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Russia's Invasion of Ukraine and the Interaction of Instrumentalized Law, Rhetoric, and Strategy

CHRISTOPHER J. BORGENT†

I. INTRODUCTION

This essay considers the integration of international legal argument within politico-military strategy.¹ It assesses Russia's arguments concerning its expanded invasion of Ukraine in comparison to its prior use of legal arguments in relation to Kosovo's drive for independence, the secessionist conflicts in the Russian "Near Abroad," and its 2014 annexation of Crimea.² While there is a larger story concerning the perceptions and misperceptions of U.S., European Union (EU), and Russian intentions and actions in the years since the

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1. This essay draws in part on Christopher J. Borgen, *Law, Rhetoric, Strategy: Russia and Self-Determination Before and After Crimea*, 91 INT'L L. STUD. 216 (2015) and Christopher J. Borgen, *The Language of Law and the Practice of Politics: Great Powers and the Rhetoric of Self-Determination in the Cases of Kosovo and South Ossetia*, 10 CHI. J. OF INT'L L. 1 (2009). I have also written about related issues elsewhere, including as the principal author of *Thawing a Frozen Conflict: Legal Aspects of the Separatist Crisis in Moldova*, 61 RECORD OF THE ASSOC. OF THE BAR OF THE CITY OF N.Y. 196 (2006) [hereinafter, "*NY City Bar Moldova Report*"].

2. The term "Near Abroad" has been used by Russian political leaders to describe the former Soviet Republics. See GERARD TOAL, NEAR ABROAD 3 (2017).

end of the Cold War, that is for another article. This essay is focused on the fact of Russia's invasion of Ukraine and the roles played by legal rhetoric as part of Russia's strategy.

This essay is divided into three sections. The first is an overview of legal argument as a tool of statecraft in a complex conflict. The second section compares and contrasts how Russia has instrumentalized legal argument in recent conflicts. The essay concludes by reconsidering the interplay of legal argument, diplomatic rhetoric, and politico-military strategy in light of Russia's recent practices.

II. LEGAL ARGUMENT AND MULTIDIMENSIONAL CONFLICTS

The language of the law—of rights and of what is right, of what is legal and illegal—is a tool of statecraft that is part of politico-military strategy. Legal claims are often a rhetoric of first, not last, resort. How we talk about law, and especially how national leaders talk about law, can shape perceptions both of law and of the conflict, justifying one's own actions while undermining those of an adversary. Claims of right—regardless as to whether they are well-founded—can be used in an attempt to strengthen the resolve of one's own side, or to persuade undecided parties either to act or refrain from action, or to confuse or weaken the resolve of one's adversary. Prior to a single shot being fired, framing the legality of a situation can be the normative analog to preparing the battlefield.

When deployed in this way, law functions as an enabler, not a guardrail. It is used to assist power projection, not constrain it. One can summarize the primary levers of statecraft with the acronym MIDFIELD: Military, Informational, Diplomatic, Financial, Intelligence, Economic, Law, and Development.³ Of particular interest in this essay are the interactions of the law, diplomatic, and military aspects of state power within multi-dimensional conflicts.

Russia's annexation of Crimea is at times described as hybrid warfare—the coordinated use of military and non-military techniques to project power in a manner in which one's adversary may not even realize that a conflict has commenced.⁴ Some have argued that hybrid

3. See, e.g., THE JOINT CHIEFS OF STAFF, JOINT DOCTRINE NOTE 1-18, vii-viii (2018).

4. For a discussion of varying definitions of hybrid warfare and related concepts, see OSCAR JONSSON, THE RUSSIAN UNDERSTANDING OF WAR 8–16 (2019). See also Patrick Jackson, *Ukraine crisis: 'Frozen conflicts' and the Kremlin*, BBC NEWS (Sept. 9, 2014),

warfare presents a new challenge not only to existing military strategies but also to the regulatory structure of international law.⁵ But, while modern technology such as social media has broadened the methods of information operations and other aspects of hybrid warfare, the coordinated application of military and non-military tools of statecraft is as old as, well, statecraft. Of course, besides being deployed to confuse adversaries in ambiguous and stealthy conflict, legal argument is routinely used to justify overt military action, sometimes trying to hide naked aggression behind a fig-leaf of verbiage. The Melian Dialogue notwithstanding, those with might tend to explain to the world that what they are doing is actually right.⁶

Thus, what was meant to act as a constraint on state power is instrumentalized to amplify power. But international legal argument is not infinitely malleable. What makes legal rhetoric so attractive to strategists and propagandists is also what potentially provides a limit to its flexibility; international law operates like a consensual vocabulary and grammar for diplomacy, both explaining the meaning of concepts but also setting-out when words do and do not fit together.⁷ Although there are areas of contestation, there are also areas of consensus around certain arguments that do or do not make sense in the grammar of international law. Arguments well outside of these areas are weak or questionable. If one wants to justify an armed intervention into another country, they will need to couch it in a form that is “grammatically correct” under international law. For example, an attempt to claim a “right” of “aggression” would be grammatically non-sensical.

<http://www.bbc.com/news/world-europe-29078541> (giving examples of hybrid warfare being used “across the Russian periphery”).

5. For a discussion of the history of the concept of hybrid warfare and its relation to law, see Aurel Sari, *Hybrid Warfare, Law, and the Fulda Gap*, in *COMPLEX BATTLESPACES: THE LAW OF ARMED CONFLICT AND THE DYNAMICS OF MODERN WARFARE* 161–90 (Christopher M. Ford & Winston S. Williams eds., 2019). Sari described the role of law as a “domain of hybrid warfare,” noting “[t]he use of law to support warfare is not a novelty,” but also that hybrid warfare “is mostly uncharted territory for lawyers and for this reason alone merits study.” *Id.* at 182 and 167.

6. According to Thucydides, in the Melian Dialogue during the Peloponnesian War, the (strong) Athenians contended to the (weak) Melians that “the strong do what they can and the weak suffer what they must.” *THE LANDMARK THUCYDIDES: A COMPREHENSIVE GUIDE TO THE PELOPONNESIAN WAR* 352 (Richard B. Strassler ed.; Richard Crawley trans., 1996).

7. I discuss this at greater length in, among other places, Borgen, *Law, Rhetoric, Strategy*, *supra* note 1 and in Borgen, *Rhetoric of Self-Determination*, *supra* note 1.

In an extreme case, though, a state might attempt to change the legal grammar itself. That seems to be what Russia is trying to do regarding its invasion of Ukraine.

III. RUSSIA'S USE OF LEGAL ARGUMENT

I divide Russia's use of legal argument in relation to conflicts in Eastern Europe into three overlapping phases: its critique of the actions of NATO states and others in relation to Kosovo; its rhetoric concerning the so-called "frozen conflicts" in states formerly part of the USSR; and its evolving arguments concerning Ukraine.

The USSR and then Russia have historically tried to maintain a diplomatic rhetoric that refers to the importance of international law and frames itself as one of the defenders of international law in the face of U.S. exceptionalism.⁸ In a 2007 address before the Munich Security Conference, Russian President Vladimir Putin said:

We are seeing a greater and greater disdain for the basic principles of international law. And independent legal norms are, as a matter of fact, coming increasingly closer to one state's legal system. One state and, of course, first and foremost the United States, has overstepped its national borders in every way. This is visible in the economic, political, cultural and educational policies it imposes on other nations. Well, who likes this? Who is happy about this?⁹

In general, Russian arguments prior to its 2008 invasion of Georgia emphasized the key role of sovereignty in the international system.¹⁰

8. For example, regarding the war in Syria, see Vladimir V. Putin, *Op-Ed: A Plea for Caution From Russia*, THE N.Y. TIMES (Sept. 12, 2013), <https://www.nytimes.com/2013/09/12/opinion/putin-plea-for-caution-from-russia-on-syria.html>; see also LAURI MÄLKSOO, RUSSIAN APPROACHES TO INTERNATIONAL LAW 148–53 (2015) (concerning the Russian government's self-image as a protector of international law and as a "restrainer" of the threat to order posed by US power).

9. *Speech and the Following Discussion at the Munich Conference on Security Policy*, PRESIDENT OF RUSS. (Feb. 10, 2007), <http://en.kremlin.ru/events/president/transcripts/copy/24034>; see also MÄLKSOO, *supra* note 8, at 149.

10. See, e.g., Written Statement of the Russian Federation to the International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo* (Request for Advisory Opinion), paras. 76–88 (Apr. 16, 2009) (emphasizing the importance of sovereignty and territorial integrity, even in the context of self-determination) [hereinafter, "Kosovo

Such arguments were at the core of Russia's criticism of NATO's military intervention regarding Kosovo in 1999 and the subsequent recognition of Kosovo by the U.S. and other states over Serbia's objections. Russia emphasized UN Charter prohibitions on the unauthorized use of force and also sovereignty and territorial integrity as cornerstones of modern international law.¹¹ NATO's intervention without Security Council authorization likely bolstered the rhetoric of certain Russian leaders that various Western states, and especially the U.S., treat international law as something that applies to others but not to themselves.

In the years that followed, Russia's arguments concerning Kosovo shifted from the West's use of force in 1999 to the question of Kosovo's status and whether the West would support Kosovo's bid for independence. In 2008, Russian Foreign Minister Sergey Lavrov said that the separation of Kosovo would be a "subversion of all the foundations of international law, . . . [a] subversion of those principles which, at huge effort, and at the cost of Europe's pain, sacrifice and bloodletting have been earned and laid down as a basis of its existence."¹²

Russia's arguments concerning both the 1999 intervention and the 2008 recognition of Kosovo's independence were focused on the role of international law as a constraint on state behavior. Putin said in 2008 that those who support Kosovo's independence "have not thought through the results of what they are doing. At the end of the day it is a two-ended stick and the second end will come back and hit them in the face."¹³ In retrospect, this signaled a shift in Russian legal argument, not so much a warning of existing facts on the ground as a

Proceedings, Russian Written Statement"]. This argument was actually made after the 2008 Georgian War. Concerning Russian discussions of sovereignty more generally, see MÄLKSOO, *supra* note 8, at 100–04 (discussing how "Russian legal scholars strongly emphasize state sovereignty as the foundational principle of international law") and 102 (stating "when sovereignty is praised it is not necessarily sovereignty in the abstract but *Russia's* sovereignty") (emphasis in original).

11. See, for example, Vladimir Putin's statements in his meeting with the Valdai Discussion Club: "The bombing of Belgrade is intervention carried out in violation of international law. Did the UN Security Council pass a resolution on military intervention in Yugoslavia? No. It was a unilateral decision of the United States." *Meeting of the Valdai International Discussion Club*, PRESIDENT OF RUSS. (Oct. 27, 2016), <http://www.en.kremlin.ru/events/president/news/53151>. See also Jade McGlynn, *Why Putin Keeps Talking About Kosovo*, FOREIGN POLICY.COM (Mar. 3, 2022), <https://foreignpolicy.com/2022/03/03/putin-ukraine-russia-nato-kosovo/>.

12. Paul Reynolds, *Legal Furore Over Kosovo Recognition*, BBC NEWS (Feb. 16, 2008), <http://news.bbc.co.uk/2/hi/europe/7244538.stm>.

13. *Kosovo independence terrible precedent: Putin*, AL ARABIYA NEWS (Feb. 23, 2008), <http://www.alarabiya.net/articles/2008/02/23/46011.html>.

warning of how Russia could use legal argument to justify its own actions.

That “second end” of the stick came back around just a few months later in August 2008, when Russia invaded Georgia in support of separatists in South Ossetia and Abkhazia. This was part of Russia’s evolving strategies related to the so-called “frozen conflicts” in its “Near Abroad,” two somewhat inaccurate terms that typically refer to the separatist conflicts in Georgia, Moldova, and Azerbaijan, along with the interstate conflict between Armenia and Azerbaijan.¹⁴ The Moldovan and Georgian conflicts, for example, included a period of military conflict circa 1992, with Russia assisting the separatists in a variety of ways, including direct military intervention, followed by de facto separation of secessionist regions with the ongoing presence of Russian troops. All three conflicts have also gone through mediation, with Russia acting as one of the mediators despite its various forms of support for the secessionists.¹⁵ By supporting separatist claims while simultaneously rebranding its forces located in the separatist enclaves as “peacekeepers” and participating as a stakeholder in mediation processes, Russia maintained influence in these countries, especially during a time of NATO and EU enlargement.

Russia’s legal arguments regarding the conflicts in states where it supports separatists are different from how it framed the situation in Kosovo. Regarding South Ossetia and Abkhazia, for example, Russia claims that its military intervention was not an invasion but at least in

14. The term “Near Abroad” is discussed above in note 2. Although each of the conflicts in Moldova (Transnistria) and Georgia (Abkhazia and South Ossetia), as well as the long-term conflict over Nagorno-Karabakh in Azerbaijan, has its own unique causes and ongoing dynamics, they have often been called the “frozen conflicts” of Eurasia, referring to their supposed intractability and that they have persisted for many years without hope of resolution. Writing in 2004, Dov Lynch of the European Union Institute argued that the term “frozen conflict” is somewhat misleading because these situations (even prior to Russia’s 2008 invasion of Georgia) have actually changed significantly. DOV LYNCH, *ENGAGING EURASIA’S SEPARATIST STATES: UNRESOLVED CONFLICTS AND DE FACTO STATES* 42 (2004). See also NICU POPESCU, *EU FOREIGN POLICY AND POST-SOVIET CONFLICTS: STEALTH INTERVENTION* 1–2 (2011) (stating that “[t]he August 2008 war in Georgia tragically highlighted the fact that contrary to widespread beliefs, these conflicts are not ‘frozen.’”).

15. See *NY City Bar Moldova Report*, *supra* note 1, at 215–18 (concerning events in the first decade after the 1992 war). Starting in 2005, negotiations concerning Transnistria followed a 5+2 format (leaders from Moldova’s national government and from the Transnistrian separatists, Russia, Ukraine, and the Organization for Security and Cooperation in Europe (OSCE) plus the US and the EU as observers). POPESCU, *supra* note 14, at 50. Concerning the history of mediation regarding the conflict over Transnistria from the perspective of an OSCE ambassador, see generally WILLIAM H. HILL, *RUSSIA, THE NEAR ABROAD, AND THE WEST: LESSONS FROM THE MOLDOVA-TRANSNISTRIA CONFLICT* (2012). Regarding Russia and these conflicts in general, see LYNCH, *supra* note 14, at 21 (referring to Russia as a “mediator-cum-supporter-cum-combatant”).

part an act of self-defense of its so-called peacekeepers who were in harm's way from Georgia's military operations in South Ossetia.¹⁶ Moreover, rather than continuing to treat sovereignty and territorial integrity as cornerstones of international law, it now made Georgia's sovereignty and territorial integrity seem merely contingent on Georgia's own actions.¹⁷ At the heart of this rhetorical reversal was a conception of the right of self-determination in relation to territorial integrity. In the Kosovo Advisory Opinion proceedings, Russia had emphasized that a group that had a right of self-determination could realize that right within the pre-existing state without seceding to form a new state.¹⁸ Russia had also argued that treating secession as a remedy under international law in situations other than decolonization was controversial and, anyway, circumstances that might allow for such a hypothesized remedy of secession did not exist in the case of Kosovo.¹⁹

By contrast, in the case of Georgia, Russia did not emphasize sovereignty or territorial integrity, as it had for decades. Rather, Russia pointed to Georgia's military operations in South Ossetia (which Georgia said were in response to attacks emanating from there) and contended that there were (at least) two legal justifications for Russia's own military intervention: (a) the protection of Russian troops and (b) the protection of affected populations, over which Russia had a responsibility.²⁰ Moreover, despite the objections of Georgia (and other

16. See *A Conversation with Sergey Lavrov*, COUNCIL ON FOREIGN RELATIONS (Sept. 24, 2008), <https://www.cfr.org/event/conversation-sergey-lavrov> (invoking the responsibility to protect, UN Charter article 51, and the protection of Russian peacekeepers).

17. See Sergey Lavrov, *Russian Foreign Policy and a New Quality of the Geopolitical Situation*, in *DIPLOMATIC YEARBOOK 2008*, MINISTRY OF FOREIGN AFFAIRS OF THE RUSSIAN FEDERATION (stating that "[t]he possession of sovereignty presupposes the duty of a state to refrain from any forcible action which deprives people living on its territory of their right to self-determination, freedom and independence" and that Georgia undermined its own territorial integrity by using force in South Ossetia). See also *id.* ("Russia's actions pursued no aims other than those dictated by the necessity of providing effective guarantees of non-resumption of aggression against the Republic of South Ossetia and the Republic of Abkhazia.").

18. Kosovo Proceedings, Russian Written Statement, *supra* note 10, para. 85.

19. *Id.* paras. 82–88, 102–03.

20. A Conversation with Sergey Lavrov, *supra* note 16; see also *Russian Federation: Legal Aspects of War in Georgia*, 2008-001474 THE L. LIBR. OF CONGRESS 3 (2008), <https://tile.loc.gov/storage-services/service/l1/l1glrd/2018299250/2018299250.pdf> (stating "[t]he necessity of defending Russian citizens living in South Ossetia from Georgian military attacks was cited as the justification for Russian actions").

countries), Russia ultimately recognized South Ossetia and Abkhazia in an act that it maintained was consistent with international law.²¹

This shift in emphasis from strong rhetorical support for state sovereignty and territorial integrity (despite its assistance to secessionists) to support for remedial secession was so pronounced that it can be better described as a reversal. Russia had previously maintained that international law was a constraint on power (although it did not necessarily apply that constraint to itself) and was a protector of state sovereignty. But now its rhetoric used legal argument to question the sovereignty of some states (Georgia, for example) while justifying its own supposed right to intervene and to maintain ongoing relations with territories that most of the world saw as separatist enclaves within a sovereign state.

Russia's arguments in these cases were increasingly based on questionable or unfounded "facts" and shaky or controversial conceptions of international law. The contention that its invasion of Georgia could be understood as an operation to defend its so-called peacekeepers was undermined by the lack of proportionality; the supposed goal of supporting troops under attack was narrow but the invasion was sweeping. Its second justification, the alleged right of unilateral intervention to protect certain populations in Georgia (and in other countries), was problematic for two reasons. First, a broad conception of such a right was based on a claim of a "responsibility to protect," which in this reading would give Russia a right of unilateral military intervention. This is a highly controversial view.

A narrower argument is that Russia was claiming a right to intervene specifically to protect Russian citizens in these separatist enclaves. But this was also a weak argument because it is questionable whether the people claimed to be Russian citizens should have been considered as such, as opposed to being citizens of Georgia. Russia's answer was to hand out Russian passports to interested citizens in Georgia, particularly in South Ossetia and Abkhazia (as well as in other Near Abroad states and separatist enclaves).²² Thus, Russia tried to change the facts on the ground to support its strategic use of legal

21. Concerning Russia's arguments justifying recognition, see Dmitry Sudakov, *Russia Recognizes South Ossetia and Abkhazia to Save People's Lives*, PRAVDA (Aug. 26, 2008), https://english.pravda.ru/russia/106214-russia_ossetia_abkhazia/.

22. Elia Bescotti, Fabian Burkhardt, Maryna Rabinovych, & Cindy Wittke, *Passportization: Russia's "humanitarian" tool for foreign policy, extra-territorial governance, and military intervention*, EUI GLOBAL CITIZENSHIP OBSERVATORY (Mar. 25, 2022), <https://globalcit.eu/passportization-russias-humanitarian-tool-for-foreign-policy-extra-territorial-governance-and-military-intervention/>.

rhetoric to claim a sovereign interest, if not a right, in possible foreign intervention.

While these arguments were a significant change from conceptualizing the law as a guardrail, Russia was still trying to explain an illegal act (its invasion of Georgia) by appropriating the language and form of mainstream legal arguments (self-defense and protecting a population over which it claimed it has responsibility). Thus, facts needed to be developed (Georgian citizens became Russian passport-holders) that could support a particular legal argument (a Russian sovereign interest in protecting passport-holders) in an attempt to justify an illegal act (invasion).

Russia's interlocking of legal argument with politico-military strategy reached its apotheosis in its invasion of Ukraine. In early 2013, diplomats expected that Ukraine and the EU would sign an Association Agreement later that year, despite significant Russian opposition.²³ Increasingly ominous statements from Russian leadership included a warning that Ukraine's Russian-speaking minority might break up the country if an association agreement were finalized and that Russia could legally assist such a secession.²⁴ The specter of separatism had not been a serious issue in Ukraine until this point, although analysts have pointed out that using separatism as a "Russian 'lever' in Ukraine" had already been discussed in the Russian government.²⁵ Once again, Russia was preparing facts on the ground to support diplomatic rhetoric and legal argument that would in turn support a larger Russian politico-military strategy.

In November 2013 then-President Yanukovich, an ally of the Kremlin, announced that Ukraine would not sign the negotiated Association Agreement.²⁶ Popular protests immediately followed.²⁷ In

23. David M. Herszenhorn, *Facing Russian Threat, Ukraine Halts Plans for Deals with E.U.*, NY TIMES (Nov. 21, 2013), https://www.nytimes.com/2013/11/22/world/europe/ukraine-refuses-to-free-ex-leader-raising-concerns-over-eu-talks.html?ref=world&_r=0&pagewanted=a.

24. Ben Hoyle, *Russia threatens to back Ukraine split*, THE TIMES (Sept. 23, 2013), <http://www.thetimes.co.uk/article/russia-threatens-to-back-ukraine-split-tjz257pzzdw>.

25. TOAL, *supra* note 2, at 243.

26. Herszenhorn, *supra* note 23.

27. Peter Dickinson, *How modern Ukraine was made on Maidan*, ATLANTIC COUNCIL (Aug. 21, 2021), <https://www.atlanticcouncil.org/blogs/ukrainealert/how-modern-ukraine-was-made-on-maidan/>.

February 2014, after President Yanukovich fled from Kyiv, parts of Ukraine's Parliament voted to remove him from power.²⁸

Around this time, there was a ramping-up of Russian cyber operations and reports of “polite people,” Russian military forces who were not wearing military insignia, in Crimea.²⁹ This combination of cyber and covert operations was paired with an instrumentalized international legal argument that attempted to provide legal cover for how Russia was developing the facts on the ground. Ultimately, Russia denied that it had annexed Crimea; rather, it said that it respected a referendum of the population of Crimea choosing independence (which it said was based on the right of self-determination), then recognized Crimea's statehood, and finally signed a treaty of merger with the state of Crimea.³⁰

The use of international legal rhetoric, especially early in a conflict, can put other actors, such as the United States and the European Union, on the wrong foot, possibly making it more difficult to marshal an effective response. According to one study, the “new generation warfare” strategies used by Russia include “strongly adhering to legalism,” such as contending there was no Russian occupation of Crimea (since troops were actually local defense forces) and claiming that any increase of Russian troops in Crimea was “within the limits of the bilateral agreement between Russia and Ukraine.”³¹

Nonetheless, Russia's justifications for its annexation of Crimea began including, and then emphasizing, irredentist arguments of righting an alleged historical wrong, the transfer by the USSR of Crimea from the Russian Soviet Socialist Republic (SSR) to the Ukrainian SSR. This claim of historical grievance was apparent in the UN Press Office summary of Ambassador Churkin's remarks in the General Assembly debate of March 27, 2014:

28. *Ukrainian MPs vote to oust President Yanukovich*, BBC.COM (Feb. 22, 2014), <https://www.bbc.com/news/world-europe-26304842>; but see Daisy Sindelar, *Was Yanukovich's Ouster Constitutional?*, RADIO FREE EUR./RADIO LIBERTY (Feb. 23, 2014), <https://www.rferl.org/a/was-yanukovychs-ouster-constitutional/25274346.html>.

29. Tom Balmforth, *Russia Mulls Special Day to Recognize Its 'Polite People'*, RADIO FREE EUR./RADIO LIBERTY (Oct. 4, 2014), <https://www.rferl.org/a/russia-ukraine-crimea-little-green-men-polite-people/26620327.html>.

30. For example, Vladimir Putin stated in August 2014 that “We did not annex [Crimea], we did not seize it, we gave people the opportunity to express themselves and make a decision and we treated that decision with respect.” *Comments at Seliger 2014 National Youth Forum*, PRESIDENT OF RUSS. (Aug. 29, 2014), <http://eng.news.kremlin.ru/news/22864>.

31. Jānis Bērziņš, *Russia's New Generation Warfare in Ukraine: Implications for Latvian Defense Policy*, 02 NAT'L DEFENCE ACAD. OF LAT., CTR FOR SECURITY AND STRATEGIC RES. (2014), <https://sldinfo.com/wp-content/uploads/2014/05/New-Generation-Warfare.pdf>.

Historical justice had been vindicated, he noted, recalling that for many years, Crimea had been part of the Russian Federation, sharing a common history, culture and people. An arbitrary decision in 1954 had transferred the region to the Ukrainian Republic, upsetting the natural state of affairs and cutting Crimea off from Russia.³²

Russia seemed to set aside the relevance of the consensual language of international law. Echoing the Bush Administration's 2008 statement upon its recognition of Kosovo, which sidelined international law by claiming Kosovo was a special case that could not be viewed as precedent, Russian Foreign Minister Sergei Lavrov stated in 2014 that "Crimea was a very special case, a unique case from all points of view. Historically, geopolitically, and patriotically, if you wish."³³

However, in 2022, Russia hunted for a justification for its expanding invasion of Ukraine. It argued about supposed broken promises concerning NATO's expansion.³⁴ But sovereignty by its very nature empowers states to freely choose which treaties they do, or do not, join. Russia made false claims of genocide in Ukraine, which it said justified military intervention in order to stop the alleged genocide.³⁵ But this was another cynical mirroring of the West's argument that it intervened in Kosovo in 1999 to prevent ethnic cleansing by Serb forces. However, in the case of Ukraine, there was no evidence supporting Russia's rhetoric. Ukraine subsequently

32. *General Assembly Adopts Resolution Calling upon States Not To Recognize Changes in Status of Crimea Region*, U.N. (Mar. 27, 2014), <https://press.un.org/en/2014/ga11493.doc.htm>.

33. Andrey Vandenko, *Sergey Lavrov: Throwing Russia Off Balance is Ultimate Aim*, ITAR-TASS (Sept. 11, 2014), <https://tass.com/top-officials/748935>. When Secretary of State Condoleezza Rice announced that the US recognized Kosovo as an independent state, she further explained: "The unusual combination of factors found in the Kosovo situation—including the context of Yugoslavia's breakup, the history of ethnic cleansing and crimes against civilians in Kosovo, and the extended period of UN administration—are not found elsewhere and therefore make Kosovo a special case. Kosovo cannot be seen as a precedent for any other situation in the world today." Condoleezza Rice, Sec'y of State, U.S. Recognizes Kosovo as Independent State, U.S. DEP'T OF ST. (Feb. 18, 2008), <https://2001-2009.state.gov/secretary/rm/2008/02/100973.htm>.

34. *See Address by the President of the Russian Federation*, PRESIDENT OF RUSS. (Feb. 24, 2022), <http://en.kremlin.ru/events/president/news/67843> (discussing the expansion of NATO in relation to Russia's invasion of Ukraine) [hereinafter, "*Putin February 24 Address*"]; *see also* Steven Pifer, *One. More. Time. It's not about NATO*, BROOKINGS (July 26, 2022), <https://www.brookings.edu/opinions/one-more-time-its-not-about-nato/>.

35. *Putin February 24 Address*, *supra* note 34 (stating "[t]he purpose of this operation is to protect people who, for eight years now, have been facing humiliation and genocide perpetrated by the Kiev regime").

initiated proceedings against Russia before the International Court of Justice, contending that the use of false claims of genocide to justify an invasion is itself a violation of international legal obligations.³⁶ Russia also said that it needed to hunt for weapons of mass destruction in Ukraine.³⁷ Again, a mirroring—or as some have said, a trolling—of U.S. arguments, in this case regarding intervention in Iraq. While these were arguments seeking to clothe an illegal action in a mantle of respectability, the extremity of Russia's violations of international law left the tsar with no clothes. As Harold Koh explained on behalf of Ukraine in the oral proceedings before the ICJ concerning Russia's claims of genocide:

[T]his case is fundamentally about Russia's lies. Russia lies about the facts, when it claims that Ukraine is committing genocide. Russia lies about the law, when it claims that its obligation to prevent genocide entitles it to launch a punitive "special military operation" against so-called "neo-Nazis" that we all recognize as an offensive war of aggression and atrocity against Ukraine's peaceful people. . . .

Our presentations have provided an anatomy of those lies. . . .

You have heard... about Russia's reign of terror throughout Ukraine while the whole world watches: the effort to disguise that illegality by the illegal recognition of the LPR [Luhansk People's Republic] and the DPR [Donetsk People's Republic], and the absurd lie that it is Ukraine that is committing genocide against its own people.³⁸

These examples show not only Russia's attempts to use international legal argument instrumentally, but also the limits of such

36. See Application Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.), 2022 I.C.J. 182, para. 24 (Feb. 22) (stating "Russia has turned the Genocide Convention on its head – making a false claim of genocide as a basis for actions on its part that constitute grave violations of the human rights of millions of people across Ukraine").

37. Emma Farge, *Russia says 'real danger' of Ukraine acquiring nuclear weapons required response*, REUTERS (Mar. 1, 2022), <https://www.reuters.com/world/russias-lavrov-says-there-is-danger-ukraine-acquiring-nuclear-weapons-2022-03-01/>; see also *Putin February 24 Address*, *supra* note 34 (stating "they went as far as aspire to acquire nuclear weapons. We will not let this happen.").

38. Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.), Verbatim Record, 2022 I.C.J. CR 2022/5, 58 (Mar. 7).

a tactic. Legal argument requires evidence, and it is made in the shadow of actual law and of previous legal arguments. The international community is not a passive recipient of the rhetoric, but an active participant assessing the claims.

In light of the limits imposed by law as a language and a grammar, since its annexation of Crimea, Russia has shifted from arguments that seemed to try to conform to the general consensus view of international law to irredentist arguments of historical grievance that questioned, if not denied, not only Ukrainian history and statehood but also basic tenets of international law. If the shift in legal rhetoric from Kosovo to South Ossetia was a shift from emphasizing law as a guardrail to using law as an enabler of unilateral military force, then the shift from South Ossetia to Crimea to the expanded conflict in Ukraine is a shift from trying to frame an argument (albeit in a cynical manner) within the general grammar of international law to tearing up the grammar book and making up a new language. It is not just revisionist; it is rejectionist.

IV. LAW, RHETORIC, STRATEGY

When one considers the role of law in domestic or international society, one often thinks of its function in clarifying the relationships of parties and in assisting the regulated in ordering their affairs and planning future action. There is also a tension between power and justice, between the law being treated as a servant of might or as a protector of right.

In international conflicts, though, law is sometimes used not to clarify the situation but to muddy the waters. Arguments are deployed to unbalance adversaries. In such circumstances, the language of law is instrumentalized not to regulate, but to project, power.

Russia has used an amalgamation of stealth, overt invasion, and quasi-legal rhetoric in Ukraine and elsewhere. It has applied the language of self-determination to stoke conflict and maintain a stake in the political futures of former Soviet states. Moreover, even if these groups did have a right of self-determination, Russia then claimed a supposed remedy of secession that is not generally accepted as a remedy applicable outside of the colonial context.³⁹ Besides

39. The International Court of Justice (ICJ) noted in the Kosovo Advisory Opinion that, although there are “radically different views” among States concerning remedial secession, almost no State proposed remedial secession as a primary argument. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo,

misrepresenting the law, it tried to develop “facts on the ground” in service of instrumentalized and cynical legal arguments in support of actions that were actually illegal. It used such techniques against Georgia in its recognitions of South Ossetia and Abkhazia. It held a referendum-by-gunpoint in areas of Eastern Ukraine that it occupied and claimed that the results could lead to independence of those regions. Similar flawed-if-not-false referenda had been held by separatists in South Ossetia and in the Transnistrian region of Moldova. Russia used the rhetoric of self-determination to interfere in the domestic politics of Ukraine and other states in its “Near Abroad” and to deny the fact of self-determination to the citizens of those states.

Russia also instrumentalized the law of state recognition in an attempt to support its denial that it had illegally annexed Crimea. It also recognized the statehood of, and subsequently annexed other parts of, Eastern Ukraine; although, maintaining a rhetoric of international law, Russia styled this as signing “treaties of accession.”⁴⁰ It further used this as justification for any possible increase in force, as this would now be in supposed self-defense of what it now claims as its own territory.⁴¹ In this way, an argument allegedly, but falsely, based on international law was used as a predicate for threatening a further use of force, including possible nuclear strikes, against Ukraine.⁴²

Advisory Opinion, 2010 I.C.J. Reports 403, paras. 82–83 (Jul. 22). *See also* JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 390 (2d ed. 2006) (describing the international community’s extreme reluctance “to accept unilateral secession of parts of independent States if the secession is opposed by the government of that State”); *but see id.* at 119 (stating “[a]t least it is arguable that, in extreme cases of oppression, international law allows remedial secession to discrete peoples within a State, and that the ‘safeguard clauses’ in the Friendly Relations Declaration and the Vienna Declaration recognize this, even if indirectly.”).

40. Concerning recognition, see *Russia recognizes independence of Ukraine separatist regions*, DW.COM (Feb. 21, 2022), <https://www.dw.com/en/russia-recognizes-independence-of-ukraine-separatist-regions/a-60861963>. Concerning annexation, see *Signing of Treaties on Accession of Donetsk and Lugansk People’s Republics and Zaporozhye and Kherson Regions to Russia*, PRESIDENT OF RUSS. (Sept. 20, 2022), <http://en.kremlin.ru/events/president/news/69465> [hereinafter, “*Putin Signing Statement*”]; *see also* *Russia’s Federation Council ratifies annexation of four Ukrainian regions*, REUTERS (Oct. 4, 2022), <https://www.reuters.com/world/europe/russias-federation-council-ratifies-annexation-four-ukrainian-regions-2022-10-04/#:~:text=In%20a%20session%20on%20Tuesday,%2C%20Russia’s%20lower%20house%2C%20yesterday.>

41. *Putin Signing Statement*, *supra* note 40 (stating “[w]e will defend our land with all the forces and resources we have, and we will do everything we can to ensure the safety of our people.”).

42. Regarding possible use of nuclear weapons, see Steven Pifer, *How to respond to Putin’s land grab and nuclear gambit*, BROOKINGS (Oct. 4, 2022), <https://www.brookings.edu/blog/order-from-chaos/2022/10/04/how-to-respond-to-putins-land-grab-and-nuclear-gambit/>.

Prior to its expanded invasion, Russia's rhetoric was less and less anchored in the shared grammar of international law and increasingly a mish-mash of quasi-legal arguments, historical grievances, and dark forebodings that attempted to persuade those who could be persuaded (or who were willing to let themselves be persuaded) and hamper those who could not. The tone and tenor of Russia's arguments is increasingly exhibiting skepticism (which might have previously existed unspoken) in the role of law, let alone the rule of law. As Lauri Mälksoo has written: "Moscow's conclusion has been that by expanding geopolitically while at the same time propagating human rights and anthropocentric values, the West had covered its realist motives behind idealist rhetoric."⁴³ The result is a devolution from explaining actions within a consensus vocabulary and grammar to what is, in effect, a rejection of that common language. Given that legal argument can also be used to change international law itself, this is especially important if the Putin regime has changed its focus, to use the terminology of political geographer Gerard Toal, from "great power geopolitics (competitive statecraft conducted within the existing territorial order) to revisionist imperial geopolitics (competitive statecraft that seeks to remake the existing territorial order)."⁴⁴

While the annexation of Crimea may mark the clearest case of the instrumentalization of law as part of hybrid warfare, recent Russian rhetoric in the face of the horrors it is perpetrating in Ukraine is the nadir of legal argument, if it can even still be called legal argument.

In any case, this makes it absolutely critical that Russian arguments clothed in the language and the rhetoric of law not go unanswered. Words matter and law can be weaponized if we let it. If we want law to be more guardrail than sword, more grammar than cudgel, then we need to continue paying attention and responding to Russia's arguments, no matter how specious or cynical they may be.

43. MÄLKSOO, *supra* note 8, at 176.

44. TOAL, *supra* note 2, at 245.