UKRAINE LESSONS LEARNED – CHAPTER ONE DOES LAW MATTER?

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"Lawyers will put an end to this war—after the military, after politicians."
– President Zelenskyy, October 2022

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INTRODUCTION

In September 2022, Syracuse University College of Law hosted a Symposium titled "Lessons Learned: Perspectives on Law and Policy from the War in Ukraine." As reported in this journal, there were panels on war crimes, intelligence, and the law of armed conflict. This was the first law school symposium in the United States addressing Russia's war on Ukraine. Participants brought a sense of urgency to the task. In this war, as in many wars, the side that first identifies and applies the right lessons may gain tactical or strategic advantage. However, the lessons have global implications as well. That is because Ukraine matters to U.S. security. It matters to European security. And it matters to global security.

One reason Ukraine matters is law. Russia's war against Ukraine is a battle over territory, but it is also a battle over ideas. Law is one of those ideas. Should, and do, states observe principles of territorial integrity? Should, and do, states adhere to the Law of Armed Conflict? Should states be free to determine their own destiny, or have that destiny dictated by more powerful states? It is therefore fitting that this Ukraine symposium was held at a law school and addressed, among other topics, the question: does law matter when states face existential threats?

This article responds to that question. Part I provides eight reasons why the outcome of the war on Ukraine matters to U.S., European, and global security. As the war turns the year, and Russian President Vladimir Putin banks on a winter of suffering to break Ukrainian morale and North Atlantic Treaty Organization (NATO) resolve, it is wise to review and remind why Ukraine matters to U.S. and NATO security and thus why the U.S. and NATO should not only stay the course assisting Ukraine.

Part II considers why Ukraine matters to the law by addressing the meaning of law, how that meaning was challenged in the U.S. by the events of January 6, and how that meaning is challenged in Ukraine. In invading Ukraine, Russia not only seeks territory; it seeks to change the rules by which powerful states, or at least authoritarian ones, will operate in the twenty-first century. Ukraine also demonstrates certain truths about law as well as emerging lessons about law. For example, there is a difference between law and a culture

of law. Law is about the power to act. A culture of law embraces the values and limitations embedded in law.

States, institutions, and individuals that believe in law would be wise to focus on developing a culture of law and not just its textual manifestations. Article 5 of the North Atlantic Treaty, for example, does not protect NATO countries from attack; the text is discretionary. NATO's value and protection derives from shared values, practiced process, and committed resources. The law—the North Atlantic Treaty—enables these security virtues.

Part III identifies three threshold legal lessons one might derive from Russia's invasions of Ukraine and from Ukraine's response. The articles that follow consider more specific lessons and issues identified during the war against Ukraine, such as those involving the use of drones, mercenaries, and the meaning of direct participation in hostilities in a war of aggression responded to by a *levée en masse*.

Part IV considers the role of accountability in defining law and the challenges of accountability in Ukraine. Here, too, there are confirmatory as well as emerging lessons about law. Criminal accountability is imperfect and almost always slow. Ukraine will present new and novel challenges *and* opportunities. A singular focus on criminal justice, however, should not dissuade the use of other forms of accountability, which may have a more immediate effect on the war's outcome and offer some measure of justice. The U.S. and European response to Russian disinformation inciting violence illustrates this.

If Ukraine offers a threshold legal lesson, it is this: this is a war over what the international rules are, and will be, and whether there will be accountability for violating those rules. That is why the outcome in Ukraine will shape and determine the twenty-first century in ways other conflicts have not. Ukraine does not represent an effort to bend or interpret the law; it is an authoritarian effort to change the law and the meaning of law. Other lessons are evident or emerging as well, but let's start with why the outcome in Ukraine matters to U.S., European, and global security.

I. WHY UKRAINE MATTERS

As this volume goes to press, we do not yet know the outcome of Russia's war against Ukraine. Winter is upon us while both sides talk of renewed offensives in the spring, if not before. Russia seeks to break the will of the Ukrainian people by striking civilian targets and critical infrastructures. Russia also seeks to break NATO consensus

using gas and oil leverage and disinformation. However, while the authors of this volume do not yet know how the war will end, we do know this: the future of Ukraine is inexorably linked to U.S. and NATO security, the shape of the twenty-first century to come, and the rule of law. Let's review why.

A. NATO and Europe's Security Are Tied to Ukraine's Security

This is a product of common borders and the credibility of deterrence. Were Russia to "win" in Ukraine, additional NATO countries would share a common border with Russia or a state under the control of a Russian proxy government, like Belarus under Alexander Lukashenko. A Russian "win" would heighten security risks in Eastern Europe and require increased defense spending in the region. A "partial win" in Ukraine, in the form of continued Russian occupation of Ukrainian territory and/or the destruction of Ukraine's long-term economic viability, would also undermine Europe's security. Additional states might be threatened with territorial seizures or feel compelled to fall into Russia's obliging orbit to avoid Russian military, cyber, or economic coercion.

B. Deterrence

Relatedly, history shows that where states do not defend their values or stand up to authoritarian aggression, that aggression will continue. This observation is associated with the 1938 Munich Agreement, but it is a repeated lesson. Slobodan Milošević waged three wars in the Balkans in the 1990s.[1] He did not stop, or more accurately was not stopped, until NATO used air power in 1999 to do so. Likewise, Russia's invasions of Georgia in 2008 and Ukraine in 2014 were met with tepid international response.[2] If Russia is successful in holding parts of Ukraine it may be emboldened to seize parts of other countries like the Baltic states, Moldova, or Georgia, where it has already seized and holds Abkhazia and South Ossetia (as with Ukraine, approximately twenty percent of the country). States

1. *See* Ninth Annual Rep. of the International Tribunal for the Prosecution of Persons Responsible for the Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, transmitted by Letter dated 4 September 2002 from the Secretary-General Addressed to the General Assembly & the Security Council, ¶ 102, U.N. DOC. A/57/379-S/2002/985 (Aug. 14, 2002).

2. *See* Peter Dickinson, *The 2008 Russo-Georgian War: Putin's Green Light*, ATL. COUNCIL (Aug. 7, 2021), https://www.atlanticcouncil.org/blogs/ukrainealert/the-2008-russo-georgian-war-putins-green-light/; Gwendolyn Sasse, *Revisiting the 2014 Annexation of Crimea*, CARNEGIE EUR. (Mar. 15, 2017), https://carnegieeurope.eu/2017/03/15/revisiting-2014-annexation-of-crimea-pub-68423.

that fear Russia's intentions may make concessions to avert such threats. Deterrence depends on credibility, which in turn depends on commitment and capacity. Ukraine is an opportunity for NATO to demonstrate both, while helping Ukraine preserve its independence and protect its territorial integrity.

C. Taiwan

The People's Republic of China (PRC) and other governments will draw lessons from the war against Ukraine on the risks and consequences of the PRC attempting to seize control of Taiwan through military means, either invasion or blockade. Ukraine prompts questions like: Does the population of Taiwan have the will and capacity to defend the island or the resilience to withstand a blockade? Do democracies, including the United States, have the will to sustain their commitments to Taiwan over time? What are the risks of conventional or nuclear escalation? It is not only conventional wisdom, but likely the case that a combination of a Ukrainian "victory" and Russian losses, along with a sustained and united NATO response, will more likely deter Chinese military action, whereas a Russian "victory," or partial victory, is likely to encourage such action.

D. Nuclear, Biological, and Chemical (NBC) Threats

United States security and global security is inexorably linked to the risk of the use of nuclear weapons, including by Russia in Ukraine. Putin has threatened to use nuclear weapons, and at times Russian disinformation has appeared to presage their possible use.[3]

The risk of an NBC incident comes in at least three forms: (1) the intentional and overt use of a nuclear device; (2) the intentional or unintentional targeting of a Ukrainian nuclear reactor with Chernobyl-type impact; and (3) the use of chemical weapons. The use or threatened use of nuclear weapons directly threatens Eastern Europe's physical security in the form of fallout. It also runs the risk of prompting a mass migration in response to a nuclear detonation or incident, or the use of chemical weapons. The use of any NBC

3. *See* Anton Troianovski & Valerie Hopkins, *With Bluster and Threats, Putin Casts the West as the Enemy*, N.Y. TIMES (Sept. 30, 2022), https://www.nytimes.com/2022/09/30/world/europe/putin-speech-ukraine-russia.html; Yuliya Talmazan, *Russia's Media Propaganda Turns to 'Spine-chilling Rhetoric' to Intimidate the West*, NBC NEWS (May 14, 2022, 4:30 AM), https://www.nbcnews.com/news/world/russia-tv-jokes-nuclear-missiles-london-putin-propaganda-ukraine-war-rcna28067.

weapons or incidents also risks the intended and unintended escalation in the nature of conflict and geographic reach of conflict. While there remains a solid redline against the use of nuclear weapons since 1945, that is not the case with chemical weapons, which have been used by Russia in Syria and to assassinate or attempt to assassinate Russian defectors. Moreover, a state that has committed war crimes on the scale that Russia has as a matter of state policy, may not feel constrained by real and perceived norms against the use of NBC weapons.

There are global proliferation risks as well. The people of Ukraine and commentators wonder whether Russia would have invaded Ukraine had Ukraine not voluntarily surrendered its Soviet-era nuclear arsenal in exchange for security guarantees in 1994. Other states might now consider whether they would be safer from external invasion if they possessed nuclear weapons and act upon that assessment.

E. Food Security

Ukraine provides forty percent of the World Food Programme's wheat supplies.[4] In the Middle East and Africa, Ukrainian exports make up to eighty percent of total grain consumption.[5] There are direct and indirect consequences that flow from this reliance. The bad news is that Russia has attacked Ukraine's agricultural infrastructure, looted Ukrainian grain, and seized or blockaded Ukraine's Black Sea ports through which most Ukrainian grain is exported. The "good news" is that under U.N. auspices, since November 2022, Russia has allowed some export of grain through its blockade of Odessa and other Black Sea ports.[6] As of December 2022, famine directly related to the absence of Ukrainian grain shipments appears to have been averted. That could change. Famine and food insecurity have direct consequences for those affected. They have indirect security consequences for other states, including the United States, like mass migration(s), humanitarian crises, and potential conflicts over resources.

4. Mark A. Green, *Forty Percent of the World Food Program's Wheat Supplies Come from Ukraine*, WILSON CENTER (June 2, 2022), https://www.wilsoncenter.org/blog-post/forty-percent-world-food-programs-wheat-supplies-come-ukraine.

5. *Ukrainian Grain is Arriving in East Africa for the First Time Since Russia Invaded*, NAT'L PUB. RADIO (Aug. 31, 2022, 7:05 AM), https://www.npr.org/2022/08/31/1120223535/ukrainian-grain-is-arriving-in-east-africa-for-the-first-time-since-russia-invad.

6. *See Ukraine War: Grain Deal Continues Despite Russia Pull-Out*, BBC NEWS (Nov. 1, 2022), https://www.bbc.com/news/world-61759692.

F. Energy Security

In 2021, almost twenty-five percent of Europe's oil imports and forty percent of its natural gas imports were from Russia.[7] As of the third quarter of 2022, those numbers are about fourteen percent and fifteen percent, respectively.[8] Russia seeks to leverage its control over European energy and heating resources to undermine, if not break, NATO consensus supporting Ukraine. This has obvious impact on the comfort and in some cases physical security of Europeans, in the form of rolling black outs and diminished winter heat, as well as direct and indirect economic costs. Russia will continue to seek to influence European policy using energy as leverage. Until European nations find and commit to reliable alternative sources of energy, the war in Ukraine will threaten Europe's economic and energy security.

G. Humanitarian Values and Impacts

Policymakers debate whether nations have a "responsibility to protect" by responding to humanitarian catastrophes and war crimes. Lawyers debate whether there is a parallel, but not necessarily coterminous, international legal authority known as "humanitarian intervention" authorizing states to intervene in other states without their consent to address humanitarian crises. In 1999, the United States and other NATO members cited refugee flows from Kosovo into Albania as one basis for using force against Serbia.[9] Some states, like the United Kingdom but not the U.S., cited humanitarian intervention as a legal basis for doing so.[10] Doctrine and law aside, while Europe experienced brutal ethnic cleansing in the Balkans, it has not experienced this scale of destruction, ethnic cleansing, war crimes, and attempted genocide since World War II. As of September 1, 2022, the Kyiv School of Economics estimates that 810 schools, 66 hospitals, and 72,085 housing buildings have been destroyed by Russian bombardment in Ukraine.[11] The United States government has stated that 900,000 to 1.6 million Ukrainian civilians, including an estimated

7. *EU Imports of Energy Products—Recent Developments*, EUROSTAT, https://ec.europa.eu/eurostat/statistics-explained/index.php?title=EU_imports_of_energy_products_-_recent_developments (Dec. 20, 2022, 5:43 PM).

8. *Id.*

9. *See* Michael J. Matheson, *Justification for the NATO Air Campaign in Kosovo*, 94 PROC. ANN. MEETING AM. SOC'Y INT'L L. 301, 301 (2000).

10. *See id.*

11. *See* KYIV SCH. OF ECON., ASSESSMENT OF DAMAGES IN UKRAINE DUE TO RUSSIA'S MILITARY AGGRESSION AS OF SEPTEMBER 1, 2022, 25–26, 28 (2022).

260,000 children have been forcibly deported into Russia.[12] In addition, there are approximately 7 million internally displaced Ukrainians and another 7.5 million refugees, mostly in Eastern Europe.[13] The scale of suffering and the volume of war crimes alone, some might argue, makes the war against Ukraine a U.S. and NATO security issue.[14] As Elie Wiesel stated in response to the Holocaust, "[w]e must always take sides. Neutrality helps the oppressor, never the victim. Silence encourages the tormentor, never the tormented."[15]

H. Law

In 1994, in exchange for relinquishing its arsenal of nuclear weapons, a legacy of the USSR and at the time the third largest arsenal in the world, Ukraine signed the Budapest Memorandum, in which Russia, the U.S., and the U.K. guaranteed Ukraine's territorial integrity and political independence.[16] While a political undertaking, the Memorandum restated the Charter's international legal principles of territorial integrity and political independence. "The Russian Federation, the United Kingdom of Great Britain and Northern Ireland and the United States of America reaffirm their commitment to Ukraine, in accordance with the principles of the CSCE Final Act, to respect the independence and sovereignty and the existing borders of Ukraine."[17]

As is evident, the Memorandum, like international law and the U.N. system, did not deter Russian aggression, and not just because of Russia's or China's veto. The law and the Memorandum were not backed by a corresponding implementing mechanism and capacity.

12. Press Release, Antony J. Blinken, Sec'y of State, Dep't of State, Russia's "Filtration" Operations, Forced Disappearances, and Mass Deportations of Ukrainian Citizens (July 13, 2022) (available at https://www.state.gov/russias-filtration-operations-forced-disappearances-and-mass-deportations-of-ukrainian-citizens/).

13. *See* Erol Yayboke, Anastasia Strouboulis, & Abigail Edwards, *Update on Forced Displacement around Ukraine*, CTR. FOR STRATEGIC & INT'L STUD. (Oct. 3, 2022), https://www.csis.org/analysis/update-forced-displacement-around-ukraine.

14. *See* Robert Pszczel, *The Consequences of Russia's Invasion of Ukraine for International Security – NATO and Beyond*, NATO REV. (July 7, 2022), https://www.nato.int/docu/review/articles/2022/07/07/the-consequences-of-russias-invasion-of-ukraine-for-international-security-nato-and-beyond/index.html ("The suffering of Ukraine presents a moral challenge to Europe and the world. Human rights and the UN Charter have been trampled upon and our values mocked. Indifference is simply not an option").

15. Elie Wiesel, Acceptance Speech for the Nobel Peace Prize (Dec. 10, 1986).

16. *See* Memorandum on Security Assurances in Connection with Ukraine's Accession to the Treaty
on the Non-Proliferation of Nuclear Weapons ¶ 1, Dec. 5, 1994, 3007 U.N.T.S. 52241.

17. *Id.*

However, here we should remember that Ukraine of the 1990s and 2000s was not the Ukraine of 2019 and President Zelenskyy. The failure of the U.N. system to preserve international peace and security in Ukraine has led President Zelenskyy to call for reform of the U.N. security system. But there is more at stake than U.N. reform. The invasions of Ukraine do not involve a legal dispute over the meaning of Article 2(4) or self-defense. They are a blatant assertion of a new norm, a norm of aggression, prompting the question: does law matter?

II. DOES LAW MATTER?

For U.S. practitioners of national security law, there are two elephants in the national security room. Both present the question: does law matter?

When one country invades another and commits war crimes at a national scale with seeming impunity, one might ask: does international law matter? Does the law of the U.N. Charter, of state sovereignty, territorial integrity, and political independence matter? Do the Nuremberg Principles and the law of armed conflict matter? Is it real law?

When a politically inspired and armed mob storms the Capitol attempting to negate a democratic election, and when political leaders and many government officials watch in silence—and in some cases applaud—one might ask: does law matter? What *does* it mean to "support and defend" the Constitution, as the oath of government service requires?

The people of Ukraine might well conclude that law does not matter. International law failed to stop Russia's invasions of Ukraine, and it has (so far) failed to hold Russia accountable for its actions. Ukraine, however, offers more nuanced strategic and tactical lessons about law and the impact of law than an initial impression might yield. These lessons start with consideration of the meaning of law.

A. What is Law?

Jurisprudence is the study of the philosophy of law and the meaning of law. The New Haven School of legal realism, for example, distinguishes between the operational versus the aspirational nature of international law.[18]

18. *See generally* W. Michael Reisman, Siegfried Wiessner & Andrew R. Willard, *The New Haven School: A Brief Introduction*, 32 YALE J. INT'L L. 575 (2007) (describing the New Haven School of thought).

Until the election of 2020 and January 6, it seemed settled in the U.S. that "law" included certain core legal values and concepts. These values might not have always been observed, and many of them were not in fact "law" but norms about law. Nonetheless, lawyers and most citizens wherever they lived and whomever they voted for would identify these principles as central to the meaning of law, including:

- Equal justice under law
- No person being above the law, or below the law
- Checks and balances
- Due process
- Separate and shared powers
- Federalism
- An independent and impartial judiciary, and
- An understanding that policy differences are resolved at the ballot box, and in accordance with the principle of "one person, one vote".

These concepts were reflected and reinforced by the Nation's ultimately bipartisan responses to the Civil Rights Movement, Watergate, and the Iran–Contra Affair, three of the defining legal events of the last seventy years.

In the past two decades, the principal philosophical debates about the meaning of law in the United States were about textualism and its constitutional cousin originalism. Without intended spin: Textualism posits that one should only look to the words of a statute and not its legislative history to determine its meaning, even in the case of textual ambiguity. Originalism posits that the meaning of the Constitution should derive from (and in some cases solely from) the understanding the drafters had of the text at the time of ratification or amendment.

Today, however, there is a more fundamental and silent debate occurring about the meaning of law. There are some who see law as a tool of power, a spoil of politics, to be wielded for the benefit and advantage of those with power. Full stop. If you want to know what the law is, count votes or count Supreme Court justices, do not analyze the matter. In contrast, there are some who perceive law as a collection of principles, rules of the road that keep political actors and democracy on track.

In the international sphere, there is a parallel development or contest over the meaning of law. One can call it a debate, but it is a debate occurring with force of arms. Is "law" what the powerful states say it is: an assertion of authority by one state over another, the

invasion and occupation of territory, or the declaration of a nine-dash line? Or, is law a collection of principles that restrict as well as authorize state behavior, whatever the state, consistent with a set of core values and norms?

Unlike past debates, this is not a debate over whether an international norm applies or is operational or aspirational. It is a debate over the norm itself. Ukraine places in jeopardy what were once agreed principles of international law, even if they were sometimes honored in the breach. These principles include:

- State sovereignty and territorial integrity
- Political independence
- Self-determination, and
- The peaceful resolution of disputes.

In short, there is a contest in Ukraine and in the U.S. between actors who believe law serves one purpose, the authority to act, and actors who believe it serves four purposes: the authority to act, boundaries to that action, process, and values. The distinction between these two visions of law is found in the difference between an international system or a *country with laws* and a system or a country with *a culture of law*. There is a difference between law and a culture of law. Communism has law. (When you check in to the Diaoyutai State Guesthouse in Beijing, you will find a copy of the Chinese Constitution by your bed. In text, it has many of the same rights and phrases that we associate with law. But does anyone believe China has a culture of law?) Fascism has law. The Nazis ruled in accordance with law.[19]

Law is text, and not more. A culture of law is imbued with values and the resources, institutions, and political will to commit to those values. In the former, those who wield the power of law have the authority to act because they define what the law is and what law will be when applied or upheld. In the latter, governmental actors are constrained by the law as well as empowered by it. And they are bound to uphold, or seek to uphold, the law's values. These are universal values and principles, not just those espoused by one or another party or one or another faction in power. It is the values behind "law" that

19. *See The Justice Trial: Trial of Josef Altstötter and Others*, *in* 4 LAW REPORTS OF TRIALS OF WAR CRIMINALS 1, 85 (U.N. WAR CRIMES COMM'N 1948) ("The capacities in which the various accused acted when committing the crimes of which they were found guilty were those of ministerial official, judge or prosecutor").

give meaning to the "rule of law." These values are essential to preserving the credibility of the law and democracy.

III. LEGAL LESSONS LEARNED AND LEARNING FROM UKRAINE: CHAPTER ONE

One reason international law and the institutions intended to uphold international peace and security did not prevent Russia's invasion(s) of Ukraine is because law is not self-executing. It requires the political will to adhere to law and to act to uphold law's values. The absence of a clear international legal basis to act is sometimes used to obscure or disguise the absence of a political will to act. At the U.N., however, even when there is the political will to act, the veto power is often used to block action. That is one reason President Zelensky has called for U.N. reform. But that is not enough, nor even the correct legal response to Russian aggression against Ukraine. Law does not provide security assurance any more than the Budapest Memorandum provided assurance. Combined with political will and resources, law provides a framework for security assurance.

The point is illustrated by Article 5 of the North Atlantic Treaty, the gold standard in collective security and security assurances.[20] But it is not the law—Article 5—or any legal obligation found in Article 5 that makes it so. It is the political will to act upon the law and the investment of resources to do so that provide assurances. Indeed, Article 5 does not compel action.

> The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an armed attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual and collective self-defence recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, *such action as it deems necessary*, including the use of armed force, to restore and maintain the security of the North Atlantic area.[21]

Article 5 is not self-executing. It does not require action. It only requires that states take such action as they deem necessary. Moreover, any such action must be "in accordance with their respective

20. North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

21. *Id.* (emphasis added).

constitutional processes." This language was added to Article 11 at the request of the Senate Foreign Relations Committee to preserve for future contextual determination whether presidents could act pursuant to their inherent constitutional authority or would require congressional authorization before taking action. In short, Article 5's credibility does not derive from its text, the law, but from the political will and resources that accompany that text along with standing and practiced mechanisms, including those authorized under Article 4 that allow NATO to quickly build and sustain consensus.

Lesson one then is that law is not self-executing. Lesson two is that security assurances embedded in law are not self-executing either. They require a commitment of resources, a process for invoking those resources, and the political will to do so. Obvious points, for sure, but they are relearned all the time. The third and likely most important threshold legal lesson from Ukraine is that the good faith application of law is a security advantage, not a disadvantage.

Some commentators bemoan the restrictions that law, and its underlying values, sometimes place on security choices. They decry the asymmetric way law is sometimes applied. When one side follows the law and its opponents do not, the opponent is thought to have an unfair advantage, and sometimes does. Likewise, one's opponents may use law, especially international law, in a cynical manner to excuse or rationalize actions that clearly violate the law, are contrary to the values of the "law," and rest on fabricated pretexts. Law in this context is not used to reflect values or uphold process, but as a weapon—hence the advent of the term "lawfare."

Whether one finds such critiques appealing or persuasive depends, in part, on whether one considers national security to encompass the protection and preservation of values or just the maintenance of physical safety. It also depends on whether one perceives law as a force multiplier or a hindrance. One of the roles of the national security lawyer is to articulate not just what the law is but also "why the law is" and how adherence to the law, generally and in context, leads to better security results.

The humane treatment of Prisoners of War (POWs), for example, is required by Common Article 3 of the Geneva Conventions and U.S. domestic law through reference to the Army Field Manual on Interrogation.[22] That is international as well as U.S. law. However,

22. In U.S. practice, complaints about the number of lawyers involved in national security decision-making become proxies for larger anxieties about the nature of law and the way law may restrict U.S. actions.

adherence to this law is more likely to result in the gathering of useful information from POWs than harsh treatment, which invariably hardens resistance. In many contexts, it will also harden the resistance and resolve of the enemy. In addition, adherence to legal values is more likely to inspire and sustain domestic and international support in the form of intelligence, manpower, sanctions, diplomacy, and public opinion, as the U.S. learned by some allies' responses to the use of Guantanamo Bay as an interrogation and detention center during the Global War on Terror.

Ukraine's response to Russian aggression demonstrates the point in positive fashion. Russia's extensive and repeated violation of international humanitarian law has solidified the Ukrainian people's will to fight and galvanized NATO nations to support Ukraine with intelligence and weapons. When I was "in" Ukraine (on Zoom) to give six presentations in February 2022, before the Russian invasion, I was repeatedly asked: does law matter when you face existential security risk? I was prepared for the question because I had heard it before, in the United States government. Here was my response:

- As George Washington was the first to state in U.S. practice: discipline and obedience to law are the difference between an armed mob and a professional military.[23] Professional militaries win wars; armed mobs commit war crimes.
- Adherence to law is often consistent with the "Principles of War." The legal principle of proportionality in targeting, for example, equates with the military principle of economy of force. Resources are finite, and one should only use those resources needed to accomplish the military mission. Likewise, the humane treatment of detainees is a legal requirement, but it also can yield security results in the form of intelligence and a willingness of the opponent to surrender.
- The military will to fight, and civilian will to resist, is based in part on adherence to law and a belief in the moral virtue of one's war effort. Mothers and fathers do not want to send their children to serve in militaries that commit war crimes. Public support will also wane for conflicts perceived as unjust and/or in which the military uses unlawful means.

23. *See* Maurer Maurer, *Military Justice under General Washington*, 28 MIL. AFFS. 8, 8 (1964).

- International support, especially from the United States and NATO, depends on adherence to law, whether that support comes in the form of weapons, information, or a willingness to absorb the indirect costs of conflict.
- Although absent in the case of Russia, adherence to law on the battlefield may lead to reciprocal adherence, including in the treatment of detainees. Even where it does not, it avoids "whataboutism" propaganda and the equating of serial war crimes with singular war crimes, a Russian propaganda specialty.
- Adherence to law also reflects who a nation is as a people and a society.
- The first "modern" military code of conduct, the 1863 Lieber Code, was adopted during the American Civil War, a period of existential risk to the United States.[24] Existential risk is not a reason or excuse to avoid the law. It is an argument to harness law's virtue as a security tool as well as a moral tool.
- Finally, law and a culture of law are also a bulwark against corruption during conflict, peace, and post-conflict reconstruction when substantial sums of money will be invested to rebuild Ukraine.

These are good talking points. Ukraine demonstrates that they are all also true. Law and a culture of law matter on the battlefield as well as to the preservation of democracy and its values. That too is a legal lesson learned from Ukraine.

IV. LAW AND ACCOUNTABILITY

One way to show that law matters is to hold perpetrators of war crimes accountable. Indeed, a legal realist might argue that without accountability law is not operational and binding, but rather aspirational and hortatory. However, justice in war is often justice delayed if it occurs at all.

A. An Army of War Criminals

International law (and U.S. law) recognizes four categories of crimes committed during war and conflict: aggression; genocide;

24. *See generally* FRANCIS LIEBER, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD (1863). For historical discussion, *see* Rick Beard, *The Lieber Codes*, N.Y. TIMES (Apr. 24, 2013, 12:59 PM), https://archive.nytimes.com/opinionator.blogs.nytimes.com/2013/04/24/the-lieber-codes/.

crimes against humanity; and grave breaches of the law of armed conflict, generally referred to as "war crimes." Although all four sets of crimes may be referred to generally as "war crimes."

"To initiate a war of aggression," the Nuremberg Tribunal concluded, "is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.'[25] As debate over the definition of "aggression" incorporated in the Rome Treaty indicates, there is general international agreement that wars of aggression are crimes, but less agreement on exactly which acts or wars might qualify. However, Russia's 2022 invasion of Ukraine surely qualifies.

Genocide occurs when there is a specific intent by the perpetrator state or actors to destroy in whole, or in substantial part, a national, ethnic, racial, or religious group as such by killing members of the group, causing serious bodily harm to members of the group, or transferring by force children of the group to another group, among other things.[26] There is general agreement on the definition of genocide, which is found in the Genocide Convention to which 153 nations are parties.[27] However, the Convention is not self-executing (it requires domestic implementation by parties) and there may be debate over whether the intent element is met and then what to do about it. The facts on the ground in Ukraine would appear to demonstrate this specific intent, as would the transfer of up to 6,000 Ukrainian children to "re-education camps" in Russia.[28]

Crimes against humanity include widespread or systematic attacks directed against any civilian population.

War crimes address grave breaches of international humanitarian law (IHL), such as violation of the principles of distinction,

25. *E.g.*, *The Judgment: The Nazi Regime in Germany*, AVALON PROJECT, https://avalon.law.yale.edu/imt/judnazi.asp (last visited Mar. 23, 2023).

26. *See* 18 U.S.C. § 1091.

27. *See* Convention on the Prevention and Punishment of the Crime of Genocide art. 2, Dec. 9, 1948, U.N. Doc. A/810 (1948), 78 U.N.T.S. 277. Art. 2 defines genocide as the "intent to destroy, in whole or in substantial part, a national, ethnic, racial, or religious group, as such: a) Killing members of the group; b) Causing serious bodily harm or mental harm to members to members of the group; c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; d) Imposing measures intended to prevent births within the group; e) Forcibly transferring children of the group to another group." *Id.*

28. *See* Media Note, Dep't of State, Evidence of Russia's War Crimes and Other Atrocities in Ukraine: Recent Reporting on Child Relocations (Feb. 14, 2023) (available at https://www.state.gov/evidence-of-russias-war-crimes-and-other-atrocities-in-ukraine-recent-reporting-on-child-relocations/).

proportionality, and necessity in targeting, rape, torture, and the use of starvation as a weapon, among others. Not every violation of IHL is a war crime, grave breaches are.

There is a fifth set of crimes as well that are often overlooked that also occur during war, "common law crimes" committed by participants and civilians, perhaps taking advantage of the absence of a police presence or central authority.

Russia and Russian actors have run the table in committing war crimes in and against Ukraine and the people of Ukraine. One struggles to identify a war crime Russian soldiers have not committed or been accused of committing. The names of Bucha and Izium have joined those of My Lai and Katyn as symbols of military atrocity. The Government of Ukraine has opened 66,000 war crimes investigations as of January 2023.[29] However, there remain doubts as to whether Russia, Russian military personnel, the responsible commanders, or Putin himself will be held accountable.

There are a number of courts that might exercise subject matter and personal jurisdiction over perpetrators of war crimes committed in Ukraine. These include in the first instance Ukrainian courts, national courts with universal or statutory jurisdiction, and the International Criminal Court (ICC). The government of Ukraine and some commentators have called for establishment of a special tribunal for Ukraine modeled on the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, or the Special Court for Sierra Leone. However, as of January 2023, there have been only twenty-five convictions for war crimes in Ukrainian courts, and only eighteen Russian soldiers are in Ukrainian custody out of the 250 for whom there is sufficient evidence to proceed to trial.[30]

There are a number of challenges to prosecuting war crimes committed in Ukraine. These include:

(1) The challenge of obtaining physical custody of alleged perpetrators, beyond those captured on the battlefield.

(2) The evidentiary challenges related to the collection and preservation of evidence on an active battlefield, to include witness identification, the protection of witnesses, the protection of intelligence sources and methods, demonstration and maintenance of

29. Liz Sly, *66,000 War Crimes Have Been Reported in Ukraine. It Vows to Prosecute Them All*, WASH. POST (Feb. 6, 2023), https://www.washingtonpost.com/world/2023/01/29/war-crimes-ukraine-prosecution/.

30. *Id.*

the evidentiary chain of custody, and the authentication of cell phone and drone-generated imagery.

(3) The scale of crimes presents its own challenges involving the allocation of resources and the prioritization of prosecutions, along with the challenges that come from maintaining custody over and preserving evidence from 66,000 or more investigations in a country torn by war.

(4) Policy issues involving the potential trade-offs between diplomatic mechanisms for ending the war and accountability. Russia may seek to extract war crimes concessions in the form of promises to decline prosecution in exchange for POWs, territory, or other peace process matters. Of course, it is theoretically possible that Russia might surrender designated offenders in exchange for an otherwise generalized amnesty or promise to forego further prosecutions. More likely is the possibility that Russia will hold Ukrainian POWs and civilians hostage pending "satisfactory" resolution of certain war crimes investigations.

(5) In the context of trial, and as discussed in this volume, there are also numerous legal issues that will, or may, arise in the context of war crimes trials. But if these issues present challenges, they also present opportunities. "Opportunity" is an uncomfortable word to describe holding perpetrators of war crimes accountable. But there is opportunity to do so here in ways not seen before, along with a parallel opportunity to purposefully and carefully develop the law. Both "opportunities" are illustrated with reference to command responsibility where additional sources and methods of evidentiary gathering should allow authorities to identify those commanders and chains of command responsible for war crimes, thus also allowing development of the *Yamashita* line of cases holding commanders responsible for the good order and discipline of their units and personnel.[31] The same might be said of additional areas of accountability and law, discussed in this journal, and suggested by the illustrative list below.

- Command Responsibility. IHL recognizes and holds commanders responsible for the actions of their subordinates and units. Commanders are responsible for what they direct. They are also responsible for what they

31. *In re Yamashita*, 327 U.S. 1, 33 (1946) (upholding the conviction finding General Tomoyuki Yamashita, commander of the Japanese forces in the Philippines in World War II, responsible for brutal atrocities committed by his troops against the civilian population and prisoners of war under the doctrine of command responsibility).

should have known was occurring and failed to stop. This is the *Yamashita* principle, named for the Japanese commander in the Philippines whose troops committed wanton rape and murder in Manila during the Second World War. Yamashita was subsequently tried by a U.S. military court and hanged after appeal to the Supreme Court of the United States. Yamashita was not charged with committing or ordering the mass atrocities, but the Court concluded he "unlawfully disregarded and failed to discharge his duty as a commander, to control the operations of the members of his command, permitting them to commit brutal atrocities . . . and he . . . thereby violated the laws of war."[32] In Ukraine, public evidence indicates that many war crimes occurred at command direction. Other crimes, no doubt, were the product of individual and spontaneous indiscipline. Given the apparent volume of evidence of the command structure of Russian units in Ukraine, there is reason to expect extensive development of law and practice in this area. Lawyers and judges should do so knowing that they are shaping the law in addition to serving justice.

- Direct Participation in Hostilities (DPH)/*Levée en masse*. The LOAC/IHL anticipates the existence of a *lévee en masse* in the event of hostile invasion. This appears to have occurred in Ukraine. In addition, media reports indicate that Ukrainian civilians in occupied and other territory have engaged in acts of organized and spontaneous resistance along a continuum, from the passive collection of information that can be used as intelligence (photographs of military personnel and vehicles that are posted and then shared with the Ukrainian military), to direct collection of information (e.g., flying drones, passing on images ,or verbal information to military personnel), to arms smuggling, to direct military engagement with Russian soldiers. International law and the legal scholars and governments who help to define that law generally agree that where civilians directly participate in hostilities, they lose their status as civilians and become combatants who might lawfully be targeted and detained, consistent with IHL for that period during which they directly participate. However, in the context of the Global War on Terror, governments, notably the U.S. and allied nations deployed in Iraq and Afghanistan did not agree

32. *Id.* at 13–14.

with the International Committee of the Red Cross (ICRC) on the scope and limitations of DPH.[33] The ICRC took a narrow view of the term, maximizing protective status of civilians as non-combatants, and the U.S. government took a broader view, accounting for the fluid nature of operations intended to counter insurgency and counter terrorism. No doubt the debate will resume as governments in the context of war crimes trials directed at Russian engagement against civilians address the nature and scope of what DPH means.

- Duress and Self-Defense. In U.S. military practice, the law recognizes an affirmative or special defense of duress. Duress requires: (1) that the accused's participation in the offense was caused by a reasonable apprehension that the accused or another innocent person would be immediately killed or would immediately suffer serious bodily injury if the accused did not commit the act; (2) that the apprehension must reasonably continue throughout the commission of the act; and (3) the accused did not have a reasonable opportunity to avoid committing the act.[34] The defendant has the burden of presenting "some evidence" of duress to receive a jury instruction on the defense, at which point the prosecution has the burden to disprove the defense beyond a reasonable doubt.[35] The jury ("members" in the case of a U.S. military court-martial), of course, can choose what evidence to credit and what weight to apply to the evidence in determining whether the elements of the underlying offense are proven beyond a reasonable doubt. It is a narrow defense. Notably, "it is a defense to any offense except killing an innocent person."[36] One might ask whether and to what extent such a defense might, or should, be available on a case specific basis to Russian soldiers directed to kill civilians or commit other war crimes, on threat of execution. How a defendant might proffer such a defense presents additional questions, which in U.S. practice might raise due process considerations. Self-defense is another affirmative defense, limited in scope and application, but U.S. military courts have

33. *See* Jay C. Jackson, *Applying the U.S. and ICRC Standards for Direct Participation in Hostilities to Civilian Support of U.S. Military Operations*, 79 A.F. L. REV. 53, 56 (2018).

34. *See* JOINT SERV. COMM. ON MIL. JUST., MANUAL FOR COURTS-MARTIAL U.S. 916(h) (2019).

35. *See id.* 920(e).

36. *Id.* at 916(h).

considered its application to the interactions between U.S. forces and civilians in combat contexts, concluding at least as a matter of theory that the defense could apply.

- Mercenaries. The present textual definition of mercenary found in Article 47 of Additional Protocol I to the Geneva Conventions is a narrow one. The definition requires six elements to be met in the conjunctive.

A mercenary is any person who: (a) is specially recruited locally or abroad in order to fight in armed conflict; (b) does, in fact, take a direct part in the hostilities, (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, but or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party; (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Part to the conflict; (e) is not a member of the armed forces of a Party to the conflict; and (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.[37]

Generally, scholars agree it is not an international crime *per se* to serve as a mercenary. However, mercenaries may lose entitlement to combatant status and their POW status if captured. Moreover, while international law may be opaque or permissive with regard to who is and is not a mercenary, domestic law often is not. Legal and factual questions abound, including: Does the Article 47 definition comport with customary international law? How should customary international law evolve in light of events in Ukraine? Is the Wagner Group a mercenary army, an army with mercenaries, or something else? Is the line between foreign volunteers, mercenaries, and contractors clear, and/or as clear as it should be going forward? These are important questions.

- Retaliation and Retribution. One way to distinguish between law and a culture of law during and after conflict is found in how persons accused of aiding and abetting an enemy are treated during and upon conclusion of hostilities. Studies in post-conflict reconstruction suggest that qualitative distinctions between retribution and

37. *See* Protocols Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts art. 47, June 8, 1977, 1125 U.N.T.S. 3.

> summary justice on the one hand and justice on the other (defined here as the adjudication of factual allegations in accord with due process before an independent and impartial judge) can determine whether any period of post-conflict reconstruction is successful. It can also help determine the quality of a nation's capacity to administer justice going forward. How these matters are addressed may also contribute to perceptions about law and courts in ways that will influence continued NATO support and investment in Ukraine's postwar economy.

It is too early to draw conclusive lessons regarding the prosecution of war crimes in Ukraine. However, a number of observations emerge.

- The potential prosecution of war crimes has not served as a deterrent to the commission of war crimes.
- We also have seen additional methods deployed to hold states and state actors accountable for their actions other than criminal prosecution, or in addition to eventual prosecution.
- However, there is room for debate as to whether these mechanisms are being used effectively and whether they are perceived by the victims of war crimes as a meaningful form of accountability.

B. Other Forms of Accountability

1. The Right to Be Heard

Holocaust survivor Elie Wiesel said, "[t]here may be times when we are powerless to prevent injustice, but there must not be a time when we fail to protest."[38] In contrast to many previous conflicts, war crimes committed in Ukraine are being revealed in real time or near real time. This reflects the fluid nature of the forward edge of battle, the ubiquitous nature of cell phones, and the sheer volume of crimes. In Ukraine, Russian war crimes are hard to miss or cover up. In addition, Ukraine has trained and deployed war crimes documentation units before the 2022 invasion. These units were "combat tested" in eight years of Donbas fighting. Thus, while victims may not, or may not yet, have their day in court, their loss is known and in this sense their voices heard.

38. Elie Wiesel, Nobel Lecture (Dec. 11, 1986).

2. Sanctions Other Than Prosecution

Also, in contrast to previous conflicts, in many cases perpetrators of war crimes are identifiable, at least at the unit and command level. This is based on the ubiquity of recording technology, the way that Russian soldiers use social media, insecure communications, the capture of POWs, and detailed Ukrainian and NATO order of battle analysis, among other factors. This also means that perpetrators are potentially subject to indirect sanctions, such as public identification, travel bans, and asset freezing, in much the same way that the Department of Justice has identified Chinese and North Korean cyber hackers—"named and shamed"—not with expectation that personal custody would soon follow indictment, but as a deterrent measure and as a form of travel and financial sanction. However, there is a potential tension between indirect sanctions and criminal prosecution, as "name and shame" campaigns also make suspects aware that they are known and therefore should not risk foreign travel.

3. Reparations

Reparations, on an individual or national basis, are another form of justice. Students of history know reparations can complicate the successful cessation of hostilities and perpetuate wartime animosities into peacetime. They also present policy issues of resource allocation and potential corruption. The availability of funding in the absence of occupation and/or capitulation is also an issue. The scholar Martin Bulla has suggested the possibility of using private international law and litigation as a potential source of financial compensation for crimes committed by mercenaries and other private actors.[39]

In Russia's case, however, there is as much as $300 billion in Russian Central Bank assets frozen overseas.[40] There are indications that some governments are considering whether such assets can be seized and used to compensate war crimes victims or provide reparations to Ukraine.[41] Such proposals implicate all four purposes of

39. Martin Bulla, Professor, Trnava University, Panel Discussion at the Ukrainian Catholic University Online Symposium "National Security Law and the War in Ukraine: Perspectives from the Frontline States" (Feb. 3, 2023).

40. Anton Moiseienko, *Politics, Not Law, Is Key to Confiscating Russian Central Bank Assets*, JUST SEC. (Aug. 17, 2022), https://www.justsecurity.org/82712/politics-not-law-is-key-to-confiscating-russian-central-bank-assets/.

41. *See* Ott Tammik, *Estonia to Move Ahead of EU With Plans to Seize Russian Assets*, BLOOMBERG NEWS (Jan. 9, 2023, 9:58 AM),

law: the authority to act, the limits on that action, essential process, and values. Nations holding frozen Russian assets would need a domestic legal basis to freeze and then seize Russian state assets. In the U.S. context, domestic law provides the authority to freeze foreign government assets, but not to confiscate and dispose of them unless and only "when the United States is engaged in armed hostilities or has been attacked by a foreign country or foreign nationals."[42] Such a determination would cross a number of presumptive U.S. and NATO redlines. However, legislation could amend the law to avoid the conclusion that the U.S. was in a state of hostilities with Russia.

The international legal basis for confiscating Russian state assets is, perhaps, more evident and also applicable to all states holding frozen Russian assets. Under the doctrine of state responsibility developed and recognized by the International Law Commission, states can engage in counter measures that would otherwise be unlawful in order to deter and remedy a predicate unlawful act by the target of the counter measures.[43] A war of aggression would seem to qualify as a predicate unlawful act (!) giving rise to a right to engage in necessary and proportionate countermeasures. The Ukrainian government and international institutions estimate the cost of rebuilding Ukraine in the neighborhood of $350–750 billion.[44] (For a sense of scale, the Marshall Plan to rebuild Europe after World War II cost $150 billion in today's inflation-adjusted dollars.[45])

The legal process question is how, by whom, and with what priority would or should confiscated funds be distributed? Would the victims of war crimes or their survivors receive compensation? If so, according to what formulas? Here, the U.S.'s experience administering the post-9/11 Victim Compensation Fund might provide insight. Or should priority be given to the rebuilding of Ukraine's economy and/or military? These are value-based questions of

https://www.bloomberg.com/news/articles/2023-01-09/estonia-to-move-ahead-of-eu-with-plans-to-seize-russian-assets.

42. 50 U.S.C. § 1702(a)(1)(C).

43. *See* Int'l L. Comm'n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 75–76 (2001).

44. *See* Andrea Shalal, *Rebuilding Ukraine after Russian Invasion May Cost $350 Bln, Experts Say*, REUTERS (Sept. 9, 2022, 2:09 PM), https://www.reuters.com/world/europe/russian-invasion-ukraine-caused-over-97-bln-damages-report-2022-09-09/.

45. *The Marshall Plan*, NAT'L MUSEUM OF AM. DIPL., https://diplomacy.state.gov/online-exhibits/diplomacy-is-our-mission/development/the-marshall-plan/ (last visited Mar. 23, 2023).

prioritization. They bring the added complexity that some of the corpus of the frozen funds represent foreign investments in Russia, such as pension funds for teachers in the United States.[46] This raises the prospect that innocent persons not aligned with the Russian government or Russian perpetrators of war crimes might ultimately bear some of the cost of Russian reparations drawn from seized state assets. The confiscation of assets for reparations may also lead to the retaliatory and pretextual seizure of foreign assets within Russia or in allied states, again raising the prospect that innocent external actors and not Russia, or in addition to Russia, may bear the cost.

President Zelenskyy stated before the International Bar Association in October 2022 that the "lawyers will put an end to this war – after the military, after politicians."[47] Whether Ukraine survives the conflict is largely a military and diplomatic question. Whether Ukraine survives any subsequent cessation of hostilities or peace is in many ways a legal question. Can Ukraine rebuild its economy and its society to attracts foreign investment, avoids corruption, and provides the resources to sustain an economy independent of Russian coercion and a military that deters further Russian military aggression?

C. Disinformation, Propaganda, and Incitement to Violence

One lesson from Ukraine on accountability is the importance of working across disciplines and not limiting responses to one tool. For example, commentators and scholars have considered mechanisms to prosecute Russian propagandists who incite violence against Ukraine and Ukrainians. They point to the prosecution of the perpetrators behind Rwandan hate radio, known as *Radio Télévision Libres des Mille Collines*, who were prosecuted before the International Tribunal for Rwanda for incitement to genocide.[48] Some of the World War II axis propagandists, like the women collectively known as "Tokyo

46. *See* Daniella Silva, *Kentucky Teachers' Retirement Fund Lost $3M in Selling Investment in Russian Bank*, NBC NEWS (Mar. 4, 2022, 3:58 PM), https://www.nbcnews.com/news/us-news/kentucky-teachers-retirement-fund-lost-3m-selling-investment-russian-b-rcna18781.

47. Volodymyr Zelenskyy, President, Ukraine, Address to the International Bar Association (Oct. 31, 2022).

48. Press Release, Int'l Crim. Tribunal for Rwanda, Three Media Leaders Indicted for Genocide (Dec. 12, 2003) (available at https://unictr.irmct.org/en/news/three-media-leaders-convicted-genocide).

Rose" and William Joyce, a.k.a. "Lord Haw-Haw," were prosecuted and in Joyce's case hanged for treason.[49]

Prosecution, however, is not a realistic option for many propagandistic activities as opposed to election interference or some other predicate offense. Most national legislation does not criminalize propaganda as opposed to incitement to genocide or treason. Likewise, governments would have to obtain custody of perpetrators to proceed with prosecution. In U.S. practice, the punishment of propaganda without more, would likely raise First Amendment concerns, and depending on context, ex post facto concerns as well. Recall that the current U.S. First Amendment test for prosecuting speech that promotes violence found in *Brandenburg* requires not only that the speech be "directed to inciting or producing imminent lawless action" but that such speech is "likely to incite or produce such action."[50] Otherwise, something more, i.e., something material, would be required before words alone can serve as a basis for prosecution.[51]

If prosecution is not a clear or immediate answer to Russian propaganda, what is? Russian disinformation is known for being full-spectrum, repetitious, and relentless. The response should be as well. A comprehensive response might include four pillars: content moderation; policy; law; and user education. Platform and content moderation might include transparency in the form of identification and labeling, warnings, and aggressive efforts at counter-speech, contextualization, and correction, either as an act of corporate social responsibility, or pursuant to regulatory requirement. A policy response might ensure that adequate funding and personnel resources are dedicated to responding to disinformation and misinformation, a 24/7 response to a 24/7 problem. Legal mechanisms might include "name and shame" campaigns, Committee on Foreign Intelligence in the United States (CFIUS) restrictions on foreign ownership or control of affected platforms, and stricter enforcement of Foreign Agent Registration Act requirements in the form of both stricter application of the law and the provision of additional prosecutorial resources to enforce the law.[52] In addition, tax, insurance, litigation, regulation, and licensure can be used to incentivize greater content moderation. A

49. *The Rise and Fall of Lord Haw Haw During the Second World War*, IMPERIAL WAR MUSEUM, https://www.iwm.org.uk/history/the-rise-and-fall-of-lord-haw-haw-during-the-second-world-war (last visited Mar. 23, 2023).

50. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

51. *See id.* at 448.

52. *See* 22 U.S.C. § 611.

pending Supreme Court case, *Gonzalez v. Google*, may also transform Section 230 of the Communications Decency Act, the 1996 law which heretofore has exempted social media companies from liability for what is posted on their platforms.[53]

Finally, schools at all levels can place greater emphasis on educating users of social media in critical thinking skills so that they are better able to see all sides to issues and distinguish between opinion, judgment, fact, and fiction. This is done in Finland.

Here is the point and the "lesson." Policymakers should utilize all the tools at their disposal to address disinformation, while also pursuing accountability in Ukraine for Russia's conduct. Accountability in the absence of prosecution may feel empty or like lesser justice, but it may be the only recourse, and such recourse may have the added virtue of impacting the outcome of the war. Prosecution, if it occurs, is usually a retroactive remedy.

CONCLUSION: DOES LAW MATTER?

The World War I veteran and poet Archibald MacLeish wrote of dead soldiers:

> They say, Whether our lives and our deaths were for peace and a new hope or for nothing we cannot say; it is you who must say this.
>
> They say, We leave you our deaths: give them an end to the war and a true peace: give them a victory that ends the war and a peace afterwards: give them their meaning.
>
> We were young, they say. We have died. Remember us.[54]

The same might be said of the Ukrainian people. One way to give meaning to the lives lost and the suffering of Ukraine is to identify and apply the lessons learned from the war. One of those lessons is that law *does* matter if we make it matter.

The international legal system, including the United Nations, failed its most fundamental task: to maintain international peace and security. However, adherence to law is also a—if not *the*—difference maker in Ukraine. It is the root of Ukraine's shared values with NATO and the United States. It distinguishes the Ukrainian military from the Russian military. Ukrainian adherence to the law of armed conflict is

53. Gonzalez v. Google LLC, No. 21-1333 (U.S. argued Feb. 21, 2023).

54. Archibald MacLeish, The Young Dead Soldiers Do Not Speak, NAT'L PARK SERV., https://nps.gov/wwim/learn/historyculture/young.htm (last visited Mar. 23, 2023).

also a *sine qua non* for U.S. and NATO military and intelligence support. Good order and discipline are the hallmark of a professional military and usually a harbinger of victory.

This volume identifies further lessons learned as well as areas that warrant further study. We hope that in some small way, it will honor the lives of those lost to Russian aggression and help contribute to a legal framework that might in the future better protect human dignity and the values of the law than it has in the past.