

THE CLOCK TOWER SECURITY SERIES



SCSS#9, 17 May 2022

‘China and Russia: Legal Gamesmanship and Rules-Based Order?’

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Introduction

China and Russia profess a “no limits” friendship in which both Beijing and Moscow aim to “strengthen strategic coordination” though ideological and geopolitical alignments are presented as “non-aligned, non-confrontational, and not targeted at third parties.” In reality, China and Russia seek to provide a strategic counterweight to U.S. “hegemony” within the current rules-based international order through the promotion of an alternative “reformed” non-liberal order. To that end, both reach out to states in the Global South to garner support for a new global order. China echoes both Moscow’s narratives around “color revolutions” and western destabilization, amplifying Russian propaganda regarding its invasion of Ukraine on Chinese social media and so mitigating against Russian isolation. China also encourages all developing nations to initiate their own paths to modernization, contrasting this to Western endeavors.

When we focus on legal norms promotion and suppression, to what extent are the efforts of each joint, shared, or at least compatible? Given China has committed itself to being a global power by 2049 and has its own compelling vision of the future, a developmental or modernization paradigm, while Russia appears mired in a protracted and debilitating war in Ukraine, we can expect to see differences. Can we account for such differences through unique historical, cultural, and ideological trajectories? What are the implications of such legal gamesmanship for the current rules-based order?

Russia’s “Special Operation” in Ukraine

There is evidence that Russia instrumentalizes the law in medium term campaigns, not least in its long running legal preparation of the battlefield prior to the invasions of Ukraine in 2014 and 2022. On 28 February 2022, Russia presented its “special military operation” in Ukraine as an act of self-defense, citing Article 51 on the UN Charter and referencing “genocide” perpetrated by Ukraine against the population of the Donbas. On 26 February, Ukraine submitted arguments to the International Court of Justice (ICJ) refuting allegations it had perpetrated genocide against the Luhansk and Donetsk so called “People’s Republics,” arguing that the Russian government planned acts of genocide in Ukraine. On 1 March, the European Court of Human Rights (ECHR) addressed Russian attacks against civilians and civilian objects in Ukraine. On 2 March a UN General Assembly resolution called for Russia to end its military operation in Ukraine and on the

same day the International Criminal Court (ICC) Prosecutor opened an investigation into the situation in Ukraine. By 10 March, Russian Foreign Minister Lavrov stated that Russia no longer would participate in the Council of Europe (CoE) and, on 16 March, the CoE confirmed this. In this period the OSCE sought evidence for war crimes and crimes against humanity. On 4 April, the ICC stated that it was trying to engage Russian war crimes investigations in Ukraine. On 14 April, Russia's Investigative Committee opened criminal cases against Ukrainian servicemen.

China's "Legal Gamesmanship"

"Legal Gamesmanship" refers to actions by a state or attributable to a state that aim to leverage or exploit the structural, normative, or instrumental functions of law to achieve national objectives in a competitive environment. These instruments can apply in contexts broader than war, including the full spectrum of peace, gray zone, and conflict, and broader than the military context, including the use of all instruments of national power. "Legal gamesmanship" is not a pejorative, most if not all state actors engage in legal gamesmanship from time to time. Not all legal gamesmanship constitutes violations of law; not all violations of law are legal gamesmanship.

For China, "forced" and "unequal treaties" in which more powerful Western actors imposed humiliating concessions on late imperial China provided a spur for the Republic of China (post-1911) to leverage international law to undo these treaties. After the founding of the People's Republic of China (PRC) in 1949, the PRC did not have a seat in the UN Security Council until 1971. As a result, international law (such as Law on the Sea, the Chicago Convention) had already been formulated either without the PRC's input as it was not "present at the creation" or was negotiated when the PRC was significantly less powerful in the international system than it is today. For these reasons, during the early years of the post-World World II international order, PRC referred to this international rule sets as "bourgeois international law." Today, however, a more powerful PRC does not intend on destroying the existing rules-based order, but rather seeks accommodations in those rules for its interests and games the rules for its advantage.

In the 21st century, we can identify three phases in China's approach to the role of international law. The first is the pre-2003 *Rhetoric Phase*, where the law is referenced as a "weapon" to be used to defend national interests. The second *Doctrine Phase* runs from 2003 to the present. In this phase the People's Liberation Army (PLA) applies the concept "legal warfare," as evidenced in the Political Works Regulation guidance given to the PLA – that is, instruction on what to focus its efforts on, as well as military textbooks on legal warfare and science of military strategy (where we can note a transition from "legal warfare" to "legal struggle"). The third *Dogma Phase* was initiated by Xi's "Thought on the Rule of Law" (2019) in which Xi exhorts the CCP and PLA to use law as a means in international "struggle" and international "competition." There are differences in tone/content for internal and external audiences, with the statements "take up legal weapons" in the "struggle against foreign powers" and "use the method of rule of law" directed at domestic audiences. The Political and Legal Committee of CCP's Central Committee held a "reading class" (a conference with senior members) in 2021 where the senior party members discussed the "competition of systems and rules" and the need to "make better use of legal tools" to protect China's interests.

Deeds can be understood as "revealed preference." When examining Chinese legal actions, we can identify three ways in which China leverages and exploits the function of international law:

1) its structural function (PLA proxy “maritime militia” uses in the South China Sea); 2) its normative function (norms govern actions and expectations); and 3) the instrumental function of law (both expanding its maritime zones and restricting activity therein, and creating legal pretexts for potential future actions, such as the 2005 Anti-Secession Law).

Conclusions: Normative splits?

Russia’s way of war in Ukraine has the potential to create friction with China, but the bar for Russian actions is set high. Russian “war crimes,” for example, have not caused a breach and China can always oppose any investigative process. Russia’s potential use of nuclear weapons would be undeniable and force China to abandon Putin as the costs of support would become too high. Were China to aid Russia through the transfer of substantial military *materiel*, it is likely China would justify this in terms of stabilizing the conflict and the act of a responsible actor. In addressing its relationship with Russia in the context of Russia’s war in Ukraine, China has a costs/benefits analysis to make, one that changes as the Ukrainian conflict evolves:

- China needs the axis with Russia to provide a strategic counterweight to the U.S. and its allies;
- Structural geo-economic realities matter – China trade with the political West in 2021 was 7 times more than with Russia - \$1.6 trillion vs \$243 bn.
- Euro-Atlantic divisions – China’s preference is for a transatlantic divorce and a non-aligned “trading” Europe seeking equidistance between the US and China, not greater Western unity;
- China does not want to be tied to a “loser” but would want to avoid the eventuality that the collapse of the Putin regime could lead to a post-Putin democratic break-through (“color revolution”) or a weak, nuclear, nationalist and unpredictable China-dependent and difficult to manage “second DPRK.”

For these reasons, we can posit that China may seek to create an off-ramp that takes a Ukrainian protracted conflict into one that is frozen. A frozen conflict better stress-tests Western unity. It can allow Russia to reconstitute its military strength while maintaining its strategic autonomy. A weaker Russia may compensate by taking greater risk in the international system, becoming a useful subordinated Chinese battering ram and spoiler to existing international order, while not opposing China’s alternative vision, or being strong enough to propose its own. Such a functionally differentiated division of labor is workable: Russia seeks to destroy, paralyze or spoil the old liberal international rules-based order (driven also by the belief that the hallmark of a Great Power is the ability to ignore “the rules”); China builds the new order in line with its global vision of future order by 2049 and its role within it.

From a Chinese perspective, the trick in Ukraine would be to provide legal support to an off-ramp for Putin in the shape of a frozen conflict codification, while ensuring such an off-ramp has no ramifications for potential future CCP and PLA actions in Taiwan. Such an outcome would underscore a general trend: China’s use of legal gamesmanship is more systematic, planned and long-term in its conception and execution; Russia’s legal gamesmanship by comparison appears more *ad hoc* and sporadic.

GCMC, 18 May 2022.

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