

International Law in the Russia-Ukraine War

Keynote Address

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It is my honor to keynote this important symposium on the “Russia-Ukraine War, One Year On.” I come to these remarks wearing three hats. First, I have taught international law for four decades, almost all of it at Yale. Second, during five different decades since 1980, I have served in legal and policymaking roles in the United States government under four Presidents: in the courts, the Justice Department, and the State Department.¹ And since 2016, I have been one of Ukraine’s legal counsel in three different international cases, before the International Court of Justice (ICJ) and the Permanent Court of Arbitration (PCA).²

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¹I began law teaching as an adjunct lecturer at George Washington Law School starting in 1983 and two years later, came to teach as a professor at Yale Law School, where I have taught ever since.

²See *Allegations of Genocide Under Convention on Prevention and Punishment of Crime of Genocide (Ukr. v. Russ. Fed’n)*, Provisional Measure, 2022 I.C.J. 211, ¶ 13 (Mar. 16) [hereinafter *Genocide Allegations Case*]; see also *Professor Koh Asks International Court of Justice to Decide Ukraine’s Suit Against Russia*, YALE L. SCH. (Sept. 27, 2023)

From those three perspectives, let me offer an overview of the current Russia-Ukraine situation: first, the spectrum of international legal issues raised; second, the historical precursors to the conflict, which began on February 24, 2022; and third, Ukraine's grand strategy, its legal component—which some call a “lawfare strategy”³—and what we might hope to see in the months ahead.

I. THE SPECTRUM OF INTERNATIONAL LAW ISSUES

During my career, every once in a while, an historical episode arises that helps define the international law landscape for the next forty years. In the 1960s, it was the Cuban Revolution; in the 1980s, it was the Iranian hostage crisis.⁴ To me, the Russia-Ukraine war feels like yet another such seminal public event, which will surely spawn consequences lasting well into the second half of this millennium.

The crisis raises almost every international legal issue you can think of: state succession; lawful and unlawful annexation;⁵ the law of aggression; the law of the sea; *opposing* the use of force by aggression: with mutual defense treaties, lawful countermeasures, and the law of neutrality;⁶ how civilians can support Ukraine's self-defense; and the crucial issue of how to engage in diplomatic and economic coercion on a multilateral basis, when lacking a U.N. Security Council resolution because of a persistent Russian veto.⁷

[hereinafter *Professor Koh Asks*], <https://law.yale.edu/yls-today/news/professor-koh-asks-international-court-justice-decide-ukraines-suit-against-russia> [https://perma.cc/F2XJ-NP4F] (preliminary objections phase); *Professor Koh Argues at the International Court of Justice on Behalf of Ukraine*, YALE L. SCH. (June 13, 2023), <https://law.yale.edu/yls-today/news/professor-koh-argues-international-court-justice-behalf-ukraine> [https://perma.cc/NB23-M4PX] (merits phase of *Terrorism Financing/CERD Case*). See generally Application of International Convention for Suppression of Financing of Terrorism and of International Convention on Elimination of All Forms of Racial Discrimination (Ukr. v. Russ. Fed'n), Provisional Measures, 2021 I.C.J. 166 (Oct. 8) [hereinafter *Terrorism Financing/CERD Case*]; Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukr. v. Russ. Fed'n), 2017-06 (Perm. Ct. Arb. 2016) [hereinafter *Coastal State Rights Case*], <https://pca-cpa.org/en/cases/149/> [https://perma.cc/9MGQ-5B43].

³ See Jill Goldenziel, *An Alternative to Zombiefing: Lawfare Between Russia and Ukraine and the Future of International Law*, 108 CORNELL L. REV. ONLINE, 1, 1 (2022).

⁴ See generally HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR (1990) (discussing these episodes).

⁵ Oona A. Hathaway, Professor, Yale L. Sch., Remarks at the Ohio State Law Journal Symposium: The Ukraine War and Its Legal Ramifications (Feb. 24, 2023).

⁶ The last topic is the subject of Professor Rudesill's contribution to this symposium. See Dakota Rudesill, Assoc. Professor, Ohio State Univ. Moritz Coll. of L., Remarks at the Ohio State Law Journal Symposium: The Ukraine War and Its Legal Ramifications (Feb. 24, 2023).

⁷ The United Nations Security Council (UNSC), one of the principal organs created under the U.N. Charter of 1945, consists of fifteen members, ten of which are elected regionally every two years and five of which—the Permanent-5 (or “P-5”)—are permanent

In the zone of *jus in bello*—the law in armed conflict, we are witnessing a “full spectrum conflict,” as the U.S. Defense Department likes to call it.⁸ The conflict has included information operations and cyber conflicts, use of irregulars⁹—both cyber-mercenaries¹⁰ and armed mercenaries like the deadly Wagner Group;¹¹ conventional warfare, but with a twist—illegal weapons like thermobaric¹² and hypersonic weapons;¹³ deployment of artificial intelligence and cyber conflict in the course of the kinetic war—for example, the Ukrainians’ effective use of drones from Turkey in anti-tank operations;¹⁴ environmental injury with regard to climate change and nuclear safety;¹⁵ and various other kinds of gross human rights violations, ranging from Russian child-stealing, to filtration camps, to forced migration.¹⁶

members: China, France, Russia, the United Kingdom, and the United States. U.N. Charter art. 23, ¶ 1. Because substantive decisions by the UNSC must be made through “an affirmative vote of nine members including the concurring votes of the permanent members,” Russia, a P-5 member may exercise veto power to impede any coercive measure against it. *Id.* art. 27, ¶ 3.

⁸ See generally David Vergun, *Official Says Integrated Deterrence Key to National Defense Strategy*, U.S. DEP’T OF DEF. (Dec. 6, 2022), <https://www.defense.gov/News/News-Stories/Article/Article/3237769/official-says-integrated-deterrence-key-to-national-defense-strategy/> [https://perma.cc/5SZM-GD9P].

⁹ See, e.g., Laura Jones & Kyle Atwell, *Political Warfare and the Road to Invasion: Irregular Warfare in Ukraine Since 2014*, MODERN WAR INST. (July 1, 2022), <https://mwi.westpoint.edu/political-warfare-and-the-road-to-invasion-irregular-warfare-in-ukraine-since-2014/> [https://perma.cc/Q8Q4-SSQB].

¹⁰ See e.g., David Kirichenko, *Crowdsourced Cyber Warfare: Russia and Ukraine Launch Fresh DDoS Cyber Offensives*, CTR. FOR EUR. POL’Y ANALYSIS (July 13, 2023), <https://cepa.org/article/russia-ukraine-launch-cyber-offensives/> [https://perma.cc/YLR5-GK9F].

¹¹ See Press Release, U.S. Dep’t of Treasury, *Treasury Sanctions Russian Proxy Wagner Group as a Transnational Criminal Organization* (Jan. 26, 2023), <https://home.treasury.gov/news/press-releases/jy1220> [https://perma.cc/L4YY-6AMB].

¹² See *What Is a Thermobaric or Vacuum Bomb?*, BBC (Mar. 10, 2022), <https://www.bbc.com/news/business-60571395> [https://perma.cc/9K2Y-UWNJ].

¹³ See Dan Maurer, *Congress and the Operational Disciplining of the Use of Armed Force: Are Rule of Engagement Within the Preclusive Core of the President’s War Powers?*, 84 OHIO ST. L.J. (2023).

¹⁴ See Dave Philipps & Eric Schmitt, *Over Ukraine, Lumbering Turkish-Made Drones Are an Ominous Sign for Russia*, N.Y. TIMES (Mar. 31, 2022), <https://www.nytimes.com/2022/03/11/us/politics/ukraine-military-drones-russia.html> [https://perma.cc/4SQZ-8242]; John Hudson & Kostiantyn Khudov, *The War in Ukraine Is Spurring a Revolution in Drone Warfare Using AI*, WASH. POST (July 26, 2023), <https://www.washingtonpost.com/world/2023/07/26/drones-ai-ukraine-war-innovation> [https://perma.cc/7REK-N8M6].

¹⁵ John Quigley, Mark Nevitt, Yvonne Dutton & Brian Dooley, *Panel on Human Security and Justice at the Ohio State Law Journal Symposium: The Ukraine War and Its Legal Ramifications* (Feb. 24, 2023).

¹⁶ See Press Release, Security Council, *Reports of Russian Federation Forces Putting Ukrainian Civilians in ‘Filtration’ Camps Must Be Investigated, Senior Officials Tell*

These injuries raise multiple issues of accountability and remedies, which fall into three broad buckets: first, two cases at the International Court of Justice—the *Genocide Allegations* case, which most recently heard Russia’s preliminary objections to jurisdiction and admissibility in September 2022,¹⁷ and the *Terrorism Financing and CERD* case which has focused on Russian Activities since 2016 in Crimea and Eastern Ukraine (the so-called “Donbas”), and held its merits hearing in the Hague in June 2023.¹⁸ Second, civil reparations and compensation—how to secure Russian assets and create an international compensation mechanism.¹⁹ Third, myriad issues surrounding criminal accountability, which graphically illustrate the international law principle of complementarity at work:²⁰ at the domestic level, the various cases pending before the Ukraine Prosecutor General’s Office are now supported by an Atrocity Crimes Advisory Council that was set up by the European Union, with support from the United States and the United Kingdom;²¹ In the International Criminal Court,²² the question of whether or not to establish a “Special Aggression Tribunal” to try Putin and other authors of Russian aggression²³

Security Council, U.N. Press Release SC/15023 (Sept. 7, 2022), <https://press.un.org/en/2022/sc15023.doc.htm> [<https://perma.cc/VK4W-M3WM>].

¹⁷ See Press Release, I.C.J. 2023/49, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation: 32 States intervening)* (Sept. 27, 2023); *Professor Koh Asks, supra* note 2.

¹⁸ See *Genocide Allegations Case, supra* note 2; *Terrorism Financing/CERD Case, supra* note 2; Press Release, I.C.J. 2023/30, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukr. v. Russ. Fed’n), Conclusion of the Public Hearings* (June 14, 2023), <https://www.icj-cij.org/sites/default/files/case-related/166/166-20230614-PRE-01-00-EN.pdf> [<https://perma.cc/MP27-JZBS>] (merits phase).

¹⁹ See generally Chiara Giorgetti, Markiyani Kliuchkovsky & Patrick Pearsall, *Launching an International Claims Commission for Ukraine*, JUST SEC. (May 20, 2022), <https://www.justsecurity.org/81558/launching-an-international-claims-commission-for-ukraine/> [<https://perma.cc/F99W-VXTA>]; Laurence H. Tribe & Jeremy Lewin, *Opinion, \$100 Billion. Russia’s Treasure in the U.S. Should Be Turned Against Putin.*, N.Y. TIMES (Apr. 15, 2022), <https://www.nytimes.com/2022/04/15/opinion/russia-war-currency-reserves.html> [<https://perma.cc/L4ZL-Q5Y6>].

²⁰ XABIER AGIRRE ET AL., *THE PRINCIPLE OF COMPLEMENTARITY IN PRACTICE* 3 (2003), https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2009_02250.PDF [<https://perma.cc/F2YV-3QRV>] (“The ICC may only exercise jurisdiction where national legal systems fail to do so, including where they purport to act but in reality are unwilling or unable to genuinely carry out proceedings.”).

²¹ See Press Release, U.S. Dep’t of State, *The European Union, the United States, and the United Kingdom Establish the Atrocity Crimes Advisory Group (ACA) for Ukraine* (May 25, 2022), <https://www.state.gov/creation-of-atrocity-crimes-advisory-group-for-ukraine> [<https://perma.cc/F65Y-T3SF>].

²² *Ukraine: Situation in Ukraine*, INT’L CRIM. CT., <https://www.icc-cpi.int/situations/ukraine> [<https://perma.cc/SJ7K-4MLS>].

²³ Hans Corell, *A Special Tribunal for Ukraine on the Crime of Aggression—The Role of the U.N. General Assembly*, JUST SEC. (Feb. 14, 2023),

As we move to the ultimate issue of how this crisis will be resolved, more questions arise: first, about whether the U.N.'s grain deal can hold, what actions the World Food Programme should take to make it effective,²⁴ and the best role for U.N. Secretary-General Antonio Guterres in sustaining the on-again, off-again negotiations.²⁵ Second, multiple procedural issues would accompany any future peace agreement: mediators, structure, terms of cease-fire, negotiated borders, neutrality, guarantors, etc. As another part of this symposium has discussed,²⁶ President Zelenskyy has put forward a ten-point "peace formula:" a plan of issues that he is willing to negotiate, including war crimes, prisoner exchange, protection for the environment, security guarantees, and any negotiation would eventually reach such crucially important issues as civil reparations.²⁷ This sweeping spectrum of international law issues could fill a law school course, and indeed, several such courses have already been taught.²⁸

II. PRECURSORS: HISTORY OF THE CONFLICT

We cannot fully understand how these international law issues fit together, and how they help explain where we currently are, without reviewing some history that may have been overlooked amid today's headlines. First, remember that Ukraine is the second largest country in Europe by land mass—the largest being Russia.²⁹ So what we have been experiencing is a war between the two largest countries in Europe, a truly extraordinary event. And Ukraine has long

<https://www.justsecurity.org/85116/a-special-tribunal-for-ukraine-on-the-crime-of-aggression-the-role-of-the-u-n-general-assembly> [<https://perma.cc/HN8F-PTPZ>].

²⁴ See Maytaal Angel, *U.N. World Food Programme Optimistic on Ukraine Grain Export Deal*, REUTERS (July 25, 2022), <https://www.reuters.com/world/europe/un-world-food-programme-optimistic-ukraine-grain-export-deal-2022-07-25> [<https://perma.cc/SGA3-RBRZ>].

²⁵ See generally António Guterres, U.N. Sec'y-Gen., Remarks to the Security Council on Ukraine (Sept. 22, 2022), <https://www.un.org/sg/en/content/sg/speeches/2022-09-22/secretary-generals-remarks-the-security-council-ukraine> [<https://perma.cc/K9W8-K3F5>].

²⁶ See Quigley, Nevitt, Dutton & Dooley, *supra* note 15.

²⁷ *Explainer: What Is Zelenskiy's 10-Point Peace Plan?*, REUTERS (Dec. 28, 2022), <https://www.reuters.com/world/europe/what-is-zelenskiys-10-point-peace-plan-2022-12-28/> [<https://perma.cc/U5BA-NU3F>].

²⁸ See, e.g., Eugene Fidell & Margaret Donovan, *The Russo-Ukrainian War*, Fall 2022 and Spring 2024 Course at Yale Law School; Harold Hongju Koh, *International Law and the Russia-Ukraine War*, Spring 2023 Course at Fordham Law School (taught as Bacon-Kilkenny Distinguished Visitor); Erik Jensen & Michael Strauss, *Ukraine: the Promise and Perils of Legal Reform and Governance, in Wartime and Reconstruction*, Fall 2023 Course at Stanford Law School.

²⁹ Ivan Alekseyevich Yerofeyev et al., *Ukraine: Introduction & Quick Facts*, ENCYC. BRITANNICA, <https://www.britannica.com/place/Ukraine> [<https://perma.cc/YHW9-9QDZ>].

had its own identity: Kyiv existed long before Moscow, and Ukrainian identity had evolved long before its colonization began.³⁰

To better understand the 1930s, I encourage you to read the extraordinary book, *Bloodlands*, by Professor Timothy Snyder, my colleague in the Yale History Department.³¹ His book describes the relationship between Stalin, Hitler, and Ukraine—the toxic combination of “Black Earth,” colonization, extermination, and big lies that led to more civilians being killed in Ukraine between 1933 and 1945 than anywhere else on Earth, perhaps more than 14 million people in all.³² As Professor Snyder points out, “[i]n colonization ideology interacts with economics.”³³ Stalin offered a deceptive vision of the potential for collective agriculture to fund the modernization of the Union of Soviet Socialist Republic; instead, it led to the “Holodomor,” millions of Ukrainians starving in a great famine.³⁴ Echoing the big lie that again accompanies today’s conflict, Stalin claimed outrageously that the Ukrainians were starving themselves to discredit Soviet rule.³⁵

Touting a “big lie” became a common *modus operandi* when Hitler succeeded Stalin as autocratic ruler of the region and also decided to enslave the Ukrainians.³⁶ Both dictators claimed throughout their political careers to be victims of an international capitalist or Jewish conspiracy.³⁷ But the fight in Ukraine was always about the “Black Earth,” which produces the grain that makes Ukraine one of the three leading grain exporters in the world.³⁸ To Stalin, the profits from the grain were more important than the lives of peasants from Soviet Ukraine.³⁹ So instead of being used to save those peasants from starving, Ukraine’s grain was shipped south by trainload for export from the ports of the Black Sea.⁴⁰

With Russia distracted by *Perestroika* and *Glasnost*, Ukraine achieved independence in 1991 after a long history of Ukrainian nationalism struggling

³⁰ See Timothy Snyder, *The War in Ukraine is a Colonial War*, NEW YORKER (Apr. 28, 2022), <https://www.newyorker.com/news/essay/the-war-in-ukraine-is-a-colonial-war> [https://perma.cc/UL7X-RRR2].

³¹ See generally TIMOTHY SNYDER, *BLOODLANDS: EUROPE BETWEEN HITLER AND STALIN* (2010) [hereinafter SNYDER, *BLOODLANDS*].

³² *Id.* at vii–viii, 20.

³³ *Id.* at 396.

³⁴ See Anne Applebaum, *Holodomor*, ENCYC. BRITANNICA, <https://www.britannica.com/event/Holodomor> [https://perma.cc/T7ST-QGD7].

³⁵ See SNYDER, *BLOODLANDS*, *supra* note 31, at 41.

³⁶ See *id.* at 387–88.

³⁷ *Id.* at 17, 30, 63, 71.

³⁸ TIMOTHY SNYDER, *BLACK EARTH: THE HOLOCAUST AS HISTORY AND WARNING* 18 (2015); Joanne Knox, *Why Is Ukraine Known as the ‘Breadbasket of Europe’? Here’s What it Produces and Exports*, FARMING LIFE (Feb. 24, 2022), <https://www.farminglife.com/country-and-farming/why-is-ukraine-known-as-the-breadbasket-of-europe-heres-what-it-produces-and-exports-3584361> [https://perma.cc/F4Q7-AE6Q].

³⁹ See SNYDER, *BLOODLANDS*, *supra* note 31, at 395.

⁴⁰ *Id.*

against empire.⁴¹ In 2004, the Ukrainians attempted to hold a free and fair presidential election.⁴² Ukrainians rejected the pro-Russian regime of President Leonid Kuchma and then-Prime Minister and presidential candidate, Viktor Yanukovich, in favor of Western-oriented opposition candidate Viktor Yushchenko.⁴³ During the campaign, Yushchenko was horribly poisoned with dioxin and the runoff election appeared rigged in favor of the pro-Russian candidate.⁴⁴ A series of protests ensued—that became known as the “Orange Revolution”—which challenged electoral fraud, voter intimidation and governmental corruption.⁴⁵ Hundreds of thousands of Ukrainians took to the streets of Kyiv to demand that Yushchenko, the internationally recognized winner, be allowed to fulfill his mandate.⁴⁶ When the protests succeeded, Yushchenko was declared the winner and sworn into office in January 2005.⁴⁷ These dramatic developments reaffirmed that Ukraine was never just a colony of Russia, but rather, an independent nation, a genuine democracy, and a vibrant civil society.

⁴¹ *Perestroika* and *Glasnost* were a series of social, political, and economic practices beginning in the mid-1980s, led by then U.S.S.R. President Mikhail Gorbachev, aimed at reforming and restructuring the stagnant economy of the Soviet Union by increasing the openness and accessibility of the economy, government, and institutions. Instead, the Soviet Union collapsed and fragmented in 1991. See Lubomyr A. Hajda et al., *Ukraine on the Path to Independence: Parliamentary Democracy & Independent Ukraine*, ENCYC. BRITANNICA, <https://www.britannica.com/place/Ukraine/Ukraine-on-the-path-to-independence> [https://perma.cc/L52Z-G2JX].

⁴² See Peter Finn, *Refusing to Accept Loss in Election, Ukrainian Premier Looks to Courts*, WASH. POST (Dec. 28, 2004), <https://www.washingtonpost.com/archive/politics/2004/12/28/refusing-to-accept-loss-in-election-ukrainian-premier-looks-to-courts/69904de0-4d7d-47d4-a20a-3c0971f33ace/> [https://perma.cc/MLV8-NXBP].

⁴³ *Id.*; see also OLEXIY HARAN & ROSTYSLAV PAVLENKO, PONARS EURASIA, THE PARADOXES OF KUCHMA’S RUSSIAN POLICY 4–5 (Sept. 2003), https://www.ponarseurasia.org/wp-content/uploads/attachments/pm_0291-0.pdf [https://perma.cc/J6EX-FMPA].

⁴⁴ *Viktor Yushchenko: Ukraine’s Ex-President on Being Poisoned*, BBC (Apr. 2, 2018), <https://www.bbc.com/news/av/world-europe-43611547> [https://perma.cc/EL64-49R4]; Jordan Mendoza, *Who is Viktor Yushchenko? What You Need to Know About the Former Ukrainian President*, USA TODAY (Mar. 1, 2022), <https://www.usatoday.com/story/news/politics/2022/03/01/viktor-yuschenko-former-ukrainian-president-poison/9333605002/> [https://perma.cc/935M-CJTN].

⁴⁵ Liliane Bivings, *Ukraine’s Orange Revolution*, KYIV INDEP. (Nov. 21, 2023), <https://kyivindependent.com/ukraines-orange-revolution/> [https://perma.cc/PK49-4SAZ]; C. J. Chivers, *Yushchenko Wins 52% of Vote; Rival Vows a Challenge*, N.Y. TIMES (Dec. 28, 2004), <https://www.nytimes.com/2004/12/28/world/europe/yushchenko-wins-52-of-vote-rival-vows-a-challenge.html> [https://perma.cc/94QG-QKSV].

⁴⁶ See Bivings, *supra* note 45.

⁴⁷ *Id.*

What this history teaches is that we have recently been witnessing a colonial war. Putin is an imperialist, who wants to rewrite history.⁴⁸ Russian history books allow no mention of an independent Ukraine;⁴⁹ Russians call it “*the Ukraine*,” not “Ukraine,” the term that Ukrainians prefer.⁵⁰ They use the Russian names of the cities, not “Kyiv” or “Lviv,” the names used by the Ukrainians themselves.⁵¹ In Russia, it is illegal to call the invasion a “war”; instead, it must always be called a “Special Military Operation.”⁵² And it remains illegal in Russia to recall that, at the beginning of World War II, Stalin was Hitler’s ally.⁵³ Despite Ukraine’s long tradition of national identity, Putin still denies the reality of the Ukrainian state.⁵⁴ He sees Ukraine as a nation that does not exist: an object, not the subject, of history.⁵⁵ His conviction that Russia

⁴⁸ See, e.g., Sergey Radchenko, *Vladimir Putin Wants to Rewrite the History of World War II*, FOREIGN POL’Y (Jan. 21, 2020), <https://foreignpolicy.com/2020/01/21/vladimir-putin-wants-to-rewrite-the-history-of-world-war-ii/> [<https://perma.cc/R8JC-P3LC>].

⁴⁹ *Ukraine/Russia: New History Textbook is a Blatant Attempt to Unlawfully Indoctrinate School Children in Russia and Russian-Occupied Ukrainian Territories*, AMNESTY INT’L (Sept. 1, 2023) [hereinafter *New History Textbook*], <https://www.amnesty.org/en/latest/news/2023/09/ukraine-russia-new-history-textbook-is-a-blatant-attempt-to-unlawfully-indoctrinate-school-children-in-russia-and-russian-occupied-ukrainian-territories/> [<https://perma.cc/Q55M-D672>].

⁵⁰ Katy Steinmetz, *Ukraine, Not the Ukraine: The Significance of Three Little Letters*, TIME (Mar. 5, 2014), <https://time.com/12597/the-ukraine-or-ukraine/> [<https://perma.cc/W8KP-4SPR>]; see Pjotr Sauer, *Russia Releases History Schoolbook Praising Ukraine Invasion*, GUARDIAN (Aug. 8, 2023), <https://www.theguardian.com/world/2023/aug/08/russia-releases-history-schoolbook-praising-ukraine-invasion> [<https://perma.cc/AJA4-UKW4>].

⁵¹ See *New History Textbook*, *supra* note 49; Jeffrey Gettleman & Olha Kotiuzhanska, *Zelensky Signs Ban on Russian Place Names in Struggle Over National Identity*, N.Y. TIMES (Apr. 22, 2023), <https://www.nytimes.com/2023/04/22/world/europe/zelensky-russian-ban-ukraine.html> [<https://perma.cc/2PFM-ALXL>].

⁵² *Do Not Call Ukraine Invasion a ‘War’, Russia Tells Media, Schools*, AL JAZEERA (Mar. 2, 2022), <https://www.aljazeera.com/news/2022/3/2/do-not-call-ukraine-invasion-a-war-russia-tells-media-schools> [<https://perma.cc/4BPM-TECQ>].

⁵³ In turning against Hitler in 1941 and joining the United States and the United Kingdom against Germany, after Germany invaded the Soviet Union, the Russians abrogated the 1939 Molotov-Ribbentrop Pact, a non-aggression agreement signed between the two nations in which Hitler and Stalin had pledged not to attack one another and not to aid an enemy state of the other. See Ian Ona Johnson, *The Long Shadow of 1939: The Molotov-Ribbentrop Pact and the Politics of Memory in Eastern Europe*, NANOVIC INST. (July 28, 2021), <https://nanovic.nd.edu/news/the-long-shadow-of-1939-the-molotov-ribbentrop-pact-and-the-politics-of-memory-in-eastern-europe/> [<https://perma.cc/83K9-AH4F>]; *Molotov-Ribbentrop: Five States Remember “Misery” Pact Victims*, BBC (Aug. 23, 2019), <https://www.bbc.com/news/world-europe-49446735> [<https://perma.cc/BKN9-DHMU>].

⁵⁴ See Michael Schwirtz, Maria Varenikova & Rick Gladstone, *Putin Calls Ukrainian Statehood a Fiction. History Suggests Otherwise*, N.Y. TIMES (Aug. 27 2022), <https://www.nytimes.com/2022/02/21/world/europe/putin-ukraine.html> [<https://perma.cc/FD6K-FE75>].

⁵⁵ See *id.*

can only be made whole by annihilating Ukraine finally helped drive Putin to full-scale invasion in early 2022.

In the fall of 2013, pro-Russian President Yanukovich decided to ally more closely with Russia by rejecting a popular call to sign a political association and free trade agreement with the European Union.⁵⁶ In response, in November 2013, large-scale protests began, which became known as the “Revolution of Dignity,” the “Maidan Revolution,” or simply “Euromaidan,” named after Maidan (Independence) Square in Kyiv where the events unfolded.⁵⁷ Like the Orange Revolution a decade earlier, the Maidan Revolution was a mass popular uprising widely viewed as a rejection of Russian overreach, and opposition to widespread governmental corruption and abuse of power.⁵⁸ During January and February 2014, clashes raged between official forces and protestors, who were attacked at their barricades by armed riot police and deadly sniper fire.⁵⁹ This caused the violent deaths of over 100 who demanded that Ukraine break free from Russian orbit to be allowed to enter into Europe.⁶⁰ The protests ultimately led to Yanukovich fleeing the country and being formally removed from office, with pro-European Petro Poroshenko eventually succeeding him as President.⁶¹

The Obama Administration strongly supported the Maidan Revolution, especially through its point person on Ukraine, then-Vice President Joe Biden.⁶² Traveling to Ukraine at least six times, Biden developed a very strong personal relationship with the leadership of Ukraine, which has only been strengthened and renewed through many subsequent contacts.⁶³ Biden’s deep immersion in Ukraine affairs, as well as that of key Biden officials like Secretary of State Antony Blinken, Undersecretary Victoria Nuland, National Security Advisor Jake Sullivan, and CIA Director and former Ambassador to Russia William

⁵⁶ Elizabeth Piper, *Special Report: Why Ukraine Spurned the EU and Embraced Russia*, REUTERS (Dec. 29, 2013), <https://www.reuters.com/article/us-ukraine-russia-deal-special-report/special-report-why-ukraine-spurned-the-eu-and-embraced-russia-idUSBRE9BI0DZ20131219> [https://perma.cc/A4WP-WTWQ].

⁵⁷ See *id.*; *Understanding Ukraine’s Euromaidan Protests*, OPEN SOC’Y FOUNDS., <https://www.opensocietyfoundations.org/explainers/understanding-ukraines-euromaidan-protests> [https://perma.cc/MCK4-NSWN].

⁵⁸ *Understanding Ukraine’s Euromaidan Protests*, *supra* note 57.

⁵⁹ See Steven Pifer, *Ukraine: Looking Forward, Five Years After the Maidan Revolution*, BROOKINGS (Feb. 22, 2019), <https://www.brookings.edu/blog/order-from-chaos/2019/02/22/ukraine-looking-forward-five-years-after-the-maidan-revolution> [https://perma.cc/22AT-RFTE].

⁶⁰ See *id.*

⁶¹ *Id.*

⁶² See Dan De Luce & Reid Standish, *What Will Ukraine Do Without Uncle Joe?*, FOREIGN POL’Y (Oct. 30, 2016), <https://foreignpolicy.com/2016/10/30/what-will-ukraine-do-without-joe-biden-putin-war-kiev-clinton-trump/> [https://perma.cc/3DWD-RQLB].

⁶³ *Id.*; see also Kevin Liptak, *Biden Makes Surprise Visit to Ukraine for First Time Since Full-Scale War Began*, CNN (Feb. 20, 2023), <https://www.cnn.com/2023/02/20/politics/biden-ukraine-zelensky-visit-one-year-anniversary-intl-hnk/index.html> [https://perma.cc/9AJ3-2GNJ].

Burns have proven to be significant assets for the Biden Administration as Russian aggression toward Ukraine has escalated.⁶⁴

Russia retaliated by launching its opening gambit in 2014, when it annexed Crimea, the peninsula in the southernmost part of Ukraine.⁶⁵ In response, the United States and the EU imposed sanctions, but they proved to be too little, too late.⁶⁶ Putin then unfolded the game plan in Crimea that he had used before in Georgia⁶⁷—a staged referendum designed so he could falsely trumpet a new “big lie”: that the people of that region had broken away from their home country and voluntarily “joined Russia.”⁶⁸ In the eastern provinces (“oblasts”) of Luhansk and Donetsk, pro-Russian armed groups wearing no uniforms—so-called “little green men”—seized the regions on the border closest to Russia, claiming to lead breakaway republics when they were in fact launching a disguised invasion.⁶⁹ But the Ukrainians and Crimean Tatars fought back.⁷⁰ So what casual observers overlook is that one reason why Ukraine has been so successful in its military battle is that in fact, they have been fighting since 2014 to keep Donetsk and Luhansk as part of Ukraine, and have lost many lives in the process.⁷¹ And so the EuroMaidan and the Ukrainian special forces’ battles in the Donbas were simply two faces of the same Ukrainian resistance to Russian domination. When I was in Kyiv, I walked by posters of the martyrs of the Maidan and a wall of fame that shows faces of Ukrainian forces killed in the

⁶⁴ See Jon Ward, *Biden’s National Security Team Earns Praise for Handling of Ukraine Crisis—for Now*, YAHOO NEWS (Mar. 16, 2022), <https://news.yahoo.com/bidens-national-security-team-earns-praise-for-handling-of-ukraine-crisis-for-now-090020010.html> [<https://perma.cc/HD23-2CQK>].

⁶⁵ *Id.*

⁶⁶ See *Ukraine and Russia Sanctions*, U.S. DEP’T OF STATE, <https://2009-2017.state.gov/e/eb/tfs/spi/ukrainerrussia/index.htm> [<https://perma.cc/W85K-NH2W>]; John Hyatt & David Dawkins, *Why Biden’s Russia Sanctions Are Too Little, Too Late for Ukraine*, FORBES (Feb. 22, 2022), <https://www.forbes.com/sites/johnhyatt/2022/02/22/how-to-stop-putins-mad-dash-to-war/?sh=5f9af01adca2> [<https://perma.cc/92GQ-V5ZN>].

⁶⁷ Illia Ponomarenko, *Before Ukraine, There Was Georgia: How Russia Recycles its 2008 Playbook*, KYIV INDEP. (Feb. 23, 2022), <https://kyivindependent.com/before-ukraine-there-was-georgia-how-russia-recycles-its-2008-playbook/> [<https://perma.cc/DE9H-RKCJ>].

⁶⁸ See Steven Pifer, *Five Years After Crimea’s Illegal Annexation, the Issue Is No Closer to Resolution*, BROOKINGS (Mar. 18, 2019), <https://www.brookings.edu/blog/order-from-chaos/2019/03/18/five-years-after-crimeas-illegal-annexation-the-issue-is-no-closer-to-resolution> [<https://perma.cc/7D5Z-FYP8>].

⁶⁹ See Vitaly Shevchenko, “Little Green Men” or “Russian Invaders”?, BBC (Mar. 11, 2014), <https://www.bbc.com/news/world-europe-26532154> [<https://perma.cc/CQJ4-65V8>].

⁷⁰ See Julian Borger, *The Underground Crimean Tatar Group Taking up Arms Against Russia*, GUARDIAN (July 17, 2023), <https://www.theguardian.com/world/2023/jul/17/the-underground-crimean-tatar-group-taking-up-arms-against-russia> [<https://perma.cc/J7PK-GTLQ>].

⁷¹ *Id.*; see also *Conflict in Ukraine’s Donbas: A Visual Explainer*, INT’L CRISIS GRP., <https://www.crisisgroup.org/content/conflict-ukraines-donbas-visual-explainer> [<https://perma.cc/85FA-8S9T>].

Donbas, the same wall that President Biden visited in February 2023 with President Zelensky.⁷²

During this same period, Russia sealed the border of Crimea and started a process of cultural erasure: eradication of the indigenous culture and language of the Ukrainians and Tatars in Crimea.⁷³ At Kerch Strait, the easternmost isthmus that connects Russia to Crimea, the Russians hastily built the Kerch Strait bridge as a supply route to Russia, set at a low height that blocked Ukrainian seagoing vessels from sailing out carrying stores of grain.⁷⁴ The Kerch Strait Bridge has since been twice attacked, perhaps by the Ukrainians or Crimean resistance, as a way of blocking Russian military access to Crimea.⁷⁵ The Russians closed the roads when there were popular assemblies to support Crimean political figures.⁷⁶ They sponsored extreme violence against Crimean activists.⁷⁷ And then, in 2014 campaign posters again repeated another “big lie:” that for Crimea, the true enemies were Ukrainians, who the posters called indistinguishable from genocidal Nazis.⁷⁸ Indeed, one Russian-produced referendum campaign poster read simply: “March 16: we choose . . .” between an image of Crimea covered by a swastika next to one covered by the Russian

⁷² Marc Santora, Peter Baker & Michael D. Shear, *Biden Visits Embattled Ukraine as Air-Raid Siren Sounds*, N.Y. TIMES (Feb. 20, 2023), <https://www.nytimes.com/2023/02/20/us/politics/biden-ukraine-visit.html> [<https://perma.cc/7WPA-KW7H>].

⁷³ LIESL GERNTHOLTZ, PEN AM., UKRAINIAN CULTURE UNDER ATTACK: ERASURE OF UKRAINIAN CULTURE IN RUSSIA’S WAR AGAINST UKRAINE 12–13 (Dec. 2022), <https://pen.org/wp-content/uploads/2022/12/Ukraine-Culture-Under-Attack-12-20-22.pdf> [<https://perma.cc/5N3X-J5D4>].

⁷⁴ See Steven Pifer, *The Battle for Azov: Round 1 Goes to Russia*, BROOKINGS (Dec. 3, 2018), <https://www.brookings.edu/blog/order-from-chaos/2018/12/03/the-battle-for-azov-round-1-goes-to-russia> [<https://perma.cc/8S8T-SKBW>].

⁷⁵ See Charles Maynes, *Explosions Disrupt Traffic on a Key Bridge from Crimea to Russia’s Mainland*, NPR (July 17, 2023), <https://www.npr.org/2023/07/17/1188044690/explosions-halt-traffic-on-a-key-bridge-from-crimea-to-russias-mainland> [<https://perma.cc/WF7A-WDV5>]; James Glanz & Marco Hernandez, *How Ukraine Blew Up a Key Russian Bridge*, N.Y. TIMES (Nov. 17, 2022), <https://www.nytimes.com/interactive/2022/11/17/world/europe/crimea-bridge-collapse.html> [<https://perma.cc/T8JE-XHKR>] (detailing the explosion of the bridge, which was—to Ukrainians—a “symbolic link to Russia after its occupation of Crimea. More recently, it has served as a crucial supply line for the Russian war effort”).

⁷⁶ Alastair Macdonald, *Crimea Tatars Say Leader Banned by Russia from Returning*, REUTERS (Apr. 22, 2014), <https://www.reuters.com/article/uk-ukraine-crisis-tatars/crimea-tatars-say-leader-banned-by-russia-from-returning-idUKBREA3L0EA20140422> [<https://perma.cc/8MMA-M3AM>].

⁷⁷ See *Crimea: Persecution of Crimean Tatars Intensifies*, HUM. RTS. WATCH (Nov. 14, 2017), <https://www.hrw.org/news/2017/11/14/crimea-persecution-crimean-tatars-intensifies> [<https://perma.cc/E6LR-PW48>].

⁷⁸ *Crimeans Urged to Vote Against “Neo-Nazis” in Kiev*, BBC (Mar. 13, 2014), <https://www.bbc.com/news/world-europe-26552066> [<https://perma.cc/ELU4-XYE7>].

flag.⁷⁹ So again we see history repeating itself: violence, attempted colonization, and big lies.

In May 2014, a Buk missile brought into Ukraine from Russia shot down a Malaysian airliner, MH-17, over the eastern conflict zone, tragically killing all 298 civilians aboard, including several infants.⁸⁰ This shoot-down has been litigated at the European Court of Human Rights, by Ukraine versus Russia at the International Court of Justice, as well as by group of countries whose nationals were affected.⁸¹ At the same time, many innocent civilians died from indiscriminate terrorist shelling and bombing attacks by Russia launched into cities far from the conflict line, such as Volnavakha, Mariupol, Kramatorsk, and Kharkiv.⁸²

As this was happening on land, similar events were transpiring in the neighboring Black Sea and the Sea of Azov.⁸³ Not surprisingly, Putin comprehensively violated Ukraine's law-of-the-sea rights.⁸⁴ Russia stole Ukraine's oil and gas,⁸⁵ obstructed navigation with the Kerch Strait Bridge,⁸⁶

⁷⁹ See Adam Taylor, *Billboard Explains How Crimea Referendum Is Being Framed: Russia vs. the Nazis*, WASH. POST (Mar. 10, 2014), <https://www.washingtonpost.com/news/worldviews/wp/2014/03/10/billboard-explains-how-crimea-referendum-is-being-framed-russia-vs-the-nazis> [<https://perma.cc/6ZEB-6R59>].

⁸⁰ See *What Happened to Malaysia Airlines Flight 17*, N.Y. TIMES, <https://www.nytimes.com/interactive/2014/07/18/world/europe/malaysia-airlines-flight-mh17-q-a.html> [<https://perma.cc/VS9W-JNXJ>]; Phil Helsel, *Malaysia Airlines MH17 Jet Crash: Three Infants Among Dead*, NBC NEWS (July 17, 2014), <https://www.nbcnews.com/storyline/ukraine-plane-crash/malaysia-airlines-mh17-jet-crash-three-infants-among-dead-n158926> [<https://perma.cc/QU57-FML7>].

⁸¹ See *Ukr. & Neth. v. Russ.*, App. Nos. 8019/16, 43800/14 & 28525/20, ¶¶ 5–9 (Nov. 30, 2022), <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-222889%22%5D> [<https://perma.cc/EC85-BGVD>].

⁸² See Pierre Vaux, *Putin's Next Prize in Eastern Ukraine*, FOREIGN POL'Y (Mar. 2, 2015), <https://foreignpolicy.com/2015/03/02/putins-next-prize-eastern-ukraine-mariupol/> [<https://perma.cc/AQZ2-RFLH>]; David Stern, *Ukraine Crisis: Deadly Bomb Blast Hits Rally in Kharkiv*, BBC (Feb. 22, 2015), <https://www.bbc.com/news/world-europe-31575384> [<https://perma.cc/VPY5-B7W6>].

⁸³ For the ongoing case concerning Ukraine's rights in the Black Sea, Sea of Azov, and Kerch Strait under the United Nations Convention on the Law of the Sea, see *Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukr. v. Russ. Fed'n)*, Case No. 2017-06, Preliminary Objections Judgment ¶¶ 1–7 (Perm. Ct. Arb. 2020) [hereinafter *Coastal State Rights Preliminary Objections Judgment*].

⁸⁴ *Id.*

⁸⁵ *Id.* ¶¶ 17(a)–(b) (recounting Ukrainian submission of its Memorial, requesting the tribunal to declare that Russia had “exclude[d] Ukraine from accessing gas fields in its territorial sea, extract[ed] gas found in such fields, and usurp[ed] Ukraine's exclusive jurisdiction over the hydrocarbons in such fields”).

⁸⁶ *Id.* ¶ 17(i) (noting Ukraine's submission that Russia had “unlawfully interfere[d] with the navigation of Ukrainian Sea Guard vessels through Ukraine's territorial sea and exclusive economic zone”).

stole their fisheries,⁸⁷ polluted the marine environment,⁸⁸ and seized cultural heritage and marine archaeology.⁸⁹ Official Russian media ran an extraordinary picture of Putin surfacing in a research submarine, having just seized some cultural heritage from Ukrainian waters.⁹⁰

Russia's strategic goal has been to cut off Ukraine's capacity to ship grain to Africa and Asia, where its exports have been serving one of the largest food populations in the world.⁹¹ Although Russia has seized the strategic port of Sevastopol in Crimea and is currently fighting in the east for the ports in Mariupol and Kherson, Ukraine's export economy—like a bathtub—drains through Odesa to the west of Crimea, which continues to ship grain and sunflower oil through one of the largest ports in the world.⁹²

Into this picture came Volodymyr Zelenskyy, who was not a professional politician, but an actor and a comedian.⁹³ He had starred in a popular TV program, “Servant of the People,” which coincidentally depicts Zelenskyy as a

⁸⁷ *Id.* ¶¶ 17(f)–(g) (noting Ukraine's submission that Russia has unlawfully exploited and excluded Ukraine from accessing fisheries within its 12-mile territorial sea and exclusive economic zone).

⁸⁸ CONFLICT & ENV'T OBSERVATORY, UKRAINE CONFLICT ENVIRONMENTAL BRIEFING, THE COASTAL AND MARINE ENVIRONMENT (Feb. 2023), <https://ceobs.org/ukraine-conflict-environmental-briefing-the-coastal-and-marine-environment/> [https://perma.cc/TR3D-A557].

⁸⁹ *Coastal State Rights Preliminary Objections Judgment, supra* note 83, ¶¶ 17(q)–(r) (regarding Ukraine's submission that Russia has unlawfully interfered with Ukraine's jurisdiction over contiguous zone and the archaeological and historical objects found there).

⁹⁰ *Id.*; Photograph of Vladimir Putin, in Roland Oliphant, *Vladimir Putin Plunges into Black Sea in Research Submarine*, TELEGRAPH (Aug. 18, 2015), <https://www.telegraph.co.uk/news/worldnews/europe/russia/11810703/Vladimir-Putin-plunges-into-Black-Sea-in-research-submarine.html> [https://perma.cc/J597-JH58].

⁹¹ See Susannah Savage, Meredith Lee Hill & Sarah Anne Aarup, *Who's Feeding the World? We Are, Say Both Ukraine and Russia, As War Rages On*, POLITICO (Feb. 20, 2023), <https://www.politico.eu/article/food-world-hunger-russia-ukraine-war-grain-export-black-sea> [https://perma.cc/X94N-L5RY] (“In peacetime, Ukraine's food exports were enough to feed 400 million people. Its farmers supplied a tenth of the wheat and half the sunflower oil sold on world markets.”).

⁹² *Id.*; see, e.g., Catalin Alin Costea, *The Strategic Importance of the Port of Odessa*, ROMANIAN CTR. FOR RUSSIAN STUDS. (Mar. 25, 2022), <https://russianstudiesromania.eu/2022/03/25/the-strategic-importance-of-the-port-of-odessa/> [https://perma.cc/LYW7-DW29] (“The port of Odessa is a strategic point of vital importance for Ukraine. It is the largest and only deep-water port in Ukraine. About 70% of its total imports and exports are carried out by sea, 65% being made through the port of Odessa.”). For the “bathtub analogy” and many other lessons, I am grateful for many illuminating conversations with Ambassador James C. O'Brien, now Assistant Secretary of State for European and Eurasian Affairs, previously Ambassador-at-Large for Sanctions Coordination.

⁹³ Stephen Mulvey, *Ukraine's Volodymyr Zelensky: The Comedian President Who Is Rising to the Moment*, BBC (Feb. 26, 2022), <https://www.bbc.com/news/world-europe-59667938> [https://perma.cc/6QEG-ZRP4].

well-meaning history teacher who suddenly becomes President of Ukraine.⁹⁴ Zelenskyy launched a surprise campaign to beat President Poroshenko by 73% of the vote.⁹⁵ He also became the country's first Jewish President, which makes it highly unlikely that he is—as the Russians charge—a neo-Nazi.⁹⁶ But both Zelenskyy and his wife, Olena Zelenska, proved to be telegenic and media-savvy; they post on Instagram and they won “Dancing with the Stars.”⁹⁷ But nobody expected him to be what after a year, he has been revealed to be: a Ukrainian Churchill with a Zoom connection.⁹⁸ As this crisis has worn on, he has proven to be a courageous leader with extraordinary capacity to spread and amplify his voice through social media.⁹⁹

At first, few people took Zelenskyy seriously: certainly not Putin or former U.S. President Donald Trump. Recall President Zelenskyy's famous July 2019 call to Trump, where he makes a perfectly reasonable foreign affairs request.¹⁰⁰ Facing pressure from Russian military action in the Donbas, Zelenskyy thanked Trump for the United States's “great support in the area of defense,” and noted that Ukraine was “almost [*sic*] ready to buy more Javelins [anti-tank weapon systems] from the United States for defense purposes.”¹⁰¹ But instead of addressing this *bona fide* national security issue, Trump responded by asking Zelenskyy to help him with a partisan political priority: gathering opposition

⁹⁴ Anthony Kao, *Ukraine's “Servant of the People” Is a Hidden Gem of Political Comedy*, CINEMA ESCAPIST (June 6, 2017), <https://www.cinemaescapist.com/2017/06/ukraines-servant-people-hidden-gem-political-comedy/> [<https://perma.cc/62UK-ZHAU>]; see also *Servant of the People (English Trailer)*, YOUTUBE (Mar. 11, 2022), <https://www.youtube.com/watch?v=FJUd2GhzCm0&t=2s> [<https://perma.cc/ED8Q-8GVZ>].

⁹⁵ See *Ukraine Election: Comedian Zelensky Wins Presidency by Landslide*, BBC (Apr. 22, 2019), <https://www.bbc.com/news/world-europe-48007487> [<https://perma.cc/EPX3-P4SF>].

⁹⁶ Zoya Sheftalovich, *Ukraine's Jewish President Zelenskiy Asks Putin: ‘How Could I Be a Nazi?’*, POLITICO (Feb. 24, 2022), <https://www.politico.eu/article/ukraine-jewish-president-volodymyr-zelenskiy-how-could-i-be-a-nazi-vladimir-putin-war/> [<https://perma.cc/D2B7-98Q5>].

⁹⁷ See generally Volodymyr Zelensky (@zelenskiy_official), INSTAGRAM, https://www.instagram.com/zelenskiy_official/?hl=en [<https://perma.cc/2UU2-DCB5>]; *Volodymyr Zelensky on Dancing with the Stars Ukraine*, YOUTUBE (Mar. 7, 2022), <https://www.youtube.com/watch?v=8cAMjV0w1Qs> [<https://perma.cc/GC83-UVW8>].

⁹⁸ Stephen Collinson, *How Zelensky Changed the West's Response to Russia*, CNN (Feb. 28, 2022), <https://www.cnn.com/2022/02/28/politics/zelensky-us-response-to-russia/index.html> [<https://perma.cc/H6RH-YTTH>].

⁹⁹ Simon Shuster, *Volodymyr Zelensky Is Time's Person of the Year*, TIME (Dec. 7, 2022), <https://time.com/person-of-the-year-2022-volodymyr-zelensky/> [<https://perma.cc/53G3-XSMA>].

¹⁰⁰ *Read Trump's Phone Conversation with Volodymyr Zelensky*, CNN (Sept. 26, 2019), <https://www.cnn.com/2019/09/25/politics/donald-trump-ukraine-transcript-call/index.html> [<https://perma.cc/5B3Z-5XA3>].

¹⁰¹ *Id.*

research to use against Biden in the forthcoming 2020 presidential election.¹⁰² He famously asked: “*I would like you to do us a favor though Whatever you can do, it’s very important that you do it if that’s possible.*”¹⁰³ Trump then went on to freeze \$320 million in U.S. aid to Ukraine to leverage Zelenskyy to comply, an outrageous diversion of an official diplomatic dialogue toward personal political gain.¹⁰⁴

All of which now helps us to better understand why, in February 2022, Putin thought he could invade Ukraine with impunity. He saw a Ukraine that seemed ripe for invasion, because it was not part of NATO and was headed by an untested novice politician—a comedian, no less.¹⁰⁵ Putin thought he could marshal superior hard power: weapons, massive ground forces, and energy.¹⁰⁶ Based on the weak response to his adventurism in Crimea and the Donbas, he underestimated the likely allied response, and its capacity to mount a new round of sanctions.¹⁰⁷ He saw democracies in disarray.¹⁰⁸ He saw a United States that had elected Donald Trump as President for four years.¹⁰⁹ He saw the United States torn and divided after the January 6, 2021 attack on our Capitol, including threats of violence against the Vice President of the United States and the Speaker of the House, the second and third in the line of presidential succession.¹¹⁰ He saw a Europe riven by crisis: a Great Britain led by Boris Johnson and consumed with Brexit, turmoil in Germany and France, and the rise

¹⁰² *Id.*

¹⁰³ *Id.* (emphasis added).

¹⁰⁴ See Joshua Yaffa, *How Donald Trump Is Making it Harder to End the War in Ukraine*, NEW YORKER (Dec. 6, 2019), <https://www.newyorker.com/news/news-desk/how-donald-trump-is-making-it-harder-to-end-the-war-in-ukraine> [https://perma.cc/XG6X-86C7].

¹⁰⁵ See Mulvey, *supra* note 93; see also Scott Simon, *Zelenskyy Accepts Ukraine Cannot Become a NATO Member Until the War Ends*, NPR (June 3, 2023), <https://www.npr.org/2023/06/03/1179979756/zelenskyy-accepts-ukraine-cannot-become-a-nato-member-until-the-war-ends> [https://perma.cc/AQT2-5MPZ].

¹⁰⁶ See Mike Eckel, *Russian Officials Predicted a Quick Triumph in Ukraine. Did Bad Intelligence Skew Kremlin Decision-Making?*, RADIO FREE EUR. (Mar. 11, 2022), <https://www.rferl.org/a/russia-invasion-ukraine-intelligence-putin/31748594.html> [https://perma.cc/YD9W-MMMY].

¹⁰⁷ See Greg Sargent, Opinion, *How Putin Badly Misjudged the West, As Explained by a Russia Expert*, WASH. POST (Mar. 24, 2022), <https://www.washingtonpost.com/opinions/2022/03/24/putin-misjudged-west-ukraine-timothy-snyder/> [https://perma.cc/2544-H7K9].

¹⁰⁸ See *id.*; Alistair Coleman, *Ukraine Crisis: Russian News Agency Deletes Victory Editorial*, BBC (Feb. 28, 2022), <https://www.bbc.com/news/technology-60562240> [https://perma.cc/6ML5-3CPX].

¹⁰⁹ See, e.g., *How America Changed During Donald Trump’s Presidency*, PEW RSCH. CTR. (Jan. 29, 2021), <https://www.pewresearch.org/2021/01/29/how-america-changed-during-donald-trumps-presidency/> [https://perma.cc/EZ35-FFEC].

¹¹⁰ *Capitol Riots Timeline: What Happened on 6 January 2021?*, BBC (June 10, 2022), <https://www.bbc.com/news/world-us-canada-56004916> [https://perma.cc/7W9B-VYUR].

of authoritarian leaders in Hungary, Poland, and Turkey.¹¹¹ He expected that if Russia showed strong resolve, NATO would prove weak and easily subordinated—the so-called “Finlandization” of NATO. But instead, as President Biden noted, Putin ended up provoking the “NATO-ization of Finland” and Sweden.¹¹²

This brings us to February 2022, when not one, not two, but three Russian-Ukrainian wars broke out. First, the *kinetic war*, which began as Putin’s “shock and awe” campaign.¹¹³ He attempted to take over the whole country, hoping to work with Belarus to drive his troops in from above to seize Kyiv.¹¹⁴ When Ukraine resisted strongly, and this shock and awe strategy failed, Putin settled in instead for a brutal war of aggression, atrocity, and attrition, narrowing his focus to the more limited military objective of holding Crimea and seizing the ports to the East as well as the four eastern provinces that include the Donbas.¹¹⁵ Atrocity was always part of the program. In the words of the President Biden, Putin “[b]ombed train stations, maternity hospitals, schools, and orphanages,”¹¹⁶ directly targeting civilian infrastructure. He combined indiscriminate shelling from afar of the kind we saw in Volnovakha and Mariupol, with up-close brutality in Bucha, Irpin, and Izyum, where Russian soldiers bound and gagged civilians, raped women, shot innocents, and threw

¹¹¹ See generally John Aubrey Douglass, *What’s New About Neo-Nationalism, Anyway?*, ZOCALO PUB. SQUARE (Dec. 13, 2021), <https://www.zocalopublicsquare.org/2021/12/13/whats-new-about-neo-nationalism/ideas/essay/> [https://perma.cc/46B3-ED8J].

¹¹² Joseph Biden, President of the U.S., Remarks at Signing of the Instruments of Ratifications for the Accession Protocols to the North Atlantic Treaty for Finland and Sweden (Aug. 9, 2022) [hereinafter Biden Treaty Remarks], <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/08/09/remarks-by-president-biden-at-signing-of-the-instruments-of-ratifications-for-the-accession-protocols-to-the-north-atlantic-treaty-for-finland-and-sweden/> [https://perma.cc/2VNU-XA38] (“[Putin] wanted the [Finlandization] of NATO, but he’s getting the NATOization of Finland.”).

¹¹³ See Jim Masters, *Russia-Ukraine War: Cyberattack and Kinetic Warfare Timeline*, MSSP ALERT (Oct. 25, 2023), <https://www.msspalert.com/news/ukraine-russia-cyberattack-timeline-updates-amid-russia-invasion> [https://perma.cc/Y7TQ-VNWW]; *Russian Forces Launch Full-Scale Invasion of Ukraine*, AL JAZEERA (Feb. 24, 2022), <https://www.aljazeera.com/news/2022/2/24/putin-orders-military-operations-in-eastern-ukraine-as-un-meets> [https://perma.cc/Y92C-46FB].

¹¹⁴ *Russian Forces Launch Full-Scale Invasion of Ukraine*, *supra* note 115.

¹¹⁵ See Masters, *supra* note 113; Paul Kirby, *Donbas: Why Russia Is Trying to Capture Eastern Ukraine*, BBC (May 26, 2022), <https://www.bbc.com/news/world-europe-60938544> [https://perma.cc/XLK8-9HTA].

¹¹⁶ Joseph Biden, President of the United States, Remarks by President Biden Ahead of the One-Year Anniversary of Russia’s Brutal and Unprovoked Invasion of Ukraine (Feb. 21, 2023) [hereinafter Biden Remarks on Russian Invasion], <https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/02/21/remarks-by-president-biden-ahead-of-the-one-year-anniversary-of-russias-brutal-and-unprovoked-invasion-of-ukraine/> [https://perma.cc/5ZDL-SV3Z].

them into mass graves.¹¹⁷ Putin then tried to cover it up with the diplomatic strategy of referendum and annexation that he had previously tried in Crimea, which the U.N. General Assembly, by an overwhelming vote, immediately branded as illegitimate.¹¹⁸ But Putin underestimated the strength of western sanctions and overestimated his own resources and the peril of relying on conscripts to fight what quickly became at home a very unpopular “special military operation.”¹¹⁹

In a way that has not been fully captured by the western media, the result was that a twentieth-century Goliath (Putin’s Russia) attacked a twenty-first-century David (Ukraine).¹²⁰ Putin opened with traditional hard power: tanks, guns, and soldiers at arms.¹²¹ He shot off thousands of conventional missiles and quickly drained his military supplies.¹²² But then, because of the hard squeeze that economic sanctions put on Russia’s financial assets, he could not buy more modern military equipment.¹²³ And so, as time has gone on, the combination of sanctions and allied rearmament has forced Putin to change the

¹¹⁷ See Matthias Williams, *Eastern Ukrainian Town of Volnovakha Destroyed After Russia Invasion, Local Governor Says*, REUTERS (Mar. 12, 2022), <https://www.reuters.com/world/europe/eastern-ukrainian-town-volnovakha-destroyed-after-russia-invasion-local-governor-2022-03-12/> [<https://perma.cc/K9SN-AXC7>] (reporting evidence of war crimes in Volnovakha); *Ukraine: Deadly Mariupol Theatre Strike ‘A Clear War Crime’ by Russian Forces*, AMNESTY INT’L (June 30, 2022), <https://www.amnesty.org/en/latest/news/2022/06/ukraine-deadly-mariupol-theatre-strike-a-clear-war-crime-by-russian-forces-new-investigation/> [<https://perma.cc/9GKD-QR22>] (reporting evidence of war crimes in Mariupol, including Russia’s strike on the Mariupol drama theatre in 2022); Erika Kinetz, Oleksandr Stashevskiy & Vasilisa Stepanenko, *How Russian Soldiers Ran a ‘Cleansing’ Operation in Bucha*, ASSOCIATED PRESS (Nov. 3, 2022), <https://apnews.com/article/bucha-ukraine-war-cleansing-investigation-43e5a9538e9ba68a035756b05028b8b4> [<https://perma.cc/BX6E-25TU>] (reporting evidence of war crimes in Bucha); Zhanna Bezpiatchuk, *Irpın: Russia’s Reign of Terror in a Quiet Neigh borhood Near Kyiv*, BBC (June 8, 2022), <https://www.bbc.com/news/world-europe-61667500> [<https://perma.cc/5ZYE-5M4K>] (reporting evidence of war crimes in Irpin); Siobhan O’Grady, Anastacia Galouchka & Whitney Shefte, *In Russian-Occupied Izyum, She Was Raped and Tortured*, WASH. POST (Oct. 9, 2022), <https://www.washingtonpost.com/world/2022/10/09/izyum-rape-torture-occupation-russia/> [<https://perma.cc/5TMV-QUDR>] (reporting evidence of war crimes in Izyum).

¹¹⁸ G.A. Res. 68/262, ¶ 5 (Mar. 27, 2014) (adopting, by a vote of 100 in favor, 11 against and 58 abstentions, a resolution calling on states not to recognize the validity of the referendum and subsequent annexation of Crimea); Press Release, General Assembly, General Assembly Adopts Resolution Calling upon States Not to Recognize Changes in Status of Crimea Region, U.N. Press Release GA/11493 (Mar. 27, 2014).

¹¹⁹ See Sargent, *supra* note 107.

¹²⁰ See Masters, *supra* note 113.

¹²¹ *Id.*

¹²² *Id.*

¹²³ Agathe Demarais, *Sanctions on Russia Are Working. Here’s Why*, FOREIGN POL’Y (Dec. 1, 2022), <https://foreignpolicy.com/2022/12/01/ukraine-russia-sanctions-economy-war-putin-embargo-technology-financial-energy/> [<https://perma.cc/WZQ8-NMUQ>].

way he has had to fight this war.¹²⁴ He cannot replenish with new modern weapons, because nearly all trade and finance are being sanctioned.¹²⁵ Meanwhile, Ukraine is importing from the West high-tech military aid of the highest quality, and giving it to battle-seasoned troops who are agile, flexible, and skilled and experienced at logistics.¹²⁶ So as the war wears on, Putin is relying on increasingly obsolete war materiel, while Ukraine is staying ahead with modern targeting and weaponry.

One can think of Ukraine's counterstrategy in the kinetic war as akin to launching a full-court press in basketball.¹²⁷ Of course, the Russians are still fighting, but only in the same way as a team subjected to a full-court press is still playing basketball. The Russians may still be fighting, but they are not playing the game they prefer to play. And because of the constant pressure the Ukrainians are putting them under, the Russians are getting tired, and making mistakes, both tactical and strategic.¹²⁸ This counter-strategy and the continuing

¹²⁴ *Id.*

¹²⁵ See Press Release, Bureau of Indus. & Sec., U.S. Dep't of Com., Commerce Restricts Foreign-Made Components to Seven Iranian Entities Supplying Drones Used by Russia to Attack Ukraine (Jan. 31, 2023), <https://www.bis.doc.gov/index.php/documents/about-bis/newsroom/press-releases/3213-iran-drones/file> [<https://perma.cc/6X4R-E97N>]; Jackie Northam, *Russia's Economy Is Still Working but Sanctions Are Starting to Have an Effect*, NPR (Dec. 27, 2022), <https://www.npr.org/2022/12/27/1144226139/russia-sanctions-ukraine> [<https://perma.cc/MB4Y-XRQT>]. See generally Press Release, U.S. Dep't of Com., U.S. Department of Commerce & Bureau of Industry and Security Russia and Belarus Rule Fact Sheet (Feb. 24, 2022), <https://www.commerce.gov/news/fact-sheets/2022/02/us-department-commerce-bureau-industry-and-security-russia-and-belarus> [<https://perma.cc/2MQJ-VSHK>] (announcing the issuance of a new sanctions rule against Russia and Belarus, imposing more stringent licensing requirements for exports of designated categories and expanding restrictions on foreign-produced items for Russian and Belarusian 'military end users').

¹²⁶ See Taras Kuzio, *The West Reaps Multiple Benefits From Backing Ukraine Against Russia*, ATL. COUNCIL (Jan. 12, 2023), <https://www.atlanticcouncil.org/blogs/ukrainealert/the-west-reaps-multiple-benefits-from-backing-ukraine-against-russia/> [<https://perma.cc/Q5ED-XUAC>] (quoting General Mark Milley, U.S. Chairman of the Joint Chiefs of Staff, "Tenacity, will, and harnessing the latest technology gives the Ukrainians a decisive advantage"); see also Senior Defense Official, Dep't of Def., Senior Defense Official Holds a Background Briefing on Ukraine (Apr. 4, 2023), <https://www.defense.gov/News/Transcripts/Transcript/Article/3351824/senior-defense-official-holds-a-background-briefing-on-ukraine/> [<https://perma.cc/6M7M-EHEQ>] (describing the latest "substantial" package of security assistance sent to Ukraine, with a focus on strengthening air defense capabilities and delivering ammunition and other materiel to sustain the Ukrainian fight, as well as expanding U.S.-led training in combined arms and joint maneuver operations).

¹²⁷ I am again grateful to conversations with my friend Assistant Secretary Ambassador Jim O'Brien. See *supra* note 92, for introducing me to the comparison to basketball's "full-court press."

¹²⁸ See, e.g., Simone Shah, *The Russian Military's 4 Biggest Mistakes in Ukraine*, TIME (Feb. 24, 2023), <https://time.com/6258141/ukraine-russia-war-putin-military-mistakes/> [<https://perma.cc/HV7U-E4FE>]; Fred Kaplan, *Why the Russian Army Isn't Learning from Its Mistakes*, SLATE (Mar. 6, 2023), <https://slate.com/news-and->

supply of new weapons into Ukraine, combined with the lack of new supply of war materiel into Russia, is putting enormous pressure on Russia.¹²⁹ It is an extraordinary exercise in modern kinetic warfare that we have not previously witnessed. But the danger of course, is that the team putting on the full-court press, here Ukraine, will also become exhausted by playing its draining counter-strategy, especially as its counter-offensive wears on, after being launched during the summer of 2023. As the counter-offensive reaches stalemate, the question increasingly becomes: who will break first, as the battlefield struggle continues?

The second war was a *cyber war*, started the day *before* the Russian attack on the ground.¹³⁰ Microsoft's information system has documented that the Russians coordinated cyber-attacks on forty-eight Ukrainian governmental entities, trying to compromise their computers and spreading wiper malware of the kind that Russian military intelligence (the GRU) perfected through their hacking unit, Sandworm, after it deployed the famous NotPetya virus, which had paralyzed the Ukrainian computer system in 2017.¹³¹ Alongside this malware attack, the Russians positioned disinformation and false narratives aimed at four different groups.¹³² They essentially told the Russian people, "We're going to win."¹³³ They told the Ukrainian people, "Give Up."¹³⁴ They

politics/2023/03/ukraine-war-why-russia-army-isnt-learning-from-its-mistakes.html [https://perma.cc/CC5Z-9TMQ].

¹²⁹ See Kuzio, *supra* note 126.

¹³⁰ MICROSOFT, DEFENDING UKRAINE: EARLY LESSONS FROM THE CYBER WAR 7 (June 2022) [hereinafter DEFENDING UKRAINE], <https://query.prod.cms.rt.microsoft.com/cms/api/am/binary/RE50KOK> [https://perma.cc/N5U5-R97F].

¹³¹ *Id.* at 2–7; ANDY GREENBERG, SANDWORM: A NEW ERA OF CYBERWAR AND THE HUNT FOR THE KREMLIN'S MOST DANGEROUS HACKERS 182–84 (2019).

¹³² DEFENDING UKRAINE, *supra* note 130, at 3.

¹³³ See Shannon Bond, *How Russia Is Losing—and Winning—the Information War in Ukraine*, NPR (Feb. 28, 2023), <https://www.npr.org/2023/02/28/1159712623/how-russia-is-losing-and-winning-the-information-war-in-ukraine> [https://perma.cc/4XV5-UYXU].

¹³⁴ See David Klepper, *Word War: In Russia-Ukraine War, Information Became a Weapon*, ASSOCIATED PRESS (Feb. 23, 2023), <https://apnews.com/article/russia-ukraine-technology-politics-782d23450e93b667afd7b57e0bba365f> [https://perma.cc/2L49-TUSW] (“Russia’s information agencies flooded Ukraine with propaganda, calling its military weak and leaders ineffective and corrupt.”).

told the United States and Europe, “Stay out.”¹³⁵ And they told the non-aligned nations, “Side with us, not Ukraine.”¹³⁶

In fact, all but one of these propaganda campaigns seems to have failed. The sole successful campaign has been their propaganda campaign to their own Russian people over the age of 50, who like their American counterparts, still watch television.¹³⁷ These older Russians, who have been deluged with television messages about how Russia is winning the war, tend to believe it and share Putin’s disdain for Ukraine.¹³⁸ But younger Russians, who access and rely on social media and can get to other nongovernmental websites, are not buying the Kremlin’s slanted message; they are getting more grim information from videos from the front that graphically depict the debacle unfolding there.¹³⁹

¹³⁵ Andrew Meldrum, *Russia Official Warns West of ‘Global Catastrophe’ for Arming Ukraine*, PBS NEWS HOUR (Jan. 22, 2023), <https://www.pbs.org/newshour/world/russia-official-warns-west-of-global-catastrophe-for-arming-ukraine> [https://perma.cc/F44G-ACE4]; see, e.g., David Klepper, *Russia’s Information War Expands Through Eastern Europe*, ASSOCIATED PRESS (July 15, 2022), <https://apnews.com/article/russia-ukraine-nato-bulgaria-misinformation-eastern-europe-0e87db7fef9263a465d6cf40d3287efe> [https://perma.cc/4GLF-GXPU].

¹³⁶ See, e.g., Mary Blankenship & Aloysius Uche Ordu, *Russian Disinformation in Africa: What’s Sticking and What’s Not*, BROOKINGS (Oct. 17, 2022), <https://www.brookings.edu/blog/africa-in-focus/2022/10/17/russian-disinformation-in-africa-whats-sticking-and-whats-not/> [https://perma.cc/M95K-EN5M] (tracking Russia’s social media propaganda efforts targeted at African nations as the war has progressed); see also Bond, *supra* note 133 (noting that Kremlin’s propaganda efforts have gained significant traction in Africa and Latin America, although big social media platforms’ efforts to take down Russian-linked accounts and influence campaigns are challenging their efficacy).

¹³⁷ See, e.g., Kseniya Kizlova & Pippa Norris, *What Do Ordinary Russians Really Think About the War in Ukraine?*, LONDON SCH. OF ECON. & POL. SCI.: EUR. POL. & POL’Y BLOG (Mar. 17, 2022), <https://blogs.lse.ac.uk/europpblog/2022/03/17/what-do-ordinary-russians-really-think-about-the-war-in-ukraine/> [https://perma.cc/SX7J-SBQZ].

¹³⁸ See *id.*; Jade McGlynn, *Not Just Putin*, PERSUASION (July 19, 2023), <https://www.persuasion.community/p/not-just-putin> [https://perma.cc/79DU-KHFK] (“Opposition media was officially banned . . . in March 2022, and . . . the overwhelming majority of the most popular political channels are pro-war.”).

¹³⁹ See Kizlova, *supra* note 137 (noting that “modern well-educated middle-class Russians, particularly tech-savvy younger generations,” who are less reliant on television as their primary source of daily news are less likely to be swayed by Russian television-based state propaganda); Nell Clark, *Here’s How Propaganda Is Clouding Russians’ Understanding of the War in Ukraine*, NPR (Mar. 15, 2022), <https://www.npr.org/2022/03/15/1086705796/russian-propaganda-war-in-ukraine> [https://perma.cc/6A2F-FNZ9] (noting that Russians have turned to creating VPNs to mask their identities and to access blocked, independent sites such as Facebook, Twitter, and Instagram); Kyle Chayka, *Watching the World’s ‘First TikTok War’*, NEW YORKER (Mar. 3, 2022), <https://www.newyorker.com/culture/infinite-scroll/watching-the-worlds-first-tiktok-war> [https://perma.cc/JMF6-3XR5].

Ukraine thwarted the Russian cyber-offensive by developing a sophisticated hybrid cyber-defense based on the “three Ds”: detect, disrupt, and deter.¹⁴⁰ They did not concentrate, but rather distributed their digital assets, in cloud servers across Europe so the Russians could not access all of the Ukrainian cyber servers to bring them down.¹⁴¹ Meanwhile, private allies, like Microsoft and other internet service providers, used artificial intelligence to detect breaches and install corrective patches as endpoint protection.¹⁴² And so most of the cyber-attacks were headed off.¹⁴³ Other fortunate developments grew out of Ukraine’s robust public-private partnerships. Private cell phone companies extended unlimited roaming charges to Ukrainian nationals, so that they could still communicate, as they were fleeing to refuge.¹⁴⁴ Elon Musk’s Starlink satellite set up a consistent cyber connection, which allowed Zelenskyy, moving from bomb shelter to bomb shelter at night, to Zoom in to a different Parliament or Congress to deliver his message requesting global support.¹⁴⁵ And so a government fragmented by bombing attacks remained united by the World Wide Web, able to conduct the kind of public diplomacy campaign of which Winston Churchill could only have dreamed.

Meanwhile, as the war has worn on, the Russian war effort has increasingly been carried out by conscripts and mercenaries.¹⁴⁶ Recent visitors to Moscow tell me that today, you will see no military-aged men on the street. Everyone knows that if you are of a fighting age, you will be drafted and sent to the front with unsafe body armor, inadequate weapons, and outmoded communications equipment.¹⁴⁷ That is why, increasingly, we are looking at stories of internal

¹⁴⁰ See generally John P. Carlin, *Detect, Disrupt, Deter: A Whole-of-Government Approach to National Security Cyber Threats*, 7 HARV. NAT’L SEC. J. 391 (2016).

¹⁴¹ Catherine Stupp, *Ukraine Has Begun Moving Sensitive Data Outside Its Borders*, WALL ST. J. (June 14, 2022), <https://www.wsj.com/articles/ukraine-has-begun-moving-sensitive-data-outside-its-borders-11655199002> [<https://perma.cc/6LVA-CS5X>].

¹⁴² See David E. Sanger, Julian E. Barnes & Kate Conger, *As Tanks Rolled into Ukraine, So Did Malware. Then Microsoft Entered the War*, N.Y. TIMES (Mar. 1, 2022), <https://www.nytimes.com/2022/02/28/us/politics/ukraine-russia-microsoft.html> [<https://perma.cc/JT9R-B5AR>].

¹⁴³ *Id.*

¹⁴⁴ See Foo Yun Chee, *Telcos Allows Free Calls to Ukraine, Waive Roaming Charges*, REUTERS (Feb. 28, 2022), <https://www.reuters.com/business/media-telecom/telcos-allow-free-calls-ukraine-waive-roaming-charges-2022-02-28/> [<https://perma.cc/3QQC-88FW>].

¹⁴⁵ Christopher Miller, Mark Scott & Bryan Bender, *UkraineX: How Elon Musk’s Space Satellites Changed the War on the Ground*, POLITICO (June 8, 2022), <https://www.politico.eu/article/elon-musk-ukraine-starlink/> [<https://perma.cc/YLQ2-9VBF>].

¹⁴⁶ Jonathan Beale, *Russia-Supporting Wagner Group Mercenary Numbers Soar*, BBC (Dec. 22, 2022), <https://www.bbc.com/news/world-europe-64050719> [<https://perma.cc/45QT-EBYZ>].

¹⁴⁷ See Caleb Davis, *Russia Extends Conscription for Compulsory Military Service up to Age 30*, REUTERS (July 25, 2023), <https://www.reuters.com/world/europe/russian-lawmakers-vote-raise-conscription-age-limit-30-2023-07-25/> [<https://perma.cc/ES6U-6CCZ>]; Peter Aitken, *Ukraine-Russia War: Russian Troops Underfunded, Equipment Sub-*

discontent within Putin's ranks.¹⁴⁸ This discontent led, in the summer of 2023, to the extraordinary spectacle of Yevgeniy Prigozhin, the head of the mercenary Wagner Group, criticizing Putin for his inept handling of the war after the brutal siege on Bakhmut.¹⁴⁹ Prigozhin then announced a mutiny and started marching to Moscow with his mercenaries to face Putin.¹⁵⁰ For a brief time, Putin and Prigozhin were eyeball to eyeball, then both of them blinked—Prigozhin agreed to stand down and go to Belarus, accepting that his forces could be integrated into the Russian military,¹⁵¹ and Putin initially seemed to walk back his threat to punish Prigozhin for his insubordination.¹⁵² But then in August 2023, Prigozhin's plane mysteriously crashed, leading to widespread speculation that Putin had brutally assassinated him.¹⁵³

Into this mix, several teams of lawyers working for Ukraine introduced a third war, a *legal counteroffensive* or “full-court press” lawfare strategy. We

Par, According to Reports, FOX NEWS (Feb. 26, 2022), <https://www.foxnews.com/world/ukraine-russian-troops-underfunded-equipment-subpar> [<https://perma.cc/9X6L-XAFD>].

¹⁴⁸ Andrei Soldatov & Irina Borogan, *Russia's Army Is in Disarray But Will Keep Fighting*, CTR. FOR EUR. POL'Y ANALYSIS (July 14, 2023), <https://cepa.org/article/russias-army-is-in-disarray-but-will-keep-fighting/> [<https://perma.cc/4RHM-R2PB>].

¹⁴⁹ See Kaitlin Lewis, *Wagner Group Grapples with 'Failures' as Rivalry Brings Russian Rift: ISW*, NEWSWEEK (Jan. 21, 2023), <https://www.newsweek.com/wagner-group-grapples-failures-rivalry-brings-russian-rift-isw-1775484> [<https://perma.cc/C72C-76LZ>]; see also KAROLINA HIRD ET AL., INST. FOR THE STUDY OF WAR, RUSSIAN OFFENSIVE CAMPAIGN ASSESSMENT 1 (Mar. 2023), <https://www.understandingwar.org/sites/default/files/Russian%20Offensive%20Campaign%20Assessment%2C%20March%2016%2C%202023%20PDF.pdf> [<https://perma.cc/UW5Q-2HDW>] (detailing Prigozhin's campaign against the Russian military establishment); Andrew E. Kramer, *As Russia Claims Victory in Bakhmut, Ukraine Sees Opportunity Amid Ruins*, N.Y. TIMES (May 21, 2023), <https://www.nytimes.com/2023/05/21/world/europe/russia-bakhmut-battle-ukraine.html> [<https://perma.cc/9NHC-YHV6>].

¹⁵⁰ Lazaro Gamio, Marco Hernandez, Josh Holder, Anatoly Kurmanaev & Christine Zhang, *How a Rebellion in Russia Unfolded Over 36 Hours*, N.Y. TIMES (June 24, 2023), <https://www.nytimes.com/interactive/2023/06/24/world/europe/prigozhin-putin-russia.html> [<https://perma.cc/M9SQ-9WCE>].

¹⁵¹ Ivan Nechepurenko & Cassandra Vinograd, *Dismissing Rebellion as 'Minor,' Kremlin Dismantles Prigozhin's Empire*, N.Y. TIMES (June 30, 2023), <https://www.nytimes.com/2023/06/30/world/europe/kremlin-prigozhin-wagner-ukraine.html?searchResultPosition=10> [<https://perma.cc/F3GU-QSSB>].

¹⁵² See Douglas London, *How Does Putin's Response to Prigozhin's Mutiny Change the Threat from Russia?*, JUST SEC. (July 25, 2023), <https://www.justsecurity.org/87142/how-prigozhins-wagner-mutiny-impacts-the-threat-from-russia-and-putin/> [<https://perma.cc/X45X-8T39>].

¹⁵³ See generally Michael R. Gordon, Warren P. Strobel, Matthew Luxmoore & Alan Cullison, *Early Intelligence Suggests Prigozhin was Assassinated*, WALL. ST. J. (Aug. 24, 2023), <https://www.wsj.com/world/russia/wagner-prigozhin-russia-assassinated-intelligence-3e456fab> [<https://perma.cc/5CSY-H5DW>].

brought two cases before the International Court of Justice,¹⁵⁴ two under the U.N. Convention on the Law of the Sea—one at the Permanent Court of Arbitration¹⁵⁵ and another at the International Tribunal on the Law of the Sea in Hamburg.¹⁵⁶ Ukraine launched five cases before the European Commission on Human Rights in Strasbourg,¹⁵⁷ and urged and encouraged the preliminary investigation by Prosecutor Karim Khan at the International Criminal Court (ICC) that led to the issuance of an arrest warrant against Putin and a lower Russian official for the crime against humanity of stealing children.¹⁵⁸ Ukraine also brought a World Trade Organization case versus Russia on international trade and transit¹⁵⁹ and a series of international commercial arbitrations challenging expropriation of Ukrainian assets in Crimea that were owned by various previously privatized entities, some of which have already yielded multi-billion dollar judgments.¹⁶⁰

¹⁵⁴ See *Genocide Allegations Case*, *supra* note 2; *Terrorism Financing/CERD Case*, *supra* note 2.

¹⁵⁵ *Coastal State Rights Case*, *supra* note 2.

¹⁵⁶ *Detention of Three Ukrainian Naval Vessels (Ukr. v. Russ. Fed'n)*, Case No. 26, Order of May 25, 2019, https://www.itlos.org/fileadmin/itlos/documents/cases/26/published/C26_Order_20190525.pdf [<https://perma.cc/S8TG-2F3Y>].

¹⁵⁷ *Ukr. and Neth. v. Russ.*, App. Nos. 8019/16, 43800/14, 28525/20, ¶ 1 (Nov. 30, 2022), <https://hudoc.echr.coe.int/eng#%7B%22itemid%22%3A%22001-222889%22%7D> [<https://perma.cc/2WAC-75L3>]; *Ukr. v. Russ. Fed'n (re Crimea) & Ukr. v. Russ. Fed'n (VII)*, App. Nos. 20958/14 and 38334/18, ¶ 1 (Dec. 16, 2020), <https://hudoc.echr.coe.int/fre?i=001-207622> [<https://perma.cc/UEH8-8RYL>]; *Ukr. v. Russ. Fed'n (VIII)*, App. No. 55855/18, ¶ 1 (Nov. 29, 2018), <https://hudoc.echr.coe.int/eng-press#%7B%22fulltext%22%3A%2255855/18%22%5D%22sort%22%3A%22kpddate%20Descending%22%5D%22languageisocode%22%3A%22ENG%22%5D%7D> [<https://perma.cc/VE38-427Z>].

¹⁵⁸ See Leila Nadya Sadat, *Conferred Jurisdiction and the ICC's Putin and Lvova-Belova Warrants*, JUST SEC. (Apr. 21, 2023), <https://www.justsecurity.org/86079/conferred-jurisdiction-and-the-iccs-putin-and-lvova-belova-warrants/> [<https://perma.cc/B569-354L>].

¹⁵⁹ Request for the Establishment of a Panel by Ukraine, *Russia—Measures Concerning Traffic in Transit*, WTO, Doc. WT/DS512/3 (Feb. 9, 2017).

¹⁶⁰ Alison Ross, *Ukrainian Bank Wins Billion-Dollar Awards Against Russia*, GLOB. ARB. REV. (Nov. 26, 2018), <https://globalarbitrationreview.com/article/ukrainian-bank-wins-billion-dollar-award-against-russia> [<https://perma.cc/65AA-88QH>]; Luke Eric Peterson, *Russia Held Liable in Confidential Award for Expropriation of Hotels, Apartments and Other Crimean Real Estate*, INV. ARB. REP. (May 9, 2018), <https://www.iareporter.com/articles/russia-held-liable-in-confidential-award-for-expropriation-of-hotels-apartments-and-other-crimean-real-estate-arbitrators-award-approximately-150-million-plus-legal-costs-for-breach-of-ukraine-bi/> [<https://perma.cc/GQ36-VCUZ>] (approximating a \$150 million award); Tom Jones & Sebastian Perry, *Russia Ordered to Pay for Petrol Stations Seized in Crimea*, GLOB. ARB. REV. (Apr. 16, 2019), <https://globalarbitrationreview.com/article/russia-ordered-pay-petrol-stations-seized-in-crimea> (on file with the *Ohio State Law Journal*) (approximating an \$80 million award). For other published awards, see, for example, Quinn Smith, *Putin's Threat to Seize U.S. Investments Could be Costly to Russia*, BLOOMBERG L. (Mar. 31, 2022),

And so the big picture: Russia wants to regain its lost empire, but Ukraine has lived through two failed empires, and refuses to go back to an empire long passed. Russia acted through force and hard power; Ukraine resisted with smart power, democracy, international law, and alliances. Russia used aggression and atrocity as its tools; Ukraine fought back with law and diplomacy. Russia tried to treat this as a localized struggle; Ukraine instead declared it a global struggle. The Ukrainians proclaimed that this is not Ukraine versus Russia; but Russia against the world.

Increasingly, this has become a battle between Russia's past and Ukraine's future. Putin says that Ukraine must again be part of the Russian empire. But the Ukrainians see this as a struggle about the future: they want to cut off from Russian energy; they want to move to renewables; they want full independence, and they want to align with Europe.¹⁶¹ Ironically, through a combination of sanctions and foreign aid, Ukraine has started to become better integrated into the supply chains of the West.¹⁶² So Putin has, by his actions, counterproductively furthered the movement of Ukraine away from Russian influence and toward the zone of western commerce. Putin would like to refight World War II and keep fighting Nazis and fascists, even as he becomes more dictatorial himself.¹⁶³ Ukraine fights for something quite different: the right to keep choosing its own leaders.¹⁶⁴

Simply put, Russia's short game is force; Ukraine's long game is law. This has now become a war about democracies saving a democracy. The issue is whether democracies like the United States will allow an autocratic regime to destroy a new democracy by force. Underlying these three wars is the real war: Russia versus the entire post-war world legal order.

III. THE LEGAL STRATEGY AS PART OF UKRAINE'S GRAND STRATEGY

Against this historical backdrop, what grand strategy has Ukraine been pursuing?

<https://news.bloomberglaw.com/us-law-week/putins-threat-to-seize-u-s-investments-could-be-costly-to-russia> [<https://perma.cc/8HUQ-P7XV>] (indicating that at least \$50 billion in awards stand against Russia).

¹⁶¹ Zelensky, Address to U.S. Congress, *supra* note 169 (“This battle is not only for the territory . . . [t]his struggle will define in what world our children and grandchildren will live . . . [i]t will define whether it will be a democracy of Ukrainians and for Americans—for all . . . the world is too interconnected and interdependent to allow someone to stay aside and at the same time to feel safe.” (emphasis added)); *see also* Zelensky, Joint Remarks, *supra* note 169 (“Right now, in Ukraine, the destiny of the international order [sic] is decided. And we, together with President Biden and our allies and partners, have to continue doing everything possible so that the democratic world would win in this historic fight.”).

¹⁶² *Servant of the People (English Trailer)*, YOUTUBE (Mar. 11, 2022), <https://www.youtube.com/watch?v=FJUd2GhzCm0&t=2s> [<https://perma.cc/ED8Q-8GVZ>].

¹⁶³ *See* SNYDER, BLOODLANDS, *supra* note 31, at 395; Radchenko, *supra* note 48.

¹⁶⁴ *See* Bivings, *supra* note 45.

Ukraine's Grand Strategy consists, simply, of five parts: information, isolation, illegality, diplomacy, and accountability. Element one is *information*: use open sources to show that Russia's actions are pervasively illegal. Two, *isolation*: particularly through economic warfare, make Putin an isolated outlaw in an interdependent world. Third, *illegality*: brand illegal all the actions of Putin and his underlings and cronies, which furthers the objective of isolation. Fourth, *diplomacy*: inspire a process that can provoke an "Accelerated Dayton"—a comprehensive process of peace negotiations—but hopefully faster than the many years that it took finally to end the war in Bosnia.¹⁶⁵ Fifth, and finally: *accountability*. Unlike at Nuremberg, few defendants are in captivity. As yet, there is no victor, so also no victor's justice. Instead, Ukraine must pursue a "fragmented Nuremberg:" asking how best to preserve criminal and civil accountability in domestic and international fora?

Ukraine's legal approach was designed to jump start and further this grand strategy. In 2016, the Foreign Ministry of Ukraine through its co-Agents at the ICJ—presidential adviser Anton Korniyevich and Oksana Zolotaryova, Head of the International Law Department of the Ministry of Foreign Affairs—asked a legal team to work out a plan to combat Russian illegalities with international law. The team assembled included myself, partners Marney Cheek, Jonathan Gimblett, and my former senior advisor David Zions from the Washington, D.C. law firm of Covington & Burling, and as our recruited co-counsel Professor Jean-Marc Thouvenin, the Secretary-General of the Hague Academy of International Law, and on law of the sea issues, Professor Alfred Soons of the Utrecht University Institute of Public International Law.

Our first step before the invasion was to go to the International Court of Justice, where we filed two cases. First, we filed a case concerning the illegalities since 2014 in Crimea, the Donbas, and the MH-17 shoot-down under the International Convention for the Prevention of the Financing of Terrorism (ICSFT) and the Convention for the Elimination of All Forms of Racial Discrimination (CERD).¹⁶⁶ That case was filed on the first floor of the Peace Palace, where the International Court of Justice holds court.¹⁶⁷ Soon thereafter, we brought a case under the U.N. Convention on the Law of the Sea before the Permanent Court of Arbitration, which is on the second floor of the Peace Palace in the Hague, to challenge Russia's wide-ranging theft of Ukraine's maritime resources.¹⁶⁸ In both cases, we argued and won provisional measures and

¹⁶⁵ Regarding the Dayton Peace Accords, see *15 Years Ago, Dayton Peace Accords: A Milestone for NATO and the Balkans*, NATO (Dec. 14, 2010), https://www.nato.int/cps/en/natolive/news_69290.htm [<https://perma.cc/ZEC3-KYW7>].

¹⁶⁶ See generally *Terrorism Financing/CERD Case*, *supra* note 2.

¹⁶⁷ *Id.*

¹⁶⁸ Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukr. v. Russ.), Case No. 2017-06, Order of Provisional Measures (Perm. Ct. Arb. 2017); Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen (Ukr. v. Russ.), Case No. 2019-28, Award on the Preliminary Objections of the Russian Federation, at iii–2 (Perm. Ct. Arb. 2020).

overcame Russia's preliminary objections en route to merits hearings, which were held in the ICJ case in June of 2023 and are expected in the Law of the Sea case in 2024.¹⁶⁹

As our team met toward the end of 2021, Putin was loudly beating the drums of war.¹⁷⁰ Dreading what we had been hearing from press sources, we asked our Ukrainian clients: "What will you do if Putin invades Ukraine?" They said: "We hope he doesn't." But we asked again: "But if he does, what would you want us to do?" They answered: "We'd want to bring another case before the International Court of Justice."

So we began to develop a theory of that case, which has been discussed at this symposium: Putin's lies created a factual and legal dispute over fulfillment of the Genocide Convention that gives the ICJ jurisdiction. Putin was claiming that genocide has been committed by Ukraine in Luhansk and Donetsk, and Ukraine disagreed, fostering a factual dispute regarding whether genocide is occurring in the Donbas. Those lies also created a legal dispute about whether Ukraine's actions give Russia any lawful basis to take military action in and against Ukraine to prevent and punish the so-called genocide. So on Putin's lies, we founded jurisdiction.

Initially, some commentators questioned whether this theory could work because most applicants do not seek declarations that they are *not* violating a treaty, which is what Ukraine was arguing as the applicant.¹⁷¹ But Article IX of the Genocide Convention says that "disputes . . . relating to the interpretation, application, *or fulfillment* of the [Genocide] Convention" fall within the Court's jurisdiction under the Convention.¹⁷² As Ukraine argued at the preliminary objections phase in September 2023, if Article IX grants jurisdiction to hear a case leveling a claim of genocide, it should equally grant jurisdiction to hear a

¹⁶⁹ *Id.* ¶¶ 154–55.

¹⁷⁰ *See supra* notes 107–14 and accompanying text.

¹⁷¹ *See, e.g.,* Marko Milanovic, *Ukraine Files ICJ Claim against Russia*, EUR. J. INT'L L.: TALK! (Feb. 27, 2022), <https://www.ejiltalk.org/ukraine-files-icj-claim-against-russia/> [<https://perma.cc/T5H5-AWFE>] (opining that the legal theory would likely merit a grant of provisional measures but expressing doubt in its chances of success on the merits); *see also* Jaime Lopez & Brady Worthington, *What's the Status of Ukraine's Case Against Russia at the ICJ?*, LAWFARE (Apr. 21, 2022), <https://www.lawfareblog.com/whats-status-ukraines-case-against-russia-icj> [<https://perma.cc/NRU4-B6NG>] ("Ukraine may be facing an uphill battle on its request[] . . . as the crux of its argument rests on the Genocide Convention, which contains explicit provisions for punishing perpetrators of genocide but not for those misinterpreting its terms.").

¹⁷² Convention on the Prevention and Punishment of the Crime of Genocide art. IX, Dec. 9, 1948, S. Exec. Doc. O, 81-1 (1949), 78 U.N.T.S. 277 (emphasis added). For elaboration of these arguments at the September 2023 preliminary objections hearing, *see Professor Koh Asks, supra* note 2 (noting that on Sept. 20, 2023, thirty-two states who had agreed to be bound by the Court's judgment intervened in support of Ukraine, arguing in an unprecedented and unified voice that the dispute before the Court raises a question of "interpretation, application or fulfillment" of the Convention that falls under Article IX, the Genocide Convention's dispute-settlement clause).

case *disputing* such a claim.¹⁷³ Both cases involve a contracting party's abuse and non-fulfillment of the Convention, thus conferring jurisdiction on the ICJ to decide the legality of Russia's bad-faith claim of genocide against Ukraine.¹⁷⁴

After offering this theory, we initially heard nothing back. But two days after the invasion, we got a call from our clients. They were in the Carpathian Mountains, exhausted and distraught. They said, "We have driven for 26 hours to a mountain lodge. We have rolling suitcases that contain the hard drives of every computer from the Foreign Ministry's legal department. Please file this case." So we did, and President Zelensky tweeted about the filing that same night.¹⁷⁵

At the time, I was on sabbatical as the George Eastman Visiting Professor at Oxford University and my daughter Emily was visiting me. I feared that I was about to get COVID-19, so we agreed to go to the Hague before I got sick, and could no longer get in to the country to argue the case. Thankfully, I didn't get COVID, and when we arrived in the Hague, our spirits were lifted when we found everywhere on the streets of signs expressing Dutch solidarity with Ukraine.¹⁷⁶

On March 7, 2022, we appeared before the Court in a COVID environment—each attorney in his or her own little glass booth, wearing a mask. The judges were also masked in their individual booths, and four of the judges appeared remotely on Zoom. The Russians did not appear because the invasion had proven to be the last straw for their lawyers, who resigned from the representation.¹⁷⁷ I gave the closing for Ukraine in the provisional measures argument. In preparing my argument, I decided to pull together all of this history, just recounted, to try to put the magnitude of the issue before the Court. As litigators know, it is a familiar tactic on a preliminary injunction motion or its equivalent to speak to the court in three steps.

First, you ask the Court, "In the face of such gross injustice, which all of us can see, are you powerless?" We were witnessing the very case, I argued, about which every international lawyer has nightmares: "[when] a permanent member

¹⁷³ See *Professor Koh Asks*, *supra* note 2.

¹⁷⁴ *Id.*

¹⁷⁵ Volodymyr Zelenskyy (@ZelenskyyUa), TWITTER (Feb. 27, 2022, 5:46 AM), <https://twitter.com/ZelenskyyUa/status/1497885721931268103> [<https://perma.cc/JX9E-E2F3>] ("Ukraine has submitted its application against Russia to the ICJ. Russia must be held accountable for manipulating the notion of genocide to justify aggression.").

¹⁷⁶ See, e.g., #StandWithUkraine: An Overview of Fundraisers, Protests and Actions in the Netherlands, NETH. HELSINKI COMM. (Mar. 3, 2022), <https://www.nhc.nl/ukraine-what-can-we-do-netherlands/> [<https://perma.cc/A6XQ-9GYM>].

¹⁷⁷ See, e.g., Cosmo Sanderson, *Pellet and Curtis Cease Counsel Work for Russia*, GLOB. ARB. REV. (Mar. 1, 2022), <https://globalarbitrationreview.com/pellet-and-curtis-cease-counsel-work-russia> [<https://perma.cc/7FRW-D9XX>]; see also Alain Pellet, Justine Batura, Julian A. Hettihewa & Polina Kulish, *An Interview with Alain Pellet*, VÖLKERRECHTSBLOG (Apr. 7, 2022), <https://voelkerrechtsblog.org/i-resigned-because-russia-had-become-an-absolutely-indefensible-client/> [<https://perma.cc/6YW2-MG3T>].

of the Security Council, with planned premeditation, [commits] naked aggression and war crimes by launching a broad and brutal military campaign against an innocent neighbour and its civilian population . . . is this Court utterly powerless to stop it?”¹⁷⁸ To which the answer must be, “No!” Because, if the answer were “yes,” what value would international law have? I was saying, in effect, “you cannot do nothing, because the tragedy in Kyiv is exactly what our international legal system was designed to prevent.”

Second, I asked, “If this Court cannot decisively order Russia to stop its military actions, grounded in flagrant abuse of and disrespect for the Genocide Convention, why should any Permanent-5 United Nations Member see international law as a meaningful obstacle to whatever it might perceive as ‘necessary military action’? Then why would we not be forced to concede that the post-war international legal project has failed?”¹⁷⁹ As the former Legal Adviser of the U.S. government—a UN Security Council Permanent-5 member viewed with suspicion by some countries around the world¹⁸⁰—I thought it critical to put the challenge directly to the Court: should the judges apply one set of rules to powerful nations and another set of rules to the less powerful ones?

Third and finally, as litigators do, I reassured the Court that we were not asking it to do too much. The Court had already issued orders like the one we were requesting. I recited many examples of past provisional measures they had issued,¹⁸¹ which looked like what we were requesting, to reassure them that “You don’t have to do everything. But you must do something and do it quickly, because yours is the signal that sends the message to the rest of the U.N. system that all international institutions must work together to prevent this attack against the entire post-war international legal framework.” I closed by saying, “The provisional measures Ukraine requests are reasonable, achievable and grounded in the very measures you have granted in the past. You have undeniable legal authority to act legal authority to act. Anything less would fail to vindicate the rule of international law under these most dire of circumstances . . . the world awaits your actions.”¹⁸² In other words: “you know

¹⁷⁸ Transcript of Oral Argument at 59, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ. Fed’n)* (Mar. 7, 2022), <https://www.icj-cij.org/sites/default/files/case-related/182/182-20220307-ORA-01-00-BI.pdf> (on file with the *Ohio State Law Journal*).

¹⁷⁹ *Id.* at 68.

¹⁸⁰ See, e.g., RICHARD WIKE, JANELL FETTEROLF, MOIRA FAGAN & SNEHA GUBBALA, PEW RSCH. CTR., *INTERNATIONAL ATTITUDES TOWARD THE U.S., NATO AND RUSSIA IN A TIME OF CRISIS* 5, 13 (June 2022), https://www.pewresearch.org/global/wp-content/uploads/sites/2/2022/06/PG_2022.07.22_U.S.-Image_FINAL.pdf [<https://perma.cc/WC3D-TWM2>] (noting that, of 17 countries surveyed, a median of 61% have a favorable view of the U.S., and 35% an unfavorable view).

¹⁸¹ See generally Transcript of Oral Argument, *supra* note 190.

¹⁸² *Id.* at 68.

how urgent the situation is. The whole world is watching. You must act, and soon.”

Nine days later they did, in a decisive vote—thirteen to two, only the Russian and Chinese judges dissenting—ruling that Russia should immediately suspend all military and paramilitary operations in the territory of Ukraine, a category that covers the activities of the Wagner Group.¹⁸³ Second and unanimously, the judges ruled that for the duration of the lawsuit, Russia could not aggravate or extend the dispute, for example, by moving to use of thermobaric, hypersonic or even nuclear weapons.¹⁸⁴

When our ruling was reported in the press, I got a call from an American reporter who asked, “But isn’t this a toothless order? Isn’t it true that the ICJ cannot enforce its own ruling?” To which I responded, “Excuse me. No court in the world, including the United States Supreme Court, can enforce its own ruling. Do you believe that Putin has violated international law?” He answered, “Yes.” I pressed him further: “And how do you know?” At first he said, “The U.N. has spoken against it and NATO has spoken against it, and everyone has said it’s illegal.” So I asked, “Whose declaration of illegality matters most?” And he answered, “Well, this Court said it; the ICJ just said it.” I told him, “That’s exactly the point. As our Supreme Court said in *Marbury v. Madison*, ‘it is the province and the duty of the judicial department to say what the law is,’¹⁸⁵ to dispel the veneer of legality around Putin’s actions.” And then, through transnational legal process, *everyone* is empowered to enforce that norm.¹⁸⁶ Everyone can help enforce the court order. Every actor in the international system is now legally entitled to stop Russian aggression, to sanction the perpetrators, and to bring the perpetrators to justice.

In short, the ICJ ruling has had multiple impacts in implementing the five-point grand strategy described above: to brand Putin an outlaw as part of a broader approach of illegality, information-sharing, isolation, accountability, and diplomacy. The ruling likely helped keep China and India on the sidelines, not taking more open steps to support Russian aggression, by sending a warning to China’s Xi Jinping and India’s Narendra Modi that giving lethal aid to Russia would be supporting a direct violation of the international court order.¹⁸⁷ China

¹⁸³ See *Genocide Allegations Case*, *supra* note 2, ¶ 86.

¹⁸⁴ *Id.*

¹⁸⁵ See *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 177 (1803).

¹⁸⁶ See generally Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2601–03 (1997) (describing how transnational legal process works).

¹⁸⁷ See David E. Sanger & Edward Wong, *Biden Warns China of ‘Consequences’ if It Aids Russia in Ukraine War*, N.Y. TIMES (Mar. 18, 2022), <https://www.nytimes.com/2022/03/18/world/europe/biden-xi-russia-china.html> [<https://perma.cc/336X-A2CE>] (citing conversations between President Biden and President Xi Jinping of China, as well as statements of other key U.S. officials, warning of “implications and consequences,” should China give material aid to support Russia in its war in Ukraine).

in particular has always been very careful not to be found in violation of international law—the Chinese always have an argument, even in the South China Sea, about why they are not violating international law.¹⁸⁸ To keep China on the sidelines, the Biden Administration and the NATO alliance released their intelligence early as a way of evoking a public reaction that would create a deterrent against the Chinese leadership openly giving Russia lethal weapons.¹⁸⁹

At the same time, the Court's provisional measures order gave other U.N. Member states a legal ruling they could support. In the *Genocide Allegations* preliminary objections hearing in the fall of 2023, more than thirty U.N. member states intervened to argue in favor of jurisdiction on Ukraine's side.¹⁹⁰ I told the Court that the sole question before it at the jurisdictional stage was, "may a powerful State could falsely accuse its neighbor of genocide, then use illegal force to kill its citizens, devastate their homeland, and destabilize the global legal order on the pretext of preventing and punishing genocide?"¹⁹¹ The Court's decision on that question, I argued, "will help define the scope of this Court's power to stop the flagrant abuse of the world's most important human rights treaty."¹⁹²

The Court's branding Russia's actions as presumptively illegal has also helped to isolate Putin and his cronies by making them today's Pinochets.¹⁹³ Think about how much Putin's freedom has been limited by the Court's order and the crushing collective sanctions that have been imposed based upon the illegality of his actions. Now, he can no longer travel far outside of Russia.¹⁹⁴

¹⁸⁸ In the case of the South China Sea Arbitration, in addition to its substantive arguments in justification for the "Nine-Dash Line," China opted neither to accept nor to participate in the proceedings. For a summary of China's position of non-acceptance, see South China Sea Arbitration (Republic of the Phil. v. China), Case No. 2013-19, Judgment, ¶ 146 (Perm. Ct. Arb. 2016). For China's substantive arguments, see *id.* ¶¶ 172–87.

¹⁸⁹ See Patrick Wintour, *China May Be on Brink of Supplying Arms to Russia, Says Blinken*, GUARDIAN (Feb. 19, 2023), <https://www.theguardian.com/world/2023/feb/19/china-may-be-on-brink-of-supplying-arms-to-russia-says-blinken> [<https://perma.cc/Y42U-N4T2>].

¹⁹⁰ See *Latest Developments: Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ. Fed'n)*, INT'L CT. OF JUST., <https://www.icj-cij.org/case/182> [<https://perma.cc/GQ8M-ZB4Y>] (noting 32 intervening states).

¹⁹¹ See *id.*

¹⁹² See *id.*; see also Professor Koh Asks, *supra* note 2.

¹⁹³ Anders Åslund, *Putin the Pariah: War Crimes Arrest Warrant Deepens Russia's Isolation*, ATL. COUNCIL (Mar. 19, 2023), <https://www.atlanticcouncil.org/blogs/ukrainealert/putin-the-pariah-war-crimes-arrest-warrant-deepens-russias-isolation/> [<https://perma.cc/4FVH-FYDF>].

¹⁹⁴ *Id.*; see also Gerald Imray, *Why Putin is Dialing in to the BRICS Summit Rather Than Attending in Person*, TIME (Aug. 21, 2023), <https://time.com/6307033/vladimir-putin-brics-summit-icc-warrant/> [<https://perma.cc/6JQR-SECC>] (Putin skipped attending in person the South African meeting of heads of state of Brazil, Russia, India, China, and South Africa (BRICS) to avoid being subject to International Criminal Court arrest warrant).

His children similarly cannot travel.¹⁹⁵ He cannot move his money.¹⁹⁶ His friends are being punished for being associated with him: they are losing their mansions, their yachts and their football teams.¹⁹⁷ So, Putin himself has become increasingly toxic and isolated.¹⁹⁸

Finally, the ruling should help dispel the controversy over the Court's jurisdiction. For whatever continuing debate there may be about the Court's jurisdiction over the merits, there can be no doubt that the Court has jurisdiction to rule on Russia's flagrant and continuing violation of its own March 16, 2022 provisional measures order.¹⁹⁹ Given that billions of dollars of Russia's assets have now been frozen, the Court can now move to a final judgment, followed by hearings in which the judges issue a court order that allocates a lump sum that could be awarded to Ukraine and its people from those immobilized funds.²⁰⁰ Such a judicial award would make clear, as a matter of international law, that Putin would not be entitled to have all Russia's assets returned if and when the assets became unfrozen as part of any subsequent political deal.

¹⁹⁵ Åslund, *supra* note 193.

¹⁹⁶ Press Release, U.S. Dep't of the Treasury, U.S. Treasury Imposes Sanctions on Russian Federation President Vladimir Putin and Minister of Foreign Affairs Sergei Lavrov (Feb. 25, 2022), <https://home.treasury.gov/news/press-releases/jy0610> [<https://perma.cc/5SWZ-QC24>].

¹⁹⁷ Megan Cerullo, *West Hits Russian Oligarchs Where It Hurts—Their Mega-Yachts*, CBS NEWS (Mar. 7, 2022), <https://www.cbsnews.com/news/russia-ukraine-oligarch-yacht-biden-task-force/> [<https://perma.cc/5KLN-XHHW>].

¹⁹⁸ See Press Release, U.S. Dep't of Treasury, U.S. Treasury Imposes Sanctions on Russian Federation President Vladimir Putin and Minister of Foreign Affairs Sergei Lavrov (Feb. 25, 2022), <https://home.treasury.gov/news/press-releases/jy0610> [<https://perma.cc/5SWZ-QC24>]; see also Brooke Harrington, *The Russian Elite Can't Stand the Sanctions*, ATLANTIC (Mar. 5, 2022), <https://www.theatlantic.com/ideas/archive/2022/03/russian-sanctions-oligarchs-offshore-wealth/623886/> [<https://perma.cc/JUB5-EBJH>].

¹⁹⁹ See *Genocide Allegations Case*, *supra* note 2, ¶¶ 48–49.

²⁰⁰ See W. M. Reisman, *The Enforcement of International Judgments*, 63 AM. J. INT'L L. 1, 2, 9, 18 (1969) (arguing that a general principle of law recognized by civilized nations, incorporated in the Statute of the Court at Art. 38(1), is the unlawfulness of abetting non-compliance. Therefore, states are compelled to aid enforcement, either by intervening states transferring assets to the creditor state by executive action, or by the injured state (Ukraine) moving “that an international organization [] ‘enjoin’ [the state in possession of frozen assets] to transfer the assets, thereby permitting [them] to participate in enforcement without bearing primary responsibility”). As Prof. Reisman notes, an analogous approach to the former was used in the *Monetary Gold* ICJ case. *Id.* at 19–20. For an argument urging the United States to use its domestic laws to transfer frozen Russian sovereign assets to Ukraine's use, see generally LAURENCE H. TRIBE, RAYMOND P. TOLENTINO, KATE M. HARRIS, JACKSON ERPENBACH & JEREMY LEWIN, RENEW DEMOCRACY INITIATIVE, MAKING PUTIN PAY: THE LEGAL, PRACTICAL, AND MORAL CASE FOR TRANSFERRING RUSSIAN SOVEREIGN ASSETS TO UKRAINE (Sept. 2023), https://rdi.org/wp-content/uploads/2023/10/RDI-Making-Putin-Pay-Report-September-2023_compressed-1.pdf [<https://perma.cc/3CXN-ECVL>].

In sum, by bringing these cases before international courts, we have put the history of Russia's illegality before the world: the *Terrorism Financing/CERD* case has revealed the illegality that has unfolded on land since 2014; the *Genocide Allegations* case has revealed the even greater illegality that followed with the full-scale land invasion of 2022, and the law of the sea case has unveiled Russia's violations of the law of the sea in the Black Sea and the Sea of Azov. By winning the provisional measures ruling in *Genocide Allegations* case, we strengthened the collective case for sanctions; we pushed forward the issue of civil reparations; we gave legal support to the NATO alliance's objectives; and we discouraged other U.N. members from joining in to support Russia's illegality. In short, our legal win helped to align Ukraine's legal strategy with Biden's diplomatic strategy, with the EU's political strategy, and with Ukraine's grand strategy: reaffirming that Ukraine's long game is law, in a battle that is not just Russia against Ukraine, but Russia against the postwar international legal order.

IV. THE ROAD AHEAD

So what is now the road ahead? One initial thought had been to try to use the procedural mechanism envisioned in Article 27(3) of the UN Charter to disable Russia from voting against a Security Council resolution because that provision bars "parties to a dispute" from voting in the Security Council.²⁰¹ But many U.N. member states felt more comfortable proceeding by General Assembly Resolution under the Korean War "Uniting for Peace" Resolution.²⁰² Almost immediately, the General Assembly held an extraordinary special session to discuss and condemn the war, and in the months since, it has held multiple follow-on, extraordinary special sessions on Ukraine.²⁰³

With respect to accountability, a road sign from Ukraine tells the story: all roads lead to the Hague. The way forward on accountability, as I have suggested, is a "Fragmented Nuremberg:" pursuing multiple forms of accountability in multiple forums against multiple defendants. Ukraine has generally been willing to support any institution that can achieve meaningful accountability, and—using as a blueprint the Milosevic and Karadzic trials at the International Criminal Tribunal for the former Yugoslavia (ICTY)—can gather an archive of criminal and civil prosecution capacity in both domestic and international courts and overcome jurisdiction and immunity barriers. The U.N. General Assembly

²⁰¹ U.N. Charter art. 27, ¶ 3 (mandating that "a party to a dispute shall abstain from voting" for a decision of the Security Council). For historical examples of when this provision has been invoked, see SEC. COUNCIL REP. ARTICLE 27(3) AND PARTIES TO A DISPUTE: AN ABRIDGED HISTORY (Apr. 2014), https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/article_27_3_and_parties_to_a_dispute.pdf [https://perma.cc/37ER-N7SQ].

²⁰² G.A. Res. 377 (V), at 10–11 (Nov. 3, 1950).

²⁰³ G.A. Res. ES-11/1 (Mar. 2, 2022).

has passed an important resolution about securing assets for civil compensation and creating a registry.²⁰⁴ On criminal accountability, three prongs are being pursued: domestic prosecutions in Ukraine,²⁰⁵ joint referral by forty-three States of ongoing crimes against humanity to the International Criminal Court,²⁰⁶ and extensive discussion about a possible Aggression Tribunal,²⁰⁷ the solution that is furthest away from becoming a reality.

On information, the goal is to support these avenues of accountability by using all open sources to create a global focal point of evidence-gathering. Multiple information streams are contributing to this effort. U.S. Director of National Intelligence Avril Haines set up an interagency task force cooperating with other governments to share sources of information about war crimes and atrocities, and the U.S. Embassy at the Hague, which was decommissioned during the Trump Administration as a central repository of intelligence on war crimes, has revived that function.²⁰⁸ Information from the U.N. High Commissioner on Human Rights and various Special Rapporteurs investigating the crisis in Ukraine are being assembled.²⁰⁹ Nongovernmental organizations

²⁰⁴ Press Release, General Assembly, General Assembly Adopts Text Recommending Creation of Register to Document Damages Caused by Russian Federation Aggression Against Ukraine, Resuming Emergency Special Session, U.N. Press Release GA/12470 (Nov. 14, 2022).

²⁰⁵ See, e.g., ABA Law Student Podcast, *Russia v. Ukraine: The Policy and Legal Considerations of an Unprovoked Attack on a Sovereign Nation*, LEGAL TALK NETWORK, at 20:01 (Mar. 8, 2022), <https://legaltalknetwork.com/podcasts/aba-law-student-podcast/2022/03/russia-v-ukraine-the-policy-and-legal-considerations-of-an-unprovoked-attack-on-a-sovereign-nation/> [<https://perma.cc/S2V4-2W4M>].

²⁰⁶ *Situation in Ukraine*, INT'L CRIM. CT., <https://www.icc-cpi.int/situations/ukraine> [<https://perma.cc/938R-NMLM>].

²⁰⁷ See, e.g., Glenn Thrush & Charlie Savage, *State Dept. Proposes Joint Tribunal to Try Russian Leaders*, N.Y. TIMES (Mar. 28, 2023), <https://www.nytimes.com/2023/03/28/us/politics/state-dept-tribunal-ukraine-war-crimes.html> [<https://perma.cc/U9RZ-ZTH6>].

²⁰⁸ See Avril Haines, Dir. of Nat'l Intel., Opening Statement on the 2023 Annual Threat Assessment of the U.S. Intelligence Community (Mar. 8, 2023), <https://www.dni.gov/index.php/newsroom/congressional-testimonies/congressional-testimonies-2023/3685-dni-haines-opening-statement-on-the-2023-annual-threat-assessment-of-the-u-s-intelligence-community> [<https://perma.cc/D9C4-C2EY>] (“The [U.S. Intelligence Community] is engaged with other parts of the U.S. Government to document and hold Russia and Russian actors accountable for their actions.”); see also Teleconference with Beth Van Schaack, Ambassador-At-Large for Glob. Crim. Just., Off. of Glob. Crim. Just. (Nov. 21, 2022), <https://www.state.gov/briefing-with-ambassador-at-large-for-global-criminal-justice-beth-van-schaack-on-justice-and-accountability-for-russias-atrocities-in-ukraine/> [<https://perma.cc/6F9M-V2FK>] (“[T]he war crimes units within Europe are—and elsewhere are increasingly interoperable. These entities and prosecutors are sharing information and strategies. They’re sharing personnel. And they’re all engaged in efforts to advance the cause of justice under all available jurisdictional bases.”).

²⁰⁹ See Press Release, Hum. Rts. Council, President of Human Rights Council Appoints Members of Investigative Body in Ukraine (Mar. 30, 2022), <https://www.ohchr.org/en/press->

like Human Rights Watch, Human Rights First, and Ukrainian NGOs like Truth Hounds and excellent investigative websites like Bellingcat are working to find information.²¹⁰ And digital crowdsourcing is being pursued by many organizations, including, for example, Conflict Observatory,²¹¹ Eyewitness,²¹² and my colleagues at the Yale School of Public Health, whose Humanitarian Research Lab has been publishing its findings derived from tapping into satellites passing over the conflict zone to identify the presence of filtration camps.²¹³

Two further steps are stating a clear theory of command responsibility and clarifying the broad pattern of international criminal violations: war crimes and crimes against humanity committed by atrocities in service of annexation.²¹⁴ Speeches given by President Biden in Warsaw²¹⁵ and Vice President Harris in Munich,²¹⁶ included gender violence, forced displacement, and the stealing of children on their lists of Putin's war crimes. To that list could and should be added such issues as the unlawful use of hypersonic weapons, filtration camps, family separation, killing children, and environmental threats at Zaporizhzhya,²¹⁷ which without close attention could tragically become a new Chernobyl. Aggression is easier to prove, because Putin's command responsibility decisions are on the public record.²¹⁸ But even as the Biden

releases/2022/03/president-human-rights-council-appoints-members-investigative-body-ukraine [https://perma.cc/3HGX-NTYT].

²¹⁰ See generally *Russia-Ukraine War*, HUM. RTS. WATCH, <https://www.hrw.org/tag/russia-ukraine-war> [https://perma.cc/7JK5-BZX6]; *Our Activity*, TRUTH HOUNDS, <https://truth-hounds.org/en/our-activity/> [https://perma.cc/23DU-NSWH]; *Ukraine*, BELLINGCAT, <https://www.bellingcat.com/tag/ukraine/> [https://perma.cc/4T9V-PCY2].

²¹¹ The Conflict Observatory has produced comprehensive, open-source reports on war crimes and other atrocities perpetrated by Russia in Ukraine. See, e.g., *Recent Reports*, CONFLICT OBSERVATORY, <https://hub.conflictobservatory.org/portal/apps/sites/#/home/> [https://perma.cc/6SEQ-KYWS].

²¹² *Ukraine—Resources Hub*, EYEWITNESS, <https://www.eyewitness.global/ukraine-resources-hub> [https://perma.cc/2A3B-4HLX].

²¹³ Ashley Liebre, *Humanitarian Research Lab Documenting Potential War Crimes in Ukraine*, YALE PUB. HEALTH MAG., Fall 2022, at 14, 15, https://ysph.yale.edu/about-school-of-public-health/communications-public-relations/publications/public-health-magazine/pdf-issues/ysph%20fall%202022_452416_56245_v6.pdf [https://perma.cc/AA4F-CAPZ].

²¹⁴ The theory of command responsibility is deeply entrenched in international humanitarian law doctrine. See generally William H. Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1 (1973).

²¹⁵ Biden Treaty Remarks, *supra* note 95.

²¹⁶ Kamala Harris, Vice President of the U.S., Remarks by Vice President Harris at the Munich Security Conference (Feb. 18, 2023).

²¹⁷ *Id.*; see also Press Release, Security Council, United Nations 'Gravely Concerned' by Situation at Zaporizhzhia Nuclear Power Plant in Ukraine, Political Affairs Chief Tells Security Council, U.N. Press Release SC/15003 (Aug. 23, 2022).

²¹⁸ See, e.g., Joe Walsh & Zachary Snowdon Smith, *Russia Orders 'Special Military Operation' In Ukraine*, FORBES (Feb. 23, 2022),

Administration is determined to delegitimize Putin by making him a war criminal, it is trying to keep the door open for a post-Putin Russia's return to the community of lawful nations. For that reason, Biden's 2023 State of the Union address never mentioned Russia as an adversary; he said only that "Putin" had started "a brutal war."²¹⁹ In another recent speech, he said to the Russian people, in effect: "We don't want to have a war with you. Please rid yourself of Putin, so we can start to make peace."²²⁰

This seems like a prime moment to get certain legislators who had previously been skeptical about the ICC, but are now interested in Ukraine accountability, to modify past U.S. legislation like the American Servicemembers Protection Act (ASPA)²²¹ by voting for and enacting legislation that would explicitly support the United States government sharing information with prosecutors in Ukraine and at the International Criminal Court. The ASPA includes the Dodd Amendment (introduced by former Connecticut Senator Chris Dodd, son of a former Nuremberg prosecutor), which permits the U.S. to assist international efforts to bring to justice foreign nationals accused of genocide, war crime and crimes against humanity.²²² In December 2022, Congress also enacted the Justice for Victims of War Crimes Act, which enables prosecution of alleged war criminals in the United States without regard to the nationality of the perpetrator or victim, but did not expressly authorize U.S. information-sharing with the ICC.²²³ In this moment, legislators who had previously declared war on the ICC are finding it convenient to say nice things about it.²²⁴ They should now be pressed to follow their words with action, by

<https://www.forbes.com/sites/joewalsh/2022/02/23/russia-orders-special-military-operation-in-ukraine/?sh=6099f3842321> [<https://perma.cc/6BNU-3XAV>].

²¹⁹ Joseph Biden, President of the U.S., State of the Union Address (Feb. 7, 2023).

²²⁰ See Biden Treaty Remarks, *supra* note 95.

²²¹ See generally American Servicemembers' Protection Act of 2002, 22 U.S.C. § 7421 *et seq.* The 2003 Dodd Amendment states: "[n]othing in this subchapter shall prohibit the United States from rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosovic, Osama bin Laden, other members of Al Queda [*sic*], leaders of Islamic Jihad, and other foreign nationals [such as Putin and his underlings] accused of genocide, war crimes or crimes against humanity." See generally Floriane Lavaud, Ashika Singh & Isabelle Glimcher, *The American Servicemembers' Protection Act and the Dodd Amendment: Shaping United States Engagement with the ICC (Part II)*, JUST SEC. (Feb. 14, 2023), <https://www.justsecurity.org/85121/the-american-servicemembers-protection-act-and-the-dodd-amendment-shaping-united-states-engagement-with-the-icc-part-ii/> [<https://perma.cc/F2FB-2AG9>].

²²² Lavaud, Singh & Glimcher, *supra* note 221.

²²³ Paras Shah, *Congress Passes Justice for Victims of War Crimes Act*, JUST SEC. (Dec. 22, 2022), <https://www.justsecurity.org/84588/senate-passes-justice-for-victims-of-war-crimes-act/> [<https://perma.cc/CFU3-TQJK>] (amending War Crimes Prosecution Act, Pub. L. 117-351, § 2, 136 Stat. 6265).

²²⁴ See, e.g., Press Release, Ted Cruz, U.S. Sen., *The ICC's Campaign Against Our Troops Will Fail Because the United States Will Ensure That It Fails* (Mar. 5, 2020), <https://www.cruz.senate.gov/newsroom/press-releases/sen-cruz-and-039the-icc-and-039s-campaign-against-our-troops-will-fail-because-the-united-states-will-ensure-that-it-fails->

enacting concrete legislation to overcome the past legal barriers to cooperation that they helped to construct.

Hopefully, the endgame of all of this activity will be *diplomacy backed by law*: what I earlier called an “Accelerated Dayton” comprehensive peace accord. The Ukrainians have begun a process of “single-issue diplomacy” directly with the Russians, mediated by the government of Turkey and U.N. Secretary-General Guterres.²²⁵ That diplomacy enabled the Black Sea Grain Initiative, which allowed cargo ships to sail from Ukrainian ports to the Bosphorus Strait subject to a joint inspection—to ensure that no weapons are on board—under the auspices of the World Food Programme.²²⁶ Despite repeated stops and starts, the Initiative has allowed over 725,000 tons of wheat to be shipped to needy recipients in Afghanistan, Yemen, and East Africa.²²⁷ Putin initially showed some interest in some of Zelenskyy’s original peace proposals, but as Russia’s brutal offensive and Ukraine’s counteroffensive have worn on, the prospect of peace talks have moved to the back burner.²²⁸ In his speeches, Zelenskyy has announced a ten-point peace proposal, but Russia has expressed little interest in it thus far.²²⁹ There have been reports about “Track Two” negotiations, and the Pope has even offered to act as an intermediary on the humanitarian issue of restoring children to their families.²³⁰ Depending upon how Ukraine’s

and-039 [https://perma.cc/9ASE-6QSQ]. For a review of positive Republican statements about cooperation with the ICC, see Ryan Goodman, *Top Cover: Congressional Republicans Pave Way for U.S. Policy Shift on Int’l Criminal Court*, JUST SEC. (Apr. 13, 2022), <https://www.justsecurity.org/81093/top-cover-congressional-republicans-pave-wave-for-us-policy-shift-on-intl-criminal-court/> [https://perma.cc/PA83-9Z6Z].

²²⁵ *The Black Sea Grain Initiative: What It Is, and Why It’s Important for the World*, U.N. NEWS (Sept. 16, 2022), <https://news.un.org/en/story/2022/09/1126811#:~:text=The%20deal%20allowed%20export%20from,the%20rest%20of%20the%20world> [https://perma.cc/YVV3-NAGR].

²²⁶ *Id.*

²²⁷ Patrick Wintour, *What Was the Black Sea Grain Deal and Why Did It Collapse?*, GUARDIAN (July 20, 2023), <https://www.theguardian.com/world/2023/jul/20/what-was-the-black-sea-grain-deal-and-why-did-it-collapse> [https://perma.cc/L783-2642]; *WFP Chartered Grain Vessel Arrives in Yemen Following Extension of Black Sea Grain Agreement*, WORLD FOOD PROGRAMME (Apr. 17, 2023), <https://www.wfp.org/news/wfp-chartered-grain-vessel-arrives-yemen-following-extension-black-sea-grain-agreement> [https://perma.cc/384R-JLAD].

²²⁸ Rob Picheta, *Despite Putin’s Claims, Ukraine Peace Talks Look Unlikely in Near Future*, CNN (Dec. 27, 2022), <https://www.cnn.com/2022/12/27/europe/ukraine-russia-negotiations-putin-unlikely-intl/index.html> [https://perma.cc/C63U-6JT3].

²²⁹ Kanupriya Kapoor & Lidia Kelly, *Zelenskiy Urges G20 to Adopt Ukraine’s Plan to Restore Peace*, REUTERS (Nov. 15, 2022), <https://www.reuters.com/world/we-will-have-fight-longer-liberate-ukrainian-land-says-zelenskiy-2022-11-15> [https://perma.cc/JE8D-Y6E4].

²³⁰ Josh Lederman, *Former U.S. Officials Have Held Secret Ukraine Talks with Prominent Russians*, NBC NEWS (July 6, 2023), <https://www.nbcnews.com/news/world/former-us-officials-secret-ukraine-talks-russians-war-ukraine-rcna92610> [https://perma.cc/GQ6J-CAZY]; *Ukraine War: Pope Francis Reveals*

counteroffensive fares, as 2023 turns into 2024, attention may turn to diplomacy whenever both Ukraine and Russia are ready.

This leads me to my last point. In addition to the three wars I have mentioned, there is a fourth war afoot: a war of ideas. Authoritarians are attacking the global system of Kantian global governance set up after World War II to promote the notion of a federation of free states sharing democratic values. The Kantian system did not erect a world government, but rather, a United Nations: a system of democratic governments collectively promoting democracy, the rule of law and human rights.²³¹ In recent years, this system has come under severe attack. At this writing, global authoritarians—including presidential candidate Donald Trump, Viktor Orbán in Hungary, Jarosław Kaczyński in Poland, Tayyip Erdoğan in Turkey, and Nicolás Maduro in Venezuela, not to mention China’s Xi Jinping and Russia’s Putin—are all playing by the same basic playbook: demonizing immigrants, cowing legislators, disparaging multilateral bureaucrats, intimidating the judiciary, rewarding cronies, intimidating the media, and claiming that constitutional checks and balances must give way to “will of the people.”²³² The threat of some of these autocrats—Trump and Brazil’s Jair Bolsonaro, for example—lingers even after they are defeated at the polls.²³³

President Zelenskyy expressly highlighted this fourth war of ideas when he delivered his address before a joint session of the United States Congress. He said:

One year in we have defeated Russia in battle for the minds of the world. America gained this victory. That’s why you’ve succeeded *in uniting the global community to protect freedom and international law* . . . This struggle will define in what world our children and grandchildren will live . . . it will define whether it will be a democracy for all, and their children and

‘Secret Peace Mission’ Underway, Helped Mediate Prisoner Exchanges, WEEK (May 1, 2023), <https://www.theweek.in/news/world/2023/05/01/ukraine-war-pope-francis-reveals-secret-peace-mission-underway-helped-mediate-prisoner-exchanges.html> [https://perma.cc/RVG2-FG2N].

²³¹ See generally IMMANUEL KANT, TOWARD PERPETUAL PEACE: A PHILOSOPHICAL SKETCH (1795), *reprinted in* TOWARD PERPETUAL PEACE AND OTHER WRITINGS ON POLITICS, PEACE, AND HISTORY (Pauline Kleingeld ed., David L. Colclasure trans., 2006).

²³² HAROLD HONGJU KOH, THE TRUMP ADMINISTRATION AND INTERNATIONAL LAW 144–45 (2019) (discussing this war of ideas).

²³³ See, e.g., Zack Stanton, *How Trumpism Is Becoming America’s New “Lost Cause”*, POLITICO (Jan. 21, 2021), <https://www.politico.com/news/magazine/2021/01/21/trump-civil-war-reconstruction-biden-lost-cause-461161> [https://perma.cc/6TKS-GGZ2]; Diane Jeantet & David Biller, *Pro-Bolsonaro Rioters Storm Brazil’s Top Government Offices*, ASSOCIATED PRESS (Jan. 8, 2023), <https://apnews.com/article/jair-bolsonaro-brazil-government-caribbean-0c03c098a5e2a09ac534412c30ae8355> [https://perma.cc/G2T9-H9W5]; Peter Baker, *A Mob and the Breach of Democracy: The Violent End of the Trump Era*, N.Y. TIMES (Jan. 6, 2021), <https://www.nytimes.com/2021/01/06/us/politics/trump-congress.html> [https://perma.cc/2NKE-TQK4].

grandchildren . . . *The restoration of international legal order is our joint task.*²³⁴

So these are the stakes. This struggle is not just about Russian imperialism or Ukraine's struggle for independence. As President Biden put it in Warsaw as the one-year anniversary of the war approached, Putin doubts our staying power, and whether NATO can stay unified.²³⁵ As the Israel-Hamas war now dominates the headlines, and the House Republicans waver on continuing aid to Ukraine, America's staying power will be tested. But the real issue, as President Biden noted, is that "the democracies of the world have to deliver democracy for our people."²³⁶ That is the biggest challenge and the one that the world's democracies must together meet.

V. CONCLUSION

On March 3, 2020, I went to Kyiv on my first trip to Ukraine. That was just seven days *before* the global pandemic hit with full force. I was invited by the Ukrainian Jessup Moot Court association and was met at the airport by a vibrant young woman, Tata Marharian, one of the reigning Jessup Moot Court champions of Ukraine. We toured Kyiv together and became friends. As we toured, she confided that she had invited me because my argument for Ukraine before the International Court of Justice had given her greater hope that international law could play an important role in leveling the playing field between a weaker and stronger nation.

Two years later, one month after the war broke out, I turned on CNN, and there was Tata again. But this time, she was dressed in full military uniform. She had enlisted; she was now a medic at a battlefield hospital; and she was asking, "Where is the international law I believed in?" She said, "I don't know how long I can go on with news of friends and my close ones being captured by Russians, being wounded, and dying. It's very devastating."²³⁷ In the months since, I have kept in touch with Tata, who remains in good spirits. Her question—"where is the international law that I believed in?"—continues to haunt me. In November 2022, she took a train to western Ukraine to call me on Zoom. She said that she is doing all right and is heartened by the support of all of the friends and allies who are fighting for the rule of international law as part of the ongoing struggle between democracy and authoritarianism.

At the Kyiv moot court, I judged two excellent Ukrainian teams. Just a week earlier, I had judged the Yale Law Jessup team, arguing the exact same case

²³⁴ See Zelensky, Address to U.S. Congress, *supra* note 169.

²³⁵ Biden Treaty Remarks, *supra* note 95.

²³⁶ *Id.*

²³⁷ *Newsroom: She Treats Victims of Russia's Attack. Hear Her Message for Russians* (CNN television broadcast Mar. 17, 2022), <https://www.cnn.com/videos/world/2022/03/17/ukraine-volunteer-message-russians-nr-vpx.cnn> [<https://perma.cc/4K8X-VEU5>].

under the same principles of international law. These two groups were students a world apart, speaking the same language of international law. They were essentially saying that, with the common language of international law, we can achieve the kind of cooperation and community that cannot be achieved in a world driven by threats, atrocities, and aggression.

The moot court in Kyiv marked the 25th anniversary of the Jessup Moot Court competition since Ukrainian independence, and every past winner came to the ceremony. At the closing ceremony, all the past winners were holding date markers denoting the year that they were champions. As I went down the line and shook hands with each Ukrainian lawyer, I asked, “What are you doing now?” One after another, each answered, “I am suing the Russians: in the European Court of Human Rights; in international commercial arbitration. I’m investigating Russian war crimes for Ukraine’s Prosecutor General. We are using law to combat Putin’s force.” As I left Kyiv, my young friend Tata Marharian posted a picture of the Ukrainian lawyers on Instagram, with the caption, “Dear Mr. Koh, let us battle a little bit on the ground, and we’ll be back to the Ukrainian International Law Army soon.”²³⁸ It struck me that she and her friends had answered her own question.

In the end, my late great boss, Secretary of State Madeleine Albright, got it right. She thought the Ukrainians could prevail, if we would just stick with them.²³⁹ Madeleine’s message remains the one we should take away, many months later. The Ukrainians can win, and they can do so by using the international law they believe in. But the costs will be high, and the stakes are great. But in this draining historic battle between law and force, our role is clear: we lawyers, everywhere, have to stick with them, to preserve Ukraine, to preserve democracy, and to preserve the global rule of law.

²³⁸ On file with the *Ohio State Law Journal*.

²³⁹ See Bill Clinton, Former President of the U.S., Remarks at Funeral Service of Former Secretary of State Madeleine Albright (Apr. 27, 2022), <https://www.c-span.org/video/?c5012443/president-bill-clinton-remembers-madeleine-albright> [<https://perma.cc/SYT8-MLXZ>] (“From the day she entered to the day she left, she tried to stick up for people who are left out or left behind . . .”).