

## WHOSE LAWFARE IS IT, ANYWAY?

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*The growing interest in “lawfare,” particularly as it applies to American and Israeli military operations, requires a realistic assessment of the nature of the alleged threat and the responses to it. The popular view of lawfare, put forward by neo-conservative commentators and some military lawyers, is exceptionally myopic, oblivious to how other nations view international justice, and disingenuous regarding America’s own aggressive use of the law to confront perpetrators of atrocity crimes during times of armed conflict. Lawfare critics cannot have it both ways, arguing that the United States is being unfairly singled out and erroneously attacked in judicial forums for allegedly illegal conduct and then contending that unconventional threats permit responses and military strategies that diverge from well-established international law. Perhaps the most significant example of major-power lawfare today, at least from an African perspective, is the International Criminal Court and its five situations under investigation on the African continent.*

Greater care needs to be taken with use of the term “lawfare,” which in common parlance has come to describe how weaker nations, civil society, insurgents, terrorists, and scholars exploit domestic law, international law, and judicial institutions to influence the foreign and military policies of major powers.<sup>1</sup> Often, the target becomes U.S. or Israeli policy. Lawfare is a particular form of asymmetrical warfare using the rule of law, or a particular interpretation of the law, to thwart the use of military power

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<sup>1</sup> David B. Rivkin & Lee Casey, *Lawfare*, WALL ST. J., Feb. 23, 2007, at A11 (defining lawfare as “tool of war” and its growing use in international claims, with purpose of “gain[ing] a moral advantage over your enemy in the court of world opinion”); DAVID KENNEDY, *OF WAR AND LAW* 13 (2006) (“To say that war is a legal institution is not only to say that war has also become an affair of rules or the military a legal bureaucracy. It is also to say something about the nature of the politics continued by military means.”); David Luban, *Lawfare and Legal Ethics in Guantanamo*, 60 STAN. L. REV. 1981, 2020 (2008) (“This would be in keeping with the concept of ‘lawfare,’ by which is meant the use of international law and litigation as a method of gaining military advantage. Some commentators regard lawfare as an insidious tool of America’s enemies, including internationalist NGOs with an agenda to promote.”).

of far superior means. “Lawfare,” as described by a Council on Foreign Relations study group I participated in several years ago, is the strategy of using or misusing law as a substitute for traditional uses of military force in order to achieve military objectives.<sup>2</sup>

I wrote in the *Financial Times* on May 6, 2004, that,

[The] central premise [of “lawfare”] advances a conspiracy to constrain the use of US military force worldwide by using the ‘soft’ weapon of international law and its ‘sovereignty-bashing’ treaties as well as anti-US interpretations of principles of customary international law . . . The military police reservist who ‘softens up’ detainees for another round of enlightened interrogation may not have the foggiest notion about this theoretical joust [about lawfare] in the halls of power. But the top civilian and military leaders know, fear and resist ‘lawfare’—and this, in turn has clearly undermined their respect for international law.<sup>3</sup>

Most of the commentary on lawfare focuses on the alleged threat it poses to U.S. military armed forces globally and Israel’s military superiority in the Middle East. The American/Israeli-centric definition and view of lawfare might lead one to believe that it is only the United States and its ally, Israel, that stand imperiled before the onslaught of weaker nations using judicial processes to challenge U.S. or Israeli military might. The great fear—and fear aptly describes the intellectual anxiety about lawfare—is that the justified use of American or Israeli military force will be thwarted by aggressive advocacy of international law in courtrooms, U.N. forums, and the world media.

I want to suggest that this view of lawfare is exceptionally myopic, oblivious to how other nations view international justice, and disingenuous regarding America’s own aggressive use of the law to confront perpetrators of atrocity crimes—genocide, crimes against humanity, and war crimes—particularly during times of armed conflict. The lawfare scare risks creating a slippery slope towards illegal and perhaps criminal conduct on the part of two great nations and their civilian and military leadership. The aftermath of 9/11, namely, the so-called “war on terror,” has generated so much fear that some appear to fear the law itself.<sup>4</sup> International law, or, for that matter, federal criminal or military law, indeed may challenge the projection of American armed forces somewhere in the world because of the character of the particular military action or its transnational application. Why is anyone

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<sup>2</sup> *Lawfare, the Latest in Asymmetries – Rapporteur’s Report*, Council on Foreign Relations, March 18, 2003, at [https://secure.www.cfr.org/publication/5753/lawfare\\_the\\_latest\\_in\\_asymmetries\\_rapporteurs\\_report.html](https://secure.www.cfr.org/publication/5753/lawfare_the_latest_in_asymmetries_rapporteurs_report.html).

<sup>3</sup> David Scheffer, *The Legal Double Standards of Bush’s War*, *FIN. TIMES*, May 6, 2004, at 21.

<sup>4</sup> See JACK GOLDSMITH, *THE TERROR PRESIDENCY* (2007).

surprised that foreign governments, non-governmental organizations, and international organizations, such as the United Nations, will fight back with the law in legal settings or simply in the media? Even terrorist entities may use propaganda in the media and in the courts to jump on the lawfare wagon.<sup>5</sup>

Several distinguished Judge Advocate General officers and neo-conservative legal scholars have authored articles revealing the self-evident elements of lawfare and practically pleading for relief from such tactics so that the United States can act unhindered, or at least devoid of criticism, in fighting terrorist threats.<sup>6</sup> They criticize non-compliance with the law of war by foreign enemies and usually, but not always, confirm the need for U.S. compliance with the law of war.<sup>7</sup> But that acknowledgement is drowned

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<sup>5</sup> Brooke Goldstein & Aaron Eitan Meyer, "Legal Jihad": *How Islamist Lawfare Tactics Are Targeting Free Speech*, 15 ILSA J. INT'L & COMP. L. 395, 397 (2009) (discussing different strategies employed by "Islamic states, organizations and individuals" who are using lawsuits "as a weapon of war against counter-terrorism experts, law enforcement personnel, politicians, and anyone working to disseminate information on Islamist terrorism and its sources of financing").

<sup>6</sup> Charles J. Dunlap, Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21<sup>st</sup> Century Conflicts*, (Carr Center for Human Rights, John F. Kennedy Sch. of Gov't, Harvard U., Working Paper, 2001), available at <http://www.ksg.harvard.edu/cchrp/Web%20Working%20Papers/Use%20of%20Force/Dunlap2001.pdf> [hereinafter Dunlap, *Law and Military Interventions*]; Charles J. Dunlap, Jr., *Lawfare: A Decisive Element of 21<sup>st</sup>-Century Conflict?*, 54 JOINT FORCE QUARTERLY 34 (2009); Charles J. Dunlap, Jr., *Lawfare Today: A Perspective*, 3 YALE J. INT'L AFF. 146 (2008) [hereinafter Dunlap, *Lawfare Today*]; Charles J. Dunlap, Jr., *Lawfare Amid Warfare*, WASH. TIMES, Aug. 3, 2007, at A19, available at <http://www.washingtontimes.com/news/2007/aug/3/lawfare-amid-warfare> [hereinafter Dunlap, *Lawfare Amid Warfare*]; Laurie R. Blank, *The Application of IHL in the Goldstone Report: A Critical Commentary*, 12 YEARBOOK OF INT'L HUMANITARIAN L. (forthcoming 2009); Kelly D. Wheaton, *Strategic Lawyering: Realizing the Potential of Military Lawyers at the Strategic Level*, 2006 ARMY LAW. 1; David B. Rivkin, Jr. & Lee A. Casey, *The Rocky Shoals of International Law*, 62 THE NAT'L INT. 35 (2000) [hereinafter Rivkin & Casey, *The Rocky Shoals*]; David B. Rivkin, Jr., & Lee A. Casey, *Lawfare*, WALL ST. J., Feb. 23, 2007, at A11 [hereinafter Rivkin & Casey, *Lawfare*]; Andrew C. McCarthy, *Lawfare Strikes Again*, NAT'L REV. ONLINE, (Jun. 12, 2007, 10:10 AM), <http://www.nationalreview.com/articles/221258/lawfare-strikes-again/andrew-c-mccarthy> (last visited Nov. 4, 2010); Anne Herzberg, *NGO "Lawfare": Exploitation of Courts in the Arab-Israeli Conflict*, NGO MONITOR (Sept. 2008); 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 L. & POL'Y 241 (2007); Richard L. Cravatts, "Lawfare:" *Another Weapon in the Jihad Against Israel*, AMER. CHRONICLE, (Jan. 12, 2009), <http://www.americanchronicle.com/articles/view/87526> (last visited Nov. 4, 2010); Scott Horton, *Lawfare Redux*, HARPER'S MAG., Mar. 12, 2010, <http://www.harpers.org/archive/2010/03/hbc-90006694> (last visited Nov. 4, 2010).

<sup>7</sup> See generally *supra* note 6 and accompanying text (E.g., Rivkin, & Casey, *Lawfare* (criticizing use of lawfare by al-Qaeda and the Taliban while suggesting the United States fight lawfare legally and politically) but see Dunlap, *Lawfare Amid Warfare* (implying that breach of the laws of war may be justified as a "more humane approach to kill bad guys when the opportunity presents itself even though some civilian losses may also occur").

under tidal waves of accusations that someone out there is trying to use the rule of law to vastly complicate, perhaps even reverse, the projection of American power.<sup>8</sup> It is an argument that melds easily into the belief that the United States is an exceptional nation entitled to exceptional privileges in the conduct of warfare and exceptions to the principles of international law. If the United States is an exceptional nation, then how dare others throw the law books at the United States when its mission is so vital both to the American people and, by extension, to the free world?

I hope I am exaggerating, but I do so to make a fundamental point: When one undertakes a detailed analysis of asymmetrical warfare morphing into lawfare against the United States or Israel, there remains the need to objectively examine military conduct against a reasonable interpretation, and not re-interpretation, of international law. The key reasoning should be to use the law as a shield against the accusations that are the weapons of lawfare. As some lawfare critics themselves recognize, so often the allegations are misguided and ill-informed interpretations of international law, with little understanding of military doctrine.<sup>9</sup>

Yet the impression left by so many in the commentariat is that the United States is intimidated by the allegations of lawfare operatives to such an extent that American officials are practically paralyzed by the experience, incapable or unwilling to defend, or inexplicably tardy in defending their actions as being in full compliance with reasonable interpretations of both federal and international law.<sup>10</sup> The strategy employed by these architects of fear is largely to shoot the messenger rather than confront the legal challenges conveyed by the messenger, however annoying or even dangerous they may be, with confidence and integrity.<sup>11</sup> They have created the straw man of lawfare to avoid answering the tough questions about the legality of foreign and military policies and operations.<sup>12</sup> Many in the com-

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<sup>8</sup> See generally *supra* note 6 and accompanying text; Clare M. Lopez, *SEALs Case Shows How Terrorists Use "Lawfare" to Undermine U.S.*, HUMAN EVENTS (Mar. 8, 2010), <http://www.humanevents.com/article.php?id=35934>.

<sup>9</sup> See Dunlap, *Law and Military Interventions*, *supra* note 6, at 21 (discussing the "incomplete understanding" of the laws of war by military people) See also Herzberg, *supra* note 6, at 6 (noting a lack of understanding of the laws of war by the NGOs that attempt to take advantage of universal jurisdiction).

<sup>10</sup> See Dunlap, *Law and Military Interventions*, *supra* note 6, at 35–37 (discussing need for cooperation); Dunlap, *Lawfare Today*, *supra* note 6, at 152–53 (commenting on challenge to the national security community); Phillip Carter, *Legal Combat: Are Enemies Waging War in Our Courts?*, SLATE MAGAZINE (Apr. 3, 2005, 5:51 PM), <http://www.slate.com/default.aspx?id=3944&da=&qt=%22legal+combat%22&submit.x=0&submit.y=0> (noting the administration's fear of lawfare).

<sup>11</sup> See Carter, *supra* note 10; Rivkin & Casey, *The Rocky Shoals*, *supra* note 6, at 35.

<sup>12</sup> See generally Rivkin & Casey, *The Rocky Shoals*, *supra* note 6 (discussing the use of international law against the United States).

mentariat recoil at the entirely predictable legal challenges and second-guessing by critics threatening the implementation of military policies, particularly against terrorists.<sup>13</sup>

The critique of lawfare would be more sustainable if the George W. Bush Administration had not waged the Iraqi War on false premises and had not engaged in years of detention, interrogation, and military commission practices that attracted significant criticism as illegal under international law and even unconstitutional under U.S. law.<sup>14</sup> The Obama Administration, despite its new policy pronouncements of respect for international law, has continued the use, albeit reformed, of the military commissions and prolonged detentions without trial of some terrorist suspects. It has held certain individuals long after they were determined not to be terrorists or other threats to national security. The Justice Department recently prosecuted one child soldier before a military commission. All of this does not help the cause of elevating the United States out of the ditch the Bush team had dug.<sup>15</sup>

The credibility of protestations over lawfare within the international community would be significantly enhanced if not for these realities. Much of the critique of lawfare aims at those who would challenge the tactics of the so-called “war on terror” with judicial responses. One gets the impression that the American position is so weak under international law that officials, and their apologists, are flailing at those who logically resort to the courts to enforce international law, particularly as it is embodied within U.S. federal law, as well as the constitutional rights of detainees.

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<sup>13</sup> Transcript, *Lawfare, the Latest in Assymetrics*, Council on Foreign Relations (Mar. 18, 2003), available at [http://www.cfr.org/publication/5772/lawfare\\_the\\_latest\\_in\\_asymmetries.html](http://www.cfr.org/publication/5772/lawfare_the_latest_in_asymmetries.html).

<sup>14</sup> See generally M. CHERIF BASSIOUNI, *THE INSTITUTIONALIZATION OF TORTURE BY THE BUSH ADMINISTRATION* (2010); PHILIPPE SANDS, *TORTURE TEAM: RUMSFELD’S MEMO AND THE BETRAYAL OF AMERICAN VALUES* (2008); JORDAN J. PAUST, *BEYOND THE LAW: THE BUSH ADMINISTRATION’S UNLAWFUL RESPONSES IN THE “WAR” ON TERROR* (2007); JACK L. GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* (2007); JANE MAYER, *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS* (2008) (discussing practices that occurred during the Bush administration).

<sup>15</sup> Harold Koh, Legal Adviser, U.S. Department of State, *The Obama Administration and International Law*, Address before the Annual Meeting of the American Society of International Law (Mar. 25, 2010), available at <http://www.state.gov/s/l/releases/remarks/139119.htm>; Dahlia Lithwick, *The Sins of Guantanamo: We’re Keeping Detainees in the Camp Because We’re Afraid of Things They Haven’t Done Yet?*, SLATE MAGAZINE (Jan. 26, 2010, 6:29 PM), <http://www.slate.com/id/2240625>; Charlie Savage, *Child Soldier for Al Qaeda is Sentenced for War Crimes*, NY TIMES, Nov. 2, 2010, at A16; DAHLIA Lithwick, *The Real Tragedy of Gitmo: Why Khadr Shouldn’t be Tried There*, NEWSWEEK, (Aug. 12, 2010), <http://www.newsweek.com/2010/08/12/why-khadr-shouldn-t-be-tried-at-guantanamo.html>.

The truer strategy would be to confront lawfare with the confidence of a nation using military force in full compliance with the law of war and with international humanitarian law.<sup>16</sup> This strategy requires hard work and the will to demonstrate that American policies, whether they are related to the use of military force or to how the United States deals with detained suspects of terrorism, in fact comply with international law. But this must not be a strategy that figures out some way to violate the law and still justify such violations. If that is the objective, then one needs to argue for new or amended laws and comply with existing law until such new or amended laws come to pass. In the meantime, civilian and military officials who violate the law should be investigated and, if merited, prosecuted in federal and military courts.

Lawfare critics cannot have it both ways, arguing on the one hand that the United States is being unfairly singled out and erroneously attacked in judicial forums for allegedly illegal conduct and, on the other hand, contending that unconventional threats permit responses and military strategies that diverge from well-established international law. Either the United States, as the world's major military, economic, and democratic power, can confidently and vigorously defend its actions under reasonable interpretations of international law, and thus defeat lawfare as it is waged through the media, in law journals, and in the courtrooms, or it can cower in the face of lawfare and appear utterly intimidated by the prospect of having to explain its actions under the rule of law. Either the United States acts within the parameters of international law and federal law, or it deviates from legal principles and international treaties long recognized as the bedrock of America's moral and legal standing in the world.

The messiness that lawfare imposes is a reality that everyone should accept. Simply alleging lawfare, as if it were some evil design, does nothing to enhance American security or create a sustainable response to false or ill-informed allegations. Policymakers must not use their annoyance with lawfare as the pretext for conduct they suspect may diverge from international law, or at least arguably does so to the extent that lawfare activists actually have credible arguments to make, ones that deserve well-reasoned responses.

Lawfare is neither a uniquely American nor an Israeli concern.<sup>17</sup> The commentariat overlook that whatever argument is made in opposition to lawfare is also available to other nations in their relationships with the United States and Israel. Much of the world easily would identify the United

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<sup>16</sup> See, e.g., Davida E. Kellogg, *International Law and Terrorism*, MIL. REV. 50, 50 (Sept.–Oct. 2005) (stating that the United States should develop its own comprehensive and proactive law fighting doctrine).

<sup>17</sup> *Id.* (stating that any members of the International Law of Armed Conflict can use lawfare as a powerful weapon in the Global War on Terrorism).

States as the primary architect and proponent of lawfare.<sup>18</sup> In their eyes, the definition of “lawfare” would more suitably be defined as stronger nations using judicial processes to challenge weaker nations and win advantages otherwise unattainable, or undesired, through the use of raw military power or political compromise.<sup>19</sup> In fact, some would view the American role during the last two decades as being at the forefront of law-building colonialization throughout much of the world, including the nations that were liberated with the end of the Cold War and third world countries burdened with corruption and vastly underdeveloped legal systems.<sup>20</sup> Further, the deceptive manner in which the United States intervened in Iraq in 2003 and then occupied it in defiance of elements of occupation law surely left a bitter legacy, making charges of lawfare pale in comparison.<sup>21</sup>

I plead guilty to being a major perpetrator of lawfare, on behalf of the U.S. Government, during the 1990s. My mission, both as senior adviser and counsel to the U.S. Permanent Representative to the United Nations, and then as America’s first Ambassador at Large for War Crimes Issues, was to use the power of the United States to build international and hybrid criminal tribunals that would subject the leaders of other nations and rebel movements engaged in warfare, including internal armed conflicts, to international criminal justice. I used the law aggressively and continuously and sometimes such actions served as at least a partial rationale for avoiding the use of American armed might or more political negotiations. From the perspective of the Serbs, the Hutus, the Revolutionary United Front in Sierra Leone, the Khmer Rouge in Cambodia, and the Indonesian Government, the tribunal-building endeavors of the 1990s and the subsequent tracking down of alleged war criminals were exercises in lawfare on steroids.<sup>22</sup> Objections from indigenous parties bedeviled every tribunal-building exercise.<sup>23</sup> The United States, its major power allies, and the U.N. Security Council im-

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<sup>18</sup> See Gideon M. Hart, Note, *Military Commissions and the Leiber Code: Toward a New Understanding of the Jurisdictional Foundations of Military Commissions*, 203 MIL. L. REV. 1, 15 (2010) (stating that one of the first instances in which lawfare was used took place in the United States in 1862 as a response to guerilla activity in Missouri).

<sup>19</sup> *Id.* at 15–16 (describing “lawfare” as the process of using military commissions to target individuals who are actively at arms against the U.S. Government).

<sup>20</sup> See Walter Laqueur, *After the Cold War: The Euphoria did not Last*, AMERICA.GOV (Apr. 1, 2006), <http://www.america.gov/st/peacesec-english/2006/April/20080522121256WRybakcuH8.543032e-02.html> (discussing the central role of the United States in international peace keeping after the Cold War).

<sup>21</sup> See David Scheffer, *Beyond Occupational Law*, 97 AM. J. INT’L L. 842, 851 (2003) (discussing the legal risk the United States took when it opposed the U.N. Security Council mandated mission and intervened in Iraq).

<sup>22</sup> DAVID SCHEFFER, *ALL THE MISSING SOULS: THE BIRTH OF INTERNATIONAL JUSTICE* (Princeton University Press forthcoming 2011).

<sup>23</sup> *Id.*

posed judicial processes on warring parties throughout the 1990s.<sup>24</sup> These included the International Criminal Tribunals for the Former Yugoslavia and Rwanda, the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, and the U.N. courts set up in East Timor and Kosovo.<sup>25</sup> Weak nations had to swallow essentially what the powerful nations imposed upon them through the creation of these tribunals, which held leaders responsible for violations of international criminal law.<sup>26</sup> Through the years, defense counsels have argued that the tribunals are illegitimate under U.N. law and international law, and that the judges have misinterpreted the substantive law in violation of the rights of their clients.<sup>27</sup> One can certainly understand if Serbs, for example, view the International Criminal Tribunals for the Former Yugoslavia (ICTY) as a judicial institution imposed by the major NATO powers and if they further believe that the ICTY wrongfully adjudicated that the actions of their civilian and military leaders during the Balkans war were in violation of international law.<sup>28</sup>

The commentariat often point to the ICTY inquiry into the NATO bombings during the Kosovo conflict as an example of how lawfare is used to second-guess major power decision-making on targeting.<sup>29</sup> Questions surrounding the legality of the targeting decisions arose very early during

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> See generally INTERNATIONALIZED CRIMINAL COURTS AND TRIBUNALS: SIERRA LEONE, EAST TIMOR, KOSOVO, AND CAMBODIA (Cesare P.R. Romano, André Nollkaemper & Jann K. Kleffner eds., 2004) (discussing the practice and application of the Sierra Leone, East Timor, Kosovo, and Cambodian tribunals); JOHN R.W.D. JONES, THE PRACTICE OF THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA (2d ed. 2000) (discussing the practice and application of the ICTY and ICTR).

<sup>27</sup> See WILLIAM A. SCHABAS, THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE 50, 53, 64 (2006) (discussing how multiple defendants have raised issues on both legitimacy and interpretation of international law; “[t]he principles set out . . . have been upheld in . . . rulings on challenges to the establishment of both the ICTY [*Milosevic* (IT-02-54-PT)] and the ICTR [*Kanyabashi* (ICTR-96-15-T)]”; “[t]he issue [of the tribunal’s legitimacy] has returned from time to time [*Kordic* (IT-95-14/2-PT)] . . .”; “defendants have argued that the tribunals should not rely upon interpretations that are inconsistent with customary international law [*Niyitegeka* (ICTR-96-14-A)].”).

<sup>28</sup> See Diane F. Orentlicher, *Shrinking the Space for Denial: The Impact of the ICTY in Serbia*, OPEN SOCIETY JUSTICE INITIATIVE, 25–35 (May 2008), [http://www.soros.org/initives/justice/focus/international\\_justice/articles\\_publications/publications/serbia\\_20080520/serbia\\_20080501.pdf](http://www.soros.org/initives/justice/focus/international_justice/articles_publications/publications/serbia_20080520/serbia_20080501.pdf) (discussing how the early “anti-Hague” and “anti-Western” sentiment toward the ICTY in Serbia stemmed from the Nationalist government fed propaganda).

<sup>29</sup> See, e.g., Human Rights Watch, *Civilian Deaths in the NATO Air Campaign* (February 2000), <http://www.hrw.org/legacy/reports/2000/nato/>; the series of scholarly articles on *NATO’s Kosovo Intervention* in 93 AJIL 824–862 (October 1999); Dunlap, *Law and Military Interventions*, at 15, 17; Robert S. Dudley, *Warfare v. Lawfare*, *airforce-magazine.com*, May 19, 2010, <http://www.airforce-magazine.com/MagazineArchive/Pages/2010/June%202010/0610edit.aspx>.

the bombing campaign and should not have been surprising.<sup>30</sup> In reality, once Washington and its NATO partners organized their review of the targeting decisions, their response to the ICTY demonstrated a professional and confident assertion of the facts and the careful review that went into each targeting decision prior to execution. No ICTY indictments were issued and, indeed, the ICTY prosecutor found no basis for investigating NATO for war crimes violations.<sup>31</sup> Aggravated, but not intimidated by the ICTY inquiries, the Clinton Administration worked with NATO headquarters to respond to every question posed by the ICTY Prosecutor.<sup>32</sup> The legal persuasion and sound reasoning behind every NATO bombing run under inquiry presents a good example of a response to lawfare. In my view, the exercise demonstrated that calm, reasoned responses to legal challenges will show U.S. compliance with international law rather than an attitude of fear, if not panic, at the thought of having to justify one's actions under the rule of law.

Perhaps the most significant example of major-power lawfare today is the International Criminal Court (ICC). The commentariat believe that the ICC may be used by weak nations or by a rogue prosecutor to isolate and shame the United States.<sup>33</sup> They fear that lawfare will prevent Washington from using its military power for just cause through the threat of investigation and prosecution of its often controversial policies and actions.<sup>34</sup> In other words, the weak will intimidate the strong—the United States or Israel—into submission by threatening ICC scrutiny.<sup>35</sup> The ICC Prosecutor's Iraq

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<sup>30</sup> See Int'l Crim. Trib. for the Former Yugoslavia [ICTY], Office of the Prosecutor, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, ¶¶ 28–56, available at <http://www.icty.org/sid/10052> (discussing the legality of NATO's bombing campaign targeting during the Kosovo conflict) (last visited Nov. 4, 2010).

<sup>31</sup> *Id.* ¶¶ 28–56, 90–91 (discussing the bombing campaign targeting decisions, NATO's response, and recommendations of the committee).

<sup>32</sup> See DAVID SCHEFFER, *ALL THE MISSING SOULS: THE BIRTH OF INTERNATIONAL JUSTICE*, Chapter 10: Crime Scene Kosovo (Princeton University Press, forthcoming 2011).

<sup>33</sup> See generally, e.g., W. Chadwick Austin & Antony Barone Kolenc, *Who's Afraid of the Big Bad Wolf? The International Criminal Court as a Weapon of Asymmetric Warfare?* 39 VAND. J. TRANSNAT'L L. 291 (2006) (discussing how “[a]dversaries of the United States could potentially use three asymmetric tactics to exploit the ICC: (1) misusing the Court's investigative processes, (2) filing questionable or fraudulent complaints for the Court to investigate, and (3) employing mass media in ICC cases to intensify international pressure against the United States” in order to isolate the United States from its coalition in the war on terror).

<sup>34</sup> *Id.* at 335–338 (discussing how one of the main objectives of adversaries of the United States will be to use the threat of the ICC to force policymakers and military leaders to second guess their policy implementation and military actions).

<sup>35</sup> *Id.* at 335–344 (discussing how the “adversaries of the [strong] will [use the threat of the ICC] to achieve three main objectives to combat the war on terror: (1) creating risk-averse

inquiry, however, led to no action against either the United States or the United Kingdom.<sup>36</sup> Nor has anything yet emerged from the ICC's preliminary review of the Rome Statute Article 12(3) declaration lodged by the Palestinian National Authority on January 22, 2009, regarding Israeli actions in the Gaza Strip in early 2008.<sup>37</sup> No one should be surprised that the ICC was presented with these issues, but neither should lawfare critics respond by simply trying to shoot the messenger. There are substantive questions about the conduct of warfare that must be addressed and the real task is to figure out precisely how that will be accomplished with the credibility and confidence that should be expected of great nations.

It is hardly surprising that some foreign officials view strong nations as having employed the ICC against weaker nations. The five situations under investigation by the ICC in Africa demonstrate that point, with Darfur perhaps being the best example of what some might view as major-power lawfare.<sup>38</sup> The major powers were not prepared to commit hundreds of thousands of troops to a ground invasion of Darfur to ensure the end of genocide and other atrocity crimes there.<sup>39</sup> They were prepared, however, through the U.N. Security Council, to deploy a non-combat peacekeeping force, though far too slowly, and to refer the situation in Darfur to the ICC in 2005 for investigation and prosecution of top Sudanese and rebel leaders.<sup>40</sup> Once the ICC Prosecutor indicted Sudanese President Omar Hassan Al Bashir, the African Union and the Arab League, as well as the Sudanese Government, balked and accused the United States and other major powers of using the ICC to unjustifiably target Africa and African leaders.<sup>41</sup> The

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behavior by U.S. policymakers and military leaders, (2) diverting resources and attention from the primary mission of fighting terrorism, and (3) splitting up international coalitions that support the war on terror.”).

<sup>36</sup> Letter from Luis Moreno-Ocampo, Chief Prosecutor, International Criminal Court (Feb. 9, 2006), available at [http://www.icc-cpi.int/NR/rdonlyres/F596D08D-D810-43A2-99BB-B899B9C5BCD2/277422/OTP\\_letter\\_to\\_senders\\_re\\_Iraq\\_9\\_February\\_2006.pdf](http://www.icc-cpi.int/NR/rdonlyres/F596D08D-D810-43A2-99BB-B899B9C5BCD2/277422/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf).

<sup>37</sup> The Office of the Prosecutor published a summary of Palestinian National Authority submissions on May 3, 2010, but it has not yet resolved the issue. Palestine, INT'L CRIM. CT., <http://www.iccpi.int/Menu/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Comm+and+Ref/Palestine/> (last visited Nov. 4, 2010).

<sup>38</sup> See *All Situations*, INT'L CRIM. CT., <http://www.icc-cpi.int/Menu/ICC/Situations+and+Cases/Situations/> (last visited Nov. 4, 2010) (addressing the situations in Democratic Republic of the Congo, Central African Republic, Uganda, Darfur (Sudan), and The Republic of Kenya).

<sup>39</sup> See S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005) (resolving the matter through methods other than ground invasion).

<sup>40</sup> *Id.* ¶ 1.

<sup>41</sup> See Christian Lowe, *AU Leaders Vote to End Bashir Cooperation with ICC*, REUTERS, July 4, 2009, available at <http://af.reuters.com/article/topNews/idAFJOE56301X20090704?pageNumber=1&virtualBrandChannel=0> (indicating that the African Union requested a

ICC did object to military force, but made the representation that the major powers chose to use the weapon of law against the relatively weak government of Sudan.<sup>42</sup> The American's use of law as a weapon is evident in its support of the ICC's investigation of Darfur and its indictment of President Al Bashir. This position is a potent one that I fully support.

The Clinton Administration endured much cynical commentary for supporting the creation of the ICTY in 1993, a powerful new legal wedge to help deter or stop the atrocities in the Balkans. Critics viewed the ICTY as the convenient policy alternative to employing decisive military force in the region to put an end to the war and its atrocities.<sup>43</sup> Though this criticism is misplaced, the fact remains that the ICTY was a legal weapon in the conflict and left the impression that its creation rationalized holding back on military engagement in the Balkans.<sup>44</sup> One might conclude that the strong NATO nations relied on the relatively cheap weapon of law to confront the warring and far weaker nations engaged in the Balkans conflict.

Similarly, the ICTY indictment of Serbian President Slobodan Milosevic in May 1999 proved to be a compelling legal battering ram that was emblematic of how useful lawfare can be, even when joined with the use of military force—in this case, the ongoing Kosovo conflict at the time.<sup>45</sup> Other ICTY indictments were used during the Balkans conflict to corner, isolate, and shame top political and military leaders and hence influence the course of the war prior to any commitment of NATO troops to Bosnia.<sup>46</sup> From the Bosnian Serb perspective, for example, the ICTY probably represents the most aggressive form of lawfare.

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deferment to the ICC proceedings because they compromise the peace efforts in Darfur); *Arab Leaders Back "Wanted" Bashir*, BBC NEWS, Mar. 30, 2009, available at <http://news.bbc.co.uk/2/hi/7971624.stm>; see also *Prosecutor v. Bashir*, Case No. ICC-02/05-01/09, Warrant of Arrest for Omar Hassan Ahmad al-Bashir (Mar. 4, 2009), <http://www.icc-cpi.int/iccdocs/doc/doc639078.pdf>; *Prosecutor v. Bashir*, Case No. ICC-02/05-01/09, Second Warrant of Arrest for Omar Hassan Ahmad al-Bashir (July 12, 2010).

<sup>42</sup> See Lowe, *supra* note 41.

<sup>43</sup> See, e.g., GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE* 207–208, 214–215 (2000) (describing the ICTY as a token gesture that had no legal teeth); SAMANTHA POWER, *A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE* 483–484 (2002) (characterizing the ICTY as a means by which Americans could cheaply and safely signal their solidarity with Bosnians); ARYEH NEIER, *WAR CRIMES: BRUTALITY, GENOCIDE, TERROR, AND THE STRUGGLE FOR JUSTICE* 112 (1998) (labeling the institution of the tribunal as “a substitute for effective action”).

<sup>44</sup> David Scheffer, *Three Memories from the Year of Origin: 1993*, 2 J. INT'L CRIM. JUST. 353, 353–357 (2004).

<sup>45</sup> See generally, *Prosecutor v. Milošević*, Case No. IT-99-37, Indictment (May 22, 1999), [http://www.icty.org/x/cases/slobodan\\_milosevic/ind/en/mil-ii990524e.htm](http://www.icty.org/x/cases/slobodan_milosevic/ind/en/mil-ii990524e.htm).

<sup>46</sup> See, e.g., Payam Akhavam, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT'L L. 7, 15 (2001) (noting that Radovan Karadzic was forced out of public political life following his indictment by the ICTY in 1996).

The same point of view no doubt consumes the thoughts of many in the Rwandan Government with respect to the ICTR, certain elements within the Cambodian Government regarding the quasi-international ECCC, and the Kenyan Government regarding the ICC, which recently confirmed the Prosecutor's independent application for an investigation of electoral violence in Kenya.<sup>47</sup> In fact, Kenya welcomed Sudan President Al Bashir to Nairobi on August 27, 2010, to celebrate the signing ceremony of the new Kenyan Constitution, despite the fact that Kenya is a State Party to the Rome Statute of the ICC and that the ICC is investigating the violence surrounding the Kenyan elections of late 2007 and early 2008.<sup>48</sup> Kenyan officials cited the priority of peace and stability in the region and their compliance with the African Union's political stance against the ICC as a Northern-controlled tribunal targeting Africa and Africans.<sup>49</sup> The Government of Chad also embraced a visit by Al Bashir in late July, even though Chad is a State Party to the ICC and absorbed hundreds of thousands of refugees from the violence in Darfur.<sup>50</sup> Even though most are State Parties to the Rome Statute, African nations view the ICC through the lens of their own sovereign identities.<sup>51</sup> The Court, backed by the major powers, including the United States on investigations and prosecutions relating to the Darfur situation and, for that matter, other African investigations, has come to represent the quintessential bastion of lawfare by mostly Western nations against the leaders of Africa.

It is a fool's errand to rationalize the end of lawfare. We all need to calm down. Lawfare is a reality that is self-evident and not as threatening as some might argue. The key is not to be intimidated by it, but to have enough

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<sup>47</sup> See Mba Chidi Nmaju, *Violence in Kenya: Any Role for the ICC in the Quest for Accountability?*, 3 AFR. J. LEGAL STUD., 78, 79 (2009).

<sup>48</sup> See Alan Cowell, *Sudan Leader Travels Despite Warrant*, N.Y. TIMES, Aug. 27, 2010, <http://www.nytimes.com/2010/08/28/world/africa/28sudan.html?scp=4&sq=Alan%20Cowell&st=cse>.

<sup>49</sup> See Press Release, African Union, On the Decision of the Pre-Trial Chamber of the ICC Informing the UN Security Council and the Assembly of the State Parties to the Rome Statute About the Presence of President Omar Hassan al-Bashir of the Sudan in the Territories of the Republic of Chad and the Republic of Kenya, Press Release No. 119/21010 (Aug. 29, 2010), available at <http://www.africa-union.org/root/ua/actualites/2010/aout/press%20release%20on%20the%20decision%20of%20the%20pre%20trial%20of%20the%20icc%20informing%20the%20un%20security%20council%20about%20president%20albashir%20of%20the%20sudan%20presence%20in%20the%20ter.doc> (denouncing members of the Security Council for criticizing Kenya and Chad for pursuing their "interest in ensuring peace and stability" by hosting al-Bashir); Michael Onyiego, *Kenya Defends Bashir Visit as Necessary for Regional Peace*, VOICE OF AMERICA, Aug. 29, 2010, <http://www.voanews.com/english/news/africa/Kenya-Defends-Bashir-Visit-as-Necessary-for-Regional-Peace--101753813.html>.

<sup>50</sup> *Sudan's President Bashir Defies Arrest Warrant in Chad*, BBC NEWS (July 21, 2010), <http://www.bbc.co.uk/news/world-africa-10718399>.

<sup>51</sup> See Onyiego, *supra* note 49, at 2.

confidence in the legality of a nation's foreign and military policies to respond to the predictable allegations that always accompany bold and controversial uses of military force. If such response means ultimately appearing in a court of law, then that may be necessary and a task that comes with major power responsibilities. The wrong course is to seek some kind of immunity from lawfare so that military power can be exercised without legal justification or constraint. I am reminded of the frequent efforts during the Bush Administration of officials seeking to immunize themselves from criminal liability through novel legal rationales or even legislation, all for the sake of unbridled assaults on terrorists.<sup>52</sup> I hope we are not engaged in a similar exercise when confronting lawfare. I suggest we confront lawfare head on with the knowledge and integrity that befits a nation acting in compliance with federal and international law.

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<sup>52</sup> See generally M. CHERIF BASSIOUNI, *THE INSTITUTIONALIZATION OF TORTURE BY THE BUSH ADMINISTRATION* (2010) and *supra* note 18.