

LAWFARE: THE WEAPONIZATION OF INTERNATIONAL LAW

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Abstract

In the modern, legally-sophisticated era, international law is deployed as a weapon of war by states and nonstate actors against their adversaries. Such use of international law is regarded as lawfare. In its literal sense, the word lawfare is a combination of two words: law and warfare. Lawfare can be either Zeusian (i.e., waged to uphold the principles of international law) or Hadesian (i.e., waged for rescinding the true spirited implementation of legal rules). Similarly, it can either be defensive or offensive in nature, depending upon the legitimate or exploitative use of law by a state or nonstate actor against its adversary. In this regard, international tribunals such as the International Criminal Court, the International Court of Justice, and the United Nations are some of the forums through which lawfare is waged by a state or nonstate actor against its adversaries. There are many examples of the deployment of law as a weapon of war in the twenty-first century. For instance, some prominent instances of use or misuse of law as a weapon of warfare are the referral by the Palestinian Authority against Israel, Russia's misuse of law through disrespecting the Budapest Memorandum in the Ukrainian conflict, financial lawfare in the shape of sanctions imposed by the United States against its adversaries Russia and Iran, and the abuse of international humanitarian law by nonstate actors such as the Taliban. Concomitantly, lawfare has also emerged as an important tool in asymmetric and hybrid warfare.

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INTRODUCTION

States have always been involved in the quest to gain advantage over their rivals.¹ In doing so, they have employed numerous tactics, including waging conventional and nonconventional wars against their rivals.² Subsequently, in the current era, international law has emerged as a modern tool

1. See, e.g., ANEEK CHATTERJEE, INTERNATIONAL RELATIONS TODAY: CONCEPTS AND APPLICATIONS 66 (2010); see also WILLIAM J. DUIKER, CONTEMPORARY WORLD HISTORY 28 (2009).

2. STEPHEN BIDDLE & JEFFREY A. FRIEDMAN, THE 2006 LEBANON CAMPAIGN AND THE FUTURE OF WARFARE: IMPLICATIONS FOR ARMY AND DEFENSE POLICY 18 (2011).

deployed by states as a weapon against their adversaries.³ In addition to states, other actors who use or misuse international law as a tool for blocking their adversaries in pursuing certain objectives are nongovernmental and nonprofit organizations, regional and international terrorist nonstate actors, municipal and city/state governments, and private individuals.⁴ Furthermore, international actors have relied on international forums, such as the International Criminal Court (ICC), the International Court of Justice (ICJ), and the United Nations, to use, misuse, and abuse international humanitarian law, international criminal law, bilateral and multilateral agreements, and general rules of international law against their adversaries.⁵ International legal experts have regarded such a use of international law to be a weapon of war and have invented a new term for this: “lawfare,”⁶ formed by combining the two words “law” and “warfare.”⁷ The term was first defined in 2001 by Charles Dunlap as a “strategy of using—or misusing—law as a substitute for traditional military means to achieve an operational objective.”⁸ One can also regard lawfare as legal warfare waged by a state or nonstate actor against its adversary.⁹

Lawfare can either be offensive or defensive.¹⁰ For instance,

3. ORDE F. KITTRIE, *LAWFARE: LAW AS A WEAPON OF WAR* 1 (2016).

4. *Id.* at 12.

5. *Id.* at 12–14.

6. *Id.* at 2.

7. Nicola Perugini & Neve Gordon, *Lawfare and the Threat of Human Rights*, HUFFPOST (July 21, 2015), https://www.huffpost.com/entry/lawfare-and-the-threat-of_b_7819282.

8. Charles J. Dunlap, Jr., *Lawfare: A Decisive Element of 21st Century Conflicts*, 35 JOINT FORCE Q., July 2009, at 34, 34–39.

9. See e.g., KITTRIE, *supra* note 3, at 1–2 (describing the Palestinian Authority’s strategy for gaining recognition by joining and engaging international institutions, recounting a time when the U.K. stopped an unwanted arms shipment by causing the ship’s insurance policy to be revoked and quoting a professor stating that China “misstate[s] or misappl[ies] international legal norms to accommodate its anti-access strategy”).

10. KITTRIE, *supra* note 3, at 89; see also Sascha Doy Bachmann & Andrés B. Muñoz Mosquera, *Hybrid Warfare as Lawfare: Towards a Comprehensive Legal Approach*, in A CIVIL-MILITARY RESPONSE TO HYBRID THREAT 61, 71 (Eugenio Cusumano & Marian Corbe, eds., 2017) [hereinafter Bachmann & Mosquera, *Hybrid Warfare*].

the legal steps taken by Israel to maintain the blockade of the Gaza Strip in 2011 were regarded as an example of offensive lawfare;¹¹ on the other hand, Israel's systematic response to the Palestinian Authority's (PA) plea in the ICC was an example of defensive lawfare.¹² Similarly, lawfare can be of either a Zeusian or a Hadesian nature. If lawfare is waged to preserve international law principles, then it is called Zeusian; if lawfare is waged to abuse or negatively exploit certain provisions of international law, then it is regarded as Hadesian.¹³ In each category, lawfare directly or indirectly becomes an essential element of asymmetric or hybrid warfare, which also encapsulates several other strategies, that states use to gain leverage over their opponents either during or outside of an armed conflict.¹⁴

This paper conducts an exploratory investigation of lawfare as a strategy adopted by states and nonstate actors. After covering a brief introduction of the entire paper in the first section, the second section includes an explanation of the origin of the term and strategy of lawfare. This section also contains an introduction of the key players waging lawfare in the contemporary international political and legal spheres. Later, the third section explains how international humanitarian law is misused by nonstate terrorist actors such as the Taliban. The fourth section includes an illustration of the international forums, such as the ICC and ICJ, being used by states and nonstate actors as the platforms to wage lawfare. The fifth section explicates the defensive and offensive categories of lawfare that are adopted by certain states and nonstate actors and serves to conclude that lawfare, whether defensive or offensive, Zeusian or Hadesian, has become an essential element of hybrid warfare in the modern era. The overall conclusions of this paper are drawn at the end. Notably, the research method adopted in this paper is entirely qualitative.

11. KITTRIE, *supra* note 3, at 313.

12. *Id.* at 269.

13. See Bachmann & Mosquera, *Hybrid Warfare*, *supra* note 10, at 70.

14. *Id.* at 62.

I. HISTORIC ORIGIN AND CONTEMPORARY EMERGENCE OF LAWFARE

This section includes an exposition of both the origin of the term and the origin of the strategy of “lawfare,” the reasons for the emergence of the strategy of lawfare, and an introduction of the main international players who are waging lawfare in the contemporary arena of international relations.

A. *Origin of the Term and Emergence of the Strategy of Lawfare*

The origin of the strategy of lawfare dates back to the ancient Athenian historian Thucydides, who commented in 431 BC on the Peloponnesian War that “the strong do what they will while the weak suffer what they must.”¹⁵ These comments were regarded as the basis for rationalizing the proverb “might makes right” in the acts of warfare.¹⁶ Later on, the works of Hugo Grotius attained essential significance in strengthening the foundation of the strategy of lawfare.¹⁷ Grotius established the theory that “the sea is common to all” in his classic book *Mare Liberum*, published in 1609.¹⁸ This theory became recognized and regarded as an essential principle in regulating the sea and its resources, which served well to suit the interests of the Dutch East India Company against the Portuguese, who were controlling the entire East Indian sea trade routes at that time.¹⁹ In fact, the Dutch East India Company had hired Grotius to present a legal framework on the basis of which a war could be waged against the Portuguese in the East Indian sea trade route.²⁰ The main purpose of the

15. Trevor Michael Alfred Logan, International Law and the Use of Lawfare: An Argument for the U.S. To Adopt a Lawfare Doctrine 2 (Spring 2017) (unpublished graduate thesis, Missouri State University), <https://bearworks.missouristate.edu/theses/3146>.

16. *Id.*

17. KITTRIE, *supra* note 3, at 4–5.

18. *Id.* at 4.

19. *Id.*

20. *Id.* at 4.

Dutch East India Company was to take control of the entire spice trade taking place on the East Indian sea route.²¹ Consequently, Grotius provided the theory that supported the Dutch, and, in turn, it became the foundation of modern lawfare strategy.²² Thus, ancient states, nations, and armed groups were deploying tactics during warfare to gain advantage over their adversaries.²³

However, in the contemporary era, the tactics of gaining that advantage have taken new shapes, including being deployed in times of peace.²⁴ That is, the strategy of lawfare is being used as an alternative to war in the modern era.²⁵ Hence, there does not have to be an actual armed conflict or war taking place for lawfare to be waged.²⁶

As far as the term “lawfare” is concerned, it only emerged in the twenty-first century.²⁷ The term was first coined in 1975 by Neville Yeomans and John Carlson in an article titled “Whither Goeth the Law – Humanity or Barbarity.”²⁸ However, they used the term “lawfare” without providing a definition of the term.²⁹ Later, Charles J. Dunlap Jr. used and defined the term lawfare in a speech and in a paper titled “Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts,” published in 2001.³⁰ Dunlap defined lawfare as “the strategy of using—or misusing—law as a substitute for traditional military means to achieve an operational objective.”³¹

In the contemporary era of international legal sophistication,

21. *Id.*

22. *Id.* at 5.

23. See DUIKER, *supra* note 1, at 28.

24. See KITTRIE, *supra* note 3, at 111 (explaining how U.S. financial lawfare against Iran is taking place without an armed conflict or war between the United States and Iran).

25. See KJ Fisher & CG Stefan, *The Ethics of International Criminal ‘Lawfare’* WHITE ROSE 4 (FEB. 26, 2016), [HTTP://EPRINTS.WHITEROSE.AC.UK/94430/7/ACCEPTED%20REVISED%20FISHERSTEFAN%20ETHICS%20OF%20INTERNATIONAL%20CRIMINAL%20LAWFARE.PDF](http://eprints.whiterose.ac.uk/94430/7/ACCEPTED%20REVISED%20FISHERSTEFAN%20ETHICS%20OF%20INTERNATIONAL%20CRIMINAL%20LAWFARE.PDF); see also Logan, *supra* note 15, at 6.

26. See Fisher & Stefan, *supra* note 25, at 7–8.

27. See Logan, *supra* note 15, at 1–2.

28. *Id.* at 1.

29. *Id.*

30. Dunlap, *supra* note 8, at 35.

31. *Id.*

the origin of the doctrine of lawfare has its roots in the foreign policy of the People's Republic of China (PRC).³² The PRC adopted lawfare as a tool of legal warfare in order to gain strategic advantage over its adversaries in the South China Sea.³³ The UN Convention on the Law of the Sea (UNCLOS) gives coastal states certain entitlements over its exclusive economic zone (EEZ), and China has used this to its advantage.³⁴ China has created manmade islands in the South China Sea, extending its EEZ to 200 nautical miles into the sea.³⁵ Using its EEZ to its advantage, China has obstructed the passage of its rivals' military-related vessels of all kinds, particularly those of the United States,³⁶ disregarding the fact that UNCLOS considers the area beyond 12 nautical miles into the sea to be an area open for all states to use for maritime and security purposes.³⁷ It is possible that the PRC initiated this strategy of lawfare to counter the perceived threats from the United States during the Vietnam War.³⁸

Following China, several other states have used lawfare as an element of their diplomatic foreign policy or, sometimes, during their involvement in armed belligerences against their adversaries.³⁹ For instance, U.S. sanctions against Iran are being termed financial lawfare waged by the United States against Iran.⁴⁰ And, the lawsuits initiated by the PA against Israel are examples of lawfare. The PA has filed complaints against Israel in the ICC alleging that Israel has committed war crimes in Palestinian territory.⁴¹ These examples of lawfare are examined in the next sections of this paper.

32. Logan, *supra* note 15, at 1.

33. *Id.* at 15.

34. *Id.*

35. *Id.*

36. KITTRIE, *supra* note 3, at 2.

37. Logan, *supra* note 15, at 16.

38. See, e.g., Qiang Zhai, *China and the American Escalation, in* LIGHT AT THE END OF THE TUNNEL: A VIETNAM WAR ANTHOLOGY 252, 258 (Andrew J. Rotter, ed., 3rd ed. 2010) (illustrating the threats perceived by Mao from the United States during the Vietnam War).

39. See, e.g., KITTRIE, *supra* note 3, at 2; see also Logan, *supra* note 15, at 26.

40. See KITTRIE, *supra* note 3, at 111.

41. *Id.* at 197; see also Logan, *supra* note 15, at 56.

B. *International Actors in the Arena of Lawfare*

The main actors that have, or could have, waged lawfare in the international legal sphere can be divided into several categories. For instance, the primary actors waging lawfare against their adversaries are sovereign states such as the United States, Russia, and China and quasi-sovereign states such as Palestine.⁴² In addition, transnational organizations, such as the European Union, the World Trade Organization, and the Arab League, whose memberships are comprised of several countries as well as international or regional advocacy groups such as the Palestinian Centre for Human Rights, Shurat Hadin, and Al-Haq, can also be considered active actors waging lawfare against their adversary state and nonstate actors.⁴³ Furthermore, lawfare has also been waged by nonstate militant groups exploiting the humanitarian principles of the law of armed conflict against their adversary states.⁴⁴ For example, the Taliban has waged lawfare by negatively using international humanitarian law to undermine NATO forces' military campaigns in Afghanistan.⁴⁵

Moreover, some city administrations have also emerged as actors waging lawfare; for example, the administrations of New York City, New York and Berkeley, California, have separately waged lawfare against certain organizations and groups.⁴⁶ In addition to city administrations, certain U.S. state governments—for instance, New York, Massachusetts, and Florida—have also waged lawfare against certain entities, alleging the entities are involved in money laundering and terrorist financing activities.⁴⁷ For instance, lawfare waged by U.S. states includes the lawsuit initiated by New York State against Standard Chartered Bank for not conducting proper

42. See KITTRIE, *supra* note 3, at 12.

43. *Id.*

44. See, e.g., Logan, *supra* note 15, at 8.

45. Logan, *supra* note 15, at 8; see also KITTRIE, *supra* note 3, at 18; CHARLES J. DUNLAP, JR., LAW AND MILITARY INTERVENTIONS: PRESERVING HUMANITARIAN VALUES IN 21ST CONFLICTS 5 (Nov. 29, 2001), <https://people.duke.edu/~pfeaver/dunlap.pdf>.

46. See KITTRIE, *supra* note 3, at 12.

47. See *id.* at 12, 28.

checks on money laundering-related transactions.⁴⁸

C. Reasons for the Emergence of Lawfare in the Contemporary International Legal Sphere

There are several factors that have contributed to the emergence of lawfare in the contemporary legal sphere.⁴⁹ For example, the waning of the Montevideo criterion in regulating nonstate actors and the emergence of international organizations have produced favorable conditions for the emergence of lawfare.⁵⁰ Subsequently, lawfare is being employed by nonstate actors, and sometimes by states, to realize a strategic advantage over their adversaries.⁵¹

1. Emergence of Nonstate Actors. In fact, the world has seen a rapid emergence of nonstate actors.⁵² Some nonstate actors (e.g., Al-Qaeda) have pursued militant extremist objectives including terrorism, while some have largely wanted to obtain statehood for themselves (e.g., the Taliban).⁵³ Such nonstate actors have made a significant impact on the course of international relations and have affected states' policies related to international legal

48. See *id.* at 143.

49. See *id.* at 40.

50. See Logan, *supra* note 15, at 31 (stating that the acceptance of Palestine's application to become a full member state to the General Assembly in 2011 was criticized by the United States' and Israel's legal experts as in abeyance of the Montevideo criterion).

51. See Logan, *supra* note 15, at 37 (maintaining that the legal actions taken by Palestinian NGOs and nonstate groups against Israel are an example of such lawfare).

52. See JIN KAI, RISING CHINA IN A CHANGING WORLD: POWER TRANSITIONS AND GLOBAL LEADERSHIP 88 (2016); see also John Akokpari, *Ghana: Economic dependence and marginalized foreign policy making*, in DIPLOMACY AND DEVELOPING NATIONS: POST-COLD WAR FOREIGN POLICY-MAKING STRUCTURES AND PROCESS 181, 182 (Justin Robertson & Maurice A. East, eds., 2005).

53. See Lawrence Azubuike, *Status of Taliban and Al Qaeda Soldiers: Another Viewpoint*, 19 CONN. J. INT'L L. 133, 135, 140, 151 (2003) (documenting the rise and scope of the Taliban's authority in Afghanistan as contrasted with Al Qaeda's lack of "international legal personality" because of its alleged connection to terrorist activities).

matters, international security, and other relevant issues.⁵⁴ The incidents after the 9/11 terrorist attacks and the subsequent use of force by the United States and NATO against Al-Qaeda and the Taliban in Afghanistan are examples of the impact caused by the emergence of nonstate actors on states' foreign policies related to international security and terrorism.⁵⁵ Soon after the 9/11 terrorist attacks, many states had to comply with the Bush Doctrine of taking stringent actions against terrorism, as U.S. president George W. Bush at that time declared to the world: "Either you are with us or you are with the terrorists."⁵⁶

2. *The Quest of Gaining Strategic Advantage over Adversary States.* Furthermore, states have also been engaged in the pursuit of gaining competitive or strategic advantage over their adversary states.⁵⁷ For such purposes, states have also exploited international law positively and negatively against their rivals, which has facilitated the rise of lawfare strategy in international relations.⁵⁸ Such use of international law against rival states has been carried out either through diplomatic endeavors, such as making international political blocs against their adversary states, or by signing international agreements and becoming parties to international conventions stipulating certain international law provisions against their adversary states.⁵⁹ For example, the influence of the United States over the UN Security Council and NATO has been evident throughout the course of the twentieth and twenty-first centuries.⁶⁰ The United

54. See KAI, *supra* note 52, at 89.

55. *Id.*

56. Mel Gurtov, *American Crusades: Unilateralism, Past, and Present*, in CONFRONTING THE BUSH DOCTRINE: CRITICAL VIEWS FROM THE ASIA-PACIFIC 1, 9 (Melvin Gurtov & Peter Van Ness, eds., 2004); see also Alexander Moens, *The Bush Doctrine Abroad*, in UNDERSTANDING THE BUSH DOCTRINE: PSYCHOLOGY AND STRATEGY IN AN AGE OF TERRORISM 251, 257 (Stanley A. Renshon & Peter Suedfeld, eds., 2013).

57. See DUIKER, *supra* note 1, at 28.

58. See Fisher & Stefan, *supra* note 25, at 11.

59. See Logan, *supra* note 15, at 2.

60. See Martin Zwanenburg, *NATO, Its Member States, and the Security Council*, in THE SECURITY COUNCIL AND THE USE OF FORCE: THEORY AND REALITY, A NEED FOR A CHANGE? 207, 208–09 (Niels M. Blokker & Nico Schrijver, eds., 2005) (noting the "decisive role [of the United States] in founding the Alliance and in drafting its constituent

States exerted its influence in order to counter the threats that it perceived from its adversaries, especially the Soviet Union during the Cold War era, and currently Russia and Iran.⁶¹ With such reasons, the United States has appeared as a party in several multilateral agreements signed with European states to pressure and gain strategic advantage over its adversaries Iran and Russia.⁶² These pressures include economic and trade sanctions that have been periodically put forward against Iran and Russia by the United States and Western European countries.⁶³ For example, in the last seven years, the U.S. Congress has passed bills imposing sanctions against Russia in 2012, March 2014, July 2014, August 2014, and August 2017.⁶⁴ In this regard, the sanctions imposed in 2014 by the United States and the European Union were advanced over Russia's alleged involvement in the Ukrainian security crises.⁶⁵ Such actions of the United States and European nations are regarded as financial lawfare against Russia.⁶⁶ Hence, the sanctions against Russia indicate that states

instrument”).

61. Logan, *supra* note 15, at 66; *see also* Justyna Pawlak & Eric Beech, *EU and U.S. Announce New Sanctions on Russia over Ukraine*, REUTERS (July 29, 2014, 11:42 PM), <https://www.reuters.com/article/us-ukraine-crisis-east-idUSKBN0FY00X20140730>. *See generally* Edward C. Luck & Nick Birnback, *For the Common Good: The U.S. Role in the United Nations*, 58 SOC. EDUC. 407 (1994).

62. *See* HANS BINNENDIJK, FRIENDS, FOES, AND FUTURE DIRECTIONS: U.S. PARTNERSHIPS 28, 32–34 (2016) (explaining that the P5+1, which included China, France, Russia, United Kingdom, United States and Germany, negotiated an agreement which cut off “every Iranian pathway to a nuclear weapon” and imposed other requirements against Iran); *see also* Pawlak & Beech, *supra* note 61 (describing the economic sanctions the EU and United States imposed against Russia and explaining that these sanctions were imposed to weaken the Russian economy and disrupt their campaign to seize territory in Ukraine).

63. John R. Crook, *Continuing Efforts to Discourage Iran's Nuclear Program*, 101 AM. J. INT'L L. 666, 666–67 (2007) (describing the economic sanctions the Security Council imposed upon Iran in response to its nuclear activities); Pawlak & Beech, *supra* note 61.

64. *See* Kathy Lally & Will Englund, *Russia fumes as U.S. Senate Passes Magnitsky Law Aimed at Human Rights*, WASH. POST (December 7, 2012, 1:47 PM) (illustrating sanctions imposed in 2012); Ivan Gutterman & Wojtek Grojec, *A Timeline of All Russia-Related Sanctions*, RFERL (September 19, 2018), <https://www.rferl.org/a/russia-sanctions-timeline/29477179.html> (illustrating sanctions imposed since 2014).

65. Pawlak & Beech, *supra* note 61.

66. KITTRIE, *supra* note 3, at 31.

indulge in lawfare through diplomatic endeavors without the occurrence of a direct and actual armed attack with an adversary.⁶⁷ Such lawfare entails the use of international law against an adversary as a weapon in substitution for conventional military force in an attempt to indirectly pressure the adversary.⁶⁸

3. *The Establishment of International Tribunals.* Furthermore, the establishment of international forums for prosecuting war crimes has also paved the way for lawfare.⁶⁹ States as well as nonstate actors have used international forums such as the ICC and the ICJ to wage lawfare against their adversaries.⁷⁰ For example, the PA has approached the ICC regarding the illegal settlements and war crimes conducted by Israel in the West Bank and Gaza area.⁷¹ The appeal by the PA to the ICC put Israel under pressure in such a way that Israel had to resort to releasing Palestinian prisoners to ease the case pursued by the PA.⁷² Hence, the states and nonstate actors used lawfare to realize their objectives in substitution of conventional war or diplomacy.⁷³ In addition, states also wage lawfare to prevent their adversaries from achieving certain power. For instance, the United States has waged financial lawfare against Iran through sanctions in order to prevent Iran from acquiring

67. See *id.* (explaining that the lessons learned in waging lawfare have resulted in the use of more aggressive and systematic lawfare tactics, such as the financial lawfare tactics the United States has applied against Russia, and an avoidance of traditional armed conflict).

68. *Id.* at 2.

69. See Fisher & Stefan, *supra* note 25, at 8 (describing a recent definition of lawfare “in which the ICC’s judicial interventions are used as a tool for States Parties and the UNSC”); see also KITTRIE, *supra* note 3, 12–14 (describing the different the ways in which different state and nonstate actors, such as the Arab League, the PRC, and the PA, have utilized the international forums to engage in lawfare).

70. Fisher & Stefan, *supra* note 25, at 7–8 (explaining that lawfare is considered to incorporate a variety of activities such as “private lawsuits against terrorist groups and states supporting terrorism as well as economic sanctions”).

71. KITTRIE, *supra* note 3, at 13.

72. *Id.*

73. Logan, *supra* note 15, at 1.

nuclear power capabilities.⁷⁴

In sum, the establishment of international criminal prosecution forums such as the ICC and ICJ, the rise of nonstate actors and transnational organizations, and the formation of favorable conditions for states and international organizations to use multilateral agreements and treaties against their adversaries have facilitated the emergence of lawfare in international relations.⁷⁵ It is foreseen that states and nonstate actors will continue to exploit the stipulations of international law for their own interests against their adversaries because the use of international law as a weapon of war is not as costly as the use of conventional military force against an adversary.⁷⁶ Furthermore, the impacts of using international law as a weapon of war appear to be more profound than the use of force.⁷⁷ That is, for example, complaints against an adversary in international criminal prosecution forums can prove to be more effective in tarnishing the reputation of the adversary at the international level, a goal that may not be possible via the use of conventional military force against that particular adversary.⁷⁸

II. LAWFARE, TERRORISM, AND THE LAW OF ARMED CONFLICT

This section describes lawfare waged by terrorist nonstate actors. Terrorist nonstate actors wage lawfare through misuse of the international law of armed conflict in the course of military and security operations launched against them.⁷⁹

A. *International Humanitarian Law and Illicit Lawfare*

74. KITTRIE, *supra* note 3, at 116–17.

75. *Id.* at 44–45.

76. KITTRIE, *supra* note 3, at 3.

77. *Id.*

78. *See, e.g., id.* at 279 (drawing from the example of lawfare waged by the PA against Israel, as the damage that has been brought to the international reputation of Israel due to its activities of war crimes and settlements in the West Bank has been enormous, which could not have been possible through any forceful means by the PA against Israel).

79. Logan, *supra* note 15, at 8.

by Terrorist Nonstate Actors

International humanitarian law has been regarded as pivotal in regulating the conduct of warring parties in an armed conflict.⁸⁰ In particular, international humanitarian law prohibits the killing of civilians and noncombatants in an armed conflict.⁸¹ However, this provision is being misused by nonstate actors such as the Taliban in Afghanistan.⁸²

B. The Inescapable Success and Surreptitious Nature of Lawfare Tactics by the Taliban

Many unfortunate incidents have occurred in which military operations against the Taliban have resulted in the deaths of innocent civilians because members of the Taliban have been disguised among those civilians.⁸³ The Taliban try to damage the reputation of NATO operations by deliberately involving themselves in such acts that could result in the deaths of innocent civilians.⁸⁴ For instance, a group of Taliban fighters once made a local wedding its hostage and then fired on U.S. forces from the location of the wedding party, thus putting civilians at grave risk.⁸⁵ The Taliban's main intentions were to frustrate the NATO and U.S. forces in Afghanistan through the deaths of civilians and to provoke antagonistic feelings among the Afghans against NATO's security operations in the Afghan land.⁸⁶

In fact, the Taliban put NATO into a relatively challenging

80. JAN RÖMER, KILLING IN A GRAY AREA BETWEEN HUMANITARIAN LAW AND HUMAN RIGHTS: HOW CAN THE NATIONAL POLICE OF COLOMBIA OVERCOME THE UNCERTAINTY OF WHICH BRANCH OF INTERNATIONAL LAW TO APPLY? 67 (2010).

81. See *What is International Humanitarian Law?*, ICRC (July 2004), https://www.icrc.org/en/doc/assets/files/other/what_is_ihl.pdf (explaining who international humanitarian law protects and what means and methods of warfare it prohibits).

82. Logan, *supra* note 15, at 8.

83. *North Atlantic Treaty Organization in Afghanistan*, in THE ENCYCLOPEDIA OF MIDDLE EAST WARS: THE UNITED STATES IN THE PERSIAN GULF, AFGHANISTAN, AND IRAQ CONFLICT 909, 911 (Spencer C. Tucker ed., 2010) (referencing death toll figures for international troops as well as insurgent deaths, and noting an increase in civilian deaths).

84. Dunlap, *supra* note 8, at 36.

85. *Id.*

86. *Id.*

position in Afghanistan when the Taliban started using human shields.⁸⁷ If the NATO forces were unaware of the presence of civilians around the Taliban and responded to the Taliban attacks, then such armed skirmishes between the Taliban and NATO forces would have resulted in the unfortunate killing of civilians, which would have invited worldwide condemnation of NATO's use of force⁸⁸ and tarnished the reputation of the NATO operations, ultimately thwarting the effectiveness of its actions against the Taliban.⁸⁹ Through such tactics, the Taliban intends to create a perception in the media and among the Afghan public that the United States is waging war in an inhumane manner and that NATO is causing the killing of innocent civilians.⁹⁰ Thus, the Taliban tries to manipulate the perception about the legality of war by maintaining that the U.S. and NATO troops disrespect international humanitarian law in Afghanistan.⁹¹

C. Undermining the Effectiveness of Airstrikes

Human Rights Watch has termed the airstrike as “probably the most discriminating weapon that exists,” as it is a strategy that can most precisely discriminate between combatants and civilians and, therefore, has to be regarded as a humanely executed strategy in a conflict-stricken area.⁹² However, the lawfare waged by the Taliban has damaged the reputation of the airstrike strategy too, because some airstrikes have resulted in the killing of civilians when Taliban members have disguised

87. See Orde F. Kittrie, *Lawfare and US National Security*, 43 CASE W. RES. J. INT'L L. 393, 396 (2010) (discussing the Taliban's tactics of placing military assets in noncombatant areas to either deter attacks or potentially produce collateral damage) [hereinafter Kittrie, *Lawfare*].

88. See Dunlap, *supra* note 8, at 36 (explaining that the Taliban had access to Afghani media and manipulated NATO's explicit promise that it “would not fire . . . if it knew there were civilians nearby”).

89. See Kittrie, *Lawfare*, *supra* note 87, at 400 (explaining that NATO's promise to withhold fire around civilians created a restriction beyond what was required by law and ultimately resulted in making it vulnerable to attacks on its credibility).

90. Dunlap, *supra* note 8, at 36.

91. *Id.*

92. *Id.*

their location among those civilians.⁹³ After such airstrikes, the Taliban denounced this action and called these airstrikes inhumane and barbaric by highlighting the civilian casualties caused.⁹⁴ Consequently, such airstrikes have invited strong condemnation by the local Afghans and international media.⁹⁵ Such a negative portrayal of airstrikes ultimately undermined the effectiveness of NATO's airstrike operations against the Taliban, and thus, created a common negative perception against the strategy of airstrikes in Afghanistan.⁹⁶ The former secretary general of NATO, Jaap de Hoop Scheffer, once termed such perceptions a "strategic battleground."⁹⁷ He also reiterated that it is the Taliban, not NATO, who are the perpetrators of human rights violations and responsible for the killing of innocent civilians,⁹⁸ but the majority of the blame for these killings gets shifted to the NATO forces, creating a largely negative perception against security operations in Afghanistan.⁹⁹

It is pertinent to mention that, in 2007, the NATO spokesperson in Afghanistan responded to allegations by a Taliban spokesman about civilian killings by emphasizing that NATO would never open fire in places where civilians would be nearby.¹⁰⁰ One year later, another NATO spokesperson said, "[i]f there is the likelihood of even one civilian casualty, we will not strike, not even if we think Osama bin Laden is down there."¹⁰¹ This strategy has been effectively followed by NATO forces in Afghanistan; however, in 2008, U.S. military officers stationed in Afghanistan reported again that the Taliban were intentionally

93. *Id.* at 36–37; KITTRIE, *supra* note 3, at 18–19.

94. *See* KITTRIE, *supra* note 3, at 18–19.

95. RABBI SIMON ALTAH HAKOHEH, WORLD WAR III: SALVATION OF THE JEWS 66 (3rd ed. 2018).

96. Dunlap, *supra* note 8, at 36.

97. *Id.*

98. *Id.*

99. *Id.*

100. Dunlap, *supra* note 8, at 36.

101. Charles J. Dunlap, Jr., *Airpower*, in UNDERSTANDING COUNTERINSURGENCY: DOCTRINE, OPERATIONS, AND CHALLENGES 100, 107 (Thomas Rid & Thomas Keaney eds., 2010) [hereinafter Dunlap, *Airpower*] (alteration in original).

risking the lives of civilians by hiding among them.¹⁰² Pertinently, such a tactical move by the Taliban not only risked civilian lives but also undermined the effectiveness of security operations against the Taliban.¹⁰³ In fact, the Taliban knew that they were not in a position to use force to undermine the effectiveness of security operations of NATO and U.S. forces, so they resorted to using lawfare and damaged the reputation of the security operations of the NATO and U.S. forces.¹⁰⁴

In summary, international humanitarian law has arguably been misused by terrorist nonstate actors who intend to bring the security operations against them into disrepute as vile and inhumane.¹⁰⁵ Ultimately, the terrorist nonstate actors misuse the provisions of international humanitarian law relevant to the protection of civilians in armed conflicts and consequently attempt to gain advantage over their adversaries through disguising themselves among civilians.¹⁰⁶ Such misuse of international humanitarian law is a weapon of war employed by nonstate actors against their adversary states.¹⁰⁷

III. INTERNATIONAL CRIMINAL LAW, TRIBUNALS, AND LAWFARE

The international criminal tribunals apply international criminal law with the core objective of penalizing the perpetrators of war crimes.¹⁰⁸ In this regard, the utmost impartiality is

102. Dunlap, *supra* note 8, at 36.

103. See *id.* (describing that the Taliban's tactic of hiding among civilians to create civilian casualties that then were reported to the media undermined NATO's airstrike missions); see also Dunlap, *Airpower*, *supra* note 101, at 107 (explaining that if counterinsurgents are not careful in framing their messages, such messages may inadvertently create a sanctuary for the enemy).

104. See Kittrie, *Lawfare*, *supra* note 87, at 400 (explaining that by hiding amongst civilians and using their casualties to antagonize the NATO airstrikes in the media, the Taliban undermined NATO's mission using lawfare).

105. See Dunlap, *supra* note 8, at 36 (describing the Taliban's tactic of hiding amongst civilians and framing the civilian casualties as "inhumane" in the media).

106. Dunlap, *Airpower*, *supra* note 101, at 107.

107. Logan, *supra* note 15, at 1; Dunlap, *supra* note 8, at 36.

108. Sheri P. Rosenberg, *Audacity of Hope: International Criminal Law, Mass Atrocity Crimes, and Prevention*, in RECONSTRUCTING ATROCITY PREVENTION 151, 151 (Sheri P. Rosenberg, Tibi Galis & Alex Zucker, eds., 2016).

expected from the international criminal tribunals in the application of international criminal law for prosecuting war criminals.¹⁰⁹ However, international criminal law has been misused by certain agents for political gain and as a weapon of war.¹¹⁰

*A. The Role of the International Criminal Court and
Lawfare by States and Nonstate Parties*

The ICC is one of the main international criminal tribunals penalizing the perpetrators of war crimes.¹¹¹ Since its birth in 2002 following the Rome Statute, the forum has become a global institution with 124 state parties.¹¹² Though the institution has served well for protecting international peace and human rights, the ICC forum has also been used to wage lawfare by states and nonstate actors.¹¹³

1. *Lawfare by Uganda.* The *Uganda v. LRA* case is a relevant example of the use of the ICC by a state to wage lawfare.¹¹⁴ Pertinently, the investigation in the case conducted under the ICC was allegedly biased.¹¹⁵ The case began when Uganda's president, Yoweri Museveni, approached the ICC in December 2003 and made a formal request to the ICC to investigate the humanitarian crimes committed by a rebel armed group, the Lord's Resistance Army (LRA), on Ugandan territory.¹¹⁶ The case brought about five charges against the top

109. WILLIAM A. SCHABAS, *THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE* 505 (2006).

110. Fisher & Stefan, *supra* note 25, at 10.

111. Rosenberg, *supra* note 108, at 151.

112. ANDERS HENRIKSEN, *INTERNATIONAL LAW* 312 (2017).

113. Fisher & Stefan, *supra* note 25, at 9–10 (defining lawfare to include “the use of international criminal judicial intervention as a tool for states, parties to conflict, and other interested actors, including the UNSC”).

114. Fisher & Stefan, *supra* note 25, at 13.

115. *Id.* at 13–14.

116. *Id.* at 13; CHRISTOPHER C. JOYNER, *INTERNATIONAL LAW IN THE 21ST CENTURY: RULES FOR GLOBAL GOVERNANCE* 133 (2005).

leadership of the LRA.¹¹⁷

It has been alleged that the chief prosecutor in the case, Luis Moreno-Ocampo, made a biased judgment in partial favor of Uganda.¹¹⁸ The chief prosecutor upheld no indictment against the Ugandan army, ignoring the human rights violations committed by the Uganda's People Defense Force (UPDF) in military operations against the LRA.¹¹⁹ This decision received strong criticism from Uganda as well as from the rest of the world.¹²⁰ Pertinently, it was the first case in the history of the ICC in which arrest warrants were issued against the charged LRA leaders.¹²¹

In this case, the intentions of the Ugandan government were evidently envisioned to smear the LRA's reputation and show its armed resistance as inhumane and criminal.¹²² The government was unable to achieve such labeling as effectively and as successfully via its military operation as it did via the rulings of the ICC against the LRA, which officially demonized the activities of the LRA.¹²³ Thus, the government of Uganda successfully waged lawfare against the LRA through the forum of the ICC.¹²⁴

The reason for the lack of objectivity in the prosecution and judgment of the case was evidently of a political nature, owing to the fact that the government of Uganda, not the LRA, had legal control of Ugandan territory; the nonstate actors such as LRA were legally under the sovereign rule of the Ugandan government.¹²⁵ Therefore, the court took the narrative that the actions of the LRA should not be in conflict with the Ugandan state. Such an intersection of law and politics created a naturally

117. Fisher & Stefan, *supra* note 25, at 13; see JOYNER, *supra* note 116, at 133 (offering more details about the charges).

118. Fisher & Stefan, *supra* note 25, at 13–14.

119. *Id.*; see also JENNIFER MOORE, HUMANITARIAN LAW IN ACTION WITHIN AFRICA 233 (2012).

120. Fisher & Stefan, *supra* note 25, at 13.

121. *Id.*

122. *Id.* at 14.

123. Fisher & Stefan, *supra* note 25, at 13–14.

124. See *id.* (implying that the Ugandan's lawfare efforts were successful).

125. See *id.* at 12–14 (highlighting how the ICC's reliance on self-referring governments to gain access to the information needed to carry out investigations can create preferential treatment).

compulsive inclination in the case in favor of the Ugandan government's narrative and against the LRA.¹²⁶ Hence, the lawfare strategy of the Ugandan government worked well and provided a favorable outcome for the state's narrative. Nonetheless, the ICC forum was, for the very first time, used to wage lawfare, which invited other states to do the same to realize their own strategic motives.¹²⁷

2. *Lawfare by Palestinian Authority against Israel.* In a manner similar to the Ugandan government, the PA approached the ICC to launch an investigation of the war crimes committed by Israel in Palestinian territory.¹²⁸ This appeal to the ICC by the PA against Israel is regarded as a fine example of lawfare.¹²⁹ However, some international law experts implied that it was a negative example of lawfare that entailed "obstructive political maneuvering."¹³⁰

Nonetheless, the case was not simple enough for Palestine because it was waged against a powerful state, Israel. In the beginning, in 2012, the ICC declined the PA's request, considering that the ICC lacked jurisdiction because Palestine had not yet been ratified as a separate state.¹³¹ It was only after much political effort by the PA that the investigations began against Israel's war crimes.¹³² This happened in 2014 when the United Nations General Assembly granted Palestine a position as a nonmember observer state and, consequently, the ICC reopened the case by gaining jurisdiction over Palestinian territory in December 2014.¹³³ Ultimately, Israel's position weakened in

126. *See id.* at 12–14, 17.

127. *See id.* at 11–17.

128. *See id.* at 16.

129. Robbie Sabel, *Manipulating International Law as Part of Anti-Israel "Lawfare,"* JERUSALEM CTR. FOR PUB. AFFAIRS, jcpa.org/overview_palestinian_manipulation/manipulating_international_law/ (last visited Jan. 7, 2020).

130. Fisher & Stefan, *supra* note 25, at 14–15.

131. *See Palestine: Campaign for the Rome Statute of the ICC*, PARLIAMENTARIANS FOR GLOBAL ACTION, <https://www.pgaction.org/campaigns/icc/me-med/palestine.html> (last visited Jan. 7, 2020).

132. *See* Fisher & Stefan, *supra* note 25, at 16.

133. *Id.* at 15–16.

comparison to that of Palestine in the ICC forum after 2014¹³⁴ because Palestine waged lawfare against Israel in the ICC with factual proof of incidents of mass war crimes committed by Israel.¹³⁵ Palestine also shared evidence of war crimes committed by Israel with the ICC in June 2015.¹³⁶ The evidence also detailed the atrocities committed by Israel during the 2014 Gaza conflict.¹³⁷

Although Israel refused to cooperate with the ICC in the matter, the ICC chief prosecutor announced an unbiased series of investigations to verify the truth behind the allegations of human rights atrocities committed by Israel in Gaza.¹³⁸ Meanwhile, the prosecutor also announced that the investigations might also be carried out for any crimes committed by Hamas against Israel.¹³⁹ In reaction, the United States and Israel staunchly opposed the ICC in its endeavor to carry out investigations against Israel.¹⁴⁰ The case is still open in the ICC; however, it is feared that Israel's noncompliant behavior and political pressure from the United States may hinder the effectiveness of the ICC's investigations and any consequent ruling that may come against Israel.¹⁴¹

No matter what ruling is given by the ICC, it is feared that Israel is continuing to commit war crimes in Gaza and in the West

134. James A Goldston, *An ICC Investigation of Possible War Crimes in Palestine Could Benefit All Involved*, OPEN SOC'Y FOUND. (June 25, 2015), <https://www.opensocietyfoundations.org/voices/icc-investigation-possible-war-crimes-palestine-could-benefit-all-involved>.

135. See Zena Tahhan, *Palestinians Submit Israel "War Crime" Evidence to ICC*, AL JAZEERA, (Sept. 20, 2017), <https://www.aljazeera.com/news/2017/09/palestinians-submit-israel-war-crime-evidence-icc-170920115342560.html> (discussing how multiple Palestinian human rights groups have submitted numerous communications to the ICC related to Israeli war crimes, including a 700 page communication); Fisher & Stefan, *supra* note 25, at 16 ("Palestine acceded to the Rome Statute on 1 April 2015 and the [Palestinian National Authority] handed over its first submission of evidence of supposed Israeli war crimes to the [ICC] in June").

136. See Fisher & Stefan, *supra* note 25, at 16; see also Tahhan, *supra* note 135.

137. See Tahhan, *supra* note 135.

138. Fisher & Stefan, *supra* note 25, at 16.

139. *Id.*

140. *Id.*

141. *Id.* at 14–17.

Bank.¹⁴² Israel has also revealed a plan to demolish several Palestinian homes that are obstructing a road project aimed at constructing Israeli settlements in the West Bank.¹⁴³ Unfortunately, Israel has recently carried out numerous airstrikes in the Gaza Strip, resulting in the destruction of around 500 Palestinian homes.¹⁴⁴

Regrettably, the airstrikes and land operations pursued by Israel in the past 10 years have also hit innocent civilians, including children.¹⁴⁵ Such barbarism is unjustified, and the United Nations Human Rights Council (UNHRC) has condemned it,¹⁴⁶ particularly in the Goldstone Report.¹⁴⁷ The lawfare waged by Palestine against Israel is quite legitimate, and thus, deserves the respect of the ICC.

B. International Court of Justice Jurisdiction and Lawfare

In addition to the ICC, the ICJ has been approached by states and nonstate actors waging lawfare against their opponent parties.¹⁴⁸ The forum has been regarded as quite effective and strong in its rulings and in exercising its jurisdiction, which has also prohibited many states and nonstate actors from pursuing certain courses of action that were criticized by their rivals in the ICJ. For example, the recent complaint launched by India in the ICJ against Pakistan regarding an Indian citizen, Kalbhushan

142. See *Israel and Palestine: Events of 2017*, HUM. RTS. WATCH, <https://www.hrw.org/world-report/2018/country-chapters/israel/palestine> (last visited Jan. 7, 2020).

143. Aseel Jundi, *Palestinian Homes to Be Demolished for Settlements Road*, AL JAZEERA (Feb. 21, 2017), <https://www.aljazeera.com/indepth/features/2017/02/israel-settlements-road-cut-east-jerusalem-170219102243614.html>.

144. *Israeli Air Strikes Damaged 500 Palestinian Homes*, MIDDLE E. MONITOR (Mar. 27, 2019; 4:31 AM), <https://www.middleeastmonitor.com/20190327-israeli-airstrikes-damaged-500-palestinian-homes/>.

145. See NORMAN G. FINKELSTEIN, *GAZA: AN INQUEST INTO ITS MARTYRDOM* 23 (2018) (highlighting a brief account of Israel's barbarity in Lebanon and Gaza); RITCHIE OVENDALE, *THE ORIGINS OF THE ARAB ISRAELI WARS* 313 (4th ed. 2015).

146. See SEADA HUSSEIN ADEM, *PALESTINE AND THE INTERNATIONAL CRIMINAL COURT* 36 (2019) (describing the UN Human Rights Council report of the air strikes by Israel).

147. *Id.*

148. KITTRIE, *supra* note 3, at 13–14.

Yadav, being held on a death sentence in Pakistan, is regarded as a significant example of lawfare waged by a state against its rival state.¹⁴⁹ The ICJ has prevented Pakistan from executing Yadav until the arrival of the final decision in July 2019 by the ICJ on the Indian appeal.¹⁵⁰

Kalbhushan Yadav was arrested by Pakistani officials in Baluchistan province in Pakistan.¹⁵¹ He was a serving Indian navy officer working for the Indian Intelligence agency at the time of his arrest.¹⁵² Yadav confessed to creating an infrastructure of terrorism in Pakistan,¹⁵³ particularly in Karachi and Baluchistan.¹⁵⁴ As per the demands of justice, he was to be punished in accordance with the national antiterrorism laws of Pakistan.¹⁵⁵ Soon after his arrest, a trial was launched against him in a military court in Pakistan,¹⁵⁶ which is the court responsible for making prosecutions against terrorists.¹⁵⁷ Upon Yadav's confession to crimes, the court handed him a death sentence in accordance with the national criminal laws in

149. See Hassan Aslam Shad, *Lessons in Lawfare*, THE NEWS INT'L (Oct. 13, 2018), <https://www.thenews.com.pk/print/380101-lessons-in-lawfare>.

150. See Jadhav Case (India v. Pakistan), Press Release, ICJ (May 18, 2017), <http://www.icj-cij.org/files/case-related/168/19440.pdf>.

151. Salman Masood, *Pakistan Releases Video of Indian Officer, Saying He's a Spy*, N.Y. TIMES (Mar. 29, 2016), <https://www.nytimes.com/2016/03/30/world/asia/pakistan-releases-video-of-indian-officer-saying-hes-a-spy.html>.

152. *Id.*

153. *Id.*

154. See generally RAW Agent Reveals, *More Spies Present to Destabilize Pakistan*, GEO NEWS (Mar. 26, 2016), <https://www.geo.tv/latest/102925-From-Kul-Bashan-Yadav-to-Mubarak-Patel-The-journey-of-a-RAW-agent> (highlighting the fact that he confessed to being in contact with the same person with whom the masterminds of the Safoora bus attack were in contact).

155. See generally The Anti-Terrorism Act, XXVII of 1997, <http://www.molaw.gov.pk/molaw/userfiles1/file/Anti-Terrorism%20Act.pdf> (furnishing a detailed description of Pakistan's strict punishment and guidelines for terrorism); The Official Secrets Act, 1923, <http://www.fia.gov.pk/en/law/Offences/3.pdf> (outlining crimes and punishments for those who help an enemy state of Pakistan).

156. Mariana Baabar & Muhammad Anis, *Military Court Awards Death Sentence to Kulbhushan*, THE NEWS INT'L (Apr. 11, 2017), <https://www.thenews.com.pk/print/197905-Military-court-awards-death-sentence-to-Kulbhushan>.

157. See Moshin Raza Malik, *A Perspective on Military Courts*, THE NATION (Jan. 22, 2019), <https://nation.com.pk/22-Jan-2019/a-perspective-on-military-courts>.

Pakistan.¹⁵⁸

However, upon learning of the death sentence, India protested and appealed to the ICJ forum to prevent Pakistan from punishing Yadav.¹⁵⁹ India admitted that Yadav was an Indian citizen, but maintained that Pakistan improperly forbid consular access to Yadav in the course of the prosecutions against him in the Pakistani military court.¹⁶⁰ Soon after India's appeal, the ICJ announced it had jurisdiction in the matter,¹⁶¹ and sent an official communication to Pakistan regarding India's appeal.¹⁶² Subsequently, the ICJ held initial public hearings on India's appeal against Pakistan and received narratives about Yadav from both states.¹⁶³ Subsequent to the initial hearings, the ICJ issued provisional measures temporarily preventing Pakistan from punishing Yadav until the arrival of ICJ's final decision.¹⁶⁴ Here, India used the ICJ forum to wage lawfare against Pakistan and to delay Pakistan's ability to punish Yadav, who himself had confessed to working as a perpetrator of terrorism in Pakistan.¹⁶⁵ This indicates the significance of the ICJ forum in hindering states from pursuing their legal and political actions, even where such actions may be related to their national security.¹⁶⁶ Yadav's sentence granted by the Pakistani military court is an example of

158. See Baabar & Anis, *supra* note 156; see also The Official Secrets Act, 1923, <http://www.fia.gov.pk/en/law/Offences/3.pdf>.

159. See Case Concerning the Vienna Convention on Consular Relation (India v. Pakistan), Request for the Indication of Provisional Measures of Protection, ¶¶ 19–20, 22 (May 8, 2017), <https://www.icj-cij.org/files/case-related/168/19424.pdf>.

160. *Id.* at ¶ 4.

161. Jadhav Case (India v. Pakistan), Application Instituting Proceedings filed in the Registry of the Court, ¶¶ 25–26 (May 8, 2017), <https://www.icj-cij.org/files/case-related/168/168-20170508-APP-01-00-EN.pdf>.

162. Urgent Communication to Pakistan from the President under Article 74, Paragraph 4, of the Rules of the Court (India v. Pakistan), Press Release, ICJ (May 10, 2017), <https://www.icj-cij.org/files/case-related/168/19426.pdf>.

163. Request for the Indication of Provisional Measures, Press Release, ICJ (May 10, 2017), <https://www.icj-cij.org/files/case-related/168/19428.pdf>.

164. Jadhav Case (India v. Pakistan): Provisional Measures, 2017 I.C.J. 231, ¶ 58 (May 18).

165. See Masood, *supra* note 151.

166. See *generally* KITTRIE, *supra* note 3, at 13 (noting how the risk of ICC prosecution may hinder security needs for certain nations).

Pakistan attempting to uphold its national security and to maintain its national narrative, which states that any terrorist who is found responsible for committing terrorist acts in Pakistan is punished seriously in accordance with Pakistan's antiterrorism laws. However, India's lawfare has challenged such a narrative.

The problem lies in the negative exploitation of international law, which hinders Pakistan from conducting legal action against a terrorist.¹⁶⁷ This problem highlights the idea that states may abuse or misuse international law through the forums of the ICC and/or ICJ against their rivals.¹⁶⁸ Such misuse of international law, which constitutes lawfare, is unfortunate and undesired in an ethical sense.¹⁶⁹ However, it is unclear how states or nonstate actors can be prevented from misusing or abusing international law in the way India did.

IV. LAWFARE AS AN ELEMENT OF HYBRID WARFARE

Hybrid warfare is a complicated category of warfare that employs several complex tactics aimed at gaining an advantage over an adversary.¹⁷⁰ International legal experts categorize such tactics into conventional and nonconventional, kinetic and non-kinetic, symmetric and asymmetric, and regular and irregular methods of warfare.¹⁷¹ Hybrid warfare also entails covert and overt tactics, which may include the use of armed combatants, irregular civilian actors, or militant nonstate actors to realize political or military ambitions.¹⁷² In this regard, lawfare has also

167. See generally Shad, *supra* note 149 (noting how nations use the international legal system to influence international relations and attack enemies).

168. See, e.g., KITTRIE, *supra* note 3, at 13 (discussing how nations will interpret international laws to fit their narrative and to influence others to take on the same narrative).

169. See Fisher & Stefan, *supra* note 25, at 7–8.

170. Sorin Dumitru Ducaru, *Framing NATO's Approach to Hybrid Warfare*, in COUNTERING HYBRID THREATS: LESSONS LEARNED FROM UKRAINE 3, 4 (Niculae Iancu et al. eds., 2016).

171. Andrés B. Muñoz Mosquera & Sascha-Dominik Bachmann, *Understanding Lawfare in a Hybrid Warfare Context*, NATO LEGAL GAZETTE, Oct. 2016, at 20, 22–23, 25, 27 [hereinafter Mosquera & Bachmann, *Understanding Lawfare*].

172. See Ducaru, *supra* note 170, at 4.

emerged as a dangerous element of hybrid warfare.¹⁷³

In the context of hybrid warfare, lawfare also entails creating legal ambiguity by exploiting loopholes in the exploitable provisions of law and then drawing biased conclusions through personalized interpretations of the legal provisions.¹⁷⁴ Such interpretations are then used as narratives by states or nonstate actors to realize strategic objectives.¹⁷⁵ Hence, public international law is misused, creating risks for international security and peace.¹⁷⁶ Within the sphere of hybrid warfare, legal experts also regard the abuse of laws as an element of asymmetric warfare.¹⁷⁷

A. Russian Intervention in Crimea as an Example of Lawfare in Hybrid Warfare

Between 2014 and 2015, Russia employed the strategy of lawfare by abusing the Budapest Memorandum.¹⁷⁸ Russia presented a manipulated interpretation of the treaty to justify its armed involvement in Crimea.¹⁷⁹ Furthermore, it also employed covert and irregular techniques to engage in hybrid warfare in the territory of Ukraine. However, on the other hand, it publicly denied being involved in the Ukraine conflict.¹⁸⁰ This confused public opinion regarding the use of force by Russia in Crimea.¹⁸¹ The Budapest Memorandum was abused through a debased interpretation by the Russian government.¹⁸²

173. See Mosquera & Bachmann, *Understanding Lawfare*, *supra* note 171, at 26–28.

174. See *id.* at 24–25, 28.

175. See *id.*

176. *Id.* at 28.

177. *Id.*

178. See Thomas D. Grant, *The Budapest Memorandum of 5 December 1994: Political Engagement or Legal Obligation?* POLISH Y.B. INT'L L. 2014, at 89, 89–90 (explaining that the Budapest Memorandum is a multiparty treaty for maintaining security assurance in Eastern Europe).

179. See *id.* at 90–91, 109.

180. See Mosquera & Bachmann, *Understanding Lawfare*, *supra* note 171, at 33.

181. *Id.*

182. See Andres B. Munoz Mosquera & Sascha Dov Bachmann, *Lawfare in Hybrid Wars: The 21st Century Warfare*, 7 J. INT'L HUMANITARIAN LEGAL STUD. 63, 80–81 (2016)

1. *Disrespecting Pacta Sunt Servanda.* In the Budapest Memorandum, signed in 1994, the main parties, including the United States, the Russian Federation, the United Kingdom, and Ukraine, were committed to respecting the sovereignty and independence of the Ukrainian borders and to avoiding the use of force against the territorial integrity of Ukraine.¹⁸³ However, against the true spirit of the Budapest Memorandum, Russia annexed Crimea in 2014 and displayed aggression in some parts of Ukraine.¹⁸⁴ Consequently, the Russian Foreign Ministry adopted the state narrative that the loss of Ukraine's territorial integrity was a result of Ukraine's internal security issues.¹⁸⁵ The Ministry further affirmed that Russia neither violated the Memorandum nor fired a single shot that could infringe the territorial integrity of Crimea.¹⁸⁶ The Ministry also ensured that the Budapest Memorandum remained intact and painstakingly followed, as Russia had not used force against Ukraine.¹⁸⁷ Such a narrative caused confusion in the legal sphere as no Russian armed soldiers were identified as active participators in the conflict in Ukraine.¹⁸⁸ Furthermore, a question arose: if Russia had denied its involvement in the conflict, then how did it manage to annex Crimea without any use of force? It is certain that Russia directly or indirectly became involved in the matter and that the majority of the conflict in Ukraine involved covert Russian connections.¹⁸⁹

The proof of Russian involvement became more certain when

[hereinafter Mosquera & Bachmann, *21st Century*].

183. See Grant, *supra* note 178, at 89–90; Mosquera & Bachmann, *21st Century*, *supra* note 182, at 79–80.

184. See generally Grant, *supra* note 178 (outlining the history of the Budapest Memorandum, how the parties to that Memorandum have historically treated it, and how Russia's annexation seems to go against the spirit of the Memorandum).

185. Mosquera & Bachmann, *21st Century*, *supra* note 182, at 80.

186. *Id.*

187. *Id.*

188. Mosquera & Bachmann, *21st Century*, *supra* note 182, at 80–81 (outlining Russia's assertion that Russian soldiers had not actively shot into Ukrainian territory).

189. See Mosquera & Bachmann, *Understanding Lawfare*, *supra* note 171, at 26 (detailing NATO's description of Russian involvement in Ukraine as hybrid, and thus, both covert and overt).

Russian president Vladimir Putin publicly stated that Russia intervened in the Ukrainian conflict to protect the rights and freedom of the Russian-speaking citizens in Crimea, thus, adhering to its obligations under international law.¹⁹⁰ This proclamation established the hypothesis that Russia had misused international law and actively waged lawfare in the conflict in Ukraine.¹⁹¹ Unfortunately, such lawfare grossly disrespected the international law norm of *pacta sunt servanda* (respecting a binding treaty in good faith), owing to the nonobservance of the provisions of the Budapest Memorandum.¹⁹² Hence, Russia applied both lawfare and hybrid warfare strategies by abusing the Budapest Memorandum and initiating a misinformation campaign combined with covert military operations, respectively.¹⁹³

2. *Putin's Narrative about Russian Troop Presence in Crimea.* In response to allegations of sending troops to Crimea, Russian president Vladimir Putin said that Russian troops had never been sent to Crimea during the conflict in Ukraine, but in fact, Russian troops were already stationed in Crimea for the security of the Black Sea Fleet of Russia, located in the region conforming with the international agreements previously signed with Ukraine.¹⁹⁴ He further maintained that the total number of Russian troops stationed in Crimea never exceeded 25,000, even when the conflict in Ukraine started.¹⁹⁵ However, if the Russian troops had only been stationed to protect the Russian fleet in the Black Sea, then why did Russia annex the entirety of Crimea? Russian troops took over the Crimean territory in addition to the

190. *Id.* at 35.

191. *See id.* (explaining how Russia waged lawfare against Ukraine by ignoring international laws dictating that Russia would defend the rights of Russians abroad, including those in Ukraine).

192. *See id.* at 33.

193. *Id.* at 33.

194. *See* Aurel Sari, *Blurred Lines: Hybrid Threats and the Politics of International Law*, STRATEGIC ANALYSIS: THE EUR. CTR. OF EXCELLENCE FOR COUNTERING HYBRID THREATS, 3-4 (January 29, 2018), <https://www.hybridcoe.fi/wp-content/uploads/2018/01/Strategic-Analysis-2018-1-January-Sari.pdf>.

195. *Id.*

fleet.¹⁹⁶ Furthermore, if there had been legal agreements under which the Russian troops were stationed in Crimea only to protect the Russian fleet, then, absent any particular clause in the earlier agreements about taking over the whole peninsula, the Russian troops breached those agreements by taking over the Crimean area.¹⁹⁷

In a nutshell, Russia deliberately created a narrative that entailed misinformation and distorted facts with manipulated references to international law that were largely debased in nature.¹⁹⁸ Russia intervened in the Ukrainian conflict and annexed Crimea, masking such aggression under the lawfare strategy by denying its active involvement in Ukraine.¹⁹⁹

B. Key Factors Facilitating Lawfare in Hybrid Warfare

There are many factors that facilitate the use of lawfare in hybrid warfare, but the nature of these factors is quite complex. For instance, the factor that facilitated Russia's lawfare used in the Ukrainian conflict and annexing Crimea was the undefined nature of the conflict in Crimea in 2015.²⁰⁰ It was uncertain whether the 2015 Crimea conflict was considered an armed conflict or merely civil unrest.²⁰¹ It was also unclear whether the scope of the conflict was international or domestic.²⁰² These uncertainties paved the way for ambiguities, which provoked the Russian government into manipulating these ambiguities to their own advantage.²⁰³ The fact that Russia denied being involved in

196. See *id.* (discussing how Russian troops took over Crimean territory, including part of the Kiev fleet); see also *How Russia Took Crimea Without a Fight From Ukraine*, NEWSWEEK (Jul. 24, 2017, 7:36 AM), <https://www.newsweek.com/russia-crimea-ukraine-how-putin-took-territory-without-fight-640934>.

197. See Sari, *supra* note 194, at 4.

198. See Mosquera & Bachmann, *21st Century*, *supra* note 182, at 80–81.

199. See Bachmann & Mosquera, *Hybrid Warfare*, *supra* note 10, at 67–68.

200. See Mosquera & Bachmann, *Understanding Lawfare*, *supra* note 171, at 27–28, 33 (detailing NATO's description of Russian involvement in Ukraine as hybrid, and thus, both covert and overt).

201. See Bachmann & Mosquera, *Hybrid Warfare*, *supra* note 10, at 66.

202. *Id.*; see also Mosquera & Bachmann, *Understanding Lawfare*, *supra* note 171, at 26–27.

203. See Bachmann & Mosquera, *Hybrid Warfare*, *supra* note 10, at 66–67.

the conflict in Crimea further challenged the application of *jus ad bellum* (legitimate reason for war).²⁰⁴ Hence, Russia's denial limited the imposition of international law in this conflict.²⁰⁵ Such covert involvement by Russia and misuse of international law facilitated the unrestricted use of lawfare in the context of a hybrid warfare waged by Russia.²⁰⁶

Russia also employed the strategy of manipulating facts through the media, giving debased information regarding the situation in Crimea and further blurring the legal paradigms implemented in controlling the conflict.²⁰⁷ Here, international law arguably becomes less assertive in the event of lawfare waged in hybrid warfare.²⁰⁸ Furthermore, owing to the uncertainty in the applicability of international legal principles, the application of international humanitarian law and human rights laws may also become challenging in the regions affected by hybrid warfare. Thus, the chances of grave atrocities and human rights violations become heightened in hybrid warfare, which makes lawfare alongside hybrid warfare the most dangerous category of warfare in the modern era, posing a significant threat to international security.²⁰⁹

In addition, the rise of armed nonstate actors has further intensified the strength of threats related to hybrid warfare because possibilities emerge where a state supports certain nonstate groups to fight against its rivals.²¹⁰ Such support may be covert or overt.²¹¹ However, in modern times, overt support for

204. See Mosquera & Bachmann, *Understanding Lawfare*, *supra* note 171, at 28.

205. *Id.*

206. See Bachmann & Mosquera, *Hybrid Warfare*, *supra* note 10, at 67–69.

207. See Mosquera & Bachmann, *Understanding Lawfare*, *supra* note 171, at 33.

208. See Bachmann & Mosquera, *Hybrid Warfare*, *supra* note 10, at 70.

209. *Id.* at 67, 70–71.

210. Such armed nonstate actors are also called proxy insurgents and are included as actors of hybrid warfare. See Giray Sadik, *Introduction: Hybrid Threats and European Security*, in EUROPE'S HYBRID THREATS: WHAT KINDS OF POWER DOES THE EU NEED IN THE 21ST CENTURY? 1, 4 (2017).

211. See ALAN NADEL, CONTAINMENT CULTURE: AMERICAN NARRATIVES, POSTMODERNISM, AND THE ATOMIC AGE 160 (1995) (detailing how Guatemalan insurgents acting as nonstate parties were, in fact, supported by state parties—the United States).

nonstate actors is rarely seen.²¹² For instance, Pakistan's government alleges that the government of India supported the rebel nonstate group Baluchistan Liberation Army (BLA) in the Baluchistan province of Pakistan.²¹³ Based on the popular belief and narrative of the Pakistani government, the covert Indian support to the BLA through its intelligence agency RAW is an instance of hybrid warfare waged by India against Pakistan.²¹⁴

C. Zeusian versus Hadesian Lawfare in Hybrid Warfare

Zeusian and Hadesian, terms referring to the Greek gods Zeus and Hades, have opposing reputations associated with them, positive and negative, respectively.²¹⁵ In the discussion of hybrid warfare, the expression "Zeusian versus Hadesian" refers to the fight between good use and evil misuse of international law by states or nonstate actors.²¹⁶ Lawfare can be used either to affirm the principles of international law or to undermine their applicability.²¹⁷ When lawfare is used to reinforce international law principles, then it is referred to as Zeusian;²¹⁸ however, when lawfare is negatively waged in a way that undermines the applicability of international law principles, then it is regarded as Hadesian.²¹⁹ An example of Zeusian lawfare is when Palestine waged lawfare by approaching the ICC regarding Israel's war crimes.²²⁰ Conversely, when Russia invoked its customized interpretation of international legal agreements during the Ukrainian conflict and waged lawfare in hybrid warfare, such

212. See Patricia Sullivan, *Is It Ever a Good Idea to Arm Violent Nonstate Actors?*, THE CONVERSATION (Jul. 10, 2017, 9:08 PM), <http://theconversation.com/is-it-ever-a-good-idea-to-arm-violent-nonstate-actors-77652>.

213. See SYED FAROOQ HASNAT, GLOBAL SECURITY WATCH—PAKISTAN 99 (2011).

214. Rehman Malik, *RAW Declares Hybrid War*, THE NATION (June 16, 2018), <https://nation.com.pk/16-Jun-2018/raw-declares-hybrid-war>.

215. See Mosquera & Bachmann, *Understanding Lawfare*, *supra* note 171, at 27.

216. *Id.*

217. *Id.*

218. See Mosquera & Bachmann, *21st Century*, *supra* note 182, at 73.

219. *Id.*

220. See, e.g., Oliver Holmes, *Palestinian Minister Delivers Israel 'War Crimes' Referral to ICC*, THE GUARDIAN (May 22, 2018; 3:37 PM), <https://www.theguardian.com/world/2018/may/22/palestinian-minister-israel-war-crimes-icc-referral>.

lawfare was Hadesian²²¹ because it prevented the application of the fundamental rules of international law (e.g., *jus ad bellum*, human rights law, and international humanitarian law).²²²

Both Zeusian and Hadesian lawfare are used in hybrid warfare.²²³ In each of these categories of lawfare, states or nonstate actors try to enforce and exploit certain restrictions internationally in order to gain competitive or strategic advantages over an adversary.²²⁴ Through such restrictions, the adversary is pressured by the international community to comply with the relevant principles of international law.²²⁵

D. Offensive vs. Defensive Lawfare

Lawfare by a state or nonstate actor can be either defensive or offensive.²²⁶

1. *Offensive Lawfare.* Actions taken by state or nonstate actors to exploit the loopholes in international law against an adversary fall within the offensive category of lawfare.²²⁷ In such an event, international law is actually used for political purposes.²²⁸ That is, the law is manipulated to serve the biased interpretation so that it legitimizes offensive actions against an adversary.²²⁹ Such lawfare is Hadesian lawfare, however, Zeusian lawfare can also be offensive if it is waged to underpin the rules

221. See Mosquera & Bachmann, *Understanding Lawfare*, *supra* note 171, at 27–28, 33.

222. *Id.* at 28.

223. See *id.* at 27 (implying that if both negative and positive use of lawfare exist in a situation, the warfare can be both Zeusian and Hadesian).

224. Mosquera & Bachmann, *Understanding Lawfare*, *supra* note 171, at 28.

225. *Id.*

226. See Bachmann & Mosquera, *Hybrid Warfare*, *supra* note 10, at 71; Mosquera & Bachmann, *21st Century*, *supra* note 182, at 87.

227. See Mosquera & Bachmann, *Understanding Lawfare*, *supra* note 171, at 27–28 (exemplifying offensive lawfare by Russia).

228. See, e.g., *id.* at 28.

229. See Bachmann & Mosquera, *Hybrid Warfare*, *supra* note 10, at 67 (highlighting the biased interpretation of the Russian government in the Ukrainian conflict).

of international law.²³⁰

a. Offensive Lawfare by Israel through Lawsuits and Blockade of the Gaza Strip. Offensive lawfare was used by Israel to serve its blockade of the Gaza Strip.²³¹ In 2011, Israel prevented a flotilla bound for Gaza from leaving Greece.²³² Israel's narrative for preventing the flotilla from leaving was that the flotilla was coming to Gaza to provide assistance to the Hamas militants who were threatening Israel's security.²³³ Israel waged lawfare in collaboration with the Shurat HaDin, a Tel Aviv-based law organization focused on protecting Jewish causes.²³⁴

i. Steps Taken by Shurat HaDin. Shurat HaDin sent legal notices to the insurance companies that provided insurance to the flotillas leaving Greece for Gaza.²³⁵ On behalf of the Israeli government, the legal notices iterated that if the flotillas reached Gaza, the insurance companies would also be held responsible for any future rocket attacks or terrorism that may take place in Israel.²³⁶ Shurat HaDin built the narrative that Hamas was getting support, including weapons, from the flotilla.²³⁷ Therefore, Shurat HaDin threatened that any company associated directly or indirectly with those flotillas would face lawsuits.²³⁸ Notably, Shurat HaDin has, since its foundation in 2003, established a very successful reputation of winning numerous lawsuits.²³⁹

230. *Id.* at 71; see Mosquera & Bachmann, *21st Century*, *supra* note 182, at 80–81 (furthering the concept of Hadesian lawfare).

231. See KITTRIE, *supra* note 3, at 313.

232. See Logan, *supra* note 15, at 41.

233. *Id.* at 41–42.

234. *Id.*

235. KITTRIE, *supra* note 3, at 314.

236. *Id.*

237. *Id.*; see also Logan, *supra* note 15, at 40–43.

238. KITTRIE, *supra* note 3, at 314.

239. See KITTRIE, *supra* note 3, at 312–13 (detailing Shurat Hadin's success and exemplifying how Shurat HaDin has taken on many impactful lawfare activities and in the process won more than one billion dollars in judgements); see also Yaakov Schwartz, *At Tol Event, Israeli Attorney Shows How 'Lawfare' Could Smite Terrorists' Warfare*, THE TIMES OF ISR. (June 6, 2017, 4:48 PM) <https://www.timesofisrael.com/at-toi-event-israeli-attorney-shows-how-lawfare-could-smite-terrorists-warfare/>.

Therefore, no flotilla owner or insurance company wanted to face them in any of the international courts.²⁴⁰ Thus, the notices to the insurance companies proved effective for Israel as the relevant insurance companies responded to Shurat HaDin and confirmed they would not provide insurance support to any Gaza-bound flotilla that left Greece.²⁴¹

The second strategy Shurat HaDin adopted in coordination with the Israeli government to wage offensive lawfare was the prevention of satellite companies from continuing to provide navigation services to any flotilla that attempted to leave Greece for Gaza.²⁴² Shurat HaDin discovered that only one company, Inmarsat, was providing satellite navigations services to the flotillas.²⁴³ Inmarsat had offices in the United States and the United Kingdom,²⁴⁴ so Shurat HaDin sent legal notices to Inmarsat in order to stop it from continuing to provide navigation services to the flotillas.²⁴⁵

By labeling Hamas as a terrorist group and Gaza-bound flotillas from Greece as the likely support for terrorist Hamas militants, Shurat HaDin invoked the terrorist finance-related clauses of international law that prohibit any corporation from providing finance or any other support to terrorists.²⁴⁶ In addition to the relevant provisions of international law, Shurat HaDin invoked the laws of the United States that provide criminal charges for those who provide any kind of support to terrorist groups.²⁴⁷ The legal notices maintained that, if Hamas employed any tactical weapon or received any assistance from the cargo carried by the Gaza-bound flotilla, Inmarsat would be charged with crimes of abetting terrorists in accordance with U.S. law.²⁴⁸

Upon receiving no response from Inmarsat, Shurat HaDin

240. See KITTRIE, *supra* note 3, at 314–17.

241. KITTRIE, *supra* note 3, at 314–15.

242. *Id.* at 315–17.

243. See Logan, *supra* note 15, at 44.

244. *Id.*; see also KITTRIE, *supra* note 3, at 315.

245. KITTRIE, *supra* note 3, at 316.

246. *Id.*; see also Logan, *supra* note 15, at 45.

247. KITTRIE, *supra* note 3, at 316; see also Logan, *supra* note 15, at 44–45.

248. See KITTRIE, *supra* note 3, at 316.

filed a lawsuit against Inmarsat in a Florida court.²⁴⁹ The case was filed on behalf of Michelle Fendel, a U.S. citizen residing in Sderot, Israel, at that time.²⁵⁰ Notably, Sderot is an area in Israel that has been targeted by Hamas the most.²⁵¹ Hamas has fired almost 9,000 mortars and rockets into the territory of Sderot.²⁵² Therefore, Fendel's narrative was that Hamas posed a significant threat to her life and property in Sderot, Hamas received assistance from the flotilla leaving Greece to launch rocket attacks on Sderot, and the satellite navigation services provided by Inmarsat to the Gaza-bound flotilla were helping the flotilla reach Hamas militants.²⁵³ Therefore, if Inmarsat did not stop providing satellite navigation services to the Gaza-bound flotilla, Inmarsat must be considered an indirect abettor of the Hamas terrorist militants. Although no decision was finalized by the court, Inmarsat stopped providing satellite navigation services to the Gaza-bound flotilla.²⁵⁴ Later on, in response to Inmarsat's disbanding of the Gaza-bound flotilla, Fendel withdrew the case against Inmarsat.²⁵⁵ Nonetheless, the case appeared as an excellent example of offensive lawfare waged by Israel through Shurat HaDin against an entity (Inmarsat) to achieve strategic advantage over an adversary (Hamas) without the use of force.

Lastly, Shurat HaDin informed the government of Greece that numerous ships in the Gaza-bound flotilla waiting to leave Greece were not registered and not insured, and therefore, created risks for the passengers if the flotillas were to leave Greece.²⁵⁶ Reacting to the complaint, the government of Greece ordered the coastal guards to inspect the registration and insurance of the ships in the flotilla.²⁵⁷ Consequently, they found many ships in the flotilla without insurance or with cancelled

249. *Id.* at 316.

250. *Id.*

251. *Id.* at 290.

252. *Id.*

253. *Id.* at 316–17.

254. *Id.* at 317.

255. *Id.*

256. KITTRIE, *supra* note 3, at 317–18; *see also* Logan, *supra* note 15, at 46.

257. *See* Logan, *supra* note 15, at 46; *see also* KITTRIE, *supra* note 3, at 317–18.

insurance.²⁵⁸ Therefore, the government of Greece prevented the Gaza-bound flotilla from leaving Greece and even arrested one captain of a ship on charges of sailing without necessary permits.²⁵⁹

ii. Rationale for Offensive Lawfare by Israel. The offensive lawfare was adopted by Israel in collaboration with Shurat HaDin in response to the criticism and condemnation Israel received by the world community and UNHRC about its aggressive handling of a Turkish flotilla, *Mavi Marmara*, that arrived in Gaza in 2010, which resulted in the deaths of some passengers.²⁶⁰ Israel maintained that *Mavi Marmara* reached Gaza to provide relief packages to the Hamas militants, and therefore, the Israeli government had to use force against the flotilla crew.²⁶¹ However, this narrative was denounced internationally and in particular by the UNHRC.²⁶² An independent commission under former New Zealand prime minister Geoffrey Palmer was set up by the United Nations to investigate the legitimacy of the use of force against the flotilla in 2010.²⁶³ The Palmer Commission also reported that the use of force by Israel was unreasonable because the flotilla had not even entered the shores of Gaza when the Israeli forces boarded.²⁶⁴ The Commission found that the Israel Defense Forces (IDF) were met with organized and violent resistance from a group of passengers, and therefore, the IDF used force in self-defense.²⁶⁵ Consequently, nine passengers died on the flotilla and some Israeli soldiers were injured.²⁶⁶ However, the UN Human Rights Council's fact-finding mission strongly criticized Israel on the use of force.²⁶⁷ Thus, in order to not repeat such an incident,

258. See KITTRIE, *supra* note 3, at 318.

259. *Id.*

260. *Id.* at 313.

261. See *id.* 313–14; see also Logan, *supra* note 15, at 40.

262. See KITTRIE, *supra* note 3, at 313.

263. See Report of the Committee on the Exercise of the Inalienable Rights of the Palestinian People, ¶ 25 U.N. Doc. A/65/35 (2010).

264. See KITTRIE, *supra* note 3, at 313.

265. *Id.* at 313–14.

266. *Id.* at 313.

267. *Id.*

Israel employed lawfare as the strategy to prevent any flotilla from reaching Gaza.²⁶⁸

Furthermore, the lawfare strategy proved to be effective for Israel as many insurance companies cancelled the insurance of certain ships in the flotilla²⁶⁹ and the Greek coast guard prevented the flotilla from leaving Greece.²⁷⁰ As a result, the blockade of the Gaza Strip by Israeli forces continued without international uproar.²⁷¹ Thus, offensive lawfare proved more beneficial for Israel than the use of force.

b. U.S. Government's Offensive Financial Lawfare against Iran. The United States has been active in waging financial lawfare by imposing sanctions against its adversaries, namely Iran and Russia.²⁷² Nonetheless, U.S. sanctions against Russia were not entirely offensive because they were usually put forward as a response to Russian involvement in an offense; for instance, in 2014, the United States imposed sanctions against Russia in response to alleged Russian involvement in the Crimean conflict.²⁷³ On the other hand, the U.S. sanctions against Iran may be seen as offensive financial lawfare.²⁷⁴ These sanctions may be considered part of U.S. hybrid warfare in an attempt to prevent Iran from gaining nuclear weapon capabilities.²⁷⁵ However, such warfare is asymmetric in nature because one party of the warfare, the United States, is much stronger than the other party, Iran.

Recently, the United States, by withdrawing from the Joint Comprehensive Plan of Action (JCPOA) nuclear deal, has imposed more stringent sanctions against Iran²⁷⁶ because U.S.

268. *Id.* at 314.

269. *Id.* at 315; *see also* Logan, *supra* note 15, at 43.

270. *See* KITTRIE, *supra* note 3, at 318.

271. *Id.* at 313–18; *see also* Logan, *supra* note 15, at 46.

272. *See* KITTRIE, *supra* note 3, at 112.

273. *Id.* at 112.

274. *Id.*; *see also* Logan, *supra* note 15, at 64.

275. *See* Logan, *supra* note 15, at 66.

276. Alastair Jamieson, *Trump Scraps the Iran Nuclear Deal. Now What?*, NBC NEWS (May 9, 2018, 2:57 AM), <https://www.nbcnews.com/news/world/trump-scraps-iran-nuclear-deal-now-what-n872296>.

president Donald Trump believes that the JCPOA is soft enough to allow Iran to gain nuclear power capabilities.²⁷⁷ At present, the JCPOA does not prevent Iran from testing ballistic missiles.²⁷⁸ Therefore, according to U.S. president Donald Trump and Israeli prime minister Benjamin Netanyahu, Iran can grow its defense capabilities and utilize them offensively against its adversaries, particularly in the Middle East region.²⁷⁹ Despite the United States' pullout from the JCPOA deal signed by the P5+1 (China, France, Russia, United Kingdom, United States plus Germany) in 2015 with Iran, these parties have called for the continuation of the JCPOA and are allowing Iran to continue acquiring benefits per the deal.²⁸⁰ Thus, the deal is presently valid,²⁸¹ but Iran is facing stringent financial sanctions by the United States.²⁸² One implication of the sanctions is that they may prevent the countries that are friendly with the United States from trading with Iran, and most importantly, from buying oil from Iran.²⁸³ However, French president Emmanuel Macron has requested that the U.S. president either remove the sanctions and facilitate

277. *Id.*

278. See F. Brinley Bruton, *What is the Iran Nuclear Deal?*, NBC NEWS (May 10, 2018, 3:04 AM), <https://www.nbcnews.com/storyline/smart-facts/what-iran-nuclear-deal-n868346>.

279. See, e.g., Judah Ari Gross, *Netanyahu: We will Step Up our Efforts against Iran in Syria after US Pullout*, THE TIMES OF ISR. (Dec. 20, 2018, 3:16 PM), <https://www.timesofisrael.com/netanyahu-we-will-step-up-our-efforts-against-iran-in-syria-after-us-pullout/>.

280. See Bruton, *supra* note 278; see also Macron rejects Trump's Call to Isolate Iran, Urges Dialogue, THE TIMES OF ISR. (Sept. 25, 2018, 11:39 PM), <https://www.timesofisrael.com/macron-rejects-trumps-call-to-isolate-iran-urges-dialogue/>.

281. Bruton, *supra* note 278; Evelyn N. Farkas, *What's the Best Way to Deal with Iran? The Nuclear Agreement Trump Ditched*, WASH. POST (June 20, 2019), https://www.washingtonpost.com/outlook/whats-the-best-way-to-deal-with-iran-the-nuclear-agreement-trump-ditched/2019/06/20/9483c1b6-9378-11e9-b570-6416efdc0803_story.html.

282. See *US Unleashes Sanctions on Iran, Hitting Oil, Banking and Shipping*, BBC NEWS (Nov. 5, 2018), <https://www.bbc.com/news/business-46092435>.

283. Saeed Kamali Dehgan & Josie Le Blond, *Trade with Iran and You Won't Trade with US, Trump Warns*, THE GUARDIAN (Aug. 7, 2018, 8:19 PM), <https://www.theguardian.com/world/2018/aug/07/iran-braces-for-new-round-of-us-economic-sanctions>.

the implementation of the JCPOA with Iran or open dialogue with Iran for a new deal.²⁸⁴ Other EU countries have also denounced the U.S. sanctions against Iran owing to the offensive nature of the sanctions.²⁸⁵ Iran regards the U.S. sanctions as “economic terrorism.”²⁸⁶

2. *Defensive Lawfare.* Lawfare is defensive when a state uses international law as self-defense in response to an adversary’s offensive lawfare or armed transgression committed against the state’s national security.²⁸⁷ For example, Israel’s response to the PA’s lawfare against Israel is defensive lawfare.²⁸⁸ That is, in addition to offensive lawfare, Israel has resorted to defensive lawfare in response to the offensive lawfare initiated by the PA and its allied NGOs against Israel.²⁸⁹

a. *Israel’s Defensive Lawfare in Response to Palestinian Authority Lawfare.* The PA and its allied Palestinian NGOs jointly waged lawfare against Israel by approaching the ICC and other international forums to initiate war crime prosecutions against Israel.²⁹⁰ The result of the appeal, not the decision, was intense damage to the reputation of Israel at the international level, and in particular, to Israeli corporations that faced boycotts in businesses from certain factions of the world.²⁹¹ Consequently, Israel adopted defensive lawfare through a number of well-

284. See *Macron rejects Trump’s Call to Isolate Iran, Urges Dialogue*, *supra* note 280; see also Richard Goldberg, *Trump Shouldn’t Give in to Macron’s Iran Deal Request*, N.Y. POST (April 23, 2018, 8:09 PM), <https://nypost.com/2018/04/23/trump-shouldnt-give-in-to-macrons-iran-deal-request/>.

285. See Yochi Dreazen, *Europe’s Fury over Trump’s Iran Decision, Explained in One Word*, VOX (May 9, 2018, 11:10 AM), <https://www.vox.com/world/2018/5/9/17335308/trump-decertify-iran-nuclear-deal-europe-sanction>.

286. See *Iran’s Rouhani Denounces US Sanctions as ‘Economic Terrorism,’* AL JAZEERA (Dec. 8, 2018), <https://www.aljazeera.com/news/2018/12/iran-rouhani-denounces-sanctions-economic-terrorism-181208065401014.html>.

287. See Mosquera & Bachmann, *21st Century*, *supra* note 182, at 86–87.

288. See KITTRIE, *supra* note 3, at 202.

289. *Id.*

290. *Id.* at 197, 239.

291. *Id.* at 279.

coordinated systematic responses to the PA's lawfare.²⁹² Israel pursued a strategy of responding to offensive lawsuits on a case-by-case basis.²⁹³ Notably, the Israeli government established a separate office under its Ministry of Justice to coordinate the responses to each lawsuit brought by the PA or any other entity in the world.²⁹⁴ The office also responds to any lawsuit waged against the state of Israel or Israeli soldiers or officials residing in any part of the world.²⁹⁵ For a quickened response, the office is working on establishing at least one law firm in every country where any law-related threat is felt by Israeli nationals or state entities.²⁹⁶ Thus, the defensive lawfare strategy by Israel entails a well-coordinated response to every lawsuit or legal action that is pursued against Israel by its adversaries.

b. China's Changing Defensive to Offensive Lawfare in Security and Financial Settings. China is also particularly important in the context of both offensive and defensive lawfare because the origin of the lawfare strategy has its roots in the use of law for gaining an advantage in the South China Sea region by the People's Republic of China (PRC).²⁹⁷

i. Lawfare for Enhancing Self-Defense. Historically, China perceived a severe threat to its national security from Japan in the East and South China Sea during WWII, and, later on, in the Southeast China sea region during the Vietnam War.²⁹⁸ Hence, China developed a self-defense strategy to counter its perceived threats in the aforementioned sea regions.²⁹⁹ Feeling the need to do so, the PRC implemented a strategy of using law for the advocacy of its personal interests in the South China Sea

292. *Id.* at 269.

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.* at 269–70.

297. *See* Logan, *supra* note 15, at 15.

298. Zhai, *supra* note 38, at 257 (discussing the severe threat China perceived to its national security from the United States in the Southeast China sea region during the Vietnam War).

299. *Id.*

region.³⁰⁰ It deployed marine security troops for enhanced vigilance and did not allow military vessels from other countries, particularly the United States, to pass through the region.³⁰¹ Similar restrictions were imposed on U.S. aircrafts in the region.³⁰²

ii. Turning Lawfare from Defensive to Offensive. According to the PRC, the right to control marine traffic in the South and Southeast China Seas complies with the UNCLOS provision that assigns entitlement to China over its exclusive economic zone.³⁰³ Although the PRC's decision to wage lawfare was defensive in nature, and China initiated lawfare as defensive and Zeusian lawfare, China's lawfare policy turned from defensive to offensive on certain occasions over time. For instance, in 2013, a territorial dispute emerged between China and the Philippines when the Philippines claimed ownership of some Spratly Islands³⁰⁴ that had been occupied by China.³⁰⁵ Furthermore, the Philippines also contested the Chinese-drawn Nine-Dash Line in the South China Sea region and denounced the line on the map as baseless and an endeavor by China to occupy the South China Sea.³⁰⁶ The Philippines took the matter to an arbitration forum under UNCLOS,³⁰⁷ but China never accepted the tribunal and did not take part in the arbitration proceedings.³⁰⁸ China's refusal to

300. See Logan, *supra* note 15, at 15.

301. *Id.* at 72 (stating that China maintained "physical control over human-made islands").

302. See KITTRIE, *supra* note 3, at 2.

303. See Logan, *supra* note 15, at 16.

304. The Spratly Islands are groups of islands that are occupied by countries sharing the South China Sea. For instance, some of these islands are owned by China and some by Taiwan, Vietnam, and the Philippines. See *Why is the South China Sea Contentious?*, BBC NEWS (July 12, 2016), <https://www.bbc.com/news/world-asia-pacific-13748349>.

305. See Logan, *supra* note 15, at 18.

306. See Donald R. Rothwell, *The 1982 UN Convention on the Law of the Sea and its Relevance to Maritime Disputes in the South China Sea*, in *THE SOUTH CHINA SEA MARITIME DISPUTE: POLITICAL, LEGAL AND REGIONAL PERSPECTIVES* 46, 56 (Leszek Buszynski & Christopher B. Roberts, eds., 2015).

307. *Id.*

308. See Yann-huei Song, *The South China Sea Arbitration Case Filed by the*

participate in the arbitration over the Nine-Dash Line area in the South China Sea complied with China's right under international law.³⁰⁹ Thus, by using this right, China resorted to lawfare in response to the Philippines' lawsuit. Hence, China's defensive lawfare strategy turned offensive as China continues to maintain its claim of ownership over the Nine-Dash Line area and some of the Spratly Islands, denying the Philippines' ownership over them.³¹⁰

Furthermore, China also shared documentation with the United Nations claiming its ownership, including white papers created to justify its stance over the Nine-Dash Line,³¹¹ which was not accepted by the Philippines. The Philippines maintained that China's control over the Nine-Dash Line is a breach of the Philippines' territorial sovereignty.³¹² Nonetheless, China exercises control of that territory, leaving the Philippines at a disadvantage.³¹³ Thus, China arguably used lawfare offensively by initially creating documentation claiming ownership of the Nine-Dash Line area and then using its right under international law to reject arbitration regarding the matter.

3. How Defensive and Offensive Lawfare Strategies Are Elements of Hybrid Warfare. In essence, the lawfare employed by states is either defensive or offensive.³¹⁴ Defensive lawfare entails responding to legal or physical threats to national security or state reputation by using relevant legal provisions to promote the state's narrative.³¹⁵ This is often done in response to offensive

Philippines against China: Arguments Concerning Submerged Features, Low Tide Elevations and Islands, in *ARBITRATION CONCERNING THE SOUTH CHINA SEA: PHILIPPINES VERSUS CHINA* 157, 168 (Shicun Wu & Keyuan Zou eds., 2016).

309. *Id.*

310. S. Jayakumar et al., *The South China Sea Arbitration: laying the groundwork*, in *THE SOUTH CHINA SEA ARBITRATION: THE LEGAL DIMENSION* 1, 8 (S. Jayakumar et al., eds., 2018).

311. See Logan, *supra* note 15, at 17.

312. *Id.* at 18.

313. See Jayakumar et al., *supra* note 310, at 8–9.

314. See Bachmann & Mosquera, *Hybrid Warfare*, *supra* note 10, at 71.

315. See Mosquera & Bachmann, *21st Century*, *supra* note 182, at 65.

lawfare waged by an adversary state or nonstate actor.³¹⁶ On the other hand, offensive lawfare is the strategy of using or misusing law for gaining strategic advantage or protecting the state's interests in a certain bilateral or multilateral matter against another state or nonstate actor.³¹⁷ It often involves a manipulated interpretation of the invoked legal provisions to maintain a strategic advantage over the adversary in times of peace or armed conflict.³¹⁸ Both offensive and defensive lawfare strategies are employed in modern hybrid warfare by states against their adversaries.³¹⁹ For example, Russia's offensive lawfare strategy worked well and suited its interests in the conflict in Crimea, which Russia maintained as part of its hybrid warfare in Ukraine.³²⁰ Similarly, Israel deployed offensive warfare through lawsuits against corporations in order continue its blockade over the Gaza Strip by preventing the flotilla from reaching Gaza.³²¹ The blockade strategy was aimed at curbing the assistance of its hybrid adversary, the Hamas militant group.³²² On the other hand, Israel also resorted to defensive lawfare in response to lawfare it faced from the PA by establishing a separate office and responding to each lawsuit on a case-by-case basis.³²³ Here, the offensive and defensive lawfare strategies of Israel were part of its response to hybrid warfare waged by its adversary Hamas.³²⁴ Hence, the defensive and offensive lawfare strategies were arguably utilized either in waging a hybrid war or in responding to a hybrid war waged by one or more adversary groups.

On a slightly different pattern, the United States deployed an offensive financial lawfare strategy against its adversary Iran by

316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.*

320. See Bachmann & Mosquera, *Hybrid Warfare*, *supra* note 10, at 67–68.

321. *Id.*

322. See Logan, *supra* note 15, at 40.

323. See KITTRIE, *supra* note 3, at 269 (categorizing Israel's lawfare as defensive because it is used to counter the PA's and NGO's initial use of lawfare).

324. See *generally* Mosquera & Bachmann, *21st Century*, *supra* note 182, at 86–87 (offering a detailed analysis of the use of lawfare in the hybrid war between Israel and Hamas).

dismissing the JCPOA deal and imposing sanctions against Iran.³²⁵ The United States' actions can be considered hybrid warfare against Iran, which the United States is pursuing through lawfare as well through building an anti-Iran narrative in international media by highlighting Iran's nuclear program as a threat to global security.³²⁶ However, the offensive and defensive lawfare strategies of Israel and the United States can also be considered examples of asymmetric warfare, in addition to hybrid warfare, because the United States and Israel are greater military powers than their adversaries, and therefore, have asymmetric advantage over them.³²⁷

V. CONCLUSION

Lawfare is the strategy of using or misusing international law as a weapon of war against an adversary.³²⁸ In the contemporary arena of international relations, the lawfare strategy is deployed by states in times of both conflict and peace.³²⁹ The major actors of lawfare are states, nonstate actors, such as rebel organizations and terrorist groups, international organizations, including nongovernmental and nonprofit organizations, administrations of cities and states, and individuals.³³⁰ With the emergence of asymmetric and hybrid warfare strategies in the current world order, the lawfare tactic has gained significant importance and is now employed by states as an alternative to investing heavily in military operations.³³¹

Unfortunately, international law, in particular international

325. See KITTRIE, *supra* note 3, at 112.

326. See Mosquera & Bachmann, *21st Century*, *supra* note 182, at 67; see also Jonathan S. Landay, *Experts Cast Doubt on Reality of Iran Nuclear Threat*, Hous. Chron., Nov. 4, 2007, at A32; Tyler Marshall, *Iran Threat Grows Amid U.S. Divisions*, L.A. TIMES (Sept. 12, 2004, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2004-sep-12-fg-irannuke12-story.html>.

327. See Logan, *supra* note 15, at 50, 71.

328. See Dunlap, *supra* note 8, at 35.

329. See KITTRIE, *supra* note 3, at 114 (detailing how financial lawfare through imposition of sanctions against Iran by the United States is an example of lawfare waged in the times of peace).

330. *Id.* at 12.

331. See Mosquera & Bachmann, *Understanding Lawfare*, *supra* note 171, at 27.

humanitarian law, is being misused or abused by nonstate actors, such as the Taliban, who tend to use human shields to protect themselves from NATO forces and to depict NATO operations in Afghanistan as inhumane.³³²

On the other hand, in certain instances, a proper international prosecution platform is also used for waging lawfare.³³³ For instance, the PA and some of its allied NGOs have appealed to the ICC to investigate war crimes committed by Israel in Gaza, using the forum of the ICC to wage lawfare against Israel.³³⁴ Similarly, India's plea in the ICJ against Pakistan to prevent Pakistan from submitting a terrorist to capital punishment, Kalbhushan Yadav, is an example of using the forum of the ICJ to wage lawfare against a state.³³⁵

Some legal experts categorize lawfare into two categories, Zeusian and Hadesian.³³⁶ The former represents the type of lawfare that is waged for upholding and preserving the rules of international law, while the latter is initiated for exploiting, misusing, or abusing certain provisions of international law, mainly facilitated by manipulated interpretations of the law.³³⁷ In this regard, lawfare can be defensive or offensive.³³⁸ In either case, it is employed in the contemporary era as an element of hybrid warfare by states and nonstate actors against their adversaries.³³⁹ Owing to the unhindered, unchecked, and unpredictable nature of lawfare waged in the sphere of hybrid warfare, it is regarded as a threat to international peace and security, as it leaves international law, including international humanitarian law and international human rights law, ineffective in the occurrence of an armed conflict waged via hybrid

332. See Logan, *supra* note 15, at 8; see also Bachmann & Mosquera, *Hybrid Warfare*, *supra* note 10, at 67.

333. See Fisher & Stefan, *supra* note 25, at 9–10.

334. See KITTRIE, *supra* note 3, at 197, 239.

335. See Shad, *supra* note 149.

336. Mosquera & Bachmann, *Understanding Lawfare*, *supra* note 171, at 27.

337. See Mosquera & Bachmann, *21st Century*, *supra* note 182, at 73.

338. See Bachmann & Mosquera, *Hybrid Warfare*, *supra* note 10, at 71.

339. *Id.* at 61–62.

warfare.³⁴⁰ The Crimean conflict is an example of such futility.³⁴¹

Therefore, it is necessary that the international community take serious measures to control and check the use of international law as lawfare, and to formulate certain legal procedures that discourage and prevent lawfare adoption as a strategy by terrorist nonstate actors. In order to mitigate the threats emerging from the unhindered misuse of law, international law-making organizations such as the International Law Association (ILA) and other global organizations such as the United Nations General Assembly (UNGA) should step up their role and impose restrictions on the misuse of law as a weapon of war. In particular, these organizations should put forward a new agenda that entails putting restrictions on misusing law as a weapon, especially in the event of armed conflicts. The UNGA should also set up neutral regulatory bodies to monitor and analyze particular lawfare relevant situations; for instance, whenever a particular entity invokes law against another entity or state, then a regulatory body should assess whether that use of law is genuine or merely a pretense of lawfare. If lawfare is identified, especially Hadesian Lawfare, then such a state or entity should not be legitimately permitted to further misuse law. Such restrictive measures by the ILA and UNGA can prove effective in terms of discouraging the unrestricted misuse of law by states and non-state actors.

340. *Id.* at 67.

341. *Id.* at 67–68.