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Continuation of War By Other Means? Tracing the Concept of Lawfare

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This dissertation is especially dedicated to my mother,
Who has been my strongest supporter from day one.
To the rest of my family and friends (with special mention to those who live in Kypseli),
This would not have been possible without you. Forever grateful for your presence in my life.

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LIST OF ABBREVIATIONS

CJEU	Court of Justice of the European Union
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EU	European Union
GA	United Nations General Assembly
GATT	General Agreement on Tariffs and Trade
ICC	International Criminal Court
ICJ	International Court of Justice
ITLOS	International Tribunal for the Law of the Sea
MFN	Most Favored Nation
OTP	Office of the Prosecutor
PA	Palestinian Authority
p(p)	Page(s)
Para.	Paragraph
PCA	Permanent Court of Arbitration
Res.	United Nations General Assembly Resolution
SC	United Nations Security Council
UNHRC	United Nations Human Rights Council
US	United States
UK	United Kingdom
WTO	World Trade Organization

I. Introduction - Lawfare: law as a weapon of war

Military theorists have long accepted that successful wars are not solely depended on the battlefield; as per the words of Carl von Clauswitz, war is a "continuation of political intercourse, carried on with other means".[1] This is the exact basis for the concept of the term "lawfare", which was first popularized in Western literature by Major Charles J. Dunlap in 2001, who defined lawfare as "a method of warfare where law is used as a means of realizing a military objective".[2] However, the method of leveraging law to gain a military advantage pre-existed Major Dunlap's definition of the term. According to Ordie F. Kittrie, the use of law as a weapon of war arguably goes back to the times of Hugo Grotius, the "father of International Law",[3] who in the early 1600s employed the notion of *mare liberum* to help the Dutch gain control over the seafaring trade routes. He therefore became the first documented person to successfully employ law in a field of battle, a fact which is particularly striking if we consider that Grotius' success predated by almost four centuries some of the technological and social advances that made law become a more powerful and widespread tool in twenty-first-century conflicts.

Later on, Major Dunlap expanded on the notion of lawfare by offering a slightly different variation of the term, and thus defining lawfare as the strategy of using (or misusing) law as a substitute for traditional military means to accomplish a warfighting goal.[4] It's important to note that all definitions used by Dunlap are value-neutral; law is neither intrinsically good nor bad, but like other weapons, it can be wielded by either side in a conflict and used for either positive or negative purposes, depending on the intent of those employing it. As Dunlap explained in a 2011 article, lawfare "focuses mainly on situations where law can achieve effects similar to those sought by conventional warfare methods."[5] He likened lawfare to another type of weapon, metaphorically created by "turning law books into swords".[6]

Of course, the West does not have the monopoly of using law as a weapon, nor are Western theorists the only ones who have conceived the idea of lawfare. In fact, even before Dunlap's first essay where we first encounter the term lawfare in military parlance, two Chinese colonels published in 1999 a book entitled *Unrestricted Warfare,* which consistently establishes the use of law as a weapon, defining it as "legal warfare".[7] The book presented a list of "examples of non-military warfare", which featured actions like "establishing international laws that

[1] Von Clausewitz C., *On War,* Howard M. and Paret P. (eds.) (Princeton University Press 1989), pp. 72-78.
[2] Dunlap Jr. C., *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts* (Harvard Kennedy School, 2001).
[3] Kittrie F. O, *Lawfare: Law as a Weapon of War (*Oxford University Press 2016), p. 4.
[4] Dunlap Jr. C, 'Lawfare Today … and Tomorrow' in Raul A., Pedrozo P., Daria P. Wollschlaeger (eds.), *International Law and the Changing Character of War* (2011), pp. 315-325.
[5] Dunlap C.J. Jr., 'Does Lawfare Need an Apologia?' in 143 Case Western Reserve Journal of International Law I (2010), pp. 121-143.
[6] *Ibid*, p. 122.
[7] Liang Q., Xiangsui W., *Unrestricted Warfare,* (translation of book by CIA's Foreign Broadcast Information Service 1999), pp. 10-15.

primarily favour a particular country."[8] Indeed, China has proved to be a pioneer in the field of legal warfare, having employed a constrictive strategy to protect its interests in the South China Sea by denying access to warships and aircraft of the U.S. and Japan to the area.[9] According to US Navy judge Robert Kline, China's maritime lawfare strategy is "slowly proving effective.... If successful, China will have achieved through the use of lawfare what it traditionally would have had to achieve almost solely through military force."[10] Continuing in the same spirit, US lawyers David Rivkin and Lee Casey asserted that international law can function as a stabilizer in the international arena and urged the US to take its place at the forefront of the lawfare race.[11] The fact is that, although the US possess more advanced lethal weapons than its adversaries, its potential advantage in sophisticated legal tools could be even greater. The US is a highly law-oriented society, with a much larger proportion of its top minds entering the legal profession and using the law creatively to achieve their goals, compared to China.[12] However, China is currently engaging in lawfare with much greater diligence and systematic effort than the United States.

Powerful States are not the only ones that benefit from engaging in lawfare; although, States like the US and China have an abundance of resources and carry a lot of political influence in international institutions, smaller States have benefitted as well from using law as a weapon of war. The conventional view is that international law was established by powerful, predominantly Western countries to protect their own interests, and that it is enforced accordingly by international courts.[13] However, weaker States have frequently achieved significant victories against the world's most powerful nations in these courts. Smaller countries have also managed to bring critical issues, such as climate change and nuclear weapons, to the attention of international courts. In recent years, nations have filed high-profile cases with the International Court of Justice in efforts to prevent atrocities during armed conflicts, including cases such as *South Africa v. Israel*,[14] *Ukraine v. Russia*[15], and *The Gambia v. Myanmar*.[16] Lacking the ability to confront stronger States on the battlefield or in the political sphere, weaker States often turn to lawfare as a means of achieving success in the courtroom.

The most popular typology of lawfare is given to us by Professor Kittrie, who has identified two distinct types of lawfare: "instrumental lawfare" and "compliance-leverage disparity

[8] *Ibid*, Part II.
[9] Kraska J., Wilson B, 'China Wages Maritime "Lawfare"' in Foreign Policy (12 March 2009).
[10] Kline R., 'The Pen and the Sword: The People's Republic of China'sEffort to Redefine the Exclusive Economic Zone Through Maritime Lawfare and Military Enforcement' in Military Law Review (June 2013), pp. 122-133.
[11] Rivkin D. & Casey L, The Rocky Shoals of International Law' in Woolsey R.J. (ed.) *The National Interest on International Law and Order (*Routledge 2003) p. 13.
[12] *Supra* note 3, pp. 13-15.
[13] Goldenziel J., Blochberger S., Granholm T., Weapon Of The Weak: International Law And State Power In The International Court Of Justice (SSRN 6 March 2024), Available at: SSRN: https://ssrn.com/abstract=4745738 [last accessed: 30.09.2024], pp. 2-4.
[14] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip* (South Africa v. Israel), ICJ, Order 26 January 2024.
[15] *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide* (Ukraine v. Russian Federation), ICJ, 26 February 2022.
[16] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Gambia v Myanmar, Provisional measures, ICJ GL No 178, ICGJ 540 (ICJ 2020), 23 January 2020.

lawfare".[17] Instrumental lawfare refers to the instrumental use of legal means to achieve aims that would otherwise have to be sought out through traditional kinetic warfare, while the second type of lawfare refers to the influence of the law of armed conflict in the kinetic battlefield.[18] However, in this dissertation we will stray away from the traditional typology of lawfare and we will look into three different and distinct types of lawfare: first of all, we will examine the concept of "Instrumental lawfare" through the case of the Palestinian Authority (PA), a term which we will define as the "strategic use international legal institutions to promote a political agenda and achieve diplomatic goals". Secondly, we will delve into the concept of "Battlefield lawfare", which is the lawfare parties to an armed conflict engage in, by exploring various warfare tactics used by Russia and the Hamas. Lastly, and most expansively, we will look into the concept of "Litigation lawfare", to see how States use international courts and tribunals to achieve their strategic aims. To better understand the enormity and complexity of a litigation lawfare strategy, we will examine Ukraine's legal battle against Russia before various international courts. This categorization serves the purposes of this dissertation better, as it highlights the variety and intricacy law can bring to the arsenal of a State and helps us realize how law can leverage the "playing" field between States, no matter the power they wield in the global world.

Apart from inquiring into the different kinds of lawfare, this dissertation will also focus on how lawfare can prove to be a danger to the very foundation of international law. Law is law; as we mentioned above, it is inherently neither good nor bad. The problem arises when law is twisted in a way that goes against the principles of the legal order it was created for.[19] Law is a crucial tool of politics and the bedrock of all democratic systems. Democracy cannot function without the rule of law, just as politics cannot bring about change without legal mechanisms. The issue, therefore, is not law's involvement in democratic politics, but rather when law is misused as a weapon of war—when it is applied dishonestly or illegitimately, and when it is abused in ways that violate its fundamental principles and core democratic values. Legal theorist Carl Schmitt contended that when law becomes excessively politicized, it turns into a tool for enforcing the will of the sovereign or ruling authority.[20] As a consequence, the legal system is no longer seen as a platform for the fair adjudication of rights or justice but instead as an instrument of political control. In this dissertation, we will analyse the balance between using law as a way to avoid armed conflict and therefore, solving confrontations peacefully, and politicizing law to a degree where the legal system is maliciously capitalized.

This work will mostly focus on the case subjects of the conflict between Ukraine and Russia and the conflict between Palestine and Israel. These case studies are the ideal example to showcase the different ways law can be used in the context of a modern armed conflict. On the one hand, both of them are waged between parties who are not militarily equal and the weaker parties are thus forced to seek other resources to gain leverage in the international arena, and

[17] *Supra* note 3, 11.
[18] *Ibid.*
[19] Luis Marti J., 'Lawfare and democracy' in IDEES (November 2020), Available at: https://revistaidees.cat/en/lawfare-and-democracy-law-as-a-weapon-of-war/ [last accessed: 30.09.2024].
[20] Luban D., *Carl Schmitt and the Critique of Lawfare* (Georgetown University Law Center, 2011), p. 2.

on the other hand, both Ukraine and Palestine have developed an extensive and multilayered strategy in a variety of legal forums and they, consequently, demonstrate perfectly the dimensions lawfare can develop to.

II. The value of Lawfare

A. Instrumental Lawfare

"Internalization of the conflict is a legal matter"

- Mahmood Abas, Palestinian Authority President

As Clausewitz states many times in his book *On War,* proper strategy includes non-military instruments of power; indeed, that is the central point of the concept of lawfare. After all, diplomacy and negotiations are often far more successful when they do not include destructive violence. In this section, we will focus on the concept of instrumental lawfare, which, as we mentioned in the introduction, could be broadly defined as the strategic use of international legal institutions to promote a political agenda and achieve diplomatic goals. Diplomacy, law and war might be three distinct fields, but they have a common theme: politics. In the words of David Kennedy: "the modernization of the law in war has transformed it into a vocabulary for assessing military conduct in war that merges what once were autonomous legal distinctions, ethical principles and pragmatic military calculations – and placed them all *in the service of a broad political process* through which the legitimacy and illegitimacy of military conduct is assessed".[21] What we need to understand in order to analyze the concept of instrumental lawfare is that law, functioning as a mechanism for regulating human behavior, is inherently political.[22] While it is essential to always respect individual rights for them to be meaningful, law ultimately reflects political disagreements that have been transformed into actionable consensus.[23] Even the notion of the "rule of law," often contrasted with teleological reasoning, carries a significant instrumental aspect.[24] Ultimately, warfare, diplomacy and the law are merely instruments in the "toolkit" of statecraft, which is the art of governing a State and its people.

The best way to demonstrate how that manifests in real world terms is the lawfare strategy that Palestine has been waging against Israel, especially after the dawn of the 21st century. But, before delving deeper into the subject, it is important to note that when talking about instrumental lawfare that Palestine is waging, we are talking about the Palestinian Authority and not the Hamas, who are different governing bodies and are engaged in different kinds of

[21] Kennedy D., *Of War and Law,* (Princeton University Press, 2006), pp. 97-98.
[22] Dunlap Jr. C., 'Lawfare: A Decisive Element of 21st Century Conflicts?' in Joint Forces Quarterly 3 (2009), pp. 34-39.
[23] Kelsen H., *General Theory of Law and State* (Cambridge: Harvard University Press, 1949), p. 15.
[24] Kelsen H., *Pure Theory of Law* (Clark: The Lawbook Exchange, 2005), pp. 24- 30.

lawfare against Israel.[25] Hamas, being internationally recognized as a terrorist organization,[26] does not have access to the same resources that the PA has and is more adept in battlefield lawfare, as we will see later on.

The objectives of the PA's lawfare strategy against Israel were clearly outlined by PA President Mahmoud Abbas in a 2011 op-ed for the *New York Times*. Abbas explained that the Palestinian campaign to gain recognition as a state by the United Nations would facilitate the "internationalization of the conflict as a legal issue" and open the door to pursuing legal claims against Israel through the United Nations, human rights bodies, and the International Court of Justice.[27] Abbas also emphasized that if negotiations failed to yield their rights, Palestinians were entitled to seek recourse through international institutions.[28]

The PA's lawfare campaign can be broken down into three main components. The first focuses on gaining international recognition for Palestine as a sovereign State, independent of negotiations with Israel. This effort includes the push for full membership in the United Nations, which, as of mid-2015, had resulted in Palestine achieving non-member observer status. It also involves joining various international organizations and treaties to incrementally enhance its diplomatic standing. The second key element of the PA's lawfare initiative was its decision in January 2015 to join the International Criminal Court (ICC), a move seen as a powerful legal tool against Israel. Lastly, the third element revolves around the PA's use of international treaties and organizations, even those to which it is not a member, to further its legal claims against Israel.

i. Recognition of Palestine as a sovereign State

As of the time of this writing, 146 countries around the world recognize Palestine as a State, with Spain, Norway and Ireland joining the list, in the aftermath of the savage retaliation Israel waged against Palestine in response to the October 7th attacks.[29] Nonetheless, Palestine's lawfare campaign in gaining recognition as a State started many years ago, back in 2012.

Resolution 67/19[30], which accorded "to Palestine non-member observer State status in the United Nations"[31] was the milestone of the PA's lawfare campaign in achieving recognition of Palestine as a sovereign State. It was, after all, the only way forward for Palestine, if we consider that in order to gain full membership in the United Nations, a positive vote from the Security Council is required (where the United States holds veto power). In 2011 and 2012, the

[25] Israel and Hamas Conflict In Brief: Overview, U.S. Policy, and Options for Congress, Congressional Research Service (6 February 2024).
[26] *Ibid.*
[27] Abbas M, 'The Long Overdue Palestinian State' in NY Times (16 May 2011) Available at: https://www.nytimes.com/2011/05/17/opinion/17abbas.html [last accessed: 30.09.2024].
[28] *Ibid.*
[29] Schaer C., 'The recognition of a Palestinian state: Exploring the impact' in DW (22 May 2024) Available at: https://www.dw.com/en/the-recognition-of-a-palestinian-state-exploring-the-impact/a-68243644 [last accessed: 30.09.2024].
[30] Res. 67/19, U.N. Doc. A/RES/67/19 (4 December 2012).
[31] General Assembly Grants Palestine Non-Member Observer State Status at UN, U.N. NEWS CENTRE, 29 November 2012.

US government explicitly stated that it would exercise this veto to block the Security Council from granting Palestine Member State status.[32] While not legally binding, General Assembly Resolutions hold significant political power, seeing as they reflect the will of the Member States. In addition, the significance of the phrasing of the Resolution is to be pointed out; for example, the Resolution referred to a "contiguous … State of Palestine".[33] despite the fact that the West Bank and Gaza are not geographically contiguous, even within Israel's pre-1967 borders. It also affirmed "the right of the Palestinian people" to independence on the Palestinian territory occupied since 1967.[34] Indeed, the Resolution itself states that Palestine is a *State,* and at the very least 138 Member States of the UN were happy with this specific wording. But while the statehood of Palestine was neither implicitly confirmed or created, it did manage to grant Palestine the observer State status, which historically has been even accorded to entities for which it was not entirely settled at the time whether they were States or not.[35]

In light of the October 7th attacks, the political landscape for the recognition of Palestine as a State drastically changed. The most important political implication a recognition like that would have is that an Israeli occupation or annexation of Palestinian territory would become a much more serious legal problem. If Palestine is a State, it becomes equal with Israel in terms of international law and has many more options in defending itself in front of international courts. Every negotiation between them would be a negotiation between States, not a negotiation between the occupier and the occupied.[36] Such a change would then set the ground for permanent status talks and give Palestine a chance to settle border disputes and water and airspace rights in front of established international arbitrations mechanisms.

However, at this point, it is unlikely that the recognition of a Palestinian State would help bring the current conflict to an end. Despite the recent move towards the recognition made by the West, Israel is still adamant in not wanting a Palestinian State, as President Netanyahu has been saying for years. Many observers fear that should such a recognition happen, Hamas would take credit and demonstrate that only armed struggle produces results.[37] On the other hand, the Palestinian Authority, which controls the West Bank and is part of the official representation of the Palestinian people, cannot do much else rather than offer their people international recognition and give legitimacy to their cause. Considering the complexity of the inward

[32]Spillius A., Blomfield A., 'Barack Obama Tells Mahmoud Abbas US Will Veto Palestinian Statehood Bid' in The Telegraph UK (22 September 2011) Available at: https://www.telegraph.co.uk/news/worldnews/barackobama/8780859/Barack-Obama-tells-Mahmoud-Abbas-US-will-veto-Palestinian-statehood-bid.html [last accessed: 30.09.2024].
[33] *Supra* note 30.
[34] *Supra* note 28.
[35] Vidmar J., 'Does General Assembly Resolution 67/19 Have Any Implications for the Legal Status of Palestine?' in EJIL Talk (4 December 2012) Available at: https://www.ejiltalk.org/does-general-assembly-resolution-6719-have-any-implications-for-the-legal-status-of-palestine/ [last accessed at: 30.09.2024].
[36] Paul J., 'Opinion: How can the U.S. renew Mideast peace talks? Recognize Palestinian statehood' in Los Angeles Times (14 December 2023) Available at: https://www.latimes.com/opinion/story/2023-12-14/palestinian-statehood-oslo-accords-yitzhak-rabin-yasser-arafat-plo-negotiations-israel-gaza [last accessed: 30.09.2024].
[37] Segal J., 'A Trial Palestinian State Must Begin in Gaza' in Foreign Policy (February 2024) Available at: Establish a Palestinian State—in Gaza First, then the West Bank [last accessed: 30.09.2024].

politics of Palestine at the moment, such a recognition would help the Palestinian Authority gain considerable political capital.

ii. Joining the International Criminal Court

Palestine's accession to the ICC entered into force on April 1st, 2015.[38] This accession was viewed as a *casus belli*[39] for Israel, while other Western countries repeatedly warned Palestine against joining the Rome Statute.[40] Israel made significant concessions to the PA in exchange for delaying the PA's membership in the ICC. In July 2013, Israel agreed to release 104 Palestinians convicted of terrorist activities on the condition that the PA would refrain from joining international organizations and treaties, including the ICC, for nine months. Preventing the PA from joining the ICC was a top priority for Israel.[41] Professor Eugene Kontorovich, a leading expert on the subject, noted that "the International Criminal Court has become perhaps the most important weapon in the lawfare campaign against Israel."[42] He emphasized the profound impact the threat of an ICC investigation has on Israeli decision-making, influencing everything from tactical to strategic levels.[43]

The ICC is an especially dangerous court for Israel because it is a court without a country, and thus a court without a political motive than can be manipulated. There is no foreign or prime minister to prevent politicized prosecutions, such as someone who values maintaining a relationship with Israel or fears the consequences of losing trade or intelligence cooperation with the Israelis and their allies. Universal jurisdiction cases were scaled back when they began targeting not only Israel but also the United States. It is highly unlikely that the ICC would ever take action against the United States or any major power that has not consented to its jurisdiction. Furthermore, the ICC has faced pressure to take on a case involving a "Western" nation, as all of its previous cases have focused on African conflicts.[44] Since European countries generally avoid engaging in conflicts where serious war crimes might occur, Israel could even become an attractive candidate for the Court to demonstrate "diversity" in its case selection.

The PA's incentive in joining the ICC stemmed, in its greater part, from its wish to be seen by the Palestinian people as striking a powerful blow against the enemy and was allegedly heavily influenced by domestic Palestinian politics. The day before the application signing ceremony,

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[38] Press Release, ICJ, *The State of Palestine Accedes to the Rome Statute*, International Criminal Court (7 January 2015).
[39] Lynch C., 'Should Israel Fear ICC War Crimes Prosecutions if Palestine Becomes a State?' in Foreign Policy (12 September 2011) Available at: Should Israel fear ICC war crimes prosecutions if Palestine becomes a state? – Foreign Policy [last accessed: 30.09.2024].
[40] Hadid D., Simons H., 'Palestinians Join International Criminal Court, but Tread Cautiously at First' in NY Times (1 April 2015) Available at: https://www.nytimes.com/2015/04/02/world/middleeast/palestinians-join-international-criminal-court-but-tread-cautiously-at-first.html [last accessed: 30.09.2024].
[41] *Supra* note 33.
[42] Kontorovich E., 'Politicizing the International Criminal Court' in Jerusalem Center For Public Affairs (April 2014).
[43] *Idem.*
[44] Mude T., 'Demystifying the International Criminal Court (ICC) Target Africa Political Rhetoric' in 7 Open Journal of Political Science 1 (2017).

The New York Times reported that Mahmoud Abbas faced "intense domestic political pressure" to "restore credibility with an increasingly critical Palestinian public."[45] Membership to the ICC was also viewed as a kind of personal victory for Abbas, who leveraged it to increase his legitimacy and strengthen his corner for the then upcoming elections.[46] This makes sense considering that the ICC is a good diplomatic (and non-violent) move that would help bring justice to the Palestinian cause and draw international attention to the Israeli settlements in the West Bank. Even the Hamas concurred in the end with this move, despite the fact that, because of the battlefield tactics they used, were much more prone to war crimes prosecution than either PA or Israel. This was quite surprising; however, Hamas military leaders seemed to believe that firstly, they were not vulnerable to prosecution of the court and secondly, since the ICC does not have a "police force" and must rely on state parties to arrest suspects, it is relatively toothless. According to the words of a Hamas official: "There is nothing to fear, the Palestinian factions are leading legitimate resistance in keeping with all international laws and standards. We are in a state of self-defense."[47] All in all, both fractions seemed to have reached the conclusion that the ICC could advance their objectives, both domestically and internationally. For instance, the Palestinians viewed the potential conviction of an Israeli officer or official by the ICC as a way to achieve justice for their victims and deter future Israeli military or settlement actions that oppose their interests. Even the mere initiation of an ICC investigation into alleged Israeli war crimes was seen as a means to support the Palestinian narrative, tarnish Israel's image and discourage further Israeli actions unfavorable to the Palestinian cause.

After the October 7th events, ICC's Prosecutor Khan launched an arrest warrant both for top Hamas officials and for Benjamin Netanyahu and the Israeli Defense Minister, accusing them for war crimes against humanity.[48] This was an unprecedented legal action against a head of State who is supported by Western nations. Netanyahu responded to this by stating that "Mr. Khan is one of the greatest antisemites of all time", whilst adding that "in any case the State of Israel is not a party to the Court and does not recognize its authority."[49] The warrant puts Netanyahu in a category of accused leaders that also includes Russian President Vladmir Putin, and late Colonel Muammar Gaddafi of Libya. It also causes significant problems in travelling in European countries (which are the staunchest of allies of the Court). That being said, whether this move was entirely bad for Israel remains to be seen. The decision to seek an arrest warrant against Netanyahu may bolster his domestic standing, as Israelis, who have historically been critical of the ICC across the political spectrum, are likely to rally in support.[50] Netanyahu is

[45] Gordon M., Sengupta S., 'Resolution for Palestinian State Fails in United Nations Security Council' in N.Y. Times (30 December 2014) Available at: https://www.nytimes.com/2014/12/31/world/middleeast/resolution-for-palestinian-state-fails-in-security-council.html [last accessed: 30.09.2024].
[46] I*bid.*
[47] Al-Mughrabi N., 'Hamas Backs Palestinian Push for ICC War Crimes Probe' in Reuters (23 August 2014) Available at: https://www.reuters.com/article/world/hamas-backs-palestinian-push-for-icc-gaza-war-crimes-probe-idUSKBN0GN093/ [last accessed: 30.09.2024].
[48] Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for arrest warrants in the situation in the State of Palestine (20 May 2024).
[49] Bowen J., 'What the ICC arrest warrants mean for Israel and Hamas' in BBC (21 May 2024) Available at: https://www.bbc.com/news/articles/cw4490z75v3o [last accessed: 30.09.2024].
[50] Atlantic Council Experts, 'Experts react: The ICC prosecutor wants Netanyahu and Hamas leaders arrested for war crimes. What's next?' in Atlantic Council (20 May 2024) Available at: Experts react: The ICC prosecutor

expected to frame the warrant as persecution for his efforts to defend Israel, a message that will likely resonate with the broader Israeli public. This surge in domestic support could provide him with greater latitude in decision-making, including the possibility of intensifying military actions in Gaza, potentially prolonging the conflict.

iii. PA Strategy of Using International Organizations to Attack Israel

In addition to its efforts to gain recognition of Palestine as a fully sovereign state, the PA's lawfare strategy has included attempts to leverage the internal processes of international organizations and treaties, even those where it is not a member, to challenge Israel and further Palestinian claims against it. After conquering the milestone of Resolution 67/19, the PA carefully wielded the threat of applying to join different international organizations. The PA's cautious approach seems to have been influenced by several factors, including US threats to cut funding to UN agencies that admitted the PA, its reliance on US bilateral aid, and concerns about potential Israeli reactions. However, during this time, the PA secured significant concessions from Israel in return for temporarily refraining from joining international treaties and organizations.[51]

In order to gain a better understanding as to how the PA leveraged this threat to promote its campaign and how the Israeli allies reacted, we can look into PA's ascension to UNESCO, which admitted Palestine as a full member on 2011.[52] The UNESCO vote activated a US law that prohibits US funds from being used for the United Nations or any specialized agency that grants the Palestine Liberation Organization the same status as member states.[53] As a consequence, the US government, which had been contributing $80 million annually to UNESCO, accounting for 22 percent of the agency's funding, ceased its financial support to UNESCO.[54] The US, being the single largest contributor to the UN budget (paying 22 % per year)[55], has a significant impact in discouraging UN agencies from admitting Palestine as a Member. The threat of defunding has made several States hesitant in recognizing Palestine as a State in the context of the UN, but that does mean that the PA itself was particularly discouraged and it certainly did not stop it from wielding it in favor of their lawfare campaign. For example, on 2014 PA President Mahmoud Abbas signed applications for fifteen international treaties during a live television broadcast.[56] Abbas did this in response to Israel's failure to release a fourth group of Palestinian prisoners by the end of March 2014, as previously agreed.

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wants Netanyahu and Hamas leaders arrested for war crimes. What's next? - Atlantic Council [last accessed: 30.09.2024].

[51] *Supra* note 3, pp. 202-205.

[52] *General Conference Admits Palestine as UNESCO Member* (UNESCO MEDIA SERVICES, 31 October 2011).

[53] Pub. L. 101-246, title IV, § 414, 104 Stat. 70 (16 February 1990).

[54]Dewey C., 'Does It Matter That the U.S. Just Lost Its Vote in UNESCO?' in Washington Post (8 November 2013) Available at: https://www.washingtonpost.com/news/worldviews/wp/2013/11/08/does-it-matter-that-the-u-s-just-lost-its-vote-in-unesco/ [last accessed: 30.09.2024].

[55] *Supra* note 3, p. 215.

[56] Rudoren J., Gordon M., Landler M., Abbas Takes Defiant Step, and Mideast Talks Falter in N.Y. Times (1 April 2014) Available at: https://www.nytimes.com/2014/04/02/world/middleeast/jonathan-pollard.html [last accessed: 30.09.2024].

Another significant lawfare victory was the ICJ's Advisory Opinion titled "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory".[57] The Wall Advisory Opinion arose from Israel's 2002 decision to construct a "security fence" that would separate Israel from much of the West Bank, territory it had captured from Jordan during the 1967 war. While both Israel and the United States urged the Court to use its discretionary power and decline to issue an advisory opinion, the Court's answer (albeit non-binding), was a huge success for Palestine's lawfare campaign. The ICJ declared that Israeli settlements were illegal and that Israel was under an obligation to "dismantle immediately"[58] the security barrier, which both Israel and terrorist groups had described as highly effective in preventing suicide bombings. Although this legal effort did not physically eliminate the wall or settlements as kinetic warfare might, it did prompt the UN Secretary-General to use his influence to pressure Israel into dismantling them. Also quite interesting to note is that the ICJ Advisory Opinion laid the groundwork for at least one criminal prosecution in a national court. For example, it was used as the basis for a three-year criminal investigation in the Netherlands, where a Dutch company was investigated for allegedly committing war crimes by leasing construction equipment to the Israeli government for use in building the wall.[59]

iv. The value of Instrumental Lawfare

To prevail against adversaries with stronger military background, waging this type of lawfares seems to be the only way forward for Palestine. While not effective in a "boots to the ground" way, it has still achieved significant milestones in garnering the international recognition the cause of the Palestinians desperately needs. We also need to also stress out once more that this is a very different type of lawfare from the one that the Hamas are currently engaged in and will be analyzed in the next section. The PA follows on the footsteps of the "Chinese way of thinking", as mentioned in the Unrestricted Warfare, and has been quick to realize that direct confrontation of the enemy is not going to do any wonders for its strategy. Careful and strategic ascension to international treaties and peaceful means of negotiation serve Palestine's cause much better than any kind of weaponry they could have in their arena.

B. Battlefield exploitation lawfare

"All warfare is based on deception."

-Sun Tzu

[57] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion, 2004 I.C.J. 136 (July 9).
[58] *Idem,* para. 202.
[59] Keller A., 'Dutch probe company over Israeli wall, Settlement construction' in People's World (20 October 2020) Available at: https://www.peoplesworld.org/article/dutch-probe-company-over-israeli-wall-settlement-construction/ [last accessed: 30.09.2024].

An intrinsic part of the way warfare is conducted is the fact that in almost all cases one side will have a military advantage over the other, be it in power, means or organization[60]; there will be, in other words, an asymmetry in their warmaking effort. This is evident in all the major confrontations we have witnessed that involve the United States who almost always have the clear technological superiority over their opponent. This holds true especially when said opponent is a non-state actor, meaning that it has even more remote access to the arena of methods a State can employ. However, while this phenomenon is further increased in modern times when technology is more than ever applied to the field of battle (use of robots, drones etc.), it is by no means a new one, but is rather an essential part of any war.[61]

This asymmetrical warfare is exactly what prompts the "weaker" side to take advantage of the law of armed conflict in order to gain leverage over their more military powerful and law-sensitive opponent.[62] The weaker party, knowing that engaging in open confrontation with the opponent will only lead to defeat and annihilation of its troops, tends to compensate by employing unconventional methods that aim to undermine the efforts of their enemy and discredit them in the eyes of the international community.[63] This makes matters complicated in terms of compliance with the rules of international humanitarian law, as their efficiency is based on mutual respect and reciprocity. It is impossible to imagine a situation where one party benefits from the law of armed conflict without abiding by the specificities that bind its troops, while the other one is restricted by the law without benefiting from it. At this point it is important to stress that the asymmetry in means and the moral or political objectives of the parties are, in principle, irrelevant from a legal point of view. The law of armed conflict applies equally to all belligerents in any occasion that qualifies as an armed conflict, whether it is international or non-international.[64] Thus, the legality of the use of force they employ to achieve their strategic means does not render international humanitarian law moot, no matter the political or other consequences it may have.

To gain a better understanding on how States engage in battlefield lawfare techniques we will look into two distinct, but equally important cases: the use of human shields by the Hamas and the Russian military and the use of "little green men" by Russia. Both cases involve camouflaging military activities behind civilians in order to manipulate international law into legalizing their (profoundly illegal) actions.

i. The use of human shields by Hamas and the Russian military

One of the most common lawfare techniques in the field of battle is the use of human shields. The rationale behind the use of human shields is that the adversary will hesitate in attacking civilians that serve as a protective barrier in front of, or mingled with their own troops. In an

[60] Pfanner T., 'Asymmetrical Warfare from the Perspective of Humanitarian Law and Humanitarian Action' in International Review Red Cross 87 (857) (March 2005) p. 151.
[61] *Supra* note 1.
[62] *Supra* note 3, p. 286.
[63] *Supra* note 58, p. 153.
[64] *Preamble*, Geneva Conventions Additional Protocol I (1977).

operational context, deterrence is based on the assumption that the attacking side will refrain from a planned attack for three main reasons (or a combination thereof), that have been identified by Michael Schmitt: firstly, because of moral concerns of killing innocents, secondly due to negative publicity in the global media that would hinder their own war efforts and thirdly, on account of excessive civilian casualties as opposed to the anticipated military advantage.[65] Human shields form a "legal fortress" for the side which uses them, as they offer an indirect legal protection to their combatants and their strategic infrastructures, taking advantage of the fact that targeting civilians is prohibited in international humanitarian law.[66] This tactic is particularly useful nowadays, where the widespread use of technology and the increased regard for the value of human lives help parties to an armed conflict exploit the death of human shields more effectively to their advantage. However, killing human shields is not the exact same as killing civilians and the distinction becomes even more pronounced when faced with the dilemma of whether killing voluntary human shields is legal or not.

While major "warfighting" players, like the Unites States and Israel, are not parties to the Additional Protocols I and II, the use of human shields is prohibited under customary international law.[67] This prohibition is better encapsulated in the context of international armed conflicts, in the Third (Art.23) and in the Fourth Geneva Convention (Art. 28) and in the Additional Protocol I (Art. 51), which was also adopted by consensus, showing the importance of the rule in the international community. Many military manuals also contain the prohibition to use human shields, mostly in connection to the prohibition of attack against civilians.[68] As per non – international armed conflicts, Additional Protocol II does not explicitly mention the use of human shields, but such practice would be prohibited by the requirement that "the civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations".[69] After all, the principle of distinction between civilians and combatants, which is of customary nature, prohibits the use of civilians to shield military objectives, a rule which applies to all types of armed conflict.[70]

The problem of distinction is further exacerbated when faced with the issue of voluntary and involuntary human shields. The majority of the international community seem to be of the view that by voluntarily becoming human shields, the individuals lose their civil immunity[71] and thus, are rendered legitimate military targets. This is the position of Israel, the United States and also of prominent scholars[72], considering that civilians who deliberately leverage their civilian status to impede the enemy's operations are directly taking part in the hostilities. More

[65] Schmitt M., 'Human Shields in International Humanitarian Law' in Columbia Journal of Transnational Law 90 (872) (2009), pp. 293-297.
[66] Douillard R., 'Human Shields In Contemporary Conflicts' in Insitut de Rechereche Strategique de l' Ecole Militaire (12 March 2021).
[67] *Rule 97*, International Humanitarian Law Databases, International Committee of the Red Cross (ICRC) Study, (Cambridge University Press, 2005).
[68] Vestner T., 'Addressing the Use of Human Shields' in Geneva Centre for Security Policy (2019), pp. 8-10.
[69] *Article 13*, Additional Protocol II to the Geneva Conventions (1977).
[70] *Supra* note 65, Rules 23-27.
[71] *Supra* note 63, 300.
[72] Dinstein Y, T*he Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge University Press, 2004), p. 292.

specifically, the Israeli Supreme Court thus introduced in its jurisprudence the notion of "free will", which weakens the legal protections granted to supposedly voluntary human shields.[73] On the other hand, the ICRC and many respected scholars believe they do not sacrifice their full protection as civilians through their actions.[74] The differentiation between involuntary and voluntary shields is logical, as voluntary shields willingly forfeit their International Humanitarian Law protections, whereas involuntary shields are subjected to victimization. When voluntary shields can effectively (cause the attacker to pause) or legally (render the attack disproportionate unless they forfeit civilian protections), it becomes apparent that they are actively "engaged" in the hostilities.

Human shields can also be used by parties to a conflict to protect their moving troops or to hold them hostage so as to inspire fear of reprisals to the enemy side. In light of the recent events in Ukraine, Russia has been accused of violating international humanitarian law by employing the above tactics. For instance, a Ukrainian Defence Ministry spokesman has charged, "The enemies have been using Ukrainian children as a living shield when moving their convoys, their vehicles, according to reports by local civilians…. Occupiers use those children as hostages as a guarantee that local civilians will not provide the enemy's coordinates to Ukrainian defenders."[75] In one incident, busloads of children reportedly were placed in front of Russian tanks. As expected, Russia has made similar assertions. When the current conflict began in February, President Putin instructed his armed forces not to "allow neo-Nazis and [Ukrainian right-wing radical nationalists] to use your children, wives, and elders as human shields."[76] Later, the head of Russia's National Defence Control Centre claimed that "militants of the territorial defence battalions continue to hold more than 4.5 million civilians hostage as a human shield."[77] On March 7, Russia's Permanent Representative to the OSCE stated that the Ukrainian government was not taking effective steps to evacuate people and was failing to control nationalists who continued to use the population as human shields.[78] He added that curfews had been imposed in Ukrainian cities, with bridges used by civilians destroyed, roads mined, and civilians threatened with physical harm.

All in all, the use of human shields to "trick" international law standards is a gross perversion of the legal norms that seek to mitigate the horrors of war. Hamas are essentially turning the

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[73] Israelian Supreme Court, *Public Committee against Torture in Israel*, Judgment (11 December 2005).

[74] Melzer N., 'Interpretive Guidance On The Notion Of Direct Participation In Hostilities Under International Humanitarian Law' in ICRC (2009), pp. 55-58.

[75] Schmitt M., 'Ukraine Symposium – Weaponizing Civilians: Human Shields in Ukraine in 'Lieber Institute West Point' (11 April 2022) Available at: https://lieber.westpoint.edu/weaponizing-civilians-human-shields-ukraine/ [last accessed: 30.09.2024].

[76] Gordon N., Perugini N., 'Why We Need To Challenge Russia's Human Shields Narrative' in AlJazeera (3 April 2022) Available at: https://www.aljazeera.com/opinions/2022/4/3/why-we-need-to-challenge-russias-human-shields-narrative [last accessed: 30.09.2024].

[77] Business Standard, 'Russia says Ukraine holding more than 4.5 mn civilians as human shields' (8 March 2022) Available at: https://www.business-standard.com/article/international/russia-says-ukraine-holding-more-than-4-5-mn-civilians-as-human-shields-122030801422_1.html [last accessed: 30.09.2024].

[78] Lukashevich A., Statement by Alexander Lukashevich on the gross and continuous violations of humanitarian law by Ukraine and the Western community's support for these, Permanent Representative Of The Russian Federation At The 1361st (Special) Meeting Of The OSCE Permanent Council (7 March 2022).

law that protects civilians to a weapon against them. It represents a deliberate strategy to exploit the humanitarian impulses of an adversary, using the law itself as a tool of warfare. This tactic not only violates the letter and spirit of International Humanitarian Law but also risks eroding the credibility and effectiveness of the international legal order in regulating armed conflict.

ii. Russia's "little green men"

International law provides for the protection of civilians by establishing rules that help the combatants distinguish each other through uniforms or other military insignia. This rule, first encountered in the Hague Regulations of 1907[79], was also elaborated in Article 44 of the Additional Protocol I, which called for belligerents to differentiate themselves from the civilian population when engaged in military actions. That being said, there is no obligation dictated by international humanitarian law to display national insignia on military uniforms or equipment. While it has become common practice to use coloured or subdued patches indicating a soldier's country of origin, this practice is legally a matter of the home country's internal regulations, not an international legal requirement.[80] Military forces are prohibited from committing acts of perfidy, such as disguising themselves as civilians, but the absence of national flags is a separate issue.

This is the exact rule that Russia sought to manipulate in its favour during its 2014 invasion of Crimea. Following Ukraine's parliament vote on February 23, 2014, to remove pro-Russian President Viktor Yanukovych, protests erupted. Just days later, on February 27, unidentified soldiers, later dubbed "little green men" entered Ukraine. These soldiers wore Russian military-style uniforms but lacked the national insignia. They seized control of the Crimean parliament, hoisted the Russian flag, occupied government buildings, and took over the peninsula in a nearly bloodless coup.[81] The occupation soon spread to the Donbas, leading to violent conflict. Russia denied that these forces were their own national ones, instead claiming they were local self-defence units. It was not until April 7th 2014, that President Putin admitted they were Russian Special Forces, although he continued to insist that only local forces were fighting in the Donbas. This use of lawfare allowed Russia to avoid escalation that might have occurred if conventional forces had been used, as this would likely have provoked a direct military response from Ukraine and possibly international intervention. By employing this tactic, Russia placed Ukraine in a difficult position—had Ukraine attacked the "little green men" Russia could have denied involvement and accused Ukraine of targeting civilians. The presence of these forces blurred the distinction between international and non-international armed conflict, complicating the legality of military actions by Ukraine or other international actors.[82]

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[79] *Article 1 of the Hague Regulations,* the Annex to the Hague Convention (IV) Respecting the Laws and Customs of War on Land (1907).
[80] Wentzell D. T., 'Russia's Green Men: The Strategic Storytellers of Hybrid Warfare' in Canadian Military Journal 22 (1) (2021), p. 45.
[81] *Ibid*, pp. 48-50.
[82] Goldenziel J., 'An Alternative to Zombieing: Lawfare Between Russia And Ukraine And The Future Of International law' in 23 Cornell Law Review (January 2023), p. 4.

From a strategic point of view, the presence of national insignia on an enemy's uniforms is largely irrelevant, meaning that upon recognizing a threat, the Ukrainian forces were not obliged to identify it further. The scenario could have played out in many ways; had they viewed them solely as a domestic threat, they would have been restricted by domestic laws that govern the use of force against their own citizens, while had they been identified as a foreign interference, Ukraine would have to abide by the relevant provisions of the law of armed conflict and would only have been obliged, as we mentioned above, to distinguish between combatants and non-combatants. In any case, the use of force was guaranteed.

The reason Russia sought to make us of this camouflage was not merely to confuse the Ukrainian forces, but rather to manipulate the international community's view on the current conflict. The objective wasn't to be fully convincing; it was to create confusion, foster disunity, and buy time. The aim was to obscure Russia's involvement just long enough to establish "facts on the ground," making it too costly in terms of lives and resources for anyone to reverse what Russia had gained.[83] It also arguably gave the international community a convenient reason to avoid committing to a costly intervention. To understand this better, it is important to recognize that Russia's claims about the green men addressed both what they were (positive assertions) and what they were not (negative assertions). Russian authorities asserted that the green men were not Russian soldiers, a predictable claim aimed at maintaining plausible deniability for the military operation and distancing Russia from actions within a sovereign state.[84] Additionally, as we mentioned above, they made the positive assertion that the Green Men were Ukrainian self-defence forces. This claim, though implausible given the known facts, reframed the conflict as a domestic issue rather than an international one. In a domestic conflict, Ukraine could theoretically invite foreign assistance, but there would be less urgency to mobilize the international community. However, if it were an international conflict (Russian interference in Ukraine's internal affairs), it would constitute a violation of the UN Charter's prohibition on the use of force against a State's territorial integrity and could prompt a call to action for UN Member States.

iii. The value of battlefield lawfare

After observing how organizations such as the Hamas and powerful States such as Russia manipulate international law to gain tactical advantage in the battlefield, we can see how a new generation of warfare is steadily developing. Wars are no longer isolated; on the contrary, the surge of technology and the information (and misinformation) that is readily accessible to everyone have booked the word a first-seat ticket to witnessing war crimes and mass atrocities. As the philosophy of *Unrestricted Warfare* dictates, this advance in weapons and technology combined with globalization and the diffusion of State power has created the conditions for a new form of warfare.[85] Hamas and Russia, while being completely different in terms of military power, have both reached the conclusion that directly confronting the enemy is no longer the prime target; rather, the focus of the conflict needs to move away from conventional warfare.

[83] *Supra* note 78, p. 46.
[84] Poznansky M., 'Revisiting plausible deniability' in Journal of Strategic Studies 45(4) (2020) pp. 7-9.
[85] Cheng D., 'Unrestricted Warfare: Review Essay II' in *Small Wars & Insurgencies* (Spring, 2000) p. 123.

In the context of human shields, this weaponization takes the form of coercing adversaries into either refraining from attacks—thus preserving the military assets or positions of the party using human shields—or proceeding with attacks and risking widespread condemnation for the resulting civilian casualties. This dilemma forces adversaries into a lose-lose situation, either compromising their military objectives or their moral and legal standing. Hamas, being undoubtedly the weaker military force, has achieved to gather international sympathy by showcasing the thousands of civilian casualties Palestine has suffered by Israel. On the other hand, the use of hiding military insignia helped reinforce Russia's strategic narrative, while it also helped Russia to avoid overt military actions to support the alleged self-determination movement and to safeguard its interests, ultimately annexing Crimea into the Russian Federation. Russia's "little green men" played a key role as strategic storytellers, contributing to the narrative Russia aimed to project to the international community.

C. Litigation Lawfare

"I would far prefer to have motions and discovery requests fired at me than incoming mortar or rocket-propelled grenade fire."

-Philip Carter, U.S. Army Officer

Litigation lawfare is the most prominent and encompassing category of lawfare and refers broadly to the usage of court means to achieve objectives that might otherwise have been gained through military or political means. One cannot doubt that lawsuits are far less costly (and bloody) than traditional warfare and are, in addition, more amenable to the general public (a fact that should always be considered by States who need to have the political support of the people in order to be successful in their war efforts). That is understandable if we consider the wars that have ravaged the world in the 20th century and continue to do so even now, with the most prominent example being of course the Hamas – Israel conflict, that has cost, as of now, the lives of nearly half a million innocents.[86]

A great advantage of litigation lawfare is that it has the additional value of bringing smaller States to the forefront of the international community as well. It is unthinkable for a small State to engage in battle against adversaries like China, the US or Russia, who greatly outnumber most States in numbers, resources and military knowledge. However, that is not the case between litigants. All States are equal in front of international courts[87], which makes it easier for States that are at a military disadvantage against more powerful rivals to challenge those rivals and achieve with legal means what war cannot do. Indeed, international law's most

[86] United Nations Office for the Coordinated Humanitarian Affairs, Report on the Occupied Palestinian Territory (9 August 2024).
[87] *Article 2(1),* UN Charter.

famous case, *Nicaragua v USA*, resulted from a smaller State protesting the equipping of armed opposition groups by a global hegemon.[88]

Recourse to courts is an especially attractive option in cases concerning use of force, where the military weaker claimants usually have higher success rates. Even if compliance by the more powerful State is unlikely, there is a clear political advantage to be gained for the claimant State to establish that it was the victim of unlawful use of force.[89] Moreover, such a ruling can bolster domestic support for the government's stance in continuing the conflict and may also generate internal pressure within the respondent State to cease its use of force. On the international stage, the victim State can strengthen its position within the UN, which plays a central role in maintaining international peace and security. Additionally, being recognized as the aggrieved party may lead to political, and potentially financial and military, support from other States. That was the case with *Nicaragua* and after that judgement, developing states have also turned to the ICJ against other developing States in cases on the use of force where they are confident of the strength of their position, as in the landmark *DRC v. Uganda*[90] and *Pakistan v. India*[91] cases.

Taking all the above into account, it is easy to discern why small States choose to pursue a litigation strategy against more powerful States with which they are usually involved in an armed conflict. The power of litigation lies in its capacity to essentially impose a "legitimacy penalty" on the respondent and to garner support for the applicant. After all, international law reflects the values of the international community, and adherence to it is seen as a prerequisite for being a member of the global community of States. As we mentioned in the previous paragraph, through legal arguments, a small State can portray its grievance as an attack on these shared values, rallying support for its cause while simultaneously challenging the legitimacy of both the contested act and the respondent State.[92] And considering that States have repeated and complex relationships with each other over periods of time, reputation is very important and could change a State's willingness for action. Thus, States that often violate international law could find themselves in an uncomfortable position in the international community, as their loss of reputation makes it more difficult for them to enter into future agreements.[93] In addition, despite the ongoing debate about the declining legitimacy of international courts, there is an increasing trend of more litigation and a rise in parallel proceedings within these courts. Over the past decade, we have observed that States are inclined to engage in "forum shopping" and often employ complex litigation strategies by initiating parallel proceedings in multiple

[88] *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. USA) (Merits) [1986] ICJ Rep 14.
[89] Gray C., 'Why states resort to litigation in cases concerning the use of force' in Klein N (ed.) *Litigating International Law Disputes: Weighing the Options* (Cambridge University Press 2014), p. 314.
[90] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, [2005] ICJ Rep. 168, [165].
[91] *Aerial Incident of 10 August 1999 (Pakistan* v. *India) (Jurisdiction)*, [2000] ICJ Rep. 12.
[92] Guilfoyle D., 'Litigation As Statecraft: Small States And The Law Of The Sea' in *British yearbook of International Law* (2012), pp. 5-8.
[93] Guzman A., 'The Cost of Credibility: Explaining Resistance to Interstate Dispute Resolution Mechanisms' in The Journal of Legal Studies 303 (2002), pp. 304–305.

international courts.[94] This approach is aimed at maximizing their chances of obtaining effective remedies for the violations of their rights. Today, it is not uncommon for essentially the same dispute to be adjudicated by different international courts, each interpreting it from their own jurisdictional perspective.

To delve deeper into the truth of the above analysis, we will analyse into the litigation strategy used by Ukraine against Russia, especially after the invasion of Crimea in 2014. Ukraine's lawfare strategy is a prime example of how smaller States use alternative methods to kinetic warfare in order to leverage the playing field and bring the military stronger opponent to a more equal position. Ukraine's lawfare strategy against Russia is almost as intricate and thought-out as the China's, with its government going so far as to advertise their "Lawfare Project" in a website.[95] To gain a better picture, we will look into Ukraine's litigation campaign in the International Court of Justice (ICJ) and the International Tribunal for the Law of the Sea (ITLOS), as well as its legal strategy in the International Criminal Court (ICC) and the European Court of Human Rights (ECtHR). Ukraine has also made substantial progress in isolating Russia from the World Trade Organization (WTO). These efforts have succeeded in isolating Russia from sectors that require international cooperation and has delegitimized (at least, in the framework of the European Union) the Russian warmaking effort.

i. International Court of Justice

Ukraine launched a legal assault against Russia before the ICJ, beginning on 2017 in respect to alleged violations of the International Convention for the Suppression of the Financing of Terrorism (ICSFT) and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) regarding Russia's actions on Crimea.[96] Ukraine contended that Russia did not sufficiently prevent or counter terrorist financing during its occupation, provided weapons to proxy forces in the Donbas who targeted civilians and shot down a commercial airliner, and carried out a campaign of "cultural erasure" in Crimea, which involved the suppression of the Crimean Tatar and Ukrainian languages, as well as forced disappearances and murders.[97] Russia took part in the proceedings, and the Court dismissed Russia's preliminary objections, thereby assuming jurisdiction over the case. Earlier this year, the Court delivered its final judgement, which was, for the most part, quite disappointing for Ukraine as the vast majority of the above claims was rejected.[98]

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[94] Marchuk I., 'From warfare to 'lawfare': increased litigation and rise of parallel proceedings in international courts: a case study of Ukraine's and Georgia's action against the Russian Federation', in *The Future of International Courts* (Routledge, 2019), pp. 227-229.

[95] List of Court Venues, Lawfare, Available at: https://perma.cc/TRM9-G5BK [last accessed: 30.09.2024].

[96] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination* (Ukr. v. Russ.), Judgment, 2019 I.C.J. (Nov. 8).

[97] *Idem.*

[98] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination* (Ukraine v. Russian Federation) Summary of the Judgment of 31 January 2024.

As a result, the Court did not find it necessary to awards any of the remedies requested by Ukraine, which, apart from being disappointing, also constituted a significant financial loss for Ukraine, whose government could have used a judgement in their favour to confiscate frozen Russian assets.[99] Thus, the Court gave Ukraine only a shred of a win, but the fault does not lie, in our opinion, in Ukraine's own litigation strategy, but rather in the Court's own tentativeness to stray from known territory. The ICFST has never before been tested by the ICJ, while all other cases that are based upon violations of the CERD (*Georgia v Russia, Qatar v United Arab Emirates, Armenia v Azerbaijan*) have not reached the merits stage of the proceedings. And while Ukraine's 2017 application did not have the success the international community might have hoped, as the Court interpreted both Conventions quite narrowly, the surge of cases arising out of conflicts that are linked to crimes connected to said Conventions does succeed in putting additional pressure to the ICJ to start taking the lead in addressing those crimes directly, if it wants to preserve its legitimacy.

Ukraine's second attempt at gaining leverage over Russia at the ICJ has proven, thus far, to be slightly more successful. Following Russia's full-scale invasion of Ukraine in February 2022, Ukraine initiated legal action against Russia, employing a particularly strategic legal approach. Since no international court has jurisdiction over Russia's violation of the UN Charter through its invasion of Ukraine or the crime of aggression committed by Russian leaders, Ukraine instead invoked the dispute resolution mechanism under the Genocide Convention to bring Russia before the International Court of Justice (ICJ). In a shrewd move, Ukraine turned Russia's own disinformation against it, claiming that Russia's false allegations of Ukraine committing genocide against the Russian ethnic minority in eastern Ukraine—used as a pretext for its unlawful aggression—constituted a "dispute" under the Genocide Convention that the ICJ should adjudicate.[100] This case presents a reversed approach to a genocide claim. What is innovative about Ukraine's strategy is that it essentially framed Russia's entire "special military operation" as being, in some way, inconsistent with the Genocide Convention, without alleging that Russia's actions themselves constituted genocide. By doing so, Ukraine sought to bypass the Court's jurisdictional limitations, which prevent it from suing Russia directly for aggression, violations of the UN Charter, or the commission of war crimes and crimes against humanity.[101]

[99] Marchuk I., 'Unfulfilled Promises of the ICJ Litigation for Ukraine: Analysis of the ICJ Judgment in Ukraine v Russia (CERD and ICSFT)' in EJIL Talk (22 February 2024) Available at: https://www.ejiltalk.org/unfulfilled-promises-of-the-icj-litigation-for-ukraine-analysis-of-the-icj-judgment-in-ukraine-v-russia-cerd-and-icsft/ [last accessed: 30.09.2024].

[100] Hathaway O., 'Taking Stock of ICJ Decisions in the 'Ukraine v. Russia' Cases—And implications for South Africa's case against Israel' in Just Security (5 February 2024) Available at: https://www.justsecurity.org/91781/taking-stock-of-icj-decisions-in-ukraine-v-russia-cases-and-implications-for-south-africas-case-against-israel/ [last accessed: 30.09.2024].

[101] Milanovic M., 'ICJ Delivers Preliminary Objections Judgment in the Ukraine v. Russia Genocide Case, Ukraine Loses on the Most Important Aspects' in EJIL Talk (2 February 2024) Available at: https://www.ejiltalk.org/icj-delivers-preliminary-objections-judgment-in-the-ukraine-v-russia-genocide-case-ukraine-loses-on-the-most-important-aspects/ [last accessed: 30.09.2024].

The Court concurred, and in its March 2022 order on provisional measures, determined that Ukraine's claims were plausible. It then ordered Russia to "immediately suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine"—an order Russia has predictably ignored.[102] However, even if the Court deemed Ukraine's claims as "plausible" at the provisional measures stage, the fact remains that the Court effectively killed Ukraine's creative legal argument (despite it having the support of 32 intervening States) by upholding Russia's claim that false allegations of genocide fall outside the scope of the Genocide Convention. This means that in the later stage of the merits, the focus of the Court will be on whether or not Ukraine was the one committing genocide on the Eastern Ukraine territories and no issue of Russia's responsibility will arise.

This constitutes somewhat of a pyrrhic victory for Ukraine. The leader of Ukraine's legal team, Anton Korynevych, told reporters that: "It is important that the Court will decide on the issue that Ukraine is not responsible for some mythical genocide, which the Russian Federation falsely alleged that Ukraine has committed."[103] In any case, Russia's violations of the Court's provisional measures order may provide Ukraine with some strategic options. The Court acknowledged that Russia "undertook the allegedly unlawful actions in and against Ukraine with the stated aim of preventing and punishing genocide allegedly committed in the Donbas region," which gives Ukraine a "legal interest…under the Genocide Convention to resolve the dispute" over whether it committed genocide.[104] Therefore, Ukraine could try to bring up the issue of Russia's illegal invasion during the merits stage by highlighting Russia's breach of the provisional measures. However, it is uncertain whether the Court will choose to address a matter it has previously avoided due to jurisdictional constraints.

ii. International Tribunal of the Law of the Sea

Ukraine has filed two (still pending) cases before ITLOS, both aiming to gain leverage against Russia with regards to maritime and territorial rights in the Black Sea.

In the *Case Concerning the Detention of Three Ukrainian Naval Vessels,* Ukraine contends that Russia violated the UN Convention on the Law of the Sea (UNCLOS) by firing on and detaining three Ukrainian vessels and 24 servicemen in 2018.[105] The Tribunal, in granting provisional measures that ordered Russia to release the vessels and crew, found Ukraine's claims to be at least plausible, and Russia eventually complied. Moreover, in the *Dispute Concerning Coastal State Rights Arbitration,* filed in February 2018, Ukraine argued that Russia violated its rights to hydrocarbon and living resources in the Black Sea, Sea of Azov,

[102] *Request for the Indication of Provisional Measures Submitted by Ukraine (Ukr. v. Russ.),* 2022 I.C.J. (Feb. 26).
[103] Corder M., 'The UN's top court says it has jurisdiction in part of Ukraine's genocide case against Russia' in AP News (3 February 2024) Available at: https://apnews.com/article/ukraine-russia-genocide-court-un-icj-c3f9cf7462cd85e73ab53aa9499093f4 [last accessed: 30.09.2024].
[104] *Supra* note 96, para. 262-265.
[105] *Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukr. v. Russ.),* I.T.L.O.S. Case No. 26, Order of May 25, 2019.

and Kerch Strait, unlawfully constructed facilities in the Kerch Strait that threaten navigation and the environment, failed to cooperate with Ukraine to address marine pollution, and violated Ukraine's rights and Russia's obligations concerning underwater cultural heritage. In January 2020, the Tribunal dismissed Russia's objections and assumed jurisdiction over all of Ukraine's claims except those related to the determination of sovereignty over Crimea.[106]

The cases initiated by Ukraine against Russia are all rooted in events stemming from Russia's annexation of Crimea in 2014. It is evident that Ukraine is leveraging UNCLOS and its compulsory dispute resolution mechanism to seek, even implicitly, international recognition of its sovereignty over Crimea.[107] However, despite UNCLOS offering a mandatory dispute settlement mechanism, Ukraine faced significant legal challenges regarding jurisdiction and exceptions, which Russia skillfully raised. The tribunal handling the *Dispute Concerning Coastal State Rights* rightly identified that the core issue was the dispute over sovereignty. As such, the tribunal could not rule on Ukraine's rights in maritime zones, as doing so would require determining the coastal State. Nonetheless, the tribunal allowed the case to proceed, requiring Ukraine to amend its memorial. Previous cases have shown that such amendments are quite achievable, particularly on issues related to the protection and preservation of the marine environment and the determination of the status of maritime features.[108] As noted by Yoshifumi Tanaka, the dispute settlement system under UNCLOS has increasingly been used as a venue for disputes which have underlying issues of territorial sovereignty.[109] This trend is evident in past cases like the *Chagos* and *South China Sea* arbitrations, where tribunals addressed substantive issues within their jurisdiction while recognizing their limitations regarding territorial disputes.

We can, therefore, see States strategically seeking to frame their disputes within the parameters of UNCLOS, underscoring the clever use of international adjudication processes.[110] UNCLOS has been referred to as a "jurisdictional artifice"[111], that States can use to implicitly recognize their sovereignty over land through maritime rights adjudication, like Ukraine is aiming to do through the Black Sea cases. Ukraine is already hard pressed in the region, with Russia controlling two-thirds of the Georgian coastline following the 2008 war, the occupation of Abkhazia and, of course, the annexation of Crimea. It is clear that Russia is trying to establish complete domination over the Black Sea, which is key for maritime trade and energy routes in the region. It is unlikely that Ukraine will manage to stave off Russian aggression relying on military terms alone; however, a favourable ruling on the pending Black Sea cases can

[106] *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukr. v. Russ.),* PCA Case Repository No. 2017-06, Award Concerning the Preliminary Objections (Perm. Ct. Arb. 2020).

[107] Oral N., 'Ukraine v. The Russian Federation: Navigating Conflict over Sovereignty under UNCLOS' in International Law Studies 478 (2021), pp. 507-509.

[108] See *South China Sea Arbitration, Philippines v China,* Award, PCA Case No 2013-19, ICGJ 495 (PCA 2016), 12th July 2016, Permanent Court of Arbitration [PCA]; see also *Chagos Marine Protected Area Arbitration, Mauritius v United Kingdom,* Final Award, ICGJ 486 (PCA 2015), 18th March 2015, Permanent Court of Arbitration [PCA].

[109] Tanaka, Y, *The International Law of the Sea* (Cambridge University Press, 3rd ed. 2019), pp. 385-389.

[110] Klein N, *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge University Press, 2005), pp. 252-258.

[111] *Idem,* p. 260.

strengthen Ukraine's maritime claims in the contested areas and implicitly question Russia's legal authority in exercising its rights over Crimean waters. This is a prime example on how Ukraine employs litigation tactics in order to circumvent Russia's more powerful presence in the region, while also strengthening its legal position over other regional powers. After all, we must not forget that a positive outcome for Ukraine will also be a positive outcome for countries like Turkey, Bulgaria and Romania, who also seek to counterbalance Russian domination over the Black Sea.[112] A Ukrainian win in the ITLOS cases is primarily a win for Ukraine's fight against Russia, but we must not dismiss the impact it will have on a broader regional context and the influence it will have on future negotiations over the Black Sea.

iii. International Criminal Court

While Ukraine was not a member of the ICC when the war broke out, it submitted a declaration in 2015 granting the ICC jurisdiction over war crimes, genocide, and crimes against humanity committed on its territory, retroactively covering the period from Russia's invasion and subsequent annexation of Crimea.[113] While Russia is also not a member of the ICC, the ICC Prosecutor's Office still has the authority to investigate Russian officials for crimes committed on Ukrainian soil.

In March 2022, the ICC prosecutor opened an investigation into alleged Russian war crimes in Ukraine following referrals from forty-three states—marking the highest number of state referrals ever received.[114] Actually, due to this 'mass referral' by more than a third of the State parties to the ICC Statute (even though a single State referral would have sufficed), the Prosecutor was able to bypass the Pre-Trial Chamber stage and to directly initiate the above "active investigation". This came eight years after a preliminary investigation had been launched in 2014. An OTP (Office of the Prosecutor) team was promptly dispatched to Ukraine, and the Prosecutor's Office established an online portal for collecting evidence of war crimes.[115] Notably, another unprecedented initiative was undertaken: the OTP, Eurojust, and the European Network for Investigation and Prosecution of Genocide, Crimes against Humanity, and War Crimes (the Genocide Network) created guidelines for civil society organizations on how to gather evidence and preserve information related to international crimes in a manner that would make them admissible in court.[116] It is not an exaggeration to say that there has never before been such a coordinated effort on so many different levels for

[112] Dalay G., 'How geopolitical competition in the Black Sea is redefining regional order' (Chatham House, 7 March 2024) Available at: https://www.chathamhouse.org/2024/03/how-geopolitical-competition-black-sea-redefining-regional-order [last accessed: 30.09.2024].

[113]Press Release ICC, 'Ukraine accepts ICC jurisdiction over alleged crimes committed since 20 February 2014' (8 September 2015) Available at: Ukraine accepts ICC jurisdiction over alleged crimes committed since 20 February 2014 | International Criminal Court [last accessed: 30.09.2024].

[114] Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation (2 March 2022).

[115] The portal to submit evidence can be accessed at: https://otppathway.icc-cpi.int/index.html. The Office of the Prosecutor General of Ukraine has also created a dedicated evidence questionnaire and portal, available at: https://warcrimes.gov.ua/#anketa [last accessed: 30.09.2024].

[116] The guidelines are available on the ICC website at: https://www.icc-cpi.int/sites/default/files/2022-09/2_Eurojust_ICC_CSOs_Guidelines_2-EN.pdf [last accessed: 30.09.2024].

an investigation conducted by the ICC. This is also evident by the individual State efforts to prosecute international criminal activities in Ukraine[117], with many European countries launching preliminary investigations, while the United Nations Human Rights Council (UNHCR) formed an "International Commision of Inquiry"[118] to gather evidence for future legal proceedings.

The turn of events after Russian aggression in Ukrainian soil has had a significant impact on Ukraine's ambivalent relationship with the ICC. It is true that most States view the sharing of jurisdiction (and the principle of complementarity) with the ICC as somewhat suspicious, as evidenced by Sudan and Uganda's stance when they were in a similar situation a few years back.[119] Complementarity is indeed a dual principle: on one hand, it determines admissibility and the allocation of cases among overlapping jurisdictions. On the other hand, it serves as a "burden-sharing principle for the consensual distribution of caseloads".[120] In the first sense, complementarity allows the ICC to assert jurisdiction when a State is unwilling or unable to prosecute. However, complementarity has also been understood as a burden-sharing principle, often referred to as "positive complementarity", which promotes the concurrent exercise of jurisdiction by both the ICC and domestic courts and fosters cooperation between international and domestic levels.[121] From the earliest instances of self-referral, States viewed the Court as a partner in sharing jurisdiction in cases they could not or chose not to handle entirely on their own. Similarly, the Court has consistently positioned itself as an institution that assists rather than competes with States, as outlined in one of the initial OTP policy papers from 2003.[122] In the current context, there is notable cooperation between Ukraine and the ICC. However, Ukraine's trust in the ICC and its willingness to collaborate do not align with its failure to ratify the ICC Statute and are somewhat contradicted by several statements from Ukrainian

[117]Pancevski B., 'Germany Opens Investigation into Suspected Russian War Crimes in Ukraine' in Wall Street Journal (8 March 2022) Available at: https://www.wsj.com/livecoverage/russia-ukraine-latest-news-2022-03-08/card/germany-opens-investigation-into-suspected-russian-war-crimes-in-ukraine-bNCphaIWE30f2REH8BCi [last accessed: 30.09.2024]; 'Polish prosecutors launch investigation into Russia's attack on Ukraine' in The First News (1 March 2022) Available at: https://www.thefirstnews.com/article/polish-prosecutors-launch-investigation-into-russias-attack-on-ukraine-28331[last accessed: 30.09.2024]; 'Estonia's Internal Security Service also investigating war crimes committed in Ukraine' in The Baltic Times (30 March 2022) Available at: https://www.baltictimes.com/estonia_s_internal_security_service_also_investigating_war_crimes_committed_in_ukraine/ [last accessed: 30.09.2024], Reuters, 'Lithuania prosecutors launch Ukraine war crimes investigation' in Reuters (3 March 2022) Available at: https://www.reuters.com/world/europe/lithuania-prosecutors-launch-ukraine-war-crimes-investigation-2022-03-03/ [last accessed: 30.09.2024]; 'Latvia commences criminal procedure over crimes committed by Russian forces in Ukraine' in Baltic News Network (17 March 2022) Available at: https://bnn-news.com/latvia-commences-criminal-procedure-over-crimes-committed-by-russian-forces-in-ukraine-233233 [last accessed: 30.09.2024].

[118] Res A/HRC/RES/49/1, 7 March 2022.

[119] Nouwen S.M.H., Werner G.W., Doing Justice to the Political: The International Criminal Court in Uganda and Sudan in EJIL 21 (4) (2010) p. 941.

[120] Rastan I., 'Complementarity: Contest or Collaboration?' in Bergsmo Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes (Forum for International Criminal and Humanitarian Law Publication Series N. 7, 2010) p. 83.

[121]Takemura Y., *Positive Complementarity* (Max Planck Encyclopedias of International Law 2018), pp. 50-65.

[122] Press Release ICC, *Paper on some policy issues before the Office of the Prosecutor*, September 2003.

officials.[123] It is also remarkable to consider that there is no official translation or commentary of the Statute in Ukrainian.

Ukraine's current situation with the ICC shows that, despite the challenging relationship that the Court has had with many States in the past, this investigation may be an opportunity both for the ICC and Ukraine itself. States's willingness to support Ukraine in its war against Russia translates into additional funding and of course, legitimacy to the ICC's mechanisms. On the one hand, the Ukraine crisis should prompt states to offer extensive, long-term support to the ICC, the only permanent global mechanism for accountability. With strong backing from states, the ICC can function more efficiently and effectively, focusing on carefully chosen situations and cases to bring the perpetrators of the most heinous crimes to justice.[124] On the other hand, Ukraine uses the ICC as leverage in pursuit of its national security and military interests. The fact that it had not yet ratified the Rome Statute gave Ukraine more room for manoeuvring, as this approach allowed the Ukrainian government to retain maximum control over future investigations and prosecutions at The Hague.[125] If the ICC's indictments or verdicts fall short of the government's expectations, Ukraine could have simply chosen to withdraw or nullify its ad hoc declarations. This situation is bound to change now that the Ukrainian parliament voted to finally ratify the Rome Statute[126], but that doesn't mean it is necessarily a bad turn of events; it can merely be a sign that Ukraine is ready to accept the obligations of being a full ICC Member and is choosing to place its trust in the institution.

Ukraine's strategy in using the ICC has, undoubtedly, proven to be quite successful. Through the unprecedented support of other States in the Prosecutor's investigation, not only has the ICC gained the legitimacy that it needed to become more relevant (although, we have to admit that this legitimacy will depend on whether or not the OTP will actually manage to make at least some arrests of high-ranking Russian perpetrators of war crimes), but also the investigation has shed light to the atrocities committed against Ukrainian people and has captured the world's interest. Ukraine's lawfare strategy with the ICC has significantly impacted the international response to its conflict with Russia by elevating the war crimes issue to a global stage and rallying widespread support from states, civil society, and international organizations. By actively engaging with the ICC and promoting the investigation of Russian atrocities, Ukraine has strengthened its narrative of being a victim of aggression and positioned itself as a defender of international law, thereby isolating Russia diplomatically. The unified international response to the OTP's investigation has heightened international scrutiny against Russia and has compelled other nations to back legal and punitive measures against the

[123] Marchuk I., 'Ukraine and the International Criminal Court: Implications of the Ad Hoc Jurisdiction Acceptance and Beyond' in Vanderbilt Law Review 49 (2) (2021) pp. 323-328.

[124] Dutton Y., Sterio M., 'The War in Ukraine and the Legitimacy of the International Criminal Court' in Just Security (August 2022) Available at: https://www.justsecurity.org/82889/the-war-in-ukraine-and-the-legitimacy-of-the-international-criminal-court/ [last accessed: 30.09.2024].

[125] Sergii M., Ukraine and the International Criminal Court Between Realpolitik and Post-truth Politics in 20 Journal of International Criminal Justice 1 (5 May 2022).

[126] 'Ukraine votes to join ICC as it seeks to bring Russia to justice' in AlJazeera (August 2024) Available at: https://www.aljazeera.com/news/2024/8/21/ukraine-votes-to-join-icc-as-it-seeks-to-bring-russia-to-justice [last accessed: 30.09.2024].

aggressor State. Ultimately, Ukraine's strategic use of the ICC has not only advanced its war efforts but also underscored the importance of international justice in conflict resolution.

iv. European Court of Human Rights

Ever since 2014, Ukraine has experienced the annexation of Crimea, the de facto occupation of the Donetsk and Luhansk regions, the downing of Flight MH-17, and numerous human rights abuses in the eastern regions. Following the Russian invasion in 2022, armed conflict spread across the entire country. During this period, both Russia and Ukraine were parties to the European Convention on Human Rights (ECHR). However, Russia ceased to be a party to the ECHR on September 16, 2022, following its expulsion from the Council of Europe (CoE) six months earlier.[127]

As of September 2024, there are four inter-state cases filed by Ukraine against Russia pending in the ECtHR.[128] One of these cases is jointly filed by Ukraine with the Netherlands (concerning the passenger plane flying from Amsterdam to Kuala Lumpur, amongst other violations perpetrated by Russia in the eastern Ukraine region).[129] Additionally, there are over 7,400 individual applications related to events in Crimea, eastern Ukraine, the Sea of Azov, and Russia's military actions on Ukrainian territory since February 24, 2022, also pending before the Court.[130] The first application was filed back in 2014 and concerned the annexation of Crimea; the final judgement was issued on 25 June 2024, when the Court issued a verdict on the first inter-state case, *Ukraine v. Russia (re Crimea)*.[131] The Court found that Russia is guilty of systemic human rights violations in Crimea since its annexation in 2014. These violations included persecution of Ukrainian political prisoners, forced disappearances, illegal detentions, torture, suppression of Ukrainian media, and other repressive measures. The Court also ruled that the tribunals established in Crimea under Russian law are not "tribunals established by law" under Article 6 of the ECHR.[132]

This judgement will certainly influence the other inter-state cases before the Court and certainly the thousands of individual "Crimean" cases also pending before it. Given the Court's stance on the above judgement, it is highly likely that the other cases will also have a favourable outcome for Russia. But, the matter of enforcement of ECtHR judgements is another matter entirely. As we mentioned above, Russia exited the jurisdiction of the Court on September 2022. This departure means that the ECHR will continue to examine all cases filed against Russia before this date. However, Russia's withdrawal as a state party is likely to affect its cooperation during these proceedings and the implementation of the Court's rulings. Throughout its membership, Russia had the highest number of pending cases and judgments

[127] Council of Europe, Resolution CM/Res (2022) 3, 25 February 2022.

[128] A full list of all pending and completed applications is available on the Court's website at: https://www.echr.coe.int/inter-state-applications [last accessed: 30.09.2024].

[129] *Case Of Ukraine And The Netherlands V. Russia* (Applications nos. 8019/16, 43800/14 and 28525/20 ECthHR).

[130] *Case Ukraine v. Russia (re Crimea)*, Grand Chamber hearing on inter-State, ECtHR 352 (2023) 13.12.2023.

[131] *Case Ukraine v. Russia (re Crimea)* [GC] - 20958/14 and 38334/18 Judgment 25.6.2024 [GC].

[132] *Idem*, para. 1011.

before the Court.[133] By the end of 2021, the ECHR had issued 3,116 judgments against Russia, making it the country with the second-highest number of judgments despite being a member for only 24 years.[134] Execution of these judgments was often problematic. As of September 16, 2022, there were 17,450 applications pending against Russia, and 2,129 judgments and decisions were awaiting full implementation by the Committee of Ministers.[135] Apart from that, on June 11, 2022, Russia enacted a law declaring that ECtHR judgments issued after March 15, 2022, are not enforceable within its territory.[136] This stance significantly diminishes the likelihood of Russia complying with future ECtHR rulings, at least for the time being. Moreover, the Court faces challenges in issuing decisions because it requires Russia's participation and a Russian judge during proceedings,[137] and since Russia's exit from the CoE, the position of the Russian judge has been abolished, complicating matters further. Finally, Russia has not complied with the ECtHR's interim measures issued on March 2022[138], which demanded an immediate halt to military actions in Ukraine. Taking all of that into account, can we truly say that the Court's judgements have anything more than symbolic value? What can Ukraine gain (from a lawfare point of view) from the condemnation of Russia by the ECtHR, apart from a "nicely written legal text"[139], as Kanstantsin Dzehtsiarou puts it?

We have established that the execution and actual enforcement of the decisions of the ECtHR is, at this point of time, almost impossible. However, that does not mean that the judgements of the Court hold no strategic value for Ukraine's legal strategy against Russia. First of all, we must not forget that the ECtHR, upon issuing interim measures ordering Russia to halt all military activities against Ukraine in 2022, was the first judicial institution to rule against Russia. By acting so quickly, the Court set the stage for the ongoing investigations regarding human rights abuses conducted by Russia in the territory of Ukraine and through its decisions, it establishes certain facts regarding the conflict. This means that other courts and bodies can use ECtHR's decisions as evidence, that will certainly play a huge role in influencing related consideration of cases in the UN Court, international arbitrations and investigations of international crimes.[140] Thus, even if Russia does not comply with the ECtHR decisions, other judicial bodies can still rely on them to produce their own judgements. Furthermore, Russia's non-participation and non-compliance with the European Court's judgements further exacerbates its image as a pariah in the international community. Russia does not appear to be

[133] ECtHR, *The ECHR in Facts & Figures*, (2021) p. .3–5.
[134] *Ibid*, p. 5.
[135] CoE, 'Russia ceases to be party to the European Convention on Human Rights' in CoE Newsroom (16 September 2022) Available at: https://www.coe.int/en/web/portal/-/russia-ceases-to-be-a-party-to-the-european-convention-of-human-rights-on-16-september-2022 [last accessed: 30.09.2024].
[136] OSCE ODIHR, *Report on Violations of International Humanitarian and Human Rights Law, War Crimes and Crimes Against Humanity Committed in Ukraine (1 April– 25 June 2022)*, (14 July 2022), pp. 11-13.
[137] Art.26, European Convention of Human Rights,
[138] Press Release issued by the Registrar of the Court, *Decision of the Court on requests for interim measures in individual applications concerning Russian military operations on Ukrainian territory*, (04 March 2022).
[139] Dzehtsiarou K., 'Ukraine v Russia (re Crimea): the European Court of Human Rights Goes 'All-in'' in EJIL Talk (27 June 2024) Available at: https://www.ejiltalk.org/ukraine-v-russia-re-crimea-the-european-court-of-human-rights-goes-all-in/ [last accessed: 30.09.2024].
[140] Karvatska, S., Vdovichen V., Toronchuk I., 'Interstate lawsuits of Ukraine to the ECtHR: Is it realistic to achieve final judgments?' in 12 Logos Universality Mentality Education Novelty: Law 1 (2024), pp. 10-12.

particularly perturbed by it, but a further implication of its dismissal of the Court's decisions might prove to be more tiresome for the Russians.

v. World Trade Organization

Ukraine has made use of WTO law to halt Russia's military action and restrict its position in the international trade scene. As Russia has been a member of the WTO since 2012, it is necessarily protected by the "Most Favored Nation" (MFN) principle, which implies that Russia is to be treated no less favourably than any other State party to WTO.[141] However, after the aggression against Ukraine broke out, Ukraine and its allies found a way to sidestep the MFN principle and invoked the national security exception (Article XXI GATT)[142] against Russia, resulting in the revocation of several WTO agreements.[143] This sidestep was greatly facilitated by the landmark decision of the panel in the *Russia – Traffic in Transit,* which held that Russia's actions in blocking trade Ukraine, Kazakhstan, and the Kyrgyz Republic. were consistent with the national security exception due to the presence of an "emergency in international relations" following the political unrest in Ukraine in 2014.[144] After all, the war has had grave effects not just in Ukraine but in the whole world, with oil prices spiking up and essential supplies, such as grain, becoming hard to find, as Ukraine is one of the largest suppliers in the global market.[145]

Before delving deeper into Ukraine's legal strategy concerning WTO, it is important to clarify that sanctions justified under Article XXI lack multilateral application, meaning that each member of the WTO can individually decide on whether or not to impose them, as well as on their nature and level of intensity. This has led to countries like China to choose not to implement sanctions on Russia and even acting as a proxy for Russia to circumvent bans implemented by other countries – allies of Ukraine.[146] However, we have to say that, so far, sanctions from WTO Members have played a critical role in slowing down Russia's military capability. First of all, we need to underline that a significant part of the global economy is currently sanctioning Russia, as 61% of the global GDP belongs to States condemning Russia.[147] Most notably, the U.S. have voted to revoke Russia's permanent normal trade

[141] Art. II, ATT 1994: General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT 1994].
[142] *Ibid*, Art. XXI.
[143] Cimino-Isaacs D., Wong L., 'Invasion of Ukraine: Russia's Trade Status, Tariffs, and WTO Issues', Congressional Research Service (18 March 2022).
[144] Panel Report, *Russia—Measures Concerning Traffic in Transit*, WTO Doc. WT/DS512/R (adopted 26 April 2019).
[145] Hoskins P., 'Ukraine war: Global wheat prices jump after India export ban' in BBC (16 May 2022) Available at: https://www.bbc.com/news/business-61461093 [last accessed: 30.09.2024].
[146] Tan H., 'Some Chinese banks are turning to document couriers to evade sanctions on Russia and keep trade moving' in Reuters (April 2022) Available at: https://www.msn.com/en-us/money/markets/to-get-paid-by-russian-customers-some-chinese-banks-are-taking-documents-across-borders-to-get-them-stamped-reported-reuters/ar-AA1pPAZJ [last accessed: 30.09.2024].
[147] Green M., 'Countries that Have Sanctioned Russia' in Wilson Center (May 2022) Available at: https://www.wilsoncenter.org/blog-post/countries-have-sanctioned-russia [last accessed: 30.09.2024].

relations[148], while the EU has imposed massive and unprecedented sanctions against Russia, including targeted restrictive measures and diplomatic and visa restrictions.[149] It is clear that the West has taken the view that sanctions could influence Russia's stance on the war and naturally, the cost of sanctions is less than the cost of an armed conflict. UK's own sanction regime mentions that its aim is to encourage Russia to cease actions whose goal is to "destabilise Ukraine or undermine or threaten the territorial integrity, sovereignty, or independence of Ukraine".[150]

While Ukraine has gained a lot of leverage in the global trade stage, we cannot say that the sanctions had the result the West was hoping for. Russian sanctions aimed to stop Putin's military offensive and halt the aggression; it is clear that these goals have failed. Indeed, the purpose of the sanctions is to put pressure on the contestant's economy and cause a change of behavior.[151] This is best achieved when sanctions are imposed simultaneously by a large number of countries and have the same security goal.[152] It is true that in the immediate aftermath of Western sanctions, the Rouble dropped in value by 45%[153] However, Russia remains a powerful economy, who is allied with the second most powerful economy in the world (China) and is still receiving a billion a day in revenue from gas and oil exports.[154] Sanctions alone are not quite enough to hinder its course of action.

As it stands, WTO is not able to assist in facilitating effective sanctions against Russia. Apart from the fact that as an organization its prime goal is trade liberalisation, the fact that its decisions require consensus remains a problem, as there is a lack of consistent and multilateral application of sanctions by members (most notably by China). Moreover, the WTO has been extremely cautious in characterizing Russia's actions in Ukraine from the perspective of public international law. In the *Transit* case, it explicitly stated that it is not within its remit to assess the legal characterizations of the events by the parties involved.[155] Similarly, in its report titled "The Crisis in Ukraine: Implications of the War for Global Trade and Development", the WTO Secretariat referred to Russia's annexation of Crimea as "the Crimea crisis of 2014," avoiding a direct legal characterization.[156] It is, therefore, clear that despite the fact that Ukraine has

[148] *Ibid.*
[149] European Council, *EU sanctions against Russia explained*, Available at: https://www.consilium.europa.eu/en/policies/sanctions-against-russia/ [last accessed: 30.09.2024].
[150] UK Statutory Instruments, *The Russia (Sanctions) (EU Exit) Regulations 2019*.
[151] Spisak A., 'Sanctioning Russia: Where Does the West Go Next?' in Institute for Global Policy (24 March 2022) Available at: https://institute.global/insights/geopolitics-and-security/sanctioning-russia-where-does-west-go-next [last accessed: 30.09.2024].
[152] *Ibid.*
[153] Beckworth D., 'Gerard DiPippo on the Russia Sanctions, Demographic Decline, and the Future of the Global Monetary System' in Mercatus Original Podcasts (August 2022) Available at: https://www.mercatus.org/macro-musings/gerard-dipippo-russia-sanctions-demographic-decline-and-future-global-monetary-system [last accessed: 30.09.2024].
[154] Reuters, 'China-Russia trade has surged as countries grow closer' in Reuters (1 March 2022) Available at: https://www.reuters.com/markets/europe/china-russia-trade-has-surged-countries-grow-closer-2022-03-01/ [last accessed: 30.09.2024].
[155] *Supra* note 142, para.7.
[156] WTO Report, *The Crisis In Ukraine: Implications Of The War For Global Trade And Development* (WTO 2022).

achieved to at least partially isolate Russia from the global trade scene, there is still a long way to go in order for Russia to really feel the effects of said isolation.

vi. The value of Litigation Lawfare

The legal weaponry Ukraine has employed against Russia is beyond creative, no matter how effective all of those lawsuits will turn out to be. Each additional legal proceeding at the very least further exacerbates Russia's international position and boosts efforts to sanction Ukraine's adversary. Facts speak louder than words; lawyers have been refusing to represent Russia in international fora ever since the 2022 invasion and thus, its ability to contest all those cases will likely be weakened in the future. Legal disputes will persist long after the active fighting has ceased. Only time will reveal whether Russia's lawfare will enhance the legitimacy of Putin's actions in regions where Russia's narrative continues to prevail. In the meantime, Ukraine's efforts to challenge Russia's legitimacy in international courts are helping it gain support from Western nations. The lawfare between Russia and Ukraine will establish legal and historical precedents regarding the application of lawfare before, during, and after armed conflict. While many apocalyptic tales conclude with the downfall of civilization, a successful Ukrainian lawfare strategy could ultimately reinforce the international legal framework.

III. The limits of lawfare – What does lawfare mean for the function and efficiency of International Law?

The strategic use of law is almost as old as law itself. The Roman lawyer Aulus Gelius gives us one of the most profound logical paradoxes that demonstrates how law can be used as a weapon.[157] One day, the Greek sophist Protagoras encountered a prospective student named Euatle, who wished to learn rhetoric from him but lacked the means to pay. Protagoras reassured Euatle, saying, "Don't worry. You can learn from me, and once you win your first Court case, you will pay me for all the lessons." Euatle gladly accepted the offer and studied under Protagoras for several years. However, after completing his training, time went by and Euatle did not pay, seeing as he had not won a case yet. Eventually, Protagoras sued him. As they were about to enter the Courtroom, Protagoras remarked, "No matter what happens, you will pay me. If I win, you will be ordered to pay. If I lose, you will have won your first case, and you will still owe me." Euatle responded, "No, master. No matter the outcome, I will not pay. If I win, I am exempt from paying. If I lose, I still haven't won my first case." This is the so called "Paradox of the Court".

The question arises: who is manipulating the law in this scenario—Protagoras or Euatle? The paradox clouds the answer. At first glance, Euatle may seem at fault for not paying what he owes, but one could also argue that Euatle is justified, as he has not yet benefitted from the lessons by winning a case. Additionally, Protagoras' offer may have been flawed from the beginning, and his lawsuit could be seen as a trap for Euatle.

[157] Gel Li A., *Les nits àtiques* (Bernat Metge, Barcelona, 2018).

As seen by the above paradigm, law can be manipulated in a manner where it is not easy to discern who is in the right and who is in the wrong – which is essentially what law is supposed to be about. If we imagine this to be true in a simple disagreement between two friends, then to what dimensions can the abuse of law arise in the case of an armed conflict or a genocide? Although the term "lawfare" can be used purely descriptively, as per Charles Dunlap's definition, it usually comes with a negative connotation.[158] Especially amongst Western scholars, to accuse someone of committing "lawfare" is to accuse them of doing something sneaky, basically insinuating that those who engage in lawfare are fighting like cowards. This was the implication of a widely noted statement in the U.S. National Defense Strategy of 2002 and 2005: "Our strength as a nation-state will continue to be challenged by those who employ a strategy of the weak, using international forums, judicial processes, and terrorism."[159] Grouping judicial processes with terrorism as part of a "strategy" essentially accuses those who challenge the U.S. government in Court of engaging in a particularly egregious form of lawfare. Referring to lawfare as a "strategy of the weak" is a provocation, as if to suggest: Why does not the enemy engage in open combat like real men, instead of pretending to be neutral defenders of legality?

The general feeling towards lawfare amongst the international community is, by and large, ambivalent; whilst many critics value the recourse to law as a means of leveling the field for smaller States in a military context, other have expressed their fear that such as a use of law could go so far as to render its merit moot, with the politicization of legal institutions and the gradual decline of their credibility. To gain a deeper understanding, we will look into the impacts that methods of lawfare have had to different functions of the international legal system and we will analyse whether lawfare can actually develop to be a danger for international law.

A. Politicizing the term "lawfare"

Critics have been saying that lawfare is simply a politicization of the law,[160] presumably for base reasons. The lawfare critic specifically accuses those who engage in it of misusing international humanitarian law and international criminal law to hinder, or at the very least, disrupt enemy military planners.[161] This is best demonstrated by Israel's response in the wake of the Goldstone Report,[162] which was published by a U.N. Fact-Finding mission that investigated war crimes in the Gaza strip. Upon publication of the report, Israel and its allies accused Richard Goldstone of being "the chief of the hanging party" whose "mandate was to find Israel guilty."[163] Undoubtedly, the Hamas had every reason to promote Goldstone's report, which was largely in their favour and shed light to potential breaches of international law by

[158] Dunlap Jr. C., 'Lawfare Today: A Perspective in Yale Journal of International Affairs (Winter 2008), pp. 146-154.
[159] *Idem*, p. 148.
[160] *Supra* note 20, p. 2.
[161] *Idem.*
[162] U.N. Human Rights Council, *Fact-Finding Mission on the Gaza Conflict, Human Rights in Palestine and Other Occupied Arab Territories*, (U.N. Doc. A/HRC/12/48 Sept. 25, 2009).
[163] Goldberg J., 'On That United Nations Report' in The Atlantic' (18 September 2009) Available at: https://www.theatlantic.com/international/archive/2009/09/on-that-united-nations-report/26777/ [last accessed: 30.09.2024].

Israel in the Arab-Israeli conflicts of the 20th century. On the other hand, it is natural for Israel to make every effort to hamper Goldstone's investigation. If strategic, goal-oriented planning behind legal arguments defines lawfare, then all litigation resembles lawfare. The only distinction lies in the military nature of the goal—in this case, that legal victories will restrict a state's military forces by deeming certain tactics legally impermissible. The real issue, as in domestic litigation, is not whether parties have ulterior motives, but whether those motives are supported by valid legal arguments. To suggest that advancing such arguments constitutes lawfare, and is therefore illegitimate, implies that law should never limit military power. Consequently, the radical critique of lawfare becomes an attack on international humanitarian law and international criminal law themselves.[164] However, when law is twisted by politics, prosecutors and judges so as to meet a particular tactical cause, law ends up serving an entirely different cause than what it was meant to, which is justice. As Orde F. Kittrie, explains, in such cases an "alternative law" is born, aimed only at attacking someone for strictly political reasons and is reduced to a weapon that distorts and betrays the basic principles of the rule of law itself, even though people engaged it in it do it in the name of legality.[165]

i. Lawfare Impact on Human Rights Organizations

To paint a better picture on how law can be politicized we will once again take a look into the ongoing conflict between Israel and Palestine. Lawfare has increasingly been used over the past six years as a tactic targeting human rights, humanitarian, and peacebuilding organizations, along with their supporters. Self-described 'pro-Israel' groups have responded to human rights lawsuits against Israeli officials by launching legal offensives against human rights defenders.[166] Such groups often view human rights litigation against the Israeli government as a direct attack to Israel itself. This perspective gained wider attention following the highly controversial World Conference Against Racism, Racial Discrimination, Xenophobia, and Intolerance in Durban, South Africa, in 2001.[167] The UN-sponsored event sparked controversy over several issues, including a debate about equating Zionism with racism. While the conference's Declaration and Programme of Action omitted references to Israel, a parallel NGO Forum included such language in its outcome statement, also promoting litigation as a tool for addressing these concerns.[168] In 2011, the disinformation group *NGO Monitor* published a document claiming that the Durban NGO Forum marked the point where NGOs consolidated the tactic of lawfare. According to the report, these NGOs have since engaged in international lobbying and filed civil lawsuits or initiated criminal complaints against Israeli

[164] *Supra* note 20, p. 5.
[165] *Supra* note 3, pp. 10-14.
[166] Guinane K., 'The Alarming Rise of Lawfare to Suppress Civil Society: The Case of Palestine and Israel' in The Charity and Security Network (28 September 2021) Available at: https://charityandsecurity.org/csn-reports/the-alarming-rise-of-lawfare-to-suppress-civil-society-the-case-of-palestine-and-israel/ [last accessed: 30.09.2024].
[167] World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance. *United Nations* (2001).
[168] Swarns R., 'The Racism Walkout: The Overview: US and Israelis Quit Racism Talks Over Denunciation' in The New York Times (4 September 2001) Available at: https://www.nytimes.com/2001/09/04/world/racism-walkout-overview-us-israelis-quit-racism-talks-over-denunciation.html [last accessed: 30.09.2024].

officials and businesses, accusing them of "war crimes" or "crimes against humanity" throughout Europe and North America. NGO Monitor portrayed these actions as "lawfare", aimed at "disrupting anti-terror operations and hindering future military actions."[169]

Propaganda and misinformation against human rights organizations, where advocates for human rights are branded as merely troublemakers who wish to delegitimize Israel's actions, are one of the most used tools in lawfare critics' arena. These pro-Israeli groups focus on associating Palestinian human rights NGOs with terrorism, cutting them of from platforms so that they cannot be heard and additionally, cutting off their funding and often filing defamation lawsuits against them.[170] Apart from the NGO Monitor that we mentioned above, other prominent organizations that target pro-Arab NGOs is the *Lawfare Project*[171], whose litigation campaign is based mostly on discrimination and free speech issues, the *Middle East Forum*[172], which usually targets Muslim charities with faux research reports that aim to cut foreign assistance to Palestine and the *Investigative Project on Terrorism*, that claims to have the "world's most comprehensive data center on radical Islamic terrorist groups."[173] Interesting to note is that all these organizations are US based. Overall, these groups are greatly facilitated by the government of Israel itself. For example, Israel's Ministry of Strategic Affairs and Public Diplomacy (now part of the Ministry of Foreign Affairs) has had a large hand in orchestrating a smear public relations campaign against Palestinian human rights organizations to tarnish the Palestinian struggle for basic rights and portray their members as anti-Semitists.[174]
In addition to picturing civil society organizations and their supporters as anti-Semitists when they pass judgement on Israeli policies, the Ministry and its affiliated organizations are equating support for those organizations with support for terrorists and specifically, with support for the Hamas. For example, on 2019 Israel release a report that promoted the notion that NGOS who supported BDS (Boycott, Divestment and Sanctions) actions against Israel have ties to terrorist organizations.[175] According to a review made on that report by the Associated Press, most of the cases were based on somewhat vague accusations of expressions to sympathy for such militant groups that took place years ago. Two people from the report were even recognized internationally for their human rights work.[176] This is just the tip of the iceberg for Israel, which has backed pressure campaigns urging online donation payment

[169] Herzberg A., 'NGO 'Lawfare': Exploitation of Courts in the Arab-Israeli Conflict' in Steinberg G.M. (ed.) the *NGO Monitor Monograph Series* (11 January 2011).
[170] The Observatory for the Protection of Human Rights Defenders, 'Target Locked: The Unrelenting Israeli Smear Campaigns to Discredit Human Rights Groups in Israel, Palestine, and the Syrian Golan' (April 2021).
[171] The Lawfare Project's 2018 IRS Form 990 puts its budget at just over $1.1 million.
[172] Bridge Initiative Team, 'Fact Sheet: Middle East Forum' in Bridge, Georgetown University (14 August 2018) Available at: https://bridge.georgetown.edu/research/factsheet-middle-east-forum/ [last accessed at: 30.09.2024].
[173] The Investigative Project on Terrorism, 'About the Investigative Project on Terrorism' Available at: About The Investigative Project on Terrorism [[last accessed: 30.09.2024].
[174] White B., 'Delegitimizing Solidarity: Israel Smears Palestine Advocacy as Anti-Semitic' in XLIX Journal of Palestine Studies 2 (Winter 2020), p. 67.
[175] Ministry of Strategic Affairs and Public Diplomacy, 'Terrorists in Suits: The Ties Between NGOs Promoting BDS and Terrorist Organizations' (1 August 2019).
[176] Associated Press, 'Israel Releases Report on Links Between BDS and Militants' in Associated Press (3 February 2019) Available at: Israel releases report on links between BDS and militants | AP News [last accessed: 30.09.2024].

processors to terminate the accounts of Palestinian groups and their supporters. It has indirectly supported the Zionist Advocacy Center through the International Legal Forum's involvement in a False Claims Act lawsuit against the Carter Center, which was dismissed at the Department of Justice's request. Its efforts have fuelled legislative pushes in the U.S. and elsewhere to criminalize support for BDS activism, despite legal protections for free speech. Additionally, the Ministry of Foreign Affairs has funded the creation of a database containing information on news, Court rulings, legislative proposals, and laws worldwide. It has particularly focused on cultivating advocates within youth groups, on college campuses, and in labour unions.[177] These tactics were, naturally, exacerbated after the October 7th attacks. The brutal retaliation that Israel enforced on the Palestinian people attracted international attention to the conflict in a way that had not been done before. Galit Distel Atbaryan, who served in Netanyahu's cabinet and has been called as "Minister for Propaganda", called for the "erasure of all of Gaza from the face of Earth" and the expulsion of the "monsters" who inhabit it.[178] Organizations like NGO Monitor have published articles which claim that at least nine Palestinian NGOs have celebrated the October 7th attacks or have denied the atrocities committed against the Israelis.[179] In the fog of war, it is easy to spread confusion regarding the lawfulness or not of attacks and prove which party is acting in accordance with the provisions of the law of armed conflict. Israel has certainly made sure that the international audience remains on their side, by heavily relying on the principle of self-defence, even as they continue their relentless assault to the Gaza Strip almost a month later.

Law is the core foundation of democracy and the essential instrument of politics. It is impossible for politics to make a change in the world without using law. The problem does not lie in law interfering with politics, but rather when law becomes a weapon of war that is used fraudulently or illegitimately. By consistently delegitimizing human rights organizations, NGOs are forced to direct their limited resources away from their core missions (that is monitoring legal abuses, providing aid etc.) towards defending legal assaults. Such tactics effectively immobilize human rights organizations, inhibiting their ability to operate.[180] Apart from the financial burden, such organizations also suffer reputational harm. Even unbased rumours can discourage potential sponsors and create a cloud of suspicion over the organization's credibility and integrity, especially when talking about rumours linking them to terrorist organizations. In addition, these legal battles have the added cost of discouraging other human rights organizations from advocating for political issues, for fear of repercussions.[181]

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[177] Ministry of Strategic Affairs and Public Diplomacy, 'Grants for Pro-Israeli Activity for 2019 – the Ministry of Strategic Affairs and Public Diplomacy' (8 July 2019) Available at: Grants for Pro-Israeli Activity for 2019 – the Ministry of Strategic Affairs and Public Diplomacy Prime Minister's Office [last accessed: 30.09.2024].

[178] Filiu J., 'Anatomy of an Israeli disinformation campaign' in Le Monde (1 July 2024) Available at: Anatomy of an Israeli disinformation campaign [last accessed: 30.09.2024].

[179] NGO Monitor, 'EU-Supported Palestinian NGOs and the October 7th Hamas Massacre' (17 April 2024) Available at: EU-Supported Palestinian NGOs and the October 7th Hamas Massacre.docx [last accessed: 30.09.2024].

[180] *Supra* note 3, pp. 275-281.

[181] Goldsmith J., 'Mission Creep in NGO Demands?' in LawfareMedia (27 March 2012) Available at: "Mission Creep" in NGO Demands? | Lawfare [last accessed: 30.09.2024].

For example, an organization that advocates for the rights of marginalized groups might refrain from taking bold steps if it fears retaliatory lawsuits, investigations, or prosecutions.
All of the above resonates with the work of the aforementioned Carl Schmitt, who argued that law, when overly politicized, transforms into a means of enforcing the will of the sovereign or ruling power. As a result, the legal system is no longer perceived as a forum for genuine adjudication of rights or justice, but rather as a vehicle for political control. This phenomenon diminishes public trust in legal institutions, as the law becomes associated with partisan interests rather than justice. When law is weaponized in order to serve political powers, the harder it becomes to hold those in power accountable through the law itself.[182] This fosters a tendency of public cynicism towards the law itself, as people begin to view law as another tool for the powerful to use, not a genuine mechanism for justice. When the law is stripped of its moral purpose and instrumentalized for political goals, society starts viewing legal norms as hollow, leading to an erosion of legal culture itself.[183] A public that sees law as no more than a political tool may lose faith in the legal system's ability to protect individual rights or ensure fair outcomes.

B. The judicialization of politics and the politicization of justice

The phenomenon of the justice system being politicized is not a new one; after all, judges are human beings and as such, they cannot overcome their own beliefs or their own subjective bias completely. That is why the law is meant to work as a safety valve, to prevent an excess of objectivity in judicial decisions. However, one can never end up with a completely politically neutral decision, especially when the method of appointment of judges is of an eminent political nature, as is the case of most Courts (international or not) in the world. It is undisputable that the application of international law by international Courts also plays an important role in promoting the goals of the international regimes under which they operate. For instance, an international Court that enforces norms of international human rights or investment law raises the costs of violating these norms, which could lead to better long-term compliance.[184] In fact, the primary role of international criminal Courts is to uphold the law by prosecuting individuals most responsible for severe international crimes, with the ultimate goal of eliminating impunity, as mentioned in the preamble of the Rome Statute ("Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes").[185] In addition, by exercising a level of degree of supervision over international organizations and by allowing those affected by governmental power to challenge such power on the international sphere, international Courts also function as the safety valve that we mentioned above, by conferring a degree of legitimacy to the works of the organizations whose

[182] Falk R., 'Lawfare" and Liberation' (23 February 2022) Available at: 'Lawfare' and Liberation | Global Justice in the 21st Century [last accessed: 30.09.2024].
[183] Shklar J., 'Political Theory and the Rule of Law' in Hutchinson A. C., Monahan P. (eds.), *The rule of law: Ideal or ideology* (Transnational, 1987), pp. 1-4.
[184] Von Bogdandy A., Venzke I., 'In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification in EJIL 23(1) (2012) pp. 17–18.
[185] *Preamble*, Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 3.

conduct they review.[186] All of the above attest to the fact that global politics and power-plays between States are heavily involved with the distribution of justice. However, what happens when States use these international forums to promote their lawfare agenda? We will examine the case of the International Criminal Court and the International Court of Justice, as these two courts are on the forefront of discussions regarding the recent armed conflicts in Ukraine and in the Gaza strip.

i. The International Criminal Court

Since its inception in 2002, the ICC has faced challenges in establishing its legitimacy. The Court's creation was a significant achievement for the Global South and civil society movements, aiming to extend international criminal law's reach to the Global North. However, its potential was constrained from the beginning by its position outside the formal United Nations framework and, more critically, by the absence of major geopolitical players like the United States, China, and Russia as members, along with Israel's refusal to join.[187] Currently, the ICC has 124 member States, including liberal democracies in Western Europe, all countries in South America, the majority of African nations, and many in Asia. Despite this broad representation, the ICC has consistently struggled to gain credibility, influence, respect, and legitimacy throughout its existence During the drafting of the Rome Statute, the extent of major-power control was a pivotal concern. While the Court's relative autonomy was viewed by many supporters as a critical strength, this independence also presents significant challenges, as the institution heavily depends on cooperation from States, especially those with global influence.

The Court has been under fire for allegedly being selective in prosecuting African States and leaders, while ignoring international crimes that might have been perpetrated by Western States.[188] While the ICC was correct in focusing its attention on Africa, considering the mass reports of human rights abuses in the region, it is also true that the arrest warrant against Benjamin Netanyahu was the first one against a leader supported by Western States. The ICC's mission is, as stated in its preamble, to punish mass atrocities; instead it was used as a bargaining chip by Palestine to negotiate the mass release of convicted murderers; the deal was, as long as Israel makes concessions, the Palestinians would put off seeking action to the ICC.[189] This is just one example of how the ICC has been used in a manner vastly different than what its mandate was predicted to be.

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[186] Dothan S., 'International Courts Improve Public Deliberation' in Michigan Journal of International Law 39 (2) (2012) pp. 230–31.
[187] Bosco D., *Rough Justice: The International Criminal Court in a World of Power Politics* (New York: Oxford University Press, 2014) p. 177.
[188] Mude T., 'Demystifying the International Criminal Court (ICC) Target Africa Political Rhetoric' in Open Journal of Political Science 7 (1) (2017) pp. 178-188.
[189] Toameh K., 'PA to halt ICC plans against Israel as peace gesture' in Jerusalem Post (May 5 2013) Available at: Palestinian Authority to halt ICC plans against Israel as peace gesture - The Jerusalem Post [last accessed: 30.09.2024].

Significant areas of international relations and legal scholarship argue that major powers are unlikely to support or empower a Court unless they maintain substantial control over it. For these organizations to remain relevant, they must draw upon and mirror the influence of dominant States.[190] That is why a significant portion of scholars argues that international Courts that cannot be controlled by powerful States will usually prove to be ineffective.[191] The most likely outcome is that powerful States will ensure the Court remains weak and ultimately becomes irrelevant. Their reasoning is simple: an institution beyond their control could become inconvenient or even dangerous. As Jacob Katz Cogan has argued, the phenomenon of mostly unchecked judicial institutions "means that States are more likely to avoid Courts, abandon them, or disregard their decisions, potentially condemning them to irrelevance."[192] For powerful States, sidelining international Courts reduces the risks posed by their independent rulings. As we saw above, States use the implicit threat that they might exit or abandon the Court as a potential pressure mechanism. Several major powers are not members of the ICC, meaning they cannot use the threat of withdrawal as leverage. Additionally, leaving the ICC does not provide the same protection as it might with other international Courts, as the Rome Statute, in certain cases, permits the Court to exercise jurisdiction over non-member States.[193] We can see how the truth of the above statement manifested itself in the case of the alleged crimes committed by the U.S. and Israel in Afghanistan and Occupied Palestine, when the ICC prosecutor had delayed addressing substantial evidence that would warrant thorough investigations to determine if indictments and prosecutions are legally justified.[194] This inaction naturally led to perceptions of the ICC's weakness, suggesting that it is unable to withstand geopolitical pressures and manipulations, particularly from Western powers. The lack of movement from the ICC can be partly attributed to the extreme nationalism during the Trump administration, which threatened the prosecutor with personal sanctions should the Court pursue cases against the U.S. or Israel.[195]

The situation evolved when Russia invaded Ukraine in early 2022, prompting NATO allies to urge the ICC to act swiftly, resulting in expedited procedures for determining whether Putin and others should face indictment for war crimes.[196] This urgency appeared to favour Western interests, further amplified by the racial dynamics of supporting a white, Christian victim of alleged atrocities—a stark contrast to the ICC's hesitance to act in similar circumstances in Gaza. Despite requests from Chile and Mexico for an ICC investigation into Israel's potential

[190] Mearsheimer J., 'The False Promise of International Institutions' in International Security 19 (3) (1994) pp. 5–49.
[191] Posner E. & Yoo J., 'Judicial Independence in International Tribunals' in California Law Review 93 (1) (2005), pp. 1–74.
[192] Cogan J., 'Competition and Control in International Adjudication' in Virginia Journal of International Law 48, (2008) p. 415.
[193] *Supra* note 183, Part 2.
[194] Falk R., 'Can the ICC Finaly Gain Credibility' in RichardFalk.org (May 2024) Available at: Can the ICC Finally Gain Credibility | Global Justice in the 21st Century [last accessed: 30.09.2024].
[195] Human Rights Watch, 'US Sanctions on the International Criminal Court' (14 December 2020) Available at: US Sanctions on the International Criminal Court | Human Rights Watch [last accessed: 30.09.2024].
[196] Radio Free Europe, 'ICC Issues Arrest Warrant For Putin For Alleged War Crimes In Ukraine' (17 March 2023) Available at: ICC Issues Arrest Warrant For Putin For Alleged War Crimes In Ukraine [last accessed: 30.09.2024].

violations of the Genocide Convention following its military actions in Gaza after October 7, the Court remained silent for a long time before issuing the arrest warrant against the Israeli officials (and the Hamas leaders).[197] Israel's response, characterized by disproportionate force and collective punishment of civilians, highlights the apparent double standards in the ICC's approach to international crimes.

In theory, the ICC should have significant autonomy in charting its own course. The Rome Statute grants the prosecutor "broad discretionary power"—much wider than that of other international or domestic prosecutors—to select cases for investigation and determine who to indict.[198] The Court can further reinforce this considerable autonomy through its moral authority. The preamble of the Rome Statute frames the ICC as a response to "unimaginable atrocities that deeply shock the conscience of humanity."[199] ICC officials can credibly assert to States and the public that their actions are apolitical, driven by the principles of the Rome Statute rather than narrow national interests. As it is led by lawyers and judges, not diplomats, the ICC can more convincingly claim impartiality and a capacity for objective judgment. However, that is just in theory. In practice, given how depended the ICC is on States because of its need for resources and on-the-ground examinations, it is highly unlikely that any of its actions can be purely apolitical. For instance, Russia has resisted the jurisdiction of the ICC, particularly in the context of investigations into its actions in Georgia (2008) and Ukraine. Russia signed the Rome Statute in 2000 but never ratified it, and in 2016, following the ICC's preliminary findings that suggested Russian actions in Crimea and Ukraine could constitute war crimes, Russia withdrew its signature.[200] This withdrawal was a clear political move to insulate itself from international criminal liability. Given this exact vulnerability and reliance on State support, the ICC could even feel compelled to cultivate alliances with powerful nations. This could involve considering the preferences of these States regarding which investigations the ICC should pursue, especially in contexts where such actions might complicate diplomatic relations or affect strategic interests.

Taking all of the above into account, we can see how the ICC, while established to ensure accountability for the gravest international crimes, is not immune to political influence, particularly from States holding great power in the global arena. Apart from being accused as selective towards smaller States, the lack of jurisdiction over non-member States and the ability of the UN Security Council to refer cases further demonstrates how political considerations can shape the Court's activities. Moreover, such powerful States often leverage their influence to avoid scrutiny or shield their allies from investigation, undermining the ICC's impartiality and universality. To deliver impartial justice, the Court certainly needs to reinforce its

[197] *Ibid.*
[198] Arbour L, *The Need for an Independent and Eff ective Prosecutor in the Permanent International Criminal Court*, (Windsor Yearbook of Access to Justice 17
(1999), 219.
[199] *Supra* note *183.*
[200] Schabas W, *The International Criminal Court: A Commentary on the Rome Statute*, (Oxford Commentaries on International Law 2016), 902-909.

independence and ensure that its actions are driven by legal principles rather than political expediency.

ii. The International Court of Justice

The ICJ as the principal judicial organ of the UN is premised upon the notion of pacific settlement of disputes between States and as the principal instrument for war prevention.[201] The Court, as a UN body, lacks its own enforcement mechanisms, making it reliant on the will of the Member States to execute its decisions. Its rulings remain declarations of law unless the losing party chooses to comply voluntarily (which has never happened to this day). Alternatively, the UN Security Council can enforce a decision, but this requires political consensus, including the support or abstention of all five permanent members, each of whom holds veto power.[202] While the General Assembly can recommend compliance or suggest measures for non-compliance, it lacks any authority to enforce decisions. Although the ICJ has built a reputation for judicial independence and professionalism, it has faced criticism for its formalistic approach and lengthy procedural delays, often taking years between the submission of a case and the final judgment.[203]

If we take into account that States bear the ultimate responsibility for electing judges for the Court, it is easy to see how ICJ's decisions can be influenced by the composition of the Court and of course, by the broader political context surrounding a case. For instance, if we take a look into the recent *South Africa v Israel* case, both South Africa and Israel had appointed their own *ad hoc* judges (Justice Dikgang Moseneke and judge *ad hoc* Barak respectively) and the order obliging Israel to stop all militarily actions that would harm Palestinians in the Gaza strip was opposed by judge *ad hoc* Barac and judge Sebutinde (of Uganda).[204] While this opposition did not prove to be a problem in the end (the order was 15-2 in favour of the South African application), we can see how nationality bias can affect the ICJ. According to a study conducted by Eric A. Posner and Miguel de Figueiredo, judges tend to support their home countries in about 90% of cases.[205] When their own country is not directly involved, they still show a preference for States that share similar characteristics, such as economic status or political system, with about 70% to 80% of their votes aligning accordingly. There is also some indication that judges may favour nations that are strategic allies of their home state, though the evidence for this is less clear due to overlapping factors. If such bias exists, it is likely minimal, the two scholars concluded. However, as we mentioned above, a completely apolitical

[201] *Article 33-39*, UN Charter.
[202] *Article 94*, UN Charter.
[203] Falk R., 'A Judicial Web of Confusion: the ICJ, ICC, and Civil Society or Peoples Tribunals' in Richardfalk.org (24 May 2024) Available at: A Judicial Web of Confusion: the ICJ, ICC, and Civil Society or Peoples Tribunals (5/24/24) | Global Justice in the 21st Century [last accessed: 30.09.2024].
[204] Sagoo R., 'South Africa's genocide case against Israel: The International Court of Justice explained' in ChathamHouse (21 February 2024) Available at: South Africa's genocide case against Israel: The International Court of Justice explained | Chatham House – International Affairs Think Tank [last accessed: 30.09.2024].
[205] Posner E., de Figueiredo M., 'Is the International Court of Justice Politically Biased' in The Journal of Legal Studies 34(2) (2005).

human being cannot exist; the question that remains is, can law regulate these subjective tendencies? Moreover, the ICJ is financed through the regular budget of the UN. The four largest financial contributors—namely, the United States (22% of the UN budget), China (12.005%), Japan (8.564%), and Germany (6.090%)—together account for about 49% of the UN's funding.[206] In any international organization, greater financial contributions tend to grant States more influence over decision-making processes. While this dynamic may not pose significant issues for the UN, it raises concerns for the ICJ, which, as the world's highest court, is expected to maintain fairness and impartiality.

Another notable example on how State behaviour can affect ICJ decisions is the issuing of Advisory Opinions. One of the most notable examples of the political impact of Advisory Opinions is the *Wall Advisory Opinion,*[207] and the more recent *Legal Consequences Arising From the Policies and Practices of Israel in the Occupied Palestinian Territory*.[208] Regarding the first decision back in July 2004, the ICJ delivered its Advisory Opinion on the legal implications of Israel's construction of a security wall in occupied Palestinian territory. The Court ruled that the wall violated international law and recommended that Israel immediately halt its construction, dismantle the sections already built, and provide reparations to the Palestinians for any damages resulting from the project.[209] Exactly 20 years later, on July 2024, the Court added "another brick in the Wall" by issuing a second Advisory Opinion, which holds that Israel's ongoing presence in the Occupied Palestinian Territories (OPT) is illegal due to the unlawful nature of its policies and actions. This illegality stems from violations of two fundamental principles of international law: the prohibition on acquiring territory by force and the right to self-determination.[210]

Neither the UN Charter nor the Statute grants Advisory opinions legally binding force. Additionally, unlike contentious cases, advisory proceedings do not require the consent of States, meaning States cannot block the issuance of an advisory opinion if a UN organ or specialized agency deems it necessary.[211] However, such an opinion does not carry res judicata effect and imposes no obligations on the primary addressee, individual States, or the international community as a whole to accept the Court's conclusion. That does not mean that Advisory Opinions do not have a legal value or that they cannot be influenced by non-legal motivations. First of all, in order to produce an Advisory Opinion, the Court heavily relies on UN documentation, especially by Resolutions from the General Assembly and the supplemented fact-finding reports by UN organs that often accompany them. For example, in the *Wall* case, the ICJ largely relied on the factual findings presented in a report by the

[206] European Institute of International Relations, 'The ICJ: A Court of Justice or A Symbolic Organ of the UN?' (28 June 2022).
[207] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ GL No 131, [2004] ICJ Rep 136, (2004) 43 ILM 1009, ICGJ 203 (ICJ 2004), 9th July 2004, United Nations [UN]; International Court of Justice [ICJ].
[208] *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, No. 186, International Court of Justice (ICJ), 19 July 2024.
[209] *Supra* note 205, para. 202.
[210] *Supra* note 206, para.261.
[211] *Supra* note 205, para. 157.

Secretary-General and a collection of accompanying documents.[212] While the UN General Assembly instructed the Court to give special consideration to the Secretary-General's report, this did not require the Court to unconditionally accept the facts described therein.[213] Nonetheless, the Court chose to do so, refraining from independently verifying whether the information provided in the UN documentation was based on credible and reliable sources. Resolutions from the UN Security Council and General Assembly are drafted, sponsored, and voted on by States, which may have various political motivations for their decisions. For example, the commentary on Draft Conclusion 12 of the ILC Draft Conclusions on the Identification of Customary International Law notes that "the attitude of States towards a given resolution […] expressed by vote or otherwise, is often motivated by political or other non-legal considerations,"[214] and thus should be approached with caution. While this observation pertains to identifying opinio juris from such Resolutions, it is equally relevant when using these Resolutions to make legal determinations about facts in judicial proceedings. For instance, of the 32 States that drafted and sponsored General Assembly Resolution 77/247 (which condemns various actions by the Israeli government and includes the request for the Palestine Advisory Opinion)[215], two-thirds do not have diplomatic relations with Israel, and several do not recognize Israel as a State. It is therefore unsurprising that these States may have political motivations for supporting a resolution condemning Israel.

All in all, while the ICJ is designed to function as an impartial judicial body, the political dynamics States certainly influence its decision-making processes. This influence manifests through a variety of channels, including the appointment of judges, the selective application of legal principles, and the political motivations behind State participation in ICJ proceedings. Moreover, the UN Security Council, where powerful States wield significant control, plays a critical role in shaping the ICJ's jurisdiction in contentious cases, particularly when it comes to enforcement. Thus, the ICJ can be an arena where political interests of States are advanced under the guise of legal neutrality. This reinforces global inequalities and undermines the Court's ability to serve as a truly neutral arbiter of international disputes.

C. Double Standards in International Law

A central idea in international law is the principle of sovereign equality between States; the 'Westphalian model' of sovereignty, developed to resolve conflicts among European powers, has long been the focal point for international lawyers analysing the foundational concept of State sovereignty.[216] This model posits that all sovereign States are equal and hold absolute

[212] Flasch O., 'Facts Matter: A Critical Analysis of the ICJ's Fact-Finding Approach' in LawfareMedia (15 July 2024) Available at: Facts Matter: A Critical Analysis of the ICJ's Fact-Finding Approach | Lawfare [last accessed: 30.09.2024].
[213] Del Mar K., 'Weight of Evidence Generated through Intra-Institutional Fact-finding before the International Court of Justice' in Journal of International Dispute Settlement 2 (2) (August 2011), pp. 393-395.
[214] *Conclusion 12*, Draft conclusions on identification of customary international law 2018, International Law Commission, 7rth Session, UNGA ((A/73/10, para. 65).
[215] UNGA A/RES/77/247.
[216] Aghie A., *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, August 2012), pp. 310-311.

authority within their own territories. However, over time, it has led to a persistent challenge: how can order be established among sovereign States? This Westphalian model has shaped the history of international law in a way that frames the non-European world as being gradually incorporated into the sovereignty system that originated in Europe. The fact remains, though, that while the principle of sovereign equality is still very much present in all international treaties and relations today, the truth is much different. We often observe powerful States dominating the global stage by heavily influencing decisions of international organizations and courts. In this order of things, is there space for smaller States to assert their claims through legal avenues or are the politics between States dictating all relationships in the international world?

International law and political dominance are often seen as fundamentally at odds. Dominant States tend to resist adhering to the frameworks and constraints of international law, perceiving it as overly limiting, and instead resort to political manoeuvring.[217] Simultaneously, the international legal system, which is grounded in the principle of sovereign equality, refrains from formally acknowledging structures of dominance, leaving such dynamics to the political sphere. However, international law relies on power for the enforcement of its norms, placing it in a difficult position. Lacking the ability to restrain powerful States independently, its effectiveness seems to depend on a balance of power: "When there is neither community of interests nor balance of power, there is no international law."[218] Consequently, international law is often perceived as a domain where equality, reason, and justice prevail, while power imbalances are relegated to the realm of politics, where might dominates over legal principles.

Despite the inherent bias international law faces (the allegation that it is shaped by Western powers to reflect their own agendas), weaker States are increasingly defying this narrative by using international law to challenge more militarily and economically dominant nations, and in many cases, succeeding. These smaller States have leveraged international law to secure moral, legal, and economic victories that have reshaped international relations and even impacted warfare.[219]

Recent high-profile cases in the ICJ have highlighted this shift. For instance, in 2019, Gambia brought a case against Myanmar over genocide, capturing global attention.[220] In 2023, South Africa sued Israel under the Genocide Convention, securing provisional measures that required Israel to allow more humanitarian aid into Gaza during the Israel-Hamas war.[221] Such actions by smaller States not only create international spectacles but also deliver significant moral and legal blows to powerful nations. Similarly, as we mentioned in the previous section, Ukraine has employed a sophisticated "lawfare" strategy in its conflict with Russia, filing multiple cases in international courts related to Russia's annexation of Crimea and the 2022 invasion. Ukraine's legal victories have bolstered its war effort, garnered international support, and

[217] Ginther, 'Hegemony', in R. Bernhardt (ed.), *Encyclopedia of Public International Law* (1986), pp. 58– 161.
[218] Morgenthau H.J., 'Positivism, Functionalism, and International Law' in AJIL 34 (1940), p. 274.
[219] *Supra* note 13.
[220] *Supra* note 16.
[221] *Supra* note 14.

established important precedents that may deter future acts of aggression by increasing the costs of war.

All five permanent members of the Security Council (which constitute the world's most powerful nations) have also faced defeats by weaker States in international courts. The most notable example is, of course, the *Nicaragua* case, where the ICJ ruled that the U.S. had violated international law by supporting the Contra rebels and mining Nicaragua's harbors. The US refused to take part in the hearings on the merits and subsequently used its UN Security Council veto power to block Nicaragua from receiving compensation. Nevertheless, the impact of the ruling is significant, as it remains one of the most prominent cases in international law, largely because a small State prevailed against a global superpower.[222]

According to Goldsmith, Sate interests often influence compliance with international law more than the law itself shapes State behaviour, with more powerful States being more likely to prioritize their own interests over adhering to legal obligations.[223] In the same spirit, Posner contends that courts without compulsory jurisdiction are likely to reflect the interests of powerful States.[224] That is mainly due to the fact that, without universal jurisdiction for all parties in disputes, courts rely on States choosing to use them, and judges may aim to appease States (especially the most powerful ones) to safeguard their own career prospects, as we in the case of the ICJ. After all, States are unlikely to turn to courts if they believe they will lose.[225]

Moreover, access to legal resources is much easier for States with significant wealth and influence. This exact wealth facilitates their participation in legal disputes, therefore helping them gain more legal experience.[226] States need the expertise and financial means to assess claims, formulate legal positions, hire and coordinate representation, file claims in international courts, gather substantial evidence, cover years of legal fees and case preparation, travel to tribunals for hearings, and manage the political and financial risks associated with pending cases. They must also account for the opportunity costs of awaiting decisions that could take years or even decades.[227] Additionally, for new participants in international dispute resolution systems, the startup costs are particularly high. That is why a significant portion of scholars argues that legal capacity is the most accurate proxy for power in international dispute resolution.[228] Legal capacity is defined as a combination of legal expertise and government effectiveness relevant to a specific type of dispute. It has been observed that general measures of government effectiveness often fail to capture the necessary specificity required for assessing legal capacity, which is why States with limited litigation experience prefer to not

[222] O'Connell M., 'The Nicaragua Case: Preserving World Peace and the World Court' in *International Law Stories,* Noyes J.E., Dickinson L.A, and Mark W. Janis M.W. (eds.) (2007).
[223] Goldsmith J., Posner E., *The Limits Of international Law,* (Oxford University Press, 2005), pp. 15-25.
[224] *Ibid.*
[225] *Supra* note 189.
[226] Carrubba C., Gabel M., Hanklan C., *Judicial Behavior under Political Constraints: Evidence from the European Court of Justice,* (American Political Science Review 102 (4) (2008) p. 20-25.
[227] *Ibid,* p. 30.
[228] Bown C., 'Developing Countries as Plaintiffs and Defendants in GATT/WTO Trade Disputes', The World Economy 27(1) (2004) pp. 59-80.

engage in legal battles with more experienced States and they increasingly prefer to avoid international tribunals and dispute resolution mechanisms. For example, relating to maritime boundary disputes, a trend towards signing Agreement to Negotiate Options (ANOs) has been noticed amongst smaller States,[229] who seem to prefer this solution rather than recourse to litigation.

However, smaller States, as we have already seen, have achieved significant victories against more powerful ones, especially in the ICJ. Prominent scholars like Goldenziel observe an increasing use of lawfare in the sense of using legal measures to achieve military or strategic goals that might otherwise require force, as with the example of Ukraine and South Africa. If the ICJ acts as a neutral arbiter, States at a disadvantage on the battlefield or in strategic competition are more likely to bring disputes before the court. Most States are incentivized to participate in court proceedings when a case is filed against them to avoid reputational damage.[230] While a State can withdraw from the court's compulsory jurisdiction, pull out of a lawsuit, or fail to appear or comply with rulings, doing so comes with significant reputational costs. For instance, the United States suffered damage to its international reputation when it withdrew from the court's compulsory jurisdiction after the unfavourable ruling in the *Nicaragua case.* Since then, globalization has heightened the visibility and importance of international law, and States have continued to use the ICJ in increasingly high-profile cases, raising the stakes of reputational consequences for nonparticipation or noncompliance. A rise of "outcasting" has been documented, where States that violate international law are increasingly marginalized by the international community.[231] Russia, for example, faced outcasting for ignoring the ICJ's provisional measures in *Ukraine v. Russia,* which ordered it to cease military actions. Politicians and diplomats referenced this ruling to highlight Russia's illegal actions and to dissuade China from selling arms to Russia.[232] Therefore, although powerful States may still risk reputational damage by refusing to appear in court, both stronger and weaker States have a growing incentive to use international courts and comply with rulings to avoid outcasting or other reputational repercussions.

Taking all of the above into account, we can see that there is an idea of a two-speed global world; a perception that powerful States have a certain leeway in using law to their advantage against smaller States because of the political influence they wield and the resources available to them. However, that is not entirely true. Smaller States have achieved significant victories in the ICJ and in other legal avenues and while perhaps the results of these victories have not succeeded in making enormous changes, they have not been a drop in the ocean either.

[229] Ásgeirsdóttir A., Steinwand M., 'Dispute Settlement Mechanisms and Maritime Boundary Settlements' in The Review of International Organizations 10 (2) (2015) pp. 119–143.
[230] Davis C., Morse J., 'Protecting Trade by Legalizing Political Disputes: Why Countries Bring Cases to the International Court of Justice' in International Studies Quarterly 62 (2018) pp. 709-712.
[231] Hathaway O., 'Outcasting: Enforcement in Domestic and International Law', The Yale Law Journal 121 (2011), p. 252.
[232] Goldenziel J., 'An Alternative to Zombieing: Lawfare Between Russia and Ukraine and the Future of International Law' in Cornell Law Review 108(1) (2022).

International law has empowered weaker States to challenge more powerful ones, reshaping the global order in the process. When weaker States are unable to confront stronger ones through military means or economic pressure, the ICJ has offered an alternative arena for conflict. The ICJ's legal, moral, and sociological legitimacy continues to expand with every case filed and each new party that seeks its jurisdiction. Such victories by smaller States in the biggest international Court are an indicator that such States can also win in other legal avenues and courts. While political influence certainly has an impact in international judicial decisions, there are still some legal safeguards who protect international institutions from being used as pawns in the political games of powerful States.

IV. Conclusion – What does Lawfare mean for future wars?

Clausewitz viewed war as a complex interaction between the forces of passion, chance, and rational policy; a "trinity" that reflects the unpredictability and calculated nature of warfare.[233] In this sense, war is not simply about physical destruction but about using violence strategically to achieve political ends. However, the landscape of modern warfare has changed drastically from the time Clauswitz developed his theory of war. Experience has shown us that violence is not the only means for a State to accomplish military objectives; in fact, States might benefit more from non-violent methods of confrontation and principally, through the use of law. Legal warfare, or lawfare, can be seen as an extension of Clausewitz's ideas, where the principles of strategy, coercion, and political objectives are pursued through legal means. Just as Clausewitz saw war as a way to bend the opponents will without necessarily resorting to total annihilation, modern conflicts increasingly employ law and international norms to limit, manipulate, or challenge adversaries, achieving political or military objectives without direct combat. This shift reflects the broader understanding of power in contemporary conflicts, where legal and non-military tools are just as critical as traditional military force in the pursuit of national interests.

Lawfare has evolved significantly from its traditional role as a legal adjunct to military conflict to a central tool in modern warfare. Historically, legal considerations in war were largely reactive, concerned with the legal justification for war (*jus ad bellum*) and the conduct during conflict (*jus in bello*), such as adherence to the laws of war and treaties like the Geneva Conventions. In this traditional framework, law was seen primarily as a regulatory mechanism to control and limit the excesses of armed conflict. However, in modern warfare, lawfare has transformed into a proactive, strategic weapon where legal mechanisms are employed not just to regulate, but to actively shape the battlefield and influence outcomes. The Chinese concept of *falu zhan* (legal warfare)[234] perfectly describes the meaning of lawfare in contemporary conflicts; the use of law is not limited to defense but can also be an offensive strategy, proactively shaping the legal environment to gain advantages before or during a conflict. This

[233] *Supra* note 1, pp. 82-85.
[234] *Supra*, note 7.

strategic use of law in international relations redefines power dynamics, where legal expertise, the ability to craft compelling legal narratives, and the manipulation of global institutions can be as effective as military might.

We have observed that the use of law as a weapon of war is an inevitability in every conflict of the 21st century. Law has become an important tool in leveling the playing field between weaker and more powerful States. By shifting the conflict in the legal arena, a small State betters its chances against its militarily superior adversary whilst avoiding a costly (and often bloody) direct confrontation of the battlefield. The value of this tactic is not to be dispersed easily, especially if we strive for a peaceful international environment. However, as we said above, law, by itself, is a value-neutral term; it is the people who wield it that give it a positive or a negative connotation. The excessive politicization of law risks undermining the integrity of legal institutions. When law is employed solely as a tool for political gain, it erodes the impartiality of legal systems, fostering distrust and de-legitimizing the very norms it is meant to uphold. This can result in legal frameworks being viewed not as pillars of justice but as mere extensions of political agendas, leading to their diminishing effectiveness in regulating State behaviour. Just as Clausewitz cautioned that war, when overused or misapplied, could spiral out of control, the misuse of law as a strategic weapon risks creating a cyclical escalation of legal contests[235], where the rule of law is weakened, and the distinction between lawful and unlawful actions becomes blurred, potentially destabilizing international relations.

[235] *Supra* note 1, pp. 90-100.

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