

## Lawfare in the Russo-Ukrainian Conflict

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### Abstract:

This article delves into the concept of "lawfare," a novel type of warfare wherein states utilize law to achieve military objectives and weaken the adversary. The study focuses on the Russo-Ukrainian conflict, examining how the Ukrainian government, facing military disadvantages against Russia, employed various legal and judicial mechanisms as a means of engaging in lawfare.

**Keywords:** Lawfare, Russo-Ukrainian Conflict, Achieving Military Objectives.

### Introduction:

The concept of lawfare finds its roots in the teachings of the Chinese military strategist and philosopher, Sun Tzu. In his renowned work, "The Art of War," he articulates « Hence to fight and conquer in all your battles is not supreme excellence; supreme excellence consists in breaking the enemy's resistance without fighting. »<sup>1</sup> He capitalizes the notion that true mastery in warfare lies not solely in prevailing through direct confrontation, but rather in dismantling the adversary's resistance without resorting to physical combat. Since at least 1963, the military doctrine of China has encompassed the doctrine of lawfare, strategically devised to either replace or complement traditional military tactics. Notably, the People's Liberation Army of China has officially disseminated guidelines on warfare, and various governmental entities have published contemporary texts, collectively emphasizing the paramount significance of lawfare in advancing Chinese interests during times of peace and conflict.<sup>2</sup>

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<sup>1</sup> Sun Tzu, The art of war, Allandale Online Publishing, England, 0222, P.8. Available at : [https://sites.ualberta.ca/~enoch/Readings/The\\_Art\\_Of\\_War.pdf](https://sites.ualberta.ca/~enoch/Readings/The_Art_Of_War.pdf)

<sup>2</sup> Goldenziel, Jill I., Law as a Battlefield: The U.S., China, and Global Escalation of Lawfare (January 25, 2020). 106 Cornell Law Review 1085, Available at : SSRN: <https://ssrn.com/abstract=3525442> or <http://dx.doi.org/10.2139/ssrn.3525442>

In 2001, Major General Charles Dunlap presented an argument advocating that lawfare would emerge as a pivotal element of modern warfare. He expounded upon the term and introduced it to the American Legal Academy.<sup>1</sup> Subsequently, in 2009, his research paper titled "Lawfare: A Decisive Element of 21st-Century Conflicts?" delineated lawfare as "the purposeful use of law as a means to achieve a military objective." Later, he broadened this definition in a 2017 article published in the *Military Review* journal, encompassing "the utilization of law as a form of asymmetric warfare."<sup>2</sup>

Twenty years after its conceptualization by Charles Dunlap, Jill Goldenziel embraced the term, recognizing the escalating complexity and prevalence of lawfare. In her work, she defines lawfare as "the strategic employment of law against a specific adversary, with the primary aim of attaining well-defined strategic, operational, or tactical objectives, weakening the legitimacy of the adversary's corresponding strategic, operational, or tactical goals, or enhancing the legitimacy of a particular individual or nation." Jill Goldenziel further identifies five distinct manifestations of lawfare, all underpinned by compelling adversaries to comply with legal norms on the battlefield.<sup>3</sup>

Lawfare is used by both governmental and non-governmental actors within and beyond armed conflicts to further their national interests. Among the prominent practitioners of this approach, China emerges as a global frontrunner. Additionally, entities such as NATO, Israel, and several other nations have established permanent staff devoted to engaging in lawfare, with the United Kingdom deeming it an indispensable component of its military planning.

Despite the evolving nature of lawfare, its prevalence as a prominent feature in interstate armed conflicts only gained momentum during the Russo-Ukrainian War. Prior to this conflict, no state openly boasted about a distinct "lawfare project." However, Ukraine now proudly declares its Lawfare Project through an official government website, available in both English and Ukrainian, with the intent of enhancing its legitimacy and garnering international support. This

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<sup>1</sup> Jill I. Goldenziel, "An Alternative to Zombieing: Lawfare Between Russian and Ukraine and the Future of International Law"; CORNELL LAW REVIEW ONLINE, Volume 108, P.2

<sup>2</sup> Mark Voyger, Waging lawfare Russia's Weaponization of International, Domestic Law Baltic Defence Colleg, P.33. available in the site web: [https://www.marshallcenter.org/sites/default/files/files/2020-09/pC\\_V10N1\\_en\\_Voyger.pdf](https://www.marshallcenter.org/sites/default/files/files/2020-09/pC_V10N1_en_Voyger.pdf)

<sup>3</sup> Jill I. Goldenziel, "An Alternative to Zombieing: Lawfare Between Russian and Ukraine and the Future of International Law", CORNELL LAW REVIEW ONLINE, Volume 108, P.2

initiative underscores that hybrid warfare extends beyond overt hostilities, encompassing economic measures, propaganda, bribery, intimidation, and legal tactics—all of which play significant roles in the Russo-Ukrainian conflict.<sup>1</sup>

The Ukrainian government, through its Ministry of Justice, has unveiled a specific lawfare strategy and established an online media platform exclusively dedicated to broadcasting the "Lawfare Project" against Russia. This initiative outlines Ukraine's intent to launch a robust and comprehensive legal confrontation against its adversary. Justified by the considerable disparity in military capabilities, Ukraine resorts to international law and tribunals, employing a meticulously orchestrated, comprehensive, and coordinated "strategic lawfare" approach. This intricate plan is crafted with invaluable contributions from both national and foreign legal advisors.<sup>2</sup>

The strategic lawfare approach is a novel and distinct legal weapon, serving as an alternative to conventional military means in the pursuit of Ukraine's operational objectives against Russia.<sup>3</sup> Addressing the question of **how Ukraine has effectively employed lawfare in the context of the Russo-Ukrainian conflict** calls for a descriptive-analytical methodology. This entails description of facts, analysis of decisions made by international and regional organizations, and examination of legal texts, judgments, and opinions from various courts on both international and domestic levels. Adopting a tripartite framework, the first section delineates **the legal means of lawfare in the Russo-Ukrainian conflict**, while the subsequent section delves into the **judicial means of lawfare** within the same context.

### **Section One: Legal Means of Lawfare in the Russo-Ukrainian Conflict**

Lawfare, while less renowned than its digital counterparts such as information warfare and cyber warfare, has emerged as a highly effective strategy for conflicting parties, adept at exploiting vulnerabilities within international legal systems. Diplomatic negotiations are

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<sup>1</sup> Jill I. Goldenziel, "An Alternative to Zombieg: Lawfare Between Russian and Ukraine and the Future of International Law", Op.Cit.P.6

<sup>2</sup> See website : <https://lawfare.gov.ua>

<sup>3</sup> Eric Chang, Lawfare in Ukraine: Weaponizing International Investment Law and the Law of Armed Conflict Against Russia's Invasion, Institute for National Strategic Studies, Strategic Perspectives, No. 39, National Defense University Press, Washington, August 2022, P.11

shrewdly deployed to gain time, sow dissent among allies, and create confusion. The strategic use of legal ambiguity and other calculated maneuvers play a crucial role in this form of warfare.

An inherent advantage of scrutinizing and analyzing the adversary's legal maneuvers is that, theoretically, lawfare cannot be shrouded in complete secrecy. Its primary objective lies in legitimizing parties' actions on the global stage, openly asserting claims through a state's legal channels, enacting new laws ratified by parliaments, issuing presidential decrees, or seeking approval for troop deployment from legislative bodies like the Senate or Parliament.<sup>1</sup>

Within the Russo-Ukrainian Conflict, the Ukrainian government has formulated an all-encompassing legal warfare strategy, harnessing diverse branches of law in its pursuit. An illustrative case occurred on March 14, 2023, when Ukraine submitted a request before the Organization for the Prohibition of Chemical Weapons (OPCW). This request, deliberated during the 102<sup>nd</sup> meeting of the OPCW Executive Council, accused Russia of an unjustified and unwarranted aggressive war against Ukraine, commencing on February 24, 2022, under the *casus belli* of a so-called "special military operation." The OPCW emphatically underscores this as the most substantial traditional war to transpire on European soil since World War II, constituting a stark violation of international agreements pertaining to arms control.

Moreover, Ukraine has been actively prosecuting Russian soldiers in its own courts since May 2022, in accordance with its domestic sanctions' laws and the principle of complementarity between domestic and international legal norms. This represents just a fraction of the numerous laws at play in this multifaceted conflict, too extensive to cover in a single article. However, this study delves into two pivotal legal strategies: the employment of bilateral investment treaties in the first part and the application of international human rights law in the second part.

### **Part One: Bilateral Investment Treaty (BIT) in the Context of the Russo-Ukrainian Conflict**

Legal warfare represents an innovative and distinctive legal instrument, employed as an alternative to conventional military methods in advancing Ukraine's operational objectives against Russia. Consequently, within the Ukrainian context, legal warfare has facilitated and coordinated the submission of claims by Ukrainian investors against Russia under the Bilateral

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<sup>1</sup> Mark Voyger, Op.Cit.P.38

Investment Treaty (BIT).<sup>1</sup> This strategic maneuver constitutes an integral part of Ukraine's comprehensive legal warfare strategy against Russia, aimed at amplifying the impact of sanctions imposed by the United States and its allies, and influencing Russia's military, geopolitical, and financial cost-benefit considerations.<sup>2</sup>

Bilateral Investment Treaties are international agreements negotiated between two sovereign states to promote foreign investment flows between them. Under these treaties, both parties provide mutual guarantees and protections to investors operating within each other's territories, with the host state extending objective protection to foreign investors.<sup>3</sup>

Bilateral Investment Treaties encompass various provisions that afford specific objective protection to investors. These provisions include safeguarding against arbitrary expropriation by the host state without providing proper compensation to the investor, ensuring Fair and Equitable Treatment (FET) - delineating minimum standards of conduct that host states must adhere to concerning foreign investors - and providing full protection and security (FPS), which entails non-discriminatory treatment, particularly in safeguarding investments from violent acts and interventions by armed groups.<sup>4</sup>

A defining feature of Bilateral Investment Treaties is the establishment of an Integrated System of Dispute Settlement (ISDS),<sup>5</sup> which constitutes an international forum for resolving disputes. Investors possess the right to initiate direct international arbitration proceedings against host states through ISDS tribunals, renowned for their impartiality and ability to award financial recovery against host states. Importantly, investment claims are not confined to only high-profile companies or individuals with substantial financial resources; the definition of

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<sup>1</sup> Russian Federation- Ukraine BIT (1998) available at : <https://investmentpolicy.unctad.org/international-investmentagreements/treaties/bit/2859/russian-federation---ukraine-bit-1998->

<sup>2</sup> Eric Chang, Op.Cit.P.15

<sup>3</sup> Today, there are more than 1,100 bilateral investment treaties in force worldwide, creating a vast and interconnected network of investment treaties between hundreds of countries. These bilateral investment treaties form the backbone of modern international investment law. For more information, see the website : : <https://investmentpolicy.unctad.org/international-investment-agreements>

<sup>4</sup> It should be noted that many BITs contain most-favored-nation (MFN) clauses, which require a state party to an investment treaty to provide investors with treatment no less favorable than the treatment it provides to investors under other investment treaties it has entered into. See: Eric Chang, Op.Cit.P.11

<sup>5</sup> Investor State Dispute Settlement.

investments under the Russia-Ukraine BIT lacks a minimum threshold amount in dollars, enabling numerous Ukrainian entities - ranging from major corporations to small businesses - to qualify for filing investment claims against Russia for various losses resulting from Russia's invasion and occupation. Thus, Ukraine has considerably benefited from these features, employing them as a legal response to Russia's actions.<sup>1</sup>

Given Russia's signing of bilateral investment treaties with over seventy other countries, foreign investors present in Ukraine and holding the nationality of those countries are also eligible to bring claims against Russia. For instance, a Dutch investor in occupied Ukraine can file a claim against Russia under the Bilateral Investment Treaty between Russia and the Netherlands.<sup>2</sup>

Consequently, Ukrainian investors have initiated eleven investment arbitration claims against Russia. In six of these cases, Ukraine has submitted supporting pleadings, seeking compensation for Russia's illegal expropriation of investments within the Crimean Peninsula. These investments include banking operations, airports, fuel stations, real estate, power plants, and more.<sup>3</sup>

For courts to exercise jurisdiction under a Bilateral Investment Treaty, the assets must be located within Russian territories. However, courts have hesitated to recognize Crimea as part of Russia, which contradicts Ukraine's interests. Consequently, Ukraine has resorted to establishing Russia's position on the Crimean Peninsula based on the principles of international humanitarian law, designating it as an occupied territory, and relying on Russia's "effective control" over Crimea.<sup>4</sup>

Even before the 2022 invasion, arbitration bodies held Russia accountable for 8 billion dollars in compensations, with further billions pending. Russia chose to oppose the initial nine arbitral proceedings but communicated with the conflicting tribunals on jurisdiction. Subsequently, Russia continued to resist, and the 8 billion dollars failed to deter Putin from invading Ukraine, indicating that numerous lawsuits will arise from the ongoing conflict. Hundreds of billions of

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<sup>1</sup> Eric Chang, Op.Cit.P.13

<sup>2</sup> Ibid.P.P.21

<sup>3</sup> Jill I. Goldenziel, "An Alternative to Zombieing: Lawfare Between Russian and Ukraine and the Future of International Law", Op.Cit.P.51

<sup>4</sup> Jill I. Goldenziel, "An Alternative to Zombieing: Lawfare Between Russian and Ukraine and the Future of International Law", Op.Cit.P.51

dollars in compensations have the potential to alter the cost-benefit analysis of the conflict and serve as a deterrent against future aggression by Russia and other countries.<sup>1</sup>

The lawfare between Russia and Ukraine will set legal and historical precedents for the utilization of lawfare before, during, and after armed conflicts.

## **Part Two: International Human Rights Law in the Context of the Russo-Ukrainian Conflict**

The Russian Federation acknowledges the paramount significance of promoting and safeguarding human rights within its domestic and international spheres. As a demonstration of its commitment, Russia has ratified numerous international instruments, including the Universal Declaration of Human Rights, various international covenants, the Convention on the Prevention and Punishment of the Crime of Genocide, and the Convention for the Protection of Human Rights and Fundamental Freedoms by the Council of Europe. As a consequence, Russia is bound by the provisions set forth by the European Court of Human Rights.

Since the onset of Russian bombardment on Ukraine, the Ukrainian government has actively encouraged its citizens to bring forth complaints before the European Court of Human Rights. Furthermore, the Ukrainian government has extended financial and legal support to individuals pursuing such complaints.<sup>2</sup> This has resulted in a request for interim measures against the Russian government in February 28<sup>th</sup>, 2022, primarily pertaining to "grave violations of human rights committed by Russian forces in the context of the military aggression on the sovereign territories of Ukraine," as stipulated in the 39<sup>th</sup> article of the European Convention on Human Rights.<sup>3</sup> The court has discerned a tangible and sustained risk of serious human rights violations

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<sup>1</sup> Jill I. Goldenziel, Op. Cit. P.10

<sup>2</sup> European Court of Human Rights Press Release 073, Decision of the Court on Requests for Interim Measures in Individual Applications Concerning Russian Military Operations on Ukrainian Territory (Apr. 3, 2022)

<sup>3</sup> Rule 39 (interim measures) of the Rules of Court reads as follow: "1. The Chamber or, where appropriate, the President of the Section or a duty judge appointed pursuant to paragraph 4 of this Rule may, at the request of a party or of any other person concerned, or of their own motion, indicate to the parties any interim measure which they considers should be adopted in the interests of the parties or of the proper conduct of the proceedings.

2. Where it is considered appropriate, immediate notice of the measure adopted in a particular case may be given to the [Council of Europe] Committee of Ministers.

against civilian populations, in direct contravention of the European Convention on Human Rights.<sup>1</sup> Notably, this includes violations delineated under Article 2 (Right to Life)<sup>2</sup>, Article 3 (Prohibition of Torture and Inhuman or Degrading Treatment),<sup>3</sup> and Article 8 (Right to Respect for Private and Family Life).<sup>4</sup>

In response to the unfolding situation, the European Court of Human Rights, with due consideration to the interests of all parties and the proper conduct of proceedings, issued a compelling order to the Russian government.<sup>5</sup> This order required them to abstain from initiating military attacks on civilians and civilian infrastructure, encompassing residential buildings, emergency vehicles, schools, and hospitals. Additionally, the court emphasized the urgent need to ensure the safety of medical institutions, individuals, and emergency vehicles within regions exposed to attacks or sieges by Russian forces.

Subsequent to the Russian armed assault on Ukraine in March 2022, the Council of Europe displayed a series of decisions:

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3. The Chamber or, where appropriate, the President of the Section or a duty judge appointed pursuant to paragraph 4 of this Rule may request information from the parties on any matter connected with the implementation of any interim measure indicated.

4. The President of the Court may appoint Vice-Presidents of Sections as duty judges to decide on requests for interim measures.”

<sup>1</sup> The European Court of Human Rights, Interim measures, February 2023, press unit. Available at : [https://www.echr.coe.int/Documents/FS\\_Interim\\_measures\\_ENG.pdf](https://www.echr.coe.int/Documents/FS_Interim_measures_ENG.pdf)

<sup>2</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.1950  
ARTICLE 2 Right to life 1. Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

<sup>3</sup> ARTICLE 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms  
« Prohibition of torture No one shall be subjected to torture or to inhuman or degrading treatment or punishment. »

<sup>4</sup> ARTICLE 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms  
: « Right to respect for private and family life 1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

<sup>5</sup> the European Court of Human Rights, "The European Court grants urgent interim measures in application concerning Russian military operations on Ukrainian territory", issued by the Registrar of the Court, ECHR 068 (2022), 01.03.2022, Available at : <https://www.acerislaw.com/wpcontent/uploads/2022/03/ECHR-Press-Release.pdf>

- On 25<sup>th</sup> February 2022, the Council of Europe suspended the representation of the Russian Federation within the organization, in accordance with Article 8 of the Council of Europe Statute.
- On 15<sup>th</sup> March 2022, the Parliamentary Assembly of the Council of Europe issued Opinion No. 300 (2022), officially declaring the Russian Federation ineligible for any further membership in the Council of Europe.
- On the 16<sup>th</sup> March 2022, the Council of Europe took the decision to suspend the Russian Federation's membership in the organization.<sup>1</sup>
- On 22<sup>nd</sup> March 2022, the European Court of Human Rights announced its ruling on the implications of the suspension of the Russian Federation's membership in the Council of Europe, under Article 58 of the European Convention. The court stated that the Russian Federation would no longer be considered a High Contracting Party to the Convention from 16<sup>th</sup> September 2022. Nonetheless, the court retained jurisdiction to examine applications against the Russian Federation concerning actions or omissions that could be deemed violations of the Convention, provided they occurred before 16<sup>th</sup> September 2022. Furthermore, the court promptly lifted the suspension on considering all applications brought against the Russian Federation, without prejudicing any legal issues arising from the consequences of the suspension of the Russian Federation's membership in the Council of Europe, while the court exercises its jurisdiction under the Convention.<sup>2</sup>

Going beyond these decisions, the European Union, guided by Articles 41 and 42 of the United Nations Charter, proceeded to enact a fifth package of sanctions against Russia on 8<sup>th</sup> April 2022. This decisive action was taken in response to the ongoing aggression by Russian forces against Ukraine and alarming reports of atrocities committed in several Ukrainian towns. The package of sanctions included a comprehensive ban on imports of coal and other solid fossil

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<sup>1</sup> Resolution of the Council of Europe CM/Res(2022)2 on the cessation of the membership of the Russian Federation to the Council of Europe, Adopted by the Committee of Ministers on 16 March 2022 at the 1428<sup>th</sup> meeting of the Ministers' Deputies) Available at : <https://rm.coe.int/0900001680a5da51>

<sup>2</sup> Resolution of the European Court of Human Rights on the consequences of the cessation of membership of the Russian Federation to the Council of Europe in light of Article 58 of the European Convention on Human Rights. Available at: [https://echr.coe.int/Documents/Resolution\\_ECHR\\_cessation\\_membership\\_Russia\\_CoE\\_ENG.pdf](https://echr.coe.int/Documents/Resolution_ECHR_cessation_membership_Russia_CoE_ENG.pdf)

fuels from Russia, the prohibition of access to EU ports for all Russian vessels, the exclusion of Russian and Belarusian transport operators from EU imports of timber, cement, and seafood, as well as the restriction of exports of jet aircraft and cryptocurrency deposits to Russia.<sup>1</sup>

In deploying these legal instruments, the European Union ostensibly seeks to extend immediate financial assistance to Ukraine, providing a stable and foreseeable financial support mechanism. The aid is intended to bolster Ukraine's overall economic stability and facilitate the reconstruction of vital infrastructure decimated due to Russia's hostile war, including energy facilities, water systems, transportation networks, roads, and bridges. However, it is crucial to acknowledge that these actions also function as instruments of the West's retaliation against Russia, albeit enacted on Ukrainian soil.<sup>2</sup>

Consequently, the strategic use of international human rights law emerges as a noteworthy aspect of Ukraine's pursuit of certain military objectives in the Russo-Ukrainian conflict.

## **Section Two: Judicial Means of Warfare under International Law in the Russo-Ukrainian Conflict**

On February 21, 2022 Russia extended diplomatic recognition to the "People's Republic of Donetsk" and the "People's Republic of Luhansk,"<sup>3</sup> accompanied by the establishment of cooperation and friendship pacts. This strategic move bestowed upon the Federal Assembly of the Russian Federation,<sup>4</sup> under the aegis of Vladimir Putin, the authorization to employ military force beyond national borders.

In an address on February 24, 2022, Russian President Vladimir Putin heralded a special military operation, aimed at curtailing the encroachment of the Western alliance with Ukraine.

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<sup>1</sup> Kudakwashe Z Mapako ,Op.Cit.P.25 Mapako, Kudakwashe, Recourse to Use of Force or Threat Thereof, Justification of An Illegal War: A Tale of the Ukraine-Russia War (June 9, 2022). Available at SSRN: <https://ssrn.com/abstract=4132649> or <http://dx.doi.org/10.2139/ssrn.4132649>

<sup>2</sup> Daily News, Commission pays a further €1.5 billion in macro-financial assistance to Ukraine 23 / 05 / 2023 Brussels, Available at : [https://neighbourhood-enlargement.ec.europa.eu/news/commission-pays-further-eu-15-billion-macro-financial-assistance-ukraine-2023-05-23\\_en](https://neighbourhood-enlargement.ec.europa.eu/news/commission-pays-further-eu-15-billion-macro-financial-assistance-ukraine-2023-05-23_en)

<sup>3</sup> Signing of documents recognising Donetsk and Lugansk People's Republics February 21, 2022. The Kremlin, Moscow <http://en.kremlin.ru/events/president/news/page/69>

<sup>4</sup> President signed Federal Law On Ratifying the Treaty of Friendship, Cooperation and Mutual Assistance Between the Russian Federation and the Lugansk People's Republic <http://en.kremlin.ru/acts/news/67834>

This maneuver was orchestrated by the United States in its ongoing endeavor to extend influence into Russia. The legal pretext for this military campaign was founded on Article 51 of the United Nations Charter, which conferred the right to undertake a distinct military operation upon securing the Russian Federation's imprimatur. This operation was cast as a legitimate defensive act in response to threats endangering Russian interests.<sup>1</sup>

The Ukrainian government swiftly contested the legitimacy of this military operation, branding Russian actions post the February 24 during the incursion into Ukraine as egregious violations of established international legal norms. This pivotal juncture has triggered a barrage of legal cases across varied judicial fora, all reiterating the alleged gravitas of the crimes attributed to the Russian Federation. Ukraine, exhibiting zealous legal activism, pursued a multi-pronged approach, encompassing the International Criminal Court, the International Court of Justice, the International Tribunal for the Law of the Sea, among others.

### **Part One: Adjudicating the Matter Before the International Court of Justice (ICJ)**

The International Court of Justice, the flagship judicial organ of the United Nations, occupies a unique legal echelon. Membership in the United Nations inherently necessitates compliance with its statute, which unequivocally binds member states to the rulings issued by the ICJ in cases involving their participation. However, it is noteworthy that the court's jurisdiction is not all-encompassing; United Nations member states retain the prerogative to refer disputes amongst themselves to alternative judicial avenues in light of existing or prospective agreements.

On February 26, 2022, Ukraine formally approached the ICJ, seeking to initiate proceedings against the Russian Federation concerning the "interpretation and application of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide." Ukraine's petition asserts that Russia's "special military operation" since February 24, 2022, hinges on a fallacious claim of genocide and consequently lacks justification under the Genocide Convention. Ukraine urges the ICJ to compel Russia to offer commitments and guarantees against future unlawful acts within Ukraine, which include employing force grounded in this erroneous claim. Full

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<sup>1</sup> Letter dated 24 February 2022 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary General, United Nations S/2022/154

reparation for any damages arising from actions predicated on this fabricated claim of genocide is also sought.

Notably, the International Court of Justice's jurisdiction is not invoked automatically in all disputes between United Nations member states, save instances where a state explicitly subjects itself to the court's compulsory jurisdiction. However, it is of pertinence that Ukraine strategically compelled Russia under the court's purview in relation to conflicts emanating from the Genocide Convention.

Article IX of the Genocide Convention stipulates, "Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of this Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."

However, the crux of the matter must pertain to the "interpretation, application or fulfilment" of the convention. As the court clarifies, "...to determine, even prima facie, whether there is a dispute as defined in Article IX of the Genocide Convention, the Court must ascertain whether the parties' positions on the matters in issue are sufficiently opposed. It is not sufficient for the Court to be merely informed that one party asserts that the Convention applies and the other party denies it."

Ukraine's approach transcends mere contestation of jurisdiction; it advances the expedient recourse of provisional measures under Articles 73<sup>1</sup>, 74, and 75. This strategic maneuver is

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<sup>1</sup> Article 73 Rules of Court (1978) Adopted on 14 April 1978 and entered into force on 1 July 1978 amendment entered into force on 14 April 2005.

1. A written request for the indication of provisional measures may be made by a party at any time during the course of the proceedings in the case in connection with which the request is made.

2. The request shall specify the reasons therefor, the possible consequences if it is not granted, and the measures requested. A certified copy shall forthwith be transmitted by the Registrar to the other party. 3 Article 75 Rules of Court (1. The Court may at any time decide to examine *proprio motu* whether the circumstances of the case require the indication of provisional measures which ought to be taken or complied with by any or all of the parties.

2. When a request for provisional measures has been made, the Court may indicate measures that are in whole or in part other than those requested, or that ought to be taken or complied with by the party which has itself made the request.

3. The rejection of a request for the indication of provisional measures shall not prevent the party which made it from making a fresh request in the same case based on new facts

designed to circumvent prolonged litigation periods and enable swift verdicts. The salient objective is to address the conflict's progression promptly, ranking high on the ICJ's agenda. The binding nature of provisional measures aims to safeguard the parties' rights during the legal process. Ergo, Ukraine earnestly implores the ICJ to deliberate the dispute within the precincts of provisional measures, expressly entailing an immediate cessation of Russia's military operations.<sup>1</sup>

Though bereft of jurisdiction to deliberate on the dispute or to impose provisional measures, the court, notwithstanding, the court decreed Russia to halt its military endeavors and ensure that both military and irregular units cease activities that bolster military operations. The court also mandated restraint from actions exacerbating or prolonging the conflict.

Even in reference to Article IX of the Genocide Convention, its scope concerns the "interpretation, application, or fulfilment" of the convention. The convention's interpretation is inseparable from its legal tenets, which mandate contracting states' enforcement through legislative measures, aligned with respective constitutions. These states commit to effective and meaningful criminal penalties applicable to genocide perpetrators.<sup>2</sup>

From the foregoing, it emerges that the scope of Article IX does not intersect with the ambit of Article 51 of the United Nations Charter. Furthermore, it does not assume the mantle of state recognition. Notwithstanding, the ICJ's embrace of jurisdiction, rooted in Article IX of the Genocide Convention, culminates in a fundamental distortion of the convention's fundamental essence and intent.

The ICJ's pronouncement appears to be steeped more in political expedience than in judicious legal reasoning. Notably, the US President invoked the ICJ's edict to caution nations against aligning with Russia, particularly China. Non-compliance would breach the ICJ's decree.

## **Part TWO: Adjudicating the Matter Before the International Criminal Court**

The International Criminal Court (ICC) exercised its jurisdiction by initiating investigations through the Office of the Prosecutor concerning crimes falling within the Court's purview as

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<sup>1</sup> Stephen P. Mulligan and Committees of Congress, The Role of International Tribunals in the Response to the Invasion of Ukraine, Congressional Research, LSB10704 · VERSION 4 Updated October 21, 2022. P. 5. Available in the site web: <https://crsreports.congress.gov>

<sup>2</sup> Article V of the Convention on the Prevention and Punishment of the Crime of Genocide

outlined in Article 15 and Article 13(b), following Ukraine's prior acceptance of jurisdiction. This was achieved by meeting the specific prerequisites outlined in Article 12(3), encompassing:

- Ukraine's formal submission of a declaration to the Registrar of the ICC, signifying its willingness to recognize the Court's jurisdiction "with regard to the crime under consideration."
- The case's initiation, either through the Prosecutor acting proprio motu or via solicitation from a party within the Rome Statute system.

In this context, Ukraine submitted a declaration on April 9<sup>th</sup>, 2014, signifying its acceptance of the ICC's jurisdiction for the period spanning from November 21<sup>st</sup>, 2013, to February 22<sup>nd</sup>, 2014. Furthermore, Ukraine petitioned the ICC to undertake investigations into alleged crimes against humanity committed within its territorial boundaries during this specified timeframe. Building upon this declaration and subsequent referral, the Office of the Prosecutor initiated a preliminary investigation. In 2015,<sup>1</sup> Ukraine submitted a secondary declaration, extending its acceptance of the ICC's jurisdiction from February 25<sup>th</sup>, 2014, onward, without setting a conclusive end date.<sup>2</sup>

The Prosecutor's Office underlined that the evidence amassed regarding the 2014 conflict between Russia and Ukraine established a "rationale basis" to infer that war crimes and crimes against humanity were perpetrated in Ukraine. This led to the broadening of the ongoing preliminary investigation to encompass newly alleged crimes that might come to light.<sup>3</sup> On March 2, 2022, the Prosecutor commenced an investigation into the situation prevailing in Ukraine, grounded in the referrals received.<sup>4</sup> On March 17, 2023, the ICC Pre-Trial Chamber issued arrest warrants concerning individuals within the ambit of the Ukrainian situation,

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<sup>1</sup> Ukraine's announcement in 0251 to accept the jurisdiction of the International Criminal Court [https://www.icc-cpi.int/sites/default/files/iccdocs/other/Ukraine\\_Art\\_12-3\\_declaration\\_08092015.pdf#search=ukraine](https://www.icc-cpi.int/sites/default/files/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf#search=ukraine)

<sup>2</sup> Ukraine's announcement in 2014 to accept the jurisdiction of the International Criminal Court <https://www.iccpi.int/sites/default/files/declarationRecognitionJurisdiction09-04-2014.pdf>

<sup>3</sup> The Office of the Prosecutor, Report on Preliminary Examination Activities, 14 December 2020, <https://www.icc-cpi.int/sites/default/files/itemsDocuments/2020-PE/2020-pereport-eng.pdf>

<sup>4</sup> ICC ,Alleged crimes committed in the context of situation in Ukraine since 21 November 2013 Ukraine. , Available at : <https://www.iccpi.int/situations/ukraine>

specifically Mr. Vladimir Vladimirovich Putin - the President of the Russian Federation - and Ms. Maria Alexeyevna Lovova Bylova - Commissioner for Children's Rights in the Office of the President of the Russian Federation.<sup>1</sup>

Manifestly, the children evacuated by Russia effectively escaped various forms of crimes, including sexual exploitation, in Europe. Maria Zakharova, the spokesperson for the Russian Foreign Ministry, expressed concerns about the destiny of Ukrainian children evacuated to European countries. She confirmed the occurrence of numerous child fatalities, hundreds of injuries, orphaned children relocated abroad, and the offspring of Russian citizens detained within Ukrainian territory as hostages, with diverse conditions laid out for the return of their children.

It is noteworthy that the Prosecution's lexicalization of the evacuation as a mere "transfer" no longer carries veracity, as evidenced by the repatriation of numerous children to Ukraine. Their images distinctly convey a heightened level of care provided. Moreover, the term "evacuation" is rendered increasingly inapplicable,<sup>2</sup> as the relocated children are now located in regions affirming allegiance to Russia, implying their potential entitlement to Russian nationality.

The politicization of the Court's operation is underscored by the United States' approval of the issuance of warrants against Putin. President Joe Biden asserted that the ICC's arrest warrant issued against the Russian President is well-founded, stating that "Putin has unequivocally perpetrated war crimes." Intriguingly, the United States abstains from subjecting even its own military personnel to the jurisdiction of the ICC, employing bilateral immunity accords in nations where various crimes falling under the ICC's jurisdiction have been committed.

## **Conclusion**

Lawfare is characterized by the strategic utilization of legal mechanisms. This strategy aims to delegitimize the actions of the opposing party while concurrently endowing the state instigating

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<sup>1</sup> - ICC, 'Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Beleva' (17 March 2023), Available at : <https://www.icc-cpi.int/news/situation-ukraineicc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and>

<sup>2</sup> The head of the Save Ukraine organization, Mykola Kuleba, confirmed that more than 100 Ukrainian children have returned to their country after being transported to Russia in a way that some described as "illegal" from Moscow. For more details, see the organization's official website: <https://saveukraineua.org/>

the conflict with a veneer of legitimacy. Furthermore, it seeks to reap benefits not only in the military sphere but also across various domains of societal interactions. In some cases, this approach can extend its reach to impeding the economic and investment endeavors of the adversary.

This article substantiates that Ukraine's conduct throughout the armed conflict with Russia encompassed a comprehensive utilization of all available legal and international juridical channels, as well as domestic legal measures. This approach served to prove to the international community that the Russian Federation had forfeited its standing as a reputable participant within the global order. This was underscored by the array of cases that were brought forth before international judicial forums, all aimed at castigating Russia as both a state entity and its responsible officials. Notably, a multitude of international and regional tribunals rendered their judgments, designating Russia as an aggressive state that ruthlessly transgressed the norms of international law.

The attainment of these judgments and subsequent international resolutions by Ukraine would have remained an insurmountable feat were it not for the support extended by the Western coalition, spearheaded by the United States of America and the NATO.

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