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The Ethics of International Criminal 'Lawfare'

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Abstract

The term “lawfare” has been used to refer to the use of international criminal law as a tool of war. Despite the expansive employment of the term to refer to appeals to law in ongoing conflict, this article demonstrates how “lawfare” has taken on negative meaning without ethical justification. We argue that the co-opting of the term as a means of condemnation is unfair and potentially detrimental, and a more exacting definition and narrower use of the term are needed to avoid obfuscating potentially purposeful recourses to international criminal law. In looking at how international criminal lawfare has manifested with referrals to the ICC, it becomes clear that problems of negative perceptions lie not with lawfare itself, but with the intentional obstruction by parties interested in the outcome of a conflict. Tackling these negative perceptions also lays the groundwork for a necessary future argument for the international community’s moral responsibility to promote safeguards to ensure that the international criminal legal system is itself just.

Keywords

international criminal law; ethics; lawfare; International Criminal Court (ICC); war crimes

1. Introduction

International criminal law, and the International Criminal Court (ICC or “the Court”) specifically, exists at the intersection of law and politics. In just over a decade, the ICC has developed from a simple yet powerful idea to an international institution that boasts 123 states parties and is used by the United Nations Security Council (UNSC) as a tool in its arsenal for the maintenance of international peace and security and the promotion and protection of human rights globally. As an instrument of legal order, international criminal law (ICL) is meant to demonstrate objectivity and impartiality in its conclusions regarding justice and the commission of particular crimes. As an international institution, however, there is the potential for agents to attempt to use it for political and strategic gains. In more than one conflict globally, ICL has been used to garner advantage in

political and peace negotiations, to legitimize acts by explaining or justifying them in the language of ICL, or to invite outside parties to judge behaviours of war and perhaps even settle disputes. This intersection of law and politics in the international sphere introduces interesting moral questions about how criminal law ought to be used in the context of ongoing conflicts.

This article questions specifically the ethics of appeals to international criminal law with the intention of influencing the outcome of a conflict. The first section of the article acknowledges the tradition of using the term “lawfare” to refer to the use of law in conflict, but in doing so, must contend with the lack of consistent understanding or use of the term. With an etymology of “lawfare” and a discussion of the current intellectual debates regarding what acts should be included under “lawfare”, as well as whether the label necessarily signals an abuse of law, the first section explores this lack of consensus on the definition. This indeterminate definition results in a lack of consensus with regard to the acts included within the category, and also, to whether the acts are inherently immoral or not. We explain our preference for a narrow definition of lawfare in the international criminal context, to speak to the appeal to ICL by parties who wish to influence the outcome of ongoing conflict. Once a definition of the term is settled, acknowledging the value of a label attached to specific appeals to ICL, we turn to the question of the morality of the use of international criminal lawfare. We argue that international criminal lawfare is, in fact, not inherently immoral and provide ethical reasoning for the need to rescue the term “lawfare” from its largely negative connotations. Its current use obfuscates the possible purposeful use of criminal law in conflict and may act to deter those who would use it justly.

We argue that misunderstanding the connection between the use of lawfare and problems with the system as cause-and-effect can invite some unwelcome results, including the dissuasion of parties to conflict from appealing to ICL when appropriate, out of fear of being negatively perceived for doing so. We believe this rescuing exercise is important, given the potential of the term to meet a need in our vocabulary: a word that describes a particular appeal to law and which alerts us to the need to be watchful for potential misuse and attempts at interference. There is reason to be cautious of such appeals. However, such appeals should not be excluded from the international legal system, nor should they all be regarded as immoral and inappropriate. Finally, we argue that there is a corresponding moral responsibility borne by the international community to ensure that the ICL system is itself just, and to be resistant to attempts at manipulation and subverting the law. Lawfare in the international criminal legal system, under the right conditions, can be just and appropriate, and should be supported by members of the international community as a means of protecting and promoting human rights globally.

2. An Etymology of “Lawfare” and the Rhetorical Use of the Term in International Politics

The term “lawfare” originates from the work of John Carlson and Neville Yeomans who referred to it in their argument regarding the movement away from the “humanitarian” community systems of justice (restorative) to more “utilitarian” systems (retributive), which are monopolized by the

state.¹ Carlson and Yeomans lament that the search for truth and harmony of the restorative approaches are replaced by the adversarial and accusatory procedures of the courts and that “lawfare replaces warfare, and the duel is with words rather than swords”.² What is interesting about this first use of the term “lawfare” is that it points to the power and the limitations of the use of a system of retributive justice. As the authors note, retributive processes are coercive, combative, and their effectiveness depends on the policies and actions of the power wielders.

Twenty-four years later, the term was again used to convey the power of using law to win a victory over one's adversary. In 1999, two officers of China's People's Liberation Army, Qiao Liang and Wang Xiangsui, published a book entitled *Unrestricted Warfare*. In this work, the term “lawfare” was used, not to refer to retributive or criminal justice at all, but rather in terms of ‘seizing the earliest opportunity to set up regulations’³, in a place where ‘politics...has become the continuation — or even just one of the manifestations — of war’.⁴ In this sense, the monopoly of law is viewed as just one of the different modalities with which one may be able to wage war. Since the introduction of “lawfare” in these works, the term has been picked up and used quite liberally to refer to a wide array of acts that combine the use or appeal to law within an adversarial context.

¹ John Carlson and Neville Yeomans, ‘Whither Goeth The Law – Humanity or Barbarity’ (2000) <<http://www.laceweb.org.au/whi.htm>>, 26 October 2015.

² Ibid.

³ Wouter G. Werner, ‘The Curious Career of Lawfare’ 43 *Case Western Reserve Journal of International Law* (2010) 62-72, p. 64.

⁴ Ibid., p. 65.

Charles J. Dunlap brought the term “lawfare” to the forefront of contemporary discussions when, in 2001, he defined it as ‘the use of law as a weapon in war’.⁵ Dunlap changed his approach to lawfare over the years, partly in response to comments on his widely-circulated 2001 article, to focus on the transformative aspects of law and war, and ‘deliver law to strategic instrumentalization by all parties for their own advantage’.⁶ The refined definition focuses on ‘the strategy of using – or misusing – law as a substitute for traditional military means to achieve an operational objective’.⁷ For Dunlap, the use of lawfare is neither ethically good nor bad; like many tools of war, it is how it is used that attaches moral significance to its use. Many follow Dunlap’s position and approach the concept of lawfare as morally neutral, that is, as the use of law with the intention of damaging an opponent, winning a public relations victory, or influencing the tactical decisions of an opponent in an ongoing conflict. David Kennedy describes the concept as ‘the waging of war by law’,⁸ and Richard Falk says it can be right to ‘conceive of “lawfare” as “soft power geopolitics” or as a form of “asymmetric warfare” waged by political actors deficient in

⁵ Charles Dunlap, Jr., Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts 29 November 2001, Carr Center for Human Rights, Harvard University, Unpublished Paper, <<http://people.duke.edu/~pfeaver/dunlap.pdf>>, 2 October 2015.

⁶ Tawia Ansah, ‘Lawfare: A Rhetorical Analysis’, 43 1/2 Case Western Reserve Journal of International Law (2010) 87-119, p. 110.

⁷ Charles J. Dunlap, ‘Lawfare Today: A Perspective’, Yale Journal of International Affairs (Winter 2008) 146-154, p. 146.

⁸ David Kennedy, *Of War and Law*, (Princeton University Press, Princeton, 2006), p. 12.

hard power’.⁹ Lawfare, understood in this ideologically neutral way, is ‘much the same as a weapon’¹⁰ in that it can be used for good or bad purposes.¹¹

Others, however, emphasize only the negative connotation of the term “lawfare”, by suggesting that it is a ‘strategy of the weak, using international fora, judicial processes and terrorism’.¹² Unfortunately, the negative connotation applied to the term has taken root, at least in some circles. Arguably, in its contemporary use, lawfare ‘is used most commonly as a label to criticize those who use international law and legal proceedings to make claims against the state, especially in areas related to national security’.¹³ Used in this way, ‘the term ‘lawfare’ [is meant] to discredit an opponent’s reliance on law and legal procedure’.¹⁴ Jon Keller suggests that use of the term lawfare is ‘just a shorthand for “I disagree with X’s legal actions”’.¹⁵ Some experts claim that the definition of lawfare can only encompass the misuse or manipulation of law to achieve an operational objective,¹⁶ by limiting the concept to ‘an exploitation of the law’ or ‘wrongful manipulation of the law and legal system to achieve strategic military or political ends’.¹⁷ We find

⁹ Richard Falk, ‘Positive and Negative Forms of ”Lawfare”’ *Foreign Policy Journal*, <<http://www.foreignpolicyjournal.com/2015/02/24/positive-and-negative-forms-of-lawfare/>> 15 May 2015.

¹⁰ Dunlap, *supra* note 7, p. 146.

¹¹ *Ibid.* . 146-154.

¹² Werner, *supra* note 3, p. 64.

¹³ Michael Scharf and Elizabeth Andersen, ‘Is Lawfare Worth Defining? Report of the Cleveland Experts Meeting, 11 September 2010’, 43/11 *Case Western Reserve Journal of International Law* (2011), 11-28, p. 12.

¹⁴ Werner, *supra* note 3, page 69.

¹⁵ Kevin J. Keller, *No, Going to the ICC Is Not ‘Lawfare’ by Palestine*, 22 January 2015, <<http://opiniojuris.org/2015/01/22/no-going-icc-not-palestinian-lawfare/>>, 28 September 2015.

¹⁶ The Lawfare Project. *Lawfare: The Use of the Law as a Weapon of War*, <<http://www.thelawfareproject.org/what-is-lawfare.html>>, 5 December 2015.

¹⁷ See definitions similar to those provided by The Lawfare Project, discussed in the Report of the Cleveland Expert Meeting, 11 September 2010, *supra* note 13, p. 18.

this unhelpful and missing the spirit in which the term was originally introduced, and also as being a misrepresentation of what law actually is. A retributive legal system is adversarial; it is a tool used by parties in conflict (not necessarily armed conflict) to resolve that conflict to their (presumed) benefit. To suggest that appeal to law by interested parties for self-interested motivations is immoral, that it is somehow separate from the general use of law, is to attach to law some lofty moral, unreasonable rigor.

The other side of the coin questions not whether lawfare is neutral or a morally problematic strategy, but how broadly the term should be used, and what types of actions it should cover. The term has been used very broadly to describe agendas to use ‘international law for propaganda purposes, for example, by orchestrating civilian deaths’,¹⁸ or the use of international law for strategic and military advantage, such as Dunlap's example of an instance when the US military bought up the exclusive rights to all satellite images of Afghanistan in 2001 so that its opponents could not do so.¹⁹ John Yoo, one of the best-known US government lawyers who wrote the so-called “torture memos”, ‘indirectly boasted about lawfare by titling his memoir *War By Other Means*’.²⁰ Others include in their understanding of lawfare engaging in debates about legal interpretations, hiding among civilians in a conflict (arguably itself a war crime),²¹ or even rulings made by the International Court of Justice.²² Private lawsuits against terrorist groups and states

¹⁸ Scharf and Andersen, *supra* note 13.

¹⁹ Dunlap, *supra* note 7, p. 147.

²⁰ David Luban, ‘Carl Schmitt and the Critique of Lawfare’, Georgetown Public Law and Legal Theory Research Paper No. 11-33 (2010) 1-13, p. 1.

²¹ Jamie A. Williamson, ‘The Knight's Code, Not his Lance’, 43 Case Western Reserve Journal of International Law (2010), 447-455, p. 448.

²² See e.g., The Lawfare Project, <<http://www.thelawfareproject.org/what-is-lawfare.html>>, 5 December 2015.

supporting terrorism as well as economic sanctions have also been characterised as examples of lawfare.²³ In the most recent article on the topic, Alana Tiemessen narrows the definition to ‘the coercive and strategic element of international criminal justice in which the ICC’s judicial interventions are used as a tool of lawfare for States Parties and the UNSC to pursue political ends’,²⁴ which comes closest to our own definition of international criminal lawfare in this paper. Should all of these examples be rightly included under the definition of “lawfare”? Arguably, no. Too broad a definition risks rendering the term relatively meaningless.

It becomes evident that lawfare exists at the intersection of law and war but lacks the precisely articulated, and consistently used, definition necessary for a discussion of the ethical implications of its use. In fact, in 2010 a group of legal scholars convened to question precisely what lawfare really is.²⁵ While some legal experts argued the term could be useful if more narrowly defined, there was little consensus as to how best to define it, despite the fact that most ‘participants agreed...that the reactive, “right-wing” concept of “lawfare” constituted a “hijacking” of the term and should be rejected’.²⁶ We suggest that a narrower definition is in fact needed to clarify what lawfare encompasses and the conditions under which it can and should be used. The term “lawfare” should be limited to the use of judicial interventions as a tool for states, parties to conflict, and other interested actors to pursue political ends.²⁷ This definition makes three important points about

²³ Scharf and Andersen, *supra* note 13, p. 17.

²⁴ Alana Tiemessen, ‘The International Criminal Court and the lawfare of judicial intervention’, *International Relations* (2015) 1-23, p. 6.

²⁵ Scharf and Andersen, *supra* note 13.

²⁶ *Ibid.*, p. 13.

²⁷ This definition is a variation of Tiemessen's definition, *supra* note 24, p. 2.

the concept of lawfare: first, the scope of the definition is such that acts can be evaluated against the definition for fit, thereby eliminating a broad and meaningless use of the term; second, it cannot be employed simply as shorthand for criticism, since it refers to characterisable acts; and, third, under this definition, lawfare can include uses of law and legal processes that complement as well as substitute for traditional military means, and include both positive and negative motivations for appealing to law.

If lawfare is defined as the above-mentioned tool of using judicial interventions, then international criminal lawfare is the use of international criminal judicial interventions as a tool for states, parties to conflict, and other interested actors, including the UNSC, to pursue political ends. We regard the characterisation currently assigned to lawfare in popular discourse as both too broad and too limiting, in that it depicts lawfare as encompassing a variety of disparate acts and also as largely the manipulation or misuse of law to achieve operational objectives.²⁸ The positive implications to a more precise definition include, first, the hope that it would in fact encourage relevant parties to a conflict to pursue their conflict in a judicial theatre as opposed to a theatre of armed conflict. A definition that ‘includes the proper use of law as a substitute for military means encourages using law instead of military force’²⁹ and supports ‘a race to the courtroom instead of to the battlefield.’³⁰ As Dunlap notes, recourse to the courts is a facet of lawfare to be encouraged.³¹ Second, a more precise definition, coupled with a more consistent use of the concept would focus

²⁸ See The Lawfare Project, <<http://www.thelawfareproject.org/what-is-lawfare.html>>, 11 November 2015.

²⁹ Scharf and Andersen, *supra* note 13, p. 17.

³⁰ *Ibid.*

³¹ Dunlap, *supra* note 7, p. 149.

the debate on the plausible proper nature of lawfare while simultaneously narrowing the conceptual lens on what is considered legitimate resorts to the rule of law.

Interpretations of lawfare as recourses to law, absent any moral judgement based simply on the appeal to law, are most appropriate. Louise Arbour's words acknowledging the complex range of manifestations of lawfare best reflect our own conviction triggering the ethical defence of international criminal lawfare:

Lawfare is, in and of itself, neither good nor bad...Spurious or outright false claims threaten to bring the entire concept of humanitarian law into disrepute, and can create the erroneous perception that it is the law itself – and not its deliberate misapplication – which is at fault. But crying “lawfare!” ... creates the appearance that the accused cannot justify their actions...³²

While misuses and manipulations of ICL exist and there is need for systemic changes for ICL to be more resistant to these, we should not disregard the potential of ICL to create positive outcomes. In the next section, we look at some recent accusations of lawfare, which affect the ICC in its unique position as an international criminal court that can investigate and adjudicate cases from ongoing conflict. And while these lawfare cases have had negative effects on the Court's legitimacy, we show that it is not true that lawfare itself is to blame. We explore the conditions that lead to faults in how lawfare has been perceived recently and pinpoint ethical considerations which could salvage the concept from an exclusive focus on unjust manipulation. These conditions are then incorporated into a discussion of the international community's moral responsibility to support just reforms of the system.

³² Louise Arbour, ‘The Laws of War: Under Siege or Gaining Ground?’ Speech 23 June 2011, Australian National University, Canberra, <<http://www.crisisgroup.org/en/publication-type/speeches/2011/the-laws-of-war-under-siege-or-gaining-ground.aspx>>, 12 November 2015.

3. International Criminal Lawfare and the Conditions that Lead to Perception Faults

Since its entry into force in 2002, the ICC has made strides in its pursuit for accountability for international crimes. In its formative years, a few remarkable and unpredicted characteristics emerged; these have both strengthened and decreased the Court's claims to legitimacy. A significant one is a proclivity for states to refer situations occurring within their own borders. It was not envisioned that any state would self-refer, and yet the first three situations before the Court - Uganda, the Democratic Republic of the Congo (DRC), and Central African Republic (CAR) - were each referred by the states themselves.

In theory, self-referrals can do much to bolster the legitimacy of the Court. The ICC obtains further legitimacy when member-states invite the Court in to investigate and judge a particular situation. This is one of three ways in which the ICC can establish jurisdiction, which include: a member-state referral of a situation, a referral by the Security Council acting under Chapter VII of the Charter of the United Nations, or an investigation initiated by the ICC Prosecutor in accordance with Article 15 of the Rome Statute. With all three options, there is potential for attempts by interested parties to use the Court to influence an ongoing conflict. Each of the examples discussed in this section represents an instance of lawfare that has negatively affected the legitimacy of ICL. We contend with the idea that the fault lies with lawfare per se. Rather, the use of lawfare makes problems of the system or court transparent. Highlighted by tricky cases of lawfare, it might seem that these problems either originate with the pursuit of lawfare or they can be eliminated if lawfare

is deemed immoral and prevented. Misunderstanding the connection between the use of lawfare and problems with the system as cause-and-effect, however, can invite some unwelcome results, including the dissuasion of parties to conflict from appealing to ICL when appropriate out of fear of being negatively perceived for doing so.

It is true that the bias and selectivity reflected in the operations of the ICC affect both the real and perceived legitimacy of ICL.³³ However, what is not evident is that it is the use of international criminal lawfare that has created this bias and selectivity. Examples of contemporaneous situations before the Court, such as Uganda, Darfur, Libya, and Palestine, demonstrate different aspects of the combination of lawfare and abuse of law that cannot and should not be conflated with lawfare itself. It is this combination, we argue, that gives international criminal lawfare its negative connotation and distasteful characterisation. There is a difference between appealing to law with self-interested motivations and intentionally perverting, hindering, or obstructing law.

3.1 Lawfare by State Referrals

Despite a number of states having self-referred situations to date, not one has helped with legitimising the ICC, and in fact each has in some manner negatively impacted the legitimacy of the ICC. The biggest problem is that the ICC depends on the self-referring governments for

³³ Kirsten J Fisher, *Moral Accountability and International Criminal Law* (New York: Routledge, 2012).

cooperation to gain access to witnesses and evidence and to assist with investigations and prosecutions. This contributes to the ICC's legitimacy deficit, which is enhanced by states' lack of compliance with the Court's requests for evidence and cooperation.

The Ugandan example demonstrates how a referring party both invited the ICC to investigate alleged crimes committed in an ongoing conflict, therefore employing lawfare, and expected and received preferential treatment and a one-sided investigation of abuses committed. Uganda's President Yoweri Museveni referred the situation to the ICC in December 2003. It was the first situation (and first cases) before the Court, with arrest warrants issued in 2005. Museveni invited the Court to investigate the commission of crimes by the rebel group the Lord's Resistance Army (LRA)³⁴ and the investigation initially yielded five indictments of the then-top leadership of the LRA. Despite his insistence that the Court investigates all sides equally, Chief Prosecutor Luis Moreno-Ocampo's decision was that no crimes committed by the Ugandan army warranted ICC indictments.³⁵ His determination to charge only LRA leaders and not members of the Ugandan army, the Uganda People's Defence Force (UPDF), which had reportedly committed its own share of atrocities, for brutalities committed in Uganda lead to criticism both in Uganda and internationally.³⁶ Some critics point to Ocampo's joint press conference with Museveni, the

³⁴ International Criminal Court, 'President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC', Press Release ICC-20040129-44 (2004) <https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2004/Pages/president%20of%20uganda%20refers%20situation%20concerning%20the%20lord_s%20resistance%20army%20_lra_%20to%20the%20icc.aspx>, 20 May 2015.

³⁵ Luis Moreno-Ocampo, Statement by the Chief Prosecutor on the Uganda Arrest Warrants (14 October 2005) <http://www.icc-cpi.int/NR/rdonlyres/3255817D-FD00-4072-9F58-FDB869F9B7CF/143834/LMO_20051014_English1.pdf>, 15 May 2015.

³⁶ Adam Branch, 'Uganda's Civil War and the Politics of ICC Intervention', 21/2 Ethics and International Affairs (2007) 179-198.

mention of (only) the LRA in the initial press releases, and indictments of only LRA members for atrocities committed in northern Uganda as evidence of lack of objectivity in the Court's response, perhaps for prudential reasons.³⁷

The motivations of the Ugandan government are clear: the self-referral was aimed at discrediting the government's opponent in the conflict, 'to delegitimize and remove... troublesome insurgents that could not be defeated militarily'.³⁸ Separate from the government's motivation in referring the situation to the ICC, however, is the Court's response to the referral. When the ICC must, or feels that it must, rely on the goodwill of the government of the territory, it will be constrained by politics as much as law, and is hampered in its performing its duties. When the referring party is both a party to the conflict and the sovereign over the territory, there is fertile ground for real and perceived inappropriate interference. Here, then, we have the potential for a dangerous combination of use of lawfare (neutral) and interference (morally wrong).

Palestine provides a more recent example of self-referral, which despite being unique, also highlights the limitations of the current system for objectively adjudicating crimes committed in war. Palestine's self-referral is perhaps a good example of the use of lawfare to invite a supposedly just and objective arbiter to weigh in on a conflict and tactics taken in war. And although the referral invites (at least in theory) investigation into the actions of both sides to the conflict, it was met by political obstacles that hindered the Court operating as it might. Arguably, the attempts

³⁷ Michael Otim and Marieke Wierda, 'Justice at Juba: International Obligations and Local Demands in Northern Uganda', in N. Waddell and P. Clark (eds.), *Courting Conflict? Justice, Peace and the ICC in Africa* (Royal African Society, London, 2008) 21-28, p 22.

³⁸ Alana Tiemessen, *The Paradox of Lawfare*, 10 May 2012, OpenCanada.org, <<https://www.opencanada.org/features/the-paradox-of-lawfare/>>, 12 May 2015.

made by powerful states to frustrate Palestine's getting its situation before the Court, as well as the characterization of the referral as a negative instance of lawfare, could be seen as obstructive political maneuvering.

It took significant political effort for Palestine to be able to invite an investigation into potential crimes committed within its territory. On 22 January 2009, the Palestinian National Authority (PNA) lodged a declaration with the Registrar of the ICC pursuant to article 12(3) of the Rome Statute to investigate 'acts committed on the territory of Palestine since 1 July 2002.' On 3 April 2012, the Office of the Prosecutor (OTP) of the ICC issued a decision stating that the OTP lacked jurisdiction to investigate alleged international crimes committed within the Palestinian territories because it could not make the legal determination whether Palestine qualifies as a State for the purpose of acceding to the Rome Statute. In its decision, it claimed that the issue sat with 'competent organs of the United Nations or eventually the Assembly of States Parties [to] resolve the legal issue relevant to an assessment of article 12.'³⁹ On 29 November 2012, the United Nations General Assembly voted, by overwhelming majority,⁴⁰ to promote Palestine to non-Member Observer State status in the United Nations, against the adamant opposition of some states, including Israel, the United States, and Canada.⁴¹ The result was that the UN General Assembly had now formally recognized Palestine as a state and it could again invite the jurisdiction of the

³⁹ ICC, Office of the Prosecutor, *Situation in Palestine*, 3 April 2012, <<https://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf>>, 23 July 2015.

⁴⁰ *UN General Assembly draft resolution A/67/L.28, conferring Palestine non-member observer state status in the UN, passed by a vote of 138 to 9.*

⁴¹ Kevin J. Heller, 'Britain to Support Palestine's UNGA Resolution?' *Opinio Juris*, 27 November 2012, <<http://opiniojuris.org/2012/11/26/britain-to-support-palestines-unga-resolution/>>, 20 September 2015.

ICC. It can invite investigation and other states can also now file war crimes complaints against Fatah and Hamas regarding actions against Israel or other states.

On 31 December 2014, Palestine granted the ICC jurisdiction to investigate crimes committed ‘in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014’, a date which corresponds roughly with the beginning of the 2014 Gaza war.⁴² Palestine acceded to the Rome Statute on 1 April 2015 and the PNA handed over its first submission of evidence of supposed Israeli war crimes to the Court in June with the aim of speeding up an ICC inquiry into abuses committed during the 2014 Gaza conflict. The Prosecutor, not the Palestinian Authority, will ultimately decide whether to open a full criminal investigation. Complicating matters is Israel’s seeming refusal to cooperate with any investigation.⁴³ The ICC Prosecutor has declared that she will investigate the existence of crimes even-handedly, considering whether there were (sufficiently grave) crimes committed by Israel in Gaza and by Hamas and Palestinian Groups by firing rockets into Israel.⁴⁴ Powerful states that opposed the referral still oppose the possibility of the Court opening a formal investigation, including the US and Israel. Erecting obstacles to the Court’s ability to function effectively can be considered unwarranted and inappropriate interference, if it can be assumed that the Court would legitimately pursue an objective

⁴² ICC, *Palestine*, <www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/p_e-ongoing/palestine/Pages/palestine.aspx>, 30 October 2015.

⁴³ ‘ICC urges Israel to cooperate with preliminary Gaza probe’, *The Times of Israel*, 13 May 2015, <www.timesofisrael.com/icc-urges-israel-to-cooperate-with-preliminary-gaza-probe/>, 11 November 2015.

⁴⁴ Aeyal Gross, ‘ICC Prosecutor: Low-ranking Israeli Soldiers, as Well as Palestinians, Could Be Prosecuted for War Crimes’, *Haaretz*, 1 May 2015, <www.haaretz.com/israel-news/.premium-1.654516>, 15 November 2015. ‘ICC prosecutor rejects Israel’s fears of bias in war crimes investigation’, *RT*, 2 May 2015, <www.rt.com/news/255037-icc-israel-palestine-unbiased-investigation/>, 15 November 2015.

investigation of potential war crimes committed by either side. Legitimate investigation might have real positive outcomes for civilians living in the area, as can be the case as both sides try to win a public relations victory of their own.⁴⁵

Uganda and Palestine provide just two examples of self-referrals which proved to be problematic, negatively affecting the legitimacy of the ICC and the enterprise of ICL itself. What these cases show is the vulnerability of the ICC to politics and power. While Palestine's context is unique in that it is unlikely the ICC will again contend with the question of a referring party's eligibility for statehood, it, like the Ugandan situation, shows the reliance of the ICC on the de facto sovereign of the territory to be able to effectively pursue its work. Under conditions in which the Court would not need to rely on the goodwill of parties to the conflict to pursue its investigations, international criminal lawfare could be an effective means of restraining violations of international humanitarian law (IHL).

3.2 *Lawfare through the UN Security Council's Judicial Interventions*

The Libyan example demonstrates how the UNSC, as representative of the international community, can engage in lawfare by referring a situation to the Court, and at the same time both avoid referring another like situation because of the self-interest of members of the UNSC, and also shielding particular actors from investigation. UNSC resolution 1970, which was adopted

⁴⁵ Hyeran Jo and Beth A. Simmons, 'Can the International Criminal Court Deter Atrocity?', Social Science Research Network, 18 December 2014, <<http://ssrn.com/abstract=2552820>>, 12 January 2015.

unanimously on 26 February 2011, referred the situation in Libya to the ICC, and condemned the Gaddafi government's use of lethal force against protesters.⁴⁶ It passed in the midst of an ongoing conflict. The ICC investigation began on 3 March 2011, and the Court issued an arrest warrant for Colonel Muammar Gaddafi, among others, on 27 June 2011.⁴⁷ Arguably, the UNSC itself engaged in lawfare in order to alter the trajectory of the conflict in Libya, at the same time as it worked to bring individuals to justice.

What was particularly problematic in SC Resolution 1970 referring the Libyan situation to the ICC was the specific exclusion from the Court's jurisdiction of nationals of any state other than Libya that is not party to the Rome Statute.⁴⁸ The treatment of non-Libyan actors in this situation is reflective of the influence of the UNSC and other powerful global actors. Excluding citizens of non-state parties (other than Libya) hinders the ability of the Court to investigate and prosecute any crimes committed within its jurisdiction in the geographical and temporal situation referred, and also acts to shield UNSC interests. The International Commission of Inquiry on Libya investigated allegations of the commission of international crimes in Libya, including investigating allegations that NATO was responsible for violations of IHL.⁴⁹ However, any crimes judged to

⁴⁶ United Nations Security Council Resolution 1970, S/RES/1970 (2011).

⁴⁷ ICC, Libya, ICC-01/11, <https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0111/Pages/situation%20index.aspx>, 6 July 2015.

⁴⁸ According to Operative paragraph 6 of S/RES/1970 (2011), the UNSC '...Decides that nationals, current or former officials or personnel from a State outside the Libyan Arab Jamahiriya which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that State for all alleged acts or omissions arising out of or related to operations in the Libyan Arab Jamahiriya established or authorized by the Council, unless such exclusive jurisdiction has been expressly waived by the State'.

⁴⁹ Kevin J. Heller, 'The International Commission of Inquiry on Libya: A Critical Analysis', in Jens Meierhenrich (ed.), *International Commissions: The Role of Commissions of Inquiry in the Investigation of International Crimes*, (2013), p. 4.

have been committed by NATO personnel would almost certainly not be addressed by the ICC due to the restricted resolution. Such selectivity diminishes the ICC's perceived impartiality and legitimacy, and portrays it as a political tool of the UNSC.⁵⁰

Similar problems related to particular interests of the powerful UNSC member states, who want to shield the nationals of specific states from potential indictments, were seen in the first UNSC referral to the ICC, UNSC Resolution 1593, adopted on 31 March 2005, referring the situation in Darfur, Sudan, to the ICC. Just like SC Resolution 1970, this resolution also includes an Operative paragraph 6, which excludes investigations of non-state parties, with the exception of Sudan.⁵¹ This has been dubbed 'the most controversial aspect of the referral'⁵², and troubling, since '...the exclusion of some states' nationals...and makes it difficult to reconcile the resolution with the principle of equality before the law. Some states' nationals...are more equal than others'.⁵³ Both these referrals to the ICC to date include elements that are deeply problematic and which impact negatively on the perception of international criminal intervention in ongoing conflict. In both referrals, Operative paragraph 6 illustrates the intentional obstructions of the pursuit of ICL.

Given that the ICC does not have unfettered global reach, UNSC referrals are the only option that leaves the state's membership to the Rome Statute extraneous, and therefore expand

⁵⁰ See e.g. Andrea Birdsall, 'The Responsibility to Prosecute and the ICC: A Problematic Relationship', 26 Criminal Law Forum (2015) 51-72, p. 67.

⁵¹ Operative paragraph 6 of SC Resolution SC/Res/1593 (2005) states that '...nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan', <www.un.org/press/en/2005/sc8351.doc.htm>, 12 October 2015.

⁵² Robert Cryer, 'Sudan, Resolution 1593, and International Criminal Justice', 19/1 Leiden Journal of International Law (2006) 195-222, p. 208.

⁵³ Ibid., p. 217.

the reach of international criminal justice. The referrals of the Darfur and Libya situations reflect the UNSC engaging in lawfare, which only became problematic, however, when intentional manifestations to obstruct the pursuit of impartial justice were evident within Operative paragraphs 6, posing clear challenges for the international community to support equitable treatment globally.

Unsurprisingly, there were expectations that the referral of Libya to the ICC ought to be followed by other like situations, including Syria.⁵⁴ A number of parallels between these two situations include the brutality by which the regime attempted – or still attempts – to suppress the will of the populace, the widespread violence and destruction civilians experienced, and the fragmentation of the opposition which creates a situation where a unified government – and, with it, domestic judicial systems able to dispense objective modes of justice – is difficult to establish. Syria, like Libya, is not a member state of the ICC and therefore, UNSC referral is the only way to bring the situation before the Court. Of course, there is reason to question the benefit of such a referral, as the referral of Libya arguably ‘did not help resolve the crisis, but instead added fuel to the flames of conflict.’⁵⁵

Nevertheless, this situation highlights the problem of the current make-up of UNSC power, especially the special veto power held by the permanent five (P5) members. The lack of UNSC attention to Syria is arguably not reflective of a lack of international will but rather the power of individual P5 members that possess veto power and can protect their allies from investigation by

⁵⁴ E.g., Birdsall, *supra* note 50.

⁵⁵ Leila Sadat, ‘Genocide in Syria: International Legal Options, International Legal Limits, and the Serious Problem of Political Will’, 5 *Impunity Watch Law Journal* 1 (2015), Washington University in St. Louis Legal Studies Research Paper No. 15-02-02, p. 100.

blocking any attempts to refer a case to the ICC. Arguably, ties between Syria and permanent members of the UNSC, namely Russia and China, shield it from referral.⁵⁶ To some, this state of affairs is an example of politics in the absence of objective justice, where legal principles become 'subservient to political agendas'.⁵⁷

Each of the four examples mentioned above demonstrates ways in which referrals to the ICC resulted in conditions that negatively affected the real or perceived legitimacy of the Court. Each example also demonstrates a way in which an appeal to criminal law as a just arbiter of behaviour in conflict was accompanied by intentional perverting, hindering, or obstructing of the pursuit of objective criminal law. The mere fact that international legal instruments exist and offer the veil of credibility, and the appearance of appealing to reason and the moral high ground, creates conditions for ICL to be regarded as potential - and potent - tools in the proverbial 'arsenal' when confronted with a conflict. The availability of these legal instruments provides agents with a choice: to use them or not, hoping for advantage for one position or side of the conflict. What should not be part of the calculation is the belief or knowledge that conditions exist for easy manipulation of the system.

4. **The International Responsibility to Contribute to Structural Justice**

⁵⁶ On 23 May, 2014, Russia and China vetoed a draft French resolution (co-sponsored by more than 60 states) to refer the situation in Syria to the ICC for possible prosecution of war crimes and crimes against humanity committed during the Syrian civil war. This was the fourth, and last draft resolution so far, double-vetoed by Russia and China, with all other members of the SC voting in favour.

⁵⁷ Louise Arbour, 'The Relationship between the ICC and the UN Security Council', 20 Global Governance (2014) 195-201, p. 199.

The pursuit of lawfare per se, in the form of various agents' appeals to international criminal law as opposed to recourse to force, must not necessarily affect the legitimacy of the ICC or other courts negatively. As Richard Falk argues, we should not 'denigrate reliance on the procedures and norms of international law in seeking to pursue rights or hold individuals accountable for violations of international criminal law'.⁵⁸ There is potential for good in the adjudication of ICL in the midst of ongoing conflict, restricted to a disinterested judge in the form of an international institution. This, however, puts significant stress on the international institution to exude fairness and the perception of fairness. Bias and selectivity reflected in the operations of the ICC affect both the real and perceived legitimacy of ICL.

Situations in which parties to a conflict attempt to garner advantage over their opponents through a referral to the ICC or other international judicial body, irrespective of self-serving and unjust motivations and expectations of the referring parties, is a condition to which international law and politics should aspire: lawfare over warfare. When used in this way, ICL can add an additional, non-lethal dimension to a conflict, and also shift the discussion and debate to a third party, and away from the belligerents. This aspiration for ICL, however, puts significant moral responsibility on the international community, both to support the objective application of international criminal law in all situations investigated by the Court and also to ensure that referrals by the international community's representative (the UNSC) is just and even-handed.

⁵⁸ Richard Falk, 'Positive and Negative Forms of "Lawfare"' *Foreign Policy Journal* (Winter 2008) 146-154.

One of the justifications for ICL is that international applications of law can be more objective in situations where it would be difficult for local administrators of law to be.⁵⁹ As such, objectivity and the perception of objectivity should be a high priority for the ICC. The use of international criminal lawfare can be a practical and effective means of lessening the negative effects of conflict on civilians, with indictments and arrests removing criminal actors from the stage of war and therefore altering the trajectory of the war and influencing the actions of belligerents, as was the case in the DRC,⁶⁰ and the threat of referrals to the ICC influencing the behaviour of warring parties. It can also encourage the pursuit of justice domestically, when appropriate, through an emphasis on positive complementarity. The ICC's work in Colombia, through incentives and threats, including pressuring the Colombian government to reform its domestic legal system, had positive results in terms of enhancing the capacity of Colombian justice mechanisms to prosecute crimes under the Rome Statute.⁶¹

Most scholars, however, point to the weak potential deterrent effect of the Court.⁶² Despite more evidence to the contrary, expectations of deterrence are still high. For instance, at the time of the UNSC Resolution 1970, several members of the UNSC expressed their hopes to see the

⁵⁹ Kenneth Roth, 'Try Saddam in an International Court', Human Rights Watch, 14 December 2003; ; Jonathan O'Donohue and Sophie Rigney, 'The ICC Must Consider Fair Trial Concerns in Determining Libya's Application to Prosecute Saif Al-Islam Gaddafi Nationally', EJIL: Talk!, 8 June 2012.

⁶⁰ Michael Broache, 'The International Criminal Court and Atrocities in DRC: A Case Study of the RCD-Goma (Nkunda Faction)/CNDP/M23 Rebel Group' SSRN 1 September 2014, <<http://ssrn.com/abstract=2434703>>, 5 November 2015.

⁶¹ Kirsten Ainley, 'The Responsibility to Protect and the ICC: counteracting the crisis' 91/1 International Affairs (2015) 37-54, p. 48-49.

⁶² See e.g., Christopher W. Mullins and Dawn L. Rothe, 'The Ability of the International Criminal Court to Deter Violations of International Criminal Law: A Theoretical Assessment' 10 International Criminal Law Review (2010) 771-786; Tiemessen, supra note 24.

referral - which was intended as a means to end the fighting in Libya - trigger a deterrent effect.⁶³ As we know, however, events unpacked very differently from such expectations. Nevertheless, although very limited, there is anecdotal evidence pointing to de-escalation of violence as a result of threats of potential ICC referrals. Some commentators refer to the relatively peaceful March 2013 presidential elections in Kenya as illustrative of the deterrent effect of the existing charges against individuals allegedly responsible for the post-election violence in Kenya in 2007 and 2008.⁶⁴ Others point to a particular episode in Cote d'Ivoire, in November 2004, when Juan Méndez, then UN Special Adviser on the Prevention of Genocide warned the Ivorian authorities that they could be held criminally responsible for the consequences of engaging in xenophobic hate speech which triggered violence, and as such, of the risks of an ICC referral if they do not end impunity and curb public expressions of racial or religious hatred.⁶⁵ The offensive messages soon ceased, and violence subsided.⁶⁶

While there are different ways in which law can be used in the context of conflict, positively or negatively, appeals to international legal institutions seem to have promise.

⁶³ Two statements from UNSC members at the time are illustrative in this sense: India, for instance, stated that 'the referral to the Court would have the effect of an immediate cessation of violence', while France argued this was an instance when the ICC 'finds justification for its existence.' Security Council, S/PV.649, 26 February 2011, New York (p. 2 for India's statement and p. 5 for France's), <http://repository.un.org/bitstream/handle/11176/15043/S_PV.6491-EN.pdf?sequence=3&isAllowed=y>, 12 November 2015.

⁶⁴ Thomas Ramoulouos, 'International Law and the Application of the Third Pillar Approach' in Daniel Fiott and Joachim Koops (eds.) *The Responsibility to Protect and the Third Pillar: Legitimacy and Operationalization* (Palgrave MacMillan, New York, 2014).

⁶⁵ See UN News Centre, *Juan Mendez, Special UN adviser on genocide warns of ethnic hate messages in Côte d'Ivoire*, 15 November 2004, <www.un.org/apps/news/story.asp?NewsID=12527&Cr=ivoire&Cr1=>, 12 October 2015.

⁶⁶ *Report of the UN Secretary-General, Implementing the Responsibility to Protect*, A/63/677, 12 January 2009, para. 55.

International institutions can help to avoid critical problems such as those introduced by the vagueness of law, the natural inclination toward vengeance, and seeing only one's own motivations or complaints as just.⁶⁷ The objectivity provided by an international institution should also be able to tame the self-aggrandizing nature of appeals to law which posit one's own side as morally superior. In this way, institutionalizing retributive justice in an international institution like the ICC is possibly the best chance of averting abuse of power cloaked in the vocabulary of law.

Furthermore, these international institutions introduce a third party to the conflict which shifts the focus – even if ever so slightly – from interactions between the opposing agents to a third, internationally recognised and legitimate entity with legal and political clout. In essence, the involvement of international institutions with objective legal and procedural elements may in fact shift the focus of the conflict which may provide a new legal and political space in which the participants can manoeuvre. This sort of widening of the realm of the conflict may reveal a more nuanced prism through which the very conflict may be judged, or even decided. The problems appear when the use of lawfare is confused with intentional obfuscations of justice. The examples in this article demonstrate how the enterprise of ICL is hampered by the reality of current conditions that affect the ability of the Court to pursue justice unfettered, and be seen to do so. They also show the need for more support from the international community for the Court to pursue justice unfettered where the commission of atrocity crimes is suspected.⁶⁸

⁶⁷ *The idea that legal institutions are necessary as a solution to these problems has a long, established history. See John Locke's Second Treatise for a liberal expression of this idea. John Locke, Second Treatise of Government, C.B. Macpherson (ed.) (Hackett, Cambridge, 1980).*

⁶⁸ Fatou Bensouda, 'Whither ICC-UNSC Relations in the 21st Century? Challenges and Opportunities', *International Criminal Justice Today*, 10 December 2015, <www.international-criminal-justice-

The use of lawfare makes problems of the system transparent. There is, thus, a moral responsibility to clarify that these problems per se need to be addressed, and that the solution is not to deem lawfare as always immoral. For example, the relationship between the ICC and the UNSC, as it stands, negatively affects the Court's work and reputation by generating a condition in which its caseload is shaped by the concerns and self-interests of permanent members of the UNSC. Since a referral by the UNSC is the method by which the 'international community' can initiate ICL proceedings, reforms to this body to ensure its objectivity are a moral concern to all members of the UN.⁶⁹ All states, as actors who contribute to the structural injustice, have this responsibility to work towards change.

The “responsibility not to veto” proposal is particularly salient since there are those who already raised questions about the appropriateness of the UNSC as a referring body, when three of its permanent members (US, China, Russia) are not state parties, and as such, not under the ICC’s jurisdiction themselves.⁷⁰ There is broad support for the two main veto restraint proposals - the French Proposal, and the Accountability, Coherence, Transparency (ACT) Group’s “Code of Conduct” - as seen in the most recent debates on the topic in the UN General Assembly, in

today.org/arguendo/article/whither-icc-unsc-relations-in-the-21st-century-challenges-and-opportunities/>, 10 December 2015.

⁶⁹ France, for instance, took the initiative toward refraining the veto further, and held a conference on 21 January 2015 with the aim to increase the political cost for P5 members that would block action that could relieve instances of mass atrocity. *The French initiative calls for a ‘statement of principles’ to be signed by the P5 that affirms their commitment to refrain from using the veto.*

⁷⁰ E.g. Birdsall, supra note 48, p. 68.

September 2015.⁷¹ The moral argument that mass atrocity crimes are so egregious that different rules should apply captures the essence of such ethical appeals.⁷²

To be morally sufficient, an institution or doctrine must, minimally, not interfere with the satisfaction of basic human rights. In the case of an enterprise that imposes international order, it must be shaped so that all persons subjected to it are, if not equally able to benefit from it, not harmed by its arrangement.⁷³ When an institutional order that coercively limits actions alternative to its own and itself avoidably fails to protect human rights, the order and the participants of it are violating a duty of justice.⁷⁴ Therefore, all member states of the ICC, but more broadly all states globally as participants in an international order that creates the rules of ICL, have the moral responsibility to ensure that the system in which they participate and which has so much power is a just one. In regards to international criminal lawfare, justice demands that parties to a conflict have equal access to an international institution (ICC) to make pronouncements about the legality of tactics taken and that parties to the conflict are treated equitably under the law.

⁷¹ See 'Why France wishes to regulate use of the veto in the UN Nations Security Council', <<http://www.diplomatie.gouv.fr/en/french-foreign-policy/united-nations/france-and-the-united-nations/article/why-france-wishes-to-regulate-use>>, 12 October 2015; and Accountability, Coherence and Transparency (ACT) Group, 'Explanatory Note' on a Code of Conduct regarding Security Council action against genocide, crimes against humanity or war crimes, 1 September 2015, New York, <<http://www.centerforunreform.org/sites/default/files/Final%202015-09-01%20SC%20Code%20of%20Conduct%20Atrocity.pdf>>, 25 October 2015.

⁷² *Ibid.*

⁷³ I. Marion Young, 'Responsibility and Global Justice: A Social Connection Model' Social Philosophy and Policy Foundation (2006) 102-130.

⁷⁴ Thomas Pogge, 'Human Rights and Human Responsibilities' in Andrew Kuper (ed) Global Responsibilities (Routledge, New York, 2005), pp. 3-36.

5. Conclusion

The use of lawfare is inevitable, and not necessarily contemptible. While we do not want to praise every self-interested referral to the ICC or other appeal to ICL as the height of morality, there are real ways in which the use of lawfare can contribute to peacebuilding and the promotion of respect for law. As it stands, however, the term is now unwieldy, and the negative connotations can mask the potentially purposeful uses of law in ongoing conflict. This article has argued that the current state of the term's usage can at worst undermine the possible benefits of interested parties employing lawfare as an alternative or supplement to armed conflict for what we would consider goals with 'right' on their side, and at best muddy the water around discussions about the problems that contemporary ICL and its institution(s) face.

Not all applications of ICL are lawfare. In many cases, ICL is employed once a conflict has ended and the society is engaged in the difficult and necessary endeavour of rebuilding. International criminal law often has a significant role to play in serving justice, restoring faith in the domestic judicial system, and the promotion of human rights protection in a society ravaged by conflict and mass violations. However, when ICL is introduced in ongoing conflicts, it can have a unique constitution, as a form of conflict management strategy or an instrument of further polarization and stacking power unevenly behind one party. International criminal lawfare, under the right conditions, can be just and appropriate and should be supported by members of the international community as a means of protecting and promoting human rights globally.

The moral responsibility of the international community can, and should, be met in a number of ways, including ensuring that states in conflict regard the Court as just and fair. This means that the international community should work to support the Court's ability to investigate and pursue indictments of all atrocity crimes that fall within the jurisdiction of the Court, regardless of which party to the conflict refers the case or has more power to support access for investigative purposes. This implies ensuring that all states wanting to have access to refer situations could do so without risking political reprisal, and ensuring that referrals by the international community's representative (UNSC) are, first, done justly and fairly, reflecting the worst or most deserving situations globally in which international crimes occurred, and, second, ensuring that like situations are treated in like manners.