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

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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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