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Semiotic Definition of Lawfare

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SEMIOTIC DEFINITION OF "LAWFARE"

Susan W. Tiefenbrun[*]

"Lawfare" is a weapon designed to destroy the enemy by using, misusing, and abusing the legal system and the media in order to raise a public outcry against that enemy. The term "lawfare" is also a clever play on words, a pun, and a neologism that needs to be deconstructed in order to explain the linguistic and political power of the term. Semiotic theory can help unpack this play on words, which creates an interesting and shocking equivalence between law and war. Semiotics is the science of signs and involves the exchange between two or more speakers through the medium of coded language and convention. Semiotics is the scientific study of communication, meaning, and interpretation. In this essay I will apply semiotic theory to expose the meanings of the term "lawfare" and to try to interpret it. I will focus on the definition of the word and the concepts of "law" as well as its denotations and connotations. Then I will look at the different definitions of "war" in order to better understand the identity of law and war created by the term "lawfare." The linkage of law to war is most clearly manifested in the expression of a "just war" and the elaboration of the "laws of war." Both law and war enjoy power, and it is precisely this shared power that constitutes the basis of the use of lawfare as a weapon of modern asymmetrical warfare. Finally, I will look at the different uses of the term "lawfare" and the serious impact of this usage on politics and on the integrity of the legal system. The abuse of the legal system, of human rights laws, and of humanitarian laws by lawfare undermines the overarching goal of world peace by eroding the integrity of the legal system and by weakening the global establishment and enforcement of the rule of law. The manipulation of Western court systems, the misuse of European and Canadian hate speech laws and libel law procedures can destroy the very principles of free speech that democracies hold most precious. Lawfare has limited public discussion of radical Islam and created unfair negative publicity against freedom loving countries. The weapon used is the rule of law itself that was originally created not to quiet the speech of the innocent but more to subdue dictators and tyrants. Ironically, it is this very same rule of law that is being abused in order to empower tyrants and to thwart free speech.

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I. INTRODUCTION

A. Lawfare is a Play on Words

"Lawfare" is a weapon designed to destroy the enemy by using, misusing, and abusing the legal system and the media in order to raise a public outcry against that enemy.[1] "Lawfare" is also a clever play on words, a pun,

[1] *See generally*, Major General Charles J. Dunlap, Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts* 2–4 (Carr Ctr. for Human Rights, John F. Kennedy Sch. of Gov't, Harvard Univ., Working Paper, 2001), *available at* http://www.ksg.harvard.edu/cchrp/Web%20Working%20Papers/Use%20of%20Force/Dunlap2001.pdf (Dunlap originally coined the phrase "lawfare" meaning "method of warfare where law is used as a means of realizing a military objective").

and a neologism that needs to be deconstructed in order to explain the linguistic and political power of the term.[2]

B. Semiotics and the Meaning of Lawfare

Lawfare creates an interesting and shocking equivalence between law and war. Semiotic theory can help unpack this play on words.[3] Semiotics is the science of signs.[4] Like doctors who constantly look for signs and symptoms to arrive at a diagnosis, lawyers and legal scholars use semiotics frequently without even knowing it. Reading, writing, interpreting documents and cases, negotiating, interviewing, and selecting jurors are merely a few of the lawyerly tasks that involve the fundamental elements of sign theory.[5] Semiotics is the "exchange between two or more speakers through the medium of coded language" and convention.[6] Lawyers engage in semiotics whenever they focus on the denotation and connotation of words, the text, the context, the pretext, and the subtext of the words of a contract or case or legal document.[7] Semiotics is derived from the Greek word *semion* or sign.[8] Signs are words, gestures, or the dots and dashes of Morse Code, and signs are the means by which communication takes place.[9] But signs can only mediate between the perception and expression of an event.[10] Thus, words, signs, and gestures lead inevitably to distortion, to the creation of multiple meanings, and to the need for interpretation.[11] Semiotics is the scientific study of communication, meaning, and interpretation.[12]

C. Organization of this Essay

In this essay, I will apply semiotic theory to expose the meanings of the term "lawfare" and to try to interpret it. First, I will focus on the defini-

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[2] Neologism is a rhetorical term referring to the creation of a "new" word. Despite the newness of the word "lawfare," the use of the law as a weapon is not a new concept. The most common metaphor depicting the analogy of law as a weapon is the depiction of the law as a "sword" or a "shield," both tenors of this metaphor belonging to the code of war. *See infra* text accompanying footnotes 156–216, discussing the different uses of the term *lawfare* in history.

[3] *See generally* SUSAN TIEFENBRUN, DECODING INTERNATIONAL LAW: SEMIOTICS AND THE HUMANITIES 3 and 23 (2010) (Chapter 1 defines semiotics and discusses the many possible uses of semiotics in the law); *See also* UMBERTO ECO, A THEORY OF SEMIOTICS (1976) (a general book on semiotics theory).

[4] TIEFENBRUN, *supra* note 3, at 19.

[5] *Id.* at 20.

[6] *Id.*

[7] *Id.*

[8] *Id.* at 23.

[9] *Id.*

[10] *Id.*

[11] *Id.* at 23–4.

[12] *Id.*

tion of the word and the concepts of "law" as well as its denotations and connotations. Then I will look at the different definitions of "war" in order to better understand the identity of law and war created by the term "lawfare." The linkage of law to war is most clearly manifested in the expression of a "just war" and in the elaboration of the "laws of war." Both law and war enjoy power, and it is precisely this shared power that constitutes the basis of the use of lawfare as a weapon.[13] Lawfare has become a key weapon of modern warfare. The abuses at Abu Ghraib and elsewhere produced negative public opinion and effects more damaging than any imposed by our enemies through the force of arms.[14] Finally, I will look at the different uses of the term "lawfare" and the serious impact of this usage on politics and on the integrity of our legal system.

II. WHAT IS LAW?

A. Theories of the Law: Natural Law, Legal Positivism, Legal Realism, and Sociological Jurisprudence

It is almost impossible to define the "law" without referring to different jurisprudential theories of the law such as "natural law," "legal positivism," "legal realism," and "sociological jurisprudence," each of which stresses different aspects of law's overarching concept.[15] Natural law is a "philosophical system of legal and moral principles . . . derived from a universalized conception of human nature or divine justice rather than from legislative or judicial action"—also called law of nature, *lex aeterna*, eternal law, divine law, and normative jurisprudence.[16] "Positive law typically consists of enacted law [or] the codes, statutes, and regulations . . . applied and enforced in the courts."[17] "The term [positive] derives from the medieval use of *positum* (Latin 'established'), and the phrase 'positive law' literally means law established by human authority."[18] "Legal positivism" is the theory that formal legal rules are valid because they are "enacted by an ex-

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[13] RONALD DWORKIN, LAW'S EMPIRE (1986). The title of this book is a metonymy of the "power" of the law. "Empire" connotes power and is a part of the whole concept of monarchical power. In sign theory, one would say that "power" is the *seme* that "law" shares with "war."

[14] Maj. Gen. Charles J. Dunlap, Jr., *Lawfare Amid Warfare*, WASH. TIMES, Aug. 3, 2007, at A17, *available at* http://www.washingtontimes.com/news/2007/aug/03/lawfare-amid-warfare.

[15] THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 15 (Jules Coleman & Scott Shapiro, eds. 2002) ("There is much uncertainty in contemporary jurisprudence about whether its subject matter is (a) the *concept* of law, or rather (b) law as a social reality and/or as a kind of reason for action. . .").

[16] BLACK'S LAW DICTIONARY 1127 (9th ed. 2009).

[17] *Id.* at 1280.

[18] *Id.*

isting political authority," and these rules are "binding in a given society, not because they are grounded in morality or in natural law."[19] The theory of legal positivism was espoused by scholars such as H.L.A. Hart and John Austin.[20] "Legal realism" is the theory that law is based not on formal rules or principles, "but instead on judicial decisions that should derive from social interests and public policy."[21] American legal realism, which flourished in the early twentieth century, was espoused by such scholars as Oliver Wendell Holmes and Karl Llewellyn.[22] Roscoe Pound in the United States and Hermann Kantorowicz in Europe were the most eminent pioneers of modern sociological jurisprudence.[23] Sociological jurisprudence seeks to frame hypotheses on which to base general laws of the operation of law in society.[24]

B. Sources of Natural Law and Written Laws

Sources of natural law theories have been traced back to Greek and Roman times and have reemerged in different forms in the contemporary world.[25] Written laws are a more recent phenomenon in the history of civilization, but the Code of Hammurabi, which is a collection of laws rather than a code, dates back to the eighteenth century before the Christian era.[26]

C. Greek Philosophers and Their Definition of the Law

What is the nature, or essence, of law is a question that "has long perplexed legal and political philosophers."[27] Throughout the ages, legal philosophers have proposed different definitions of the law. The Greeks were the first to have speculated about the nature of law, particularly Plato and Aristotle.[28] In the natural law theories that developed, the pleasure/pain

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19 *Id.* at 978.

20 *Id.*; *John Austin (English Jurist)*, ENCYCLOPEDIA BRITANNICA, http://www.britannica.com/EBchecked/topic/43601/John-Austin/480/Assessment (last visited Nov. 3, 2010).

21 BLACKS, *supra* note 16, at 979.

22 *Id.*

23 *Philosophy of Law*, ENCYCLOPEDIA BRITANNICA, http://www.britannica.com/EBchecked/topic/332775/philosophy-of-law/36359/Growth-of-the-sociological-school (last visited Nov. 3, 2010).

24 *Id.*

25 J.B. SCHNEEWIND, THE INVENTION OF AUTONOMY, A HISTORY OF MODERN MORAL PHILOSOPHY 17 (1998).

26 Charles F. Horn, *The Code of Hammurabi: Introduction*, THE AVALON PROJECT, http://avalon.law.yale.edu/ancient/hammint.asp (last visited Nov. 3, 2010).

27 R. Wollheim, *The Nature of Law*, *in* M.D.A. FREEMAN, LLOYD'S INTRODUCTION TO JURISPRUDENCE, 61 (8th ed. 2008).

28 GEORGE C. CHRISTIE, JURISPRUDENCE: TEXT AND READINGS ON THE PHILOSOPHY OF LAW 2–3 (1973); *see also* PLATO, THE LAWS (356–361 B.C.); ARISTOTLE, NICOMACHEAN ETHICS BK. V, (Jonathan Barnes ed., Rev. Oxford trans., Princeton Univ. Press 2nd ed. 1985) (384 B.C.).

principle discussed by Plato and Aristotle became the vehicle for obtaining evidence of the law of nature.[29] Justice for Aristotle was the practice of virtue in one's relations with one's neighbor.[30] Natural law theories developed from Aristotle's distinction between natural justice and conventional justice.[31]

D. Romans and the Natural Law, Positive Law, and International Law

Later, according to Roman jurists, natural law was conceived of as a part of positive law.[32] Even the Latin root of the word "law" or "*lex*" means "statute."[33] The more general Latin term "*ius*" means "right" or "law." [34] The Romans believed that "[s]ome rules are established by men's wills and can be changed at their pleasure; others are unchangeable, existing of necessity always and everywhere, because they depend upon nature itself."[35] Natural law is distinguished from positive law by this necessity, unchangeableness, and independence of human will.[36] Thus, the Romans recognized both a positive law that acts at the same time and in the same way as natural law. Natural law for the Romans was "as genuine a *force* as . . . positive law."[37] The Romans also recognized the existence of a law having force between nations (the Law of Nations or *ius gentium*) which the Romans often confused with the Law of Nature or natural law.[38]

E. Hebrews and Their Definition of Law

The Talmud says that "[w]hatever decision of a mature scholar in the presence of his teacher will yet derive from the Law (Torah) that was already spoken to Moses on Mount Sinai."[39] This assertion presupposes that the oral law must respect the revealed written law. The richness, ambivalences, and silences of the written law in a changing world left the widest freedom to the scholarly reason of the rabbinical exegetes who were in charge of the interpretation of the written and oral law. The operations of

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29 *See* CHRISTIE, *supra* note 28.

30 *See* ARISTOTLE, *supra* note 28.

31 *Id.* at 37–41.

32 N. M. KORKUNOV, GENERAL THEORY OF LAW 123 (W.G. Hastings trans., Boston Book Co.) (1909).

33 D.P. SIMPSON, CASSELL'S NEW LATIN DICTIONARY 343 (Funk & Wagnalls) (1959).

34 *Id.* at 331.

35 KORKUNOV, *supra* note 32, at 123.

36 *Id.*

37 *Id.* (emphasis added).

38 MONSIEUR DE VATTEL, THE LAW OF NATIONS; OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS Preface 3a (Charles Fenwick trans., 1916).

39 THE NEW ENCYCLOPEDIA BRITANNICA , MACROPEDIA VOLUME 10, 716–717(William Benton, Publisher, 1943–1973) (discussing the Western Philosophy of Law and its origins).

the rabbinical schools and courts over many centuries, especially during and following the first Babylonian Exile, resembled the great Roman jurists and the great judges of the common law tradition.[40]

F. Law in the Middle Ages: Saint Augustine and Saint Thomas Aquinas

Law was defined in the Middle Ages by Saint Augustine who placed God's reason beside God's will as the highest source of the unchangeable, eternal, divine law binding directly on man and all other creatures.[41] In the period of Scholasticism, Aquinas, like Augustine, gave a plausible place to both natural law and temporal or positive law under the eternal law.[42] Saint Thomas Aquinas (1215–74) and Saint Augustine both believed that a "just war" is a means of meting out punishment, making amends, restoring what has been seized unjustly, and a way to achieve peace.[43]

G. Law and "Just War" in the Middle Ages and the Renaissance

The concept of a "just" war was very much part of the theories of law in the Middle Ages and in the Renaissance. Theorists then justified the idea of resorting to war in order to remedy a serious offence or to recapture stolen lands.[44] The sovereign had to justify the validity of his claim and then prove that he wanted a "just war" in order to raise troops and sustain the morale of his troops.[45]

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[40] W. J. CONYBEARE, THE LIFE AND WRITINGS OF ST. JOHN 59 (1892).

[41] MICHAEL BERTRAM CROW, THE CHANGING PROFILE OF THE NATURAL LAW XX (1977).

[42] *Id.* at 173 ("All other laws derive from the eternal law—here St. Thomas follows St. Augustine particularly closely. . . . The eternal law is the *summa ratio*, and all other laws insofar as they participate in right reason, i.e. insofar as they are laws at all, derive from it.").

[43] AURELIUS AUGUSTINE, THE CITY OF GOD VOL. II 311 (Marcus Dods, ed., Edinburgh, T&T Clark 1871) ("For it is the wrong–doing of the opposing party, which compels the wise man to wage just wars; and this wrong–doing, even though it may give rise to no war, would still be matter of grief to man because it is man's wrong-doing."); JOHN J. ELMENDORF, ELEMENTS OF MORAL THEOLOGY (New York, James Pott & Co., 1892) (discussing Aquinas' views on war and the three requisites for waging a righteous war, including "due authority," "a just cause," and the "right intention on the part of those who make war." Only if all three requisites are satisfied will a war be considered just); *see* Kari M. Fletcher, *Defining the Crime of Aggression: Is There an Answer to the International Criminal Court's Dilemma?,* 65 A.F. L. REV. 229, 232 (2010) (summarizing both Augustine's and Aquinas' arguments on how to wage just war).

[44] THEODOR MERON, BLOODY CONSTRAINT, WAR AND CHIVALRY IN SHAKESPEARE 27 (1998).

[45] *Id.*

H. Power of Law in the Renaissance as Defined by Machiavelli

During the Renaissance period, Machiavelli viewed political power as a value and as an end in itself, and his legal theory was based on the ends justifying the means.[46] To Machiavelli, the human lawgiver was supreme.[47] Machiavelli held firmly to the point of view that power is itself the end.[48] Virtue for Machiavelli was those acts that enable the sovereign to accomplish his end, and it is through cunning, deceit, unscrupulousness, and ruthlessness that the sovereign can and should enable himself to maintain himself in power.[49]

I. The "Force" of Law in the l8th Century as Defined by Montesquieu

In the eighteenth century, Montesquieu defined the law as "the necessary relations derived from the nature of things," and he clarified that "all beings have their laws: the [Deity] has [his] laws, the material world has its laws, the intelligencies [sic] superior to man have their laws, the beasts their laws, man his laws."[50] Montesquieu recognized the "force" of law.[51]

J. The Force and the Liberalizing Nature of Law as Defined by H.L.A. Hart in the Twentieth Century

In the early twentieth century, following on the work of John Austin in 1832's *Lectures on Jurisprudence*, Hart pursued a modern positivist conception of law and the importance of rules, which he elaborated in 1961's *The Concept of Law*.[52] Rules restrain and constrain people by forcing them to obey.[53] But, by adhering to the discipline of obedience, rules and the law paradoxically bring liberty to people and create liberalizing order, consistency, and stability in society.[54] Earlier, Immanuel Kant (1724–1804) actually defined the law as "norms of liberty," recognizing full well the ambiguity and contradiction inherent in the law which imposes constraints in order to produce liberty.[55]

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46 *See generally* W.T. JONES, MASTERS OF POLITICAL THOUGHT, VOL. II, 22–52 (1941).
47 *Id.*
48 *Id.*
49 *Id.* at 42.
50 MONTESQUIEU, THE SPIRIT OF THE LAWS 1 (Cohler et al. eds., & trans., 1989).
51 *Id* at 4.
52 H.L.A. HART, THE CONCEPT OF LAW 206−08 (Penelope A. Bulloch and Joseph Raz eds., 2nd ed. 1994).
53 *Id.* at 61−62.
54 N.M. Korkunov, *General Theory of Law in* 4 THE MODERN LEGAL PHILOSOPHY SERIES 81−85 (W.G. Hastings trans., 1909).
55 *Id.* at 82−83.

In his book, *The Concept of Law*, Hart stressed that there exist many concepts of law, but he did not actually define the law.[56]

K. Law as Interpretation in the Twentieth Century

Ronald Dworkin, whose early work widely criticized Hart's version of legal positivism, tried to define the law in terms of interpretation. To determine what the law "is" according to Dworkin, it is necessary to find the best interpretation available of the relevant legal data: legislative acts, judicial decisions, constitutional texts, and other sources.[57]

L. Law and Legal Realism as Defined by Oliver Wendell Holmes in the Twentieth Century: Law is Power and Protection

Oliver Wendell Holmes' concept of the law focuses less on the formal consistency of the rules in the legal system and more on its development. Holmes (1841–1935), who preceded Hart, was influenced by the great semiotician Charles Sanders Peirce who inspired some legal scholars to redirect their attention away from the formal rules in order to capture the true essence of law.[58] Holmes applied legal realist theory to his work as a judge. Holmes said, "[t]he law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become."[59] Holmes stressed the power of the law when he referred back to the origin of legal procedure that is grounded in "vengeance."[60] Holmes defined the law poetically calling it "our mistress . . . only to be wooed with sustained and lonely passion."[61] But, for Oliver Wendell Holmes, the law is both protection and power, which he likens to the charms and force of the femme fatale*:*

> When I think of the Law as we know her in the courthouse and the market, she seems to me a woman sitting by the wayside, beneath whose overshadowing hood every man shall see the countenance of his deserts or needs. The timid and overborne gain heart from her protecting smile. Fair combatants, manfully standing to their rights, see her keeping the lists with the stern and discriminating eye of even justice. The wretch who has defied her most sacred commands, and has thought to creep through ways where

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56 HART, *supra* note 52, at v–vi (describing THE CONCEPT OF THE LAW).

57 DWORKIN, *supra* note 13.

58 OLIVER WENDELL HOLMES, JR., THE COMMON LAW 35−38 (Boston, Little, Brown and Company 1881).

59 *Id.* at 1.

60 *Id.* at 2.

61 Oliver Wendell Holmes, Speech at the Suffolk Bar Association Dinner: The Law (Feb. 5, 1885), *reprinted in* Holmes, SPEECHES 17 (2006).

> she was not, finds that his path ends with her, and beholds beneath her hood the inexorable face of death.[62]

M. The Power of the Law: Law Is Order, Force, and Rules

1. Black's Law Dictionary definition of the law

Black's Law Dictionary defines the law with specific reference to its powerful impact.[63] Black refers to law as "order" and "force."[64] Law is the "regime that *orders* human activities and relations through systematic application of the *force* of politically organized society, or through social pressure, backed by *force*, in such a society."[65] Black's fourth definition relates the law to a set of rules, a concept of the law that is not far from legal positivism. Law is "the set of *rules* or principles dealing with a specific area of a legal system."[66]

2. Judge Richard Posner's definition of the law as power: law is a social institution, a set of rules, and a source of rights, duties, and powers

Judge Richard Posner's definition of the law also refers to its "power" as he points out that there are several different senses of the word "law."[67]

> The first is law as a distinctive social institution; that is the sense involved when we ask whether primitive law is really law. The second is law as a collection of sets of propositions—the sets we refer to as antitrust law, the law of torts, the Statute of Frauds, and so on. The third is law as a source of rights, duties, and *powers*, as in the sentence "The law forbids the murdering heir to inherit."[68]

III. WHAT IS INTERNATIONAL LAW?

"Lawfare" is frequently referred to as the misuse of "international law," and the abuse of the domestic and international courts in order to claim international law violations against the enemy.[69] These claims become as powerful and fearsome as a weapon of war.

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62 *Id.* at 18.

63 BLACK'S LAW DICTIONARY 889 (7th ed. 1999).

64 *Id.*

65 *Id.* (emphasis added).

66 *Id.* (emphasis added).

67 RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 220–221 (1990).

68 *Id.* (emphasis added).

69 The American Non-Governmental Organization Coalition for the International Criminal Court, *Lawfare and the International Criminal Court: Questions and Answers*, http://www.amicc.org/docs/Lawfare.pdf (last visited Nov. 3, 2010).

A. International Law is the Law of Nations: William Blackstone and the Law as Commandment

We shall look very briefly at the history and development of international law in order to understand how lawfare works. The word "international law" refers to the laws that exist among sovereign nations. In the eighteenth century in England, William Blackstone spoke of two foundations of the law, the law of nature—for example, the law of revelation or natural law—and human laws—for example, positive law.[70] Blackstone also recognized international law, which he called the "law of nations."[71]

For Blackstone the law has the force of a commandment:

> This then is the general signification of law, a rule of action dictated by some superior being; and in those creatures that have neither the power to think, nor to will, such laws must be invariably obeyed, so long as the creature itself submits, for its existence depends on that obedience. But laws, in their more confined sense, and in which it is our present business to consider them, denote the rules, not of action in general, but of *human* action or conduct: that is, the precepts by which man, the noblest of all sublunary beings, a creature endowed with both reason and freewill, is *commanded* to make use of those faculties in the general regulation of his behavior.[72]

B. Samuel von Pufendorf: Man is Uncivilized and Evil and Needs International Law (Seventeenth Century)

The work of Samuel von Pufendorf, *De officio hominis et civis prout ipsi praescribuntur lege naturali*, was published in l673 in Sweden.[73] Pufendorf, a predecessor of Hugo Grotius, recognized the existence of both divine law and human law.[74] Pufendorf believed that man needs the law to civilize society.[75] Like Hobbes, Pufendorf thought:

> [N]o animal is fiercer and more untamed than man, none is prone to more vices which tend to menace others. For outside of his instinct of hunger and love, an insatiable desire dominates him of acquiring superfluous things and of inflicting upon others cruel wrongs. In the natural state man loves the independence to realize only his own interests. A good citizen, however, is he who promptly obeys the *commands* of his sovereign, strives with all his might for the common weal and prefers this unhesitatingly to his own interests, who considers nothing advantageous to himself except

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70 1 WILLIAM BLACKSTONE, COMMENTARIES 42 (Garland Publ'g 1978) (1783).

71 4 BLACKSTONE, *supra* note 70, at 66.

72 *Id.* at 39.

73 SAMUEL VON PUFENDORF, ON THE DUTY OF MAN AND CITIZEN ACCORDING TO NATURAL LAW (Frank Moore trans., Oxford Univ. Press 1927) (1682).

74 *Id.* at 16.

75 *See generally, id.*

> that which serves also the common good, and who shows himself accommodating to his fellow citizens . . . If there were no courts, one man would devour another.[76]

Law, then, is necessary, civilizing, and powerful.

C. Hugo Grotius, On the Law of War and Peace (1625)

Hugo Grotius, the "father" of international law, was a Dutch political and legal philosopher who lived during the anarchy of the Thirty Years' War (1618–1648). He tried to introduce a degree of normative restraint among the monarchical rulers of the newly emerged sovereign states of Europe.[77] He also tried to establish a basis in natural law for a rejection of *raison d'etat*, as a just cause for war, as well as for legal limits on the means and modes of violence in war.[78] Grotius wrote an influential book, *On the Law of War and Peace* in 1625, in which he defined the law in terms of "force." [79] Grotius conceived of the law as rules, and he saw a natural division of the law into two categories: the law of nature and the volitional law.[80] But, he added, "[t]here is a third meaning of the word law, which has the same *force* as statute whenever this word is taken in the broadest sense as a rule of moral actions imposing obligation to what is right."[81]

IV. SCIENTIFIC LAW AND THE POWER OF JURIDICAL LAW

Laws are general norms, juridical or moral, ethical or technical, that provide rights and formulate responsibilities and duties. Law in the scientific sense is different from norms.[82]A scientific law is a general formula expressing an established uniformity; it expresses not what ought to be but what actually is.[83] Thus, scientific "law" is a generalized expression of reality. Juridical norms express not what is, but what ought to be, and these norms can be broken. Scientific laws cannot be broken because they are reflections of what exists in nature. Juridical law depends upon people's will and choice to obey or disobey the law. Juridical norms guide the activity of people and provide the way to attain their goals by fixing the condi-

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[76] Walther Schücking, *Introduction* to SAMUEL VON PUFENDORF, ON THE DUTY OF MAN AND CITIZEN ACCORDING TO NATURAL LAW 17a (Herbert F. Wright trans., Oxford Univ. Press 1927) (1682).

[77] ENCYCLOPEDIA BRITANNICA, *supra* note 39, Vol. 5, at 514.

[78] *Id.*

[79] *See generally*, HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES (Francis W. Kelsey trans., Clarendon Press 1925) (1646).

[80] *See generally, id.*

[81] *Id.* at 38.

[82] KORKUNOV, *supra* note 32, at 65.

[83] *Id.*

tions of their actions, by providing order in their daily lives, and by controlling their actions. Juridical law is power.

Thus, in reviewing briefly this broad array of only some of the extant definitions of the law, whether the law is conceived of as rules, as interpretation, as providing liberalizing rights or as imposing commandments or constraining duties and responsibilities, there can be no doubt that law is empowering.

V. WHAT IS WAR?

Since the term "lawfare" is recognized today as being a serious and dangerous weapon of war based on a play on the words "law" and "war," it is important for us to look briefly at the denotations and connotations of the term "war" in order to unravel the sources of the pun.[84]

A. Theories of War

In the aftermath of two world wars, and with the developing fears of nuclear, biological, and chemical warfare capable of destroying the world, the theory of war has become an important and controversial subject.[85] Scholars have tried to understand the nature of war, to develop theories relating to the causes of war, the conduct and prevention of war, and to study the impact of the rigorous application of laws of war.[86]

B. Origin and Duality of the Term "War"

War, as we are told, is hell, except when it is noble, thrilling, profitable or simply convenient.[87] The word "war" comes from the Middle English word "*werre*" and the Old High German word "*werra,"* both of which denote war as "strife" and "confusion."[88] Both of these meanings have a singularly negative connotation. However, in the Middle Ages the concept

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[84] For the media's recent use of the term, *see, e.g.*, Editorial, *The Lawfare Wars*, WALL ST. J., Sept. 2, 2010, at A14. "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. Two separate cases this week show that lawfare is alive and dangerous." *Id.* The two cases the author referred to were the decision to stop the military commission trial of Abdal-Rahim al-Hashiri, the alleged mastermind behind al-Qaeda's suicide attack on the USS Cole, and the delay of the Khalid Sheikh Mohammed proceedings.

[85] JAMES TURNER JOHNSON, MORALITY & CONTEMPORARY WARFARE 1–2 (Yale Univ. Press, 1998).

[86] *See, e.g.*, JAMES TURNER JOHNSON, MORALITY & CONTEMPORARY WARFARE, 51–66 (1999).

[87] *See* Ronald Steel, *Theodore Roosevelt, Empire Builder*, N.Y. TIMES BOOK REV. (Apr. 25, 2010), http://www.nytimes.com/2010/04/25/books/review/Steel-t.html?_r=1&scp=1&sq=empire%20builder&st=cse.

[88] *See War Definition*, ONLINE ETYMOLOGY DICTIONARY, *available at* http://www.etymonline.com/index.php?search=war&searchmode=none (last visited Nov. 3, 2010).

of war acquired an ennobling, positive connotation, where warriors and knights were glamorized as heroes despite the havoc and destruction that war wreaked on civilians.[89]

This duality of the term "war" is best represented in the Latin term for "war," which is "*bellum*" and which, ironically, is a declined form of the adjective "bellus" meaning beautiful, pretty, handsome, or charming.[90] War can be beautiful if it frees an oppressed people in search of their legal right of self-determination. Therefore, war etymologically has both negative and positive connotations.

Nevertheless, war is generally conceived of in the negative light as something to be avoided and used only as a last resort in order to preserve the State.[91] Law, similarly, has both positive and negative connotations. However, we have shown that law is generally conceived of in the positive light as an ordering, stabilizing, and protective system that provides rights and imposes liberating duties.[92] The laws of war help to right the wrongs of war by protecting civilians, soldiers, and prisoners of war from its inevitable abuses.

C. War in the Middle Ages: Positive and Negative Connotations of the Term "War"

Theories of war and perceptions of warriors have evolved through the ages. During the Middle Ages, war was both catastrophic and ennobling.[93] At that time, war was considered to be "an endemic condition . . . wreaking havoc on the common people, particularly the peasants, who were the victims of ravaging mercenaries, free companies, robbers and even some knights for whom, notwithstanding the rules of chivalry, plunder of the countryside was a way of life."[94]

However, war had its positive features as well. The Middle Ages was an era of poverty and hardship, and war offered material incentives where adventurers and mercenaries could fight for profit from pillage and ransom.[95] For the professional warriors, the knights, war was both glorious and ennobling, even though war was full of hardship for them and for the civilians.[96] The doctrine of chivalry focused on the knight's beneficial service to the community and his duty to defend the weak.[97] Knights gained

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89 *See* MERON, *supra* note 44, at 18.
90 *See War Definition*, *supra* note 88.
91 *See* JOHNSON, *supra* note 86, at 5–7.
92 *See* KORKUNOV, *supra* note 32, at 49.
93 *See* MERON, *supra* note 44, at 18.
94 *Id.*
95 *See id*.
96 *See id*.
97 *See id.*

fame and honor through chivalric deeds.[98] The Church actually supported war and made martyrs out of the noble crusaders who fought in its defense.[99] If a soldier died in battle, he was revered as a martyr for the cause, and he was assured of going to heaven.[100] Some people in the Middle Ages even aspired to enhance their social status by fighting wars and by becoming elevated to knighthood.[101] In this period, "war" had a positive connotation despite its horrific impact on the daily lives of civilians. The glorification of knightly virtue, the social mystique attached to arms, the ceremonies ascribed to knighting before battles, and the profits earned from war by nobles and knights all contributed to the glamorization of war.[102]

So positive was the connotation of "war" in the Middle Ages that the French author Jean de Bueil in his medieval novel *Le Jouvencel* (l465) called war a "joy" and a "delight."[103] He wrote, "It is a joyous thing, is war . . .[y]ou love your comrade so in war . . . [a]nd out of that, there arises such a delectation, that he who has not tasted it is not fit to say what a delight it is."[104] Medieval apologists for war tried to minimize the brutality and bloodiness of war.[105] They tried to justify war because it served the interests of the nobles and the knights for whom war was "an opportunity to gain glory on the battlefield and to acquire wealth."[106]

D. War in the Fourteenth Century: "Just War" Brings Peace

During the fourteenth century, in his famous treatise *Tractatus de bello, de represaliis et de duello*, and relying on the Old Testament and Saint Augustine, Giovanni da Legnano argued that wars came from divine law with "positive allowance" from God. [107] Lawful or "just" war and war itself would lead to peace and tranquility.[108] Da Legnano actually argued

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98 *See id.* ("For the warring class, the knights, war was both noble and ennobling . . . the soothing doctrine of chivalry with its emphasis on the idea of service to the community and the duty to defend the weak and to right any wrongs combined with the quest for recognition, fame and honour . . .").

99 *See id.*

100 *See id.*

101 *Id.*

102 *Id.*

103 JOHAN HUIZINGA, THE AUTUMN OF THE MIDDLE AGES 81(Rodney J. Payton & Ulrich Mammitzsch trans., 1996) (1921) (quoting JEAN DE BUEIL, LE JOUVENCEL (1465)).

104 *Id.*

105 MERON, *supra* note 44, at 18 (discussing how "chroniclers" such as Jean Froissart were apologists for war, "masking or minimizing war's horrors, brutality, bloodiness, greed and economic motivations . . .").

106 *Id.* at 19.

107 GIOVANNI DA LEGNANO, TRACTATUS DE BELLO, DE REPRESALIIS ET DE DUELLO 224 (Thomas Erskine Holland ed., James Brierly trans., 1917) (1477).

108 *Id.* ("[F]or a declaration of a lawful war and a lawful war itself tend to the good, for they tend to the peace and quiet of the world.").

that the authority to punish evil persons stemmed from God.[109] Later Honore Bouvet, in *The Tree of Battles*, (circa 1387) declared that war was "not an evil thing, but [a] good and virtuous" thing because it sought to "set wrong right."[110] Bouvet believed that the evil that happens in war is not caused by war itself but by abuse—for example, pillaging towns, raping women, or setting fire to a church.

During the late Middle Ages, war consisted of first showing proof that the war was a "just war," then issuing an ultimatum or declaration of war, then actually conducting the war gloriously according to the laws and customs of war, and finally negotiating diplomatically the treaty of peace.[111]

E. Wars in the Seventeenth Century: Limited War

After the end of the wars of religion and about the middle of the seventeenth century, wars were fought for the interests of individual sovereigns and were limited in both their objectives and scope.[112] War then was couched in terms of strategies.[113]

F. Wars From the Eighteenth Century to the Present: Total War

In the eighteenth century, the situation changed dramatically, especially with the outbreak of the French Revolution, which increased the size of forces from a small number of professional soldiers to large conscripted armies.[114] During this period, the ideals of the Revolution appealed to the masses who were subject to conscription.[115] War then became a rational, limited instrument of national policy, an approach best articulated by the Prussian military theorist Carl von Clausewitz in *Vom Kriege* (1832)(*On War*, l873).[116]

World War I was a "total" war because it mobilized entire populations and economies for a prolonged period of time, and thus did not fit into Clausewitz' concept of war as "limited" conflict.[117] After World War I, war was no longer regarded as a "rational instrument" of state policy, and theorists believed that war should be undertaken only if survival of the state was

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109 *Id.* ("For every act punishing evil persons proceeds from God . . .").

110 HONORE BOUVET (BONET), THE TREE OF BATTLES 125 (G.W. Coopland ed., Ernest Nys trans., Harvard University Press 1949) (1883).

111 THEODOR MERON, HENRY'S WARS AND SHAKESPEARE'S LAWS: PERSPECTIVES ON THE LAW OF WAR IN THE LATER MIDDLE AGES 2 (Clarendon Press 1993).

112 ENCYCLOPEDIA BRITANNICA, http://www.britannica.com/EBchecked/topic/635532/war/53510/Evolution-of-theories-of-war (last visited Nov. 3, 2010).

113 *Id.*

114 *Id.*

115 *Id.*

116 CARL VON CLAUSEWITZ, ON WAR 605 (Michael Howard & Peter Pare eds. & trans., Princeton University Press 1976). *See also supra* note 112.

117 *Supra* note 112.

at stake.[118] After World War I, some theoreticians believed that war was a calamity and a social disaster.[119] This was Count Leo Tolstoy's (1828–1910) earlier and prophetic opinion in the concluding chapter of *War and Peace*.[120]

World War II and the subsequent evolution of nuclear weapons and weapons of mass destruction make it even more imperative to understand the nature of war. War has become an intractable social phenomenon, and the elimination of nuclear war is an essential precondition for the survival of mankind.[121] But war still remains a rational instrumentality in certain more limited conflicts.

Clausewitz defined war as a rational instrument of foreign policy, "an act of violence intended to compel our opponent to fulfill our will."[122] More modern definitions of war, such as "armed conflict between political units," disregard the narrow, legalistic definitions of the nineteenth century, which limited the concept of war to formally declared war between states.[123] This included civil wars but excluded riots, banditry, or piracy. War is generally understood in the modern sense to embrace only fairly large scale armed conflicts, usually excluding those involving fewer than 50,000 combatants.[124]

G. Modern Asymmetrical Warfare

Modern warfare, however, has been characterized as "asymmetrical" and, therefore, quite different in quality from wars waged before World War II and the Korean War.[125] The Korean War was, by definition, a "police action" and not an actual declared "war," despite all the devastating features of that armed conflict that in every way resembled what we all perceive of as the horrors of war.[126]

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118 CASPAR W. WEINBERGER, FIGHTING FOR PEACE 439–440 (Warner Books 1990). *See also supra* note 12.

119 3 LEO TOLSTOY, WAR AND PEACE 362–364 (Nathan H. Dole trans., Thomas Y. Crowell & Co. 1889). 3 GEORGE ORWELL, *Notes on Nationalism*, *in* THE COLLECTED ESSAYS, JOURNALISM AND LETTERS OF GEORGE ORWELL 371 (Sonia Orwell & Ian Angus eds., Harcourt, Brace & World Inc. 1968). *See also supra* note 112.

120 *Supra* TOLSTOY, note 119. *See also supra* note 112.

121 *See supra* note 112. *See also* Mr. A. B. Vajpayee, Speech to the General Assembly (Oct. 10, 1978), http://www.un.int/india/ind201.htm.

122 VON CLAUSEWITZ, *supra* note 116, at 75.

123 JOHN H. BODLEY, ANTHROPOLOGY AND CONTEMPORARY HUMAN PROBLEMS 178 (3rd ed., Mayfield Publ'g Co. 1995).

124 ENCYCLOPEDIA BRITANNICA, Vol. 19, *supra* note 39, at 543.

125 *See* Erika Myers, Note, *Conquering Peace: Military Commissions as a Lawfare Strategy in the Mexican War*, 35 AM. J. CRIM. L. 201, 203–204 (2008) (stating that a new relationship between law and war known as lawfare began after World War II).

126 *See* Sarah E. Barnes, *Categorizing Conflict in the Wartime Enforcement of Frauds Act: When are we Really at War?*, 59 DEPAUL L. REV. 979, 1010 (2010) (defining the Korean

1. Definition of asymmetrical warfare

Asymmetrical war is defined by an attempt to erase two basic features of war: the front and the uniform.[127] In asymmetric warfare there is an attempt by paramilitary organizations to erode the distinction between combatants and noncombatants.[128] For example, one writer in the *New Republic* claims that Hamas militants fight without military uniforms, in ordinary and undistinguishing civilian garb, taking shelter among their own civilian population and attacking Israeli civilians intentionally and indiscriminately.[129] Furthermore, Hamas militants who are embedded in the civilian population do not carry weapons while moving from one position to another because arms and ammunition have been pre-positioned for them and stored in different houses (non-military establishments).[130]

2. Asymmetrical warfare and a "just war"

Clearly the use of asymmetrical warfare is in direct conflict with the concept of a "just war," which resides on the fundamental military principles of customary law known as "necessity," "distinction," "proportionality," and "humanity."

a. Principle of necessity and asymmetrical warfare

Military "necessity" was defined in the l863 Lieber Code.[131] In war, soldiers can use only "those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war."[132] The principle of "necessity" requires that force be used "solely for the purposes of accomplishing the mission."[133] In asymmetrical warfare, victory and the collapse of the enemy's army is never final, and the mission shifts making it difficult to adhere to the necessity principle.[134]

Was as a police action despite the fact that there was neither a formal declaration nor any authorization by Congress to use force).

127 *See* Moshe Halbertal, *The Goldstone Illusion: What the U.N. Report Gets Wrong about Gaza–and War*, THE NEW REPUBLIC (Nov. 6, 2009, 12:00 AM), http://www.tnr.com/article/world/the-goldstone-illusion (defining asymmetrical war as "an attempt on the part of [certain] groups to erase two basic features of war: the front and the uniform").

128 *See id.* (discussing how Palestinian armed groups "attempt nothing less than to erase the distinction between combatants and noncombatants on both sides of the struggle").

129 *See id.*

130 *See id.*

131 Instructions for the Gov't of Armies of the U.S., Field, Gen. Order 100, Section 1 ¶ 14 (by Francis Leiber 1898).

132 *Id.*

133 *See* Halbertal, *supra* note 127 (stating that the principle of necessity "requires that force be used solely for the purposes of accomplishing the mission").

134 *See id.*

b. Principle of distinction and asymmetrical warfare

The principle of "distinction," sometimes referred to as the principle of discrimination or identification, "separates combatants from noncombatants and legitimate military targets from civilian objects."[135] While waging war, it is unlawful to intentionally hit innocent civilians or nonmilitary targets.[136] The intentional killing of innocent civilians is prohibited even in cases where such a policy might be effective in stopping terrorism.[137] How does one then fight against suicide bombers? If the enemy does not appear in uniform and if there is no specified zone that can be described as the "battlefield," one cannot easily determine who is and who is not a combatant. Thus, the military principle of distinction is also difficult to obey in an asymmetrical war.

c. Principle of proportionality and asymmetrical warfare

The principle of proportionality requires that "the losses resulting from a military action should not be excessive in relation to the expected military advantage."[138] Thus, the act of brutally destroying an entire city—for example, Warsaw in World War II—is disproportionate to the military advantage sought.

The principle of proportionality is the most difficult of all to adhere to because it requires one to observe the principle of avoidance.[139] In asymmetrical warfare, it is conceivable that while targeting combatants, some noncombatants will be killed accidentally by collateral damage. The foreseeable collateral death of civilians should be proportionate to the military advantage that will be achieved by eliminating the target.[140]

d. Principle of humanity and asymmetrical warfare

The principle of "humanity" can be found in the Martens Clause in the Preamble to Hague Convention IV (l907):

> [I]n cases not included in the Regulations . . . the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized

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135 The UK Ministry of Defence, THE MANUAL OF THE LAW OF ARMED CONFLICT 24 (The UK Ministry of Defence & Oxford University Press eds. 2004).

136 *Id*. at 54–55.

137 *See* Jean-Marie Henckaerts & Louise Doswald–Beck, *The Principle of Distinction*, *in* 1 Customary International Humanitarian Law: Rules 3 (Cambridge University Press), *available at* http://assets.cambridge.org/97805218/08996/EXCERPT/9780521808996_excerpt.pdf.

138 THE MANUAL OF THE LAW OF ARMED CONFLICT, *supra* note 135, at 25.

139 *Id*. at 23–26.

140 *Id*. at 25.

> peoples from the laws of humanity, and the dictates of the public conscience.[141]

Thus, while waging war, one must be civilized and humane. Intentionally using children as human shields or storing military weapons in civilian locations are flagrant examples of inhumane actions that put non-combatants in harm's way.

VI. WHAT ARE THE LAWS OF WAR?

"Lawfare" is defined as perceived or orchestrated incidents of laws of war violations that are employed as an unconventional means of confronting a superior military power.[142] Therefore, in order to understand lawfare, we must understand the laws of war.

The most obvious link between the concepts of law and the concepts of war is the very important notion of laws of war, also referred to as "humanitarian" law. Long before the start of World War II, numerous attempts were made to codify the rules of appropriate military behavior during armed conflict.[143]

A. Ancient Laws of War

Laws of wartime conduct date back to the beginning of recorded history. In the sixth century B.C., Chinese warrior Sun Tzu suggested regulating the way wars are conducted.[144] The notion of war crimes appeared as early as 200 B.C. in the Hindu code of Manu.[145] The ancient Greeks fought many wars in which they observed rules of battle prohibiting summary execution of prisoners, attacks on noncombatants, pursuit of defeated opponents beyond a limited duration, and many other forms of warfare that are also condemned and codified today.[146]

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141 *Convention (IV) Respecting the Laws and Customs of War on Land: Regulations Concerning the Laws and Customs of War on Land*, October 18, 1907.

142 *See* Dunlap, *supra* note 14.

143 *See* Tiefenbrun, *supra* note 3, at 144–148 (providing a brief history of the laws of war); *See also* A.P.V. ROGERS, LAW ON THE BATTLEFIELD (2d. ed., Juris Publishing, 2004) (providing an overview of the laws of war).

144 Maria Trombly, *Reference Guide to the Geneva Conventions: A Brief History of the Laws of War*, SOCIETY OF PROFESSIONAL JOURNALISTS (2003), *available at* http://spj.org/gc-history.asp?.

145 *Id.*

146 Eric A. Posner, *A Theory of the Laws of War* (John M. Olin Law & Economics Working Paper No. 160), *available at* http://www.law.uchicago.edu/files/files/160.eap_.laws-of-war.pdf.

B. Seventeenth, Eighteenth, and Nineteenth Centuries and the Laws of War

In 1625, Hugo Grotius wrote *On the Law of War and Peace*, focusing on the humanitarian treatment of civilians.[147] In the eighteenth and nineteenth centuries, scholars such as De Vattel in France created rules regulating the conduct of armed conflict, and the famous Lieber Code was issued in 1863 by President Lincoln to the Union forces in the Civil War.[148] The first Geneva Convention was signed in l864 to protect the sick and wounded in wartime.[149] The Red Cross played an integral part in the drafting and enforcement of that first Geneva Convention and the Geneva Conventions of l924 and l949.[150] The St. Petersburg Declaration Renouncing the Use, In Time of War, of Explosive Projectiles Under 400 Grammes weight was enacted in l868.[151]

C. Twentieth Century and the Laws of War

The twentieth century was a banner period for the regulation of armed conflict. The Hague Peace Conferences of l899 and 1907 produced the Hague Regulations that were an official effort at codifying the rules of war.[152] Rules against perfidy were also recognized before l939 and reflect "chivalric values" that date back to medieval times when war conjured up glory, honor, and nobility.[153] After World War II, the Nuremberg Charter, the Genocide Convention, four l949 Geneva Conventions, and two l977 Protocols, human rights laws that apply during war, the Charter of the International Military Tribunal for the Far East, and other laws, were enacted to

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147 HUGO GROTIUS, DE JURE BELLI AC PACIS (1625).

148 HOWARD M. HENSEL, "*The Protection of Cultural Objects During Armed Conflicts*," *in* THE LAW OF ARMED CONFLICT: CONSTRAINTS ON THE CONTEMPORARY USE OF FORCE 44 (2007).

149 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Aug. 22, 1864, 129 Consol. T.S. 361 *reprinted in* 1 SUPPLEMENT AM. J. INT'L L. 90–92 (1907).

150 Theodor Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AM. J. INT'L L. 238, 245 (1996) (describing the role of the ICRC since the 1864 Convention).

151 St. Petersburg Declaration Renouncing the Use, In Time of War, of Explosive Projectiles Under 400 Grammes Weight, Dec. 11, 1868, 18 Martens 474 *reprinted in* 1 SUPPLEMENT AM. J. INT'L L. 95 (1907).

152 Convention Respecting the Law and Customs of War on Land, Oct. 18, 1907, annex, 1 Bevans 631, 643.

153 Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 243 (2000) (describing how values of chivalry were a "competing inspiration" for international humanitarian law).

include most of the common protections and prohibitions during wartime conduct that we know of today.[154]

The four basic principles of customary law that constitute military doctrine are "necessity," "humanity," "distinction," and "proportionality," which, as we have shown earlier, not only regulate but constrain warfare, especially as it is waged today in an asymmetrical war.[155]

VII. WHAT IS LAWFARE?

A. Derivation and Usages of the Term "Lawfare"

"Lawfare" is not a new phenomenon, and it is clearly based on a play on words between warfare and the use of law—primarily international law—and the legal process as a weapon of war. The term "lawfare" was first used in the manuscript "Whither Goeth the Law—Humanity or Barbarity."[156] The concept of lawfare was first brought to the attention of the modern world in a 2001 essay by Major General Charles J. Dunlap, Jr., Deputy Judge Advocate General for the U.S. Air Force., which he wrote for Harvard's Carr Center.[157] In that essay, Dunlap defined "lawfare" as the use of the law and the legal process as a weapon in modern warfare, either to achieve a military objective or to deny an objective to the enemy.[158] He later expanded on the definition, explaining that "lawfare" was "the exploitation

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[154] Protocol Additional of the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflict, June 8, 1977, 1125 U.N.T.S 3, 16 ILM 1391 (1977) [hereinafter Add'l Protocol I]; Protocol Additional of the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-international Armed Conflict, 1125 U.N.T.S. 609, 16 ILM 1442 (1977) [hereinafter Add'l Protocol II]; The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva I]; The Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva II]; The Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva III]; The Geneva Convention Relative to the Protection of Civilian Persons in the Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva IV]; International Military Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. No. 1589, 4 Bevans 20 (as amended April 26, 1946); Convention on the Prevention and Punishment of the Crime of Genocide (1978), 78 U.N.T.S. 277 [hereinafter Genocide Convention]; Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Annex Containing the Charter of the International Military Tribunal, Aug. 8, 1945, DEP'T ST. BULL., Aug. 12, 1945, at 222, 82 U.N.T.S. 279 [hereinafter Nuremberg Charter].

[155] *See, e.g.*, A.P.V. ROGERS, LAW ON THE BATTLEFIELD 3 (2004).

[156] John Carlson & Neville Yeomans, *Whither Goeth the Law—Humanity or Barbarity*, *in* THE WAY OUT: RADICAL ALTERNATIVES IN AUSTRALIA 155 (Margaret Smith & David John Crossley, eds. 1975).

[157] Dunlap, *supra* note 1.

[158] *Id.*

of real, perceived, or even orchestrated incidents of law-of-war violations being employed as an unconventional means of confronting" a superior military power.[159] The definition has been further expanded to include the wrongful manipulation of the legal system to achieve strategic political or military goals.[160]

Lawfare has moved beyond gaining mere moral advantages over nation states and winning lawsuits against government actors. There have been many examples of lawfare used in the past against the Belgian Congo, Ireland, the Apartheid in South Africa, and U.S. actions in Iraq.[161] 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.[162]

Lawfare 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 tem.[163]Lawfare tends to be used as a weapon against countries where the rule of law is strong.[164] It is most commonly used in asymmetrical warfare by guerrillas and terrorists who seek to affect public perception abroad and gain a moral advantage.[165]Lawfare can take the form of a legal campaign to delegitimize and frustrate the actions of a nation State dedicated to the eradication of terrorist methods. Arguably, an example of the use of lawfare at the U.N. is the effort to exclude attacks on American civilians from any international definition of State-sponsored terrorism.[166] Lawfare may in-

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159 Dunlap, *supra* note 14, at A19 (expanding the definition of Lawfare).

160 David Luban, *Lawfare and Legal Ethics in Guantanamo*, 60 STAN. L. REV. 1981, 2020–21 (2007–2008) (referencing former State Department official and current law professor John Yoo's memoir entitled War by Other Means).

161 *See* Case Concerning Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda) (Order of Dec. 19, 2005), http://www.icj-cij.org/docket/files/116/10455.pdf (Belgian Congo); Benjamin G. Davis, *Refluat Stercus: A Citizen's View of Criminal Prosecution in U.S. Domestic Courts of High-Level U.S. Civilian Authority and Military Generals for Torture and Cruel, Inhuman or Degrading Treatment*, 23 ST. JOHN'S J. LEGAL COMMENT. 503, 539 (2008) (Ireland; Apartheid in South Africa); Dunlap, *supra* note 1 (U.S. actions in Iraq).

162 Brooke Goldstein & Aaron Eitan Meyer, *"Legal Jihad": How Islamist Lawfare Tactics are Targeting Free Speech*, 15 ILSA J. INT'L & COMP. L. 395, 396 (2008–2009).

163 *See, e.g.*, Maj. Gen. Charles J. Dunlap, Jr., *Lawfare Today: A Perspective*, 3 YALE J. INT'L AFF. 146, 148 (2008) (noting a benefit of Lawfare).

164 *See* U.S. Dep't of Def., *The National Defense Strategy of the United States of America* 3 (2005), http://www.defense.gov/news/Mar2005/d20050318nds2.pdf.

165 *See, e.g.*, Nathaniel Burney, *International Law: a Brief Primer*, The Burney Law Firm, LLC, http://www.burneylawfirm.com/international_law_primer (last visited Nov. 3, 2010).

166 Brooke Goldstein, Opening Remarks at the Lawfare Conference (Mar. 11, 2010), *available at* http://www.thelawfareproject.org/l4l/opening-remarks (noting Lawfare efforts being attempted at the United Nations).

volve the law of a nation turned against its own officials or the spread of universal jurisdiction whereby one nation or an international organization hosted by that nation reaches out to seize and prosecute officials of another nation.

B. Techniques of Lawfare

There are three types of lawfare: (1) The initiation of lawsuits before courts in the international system—the International Court of Justice and the International Criminal Court; (2) the misuse of legal terminology to manipulate international institutions and create negative opinions about the enemy; and (3) the prosecution of foreign nations in domestic courts for military and civilian action.

1. Filing of malicious libel, harassment, or hate speech lawsuits to silence the enemy

Techniques of lawfare include frivolous libel and "hate speech" lawsuits brought against writers, politicians, journalists, and even cartoonists who speak publicly or satirically about issues of national security. Lawfare has been used to describe the filing of workplace harassment lawsuits against counter-terrorism experts that brief military and police officers about radical Islam.[167] The fear of these lawsuits produces silence, and at best has a chilling effect on free speech.

The United States and Israel, fearing the initiation of politically motivated lawsuits in international courts and the potential abuse of these courts in the absence of an effective system of checks and balances, have rejected participating in the International Criminal Court.[168]

One author coined this type of "lawfare" a form of "legal jihad."[169] By filing a series of malicious lawsuits in American courts and in more favorable courts abroad, suits that are designed to punish and silence those who engage in public discourse about radical Islam, or about other political issues of general public concern, the misuse of the legal system here becomes a serious weapon of defense. [170] Some Non Governmental Organizations have been influential in initiating suits over the same set of events in several different jurisdictions, thereby causing harassment of the defendants and exhaustion of their resources. This tactic is done until a favorable judg-

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167 *Id.* at 2.

168 *See* Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT'L L. 510, 525 (2003) (explaining the reluctance that certain nations feel in ratifying the I.C.C. Statute).

169 Goldstein & Meyer, *supra* note 162, at 397 (explaining how radical Islamists are using Lawfare to attack the United States).

170 *Id.*

ment of the desired suit is achieved somewhere. "In 2005, the Islamic Society of Boston (ISB) filed a lawsuit charging defamation against over a dozen defendants including the Boston Herald, Fox 25 News, counter-terrorism expert Steven Emerson, and several others . . . for publicly speaking about the Islamic Society's connections to radical Islam and for raising questions about the construction of its Saudi-funded mosque in Boston."[171]

a. Libel tourism

A growing phenomenon called "libel tourism" is another example of the use of lawfare and its silencing impact. Libel tourism is forum shopping.[172] Plaintiffs bring defamation lawsuits in plaintiff-friendly jurisdictions like England, the "libel capital of the Western world."[173] In British courts, "libel plaintiffs do not need to prove the guilt of the accused, but rather the accused must prove their own innocence."[174] This is the exact opposite of the presumption of innocence used in U.S. courts.[175]

In a libel tourism case, free speech is shut down and writers can no longer feel safe to report about suspicious activity or sources of terror. An example of this damaging use of lawfare is Sheikh Khalid Salim bin Mahfouz, who has initiated roughly forty libel cases in British courts.[176] One case involves the publication of a book called "Alms for Jihad" in which Mahfouz is accused of funding al-Qaeda.[177] Cambridge University Press published the book, but ultimately removed it from circulation in order to end the lawsuit.[178] To avoid the injustice of this kind of lawfare, the New York State Assembly in January 2008 introduced the "Libel Terrorism Protection Act" in order to ensure that foreign judgments that do not comport with American law and public policy will not be enforceable in New York.[179]

b. Hate speech cases in Europe and Canada

Lawfare is achieving a high degree of success in Canada and Europe because their judicial systems and laws do not afford their citizens the same level of free speech protection granted under the U.S. Constitution.[180]

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171 *Id.* at 398.
172 Elizabeth Samson, *Warfare Through Misuse of International Law*, BESA (Mar. 23, 2009), http://www.biu.ac.il/soc/besa/perspectives73.html.
173 *Id.*
174 *Id.*
175 *Id.*
176 Goldstein & Meyer, s*upra* note 162, at 402.
177 *Id.*
178 *Id.*
179 *Id.* at 403.
180 *Id*. at 400.

In Europe and Canada hate speech legislation and liberal libel laws, as well as a virtual codification of "Islamophobia" as a cause of action, have created an ideal framework for malicious litigants to achieve their goals.[181] The Council of Europe released Resolution 1605 asserting widespread Islamophobia and calling all member nations to "condemn and combat Islamophobia."[182]

Canada is not exempt from lawfare. Canada's laws are being used to attack the free speech rights of authors and activists. Section thirteen of the Canadian Human Rights Act (CHRA) bans the electronic transmission of material that is deemed "likely to expose persons to hatred or contempt by reason of the fact that those persons are identifiable on the basis of a prohibited ground of discrimination."[183] As a result of the Canadian hate-speech law, as well intentioned as it may have been, there has been an avalanche of "human rights" complaints in the Canadian Human Rights Commissions against outspoken critics of radical Islam and their publishers.

c. Hate speech and slander cases in the Middle East

Similarly, "Jordan charged twelve Europeans in 2008 with blasphemy, demeaning Islam and Muslim feelings, and slandering and insulting the prophet Muhammad in violation of the Jordanian Penal Code."[184] Eleven Danish journalists published a cartoon of Muhammad, and the twelfth defendant was the Dutch politician Geert Wilders.[185] The Jordanian Penal code does not place the same value on freedom of speech as Americans do because Jordanian laws are informed by religious beliefs.[186]

2. The misuse of legal terminology to sway public opinion

This mode of lawfare relies on the relative inexperience of lay people with the law and with legal process, even though they want to advance their own ideas effectively. For example, some claim that U.N. resolutions are used to gain sympathy for the cause of lawfare combatants and to intimidate their opposition. International Court of Justice (ICJ) Advisory

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181 *Id.*

182 Eur. Parl. Ass'n, European Muslim Communities Confronted with Extremism, 13th Sess., Doc. No 1605 at 9.2 (April 15, 2008), *available at* http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta08/ERES1605.htm.

183 Canadian Human Rights Act, 2010, c.H-6, § 13, *available at* http://laws.justice.gc.ca/eng/H-6/page-2.html [hereinafter CHRA] (CHRA has had a one hundred percent conviction rate on section l3 charges. The well-intentioned Canadian "hate speech" law proves to be very dangerous, violative of free speech and constitutional rights, and rather short-sighted. The United States does not adopt hate-speech laws for this very reason).

184 Samson, *supra* note 172, at 4.

185 *See id.*

186 *See id.*

Opinions are non-binding.[187] Similarly, U.N. Resolutions do not have the force of law and are an expression of sentiment. [188] However, both U.N. Resolutions and ICJ Advisory Opinions can be very effective to sway public opinion and even cause changes in international law.[189] They are often "precursors to the establishment of authoritative international law by way of a U.N. Convention."[190] For example, every year since 1999, the U.N. has passed a Resolution on Combating Defamation of Religions.[191] This resolution is another example of a political attempt to stifle free speech and any criticism of Islam. International law attorney Elisabeth Samson argues that defamation of a religion is a legal impossibility because a religion is a set of beliefs and not a "person, business, group or government" all of which are tangible entities required by the legal definition of defamation.[192] This is another example of the misuse of legal terminology to manipulate the public.

a. Lawfare to sway public opinion against the United States

Lawfare has been used as a weapon of war to sway public opinion against the U.S. military, which is the most powerful military in the world. Lawfare is "often used to fight a stronger opponent asymmetrically, targeting the opponent's vulnerabilities such as domestic public opinion."[193] During the 2003 Iraqi conflict, allied forces were the target of a persistent lawfare campaign.[194] International activists used legal means to try to declare military action illegitimate.[195] In coordination with the Iraqi authorities, human shields were positioned at prospective targets to disrupt American war plans.[196] Saddam Hussein's Fedayeen attacked American and British troops from civilian areas in an attempt to cause civilian casualties.[197] The Iraqi Information Ministry conducted daily briefings in which they accused American forces of wartime atrocities.[198] However, this information campaign had limited success because of the numerous Western journalists em-

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187 *See Advisory Jurisdiction*, INTERNATIONAL COURT OF JUSTICE, *available at* http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=2 (defining advisory opinions and advisory proceedings).

188 Samson, *supra* note 172.

189 *See id.*

190 *Id.*

191 *See id.*

192 *See id.*

193 *Lawfare, the Latest in Asymmetries—Part Two*, COUNCIL ON FOREIGN RELATIONS (May 22, 2003), *available at* http://www.cfr.org/publication/6191.

194 *See id.*

195 *Id.*

196 *Id.*

197 *Id.*

198 *Id.*

bedded with allied forces.[199] Nevertheless, it was convincing to many in the Arab world, which has lead to the escalation of negative public opinion there and around the world with regard to the United States. [200]

b. Lawfare to sway public opinion against Israel

More recently, new evidence has been presented of Hamas using Palestinian children as human shields, and of Hamas establishing command centers and Kassam launch pads in and near more than one hundred mosques and hospitals during Operation Cast Lead in the Gaza Strip, which are hardly considered military targets under the international laws of war.[201]

This lawfare tactic against Israel is not new and is all too effective in swaying public opinion globally. Israel is deemed by many to be the aggressor nation rather than a victim.[202] During the *Al-Aqsa* intifada, Palestinian children were used as human shields to create martyrs for the media.[203] Media reports highlighted instances in which Palestinian children were killed or injured by Israeli troops or policemen, generating much negative criticism all over the world of Israeli policies.[204] Few in the Western world at that time, in 2000, thought through the chaos they saw on the news or even considered whose interests were being served by the violence. Palestinian leadership accused Israel of committing human rights violations resulting in the fatalities of these children. However, little attention was paid to the core questions of how and why the children were in harm's way in the first place. This is an example of lawfare that is unfortunately working all too well due to the international community's blurring of an important distinction between cause and effect.

3. The prosecution of foreign nations in domestic courts for military and civilian action: universal jurisdiction abuses

Universal jurisdiction is exercised by states claiming that it is within their moral obligation to mankind to prosecute individuals who allegedly committed crimes outside the boundaries of the prosecuting state, regardless of any relation of the person with that state.[205] Each state has the responsibility to protect populations from genocide, war crimes, and crimes against

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199 *Id*.

200 *Id.*

201 Yaakov Katz, *'Hamas Used Kids as Human Shields'*, JERUSALEM POST, Mar. 15, 2010, http://www.jpost.com/Israel/Article.aspx?id=171009.

202 *See, e.g.*, Tony Judt, *Israel without Clichés*, N.Y. TIMES, June 10, 2010, at A31.

203 Justus Reid Weiner, *The Use of Palestinian Children in the Al- Aqsa Intifada*, JERUSALEM LETTER/VIEWPOINTS, November l, 2000, http://www.jcpa.org/jl/vp441.htm.

204 *Id.*

205 Samson, *supra* note 188.

humanity.[206] However, many, including Henry Kissinger, denounce universal jurisdiction as a breach of state sovereignty and claim it may produce a serious rise in the tyrannical power of judges.[207]

The misuse or abuse of universal jurisdiction laws can result in lawfare. For example, Belgium's attempt to prosecute former President Bush and Prime Minister Tony Blair for war crimes as well as Jordan's demand for the extradition of a Dutch politician to stand trial for blasphemy of Islam have been cited as examples of lawfare.[208] The recent publication and media bashing of Richard Goldstone's U.N. Investigative Report on the Gaza War resulted in an international outcry, especially by the Jewish community in South Africa and in the United States.[209] Richard Goldstone and Christine Chinkin, the authors of the Report, were accused of engaging in lawfare because the Report accused Israel of war crimes.[210] Some have even argued that the Nuremberg Trials could be called a kind of universal jurisdiction lawfare against German officials following the actual warfare of World War II.[211]

A notable U.S. official often cited in connection with lawfare is Kissinger, who faced questioning and possible prosecution in France, in Brazil, and then in England, as initiated by the Spanish magistrate Baltasar Garzon—for his earlier attempt to prosecute Chilean dictator Augusto Pinochet.[212] Garzon claimed Kissinger was involved as a Nixon Administration

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206 *Id.*

207 *Id.*

208 Brooke Goldstein, Opening Remarks at the Lawfare Conference (March 11, 2010), http://www.thelawfareproject.org/141/opening-remarks.

209 Avrom Krengel, *Richard Goldstone, We Deplore Your Report*, THE GUARDIAN, May 5, 2010, *available at* http://www.guardian.co.uk/commentisfree/2010/may/05/avrom-krengel-richard-goldstone.

210 Barry Bearak, *South African Judge May Be Kept From Grandson's Bar Mitzvah*, N.Y. TIMES, April 17, 2010, at 1; *see also Understanding the Goldstone Report*, UNDERSTANDING THE GOLDSTONE REPORT, http://www.goldstonereport.org (last visited Nov. 3, 2010) ("[T]he report will play a key role in the effort to specifically target Israeli troops in both boycott movements and *lawfare* attacks, and more broadly to establish a reigning paradigm of international law as applied to 21st century asymmetrical conflict.") (emphasis added); Alan Dershowitz, *The Case Against the Goldstone Report: A Study in Evidentiary Bias*, UNDERSTANDING THE GOLDSTONE REPORT, Oct. 27, 2010, http://www.goldstonereport.org/pro-and-con/critics (last visited Nov. 3, 2010) (calling the report "far more biased against Israeli than Palestinian witnesses, and far more willing to draw adverse inferences of intentionality from Israeli conduct and statements than from comparable Palestinian conduct and statements. He actually called the report "a shoddy piece of work, unworthy of serious consideration by people of good will, committed to the truth.").

211 *Compare* SUSAN TIEFENBRUN, DECODING INTERNATIONAL LAW: SEMIOTICS AND THE HUMANITIES 158–59 (2010) (discussing the Nuremburg trials as an example of retributive justice) *with* PETER MAGUIRE, LAW AND WAR: INTERNATIONAL LAW & AMERICAN HISTORY 159–78 (2010) (describing parts of the Nuremburg trials as a public relations ploy to charge the Germans with war crimes).

212 *See* CHRISTOPHER HITCHENS, THE TRIAL OF HENRY KISSINGER (Verso 2001).

official with a South American program of abductions, torture, and assassinations known as Operation Condor.[213] Kissinger subsequently warned that universal jurisdiction risks "substituting the tyranny of judges for that of governments."[214]

Another example of this kind of potential misuse of universal jurisdiction is the Palestinian Center for Human Rights' petition to the Spanish Court against two Israeli officials, National Infrastructure Minister and former Defense Minister Binyamin Ben-Eliezer and former I.A.F. and I.D.F. Chief of Staff Dan Halutz. The Palestinian petition sought investigation of the two Israeli officials for alleged crimes against humanity for their involvement in the assassination of a Hamas operative in 2002.[215] This kind of a prosecution could result in the undermining of international sympathy for the Israeli people as well as citizens all over the world in their fight against terrorism.[216]

VIII. CONCLUSION

Domestic and international legal decisions influence public opinion, and laws of war affect the military's entire approach to waging war. The abuse of the legal system, of human rights laws, and of humanitarian laws by lawfare undermines the overarching goal of world peace by eroding the integrity of the legal system and by weakening the global establishment and enforcement of the rule of law. The manipulation of Western court systems, the misuse and abuse of European and Canadian hate speech laws and libel law procedures can destroy the very principles of free speech that democracies hold most precious. Lawfare has limited public discussion of radical Islam, created unfair negative publicity against freedom loving countries, and has done so curiously without reproach from the American Civil Liberties Union,[217]that typically and traditionally protects democracy.

Lawfare is not a benign weapon of war. It bases its strategy on using the law to gain negative publicity for the enemy country. Lawfare is an assault on the people of free nations to exercise their constitutional rights to free speech under both international and domestic laws. Lawfare users are fighting freedom and attacking those who have the right to speak and act openly. The weapon they use is the rule of law that was originally created

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213 *See* Katherine Iliopoulos, *Spain's Memory War: Judge Halts Attempt to Enforce Justice for Franco's Killings*, CRIMES OF WAR PROJECT (Nov. 19, 2008), http://www.crimesofwar.org/news-spain.html.

214 HENRY KISSINGER, DOES AMERICA NEED FOREIGN POLICY? 273 (Simon and Schuster 2001).

215 *See* Samson, *supra* note 172, at 2.

216 *Id.*

217 Goldstein & Meyer, *supra* note 162, at 409 (discussing the lack of activity from the ACLU).

not to quiet the speech of the innocent, but more to subdue dictators and tyrants. Ironically, it is this very same rule of law that is being misused to empower these tyrants and to thwart free speech about national security and other public concerns. "Lawfare" is an attack on the sovereignty of democratic States. "Lawfare" is a pun, a not so funny play on words based on the shared power of the law that is as strong as the power of military might, especially when it is misused and abused. Continued use of lawfare will erode the integrity of the national and international legal systems and result in the unfortunate and increased use of warfare to resolve disputes.