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Article 1

What Does Lawfare Mean?

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WHAT DOES LAWFARE MEAN?

*David Hughes**

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1. “LAWFARE DESCRIBES A METHOD OF WARFARE WHERE LAW IS USED AS A MEANS OF REALIZING A MILITARY OBJECTIVE.”

— *Major General Charles J. Dunlap Jr., USAF (Ret.)*¹

When four planes, commandeered by al-Qaeda hijackers, struck the economic and military heart of the United States, international

1. Charles J. Dunlap, Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts* 4 (Carr Ctr. Human Rights, John F. Kennedy Sch. Gov't, Harvard Univ., Working Paper, 2001) [hereinafter Dunlap Working Paper].

law's relationship with terrorism, war, and national security was altered.² The proliferation and institutionalization of international law that had followed the Second World War was suddenly met with increased resistance.³ The term "lawfare," upon entering the concurrent discourse, initially described what observers perceived as the novel use of international law within situations of traditional or asymmetrical conflict, before later developing into a blanket term of competing meanings.

Major General Charles J. Dunlap Jr. of the United States Air Force first popularized lawfare in a paper describing the challenges posed by international law when engaging in a modern military intervention. Lawfare, he posited, was an innovative form of warfare in which law was employed to achieve a traditional military objective.⁴ Years later Dunlap would evolve his understanding of the term, holding that lawfare constituted "the strategy of using – or misusing – law as a substitute for traditional military means to achieve a warfighting objective."⁵ When Dunlap sought to define the term, he claimed ideological neutrality. Lawfare, like traditional weaponry, could be wielded for legitimate or illegitimate purposes.⁶ Furthermore, lawfare conveyed limited descriptive potential. Dunlap would later explain that lawfare was intended to focus "principally on circumstances where law can create the same or similar effects as those ordinarily sought from conventional warmaking approaches."⁷ Yet when the term lawfare entered the public vernacular and policy

2. For a discussion of how the events of September 11, 2001 have effected or been used to justify a 'new paradigm' in international law, see Stephen P. Marks, *International Law and the 'War on Terrorism': Post 9/11 Responses by the United States and Asia Pacific Countries*, 1 ASIA PAC. L. REV. 43, 48 (2006). See also Anthea Roberts, *Righting Wrongs or Wronging Rights? The United States and Human Rights Post-September 11*, 15 EUR. J. INT'L L. 721 (2004). See generally DOMINIC MCGOLDRICK, FROM 9-11 TO THE 'IRAQ WAR 2003': INTERNATIONAL LAW IN AN AGE OF COMPLEXITY (2004).

3. For a detailed and critical overview of the Bush Administration's approach to international law, see JENS DAVID OHLIN, THE ASSAULT ON INTERNATIONAL LAW (2015).

4. As Dunlap recognized, the term is widely believed to have originated in a paper published as part of an edited volume in 1975. See Dunlap Working Paper, *supra* note 1. The authors used the term lawfare to decry the adversarial nature of western legal systems. See John Carlson & Neville Yeomans, *Whither Goeth the Law – Humanity or Barbarity*, in THE WAY OUT: RADICAL ALTERNATIVES IN AUSTRALIA 155 (David Crossley & Margaret Smith eds., 1975).

5. Charles J. Dunlap Jr., *Lawfare Today...and Tomorrow*, 87 INT'L L. STUD. SER. US NAVAL WAR COL. 315, 315 (2011) [hereinafter Dunlap Today and Tomorrow].

6. *Id.* at 315-16.

7. Charles J. Dunlap, Jr., *Does Lawfare Need an Apologia?*, 43 CASE W. RES. J. INT'L L. 121, 122 (2010) [hereinafter Dunlap Apologia].

discourses that followed the September 11th attacks, its meaning became blurred and its uses varied.

Today, there is no consensus as to lawfare's meaning.⁸ It has, however, moved from Dunlap's purportedly neutral connotations to assume a pejorative or polemic tone within popular and political speech.⁹ The propagation of the term lawfare that followed Dunlap's early framing of the neologism, its influence on the concurrent discourse, has occurred on the margins of the US-led War on Terror, though it is not limited to these events.

Within such a context, lawfare has evolved to describe and denounce various forms of international legal engagement.¹⁰ Often, though not exclusively, these usages are directed towards non-state actors: individuals, non-governmental organizations, international institutions, or sub-state militant groups. Descriptions or accusations of lawfare have occurred in relation to the general and the specific. Lawfare has been understood as the imposition or manipulation of international legal standards to confine traditional military means and operations and to limit both state responses to terrorism and the use of force.¹¹ Those who employ the precepts of international law, often before international fora, to shame countries like the United States or Israel have been accused of engaging in lawfare.¹² The use of human

8. See Michael P. Scharf & Elizabeth Andersen, *Is Lawfare Worth Defining? - Report of the Cleveland Experts Meeting - September 11, 2010*, 43 CASE W. RES. J. INT'L L. 11, 13-15 (2010); see also *Lawfare, the Latest in Asymmetries - Part Two*, COUNCIL ON FOREIGN REL. (May 22, 2003), <http://www.cfr.org/defense-and-security/lawfare-latest-asymmetries---part-two/p6191>; *Lawfare, the Latest in Asymmetries*, COUNCIL ON FOREIGN REL. (Mar. 18, 2003), <http://www.cfr.org/defense-and-security/lawfare-latest-asymmetries/p5772>.

9. David Luban, *Carl Schmitt and the Critique of Lawfare*, 43 CASE W. RES. J. INT'L L. 457, 458 (2010).

10. For a more detailed account of how the term "lawfare" has evolved since being reintroduced by Charles Dunlap, see Susan W. Tiefenbrun, *Semiotic Definition of Lawfare*, 43 CASE W. RES. J. INT'L L. 29, 51-57 (2011). See also Wouter G. Werner, *The Curious Career of Lawfare*, 43 CASE W. RES. J. INT'L L. 61 (2010).

11. For example, the position assumed by the Council on Foreign Relations described lawfare as "a strategy of using or misusing law as a substitute for traditional military means to achieve military objectives." This understanding of lawfare does not differ from Dunlap's offering but the Council held, in accordance with this meaning, that "[e]ach operation conducted by US military results in new and expanding efforts by groups and countries to use lawfare to respond to military force." See *Lawfare, the Latest in Asymmetries*, *supra* note 8.

12. W. Chadwick Austin and Antony Barone Kolenc, for example, argue that the International Criminal Court is vulnerable to abuse by the United States' adversaries who may seek to shame the United States by misusing the Court's investigative processes, filing dubious complaints with the Court, or by engaging the media in relation to ICC proceedings to generate international pressure against the United States. See W. Chadwick Austin & Antony Barone Kolenc, *Who's Afraid of the Big Bad Wolf? The International Criminal Court as a Weapon of*

shields by non-state actors engaged in asymmetrical warfare has been held to constitute lawfare.¹³ Further, the use of libel laws to attempt to silence groups who “oppose” the threat of “militant Islam” and seek to expose the means of terrorist financing have been described as acts of lawfare.¹⁴ Lawfare has also been used to label and deride the efforts of lawyers and organizations representing foreign nationals held at the Guantánamo Bay detention camp in Cuba.¹⁵ Finally, and in close association to Dunlap’s intended use of the term, the label of lawfare has described the strategic use of international law by States for the purpose of achieving a particular, often military, objective.¹⁶

This paper is built around several prominent quotations which claim to either define lawfare or describe what the user deems as an act of lawfare. It will explore these varied uses of the term and attempt to understand what the significance of lawfare’s advent is for the practice and function of international law. It accepts that a consensus definition of the term will remain elusive and does not attempt to provide one. Instead, it borrows from Alison Young’s argument that to better understand a particular discourse, and our investment in it, we should “flow with the current meaning.”¹⁷ As such, it is not consumed by the definitional question of what lawfare is. Rather, it asks what the label of lawfare means for both the understanding and practice of international law.

In exploring this question, it attempts to (re)frame the debate that surrounds lawfare. Currently, this exists amongst three broad camps: those who understand lawfare as the use and abuse of international law to threaten state interests; those who view it as a rhetorical device intended to discredit parties who attempt to engage with international law as a means to ensure accountability and compliance; and those who describe lawfare as a weapon, the legitimacy of which is defined by its user’s intentions.

Asymmetric Warfare, 39 VAND. J. TRANSNAT’L L. 291 (2006); see also David Scheffer, *Whose Lawfare Is It, Anyway?*, 43 CASE W. RES. J. INT’L L. 215, 223 (2010); *infra* discussion in Sections 2, 3.

13. See *infra* Sections 2, 7.

14. See *infra* Section 6.

15. See *infra* Sections 4, 5.

16. See *infra* Section 7.

17. ALISON YOUNG, FEMININITY IN DISSENT 43 (1990); see also Anne Orford, *Muscular Humanitarianism: Reading the Narratives of the New Interventionism*, 10 EUR. J. INT’L L. 679, 682 (1999).

A 2010 symposium hosted by Case Western Reserve's School of Law, titled *LAWFARE!*, featured proponents of each view.¹⁸ Many from all sides of the lawfare debate presented positions that held the notion of lawfare as novel—an observed phenomenon that now assumed a prominent position within an increasingly internationalized environment.¹⁹ While this view was widely accepted, manifestations of what is commonly termed lawfare often predate the term's popularization. Alongside the proliferation of international law throughout the twentieth century it is, of course, possible to find myriad examples of legal engagements and arguments that may conform with what is now broadly termed lawfare. Furthermore, critical framings of lawfare that explicitly or implicitly view it as novel and contextual risk erroneously preserving it within a singular time and place. Most often this is the United States of George W. Bush and the War on Terror.²⁰ What is popularly held to constitute lawfare is neither novel nor contextual, yet the implications of the term's use may be significant.

Lawfare, however, as most commonly understood and applied, has evolved within political and popular discourses to serve as a warning of the corrosive effects and potential hazards of international law.²¹ Opponents of this framing have argued that the labelling of international legal engagements as lawfare has become a neoconservative doctrine whose “real target is international law itself.”²² Thus, lawfare is presented not as a legal argument, but

18. For an overview of the symposium, see Michael P. Scharf & Shannon Pagano, *Foreword: LAWFARE!*, 43 CASE W. RES. J. INT'L L. 1 (2010). The papers of the participants are contained throughout all of 43 CASE W. RES. J. INT'L L. (2010-2011).

19. E.g., Craig H. Allen, *Command of the Commons Boasts: An Invitation to Lawfare*, 83 INT'L L. STUD. SER. US NAVAL WAR COL. 21 (2007); see also Michael J. Lebowitz, *The Value of Claiming Torture: An Analysis of Al-Qaeda's Tactical Lawfare Strategy and Efforts to Fight Back*, 43 CASE W. RES. J. INT'L L. 357 (2010); Austin & Kolenc, *supra* note 12.

20. For example, see Michael Kearney's explanation of lawfare having “emerged in response to human rights litigation during the ‘war on terror’, and rapidly progressed from conservative newspaper opinions and blogs to legal and political academic journals.” Michael Kearney, *Lawfare, Legitimacy and Resistance: The Weak and the Law*, 16 PAL. Y.B. INT'L L. 79, 88 (2010).

21. The editorial board of the Wall Street Journal has warned about the dangers of lawfare, holding that “however well our troops do on the battlefield, a reality of modern times is that the U.S. can still lose the war on terror in the courtroom.” See *The Lawfare Wars*, WALL ST. J. (Sept. 2, 2010), <http://www.wsj.com/articles/SB10001424052748703467004575463721720570734>; see also David B. Rivkin, Jr. & Lee A. Casey, *Lawfare*, WALL ST. J. (Feb. 23, 2007), <http://www.wsj.com/articles/SB117220137149816987>.

22. Scott Horton, *The Dangers of Lawfare*, 43 CASE W. RES. J. INT'L L. 163, 167 (2010-2011); see also Scheffer, *supra* note 12, at 217.

instead as a policy prescription. Leila Nadya Sadat and Jing Geng have argued that the use of the term, popularly conceived, constitutes “an effort to attack and dismantle legal norms – and even some legal or international institutions – in order to promote the efforts of America’s (or Israel’s) military.”²³

When one observes contemporary applications of lawfare, it is often intended to decry or delegitimize arguments that themselves draw upon international legal principles. Viewed singularly, this provides credence to the understanding of lawfare espoused by Sadat and Geng. But as several observers have noted, nearly all States engage with international law in a manner that can fit comfortably within common conceptions of lawfare.²⁴ Thus, when observing the debate that surrounds the use of the term, it becomes evident that pejorative or polemic applications of lawfare are often decrying a *particular* use of international law by a *particular* type of actor. When framing the lawfare debate or articulating a response to accusations of lawfare that are intended to delegitimize such specific uses of international law, it is prudent to understand the application of the label not as a general means of attacking or dismantling legal norms, but as a particular strategy intended to limit access to international justice.

2. “THE FIRST TYPE OF LAWFARE IS ASYMMETRICAL WARFARE. DURING THE RECENT CONFLICT WITH IRAQ, ALLIED FORCES WERE THE TARGET OF A PERSISTENT LAWFARE CAMPAIGN. EVEN BEFORE THE CONFLICT BEGAN, INTERNATIONAL ACTIVISTS USED LEGAL MEANS TO TRY TO DECLARE MILITARY ACTION ILLEGITIMATE. IN COORDINATION WITH IRAQI AUTHORITIES, HUMAN SHIELDS WERE POSITIONED AT PROSPECTIVE TARGETS TO DISRUPT AMERICAN WAR PLANS.”

— *Council on Foreign Relations*²⁵

Lawfare, as initially described by Dunlap, was a reaction to the perception that international law was assuming a more prominent and

23. Leila Nadya Sadat & Jing Geng, *On Legal Subterfuge and the So-Called “Lawfare” Debate*, 43 CASE W. RES. J. INT’L L. 153, 160 (2010-2011).

24. Allen, *supra* note 19, at 36. See generally ORDE F. KITTRIE, *LAWFARE: LAW AS A WEAPON OF WAR* (2016).

25. *Lawfare, the Latest in Asymmetries*, *supra* note 8.

strategic role within situations of international armed conflict.²⁶ With increasing frequency, actors engaged in traditional conflict situations were believed to rely upon what Dunlap characterized as lawfare within “circumstances where law can create the same or similar *effects* as those ordinarily sought from conventional war making approaches.”²⁷ Upon popularizing the term, Dunlap evolved his understanding of lawfare to include what he perceived to be the cynical manipulation of particular uses of international law.²⁸ Accordingly, and with what was presented as increased frequency, the United States’ opponents were understood to nefariously engage the rule of law and the humanitarian values it represents to create a perception that the United States is waging war in violation of international law.²⁹

This notion of lawfare is emblematic of the view forwarded by the Council on Foreign Relations. This warned, in regards to the Iraq War, that international activists were turning to legal means to demonstrate the illegitimacy of the military operation.³⁰ Several commentators have lent credence to this notion of lawfare, holding that it endeavors to “gain a moral advantage over your enemy in the court of world opinion.”³¹ In response, they have declared that “[t]he U.S. must go on both the legal and public diplomacy offensive, utilizing such aggressive litigation tactics as seeking sanctions against lawyers who make frivolous arguments or violate security regulations.”³² Often, nongovernmental organizations (“NGOs”) are perceived as the primary perpetrators of this notion of lawfare and are increasingly held to function in opposition to a State’s security interests.³³

The currency that international law-based claims carry within the public sphere is viewed as an extension of the general influence that international law has assumed within occurrences of international

26. See Dunlap Working Paper, *supra* note 1, at 2-4.

27. Dunlap Apologia, *supra* note 7, at 122; see also Charles J. Dunlap, Jr., *Lawfare: A Decisive Element of 21st Century Conflicts?*, 54 *JOINT FORCES Q.* 34 (2009) [hereinafter Dunlap Conflicts].

28. Dunlap Apologia, *supra* note 7.

29. Dunlap Working Paper, *supra* note 1, at 4.

30. *Lawfare, the Latest in Asymmetries*, *supra* note 8.

31. Rivkin & Casey, *supra* note 21.

32. *Id.*

33. See generally Neve Gordon, *Human Rights as a Security Threat: Lawfare and the Campaign against Human Rights NGOs*, 48 *L. & SOC’Y REV.* 311, 311-12 (2014).

armed conflict.³⁴ Some, observing the increasing application of international law from within military establishments, have been inclined to interpret such uses as an obstruction. General Wesley Clark, who served as Supreme Allied Commander, Europe during the NATO mission in Kosovo, described the challenges posed by increased legal oversight within a military campaign:

The processes of approving the targets, striking the targets, reading the results, and restriking were confusing. The original plans had presumed that the [Supreme Allied Commander, Europe] would have the authority to strike targets within overall categories specified by NATO political leaders, but Washington had introduced a target-by-target approval requirement. The other Allies began to be increasingly demanding, too. It was British law that targets struck by any aircraft based in the United Kingdom had to be approved by their lawyers, the French demanded greater insight into the targeting and strikes, and of course there had to be continuing consultation with NATO headquarters and with other countries, too.³⁵

The NATO intervention in Kosovo and the accompanying campaign against Serbia are held by many, from an operational perspective (*jus in bello*), to represent “a high-water mark of the influence of international law in military interventions.”³⁶ Certain commentators, opposed to the heightened influence of international law on operational decision-making, described the perceived restrictive or prohibitive function of international law as lawfare. Often held to be encouraged by NGOs and as an impediment to the achievement of military or security objectives, opponents of the restrictive use of international law claimed:

One of the most striking features of the Kosovo campaign, in fact, was the remarkably direct role lawyers played in managing combat operations – to a degree unprecedented in previous wars . . . The role played by lawyers in this war should also be

34. Dunlap Working Paper, *supra* note 1, at 1.

35. WESLEY K. CLARK, WAGING MODERN WAR: BOSNIA, KOSOVO, AND THE FUTURE OF COMBAT 224 (2001).

36. Dunlap Working Paper, *supra* note 1, at 1-2; *see also* MICHAEL IGNATIEFF, VIRTUAL WAR: KOSOVO AND BEYOND 197-98, 200, 207 (2000); Adam Roberts, *NATO's 'Humanitarian War' over Kosovo*, 41 SURVIVAL: GLOBAL POL. & STRATEGY 102, 102 (1999).

sobering – indeed alarming – for devotees of power politics who denigrate the impact of law on international conflict.³⁷

The term lawfare, in response, served as a descriptive denunciation of the perceived rise and prohibitive influence of international law within conflict situations. Though Dunlap and others would later insist that understandings of lawfare were intended to maintain a neutral connotation, these common applications of the term would retain a pejorative association.³⁸

As the asymmetrical warfare of the twenty-first century replaced the traditional wars of the twentieth century, an amended understanding of certain uses of international law – termed lawfare – employed as a means of achieving a military objective, increasingly became associated with the tactics of non-state militant groups.³⁹ The label of lawfare, now applied to an ever-broadening scope of legal engagements within instances of armed conflict, was held to define occasions of asymmetrical warfare in which “a group or state that is facing a nation committed to comply with the laws of war will choose to openly violate the law not only for the tactical advantage gained but for the strategic benefit that arises.”⁴⁰

The 2003 US-led war in Iraq provided the archetypical example. Lawfare came to describe the tactics of US adversaries. These included:

. . . attacking from protected places and using protected places or objects as weapons storage sites, fighting without wearing a proper uniform, using human shields to protect military targets, using protected symbols to gain military advantage, and murdering of prisoners or others who deserve protection.⁴¹

In each of these observed instances, the term lawfare is employed to describe “an inferior force [using] the superior force’s commitment to adhere to the law of war to its tactical advantage.”⁴²

37. Richard K. Betts, *Compromised Command: Inside NATO’s First War*, 80 FOREIGN AFF. 126, 129 (2001).

38. Dunlap Today and Tomorrow, *supra* note 5, at 315.

39. See Austin & Kolenc, *supra* note 12; see also Dale Stephens, *The Age of Lawfare*, 87 INT’L L. STUD. SER. US NAVAL WAR COL. 327, 330 (2011); Kittrie, *supra* note 24, at 340-41.

40. Eric Talbot Jensen, *The ICJ’s “Uganda Wall”: A Barrier to the Principle of Distinction and an Entry Point for Lawfare*, 35 DENV. J. INT’L & POL’Y 241, 269 (2007).

41. *Id.* at 269-70.

42. *Id.* at 270.

Thus, three related notions of lawfare emerged from the term's description of the use of international law within instances of armed conflict. The first, as initially identified by Dunlap, employed law and legal argumentation to imply that the United States was engaging in a war and actions that violated fundamental principles of international law. The second notion of lawfare held that through the increased influence of international law, law served as a prohibitive intrusion on US efforts to achieve operational and security-based objectives. The final notion suggests that the United States' adversaries used a variety of asymmetrical tactics, deemed lawfare, to disrupt the operational capabilities of, and gain tactical advantage against, a State committed to upholding the precepts of international law.

Such conceptions of lawfare, however, cannot be exclusively attributed to non-state actors. Dunlap, along with many others, has acknowledged that many states engage with international law through such means as to constitute lawfare.⁴³ He provides examples that include the US purchase of selected satellite imagery prior to the commencement of military operations in Afghanistan, the imposition of sanctions against Iraq to prevent the purchase of aircrafts or materials necessary for the maintenance of their existing fleet, efforts to enhance the rule of law as a strategic objective of counterinsurgency operations, and the use of legal means to confiscate financial assets from terrorist groups and their funders.⁴⁴

The use of international law, employed by state actors, however, goes well beyond these identified examples of strategic legal engagements. It manifests through instances in which international law is employed by States for similar purposes to those that prevalent uses of the lawfare label commonly accuse the United States' "adversaries" of undertaking. Of relevance to the Council on Foreign Relations' assertion that lawfare constitutes efforts to claim that US wars represent legal violations, David Kennedy notes:

But if law can increase friction by persuading relevant audiences of a campaign's illegitimacy, it can also grease the wheels of combat. Law is a strategic partner for military commanders when it increases the perception of outsiders that what the military is doing is legitimate.⁴⁵

43. Dunlap Apologia, *supra* note 7; *see also* Scheffer, *supra* note 12.

44. Dunlap Apologia, *supra* note 7, at 123-24.

45. DAVID KENNEDY, OF WAR AND LAW 41 (2006).

Furthermore, claims that lawfare is demonstrative of the increasingly prohibitive application of international humanitarian law seeks to assign pejorative implications to what is purely a debate concerning the purpose or necessity of law and legal regulation within a particular context. Since the mid-twentieth century, when the Geneva Conventions opened for ratification, they have been subject to interpretative disagreement.⁴⁶ Yoram Dinstein explains that international humanitarian law is predicated on an equilibrium between opposing impulses – military necessity and humanitarian considerations.⁴⁷ This naturally facilitates interpretive discord: “[B]etween military commanders and humanitarian workers, there might be a different understanding of that which constitutes acceptable collateral damage, simply because their respective interpretations of the principle of proportionality are taken from different standpoints.”⁴⁸

The suggestion that the source of such disagreement concerning the applicability or necessity of legal regulation constitutes a notion of lawfare seeks to delegitimize a particular interpretation of international humanitarian law. It preferences the interpretation of the military commander, while denouncing, or assigning pejorative implications to, a humanitarian-focused reading of the law that becomes the form of legal engagement employed by the weak, employed by the adversary.

Furthermore, the described forms of legal engagement and denouncement that hold lawfare to have become a tactic employed by non-state actors against US interests and commitments to international law are scarcely limited to this context. Neither are they the sole manifestations of the asymmetrical wars fought in Iraq and Afghanistan. Human shields, often presented as a lawfare method in which opponents of a State committed to international law manipulate this commitment to gain an operational or moral advantage, are consistently discussed as tactics employed by US adversaries in the War on Terror.⁴⁹ The use of human shields for tactical purposes,

46. Jamie A. Williamson, *The Knight's Code, Not His Lance*, 43 CASE W. RES. J. INT'L L. 447, 447-48 (2010).

47. YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 16 (2004).

48. Williamson, *supra* note 46, at 448.

49. See, e.g., Robert Gates, Sec'y of Defense, & Michael Mullen, Joint Chief of Staff, Secretary Gates, Admiral Mullen on U.S. Forces in Afghanistan, Press Conference from the Pentagon (May 12, 2009), available at <http://iipdigital.usembassy.gov/st/english/texttrans/20>

however, has been observed in such early military encounters as the American Civil War and the Franco-Prussian War.⁵⁰ The British Manual of Military Law, issued at the start of the First World War, denounced the practice, as did the Commentaries to the 1949 Geneva Conventions.⁵¹ Nevertheless, human shields have been employed within many of the conflicts that have occurred throughout the twentieth century.⁵²

Similar discourses as those observed in relation to the use of human shields against US interests and by sub-state armed groups have featured prominently in numerous conflict situations. These include Israel's official response to the international condemnation that followed its military operations within the Gaza Strip in 2014.⁵³ Russian forces commonly accused Chechen fighters of tactically employing human shields during the bombardment of Grozny in the late 1990s, and Pakistani Security Forces made similar claims during the siege of Lal Masjid in Islamabad.⁵⁴ Commonly, these claims hold that the employment of such tactics by non-state actors demonstrate not simply a violation of international law, but instead the manipulation of international law. This infers, often directly, that state actors, otherwise committed to upholding the various provisions of international humanitarian law within situations of international or non-international armed conflict, are placed in a manufactured environment in which compliance with international law is compromised. It serves to delineate two forms of international law –

09/05/20090512113947eafas0.118664.html#axzz4ErRG1ITZ (describing how the Taliban provokes and exploits civilian casualties); see also *Lawfare, the Latest in Asymmetries*, *supra* note 8; Dunlap Today and Tomorrow, *supra* note 5, at 315; Jensen, *supra* note 40, at 269-70; Austin & Kolenc, *supra* note 12, at 326.

50. Michael N. Schmitt, *Human Shields in International Humanitarian Law*, 47 COLUM. J. TRANSNAT'L L. 292, 293 (2009).

51. *Id.* at 293-94.

52. *Id.* at 294-96.

53. See, e.g., *Behind the Headlines: Fighting Hamas terrorism within the law*, ISR. MINISTRY FOREIGN AFF. (Aug. 7, 2014), <http://mfa.gov.il/MFA/ForeignPolicy/Issues/Pages/Fighting-Hamas-terrorism-within-the-law.aspx>; see also *Hamas' Use of Human Shields is a War Crime*, ISR. DEF. FORCES (July 14, 2014), <https://www.idfblog.com/blog/2014/07/14/hamas-use-human-shields-war-crime/>; *Captured Hamas Manuel Explains Benefit of Human Shields*, ISR. DEF. FORCES (Aug. 4, 2014), <https://www.idfblog.com/blog/2014/08/04/captured-hamas-combat-manual-explains-benefits-human-shields/>.

54. *Chechens 'using human shields'*, BBC NEWS (Dec. 2, 1999, 7:37 AM), <http://news.bbc.co.uk/2/hi/europe/545672.stm>; see also *Pakistan's Red Mosque Showdown: Jihadists Using Girls as Human Shields?*, SPIEGEL ONLINE (July 5, 2007), <http://www.spiegel.de/international/world/pakistan-s-red-mosque-showdown-jihadists-using-girls-as-human-shields-a-492545.html>.

legitimate and illegitimate – that are employed by the state and non-state actor respectively.

From such origins, the notion of lawfare presented by Dunlap, evolved from its particular application to instances of traditional and asymmetric armed conflict and was increasingly viewed as a threat to US interests in a post-September 11th internationalized landscape. With newfound prominence, lawfare came to describe a host of international legal engagements. Its popularized usages would maintain a pejorative slant and would present a deep skepticism concerning the role and utility of international law within this environment. Denunciations of international law, however, were not absolute and instead focused specifically on the use of international law by non-state actors.

3. *“OUR STRENGTH AS A NATION WILL CONTINUE TO BE CHALLENGED BY THOSE WHO EMPLOY A STRATEGY OF THE WEAK USING INTERNATIONAL FORA, JUDICIAL PROCESSES, AND TERRORISM.”*

— *United States of America, 2005 National Defense Strategy*⁵⁵

That the National Defense Strategy of the United States equated recourse to international law with acts of terrorism demonstrates the extent to which particular forms of legal engagement were viewed as a threat to US interests. Jack Goldsmith, an international lawyer and scholar, who served as the head of the Office of Legal Counsel in the Bush Administration, recalls the extent of this concern: “[Secretary of Defense] Rumsfeld had already been worrying about this problem under the rubric of ‘lawfare’, an idea that had been discussed in the Pentagon for years.”⁵⁶ Within the White House, the Department of Justice, and the Pentagon, lawfare provided an all-encompassing term to describe the means by which the United States’ foes engaged with international law to shame and attempt to weaken US efforts within the War on Terror and the broad security apparatus that developed in the wake of the September 11th attacks. Goldsmith explained this emergent notion of lawfare:

55. DEP’T DEF., *THE NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA* 5 (2005), <http://archive.defense.gov/news/Mar2005/d20050318nds1.pdf>.

56. JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 58 (2007).

Enemies like Al Qaeda who cannot match the United States militarily instead criticize it for purported legal violations, especially violations of human rights or the laws of war. They hide in mosques so that they can decry U.S. destruction of religious objects when attacked. They describe civilian deaths as “war crimes” even when the deaths are legally permissible “collateral damage” or they complain falsely that they were tortured Lawfare works because it manipulates something Americans value: respect for law.⁵⁷

Yet the perceived threat of lawfare was not simply viewed as a tactic undertaken by non-state actors like al-Qaeda or the Taliban, with whom the United States was engaged in asymmetrical war. Secretary Rumsfeld and the Pentagon viewed lawfare as constituting an unwarranted, but potentially influential, check on US military power. The expressed commitment of the United States’ traditional allies in Europe and South America to human rights regimes caused Rumsfeld to believe “that opponents incapable of checking American military power would increasingly rely on lawfare weapons instead.”⁵⁸ A Department of Defense memorandum, authored by Secretary Rumsfeld, articulated the extent of the threat posed by such a notion of lawfare:

In the past quarter century, various nations, NGOs, academics, international organizations, and others in the “international community” have been busily weaving a web of international laws and judicial institutions that today threatens [US Government] interests Unless we tackle the problem head-on, it will continue to grow. The issue is especially urgent because of the unusual challenges we face in the war on terrorism.⁵⁹

Despite its broad usage, within a variety of contexts and by various actors, lawfare gained much of its political currency and popular practice amid the US-led wars in Iraq and Afghanistan and the emergent national security response to the terrorist attacks in New York and Washington, D.C.⁶⁰ Increasingly, law-based criticisms (both

57. *Id.* at 58-59.

58. *Id.* at 59.

59. Memorandum from Donald Rumsfeld, U.S. Sec’y of Def., on Judicialization of International Politics to Vice President et al. (Apr. 9, 2003), <http://library.rumsfeld.com/doclib/sp/221/2003-04-09%20to%20Vice%20President%20et%20a%20re%20Judicialization%20of%20International%20Politics.pdf>.

60. Horton, *supra* note 22, at 167.

international and municipal) of US actions and policies were met with accusations of lawfare. This popularized notion of lawfare had shifted considerably from Dunlap's professed neutrality.⁶¹ It developed a broad reach that extended well beyond the term's initial conception as a means of legal engagement focused on the achievement of a traditional military objective.⁶² This emergent reactive notion of lawfare was firmly embedded within neoconservative doctrine, an extension of an entrenched skepticism that viewed international law as a cumbersome and ultimately ineffective means of addressing national and global security challenges.⁶³

Many within the Bush Administration viewed this scant understanding of international law as an avoidable constraint on efforts to expand the boundaries of executive power and as constituting an affront to US sovereignty.⁶⁴ Yet despite their ideological disdain and the professed ineffectiveness of international law, neoconservatives, paradoxically, view particular forms of legal engagement as a direct (and potentially effective) threat to the United States' domestic and foreign interests.⁶⁵ Various conservative commentators and ideological allies echoed the Administration's cautions concerning the threat posed by international law.⁶⁶ They held that "the most significant common thread among all these actions is the clear desire to portray U.S. government actions as illegal and unprecedented" and that "international law constitutes a real and immediate threat to U.S. national interest."⁶⁷

61. Dunlap himself, in a later paper, noted this ideological shift and asserted that "despite the lawfare's [*sic*] frequent negative characterization as a tool of terrorists, it is vital to remember that it is not restricted to one side of a conflict." See Dunlap Apologia, *supra* note 7, at 123-24.

62. In relation to this development, Dunlap held that "lawfare was never meant to describe every possible relation between law and warfare. It focuses principally on circumstances where law can create the same or similar effects as those ordinarily sought from conventional warmaking approaches." See *id.* at 122.

63. Francis Fukuyama, *After Neoconservatism*, N.Y. TIMES MAG. (Feb. 19, 2006), <http://www.nytimes.com/2006/02/19/magazine/after-neoconservatism.html>.

64. Ohlin, *supra* note 3, at 8-9; see also Horton, *supra* note 22, at 167-68.

65. See generally JEREMY A. RABKIN, LAW WITHOUT NATIONS? WHY CONSTITUTIONAL GOVERNMENT REQUIRES SOVEREIGN STATES (2005).

66. See, e.g., John Fonte, *Democracy's Trojan Horse*, NAT'L INT. (2004), <http://nationalinterest.org/article/democracys-trojan-horse-1155>; Clare Lopez, *SEALS Case Shows How Terrorists Use 'Lawfare' to Undermine U.S.*, HUM. EVENTS (Mar. 8, 2010), <http://humanevents.com/2010/03/08/seals-case-shows-how-terrorists-use-lawfare-to-undermine-us/>; David B. Rivkin, Jr. & Lee A. Casey, *The Rocky Shoals of International Law*, 62 NAT'L INT. 35 (2000-2001) [hereinafter *Rocky Shoals*]; Austin & Kolenc, *supra* note 12.

67. Rivkin & Casey, *supra* note 21; *Rocky Shoals*, *supra* note 66, at 35.

Though this strayed considerably from Dunlap's more limited iteration of lawfare, it came to represent the term's prevalent, politicized application.⁶⁸ Opponents of lawfare's current manifestation and ideological grounding often (though not exclusively) hold that, however defined, "lawfare is a potentially powerful term that reflects the importance of law in the conflicts of the twenty-first century."⁶⁹ Still, its most ardent critics argue that the accusation or labelling of lawfare, popularly understood, facilitates the critique and silencing of human rights advocacy, verges towards propaganda, and ultimately discredits the intended function of international law.⁷⁰

Sadat and Geng, continuing their argument that lawfare's common use serves to attack and dismantle legal norms, assert that the use of the term lawfare "poses a frontal challenge to our constitutional system, as well as the specific rules of war, international human rights law, and the international legal system, and even U.S. Constitutional rights, such as the right to habeas corpus." Opponents who view lawfare within this context, as attempting to silence or delegitimize international law-based criticisms of state actors, place the use of lawfare within a culture of international legal neglect and unchecked impunity. This understanding and rejection of such uses of lawfare often accompanies the view that the Bush Administration and neoconservative ideology express general hostility towards international law, that it dismisses its dictates.⁷¹

But framing lawfare, generally, as an attack on international law or as an attempt to dismantle legal norms perpetuates an overtly utopian view of international law. It reduces understandings of

68. The Cleveland Experts Meeting discussed whether the term lawfare had been hijacked by neoconservative interests and debated how best to respond to this. While there appeared broad consensus that the term had been manipulated along ideological lines, there was no broad agreement about how to best respond. Several participants expressed that "now that others have widely propagated an alternative definition of the term, the academy has lost the initiative and would be fighting a futile cause in trying to recapture the concept as a neutral term." See Scharf & Anderson, *supra* note 8, at 12-13.

69. This did not discount the view that "lawfare may not be a particularly useful term and may serve simply as an invented phenomenon useful only to anti-international humanitarian law hijackers as a tool of intimidation." *Id.* at 13, 15.

70. See, e.g., Kearney, *supra* note 20, at 88-89.

71. See, e.g., Mary Ellen O'Connell, *Crying War*, in INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: BRIDGING THEORY AND PRACTICE 93, 100 (Thomas J. Biersteker et al. eds., 2007). See generally JORDAN J. PAUST, BEYOND THE LAW: THE BUSH ADMINISTRATION'S UNLAWFUL RESPONSES IN THE "WAR" ON TERROR (2007); Ohlin, *supra* note 3.

international law to binary conceptions of conformity/violation, and fails to recognize the myriad forms of legal engagement that occur under the broad rubric of international law.⁷² The Bush Administration and its neoconservative allies, so often the recipients of allegations of international legal maleficence, nevertheless engaged consistently with international legal arguments.⁷³ Secretary Rumsfeld's Department of Defense memorandum, which warned of the international community's efforts to use international law to threaten US interests, continued to provide a host of potential responses to what was perceived as the judicialization of international politics.⁷⁴ These themselves drew heavily upon international law. They called for the formulation of legal arguments under the laws of armed conflict and belligerent occupation to justify a US presence and the use of force within and against Iraq. In attempting to delegitimize the International Criminal Court, Secretary Rumsfeld's prescriptions sought to strengthen and expand bilateral frameworks through Article 98 agreements to protect US officials from prosecution at the Court and proposed the enactment of legislation that would effectively sanction nations that pursue charges against US officials.⁷⁵

Such forms of legal engagement by the Bush Administration do not imply fidelity with international law or dismiss claims grounded within law that undertaken actions or policies by the Administration served to violate US legal commitments or international legal norms. Instead, this is intended to illustrate the folly of viewing lawfare

72. See generally EYAL WEIZMAN, *THE LEAST OF ALL POSSIBLE EVILS: HUMANITARIAN VIOLENCE FROM ARENDT TO GAZA* (2011); Kennedy, *supra* note 45.

73. For an account of the Bush Administration's legal argumentation in relation to many of its most controversial practices, see Curtis A. Bradley, *The Bush Administration and International Law: Too Much Lawyering and Too Little Diplomacy*, 4 *DUKE J. CONST. L. & PUB. POL'Y* 57, 68 (2009). For an overall account of the role assumed by international law within successive US administrations and within the State Department, see MICHAEL P. SCHARF & PAUL R. WILLIAMS, *SHAPING FOREIGN POLICY IN TIMES OF CRISIS: THE ROLE OF INTERNATIONAL LAW AND THE STATE DEPARTMENT LEGAL ADVISER* (2010).

74. Memorandum from the U.S. Sec'y of Defense, *supra* note 59.

75. Article 98 agreements reference Article 98(2) of the Rome Statute which holds, *inter alia*, that the ICC may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under an existing international agreement. On this basis, the United States has signed over one hundred bilateral immunity agreements with individual countries to ensure they do not surrender any American to the Court's jurisdiction. See Rome Statute of the International Criminal Court art. 98(2), July 17, 1998, 183 U.N.T.S. 9; see also David J.R. Frakt, *Lawfare and Counterlawfare: The Demonization of the Gitmo Bar and Other Legal Strategies in the War on Terror*, 43 *CASE W. RES. J. INT'L L.* 335, 352 (2010); Memorandum from the U.S. Sec'y of Defense, *supra* note 59.

through such a generalized lens – as a broad assault on the discipline of international law. What is often described, critically, as lawfare is not a total or ontological challenge to international law, but is instead a denouncement of particular groups of law’s users. It is therefore more prudent to understand lawfare not as a general dismissal of international law, but instead as a particular affront to international law. This affront seeks to limit the access of particular groups and individuals to international recourse and delegitimize the means and methods through which such recourse may be pursued.

4. “*LAST YEAR THE AMERICAN CIVIL LIBERTIES UNION (ACLU) AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (NACDL) ESTABLISHED THE JOHN ADAMS PROJECT TO ‘SUPPORT MILITARY COUNSEL AT GUANTANAMO BAY.’ THE MISSION BEHIND THIS TREACHEROUS ENTERPRISE WAS TO IDENTIFY INTELLIGENCE OFFICERS INVOLVED IN INTERROGATING GUANTANAMO BAY DETAINEES AND THEN PROVIDE THAT INFORMATION TO MILITARY DEFENSE ATTORNEYS REPRESENTING DETAINEES SO THAT THEY COULD ATTEMPT TO CALL INTELLIGENCE PERSONNEL TO TESTIFY.*”

— *Florida Congressman Jeff Miller (R)*⁷⁶

Lawfare came to describe the efforts of lawyers and organizations attempting to challenge the bestowed legal status and detention of foreign nationals held in the US Naval base at Guantánamo Bay, Cuba. The foreign national detention program, initiated by the Bush Administration in 2002, became a notorious symbol of the US-led War on Terror. The location, and uncertain legal status of the detainees, constituted a deliberate strategy to place these individuals beyond the jurisdiction of US courts.⁷⁷ This initially served to create a legal gray area, where detainees were denied *habeas corpus* protections under the US Constitution and effectively

76. Jeff Miller, *Guest Blogger: Congressman Jeff Miller (R-FL) On Investigating the John Adams Project*, DAILY SIGNAL (May 21, 2010), <http://dailysignal.com/2010/05/21/guest-blogger-congressman-jeff-miller-r-fl-on-investigating-the-john-adams-project/>.

77. Fiona de Londras, *Guantanamo Bay: Towards Legality?*, 71 MOD. L. REV. 36, 36-37 (2008); Frakt, *supra* note 75, at 347 (recalling how alternative locations, like Andersen Air Force Base in Guam, were rejected due to the possibility that detainees held there may gain access to US Courts).

insulated from legal challenges that would contest the grounds of their detention.⁷⁸

The Administration's strategy evoked a torrent of criticism that drew upon domestic constitutional law and a human rights-based framework.⁷⁹ Foreign States, alongside regional and international organizations, joined the mounting chorus of condemnation.⁸⁰ The European Parliament called on the United States to "close the Guantanamo Bay detention facility and insist[] that every prisoner should be treated in accordance with international humanitarian law and tried without delay in a fair and public hearing by a competent, independent, impartial tribunal."⁸¹

Within the United States, the Bush-era detention program faced mounting domestic legal challenges.⁸² A series of petitions, coordinated through the Center for Constitutional Rights, brought

78. John Yoo, a former lawyer in the Office of Legal Counsel and architect of much of the Administration's legal framework concerning many of the most controversial aspects of the war on terror, confirmed this intention. See JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR* 142-46 (2006).

79. The US section of Amnesty International have been amongst the most high-profile critics of the Guantánamo Bay detention program, holding that "[f]rom day one, the USA failed to recognize the applicability of human rights law to the Guantanamo detentions." See Amnesty Int'l, *Guantanamo, A Decade of Damage to Human Rights*, AI Index No. AMR 51/103/2011 (2011). Numerous other human rights-focused NGOs expressed similar, rights-based, condemnations of the detention program. See e.g., *Locked Up Alone: Detention Conditions and Mental Health at Guantanamo*, HUM. RTS. WATCH (June 9, 2008), <https://www.hrw.org/report/2008/06/09/locked-alone/detention-conditions-and-mental-health-guantanamo>.

80. See, e.g., *Merkel: Guantanamo Mustn't Exist in Long Term*, SPIEGEL ONLINE (Jan. 9 2006, 9:58 AM), <http://www.spiegel.de/international/20uantan-interview-merkel-guantanamo-mustn-t-exist-in-long-term-a-394180.html> (comments of German Chancellor Angela Merkel); *Blair: Guantanamo is an anomaly*, GUARDIAN (Feb. 17, 2006, 7:38 PM), <https://www.theguardian.com/uk/2006/feb/17/politics.guantanamo> (comments of former British Prime Minister Tony Blair); see also *UK told US won't shut Guantanamo*, BBC NEWS (May 11, 2006, 2:55 PM), http://news.bbc.co.uk/2/hi/uk_news/politics/4760365.stm.

81. Resolution on Guantanamo, EUR. PARL. DOC. B6-0299/2006 (May 23, 2006); see also Press Release, Inter-Am. Comm'n on H.R., Inter-American Commission Urges United States to Close Guantanamo Without Delay, Resolution No. 1/06 (July 28, 2006); Juan E. Mendez (Special Rapporteur on torture and other cruel, inhuman or degrading treatment of punishment), *Statement of the United Nations Special Rapporteur on torture at the Expert Meeting on the situation of detainees held at the U.S. Naval Base at Guantanamo Bay* (Oct. 3, 2013), delivered by Ms. Stephanie Selg, Associate Human Rights Expert, Office of the High Commissioner for Human Rights (OHCHR) to the Inter-American Commission on Human Rights, <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=13859&>.

82. See generally Meredith B. Osborn, *Rasul v. Bush: Federal Courts Have Jurisdiction over Habeas Challenges and Other Claims Brought by Guantanamo Detainees*, 40 HARV. C.R.-C.L. L. REV. 265 (2005); de Londras, *supra* note 77.

numerous writs of *habeas corpus* on behalf of various detainees. The representation provided by these lawyers, dubbed the Guantánamo Bay Bar, in bringing forth *habeas* petitions attracted instant controversy and would be viewed as an example of an expansive notion of lawfare.⁸³

Several commentators perceived the actions of these lawyers, and the intentions of their clients, as treacherous and equated the legal motions with national security threats:

Lawyers can literally get us killed We may never know how many of the hundreds of repatriated detainees are back in action, fighting the U.S. or our allies thanks to the efforts of the Guantanamo Bay Bar Allowing lawyers to subvert the truth and transform the Constitution into a lethal weapon in the hands of our enemies – while casting themselves as patriots – makes mockery of the sacrifices made by true patriots⁸⁴

Others assumed a critical but more measured response to the assigned intentions of the lawyers and the *habeas* petitions. While these did not reach the levels of hysteria displayed by some commentators, they served to provide an expansive understanding of how lawfare was understood:

Most instances of lawfare, such as the more than 400 *habeas corpus* lawsuits filed by detainees held at Guantanamo Bay, Cuba, simply seek to harass and burden our legal mechanisms. Like a computer virus or a hacker's denial-of-service attack on a network, meritless suits seek to grind the wheels of justice to a halt.⁸⁵

This emergent notion of lawfare moved well beyond Dunlap's conception of law as a substitute for a traditional military means to achieve an operational objective.⁸⁶ As David Frakt, a former Defense Counsel with the Office of Military Commissions, asks of this imposed notion of lawfare: “[W]hat exactly are the military ends

83. For an overview of the associated controversy, see Frakt, *supra* note 75, at 336-40. See also Scott Horton, *Silencing the Lawyers*, HARPER'S MAG. (May 26, 2010, 10:23 AM), <http://harpers.org/blog/2010/05/silencing-the-lawyers/> [hereinafter Horton *Silencing the Lawyers*].

84. Daniel Halper, *Lawfare Warning*, WKLY. STANDARD (Mar. 5, 2010), <http://www.weeklystandard.com/lawfare-warnings/article/422507>, quoted in Frakt, *supra* note 75, at 338.

85. C. Peter Dungan, *Fighting Lawfare: At the Special Operations Task Force Level*, 21 SPECIAL WARFARE 9, 10 (2008).

86. Dunlap Apologia, *supra* note 7, at 122.

pursued by [this] lawfare? What is it that a military enemy is theoretically trying to accomplish through manipulative legal actions?”⁸⁷

Yet when the Supreme Court of the United States held District Courts had jurisdiction to hear the *habeas* petitions and, later, that the Guantánamo detainees were entitled to protection under the US Constitution, accusations of lawfare were accompanied by firm policy prescriptions that served to further obfuscate the detainees’ access to judicial remedies and the ability of their lawyers to bring forth such petitions.⁸⁸ This emergent notion of lawfare, described in a *Washington Post* op-ed as the use of federal courts to undermine the military’s ability to keep dangerous enemy combatants off the battlefield, evoked a range of official responses.⁸⁹

From the time that the Bush Administration initiated the transfer of foreign detainees to Guantánamo Bay, efforts were taken to limit their access to both courts and lawyers.⁹⁰ Initially, many of the detainees were held *incommunicado* and had their identities concealed.⁹¹ In direct response to the early Supreme Court decisions in *Rasul v. Bush* and *Hamdi v. Rumsfeld*,⁹² which extended *habeas* protections to the detainees, the US Congress passed the 2005 *Detainee Treatment Act*, which, *inter alia*, held that:

[N]o court, justice, or judge shall have jurisdiction to hear or consider . . . an application for a writ of *habeas corpus* filed by or on behalf of an alien detained by the Department of Defense at Guantánamo Bay, Cuba.⁹³

Following the *Hamdi* decision, in which the Court held the detainees are entitled to some level of due process, the Government established Combat Status Review Tribunals.⁹⁴ These, however, were designed to deny detainees legal representation and prohibited the lawyers who

87. Frakt, *supra* note 75, at 341.

88. See *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Boumediene v. Bush*, 533 U.S. 723 (2008).

89. Marc A. Thiessen, *The ‘al-Qaeda seven’ and selective McCarthyism*, WASH. POST, (Mar. 8, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/08/AR2010030801742.html>.

90. See generally David Luban, *Lawfare and Legal Ethics in Guantánamo*, 60 STAN. L. REV. 1981, 1987-98 (2008) [hereinafter Luban Lawfare].

91. *Id.* at 1989.

92. See generally *Rasul*, 542 U.S. 466; *Hamdi*, 542 U.S. 507.

93. Detainee Treatment Act, 28 U.S.C. § 2241 (2005).

94. See generally Robert A. Peal, *Combat Status Review Tribunals and the Unique Nature of the War on Terror*, 58 VAND. L. REV. 1629 (2005).

represented these clients in federal court from discussing the Review Tribunal procedure.⁹⁵

When defense counsel formally gained increased access following the Supreme Court decisions in 2004, they faced numerous practical obstacles in accessing their clients. Guantánamo's location, limiting travel logistics, federal oversight of lawyer-client communications, and the classified status of such information all contributed to a climate in which "the mechanics of meeting with [their] clients comprise[d] one important set of policies that [made] these representations unusually difficult."⁹⁶ These factors were compounded by several other intentional efforts that sought to deny the detainees' access to their lawyers and endeavored to compromise the lawyers' abilities to conduct their defense effectively. Deliberate efforts were taken to ensure that the detainees were unable or unwilling to meet with their lawyers:

They don't tell the detainee that his lawyer is there to see him. Instead, they tell him that he "has a reservation," which means an interrogation. The detainee says he doesn't want to go, so then they tell the lawyer that his client doesn't want to see him.⁹⁷

Numerous other methods were deliberately employed to strain the client-lawyer relationship. Detainees were told of their lawyer's sexual orientation, cultural or religious heritage, or given examples of their past clients. The detainees were told that their lawyer was gay, Jewish, or once represented the State of Israel (whether or not these claims were factual), and were encouraged by Guantánamo interrogators not to trust their lawyers as a result.⁹⁸

Beyond the restrictive environment manufactured in Guantánamo, Jeff Miller, the Congressman from Florida who equated the American Civil Liberties Union ("ACLU") and the National Association of Criminal Defense Lawyers' ("NACDL") efforts to support *habeas* petitions for several of the Guantánamo detainees with an act of treachery, compelled the Defense Department's Inspector General to investigate the "conduct and practice" of lawyers

95. Luban Lawfare, *supra* note 90, at 1987; see also JOSEPH MARGULIES, GUANTANAMO AND THE ABUSE OF PRESIDENTIAL POWER 159-70 (2006).

96. Luban Lawfare, *supra* note 90, at 1989-90.

97. *Id.* at 1990.

98. *Id.* at 1992-98.

who represented clients at Guantánamo.⁹⁹ Government officials publicly shamed the defense attorneys as a professional class and implicitly threatened the business interests of the firms where they were employed.¹⁰⁰ David Frakt asserted that “[t]he Bush Administration took their counterlawfare efforts to the extreme by denying detainees all access to lawyers or to courts, and by asserting that no laws or treaties, including Article 3 [of the Geneva Conventions], protected detainees”¹⁰¹

Again, though, this was not a blanket rejection of international law or an assertion that the exigency of the post-September 11th landscape compelled derogation from relevant legal frameworks. Instead, in establishing its response to this expansive notion of lawfare, the Administration presented intricate legal arguments that drew directly on interpreted notions of international law. The Geneva Convention Relative to the Treatments of Prisoners of War (The Third Geneva Convention) was held, based on a formulistic reading of the Convention’s provisions, to apply only to High Contracting Parties “which can only be states.”¹⁰² In following: “[N]one of the provisions of [the Third Geneva Convention] apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world.”¹⁰³

Common Article 3 of the Conventions, which provides protection to combatants captured during battle in instances of non-international armed conflict, was declared inapplicable due to the international status of the US military campaigns in Afghanistan and Iraq.¹⁰⁴ The Office of Legal Counsel and the State Department debated the application of this body of law to the detainees, each

99. This was required through a provision in a Defense Appropriations Act and compelled formal investigation when defense lawyers were believed to have “interfered with the operations” at Guantánamo or “violated any applicable policy of the department.” This was interpreted broadly so that almost any initiative undertaken by defense counsel could trigger a potential investigation. See Horton Silencing the Lawyers, *supra* note 83.

100. Gregory P. Noone, *Lawfare or Strategic Communications*, 43 CASE W. RES. J. INT’L L. 73, 77 (2010); see also *Top Pentagon Officials Calls for Boycott of Law Firms Representing Guantanamo Prisoners*, DEMOCRACY NOW (Jan. 17, 2007), http://www.democracynow.org/2007/1/17/top_pentagon_official_calls_for_boycott. These comments, however, were widely denounced. See Luban *Lawfare*, *supra* note 90, at 1982.

101. Frakt, *supra* note 75, at 346-47.

102. Memorandum from George W. Bush, U.S. President, on Humane Treatment of Taliban and al Qaeda Detainees to Vice President et al. (Feb. 7 2002), http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf.

103. *Id.*

104. *Id.*; see Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

putting forth international law-based arguments detailing how the President was required to act in response to the threat of terrorism.¹⁰⁵ These legal engagements, along with various legislative and policy initiatives taken by both the Administration and Congress, contrived to ensure that, until definitive Supreme Court intervention nearly seven years after Guantánamo Bay received its first detainees in the War on Terror, *habeas* petitions were severely limited.¹⁰⁶

Contested conceptions and interpretations of international law were at the core of the debate and controversy that surrounded the detention program at Guantánamo Bay. The policies and legislative framework that created the detention facility drew upon interpretations of international law.¹⁰⁷ These arguments failed to convince many beyond the Administration and its staunchest allies. The Supreme Court denounced many of the Government's policies and supporting legal arguments.¹⁰⁸ Yet, the efforts taken by the detainees themselves, by individual lawyers who offered their representation, and by private organizations who coordinated or supported these efforts merited the charge of lawfare. In response to this expansive understanding of lawfare, the Administration and Congress increased its efforts to further deny the Guantánamo detainees, the vast majority of whom were never charged, access to courts and access to legal representations.¹⁰⁹ Again, lawfare did not equate to a broad denouncement of international law, but instead to a particular and systematic effort to limit the use of international law and legal remedies by a particular actor, for a particular purpose.

105. Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., on Application of Treaties and Laws to al Qaeda and Taliban Detainees to William J Haynes II, Gen. Couns. Dep't Def. (Jan. 9, 2002), <http://nsarchive.gwu.edu/NSAEBB/NSAEBB127/02.01.09.pdf>; Memorandum from William H. Taft, Dep't of State, on Your Draft Memorandum of January 9 to John C. Yoo, Deputy Assistant Att'y Gen. (Jan. 11, 2002), <http://nsarchive.gwu.edu/torturingdemocracy/documents/20020111.pdf>. For an account of these international law-based debates between the Office of Legal Counsel and the State Department, see Bradley, *supra* note 73, at 66-67.

106. See *Boumediene v. Bush*, 533 U.S. 723 (2008).

107. See Bradley, *supra* note 73, at 62-67.

108. See *supra* note 88.

109. Of the 779 individuals detained at Guantánamo, 674 were released without any charge and others await release. See *Guantanamo: Facts and Figures*, HUM. RTS. WATCH (Apr. 18, 2016), <https://www.hrw.org/video-photos/interactive/2016/04/18/guantanamo-facts-and-figures>.

5. “AT THE BEGINNING OF THE TRIAL, ONCE MORE THE BROTHERS MUST INSIST ON PROVING THAT TORTURE WAS INFLICTED ON THEM BY STATE SECURITY [INVESTIGATORS] BEFORE THE JUDGE.”

— *al-Qaeda Training Manual (The Manchester Manual)*¹¹⁰

The controversy that surrounded the detainees contributed towards another understanding of lawfare that carried beyond the boundaries of the US Naval base at Guantánamo Bay. This use of the term lawfare is of multifaceted purpose. It claims that accusations of torture or mistreatment by, or on behalf of, detainees constitute either a strategic effort to burden tactical operations within zones of combat or seek to shame the United States’ international reputation and generate public disapproval of its foreign policy.

The first accused motive holds that, “[r]ecently, insurgent forces in Iraq and Afghanistan have been waging a legal battle against tactical-level forces to extend the lines of operation of their leaders’ lawfare efforts and to attempt to blunt America’s tip of the spear.”¹¹¹ This understanding of lawfare, which manifests simply through the accusation of torture, abuse, or other forms of mistreatment, constitutes a strategic attempt to compromise the operational objectives of the state against whom the accusation is made:

[D]etainees may make claims of abuse at the point of capture by indigenous forces, claim abuse again when transferred to an American detachment or team, and then claim abuse once again when they reach the detention facility Knowing that U.S. forces are duty-bound to investigate all claims of detainee abuse, insurgents can effectively burden leaders at three different levels of tactical command with detailed investigations.¹¹²

Additionally, this notion of lawfare argues that claims of torture constitute a significant public relations victory for the United States’ enemies:

By latching onto the torture narrative through the confirmed instances of mistreatment, and further taking this narrative onto the record in various legal forums, the tactic served to irreparably

110. *Al Qaeda Manual, Part 21*, U.S. BORDER PATROL, http://www.usborderpatrol.com/Border_Patrol1803_21.htm (alteration in original).

111. Dungan, *supra* note 85, at 10.

112. *Id.*

harm the image of the United States, removed the benefit of the doubt pertaining to government efforts to combat torture allegations, and consequentially the government's ability to effectively prosecute both a war and its accused war criminals.¹¹³

Commentators who perpetuate this notion of lawfare have suggested that detainees of the War on Terror intentionally provoke US officials so as to “force” mistreatment and substantiate a claim of abuse.¹¹⁴ That these detainees (often, accused members of al-Qaeda or the Taliban) would manufacture an accusation of torture or abuse to gain a tangible advantage over their captors is described as “akin to malicious prosecution.”¹¹⁵ This understanding of lawfare, however, extends beyond the individual detainee who claims torture or abuse.

Both non-governmental organizations and media outlets who have either reported or investigated accusations of torture have been charged with practicing this form of lawfare. Such groups and their representatives are believed to be forwarding an ideological agenda intent on damaging the United States' reputation and curtailing its hegemonic design.¹¹⁶ Amnesty International has been accused of disseminating its literature to detainees held by US forces and essentially directing detainees to claim torture.¹¹⁷ This particular claim of lawfare moved beyond the accusation made by the detainee, often with little regard for the merits of the accusation, and fixated on the intermediary who sought to substantiate or disseminate the varied claims.

NGOs and certain media outlets were declared as threats to US interests.¹¹⁸ Their actions were equated with terrorist organizations: “This new class of warrior consists of intergovernmental organizations, transnational guerrilla and terrorist groups, multinational organizations . . . and a rapidly growing number of nongovernmental organizations in a wide variety of functional

113. Lebowitz, *supra* note 19, at 362.

114. See Tung Yin, *Boumediene and Lawfare*, 43 U. RICH. L. REV. 865, 880 (2009).

115. *Id.* at 881.

116. See Austin & Kolenc, *supra* note 12, at 319-20; see also Frakt, *supra* note 75, at 342.

117. See Lebowitz, *supra* note 19, at 374; see also Debra Burlingame & Thomas Joscelyn, *Gitmo's Indefensible Lawyers*, WALL ST. J. (Mar. 15, 2010), <http://www.wsj.com/articles/SB10001424052748704131404575117611125872740>.

118. Fonte, *supra* note 66.

areas.”¹¹⁹ These charges, however, went beyond simple accusations and talking-points espoused by various commentators who – in accordance with Michael Kearney’s understanding of lawfare as a “critique of human rights activism and advocacy” – viewed the role assumed by NGOs and certain media outlets as detrimental to US interests within the War on Terror.¹²⁰

Donald Rumsfeld introduced this notion of lawfare into the official discourse that surrounded the detainees held in US custody. The Secretary of Defense claimed, “[t]hese detainees are trained to lie, they’re trained to say they were tortured, and the minute we release them or the minute they get a lawyer, very frequently they’ll go out and they will announce that they’ve been tortured . . . The media jumps on these claims.”¹²¹ Secretary Rumsfeld would substantiate such accusations with reference to an al-Qaeda training manual, discovered by the Manchester Metropolitan Police during a raid of a home in the North-East of England. Dubbed the Manchester Manual, Secretary Rumsfeld repeated the claim that terrorists have been trained to lie about abuse and torture while in US captivity because “their training manual says so.”¹²²

The Manchester Manual served as purportedly uncontroversial evidence that al-Qaeda practiced aggressive forms of lawfare, were familiar with and able to advantageously manipulate US and international law, and employed a standard operating procedure that manufactured false claims of abuse to both burden and denigrate US objectives and interests.¹²³ David Frakt has claimed that the Bush

119. Austin & Kolenc, *supra* note 12, at 303-04; *see also* Davida E. Kellogg, *International Law and Terrorism*, 85 MIL. REV. 50, 50 (2005) (“The opinions of nongovernmental organizations (NGOs), terrorist sympathizers and apologists, and uninformed reporters with political agendas are not the law, and by our inaction we should not allow them to become new prerogative norms.”); Fonte, *supra* note 66.

120. Kearney, *supra* note 20, at 88.

121. Donna Miles, *Al Qaeda Manual Drives Detainee Behavior at Guantanamo Bay*, AM. FORCES PRESS SERV. (June 29, 2005), http://www.dodea.edu/Offices/Safety/upload/13_Detainee_Behavior_Guantanamo_Bay.pdf.

122. *Id.*

123. For example, during a Department of Defense briefing, Paul Butler, the Principal Deputy Assistant Secretary of Defense, asserted:

During questioning of the detainees, new information is constantly revealed, confirmed and analyzed to determine its reliability. Unfortunately, many detainees are deceptive and prefer to conceal their identities and actions. Some of you may be familiar with a document called the Manchester Manual. This was a document that was picked up in a search in Manchester, England and has surfaced in various other venues, including in Afghanistan. It’s really the al Qaeda manual, and in it is a large

Administration used the existence of the Manual to convince the public of the legitimacy of its enhanced interrogation program. He cites a Department of Defense official who argued that the Manchester Manual demonstrated al-Qaeda's ability to remain impervious to traditional interrogation techniques: "There is a very lengthy chapter on counter-interrogation techniques. These are sophisticated terrorists who know how to avoid interrogation."¹²⁴

The Manual, described as both an act and evidence of lawfare, was used by US officials to formally defend the United States against international law-based accusations of torture and prisoner mistreatment, despite the fact that the Manual had been discovered in 2000 – before the United States formally began its leadership role in the War on Terror.¹²⁵ In response to questions posed by the United Nation's Committee Against Torture to the US Government regarding allegations of abuse and torture, Charles Stimson, the Assistant Secretary of Defense for Detainee Affairs, replied to the UN monitoring body:

While the United States is aware of allegations of torture and ill-treatment, and takes them very seriously, it disagrees strongly with the assertion that such are widespread or systematic . . . these allegations must be placed in context: they relate to a minute percentage of the overall number of persons who have been detained. Moreover, not everything that is alleged is in fact truth. For example, it is well-known that al Qaeda are trained to lie. The "Manchester Manual" instructs all al Qaeda members,

section which teaches al Qaeda operatives counterinterrogation techniques: how to lie, how to minimize your role.

See *Briefing on Detainee Operations at Guantanamo Bay*, DEP'T DEF. (Feb. 13, 2004), <https://cryptome.org/dod-gulag.htm>; see also Jane Mayer, *The Experiment*, NEW YORKER (July 11, 2005), <http://www.newyorker.com/magazine/2005/07/11/the-experiment-3>.

124. Paul Butler, *The Detainees*, PBS NEWSHOUR (Feb. 13, 2004, 12:00 AM), <http://www.pbs.org/newshour/bb/terrorism/jan-june04/detainees2-13.html>, quoted in Frakt, *supra* note 75, at 350.

125. US efforts to reference the Manual as evidence of a lawfare strategy intended to undermine a variety of American interests was held by several commentators to be disingenuous. The Manual was discovered prior to September 11th, prior to Guantánamo Bay or Abu Ghraib, and prior to US initiation of the war on terror. This reading of the Manual did not appear to instruct detainees to fabricate claims of torture and abuse but instead to report it: "written in the expectation that its recruits would be detained by . . . enemy Arab regimes, the manual anticipates torture as an inevitable fact, and simply urges captives to report the treatment they receive." Larry Siems, *Chapter 5, Part 2 - The Battle Lab*, TORTURE REP. (Sept. 3, 2010, 3:54 PM), <http://www.thetorturereport.org/report/chapter-5-part-2-battle-lab>.

when captured, to allege torture, even if they are not subject to abuse.¹²⁶

The Administration's position in the debate over interrogation techniques and accusations of torture and other forms of mistreatment did not, however, disassociate from international legal reasoning. The enhanced interrogation program that gave rise to many allegations of torture leveled against the United States was based largely upon particular readings and interpretations of international law. The notorious definition of torture that would form the basis of the enhanced interrogation programs operated by the Central Intelligence Agency and the Department of Defense was effectively a legal argument about the necessary standard of conduct that must be achieved so as to remain in compliance with the United Nation's Convention Against Torture.¹²⁷ The Bush Administration and the Department of Justice drew directly upon international law when they sought to devise the means and methods of interrogation that would provide their desired security and intelligence outcomes. These legal arguments were, of course, abject failures that were routinely denounced and almost universally held to have strayed disastrously from any plausible account of state obligation pertaining to the treatment of detainees or the prohibition on torture.¹²⁸ Yet the merits of these arguments and legal engagements are not of direct concern, nor do they alter the fact that US officials attempted to draw directly upon international legal arguments to legitimize aspects of their interrogation tactics.

126. *United States' Response to the Questions Asked by the Committee Against Torture*, U.S. DEP'T ST. (May 5, 2006), <http://www.state.gov/j/drl/rls/68561.htm>.

127. The imposed standard was drafted by the Office of Legal Counsel and held that "physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death. For purely mental pain or suffering to amount to torture . . . it must result in significant psychological harm of significant duration, e.g. lasting for months or even years In short, reading the definition of torture as a whole, it is plain that the term encompasses only extreme acts." Off. Assistant Att'y Gen. On Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A to Alberto R. Gonzalez, Couns. to the President (Aug. 1, 2002), <http://nsarchive.gwu.edu/NSAEBB/NSAEBB127/02.08.01.pdf>; see also Bradley, *supra* note 73, at 70-72; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

128. See DAVID P. FORSYTHE, *THE POLITICS OF PRISONER ABUSE: THE UNITED STATES AND ENEMY PRISONERS AFTER 9/11 60-75* (2011). See generally DAVID COLE, *THE TORTURE MEMOS: RATIONALIZING THE UNTHINKABLE* (2013); DAVID LUBAN, *TORTURE, POWER, AND LAW* (2014).

Individuals or organizations who claimed abuse or denounced these interrogation techniques and the treatment of detainees more broadly were accused of practicing lawfare. First, the accusation of lawfare would dismiss the substance of the claim, effectively (albeit informally) rendering the claim inadmissible due to the perceived and assigned motives of the individual or organization forwarding the claim. This allows the claim to be denied by accusing the claimant of lying as per the Manchester Manual. Second, it accuses third-party interests (often NGOs or international organizations) who make or publicize similar accusations of perpetuating a false claim. Collectively, this delegitimizes the use of international mechanisms and standards by such actors who seek to pursue or frame claims in accordance with international law. These particular forms of international legal engagement become an illegitimate and (informally) inadmissible means of achieving redress or demanding account.

6. “*SUCH LAWFARE – THE MANIPULATION OF WESTERN LAWS AND JUDICIAL SYSTEMS TO ACHIEVE STRATEGIC MILITARY AND POLITICAL ENDS – OFTEN MANIFESTS AS FRIVOLOUS LAWSUITS DESIGNED TO SILENCE, PUNISH, AND DETER THOSE WHO PUBLICLY SPEAK AND REPORT ON MILITANT ISLAM, TERRORISM AND THEIR SOURCES OF FINANCING.*”

— *Brooke Goldstein and Benjamin Ryberg (of the Lawfare Project)*¹²⁹

On the margins of the War on Terror, lawfare has come to describe the actions of individuals or organizations who employ libel or hate speech laws to “silence” criticism of “controversial Islamic organizations.”¹³⁰ This marked a significant departure from Dunlap’s description of law as a substitute for traditional military means to achieve an operational objective.¹³¹ Opponents of this notion of

129. Brooke Goldstein & Benjamin Ryberg, Note, *The Emerging Force of Lawfare: Legal Maneuvering Designed to Hinder Exposure of Terrorism and Terror Financing*, 36 *FORDHAM INT’L L.J.* 634, 637 (2003).

130. Alan Dershowitz & Elizabeth Samson, *The chilling effect of ‘lawfare’ litigation*, *GUARDIAN* (Feb. 9, 2010, 8:30 AM), <https://www.theguardian.com/commentisfree/libertycentral/2010/feb/09/libel-reform-radical-islamic-groups>.

131. Dunlap Apologia, *supra* note 7, at 338; *see also* Frakt, *supra* note 75, at 342.

lawfare hold that, “over the past ten years, there has been a steady increase in Islamist lawfare tactics directly targeting the human rights of North American and European civilians in order to constrain the free flow of public information about radical Islam.”¹³²

This notion of lawfare is believed to create a chilling effect on individuals disseminating information about such groups.¹³³ Alan Dershowitz and Elizabeth Samson have argued that “[radical Islamic groups] have learned to sue their critics for defamation, not with the intent to win the case, but with the hope of imposing an unaffordably high cost on criticism of their actions.”¹³⁴ According to opponents of this notion of lawfare, it is “effective because one lawsuit can silence thousands who have neither the time nor the financial resources to challenge well-funded terror financiers or the vast machine of the international judicial system.”¹³⁵

Despite the apparent departure from Dunlap’s intended meaning of the term, this notion of lawfare has strained its application to include national security considerations. Brooke Goldstein and Benjamin Ryberg of The Lawfare Project argue that the significance of such lawfare tactics has adversely impacted how the US Government approaches national security reporting.¹³⁶ This threat, according to Goldstein and Ryberg, has resulted from formal engagements with international legal mechanisms:

For more than ten years, an international movement to silence free speech about Islamist terrorism has emerged from the United Nations under the guise of “prohibiting discrimination on the basis of religion or belief” – with a marked focus on Islam.¹³⁷

Accordingly, this, coupled with the use of domestic courts to bring libel cases against groups or individuals who attempt to expose

132. Tiefenbrun, *supra* note 10, at 52; *see also* Aaron Eitan Meyer, *Islamist Lawfare*, AM. SPECTATOR (Sept. 15, 2009, 10:07 AM), http://spectator.org/40898_islamist-lawfare/>; Brooke Goldstein, *The Disproportionate Use of Lawfare*, GATESTONE INST. (Apr. 5, 2010, 5:00 AM), http://www.gatestoneinstitute.org/1132/the-disproportionate-use-of-lawfare>; Frakt, *supra* note 75, at 342; Dershowitz & Samson, *supra* note 130.

133. Tiefenbrun, *supra* note 10, at 52.

134. Dershowitz & Samson, *supra* note 130.

135. Tiefenbrun, *supra* note 10, at 52.

136. Goldstein & Ryberg, *supra* note 129, at 652-55.

137. Goldstein and Ryberg cite Human Rights Council Resolution 19/25, which reaffirms the “obligation of states to prohibit discrimination on the basis of religion or belief and to implement measures to guarantee the equal and effective protection of the law.” Goldstein & Ryberg, *supra* note 129, at 650 (*quoting* Human Rights Council Res. 19/25, U.N. Doc. A/HRC/RES/19/25, at 1 (Apr. 10, 2012)).

“terrorism or terrorist financing,” carries detrimental effects on domestic policy and security initiatives.¹³⁸ Domestically, this has manifested through a host of initiatives, largely undertaken by the Obama Administration, that Goldstein and Ryberg believe to evidence “how the Islamist lawfare strategy to politicize speech deemed ‘Islamophobic’, and to silence speech deemed blasphemous of Islam, is directly impacting U.S. domestic policy.”¹³⁹

While free speech receives broad formal protection under the First Amendment to the US Constitution, opponents of this form of purported lawfare draw upon the threat of “libel tourism.”¹⁴⁰ This supposes that a plaintiff will “forum shop” to find a sympathetic and legally advantageous jurisdiction to bring forth a libel claim against a foreign defendant. Most often, the United Kingdom, known for plaintiff-friendly libel laws and a burden of proof standard under which the accused must prove his or her own innocence, is the preferred venue.¹⁴¹ While such methods and legal tactics have increasingly been discussed in relation to an expansive notion of lawfare, the use of libel tourism, forum shopping, and the vexatious employment of domestic laws to silence criticism have long histories of strategic application.¹⁴² Yet it has not been until particular groups – primarily Muslims or Islamic organizations – began, or were at least

138. Goldstein and Ryberg cite American co-sponsorship of Human Rights Council Resolutions promoting religious tolerance as evidence of “the suppression of legitimate dialogue about real and imminent national security threats.” *Id.* at 650-52; *see also* Human Rights Council Res. 16/18, U.N. Doc. A/HRC/RES/16/18, at 1 (Apr. 12, 2011).

139. Goldstein and Ryberg provide examples including Secretary of State Clinton’s efforts to implement Human Rights Council Resolution 16/18; a revision of federal counterterrorism training materials to eliminate reference to “jihad” and “Islam”; the failure of the Obama Administration’s National Intelligence Strategy to reference Islam or characterize jihad as a form of holy war against the West; and the classification of the Fort Hood military base shooting as “workplace violence” rather than an act of terrorism. *See* Goldstein & Ryberg, *supra* note 129, at 652-53.

140. *See* Arlen Specter & Joe Lieberman, *Foreign Courts Take Aim at our Free Speech*, WALL ST. J. (July 14, 2008), <http://www.wsj.com/articles/SB121599561708449643>.

141. Trevor C. Hartley, *Libel Tourism and Conflict of Laws*, 59 INT’L & COMP. L.Q. 25 (2010); *see also* Sarah Staveley-O’Carroll, *Libel Tourism Laws: Spoiling the Holiday and Saving the First Amendment?*, 4 N.Y.U. J. L. & LIBERTY 252 (2009).

142. *See* Richard Garnett & Megan Richardson, *Libel Tourism or Just Redress? Reconciling the (English) Right to Reputation with the (American) Right to Free Speech in Cross-border Libel Cases*, 5 J. PRIV. INT’L L. 471 (2009); *see also* Yasmine Lahlou, *Libel Tourism: A Transatlantic Quandary*, 2 J. INT’L MEDIA & ENT. L. 199 (2009); Raymond W. Beauchamp, *England’s Chilling Forecast: The Case for Granting Declaratory Relief to Prevent English Defamation Actions from Chilling American Speech*, 74 FORDHAM L. REV. 3073, 3074-76 (2006).

perceived to begin, engaging with libel laws that the term lawfare was applied and legislative and judicial measures were taken in response.

Following the 2003 publication of *Funding Evil: How Terrorism is Financed and How to Stop It*, a book in which author Rachel Ehrenfeld accused Khalid Salim Bin Mahfouz, a prominent Saudi banker, of providing financial support to al-Qaeda and other terrorist organizations, Bin Mahfouz filed a defamation claim in English court.¹⁴³ After Ehrenfeld refused to acknowledge the English Court's jurisdiction, Bin Mahfouz was awarded damages.¹⁴⁴ Bin Mahfouz did not attempt to enforce the ruling in the United States; however, Rachel Ehrenfeld filed for a declaratory judgment, arguing that "under federal and New York law, bin Mahfouz could not prevail on the libel claim against her and that the English default judgement was invalid."¹⁴⁵

The New York Court of Appeals declined jurisdiction on the matter but held that there was a need to protect New York residents from the chilling effect of foreign libel judgments but that such actions needed to result from state legislation.¹⁴⁶ In direct response, lawmakers in Albany passed the Libel Terrorism Protection Act, dubbed "Rachel's Law," which "was designed to address the issue of obtaining personal jurisdiction over a plaintiff in a foreign defamation action, as well as the substantive issue of whether a New York Court would enforce a foreign judgment."¹⁴⁷

The legislation focused on narrow jurisdictional issues and the compatibility of foreign judgments with afforded First Amendment protections. The accompanying discourse surrounding the drafting and passage of the legislation, however, fixated on issues of terrorism, terrorist financing, and the accompanying notion of lawfare.¹⁴⁸ Various States followed, passing similarly formed laws and the

143. Bin Mahfouz v. Ehrenfeld [2005] EWHC (QB) 1156 (Eng.).

144. *Id.*; see also Andrew R. Klein, *Some Thoughts on Libel Tourism*, 38 PEPP. L. REV. 375, 377 (2011).

145. See Michelle Feldman, *Putting the Breaks on Libel Tourism: Examining the Effects Test as a Basis for Personal Jurisdiction under New York's Libel Terrorism Protection Act*, 31 CARDOZO L. REV. 2457, 2458 (2010); see also Ehrenfeld v. Bin Mahfouz, 9 N.Y.3d 501, 507 (2007).

146. *Ehrenfeld*, 9 N.Y.3d at 507.

147. Klein, *supra* note 144, at 381.

148. See Rory Lanaman & Dean G. Skelos, *The Libel Terrorism Protection Act, Also Known as Rachel's Law, Signed by Governor*, AM. CTR. DEMOCRACY (May 1, 2008, 5:38 AM), <http://acdemocracy.org/the-libel-terrorism-protection-act-also-known-as-rachels-law-signed-by-governor/>.

following year federal legislation began moving through Congress.¹⁴⁹ While the resulting federal legislation sought to balance free speech protections with the principle of comity and did not directly mention issues of terrorism or lawfare, the legislation was largely driven by such influences.¹⁵⁰

Certainly, individuals or groups of litigants may attempt to advantageously or vexatiously apply libel laws, either within the United States or through foreign jurisdictions, but this is hardly an exclusive phenomenon attributable to a particular group. Yet, the identification of such legal actions, regardless of their respective merits, as lawfare, is reserved for what Alan Dershowitz and Elizabeth Samson dubbed “controversial Islamic organizations.”¹⁵¹ The singular focus of this notion of lawfare, and the at least partially implied intentions of accompanying reactive legislation, serves to brand any legal action brought by an Islamic group or individual as malicious and devoid of legal merit often before or without the substance of the legal claim receiving judicial treatment. This, in itself, creates a chilling effect. From the moment of commencement, legal actions brought by a particular class, under the supposed guise of lawfare, are reactively doubted, limited, and repressed.

7. *“TRUTH BE TOLD, WE HAVE EVERY REASON TO EMBRACE LAWFARE, FOR IT IS VASTLY PREFERABLE TO THE BLOODY, EXPENSIVE, AND DESTRUCTIVE FORMS OF WARFARE THAT RAVAGED THE WORLD IN THE 20TH CENTURY...I WOULD FAR PREFER TO HAVE MOTIONS AND DISCOVERY REQUESTS FIRED AT ME THAN INCOMING MORTAR OR ROCKET-PROPELLED GRENADE FIRE.”*

— *Phillip Carter (former US Army Officer)*¹⁵²

149. This culminated in the passage of the Securing the Protection of our Enduring and Established Constitutional Heritage Act. See Securing the Protection of Our Enduring and Established Constitutional Heritage Act, 28 U.S.C. § 4102 (2010); see also Klein, *supra* note 144, at 381-84.

150. Mark W. Holzer, *Offensive Lawfare and the Current Conflict*, HARV. NAT’L SEC. J. (Apr. 10, 2012, 1:17 AM), <http://harvardnsj.org/2012/04/offensive-lawfare-and-the-current-conflict/>.

151. Klein, *supra* note 144.

152. Phillip Carter, *Legal Combat: Are enemies waging war in our courts?*, SLATE, (Apr. 4, 2005, 5:51 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2005/04/legal_combat.html.

Much of what was originally termed lawfare is clearly preferable to the high costs and tragic certainties of war. Charles Dunlap has acknowledged that “there are many uses of what might be called ‘lawfare’ that serve to reduce the destructiveness of conflicts, and therefore further one of the fundamental purposes of the law of war.”¹⁵³ In such instances, it is not immediately evident why these uses of international law do not simply represent an intended or successful function of international law. Though if Dunlap is correct that acts such as purchasing satellite imagery, imposing sanctions against Iraq’s Air Force, strengthening the rule of law, or ceasing the finance of terrorist organizations enabled the evasion of sustained episodes of violence then such forms of legal engagement are plainly preferable.¹⁵⁴

States, however, have long partaken in such forms of legal engagement. An increasingly globalized and formalist international environment, mature legal mechanisms, and developed civil society organizations may provide greater opportunities for engagement but such forms of strategic legal employment are well-established.¹⁵⁵ The actions of a State or international actor that invokes international law in furtherance of a strategic objective do not frequently merit such general attention or a designated nomenclature.

Despite the ubiquity of much of what Dunlap’s evolved conception of lawfare describes, the term has gained prominence within media and amongst policymakers. It is tempting to place the rise of lawfare within the context of a post-September 11th, War on Terror, Bush Administration-dominated environment. It is here that lawfare has its origins, developed its diverse understandings and applications, and received prominent attention from the highest levels of political power. But lawfare should not be understood within this singular context. An analysis of the use of the term lawfare over a ten-year span found that while the term began appearing within the media in 2003, eighty-seven percent of total references to lawfare occurred between 2009 and 2013, when the study concluded.¹⁵⁶

153. Dunlap Today and Tomorrow, *supra* note 5, at 316.

154. Dunlap Apologia, *supra* note 7, at 123-24.

155. See generally PETER MAGUIRE, LAW AND WAR: INTERNATIONAL LAW AND AMERICAN HISTORY (2010); MARK WESTON JANIS, THE AMERICAN TRADITION OF INTERNATIONAL LAW: GREAT EXPECTATIONS 1789-1914 (2004).

156. The analysis performed by Neve Gordon was global in scope and found that the term lawfare appeared in 43 of the 207 “Major World Publications” within the LexisNexis database. See Gordon, *supra* note 33, at 318-21.

Still, the question remains: Do we have every reason to embrace a state-led notion of lawfare, as many commentators have suggested?¹⁵⁷ Orde Kittrie argues that “the U.S. government’s lack of systematic engagement with lawfare is a tremendous missed opportunity” and that “lawfare, deployed systematically and adeptly, could in various circumstances save U.S. and foreign lives by enabling U.S. national security objectives to be advanced with less or no kinetic warfare.”¹⁵⁸

Again, it is evident that such uses of international law, while not necessarily novel, are to be welcomed. Kittrie, and many commentators engaged in the lawfare debate, however, understand law within this context to constitute a weapon of war. Dunlap, for instance, has argued that:

[H]arking back to the original characterization of lawfare as simply another kind of weapon, one that is produced, metaphorically speaking, by beating law books into swords . . . a weapon can be used for good or bad purposes, depending upon the mindset of those who wield it. Much the same can be said about the law.¹⁵⁹

If one, however, envisions law as a weapon, as opposed to a strategic tool or some less incendiary analogy, it will facilitate efforts to brandish such a weapon in instances that its user perceives as a just cause. Congruently, however, this view of international law also facilitates an inverse understanding of law’s use by one’s opponent. Whether an enemy on the battlefield or an ideological challenger, law becomes a weaponized threat requiring a firm and decisive response. Considerations of whether we have every reason to embrace lawfare should be made within this context. Often, when a legal engagement is branded as lawfare, the response to this particular form of legal engagement begins to demonstrate what lawfare means. This is not a definitional question but instead one focused on the implications of applying the term lawfare to such forms of legal engagement – as an action, a form of speech, and as a label.

As Neve Gordon demonstrates, the vast majority of literature dedicated to lawfare focuses on its definition and normative underpinnings.¹⁶⁰ Instead, he holds that “lawfare is not merely used to

157. Carter, *supra* note 152.

158. Kittrie, *supra* note 24, at 3.

159. Dunlap Apologia, *supra* note 7, at 123-24.

160. Gordon, *supra* note 33, at 312.

describe certain phenomena, but that it operates as a speech act that reconstitutes the human rights field as a national security threat.”¹⁶¹ Gordon’s understanding of what lawfare *does* asks both the correct question and is well demonstrated through the Israeli case study that substantiates his work.¹⁶² It is now, however, prudent to ask what lawfare means – to both understandings and functions of international law – from a more holistic perspective.

If we survey the literature and observe examples of how lawfare has been deployed and understood as both a description of a phenomenon and an act with normative implications varied examples emerge. The claim of torture, filing a *habeas* brief, and the use of a human shield are each held to constitute both an international legal engagement and an act of lawfare. Likewise, the imposition of sanctions against a foreign military or a defense lawyer, the signing of an Article 98 agreement to immunize a US official from ICC prosecution, or the confiscation of terrorist assets constitute both a legal engagement and a form of lawfare.

The critical view of lawfare, that it popularly constitutes an attack on or dismantlement of legal norms, serves to endow international law with a singular, likely virtuous, purpose. It does not recognize that international law is commonly used for a diversity of reasons, any of which may evoke their own competing moral pronouncements or normative attributions. This recalls David Kennedy’s understanding of international law as “a set of arguments, rhetorical performances and counter-performances, deployed by people pursuing projects of various kinds.”¹⁶³ Labeling certain legal engagements as lawfare serves to tip the balance of these pursuits.

Its pejorative application – that is, its framing of international legal engagement as a weapon, as a threat – serves to delegitimize and ultimately disenfranchise *particular* forms of legal engagement. It is thus accurate to view, understand, and frame, this most common application of the term lawfare, not as a dismantlement of legal norms or as an attack on the human rights field (though it may do such things), but instead as a limitation on access to international justice.

The concept of access to justice is well formed within many domestic jurisdictions. In comparison, however, its articulation within

161. *Id.*

162. *Id.* at 318-39.

163. DAVID KENNEDY, *LAWFARE AND WARFARE IN THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW* 158, 173 (James Crawford & Martti Koskenniemi eds., 2012).

international law, while drawing upon established concepts, is recent in its use.¹⁶⁴ As international law's focus developed from its early state-centric conception to include considerations of the individual actor, the notion of access to international justice began to form.¹⁶⁵ Individualized international justice secured its modern foundation through the drafting of the United Nations Charter and the establishment of the Nuremburg Tribunal.¹⁶⁶ Article 2 of the Universal Declaration of Human Rights holds that "[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind"¹⁶⁷ Continuing, the Declaration holds that every individual possesses a right to an effective remedy for any acts that violate their fundamental rights and that all are "entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations"¹⁶⁸

These foundational principles, which gave license to individuals within international mechanisms, began the transformation of established domestic legal principles into international legal obligations.¹⁶⁹ These received further grounding through the host of global developments occurring throughout the latter-half of the twentieth century. Adoption of the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights strengthened the legal effect of these provisions. The development of legally binding regional human rights treaties and accompanying enforcement mechanisms like the European Court of Human Rights further facilitated the ability of the individual to gain access to the promise of international justice and redress.¹⁷⁰

164. Patrick Keyzer, Vesselin Popovski, & Charles Sampford, *What is 'access to international justice' and what does it require?*, in ACCESS TO INTERNATIONAL JUSTICE 1, 2 (2015).

165. For an account of this development and international law's growing recognition of the individual subject, see ANTONIO AUGUSTO CANCADO TRINDADE, THE ACCESS OF INDIVIDUALS TO INTERNATIONAL JUSTICE 3-8 (2011). See generally BRUNO SIMMA, FROM BILATERALISM TO COMMUNITY INTEREST IN INTERNATIONAL LAW 217 (1994).

166. Keyzer et al., *supra* note 164, at 3.

167. G.A. Res. 217 (III) A, art. 2, Universal Declaration of Human Rights (Dec. 10, 1948).

168. *Id.* art. 8, 10.

169. For an account of these developments, see Keyzer et al., *supra* note 164, at 1-5.

170. *Id.* at 3; see also International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3; Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols Nos. 11 and 14, Nov. 4, 1950, E.T.S. 5,

Narrowly, access to international justice, like its domestic counterpart, can be understood as “the right to a judicial remedy before an independent court of law.”¹⁷¹ While it is not the purpose of this paper to trace the development of the concept of access to international justice, it is employed here in its broadest sense. This holds that under international law, respect for principles, provisions, and individual rights receive meaning and actualization through the ability of individuals to engage with them through formal and informal, state and non-state, systems or regimes.

As commonly employed, the accusation of lawfare serves to justify interference, or attempted interference, with this ability. It does not represent an ontological challenge to international law. Those who scream lawfare loudest and denounce the role and influence of international law rarely (if ever) intend their denouncement to discount the totality of ways which international law can be engaged. Often, their response to lawfare draws upon international law, at least in part and not always convincingly. But equally, they are actors under international law who engage and apply it accordingly.

The claim of lawfare, the perceived threat of international law that constitutes many of lawfare’s popularized usages, as they have developed, serves to limit particular forms of legal engagement. Most of these are by or on behalf of individual subjects or are directed towards state actors. Lawfare serves to resist or delegitimize these particular engagements. It serves to justify legal measures or policies that discount these engagements. Despite self-evident examples of international legal engagements that appear vastly preferable to warfare or the use of force, when one suggests that we have every reason to embrace lawfare it is necessary to understand what lawfare often means for the function and efficacy of international law, and the status of the individual or non-state actor.

available at <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680063765>.

171. FRANCESCO FRACIONI, *THE RIGHT OF ACCESS TO JUSTICE UNDER CUSTOMARY INTERNATIONAL LAW IN ACCESS TO JUSTICE AS A HUMAN RIGHT* 1, 3 (2007).