

POWERFUL STATES AND INTERNATIONAL LAW: CHANGING
NARRATIVES AND POWER STRUGGLES IN INTERNATIONAL COURTS

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I. INTRODUCTION

This article examines changing attitudes of powerful states towards international law and their attempts to instrumentalize international law in order to pursue their larger geopolitical goals. Both China and Russia have been advancing their regional narratives of international law that reiterate the importance of the principle of sovereignty, which is viewed as indivisible and absolute, in stark contrast to the Western understanding of sovereignty constrained by human rights. The Trump administration of the United States of America has chosen to disengage from the matters of international law while focusing on national interests and placing “America first.” Hence, the role of the United States, which used to be a powerful actor in advancing international law,

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has been largely reduced to that of a passive observer that at times loudly disagrees on the principal matters of international law (climate change, refugees, global warming, nuclear weapons, etc.). The situation has placed rising powerful states, such as China and Russia, in an advantageous position. Although they used to take a “back seat” in these matters, they are now taking the lead on shaping alternative narratives of international law.

Whereas powerful states exhibit changing attitudes towards international law, the wronged states affected by Russian, Chinese, or American foreign policies are not afraid of taking on powerful adversaries in international courts. Russia’s involvement in the conflicts in neighbouring satellite states has generated an unprecedented number of disputes before international courts. Currently, the Prosecutor of the International Criminal Court (ICC) examines the alleged crimes committed by Russians during a short-lived Russia-Georgia war (2008), as well as the alleged crimes associated with the occupation of Crimea and the ongoing armed conflict in eastern Ukraine. Two lawsuits were filed against Russia to the International Court of Justice (ICJ) on the basis of the International Convention on the Elimination of All Forms of Racial Discrimination, or CERD, (Ukraine and Georgia) and the International Convention for the Suppression of the Financing of Terrorism, or ICSFT, (Ukraine), which were followed by the initiation of inter-state arbitration proceedings against Russia based on the United Nations Convention on the Law of the Sea, or UNCLOS, (Ukraine). China has been fighting tooth and nail to assert its sovereignty rights and protect its maritime interests in the South China Sea, albeit unsuccessfully, as the South China Sea arbitration award demonstrates. Iran and Palestine went ahead with lodging lawsuits against the U.S. before the ICJ in response to the American foreign policy decisions in the Middle East. The ICC put Americans on its radar when the ICC Prosecutor, acting *proprio motu*, began to look into the alleged misconduct of U.S. troops and CIA agents on the territory of Afghanistan and other European states (home to the so-called “black sites”). The completion of the ICC Prosecutor’s long-standing preliminary examination coincided with the Trump’s presidency, whose administration officials launched a full-blown offensive against the Court.

This article explores the links between emerging regional narratives of international law advanced by powerful states (Russia, China, and the United States), and the response to such regionalization of international law in the form of instrumental “lawfare” from weaker states that find themselves at loggerheads with powerful adversaries. The article poses important questions underlying ongoing academic discussions on international law. What is the rationale behind the emergence of regional narratives of international law advanced by powerful states? What does the phenomenon of instrumental “lawfare” involving powerful states mean for the development of international law? Are there any discernible patterns across international courts in the strategies pursued by powerful states to fend off litigation attempts initiated by weaker adversaries? Are less powerful states *guardians* of the preservation of international law?

II. CHANGING NARRATIVES OF INTERNATIONAL LAW

A. *Russia's Narrative of International Law*

Following the collapse of the Soviet Union and its doctrine of international law coloured by extensive references to Marxism and Leninism, Russian scholars attempted to revamp the school of international law and align it with a more Western understanding of international law. While it appears that Russian scholars use the same international law vocabulary as their Western colleagues, a more in-depth examination of the meaning accorded to major international law principles and concepts reveals that there are fundamental differences in the way international law has been perceived and construed in Russia.¹ On each occasion, Russia affirms its commitment to the fundamental principles of international law, such as the principle of sovereignty, the principle of peaceful settlement of international disputes, and the principle of self-determination. The principle of sovereignty is given the status of a “holy cow:” it is perceived as indivisible and absolute.² Most controversially, in the recent jurisprudence of the Russian Constitutional Court, the principle of sovereignty was elevated to the rule of *jus cogens*.³ Globalisation, interdependence between states and multilateralism are perceived as something threatening, contributing to the erosion of the principle of sovereignty.⁴

As described below, Russia's narrative of international law firmly grounded in the inviolability of sovereignty resembles Chinese approaches towards international law and its commitment to the Five Principles of Peaceful Coexistence (1954). Much effort has been invested by both states to validate and communicate their autonomous vision of international law, including through the adoption of the Russian-Chinese joint declaration on the promotion of

¹ LAURI MÄLKSOO, *RUSSIAN APPROACHES TO INTERNATIONAL LAW* 87 (2015). *See also* Iryna Marchuk, *Russia, International Law and the International Court of Justice*, in *RESEARCH HANDBOOK ON THE INTERNATIONAL COURT OF JUSTICE* (Edward Elgar Publishing, Achilles Skordas ed., forthcoming).

² A. Moiseev, *Соотношение суверенитета и надгосударственности в современном международном праве: в контексте глобализации* [*Relationship Between Sovereignty and Supranationalism in International Law in the Context of Globalisation*] (2007) (Doctoral Dissertation Summary, Diplomatic Academy of the Ministry of Foreign Affairs of the Russian Federation).

³ Decision of the Constitutional Court of the Russian Federation on the Possibility of Enforcement in Accordance with the Constitution of the Russian Federation of the Decision of the Eur. Ct. H.R. of July 31, 2014 in the Case of OAO Neftyanaya Kompaniya Yukos v. Russia, 1-П/2017, Jan. 19, 2017, para. 2. For more, *see* Marina Aksenova & Iryna Marchuk, *Reinventing or Rediscovering International Law? The Russian Constitutional Court's Uneasy Dialogue with the European Court of Human Rights*, 16 INT'L J. CONST. L. 1322 (2018).

⁴ L. Terentjeva, *Концепция суверенитета государства в условиях глобализационных и информационнокоммуникационных процессов* (*The Concept of Sovereignty in Light of Globalisation and Technological Developments*), J. HIGHER SCH. ECON. 187 (1998).

international law (2016), in order to dispel myths that *their* understanding of international law and its underlying principles is a shield to excuse themselves from international responsibility.⁵ The endorsement of the respect for sovereignty of other states and the non-intervention principle run contrary to Russia's own misconduct in Ukraine, where it annexed Crimea following the ousting of the Yanukovich regime after the Maidan protests and got militarily involved in the conflict in eastern Ukraine. As rightly pointed by one commentator, the declaration is the joint effort by both countries to rebut the Western vision of international law rooted in human rights and democratic legitimacy of governments, portraying it as the departure from "the original purpose of the UN Charter as the constitutional treaty of the international community."⁶

Russia's highly influential public figures, such as the Chairperson of the Russian Constitutional Court, Valerii Zorkin, also condemn the "flawed" Western understanding of the principle of sovereignty in international law, which, in his opinion, is greatly undermined by globalisation and the expansive use of the liberal human rights doctrine. He develops his argument by emphasizing that globalisation is fraught with the substitution of multilateralism with unilateralism, the latter being imposed by the "selfish politics" of superpowers, such as the United States.⁷ He refers to the Western terms of "soft sovereignty," "the right of ethnic groups and regions to self-determination," and "humanitarian interventions" as examples illustrative of the erosion of the principle of sovereignty.⁸ Zorkin denounces the use of human rights as a tool to intervene in the internal affairs of the marginalised states or the so-called "failed" states in violation of the principle of non-intervention under international law.⁹ In Russian public debate and academic scholarship, attention is drawn to the dichotomy between Russian understanding of international law rooted in upholding the UN Charter, and the Western understanding of international law aided by the expansive human rights doctrine, the latter being perceived by

⁵ Hanqin Xue, *Chinese Observations on International Law*, 6 CHINESE J. INT'L L. 83, 84 (2007) [hereinafter *Chinese Observations*]; see *The Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law*, THE MINISTRY OF FOREIGN AFFAIRS OF THE RUSSIAN FEDERATION (June 25, 2016), https://www.mid.ru/en/foreign_policy/position_word_order/-/asset_publisher/6S4RuXfeYIKr/content/id/2331698 [hereinafter 2016 Russia-China Declaration].

⁶ Lauri Mälksoo, *Russia and China Challenge the Western Hegemony in the Interpretation of International Law*, EJIL: TALK! BLOG OF THE EUR. JOURNAL OF INT'L LAW (July 15, 2016), <https://www.ejiltalk.org/russia-and-china-challenge-the-western-hegemony-in-the-interpretation-of-international-law/>.

⁷ Valerii Zorkin, Апология Вестфальской системы (*Apology of the Westphalian System*), RUSSIAN GLOBAL AFF. (Aug. 22, 2006, 2:30 AM), <https://rg.ru/2006/08/22/zorkin-statjya.html>.

⁸ *Id.*

⁹ *Id.*

Russia as a cover-up for the Western interventionist policies.

However, Russians are quick to adopt the concepts of international law, which they earlier criticised for being against the very nature of the principle of sovereignty in international law, when such concepts are useful to justify their own military conduct abroad, in particular in Russia's satellite states. The Responsibility to Protect (R2P) doctrine was frequently referred to as a justification for waging the war in Georgia. The right to self-determination and remedial secession have often been relied upon to endorse South Ossetiya's and Abkhazia's proclamation of independence, as well as Crimea's "reunification" with Russia. The State Duma authoritatively viewed independence of Georgia's two breakaway republics as the means "to prevent the return to the conflict, to restore peace and security in the region, and foster international cooperation in accordance with the principles enshrined in the UN Charter."¹⁰ It also underlined that over the years of de facto independence the people of both republics "have developed into democratic states with all attributes of statehood, therefore having more grounds for international recognition than Kosovo."¹¹ Therefore, it appears that Russians have demonstrated a particular skill in instrumentalising international law when it suits their larger geopolitical interests and goals.

B. China's Narrative of International Law

China's understanding of international law is very much anchored in the strict adherence to the principle of sovereignty. As pointed by Judge Xue Hanqin, China's take on sovereignty is often "misinterpreted in the West as a disregard of international law, or worse still, considered an excuse to evade its international responsibility."¹² China has routinely been branded in the West as "an exporter of human rights violations,"¹³ which range from the clampdown on human rights defenders and activists through detention and politically motivated trials to interference with the rights of free expression and freedom of assembly (e.g. recent Hong Kong anti-government protests).

The Western states and international organizations have on many occasions emphasized China's non-compliance with international law. However, China maintains that it is largely misunderstood, as it upholds its obligations under international law. In that regard, it often refers to the 1954 Five Principles of Peaceful Coexistence, which were adopted to communicate its vision of international affairs and based on the "mutual respect for each other's territorial

¹⁰ Постановление Государственной Думы Федерального Собрания Российской Федерации № 843-5 (Decree of the State Duma of the Russian Federation No. 843-5) (Aug. 25, 2008), <https://www.lawmix.ru/expertlaw/54382>.

¹¹ *Id.*

¹² *Chinese Observations, supra note 5.*

¹³ Ankit Panda, *Reflecting on China's Five Principles, 60 Years Later*, DIPLOMAT (June 26, 2014), <https://thediplomat.com/2014/06/reflecting-on-chinas-five-principles-60-years-later/>.

integrity and sovereignty, mutual non-aggression, mutual non-interference in each other's internal affairs, equality, and cooperation for mutual benefit and peaceful co-existence."¹⁴ The Principles are still very much at the heart of China's foreign policy after 65 years since their adoption. China repeatedly refers to the Principles to justify its voting practices at the United Nations Security Council (UNSC). No amount of pressure exerted by other states and actors, particularly with respect to the human tragedy in Syria, could convince China to depart from its strict adherence to the principles of sovereignty and non-intervention in other states' affairs.¹⁵ China adopts a rather pragmatic "compartmentalized" approach to international law: it sees a great potential in advancing international trade and its economic interests through enforcement of international law in the field of international economic law; however, it remains less enthusiastic about upholding international human rights law at the backdrop of unfolding human rights problems it has faced over the last years at home (secessionist movements in Tibet and Hong Kong).

China remains particularly sceptical towards doctrines of international law that have acquired greater popularity in the West over the last years, in particular the concept of R2P and the principle of universal jurisdiction, which it views as encroaching upon sovereignty. China maintains that the concept of R2P is overly intrusive, since it interferes with sovereignty by entitling any state(s) to take measures on the territory of another state(s) in the name of the protection of human rights.¹⁶ Likewise, it disapproves of national courts turning into "quasi-world" courts by rejecting immunities of state officials and prosecuting them on the charges of international crimes.¹⁷ Whereas the ICC is a treaty-based body that does not have universal jurisdiction over international crimes, China finds worrisome that the Court may under certain circumstances exercise its jurisdiction over nationals of non-ratifying states who committed crimes on the territory of States Parties to the Rome Statute.¹⁸ Ultimately, China strongly upholds its view that the principle of sovereignty accords each State the right to freely choose the governance model most suitable to its needs, which cannot be subject "to external scrutiny and interference."¹⁹ This strict adherence to the concept of sovereignty dates back to Chinese history, as China remains

¹⁴ *Syria War: Russia and China Veto Sanctions*, BBC (Feb. 28, 2017), <https://www.bbc.com/news/world-middle-east-39116854>.

¹⁵ *Id.*

¹⁶ XUE HANQIN, CHINESE CONTEMPORARY PERSPECTIVE ON INTERNATIONAL LAW: HISTORY, CULTURE, AND INTERNATIONAL LAW IN COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 106 (Brill, 2012) [hereinafter CHINESE CONTEMPORARY PERSPECTIVE ON INTERNATIONAL LAW].

¹⁷ *Id.* at 90-91.

¹⁸ Lu Jianping & Wang Zhixiang, *China's Attitude Towards the ICC*, 3 J. OF INT'L CRIM. JUST. 608, 611 (2005).

¹⁹ CHINESE CONTEMPORARY PERSPECTIVE ON INTERNATIONAL LAW, *supra* note 16, at 95.

committed to protect its “hard-won-sovereignty and territorial integrity,” while not tolerating any form of external interference.²⁰ China often portrays itself as being neutral in international affairs and usually refrains from any UNSC initiatives, which it sees as interfering with sovereignty of other states. In return, it does not wish any state or international organization to meddle in its sovereign affairs.

While China portrays itself as a peacemaker that prefers to settle international disputes through negotiations, it appears to defend its sovereignty at the expense of sovereignty of its less powerful neighbours. As discussed in the second part of this article, this is particularly evident from China’s stance in the South China Sea arbitration dispute with the Philippines.²¹ Notwithstanding China’s non-participation in the arbitration proceedings, it stated in unequivocal terms that it considers any decision of the arbitral tribunal “null and void” and “without binding effect.”²² China upholds its “indisputable sovereignty over the South China Sea and adjacent waters” based on the historic rights arguments and views any decision rendered by the tribunal as the imposition of a unilateral measure encroaching upon its sovereignty and maritime rights.²³ Following the issuance of the final award, it is not a matter of coincidence that China formed a closer alliance with Russia on the matters of international law and issued a joint declaration on the promotion of international law (2016), in which both states emphasized upon a commonly shared principle of sovereign equality of states as a necessary bedrock for the “stability of international relations.”²⁴ The declaration also condemns “any interference by states in the internal or external affairs of states with the aim of forging change of legitimate governments,”²⁵ which is a thinly veiled snub at the Western support of the regime change in the Middle East. In addition, both countries stressed upon the need for consistent interpretation of UNCLOS in “a manner that does not impair legitimate interests of States Parties to the Convention and does not compromise the integrity of the legal regime established by UNCLOS.”²⁶ This was clearly an open rejection of the authority of the arbitral tribunal that ruled against the Chinese maritime interests in the South China Sea.

The rhetoric of communication between the Chinese and American governments has also significantly changed. The Trump administration’s disinterest in the matters of human rights means that it no longer invokes the

²⁰ *Id.* at 71 (referring to the speech of the Chinese Premier Wen Jiabao at the 63rd GA session in 2008).

²¹ *See infra* Part III.A.

²² South China Sea Award (Phil. v. China), PCA Case No. 2013-19, Award of July 12, 2016, ¶ 61 (United Nations Convention on the Law of the Sea, Jul. 12, 2016) [hereinafter South China Sea Award].

²³ *Id.*

²⁴ 2016 Russia-China Declaration, *supra* note 5, ¶ 2.

²⁵ *Id.* at ¶ 4.

²⁶ *Id.* at ¶ 9.

human rights card as a tool to pressure China. Both states have been embroiled in a number of bitter trade disputes, accusing each other of the imposition of unfair tariff policies.²⁷ Pundits speculate that China's strained relationship with the U.S. will push it towards a stronger alliance with Russia; and with a commonly shared narrative of international law, this does not seem like an improbable scenario.

C. *American Narrative of International Law*

The engagement of the United States with international law has dramatically shifted with the election of Donald Trump as the President. The change of administration is always associated with new foreign policy directions that are very much linked to the ways in which international law is interpreted and applied. All of Trump's predecessors have acknowledged the utility of international law to advance American geopolitical interests. Patchy human rights records of less developed countries have often been used as a tool to pressure them into compliance and achieve American larger geopolitical objectives. When it comes to the protection of national interests, the U.S. did not shy away from pushing the limits of the doctrine of international law to justify waging the war on terror in the aftermath of the 9/11 attacks and founding its infamous Guantanamo Bay prison, in which it held terrorist suspects in great numbers, treating them as "enemy combatants" and denying them any protection under international humanitarian law (IHL).

The Obama administration attempted to depart from the policies of the Bush Administration and portrayed itself as a "smart power," which utilised international law together with the mix of other tools to achieve its foreign policy objectives.²⁸ In her memoir, then Secretary of State Hillary Clinton defined "smart power" as "choosing the right combination of tools—diplomatic, economic, military, political, legal, and cultural—for each situation."²⁹ This Obama-Clinton doctrine was dissected by Harold Koh who viewed international law as "smart power" through the lens "Engage-Translate-Leverage."³⁰ The first element, "engage," means the prioritization of engagement with like-minded states over unilateralism when faced with a foreign policy problem.³¹ "Translate" stands for preference for "a persuasive legal translation over denying the applicability of law altogether," particularly when dealing with entirely new legal challenges (drone warfare, cyber warfare, etc.).³² The very last element,

²⁷ *China and Russia Hit Back at Trump Tariffs*, BBC (June 20, 2019), <https://www.bbc.com/news/business-44742714>.

²⁸ HILLARY RODHAM CLINTON, *HARD CHOICES* 20-35 (Simon & Schuster, 2015).

²⁹ *Id.* at 33.

³⁰ Harold Hongju Koh, *The Trump Administration and International Law*, 56 WASHBURN L. J. 413, 417 (2017).

³¹ *Id.*

³² *Id.*

“leverage,” means “blending legal arguments with other tools—including military force, diplomacy, development, technology, markets, and international institutions—to achieve complex sustainable foreign policy outcomes that cannot be achieved without the legitimacy that international law bestows.”³³ When contrasting the approach to international law advanced by the Obama administration to that of the Trump Administration, Koh describes the latter as “disengage-black hole-hard power.”³⁴ The Trump administration has taken the most radical stance towards international law by openly dismissing its authoritative value and promoting “America first.”³⁵ Whereas Americans were always present at the table of negotiations when major global issues had been at stake, this has dramatically changed. Americans are reluctant to be actively involved in the world international affairs, unless their interests (primarily of economic nature) are directly affected. The Trump administration’s tactic of using hard power at the international arena has already seriously backfired. In particular, it alienated China by initiating an aggressive trade war and threw under the bus the Iran nuclear deal by branding it “the worst and one-sided transaction the U.S. has ever entered into.”³⁶

However, notwithstanding this hostile approach towards international law, this does not absolve the U.S. from its existing treaty obligations. As demonstrated by the litigation examples below, the U.S. has to justify itself over the alleged wrongdoings before the ICJ.³⁷ Whereas the bullying of the ICC in response to the ICC Prosecutor’s inquiry into the alleged crimes committed by Americans might have initially worked, the situation was reversed by the recent ruling of the ICC Appeals Chamber that approved a formal investigation into the situation of Afghanistan.³⁸ The Trump administration will leave at some point, which would mark an opportunity for the U.S. to re-engage with matters of international law. However, being a reluctant observer, the U.S. leaves space for other states with rising hegemonic ambitions, such as China and Russia, to re-shape the doctrine of international law by promoting their sovereign rights at the expense of sovereignty of their weaker neighbours.

³³ *Id.* at 418.

³⁴ *Id.* at 420.

³⁵ For more, see Monica Hakimi, *International Law in the Age of Trump*, EJIL TALK! BLOG OF THE EUR. JOURNAL OF INT’L LAW (June 20, 2019), <https://www.ejiltalk.org/international-law-in-the-age-of-trump/>.

³⁶ *Trump, Iran and the nuclear deal: What’s happened?*, BBC (May 15, 2019), <https://www.bbc.com/news/av/world-middle-east-48283132>.

³⁷ See *infra* Part III.

³⁸ Situation in the Islamic Republic of Afghanistan, ICC-02/17 OA4, Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan,” ¶ 21 (Mar. 5, 2020) [hereinafter ICC Afghanistan Appeal Decision].

III. INSTRUMENTAL LAWFARE IN INTERNATIONAL COURTS AS A MEANS TO COUNTER CHANGING NARRATIVES OF INTERNATIONAL LAW

A new emerging trend can be observed in international courts: powerful states have been embroiled in an increasing number of disputes, which are often lodged by adversary states with less prominent geopolitical presence. International law has become “weaponized” and “lawfare” has become a powerful substitute for traditional warfare. The term “lawfare” is not new; it was first introduced by the United States Air Force general Charlie Dunlap who described it as “a strategy of using—or misusing—law as a substitute for traditional military means.”³⁹ In his work, he acknowledged that there was no common ground as to what “lawfare” as a phenomenon entails and analyzed it in the context of the conflict in Afghanistan, in which he argued the adversary manipulated civilian casualties “to make it appear that U.S. and allied forces have somehow violated legal or ethical norms.”⁴⁰ Thus, he attributes mostly negative connotation to the term “lawfare” as an asymmetrical form of warfare, which is exploited by the adversary against a law-abiding state. However, he also acknowledged a positive connotation of the term “lawfare” as a strategy for achieving policy objections through enforcing legal obligations under international law.⁴¹ As described in this part of the article, the dynamics of “lawfare” has changed. Whereas in Dunlap’s understanding “lawfare” was often invoked as a tactic by the offenders of international law against the U.S. as a law-abiding state, we observe an emerging trend when powerful states tend to violate international law, which prompts weaker states or international institutions to take action against powerful states by relying upon international law.⁴² Powerful states argue that weaker states “abuse” international law by bringing meritless cases against them, while the latter claim that international law is the only tool left at their disposal to defend their sovereign rights.

For the purposes of this article, the term “lawfare” is narrowly applied as opposed to how it has been generally defined in academic scholarship.⁴³ Only

³⁹ Charles J. Dunlap Jr., *Lawfare Today: A Perspective*, 3 YALE J. INT’L AFF. 146, 146 (2008) [hereinafter *Lawfare Today*].

⁴⁰ *Id.* at 147-48; see also Charles J. Dunlap Jr., *Lawfare Today ... and Tomorrow*, in INT’L LAW STUDIES, INTERNATIONAL LAW AND THE CHANGING CHARACTER OF WAR 316 (Raul A. “Pete” Pedrozo & Daria P. Wollschlaeger eds., 2011).

⁴¹ *Lawfare Today*, *supra* note 39, at 147.

⁴² Iryna Marchuk, *From Warfare to ‘Lawfare’: Increased Litigation and Rise of Parallel Proceedings in International Courts*, in THE FUTURE OF INTERNATIONAL COURTS: REGIONAL, INSTITUTIONAL AND PROCEDURAL CHALLENGES 225, 234 (Routledge Research in Int’l Law, Avidan Kent, et al. eds., 2019) [hereinafter *From Warfare to ‘Lawfare’*].

⁴³ ORDE F. KITTRIE, *LAWFARE: LAW AS A WEAPON OF WAR* 11 (Oxford U. Press, 2016). The author distinguishes between two types of lawfare: (1) “instrumental warfare,” “the instrumental use of legal tools to achieve the same or similar effects as those sought from conventional warfare;” and (2) “compliance-leverage disparity warfare,” “lawfare...designed to gain advantage from the greater influence that law...and its processes exerts over an adversary.”

two types of instrumental “lawfare” are addressed: (1) reconfiguration and instrumentalization of international law by powerful states aimed to disadvantage an adversary; and (2) prolific litigation pursued by weaker states or international institutions against powerful states in international courts.

A. *Taking on Russia*

Russia has reluctantly been involved as a respondent in countless disputes adjudged by various international courts due to its military engagement in neighbouring satellite states. Following the 2008 Georgia-Russia war, Georgia was quick to bring up the matter of Russia’s responsibility through lodging a lawsuit against Russia at the ICJ (the first ever contentious case, in which Russia acted as a respondent)⁴⁴ and filing an inter-state application against Russia (*Georgia v. Russia II*) before the European Court of Human Rights (ECtHR).⁴⁵ Whereas Georgia did not succeed with its lawsuit under CERD in the ICJ, which was dismissed on jurisdictional grounds,⁴⁶ the ECtHR’s judgment in *Georgia v. Russia II* is still pending. In addition, the ICC Prosecutor decided to invoke her *proprio motu* powers and launched an inquiry into the alleged war crimes committed by all sides to the conflict. The Prosecutor got “blessings” from the Pre-Trial Chamber to move ahead with a fully-fledged investigation in the situation of Georgia and is yet to identify individual suspects for the alleged crimes associated with the conflict.⁴⁷ In Georgia, there are high hopes that Russians will be the first ones on the ICC Prosecutor’s list of suspects, however, it is still premature to conclude who will be identified as suspects in individual cases within the situation. It appears that the Office of the Prosecutor (OTP) has recently intensified its efforts to investigate the situation.

Following the occupation of Crimea and the escalation of violence in eastern Ukraine, Ukraine followed in the footsteps of Georgia by bringing a number of lawsuits against Russia in various international courts. The Ukrainian government has been outspoken about the use of defensive “lawfare” as its tactic to hold Russia accountable for its numerous violations of international law, spanning across a wide range of international treaties which have been duly ratified by Russia, including CERD, ICSFT, ECHR, and UNCLOS. Ukraine closely studied litigation mistakes of Georgia, which led to its case being dismissed on jurisdictional grounds in the ICJ. Therefore, Ukraine did its best to

⁴⁴ Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Georgia v. Russian Federation*), Application Instituting Proceedings, 2008 I.C.J. General List No. 140 (Aug. 12).

⁴⁵ *Georgia v. Russia II*, App. No. 38263/08 Eur. Ct. H.R. (Aug. 12, 2008).

⁴⁶ Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Georgia v. Russian Federation*), Judgment (Preliminary Objections), 2011 I.C.J. Rep. 70, ¶ 182-84 (Apr. 1).

⁴⁷ Situation of Georgia, ICC-01/15-12, Decision on the Prosecutor’s request for authorisation of an investigation, Pre-Trial Chamber I (Jan. 27, 2016).

avoid any miscalculated steps by entering into a phase of prolonged, albeit futile, negotiations with Russia as a means of demonstrating its fulfilment of the necessary jurisdictional preconditions both under CERD and ICSFT prior to bringing the case before the ICJ.⁴⁸ As in the case of Georgia, Ukraine was unable to bring a set of broader issues before the Court, which are at the heart of dispute between the two states—i.e. self-determination, remedial secession, and the unlawful use of force. In the absence of the acceptance of the compulsory jurisdiction of the ICJ by Russia, Ukraine had no other choice but to invoke two treaties as the legal basis for its action that have been ratified by both Russia and Ukraine, notwithstanding their remote connection to the real issues at stake.⁴⁹ CERD was chosen by Ukraine as an instrument to demonstrate Russia’s policy of “cultural erasure” on the territory of Crimea following its occupation through a “broad-based pattern of discriminatory acts” directed against non-Russian ethnic population.⁵⁰ In addition, Ukraine invoked ICSFT to describe Russia’s role in the financing of terrorism in eastern Ukraine and its failure to honour treaty obligations, such as the duty to cooperate in the prevention of the prohibited conduct under the Convention.⁵¹ Most recently, in the present case, the ICJ delivered its highly anticipated judgment on the preliminary objections raised by Russia with respect to the Court’s jurisdiction and the admissibility of Ukraine’s claims under CERD and ICSFT. The ICJ overwhelmingly rejected Russia’s preliminary objections that the Court lacks jurisdiction to entertain Ukraine’s claims under both conventions, and found that Ukraine’s Application in relation to the claims under CERD was admissible.⁵² Hence, Ukraine’s case, unlike Georgia’s case, proceeds to the merits stage; and it appears that Ukraine’s strategy of “lawfare” starts to bear fruit.⁵³

⁴⁸ For more, see Iryna Marchuk, *Ukraine Takes Russia to the International Court of Justice: Will it Work?*, EJI TALK!: BLOG OF THE EUR. JOURNAL OF INT’L LAW (Jan. 26, 2017), <https://www.ejiltalk.org/ukraine-takes-russia-to-the-international-court-of-justice-will-it-work/>; Iryna Marchuk, *Ukraine v. Russia at the ICJ Hearings on Indication of Provisional Measures: Who Leads?*, EJI TALK!: BLOG OF THE EUR. JOURNAL OF INT’L LAW (Mar. 16, 2017), <https://www.ejiltalk.org/ukraine-v-russia-at-the-icj-hearings-on-indication-of-provisional-measures-who-leads/>.

⁴⁹ Iryna Marchuk, *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. Russia)*, MELBOURNE JOURNAL OF INT’L LAW 436, 437 (2018) [hereinafter *Application of the ICSFT and CERD*].

⁵⁰ *Id.* at 439.

⁵¹ *Id.* at 440.

⁵² 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), Judgment (Preliminary Objections), 2019 I.C.J. General List No. 166, ¶ 134 (Nov. 8).

⁵³ For more, see Iryna Marchuk, *Green Light from the ICJ to Go Ahead with Ukraine’s Dispute against the Russian Federation Involving Allegations of Racial Discrimination and Terrorism Financing*, EJIL Talk!: BLOG OF THE EUR. JOURNAL OF INT’L LAW (Nov. 22, 2019),

Almost immediately after Russia's assumption of control over Crimea, and at the backdrop of rising secessionist movements in eastern Ukraine, Ukraine went ahead with filing its first inter-state application against Russia before the ECtHR (*Ukraine v. Russia* no. 20958/14). In its application, the Ukrainian government alleged that, as of 27 February 2014, by virtue of exercising effective control over Crimea and the separatist armed groups in eastern Ukraine, Russia was responsible for a broad spectrum of human rights violations, including Articles 2-3, 5-6, 8-11, and 13-14; Article 1 of Protocol No. 1; and Article 2 of Protocol No. 4 to the Convention.⁵⁴ This was followed by seven (later reduced to five in total) additional inter-state applications that expanded on alleged human rights violations attributable to Russia on the territory of Ukraine.⁵⁵ For the purposes of the expeditiousness of the proceedings, the Court grouped inter-state proceedings based on a geographical criterion. All alleged human rights violations associated with the events in Crimea were registered as *Ukraine v. Russia (re Crimea, case no. 20958/14)*, whereas allegations concerning the events in eastern Ukraine were registered as *Ukraine v. Russia (re eastern Ukraine, case no. 8019/16)*. In their scope, inter-state applications lodged by Ukraine cover a wide range of the alleged violations of the Convention touching upon all aspects of Russia's alleged involvement in the conflict in eastern Ukraine and its occupation of Crimea. At this stage, it is too early to predict how long it will take for the Court to adjudge pending inter-state applications, given that the handling of inter-state applications has been notoriously slow in the ECtHR. Ukraine's resort to such inter-state proceedings should also be viewed through its desire to apply reputational pressure upon Russia. However, this strategy has not yielded the anticipated fruitful results, as—much to Ukraine's and its allies' disappointment in the Council of Europe (CoE)—Russia was recently reinstated in its voting rights in the Parliamentary Assembly of the Council of Europe (PACE).⁵⁶

Being a non-ratifying state of the Rome Statute, Ukraine accepted the ad hoc jurisdiction of the ICC with respect to the alleged crimes committed on the territory of eastern Ukraine and Crimea.⁵⁷ The ICC Prosecutor explicitly

<https://www.ejiltalk.org/green-light-from-the-icj-to-go-ahead-with-ukraines-dispute-against-the-russian-federation-involving-allegations-of-racial-discrimination-and-terrorism-financing/>.

⁵⁴ Press Release, Eur. Ct. H.R., European Court of Human Rights Deals with Cases Concerning Crimea and Eastern Ukraine, ECHR 345 (Nov. 26, 2014).

⁵⁵ *Ukraine v. Russia (re Crimea)*, App. No. 20958/14 Eur. Ct. H.R.; *Ukraine v. Russia II*, App. No. 43800/14 Eur. Ct. H.R. (resolved by diplomatic means); *Ukraine v. Russia III*, App. No. 49537/14 Eur. Ct. H.R. (later struck out of the Court's record when an individual application, *Dzhemilov v. Ukraine*, App. No. 49522/14 Eur. Ct. H.R., was lodged on the same subject matter); *Ukraine v. Russia (re eastern Ukraine)*, App. No. 8019/16 Eur. Ct. H.R.; *Ukraine v. Russia VII*, App. No. 38334/18 Eur. Ct. H.R.; *Ukraine v. Russia VIII*, App. No. 55855/18 Eur. Ct. H.R.

⁵⁶ *PACE ratifies Russian delegation's credentials*, COUNCIL OF EUROPE (June 26, 2019), <https://www.coe.int/en/web/portal/-/pace-ratifies-russian-delegation-s-credentials>.

⁵⁷ Iryna Marchuk, *Ukraine and the International Criminal Court: Implications of the Ad*

recognised Russia's role in the conflict in Ukraine by acknowledging the application of international humanitarian law to the situation in Crimea (due to its occupation by Russia) and the situation in eastern Ukraine (due to Russia's military involvement in the conflict).⁵⁸ Despite Russia's status as a non-State Party to the Rome Statute, the ICC can potentially exercise its jurisdiction with respect to the crimes committed by Russian nationals, provided that the alleged crimes have been committed on the territory of Ukraine. The ICC Prosecutor's findings on the occupied status of Crimea clearly irked the Russian government, which was quick to accuse the Court of its biased attitude towards Russia and led to Russia's symbolic withdrawal of its signature from the Rome Statute.⁵⁹ Although the withdrawal did not have any legal implications, absent Russia's ratification of the Rome Statute, it nevertheless conveyed a strong message that the ICC should not count on any cooperation with Russia in its examination of the situation in Ukraine.

The intensity of the conflict began to subside after 2016, however, the incident in the Kerch strait, which involved Russia's capture of the three Ukrainian naval vessels and the arrest of all the crew members, flared up tensions between the two states, having led to more litigation in international courts. Ukraine's maritime claims against Russia are subject to separate inter-state arbitration proceedings, which were instituted under UNCLOS: one dispute concerning Ukraine's coastal state rights in the Black Sea, Sea of Azov, and Kerch Strait; and another dispute concerning the immunity/detention of three Ukrainian naval vessels and the 24 servicemen on board.⁶⁰

In the former case, Ukraine suffered a serious blow, as some of its major claims have already been rejected at the preliminary objections stage. The Tribunal upheld Russia's objection with respect to the existence of the sovereignty dispute between the Parties. It found that it lacked jurisdiction over Ukraine's dispute under article 288(1) of UNCLOS "to the extent that a ruling of the Tribunal on the merits of Ukraine's claims necessarily requires

Hoc Jurisdiction Acceptance and Beyond, 49 VAND. J. TRANSNAT'L L. 323, 336 (2016).

⁵⁸ INT'L CRIM. CT., OFF. OF THE PROSECUTOR, REPORT ON PRELIMINARY EXAMINATION ACTIVITIES, ¶ 158, 169-170 (Nov. 14, 2016) [hereinafter 2016 OTP REPORT].

⁵⁹ Iryna Marchuk & Budhimali Aloka Wanigasuriya, *Making the Wrong Enemies? The ICC Prosecutor's Dilemma When Targeting Powerful States at the Preliminary Examination Stage*, in THE ROME STATUTE OF THE ICC AT ITS TWENTIETH ANNIVERSARY: ACHIEVEMENTS AND PERSPECTIVES 125, 137-38 (Pavel Šturma ed., 2019).

⁶⁰ State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation), PCA Case No. 2017-06, Notification and statement of claim under Annex VII to the 1982 United Nations Convention on the Law of the Sea (Sep. 16, 2016); ITLOS, Immunity of Three Ukrainian Naval Vessels and the Twenty-Four Servicemen on Board (Ukraine v. The Russian Federation), Case No. 26, Request of Ukraine for the Prescription of Provisional Measures Under art. 290, para. 5, of the UNCLOS (Apr. 16, 2019) [hereinafter ITLOS Ukraine's Provisional Measures Request]; Detention of Three Ukrainian Vessels and Servicemen (Ukraine v. The Russian Federation), PCA Case No. 2019-28, Procedural Order No. 1 (confidential) (Nov. 22, 2019).

it to decide, expressly or implicitly, on the sovereignty of either Party over Crimea.”⁶¹ Hence, Ukraine’s claims that are premised on its status as a sovereign over Crimea, in particular those concerning its rights as a “coastal State” under UNCLOS, fall outside the jurisdiction of the Tribunal. That said, Russia was less successful with its objection to the Tribunal’s jurisdiction related to the legal status of the Sea of Azov and the Kerch Strait as internal waters. This was rejected by the Tribunal and the matter is reserved for the merits.⁶²

In the latter case, Ukraine initially sought the International Tribunal for the Law of the Sea (ITLOS) to prescribe provisional measures ordering Russia to release the Ukrainian naval vessels and detained servicemen. Ukraine’s case narrowly focused on the questions of immunities and detention, having omitted the underlying aspect of IHL, notwithstanding that the incident took place at the backdrop of the occupation of Crimea.⁶³ This line of argumentation was advanced by Ukraine for strategic reasons, as the acknowledgement of the application of the rules of IHL and treating the incident as a military operation would have made the case inadmissible before the Tribunal. More specifically, the parties disagreed on the interpretation of the regime of passage through the Kerch Strait, and whether Russia’s arrest of the Ukrainian vessels and detention of the crew members constituted a military operation, thus falling outside the ambit of UNCLOS. However, the Tribunal treated the use of force by Russians as a law enforcement operation rather than a military operation, and therefore confirmed its *prima facie* jurisdiction over the dispute.⁶⁴ Although Russia refused to participate in the proceedings before the Tribunal, it nevertheless submitted a memorandum outlining its position on the circumstances of the case.⁶⁵ The Tribunal prescribed the requested provisional measures by ordering Russia to immediately release the captured Ukrainian naval vessels, as well as all detained Ukrainian servicemen.⁶⁶ The dispute was partially resolved by diplomatic means when the newly elected Ukrainian President Volodymyr Zelensky reached an agreement with Russian President Vladimir Putin on the exchange of prisoners, which included, among others, all previously detained crew members in the Kerch Strait incident. Most recently, Russia also returned all three naval vessels

⁶¹ State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation), PCA Case No. 2017-06, Award Concerning the Preliminary Objections of the Russian Federation, Feb. 21, 2020, ¶ 197.

⁶² *Id.* ¶ 293.

⁶³ ITLOS Ukraine’s Provisional Measures Request, *supra* note 60, ¶ 20.

⁶⁴ ITLOS, Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation), Case No. 26, Order of May 25, 2019 (Provisional Measures), ¶¶70-76 [hereinafter ITLOS Ukraine v. Russia Order].

⁶⁵ ITLOS, Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation), Case No. 26, Memorandum of the Government of the Russian Federation of May 7, 2019 (Provisional Measures), ¶28.

⁶⁶ ITLOS Ukraine v. Russia Order, *supra* note 64, ¶124.

which it had earlier seized. However, Ukraine still pursues its claims against Russia in relation to the unlawful detention of its vessels and servicemen, and recently submitted a memorandum to the UNCLOS Annex VII Arbitral Tribunal outlining more fully its claims under the Convention.

By no means is this an exhaustive list of cases that have been instituted against Russia in international courts. The overview refers only to major cases and does not include references to thousands of individual applications lodged by Georgian and Ukrainian nationals in Strasbourg pending determination by the ECtHR. In addition, there are multiple investor-state arbitration proceedings instituted by the Ukrainian companies against Russia, all of which are related to the expropriation of foreign investments in Crimea.

B. Taking on the United States

The United States has been embroiled in a number of disputes in international courts linked to its foreign policy decisions in the Middle East and its role in waging the war on terror after the 9/11 attacks. Quite reluctantly, the U.S. found itself in the midst of the ICC Prosecutor's examination of the situation in Afghanistan, which examined, inter alia, alleged crimes committed by members of the U.S. armed forces on the territory of Afghanistan, as well as by members of the CIA committed in secret detention facilities in Afghanistan and on the territory of other States Parties to the Rome Statute, such as Poland, Romania and Lithuania, known to have hosted CIA black sites. The preliminary examination stretched over 12 years before the ICC Prosecutor decided to seek the authorization of the Pre-Trial Chamber (PTC) to go ahead with a fully-fledged investigation. It was only then that the U.S. government officials openly criticised the Court, calling any potential ICC investigation concerning the U.S. personnel as "wholly unwarranted and unjustified" and boasting of its own "robust national system of investigation."⁶⁷ The position of the U.S. government did not come as a major surprise given Trump's open hostility to international institutions and protection of national interests.⁶⁸ Shortly after the release of the ICC Prosecutor's request for the authorisation of an investigation, many commentators drew attention to potential hurdles to be faced by the ICC Prosecutor in chasing Americans in the absence of cooperation with the U.S. as a non-State Party to the Rome State, as well as the direct prohibition of voluntary cooperation with the ICC in the American Service-Members' Protection Act (ASPA).⁶⁹ Moreover, it was openly questioned as to whether prosecuting

⁶⁷ Ambassador Michele J. Sison, U.S. Deputy Permanent Representative to the United Nations, Remarks at a UN Security Council Briefing on the Situation in Libya (Nov. 8, 2017), <https://usun.state.gov/remarks/8095>.

⁶⁸ John G. Ikenberry, *The Plot Against American Foreign Policy: Can the Liberal Order Survive*, 96 FOREIGN AFF. 2 (2017).

⁶⁹ Teri Schulz, *US, Afghanistan forces likely to face war crimes investigation, alongside Taliban*, DW NEWS (Nov. 20, 2017), <https://www.dw.com/en/us-afghanistan-forces-likely-to->

Americans would be in the interests of justice, as the scale and gravity of the alleged crimes committed by Americans paled in comparison to those crimes allegedly committed by Taliban forces and the Afghan government.

The U.S. government's rhetoric was sharpened and became openly hostile when the U.S. National Security Adviser, John Bolton, unleashed his attack on the ICC as an institution threatening with sanctions over an investigation into the alleged crimes committed by Americans, while at the same time announcing the closure of the Office of the General Delegation of the Palestine Liberation Organization (PLO) in Washington due to a separate ICC preliminary examination into the alleged crimes committed by Israelis. He went so far as to brand the ICC inquiry into the alleged crimes in Afghanistan "utterly unfounded, unjustifiable investigation," dismissing the authority of the ICC as "illegitimate."⁷⁰ The same hostile rhetoric was advanced by the U.S. Secretary of State, Mike Pompeo, who announced the plan to take further steps in revoking or denying visas to the staff members of the ICC directly involved in investigating the alleged crimes committed by Americans in Afghanistan or other countries, as well as imposing economic sanctions "if the ICC does not change its course."⁷¹ Just a few days before the issuance of the PTC's decision on the fate of the investigation into the situation in Afghanistan, the U.S. took an unprecedented step in revoking the visa of the ICC Prosecutor, Fatou Bensouda, due to her intention to investigate the alleged crimes committed by Americans.⁷² The ICC Prosecutor responded by issuing a public statement, emphasizing upon the independence and impartiality of her mandate, as well as reiterating her intention to proceed carrying out her duties "without fear or favour."

Shortly after the visa scandal, the PTC finally issued a decision denying the ICC Prosecutor's request for the authorisation of an investigation into the situation of Afghanistan.⁷³ The decision attracted a storm of criticism worldwide, as the PTC concluded that opening of an investigation would not be in the interests of justice, notwithstanding its finding that both the jurisdiction and the admissibility criteria had been satisfied. The meaning of "interests of justice" as a statutory criterion that may preclude the ICC Prosecutor's investigation has

face-war-crimes-investigation-alongside-taliban/a-41459624.

⁷⁰ Owen Bowcott, et al., *John Bolton Threatens War Crimes Court with Sanctions in Virulent Attack*, GUARDIAN (Sep. 10, 2018), <https://www.theguardian.com/us-news/2018/sep/10/john-bolton-castigate-icc-washington-speech>.

⁷¹ AFP in Washington, *US to Deny Visas for ICC Members Investigating Alleged War Crimes*, GUARDIAN (Mar. 15, 2019), <https://www.theguardian.com/us-news/2019/mar/15/mike-pompeo-us-war-crimes-investigation-international-criminal-court>.

⁷² Patrick Wintour, et al., *US Revokes ICC Prosecutor's Visa Over Afghanistan Inquiry*, GUARDIAN (Apr. 5, 2019), <https://www.theguardian.com/law/2019/apr/05/us-revokes-visa-of-international-criminal-courts-top-prosecutor>.

⁷³ Situation in the Islamic Republic of Afghanistan, ICC-02/17-33, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, Pre-Trial Chamber II, ¶ 55 (Apr. 12, 2019) [hereinafter ICC Afghanistan Authorisation Decision].

been subject to long-standing debates, which prompted the ICC prosecutor to issue a policy paper dedicated to the interests of justice. However, the paper is rather broad in its scope without giving much guidance as to what factors should be considered in determining the concept of the interests of justice. While acknowledging that the concept of the interests of justice is “broader than criminal justice itself,” the paper underlines that it should be interpreted in accordance with the object and purpose of the Rome Statute and does not extend to cover “all issues related to peace and security.”⁷⁴

By examining the overarching goals of the ICC (the effective prosecution of international crimes, the fight against impunity and the prevention of mass atrocities), the PTC concluded that “an investigation would only be in the interests of justice if prospectively it appears suitable to result in the effective investigation and subsequent prosecution of cases within a reasonable time frame.”⁷⁵ When applying this test to the situation in Afghanistan, the PTC found that certain factors were speaking against the prospects of “successful and meaningful investigations,” in particular the significant time lapse since the crimes had been committed, scarce cooperation obtained by the ICC Prosecutor throughout the preliminary examination and the availability of evidence. While not mentioning the U.S. directly, the PTC pointed towards difficulties in “gaug[ing] the prospects of securing meaningful cooperation from the authorities” at the backdrop of changing “political landscape both in Afghanistan and key states” coupled with “the complexity and volatility of the political climate still surrounding the Afghan scenario.”⁷⁶ The very last factor that the PTC invoked in arguing that it would be contrary to the interests of justice to pursue an investigation in Afghanistan was its reference to the OTP’s limited “financial and human resources,” which it viewed could be better used by focusing on situations/cases with “realistic prospects” of resulting in trials.⁷⁷ In conclusion, the PTC held that the circumstances of the situation in Afghanistan “make the prospects for a successful investigation and prosecution extremely limited,” which would lead to nothing less than “frustration and possibly hostility” vis-à-vis the ICC on the part of victims.⁷⁸

The Trump administration released a public statement welcoming the PTC’s decision, reiterating that “any attempt to target American, Israeli, or allied personnel for prosecution will be met with a swift and vigorous response.”⁷⁹ In strong language, the statement yet again dismissed the legitimacy of the Court stemming from its “broad unaccountable prosecutorial powers” and the

⁷⁴ INT’L CRIM. CT., POLICY PAPER ON THE INTERESTS OF JUSTICE ¶ 8 (2007).

⁷⁵ ICC Afghanistan Authorisation Decision, *supra* note 73, ¶ 89.

⁷⁶ *Id.* ¶ 94.

⁷⁷ *Id.* ¶ 95.

⁷⁸ *Id.* ¶ 96.

⁷⁹ *Statement from the President*, WHITE HOUSE (Apr. 12, 2019), <http://whitehouse.gov/briefings-statements/statement-from-the-president-8>.

perceived threat it poses to American national sovereignty.⁸⁰

The PTC's decision was appealed by the ICC Prosecutor who argued that the PTC erred in the interpretation of its discretionary powers under the Rome Statute when it sought to make a positive interpretation that the initiation of an investigation was in the interests of justice.⁸¹ The Appeals Chamber reversed the PTC's decision, thereby authorizing an investigation into the situation of Afghanistan. More specifically, the Appeals Chamber found that the PTC erred in its interpretation of article 15(4) of the Rome Statute when it reviewed the Prosecutor's assessment of the interests of justice criterion as laid down in article 53(1) of the Statute. Instead, the PTC was only bound to assess "whether there is a reasonable factual basis to proceed with an investigation, in the sense of whether crimes have been committed, and whether the potential case(s) arising from such investigation would appear to fall within the Court's jurisdiction."⁸² The decision ruffled a few feathers in the Trump administration and was labelled as "a truly breathtaking action by an unaccountable political institution, masquerading as a legal body."⁸³

The situation in Afghanistan in the ICC has not been the only nuisance to the Trump administration. Three lawsuits have been lodged against the United States before the ICJ: two as a direct result of the U.S. long-standing sanctions policy against Iran (initiated in the last months of Obama's presidency) and the decision of the Trump administration to walk away from the nuclear deal, and the last one as a response to the U.S. decision on relocation of its embassy to Jerusalem. On 14 June 2016, Iran lodged a lawsuit against the United States in the ICJ with regard to the dispute concerning the alleged violations of the Treaty of Amity, Economic Relations, and Consular Rights.⁸⁴ The dispute is the culmination of a long-standing standoff between Iran and the U.S. following the breakdown of diplomatic relations between the two states in the aftermath of the Iranian revolution and seizure of the U.S. Embassy in Tehran in 1979. A turning point in relations between the two states was bombing of the U.S. Marine Corps barracks in Beirut (Lebanon) that led to the killing of 241 American servicemen, which the U.S. attributed to Iran. As a result, the U.S. has designated Iran as a "state sponsor of terrorism."⁸⁵ This led to a flurry of legislative activities and

⁸⁰ *Id.*

⁸¹ ICC Afghanistan Appeal Decision, *supra* note 38, ¶ 21 (Mar. 5, 2020).

⁸² *Id.* ¶ 46.

⁸³ *Press Statement*, ICC Decision on Afghanistan by Michael R. Pompeo, Secretary of State (Mar. 5, 2020), U.S. DEPARTMENT OF STATE <https://www.state.gov/icc-decision-on-afghanistan/>.

⁸⁴ Press Release, Int'l Court of Justice, Iran Institutes Proceedings Against the United States with Regards to a Dispute Concerning Alleged Violations of the 1955 Treaty of Amity (Jun. 15, 2016).

⁸⁵ *Certain Iranian Assets (Iran v. U.S.)*, Judgment (Preliminary Objections), 2019 I.C.J. General List No 164, ¶ 20-21 (Feb. 19) [hereinafter *Iran v. U.S. Preliminary Objections Judgment*].

resulted in the amended 1996 Foreign Sovereign Immunities Act (FSIA) that removed the immunities in national courts from States designated as “state sponsors of terrorism,” in particular in cases involving allegations of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support for such acts.⁸⁶

This opened a floodgate of cases in American courts that alleged damages arising from deaths and injuries caused by acts allegedly supported by Iran (e.g. *Peterson* case concerning the 1983 bombings of the U.S. barracks in Beirut). Iran claimed that the U.S. legislation was in violation of international law on immunities. In 2002, the U.S. adopted the Terrorism Insurance Act (TRIA) that established the procedure for enforcement of judgments which came out after the 1996 amendments to the FSIA. The assets subject to enforcement proceedings included blocked assets of a “terrorist party,” which also covered designated “sponsors of terrorism,” and “blocked assets of any agency or instrumentality of that terrorist party.”⁸⁷ In 2008, the U.S. expanded categories of assets available for the satisfaction of judgment creditors by including all property of Iranian-State-owned entities, whether or not that property had previously been “blocked” by the U.S. Government, and regardless of the degree of control exercised by Iran over those entities.⁸⁸ The last nail in the coffin was the U.S. President’s Executive Order 13599, which blocked all assets of Iran, including those of the Central Bank of Iran (Bank Markazi) and its financial institutions, where such assets are within United States territory or “within the possession or control of any United States person, including any foreign branch.”⁸⁹ The same year, the U.S. adopted the Iran Threat Reduction and Syria Human Rights Act, which made available the assets of Bank Markazi for satisfaction of judgements against Iran in the *Peterson* case.⁹⁰ Notwithstanding Bank Markazi’s challenge of the validity of that legislative provision in the U.S. courts, the constitutionality of that provision was upheld by the U.S. Supreme Court.⁹¹

The tightening anti-terrorism legislation adopted by the U.S. aimed at the assets of Iran and its state-owned companies, which resulted in the default judgements and awards entered by the U.S. courts, prompted Iran to seek recourse in the ICJ. As the legal basis for its action before the ICJ, Iran invoked the Treaty of Amity that entitles the parties to submit a dispute to the ICJ “as to the interpretation or application of the Treaty,” which is not “satisfactorily adjusted by diplomacy.”⁹² The United States maintained that the dispute in

⁸⁶ *Id.* ¶ 22 (referring to FSIA, § 1605(a)(7)).

⁸⁷ *Id.* ¶ 23 (referring to FSIA, § 1605(a)(7)).

⁸⁸ *Id.* ¶ 23 (referring to FSIA, § 1610 (g)).

⁸⁹ *Id.* ¶ 25.

⁹⁰ *Id.* ¶ 26.

⁹¹ *Bank Markazi v. Peterson*, 136 S. Ct. 1310 (2016).

⁹² Treaty of Amity, Economic Relations, and Consular Rights, Iran-U.S., art. XXI (2), Aug. 15, 1955, 284 U.N.T.S. 93.

question had nothing to do with the Treaty, arguing that Iran was “attempting to embroil the Court in a broader strategic dispute,” as the actions of which Iran complains are inextricably linked to “Iran’s long-standing violation of international law with regard to the United States.”⁹³

The United States raised a number of jurisdictional objections, requesting the Court to dismiss as outside the Court’s jurisdiction (1) all claims that U.S. measures that block the property and interests in property of the Government of Iran or Iranian financial institutions violate the Treaty; (2) all claims predicated on the United States’ purported failure to accord sovereign immunity from jurisdiction and/or enforcement to the Government of Iran, Bank Markazi, or Iranian State-owned entities; and (3) all claims of purported violations of Articles III, IV, or V of the Treaty of Amity that are predicated on treatment accorded to the Government of Iran or Bank Markazi. The first objection raised by the United States was dismissed by the Court, as it interpreted the Treaty of Amity as containing no provision expressly excluding certain matters from its jurisdiction, but merely affording the Parties a defence on the merits.⁹⁴ As for the second objection, which concerned an important matter of sovereign immunities, the Court upheld the United States’ objection that it does not have jurisdiction to adjudge the matter. Having meticulously examined the provisions of the Treaty, the Court held that Iran’s claims based on the alleged violation of sovereign immunities guaranteed by customary international law do not relate to the dispute and fall outside the scope of the compromissory clause of the Treaty.⁹⁵ At the heart of disagreement between the parties was whether Bank Markazi is a “company” within the meaning of the Treaty of Amity, which justified its assertion of the rights and protections afforded to “companies” by the respective articles of the Treaty. Absent all the facts necessary to determine whether Bank Markazi was carrying out activities within the meaning of a “company” under the Treaty, the Court was unable to conclude on the afforded protection under the Treaty, since the question was deemed to be closely related to the merits of the case. Therefore, the third objection was treated by the Court as lacking an exclusively preliminary character.⁹⁶

The Trump administration’s sanctions policy against Iran led to yet another lawsuit pending determination by the ICJ. The dispute was lodged by Iran on the basis of the same Treaty of Amity concerning re-imposition by the U.S. of a comprehensive set of sanctions and restrictive measures against Iran by the U.S. decision of 8 May 2018.⁹⁷ By that decision President Trump controversially

⁹³ Iran v. U.S. Preliminary Objections Judgment, *supra* note 85, ¶ 34.

⁹⁴ *Id.* ¶ 47.

⁹⁵ *Id.* ¶ 80.

⁹⁶ *Id.* ¶ 97.

⁹⁷ Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran v. U.S.), Application Instituting Proceedings, 2018 I.C.J. General List No. 175, ¶ 1-2 (July 16).

announced the end of the U.S. participation in the Joint Comprehensive Plan of Action (JCPOA), which was an agreement on the nuclear programme of Iran reached by Iran, P5 of the UNSC, Germany, and the EU.⁹⁸ When lodging the lawsuit against the U.S., Iran sought at the same time the indication of provisional measures in order to preserve its rights under the Treaty of Amity, pending the final determination in the case.⁹⁹ Having examined the necessary prerequisites for the indication of provisional measures, the Court unanimously imposed provisional measures requiring the U.S. to remove any impediments arising out of its decision to the free export of humanitarian goods to the territory of Iran (e.g. medicine, agricultural produce, or civil aviation equipment) and ordered the parties to refrain from aggravating the dispute.¹⁰⁰ The Court did not fully satisfy Iran's request and only indicated provisional measures with respect to humanitarian goods. In his response to the ICJ ruling, U.S. Secretary of State Michael Pompeo announced the U.S. decision to terminate the 1955 Treaty of Amity with Iran, which in his opinion is used by Iran to bring "meritless" claims before the ICJ, in order to thwart any attempts by Iran to "interfere with the sovereign rights of the United States to take lawful actions necessary to protect our national security."¹⁰¹ He added that the ICJ was merely used as a platform by Iran for "political and propaganda purposes" and stated that the U.S. was in compliance with the ICJ ruling, since its sanctions policies leave out the existing humanitarian related transactions.¹⁰²

Another foreign policy decision that led to the lawsuit against the U.S. in the ICJ concerned the relocation of its Embassy to Jerusalem, which sparked an outcry among Palestinians who view this move as the endorsement by the U.S. of Israeli's sovereign rights over Jerusalem. Palestine invoked the Vienna Convention on Diplomatic Relations (VCDR) as the basis for its action before the ICJ, arguing that by relocating its Embassy to Jerusalem, the U.S. was in breach of the Convention.¹⁰³ More specifically, it argued that the relocation interfered with the Convention provisions on the establishment of a diplomatic mission by the sending state "in the receiving state," as well as the official

⁹⁸ *Remarks by President Trump on the Joint Comprehensive Plan of Action* (May 8, 2018, 2:13 PM), <http://www.whitehouse.gov/briefings-statements/remarks-president-trump-joint-comprehensive-plan-action>.

⁹⁹ *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran v. U.S.)*, Request for the Indication of Provisional Measures, 2018 I.C.J. General List No. 175, ¶ 42 (July 16).

¹⁰⁰ *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran v. U.S.)*, Order (Provisional Measures), 2018 I.C.J. General List No. 175, ¶ 102 (Oct. 3).

¹⁰¹ *Secretary Pompeo's Remarks to the Media Concerning the ICJ Decision*, U.S. EMBASSY AND CONSULATE IN THE NETHERLANDS (Oct. 8, 2018), <http://nl.usembassy.gov/secretary-pompeos-remarks-to-the-media-concerning-the-icj-decision>.

¹⁰² *Id.*

¹⁰³ *Relocation of the United States Embassy to Jerusalem (Palestine v. U.S.)*, Application Instituting Proceedings, 2018 I.C.J. General List No. 176 (Sept. 28).

functions attached to such mission on the territory of the receiving state.¹⁰⁴ Given the contested status of Jerusalem, a number of important questions arise, in particular the statehood of Palestine, interpretation of “the receiving state” related provisions under VCDR, and most importantly, legal interests of Israel as the third state. As pointed by Milanovic, the lawsuit is an example of “Palestinian strategic litigation” exploiting all possible legal avenues to exert pressure on Israel and its powerful ally, the United States.¹⁰⁵

C. Taking on China

One of the major defeats faced by China in international courts was the arbitration award in the *South China Sea* dispute (Philippines v. China) regarding maritime rights and entitlements in the South China Sea. The controversy surrounding the control over the South China Sea, which spans an area of 3.5 million square kilometres and generates revenue amounting to trillions of dollars as a busy shipping route, has been unfolding for decades. Besides being a busy shipping lane, the South China Sea boasts rich fishing resources and a biodiverse coral reef ecosystem, holding a great potential for oil and gas resources exploration.¹⁰⁶ Bordered by China, the Philippines, Malaysia, Vietnam, Brunei, Singapore and Indonesia, the South China Sea has become a highly contested area.

The Philippines instituted arbitration proceedings against China seeking the Tribunal to rule on a number of issues, in particular (1) the source of maritime rights and entitlements in the South China Sea; (2) the determination of the entitlements to maritime zones that would be generated under UNCLOS by Scarborough Shoal and certain maritime features in the Spratly Islands that are claimed by both the Philippines and China; and (3) the lawfulness of China’s actions in the South China Sea with respect to fishing, oil exploration, navigation, the construction of artificial islands and installations and its alleged adverse impact on the marine environment.¹⁰⁷ Although China refused to take part in the proceedings, it argued in its Position Paper that the Tribunal lacked the jurisdiction, since the subject matter of the dispute concerned the territorial sovereignty and constituted “an integral part of maritime delimitation between the two countries.”¹⁰⁸ Neither the matters of sovereignty nor the matters of

¹⁰⁴ *Id.* ¶¶ 36-50.

¹⁰⁵ Marko Milanovic, *Palestine Sues the United States in the ICJ re Jerusalem Embassy*, EJIL: TALK! BLOG OF THE EUR. JOURNAL OF INT’L LAW (Feb. 28, 2017), <http://www.ejiltalk.org/palestine-sues-the-united-states-in-the-icj-re-jerusalem-embassy>.

¹⁰⁶ South China Sea Award, *supra* note 22, ¶ 3.

¹⁰⁷ *Id.* ¶ 9.

¹⁰⁸ *Id.* ¶ 13 (referring to CHINA’S FOREIGN MINISTRY, POSITION PAPER OF THE GOVERNMENT OF THE PEOPLE’S REPUBLIC OF CHINA ON THE MATTER OF JURISDICTION IN THE SOUTH CHINA SEA ARBITRATION INITIATED BY THE REPUBLIC OF THE PHILIPPINES (Dec. 7, 2014)).

maritime delimitation can be adjudged within the UNCLOS legal framework.

The very first claim examined by the Tribunal dealt with China's assertion of historic rights within the "nine-dash line." The Tribunal ruled in favour of the Philippines by finding that UNCLOS left "no space for assertion of historic rights" and therefore, China's ratification of UNCLOS resulted in its historic rights being superseded by the limits of maritime zones as outlined by the Convention.¹⁰⁹ As for the second claim advanced by the Philippines, the Tribunal found that Scarborough Shoal and other maritime formations constitute "rocks" within the meaning of Article 121(1) of UNCLOS, which cannot sustain human habitation or economic life of their own, and therefore do not give right to exclusive economic zone or continental shelf.¹¹⁰ Moreover, it was recognised that China did not have any possible entitlements to maritime zone in the area of Mischief Reef and Second Thomas Shoal, as they form part of the exclusive economic zone and continental shelf of the Philippines.¹¹¹ The Tribunal also established a number of violations attributable to China due to its actions that had an adverse impact on the marine environment. More specifically, China violated the Philippines' sovereign rights over (1) the non-living resources of its continental shelf in the area of Reed Bank through the operation of its marine surveillance vessels, as well as over (2) the living resources of its exclusive economic zone through the imposition of the 2012 moratorium on fishing in the South China Sea in the areas falling within the exclusive economic zone of the Philippines.¹¹² The Tribunal also found that China failed to exhibit due regard for the Philippines' sovereign rights with respect to fisheries in its exclusive economic zone¹¹³ and unlawfully prevented Filipino fishermen from engaging in traditional fishing at Scarborough Shoal.¹¹⁴ Moreover, China breached its treaty obligations under UNCLOS by failing to prevent Chinese fishing vessels from engaging in harmful harvesting activities of endangered species,¹¹⁵ as well as through its island-building activities.¹¹⁶ In addition, China, in the course of the arbitration proceedings, was recognised to have aggravated and extended the disputes between the Parties by means of its dredging, artificial island-building, and construction activities.¹¹⁷

¹⁰⁹ *Id.* ¶¶ 261-263, 278.

¹¹⁰ *Id.* ¶¶ 643-645.

¹¹¹ *Id.* ¶¶ 646-647.

¹¹² *Id.* ¶ 716.

¹¹³ *Id.* ¶ 757.

¹¹⁴ *Id.* ¶ 814.

¹¹⁵ *Id.* ¶ 992.

¹¹⁶ *Id.* ¶ 993.

¹¹⁷ *Id.* ¶ 1181.

1. Sovereignty Battles in International Courts and Beyond (My Sovereignty v. Your Sovereignty)

Whereas powerful states, such as China and Russia, portray themselves as championing the principles of sovereignty and non-interference in other states' affairs, they do not walk the talk, as their actions directly encroach upon the sovereignty of weaker states. At first sight, it appears that both states blatantly disregard international law. However, this depiction is not completely accurate, as both China and Russia go to great length in explaining how their actions comply with international law. Russia has exhibited particular skill in instrumentalizing international law by invoking and misinterpreting the Western doctrines, which it has previously fiercely opposed (e.g. R2P, the right to remedial secession).

The actions of Russians during the 2008 Russia-Georgia war and its subsequent occupation of the Georgian territories of Abkhazia and South Ossetia were repeatedly recognized as violating the sovereignty and territorial integrity of Georgia. However, despite the twelve years since the end of the conflict, the situation remains unresolved and Russia still occupies the Georgian territories of Abkhazia and South Ossetia. The latest EU resolution points to a number of mixed methods employed by Russia in undermining Georgia's sovereignty, including, *inter alia*, the use of propaganda, disinformation, and false news as part of its information warfare.¹¹⁸ As described above, Georgia attempts to protect its sovereign rights by pursuing a counter strategy of "lawfare" against Russia in international courts. Whereas the strategy might not have worked out smoothly in all courts where Georgia sought recourse (see above regarding the outcome in the ICJ proceedings in *Georgia v. Russia*), the initiation of such proceedings sent a strong signal that a small country with modest international leverage was not afraid of taking on a powerful state, such as Russia, to defend its sovereign interests.

Similar pattern of trumping over the sovereignty of its neighbour has been pursued by Russia in Ukraine. Having been dissatisfied with re-shuffling of the government that led to the departure of the former Ukrainian president Yanukovich, Russia occupied Crimea and incorporated it into its territory. Notwithstanding this blatant violation of international law, Russia used international law to justify its position by referring to the right of the "Crimean people" to self-determination and their right to remedial secession.¹¹⁹ Although Russia was strongly opposed to Kosovo's claim to self-determination, it nevertheless invoked the same Kosovo precedent to justify the legitimacy of the unilateral secession of Crimea and its full compliance with international law.¹²⁰

¹¹⁸ Resolution on Georgian Occupied Territories Ten Years After the Russian Invasion, EUR. PARL. DOC. (RSP 2741) (2018).

¹¹⁹ Vladimir Putin, *Address by President of the Russian Federation* (Mar. 18, 2014, 3:50 PM), <http://en.kremlin.ru/events/president/news/20603>.

¹²⁰ *Id.*

The Russian representative argued before the ICJ that the “real purpose” behind Ukraine’s lawsuit is “to challenge Crimea’s reunification with Russia,” which was “based on a free and genuine decision of the people of Crimea expressed in a referendum.”¹²¹ However, the involvement of Russia in the conflict in Ukraine goes beyond Crimea, as Russia is also blamed for steering the conflict in eastern Ukraine by providing military, financial and logistical support to the pro-Russian separatist groups opposed to the Ukrainian government. As discussed above, Russia’s involvement in the conflict in eastern Ukraine and the evaluation of its degree of control is currently subject to judicial scrutiny in various international courts. Ukraine’s sovereign rights are directly affected, as it does not exercise control over a substantial part of its territory in eastern Ukraine, which is designated as “non-government-controlled areas.” In turn, Russia submits that in no way it is in breach of the territorial sovereignty in Ukraine, since the situation in eastern Ukraine is purely “an internal armed conflict” between “the Ukrainian armed forces supported by pro-government volunteer battalions and the people of eastern Ukraine, self-organized in the Donetsk People’s Republic (DPR), and Lugansk People’s Republic (LPR).”¹²²

Following the final arbitration award in the South China Sea dispute, the Chinese government was quick to reiterate that that “China’s sovereignty and maritime rights and interests in the South China Sea” remain unaffected.¹²³ The lawsuit brought by the Philippines was dismissed as politically motivated and contrary to international law. China maintained that it would not succumb to any award related external pressure, as it is firmly committed to safeguard its sovereignty and maritime rights.¹²⁴ China’s open dismissal of the authority of the arbitration proceedings and its non-compliance with the final award leave competing maritime claims unsettled. China does not only find itself in a standoff with the Philippines and other claimant states, but also with the U.S. that entered into the regional alliance to constrain China’s maritime influence and its enhanced military presence. China’s actions in the South China Sea are viewed by the U.S. as contributing to the “potential erosion of international law.”¹²⁵

Being caught in the middle of the South China Sea wrangling, the U.S. is

¹²¹ 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), Verbatim Record CR2019/9 (Preliminary Objections), 2019 I.C.J., at ¶ 11 (June 3).

¹²² *Id.* at ¶ 10.

¹²³ *China’s Sovereignty and Maritime Rights and Interests in the South China Sea Shall Not Be Affected by Arbitration Award*, MFA NEWS: S. CHINA SEA ISSUE (July 16, 2016), https://www.fmprc.gov.cn/nanhai/eng/wjbxw_1/t1382766.htm.

¹²⁴ *Id.*

¹²⁵ Richard J. Heydarian, *The Conflict to Come in the South China Sea: Forget the US-China Trade War, the More Meaningful Superpower Clash Will Likely Be at Sea*, ASIA TIMES (May 22, 2019), <https://www.asiatimes.com/2019/05/article/the-conflict-to-come-in-the-south-china-sea/>.

also fighting its own battles in international courts (as discussed above). Despite the fact that the U.S. largely lost on its objections to the ICJ jurisdiction in *Certain Iranian Assets*, it succeeded in convincing the Court that the question of sovereign immunities does not fall within the scope of the Treaty of Amity, which Iran invoked as the legal basis for its action before the ICJ. If the Court had decided to proceed with the matter of sovereign immunities on the merits, the outcome for the U.S. would have been less certain. The U.S. far-reaching anti-terrorism legislation, as well as its questionable foreign policy decisions, such as the re-imposition of sanctions in defiance of the Iranian nuclear deal and the relocation of its Embassy to Jerusalem, caused some serious diplomatic rows with the affected states. However, it is remarkable that the affected states, which believe that their sovereign rights are affected, have been engaged in creative lawyering by using ample opportunities afforded by international law to bring lawsuits against powerful adversaries.

2. Backlash Against International Courts and Distrust Towards Their Work

This emerging trend of “lawfare” involving powerful states as respondents in lawsuits before international courts has only amplified the ongoing backlash against international courts. The ICC received most criticism directed against it by the U.S. and Russia in response to the ICC Prosecutor’s inquiry into the alleged crimes committed by nationals of both countries on the territories of other states, such as Afghanistan, Georgia, and Ukraine. As discussed above, the U.S. representatives launched an openly aggressive attack on the ICC. Speaking of the ICC as an institution, John Bolton said: “We will let the ICC die on its own. After all, for all intents and purposes, the ICC is already dead.”¹²⁶ In response, the former U.S. ambassador-at-large for war crimes David Scheffer commented that Bolton’s speech “isolates the U.S. from international criminal justice” and shows that “the U.S. is intimidated by international law and organizations.”¹²⁷

Russia openly engaged in the criticism of the ICC when the Office of the Prosecutor in its report on preliminary examination activities (2016) found that the rules of international humanitarian law applied to the occupied Crimea, as well as noted Russia’s involvement in the conflict in eastern Ukraine.¹²⁸ This provoked a swift reaction from the Russian government that symbolically recalled its signature from the Rome Statute, which it had never ratified. The signature was recalled by the decree signed by the Russian President Vladimir Putin on 16 November 2017. The Ministry of Foreign Affairs issued an official statement in which it clarified the reasons behind Russia’s withdrawal of its

¹²⁶ Owen Bowcott, et al., *supra* note 70.

¹²⁷ *Id.*

¹²⁸ 2016 OTP REPORT, *supra* note 58, ¶155–158, ¶169–170 (describing Crimea and Eastern Ukraine).

signature from the Rome Statute, including the failure of the ICC to live up to the expectations of becoming “a truly independent, authoritative international tribunal,” its poor performance record when measured against the maintenance costs, and the distrust of the African states towards the ICC.¹²⁹ Whereas the statement makes no mention of Ukraine, it directly alleged the ICC bias in its handling of Georgia’s inquiry pointing that the Court exclusively focused on the actions of South Ossetian militia and Russian soldiers, while leaving out “actions and orders of Georgian officials...to the discretion of the Georgian justice.”¹³⁰ As argued elsewhere, Russia also significantly undermined the authority of the ECtHR by openly refusing to execute some of its decisions as running contrary to the Constitution of the Russian Federation.¹³¹ Although none of those ECtHR decisions were related to the conflict in Georgia and Ukraine, the introduction of this new “review” procedure of the decisions of the ECtHR by the Russian Constitutional Court paves way for future non-compliance by Russia, especially at the backdrop of pending inter-state applications and a large number of pending individual applications related to the conflicts in both countries.

Both Russia and China have shown a deep lack of trust in the authority of arbitration proceedings. As noted above, China openly dismissed the authority of the arbitral tribunal in the South China Sea case by disregarding the legal value of the final award. Following the occupation of Crimea, many Ukrainian companies resorted to investor-state arbitration to obtain remedies for the losses they incurred as the result of the expropriation of their investments in Crimea. However, Russia in its official letters dated 12 August and 15 August 2015 to the Permanent Court of Arbitration (PCA), “did not recognise the jurisdiction of an international arbitral tribunal at the Permanent Court of Arbitration in settlement of [the Claimants’ claims].”¹³² Likewise, Russia communicated its note verbale to the ITLOS where Ukraine recently sought to have the matter settled under UNCLOS in relation to the detention of its naval vessels and crew members, in which it rejected the constitution of the arbitral tribunal under Annex VII of UNCLOS.¹³³ Russia submitted that Ukraine’s claims fell outside

¹²⁹ *Statement by the Russian Foreign Ministry*, MINISTRY OF FOREIGN AFF. RUSS. FED’N (Nov. 16, 2016), http://www.mid.ru/ru/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2523566?p_p_id=101_INSTANCE_cKNonkJE02Bw&_101_INSTANCE_cKNonkJE02Bw_languageId=en_GB; see also Sergey Sayapin, *Russia’s Withdrawal of Signature from the Rome Statute Would Not Shield its Nationals from Potential Prosecution at the ICC*, EJIL TALK! BLOG OF THE EUR. JOURNAL OF INT’L LAW (Nov. 21, 2016), <https://www.ejiltalk.org/russias-withdrawal-of-signature-from-the-rome-statute-would-not-shield-its-nationals-from-potential-prosecution-at-the-icc/>.

¹³⁰ *Id.*

¹³¹ Aksenova & Marchuk *supra* note 3.

¹³² *E.g.*, Press Release, Permanent Court of Arbitration Press, Arbitration between PJSC Ukrnafta as Claimant and the Russian Federation, Arbitration between Stabil LLC and Ten Others as Claimants and the Russian Federation (May 2, 2016), <https://pcacases.com/web/sendAttach/1701>.

¹³³ Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation), Case No.

the jurisdiction of the arbitral tribunal “in light of the reservations made by both the Russian Federation and Ukraine under Article 298 of UNCLOS stating, *inter alia*, that they do not accept the compulsory procedures...entailing binding decisions for the consideration of disputes concerning military activities.”¹³⁴

As for the ICJ proceedings, neither Russia nor the U.S. envisioned being involved in contentious proceedings before the ICJ, since none of them accepted the compulsory jurisdiction of the Court. Both states submitted extensive preliminary objections to jurisdiction of the ICJ, arguing that none of the instruments invoked by parties (e.g. CERD, ICSFT, VCDR, and the 1955 Treaty of Amity) described the nature of the dispute at stake with the states that lodged disputes against them. Russia and the U.S. argued that those instruments were simply used by their adversaries to advance their geopolitical goals and to exert reputational pressure on them.

3. Non-Participation or Selective Participation in the Proceedings

Powerful states choose their battles carefully and do not always engage in litigation before international courts. However, this non-participation or selective participation in proceedings before international courts does not mean that powerful states sit idle, while important matters involving their interests are being adjudged. As discussed above, despite being non-ratifying states of the Rome Statute, both the U.S. and Russia in very strong terms dismissed any prospect of cooperation with the Court. This is not insignificant, as prior to making public hostile statements directed at the ICC, both states did cooperate with the ICC: Russia furnished the ICC Office of the Prosecutor with evidence in relation to the ICC Prosecutor’s inquiry into the situation in Georgia, whereas Americans provided more general assistance on tracking and locating the ICC suspects on the run.¹³⁵

As discussed above, both China and Russia refused to participate in arbitration proceedings initiated against them under UNCLOS. However, they communicated their position on the non-acceptance of the jurisdiction by sending official letters directly to the PCA or through the respective foreign ministries. In fact, China challenged the jurisdiction of the arbitral tribunal through publishing its Position Paper, as well as sending communications to the members of the tribunal on behalf of the Chinese Ambassador of the Netherlands.¹³⁶ Notwithstanding China’s non-participation, the constituted arbitral tribunal treated China’s Position Paper and communications “as equivalent to an objection to jurisdiction.” Hence, the Tribunal’s Award on

26, Note Verbale from the Embassy of the Russian Federation to the Federal Republic of Germany (Apr. 30, 2019), https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_26/NVRF_2019.04.30.pdf.

¹³⁴ *Id.*

¹³⁵ Marchuk & Wanigasuriya, *supra* note 59, at 135.

¹³⁶ South China Sea Award, *supra* note 22, ¶ 13 (original footnote omitted).

Jurisdiction and Admissibility directly examined the objections to jurisdiction as set out in China's Position Paper.¹³⁷

The ICJ as the highest UN Court that has representatives of China, USA, and Russia on the bench of judges is not an international court which can be easily ignored. Whereas all three states attempted to minimise their prospective participation in contentious proceedings before the Court by refusing to accept its compulsory jurisdiction, Russia and the U.S. have nevertheless reluctantly found themselves to be respondents in a number of highly controversial disputes, which largely stem from their foreign policy choices and/or military involvement abroad. Both Russia and the U.S. hired top international lawyers to represent their interests in the ICJ and did their best to challenge the ICJ's jurisdiction, thus attempting to prevent the cases from being heard on the merits and potentially resulting in damning decisions against them.

4. Abuse of Jurisdiction, Abuse of Process, or Abuse of International Law?

When describing the litigation strategies of weaker states, the powerful states often use the word "abuse," be it "abuse of the jurisdiction" or "abuse of process." In *Certain Iranian Assets* case, the U.S. raised an objection based on "abuse of process."¹³⁸ The U.S. argued that, in the absence of any friendly, commercial, and consular interests as envisaged by the Treaty of Amity, the fundamental conditions underlying the Treaty no longer existed between Iran and the U.S. Therefore, Iran's recourse to the ICJ proceedings constituted an "abuse of process," as instead of "vindicat[ing] interests protected by the Treaty," Iran sought to "embroil the Court in a broader strategic dispute."¹³⁹ The ICJ may in exceptional circumstances reject a claim "based on a valid title of jurisdiction on the ground of abuse of process" when there is "clear evidence that the applicant's conduct amounts to an abuse of process."¹⁴⁰ However, in the present case, the Court endorsed a formalistic approach by noting that, at the time of Iran's application, the Treaty of Amity was in force and therefore, it did not consider there were "exceptional circumstances which would warrant rejecting Iran's claim on the ground of abuse of process."¹⁴¹ Hence, the Court rejected to be involved in addressing the matters of politics and delivered a predictably sober decision in that regard. The word "abuse" also featured in the statement of the U.S. Secretary of State Michael Pompeo in response to the ICJ order on the indication of provisional measures in another lawsuit concerning the U.S. policy

¹³⁷ *Id.* at ¶ 14.

¹³⁸ Iran v. U.S. Preliminary Objections Judgment, *supra* note 85, ¶ 100.

¹³⁹ *Id.* at ¶ 107.

¹⁴⁰ *Id.* at ¶ 113 (citing in support Preliminary Objections, Judgment of June 6, 2018, ¶ 150); *see also* *Certain Phosphate Lands in Nauru (Nauru v. Austl.)*, Preliminary Objections, Judgment, 1992 I.C.J. Rep. 240 ¶ 38 (June 26).

¹⁴¹ *Id.* at ¶ 114.

of the re-imposition of sanctions against Iran. In strong words, he condemned “how Iran has hypocritically and groundlessly abused the ICJ as a forum for attacking the United States.”¹⁴²

Likewise, Russia argued that Ukraine abused the jurisdiction of the Court by bringing claims under CERD and ICSFT that were not at the heart of the dispute between the two states, as the dispute largely concerns the use of force under international law. Hence, Russia’s position is that both conventions were used as a cover-up by Ukraine to bring up a set of broader issues through the backdoor, which the Court is not competent to adjudge. In that regard, Ukraine replicated the litigation strategy of Georgia that invoked CERD as the legal basis for its action before the ICJ by taking advantage of Russia’s earlier withdrawal of reservations to the compromissory clauses in selected human rights conventions, including CERD. In the *Marshall Islands* case, Judge Crawford, who represented the interests of Georgia in its lawsuit against Russia prior to his judicial appointment in the ICJ, hinted at the weakness of Georgia’s argument as to its interpretation of the existence of a dispute under CERD, as he openly questioned whether the dispute concerned racial discrimination under CERD or whether it was being used as a “device to bring a wider set of issues before the Court.”¹⁴³ The same reasoning applies to pending Ukraine’s lawsuit against Russia. Whereas CERD could be applied to some extent to describe the worsening human rights situation on the territory of the occupied Crimea, if the case were to proceed to the merits stage, the Court, being bound by the CERD framework, would not be able to address the real underlying issues at stake, such as the right to self-determination and the right to remedial secession.¹⁴⁴ Invoking ICSFT as the basis for the ICJ jurisdiction may prove to be a strategic mistake on the part of Ukraine, as it framed the situation in eastern Ukraine within the terrorism suppression regime, but it is more accurately described under the IHL framework. Although it may be argued that the terrorism suppression regime and IHL are not mutually exclusive, Ukraine was not convincing at the provisional measures stage that the acts for which Russia allegedly provided support could amount to the underlying acts of terrorism.¹⁴⁵ In light of the above, the question remains open as to whether weaker states “abuse” international law or rather they creatively engage with matters of international law in order to advance accountability of powerful states.

¹⁴² *U.S. Secretary of State Pompeo’s Remarks to the Media*, U.S. DEP’T OF STATE (Oct. 3, 2018), <https://www.state.gov/remarks-to-the-media-3/>.

¹⁴³ *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. U.K.)*, Judgment (Preliminary Objections), 2016 I.C.J. Rep. 1093, ¶ 19 (Oct. 5, 2016) (dissenting opinion by Crawford, J.).

¹⁴⁴ *From Warfare to ‘Lawfare,’ supra* note 42, at 232-33.

¹⁴⁵ *Application of the ICSFT and CERD, supra* note 49, at 450.

IV. CONCLUDING WORDS

Over the last years we have witnessed profound changes at the international arena, such as the changing nature of warfare, rise of nationalist populist movements, distrust in the work of international institutions, and departure from multilateralism. Ushering in a new area of international affairs is accompanied by the transformation of international law. As demonstrated in this article, international law is no longer a uniform discipline, rather it is a melting pot of different regional narratives, each narrative tailored to specific geopolitical needs of powerful actors who shape international law. There has been a surge of sovereignty-centric approaches to international law advanced by powerful actors, such as Russia, China, and the United States. This renewed resort to sovereignty as a “darling” of international law is largely a response by powerful states to the actions of other states and/or international organizations whose actions are viewed by the former as encroaching upon their sovereign rights. However, this article also argues that powerful states often tend to defend their sovereignty at the expense of sovereignty of weaker states that are fighting an uphill battle to bring the former to account for the alleged violations of international law in international courts.

Instrumentalization of international law by superpowers comes at a high price, as they reluctantly find themselves being embroiled in countless disputes before international courts. The states affected by the Russian, Chinese, and American policies have been vocal about pursuing the strategy of defensive “lawfare” against powerful adversaries in international courts. The phenomenon of “lawfare” appears to have changed as to what has been originally conceived by Charles Dunlap who introduced the term. International law was largely seen as a tool used *by* or *against law-abiding* powerful actors, but it appears that powerful states no longer diligently abide by international law. Hence, the affected states with less significant geopolitical presence fight their battles in the courtrooms of international courts. This has prompted powerful states to justify their actions in front of international judges. In doing so, they advance their own sovereignty-centric narratives of international law or exhibit particular skill in instrumentalizing the doctrines of international law (e.g. R2P, remedial secession), which in fact run contrary to their interpretation of the principle of sovereignty. Powerful states and their adversaries have been accusing each other of abusing international law: the latter arguing that international law is the only tool at their disposal to defend their sovereign interests affected by powerful states; the former contending that the excessive litigation is nothing more than the tactic of creative lawyering and a tool of political propaganda pursued by their weaker adversaries. The truth is somewhere in the middle. Powerful states should be held to account for their poor foreign policy choices resulting in the violations of international law. However, the affected states are somewhat limited by the existing jurisdictional limitations of international courts, thus it is quite understandable that they exploit all possible options to defend their rights

and interests. This hardly qualifies as an abuse, rather it is borne out of necessity to seek solutions by relying on “lawfare” rather than following a dangerous path of warfare.