ATHENA

Critical Inquiries in Law, Philosophy and Globalization

VOLUME 5.1 /2025

Lawfare and the Future of International Crimes

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ISSN
2724-6299
(ONLINE) https://doi.org/10.6092/issn.2724-6299/v5-n1-2025

Ownership

Alma Mater Research Institute for Human-Centered Artificial Intelligence (Alma Human AI)
Alma Mater Studiorum
Università di Bologna
Via Galliera, 3 40121
Bologna (Italy)

Publisher

Alma Mater Studiorum – Università di Bologna
Alma Diamond – open scholarly communication
Via Zamboni, 33 40126
Bologna (Italy)

ATHENA

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VOLUME 5.1
2025

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"Lawfare" is Worth Defining

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1. Introduction

What is it, exactly, that we think we perceive upon encountering the word *lawfare*? If our understanding is coloured by its colloquial use in traditional and digital media, it will be inevitable to concur with the Cambridge English Dictionary or the Oxford English Dictionary, which defined *lawfare* as "the use of legal action to cause problems for an opponent" and "legal action undertaken in order to exert power or control, esp. as part of a hostile campaign against a particular country or group", respectively. Such "lexical" definitions undoubtedly reflect the negative connotation *lawfare* has carried since the 1830s,[1] and yet they are not sufficient in terms of framing the scholarly debate surrounding the term which rose to prominence in the late 1990s.

Few would contest that the foremost contribution in this context came from Charles J. Dunlap Jr., who attempted to render *lawfare* a "value-neutral" term by narrowing down its scope: "the strategy of using — or misusing — law as a substitute for traditional military means to achieve a warfighting objective" (Dunlap 2008). It must be noted that this definition denoted a

[1] According to the Oxford English Dictionary, the earliest use of the term lawfare was in the 5 September 1835 issue of the daily *Bucks Herald* from Buckinghamshire, United Kingdom, in reference to particularly hostile legal proceedings.

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https://doi.org//10.6092/issn.2724-6299/22381

remarkable evolution in Dunlap's thinking, given that Dunlap, as a currently retired officer of the United States Air Force (USAF), had initially framed *lawfare* within a traditional, "Clausewitzian trinity",[2] and addressed the historical opposition of the North American civil rights movement to US aggression in Vietnam and the more recent *potential* investigation of the International Tribunal for the Former Yugoslavia (ICTY) into NATO bombing campaigns in Serbia under the heading of lawfare (Dunlap, 2001). It can be surmised that a key factor in this evolution was Dunlap's perception of law as a *weapon* in achieving an operational objective: thus, law, as any other weapon, could "be used for good or bad purposes" (Dunlap, 2008).

However, as a great English playwright once remarked in the voice of a Danish prince, "there is nothing either good or bad, but thinking makes it so" (Shakespeare 2006). In this light, there is no inherent logical incoherence in — for instance — Dunlap's depiction of unilateral coercive measures as "good" lawfare (Dunlap, 2010) in spite of the emerging consensus as to their illegality under international law (*inter alia* Douhan, 2017; Kurtul, 2022a; De Zayas, 2023). This does not mean, on the other hand, that Dunlap's approach in applying a "value-neutral" concept to real-life disputes and conflicts is wholly impartial — nor does he imply that this is the case. As he admits in a multitude of his works, Dunlap primarily addresses "the doers": legal practitioners and members of the armed forces fighting on the "good" side, i.e., "democracies" (Dunlap 2010). In his words, the use of lawfare "was not — and *is not* — intended to assuage the penchant of academics and policy enthusiasts to put all human activity into some designated theoretical box suitable for explication in university texts" (Dunlap, 2010), and perceived lawfare practices emerging from the People's Republic of China (PRC) are

[2] The "trinity" Dunlap refers to in relation to "lawfare" is not von Clausewitz's *wunderliche Dreifaltigkeit* (or rather, the trinity consisting of violence/passion, chance/probability, and reason/policy), but rather the latter's analysis of the relationship between the military, the government, and the people.

ISSN 2724-6299 (Online)
https://doi.org//10.6092/issn.2724-6299/22381

viewed as moves that "democracies" need to counter — even if it means lowering the threshold of humanitarian restrictions in warfare to the bare minimum envisaged in international humanitarian law[3] (Dunlap, 2001).

Yet Dunlap has not been the only author to use the term "lawfare" from a highly subjective standpoint. As a matter of fact, a closer inspection of "lawfare literature" can lead any researcher to the conclusion that the definition of "lawfare"—as well as the distinction between "good" and "bad" lawfare — depend on the audience that the author aims to address. Orde Kittrie's influential monograph, *Lawfare* (Kittrie, 2016), is a case in point: while the author makes a significant and laudable attempt to incorporate different interpretations of and approaches in describing "instrumental lawfare",[4] he ultimately seeks to propose a viable "lawfare strategy" for the US Government (Kittrie, 2016, 39), in addition to his scholarly goal of compiling the first comprehensive source on lawfare in the English language. Other authors, like Brooke M. Goldstein and Aaron Eitan Meyer, have arguably instrumentalised the very term "lawfare" by framing (among other things) the International Court of Justice's Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory as part of a broader "Islamist lawfare" strategy against Israel (Goldstein and Meyer, 2008), whereas authors like Christi Bartman (2010) and Brad Fisher (2023) offer an exclusively anti-Soviet, anti-PRC, and anti-Russian interpretation, with the latter proposing a new term — Malign Legal Operations — to describe Russian legal actions within the context of international law.

[3] It should be noted that Dunlap prefers to use the term "laws of armed conflict" (LOAC) in lieu of international humanitarian law.
[4] In Kittrie's approach to "lawfare", "instrumental lawfare" 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". This is distinguished from "compliance-leverage disparity lawfare" which is "designed to gain advantage from the greater influence that law, typically the law of armed conflict, and its processes exerts over an adversary" as an armed conflict ensues on a kinetic battlefield (Kittrie, 2016, 11).

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https://doi.org//10.6092/issn.2724-6299/22381

It follows that "the use or misuse" of the term "lawfare" itself has largely become a battleground for "narrative warfare" akin to the (ab)use of international law terminology in political rhetoric[5] (*inter alia* Maan, 2024, 76). This complements the pre-existing perception of law as a battleground (Goldenziel, 2021) and paves the way for a myriad of "lawfare" accusations devoid of consistency. Such a predicament echoes Raphael Lemkin's remark on how he had transformed his anguish into "a moral striking force" (Akhavan, 2015, 90) in coining and helping define the "crime of crimes" (Schabas 2009): genocide. It is self-evident that the semiotic weight of Lemkin's coinage eclipses that of lawfare, which Tiefenbrun had dubbed a "clever but potentially destructive play on words" based on how both "law" and "war" "enjoyed power" (2010), for "genocide" etymology stems from the *killing* of a *people*. Then, in view of how the use of the term "genocide" has been prone to abuse (Akhavan, 2015; Schabas, 2011; Tekin and Uraz, 2025), one can spot the inherent fallacy in Tiefenbrun's argument that "lawfare" is a destructive construct aimed at swaying public opinion against the United States and Israel, in favour of "tyrants" and "terrorism" (Tieferbrun, 2010).

There is, however, a key difference between the use of terminology pertaining to the realm of international *criminal* law (chiefly "genocide") and that of the term "lawfare". In the former case, legal scholars and practitioners had initially lamented the dearth of legal literature, viewing this as a factor contributing to their reliance on "intuitive rather than reasoned" terminology when addressing the crimes committed in the former Yugoslavia and Rwanda (Schabas, 2009, xi). By contrast, when confronted with the question "is lawfare worth defining?", leading legal scholars and military figures — including William Schabas, Orde Kittrie, Susan Tiefenbrun, and Charles

[5] To further contextualise, Maan's main argument is that "meaning" precedes "truth" in narrative warfare; hence, the (ab)use of the "Responsibility to Protect" doctrine by the United States and NATO to bypass the UN Security Council in militarily interfering in third countries is presented as a viable strategy (Maan, 2024, 78) irrespective of its dubious legality under international law.

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Dunlap — failed to agree even on whether "lawfare" merited a definition, let alone on what that definition should be (Scharf and Andersen, 2010)[6].

One may therefore infer that the "us" and "them" dichotomy has long shaped the scholarly debate on "lawfare" conducted in the English language — not only through attempts to define the "lawfare" policies of Western "liberal democracies" in contrast to a purportedly nefarious, "illiberal" "Other" accused of constantly abusing the law, but also in the persistent lack of consensus on the term's meaning. Conversely, the authors of scholarly works in neo-Latin languages—notably Portuguese and French — have used the terms *guerra jurídica* and *guerre juridique*[7] in reference to "the strategic use of the law with the purpose of delegitimising, harming or annihilating the enemy" (Martins, Martins, and Valim, 2023) in predominantly (albeit not exclusively)[8] domestic contexts, with focus on the political prosecution of left-wing figures like the current President of Brazil, Luiz Inácio Lula da Silva, and the leader of *La France Insoumise*, Jean-Luc Mélenchon (Dias, 2022).

Thus, aside from the evident political divergence in the origins of "lawfare" versus those of *guerra jurídica*, there emerges a new dichotomy: "external / international lawfare", which involves the "use or abuse" of the norms of international law *in lato sensu* to achieve a warfighting objective or to delegitimise a geopolitical adversary for the purpose of gaining political leverage; and "internal / domestic lawfare", denoting the strategic deployment of public (typically criminal) law to suppress opposition to the political system at the national level. Neither of the foregoing forms of lawfare can be deemed to *ipso facto* entail a malicious misinterpretation of

[6] This article was shaped by the contributions made by legal scholars and military officers who attended the symposium on "lawfare" convened at the Case Western Reserve University School of Law on 10-11 September 2010. Due to the application of the Chatham House Rule, the authors of the statements referenced in the article cannot be identified.
[7] Both *guerra jurídica* and *guerre juridique* are usually used as direct translations of "lawfare".
[8] At the time this article was written, there was a growing attention among Francophone legal scholars towards the study of Chinese Falü Zhan (法律战).

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the law and, in today's conflict-ridden world where international crimes are arguably committed on a daily basis, there are convergences between the two forms which require closer inspection.

2. Contemporary Dynamics Between "External / International Lawfare" and "Internal / Domestic Lawfare"

As one may infer from the foregoing, the bulk of lawfare literature in the English language relates to "external / international lawfare". Hence, the scope of the literature has largely entailed international law and its various sub-branches including international humanitarian law (*inter alia* Berkowitz, 2012), international criminal law (*inter alia* Murina, 2010), international law of the sea (*inter alia* Kittrie, 2016, 168), and space law (*inter alia* Kittrie, 2016, 166), with the latter two areas focusing mostly on Chinese practices — albeit with little accuracy[9] (as illustrated by de la Rasilla and Cai, 2024). Over the past decade, there have also been notable scholars who have used the term "lawfare" in the context of international human rights law, apparently influenced by Martins, Martins and Valim's influential work on the proceedings against Luiz Inácio Lula da Silva (2023).

While the human rights aspect of "external / international lawfare" continues to be outweighed by scholarly debates in other areas of

[9] Two of the most common accusations made by US legal scholars and practitioners against China in the context of the law of the sea are China's alleged malign misinterpretation of the EEZ and the norms pertaining to seabed mining (see, *inter alia*, Kittrie, 2016, 167). These can be viewed, at the very least, a poor attempt at *tu quoque*, as the United States is not a party to the UNCLOS and, during the Third United Nations Conference on the Law of the Sea, the part of the draft concerning seabed mining famously was met with strong objection by the United States. By contrast, China has consistently claimed to uphold the "common heritage of mankind" principle proposed by developing countries (Zhang, 2024) and proposed the equity principle as opposed to the equidistance rule without inconsistencies (*ibid*). Kittrie's parallel accusations concerning China's use of lawfare to prepare for warfare in outer space (2016, 168) are also largely devoid of substance, in view of China's contributions to (among other things) the Ad-Hoc Committee on the prevention of an arms race in outer space (in spite of US objections) and the Conference on Disarmament (Vanhullebusch, 2024).

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international law, human rights law has consistently been central to the discourse on "internal / domestic lawfare". Indeed, the aforementioned case of Jean-Luc Mélenchon in France (Da Silva, 2022), as well as the 2025 crackdown on Turkish opposition figures including İstanbul mayor Ekrem İmamoğlu [10] (Erkan, 2025) have at times been framed as "lawfare" by scholars and practitioners, who raised human rights arguments against the misuse of domestic criminal law.

Notwithstanding the differences between these two broad categories—particularly with respect to the fields of law they engage—there are also significant points of convergence. In a geopolitically volatile world, where law is shaped (albeit not silenced) by the sound of arms (Cicero, 53, § 11), it is perhaps unsurprising that international crimes lie at the heart of this intersection.

A particularly prominent illustration of this dynamic can be found in Germany, where "denialism" laws can be traced back to the early-to-mid-1990s when German lawmakers decided to consider a new provision in the *Strafgezetzbuch* (StGB) which would specifically criminalise the denial of the Holocaust (Pech, 2011; Kurtul, 2022b). At the time, this was not an unprecedented step in Europe, as German lawmakers were trailing behind their French counterparts who had enacted the *Loi Gayssot*[11] when Federal Germany was still relying on *streitbare Demokratie* (or "militant democracy") doctrine[12] to combat the apology, denial, or trivialisation of

[10] It is worth noting that two separate words for "lawfare" are used in Turkish legal and political discourse. *Hukuk savaşı* or "war of law" is more commonly used for lawfare applied in international disputes (Uraz, 2022), whereas *düşman hukuku* or "hostile law / law of the enemy / law for the enemy" is used for domestic processes aimed at silencing perceived enemies of the political system (Erkan, 2025). Both terms can be translated as "lawfare".

[11] Named after French deputy Jean-Claude Gayssot from the French Communist Party who first drafted the bill in 1990, this French legislation amended the 1881 Act on the Freedom of the Press with a new provision on the "denial of crimes against humanity as defined under the Statute of the Nuremberg International Military Tribunal", effectively criminalising Holocaust denial.

[12] As one may observe in the landmark decision of the European Commission of Human Rights in the *German Communist Party* case (App no 250/57), this prevailing constitutional

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https://doi.org//10.6092/issn.2724-6299/22381

Nazi crimes, as such acts were interpreted as a threat to Federal German constitutional order (Pech, 2011). After the infamous "Auschwitz lie" case (*ibid*), however, German lawmakers were convinced that a more specific criminal provision was necessary, thereby conceiving Section 130 of the StGB, which criminalised, among other things, "denying or downplaying (international crimes)[13] committed under the rule of National Socialism".

Thus, when contemporary German lawmakers moved to expand the scope of Section 130 StGB, citing obligations under EU law stemming from the well-known Council Framework Decision 2008/913/JHA[14], one might have assumed that the new "denialism" offence would cover *past* genocides, crimes against humanity, and war crimes — as is the case in most other EU Member States (Kurtul, 2022b). However, the parliamentary debates in both the *Bundestag* and the *Bundesrat* in 2022 focused heavily on the ongoing Russian military intervention in Ukraine. Indeed, these discussions unsurprisingly anticipated — and were soon echoed by — the *Bundestag*'s subsequent resolution recognising the 1931–1933 famine in Ukraine as a "genocide" perpetrated by Soviet officials[15] (Kurtul, 2022c). Consequently, despite efforts by the German Ministry of Justice to clarify that courts must "unequivocally determine" that the object of denial constituted an

doctrine in the Federal Republic of Germany bestows significant discretion on German authorities (both judicial and executive) in combating expressions and associations deemed "contrary to the liberal democratic order".

[13] The specific phrase used in the provision is "acts of the kind referred to in Sections 6 to 12 of the Code of Crimes against International Law". These provisions refer to the "core international crimes" in international law; namely, genocide, crimes against humanity, and war crimes.

[14] Officially named "Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law", this instrument of EU law envisions, among other things, the criminalisation of racial discrimination (including hate speech) and the denial of the commission of core international crimes.

[15] Some historians and politicians refer to this tragedy as "Holodomor", a man-made famine targeting Ukrainian nationhood (*inter alia*, Graziosi, Hajda, Hryn, 2014). However, there is no consensus on whether the famine was "man-made" (*inter alia*, Tauger, 1991; 2015), let alone whether the act described in this narrative constitutes the crime of genocide (Kurtul, 2022c).

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international crime in order to establish the *actus reus* of the offence,[16] it was clear that the recognition of the 1931–1933 famine as "genocide" — and the earlier legislative attempt to criminalise "denialism" — could not be viewed as independent from the German government's broader policy of military support to Ukraine and hostility towards Russia. In this light, German lawmakers' "legislative activism" entails the use of legislative functions to delegitimise a geopolitical adversary in the context of an ongoing armed conflict and, at the same time, generates an internal chilling effect[17] among critics of German foreign policy on the ongoing war — thereby epitomising modern lawfare.

Of course, the aforementioned German example is not an isolated one in terms of invoking international crimes for the purpose of pursuing a geopolitical or military objective in the context of lawfare. Indeed, the declarations of former Vice President of the International Court of Justice (ICJ), Kirill Gevorgian,[18] and another prominent judge of the ICJ, Xue Hanqin[19] in the ongoing case between Ukraine and Russia on the application of the Genocide Convention demonstrate how the Convention may be misused to obtain a ruling on *jus ad bellum* with a "reverse compliance" argument. The position of Gevorgian and Xue is firmly rooted in the ICJ's earlier decisions in relation to submissions filed by the former Federal Republic of Yugoslavia and its continuing state, Serbia and Montenegro,

[16] Bundesministerium der Justiz und für Verbraucherschutz, 'FAQ zu § 130 StGB' (*BMJV*, 28 October 2022) <https://www.bmjv.de/SharedDocs/Meldungen/DE/2022/1028_Paragraph130_FAQ.html> date accessed 5 July 2025.

[17] In this context, it is necessary to stress that the threshold for legitimate interferences with political speech in "denialism" cases (excluding Holocaust denial) is quite high under Europe's regional human rights regime. See *Perinçek v Switzerland* App no 27510/08 (ECtHR, 15 October 2015) and *Mercan and Others v Switzerland* App no 18411/11 (ECtHR, 28 November 2017).

[18] *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) [2022] ICJ Rep 2022, 211.

[19] *Ibid*.

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against NATO Member States regarding the extensive bombing campaign conducted in former Yugoslav territory. Indeed, in these cases, the ICJ had taken an approach that clearly contradicted its recent Orders and Judgment in relation to the war in Ukraine, as it had stressed that the use of force in itself could not "constitute an act of genocide within the meaning of Article II"[20] of the Genocide Convention, which also meant that the ICJ could not previously claim *prima facie* jurisdiction on these grounds. Regardless, in assessing Ukraine's submissions, the ICJ took a different path which, combined with the apparent lack of neutrality and objectivity in the majority of Article 63 interventions [21] filed at the preliminary objections stage, consolidated the possibility for the use of the ICJ as "a field of lawfare" (Uraz, 2025) in future cases.

Another evolving element in the dynamics between "external / international lawfare" and "internal / domestic lawfare" is the role of human rights law in the execution of lawfare. The starting point of this evolution, however, is not very recent: indeed, the judgment of the European Court of Human Rights[22] (ECtHR) in the inter-state case between Cyprus and Turkey was treated as a political victory by the authorities of the applicant State while authorities of the respondent State viewed it as a ruling marred by prejudice in view of the perceived anti-Turkish bias of the Council of Europe in relation to the Cyprus issue (Özersay and Gürel, 2008). Thus, dissenting opinions on the majority's assessment regarding whether Northern Cypriot courts could provide effective remedies [23] and practical questions pertaining to the determination of moral damages in the context of just satisfaction [24] (Pustorino, 2014) have been overshadowed by (geo)political debates

[20] *Legality of Use of Force (Yugoslavia v Belgium), Provisional Measures* (Order of 2 June 1999) [1999] ICJ Rep 1999 (I), 137.
[21] In this context, Article 63 refers to Article 63 of the Statute of the International Court of Justice.
[22] *Cyprus v Turkey* App no 25781/94 (ECtHR, 10 May 2001).
[23] See the partially dissenting opinions of judges Marcus-Helmons, Fuad, Palm, Jungwiert, Levits, Pantiru, and Kovler.
[24] *Cyprus v Turkey* App no 25781/94 (ECtHR, 12 May 2014).

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inevitably linked to Turkish military actions (and Greek Cypriot reaction thereof) in Cyprus.

It scarcely requires emphasis that the war in Ukraine has taken the use of the Strasbourg court as "an ICJ-like field of lawfare" to a new level. No case exemplifies this evolving phenomenon better than Ukraine's application against Russia regarding Crimea, as the judgment of the European Court of Human Rights in this case has been hailed as a "clear and undeniable victory for Ukraine" (Dzehtsiarou, 2024), given that the ECtHR ruled against the respondent State on grounds of almost every substantive and procedural right enshrined in the European Convention on Human Rights (ECHR). There were, however, a procedural ambiguity and a jurisdictional grey area which had to be interpreted against the respondent State in order to realise this decisive victory: i.e., the absence of submissions by Russia due to its withdrawal from the Council of Europe, and challenges *ratione materiae* in the context of international humanitarian law. With regard to the former, Russia was deprived of a list of *ad hoc* judges who qualified to sit in proceedings where Russia appeared as the respondent State, as Russia was no longer a High Contracting Party, even though it could be held responsible for Convention violations which occurred prior to its withdrawal. Consequently, there was a grey area as to what extent Russia could benefit from the procedural guarantees in the Rules of Court, in accordance with the adversarial principle. Furthermore, with regard to the alleged violation of the right to a fair trial, the Strasbourg court referred to the realm of international humanitarian law in holding that the courts established by the occupying power could not be deemed established by law.[25] While the ECtHR had taken a similar approach in *Cyprus v Turkey* in light of the ICJ's Advisory Opinion in the Namibia case,[26] it had faced significant opposition from dissenting

[25] *Ukraine v Russia (re Crimea)* Apps nos 20958/14 and 38334/18 (ECtHR, 25 June 2024) paras 913, 914, 915, 916.
[26] *Cyprus v Turkey* App no 25781/94 (ECtHR, 10 May 2001) para 90.

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judges who argued that the non-recognition of domestic courts in the Turkish Republic of Northern Cyprus could hinder the access of both Turkish Cypriots and Greek Cypriots to the ECtHR[27]—which apparently did not apply to the Russians of Crimea as Russia had already withdrawn from the Council of Europe. Moreover, Russia's withdrawal arguably resulted in a judicial monologue, as most Ukrainian arguments were readily accepted by the Court in the absence of an adversary, and the Court delivered its judgment without any qualms as to the relationship between Russia and the Council of Europe (Dzehtsiarou, 2024).

Despite Dunlap's earlier allusions (Dunlap 2010), there is another key dynamic between contemporary "external / international lawfare" and "internal / domestic lawfare" which must be discussed in a new light: unilateral coercive measures. As the author of this foreword had pointed out in an earlier piece published in *Athena* (Kurtul 2022a), the employment of comprehensive unilateral coercive measures against other sovereign states has been widely viewed as a violation of the principle of non-intervention, especially when the purpose of the measures is to enforce regime change without resorting to open warfare. More recently, however, experts[28] in the fields of international human rights law and public international law have also drawn attention to human rights implications of targeted unilateral coercive measures, i.e., unilateral coercive measures targeting natural or legal persons (colloquially referred to as "Magnitsky sanctions"), with focus on the right to a fair trial and the right to an effective remedy (see, *inter alia*, Douhan, 2017; 2021 [29]). Outright denial of such procedural rights — ostensibly for geopolitical goals — has unfortunately become very common since Russia's military intervention in Ukraine, as journalists have frequently been

[27] See footnote no. 23.
[28] Including, but not limited to, Alfred Maurice De Zayas (2023) and Alena Douhan (2017).
[29] This refers to Douhan's report on the notion, types and qualification of unilateral coercive measures, in her capacity as the UN Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights (UN Doc A/HRC/48/59).

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sanctioned by governments and supranational organisations for reporting "on the wrong side of the conflict", with restricted avenues for redress.[30]

One of the most recent (and poignant) examples of this evolving phenomenon is the case of Turkish citizen Hüseyin Doğru, who has been subjected to unilateral coercive measures by the Council of the European Union[31] and the German Government (More and Murray, 2025) on grounds of his alleged participation in Russia's destabilising actions in the European Union, which the German Government tried to substantiate by claiming that Doğru's media company and state-owned Russia Today were closely linked (*ibid*). Regardless, one could argue that this was a politically convenient explanation for German authorities, as the rationale offered by the Council of the European Union also referenced Doğru's reporting of pro-Palestinian protests in Germany,[32] which also included footage of police brutality (Vračar, 2025).

Regardless of some of the grim examples provided above, it is necessary to underline that not all forms of modern lawfare constitute a grave violation of human rights in a domestic sphere, or the manipulation of international law for geopolitical purposes. In other words, "lawfare" does not mean a lack of legal grounds or legal reasoning, for it typically entails the employment of a sound legal strategy to overcome an adversary, be it home or abroad. It follows that, in defining and "identifying" lawfare with intellectual integrity,

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[30] In the context of EU law, a natural or legal person subjected to unilateral coercive measures may challenge the decision of the Council before the General Court in Luxembourg; however, this is typically preceded by a request to the Council to review its decision. As the procedure effectively reverses the burden of proof while implementing *de facto* penalties in a manner akin to criminal law, it is very difficult to argue that the right to a fair trial and the right to an effective remedy are fully respected.

[31] See Council of the EU, 'Russian hybrid threats: EU lists further 21 individuals and 6 entities and introduces sectoral measures in response to destabilising activities against the EU, its member states and international partners' (*Council of the EU*, 20 May 2025) <https://www.consilium.europa.eu/en/press/press-releases/2025/05/20/russian-hybrid-threats-eu-lists-further-21-individuals-and-6-entities-and-introduces-sectoral-measures-in-response-to-destabilising-activities-against-the-eu-its-member-states-and-international-partners/> date accessed 3 July 2025.

[32] Council Decision (CFSP) 2025/966 of 20 May 2025 amending Decision (CFSP) 2024/2643 concerning restrictive measures in view of Russia's destabilising activities [2025] OJ L, 2025/966.

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https://doi.org//10.6092/issn.2724-6299/22381

legal scholars need to think beyond the perceived "duty" to "overcome the adversary", which is brilliantly illustrated by our contributors, Dr Eric Loefflad and Dr Onur Uraz.

3. "Lawfare as a Discourse" and "Lawfare as the Strategic Use of Law"

The two "lawfare" contributions in this issue approach the subject from fundamentally different — though not opposing — standpoints, each situated within the broader categories of "external / international lawfare" and "internal / domestic lawfare" outlined above. The first piece, written by Dr Eric Loefflad, offers a novel understanding of lawfare as a discourse rather than a strategic use of law in the strict sense. In doing so, he departs from the affective assumptions attached to the use of the term lawfare, with focus on the fear of moral injury connected with the term in US and Israeli literature. Within this framework, he draws inspiration from more "traditional" interpretations of lawfare, and deconstructs these views in underscoring a common concern among US and Israeli authors: i.e., the use of "lawfare" by the non-Western adversary which could portray the US or Israel as violators of (for instance) international humanitarian law, thereby affecting the morale, cohesion, and legitimacy of the military as an institution in the eyes of the public.

The second piece, written by Dr Onur Uraz, departs from the idea that lawfare is "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." Uraz draws his definition from his study of "traditional" lawfare literature within the framework of "external / international lawfare" and carefully formulates his proposition with a view to encompass all previous definitions of lawfare in the context of international law. Uraz then applies this definition to pending cases "of high politics"

ISSN 2724-6299 (Online)
https://doi.org//10.6092/issn.2724-6299/22381

before the ICJ, including those relating to the field of international human rights law—specifically, the application of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

One may therefore assume, at first view, that Uraz's piece builds on and contributes to the ongoing debate on "lawfare as a weapon" in the broad sense, especially since he uses Kittrie's definition of "instrumental lawfare" as a starting point and focuses more on legal practice. However, the novelty of Uraz's piece lies in its impeccable intellectual honesty and objectivity within the context of "traditional" lawfare literature, which is evident in his argument that lawfare practised before the ICJ may also help reinforce international norms and the peaceful resolution of disputes. In the latter context, Uraz further contends that such an outcome would bolster the perception of the ICJ as a legitimate and efficient forum—which could, in turn, render the "World Court" a viable platform for "weaker" states seeking to use international law "as a shield" in face of "egregious violations of the most basic principles of international law" as epitomised by Israeli actions in Gaza.[33]

According to Loefflad, on the other hand, such an outcome is exactly what more potent states like the United States (or Israel) might fear. Indeed, Loefflad's piece illustrates how the landmark judgment of the ICJ in *Nicaragua v United States*[34] led "Reaganites" to view international law as a threat to the United States, thereby influencing the position of the Reagan administration in relation to the Additional Protocols of the Geneva Convention, which they refused to submit to the US Senate for ratification. In this respect, Loefflad also addresses how the "special relationship" between the United States and Israel—forged by shared traumatic legacies and political ideologies — influences the affective genealogy of lawfare, as

[33] In this regard, one could cite (among other things) the recent report by Francesca Albanese, UN Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967 (UN Doc A/HRC/59/23).
[34] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States), Jurisdiction and Admissibility* [1986] 1984 ICJ Rep. 392.

ISSN 2724-6299 (Online)
https://doi.org//10.6092/issn.2724-6299/22381

he draws parallels between the US' fear of international cases and Israeli views on Palestinians' right to self-determination under international law.

However, as Uraz notes in relation to the "traditional" lawfare literature, the use of lawfare also carries significant risks — particularly within the frameworks of international criminal law and international human rights law. In the latter context, he highlights (among other things) the submissions made before the ICJ by Armenia and Azerbaijan against one another under the ICERD, illustrating how both recently belligerent states have invoked human rights arguments to advance moral and political goals. In a similar vein, Uraz also stresses that the Genocide Convention is prone to be misused in the context of lawfare, citing the aforementioned submission made by Ukraine. A noteworthy observation that Uraz makes in this respect is that "the general political situation determines the course of lawfare, while lawfare contributes to the political discourse", which complements Loefflad's point on how the internal contradictions of liberalism regarding the perception of international law fuel the discourse of lawfare.

In sum, despite methodological differences, both authors recognise that lawfare can be effectively employed by weaker parties in a dispute or conflict and may even produce positive outcomes — a view that runs counter to its prevailing portrayal in much of the English-language literature on lawfare. In this regard, Uraz's detailed study falls within the category of "external / international lawfare"; he adopts a doctrinal and practice-oriented approach to assess both the advantages and potential risks of deploying such strategies within international legal frameworks. Loefflad, by contrast, engages with both "internal / domestic" and "external / international" dimensions from a more theoretical standpoint — though with a particular emphasis on the latter and its influence on legal scholarship and political discourse emanating from the United States and Israel.

Together, these contributions offer a clear departure from the one-sided and antagonistic perspectives that have characterised much of the existing

ISSN 2724-6299 (Online)
https://doi.org//10.6092/issn.2724-6299/22381

literature in English, thereby broadening the interpretive horizon of lawfare scholarship.

4. Transcending the "us" and "them" Dichotomy: The Future of Lawfare and International Crimes

As the great Antonio Gramsci had observed in a prison cell in 1930, a great variety of morbid symptoms emerge in a state of interregnum where the old is dead, yet the new cannot be born (Gramsci, 2015, 311; my translation). The bellicose climate we are experiencing can be deemed such a symptom: one hardly needs to point out that we are at the end of Fukuyama's "end of history" (1992) and Hardt and Negri's "Empire" (2000), as the unipolar world envisioned by these authors has gradually transformed into a multipolar world which inherited the same inherently war-prone socio-economic system and contradictions thereof (*inter alia* Lenin, 1963; Guérin, 1938).

Yet this is not merely a repetition of Cicero's maxim *silent enim leges inter arma* — as cited earlier (Cicero, 53, § 11). What we witness more frequently in this interregnum is not simply the silencing of law, but rather the widespread disregard for international law on the global stage and the weaponisation of domestic law to undermine the rule of law at the national level. These developments do not displace the strategic use of law to overcome adversaries; instead, they operate alongside it, compounding the legal fragmentation of the current moment.

One should recognise, in any event, that attempts to judicially resolve international disputes are frequently perceived as lawfare by respondent parties, irrespective of the intent of the claimants. As the reader will observe in the contributions to this issue, Israel and the United States are glaring examples of this phenomenon in a contemporary context, but it would be wrong to assume that all examples are inherently and exclusively malign. As a matter of fact, due to the overtly Western — or, as Anghie (2004) illustrates, imperialistic — origins of modern international law, early 20th century

ISSN 2724-6299 (Online)
https://doi.org//10.6092/issn.2724-6299/22381

international lawyers in Republican Turkey (Kurtul and Uraz, 2025) and China (Zhang, 2024) were suspicious towards Western legal actions due to previous experiences with capitulations and unequal treaties granting Western powers and their subjects a privileged status within Ottoman and Qing jurisdictions.

Notwithstanding these deeply ingrained perceptions and contemporary contradictions rooted in unipolarity, a multipolar world provides us with the opportunity to transcend this "us" and "them" dichotomy — at least at an intellectual (or scholarly) level. This task is by no means an easy one, as legal and diplomatic practice evolves in the opposite direction: a case in point is the very recent creation of the "Special Tribunal for the Crime of Aggression against Ukraine" under the auspices of the Council of Europe, with the support of the NATO Parliamentary Assembly[35] and the European Union.[36] Irrespective of the illegality of Russia's military intervention, such unsophisticated and blatant acts of lawfare are unlikely to contribute to the peaceful resolution of the ongoing conflict, deliver justice to victims, or effectively prosecute international criminals. Instead, a more likely outcome is the weaponisation of international crimes to pursue geopolitical and military objectives, which will inevitably cast doubt on the legitimacy of the conceptualisation of international crimes in the eyes of the broader international community, leading to normative or practical gaps in preventing and punishing some of the most atrocious crimes in existence.

[35] NATO Parliamentary Assembly, *Resolution 479 – NATO Post-Madrid* (NATO PA, 2022 Madrid Annual Session, 21 November 2022) https://www.nato-pa.int/download-file?filename=/sites/default/files/2022-11/RESOLUTION%20479%20-%20%20NATO%20POST%20MADRID%20.pdf date accessed 3 July 2025.

[36] European Commission, 'Statement by President von der Leyen on Russian accountability and the use of Russian frozen assets' (30 November 2022) <https://ec.europa.eu/commission/presscorner/detail/en/statement_22_7307 date accessed 3 July 2025; European Parliament, 'Ukraine war: MEPs push for special tribunal to punish Russian crimes' (Press Release, 19 January 2023) https://www.europarl.europa.eu/news/en/press-room/20230113IPR66653/ukraine-war-meps-push-for-special-tribunal-to-punish-russian-crimes date accessed 3 July 2025.

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https://doi.org//10.6092/issn.2724-6299/22381

In spite of such evident challenges, the valiant efforts to define lawfare — exemplified by the contributions of Dr Loefflad and Dr Uraz — offer a pathway for legal scholarship to look beyond the conflict and reassert the centrality of the international rule of law. Achieving this, however, necessitates a sustained and candid dialogue among scholars situated on both "sides" of the divide. It is hoped that the present issue constitutes a meaningful step towards fostering such engagement.

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ISSN 2724-6299 (Online)
https://doi.org//10.6092/issn.2724-6299/22381

ATHENA

CRITICAL INQUIRIES IN LAW, PHILOSOPHY AND GLOBALIZATION

The United States, Israel, and the Affective Lives of Moral Injury

A Genealogy of Lawfare's Emotional Presuppositions

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ABSTRACT

While 'lawfare' is subject to numerous understandings, I argue that a neglected line of inquiry surrounding lawfare is the emotional presuppositions invoked by the usage of this term. Viewing said emotions as deeply linked to the formative American and Israeli invocations of this particular word, I advance the argument that the use of the term 'lawfare' expresses a fear of 'moral injury' whereby acting contrary to stated values might impair combat efficiency. Exposing this point, I argue, demands a genealogical investigation of the varied intersections of law, war, and morality within the American and Israeli experiences preceding the articulation of 'lawfare' immediately after 9/11. I focus here on the interlinkage of various events, and the diverging ideologies that framed them, from experiences of Nazism to the Vietnam War to Israel's various multi-scalar wars against both its neighbours and the Palestinians. Through exposing these histories and their affective legacies, we gain deeper insights into the long shadows of moral injury that lawfare discourse seeks to pre-empt. Such an exercise possesses great value when navigating a geopolitical future that, despite its many uncertainties, will likely include increasingly prolific invocations of 'lawfare' that stem from deeply rooted and historically textured emotions.

Keywords: lawfare, moral injury; Israel, United States, history of the laws of war

ATHENA
Volume 5.1/2025, pp. 1-55
Articles
ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/21443

1. Introduction – An Anti-emotional Emotionalism

Whatever the future of 'lawfare' may be, defining attributes of this concept's origins cannot but be relevant. Articulated in its modern form by then US Air Force Colonel Charles Dunlap in the immediate wake of 9/11, lawfare presented the prospect of military action being undermined by legal interference.[1] According to Dunlap (2001, 20) '…those interested in promoting law as an ameliorator of the misery of war are obliged to ensure it does not become bogged down with interpretations that are at odds with legitimate military concerns.' Inexorably positioned alongside President George W Bush's revenge-fuelled and truth-transcending vows to militantly eradicate terrorism (Kellner, 2007), imaginations of illegitimate lawfare could not but elicit the most intense of emotions. In the face of the US's defining alliance with Israel, lawfare's emotive qualities took on additional dimensions as they concerned Israeli suppression of Palestinian resistance in the Occupied Territories via the Second Intifada that began in September 2000. With Israeli uses of force already accused of going beyond what the law of occupation allowed (Falk, 2000), once the attacks of 11 September 2001 occurred, there was little doubt in many minds that violence-constraining legalism might be wielded by the enemies of those with the capacity, will, and legitimacy to annihilate the existential, but mystified, threat of terrorism (Ansah, 2010; Gordon, 2014). Giving terminological expression to this instinct, lawfare discourse emerged in its modern iteration with an exceedingly narrow American/Israeli focus.[2] Riding the high waves of emotion that defined and connected these formative contexts, charging 'lawfare' could communicate profound indignation towards anyone who would use popularly accessible legal discourses to take even the slightest

[1] On earlier constructions of 'lawfare', see Werner, 2010.
[2] '[T]he lawfare literature is devoid of any sense that there is a geography and history of lawfare beyond the US and Israel and before 9/11': Jones, 2014, 226.

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issue with the US or Israel acting upon its sacrosanct 'freedom to fear' (Carty, 2002).

However, there is something deeply paradoxical about lawfare if we are to consider its affective salience in relation to the traits often associated with 'law' and 'warfare' that, in their amalgamation, create 'lawfare.' After all, theorists and practitioners of both law and war tend to define their pursuits as transcending, or at least circumscribing, the domain of human emotion. Regarding the former, while there is an increasing body of literature on law's relationship to emotions (Bandes and Blumenthal, 2012), their relationship continues to nevertheless be defined by the view that law is an objective medium that must maintain its objectivity regardless of the emotions it invokes (Grossi, 2019). Regarding the latter, war – and the waging of war – is typically shaped by an ethos of affective distancing in its efforts to control emotions such as fear and compassion when rendering the efficient conduct of organised force/violence possible (Grossman, 2009). In few instances was cold calculation as a common presumption of law and war more apparent than during the US-led 'Global War on Terror', the same context giving rise to modern lawfare discourse.[3] Against this backdrop of disclaimed affective relevance regarding the law-war continuum, lawfare discourse produced something of a designated 'safe space' for expressing emotion on the topic of law and war by those who saw the 'Global War on Terror' as a just endeavour.

To identify this emotive paradox of lawfare is to identify something important concerning its discursive function – if discourse is understood in the Foucauldian sense to consist of assertions of rival truth claims within structures defined by shifting power dynamics (Foucault, 2001). Here, to claim truth is lodge an assertion of power that, through the discursive function, opens the door to rival truths by those seeking their own empowerment. This quest for power through 'truth' is especially relevant to

[3] Here, through models developed by influential conservative figures shifting between academia and government, selective compliance with international law was presented as a matter of 'rational choice' when furthering the US's particular conception of its security interests, Ohlin, 2014.

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lawfare, given how its component parts of law and war, concepts connected to the truth of power, relate to one another as matters of both popular perception and actual operation. As David Kennedy (2006) has shown, while law is often understood to be an alternative to war and/or a means of contesting war's violence, this presumption is prone to concealing how modern war operates through highly legalistic means whereby essential coordination functions could not be untaken without law's organisational capacities. As such, those who criticise war in the name of law are liable to being dismissed as insufficiently knowledgeable, and thus not grasping the 'truth', of what it means to subject war to law.

Given how consciousness of this law-war relationship can differ dramatically depending on where one is placed in relation to the broader apparatus surrounding the law-war continuum, there is much room for discursive contestation that draws upon all manner of emotional force given the existential stakes of war and, for that matter, law. Faced with lawfare discourse as a site of clashing truth claims prone to intense emotionality,[4] following Foucault (1977), I advance the argument that, rather than any embodiment of absolute truth, 'lawfare' can be understood through a genealogical exploration whereby a series of incidents, accidents, and peculiarities over an extended timescale contingently merged to make

[4] With lawfare, one must account for how discourse has expanded over the last quarter-century. By approximately 2007/08, the almost universally pejorative assertions of lawfare began giving way to a purported non-normative usage of the term as a framework for characterising the relationship between law and war, Irani, 2018, 126. While many continued to invoke lawfare as a term of indignation, others, including Dunlap (2010) himself, came to emphasise lawfare's neutrality and implored the prospect of Western states themselves explicitly deploying law to further strategic aims. Owing to the broader application of lawfare as a purportedly neutral tool of explanation, there has been no shortage of efforts to invoke it as a means of describing and/or pursuing Western rivalries with Russia and China, see Voyger, 2018; Goldenziel, 2022; Nash and Guzel, 2024; Malzac, 2024. However, it would be exceedingly difficult to argue that the affectively distanced neutral framing of lawfare might eventually transcend the affectively laden formative pejorative framing of this term for there is simply too much organised effort to promote the characterisation of lawfare as an illegitimate tactic, Gordon, 2024. The widespread post-October 7th framing of legal efforts to intercede on behalf of the Palestinians as 'illegitimate lawfare' is a testament to this persistence, see e.g., Sabel, 2023; Bauhn, 2024. For an attempt to reconcile lawfare usages in both neutral and pejorative senses, see Kittre, 2015.

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https://doi.org/10.6092/issn.2724-6299/21443

something amorphous appear, and be experienced, as something concrete. On this basis, connecting historic bodies of discourse – and the clashes of truth and power embedded within them – provides for an account of lawfare's worldly force and emotive resonance that is conscious of the limits of discourse itself. However, this analysis goes beyond the mere exposure of the indeterminacy of novel language via the excavation its contested lineages. In addition to destabilising the truth claims of those who would present 'lawfare' in determinate terms, through this genealogy I aim cast light on the underlying material structures of international law and politics that manifested to produce lawfare as a distinct discursive form (Vucetic, 2011, 1311). This matter of materiality on this front is all the more important given how so many individual lives are shaped by the material effects of what those empowered to wage war happen to think about war and its relationship to law (Jones, 2025).

In constructing this genealogical account of lawfare discourse according to these presumptions, the seemingly paradoxical emotionality that manifested with coining of the term 'lawfare' in the wake of 9/11 could hardly be more relevant. I thus take the position that no subsequent invocation of 'lawfare' can be fully divorced from the affective weight of the context that made this term so captivating to so many. Understanding this reality means delving into the politics of trauma and the modalities of worldmaking that, paradoxically, made 'lawfare' discourse a profound catalyst for performative emotionality despite the ideals of emotional decoupling that shape understandings of both law and war. Given the worldly impact spawned by emotional reactions of those who assert 'lawfare' for the purpose of condemning it, there is little option but to engage with the emotive presuppositions that animate this term and their histories. To do so is to shift lawfare discourse away from the terms set by those for whom 'lawfare' is an object of profound emotional attachment. As such, we must ask why this attachment took the form that it did?

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/21443

In unpacking these assertions, as a compliment to Foucauldian genealogy, my analysis of the origins of the emotive presuppositions behind 'lawfare' discourse will be an exercise in what Clifford Geertz (1973, 3-30) deemed 'thick description.' Here, in contrast to exclusive focus upon the 'thin' abstracted logics of geopolitical competition or international legal doctrine, my objective is to account for the many deeply-embedded socio-cultural forces that, in their intersections, become reified through a subject that finds meaning in the term 'lawfare' as an embodiment of their anger, fear, and contempt. This, in turn, opens the door to broader considerations of how the lawfare-hating (and lawfare-fixated) subject influentially acts upon the world, especially when the models of subjectivity they use to define themselves fall into the very hands of those they wish to exclude. While struggles over the meanings of law, war, and their inter-relationship are global in their distribution, in constructing a genealogy of the affective lives of lawfare, my predominant focus is on the US, Israel, and their (in)famous 'special relationship.' After all, 'lawfare' – as we know it – would not possess its current meaning had it not been for the connected efforts of these two nations to shape the laws of war as they have. The affective politics behind this conjoined American-Israeli effort, and their similarly emotive potential consequences, is a story that remains to be told. Uncovering this story can demystify the rhetorical alchemy of 'lawfare' whereby the question of 'is the US/Israel violating the law in its fight against terrorism?' is redirected into the question of 'why would you try to aid the enemy by morally injuring us?'

I begin my account by theorising how 'moral injury' can be understood as the 'concept behind the concept' when making sense of the rhetorical stakes of lawfare discourse and its asserted boundary lines of who can assert what. I argue that the impasse of lawfare's rhetorical traps could be undertaken through a genealogy that exposes the terms of moral injury as it concerns the US and Israel. From here, I begin a genealogical account focused on the timeframe from between the end of the Second World War and the 1967 'Six-Day War' that forged the modern US-Israel 'special relationship.'

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/21443

I then turn to the 1970s as a moment of major global shifts and argue that the varied uncertainties here brought the US and Israel ever closer together, especially as it concerned mutual condemnation of Third World attempts to transform international law into a system that would serve the interests of the world majority. Finally, I consider developments in the 1980s and 90s, especially as they – in a highly contradictory capacity – engendered the hopes that American hegemony, peace in the Middle East, and the grand expansion international law could all occur in a harmonious mutually-reinforcing capacity. As the attacks of 9/11 dashed these hopes, this set the stage for the discourse of 'lawfare' to be deployed by those whose histories gave them ample occasion to fear moral injury.

2. What Weight to Moral Injury?

In their efforts to theorise war beyond narrow disciplinary presumptions, Tarak Barkawi and Shane Brighton (2011) assert that, if war can be said to possess a transcendent essence, it is exposure to radical contingency. In other words, to wage a war, and thus raise the stakes of a dispute to the highest existential level, is to invite the possibility that anything might happen. While this dynamic is certainly visible on the rarefied domain of the battlefield, this is but a fraction of war's contingent possibilities. Whether art/literature, scientific/technological innovation, political ideals/identity, morals/ethics, or legal principles/institutions (both within and between bounded polities), all of these meta-domains have long histories of being transformed in ways they never would have otherwise been transformed had it not been for war. Amid the war-triggered tempest of contingency, even the most concerted attempts to invoke existing presumptions in the name of stability have a tendency of being swept up in the storm and retooled into the very novelties they originally attempted to pre-empt.

When viewing the charge of lawfare as a stabilisation attempt in the face of the profound universe of war-related contingency triggered by 9/11, it is

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https://doi.org/10.6092/issn.2724-6299/21443

not difficult to observe how this discourse worked to secure particular constructions of identity. Dunlap (2001, 4) made this dynamic of identity-based risk and securitisation central in his statement that:

> There are many dimensions to lawfare, but the one ever more frequently embraced by US opponents is a cynical manipulation of the rule of law and the humanitarian values it represents. Rather seeking battlefield victories, *per se*, challengers try to destroy the will to fight by undermining the public support that is indispensable when democracies like the US conduct military interventions. A principle way of bringing about that end is to make it appear that the US is waging war in violation of the letter or spirit of [the Law of Armed Conflict].

When interpreting this assertion, what becomes readily apparent is a view of liberal values existing in a fine balance with the effective military capabilities that secure the very conditions of liberalism in a dangerously illiberal world. Accordingly, the proliferation of legal doctrines regarding humanitarian protection and constraints on military discretion might serve to impair the very operation of American power in ordering the world on more or less liberal terms. Should these legal arguments, fall into the hands of America's enemies, then through their persuasive impacts (upon humanitarian advocates, democratic publics, or even US servicemen), the performance of the US military is unduly constrained. Thus, according to this argument, in using formally liberal precepts to undermine a substantive American mission, 'lawfare' has the power to render liberalism the proverbial snake that devours its own tail.

It did not take long before this designation of 'lawfare' became a terminology for furthering the pre-existing narrative that Israel, especially at the UN, was disproportionately condemned as a violator of international law

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https://doi.org/10.6092/issn.2724-6299/21443

– a condemnation often believed to be a pretext for antisemitism.[5] On this reading, criticism of Israel on the grounds of international law, especially as it might be perceived to implicate the Israeli state's 'right to exist' (a discourse that itself exceeds international law's capacity (Vidmar, 2015)), is akin to the antisemitism experienced by the individual Jew (Klug, 2003). A major illustration of how the term 'lawfare' offered a tool for those who feel threatened along these lines is the 'Lawfare Project' a self-professed Jewish civil rights organisation dedicated to legally entrenching a seamless nexus between Zionism and Judaism (Goldstein, 2010) – especially as it concerns equating criticism of Israel with antisemitism.[6] This is to say nothing of how the lawfare concept has been embraced by leading Israeli international lawyers, namely Yoram Dinstein (2011), who presented this term in a manner evoking distinctions between the 'civilised' and the 'barbarous.'

Such efforts to assert stability in the face of far-reaching contingency at least partially accounts for why lawfare discourse faces grave limits, and reproduces extensively critiqued tropes, when theorising the law/war relationship within the present global system. To quote Craig Jones (2020, 297) on this point, '…prevailing accounts of what has been called 'lawfare' assert rather than explain the juridical turn in late modern war.' Additionally, as Freya Irani (2018, 120) makes clear, when Western lawyers speak of lawfare – especially in response to non-Western charges of Western legal breaches – they deploy a distinct vocabulary regarding the 'abuse', 'misuse', and 'cynical manipulation' of law. However, '[o]ften these terms appear without being related to any particular practices: that these invocations are misuses appears self-evident in this discourse' (*ibid*, 121). Thus, within such lawfare narratives, respect for the law – in spirit if not letter – is presented as a Western cultural trait relative to non-Westerners that exists *a priori* to any

[5] A structure of this argument is that the Israeli-Palestinian Conflict is fundamentally 'political', yet the Palestinians have distorted this by framing it as 'legal', see e.g., Zipperstein, 2022.

[6] In this way, entities like the Lawfare Project, ironically use law to solidify a preferred interpretation of Jewishness as an attempt to silence dissenting conceptions of this identity/tradition, see Mann and Yona, 2024.

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specific application of, or (non-)compliance with, the law (*ibid*, 122-125). Such sentiments are only further exemplified through the ways in which Western lawyers, especially after their embrace of lawfare as a 'non-normative' descriptive category, view their applications of law as non-violent alternatives to violence – even when the actual impacts of these legal interpretations are markedly violent (*ibid*, 126-128). All of this begs the question of why those who claim charges against them as 'lawfare' are seemingly willing to uncritically tolerate such analytical shortfalls when faced with the arguments of those who seek to de-monopolise discourse the laws of war.

Might this have anything to do with how the identity-edifying weight of what they seek to protect provides pressing incentive to frame and reproduce 'lawfare' in a manner calling for extensive restriction of who can legitimately discuss, and access, law in relation to war (Hughes, 2016)? In answering this question in the affirmative, zealously guarding the laws of war via lawfare discourse arguably has a great deal to do with perceived threats of contingency. After all, influential legal interpretations coming from academia, civil society, and international organisations, make it harder for governments and militaries to possess a monopoly on the interpretation of the laws of war, and this loss is a powerful source of uncertainty. This is especially true given how, in the rarified domains of 'national security law', the lawyers most likely to charge 'lawfare' operate without much of the scrutiny otherwise imposed by the legal field (Hathaway, 2021). Yet, on a substantive level, if there is a concept that encapsulates the fears of those who charge 'lawfare' – a fear those seeking to control wartime contingency wish to eradicate – it is 'moral injury.'

While the term 'moral injury' has a highly political history (MacLeish, 2018; Abu El-Haj, 2022, 127-164) – and one of the utmost relevance to the genealogy detailed below – when thinking through the charge of 'lawfare' it makes sense to think of moral injury as those who lodge the 'lawfare' charge think of it. Broadly defined as the '…psychological, biological, spiritual,

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https://doi.org/10.6092/issn.2724-6299/21443

behavioural, and social impact of perpetrating, failing to prevent, or bearing witness to acts that transgress deeply held moral beliefs', this risk of moral injury is exceedingly pronounced in war given its rendering of otherwise taboo acts of killing into survival imperatives and duties to others (Lumpkin, Stewart, and Kornegay, 2024, 96, quoting Litz et al, 2009, 697). Moreover, owing to the collective nature of military engagement, the existence of a morally-injured subject, and its possible reproduction, questions the general will to fight. Contrast against the idealised heroic subject whose gallantry in combat can be linked to the justice of their cause, the possibility of one being morally injured by engaging in the same actions tarnishes any overarching narrative of justice. Owing to this susceptibility, varied 'just war' doctrines exist to free combatants' conscience when executing the labour of war. In the words of Robert Meagher (2014, 129), just war '…promised at least the possibility of war without sin, war without criminality, war without guilt or shame, war in which men would risk their lives but not their souls.'

This issue of moral injury takes on unique dimensions in the asymmetric situations that gave rise to lawfare discourse whereby the liberal universalist self-conception of those waging constrained war in accordance with humanitarian principles is contrast against a 'savage' enemy purported blatantly disregard the same set of constraints. Here, as a general matter, by committing itself to humanitarian values and the peaceful resolution of disputes as guiding ideals, liberalism cannot embrace the violence of war as a good in and of itself (Howard 2008). After all, given how the protection of individual life is central to liberal philosophy, the taking of life in war demands a justification that this violence was necessary to prevent a greater harm to the continuity of life under conditions that dignify individual well-being (Dillon and Reid, 2009). On this basis, eliminating an enemy that views violence as an end in and of itself, while maintaining one's liberal self-perception in doing so, serves this logic of dignification despite the deployment of otherwise anathema acts of killing. Given this dynamic, maintaining a sense of liberal conscience under the harshest of wartime

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conditions and professing constraint when faced with an enemy presumed incapable of reciprocation on this point thus becomes a testament to how individual morality constructs collective liberal legitimacy.

Against this presumption, by possessing a conscience that can be morally injured, the very vulnerability of an individual combatant serving a liberal cause becomes a source of collective resilience. This individualised susceptibility to moral injury links closely to liberalism's individualisation of moral conscience – a line of discourse expanded immensely by the so-called 'individualisation of war' purportedly expanded through twenty-first century conflicts (Welsh, 2019).[7] As a result of this individualistic construct, within a system premised on liberalism, a former combatant's expression of their moral injury as a matter of individual experience cannot as easily be countered by any just war tradition premised on a collectively shared notion of substantive morality. In the face of this absence, the laws of war – just war's 'non-identical twin' (Luban, 2017) – takes on an enhanced degree of weight in relation to liberal justification. Here, true to liberal abstraction, legal obligation provides a 'thin' medium of institutional coordination that provides an alternative to shared substantive morality as a basis for order (Knox, 2022, 35). This abstracting quality is present in how liberal notions of 'humanity' shaped a codified laws of war allegedly able to successfully bind actors otherwise prone to disagreeing about substantive morality (Kalmanovitz, 2020, 127-151).

Against this liberal backdrop, centring moral injury greatly expands insights into how the charge of 'lawfare' operates. In viewing opinion on war as the prioritised purview of the individuals who have waged it, those who dismiss non-military (or non-military adjacent) invocations of the laws of war to scrutinise military action are appealing to liberalism's deferral to the subjectivity of moral experience that exists in tension with liberalism's promotion of universally accessible inquiry. This prioritisation has everything

[7] For a critical approach, see Tognocchi, 2024.

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https://doi.org/10.6092/issn.2724-6299/21443

to do with how the wartime risk of moral injury purportedly exists beyond the experience of the noncombatant. Prioritising this standpoint in legal evaluation becomes crucial given how the interpretation of the laws of war (i.e., "was a target the result of legitimate civilian/combatant 'distinction'?", "was an attack 'proportionate' to achieving a legitimate objective?", etc.) has great bearing on whether a given wartime action should or should not be accepted as morally injurious (Luban, 2013). On this basis, since the gravely impactful possibility of moral injury is at stake when applying and interpreting the laws of war, this process of handling the law must be carefully controlled. Otherwise, those who seek to undermine military efficiency through inflicting moral injury via lawfare might find themselves aided and abetted by a cadre of 'useful idiots' who believe that, by invoking the laws of war, they are promoting humanitarian values when, in fact, they are undermining their possibility. As such, the fear of moral injury as an uncontrolled contingency of war forms the kernel of Dunlap's (2001, 4) influential warning on the dangers of the perception that military forces battling the existential threat of terror are '…waging war in violation of the letter or spirit of…' the law.

When thinking through the ways in which liberal ideals formed and sustained the lawfare concept in the context of the 'Global War on Terror', a binding agent of the utmost power was the imagination of a profoundly illiberal enemy utterly impervious to moral injury. This of course took the form of Islamic 'holy warriors' who, in their fixation upon otherworldly reward and resorts to suicide bombing, represented a grave 'radical evil' that exists beyond temporal reasoning and only yields to pre-emptive force (Bilsky, 2004). However, a quarter-century in retrospect, while such American and Israeli justificatory narratives for violence are alive and thriving, the same cannot be said of liberalism as an active force of legitimation within these societies, let alone their relations with the greater world. While designations of 'liberal' are not – and never were – premised on any strict conduct-based criteria (Lawson and Zarakol, 2023), the US, as it is

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https://doi.org/10.6092/issn.2724-6299/21443

currently led by Donald Trump, and Israel, as it is currently led by Benjamin Netanyahu, are openly eschewing liberal models of reasoning and justification with seemingly no end in sight.[8] Given that lawfare discourse was so strongly linked to a purportedly liberal identity, especially as it constructed and characterised moral injury, what does – or could – lawfare possibly mean against such a backdrop of liberal desolation?

Against the broad theoretical framing presented above, given that liberalism is no longer there to act as a façade, I seek to uncover the affective coordinates of American and Israeli lawfare discourse in substantive terms. Through this movement, it becomes possible to see how collective imaginations of trauma, suffering, and sacrifice manifest as modalities of political power in the US and Israel and shape the close relations between these two nations. Doing so requires a showcasing of how this admittedly vast reality crystallises into emotion-laden, and moral injury-fearing, invocations of 'lawfare.' Such an account only makes sense if we can identify what concepts, structures, and events the lawfare-hating subject draws upon when crafting lawfare narratives for the purpose of hating them. To expose this process of subject-formation, I present a broad genealogy that disaggregates a varied array developments for the purpose of showing how their affective legacies are amalgamated through the term 'lawfare.'

3. Setting Moral Standards: American Supremacy, Zionist Nationhood, and Postwar International Law, 1945-1968

When it comes to exemplifying the attributes of law and war that tensely result in modern lawfare discourse, the Second World War was an important point of unification. Through this conflict, Adolf Hitler's Nazi Germany provided a hitherto unforeseen manifestation of supreme universal evil that,

[8] Such rejections of liberalism are, arguably, responses to the compounded moral injuries of the wars of the past several decades where, through the forging of a new identity beyond liberalism, the violence inflicted abroad came home, see Subotic and Steele, 2018; Hajjar, 2019; Rajah, 2022.

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in the eyes of those who could claim a particular oppositional relationship with said evil, enables particularity here to be legitimised in universal terms. For the project of American global supremacy – in challenging the longstanding American tradition of non-entanglement in great power alliance systems – a particular legitimacy was claimed through the assertion of itself as the supreme *vanquisher* of the ultimate universal evil (Foner, 1999). For the Zionist project of creating Israel as a Jewish state in historic Palestine – in challenging centuries of preceding patterns of Jewish socio-political belonging – a particular legitimacy was claimed through the assertion of itself as the supreme *victim* of the ultimate universal evil (Zertal, 1998). For both the US and the Zionists, this universality-cum-particularity model of legitimacy based on their relationship with Nazism manifested as a distinct duality vis-a-vis the nature and application of international law as it concerns war/violence.

Regarding the US, while wartime commitments to freedom and the rule of law defined American values against its opponents, as Stephen Wertheim (2020, 47-114) has shown, even prior to US entry, war planners had already begun crafting elaborate visions of American global supremacy unmoored from lawful constraint. However, after the US's entry into this war and ultimate success therein, these same planners viewed a postwar system of international organisation – which became the United Nations – as a means of legitimising American global power before a domestic populous that was never fully comfortable seeing its national project in imperial terms (*ibid*, 165-172). Compounding this contradictory interplay between universal ideals and narrow interests was the American role in projects to 'humanise' international law as an expression of American morality. Chief amongst these postwar realisations was the largely American-influenced International Military Tribunal's trial of Nazi leadership (Hathaway and Shapiro, 2017, 276-297). Here the US, in condemning its opponents while also tensely navigating relations with its allies (especially the Soviets), legally condemned evil in universal terms while (by distinguishing itself from the Nazis)

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https://doi.org/10.6092/issn.2724-6299/21443

preserving the option of waging future wars via extensive interpretations of 'military necessity' (Moses, 2021, 231-237). Through varied postwar humanitarian legal innovations, from the Universal Declaration of Human Rights to the Genocide Convention to the revision of the laws of war via the Fourth Geneva Convention, great power efforts to restrict broad undertakings of liability was all-pervasive (Hoover, 2013; van Dijk, 2022; Gurmendi Dunkelberg, 2025). While certainly an agent of this interest-based narrowing (Barsalou 2018), the US stood out as the greatest power in terms of both material strength and commitment to universal liberal ideals (Borgwardt, 2005).

In establishing global pre-eminence, there was minimal occasion to consider Americans' individualised wartime trauma as a major political force. Given the loss of approximately one-third of all Jews in the Nazi Holocaust, a similar avoidance of trauma's deep political implications was hardly an option for Zionism's proponents. Here, as Irit Keynan (2018, 103-105) has shown, when faced with the suffering experienced by Holocaust survivors, the leading Zionists displayed a general dismissiveness towards individual trauma in casting the creation of a Jewish state in Palestine as a means of rectifying collective trauma. This same moment of struggle over whether the Jewish future would be determined along Zionist or non-Zionist lines in the face of conflicting constructions of Holocaust trauma (Grodzinsky, 2004), linked closely with similarly ambivalent Jewish engagements with international law (Giladi, 2021). On the one hand, longstanding experiences of victimhood placed Jewish lawyers on the forefront of efforts to transform international law along humanitarian lines (Bilsky and Weinke, 2021). On the other hand, the Zionist call for a logic of state creation necessarily entailed a legitimation of sovereign violence – something novel to the Jewish experience but a well-established logic of existing international law (Fuchs and Hollander, 2014). The tensions embedded within these diverging methods of legal reasonings soon gained many issues to perpetually attach to. In the series of events from 1947 to 1949, Britain terminated its Palestine

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https://doi.org/10.6092/issn.2724-6299/21443

mandate, the United Nations put forth a plan to partition the land into an Arab and Jewish state, and, in the midst of the mass expulsion of 750,000 Palestinians and defeat of invasion by surrounding Arab states, Israel declared independence and was quickly recognised by much of the international community (Kattan, 2009, 146-247).

Following the creation of the state of Israel, despite their nation's recognition, Americans – including Jewish Americans – viewed this development with much ambivalence (Barnett, 2016, 121-153). However, despite no 'special relationship' yet existing, when it came to contesting the international legal legitimacy efforts of both nations, forces of opposition were already undergoing a consolidation process. Consisting of the Soviet Union and the emerging Third World movement to decolonise Asia and Africa, their use of international law to lodge varied critiques of American and Israeli legitimacy claims – and the emotions they invoked – planted the seeds of what would later be declared 'lawfare.' Regarding Third World assertiveness in declaring independence via self-determination to be a 'right' rather than a mere 'principle', while the US sought to involve itself in this process (Kelly and Kaplan, 2001), anti-Zionist influences pulled from a different direction. After all, it was the influence of Arab states that barred Israel's organised participation in the meta-project of Afro-Asian solidarity – an influence apparent in Israel's non-invitation to the 1955 Bandung Conference of newly independent states (Appadorai, 1955, 221-222). Regarding the Soviets, while initially viewing international law as counter-revolutionary, they embraced it to an enhanced degree following Premier Nikita Khruschev's 1956 announcement of the 'peaceful coexistence' doctrine that disavowed open confrontation with Western imperialism (Khruschev, 1959). While initially supportive of Zionism (Kahng, 1998), when faced with the charge (especially from China) that 'peaceful coexistence' was a betrayal of a world revolution now centred in the Global South, the Soviets sought to champion anticolonialism and, in doing so, had to engage anti-Zionism (Friedman, 2015, 83-86, 158). The result of this was

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https://doi.org/10.6092/issn.2724-6299/21443

a Palestine-inclusive Soviet construction of 'wars of national liberation' that, in a contradictory manner, sought to reconcile commitments to both world revolution and international law (Ginsburgs, 1964).

From an American perspective, and one familiar to followers of lawfare discourse, such Soviet and Third World efforts to conform their efforts to international legal rationales were a cynical manipulate international law for political purposes without due regard for its systemic integrity as a juridical regime (Eagleton, 1953; Ramundo, 1967). However, with this American dismissiveness came an openness to condemnations that the US was hypocritical in relations to the same legal standards it considered central to its identity. In other words, the US has set itself up for grave moral injury. This occurred through enhanced involvement in Vietnam. Originally an attempt at distanced aid to a South Vietnam, an entity of contested international legal personality resulting from Vietnam's independence war against France (Heller and Moyn, 2024), President Lyndon Johnson dramatically escalated the involvement of US troops following the 1964 Gulf of Tonkin Incident involving naval clashes (real and alleged) between American and North Vietnam naval forces (Moïse, 1996). Interestingly, the forcible American response drew heavily on Israeli legal justifications for cross border military incursions in the 1950s that were originally condemned by the US (Cuddy, 2023). With American involvement controversial from the onset, such a juridical move indicated a larger array of shifts that complicated the US's image of itself as the guardian of the postwar international legal order.

When considering American legal-cum-moral struggles over military involvement in Vietnam, the significance of Israel must not be discounted. In this capacity, Israel's narrative of rising from the ashes of the Holocaust – a narrative starkly reiterated through the 1961 Jerusalem trial of Nazi official Adolph Eichmann – supplied anti-Vietnam War protestors with an imaginary of higher (international) law that transcended the narrow confines of patriotic obedience in the face of injustice (Meister, 2011, 265; Molden, 2010). However, if there was one great Israeli-prompted event that inexorably

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https://doi.org/10.6092/issn.2724-6299/21443

shaped the moral characterisation of America's Vietnam, it was the 'Six-Day War' of June 1967 where, pre-emptively, Israel launched attacks against Egypt, Jordan, and Syria capturing East Jerusalem, the West Bank, the Gaza Strip, the Golan Heights, and the Sinai Peninsula. Rapidly realigning political dynamics in the Middle East (including definitive Soviet siding with the Arab states) and widely being hailed as inaugurating the US-Israel 'special relationship', this war's impact must be considered in relation to its contemporaneous occurrence with the war in Vietnam (Kaplan, 2018, 94-96). As a military matter, the Six-Day War, in its blindingly swift decisiveness, was everything that the long, drawn-out, and blunder-ridden 'quagmire' in Vietnam was not (Halberstam, 2007).

In a connected vein, from the perspective of many Americans, the morality of Israel's 1967 war registered differently from Vietnam in that it was not being waged on questionable grounds half a world away but was rather driven by a survival imperative in the face of hostile neighbours (Kaplan, 2018, 94-135; Mitelpunkt, 2018, 144-156). Thus, as Michael Fischbach (2019) has shown, the Arab-Israeli conflict profoundly divided the American antiwar left in that many condemned American actions in Vietnam while avoiding the radical Third Worldist view of Israel as a fundamentally colonial entity. In a connected capacity, the war had a highly transformative effect when it came to instilling Zionist sensibilities within a previously ambivalent American Jewish community. With a US-Israel alliance gaining in strength, American Jews – no-longer fearing accusations of dual-loyalty – could view support for Israel as an extension of American patriotism in a manner conflating criticism of Israel with inherent antisemitism (Barnett, 2016, 155-172).

Moreover, this newfound post-67 American-Israeli embrace had vast international legal consequences. Importantly, in capturing of territories of varied statuses both within and beyond the former British Mandate of Palestine, Israel presented serious questions regarding territorial acquisition by conquest that, by this point, was understood to be banned under the United Nations Charter (Jennings, 2017, 75-82). On this point, while the UN Security

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https://doi.org/10.6092/issn.2724-6299/21443

Council quickly issued Resolution 242 affirming the inadmissibility of acquiring territory by war and calling for Israeli withdrawal, Israel and its proponents insisted that by linking withdrawal obligations to 'territories' as opposed to '*the* territories', this resolution did not require complete Israeli withdraw from all that it occupied in 1967 (McHugo, 2002). Zionist arguments along this line were further buttressed by claims that Israeli-occupied territories part of the British-administered Palestine Mandate (East Jerusalem, the West Bank, and Gaza) occupied by Jordan and Egypt in 1948 had no sovereign to revert back to and Israeli maintenance of them was essential for security (Blum, 1968; Schwebel, 1970). For those unpersuaded by these arguments, explicit or implicit US support for them – not to mention the American violence wrought in Vietnam – was evidence of a rank hypocrisy as it concerned the US's proclaimed ability to legitimately dispense international law and justice. This was especially true as Vietnamese and Palestinian causes became increasingly linked through a common anti-imperialist imagination (Lê Espiritu, 2018). The battlelines of a global meta-conflict of legal interpretation were drawn and there was no shortages of moral challenges waiting to be lodged.

When centring individual subjectivity against these broad backdrops, it becomes highly notable that numerous facets surrounding American power, liberal political justification, the technicalities of law, the Vietnam War, and the question of post-Holocaust Jewish identity all manifested through a single individual in the form of Arthur Goldberg. From humble beginnings as the son of Jewish immigrants from the Russian Empire, Goldberg eventually served as John F Kennedy's Secretary of Labour and was later appointed as an Associate Justice of the US Supreme Court, a position he resigned from in 1965 to serve as US Ambassador to the UN out of a belief that he end the Vietnam War (Stebenne, 1996; Goldberg, 1967). However, following the Six-Day War, Goldberg was active in drafting Resolution 242 and provided an influential voice in favour of the position that the resolution did *not* mandate complete Israeli withdrawal (Goldberg, 1973). In his recounting, political

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https://doi.org/10.6092/issn.2724-6299/21443

negotiation as opposed to strict legal application was key to resolving the Arab-Israeli conflict and the Arab states, rather than pursue good faith negotiation, '…counted on the Resolution's ambiguities to permit them to assert their own interpretation' in the hopes that diplomatic support for Israel would erode with time (*ibid*, 193). Prefiguring later lawfare discourse, Goldberg – in a manner deeply consistent with his Zionist commitments[9] – deemed a particular (Arab) interpretation of law to be at odds with the overall purpose that he claimed law should exist to serve. Saturated with an array of powerful emotions, this dynamic of proto-lawfare argument took on a whole new order of magnitude as the 60s gave rise to the 70s.

4. Contesting Moral Reasoning: Crisis, Resistance, and Counter-Hegemonic Challenge After Decolonisation, 1968-1980

Lawfare's core premise that international law is prone to undue 'abuse' and 'manipulation' is underpinned by the larger question of who has the right to make international law? In few instances was this question as hotly contested as it was during the 1970s. With formal decolonisation achieved throughout most of Asia and Africa, these states (joined by Latin America to create the 'G-77' bloc) now possessed a clear majority within key international institutions – especially the United Nations General Assembly (Gregg, 1977). Advancing the position that this majority enabled Third World states to effectively use international fora as a global legislature, such action faced strident resistance from the Global North. For the latter faction's proponents, a key argument was that radical Third World designs would fundamentally undermine international legal standards – especially as they existed as matters of customary international law (Galindo and Yip, 2017). This stance in turn invited contestation from Third World jurists and statemen who characterised existing legal barriers to transformative agendas as imperial relics unduly

[9] Following his UN tenure, Goldberg served as president of the American Jewish Committee and, in this role, 'he was instrumental in converting that traditionally non-Zionist organization into an active and staunch supporter and advocate of Israel.' Cohn, 1990, 11.

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imposed on the non-European world that, in light of decolonisation, had no place within an international system dedicated to fairly representing all the world's people (Wheatly, 2023, 273-277). While the basic structure of this arrangement generated numerous claims and counter-claims that international law was being unduly abused and manipulated (rhetoric familiar to followers of lawfare discourse), intensity here was exponentially amplified if the substantive dimensions of these 70s debates are considered.

On one level, given how the Third World struggle had shifted from achieving formal independence to realising its promises, legal proposals focused on reforming global mechanisms of distribution that maintained a gap between rich and poor nations – most famously the New International Economic Order (McKenna, 2020). The emotional resonance of such redistribution designs was felt immensely in an anxious Global North beset by the 70s 'crisis of capitalism' where declining prosperity engendered much fear of a Third World whose taking of an enhanced share would only fuel further malaise (Maier, 2010). On another (similarly emotional) level, the 70s Third World legal agenda was heavily focused on war and intervention in lingering colonial situations as well as actual and potential neocolonial impositions. While most armed struggles had ceased by the 70s, there remained the Arab-Israeli conflict and American involvement in Vietnam – as well as Portuguese and white minority regimes in Southern Africa (Travers, 1976). Chief amongst the Third World legal projects addressing these situations were defining aggression as an illegitimate use of force and generating legal recognition for self-determination struggles under the laws of war (Wilson, 1990). Connecting distributional and martial issues was the Third Wordlist view of human rights that, following from revolutionary upheaval, set reversing the indignity of colonialism as its core axiomatic principle (Mohandesi, 2023). Given the proliferation of identity-transforming experiences in both the US and Israel during the 1970s, there was ample occasion to condemn Third World legal innovations as illegitimate attempts to inflict moral injury – and thus manipulatively deform international law.

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https://doi.org/10.6092/issn.2724-6299/21443

In the US, at the official level, the beginning of the long 70s could be read as an effort to stem and supress the politics of emotion. Here, the successful 1968 presidential campaign of Richard Milhouse Nixon was an appeal to a 'silent majority' alienated by antiwar radicalism that tapped into popular dissatisfaction with the Vietnam War on pragmatic grounds and aimed to achieve an honourable peace that maintained American global primacy (Sargent, 2015, 42-43; Campbell, 2014). Nixon's actions towards this end were aided immensely by his National Security Advisor, and later Secretary of State, Harvard political scientist Henry Kissinger, a German Jewish refugee from Nazism whose experiences engendered a view of the world as an anarchic struggle for survival devoid of shared legal/moral presumption between nations (Milne, 2015, 326-386). While viewing the world this way enabled Nixon/Kissinger to 'thaw' the Cold War via détente policies of opening new channels of American-Soviet interaction and open of US-China diplomatic relations (Sargent, 2015, 62-66), it also engendered disconnect with emotional realties – especially as they concerned the prolonging of the war in Vietnam. With the broader American public suffering something of a collective moral injury popularly deemed the 'Vietnam Syndrome', Nixon's reliance on esoteric geopolitical rationales such as 'disengagement with escalation' to continue the war represented a grand misreading of the nation's collective mood (Kimball, 2010).

When identifying this mood, there was no greater personification than the traumatised American Vietnam veteran who, unlike the preceding Second World War generation, received no great heroes' welcome home. As détente questioned the existential risk of communist subversion that justified the US's initial Vietnam involvement (Slater, 1993), there was little to explain the moral purpose of killing in this war, especially as it involved counterinsurgencies where soldiers operated in civilian environments productive of atrocities that were unprecedentedly publicised (Brzezinski, 2024). This is to say nothing of how the Vietnam War fatally tarnished the global reputation of a US that, following the Second World War, had such

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https://doi.org/10.6092/issn.2724-6299/21443

grand ambitions of moral global leadership (Lawerence, 2021a). In this context, radical psychiatrists seeking to articulate 'Post-Traumatic Stress Disorder' (PTSD) as a mental condition drew upon their work with Vietnam veterans to claim that recovering from their trauma demanded open opposition to the war and the politics of imperial militarism that made it possible (Abu El-Haj, 2022, 41-54). By virtue of this framing, it was the witness bearing of the traumatised veteran who, in pursuing their personal path to redemption, acted to further a new discourse on national purpose for a nation morally injured by its imperial hubris (*ibid*, 54-62). Despite its cogent linking of individual trauma to the public sphere via the figure of the morally injured veteran, this model proved starkly limited in its translation into political success. This was demonstrated through the 1972 Presidential election whereby George McGovern, who ran on a decidedly moral antiwar platform, lost to Nixon in a landslide (Haar, 2017). A notable defection via the McGovern phenomenon were traditional democratic voters who, in insisting that the US had an indispensable role to play as a moral intervenor on the world's stage, emerged as the ultimately highly influential Neoconservatives (Friedman, 2005, 137-138).

Within this same timeframe of conflicting American visions during the late Vietnam War, another wartime trauma re-evaluation occurred in Israel. Though the Palestine Liberation Organisation ('PLO') remained the great post-67 focus, unresolved tensions stemming from Israel's 1967 territorial captures remained. On 6 October 1973, in what Israelis deemed the 'Yom Kippur War', a coalition of Arab forces led by Syria and Egypt caught Israel unprepared in their attack on the Israeli-occupied Golan Heights and Sinai Peninsula. Following numerous casualties and military setbacks before gaining the advantage, Israeli Prime Minister Golda Meir ultimately yielded to American diplomatic pressure and agreed to a ceasefire brokered by Kissinger premised on territorial concessions to Egypt (Quandt, 1975, 38-39). While lacking the sense of moral injury resulting from violence against civilians as was the case with Vietnam, the 1973 Arab-Israeli War –

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especially as it stood in contrast to the Six-Day War – nevertheless raised a number of questions surrounding the meaning of wartime sacrifice in the face of national humiliation. To quote Keynan (2018, 106), '[i]n 1973, the rhetoric of [Israeli] war changed, and the national myths of heroism gave way to a new narrative that emphasised the individual toll of war.'

In the face of this national identity crisis came the political ascension of Israel's radical right that ultimately led to the 1977 election of Menachim Begin as Prime Minister (Pedazur, 2012, 35-80). Amid this shift, Israel gained a new wave of American supporters via the Neoconservatives, many of them Jewish, who viewed the 1973 war as grounds for opposing détente and returning to active Cold War confrontation (Rosenberg, 2015). A leading figure here was onetime Dean of Yale Law School Eugene Rostow – a son of socialist Jewish immigrants – who stated that '[w]hen the Soviet Union offers the Arabs the glittering dream of Holy War to destroy Israel even men…who genuinely believe in peace with Israel, cannot refuse to join the Jihad' (Quoted in Rosenberg, 2015, 734). Here, Rostow framed an alien enemy against whom violence should not legitimately result in moral injury – and, therefore, attempted infliction of moral injury by this enemy must be stridently and unapologetically pre-empted.

Rostow's status as an international legal scholar, is a testament to how the US and Israel were linked through their shared fear of, and disdain for, international legal condemnation. The 1970s and its defining international legal struggles, are pivotal to uncovering the parameters of this trauma bond that echoes into post-9/11 lawfare discourse. While Israel–especially considering its 1967 occupations–produced no shortage of international legal controversy, US involvement in Vietnam was similarly condemned (Heller and Moyn, 2024). Though international law was far from the main antiwar focus, broad invocations of Nuremburg in this context were enough to gain the attention of the renowned Nuremberg prosecutor Telford Taylor. For Taylor (2010), while American involvement in Vietnam precluded any clear liability for aggression, the same could not be said for the atrocities

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committed against civilians that was the source of so much moral injury for US troops. Such violence, most infamously the 1968 My Lai massacre of as many as 500 Vietnamese civilians, questioned just how effectively US military discipline incorporated international legal standards (Jones, 2020, 78-87). This is to say nothing of the horrific deaths and injuries caused by non-precision weapons such as incendiary napalm came to symbolise the Vietnam War's indiscriminate violence (Neer, 2013,134-164).

Such focuses on atrocity in the 1970s coincided with efforts to re-brand the laws of war as 'international humanitarian law' (Wilson, 2017, 571). While global in its reasons (Alexander, 2015), this humanitarian reframing could easily lead critics of American actions in Vietnam to admire – or at least minimise – Israeli actions in the Occupied Palestinian Territories (McAlister, 2009). Upon capturing the Territories in 1967, while Israel quickly disclaimed the preservation-focused international law of occupation – it nevertheless proclaimed adherence to this legal regime's humanitarian provisions (Roberts, 1990, 62-66). For some, the defiance of preservationist law allowed for the very possibility of Palestinian self-determination (Gerson, 1973, 46-47). However, in defiance of any such outcome, peaceful 'humanitarian' transformation was only part of a larger strategy to normalise the occupation by rendering it irreversible (Gordon, 2008, 70-92).

In the face of this rise of 'international humanitarian law', a related regime could hardly be more consequential when it came to making sense of this moment – international human rights. While this 'human rights revolution' was a worldwide convergence (Eckel and Moyn, 2014), in the context of American self-understanding, it provided a vocabulary for addressing that which the amoral realpolitik of Nixon/Kissinger could not account for (Arnold, 1980, 57). Possessing cross-spectrum political appeal – depending on one's causes – human rights provided nothing short of a 'reclaiming of American virtue' (Keys, 2014). Of these causes, American support for Israel could certainly be cast in human rights language, especially given the 1973 exposure of Israeli vulnerability (Mitelpunkt, 2018, 191-194). This ethos was

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prominently demonstrated through a high-profile 1975 speech by US Ambassador to the UN Daniel Patrick Moynihan that broke from established diplomatic conventions in condemning UN General Assembly Resolution 3379 and its declaration that Zionism was a form of racism (Troy, 2012). According to Moynihan (1975):

> The terrible lie that has been told here today will have terrible consequences. Not only will people begin to say, indeed they have already begun to say that the United Nations is a place where lies are told, but far more serious, grave and perhaps irreparable harm will be done to the cause of human rights itself. The harm will arise first because it will strip from racism the precise and abhorrent meaning that it still precariously holds today. How will the people of the world feel about racism and the need to struggle against it, when they are told that it is an idea as broad as to include the Jewish national liberation movement?

Delivered fifteen months after Nixon's Watergate scandal-triggered resignation, and six months after the complete US withdrawal from Vietnam via the fall of Saigon,[10] Moynihan's speech departed from amorality in the face of a morally anxious American reality. In doing so, he rebuffed alleged moral injury both through and on behalf of Israel. For in the same speech, Moynihan (1975) rejected Third World retribution efforts as inconsistent with human rights, classically understood, and, in his telling, the attempt to conflate Zionism and racism provided lens for exposing impropriety on this front. Thus, for Moynihan, support for Zionism could be understood as a litmus test for whether Third World assertions furthered international legal order premised on human rights or, to use modern terminology, were manipulative illustrations of 'lawfare.'

[10] These two events were connected as Nixon's subpoenaed tapes revealed his intentional prolonging of the Vietnam War in the interests of gaining re-election, see Hughes, 2015.

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A related source of lawfare-originating controversy concerned Third Worldist efforts to revive the immediate postwar task of defining aggression under international law – a legacy of Nuremberg derailed by Cold War politics – via the General Assembly's 1974 Resolution 3314 (Sellers, 2013, 276-286). Binding the US and Israel closer, for numerous Western commentators, such Third World efforts were an exercise in rank hypocrisy – especially how, from their perspective, the 1973 Egyptian and Syrian-led attack on Israeli held territory was a quintessential act of aggression (Rostow, 1975).[11] Moreover, the 1973 OPEC oil embargo against states supporting Israel – which resulted in an economic 'shock' deeply impacting Western consumers – was itself perceived not only an act of aggression, but a secondary aggression against those who contested the original act of aggression (Paust and Blaustein, 1974; Dempsey, 1977). Such anti-Third World views extended to growing fears of transnational terrorism – a feature present in claims that the definition of aggression was deliberated drafted to exclude state responsibility for the acts of non-state armed groups (Blum, 1976, 232). In this meta-context, few figures proved as prescient in anticipating future lawfare discourse as much as Julius Stone, a British-born Australian jurist of Lithuanian Jewish origin whose formative experiences of antisemitism rendered him a devout Zionist (Mowbray, 2019). According to Stone (1977, 242-245), in contrast to the stated objectives of their proponents, such Third World-led efforts at defining aggression would not lead to greater legal predictability and coherence – but would rather create new channels for waging 'political warfare' through the medium of law.

A similar fear of Third World manipulation of law in relation to war, and one arguably closer to American and Israeli moral injury fears, concerned the revision of hostilities conduct regulation via the two Additional Protocols to the Geneva Conventions. Convened in 1973, the Geneva Conference tasked with this revision was notable for its inclusion of representatives from

[11] Alternatively, see Quigley, 2023.

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national liberation groups (including the PLO) – an initiative furthered in great measure by Vietnam (Alexander, 2023). While codifying core law of armed conflict principles as they concerned distinction, proportionality, and the protection of civilians, the final text of the international-focused Additional Protocol I ('API') classified wars of national liberation against 'colonial domination, alien occupation, and racist regimes' to be international, as opposed to internal armed conflicts (AP I, Art 1(4)). Relatedly, when defining conflict participants entitled to combatant immunity and prisoner of war status, while affirming the general need for soldiers to distinguish themselves via uniforms and insignia, in actualising the wars of national liberation delegation, API stated '…that there are situations…where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly: (a) during each military engagement, and (b) during such time as he is visible to the adversary…' when preparing an attack (*ibid*, Art 44(3)).

In extending international conflict and its legitimate participants, API asserted that the American or Israeli soldier possessed an equivalent legal status to the Viet Cong or PLO fighter they opposed – and thus directly challenged their perception of moral superiority. Such indignation at the threat of moral injury lurked behind largely American and Israeli claims that the Additional Protocols were a dangerously illegitimate attempt to undo progress made in the laws of war through their incorporation of inappropriate political considerations into the legal process (Baxter, 1975; Dinstein, 1979). Discourse towards this end was perforated with a feared return of 'just war' as a catastrophically violent, and irreducibly subjective, mechanism of justification that modern legal rationality progressively excised (Whyte, 2018). However, this universalistic condemnation of the Third World agenda was paradoxically linked to the asserted particularities of historic trauma that justified the Zionist project. Synthesis here was expressed by the Israeli delegate who, after depicting the Jewish experience of war and genocide as

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instilling a deep Israeli respect for international law, condemned API as a 'just war' revival and claimed that '…infiltration of political themes into Geneva-based law could well do pernicious and long-term damage to its universality and impartiality and thus undermine the humanitarian work conducted at the Conference' (Geneva Conference Official Record, 1978, 216). While, on this basis, Israel alone voted against the Protocols' adoption, the US delegation led by George Aldrich (1981) ultimately viewed adherence as more beneficial than detrimental, despite moral injury risks, and acceded to the Protocols.

Amidst these many controversies where Americans and Israelis depicted transformed understandings of international law as new channels for moral insult, Jimmy Carter was elected US President in a narrow victory over Nixon's successor Gerald Ford in 1977. Making human rights central to his foreign policy agenda, within this overarching scheme, a particular concern of Carter – himself a devout Evangelical Christian – was achieving peace in the Middle East (Sargent, 2015, 250-260). In centring moral considerations here as he did, Carter drew the ire of both the Nixon-Kissinger realpolitik proponents and Neoconservatives (Nixon, 2013; Kirkpatrick, 1979). Despite these detractions, Carter, in a highly celebrated capacity, brokered peace between Israel and Egypt via the 1979 Camp David Accords (Mitelpunkt, 2018, 270-276). However, this success could not overcome the effect of worsening economic conditions and a series of foreign policy embarrassments – namely the Iran hostage crisis. A new era dawned as Carter lost his 1980 bid for second term in a landslide to California Governor Ronald Wilson Reagan.

5. Asserting Moral Dominance: From the Second Cold War to the End of History to the Day That Changed Everything, 1980-2001

When identifying Reagan's influence on what would later be deemed 'lawfare', two inter-twined axiomatic factors are his 'Second Cold War' and his efforts to reverse the (post-)Vietnam syndrome. Regarding the former,

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through renewed confrontation with the Soviet Union in avowedly moral terms, international legal innovations stemming from earlier détente policies could be viewed as channels through which the US might be manipulated by its rivals (Szabo, 2022). However, true to later formulations of lawfare, despite the ability of opportunistic legal interpretations to undermine American interests, it was nevertheless essential to avoid perceptions of American legal breaches as a means of affirming moral reputation. After all, in the American self-perception central to Reaganism, respect for the 'rule of law' set the US apart from the 'totalitarianism' of the Soviet's 'Evil Empire' (Rana, 2024, 640-641). Regarding the latter, given Reagan's campaign against the internalised moral injury of the Vietnam War, the very character of the traumatised Vietnam veteran needed reframing. Rather than linking trauma to combat – including violence against civilians – in the Reaganite reframing, veteran trauma resulted from a lack of support from an ungrateful and unpatriotic American public who opposed the war in Vietnam (Abu El-Haj, 2022, 67-68, 91-98). As such, legal interpretations viewed as morally compromising US troops were liable to being condemned as abusive manipulations of the law. Taking these two points together, the fear of cynical forces manipulating international law to undermine perceptions of American virtue could be placed alongside HIV/AIDS, crack cocaine, and satanic ritual abuse cults as one of the many existential fears that defined Reagan-era politics and culture (Jenkins, 2008).

When considering these Reaganite innovations abroad, few were as delighted as Begin. No longer constrained by the amoral realpolitik of Nixon/Kissinger or the peace-mongering of Carter, Reagan's coalition, as it included neoconservatives and Evangelical Christians (very different from Carter), contained many who viewed Israel in messianic terms (Kaplan, 2018, 212-214). Against this backdrop, in 1982, Begin invaded a civil war-torn Lebanon, where the PLO leadership had taken up residence, via 'Operation Peace for Galilee.' Ostensibly, undertaken in response to rocket attacks on the North of Israel, the Israelis also sought to decapitate the PLO and support

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the Christian Phalangists who, from Israel's perspective, would be the most advantageous leaders of Lebanon (Chamberlin, 2018, 483-484; Hamilton, 2011). However, as actions here resulted in protracted fighting and many civilian casualties, Israel faced a legitimacy crisis. After all, by invading a smaller crisis-ridden nation, Israel could not easily resort to its 'David versus Goliath' narrative of being the small state (and essential refuge of a people nearly exterminated) that heroically staved off the attacks of several much larger states bent on its destruction (Kaplan, 2018, 138-153; Kober, 2013). Much like the American experience in Vietnam, Israeli actions in Lebanon presented grave risks of moral injury. This concerned both Israel's diminishing international reputation and the experiences of its own soldiers, who, on a unprecedented scale, came out as conscientious objectors (Linn, 1986).

In the face of such risks came Israeli calls to reformulate international law in capacities that became mainstays of the 'global war on terror' – objections to which were deemed 'lawfare.' When justifying Israel's resort to force, Israel's UN Ambassador Yehuda Blum claimed that attacking the PLO in Lebanon was legitimate, for 'if a State is unwilling or unable to prevent the use of its territory to attack another State, that latter State is entitled to take all necessary measures in its own defence' (Quoted in Levenfeld, 1982, 5). When justifying the conduct of hostilities, Israel claimed that high civilian casualties occurred not from legal breaches, but from their opponents were deploying 'human shields.' While using human bodies as a defensive fortification based on a wager the opponent will refuse to kill is a longstanding practice (Gordon and Perugini, 2020), one of the first accusations of 'human shields' as moral affirmation in contrast to enemy barbarism was articulated by then Israeli Defence Minister Ariel Sharon through an op-ed in the *New York Times*. Published weeks before the Sabra and Shatila Massacre of Palestinian refugees that implicated him, Sharon (1982) stated that:

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> Israel's troops entering Lebanon were greeted as liberators for driving out the terrorists who had raped and pillaged and plundered. Our soldiers were welcomed despite the casualties that were the inevitable result of fighting against PLO terrorists who used civilians as human shields and who deliberately placed their weapons and ammunition in the midst of apartment houses, schools, refugee camps and hospitals. No army in the history of modern warfare ever took such pains to prevent civilian casualties as did the Israel Defense Forces…. This policy stands in vivid contrast to the PLO's practice of attacking only civilian targets.

While Reagan's diplomatic pressure led Israel to withdraw most of troops from Lebanon in 1985, Reaganite developments in the US contributed immensely to building a legal-cum-moral model for deploying violence in the vein of 'Operation Peace for Galilee.' With Reagan upholding the 1973 ban on conscription (an achievement of the anti-Vietnam War movement), the 'all-volunteer' US military increasingly became tangibly decoupled from the rest of American life and became something of an entirely parallel social sphere (Abu El-Haj, 2022, 25-26). In this context came a 'military professionalism' movement whereby officers asserted increased influence over defence affairs in a manner resisting capture by opportunistic civilian politicians – those blamed for the blunders in Vietnam that tarnished the military's reputation (Bacevich, 2013, 37-48). A key component of this siloing of the US military concerned the control over the laws of war and their possible interpretation – a matter that was, yet again, a response to how perceived legal violations in Vietnam undermined faith and confidence in military actions.

One figure leading this reappraisal was Vietnam veteran and military lawyer W Hays Parks (Jones, 2023, 210-211). Taking the position that the laws of war are not a detriment to military efficiency, he argued that contra Vietnam, military law must go beyond retroactively of prosecuting soldiers for its violation and become a proactive shaper of military strategy (Parks,

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2002, 984-985). Such a proactive approach was evident in the formulations of 'operational law' in newly enclosed military spaces that merged international and domestic legal standards to further military efficiency (Jones, 2020, 91-124). In the words of Jones (2023, 213):

> …operational law allowed the US military to domesticate the laws of war in two key senses: it allowed them to "nationalize" the international laws of war (and therefore advance claims of ownership to and dominance over the laws of war), and it permitted the US military to "tame" the laws of war, rendering them ever more pragmatic, practitioner-oriented, and military-friendly.

However, despite 'operational law' developing in its shadows, the major Reagan-era controversy that instilled popular international legal consciousness concerned not the laws of war, but human rights.

While avoiding extensive troop deployment abroad, architects of a so-called 'Reagan Doctrine' took an interventionist approach to aiding local allies committed to a decidedly anti-communist agenda (Scott, 1996). Cast in unabashed moral terms, and disavowing of the precept that peoples' have the right to choose their own system of government, such Reagan Doctrine interventions were premised on highly selective constructions of 'human rights' (Snyder, 2021). Though extensive in their scope, the defining struggle here over international law and human rights occurred in Central America – the US's long proclaimed 'sphere of influence.' Here, the Neoconservatives, with key figures now in government, set about actively aiding anti-communist states in Guatemala and El Salvador, and anti-communist insurgents in Nicaragua (Grandin, 2006).

Done in the name of human rights, these interventions – and their catastrophically violent consequences – were similarly opposed in the name of human rights albeit in a manner premised on the doctrinal specificities of international law that opposed American exceptionalism (Shetack, 1989). Portending later 'lawfare' discourse, Reaganites condemned international law

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as a grave danger to American interests when, in 1986, the International Court of Justice entered a verdict against the US for violating the customary norm against non-intervention through its support of Nicaragua's anti-government Contras (Malawer, 1988, 94-99). As opponents of American interventionism celebrated this decision (see e.g., Falk, 1987), the Reagan Administration performatively condemned international law as an enabler of Third World 'radicalism/terrorism' by refusing to submit the Additional Protocols of the Geneva Convention to the US Senate for ratification in 1987 – an outcome influenced by an alliance of prominent Neoconservatives and Vietnam veterans (Kattan, 2023).

Also, in 1987, such characterisations of international law as an enabler of 'terrorism' carried great weight in Israel given that, on December 7th, the Palestinians began their First Intifada in the Occupied Territories. A response to ever diminishing hopes the occupation would end as well as worsening conditions of Palestinian life (Said, 1989), the Intifada – originally a series of protests that soon became apparent as a concerted uprising – raised several questions regarding Israeli response (Gordon, 2008, 154-156). On the one hand, with the experience in Lebanon still very fresh, there were numerous moral injury risks that, as with Lebanon, related to both international opinion and the ethical objections of IDF soldiers finding themselves fighting in densely populated civilian areas (*ibid*, 157-161; Linn, 1996). This problem for Israel was compounded by arguments that Palestinian resistance was a just response to occupation in denial of their right to self-determination under international law (Falk and Weston, 1991). One the other hand, especially as Israeli casualties (military and civilian) mounted at the hands of Palestinians (who themselves suffered casualties during the Intifada greater than during the preceding two decades of occupation (Gordon, 2008, 157)), the Israeli state felt compelled to go to great lengths to maintain its supremacy – often in capacities that brazenly disregarded international opinion (Silber, 2010).

Interestingly, one figure who offered Israel advice along these lines was Henry Kissinger who condemned American Jewish criticism of Israeli

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actions, suggested Israel undertake an international media blackout and warned Israel against making any concessions (or holding a peace conference) as this would only increase oppositional forces (Berman, 2002). The implication here was clear; when faced with the Intifada, international legal standards were Israel's grave enemies. As such, while the horrors of the Holocaust were universalised through humanity-focused legal innovations, Zionists increasingly viewed this suffering as their exclusive property from which they could justifiably exclude others. While Americans similarly strived to present their own particular interests in universal terms during this timeframe, they soon gained a major advantage in doing so as the structure of the world fundamentally and unexpectedly shifted in a way that left the US as the world's sole remaining superpower.

As the First Intifada continued in the Occupied Territories, a momentous transformation happened on the world's stage in 1989 with the collapse of the Berlin Wall, the end of the Cold War, and the beginning of the so-called 'End of History.' While famously prompting innumerable visions of what international law might become in the absence of Cold War gridlock, one vision deeply attuned to the specificities of American and Israeli emotions, and their fear of moral injury, was articulated by prominent critic of anti-Zionism, now New York Senator, Daniel Patrick Moynihan. Published in 1990, Moynihan's *On the Law of Nations* chastised Reagan-era denouncements of international law as unprecedented in the broad arc of American history and dangerous to American constitutional democracy as well as American commitments to Israel. Further restating all that he found absurd about Third World criticism of Israel, Moynihan claimed that, by articulating the Reagan Doctrine as a grounding for order specific to the Western Hemisphere, this problematically excluded Israel. According to Moynihan, 'should a renewed Arab invasion of Israel take place, the United States under the Reagan Doctrine would have no grounds for rejecting it *at law*, nor would there be any basis *at law* for responding' (Moynihan, 1990, 129). Concluding his case for American re-engagement with international law

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(and the protection of Israel it could offer), in Moynihan's words, '[i]nternational law changes, just as domestic law changes. We are fully within our rights to propose changes; to limit or withdraw commitments. What we must not do is act as if the subject was optional, essentially rhetorical' (*ibid*, 177). Thus, for Moynihan, America abandoning international law was an act of self-inflicted moral injury. Should that abandonment compromise Israel, this could very well be a moral injury the US might never recover from.

While Moynihan's tone remained perforated with dour Cold War sensibilities, the collective mood shifted rapidly. On 17 January 1991, with UN Security Council authorisation, a US-led coalition launched Operation Desert Storm in response to Iraq's invasion of Kuwait. Celebrated by both international lawyers and 'military professionalism' advocates (Bacevich, 2013, 35-36), this First Gulf War represented the possibility of a virtuously law-governed global order premised on American supremacy (Aber, 2023). Not long after came the 1993 end of the First Intifada as Israeli and Palestinian leadership agreed to a US-brokered peace process via the Oslo Accords. Though the peace process's timeframe contained numerous instances of trauma-triggering violence for all involved, Oslo nevertheless embodied the liberal optimism that defined the immediate post-Cold War. As Adam Sutcliffe (2024, 225-227) notes, the Oslo Accords were emblematic of a time when universal empathy was envisaged as the great cure for all worldly ills now that the era of irreconcilably ideological conflict had come to an end. In the domain of international law, this sentiment found its expression through a newly hegemonic 'human rights discourse' offering the promise that, contra the demands of uncompromising revolution, endless cycles of violence could in fact be broken (Meister, 2011, 21-25).

Despite this liberal optimism, it quickly became apparent that the end of the Cold War had not excised extreme violence. Especially in the former Yugoslavia and Rwanda, post-Cold War conflicts did much to conjure imaginations of Nazism/the Holocaust as something capable of repeating

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itself (see e.g., Sohn, 1996). Through this pattern of sense-making came a return of the post-Second World War viewpoint detailed above that Nazism was the supreme inexplicable evil and, when faced with this reality, it must be acknowledged that the Americans were its greatest vanquishers and Jews its greatest victims. Now in the post-Cold War world, as consciousness of Nazi evil entered a new era, Americans power was seemingly beyond contestation, and the Jews possessed a state that seemed as if it would finally achieve peace with its enemies. From here came a tremendous global legal innovation with the resurrection of the seemingly abandoned project of international criminal justice via the Security Council's creation of the ad hoc criminal tribunals for the former Yugoslavia and Rwanda in 1993 and 1994 respectively.

Hailed as a return to the unified justice that existed at Nuremberg, it seemed for many that these new legal developments could end impunity in a world now ready to realise the untold promises that had been frustrated during the Cold War (Teitel, 2003, 89-92). Here, tribunal adjudication confronted the contested category of 'non-international armed conflict' (something states feared subjecting to treaty) as an issue that could become subject to standards formed through customary international law (Hoffman, 2010). As this adjudicatory-cum-customary approach to the laws of war came to reshape a traditionally treaty-formed body of law (Mantilla, 2024), this represented a direct challenge to American – and increasingly Israeli (Cohen, 2011, 373-374) – efforts to seek authority over these laws through their projects of military lawyering. While not readily apparent in the 1990s when post-Cold War American global supremacy and the expansion of international law seemed harmonious, this was not to last. In light of complex histories of the law-war-trauma nexus, the latter could be imagined as a conspiracy to morally injure the former. On 28 September 2000, Ariel Sharon, now campaigning for Israeli Prime Minister, controversially visited the Temple Mount/Dome of the Rock – an Islamic sacred site – that, considering widespread Palestinian frustration with the inequities of the proclaimed 'peace process', is often

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considered the catalyst for a new round of uprisings deemed the Second Intifada (Pressman, 2003). With violence taking on increasing heights in the Holy Land and shattering promises of peace, roughly one year later, the al-Queda suicide attacks in New York and Washington DC took place on 11 September 2001.

6. Conclusions - Passion and Dispassion After 9/11

With 9/11 hailed as the 'day that changed everything' (Morgan, 2009), 'lawfare' provided a visceral assertion that those seeking to subject war to law had to recognise that the legal standards they invoked were the products of a world that no-longer existed after 9/11. Paradoxically, this very designation of 9/11 as 'unprecedented' was a catalyst for mobilising so many understandings of the law-war-morality continuum that, as detailed above, were being shaped over half a century. Through this distinct temporal dynamic came something of a 'passion gap' between those who viewed 'lawfare' as a meaning conceptual frame versus those who did not. The former, in their privileging of American and Israeli military perspectives, could passionately draw upon decades of embedded fears of moral injury when loudly denouncing even the most remote prospect of existing legal standards somehow enabling a mystified, but existentially threating, 'terrorist' enemy. The latter, tasking themselves with the judiciously dispassionate appraisal of increasingly complex legal regimes (and dismissively viewing 'lawfare' as a distortion), in great measure cut themselves off from the emotional force that guided earlier generations in opposing militaristic domination legally and otherwise (Modirzadeh, 2020). What are the parameters of this 'passion gap' regarding emotional characterisations of the relationship between law and war? How might it shape the anticipation and interpretation of future events? Whatever inquiry into these issues might look like, the above-detailed genealogy has much to offer to those who would seek to understand the subjects and subjectivities of

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'lawfare' through the complex histories of emotion that found succinct expression through this term.

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ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/21443

ATHENA

CRITICAL INQUIRIES IN LAW, PHILOSOPHY AND GLOBALIZATION

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

This article was completed while the author was a visiting scholar at NUS Centre for International Law, the author would like to thank Nilufer Oral, Helene Tigroudja, Elena Pribytkova and Rashmi Raman for their valuable feedbacks and comments.

ATHENA
Volume 5.1/2025, pp. 56-113
Articles
ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/21521

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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https://doi.org/10.6092/issn.2724-6299/21521

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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https://doi.org/10.6092/issn.2724-6299/21521

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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https://doi.org/10.6092/issn.2724-6299/21521

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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https://doi.org/10.6092/issn.2724-6299/21521

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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https://doi.org/10.6092/issn.2724-6299/21521

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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https://doi.org/10.6092/issn.2724-6299/21521

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.

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/21521

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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https://doi.org/10.6092/issn.2724-6299/21521

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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https://doi.org/10.6092/issn.2724-6299/21521

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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https://doi.org/10.6092/issn.2724-6299/21521

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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https://doi.org/10.6092/issn.2724-6299/21521

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

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/21521

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

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/21521

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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ATHENA

CRITICAL INQUIRIES IN LAW, PHILOSOPHY AND GLOBALIZATION

Western and Islamic Constitutionalism

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ABSTRACT

This essay aims to develop the comparison between Western constitutionalism and Islamic constitutionalism. In the Western tradition the term constitutionalism points to the limitation of government through law. There have been different models of constitutionalism, in particular the American and the French ones, that can be understood in the light of the two interpretive categories of *constitutional democracy* and *legislative democracy*, respectively. The developments of contemporary constitutionalism appear very complex, as today's constitutions are the reflection of the cultural, religious, social and political pluralism of current societies. Therefore, the centrality of *interpretation* is imposed, whose complexity derives from the fact that pluralistic constitutions merge *legal issues and moral issues* together. About Islamic constitutionalism some Islamic thinkers consider secularism a philosophy, while Islam is another form of philosophy, which has its own vision of human life, rights and duties. In this perspective it follows that it is reasonable to think that constitutionalism can be achieved differently in different societies depending on the conceptions of rights and duties that are accepted and shared.

Keywords: western constitutionalism, constitutional democracy, legislative democracy, islamic constitutionalism, secularism

ATHENA
Volume 5.1/2025, pp. 114-141
Miscellanea
ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/22081

1. Ancient and Modern Constitutionalism

The term *constitutionalism* points to the existence of legal limits on government action: it expresses the idea of *government limited through law*. It is therefore through these limitations, looking at the ways in which they are set, that we get a criterion for distinguishing between *ancient* and *modern* constitutionalism.

In *Constitutionalism: Ancient and Modern*, Charles Howard McIlwain (1958) traces the turning point back to the age of revolutions in the late eighteenth century. The full extent of the historical-constitutional innovation introduced by the revolutionary process can be appreciated by looking at the words that Thomas Paine - one of the most important scholars who interpreted the American constitutionalism - used to analyze the American Revolution: "A constitution is a thing antecedent to a government, and a government is only the creature of a constitution. The constitution of a country is not the act of its government, but of the people constituting a government" (Paine 1953 a, 87). As we can see, the concept of constitution, in Paine's thought, is that of a *constituent power* of the people, who are in this sense sovereign and lay down the principles that will limit government action.

This conception stands in contrast to that of British constitutionalism, which locates limits of government action in the *substantive principles embodied in the institutions that have been formed over the course of the history of the English people*.

This understanding of the constitution is aptly expressed, in its basic contours, in the words of Henry Saint John, 1st Viscount Bolingbroke, an exponent of the party of Tories:

> By constitution we mean, whenever we speak with propriety and exactness, that assemblage of laws, institutions and customs, derived from certain fixed principles of reason, directed to certain

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/22081

> fixed objects of public good, that compose the general system, according to which the community hath agreed to be governed.

The constitution is thus identified with the common law tradition, and, on that basis, limits are placed on government action. Indeed, as Bolingbroke goes on to say: "In a word, and to bring this home to our own case, constitution is the rule by which our princes ought to govern at all times" (Bolingbroke 1754, 130).

Also speaking to the same effect, consistently with this constitutional tradition, was Edmund Burke - who belonged to the party of Whigs - in the stance that in the late eighteenth century he took against the French Revolution:

> If you are desirous of knowing the spirit of our constitution, and the policy which predominated in that great period which has secured it to this hour, pray look for both in our histories, in our records, in our acts of parliament […]. All the reformations we have hitherto made have proceeded upon the principle of reverence to antiquity […]. Our oldest reformation is that of Magna Charta of 1215 (Burke 2003, 27).

In the analysis offered by McIlwain, the two contrasting visions—Thomas Paine's and that of the British constitutionalists—reflect a distinction between a *modern* understanding of the word "constitution" and the *traditional* conception, "in which the word was applied only to substantive principles to be deduced from a nation's actual institutions and their development" (McIlwain 1958, 3).

On the modern conception, then, the constitution comes into being the moment a *constituent power* is established as the foundation on which rests the constitution itself; ancient constitutionalism, on the other hand, identifies the constitution with the authoritative and abiding principles that a people can look to as part of their own historical tradition.

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/22081

In reality, modern constitutionalism advanced along a dual track, on the one hand building on the experience of the American and French Revolutions of the late eighteenth century, and on the other solidifying the constitutional parliamentarianism that grew out of the British Civil Wars and the Glorious Revolution of the seventeenth century.

The constitutional struggle of seventeenth-century England can be viewed in light of the classic distinction between *gubernaculum (government)* and *jurisdictio (jurisdiction)*, one that McIlwain recovers from the thirteenth-century English jurist Henry de Bracton (1216–1268) (McIlwain 1958, 84ff): *gubernaculum* (government) referred to the sovereign's discretionary and unchallengeable power; by contrast, *jurisdictio* (law) referred to the sovereign's obligation to act within the boundaries of the realm's customs, that is, in keeping with the principles of the common law. The constitutional struggle, then, was the conflict between those who saw the need to impose limits on sovereign power and those who took the opposite stance, rejecting any and all limits that had never been enforced.

The struggle ended with the Glorious Revolution of 1689, which established parliamentary sovereignty, limiting the powers of the monarchy under a system where king and Parliament would act as co-sovereigns. Thus, began modern constitutionalism in England, the most prominent feature of which is identified by McIlwain with the introduction of the idea that the king was accountable "to the law and to the people" in carrying out the activities of government. This accountability under the law meant that the king's official acts would no longer be "beyond the legal scrutiny of the courts or removed from the political control of the people's representatives in parliament," (McIlwain 1958, 124) an idea that became effective with the 1701 Act of Settlement, making judicial power independent of the king, in combination with the ability of Parliament to exert "a positive political control of government," guaranteeing "individual right against governmental will" (*ibidem*, 126).

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https://doi.org/10.6092/issn.2724-6299/22081

Through English constitutional history, then, two fundamental aspects of modern constitutionalism were forged: "the legal limits to arbitrary power and a complete political responsibility of government to the governed" (*ibidem*, 146). Modern constitutionalism would not become fully established until the end of the eighteenth century, when, as mentioned, the constitution came to be conceived as an act of the people that set the limits and manner in which government action must unfold.

2. Constitutional Models

The constitutionalism that came into being in seventeenth-century England established the principle of limited government, meaning a government of laws and not of men. The constitutionalism that emerged in the late eighteenth century with the American and French Revolutions recognized the centrality of constituent power and conceived of it as the foundation of constituted powers, but it did so giving rise to two different models in those two historical-constitutional contexts.

American constitutionalism was designed to enshrine guarantees for an already structured civil society. In France, on the other hand, it was meant to bring about a new society that would supersede the constitutional reality of the *Ancien Régime*. French constitutionalism introduced a program of social revolution, and it was the legislature that would play a central role in outlining this program, this in keeping with the principle set forth in Article 6 of the 1789 Declaration of the Rights of Man and of the Citizen: *La Loi est l'expression de la volonté générale* ("The Law is the expression of the general will").

In the American experience, an already established civil society demanded that governmental power be subject to a set of clearly stated limits, very much in keeping with the ideas contained in Thomas Paine's

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https://doi.org/10.6092/issn.2724-6299/22081

1776 *Common Sense*.[1] The US Constitution of 1787, along with the 1791 Bill of Rights, was thus conceived as a technique for limiting the power of government through a set of protected rights enshrined in the constitution itself, and this established the principle of constitutional sovereignty, the idea of the constitution as the supreme law of the land (Article VI, Clause 2) (Fioravanti 1991, 74).

The difference between the two constitutional models can be stated thus: whereas in the American experience the constitution was conceived as a *contract*, in the French experience it was conceived as a *statutory enactment*, an act laying down a set of ground rules (Dogliani 1994, 200). At the foundation of the constitutional contract in the United States was a social contract of broad agreement around a set of widely shared moral principles in accordance with which the constitutional contract itself governed the exercise of political power. In France, on the other hand, it was a pre-existing political unit — the nation or the people — that served as the constitutional foundation, generating the constitutions that followed one another during the revolutionary decade from 1789 to 1799, which constitutions in turn established the organizing framework within which the political organs would function.

In the French reality the legislature was assigned the revolutionary role of proclaiming the natural rights of man that had been denied by the *Ancien Régime*. This central role of the legislature meant that rights would be guaranteed not through the constitution, as was the case in the American system, but through the law,[2] and this was a problematic guarantee, as it was based on *majority rule*.

[1] In Paine's vision, government was to be limited by the ends it was to promote through its own design: "Here then is the origin and rise of government, namely, a mode rendered necessary by the inability of moral virtue to govern the world; here too is the design and end of government, viz., freedom and security" (T. Paine 1953 b, 6).

[2] As Rousseau was early to state in the *Social Contract*, in a civil society "all rights are defined by law" (*tous les droits sont fixes par la loi*) (J.-J. Rousseau 1994, 73). Instead, in the history of British constitutionalism, jurisprudence is "the main instrument for developing the rules for the protection of liberties". It is judges and not legislators who build English

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https://doi.org/10.6092/issn.2724-6299/22081

3. Constitutionalism, Democracy, and the Protection of Rights

American and French constitutionalism can be understood in light of the two interpretive categories of *constitutional democracy* and *legislative democracy*, respectively (Bongiovanni and Gozzi 1997, 215 ff.). In the former, the superiority of the constitution over the legislature translates into a system of guarantees ultimately entrusted to the decisive role of the Supreme Court, with its power of judicial review: this principle was first put to words in 1788 by Alexander Hamilton in *Federalist* 78,[3] and then in the 1803 landmark case of *Marbury v. Madison*, in an opinion written by Chief Justice John Marshall, it became actual precedent.[4]

In France, by contrast, the primacy of the legislature ruled out any possibility of introducing judicial review of laws. This is borne out by the fact that nothing ever came of the project for a *jury constitutionnaire* that Emmanuel-Joseph Sieyès had put forward as early as 1795.

In the difference between these two ways of framing the relationship between the constitution and legislative power, then, we have a master criterion for interpreting the two models of constitutionalism. The same difference also points to *two different ways of guaranteeing rights* and *two different conceptions of rights*. In short, while the American model of constitutional democracy grows out of the Lockean liberal tradition in which rights trump state power, the French model bases rights on the

common law. "The subject of liberties, as elaborated by jurisprudence, and expressed in *common law* rules, is substantially unavailable to a political power" (M. Fioravanti 1991, 19).

[3] This is how Hamilton expressed the principle of judicial review: "By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority, such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing" (A. Hamilton 2022,346).

[4] From the opinion: "Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

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https://doi.org/10.6092/issn.2724-6299/22081

authority of the legislature, foreshadowing a critical tension in contemporary democracies: that between the universalism of human rights and the majority principle expressed in the law.

In light of the foregoing analysis, we can arrive at a definition of the constitution as the body of rules governing the relations between the holders of political power and the rights of those subject to that power, and of constitutionalism as *the way in which to go about understanding the constitution*.

Over the course of the nineteenth century, the understanding of the constitution as the outcome of the people's constituent power gradually lost ground to the understanding of it as the outgrowth of the history and reality of a *nation*. A paradigm took hold that coupled *historicism* with *legal statism* by conceiving law as a body of norms that develop historically in the nation's consciousness and then find a legal statement in the state's statutory enactment, that is in the law of the State.

While in the United States rights were enshrined in the constitution — and namely in the 1791 Bill of Rights, that is the first ten amendments — in continental Europe rights found their basis in statutory law.

Over the course of the nineteenth century, Europe saw the establishment of the so-called *Rechtsstaat*, that is the state within the limits of the law: the state as an entity subject to the rule of law. It was a European paradigm.

This doctrine rejected the idea of natural rights and embraced that of rights as having their exclusive basis in posited law. On this doctrine, the law is an expression of the general will, that is, of the majority of the nation, and as such *it could change the constitution*. In this conception of the state, the legislative power belonged jointly to both the sovereign and the popular representation (Bähr 1864, 13), which contributed to the creation of a limited political power, as it prevented any possible arbitrariness. In this doctrine *the state limited itself through the law, not through the constitution.*

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4. The Age of Democracy and the Future of Constitutions. The Constitutions of Pluralism

In the late nineteenth and early twentieth centuries the *Rechtsstaat* model - the model of the liberal state - went into decline in the face of the rise of popular parties that could appeal to a plurality of values no longer lined up with those of the ruling class.[5] This was the age of democracy, in which the legislature was no longer the interpreter of the nation's law, but rather the expression of a collection of parties, classes, and interest groups. This made it necessary to reassert the supremacy of the constitution as a tool with which to limit the discretionary and even potentially arbitrary use of power by legislatures beholden to the shifting winds of majority sentiment.

In fact, in the wake of World War I, the unchecked power of parliaments raised concerns about that very prospect of majorities violating the constitution. But the necessary guardrails would not be put into place until after World War II. This was when Germany, for example, set up a system of judicial review (*richterliches Prüfungsrecht*) as a power entrusted exclusively to the Federal Constitutional Court (the *Bundesverfassungsgericht*). It is this shift that marks the primacy of the constitution over the legislature and stands as the basic framework for today's constitutional democracy. This is a paradigm shift to illustrate which we can go back to the German experience.

The democracy that emerged in Germany after World War II elevated the Federal Constitutional Court to the role of "guardian of the constitution" (*der Hüter der Verfassung*) and made it a constitutional body within the process of political will-formation. With the development of a system of constitutional justice so understood it became possible to ensure that legality and legitimacy always coincide, so that no tension can arise between the two (Leibholz 1957, 11).

[5] It is essential here to go to S. Romano (1969). *Lo Stato moderno e la sua crisi* (1909) (Giuffrè).

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https://doi.org/10.6092/issn.2724-6299/22081

In German constitutional democracy, even the constitution came to be understood in a different way than it had been under the *Rechtsstaat* - that is the model of the state within the limits of the law (the state subject to the rule of law): no longer understood as the result of the nation's historical development, the constitution now came to be seen as the "legal positivizing of the fundamental values around which the life of the community is structured" (Böckenförde 1976, 81, my translation). These values consist of the principles of justice underpinning the basic rights, whose effective protection is a necessary condition for making effective the freedom of every individual (*ibidem*, 79).

In the constitutionalizing of basic rights and the primacy of the constitution over statutory law lies the essence of constitutional democracy. According to Dieter Grimm – an important German constitutionalist – the democratic-constitutional form of government is a form of state consisting of two levels of decision-making legality: there is the constituent legality of the principles enshrined in the democratically enacted constitution, and there is the legality of legislative enactment. The former (constituent) legality is based on a broader consensus than that of legislative enactment, where decisions are made by majority vote, and so they can be made by no more than a slim majority. When these two decision-making levels come into conflict, the conflict can only be resolved by recourse to the constitutional court. This two-level legality (*zweistufige Legalität*), Grimm concludes, "is synonymous with the constitution itself" (Grimm 1980, 706, my translation).

The primacy of the constitution over the powers of the state is built into the very structure of the two-level legality of constitutional democracy, where the constituent decision through which basic rights are enshrined in the constitution is removed from legislative discretion. In this sense, the constitutions of present-day democracies are *constitutions of protected rights (constitutions of rights' guarantee)*. But as such they are also *constitutions understood as guiding principles*: they are the basic norms

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https://doi.org/10.6092/issn.2724-6299/22081

whose principles the public authorities are to use as guides in upholding the constitution itself, which may include a principle of substantive equality to be achieved by protecting a suite of social rights (Fioravanti 1991, 142-47).

However, the story of contemporary constitutionalism is much more complex than that, for the constitutions that emerged out of this process were drafted against a background of pluralism, requiring buy-in from all parties (that is the consensus of all parties) despite the range of their different positions (Zagrebelsky 1996, 77). In this sense these constitutions can be described as *pluralistic constitutions (or constitutions of pluralism)*, ones reflecting a plurality of political ideologies. For example, folded into the Italian Constitution of 1947 are socialist, liberal, and Catholic ideologies, exemplifying the kind of compromise that was typical of postwar constitutions.

Contained in contemporary pluralistic constitutions are principles expressing the traditions and ideas behind each constitutional order. These principles purport to be

> universal, and they sit next to each other, expressing the different claims advanced by the different 'parties 'to the constitutional contract, but they are not underpinned by any rule of compatibility on which basis to resolve 'collisions 'among principles or strike a balance between them (*ibidem*, 78, my translation).

From that historical reality it follows that central to the practice of contemporary constitutionalism is the act of interpretation, an act through which "the constitutional past, taken as a source of values to be upheld, is brought into relation to a future that poses a problem to be solved in continuity with that past" (*ibidem*, 81, my translation). But that interpretive act is complex, the complexity stemming from the background pluralism it is meant to solve, and in particular from the fact that in a

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https://doi.org/10.6092/issn.2724-6299/22081

pluralistic constitution *the legal elements are merged with moral ones*. Which in turn means that the validity of any law — that is, its constitutionality, its conformity to the legal principles contained in the constitution — depends in good part on how certain complex moral questions are worked out, as when assessing whether a given law is consistent with the equality of all human beings (Dworkin 1977, 185).

The question of the relation between law and morality in contemporary constitutionalism is addressed by Robert Alexy – a German philosopher of law – from a perspective that attempts to make sense of the trends in today's legal systems. As Alexy argues, if a legal system incorporates principles,[6] it follows that there must be a connection between law and morality.[7] The incorporation of principles into the constitutional system expands the function of the judge, who will no longer be a mere executor of the law, but will exercise the function of balancing the principles on which the law is founded. The principles represent the vehicle through which the equitable role of the judge is affirmed in relation to the protection of fundamental rights. What this also means is that contemporary constitutionalism, as Alexy construes it, can be described as an attempt to strike a balance between the will of the majority as expressed by the legislature and judicial decision-making geared toward protecting individual rights.[8]

5. Change in the Functions of the Constitution

In reflecting on the future of the constitution, other authors highlight the increasing weakness of the constitution as it sheds the ability to act as a

[6] Alexy characterizes principles as belonging to the deontological sphere of duty and values as belonging to the axiological sphere of the good. But in doing so he equates the two, arguing that principles and values are the same thing and that a theory of values can be reformulated as a theory of principles. See R. Alexy 1985, 510 and 125ff. Translated into English as *A Theory of Constitutional Rights*, trans. Julian Rivers, 2002.
[7] In this regard, see the reconstruction of Alexy's thought in G. Bongiovanni 1998, 37ff.
[8] *Ibidem*, 46.

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standard in light of which to govern politics by settling the disputes around which the political process cannot find any consensus (Grimm 1996, 129).

In the age of the *Rechtsstaat* (the state governed by law) the constitution was entrusted with the function of guaranteeing individual freedoms. But under that model, the public power governed by the constitution was a unitary power.

With the rise of democracies in the twentieth century, the state found itself having to take on new roles, particularly that of attending to the basic needs of the population. At the constitutional level, this meant *writing social rights into the constitution*, as happened with the Weimar Constitution of 1919 (Arts. 157ff.).

At the same time, new actors emerged. These were mainly interest groups, and while they were not organs of the state — a matter with which the constitution was concerned — they did influence the state's decision-making. Modern constitutions were written assuming a distinction between state and society, but then that distinction fell away: society and social groups were now part and parcel of public power, such that it was no longer tenable to intervene on the basis of a constitution exclusively concerned with the powers of the state (*ibidem*, 159). The constitution thus lost its cohesive function as a tool of social and political integration (Frankenberg 2000, 1). In the face of these profound transformations of the state and of society, will a different conception of the constitution take hold, or will the constitution be reduced to a partial order incapable of taking in the totality of the spheres of state activity? (Grimm 1996, 163).

6. Constitutionalism, Democracy, and Rights

The transformations that constitutionalism underwent in contemporary age run parallel to the changing understanding of rights in the experience of present-day democracies. Rights in the modern age can be described as having gone through three phases as follows, each identified in light of the

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https://doi.org/10.6092/issn.2724-6299/22081

foundation on which they have been understood to rest. We thus have (1) a *naturalistic-rationalistic* conception of rights in the seventeenth and eighteenth centuries; (2) a *positivistic and legalistic* conception of rights in the nineteenth century; and (3) a *constitutional* conception of rights in the twentieth century. In the first phase, rights were understood to have their foundation in *natural law*, in turn understood as a law of reason; in the second phase this natural law was replaced with the state's *posited law*; and then in the third phase this legal-positivistic foundation was in its own turn replaced with the democratic *constitution*, seen as a more solid and secure foundation for rights than the legislative foundation, once it was appreciated how liable the latter was to change with the changing mood of the legislative majority of the moment.

The Weimar Constitution of 1919 is of fundamental importance to the theory of democracy and rights, as it enshrines a list of *social* rights alongside the traditional rights to liberty, the former understood as a necessary condition for a genuine exercise of latter. The new social rights were meant to address the reality of individuals who are no longer isolated but enter into in associative forms. In this connection the labor lawyer Hugo Sinzheimer, who was among the drafters of the Weimar Constitution, set the individualistic understanding of rights characteristic of the liberal tradition against an understanding that might be described as communitarian *avant la lettre*, where individuals are considered not in isolation but as embedded in a social reality. On this doctrine of social law, a principle of *solidarity* is therefore asserted against the liberal conception of rights, understood as a mere guarantee of individual autonomy over the state's intervention.

At work here, according to Michael Walzer, is a "subversive logic of rights," (M. Walzer 1991, 117) in that rights are now asserted to be genuinely universal. They are no longer the rights of the late eighteenth-century declarations tailored to the specific interests of the bourgeoisie but are increasingly the rights claimed by other sectors of civil society: the

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labor movement, the women's movement, ethnic and cultural minorities, and so on. In this sense, rights can be understood as a guarantee of pluralism in civil society: the State within the law of the nineteenth-century (*Rechtsstaat)* can accordingly be described as having given way to a State of rights (Zagrebelsky 1992, 84).

In contemporary pluralistic democracies, rights are no longer a check against government interference but rather serve as a basis on which people can advance claims by individually and collectively participating in the life of the state. In this sense, Jürgen Habermas has argued that the democratic principle consists in the concrete ability to freely exercise basic rights in the process of political will-formation and that therein lies the legitimacy of enacted law: "democratic procedure should ground the legitimacy of law."[9] Contemporary pluralistic democratic societies are increasingly diverse, with a multiplicity of national, ethnic, religious, and cultural groups.[10] We are therefore faced with the problem of setting out the constitutional conditions for the possibility of such pluralistic multicultural societies.

Multiculturalism recognizes the pluralism of values, rejecting the notion that all values can be reduced to a single system of values. This means recognizing the equal status of all existing cultural communities in civil society. Which in turn means that we are no longer faced with the problem of excluded minorities, or of the need for the majority to tolerate minorities. In other words, *multiculturalism means that we need to*

[9] Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (The MIT Press, 1996), sec. 4.2.1, p. 151. Originally, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (Suhrkamp, 1992), p. 188.

[10] On the relationship between constitutional law and multicultural society see G. Cerrina Feroni 2017. Multiculturalism is a political, legal and ethical project that recognizes the equal dignity of the "cultural expressions of individuals and groups that coexist in a democratic system" (*ibidem*, 5, my translation).
See also Groppi, who emphasises the connection between multiculturalism and constitutionalism, since multiculturalism is an "expression of the 'pluralism' that is the basis of the constitutional state (also called, not by chance, a 'state of pluralist democracy')", in T. Groppi 2018, 2 (my translation).

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definitively move past the principle of majority rule (Raz 1994, 69). The recognition of cultural pluralism also entails a need to embrace *legal diversity*, a system of law allowing for differential treatment of different cultural groups and identities by recognizing their *cultural rights* within the existing constitutional framework.

Underlying the problem of multiculturalism, however, is a deeper problem that has yet to be adequately addressed. As Seyla Benhabib has rightly observed in *The Rights of Others*, this unresolved problem revolves around the concept of the people. This concept is uncritically taken to refer to a naturalistic, culturally homogeneous group (Benhabib 2004, 202ff). But that does not tally with the historical reality of the people in a constitutional democracy, where the people are actually a plurality groups whose interests, self-understandings, and positions in society are always in flux, in becoming. This means that the fundamental problem of multiculturalism — that of *integration* — cannot be solved until we deal with the concept of the people as a culturally homogeneous people. Indeed, this is the source of culturally discriminatory legal norms, in that they do not recognize and protect the specificity of cultural differences, and so we need to be able to move past that concept.

There is therefore a range of transformations that constitutional democracies *could* undergo in view of their underlying multiculturalism. As discussed, these are the transformations that come from recognizing collective rights, moving beyond the principle of majority rule, embracing legal diversity, and revisiting the concept of the people, and they should ultimately translate into *a rethinking of the principles of Western constitutionalism*.

James Tully, a leading theorist of multiculturalism, has observed that the purported universality of the language of constitutionalism stifles cultural differences and imposes a dominant culture by masquerading it as culturally neutral. He instead puts forward a theory of constitutionalism based on intercultural dialogue and negotiation, recognizing that each

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https://doi.org/10.6092/issn.2724-6299/22081

culture is formed in a process of continuous interchange and intermingling with other cultures. The constitution, in other words, needs to be reconceived as a "form of accommodation" of cultural diversity (Tully 1997, 30).

It would be necessary to embrace the idea of a *genuinely intercultural sovereignty*, and of constitutions as "based on *the sovereignty of culturally diverse citizens*, not on abstract forgeries of culturally homogeneous individuals, communities or nations" (*ibidem*, 183, italics added). We can thus see coming into view the new face of our democracies, which could accordingly be described as *multicultural constitutional democracies*. Recognizing the multicultural nature of societies, this new constitutionalism can reenvision the democratic constitution as a framework designed to make possible the coexistence of different groups, life-worlds (*Lebenswelten*), and value systems (Belvisi 2000, 164). As Gustavo Zagrebelsky puts it, the outcome of such a constitutional framework can accordingly be described as a "compromise struck between possibilities" (Zagrebelsky 1992, 10, my translation). In the same vein, Zagrebelsky also comments that our constitutions

> need to regenerate themselves with a view to a constitutionalism meant for "open constitutional states." [...] For constitutionalists, this means [...] *taking the notion of law—originally theorized as a command through which the sovereign rules over all subjects, good and bad alike—and rethinking it as a device with which to ensure coexistence in the interaction that takes place among people of different kinds* (Zagrebelsky 2007, 126, my translation).

7. Islamic Perspectives on Constitutionalism

In a very interesting text, Raja Bahlul analyzes the possibility of Islamic constitutionalism, meaning a constitutionalism based on Islamic thought

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and ideals. He begins by pointing out that some concepts from Western tradition have equivalent terms in Arabic. For example, the idea of a state subject to the rule of law (*État de droit*) corresponds to *dawlat al-qānun*, and the rule of law itself corresponds to *ḥukm al-qānun* (Bahlul 2007, 515). And of course, this is not just a matter of formal equivalence or correspondence.

Bahlul observes that discussion of the meaning and possibility of constitutionalism in Arab-Islamic thought can serve as a testing ground for the universality of this concept. He believes that constitutionalism has significance for Arab-Islamic political thought, too. The foundations of constitutionalism in Arab-Islamic thought are theistic. There are two variants: the Ashʿarite variant (which is voluntarist) and the Muʿtazilī variant (which is objectivist, known for its rationalism). Ashʿarism aims to limit the discretionary powers of rulers, i.e. the discretionary power of the executive.

As far as Muʿtazilīsm is concerned, this vision can be argued to have put forward the idea of a separate, independent judiciary, capable of keeping in check the abuses of legislative majorities. What is interesting from this perspective is the interpretation of Western constitutionalism in relation to a possible Islamic constitutionalism.

In the Western perspective constitutionalism, democracy, and the separation of powers are closely linked. In the West, they all came into being in the context of secularism (*laïcité*), which is their necessary background and presupposition.[11] Since the Islamic thinkers (for instance Gannouchi, Turabi) reject secularism,[12] the problem arises as to whether it is possible to espouse Islam, constitutionalism, and democracy all at the same time. How can an Islamic regime be democratic unless it is secular?

[11] Indeed, from the seventeenth century onward, Western political and legal thought has been developed on a secularist basis, meaning it presupposes a separation between revealed truth and reason, between church and state. And this separation has been the condition for pluralism and tolerance.

[12] Here Bahlul is referring to thinkers like Rachid Ghannouchi and his 1993 book *Al-Ḥurriyāt al ʻĀmmah fī al Dawla al Islāmiyya* (Public liberties in the Islamic state).

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https://doi.org/10.6092/issn.2724-6299/22081

But that question assumes that Islam is incompatible with democracy. Western constitutionalism requires democracy, and democracy requires secularism: so, constitutionalism also requires secularism. But on the approach espoused by Islamic constitutionalism, Islam rejects secularism. It follows that Islam is incompatible with both democracy and constitutionalism.

That is the first part of the argument, but there is – in the opinion of some Islamic thinkers – a second part that introduces a different perspective. Democracy – according, for example, to Joseph Schumpeter's interpretation, expressed in his book *Capitalism, Socialism and Democracy* (1942) – can be considered as a political *method* that is neutral with respect to the values of a society. In this perspective democracy, according to Gannouchi, could be understood to mean popular sovereignty, political equality, and majority rule. None of these concepts bears any necessary connection to secularism. So, Islam need not necessarily reject democracy so understood. Islamic thinkers accordingly propose to free democracy from secularism, endorsing the former and discarding the latter. In short, they see secularism as a philosophy, and Islam as another form of philosophy, with its own vision of human life, rights, and duties.

We can see, then, that constitutionalism can take different forms in different societies depending on which conceptions of rights and duties are embraced and shared in those societies. And once we frame the problem in this way, we will also be in a position to see that Islamic constitutionalism is profoundly different from Western constitutionalism, because the philosophy of Western democracy is relativism, which allows for pluralism, whether religious, political or ideological. For this reason, Western constitutionalism cannot take a religious conception as its foundation.

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8. An Islamic Constitutionalism?

Nathan Brown, a professor of political science and international affairs at George Washington University, notes that "Arab constitutional texts have been written primarily to enable, organize, and justify political authority" (Brown 2002, 161): from the very start, since the 1861 Tunisian constitution, *they have essentially been conceived to legitimize existing balances of power*. Given this background, Brown asks two central questions: "how can constitutionalism emerge in societies in which liberalism is so far from hegemonic?" And "can Islamic principles [...] be employed to build a different kind of constitutionalism?" (*ibidem*, 162).

In the late nineteenth and early twentieth centuries, several Islamic thinkers set out principles for an Islamic constitutionalism that in the *sharīʿa* located the limits of political power. They were looking to both the Islamic and the Western traditions. This, for example, was the vision espoused by both Rashid Riḍā (1865-1935) and ʿAbd al-Razzāq al-Sanhūrī (1895-1971).[13]

Rashīd Ridā, a Syrian intellectual, published his volume on the caliphate (*Al-Khilāfa wa al-imāma al-ʻuzmà*) in 1922 in which he stated that the community of believers (*umma*) constitutes the basis of any potential political construction. In fact, he declares that the unity of the supreme imamate (or caliphate) derives from the unity of the *umma*: "the unity of the imamate follows that of the Community."[14]

The Community has the right to remove the supreme imām (the caliph), as the "supreme authority is a right that belongs to the people" (Laoust 1986, 24).

[13] N. Brown 2002, 165. Nathan Brown writes: "Rida sought an Islamic state governed by the *sharīʿa* (supplemented by positive law within its boundaries), involving consultation as well as an active role by an invigorated *ʿulama*. Al-Sanhuri saw the *sharīʿa* not as the basic framework of government but as a rich legal source that needed only to be modified to be applied to modern circumstances."
[14] H. Laoust 1986, 89 (my translation). See also M. Campanini 2008, 139.

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The original aspect of Rashīd Ridā's conception consists in the fact that he identifies the 'ulamā' – those who can "lose and bind" (*ahl al-hall wa al-ʻaqd)* – with the members of a freely elected parliament: "These parliamentary institutions - he writes - correspond in Islam to the body of *ahl al-hall wa al-ʻaqd*" (*ibidem,* 100). In this way Rashīd Ridā recovers an important aspect of European political tradition (Campanini 2008, 142).

Compared to Rashīd Ridā, ʿAbd al-Razzāq al-Sanhūrī's conception of the caliphate is more oriented towards a cosmopolitical perspective. He was an Egyptian jurist, professor of law and politician. In his 1926 book on the Caliphate, *Le Califat. Son Evolution vers une Société des Nations Orientale*, he reaches some relevant conclusions: "The best combination in the current state of our civilization involves, in our opinion, entrusting the exercise of religious attributions to a *body distinct and independent from the body in charge of exercise of political powers…*;" the caliph will unite "in his person the two attributions without preventing them from remaining distinct in their practical functioning" (al-Sanhūrī 1926, 571, my translation).

Furthermore, Al-Sanhūrī highlights the need for a League of Nations with specifically "oriental" characteristics.

Al-Sanhūrī wrote:

> […] the establishment of an Oriental League of Nations would reconcile modern nationalist tendencies with the need to ensure some unity among Muslim peoples[…] By examining the question of the application of the principles of Muslim law, we have foreseen the possibility of a legal system that is applicable to all citizens, Muslim or not. This leads us to the conception of a Muslim society in the broadest sense of the term: *political and non-religious society*. It will be accessible to all confessions as long as they respect constitutional laws (*ibidem*, 584-586, (my translation, my emphasis).

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Here we can recognize, as for Ridā, a flexibility of Muslim law which presupposes "a secularization of the State and a peaceful coexistence of faiths and peoples" (Campanini 2008, 148).

In these scholars we can find an encounter with the Western tradition.

Let's continue the analysis of Islamic constitutionalism. In Islamic constitutionalism, a clear distinction is drawn between human-centric views—those that locate sovereignty in human beings—and Islam, which recognizes only God as sovereign, making the *sharīʿa* the foundation of the Islamic constitutional order.

According to Islamic constitutionalists, a

> sharp distinction is often made between the Qur'an and the *sunna* on the one hand and other sources of *sharīʿa*-based law on the other […] A rule based on a clear Qur'anic text or an unambiguous statement of the Prophet cannot be changed by later interpretation; […] but Islamic constitutionalists can be fairly wide-ranging in their acceptance of new interpretations of law.[15]

There are likewise other commentators who, while representing a minority voice in the Muslim world, go so far as to claim that "Sharīʿa is not identical with the sources of Islam as such, but rather with the way those sources were historically interpreted and applied."[16] On this view, "an Islamic political order must be based on the *sharīʿa*, but the *sharīʿa* must be reinterpreted."[17] The problem, then, lies in interpretation.

At the core of the debate on modern Islamic constitutionalism is the concept of the *shūrā* (consultation), the ancient practice of deciding matters of public or communal interest in consultation with those who stand to be affected by the decision. The turn toward consultation therefore

[15] N. Brown, 2002, 170-171. In this regard Brown mentions at p. 171 Tawfiq Shawi, *Fiqh al-shura wa-l-istishara* (The jurisprudence of Consultation and Seeking Advice) (Dar al-wafa', 1992), and Mohamed S. El-Awa, *On the Political System of the Islamic State* (American Trust Publications, 1980).
[16] A. A. An-Naʿīm 1989, 12, quoted in N. Brown, 2002, 175.
[17] N. Brown 2002, 175; cf. An-Naʿīm 1996.

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raises the *problem of how the sovereignty of the people can be made consistent with that of God*. This question of popular sovereignty became a central concern, perhaps irreversibly so, when in the season of the so-called Arab Springs of the early 2011s, a series of uprisings and protests broke out seeking to end the corruption of the power elites in the Arab world. These developments suggested an opening toward Western constitutional models, without going against the Islamic tradition, as was case with the Tunisian constitution of 2014.

Closely bound up with the problem of constitutionalism is that of democracy, in that there can be no democracy without a constitution placing limits on the exercise of power. It is to the problem of democracy that we will therefore now turn.

9. Islam and Democracy

As Nathan Brown comments, it is fair to say that the constitutions enacted in the Arab countries essentially reflect the existing power relations entrenched in these countries, while doing little to secure the separation of powers needed to guarantee basic rights. They can in this sense be described as *constitutions in a nonconstitutional world*,[18] that is, *constitutions without constitutionalism*. Indeed, there is a separation of legislative, executive, judiciary powers, but not a separation of their functions.

Constitutionalism and Western democracy are two inseparable concepts. The absence of constitutionalism in the Muslim world rules out the possibility of establishing forms of democracy comparable to those in the West. Which in turn makes unfeasible the idea of exporting the model of Western constitutional democracy to the Arab world.

This problem raises once again the fundamental question: is Islam compatible with democracy? Or, as Yadh Ben Achour – an exponent of

[18] The expression is from N. Brown 2002.

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the liberal-democratic reformism – puts it, is it possible to be religious and democratic at once? (Ben Achour 1992, 258ff). The question can legitimately be asked because Arab constitutions explicitly invoke Islam,[19] on the premise of the close connection understood to exist among religion, law, and politics,[20] making it difficult (on this conception) to accept the idea that different religions might stand on an equal footing. And yet this is not an idea that a democracy can reject: as Ben Achour observes, democracy must be able to tolerate dissent, nor is it enough to describe democracy as "government by the people," for we also have to ask, who are the people? The people, Ben Achour answers, are "a people made of citizens who understand themselves to be such on the basis of their political allegiance to the state, to the political city, and who do not confuse their role as citizens with their identity as believers" (Ben Achour 1992, 261, my translation).

This does not mean rejecting religion but rather "interiorizing" it and mutually acknowledging the variety of religions and the right to practice them. Indeed, democracy today - in the Western perspective - is sustainable only to the extent that we recognize that the values we choose to live by, and which shape our personal identity, are not absolute (but only relative) and therefore cannot be imposed on everyone else (*ibidem*, 271). Indeed, as Hans Kelsen – one of the most important philosophers of law of the last century – puts it, the philosophy of democracy is the philosophy of relativism.[21]

[19] Examples are Article 2 of the Algerian Constitution of 1971, Article 2 of the Egyptian Constitution of 2014, Article 1 of the Tunisian Constitution of 1959, and Article 2 of the Jordanian Constitution. Islam is conceived as a source of identity and a basis of social integration, and in this sense the relation between Islam and the state ought to be understood as descriptive rather than normative. See Amor 1994, 45.

[20] In this relation "the political and the legal do not have any autonomy, and any distinction in this sphere was limited, almost trivial." Amor 1994, 36, my translation.

[21] H. Kelsen 1955, 39:" This is the true meaning of the political system which we call democracy and which we may oppose to political absolutism only because it is political relativism."

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10. Conclusions

In the Western tradition there are different conceptions of constitutionalism with different models of democracy, notable among which are the American and French models.

In Islam, too, there are different conceptions of constitutionalism. Islamic constitutionalism rests on a theistic foundation and declares Islam to be incompatible with secularism: it accordingly considers democracy only as a method, compatible with different philosophies, namely, Islam itself and secularism.

Even so, there are authors, such as Rashid Riḍā and ʿAbd al-Razzāq al-Sanhūrī, whose outlooks overlap significantly with the Western tradition, as with respect to parliamentarianism.

There are also Muslim authors who embrace liberal-democratic reformism and make the case that Islam is compatible with democracy and pluralism.

In short, there is no single conception of constitutionalism. The idea needs to be traced back to different traditions and societies. There are significant convergences with the Western tradition, but Islam will inflect constitutionalism in its own way, safeguarding its own cultural identity.

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ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/22081

ATHENA

CRITICAL INQUIRIES IN LAW, PHILOSOPHY AND GLOBALIZATION

Separation of Powers and Climate Litigation: International Law as a Guide Between Judicial Activism and Legislative Prerogatives

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ABSTRACT

This article examines the principle of separation of powers in the context of climate litigation, asking whether and to what extent courts may legitimately intervene when political authorities fail to act on climate change. Starting from the premise that separation of powers is historically and contextually relative, the article shows how this relativity is reflected in judicial practice on climate change. Notably, a comparative analysis of domestic and international case law identifies three distinct approaches: strict deference to political institutions, moderate review, and active intervention, illustrating how different legal systems draw the boundary between law and politics in climate matters. In light of this variability, the article argues that international law can offer a unifying normative framework by constraining political discretion and supporting judicial scrutiny: through binding obligations under climate and human rights law, as well as norms on access to justice, international law enables a functional understanding of the separation of powers in which courts legitimately uphold legal commitments in response to political inaction.

Keywords: separation of powers, climate change litigation, human rights, judicialization of international law, access to justice, IPCC

ATHENA
Volume 5.1/2025, pp. 142-174
Miscellanea
ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/22114

1. Introduction

The Paris Agreement sets a clear objective: to limit the global temperature increase to well below 2°C and to pursue efforts to cap it at 1.5°C above pre-industrial levels. This threshold is widely recognized, most notably by the Intergovernmental Panel on Climate Change (IPCC), as the critical line beyond which the impacts on ecosystems, public health, and global stability would become increasingly severe and irreversible (IPCC, 2023). Yet, despite this scientific consensus and the clarity of the temperature goals, political organs of Member States have consistently failed to adopt measures commensurate with the scale of this global threat[1].

One of the reasons for this persistent inertia lies in the design of international climate law's mitigation framework, which is primarily composed of programmatic norms: they articulate collective, long-term objectives while leaving States considerable discretion in determining the means to achieve them (Klabbers, 2018; Kulovesi and Recio, 2023). Thus, although the Paris Agreement sets the aforementioned temperature goal, its implementation relies on Nationally Determined Contributions (NDCs), which are unilaterally defined and updated by each State (Dupuy and Viñuales, 2018, 187 ff.).

In response to this persistent gap between international commitments and actual implementation, particularly affected individuals, non-governmental organizations (NGOs) and small islands States with low-lying coasts have increasingly turned to the judiciary as a means to enforce climate obligations. Hence, strategic climate litigation, i.e., judicial action aimed at compelling more robust climate policies, has gained considerable momentum in recent

[1] See Climate Action Tracker, "an independent scientific project that tracks government climate action and measures it against the globally agreed Paris Agreement aim of "holding warming well below 2°C and pursuing efforts to limit warming to 1.5°C", https://climateactiontracker.org/.

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https://doi.org/10.6092/issn.2724-6299/22114

years, with a significant rise in climate-related cases globally (United Nations Environment Programme (UNEP), 2023).

At the domestic level, applicants have invoked legal standards such as the duty of care, tort law, and human rights provisions to bring claims against States and corporations contributing significantly to greenhouse gas emissions (Savaresi and Setzer, 2022; Maxwell, Mead and van Berkel, 2022; Misonne, Torre Schaub and Adam, 2025).[2]

At the international level, regional human rights courts and UN treaty bodies have played a pivotal role, as individuals and NGOs have brought claims arguing that inadequate State action to reduce emissions amounts to a violation of fundamental rights: cases such as *KlimaSeniorinnen*[3] before the European Court of Human Rights ("ECtHR"), *Sacchi et al.*[4] before the UN Committee on the Rights of the Child (CRC), and *Billy et al.*[5] before the UN Human Rights Committee (HRC) have paved the way to climate litigation through human rights fora (Peel and Osofsky, 2018; Savaresi, Auz, 2019; Luporini, Kodiveri 2021; Rodriguez-Garavito, 2022; Luporini, Savaresi, 2023). This trajectory has been further reinforced by the recent advisory opinion issued by the Inter-American Court of Human Rights ("IACtHR"), which adopts a particularly progressive stance on States' climate obligations under the American Convention on Human Rights[6] (Feria-Tinta, 2023; Riemer, Scheid, 2024). Lastly, the advisory opinion to be issued by the African Court on Human and Peoples' Rights ("AfCHPR")[7], following a

[2] For updated data, see Sabin Center for Climate Change Law, Climate Change Litigation Databases, https://climatecasechart.com/.
[3] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, 2024 Eur. Ct. H.R. (2024).
[4] Committee on the Rights of the Child, "Decision Adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, Concerning Communication No. 104/2019", UN Doc CRC/C/88/D/104/2019 (11 November 2021) (*Sacchi* et al *v Argentina* et al).
[5] Human Rights Committee, "Views Adopted by the Committee under Article 5 (4) of the Optional Protocol, Concerning Communication No. 3624/2019", UN Doc CCPR/C/135/D/3624/2019 (22 September 2022) (*Daniel Billy* et al *v Australia*).
[6] IACtHR, "Opinión Consultiva Oc-32/25 de 29 de Mayo de 2025 Solicitada por la República de Chile y la República de Colombia - Emergencia Climática y Derechos Humanos".
[7] AfCHPR, "In the Matter of a Request by the Pan African Lawyers Union (Palu) for an Advisory Opinion on the Obligations of States with Respect to the Climate Change Crisis" (2nd May 2025).

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https://doi.org/10.6092/issn.2724-6299/22114

pending request (Suedi, 2025), is also expected to further influence the legal landscape in this area. Another major development is the increasing recourse to international courts through requests for advisory opinions concerning climate-related obligations beyond the human rights sphere. Small island nations, acutely vulnerable to the existential threats posed by climate change, have led the way in seeking legal clarification of States' responsibilities by engaging international courts with inter-State jurisdiction. One such initiative resulted in the advisory opinion recently delivered by the International Tribunal for the Law of the Sea (ITLOS), which clarified States' duties under the United Nations Convention on the Law of the Sea in relation to climate change (Longo, 2024; Macchia, 2024; Yallourides and Deva, 2024). Even more prominently, the advisory proceedings currently pending before the International Court of Justice (ICJ) aim to define the scope of States' obligations under general international law and international human rights law to prevent, mitigate, and redress the impacts of climate change, particularly with respect to the rights of present and future generations (Bodansky, 2023; Buszman, 2024; Savaresi, 2024; Priess, 2025).

In short, there is no doubt that, in today's legal landscape, domestic and international courts have thus emerged as key actors in the legal response to climate change, playing a central role in holding major emitters accountable. However, a closer look at these developments raises broader questions of great interest to public law scholars, as it challenges several long-established categories of legal theory. Chief among them is the traditional understanding of the separation of powers: can a judge invoke broadly formulated norms, such as human rights provisions or domestic tort law, to direct the legislative and executive branches on how to act in the face of climate change? And if so, to what extent may courts do so when the dispute involves inherently political choices and public policy considerations? (Guarna Assanti, 2021; Pane, 2023).

The answer to these questions cannot but be relative. It necessarily depends on the conception of the separation of powers one adopts as a reference point.

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https://doi.org/10.6092/issn.2724-6299/22114

This notion, indeed, is inherently flexible, and its concrete definition is closely tied to specific historical and political contexts. What may be seen as judicial overreach in one legal culture might be viewed as legitimate adjudication in another. In light of the above, the present article argues that strategic climate litigation reveals diverging understandings of the separation of powers, and it aims to identify which of these conceptions aligns more closely with the current international legal framework.

To this end, the second section will explain why the separation of powers must be regarded as a relative, context-dependent concept; the third section will examine key judgments in strategic climate litigation to illustrate the different ways in which this principle has been understood; the fourth section will explore the role that international law plays in shaping and legitimizing these judicial interventions; finally, the fifth section will draw some general conclusions.

2. The Inherent Relativity of the Notion of Separation of Powers

Throughout the history of modern constitutionalism, the concept of separation of powers has been interpreted in various ways, influenced by the historical and political context in which different legal experiences and theories have been shaped (Eckes, 2021a, 1316). This relativity is reflected both in the theoretical understanding of the concept and in the concrete institutional arrangements through which it has been implemented across different legal systems.

As for the theoretical origins of the separation of powers, they are most commonly traced back to Montesquieu's *L'Esprit des Lois*, where the Enlightenment thinker introduced the idea that government functions should be divided among three distinct branches: the legislative, responsible for making laws; the executive, charged with implementing them; and the judiciary, competent to sanction those who violate them (Montesquieu, 1748). This tripartite model, though famously systematized by Montesquieu,

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/22114

had already found an earlier formulation in John Locke's *Two Treatises of Government*, which distinguished between legislative, executive, and federative powers (Locke, 1689). In Montesquieu's thought, each branch must operate independently and without encroaching on the others' spheres. Thus, Montesquieu's work is often associated with the image of the judge as *bouche de la loi*, that is, a mere mechanical applicator of legislative texts (Spector, 2015).

However, this conception must be understood in light of the historical context in which it emerged: the Enlightenment's reaction against absolutism. From this perspective, the idea underpinning the separation of powers is not rigid division for its own sake but rather a system of checks and balances designed to prevent any one branch from dominating the others, thereby avoiding the concentration of power characteristic of absolute monarchies. This inherent flexibility makes the doctrine of separation of powers primarily a mechanism to maintain equilibrium among branches of government, ensuring no single authority can wield unchecked power (Hazo, 1968, 1965).

Consequently, Montesquieu's vision of the judge has been interpreted by emphasizing two different aspects. On one hand, the judge as a *juge automate*, a figure whose role is limited to the strict and mechanical application of statutory law, without room for discretion or interpretive reasoning; on the other hand, the judiciary's function as a check on the legislative and executive powers, those branches most directly tied to the will of the majority. From this perspective, the judiciary is not merely a passive instrument but an essential counterbalance, tasked with preventing the concentration or abuse of power (Schoukens, 2024, 187-188).

This fundamental ambivalence in Montesquieu's thought is mirrored in the subsequent theoretical evolution of the separation of powers throughout the 19th century. In fact, the restrictive understanding of judicial authority gave rise to doctrines such as the "political question doctrine", which posits the existence of a sphere of political discretion that is entirely insulated from

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https://doi.org/10.6092/issn.2724-6299/22114

judicial oversight. According to this theory, certain matters, especially those involving foreign policy or national security, are deemed non-justiciable, falling exclusively under the purview of elected officials. In practice, courts in several jurisdictions have invoked this doctrine to rule that executive decisions in the field of international relations are beyond judicial review, thereby excluding them from legal scrutiny and from the binding reach of international law itself (Amoroso, 2012; Amoroso, 2015; Magi, 2021).

By contrast, the interpretation of the separation of powers as a means primarily intended to ensure equilibrium among branches of government gave rise, particularly with the emergence of the welfare state and twentieth-century constitutionalism, to a more *functional* and *relational* reading of the principle. According to this view, the separation of powers is not an end in itself, nor a rigid framework designed to compartmentalize institutional roles (Ackermann, 2000, 633). Rather, it is a tool that serves the broader goal of liberal democracies: the protection of both *collective* and *individual autonomy* (Möllers, 2013).

Collective autonomy is safeguarded through democratic decision-making processes, whereby the will of the majority is translated into law via politically accountable institutions. Individual autonomy, on the other hand, is ensured through the imposition of legal limits on that majority will, limits which are upheld by institutions with technical or counter-majoritarian legitimacy, such as the judiciary. In this context, the separation of powers becomes an architecture of mutual oversight and cooperation, rather than one of strict institutional isolation. This perspective emphasizes that the principle must be understood in a dynamic and context-sensitive way: it is the *interaction* between powers, not their insulation, that ensures a just and balanced exercise of authority. This relationship, therefore, is fluid and dynamic, resulting in a continuous redefinition of the boundary between the *political* and the *legal* (Eckes, 2021b).

This challenge to draw a sharp distinction between these domains becomes all the more evident when one turns from the theoretical aspects to the way in

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https://doi.org/10.6092/issn.2724-6299/22114

which the role of the judge has been concretely realized across different legal systems (Cappelletti, 1984). In this respect, the role of ordinary judges varies depending on the legal tradition in which they operate; for instance, between common law and civil law systems. At the same time, the emergence of supreme, constitutional, and supranational courts has introduced an additional layer of complexity, as these bodies often occupy a more ambiguous position within the separation of powers (Biondi, Zanon, 2014).

When it comes to the varying role of judges across different legal traditions, important divergences emerge. For example, in some common law systems, such as the United States, some ordinary judges are elected and therefore enjoy a form of popular and political legitimacy. Such an arrangement would be inconceivable in many civil law jurisdictions, where judicial authority is rooted in technical expertise (Bartole, 1996; Caianiello, 1998). Moreover, different forms of judicial restraint shape the activity of courts in common law systems. In the United States, for example, doctrines such as constitutional avoidance, the presumption of constitutionality, and strict standing requirements serve to limit judicial intervention, especially in politically sensitive matters. This is particularly relevant in areas like environmental law, where identifying clear rights holders can be difficult. In such contexts, standing, the admissibility of public interest litigation, and the protection of diffuse interests are not merely procedural matters; they contribute in a substantive way to defining the role of the judiciary within a constitutional system and reshaping the balance of powers (on this issue, see Weill, 2023).

As for the role played by Supreme Courts, in many jurisdictions they are entrusted with what is often described as a *nomophylactic* function, i.e., ensuring the uniform interpretation and application of the law across the judicial system. While formally a legal task, in practice this role may acquire a creative dimension, particularly when the process of consolidating a unified interpretation requires choices that carry significant normative or policy

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implications. The boundary between law and politics thus becomes increasingly porous (Grossi, 2012; Grossi, 2016).

This ambiguity is even more pronounced in the case of constitutional courts. With the advent of constitutionalism, such courts have come to act as guardians of constitutional order, through the power to review legislation. In Kelsen's conception, the constitutional court stands not within, but above the classical separation of powers, functioning in many respects as a kind of "negative" unelected legislator (Kelsen, 1928; Kelsen, 1942). Although it is not part of the political sphere in a conventional sense, the court exercises a function that is inherently political (Drigo, 2025). Its legitimacy derives not from democratic representation, but from legal expertise and its role in upholding fundamental rights and constitutional principles (Kelsen, 1945; Ragone, 2025).

A striking example of this dynamic can be found in the United States Supreme Court, which famously asserted its interpretive supremacy in the landmark case of *Marbury v. Madison* (1803), declaring that "[I]t is emphatically the province and duty of the judicial department to say what the law is"[8]. With this pronouncement, the Court positioned itself as the ultimate arbiter of constitutional meaning, effectively elevating its role above the traditional three branches of government in its capacity as guarantor of the constitutional framework.

As for supranational courts, legal scholars refer to the concept of *vertical* separation of powers, which denotes the distinction between what falls exclusively within the sovereign prerogatives of States and what lies within the *ratione materiae* jurisdiction of international courts (Polzin, 2022). In the past, this boundary was clear-cut, as the voluntary nature of jurisdiction has always been a fundamental principle of international law (Orakhelashvili, 2020). Over time, however, international law has undergone progressive judicialization, evolving from ad hoc arbitral tribunals handling specific

[8] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), 177.

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disputes to permanent courts tasked with overseeing compliance with multilateral treaties (Iovane, 2017; Follesdal, Ulfstein, 2018). Today's legal landscape is shaped by a form of so-called multilevel constitutionalism, where, based on the understanding of treaties as living instruments, the *ratione materiae* jurisdiction of certain courts, especially those relying on broad and inherently vague standards such as human rights, continues to be redefined and expanded, particularly in contexts where States fall short in fulfilling their obligations (Zarbyiev, 2012). This dynamic development generates tension with States, which remain the *treaty masters* and, viewing this phenomenon with suspicion, emphasize principles such as subsidiarity and the margin of appreciation. One of the clearest illustrations of this can be found in the European context, where the Court of Justice of the European Union and the ECtHR, both initially designed to ensure State compliance with international treaties, have progressively assumed a quasi-constitutional role. This transformation has not gone uncontested: it has prompted increasing resistance from member States, wary of the expanding jurisdiction and normative influence of these supranational courts (Hofmann, 2018; Breuer, 2021).

Against the backdrop of this already multifaceted scenario, contemporary legal systems have seen the concept of separation of powers come under renewed pressure (Azzarriti, Dellavalle, 2014). As it has been noted, indeed, there is a "darkening of political representation and an appropriation of lawmaking by 'communities,' particularly the 'legal community' and, within it, judges in a preeminent position - community versus State" (Staiano, 2018, 37). This phenomenon is the result of a deeper dysfunction: the persistent inability of political institutions to address the structural and urgent challenges of our time has rendered them "formally legitimate, but substantively no longer legitimate," and thus, in practice, "tyrants".

According to the relational conception of the separation of powers, it is precisely this form of tyranny that justifies a rebalancing intervention by the judiciary. In this vein, strategic climate litigation, both at the domestic and

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international levels, exemplifies this ongoing crisis within the separation of powers framework: applicants seek to liberate themselves from the "omissive tyranny" of political power, thereby aligning with the functional and relational conception of separation of powers (Eckes, 2021a, 1310).

Whether this encroachment aligns with the separation of powers principle depends largely on the conceptual framework adopted: it is incompatible with the nineteenth-century view of judges as mere *bouche de la loi*, but fits within a more substantive, purposive understanding of the principle that has developed in opposition to that traditional view. Moreover, much depends on the legal system in which the case is situated and on the specific role of the court seized (e.g., whether it is a constitutional court, a supreme court, or an ordinary court) as each may be entrusted with different functions and degrees of authority within its respective institutional framework.

Therefore, it is crucial to examine relevant case law to understand how different courts involved in strategic climate litigation have interpreted and applied the concept of separation of powers (Saltalamacchia, 2024).

3. Climate Change Judgments and Separation of Powers

The first group of cases has adopted a rigid view of the separation of powers, denying any possibility for judges to rule on climate matters. This group corresponds primarily to the "first generation" of strategic climate litigation, in which U.S. judges played a leading role. In cases such as *American Electric Power Company Inc.*[9] and *Comer*[10], U.S. courts applied the political question doctrine to climate change, holding that decisions on emissions reduction require a reasoned balancing of conflicting interests (Kuh, 2019). Therefore, this task falls within the remit of the legislative or executive branches, particularly through international cooperation. This approach was recently

[9] *American Electric Power Company Inc. et al. v Connecticut*, 564 U.S. 410 (2011).
[10] *Comer v. Murphy Oil USA*, No. 1:05-CV-00436-LG-RHW, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007); *City of Oakland v. BP p.l.c.,* No. 3:17-cv-06011-WHA (N.D. Cal. June 2018).

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reaffirmed by the Ninth Circuit Court of Appeals in its ruling on the well-known *Juliana* case, in which the court unequivocally stated that

> "it is beyond the power of an Article III court to order, design, supervise, or implement the plaintiffs' requested remedial plan. As the opinions of their experts make plain, any effective plan would necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches"[11] (p. 25) (Colby, Ebbersmeyer, Heim and Røssaak, 2020; Nedevska, 2021; Montgomery, 2021).

However, this restrictive approach is not exclusive to U.S. jurisprudence (Pane, 2023). Two examples are the *Klimaatzaak*[12] case, decided by the Brussels Court of First Instance in 2021 (see Briegleb, De Spiegeleir, 2023), and the *Giudizio Universale*[13] case, ruled on by the Rome Tribunal in 2024 (Luporini, 2021; Bruno, 2022; Butti, 2024; Cecchi, 2024; Palombino, 2024; Vinken, Mazzotti, 2024).

In the first case, Belgian judges reached a paradoxical conclusion: the Belgian State and the three Regions composing it, who were the defendants in the lawsuit, had violated Article 1382 of the Civil Code, which requires them to act with prudence and diligence, as well as Articles 2 and 8 of the European Convention on Human Rights (ECHR), which guarantee, respectively, the right to life and the right to respect for private and family life. Indeed, the defendants, despite being aware of the risks that climate change poses to the country's population, had failed to take the necessary measures to prevent those risks from materializing. Nevertheless, the principle of separation of powers prevented the court from ordering the

[11] *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020), p. 25.
[12] Tribunal de première instance francophone de Bruxelles, Section Civile, 4ème Chambre, 17 juin 2021, No. 2015/4585/A. It is worth noting that this judgment was overturned by the Brussels Court of Appeal, which, in addition to confirming the violations, ordered the authorities to reduce greenhouse gas emissions. See Cour d'appel de Bruxelles, Section Civile, 2ème Chambre, 30 novembre 2023, Nos. 2021/AR/1589, 2022/AR/737 and 2022/AR/891.
[13] Tribunale ordinario di Roma, Seconda Sezione Civile, 26 febbraio 2024, No. 39415/2021.

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government to modify its emissions reduction targets, as this matter falls within the exclusive competence of the legislative and executive branches (Petel and Vander Putten, 2023). Therefore, although the violation was established, the Brussels Court of First Instance held that it could not issue a ruling on the matter.

Similarly, the Rome Tribunal declared that "The interest whose protection is sought through compensation for damages under Articles 2043 and 2051 of the Civil Code does not fall within the scope of subjectively protected legal interests, since decisions regarding the methods and timelines for addressing the phenomenon of anthropogenic climate change, which involve discretionary assessments of a socio-economic nature and a cost-benefit analysis across various sectors of collective life, fall within the remit of political bodies and cannot be subject to judicial review in the present case. Through the civil action brought, the plaintiffs are essentially asking the Court to annul primary and secondary normative provisions […] which represent the implementation of political decisions made by the legislature and the government in line with internationally and European-assumed objectives (both short- and long-term), which would constitute a violation of a fundamental principle of the legal system: the separation of powers" (p. 12).[14]

A second set of cases reflects a different approach, in which courts have found it compatible with the principle of separation of powers to assess the adequacy of emission reduction plans adopted by the legislative and executive branches, without, however, going so far as to impose specific thresholds to respect. A landmark example is the 2021 ruling of the German Federal Constitutional Court in the *Neubauer* case.[15] In that decision, the Court held that parts of the German Climate Protection Act (*Bundesklimaschutzgesetz*) were incompatible with fundamental rights. It emphasized that Article 20a of the German Basic Law imposes a duty on the legislature to protect the climate, particularly by ensuring an equitable distribution of the carbon

[14] Giudizio Universale, cit., p. 12 [translation by the author].
[15] *Neubauer*, BVerfG, 1 BvR 2656/18, 2021, par. 206.

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budget across generations (Bäumler, 2021; Minnerop, 2022; Di Martino 2024). Under this framework, the Court found that the plan was insufficient, as it allowed the current generation to consume a disproportionate share of the CO_2 budget, thereby shifting the burden of emissions reductions onto future generations (Eckes, 2021c). Nonetheless, the Court clarified that "it is not the role of the judiciary […] to translate the vague language of Article 20a of the Basic Law into quantifiable global warming thresholds or specific emission limits or reduction targets" (para. 206).

Another clear example of this approach is the recent *KlimaSeniorinnen* judgment by the ECtHR. In that decision, Strasbourg judges found, among others, that Switzerland's insufficient action in reducing greenhouse gas emissions substantiated a violation of Article 8 of the ECHR. The Court held that climate change has harmful effects on the life, health, and quality of life of the applicants, and that the State, by failing to take adequate measures despite being aware of these risks, had breached its positive obligations under that article (Milanovic, 2024; Buyse, Istrefi, 2024; Pedersen, 2024; Savaresi, Norlander, Wewerinke-Singh, 2024; Humphreys, 2024; Letwin 2024; Hilson, Geden, 2024; Letsas, 2024; Guarna Assanti 2024; Ragni 2024).

In making this finding, the Court was careful to acknowledge the respective competences of the legislature and, given its status as an international court, also considered the principle of separation of powers in its vertical dimension. On this point, the Court emphasized that "[J]udicial intervention, including by this Court, cannot replace or provide any substitute for the action which must be taken by the legislative and executive branches of government" (para. 412). However, it added that when a matter concerns rights protected under the Convention, "this subject matter is no longer merely an issue of politics or policy but also a matter of law having a bearing on the interpretation and application of the Convention" (para. 450). Accordingly, the Court is entitled to review the measures adopted by States to reduce greenhouse gas emissions, insofar as an unchecked rise in emissions could lead to serious and irreversible human rights violations. This does not

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mean, however, that the Strasbourg judges can dictate the specific measures that a respondent State must adopt; such choices remain the prerogative of the national legislature and fall within its margin of appreciation (Blattner, 2024).

Lastly, a third group of cases has gone even further. In these instances, courts have not only found that legislative inaction constitutes a breach of tort law or of human rights obligations but have also identified specific standards that lawmakers are required to meet (Morvillo, 2019). The landmark case in this category is *Urgenda*, decided by the Dutch Supreme Court in 2019, following earlier rulings by the District Court of The Hague (2015) and the Court of Appeal (2018)[16] (Bergkamp, 2015; Lin, 2015; De Graaf, Jans, 2015; van Zeben, 2015; Peeters, 2016; Verschuurenm 2019; Mayer, 2019). In this decision, the Dutch judiciary held that the government of the Netherlands had violated Articles 2 and 8 of the ECHR by failing to take sufficient action to reduce greenhouse gas emissions. Acknowledging the real and imminent threat posed by climate change to the lives and well-being of those under its jurisdiction, and despite being fully aware of it, the government had not adopted all reasonably available measures to mitigate that risk (para. 5.6.2). This failure also amounted to a breach of the duty of care owed to individuals under its jurisdiction, giving rise to non-contractual liability (Passarini, 2020; Pedersen, 2020; Spier, 2020; Wewerinke-Singh, McCoach, 2021).

Importantly, the *Hoge Raad* went further: relying on scientific assessments by the Intergovernmental Panel on Climate Change (IPCC) and on the international legal framework on climate change, the Court established a concrete emissions reduction obligation: the Netherlands was required to reduce its emissions by at least 25% relative to 1990 levels by 2020. In doing so, the Court imposed a binding target on the legislature, leaving discretion only as to the choice of means for achieving it (Schoukens, 2024, 190).

This overview of the main judicial approaches to the separation of powers in climate litigation, ranging from strict deference to active intervention,

[16] *Staat der Nederlanden v. Stichting Urgenda*, Hoge Raad der Nederlanden, 20 de diciembre de 2019, ECLI:NL:HR:2019:2006.

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highlights the lack of a uniform standard across national legal systems. In this fragmented landscape, international law can serve as a shared global interpretive framework, helping domestic courts to find the complex balance between judicial intervention and legislative discretion. The question then arises as to how international law can concretely provide such guidance.

4. Understanding Separation of Powers in Climate Matters Through the Lens of International Law

For our purposes, international law offers a useful framework through two main categories of norms. First, there are substantive standards which, when interpreted in light of the best available science, may limit political discretion on climate change and thereby allow for judicial scrutiny. Second, there are norms concerning access to justice.

Among the substantive standards, two areas of international law stand out: climate change mitigation obligations and human rights law. As previously noted, the first are rooted in the Paris Agreement, which establishes legally binding temperature goals, most notably the objective of limiting global warming to well below 2°C, and to pursue efforts to cap it at 1.5°C above pre-industrial levels. While States retain discretion over the means to achieve these goals through their NDCs, scientific evidence from the IPCC has made it clear that current climate policies are insufficient to meet these targets. As such, a failure to adjust policy trajectories risks amounting to a breach of international legal obligations, transforming the issue from a matter of political discretion to one of legal non-compliance (Ritz, 2024). A similar dynamic applies to human rights obligations. As previously noted, IPCC findings have established that exceeding certain temperature thresholds, such as the 1.5°C limit, would result in serious and foreseeable harm, potentially infringing upon fundamental rights. In this light, the best available science becomes essential not only for informing policy but also for interpreting the scope of legal obligations under human rights law. For example, as clarified

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by the ECtHR in *KlimaSeniorinnen*, insufficient action on climate change may amount to a violation of Article 8 ECHR, which protects the right to private and family life. In such cases, political discretion is again constrained, as the failure to take adequate measures is no longer a matter of policy choice but of non-compliance with binding human rights standards (Gallarati, 2024).

In both instances, when interpreted in light of the best available science, these international norms reveal that legislative discretion is no longer unbounded. Therefore, given that political inaction may entail violations of binding international obligations, particularly those related to mitigation and human rights, judicial intervention appears justified.

The second category, access to justice, can in turn be understood along two complementary lines: environmental procedural rights, and access to justice as guaranteed under human rights treaties.

As for environmental procedural rights, a key instrument is the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention). Article 9(3) of the Convention provides that "each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment" (Mezzetti, 2011; Passarini, 2023); furthermore, Article 9(4) specifies that "the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive" (Ryall, 2019). On this point, the Implementation Guide to the Convention, published by the United Nations, clarifies that

> "in situations where a violation is ongoing or further harm may occur, or where damage can be remedied or its effects mitigated, courts and administrative authorities should be empowered to issue decisions that put an end to the situation or require corrective

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> action". (United Nations Economic Commission for Europe, UNECE, 2014, 200-201).

Therefore, it is reasonable to infer that the Convention is applicable not only to environmental matters, but also to climate litigation (Eckes, Trapp, 2024).

Consequently, States are under an obligation to consider such claims and to provide an adequate remedy to the claimants in climate matters when the established legal requirements are met. While this obligation is, strictly speaking, addressed to the legislator, requiring the provision of appropriate legal tools and procedural avenues for courts to adjudicate the types of disputes described, it may also serve an important interpretative function for judges (Smyth, 2022; Richelle, 2022). Specifically, the Convention might be used to choose a more flexible understanding of the principle of separation of powers, allowing courts to embrace broader interpretations of existing standards, such as extra-contractual liability or human rights. Since these legal standards are often formulated in open or vague terms, the Aarhus Convention, though formally directed at lawmakers, can offer normative support for judicial interpretations that expand access to justice in climate litigation and align national adjudication with international environmental commitments.

Although the Aarhus Convention has a regional focus limited to Europe, it is important to note that similar legal frameworks exist in other regional contexts. As a result, the underlying reasoning can be extended to those jurisdictions as well (e.g., the *Acuerdo Regional sobre el Acceso a la Información, la Participación Pública y el Acceso a la Justicia en Asuntos Ambientales en América Latina y el Caribe*, known as Escazú Agreement, on which see Medici-Colombo, Ricarte, 2024, 160).

Added to this are the elements provided by international human rights law on access to justice. One notable example is the protection afforded by Articles 6 and 13 of the ECHR, as interpreted by the aforementioned *KlimaSeniorinnen* judgment.

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With regard to Article 6, in the *KlimaSeniorinnen* case the claimant association had been denied standing before the domestic courts. The ECtHR found that the conditions for the applicability of Article 6 were met, as there was a genuine and serious dispute concerning a civil right (namely, the right to life and physical integrity, derived from Article 10 of the Swiss Constitution) and the outcome of the proceedings was "directly decisive" for the association. The Court also emphasized the essential role of associations in promoting specific causes related to environmental protection, and the importance of collective action in the context of climate change. Thus, it found that domestic courts had failed to deal with the claim in a serious or adequate manner: they had neither engaged with the substance of the allegations nor provided compelling reasons for dismissing them. Moreover, they had not adequately examined the available scientific evidence on climate change and its present and future effects on human rights, nor had they properly assessed the standing of the association, which would have required an independent evaluation of the situation of the individual claimants (para. 615 ff.).

Given that no alternative legal avenues or procedural safeguards were available, the ECtHR concluded that the restriction placed on the association's access to justice impaired the very essence of the right itself. The judgment also highlighted the crucial role of national courts in climate litigation and underlined the importance of access to justice in this field, in line with jurisprudence developed across various Council of Europe member States (para. 630 ff.).

For its part, Article 13 of the ECHR provides that "everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority". To rely on this guarantee, applicants must raise a claim that is arguable under the Convention. As already noted, the *KlimaSeniorinnen* ruling confirmed that a failure to adequately reduce emissions may, under certain conditions, amount to a violation of Article 8. Consequently, claimants in strategic climate litigation

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may be regarded as presenting arguable claims under the ECHR and are therefore entitled to invoke Article 13. However, since the *KlimaSeniorinnen* judgment considers that the assessments relating to Article 13 are encompassed within those of Article 6, it does not explicitly address this aspect (para. 641 ff.).

Similar reasoning has also emerged from the Inter-American Court of Human Rights in its very recent advisory opinion on States' climate obligations under the American Convention on Human Rights. The Court adopts a notably progressive approach, affirming that States must ensure effective judicial remedies for those affected by the climate crisis. This includes guaranteeing procedural mechanisms that reflect the urgency and complexity of climate litigation, applying the *pro actione* principle, ensuring broad standing in both individual and collective claims, easing evidentiary burdens, and providing adequate resources for environmental justice. These elements are presented as essential to making access to justice effective in the context of the climate emergency (para. 540 ff.).

In light of the above, international legal standards can serve to expand the scope for judicial intervention in climate matters, thus supporting a broader reading of the separation of powers. How these standards are operationalised, however, depends both on the type of court involved and on the degree to which a given legal system is open to international law. In many jurisdictions where international norms enjoy supra-legislative status, constitutional courts may use them as benchmarks to assess the compatibility of domestic laws with constitutional principles. For instance, legislation that fails to demonstrate sufficient ambition in climate mitigation efforts, contrary to the substantive standards that limit legislative discretion, or that does not ensure effective access to justice in climate-related cases may be found unconstitutional. Ordinary judges, for their part, may rely on international access to justice standards to adopt a more flexible interpretation of domestic procedural rules, such as standing or admissibility requirements. Substantive obligations under international law may also inform the interpretation of

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domestic tort law or duties of care, particularly where judicial mandates include the protection of fundamental rights. Lastly, international and supranational courts, in their role as guardians of the treaties they are called to interpret and apply, may rely on interpretive tools such as Article 31(3)(c) of the Vienna Convention on the Law of Treaties to incorporate other relevant international norms, particularly those concerning climate obligations, human rights, and access to justice. The integration of these norms can broaden the interpretive scope of the treaties themselves, thereby expanding the space for judicial intervention and allowing courts to relax certain procedural requirements in order to ensure effective access to justice.

In all these contexts, international law enables judges to act not as political decision-makers, but as guardians of binding legal standards. Whether and how these norms are applied, however, will ultimately depend on which courts are seized and the normative framework within which they operate.

5. Conclusions

In conclusion, this article has demonstrated that the concept of separation of powers is both historically and geographically relative. The boundary between the legal and the political remains difficult to define, not only in institutional practice but also at the level of constitutional theory. This ambiguity is further reflected in the comparative analysis of climate judgments, which reveals divergent understandings of the very notion of separation of powers. Yet, international law offers a unifying framework that supports a more inclusive and functional reading of the separation of powers in the context of climate litigation. On the one hand, substantive standards, such as those established under the Paris Agreement and interpreted in light of the best available science, serve to limit legislative discretion by setting legally binding targets that courts may be called upon to uphold. On the other hand, international norms on access to justice, whether enshrined in environmental conventions or human rights treaties, empower judges to

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interpret procedural rules more flexibly, thereby enhancing judicial protection in climate cases.

Ultimately, while the separation of powers is not a fixed or universal concept, international law tends to favour an understanding of it in the context of climate change litigation that reinforces judicial accountability where State inaction threatens to undermine legal obligations. In this sense, judicial intervention in climate matters should not be seen as an undue encroachment upon a fundamental constitutional principle or as a challenge to democratic legitimacy. Rather, it constitutes a means of ensuring compliance with binding international standards.

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ATHENA

CRITICAL INQUIRIES IN LAW, PHILOSOPHY AND GLOBALIZATION

The Constitutionalization of the Right to Abortion from Different Understandings of Autonomy

A Review of the Jurisprudence of the Mexican Supreme Court of Justice

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ABSTRACT

This article explores the constitutionalization of abortion in Mexico within the broader framework of Latin American constitutionalism. It highlights the pivotal institutional reforms of 1994 and 2011 that redefined the role of the Mexican Supreme Court and elevated international human rights instruments to constitutional status. These reforms opened new legal avenues for feminist advocacy, enabling the recognition of reproductive rights. The article conceptualizes three jurisprudential approaches to abortion: (1) unjustified paternalism, often manifest under causal regulatory frameworks; (2) a negative liberal theory of autonomy, characteristic of decriminalization arguments; and (3) relational autonomy, which emphasizes contextual and substantive equality considerations. By examining key Supreme Court cases, the author identifies a progressive shift toward recognizing abortion as a fundamental right, which allows for the construction of reasons in favour of a narrative based on the relational conception of autonomy and substantive equality. The article aims to contribute to feminist legal strategies by clarifying the argumentative frameworks surrounding reproductive autonomy in constitutional adjudication.

Keywords: constitutionalization of abortion, Mexican Supreme Court of Justice, relational autonomy, substantive equality, feminist legal theory

A previous version of this work will be published in Spanish in the book by Beltrán y Puga, Alma et al. (eds.) "Cuerpo y Derecho. Vol. II: Reproducción, Violencia y Justicia" *forthcoming.*

ATHENA
Volume 5.1/2025, pp. 175 - 206
Miscellanea
ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/20451

1. The Constitutionalization of Abortion

Ruth Rubio Marín (2023, 114) points to the U.S. Supreme Court case *Roe v. Wade* (1973)[1] as the first decision to *constitutionalize* abortion in world history. Similarly, Reva Siegel (2016) recognizes the first rulings that constitutionalized abortion in the 1970s, beginning with *Roe*. Isabel Cristina Jaramillo (2018, 17), for her part, explains how from the 1990s, Latin American feminists turned their attention to the framing of abortion by the courts and what consequences this had on the campaigns for its decriminalization. With regards to Latin America, Paola Bergallo and Agustina Ramón Michel (2016, 229) point out that it was in 2006 that the courts joined the liberalizing trend that recognized constitutional limits to the criminalization of abortion. In Mexico, this trend began earlier, with the first ruling that dates back to 2002.[2]

By "constitutionalization" of abortion I mean the approach to the issue through constitutional arguments that are ultimately reflected in judgments of the Supreme Court of Justice under the recognition that, regardless of the position adopted, it involves conflicting constitutional values.[3] Constitutionalization implies a shift from considering abortion as a matter of public policy, mainly foreseen as criminal conduct in the penal codes, to accepting it as one that involves multiple rights in dispute and, therefore, requires some constitutional balancing for its resolution (see Bergallo and Ramón Michel, 2018; Beltrán y Puga 2018, 59). Perhaps this is the main characteristic of the "change of framing" in the abortion debate, i.e.,

[1] US Supreme Court, *Jane Roe et al vs Henry Wade*, 410 U.S. 113, 22 January 1973.
[2] Mexican Supreme Court of Justice, Plenary, Action of Unconstitutionality AI 10/2000, January 29 and 30, 2002.
[3] Reva Siegel (2016, 32 and 47) criticizes equating the constitutionalization of abortion with its adjudication or judicialization, locating the dynamics of constitutionalization (and consequent polarization) in politics. I agree with this position. For her, it was feminists who "changed the way abortion was debated." (34).

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/20451

addressing the conflict in its complexity as one that involves tension between different human rights.[4]

The fact that abortion is treated as a constitutional issue inevitably influences the political and social field. The recognition that the debate on abortion is not limited to the aspiration for the life of the *nasciturus* as the only legally relevant good that ought to be protected but that the rights of women and people with gestational capacity are at stake,[5] legitimizes feminist struggles in the public sphere, which, from being "murderers" or "crime apologists," come to be perceived as human rights activists. At the same time, it serves to delegitimize certain once-dominant positions, such as religious ones, in the public argumentation sphere.

As human rights defenders, the arguments presented by feminists, the information revealed about the true consequences of the criminalization of abortion for the most vulnerable women, and the visibility on the inconsistencies sustained by the legal systems in terms of dignity, citizenship, autonomy and equality for women, generate a public impact that was once inconceivable. Thus, the reception of the arguments related to their rights by the courts helps to change the status of feminist political action, which generates empathy and more adhesion on the part of citizens and groups in power, as well as advancing gender equality from a substantive standpoint.

Likewise, due to their institutional position as the ultimate guardians of the constitutional system, when supreme courts speak, they not only place issues on the agenda but can also shape the parameters of public discourse. This impacts decision-makers, who can outright accept the judicial interpretation – depending on the case, reaffirming their own previous decision, softening or eliminating criminal provisions, making protocols for access to non-punishable abortions, or even legislating it as a right – or can respond

[4] On an approach based on the principle of proportionality see Verónica Undurraga (2016).
[5] As established by the Supreme Court of Justice as of 2021, the inclusion of persons with gestational capacity for access to abortion is intended to "include, recognize and make visible those persons of gender diversity who do not identify themselves as women, but who can gestate. For example, transgender men, non-binary people, queer, among others." See AR 267/2023 (2023 para. 27), also AI 148/2017 (2021, para. 52).

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/20451

reactionarily – trying to shield their interpretations through constitutional reforms,[6] placing supererogatory requirements on access to non-punishable abortions, regulating the forms of access until it becomes null and void – for example, through the broad recognition of conscientious objection – or even simply defying judicial rulings.

It should be noted that these dynamics function as double-edged weapons since the courts are not always sympathetic to feminist pretensions. Thus, while we can recognize the importance of constitutionalization, we should not rush to celebrate it because the power of the discourse emanating from the highest judicial body also has its radiating and penetrating effects when it is contrary to feminist claims – as we have recently seen in the United States.[7]

What constitutionalization generates, therefore, is a new terrain for political struggle in which the same opposing forces will dispute the interpretation of the rights involved in abortion, using the language of human rights as a weapon. And given that sexual and reproductive rights are largely absent in the constitutional charters,[8] the struggle will address the interpretation and content of the rights that are positive in nature, and especially that of autonomy.[9]

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[6] As practically half of the Mexican states did after the 2008 ruling, see *infra*.

[7] US Supreme Court, *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022), 24 June 2022.

[8] This is debatable since in most Latin American constitutions, the International Human Rights Treaties are already constitutionalized, among them the CEDAW, which, together with the general observations and recommendations made by its committee, have enshrined Sexual and Reproductive Rights as enforceable. See Article 16, which guarantees women equal rights to decide "freely and responsibly the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights," as well as General Recommendation 24 of the CEDAW Committee (1999) which requests States to give priority to the "prevention of unwanted pregnancies through family planning and sex education." In the "case of the Political Constitution of the United Mexican States, the provision is expressed in its 4th article: "[...] Everyone has the right to decide freely, responsibly and in an informed manner on the number and spacing of their children. [...]."

[9] Constitutionalizing the debate in these terms may present democratic objections when the judicial interpretation clashes with that of the representative bodies. In addition, it has other limitations. As Isabel Cristina Jaramillo and Tatiana Alfonso Sierra (2008) point out, translating political struggles against structural or distributional problems into the language of individual rights tends to compartmentalize conflicts into closed areas of norms that fail to entirely encompass the phenomenon. In the same vein, Jeremy Waldron (2012) uses the case of the decriminalization of abortion to compare the quality of the deliberation that took

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https://doi.org/10.6092/issn.2724-6299/20451

2. The Constitutionalization of Abortion in Mexico

The constitutionalization of abortion was possible in Mexico after some far-reaching institutional changes that were characterized as a new era of constitutionalism (see Zamora and Cossío, 2006, 411-412). I want to highlight two of them. On the one hand, the 1994 constitutional reform completely modified the Mexican Supreme Court of Justice (hereinafter SCJ), granting it the functions of a Constitutional Court (see Magaloni, 2008, 199). This enabled social movements' struggle for human rights to find an increasingly fertile avenue in litigation.

On the other hand, the 2011 constitutional reform on human rights set "a new stage" (Pou Giménez and Triviño Fernández, 2024, 174). While it is true that Mexico had been a pioneer in the consecration of social rights with the 1917 Constitution (still in force), successive amendments expanded the catalogue of rights and gave them a newfound binding force.[10] The 2011 reform culminated this process of constitutionalization with the incorporation of the International Human Rights Instruments, which were inserted into the constitutional hierarchy (see Guastini, 2009, 49; Alterio, 2021, 57). Since then, the jurisprudence of the Supreme Court has consistently recognized and developed such rights, especially those of women, in concert with international developments (see Espejo Yaksic and Ibarra Olguín, 2019; Espejo Yaksic and Lovera Parmo, 2023).

This constitutional paradigm shift, as it has also been called, is not an exception confined to the country. Starting in the 1990s, Latin American countries opted for constitutional changes, partly in response to the bloody dictatorships that ravaged the region during the twentieth century (see

place in the United States (with *Roe*) with that which took place in the United Kingdom in order to show the superiority of the latter. The reason for this, according to the author, is that in the legislative sphere, there is freedom to debate the problem of abortion in its integral dimension, and it should not be forced to be included in the interpretation of written rights that are alien to it, such as due process. For a view that privileges the democratic path in abortion developments (see Erdman and Bergallo, 2024).

[10] For a characterization of the recognition of social rights since the 1917 Constitution, I recommend Alterio and Niembro Ortega (2024).

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https://doi.org/10.6092/issn.2724-6299/20451

Gargarella, 2013). Among the institutional innovations introduced were constitutions superior to ordinary legislation, with strong judicial review powers and the generous recognition of fundamental rights (especially economic, social, cultural, and environmental rights – DESCA) guaranteed by international protection mechanisms, which were incorporated into domestic legal systems. This combination enabled much of academia to speak of a new Latin American constitutionalism which, immersed in "aspirational" constitutions with strong jurisdictional guarantees, enabled practices of "transformative constitutionalism" (see von Bogdandy et al, 2017).

However, not everything is progressive, much less homogeneous. The diverse and long constitutional trajectories, somehow accumulated and often in tension, generated tension in interpreting the rights, making their adjudication more complex (Jaramillo Sierra, 2022).[11] This is especially relevant when claiming *unwritten* rights – such as sexual and reproductive rights – that affect in a differentiated way one of the groups that has historically been excluded from constitutional designs, such as women.[12]

My objective in this article is to review the path of the constitutionalization of abortion up to its argumentative consecration as a fundamental right in Mexico while critically analyzing the possible manifestations of this constitutionalization and its consequences from a feminist perspective. For this task, I will theorize three ways this can occur, using the understanding of individual autonomy as a point of analysis.

I will call the first one "*unjustified paternalism*" and it usually – although not necessarily – coincides with the permission for abortion under a causal

[11] The author identifies three regional constitutionalism models to analyze an incipient argument on sexual equality: the liberal, the social, and the postcolonial.

[12] As Rubio Marín (2023, 111) explains, "the absence of any mention of reproductive rights is probably the most paradigmatic example of the limits of an inclusive constitutionalism built around the male experience". It should be noted that when the 1917 Mexican Constitution was drafted, women did not have political rights and, therefore, did not participate in its drafting. Although this changed in the middle of the last century, the original constitutional matrix did not, so women have had to strategically adapt their constitutional arguments to the always backward normative consecration. On a similar phenomenon see Siegel (2005).

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scheme. Although liberal regimes exceptionally admit specific paternalistic measures, for them to be *justified,* the person whose will is (coercively) substituted must be in a situation of basic incompetence to decide, and the measure must be objectively oriented to avoid harm to her (Garzón Valdés, 1988). When these conditions are not met, the measure is unjustified and, therefore, violates the right to autonomy.

The second is based on a *negative* "*liberal theory of autonomy*" and is primarily present in the arguments for decriminalization. According to Nino (1989, 204-205), the principle of autonomy

> prescribes that the free individual choice of life plans and the adoption of ideals of human excellence being valuable, the State (and other individuals) should not interfere in that choice or adoption, limiting itself to designing institutions that facilitate the individual pursuit of those life plans and the satisfaction of the ideals of virtue that each one upholds and preventing mutual interference in the course of such pursuit.

Finally, a third way of grounding abortion can be identified with an idea of "*relational autonomy*" (which is reinforced by an understanding of equality in substantive terms). These arguments are possible under legalization schemes, although they are advanced strategically in other contexts. This conception conceives autonomy as individuals' *gradual* and multidimensional capacity, which develops as a function of the contexts of relationships with other subjects and the options they have to choose (Mackenzie, 2014). The interaction with the arguments on equality is determined by the attention given to the natural vulnerability of individuals (both as individuals and as a group) and the consequent duty of the State to act *positively* to counteract it, thereby enhancing autonomy (Álvarez Medina, 2022, 15-19; Fineman, 2010, 255-256). In the words of Álvarez (2022, 17), "the model that focuses on vulnerability acquires a more significant commitment to autonomy to the extent that it admits that its realization must

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be achieved by attending to diversity and, therefore, to the achievement of equality".[13]

The article will be developed as follows. In section 3, I will begin by reviewing the cases that reached the SCJ under the causal system (3.1 and 3.2), which applies a *paternalistic theory* that greatly restricts women's autonomy. In section 3.3, I will dwell on AR 1388/2015 on health grounds, given the importance of the arguments used by the Court, which align more with an understanding of *relational autonomy*. In section 4, I will analyze the first case in which the Court upheld the decriminalization of abortion by declaring the Federal District (DF) legislation constitutional and distinguish the arguments used in that case from those typically used in a *negative liberal* approach. In section 5, I will study the "Coahuila case" as the inaugural case of a path towards legalization, following the recognition of reproductive autonomy as a fundamental right within its entity. These sections will allow me to construct reasons in favor of a narrative based on the relational conception of autonomy and substantive equality. Finally, in section 6, I will give a brief conclusion. The overall idea is to contribute to rationalizing the scope and limits of each type of argument in the constitutionalization of the right to abortion and its remedies in order to collaborate with the legal strategies of feminism in this area.

3. Constitutional Arguments for the Non-punishability of Abortion According to Causal Grounds

3.1. The Cause for "Malformations" of the Product

The first time the SCJ intervened in the abortion debate was in response to the legislative decision of the then-DF to establish an absolute excuse in the case of genetic or congenital alterations of the product of conception that endangered its life or that of the pregnant woman. The constitutional

[13] On the interplay between relational theories of autonomy and equality, see Mackenzie (2022).

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principles that were interpreted in the Action of Unconstitutionality AI10/2000 (2002) were the protection of life from conception, equality, and legal certainty, all invoked by the parliamentary minority opposing the criminal code reform (Suprema Corte de Justicia de la Nación, 2022, 11-12). The Court recognized the constitutionality of the reform because, as it established, the norm "does not authorize the deprivation of the life of the product of conception, but only contemplates the possibility that, if the criminal act occurs and the requirements are met, it is concluded that no sanction should be applied" (Suprema Corte de Justicia de la Nación 2022,13; AI, 2002, 112). Regarding the pregnant woman, the Court admitted that the situation foreseen places her before a difficult decision: "the heroic of accepting to continue with the pregnancy and that of accepting the interruption of the pregnancy with the consequence that it is a crime" (AI, 2002, 111).

Although in the case we can see a narrative focused on the protection of prenatal life, without any allusion to women's rights, the justification of the rule that the Court highlights is important: "to address the urgent public health problem of deaths of pregnant women due to illegal abortions" (Suprema Corte de Justicia de la Nación, 2022,12). I highlight this first ruling for two reasons. First, to point out that the progress came from the Legislative Assembly and that the role of the Court was to support it constitutionally. Second, to point out that from the beginning, the Court took a non-absolutist position on rights, and even when the focus was on the protection of prenatal life, the consequences of illegal abortions for the lives of pregnant women were recognized as a concern worthy of constitutional attention.

This issue also allows us to reflect on the formulation of the cause and the type of justification given to it, which in some cases will be acceptable from a human rights paradigm and in others not. The Court has not made this justification explicit (neither in this nor in other cases) other than by alluding to the suffering of the pregnant woman, and this has given rise to a dispute over the argumentation in the sphere of academia and social movements.

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On the one hand, when the causal grounds provide for a product of conception that is anencephalic and/or not viable for independent life, the argument is the cruel and inhuman treatment that would be given to a pregnant woman who is forced to continue with a pregnancy in order to give birth to someone condemned to die immediately. The termination of pregnancy here is not only aimed at safeguarding the psychic and physical health of the woman, but it also avoids the torture that would imply having to give birth to a being who will not survive. It is a matter of accepting the impossibility of demanding heroic acts from pregnant women. This approach is based on abortion as a "necessary evil", a suffering that is preferred to another that is presented as more serious and that turns the woman into a double victim (Triviño Caballero, 2019, 212).

On the other hand, when the causal grounds enable abortion of products with "malformations" not incompatible with extrauterine life,[14] eugenic justifications have been tested, the political and social messages of which have been resisted by groups in defense of the rights of persons with disabilities[15] and exploited by anti-rights groups.[16] In that assumption, it would seem that the State's lack of interest in punishing abortion is related to the lack of value that would be given to a fetus that will present, once born, some kind of severe disability. The message there seems to be that certain fetuses have more value than others and, therefore, that certain people may be expendable for society and therefore "abortable".[17] This type of argumentation generates symbolic violence and is discriminatory, as well as

[14] In these cases, the "accreditation of the cause" further complicates access to abortion because it leaves the determination to medical committees that must establish the "severity" of the fetal condition to allow it or not. This was seen in AR 1388/2015, to be analyzed below, where the fetus suffered from Klinefelter syndrome, and the medical Committee, without considering the risk to the health of the pregnant woman, decided not to perform the abortion because said syndrome was compatible with extrauterine life. See para. 8 of the judgment.
[15] It is important to note that the term "malformations" is opposed by disability rights groups, who prefer to call the fetus "with functional diversity" (see Iglesias and Palacios, 2019).
[16] On the so-called *crip-washing* or use of the rights of persons with disabilities to undermine women's sexual and reproductive rights, see Triviño Caballero (2019, 214 et seq); Moscoso and Platero (2017).
[17] A similar claim has been made by feminism when selective abortion has been based on gender, allowing the abortion of female fetuses.

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inadmissible from a human rights perspective (Moscoso, 2014). In addition, it has the perverse effect of confronting groups in vulnerable situations with a very precarious recognition of their rights, reinforcing stereotypes.

A less explored alternative line of argument is of interest here. It not only focuses on the autonomy or agency of the pregnant woman from a feminist perspective but also from a disability perspective that, in an intersectional manner, should inform our understanding of reproductive rights. The argument is based on the social-relational environment that enables (or hinders) the autonomous decision of the person.[18] Thus, the understanding that the birth of a person, with or without functional diversity, requires resources and special care that will fall mainly on the mother and her family, makes it necessary to establish social provisions to ensure that these burdens are shared with the State and can be undertaken at a personal and familial level. In order for a woman to make an autonomous (and private)[19] decision on whether or not to continue with a pregnancy, she must have certain guarantees that she will have the necessary conditions not only to have an abortion but also to have/raise a child.[20] These conditions, among others, can be translated into "supports",[21] which are key to a conception of feminist relational autonomy and an express demand for the social model of disability. Let me explain this convergence.

The disability perspective is based on recognizing the autonomy of persons with disabilities. It requires accommodations and support for the exercise to

[18] What Catriona Mackenzie (2014) characterizes as the "self-determination" dimension of relational autonomy.
[19] This moves us from abortion on grounds of absolution to free abortion.
[20] These conditions must include the moments prior to pregnancy so that pregnancy can also be a possible decision for everyone. As Teresa Villaverde (2019) expresses "While middle-class white women in the "global North" ask to be able to decide on motherhood, working-class women in other parts of the world demand, before a clandestine abortion tool, living conditions that allow them to decide".
[21] I put support in quotation marks because I am using the word in all its possible senses, both in terms of assistance in making a decision and in terms of structural conditions that allow both the termination of a pregnancy without obstacles and the raising of a child without high costs and resignations. Developments on the right to care point precisely to this type of "support" regarding public services, infrastructures, and social protection policies that generate co-responsibility between the family, the State, and society (Pautassi, 2018).

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its fullest degree of their autonomy, to the point that they are essential elements of the right.[22] Providing them is an obligation of the state, and not doing so constitutes discrimination.[23] This understanding of autonomy as a *gradual* capacity that requires conditions for its exercise, should be applied to all persons, especially to those who are in situations of vulnerability, whether or not they have a disability or are pregnant with a product with or without functional diversity (Álvarez Medina, 2018, 43 ff.). The idea is that any pregnant person should have the support to be able to make an autonomous decision on whether or not to continue with the pregnancy in her internal forum and without having to give explanations, avoiding conditioning both maternity and access to pregnancy termination to heteronomous reasons based on the functional diversity of the fetus (Iglesias and Palacios, 2019, 218).

3.2. The "Rape" Cause of Action

The following pronouncements on causal grounds for abortion were made by *Amparo* trials, almost 10 years after the recognition of the constitutionality of the decriminalization of abortion in DF in August 2008, which I will discuss in section 4. This is not minor because in resolving the *Amparo* cases, the Court had some political support, which was also accompanied by a growing mobilization of women who used litigation to advance their causes. Although resistance to abortion continued in most of the country,[24] the composition of the Court had become more sensitive to receiving progressive human rights claims (Niembro Ortega, 2021).

[22] This is the meaning given to Article 12.3 of the Convention on the Rights of Persons with Disabilities.

[23] An express recognition by the Court in AR 1368/2015. On accommodations as a requirement in addition to the right to substantive equality of persons, see Fredman (2012, 30).

[24] An example of this was the constitutional amendments that took place in 17 Mexican states to protect life from conception, which were judicialized through AR 633/2010, IA 11/2009, CC89/2009, CC 104/2009, and IA 106/2018 (see Suprema Corte de Justicia de la Nación, 2022, 51-69). On the backlash that these reforms to local constitutions produced and the Court's response, see Pou Giménez and Triviño Fernández, 2024,189)

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Amparos AR 601/2017 and AR 1170/2017, both decided in April 2018, addressed the refusal by health authorities to terminate pregnancies resulting from rape. In both Morelos and Oaxaca, the grounds for exemption due to rape and fetal malformations were expressly provided for in the penal codes. However, the reality was one of inaccessibility to abortion. The argumentation of the Court gave great relevance to the plaintiffs' quality as *"victims"*[25] when criticizing the authorities for extending the suffering, and the physical and psychological damage they already suffered as a result of the rape by denying them the permitted interruption. In this narrative, the woman – not the *nasciturus* – is foregrounded. Although the criminal nature of abortion is not questioned, there is a new impulse to exceptions focusing on the counter-values that are considered of special relevance. This is a step forward because the pregnant woman appears as a bearer of human rights – even if it is as a victim and even if these are negative rights such as not suffering cruel, inhuman, and degrading treatment – and it begins to slightly undermine, albeit minimally, the mandate of motherhood.

In addition, the fact that the Court ordered comprehensive reparations for the denial of access to abortions shed new light on the constitutional debate.[26] The Court established an obligation of public health institutions to provide

[25] They were even incorporated into the victim assistance program for comprehensive reparations. This was a novelty in matters of *Amparo*, since the Court has generally been timid in establishing reparations for human rights violations, limiting itself to *restitution* (see Quintana Osuna, 2016). This issue was aggravated in relation to abortion since, due to the inherent time-periods with pregnancy, for a long time, its termination served as an excuse for not accepting cases for "lack of subject matter" since, at the time of the consideration of the *Amparo*, either the abortion had already been performed or the birth had already taken place. I will return to this point in the following section.

[26] The Court explained that integral reparation includes: "Restitution, which seeks to return the victim to the situation prior to the commission of the crime or the violation of his or her human rights; Rehabilitation, which seeks to help the victim deal with the effects suffered as a result of the punishable act or human rights violations; Compensation, which is granted to the victim in an appropriate manner and proportion to the gravity of the punishable act committed or the human rights violation suffered and taking into account the circumstances of each case. This will be granted for all damages, suffering, and economically assessable losses resulting from the crime or human rights violation. Satisfaction seeks to recognize and restore the dignity of the victims. Measures of non-repetition, it is sought that the punishable act or violation of rights suffered by the victim does not happen again". (AR 601/2017, 26; AR 1170/2017, 27).

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medical care in the event of an emergency. It compelled them not to implement mechanisms that prevent the rights of women victims of rape from being realized (AR 601/2017,19). It thus ordered measures of non-repetition "to avoid the occurrence of serious human rights violations [... and to attend to] effectively, immediately and without objection, requests for termination of pregnancy resulting from rape, *giving priority to the rights of all women who have been victims of cruel and inhuman acts* [...]". These obligations – according to the SCJ – are an "*inexcusable observance of the* constitutional *mandate* (AR 601/2017,32).

One of the contributions of these decisions is found in the remedies. These are sought to compensate for the harm suffered by the woman and make an effort towards correcting the authorities' actions in the future.[27] Despite this, the fact of anchoring them to the recognition of women as victims prevents us from speaking of transformative remedies since the narrative reinforces the gender stereotypes that place women under the need for protection and care, denying them their autonomous personhood and the power to decide on their reproductive life.[28]

In constitutional terms, the approach to abortion in all these precedents is *paternalistic* and looks to the past. It is admitted as a corrective mechanism for situations of severe violation of women's human rights (sexual violence suffered by the pregnant woman or, in its case, the suffering of carrying a pregnancy whose product cannot survive or endangers her health or her own life) that are mitigated by the performance of the abortion. Abortion is, therefore, not a subjective right of every pregnant person but a *remedy* to a greater evil.

In short, whatever arguments are used to terminate a pregnancy *on causal grounds*, will highlight the pitfalls and limitations that such a system presents

[27] Always bearing in mind the implied limitation by circumscribing such orders to the specific case.
[28] I use the classification of remedies as *compensatory, corrective and transformative* as the CEDAW Committee does in General Recommendation No. 25 (2004). For a more robust characterization of these remedies, I refer to Alfonso Sierra and Alterio (2021, 1079-1081).

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for the recognition of abortion. The fact of having to justify on a case-by-case basis (and on an *individual basis*) the will to terminate a pregnancy generates consequences that violate rights. First, it allows the reproduction of stigmas, stereotypes, and violence in two ways. On the one hand, it reinforces the message of a victimized woman, without agency, who resorts to abortion because she "has no choice", a woman who will be "traumatized" by the practice and who is allowed to do so as an alternative of last resort to avoid re-victimization, because if she had a choice she would be a "bad woman", selfish, frivolous and a murderer (Triviño Caballero, 2019, 213). On the other hand, in the case of products with "malformations" that are not incompatible with life, the idea is reproduced that some lives are not worthy of being lived, exercising symbolic violence (Iglesias and Palacios, 2019).

Second, it removes the power of decision-making from the pregnant woman, transferring it to the third party with authority to determine that the grounds are met and that the justification is adequate (generally a medical or hospital group, or a judicial agent). In no case is there any recognition of the woman or pregnant person as a moral and autonomous agent, only an attempt not to aggravate an already harmful situation. Thus, the woman is objectified and subjected to invasive procedures to verify the alleged situation, as well as to re-education regarding the consequences of the interruption (meditating the imposition of waiting periods, mandatory counseling, dissuasion techniques, and so on), which represents an unjustified exercise of paternalism (Triviño Caballero, 2019, 208).[29] These procedures not only place her in a situation of dependence and vulnerability but are also sexually discriminatory.[30]

[29] As the author points out, "In the case of minors or women with disabilities, the consent or opinion of third parties (sometimes both parents or guardians) has become the stronghold of control in advanced legislations" (210).

[30] As established in General Recommendation 24 of the CEDAW Committee and affirmed by the SCJ, AR1388/2015 (2019, para 107) "When women request specific services that only they require, such as the termination of pregnancy for health reasons, the denial of such services and the barriers that restrict or limit their access, constitute acts of discrimination and a violation of the right to equality before the law". Similarly, para. 137-8.

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Lastly, it generates legal insecurity since, until the exculpatory excuse is reliably established by whoever has the authority to do so, both the pregnant woman and any person who may assist her in the termination of the pregnancy are committing a crime and may be subject to sanctions. This is a powerful inhibiting reason that can bend the will of the pregnant person, in addition to generating a strong incentive to abstain from assisting her, which ultimately results in the systematic denial of abortions, even when the situations foreseen by the law are present (see Pou Giménez, 2019).[31]

3.3. The "Health" Causal Ground as a Springboard Towards a Conception of Relational Autonomy

Although AR 1388/2015 decided on health-related grounds (ruled in 2019) remains within the logic of exculpatory defenses, and, therefore, within the paradigm of abortion as a criminal offence, and consequently within a framework that individualizes both access to abortion and reparations for violations of such access; the forcefulness of the arguments made by the Court warrant its analysis in a separate section.

The case deals with a woman with serious health conditions and a high-risk pregnancy in which the fetus presented Klinefelter syndrome and whose request for termination of pregnancy was denied by the hospital. After unfavorable rulings in the lower instances, the case reached the Supreme Court. There, for the first time, the human rights of women appear in the foreground, with a development that, at times, makes it difficult to conceive of a circumstance in which abortion would still be considered punishable.

The Court in AR 1388/2015 (para 84) uses a definition of the right to health in terms of international standards as "the right of every person to the enjoyment of the highest attainable standard of physical and mental health", which implies considering, among others, the socioeconomic factors that

[31] It is also the central argument used by the Inter-American Court of Human Rights to condemn the State in the case *Beatriz y ots vs. El Salvador*, Merits, Reparations and Costs (2024).

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make it possible to enjoy a healthy life, including the fundamental determinants of health and access to health protection services (para.108).[32] From there, the SCJ affirms that the harm (which enables it to request the termination of pregnancy) can only be measured according to *individual* standards, which "must be defined by the women" (para.118), and which will be given "not only in those cases in which [pregnancy] causes them physical harm but also in those cases in which their *well-being* is harmed, including whatever each woman understands as constituting *being* well" (para. 119).

In order for women to be able to make this autonomous decision, according to the Court, the State (including all public and private agents that make up the health system) must not only refrain from hindering – and guarantee that third parties do not hinder – the exercise of this right, it must also create the necessary conditions including infrastructure, regulation, human and economic resources, as well as supplies and sanitary conditions to ensure women's access to abortion for health-related reasons (para. 126, 127, 136).

In addition to these developments, the highest Court analyzes the procedural conditions for access to justice and the available remedies through *Amparo*, applying a gender perspective. First, the Court dismisses the grounds of inadmissibility based on the alleged lack of purpose of the *Amparo* action, raised on the basis that the woman had already undergone the interruption of her pregnancy at the time the case came before the courts. In this sense, the Court established that applying the "neutral" rule of inadmissibility implies an act of discrimination against women. Pregnancy is a biological process that is only experienced by people with a female reproductive system and has a fatal termination period. The strict application of the rule of inadmissibility would make *Amparo*, and the restitution of rights that it facilitates, inaccessible to women when they suffer violations of their right to health.

[32] This is important because it highlights the positive aspect of the right to health, which, as a person's well-being, is only possible in a social context and not in the abstract, which gives a relational perspective to the enjoyment of the right. Hence, the link it presents with the right to liberty, autonomy, and free development of the personality is evident in the "right to make decisions about one's own health and body".

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Furthermore, it clarifies that the authorization to interrupt the pregnancy is not the only effect that can be granted through the *Amparo*, since what is alleged is a health-related harm that is not extinguished with such interruption. The effect of the *Amparo* can be to order the restitution of the right to health through the provision of medical care services to combat the sequelae and complications resulting from the refusal to perform the abortion when it was requested (paras. 58-75).

As I was saying, this *Amparo*, unlike the previous ones, enables, for the first time, the woman to recover her autonomy by empowering her to determine whether the continuation of the pregnancy affects her health. In addition, it provides that certain conditions must be met for the decision to be effectively executed. However, precisely because it is within the framework of the causal ground's regime, the extent of this autonomy is minimal, and the strength of the arguments towards the demands of substantive equality is also limited. This is due to the fact that the reasoning insufficiently presents abortion as a *positive* right linked to the need for the State to create an environment conducive to human procreation (Rubio Marín, 2023, 117).

The reflections expressed in this *Amparo* were taken up again in AR 438/2020 (2021) to constitutionally protect a young 18-year-old woman with severe disabilities, who had been raped, but who had been denied an abortion because the pregnancy had reached 23.4 weeks. The particularity of this case lies in the time of gestation as a possible limit to the exercise of the woman's rights to autonomy and health. An issue that returns to the techniques of constitutional balancing in the face of a conflict of values in the legal system. The criterion established by the Court is

> The term of 90 days from conception for accessing a non-punishable abortion ignores the effects that women suffer as a result of rape and re-victimizes them. Forcing a woman to endure a pregnancy resulting from rape implies structural discrimination that responds to a stereotype that assumes that the primary function of women is procreation. It is intended to force her to bear and continue with a

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https://doi.org/10.6092/issn.2724-6299/20451

> pregnancy that was the product of a crime only because she did not act with the "opportunity" indicated by the legislator. […] Consequently, this protection given to the conceived over the mother constitutes a form of violence against women and violates the right to free development of personality and human dignity. This condition is unconstitutional because it violates the rights of persons with disabilities and minors (Suprema Corte de Justicia de la Nación, 2022, 89; AR 438/2020, para. 137-140).

As can be seen, the Court is forceful in prioritizing women's human rights over the *nasciturus*. Here, not only does it apply the gender perspective to analyze the norms at stake, but also the perspective of disability and the best interests of the child to declare the unconstitutionality of the 90-day time limit. It argues that people belonging to these groups present significantly more conditions of vulnerability that may prevent them from even knowing that they are pregnant as a result of rape. Thus, they cannot seek support from health services within the time limit established by the law, which *establishes a single, generic time limit that unifies all women*, while also ignoring the situation of poverty and extreme marginalization of the claimant (Suprema Corte de Justicia de la Nación, 2022, 94-95).

The latter strengthens the rationale by incorporating an intersectional vulnerability analysis for assessing the law and its differentiated application, emphasizing the contexts in which rights are exercised. This approach is typical of conceptions of substantive equality that attempt to accommodate differences to avoid discrimination through uniform norms (Fredman, 2012). Especially concerning the right to autonomy, the argument forces us to remove it from the abstraction that is typical of the liberal constitutional construction, to place it on the plane of interdependence generated by social relations and the opportunities that may or may not arise for its exercise, as suggested by an understanding of relational autonomy.

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4. Constitutional Arguments for Decriminalization

As I mentioned before, the Legislative Assembly of DF (today the Congress of Mexico City) was a pioneer in the region in decriminalizing abortion for the first 12 weeks of gestation in April 2007. This law was challenged by national government officials belonging to the National Action Party (PAN) – the country's conservative party.

The Court had to resolve the constitutionality of the law in AI 146/2007 and its accumulated cases (2008) which, in chronological terms, was the second time it had to rule on abortion after AI 10/2000, already mentioned in 3.1. This context is noteworthy because, unlike in other countries, these matters came before the Court after a majority-led political decision had already been made in favor of liberalization. In this sense, the Court did not have to construct arguments for decriminalization but only evaluate whether those used by the democratic instance were constitutionally admissible. The Court said yes.

In a judgement that was preceded, for the first time, by the use of public hearings, the Court was deferential to the reasoning of the Legislative Assembly and established the following relevant criteria.

(i) The right to life is not absolute (AI 146/2007, 161).

(ii) Article 4 of the American Convention on Human Rights establishes that life ought to be respected, "in general", from the moment of conception, thus allowing States to provide abortions. In addition, Mexico made a reservation to the said article and, therefore, has no obligation to protect life from conception (AI 146/2007, 171).

(iii) There is no constitutional obligation to criminalize abortion. The Legislative Assembly carried out a balancing, the result of which was the duty to decriminalize abortion in the face of the State's obligations regarding health, information, and responsibility in women's decision-making (AI 146/2007, 180):

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> The general justification of the measure [...] was to put an end to a public health problem derived from the practice of clandestine abortions, [...] to guarantee equal treatment to women, specifically to those with lower incomes, as well as to recognize their freedom to determine their sexual and reproductive life; to recognize that there should be no forced maternity and that women should be allowed to develop their life project in the terms they deem convenient. (AI 146/2007, 181).

And

(iv) The continuation of the unwanted pregnancy has distinctively permanent and profound consequences for the woman (...), and it is this asymmetrical effect on the woman's life plan that establishes the basis for the different treatment that the legislator considered in granting her the final decision as to whether the pregnancy should or should not be terminated, which does not make it unreasonable to deny the male participant the capacity to make this decision. (AI 146/2007, 188).

Thus, the Court considered that the law is suitable to safeguard the rights of freedom and non-discrimination of women, the opposite of which would equate to criminalization (AI 146/2007, 183-184).

I want to highlight the understanding of equality embodied in this seminal judgment. By recognizing the specific contexts in which the practice occurs and its consequences, as well as the fact that men and women are in an asymmetrical situation in the face of pregnancy – and that it is constitutional for the law to treat them differently – the Court moved away from formal interpretations of equality and thus from assimilationist approaches (Rubio Marín, 2023, 93-101). With these considerations, the Court laid the foundations for approaching reproductive autonomy as an intelligible right in contexts tending to guarantee substantive equality, which would only be consolidated jurisprudentially 13 years later.

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This argumentative construction, however, has not been found in other decriminalization processes. Although I am not interested in making a comparative study here, I would like to mark a counterpoint with rulings that followed the line of the emblematic *Roe v. Wade* case previously cited, which was based on a woman's right to privacy (or the right to be left alone), requiring non-interference by the State. That type of constitutional underpinning, which I have described as *liberal and negative,* has been met with strong criticism within feminism insofar as it omits equality considerations (Siegel, 1995) and encourages a narrative where autonomy is equated with the right of ownership over one's own body (Phillips, 2011, 2013). I cannot here expand on all the implications this has concerning abortion, but I would like to point out some issues to consider the contrasts.

The first is contextual: the U.S. Constitution does not include social rights or gender equality rights as most Latin American constitutions do (or the international treaties to which they adhere) (Fineman, 2010, 254-255). In fact, at the time of the *Roe* decision, the U.S. Court had not even begun to develop its jurisprudence on sex discrimination (Siegel, 1995, 60). This historical particularity has served as an excuse for the recent backlash against the austere interpretation of a woman's right to terminate a pregnancy.

The second has to do with the anchoring of abortion in reasons of sexual rather than gender differences. As Reva Siegel (1995, 54) explains, by omitting considerations of equality, the physiological process of pregnancy is abstracted from the social context in which women live as if it were an issue related to their bodies and not to their roles. This, which seems to have been overcome, becomes relevant today in the face of "gender-critical" feminist theories that are favoring the re-anchoring of the legal protection of women (*cis* only) to their biology, with all the negative consequences that this entails (see Butler, 2024; Alterio, 2024).

The third and final point concerns the implications of a "proprietary" narrative of autonomy (see Nedelsky, 1990). Not only because this understanding refers to individualistic and negative conceptions of rights

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(which are at the antipodes of the recognition of abortion as a social right), but also because of how this metaphor is projected to other important debates for feminism. I refer to how the language of "ownership over one's own body" can invoke, as Anne Phillips points out, its availability in the marketplace and its price in it, obscuring the power relations that are intrinsic to such a context (Phillips, 2011). This is concerning if you consider autonomy in other planes of reproduction or sexuality, such as surrogacy or sex work (see Nussbaum, 2022, Phillips, 2009).

A liberal approach to autonomy, which ignores the structural inequality in which many women make decisions – that is, which does not take into account situations of vulnerability, the network of social relations in which they are immersed, the availability (or not) of options that are available to them, and which only concentrates on the decision – privatizes the burdens that these entail and places women in the situation of being responsible for all their consequences (Jaramillo Sierra, 2018, 19). This approach is the opposite of a relational articulation of autonomy and is an advantage that the Mexican Court has not used.

5. The Path Towards the Legalization and Consecration of Abortion as a Fundamental Right

The next decriminalization case occurred in a different context (GIRE, 2024, 65). Abortion was already legal in 4 states of the Republic,[33] and the Court had openly adopted women's rights as its banner. Among the issues it had to resolve, it ruled on the constitutional possibility of criminalizing abortion. This time, the Court was no longer deferential to the Legislature. While in 2007, it had said that the Legislature *could* decriminalize, it had not said that those states that continued to opt for criminalization were contravening the Constitution. This was reversed on September 7, 2021, when AI 148/2017

[33] In addition to Mexico City (2007), Oaxaca decriminalized up to the 12th week of gestation in 2019, Hidalgo in June 2021, and Veracruz in July 2021.

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declared unconstitutional the articles of the criminal code of Coahuila that criminalized the practice.

In a new balancing exercise, the SCJ established that the punitive route does not harmonize the right to decide of women and people with the capacity to gestate, with the constitutional purpose of protecting the life of the conceived, but rather annuls the former entirely (AI 148/2017, para. 266). Furthermore, making abortion a crime implies discriminating against people with gestational capacity since it assumes that their destiny is to be mothers (GIRE, 2024, 62, 70-71). Hence, the Court opted to *redefine the practice* of abortion in a destigmatizing direction, establishing that it is "necessary to eliminate the treatment that this expression receives and that is equated, by the design of the legal system, with a *crime*, since this [...] perpetuates a stereotype of gender concerning the role of women in society" (AI 148/2017, para. 264). In this sense, the Court opted for a transformative narrative, which *focuses on the future*, on the life project of women and people with the capacity to gestate, which it hopes can be free of stigmas and stereotypes, overthrowing the motherhood mandate.

Although anchored in an idea of substantive equality, this attempt at re-signification is based on a conception of agents capable of "self-authorizing" themselves for specific actions (Johnston, 2022,127). As Mackenzie (2014, 35) states, part of self-authorization – one of the dimensions of autonomy – is given by the social recognition condition: "that others regard the person as having the social standing of an autonomous agent". Dismantling prejudices and social stereotypes enables social recognition and self-authorization, thus increasing autonomy.

At the same time, the Court recognized without restrictions the "exclusive" right of women and people with gestational capacity to self-determination in matters of maternity (naming it reproductive autonomy),[34] which is enshrined

[34] It is important to note that this concept comes from the Inter-American Court of Human Rights, which recognized it in the case *Artavia Murillo et al. (In Vitro Fertilization) v. Costa Rica*, Preliminary Objections, Merits, Reparations, and Costs, Series C No. 257 (2012).

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in Articles 1 and 4 of the Constitution (AI 148/2017, para. 154-155, 195). Furthermore, it anchored the fundamental right to decide in the "reproductive justice" notion, which includes the right to self-determination, bodily autonomy, and physical and psychological integrity (AI 148/2017, para.129). In an argument that explicitly departs from any paternalism,[35] the Court affirmed that "reproductive freedom [...] implies that *it is not up to the State to know or evaluate the reasons for continuing or interrupting a pregnancy, since they belong to the woman's private sphere*, and can be of the most diverse nature" (AI 148/2017, para. 130). With this, the Court abandons the rationale of justification based on causal grounds and returns the decision to the pregnant person in all cases.

Although a firm liberal anchorage could be found in this foundation of the law, *the* fact is that the Court bases the law on a robust conception of equality that, in its words, "seeks to eliminate factual or legal assumptions based on a social hierarchy of supposed biological order", that is, it seeks to incorporate a vision of non-subordination or non-domination between genders (AI 148/2017, para. 89, AR 267/2023, para. 62). From there, it dedicates a good part of the decision to clarifying the conditions of inequality, marginalization, and precariousness in which many women in the country find themselves, pointing out how they influence their decisions (AI 148/2017, para. 132-135). Consequently, it recognizes that "it is necessary to establish the scope of the right to decide as a requirement for the State to implement specific measures useful for its materialization" (AI 148/2017, para. 138). Among the *positive* measures mentioned are sex education, access to information, recognition of the woman as the holder of the right to decide, and the guarantee that she can interrupt her pregnancy in public health institutions in an accessible, free,

[35] "A paternalistic position that supports the idea that women need to be 'protected' from making certain decisions about their life plan, sexual and reproductive health, has no place in the annulment of the right to decide since this approach entails a disregard for women as rational, individual and autonomous beings, fully aware of the decisions that – following their life plan – are the ones they consider most convenient". (AI 148/2017, para. 73).

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confidential, safe, expeditious and non-discriminatory manner within a period close to the beginning of the gestation (AI 148/2017, para.140-164).[36]

One last consideration about the case, which enables me to recover a mentioned point, is that the Court insists on making distinctions according to the context. On this occasion, when analyzing the timeframe that the legislation set for non-punishable abortions (which it declares unconstitutional), the Court establishes that the legislation that allows access to abortion must differentiate cases according to the situation of the woman or the pregnant person. Thus, if the antecedent is an unlawful conduct that forced the sexual and reproductive rights of the woman, special provisions must be provided to address the particularities of such a scenario. With all this, the Court consolidates its departure from the postulates of universality and abstraction that are typical of the liberal paradigm and applies considerations of intersectionality to the conditions for reproductive autonomy.

After this ruling that decriminalized abortion in Coahuila, and perhaps because of the radical nature of its argument, decriminalization followed in many other states. In 2021, it was legalized in Baja California and Colima; in 2022, in Sinaloa, Guerrero, Baja California Sur, and Quintana Roo. In 2023, Aguascalientes had to decriminalize after a conviction, and in 2024 Jalisco, Zacatecas, Nayarit, San Luis Potosí, Chiapas and Yucatán had to do the same. Finally, it was decriminalized in the States of Puebla, Michoacán, and in the State of Mexico in 2024, in Campeche in February 2025, and through the courts in Chihuahua in January 2025, making a total of 21 States (out of 32) where abortion is not punishable.

In AR 267/2023 of September 2023, the criminalization in the Federal Criminal Code was also declared unconstitutional. This *Amparo* reiterates the argumentation of AI 148/2017. However, its effects are remarkable as it

[36] Note that the establishment (without specifying) of this "short period close to conception" to exercise the right to decide is the formula used by the Court to "balance the coexisting elements and provide a scope of protection to both the conceived and the reproductive autonomy" (AI 148/2017, para. 198).

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declares the norms inapplicable for all people in the legal sphere of the complaining association, not only in the present and in the future, but also retroactively to those already prosecuted or sentenced for the crime (see AR 267/2023, para. 218-223). This is the closest to general effects that an *Amparo* trial for abortion has ever had. Another point to note is that the *Amparo* was promoted by GIRE, a civil association dedicated to the defense of reproductive rights. That its legal standing was accepted is exceptional in Mexico and has the consequence of opening up judicial representation and participation, as well as extending its effects far beyond when the complainant is an individual woman (or several women). This is an issue that I cannot deal with here, but which can reinforce the Court's commitment to the participatory dimension of substantive equality.

6. Conclusions

Throughout this article, I have sought to highlight different constitutional arguments that have been developed with regards to access to abortion until its consecration as a fundamental right, and how these arguments reflect different conceptions of autonomy. I have insisted on the consequences of each, even when the justifications are not explicit, and I have linked them to the conceptions of equality that have accompanied them.

Along the way, on the one hand, I have rejected paternalistic arguments for access to abortion in the causal systems, both because of their problematic reinforcement of gender stereotypes and symbolic violence and because they are not particularly transformative since they focus on the past. On the other hand, I have welcomed constitutional approaches based on the right to substantive equality, allowing us to understand autonomy in relational terms. Regarding the arguments of a negative liberal conception of autonomy, I suggest that although they have been present in Mexico in a subsidiary way, they have not been the basis for women's rights, enabling them to benefit from greater scope and a transformative vocation. The whole construction

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https://doi.org/10.6092/issn.2724-6299/20451

that emerged from *Roe* and inaugurated the constitutionalization of abortion at the international level is alien to Mexican constitutionalism and, I suggest, also to Latin American constitutionalism, which is rather founded on a robust understanding of social rights and substantive equality. It is time for the normative force of these arguments to become a reality in the daily lives of all women.

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ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/20451

ATHENA

CRITICAL INQUIRIES IN LAW, PHILOSOPHY AND GLOBALIZATION

They Called It Peace: Worlds of Imperial Violence

LAUREN BENTON, PRINCETON, OXFORD, BEIJING: PRINCETON UNIVERSITY PRESS, 2024, 304 PP., ISBN 9780691248479

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ABSTRACT

Lauren Benton's new book, *They Called It Peace*, offers a comprehensive view of the various forms of violence that European empires deployed overseas from the early modern period to the 19th century. These forms of violence—ranging from household abuses and slavery to deliberate killings and mass exterminations—soon became routine mechanisms for maintaining colonial rule. As the author convincingly demonstrates through a solid theoretical framework and rich historical evidence, small wars were far from marginal, despite being represented as such by Europeans. Rather, they had global implications for legal, political, and cultural imaginaries, resonating to this day. This review aims to highlight the book's important contributions to both the history of international law and global history.

Keywords: global history, international law, empires, colonialism, war

ATHENA
Volume 5.1/2025, pp. 207 - 217
Book Reviews
ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/19837

1. Introduction

Lauren Benton's new book, though looking at a very distant past, is extremely relevant for contemporary times as it offers a critical perspective on the thin and often blurred differences that divide what we consider 'peace' and 'war.' Indeed, by enquiring how seemingly negligible forms of political violence that have taken place in the margins of European empires have had global implications, the book is an occasion to reflect on political patterns of the past that still haunt the present. *They Called It Peace*, starting from the poignant title borrowed from Tacitus's *Agricola*, is a rich journey across the ways political violence has been practiced, perceived, and justified throughout early modern empires.

For those interested in the intertwining histories of European imperialism and law, Benton is a renowned and well-known scholar. This book, while standing in continuity with the author's two-decades-long intellectual project of unbundling the imperial legacies that constitute the modern international,[1] adds something significant. In *They called it peace* Benton focuses specifically on political violence, with the aim of enquiring how it acted throughout modernity as a catalyzer of legal, diplomatic, and cultural practices. In particular, the author looks at how minor forms of political violence, the so-called small wars, defined the 'rhythms' and the very logics of imperial administration between the 16th and the 19th Century, having important ramifications beyond the colonies (Benton 2024, xiii). The main goal of the book is to challenge the idea that small acts of violence in distant places, far away from the *Metropole* and from the sight of 'enlightened men', had a minor significance in the emergence of global orders. This conception was a commonplace among Europeans, often corroborated and carried on by Western historiography and Western literature depicting history as a sequence

[1] Just to mention a few of Benton's key contributions on the history of imperialism and law, see Benton 2009 and Benton and Ford 2018.

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/19837

of major wars and peace treaties. This exotic approach to imperial violence has prevented an appraisal of the central role that small wars played in defining the political and legal imaginaries of war and peace all over the world.

Benton's question stems exactly from this, namely from the intuition that small wars were not simply small, but they were single parts of a trend to keep imperial dominion in a phase of transition from conquest to power consolidation overseas. Such a consolidation never really happened as a linear and successful endeavor, since European imperialism, as Benton shows, has always been an incoherent struggle of tracing borders between inside and outside, public and private, slave and master, trade and plunder, peace and war. Thus, and this is how the core argument of the book emerges, small wars were not only fundamental in the attempts to conquer, but they were also foundational processes in the definition of empires' waxing powers and in the consolidation of imperial political 'orders.' Small wars became routine practices that extended violence in space and time, sometimes with phenomena of private abuses and brutality, other times with forms of open extermination and mass atrocity. Small wars were most of the time portrayed as minor episodes in utopian projects of world peacemaking, but, beyond this, they acted as karstic boosters for larger wars, paradigm shifting and epochal transitions. In sum, the book reveals that in the last four centuries small wars were truly global events.

To present this argument the author has split the book into two parts, also to offer a chronological sequence to the reader. In the first part the author looks at the early-modern waves of imperial violence which she calls a 'global regime of plunder'; while in the second part she shows how these scattered forms of plunder took a more legal and formalized shape with the 'global regime of armed peace' that characterized European imperial violence across the 18th and 19th Century (Benton 2024, 101). The author relies on the one hand on a solid – and to some extent innovative – theoretical framework, which is the combined by-product of sophisticated epistemological

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/19837

considerations, such as the interaction between law and political violence, and a critical perspective on imperialism. On the other hand, Benton relies on rich historical evidence, which is the outcome of a grounded research on colonialism, attentive to local contexts and cultural relativities.

2. Small Wars Between History and Theory

From the theoretical point of view, the book is developed along three argumentative lines, mainly expounded in the first part of the book. The first argumentative line concerns how the term 'small war' entails considerably more intellectual flexibility than the term 'conventional war', both in terms of space and time. Spatially, small war implies a number of places other than the battlefield as well as several different subjects other than soldiers. Imperial agents, households, slave traders, sailors, captains, and even missionaries were actors in small wars. Temporally, small wars could last years or decades as they are characterized by low-intensity clashes, at times interrupted by truces, and then brutally recovered with punishments and massacres. Located into an intermediate sphere between peacemaking, namely the attempt to establish order, and war making, namely the attempt to defeat enemies and subjugate them, small wars' ambiguous spatial and temporal conditions fitted European imperial expansions where the inside and outside were hard to trace. This provides an important explanation for the fact that modern European legal and political categories, as that of enemy, rebel, truce, subject, or jurisdiction, were and still are extremely volatile, dependent on the context and the instrumental purpose of their user. As Benton shows, 'for centuries massacres and slaving were classed as lawful and just treatment of enemies who refused to submit. Aggressors represented their victims as peacebreakers or rebels' (Benton 2024, 3). This allows Benton to demonstrate that the poor theorization of small wars depends on the fact that they were fought on the threshold of war and peace, and they borrowed the languages, legal logics, and strategies of both war and peace.

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/19837

This leads to the second argumentative line, namely the importance of language as a fundamental dimension of political violence. Benton explains that political violence historically has always had a linguistic dimension for its justification. Language is a means to make political violence intelligible and eventually to represent it before specific audiences. Especially in imperial violence, where geographically distant events had to be told and reported by direct witnesses, the linguistic dimension played a key role in the *historicization* of political violence (see, for instance, Orford 2021). The author's claim is that despite the fact that their violence took place in distant sites and often fought for low stakes, both Europeans and indigenous strived to provide some basic legitimacy for its exercise. In this respect, law emerged as a key dimension of small wars. Even if logics would suggest that small wars are the opposite of law, they had a substantial legal dimension that historically cannot be disregarded. As Benton shows across the central part of the book, all parties in small wars resorted to legal or quasi-legal arguments as moral, religious or economic discourses. Rarely small wars lacked justifications. In developing this argument Benton adopts a critical view of the laws of war, trying to show that there are no superior sources to international law.[2] International law and the laws of war, following Koskenniemi's (2021, 4–9) definition, are interpreted by the author more as a genre, as a collection of arguments deliberately picked from daily life experience, natural law, history, poetry, science and other domains of knowledge. From this emerges Benton's attempt to use intellectual and social history to challenge the idea of a progressive history in the crafting of the laws of war and to 'expose the myth that law worked to contain violence' (Benton 2024, 198). In imperial lands, where violence was chronic and political order was in the making, justifications and strategies flowed from one side to the other easily: indigenous populations mimicked the vocabulary and arguments of European wars and, sometimes, also the other way around.

[2] Similar arguments are raised, for instance, by Kennedy 2006, Kalmanovitz 2015 and Kingsbury and Straumann 2010.

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/19837

The third and last theoretical line concerns the 'smallness' of small wars. Despite conventional wisdom considers small wars as chaotic, improvised, and shapeless, especially if compared to conventional wars fought in early modern Europe, the book does an important work in unpacking this myth. Small wars were rhetorically and instrumentally kept small by their promoters. But reality was that small wars implied in most cases cruel practices as raiding, slaving, raping, and plunder, whose effects were often enduring on social structures and ecosystems. The typical narrative of small wars as asymmetric by definition is partly confuted throughout the book because indigenous populations replicated Europeans' strategies, tactics and weapons in a game of continuous, mimetic actions. This, often, led small wars to escalate to levels of overarching and systematic violence, purposely and indiscriminately directed against children and women (Benton 2024, 10).

From a historical perspective, the book is built around four key points, whose discussion is intended to support the theoretical scaffolding. The first point is the longstanding historiography *topos* of major wars as turning points in history. Benton aims to provide evidence to the reader that the Eurocentric idea of history as nothing but a series of major wars, whose outcome has been the cause of epochal transitions, is not only inaccurate but also blind to the chronic violence undertaken by empires to maintain and expand political power in distant lands. Imperial chronic violence, whose immediate outcome was often not acknowledged, has been both functional to the way of fighting major wars and complementary to their outcome. As the book explains, it has been functional because in distant lands violent methods were tried and experimented with low stakes in order to be exported in Europe later. For what concerns its complementarity, resources, goods, alliances, and even legal excuses used in colonial lands played a fundamental role in the management of empires' power, even in Europe.

The second historical aspect is to demonstrate that European imperialism was far from a large, comprehensive and coherent enterprise. Imperialism was initially played on a small scale and, on a smal scale it remained for a long

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/19837

time, so that small-scale violence became a central aspect of colonial management, a sort of administrative practice, undertaken by an array of different subjects. To prove this, Benton focuses on Latin America and the Pacific, two regions that according to her are less discussed by global historians, and through which it is possible to clearly see the chronic character of violent practices and their initial tiny dimension. This allows, for instance, to explain how the household, an apparently non-political institution, played a key role in the political expansion of empires and represented 'the only pathway available' to turn small 'fortified outposts into settled colonies' (Benton 2024, 63–65). In a very interesting excerpt she explains that 'household expansion' was the strategy adopted by the Portuguese in the 16th Century to form enclaves in the Indian Ocean and few later by the British empire in the Caribbean (Benton 2024, 105). The household was used as the primary outpost to penetrate foreign lands. The household had a basic institutional form – made by a chief (a white man) and a hierarchy of different subjects as woman, servants, soldiers, slaves (generally indigenous), children and so on – and could carry on different activities as production, transformation, trade and small war. The household was the embryonic form of imperial order. As a matter of fact, the Portuguese built a sort of garrison empire overseas, constituted by strategically scattered fortified ports and by small in-land fortresses inhabited by few households. This shows the subtle relationship that existed between private violence and public conquest. As Benton claims, first imperial expansion was, among other things, essentially conducted on a small scale, quasi-private level and war of conquest was rarely public, rather it was more often called 'peacemaking' or 'social ordering' against rebels. From a legal and moral perspective, Benton shows how household in overseas territories could act as frontrunners of the *Metropole* and make small wars for the sake of common good.

The third point is to highlight the linkage between small violence, global order, and peacemaking. The book illustrates how the connection between constant episodes of violence and the constitution of political orders became

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/19837

a structural element of European empires. Small war was, first of all, undertaken under the 'imperative of maintaining order', especially for the flourishing of commerce and for the survival of traders. Small violence reached such a frequency that it became the ordinary practice for empires to keep control over economic, political and social orders around the world. As Benton notes, 'as imperial small wars multiplied, they gave rise to new institutional gambits and experiments […] Many of the effects carry into the present' (Benton 2024, 13). The imperative of order and its promise of peaceful coexistence were often presented as sufficient reasons to accept violence. Thus, violence could be portrayed as peacemaking, or as a temporary shift towards definitive peace.

The fourth and probably most ambitious historical point is part of Benton's two-decades-long intellectual project and concerns the continuities of imperial logics, rationales, and languages in the history of the so-called international. Indeed, in multiple parts of the book Benton stresses the significant legacies of imperialism in what we conventionally deem international politics. As she states in the introduction, 'the age of empires is in many ways still with us […] many continuities in the mechanism, justifications, and rhythms of war across global and international orders. When twentieth-century empire states packaged their violence, for example, as an inside job – a work of policing, not war – they were drawing on an imperial repertoire' (Benton 2024, xiii). This reconnects to the relevance of the book for the current understanding of international dynamics.

In terms of style, though stimulating and rich, the book is accessible, even to those who have a modest command of early modern history of empires. In fact, only some minor critiques can be raised. The first is a stylistic critique about the argumentative structure of the first part. The theoretical generalizations in the opening chapters could be matched with more historical examples. This would strengthen the intelligibility of the theoretical edifice, guiding the reader to understand the subtleties that emerge from Benton's interpretation of the connections between law and political violence. The

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/19837

second one is a conceptual critique. Benton could devote more room to explain the concept of 'small war.' My impression is that Benton too often gives the concept for granted, at least from a semantical point of view. Though the book evidently deals with another theme, the concept of 'small war' could be the object of a deeper and more critical conceptual analysis, aimed at showing the slippery, yet structural, semantics of this concept for Western imaginary of major wars. For example, a digression on some classics on the topic such as Callwell's (2010) *Small Wars: Their Principles and Practice*, could help the reader to frame the emergence of 'small war' in the context of late 19th Century imperialism. The third one is linked to the second critique. The author could further emphasize the conceptual relationship between 'small war' and 'peace' (or 'peacemaking'). There is barely a reference to the fact that the concept of 'peace' is effectively a 19th Century invention, imbued with Eurocentric and parochialist views of the world, loaded with anti-revolutionary intentions, and often waved to cover imperialist aspirations and inhumane policies. 'Peace' could be the object of a larger discussion centered on the derogative and strongly hierarchical semantics that this modern concept implies, especially when deployed in close connection to political violence.

3. Conclusions

Overall, the book is exceptionally valuable in showing how our extremely fragile distinction between war and peace has always been a land of legal discussion, political negotiation, and power assertion from early to late modern times. And, indeed, as a book of global history, *They Called It Peace* does a great job in deconstructing and showing the extent to which the typical dichotomies on which traditional Eurocentric history is based on are contingent; as, for example, the dichotomy private-public, domestic-international, international-imperial, war-peace. Benton, of course, does not cynically dismiss the distinction between peace and war as fiction. Rather,

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/19837

she tries to highlight how it created grey and intermediate areas where other forms, such as the small war, proliferated and had systemic effects, comparable to that of major wars and epochal peace agreements.

Especially in a time sparked by uninterrupted cycles of violence as ours – where the distinction between peace and war crumbles, where forms of violence and their justifications, though new, seem frequently to recall episodes from the last four centuries – this book provides the reader with significant tools to decipher from a historical and critical perspective the incessant oscillation between peace and war that made and re-made modern international politics.

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ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/19837

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