

# LAWFARE: A NEW TOOL FOR FIGHTING TERRORISM?

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## I. INTRODUCTION

This Note will explore the use of “lawfare” by governments and non-governmental organizations that are aligned with or opposed to the various belligerents in the ongoing Israeli-Palestinian conflict. This Note will use the lawfare definition popularized by US Air Force (USAF) Major General Charles J. Dunlap: “the strategy of using—or misusing—law as a substitute for traditional military means to achieve a warfighting objective.”<sup>1</sup> Specifically, this Note will examine the ways in which Israel, the Palestinian National Authority, the State of

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<sup>1</sup> Charles J. Dunlap, Jr., *Lawfare Today ... and Tomorrow*, 87 INT’L L. STUD. 315, 315 (2011).

Palestine, the United States, and terrorist organizations use lawfare. The lawfare practices discussed will include the use of international organizations and legal venues, war crime allegations, and the influence of public opinion on lawfare.

This Note compares the use of various lawfare tactics by the Israeli government against Hamas to US-led lawfare tactics against Islamic State of Iraq and Syria (ISIS). This Note uses that information to analyze implications that lawfare might have on the on-going conflict between the United States and ISIS. This Note is particularly focused on exploring how ISIS might use or benefit from international organizations and legal venues in ways that Hamas has. Finally, this Note suggests actions the United States can take to combat ISIS in a legal theater.

## II. LEGAL OVERVIEW

### A. Working Definition of Lawfare

The term “lawfare” in the context of international military conflicts was popularized by USAF Major General Charles J. Dunlap in the late 1990s, when he used the term to describe how the law was starting to alter the nature of warfare.<sup>2</sup> In 2001, on the heels of the 1999 Kosovo campaign,<sup>3</sup> Dunlap first wrote about lawfare in a working paper for Harvard University’s Carr Center,<sup>4</sup> where Dunlap described lawfare as “the use of law as a weapon of war”<sup>5</sup> and “a method of warfare where law is used as a means of realizing a military objective.”<sup>6</sup> Over time, the definition has been refined. For the purposes of this Note, lawfare will be defined as “the strategy of using—or misusing—law as a substitute for traditional military means to achieve an operational objective.”<sup>7</sup>

As the world has become more globalized, the relationship between the law and war has evolved—particularly with respect to nations with democratic values, whose people place a high value on the rule of law.<sup>8</sup> Americans, in particular, place a high value on the rule of law, as noted in George Will’s characterization of the United States being the “Litigation Nation.”<sup>9</sup> Will notes the deep “legal self-consciousness” of Americans and writes that “[t]oday, rights

<sup>2</sup> Charles J. Dunlap, *Lawfare Today: A Perspective*, 3 YALE J. INT’L AFF. 146, 146 (Winter 2008) [hereinafter Dunlap, *Lawfare Today*].

<sup>3</sup> Jack Goldsmith, *Thoughts on “Lawfare”*, LAWFARE BLOG (Sept. 8, 2010, 9:24 PM), <https://www.lawfareblog.com/thoughts-lawfare>.

<sup>4</sup> Charles J. Dunlap, *Lawfare: A Decisive Element of 21<sup>st</sup>-Century Conflicts?*, 54 JOINT FORCE Q. 34, 35 (3d Quarter 2009) [hereinafter Dunlap, *A Decisive Element*].

<sup>5</sup> Charles J. Dunlap, *Law and Military Interventions: Preserving Humanitarian Values in 21st Conflicts*, Humanitarian Challenges in Military Intervention Conf. 1, 2 (Nov. 29, 2001), <http://people.duke.edu/~pfeaver/dunlap.pdf>.

<sup>6</sup> *Id.* at 4.

<sup>7</sup> Dunlap, *Lawfare Today*, *supra* note 2, at 146.

<sup>8</sup> Dunlap, *A Decisive Element*, *supra* note 4, at 35.

<sup>9</sup> George Will, *Litigation Nation*, WASH. POST (Jan. 11, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/09/AR2009010902353.html>.

increasingly are offensive weapons wielded to inflict demands.”<sup>10</sup> While Will’s characterization of the prevalence of Americans’ legal consciousness is based primarily on civil tort actions, the name “Litigation Nation” is useful in illustrating how important the law is in American life, and why lawfare can be such a powerful tool. In addition to the deep legal consciousness of Americans, international trade and commerce depends upon international law, making the law increasingly more influential and useful as a tool.<sup>11</sup>

While Dunlap’s definition of lawfare is the most popular definition, is used in the context of military operations,<sup>12</sup> and will be used in this Note, the term has been defined differently by journalists and other theorists. In contrast to Dunlap’s definition, which is neutral, lawfare has been called “inherently negative” when used to describe “the abuse of Western laws and judicial systems to achieve strategic military or political ends.”<sup>13</sup> The pejorative definition of the term has primarily been used by neoconservative and other political groups who view lawfare as being an unfair tool in the pursuit of military and political objectives.<sup>14</sup> Lawfare has come to describe the use of legal instruments such as filing claims against opponents in international courts, using legislation to disadvantage an opponent, and using multimedia platforms to influence public opinion to win support or inspire opposition. The various uses of lawfare reflect the differences among its definitions and are the result of the ever-evolving strategies and instruments of war, particularly with respect to the War on Terror.<sup>15</sup>

## **B. The Law of Armed Conflict**

The law of armed conflict (LOAC),<sup>16</sup> also known as “international humanitarian law” and the “law of war,” is the body of law that governs the conduct of belligerents engaged in warfare.<sup>17</sup> LOAC “requires that belligerents refrain from employing any kind of degree of violence which is not actually necessary for military purposes” and that they conduct hostilities with regard for principles of

<sup>10</sup> Will, *supra* note 9.

<sup>11</sup> Dunlap, *A Decisive Element*, *supra* note 4, at 35.

<sup>12</sup> Scott Horton, *The Dangers of Lawfare*, 43 CASE W. RES. J. INT’L L. 163, 170 (2010).

<sup>13</sup> *What is Lawfare?*, LAWFARE PROJECT, <https://thelawfareproject.org/lawfare/what-is-lawfare-1/> (last visited Oct. 18, 2017).

<sup>14</sup> Horton, *supra* note 12, at 170.

<sup>15</sup> Guy Raz, *Defining the War on Terror*, NPR (Nov. 1, 2006, 12:37 PM), <http://www.npr.org/templates/story/story.php?storyId=6416780>.

<sup>16</sup> For the purposes of this Note, the U.S. military definition of LOAC and its policies regarding compliance with LOAC will be used.

<sup>17</sup> U.S. INT’L & OPERATIONAL L. DEP’T, LAW OF ARMED CONFLICT DESKBOOK 8 (2012), [https://www.loc.gov/tr/frd/Military\\_Law/pdf/LOAC-Deskbook-2012.pdf](https://www.loc.gov/tr/frd/Military_Law/pdf/LOAC-Deskbook-2012.pdf) [hereinafter LAW OF ARMED CONFLICT DESKBOOK].

humanity and chivalry.<sup>18</sup> Under LOAC are two broad categories of sources of law: (1) “The Hague Tradition,” which refers to the various Hague Conventions that regulate the means and methods of warfare (e.g. weapons, targeting decisions, and warfare tactics); and (2) “The Geneva Tradition,” which refers to the multiple Geneva Convention treaties and subsequent Protocols that are aimed at protecting the victims of warfare.<sup>19</sup> This Note implicates the Geneva Tradition, as the treatment of civilians in armed conflict is the primary impetus for lawfare in the ongoing Israeli-Palestinian conflict and the War on Terror.

### 1. The Geneva Tradition

The fourth Geneva Convention provides protection to civilians during conflict and defines such protected persons as those who “find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”<sup>20</sup> However, it is important to note that the next sentence of the treaty states that “[n]ationals of a State which is not bound by the Convention are not protected by it”<sup>21</sup> unless such persons are civilians who are in a country that is a party to the armed conflict.<sup>22</sup> This exception is based on the deeply rooted tradition of discrimination or distinction in war—that is, the principle of only directing military attacks at military targets and combatants, and not at civilians.<sup>23</sup> The principle of distinction between combatants and civilians was codified in Protocol Additional I (“Protocol I”).<sup>24</sup> This principle of LOAC is tested repeatedly by Israeli forces, Hamas fighters, and the parties to the War on Terror.

<sup>18</sup> U.S. DEP’T OF THE ARMY, DEPARTMENT OF THE ARMY FIELD MANUAL 27-10: THE LAW OF LAND WARFARE 3 (July 1956), [https://www.loc.gov/rr/frd/Military\\_Law/pdf/law\\_warfare-1956.pdf](https://www.loc.gov/rr/frd/Military_Law/pdf/law_warfare-1956.pdf).

<sup>19</sup> LAW OF ARMED CONFLICT DESKBOOK, *supra* note 17, at 19–20.

<sup>20</sup> Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, art. 4, Aug. 12 1949, 75 U.N.T.S. 287.

<sup>21</sup> *Id.*

<sup>22</sup> LAW OF ARMED CONFLICT DESKBOOK, *supra* note 17, at 107. The Fourth Geneva Convention provides that “the provisions of Part II cover the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race nationality, religion or political opinion.” *Id.*

<sup>23</sup> *Id.* at 148. *See also* Protocol Additional I, *infra* note 24.

<sup>24</sup> Protocol Additional I to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts, art. 48, June 8, 1977, 1125 U.N.T.S. 3 (“In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”).

## 2. Israeli and Palestinian LOAC Policies

Israel became a party to the Fourth Geneva Convention in 1949, and Palestine ratified the Convention in 2014,<sup>25</sup> on the same day it ratified Protocol I.<sup>26</sup> However, Israel never ratified Protocol I.<sup>27</sup> It is important to note that although the Geneva Conventions and their subsequent protocols are only binding on states that are parties to the treaties, the principles of LOAC are customary international law and the international community expects each state to abide by such principles, regardless of whether the state is a party to the treaties.<sup>28</sup>

## 3. US LOAC Policy

Like Israel, the United States ratified the Fourth Geneva Convention in 1949<sup>29</sup> and did not ratify Protocol I despite signing the treaty in 1977.<sup>30</sup> While the Geneva Conventions and Protocols can only bind member states who have ratified those treaties and the United States did not ratify Protocol I, the United States' policy is to "comply with LOAC during all operations, whether international armed conflict, non-international armed conflict, or situations short of armed conflict."<sup>31</sup> The US Department of Defense (DoD) issued a directive that requires all members of the DoD to comply with LOAC in all conflicts, however they are characterized.<sup>32</sup>

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<sup>25</sup> *Treaties, States Parties and Commentaries: Convention (IV) relative to the Protection of Civilian Persons in Time of War*, INT'L COMM. RED CROSS, [https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp\\_viewStates=XPages\\_NORMStatesParties&xp\\_treatySelected=380](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=380) (last visited Oct. 18, 2017) [hereinafter ICRC: Convention (IV)].

<sup>26</sup> *Treaties, States Parties and Commentaries: Protocol Additional to the Geneva Conventions of 12 August 1949*, INT'L COMM. RED CROSS, [https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp\\_viewStates=XPages\\_NORMStatesParties&xp\\_treatySelected=470](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=470) (last visited Oct. 18, 2017) [hereinafter ICRC: Protocol I].

<sup>27</sup> *Id.*

<sup>28</sup> HURST HANNUM ET AL., *INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE* 202–59 (6th ed. 2017). A party may only relieve itself of its obligation to follow customary international law (CIL) if the party has repeatedly objected to the particular part of the CIL that they do not wish to follow. *Id.* Neither Hamas nor Israel have repeatedly objected to the CIL norm of discriminating between civilians and belligerents in warfare. Thus, both Hamas and Israel are bound by the CIL principle of distinction/discrimination.

<sup>29</sup> ICRC: Convention (IV), *supra* note 25.

<sup>30</sup> ICRC: Protocol I, *supra* note 26; *Treaties, States Parties and Commentaries: Protocol Additional: Signatory States*, INT'L COMM. RED CROSS, [https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp\\_viewStates=XPages\\_NORMStatesSign&xp\\_treatySelected=470](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesSign&xp_treatySelected=470) (last visited Oct. 18, 2017) (noting how the United States was joined by Iran and Pakistan in signing Protocol I in 1977, but neither of those three states ratified the treaty).

<sup>31</sup> LAW OF ARMED CONFLICT DESKBOOK, *supra* note 17, at 27.

<sup>32</sup> U.S. DEP'T OF DEFENSE, DIRECTIVE 2311.01E: DoD LAW OF WAR PROGRAM 2 (May 9, 2006), <http://www.dtic.mil/whs/directives/corres/pdf/231101e.pdf>.

This is significant because that policy requires the US military to treat all belligerents in compliance with LOAC, even if the belligerents are not U.N. member states, or states at all.<sup>33</sup> The Directive's adherence to the principle of distinguishing civilians from combatants to protect civilians demonstrates a commitment to LOAC, despite the United States' refusal to join the 174 states that have ratified Protocol I.<sup>34</sup>

### **C. Lawfare in the Israeli-Palestinian Conflict**

Consistent with varying definitions of lawfare, there are various forms of lawfare that have been utilized in the Middle East by state actors, non-government organizations (NGOs), and international organizations.

#### **1. History of the Conflict**

##### **a. The Palestine Mandate**

At the start of World War I, the region of Palestine (which encompasses modern-day Israel and Palestinian territories) was controlled by the Ottoman Empire,<sup>35</sup> which was at war with Great Britain.<sup>36</sup> As part of its strategy to defeat the Ottoman Empire and its allies, Great Britain made two promises:<sup>37</sup> one to the Arabs who constituted the vast majority of the population of Palestine, and another to leaders of the European Zionist movement.<sup>38</sup> First, the British promised the Arabs independence in exchange for an Arab revolt against the Ottoman Turks.<sup>39</sup> Two years later, the British endorsed the Balfour Declaration,<sup>40</sup> which pledged

<sup>33</sup> U.S. DEP'T OF DEFENSE, DIRECTIVE 2311.01E, *supra* note 32.

<sup>34</sup> ICRC: Protocol I, *supra* note 26.

<sup>35</sup> Malcolm E. Yapp & Stanford J. Shaw, *Ottoman Empire*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/place/Ottoman-Empire> (last updated Aug. 1, 2016).

<sup>36</sup> Michael Lynk, Book Note, 48 OSGOODE HALL L. J. 669, 669 (2011) (reviewing VICTOR KATTAN, FROM COEXISTENCE TO CONQUEST: INTERNATIONAL LAW AND THE ORIGINS OF THE ARAB-ISRAELI CONFLICT, 1891-1949 (2009)).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*; *Zionism*, BRITANNICA ACADEMIC, <http://academic.eb.com.ezproxy2.library.arizona.edu/levels/collegiate/article/78399> (last updated June 9, 2015).

<sup>39</sup> Lynk, *supra* note 36. The series of letters exchanged between McMahon and Ibn Ali came to be known as the McMahon-Hussein Correspondence. Great Britain's promise to recognize and support Arab independence was memorialized in Sir McMahon's October 24, 1915 letter to Hussein. See *The McMahon-Hussein Correspondence (July 14, 1915–March 10, 1916)*, UNIV. OF DEL., <http://www1.udel.edu/History-old/figal/Hist104/assets/pdf/readings/13mcmahonhussein.pdf> (last visited Oct. 18, 2017).

<sup>40</sup> The Balfour Declaration refers to a Nov. 2, 1917 letter written by the British Foreign Secretary, Lord Balfour, to Lord Rothschild, who was a leading Zionist figure in Great Britain at the time.

support for “the establishment in Palestine of a national home for the Jewish people” and that “nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country.”<sup>41</sup>

After defeating the Ottoman Turks in World War I, the British won control over Palestine and sought to formalize their control by establishing a mandate.<sup>42</sup> Mandatory Palestine was drawn up in 1920 and was adopted in 1922.<sup>43</sup> The Mandate formally authorized the British to control “the territory of Palestine,” pursuant to Article 22 of the Covenant of the League of Nations.<sup>44</sup> During British rule, immigration of European Jews increased significantly, as “the Jewish population grew from 8 per cent in 1917 to 31 per cent by 1946,” due largely to British support of the Zionist movement.<sup>45</sup> The promise of Arab independence and the promise of supporting a Jewish state were incompatible, as support for a Jewish state required that the area under the Mandate be ruled by Zionist sympathizers, which the Arabs in the area were not.<sup>46</sup>

The years of British rule saw periodic violence and the British slowly came to realize that governing Palestine under the Mandate proved to be a much more difficult task than they had anticipated.<sup>47</sup> In 1939, Great Britain adopted a policy paper known as the White Paper, which became the governing policy for Mandatory Palestine.<sup>48</sup> The White Paper called for the establishment of an independent Palestinian state within 10 years “in which Arabs and Jews share government in such a way as to ensure that the essential interests of each community are safeguarded,”<sup>49</sup> along with a significant reduction of Jewish immigration.<sup>50</sup>

At the close of World War II, the British found themselves in a quandary: they did not want to diverge from the policies emulated in the White Paper, but in the face of millions of displaced Jews after the Holocaust, faced mounting public pressure to allow displaced Jews to move to Mandatory Palestine.<sup>51</sup> Despite pressure from the Anglo-American Committee of Inquiry, which recommended in 1946 that the British allow 100,000 displaced Jews who were victims of Nazi

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<sup>41</sup> Letter from Lord Arthur James Balfour, the British Foreign Sec’y, to Lord Rothschild (Nov. 2, 1917) (on file at <http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/the%20balfour%20declaration.aspx>).

<sup>42</sup> Noah Rayman, *Mandatory Palestine: What It Was and Why It Matters*, TIME (Sept. 29, 2014), <http://time.com/3445003/mandatory-palestine/>.

<sup>43</sup> *Id.*

<sup>44</sup> The Mandate for Palestine, July 24, 1922.

<sup>45</sup> Lynk, *supra* note 36, at 672.

<sup>46</sup> *Id.*

<sup>47</sup> Yoram Dinstein, *The Arab-Israeli Conflict from the Perspective of International Law*, 43 UNIV. OF NEW BRUNSWICK L.J. 301, 305 (1994).

<sup>48</sup> *Id.*

<sup>49</sup> *British White Paper of 1939*, § 1 (Nov. 1, 1938).

<sup>50</sup> *Id.* § II.

<sup>51</sup> Dinstein *supra* note 47, at 305–06.

persecution during the Holocaust to emigrate to Mandatory Palestine,<sup>52</sup> the British refused and continued to follow the White Paper policy of limiting immigration.<sup>53</sup>

#### b. The Partition Resolution & Israeli Independence

In 1947, the United Nations General Assembly called for the end of the Mandate and for the creation of two independent states, one Jewish and one Arab.<sup>54</sup> This Partition Resolution provided for the establishment of the two independent states, which were to be linked economically, and a Special International Regime for the City of Jerusalem.<sup>55</sup> The Zionists accepted the resolution, but because General Assembly resolutions are not legally binding and cannot create a state, the Arabs were free to reject the resolution.<sup>56</sup> Arabs overwhelmingly rejected the Partition Resolution and, in response, a civil war in Palestine between the Arabs and Jews broke out the day after the United Nations passed the Resolution.<sup>57</sup> The civil war continued from November 20, 1947 to May 1948, when Jewish leaders declared victory and their independence as the State of Israel.<sup>58</sup>

Hours after the State of Israel declared independence on May 15, 1948, the Jewish state was invaded by five Arab armies from Jordan, Egypt, Lebanon, Syria, and Iraq.<sup>59</sup> The war ended with a series of armistice agreements between Israel and four of the five invading countries: Jordan, Egypt, Lebanon, and Syria.<sup>60</sup> The fifth invading country, Iraq, never agreed to an armistice with Israel and instead withdrew its army because it did not share physical borders with the new state of Israel.<sup>61</sup> Therefore, there has never been a treaty or agreement to cease hostilities between these two nations. Unsurprisingly, there have been several military clashes between Iraq and Israel since 1948.<sup>62</sup>

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<sup>52</sup> *Anglo-American Committee of Inquiry*, ch.1 (Apr. 20, 1946). The Anglo-American Committee on Inquiry was comprised of members appointed by the United States and the United Kingdom, and was convened on January 4, 1946, to “examine the political, economic and social conditions in Palestine as they bear upon the problem of Jewish immigration and settlement therein and the well-being of the peoples now living therein.” *Id.* at preface.

<sup>53</sup> Dinstein *supra* note 47, at 306.

<sup>54</sup> G.A. Res. 181 (II)(I)(A), pt. 1 (Nov. 29, 1947).

<sup>55</sup> *Id.*

<sup>56</sup> Dinstein, *supra* note 47, at 306.

<sup>57</sup> *Id.* at 307.

<sup>58</sup> *Id.* at 306–07 (“On 15 May 1948, within hours of Israel’s Declaration of Independence, five Arab armies invaded the newly born State. The invasion transformed the conflict from a civil war to an international (interstate) war.”).

<sup>59</sup> *Id.* at 307–08.

<sup>60</sup> Israel-Jordan in 42 U.N.T.S. at 303; Israel-Egypt in 42 U.N.T.S. at 251; Israel-Lebanon 42 U.N.T.S. at 287; Israel-Syria 42 U.N.T.S. at 327.

<sup>61</sup> Dinstein, *supra* note 47, at 308.

<sup>62</sup> *Id.* (“Israel and Iraq clashed militarily on several occasions in the post-1948 era: mutual bombing raids in 1967; the Iraqi expeditionary force which stopped the Israeli army at the gates of Damascus in 1973; Israel’s destruction of an Iraqi nuclear reactor in 1981; and, most recently, Iraq launched Scud missiles at Israeli population centres in 1991.”).



Despite the Armistice Agreement between Israel and Egypt, tensions eventually manifested in an Egyptian blockade of Eilat—a vital port for Israel—when Egyptian President Nasser nationalized the Suez Canal and brought the waterway under Egyptian control.<sup>63</sup> Because the Suez Canal was owned largely by British and French interests, both nations responded to the nationalization and blockade by agreeing to help Israel.<sup>64</sup> After Great Britain and France intervened, a UN Emergency Force was assigned to the area in December 1956, prompting the Israeli forces to withdraw in March 1957.<sup>65</sup> This ordeal came to be known as the Suez Crisis and is seen as an Arab victory by Egyptians.<sup>66</sup>

### c. The Six-Day War

Arabs and Israelis again clashed militarily in June 1967 when President Nasser mobilized forces in the Sinai, requested that the UN forces leave, and blockaded the port city of Eilat once more, all to demonstrate support for Syria.<sup>67</sup> Days later, King Hussein of Jordan placed Jordanian forces under Egyptian command, in support of the Egyptian blockade.<sup>68</sup> Iraq joined with Egypt and Jordan shortly thereafter.<sup>69</sup> This apparent mobilization of three Arab nations that Israel had previously been at war with prompted Israel to respond defensively, in fear of annihilation.

On June 5, 1967, Israel executed a preemptive air assault that destroyed over 90 percent of the Egyptian air force, and launched a similar assault that debilitated the Syrian air force.<sup>70</sup> After incapacitating the Egyptian air force, Israel was able to overwhelm Egyptian ground forces within three days, resulting in the Israeli occupation of the Gaza Strip and all of the Sinai Peninsula up to the east bank of the Suez.<sup>71</sup> Jordanian forces shelled West Jerusalem on June 5, and were swiftly defeated by an Israeli counterattack.<sup>72</sup> On June 7, Israel was able to drive out Jordanian forces from Jerusalem and most of the West Bank.<sup>73</sup> Israel and Jordan then accepted a ceasefire agreement called for by the UN, and Egypt accepted the following day.<sup>74</sup> Syria, however, continued to shell northern Israel until Israel

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<sup>63</sup> *Arab-Israeli wars*, BRITANNICA ACADEMIC (last updated Oct. 23, 2009), <http://academic.eb.com.ezproxy1.library.arizona.edu/levels/collegiate/article/8143> (last updated Oct. 23, 2009).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Six-Day War*, BRITANNICA ACADEMIC, <http://academic.eb.com.ezproxy1.library.arizona.edu/levels/collegiate/article/470946> (last updated Apr. 30, 2015).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Six-Day War*, *supra* note 67.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

attacked and captured the Golan Heights from Syrian forces on June 9, which prompted Syria's acceptance of the ceasefire the next day.<sup>75</sup> The Arab nations suffered disastrous casualties: more than 11,000 Egyptians; 6,000 Jordanians; and 1,000 Syrians were killed.<sup>76</sup> In contrast, Israel suffered only 700 casualties total.<sup>77</sup> Moreover, the Six-Day War turned hundreds of thousands of Arabs into refugees, in addition to bringing more than one million Palestinians under Israeli rule.<sup>78</sup>

Several other hostilities have occurred since—most notably the Yom Kippur War of 1973, in which Egypt and Syria launched an attack on Israeli forces that occupied the Sinai Peninsula and Golan Heights.<sup>79</sup> Israel prevailed, but not without suffering major losses.<sup>80</sup> In November 1977, Egypt formally recognized Israel as a sovereign nation through the Camp David Accords, which was negotiated with help from the United States, in Jerusalem.<sup>81</sup>

#### d. The Era of Hamas

The next major escalation between Palestinians and Israelis was the First Intifada (uprising) in December 1987, in which Palestinians revolted in Israeli-occupied Palestinian territories.<sup>82</sup> The Muslim Brotherhood in Gaza also formed Hamas—an Islamic Resistance Movement with the dual purpose of executing armed conflicts against Israel and providing social welfare programs to Palestinians.<sup>83</sup> Hamas described itself in its charter as being dedicated to the destruction of Israel and committed to the establishment of an Islamic society in the region instead.<sup>84</sup> Hamas was, unsurprisingly, violent towards Israel and continues to launch attacks on Israelis today.<sup>85</sup> In 1993, the Israeli Prime Minister, Yitzhak Rabin, and PLO leader Yasser Arafat, signed the Oslo Accords, agreeing to recognize the existence of the other.<sup>85</sup> Despite the peace agreements of the Oslo Accords, Hamas continued to attack Israelis with multiple suicide bombings.<sup>86</sup>

<sup>75</sup> *Six-Day War*, *supra* note 67.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Israel Profile – Timeline*, BBC (Apr. 19, 2016), <http://www.bbc.com/news/world-middle-east-29123668>.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Profile: Hamas Palestinian movement*, BBC (July 11, 2014) <http://www.bbc.com/news/world-middle-east-13331522>.

<sup>84</sup> THE COVENANT OF THE ISLAMIC RESISTANCE MOVEMENT (Aug. 18, 1988), *translated in Hamas Covenant 1988*, THE AVALON PROJECT, [http://avalon.law.yale.edu/20th\\_century/hamas.asp](http://avalon.law.yale.edu/20th_century/hamas.asp).

<sup>85</sup> *Id.*

<sup>85</sup> *Shattered Dreams of Peace: The Negotiations*, PBS, <http://www.pbs.org/wgbh/pages/frontline/shows/oslo/negotiations/> (last visited Nov. 17, 2016).

<sup>86</sup> *CFR Backgrounders: Hamas*, COUNCIL ON FOREIGN REL., <http://www.cfr.org/israel/hamas/p8968> (last visited Nov. 17, 2016).

In 1997, the United States designated Hamas as a foreign terrorist organization (FTO), citing Hamas's continued attacks on Israeli civilians.<sup>87</sup> The classification of a group as an FTO carries economic consequences, as the designation bars any person subject to American jurisdiction from providing such organizations with "material support or resources."<sup>88</sup> This means that the United States has criminalized all financial and logistical (or otherwise material) assistance to Hamas.

Sporadic violence continued throughout the 1990s and eventually erupted into the Second Intifada in the fall of 2000 when Palestinian protests became violent following Israeli leader Ariel Sharon's visit to a holy site in Jerusalem known as the Temple Mount to Jews (known as the Al-Haram al-Sharif to Muslims).<sup>89</sup> Violence continued into 2005, and attacks were launched by both Hamas and the Israel Defense Forces (IDF),<sup>90</sup> resulting in the deaths of civilians on both sides.<sup>91</sup> Because of the continued violence, Israel began to construct its West Bank barrier in June 2002, with the aim of keeping Palestinian suicide bombers out of Israel.<sup>92</sup> However, in July 2004, the International Court of Justice issued an advisory opinion declaring the wall illegal and calling for Israel to remove the wall.<sup>93</sup> On the diplomatic side of the conflict, several peace agreements brokered by the European Union, United Nations, Russia, and the United States broke down.<sup>94</sup> Eventually, Palestinian and Israeli leaders declared a truce after a summit in Egypt, with both sides expressing hope that the truce would lead to a new era of peace.<sup>95</sup> However, just two days later, Hamas declared that the group was not bound by the ceasefire and began to fire dozens of mortars and rockets at an Israeli settlement.<sup>96</sup>

In 2006, Hamas won the Palestinian parliamentary elections and the violence between the group and Israeli forces escalated once again.<sup>97</sup> Kidnappings, full-scale IDF invasions into Gaza, Israeli air strikes, the capture of prisoners on

<sup>87</sup> *CFR Backgrounders: Hamas*, *supra* note 86.

<sup>88</sup> 18 U.S.C.A. § 2339(A) (2009) ("[T]he term 'material support or resources' means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.").

<sup>89</sup> *Israel Profile—Timeline*, *supra* note 79.

<sup>90</sup> The IDF is the Israeli Defense Forces, which is the military for the State of Israel. See *About Ministry of Defense*, ISRAEL MINISTRY OF DEF., [http://www.mod.gov.il/About/Pages/about\\_mod.aspx](http://www.mod.gov.il/About/Pages/about_mod.aspx) (last visited Oct. 18, 2017).

<sup>91</sup> See *Al-Aqsa Intifada Timeline*, BBC NEWS, [http://news.bbc.co.uk/2/hi/middle\\_east/3677206.stm](http://news.bbc.co.uk/2/hi/middle_east/3677206.stm) (last updated Sept. 29, 2004).

<sup>92</sup> *Id.*

<sup>93</sup> *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. Rep. 883, ¶ 145 (July 9). Note: the wall has not been removed.

<sup>94</sup> *Al-Aqsa Intifada Timeline*, *supra* note 91.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Israel Profile—Timeline*, *supra* note 79.

both sides, missile and mortar attacks from Hamas, and sporadic attacks on Israeli civilians characterized the conflict from 2006 to 2014.<sup>98</sup> Despite the violent tendencies and extremism of Hamas, the group has come to be popular among Palestinians in large part because of the social welfare programs they administer in Gaza.<sup>99</sup> Because of the repeated break-downs of peace and ceasefire agreements caused by extremists on both sides of the conflict and increased number of Israeli settlements in the West Bank and East Jerusalem, the Israelis and Palestinians appear to be skeptical of each another with little political will to negotiate a true peace.<sup>100</sup>

## 2. Lawfare Examples in the Conflict

This Note will focus on lawfare examples derived from the LOAC violations Hamas and Israel continuously allege against one another. These claims about LOAC violations will be explored in the context of (1) litigation in international and American courts; (2) the alleged use of “human shields” in the conflict; and (3) how international organizations address these allegations.

### a. Lawfare in the Courtroom

Perhaps the most well-known and one of the first examples of lawfare in the courtroom was a civil lawsuit in which two Americans sued several non-government organizations for their involvement in funding Hamas, and members of Hamas that murdered their son in Israel.<sup>101</sup> In *Boim v. Holy Land Foundation for Relief and Development*, the parents of David Boim sued the Holy Land Foundation, the American Muslim Society, the Quranic Literacy Institute, and Muhammad Salah for financially supporting Hamas, in violation of 18 U.S.C. §

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<sup>98</sup> *Israel Profile—Timeline*, *supra* note 79.

<sup>99</sup> Bryony Jones, *Q&A: What is Hamas?*, CNN (Nov. 24, 2012), <http://www.cnn.com/2012/11/16/world/meast/hamas-explainer/> (noting that Hamas runs schools, hospitals, soup kitchens and provides other social services to Palestinians in Gaza).

<sup>100</sup> Oren Liebermann, *What the UNSC Resolution Means for the US and Israel*, CNN (Dec. 27, 2016), <http://www.cnn.com/2016/12/26/politics/understanding-unsc-resolution/> (“There is a broad international consensus that settlements in the West Bank and East Jerusalem are illegal and that they constitute an obstacle to peace.”).

<sup>101</sup> See *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 687–88 (7th Cir. 2008).

2333(a),<sup>102</sup> which is part of the “Anti-Terrorism Act.”<sup>103</sup> David Boim was an American citizen who, at the age of 17, was fatally shot near a bus stop in Jerusalem by Hamas gunmen in 1996.<sup>104</sup> The court held that both the American Muslim Society and Quranic Literacy Institute were civilly liable for damages under 18 U.S.C. 2333(a) because both organizations either knew or should have known that their monetary donations to Hamas would aid and abet Hamas’s terrorist activities.<sup>105</sup> The court explained that it made “good sense”<sup>106</sup> to hold organizations liable for donating to terrorist groups as a counter-terrorism measure:

A knowing donor to Hamas—that is, a donor who knew the aims and activities of the organization—would know that Hamas was gunning for Israelis, that Americans are frequent visitors to and sojourners in Israel, that many U.S. citizens live in Israel, and that donations to Hamas, by augmenting Hamas’s resources, would enable Hamas to kill or wound, or try to kill, or conspire to kill more people in Israel. And given such foreseeable consequences, such donations would “appear to be intended ... to intimidate or coerce a civilian population” or to “affect the conduct of a government by ... assassination,” as required by section 2331(1) in order to distinguish terrorist acts from other violent crimes, though it is not a state-of-mind requirement; it is a matter of external appearance rather than subjective intent, which is internal to the intender.<sup>107</sup>

*Boim* has been noted as a successful example of pro-Israel lawfare in the American justice system and could serve as a model for future lawfare against terrorist groups like ISIS and its supporters here in the United States. Although the court remanded the case regarding the liability of the Holy Land Foundation, while holding the other two organization-defendants liable, the US Department of Justice

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<sup>102</sup> 18 U.S.C. § 2333 (2016) (“In an action under subsection (a) for an injury arising from an act of international terrorism committed, planned, or authorized by an organization that had been designated as a foreign terrorist organization under section 219 of the Immigration and Nationality Act (8 U.S.C. 1189), as of the date on which such act of international terrorism was committed, planned, or authorized, liability may be asserted as to any person who aids and abets, by knowingly providing substantial assistance, or who conspires with the person who committed such an act of international terrorism”).

<sup>103</sup> *Id.*

<sup>104</sup> *See Boim*, 549 F. 3d at 687.

<sup>105</sup> *Id.* at 705.

<sup>106</sup> *Id.* at 690 (“By this chain of incorporations by reference (section 2333(a) to section 2331(1) to section 2339A to section 2332), we see that a donation to a terrorist group that targets Americans outside the United States may violate section 2333. Which makes good sense as a counterterrorism measure.”).

<sup>107</sup> *Id.* at 693–94.

later secured criminal convictions of five former leaders of the HLF, who were found guilty of funneling over \$12 million to Hamas.<sup>108</sup>

A similar lawsuit was brought by American citizens who were physically and psychologically injured by Hamas terrorist acts in Israel. In *Rothstein v. UBS AG*, the victims of Hamas sued the financial institution, UBS,<sup>109</sup> for allegedly furnishing US dollars to Iran, which then funneled the money to Hamas.<sup>110</sup> Hamas, as well as Hezbollah were said to have received funding from Iran “for the specific purpose of facilitating and causing terror attacks against innocent civilians” and the complaint alleged that the terrorist organizations relied on funding from Iran because they were unable to access banking institutions due to counterterrorism restrictions put in place by the United States.<sup>111</sup> The court held that the plaintiffs had standing to sue UBS under 18 U.S.C. § 2333,<sup>112</sup> but ultimately dismissed the case because the plaintiffs “failed to allege proximate cause sufficiently to state a claim on which relief can be granted.”<sup>113</sup> The court further explained:

[W]e are not persuaded that the district court erred in concluding that plaintiffs had not stated a claim on which relief could be granted against UBS on an aiding-and-abetting theory, because it does not appear to us that Congress intended § 2333(a) to permit recovery on such a theory.<sup>114</sup> ... We doubt that Congress, having included in the ATA several express provisions with respect to aiding and abetting in connection with the criminal provisions, can have intended § 2333 to authorize civil liability for aiding and abetting through its silence.<sup>115</sup>

Given the outcome of *Rothstein*, it appears that litigation against a financial institution or other organization that did not know (or should not have been aware) that their services were being used to aid and abet terrorism is unlikely to be successful in the United States unless Congress amends the statute. Although litigation against a bank has failed, there have been other recent attempts to hold other companies liable for providing services to terrorist organizations.<sup>116</sup> The implications of those lawsuits are discussed in Part IV(A)(i) of this Note.

<sup>108</sup> *No Cash for Terror*, FBI ARCHIVES (Nov. 25, 2008), <https://archives.fbi.gov/archives/news/stories/2008/november/hlf112508>.

<sup>109</sup> UBS is a Swiss financial services company that provides various financial services to clients all over the world. *See UBS in a Few Words*, UBS, [https://www.ubs.com/global/en/about\\_ubs/about\\_us/ourprofile.html](https://www.ubs.com/global/en/about_ubs/about_us/ourprofile.html) (last updated Sept. 2017).

<sup>110</sup> *Rothstein v. UBS AG*, 708 F.3d 82, 86 (2d Cir. 2013).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 94.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 97.

<sup>115</sup> *Rothstein*, 708 F.3d at 98.

<sup>116</sup> *See infra* Section IV(A).

## b. Lawfare in the Media: Human Shields

Levying allegations of LOAC violations and war crimes is serious and has become an increasingly more popular tactic of lawfare. By alleging war crimes, the party making such charges can persuade the international community to cast doubt and sometimes denounce the alleged actions of the accused party. Neither the Israeli government nor Hamas is a stranger to such allegations, and both have alleged different war crimes against the other, often sparking more outrage and calls for action.<sup>117</sup>

Perhaps the most pervasive and serious accusation of war crimes relating to the conflict is the Israeli government's allegation of Hamas using human shields. That is, Israelis have accused Hamas of both hiding military supplies such as missiles in civilian buildings, as well as firing missiles from civilian buildings and locations.<sup>118</sup> Hamas's rockets have in fact been found hidden in vacant U.N. buildings and schools, as well as other civilian facilities within Gaza.<sup>119</sup> These allegations began in 2014, when the death toll rose from the IDF's Operation Protective Edge<sup>120</sup> and prompted Israeli officials to explain that the disproportionate number of civilian casualties on the Palestinian side was partly the result of Hamas using Palestinian civilians as human shields.<sup>121</sup> Israeli Prime Minister Benjamin Netanyahu has been particularly outspoken about Hamas using human shields, saying "Hamas uses schools, residential buildings, mosques, and hospitals to fire rockets at Israeli civilians... Hamas uses innocent civilians as a human shield for terrorist activity."<sup>122</sup>

Many reporters who have been to Gaza have said that they saw no evidence of Hamas actually forcing civilians to remain in areas that are under attack and therefore be used as human shields—meaning that what has been reported does not amount to a human shield war crime under international law.<sup>123</sup> However, "it is indisputable that Gaza militants operate in civilian areas, draw return fire to civilian structures, and on some level benefit in the diplomatic arena from the rising

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<sup>117</sup> See *infra* Section IV(A).

<sup>118</sup> Michael Martinez, *Is Hamas Using Human Shields in Gaza? The Answer is Complicated*, CNN (July 23, 2014), <http://www.cnn.com/2014/07/23/world/meast/human-shields-mideast-controversy/>.

<sup>119</sup> *Id.*

<sup>120</sup> See *Occupied Palestinian Territory: Gaza Emergency Report*, U.N. OFF. OF COORDINATION OF HUMANITARIAN AFF. (Sept. 4, 2014), [http://www.ochaopt.org/documents/ocha\\_opt\\_sitrep\\_04\\_09\\_2014.pdf](http://www.ochaopt.org/documents/ocha_opt_sitrep_04_09_2014.pdf). According to the UN's Office for the Coordination of Humanitarian Affairs, between July 7 and August 26 of 2014, at least 2,131 Palestinians were killed during Operation Protective Edge, and an estimated 1,473 of the casualties were civilians. *Id.*

<sup>121</sup> Martinez, *supra* note 118.

<sup>122</sup> Ann Barnard & Jodi Rudoren, *Israel Says That Hamas Uses Civilian Shields, Reviving Debate*, N.Y. TIMES (July 23, 2014), <http://www.nytimes.com/2014/07/24/world/middleeast/israel-says-hamas-is-using-civilians-as-shields-in-gaza.html>.

<sup>123</sup> *Id.*

casualties.”<sup>124</sup> In an attempt to mitigate the loss of civilian life, Israel has “gone to unprecedented lengths to keep Palestinian civilians out of harm’s way, including dropping leaflets, making phone calls and sending text messages.”<sup>125</sup> Despite these efforts, there have been reports of Hamas encouraging residents not to flee their homes when they are warned by Israel of a pending strike, in an effort to deter Israel from carrying out a planned attack on a Hamas target.<sup>126</sup>

Hamas has also accused Israel of war crimes, namely the killing of hundreds of Palestinian civilians during airstrikes and failure to adequately discriminate or distinguish between combatants and civilians.<sup>127</sup> These accusations stem from the same events that the Israelis argue are war crimes committed by Hamas.<sup>128</sup> PLO Executive Committee member Hanan Ashrawi explains that there are so many Palestinian civilian casualties in part because Hamas is no longer just a military wing, but rather is now a major political party with institutions that are deeply connected to Palestinian society.<sup>129</sup> From Hamas’s perspective, the problem is that “Israel is not discriminating... if you are going to destroy everything related to Hamas as a party, as a movement, it means that you’re going to go on the rampage against families, homes, hospitals, schools, and social services.”<sup>130</sup>

The United Nations validated some of these concerns when its Human Rights Council adopted a resolution in July 2014 to establish an “independent, international commission of inquiry... to investigate all violations of international humanitarian law and international human rights laws in the Occupied Palestinian Territory.”<sup>131</sup> The independent commission of inquiry found that both the IDF and Hamas may have committed war crimes:

In relation to each attack on residential buildings that resulted in significant destruction and civilian deaths or injuries, the onus is on Israel to explain the factual elements that rendered the houses or the person(s) present inside a military target. Israel should provide specific information on the effective contribution of a given house or inhabitant to military action and the clear advantage to be gained by the attack. Should a strike directly and intentionally target a house in the absence of a specific military objective, this would amount to a violation of the principle of distinction. It may also constitute a direct attack against civilian objects or civilians, a war crime under international criminal

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<sup>124</sup> Barnard & Rudoren, *supra* note 122.

<sup>125</sup> *Gaza Crisis: Toll of operations in Gaza*, BBC NEWS (Sept. 1, 2014), <http://www.bbc.com/news/world-middle-east-28439404>

<sup>126</sup> Barnard & Rudoren, *supra* note 122.

<sup>127</sup> *See id.*; Martinez, *supra* note 118.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> Hum. Rts. Council Res. S-21/1, U.N. doc. A/HRC/S-21/2, at ¶ 13 (July 24, 2014).



law.<sup>132</sup> [...] The commission also considered air strikes against *prima facie* residential buildings that did not cause deaths because the buildings had been vacated... Without precise information about the possible military use of these premises, the commission is unable to make a conclusive assessment regarding Israel's respect of the principle of distinction. These attacks raise concerns that Israel's interpretation of what constitutes a "military objective" may be broader than the definition provided for by international humanitarian law.<sup>133</sup>

.....

The use of rockets in the possession of Palestinian armed groups, indiscriminate in nature, and any targeted mortar attack against civilians constitute violations of international humanitarian law, in particular of the fundamental principle of distinction, which may amount to a war crime. The intent of some Palestinian armed groups to direct attacks against civilians is demonstrated by statements indicating that their intended targets were civilians or large population centres in Israel.<sup>134</sup> [...] They [ Hamas ] also reportedly conducted military operations within or in close proximity to sites benefiting from specific protection under international humanitarian law, such as hospitals, shelters and places dedicated to religion and education, including within or in the vicinity of schools operated by the United Nations Relief and Works Agency for Palestine Refugees in the Near East.<sup>135</sup>

While there is much debate as to whether the rockets found in civilian buildings were actually instances of civilians being used as human shields,<sup>136</sup> it is important to note the gravity of such an allegation: the use of human shields is a violation of the principle of distinction in customary international law—which both Israel and Hamas are bound by—and it is specifically prohibited by the Rome Statute.<sup>137</sup> The Rome Statute, which governs the International Criminal Court (ICC), characterizes “[u]tilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military

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<sup>132</sup> Hum. Rts. Council, Rep. on the Independent Commission of Inquiry Established Pursuant to Human Rights Council Resolution S-21/1, U.N. Doc. A/HRC/29/52, at 10 (June 24, 2015) [hereinafter Independent Commission Report].

<sup>133</sup> *Id.* at 11.

<sup>134</sup> *Id.* at 9.

<sup>135</sup> *Id.* at 15.

<sup>136</sup> Martinez, *supra* note 118.

<sup>137</sup> The Rome Statute is an international treaty that governs the International Criminal Court, which is dedicated to investigating and prosecuting genocide, war crimes, and crimes against humanity. *See* Rome Statute of the International Criminal Court, July 17, 1998 [hereinafter Rome Statute].

operations”<sup>138</sup> as a “serious violation[s] of the laws and customs applicable in international armed conflict.”<sup>139</sup> Although Israel is not a member of the International Criminal Court, Israel could request that the ICC investigate and prosecute the alleged war crime if Israel makes a declaration accepting the ICC’s jurisdiction.<sup>140</sup> Or, more likely, Israel could find itself under the ICC’s jurisdiction at the request of Palestine. It is worth noting that the ICC “can only intervene where a State is unable or unwilling genuinely to carry out the investigation and prosecute the perpetrators,” and that the ICC prosecutes only individuals—not countries.<sup>141</sup>

On January 1, 2015, Palestine declared that it would accept the jurisdiction of the ICC “over alleged crimes committed in the occupied Palestinian territory, including East Jerusalem since June 13, 2014.”<sup>142</sup> In response to Palestine’s request that the ICC investigate the hostilities, the ICC reported that both the Palestinians and Israelis may have committed war crimes by harming civilians.<sup>143</sup>

The ICC’s findings suggest that the ongoing conflict in Gaza is partly a war of perception, as both sides have likely committed war crimes, yet both sides nonetheless exploit the hostilities and their results to gin up international support.<sup>144</sup> Israel advances the narrative that they are very careful about adhering to the LOAC principle of discriminating/distinguishing combatants from civilians and that the only reason Israeli air strikes result in so many civilian casualties is because Hamas hides their munitions in civilian buildings and fires at Israel from behind civilian areas.<sup>145</sup> Hamas responds by blaming Israel for the civilian deaths, and insists that Hamas is so deeply embedded in Palestinian communities and culture that there is no way for their fighters to not be among civilians.<sup>146</sup> The Israeli response to that explanation is that Hamas deliberately chooses to remain among civilians to exploit civilian deaths.<sup>147</sup>

### c. Lawfare in the EU: Should Hamas be Considered a Terrorist Group?

The European Union (EU) currently lists Hamas as a terrorist group, despite the recommendation of its second-highest court in 2014, which advised that

<sup>138</sup> Rome Statute, *supra* note 137 at art. 8(2)(b)(xxiii).

<sup>139</sup> *Id.* at art. 8(2)(b).

<sup>140</sup> BENJAMIN N. SCHIFF, BUILDING THE INTERNATIONAL CRIMINAL COURT 80 (2008).

<sup>141</sup> *Understanding the International Criminal Court*, ICC 1, 1 (May 2011), <https://www.icc-cpi.int/resource-library/Documents/UICCEng.pdf>.

<sup>142</sup> *Report on Preliminary Examination Activities*, ICC 1, 5 (Nov. 14, 2016), [https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE\\_ENG.pdf](https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf).

<sup>143</sup> *Id.* at 27–29.

<sup>144</sup> Martinez, *supra* note 118.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* (“They use the strategy of human shields for a reason because they think it works. They think that Israel will be (blamed) for these civilian casualties . . . Hamas should be responsible for the use of human shields.”).

the EU drop Hamas from its terrorist list.<sup>148</sup> That recommendation came from the General Court of the European Union, which stated in a press release that its recommendation was because the court found that the reasons for maintaining Hamas on the list were “based not on acts examined and confirmed in decisions of competent authorities but on factual imputations derived from the press and internet.”<sup>149</sup> Although the court’s recommendation was not followed, in September 2016 the EU Court of Justice’s Advocate General, Eleanor Sharpston, echoed the 2014 press release and said that Hamas should be removed because the EU “cannot rely on facts and evidence found in press articles and from the internet.”<sup>150</sup>

The EU’s classification of Hamas is critical in the conflict because that classification means that Hamas’s assets will remain frozen and the EU will continue to work to stop European funds from reaching the group.<sup>151</sup> The EU has not made a final decision on whether to follow the advice of the Advocate General, and a decision is forthcoming in 2017.<sup>152</sup> It is important to note that if the EU removes Hamas from its terror list, Hamas’s assets will become available and Hamas will likely benefit from European funding, which of course, would help the group in the conflict against Israel.

#### d. Did the United Nations Arm Hamas with Ammunition for Lawfare?

As recently as December 2016, the United Nations Security Council adopted Resolution 2334, admonishing Israel for its settlements in what it considered occupied Palestinian territories and calling for Israel to remove all Israeli settlements in “occupied Palestinian territory, including East Jerusalem.”<sup>153</sup> The UN Security Council voted 14-0 in favor of adopting the resolution, and the United States abstained.<sup>154</sup> Specifically, the UN Security Council asserted with the resolution that “Israel’s establishment of settlements in Palestinian territory occupied since 1967, including East Jerusalem, had no legal validity, constituting a flagrant violation under international law and a major obstacle to the vision of two States living side-by-side in peace and security.”<sup>155</sup>

<sup>148</sup> Gabriele Steinhauser, *EU Top Court Advised to Drop Hamas, Tamil Tigers from Terror List*, WALL ST. J. (Sept. 22, 2016), <http://www.wsj.com/articles/eu-top-court-advised-to-drop-hamas-tamil-tigers-from-terror-list-1474535703>.

<sup>149</sup> Press Release, General Court of the E.U., *The Court Annuls, on Procedural Grounds, the Council Measures Maintaining Hamas on the European List of Terrorist Organizations*, Press Release No. 178/14 (Dec. 17, 2014).

<sup>150</sup> Steinhauser, *supra* note 148.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> S.C. Res. 2334, ¶ 2 (Dec. 23, 2016).

<sup>154</sup> Press Release, Security Council, *Israel’s Settlements Have No Legal Validity, Constitute Flagrant Violation of International Law, Security Council Reaffirms*, U. N. Press Release SC/12657 (Dec. 23, 2016) [hereinafter *Israel’s Settlements Have No Legal Validity*].

<sup>155</sup> *Id.*

The resolution was adopted pursuant to Chapter VI of the United Nations Charter, and not Chapter VII, so the resolution is not legally binding.<sup>156</sup> Nonetheless, by declaring the Israeli settlements to be illegal, the UN has not only lent its support and empathy to the Palestinian cause, but has essentially accused Israel of committing crimes<sup>157</sup> and has likely emboldened Palestinian leaders to wage lawfare against Israel in the form of court cases, in addition to encouraging economic sanctions against Israel.<sup>158</sup> Most importantly, the passage of Resolution 2334 may have laid the foundation and provided precedent for future UN actions against Israel.

### III. ANALYSIS

Understanding the use of lawfare in the Israeli-Palestinian conflict is essential to being equipped to formulate an effective strategy to fight against ISIS in the global War on Terror.<sup>159</sup> As the nature and weapons of war continue to change and expand into non-traditional methods, the United States has much to learn from how Hamas has been successful in its fight against Israel. Like Israel, the United States is engaged militarily with a foreign terrorist organization that seeks to establish a sovereign state, undermine and erode Western institutions and values, and promote Sharia Law.<sup>160</sup> Like Hamas, ISIS is considered a terrorist group by the United States and is not a state-sponsored military force.<sup>161</sup> As terrorist organizations—rather than state-sponsored military forces—both Hamas and ISIS employ non-traditional warfare techniques such as suicide bombings that target civilians, using human shields,<sup>162</sup> and using political pressure of sympathetic nations to deter retaliation by

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<sup>156</sup> S.C. Res. 2334, *supra* note 153.

<sup>157</sup> *Id.* See also Israel's Settlements Have No Legal Validity, *supra* note 154.

<sup>158</sup> Liebermann, *supra* note 100 (“The resolution also calls on countries to recognize a difference between Israel and the Occupied Palestinian Territories when dealing with Israel. That could lead to sanctions against products from Israeli settlements in the West Bank. Palestinian leaders say they will wait to see if Israel abides by the resolution. If not, they can pursue cases against Israeli leaders at the International Criminal Court (ICC) under the Geneva Convention.”).

<sup>159</sup> The “War on Terror” refers to the US-led military operations in the Middle East that began after the terrorist attacks on the World Trade Center in New York City on September 11, 2001.

<sup>160</sup> See generally *Why We Hate You & Why We Fight You*, 15 DABIQ 1, 30, <http://clarionproject.org/factsheets-files/islamic-state-magazine-dabiq-fifteen-breaking-the-cross.pdf>. Note: Dabiq is a periodical magazine published by ISIS itself.

<sup>161</sup> U.S. STATE DEP’T, FOREIGN TERRORIST ORGANIZATIONS, <https://www.state.gov/j/ct/rls/other/des/123085.htm> (last visited Oct. 18, 2017) (noting that the State Department Bureau of Counterterrorism designated the “Islamic State of Iraq and the Levant” as a FTO in December 2004).

<sup>162</sup> Off. of the High Comm’n of Hum. Rts., Rep. on the Protection of Civilians in Armed Conflict in Iraq: 11 September–10 December 2014 at 10–11 (Dec. 15, 2014), [http://www.ohchr.org/Documents/Countries/IQ/UNAMI\\_OHCHR\\_Sep\\_Dec\\_2014.pdf](http://www.ohchr.org/Documents/Countries/IQ/UNAMI_OHCHR_Sep_Dec_2014.pdf).

their Western adversaries. The most important lesson for the United States to learn is how to prevent ISIS from effectively adding lawfare to its arsenal.

### **A. What is ISIS?**

Born out of al-Qaeda, ISIS was founded in 2004 and later rebranded as the “Islamic State of Iraq” in 2006, before US-led troops pushed the group into obscurity.<sup>163</sup> ISIS reemerged in 2011 as the Iraqi Shiite-dominated government fueled unrest among Sunnis in Iraq.<sup>164</sup> During this time, the Iraqi Shiite-dominated government was dispatching ISIS fighters to take advantage of the growing unrest in Syria.<sup>165</sup> In 2013, the group became known as the Islamic State of Iraq and Syria after it successfully seized two major cities in Iraq: Fallujah and Ramadi.<sup>166</sup> Since 2014, ISIS has executed campaigns to seize and control even more land in both Iraq and Syria.<sup>167</sup> ISIS has implemented a hierarchal governing system, which includes regional governors and seven councils that make decisions regarding a wide range of matters from financial issues to counterintelligence.<sup>168</sup> The ongoing conflict between ISIS, Syrian rebels, and North American Treaty Organization (NATO) allies in Syria is a fluid situation, so changes in territorial control and governance should be expected.

Unlike Hamas, which was elected into power by Palestinians, ISIS was not elected to govern any area and has often seized cities and invaded communities.<sup>169</sup> This is worth noting because unlike ISIS, Hamas has some semblance of legitimate authority, even if only granted by the Palestinians themselves.<sup>170</sup> Therefore, the United States may stand to benefit from ISIS’s standing as a foreign terrorist organization that has not been elected—there is a distinct benefit in the absence of any authority legitimized through elections. Because ISIS exists throughout various regions of Iraq and Syria, the group is much more dispersed and targets all groups with whom they disagree, as opposed to just one ethnic or religious group.<sup>171</sup>

Like Hamas, ISIS routinely targets and kills civilians in violation of the LOAC principle of discrimination. The United Nations reported in October 2016

<sup>163</sup> Cameron Glenn, *The ISIS Primer*, WILSON CTR. (Nov. 19, 2015), <https://www.wilsoncenter.org/article/the-isis-primer>.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> Nick Thompson & Atika Shubert, *The Anatomy of ISIS: How the ‘Islamic State’ Is Run, from Oil to Beheadings*, CNN (Jan. 14, 2015), <http://edition.cnn.com/2014/09/18/world/meast/isis-syria-iraq-hierarchy/>.

<sup>169</sup> See Jones, *supra* note 99 (explaining that Hamas won a landslide electoral victory in Palestine in 2006). See also Cameron Glenn, *Timeline: Rise and Spread of the Islamic State*, WOODROW WILSON INTERNATIONAL CENTER FOR SCHOLARS, <https://www.wilsoncenter.org/article/timeline-rise-and-spread-the-islamic-state>.

<sup>170</sup> Jones, *supra* note 99.

<sup>171</sup> Glenn, *supra* note 163.

that ISIS appeared to be employing increasingly brutal measures while it attempted to defend Mosul from a US-led international military offensive.<sup>172</sup> According to the United Nations' Office of the High Commissioner for Human Rights, ISIS executed 232 civilians in one day at two military bases; 42 of whom were reportedly shot in the head after refusing to join ISIS.<sup>173</sup> The United Nations has also reported that ISIS combatants forced thousands of civilians in various neighborhoods of Mosul at gunpoint to relocate to ISIS strongholds in the city. This increased Mosul's population from 23,000 to 60,000—presumably in an effort to use the civilians as human shields.<sup>174</sup> Additionally, ISIS officials have taken steps to cut off civilians from the outside world by confiscating satellite dishes, SIM cards and other communications equipment.<sup>175</sup> Countless additional reports<sup>176</sup> indicate that ISIS has executed many more civilians and ramped efforts of intimidation by displaying the bodies of the dead in public places,<sup>177</sup> converting colleges into “killing field[s],” and torturing civilians before decapitating them.<sup>178</sup> The Battle for Mosul was essentially declared an Iraqi victory on July 10, 2017,<sup>179</sup> after an international coalition made up largely of Iraqi forces and international air strikes<sup>180</sup> succeeded in liberating the city. However, ongoing post-victory conflicts continue as of August 2017.<sup>181</sup>

<sup>172</sup> Jared Malsin, *ISIS Reportedly Murders Hundreds of Iraqi Civilians as it Defends Mosul*, TIME (Oct. 28, 2016), <http://time.com/4549266/isis-civilians-massacre-mosul-offensive/>.

<sup>173</sup> *Id.*

<sup>174</sup> See Moni Basu, *Human shields in Iraq: The new ISIS strategy in the fight for Mosul*, CNN (Oct. 30, 2016) <http://www.cnn.com/2016/10/30/middleeast/iraq-mosul-isis-human-shields/>.

<sup>175</sup> Malsin, *supra* note 172.

<sup>176</sup> There are seemingly endless reports of the brutal measures taken by ISIS against civilians in Iraq, Syria, and other parts of the Middle East. There are far too many atrocities to include them all and can be easily found in the daily news and through a quick search of the Internet. See, e.g., *infra* notes 178–80.

<sup>177</sup> Bethan McKernan, *Mosul: ISIS Shoots Dead 40 Civilians and 'Hangs Bodies from Electricity Poles'*, INDEPENDENT (Nov. 11, 2016), <http://www.independent.co.uk/news/world/middle-east/mosul-offensive-latest-isis-shoots-kills-civilians-in-brutal-crackdown-a7411651.html>.

<sup>178</sup> Bethan McKernan, *'They Would Torture Them Inside and Slit Their Throats Outside: Eyewitnesses Reveal Full Scale of ISIS Depravity as They Flee Mosul*, INDEPENDENT (Nov. 8, 2016), <http://www.independent.co.uk/news/world/middle-east/isis-mosul-offensive-eyewitness-accounts-torture-murder-depravity-a7404116.html>.

<sup>179</sup> *Battle for Mosul: Iraq PM Abadi formally declares victory*, BBC (July 10, 2017) <http://www.bbc.com/news/world-middle-east-40558836>.

<sup>180</sup> *Battle for Mosul: The story so far*, BBC NEWS (Jan. 9, 2017), <http://www.bbc.com/news/world-middle-east-37702442>.

<sup>181</sup> See Mohamed Mostafa, *Islamic State Attacker Killed at Police Checkpoint in Eastern Mosul: Ministry*, IRAQI NEWS (Aug. 16, 2017), <http://www.iraqnews.com/iraq-war/islamic-state-attacker-killed-police-checkpoint-eastern-mosul-ministry/>. See also Nehal Mostafa, *Nine Civilians Killed, Injured in Landmine Explosion, East of Mosul*, IRAQI NEWS (Aug. 19, 2017), <http://www.iraqnews.com/iraq-war/nine-civilians-killed-injured-landmine-explosion-east-mosul/>.

### **B. How ISIS Could Become Hamas Copycats**

While it is useful to understand the shocking nature of the warfare that ISIS and Hamas are waging,<sup>182</sup> it may be more useful to understand how Hamas has successfully used media campaigns to pressure other nations into advancing their cause in international venues such as the United Nations and ICC, and how ISIS might one day attempt to follow suit. With similar goals of establishing a Muslim state and fighting Western values and influence,<sup>183</sup> ISIS might very well look to Hamas as an example of a successful terrorist organization, should Hamas continue to gain ground in its fight against Israel.

Understanding that Hamas has committed acts of terror that violate LOAC,<sup>184</sup> but has nonetheless accused Israel of war crimes,<sup>185</sup> the United States should be wary that ISIS might allege war crimes related to the ongoing air strikes in Iraq and Syria. For example, ISIS operatives or sympathizers could capitalize on the fact that in November 2016, a spokesman for the US Central Command told reporters that an estimated 119 civilians had been killed by American air strikes since the attacks began in 2014.<sup>186</sup> Moreover, Amnesty International estimates that as many as 300 civilians may have been killed by American air strikes.<sup>187</sup> While the United States can certainly defend such allegations by explaining the civilian deaths were not the result of a failure to discriminate between civilians and combatants, but were inevitable collateral damage because ISIS hides in civilian areas, the utterance of “war crimes” alone can cause a media frenzy worldwide.

Levying accusations of war crimes against a nation carries much more weight than accusing a foreign terrorist organization of violating LOAC, which is why ISIS may turn to such accusations in an effort to engage in lawfare. While the term “war crimes” carries negative connotation, the term only has a tangible, legal effect if a court finds an accused party guilty of violating LOAC. Hamas successfully alleged war crimes against Israeli political and military officials, and was able to persuade the ICC to investigate the activities in “occupied Palestinian

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<sup>182</sup> Many of ISIS’s and Hamas’s actions would be considered war crimes, in violation of the principle of distinction because not only do these organizations target civilians, but they also subject their own civilians to violence and danger by using them as human shields. See *supra* notes 177–78. See also *Battle for Mosul: The Story So Far*, *supra* note 180.

<sup>183</sup> Glenn, *supra* note 163.

<sup>184</sup> Hamas has repeatedly claimed responsibility for attacks against Israeli civilians, which is a violation of the principle of discriminating between combatants and civilians. See *supra* Section II(B)(ii)(b).

<sup>185</sup> See *Id.*; Martinez, *supra* note 118; Liebermann, *supra* note 100.

<sup>186</sup> Alexander Smith, *U.S. Airstrikes in Iraq, Syria Killed Twice the Civilians Previously Announced*, NBC NEWS (Nov. 10, 2016), <http://www.nbcnews.com/storyline/isis-terror/u-s-airstrikes-iraq-syria-killed-twice-civilians-previously-announced-n682011>.

<sup>187</sup> *Id.*

territories.”<sup>188</sup> Fortunately for the United States, any allegation of American war crimes would be unlikely to take place at the ICC because it is not a party to the Rome Statute and has not accepted the ICC’s jurisdiction.<sup>189</sup> Moreover, the United States is unlikely to ever be considered a nation that “is unable or unwilling genuinely to carry out the investigation and prosecute” war crimes,<sup>190</sup> given the sophisticated nature of the American justice system.

Although the United States would likely never face charges in the ICC, accusations of war crimes could certainly have a profound impact on US public opinion and politics, and eventually influence American foreign policy. Hamas has successfully used war crime allegations to drum up support for a Palestinian state and to rally opposition to Israel’s settlement activities and defense policies in “occupied Palestinian territories.”<sup>191</sup> ISIS may seek to do the same.

#### IV. IMPLICATIONS

##### A. Lawfare: Coming to a Courtroom Near You!

###### 1. Forthcoming Lawfare Cases

Two lawsuits have recently been filed by the families of Americans who were killed by terrorists in Europe.<sup>192</sup> In June 2016, the father of an American who was killed in the Paris massacre that was orchestrated by ISIS in November 2015, filed suit against Google, Facebook, and Twitter.<sup>193</sup> The complaint alleged that the

<sup>188</sup> Liebermann, *supra* note 100.

<sup>189</sup> U.S. STATE DEP’T, INTERNATIONAL CRIMINAL COURT, <https://www.state.gov/j/gcj/icc/> (last visited Jan 13, 2017).

<sup>190</sup> *Understanding the International Criminal Court*, *supra* note 141.

<sup>191</sup> See S.C. Res. 2334, ¶ 2 (Dec. 23, 2016) (using the term “occupied Palestinian territories” to refer to parts of the West Bank and East Jerusalem that were seized by Israel in the 1967 war). I use quotation marks around the term to denote that there is significant disagreement about whether these areas are “occupied Palestinian territories” per The Hague Convention of 1907, “[t]erritory is considered occupied when it is actually placed under the authority of a hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.” Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, art. 42, Oct. 18, 1907. Furthermore, Art. 43 of The Hague Convention states that “[t]he authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.” *Id.* at art. 43. These articles together define occupied territory and because Palestine was never a sovereign nation prior to 1967, some argue that there was never “authority of the legitimate power,” so the disputed areas do not qualify as occupied territory under international law. See generally WILLIAM M. MALLOY, TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS AND AGREEMENTS 1776-1909 (1910).

<sup>192</sup> See *infra* notes 193, 198, & 200.

<sup>193</sup> Barbara Ortutay, *Father of Paris Victim Sues Social Media Companies*, ASSOCIATED PRESS (June 15, 2016), <http://bigstory.ap.org/article/>



social media companies “knowingly permitted” ISIS to use their online platforms to recruit members, raise money, and promote “extremist propaganda.”<sup>194</sup> While internet companies are generally exempt from liability<sup>195</sup> for the content that users post on their websites, it is unclear if the social media companies will be immune from liability because, according to plaintiff’s counsel, the complaint “is not about what ISIS’s messages say.”<sup>196</sup> Rather, “[i]t is about Google, Twitter, and Facebook allowing ISIS to use their social media networks for recruitment and operations.”<sup>197</sup>

Similarly, family members of three Americans who were killed in the ISIS attacks in Belgium filed suit against Twitter in January 2016.<sup>198</sup> The complaint alleges that Twitter performed “a uniquely essential role in the development of ISIS’s image, its success in recruiting members from around the world, and its ability to carry out attacks and intimidate its enemies” in violation of 18 U.S.C. § 2333.<sup>199</sup> Twitter, Google, and Facebook also face another similar lawsuit, which was filed by families of three victims of the ISIS-inspired nightclub attack in Orlando, Florida in June 2016.<sup>200</sup> That complaint alleges that the social media and internet companies enabled ISIS to use those internet platforms to spread extremist propaganda and to recruit others to engage in terrorism.<sup>201</sup> Furthermore, the complaint states that “[w]ithout Defendants Twitter, Facebook, and Google (YouTube), the explosive growth of ISIS over the last few years into the most feared terrorist group in the world would not have been possible.”<sup>202</sup>

The results of those lawsuits remain to be seen and will likely shape the way in which the United States engages in lawfare against ISIS in the future. If any of the lawsuits are successful, social media companies will be on notice that they can be held civilly liable for allowing ISIS to use their services, which would have a profound impact on how such companies operate. Regardless of whether the lawsuits are successful, the rise of suits against social media companies under 18

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<sup>194</sup> Ortutay, *supra* note 193.

<sup>195</sup> See 47 U.S.C. § 230(c)(1) (“No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”). This generally provides a safe harbor for internet companies in terms of liability for the material that users post on their websites. *Id.*

<sup>196</sup> Ortutay, *supra* note 193.

<sup>197</sup> *Id.*

<sup>198</sup> Alex Heath, *Families of American Killed by ISIS Are Suing Twitter for Allegedly Providing ‘Tremendous Utility and Value’ to the Terrorist Organization*, BUS. INSIDER (Jan. 9, 2017), <http://www.businessinsider.com/twitter-sued-isis-victims-families-france-belgium-attacks-2017-1>.

<sup>199</sup> *Id.*

<sup>200</sup> Emma Woollacott, *Orlando Pulse Nightclub Shooting Victims’ Families Sue Facebook, Twitter, and Google*, FORBES (Dec. 20, 2016), <http://www.forbes.com/sites/emmawoollacott/2016/12/20/pulse-victims-families-sue-facebook-twitter-and-google/#5272e3b44bfb>.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

U.S.C. § 2333 could very well have a political impact and inspire Congress to take up the issue of whether social media companies should face such liability.

## 2. Legalizing Domestic Lawfare Against ISIS

Congress could easily make legislative changes to help combat ISIS in the lawfare arena by giving terrorism victims a right of action against social media companies who provide material support to ISIS. American courts are already seeing novel legal claims against social media companies for the wrongful deaths of Americans in various ISIS-affiliated terrorist attacks,<sup>203</sup> and such lawsuits may very well continue until the law in this area is settled. That said, Congress can and should consider amending the Anti-Terrorism Act to provide Americans a right of action against social media companies who knowingly provide substantial assistance. Such legislation must be narrowly tailored and must explicitly define what constitutes “substantial assistance” for social media companies to make clear which practices are permissible and which could result in civil liability under 18 U.S.C. § 2333.<sup>204</sup> For example, to be an effective change in law, § 2333 would need to include civil liability for knowingly providing social media account access to ISIS members and those who use their accounts to recruit ISIS sympathizers and to organize or promote terrorist acts.

Not only would amending the ATA provide relief for victims of ISIS-related terrorism, but it would provide guidance for courts which are likely to see more lawsuits against social media companies. More importantly, it would significantly hinder ISIS’s recruitment activities, as the group heavily relies on social media for recruitment and promoting its propaganda.<sup>205</sup> If social media companies can be held civilly liable for allowing ISIS members to use their platforms to recruit and organize terrorist acts, it follows that social media companies will take greater steps to terminate or disable ISIS accounts on platforms such as Facebook, Twitter, and YouTube. Disabling ISIS accounts would weaken ISIS by hindering recruitment and organizational abilities both abroad and in the United States. Furthermore, without access to social media to publish and share videos, ISIS would suffer a major setback in its efforts to influence public opinion and gain sympathy from other nations, thereby making it much more difficult to wage lawfare.

## **B. What the United States Can Do to Trump ISIS**

With the ongoing violence in the Middle East and incessant headlines from American news outlets about airstrikes in Iraq and Syria, there is no shortage of

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<sup>203</sup> See *supra* Section IV(A)(i).

<sup>204</sup> 18 U.S.C. § 2333 (2016).

<sup>205</sup> U.N. Hum. Rts. Council, Rep. of the Independent International Commission of Inquiry on the Syrian Arab Republic, Rule of Terror: Living under ISIS in Syria, ¶ 18, U.N. Doc. A/HRC/27/CRP.3 (Nov. 19, 2014).

proposed solutions to these problems. What follows are opinions about how the United States can and should proceed, based on the successes and struggles of Israel in its conflict with Hamas.

### 1. Waging Lawfare Through the News Media & Public Opinion

A critical step in a lasting and effective strategy to defeat ISIS in a lawfare arena is to win back the American conscience and public support for the use of lawfare against ISIS. This means clearly defining the objective and enemy and persuading the American people that the lawfare actions undertaken are necessary to achieve the objective. The importance of clearly defining the enemy and our objective cannot be overstated. As Barry Goldwater wrote about the Cold War against the Soviet Union, “it seems [to me] that our approach to foreign affairs suffers from a confusion in objectives.”<sup>206</sup> Reasonable minds can disagree about what our objective should be in the conflict against ISIS, but to be successful by any measure, a clear objective is necessary. The Trump Administration would do well to develop a message about what that objective is—whether the goal is absolute victory over ISIS, containment of ISIS to particular regions, peacekeeping, or a combination thereof. Regardless of the Trump Administration’s chosen objective, the objective must be clear to enable the US government to garner public support in its fight against ISIS, as public support is vital to fostering a lawfare-friendly legal environment.

Although defining a clear objective is certainly a difficult task, defining the enemy may be a greater challenge. This challenge was highlighted in the 2016 presidential election, when Donald Trump and Hillary Clinton each made comments about the conflict with ISIS and sparked speculation and criticism that some characterizations of the conflict would inadvertently harm the United States. For example, Trump repeatedly (and mostly falsely) accused Clinton of failing to use the term “radical Islamic terror,” which he argued was critical because “to solve a problem, you have to be able to state what the problem is or at least say the name.”<sup>207</sup> In response, Clinton insisted that the term used did not matter and that “we have to defeat radical jihadist terrorism or radical Islamism, whatever you call it—it’s the same. But we cannot demonize, demagogue and declare war on an entire religion.”<sup>208</sup>

This disagreement between two presidential candidates not only highlights the disagreement about the terminology used, but highlights a more important point:

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<sup>206</sup> BARRY GOLDWATER, *CONSCIENCE OF A CONSERVATIVE* 105 (Regnery Pub. Inc. 1990).

<sup>207</sup> Amy Sherman, *Trump: Clinton Won’t Use the Term ‘Radical Islamic Terrorists’*, POLITIFACT (Oct. 9, 2016), <http://www.politifact.com/truth-o-meter/statements/2016/oct/09/donald-trump/trump-clinton-wont-use-term-radical-islamist-terro/>.

<sup>208</sup> *Id.*

if we are not careful with defining the enemy, we could do more harm than good.<sup>209</sup> That said, the Trump Administration's first step in the fight against ISIS can and should be to implement a consistent, deliberate policy to actively distinguish between ISIS militants and Muslims as a whole. This policy could be strengthened by the Trump Administration working with the Associated Press (AP) to adopt the term in its *AP Stylebook*,<sup>210</sup> to establish consistency in reporting. By standardizing the terminology for ISIS, the AP could effectively educate the public and limit misunderstandings about whom we are fighting, which would help the United States focus on the objective of defeating ISIS. With the government, news media, and American public using the same terminology and having the same understanding—that we are fighting terrorists, not targeting an entire religion—public support for legal measures against ISIS would certainly rise and therefore increase the success of lawfare and in turn, US security.

## 2. Putting the “United” in United Nations

As a permanent member of the UN Security Council, the United States carries the power of a meaningful veto of Security Council resolutions and other actions, which allows it to prevent the passage of any resolution it disagrees with.<sup>211</sup> Each of the other five permanent members (France, Russia, the United Kingdom, and China) has utilized the veto power at some point in history, and each has chosen

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<sup>209</sup> Sherman, *supra* note 207. President Obama succinctly explained the danger in using imprecise terminology: “If we fall into the trap of painting all Muslims with a broad brush and imply that we are at war with the entire religion, then we are doing the terrorists’ work for them.” *Id.* In 2002, President George W. Bush similarly explained the danger of conflating the enemy (terrorists) with all Muslims: “This great nation of many religions understands, our war is not against Islam, or against faith practiced by the Muslim people. Our war is against evil.” *Id.*

<sup>210</sup> The Associate Press has published its *AP Stylebook* since 1953 and has updated the guide for journalists annually. Per the AP, the stylebook “provides fundamental guidelines for spelling, language, punctuation, usage and journalistic style” and “is the definitive resource for journalists.” *What is the AP Stylebook?*, ASSOCIATED PRESS, [https://www.apstylebook.com/?do=what\\_is](https://www.apstylebook.com/?do=what_is) (last visited Feb. 10, 2017). Furthermore, the AP has changed terminology in the past to influence politics and public opinion about issues such as illegal immigration. See Rachel Weiner, *AP drops ‘illegal immigrant’ from Stylebook*, WASH. POST (Apr. 2, 2013), [https://www.washingtonpost.com/news/post-politics/wp/2013/04/02/ap-drops-illegal-immigrant-from-stylebook/?utm\\_term=.dc923e18e578](https://www.washingtonpost.com/news/post-politics/wp/2013/04/02/ap-drops-illegal-immigrant-from-stylebook/?utm_term=.dc923e18e578) (describing the AP’s decision to drop the term “illegal immigrant” from its stylebook as “a victory for immigrant advocates who argue that the term is biased against the people it describes.”).

<sup>211</sup> *Voting Systems and Records*, U.N., <http://www.un.org/en/sc/meetings/voting.shtml> (last visited: Feb. 10, 2017) (“It was agreed by the drafters that if any one of the five permanent members cast a negative vote in the 15-member Security Council, the resolution or decision would not be approved . . . If a permanent member does not fully agree with a proposed resolution but does not wish to cast a veto, it may choose to abstain, thus allowing the resolution to be adopted if it obtains the required number of nine favourable votes.”).

to abstain from voting to signify disagreement without preventing adoption of a resolution.<sup>212</sup> That said, the United States wields significant influence in the United Nations and can obstruct any Security Council resolutions that are objectionable. Should the Security Council consider a resolution that undermines the American fight against ISIS or that would lend any support to ISIS's cause, the United States can and should use its veto power to demonstrate commitment to debilitating ISIS in every way possible.

Additionally, as a founding state of the United Nations and its greatest financial contributor,<sup>213</sup> the United States should exercise its influence on the United Nations more often. With a new administration and a new UN Ambassador, former South Carolina Governor Nikki Haley, it appears that the United States will be changing its approach to the United Nations.<sup>214</sup> With the warning to "those that don't have our back, we're taking names; we will make points to respond to that accordingly," we can likely expect the United States to seek a more influential role and expect more pressure on its allies at the United Nations.<sup>215</sup> This new approach, if used prudently, could be beneficial to the United States, should the United Nations consider taking action or remaining silent on a matter that would adversely affect the American fight against ISIS. Furthermore, showing increased strength and resolve to defeat ISIS (along with strategic planning) at the United Nations could enable the United States to win the support of allies and unite other countries to assist in the fight against ISIS.

## V. CONCLUSION

The fight against ISIS, like the Israeli fight against Hamas, is already being fought in part in a lawfare theater. While challenging ISIS in international legal venues is unlikely to be successful because of jurisdictional issues, the United States can take steps today to use its own courts to fight ISIS. Obstructing ISIS's use of social media platforms by holding social media outlets civilly liable for providing substantial assistance to the group would dramatically weaken the terrorist group and starve the organization of new recruits. However, success in an American courtroom requires that the law be amended, which requires public support. Taking

<sup>212</sup> *Voting Systems and Records*, *supra* note 211.

<sup>213</sup> U.N. Secretariat, *Assessment of Member States' Contributions to the United Nations Regular Budget for the Year 2017*, U.N. Doc. ST/ADM/SER.B/955 (Dec. 28, 2016) (discussing that for 2017, the US financial contributions amounted to 22% of the UN's budget, and the next largest contribution came from Japan, whose contribution was 9.68% of the UN's budget).

<sup>214</sup> Somini Sengupta, *Nikki Haley Puts U.N. on Notice: U.S. Is 'Taking Names'*, N.Y. TIMES (Jan. 27, 2017), [https://www.nytimes.com/2017/01/27/world/americas/nikki-haley-united-nations.html?\\_r=0](https://www.nytimes.com/2017/01/27/world/americas/nikki-haley-united-nations.html?_r=0) ("You're going to see a change in the way we do business . . . Our goal with the administration is to show value at the U.N., and the way we'll show value is to show our strength, show our voice, have the backs of our allies and make sure our allies have our back as well.").

<sup>215</sup> *Id.*

lawfare to the front of media outlets is vital to garnering public support for laws and a legal environment amenable to lawfare challenges, as well as international support of the United States and its allies in the fight against ISIS. Altogether, these lawfare tactics combine the powers of all three branches of our government and could prove to be an effective strategy in the fight against ISIS.

