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The Growing Role of the International Court of Justice as a Field of Lawfare: Perils and Prospects

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ABSTRACT

The International Court of Justice (ICJ) has seen a sharp rise in cases, reflecting both increased reliance on judicial mechanisms and a strategic shift in how states use the Court. While some cases solely aim to resolve legal disputes, particularly in territorial and immunity matters, others—especially those involving politically charged conflicts—suggest a broader function. In such cases, litigation serves as a tool for shaping international narratives, exerting diplomatic pressure, and reinforcing legal norms rather than achieving a definitive legal resolution. This article examines the ICJ's evolving role as a forum for lawfare, where legal proceedings utilized to advance political, moral, or diplomatic goals. It assesses whether this instrumentalization aligns with the ICJ's foundational purpose or necessitates a reassessment of its role in international dispute settlement framework. The article, after analysing the definitional discussion on lawfare and tracing its evolution from military strategy to broader international law applications, explores how the ICJ has become a battleground for lawfare, particularly in disputes under the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Prevention and Punishment of the Crime of Genocide. Next, it weighs benefits and risks of such a utilization, contrasting views on norm reinforcement with concerns over politicization. The article concludes by examining how differing conceptions of the ICJ's function may shape perspectives on lawfare's impact on the ICJ's legitimacy and role in global governance.

Keywords: lawfare, International Court of Justice, international dispute resolution, CERD, Genocide Convention

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1. Introduction

The International Court of Justice ('ICJ') has recently witnessed an unparalleled surge in popularity, with twenty-six cases and advisory opinion requests currently pending before it.[1] On the face of it, since the ICJ is the principal judicial organ of the United Nations and functions as a judicial forum for the settlement of disputes between states, intending to uphold international law and promote peaceful coexistence, the increasing reference to the Court could be seen as a positive development for the promotion of peace. However, upon closer examination of the individual cases, it does not appear that every case before the Court genuinely aims at resolving a dispute or that the applicant may genuinely believe that the violation they have suffered will cease as a result of the proceedings.

In the context of matters pertaining to land and maritime delimitation, sovereignty, or state immunities, it is evident that the involved parties straightforwardly regard the Court as a forum for the resolution of their disputes. Conversely, in relation to certain other disputes – particularly those that are highly politicised – the expected function of the Court is somewhat transformed. In such cases, recourse to the ICJ often appears not to be made with the aim or genuine expectation of resolving the dispute in question, but rather to open a new front in order to gain the moral or political high ground in a usually much wider and multifaceted dispute. To illustrate this point, in a recent private dialogue concerning the *South Africa v. Israel* Case, a member of South Africa's legal team conceded that they held modest expectations regarding the Court's adjudication on the merits. The primary objective of their application, they revealed, was to secure interim measures aimed at mounting further international pressure on Israel. Analogous observations can be made with regard to other ongoing cases, including

[1] International Court of Justice, 'Pending Cases', available at. https://www.icj-cij.org/pending-cases (accessed on 10.03.2025).

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Ukraine v. Russia,[2] cross-cases stemming from the alleged violation of the CERD between Azerbaijan and Armenia,[3] or *Nicaragua v. Germany*.[4] In addition, it is often observed in such cases that the dispute is 'repackaged' in such a way as to fall within the jurisdiction of the Court when it is not possible to bring the 'actual' dispute – e.g. the legal dispute lies at the heart of the broader conflict – before the Court under a clause conferring jurisdiction.

In this respect, it may be possible to speak of two different uses of the ICJ. On the one hand, the Court is used as a dispute settlement mechanism; on the other hand, it is used as a field of lawfare, i.e., to an extent, for the validation, expression and promotion of prevailing international legal norms and principles. This article aims to focus on the latter use and to analyse the dangers and prospects of using the ICJ as a field of lawfare. In doing so, the article addresses two interrelated questions: (i) whether the idea of lawfare is consistent with the ICJ's *raison d'être*, and (ii) whether evolving expectations of the Court require us to reconsider its *raison d'être*.

The article will present its analysis under four main sections. The first section will discuss what we should understand by the concept of 'lawfare'. While Charles J. Dunlap Jr., who is widely credited with popularising the term, characterises the concept as "the strategy of using—or misusing—law as a substitute for traditional military means to achieve a warfighting objective" (Dunlap, 2001), over time, less 'value-neutral' and broader definitions of the concept have been proposed and employed in the different contexts. Thus, it appears an essential starting point to present an understanding of the concept. The subsequent section will proceed from this fundamental point and explore how the ICJ has evolved into a domain of

[2] *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide* (*Ukraine v. Russian Federation*), ICJ GL No 182, 16 March 2022.
[3] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Armenia v Azerbaijan*), ICJ GL No 180 16 September 2021; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Azerbaijan v. Armenia*) ICJ GL No 181, 23 September 2021.
[4] *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory* (*Nicaragua v. Germany*), ICJ GL No 183, 1 March 2024.

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lawfare in specific disputes, with a particular focus on the disputes emerge in the scope of the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination ('CERD') and the Convention on the Prevention and Punishment of the Crime of Genocide ('Genocide Convention') due to their illustrative capacity.

In the broader debates regarding the concept of 'lawfare', two distinct positions can be identified. 'Idealists' posit that the instrumentalization of International Law will serve to reinforce norms as legitimacy standards for international actors, with a consequent improvement in the adherence of many of these actors to the normative order. Conversely, 'realists' posit that the over-instrumentalization of International Law will result in its politicisation, thereby giving rise to the perception of bias and undermining its legitimacy, which is rooted in the concept of 'perceived' impartiality. The third section will examine the perils and prospects of using the ICJ as a field of lawfare in light of these divergent perspectives and attempt to provide a comprehensive picture.

The fourth section will argue that the ICJ is still caught between different visions of dispute settlement in International Law and that the answers to the questions posed in this article may vary depending on the prevailing vision at the time. The Anglo-American conception of dispute settlement and state responsibility is based on a bilateral, consensual understanding, eschewing the establishment of a general relationship of responsibility and overarching normative principles. In this sense, the ICJ should be assigned more of an arbitral role. The continental conception, on the other hand, is more interested in community values and multilateral responsibility. This understanding typically sees the role of the ICJ in a cosmopolitan light, as having a norm-setting and public order function in addition to its dispute settlement role. How to approach the use of the ICJ as a field of lawfare is likely to depend on the perspective from which it is viewed.

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2. The Concept of 'Instrumental Lawfare'

The concept of lawfare has gained notable traction in international legal discourse over the past two decades (Fisher, 2023, 100). The characterisation of lawfare by Dunlap and the antecedents of his definition (Dunlap, 2009, 34) have presented lawfare as a substitute for war or as a weapon of war in order to achieve military objectives (Dunlap, 2008, 146). Nevertheless, lawfare lacks a universally accepted definition and indeed a variety of definitions have emerged over time. The initial inquiry into the notion pertains to the way it is employed, whether in a value-neutral, pejorative, or complimentary sense. On the one hand, lawfare can function to uphold legal norms, ensuring accountability and justice. On the other hand, it can be utilized as a mechanism for legal harassment, delegitimization, or the exertion of asymmetrical power dynamics. This dual nature engenders complexity in evaluating whether lawfare strengthens or undermines the international legal order. For example, while Dunlap's definition is a value-neutral one, his in-depth analyses call for caution about the potential misuse of 'lawfare', noting that "there is disturbing evidence that the rule of law is being hijacked into just another way of fighting, to the detriment of humanitarian values as well as the law itself" (Dunlap, 2001, 2). But overall, he was of the opinion that lawfare is not intrinsically 'evil', conceding that "(l)awfare is much like a tool or weapon that can be used properly in accordance with the higher virtues of the rule of law – or not. It all depends on who is wielding it, how they do it, and why" (Dunlap, 2008, 148).

In this regard, a significant conceptual distinction is posited by Orde Kittrie, who aligns with Dunlap's value-neutral definition (Kittrie, 2010, 394). According to Kittrie, one version of lawfare is 'Instrumental Lawfare', which is defined as "the instrumental use of legal tools to achieve the same or similar effects as those traditionally sought from conventional kinetic military action", while the other version, 'Compliance-Leverage Disparity Lawfare', is "designed to gain advantage from the greater influence that law,

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typically the law of armed conflict, and its processes exerts over an adversary" (Kittrie, 2016, 11). Accordingly, the latter is typically "waged by state or non-state actors against adversaries over which law has significantly greater leverage or which otherwise feel more compelled to comply with the relevant type or provision of law" (Kittrie, 2016, 11). A well-known strategy employed by terrorist groups in this sense is the firing of weapons from holy sites or civilian areas, with the intention of prompting a retaliatory attack. This could potentially force the State under attack to act against its commitment to International Law or allow the terrorist organisation to obtain sufficient material to disseminate propaganda against the State it attacked (Fisher, 2023, 103).

'Instrumental Lawfare' has a wider-scope and it "can be waged using legal tools including international, national, and sub-national laws and forums, and different combinations thereof" (Kittre, 2016, 13). According to Kittre, this kind of warfare in the international legal order may include "Creating new international laws designed to disadvantage an adversary", "Reinterpreting existing international laws so as to disadvantage an adversary", "Generating international law criminal prosecutions in international tribunals", "Using international law to generate intrusive and protracted investigations by international organizations", "Generating international organization votes to disadvantage an adversary'", "Generating international law advisory opinions in international forums", "Using international law as grounds for 'universal jurisdiction' prosecutions of third-country officials in national courts for alleged war crimes" and "Using international law as grounds for criminal prosecutions of domestic companies in national courts for alleged war crimes" (Kittre, 2016, 13-14). As is rather evident, 'instrumental lawfare' is not necessarily reserved for terrorist, rebellious or 'disadvantaged' non-state groups. On the contrary, states and international organisations are much better positioned to use legal tools in this manner. From this perspective, as noted by Waseem Ahmed Qureshi, lawfare "can be of either a Zeusian or a Hadesian nature. If lawfare is waged to preserve international law principles,

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then it is called Zeusian; if lawfare is waged to abuse or negatively exploit certain provisions of international law, then it is regarded as Hadesian" (Qureshi, 2019, 43). It is rather manifest that the notion of lawfare that is relevant in the context of this article is that of 'instrumental lawfare'.

Other scholars similarly noted that lawfare can also complement military means and can even exist without any connection to a military objective, but instead to a political one (Scharf and Andersen, 2010, 17). Accordingly, legal actions such as economic sanctions against Iran or private lawsuits against terrorist groups and state sponsors of terrorism have been effective and, perhaps more importantly, have implied another 'peaceful' means for action. It should be noted, however, as Michael Newton warns us, "the term 'lawfare' should never be automatically conflated with the legitimate use of legal forums to vindicate and validate binding legal norms when they are in danger of being overwhelmed or replaced for the sake of expediency of political convenience" (Newton, 2010, 256). As far as can be observed, what distinguishes instrumental lawfare from the 'legitimate' use of legal forums is that the former is not necessarily aimed at resolving a legal dispute, but at the strategic use of legal mechanisms to achieve political, military or strategic objectives.

Conversely, alternative perspectives contend that the term 'lawfare' is inherently pejorative, and that the legitimate utilisation of a legal forum or right should not be associated with it (Irani, 2018; Goldstein, 2010). To give some examples, the 'Lawfare Project', an organisation dedicated to safeguarding the rights of Jewish individuals and has identified fighting lawfare as one of its primary objectives,[5] defined 'lawfare' as "the wrongful manipulation of the law and legal systems to achieve strategic military or political ends" (Goldstein, 2010). This definition is unambiguously negative but notably does not limit the scope solely to military objectives. In exploring these 'other' uses of lawfare, founder Brooke Goldstein "used examples of

[5] The Lawfare Project, 'Who Are We', https://www.thelawfareproject.org/who-we-are.

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defamation lawsuits to deter journalists from exposing terrorist organizations, hate speech lawsuits used to silence those who discuss the threat of 'radical Islam and terrorism,' and the exploitation of LOAC (Law of Armed Conflict) and war crimes accusations" (Fisher, 2023, 101)

Newton, another scholar who perceives lawfare as an abusive and malicious practice, suggests that

> "the illegitimate exploitation of the law in turn permits the legal structure to be portrayed as a means of indeterminate subjectivity that is nothing more than another weapon in the moral domain of conflict at the behest of the side with the best cameras, biggest microphones, and most compliant media accomplices" (Newton, 2010, 255).

Aside from that Newton overly limits his inquiry by merely focusing on the 'misuse' of laws of war, his concerns about the relativisation of legal structures by lawfare should also be treated carefully. At first glance, Newton's argument that the "malicious use of norms erodes humanitarian law by relativising it" seems acceptable. However, when considered in more depth, it is possible to see that this is a situation arising from the nature of law and that the entire history of law has evolved in the form of the emergence of opportunists who first take advantage of the loophole, and then the closing of this loophole either by changing the practice or by refining the norms.

Newton nevertheless contends otherwise, focusing on a report of the United Nations Fact Finding Mission on the Gaza Conflict (2009), also known as the Goldstone Report,[6] as an illustrative document. He argues that the report

> "represents a pernicious expansion of international common law in a manner that would dramatically undermine military operations.

[6] UN, GA, A/HRC/12/48 (2009), 'Human Rights in Palestine and other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict', https://documents.un.org/doc/undoc/gen/g09/158/66/pdf/g0915866.pdf.

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> Phrased another way, lawfare that results in tactically irrelevant rules that actually undermine respect for the application and enforcement of humanitarian law is illegitimate and untenable" (Newton, 2010, 271).

A potential issue with his analysis is that Newton appears to be conflating differing interpretations or applications of legal norms, as well as differing assessments of facts, with lawfare. Lawfare, by any definition, requires 'misuse' of law or using legal norms for ends go beyond the purpose of the norm or venue in question. Newton's assertion that the manner in which the Goldstone Report interprets and applies legal norms or engages with facts is erroneous may be accurate (Newton, 2010, 272). However, the labelling of the report itself as a means of lawfare extends beyond the definitional limits of lawfare and renders any decisions or legal assessments that are deemed inaccurate, deficient or politically motivated by someone susceptible to being labelled as lawfare.

Christi Scott Bartman, on the other hand, focuses exclusively on the international legal system and defines lawfare as "the manipulation or exploitation of the international legal system to supplement military and political objectives legally, politically, and equally as important, through the use of propaganda" (Bartman, 2010, 423). While this definition encompasses both military and political objectives as motivations and introduces propaganda as a pivotal element (cfr. Dunlap, 2008), it nevertheless presents a negative perspective by confining the concept to 'manipulative' and 'exploitative' uses of legal instruments and forums. Moreover, putting propaganda at the heart of the definitional attempt is rather tricky given that propaganda is a double-edged sword. Undoubtedly, one of the main aims of lawfare is to undermine the moral and public support of the adversary. However, the party that believes it has been subjected to lawfare may also use it as a propaganda tool, attempting to convince domestic public opinion of the legitimacy of its own actions by claiming victimisation. Of course, in cases where the actions of the party subjected to lawfare are entirely consistent with

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international law and the lawfare is based on unsubstantiated allegations, this would not be a practical problem. In reality, however, the situation is much more complex. Lawfare often arises from actual violations. When lawfare becomes a counter-propaganda tool, the state subjected to lawfare may gain the public support necessary to continue its actual violations. The events in Gaza after 7 October 2023 and Israel's actions can be seen as the closest example of this situation, as the Israeli government has portrayed the entire legal process and allegations against its operations as bias and abuse of the law and has sought to gain domestic and international support by emphasising its victimhood.[7]

It can be said, then, that such definitions, which see the concept of lawfare in a purely negative light, suffer from a paradoxical problem. For, the scholars making the definition see some practices as lawfare by default, and then they put forward the abstract definition according to the characteristics of those practices. However, this approach inherently results in the definition's content being determined by the events the scholar deems to be lawfare. It is acknowledged that this is a conceptual paradox that can be identified in many definition attempt, yet the 'negative' definitions given above appears to be distinctly the product of some specific motivations.

Semantically, the concept of lawfare is devoid of any overtly negative or positive connotations (Gloppen, 2018, 1). The only definitive implication of its semantic structure is that the concept refers to the utilisation of law outside its intended purpose, namely the establishment of order, the assurance of justice and the resolution of disputes through the rule of law. Moreover, emerging from the combination of words 'law' and 'warfare' does not necessarily mean lawfare should be strictly about 'military objectives'. Legal tools and venues can also be used to attain a political or moral edge against

[7] See, for example, Robbie Sabel, "*Manipulating International Law as Part of Anti-Israel* 'Lawfare'", https://jcpa.org/overview_palestinian_manipulation/manipulating_international_law/.

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an adversary and the concept is well-suitable to encompass these utilisations as well.

Another problem with attributing an inherent moral quality to 'lawfare' is that supposedly malicious (mis)uses of legal norms and venues may nevertheless lead to 'humanitarian' consequences, while supposedly 'virtuous' use of legal tools in order to achieve broader ends may cause damaging consequences. For example, the coercion inflicted by the misuse of law by terrorist groups may force states to develop practices and technologies, such as targeted attacks, that enable them to comply with the law. In contrast, when states and international organisations use sanctions as tools of coercion, citing legal justifications related to human rights violations, nuclear proliferation, or threats to international peace, such sanctions usually disproportionately affect civilian populations while achieving limited policy outcomes.

Against this background, the term lawfare can be defined as 'the strategic use of legal norms, instruments and mechanisms not only for the resolution of legal disputes or the maintenance of legal order and justice, but also, or alternatively, for the achievement of political, military, moral or strategic objectives'. Such a definition is broad enough to encompass both 'instrumental lawfare' and 'compliance-leverage disparity lawfare', as well as offensive and defensive uses of lawfare, while avoiding either pejorative or positive connotations. Since the main purpose of this article is to assess the use of the ICJ as a lawfare field, it is clear that the main focus will necessarily be on 'instrumental lawfare', i.e. attempts to use the ICJ not solely or at all as a dispute settlement mechanism, but to achieve political, military, moral or strategic objectives. With this definition in mind, the next section shall identify those cases where the ICJ has been observed to be used as a means of instrumental lawfare.

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3. Use of ICJ as a Means of Instrumental Lawfare

At this juncture, it appears that an essential starting point is to consider the debates regarding the ICJ's position in the cases of 'high politics', since 'lawfare' is closely related, yet nevertheless distinct. The ICJ, as the oldest international court in operation and with the broadest (possible) jurisdiction of any international, has a considerable amount of experience with cases of 'high politics', such as, inter alia, the *Nicaragua v. United States, Lockerbie* and *South-West Africa* cases. The nature and impact of such cases have been debated in both the courtroom and academia for some time. While the debate once appeared to be settled for good, the recent applications to the ICJ, most prominently *South Africa v. Israel*, 'reinflamed' the debate to an extent.

It is true that in the Western legal tradition, domestic courts occasionally consider cases of such nature, i.e. cases that claimed to be unlikely to be resolved through the application of legal norms (Odermatt and Petkova, 2024), inappropriate to be considered before them (Coleman, 2003, 30). For example, in January 2024, the U.S. District Court in Northern California dismissed a lawsuit against the U.S. President and Secretary of Defence, citing the 'political question doctrine'. The plaintiffs sought a court order to halt the provision of assistance to Israel by the United States, but the court ruled the case inadmissible, emphasising that decisions on U.S. support for Israel involve complex political questions that are beyond the scope of judicial review.[8]

The question of whether a similar doctrine is applicable before the ICJ has been already the subject of debate (Sugihara, 1996). Some scholars, as well as the ICJ judges,[9] have argued that the application of the political question doctrine would be preferable and would prevent the Court from becoming

[8] United States District Court Northern District of California, '*Defense for Children International-Palestine, et al., Plaintiffs, V. Joseph R. Biden, Et Al., Defendants*', Case No. 23-Cv-05829-Jsw, Order Granting Motion to Dismiss and Denying Motion for Preliminary Injunction, 31 January 2024.

[9] See, e.g., *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* (Merits) [1986] ICJ Rep 14, 168 *(Separate Opinion of Judge Lachs).*

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overly politicised. It has also been suggested that the Court's actual impact in highly political disputes has been restricted (Steinberger, 1974). Further, questions such as whether a state can challenge an inherently political act of the Security Council before the Court exemplifies the complexities before the ICJ and the intricate dynamics between state sovereignty and international legal obligations (Coleman, 2003, 32).[10] Jed Odermatt has further argued that, despite its formal non-application of the 'political question doctrine', the ICJ has already engaged in 'avoidance techniques', including the adoption of a restrictive stance on issues of standing and jurisdiction, or the reframing of legal questions in a manner that enables the circumvention of contentious political issues (Odermatt, 2018).

Yet drawing a line between political and legal is by no means an easy task. The international legal system is built upon the national interest of individual countries; hence, international disputes are necessarily political, albeit to different degrees. The Court emphasised in *Hostages* that "legal disputes between sovereign States by their very nature are likely to occur in political contexts and often form only one element in a wider and longstanding political dispute between the States concerned".[11] As Gleider Hernández points out,

> The notion of 'high politics' in international adjudication is only paradoxical if one insists strictly on a conceptual separation between law and politics. Though the point of law and legal systems is to transcend politics, or at the very least, to organise law and legal institutions around processes that operate independently from brute politics, only the most strident formalist would maintain that law is entirely separate from politics. (…) Law provides a framework for social relations and serves in turn to frame or generate them, in part;

[10] See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)* (Provisional Measures) [1993] ICJ Rep 325, [106] *(Separate Opinion of Judge Lauterpacht).*

[11] *United States Diplomatic and Consular Staff in Tehran*, Judgment, ICJ. Reports 1980, 20.

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> and, of course, law in its modern form remains an expression of political, moral and ethical choices channelled through processes which validate precisely those political choices and give them their legal form (Hernández, 2024).

While the 'political question doctrine' may be considered as a rational instrument at the domestic level, as it is designed to safeguard the national interest by offering courts a means to circumvent situations where national interests are at stake in the international arena, for an international court that is required to resolve international disputes the ultimate interest is a universal one. It is thus challenging to concur with the assertions put forward by the United States in the *Nicaragua v. United States* case, in which it contended that the ICJ is not equipped or designed to adjudicate essentially political matters pertaining to collective security and self-defence.[12]

Indeed, other scholars and the majority of the ICJ bench did not subscribe to the applicability of the political question doctrine before the ICJ. The ICJ rejected the related US claims in *Nicaragua v. United States* by stating that "the Court has never shied away from a case brought before it merely because it had political implications".[13] As is affirmed in other judgments,[14] judges are essentially tasked with isolating and locating "justiciable issues" that come before them while disregarding the matters that fall outside of this scope. Hans Kelsen also elucidates this point by arguing that the distinction between a legal and political dispute is determined not by the subject matter of the disagreement but by the nature of the legal principles governing its resolution (Kelsen, 2003 (1952), 404).

As for the 'reduction' of complex political disputes to 'justiciable issues', even if one may hesitate to go as far as Hersch Lauterpacht, who considers

[12] "Statement on the U.S. Withdrawal from the Proceedings Initiated by Nicaragua in the International Court of Justice', 18 January 1985, in 79 *American Journal of International Law* (1985), 439.
[13] *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States*), Jurisdiction and Admissibility, 1984 ICJ REP. 392.
[14] *Legality of the Threat or Use of Nuclear Weapons*,Advisory Opinion, [1996] 1 ICJ Rep 226.

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that "(a)ll conflicts in the sphere of international politics can be reduced to contests of a legal nature" (Lauterpacht, 1933, 389), it must be accepted that in the majority of 'highly political' international disputes, there are one or more underlying legal issues, which are intertwined with the political dispute and may be engaged by the Court. The capacity of the Court's judgment to resolve the dispute, or its enforceability, is not contingent upon the 'justiciability' of the problem, but rather upon the structural deficiencies of the international legal order (Argüello, 2024). In *Lockerbie,* Judge Weeramantry emphasised this point from a different angle by stressing that "(w)hat pertains to the judicial function is the proper sphere of competence of the Court. The circumstance that political results flow from a judicial decision is not one that takes it out of that sphere of competence".[15]

It can be argued, then, that there are no satisfactory legal or other reasons for excluding highly political cases from the Court's jurisdiction. The rationale for initiating this section with an emphasis on this debate is that the arguments for and against the utilisation of the ICJ as a 'lawfare field', despite being related, should not be conflated with the arguments about the Court's position in relation to the cases of 'high politics'. Within the ICJ, lawfare manifests in various forms: states initiate cases not necessarily to resolve disputes but to delegitimize opponents, influence international opinion, or complicate geopolitical rivalries. While all cases of lawfare are thus necessarily the cases of 'high politics', not every case of 'high politics' is a lawfare. That is, the summarised debates concerning the cases of 'high politics' are applicable to the cases of 'lawfare'.

To elaborate and moving to the use of ICJ for lawfare, in the majority of 'high politics' cases, the Court was tasked with resolving the core, or at the very least a substantial aspect, of the broader dispute. In *Nicaragua v. United States,* for instance, the legal question before the Court was, *inter alia*, the

[15] *Questions of Interpretation and Application of the 1971 Montréal Convention Arising from the Aerial Incident at Lockerbie (Libya v UK)*,Provisional Measures, [1992] ICJ Rep 3, 56 (Dissenting Opinion of Judge Weeramantry).

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legality of the United States' military and paramilitary activities in Nicaragua and its violation of Nicaragua's sovereignty through both direct and indirect means. In the *Lockerbie* cases, the primary legal question concerned whether Libya was obligated to extradite the suspects in accordance with the provisions of the Montreal Convention. While the underlying political dispute may be interpreted as pertaining to Libya's alleged facilitation of terrorism, it is evident that the legal question posed to the Court was intricately intertwined with the broader political discourse, ultimately seeking a definitive resolution to the prevailing circumstances or at least an aspect of it.

The distinguishing characteristic of lawfare is that its primary objective is not, in itself, to be an attempt to resolve the fundamental dispute between the parties or a substantial part of it. Rather, it involves the strategic deployment of legal norms and mechanisms to delegitimize opponents, influence international opinion, gain a moral and political advantage, or exacerbate geopolitical rivalries. Also, lawfare usually involves "attempting to litigate small legal portions of multifaceted disputes by characterizing them, compartmentalizing them, or disaggregating them through compromissory clauses, almost 'squeezing' the relevant claims into specific treaty-based allegations" (Botticelli, 2024).

Recent years have seen an escalation in the utilisation of the ICJ in this manner, most notably through the implementation of the CERD and the Genocide Convention. These Conventions represent two of the most significant and extensively ratified international human rights instruments, are characterised by their unique moral and political weight, and both incorporate compromissory clauses that enable disputes arising from these instruments to be referred to the ICJ. This section will thus concentrate on the utilisation of the CERD and the Genocide Convention as a means of lawfare.

However, a final and essential point that must be made before focusing on the cases is that the provisional measures regime of the ICJ has manifested the Court as an attractive field of lawfare (Ramsden, 2022, 466). As is known, the ICJ proceedings on the merits usually take a very long time. For a state in

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an on-going conflict, the political benefit of such a protracted litigation process will be obviously limited. It is also uncertain whether the outcome of the case will be positive. The provisional measures regime, however, promptly yields results and offers more favourable standards for the applicant state. Three criteria should be proved by the State who seeks provisional measures.

1. *Prima facie* jurisdiction over merits should be demonstrated.[16] The *prima facie* nature of the requirement benefits the applicant, as the ICJ is not required to definitively establish jurisdiction but must determine if the applicant's claims appear to be based on provisions that could establish the ICJ's jurisdiction.
2. The applicant must demonstrate that the rights it seeks to protect must be a at least plausible, i.e. "the subject of dispute in judicial proceedings".[17] While the exact meaning of plausibility and how to apply it is not clear, it appears that standard set by the Court is much lower compared to its assessment at the merit stage (Schondorf, 2024).
3. Finally, the applicant must convince the Court that there exists a risk of irreparable prejudice and urgency.[18]

These facts present a very clear playbook for the States to use the ICJ in their lawfare endeavours against an adversary. If a state can frame an aspect of a broader dispute in a perceived favourable manner in the context of human rights treaties of universal importance with a usable compromise clause, such as those mentioned above, then it can refer that aspect of the dispute to the ICJ with a request for provisional measures. Because of the special weight and universality of the treaties in question, such an act is likely to attract a great deal of attention. This will provide the applicant state a considerable moral, political, and legal upper hand especially if the requested provisional measures are granted by the Court.

[16] *Case concerning Passage through the Great Belt (*Finland v Denmark*)*, Provisional Measures, [1991] ICJ Rep 12, ICGJ 84, para 14.
[17] *Ibid*. para 16.
[18] *Ibid*. para. 23.

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3.1. Use of the CERD as a Tool of Lawfare

The CERD has been arguably the Convention that has 'suffered' most from such a use so far, so much so that Judge Yusuf felt the need to state in his dissenting opinion in *Armenia v. Azerbaijan* that "(i)t is high time that the Court put an end to the attempts by States to use the CERD as a jurisdictional basis for all kinds of claims which do not fall within its ambit".[19] The first instance of the CERD and its compromissory clause being used as a jurisdictional 'picklock' was in 2008, when Georgia invoked the CERD against Russia. The broader disagreement between Georgia and Russia had its origins in the dissolution of the Soviet Union and encompassed a range of issues including Georgia's political stance towards the West and the situation of minority groups in the country. However, the dispute that ultimately led to Georgia's invocation of the CERD pertained specifically to Russia's use of military force against Georgia in 2008. This escalated into a full-scale war following Georgia's military actions against separatists in South Ossetia and Abkhazia who were supported by Russia. In response, Georgia filed a case against Russia at the ICJ, alleging violations of the CERD.[20] The application was also accompanied by a request for the indication of provisional measures aimed at preserving Georgia's rights under the CERD 'to protect its citizens against violent discriminatory acts by Russian armed forces, acting in concert with separatist militia and foreign mercenaries'.[21]

Following the public hearing, the Court decided that 'the rights which Georgia invokes in, and seeks to protect by, its Request for the indication of provisional measures have a sufficient connection with the merits of the case it brings for the purposes of the current proceedings; and whereas it is upon

[19] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Armenia v. Azerbaijan)*, Order of 22 February 2023 (Declaration of Judge Yusuf), 10.
[20] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Georgia v. Russian Federation*), Application Instituting Proceedings, 12 August 2008.
[21] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Georgia v. Russian Federation)*, Request for the Indication of Provisional Measures of Protection submitted by the Government of Georgia, 14 August 2008.

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the rights',[22] issued provisional orders directed at Russia.[23] Yet, regardless of the humanitarian concerns underpinning the order, the question of whether the dispute in question is genuinely related to the CERD lingered. Indeed, the joint dissenting opinions to the provisional measures order raised these concerns by noting that

> (a)dmittedly, the ensuing armed conflict concerned a region in which serious ethnic tensions could lead to violations of humanitarian law, but it is difficult to consider that the armed acts in question, in and of themselves and whether committed by Russia or Georgia, fall within the provisions of CERD.[24]

It is also pointed out that Georgia failed to sufficiently demonstrate that Russia's actions in the conflict were driven by racial or ethnic discrimination. Furthermore, the dissenting judges questioned the timing of the application, given that the practices referred to in the application have been allegedly in place for a considerable time, yet Georgia filed the claim only after the outbreak of armed conflict.[25] The absence of any prior negotiations between the parties, as required by Article 22 CERD (compromissory clause), before invoking the ICJ's jurisdiction, was also indicative. Indeed, Russia raised this final point as a preliminary objection as to the jurisdiction, and the Court dismissed the case at that stage due to the unfulfillment of the genuine negotiation requirement under Article 22.

Notwithstanding the case's dismissal on procedural grounds, as far as is observed, it is evident that the case constitutes a 'successful' instance of lawfare for several reasons. First, Georgia initiated the case under the CERD, as opposed to the more general framework of international law or the UN

[22] *Application of the International Convention on the Elimination of all Forms of Racial Discrimination* (*Georgia v. Russian Federation*), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008, 392.
[23] *Ibid*. 398.
[24] *Ibid*. 'Joint dissenting opinion of Vice-President Al-Khasawneh and Judges Ranjeva, Shi, Koroma, Tomka, Bennouna and Skotnikov', 402.
[25] *Ibid*. 400.

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Charter, which govern the use of force. This decision was obviously influenced by Russia's non-acceptance of the ICJ's compulsory jurisdiction, thereby precluding Georgia from bringing claims related to aggression or the unlawful use of force. By relying on CERD, Georgia sought to establish ICJ jurisdiction indirectly, thereby demonstrating the utilisation of available legal avenues to challenge an adversary. Second, Georgia (re)framed its case within the legal framework of CERD. This enabled Georgia to present Russia's actions not just as military aggression but as a violation of international human rights law, specifically ethnic cleansing and racial discrimination. By doing so, Georgia sought to delegitimize Russia's military intervention on the world stage and influence international opinion.

Third, in its request for provisional measures, Georgia sought the immediate intervention of the ICJ. Provisional measures are intended to prevent irreparable harm before a case is fully adjudicated, but their impact often extends beyond legal considerations. A favourable ruling on provisional measures could pressure the accused state diplomatically and restrict its future actions. Securing such measures aimed at constraining Russia's actions in the region and drawing greater international scrutiny to Russia's conduct. Fourth, the case was initiated in the aftermath of the 2008 Russia-Georgia war, during which Russia decisively asserted control over South Ossetia and Abkhazia. Consequently, Georgia's legal action appeared as not merely about seeking judicial remedies but was part of a broader effort to challenge Russia's military intervention and political dominance. Georgia's efforts to characterise Russia's actions as violations of international human rights law were a significant component in its broader diplomatic strategy aimed at countering Russian influence in the region. This strategic utilisation of legal mechanisms to influence public perception is a hallmark of lawfare, where the courtroom becomes an extension of political and diplomatic battles. At this point, it is also imperative to underscore that the objective of these observations is not to advocate for or against Russia's compliance with international law or to claim that Russia did not, in essence, violate the CERD.

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These are discrete issues. Instead, the objective here is to illustrate the *modus operandi* of 'lawfare' before the ICJ.

To move on, almost a decade later, in 2017, Ukraine followed the footsteps of Georgia and applied to the Court against Russia under the CERD, alongside the International Convention for the Suppression of the Financing of Terrorism ('ICSFT'). The case concerned events that had taken place in eastern Ukraine and Crimea since 2014. Ukraine accused Russia of violating its obligations under the ICSFT by failing to prevent and suppress the financing of terrorism, specifically in relation to the actions of the Donetsk People's Republic and the Luhansk People's Republic. Under the CERD, Ukraine alleged that, following Russia's takeover of Crimea, it engaged in systemic racial discrimination against Crimean Tatars and ethnic Ukrainians, depriving them of fundamental political, civil, economic, social, and cultural rights.[26] Ukraine also sought several provisional measures and two of which were granted by the ICJ, requiring Russia to lift restrictions on the representative institutions of the Crimean Tatar community, including the Mejlis, and to ensure access to education in the Ukrainian language.[27]

The ICJ delivered its judgment on the merits in 2024, which Iryna Marchuk describes "as a sobering experience for those who followed the case closely, as the vast majority of Ukraine's claims were rejected" (Marchuk, 2024a). Ultimately, the Court dismissed all but one of Ukraine's claims under the ICSFT (failure to investigate), while similarly only one of Ukraine's claims under CERD was sustained, finding that Russia had violated Articles 2(1)(a) and 5(e)(v) of CERD in relation to its implementation of the education

[26] *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*), Application Instituting Proceedings, 16 January 2017.
[27] *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*), Request for the Indication of Provisional Measures, 16 January 2017.

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system in Crimea after 2014.[28] While many technicalities of the verdict are already analysed and criticised and will not be repeated here (See. Marchuk, 2024b; Mälksoo, 2024), for the purpose of this article, it can be argued that the case bears many similarities with *Georgia v. Russia* as an episode of lawfare.

Firstly, in essence, Ukraine appears to be leveraging human rights and counter-terrorism instruments to circumvent the conventional limits of state responsibility, by framing its claims against Russia under CERD and ICSFT (Papadaki, 2022). Secondly, by characterising Russia's actions as violations of international human rights and counterterrorism obligations, Ukraine sought to consolidate its position in international diplomacy, to reinforce its narrative that Russia was not merely violating Ukrainian sovereignty but also perpetrating grave human rights abuses and providing support for terrorism, thereby reinforcing sanctions and diplomatic isolation efforts. Thirdly, the obtaining of the provisional measures was significant for Ukraine, as it served as an important diplomatic victory that could be used not only to constrain Russia's actions but also to generate immediate international attention and a sense of victimhood (cf. Gapsa, 2024). Finally, although Ukraine did not win most of its claims, the case itself served long-term strategic objectives. Even the ICJ's recognition that there was a dispute under CERD and ICSFT, and its willingness to consider Ukraine's claims, strengthened Ukraine's position in other international legal and political forums.

Next, in 2019, Qatar invoked the CERD in relation to the United Arab Emirates (UAE). This case also stemmed from a broader diplomatic crisis between Qatar and the Arab League concerning various issues (Rossi, 2019), which were eventually resolved in 2021. It is noteworthy that, among all the cases invoked the CERD over the last two decades, this one was the most pertinent to the scope of the Convention. Indeed, the crisis gave rise to a

[28] *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*), Provisional Measures, ICGJ 514 (ICJ 2017), [2017] ICJ GL No 166, 19th April 2017.

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number of discriminatory practices on the part of the UAE, including expulsion of all Qataris, a complete travel ban, forcing UAE citizens residing in Qatar to return home, prohibition of pro-Qatar speech, and closure of Qatari business offices in the UAE.[29]

Qatar's application was also accompanied by its request for the indication of provisional measures, in which Qatar requested more than ten measures.[30] In 2018, after concluding that it had *prima facie* jurisdiction and that the conditions for the indication of provisional measures were met, the Court issued its provisional order, albeit limited in scope compared to Qatar's requests.[31] Notably, in 2019, the UAE requested counter-provisional measures, arguing that Qatar had abused its rights by initiating two parallel proceedings based on the same facts before both the CERD Committee and the Court, and that Qatar had failed to comply with the provisional measures order it obtained in 2018 in order to inflame the dispute.[32] As to the latter point, UAE claimed that "Qatar has failed to comply with the Court's 23 July 2018 Order by hampering the UAE's attempts to assist Qatari citizens, including by blocking access by Qatari citizens to the website by which Qatari citizens can apply for a permit to return to the UAE, and by using its national institutions and State-controlled media to inflame the dispute".[33] While this application was, as expected, dismissed by the Court on the grounds that the measures requested did not relate to the protection plausible rights,[34] it

[29] OHCHR Technical Mission to the State of Qatar, 17-24 November 2017, Report on the Impact of the Gulf Crisis on Human Rights (December 2017), 39,40
[30] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Qatar v United Arab Emirates*), Provisional Measures, Order, ICJ GL No 172, [2018] ICJ Rep 406, ICGJ 527 (ICJ 2018), 23rd July 2018, 409,410
[31] *Ibid*. 433.
[32] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Qatar v. United Arab Emirates)*, Provisional Measures, Order of 14 June 2019, I.C.J. Reports 2019, 363ff.
[33] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Qatar v. United Arab Emirates)*, "Request for the Indication of Provisional Measures to Preserve the United Arab Emirates' Procedural Rights and to Prevent Qatar from Aggravating or Extending the Dispute Submitted by the United Arab Emirates, 22 March 2019, p. 21, available at. https://www.icj-cij.org/sites/default/files/case-related/172/172-20190322-REQ-01-00-EN.pdf.
[34] *Ibid*. 369.

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illustrated how the provisional measures regime in particular have become a particular tool of lawfare because of their immediate political and moral impact.

Qatar's application is ultimately and rather controversially rejected at the preliminary objections stage due to the lack of jurisdiction, in which the Court upheld the UAE's objection that the discrimination on the basis of 'nationality' is not grounds for alleging 'racial discrimination' under the CERD.[35] In any case, this application as well had features of lawfare. The dispute arose in the context of the Gulf diplomatic crisis, when not only the UAE but also Saudi Arabia, Bahrain and Egypt imposed a blockade on Qatar, severing diplomatic ties and restricting economic, travel and trade relations. However, unlike the UAE, these other countries had reservations to Article 22 of the CERD. As a result, Qatar was able to frame the blockade as a violation of international human rights law under CERD, rather than as a political or security issue, and only against the UAE. This strategic approach allowed Qatar to use the process to gain an advantage in the dispute and to focus international attention on the actions of the UAE and, indirectly, other states. It also helped Qatar circumvent the national security arguments used by the UAE and its allies to justify the blockade, shifted the locus of the debate from politics to human rights, and reinforced Qatar's image as a state committed to international law. In addition, the provisional measures put legal and diplomatic pressure on the UAE and gave Qatar an early symbolic victory.

Finally, the parallel cases brought by Azerbaijan and Armenia in 2021 under the CERD are the most recent and perhaps the most obvious example of lawfare before the ICJ (Fontanelli, 2021; Wang, 2021; Nakajima, 2025). These cases arose in the aftermath of the Second Karabakh War, a conflict in which Azerbaijan regained its territories previously occupied by pro-

[35] *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Qatar v United Arab Emirates)*, Preliminary Objections, ICJ GL No 172, ICGJ 554 (ICJ 2021), 4th February 2021.

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Armenian forces following the First Karabakh War.[36] While Karabakh has significant historical value for both parties and is central to their identity, the broader dispute involves a verity of legal question regarding, *inter alia*, use of force against secessionists and occupying forces, self-determination, minority rights (Knoll-Tudor, 2020). The instability of the situation eased after the mass migration of Karabakh Armenians to Armenia in late 2023, but their lawfare continues before the ICJ and several other international courts and institutions (Nakajima, 2023).

What makes these cases very salient examples of lawfare is that, in order to bring before the Court legal issues that are much more pressing for the parties, they mixed them with issues that may fall within the scope of CERD. To begin with Armenia, it is quite obvious that its main objective in the broader dispute is to claim the right to self-determination and secession for the Armenian minority in the region. However, since this is not possible under the CERD, Armenia began its application by claiming that people of Armenian origin have been subjected to racial discrimination as part of Azerbaijani state policy for decades.[37] Regardless of the veracity of the allegations, the question that comes to mind, just as in the case of Georgia's complaint against Russia, is the timing. If these practices have been going on for so long, why did Armenia wait until it lost the Second Karabakh War? Armenia also alleged the existence of systematic discrimination, mass killings and torture against ethnic Armenians during the war, suggesting that these were serious violations of CERD norms,[38] when in fact these claims appear much more related to international humanitarian treaties and norms. Similarly, the application attempted to stretch the limits of CERD by referring to claims such as that ethnic Armenian soldiers in Azerbaijani custody were

[36] See. UN Security Council Resolutions 822, 853, 874, and 884
[37] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Armenia v. Azerbaijan*), filed in the Registry of the Court on 16 September 2021, 6
https://www.icj-cij.org/public/files/case-related/180/180-20210916-APP-01-00-EN.pdf.
[38] *Ibid*. 30.

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subjected to execution, torture, ill-treatment or rigged prosecutions,[39] or the alleged destruction of Armenian cultural heritage sites.[40] Filippo Fontanelli, who ultimately suggests that both of these parallel applications "use a CERD-shaped cookie cutter on an enormous sheet of cookie dough, spanning over wrongdoings that transcend racial discrimination", observes that

> Armenia accuses Azerbaijan of CERD breaches and wrongdoings under other sources, which are presented as racially motivated. For example, after listing public declarations that would reveal the Azerbaijani policy of ethnic cleansing, Armenia mentions conduct that is not CERD-specific. (…) Armenia attracts under the rubric of 'racial discrimination' allegations of war crimes, violations of human rights and of the ceasefire (Fontanelli, 2021).

All of this does not, of course, suggest that the Armenian application is entirely outside the scope of CERD. Indeed, the application also deals in detail with examples of what may constitute hate speech against Armenians in Azerbaijan, or with issues such as the 'military trophy park', which could be argued to contain racist elements - and which was indeed revised by Azerbaijan after the initiation of case. Yet, in overall, it appears reasonable to characterize Armenia's strategy as an attempt to reframe its larger conflict with Azerbaijan within the framework of CERD, thereby gaining access to the ICJ. This approach involves presenting a wide array of disputes as violations of CERD, a tactic that has been observed in previous cases (Fontanelli, 2021).

A very similar observation can be made about Azerbaijan's application.[41] Azerbaijan's ultimate goal seems to be claiming ethnic cleansing and cultural extermination of Azerbaijanis after the First Karabakh War, asserting full

[39] *Ibid*. 66ff.
[40] *Ibid*. 6,7.
[41] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Azerbaijan v. Armenia)* filed in the Registry of the Court on 23 September 2021,
https://www.icj-cij.org/public/files/case-related/181/181-20210923-APP-01-00-EN.pdf.

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control over Karabakh without compromising any legal autonomy for the minorities in the region, and receiving compensation for environmental destruction and illegal exploitation of natural resources. Like Armenia's application, Azerbaijan as well appears to have conflated the issues on which it is based, such as environmental damage, allegations of ethnic cleansing, alleged violations of humanitarian law or non-disclosure of landmine maps, with other issues that might more appropriately fall within the scope of CERD.[42]

Rather unsurprisingly, both applications before the ICJ were also accompanied by requests for a series of provisional measures, while Armenia made four additional requests for either to modify the provisional measures initially granted or to grant new measures, Azerbaijan made one additional request in addition to its initial one. Although it is beyond the scope and purpose of this article to summarise the entire process, which is discussed in many different articles and contributions (e.g. Salkiewicz-Munnerlyn and Zylka, 2021), it suffices to note that both parties had limited success in their requests for provisional measures. That said, a particularly successful use of instrumental lawfare through provisional measures occurred in 2023, when Armenia requested for provisional measures regarding the blockade of the Lachin Corridor.[43] The Karabakh Region is linked to Armenia by the Lachin Corridor, which was administered by Azerbaijani and Russian forces. The blockade situation arose against a background of very tense relations. Azerbaijani protestors set up the blockade, asserting that Armenia was illegally exploiting natural resources on Azerbaijani territory. In response, Armenia requested new provisional measures regarding the situation by asserting that the blockade violated Article 5 of CERD, which protects various rights, including freedom of movement within a state's borders, the right to leave and return to one's country, and access to public health, medical

[42] *Ibid*.
[43] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Armenia v. Azerbaijan*), Provisional Measures, Order of 22 February 2023, I.C.J. Reports 2023, p. 14

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care, and social services.[44] In this instance, the Court found a credible connection between ordering Azerbaijan to lift the blockade and ensuring the unrestricted movement of people and goods along the Lachin Corridor. The Court ordered that Azerbaijan "must take all measures at its disposal to ensure unimpeded movement of persons, vehicles and cargo along the Lachin Corridor in both directions".[45]

This provisional measure was an important political triumph card for Armenia at that time, i.e. before the mass migration, and helped to put Azerbaijan under pressure on many political platforms. Nevertheless, the indication of this provisional measure was not without its critics. Judge Yusuf, for example, in his declaration, emphasised that the blockade was a matter of international humanitarian law, not the CERD. He insisted that the majority had not properly considered the 'racial discrimination' aspect of the blockade in reaching their conclusion, noting the lack of "evidence that the alleged acts or omissions constituted, even plausibly, acts of racial discrimination".[46]

In overall, then, these parallel proceedings highlight the reciprocal nature of lawfare, where both states used legal arguments to counterbalance each other's claims and maintain symmetry in international legal proceedings. As Yilin Wang noted, the strategy for each party was "to cleverly re-characterize the dispute around racial discrimination in order to pass the step of jurisdiction *ratione materiae*" (Wang, 2021). By bringing these cases to the ICJ, both Armenia and Azerbaijan somewhat transformed a regional territorial conflict into a legal and human rights issue with global implications. Azerbaijan sought to reinforce its post-war narrative, portraying Armenia as the aggressor responsible for past ethnic cleansing. Armenia aimed to frame Azerbaijan's victory as tainted by human rights abuses and the erasure of Armenian cultural heritage. Both sides leveraged the legal

[44] *Ibid*. 21 ff.
[45] *Ibid*. 30.
[46] *Ibid*. Declaration of Judge Yusuf, 32.

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process as a diplomatic tool, ensuring that their grievances remained on the international agenda and that the ICJ proceedings could serve as a counterbalance to political negotiations or future peace talks. It remains to be seen whether in the future CERD will continue to play a 'picklock' role to come before the Court in lawfare endeavours.

3.2. Use of the Genocide Convention as a Tool of Lawfare

Another treaty that has been frequently used recently for these endeavours is the Genocide Convention. So much so that, even at the final stages of finalising this article, a new application based on the Genocide Convention was made, and Sudan accused the UAE of being 'complicit in the genocide' of the Masalit community through its military, financial and political backing to Sudan's paramilitary Rapid Support Forces (RSF) in the civil war.[47] While there is clearly a non-negligible difference between supporting an armed opposition group and selling weapons to another State, Sudan's application, at its core, resembles the one made by Nicaragua against Germany in 2024, in which the applicant claimed that Germany's assistance to Israel enables the latter to further its atrocities, which is claimed to constituted Genocide in Gaza, in Occupied Palestinian Territory, and thus Germany is in violation with the Genocide Convention as it fail to undertake its duty to prevent genocide.[48]

One of the factors that complicates the analysis of genocide cases as lawfare is that they frequently emerge in the context of conflicts characterised by significant human rights violations. However, it is challenging to bring these violations before the Court without invoking the Genocide Convention, to which a substantial number of States are parties and which contains a

[47] *Proceedings instituted by Sudan against the United Arab Emirates* (*Sudan v UAE*), 'Application instituting proceedings', 5 March 2025, https://www.icj-cij.org/sites/default/files/case-related/197/197-20250306-app-01-00-en.pdf .

[48] *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory* (*Nicaragua v. Germany*), 'Application instituting proceedings and request for the indication of provisional measures', 1 March 2024, https://www.icj-cij.org/sites/default/files/case-related/193/193-20240301-app-01-00-en.pdf.

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practicable compromissory clause. It can be thus argued that events that are likely to constitute war crimes, systematic human rights violations, crimes against humanity or other violations of international law norms are recently attempted to be brought within the framework of the Genocide Convention in order to be dragged before the Court. What is more, genocide is widely considered as "crime of crimes" in the public eye, thus the invocation of the term provides a political and moral upper hand in a conflict (cf. Carruthers, 2020).

Such use of the Genocide Convention in recent years has been initiated by the Gambia's application against Myanmar, claiming that the latter's atrocities and gross human rights violations against the Rohingya people amount to the crime of genocide and entail Myanmar's responsibility.[49] The politics behind the case have much to do with the efforts of the Organisation of Islamic Cooperation (OIC) to draw the world's attention to the suffering of Rakhine Muslims in Myanmar (Ramsden, 2022, 458). By bringing the case to the ICJ, Gambia and its backers in the OIC sought to internationalise the Rohingya crisis and put legal and diplomatic pressure on Myanmar. Even before a final ruling, the mere existence of the ICJ case has placed Myanmar under intense scrutiny, affecting its diplomatic relations and global reputation.

Whether Myanmar's apparent gross violations amount to the crime of genocide is technically debatable, mainly because the plaintiff may have difficulty proving that Myanmar acted "with intent to destroy physically or biologically a substantial part of the Rohingya people" (Milanovic, 2020). While the outcome of the case, which is currently at the merits stage, is therefore eagerly awaited, the main significance of this case in terms of the concept of lawfare is that, the Court ruled that a particular consequence of the obligation to prevent and punish genocide of being an *erga omnes partes* one

[49] *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), 23rd January 2020.

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is that any State Party to the Convention can invoke the responsibility of another state party before the Court in the event of a violation. With this decision, which has been described by some authors as 'opening Pandora's box' (Carli, 2024), the Genocide Convention has become an immensely useful tool for lawfare.

Indeed, in the proceeding initiated by South Africa against Israel under the Genocide Convention in relation to Israel's actions in Gaza since 7 October 2023, South Africa is establishing its legal standing before the Court on this justification.[50] While it is evident that Israel has committed gross human rights violations and violated a number of the laws of armed conflict in Gaza, the main challenge will once again be to prove genocidal intent. However, as indicated in the introduction, it can be argued that the initiation of this case alone has fulfilled most of the political and moral objectives that accompanied it. First of all, the very fact that Israel's atrocities have been framed within the Genocide Convention is an important political action against Israel, given its historical association with the concept. Second, one of the immediate tactical victories of lawfare was to secure provisional measures.[51] While the Court did not explicitly order an end to military operations, the ruling reinforced perceptions of legal and humanitarian wrongdoing, which South Africa and its allies used in diplomatic and media campaigns. Third, even if the ICJ does not ultimately rule in South Africa's favour, the mere filing of a genocide case shapes international discourse and leads to greater political and economic pressure on Israel.

Finally, another application arising under the Genocide Convention was filed by Ukraine against Russia in 2022. However, this case is rather different from those mentioned so far and can be characterised as the case in which the

[50] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, 'Application instituting proceedings and request for the indication of provisional measures', 29 December 2023, https://www.icj-cij.org/sites/default/files/case-related/192/192-20231228-app-01-00-en.pdf.
[51] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip* (*South Africa v Israel)*, Provisional Measures, General List No 192, 26 January 2024.

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practice of lawfare is most noticeable. This is because in this case Ukraine did not have a genocide claim against Russia. On the contrary, Ukraine claimed that one of the justifications for Russia's 'special military operation' launched against it on 24 February 2022 was 'Ukraine's alleged violation of the Genocide Convention' and brought a 'reverse compliance' case before the Court. In other words, Ukraine asked the Court to declare that it had not committed the crime of genocide and that Russia's invasion, allegedly in the name of preventing and punishing genocide, was therefore illegal and must be stopped.[52] On the other hand, Russia has repeatedly claimed that its 'operation' has not been based on the Genocide Convention, but on the United Nations Charter.[53]

An important legal victory for Ukraine was at the stage of provisional measures. While Ukraine claimed that Russia's invasion only in the Donbass region was based on its responsibility to prevent and punish genocide and that a provisional suspension of these operations should be ordered, the Court stated that it was not bound by the request and, in our opinion, exceeded its jurisdiction and ordered Russia to suspend 'all' its operations.[54] However, on 2 February 2024, in its decision on the preliminary objections, the Court took a step backwards by upholding Russia's objection that false allegations of genocide and the use of force based thereon fall outside the scope of the Genocide Convention. The Court thus simply decided that it had jurisdiction only to rule on Ukraine's 'reverse compliance' claim, i.e. seeking a declaration that it did not commit genocide.[55]

Admittedly, regardless the (il)legality of Russia's aggressions, Ukraine's concerns were not directly related to the Genocide Convention, but rather to

[52] *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide* (*Ukraine v. Russian Federation*), Provisional Measures, Order of 16 March 2022, I.C.J. Reports 2022, 213.
[53] *Ibid*. 220.
[54] *Ibid*.
[55] *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide* (*Ukraine v. Russian Federation*), Preliminary Objections, Judgment of 2 February 2022, 49ff.

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the use of force by the Russian on order territory. As Judge Xue argued in her Declaration attached to the provisional measures order,

> Although the Russian Federation did refer to the alleged genocidal acts committed in the Luhansk and Donetsk regions of Ukraine in its official statements, it appears that the issue of the alleged genocide is not just one aspect of a broader political problem between the two States which may be separately examined, or the very reason for the Russian Federation to launch military operations against Ukraine, as claimed by Ukraine; it is an integral part of the dispute between the Russian Federation and Ukraine over the security issue in the region. Ukraine's claim ultimately boils down to the very question whether recourse to use of force is permitted under international law in case of genocide. Ukraine's grievances against the Russian Federation, therefore, directly bear on the legality of use of force by Russia under general international law, rather than the Genocide Convention. Therefore, I am of the view that the rights and obligations which Ukraine claims are not plausible under the Genocide Convention.[56]

Nevertheless, the aforementioned shift between provisional measures order and the decision on the preliminary objections was of a highly demonstrative nature. As it will be remembered, at the time of the provisional measures issued by the Court, the public opinion overwhelmingly condemned Russia and the measures were issued amid this public mood. As far as it can be observed, it is against this background that the provisional measures, which is a part of Ukraine's overall lawfare project against Russia (Goldenziel, 2023; Chang, 2022), issued with a rather 'liberal' approach, through exceeding its jurisdictional limits as is explained above and disregarding the concerns put forward by Judge Xue. In other words, and

[56] *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide* (*Ukraine v. Russian Federation*), Provisional Measures, Declaration of Judge Xue 16 March 2022, I.C.J. Reports 2022, 240.

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paradoxically, the general political situation determines the course of lawfare, while lawfare contributes to the political discourse.

In any case, Ukraine's referral to the ICJ, despite its somewhat failure at the preliminary objections stage, served great deal of political and moral purposes. By shoehorning the conflict into the Genocide Convention, it succeeded in bringing the conflict before the ICJ. It is precisely this aspect that Judge Gevorgian emphasises, critically noting that

> To circumvent this problem, Ukraine claims that the Convention embodies a right "not to be subjected to another State's military operations on its territory based on a brazen abuse of Article I of the Genocide Convention". This argument is unconvincing and undermines the fundamental requirement that jurisdiction emanates from consent. Under the interpretation advanced by Ukraine, any purportedly illegal act, including the unauthorized use of force, could be shoehorned into a random treaty as long as the subject-matter regulated by this treaty had some role in the political considerations preceding the respective act.[57]

Moreover, all these cases under the Genocide Convention seem to have opened a new door. These cases have led to an exploding popularity of the institution of intervention provided for in Articles 62 and 63 of the Statute of the ICJ, which allows third States to intervene in cases pending before the Court. The institution of intervention, which for many years had received limited attention from the international legal public and publications because it was rarely used by States and was applied in cases relating to border disputes, i.e. very technical disputes, has suddenly become a means of solidarity (Khubchandanii, 2022). What is striking is that while intervention under the ICJ Statute is not intended to be made against or in favour of a state

[57] *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide* (*Ukraine v. Russian Federation*), Provisional Measures, Declaration of Vice-President Gevorgian, 16 March 2022, I.C.J. Reports 2022, 234.

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party, but to protect the intervening state's own interests, all these requests for intervention were basically made in a way that circumvented the purpose of the institution of intervention and supported Gambia, Ukraine and South Africa in their cases. In other words, the institution of intervention has become an instrument of lawfare as a means of political solidarity that has gone beyond its original purpose, namely the protection of third-party interests and the consistent interpretation of international legal norms (McGarry, 2022).

Overall, the purpose of this section has been, first, to highlight the similarities and differences between 'high politics' and 'lawfare' cases before the ICJ and, second, to demonstrate the *modus operandi* of lawfare before the ICJ. It cannot be overemphasised that the purpose of this scrutiny was not to defend certain states as 'victims of lawfare', nor to paint a negative or positive picture of the idea of lawfare. Nevertheless, a number of conclusions can be drawn from the analysis in this section. First, all cases of lawfare are necessarily cases of 'high politics', but there is no acceptable argument, legal or otherwise, that the ICJ should refrain from dealing with such cases as long as it can isolate and locate 'justiciable issues'. Second, the compromissory clauses of those nearly universal human rights treaties provide valuable jurisdictional picklocks for those states that believe they can link their broader disputes to these instruments and thus bring a dispute before the ICJ that can benefit their political, legal and moral position against an adversary. Third, and related to the previous point, the *erga omnes* and *erga omnes partes* obligations became jurisdictional tools for the 'third parties' to bring cases before the ICJ, which broadens the possible extent and use of the lawfare(s). Fourth, by 'squeezing' or 'repackaging' their broader legal and other claims into specific treaty-based allegations, applicants seek to gain a political and moral upper hand rather than to resolve a legal dispute through adjudication. Fifth, the obtaining of provisional measures, as a relatively low-hanging fruit, is one of the central practices in the use of the ICJ as an instrument of lawfare. Finally, an emerging practice before the ICJ that can be seen as an extension

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of lawfare is mass intervention, which is primarily aimed at demonstrating solidarity rather than protecting legal interests.

4. Prospects and Perils of Using the ICJ as a Means of Lawfare

Having established the article's understanding of lawfare and demonstrated its operation before the ICJ, the next step is to analyse the prospects and perils of using the Court as a means of lawfare. In this analysis, the focus will be on the possible impacts on the ICJ's future, credibility and expected functions. When the practice of lawfare is considered specifically in the context of the ICJ, a 'mix sentiment' may emerge.

4.1. Prospects

To begin by looking on the 'bright side', one might argue that instead of making speculative assumptions and analyses of motives, we can take applications to the ICJ at their face value. It can be posited that the parties involved harbour a belief in a peaceful resolution of the dispute through the intervention of the Court, or at the very least, a recognition that the submission of a portion of the dispute to the Court would contribute to a peaceful outcome.

Notwithstanding the absence of such a belief, the applicant's reliance on the established norms and institutions of law, whether out of necessity or as a strategic manoeuvre, may be perceived as a positive contribution to the perceived legitimacy and efficacy of the Court. It can be also posited that the decision to bring highly political cases before the ICJ is frequently motivated by the prospect of legal proceedings to reshape complex political disputes into structured legal cases (Steininger and Deitelhoff, 2021, 105). A notable consequence of ICJ involvement is the possibility of de-escalating hostilities. Beyond immediate conflict containment, judicial proceedings can foster a degree of trust between opposing sides by providing a structured legal framework in which they assume defined roles. A court ruling also establishes

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a legal framework for future claims, offering a structured basis for subsequent legal arguments and negotiations. In this way, it can be said that the Court's role extends beyond adjudication, influencing both the trajectory of the conflict and the terms of its eventual resolution (Krieger, 2024).

Furthermore, it can be contended that one of the ICJ's role is precisely to provide a platform for 'smaller' or relatively 'weaker' states to utilise international law as a shield against the political and/or military might of their adversaries (Guilfoyle, 2023). This is particularly pertinent in situations where there are egregious violations of the most basic principles of international law, as is currently evident in Gaza or Rohingya. The notion of referring to the 'World Court' as a victim or on behalf of a victim should not be disregarded as lawfare. Instead, it should be recognised as a contribution to the promotion and protection of fundamental values, despite any political motivations. Also, a favourable ruling in such cases can pave the way for reparations or compensation claims in the long run (Tams, 2021). Even if the case does not succeed, it may strengthen future accountability efforts, such as prosecutions for war crimes or human rights violations.

Another perspective to consider within this framework is that, even in instances where the ICJ's directives and rulings are incapable of yielding immediate consequences, they fulfil the functions of promoting and clarifying norms, thereby potentially exerting long-term "expressivist" influences (Steininger and Deitelhoff, 2021, 105). To elaborate, by declaring and clarifying the true breadth and meaning of international legal norms and responsibility of the actors bound by these norms, the ICJ has the potential to influence other States behaviours in the long term, since the ICJ decisions, for better or worse, always functioned as a benchmark in international legal and political discourse. Additionally, in the cases previously discussed, states such as Russia and Israel did not totally disregard the judicial proceedings, but rather responded to the applications, thereby demonstrating the sustained value and respect attributed to the ICJ.

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As for the long-term 'expressivist' impact, 'expressivism' refers to a theory that evaluates legal actions and decisions based on the meaning, symbolism, or message they convey, rather than solely on their practical or instrumental effects (Amann, 2002, 117ff). While expressivists theories have been predominantly discussed in the context of the impact of the International Criminal Justice (Stahn, 2020; Barrie, 2019), a similar case may be posited in relation to the ICJ's cases of 'high politics', in which the Court's decisions can function as signals to states about their obligations under international law. In analysing the pragmatic (mis-)use of international law in the context of the conflict between Russia and Ukraine, Filipe dos Reis and Janis Grzybowski suggests in this direction that

> the turn to the language of international law is not accidental, cheap or superfluous: it provides a rich and complex semantic infrastructure of subjects, statuses, constraints, permissions and demarcations that enable communication and understanding, however limited, where otherwise weapons have come to speak. This recalls international law's important role as a language of conflict and compromise, even where some of its key rules are clearly stretched, bent and broken (Reis and Grzybowski, 2024, 319).

What is more, it can be also argued that initiating legal proceedings at the ICJ, irrespective of the underlying motivations, may contribute to the establishment of a historical and legal record of wrongdoing. This record can subsequently be utilised in future negotiations within the United Nations system or before other international courts. As is observed by Ana Luísa Bernardino,

> By submitting these (highly political) disputes to the Court or otherwise participating in the proceedings, states may seek first and foremost factual determinations and not simply statements of the law. (…) A judgment or advisory opinion of the ICJ has the potential

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> to shape official history and become received wisdom for generations of international lawyers, many of whom will not have lived through these events and will learn about them from these decisions. (Bernardino, 2024).

That said, it is important to note that Bernardino also issues a warning regarding the role of the Court in such circumstances. She highlights the propensity for the Court to be susceptible to misrepresentations and manipulations. Additionally, due to the absence of fact-finding capabilities, the Court may encounter difficulties in effectively fulfilling its responsibilities.

Some scholars, on the other hand, suggest that the bringing of highly-political cases to the ICJ by smaller and weaker parties is more than just a strategic tool to draw global attention to their disputes. Accordingly, beyond seeking a legal resolution, such cases also function as a platform to challenge existing norms and push for a reconfiguration of international law. According to Heike Krieger

> By relying on international law and international legal procedures, states plea for reconstructing the international legal order instead of opting for sheer political 'tabula rasa' processes where unmitigated political power competition and, in particular, the most powerful state will decide the outcome of the transformation. (…) In these processes, the ICJ may appear to be a particularly suitable forum for actors challenging the old order because its jurisprudence (…) tends to be based on thin, open, and pluralistic understandings of central order-building concepts. These include a conceptualisation of the community for which an order is built as contained in the legal term 'international community' and a conceptualisation of the bearers of an order, i.e., actors' legitimacy and responsibility for an order's common or shared interests. The thin, open, and pluralistic understandings of central legal concepts support a negotiated order-building process in which many states (and non-state actors) hold

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> the power, agency, and political consciousness to create an order. They provide space to contest the hegemonic liberal international order, in which the US, as the single superpower, aimed to impose its order ideas on the other actors (Krieger, 2024).

This view is closely linked to the growing utilization of *erga omnes partes* and *erga omnes* obligations before the Court, as in *Gambia v. Myanmar* or *South Africa v. Israel*, in order to protect and promote community values and interests through using the language and tools of international law (Hachem, Hathaway and Cole, 2023). However, this idea comes with some caveats and reservations. Krieger herself acknowledges that assigning "the ICJ to the role of an arbiter in transforming international relations from a hegemonic to a negotiated order (…) may overstrain the Court" (Krieger, 2024). The very possibility of non-compliance may also have negative impact on its authority and accusations of over-politicisation may come as an extension of taking on such a role. What is more, the idea of the 'international community' or 'common interests' lacks concrete substance and many cases brought before the Court under such rubrics aim to promote and protect the interests of certain communities.

4.2. Perils

Turning to the arguments against using the ICJ as a field for lawfare, a very common concern is the politicisation and degeneration of the Court as a credible judicial mechanism. It may be argued that lawfare can undermine the legitimacy, effectiveness, and long-term role of the ICJ in international adjudication. The ICJ relies on its perceived neutrality and independence to maintain authority over international disputes (Fontanelli, 2021b). If, however, states use the Court primarily for political and moral manoeuvring rather than genuine dispute resolution, it may be seen as a politicised institution rather than a neutral arbiter of law. Frequent cases driven by lawfare strategies could lead to accusations of bias, especially if judgments

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or provisional measures appear to favour one side in politically charged conflicts (Ramsden, 2022, 471).

Fontanelli adds that that the strategy of pushing broader conflicts through specific treaty-based allegations may not only may undermine the Court's reputation/credibility as dispute settler, but also "might contribute to the fall into disgrace of compromissory clauses in new treaties" (Fontanelli, 2021). He indeed noted a decline in the inclusion of compromissory clauses to the recent international treaties. It can also be said that the over-politicisation of fundamental treaties like the Genocide Convention or the CERD may also erode their value and credibility in the long run (Carruthers, 2020).

Another concern is that, since the Court lacks an enforcement mechanism, if states perceive that cases are being filed not for genuine legal resolution but for political or strategic gains, they may be less inclined to respect the Court's rulings, undermining its authority. A failure to enforce judgments could weaken the Court's credibility, reducing its effectiveness in future disputes (Yasuaki, 2022). Relatedly, if major powers perceive the ICJ as being used against them in lawfare tactics, they may eventually refuse to participate in proceedings, limiting the Court's ability to adjudicate crucial international disputes. The increasing utilisation of the Court as a tool for lawfare has also the potential to inundate its docket, thereby diverting resources from other cases. A pertinent example of this phenomenon is the Azerbaijan/Armenia conflict, wherein the utilisation of the ICJ by one state for the purpose of lawfare prompted a response from its adversaries in the form of their own filings, culminating in an escalation of legal disputes rather than their resolution. This dynamic could potentially engender a cycle of reciprocal legal action, thereby further politicising the Court and diminishing its efficacy in adjudicating on authentic legal disputes.

The growing role of provisional measures in lawfare strategies is likewise source of a concern. Given the relatively low standards set by the Court, the procurement of provisional measures is relatively straightforward, and due to their expediency, they are even more politically advantageous for the parties

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who seek them. The discrepancy between the threshold for merits and preceding incidental proceedings is prone to "be exploited by parties strategically to obtain interlocutory rulings (…) as an independent goal" (Nakajima, 2025). This phenomenon gives rise to another concern, namely that when the Court adopts its high standards during the preliminary objections and merits phases, it takes backsteps from provisional measure orders, which can reinforce the accusation of the provisional measures being politicised. A further issue that must be addressed is that of the efficacy of these measures. State compliance with provisional measures sits approximately at fifty per cent (Alexianu, 2023), which may have a detrimental effect on the Court's credibility.

As demonstrated by the analysis presented herein, it is possible to formulate robust negative and positive arguments for the utilisation of the Court as a field of lawfare. The inclination towards either of these lines of argumentation appears to be contingent on, as far as observed, the assumptions concerning the role assigned to the Court within the international legal order. In this regard, the article will culminate by presenting an assessment of the potential ramifications of these divergent perspectives on the future of lawfare before the Court.

5. An Old Debate with New Implications: Arbitral v. Judicial Nature of the ICJ

Differing views on the nature of the Court dates back to the creation of the Court's predecessor, the PCIJ. One school of thought was optimistic that the Court would not be "a Court of Arbitration, but a Court of Justice",[58] while another perspective adopted a more cautious stance regarding the delineation of the Court's role and position within a system founded upon the principles of sovereign equality and consent (Forlati, 2014,2). The distinctions between

[58] PCIJ, Advisory Committee of Jurists, Annex No. 2 (1920), Procès-verbaux of the Meetings of the Committee. Van Langenhuysen (Hague), 8.

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'arbitral' and 'judicial' characteristics may be briefly summarised under five points. Firstly, a judicial body possesses a permanent existence, while an arbitral tribunal is established ad hoc or temporarily, specifically for the resolution of the dispute in question. Secondly, a judicial body applies legal principles in a general and consistent manner, contributing to the development of jurisprudence, while an arbitral tribunal is more flexible and party-driven, as it focuses on resolving the specific disputes rather than establishing broader norms. Thirdly, judicial bodies consist of permanent judges, often elected through established procedures, ensuring institutional independence, while in an arbitral tribunal, the selection of arbitrators is usually made by the parties involved, thereby affording them further control over the proceedings. Fourthly, judicial bodies focus on legal adjudication and norm-setting, ensuring a structured application of the law and contributing to the maintenance of the international legal order, while arbitral tribunals prioritise dispute resolution, often seeking compromise rather than establishing overarching legal principles. Finally, while judicial bodies are characterised by strict procedural rigour, arbitral tribunals are typically granted a greater degree of flexibility.

It must be acknowledged that, despite the initial ideal of setting the ICJ as a 'pure' judicial body, eventual structure of the Court exhibits characteristics of both types, thereby giving rise to debates about its function. Before anything, the rejection of the provision of compulsory jurisdiction over inter-State disputes represents the most significant blow to the aforementioned ideal. According to Georges Scelle, a judicial body is defined by having "jurisdictions proper, i.e. institutional and with a tendency towards being compulsory, which are implicitly conceived as organs of global international society", while arbitral tribunals usually function as "a substitute for the struggle of forces between the litigants".[59] The rejection of compulsory jurisdiction thus rendered the distinction between the Court and its

[59] G. Scelle, *'Rapport sur la procédure arbitrale'*, doc. A/CN.4/18, (1950) *ILC Yearbook*, vol. II, p. 114 para. 80. (Original in French.)

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predecessor, the Permanent Court of Arbitration, somewhat negligible, as the distinguishing feature of the new Court was then its permanent nature, accompanied by "very limited options left to the parties as to the choice of the Bench, the public nature of proceedings and the fact that procedural aspects were to be regulated once and for all by the Statute, as supplemented by the Rules of Court" (Forlati, 2014,1).

The Court's ability to apply legal principles in a general manner and contribute to the development of jurisprudence is another complexity in its nature. In relation to the inter-state disputes, Article 59 makes clear that the common law concept of precedent or *stare decisis* does not apply to the decisions of the ICJ. Article 59 also stipulates that the Court's decisions are binding only on the parties and only in respect of that particular case. This construction clearly undermines the Court's ability to formally contribute to the development of jurisprudence, rather it comes through as a manifestation of an arbitral concept. The Court's advisory powers are also part of its judicial function, but they are not binding, which weakens their jurisprudential impact.

Examples of the arbitral aspects in the Court's design can be multiplied, e.g. the appointment of ad-hoc judges, the autonomy of the parties in terms of legal basis and procedure (i.e. the parties before the ICJ can agree on the specific legal issues to be dealt with by the Court, which is similar to arbitral proceedings, and they can also ask the ICJ to apply principles of equity under Article 38(2) of the ICJ Statute) or, like arbitral awards, the ICJ's decisions are binding but lack direct enforcement mechanisms. All this can be seen as drawbacks for the Court's judicial function. Antonio Cassese, for example, locates arbitral aspects of the Court as a source for its struggles and suggests that "the essential recipe for reviving the Court and bringing it into the twenty-first century is to turn it from a substantially arbitral court, a late nineteenth century behemoth oriented to unrestricted respect for outmoded conceptions of state sovereignty, into a proper court of law, with all the attributes and trappings of a modern judicial institution" (Cassese, 2012, 241).

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For others, however, including the Court itself, these perceived drawbacks do not alter the judicial nature of the Court. In *Northern Cameroons*, the Court stated that

> There are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore. There may thus be an incompatibility between the desires of an applicant, or, indeed, of both parties to a case, on the one hand, and on the other hand the duty of the Court to maintain its judicial character. The Court itself, and not the parties, must be the guardian of the Court's judicial integrity.[60]

As Serena Forlati points out, the Court also refuses to include 'judgments by consent' in the operative part of its judgments, stressing that this would be contrary to its judicial function (Forlati, 2014, 9). Apart from the Court's own positioning, there are some structural factors, in addition to the historical development of the Court, which allow the authors to argue that its judicial nature is predominant. While these investigations are rather lengthy and cannot be adequately covered in the context of this article (See. Forlati, 2014; Hernández, 2014), some of the points made in this direction can be summarised.

To begin with, the legal reasoning of the Court plays a *de facto* role in the development of jurisprudence, as the Court is largely seen as the supreme normative standard-setter (Tams and Sloan, 2013; Shahabuddeen, 1996, 107). This role has much to do with its historical *raison d'être*, as the Court emerged in the early 1900s as a central part of the effort to 'institutionalise law' (Hernández, 2014, 10; Kolb, 2014, 2-4). That is, the ideal behind its creation was not only to create a body to resolve disputes, but also to ensure the rule of law. Its organic link with the UN also enhances and reinforces its position as a norm-setter. Moreover, the Court plays an immense role in determining

[60] *Northern Cameroons* (*Cameroon v United Kingdom*), Preliminary Objections, Judgment, [1963] ICJ Rep 15, ICGJ 153 (ICJ 1963), 2nd December 1963, 29.

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what constitutes an international customary rule or general principle, both of which are major sources of international law. As Cassese puts it,

> ...the difficulty with custom is that, apart from traditional rules, which are undisputed, emerging rules or rules that are indicative of new trends in the world community need, in order to be recognized, the formal imprimatur of a court of law. No other court is in a better position than the ICJ to play this role. Once the ICJ has stated that a legal standard is part of customary international law, few would seriously challenge such a finding. (Cassese, 2012, 240).

In addition, the liberty the Court has in establishing its own procedural rules, and the tendency it exhibited to enhance its judicial function with regard to issues of procedure, are noteworthy aspects (Forlati, 2014, Sec.1.1.). As is noted by Forlati, for example, the Court's role was clearly enhanced when "the Rules of Court established the possibility of hearing counter-claims and joining proceedings, which has no basis in the Statute; or when, in LaGrand, the Court held that provisional measures adopted under Article 41 of the Statute are binding upon the Parties" (Forlati, 2014, 8) Another important feature of the Court in this context is its ability to adjudicate on its own jurisdiction, as is established in *Nottebohm*,[61] which is a concept rather alien to arbitration.

An additional thing that must be stressed is that the Court's approach to dispute settlement has undergone a substantial evolution over time. Initially conceptualised as a bilateral dispute resolution mechanism, its role has undergone a progressive transformation, assuming a more normative and quasi-legislative function in response to evolving international dynamics. This evolution can be elucidated through salient shifts in jurisdiction, procedural flexibility, and engagement with broader international law principles (Kolb, 2013, 1144ff.). The Court has gradually assumed a more

[61] *Nottebohm (Liechtenstein v Guatemala)*, Preliminary Objection (Second phase), Judgment, [1955] ICJ Rep 4, ICGJ 185 (ICJ 1955), 6th April 1955, 119.

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active role in the development of international law, through the broad interpretation of treaties and the issuance of advisory opinions that contribute to the establishment of global legal norms. It has evolved into a court of principles that exerts influence on state behaviour, international human rights law, and humanitarian law, thus transcending its original function as a mere bilateral dispute resolver.

> The Court, designed to be objective and impartial, is equally the institutional embodiment of a delicate compromise between the sacrosanct sovereignty of the State and the economic and political pressures for a stronger 'international community'. The international law that it applies and interprets is defined by that compromise, and it is for this reason that one cannot properly understand the Court without moving away from the viewpoint that evaluates its work with a pre-conceived notion of its ideal purpose. (Hernandez, 2014, 7).

In overall, then, the analysis presented in this final section demonstrates that the ICJ is a court caught between two visions, between (i) a traditional, bilateral dispute resolution mechanism focused on strict state consent and legal adjudication and (ii) a more expansive, quasi-legislative body that interprets and reinforces international norms, often engaging in politically charged cases. The former vision may a lot to do with the Anglo-American conception of dispute settlement and state responsibility, which was dominant at the beginning of the 20th century. Anglo-American practice of dispute resolution tends to rely more on practice than law and ad hoc consent more than institutional enforcement (Nissel, 2013, 799). From this perspective, there was a clear misfit between sovereignty and an idea of international judicial practice that can establish a general relationship of responsibility and overarching normative principles. However, the repercussions of the Second World War, in recognising the significance of shared normative values and interests, and the advent of globalisation, have catalysed a shift in approach.

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The post-war continental conception of international law on dispute settlement and state responsibility places considerable emphasis on common interests and global norms, necessitating the ICJ to function not only as a dispute resolution body, but also as a norm-setter, transcending its arbitral role.

6. A Conclusion: Two Ways to Move Forward

As far as is observed, the manner in which the Court is perceived as a field of lawfare is contingent upon the conceptual framework that is given precedence. If the Court's role is regarded as predominantly arbitral, it can be deduced that lawfare is detrimental to the Court's integrity and should be eschewed. It is evident that the practice of presenting disputes to the Court through the backdoor, with no genuine expectation of resolving the dispute, would contradict the fundamental principle that characterises the Court as a dispute resolution forum based on consent between sovereign states. If this perception prevails, it is conceivable that the 'true object' or 'real dispute' objections (Harris, 2020; Giacco, 2024), which have so far been rejected by the Court (Fontanelli 2021), may be reevaluated and/or a new approach may be developed in relation to the abuse of process and rights objections (Baetens, 2019).

However, if the nature and structure of the Court is conceived more from a continental perspective and in a way that emphasises its judicial function, it would become possible to downplay any harm in using the Court for lawfare purposes. On the one hand, it can be argued that it is beneficial to have more disputes before the Court, given that each case that comes before the Court allows it to set or clarify normative standards. On the other hand, given that the Court in this conception has a duty to protect community interests and values, it would be unreasonable to make it more difficult for 'aggrieved' states to bring their disputes before the Court, even for the purpose of lawfare, or to prevent the Court from making assessments on issues concerning norms

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of human rights and fundamental values. One may claim that we are at a breaking point, for the growing prominence of the concepts of *erga omnes* and *erga omnes partes* responsibility in relation the invocation of the Court's jurisdiction, the fact that states bringing their broader disputes before the Court within the framework of fundamental human rights treaties and the growing use of the intervention regime outside its purpose as a means of solidarity may force international actors to lean towards one of these two conceptions about the nature of the Court.

While the direction in which the international framework will evolve towards remains to be seen, there appears a discrepancy between the state practice and the perception or perhaps desires of international lawyers. On the one hand, it is difficult to observe an essentially principled approach in state practice. In a rather Machiavellian manner, states emphasise the judicial function of international courts and tribunals to the extent that it is in their lawfare interests and shift their emphasis to the arbitral function and consent when it is against their interests. On the other hand, international legal scholarship seems to give more weight to the judicial function of the Court than perhaps it should, since it is largely motivated by a desire for the development and uniform acceptance of international norms and institutions. Although the author belongs in principle to the latter camp, the Court's potential disregard for the positions and approaches of States may lead to a practice with a very limited impact and a rather utopian character. In this respect, it may be preferable for the Court to develop an approach that would prevent or at least minimise the effects of judicial proceedings, which are mostly initiated to gain political and moral advantage, by developing instruments such as "real object/real dispute" tests or by being more conservative in issuing provisional orders in cases of this nature.

In conclusion, the article's findings can be summarised as follows: firstly, the concept of lawfare is neither inherently negative nor positive in nature, both historically and semantically. Secondly, lawfare can manifest in the forms of both "instrumental lawfare" and "compliance-leverage disparity

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lawfare". The former pertains to the (mis)use of legal norms in warfare, while the latter involves the instrumental use of legal tools to achieve military, political, moral, or other objectives. Consequently, the utilisation of the ICJ as a field of lawfare is a type of instrumental lawfare. Thirdly, the ICJ's status as an appealing venue for lawfare appears to be attributed to several factors, including its universal significance and impact as the judicial organ of the UN, the universally accepted human rights treaties that involve compromissory clauses, the acceptance that *erga omnes partes* obligations grant each party standing to bring cases before the ICJ, and the way in which the provisional measures regime of the Court functions. Fourthly, the acceptability of the lawfare practice before the Court, and the consideration of its potential implications for the Court's legitimacy and functionality, is contingent upon the extent to which the Court is regarded as primarily an arbitral or judicial body.

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