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UNCLOS and the South China Sea Arbitration: Into Lawfare's Abyss?

Christian R. J. Pogies

Summary

In July 2016, the Permanent Court of Arbitration (PCA) announced its highly anticipated award on the Philippines' case against China's claims in the South China Sea. However China declared that it would accept neither the tribunal's proceedings, conducted under the United Nations Convention on the Law of the Sea (UNCLOS), nor the award itself. Even though China remained absent throughout the arbitration process, the issued award has had an impact on the conflict as well as on the future of international law itself. Since the Philippines first invoked the tribunal in late 2013, both states have increasingly accused each other of violating international law. Observers tend to use the term "lawfare" in reference to the current relationship between the two states. I will argue that the use of this neologism — a combination of "law" and "warfare" — appears to be a double-edged sword in the context of this dispute. As an analytical tool, lawfare is useful to understand that by invoking international law, military objectives — for example reclamation of territory, access or denial of access to waters — are achievable. The concept may even have a positive impact on international law, as long as the phenomenon to which it refers unfolds within the rule of law. Nevertheless, one has to reflect in a critical manner on a burgeoning normative and political instrumentalization of the term. While lawfare as an analytical tool is revealing of today's power reach of international law, the strategic use of this term is at the same time paradoxically also a burden to the future rule of law.

Keywords: China, the Philippines, South China Sea arbitration, UNCLOS, international law, lawfare

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Tides of change

As the ongoing conflict in the South China Sea shows, matters related to maritime issues are increasingly becoming the focus of international relations. Ocean space was long viewed as the “great void” or a “nonterritory,” but nowadays this understanding has changed considerably (Steinberg 2001: 125). With ongoing technological progress, states and companies are continuously expanding their capability to exploit maritime resources. Furthermore, control over shipping lanes is of key strategic importance in the globalized economy. However, beyond the classic spheres of realpolitik, the world’s seas and islands also have an increasing symbolic significance. These factors not only increase the value of ocean usage for various actors, but also the potential for conflicts between them.

Inter alia, to deal with the issue of conflicts potentially arising concerning maritime issues, the United Nations concluded the most comprehensive treaty in its history in 1982 (Wolfrum 2006: 2). The United Nations Convention on the Law of the Sea (UNCLOS), also referred to as “the constitution of the oceans,” claims to manage all matters related to maritime issues (Koh 1982). For one thing, many divergent interpretations of the convention have been decided on in its far-reaching dispute settlement mechanisms (Sohn et al. 2014). A true litmus test for this elaborate tool of international law, however, was still pending up until the present arbitration case. This was due to a lack of involvement from great powers in the cases brought forward previously — not being ones that altered fundamental aspects of their national interest, such as territorial claims.

In this analysis, I will focus on the conflict in the South China Sea — as it challenges the ability of international law to influence similar disputes in future. This matter is particularly relevant if one views the conflict in the South China Sea as an analogy for an Arctic becoming increasingly exploitable, or in all probability for upcoming outer space disputes too. For both of these situations, experts view the UNCLOS dispute settlement mechanisms as the likely blueprint (Beckman 2016a; Fox 2016; Goh 2007: 228–237). However, in the current arbitration process, these mechanisms seem to be undermined by a strategic use of the concept of “lawfare.”

To approach the topic of lawfare and its impact on international law’s power over disputes, I will proceed in four steps. First, I will exemplify the struggle regarding international law’s interpretation in the South China Sea, as different readings of the convention’s articles are of great importance to various national interests around the globe. Second, one has to consider the current award. By invoking legal proceedings against China, the Philippines left the path of bilateral negotiations and sought a binding decision on several aspects of the dispute instead. This is crucial, as the binding nature of UNCLOS and its interpretation via the Permanent Court of Arbitration (PCA’s) award should imply an end to this struggle. However, various parties have interpreted this arbitration and its award — which is binding, but not enforceable — through the lens of lawfare. In the present case, this concept appears

to be situated at the interface between the struggle regarding the interpretation of international law, the PCA's award, and the overall power of international law. After taking a closer look at the concept of lawfare and its use in alternate contexts, I will argue, on the one hand, that lawfare as an analytical tool is able to reveal the current power of international law. To the international community the concept could even promote a more *peaceful* way to approach interstate conflicts, as long as lawfare is fought in compliance with the rule of law. On the other hand, the strategic use of this concept also constitutes a serious threat to the rule of law — that due to its subversive tendencies.

The South China Sea: A global struggle for the interpretation of international law

In the South China Sea, there lie two disputed island groups and one atoll. All three of these are subject to a variety of interconnected conflicts. These mainly concern the question of rightful sovereignty under customary international law (CIL) and the interpretation of their status as maritime features under UNCLOS.

Situated in the north of the South China Sea lies the Paracel Islands group, which China, Taiwan and Vietnam all claim as their own. In the south of the South China Sea, meanwhile, lie the Spratly Islands, to which comprehensive claims have also been made by these three states. Additional claimants to this largest of the island groups include Brunei Darussalam, Malaysia and the Philippines, but none of them claim the Spratlys as a whole. Furthermore a conflict exists regarding Scarborough Shoal, which is situated in the southeast reaches of the South China Sea. Sovereignty rights over this maritime feature are claimed by China, Taiwan, and the Philippines (Beckman 2013: 144–145).

While the South China Sea and its rich fishing grounds functioned in the past primarily as a substantial basis for the coastal communities' self-sufficiency, nowadays the fishing industry has become an industrialized sector of great importance to many states (Greer 2016). Additionally, advances in technology have made it possible to exploit nonliving resources such as oil and gas there too. While the topic of nonliving resources is often described in the media as being one of the main drivers for these conflicts, scholars advise against overestimating the role that they play in the conflicts' dynamics (Kreuzer 2014: 9–10; Owen and Schofield 2012).

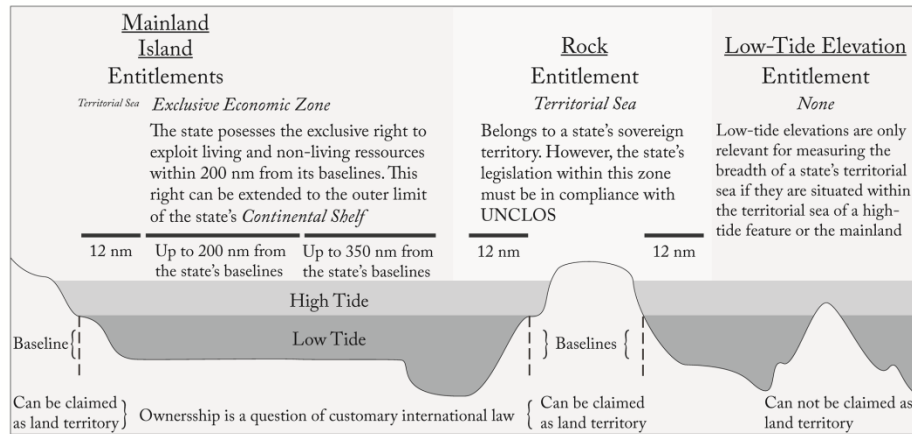
Beyond the local economic factor of resource exploitation, the South China Sea is also a vital part of the global economy. This maritime area and the current interpretation of UNCLOS by the PCA are therefore not only of relevance for its riparian states but also for a number of external maritime states too. In 2014, of the world's 20 largest container harbors 14 were situated along the coasts of the South China Sea and its adjacent waters (IAPH 2015). As one of the world's busiest sea routes, it was expected that a trade volume of 5.3 trillion US dollars would have

passed through this area by the end of 2016 (Schonhardt and Saurabh 2016). China, Japan, and Taiwan, for instance, receive more than 80 percent of their crude oil supplies via these sea lanes (OSD 2016: 51).

Additionally, Japan itself has a territorial conflict with China and Taiwan over the Senkaku/Diaoyu Islands in the East China Sea (Lee 2014). An unfavorable award for China was in Japan’s interest, as it could strengthen its own claims (Poudel 2016). The United States, for its part, wants to ensure that their interpretation of freedom of navigation described in UNCLOS is upheld in the entire East Asia region. This due to the fact that, after UNCLOS entered into force in 1996, about 40 percent of the global oceans space has lain in so called “exclusive economic zones” (EEZs) (Scher 2009: 12). Since the US assumes that a number of states try to restrict access to their EEZs, they are apprehensive about an upcoming significant decrease in their own scope to project military power worldwide (Kraska 2007; Scher 2009: 12). In the case of the South China Sea, the US sees these attempts being made mainly by China — but also by a number of other states besides (USDP 2017). Further support for the assurance of the freedom of navigation is given mainly by Australia, the European Union, and India — less out of military than economic reasons (Bateman 2015; Linck 2016; Scott 2013).

At the latest since the initial adoption of UNCLOS, this economic and military — respectively strategic — role of the modern ocean space has been tied to states having an internationally recognized sovereignty over maritime features. As under UNCLOS, states may now claim different kinds of sea zones, deriving from “islands”, “rocks” and “low-tide elevations.”

III. 1



Since the claims of all states sharing a coastline with the South China Sea are based mostly on a few relevant articles of UNCLOS and CIL, China’s position stands out.

Unlike the other states concerned, China claims “historic rights” under UNCLOS to the area within the so-called “nine-dash line” covering the bulk of the South China Sea. Since its first official submission of a map showing this line to the UN in 2009, China has fostered a certain kind of strategic ambiguity regarding what the exact nature of this historic claim is (Wang 2015).

Bearing in mind the strategic importance of this maritime area for the various actors involved, as well as their divergent interpretations of UNCLOS and CIL, the South China Sea appears to be a crucial platform for global struggles and the interpretation of international law. By invoking the PCA in The Hague, an additional party entered into this struggle — one with the ability to issue a legally binding award for China and the Philippines regarding the questions that it was tasked to answer. In doing this, the Philippines hoped to prevent China from: “convert[ing] the nine-dash line, or its equivalent in the form of exaggerated maritime zones for tiny, uninhabitable features, into a Berlin Wall of the sea: a giant fence owned by and excluding everyone but China itself” (del Rosario 2015: 198). However China’s point of view differs from that of the Philippines, and it claims that its “refusal to accept the arbitration submitted by the Philippine side is an act truly in keeping with the law” (Sun 2014).

A contested arbitration

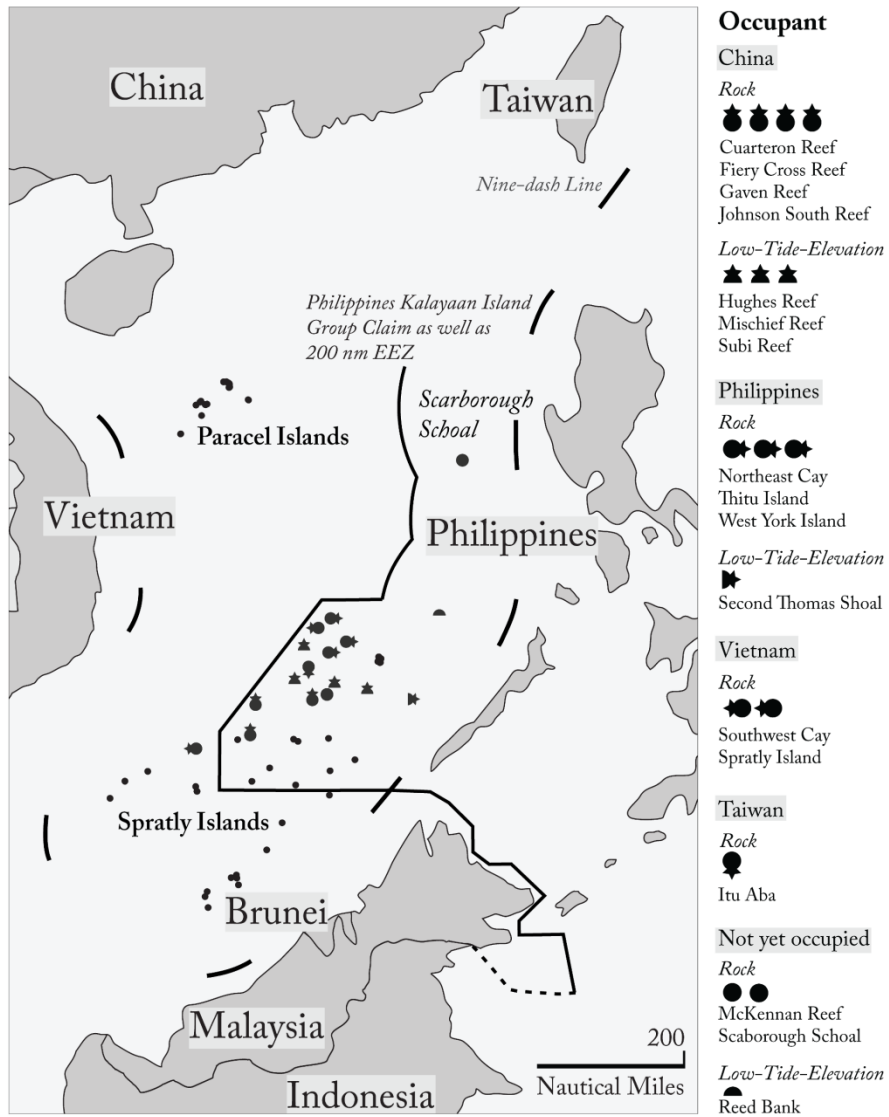
The PCA surprised most of the arbitration’s observers with a major victory being awarded to the Philippines. In almost every aspect, the court ruled in favor of the archipelagic state. It even decided to grant an adverse award to China for its highly controversial nine-dash line, a decision that the court could have avoided making by declaring that it does not possess jurisdiction in this regard (Ku 2016). Instead, out of the 15 submissions made by the Philippines the court rejected only one minor one. Considering the range of possible arbitration outcomes, China now faces what is nearly the worst-case scenario for it.

The PCA’s denial of the claimed historic rights probably marks the most profound setback for China, while at the same time also being an outcome to the great advantage of many other countries (Beckman 2016b; Kraska 2016). By defining China’s claims based on historic rights to maritime space in the South China Sea as being inconsistent with UNCLOS, the country is neither able to legally claim natural resources in a bulk of the disputed areas nor can China make any lawful attempts to restrict the interpretation of freedom of navigation in large parts of the South China Sea (PCA 2016: 117). In addition, with the court’s decision to define the largest maritime feature in the South China Sea, Itu Aba, as a rock under UNCLOS (PCA 2016: 254), neither of the features that are currently occupied by China can legally constitute an EEZ. Finally, the court decided to define three out of the seven features currently occupied by China in the Spratly Islands as low-tide elevations (PCA: 174)

— one of which is situated within the Philippines' EEZ and continental shelf (PCA: 260).

III. 2

Post Award Status of Relevant Maritime Features in the South China Sea



Likely in anticipation of an unfavorable outcome arising, China tried to delegitimize the authority of the court in this case from the very beginning of the arbitration proceedings. As the country laid out its stance on those proceedings in a series of statements, the bottom line was always “no acceptance, no participation, no recognition, and no implementation [of the court’s proceedings and the award]” (Fu 2016). Further bilateral negotiations to resolve the disputes were favored instead. Although the award by the PCA expressly stresses its binding nature, it is not actually enforceable however — as international, unlike municipal, law lacks the necessary mechanisms for that, at least in the face of the veto powers of the UN Security Council.

Rule of law or lawfare?

Both factors considered, the various states’ contestation over the interpretation of international law and China’s rejection of the South China Sea arbitration case, are indicative of a discursive switch. In politics, academia, and in the media, the pre-arbitration debate was centered around the question of exactly who in the South China Sea region interprets the law in a legally correct manner. The actual invocation of the court, however, introduced another question to the fray: whether international law, as the Philippines is using it, is even a legal and legitimate way to approach a solution to the dispute (Cheng 2016; Ma 2016; Smirnov 2016). While this reflection on the role of institutions should always be welcomed within the academic field, the denial of the legality of the arbitration process also interconnects with a rise in the normative lawfare argument.

The term lawfare has undergone considerable changes since it was first mentioned in the 1950s, later becoming well known due to its further refinement by Charles J. Dunlap in the early 2000s (Sadat and Geng 2010). Nowadays, the concept of lawfare no longer appears to be as homogenous (Scharf 2010). I therefore want to focus solely on three of its conceptual uses — all of which are relevant to this dispute, and all of which may affect international law.

The most prominent definition of lawfare was the one developed in 2005 by former US Air Force General, and now professor at Duke University, Dunlap. He defines lawfare as “the strategy of using – or misusing – law as a substitute for traditional military means to achieve an operational objective” (Dunlap 2008: 146). Dunlap states clearly that lawfare should be understood as an “ideologically *neutral*” analytical tool, one that focuses on circumstances “where law can create the same or similar *effects* as those ordinarily sought from conventional warmaking approaches” (2010: 121, italics added by the author himself). It is, furthermore, like a weapon that “can be used for good or bad purposes, depending upon the mindset of those who wield it” (Dunlap 2010: 121).

However, with the second use of lawfare, the term as Dunlap described it runs the risk of losing its intended “neutrality.” As Wouter G. Werner stressed “[the

meanings of terms such as ‘lawfare’ are not set in stone, but rather, evolve through their use in different social practices” (2010: 62). Lawfare, being applied more broadly in the media and for political means might finally “become a tool in a legal demolition derby as its original meaning becomes obscured and distorted over time,” Melissa A. Waters adds (2010: 328). A “reflexive” use of lawfare might turn the academic concept into “a political instrument that can be used to undermine the activities of legal and political opponents” (Werner 2010: 63). Although Werner and most other critics of lawfare thought about reflexive lawfare in cases in which the Bush administration used the term as an instrument to discredit opponents of the government, one also can find similarities concerning the South China Sea context too. The use of the term lawfare here also became an instrument of the practice itself, namely to denounce the Philippines’ legal position and the PCA’s award. Most prominent in this regard was when China’s press agency Xinhua quoted the international lawyer Stefan Talmon’s words: “The Arbitration is an act of ‘lawfare’ rather than an exercise in the rule of law” (Xinhua 2016).

This reflexive use of lawfare seems to fit well with the third use of the concept — China’s so called “legal warfare” and how it is being used in the current dispute. In 1999 two colonels of the People’s Liberation Army published a book entitled *Unrestricted Warfare*. Therein the authors describe legal warfare as part of a hybrid definition of warfare, also including psychological and public opinion/media warfare (Bergerson 2016: 8; Cheng 2012a). In 2003 this approach to hybrid warfare was codified in the “Political Work Regulations of the Chinese People’s Liberation Army,” and became commonly known as the “three warfares” due to a report prepared for a Pentagon think tank (Halper 2013). At its core, legal warfare therein is about “arguing that one’s own side is obeying the law, criticizing the other side for violating the law (*weifa*), and making arguments for one’s own side in cases where there are also violations of the law” (Yanrong, cited in Cheng 2012b: 2).

The aforementioned newspaper article by Xinhua, China’s rental of a media screen in Times Square to support its stance (Tian 2016), as well as the public-effective proclamation of other states willing to support them can be interpreted in this light (AMTI 2016; Lu 2016). The assumption about international law being an instrument of power in an ongoing interpretation struggle — also after the award — seems to be reflected in a speech given by then-President Jiang Zemin in 1996. Jiang therein urged that, “[o]ur leaders and cadres, especially those of high rank, ought to take note of international law and enhance their skills in applying it. [...] We must be adept at using international law as ‘a weapon’ to defend the interests of our state and maintain national pride” (cited in Wang 2005: 128). Wang Tieya, one of China’s leading legal scholars, later characterized Jiang’s speech as the “‘second spring’ in twenty years of international law in China” (2005: 128). While scholars in China might have considered this speech to be a wakeup call, Western ones viewed it more as a call to arms (Kittrie 2016: 160–195; Odom 2015).

The award and its implications

The power of international law today seems to find its confirmation in the conceptualization of lawfare. While the Realist school of International Relations theory still considers international law as a tool of mere effectiveness (Koh 1997; Krasner 2002), the South China Sea arbitration lets us observe a differentiated picture in fact. Even though China's noncompliance with the award is surely not the preferred outcome of the Philippines, the country does now possess additional scope for genuine action.

For example, the Philippines can give legally valid concessions to foreign companies from other states (e.g. India, Russia, or the US) to exploit maritime resources within areas that are now undisputed from a legal point of view. To be guaranteed its own rights as granted by the award, Kerry L. Nankivell (2016) suggests asking the US to conduct fishery enforcement. The Philippines can additionally try to sue Chinese companies operating within its own EEZ in courts where enforceable rulings exist (McGarry 2016). Finally, but importantly, in taking into account China's history of negotiating disputed territories (Fravel 2008), the Philippines might now hold more solid ground in upcoming talks likely to happen between the two countries (Bautista 2016; Mogato 2016). Viewing this through the analytical lens of Dunlap's lawfare concept, the Philippines gained a lot by waging it. The country with the significantly weaker military was able to challenge the great power state by wielding its only weapon available, UNCLOS. Importantly, the Philippines' waging of lawfare was done *peacefully* — namely by relying on the rule of law.

On the other hand, there are reasonable indications that China was seriously concerned about the arbitration's award — even despite it not being directly enforceable. China's furious media campaign to delegitimize the PCA during the course of the arbitration process and following the award was impressive. However, as lawfare is not used in only a single context, one can also interpret China's media campaign as both the legal part of the aforementioned three warfares and as reflexive lawfare. Both legal warfare and reflexive lawfare seem to interconnect, and are capable of building an unholy alliance against the power of international law. This is due to their subversive tendencies, which suggest to stigmatize legal proceedings as biased, illegitimate, and illegal. China, by giving its own legal opinion external to the court, has tried to turn public opinion against the rule of law — which the country is, counterfactually, simultaneously claiming for itself.

In the long term, this phenomenon — which might be described as a paradox of the power of international law — runs the risk of eroding the international juridical system. It seems that international law, by becoming more effective, tends to be conceptualized more and more in terms specifically of lawfare. The latter therefore appears as a concept not only emphasizing the power of international law but also hamstringing it at the same time — and this at the very moment of its rise.

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