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International Law and the Use of Lawfare: An Argument for the U.S. To Adopt a Lawfare Doctrine

Trevor Michael Alfred Logan

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**INTERNATIONAL LAW AND THE USE OF LAWFARE: AN ARGUMENT FOR
THE U.S. TO ADOPT A LAWFARE DOCTRINE**

A Masters Thesis

Presented to

The Graduate College of
Missouri State University

In Partial Fulfillment

Of the Requirements for the Degree

Master of Science, Defense and Strategic Studies

By

Trevor Michael Alfred Logan

May 2017

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Defense and Strategic Studies

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Master of Science

Trevor Michael Alfred Logan

ABSTRACT

The purpose of this thesis is to develop a comprehensive operational definition of lawfare, analyze historical case studies of states currently implementing lawfare strategies, and to make an argument for why the U.S. should adopt a lawfare doctrine. Chapter 1 will focus on defining the concept of lawfare and drafting an operational definition of lawfare. Chapter 2 focuses on the evolution of the lawfare doctrine established by the People's Republic of China (PRC), identifies the current lawfare operations conducted by the PRC in the fields of maritime, airspace, cyberspace, and outer space, and analyzing the implications of PRC lawfare operations for the U.S. Chapter 3 observes the use of lawfare by both Israel and Palestine, specifically focusing on Palestine's use of lawfare to seek international recognition of statehood and the efforts of Israel to counter Palestinian lawfare operations through direct and indirect means. Chapter 4 illustrates the capacity of the U.S. to be a leader in the field of lawfare by identifying the current U.S. asymmetrical advantages that the U.S. has over other states in the international community. Chapter 5 concludes with a summary of the U.S. lawfare assets, an argument for why the U.S. should adopt a lawfare doctrine, and an outlined proposal of the resources needed for the U.S. lawfare doctrine, a mission statement for the lawfare doctrine, and a set of operational objectives that the U.S. lawfare doctrine should look to attain.

KEYWORDS: Lawfare, China, PRC, Israel, Palestine, U.S., strategy, doctrine, proposal

This abstract is approved as to form and content

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CHAPTER 1: INTRODUCTION TO THE CONCEPT OF LAWFARE

As the world continues to progress ever closer towards being more quantifiable and regulated, states are likely to seek alternative vehicles to attain an asymmetrical advantage over their adversaries within the construct of an ever-changing international system. Lawfare is defined as one or more of the following characteristics: a form of asymmetric warfare using a legal system against an adversary; an instrument of state power; or a strategy that stipulates how a state should engage in international law and foreign relations. Presently, lawfare is being viewed a useful tool for both state and non-state actors to achieve strategic goals that have traditionally solely been attainable through diplomatic or military means. Subsequently, countries like the U.S. are likely to be faced with the decision of whether to adopt an offensive lawfare strategy that advances their interests or a counteroffensive strategy that addresses the offensive lawfare strategies of adversarial states in the near future.

Lawfare has been viewed by some states as an adjunct to traditional diplomacy; developing over time into an instrument of statecraft. The first evidence of a state considering the use of lawfare as a tool of diplomacy was the People's Republic of China (PRC), who adopted a lawfare doctrine; although referring to lawfare under the designation of "legal warfare." The term lawfare was first used in a 1975 writing titled *Whither Goeth the Law – Humanity or Barbarity*, by authors John Carlson and Neville Yeomans, but was made popular after a 2001 speech by U.S. Major General Charles J. Dunlap Jr.¹ In the 21st century, other states have considered and implemented lawfare

¹ Christi Scott Bartman, *Lawfare: Use of the Definition of Aggressive War by the Soviet and Russian Federation Governments*. (Newcastle: Cambridge Scholars, 2010), 2.

strategies as an instrument of statecraft; reinforcing the value of lawfare as a useful tool that can be used by state and non-state actors.

Within the field of international law, the scope, nature, and employment of lawfare have historically focused on the perspective of a state's influence within the international system, the interests of that country, and for what purpose that state is seeking to achieve with the use of lawfare. In contemporary international politics, the concept of lawfare was illustrated through the diplomatic creation and signing of international laws and agreements. States seeking to enter these agreements were looking for a way to establish customary international law that would either preserve the existing rights of their state or otherwise benefit their state interests. To accomplish this, diplomatic officials would leverage the power and international influence of their state to achieve state objectives. An example of this contemporary method is observable in the Melian Dialogue between the Athenians and Melians.

During the Peloponnesian War, Athenian historian Thucydides noted: "the strong do what they will while the weak suffer what they must."² Based on this model, lawfare was employed with a "might makes right" mentality, in which states with a sufficient level of international status could have a direct influence in the creation of international law. These agreements would often advance the interest of a state or coalition of states, sometimes at the detriment of other countries. The ability for states to leverage their global influence closely aligns with the Montevideo criterion: in which a state's international personality is derived from its state identity, sovereignty, and legitimacy.

² Thucydides, "History of the Peloponnesian War," The Melian Dialogue, 451 bc, accessed November 12, 2016. <https://www.mtholyoke.edu/acad/intrel/melian.htm>.

The Montevideo criterion is the basis for a state being able to draft, sign, or engage in international politics within the scope of international law. The Montevideo criterion stipulates that a state must possess the following: a defined population, a defined territory, an established government, and capacity to enter relations with foreign countries.³ Though highly criticized, these four criteria create a working framework for drafting international laws. Subsequently, the Montevideo criterion served as the necessary requirements to conduct international law.

Over time, the Montevideo criterion has been less efficient to hinder non-state actors and self-determination movements from impacting decisions in the field of international law. During the 20th and 21st Centuries, the international community experienced an unprecedented increase in the presence of non-state actors or non-sovereign entities that possess significant influence at either the national or international level.⁴ This phenomenon is mainly attributable to the creation of international organizations, subsequent tribunal decisions by these international institutions, pronouncements by international law scholars, and changes in customary laws over time. To better understand the strengths, capabilities, and limitations of lawfare, a comprehensive operational definition of lawfare must be presented.

³ David J. Bederman, *International law frameworks*, 2nd ed. (New York, NY: Foundation Press Thomson/West, 2006), 53.

⁴ National Intelligence Council, "Nonstate Actors: Impact on International Relations and Implications for the United States," August 23, 2007, 2, accessed January 03, 2017, https://www.dni.gov/files/documents/nonstate_actors_2007.pdf.

Drafting an Operational Definition for Modern Lawfare

Although the conceptual roots of lawfare can be traced back to foundational international customary practices between states, the definitions and uses of lawfare developed in the early 21st century denote a noticeable delineation from traditional diplomacy. Moreover, examples and case studies of lawfare used by state and non-state actors are more prevalent and identifiable in the 21st Century than at any point in history. In the modern context, two current operational definitions have been outlined that best represent the concept of lawfare.

The first reference and discussion of lawfare as a viable instrument of statecraft to be used in future conflicts was brought up in *Unrestricted Warfare*, a book written by two officers of the People's Liberation Army (PLA) of China. Written in 1999, *Unrestricted Warfare* discusses various strategies of how the PRC could take on and defeat a superior adversary in a theoretical future conflict.⁵ Included in this discourse were the concepts of using technology, economic warfare, network warfare, and legal means to counter an adversary's strengths. The objective of implementing these lawfare strategies is to secure an asymmetrical advantage for the PRC over any potential adversary. Lawfare, or "legal warfare" as mentioned in *Unrestricted Warfare*, is defined as the use of international law, and other various means, to create a change in the strategic environment without the use of direct military action.⁶ Additional information and an examination of the strengths and weaknesses of Chinese lawfare can be found in Chapter 2.

⁵ Qiao Liang and Wang Xiangsui, *Unrestricted Warfare* (Beijing: PLA Literature and Arts Publishing House Arts, 1999), 19.

⁶ *Ibid.*

The second definition of lawfare appeared in a position paper written by U.S. Air Force Major General Charles J. Dunlap Jr. In an article discussing the increasing utility of law in modern combat, Dunlap defined lawfare as “the strategy of using – or misusing – law as a substitute for traditional military means to achieve an operational objective.”⁷ The position paper addressed the use of lawfare tactics by the Taliban and other terrorist groups, but also discussed the overall topic of lawfare. Although Dunlap’s definition of lawfare was published two years after *Unrestricted Warfare* was released, Dunlap is credited with coining the term lawfare and bringing the concept back into the forefront of international law and international relations.⁸ Information in addition to an opportunity analysis on U.S. lawfare can be located in Chapter 4. Although the two definitions attempt to illustrate the concept of lawfare, a more comprehensive operational definition is needed to aid in drafting a full lawfare doctrine.

By incorporating aspects of both modern definitions of lawfare, a state seeking to develop a lawfare strategy that it can use as an instrument of state power. Lawfare is the strategy of using or creating international or domestic laws that result in a change in the strategic environment that is in the pursuit of a military or a political objective. This definition places emphasis on a state’s motivation for employing a lawfare strategy, observing that a state would not implement a lawfare campaign that did not advance its interests in some way. By viewing the entire field of lawfare through this definition, one can begin to observe and analyze the various motivations and intentions behind state actions within the arena of international law. Additionally, the new lawfare definition

⁷ Charles J. Dunlap, Jr., "Law and Military Interventions: Preserving Humanitarian Values in 21st Conflicts," *Duke University Law*, November 29, 2001, 4, accessed November 15, 2016, <http://people.duke.edu/~pfeaver/dunlap.pdf>.

⁸ *Ibid.*

allows one to analyze the strengths and weaknesses of existing lawfare strategies and lawfare operations. Almost equally as important as determining what defines lawfare, a general understanding of the uses and potential power of lawfare must be outlined to gain a comprehensive framework for lawfare.

Lawfare as an Instrument of Statecraft

In the modern era, lawfare has become increasingly viewed as an effective instrument of state power that can be used to acquire an asymmetrical advantage within the international system.⁹ States can develop strategies or conduct operations to use lawfare in a given scenario. Although states consider lawfare with differing levels of interest, the states using lawfare value the ability of the tool to attain an asymmetrical advantage for the state over its potential adversaries.

There are several reasons for why a state might find lawfare as an appealing alternative tool to kinetic action. For emerging military powers, lawfare can serve to complement a well-established or developing military capability. The advantage of implementing lawfare to supplement a military capability can be related to obtaining an asymmetrical advantage over an adversary in a conflict, or possibly hindering the operational capacity of an enemy during a battle. Examples of these lawfare strategies can be viewed when looking at the use of lawfare by both the Palestinian Authority and Israel during the Israel-Palestinian conflict (discussed in chapter 3).

Another potential use for lawfare can be used to offset a deficit in military capability between a state and its adversary. Using lawfare in this manner can be

⁹ Orde F. Kittrie, *Lawfare: Law as a Weapon of War* (Oxford, UK: Oxford University Press, 2016), 1.

beneficial to countries seeking to address an opponent that is militarily more advanced, or to maintain a certain level of force protection if a state is making other reductions to its military forces. An example of the former can be found in looking at the uses and motivations of lawfare by the People's Republic of China (Discussed in chapter 2). Alternatively, an example of the latter could be used in place for the US; however, the U.S. is currently not implementing lawfare as an instrument of statecraft (Discussed in chapter 4).

Lawfare can also be an appealing alternative for those who dislike the cost of kinetic operations. When compared to developing, and maintaining a conventional force, lawfare is almost always financially cheaper.¹⁰ Additionally, using lawfare has rarely been the cause of loss of life.¹¹ In an era of sequestration and attempting to pull away from an ongoing conflict, lawfare can be an effective solution for the U.S. to maintain its interests abroad with a shrinking federal budget.

Lawfare Typology

In the 21st Century, the majority of lawfare examples used has fallen into one of two broad categories: Instrumental lawfare and compliance-leverage disparity lawfare.¹² Instrumental lawfare is defined as “the use of legal tools to achieve the same or similar effects of legal instruments to achieve the same or similar effects as those traditionally sought from the conventional kinetic military action.”¹³ This type of lawfare comprises the majority of lawfare examples, as the scope of this lawfare type extends to any use of

¹⁰ *Ibid.* 8.

¹¹ *Ibid.*

¹² *Ibid.* 1.

¹³ *Ibid.* 11.

legal tools to achieve a strategic goal. Subsequently, this type of lawfare is limited only by the creativity of the states and individuals seeking to create a lawfare strategy. Most of the lawfare examples outlined in the following chapters will focus on the use of instrumental lawfare by state and non-state actors to achieve various objectives. Although the following chapters are focused on the use of instrumental lawfare, both types of lawfare have the capacity to be highly impactful and merits future research.

Compliance-leverage disparity lawfare is defined as laws used to gain an advantage from the greater influence of law on or off a kinetic battlefield.¹⁴ An example of this type of lawfare can be observed in Dunlap's lawfare essay, as the focus of the article is how the Taliban were using existing laws and the Law of Armed Conflict (LOAC) to avoid being targeted by U.S. military personnel.¹⁵ While the focus of that discussion centered on the Taliban, additional examples can be found with many other terrorist organizations around the world.

Purpose

The purpose of the subsequent chapters is to provide several case studies of states that have adopted or incorporated lawfare strategies, the strengths and weaknesses of those strategies, and a conclusion of future lawfare strategies from those states. Chapter 4 will assess the capacity for the U.S. to implement lawfare strategies by analyzing examples of U.S. lawfare successes. Chapter 5 will conclude with a proposal for a U.S.

¹⁴ *Ibid.*

¹⁵ Charles J. Dunlap, Jr., "Law and Military Interventions: Preserving Humanitarian Values in 21st Conflicts," Duke University Law, November 29, 2001, 1, accessed November 15, 2016, <http://people.duke.edu/~pfeaver/dunlap.pdf>.

lawfare doctrine: what it would look like, what the purpose of a U.S. lawfare strategy, and what the potential strengths and weaknesses of drafting a lawfare doctrine.

Method

To analyze the effectiveness of a lawfare strategy, one must understand the motivations the promulgated a state to implement a lawfare strategy, what the intended outcome of the lawfare strategy was seeking to accomplish, how the lawfare campaign was carried out, and what was the result of the lawfare operation. Each case study will begin with an analysis of official pronouncements and actions by the lawfare state. After assessing the motivations behind why a state would seek to conduct a lawfare operation, an analysis of the lawfare operation will demonstrate the thinking and rationale of the lawfare state. The effectiveness of a lawfare operation will be determined by the operations ability to cause a change in the lawfare state's strategic environment and the response from the surrounding international community. By analyzing the steps taken during a specific lawfare campaign; one can understand a state's mentality for using lawfare in future conflicts. Each chapter will conclude with an analysis of the state's lawfare apparatus, its effectiveness in employing lawfare strategies, and potential impacts from current lawfare operations being carried out by the lawfare state.

End State

Analyzing the results of a particular lawfare case study can determine the overall effectiveness of the lawfare concepts employed. The Subsequent chapters will examine the responses from adversarial belligerents to lawfare operations and assess the overall

efficiency of the lawfare strategies used. In doing so, general conclusions will be made on the efficiency of a state's lawfare campaigns and how a country like the U.S. can learn from these campaigns when developing its lawfare doctrine.

CHAPTER 2: CHINA'S ADOPTION OF A LAWFARE DOCTRINE

In the 21st century, the frequency and scope of lawfare used by the People's Republic of China (PRC) have increased at an almost unprecedented level. Moreover, the presence of a PRC lawfare doctrine sets China apart from other states that have also incorporated lawfare as a component of their overall diplomatic strategy. By observing the PRC's use of lawfare in the fields of maritime, aviation, space, and cyberspace, one can gain a better understanding of the strengths and weaknesses of the PRC lawfare strategy. These observations can provide states with vital information needed for a state to consider adopting an offensive or defensive lawfare strategy to counter the PRC's aggressive lawfare campaigns. To gain a better understanding of how China views lawfare, one must understand the historical changes that have occurred both in Chinese society as a whole and how those changes impacted the Chinese rule of law.

Much like the Communist revolution has changed and shaped the modern PRC, the country's views on its legal apparatus and use of lawfare have also observed correlating changes over the past century. Under the direction of Communist Party Leader Mao Zedong, the PRC systematically dismantled its legal apparatus during the Cultural Revolution.¹⁶ From 1966 to 1976, the PRC systematically unraveled its legal system by disbanding its Ministry of Justice, closing all running domestic law education programs, and retraining all practicing lawyers to serve the communist party as farmers and laborers.¹⁷ In sum, all lawyers were no longer allowed to practice law, and the state

¹⁶ Orde F. Kittrie, *Lawfare: Law as a Weapon of War* (Oxford, UK: Oxford University Press, 2016), 163.

¹⁷ Eric W. Orts, "The Rule of Law in China," *Vanderbilt Journal of Transnational Law* 34 (2001): 44.

prevented any additional Chinese nationals from becoming practicing lawyers.

Effectively, the PRC had become a lawless state.

The central reason for the PRC to suspend its legal apparatus was based on the ideology of the ruling Communist Party Chairman Mao Zedong. According to Chairman Mao, the rule of law in China was hindering the free flow of the revolution and therefore needed to be abolished.¹⁸ Before this abolition, the historical precedent for the use of law in the PRC was that law was viewed solely a tool for the government to exert authoritarian control over its people.¹⁹ Subsequently, the decision to suspend its legal apparatus had less of an impact on daily life than a similar decision would have had in a more legally saturated state such as the US.

After the death of Mao Zedong in 1976, the PRC began to reconstruct its legal apparatus and the basic rule of law quickly. By 2008, the PRC had developed a sophisticated legal system, complete with thousands of laws, regulations, and the third highest number of practicing lawyers in the world.²⁰ Changes during this reformation period were focused on reestablishing legal tools for absolute control over PRC citizens. Harsh penalties were established to dissuade PRC lawyers from taking on sensitive cases that involved defending the individual rights of PRC citizens.²¹ Both the rule of law and legal apparatus of the PRC were primarily centered on placing more power and resources towards advancing PRC interests. This focus would significantly influence the PRC views on lawfare and decision to create a lawfare doctrine.

¹⁸ Orde F. Kittrie, *Lawfare: Law as a Weapon of War* (Oxford, UK: Oxford University Press, 2016), 164.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*

The concept of current lawfare and the PRC lawfare doctrine can be traced back to *Unrestricted Warfare*, in which two officers of the People’s Liberation Army (PLA) discuss how to address wars and conflict in the 21st century. In the text of *Unrestricted Warfare*, authors Qiao Liang and Wang Xiangsui present a variety of future strategies that the PRC can employ to defeat a technologically superior adversary through several alternative modes of action.²² These strategies encompass the ideology of Sun Tzu, stating that “to win one hundred victories in one hundred battles is not the pinnacle of excellence; defeating the enemy without fighting is the pinnacle of excellence.”²³ To that end, the PRC lawfare doctrine is comprised of three primary warfare methods: legal warfare, psychological warfare, and public opinion or media warfare.

Legal warfare includes all of the lawfare strategies and lawfare campaigns of the state. The objective for legal warfare in the warfare trilogy is to utilize all available state legal assets to achieve the political and military objectives of the PRC.²⁴ The psychological leg of the warfare trilogy encompasses the efforts of the PRC to hinder an adversary’s capacity to make and justify decisions against the PRC.²⁵ The objective for psychological warfare is to effectively wear down the ability for the leadership of an adversary to take decisive actions, while also seeking to defend against the capacity for the rival state to make alternative moves to counter PRC operations. Public opinion or media warfare is defined as the “the struggle to gain dominance over the venue for implementing psychological and legal warfare.”²⁶ The goals of media warfare are to

²² Qiao Liang and Wang Xiangsui, *Unrestricted Warfare* (Beijing: PLA Literature and Arts Publishing House Arts, 1999), 19.

²³ Sun Tzu, *The Art of War*, ed. Samuel B. Griffith (Oxford: Oxford University, 1971).

²⁴ Stefan Halper, *China: The Three Warfares*. (Washington: University of Cambridge, 2013). 29.

²⁵ *Ibid.*

²⁶ Dean Cheng, "Winning Without Fighting: Chinese Legal Warfare," The Heritage Foundation, May 21, 2012, accessed December 26, 2016.

preserve friendly morale, alter an enemy's situational assessment, weaken an enemy's will to fight, and generate support at home or abroad.²⁷ As opposed to legal and psychological warfare, public opinion warfare can be undertaken during times of peace as well as implemented during times of conflict. These three pillars of warfare have been woven into the framework of Chinese military strategy. These strategies are illustrated as *falu zhan*, or "legal warfare."²⁸ The discussion of legal warfare in *Unrestricted Warfare* would also provide a modern operation definition for the PRC lawfare strategy.

As previously discussed in Chapter 1, the PRC definition of Lawfare is the use of various means, including international law, to create a change in the strategic environment without the use of military action.²⁹ As this definition would imply, the strategy for this strategy of lawfare should be to use legal warfare strategies instead of physical confrontation or before physical confrontations begin.³⁰ In the 21st century, the PRC has implemented this lawfare strategy in the areas of maritime, aviation, space, and cyberspace. Using lawfare in these areas have helped the PRC in its singular objective to extend its territorial sovereignty through shaping international opinion. Out of all PRC lawfare operations currently in contention, none is more easily identifiable than China's maritime lawfare strategy.

²⁷ Stefan Halper, *China: The Three Warfares*. (Washington: University of Cambridge, 2013).

²⁸ Orde F. Kittrie, *Lawfare: Law as a Weapon of War* (Oxford, UK: Oxford University Press, 2016), 162.

²⁹ Qiao Liang and Wang Xiangsui, *Unrestricted Warfare* (Beijing: PLA Literature and Arts Publishing House Arts, 1999), 19.

³⁰ Dean Cheng, "Winning Without Fighting: Chinese Legal Warfare," The Heritage Foundation, May 21, 2012, accessed December 26, 2016.

PRC Maritime Lawfare

One of the more contentious areas of focus for the PRC lawfare strategy is in the field of international maritime law. The PRC has taken particular stances on articles of the United Nations Convention on the Law of the Sea (UNCLOS) and internationally observed Exclusive Economic Zones (EEZ).³¹ By artificially creating man-made islands in the South China Sea, the PRC is attempting to incorporate the newly created islands as part of its coastal territory, effectively extending its EEZ 200 miles into international waters.³² This new EEZ has been carved out of the existing EEZ's of other coastal states in the South China Sea. By claiming exclusive rights to this expansive territory, the PRC is also arguing that it has the sole right to regulate all forms of traffic through the area: to include both military and commercial maritime and aviation vessels. In doing so, the PRC can achieve its overall lawfare strategy for its maritime and national security interests.

The overall objective of the PRC's naval lawfare strategy is to simultaneously usurp individual access to fishing and shipping lanes while providing an extended buffer zone against adversary warships.³³ To gain a better understanding of how the PRC is attempting to achieve this lawfare objective, one must understand the articles of the UNCLOS and EEZ that the PRC is exploiting. The first, the UNCLOS, is an international multilateral agreement regarding the demarcation of territorial sovereignty among all coastal states.

³¹ Orde F. Kittrie, *Lawfare: Law as a Weapon of War* (Oxford, UK: Oxford University Press, 2016), 166.

³² *Ibid.*

³³ *Ibid.*

The purpose of the UNCLOS is to affirm that the territorial sovereignty of coastal states extends 12 nautical miles beyond the end of its land territory and secure the rights to certain resources within that area.³⁴ This convention establishes customary laws for empowering coastal states to regulate the entering and exiting of ports and to preserve freedom of passage for flagged vessels of all countries in international waters. Additionally, outside of the 12-nautical mile demarcation, the UNCLOS observes the right of use for all states to use international waters to pursue maritime and security interests. For traditional great power states, the UNCLOS provision on international waters has provided the ability to project force into the region.³⁵

Article 55 of the UNCLOS defines an EEZ as the area beyond and adjacent to a territorial sea in which a state is entitled to specific rights within that area.³⁶ Article 55 provides coastal states with the sovereign right of exploration, exclusive access to all natural resources both in the ocean and the corresponding seabed, and jurisdiction over the EEZ. According to the stipulations of the UNCLOS, these rights only extend up to “200 nautical miles from the baselines from which the breadth of the territorial sea is measured.”³⁷ By creating artificial islands within its established EEZ, the PRC’s strategy to extend its EEZ is to make claims that the origin of its coastal baseline should be calculated 200 nautical miles out from the shorelines of those islands.

³⁴ United Nations, "Overview - Convention & Related Agreements," December 10, 1982, accessed December 28, 2016, 21, http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

³⁵ David J. Bederman, *International law frameworks*, 2nd ed. (New York, NY: Foundation Press Thomson/West, 2006), 124.

³⁶ United Nations, "Preamble to the United Nations Convention on the Law of the Sea," December 17, 1970, accessed December 24, 2016, http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

³⁷ *Ibid.* Article 57.

In the context of international law, a variety of different means can change customary laws: pronouncements from international tribunals, diplomatic statements, an established precedent of military operations, and the writings of legal scholars.³⁸ These events serve as a precedent for future actions within the international community. The PRC has used this standard practice to achieve its maritime lawfare strategy. In addition to its territorial claims to man-made islands and marine operations within the South China Sea, the PRC is also actively engaged in a multilateral communications effort to substantiate its claims to the expanded EEZ. This strategic communications campaign includes international legal writings from the Chinese authors, operations to shape domestic legislation claiming the territory, and declarative statements in an international arena.³⁹ An especially aggressive event in this communication campaign occurred in 2009 when the PRC disseminated a map showing China's expansive claims in the South China Sea.

In May of 2009, the PRC dispersed two formal documents to all UN member states.⁴⁰ The first report said China's indisputable claim to the contested islands in the South China Sea, the exclusive rights to all the surrounding waters and subsoil, and immutable jurisdiction over the territory above.⁴¹ The second document contained a map indicating China's claim, demarcating its new coastal EEZ with a nine-dash-line. Also, marked on the map were the regional EEZ's as recognized by the international

³⁸ Orde F. Kittrie, *Lawfare: Law as a Weapon of War* (Oxford, UK: Oxford University Press, 2016), 166.

³⁹ *Ibid.* 167.

⁴⁰ *Ibid.*

⁴¹ U.S. Department of State, *Limits in the Seas*, No. 143, *China: Maritime Claims in the South China Sea* (December 5, 2014), <http://www.state.gov/documents/organization/234936.pdf>.

community. In 2013, the Philippine's invoked Article 297 of the UNCLOS, causing the territorial dispute to go before the Permanent Court of Arbitration.⁴²

The Permanent Court of Arbitration had three overarching claims to settle between the PRC and the Philippines. First, the Philippines complaint argued that the PRC's interpretation of the nine-dash-line conflicts with provisions of UNCLOS.⁴³ Second, Philippine's challenges some contested reef formations, asserting that the structures do not meet the definitions of islands. Subsequently, these disputed islands do not substantiate China's claims to the extended EEZ. Third, the Philippines argued that the PRC law enforcement operations in the region was inconsistent with UNCLOS obligations, and interfered with the Philippine sovereignty.⁴⁴

PRC Aviation Lawfare

Similar to the maritime lawfare strategy of the PRC, the aviation policy of the PRC has primarily focused on denying operational space for the U.S. and its regional allies. Under the Chicago Convention on International Civil Aviation, all states have complete sovereignty over the airspace above its territory as recognized by the international system.⁴⁵ Currently, the PRC is capitalizing this observed right and combining it with its strategy on extending its EEZ to reach China's territorial airspace.

⁴² Christopher Mirasola, "A Shifting Tide in the South China Sea: The Permanent Court of Arbitration Declares Jurisdiction," *Harvard International Law Journal*, November 09, 2015. Web. December 10, 2016.

⁴³ Thomas A. Mensah et al., "PCA Case N° 2013-19 in the Matter of the South China Sea Arbitration," January 12, 2016. Web. December 27, 2016. 42.

⁴⁴ Christopher Mirasola, "A Shifting Tide in the South China Sea: The Permanent Court of Arbitration Declares Jurisdiction," *Harvard International Law Journal*, November 09, 2015. Web. December 10, 2016.

⁴⁵ International Civil Aviation Organization, "Worldwide Air Transport Conference (ATCONF), Sixth Meeting. (Montreal: International Civil Aviation Organization, 2013). Print.

These concurrent claims pose a unique challenge for the U.S. and its regional allies conducting aerial operations in this contested area.

By extending its airspace sovereignty claims, the PRC has put itself at odds with the U.S. government. The tension between the U.S. and China stems from safety concerns over several air-to-air encounters between military aircraft.⁴⁶ These security concerns are supported by a 2001 incident in which a Chinese F-8 fighter jet interceptor collided with a U.S. EP-3 reconnaissance plane 75 miles off the coast of Hainan Island.⁴⁷ The incident resulted in the death of the Chinese pilot and the U.S. pilot needing to perform an emergency landing in Chinese territory. The U.S. crew aboard the damaged aircraft were taken into Chinese custody and detained for 11 days.⁴⁸ It is likely that these concerns will continue to be an issue as U.S. aircraft operations continue in contested airspace. Another area of contention between the U.S. and the PRC is over the applicability of international law in cyberspace.

PRC Interpretations of Law of Armed Conflict in Cyberspace

Another area of PRC lawfare that is becoming of great concern to the U.S. is China's views of lawfare in cyberspace. The concept of cyber warfare and cyberspace is a relatively recent phenomenon. Subsequently, customary international law and international conventions that would regulate the scope and application of international laws in cyberspace has yet to be universally agreed. The main area of concern regarding

⁴⁶ James Kraska and Raul Pedrozo, "The US-China Arrangement for Air-to-Air Encounters Weakens International Law." Lawfare Blog, March 09, 2016, accessed December 15, 2016, <https://www.lawfareblog.com/us-china-arrangement-air-air-encounters-weakens-international-law>.

⁴⁷ *Ibid.*

⁴⁸ Shirley A. Kan et al., "China-U.S. Aircraft Collision Incident of April 2001: Assessments and Policy Implications," Congressional Research Service, October 10, 2001, accessed December 27, 2016, <https://fas.org/sgp/crs/row/RL30946.pdf>.

the use of lawfare and the field of cyber is how the LOAC applies to acts of cyber warfare.

The LOAC plays a major role in preventing and managing hostilities between nations before and through the duration of a conflict. International laws and practices in this subfield of international law are broken into two categories: *Ius ad Bellum* and *Ius in Bello*.⁴⁹ *Ius ad Bellum* establishes the prohibition of the use of force in international relations.⁵⁰ *Ius in Bello* outlines international laws to be observed during times of conflict.⁵¹ Both categories of international law work to support and promote Article 1 of the UN charter which is the prohibition of war and promotion of international peace and security among member states.⁵² Additionally, both categories seek to protect innocents by differentiating between combatants and noncombatants. China's public statements towards the role of LOAC in cyberspace bears significant implications for other states and their citizens.

Correlating with advances in technology, the PRC has repeatedly stated that the obligations of LOAC and other international laws do not apply in the field of cyberspace. China has substantiated these claims by saying that even though cyber attacks are acts of aggression, they do not violate the territorial integrity or sovereignty.⁵³ Furthermore, the PRC also observes that it is impossible to discriminate between military and nonmilitary targets in cyberspace and that Internet attacks can pose a serious challenge on managing

⁴⁹ David J. Bederman, *International law frameworks*, 2nd ed. (New York, NY: Foundation Press Thomson/West, 2006), 223.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² United Nations, "Charter of the United Nations and Statute of the International Court of Justice," United Nations, 1945, Article 1, accessed December 21, 2016, <https://treaties.un.org/doc/publication/ctc/uncharter.pdf>.

⁵³ Adam Segal, "China, International Law, and Cyberspace," Council on Foreign Relations, October 02, 2012, accessed December 21, 2016, <https://www.cfr.org/blog-post/china-international-law-and-cyberspace>.

collateral damage to noncombatants.⁵⁴ China has, however, made concessions that the international community outline a certain level of voluntary restraint towards cyber operations.

In January 2015, the PRC along with other member states of the Shanghai Cooperation Organization – Kazakhstan, Kyrgyzstan, the Russian Federation, Tajikistan, and Uzbekistan submitted a proposal to the UN Secretary-General for a “voluntary code of conduct for information security.”⁵⁵ The 2015 proposal noted an initial attempt to draft similar legislation in 2011, and that the new proposal included some of the comments and critiques of the previous proposal.⁵⁶ The proposal also illustrated the need to prevent the potential use of technologies in operations that would otherwise threaten international peace and security or the infrastructure within states.⁵⁷ This proposal was viewed suspiciously by the U.S. and other countries, as it appeared to be in contradiction of the previously demonstrated views of the PRC. The threat of cyber warfare and the continued PRC strategy of denying the applicability of existing international laws and the LOAC in cyberspace is a grave concern to the U.S. and other potential adversaries.

By challenging the relevance of current international laws in cyberspace, the PRC can set a powerful precedent that solidifies a significant asymmetrical advantage over its opponents. Indeed, the power for the PRC to disrupt the ability of a military force like the U.S. to communicate with its military leaders and theater assets can render a

⁵⁴ *Ibid.*

⁵⁵ Kristen Eichensehr, "International Cyber Governance: Engagement Without Agreement?," *Just Security*, February 02, 2015, accessed December 21, 2016, <https://www.justsecurity.org/19599/international-cyber-governance-engagement-agreement/>.

⁵⁶ Liu Jieyi et al., "Letter dated 9 January 2015 from the Permanent Representatives of China, Kazakhstan, Kyrgyzstan, the Russian Federation, Tajikistan and Uzbekistan to the United Nations addressed to the Secretary-General," United Nations, January 13, 2015, accessed December 12, 2016, http://repository.un.org/bitstream/handle/11176/158448/A_69_723-EN.pdf?sequence=3&isAllowed=y.

⁵⁷ *Ibid.*

conventionally superior U.S. incapable of responding to PRC military operations. Additionally, a similar style of cyber-attack can threaten the ability for the U.S. to launch a nuclear second strike in the event of a nuclear exchange. Cyberspace has already been established as a central component of Chinese military strategy, having demonstrated the capacity to sway future kinetic military operations for the PRC over a superior adversary.⁵⁸ Subsequently, both cyber warfare and lawfare strategies to preserve this capability is of great importance to the Chinese government.

By taking stances that cyber operations are bound by the LOAC, the U.S. has voluntarily placed restrictions on its military operational capacity.⁵⁹ This disparity provides the PRC with a substantial asymmetrical advantage over the U.S. Subsequently; the PRC is likely to leverage this U.S. self-imposed restriction on cyber warfare to continue its cyber operations without fear of military reprisal. Another area of territorial dispute for the PRC involves designations of territory in outer space.

PRC Lawfare In Outer Space

Like the maritime and aviation lawfare strategies implemented by the PRC, China is also using lawfare to advance its territorial interests in space. Chinese scholars have demonstrated these interests by insisting that China's territorial claims do not end at the edge of their controlled airspace, but rather their sovereignty extends indefinitely upwards from the edges of China's claimed territorial land borders.⁶⁰ The PRC stance on

⁵⁸ Orde F. Kittrie, *Lawfare: Law as a Weapon of War* (Oxford, UK: Oxford University Press, 2016), 170.

⁵⁹ *Ibid.*

⁶⁰ U.S.-China Economic and Security Review Commission, "2008 Report to Congress of the U.S.-China Economic and Security Review Commission," U.S.-China Economic and Security Review Commission, November 2008, 152, accessed December 21, 2016, https://www.uscc.gov/sites/default/files/annual_reports/2008-Report-to-Congress-_0.pdf.

outer space sovereignty poses a direct challenge to the positioning and use of satellites by the international community. This assertion of territorial sovereignty in space; however, contradicts all standing international agreements, including the Outer Space Treaty and the Convention on International Civil Aviation, in which a general understanding of space operations is observed.⁶¹ The difference in interpretation of territorial sovereignty has led to conflict and contention between the PRC and the U.S.

In a pronouncement on U.S. national space policy, the U.S. has asserted that it rejects any claims to territorial sovereignty by any state in outer space, indicating that it is the observed right of all states to conduct operations in outer space and that those operations shall not be interfered with by other states.⁶² The dispute over territorial sovereignty in outer space is a serious concern to the US, one of the several states that rely heavily on its ability to collect, receive, and transmit data using satellite communications. These satellites help the U.S. communicate and conduct operations across the globe. Subsequently, the possibility of territorial sovereignty being observed in outer space poses a significant threat to the U.S. and its operational capacity. Another area of concern for outer space territorial sovereignty is regarding the field of arms control.

The ability to observe and verify compliance by national technical means has been a foundational point of all the key arms control agreements in which the U.S. is a party. Moreover, while the U.S. is not currently involved in a bilateral arms control agreement with China, any future arms control agreements are likely to have a

⁶¹ Orde F. Kittrie, *Lawfare: Law as a Weapon of War* (Oxford, UK: Oxford University Press, 2016), 168.

⁶² U.S. Office of the President, "U.S. National Space Policy," August 31, 2006, 1, accessed December 21, 2016, <https://fas.org/irp/offdocs/nspd/space.pdf>.

verification clause that will be conducted by satellite verification. It is unlikely that these disagreements over territorial sovereignty will be settled outside of a court of arbitration, which can have collateral effects on any future arms control agreement between the U.S. and China.

Future PRC Lawfare and Potential Responses for the U.S. and Its Allies

Based on previous lawfare initiatives over the past several decades, it is likely that the PRC will continue its aggressive lawfare operations to achieve its strategic interests. It would seem unlikely that a state that had previously viewed the rule of law as a hindrance to the flow of the communist revolution would be so successful at employing lawfare strategies to achieve its strategic interests. Indeed, the argument can be made that the decision to dismantle its entire legal apparatus served effectively as a reset button, leaving the PRC able to rebuild its entire legal system from its foundations. Subsequently, the PRC currently has the third largest number of lawyers in the world, sophisticated legal institutions, and a growing interest in growing its number of international lawyers.⁶³ Based on these investments, it is likely that future PRC lawfare operations will only become more sophisticated in the future. Other states in the international community will likely be faced with the decision on how to best address, contain, and counter PRC lawfare operations.

Depending on how much a state would like to invest in its lawfare activities, there are several possible strategies that can either counter or at least hinder PRC lawfare strategies. States not wishing to develop their lawfare strategy can disrupt Chinese

⁶³Orde F. Kittrie, *Lawfare: Law as a Weapon of War* (Oxford, UK: Oxford University Press, 2016), 186-187.

lawfare operations by challenging the PRC's territorial claims and pushing for international reform in cyberspace. The danger in the PRC lawfare strategy is that many of the assertions that they are proposing are not being universally refuted by the international community. If left unchallenged, the current PRC claims in the South China Sea and about its airspace, outer space, and cyberspace can set a precedent for future international actions.

Chapter 3: ISRAEL AND PALESTINIAN LAWFARE

Similar to how the Spanish Civil War served as a laboratory to test out tactics later used in World War II, one can look at the use of lawfare by both the Palestinian Authority (PA) and Israel during the Israel-Palestine conflict as a testing ground for how states can employ lawfare during an armed conflict. Moreover, analyzing the lawfare strategies and motivations for Israel and Palestine to use lawfare, one can gain a better understanding of the impact that lawfare can have in shaping a conflict from a military, diplomatic, and strategic level. To get a better understanding of the mentalities and purpose for Israel and Palestine to adopt lawfare strategies, one must understand the historical background of the conflict.

The Israel-Palestine conflict has historically been fueled by territorial disputes and over access to mutual religious sites. In the aftermath of World War II, the UN proposed partitioning the territory of Palestine into two sovereign states. One-half of the area would remain the Arab country of Palestine.⁶⁴ The other half of the area would go to resettling the Jewish state of Israel, which had made historical claims to the territory before Palestinian occupation.⁶⁵ In sum, neither state was adequately appeased by the two-state proposal, and an ensuing conflict over territorial claims and access to religious sites within the territory are still a center focus of the conflict to date.

In the modern lawfare case study of the Israel-Palestine conflict, the two ruling governments represent the interests of the Palestinian Arabs. Presently, the PA is in

⁶⁴ United Nations General Assembly, "Resolution 181 (II). Future government of Palestine," November 29, 1947, 1, accessed November 20, 2016, <https://unispal.un.org/DPA/DPR/unispal.nsf/0/7F0AF2BD897689B785256C330061D253>.

⁶⁵ *Ibid.*

control over the territory surrounding the West Bank. The other Palestinian-controlled territory, the Gaza Strip, is ruled by Hamas, a designated terrorist organization on the U.S. Department of States terrorist list.⁶⁶ It is important to note that while both ruling parties have employed lawfare strategies to hinder or otherwise hamper Israeli operations, references to the Palestinian lawfare campaign are representative of the lawfare operations conducted by the PA operating in the West Bank. While Hamas has conducted lawfare operations in the Gaza Strip, the scope of their lawfare tactics has been focused on enhancing their kinetic military operations and to prevent states from using their forces to target Hamas operatives.⁶⁷ When analyzing the strengths and weaknesses of a lawfare strategy, focusing on the lawfare operations conducted by the PA would be more fruitful than the lawfare activities of Hamas. Subsequently, an analysis of Hamas lawfare strategy will not be addressed in the Israeli- Palestinian case study.

The Palestinian Lawfare Campaign: The Search for Statehood

The central objective of the Palestinian lawfare campaign is to leverage existing legal instruments and to work within the constructs of the international system to achieve recognition of statehood. In doing so, the PA is attempting to draw an end to decades of negotiations that has been unable to bring Israel and Palestine any closer to a solution of the Israel-Palestine conflict. The primary imperative for state recognition is that it will provide critical legal standing in the ongoing territorial dispute between the territories of

⁶⁶ U.S. Department of State, “Foreign Terrorist Organizations,” accessed December 21, 2016, <https://www.state.gov/j/ct/rls/other/des/123085.htm>.

⁶⁷ Orde F. Kittrie, *Lawfare: Law as a Weapon of War* (Oxford, UK: Oxford University Press, 2016), 285.

Israel and Palestine. The first notable step in the lawfare campaign for state recognition was the 1988 Palestinian universal declaration of independence.

In the aftermath of the first Intifada, the 1988 universal declaration of independence observed the inherent need for Palestinian sovereignty against Israeli occupation in the Gaza Strip and West Bank.⁶⁸ To that end, the document made the unilateral claim that the territories of the Gaza Strip and West Bank were now officially declared to be Palestinian sovereign territory, establishing Jerusalem as a provisional capital.⁶⁹ Additionally, the universal declaration of independence tasked the Palestinian Liberation Organization with the power to rule over the defined territory of Palestine, all Palestinian's living in these territories, and recognized the right of the Palestinian people to fight against foreign occupation.⁷⁰ The 1988 Palestinian universal declaration of independence would have a significant impact on the Palestinian path to statehood.

As previously discussed in Chapter 1, statehood, as defined in the Montevideo criterion, is crucial for engaging in the process of creating international laws. The 1988 Palestine universal declaration of independence established a presence to three of the four requirements for statehood outlined in the Montevideo criterion; Palestine now only needed to demonstrate its capacity to enter foreign relations. In the years since the 1988 universal declaration, the US, Israel, and other opposition states have undertaken a joint effort to block Palestine's recognition to statehood.

⁶⁸ Palestinian National Council, "Palestinian National Council Declaration of Independence," November 14, 1988, 1, accessed November 12, 2016, <http://www.mulataqa.org/pdfs/PNC%20INDEPENDANCE%20DECLERATION.pdf>.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

After Palestine had released its universal declaration of independence, the U.S. indicated that it refused to acknowledge the declaration, and urged Palestine to resume peace talks between Israel and Palestine.⁷¹ The stance of the U.S. was not necessarily to refute Palestine's right to sovereignty, but rather place importance on coming to a resolution to the conflict through peace talks between Israel and Palestine. While the universal declaration of independence did not directly affirm Palestine's sovereignty, it was a significant success story of using an understanding of international law frameworks and lawfare to cause a change in the strategic environment. This early success in lawfare would serve as a model for the future lawfare strategy of the PA.

A quote from PA President Mahmood Abbas accurately summarizes the preference and perspective of the PA lawfare strategy. In a 2011 Op-Ed published in the New York Times, President Abbas described the PA lawfare strategy as “an internationalization of the conflict as a legal matter, not only a political one.”⁷² This quote encapsulates the objective for the Palestinian lawfare strategy: to gain legal standing within the international system to bring an end to the Israeli-Palestinian conflict in a way that favors Palestinian interests. In the 21st century, the lawfare campaign of the PA is conducting in three different campaigns. The first lawfare campaign is Palestine's continued effort to gain admission to the UN as a full member state. Palestine's second lawfare campaign was the appointment process to the International Criminal Court. Palestine's third lawfare campaign encompasses individual legal action against the state

⁷¹ Youssef Ibrahim, "P.L.O Proclaims Palestine to be an Independent State; Hints at Recognizing Israel," The New York Times, November 15, 1988, accessed October 11, 2016, <http://www.nytimes.com/1988/11/15/world/plo-proclaims-palestine-to-be-an-independent-state-hints-at-recognizing-israel.html?pagewanted=all>.

⁷² Mahmoud Abbas, "The Long Overdue Palestinian State," The New York Times, May 16, 2011, accessed November 18, 2016, <http://www.nytimes.com/2011/05/17/opinion/17abbas.html>.

of Israel to achieve alternative objectives that benefit Palestine. The first purpose of the PA lawfare strategy, gain admission to the UN General Assembly, remains a central imperative for Palestine.

Palestine's admission to the UN is an integral component of the PA lawfare strategy as it represents a longstanding political objective for both the government and citizens living in Palestinian territory. By attaining recognition of statehood, Palestine will be able to bring more international attention its numerous complaints against Israel, as well as make future occupation by Israel illegal by international law standards. Moreover, by pursuing recognition of statehood outside of the negotiations process, Palestine is hoping to attain its end goal of territorial sovereignty without conceding anything to the state of Israel. The importance of reaffirming Palestinian rights and decision to seek state recognition within the international system was observed in a quote from President Abbas when he noted that "If we don't obtain our rights through negotiations, we have the right to go to international institutions."⁷³

In a 2011 speech delivered the UN General Assembly, President Abbas announced that he had officially applied for Palestine's admission as a full member state.⁷⁴ The membership was notably controversial, making territorial claims based on June 4, 1976, territorial borders, with Al-Kuds Al-Sharif as its identified capital.⁷⁵ The U.S. and other UN members opposed Palestine's application.

⁷³ Middle East Institute, "Abbas to Act against Israel at UN If Peace Talks Fail," Middle East Institute, 2013, accessed December 08, 2016, <http://www.mei.edu/content/abbas-act-against-israel-un-if-peace-talks-fail>.

⁷⁴ UN News Center, "Security Council refers Palestinian application to UN membership committee," United Nations News Center, September 28, 2011, accessed September 12, 2016, <http://www.un.org/apps/news/story.asp?NewsID=39863#.WUWFXmjytPY>.

⁷⁵ Orde F. Kittrie, *Lawfare: Law as a Weapon of War* (Oxford, UK: Oxford University Press, 2016), 201.

The source of opposition from the US, among other states of the UN General Assembly, was the belief that the only way to achieve lasting peace between Israel and Palestine was through a mutual peace process between the two states.⁷⁶ This basis of this position stems from observations of both Israel and Palestine throughout the duration of the negotiation process. Additionally, at the time of Palestine's application submission, Israeli legal advisers claimed that Palestine's application violated the terms of Article XXXI (7) of the Israeli-Palestinian Interim Agreement, which prohibits either state from seeking to change the contested territorial status of the Gaza Strip and the West Bank.⁷⁷ Other states that oppose Palestine's application to become a full member state cite the fact that Palestine did not meet the international legal standards for independent statehood as stipulated in the Montevideo criterion. Nevertheless, the Palestinian application to become a full member state proceeded undeterred.

To become a full member state in the UN General Assembly, the UN requires either an affirmative vote or vote of absentia from all members sitting on the UN Security Council. Additionally, the five permanent members of the UN Security Council: the United States, China, the Russian Federation, France, and the United Kingdom, can veto an application.⁷⁸ A single veto vote results in a rejection of the application.⁷⁹ Noting the U.S. disapproval of the application, UN General Assembly Resolution 67/19 was voted on by the UN General Assembly to elevate Palestine's membership status. If passed, the

⁷⁶ *Ibid.*

⁷⁷ UN Security Council, "Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip," September 28, 1995, 19, accessed October 19, 2016, <http://www.unsco.org/Documents/Key/Israeli-Palestinian%20Interim%20Agreement%20on%20the%20West%20Bank%20and%20the%20Gaza%20Strip.pdf>.

⁷⁸ United Nations, "Charter of the United Nations," United Nations, 1945, Chapter V (23-27), accessed August 11, 2016, <https://treaties.un.org/doc/publication/ctc/uncharter.pdf>.

⁷⁹ *Ibid.*

resolution would elevate the status of Palestine to a non-member, observer state. Additionally, the resolution also promoted the continued pursuit of a peace accord between Israel and Palestine. The result of UN General Assembly Resolution 67/19 was approved with 138 states in favor, nine votes opposed, and forty-one states are abstaining.⁸⁰ As a nonmember state, Palestine would be able to join onto other international organs and agreements. Following the passage of UN General Assembly Resolution 67/19, Palestine readied its next lawfare operation, while Israel and the U.S. looked to deter any further applications.

Before the vote on UN General Assembly Resolution 67/19, Palestine received full member recognition by the United Nations Educational, Scientific, and Cultural Organization (UNESCO).⁸¹ The result of the UNESCO vote on Palestinian membership was 107 member states in favor, 14 votes against, and 52 states abstaining.⁸² In response to this vote, both the U.S. threatened to withdraw its funding contributions to the organization, approximately 22% of UNESCO's total budget.⁸³ Back in the Middle East, Israel responded to the news of the UNESCO vote by increasing Israeli settlement activities in the West Bank.⁸⁴ Moreover, both the U.S. and Israel threatened to pull their financial contributions from any other agencies considering admitting the PA to their organization. In response to these threats and counter operations, UN Secretary-General

⁸⁰ Ethan Bronner and Christine Hauser, "U.N. Assembly, in Blow to U.S., Elevates Status of Palestine," *The New York Times*, November 29, 2012, accessed November 08, 2016, <http://www.nytimes.com/2012/11/30/world/middleeast/Palestinian-Authority-United-Nations-Israel.html>.

⁸¹ UN News Center, "UNESCO votes to admit Palestine as full member." UN News Center. United Nations, October 31, 2011, accessed December 26, 2016, <http://www.un.org/apps/news/story.asp?NewsID=40253#.WUWMumjytPY>.

⁸² *Ibid.*

⁸³ Orde F. Kittrie, *Lawfare: Law as a Weapon of War* (Oxford, UK: Oxford University Press, 2016), 202.

⁸⁴ UN News Center, "UNESCO chief regrets United States decision to withhold funding." UN News Center. United Nations, November 02, 2011, accessed December 26, 2016, <http://www.un.org/apps/news/story.asp?NewsID=40286#.WUWNVGjytPY>.

Ban Ki-moon voiced his concern over the trajectory of these actions and called on all parties to act responsibly for peace.⁸⁵ The result of the U.S. and Israeli counter strategy resulted in a two-year abatement of international agencies willing to consider Palestine's admission to their organizations. To supplement this deterrent strategy, Israel and the U.S. also worked to create a negotiation window between the PA and Israeli governments.

In July 2013, an initiative was taken up to generate more peace discussions between Israel and Palestine. Spearheaded by U.S. Secretary of State John Kerry, the Israeli government agreed to release 104 Palestinian prisoners in exchange for Palestine agreeing to refrain from applying to any international organizations for nine months.⁸⁶ Per the agreement, the Prisoners were divided into four groups and released in successive waves throughout the 9-month term of the agreement. The agreement, however, only lasted for eight months, resulting in a release of 78 Palestinian prisoners instead of the agreed 104.⁸⁷ Although neither of the end terms of the deal was realized, the release of Palestinian prisoners is significant.

Many of these prisoners were serving sentences for murder or other acts of terrorism against Israeli nationals.⁸⁸ These Prisoners had been arrested and imprisoned before the signing of the Oslo accords entered force. In the eyes of the PA leadership, many of those prisoners were considered prisoners of war, adding a layer of emotion

⁸⁵ *Ibid.*

⁸⁶ Mehdi Hasan, "Transcript: Saeb Erekat," April 02, 2014, accessed October 12, 2016, <http://www.aljazeera.com/programmes/headtohead/2014/03/transcript-dr-saeb-erekat-201432611433441126.html>.

⁸⁷ Orde F. Kittrie, *Lawfare: Law as a Weapon of War* (Oxford, UK: Oxford University Press, 2016), 206.

⁸⁸ *Ibid.*

regarding the release of these prisoners.⁸⁹ After the conclusion of the agreement, the PA resumed its lawfare operations, looking for new opportunities to join various international organizations. The conclusion of this pause in lawfare operations marked the start of a new PA lawfare strategy: Joining the International Criminal Court.

Palestine's Ascension to the International Criminal Court:

On April 1, 2014, PA President Abbas announced, on live television, that Palestine would resume its efforts to join existing international organizations and treaties. President Abbas did so by signing 15 applications for Palestine to join onto existing international agreements.⁹⁰ The announcement cited that the decision to move forward with these applications was linked to Israel's failure to release Palestinian prisoners by the end of March 2014 as stipulated in the negotiation process between Israel and Palestine.⁹¹ In response to this announcement, Israeli officials stated that Israel was not obligated to release the fourth wave of Palestinian prisoners since there had been no substantive negotiations between Israel and Palestine since November of the previous year.⁹² It is apparent that the PA had dedicated a considerable amount of time drafting a list of international organizations, treaties, and conventions for which to apply.

According to chief PA negotiator Saeb Erekat, the PA had compiled a list of 63 international organizations, treaties, and conventions that Palestine would apply for

⁸⁹ Jodi Rudoren, "Palestinian Prisoner Release Is Critical Hurdle in Resuming Peace Talks," *The New York Times*, July 20, 2013, accessed November 03, 2016, <http://www.nytimes.com/2013/07/21/world/middleeast/palestinian-prisoner-release-is-critical-hurdle-in-resuming-peace-talks.html>.

⁹⁰ Jodi Rudoren, Michael R. Gordon, and Mark Lander, "Abbas Takes Defiant Step, and Mideast Talks Falter," *The New York Times*, April 01, 2014, accessed November 12, 2016, <https://www.nytimes.com/2014/04/02/world/middleeast/jonathan-pollard.html>.

⁹¹ *Ibid.*

⁹² Orde F. Kittrie, *Lawfare: Law as a Weapon of War* (Oxford, UK: Oxford University Press, 2016), 207.

member status.⁹³ Included in this list were the World Bank, the International Civil Aviation Organization, the International Maritime Organization, and the International Criminal Court.⁹⁴ The U.S. response to the decision of President Abbas to put forward its 15 applications was minimal.

Although the U.S. had previously threatened to withdraw its monetary contributions from any organization of the UN that extended the same standing as member states, it took no such step after the news of Palestine's applications to 15 treaties. Instead, the U.S. issued letters of disposition, saying that international agreements are limited to sovereign states, and therefore Palestine should not be allowed to accede to these international treaties because it does not meet such a standard.⁹⁵ By the end of 2014, the PA had officially submitted its application for membership to the International Criminal in addition to 19 other UN agencies. Palestine's accession to the International Criminal Court entered into force on April 1, 2015.⁹⁶

Established in 1998, the International Criminal Court was established as the first international organization to have territorial jurisdiction over states in the international community.⁹⁷ Under the preamble of the Rome Statute of the International Criminal Court, "the primary mission of the International Criminal Court is to help put an end to

⁹³ United Nations Associated Press, "Palestinians hold off on UN agency membership," *The Times of Israel*, May 21, 2013, accessed November 27, 2016, <http://www.timesofisrael.com/palestinians-hold-off-on-un-agency-membership/>.

⁹⁴ Joe Lauria, "PLO Official Says Palestinians Will Seek to Join International Court," *The Wall Street Journal*, April 29, 2014, , accessed November 15, 2016, <https://www.wsj.com/articles/plo-official-says-palestinians-will-seek-to-join-international-court-1398810549>.

⁹⁵ Orde F. Kittrie, *Lawfare: Law as a Weapon of War* (Oxford, UK: Oxford University Press, 2016), 207.

⁹⁶ Michelle Nichols, Louis Charbonneau, and Thomas Escritt, "U.N. confirms Palestinians will be ICC member on April 1," *Reuters*, January 07, 2015, , accessed November 27, 2016, <http://www.reuters.com/article/us-palestinians-israel-un-idUSKBN0KG1JV20150107>.

⁹⁷ International Criminal Court, "Understanding the International Criminal Court," *International Criminal Court*, 3, accessed November 22, 2016, <https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf>.

impunity for the perpetrators of the most serious crimes of concern to the international community as a whole and thus contribute to the prevention of these offenses.⁹⁸ The decision for the PA to join the International Criminal Court was made based on several key factors: domestic political concerns, external opposition to Palestinian statehood outside of the negotiation process, and a desire to address Palestine's past complaints against the state of Israel.

It was the assessment of analysts within the international community that Palestine's application for the International Criminal Court has primarily used a vehicle to quell intense internal domestic pressures. In the days leading up to the signing of the application to the International Criminal Court, the New York Times observed unusually high levels of domestic political tension coupled with a need for President Abbas to regain some credibility with an "increasingly growing critical Palestinian population."⁹⁹ This sentiment corroborated a 2014 poll showing that President Abbas' approval rating had dropped to 35% from 50% earlier that year.¹⁰⁰ Another possible reason for why President Abbas sought to join the International Criminal Court was as a means of bringing longstanding complaints of Israeli war crimes before the court.

From a lawfare perspective, joining the International Criminal Court poses a strategic advantage for the PA. Not only does joining the International Criminal Court bolster Palestine's ongoing case for statehood, but the physical seat also provides direct

⁹⁸ *Ibid.*

⁹⁹ Michael R. Gordon and Somini Sengupta, "Resolution for Palestinian State Fails in United Nations Security Council," *The New York Times*, December 30, 2014, accessed November 18, 2016, <https://www.nytimes.com/2014/12/31/world/middleeast/resolution-for-palestinian-state-fails-in-security-council.html>.

¹⁰⁰ Jodi Rudoren, "Palestinians Set to Seek Redress in a World Court," *The New York Times*, December 31, 2014, accessed December 02, 2016, <https://www.nytimes.com/2015/01/01/world/middleeast/palestinians-to-join-international-criminal-court-defying-israeli-us-warnings.html>.

access to air years of complaints against Israel in front of the international community. Some International Criminal Court experts have assessed however that Palestine's seat on the court will not provide control over the court's proceedings against the state of Israel.¹⁰¹ Subsequently, Palestine's seat at the International Criminal Court may not have provided as large of a bargaining chip as the PA would have hoped.

Individual Legal Action Against Israel By Palestinian Non-Governmental Organizations and Their Allies

Another active component of the lawfare strategy carried out by the PA is through independent legal action against Israel. This lawfare strategy includes legal proceedings waged by Non-Governmental Organizations acting on behalf of Palestine and its allies. This large and seemingly amorphous group of individuals and organizations are primarily interested in advancing the Palestinian cause for statehood. While the Palestinian government is actively engaged in lawfare operations within the international system, the volume of domestic complaints against both the state of Israel and Israeli government officials has severely hampered the ability for Israel to conduct operations to counter Palestinian efforts. One critical section of this group is individuals and organizations that have associated themselves with the Boycott, Divestment, and Sanctions movement.

The Boycott, Divestment, and Sanctions movement is an international campaign that employs legal, economic, and political pressure on the state of Israel to coerce compliance from the Israeli government. Active participants of the Boycott, Divestment, and Sanctions Movement leverage their economic and regional influence to disrupt the

¹⁰¹ Orde F. Kittrie, *Lawfare: Law as a Weapon of War* (Oxford, UK: Oxford University Press, 2016), 212.

flow of funding going to the Israeli government or any individuals that conduct business with the state of Israel.

The movement encompasses of three primary objectives: ending Israel's illegal occupation and colonization of Arab lands to include removing the wall, recognizing the fundamental equal rights of Arab-Palestinian citizens, and the Israeli recognition, acknowledgment, and protection of Palestinian refugees as stipulated in UN resolution 194.¹⁰² The focus of the Boycott, Divestment, and Sanction movement is to create universal jurisdiction so that individual citizens can pursue legal recourse against Israeli officials for alleged war crimes.

The results of this campaign have been a significant number of civil suits brought against the state of Israel and members of the Israeli government. Although the majority of the suits against Israeli officials and the state of Israel have not resulted in large sum settlements paid to the plaintiffs, the amount of time, resources, and personnel needed to respond to these lawsuits has had an uncalculated negative impact on the Israeli economy and ability to conduct other operations. Subsequently, the volume of lawsuits brought up by members of the Boycott, Divestment, and Sanctions Movement has significantly hindered the ability of the Israeli government to counter other Palestinian lawfare campaigns; making the Boycott, Divestment, and Sanctions Movement a useful component of the Palestinian lawfare strategy. This issue is likely to continue in the future, and the onus will be on the state of Israel to develop an effective solution for handling this volume of civil litigation. To respond to aspects of the lawfare strategy of

¹⁰² Orde F. Kittrie, *Lawfare: Law as a Weapon of War* (Oxford, UK: Oxford University Press, 2016), 240.

the PA, Israel has already developed a unique strategy: offensive lawfare waged by both public and private corporations.

Israeli Offensive Lawfare: A Way to Mitigate Against Hostile Aggression

Given its unique historical background and numerous perceived existential threats to its national security, Israel has taken a precarious stance on its aggressive use of lawfare. Israel's hesitation to employ lawfare strategies is attributable to Israel's fear that if it uses lawfare, it might set a precedent for adversarial states to conduct future lawfare operations against Israel.¹⁰³ In terms of lawfare initiatives waged by Palestine during the Israel-Palestine conflict, it is evident that it is imperative for the Israeli government to respond with lawfare operations of its own. The Israeli government has taken a more private method of conducting lawfare operations to accommodate a need for a counter-lawfare strategy. By providing information and other forms of material support to both private litigation firms and U.S. prosecutors, the Israeli government has been able to conduct lawfare operations while not being directly implicated in the process. By implementing this strategy, the Israeli government can wage offensive lawfare while adhering to its current commitments to international organizations and conventions.

Within the scope of the Israeli-Palestinian conflict, there are several instances in which offensive lawfare was used that merit further study. By analyzing how Israel was able to use a private Israeli litigation firm to stop a flotilla from delivering an arms shipment to the Gaza Strip and going after terrorist financing operations by suing the Ban of China, one can gain a better understanding of the strengths and weaknesses of using

¹⁰³ Orde F. Kittrie, *Lawfare: Law as a Weapon of War* (Oxford, UK: Oxford University Press, 2016), 311.

private entities to conduct lawfare operations on behalf of the state. These case studies in conjunction with Israel's ongoing efforts to prevent Palestine's path to statehood comprise Israel's lawfare strategy. The first case study, using lawfare to stop an arms shipment, demonstrates the disruptive power that lawfare can have on an adversary's military operations.

Case Study: Israel Uses Lawfare to Stop Gaza-Bound Flotilla

The 2011 decision for the Israeli government to use actionable intelligence and lawfare to prevent an arms shipment demonstrates the power that lawfare can provide to state governments. The Israeli government was able to provide a private Israeli law firm, Shurat HaDin, with critical information so that the company could prevent the arms shipment from being delivered to Hamas terrorists conducting operations in the Gaza Strip.¹⁰⁴ The Shurat HaDin Law Center is a private group of ten attorneys that have taken information collected by Israeli intelligence services and conducted lawfare operations on behalf of the state of Israel. Based in Tel-Aviv, Shurat HaDin has a shared mutual interest with the Israeli government to protect the state of Israel from terrorist security threats.¹⁰⁵ Subsequently, the Shurat HaDin Law Center has championed several lawfare initiatives on behalf of the Israeli government. A quote from Nitsana Darshan-Leitner, the founder, and director of the Shurat HaDin Law Center typifies the mutual interest shared between the two parties and why a private litigation firm would agree to serve as a proxy in Israel's offensive lawfare operations.

¹⁰⁴ *Ibid.* 312.

¹⁰⁵ Shurat HaDin, "About Us," Shurat HaDin: Israel Law Center, accessed November 12, 2016, <http://israelawcenter.org/about/>.

In an article published in the Jerusalem Post, Nitsana Darshan-Leitner observed that countries are confined by external pressures within the international system, which can restrict their ability to operate freely without constraint.¹⁰⁶ Indeed, the constructs that have been created to bring order to an otherwise anarchical international system can sometimes prohibit the ability of a state to act in a way that would give the state an asymmetrical advantage within its strategic environment. Darshan-Leitner then made the point that private citizens are not required to abide by such limitations, and are therefore able to take actions that sovereigns just cannot undertake.¹⁰⁷ This flexibility has allowed private organizations, like Shurat HaDin, to operate based on their personal interests and without the predisposition of wanting to protect the longstanding diplomatic relationships built between states. This lack of restriction allows for some degree of autonomy that can be highly beneficial to a country; however, it can also be a source of considerable controversy for the state.

When state lawfare objectives shift away from the interests of the private organization conducting the lawfare operation, the tension between the two parties may develop. Such pressure has developed at various times during the Israeli-Shurat HaDin lawfare partnership due to flippant support from the Israeli and U.S. governments.¹⁰⁸ An example that demonstrates the success of using private organizations to conduct an offensive lawfare operation is observable in the 2011 blockade of a Gaza-bound flotilla.

In 2011, Israeli intelligence services received an intelligence report that a shipment containing weapons and ammunition was scheduled to depart from a Greek

¹⁰⁶ Sarah Hershenson, "A New Type of Warfare," The Jerusalem Post, September 20, 2012, accessed December 05, 2016, <http://www.jpost.com/Magazine/Features/A-new-type-of-warfare>.

¹⁰⁷ *Ibid.*

¹⁰⁸ Orde F. Kittrie, *Lawfare: Law as a Weapon of War* (Oxford, UK: Oxford University Press, 2016), 313.

harbor, travel through the Israeli blockade, and delivered to Hamas forces operating in the Gaza strip. The Israeli government approached the Shurat HaDin Law Center with the information and requested that they help stop the shipment of the weapons and ammunition was delivered to the Hamas operatives. After a brief period of research, the Shurat HaDin Law Center drafted a comprehensive plan that would give them legal standing to halt the shipment.

The plan comprised of three phases: an issued warning to all maritime insurance companies operating in the region, a warning disseminated to the Inmarsat Global Satellite Company, and a filed lawsuit to seize the boat while the cargo was in transit. When paired with additional pressure leveraged directly against the Grecian government, this three-stage plan allowed the Shurat HaDin Law Center to act on behalf of the Israeli government to prevent a breach of the Israeli blockade without bloodshed. For the first phase of the three-step plan to be successful, the Shurat HaDin Law Center needed to conduct extensive research into Grecian shipping laws.

After researching Greek shipping regulations, the attorneys at Shurat HaDin discovered that no commercial or merchant ship could exit a Greek port without proper documentation of maritime insurance.¹⁰⁹ While the law center did not know the specific insurer of the flotilla, it decided to draft letters and send warnings to all insurance companies that provide coverage to merchant vessels operating in that region. Included in the letter was information stating that per U.S. Supreme Court Decision *Holder v. Humanitarian Law Project*, it is a federal crime to “knowingly provide material support

¹⁰⁹ *Ibid.* 314.

or resources to a directly or indirectly aid a foreign terrorist organization.”¹¹⁰

Subsequently, any ship transporting shipments to Hamas forces in the Gaza Strip would be in violation of international law and intentionally violated the Israeli naval blockade of the Gaza Strip. These official warning letters were sent to all the main insurance companies that would be likely providing coverage to the flotilla; several of these insurers responded back to Shurat HaDin’s warning.

Several maritime insurance firms responded to Shurat HaDin’s warning letter, stating that they would not knowingly insure any merchant vessels that were transporting materials to Hamas terrorists in the Gaza Strip.¹¹¹ In a response letter from Lloyd’s of London, the company took an additional step by stating that their company underwriters would never allow the business to insure a shipment that would be in violation of law, as the potential costs of such a delivery would be too high.¹¹² Whether Lloyd’s of London had any prior information about the shipment before receiving the Shurat HaDin warning letter remains unknown; however, by responding to the notice, Lloyd’s of London acknowledged that they would be legally liable if the flotilla shipment would proceed as scheduled. This response gave Shurat HaDin and the Israeli government additional leverage to help stop the shipment. With this early success, the Shurat HaDin Law Center proceeded with the second phase of its plan to halt the flotilla: to target an additional component needed for the ship to leave port.

¹¹⁰ “Providing material support to terrorists,” Title 18 U.S. Code, Section 2339A (b)(1). § 2339A (b)(1), 2004, accessed December 20, 2016, <https://www.gpo.gov/fdsys/pkg/USCODE-2015-title18/pdf/USCODE-2015-title18-partI-chap113B-sec2339.pdf>.

¹¹¹ Orde F. Kittrie, *Lawfare: Law as a Weapon of War* (Oxford, UK: Oxford University Press, 2016), 315.

¹¹² *Ibid.*

Upon further research, the attorney's at Shurat HaDin learned that maritime vessels are not permitted to travel in or out of Greek ports without a working satellite communications system. With that information in mind, Shurat HaDin focuses its efforts on applying pressure on Inmarsat. Based out of the U.S. and UK, Inmarsat was the sole provider of commercial maritime communication technologies to all marine vessels in the region, including the *Mavi Marmara*.¹¹³ The *Mavi Marmara* was involved in a previous Israeli interdiction operation in 2010, which resulted in the deaths of nine Turkish activists and the hands of Israeli forces.¹¹⁴ While the *Mavi Marmara* did not lead to the deaths of any Inmarsat personnel, it sent a serious message to the international community: Israel is prepared to break international law by attacking flagships to disrupt the flow of weapons and supplies to Hamas terrorists in the Gaza Strip.¹¹⁵

In a similar letter to the ones distributed to maritime insurance companies, the Shurat HaDin Law Center made the same case that Inmarsat would be held criminally liable in U.S. courts for providing material support or resources to a foreign terrorist organization. Additionally, the letter to Inmarsat stated that they would also be held accountable for all future attacks on U.S. nationals by Hamas operatives.¹¹⁶ To further substantiate their claim, the Shurat HaDin cited *Boim v Holy Land Foundation*, a U.S. seventh circuit court of appeals decision that affirmed a previous settlement award of \$156 million dollars to the family of David Boim, a U.S. citizen killed in a Hamas attack in the West Bank.¹¹⁷ Accompanying the letter was a civil complaint against both Inmarsat

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ Associated Press, "Mavi Marmara: Why did Israel stop the Gaza flotilla?," BBC News, June 27, 2016, accessed November 11, 2016, <http://www.bbc.com/news/10203726>.

¹¹⁶ Orde F. Kittrie, *Lawfare: Law as a Weapon of War* (Oxford, UK: Oxford University Press, 2016), 315.

¹¹⁷ *Boim v. Quranic Literacy Institute and Holy Land Foundation for Relief and Development*, 291 F.3d 1000, (7th circuit 2001).

and the CEO of Inmarsat claiming that Inmarsat is criminally liable for facilitating previous flotilla shipment that has provided material support to Hamas acts of terror.¹¹⁸

In response to the letters and civil complaint from the Shurat HaDin Law Center, Inmarsat agreed to terminate all satellite communication services to the flotilla.¹¹⁹ In reciprocation to Inmarsat's decision to comply with the Shurat HaDin Law Center, the law center dropped all civil complaints raised against both Inmarsat and its CEO.¹²⁰ With the suspension of the flotilla's insurance and communication operations, it was becoming increasingly unlikely that the flotilla was going to be able to leave Greek territorial waters. With the two difficult phases of the plan completed, the third and final stage of the plan was to apply pressure to the Greek government to uphold its maritime laws.

In addition to using the threat of criminal liability against marine insurance and radio communication companies, the Shurat HaDin Law Center also filed a lawsuit in a U.S. federal court to seize the actual ships comprising the flotilla.¹²¹ The lawsuit filed on behalf of Dr. Alan Bauer, and American who was critically injured in a 2002 suicide bombing perpetrated by Hamas terrorists.¹²² The lawsuit claimed that per the Neutrality Act (18 U.S.C. § 962), whoever attempts to fit out or arm any vessel with the intent that the ship will commit hostilities against any state or citizen of which the U.S. is at peace with shall be subject to fines or forfeiture of property to redress punitive damages to the plaintiff.¹²³ Based on this decision, the plaintiff claimed that even though the arms were

¹¹⁸ Orde F. Kittrie, *Lawfare: Law as a Weapon of War* (Oxford, UK: Oxford University Press, 2016), 315.

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

¹²¹ *Ibid.* 317.

¹²² *Ibid.*

¹²³ "Arming vessel against friendly nation," Title 18 U.S. Code, Section 962, June 25, 1948, accessed December 20, 2016, <https://www.gpo.gov/fdsys/pkg/USCODE-2015-title18/pdf/USCODE-2015-title18-partI-chap45-sec962.pdf>.

not installed to be used by the crew as a naval weapon system, they were still outfitted on the ship so that they could be transported to the Gaza Strip where they would be used to engage in hostilities. The case was dismissed, stating that Dr. Alan Bauer did not have the standing to pursue legal recourse.

With all three phases of the plan in place, the Shurat HaDin Law Center began to apply pressure on the Greek government, stating that there may be ships attempting to leave port with improper insurance or a functioning satellite communication system. The Greek government responded by interdicting and inspecting several flotillas of ships trying to leave port.¹²⁴ Ultimately, the Shurat HaDin Law Center was able to use U.S. federal laws and the threat of legal proceedings to leverage compliance from several state and non-state actors. The result was a success, demonstrating the power of using private litigation firms to conduct offensive lawfare operations that achieve state objectives. Additionally, stopping the flotilla using lawfare instead of military force confirmed that Israel could maintain an effective naval blockade of the Gaza Strip without having to resort to the use of military force against innocent foreign nationals.¹²⁵ The second case study on Israel's use of lawfare, Israel's lawsuit against the Bank of China, represents Israel's second lawfare campaign using the Shurat HaDin Law Center.

Case Study: Israel Sues Bank of China for Assisting Financial Transfers to Terrorist Cells.

By reviewing the decisions and actions of the Shurat HaDin Law Center and Israeli government when attempting to bring a lawsuit against the Bank of China, one can

¹²⁴ Orde F. Kittrie, *Lawfare: Law as a Weapon of War* (Oxford, UK: Oxford University Press, 2016), 312.

¹²⁵ *Ibid.* 313.

gain an understanding of the potential pitfalls associated with using private organizations to conduct diplomatic lawfare operations on behalf of the state. The case study is comprised of several interrelated lawsuits filed in U.S. federal court, as many of the plaintiffs in these cases were the family members of the victims of Hamas terrorist attacks carried out between 2006 and 2008.¹²⁶ Each of the suits alleged that the Bank of China was complicit in helping finance terrorist activities by knowingly facilitating financial transfers to two terrorist groups through accounts held by a Palestinian citizen Said al-Shurafa, a suspected terrorist leader.¹²⁷ The Bank of China is the fourth largest bank in the People's Republic of China and is completely controlled and operated by the Chinese government.¹²⁸

Reportedly conducted at the request of the Israeli government, the plaintiffs moved forward with their individual lawsuits, claiming that Israel would provide any resources needed to prove their claims.¹²⁹ The majority of the lawsuits hinged on whether the plaintiffs could sufficiently show that the Bank of China knew that it was knowingly complicit in facilitating terrorist transactions during the time of the terrorist attacks. The Israeli government was reportedly willing to produce Uzi Shaya, a former Israeli intelligence official, to prove that the Bank of China members knew of the transactions.¹³⁰

As a former intelligence officer, Shaya had reportedly met with officials from the Bank of China back in 2005. During this meeting, Shaya had provided the bank officials

¹²⁶ *Ibid.* 318.

¹²⁷ *Ibid.*

¹²⁸ *Wultz v. Bank of China Ltd.*, 910 F. Supp. 2d 548, 554 (S.D. NY 2013).

¹²⁹ Orde F. Kittrie, *Lawfare: Law as a Weapon of War* (Oxford, UK: Oxford University Press, 2016), 319.

¹³⁰ *Ibid.*

with collected material evidence, bank account numbers, the names of the account holders, and evidence linking the account holders to a terrorist organization.¹³¹ Shaya recalled that after this meeting, the bank officials took no action to block any transactions or freeze the bank accounts in question.¹³² Shaya's testimony and evidence would provide the only direct link proving that the bank officials were aware of the account activities and continued to facilitate the transfers between the accounts and the terrorist organization. Although the prospect of Shaya's testimony seemed compelling, the Israeli government announced that not only would the government not produce Uzi Shaya as a material witness, but they issued a gag order barring his testimony in any of the lawsuits.

Attorneys at the Shurat HaDin Law Center assessed that the Israeli government rescinded its initial offer to supply the plaintiffs with all the necessary resources to win their trials because the government had determined that Shaya's testimony would cause irreparable damage to the diplomatic relationship between the People's Republic of China and the state of Israel.¹³³ Shaya's testimony threatened to sever Israel's diplomatic and economic ties with China, constituting over \$8 billion dollars in international trade for the Israeli economy.¹³⁴ While this trade relationship does not comprise the majority of Israel's annual trade, it was significant enough for Israel to conclude that the pursuit of legal recourse was not worth the economic, domestic, or political capital lost. When the news of Shaya's testimony was going to be suppressed, the attorneys of the plaintiffs looked to obtain a subpoena to compel Uzi Shaya's testimony legally.

¹³¹ *Ibid.*

¹³² *Ibid.*

¹³³ *Ibid.* 320.

¹³⁴ *Ibid.*

Many of the families involved in the litigation process against the Bank of China fought to block Israel's ability to suppress Uzi Shaya's testimony. Many of the plaintiffs filed a brief stating that Israel should not be allowed to intentionally sabotage their cases after encouraging that they seek legal action.¹³⁵ For the remainder of 2013, the debate on whether Israel has legal standing to suppress Shaya's testimony in U.S. courts. These discussions were argued in several different legal and political forums, by members of the U.S. Congress, by Israeli officials, by Chinese diplomats, and representatives from the Bank of China.¹³⁶ In July 2014, a U.S. federal court judge settled the debate by granting Israel's motion to suppress Uzi Shaya from testifying in any case against the Bank of China.¹³⁷ Without Shaya's testimony, the plaintiffs were unable to prove their claims against the Bank of China. The entire process resulted in immense embarrassment for the Israeli government, frustration for the families seeking justice, and increased tension between the Israeli government and the Shurat HaDin Law Center.

By shifting their priorities away from the lawfare operations, the Israeli government learned the potential negative repercussions of using private litigation firms to conduct lawfare operations on behalf of the state. Despite this tension, Israel was not completely dissuaded from using private litigation firms from conducting lawfare operations on behalf of the state. The case study, Israel's use of military operations to supplement a lawfare operation, demonstrates an alternative perspective on the role of lawfare as a tool of statecraft.

¹³⁵ *Ibid.*

¹³⁶ Orde F. Kittrie, *Lawfare: Law as a Weapon of War* (Oxford, UK: Oxford University Press, 2016), 321.

¹³⁷ Yonah J. Bob, "Israel Delivers Shocking Blow to Bank of China Terror Victims' Families Case," *The Jerusalem Post*, July 22, 2014, accessed October 15, 2016, <http://www.jpost.com/Diplomacy-and-Politics/Israel-delivers-shocking-blow-to-Bank-of-China-terror-victims-families-case-368430>.

Israel's Use of Diplomacy and Instrumental Lawfare to Undermine Palestinian Statehood

Within the context of the Israel-Palestine conflict, Israel currently enjoys a significant asymmetrical advantage over the Palestinian Authority. Although Palestine's status within the UN has been upgraded to Non-member observer state, it is still seeking to get a full recognition of statehood. Until it can demonstrate a capacity to enter into foreign relations with another state, there is an inherent level of disparity between Israel and Palestine in the international arena. This advantage is observed when looking at Israel's ability to issue pronouncements against Palestine's applications to international organizations and challenges to Palestine territorial claims through Israeli settlements.

The objective of this institutional lawfare strategy is to hinder Palestine's path to statehood outside of the negotiations process. By focusing its institutional lawfare operations on blocking Palestine's path to statehood, Israel can conduct a state-run lawfare campaign that has little chance of setting a precedent that could be later used against the state of Israel. Within this lawfare campaign, public announcements denouncing Palestinian applications to international organizations have received an increased amount of attention because the interaction is being conducted on an international stage.

As previously discussed, upon hearing the voting results of UN General Assembly Resolution 67/19, Israel began taking steps to deter future applications from Palestine to other international organizations and agreements. The focus of this move was to block Palestinian recognition of statehood outside of the negotiation process, which would likely undercut all Israeli territorial claims to its disputed areas in the Gaza Strip and

West Bank. Moreover, recognition of Palestinian statehood would substantiate claims of Illegal occupation by Israel into Palestinian territory, forcing Israel to withdraw these troops or be in direct violation of the UN Charter.¹³⁸ An area that Israel is heavily attempting to undermine and reduce Palestinian influence in the international system is in regard to Palestine's appointment to the International Criminal Court.

In terms of Palestine's involvement with the International Criminal Court, the possibility of a preliminary investigation by the court is likely to pose a significant challenge to Israeli national security. In the eyes of the Israeli Foreign Minister Avigdor Lieberman, the preliminary examination threatens to "harm Israel's right to defend itself against terror."¹³⁹ Additionally, Lieberman stated that Israel would respond to this investigation by "... bring about the dismantling of this court which represents hypocrisy and gives impetus to terror."¹⁴⁰ In pursuing this investigation, Israeli officials believe that ICC is part of the problem promulgating the Israeli-Palestinian conflict, not the solution. Subsequently, Lieberman began a campaign to persuade key contributing countries to withdraw their funding from the International Criminal Court. Comprising over half of the \$158 million-dollar annual budget for the International Criminal Court, Israel targeted the top seven donors to this organization: Germany, Japan, Britain, Italy, France, Spain, and Canada.¹⁴¹

¹³⁸ United Nations, "Charter of the United Nations and Statute of the International Court of Justice," United Nations, 1945, Article 1, Section 4, accessed December 21, 2016, <https://treaties.un.org/doc/publication/ctc/uncharter.pdf>.

¹³⁹ Justin Jalil, "FM calls to dismantle ICC after launch of 'war crimes' probe," Times of Israel, January 16, 2015, accessed February 04, 2017, <http://www.timesofisrael.com/fm-calls-to-dismantle-icc-after-launch-of-war-crimes-probe/>.

¹⁴⁰ *Ibid.*

¹⁴¹ Thomas Escritt and Anthony Deutsch, "Exclusive: ICC backers defy Israeli call to cut funding to war crimes court," Reuters, January 27, 2015, accessed February 04, 2017, <http://www.reuters.com/article/us-israel-icc-idUSKBN0L01NJ20150127>.

Case Study: Understanding the Difference Between State-Run Lawfare and Private Offensive Lawfare

By looking at lawfare campaigns carried out by the state of Israel and private litigation firms, one can gain a better understanding of the advantages and disadvantages of conducting lawfare through indirect means. While Israel's collaboration with the Shurat HaDin Law Center was able to effectively stop a flotilla shipment of weapons and supplies from leaving Greek shores, the lawfare operations to counter Palestine's advances toward statehood in addition to pursuing civil litigation against the Bank of China demonstrated the potential for negative media coverage and political damage that can result from conducting overt lawfare operations in the public eye. The potential negative repercussions of conducting offensive lawfare operations reiterated the quote from Nitsana Darshan-Leitner when she observed that state relations are on a continuum in which they must carefully consider how each action will affect the diplomatic relationships that they have with other states in the international system.¹⁴²

If Israel had decided to conduct the lawfare operations of stopping the flotilla and suing the Bank of China at a state level, it is likely that Israel would have made a careful cost-benefit analysis to determine how pursuing legal recourse against the Bank of China would have on Israel's longstanding relations with the People's Republic of China. While it is unclear if Israel would have continued to pursue legal action against the bank is unknowable, it is likely that if the state decided to move forward with the case, they would not have suppressed Uzi Shaya's testimony. Additionally, Israel would have likely been saved from the embarrassment of implementing a flippant strategy on an

¹⁴² Orde F. Kittrie, *Lawfare: Law as a Weapon of War* (Oxford, UK: Oxford University Press, 2016), 311.

international stage. However, since both lawfare campaigns were conducted by a singularly focused private entity, the decision to withdraw state support from the Bank of China resulted in significant damage to Israel's image and reputation in the international system. By comparing the flotilla and Bank of China case studies, one can gain insight into the potential benefits of states collaborating with private organizations on lawfare campaigns.

Based on the analysis of the flotilla and Bank of China case studies, it is apparent that there are clear advantages to collaborating with private entities. Specifically, a state conducting a lawfare campaign using litigators from the private sector can allow a state to outsource state objectives to private entities, allowing states to adapt and address changes in the strategic environment simultaneously. A state that could greatly benefit from this type of lawfare strategy would be the U.S. The U.S. currently has one of the highest concentrations of practicing lawyers and law firms that address a vast array of specialties.¹⁴³

Conclusions: Lessons Learned and the Future of Lawfare in the Israeli-Palestinian Conflict

The tactics and lawfare strategies used in the Israel-Palestinian conflict provide a unique insight into the wide array of applications for lawfare. By looking at the lawfare strategies employed by the PA, it is evident that lawfare can have a tremendous impact in gaining additional attention from the international community to the plight of a state.

¹⁴³ American Bar Association, "Lawyer demographics tables 2015 - American Bar Association," American Bar Association, 2015, accessed January 24, 2017, https://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer-demographics-tables-2015.authcheckdam.pdf.

Disenfranchised by decades of calling for peace negotiations between Palestine and Israel, it is evident that leveraging lawfare to attain recognition of statehood is likely going to be the most effective way for Palestine to have its sovereignty affirmed. In the eyes of the PA government, recognition of statehood is the only way to attain a peaceful solution between Israel and Palestine. According to PA President Abbas, if Palestine can gain a better standing in the international system, the rest of the international community will be likely to enforce the provisions of the UN charter and pursue war crimes charges against the state of Israel for illegal occupation of Palestinian territory.

Palestine's three-pronged lawfare strategy demonstrates the ability for a weaker state or self-determination movement to use lawfare within the international system to achieve a military or political objective without the need for direct kinetic conflict. Palestine's campaign for statehood in the UN has been particularly effective and is likely to continue to bring PA closer to full recognition of statehood.

The PA's appointment to the International Criminal Court is the most significant development of the PA's lawfare campaign to date. Admission to the International Criminal Court will allow the PA to pursue additional levels of legal recourse against the state of Israel. Regardless of the decisions of those charges, the increased frequency of war crime charges against Israeli officials can be viewed as a red flag to the international community, prompting additional investigations into the regional conflict. Additionally, the longer that the PA has a seat on any international organization, the better case the PA will have on claiming that it is a state. The precedence has been set because only states are allowed to join international treaties or become members of international organizations.

Since the PA is a member of the International Criminal Court, it can make the claim that the seat is an affirmation of Palestinian statehood. Subsequently, the longer that the PA remains a member of the International Criminal Court, the more likely that the Israeli-Palestinian conflict will result in a two-state solution despite Israel's protests. Almost as significant as the PA's lawfare campaign in the international system is the lawfare campaign being waged by non-state actors on behalf of the PA. The Boycott, Divestment, and Sanctions movement is dedicated to ending Israeli occupation in Palestine and protecting the rights of Palestinian Arabs. By establishing precedents in Israeli and U.S. courts, both individuals and organizations associated with the Boycott, Divestment, and Sanctions movement can help pave the way for future litigation efforts against the state of Israel.

Whether these cases against Israel will result in large sum settlements against Israel is somewhat irrelevant, as the threat of civil litigation may be enough to deter private corporations from conducting business with the Israeli government. Additionally, the increased frequency and time required for the Israeli government to respond to these civil complaints can distract the Israeli government from being able to conduct offensive lawfare campaigns against the PA. Continued pressure from members of the Boycott, Sanctions, and Divestment movement is likely to hinder Israel's ability to counter the current PA lawfare strategy to achieve statehood.

Although Israel's lawfare strategy has been mainly used to prevent the advancement of PA lawfare initiatives, several concepts can be insightful for a state looking to incorporate lawfare tactics into its instruments of statecraft. By observing Israel's efforts to counter Palestinian statehood in addition to the subsequent flotilla and

Bank of China case studies, other state leaders in the international community can understand the utility of leveraging existing legal infrastructures can have on delaying or outright denying an adversary without the need for direct military action.

The purpose of Israel's lawfare strategy is to counter the PA's path to sovereignty and force Palestine back to the negotiation table. As a recognized state, Israel has an innate advantage over the PA. Although the PA is making significant progress towards full statehood as a member of the UN, Israel is currently able to leverage its influence as a UN member state to possibly block the PA from being admitted to international organizations or signing onto additional treaties. It will be imperative that Israel and its allies continue to try and block the PA's path to statehood if they want the Israeli-Palestinian conflict to be resolved through negotiated peace talks brokered by the US. If the PA attains recognition of statehood in the UN, it is assumed that peace negotiations between Palestine and Israel will deteriorate if not completely stop.

The use of private and public collaboration between Israel and the Shurat HaDin Law Center is of interest to states with advanced legal apparatuses. The flotilla case study is a success story for how a state can leverage lawfare to proactively stop a shipment of supplies from reaching a terrorist organization. The innovative approach to identifying which domestic or international laws are leverageable allowed Israel to halt a supply shipment without causing an international incident or take direct military action against Hamas operatives in the Gaza Strip. Additionally, by disrupting enemy supply routes can provide a profound advantage to the military forces of the state. By cutting off Hamas supply routes, Israel was likely able to delay or prevent a future attack against the Zionist state, as Hamas leaders likely had to reassess their strategies with fewer supplies and

identify new supply routes. This lawfare strategy also likely deterred other international organizations from conducting similar transactions with the terrorist group out of fear of being entangled in civil litigation.

The Bank of China case study demonstrates the potential pitfalls of using private organizations to conduct lawfare operations. The sudden shift in priority left plaintiffs feeling marginalized by the Israeli government in addition to outraging several members of U.S. Congress. The Bank of China case study identified that the interests of private entities could differ from the sake of the state. When there is a difference between these two groups, private firms, like the Shurat HaDin Law Center, can go from being a key ally of the state to being one of its most outspoken critics. Additionally, firms like Shurat HaDin can also lead civil litigation suits against government actions. An example of this occurred during the Palestinian prisoner exchange.

The concept of using collaborative private entities to conduct lawfare operations can have significant benefits for the state. From the perspective of Israel, using private litigation teams has allowed Israel to engage in lawfare tactics without fear of setting a precedent that can be used against Israel. Additionally, the flotilla success demonstrates that this lawfare strategy has some inherent validity to it. States looking to adopt a similar lawfare strategy should be aware of the potential drawbacks of shifting priorities and the potential to be held responsible for the actions of a private firm against another state.

CHAPTER 4: U.S. LAWFARE: AN OPPORTUNITY ANALYSIS

It would seem intuitive that a state with one of the highest number of practicing lawyers in the world would also be a leader in the use of lawfare; however, the U.S. has had a limited history regarding the use of lawfare as an instrument of statecraft. There are several contributing factors as to why the U.S. has historically demonstrated less interest in developing a lawfare strategy. By looking at the American Bar Association lawyer census for 2015, one can observe that 75% of all practicing lawyers in the U.S. operate in private practice.¹⁴⁴ The next highest concentration of practicing lawyers is in the government sector, constituting 8% of the total population.¹⁴⁵ This demographic census might indicate that supporting U.S. interests from a legal standpoint is not the primary reason for a student to pursue an education in law. Although these demographics do not demonstrate an immediate support infrastructure to conduct an effective lawfare strategy, the array and diversity of legal expertise have the potential to provide a tremendous asset to the U.S. government.

An advantage of having a diverse legal workforce is that the lawfare potential of the U.S. is that it can provide a presumptive lawfare program with a diverse set of legal assets. The potential of these assets places an imperative that members of the U.S. federal government or non-state actors seeking to take up a lawfare strategy need to be able to identify these elite legal individuals, recruit their service, and exploit their expertise on

¹⁴⁴ American Bar Association, "Lawyer demographics tables 2015 - American Bar Association," American Bar Association, 2015, accessed January 24, 2017, https://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer-demographics-tables-2015.authcheckdam.pdf.

¹⁴⁵ *Ibid.*

behalf of the U.S. government. At times, hiring these top people can be a difficult task, with reasons stemming from personal interest, ideological reasons, or an inability for the U.S. government to compensate the lawyers for an equal level of wages that they can receive from working in the private sector. Difficulties with recruiting and attaining a cohesive legal strategy have hindered the ability to leverage its legal assets to conduct lawfare operations thoroughly. Despite these issues, the U.S. government does have a permanent cadre of legal staff in many agencies and military branches with the necessary background and expertise to conduct lawfare operations.

In addition to a diverse set of legal assets, the U.S. also possesses several asymmetrical tools that it can use in lawfare campaigns. As a permanent member of the UN Security Council, the U.S. can unilaterally veto any measure that is presented before the council; a source of tremendous power within the United Nations. The U.S. also in a unique economic position within the global economy, which allows it to leverage its purchasing power to punish or hinder the capacity of other state or non-state actors to continue actions that are contrary to international laws or U.S. interests. These advantages allow the U.S. to make unilateral changes in the international system in the pursuit of state interests. The U.S. permanent seat on the UN Security Council provides an ongoing foundation in international politics.

The UN Security Council: A Permanent Stage in the International Community

As one of the five permanent members of the UN National Security Council, the U.S. has a unique advantage over all states in the international community. The UN Security Council is made up of five permanent members and ten countries elected for

two-year rotations by the UN General Assembly.¹⁴⁶ The five permanent members are the US, China, France, the Russian Federation, and the United Kingdom, also known as the five identified nuclear weapon states in the Nuclear Nonproliferation Treaty.¹⁴⁷ These permanent members have the sole power to veto resolutions that come before the security council.

A single veto can defeat any Security Council Resolution. This right of veto provides immense power for the permanent members, as they have the authority to defeat an action based on their respective state interest unilaterally. Historically, this has provided a significant point of leverage for the US. There are two relevant case studies in which the U.S. has used its position on the Security Council to advance a U.S. interest or the interest of an ally. The first case study was the U.S. effort to stymie Palestine's path to statehood after becoming a non-member, observer state. The second case study was a recent decision not to use its veto power to block a resolution demanding that Israel ceases building settlements in the West Bank. In doing so, the U.S. used lawfare to cause a change in the strategic environment that aligned with the interests of the state. The first case study of the U.S. using its influence within the international system and financial resources was to block Palestine's path to statehood.

As stated in Chapter 3, the U.S. and Israel have played active roles in Palestine's path to statehood. In 2011, President of the Palestinian Authority Mahmood Abbas announced in a General Assembly speech that he had officially submitted its application to become a non-member, observer state. The US, among other countries, opposed this

¹⁴⁶ United Nations Security Council, "Current Members," accessed February 10, 2017, <http://www.un.org/en/sc/members/>.

¹⁴⁷ United Nations, "Charter of the United Nations," United Nations, 1945, Chapter V (23-27), accessed August 11, 2016, <https://treaties.un.org/doc/publication/ctc/uncharter.pdf>.

action, saying that the only way to ensure a peaceful solution between Israel and Palestine is through US-brokered negotiations.¹⁴⁸ This sentiment mirrored a quote from President Barack Obama. In an address to the UN General Assembly, Obama observed that “peace will not come through statements and resolutions at the U. N... If it were that easy, it would have been accomplished by now.”¹⁴⁹ Before these speeches, the U.S. had already demonstrated its resolve to contest Palestine’s admission to other international organizations by threatening to withdraw its funding contributions from the UN Educational, Scientific, and Cultural Organization after it voted to admit Palestine as a full member of its organization.¹⁵⁰ Undoubtedly, this threat had an impression on other organizations considering accepting Palestine into their ranks.

In this case study, the U.S. demonstrated its capability to leverage its position and influence at the UN to advance its interests at the expense of another state. Although it was not ultimately successful at permanently blocking Palestine’s admission to other international organizations like the International Criminal Court, the process demonstrated that the U.S. could use its position in the UN to conduct future lawfare operations. The U.S. seat on the UN Security Council provides the potential for the U.S. to wield unique lawfare capabilities.

The second case study that demonstrates the full potential of the U.S. seat on the UN Security Council was in 2016 when the U.S. could have unilaterally defeated a measure but chose to abstain instead. Additionally, this decision contradicted previous

¹⁴⁸ Orde F. Kittrie, *Lawfare: Law as a Weapon of War* (Oxford, UK: Oxford University Press, 2016), 201.

¹⁴⁹ Helene Cooper, "Obama Says Palestinians Are Using Wrong Forum," *The New York Times*, September 21, 2011, accessed December 11, 2016, <http://www.nytimes.com/2011/09/22/world/obama-united-nations-speech.html>.

¹⁵⁰ Orde F. Kittrie, *Lawfare: Law as a Weapon of War* (Oxford, UK: Oxford University Press, 2016), 201.

actions taken by the U.S. regarding Palestine and Israel. On December 22, 2016, Egypt introduced a resolution before the UN Security Council to condemn Israeli settlements in the West Bank and East Jerusalem as illegal.¹⁵¹ While rumors of the vote had been circulating for some time, the sudden announcement and timing of the ballot were still somewhat of a surprise. In a call with his top national security advisers, Obama stated that he was not opposed to the idea of abstaining from the measure if there were no significant changes to the presumptive proposal.¹⁵²

The internal diaspora among U.S. officials was initially conflicted on the upcoming resolution; however, most agreed that taking a stand would be worth the potential backlash of both Congress and Israeli leadership. The increase in the building of Israeli settlements threatened to ruin any chances of future negotiations between Israel and Palestine.¹⁵³ From the perspective of the rest of the UN, a U.S. veto would have implied that the U.S. approved with the Israeli settlements on Palestinian land.

According to Secretary of State John Kerry, the building of Israeli settlements threatened to destroy any chances of a two-solution through negotiations.¹⁵⁴ In a December address to the Dean Acheson Auditorium Secretary Kerry stated that the U.S. “could not, in good conscience, stand in the way of a resolution at the United Nations that

¹⁵¹ Karen DeYoung, "How the U.S. came to abstain on a U.N. resolution condemning Israeli settlements," *The Washington Post*, December 28, 2016, accessed January 11, 2017, https://www.washingtonpost.com/world/national-security/how-the-us-came-to-abstain-on-a-un-resolution-condemning-israeli-settlements/2016/12/28/fed102ee-cd38-11e6-b8a2-8c2a61b0436f_story.html.

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

¹⁵⁴ Carol Morello and Ruth Eglash, "Kerry harshly condemns Israeli settler activity as an obstacle to peace," *The Washington Post*, December 28, 2016, accessed January 11, 2017, https://www.washingtonpost.com/world/national-security/kerry-address-middle-east-peace-process-amid-deep-us-israel-strains/2016/12/28/d656e5fa-cd0a-11e6-b8a2-8c2a61b0436f_story.html.

makes clear that both sides must act now to preserve the possibility of peace.”¹⁵⁵

Additionally, Kerry noted that the Obama administration has gone to great lengths to support the security of Israel, but that it would be a fallacy to think that the U.S. would vote in a manner just to align with the interests of an ally for the sake of appeasement.¹⁵⁶ Indeed, the U.S. has undertaken great lengths to support Israel and numerous efforts to delegitimize Palestine’s claims to statehood out of the negotiations process. Despite this historically supportive relationship, the U.S. still votes based on its strategic interests.

The UN Security Council voted to condemn Israeli settlements on December 23, 2016. Of the 15 members of the UN Security Council, all members except for the U.S. voted to approve the resolution.¹⁵⁷ Included in these 14 votes of approval were the Russian Federation, China, and some of the closest European allies of the US. With the die cast, the U.S. voted in abstention, and the resolution passed without opposition.¹⁵⁸

The two case studies outline the power of the U.S. permanent seat on the UN Security Council. This seat, in addition to the veto powers enumerated to permanent members, could be a powerful tool for lawfare in future scenarios. By being a permanent member, the U.S. can create, introduce, lead the discussion on resolutions, or unilaterally overturn a ballot based on U.S. interests; allowing the U.S. to be an active participant in framing the decisions that shape global politics. Another lawfare tool that is at the U.S.

¹⁵⁵ John Kerry, "Read the full transcript of John Kerry's speech on the Mideast peace process," The Washington Post, December 28, 2016, accessed January 11, 2017, <https://apps.washingtonpost.com/g/documents/world/read-the-full-transcript-of-john-kerrys-speech-on-the-mideast-peace-process/2258/>.

¹⁵⁶ *Ibid.*

¹⁵⁷ Carol Morello and Ruth Eglash, "Kerry harshly condemns Israeli settler activity as an obstacle to peace," The Washington Post, December 28, 2016, accessed January 11, 2017, https://www.washingtonpost.com/world/national-security/kerry-address-middle-east-peace-process-amid-deep-us-israel-strains/2016/12/28/d656e5fa-cd0a-11e6-b8a2-8c2a61b0436f_story.html.

¹⁵⁸ *Ibid.*

disposal is the ability to undercut another state's economy solely through controlling U.S. import-export trading with that country.

Sanctions: A Tool of Economic Lawfare

Another powerful tool in the U.S. lawfare arsenal is the ability to create and implement sanctions as a means of economic lawfare. Being one of the world's largest economy, the U.S. has the capability to impose sanctions on its import-export trading relations with another state, which results in significant pressure being applied to the target state. The U.S. has also used its seat on the UN Security Council to pursue multilateral sanction efforts against countries like Iraq, Iran, and North Korea for noncompliance of international laws and weapons of mass destruction proliferation issues. Sanctions have the capacity to coerce a state to resume negotiations or hinder that state's ability to continue with its noncompliant behavior. A case study that outlines the effects of prolonged U.S. unilateral and multilateral sanction efforts leading up to a conflict can be seen in the U.S. sanction campaign against Iraq. The sanction efforts against Iraq during the 1990's leading up to the U.S. invasion of Iraq primarily focused on addressing the aggressive operations of the Saddam Hussein regime.

In August of 1990, the UN Security Council passed Resolution 660, formally denouncing the invasion of Kuwait by Iraq.¹⁵⁹ Shortly after that, the UN Security Council passed Resolution 661, a follow-up to Resolution 660 that also included language about sanctions on imported goods originating from Iraq and Kuwait.¹⁶⁰ Resolution 661

¹⁵⁹ United Nations Security Council, Resolution 660, "Response to the Invasion of Kuwait by Iraq," August 2, 1990, accessed January 12, 2017, <http://unscr.com/en/resolutions/doc/660>.

¹⁶⁰ United Nations Security Council, Resolution 661, "Sanctions on Iraq for the Illegal Invasion of Kuwait," August 6, 1990, accessed January 12, 2017, <http://unscr.com/en/resolutions/doc/660>.

outlined that all states will prevent the import of all commodities and products originating from Iraq or Kuwait.¹⁶¹ Additionally, each state will prevent any of its nationals from importing or dealing with any goods or flagships originating from Iraq or Kuwait, and a prohibition on the sale of weapons or any other military equipment to any person or organization in Iraq or Kuwait.¹⁶² These sanction efforts would set the stage for the passage of Resolution 687, authorizing the use of force to restore the territorial integrity of Kuwait and return its government.

Passed on April 3, 1991, UN Security Council Resolution 687 authorized all member states cooperating with the Kuwaiti government to deploy military forces to restore Kuwait's sovereignty. Moreover, the resolution observed Iraq's possession of weapons of mass destruction and called for a complete dismantlement of all its chemical, biological, and all ballistic missiles with a range greater than 150 kilometers.¹⁶³ The resolution also indicated a significant concern over reports from other member states being approached by Iraq to acquire components for a nuclear weapons program. By looking at the passage of 660, 661, and 687 demonstrated how the U.S. could use sanction resolutions leading up to a conflict. The passage of these resolutions imposed strict sanctions helped apply pressure on the Iraqi government before Operation Desert Shield. The use of U.S. sanctions and other economic warfare operations against Iran demonstrated the power of leveraging sanctions to bring a state back to the negotiation table.

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*

¹⁶³ United Nations Security Council, Resolution 687, "Iraq-Kuwait," April 3, 1991, accessed January 13, 2017, <http://unscr.com/en/resolutions/doc/687>.

Following the fall of the Shah of Iran during the Iranian Revolution in 1979, relations between the U.S. and Iran quickly began to sour. Shortly after the seizure of the U.S. Embassy in Tehran, the U.S. imposed its first set of sanctions against Iran.¹⁶⁴ In the decades following the Iranian Revolution, the U.S. has championed several waves of unilateral sanctions efforts, restricting import-export trading between the U.S. and Iran, and US-led UN Security Council Resolutions imposing import-export sanctions against Iran. The lawfare campaign implemented by the U.S. government focused on three primary objectives: using unilateral financial restrictions targeting Iran's nuclear and terrorist operations, promoting financial measures against Iran with the cooperation of international organizations and key strategic partners, direct U.S. engagement with foreign financial institutions to deny services to Iran.¹⁶⁵ By looking at the Iranian response to these sanction efforts; one can understand the sophistication of U.S. sanctions to bring a noncompliant regime to negotiations with a state that the government leadership despises.

At the height of the U.S. sanction efforts against Iran, Iranian President Mahmoud Ahmadinejad referred to sanctions as “a hidden war... on a far-reaching global scale... a kind of war through which the enemy assumes it can defeat the Iranian nation.”¹⁶⁶¹⁶⁷ The use of sophisticated sanction efforts hindered Iran's ability to sell oil to other states, utilize international bank transaction methods, and increased pressure on Iran's nuclear

¹⁶⁴ U.S. Department of State, "Iran Sanctions," accessed January 13, 2017, <https://www.state.gov/e/eb/tfs/spi/iran/index.htm>.

¹⁶⁵ Orde F. Kittrie, *Lawfare: Law as a Weapon of War* (Oxford, UK: Oxford University Press, 2016), 125.

¹⁶⁶ Juan C. Zarate, *Treasury's war: the unleashing of a new era of financial warfare* (New York: PublicAffairs, 2013), 342.

¹⁶⁷ Orde F. Kittrie, *Lawfare: Law as a Weapon of War* (Oxford, UK: Oxford University Press, 2016), 111.

program. The net result of these forces was an Iranian leadership willing to negotiate imposed limitations on its nuclear program.

On July 14, 2015, the P5+1 (the US, Russian Federation, China, United Kingdom, France, and Germany) announced that they had reached an agreement with Iran on a Joint Comprehensive Plan of Action (JCPOA) regarding Iran's nuclear program. Stipulated in the JCPOA, Iran would agree to place constraints on its nuclear program in exchange for a reprieve from all nuclear-related sanctions currently imposed on Iran.¹⁶⁸ In a prepared statement on August 05, 2015, President Obama praised the effectiveness of sanctions for making this agreement possible.¹⁶⁹ The use of sanctions and other tools of financial lawfare allowed the U.S. to elicit compliance from an otherwise defiant regime.

The Iranian lawfare case study demonstrates the U.S. capacity to create effective sanctions that apply significant pressure to another state while not causing significant adverse effects on the U.S. or global economies. This tools capacity to target a nation's ability to finance its illegal operations allows the U.S. to apply a certain level of punishment over another sovereign and increase internal pressures for compliance with U.S. interests. In the example of Iran, sanctions were effective because it generated a significant burden for the Iranian regime. When looking at the U.S. of sanctions to dissuade North Korea's nuclear program, it becomes evident that the use of sanctions and financial lawfare is ineffective when the leadership of the target country has no issue passing the hardships of sanctions onto its citizens.

¹⁶⁸ U.S. Department of State, "Joint Comprehensive Plan of Action," July 14, 2015, accessed January 13, 2017, <https://www.state.gov/documents/organization/245317.pdf>.

¹⁶⁹ U.S. Office of the President, "Statement by the President on Iran Nuclear Deal," August 5, 2015, accessed December 10, 2016, <https://www.whitehouse.gov/the-press-office/2015/08/05/remarks-president-iran-nuclear-deal>.

Started under the George W. Bush Administration, the North Korean Illicit Activities Initiative was created to generate significant diplomatic leverage over North Korea. The focus of this initiative was to target North Korea's illicit funding sources that were helping to offset the massive trade deficits caused by sanctions.¹⁷⁰ To target these sources of financing, David Asher of the Treasury Department created a plan that called for the creation of an international law enforcement model that would promote cooperation between states in the international community. Through international law enforcement cooperation, the U.S. would be far more effective at shutting down North Korean illicit funding.¹⁷¹ The North Korean Illicit Activities Initiative ultimately failed to cut-off all of North Korea's illegal sources of financing. Subsequently, it could continue funding its nuclear program despite severe hardships placed on North Korean citizens.

The U.S. use of sanctions of financial warfare against North Korea demonstrates the potential difficulties that can arise when attempting to use economic warfare alone to coerce a totalitarian regime. Unlike the use of sanctions against Iran and Iraq, North Korea is more economically isolated from the world. Moreover, based on the penalties related famines, it is apparent that the North Korean regime values its nuclear program more than it values the welfare of its people.

Financial Warfare: The Power of Disrupting Terrorist Financing

In the 21st Century, the U.S. effort to counter terrorism financing has arguably been one of the most successful warfare campaigns that the U.S. has conducted. Under

¹⁷⁰ Juan C. Zarate, *Treasury's war: the unleashing of a new era of financial warfare* (New York: PublicAffairs, 2013), 229.

¹⁷¹ *Ibid.*

the direction of the Obama Administration, the U.S. undertook a multiphase approach focused on identifying, targeting, and disrupting terrorist financing operations on a global scale. By looking at the Expanded role of the Treasury Department, implementing the U.S. counterterrorism strategy, and identifying funding sources to target, one can get a better understanding of how the U.S. could successfully conduct financial lawfare operations to stop the ability for terrorist organizations to finance their operations.

Created by the Intelligence Authorization Act of 2004, the Department of Treasury's Office of Intelligence and Analysis was established to advance U.S. national security interests and support the Treasury's counterterrorism efforts.¹⁷² With its newly enumerated powers, the Office of Intelligence and Analysis started to craft innovative ways to target the \$1.6 billion assets used by states to help fund terrorism activities.¹⁷³ "Treasury's Under Secretary for terrorism and financial intelligence [was] sometimes described within the administration as President Obama's favorite combatant commander."¹⁷⁴ This quote typifies President Obama's preference for using the Department of Treasury to combat terrorist financing. The ability for the U.S. to identify, target, and disrupt terrorist financing is authorized under two Executive Orders.

The ability of the President to coordinate measures to go after terrorist financing is primarily enumerated in Executive Order 13224 and Executive Order 13382.¹⁷⁵ These

¹⁷² U.S. Department of Treasury, Office of Intelligence and Analysis, "Strategic Direction: Fiscal Years 2012-2015," 8, accessed December 12, 2016, <https://www.treasury.gov/about/organizational-structure/offices/Documents/Strategic%20Direction%2008-13-12.pdf>.

¹⁷³ Martin A. Weiss, "Terrorist Financing: U.S. Agency Efforts and Inter-Agency Coordination," Congressional Research Service, August 3, 2005, accessed December 12, 2016, <https://fas.org/sgp/crs/terror/RL33020.pdf>.

¹⁷⁴ Annie Lowrey, "Aiming Financial Weapons From Treasury War Room," The New York Times, June 3, 2014, accessed December 12, 2016, <https://www.nytimes.com/2014/06/04/business/aiming-financial-weapons-from-war-room-at-treasury.html>.

¹⁷⁵ Orde F. Kittrie, *Lawfare: Law as a Weapon of War* (Oxford, UK: Oxford University Press, 2016), 125.

Executive Orders provide the statutory authority for the International Emergency Economic Powers Act (IEEPA). The IEEPA provides the President with the authority “to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy or economy of the United States, if the President declares a national emergency with respect to such a threat.”¹⁷⁶

Once the President has declared that threat as a national emergency, the President has the legal authority to prohibit the transfers of credit or payments between, by through, or to any banking institution, to the extent that those transfers involve the interest of a foreign country or foreign national associated with the national emergency.¹⁷⁷

Additionally, once the President has declared a threat as a national emergency, the President may also block, prevent, or otherwise void any acquisition, holding, use, or transfer between any person and a foreign national or country associated with the national emergency within the jurisdiction of the United States.¹⁷⁸ These powers were used by enacted under President George W. Bush in 2005 to authorize the Department of Treasury to identify, target, and block the assets of foreign person determined “to have committed, or to pose a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States.”¹⁷⁹ This authorization allowed the Treasury Department a significant

¹⁷⁶ “International Emergency Economic Powers Act,” Title 50 U.S. Code, Sections 1701-1707, October 28, 1977, accessed December 20, 2016, <https://www.treasury.gov/resource-center/sanctions/Documents/ieepa.pdf>.

¹⁷⁷ *Ibid.* § 1702 (a) (1) (A) (ii).

¹⁷⁸ *Ibid.* § 1702 (a) (1) (B).

¹⁷⁹ Executive Order no. 13,382, Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters, title 3, July 1, 2005, accessed December 20, 2016, <https://www.treasury.gov/resource-center/sanctions/Documents/whwmdeo.pdf>.

amount of freedom to think of creative solutions to target and combat terrorist financing operations around the world; demonstrating the capacity of U.S. financial lawfare to address emerging threats with effective solutions.

U.S. Lawfare: Missed Opportunities

As previously discussed, the U.S. can be a world power in the use of lawfare. The number and diversity of practicing lawyers, the status of the U.S. within international organizations, and the ability to influence the global economy provide an asymmetric lawfare advantages for the United States. While the U.S. has had periodic successes at utilizing lawfare-type strategies to address specific threats, the U.S. government has never identified these efforts as lawfare. Moreover, the U.S. Departments of State, Treasury, Justice, Defense, or any other element of the U.S. government has never allocated resources towards a lawfare component or developing a lawfare strategy to be used in a more strategic environment. Until the U.S. government establishes a sound lawfare doctrine that uses U.S. asymmetric advantages in the international system, it is possible that the U.S. will fail to capitalize on opportunities to advance its national interests or adequately defend against the lawfare campaigns of other states.

CHAPTER 5: AN ARGUMENT FOR THE U.S. TO ADOPT A LAWFARE DOCTRINE

While Chapters 1 through 4 focused on analyzing the strengths and weaknesses of lawfare strategies implemented by China, the Palestinian Authority, Israel, and the U.S., Chapter 5 will focus on steps to develop a U.S. lawfare doctrine. As discussed in Chapter 4, the U.S. has the potential to be a global leader in the field of lawfare; however, the U.S. has never openly considered a lawfare doctrine. Moreover, other states like China are likely to continue leveraging lawfare within the international community; causing the U.S. to develop countermeasures or concede to the interests of other countries. Conceding these battles may have collateral effects on a global scale.

For example, if China's claims to the South China Sea are uncontested, the Chinese government will have the standing to argue that there is a precedent that the international community acknowledges this territorial claim, allowing China the ability control all merchant traffic through the region. While the physical control over human-made islands in the South China Sea does not pose a direct threat to U.S. interests, the ability for the PRC to control the flow of goods and U.S. military vessels through the South China Sea directly threatens U.S. national and economic security. The South China Sea example is only one of the many scenarios that the U.S. will likely have to address with legal action in the future.

The Future of U.S. Lawfare

Similar to the need for the U.S. to develop new tactics, strategies, and intelligence tradecraft to combat the threat of terrorism after the September 11, 2001 attacks on the U.S., the U.S. will likely need to take similar measures to address the future threat of lawfare by other states in the international community. Although the U.S. does not have the luxury of knowing what the exact threats will be over the next decade and how to prioritize those threats appropriately, it can establish a basic lawfare apparatus that can be tailored to address or mitigate specific and emerging threats. If the U.S. does not experience a significant decrease in the number and expertise of its population of practicing lawyers, the U.S. will be able to leverage this pool of legal experts to handle threats to U.S. national security, even in an era of sequestration.

Unlike the traditional cost to develop and maintain fixed military assets, funding a government agency or military units dedicated to conducting lawfare activities for the United States would be significantly cheaper. As stated in Chapter 1, states looking to conduct lawfare operations would only need to allocate funding for legal staff, administration staff, and an area of operations to conduct lawfare, whereas costs to increase military preparedness to a new threat has many additional costs other than just personnel. Presently, the U.S. has no formal governmental agency that is equipped or prepared to support the use of lawfare. The U.S. does however have several existing legal authorities that a lawfare program could be based on.

Housed within the U.S. Department of State, the Office of the Legal Adviser provides legal advice on all domestic and international legal issues that arise from State

Department operations.¹⁸⁰ This includes supporting department policy officials in formulating U.S. foreign policy, promoting U.S. adherence to international law, and international institutions that the U.S. is a party.¹⁸¹ The Office of the Legal Adviser is able to provide support to this broad range of directives with approximately 200 permanent attorneys and 100 support staff. While the Office of the Legal Adviser would be well suited to take on the U.S. lawfare program, adding any additional mandate to the already overburdened office would likely result in an inefficient lawfare program.

Another legal program that could support the U.S. lawfare program is the Office of the General Counsel at the Department of Defense. The General Counsel provides advice for the Department of Defense for all Defense related initiatives.¹⁸² While the Office of the General Counsel has the office experience of how to handle the legal issues of military conflict, it would be difficult for the office to provide the constant support that a U.S. lawfare program would require.

The other legal department capable of supporting a U.S. lawfare program would be the Department of Justice Office of Foreign Litigation. The Office of Foreign Litigation is tasked with handling litigation in foreign courts in which the U.S. is a party or has a state interest represented.¹⁸³ The Office of Foreign Litigation certainly has the legal expertise needed to support a lawfare program, but it is possible that the office would lack the diplomatic or military experiences required to create strategic lawfare courses of action.

¹⁸⁰ U.S. Department of State, "Practicing Law in the Office of the Legal Adviser," accessed April 20, 2017, <https://www.state.gov/s/l/3190.htm>.

¹⁸¹ *Ibid.*

¹⁸² U.S. Department of Defense, "DoD General Counsel-about us," accessed April 17, 2017, <http://ogc.osd.mil/about.html>.

¹⁸³ U.S. Department of Justice, "Attorney - Office of Foreign Litigation," March 13, 2015, accessed April 17, 2017, <https://www.justice.gov/legal-careers/job/attorney-office-foreign-litigation>.

The most effective course of action for the U.S. to stand up a lawfare element would be to create a department within the Department of Justice, State, or Defense. The presumptive lawfare program would likely require 200 practicing attorneys and 100 support staff. The support staff will include paralegals, policy advisers, and administrative staff. The attorneys can be either recruited from the private sector or assigned to the lawfare program as a joint duty assignment initiative from the Departments of Justice, State, and Defense. While creating a stand-alone agency would provide greater control over the culture and development of the U.S. lawfare mission, sequestering legal resources and office space from an already developed government agency will allow the U.S. government to stand-up a lawfare program quickly. After the lawfare element is created, the U.S. government will need to develop a lawfare doctrine to outline how the element is to conduct lawfare operations.

A U.S. Lawfare Doctrine

A Proposal for a U.S. lawfare doctrine would be to establish an organization that is responsible for identifying opportunities to use lawfare, drafting actionable courses of action involving the use of lawfare, and conducting lawfare operations on behalf of the United States. Creating such a framework helps to formulate a foundation of policies and procedures that allow an agency to create an adaptive lawfare strategies that address a developing threat and mitigate its effects on U.S. interests and national security. Additionally, the creation of a lawfare doctrine establishes a specific mission, scope, and strategic goals for the use of lawfare by the United States.

Mission

The mission of the U.S. lawfare doctrine should be to identify, assess, and implement lawfare strategies that advance U.S. interests or counter the lawfare operations of other states. To that end, U.S. lawfare will need to work reactively and proactively to respond to emerging threats promptly. To accomplish this mission, lawfare strategists will need the freedom and flexibility to respond to both near-term and strategic threats. To maintain an effective balance between liberty and oversight, a more detailed scope must be outlined.

Scope

The scope of the U.S. lawfare doctrine would likely be general in nature to allow for an array of lawfare policy options to be implemented, but controlled with internal and external oversight. For lawfare to be effective, it must be allowed to explore creative and comprehensive solutions; however, if too much freedom is given without the presence of an oversight mechanism, the lawfare could threaten to become too detached from the lawfare mission statement. Subsequently, both internal and external oversight structures should be in place to monitor and ensure that the lawfare policies being enacted align with the mission statement of the lawfare doctrine, and the lawfare campaigns are consistent with current U.S. legal standards.

Strategic Goals

The stated strategic goals of the U.S. lawfare doctrine could be outlined as follows:

1. To coordinate and use existing domestic and international legal instruments to advance U.S. interests.
2. To develop and implement new domestic and international legal instruments to advance U.S. interests.
3. To identify, address, and counter any legal actions that impede the U.S. pursuit of its national interests.
4. To coordinate with other agencies within the U.S. government to develop lawfare options that work in conjunction with other government initiatives in the pursuit of U.S. national interests.

Analysis

This U.S. lawfare doctrine will provide the foundation necessary to conduct offensive and defensive lawfare operations against future adversaries. While general in nature, the lawfare doctrine outlines the essential duties and responsibilities of the proposed lawfare program. When combined with an internal and external oversight system, the lawfare doctrine has the necessary strategic framework and direction to create lawfare policy options to meet its specified mission and strategic goals.

Based on the relatively low cost of conducting lawfare campaigns compared to military action, it is likely that more states will be looking to use lawfare to advance their respective national interests. Presently, the U.S. has the tools to be a world leader in the use of lawfare; a position that it can use to further its national interests or disrupt the lawfare operations of adversarial states. China has been the only state actor to develop and use an institutional lawfare doctrine and is likely to be a leader in the field of lawfare for the near future. Other states, like Israel and Palestine, have adopted informal lawfare policies, opting to conduct lawfare campaigns without the rigid structure of a lawfare doctrine.

As one of the main targets of Chinese lawfare operations, the U.S. is facing a decision point. The U.S. has four options to respond to Chinese lawfare operations:

1. The U.S. can ignore China's continued lawfare operations.
2. The U.S. can address China's lawfare operations on a case-by-case basis using lawfare.
3. The U.S. can develop a lawfare doctrine to counter China's lawfare operations.
4. The U.S. can create an offensive lawfare strategy to mitigate China's lawfare strategies.

While it is true that the U.S. can decide to ignore PRC lawfare operations directed at the US, it is likely that doing so will have negative repercussions on future U.S. efforts. Given the increased use of lawfare by state and non-state actors in the 21st Century, it is imperative that the U.S. at least consider developing defensive lawfare strategies to counter the lawfare operations of other states. By implementing a lawfare doctrine, the U.S. can develop future defensive countermeasures for a relatively low cost.

REFERENCES

- Abbas, Mahmoud, "The Long Overdue Palestinian State," *The New York Times*, May 16, 2011, accessed November 18, 2016, <http://www.nytimes.com/2011/05/17/opinion/17abbas.html>.
- American Bar Association, "Lawyer demographics tables 2015 - American Bar Association," American Bar Association. 2015, accessed January 24, 2017, https://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer-demographics-tables-2015.authcheckdam.pdf.
- "Arming vessel against friendly nation," Title 18 U.S. Code, Section 962, June 25, 1948, accessed December 20, 2016, <https://www.gpo.gov/fdsys/pkg/USCODE-2015-title18/pdf/USCODE-2015-title18-partI-chap45-sec962.pdf>.
- Associated Press, "Mavi Marmara: Why did Israel stop the Gaza flotilla?" *BBC News*, June 27, 2016, accessed November 11, 2016, <http://www.bbc.com/news/10203726>.
- Bartman, Christi Scott. *Lawfare use of the definition of aggressive war by the Soviet and Russian Federation governments* (Newcastle: Cambridge Scholars, 2010).
- Bob, Yonah J, "Israel Delivers Shocking Blow to Bank of China Terror Victims' Families Case." *The Jerusalem Post*, July 22, 2014. Accessed October 15, 2016. <http://www.jpost.com/Diplomacy-and-Politics/Israel-delivers-shocking-blow-to-Bank-of-China-terror-victims-families-case-368430>.
- Boim v. Quranic Literacy Institute and Holy Land Foundation for Relief and Development, 291 F.3d 1000, (7th circuit 2001).
- Bederman, David J. *International law frameworks*. 2nd ed. (New York, NY: Foundation Press Thomson/West, 2006).
- Bronner, Ethan, and Christine Hauser, "U.N. Assembly, in Blow to U.S., Elevates Status of Palestine," *The New York Times*, November 29, 2012, accessed November 08, 2016, <http://www.nytimes.com/2012/11/30/world/middleeast/Palestinian-Authority-United-Nations-Israel.html>.
- Cheng, Dean, "Winning Without Fighting: Chinese Legal Warfare," *The Heritage Foundation*, May 21, 2012, accessed December 26, 2016.
- Cooper, Helene, "Obama Says Palestinians Are Using Wrong Forum," *The New York Times*, September 21, 2011, accessed December 11, 2016, <http://www.nytimes.com/2011/09/22/world/obama-united-nations-speech.html>.

- DeYoung, Karen, "How the U.S. came to abstain on a U.N. resolution condemning Israeli settlements," *The Washington Post*, December 28, 2016, accessed January 11, 2017, https://www.washingtonpost.com/world/national-security/how-the-us-came-to-abstain-on-a-un-resolution-condemning-israeli-settlements/2016/12/28/fed102ee-cd38-11e6-b8a2-8c2a61b0436f_story.html.
- Dunlap, Charles J., Jr. "Law and Military Interventions: Preserving Humanitarian Values in 21st Conflicts." *Duke University Law*, November 29, 2001, accessed November 15, 2016. <http://people.duke.edu/~pfeaver/dunlap.pdf>.
- Eichensehr, Kristen, "International Cyber Governance: Engagement Without Agreement?" *Just Security*. February 02, 2015, accessed December 21, 2016, <https://www.justsecurity.org/19599/international-cyber-governance-engagement-agreement/>.
- Escritt, Thomas, and Anthony Deutsch, "Exclusive: ICC backers defy Israeli call to cut funding to war crimes court," *Reuters*, January 27, 2015, accessed February 04, 2017, <http://www.reuters.com/article/us-israel-icc-idUSKBN0L01NJ20150127>.
- Executive Order no. 13,382, Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters, title 3, July 1, 2005, accessed December 20, 2016, <https://www.treasury.gov/resource-center/sanctions/Documents/whwmdeo.pdf>.
- Gordon, Michael R., and Somini Sengupta, "Resolution for Palestinian State Fails in United Nations Security Council," *The New York Times*, December 30, 2014, accessed November 18, 2016.,<https://www.nytimes.com/2014/12/31/world/middleeast/resolution-for-palestinian-state-fails-in-security-council.html>.
- Halper, Stefan, *China: The Three Warfares*. (Washington: University of Cambridge, 2013).
- Hasan, Mehdi, "Transcript: Saeb Erekat," April 02, 2014, accessed October 12, 2016, <http://www.aljazeera.com/programmes/headtohead/2014/03/transcript-dr-saeb-erekat-201432611433441126.html>.
- Hershenson, Sarah, "A New Type of Warfare," *The Jerusalem Post*, September 20, 2012, accessed December 05, 2016, <http://www.jpost.com/Magazine/Features/A-new-type-of-warfare>.
- Ibrahim, Youssef, "P.L.O Proclaims Palestine to be an Independent State; Hints at Recognizing Israel," *The New York Times*, November 15, 1988, accessed October 11, 2016, <http://www.nytimes.com/1988/11/15/world/plo-proclaims-palestine-to-be-an-independent-state-hints-at-recognizing-israel.html?pagewanted=all>.

International Civil Aviation Organization, "Worldwide Air Transport Conference (ATCONF), Sixth Meeting. (Montreal: International Civil Aviation Organization, 2013). Print.

International Criminal Court, "Understanding the International Criminal Court." International Criminal Court. Accessed November 22, 2016. <https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf>.

"International Emergency Economic Powers Act," Title 50 U.S. Code, Sections 1701-1707, October 28, 1977, accessed December 20, 2016, <https://www.treasury.gov/resource-center/sanctions/Documents/ieepa.pdf>

Jalil, Justin, "FM calls to dismantle ICC after launch of 'war crimes' probe," Times of Israel, January 16, 2015, accessed February 04, 2017, <http://www.timesofisrael.com/fm-calls-to-dismantle-icc-after-launch-of-war-crimes-probe/>.

Jieyi, Liu, Kairat Abdrakhmanov, Talaipek Kydyrov, Vitaly Churkin, Mahmamin Mahmaminov, and Muzaffarbek Madrakhimov. "Letter dated 9 January 2015 from the Permanent Representatives of China, Kazakhstan, Kyrgyzstan, the Russian Federation, Tajikistan and Uzbekistan to the United Nations addressed to the Secretary-General." United Nations. January 13, 2015, accessed December 12, 2016, http://repository.un.org/bitstream/handle/11176/158448/A_69_723-EN.pdf?sequence=3&isAllowed=y.

Kan, Shirley A., Richard Best, Christopher Bolkcom, Robert Chapman, Richard Cronin, Kerry Dumbaugh, Stuart Goldman, Mark Manvin, Wayne Morrison, Ronald O'Rourke, and David Ackerman. "China-U.S. Aircraft Collision Incident of April 2001: Assessments and Policy Implications." Congressional Research Service. October 10, 2001, accessed December 27, 2016. <https://fas.org/sgp/crs/row/RL30946.pdf>.

Kerry, John, "Read the full transcript of John Kerry's speech on the Mideast peace process," The Washington Post, December 28, 2016, accessed January 11, 2017, <https://apps.washingtonpost.com/g/documents/world/read-the-full-transcript-of-john-kerrys-speech-on-the-mideast-peace-process/2258/>.

Kittrie, Orde F. *Lawfare: Law as a Weapon of War*. (Oxford, UK: Oxford UP, 2016).

Kraska, James, and Raul Pedrozo, "The US-China Arrangement for Air-to-Air Encounters Weakens International Law." Lawfare Blog, March 09, 2016, accessed December 15, 2016, <https://www.lawfareblog.com/us-china-arrangement-air-air-encounters-weakens-international-law>.

- Lauria, Joe, "PLO Official Says Palestinians Will Seek to Join International Court," *The Wall Street Journal*, April 29, 2014, accessed November 15, 2016, <https://www.wsj.com/articles/plo-official-says-palestinians-will-seek-to-join-international-court-1398810549>.
- Liang, Qiao, and Wang Xiangsui. *Unrestricted Warfare*. (Beijing: PLA Literature and Arts Publishing House Arts, 1999).
- Lowrey, Annie, "Aiming Financial Weapons From Treasury War Room," *The New York Times*, June 3, 2014, accessed December 12, 2016, <https://www.nytimes.com/2014/06/04/business/aiming-financial-weapons-from-war-room-at-treasury.html>.
- Mensah, Thomas A., Jean-Pierre Cot, Alfred H. A. Soons, and Rudiger Wolfrum, "PCA Case N° 2013-19 in the Matter of the South China Sea Arbitration," January 12, 2016, accessed December 27, 2016. 42.
- Middle East Institute, "Abbas to Act against Israel at UN If Peace Talks Fail," Middle East Institute, 2013, accessed December 08, 2016, <http://www.mei.edu/content/abbas-act-against-israel-un-if-peace-talks-fail>.
- Mirasola, Christopher, "A Shifting Tide in the South China Sea: The Permanent Court of Arbitration Declares Jurisdiction," *Harvard International Law Journal*, November 09, 2015, accessed December 10, 2016.
- Morello, Carol, and Ruth Eglash, "Kerry harshly condemns Israeli settler activity as an obstacle to peace," *The Washington Post*, December 28, 2016, accessed January 11, 2017, https://www.washingtonpost.com/world/national-security/kerry-address-middle-east-peace-process-amid-deep-us-israel-strains/2016/12/28/d656e5fa-cd0a-11e6-b8a2-8c2a61b0436f_story.html.
- National Intelligence Council, "Nonstate Actors: Impact on International Relations and Implications for the United States," August 23, 2007, accessed January 03, 2017, https://www.dni.gov/files/documents/nonstate_actors_2007.pdf.
- Nichols, Michelle, Louis Charbonneau, and Thomas Escritt, "U.N. confirms Palestinians will be ICC member on April 1," *Reuters*, January 07, 2015, accessed November 27, 2016, <http://www.reuters.com/article/us-palestinians-israel-un-idUSKBN0KG1JV20150107>.
- Orts, Eric W, "The Rule of Law in China," *Vanderbilt Journal of Transnational Law* 34 (2001): 44.
- Palestinian National Council, "Palestinian National Council Declaration of Independence," November 14, 1988, accessed November 12, 2016,

<http://www.multaqa.org/pdfs/PNC%20INDEPENDANCE%20DECLARATION.pdf>.

“Providing material support to terrorists,” Title 18 U.S. Code, Section 2339A (b)(1). § 2339A (b)(1), 2004, accessed December 20, 2016, <https://www.gpo.gov/fdsys/pkg/USCODE-2015-title18/pdf/USCODE-2015-title18-partI-chap113B-sec2339.pdf>.

Rudoren, Jodi, "Palestinian Prisoner Release Is Critical Hurdle in Resuming Peace Talks," *The New York Times*, July 20, 2013, accessed November 03, 2016, <http://www.nytimes.com/2013/07/21/world/middleeast/palestinian-prisoner-release-is-critical-hurdle-in-resuming-peace-talks.html>.

Rudoren, Jodi, "Palestinians Set to Seek Redress in a World Court," *The New York Times*, December 31, 2014, accessed December 02, 2016, <https://www.nytimes.com/2015/01/01/world/middleeast/palestinians-to-join-international-criminal-court-defying-israeli-us-warnings.html>.

Rudoren, Jodi, Michael R. Gordon, and Mark Lander, "Abbas Takes Defiant Step, and Mideast Talks Falter," *The New York Times*, April 01, 2014, accessed November 12, 2016, <https://www.nytimes.com/2014/04/02/world/middleeast/jonathan-pollard.html>.

Segal, Adam, "China, International Law, and Cyberspace," *Council on Foreign Relations*, October 02, 2012, accessed December 21, 2016, <https://www.cfr.org/blog-post/china-international-law-and-cyberspace>.

Shurat HaDin, "About Us," *Shurat HaDin: Israel Law Center*, accessed November 12, 2016. <http://israellawcenter.org/about/>.

Sun Tzu, *The Art of War*, ed. Samuel B. Griffith (Oxford: Oxford University, 1971).

Thucydides, "History of the Peloponnesian War," *The Melian Dialogue*, 451 bc, accessed November 12, 2016, <https://www.mtholyoke.edu/acad/intrel/melian.html>.

UN News Center, "Security Council refers Palestinian application to UN membership committee," *United Nations News Center*, September 28, 2011, accessed September 12, 2016, <http://www.un.org/apps/news/story.asp?NewsID=39863#.WUWFXmjytPY>.

UN News Center, "UNESCO chief regrets United States decision to withhold funding," *UN News Center, United Nations*, November 02, 2011, accessed December 26, 2016, <http://www.un.org/apps/news/story.asp?NewsID=40286#.WUWNVGjytPY>.

- UN News Center, "UNESCO votes to admit Palestine as full member," UN News Center, United Nations, October 31, 2011, accessed December 26, 2016, <http://www.un.org/apps/news/story.asp?NewsID=40253#.WUWMumjytPY>.
- UN Security Council, "Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip," September 28, 1995, accessed October 19, 2016, <http://www.unsco.org/Documents/Key/Israeli-Palestinian%20Interim%20Agreement%20on%20the%20West%20Bank%20and%20the%20Gaza%20Strip.pdf>.
- United Nations Associated Press, "Palestinians hold off on UN agency membership," The Times of Israel, May 21, 2013, accessed November 27, 2016, <http://www.timesofisrael.com/palestinians-hold-off-on-un-agency-membership/>.
- United Nations, "Charter of the United Nations," United Nations, 1945, accessed August 11, 2016, <https://treaties.un.org/doc/publication/ctc/uncharter.pdf>.
- United Nations, "Charter of the United Nations and Statute of the International Court of Justice," United Nations, 1945, accessed December 21, 2016, <https://treaties.un.org/doc/publication/ctc/uncharter.pdf>.
- United Nations, "Overview - Convention & Related Agreements," December 10, 1982, accessed December 28, 2016, http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.
- United Nations, "Preamble to the United Nations Convention on the Law of the Sea," December 17, 1970, accessed December 24, 2016, http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.
- United Nations General Assembly, "Resolution 181 (II). Future government of Palestine," November 29, 1947, accessed November 20, 2016, <https://unispal.un.org/DPA/DPR/unispal.nsf/0/7F0AF2BD897689B785256C330061D253>.
- United Nations Security Council, "Current Members," accessed February 10, 2017, <http://www.un.org/en/sc/members/>.
- United Nations Security Council, Resolution 660, "Response to the Invasion of Kuwait by Iraq," August 2, 1990, accessed January 12, 2017, <http://unscr.com/en/resolutions/doc/660>.
- United Nations Security Council, Resolution 661, "Sanctions on Iraq for the Illegal Invasion of Kuwait," August 6, 1990, accessed January 12, 2017, <http://unscr.com/en/resolutions/doc/660>.

- United Nations Security Council, Resolution 687, "Iraq-Kuwait," April 3, 1991, accessed January 13, 2017, <http://unscr.com/en/resolutions/doc/687>.
- U.S.-China Economic and Security Review Commission, "2008 Report to Congress of the U.S.-China Economic and Security Review Commission," U.S.-China Economic and Security Review Commission, November 2008, accessed December 21, 2016, https://www.uscc.gov/sites/default/files/annual_reports/2008-Report-to-Congress_0.pdf.
- U.S. Department of Defense, "DoD General Counsel-about us," accessed April 17, 2017, <http://ogc.osd.mil/about.html>.
- U.S. Department of Justice, "Attorney - Office of Foreign Litigation," March 13, 2015, accessed April 17, 2017, <https://www.justice.gov/legal-careers/job/attorney-office-foreign-litigation>.
- U.S. Department of State, "Foreign Terrorist Organizations," accessed December 21, 2016, <https://www.state.gov/j/ct/rls/other/des/123085.htm>.
- U.S. Department of State, "Iran Sanctions," accessed January 13, 2017, <https://www.state.gov/e/eb/tfs/spi/iran/index.htm>.
- U.S. Department of State, "Joint Comprehensive Plan of Action," July 14, 2015, accessed January 13, 2017, <https://www.state.gov/documents/organization/245317.pdf>.
- U.S. Department of State, Limits in the Seas, No. 143, China: Maritime Claims in the South China Sea (December 5, 2014), <http://www.state.gov/documents/organization/234936.pdf>.
- U.S. Department of State, "Practicing Law in the Office of the Legal Adviser," accessed April 20, 2017, <https://www.state.gov/s/l/3190.htm>.
- U.S. Department of Treasury, Office of Intelligence and Analysis, "Strategic Direction: Fiscal Years 2012-2015," accessed December 12, 2016, <https://www.treasury.gov/about/organizational-structure/offices/Documents/Strategic%20Direction%202008-13-12.pdf>.
- U.S. Office of the President, "Statement by the President on Iran Nuclear Deal," August 5, 2015, accessed December 10, 2016, <https://www.whitehouse.gov/the-press-office/2015/08/05/remarks-president-iran-nuclear-deal>.
- U.S. Office of the President, "U.S. National Space Policy," August 31, 2006, accessed December 21, 2016, <https://fas.org/irp/offdocs/nspd/space.pdf>.

Weiss, Martin A, "Terrorist Financing: U.S. Agency Efforts and Inter-Agency Coordination," Congressional Research Service, August 3, 2005, accessed December 12, 2016, <https://fas.org/sgp/crs/terror/RL33020.pdf>.

Wultz v. Bank of China Ltd., 910 F. Supp. 2d 548, 554 (S.D. NY 2013).

Zarate, Juan C. Treasury's war: the unleashing of a new era of financial warfare. (New York: PublicAffairs, 2013).