territory at the time of the alleged breach.”⁷⁹ Press reports confirm that the *Everest* claimants presented the same arguments regarding Russia’s *de facto*, effective control over Crimea, and that it was irrelevant whether Russia’s annexation was internationally lawful or not.⁸⁰

It thus appears that the tribunals in the cases above independently arrived at the same solution, citing to the law of occupation to legally underpin their findings of jurisdiction. It is almost certain that the tribunals supported their conclusions by citing to the two primary sources of the law of occupation: the Hague Convention (1907) and the subsequent Fourth Geneva Convention (1949).

Article 42 of the Hague Convention sets out that “territory is considered occupied when it is placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.”⁸¹ The U.S. Department of Defense Law of War Manual adheres to the Hague Convention’s definition of occupied territory, and further specifies that “territory is considered occupied when it is actually placed under the authority of the hostile forces”; that such occupation must be “actual and effective; that is, the organized resistance must have been overcome, and the Occupying Power must have taken measures to establish authority”; and that “occupation also requires the suspension of the territorial State’s authority and the substitution of the Occupying Power’s authority for the territorial State’s authority.”⁸² All of these factual elements were met in the case of Russia’s invasion and its subsequent administration of Crimea as part of Russian territory.

The Department of Defense Law of War Manual generally accords with international practice among States: doctrine has distilled Article 42 of the Hague Convention into a test of effective territorial control.⁸³ This notion emphasizes “definite control over the area,” which begins “when there is a sufficient force to retain command of a situation, following cessation of substantial local resistance.”⁸⁴ This reflects a functional test: the law of occupation applies whenever the foreign force is capable of exercising the authorities that the law expects and requires it to exert effective control as an occupant.⁸⁵ Effective control over territory imposes an obligation on the occupant to exercise control over the population. This obligation is found in Article 43 of the Hague Convention, which requires the occupying power to “take all the measures in [its] power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”⁸⁶ In all likelihood, the obligation to exercise control and respect the laws in force of the occupied country was a significant factor—if

not the determining factor—for the various tribunals in deciding whether the Russia-Ukraine BIT applied to occupied Crimean territory.

The Fourth Geneva Convention provides the second main source for the law of occupation. The convention focuses specifically on the protection of civilian persons in times of war. When the Hague Convention and the Geneva Convention are both applicable, the provisions of the latter relating to occupation supplement the Hague Convention.⁸⁷ Article 4 of the Geneva Convention defines protected persons as those “who, at a given moment and in any manner whatsoever, find themselves, in the case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”⁸⁸ The obligations of the Geneva Convention, which focus on obligations owed to individuals, supplement the Hague Convention, which imposes broader obligations applicable to the occupied territory as a whole. Logically, the Ukrainian investors would have focused on the convention’s protections owed to individuals to buttress their jurisdictional defense. For example, Article 53 of the Geneva Convention prohibits an occupying power from destroying real or personal property in the occupied territory, unless such destruction is rendered necessary by military operations.⁸⁹ It is possible that the claimants buttressed any arguments based on the Geneva Convention with references to customary international law (CIL), as well. Similar to the Geneva Convention’s Article 53, CIL Rule 51, as compiled by the International Committee of the Red Cross, imposes a general duty to respect and protect private property: “private property must be respected and may not be confiscated; except where destruction or seizure of such property is required by imperative military necessity.”⁹⁰ The existence of broad duties of protection of private property under the Geneva Convention and CIL may well have influenced the tribunal’s decision on the applicability of a BIT in occupied territory in times of armed conflict.⁹¹

Leveraging Other Sources of International Law

Beyond the Hague Convention and the Geneva Convention, the various tribunals reportedly relied on other sources of international law. The *Everest* claimants notably drew parallels to international law jurisprudence by citing to the *Certain German Interests* case of the Permanent Court of International Justice, in which the court held that Poland was liable for expropriating German-owned property that was in German territory and subsequently became Polish.⁹²

The tribunal in *Ukrnafta v. Russia* and *Stabil LLC and others v. Russia* also relied on other sources of international law to further support its overall jurisdictional approach. A single tribunal heard both sets of related claims, which alleged Russia’s seizure of networks of petrol stations and associated assets. As with *Aeroporto Belbek* and *PrivatBank*, the tribunal found it

had jurisdiction and was satisfied that Russia had established “effective control” over Crimea through its occupation and annexation of Crimea.⁹³ The tribunal further cited to the Vienna Convention on the Law of Treaties (VCLT), whose Article 29 states that treaties are binding on each contracting party in respect of its “entire territory.”⁹⁴ Further applying Article 31(1) of the VCLT,⁹⁵ the tribunal looked at the ordinary meaning of the term *territory*, concluding that this was sufficiently broad to cover the entire territory under Russia’s control and that the VCLT’s definition was not limited to *lawful* occupation only. This textual interpretation was reinforced by the fact that English, Russian, and Ukrainian legal dictionaries all defined the term *territory* without reference to the principle of sovereignty. The tribunal also noted that both Ukraine and Russia have entered other BITs which defined territory by reference to sovereignty, whereas both parties chose not to do so in the Russia-Ukraine BIT. Finally, the tribunal found it significant that both Russia and Ukraine took the position that Crimea was part of Russian territory (although Russia took the position that its annexation of Crimea was legal, while Ukraine took the contrary position).⁹⁶

Although not mentioned in the press reports, it is possible that the claimants also referred to Article 3 of the Draft Articles on the Effects of Armed Conflict on Treaties, which states that “the existence of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties . . . as between States parties to the conflict”; under the Draft Articles, this includes investment instruments, as well as treaties on international settlement of disputes.⁹⁷ Logically, the Draft Articles should be read in conjunction with Article 29 of the VCLT to cover situations of armed conflict, which commonly result in territory passing under the effective control of one State to another.

By focusing on the law of occupation as well as other sources of international law, the various tribunals threaded a difficult needle, finding that they had jurisdiction, while at the same time studiously avoiding any judgment on the underlying issue of sovereignty—that is, the international legality of Russia’s annexation of Crimea. Because tribunals are private adjudicative bodies constituted to settle narrow investment disputes, they no doubt recognized the potential limitations on their authority to determine far-reaching issues of territorial sovereignty. An award on jurisdiction based on a finding of Crimea’s *de jure* territorial status might potentially exceed the scope of a tribunal’s powers and would be challenged by Russia in any subsequent recognition and enforcement action. Article V of the New York Convention contains several potential grounds to refuse recognition and enforcement, including excess of powers/excess of scope and public policy grounds.⁹⁸ On a more practical level, the tribunals may have exercised judicial restraint to avoid further escalating the conflict between the belligerent States.

Ukraine's Coordination of Legal Strategy and Public Opinion

Ukraine's influence is clearly apparent in the claimants' reliance on the law of occupation and the meaning and scope of effective control. In fact, the Ukrainian government filed submissions as a nondisputing party in six of the investment treaty claims and coordinated its jurisdictional approach with the claimants.⁹⁹ Not only were several of the claimants State-owned enterprises, but also the *Aeroport Belbek*, *PrivatBank*, *Ukrnafta*, and *Stabil* claims are all associated with Ukrainian oligarch Igor Kolomoisky, further linking the various claimants together.¹⁰⁰

Broadly speaking, Ukraine and the claimants adopted consistent positions, which pointedly refused to concede the legality of Russia's annexation of Crimea.¹⁰¹ This refusal is significant, because from the individual investors' point of view, accepting Russia's *de jure* control over Crimea might have provided the easiest, most straightforward solution to meet the jurisdictional requirements of the BIT. Indeed, the claimants could have simply relied on Article 15 of the Vienna Convention on Succession of States in Respect of Treaties to concede Russia's legal annexation of Crimea, and thus argue for the applicability of the Russia-Ukraine BIT to Crimea.¹⁰² Obviously, this argument would have harmed Ukraine's overall political interests; as it was, none of the claimants took this position. (It may also be that the Ukrainian investors predicted the tribunals' reluctance to rule on Crimea's *de jure* status.) By focusing instead on the law of occupation and the concept of effective control, Ukraine and its investors appear to have presented a united front, and in doing so were able to have it both ways by effectively arguing that BITs apply to occupied territory (thus prevailing on jurisdiction), while not conceding (or even discussing) the underlying legality of Russia's annexation of Crimea.¹⁰³

Ukraine's coordination is also evident in its media efforts to solicit favorable international public opinion through the investment arbitration proceedings. The Ministry of Justice's public broadcasting of its Lawfare Project is clearly part of an overall strategy to delegitimize Russia's actions, while legitimizing Ukraine's own claims of territorial sovereignty over Crimea. Ukraine's use of lawfare thus overlaps with its strategic communications efforts.¹⁰⁴ By publicizing its lawfare efforts and casting them as a lawful tool to confront Russia's unlawful military aggression, Ukraine is openly fighting an information war for legitimacy before an international audience.

Russia, too, deployed a sophisticated information war during its invasion of Crimea and successfully convinced the local ethnic Russian majority in Crimea to accept the military action not as an invasion but as a liberation—or at least, an opportunity at self-determination and

secession. While Russia may have won the information war and battle for public opinion within Crimea, Ukraine has plainly won the broader information war on the international stage, as evidenced by the UN General Assembly's resolution declaring invalid the Crimean referendum to secede from Ukraine.¹⁰⁵ Ukraine's most important audiences, the United States¹⁰⁶ and the European Union,¹⁰⁷ do not recognize the Crimean referendum. Ukraine's lawfare strategy has been crucial in preventing the internationally recognized legal annexation of Crimea, thus achieving a favorable *de jure* situation. The influence of the investment treaty claims in this information war for legitimacy should not be underestimated. While it is true that the investment tribunals have uniformly avoided any judgment on the legality of Russia's annexation of Crimea, the awards holding Russia liable can still be understood as an implied international condemnation of Russia's invasion and occupation of Crimea. Moreover, unlike the UN General Assembly's resolution, the investment awards have imposed a practical, real world ongoing sanction against Russia in the form of substantial damages.

Thus, Ukraine's strategic coordination of the investment claims has yielded a twofold return on investment: there is a practical value in the awards imposing significant financial consequences for Russia's military actions; and there is a further legitimizing value in the awards' implicit criticism of the Russian occupation (and in the very fact that Ukraine is defending an aggressive military action through a peaceful mode of dispute resolution), all of which Ukraine has astutely integrated into its strategic communications efforts.¹⁰⁸

Russia Tacitly Acknowledges the Effectiveness of Ukraine's Lawfare Strategy

In a narrow technical sense, Ukraine has succeeded in its lawfare objective of using legal means to apply pressure against a military adversary, forcing that adversary to defend itself in multiple arenas.¹⁰⁹ It is important to note that, as a battleground in which to engage Russia, investment arbitration structurally favors Ukraine: investors are always the claimants in BIT arbitrations, while the host State is always the respondent. The international obligations contained in BITs are one-sided: investors benefit from those obligations, while only host States undertake these obligations and can be held liable for breaches of the same. (At worst, losing claimants may be liable for the fees and costs of a prevailing respondent.) Ukraine clearly understood this when it remarked on the relative asymmetrical advantage of fighting Russia on the legal front.¹¹⁰ Through a well-coordinated and systematic campaign of lawfare, Ukraine seized the initiative post-invasion, and redefined the battlefield for Crimea. Russia, by contrast, was forced into a defensive and reactive posture, and has fought the "legal war" almost entirely on Ukraine's terms.

Indeed, the investment treaty claims have been largely successful, resulting in significant monetary awards against Russia: Russia was held liable in the *Aeroporto Belbek* and *PrivatBank* cases (although the tribunal has not yet ruled on the damages phase, PrivatBank seeks over USD 1 billion in damages);¹¹¹ the *Everest* tribunal awarded claimants USD 159 million in damages,¹¹² which was successfully enforced in Ukraine;¹¹³ the *Ukrnafta* and *Stabil LLC* tribunal awarded claimants nearly USD 88 million, including legal fees and interest;¹¹⁴ that same award survived Russia's challenge before the Swiss Federal Supreme Court (at the legal seat of the arbitration), with a four-to-one majority of the Swiss court ruling that Russia has assumed responsibility under the Russia-Ukraine BIT to protect Ukrainian investments in Crimea made prior to the Russian annexation of the territory in 2014;¹¹⁵ the *Oschadbank* tribunal awarded the claimant over USD 1.1 billion in damages;¹¹⁶ and, in potentially the biggest award reported to date, *Naftogaz* prevailed on the merits, with its USD 5 billion quantum claim yet to be decided.¹¹⁷

Russia risks continued and theoretically near-unlimited exposure to such claims and awards for as long as its occupation of Crimea continues. Existing awards will continue to accrue considerable legal interest if left unpaid (pre- and post-award legal interest awarded by investment tribunals typically range between the London Inter-Bank Offered Rate (LIBOR) +2 percent to LIBOR +4 percent, compounded, leading to swiftly escalating interest sums that far outstrip principal damages); meanwhile, new claims may continue to be filed as the occupation persists. Thus, in a very real sense, Ukraine has utilized international investment law to make Russia pay for the damages of war.

Of course, it is worth noting that these investment treaty arbitrations have failed to achieve Ukraine's ultimate objective to force Russia's withdrawal from Crimea. However, expecting that international legal proceedings will, on their own, reverse a military invasion and major land annexation is perhaps an unrealistic benchmark of success. On this point, even the 2014 Western sanctions against Russia failed to force the latter to withdraw from Crimea¹¹⁸ (or, for that matter, prevent the current invasion). Nevertheless, Ukraine's lawfare strategy should be considered as a significant tool in the nonkinetic toolkit to counter a belligerent State.

Russia itself has acknowledged the impact of Ukraine's lawfare strategy: in a revealing response to the mounting negative awards, Russia has reversed its policy of not participating in the arbitrations, and it is now scrambling to defend and challenge enforcement efforts in multiple jurisdictions around the world.¹¹⁹ Even more telling, in 2018, a Russian State-owned bank, Vnesheconombank, threatened a BIT claim against Ukraine after the bank's local assets in Ukraine were frozen at the request of the *Everest* creditors seeking to enforce the USD 159 million award; this was followed by a similar announcement in May 2022 by Russia's largest bank,

Sberbank, that it would also initiate a BIT claim against Ukraine, following Ukrainian government measures allowing for seizure of its assets, worth approximately USD 200 million.¹²⁰ Russia's initiation of investment treaty claims of its own amounts to a tacit yet remarkable admission of the effectiveness of Ukraine's use of investment treaty lawfare as a weapon.

International Investment Lawfare as Backdoor War Reparations for the Renewed Invasion

Ukraine's lawfare strategy in Crimea can be further leveraged to counter Russia's current invasion. Russia's ongoing invasion has arguably resulted in the occupation of swaths of Ukraine, resulting in effective control of these areas as understood under LOAC. Applying the jurisdictional reasoning of the investment treaty awards, these occupied territories can be considered *de facto* Russian territory. For example, Russian forces completely besieged Mariupol by early March 2022, gradually gaining control by end of April 2022. The widely reported siege of Mariupol presents a *prima facie* case of Russian occupation, opening the way for an investment claim under the Russia-Ukraine BIT. Indeed, Ukrainian oligarch Rinat Akhmetov has publicly announced that he plans to bring a claim against Russia potentially worth USD 20 billion over the destruction of his steel plants during the siege.¹²¹

It should be noted that investment claims are not limited to corporate claimants or high net worth individuals; the definition of investments under the Russia-Ukraine BIT puts no floor on the dollar amount that can be claimed. In principle, countless Ukrainian businesses, from the largest corporations to the smallest storefront shops, may be eligible to bring investment treaty claims against Russia for various losses arising from Russia's invasion and occupation. Because Russia has signed bilateral investment treaties with over seventy other States, foreign investors present in Ukraine and holding nationality from those seventy-plus States will also be eligible to bring claims against Russia (for example, a Dutch investor in occupied Ukraine could file a claim against Russia under the Russia-Netherlands BIT).

A vital point is that Russia has agreed to most-favored nation clauses in many of the BITs it has entered, including the Russia-Ukraine BIT.¹²² As noted above, MFN clauses require a State that is a party to one investment treaty to provide investors with treatment no less favorable than the treatment it provides to investors under other investment treaties it has entered. This means that Ukrainian investors (and other foreign investors in Ukraine) can claim protections found in BITs that Russia has entered with other States. This is critical, because a number of these BITs grant protections against armed conflict that are not found in the Russia-Ukraine BIT itself. This includes BITs that grant the guarantee of full protection and security, or FPS.¹²³

This guarantee specifically protects investors from acts of physical violence by the host State's organs, including its armed forces.¹²⁴ Other BITs that Russia has entered include even more direct and specific references to compensation for losses due to armed conflict. For example, the BIT between Russia and the Netherlands states:

*Investors of the one Contracting Party who suffer losses in respect of their investments in the territory of the other Contracting Party owing to war or other armed conflict, a state of national emergency, civil disturbance or other exceptional situations shall be accorded by the latter Contracting Party fair and equitable treatment, as regards restitution, indemnification, compensation or other settlement, which in any case shall not be less favourable than that accorded to investors of any third State. Resulting payments shall be made without delay and be freely transferable.*¹²⁵

By virtue of the MFN clause in the Russia-Ukraine BIT, Ukrainian investors can benefit from this specific protection against losses arising from armed conflict in Russian-occupied Ukraine.

Other protections that do not explicitly mention armed conflict can also come into play: for example, the guarantee of fair and equitable treatment requires the host State to provide a stable and predictable legal and business framework. (As with FPS, FET is not found in the Russia-Ukraine BIT.) State actions that undermine this broad guarantee, and that are inconsistent with an investor's reasonable expectations regarding the investment environment, will result in liability for the host State. The FET standard is known for its expansive scope and for its relationship to FPS: failure to guarantee fair and equitable treatment can also breach the obligation of full protection and security.¹²⁶ Once again, under the MFN clause, this specific protection can be imported into the Russia-Ukraine BIT.¹²⁷ Russia's military invasion has cratered Ukraine's economy; this presumably runs counter to any reasonable investor expectations for a stable and predictable investment environment.

Taken together, investors located in Ukraine can leverage these substantive protections and assert an exceptionally wide range of claims for losses arising from the Russian invasion. This could include direct expropriation by Russian authorities (for example, Russian nationalization of major Ukrainian State-owned companies); direct damage to business resulting from kinetic activities (physically destroyed businesses, or even residences); and indirect damages resulting from business disruptions/interruptions, including lowered revenues/lost profits, or total loss of investments resulting from the destabilized economic, financial, legal, and security environment.

It is even possible that investors could claim for the death of individuals killed during Russian military operations if there is a sufficient nexus to investment activities (for example, a business owner or company executive killed during the invasion might have a direct causal link to investment losses). Given the extent of possible investment claim scenarios, the Russia-Ukraine BIT, exploited to its fullest scope, can effectively be understood as a potential backdoor legal mechanism for war reparations.

Russia's military action will thus potentially expose it to a further, massive wave of investment treaty claims, with liability orders of magnitude greater than the current liability arising out of the Crimean invasion. Russia's defense of such new claims would face a very difficult uphill battle, considering the now well-established line of adverse arbitral decisions.¹²⁸ The resulting financial pain from future investment treaty awards is likely to be considerable, especially as a complement to the threat of other financial sanctions. This includes, for example, excluding Russia from the SWIFT global electronic payment system—a sanction which was one of the most crippling measures used against Iran.¹²⁹ The sanctions tied to the Crimean invasion alone compelled Russia to forgo international credits (foreign investment) of some USD 479 billion, or about one-third of its current gross domestic product (GDP), which would have gone toward investment and, thus, economic growth.¹³⁰ These direct and indirect costs of Russia's occupation do not account for Russia's debts accrued under the various adverse investment awards discussed above. If the *PrivatBank*, *Oschadbank*, *Naftogaz*, and *Ukrenergo* claims alone are fully realized and enforced, Russia would be further exposed to a debt of more than USD 8 billion, without accounting for quickly compounding legal interest.¹³¹ Again, an invasion and occupation of the remainder of Ukraine would lead to far greater financial exposure.

Thus, Ukraine's lawfare—the encouragement and coordination of BIT claims against Russia—forms part of an overall strategy that can amplify any sanctions imposed by the United States and its allies, materially affecting Russia's military and geopolitical cost-benefit analysis. This lawfare strategy represents a new and unique legal weapon used as a substitute for traditional military means in pursuing Ukraine's operational objectives against Russia.

Recommendations for a Coordinated U.S. Lawfare Strategy

Ukraine's exploitation of international investment law as a weapon to directly counter Russia's military activities is remarkable as much for its sheer creativity as for its practical impact. The United States and its allies can learn from Ukraine's resourcefulness. As a narrow goal, the United States could aid Ukraine's lawfare objectives by engaging in opportunistic (but legitimate) lawfare actions against Russia wherever possible. From a broader perspective, Ukraine's

successful use of a coordinated lawfare strategy against Russia, a Great Power competitor, highlights the need for the United States to adopt a similar unified national strategy.

As the United States navigates the current Ukrainian crisis, it should pay close attention to and encourage Ukraine's investment treaty lawfare strategy and consider integrating it in the overall response to Russia's actions. The most direct and powerful way to do this would be for the United States to engage in a coordinated lawfare action by supporting successful Ukrainian investors' asset-tracing and enforcement efforts against Russia. Russia is a difficult State to enforce against,¹³² and assisting successful investors (holding positive arbitration awards) to uncover Russian commercial assets would be an immense boost to those investors and to Ukraine (this is particularly so, as many of the biggest investor-claimants are Ukrainian State-owned entities). While standard sanctions regimes merely freeze assets, there is a robust argument for actual seizure of Russian assets (also termed *asset recovery*, or *forfeiture*), especially considering the geopolitical stakes involved in responding to Russia's military aggression in Europe. At the World Economic Forum in May 2022, President Volodymyr Zelensky himself called for seizure of Russian assets, to be "allocated to a special fund to compensate all the victims of war."¹³³ Seizing assets belonging to sanctioned Russian oligarchs would not only tap into vast, ill-gotten offshore wealth estimated to be 85 percent of Russia's GDP,¹³⁴ but would be directed against Putin's power base, weakening him politically. Frozen Russian Central Bank funds would provide an even larger pool of funds. Seizure of these sanctioned Russian State assets would require legislative and/or executive action that permits the U.S. Treasury to identify, freeze, recover, and distribute such assets.

There is, in fact, precedent in the United States for seizure and targeted distribution of sanctioned assets to satisfy judgments against a foreign State. In 2012, Congress passed the Iran Threat Reduction and Syria Human Rights Act of 2012, 22 U.S.C. §8772, which made available for post-judgment execution assets held at Citibank on behalf of the Central Bank of Iran. The statute is highly unusual because it designates specific assets and renders them available to satisfy the judgments underlying a specific litigation identified by docket number—*Peterson et al. v. Islamic Republic of Iran et al.*, dealing with the above-mentioned FSIA claims against Iran relating to the 1983 terrorist bombing in Beirut.¹³⁵ In that case, the United States District Court for the Southern District of New York acted on information provided by the U.S. Treasury, which disclosed a then-unknown Citibank account holding USD 2 billion ultimately belonging to the Central Bank of Iran. The Court issued an *ex parte* injunction freezing the funds held in the account, and successful FSIA judgment creditors (victims and families of victims of the truck bombing against the U.S. Marines) were able to enforce and collect on those funds.¹³⁶

Canada envisaged a similar statute, introducing a bill in 2021 that would authorize Canadian courts to seize frozen assets of sanctioned Russian officials and distribute the assets to organizations such as the UN High Commissioner for Refugees (UNHCR).¹³⁷ Immediately following Russia's invasion on February 24, 2022, Rep. Tom Malinowski (D-NJ) and Rep. John Curtis (R-UT), who co-chair the Congressional Caucus Against Foreign Corruption and Kleptocracy, also called for the freezing and seizure of assets held by allies of Vladimir Putin's regime; the House of Representatives passed the bill in April 2022, but the Senate version of the bill has yet to be voted on.¹³⁸ The United States could enact a statute similar to 22 U.S.C. §8772, designed to complement U.S. sanctions against Russia, Putin, and designated oligarchs, and further tailored to specifically aid Ukrainian investors to enforce on frozen and seized Russian assets in order to satisfy successful investment treaty awards.

Integrating such a lawfare action with Ukraine's investment treaty lawfare strategy would provide a legitimizing basis for an admittedly aggressive and rarely utilized sanctions mechanism.¹³⁹ There is a compelling normative justification in seizing ill-gotten funds both from kleptocratic oligarchs (who are sanctioned in the first place due to their assistance in Russia's military activities¹⁴⁰) and from the Russian Central Bank, and providing these funds to satisfy Ukrainian investors for losses directly arising out of Russia's invasion and occupation. The perceived legitimacy of distributing seized Russian funds to Ukrainian investors could provide the political cover and support needed to pass such aggressive seizure measures and convince U.S. allies to do the same. As noted, the potential liability arising out of future investment treaty awards would be sizable, but the bulk of seized Russian assets would be distributed elsewhere, either directly to Ukraine or, for example, to nongovernmental organizations (NGOs) undertaking humanitarian relief in Ukraine, such as the UNHCR or the International Committee of the Red Cross. There will be no shortage of deserving outlets for seized funds to remedy the damage caused by war.

Any U.S. decision to seize sanctioned Russian assets should be accompanied by a coordinated campaign to increase the flow of claims brought by Ukrainian investors. At relatively little cost, the United States can aid and/or encourage Ukraine's Ministry of Justice in an information campaign to educate and assist investors to file claims against Russia. While smaller investors will be eligible to bring claims, the focus should be on larger investors whose losses will be greater, leading to larger damages against Russia.

Finally, Ukraine's example underlines the increasing use of lawfare by State actors as a systematic policy of national power (often intersecting with LOAC) and highlights the lack of a similar national lawfare strategy in the United States. This disparity is startling, especially in the

context of America's otherwise holistic approach to its national defense strategy. The 2018 National Defense Strategy (NDS) acknowledges that long-term strategic competition will require "the seamless integration of multiple elements of national power—diplomacy, information, economics, finance, intelligence, law enforcement, and military"¹⁴¹ (these elements of national power are sometimes shortened to DIMEFIL); the reference to integrated deterrence is repeated in the 2022 NDS.¹⁴² The absence of law as a tool of national power in DIMEFIL is both conspicuous and inexplicable, particularly given America's relative dominance and expertise in the legal domain and the fact that it has been the primary shaper of the rules-based international order in the postwar era.¹⁴³ Indeed, the United States boasts stable and efficient legal institutions, an extremely robust legal culture, and its bar comprises skilled lawyers operating at all levels of government and civil society. It also holds outsize influence in, and corresponding ability to shape, major international institutions and legal mechanisms. The 2018 NDS goes on to state that "[m]ore than any other nation, America can expand the competitive space, seizing the initiative to challenge our competitors where we possess advantages and they lack strength."¹⁴⁴ As the examples discussed above clearly demonstrate, the legal domain occupies a prominent part of this competitive space where the United States could enjoy a significant advantage.

The U.S. gap in lawfare has not gone wholly unnoticed—most notably vis-à-vis the PRC's lawfare strategy. In 2008, the State Department's International Security Advisory Board noted that:

*It is essential that the United States better understand and effectively respond to China's comprehensive approach to strategic rivalry, as reflected in its official concept of "Three Warfares." If not actively countered, Beijing's ongoing combination of Psychological Warfare (propaganda, deception, and coercion), Media Warfare (manipulation of public opinion domestically and internationally), and Legal Warfare (use of "legal regimes" to handicap the opponent in fields favorable to him) can precondition key areas of strategic competition in its favor.*¹⁴⁵

There is, therefore, a mounting argument for the United States (and its allies) to adopt a strategic approach to lawfare—to aggressively and creatively wage and defend against lawfare—deploying law as a weapon against its adversaries while countering its adversaries' efforts to use it as a weapon. Such an approach would require the participation of civilian and military lawyers within all three branches of government, as well as lawyers from civil society, including (but not limited to) the plaintiff's bar and U.S.-aligned NGOs.

Professor Orde Kittrie, who wrote the first seminal English-language book on lawfare, *Lawfare: Law as a Weapon of War*, concludes in his book that the United States has the potential to be the dominant lawfare superpower. This conclusion rejects a binary choice between, on the one hand, a “white glove” approach that eschews any instrumental use of law for strategic purposes and, on the other hand, ignoring (or violating) international legal obligations as casually as certain adversaries do. Instead, Professor Kittrie advocates a third way:

[M]ore effectively using (but not abusing) law to achieve a strategic objective. The United States leads the world in the quality of its attorneys, many of whom are already experienced in aggressively leveraging its domestic legal system. All the United States government has to do is develop and implement a strategy for waging and defending against lawfare in a more sophisticated, systematic, and coordinated manner.

The U.S. government’s current approach to lawfare represents tremendous missed opportunities and poses increasingly important vulnerabilities, but could be rectified quickly and at relatively little cost. The benefits would include achieving some U.S. national security objectives with less or no kinetic warfare, thereby saving U.S. taxpayer dollars and some U.S. and foreign lives.¹⁴⁶

It is evident that lawfare, as a strategic tool in international armed conflict and competition below armed conflict, is here to stay. China’s Three Warfares strategy in the Indo-Pacific region already poses concern for the United States in one of the two major GPC arenas. The war in Ukraine now brings lawfare into the other major GPC arena. This compels the United States to take a hard look at its own policies and consider whether it is sufficient to maintain an ad hoc approach to lawfare going forward, or whether it should adopt a more systematic strategy.

Notes

¹ An early version of this article appeared in the *Lawfire* blog, published by Duke Law School's Center on Law, Ethics and National Security, and edited by Major General Charles J. Dunlap, Jr., USAF (Ret.); see Eric Chang, "Ukraine's Lawfare Strategy May Help in Deterring Further Russian Plans for Invasion," *Lawfire* blog, December 21, 2021, available at <<https://sites.duke.edu/lawfire/2021/12/21/guest-post-eric-chang-on-ukraines-lawfare-strategy-may-help-in-deterring-further-russian-plans-for-invasion/>>.

² Austin Ramzy, "The Invasion of Ukraine: How Russia Attacked and What Happens Next," *New York Times*, February 26, 2022, available at <<https://www.nytimes.com/2022/02/24/world/europe/why-russia-attacked-ukraine.html>>. Just a few days earlier, on February 21, 2022, President Putin recognized the independence of the so-called Donetsk People's Republic and Luhansk People's Republic in the Donbas region of Ukraine, ordering Russian military forces into this eastern territory of Ukraine for alleged "peacekeeping operations." See Robyn Dixon, Paul Sonne, and Ellen Nakashima, "Putin Orders Troops to Eastern Ukraine after Formally Recognizing Two Moscow-Backed Separatist Regions," *Washington Post*, February 21, 2022, available at <<https://www.washingtonpost.com/national-security/2022/02/21/ukraine-russia-putin-biden/>>.

³ Paul Sonne, Ruby Mellen, and Laris Karklis, "Russian Military Movements Near Ukraine: What Satellite Images Show," *Washington Post*, December 8, 2021, available at <<https://www.washingtonpost.com/world/2021/12/08/russia-ukraine-satellite-images/>>; Paul Kirby, "Is Russia Preparing to Invade Ukraine? And other Questions," *EU Reporter*, January 11, 2022, available at <<https://www.eureporter.co/world/russia/2022/01/11/is-russia-preparing-to-invade-ukraine-and-other-questions/>>.

⁴ Michael Schwirtz, "Russian Troops in Final Stages of Readiness Add to Worries for Ukraine," *New York Times*, February 5, 2022, available at <<https://www.nytimes.com/2022/02/04/world/europe/russian-troops-ukraine-crimean-peninsula.html>>.

⁵ Isabelle Khurshudyan, Missy Ryan, and Paul Sonne, "Russia-U.S. Talks Hit Impasse over NATO Expansion as Moscow Denies Plans to Invade Ukraine," *Washington Post*, January 10, 2022, available at <<https://www.washingtonpost.com/world/2022/01/10/us-russia-delegations-meet-geneva/>>; Rick Gladstone and Maria Varenikova, "Angry U.S.-Russia Exchange at UN Punctuates Deepening Ukraine Rift," *New York Times*, January 31, 2022, available at <<https://www.nytimes.com/2022/01/31/world/europe/ukraine-russia-united-nations.html?searchResultPosition=18>>; Scott Neuman, "In Ukraine, the Road to War Was Paved by the Failure of Diplomacy," NPR, February 24, 2022, available at <<https://www.npr.org/2022/02/24/1073015013/ukraine-russia-invasion-war-diplomacy>>.

⁶ Adela Suliman and Rachel Pannett, "World Leaders React to Russia's Attack on Ukraine: 'A Dark Day for Europe,'" *Washington Post*, February 24, 2022, available at <<https://www.washingtonpost.com/world/2022/02/24/world-reaction-russia-ukraine-attack/>>.

⁷ Michael Crowley, "All Options Are Not on the Table as Biden Moves Troops Closer to Ukraine," *New York Times*, February 5, 2022, available at <<https://www.nytimes.com/2022/02/05/us/politics/biden-ukraine-russia-war.html?searchResultPosition=8>>.

⁸ "U.S. Treasury Announces Unprecedented & Expansive Sanctions Against Russia, Imposing Swift and Severe Economic Costs," Department of the Treasury, February 24, 2022, available at

<<https://home.treasury.gov/news/press-releases/jy0608>>.

⁹ “Statement by President Biden on Nord Stream 2,” The White House, February 23, 2022, available at <<https://www.whitehouse.gov/briefing-room/statements-releases/2022/02/23/statement-by-president-biden-on-nord-stream-2/>>; Andrea Shalal, “Nord Stream 2 Pipeline Under Threat if Russia Invades Ukraine—U.S. Officials,” Reuters, December 7, 2021, available at <<https://www.reuters.com/markets/commodities/us-has-understanding-with-germany-shut-nord-stream-2-pipeline-if-russia-invades-2021-12-07/>>.

¹⁰ Ellen Nakashima, “Biden Administration Imposes Significant Sanctions on Russia over Cyberspying, Efforts to Influence Presidential Election,” *Washington Post*, April 15, 2021, available at <https://www.washingtonpost.com/national-security/biden-to-announce-tough-sanctions-on-russia-over-cyber-spying/2021/04/15/a4c1d260-746e-11eb-948d-19472e683521_story.html>.

¹¹ Andrew E. Kramer, “In Russia, a Military Buildup That Can’t Be Missed,” *New York Times*, April 20, 2021, available at <<https://www.nytimes.com/2021/04/16/world/europe/russia-ukraine-troops.html?action=click&module=Top%20Stories&pgtype=Homepage>>.

¹² F. Stephen Larrabee, Peter A. Wilson, and John Gordon IV, *The Ukrainian Crisis and European Security: Implications for the United States and U.S. Army* (Santa Monica, CA: RAND, 2015), 6, available at <https://www.rand.org/pubs/research_reports/RR903.html>.

¹³ Steven Pifer, “Crimea: Six Years after Illegal Annexation,” *Brookings*, March 17, 2020, available at <<https://www.brookings.edu/blog/order-from-chaos/2020/03/17/crimea-six-years-after-illegal-annexation/>>.

¹⁴ Larrabee, Wilson, and Gordon, *The Ukrainian Crisis*, 6.

¹⁵ United Nations (UN) General Assembly, “General Assembly Adopts Resolution Calling upon States Not to Recognize Changes in Status of Crimea Region,” UN press release GA/11493, March 27, 2014, available at <<https://www.un.org/press/en/2014/ga11493.doc.htm>>.

¹⁶ “[A]fter taking office in 2000, he famously called the collapse of the Soviet Union a ‘genuine tragedy’ and ‘the greatest geopolitical catastrophe’ of the twentieth century.” Quoted in James Hershberg, “Putin Is Repeating the USSR’s Mistakes,” *Foreign Affairs*, February 24, 2022, available at <<https://www.foreignaffairs.com/articles/ukraine/2022-02-24/putin-repeating-ussrs-mistakes>>; Fiona Hill, “Putin Has the U.S. Right Where He Wants It,” *New York Times*, January 24, 2022, available at <<https://www.nytimes.com/2022/01/24/opinion/russia-ukraine-putin-biden.html>>.

¹⁷ Zbigniew Brzezinski, “The Premature Partnership,” *Foreign Affairs*, March/April 1994, available at <<https://www.foreignaffairs.com/articles/russian-federation/1994-03-01/premature-partnership>>.

¹⁸ “At the 2008 NATO summit in Bucharest, Romania, Vladimir Putin told a surprised George W. Bush, ‘You have to understand, George, that Ukraine is not even a country. Part of its territory is in Eastern Europe and the greater part was given to us.’” Quoted in Angela Stent, “Putin’s Ukrainian Endgame and Why the West May Have a Hard Time Stopping Him,” CNN, March 4, 2014, available at <<https://www.cnn.com/2014/03/03/opinion/stent-putin-ukraine-russia-endgame/index.html>>; Hill, “Putin Has the U.S. Right Where He Wants It.”

¹⁹ Larrabee, Wilson, and Gordon, *The Ukrainian Crisis and European Security*, 6.

²⁰ Michael Schwartz, “Ukraine Commanders Say a Russian Invasion Would Overwhelm Them,” *New York Times*, December 9, 2021, available at <<https://www.nytimes.com/2021/12/09/world/europe/>>.

ukraine-military-russia-invasion.html?searchResultPosition=8>.

²¹ Christian Mamo, “Inside Crimea’s Water Crisis,” *Emerging Europe*, April 2, 2021, available at <<https://emerging-europe.com/news/inside-crimeas-water-crisis/>>; Clara Ferreira Marques, “Crimea’s Water Crisis Is an Impossible Problem for Putin,” *Bloomberg*, March 18, 2021.

²² Samuel Charap, “Moscow’s Calibrated Coercion in Ukraine and Russian Strategic Culture,” *George C. Marshall European Center for Security Studies*, September 2020, available at <<https://www.marshallcenter.org/en/publications/security-insights/moscows-calibrated-coercion-ukraine-and-russian-strategic-culture-0>>. Ukraine’s activities are pitted against Russia’s own hybrid warfare, which includes the use of conventional and unconventional, military and non-military, overt and covert actions, which have the aim of creating ambiguity and confusion on the nature, origin, and objective of the threat. See Jan Joel Andersson and Thierry Tardy, “Hybrid: What’s in a Name?” *European Union Institute for Security Studies*, October 28, 2015, 1–2, available at <<https://www.iss.europa.eu/content/hybrid-what%E2%80%99s-name>>. Russia’s semi-covert 2014 invasion of Crimea and its information campaign to encourage a local Crimean referendum on secession are both consistent with its other hybrid or “gray zone” hostilities, which include, for example, cyber hacking activities. Stacie L. Pettyjohn and Becca Wasser, *Competing in the Gray Zone: Russian Tactics and Western Responses* (Santa Monica, CA: RAND, 2019), 12–13, available at <https://www.rand.org/pubs/research_reports/RR2791.html>.

²³ Joint Doctrine Note 1-19, *Competition Continuum 2–3* (Washington, DC: The Joint Staff, June 3, 2019), 10–11. The *Competition Continuum* describes international relations in nonbinary terms. Rather than a world either at peace or at war, the Joint Doctrine Note describes a world of enduring competition conducted through a mixture of cooperation, competition below armed conflict, and armed conflict. In defining this concept, U.S.-China relations are provided as a prime example, noting competition below armed conflict regarding freedom of navigation, while cooperation exists in other areas such as counterpiracy.

²⁴ Charles J. Dunlap, Jr., “Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts,” Humanitarian Challenges in Military Intervention Conference, Washington, DC, November 29, 2001.

²⁵ Charles J. Dunlap, Jr., “Lawfare Today: A Perspective,” *Yale Journal of International Affairs* (Winter 2008), 146.

²⁶ Gregory P. Noone, “Lawfare or Strategic Communications?” *Case Western Reserve Journal of International Law* 43, no. 1 (2010), 73–74.

²⁷ Orde F. Kittrie, *Lawfare: Law as a Weapon of War* (Oxford: Oxford University Press, 2016), 11.

²⁸ Kittrie, *Lawfare*, 11–17.

²⁹ Michael P. Scharf and Elizabeth Andersen, “Is Lawfare Worth Defining? Report of the Cleveland Experts Meeting, September 11, 2010,” *Case Western Reserve Journal of International Law* 43, no. 1 (2010), 11, 18.

³⁰ Kittrie, *Lawfare*, 11–12.

³¹ Another definition that expands upon Dunlap’s and Kittrie’s work is advanced by Professor Jill Goldenziel, who defines *lawfare* as:

1) the purposeful use of law taken toward a particular adversary with the goal of achieving a particular strategic, operational, or tactical objective, or 2) the purposeful use of law to bolster the legitimacy of one's own strategic, operational, or tactical objectives toward a particular adversary, or to weaken the legitimacy of a particular adversary's particular strategic, operational, or tactical objectives.

See Jill I. Goldenziel, "Law as a Battlefield: The U.S., China, and the Global Escalation of Lawfare," *Cornell Law Review* 107 (2021), 1085, 1097. Beyond the varying definitions described above, there is further conceptual ambiguity in the fact that many examples of lawfare appear to cross over into examples of information operations, psychological operations, and media communications. See Leila Nadya Sadat and Jing Geng, "On Legal Subterfuge and the So-Called 'Lawfare' Debate," *Case Western Reserve Journal of International Law* 43, no. 1 (2010), 153. Finally, there is some debate as to whether the legitimate application of international law (especially the Law of Armed Conflict, or LOAC) in an armed conflict should be labeled "lawfare" as such. See Scharf and Andersen, *Is Lawfare Worth Defining?* 11, 18.

³² Charles J. Dunlap, Jr., "Does Lawfare Need an Apologia?" *Case Western Reserve Journal of International Law* 43, no. 1 (2010), 121, 123–124. Another example is the U.S. purchase, in 2001, of exclusive rights to selected commercial satellite imagery prior to operations in Afghanistan, which had the effect of denying the data to any hostile forces. See *ibid.* at 123.

³³ Richard Spencer, Adrian Blomfield, and David Millward, "Britain Stops Russian Ship Carrying Attack Helicopters for Syria," *Telegraph* (London), June 19, 2012; Stephen Stewart, "Cargo Ship MV Alaed Carrying Attack Helicopters Bound for Syria Is Halted off Scottish Coast," *Daily Record*, June 20, 2012, available at <<https://www.dailyrecord.co.uk/news/politics/cargo-ship-mv-alaed-carrying-1129794>>.

³⁴ Sadat and Geng, "On Legal Subterfuge and the So-Called 'Lawfare' Debate," 153; Kittrie, *Lawfare*, 11.

³⁵ Dunlap, "Does Lawfare Need an Apologia?" 134.

³⁶ Mahmoud Abbas, "The Long Overdue Palestinian State," *New York Times*, May 16, 2011, available at <<https://www.nytimes.com/2011/05/17/opinion/17abbas.html>>.

³⁷ International Criminal Court (ICC), "The State of Palestine Accedes to the Rome Statute," press release ICC-ASP-20150107-PR1082, January 7, 2015, available at <https://www.icc-cpi.int/Pages/item.aspx?name=pr1082_2>; Kittrie, *Lawfare*, 208.

³⁸ "Palestinian Report: Israel to Release Fourth Group of Prisoners Within 48 Hours," *Jerusalem Post*, March 30, 2014, available at <<https://www.jpost.com/Diplomacy-and-Politics/Palestinian-report-Deal-reached-for-fourth-prisoner-release-within-48-hours-346949>>; Kittrie, *Lawfare*, 205–206. The Palestinian Authority and its allies have also adroitly waged their Boycott, Divestment, and Sanctions campaign, which has included lawsuits and criminal prosecutions in various courts around the world, against companies accused of aiding and abetting alleged Israeli war crimes by supplying equipment, technology, or supplies. See also Kittrie, *Lawfare*, 239.

³⁹ Larry M. Wortzel, *The Chinese People's Liberation Army and Information Warfare* (Carlisle, PA: U.S. Army War College Press, March 2014), available at <<http://www.jstor.org/stable/resrep11757>>. The

Three Warfares doctrine emphasizes legal warfare; the other two components are psychological warfare and public opinion warfare. This conflation of legal, communications, and political efforts highlights a further conceptual ambiguity in the scholarly definition of lawfare, but that is outside the scope of this article. See Noone, “Lawfare or Strategic Communications?” 79.

⁴⁰ Doug Livermore, “China’s ‘Three Warfares’ In Theory and Practice in the South China Sea,” *Georgetown Security Studies Review*, March 25, 2018, available at <<https://georgetownsecuritystudiesreview.org/2018/03/25/chinas-three-warfares-in-theory-and-practice-in-the-south-china-sea/>>.

⁴¹ Robert Williams, “International Law with Chinese Characteristics: Beijing and the ‘Rules-Based’ Global Order,” *Global China*, October 2020, available at <https://www.brookings.edu/wp-content/uploads/2020/10/FP_20201012_international_law_china_williams.pdf>; Dong Wang, *China’s Unequal Treaties: Narrating National History* (Lanham: Rowman and Littlefield, 2008), 128.

⁴² Kittrie, *Lawfare*, 162, citing to Paul Stempel, “Reading Lawfare in Chinese: The Meaning of the Term ‘Falu Zhan’ (‘Lawfare’) in Chinese Military Literature,” July 2011 (unpublished article).

⁴³ In the cyberspace realm, the People’s Republic of China (PRC) has repeatedly refused to recognize that international law, including LOAC, applies, contrary to the U.S. view. See *Annual Report to Congress: Military and Security Developments Involving the People’s Republic of China 2011* (Washington, DC: Office of the Secretary of Defense, 2011), 6. In the outer space realm, the PRC has adopted an aggressive *ad coelum* interpretation that it has absolute sovereignty over national space, subjecting satellites in orbit over Chinese territory to its consent and control. This position is contrary to current international law, including the Outer Space Treaty and the Convention on International Civil Aviation. See also Kittrie, *Lawfare*, 168.

⁴⁴ Robert C. De Tolve, “At What Cost? America’s UNCLOS Allergy in the Time of ‘Lawfare,’” *Naval Law Review* 61 (2012), 10–13. While the majority of United Nations Convention on the Law of the Sea (UNCLOS) signatories adopt this prevailing view, a few Member States side with China’s interpretation, including Argentina, Brazil, India, Indonesia, Iran, Malaysia, the Maldives, Oman, and Vietnam. China’s selective interpretation of UNCLOS exploits this minority view. See Oriana Skylar Mastro, “How China Is Bending the Rules in the South China Sea,” *Freeman Spogli Institute for International Studies at Stanford*, February 17, 2021, available at <<https://fsi.stanford.edu/news/how-china-bending-rules-south-china-sea>>.

⁴⁵ Raul Pedrozo, “The Building of China’s Great Wall at Sea,” *Ocean and Coastal Law Journal* 17, no. 2 (2012), 253, 257.

⁴⁶ *Ibid.*, 284–285.

⁴⁷ De Tolve, “At What Cost?” 12–13.

⁴⁸ In the Matter of the South China Sea Arbitration (The Republic of the Philippines v. the People’s Republic of China), Case No. 2013-19, Permanent Court of Arbitration, Awarded on July 12, 2016, at ¶¶ 180 et seq., available at <<https://www.pcacases.com/pcadocs/PH-CN%20-%2020160712%20-%20Award.pdf>>.

⁴⁹ *Ibid.*, ¶¶ 1202–1203.

⁵⁰ 18 U.S.C. §§ 2333(a), 2339(B); *Linde v. Arab Bank, PLC*, 882 F.3d 314 (2nd Circuit 2018); Harry Graver and Scott R. Anderson, “Shedding Light on the Anti-Terrorism Clarification Act of 2018,” *Lawfare* blog, October 25, 2018, available at <<https://www.lawfareblog.com/shedding-light-anti-terror>>.

ism-clarification-act-2018>.

⁵¹ 28 U.S.C. §§ 1602–1611.

⁵² 28 U.S.C. § 1605A(c).

⁵³ *Peterson v. Islamic Republic of Iran*, 264 F. Supp. 2d 46, 61 (D.D.C. 2003).

⁵⁴ Jay Solomon, “U.S. Freezes \$2 Billion in Iran Case,” *Wall Street Journal*, December 12, 2009, available at <<https://www.wsj.com/articles/SB126057864707988237>>.

⁵⁵ “About Lawfare Project History,” Law Confrontation with Russian Federation, January 26, 2021, available at <<https://lawfare.gov.ua/about>>.

⁵⁶ *Ukraine v. Russian Federation*, App. Nos. 20958/14 and 38334/18 (re: Crimea) (re: allegations of systematic human rights violations committed by the Russian Federation in Crimea); *Ukraine and the Netherlands v. Russian Federation*, App. Nos. 8019/16, 43800/14, and 28525/20 (re: events in Eastern Ukraine, including the crash of Malaysian Airlines flight MH17); *Ukraine v. Russian Federation* (VIII), App. No. 55855/18 (re: naval incident in the Kerch Strait leading to the capture of three Ukrainian naval vessels and their crews); *Ukraine v. Russian Federation*, App. No. 10691/21 (re: allegations of Russian state-authorized assassination operations); and *Ukraine v. Russian Federation*, App. No. 49537/14 (struck off list).

⁵⁷ *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation)*, Case No. 2017-06, Permanent Court of Arbitration, 2017.

⁵⁸ *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 (Ukraine v. Russian Federation)*, Application, January 16, 2017, available at <<https://www.icj-cij.org/public/files/case-related/166/166-20170116-APP-01-00-EN.pdf>>.

⁵⁹ Request for Consultations by Ukraine, *Russia: Measures Concerning Traffic in Transit*, World Trade Organization (WTO) Doc. WT/DS512/1, September 14, 2016; Request for Consultations by Ukraine, *Russia: Measures Affecting the Importation of Railway Equipment and Parts Thereof*, WTO Doc. WT/DS499/11, October 21, 2015; Request for Consultations by Ukraine, *Anti-Dumping Measures on Ammonium Nitrate from Russia*, WTO Doc. WT/DS493/1, May 7, 2015.

⁶⁰ Ukraine is not a party to the Rome Statute of the International Criminal Court.

⁶¹ Declaration of Ukraine, April 9, 2014, International Criminal Court, available at <<https://www.icc-cpi.int/itemsDocuments/997/declarationRecognitionJurisdiction09-04-2014.pdf>>; Declaration of Ukraine, September 8, 2015, International Criminal Court, available at <https://www.icc-cpi.int/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf>.

⁶² “Factsheet: Armed Conflicts,” European Court of Human Rights Press Unit, April 2022, 20–23, available at <https://www.echr.coe.int/Documents/FS_Armed_conflicts_ENG.pdf>.

⁶³ “Dispute Relating to Allegations of Genocide (Ukraine v. Russian Federation),” Application, International Court of Justice, February 27, 2022, available at <<https://www.icj-cij.org/public/files/case-related/182/182-20220227-APP-01-00-EN.pdf>>; *Ukraine v. Russia* (X), App. No. 11055/22 (re: “massive human rights violations committed by Russian troops in the course of the military aggression against the sovereign territory of Ukraine”), European Court of Human Rights, available at <<https://hudoc.echr.coe.int/eng-press>>.

⁶⁴ “Oschadbank Files Claim Worth UAH 15 Bln Against Russia for Losses Caused by Crimean

Annexation—Yatseniuk,” Interfax-Ukraine, August 7, 2015, available at <<https://en.interfax.com.ua/news/economic/276618.html>>.

⁶⁵ Agreement Between the Government of the Russian Federation and the Cabinet of Ministers of the Ukraine on the Encouragement and Mutual Protection of Investments, Russian Federation–Ukraine Bilateral Investment Treaty (BIT), UN Conference on Trade and Development (UNCTAD) Investment Policy Hub, November 27, 1998 (hereafter Russia-Ukraine BIT), available at <<https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/2859/russian-federation---ukraine-bit-1998->>.

⁶⁶ The Vienna Convention on the Law of Treaties defines an *international agreement* as “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.” See Vienna Convention on the Law of Treaties, Art. 2, May 23, 1969; 1155 U.N.T.S. 331; 8 I.L.M. 679. Department of Defense Instruction (DODI) 5530.03 defines an *international agreement* as (1) any agreement with one or more foreign government (including their agencies, instrumentalities, or political subdivisions) or international organizations; (2) signed or agreed to by representatives of any Department or Agency within the U.S. Government; and (3) signifies the intention of the parties to be bound under international law. DODI 5530.03, *International Agreements* (Washington, DC: Department of Defense, December 4, 2019), 27.

⁶⁷ International Investment Agreements Navigator, United Nations Conference on Trade and Development (UNCTAD) Investment Policy Hub, n.d., available at <<https://investmentpolicy.unctad.org/international-investment-agreements>>.

⁶⁸ Russia-Ukraine BIT, Art. 9.

⁶⁹ “About Lawfare Project History.”

⁷⁰ Convention on the Recognition and Enforcement of International Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3.

⁷¹ Oschadbank v. the Russian Federation, PCA Case No. 2016-14, PCA Case Repository, Award, November 26, 2018; PJSC CB PrivatBank and Finance Company Finilon LLC v. The Russian Federation, PCA Case No. 2015-21, PCA Case Repository, Interim Award, February 24, 2017; Aeroport Belbek LLC and Mr. Igor Valerievich Kolomoisky v. the Russian Federation, PCA Case No. 2015-07, PCA Case Repository, Interim Award, February 24, 2017; Stabil and others v. the Russian Federation, PCA Case No. 2015-35, PCA Case Repository, Award, April 12, 2019; PJSC Ukrnafta v. the Russian Federation, PCA Case No. 2015-34, PCA Case Repository, Award, April 12, 2019; Everest Estate LLC and others v. the Russian Federation, PCA Case No. 2015-36, PCA Case Repository, Award, May 2, 2018; Limited Liability Company Lugzor and others v. the Russian Federation, PCA Case No. 2015-29, PCA Case Repository, Notice of Arbitration, May 26, 2015; NJSC Naftogaz of Ukraine and others v. the Russian Federation, PCA Case No. 2017-16, PCA Case Repository, Award on Liability, February 22, 2019; and JSC DTEK Krymenergo v. the Russian Federation, PCA Case. No. 2018-41 (2018). There are also press reports that Ukraine’s nuclear energy company, NNEGC Energoatom, is preparing to file a USD 100 million claim against Russia over the alleged expropriation of a wind farm in Crimea. See Cosmo Sanderson, “Ukrainian State Entity Prepares Crimea Claim,” *Global Arbitration Review* (January 6, 2021), available at <<https://globalarbitrationreview.com/ukrainian-state-entity-prepares-crimea->>

claim>. Finally, it is also reported that Ukrenergo, a state-owned power company, is proceeding with a USD 1 billion investment claim against Russia for the alleged seizure and expropriation of 15 electrical substations and several thousand kilometers of power lines in Crimea. See Cosmo Sanderson, “Ukrainian State Entity’s Claim Against Russia Underway at PCA,” *Global Arbitration Review*, August 5, 2020, available at <<https://globalarbitrationreview.com/ukrainian-state-entities-claim-against-russia-underway-pca>>.

⁷² Russia has appointed counsel in the two most recent cases, *Energoatom v. Russia* and *Ukr-energo v. Russia*.

⁷³ Russia-Ukraine BIT, Art. 1.

⁷⁴ “Hughes Hubbard Wins Jurisdiction Decisions in Crimea Arbitration,” Hughes Hubbard & Reed, March 1, 2017, available at <<https://www.hugheshubbard.com/news/breaking-news-hughes-hubbard-secures-first-award-holding-russia-responsible-in-crimea>>.

⁷⁵ *Ibid.*

⁷⁶ Alison Ross, “Crimea Cases Against Russia to Proceed,” *Global Arbitration Review*, March 9, 2017, available at <<https://globalarbitrationreview.com/crimea-cases-against-russia-proceed>>.

⁷⁷ Yelena Burova, “Round-Up of Investment Arbitrations Against CIS States: Recent Developments,” *CIS Arbitration Forum*, March 21, 2017, available at <<http://www.cisarbitration.com/2017/03/21/round-up-of-investment-arbitrations-against-cis-states-recent-developments/>>.

⁷⁸ Tom Jones, “Billion-Dollar Crimea Award Enforced in Ukraine,” *Global Arbitration Review*, July 23, 2019, available at <<https://globalarbitrationreview.com/billion-dollar-crimea-award-enforced-in-ukraine>>.

⁷⁹ Douglas Thompson, “Crimea Real Estate Claim Goes Forward,” *Global Arbitration Review*, April 5, 2017, available at <<https://globalarbitrationreview.com/crimea-real-estate-claim-goes-forward>>. Claimants in *Everest* alleged Russia’s expropriation of a range of real estate properties in Crimea.

⁸⁰ *Ibid.*

⁸¹ Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, Art. 42, October 18, 1907, 36 Stat. 2277 (1910), available at <<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/0/1d1726425f6955aec125641e0038bfd6>>.

⁸² Office of General Counsel, *Department of Defense Law of War Manual* (Washington, DC: Department of Defense [DOD], December 2016), § 11.2.2.

⁸³ Eyal Benvenisti, *The International Law of Occupation*, 2nd ed. (Oxford: Oxford University Press, 2013), 43–51.

⁸⁴ *Idid.*, 47–48.

⁸⁵ *Ibid.*, 47–48. Similarly, under the *DOD Law of War Manual*, whether territory is occupied is a question of fact. See *DOD Law of War Manual*, § 11.2.

⁸⁶ Hague Convention (IV) Respecting the Laws and Customs of War on Land, Art. 43.

⁸⁷ *DOD Law of War Manual*, § 11.1.2.2.

⁸⁸ Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Art. 4, August 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, available at <<https://ihl-databases.icrc.org/ihl/INTRO/380>>.

⁸⁹ Ibid., Art. 53.

⁹⁰ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol. 1, *Rules* (Cambridge: Cambridge University Press 2009), 178.

⁹¹ Benvenisti, 82.

⁹² Jarrod Hepburn, “Investigation: Full Jurisdictional Reasoning Comes to Light in Crimea-Related BIT Arbitration vs. Russia,” *Investment Arbitration Reporter*, November 9, 2017, available at <<https://www.iareporter.com/articles/full-jurisdictional-reasoning-comes-to-light-in-crimea-related-arbitration-everest-estate-v-russia/>>, cited in *Certain German Interests in Polish Upper Silesia, Germany v. Poland*, Merits, Judgment, 1926 P.C.I.J. (ser. A), no. 7 (May 25, 1926), at 81–82.

⁹³ Jarrod Hepburn and Ridhi Kabra, “Investigation: Further Russia Investment Treaty Decisions Uncovered, Offering Broader Window into Arbitrators’ Approaches to Crimea Controversy,” *Investment Arbitration Reporter*, November 17, 2017, available at <<https://www.iareporter.com/articles/investigation-further-russia-investment-treaty-decisions-uncovered-offering-broader-window-into-arbitrators-approaches-to-crimea-controversy/>>.

⁹⁴ Vienna Convention on the Law of Treaties, Art. 29, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679.

⁹⁵ Article 31(1) of the Vienna Convention on the Law of Treaties states that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” See also Vienna Convention on the Law of Treaties, Art. 29.

⁹⁶ Hepburn and Kabra, “Treaty Decisions Uncovered.”

⁹⁷ UN General Assembly Resolution 66/99, “Effects of Armed Conflict on Treaties,” December 9, 2011, at 2, available at <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N11/464/76/PDF/N1146476.pdf?OpenElement>>. Article 7 and an accompanying Annex to the treaty lists the treaties that continue to be operative; while BITs are not specifically included, the Annex does list “treaties of friendship, commerce and navigation and agreements concerning private rights,” which are the precursors to modern BITs, as well as treaties relating to the international settlement of disputes . . . including arbitration.” Ibid., at 3.

⁹⁸ Under Article V of the New York Convention on Recognition and Enforcement of Arbitral Awards, municipal (national) courts maintain residual control over the substance of international arbitral awards and may refuse recognition and enforcement of the award if the award “deals with a difference not contemplated by or not falling within the terms of the submission of the arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration.” See New York Convention, Art. V. Courts may also refuse recognition and enforcement of an arbitral award if “the subject matter of the difference is not capable of settlement by arbitration under the law of that country . . . or . . . [t]he recognition or enforcement of the award would be contrary to the public policy of that country. See Ibid.

⁹⁹ Those cases are *Ukrnafta v. Russia*; *Stabil LLC and others v. Russia*; *Belbek v. Russia*; *Privat-Bank v. Russia*; *Everest Estate LLC and others v. Russia*; and *Lugzor and others v. Russia*.

¹⁰⁰ “Another Crimea Panel in Place at the PCA,” *Global Arbitration Review*, August 19, 2016, available at <<https://globalarbitrationreview.com/another-crimea-panel-in-place-the-pca>>.

¹⁰¹ Ibid.

¹⁰² Vienna Convention on Succession of States in Respect of Treaties, Art. 15, August 23, 1978, 1946 U.N.T.S. 3, 17 I.L.M. 1488.

¹⁰³ Interestingly, in the separate maritime dispute between Ukraine and Russia, Ukraine took a different approach, emphasizing the *de jure* status of Crimea as part of sovereign Ukrainian territory, as opposed to *de facto* Russian control. This is because arguing that Crimea was *de facto* part of Russian territory would have been counterproductive to Ukraine's maritime claim over Crimea's coastal waters. Rather, Ukraine took the position that its territorial sovereignty over Crimea was not in dispute, thus giving it jurisdictional standing to bring the UNCLOS claim to dispute coastal rights off the peninsula. Arbitration tribunals constituted pursuant to the UNCLOS may decide disputes about the rights and obligations in a given maritime zone, but do not have jurisdiction to decide disputes over the territorial sovereignty of such maritime zones. Such sovereignty disputes are governed by other fields of international law (for example, the law of acquisition of territory, secession, and so on), and must be disputed in other international fora, such as the Permanent Court of Arbitration in The Hague, Netherlands. For its part, Russia objected to UNCLOS jurisdiction on the basis that the tribunal could not adjudicate issues regarding Crimean coastal State rights without addressing a preliminary determination of sovereignty over Crimea itself. Ukraine countered, *inter alia*, that this jurisdictional objection was inadmissible, because Russia could not advance objections based on its illegal territorial acquisition of Crimea, and because Russia's claim of sovereignty over Crimea was implausible, given the internationally accepted status that the peninsula legally remained a part of Ukraine. The UNCLOS tribunal disagreed, finding that there was a plausible, objective sovereignty dispute that it had no jurisdiction to adjudicate. See *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation)*, Case No. 2017-06, Permanent Court of Arbitration, 2017. Ukraine's different approach in its maritime dispute further highlights the tension present in the BIT cases—that is, arguing that Crimea is *de facto* part of Russian territory for purposes of obtaining jurisdiction under the Russia-Ukraine BIT, while not conceding that Crimea is *de jure* part of Russia. It may be that the UNCLOS tribunal's rejection of Ukraine's jurisdictional defense was partly influenced by knowledge of Ukraine's jurisdictional position in the reported BIT cases.

¹⁰⁴ As already noted, there is some conceptual ambiguity between the concepts of lawfare. See Sadat and Geng, "On Legal Subterfuge and the So-Called 'Lawfare' Debate." Part of this ambiguity resides in the overlap between lawfare and strategic communications. See also Noone, "Lawfare or Strategic Communications?" Interestingly, China's Three Warfares doctrine recognizes this overlap and unites legal warfare with strategic communications warfare (psychological warfare and media warfare) in its overall strategy.

¹⁰⁵ UN General Assembly, "General Assembly Adopts Resolution Calling upon States Not to Recognize Changes in Status of Crimea Region."

¹⁰⁶ "Statement by President Biden on the Anniversary of Russia's Illegal Invasion of Ukraine," The White House, February 26, 2021, available at <<https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/26/statement-by-president-biden-on-the-anniversary-of-russias-illegal-invasion-of-ukraine/>>.

¹⁰⁷ "European Parliament Calls on Russia to Withdraw Military Forces from Ukraine," European Parliament, March 13, 2014, available at <<https://www.europarl.europa.eu/pdfs/news/expert/infop>>.

ress/20140312IPR38707/20140312IPR38707_en.pdf>.

¹⁰⁸ Goldenziel, “Law as a Battlefield,” 1097–1098. Professor Jill Goldenziel’s definition of lawfare includes the purposeful use of law to bolster the legitimacy of one’s own strategic, operational, or tactical objective toward an adversary.

¹⁰⁹ Noone, “Lawfare or Strategic Communications?” 74.

¹¹⁰ “About Lawfare Project History.”

¹¹¹ Tom Jones, “Russia Held Liable Again over Crimean Assets,” *Global Arbitration Review*, February 15, 2019, available at <<https://globalarbitrationreview.com/russia-held-liable-again-over-crimean-assets>>.

¹¹² “Russia Held Liable for Crimea Real Estate Seizures,” *Global Arbitration Review*, May 9, 2018, available at <<https://globalarbitrationreview.com/russia-held-liable-crimea-real-estate-seizures>>.

¹¹³ Sebastian Perry, “Enforcement of Crimea Award Upheld in Ukraine,” *Global Arbitration Review*, February 7, 2019, available at <<https://globalarbitrationreview.com/enforcement-of-crimea-award-upheld-in-ukraine>>.

¹¹⁴ Tom Jones and Sebastian Perry, “Russia Ordered to Pay for Petrol Stations Seized in Crimea,” *Global Arbitration Review*, April 16, 2019, available at <<https://globalarbitrationreview.com/russia-ordered-pay-petrol-stations-seized-in-crimea>>.

¹¹⁵ “Crimea Awards Upheld in Switzerland,” *Global Arbitration Review*, October 16, 2018, available at <<https://globalarbitrationreview.com/crimea-awards-upheld-in-switzerland>>; Sebastian Perry, “Russia Fails to Overturn Crimea Awards,” *Global Arbitration Review*, December 18, 2019, available at <<https://globalarbitrationreview.com/russia-fails-overturn-crimea-awards>>.

¹¹⁶ Jones, “Russia Held Liable Again over Crimean Assets.” However, Russia succeeded in annulling the *Oschadbank* award before the Paris Court of Appeal. See Cosmo Sanderson, “Russia Overturns Billion-Dollar Crimea Award,” *Global Arbitration Review*, March 30, 2021, available at <<https://globalarbitrationreview.com/russia-overturns-billion-dollar-crimea-award>>. Despite this enforcement defeat, the *Oschadbank* claimants can appeal to France’s supreme court, the *Cour de cassation*, and elsewhere, and can continue to enforce in other jurisdictions where Russian assets are discovered.

¹¹⁷ Tom Jones, “Russia Liable for Seizure of Naftogaz Assets in Crimea,” *Global Arbitration Review*, March 1, 2019, available at <<https://globalarbitrationreview.com/russia-liable-seizure-of-naftogaz-assets-in-crimea>>.

¹¹⁸ Anders Åslund and Maria Snegovaya, “The Impact of Western Sanctions on Russia and How They Can Be Made Even More Effective,” *Atlantic Council*, May 3, 2021, available at <<https://www.atlanticcouncil.org/in-depth-research-reports/report/the-impact-of-western-sanctions-on-russia/>>.

¹¹⁹ “Crimea Awards Upheld in Switzerland.”

¹²⁰ “Ukraine Threatened over Asset Freeze,” *Global Arbitration Review*, September 17, 2018, available at <<https://globalarbitrationreview.com/attachments-and-freezing-orders/ukraine-threatened-over-russian-asset-freeze>>.

¹²¹ Jack Ballantyne, “Ukraine’s Richest Man Warns of Claim Against Russia Over Mariupol Siege,” *Global Arbitration Review*, May 27, 2022, available at <<https://globalarbitrationreview.com/article/ukraines-richest-man-warns-of-claim-against-russia-over-mariupol-siege>>.

¹²² Russia-Ukraine BIT, Art. 3(1).

¹²³ For example, the BIT between Russia and Canada contains a full protection and security (FPS) clause. Agreement Between the Government of Canada and the Government of the Union of Soviet Socialist Republics for the Promotion and Reciprocal Protection of Investments, November 20, 1989, Art. 3(1), UNCTAD Investment Policy Hub, available at <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/632/download>>. For a full list of BITs in which Russia has granted the guarantee of FPS, see “Investment Treaty Arbitration: Russia,” on *Global Arbitration Review*’s Web site, available at <<https://globalarbitrationreview.com/insight/know-how/investment-treaty-arbitration/report/russia>>.

¹²⁴ Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford: Oxford University Press, 2012), 160–166; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, ICSID Cases Database, Award, July 24, 2008, at ¶ 730 (full security and protection extends to actions by organs and representatives of the State itself); *American Manufacturing & Trading, Inc. v. Democratic Republic of Congo*, ICSID Case No. ARB/93/1, ICSID Cases Database, Award, February 21, 1997, at ¶¶ 6.06–6.11 (breach of guarantee of full protection and security due to Zaire’s failure to prevent looting of investment by its armed forces).

¹²⁵ Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Union of Soviet Socialist Republics, October 5, 1997, Art. 7, UNCTAD Investment Policy Hub, available at <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2076/download>>.

¹²⁶ *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, ICSID Cases Database, Award, July 14, 2006, at ¶ 408, available at <<https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/01/12>>.

¹²⁷ For a full list of BITs in which Russia has granted the guarantee of fair and equitable treatment [FET], see “Investment Treaty Arbitration: Russia,” on *Global Arbitration Review*’s Web site, available at <<https://globalarbitrationreview.com/insight/know-how/investment-treaty-arbitration/report/russia>>.

¹²⁸ Russia could withdraw from the Russia-Ukraine BIT. However, the BIT would continue to apply to any breaches that occurred prior to termination of the treaty, for a period of 10 years after the date of termination (known as a “survival clause”). See Russia-Ukraine BIT, Art. 14(3). In addition, the BIT has an initial 10-year term (starting in January 2000), and is thereafter automatically renewed for a 5-year term until either contracting party notifies the other contracting party (not later than 12 months prior to the expiration of the effective term) of its intention to terminate the Agreement. Russia-Ukraine BIT, Art. 14(2). The latest 5-year term began in January 2020, and lasts until January 2025. Under this “tacit renewal” mechanism, the BIT cannot be terminated before the expiration of the current 5-year term in 2025. Termination must occur during the 12-month window, which, if missed, will not come around again until the end of the next term. Thus, the soonest Russia can hope to terminate the BIT would be in December 2024, and under the 10-year survival clause, Ukrainian investors would have until 2034 to file claims against Russia, which would provide ample time for such claims.

¹²⁹ Julian Borger, “What Sanctions Could the U.S. Hit Russia with if It Invades Ukraine?” *The Guardian*, December 7, 2021, available at <<https://www.theguardian.com/us-news/2021/dec/07/us-russia-sanctions-joe-biden-vladimir-putin>>.

¹³⁰ Åslund and Snegovaya, “The Impact of Western Sanctions on Russia and How They Can Be Made Even More Effective.”

¹³¹ *Oschadbank v. Russia, Naftogaz and others v. Russia, and Ukrenergo v. Russia.*

¹³² The largest known investment treaty award was issued against Russia in 2014. The dispute was brought by former shareholders of OAO Yukos Oil Company and involved three related arbitrations heard by a single Tribunal, which found that Russia had taken expropriatory measures against the claimants between 2003 and 2007, and awarded over USD 50 billion. The parties have since been engaged in a long-running worldwide fight over recognition and enforcement of the award. *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. 2005-04/AA227, PCA Case Repository, Award, July 18, 2014; *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, PCA Case No. 2005-03/AA226, PCA Case Repository, Award, July 18, 2014; *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, PCA Case No. 2005-05/AA228, PCA Case Repository, Award, July 18, 2014.

¹³³ Chris Giles and Max Seddon, “Volodymyr Zelensky Calls for Global Plan to Rebuild Ukraine after War,” *Financial Times*, May 23, 2022.

¹³⁴ Paul Krugman, “Laundered Money Could Be Putin’s Achilles’ Heel,” *New York Times*, February 24, 2022, available at <<https://www.nytimes.com/2022/02/24/opinion/russia-ukraine-sanctions-offshore-accounts.html?searchResultPosition=1>>.

¹³⁵ *Bank Markazi, AKA Central Bank of Iran v. Peterson et al.*, 136 S. Ct. 1310 (2016).

¹³⁶ Solomon, “U.S. Freezes \$2 Billion in Iran Case.” The USD 2 billion in assets were put into a larger, congressionally created fund meant to assist all victims of State-sponsored terrorism who sued under the provisions of the *Foreign Sovereign Immunities Act*. In addition to victims of terrorism sponsored by Iran, the fund was meant to compensate terrorism sponsored by North Korea, Cuba, Syria, Iraq, Libya, and Sudan. Jennifer K. Elsea, *Justice for United States Victims of State Sponsored Terrorism Act: Eligibility and Funding* (Washington, DC: Congressional Research Service, February 9, 2021), available at <<https://crsreports.congress.gov/product/pdf/IF/IF10341>>.

¹³⁷ Senate of Canada, *Frozen Assets Repurposing Act*, S-217, 1st sess., 44th Parliament (2021), available at <<https://www.parl.ca/DocumentViewer/en/44-1/bill/S-217/first-reading>>.

¹³⁸ “Representatives Malinowski and Curtis Call for Immediate Seizure of Putin’s Cronies’ Yachts, Jets, Villas, and Secret Bank Accounts,” *Insider NJ*, February 24, 2022, available at <<https://www.insidernj.com/press-release/representatives-malinowski-and-curtis-call-for-immediate-seizure-of-putins-cronies-yachts-jets-villas-and-secret-bank-accounts/>>.

¹³⁹ One of the policy concerns regarding seizure of frozen assets is that it could make nations reluctant to keep their reserves in U.S. dollars, for fear that in future conflicts the United States and its allies would confiscate the funds. While valid, this same policy concern arises when deciding whether to sanction and freeze assets in the first place; arguably, any policy downsides have already been substantially incurred during the sanctions process. Moreover, the exceptional circumstances of Russia’s invasion of Ukraine provide justification for the equally exceptional step of seizing and redistributing Russian assets.

¹⁴⁰ Åslund and Snegovaya, “The Impact of Western Sanctions on Russia and How They Can Be Made Even More Effective.”

¹⁴¹ *Summary of the 2018 National Defense Strategy of the United States of America: Sharpening*

the American Military's Competitive Edge (Washington, DC: DOD, 2018), at 4.

¹⁴² “Fact Sheet: 2022 National Defense Strategy,” Department of Defense, March 28, 2022, available at <<https://media.defense.gov/2022/Mar/28/2002964702/-1/-1/1/NDS-FACT-SHEET.PDF>>.

¹⁴³ A more recent acronym and concept for the instruments of national power is MIDFIELD (military, informational, diplomatic, financial, intelligence, economic, law, and development), which “conveys a much broader array of options for the strategic and policymaker to use.” Joint Doctrine Note 1-18, *Strategy* (Washington, DC: The Joint Staff, April 25, 2018), at viii. Notwithstanding this reference, the MIDFIELD concept has not enjoyed the same level of wide recognition and application as DIME-FIL.

¹⁴⁴ *Summary of the 2018 National Defense Strategy of the United States of America*, at 4.

¹⁴⁵ *China's Strategic Modernization: Report from the ISAB* [International Security Advisory Board] *Task Force* (Washington, DC: Department of State, 2008), at 2.

¹⁴⁶ Kittrie, *Lawfare*, xiii–xiv, 343. Professor Jill Goldenziel also notes the failure of the United States to include lawfare as part of its traditional discussion of the instruments of military power. See Goldenziel, “Law as a Battlefield,” 1161–1171.

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