HOW STATES PERSUADE: AN ACCOUNT OF INTERNATIONAL LEGAL ARGUMENT UPON THE USE OF FORCE

DAVID HUGHES*

ABSTRACT

This Article presents a theory of the sociology of argument in international law and considers how persuasion, through international legal argument, shapes legal change and influences notions of compliance. Commonly, international law is portrayed as a medium for debate. Within the resulting debates, persuasion is understood as a tool to induce compliance. Yet this is only one side of the conversation. Persuasion is a two-way discourse. Efforts to alter the behavior of a "non-compliant" state through cogent communication are often met with or preempted by legal arguments put forth by the state. This is perhaps most apparent in the deliberative environments that accompany the use of force and the conduct of warfare.

Built around a series of case studies in which states offer legal arguments in support of actions that, prima facie, extend beyond the limits of legal permissibility, this Article presents a theory of persuasion and legal communication that differs from how legal argument and international law are commonly understood. This Article offers a detailed and theorized account of the processes through which the non-compliant state argues, persuades, and employs international law. By mapping and conceptualizing persuasive techniques, I suggest that international law must be considered both in compliance and in violation. Switching emphasis and considering the actions and arguments offered by the "non-compliant" state facilitates a novel and complete understanding of the diplomatic, informal, and daily interactions that more commonly and more consequentially define how international law is understood, practiced, and altered.

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I. Introduction

Barack Obama arrived at Oslo City Hall in December 2009 to deliver the Nobel Lecture and receive the Peace Prize. In his speech, the President recalled the legacy of Henry Dunant.[1] In 1901, Dunant became the Prize's inaugural recipient.[2] He had founded the International Committee of the Red Cross (ICRC) and oversaw the adoption of the first Geneva Convention. The call for humanity that Dunant brought forth from the fields of Solferino initiated the legal regulation of warfare.[3] Resulting efforts did not outlaw hostilities. They began an arduous process of codification, dictating both when and how states may use force. A legal vocabulary emerged in concurrence, which structured the discourse accompanying war. It provided a means to contest when force is justifiable. Legitimacy demanded transparency. In a later address, President Obama cited the need to publicly explain and justify U.S. military actions. The inability to provide reasoning, the President warned, encouraged international suspicion, eroded legitimacy, and reduced accountability.[4]

States have long coupled the use of force with contestations of legitimacy.[5] As the international legal framework governing both *jus ad bellum* and *jus in bello* matured, states increasingly harnessed a legal vernacular.[6] Diplomatic communications accompanied military forays. The battlefield expanded from the frontline into international fora. David Ben-Gurion, Israel's first Prime Minister, described the institutional relationship between his nation's Defense and Foreign Ministries. Ben-Gurion succinctly elucidated that, "the Minister of Defense is authorized to make defense policy; the role of the Foreign Minister is to explain that policy."[7]

The turn to legal rationale increased following the Second World War. Though international law's expansion was far-reaching, the prohibition of the use of force and the proliferation of international humanitarian law (IHL) were global responses to war's unmitigated

1. Barack Obama, Nobel Lecture at Oslo City Hall: A Just and Lasting Peace (Dec. 10, 2009).

2. *Henry Dunant: Biographical*, The Nobel Prize, www.nobelprize.org/prizes/peace/1901/dunant/biographical/ (last visited Nov. 2, 2019).

3. Martin Gumpert, Dunant: The Story of the Red Cross (1938).

4. Barack Obama, Address at West Point Commencement Ceremony: Remarks by the President at the United States Military Academy Commencement Ceremony (May 28, 2014).

5. M. Cherif Bassiouni, *Terrorism: The Persistent Dilemma of Legitimacy*, 36 Case W. Res. J. Int'l L. 299, 299 (2004).

6. *See* Michael Byers, War Law 3, 43 (2006).

7. Dan Horowitz, *The Israeli Concept of National Security, in* National Security and Democracy in Israel 11, 12 (Avner Yaniv ed., 1993).

horror.[8] These developments further facilitated the embrace of legal argument, which would become "one of the staple features of state practice on the use of force, so that when states use force against other states, they also use international law to define and defend, argue and counter-argue, explain and rationalise their actions."[9]

As the nature of warfare evolved, as states perceived new dangers, the post-war legal vernacular was understood as incomplete. Responses to the altered nature of warfare feature inventive (and, at times, dubious) legal claims. These address the gaps, where the laws of war fall silent and fail to directly contemplate evolving scenarios and emerging threats. Such discussions influence conceptions of permissibility, they establish new standards, and they formalize through state practice, *opinio juris*, authoritative argument, and the recognition of custom. States have, however, altered the ways that they invoke international law.[10] Sophisticated legal appeals have moved the discourse accompanying the use of force beyond assertions of legal conformity. The use of force is coupled with appeals that attempt to persuade the international community that inventive legal arguments constitute an acceptable interpretation or application of international law. Legal arguments may be offered in good faith, in response to a lawmaking moment. They may also accompany events that clearly violate international law. Legal arguments supplement state behavior that stretches or exceeds the boundaries of legal permissibility. International law is invoked to persuade audiences that a particular action, interpretation, or policy is acceptable.

Yet the relationship between international law and persuasion is understood differently. Law is often portrayed as a medium for debate and agreement.[11] Within this debate, persuasion is assigned a particular purpose. Steven Ratner explains that, "for those international actors seeking to promote respect for international law, persuasion is at the core of the enterprise."[12] Thus persuasion becomes a means to

8. *See generally* MICHAEL N. SCHMITT & WOLFF HEINTSCHEL VON HEINEGG, THE DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW (2017).

9. Dino Kritsiotis, *When States Use Armed Force, in* THE POLITICS OF INTERNATIONAL LAW 45, 47 (Christian Reus-Smit ed., 2004).

10. Yahli Shereshevsky, *Back in the Game: International Humanitarian Lawmaking by States*, 37 BERKELEY J. INT'L L. 1, 10 (2019).

11. Harlan Grant Cohen, *Finding International Law, Part II: Our Fragmenting Legal Community*, 44 N.Y.U. J. INT'L L. & POL. 1050, 1067 (2011).

12. Steven R. Ratner, *Persuading to Comply: On the Deployment and Avoidance of Legal Argumentation*, *in* INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART 568, 568 (Jeffery L. Dunoff & Mark A. Pollack eds., 2013).

encourage fidelity towards international law. It forms a subset of the broader discussion regarding compliance. Through a communicative process, reliant upon legal argument, the non-compliant state is convinced to alter its behavior and adhere to legal dictate.[13]

However, this is only one side of the conversation. Persuasion is a two-way discourse. It is both a means to ensure compliance and a method to define how international law should be understood.[14] Efforts to alter the behavior of a non-compliant state through cogent communication are often met with or pre-empted by legal argumentation put forth by the state. This Article considers how states employ persuasion upon or following the use of force. I emphasize instances in which states offer legal arguments in support of actions and legal interpretation that, prima facie, extend beyond the limits of legal permissibility. Persuasion is understood broadly. The state becomes not only the "engine and the target" of compliance but a participant actively engaged in defining what compliance means.[15]

Section two of this Article poses the question: *why* do states persuade? This section begins abstractly before moving beyond the contestations of compliance that often frame considerations of persuasion. It explores reasons why a non-compliant state, devoid of obligation and absent coercion, may employ legal argument and engage in a persuasive discourse. These reasons vary and are non-exhaustive. A state—whose actions are broadly understood to be in violation of international law—may employ persuasive legal argument to frame facts. Factual persuasion may be based on a lie, a generous reading, spin, or conjecture, but will strive to formulate the relevant events in a manner that fits within a preferred legal framework (e.g., we did not do what you claim that we did). The state may appeal to persuasion to advance a particular legal doctrine. Doctrinal persuasion features arguments about how the law should or ought to be understood. Appeals may invoke well known legal principles but often forward expansionist claims about the validity of a legal rule or norm (e.g., what you said happened but it is not illegal or the law is unclear). Or the state may invoke persuasive legal argument to generate legitimacy for a regime, scenario, or concept. Legitimacy persuasion is exhibited when the state purports that a

13. *Id.* at 573; *see also* Nicole Deitelhoff, *The Discursive Process of Legalization: Charting Islands of Persuasion in the ICC Case*, 63 INT'L ORG. 33 (2006).

14. On a related note, Shereshevsky has described how, within epistemic communities, transnational actors assume varied interpretative positions and "take part in the battle over the ideological version of international to be adopted." *See* Yahli Shereshevsky, *Targeting the Targeted Killings Case – International Lawmaking in Domestic Contexts*, 39 MICH. J. INT'L L. 241, 268 (2018).

15. Ratner, *supra* note 12, at 570.

particular policy, objective, or action is acceptable due to its accordance with a legal or normative standard (e.g., this military action is a necessary response to an emerging threat).[16]

Section three asks *whom* do states persuade? This section considers the audiences that states engage through legal argument. The target of persuasion alters alongside the form and purpose of persuasion. The target may be broad (e.g., the international community) or narrow (e.g., interpretative communities, another state, a key ally).

Section four considers *how* do states persuade? It provides an account of the communicative process that states employ when engaging in this particular form of legal argumentation. The described process—also non-exhaustive—presents five complementary techniques that states commonly invoke when presenting a non-intuitive legal appeal. First, the state identifies a "common lifeworld." Second, the state establishes itself as a general norm-acceptor. Third, the state demonstrates its authority to interpret the law. Fourth, it establishes a standard of compliance based on the "acceptable legal argument." And fifth, the state draws upon precedent and commonalities. Through these phases, the state forwards a particular form of legal argument. This argument intends to influence understandings of law and fact. It seeks to generate legitimacy for state action and policy. And it justifies the use of force in ways that often extend beyond previously endorsed limits.

Section five merges the question of *why* with the question of *how*. It presents a series of three case studies. These case studies correspond with the abovementioned categories, describing a state's motives and methods of persuasion. Within, descriptive accounts chronicle uses of legal argumentation. The first case study describes Russia's appeals to international law following the annexation of Crimea. It traces Russia's reliance upon international law and use of factual persuasion to supplement various lies that denied, excused, and then explained Russian actions in Ukraine. The second case study chronicles the United States' and the United Kingdom's employment of international legal argument to assure selected audiences, through appeals to doctrinal persuasion, of a particular legal interpretation's validity. Situated within the war on terror, this case study retells the interpretative development of the unwilling and unable standard in accompaniment of the use of force against a non-state armed group in Syria. The third and final case study details Israel's reliance upon legal argument both during and in the aftermath of the 2014 Gaza war. It demonstrates the use of legitimacy persuasion to purport that a particular, controversial, use of force

16. A special thanks to Harlan Cohen for helping clarify my thinking on these categorizations.

is legally, morally, and politically acceptable. In each instance, legal arguments—persuasive endeavor—are offered by a state whose actions are deemed non-compliant with conventional legal understandings. In each instance, the (purportedly) non-compliant state exhibits a similar persuasive methodology.

Section six concludes. It identifies challenges in evaluating the effectiveness of persuasion and legal argumentation.

In *A Memory of Solferino*, Henry Dunant described the furious violence that defined nineteenth century warfare.[17] The nature of war has changed in the 108 years between Dunant's receipt of the first Peace Prize and President Obama's acceptance of the award. As violence assumes new forms and manifests through novel challenges, international law increasingly structures the discourse that accompanies the use of force. Often it prescribes limits and instills a standard of compliance. Still, however, we remain in a constant conversation about the moments when the use of force is permissible. We evolve the boundaries that define acceptable conduct once force is invoked. Persuasion and legal argument assume a significant role within these debates. They become an invaluable resource for those who demand greater adherence to the laws governing war. Still, considerations of the extent to which and the means by which states employ persuasion in response to the call for greater compliance—to define the moments and to set the boundaries—are often absent from these conversations.

Ultimately, we dismiss the relevancy of the non-compliant state as an outlier, as evidence of international law's failure or inability to affect change. Yet it is in such instances of non-compliance that persuasion is most prevalent. The language of international law is so entrenched that the non-contentious, incontrovertible legal claim requires no justification other than repetition of a familiar stock phrase or article number and sub-paragraph. *Parties to an armed conflict must at all times distinguish between the civilian population and combatants. Article 2(4). Self-defense. Et cetera, ad infinitum.* The controversial legal contention, however, requires something more. For if it is to carry, it demands cogent argument. Focus on the non-compliant state or the contestable legal assertion shows us how states employ legal argumentation, not in a formal setting like a court where the rules and conventions of legal discourse are firmly established, but in the diplomatic, informal, and quotidian interactions that more commonly and more consequentially define how international law is understood, practiced, and altered.

17. *See generally* HENRY DUNANT, A MEMORY OF SOLFERINO (1959).

II. WHY DO STATES PERSUADE?

Contemporary considerations of compliance are frequently premised on Louis Henkin's oft-quoted aphorism that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."[18] International law's influence is disregarded by realists and neo-realists who view compliance as an unimportant by-product of unitary state interest.[19] But beyond these dismissive understandings, Henkin's premise is widely embraced.[20] Proponents of a liberal approach accentuate the role of domestic actors within the international sphere. Interactions amongst these groups and with national governments influence state policy and preference compliance with international law.[21] The institutionalist approach seeks to explain the influence of international organizations (or regimes) on state behavior. States are perceived as "utility-maximizers." International regimes contribute towards legal compliance by facilitating agreements that conform with or further the particular interests of states.[22] And several prominent theories emphasize international law's normative force. They posit that compliance stems from a state's acceptance and internalization of law's inherent features.[23]

Compliance is thus assumed. It is prevalent, but it is not universal. Andrew Guzman notes that compliance mostly occurs "in situations with many repeated interactions, each with relatively small stakes. . .the topics that have traditionally held center stage in international law – the laws of war, neutrality, arms control, and so on – are precisely those in which international law is least likely to be relevant."[24] Observers quickly identify instances of non-compliance, violations of

18. LOUIS HENKIN, HOW NATIONS BEHAVE 47 (2d ed. 1979).

19. *See generally* KENNETH W. WALTZ, THEORY OF INTERNATIONAL POLITICS (1979).

20. *See generally* Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 112 YALE L.J. 1935 (2002).

21. *See* Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503, 503 (1995).

22. *See generally* ROBERT O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY (2002).

23. *See, e.g.*, THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990); Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L. L. 705 (1988); ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS (1995) [hereinafter Chayes & Chayes, The New Sovereignty]; Abram Chayes & Antonia Handler Chayes, *On Compliance*, 47 INT'L ORG. 175 (1993) [hereinafter Chayes & Chayes, On Compliance]; Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2600 (1997).

24. Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1828 (2002).

international law that exhibit legal disregard and precede or accompany tragedy. In response to these legal violations, it is clear why certain actors—both state and non-state–embrace persuasion as a means to secure legal adherence. A non-compliant state (or other powerful entity) becomes the target of persuasion.[25]

To this extent, international law is a project, a form of advocacy. The persuader employs a familiar language of rights, obligations, incentives, and norms to convince the state to alter its behavior.[26] Persuasion's influence upon this process is either minimized (through focus on the fixed traits of parties or norms) or accentuated (by examination of the communicative process between the persuader and persuaded).[27] Persuasion, however, remains linked to compliance. Communicative interactions move from those seeking to ensure adherence towards those whose behavior is deemed impermissible.[28]

Yet moments of non-compliance also produce instances of persuasion. A legal violation may cause many to question international law's efficacy, but it does not discount law's relevancy.[29] Law is more than a constraint on state power. It is a discursive medium.[30] Constructivist scholars contend that "actors assume the existence of a set of socially sanctioned rules, but international law 'lives' in the way in which they reason argumentatively about the form of these rules . . . ."[31] Within this discourse, persuasion is not only a means to influence state behavior, but also a form of interaction that accompanies the discussions and debates exhibited by law's transformative potential.[32] George Brandis, the Attorney General of Australia, explained that "it is vital that States (and their international legal advisers) have the

25. Ratner, *supra* note 12, at 570.

26. *See generally* David Kennedy, *Lawfare and Warfare, in* THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW 158 (James Crawford & Martti Koskenniemi eds., 2012).

27. *See* Ratner, *supra* note 12, at 571.

28. David Kennedy offers a similar observation but limits his description of the deliberative process to competing conceptions of legitimacy between proponents and opponents of war. *See* DAVID KENNEDY, OF LAW AND WAR 40-41 (2006).

29. Frédéric Mégret, *International Law as Law, in* THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW 64, 77 (James Crawford & Martti Koskenniemi eds., 2012).

30. *Id.* at 78.

31. Christian Reus-Smit, *The Politics of International Law, in* THE POLITICS OF INTERNATIONAL LAW 14, 41(Christian Reus-Smit ed., 2004); *see also* CHARLOTTE PEEVERS, THE POLITICS OF JUSTIFYING FORCE: THE SUEZ CRISIS, THE IRAQ WAR, AND INTERNATIONAL LAW 5 (2014).

32. PEEVERS, *supra* note 31, at 10.

courage to explain and defend their legal positions."[33] The state—so often the target of persuasion—engages in this communicative process. It too employs persuasive argument.

The assumption that international law is least relevant in areas where its weaknesses are apparent and compliance illusive encourages the present focus. Daniel Reisner, when head of the Israel Defense Force's (IDF) International Law Division (ILD), claimed that:

> If you do something for long enough, the world will accept it. The whole of international law is now based on the notion that an act that is forbidden today becomes permissible if executed by enough countries. . .After we bombed the reactor in Iraq, the Security Council condemned Israel and claimed the attack was a violation of international law. The atmosphere was that Israel had committed a crime. Today everyone says it was preventive self-defense. International law progresses through violations.[34]

The laws governing the use of force provide compelling examples of law's persuasive function. They illustrate myriad ways and reasons that a state—whose actions or policy preferences are deemed inconsistent with legal requirements—employs international legal argument and persuasion. Despite periodic violation, the norm prohibiting aggression has become so entrenched that states are compelled to justify military incursions. International law may appear as an ineffective constraint, yet legal argument is ever present. States, upon the use of force, read international law permissibly. They argue that the world faces unforeseen threats. IHL, when drafted, failed to foresee these emergent dangers and must be interpreted to facilitate necessary responses.[35] Sir Daniel Bethlehem, the former legal adviser to the U.K.'s Foreign and Commonwealth Office (FCO), noted in defense of his efforts to reform the *jus ad bellum* that "if the law is to influence, it must descend from the heights of broad principles to engage with the

33. George Brandis, *The Right of Self-Defense Against Imminent Armed Attack in International Law*, EJIL: TALK! (May 25, 2017), https://www.ejiltalk.org/the-right-of-self-defence-against-imminent-armed-attack-in-international-law/.

34. Yotam Feldman & Uri Blau, *Consent and Advise*, HAARETZ, (Jan. 29, 2009), https://www.haaretz.com/1.5069101.

35. *See generally* Michael P. Scharf, *How the War Against ISIS Changed International Law*, 48 CASE WESTERN RESERVE J. INT'L L. 1 (2016); Victor Kattan, *Furthering the 'War on Terrorism' Through International Law: How the United States and the United Kingdom Resurrected the Bush Doctrine on Using Preventive Military Force to Combat Terrorism*, 5 J. ON THE USE OF FORCE & INT'L L. 97, (2018).

reality of particular circumstances that requires its attention."[36] Humanitarians, acutely aware of law's destructive potential, offer a restrictive reading of these same laws. They wish to limit the state's ability to use force and constrain the forms of violence that are employed.[37] The contrasting discourses create a deliberative environment. Within this environment, the prevalence, diversity, and purposes of a more expansive conception of persuasive legal argument may be better understood.

The willingness of states to offer legal argument is predictable. If we assume that international law is important, that states exhibit a propensity to comply, then persuasion becomes a form of justificatory discourse. It aligns the state's tendency to couple uses of force with legal reasoning.[38] Ryan Goodman has termed this the politics of justification. This entails "the political mobilization of support for escalating hostilities."[39] Often, this process is internalized. The state's justificatory discourse targets domestic audiences. International norms are cited, and governments employ legal vocabularies to establish policy preferences, explain undertaken initiatives, and justify institutional changes.[40]

Of course, this process of justification goes beyond the domestic sphere. It occurs within international institutions, amongst allies, and in response to adversaries.[41] Here, as Chayes and Chayes demonstrate, questionable actions are explained and justified by foreign ministries, which rationalize state behavior through diplomatic exchanges. It is "almost always an adequate explanation for an action, at least *prima facie*, that it follows the legal rule. It is almost always a good argument for an action that it conforms to the applicable legal norms, and against, that it departs from them."[42] However, the discursive process, described by Chayes and Chayes, is primarily understood as a tool to influence state behavior and "as a principle method of inducing compliance."[43]

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36. Daniel Bethlehem, *Principles of Self-Defense—A Brief Response*, 107 AM. J. INT'L L. 579, 581 (2003).

37. *See generally* David Luban, *Military Necessity and the Cultures of Military Law*, 26 LEIDEN J. INT'L L. 315 (2013).

38. PEEVERS, *supra* note 31; *see also* Oscar Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. REV. 113, 117-20 (1986).

39. Ryan Goodman, *Humanitarian Intervention and the Pretexts for War*, 100 AM. J. INT'L. L. 107, 116 (2006).

40. *See* Andrew P. Cortell & James W. Davis, Jr., *Understanding the Domestic Impact of International Norms: A Research Agenda*, 2 INT. STUD. REV. 65, 70 (2002).

41. PEEVERS, *supra* note 31, at 47.

42. Chayes & Chayes, The New Sovereignty, *supra* note 23, at 118-19.

43. *Id.* at 25-26.

This underappreciates persuasion's prevalence. For a variety of purposes and through a diversity of forms, legal argument extends beyond efforts to compel or demonstrate state compliance. Its uses are greater and more sophisticated than the justificatory tones habitually offered by states upon the use of force. When George Brandis called upon states to "explain and defend" their legal positions, the Attorney General clarified that this ensures that "states maintain control over the development of international law."[44] Though the state's use of legal argument varies, exhibiting numerous motives, I identify three complementary rationales that undergird state persuasion—to align facts with a preferred legal framework (i.e. factual persuasion); to forward a doctrinal interpretation (i.e. doctrinal persuasion); or to demonstrate the legitimacy of a particular regime, scenario, or concept (i.e. legitimacy persuasion). These are non-exhaustive, may be subjectively distinguished, often overlap, and only constitute broad categorizations. Commonly, factual and doctrinal persuasion lead to legitimacy persuasion. A state will advantageously frame facts. It will forward expansionist interpretations of law that facilitate its efforts. Or, it will do both to reach a determination that a particular situation or policy is legitimate. Persuasive interactions may be more limited, singularly focused on an episodic event, negotiation, or interpretative moment. Through confluence or as independent legal interactions, each of the identified persuasive forms demonstrate how a state—in defense or in furtherance of a legal position or policy that is broadly held to be legally *impermissible*—employs persuasion and legal argument in ways that extend beyond a compliance-violation binary.

A. *Factual Persuasion*

On August 31, 1939, Heinrich Himmler initiated a series of events that began the Second World War. Under Himmler's direction, members of the German *Schutzstaffel* (SS) and *Sicherheitsdienst* (SD) undertook a false flag operation. Donning Polish military uniforms, they attacked German radio stations, railways, and custom posts. Reinhard Heydrich, then head of the SD, instructed his operatives to manufacture evidence of the attacks, "for the foreign press as well as for German propaganda purposes."[45] Prisoners from a concentration camp were dressed in Polish apparel, killed, and left at the site of the raids. A radio

44. Brandis, *supra* note 33.

45. LORD RUSSELL, THE SCOURGE OF THE SWASTIKA: A HISTORY OF NAZI WAR CRIMES DURING WORLD WAR II 11-12 (2008).

station in Gleiwitz was overtaken. A Polish-speaking SD officer broadcasted a call to arms, announcing that the time for conflict had arrived and that the Polish "should unite and strike down any German from whom they met resistance."[46] The following day Adolf Hitler commenced the invasion of Poland, citing the fiction of Polish aggression and the previous night's events in justification of a "defensive" German response.[47]

Factual persuasion may be based on a demonstrable lie, conjecture, or simply constitute advantageous framing. Regardless of the underlying assertion, this persuasive form is displayed when a state forwards a purportedly factual contention that is intended to facilitate subsequent appeals to a particular legal framework. Political leaders appear more willing to mislead domestic constituencies than they are international audiences.[48] Within international affairs, Ian Johnstone explains that "purely self-serving arguments, or those seen as arbitrary or beside the point, are simply not persuasive. For that reason, they are rarely heard when public policy choices are being debated."[49] Although true in most deliberative scenarios, distinguishable examples exist. States—in neglect of even a semblance of good-faith—may present legal arguments that are posited on a demonstrable falsehood. Such instances recall Hans Morgenthau's skeptical assertion that states can always offer a legal argument to justify their policies.[50]

These legal appeals constitute disingenuous misuses of law. However, factual persuasion need not be understood singularly. A state, willing to violate international law or whose actions are based on a controversial legal contention, often establishes a fact pattern that lends itself to a more compelling legal claim. Factual persuasion allows the violating state to shift the premise. Altering an unconventional factual assertion to make it appear more amenable to facilitatory legal language structures persuasive claims that the state's actions are not as they seem or meet some standard of permissibility. A liberal state may lie to justify or dismiss behavior that contradicts the values that they otherwise

46. *Id.* at 12.

47. *See* Adolph Hitler, Speech at the Reichstag Building in Berlin: Address to the Reichstag (Sept. 1, 1939).

48. JOHN J. MEARSHEIMER, WHY LEADERS LIE: THE TRUTH ABOUT LYING IN INTERNATIONAL POLITICS 6 (2011).

49. IAN JOHNSTONE, THE POWER OF DELIBERATION: INTERNATIONAL LAW, POLITICS AND ORGANIZATION 5 (2011).

50. HANS J. MORGENTHAU, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE 282 (1978).

espouse.[51] The British insistence that the bombing of Dresden targeted military installations—and the subsequent American claim that the operation constituted a strategic necessity—are irreconcilable with accounts of the civilian sites that were directly targeted during the campaign.[52] These factual claims, however, allowed U.K. and U.S. officials to align the discourse with recognized norms. Accordingly, they presented their actions as a lawful military operation.

A state, outwardly committed to liberal values but that seeks an alliance or military partnership with an illiberal nation or group, may present a similar factual claim. The state will employ international legal rhetoric to excuse the illiberal behavior of the strategic partner.[53] The United States has maintained numerous advantageous relationships with such regimes. From its efforts to portray Stalin's Soviet Union as an aspiring democracy to its more recent interest-driven affiliation with Aliyev's Azerbaijan, the United States has coupled a legal vernacular with misleading claims regarding the domestic reality of certain strategic partners.[54]

Actors may present a purportedly factual claim to dismiss a legal accusation. Following the April 2017 sarin-gas attack in Khan Sheikhoun, President Bashar al-Assad denied the use of, or intent to deploy, chemical weapons.[55] Russia furthered this narrative. Supplementing the Syrian denial with legal argument, Russian officials contended that the airstrike featured conventional weapons. Syrian warplanes, Russia claimed, directed the strike against legitimate military targets and thus acted consistently with legal requirements.[56]

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51. MEARSHEIMER, *supra* note 48, at 77-79.

52. *See generally* ALEXANDER MCKEE, DRESDEN, 1945: THE DEVIL'S TINDERBOX (1982); *see also* Dominic Selwood, *Dresden was a civilian town with no military significance. Why did we burn its people?*, THE TELEGRAPH (Feb. 13, 2015), https://www.telegraph.co.uk/history/world-war-two/11410633/Dresden-was-a-civilian-town-with-no-military-significance.-Why-did-we-burn-its-people.html.

53. MEARSHEIMER, *supra* note 48, at 78-79.

54. *Id.* at 78-79; *see also* Samuel Ramani, *Three reason the U.S. won't break with Azerbaijan over its violations of human rights and democratic freedoms*, WASH. POST (Jan. 20, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/01/20/3-reasons-the-u-s-wont-break-with-azerbaijan-over-its-violations-of-human-rights-and-democratic-freedoms/?utm_term=.32517b2ee3b9. *See generally* Ernest R. May & Phillip D. Zelikow, eds., DEALING WITH DICTATORS: DILEMMAS OF U.S. AND INTELLIGENCE ANALYSIS, 1945-1990 (2006).

55. Laura Smith-Spark, *Assad claims Syria chemical attack was a 'fabrication', in face of evidence*, CNN (Apr. 13, 2017), https://www.cnn.com/2017/04/13/middleeast/syria-bashar-assad-interview/index.html.

56. *See* Robert Lawless, *A State of Complicity: How Russia's Persistent and Public Denial of Syrian Battlefield Atrocities Violates International Law*, 9 HARV. NAT. SEC. J. 180, 187-88 (2018).

These invocations of international legal argument are often dismissed as abuses of law.[57] Whether they wish to shift the discourse from a controversial event to an abstract legal discussion, signal a commitment to normative values, or simply provide the most expedient option, states may present a factual contention to further a subsequent legal claim. These uses of factual persuasion are often aimed at a limited audience. They are intended to substantiate assertions of compliance. More commonly, however, persuasive legal argument is employed to influence conceptions of compliance. It is employed to preference a particular interpretation of law, to determine what precisely compliance entails.

B. *Doctrinal Persuasion*

The Israel Defense Forces launched Operation Cast Lead in December 2008. Israel insisted that the 22-day military offensive was designed to eliminate Hamas' rocket-launching capacity and infrastructure.[58] Officials immediately offered legal justification.[59] Within Gaza, growing death tolls and mounting hardship caused many within the international community to amend their response to the hostilities. Initial calls for restraint and affirmations of Israel's right to self-defense were replaced by condemnation of IDF actions.[60] An international law-based discourse emerged in concurrence. The Israeli government and the Palestinian Authority (PA) presented an array of factual and legal assertions. Beyond common assurances of compliance, persuasive appeals were offered to support novel, often unsound, interpretative claims. Daniel Reisner, the former head of the ILD, described how military lawyers were tasked with forwarding such legal appeals: "we defended policy that is on the edge: the "neighbor procedure" [making

57. *See e.g., The Observer view on Russia's actions in Syria and the Failure of International Law*, GUARDIAN (Oct. 1, 2016), https://www.theguardian.com/commentisfree/2016/oct/01/observer-view-russian-actions-syria-influence-international-law.

58. The State of Israel, *The Operation in Gaza 27 December 2008-18 January 2009: Factual and Legal Aspects*, (July 2009) at ¶ 16.

59. *See* Israel Ministry of Foreign Affairs, *Operation Cast Lead – Israel Defends its Citizens*, (Dec. 27, 2008), https://mfa.gov.il/MFA/ForeignPolicy/Terrorism/GazaFacts/Pages/Operation-Cast-Lead-Israel-Defends-its-Citizens.aspx; *see also* Israel Ministry of Foreign Affairs, Background Paper, *Responding to Hamas Attacks from Gaza – Issues of Proportionality*, (Dec. 2008), https://mfa.gov.il/mfa/aboutisrael/state/law/pages/responding%20to%20hamas%20attacks%20from%20gaza%20-%20issues%20of%20proportionality%20-%20march%202008.aspx.

60. *See* Joel Peters, *Gaza*, *in* THE ROUTLEDGE HANDBOOK ON THE ISRAELI-PALESTINIAN CONFLICT 196, 203 (Joel Peters & David Newman eds., 2013); *see also* COLIN SHINDLER, A HISTORY OF MODERN ISRAEL, 379-80 (2d ed. 2013).

a neighbor knock on the door of a potentially dangerous house], house demolitions, deportations, targeted assassination.."[61] The PA acknowledged that launching rockets at civilian populations violated international law. It, however, excused Hamas' actions. They were not, the PA claimed, violations of the principle of distinction because the Gazan militants only possessed crude weaponry and were unable to control the projectiles.[62]

States appeal to international legal argument to posit doctrinal claims. Claims may follow a particular action that exists within a legal grey-area or that formally requires a legal response. This recalls Rebecca Ingber's notion of an interpretation catalyst.[63] A doctrinal assertion that requires persuasive vigor may be in response to a legal accusation. It may follow a clear violation. Or it may accompany a legal contention that is controversial and strains contemporary consensus. The state does not deny or distort the factual context within which the interpretative claim arises. Instead, it suggests that the law is unclear or that it differs from that which is broadly assumed.

Doctrinal persuasion presents a legal interpretation. Interpretation is traditionally understood as a technique to discern meaning from legal texts.[64] More broadly, however, it constitutes a "persuasive phenomenon."[65] The interpreter's motives will range. They may simply wish to extract certainty from an imprecise legal formulation. This allows the state to operate in accordance with legal dictate or predict the intentions of other actors whose behavior will be similarly influenced by the "correct" meaning of the legal text. Alternatively, as Martti Koskenniemi suggests, the interpreting state may wish to impose a subjective political position onto a broader policy or legal debate. Interpretation, Koskenniemi concludes, is not a method to discover

61. Feldman & Blau, *supra* note 34.

62. U.N. General Assembly, Second Follow-up to the Report of the United Nations Fact-Finding Mission on the Gaza Conflict: Report of the Secretary General, ¶¶ 19, 65, 69, U.N. Doc. A/64/890 (Aug. 11, 2010).

63. Rebecca Ingber, *Interpretation Catalysts and Executive Branch Legal Decisionmaking*, 38 YALE J. INT'L L. 359 (2013).

64. This is prescribed by the Vienna Convention on the Law of Treaties and offers such concepts as good-faith, ordinary meaning, context, object, and purpose. *See* Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331; *see also* Daniel Peat & Matthew Windsor, *Playing the Game of Interpretation: On Meaning and Metaphor in International Law*, *in* INTERPRETATION IN INTERNATIONAL LAW 3, 3 (Andrea Bianchi, Daniel Peat & Matthew Windsor eds., 2015).

65. *Id.*

meaning but instead a means to create it.[66]

Interpretation becomes a game. The objective "is to persuade one's audience that [a particular] interpretation of the law is the correct one."[67] The form of the interpretative appeal is determined by the intended audience. An interpretative claim presented to the International Court of Justice (ICJ) will likely be grounded in the Vienna Convention on the Law of Treaties.[68] A broad assertion that a military action conforms with IHL may exhibit fewer rigid invocations of legal principles. Thus, uses of persuasion to interpret the law vary from official formulations of textual meaning to casual legal avowals.

The present focus is less concerned with the formal interpretative process. Instead, the invocations of persuasion, described throughout, emphasize legal argument's demotic appeal. Iain Scobbie explains that in domestic and international law alike, persuasive and interpretative arguments exist "in activities such as advising clients, engaging in negotiations, research and the construction of academic arguments, or the presentation of a proposed text or its interpretation to non-judicial bodies."[69]

Less-formal interpretative appeals to international law are constant features of the broader deliberations that accompany the use of force. States employ such rhetoric for a variety of reasons. The state may appeal to doctrine to illustrate that a particular action conforms with international law. When, on May 14, 2018, IDF snipers killed over sixty Gazan protesters—participants in mass demonstrations near the border fence—the international community demanded answers.[70] In response to a joint petition by a group of Israeli NGOs, the Government offered an inventive legal appeal.[71] The mass protests were defined as part of an

66. *Id.* at 12-13; *see also* MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 18, 531 (2005).

67. Andrea Bianchi, *The Game of Interpretation in International Law: The Players, the Cards, and Why the Game is Worth the Candle*, *in* INTERPRETATION IN INTERNATIONAL LAW 34, 36 (Andrea Bianchi, Daniel Peat & Matthew Windsor eds., 2015).

68. *Id.* at 44.

69. Iain Scobbie, *Rhetoric, Persuasion, and Interpretation in International Law*, *in* INTERPRETATION IN INTERNATIONAL LAW 61, 74 (Andrea Bianchi, Daniel Peat & Matthew Windsor eds., 2015).

70. Hum. Rts. Council, Violations of international law in the context of large-scale civilian protests in the Occupied Palestinian Territory, including East Jerusalem, UN Doc. A/HRSC/S-28/L.I (May 18, 2018); *see also* Amir Tibon, *U.S. Blocks Security Council Statement Calling for Investigation Into Gaza Violence*, HAARETZ (May 15, 2018), https://www.haaretz.com/israel-news/u-s-blocks-security-council-statement-calling-for-gaza-investigation-1.6091919.

71. State of Israel, *Response of the State to the High Court of Justice* (Apr. 30, 2018), https:// www.acri.org.il/he/wp-content/uploads/2018/04/bagatz-3003-18-Gaza-shooting-meshivim1-2-0418.pdf [Hebrew].

armed conflict between Israel and Hamas.[72] Israel claimed that a law enforcement paradigm, inspired by human rights law but applied under IHL, governed the applicable use of force. The protestors, constituting a mass of individuals, had become a collective threat. In response, the IDF justified the use of live fire under an inventive legal paradigm that permitted the preemptive use of force (i.e., before the mass of individuals had breached the border fence).[73]

Such invocations of doctrinal persuasion occur in response to a *particular* event. Similar interpretative appeals may also be presented to validate a *general* policy objective. Often, the policy has been received skeptically, as a violation of international law. The state, however, wishes to implement or justify the policy and engages in doctrinal appeals to persuade a broader audience of the policy's legality. In 2010, the Obama Administration detailed its legal support for the use of drones to aid in the United States' global response to terrorism. The legality of using weaponized drones for targeted killing was increasingly questioned.[74] Harold Koh, then the Legal Adviser to the State Department, addressed the American Society of International Law's Annual Meeting.[75] Koh detailed the Administration's claim. The U.S. drone policy was limited to military targets. Koh assured that civilian casualties were proportionate to the military advantage gained. The general policy was thus a legitimate act of self-defense and consistent with IHL.[76]

By interpreting international law to exhibit compliance, further an interpretative claim, or validate a controversial policy, the state relies on doctrinal persuasion. These arguments identify an international legal question and interpret a particular point of law. An established doctrine or treaty provision is read in accordance with the desired outcome. Beyond appeals to specific interpretative questions, states will

72. This was said to be because the weekly protests displayed high levels of violence and furthered Hamas' operational interests. *See* Eliav Lieblich, *Collectivizing Threat: An Analysis of Israel's Legal Claims for Resort to Force on the Gaza Border*, JUST SECURITY (May 16, 2018), https://www.justsecurity.org/56346/collectivizing-threat-analysis-israels-legal-claims-resort-force-gaza-border.

73. *Id.*

74. *See* Hum. Rts. Council, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010). *See generally* Mary Ellen O'Connell, *Unlawful Killing with Combat Drones: A Cast Study of Pakistan, 2004-2009*, *in* SHOOTING TO KILL: SOCIO-LEGAL PERSPECTIVES ON THE USE OF LETHAL FORCE 263 (Simon Bronitt, Miriam Gani & Saskia Hufnagal eds., 2012).

75. Harold Hongju Koh, Keynote Speech at Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010).

76. *Id.; see also* Shereshevsky, *supra* note 10.

also invoke international law broadly. These legal appeals may be independent acts or the end-product of a legal contention premised upon a factual and/or doctrinal claim. Similar to the interpretative arguments addressed here, the state employs international legal rhetoric and reasoning to persuade various audiences that a regime, scenario, or event conforms with international law and is thus legitimate.

C. *Legitimacy Persuasion*

During the 2002 State of the Union, President George W. Bush began building the case for war against Iraq.[77] Hostile towards the United States, the Iraqi regime was portrayed as a security threat. It was a source of regional and international instability. Saddam Hussein, the President explained, had committed egregious human rights violations and had expelled weapons inspectors. Indifference, in response to this mounting threat, would be catastrophic.[78] In the wake of the September 11 attacks, appeals to security and links to terrorism carried currency.[79] In the United Kingdom, however, British participation in a U.S.-led coalition was framed as a "war of choice." Policymakers accepted this. They sought to "persuade public opinion that that choice was necessary to ensure freedom and security."[80]

Throughout Whitehall, within the FCO, and across British society, questions of the pending war's legality assumed prominence. Prime Minister Tony Blair's Labour Government employed legal reason in justifying the use of force against Iraq. Following much internal debate—and staunch opposition from the FCO's own lawyers—military action was initially premised on United Nations involvement.[81] A weapons inspection regime would be re-imposed through the U.N. When the Iraqis rejected or violated the initiative, the British could build a legal case justifying the use of force.[82] Internal deliberations adhered to traditional legal structures.[83] Doctrines and texts were interpreted and

77. George W. Bush, State of the Union: The President's State of the Union Address (Jan. 29, 2002).

78. *Id.*

79. PEEVERS, *supra* note 31, at 134-35; *see also* Herbert W. Simons, *Rhetoric's Role in Context, Beginning with 9/11*, 10 RHETORIC & PUB. AFF. 183 (2007).

80. PEEVERS, *supra* note 31, at 134.

81. *See* The UK Iraq Inquiry, Statement by Sir Michael Wood to the Iraq Inquiry (Jan. 15, 2010), http://webarchive.nationalarchives.gov.uk/20160512094556/http://www.iraqinquiry.org.uk/media/43477/wood-statement.pdf.

82. PEEVERS, *supra* note 31, at 142.

83. *Id.* at 143-52.

debated. *Lex lata* declarations were advanced alongside *lex ferenda* assertions.

States employ legal argument to exhibit legitimacy. Diplomats, military commanders, and elected officials all invoke legal vernacular as a persuasive and strategic asset.[84] Such legal arguments share much with the tendency of states to offer doctrinal claims. However, where the aforementioned category comprises inventive assertions of specific legal meaning, the current designation captures a less intricate, redolent use of law. Of course, there is much overlap between these categorizations. Disparate arguments may be simultaneously employed and factual and doctrinal persuasion will commonly precede claims of legitimacy. Either collectively or exclusively, a state may use any or all forms of legal argument to persuade diverse audiences.

Understood independently, this final purpose of persuasion occurs when states attempt to legitimize a regime, scenario, or concept through ill-defined legal (or legal-sounding) language. Such appeals are reminiscent of what Naz Modirzadeh has termed folk international law: "a law-like discourse that relies on a confusing and soft admixture of IHL, *jus ad bellum*, and [international human rights law] (IHRL)."[85] The use of legal vernacular to exhibit legitimacy presents for a variety of reasons. It may offer a persuasive argument that insists a military action is justifiable. It may facilitate a *sui generis* legal claim. This legitimizes a particular situation but denies the extension of broader meaning or precedential value. The use of general legal argument also enables the establishment of emergent norms through novel legal claims. The development of and appeals to humanitarian intervention illuminates each invocation of this form of persuasive legal argument.

The NATO military campaign in Yugoslavia began in 1999 and lasted for seventy-eight days. It was justified in response to Serbian policies in Kosovo where Slobodan Milosevic was leading efforts to ethnically cleanse the Albanian majority.[86] The North Atlantic Council defended its decision to use force with reference to the "massive humanitarian catastrophe" that resulted from an unrestrained assault by Yugoslav forces against Kosovo's civilian population.[87] NATO members consistently cited humanitarian considerations. Explaining the collective

84. *See* KENNEDY, *supra* note 28, at 8, 41.

85. Naz K. Modirzadeh, *Folk International Law: 9/11 Lawyering and the Transformation of the Law of Armed Conflict to Human Rights Policy and Human Rights Law to War Governance*, 5 HARV. NAT'L SEC. J. 225, 229 (2014).

86. *See generally* Adam Roberts, *NATO's Humanitarian War Over Kosovo*, 41 SURVIVAL 102 (1999).

87. Press Release N-NAC-1(99) 51, NATO, *The Situation in and around Kosovo* (Apr. 12, 1999), https://www.nato.int/docu/pr/1999/p99-051e.htm; *see also* Scharf, *supra* note 35, at 42.

use of force, the aversion of an atrocity provided legal and moral justification.[88] Canada's Ambassador to the United Nations asserted that, "humanitarian considerations underpin our action."[89] Similarly, the Dutch noted that military action found legal basis in prevention of the pending humanitarian crisis.[90] However, as Nicholas Wheeler notes, these actors did not specify the nature of this legal basis.[91] They did not provide legal reasoning beyond generalized avowals of humanitarian interests.

The U.K. Government offered further uses of legal language to persuade that the use of force was justifiable. Initially, Prime Minister Blair framed military action as a "battle for humanity."[92] Accordingly, it is "a just cause, it is a rightful cause."[93] The Secretary of Defense would later expand, noting that:

> [O]ur legal justification rests upon the accepted principle that force may be used in extreme circumstances to avert a humanitarian catastrophe. . .The use of force in such circumstances can be justified as an exceptional measure in support of purposes laid down by the Security Council, but without the Council's express authorization, when that is the only means to avert an immediate and overwhelming humanitarian catastrophe.[94]

This directly implied that international law permitted a humanitarian basis for the use of force—a proposition that, devoid of Security Council authorization, is uncertain.[95] While this exhibits the tendency of states to make persuasive assertions of legitimacy through non-specific legal claims, the United Kingdom and the United States would subsequently amend their argumentative focus. States recognize that their legal arguments contribute to the formation of international law.[96] When justifying the Nixon administration's use of force against the

88. *See* Nicholas J. Wheeler, *Reflections on the Legality and Legitimacy of NATO's Intervention in Kosovo*, 4 INT'L J. HUM. RTS. 145, 153 (2000).

89. *Id.; see also* U.N. SCOR, 54th Sess., 3988th mtg, U.N. Doc. S/PV.3988 (Mar. 24, 1999).

90. U.N. SCOR, 54th Sess., 3988th mtg, U.N. Doc. S/PV.3988 (Mar. 24, 1999); *see also* Scharf, *supra* note 35, at 43.

91. Wheeler, *supra* note 88, at 153.

92. Quoted in Scharf, *supra* note 35, at 42-43.

93. *Id.*

94. *Id.* at 43; *see also* 328 Parl Deb HC (6th ser.) (1999) col. 616-17 (UK).

95. *See generally* Harold Hongju Koh, *The War Powers and Humanitarian Intervention*, 53 HOUS. L. REV. 971 (2016).

96. *See generally* Harold Hongju Koh, *The Legal Adviser's Duty to Explain*, 41 YALE J. INT'L L. 189 (2016).

North Vietnamese in Cambodia, Legal Adviser John Stevenson argued that,

> [I]t is important for the Government of the United States to explain the legal basis for its actions, not merely to pay proper respect to the law, but also because the precedent created by the use of armed forces in Cambodia by the United States can be affected significantly by our legal rationale.[97]

In Kosovo, U.S. Secretary of State Madeleine Albright was reluctant to provide precedential support for unrestricted humanitarian intervention.[98] Wishing to maintain claims that NATO action was legitimate, Albright argued that the military campaign was "a unique situation *sui generis* in the region of the Balkans."[99] Prime Minister Blair reversed assertions regarding humanitarian intervention's normative potential. Instead, the Prime Minister argued that the Kosovo operation was exceptional.[100] NATO members made an explicit distinction. They differentiated between specific legal arguments (that would carry legal weight and give precedential value) and a general claim that employed legal language to imply that the particular event was legitimate but of no greater legal significance.[101] Michael Matheson, the State Department's Legal Adviser, would later note that

> [W]e listed all the reasons why we were taking action and, in the end, mumbled something about it being justifiable and legitimate but not a precedent. So in a sense, it *was* something less than a definitive legal rationale – although it probably was taken by large parts of the public community as something like that.[102]

Finally, a state that wishes to legitimize a general policy or foster the development of an underlying norm may also appeal to non-specific

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97. *Id.; see also* John R. Stevenson, *Statement of the Legal Advisor*, 65 AM. J. INT'L L. 933, 935 (1971).

98. Scharf, *supra* note 35, at 46.

99. *See* U.S. Dep't of State, Press Conference, Press Conference with Russian Foreign Minister Igor Ivanov (Jul. 26, 1999), [https://perma.cc/EGX5-GGEF].

100. Scharf, *supra* note 35, at 47; *see also* 330 Parl Deb HC (6th ser.) (1999) col. 30 (UK).

101. *See* Scharf, *supra* note 35, at 46-47.

102. Cited in MICHAEL P. SCHARF & PAUL R. WILLIAMS, SHAPING FOREIGN POLICY IN TIMES OF CRISIS: THE ROLE OF INTERNATIONAL LAW AND THE STATE DEPARTMENT LEGAL ADVISER 124-25 (2010).

legal language. When the United Kingdom had initially argued in favor of a norm permitting the unilateral use of force in response to humanitarian crisis, they offered general legal affirmations. Michael Scharf explains that how "a custom pioneer describes a new rule of customary international law can greatly impact its international acceptance."[103] When a Canadian-led initiative answered Kofi Annan's call to reconcile the traditional conception of sovereignty with collective efforts to prevent atrocity crimes, the resulting responsibility to protect (R2P) doctrine employed legal language to persuade. Borrowing from the *jus ad bellum* and just war theory, R2P would only justify military action that was based upon "right authority, just cause, right intention, last resort, proportional means and reasonable prospects."[104]

The persuasive use of legal language by states may further good-faith efforts to progressively advance a policy or develop the law. They may constitute manipulative attempts to secure state interests. Regardless of motivation, persuasion is employed and international legal argument is ubiquitous. The motivation that accompanies these persuasive appeals may appear obvious. In many instances they will be subjective. In 2013, when the al-Assad regime launched a chemical weapons attack in eastern Damascus, the United Kingdom invoked the doctrine of humanitarian intervention.[105] The United Kingdom provided a general legal argument to justify the use of force without Security Council authorization. This required evidence of significant humanitarian distress; the absence of alternative methods; and the necessary, proportionate, and limited use of force.[106] British arguments may be received as an attempt to provide a legal basis to achieve a necessary humanitarian objective. Russia's invocation of humanitarian intervention and R2P in 2008 assumed a similar argumentative structure.[107] Yet, this justification of Russia's incursion into South Ossetia and Abkhazia was largely

103. Scharf, *supra* note 35, at 41.

104. *See* INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT 32 (2001).

105. *See* Prime Minister's Office, *Chemical Weapon Use by Syrian Regime: UK Government Legal Position* (Aug. 29, 2013), http://i2.cdn.turner.com/cnn/2013/images/08/29/chemical-weapon-use-by-syrian-regime-uk-government-legal-position.pdf.

106. *Id.; see also* Letter from Rt Hon Hugh Robertson, MP, House of Commons to the House of Commons Foregin Affairs Committee on Humanitarian Intervention and the Responsibility to Protect (Jan. 14, 2014), https://www.justsecurity.org/wp-content/uploads/2014/01/Letter-from-UK-Foreign-Commonwealth-Office-to-the-House-of-Commons-Foreign-Affairs-Committee-on-Humanitarian-Intervention-and-the-Responsibility-to-Protect.pdf.

107. *See generally* Christina G. Badescu & Thomas G. Weiss, *Misrepresenting R2P and Advancing Norms: An Alternative Spiral?* 11 INT'L STUD. PERSPECTIVES 354 (2010).

perceived as buttressing an increasingly aggressive foreign policy.[108] Perspectives alter and are subject to varying influences. Often, the intention of the legal arguments forwarded by states, the extent to which persuasion is offered and received in demonstration of legality and legitimacy, is directed by the particular audience addressed by the state.

III. WHOM DO STATES PERSUADE?

Chaim Perelman explains that every argumentation is addressed to an audience. The audience may be large or small; competent or less competent.[109] Always, according to Perelman, it consists of "the ensemble of those whom the speaker wishes to influence. . ."[110] States, upon the use of force, direct persuasive argument towards a variety of audiences. The form and purpose of the argument correlates with the target of persuasion. The state may wish to persuade both domestic and international audiences. They may seek to convince the Security Council that a particular military action is legitimate. Or, they may hope to assure an interpretative community that a certain tactic, policy, or choice of weaponry is permissible. Persuasion's boundaries are broad and its intended audience varies. Most often, though, the use of legal argument targets a definable group.

Upon or in advance of the use of force, domestic constituencies become a target of persuasion. Legal argument is employed when a state wishes to advance a military policy. It is offered if the use of force is contingent upon the formal approval of a legislative body. As per Article I, Section 8 of the U.S. Constitution, Congress possesses the power to declare war.[111] Though the Executive often employs force without congressional approval, persuasive appeals regarding the legality of military action commonly feature when a President builds the case for war.[112] These appeals also target broader society. A controversial military action, a war of choice, or a foreign intervention will accrue significant costs. Lives will be lost and huge sums of money will be spent. Governments employ legal argument to persuade the public

108. *See generally* Vladimir Baranovsky & Anatoly Mateiko, *Responsibility to Protect: Russia's Approaches*, 51 INT'L SPECTATOR 49 (2016).

109. CHAIM PERELMAN, THE IDEA OF JUSTICE AND THE PROBLEM OF ARGUMENT 100 (1963).

110. CHAIM PERELMAN & LUCIE OLBRECHTS-TYTECA, THE NEW RHETORIC: A TREATISE ON ARGUMENTATION 19 (1969).

111. *See* U.S. CONST. art. I, § 8, cl. 11.

112. *See generally* DAVID J. BARRON, WAGING WAR: THE CLASH BETWEEN PRESIDENTS AND CONGRESS 1776 TO ISIS (2016).

that a military action is necessary and legitimate.[113] The action may be framed as a response to an immediate or existential threat. Devoid of an obvious defensive element, it may be presented as within the state's broader interest. In both instances, the state speaks to domestic audiences through the language of international law. In 2015, following a series of attacks by members of the National Socialist Council of Nagaland, the Indian Army conducted airstrikes inside Myanmar. Indian officials employed a legal vernacular to offer domestic justification. Rajyavardhan Singh Rathore, the Minister of State for Information and Broadcasting, invoked the notions of necessity and "hot pursuit" to validate the counter-insurgency operation.[114]

Often, however, when states employ a legal vernacular to profess legitimacy or assert the legality of a particular initiative, they engage in a two-level game.[115] Arguments are advanced for both domestic and international purposes. Robert Putnam explains that within the domestic sphere, local groups and elected officials compete to advance interests through the mechanisms of government. Internationally, states "seek to maximize their own ability to satisfy domestic pressures, while minimizing the adverse consequences of foreign developments."[116] International legal arguments target either or both audiences. When Bashar al-Assad deployed chemical weapons in 2013, the Obama Administration considered responding through military action.[117] The proposed use of force, however, experienced domestic and international resistance.[118] In reply, the White House Counsel appealed to the international norm prohibiting the use of chemical weapons. They sought to influence both levels of opinion:

> [T]he president believed that it was important to enhance the legitimacy of any action that would be taken by the executive . . .

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113. MICHAEL J. BUTLER, SELLING A 'JUST' WAR: FRAMING, LEGITIMACY, AND US MILITARY INTERVENTION 9 (2012).

114. *Rajyavardhan Singh Rathore Lauds Army Operation in Myanmar*, THE ECONOMIC TIMES (Jun. 10, 2015), https://economictimes.indiatimes.com/news/defence/rajyavardhan-singh-rathore-lauds-army-operation-in-myanmar-says-it-is-beginning/articleshow/47606435.cms; *see also* Deepak Raju & Zubin Dash, *Balancing the Language of International Law and the Language of Domestic Legitimacy—How Well Does India Fare?*, (2017) 57 INDIAN J. INT'L L. 63 (2017).

115. *See generally* Robert Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427 (1988).

116. *Id.* at 434.

117. Thom Shanker, C.J. Chivers & Michael R. Gordon, *Obama Weighs 'Limited' Strike Against Syrian Forces*, N.Y. TIMES (Aug. 27, 2013), https://www.nytimes.com/2013/08/28/world/middleeast/obama-syria-strike.html.

118. Koh, *supra* note 96, at 204-06.

> to seek Congressional approval of that action and have it be seen, again as a matter of legitimacy both domestically and internationally, that there was a unified American response to the horrendous violation of the international norm against chemical weapons use.[119]

A state that attempts to persuade an international audience will target its arguments generally or specifically. Often, the audience's composition corresponds with the form of argument offered by the persuading state. When officials address the international community and claim that the state's actions, upon the use of force, adhere to international law, they offer broad claims of legitimacy or legality. Persuasion is presented generally (i.e., towards the international community as a whole). Arguments that target general audiences may be formal. This will include official statements presented on behalf of the state, often through their foreign ministry or a diplomatic delegation to an international organization. Informally, states will also attempt to persuade an array of additional actors. These will include social movements, the media, and transnational civil society.[120] Specific audiences will be targeted through both broad and narrow legal arguments. Broad assertions—of legitimacy or legality—may be employed to influence the opinion of key allies. The persuading actor may target particular states with which it hopes to form a military alliance or whose cooperation it desires to facilitate a military objective (e.g., to gain access to airspace).[121] Broad arguments may be directed towards members of a regional organization or bloc that hold particular influence (e.g., a P5 member of the Security Council). While the audience's identities vary, these persuasive engagements present broad claims of legal compliance. They target specific audiences whose influence is sought. Pnina Sharvit Baruch, the former head of the Israel Defense Forces' International Law Department contends:

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119. *Id.*; *see also* Charlie Savage, *Obama Tests Limits of Power in Syrian Conflict*, N.Y. TIMES (Sept. 8, 2013), https://www.nytimes.com/2013/09/09/world/middleeast/obama-tests-limits-of-power-in-syrian-conflict.html.

120. JOHNSTONE, *supra* note 49, at 43-44.

121. In a 2016 address to the American Society of International Law, State Department Legal Advisor Brian Egan described the importance of illustrating international legal compliance for, *inter alia*, building and maintaining international coalitions. *See* Brian Egan, State Dep't. Legal Advisor, Speech to the Annual Meeting of the American Society of International Law: International Law, Legal Diplomacy, and the Counter-ISIL Campaign: Some Observations (Apr. 1, 2016).

> [I]t is important on a diplomatic level – to be able to give good answers to allies like the United States and the United Kingdom. Now it is also important, with the potential of [international] criminal investigations, to demonstrate the legitimacy of actions and also be able to give good answers. Beyond criminal proceedings, however, it is necessary to respond to international organizations, NGOs, and others who are critical of military actions.[122]

Specific audiences are also the target of intricate legal claims. These concern specific issues or interpretative contentions (e.g., the legal status of detainees within a non-international armed conflict).[123] They look to influence common legal assumptions or seek to develop new legal understandings (e.g., who constitutes a direct participant in hostilities).[124] These arguments are directed towards strategic audiences. Identified audiences may exist within international organizations. Treaty regimes become persuasive venues.[125] A state that wishes to forward a legal position or defend a particular action—often one that challenges consensus or exceeds conceptions of permissibility—directs persuasive assertions at a particular audience. These audiences—which include other states, norm influencers, or regional and international organizations—overlap with the broad audiences targeted through general legal claims. Often, however, the persuading entity communicates directly with specific groups or communities that exist within the identified audience (e.g., members of the International Law Commission; foreign legal advisers; specific diplomats).

Persuasion is likely to be most prevalent when directed towards small groups that share common identities.[126] Interpretative or epistemic communities, that possess a like vision of international law, become the

122. Interview with Pnina Sharvit Baruch, Retired Colonel Advisor, Israel Def. Force (Mar. 20, 2017).

123. *See, e.g.*, U.S. Dep't of State, *Response of the United States of America to Inquiry of the UNCHR Special Rapporteurs Pertaining to Detainees at Guantanamo Bay* (Oct. 21, 2005), https://www.state.gov/documents/organization/87347.pdf.

124. *See, e.g.*, U.K. MINISTRY OF DEF., MANUAL OF THE LAW OF ARMED CONFLICT §§ 2.5.2., 5.3.2., 5.3.3 (2004).

125. Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 665-666 (2004).

126. Yahli Shereshevsky distinguishes between members of contrasting epistemic communities that promote IHL's legitimizing role (e.g., military lawyers) and its limiting role (e.g., humanitarian actors). *See* Shereshevsky, *supra* note 14, at 268; s*ee also* Alastair Iain Johnston, *Treating International Institutions as Social Environments*, 45 INT. STUD. Q. 487, 509 (2001).

primary targets of narrow persuasive arguments.[127] These communities are "involved in the creation, implementation, and application of norms."[128] Where both communities offer "knowledge and policy advice," interpretative communities also present judgments regarding the meaning and actualization of norms.[129] Ian Johnstone explains that "interpretative communities" describe the nature of interpretation and not the composition of interpreters.[130] However, commonalities exist amongst the involved parties. When states direct international legal arguments towards interpretative communities, they first attempt to influence the individuals and entities "responsible for the creation and implementation of norms."[131] This includes those individuals, government agents, and organizational representatives that possess "expertise in international law and/or special knowledge in the relevant field."[132] Johnstone recalls that this will include "political leaders, diplomats, government officials, international civil servants, scholars, and experts who participate in some way in the particular field of international law or practice."[133] Next, states that forward legal arguments will address a narrow network. This consists of governmental and inter-governmental representatives who "share a set of assumptions, expectations, and a body of consensual knowledge."[134]

The membership of these communities is informally defined and often overlapping. These states, organizations, individuals, groups, and professional networks become the targets of persuasion. Interpretative communities are the preferred focus of these persuasive efforts because they possess expertise and have the ability to influence or determine legal meaning. Collectively, members of the interpretative community—including the persuading state—partake in "a shared enterprise with broadly similar understandings of what they are doing and why they are doing it."[135] Legal arguments or interpretations that concern the use of force often appeal to "security communities."[136] Initially a description of an informal unity amongst states grouped by their

127. *See infra* Section IV. *See generally* Shereshevsky, *supra* note 10.

128. JOHNSTONE, *supra* note 49, at 41.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 42.

133. *Id.*

134. *Id.*

135. *Id.*

136. *See* Emanuel Adler & Michael Barnett, *Security Communities in Theoretical Perspective, in* SECURITY COMMUNITIES 3, 3-4 (Emanuel Adler & Michael Barnett eds., 1998).

willingness to ensure that differences between parties were solved without resort to force, the notion of security communities has developed.[137] Emanuel Adler and Michael Barnett describe security communities as consisting of states that share common values and agree to formal cooperation.[138] These may form through regional groupings, as with the Association of South East Asian Nations. They may actualize through an international organization like NATO or the Organization for Security and Cooperation in Europe. And they may result from bilateral relationships between certain states.[139] Prominent security communities, both within and among states, will be more likely to accept arguments from partners with which they share a common identity. They will be open to explanations of behavior and interpretations of law if they believe that they may face similar security challenges to the persuading entity; that they too may be required to use force in similar circumstances and for similar purposes.

Former Bush Administration Legal Adviser John Bellinger addressed both general and specific audiences. Bellinger was motivated by the contemptuous reception that many of the Bush-era policies received throughout the international community. In response, the Legal Adviser engaged in a process of "international legal diplomacy."[140] This, Bellinger recounts, involved promoting the US commitment to international law. As Legal Advisor, Bellinger would travel extensively to conduct an international legal dialogue. Interlocutors—allies, international organizations, individuals, and NGOs—were targeted. In multilateral forums, through bilateral meetings and speeches, across the pages of legal blogs, newspaper op-eds, and law review articles, Bellinger addressed these various audiences.[141]

This process of legal diplomacy offered more than rebuttals of the Bush Administration's perceived hostility towards international law. Bellinger lobbied members of the international community to adopt particular legal constructions. Positions and policies were advanced and advocated. Amongst allies, Bellinger promoted an extensive reading of the *jus ad bellum* pertaining to the U.S.-led war on terror.[142] Legal

137. *See* KARL W. DEUTSCH, POLITICAL COMMUNITY AND THE NORTH ATLANTIC AREA: INTERNATIONAL ORGANIZATION IN THE LIGHT OF HISTORICAL EXPERIENCE 5 (1957).

138. Adler & Barnett, *supra* note 136, at 4.

139. *See e.g.*, Sean M. Shore, *No Fences Make Good Neighbors: The Development of the US-Canada Security Community, 1871-1940, in* SECURITY COMMUNITIES 333 (Emanuel Adler & Michael Barnett eds., 1998).

140. *Id.* at 135; *see also* Kattan, *supra* note 35, at 115.

141. SCHARF & WILLIAMS, *supra* note 102, at 137, 145.

142. *See* Kattan, *supra* note 35, at 114-117; *see also* SCHARF & WILLIAMS, *supra* note 102, at 135-146.

arguments and the use of persuasion were initially directed generally. At the regional level, Bellinger sought to convince European allies that the United States was in full compliance with international law.[143] He proposed increased cooperation to determine the appropriate legal framework necessary to combat non-state armed groups.[144]

Victor Kattan traces the resulting legal diplomatic process. When a schism emerged regarding the classification of the ongoing conflict in Afghanistan, Bellinger pivoted to a specific audience.[145] This consisted of "a smaller but geographically more diverse group of countries who face serious terrorist threats and also engage in international military operations."[146] Legal arguments were directed towards security communities. These, Kattan explains, consisted of members of the defense, intelligence, and security establishments of "a smaller, more select, group of legal advisers from states that rely on U.S. military aid and technology."[147]

Brian Egan, who would become State Department Legal Adviser in 2016, continued the process of international legal diplomacy. At the American Society of International Law's Annual Meeting, Egan explained that "legal diplomacy builds on common understandings of international law, while also seeking to bridge or manage the specific differences in any particular State's international obligations or interpretations."[148] Continuing, Egan acknowledged the necessity of persuasive legal engagements:

> It is important that our actions be understood as lawful by others both at home and abroad in order to show respect for the rule of law and promote it more broadly, while also cultivating partnerships and building coalitions. Even if other governments or populations do not agree with our precise legal theories or conclusions, we must be able to demonstrate to others that our most consequential national security and foreign policy decisions are guided by a principled understanding and application of international law.[149]

143. Kattan, *supra* note 35, at 114-117.

144. *See* Kattan, *supra* note 35, at 119-120.

145. *Id.* at 122.

146. John B. Bellinger III, Speech to the International Bar Association Meeting: Remarks to the Rule of Law Symposium (Oct. 8, 2010).

147. Kattan, *supra* note 35, at 122.

148. Egan, *supra* note 121, at 244.

149. *Id.* at 247.

The dynamic of a state, articulating the legality of its action, of positing preferred interpretations of international law, or of presenting policy through an international legal lens is familiar. The substantive process that accompanies such appeals is, however, underexplored. The unanswered question thus becomes, how do states persuade?

IV. How Do States Persuade?

In Aristotle's *Rhetoric*, persuasion and speech exist:

> [T]o affect the giving of decisions – the hearers decide between one political speaker and another, and a legal verdict is a decision – the orator must not only try to make the argument of his speech demonstrative and worthy of belief; he must also make his own character look right and put his hearers, who are to decide, into the right frame of mind.[150]

State conduct—behavior evoking controversy, that which is interpreted as a violation, or which occurs within a grey-area—must be explained and justified.[151] Yet, invocations of international legal argument are not often subject to formal adjudicative processes. In most instances, an independent decisionmaker does not evaluate contrasting assertions. Still, in the absence of an authoritative verdict, legal vernacular buttresses the justifications offered by states before or upon the use of force. The argumentative pattern employed by states reflects the Aristotelian form. Through a process of justificatory discourse, Ian Johnstone explains, "claims are made and criticized, actions approved and condemned, actors persuaded and dissuaded in an often cacophonous discursive interaction where legal norms loom large."[152]

Arguments are structured around these norms and a legalized discourse emerges. Assertions and exchanges, by and between states, employ the language of international law to convince and to justify. Chayes and Chayes note that the resulting "diplomatic conversation" constitutes an essential function of international relations.[153] These efforts "make up the ordinary business of foreign ministries as they seek to generate support for policy positions or to elicit cooperative action."[154] Such observations, however, are commonly presented to

150. Aristotle, Rhetoric, bk. II, ch. 1, 2194 (W. Rhys Roberts trans., 2015).
151. Chayes & Chayes, The New Sovereignty, *supra* note 23, at 118.
152. Johnstone, *supra* note 49, at 7.
153. Chayes & Chayes, The New Sovereignty, *supra* note 23, at 119.
154. *Id.*

explain state behavior. The need to justify certain actions to both domestic and international audiences compels legal appeals and, through a process of internalization, induces compliance.[155]

Persuasion is understood singularly. It constitutes a means to ensure desirable state behavior. Martha Finnemore explains that being persuasive entails "grounding claims in existing norms in ways that emphasize normative congruence and coherence."[156] When normative claims are persuasive, they become a powerful means of influencing state behavior.[157] The persuasive process is understood to result in the internalization of new norms. This affects the behavior of states—the targets of persuasion—by redefining their interests and identities.[158] For Ryan Goodman and Derek Jinks, "the touchstone of this approach is that actors are consciously convinced of the truth, validity, or appropriateness of a norm, belief, or practice."[159] The actor "changes its mind" and state behavior is altered.[160]

Beyond dismissive realist accounts, the discursive process is widely assumed. However, the substance of this process—the function of legal argumentation and persuasion—remains underexplored.[161] Steven Ratner explains that even the dynamic theories, those that emphasize the role of persuasion, do not "amply address the invocation of legal norms during the conversation about compliance."[162] Offerings that provide accounts of the microprocesses of persuasive legal engagements continue to focus on how law can affect state behavior and ensure compliance.[163]

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155. *Id.* at 118.

156. MARTA FINNEMORE, NATIONAL INTERESTS IN INTERNATIONAL SOCIETY 141 (1996).

157. *Id.*

158. Goodman & Jinks, *supra* note 125, at 635; *see also* Johnston, *supra* note 126, at 488.

159. Goodman & Jinks, *supra* note 125, at 635.

160. *Id.*

161. Ratner, *supra* note 12.

162. *Id.* at 572.

163. Steven Ratner explains that to "attempt a successful outcome regarding compliance, the persuading entity must base the contours of its communication strategy on four factors: the nature of the *dispute*, the nature of the *parties*, the nature of the *persuasive setting*, and the nature (as well as its sense) of *its own identity*." *See id.* at 575. Elsewhere Ratner notes that the persuading entity's deployment of legal norms requires choice regarding four core elements of legal argumentation – the publicity of legal argumentation; the density of legal argumentation; the directness of legal argumentation; and the tone of legal argumentation. *See* Steven R. Ratner, *Law Promotion Beyond Law Talk: The Red Cross, Persuasion, and the Laws of War*, 22 EUR. J. INT'L L. 459, 492 (2011). Ryan Goodman and Derek Jinks wish to understand the microprocess of persuasion as a means to understand how norms influence actors. They accentuate two techniques – framing and cuing – to determine the "persuasiveness of counterattitudinal messages." See, Goodman & Jinks, *supra* note 125, at 636–37.

I wish to complement these considerations by understanding how the non-compliant state—so commonly the target of persuasion—invokes legal argument within this discursive process. The state will become not merely the subject of persuasion, but an actor whose diplomatic appeals and communicative actions are laced with legal justification. Compliance is not the only end sought by persuasive legal appeals. To frame facts, to influence doctrine, and to legitimize regimes, scenarios, or concepts, states employ legal argument. They too become persuading entities. The framework that I identify and suggest captures how the non-compliant state employs legal argument upon the use of force accentuates five complementary persuasive techniques: (a) identifying a common lifeworld; (b) establishing the state as a general norm-acceptor; (c) demonstrating the authority to interpret; (d) instilling the standard of the acceptable legal argument; and (e) drawing upon precedent and commonality. These are considered in turn.

A. *Identifying a Common Lifeworld*

In *Rhetoric*, the concept of *topoi* denotes shared ideas.[164] These common ideas exist amongst the proponents, the opponents, and the audiences that present and evaluate argument. The persuasiveness of a particular argument has since been understood as contingent upon the ability of the speaker to successfully appeal to these shared ideas.[165] The common ideas and beliefs that are held amongst states and referenced during legal argumentation are often obvious. A familiar language of shared norms—opposition to aggression, a commitment to rights, the sanctity of humanitarianism—structures persuasive engagements. Universally endorsed values become stock phrases of international legal argument. Yet, states do more than appeal to a recurrent vocabulary of values and beliefs. The non-compliant state that undertakes persuasive endeavors often begins by identifying a common premise. This will be shared among interlocutors. It provides the context against which the state's legal assertions will be presented and received.

Jürgen Habermas contends that society may be conceived "as the lifeworld of the members of a social group."[166] The lifeworld complements communicative action and is understood as "the context-forming

164. ARISTOTLE, *supra* note 150.

165. FRANK SCHIMMELFENNIG, THE EU, NATO AND THE INTEGRATION OF EUROPE: RULES AND RHETORIC 201 (2003).

166. JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION, LIFEWORLD AND SYSTEM: A CRITIQUE OF FUNCTIONALIST REASON 204 (Thomas McCarthy trans., Vol. 2, 1987).

background of processes of reaching understanding."[167] Thomas Risse, who applies Habermasian communicative theory to international relations, describes the argumentative process undertaken by states. Effective communication, Risse contends, requires that actors "share a common lifeworld."[168] The common lifeworld "consists of shared culture, a common system of norms and rules perceived as legitimate, and the social identity of actors being capable of communicating and acting."[169] By appealing to the common lifeworld, states access "a repertoire of collective understandings to which they can refer when making truth claims."[170] Though international law provides a prosaic vocabulary—allowing states to articulate common norms and appeal to shared standards—the advancement of non-conventional or non-adherent legal argument often begins through the re-establishment of a non-legal, empathetic context.

The notion of the lifeworld, as applied here, departs significantly from Habermas' usage. As Risse acknowledges, an anarchic conception of international relations is antithetical to a shared lifeworld.[171] As initially conceived, the lifeworld is "holistically structured and unavailable (in its entirety) to conscious reflective control."[172] Within this Article, however, the lifeworld is used to capture the identified commonalities, the shared understandings, truisms, and uncontroversial assumptions that undergird many persuasive interactions. Where Risse and Harald Müller contend that the lifeworld may be *constructed* as a means to build trust and authenticate exchanges, I employ the term to describe a prerequisite communicative phase that *identifies* and *accentuates* shared understandings.[173]

The preliminary identification of a shared and relatable context, that tells of more than legal rules, precedes substantive legal contentions. The presumption that the state's actions or policy—upon or following the use of force—violates international law, distances the state from the common (legal) norms described by Risse. A state that applies force in a seemingly offensive fashion may not plausibly appeal to the familiar

167. *Id.*

168. Thomas Risse, *Let's Argue! Communicative Action in World Politics*, 54 INT'L ORG. 1, 10 (2000).

169. *Id.*

170. *Id.* at 10-11.

171. *Id.* at 14.

172. A special thanks to Max Cherem for clarifying this point. *See* Max Cherem, *Jürgen Habermas (1929—)*, INTERNET ENCYCLOPEDIA OF PHILOSOPHY, https://www.iep.utm.edu/habermas/.

173. Risse, *supra* note 168, at 15.

language of non-aggression and Article 2(4). A state whose military is accused of systematically violating the principle of distinction cannot credibly describe their commitment to the protection of persons not partaking in hostilities. Instead, a state favoring a broad or inventive interpretation of international law, that has perhaps proposed using force in a manner deemed inconsistent with legal standards, accentuates non-legal experience. The non-compliant state identifies a relatable framework within which its actions are contextualized and shared amongst the target audiences that the state wishes to persuade.

Effective persuasion builds upon "propositions or premises [with] which the audience already agrees."[174] Legal assertions that, for example, support the use of force against non-state actors establish a narrative concerning the global threat posed by terrorism and the susceptibility of states to an emergent danger that exceeds legal categorization and defies conventional defensive responses. They do not begin by supporting the resulting military action through a strict reading of the *jus ad bellum*. Such narratives, however, are not forwarded within an ideational vacuum.[175] A legal interpretation that stretches conventional understandings, or a military policy that appears contrary to legal dictate, positions the persuasive claim in opposition to well-established legal norms. The premise developed by the non-compliant state "must compete with other norms and perceptions of interest."[176]

Constructivist scholars emphasize the usefulness of framing. Normative advancement is centered upon the ability of actors to "reinterpret" or "rename" a particular issue in a compelling way.[177] Constructivists associate this process with norm entrepreneurs.[178] The construction of cognitive frames is identified as an essential component of norm development.[179] The norm entrepreneur is successful when "the new frames resonate with broader public understandings and are adapted as new ways of talking about and understanding issues."[180] Ryan Goodman and Derek Jinks insist that framing is the "first and most important technique of persuasion."[181]

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174. Scobbie, *supra* note 69, at 70.

175. Rodger A. Payne, *Persuasion, Frames and Norm Construction*, 7 EUR. J. INT'L REL. 37, 38 (2001).

176. Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887, 897 (1998).

177. *See generally* Payne, *supra* note 175.

178. *See generally* Cass Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996).

179. *See* John W. Myer et al., *World Society and the Nation-State*, 103 AM. J. SOC. 144 (1997).

180. *Id.* at 897.

181. Goodman & Jinks, *supra* note 125, at 635.

As with broader conceptions of persuasion, framing is presented as a means to influence state behavior. It is a method to achieve compliance, to gain endorsement of an emergent norm, or to coax the state to embrace or repudiate a particular policy. Identification of a common lifeworld, while similarly focused on accentuating a relatable premise, allows for broader development. It becomes a technique employed by a non-compliant state. When states develop legal arguments upon the common lifeworld, they preference appeals to shared culture and familiar challenges. Rules and norms assume a significant role throughout the persuasive process. The state is not, however, immediately fixated on forwarding a particular norm or grounding its argument within a formal legal framework. Persuasive engagements by non-compliant states necessarily push against established norms. Upon developing a broad and relatable premise upon which a prohibited action can be reconceived as something other than a legal violation, the state moves to establish its credibility. Though the state may be in violation of a *particular* legal provision, it continues the persuasive process by emphasizing its *general* commitment to international law.

B. *Establishing the State as a General Norm-Acceptor*

States strive to be perceived as compliant with international law. The state emphasizes its deference to legal norms. It professes respect for the rule of law. And the state positions itself as a member, in good-standing, of the post-war international order. A state whose behavior betrays this outward projection of legal fidelity often continues to situate itself as in general acceptance of international law. A violation is an exception, not the standard. If, as Oscar Schachter suggests, international law provides a common language, states covet fluency.[182] An action that appears non-compliant, a favored interpretation that stretches conventional understanding is explained through reiteration of the state's broad legal commitment. In alignment with the Aristotelian conception of persuasion, the non-compliant state builds its legal contention upon efforts to "make [its] own character look right."[183]

Harold Koh, drawing upon the perspective of the government lawyer, contends that public officials "almost always believe their actions are necessary, correct, and lawful."[184] The state, Koh suggests, must

182. Oscar Schachter, *The Quasi-Judicial Role of the Security Council and the General Assembly*, 58 AM. J. INT'L L. 960, 960-963 (1964); *see also* Rosalyn Higgins, *The Place of International Law in the Settlement of Disputes by the Security Council*, 64 AM. J. INT'L L. 1, 1 (1970).

183. ARISTOTLE, *supra* note 150, bk. I, ch. 2, 2194.

184. Koh, *supra* note 96, at 195.

provide public justification so that others will accept the resulting assertion of legal compliance. The justificatory discourse is understood as a necessary factor in establishing both domestic and international legitimacy.[185] Also, however, these legal articulations allow the state to cultivate its standing as a general norm-acceptor. States wish to maintain this standing within the international community and undertake efforts to avoid the perception of chronic legal disregard.[186] Where legality denotes legitimacy, persuasion builds upon more than the directly applicable legal norms. Persuasive efforts, in defense of a questionable action or in furtherance of a non-compliant policy, are established upon professed adherence to "the general values and principles of international law" that the state purports to cherish.[187]

International lawyers do not question the proposition that states hold an interest in "maintaining a reputation for good faith compliance with the law."[188] This is understood to facilitate reciprocity and international cooperation. States desire predictability. Stability is associated with legal amenability.[189] A good reputation is maintained, Andrew Guzman explains, "as long as a country honors all of its previous international commitments."[190] A state's reputation appears more durable than this suggests.[191] While continued instances of legal violation erode credibility, a state may present its reputation to signal that a novel legal contention—one that strains interpretative likelihood or proposes illicit military action—is a marginal disagreement about the meaning of a legal norm. It is not, the state will suggest, an ontological claim regarding the validity of a dominant value. As Thomas Risse notes, the more a non-compliant state accepts the validity of international norms, the more it engages with others over the minutiae of a legal proposition.[192]

Game theorists understand a player's reputation as a "summary of its opponents' current beliefs about the player's compliance strategy or set of strategies in connection with various commitments."[193] States

185. *Id.*

186. THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 31-33 (1995).

187. Robert Fine, *Political Argument and The Legitimacy of International Law: A Case of Distorted Modernization, in* LEGALITY AND LEGITIMACY: NORMATIVE AND SOCIOLOGICAL APPROACHES 197, 198-199 (Chris Thornhill & Samantha Ashenden eds., 2010).

188. JOHNSTONE, *supra* note 49, at 7.

189. *Id.* at 33-34.

190. Guzman, *supra* note 24, at 1847.

191. *See* George W. Downs & Michael A. Jones, *Reputation, Compliance, and International Law,* 31 J. OF LEGAL STUD. 95, 96 (2002).

192. Risse, *supra* note 168, at 30.

193. Downs & Jones, *supra* note 191, at 98.

actively develop their reputation for general legal fidelity. They seek to nurture conceptions that they comply with law and honor undertaken commitments. In turn, the state promotes this reputation as a warrant when the state's actions deviate from its professed affinity to international law. A controversial policy, an assumed violation, is juxtaposed with the assertion that the state is a norm-acceptor. Prior to engaging in substantive accounts—in defense of a particular military action, in explanation of a permissive legal interpretation—the state recites its liberal credentials. A strong reputation, emphasizing legal like-mindedness, dampens the consequences of an action that betrays that affinity. It positions target audiences to receive and take seriously the state's legal assertions. And it further establishes a communicative context, upon which the non-compliant state may continue to build and to persuade by demonstrating its ability to provide authoritative legal interpretation.

C. *Demonstrating the Authority to Interpret*

Legal disputes often feature competing assertions of competence. Opposing legal propositions are supplemented with declarations accentuating the respective parties' capacity to make an authoritative legal claim. Beyond the core substantive question, competing actors contest expertise and authority.[194] This form of persuasion assumes particular salience within international law. The sources of international law—treaties between states; customary international law; general principles; judicial decisions; and the writings of the most highly qualified publicists—compel interpretation.[195] These sources facilitate a range of possible meanings and can be applied in a diversity of ways.[196] Treaties are drafted in broad, agreeable language.[197] Customary international law is identified through an ill-defined and imprecise process.[198] Judicial decisions and the works of legal scholars are interpretative exercises that produce varying opinions.[199]

194. PEEVERS, *supra* note 31, at 246.

195. Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055.

196. DAVID KENNEDY, A WORLD OF STRUGGLE: HOW POWER, LAW, AND EXPERTISE SHAPE GLOBAL POLITICAL ECONOMY 269-274 (2016).

197. Katerina Linos & Tom Pegram, *The Language of Compromise in International Agreements*, 70 INT'L ORG. 587 (2016).

198. *See e.g.* Stefan Talmon, *Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion*, 26 EUR. J. INT'L L. 417 (2015).

199. Michael Peil, *Scholarly Writings as a Source of Law: A Survey of the Use of Doctrine by the International Court of Justice*, 1 CAMBRIDGE J. INT'L & COMP. L. 136 (2012).

As most international legal contentions are not subject to formal decision-making, their persuasive value is influenced by an actor's ability to exhibit authority and expertise. As the formal subjects of international law, states possess inherent authority. Yet the most affected states, those commonly at the forefront of the contemporary discourse regarding the law's governing war, debate and demonstrate this authority. Efforts to accentuate the state's or its representative's expertise further builds upon the Aristotelian notion of affecting the giving of a decision through making one's character look right.[200] As Charlotte Peevers demonstrates, "the authority to speak the law is often determined by the status of the speaker of the invocation or imposition. Some actors appear to hold greater legitimacy in claiming powers than others."[201] Often, a speaker's authoritativeness is inherent or institutionalized. A particular state's foreign ministry is understood to possess high-level expertise in a certain area or field. A specific court is deemed competent to determine particular legal questions that have repeatedly come before its docket. A jurist is recognized as a leading authority on a body of law.

The ability to demonstrate authority and expertise is a formative aspect of the persuasive process. Expertise, Peevers explains, is conveyed by lawyers, diplomats, academics, and technocrats to influence the justificatory discourse that accompanies uses of force.[202] In part, the turn to expertise was a reaction to the belief that "traditional approaches to international governance and the traditional institutions of international law would be ill-equipped to deal with the problems of a globalised world. . ."[203] Expert networks provided an obvious means to ensure technocratic solutions.[204] Also, however, they would become a means of exhibiting credibility. An actor brandishing expertise, whose foreign ministry and government lawyers willfully engage in legal processes and offer a rarefied body of knowledge, is better positioned to persuade. Alistair Iain Johnston notes that persuasion is contingent upon the authoritativeness of the messenger.[205] When a state proposes a counter-attitudinal interpretation, when it engages in a military action that is

200. ARISTOTLE, *supra* note 150, bk. I, ch. 2.

201. PEEVERS, *supra* note 31, at 4; *see also*, Shereshevsky, *supra* note 10, at 10.

202. PEEVERS, *supra* note 31, at 14.

203. Holly Cullen, Joanna Harrington & Catherine Renshaw, *Experts, Networks and International Law, in* EXPERTS, NETWORKS AND INTERNATIONAL LAW 1, 1 (Holly Cullen, Joanna Harrington & Catherine Renshaw, eds., 2017).

204. *See generally* KENNEDY, *supra* note 196.

205. JOHNSTONE, *supra* note 126 at 509-510.

perceived as a violation, the state couples accompanying legal rhetoric with an accounting of interpretative authority.

The demonstration of expertise bolsters this sense of interpretative authority. It facilitates state efforts to form or contribute to existing epistemic communities.[206] These groups, as defined by Peter Haas, are "networks of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area."[207] Interpretative legal avowals are well received when addressed by an actor to an epistemic community of which the actor is a member or from which the actor may derive credibility. Whether the state wishes to engage with an epistemic community or make a broad claim, international legal assertions are built upon the professed expertise or authority of the speaker.

States actively cultivate authoritativeness and expertise. This enables access to and ensures influence within epistemic communities. It increases the persuasiveness of the state's legal avowals when it targets general, non-expert audiences. As Yahli Shereshevsky details, states employ various persuasive strategies as they engage with formal and informal lawmaking processes.[208] States send legal experts to partake in international law conferences. They draw upon the professional reputations of their legal representatives.[209] Written outputs that convey the state's legal positions are made accessible and widely distributed. When relevant, they are translated into English. These outputs are presented in a "quasi-academic style" that relies upon extensive footnoting and elaborate legal reasoning.[210] This both draws upon and exhibits the state's legal expertise. It places the legal contention, Shereshevsky notes, within an existing persuasive discourse as opposed to presenting a simple declaration of *opinio juris*.[211] Within this discourse and throughout these persuasive appeals, the state recognizes that formal authority alone is insufficient. The state seeks to apply its established

206. These communities will also include members of international organization and civil society groups. *See* Cullen, Harrington & Renshaw, *supra* note 203, at 2.

207. *See* Peter M. Haas, *Introduction: epistemic communities and international policy coordination*, 46 INT'L ORG. 1, 3 (1992).

208. Shereshevsky, *supra* note 10, at 51.

209. Shereshevsky notes, for example, Harold Koh's 2010 speech to American Society of International Law's Annual Meeting. Shereshevsky suggests that Koh's participation "can be seen as an attempt by the United States to become part of the international law conversation in a less confrontational way and be received as an actor that participates in the legal debate rather than challenging existing norms." *Id.*

210. *Id.* at 49-50.

211. *Id.* at 49.

expertise to a permissively formulated standard that permits the *acceptable* legal argument.

D. *Instilling the Standard of the Acceptable Legal Argument*

States project legal fidelity. They wish to maintain "a reputation for good faith compliance with the law. . ."[212] Yet, when a state employs legal argument to explain or to justify, it is often content to meet a minimum level of compliance or present only a *plausible* legal argument. A state whose actions are widely-assumed to violate international law will struggle to dislodge consensus legal opinion. In response to legal opposition—within the international community, throughout civil society, and amongst independent legal experts—the non-compliant state acts to instill and to meet the standard of the acceptable legal argument. Legal interpretations and applications of international law to complex fact patterns move from the objective of persuading an audience that an argument is correct to suggesting that the legal contention is plausible.[213] By establishing a reduced legal burden, the state's persuasive appeals become more effective. The state benefits from the perception that it has engaged with the international legal process. Sometimes engagement alone is sufficient to project legitimacy. Recalling Daniel Reisner's contention that international law advances through violations, the non-compliant state may begin to alter legal thresholds to further align legal requirements with state prerogatives.[214]

As identified by the New Haven School, a discursive understanding of international law suggests that legal meaning is derived from argumentative reasoning.[215] The rhetorical nature of the reasoning process features a permissive standard of interpretative validity. Interpretations, as Peevers identifies, "no longer *need* to make the claim of 'truth': rather they have to be 'acceptable'."[216] As Ian Johnstone explains, states rarely dismiss international law's relevancy. Instead, when an action is deemed contrary to international law, the state responds that "this is how we interpret the law, and our interpretation is correct."[217] States

212. JOHNSTONE, *supra* note 49, at 7.

213. To recall the notion that the purpose of persuasion is to convince an audience that a particular interpretation is correct, see Bianchi, *supra* note 67, at 36.

214. Feldman & Blau, *supra* note 34.

215. *See generally* W. Michael Reisman, *International Law-making: A Process of Communication*, 75 AM. SOC'Y INT'L L. PROC. 101 (1981).

216. PEEVERS, *supra* note 31, at 5.

217. JOHNSTONE, *supra* note 49, at 34. Johnstone provides the example of U.S. efforts to "present the best legal case it could for military action against Iraq." *Id.*

will, of course, engage in particular interpretative projects in good faith. Their contentions reflect what they believe constitutes the "correct" legal position. However, when an invested state whose actions are widely perceived as non-compliant posits a counter-intuitive legal claim, the state seeks to stretch the boundaries of plausibility. Though every legal or legal-sounding statement will not meet an amended standard of reasonableness, persuasive efforts appeal to a permissively constructed conception of what constitutes an acceptable legal argument.

Much international law—as practiced by its institutions, as defined within its instruments, and as construed through its arbiters—favors broad and permissive legal formulations. International treaties are drafted in multivalent language. Human rights agreements converge around "the lowest common denominator."[218] Such regimes are amenable to an expansive set of legal interpretations that result from the "diverse cultural and legal traditions embraced by each Member State."[219] Though many treaties contain dense rules, broad legal arguments are typically removed from legal minutiae. Instead, arguments reference general principles. This facilitates a panoply of potential interpretations. States actively encourage the development of legal systems that tolerate an array of legal reasoning. The European Court of Human Rights (ECtHR)' margin of appreciation, for example, provides member states with discretion in fulfilling their obligations under the European Convention on Human Rights (ECHR).[220] The margin, first referenced in a 1958 European Commission report, is intended to ensure a minimum level of human rights protection while permitting a range of interpretative contentions.[221] Similarly, the ICJ has "rejected any assertion that in any given situation, only one action could possibly be considered reasonable."[222]

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218. Janina Dill, *"The Rights and Obligations of Parties to International Armed Conflicts": From Bilateralism but Not Toward Community Interest?, in* COMMUNITY INTERESTS ACROSS INTERNATIONAL LAW 430, 436 (Eyal Benvenisti & Georg Nolte eds., 2018); *see also* CLARE OVERY & ROBIN C.A. WHITE, JACOBS & WHITE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS 52-54 (2006).

219. Council of Eur., *The Margin of Appreciation*, https://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp

220. *See* STEVEN GREER, THE MARGIN OF APPRECIATION: INTERPRETATION AND DISCRETION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS 5 (2000).

221. The ECHR has held that "national authorities are better placed to assess the content of limitations based on contextual considerations." *See* Handyside v. United Kingdom, 1 Eur. Ct. H.R. at 737 (1976); *see also* Eleni Frantziou, *The Margin of Appreciation Doctrine in European Human Rights Law, in* UCL POLICY BRIEFING 1 (2014).

222. Olivier Corten, *Reasonableness in International Law, in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2013).

The notion of reasonableness is used in international lawmaking to ensure discretion in the interpretation and application of legal rules. States include the term "reasonable" in legal instruments to introduce a degree of flexibility.[223] Reasonableness is read into the judgments of international courts—often despite its textual absence—to ensure adaptability and to facilitate a diversity of state interpretations.[224] Interpretations of broadly constructed legal rules employ reasonableness to fill the legal lacunae that results from textual ambiguity and to support a preferred articulation.[225] States prefer interpretative flexibility and advocate for the acceptance of diverse legal responses. Within armed conflict, the notion of proportionality is subject to the assessment of the "reasonable military commander."[226] Citing the conclusion of the Committee Established to Review NATO Bombings in Yugoslavia—which held that a human rights lawyer and a military commander will likely posit opposing interpretative results—states endorse a standard of legal permissibility based upon the latter's assessment.[227]

Efforts to instill the standard of the acceptable legal argument draw upon international law's perceived subjectivity.[228] Former British Foreign Secretary Jack Straw argued, in a correspondence debating the legality of the Iraq war, that "everyone knew that international law was uncertain and that, therefore, reasonable and honestly held differences of opinion could be held."[229] Parameters do, however, exist. Johnstone notes that there, "is a limit to which any language, including the

223. For example, Article 3 of the First Protocol to the ECHR requires that member state must hold elections at "reasonable intervals." *See* Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, Mar. 20, 1952, 213 U.N.T.S. 221; *see also* Corten, *supra* note 222.

224. Corten, *supra* note 222. In the ECHR's Article 14 jurisprudence, the Court has held that "the principle of equal treatment is violated if the distinction has no objective and reasonable justification." *See* Case "Relating to Certain Aspects of the Laws on the Use of Languages" v. Belgium (Merits) (*Belgian Linguistics Case No.2*), App. No. 1474/62, 1 Eur. H.R. Rep. 252, (1968).

225. Corten, *supra* note 222.

226. *See* United Nations Int'l Criminal Tribunal for the Former Yugoslavia, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, ¶ 50 (Jun. 13, 2000) [hereinafter Final Report to the Prosecutor]. *See generally* Robert D. Sloane, *Puzzles of Proportion and the "Reasonable Military Commander": Reflections on the Law, Ethics, and Geopolitics of Proportionality*, 6 HARV. NAT'L. SECURITY J. 299 (2015).

227. *See e.g.* THE STATE OF ISRAEL, THE OPERATION IN GAZA 27 DECEMBER 2008 – 18 JANUARY 2009: FACTUAL AND LEGAL ASPECTS, ¶ 124 (2009).

228. *See, e.g.* Pnina Sharvit Baruch, *Operation Protective Edge: The Legal Angle, in* THE LESSONS OF OPERATION PROTECTIVE EDGE 66 (Anat Kurz & Shlomo Brom eds., 2014).

229. Letter from Jack Straw, Foreign Secretary, to Sir Michael Wood: Iraq: Legal Basis for Use of Force (Jan. 29, 2003), *cited in* PEEVERS, *supra* note 31, at 146.

language of the law, can plausibly be stretched."[230] Good and bad legal arguments are advanced by states. Interpretative communities, Johnstone suggests, distinguish between these arguments and assess their credibility.[231] Non-compliant states, however, target both narrow and broad audiences. Their legal contentions are often directed beyond interpretive communities. Legal arguments, dismissed by experts, may resonate amongst broader audiences. Certain legal claims may hold little salience within the international legal community but still drive public debates. When attempting to persuade, the non-compliant state draws upon legal ambiguity, an expansive notion of reasonableness, and the willingness (or necessity) of legal institutions to accept a plausible explanation. Upon this permissively construed interpretative foundation, the final persuasive technique sees the non-compliant state appealing to precedent and commonality when applying law to fact.

E. *Drawing Upon Precedent and Commonality*

Effective speech, Aristotle claimed, requires the speaker to demonstrate that a contention is worthy of belief.[232] Worthiness is exhibited through the persuasive pull of past agreements, decisions, or actions. States appeal to precedent and commonality as they apply the law (that they interpret) to the facts (that they frame). Precedent's appeal is unaffected by its formal status. As per Article 59 of the *Statute of the International Court of Justice*, decisions of the Court are held to have "no binding force except between the parties and in respect of that particular case."[233] The Statute embodies the general legal principle that "international courts are explicitly not bound by precedent."[234] Judicial decisions are recognized as "subsidiary means for the determination of rules of law."[235]

Notwithstanding precedent's formal status, appeals to past decisions, established legal principles, and existing patterns of behavior foreground international legal contentions. By invoking precedent, an

230. JOHNSTONE, *supra* note 49, at 25.

231. *Id.* at 34.

232. ARISTOTLE, *supra* note 150, bk. I, ch. 2.

233. *See* Statute of the International Court of Justice art. 59, Jun. 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 933.

234. Krzysztof J. Pelc, *The Politics of Precedent in International Law: A Social Network Application*, 108 AM. POL. SCI. REV. 547, 548 (2014).

235. ICJ Statute, *supra* note 195 at art. 38 (1)(d). A weak form of precedents does, however, hold a role in international criminal law. *See* Aldo Zammit Borda, *Precedent in International Criminal Courts and Tribunals*, 2 CAMBRIDGE J. INT'L & COMP. L. 287 (2013).

actor implies that a legal contention is part of a tradition. It is an established tenet and not merely a self-serving claim. Precedent allows a state to demonstrate that it is part of a group or community of alike actors that understand and engage the law in a similar way. The supposedly non-compliant behavior, the state signals, is not uncontemplated. Harlan Grant Cohen explains that across international law, practitioners invoke, and tribunals apply, precedent. Continuing, Cohen explains that "reports from international investment arbitration, international criminal law, international human rights, and international trade all testify to precedent's apparent authority."[236]

Precedent's authoritativeness is, however, described as "informal."[237] States deny—often vehemently—the binding force of past legal decisions.[238] Within international affairs, states value flexibility. Despite predictability's appeal, states resist officially recognizing the lingering constraint of legal rules derived from the decisions of international tribunals. Yet, states do appeal to precedent. Individually, these legal appeals willingly recall supportive judicial decisions. Often, however, the use of precedent is not confined by a formalist application of *stare decisis*. States exhibit a persuasive tendency to recall legal measures that present as analogous to the contention or policy that the state wishes to advance.

Precedent becomes a means of persuasion. An advantageous past decision by a judicial or appellate body will be cited by a state that argues before that same body. Cross-fertilization occurs when a persuasive entity is cited in an alternative forum. Cohen notes that "decisions by international courts or tribunals with general jurisdiction over international law broadly or an area of international law specifically might be invoked as precedential with regard to that area of law regardless of the forum for the current argument."[239] Applied expansively, a state's use of precedent may accentuate a prior or similar interpretation of a legal rule.[240] The pre-existing interpretation may have been offered by another state or by a legal expert. Non-binding decisions by U.N. bodies are commonly invoked as a form of precedent.[241] States accentuate the interpretations of what Sandesh Sivakumaran terms "state

236. Harlan Grant Cohen, *Theorizing Precedent in International Law*, in INTERPRETATION IN INTERNATIONAL LAW 269 (Andrea Bianchi et al. eds., 2015).

237. Pelc, *supra* note 234, at 547.

238. Cohen, *supra* note 236, at 269.

239. *Id.* at 276.

240. *Id.* at 275.

241. *Id.* at 277.

empowered entities."[242] These include the decisions, judgments, or reasoning of organizations and bodies that include the International Law Commission, the ICRC, and the Human Rights Committee.

Understood broadly, precedent derives from a diversity of sources. Moving beyond the opinions of decision-making entities, Cohen notes that state behavior is amongst the oldest forms of international precedent.[243] By recalling past acts, a non-compliant state may defend a controversial event as consistent with a pattern of state action. This lessens the potency of formal legal discourse. If a majority views the controversial event as a violation, recalling past state behavior alters the analysis. Tangibility precedes abstraction, emphasizing what states do, and not simply what the law requires. As Michael Reisman explains, "inferences about what other actors think is acceptable behavior are not derived from international judgments or from constitutional documents, statutes, or treaties. They are almost entirely derived from the responses of key actors to a critical event."[244] If law is identified in the ways that states interpret and apply norms in particular cases, the persuading state will accentuate those cases.[245] A state bolsters the persuasiveness of its contention when it displays that analogous actions have been undertaken and implicitly or explicitly received by the international community.

Similarly, the persuading state may accentuate the commonality of a particular event. When a state pursues a military action or proposes a particular policy it may draw upon a shared (sometimes hypothetical) scenario. Building upon the sentiments established in the first phase, the state challenges the target audience to consider how it has or would react in a comparable setting. If a dangerous non-state armed group were amassed on your border—the persuading state asserts—you too would be compelled to act in pre-emptive self-defense.[246] If an attack against a major urban center caused thousands of deaths and altered your city's landscape you too would disregard legal formality.[247] Appeals to commonality allow for variances in the analogy. Within a formal system of *stare decisis*, precedent's effectiveness is contingent on the

242. *See* Sandesh Sivakumaran, *Beyond States and Non-State Actors: The Role of State Empowered Entities in the Making and Shaping of International Law*, 55 COLUM. J. TRANSNAT'L L. 343 (2017).

243. Cohen, *supra* note 236, at 269.

244. W. Michael Reisman, *The International Incidents: Introduction to a New Genre in the Study of International Law*, 10 YALE J. INT'L L. 1, 2 (1984).

245. *Id.* at 12.

246. *See generally* Sean D. Murphy, *The Doctrine of Preemptive Self-Defense*, 50 VILL. L. REV. 699 (2005).

247. Steven Ratner has termed this the Eiffel Tower Factor. *See* Steven R. Ratner, *Jus ad Bellum and Jus in Bello After September 11*, 96 AM. J. INT'L. L. 905 (2002).

similarity between the past fact pattern and the current context.[248] By illustrating commonalities, persuasion becomes a thought experiment. Legal texts that support the consensus view that a particular action is illegal are presented as in tension with necessity. A particular incident becomes a "norm-indicator" or a "norm-generator."[249] Past actions and assumed responses provide persuasive license to the non-compliant state.

Appeals to precedent encourage a target audience to accept a counter-attitudinal message. A controversial military action, an expansive interpretation, accentuates past practice to both illustrate a pattern of similarity and imply a broader sense of international acceptance. Through the creation of a common lifeworld, by positioning the state as a general norm-acceptor, in demonstrating the authority to interpret, instilling the standard of the acceptable legal argument, and when drawing upon precedent and commonality, the non-compliant state applies law to fact. It engages in a persuasive process to frame facts, to interpret doctrine, or to legitimize regimes, scenarios, and concepts. Legal arguments follow familiar patterns. International law provides an often-reiterated language and a set of discursive conventions. Mostly, states display a recognizable argumentative structure. When a state addresses a broad audience, it relies upon lofty contentions and recurrent themes. When the state targets its arguments narrowly, towards or within an interpretative community, it becomes more technocratic. It references favored sources and a hierarchy of legal authority. However, persuasive engagements display idiosyncrasy.

The phases discussed above are non-exhaustive. A particular use of legal argument, by a non-compliant state, will not necessarily invoke each of these phases or apply them in a linear fashion. These phases of engagement represent an amalgamation of the persuasive practices that states undertake. Application is necessarily specific to the context within which the non-compliant state wishes to persuade. This application will now be described.

V. When States Persuade: Accounts of Legal Argument Upon the Use of Force

The *Caroline* affair began in 1837 when British forces suspected that a privately owned steamship in the Niagara River aided Canadian rebels

248. Reisman, *supra* note 244, at 19.

249. *Id.* at 4.

in opposing British rule.[250] Two British officers, leading a contingent of volunteers, seized the ship. They burned and then sank the vessel.[251] The *Caroline* was moored in American water and was owned by Buffalo native William Wells. During the raid a U.S. citizen was killed. Anglo-American relations deteriorated.[252] Amidst calls for reparations, reprisals, and the increasing prospect of war, a diplomatic discourse began between British and U.S. officials.[253] Legal explanations were offered in concurrence. The British argued that the *Caroline's* destruction was a public act justified under the law of nations.[254] The United States responded that the *Caroline* was not engaged in piracy, operated as a freight and passenger ship, and had been flying the U.S. flag.[255]

Harold Koh identifies this discourse as initiating a tradition of public explanation.[256] From the 19th century, U.S. officials increasingly coupled actions with international legal justifications.[257] Legal reasoning, assertions of compliance, reveal much about how international law is understood. Also, however, this conversive process provides opportunity for law to be formed, developed, or altered. The *Caroline* affair is paradigmatic. Following a letter sent by the U.S. Secretary of State, Daniel Webster, to the British Ambassador, Henry Fox, a set of legal criteria were established.[258] These required that the "necessity of self-defense was instant, overwhelming, leaving no choice of means and no movement of deliberations."[259] The requirements of imminence, necessity, and proportionality were identified and now inform the classic definition of self-defense under international law.[260]

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250. *See generally* CRAIG FORCESE, DESTROYING THE CAROLINE: THE FRONTIER RAID THAT RESHAPED THE RIGHT TO WAR (2018).

251. *Id.*

252. Howard Jones, *The Caroline Affair*, 38 THE HISTORIAN 485, 485 (1976).

253. *Id.* at 485, 489, 495-96.

254. Henry Fox, the British Ambassador to the U.S., argued that "the 'piratical character' of the *Caroline* and the inability of New York to enforce American neutrality laws had justified destruction of the boat wherever found." This draw upon international law as the Ambassador recognized that by labelling the ship "pirate" all concerned states were entitled to capture and destroy. *See id.* at 495-97.

255. *Id.*

256. Koh, *supra* note 96, at 193.

257. *Id.*

258. DANIEL WEBSTER, THE PAPERS OF DANIEL WEBSTER: DIPLOMATIC PAPERS, VOLUME 1, 1841-1843 62 (Kenneth E. Shewmaker ed. 1983).

259. *Id.*

260. *Id.*; *see also* JAN KITTRICH, THE RIGHT OF INDIVIDUAL SELF-DEFENSE IN PUBLIC INTERNATIONAL LAW 153 (2008).

The following case studies describe the discursive process accompanying the use and application of force by states. Each considers the role that persuasion and legal argument assume within the resulting discourse. The first study describes the use of international legal argument by the Russian Federation following its annexation of Crimea. Russia's use of factual persuasion facilitated an array of subsequent legal claims. The second study details the U.S. and British advancement of the "unwilling or unable" test within the context of the "war on terror." This constitutes an example of doctrinal persuasion as an expansionist *ad bellum* argument was offered in accompaniment of the use of force in Syria. A third case study describes the use of legal argument by Israel both during and after the 2014 Gaza war. This illustrates how a state employs legitimacy persuasion to demonstrate the acceptableness of a particular scenario that would attract international censure.

Despite the assigned forms of persuasion, I do not suggest that states employ legal argument for a singular purpose. States appeal to international law in multifaceted ways. They are motivated, often simultaneously, by a diversity of reasons. The legal responses evoked by an incident or series of incidents as broad and enduring as, for example, the "war on terror" facilitate myriad legal engagements. These will overlap, contradict, and evolve. In one instance a state may employ international law in alignment with a factual contention. Later, that same state will recall law to advance a good-faith legal interpretation or to make a doctrinal claim. Whether a state is lying, whether it is offering a good-faith interpretation, or advancing a self-serving legal argument will evade agreement. Motives may be transparent but are often difficult to discern. The purpose of these categorizations is not to assess the validity of the particular legal arguments. Instead, it is to demonstrate how the persuasive process is employed in a diversity of scenarios to achieve generalizable purposes.

A. *The Use of Persuasive Legal Argument Following the Russian Annexation of Crimea*

Almost without warning, Ukraine moved from the cusp of European integration and into Moscow's sphere of influence. President Viktor Yanukovych's tenure on Bankova Street commenced with familiar calls to ensure the requisite reforms necessary to facilitate European Union (EU) membership.[261] In early September 2013, President Yanukovych

261. Steven Pifer, *External Influences on Ukraine's European Integration*, BROOKINGS INST. (Apr. 1, 2013), https: //www.brookings.edu/articles/external-influences-on-ukraines-european-integration.

chaired a fractious meeting amongst members of his political party.[262] The East-West divisions displayed by party loyalists became the harbinger of a tumultuous year that altered Ukraine's political trajectory. Following the suspension of a pending EU association agreement, thousands of protestors gathered in Kiev's Independence Square. The "Euromaidan" protests spread across the country.[263] To quell opposition, Yanukovych employed increasingly anti-democratic tactics. His support dwindled. Members of the *Rada* passed legislation stripping Yanukovych's legal powers. Police abandoned their guard of the Presidential offices and the *Rada* voted to impeach.[264]

The deposed President called the events a coup.[265] Pro-Russian, anti-government groups countered the Euromaidan protests. Violent outbreaks and large demonstrations began in Donetsk and Luhansk, but attention soon turned to the Autonomous Republic of Crimea.[266] As protests mounted throughout Ukraine, Sergei Aksyonov began forming a paramilitary force. Aksyonov led the Russian Unity party, a minor political faction in the Crimean State Council that held three seats in the regional legislature. Days after Yanukovych's impeachment, the State Council was seized by two dozen armed militants. Aksyonov mediated.[267] Hours later, a quorum of parliamentarians was gathered and—under uncertain circumstances—Aksyonov was appointed as Crimea's Prime Minister.[268]

On March 6, 2014, under Aksyonov's stewardship, the State Council adopted a decree establishing the parameters of an "all-Crimean

262. Elizabeth Piper, *Special Report: Why Ukraine spurned the EU and embraced Russia*, REUTERS (Dec. 19, 2013), https://www.reuters.com/article/us-ukraine-russia-deal-special-report/special-report-why-ukraine-spurned-the-eu-and-embraced-russia-idUSBRE9BI0DZ20131219.

263. *See generally* DAVID R. MARPLES & FREDERICK V. MILLS, UKRAINE'S EUROMAIDAN: ANALYSES OF A CIVIL REVOLUTION (2015); DAVID R. MARPLES, UKRAINE IN CONFLICT: AN ANALYTICAL CHRONICLE (2017).

264. Kevin Bishop, *Ukrainian MPs vote to oust President Yanukovych*, BBC NEWS (Feb. 22, 2014), https:// www.bbc.com/news/world-europe-26304842.

265. Viktor Yanukovych, *The Prosecutor General's Office Probes Coup in Ukraine in 2014 Under Yanukovych's Application*, KYIV POST (Nov. 29, 2017), https://www.kyivpost.com/ukraine-politics/prosecutor-generals-office-probes-coup-ukraine-2014-yanukovychs-application.html.

266. *Ukraine Crisis: Timeline*, BBC NEWS (Nov. 13, 2014), https://www.bbc.co.uk/news/world-middle-east-26248275. *See generally* NEIL KENT, CRIMEA: A HISTORY (2016); ELIZABETH A. WOOD ET AL., ROOTS OF RUSSIA'S WAR IN UKRAINE (2016).

267. There has been speculation that the armed groups that seized the Parliament were acting under Aksyonov's command. Aksyonov, however, claims that the group acted "spontaneously." *See* Simon Shuster, *Putin's Man in Crimea Is Ukraine's Worst Nightmare*, TIME MAGAZINE (Mar. 10, 2014), http://time.com/19097/putin-crimea-russia-ukraine-aksyonov.

268. *Id.*

Referendum."[269] Voters would indicate support for reunification of Crimea with the Russian Federation or favor restoration of the 1992 Crimean Constitution.[270] Five days later, the Crimean legislature and the Sevastopol City Council passed a joint resolution. This declared Crimea's independence and stated that, if voters choose to secede, the State Council would declare total autonomy from Ukraine and move to join the Russian Federation.[271] The referendum was held on March 16, 2014. The official results reported that 96.7% chose unification.[272]

Ukrainian officials denounced the events in Crimea.[273] International observers added to the mounting condemnation.[274] The General Assembly pronounced that the referendum had no validity."[275] For a single day Crimea claimed sovereign status. Then, on March 18, President Vladimir Putin informed the relevant Russian institutions that Crimean authorities sought accession into the Russian Federation.[276] Immediately,

269. Resolution of the Verkhovna Rada of the Autonomous Republic of Crimea No. 1702-6/14, On Holding of the All-Crimean Referendum (Mar. 6, 2014).

270. Thomas D. Grant, *Annexation of Crimea*, 109 AM. J. INT'L. L. 68, 68-69 (2015).

271. *See* Danielle Wiener-Bronner, *What Would an Independence Vote Really Mean for Crimea?*, THE ATLANTIC (Mar. 11, 2014), https://www.theatlantic.com/international/archive/2014/03/crimea-independence-russia-us-ukraine/359058/.

272. There are doubts regarding both the procedure and results of the referendum. *See* Grant, *supra* note 270, at 69-70; *see also* Anne Peters, *The Crimean Vote of March 2014 as an Abuse of the Institution of the Territorial Referendum*, MAX PLANCK INST. FOR COMPARATIVE PUB. AND INT'L LAW (2015), http://ssrn.com/ abstract=2463536. Despite widely-acknowledged flaws in the referendum process, a plurality of Crimea's population did appear to favor accession to the Russian Federation. *See* Robin Geiß, *Russia's Annexation of Crimea: The Mills of International Law Grind Slowly but They Do Grind*, 91 INT'L L. STUD. 425, 427 (2015).

273. Geiß, *supra* note 272, at 425, 427; *see also* Letter from the Permanent Rep. of Ukr, to the President of the Sec. Council, U.N. (Mar. 15, 2014) (on file with the U.N. Doc. S/2014/193); *Judgement of the Constitutional Court of Ukraine on All-Crimean Referendum*, MINISTRY OF FOREIGN AFFAIRS OF UKR. (Mar. 14, 2014); Grant, *supra* note 270 at 69.

274. Grant, *supra* note 270, at 70. *See, e.g.* European Commission for Democracy Through Law, *Opinion on Whether the Decision Taken by the Supreme Council of the Autonomous Republic of Crimea in Ukraine to Organise a Referendum on Becoming a Constituent Territory of the Russian Federation or Restoring Crimea's 1992 Constitution is Compatible with Constitutional Principles*, Doc. No. CDL-AD (2014) 002 (Mar. 21, 2014).

275. *See* G.A. Res. 68/262, ¶ 5 (Mar. 27, 2014).

276. Press Release from Vladimir Putin, President of Russia, The President Has Notified the Government, the State Duma and the Federation Council of Proposals by the Crimean State Council and the Sevastopol Legislative Assembly Regarding Their Admission to the RF and the Formation of New Constituent Territories (Mar. 18, 2014), http://en.kremlin.ru/acts/news/20599; *see also* Grant, *supra* note 270, at 17.

a treaty was drafted and signed to formalize the annexation of Crimea.[277] The United States announced that Russian actions in Crimea constituted a "brazen military incursion" and that annexation amounted to a "land grab."[278] Arseniy Yatsenyuk, Ukraine's interim-Prime Minister, stated that events had moved from the political to the military stage.[279] The British held that "it is completely unacceptable for Russia to use force to change borders on the basis of a sham referendum held at the barrel of a Russian gun."[280] A dominant narrative emerged.[281] Crimea was assumed by Russia in violation of the prohibition on the forceful acquisition of territory.

Moscow contended that Yanukovych's impeachment was illegal. The succeeding interim government was illegitimate.[282] Russian officials claimed that Ukraine had come under the control of extremists who threatened the nation's Russian population and disrupted regional stability.[283] Kremlin officials began building an international legal argument. A series of bilateral treaties—reached between Russia and Ukraine to, *inter alia*, ensure Ukraine's territorial integrity—were dismissed.[284] Russia argued that regime change in Kiev created a new state

277. Grant, *supra* note 270, at 17; *see also* Press Release from Vladimir Putin, President of Russia, Executive Order on Executing Agreement on Admission of Republic of Crimea into the Russian Federation (Mar. 18, 2014), http://en.kremlin.ru/acts/news/20600.

278. Bridget Kendall, *Ukraine Crisis: Putin Signs Russia-Crimea Treaty*, BBC NEWS (Mar. 18, 2014), https://www.bbc.com/news/world-europe-26630062.

279. *Id.*

280. *Id.*

281. Roy Allison, *Russia and the Post-2014 International Legal Order: Revisionism and Realpolitik*, 93 INT'L AFF. 519, 525 (2017).

282. Russia based its argument on the Ukrainian Constitution which held impeachment proceedings to require that the President is formally charged with a crime; the charges are reviewed by the Constitutional Court; and that the Rada secures a three-fourths majority vote in favour of impeachment. *See* JANIS BERZŅIŠ, RUSSIA'S NEW GENERATION OF WARFARE IN UKRAINE: IMPLICATIONS FOR LATVIAN DEFENSE POLICY (Nat'l Def. Acad. of Lat. Ctr. for Sec. and Strategic Res. Ed., 2014); s*ee also* Howard Amos, Shaun Walker & Haroon Siddique, *Ukraine's New Government is Not Legitimate – Dmitry Medvedev*, GUARDIAN (Feb. 23, 2014), https://www.theguardian.com/world/2014/feb/24/ukraine-viktor-yanukovych-arrest-warrant.

283. BERZŅIŠ, *supra* note 282, at 2-3.

284. For example, the Budapest Memorandum induced Ukraine to surrender nuclear weapons in exchange for a commitment to its territorial integrity from Russia, the United States, and the United Kingdom. *See* Memorandum on Security Assurances in Connection with Ukraine's Accession to the Treaty on the Non-Proliferation of Nuclear Weapons, Dec. 5, 1994, 2866 U.N.T.S. 13 [hereinafter Budapest Memorandum]. Ukraine's territorial integrity was reaffirmed in the 1997 Treaty on Friendship, Cooperation, and Partnership Between Ukraine and Russia. *See* Treaty on Friendship, Cooperation and Partnership, Russ.-Ukr., art. 3, May 31, 1997, 3007 U.N.T.S. 1 [hereinafter Treaty of Friendship]. Finally, the Black Sea Fleet Status of Forces Agreement permits a Russian military presence in Crimea but restricts the public presence of

with which Russia had not concluded formal agreements. Russian officials characterized Crimean "reunification" as the result of two independent legal acts.[285] First, following a legitimate referendum, Crimea lawfully separated from Ukraine. Then, annexation was realized through a bilateral treaty between Russia and Crimea.[286] Self-determination featured prominently within the Russian narrative.[287]

Initially, Russia denied using force.[288] Claims that Russian militants were operating in Crimea to bolster Aksyonov and to facilitate annexation were rejected. In the weeks preceding the referendum President Putin insisted that "no Russian troops – apart from those already stationed at the Russian Navy base in Sebastopol – were present anywhere in Crimea."[289] Substantiated reports that hundreds of armed soldiers in "unmarked Russian uniforms" were positioned at military sites and government buildings throughout Crimea were dismissed.[290] Putin insisted that these individuals were "self-organized local forces" whose uniforms could have been "purchased at any store."[291] Information spread through media reports.[292] In the lead-up to the referendum, these groups—the members of which were dubbed "little green men"—

Russian forces while also ensuring Ukrainian sovereignty over Crimea. *See Agreement Between the Russian Federation and Ukraine on the Status and Conditions of the Russian Federation Black Sea Fleet's Stay on Ukrainian Territory*, 1 RUSS. & EURASIA DOCUMENTS ANN. 129 (1998); *see also* Grant, *supra* note 270, at 78-80; Christian Marxsen, *The Crimea Crisis: An International Law Perspective*, 74 ZAÖRV 367, 370-371 (2014).

285. Grant, *supra* note 270, at 68.

286. *Id.*

287. The Russia-Crimea Accession Treaty premised "reunification" on "the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations according to which all peoples have the inalienable right to freely and without external interference determine their political status and to pursue their economic, social, and cultural development, and according to which every State has the duty to respect that right." *See* Treaty Between the Russian Federation and the Republic of Crimea on the Accession of the Republic of Crimea to the Russian Federation and on Forming New Constituent Entities within the Russian Federation, Russ.-Ukr., Mar. 18, 2014, http://publication.pravo.gov.ru/Document/View/0001201403180024?index=0&rangeSize=1&back=False.

288. Press Conference, Vladimir Putin Answered Journalists' Questions on the Situation in Ukraine (Mar. 4, 2014), (transcript available at http://en.kremlin.ru/events/president/news/20366) [hereinafter *Putin Answered Questions on Ukraine*]; *see also* Peter M. Olson, *The Lawfulness of Russian Use of Force in Crimea*, 53 MIL. L. & L. WAR REV. 17, 20 (2014).

289. Natalia Antelava, *The Creeping Annexation of Crimea*, NEW YORKER (Mar. 4, 2014), https://www.newyorker.com/news/news-desk/the-creeping-annexation-of-crimea.

290. Vitaly Shevchenko, *Little Green Men or Russian Invaders?*, BBC NEWS (Mar. 11, 2014), https:/www.bbc.com /news/world-europe-26532154.

291. *Id.*

292. *See e.g.* Neil Buckley et al., *Ukraine's 'Little Green Men' Carefully Mask Their Identity*, FINANCIAL TIMES (Apr. 14, 2014), https://www.ft.com/content/05e1d8ca-c57a-11e3-a7d4-00144feabdc0.

began conducting military functions.[293] NATO and American officials insisted there was a definitive connection between Russia and the armed groups.[294] President Putin denied accusations that Russia acted in violation of international law, claiming "Russia's Armed Forces never entered Crimea."[295]

Putin's claim proved false.[296] The discourse shifted from questioning whether Russia maintained a presence in Crimea to interrogating the legality of that presence.[297] In response to mounting accusations of wrongfulness, Russia offered a series of international legal arguments concerning the use of force. Broadly, Russia asserted that: (1) the interim Ukrainian government was illegitimate. Russian forces only entered Crimea upon invitation by President Yanukovych and the local Crimean authorities.[298] (2) Intervention was justified in response to a mounting humanitarian crisis and to ensure the human rights of Ukraine's Russian minority.[299] And, (3) the enduring political chaos posed a threat to Russia's Black Sea Fleet and to Russian forces stationed in Sevastopol.[300]

Roy Allison contends that Russia's legal appeals facilitated a "deniable intervention."[301] By appealing to international law, Allison notes

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293. Veronika Bílková, The Use of Force by the Russian Federation in Crimea, 75 HEIDELBERG J. INT'L L. 27, 34-35 (2015).

294. *See* Arron Merat & Hayley Dixon, *Ukraine Crisis as it Happened: US Puts Military Cooperation with Russia on Hold*, TELEGRAPH (Mar. 4, 2014), https://www.telegraph.co.uk/news/worldnews/europe/ukraine/10672417/Ukraine-crisis-as-it-happened-US-puts-military-cooperation-with-Russia-on-hold.html.; *see also NATO Commander: We need to Be Ready for Little Green Men*, VOA NEWS (Aug. 17, 2014), https://www.voanews.com/a/nato-commander-says-alliance-needs-to-be-ready-for-new-type-of-warfare/2416614.html.

295. Vladimir Putin, President of the Russian Federation, Address by President of the Russian Federation (Mar. 18, 2014), (transcript available at http://en.kremlin.ru/events/president/news/20603) [hereinafter Address 18 March].

296. Shaun Walker, *Putin Admits Russian Military Presence in Ukraine for First Time*, GUARDIAN (Dec. 17, 2015), https://www.theguardian.com/world/2015/dec/17/vladimir-putin-admits-russian-military-presence-ukraine; *see also* Bílková, *supra* note 293, at 34.

297. LAURI MÄLKSOO, RUSSIAN APPROACHES TO INTERNATIONAL LAW 191 (2015).

298. Olson, *Lawfulness of Russian Force*, *supra* note 288, at 18, 30-33; *see also* U.N. SCOR, 69th Sess., 7125th mtg. at 3-4, U.N. Doc. S/PV.7125 (Mar. 3, 2014) [hereinafter, UNSC 7125th Meeting]; *Putin Answered Questions on Ukraine*, *supra* note 288; Roy Allison, *Russian 'Deniable' Intervention in Ukraine: How and Why Russia Broke The Rules*, 90 INT. AFF. 1255, 1264 (2014).

299. Allison, *supra* note 298, at 1262; *see also* UNSC 7125th Meeting, *supra* note 298, at 3; Olson, *Lawfulness of Russian Force*, *supra* note 288, at 34-35.

300. *See Putin Answered Questions on Ukraine*, *supra* note 288; *Vladimir Putin submitted appeal to the Federation Council* (Mar. 1, 2014), PRESIDENT OF RUSS., http://en.kremlin.ru/events/president/news/20353; *see also* Olson, *supra* note 288, at 33-34; Allison, *supra* note 298, at 1263.

301. Allison, *supra* note 298, at 1259.

that Russia blurred "the legal and illegal, to create justificatory smokescreens, in part by exploiting some areas of uncertainty in international law, while making "unfounded assertions of facts."[302] The contours of Russia's legal appeals are now well-known. They have been dismissed and deconstructed by an array of international lawyers.[303] Samantha Power, the U.S. Ambassador to the U.N. quipped that Moscow "had just become the rapid response arm of the Office of the High Commissioner for Human Rights" and that the legal assertions presented by the Russian Federation "are without basis in reality."[304] The British Ambassador told the Security Council that Russian claims were "fabricated to justify Russian military action."[305] Also, however, the series of legal arguments presented by Russia illuminate how legal discourse moves beyond assessments of validity. These arguments illustrate how a non-compliant state employs factual persuasion to present events that fit within international legal frameworks that serve to persuade audiences about the acceptableness of a military action.

1. The Identification of a Common Lifeworld

Russia formulated a shared and relatable context in the weeks preceding the formal annexation of Crimea. A lifeworld was identified. This was grounded in a historical narrative. Russian officials drew upon the notion of national identity as they accentuated Russia's deep connection to Crimea. In a widely broadcast speech, President Putin announced that "in people's hearts and minds, Crimea has always been an inseparable part of Russia."[306] Putin presented a historical account. Following the Bolshevik Revolution, large parts of Russia's south were added to Ukraine.[307] This occurred, Putin claimed, without "consideration for the ethnic make-up of the population."[308] In 1954, Nikita Khrushchev transferred Crimea and Sevastopol to Ukraine. The Communist Party, Putin continued, violated constitutional norms.

302. *Id.*

303. *See, e.g.*, THOMAS D. GRANT, AGGRESSION AGAINST UKRAINE: TERRITORY, RESPONSIBILITY, AND INTERNATIONAL LAW (2015); *see also* Olson, *supra* note 288; Allison, *Russian Deniable Intervention*, *supra* note 298; Allison, *supra* note 281.

304. UNSC 7125th Meeting, *supra* note 298, at 4; *see also* Nick O'Malley, *War of Words at UN Over Russia's Crimea Move*, SYDNEY MORNING HERALD (Mar. 4, 2014), https://www.smh.com.au/world/war-of-words-at-un-over-russias-crimea-move-20140304-hvg0c.html.

305. UNSC 7125th Meeting, *supra* note 298, at 7; *see also* Allison, *supra* note 298, at 1262.

306. Address 18 March, *supra* note 295; *see also* Geiß, *supra* note 272, at 438.

307. Address 18 March, *supra* note 295.

308. *Id.*

Naturally, "in a totalitarian state nobody bothered to ask the citizens of Crimea and Sevastopol."[309]

Following annexation, the Russian Ambassador to the UN, Vitaly Churkin, furthered this narrative. Events in Crimea were said to have "restored historical justice."[310] Ambassador Churkin told the General Assembly:

> historical justice has triumphed. For ages, Crimea has been an integral part of our country, we share history, culture, and the main thing, people. And only the voluntaristic decisions by the U.S.S.R. leaders in 1954, which transferred Crimea and Sevastopol to the Ukrainian Republic, although within one state, has distorted this natural state of affairs.[311]

The historical connection between Russia and Crimea, the conveyed sense of national identity, targeted domestic audiences. It appealed to ethnic Russian populations in the neighboring, former Soviet states. This established a foundation upon which a lifeworld would further be described. Allison explains that this coupled a domestically-targeted, ethno-territorial evocation of the past with a statement of strategic intent.[312] Restoration of a historical injustice was presented as both a security necessity and an expression of self-determination. Sevastopol was described as "a fortress that serves as the birthplace of Russia's Black Sea Fleet."[313] Crimea was presented as a symbol of military glory and strategic necessity.[314] Russia possessed a historical duty, Ambassador Churkin told the Security Council, to guarantee regional stability and protect the ethnic population in the "near abroad."[315]

Russia insisted that it was compelled to intervene. Appeals to the lifeworld expanded outwardly. Addressing regional and international

309. *Id.*

310. *See* Erika Leonaitė & Dainius Žalimas, *The Annexation of Crimea and Attempts to Justify It in the Context of International Law*, 14 J. LITH. ANN. STRAT. REV. 11, 49 (2016).

311. U.N. GAOR, 68th Sess., 80th plen. mtg. at 3, U.N. Doc A/68/PV.80 (Mar. 27, 2014), http://www.russia.org.cn/en/news/speech-by-russia-s-permanent-representative-to-the-united-nations-vitaly-churkin-at-the-session-of-the-un-general-assembly-new-york-27-march-2014/. [hereinafter UNGA 80th Meeting].

312. This recalled the lost territories of "Novorossiya" which, in the 1920s were transferred from the Soviet Government to the Ukrainian Social Soviet Republic. *See* Allison, *supra* note 298, at 1266, 1282.

313. Address 18 March, *supra* note 295.

314. *Id.*

315. *See* Christopher J. Borgen, *Law, Rhetoric, Strategy: Russia and Self-Determination Before and After Crimea*, 91 INT'L L. STUD. 216, 274 (2015).

audiences, Russia told of universal values. Within, liberal norms were displaced by fascist tendencies and Ukraine descended into anarchy. President Putin framed events as a violent *coup d'état*. Those who perpetrated the events in Kiev, Putin declared, "were preparing yet another government takeover; they wanted to seize power and would stop short of nothing. They resorted to terror, murder and riots. Nationalists, neo-Nazis, Russophobes and anti-Semites executed this coup."[316] Russian officials documented alleged human rights violations and disseminated reports depicting post-revolution Ukraine as lawless.[317] This facilitated subsequent legal assertions that evoked the sentiment of the responsibility to protect, claimed that intervention followed invitation, and asserted the right of states to protect nationals abroad.[318] Invocations of a lifeworld—exhibiting an illiberal decline, marked by escalating violence and the persecution of a vulnerable ethnic group—contextualized Russia's substantive legal arguments.

Russia professed that intervention was required to realize legitimate legal aims, to provide protection, and to ensure preservation of the threatened liberal norms. Legal arguments favoring self-determination were compromised by an anarchic society. Russian insistence that annexation was a legitimate expression "of the people of Crimea" was built upon the identified lifeworld. Russia held that:

> Following the unlawful and violent coup in Ukraine the possibility to exercise the right to self-determination within the Ukrainian state was eliminated. There was a spate of killings, mass violence, abductions, attacks on journalists and human rights activists, politically motivated imprisonments, egregious incidents with racist motives (including anti-Russian and anti-Semite), committed upon instructions or with the tacit approval of the Kyiv authorities. Moreover, a group of people supposedly controlled by the illegal authorities of Kyiv attempted to overthrow the legal government of Crimea. The authorities in Kyiv do not represent the Ukrainian people as a whole, especially the population of Crimea; they do not exercise effective control over the territory and do not maintain law and order.[319]

316. Address 18 March, *supra* note 295.

317. *See* Ministry of Foreign Affairs of the Russian Federation, White *Book on Violations of Human Rights and the Rule of Law in Ukraine* (Oct. 9, 2014), https://www.voltairenet.org/IMG/pdf/White_Book_Voltaire_Network_-2.pdf.

318. *See* U.N. SCOR, 69th Sess., 7124th mtg. at 5, U.N. Doc. S/PV/7124 (Mar. 1, 2014).

319. The Russian legal justification then pivoted to the issue of succession and self-determination, noting: "Under these circumstances on 17 March 2014, the Verkhovna Rada of the

When Yanukovych was deposed and Crimea voted to secede, Russia faced mounting condemnation. This told of foreign interference, unlawful annexation, and the use of force in contradiction of the most fundamental international norms.[320] In response, Russia developed a legal narrative. Substantive legal engagements were premised upon the identified lifeworld. This exhibited shared ideals and relatable fears. Persuasive endeavors and the subsequent development of contrarian legal arguments were built upon this context and would facilitate Russian insistence that its actions were reflective of a general commitment to international law.

2. Establishing the State as a General Norm-Acceptor

Expressions of legal fidelity featured throughout the Russian discourse that accompanied events in Crimea. Russian actions—the deployment of armed forces to facilitate annexation—were presented as both consistent with and in furtherance of international law. Prior to acknowledging that Russian forces were operating in Crimea, President Putin offered preemptive legal arguments. These insisted that Russian involvement in Crimea would either constitute a "humanitarian intervention" or an "intervention by invitation."[321] In forwarding these arguments, Russian officials accentuated their *general* commitment to international law. President Putin declared:

> We proceed from the conviction that we always act legitimately. I have personally always been an advocate of acting in compliance with international law. I would like to stress yet again that if we do make the decision, if I do decide to use the Armed Forces, this will be a legitimate decision in full compliance with both general norms of international law, since we have the appeal of the legitimate President, and with our commitments. . .[322]

Republic of Crimea, guided by the results of the referendum held on 16 March, decided to proclaim the independence of Crimea (the Republic of Crimea). On 18 March the Republic concluded a treaty with Russia and was included in its territory." *See* Posol'stvo Rossii V Kndr Pravovyye obosnovaniya pozitsii Rossii po Krymu i Ukraine [Legal Justification of the Position of the Russian Federation in Respect of Ukraine and Crimea] (Oct. 27, 2014), http://www.rusembdprk.ru/ru/press-relizy/155-pravovye-obosnovaniya-pozitsii-rossii-po-krymu-i-ukraine (Rus.) [hereinafter Russian Federation]. Oleksandr Zadorozhnii, *To Justify Against All Odds: The Annexation of Crimea in 2014 and the Russian Legal Scholarship*, POLISH Y.B. INT'L L. 139, 157 (2015) (citing Russian Federation, *supra*).

320. *See generally* UNGA 80th Meeting, *supra* note 311.

321. Oleksandr Merezhko, *Crimea's Annexation by Russia—Contradictions of the New Russian Doctrine of International Law*, 75 ZAÖRV 167, 189-192 (2015).

322. *Putin Answered Questions on Ukraine*, *supra* note 288.

Substantive legal arguments were coupled with general expressions of international legal alacrity. Attempts by Russian officials to persuade varied audiences drew upon international law's rhetorical centrality in the foreign policies and strategy documents of the post-Soviet era.[323] Since the mid-1980s, international law had been afforded a prominent position in the reformist discourse that marked *perestroika*.[324] Under the banner *more international law*, Mikhail Gorbachev recognized that expressions of legal devotion facilitated the transition from autocracy.[325] The pivot toward international law was reflected in the Constitution of the Russian Federation. Article 15 dictates that "the universally-recognized norms of international law and international treaties and agreements of the Russian Federation shall be a component part of its legal system."[326]

The centrality of Russia's formal commitment to international law was offered in defense of Russian actions in Crimea. These purported efforts—intervention by invitation, for humanitarian purposes, or to facilitate self-determination—were not merely consistent with legal dictate.[327] They were in defense of legal norms, disregarded by Ukrainian actors and their western enablers. Speaking in Sochi, President Putin announced that the international system had become "seriously weakened, fragmented and deformed."[328] International relations, Putin continued, "must be based on international law, which itself should rest on moral principles such as justice, equality and truth."[329] Russia recalled its enduring commitment to law to impress that contemporary actions aligned with traditional commitments. This, Putin suggested, positioned Russia to become a world leader in "asserting the norms of international law."[330]

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323. MĀLKSOO, *supra* note 297 at 1, 150; *see also* MINISTRY OF FOREIGN AFFAIRS OF THE RUSSIAN FEDERATION, THE CONCEPT OF THE FOREIGN POLICY OF THE RUSSIAN FEDERATION (Feb. 18, 2013) http://www.mid.ru/en/foreign_policy/official_documents/-/asset_publisher/CptICkB6BZ29/content/id/122186; Russian Federation Presidential Edict No. 683, *Russian National Security Strategy* (Dec. 2015), http://www.ieee.es/Galerias/fichero/OtrasPublicaciones/Internacional/2016/Russian-National-Security-Strategy-31Dec2015.pdf.

324. MĀLKSOO, *supra* note 297, at 154; *see generally* John Quigley, *Perestroika and International Law*, 82 AM. J. INT'L. L. 788 (1988).

325. MĀLKSOO, *supra* note 297, at 154.

326. KONSTITUTSIIA ROSSIISKOI FEDERATSII [Konst. RF] [Constitution] art. 15(4) (Russ.)

327. Allison, *supra* note 298, at 1258.

328. Vladimir Putin, President, Russian Federation, Address at the Meeting of the Valdai International Discussion Club (Oct. 24, 2014), http://en.kremlin.ru/events/president/news/46860.

329. *Id.*

330. *Id.*

A general milieu of legal reverence preceded Russian claims that its actions in Crimea were not an unlawful use of force. On March 3, 2014, Russia convened a meeting of the Security Council. Ambassador Churkin announced that President Yanukovych had formally requested Russia to "use the armed forces of the Russian Federation to establish legitimacy, peace, law and order, and stability in defense of the people of Ukraine."[331] Explicitly rejecting allegations of aggression, Churkin told the Security Council that the events in Ukraine must be redressed "in accordance with international obligations, including most importantly those related to international humanitarian law, in defense of human rights and the rights of national minorities."[332]

On the eve of the referendum, Ukraine's interim-Prime Minister travelled to New York. Yatsenyuk told the Security Council that Russian actions violated Article 2(4) of the UN Charter and asked the Russian Federation whether it sought war.[333] Churkin replied that Russia did not view events in Ukraine as an armed conflict but as a means of ensuring "the fundamental norms of international law."[334] Russia endorsed the scheduled referendum as an expression of equal rights. This, the Russian Ambassador insisted, was an extraordinary measure that was reflective of Russia's general commitment to territorial integrity and the requirements of self-determination.[335]

3. Demonstrating the Authority to Interpret

The Russian narrative advanced controversial legal claims. Arguments that intervention followed invitation, was motivated by humanitarianism, or that secession constituted a legitimate expression of self-determination were factually contentious and relied upon uncertain legal assumptions. Russian officials paired contrarian legal interpretations with expressions or displays of competence. The role of legal experts was accentuated. Appeals to expertise are emblematic of the persuasive process. They provide a means for the state to bolster its claim to interpretative authority.

When Russian officials began building legal arguments justifying intervention, observers recalled the series of agreements that Russia and Ukraine concluded during the 1990s.[336] A Russian incursion would

331. UNSC 7125th Meeting, *supra* note 298, at 3-4.

332. *Id.* at 3.

333. U.N. SCOR, 69th Sess., 7134th mtg. at 3-4, U.N. Doc. S/PV.7134 (Mar. 13, 2014).

334. *Id.* at 14.

335. U.N. SCOR, 69th Sess., 7138th mtg. at 2, U.N. Doc. S/PV/7138 (Mar. 15, 2014).

336. Merezhko, *supra* note 321, at 168-69.

breach the resulting territorial assurances.[337] Facing such questions, President Putin supplemented an inventive legal argument with an appeal to expertise. Asked whether Russian military involvement would violate the Budapest Memorandum, Putin responded:

> In such a case it is hard not to agree with some of our experts who say that a new state is now emerging on this territory. This is just like what happened when the Russian Empire collapsed after the 1917 revolution and a new state emerged. And this would be a new state with which we have signed no binding agreements.[338]

Putin's rejoinder drew upon Soviet-era legal scholarship. Leading international lawyers from the U.S.S.R. had developed a counterintuitive argument regarding revolution's influence on statehood.[339] Putin recalled how legal experts coalesced around the notion that the Bolshevik revolution heralded "a new subject of international law."[340] The absence of continuity, severed by revolutionary transformation, implied that the emergent state was not subject to agreements formed under the former (deposed) government.

Russia often invokes the expertise of its international lawyers. Foreign policy decisions are supported through consensus legal pronouncements. These commonly adhere to the state's position.[341] This process of reliance and adherence was exemplified during Russia's opposition to the U.S.-led invasion of Iraq. A symposium, convened at St. Petersburg State University, featured a meeting between President Putin, President Chirac of France, and German Chancellor Schröder. The heads of state met with leading members of the Russian legal academy. Putin told the gathering: "Now as never before it is important to rely on the opinion of the expert community – lawyers, political scientists, specialists in different fields of international relations. . .We, of

337. *See* Budapest Memorandum, *supra* note 284, para. 1; *see also* Treaty of Friendship, *supra* note 284, art. 3.

338. *Putin Answered Questions on Ukraine*, *supra* note 288; *see also* Merezhko, *supra* note 321.

339. Merezhko, *supra* note 321.

340. Soviet lawyers had claimed that the absence of continuity between the Russian Empire and Soviet Russia meant that the emergent Soviet Government was not responsible for the debts assumed by the Empire. *See id.*

341. *See* ANTHEA ROBERTS, COMPARATIVE INTERNATIONAL LAW: CRIMEA AND THE SOUTH CHINA SEA: CONNECTIONS AND DISCONNECTS AMONG CHINESE, RUSSIAN, AND WESTERN INTERNATIONAL LAWYERS 111, 128 (Anthea Roberts et al. eds., 2018); *see also* Maria Issaeva, *The Case of Crimea in the Light of International Law: Its Nature and Implications*, 3 RUSS. L.J. 158 (2015).

course, will impatiently wait for the results of your works, fresh ideas, suggestions."[342]

As events in Crimea transpired, a series of professional documents were offered to support Russia's legal arguments. Purportedly independent, these supplementary avowals sought to accentuate the speaker's interpretative authority and, by association, the endorsed argument's validity. The Russian Association of International Law circulated a detailed letter.[343] This was addressed to the worldwide community of international lawyers and signed by Anatoly Kapustin, perhaps Russia's foremost international legal expert.[344] The letter refuted allegations that Russian actions in Crimea breached international law. It sought to clarify "the basic facts, history and legal foundations" of the Russian incursion.[345] It offered an account that closely aligned with official state discourse.[346] In turn, this would be cited in support of Russia's varied legal positions.[347] Elsewhere, Russian officials relied upon the "White Book on violations of human rights and the rule of law in Ukraine."[348] This was published by the Ministry of Foreign Affairs and, at least outwardly, shared stylistic similarities with the U.S. State Department's Country Reports on Human Rights Practices. Published in English, these Russian documents sought to establish, endorse, and persuade. They advanced particular legal arguments while associating authoritativeness and professional competence with what were widely-received as contentious interpretative appeals.

4. Instilling the Standard of the Acceptable Legal Argument

Russia's actions in Ukraine were certain to evoke a legal response. When Russian military forces became active in Crimea, when annexation was formalized, officials in Moscow were accused of violating a foundational tenet of the international legal order. The pervasive

342. MĀLKSOO, *supra* note 297, at 83-84.

343. Circular Letter from Professor Anatoly Y. Kapustin, President, Russian Ass'n of Int'l Law, to the Exec. Council of the Int'l Law Ass'n (June 2014), http://www.ilarb.ru/html/news/2014/5062014.pdf.

344. Leonaitė & Žalimas, *supra* note 310, at 37-38.

345. Circular letter from Professor Anatoly Y. Kapustin, President, Russian Ass'n of Int'l Law, to the Exec. Council of the Int'l Law Ass'n, *supra* note 343.

346. This largely focused on the threat to the ethnically-Russian population in the Eastern and Southern regions of Ukraine, the grounds justifying humanitarian intervention, and the case for self-determination. See *id.*

347. See, Borgen Law, Rhetoric and Strategy, *supra* note 315, at 239.

348. Ministry of Foreign Affairs of the Russian Federation, *supra* note 317; *see also*, Zadorozhnii, *supra* note 319, at 141-42.

assumption that Russia employed force to acquire territory fueled condemnation.[349] In reply, the legal narrative that Russia presented was unlikely to sway a plurality of non-Russian international lawyers. It would not dislodge the consensus western belief that Russia had acted unlawfully.[350] However, as Christian Marxsen acknowledged, "since Russia is powerful enough to pursue its interests anyway, it does not need an ultimately convincing legal justification. A justification that is at least not totally absurd, but somehow arguable, is already good enough for making a case in the international political sphere."[351]

Russia's legal contentions—while straining credibility—targeted diverse (often non-legal) audiences.[352] Inherent in Russian claims were efforts to impose or expand evaluative legal standards. Broad understandings of the use of force and aggression were advanced, thus lessening the persuasive burden. These assertions moved beyond existing doctrine and forwarded permissive standards that lent to favorable legal assessments. Article 3(a) of the Definition of Aggression instructs that the unlawful act includes "the invasion or attack by the armed forces of a State of the territory of another State, or any military operation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof."[353] Russia equated the use of force with active belligerency.[354] The fact that Russia's involvement in Crimea did not result in an exchange of hostilities was presented as lessening legal responsibility. This implied that an act of aggression was contingent upon "a significant military confrontation or the actual use of arms."[355] President

349. Kendall, *supra* note 278.

350. *See* ROBERTS, *supra* note 341, at 111.

351. Christian Marxsen, *Crimea's Declaration of Independence*, EJIL TALK! (Mar. 18, 2014), https://www.ejiltalk.org/crimeas-declaration-of-independence/.

352. Borgen, *supra* note 315, at 236, 271-72.

353. Acts of aggression are further held to include "the blockade of the ports or coasts of a State by the armed force of another State" and the use of armed forces "of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement." *See* G.A. Res. 3314 (XXIX), Definition of Aggression, art. 3(a), (c), (e), U.N. Doc. A/Res/3314 (Dec. 14, 1974); *see also* Leonaitė & Žalimas, *supra* note 310, at 16.

354. The concept of the indirect use of force is generally applied to situations in which the offending actor exhibits technical or organizational involvement in an armed conflict. This form of involvement may entail the provision of weapons or irregular forces. *See* SERGEY SAYAPIN, THE CRIME OF AGGRESSION IN INTERNATIONAL CRIMINAL LAW 83-84 (2014); *see also* Leonaitė & Žalimas, *supra* note 310, at 15.

355. Leonaitė & Žalimas, *supra* note 310, at 17.

Putin dismissed the charge of aggression based upon this lessened standard of compliance. Putin noted: "they keep talking of some Russian intervention in Crimea, some sort of aggression. This is strange to hear. I cannot recall a single case in history of an intervention without a single shot being fired and with no human casualties."[356]

5. Drawing Upon Precedent and Commonality

Russia invoked the Kosovo precedent. Legal contentions—that framed events in Crimea as an expression of self-determination and a lawful example of state succession—recalled western support for the Kosovo Assembly's 2008 Declaration of Independence. They referenced the ICJ's resulting Advisory Opinion that held the Declaration did not violate international law.[357] Russia accentuated the legal and factual similarities between events in Crimea and the reaction and legal reasoning offered by various states and institutions in response to earlier occurrences in the Balkans. The Supreme Council of Crimea invoked the Kosovo precedent in its Declaration of Independence. The document premised succession on what it claimed was the "confirmation of the status of Kosovo by the [ICJ] . . . which says that [a] unilateral declaration of independence by part of the country doesn't violate any international norms."[358]

President Putin made extensive use of the Kosovo precedent.[359] In presenting the case that Crimean succession was an expression of self-determination that accorded with democratic procedures, Putin stated:

> the Crimean authorities referred to the well-known Kosovo precedent – a precedent that our western colleagues created with their own hands in a very similar situation, when they agreed that the unilateral separation of Kosovo from Serbia, exactly what Crimea is doing now, was legitimate and did not require any permission from the country's central authorities. Pursuant to Article 2, Chapter 1 of the United Nations Charter,

356. Address 18 March, *supra* note 295.

357. As of 2017, 110 members of the UN have extended diplomatic recognition to Kosovo. *See* Jieun Choi, *The Costs of Not Being Recognized as a Country: The Case of Kosovo*, BROOKINGS INSTITUTE: FUTURE DEVELOPMENT (Nov. 16, 2017), https://www.brookings.edu/blog/future-development/2017/11/16/the-costs-of-not-being-recognized-as-a-country-the-case-of-kosovo/; *see also* Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. Rep. 403 (July 22).

358. *See Declaration of Independence of the Autonomous Republic of Crimea and Sevastopol*, VOLTAIRE NETWORK (Mar. 11, 2014), http://www.voltairenet.org/article182723.html.

359. Merezhko, *supra* note 321.

> the UN International Court agreed with this approach and made the following comment in its ruling of July 22, 2010, and I quote: 'No general prohibition may be inferred from the practice of the Security Council with regard to declarations of independence.'[360]

Russia directly cited the U.S. written submission to the ICJ which asserted that "declarations of independence may, and often do, violate domestic legislation. However, this does not make them violations of international law."[361]

When Russia was accused of using force to unlawfully acquire territory, officials pivoted to the Kosovo precedent. Sergey Lavrov, Russia's Foreign Minister, stated that when western nations reproach Russia "we tell them that in Kosovo their policy was quite different."[362] Historical examples and instances of state behavior were presented as analogous with or justifying Crimea's accession to the Russian Federation. Putin likened the process of Crimean "reunification" to amalgamation of the Democratic and Federal German Republics.[363] When the Russian narrative forwarded humanitarian justifications, officials linked Russia's actions in Crimea with what they purported to be parallel state behavior.[364] Since its conflict with Georgia in South Ossetia and Abkhazia, Russia claimed it was the victim of a legal double standard: "we can't understand why those who are talking about the responsibility to protect and about security of the person at every turn, forgot it when it came to the part of the former Soviet space where the authorities began to kill innocent people, appealing to sovereignty and territorial integrity."[365]

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360. Address 18 March, *supra* note 295.

361. *Id.*; *see also* Written Statement of the United States of America, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, 2010 I.C. J. Rep. 403, at 51 (Apr. 17, 2009), https://www.icj-cij.org/files/case-related/141/15640.pdf.

362. Andrey Vandenko, *Sergey Lavrov: Throwing Russia off Balance Is Ultimate Aim*, TASS: RUSSIAN NEWS AGENCY (Sept. 11, 2014), http://tass.com/top-officials/748935; *see also* Borgen, *supra* note 315, at 247-48.

363. Putin recalled Russia's unequivocal support for the "sincere, unstoppable desire of the Germans for national unity." *See* Address 18 March, *supra* note 295, *see also* Geiß, *supra* note 272, at 430.

364. Vasile Rotaru & Miruna Troncotă, *Continuity and Change in Instrumentalizing 'The Precedent': How Russia Uses Kosovo to Legitimize the Annexation of Crimea*, 17 SE EUR. & BLACK SEA STUD. 325, 329 (2017).

365. Ministry of Foreign Affairs of the Russian Federation, *Russian Foreign Minister Assesses New Geopolitical Situation* (Dec. 30, 2008), http://r2plive.org/russian-foreign-minister-assesses-new-geopolitical-situation/; *see also* Borgen, *supra* note 315, at 246.

Officials consciously "mimicked" the justificatory language that western states employed in defense of the NATO-led interventions in Kosovo and Libya.[366] Moscow reasoned that a "looming humanitarian catastrophe" would cause 675,000 Russian-speakers to flee from Ukraine and into Russia.[367] Roy Allison explains that since the Georgian war, Russia has made strategic use of legal arguments by "selectively mimicking western humanitarian discourses."[368] By drawing upon the Kosovo precedent, by phrasing legal contentions in a humanitarian vernacular, and through the language of human rights, Russia insisted that it, too, was entitled to act in Crimea as the West had elsewhere.[369]

6. Conclusion

The discursive process began with a Russian lie. Factual claims were presented in accordance. Soon, however, the affirmation that Russian forces were not active in Crimea was altered. Intricate legal justifications built upon factual dismissals. These arguments constructed an environment, often unsubstantiated, in which chaos had replaced order. They accentuated Russia's general commitment to international law and justified intervention as a manifestation of that commitment. Legal arguments were doctrinally weak. Beyond Russia's legal community, they carried little sway. Understood singularly, Russia's legal contentions were ineffective. Falsehoods were exposed.[370] International lawyers quickly deconstructed Russia's substantive assertions.[371] Various European institutions insisted that Moscow's formulations lacked legal validity.[372] Russia's reasoning was rejected by numerous states as little more than efforts to sanitize a land grab.[373]

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366. Allison, *supra* note 298, at 1264.

367. *Id.*; *see also* Ben Hoyle, *Exodus Begins for the Families Fearing the Future Under Russian Yoke*, THE TIMES OF LONDON (Mar. 17, 2014), https://www.thetimes.co.uk/article/exodus-begins-for-the-families-fearing-future-under-russian-yoke-8fctzr5wxz3.

368. Allison, *supra* note 281, at 534.

369. Rotaru & Troncotă, *supra* note 364, at 329.

370. Andrew Higgins et al., *Photos Link Masked Men in East Ukraine to Russia*, N.Y. TIMES (Apr. 20, 2014), https://www.nytimes.com/2014/04/21/world/europe/photos-link-masked-men-in-east-ukraine-to-russia.html?hp&_r=0.

371. *See* Borgen, Law, Rhetoric and Strategy, *supra* note 315; *see generally* GRANT, *supra* note 303.

372. *See* EUR. COMM. OF MINISTERS, *Situation in Ukraine*, 1195th mtg. (Mar. 19-20, 2014); *see also* EUR. PARL. ASS., Resolution 1988 (Apr. 9, 2014); EUR. PARL. ASS., Resolution 1990 (Apr. 10, 2014); European Council, *Statement of the Heads of State or Government on Ukraine* (Mar. 6, 2014).

373. *Ukraine: UK Condemns Russian 'land grab' of Crimea*, BBC NEWS (Mar. 18, 2014), https://www.bbc.co.uk/news/uk-politics-26632857; *see also Biden: Russia Violated International Law with*

A majority of states held that Russia's territorial acquisition was unlawful and denied legal recognition.[374] It is, however, unlikely that Moscow sought or assumed acceptance from such states. Persuasion's effectiveness is contingent upon whether the intended audience is moved or the desired objective is achieved. Innumerable legal and non-legal factors influence determinations of how the non-compliant state's persuasive appeals are received. Thomas Grant demonstrates that the responses of states facing secessionist movements are guided by local experiences.[375] Nigeria, which had settled a boundary dispute with Biafra through adjudication, endorsed a similar process to address the Crimean crisis.[376] The Indonesian experiences with Aceh and Western New Guinea influenced its strong affirmation of Ukraine's territorial integrity.[377] Argentina, whose claim to the Falkland Islands risked being undermined if a nexus was established between self-determination and referendum, described the Crimean process as "worthless."[378]

Russia did, however, achieve identifiable objectives. Beyond the particularities of Russia's varied legal contentions, Roy Allison explains that Moscow sought to position itself at the forefront of states that desired differentiation from the western liberal order.[379] Designed to increase global influence and regional control, Russian officials followed events in Crimea by proposing an international conference to reformulate international law since "there are no agreed rules and the world may become an increasingly unruly place."[380] Such developments are unlikely. But events in Crimea did allow Russian officials to herald the end of U.S. hegemony and tell regional partners and strategic allies that the Russian Federation was pursuing a new world order that better

Crimea Annexation, NBC NEWS (Mar. 18, 2014), https://www.nbcnews.com/storyline/ukraine-crisis/biden-russia-violated-international-law-crimea-annexation-n55511.

374. GRANT, *supra* note 303, at 64; *see also* Statements by the United Kingdom and France, U.N. SCOR, 69th Sess., 7144th mtg at 14-16, 20, UN Doc. S/PV/7144 (Mar. 19, 2014); Statement by the European Union, UNGA 80th Meeting, *supra* note 311, at 4-5; Statement by the United States, U. N. SCOR, 69th Sess., 7144th mtg. at 10, U.N. Doc. S/PV/7144 (Mar. 19, 2014).

375. GRANT, *supra* note 303, at 67-68.

376. *See* U.N. GAOR, 80th plen. mtg, *supra* note 311, at 18-19.

377. GRANT, *supra* note 303, at 67.

378. *Id.* at 68; *see also Crimea Vote as Worthless as Falklands poll – Argentina President*, REUTERS (Mar. 19, 2014), https://www.reuters.com/article/ukraine-crisis-falklands/crimea-vote-as-worthless-as-falklands-poll-argentina-president-idUSL6N0MG3ZW20140319.

379. Allison, *supra* note 298, at 1267.

380. *Id.*; *see also* Pavel Felgenhauer, *Ukraine as a Battlefield for a New World Order According to Putin*, EURASIA DAILY MONITOR (July 3, 2014), https://jamestown.org/program/putin-ukraine-is-a-battlefield-for-the-new-world-order/.

reflected the interests of emergent powers.[381]

Many of Russia's legal contentions appear designed to appease China.[382] Legal arguments, references to process, and the historical connection between Russia and Crimea sought to pacify Beijing's unease with "territorial revisionism."[383] China was deferential. It, alongside several strategically significant states including India, Brazil, and South Africa, abstained from the General Assembly Resolution that affirmed "commitment to the sovereignty, political independence, unity and territorial integrity of Ukraine."[384] Only fifty-two percent of U.N. members favored the resolution.[385] This prompted Ambassador Churkin to declare a "moral and political victory."[386]

Russian actions in Ukraine received domestic support. Arguments that pulled upon national identity and historical bonds increased local passions.[387] Contentions that Russia's claim to Crimea would ensure the safety and rights of a related ethnic group generated legitimacy in Russia, Crimea, and amongst the Russian-speaking population in Eastern Ukraine.[388] These elements of Russia's legal reasoning appealed to populist sentiments. They provided political consolidation as President Putin's approval rating reached its zenith.[389] Within the near abroad, Russia's desire to extend its sphere of influence was reflected through its legal contentions. Appeals to humanitarian motives, democratic process, and western hypocrisy—facilitated through factual persuasion—targeted Russian-speaking populations in the former Soviet states. Russia's efforts to position itself as a regional guardian, to ensure stability, and to protect vulnerable groups may appeal to various demographics within the near abroad. It, however, received a mixed reception from regional actors.[390]

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381. Allison, *supra* note 298, at 1268.

382. *Id.* at 1259.

383. *Id.*

384. G.A. Res. 68/262 (Mar. 23, 2014); *see also* Allison, *supra* note 298, at 1268.

385. The fifty-two percent of members referred to the total number of U.N. members. Of those that cast votes on the Resolution, 59.17% approved; 6.51% voted against; and 34.32% abstained. *See* Voting Record on Item 33(b) A/68/L.39 Draft Resolution Territorial Integrity of Ukraine, https://papersmart.unmeetings.org/media2/2498292/voting-record.pdf.

386. Allison, *supra* note 298, at 1268.

387. *See* Leonid Ragozin, *Annexation of Crimea: A Masterclass in Political Manipulation*, AL JAZEERA (Mar. 16, 2019), https://www.aljazeera.com/indepth/opinion/annexation-crimea-masterclass-political-manipulation-190315174459207.html.

388. Allison, *supra* note 298, at 1282.

389. *Id.* at 1291-92.

390. Borgen, *supra* note 315, at 274-75.

The effectiveness of persuasion is most often intangible. Russia's principle contention—that Western-led interventions in Kosovo and Iraq have altered the international legal order—was sympathetically received by select states. However, the collective efficacy of these efforts cannot be understood episodically. As Roy Allison notes, while Russia will be unable to shift broad support for the prohibition on the use of force, it will attempt to persuade strategic allies and challenge the "right of the United States and other western powers to act as the privileged custodians and interpreters of core principles of international order."[391] The effectiveness of Russia's legal engagements is inseparable from this broader context. It is contingent upon myriad factors, personalities, and interests. This is perhaps best illustrated by what Allison identifies as a new tactical opportunity—unknown upon Crimea's annexation—in which Russia may influence a U.S. Administration that has received the Atlantic Alliance skeptically, softened its condemnation of Russia, and may be amenable to a transactional relationship that would further empower Moscow to pursue the objective of "compelling Ukraine to accept a neutral status between Russia and NATO."[392]

B. *The Use of Persuasive Legal Argument to Apply and Advance the Unwilling or Unable Standard*

President Obama declared that initial military action against ISIS would be limited to Iraq. The scope and duration of the airstrikes that would begin in August 2014 were intended to "protect American personnel in Iraq by stopping the current advance on Erbil . . . and to help forces in Iraq as they fight to break the siege of Mount Sinjar and protect the civilians trapped there."[393] The U.S. rationale alluded to self-defense, intervention by invitation, and humanitarian motives. The preceding year's events—the rise of ISIS, the fall of Mosul—compelled a military response. In accompaniment, this required legal justification.[394] Strategically, the United States would conduct airstrikes in Iraq, arm Syrian factions combatting ISIS, and form an international coalition to continue counter-terrorism efforts.[395] U.S. officials offered a

391. Allison, *supra* note 298, at 1268.

392. Allison, *supra* note 281, at 543.

393. Press Release, White House Off. of the Press Sec'y, Letter from the President – War Powers Resolution Regarding Iraq (Aug. 8, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/08/08/letter-president-war-powers-resolution-regarding-iraq.

394. Olivia Gonzalez, Comment, *The Pen and the Sword: Legal Justifications for the United States' Engagement Against the Islamic State of Iraq and Syria (ISIS)*, 39 FORDHAM INT'L L.J. 133, 135 (2015).

395. *Id.* at 136.

firm legal basis for military action in Iraq. President Obama, in a nationally televised address, insisted that the use of force was in response to a direct "request of the Iraqi government."[396] Formally, intervention was predicated upon invitation.[397]

During the following months, ISIS militants increased their gains in Syria. Soon after, the United States expanded its scope of operations.[398] President Obama announced that as part of a "comprehensive and sustained counterterrorism strategy," coalition forces would pursue ISIS within the Syrian theater.[399] On September 22, in the early morning hours, the United States led a series of strikes against ISIS targets in Raqqa and to the west of the Iraq border in Deir ez Zour and Al-Hasakah.[400]

The Syrian expansion was presented as a necessary evolution of the international effort to combat ISIS. However, where the Iraqi phase of operations claimed a firm legal basis, realpolitik and a confluence of diplomatic and strategic considerations denied a similar extension of the intervention by invitation justification. Syria, though consenting to Russian and Iranian presence, insisted that an invitation was not extended to the U.S.-led coalition.[401] Neither would U.S. officials or members of the coalition seek Syrian consent. Following the Syrian civil war—which began in 2011 when Bashar al-Assad violently suppressed anti-government protests—many western states viewed the Damascus authorities as illegitimate. They supported al-Assad's

396. President Barack Obama, Statement by the President (Aug. 7, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/08/07/statement-president; *see also* Karine Bannelier-Christakis, *Military Intervention Against ISIL in Iraq, Syria and Libya, and the Legal Basis of Consent*, 29 LEIDEN J. INT'L L. 743, 750–51 (2016).

397. *See* Letter from Permanent Rep. of Iraq to the U.N., to the Secretary-General (June 25, 2014) (U.N. Doc. S/2014/440); *see also* Letter from Permanent Rep. of Iraq to the U.N. to the President of the Security Council, (Sept. 22, 2014) (U.N. Doc. S/2014/691).

398. Greg Jaffe, Missy Ryan & Karen DeYoung, *Obama Outlines Plans to Expand U.S. Special Operations Forces in Syria*, WASH. POST (Apr. 25, 2016), https://www.washingtonpost.com/world/national-security/obama-to-announce-plans-to-grow-us-special-operations-force-in-syria/2016/04/24/93a2108a-0a6a-11e6-a6b6-2e6de3695b0e_story.html.

399. President Barack Obama, Statement by the President on ISIL (Sept. 10, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/09/10/statement-president-isil-1 [hereinafter Obama 10 September Speech].

400. Helene Cooper & Eric Schmitt, *Airstrikes by U.S. and Allies Hit ISIS Targets in Syria*, N.Y. TIMES (Sept. 22, 2014), https://www.nytimes.com/2014/09/23/world/middleeast/us-and-allies-hit-isis-targets-in-syria.html.

401. *See* Bannelier-Christakis, *supra* note 396, at 767; *see also* Permanent Rep. of Syria to the U.N., Identical letters dated Sept. 17, 2015 from the Permanent Rep. of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, at 1, U.N. Doc. S/2015/719 (Sept. 21, 2015).

departure.[402] The United States plainly stated, "we're not going to ask for permission from the Syrian regime."[403]

When Samantha Power, the U.S. Ambassador to the United Nations, presented the Secretary General with an Article 51 letter, military operations in Syria were predicated on an inventive (though not novel) legal justification. The United States stated:

> ISIL and other terrorist groups in Syria are a threat not only to Iraq, but also to many other countries, including the United States and our partners in the region and beyond. States must be able to defend themselves, in accordance with the inherent right of individual and collective self-defense, as reflected in Article 51 of the Charter of the United Nations, when as is the case here, *the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks.*[404]

The legal argument advanced by the United States and select members of the coalition had gained salience amongst some international lawyers.[405] The unwilling or unable test was not, however, grounded in clear legal doctrine. Neither the relevant legal instruments or I.C.J. jurisprudence reference the test.[406] It is instead identified through a lineage of select state practice.[407] Appeals to some variant of the unwilling or unable test have long featured within U.S. foreign policy though its

402. Bannelier-Christakis, *supra* note 396, at 767.

403. *See* Anne Gearan, *U.S. Rules Out Coordinating with Assad on Airstrikes Against Islamists in Syria*, WASH. POST (Aug. 26, 2014), https://www.washingtonpost.com/world/national-security/us-rules-out-coordinating-with-assad-on-airstrikes-against-islamists-in-syria/2014/08/26/cda02e0e-2d2e-11e4-9b98-848790384093_story.html?utm_term=.57997b360442.

404. *See* Permanent Rep. of the United States to the U.N., Letter dated Sept. 23, 2014 from the Permanent Rep. of the United States of America to the United Nations addressed to the Secretary-General, at 1, U.N. Doc. S/2014/695 (Sept. 23, 2014) (emphasis added) [hereinafter U. S. 23 September Letter].

405. *See* Ashley S. Deeks, *Unwilling or Unable: Toward a Normative Framework for Extraterritorial Self-Defense*, 52 VA. J. INT'L L. 483, 503 (2012); *see also* Elizabeth Wilmshurst et al., *The Chatham House Principles of International Law on the Use of Force in Self-Defence*, 55 INT'L & COMP. L.Q. 963, 963, 970 (2006); Nico Schrijver & Larissa van den Herik, *Leiden Policy Recommendations on Counter-Terrorism and International Law*, 57 NETH. INT'L L. REV. 531, 533, 542 (2010).

406. *See* Olivier Corten, *The 'Unwilling or Unable' Test: Has it Been, and Could it Be, Accepted?*, 29 LEIDEN J. INT'L L. 777, 778–79 (2016).

407. *See* Elena Chachko & Ashley Deeks, *Which States Support the 'Unwilling and Unable' Test?*, LAWFARE (Oct. 10, 2016, 1:55 PM), https://www.lawfareblog.com/who-board-unwilling-or-unable#UnitedKingdom.

prevalence increased in the wake of the September 11 attacks.[408] States—notably the United States, Israel, Russia, and Turkey—have explicitly invoked the unwilling or unable test to justify cross-border force against non-state actors.[409] As Monica Hakimi notes, "third states, for the most part did not endorse the legal claim, but they tacitly condoned the actual operations."[410]

Despite the test's prevalence—and with several notable exceptions—states remain reluctant to legally endorse the unwilling or unable standard.[411] The I.C.J. has declined to embrace broad interpretations of the right to self-defense against non-state armed groups.[412] And proponents of the unwilling or unable test concede its legal formulation is ill-defined and that it may not constitute customary international law.[413] Where the United States and select coalition allies did not experience legal opposition to their military operations against ISIS in Iraq, the legal rationale accompanying the use of force in Syria necessitated doctrinal persuasion. These appeals would posit a preferred legal interpretation and facilitate a desired military operation while, from the U.S. and British perspective, beneficially altering the *jus ad bellum*.

1. The Identification of a Common Lifeworld

Ambassador Power's Article 51 letter recalled the perils of terrorism.[414] Advancement of the unwilling or unable test—in justification of U.S. operations in Syria—built upon a relatable context. The general

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408. *Id.*; *see also* Paulina Starski, *Silence Within the Process of Normative Change and Evolution of the Prohibition on the Use of Force: Normative Volatility and Legislative Responsibility*, 4 J. ON USE FORCE & INT'L L. 14, 61 (2017).

409. Monica Hakimi, *Defensive Force Against Non-State Actors: The State of Play*, 91 INT. L. STUD. 1, 13 (2015).

410. *Id.* at 14.

411. Following an exhaustive reading of the letters sent to the Security Council from August 2014 to January 2016 and after analysing relevant U.N. debates, Olivier Corten concludes that, "it would be excessive to contend that the 'unwilling and unable' standard has been accepted by the international community of states as a whole." *See* Corten, *supra* note 406, at 786.

412. Marja Lehto, *The Fight Against ISIL in Syria. Comments on the Recent Discussion of the Right of Self-Defence Against Non-State Actors*, 87 NORDIC J. INT'L L. 1, 7 (2018); *see also* Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 147 (Dec. 19).

413. Ryan Goodman, *International Law—and the Unwilling and Unable Test—for US Military Operations in Syria*, JUST SECURITY (Sept. 12, 2014), https://www.justsecurity.org/14949/international-law-unwilling-unable-test-military-operations-syria/; *see* Daniel Bethlehem, *Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AM. J. INT'L L. 770, 773 (2012) [hereinafter Bethlehem Principles]; *see also* Deeks *supra* note 405, at 500.

414. U.S. 23 September Letter, *supra* note 404.

menace of international terrorism and the particular threat posed by ISIS were accentuated. A common lifeworld was identified. This was premised upon three contentions. ISIS's actions in Iraq and Syria—around Mount Sinjar and toward the Yazidi population—were framed as genocide or ethnic cleansing.[415] ISIS's existence—their origins and their contemporary function—were linked with *al-Qa'ida* and the constant threat of transnational terrorism.[416] And ISIS's methods—the beheadings, mass rape, crucifixions, and public floggings—were presented as uniquely brutal.[417] Collectively, the lifeworld evoked a conception of terrorism that was ever-present, extensive in reach, familiar yet novel, and that warranted a military reply.

Articulation of the lifeworld began before operations against ISIS extended into Syria. In mid-August 2014, Ambassador Power addressed the Security Council. ISIS were defined as greater than a regional issue. Power told the Council that ISIS and other *al-Qa'ida* affiliates threatened the people of Syria and Iraq but also endangered the world-at-large.[418] Power illustrated the humanitarian consequences of ISIS's advancement. Having seized Iraqi and Syrian infrastructure, ISIS possessed "the ability to block the flow of electricity and to control access to the water supplies on which people depend."[419] Recent ISIS attacks, Power noted, "have displaced an estimated 200,000 people, bringing the total number of internally displaced persons in Iraq since January to a staggering 1.4 million."[420] ISIS sought to eradicate the Yazidi population. "Yazidis have been buried alive, beheaded or killed in mass executions. Thousands were forced to flee to Mount Sinjar, where many ultimately perished from thirst or exposure to the elements."[421] Elsewhere in Syria, ISIS militants were evidenced to have purposefully exacerbated a humanitarian catastrophe by confiscating aid destined for civilians in the country's east.[422]

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415. *See, e.g.*, U.N. SCOR, 69th Sess., 7271st mtg. at 6, U.N. Doc. S/PV.7271. [hereinafter UNSC 7271 Meeting]; *see also* Obama 10 September Speech, *supra* note 399.

416. *See* Lieutenant Gen. William Mayville & Press Sec'y Rear Admiral John Kirby, Department of Defense Press Briefing on Operations in Syria by Lt. Gen. Mayville in the Pentagon Briefing Room (Sept. 23, 2014), https://www.defense.gov/Newsroom/Transcripts/Transcript/Article/606931/department-of-defense-press-briefing-on-operations-in-syria-by-lt-gen-mayville/.

417. Obama 10 September Speech, *supra* note 399.

418. *See* U.N. SCOR, 69th Sess., 7242d mtg. at 3, U.N. Doc. S/PV.7242 [hereinafter UNSC 7242 Meeting].

419. *Id.*

420. *Id.*

421. *Id.*

422. *Id.*

President Obama furthered this theme in a national address. ISIS had "threatened a religious minority with genocide."[423] The President continued that if ISIS's advancement continued unabated, "these terrorists could pose a growing threat beyond [the] region, including to the United States."[424] This threat—ISIS's ever-expanding capacity and global reach—recalled the war on terror. President Obama referenced the September 11 attacks.[425] Terrorism was identified as a global menace, the source of collective fear, and the recipient of unconditional condemnation. The argumentative process, embraced by U.S. officials, did not simply identify cause for defensive action. It acknowledged a lifeworld, emphasizing that ISIS was an affront to universal values, had committed the most egregious atrocity crimes, and sought departure from the shared ideals that coalition members would act to uphold. Retrospection structured current debates as old threats and common fears were repurposed as the "new front" in the global war against terrorism.[426]

These reflections did not preclude novel claims. Throughout the framing process, ISIS were represented as uniquely brutal. Their methods were presented through anecdotes and conveyed to various audiences. Ambassador Power described to the Security Council a meeting with a Bishop from Mosul who witnessed ISIS attack a hospital: "a Christian patient who refused to convert was shot in the head. Two who agreed to convert, denounced as infidels, had their throats slit."[427] Ambassador Power conveyed that 500 Yazidi women and children had been abducted, systematically raped, trafficked, or killed.[428] President Obama would later note that "in a region that has known so much bloodshed, these terrorists are unique in their brutality. They execute captured prisoners. They kill children. They enslave, rape, and force women into marriage. . ."[429]

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423. Obama 10 September Speech, *supra* note 399.

424. *Id.*

425. *Id.*

426. UNSC 7242 Meeting, *supra* note 418, at 3.

427. *Id.*

428. *Id.*

429. Obama 10 September Speech, *supra* note 399; *see also* UNSC 7271 Meeting, *supra* note 415, at 6. For a similar sentiment, see *Transcript: President Obama's Remarks on the Execution of Journalist James Foley by Islamic State*, WASH. POST (Aug. 20, 2014), https://www.washingtonpost.com/politics/transcript-president-obamas-remarks-on-the-execution-of-journalist-james-foley-by-islamic-state/2014/08/20/f5a63802-2884-11e4-8593-da634b334390_story.html?noredirect=on&utm_term=.ef93e8f546f5; *see also* Julie Hirschfeld Davis, *After Beheading of Steven Sotloff, Obama Pledges to Punish ISIS*, N.Y. TIMES (Sept. 3, 2014), https://www.nytimes.com/2014/09/04/world/middleeast/steven-sotloff-isis-execution.html.

British Prime Minister David Cameron presented a similar narrative. When the British began airstrikes late in 2015, ISIS's devastating reach had been felt throughout Europe. Addressing Parliament, Prime Minister Cameron referenced recent attacks in Berlin, Istanbul, and at the *Bataclan* and *Stade de France* in Paris. The threat posed by ISIS became vicarious. It reached people in Europe and threatened those across the United Kingdom as they wended their way through their daily routines. The Prime Minister explained that ISIS "has already taken the lives of British hostages, and inspired the worst terrorist attack against British people since 7/7, on the beaches of Tunisia—and, crucially, it has repeatedly tried to attack us right here in Britain."[430]

When the United States (and later the United Kingdom) expanded operations into Syria, legal justifications were premised upon the shared ideas and collective understandings evoked through this pre-established context. The United States was leading a global effort to combat terrorism. Regional and international actors were working to ensure a "common security."[431] Following the September 22 airstrikes, President Obama convened a Security Council meeting.[432] The President emphasized terrorism's commonality, its enduring threat: "the tactic of terrorism is not new. So many nations represented here today, including my own, have seen our citizens killed by terrorists who target innocents."[433] ISIS was presented as a unique manifestation of a shared experience. Initially, broad appeals did not delineate a specific threat that would amount to an armed attack.[434] Instead, they exhibited a group whose cruelty was limitless and whose potential displayed extensive reach.[435] They appealed to the common fears and vulnerabilities of a diverse

430. 26 Nov. 2015, Parl Deb HC (2015) col. 1489 (UK) [hereinafter Cameron 26 November Speech].

431. President Barack Obama, Statement by the President on Airstrikes in Syria (Sept. 23, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/09/23/statement-president-airstrikes-syria.

432. Julian Borger, *The Message of Obama's UN Meeting Is Clear: He Is Nothing Like His Predecessor*, GUARDIAN (Sept. 24, 2014, 7:17 AM), https://www.theguardian.com/world/2014/sep/24/message-barack-obama-un-security-council-meeting-isis-george-bush.

433. U.N. SCOR, 69th Sess., 7272d mtg. at 3, U.N. Doc. S/PV.7272 (Sept. 24, 2014).

434. In his 10 September address, President Obama noted that "While we have not yet detected specific plotting against our homeland, ISIL leaders have threatened America and our allies." *See* Obama 10 September Speech, *supra* note 399.

435. Continuing, the President noted that "Our Intelligence Community believes that thousands of foreigners — including Europeans and some Americans — have joined [ISIS] in Syria and Iraq. Trained and battle-hardened, these fighters could try to return to their home countries and carry out deadly attacks." *See id.*

collective of states that faced or perceived the threat of terrorism. Military force—formally justified through an interpretative appeal to the unwilling or unable test—was a necessary response, one that would reflect a general commitment to international law.

2. Establishing the State as a General Norm-Acceptor

Elucidation followed assuredness. Within a year, U.S. officials provided a comprehensive legal account of the unwilling or unable standard. State Department Legal Advisor Brian Egan, addressed the Annual Meeting of the American Society of International Law (ASIL). Before detailing the Obama Administration's legal rationale for the use of force in Syria, Egan began by presenting the U.S. as a general norm acceptor:

> [T]he United States complies with the international law of armed conflict in our military campaign against ISIL, as we do in all armed conflicts. We comply with the law of armed conflict because it is the international legal obligation of the United States; because we have a proud history of standing for the rule of law; because it is essential to building and maintaining our international coalition; because it enhances rather than compromises our military effectiveness; and because it is the right thing to do.[436]

The legal rules governing non-international armed conflicts (NIAC) were enumerated.[437] Egan told the gathered legal experts that these rules, regarded as customary international law, received close scrutiny within the U.S. Government and through domestic courts.[438]

Egan described the United States as a leader in international legal compliance. Its general commitment to legal norms ensures that coalition members, as well as U.S. forces, exhibit the highest standards of compliance. This commitment to legal order, Egan explained:

> also extends to promoting law of armed conflict compliance by our partners. . .When others seek our assistance with military

436. Egan, *supra* note 121, at 236.

437. Egan noted the principle of distinction; the definition of military objects; the need to take precautions; targeting prohibitions specific to NIACs; the demands of proportionality; and the illegality of actions or threats which intend to spread terror amongst a civilian population. *See id.* at 242-243.

438. *Id.* at 242.

> operations, we ensure that we understand their legal basis for acting. We also take a variety of measures to help our partners comply with the law of armed conflict and to avoid facilitating violations through our assistance. . .[439]

Professions of legal fidelity were further bolstered. Egan explained that the United States' commitment to legal compliance surpassed that which was formally required. As a matter of international law, Egan insisted, the United States is compelled to comply with IHL. In practice, however, the United States "imposes standards on its direct action operations that go beyond the requirements of the law of armed conflict."[440] As U.S. officials furthered the interpretative assertions undergirding operations in Syria, they accentuated the state's reputation. From a position of legal fidelity and leadership, the United States drew from a general sense of norm acceptance to illustrate the credibility of a specific interpretative claim.

British officials exhibited a similar approach. Prime Minister David Cameron told Parliament that the expansion of airstrikes into Syria constituted collective self-defense. They were legally permissible because the "Assad regime is unwilling and/or unable to take action necessary to prevent ISIL's continuing attack on Iraq, or indeed attacks on us."[441] The ensuing process mirrored occurrences in the United States. The British Attorney General addressed an expert audience at the International Institute for Strategic Studies (IISS) in London. In a speech titled "The Modern Law of Self-Defence", the Rt. Hon. Jeremy Wright expanded upon the Government's invocation of the unwilling or unable test.[442] The Attorney General began, asserting that the United Kingdom "is a world leader in promoting, defending and shaping international law."[443] British legal contributions—to the slave trade's eradication; to the formation of the imminence requirement; to

439. *Id.* at 245.

440. For example, Egan notes that "the U.S. military may impose an upper limit as a matter of policy on the anticipated number of non-combatant casualties that is much lower than that which would be lawful under the rule that prohibits attacks that are expected to cause excessive incidental harm." Furthermore, Egan explains how despite the U.S. not being party to the Second Additional Protocol to the Geneva Conventions, US practice is consistent with the Protocol's dictates the rules applicable in NIACs. *See id.* at 245-246.

441. Cameron 26 November Speech, *supra* note 430, at col. 1491.

442. The Rt. Hon. Jeremy Wright QC MP, *The Modern Law of Self-Defence*, EJIL: TALK! (Jan. 11, 2017), https://www.ejiltalk.org/the-modern-law-of-self-defence/. [hereinafter Wright Modern Law of Self-Defence].

443. *Id.*

the founding of the League of Nations; and to the UN—were recounted. The United Kingdom's role in drafting, and its willingness to sign, the Kellogg-Briand Pact, the Ottawa Treaty, and the Rome Statute were recalled.[444] By engaging with the legal questions that resulted following the use of force in Syria, the Attorney General pledged to continue the British tradition of "advocating, celebrating and participating in a rules-based international order."[445] The United Kingdom "should and will only use armed force, and will only act in self-defense, where it is consistent with international law to do so."[446] These parallel persuasive appeals, offered by U.S. and U.K. officials, would next move to establish the credentials of the respective actors forwarding the inventive interpretative claim.

3. Demonstrating the Authority to Interpret

Both speeches targeted a specific epistemic community. The venues for each address—the IISS and at ASIL's Annual Meeting—were indicative of a particular professional class. Interpretative appeals, to the applicability of the unwilling or unable test, were directed toward influential communities of international lawyers. They sought expert approval—that the justifications for the use of force in Syria were legally tenable. As Peter Haas suggests, interpretative claims are efficaciously received when directed towards a community from which the speaker derives credibility.[447] By addressing academic or professional conferences, by emphasizing interpretative sources, and by accentuating the speaker's reputation and credentials, the persuading entity bolsters its authoritativeness.[448]

Legal scholars initiated the interpretative advancement of the unwilling or unable test.[449] Academic endorsements of the standard were, however, closely linked with state practice.[450] The actions of states informed scholarly articulations of an amended self-defense doctrine.[451] States then emphasized academic contributions supportive of interpretations that departed from a strict reading of Article 51.[452] Most

444. *Id.*

445. *Id.*

446. *Id.*

447. Haas, *supra* note 207, at 3.

448. *See* Shereshevsky, *supra* note 10, at 51.

449. *See* Corten, *supra* note 406, at 778.

450. Lehto, *supra* note 412, at 17-18; *see generally* Kattan, *supra* note 35; *see also* Shereshevsky, *supra* note 10.

451. *See generally* Deeks, *supra* note 405.

452. Oren Gross, Unresolved Legal Questions Concerning Operation Inherent Resolve, 52 TEX. INT'L L. J. 221, 253 (2017).

prominently, Sir Daniel Bethlehem published a list of principles intended to address the "scope of a state's right to self-defense against an imminent or actual armed attack by nonstate actors."[453] When such attacks emanate from a third state, the victim state may intervene without consent when the third state is, *inter alia*, "unwilling to effectively restrain the armed activities of the non-state actor" or when there is a reasonable basis "for concluding that the third state is unable to effectively restrain [these] armed activities. . ."[454]

Brian Egan's interpretative endorsement of the unwilling or unable test drew heavily upon the Bethlehem Principles. Egan told the ASIL Annual Meeting, "when considering whether an armed attack is imminent under the *jus ad bellum* for purposes of the initial use of force against a particular non-State actor, the United States analyzes a variety of factors, including those identified by Sir Daniel Bethlehem."[455] Similarly, Attorney General Wright extensively cited the Bethlehem Principles when describing how the United Kingdom interprets "the long-standing rules of international law on self-defence to our need to defend ourselves against new and evolving types of threats from non-state actors."[456] The Attorney General recognized Sir Daniel's role as the former Legal Adviser to the FCO and that his principles were informed by "detailed official-level discussions between foreign ministry, defence ministry, and military legal advisers from a number of states who have operational experience in these matters."[457]

Both the Legal Adviser and the Attorney General noted that the Bethlehem Principles were published in the American Journal of International Law.[458] Repeated references to the Bethlehem Principles, allusions to the professional prestige of their author, exemplify authoritativeness. They, along with references to *The Chatham House Principles on International Law on the Use of Force by States in Self-Defence* and the *Leiden Policy Recommendations on Counter-Terrorism and International Law*, accentuate the role of expert opinion in the drafting process of the respective documents. Invocations of these documents were both lauded as professional sources supporting a particular interpretative position and as the work product of influential epistemic communities. Appeals to the latter ensure that the documents' source, their associated

453. Bethlehem Principles, *supra* note 413, at 770.

454. *Id.* at 776.

455. Egan, *supra* note 121, at 239.

456. Wright Modern Law of Self-Defence, *supra* note 442.

457. *Id.*

458. *See* Egan, *supra* note 121, at 239; *see also* Wright Modern Law of Self-Defence, *supra* note 442.

esteem, become indirect efforts to influence the justificatory discourse.[459]

To advance the favored interpretation of the unwilling or unable test's applicability, U.S. and British officials conveyed their own professional competence. They noted their membership within the interpretative community that they now sought to influence. Brian Egan offered professional credentials. Egan told the Annual Meeting that:

> prior to my confirmation, I served as a Deputy White House Counsel and Legal Adviser to the National Security Council for nearly three years. Based on my experience in that position, I can tell you that the President, a lawyer himself, and his national security team have been guided by international law in setting the strategy for counterterrorism operations against ISIL.[460]

The professional competence of the respective speakers and the authoritativeness of the documents that they would cite became factors that lent credence to the particular interpretative claim.

4. Instilling the Standard of the Acceptable Legal Argument

The interpretative advancement of the unwilling or unable test is an effort to alter a legal standard. It is an attempt to expand the strictures of Article 51. Acceptance of a novel formulation facilitates subsequent legal arguments that accompany the use of force against non-state actors. The persuasiveness of legal appeals and claims of legitimacy are bolstered when evaluated in accordance with this broad notion of legal compliance. Brian Egan explains that "if [a state] must rely on self-defense to use force against a non-State actor on another State's territory, [they must] determine that the territorial State is "unable or unwilling" to address the threat posed by the non-State actor. . ."[461] Reconstructed as positive international law, the imposed reading was presented as a certain legal standard. Egan continued:

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459. *See* Egan, *supra* note 121, at 239; *see also* Wright Modern Law of Self-Defence, *supra* note 442; s*ee also* PEEVERS, *supra* note 31, at 4.

460. Egan, *supra* note 121, at 236.

461. *Id.* at 240. This argument is similar to that offered by President Clinton to Congress in 1998 in defense of U.S. strikes against Al Qaeda bases in Sudan and Afghanistan. *See U.S. Fury on 2 Continents; Clinton's Words: 'There Will Be No Sanctuary for Terrorists'*, N.Y. TIMES (Aug. 21, 1998), https://www.nytimes.com/1998/08/21/world/us-fury-2-continents-clinton-s-words-there-will-be-no-sanctuary-for-terrorists.html.

> [I]n some cases international law does not require a State to obtain the consent of the State on whose territory force will be used. In particular, there will be cases in which there is a reasonable and objective basis for concluding that the territorial State is unwilling or unable to effectively confront the non-State actor in its territory so that it is necessary to act in self-defense. . .[462]

The Article 51 letter that Ambassador Power presented to the Secretary General was the outcome of an ongoing attempt to amend the *jus ad bellum*.[463] Transnational efforts, amongst aligned states, advocated in accordance with Attorney General Wright's contention that "international law is not static and is capable of adapting to modern developments and new realities."[464] Several states long-favored reformulation of the law governing the use of force. These states interpreted the September 11 attacks as urgent demonstrations of the need for legal reform.[465] The military response to international terrorism featured numerous efforts to impose permissive legal standards.[466] Articulations of preemptive self-defense, application of the unwilling or unable test, constituted efforts to instill facilitatory legal standards.[467] Appeals to these imposed standards, notwithstanding their uncertain legal status and in several instances broad rejections, provided states the ability to exhibit an, at least, plausible legal argument.

Formulations of reduced burdens identified legal ambiguity. They emphasized the lack of consensus surrounding the legal standards relevant to the contemporary challenges posed by the use of force. A particular legal interpretation may not be doctrinally entrenched, but would constitute an acceptable legal argument. John Bellinger, when serving as Legal Advisor, reminded European interlocuters that legal rules governing conflict with non-state actors were uncertain. Bellinger insisted that the lack of clarity regarding the relationship between international law, self-defense, and non-state actors "provided impetus for cooperation in determining the appropriate legal framework."[468] U.S. actions,

462. Egan, *supra* note 121, at 241.

463. *See generally* Kattan, *supra* note 35.

464. Wright Modern Law of Self-Defence, *supra* note 442.

465. Kattan, *supra* note 35, at 113-14.

466. *See* Ratner, *supra* note 247.

467. *See generally* U.S. Dep't of State, *The National Security Strategy of the United States of America* (Sept. 2002), https://www.state.gov/documents/organization/63562.pdf.

468. Public Library of U.S. Diplomacy, *Legal Adviser Bellinger's Meeting with Belgian Officials*, WIKILEAKS (Mar. 8, 2007), https://wikileaks.org/plusd/cables/07BRUSSELS772a.html; *see also* Kattan, *supra* note 35, at 119-20.

justified through inventive legal reasoning should not, Bellinger insisted, be construed as legal disregard. The United States was not "violating *clear* legal norms" as "legal experts *differ* on the interpretation and implementation of [the] laws of war."[469] Ambiguity created potential. An array of feasible legal arguments, offered as acceptable if not certain, justified uses of force that appeared to go well-beyond a formalist reading of the UN Charter. These allowed the state to exhibit commitment to a legal process and provided members of the international community with an argument that could be received in satisfaction of a broad, but acceptable, legal standard.

5. Drawing Upon Precedent and Commonality

Invocations of precedent were featured throughout Brian Egan's ASIL address. An expansive reading of the self-defense criteria recalled a lineage of state behavior. The use of force against non-state actors was presented as a commonality that long pre-dates the global war on terror. Contemporary legal arguments and preferred interpretations were not inventive responses to a modern threat, but instead manifestations of familiar state practice. Egan noted:

> the inherent right of individual and collective self-defense recognized in the U.N. Charter is not restricted to threats posed by States. Nor is the right of self-defense on the territory of another State against non-State actors, such as ISIL, something that developed after 9/11. To the contrary, for at least the past two hundred years, States have invoked the right of self-defense to justify taking action on the territory of another State against non-State actors. As but one example, the oft-cited *Caroline* incident involved the use of force by the United Kingdom in self-defense against a non-State actor located in the United States. . .[470]

Two centuries of supportive state behavior were emphasized. Appeals to the *Caroline* incident associated applications of force against non-state actors operating on a third state's territory with the origins of the self-defense doctrine.

Advancement of the unwilling or unable test accentuated the prevalence of similar state practice. Egan identified the increasing number of states that had offered legal justifications in support of the use of

469. Bellinger's Meeting with Belgian Officials, *supra* note 468 [emphasis added].

470. Egan, *supra* note 121, at 239.

force against ISIS in Syria. Egan demonstrated that, "the United States is not alone in providing such public explanations. Over the last eighteen months, for example, nine of our coalition partners have submitted public Article 51 notifications to the UN Security Council explaining and justifying their military actions in Syria against ISIL."[471] While minimizing divergencies in legal reasoning, Egan continued, "though the exact formulations vary from letter to letter, the consistent theme throughout these reports to the Security Council is that the right of self-defense extends to using force to respond to actual or imminent armed attacks by non-State armed groups like ISIL."[472] These instances of similar state behavior and the alike legal reasoning provided by a diversity of states were presented as "the clearest evidence" of the unwilling or unable test's relevancy.[473]

Earlier efforts to formalize the unwilling or unable test made similar use of precedent. John Bellinger told an audience at the London School of Economics that "over a century of state practice supports the conclusion that a state may respond with military force in self-defense to such attacks, at least where the harboring state is unwilling or unable to take action to quell the attacks."[474] Bellinger also would trace the origins of this interpretative account to the *Caroline* incident.[475] As Victor Kattan identifies, Bellinger's appeal to state practice evoked the language advanced in the 2002 National Security Strategy.[476] This too alluded to precedent, noting that "for centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack."[477]

British appeals to precedent—in advancement of the unwilling or unable test—offered greater specificity. Attorney General Wright noted that the United Kingdom's interpretative approach was common amongst several states who "have also confirmed their view that self-defense is available as a legal basis where the state from whose territory the actual or imminent armed attack emanates is unable or unwilling

471. *Id.* at 244.

472. *Id.*

473. *Id.*

474. John B. Bellinger III, Legal Advisor, U.S. Dep't of State, Speech at the London School of Economics: Legal Issues in the War on Terrorism (Oct. 31, 2006), https://2009-2017.state.gov/s/l/2006/98861.htm.

475. *Id.*

476. Kattan, *supra* note 35, at 116.

477. U.S. Dep't of State, *supra* note 467, at 15.

to prevent the attack. . ."[478] In support, the Attorney General referenced a *Lawfare* post by Elena Chachko and Ashley Deeks cataloging state articulations of the unwilling or unable test.[479] The published version of the Attorney General's speech includes an annex that links readers to the Article 51 letters of ten states that provided legal justifications favoring the use of force against ISIS targets in Syria.[480]

6. Conclusion

The decision to use force in Syria demanded an innovative doctrinal justification. The United States was required to distinguish from the rationale that supported coalition efforts in Iraq. The persuasive discourse accompanying operations in Syria advanced a preferred legal interpretation within a familiar justificatory framework. Despite acknowledging legal ambiguity, the unable or unwilling test was presented as a firm legal standard. This preferred interpretative position sought to both influence understandings of the *jus ad bellum* and legitimize a particular use of force. Collectively, this advocated approach derived persuasive value by positioning a legal interpretation as a necessary reformation within the war on terror, a reflection and formalization of state practice, a direct response to the rise of ISIS throughout the Levant, and a safeguard against an emergent threat that emanated from the eastern Mediterranean and into the Western world.

The effectiveness of a persuasive claim is influenced by the broader policy objective that the specific legal argument wishes to further. Ambassador Power's articulation of the unwilling or unable test is inseparable from efforts to justify and advance the legal framework regulating the war on terror. It must be considered alongside general, state-led efforts to expand the *jus ad bellum* to permit the use of force against non-state armed groups.[481] The multitudinous factors that influence evaluations of this broad policy inevitably shape how the specific legal articulation is received. Accordingly, persuasion's effectiveness is best considered incrementally.

The Article 51 letter in which the United States justified its decision to use force in Syria was not the first formal invocation of the unwilling or unable standard. While it has been periodically invoked since the

478. Wright Modern Law of Self-Defence, *supra* note 442.

479. *Id.*; *see also* Chachko & Deeks, *supra* note 407.

480. Wright Modern Law of Self-Defence, *supra* note 442.

481. *See generally* Kinga Tibori-Szabó, *The 'Unwilling or Unable' Test and the Law of Self-defence, in* FUNDAMENTAL RIGHTS IN INTERNATIONAL AND EUROPEAN LAW PUBLIC AND PRIVATE LAW PERSPECTIVES 73, 85 (Christophe Paulussen et al. eds., 2016).

1960s, the test, as noted, does not "appear as such in any legal instrument, including recent ones, nor was it employed in relevant existing case law, particularly by the ICJ."[482] Early articulations of unwilling or unable—by Israel in response to attacks by armed groups operating within Lebanon—were explicitly rejected by the Security Council and denounced throughout the international community.[483] From absolute rejection, articulations of an unwilling or unable standard received sequential support. As states identified the threat posed by transnational terrorist networks, legal contentions expanding restrictive readings of the *jus ad bellum* gained salience.[484]

Within the post-9/11 context, following explicit Security Council recognition of the lawful use of force against a non-state armed group, the unwilling or unable test became evermore prevalent.[485] Appeals to the standard are increasingly accepted.[486] They are not, however, universally endorsed.[487] A majority of states have rejected both a general articulation of the test and its specific application in justification of U.S.-led actions in Syria.[488] Amongst international lawyers, the test's formal legal status remains controversial.[489] Notwithstanding, the aforementioned persuasive appeals assuaged many coalition partners. Though the United States' persuasive efforts have not altered the *jus ad bellum*, the United Kingdom, Canada, Australia, and Turkey have each cited some variant of the test in justification of the use of force (and in furtherance of U.S. objectives) against ISIS in Syria.[490]

As with many persuasive contentions, the effectiveness of a particular claim is context dependent. When the United States offered the unwilling or unable test in justification of its military operations in Syria, it drew upon a cause many deemed just and a threat many believed visceral. A desired outcome, the perceived utility of a particular policy, and a sense of moral certitude all influence the reception, and thus

482. Corten, *supra* note 406, at 778-79; *see also* Tibori-Szabó, *supra* note 481, at 75-80.

483. *See* U.N. SCOR, 36th Sess., 2292nd mtg. at 54, U.N. Doc. S/PV.2292 (July 17, 1981); *see also* Tibori-Szabó, *supra* note 481, at 77-78.

484. *See* Tibori-Szabó, *supra* note 481, at 79.

485. *See* S.C. Res. 1368 (Sept. 12, 2001); *see also* S.C. Res. 1373 (Sept. 28, 2001).

486. *See* Deeks, *supra* note 405, at 491.

487. Chachko & Deeks, *supra* note 407.

488. Corten, *supra* note 406, at 798.

489. Chachko & Deeks, *supra* note 407; *see also* Tom Ruys, 'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice 2 (2010); Kevin Jon Heller, *Do Attacks on ISIS in Syria Justify the "Unwilling or Unable" Test?*, Opinio Juris (Dec. 13, 2014), http://opiniojuris.org/2014/12/13/attacks-isis-syria-justify-unwilling-unable-test/.

490. Chachko & Deeks, *supra* note 407.

effectiveness, of persuasive legal appeals. When, in 2002, Russia evoked the unwilling or unable standard to justify military action against Chechen groups positioned in the Pankisi Valley, the United States denounced the violation of Georgian sovereignty.[491] Rwanda's incursion into Eastern Congo was justified in response to the DRC's inability to disarm and disband the *Interahamwe*.[492] The international community's response was mixed. The Security Council recognized that the *Interahamwe*, perpetrators of the Rwandan genocide, were "a source of instability, a threat to civilian populations and an impediment to good neighborly relations."[493] Sovereignty was, however, deemed sacrosanct as the international community condemned Rwanda's unauthorized cross-border forays.[494]

When the U.S. invoked Article 51 and cited the unwilling or unable standard in justification of the use of force against ISIS in Syria, the international response remained mixed. It had, however, moved considerably from the near unanimous denunciations of the late 1960s, demonstrating greater acquiescence to both the test's utility and legal status. The effectiveness of these persuasive engagements, whether the unwilling or unable standard has achieved legal status, remains unsettled. However, as Olivier Corten notes, there is a sense amongst commentators that the test will be "increasingly accepted in practice and [in] supporting statements of governments and international organizations."[495] Determining whether and how U.S. contentions influence the test's formalization, requires a long-term perspective. It is nevertheless clear that the unwilling or unable standard has entered the legal, political, and justificatory lexicon that states employ to use force in response to the threat posed by non-state armed groups.

C. *The 2014 Gaza War*

Hamas first aimed mortars beyond the Gaza Strip in 2001. They detonated in Nahal Oz, a kibbutz near Sderot. On February 10, 2002, the first rockets were launched towards communities in Israel's south.[496]

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491. *See* Ruys, *supra* note 489, at 466.

492. *Id.* at 467.

493. *Id.; see also* U.N. SCOR, 5095th mtg., U.N. Doc. S/Prst/2004/45 (Dec. 7, 2004) [hereinafter UNSCOR 5095th Mtg].

494. Ruys, *supra* note 489, at 467-68; *see also* UNSCOR 5095th Mtg, *supra* note 493.

495. Corten, *supra* note 406, at 798 (quoting Elizabeth Wilmshurst & Michael Wood, *Self-Defence Against Nonstate Actors: Reflections on the "Bethlehem Principles"*, 107 AM. J. INT'L L. 390, 393 (2013)).

496. The IDF noted that this was the first time such rockets had been launched towards targets in Israel. *See* Press Release, Isr. Ministry of Foreign Affairs, Palestinians launch rockets at Israel,

These early attacks were limited. They did not garner the same level of attention as the suicide bombings that had become the hallmark of the second *Intifada*. Still, Israel's response was considerable—striking Hamas and PA targets throughout Gaza.[497] Israel framed its actions as a military necessity. Since the commencement of the second *Intifada*, Israel altered the defensive legal paradigm used to engage with non-state armed groups from a law enforcement model to a military framework.[498] Daniel Reisner, who oversaw this policy shift when head of the IDF's ILD, recalled:

> when we started to define the confrontation with the Palestinians as an armed confrontation, it was a dramatic switch, and we started to defend that position before the Supreme Court. In April 2001, I met with American envoy George Mitchell and explained that above a certain level, fighting terrorism is armed combat and not law enforcement. His committee [which examined the circumstances of the confrontation in the territories] rejected that approach. Its report called on the Israeli government to abandon the armed confrontation definition and revert to the concept of law enforcement. It took four months and four planes to change the opinion of the United States. . .[499]

The rockets continued, summarily preceded by strong military actions.[500] Following Israeli disengagement from Gaza and the 2006 Palestinian elections—in which Hamas won 74 of the Legislative Council's 132 seats—inter-communal violence peaked. Hamas militants feuded with Fatah's security forces. In June 2007, Hamas

(Feb. 10, 2002), https://www.mfa.gov.il/mfa/pressroom/2002/pages/palestinians%20launch%20rockets%20at%20israel%20-%2010-feb-200.aspx; *see also* JEAN-PIERRE FILIU, GAZA HISTORY 264 (John King trans.) (2014).

497. *See* JEAN-PIERRE FILIU, GAZA HISTORY 263-68 (John King trans.) (2014).

498. *See generally* Feldman & Blau, *supra* note 34; Amichai Cohen, *Legal Operational Advice in the Israeli Defense Forces: The International Law Department and the Changing Nature of International Humanitarian Law*, 26 CONN. J. INT'L L. 367, 374 (2001).

499. Feldman & Blau, *supra* note 34; *see also* DANIEL REISNER, INTERNATIONAL LAW AND MILITARY OPERATIONS IN PRACTICE (2009), JERUSALEM CENTER FOR PUBLIC AFFAIRS: ISRAELI SECURITY, REGIONAL DIPLOMACY AND INTERNATIONAL LAW (June 18, 2009), http://jcpa.org/article/international-law-and-military-operations-in-practice-iii/.

500. In response to the continued rocket attacks, the IDF engaged in several small-scale military operations during the mid-2000s. *See generally Razing Rafah: Mass Home Demolitions in the Gaza Strip*, HUM. RTS. WATCH (Oct. 17, 2004), https://www.hrw.org/report/2004/10/17/razing-rafah/mass-home-demolitions-gaza-strip; *see also* IDF Spokesperson, *Briefing: Gaza Division Commander, Brig. Gen. Shmuel Zakai* (May 23, 2004), http://www. imra.org.il/story.php3?id=20933.

assumed full control of the Gaza Strip.[501] Within months, Israel listed Gaza as a "hostile territory."[502] Sanctions against the Hamas-controlled territory were instituted and so began the Israeli-Egyptian blockade of Gaza that continues to this day.[503] A series of large-scale military operations followed, including Operation Cast Lead in 2008-09 and, with predictable regularity, Operation Pillar of Defense in 2012. Israel presented the ensuing uses of force in Gaza as direct responses to the cascade of rockets launched by Hamas.[504] A familiar pattern of actions and counteractions solidified what continues to resonate as Gazan rockets precede Israeli airstrikes which precede Gazan rockets in a ferocious carousel of violence and escalation buttressed by purported legal justifications.

Operation Protective Edge in 2014 was the third military offensive that Israel launched against Hamas. The 2014 Gaza war was initiated by a series of events that began with the abduction and murder of three Israeli yeshiva students, Eyal Yifrach, Gilad Shaar, and Naftali Fraenkel, and the immolation of Mohammad Abu-Khdeir, a sixteen-year old Palestinian from East Jerusalem.[505] Again, Israel framed its military operation as a defensive response to the increase in rocket attacks emanating from within Gaza.[506] The war lasted for fifty-one days. It was of greater duration and brought higher casualties than preceding escalations.[507] The international community reverted to many of the habitual

501. FILIU, *supra* note 496, at 302-303.

502. ISRAEL MINISTRY OF FOREIGN AFFAIRS, *Security Cabinet Declares Gaza Hostile Territory* (Sept. 19, 2007), http://www.mfa.gov.il/mfa/pressroom/2007/pages/security%20cabinet%20declares%20gaza%20hostile%20territor y%2019-sep-200.aspx.

503. *See* James Kraska, *Rule Selection in the Case of Israel's Naval Blockade of Gaza: Law of Naval Warfare or Law of the Sea?*, 13 Y. B. INT'L HUMAN. L. 367, 375-379 (2010).

504. For an account of contrasting narratives surrounding Pillar of Defence, *see* Robert Wright, *Who Started the Israel-Gaza Conflict*, THE ATLANTIC (Nov. 16, 2012), https://www.theatlantic.com/international/archive/2012/11/who-started-the-israel-gaza-conflict/265374/.

505. *See* Isabel Kershner, *Israeli Teenagers said to be kidnapped in West Bank*, N.Y. TIMES (June 13, 2014), http://www.nytimes.com/2014/06/14/world/middleeast/3-israeli-teenagers-said-to-be-kidnapped-in-west-bank.html ?_r=0; *see also* Peter Beaumont & Orlando Crowcroft, *Bodies of three missing Israeli teenagers found in West Bank*, THE GUARDIAN (June 30, 2014), http://www.theguardian.com/world/2014/jun/30/bodies-missing-israeli-teenagers-found-west-bank; Adiv Starman, *Six Jewish Extremists Arrested in Killing of Jerusalem Teen*, TIMES OF ISRAEL (Jun. 6, 2014), http://www.timesofisrael.com/suspects-arrested-in-killing-of-east-jerusalem-teen/.

506. *Behind the Headlines: Operation Protective Edge - Q&A*, ISRAEL MINISTRY OF FOREIGN AFFAIRS (Aug. 14, 2014), http://mfa.gov.il/MFA/ForeignPolicy/Issues/Pages/Operation-Protective-Edge-QA.aspx [hereinafter Israel MFA Behind the Headlines].

507. *See* U.N. Office for the Coordination of Humanitarian Affairs, *Fragmented Lives: Humanitarian Overview 2014* 1, 6 (Mar. 2015), https://www.ochaopt.org/sites/default/files/Annual_Humanitarian_Overview_2014_English_final.pdf.

postures assumed in response to violent outbreaks between Israel and Hamas. The right to self-defense received familiar avowals. Calls for restraint resonated. And, as the conflict continued, Israel would face mounting international criticism.[508] Israel presented what it asserted to be a paradigmatic appeal to self-defense.[509] It cited assurances by world leaders that had spoken of Israel's inherent right to protect itself from the threat of terrorism.[510] However, Israel acknowledged that much of the ensuing criticism that followed Operations Cast Lead and Protective Edge addressed the *jus in bello*. Pnina Sharvit Baruch, who headed the ILD during the 2008-09 war, later noted, "the more significant claims concern the manner in which the IDF used force in the operation and the application of the laws of warfare (that is, the area of jus in bello)."[511] An international legal discourse accompanied each conflict. Israel faced increasing accusations of legal wrongdoing. In reply, Israeli officials harnessed the language of international law. In an effort to persuade varied audiences of the military operations' legitimacy, Israeli officials presented detailed legal narratives. They engaged in ongoing efforts to, as Prime Minister Netanyahu declared, "delegitimize the delegitimization."[512]

1. The Identification of a Common Lifeworld

Israeli officials referenced a lifeworld that was both general and specific. Situated on the frontline of the war against terrorism, they described two relatable contexts. Each context correlated with a series of arguments that appealed respectively to the *jus ad bellum* and the *jus in bello*. The first told of the threat of terrorism. The second conveyed the challenges of combatting this threat. During and in the aftermath of the 2014 Gaza wars, Israel grounded its legal appeals within these contexts. The struggle against Hamas and the realities of asymmetrical

508. Members of the Security Council repeatedly called for the imposition of a ceasefire, demanded general compliance with IHL, and, while recognizing Israel's right to self-defence, held that many of its military actions were disproportionate and lead to unacceptable civilian casualties. *See* U.N. SCOR, 69th Year, 7231st mtg., U.N. Doc. SC/11502 (2014).

509. *See, e.g.* U.N. SCOR, 63rd Year, 6060 mtg., at 6, U.N. Doc. SC/6060.

510. Israel MFA Behind the Headlines, *supra* note 506; *see also* State of Isr., *The 2014 Gaza Conflict: Factual and Legal Aspects*, ISRAEL MINISTRY OF FOREIGN AFFAIRS (May 2015), https://mfa.gov.il/ProtectiveEdge/Documents/2014GazaConflictFullReport.pdf [hereinafter 2014 Gaza Conflict Report]

511. PNINA SHARVIT BARUCH, *supra* note 228, at 66.

512. Barak Ravid, *Delegitimization of Israel Must Be Delegitimized*, HAARETZ (Oct. 16, 2009), https://www.haaretz.com/1.5250761.

warfare were positioned as reminiscent of the global war against terrorism and as a particular challenge that Israel was forced to confront.

Protective Edge began on July 8, 2014. Israeli F-16s targeted 200 sites across Gaza. Hamas launched upwards of 150 rockets into Israel.[513] The operation's commencement was accompanied by a legal discourse. Initial appeals to Article 51 were supplemented. Officials conveyed a broader context. Within, Israelis were subject to the prolonged barrage of rocket and mortar fire. Gaza was aggressively consumed by Hamas, a designated terrorist organization that "violently seized control of the Gaza Strip and transformed it into a terror fortress."[514] When hostilities commenced, the Israeli Permanent Representative to the UN addressed the Security Council. Ambassador Prosor identified a lifeworld besieged by terror:

> there is a storm of rockets being fired by the Hamas terrorist organization in Gaza. Hamas is indiscriminately threatening the lives of 3.5 million innocent men, women and children in Israel from the south to the north – from Beersheba to Tel Aviv and Haifa. In the past three days, 442 rockets have been fired into Israel. That is one every 10 minutes. Fifteen seconds is how much time one has to run for one's life. Imagine having only 15 seconds to find a bomb shelter. Now imagine doing that with small children, elderly parents or an ailing friend.[515]

Terrorism's threat was not limited; it was presented as an everlasting and inescapable reality predating the current military operation. Gaza was described as raucous, as a place where public squares and hospitals took the names of terrorists, where children dressed as suicide bombers and chanted death to Israel.[516] Ambassador Prosor explained that a "generation of Israeli children [are] growing up under the shadow of that threat. Such an abnormal way of life has become the norm for many Israelis."[517] Operation Protective Edge was presented within this context. It was a purely defensive exercise, a struggle to alter the intolerable reality caused by the culminative effects of Hamas' terror.

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513. Karen Yourish & Josh Keller, *The Toll in Gaza and Israel, Day by Day*, N.Y. TIMES (Aug. 8, 2014), https://www.nytimes.com/interactive/2014/07/15/world/middleeast/toll-israel-gaza-conflict.html.

514. Israel MFA Behind the Headlines, *supra* note 506.

515. U.N. SCOR, 69th Year, 7214th mtg., at 6, U.N. Doc. S/PV/7214 (Oct. 7, 2014).

516. *Id.* at 8.

517. *Id.* at 6.

Efforts to control the international law-based narrative continued following the cessation of hostilities. The discourse coalesced around a lengthy report published by a U.N. Fact Finding Commission. Israeli and Palestinian officials were accused of significant legal violations.[518] In response, the Israeli Ministries of Foreign Affairs and Defense prepared a series of reports.[519] Reverting to a practice that began following Operation Cast Lead, Israeli officials presented a comprehensive "factual and legal account" of the war. Legal analysis and assurances of IHL conformity were posited upon a relatable context. Hamas and the dangers emanating from Gaza were manifestations of the global threat posed by terrorism. Since its inception, Hamas orchestrated countless attacks—suicide bombings, abductions, rockets, and cross-border raids. The report continued, noting that Hamas "had killed at least 1,265 Israelis, wounded thousands more, and terrorised millions."[520]

The lifeworld told of vulnerability. Though the incessant rocket attacks were specific to Israel, the report conveyed a relatable sense of susceptibility to what was framed as a common threat.[521] In detail, it described Israel's long history of subjection to terrorism. Pictures of children seeking shelter from rockets accentuated the report. The effects of the attacks were conveyed in a detailed chapter that described "life under the threat of terrorist rockets and cross-border tunnel attacks."[522] The report cited medical studies that "show[ed] that large percentages of Israeli citizens in range of Hamas fire suffer from long-term symptoms of post-traumatic stress disorder and other impairments to personal, social, and occupational functioning, including intense anxiety, flashbacks, feelings of powerlessness, and hypervigilance."[523]

Likened to ISIS and *al-Qa'ida*, Hamas sought "to impose an extreme version of Sharia law."[524] They were presented as an affront to liberal

518. The most significant of these concerned Israeli airstrikes that were alleged to have targeted residential areas within Gaza. Israel was accused of failing to distinguish between combatants and civilians during the conduct of its military operations. *See* Rep. of the Human Rights Council, *Human rights situation in Palestine and other occupied Arab territories: Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1*, at para.112, U.N. Doc. A/HRC/29/CRP.4 (Jun. 23, 2015) [hereinafter UN COI Report 2015].

519. 2014 Gaza Conflict Report, *supra* note 510.

520. *Id.* at 9.

521. *Id.* at 10-14.

522. *Id.* at 106-135.

523. *Id.* at 15.

524. *Id.* at 13.

values—the agents of gender-based oppression; an armed group who had banned displays of Christian symbols, called for the execution of members of the LGBT community, harassed journalists, and persecuted political opponents. Hamas was aligned with Syria, Iran, and *Hezbollah*. They were not confined to Gaza. Hamas had planned "attacks out of Turkey and Qatar" and viewed "Europe as a crucial arena for its *jihadist* movement."[525]

Necessity demanded a military response. Additional aspects of the lifeworld were identified as Israeli officials addressed specific claims of legal disregard. Required defensive actions were juxtaposed with the challenges of asymmetrical conflict. A shared experience—albeit one that was limited to states or militaries engaged in conflict against non-state armed groups—was recalled.[526] Israel described the environment in which it was required to confront Hamas. Identifiable challenges, long acknowledged by states engaged in such forms of warfare, were offered.[527] Hamas was described as having cultivated an arena of belligerency within which increased civilian casualties became tragic inevitabilities but not legal wrongs. Ambassador Prosor told the Security Council that, "Hamas exploits our concern for human life by hiding in Palestinian homes, schools and mosques and by using the basement of a hospital in Gaza as its headquarters. They are committing a double war crime, targeting Israeli civilians while hiding behind Palestinian civilians."[528] As the fighting continued, the Foreign Ministry attributed civilian deaths in Gaza to Hamas' legal disregard. They developed a narrative, drawing upon the shared experiences of states that confront non-state armed groups in urban centers. Hamas were accused of willfully placing their own population in danger by launching attacks from densely populated areas, by using human shields, and by transforming civilian sites into military targets.[529]

The post-war Israeli report documented this supplementary feature of the identified lifeworld. Hamas were adjudged to have aggravated their own citizens' suffering for political gain. Common operational

525. *Id.* at 13-14.

526. This recalls Harald Müller's contention of the lifeworld. Within this phase of communicative exchange actors construct narratives that draw upon common experiences. *Cited in* Risse, *supra* note 168, at 15.

527. *See generally* Eyal Benvenisti, *The Legal Battle to Define the Law on Transnational Asymmetric Warfare*, 20 DUKE J. COMP. & INT'L L. 339 (2010).

528. UNSC 7214th Meeting, *supra* note 515, at 7.

529. *See* ISRAEL MINISTRY OF FOREIGN AFFAIRS, *Fighting Hamas terrorism within the law* (Aug. 7, 2014), https://mfa.gov.il/MFA/ForeignPolicy/Issues/Pages/Fighting-Hamas-terrorism-within-the-law.aspx. [hereinafter Israel MFA Fighting Hamas Terrorism].

challenges, that resulted in heightened death tolls, property damage, and the optics of razed civilian sites, were presented as inevitabilities: "despite the extensive precautions taken by the IDF to avoid or minimise damage to civilian life and property, the strategy of conducting hostilities from densely-populated civilian areas significantly exacerbated damage."[530] The report recalled the challenges of urban warfare. It evidenced Hamas' strategy. A combat manual recovered from the *al-Qassam* Brigade was replicated to illustrate that Hamas militants embedded within civilian populations to, as the manual stated, "raise the hatred of our citizens towards the [IDF] and increase their support [for Hamas]."[531] Specific incidents were described. Satellite images showed Hamas conducting operations from protected sites. These familiar challenges of asymmetrical warfare were presented throughout the report.[532] In great detail, Israel purported, that the war took place within a context, manufactured by Hamas, that was "directly responsible for the scale of the civilian casualties and property damage."[533] Evaluations of the war's legitimacy were to be situated within this context. Notwithstanding the described challenges, Israeli officials claimed that the resulting military response was guided by international law.

2. Establishing the State as a General Norm-Acceptor

"No other country and no other army in history have gone to greater lengths to avoid casualties among the civilian population of their enemies," said Prime Minister Netanyahu.[534] Having traveled to New York to address the General Assembly following the conclusion of Operation Protective Edge, the Prime Minister told the gathered dignitaries, "this concern for Palestinian life was all the more remarkable given that Israeli civilians were being bombarded by rockets day after day, night after night. And as their families were being rocketed by Hamas, Israel's citizen army. . .upheld the highest moral values of any army in the world."[535]

Israel's efforts to assert legitimacy were premised upon claims that the IDF's actions throughout the Gaza war reflected Israel's

530. 2014 Gaza Conflict Report, *supra* note 510, at 97.

531. *Id.* at 74; *see also* Israel Defense Forces, *Captured Hamas Manuel Explains Benefit of Human Shields* (Aug. 4, 2014), https://www.idf.il/en/articles/hamas/captured-hamas-combat-manual-explains-benefits-of-human-shields/.

532. *See generally* 2014 Gaza Conflict Report, *supra* note 510.

533. *Id.* at 97.

534. *Transcript of Benjamin Netanyahu's Address to the 2014 UN General Assembly*, HAARETZ (Sept. 29, 2014), https://www.haaretz.com/transcript-netanyahu-s-speech-to-unga-1.5308958.

535. *Id.*

commitment to international law. Affronts to this supposed commitment were subject to investigation and presented as anomalies.[536] While Israeli officials acknowledged that Protective Edge's legitimacy would be contested, the subject of intense legal scrutiny, Israel's intricate legal arguments, interpretative contentions, and assertions of compliance were preceded by claims of general legal fidelity. During the war, the Foreign Ministry disseminated real-time accounts of the IDF's legal conduct. These asserted that Israel was bound by IHL and "committed to limiting itself to a lawful response."[537] Continuing, the Foreign Ministry described Israel's dedication to the principles of distinction, proportionality, humanity, and precaution. These legal tenets guide operational decisions. Israeli officials conveyed, that in accordance with these requirements, the IDF uses

> the most sophisticated weapons. . .in order to pinpoint and target only legitimate military objectives and minimize collateral damage to civilians; advance notice is given to the civilian population located in the vicinity of military targets; [and] attacks are called off in cases in which a sudden civilian movement [occurs] in the targeted areas. . .[538]

General claims of legal compliance featured throughout the conflict. Ambassador Prosor told the Security Council: "throughout Operation Protective Edge, Israel has been committed to upholding international law. Our army is a moral army like no other in the world. It does not aspire to harm any innocent person. We are operating only against terrorist targets and genuinely regret any civilian loss."[539] Defense Minister Moshe Ya'alon—in response to the publication of the Fact-Finding Commission report—accused the UN body of delegitimizing Israel. Ya'alon claimed that the IDF had "acted in accordance with international law in Operation Protective Edge, and did all it could to prevent harm to civilians."[540]

Public justifications became declarations of legal intention. These affirmations of Israel's commitment to both the *jus ad bellum* and the

536. *See generally* David Hughes, *Investigation as Legitimisation: The Development, Use and Misuse of Informal Complementarity*, 19 MELB. J. INT'L L. 84 (2018).

537. Israel MFA Fighting Hamas Terrorism, *supra* note 529.

538. *Id.*

539. U.N. SCOR, 69th Year, 7220 mtg., at 8, U.N. Doc. S/PV/7220 (2014).

540. Yaakov Lappin, *Ya'alon: Israel Won't Tolerate Attempts to Tarnish IDF Soldiers*, JERUSALEM POST (Jun. 22, 2015), https://www.jpost.com/Israel-News/Yaalon-Israel-wont-tolerate-attempts-to-tarnish-IDF-soldiers-406796.

jus in bello were conveyed through the Foreign and Defense Ministries report. Presentation of intricate legal arguments, direct responses to varied legal accusations, began by recounting Israel's general commitment to international law. The report signaled acceptance of the norms governing the use of force and the conduct of hostilities. The IDF, "maintains binding policies, procedures and directives that implement Israel's legal obligations. . .[and] ensures that its forces receive adequate training on these obligations."[541] Legal accountability, officials claimed, demanded that, "the IDF sought to achieve the goals set by the Government of Israel [during Operation Protective Edge] while adhering to the Law of Armed Conflict."[542] Efforts and policies, presented in accordance with Israel's legal commitments were described throughout the report.[543]

The use of force was designated as a last resort. The report conveyed what officials claimed were efforts to deescalate and employ diplomacy to avoid military confrontation.[544] Detailing the threat posed by Hamas, the report tells of a general commitment to the *jus ad bellum* process. Only when such efforts were exhausted, Israel asserted that it was left with "no choice but to launch a broader military operation in order to protect Israel's civilian population."[545] Upon reaching this conclusion, Israel announced its commitment to the rules regulating the conduct of warfare.

A detailed chapter of the Israeli report—professing legitimacy through case-specific accounts and describing the IDF's actualization of IHL—begins with a generalized avowal: "Israel conducted its military operations during the 2014 Gaza Conflict in accordance with the rules of the Law of Armed Conflict governing both international and non-international armed conflicts, including the rules relating to distinction, precautions and proportionality."[546] The report continues to describe Israel's commitment to the international conventions governing armed conflict and its compliance with "all rules of customary international law, including rules embodied in conventions to which [Israel] is not party."[547] The report attempts to persuade audiences,

541. 2014 Gaza Conflict Report, *supra* note 510, at 4.

542. *Id.*

543. This included descriptions of the IDF's employment of advance warning systems, targeting policies, and the use of unilaterally declared humanitarian pauses. *See id.* at 4-5.

544. *Id.* at 32.

545. *Id.*

546. *Id.* at 137.

547. The report cites the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land and Additional Protocols I and II to the Geneva Conventions as agreements to which

that Israel exhibits a general sense of legal fidelity, through further substantiation. It details "strict procedures and oversight for compliance with the Law of Armed Conflict."[548] The IDF's training procedures are explained over several pages.[549] A sub-section of the report recounts how "IDF military lawyers regularly provide advice on international law at all levels of command."[550] Operational regulations, directives, and orders—that "implement applicable rules of the Law of Armed Conflict"—are extensively cited.[551]

3. Demonstrating the Authority to Interpret

Post-war legal contentions were coupled with displays of competence and authoritativeness. The style and presentation of the Foreign and Defense Ministries report; accentuation of the contribution made by military lawyers in the planning, conduct, and justification of Protective Edge; and the role attributed to independent experts all supplemented Israel's interpretative avowals. These persuasive appeals recall Charlotte Peevers' suggestion that professional expertise is conveyed to influence the legal justifications offered upon the use of force.[552]

The legal contentions—both general and specific—made throughout the Foreign and Defense Ministries report are presented in a "quasi-academic" style. The report is published in English. It contains extensive footnoting and elaborate legal reasoning.[553] Particular legal arguments, interpretative positions, are supported in a familiar manner. Experts are cited. Affirming legal materials are displayed.[554] The report itself is presented as the authoritative account of the war. It is framed as an "unprecedented effort to present the factual and legal aspects concerning the 2014 Gaza Conflict."[555]

Israel was not a signatory but which were viewed as constituting customary international law. *See id.* at 138.

548. *Id.*

549. *Id.* at 138-140.

550. *Id.* at 140-141.

551. *Id.* at 141-147.

552. PEEVERS, *supra* note 31, at 14.

553. Shereshevsky, *supra* note 10, at 51.

554. For example, the Israeli claim that it does not exercise effective control over Gaza and thus cannot be considered as an occupying power is said to be "supported by leading international law scholars." In support, the report cites academic contributions by Adam Roberts, Eyal Benvenisti, and Yuval Shany. Additionally, it cites decisions by the Israeli High Court of Justice and the First Report of the Turkel Commission. *See* 2014 Gaza Conflict Report, *supra* note 510, at 17.

555. *Id.* at 8.

The report's thoroughness and the ability of its authors to draw upon intelligence briefings, access satellite images and interview witnesses, and to receive experiential accounts from decision-makers, purport to lend credence to the report's legal and factual contentions. Officials claim that the Israeli report is "far more comprehensive than reports issued by other organisations, including international organisations and non-governmental organisations, and is also unparalleled in its access to information from Israel, including information regarding the conduct of the terrorist organisations and the reasoning and details behind Israel's conduct."[556] The report's professional composition, access, and substantiation each demonstrate what Israeli officials present as authoritative accounts of legal legitimacy.

The role of legal expertise is accentuated. A chapter of the report—describing the IDF's internalization of international law—details the influence of lawyers. Military commanders receive IHL training from the IDF's legal experts. Legal advice is available when operations are planned, in real-time, and upon their conclusion.[557] The report prefaces its legal defense of Operation Protective Edge by informing that "the Military Advocate General [MAG] Corps deploys specially trained military lawyers at various levels of command in order to improve access to legal advice and enhance the implementation of international law during operations, as well as to assist with [the] 'lessons-learned' process following operations."[558] Legal trainings are described, suggesting interpretative expertise. The resulting legal advice, the report notes, receives elevated status:

> IDF military lawyers regularly provide advice on international law at all levels of command. These lawyers. . .are not subordinate to the commanders they advise, because the [MAG] has an independent status outside the military hierarchy in relation to all legal issues. . .By positioning military lawyers in this manner within the IDF, Israel ensures that they can provide frank and professional advice. Legal opinions of the MAG Corps are binding upon the IDF, including with regard to the legality of individual attacks.[559]

556. *Id.*
557. *Id.* at 138.
558. *Id.*
559. *Id.* at 140.

The ILD, upon the commencement of hostilities, is staffed by "dozens of additional Law of Armed Conflict experts."[560] Functioning independently from the military command, the report explains that the legal experts advise the General Staff Command. They are deployed to provide IHL advice at the regional and divisional levels by assessing the "legality of decisions regarding rules of engagement, targeting, use of weapons, detainee treatment, and humanitarian efforts."[561]

The endorsements of independent legal experts are accentuated. The capacity of Israel's post-conflict accountability mechanisms is described and corroborated with reference to recommendations offered by the Turkel Commission, the independent expert body that evaluated Israel's investigatory procedures.[562] Prominent experts, having endorsed Israel's legal capacity or proffered comparable legal interpretations, were listed with their credentials provided in accompaniment.[563] The IDF extended "unprecedented access" to Michael Schmitt and John Merriam to evaluate whether Israel's "systems and processes for engaging in attacks promote compliance with the [Law of Armed Conflict]."[564] Schmitt, a prominent IHL expert, and Merriam, a Major in the U.S. Judge Advocate General's Corps, were accompanied by IDF officials on a "staff ride" of the Gaza Strip. They were permitted to inspect an Israeli operations center that oversees combat missions to see a "Hamas infiltration tunnel" and to review "IDF doctrine and other targeting guidance. . . [They received] briefings by IDF operators and legal personnel who have participated in targeting."[565] Schmitt and Merriam published a law review article in the University of Pennsylvania's Journal of International Law conveying the IDF's targeting procedures and associated legal positions.[566]

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560. *Id.* at 141.

561. *Id.*

562. The report noted that the Commission was led by the former Supreme Court Justice, Jacob Turkel, and observed by international legal experts. It noted that, "although the Turkel Commission recommended additional best practices that Israel might implement, it found that Israel's system ranks favourably with those of other democratic countries, including Australia, Canada, Germany, the Netherlands, the United Kingdom and the United States. *See id.* at 218; *see also* Turkel Commission, *The Public Commission to Examine the Maritime Incident of 31 May 2010—Second Report: Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law* (Feb. 2013) https://www.gov.il/BlobFolder/generalpage/alternatefiles/he/turkel_eng_b1-474_0.pdf.

563. 2014 Gaza Conflict Report *supra* note 510, at 231.

564. *See* Michael N. Schmitt & John J. Merriam, *The Tyranny of Context: Israeli Targeting Practice in Legal Perspective*, 37 U. PA. J. INT'L L. 53 (2015).

565. *Id.* at 56.

566. *Id.* at 94-136.

This was presented as the "first look inside Israeli targeting."[567] Schmitt and Merriam continued evaluating Israel's contentions and concluded that, in many instances, "the IDF imposes policy restrictions that go above and beyond the requirements of the [law of armed conflict]."[568] Israel's interpretative contentions are deemed conventional. However, as with many states that forward persuasive appeals of legal legitimacy upon the use of force, these contentions often appeal to permissively construed legal standards.

4. Instilling the Standard of the Acceptable Legal Argument

Much of the international community denounced Israel's conduct during the 2014 Gaza war. Mounting civilian casualties and the damage and displacement incurred from constant bombardment caused significant segments of the international community to replace calls for restraint with accusations of legal violations.[569] The U.N. Fact Finding Commission report charged that Israel's targeting selection "did not take into account the requirement to avoid, or at the very least minimize, incidental loss of civilian life."[570] Illustrating the sentiment—that states rarely dismiss law's relevancy but instead make interpretative contentions—Israeli officials promoted permissive readings of IHL in response to accusations of legal violations.

Efforts to alter international law's application accompanied formal affirmations of the law's relevancy.[571] Prime Minister Netanyahu and Ehud Barak, when serving as Minister of Defense, endorsed restructuring the legal standards that regulate hostilities between states and nonstate armed groups. Barak noted that, while Israel cannot change international law, it could advantageously develop it.[572] Following Operation Protective Edge, contestations of legitimacy were displayed through

567. *Id.* at 138.

568. *Id.* at 137.

569. *See generally* U.N. SCOR, 60th Year, 7222nd mtg., U.N. Doc. S/PV/7222 (Jul. 22, 2014); *see also* Human Rights Council Res. 40/13, U.N. Doc. A/HRC/RES/29/25 (July 1, 2015) (adopted 41-1 with 5 abstaining).

570. Continuing the report claims that "the decision by the IDF to use mortars in this incident rather than availing themselves of more precise weapons, indicates that the IDF did not take all feasible precautions to choose means with a view to avoiding or minimizing civilian casualties." *See* U.N. COI Report 2015, *supra* note 518, ¶ 446.

571. *See e.g.*, Israel MFA Fighting Hamas Terrorism, *supra* note 529; *see also* 2014 Gaza Conflict Report, *supra* note 510, at 137-38.

572. *See* EYAL WEIZMAN, THE LEAST OF ALL POSSIBLE EVILS: HUMANITARIAN VIOLENCE FROM ARENDT TO GAZA 93 (2011). *See generally* Asa Kasher, *Operation Cast Lead and the Ethics of Just War*, AZUER (2009), http://azure.org.il/article.php?id=502; George E. Bisharat, *Violence's Law: Israel's Campaign to Transform International Legal Norms*, 42 J. PALEST. STUD. 68 (2013).

assertions that IDF conduct complied with broadly constructed legal standards. Favored interpretations of IHL principles were offered. Premised upon expansive conceptions of reasonableness, Israeli officials sought to instill and then satisfy these faciliatory legal standards.

Israel asserts that it "scrupulously observed the principle of distinction."[573] Grounded in reasonableness, adherence and legitimacy were professed. The report claimed that the IDF limited targeting to "persons where there was reasonable certainty that they were members of organised armed groups or civilians directly participating in hostilities, and only [targeted] structures where there was reasonable certainty that they qualified as military objectives."[574] Israel directly rejected the ICRC notion of continuous combat function and instead adopted a formal status-based approach to targeting.[575] Accentuating IHL's most permissive features, an attack, the report noted, against an intended military target but which unintentionally struck a civilian object did not render the action unlawful.[576] Israel professed that its precautionary measures were unprecedented in scale and rigor.[577] Roof knocking—a method devised by the IDF during Operation Cast Lead to provide final warning of an impending attack—was described as exceeding the requirements of international law. It was deemed highly effective and would later be employed by U.S. forces in Syria.[578] The practice—the legal status of which remains contentious (even legally dubious)—imposed an uncertain legal standard in substantiation of an Israeli narrative of compliance and legitimacy.[579]

Proportionality is presented as an operational mandate.[580] The Foreign and Defence Ministries report stresses that proportionality does not "forbid incidental harm to civilians and civilian property. Rather, under customary international law, this principle prohibits

573. 2014 Gaza Conflict Report, *supra* note 510, at 155.

574. *Id.*

575. *See* ICRC, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (May 2009), https://casebook.icrc.org/case-study/icrc-interpretive-guidance-notion-direct-participation-hostilities; *see also* Shereshevsky, *supra* note 14, at 249-50.

576. Shereshevsky, *supra* note 14, at 169.

577. These included the use of advanced warning systems, timing attacks to ensure minimal civilian risk, delaying planned attacks to allow evacuation of targeted areas, selection of munitions, and other methods. *See id.* at 170.

578. *Id.* at 180; *see also* Itamar Mann, *Roof Knocking and the Problem of Talking with Bombs*, JUST SECURITY (May 31, 2016), https://www.justsecurity.org/31319/roof-knocking-problem-talking-bombs/.

579. *See* Janina Dill, *Israel's Use of Law and Warning in Gaza*, OPINIO JURIS (July 30, 2014), http://opiniojuris.org/2014 /07/30/guest-post-israels-use-law-warnings-gaza/.

580. 2014 Gaza Conflict Report, *supra* note 510, at 181.

attacks that may be expected to cause incidental loss of civilian life, injury to civilians, or damage to civilian objects. . .that would be excessive in relation to the military advantage anticipated."[581] Determinations, assessments of whether an attack meets this standard, could not be made in hindsight. Israel claimed that proportionality analysis was adjudged against the standard of the "reasonable military commander."[582] The excessiveness of collateral damage and the anticipated military advantage are assessed in accordance with "the information reasonably available to [the military commander] at the time of the attack."[583] If the damage incurred becomes excessive, "the attack is nevertheless lawful as long as, when the attack was launched, the commander reasonably expected the collateral damage to be proportionate."[584]

The Israeli report alters the burden of the proportionality assessment. Contending that because "third parties lack information about the aims, intelligence, operational circumstances and means of an attack," they are ill-suited to discern "the military advantage anticipated by an individual commander. . ."[585] The acceptableness of legal arguments—grounded in unattainable information—is altered.[586] Plausibility replaces validity. Assessments of proportionality, corresponding assertions of legitimacy, become reliant upon particular valuations. This suggests that "only a military commander can properly make proportionality assessments."[587] An acceptable legal standard is imposed. Lieutenant Colonel Roni Katzir, in a paper presented to the IDF International Conference on the Law of Armed Conflict and published in a special issue of the Vanderbilt Journal of Transnational Law, states that reasonableness implies that:

> [T]he law accepts that assessing excessiveness is not a matter of reaching the one and only answer to a determination. It would be a mistake to think that in each and every case of a proportionality assessment there is a single point on a scale where

581. This language closely adheres to the First Additional Protocol to the Geneva Convention; *see also* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict, art. 57(2)(a)(iii), Jun 8, 1977, 1125 U.N.T. S. 3 [hereinafter First Additional Protocol].

582. 2014 Gaza Conflict Report, *supra* note 510, at 181.

583. *Id.* at 185.

584. *Id.* at 186.

585. *Id.*

586. Bisharat, *supra* note 572, at 76; *see also* LALEH KHALILI, TIME IN THE SHADOWS: CONFINEMENT IN COUNTERINSURGENCIES 64 (2013).

587. Roni Katzir, *Four Comments on the Application of Proportionality under the Law of Armed Conflict*, 51 VAND. J. TRANS. L. 857, 857 (2018).

> each and every reasonable military commander agrees that a proportionate attack becomes excessive.[588]

This evaluative standard—that of the reasonable military commander—is not found in the First Additional Protocol to the Geneva Conventions.[589] It is not deduced from international case law.[590] Instead, Israeli officials draw upon select international precedent to persuade audiences that IDF actions in Gaza should be evaluated through this permissive legal standard.

5. Drawing Upon Precedent and Commonality

Israeli officials appealed to precedent and commonality. Efforts to legitimize Operation Protective Edge drew upon analogous legal interpretations to persuade varied audiences. The standard of the reasonable military commander—the imposed means of assessing (and subsequently asserting) conformity with IHL—derives from the *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*.[591] Israel's initial efforts to establish this evaluative standard began before the 2008–09 Gaza war and drew heavily upon the ICTY Prosecutor's report.[592] Following Operation Cast Lead, Israeli officials extensively cited the report.[593] The Prosecutor's report, Israel contended, provided credence to the claim that "international law confirms the need to assess

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588. Katzir notes that the article is written in a personal capacity and "does not necessarily represent the official views of the Israel Defense Forces or the States of Israel." *See id.* at 859.

589. *See* First Additional Protocol, *supra* note 581, art. 57(2)(a)(iii).

590. *See* Ian Henderson & Kate Reece, *Proportionality under International Humanitarian Law: The Reasonable Military Commander Standard and Reverberating Effects*, 51 VAND. J. TRANS. L. 836, 837-839 (2018).

591. *Id.* at 841. The report contends that:

> "it is unlikely that military commanders with different doctrinal backgrounds and differing degrees of combat experience or national military histories would always agree in close cases. It is suggested that the determination of relative values must be that of the reasonable military commander. Although there will be room for argument in close cases, there will be many cases where reasonable military commanders will agree that the injury to noncombats or the damage to civilian objects was clearly disproportionate to the military advantage gained." *See* Final Report to the Prosecutor, *supra* note 226, para. 50.

592. References to the standard of the reasonable military commander appeared throughout a lineage of official Israeli communications—Foreign Affairs statements, High Court of Justice decisions, diplomatic notes, background papers, and legal briefs. *See* ICRC, Database of Customary IHL, *Israel: Practice Relating to Rule 14: Proportionality in Attack*, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cou_il_rule14.

593. The Operation in Gaza 2009, *supra* note 58, at 12, 35, 45-46, 49, 144.

proportionality from the standpoint of a reasonable military commander, possessed of such information as was available at the time of the targeting decision and considering the military advantage of the attack as a whole."[594]

Further attempts to impose an expansive notion of proportionality can again be traced to the discursive exchanges that followed the 2008–09 Gaza war. State practice was cited. The military manuals of various nations referenced. Statements by individuals who inhabited select epistemic communities were recalled. Israel recounted that Australia's Defence Force Manual holds that "collateral damage may be the result of military attacks. This fact is recognised by [the Law of Armed Conflict] and, accordingly, it is not unlawful to cause such injury or damage."[595] Canada's Law of Armed Conflict Manual and the U.S. Naval Handbook were referenced in substantiation.[596] General A.P.V. Rogers, the former Director of British Army Legal Services, was cited at length. Israeli officials noted a lecture, delivered at the Lauterpacht Centre for International Law, during which General Rogers stated that:

> civilians and civilian objects are subject to the general dangers of war in the sense that attacks on military personnel and military objectives may cause incidental damage. . .Members of the Armed Forces are not liable for such incidental damage, provided it is proportionate to the military gain expected of the attack.[597]

Writing after Operation Protective Edge in a publication by the Institute for National Security Services, Pnina Sharvit Baruch again recalled the reasonable military commander. With reference to the ICTY Prosecutor's report, Sharvit Baruch reiterated that "the laws of warfare state that the standard [to assess proportionality] is that of a reasonable military commander."[598] This preferred standard was referenced within a discussion regarding the challenges Israel would face when asserting legal legitimacy.[599]

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594. *Id.* at 45.

595. *Id.* at 44. These were referred to through the ICRC Customary IHL Study; *see also* CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME II: PRACTICE 299 (Jean-Marie Henckaerts & Louise Doswald-Beck, eds., 2005).

596. The Operation in Gaza 2009, *supra* note 58, at 44; *see also* Customary International Humanitarian Law, *supra* note 595, at 300, 305.

597. The Operation in Gaza 2009, *supra* note 58, at 44-45.

598. PNINA SHARVIT BARUCH, *supra* note 228, at 67.

599. *See id.* at 67-69.

6. Conclusion

The Foreign and Defence Ministries report, published following Operation Protective Edge, made extensive use of precedent. Legal contentions and factual assertions were supplemented with supportive materials. Israel's responses, the series of reports, the diplomatic interactions, public declarations, and targeted addresses, are demonstrative of the ways that states appeal to international law to legitimize and to persuade. Persuasive appeals will, however, become fragmented. Considerations of effectiveness must account for the constitutive parts of an overall legal strategy. They must evaluate the varied receptions that correspond to a particular legal assertion or argumentative objective.

Israel's legal narrative contained appeals to both the *jus ad bellum* and the *jus in bello*. Initial contentions—of defense against a persistent barrage of rockets and terror—received broad support. Partially, these familiar reactions were guided by ideology and partisanship. Reliable allies including the United States, the United Kingdom, Australia, France, and Canada indicated their support of Israel's military initiative.[600] Israel's staunchest critics denounced IDF aggression in Gaza.[601] Unexpected reactions featured alongside these predictable diplomatic postures. Egypt and Saudi Arabia condemned Hamas' actions, accusing the Gazan group of exacerbating Palestinian suffering.[602] Following several meetings, the Security Council issued a balanced statement that called for an immediate ceasefire. This neither endorsed or denounced Israel's actions.[603]

Certain states were influenced by Israel's legal appeals. Canadian officials accepted a near verbatim account of the *jus ad bellum* arguments that Israel presented through its public pronouncements.[604] Often,

600. *See World reacts to the conflict in Gaza*, AL JAZEERA (Jul. 10, 2014), https://www.aljazeera.com/news/middleeast/ 2014/07/world-reacts-conflict-gaza-201471073217736666.html>.

601. *Id.*

602. *See generally* Yoel Guzansky, *The Gaza Campaign: An Arena for Inter-Arab Confrontation* in THE LESSONS OF OPERATION PROTECTIVE EDGE 167 (Anat Kurz and Shlomo Brom, eds., 2014); *see also* Roi Kais & Elior Levy, *Hamas Demonstratively Bypasses Egypt*, YNET NEWS (July 19, 2014), http://www.ynet.co.il/articles/0,7340,L-4546333,00.html.

603. U.N. SCOR, 69th Year, 7725 mtg., U.N. Doc. S/Prst/2014/13 (July 28, 2014).

604. The Canadian Press, *Stephen Harper Accuses Hamas of Using Human Shields, Urges World Leaders to Side with Israel*, NATIONAL POST (July 13, 2014), https://nationalpost.com/news/world/israel-middle-east/stephen-harper-accuses-hamas-of-using-human-shields-urges-world-leaders-to-side-with-israel; *see also* Les Whittington, *John Baird Condemns Hamas for Rejecting Ceasefire*, TORONTO STAR (July 15, 2014), https://www.thestar.com/news/canada/2014/07/15/hamas_not_interested_in_peace_john_baird_says.html.

however, strategic and non-legal considerations affect the reception of a legal narrative. Egyptian and Saudi officials, offering unprecedented criticisms of Hamas' actions and aberrant silence in response to Israel's use of force, sought tactical benefit. Officials in Cairo and Riyadh viewed Hamas as an extension of the Muslim Brotherhood, a beneficiary of Turkey and Qatar, and as acting in the furtherance of Iranian interests.[605] Political calculations, ever-present, affected the reception of the Israeli narrative and guided the responses of key regional actors.[606]

Support for or indifference towards Operation Protective Edge was not, however, absolute. Considerations of the cause of war were replaced by deliberations regarding military conduct. The *jus in bello* arguments presented by Israel were less impactful. Acquiescence dwindled. As the campaign continued, regional leaders and key allies altered their endorsements.[607] King Abdullah claimed that Israeli actions in Gaza constituted war crimes. Jordan stated that mounting civilian casualties contradicted Israel's claim that the war was justified. The Egyptian Foreign Ministry denounced the inhumane blockade of Gaza.[608] U.S. officials would also adjust their often steadfast support. While reaffirming Israel's right to use force against Hamas attacks, U.S. officials became increasingly critical of particular Israeli actions.[609]

The war's optics—the scores of dead, the seemingly heedless destruction that marked Gaza's landscape—drove sentiment. Many critics remained unmoved by Israel's legal contentions. Others, however, accepted varying aspects of the Israeli narrative. Evaluations of persuasiveness must attempt to reconcile the fragmentation of both legal contentions and diplomatic receptions. Audiences will pick and choose which aspects of a broad legal appeal that they accept, that they understand as morally imperative, as strategically advantageous, as plausibly acceptable, or as materially insignificant. Assessments of persuasion's effectiveness, or whether legal argument influenced the perceived

605. Guzansky, *supra* note 602, at 168-69.

606. *See generally* David D. Kirkpatrick, *Arab Leaders, Viewing Hamas as Worse Than Israel, Stay Silent*, N.Y. TIMES (July 30, 2014), https://www.nytimes.com/2014/07/31/world/middleeast/fighting-political-islam-arab-states-find-themselves-allied-with-israel.html.

607. Ariel Ben Solomon, *Israel not Taking Jordan, Egypt, and the Saudi's Belated Criticism Too Seriously*, JERUSALEM POST (Aug. 13, 2014), https://www.jpost.com/Arab-Israeli-Conflict/Israel-not-taking-Jordan-Egypt-and-the-Saudis-belated-criticism-too-seriously-370963.

608. *Id.*; *see also* Gilead Sher & Liran Ofek, *Reviving a Regional Approach, in* THE LESSONS OF OPERATION PROTECTIVE EDGE 159, 161 (Anat Kurz & Shlomo Brom eds., 2014).

609. *See generally* Oded Eran, *The United States and Israel in Crossfire, in* THE LESSONS OF OPERATION PROTECTIVE EDGE 183 (Anat Kurz & Shlomo Brom eds., 2014).

legitimacy of a particular military operation often evades a singular response. It necessitates long-term perspective, acknowledgement of sought objectives, and identification of the conspicuous and inconspicuous ways that legal discourse can affect non-legal considerations as a state contends that a particular use of force was, in fact and in law, legitimate.

VI. Conclusion

Persuasion is a means to induce change.[610] Whether employed by a non-compliant state seeking legitimacy, an international lawyer furthering a client's interest, a norm entrepreneur that desires social adaptation, or a nongovernmental organization promoting a favored interpretation, persuasion exemplifies international law's function. The relationship between persuasion and international law is often framed around questions of compliance. How can a non-compliant state be persuaded to act in accordance with legal dictate? The importance of this question is clear. Successful efforts to ensure compliance enable international law's ability to reform, to protect, to limit the use of force, to promote human rights, and to contribute to a stable world order. The preceding pages attempt to move considerations of persuasion beyond its common affiliation with compliance. They do not dismiss the relevancy of these questions or the view, ubiquitous amongst lawyers, that persuasion is an essential element of the trade. I instead offer a broader conception of international law's purpose. Within, persuasion becomes a two-way discourse between the non-compliant entity and a wider audience. It is both a means to promote compliance and to define what compliance means.

Compliance serves as a marker of international law's success. Yet compliance is a limited measure of international law's relevancy.[611] Persuasion's effectiveness is not only assessed by adjudging legal fidelity. While evaluating effectiveness is a natural corollary to understanding the methods of legal change, ruminations must consider a host of legal and non-legal factors. Multitudinous considerations—beyond the merits of a legal contention and the skill with which an argument is delivered—affect the reception of an international legal claim. Such factors will include: (i) economic considerations; (ii) strategic and/or security alliances; (iii) the value or desirability of precedent; (iv) effects

610. Finnemore & Sikkink, *supra* note 176, at 914.

611. *See generally* Lisa L. Martin, *Against Compliance, in* Interdisciplinary Perspectives on International Law and International Relations: The State of the Art 591 (Jeffery L. Dunoff & Mark A. Pollack eds., 2013).

on regional stability; (v) self-interest; (vi) political personalities and leadership; (vii) domestic political considerations; (viii) the anticipated reactions of other states; (ix) values that the state wishes to project/believes it represents; (x) whether the proposed legal action affects states or non-state actors; (xi) implications for sovereignty; (xii) emotional appeal; (xiii) framing and context; (xiv) whether the appeal facilitates a "winning" approach; (xv) available information; (xvi) public perception; (xvii) media portrayal; (xviii) lobbying and private influence; (xix) history and the state's sense of its place within the global order; and (xx) power politics and whether the persuading entity can pressure the state to accept its legal contention.

It is difficult to discern the effectiveness of a legal contention. Yet questions regarding factors, both legal and non-legal, that influence the reception of a persuasive appeal are unavoidable. In certain instances where multiple considerations interject and a decision-making process lacks transparency, considering how an international legal argument motivates responses and contributes towards outcomes will be an arduous, perhaps improbable, task.[612] Such ambiguity is unavoidable even when a particular persuasive episode is articulated through a legal vernacular. The preceding case studies have only touched on the question of effectiveness. In concluding, each case study alludes to different factors that affect the reception of the respective persuasive appeals.

The legal arguments offered by Russian officials tell of the strategic significance of non-legal objectives and differentiated audiences. The demonstrable falsity and legal flaws in Russia's contentions resulted in their broad dismissal. However, evaluations of these appeals must consider more than their legal cogency. Assessments of persuasiveness must understand what the desired outcome of a legal appeal is and whether the associated appeal achieves or furthers this objective. The effectiveness of Russia's legal approach may be dismissed by the legal academy or international bodies but is also contingent on how it is received by BRIC nations, key allies such as China, and certain demographics within the near abroad.

Legal contentions, offered by U.S. and British officials in justification of military action in Syria, tell of the influence of context and the necessity of incrementalism. Direct legal considerations ask whether the unwilling or unable test has achieved legal status. Did U.S. and British arguments contribute towards the test's legal standing? Yet the extent

612. Rachel Brewster, *The Effectiveness of International Law and Stages of Governance, in* RESEARCH HANDBOOK ON THE POLITICS OF INTERNATIONAL LAW 55, 61 (Wayne Sandholtz & Christopher A. Whytock eds., 2017).

to which the described arguments are effective, the manner by which they are received and contribute to the sought objective is inseparable from the war on terror and the motives, sentiments, and policies that it induces. Equally, evaluations of the argument's effectiveness cannot only be understood in relation to a specific military action. While the immediate response of states in the Security Council and General Assembly are important indicators of an argument's effectiveness, full evaluation requires long-term perspective. It is necessary to understand how the particularities of one argumentative episode contribute to the gradual acceptance of a persuasive contention's political legitimacy as well as legal certainty.

Israel's attempts to justify its actions during the 2014 Gaza War tell of fragmentation. Assessments of persuasion's influence must consider how the component parts of a cohesive legal argument will pursue varying objectives, target disparate audiences, and be selectively received. The surety of an *ad bellum* contention will not necessarily equate to *in bello* acceptance. A state's argumentative strategy will pursue multiple objectives. Israel's efforts to legitimize its military actions in Gaza sought legal affirmation but also intended to maintain and develop diplomatic relations, promote particular legal norms, shape a media narrative, and avoid scrutiny by the International Criminal Court.[613]

Further questions need to be asked. The purpose here has been to identify and map persuasive techniques. I suggest that international law matters both in conformity and in violation. However, within deliberative environments understandings of persuasion and legal argument must look beyond conceptions of compliance and towards notions of effectiveness to further comprehend international law's influence and potential. Though this Article describes particular forms of legal argument, these core claims are generalizable beyond the contexts of the use of force and IHL. Questions regarding the successes and failures of persuasive appeals, though alluded to, require additional attention. This exceeds the current scope. A fuller understanding of international legal argument's ability to persuade should move to consider how persuasive efforts can be evaluated, what constitutes success, how to adjudge influence, and how to differentiate between the many factors that influence a legal appeal's reception. By asking such questions and observing such processes we can further our understanding of international law's broader function while better harnessing its strongest potentials and resisting its worst impulses.

613. *See generally* Hughes, *supra* note 536.