

LEGAL ELEMENT OF RUSSIA'S HYBRID WARFARE

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In the modern international community, there are an increasing number of laws regulating the conduct of states, international organisations, multinational corporations, and individuals. International law is expanding to encompass new areas (e.g. the cyber domain), while existing rules are becoming more detailed (e.g. human rights law). At the same time, various actors have come to attach more importance to legal arguments when, for example, it comes to choosing a course of actions or criticising another's behaviour. Most states are conscious of how they are perceived by other states and want to avoid the reputation of being a lawbreaking, or rogue state, due to the various negative consequences (e.g. decreased foreign investments, exclusion from international conferences, increased scrutiny by international organisations, etc.).

International laws define the way in which different actors may behave, must behave, or may not behave. By setting these rules, international law contributes to the maintenance of order in the international community and makes it easier for states to predict how others will behave in specific situations. When one actor has a certain right, then another actor has a corresponding obligation to respect that right, e.g. state X has the right to territorial integrity, therefore state Y has an obligation to refrain from violating the territorial integrity of state X. If a conflict arises, state X can use international law to assert its right and take appropriate measures to protect itself, e.g. the exercise self-defence. In other words, the law can provide criteria for the assessment of whether someone's behaviour is lawful or unlawful and prescribes the permitted counter-measures.

In modern conflicts, international law is often utilised as a weapon together with kinetic and other non-kinetic means. Using law in such a manner is called "lawfare". Charles J. Dunlap, Jr pioneered the term in 2001 and now defines lawfare as "the strategy of using – or misusing – law as a substitute

for traditional military means to achieve an operational objective”.¹ International law is a conveniently available option, and is a low-cost way for a state to pursue its interests. Like any traditional weapon, international law is neither good nor bad in and of itself – it simply depends on how it is used.

Russia uses both national and international law as a weapon. In Ukraine it combined lawfare with kinetic and other non-kinetic means to achieve its objectives. It manipulates international law in order to change the legal paradigm and take advantage of the loopholes and ambiguities. For example, how should the conflict in Ukraine be characterized? Has it reached the threshold of an armed conflict, wherein international humanitarian law (law of armed conflict) becomes applicable? If yes, then is it an international or non-international armed conflict (the applicable laws differ considerably)? Russia denies that it has breached the prohibition of using force against the territorial integrity of another state and claims that the ensuing territorial changes were effected through peaceful and lawful means (self-determination confirmed by a referendum). And moreover the employment of Russian forces was lawful and necessary to protect Russian nationals in Ukraine. Therefore, based on these arguments it becomes apparent that although Russia cannot unilaterally change the system of international law, it can erode the position and foundations of these international laws.

Russia often stresses that it behaves in accordance with international law, whereas others (foremost Ukraine and the Western countries) intentionally violate it. Russia’s Foreign Policy Concept (both the 2013 and 2016 version) emphasises that the consistent application of international law is indispensable for the continuance of orderly and mutually beneficial international relations and that Russia conducts its foreign policy according to international law.² When it comes to international law, the 2016 version reiterates mostly the 2013 version, but the former takes a more direct and realistic approach, and reflects the actual practice of Russia in recent years

¹ **Dunlap, C. J. Jr.** 2008. Lawfare Today: A Perspective. – Yale Journal of International Affairs, Vol. 3, No. 1, p. 146.

² The role of international law is discussed in various paragraphs of the foreign policy concept. **Concept of the Foreign Policy of the Russian Federation** 2013. – Ministry of Foreign Affairs of the Russian Federation. <www.mid.ru/en/foreign_policy/official_documents/-/asset_publisher/CptICk6B6BZ29/content/id/122186> (accessed on 31.01.2016). [**Concept of the Foreign Policy of the Russian Federation** 2013]; **Foreign Policy Concept of the Russian Federation** 2016. – Ministry of Foreign Affairs of the Russian Federation. <www.mid.ru/en/foreign_policy/official_documents/-/asset_publisher/CptICk6B6BZ29/content/id/2542248> (accessed on 31.01.2016) [**Foreign Policy Concept of the Russian Federation** 2016]

(e.g. justifies such interpretations of international law that were useful during the annexation of Crimea, denounces such practices of Western world that impose a threat to Russia's view of international relations).

In this sense Russia often portrays itself as a guardian of international law. It advances the notion that only Russia understands the original meaning of the central legal instruments, notably the United Nations Charter, and the general principles of international law, while others misinterpret, manipulate and misuse the rules of international law. This is what actually destabilises international relations, e.g. Russia alleges that the on-going conflict in Eastern Ukraine was started by and continues to be sustained by the European Union and the United States.

Russia focuses on the rules that regulate and safeguard inter-state relations, e.g. sovereignty, prohibition of the use of force, the prohibition of intervention in internal affairs, and the respect for territorial integrity, but it often adhere to an excessively conservative understanding of these rules that avoids the discussion of the rights and interests of individuals, and in many ways, seems to believe that these rules were carved in stone, (e.g. in 1945, with the adoption of the United Nations Charter) and therefore should not evolve over time. In other words, when Russia and other states discuss these issues, they may be using the same terms, but have a different understanding of them.

Although Russia's Foreign Policy Concept gives international law a prominent role, it is not the only factor that governs Russia's actions. The 2013 version declared that 'Russia pursues an independent foreign policy guided by its national interests and based on unconditional respect for international law'³ and the 2016 version repeats that 'Russia conducts an assertive and independent foreign policy guided by its national interests and based on unconditional respect for international law'⁴. It is true that a state's national interests can override its obligations under international law, and that a state can make a conscious choice to ignore international law when considering its course of action – this is an inescapable reality of international relations.

Russia acknowledges that the fundamental legal instrument of international law is the United Nations Charter (1945). Additionally, it invokes well-known documents such as the Friendly Relations Declaration (1970)⁵ and

³ **Concept of the Foreign Policy of the Russian Federation** 2013, para. 24.

⁴ **Foreign Policy Concept of the Russian Federation** 2016, para 21.

⁵ UN Doc. GA Res 2625 (XXV).

the Helsinki Final Act (1975)⁶. These sources contain universally endorsed principles such as the respect for sovereignty and territorial integrity, the withholding of force, the inviolability of borders, and the non-intervention in and peaceful settlement of disputes. Although Russia stresses the importance of these principles, it blatantly violates them, which is manifest by the annexation of Crimea and the intervention in Eastern Ukraine. When challenged by others, Russia simply denies that it has done anything unlawful (e.g. there are no Russian armed forces in Ukraine, Russia does not provide assistance to ‘self-defence forces’, etc.), or it tries to create distractions by repeating its propaganda narratives (e.g. the people who are mistreated or threatened by the pro-Western regime in Kyiv must be protected). Such narratives carry powerful historical connotations and are designed to end the discussion about the lawfulness of Russia’s conduct by justifying, at least morally, the necessity to fight against extremism and its equivalents.

Russia skilfully uses the mistakes of other states to defend or to justify its own actions. In its domestic discussions and textbooks of international law Russia focuses on certain events, such as those that show the West disrespecting international law, and acting unilaterally (independent of authoritative collective mechanisms, foremost the United Nations). As a result, the West not trustworthy. Most notably, the referenced events include the NATO military operation in Kosovo (1999), the United States invasion of Iraq (2003), and the Western intervention in Libya (2011), which eventually exceeded the Security Council’s mandate. These actions are seen as precedents, and Russia uses them to defend its interests, regardless of the arguments made to the contrary by the West. However, conversely Russia also has no problem abandoning its long-term positions in favour of Western positions, as long as those positions better serve its own interests. In the case of Crimea, Russia abandoned its conservative position on self-determination, which it presented to the International Court of Justice in 2009 in connection with Kosovo’s unilateral declaration of sovereignty,⁷ and instead adopted the liberal position by emphasising that the United States had put forward that position during those proceedings.

When Russia claims that its actions are in accordance with international law and it is actually the actions of other states that are in violation of it, it

⁶ Final Act, Conference on Security and Co-operation in Europe, 1 August 1975.

⁷ **Written Statement of the Russian Federation** 2009. <www.icj-cij.org/docket/files/141/15628.pdf> (accessed on 31.01.2017); Värk, R. 2014. The Advisory Opinion on Kosovo’s Declaration of Independence: Hopes, Disappointments and Its Relevance to Crimea. – Polish Yearbook of International Law, Vol. 34, pp. 111–127, 123–125.

makes no reference to specific legal sources to explain its position. Instead, it simply makes general statements and continues to insist that it adheres to international law, or that it is other states who violate international law. This is done because it is more difficult to provide specific rules, which support or prohibit particular actions. There are also certain concepts that tend to recur in Russia's discourse to justify their actions, e.g. the protection of nationals abroad, intervention by invitation, and the provision of 'humanitarian' assistance, but the legal justifications of such concepts are either dubious or controversially implemented. When states provide genuine humanitarian assistance, it is done openly; often in co-operation with IOs/NGOs (e.g. the International Committee of the Red Cross) and in a way that allows others to verify the nature of the assistance. States are certainly free to offer humanitarian assistance, but other states are not obliged to accept such assistance, especially if the delivery has not been co-ordinated with them and they cannot verify the contents of the humanitarian convoys, as was the case with Russian 'humanitarian assistance' to Ukraine in August and September of 2014.

Even if Russia puts forward specific legal arguments to justify its actions, it does so in a twisted way. Russia argues that the regions in Eastern Ukraine should have the right of self-determination and to potentially secede, and that Ukrainians had no right to force the president, who had lost people's confidence, to step down. Likewise, Russia claims that it respects the territorial integrity of Ukraine, yet at the same time intervenes in Eastern Ukraine, destabilises the situation in Ukraine, and legitimises the so-called 'People's Republics of Donetsk and Luhansk' by recognising elections in these regions.

Russia maintains that the sanctions against it are unlawful, as they were not imposed by the Security Council.⁸ According to this argument only the United Nations has a legitimate right to impose general sanctions that are binding for all states. This however is disingenuous. The United Nations is not the only mechanism that can impose sanctions. States and international organisations also have such rights. Although these rights are not unlimited, they can include retorsions and reprisals. Nevertheless, Russia strives to depict the states that have imposed the sanctions against Russia as violators of international law, and portrays itself as an innocent victim who is subject to unfair and unlawful coercion by the West.

⁸ E.g. **News conference of Vladimir Putin**. 18 December 2014. <en.kremlin.ru/events/president/news/copy/47250> (accessed on 31.01.2017).

One interesting document that has played a significant role in discussions about the conflict in Ukraine is the Budapest Memorandum on Security Assurances signed on 5 December 1994.⁹ It was developed in connection with Ukraine's accession to the Treaty on the Non-Proliferation of Nuclear Weapons and provides security assurances by the United States of America, the Russian Federation, and the United Kingdom. The signatories promise to:

- *Respect the independence and sovereignty and the existing borders of Ukraine in accordance with the principles of the Helsinki Final Act (1975);*
- *Refrain from threats or the use of force against the territorial integrity or political independence of Ukraine, except in self-defence or otherwise in accordance with the United Nations Charter;*
- *Refrain from the use of economic coercion to subordinate Ukraine to their own interests;*
- *Seek immediate action from the United Nations Security Council to provide assistance to Ukraine if it becomes a victim of an act of aggression or the object of a threat of aggression in which nuclear weapons are used;*
- *Not to use nuclear weapons against Ukraine, except in self-defence;*
- *To consult with one another if questions arise regarding these commitments.*

It is debatable whether the memorandum is a political document or a legal treaty.

When considering the statements made by the signatories during and after the Ukrainian crisis, it seems that the signatories do not strictly consider the memorandum to be a binding legal treaty. Furthermore, they disagree as to what the exact purpose of the memorandum is. For example, the United States Ambassador, Geoffrey Pyatt, claimed that the memorandum was not an agreement on security guarantees, but is rather an agreement to respect the sovereignty and territorial integrity of Ukraine. If this is the case, it means that no one can accuse the United States and the United Kingdom of not fulfilling their obligations towards Ukraine.¹⁰

Russia denies that it has violated the memorandum. It argues that: first, the crisis in Ukraine is a result of complex international processes, which are unrelated to Russia's obligations. Second, due to the anti-constitutional

⁹ UN Doc. A/49/765-S/1994/1399.

¹⁰ **Goncharenko, R.** 2014. Ukraine's forgotten security guarantee: The Budapest Memorandum. – Deutsche Welle, 5 December. <www.dw.com/en/ukraines-forgotten-security-guarantee-thebudapest-memorandum/a-18111097> (accessed on 31.01.2017).

coup, Ukraine is 'a new state with which we have signed no binding agreements'.¹¹ However, according to this line of reasoning States cannot make agreements – only governments can, therefore, when a government changes, any agreements made by the previous administration become invalid. This is not a sound position under international law.

The memorandum mostly refers to 'commitment' and only once does it use the word 'obligation' (the 'obligation to refrain from the threat or use of force' against Ukraine). Therefore, the wording is not the strongest. However, even if the signatories did not intend for the memorandum to have the same effect as a traditional legal treaty, it does reaffirm matters that are otherwise legally binding. For example, States are obliged to respect the independence and sovereignty of other States under all circumstances. But, as for it providing tangible security and defence assistance in case of an attack against the independence and sovereignty of Ukraine, the memorandum is of little use.

¹¹ **Vladimir Putin answered journalists' questions on the situation in Ukraine.** 4 March 2014. <en.kremlin.ru/events/president/news/20366> (accessed on 31.01.2017).