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# Lawfare and U.S. National Security

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## LAWFARE AND U.S. NATIONAL SECURITY

*Professor Orde F. Kittrie\**

*The increasing legalization of international relations has made law an increasingly powerful alternative to traditional military means to achieve operational objectives. Terrorist groups and their state sponsors have made explicit use of such “lawfare” to achieve their operational objectives. The U.S. government’s response to law’s potential as a tool for advancing national security objectives has thus far been predominantly defensive. The United States should not only fight back hard against terrorists’ use of lawfare but also more vigorously look for ways to itself so use law. Lawfare is less deadly than traditional warfare. Also, the U.S.’s advantage in sophisticated legal weapons is surely even greater than its advantage in sophisticated lethal weapons. The article suggests how the United States could more effectively deploy some types of lawfare as a tool for promoting its national security objectives. It takes as a case study the uses and potential uses of lawfare against Iran.*

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The increasing legalization of international relations has made law an increasingly powerful alternative to traditional military means to achieve operational objectives. Major General Charles Dunlap, Jr., has famously coined the term “lawfare” to describe the strategy of so using—or misusing—law. Terrorist groups and their state sponsors have made explicit and sometimes effective use of lawfare to achieve their operational objectives.

Under the Obama Administration, and especially the Bush Administration, the U.S. executive branch’s response to law’s potential as a tool for advancing military objectives has thus far been predominantly defensive. This is unfortunate. If there are ways of accomplishing traditional military objectives using law, the United States should not only fight back hard against terrorists’ use of them but also vigorously look for ways to itself so use law. First, lawfare is less deadly than traditional warfare. Second, if some portion of the battle can take place in the courts rather than the battlefield, that should be to the U.S.’s great advantage. While the United States does have more sophisticated lethal weapons than those of its adversaries, its advantage in sophisticated legal weapons is surely even greater. However, the U.S.’s advantage in sophisticated legal weapons has thus far been underutilized.

Part I of this article analyzes lawfare and its use by terrorists and their state sponsors. Part II examines the U.S. executive branch’s defensive response to lawfare. Part III employs as a case study the uses thus far and potential future uses of lawfare against Iran, which is both the leading state sponsor of terrorism and the leading threat to the nuclear nonproliferation regime. The remarkable impact of the limited deployment of lawfare against Iran to date indicates that some types of lawfare, deployed systematically and effectively, may be able to save U.S. and foreign lives by significantly advancing U.S. national security objectives that would otherwise require kinetic warfare.<sup>1</sup> Part IV notes that the successes of lawfare-style sanctions vis à vis Iran call into question the accuracy of the dominant paradigm in the scholarly literature regarding sanctions, which derides sanctions as ineffective in a globalized economy. Part IV concludes by considering lessons

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<sup>1</sup> Kinetic warfare is warfare that involves traditional weapons such as guns and bombs. See, e.g., Ruth Walker, *Other Ways Than By (Kinetic) Warfare*, CHRISTIAN SCI. MONITOR, Jan. 23, 2009, <http://www.csmonitor.com/The-Culture/The-Home-Forum/2009/0123/p18s01-hfes.html>.

learned and how the United States could more effectively use some types of lawfare as a tool for promoting its national security.

#### I. LAWFARE AND ITS USE BY TERRORISTS AND THEIR STATE SPONSORS

In his series of influential articles on “lawfare,” Major General Charles Dunlap, Jr., used the term lawfare to describe the “strategy of using—or misusing—law as a substitute for traditional military means to achieve an operational objective.”<sup>2</sup> The concept of lawfare is extremely useful both for describing a particular set of distinct activities undertaken by enemies of the United States (and its allies), principally terrorists and their state sponsors, and for describing a particular set of distinct activities that could be undertaken by the United States to accomplish its national security objectives vis à vis its enemies.

Lawfare, as practiced by enemies of the U.S., has thus far predominantly taken two interrelated forms: (1) battlefield tactics designed to gain advantage from the greater allegiance of the United States and its allies to international law—especially the international law of armed conflict—and its processes; and (2) the use—or misuse—of legal forums to achieve operational objectives traditionally achieved by military means.

##### A. *Battlefield Tactics Designed to Gain Advantage from the Other Side’s Greater Allegiance to International Law*

In his first major article on lawfare, published in 2001, Dunlap focused primarily on battlefield tactics designed to gain advantage from the U.S.’ greater allegiance to international law and its processes, and especially the international law of armed conflict.<sup>3</sup> He suggested that these tactics are

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<sup>2</sup> Charles Dunlap, *Lawfare Today: A Perspective*, 3 YALE J. INT’L AFF. 146, 146 (2008). Other commentators have offered various narrower definitions. See, e.g., David B. Rivkin, Jr. and Lee Casey, *Lawfare*, WALL ST. J., Feb. 23, 2007, at A11 (“The term ‘lawfare’ describes the growing use of international law claims, usually factually or legally meritless, as a tool of war.”); Kenneth Anderson, ‘*Lawfare*’ as *Illegal Behavioral Counters to Superior Military Forces, and the Limits of Technological Responses to It*, KENNETH ANDERSON’S L. OF WAR AND JUST WAR THEORY Blog (May 5, 2008, 10:09 AM), <http://kennethandersonlawofwar.blogspot.com/2008/05/as-illegal-behavioral-counters-to.html> (“One way to define ‘lawfare,’ in fact, is systematic behavioral violations of the rules of war, violations of law undertaken and planned through advance study of the laws of war in order to predict how law-abiding military forces will behave and exploit their compliance; and where such violations are intended as a behavioral counter to superior military forces, including superior, yet law-compliant, technology and weapons systems.”).

<sup>3</sup> See Charles J. Dunlap, Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21<sup>st</sup> Century Conflicts* (Carr Center for Human Rights, John F. Kennedy Sch. of Gov’t, Harvard U., Working Paper, 2001), available at <http://www.ksg.harvard.edu/cchrrp/Web%20Working%20Papers/Use%20of%20Force/Dunlap2001.pdf> [hereinafter Dunlap, *Law and Military Interventions*].

designed to accomplish two main goals: (1) the tactical goal of causing U.S. armed forces to fight with one hand tied behind their back and (2) the strategic goal of destroying the American public's will to fight by making it appear that the United States is waging war in violation of the law of armed conflict.<sup>4</sup> The same enemy act can accomplish both goals. Dunlap gave as an example Taliban placement of military assets in or around "noncombatant facilities such as religious structures and NGO [non-governmental organization] compounds in the hopes of either deterring attacks or, if attacks do take place, producing collateral damage media events that serve their cause."<sup>5</sup> Similar tactics have been adopted by other armed forces, including Saddam Hussein's Iraqi military<sup>6</sup> and Hamas, which, as Laurie Blank notes, has fired from schools and residential areas "in the hope that nearby civilians would deter Israel from responding."<sup>7</sup>

It has been said by some at this conference that insurgent activities such as firing from amongst civilians are simply a violation of the law of war, and do not merit their own attention, separate from that, as examples of one type of lawfare—the deliberate attempt to gain advantage from the other side's greater allegiance to international law and its processes. I disagree. I find particularly cynical, troubling, corrosive of international law, and worthy of separate study, efforts to deliberately try to gain advantage from one side's greater allegiance to international law and its processes. This is a type of lawfare that the United States should strongly oppose and definitely not seek to replicate.

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<sup>4</sup> *Id.* at 11–13.

<sup>5</sup> *Id.* at 13.

<sup>6</sup> See Jefferson D. Reynolds, *Collateral Damage on the 21<sup>st</sup> Century Battlefield, Enemy Exploitation of the Law of Armed Conflict, and the Struggle for a Moral High Ground*, 56 A.F. L. REV. 1, 43–51 (2005); Human Rights Watch, *Off Target: The Conduct of the War and Civilian Casualties in Iraq 74-76* (2003); Senior Def. Official, U.S. Dep't of Def., Briefing on Use of Human Shields in Iraq (Feb. 26, 2003), available at <http://www.globalsecurity.org/wmd/library/news/iraq/2003/iraq-030226-dod01.htm> ("The Iraqis have regularly placed air defense missile systems and associated equipment in and around civilian areas, including parks, mosques, hospitals, hotels, crowded shopping districts, and even in cemeteries. They have positioned rocket launchers next to soccer stadiums that are in active use, and they've parked operational surface-to-air missile systems in civilian industrial areas. This is a well-organized, centrally managed effort, and its objectives are patently clear: preserve Iraq's military capabilities at any price, even though it means placing innocent civilians and Iraq's cultural and religious heritage at risk, all in violation of the fundamental principle that civilians and civilian objects must be protected in wartime.").

<sup>7</sup> Laurie R. Blank, *Finding Facts But Missing the Law: The Goldstone Report, Gaza and Lawfare*, 43 CASE W. RES. J. INT'L L. 279, 290 (2011)(citing Goldstone report quote of interview with three Palestinian militants).

*B. Use—Or Misuse—of Legal Forums to Achieve Operational Objectives Traditionally Achieved by Military Means*

Briefly in Dunlap's seminal 2001 article,<sup>8</sup> and especially since, the concept of lawfare has also been used, in particular by other commentators, to describe efforts to use—or misuse—legal forums to advance operational objectives traditionally achieved by military means.<sup>9</sup> This latter type of lawfare was famously referred to in the Pentagon's March 2005 National Defense Strategy for the United States of America, which stated: "Our strength as a nation will continue to be challenged by those who employ a strategy of the weak, focusing on international fora, judicial processes, and terrorism."<sup>10</sup>

Dunlap provides several examples of such efforts to manipulate legal forums to advance operational objectives traditionally achieved by military means. For instance, in Colombia, the FARC rebels discovered that one way of getting rid of a particularly effective government military commander is to accuse that commander of human rights violations.<sup>11</sup> This is effective because under Colombian law, the commander must then be relieved of command and is not eligible for military defense counsel, thus requiring him to spend personal funds to hire defense counsel.<sup>12</sup>

The manipulation of legal forums to advance military objectives is also an explicit tactic of Hezbollah and Hamas. Hezbollah Secretary General Sayyed Nasrallah has spoken as follows of manipulating legal forums to advance his military objective of defeating Israel: "We have to sue the Israeli leaders anywhere possible in the world. Suing Israel for its crimes will render Israeli leaders beleaguered and perplexed."<sup>13</sup>

Similarly, a Hamas leader recently discussed the group's "policy" of seeking to have senior Israeli leaders arrested whenever they visit European countries.<sup>14</sup> The *Times of London* reported that "Hamas says that it initiated" a British arrest warrant issued against Tzipi Livni, who served as

<sup>8</sup> Dunlap, *Law and Military Interventions*, *supra* note 3, at 36.

<sup>9</sup> See Rivkin and Casey, *supra* note 2; Jeremy Rabkin, *Lawfare*, WALL ST. J., July 13, 2004, at A14.

<sup>10</sup> U.S. DEP'T OF DEF., THE NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA 5 (2005).

<sup>11</sup> Dunlap, *Law and Military Interventions*, *supra* note 3, at 36.

<sup>12</sup> Dunlap, *Law and Military Interventions*, *supra* note 3, at 36; Charles J. Dunlap, Jr., *The Law of Armed Conflict*, AFA Policy Forum, (Sept. 13, 2005), [http://www.afa.org/media/scripts/Dunlap\\_conf2005.asp](http://www.afa.org/media/scripts/Dunlap_conf2005.asp).

<sup>13</sup> Mohamad Shmaysani, *Sayyed Nasrallah: Unite to Back Turkey, Egypt; Take Part in Freedom Flotilla 2*, AL MANAR (June 4, 2010), <http://www.almanar.com.lb/newssite/NewsDetails.aspx?id=140626&language=ar> (Al Manar is a Lebanese media outlet affiliated with Hezbollah).

<sup>14</sup> James Hider, *Hamas Using English Law to Demand Arrest of Israeli Leaders for War Crimes*, TIMES OF LONDON (Dec. 21, 2009).

Foreign Minister of Israel during the 2008 war in Gaza.<sup>15</sup> According to the *Times*, in the United Kingdom “the campaign by Hamas takes advantage of an aspect of law in England and Wales that allows anyone to apply for an arrest warrant for alleged war crimes without the need for a prosecuting lawyer.”<sup>16</sup> As a result of the warrant, Livni, who had been scheduled to address a meeting in London, was forced to cancel her visit.<sup>17</sup>

Similar warrant efforts have led other Israeli leaders to cancel other visits to the U.K.<sup>18</sup> Such efforts to manipulate legal forums to transform Israel into a pariah state seem designed to contribute to the Hezbollah and Hamas objectives of destroying Israel, including by distracting Israel’s leaders from their duties; contributing to Israel’s delegitimization and demoralization; and reducing Israel’s ability to conduct diplomatic relations and communicate effectively with foreign audiences.

## II. THE U.S. EXECUTIVE BRANCH’S DEFENSIVE RESPONSE TO LAWFARE

Under the Obama Administration, and especially the Bush Administration, the U.S. executive branch’s response to law’s potential as a tool for advancing military objectives has thus far been predominantly defensive. Donald Rumsfeld, Secretary of Defense during the George W. Bush Administration, saw lawfare in “personal terms,” expecting to be “at the top of the target list,” according to Jack Goldsmith, who served during that administration as Special Counsel at the Department of Defense and then Assistant Attorney General for the Office of Legal Counsel.<sup>19</sup>

Rumsfeld’s concern increased after a group of Iraqis brought universal jurisdiction criminal complaints against him and General Tommy Franks in a Belgian court in the spring of 2003.<sup>20</sup> The complaints centered on war crimes alleged to have been committed during the invasion of Iraq.<sup>21</sup> After Rumsfeld threatened to move NATO headquarters out of Belgium, Belgium changed its universal jurisdiction law and blocked the prosecutions of Rumsfeld and Franks.<sup>22</sup> However, Rumsfeld worried about both the universal jurisdiction laws that remained on the books elsewhere in Europe and international tribunals.<sup>23</sup> Rumsfeld’s concern about the latter was heigh-

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

<sup>16</sup> *Id.*; see also Richard Ford, *Anyone Can Apply for a Warrant Over Allegations of a Serious Offence*, *TIMES OF LONDON* (Dec. 21, 2009).

<sup>17</sup> Soeren Kern, *New “War Crimes” Lawfare*, *HUDSON NEW YORK*, Aug. 4, 2010, <http://www.hudson-ny.org/1456/new-war-crimes-lawfare>.

<sup>18</sup> *Id.*

<sup>19</sup> JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 59 (2007).

<sup>20</sup> *Id.* at 60–61.

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

<sup>22</sup> *Id.* at 61.

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

tened by a narrowly averted move by the International Criminal Tribunal for the former Yugoslavia to prosecute NATO officials for bombing a Serbian television station and other alleged war crimes during the 1999 Kosovo campaign.<sup>24</sup>

As was discussed in detail at the Lawfare! symposium, some associated with the Bush Administration used the term “lawfare” to derogatorily describe legal work by a human rights non-governmental organization (NGO) and several American attorneys defending Guantanamo detainees and other defendants in the war on terror.<sup>25</sup> The unsubstantiated implication was that the NGO and attorneys were trying to use law to advance a traditional military objective; for example, the defeat of the United States and its allies.<sup>26</sup>

The Bush Administration placed considerable weight in its legal policy decisions on defending the United States from lawfare. For example, the Administration opposed U.S. participation in the International Criminal Court (ICC) out of fear that those hostile to the United States might bring about ICC trials of American leaders or soldiers.<sup>27</sup> The Administration also argued for its Guantánamo military tribunals in part on the grounds that standard criminal trials of al-Qaeda operatives could be manipulated by defense counsel to put prosecutors to a choice between revealing sensitive U.S. intelligence sources and methods or letting terrorists go free.<sup>28</sup> As of January 2011, nearly two years into the Obama Administration, the United States still has not joined the ICC, and the Obama Administration has itself decided to use military commissions in certain circumstances.<sup>29</sup>

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

<sup>25</sup> See, e.g., Jeff Breinholt, *J'Accuse: Lawfare Lawyers Storming the Courts*, FAMILY SECURITY MATTERS, Jan. 4, 2008, <http://www.fsmarchives.org/article.php?id=1386307>; Jeff Breinholt, *Is Lawfare Being Abused by American Lawyers?*, FINDLAW'S WRIT, Mar. 9, 2007, [http://writ.news.findlaw.com/commentary/20070309\\_breinholt.html](http://writ.news.findlaw.com/commentary/20070309_breinholt.html).

<sup>26</sup> It is worth noting that the implication may not be as far off the mark in the specific case of American attorney Lynne Stewart, who was convicted in 2005 by a U.S. federal district court of “assisting terrorism by smuggling information from an imprisoned client to violent followers in Egypt.” John Eligon, *Heftier Term for Lawyer in Terrorism Case*, N.Y. TIMES, July 16, 2010, at A22.

<sup>27</sup> Phillip Carter, *Legal Combat: Are Enemies Waging War in Our Courts?*, SLATE (Apr. 4, 2005, 5:51 PM), <http://www.slate.com/id/2116169/>; Goldsmith, *supra* note 19, at 61–63.

<sup>28</sup> Goldsmith, *supra* note 19, at 109; Frederic L. Borch, III, *Why Military Commissions Are the Proper Forum and Why Terrorists Will Have “Full and Fair” Trials: A Rebuttal to Military Commissions: Trying American Justice*, THE ARMY LAWYER 10 (2003).

<sup>29</sup> Charlie Savage, *Judge Delays Resumption of Guantanamo Trial*, N.Y. TIMES, Oct. 15, 2010, <http://www.nytimes.com/2010/10/15/us/15gitmo.html#> (“Mr. Obama had been a critic during the presidential campaign of Mr. Bush’s use of military commissions. But his administration eventually decided that the tribunals were necessary if certain detainees were to receive trials, because they offered greater flexibility than civilian courts in the admission of certain kinds of evidence, like hearsay and materials gathered under battlefield conditions.”).



In addition, the U.S. military has, at least in part in response to lawfare, greatly restricted its targeting (on occasion restricting itself beyond the requirements of international law) in order to avoid accusations of disproportionate collateral damage to civilians.<sup>30</sup> Dunlap provides an example of how reports about NATO airstrikes allegedly causing civilian casualties were responded to by the International Security Assistance Force (ISAF) in Afghanistan.<sup>31</sup> ISAF responded to reports of such deaths by proclaiming that NATO “would not fire on positions if it knew there were civilians nearby.”<sup>32</sup> A NATO spokesman emphasized that “if there is the likelihood of even one civilian casualty, [NATO] will not strike, not even if we think Osama bin Laden is down there.”<sup>33</sup> This goes beyond the requirements of international law and also encourages enemy forces to surround themselves with innocents so as to immunize themselves from attack.<sup>34</sup> As Dunlap so eloquently puts it, NATO’s creation of restrictions beyond what is required by the law of armed conflict

creates for its adversary a substitute for conventional military weaponry. . . for the Taliban to survive it is not necessary for them to build conventional air defenses; rather, just by operating amidst civilians they enjoy a legal sanctuary . . . that is as secure as any fortress bristling with anti-aircraft guns.<sup>35</sup>

So the U.S. executive branch’s response to lawfare—law as a tool for advancing operational objectives traditionally achieved by military means—has been predominantly defensive, a response adopted originally by the Bush Administration but which still strongly influences the U.S. ap-

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<sup>30</sup> Charles J. Dunlap, Jr., Visiting Professor, Duke University School of Law and Associate Director, Center on Law, Ethics, and National Security, Presented at Case Western University School of Law Frederick K. Cox International Law Center War Crimes Research Symposium, Does Lawfare Need an Apologia? (Sept. 10, 2010), available at <http://www.au.af.mil/au/aunews/archive/2010/0520/0520Articles/Dunlap0520.pdf> (“By creating restrictions beyond what the law of armed conflict would require, NATO’s pronouncements encourage the Taliban to shield themselves from air attack by violating the law of armed conflict by embedding themselves among civilians.”).

<sup>31</sup> See *id.* (discussing comments from Maj. John Thomas, spokesman for NATO’s International Security Assistance Force).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*; Charles J. Dunlap, Jr., Op-Ed., *Lawfare Amid Warfare*, WASH. TIMES, Aug. 3, 2007, at A17, available at <http://www.washingtontimes.com/news/2007/aug/03/lawfare-amid-warfare/?page=1> (“Establishing a paradigm of “zero tolerance” for casualties may well come back to haunt us in yet another way. Specifically, it encourages the enemy to do exactly what we do not want them to do: surround themselves with innocent civilians so as to virtually immunize themselves from attack. It creates a sanctuary that the bad guys are not entitled to enjoy, and sends them exactly the wrong message.”).

<sup>35</sup> Dunlap, *supra* note 30.

proach to the ICC and other issues. This is unfortunate, as the U.S. government could more effectively advance its national security objectives by making more offensive use of lawfare.

### III. HOW THE U.S. GOVERNMENT CAN BETTER USE LAWFARE AS A TOOL FOR PROMOTING NATIONAL SECURITY

The U.S. government's response to lawfare should not simply be a defensive crouch. If there are ways of accomplishing traditionally military objectives using law, the United States should not only fight back hard against others' use of them but also vigorously look for ways to itself so use law. As Phillip Carter so eloquently put it: "[W]e have every reason to embrace lawfare, for it is vastly preferable to the bloody, expensive, and destructive forms of warfare that ravaged the world in the 20<sup>th</sup> century."<sup>36</sup>

First, lawfare has the clear advantage of being less deadly to both combatants and bystanders than is conventional warfare.<sup>37</sup> As Carter wryly puts it, he "would far prefer to have motions and discovery requests fired at [him] than incoming mortar or rocket-propelled grenade fire."<sup>38</sup> Second, if some part of the fight is to take place not in the battlefields but rather the courts, that should be to U.S. society's great advantage. While the United States does have more sophisticated lethal weapons than its adversaries, its advantage in sophisticated legal weapons is surely even greater. Thus far, the U.S. advantage in sophisticated legal weapons has been underutilized in the war on terror. The U.S. government, and perhaps even concerned U.S. attorneys in the private sector, could be doing far more to use law—both existing law and potential changes to law—as part of the fight against al-Qaeda, the Taliban, the Iranian regime, and others who seek to engage in terrorist acts against the United States and/or acquire weapons of mass destruction.

In order to concretely analyze how the United States could more effectively use lawfare as a tool for promoting its national security, the remaining sections of this article employ as a case study the uses thus far and potential future uses of lawfare against Iran, which is both the leading state sponsor of terrorism<sup>39</sup> and the leading threat to the nuclear nonproliferation regime. The article will analyze, and draw more broadly applicable lessons from, four existing examples of where law is already being used deliberate-

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<sup>36</sup> Phillip Carter, *Legal Combat: Are Enemies Waging War in Our Courts?*, SLATE (Apr. 4, 2005, 5:51 PM), <http://www.slate.com/id/2116169/>.

<sup>37</sup> *Id.* ("[L]awfare rarely generates the collateral damage of conventional warfare. In recent war zones such as Bosnia, Chechnya, and Iraq, the cumulative civilian death toll stretches into the hundreds of thousands.")

<sup>38</sup> *Id.*

<sup>39</sup> OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, U.S. DEP'T OF STATE, COUNTRY REPORTS ON TERRORISM 2009 (2009), <http://www.state.gov/s/ct/rls/crt/2009/140889.htm> ("Iran remained the most active state sponsor of terrorism.")

ly, systematically, and creatively to achieve operational objectives against Iran.

A. *The Iranian Threat to International Peace and Security*

Iran's nuclear weapons program, state sponsorship of terrorism, and human rights abuses make it a preeminent threat to international peace and security. In pursuing its dangerous agenda, the Iranian government egregiously violates international law. For example, Iran continues to violate U.N. Security Council resolutions ordering Iran to suspend its nuclear enrichment, reprocessing, and heavy water related activities.<sup>40</sup> In a series of periodic reports, most recently on November 23, 2010, the Director General of the International Atomic Energy Agency has determined again and again that "contrary to the relevant resolutions of the Board of Governors and the Security Council, Iran has not suspended its enrichment related activities" and has "continued" with "heavy water related activities."<sup>41</sup>

At the same time, Iran has chosen to violate numerous other international legal obligations. Iran's brutal response to postelection protests contravened its human rights obligations under international law, including the International Covenant on Civil and Political Rights.<sup>42</sup> Iran has also continued its destabilizing support for terrorist groups across the Middle East, including by providing them with arms in violation of U.N. Security Council Resolutions 1701 and 1747.<sup>43</sup>

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<sup>40</sup> S.C. Res. 1737, ¶ 2, U.N. Doc. S/RES/1737 (2006) (Dec. 27, 2006); *see also* S.C. Res. 1747, ¶¶ 12–13, U.N. Doc. S/RES/1747 (2007) (Mar. 24, 2007) (reaffirming resolution 1737); S.C. Res. 1803, ¶¶ 1, 14, 18–19, U.N. Doc. S/RES/1803 (2008) (Mar. 3, 2008) (reaffirming resolutions 1737 and 1747); S.C. Res. 1929, ¶¶ 1–2, 36–37, U.N. Doc. S/RES/1929 (2010) (June 9, 2010) (affirming Iran's non-compliance with resolutions 1737, 1747, and 1803 and reaffirming resolution 1737).

<sup>41</sup> Int'l Atomic Energy Agency [IAEA] Director General, *Implementation of the NPT Safeguards Agreement and Relevant Provisions of Security Council Resolutions in the Islamic Republic of Iran*, at 9, IAEA Doc. GOV/2010/62 (Nov. 23, 2010), <http://www.iaea.org/Publications/Documents/Board/2010/gov2010-62.pdf>. *See also, e.g.*, Int'l Atomic Energy Agency [IAEA] Director General, *Implementation of the NPT Safeguards Agreement and Relevant Provisions of Security Council Resolutions in the Islamic Republic of Iran*, at 11, IAEA Doc. GOV/2010/46 (Sept. 6, 2010), <http://www.iaea.org/Publications/Documents/Board/2010/gov2010-46.pdf> (identical language).

<sup>42</sup> International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316, at 52–60 (Dec. 16, 1966), *available at* [www2.ohchr.org/English/law/ccpr.htm](http://www2.ohchr.org/English/law/ccpr.htm); International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. 95–20, 999 U.N.T.S. 171.

<sup>43</sup> For example, an Iranian ship carrying weapons from Iran to Yemeni rebels, which was seized by the Yemeni government on October 26, 2009, violated UN Security Council Resolution 1747, which orders that "Iran shall not supply, sell or transfer directly or indirectly from its territory or by its nationals or using its flag vessels or aircraft any arms or related materiel." S.C. Res. 1747, *supra* note 41, ¶ 5. A second ship, carrying 500 tons of weapons from Iran to Hezbollah in Lebanon, which was seized by the Israeli navy on November 3,

*B. Overview of U.S. and International Responses to Iran*

What is the range of responses available to the United States and to the international community? A U.S. President's five key tools for altering the behavior of a foreign country can be alliteratively characterized as: (1) speaking (statements and negotiations); (2) sweeteners (incentives); (3) sanctions (economic and diplomatic restrictions); (4) sabotage and (5) soldiers (military action). In the case of Iran, speaking and sweeteners have been tried and failed,<sup>44</sup> and soldiers are a very problematic option.

The United States and its allies are reportedly focusing their efforts against Iran's nuclear program on sanctions and covert sabotage (including, for example, the Stuxnet computer virus).<sup>45</sup> The combination of sanctions and sabotage seems, as of early January 2011, to be succeeding in significantly slowing Iran's nuclear program.<sup>46</sup> On January 10, 2011, Secretary of State Hillary Clinton stated: "The most recent analysis is that the sanctions have been working. They have made it much more difficult for Iran to pur-

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2009, violated Resolution 1747 as well as Resolution 1701, which ordered all States to "prevent . . . the sale or supply to any entity or individual in Lebanon of arms and related materiel of all types." *See id.*; S.C. Res. 1701, ¶ 15, U.N. Doc. S/RES/1701 (2006) (Aug. 11, 2006).

<sup>44</sup> Seven days after his inauguration, President Barack Obama declared that "if countries like Iran are willing to unclench their fist, they will find an extended hand from us." Nazila Fathi & Alan Cowell, *After Obama Overture, Iran's Leader Seeks U.S. Apology*, N.Y. TIMES, Jan. 29, 2009, at A8. Over the rest of 2009, the Obama administration followed up on the January 27, 2009 declaration with numerous friendly gestures to the Iranian regime. The United States used terminology suggesting it was no longer seeking regime change, emphasized its disinterest in using military force against Iran's nuclear program, for a year stopped seeking significantly stronger sanctions against Iran, and offered Iran a very generous deal relating to its Tehran Research Reactor. However, the Iranian regime responded to Obama's outstretched hand with a clenched fist. As President Obama stated in his speech of March 20, 2010 to the Iranian people on the occasion of Nowruz, the Iranian new-year: "You have refused good faith proposals from the international community . . . Faced with an extended hand, Iran's leaders have shown only a clenched fist." THE WHITE HOUSE, OFFICE OF THE PRESS SECRETARY, REMARKS OF PRESIDENT OBAMA MARKING NOWRUZ (2010), <http://www.whitehouse.gov/the-press-office/remarks-president-obama-marking-nowruz>; *see also* Videotaped Remarks on the Observance of Nowruz, 2010 DAILY COMP. PRES. DOC. 201000190 (Mar. 20, 2010), *available at* <http://www.gpoaccess.gov/presdocs/2010/DCPD-201000190.pdf>.

<sup>45</sup> David Ignatius, *Buying Time with Iran*, WASH. POST, Jan. 9, 2011, at A17 ("Stuxnet was just one of what appeared to have been a series of efforts to disrupt the supply chain of the Iranian nuclear program."); Isabel Kershner, *Israeli Ex-Spy Predicts Delay for Iran's Nuclear Ambitions*, N.Y. TIMES, Jan. 8, 2011, at A8 ("The United States also has a covert program to undermine Iran's nuclear program.").

<sup>46</sup> *See, e.g.*, Jay Solomon & Charles Levinson, *Sanctions Slow Iran's Warhead Capability*, WALL ST. J., Jan. 8-9, 2011, at A1; Ignatius, *supra* note 45, at A17 ("The Obama Administration has concluded that Iran's nuclear program has been slowed by a combination of sanctions, sabotage and Iran's own technical troubles.").

sue its nuclear ambitions.”<sup>47</sup> As Washington Post Associate Editor David Ignatius wrote about U.S. policy towards Iran in a column in early January 2011, “What’s increasingly clear is that low-key weapons—covert sabotage and economic sanctions—are accomplishing many of the benefits of military action, without the costs.”<sup>48</sup>

While Stuxnet and other efforts to sabotage Iran’s nuclear program are clearly having a significant impact, and undoubtedly raise important questions in the cyberlaw and other relevant legal arenas, they are not examples of using law as a tool to achieve an operational objective. In contrast, sanctions are a form of lawfare, as Paul Williams noted at the Lawfare! symposium, and as Gen. Charles Dunlap discusses in the section titled “Lawfare as an American Weapon” of his article for this symposium.<sup>49</sup> Gen. Dunlap provides several examples of when “actions that could be characterized as lawfare have been carried out by the United States—and properly so.”<sup>50</sup> In doing so, he offers the following outstanding example of the potential power of the sanctions type of lawfare:

Legal ‘weaponry’ can have effects utterly indistinguishable from those produced by their kinetic analogs. During the 2003 invasion, for example, the Iraqi air force found itself hobbled by a legal device—sanctions—as effectively as by any outcome from traditional aerial combat. By preventing the acquisition of new aircraft, as well as spare parts for the existing fleet, Iraqi airpower was so debilitated that not a single aircraft rose in opposition to the coalition air armada.<sup>51</sup>

The sanctions imposed on Iran in recent years—through U.N. Security Council resolutions binding under international law and through changes to the domestic laws of the U.S., European Union, and others—have been a particularly salient, deliberate, and, in many cases, creative form of lawfare. The sanctions use law as a substitute for traditional military means to advance an operational objective—in this case, halting Iran’s illicit nuclear program.<sup>52</sup>

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<sup>47</sup> Jay Solomon, *Clinton Says Curbs Slow Iran Program*, WALL ST. J., Jan. 11, 2001, at A10.

<sup>48</sup> Ignatius, *supra* note 45, at A17.

<sup>49</sup> Dunlap, *supra* note 30.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *See, e.g.*, S.C. Res. 1737, *supra* note 40 (the Security Council, in the resolution’s preamble, notes that the resolution is motivated in part by a determination “to constrain Iran’s development of sensitive technologies in support of its nuclear and missile programmes”); Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, Pub. L. No. 111-195, § 2 (10) (2010)(finding that “economic sanctions to prevent Iran from

What are the principal means by which sanctions—economic and other restrictions imposed through changes to international and domestic law—can advance their operational objective? Sanctions can have any or all of several useful impacts on the target, including especially (1) coercing the target (in this case Iran) into halting its illegal behavior, if the costs of the behavior (in this case proceeding with the nuclear program or supporting terrorism) are increased sufficiently to outweigh the benefits to the regime of proceeding with the behavior; and (2) constraining the target from engaging in illegal behavior, if the sanctions materially reduce the target's supply of assets necessary to engage in the behavior.<sup>53</sup> The U.S. government's current sanctions on Iran are designed to both coerce and constrain Iran.<sup>54</sup>

Recent history shows that strong sanctions, effectively implemented, can help stop illegal nuclear weapons programs and terrorism. For example, robust sanctions helped induce Libya to forsake terrorism and verifiably relinquish its nuclear, chemical, and biological weapons programs.<sup>55</sup> In exchange for the lifting of sanctions imposed by the United Nations and United States, Libya halted its support for terrorism, paid \$2.7 billion to the families of the Pan Am flight 103 bombing victims, and allowed a team of British and U.S. government experts to enter Libya and dismantle its weapons of mass destruction infrastructure.<sup>56</sup>

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developing nuclear weapons, are necessary to protect the essential security interests of the United States.”).

<sup>53</sup> Readers interested in a more detailed discussion of the goals potentially served by the imposition of sanctions in the international arena may wish to refer to Orde F. Kittrie, *Averting Catastrophe: Why the Nuclear Nonproliferation Treaty is Losing its Deterrence Capacity and How to Restore It*, 28 MICH. J. INT'L L. 337, 354–61 (2007).

<sup>54</sup> Press Release, U.S. Dep't of the Treasury, Remarks at the Center for Strategic and International Studies by Treasury Under Secretary for Terrorism and Financial Intelligence Stuart Levey (Sept. 20, 2010) [hereinafter Levey remarks], available at <http://www.ustreas.gov/press/releases/tg862.htm> (Levey emphasizes two desired impacts of the Obama Administration's tightening sanctions on Iran. One is “to sharpen the choice for Iran's leaders between integration with the international community, predicated on fulfilling their international obligations, and the hardship of further isolation.” Levey explains that “[b]y dramatically isolating Iran financially and commercially and by capitalizing on Iran's existing vulnerabilities, we can impact Iran's calculations” so as to “create crucial leverage for our diplomacy.” Another desired impact is to “make it harder for Iran to pursue international procurement for its nuclear and military programs.”).

<sup>55</sup> GARY CLYDE HUFBAUER, JEFFREY J. SCHOTT, KIMBERLY ANN ELLIOTT & BARBARA OEGG, *ECONOMIC SANCTIONS RECONSIDERED* 12–13 (3d ed. 2007) (“[T]he surprise decision by Libyan President Muammar Gadhafi in 2003 to renounce weapons of mass destruction was partly influenced by his desire to end the decade-old U.S. sanctions and to gain access to American oil field technology and know-how.”).

<sup>56</sup> The sanctions on Libya both contained Qaddafi's ability to develop weapons of mass destruction and ultimately coerced him, including by grinding down Libya's oil industry and causing economic problems so severe they threatened his grip on Libya. See Kittrie, *supra* note 53, at 406–14.

Unfortunately, the U.N. Security Council—thanks to Russian and Chinese obstructionism—has thus far imposed relatively weak sanctions on Iran for its proliferant activities.<sup>57</sup> For example, the sanctions thus far imposed by the Security Council on Iran are significantly weaker than the sanctions imposed by the Council in response to many lesser threats to international peace and security—including on Liberia during its 2003 civil war, Sierra Leone in response to its 1997 military coup, Yugoslavia during the Bosnia crisis, Haiti in response to its 1991 military coup, Libya in response to its support for terrorism, and Iraq in response to its invasion of Kuwait and weapons of mass destruction programs.<sup>58</sup>

Due to its ideology, the value to the Iranian regime of engaging in nuclear proliferation is particularly high.<sup>59</sup> However, the price the international community has exacted from the Iranian regime for its violations has thus far been remarkably low. Security Council Resolutions 1737, 1747, 1803, and 1929 are, by themselves, too weak to coerce Iran into compliance, halt Iran's ability to advance its nuclear weapons program, or deter other states from following Iran's lead and developing their own nuclear weapons program. This is unfortunate because Iran's heavy dependence on foreign trade leaves it highly vulnerable to strong economic sanctions.<sup>60</sup>

Concerned that U.N. Security Council sanctions on Iran are insufficiently impactful, and faced with the drawbacks of a U.S. military option, American opponents of Iran's nuclear weapons program are creatively using law in four key ways to step up the pressure on Iran to comply with international law and cease its enrichment and other sensitive nuclear activities: (1) state and local actions including pension divestment; (2) legal pressure on foreign banks doing business with Iran; (3) legal pressure on foreign energy companies supplying refined petroleum to Iran; and (4) litigation strategies.

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<sup>57</sup> See *id.* at 383–84, 389 (discussing Russian and Chinese blocking of strong Security Council sanctions on Iran).

<sup>58</sup> See Orde F. Kittrie, *Emboldened by Impunity: The History and Consequences of Failure to Enforce Iranian Violations of International Law*, 57 SYRACUSE L. REV. 519, 547–48 (2007) (comparing the strength of these sanctions imposed by the Security Council).

<sup>59</sup> See *id.* at 543–44 (“Iranian leadership is . . . motivated by a religious conviction that exalts martyrdom and suffering. In comparison with a purely economic calculation, the Iranian regime's ideology causes it to ascribe greater cost to complying with the sender's demand to shut down the nuclear weapons program and lesser cost to any suffering that may be imposed by sanctions.”).

<sup>60</sup> See Kittrie, *supra* note 58, at 536–537 (“Iran's heavy dependence on oil export revenue and other foreign trade leaves it highly vulnerable to economic sanctions.”); see also Kittrie, *Using Stronger Sanctions to Increase Negotiating Leverage with Iran*, ARMS CONTROL TODAY (Dec. 2009), at 18–21, <http://www.armscontrol.org/print/3982>.

1. State and local actions including pension divestment

As of 2004, U.S. state and local pension funds reportedly had some \$188 billion invested in foreign companies doing business with state sponsors of terrorism, including Iran.<sup>61</sup> State and local pension fund divestment from such companies was seen by its proponents as having the potential to contribute significantly to discouraging these and other foreign companies from investing in, or otherwise doing business with, these state sponsors of terrorism.<sup>62</sup> In addition, the threatened withdrawal from such companies of state and local pension fund investment was seen as providing these companies with a strong incentive to withdraw from business they were already doing with the state sponsors of terrorism.<sup>63</sup> At least twenty-seven states and the District of Columbia have divested pension funds from companies doing business with Sudan, as have at least twenty-two cities.<sup>64</sup> In addition, at least nineteen states and the District of Columbia have divested pension funds from companies investing in Iran's energy sector.<sup>65</sup> In order to facilitate such divestment relating to Sudan, Congress passed, and President Bush signed into law in 2007, the Sudan Accountability and Divestment Act, which clarifies that certain types of state and local divestment from companies doing business with Sudan are not preempted.<sup>66</sup> Similarly, on July 1, 2010, President Obama signed into law the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, which clarifies that certain types of state and local divestment from companies doing business with Iran are not preempted.<sup>67</sup>

Iran's opponents in the United States have also used state and local law in other ways to put pressure on Iran. For example, in 2007, when Minnesota Governor Tim Pawlenty discovered that an Indian company, Essar, was seeking to both invest some \$1.6 billion in Minnesota and invest over

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<sup>61</sup> See Ctr. for Sec. Policy, *The Terrorism Investments of the 50 States*, DIVESTTERROR.ORG, 2 (Aug. 12, 2004), [http://merln.ndu.edu/merln/mipal/reports/Divest\\_Terror\\_Report.pdf](http://merln.ndu.edu/merln/mipal/reports/Divest_Terror_Report.pdf) ("The total estimated value of the stock of some 400 companies doing business in terrorist sponsoring states held by America's leading public pension systems is approximately \$188 billion.").

<sup>62</sup> See *id.*

<sup>63</sup> See *id.*

<sup>64</sup> See generally Perry S. Bechky, *The Politics of Divestment*, in *THE POLITICS OF INTERNATIONAL ECONOMIC LAW* (Tomer Broude ed., forthcoming 2010).

<sup>65</sup> *Id.*; *State-by-State Update on Iran Divestment Legislation* (updated August 2010), The Israel Project, <http://www.theisraelproject.org/site/apps/nlnet/content2.aspx?c=hsJPK0PIJpH&b=689705&ct=8641297>.

<sup>66</sup> Sudan Accountability and Divestment Act of 2007, Pub. L. No. 110-174, 121 Stat. 2516.

<sup>67</sup> Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, Pub. L. No. 111-195, 124 Stat. 1313.



\$5 billion in building a refinery in Iran, he put Essar to a choice.<sup>68</sup> Pawlenty threatened to block state infrastructure subsidies and perhaps even construction permits for the Minnesota purchase unless Essar withdrew from the Iranian investment.<sup>69</sup> Essar promptly withdrew from the Iranian investment.<sup>70</sup>

In 2009, activists in Los Angeles, California put pressure on Siemens, which sold communications monitoring and other equipment to the Iranian government, by opposing Siemens' efforts to supply rail cars to the Los Angeles Metropolitan Transportation Authority.<sup>71</sup> In January 2010, Siemens announced that it would forgo new business with Iran.<sup>72</sup> Although the Siemens decision to forgo new business with Iran was not as clearly tied to U.S. state or local pressures as was Essar's decision, the rail car contract incident provides another interesting example of how lawfare can be used at the state or local level.

## 2. Legal pressure on foreign banks doing business with Iran<sup>73</sup>

The U.S. Department of the Treasury has convinced more than eighty banks around the world, including most of the world's top financial institutions,<sup>74</sup> to cease some or all of their business with Iran.<sup>75</sup> The tactics Treasury is using were designed and first implemented under the George W.

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<sup>68</sup> See Larry Oakes, *Essar Drops Plan with Iran: Steel Mill on Range is a Go*, STARTRIBUNE.COM (Oct. 31, 2007, 8:12 PM), <http://www.startribune.com/business/11245206.html> (discussing Minnesota Governor Tim Pawlenty's statement that Essar's plans with Iran, if carried out, would jeopardize Essar's subsidies to operate in Minnesota).

<sup>69</sup> See *id.* (stating that Minnesota Governor Tim Pawlenty had threatened to pull construction permits if Essar followed through with its plans to build an oil refinery in Iran).

<sup>70</sup> See Tim Pugmire, *Pawlenty Says Essar Concerns are Resolved*, MPR NEWS (Oct. 31, 2007, 5:16 PM), <http://minnesota.priprod.publicradio.org/display/web/2007/10/31/essargoesforward/>.

<sup>71</sup> See Eli Lake, *Siemens Risks Losses Due to Iran Ties*, WASH. TIMES (July 17, 2009, 4:45 AM), <http://www.washingtontimes.com/news/2009/jul/17/siemens-risks-losses-due-to-iran-ties/print/> ("One of the world's largest engineering firms, Siemens, could lose hundreds of millions of dollars in sales to the Los Angeles Metropolitan Transportation Authority (MTA) because it sold Iran equipment used to spy on dissidents.").

<sup>72</sup> See Eli Lake, *Siemens Decides to End Deals with Iran*, WASH. TIMES. (Jan. 28, 2010, 5:01 AM), <http://www.washingtontimes.com/news/2009/jul/17/siemens-risks-losses-due-to-iran-ties/print/> (stating that Siemens announced that it "would be forgoing new business with Iran").

<sup>73</sup> Readers interested in a more detailed discussion of the U.S. Treasury Department's innovative campaign to persuade banks to curtail their business with Iran may wish to refer to Orde F. Kittrie, *New Sanctions for a New Century: Treasury's Innovative use of Financial Sanctions*, 30 U. PA. J. INT'L L. 789, 789–822 (2009), from which this discussion is adapted.

<sup>74</sup> See *id.* at 815 ("More than 80 banks around the world, including 'most of the world's top financial institutions,' have curtailed business with Iran.").

<sup>75</sup> See Robin Wright, *Stuart Levy's War*, N.Y. TIMES MAG., Nov. 2, 2008, at 31.

Bush administration.<sup>76</sup> However, the Obama Administration cast a strong vote of confidence in them, including by taking the extraordinary decision to retain in place Stuart Levey, the Bush-appointed Under Secretary of the Treasury, who is principally known as the leading architect of these financial sanctions.<sup>77</sup>

What is Treasury's rationale for pressuring foreign banks to curtail their business dealings with Iran? Iran utilizes the international financial system to advance both its nuclear program and its state sponsorship of terrorism. In order to avoid suspicion and minimize the risk of detection, Iran's state-owned banks and other entities use an array of deceptive practices when using their global financial ties to advance Iran's nuclear program and sponsorship of terrorism. For example, Iran uses front companies and intermediaries to surreptitiously obtain technology and materials for its nuclear and missile programs from countries that would prohibit such exports to Iran.<sup>78</sup> In addition, Iranian banks ask other financial institutions to remove the Iranian banks' names when processing their transactions through the international financial system.<sup>79</sup> The goal is to allow Iranian banks to remain undetected as they move money through the international financial system to pay for the Iranian government's nuclear and missile related purchases and to fund terrorism.<sup>80</sup>

What accounts for Treasury's considerable success in persuading foreign banks to stop doing business with Iran? Treasury's principal innovation can be described as follows: Rather than asking, e.g., the Swiss government to order its banks to stop doing business with Iran, the Treasury has gone directly to the Swiss banks. Treasury has found that its unprecedented direct outreach to a country's key private financial institutions can yield results much more quickly than does outreach to that same country's government, which can lack political will or the necessary authority, or may face cumbersome bureaucratic procedures for exercising whatever relevant

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<sup>76</sup> See, e.g., *id.*, Kittrie *supra* note 73, at 815.

<sup>77</sup> Paul Richter, *Obama Administration Keeps Bush Official Involved with Iran Sanctions*, L.A. TIMES (Feb. 3, 2009), <http://articles.latimes.com/2009/feb/03/world/fg-usiran3> ("The Obama administration has decided to retain the official who led the Bush administration's effort to squeeze Iran with economic sanctions, providing an important clue on how it intends to approach the Islamic Republic.").

<sup>78</sup> See *Between Feckless and Reckless: U.S. Policy Options to Prevent a Nuclear Iran: Joint Hearing Before the Subcomm. on the Middle East and South Asia, and the Subcomm. on Terrorism, Nonproliferation and Trade of the H. Comm. on Foreign Affairs*, 110th Cong. 28 (2008) [hereinafter Glaser statement] (statement of Daniel Glaser, Deputy Assistant Secretary for Terrorist Financing and Financial Crimes, U.S. Dep't of Treasury), <http://foreignaffairs.house.gov/110/41849.pdf>.

<sup>79</sup> *Id.*

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

authorities it does have.<sup>81</sup> Once some foreign private financial institutions decide to halt business with entities or individuals of concern, the reputational risk for others not to follow is increased, and those who have halted business with Iran often cooperate with the United States in putting pressure on those who have not yet done so.<sup>82</sup> Other banks within the jurisdiction soon follow.<sup>83</sup> Such private sector decisions can in turn make it more politically feasible for foreign governments to impose restrictions because some or all of the major relevant companies in their jurisdiction have already forgone the business.<sup>84</sup>

What does the Treasury Department say to the foreign banks to get them to stop doing business with Iran? Treasury officials remind the foreign banks of the risks of doing even *prima facie* legal business with Iran.<sup>85</sup> The banks with which the Treasury Department communicates are already aware of the prosecutions the Treasury has brought against other banks. For example, in May 2004, the Federal Reserve fined UBS, Switzerland's largest bank, \$100 million for sending U.S. dollars to Cuba, Iran, Libya, and Yugoslavia, and intentionally hiding the transactions by submitting false monthly reports to the Federal Reserve.<sup>86</sup> In December 2005, ABN Amro Bank NV, a Dutch firm, was fined \$80 million by U.S. federal and state financial regulators for actions including modification by its branch in Dubai of payment instructions on wire transfers, letters of credit, and checks issued by Iran's Bank Melli and a Libyan bank in order to hide their involvement in the transactions and enable access to the U.S. banking system.<sup>87</sup> As one former Treasury official put it in 2008, the Treasury Department's success in persuading foreign banks to curtail transactions with Iran

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<sup>81</sup> PRESS RELEASE, U.S. DEP'T OF TREASURY, REMARKS BY TREASURY SECRETARY PAULSON ON TARGETED FINANCIAL MEASURES TO PROTECT OUR NATIONAL SECURITY (June 14, 2007) [hereinafter Paulson Remarks].

<sup>82</sup> *See id.*

<sup>83</sup> *See id.*

<sup>84</sup> Glaser statement, *supra* note 78, at 35.

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

<sup>86</sup> *See UBS Fined \$100 Million Over Trading of Dollars*, N.Y. TIMES, May 11, 2004, at C17.

<sup>87</sup> Paul Blustein, *Dutch Bank Fined for Iran, Libya Transactions: \$80 Million Levied for Foreign Dealings, Money Laundering*, WASH. POST (Dec. 20, 2005, 5:09 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/19/AR2005121901804.html>. Between December 2001 and April 2004, ABN AMRO's overseas branches removed or revised references to entities in which the governments of Libya and Iran had an interest before forwarding wire transfers, letters of credit and U.S. dollar checks to ABN AMRO branches in New York, NY and Chicago, IL. OFFICE OF FOREIGN ASSETS CONTROL, DEP'T OF TREASURY, ENFORCEMENT INFORMATION (Jan. 3, 2006).

was due in part to those banks' eagerness "to avoid being the 'next ABN AMRO.'" <sup>88</sup>

Such prosecutions have continued under the Obama Administration. In January 2009, Lloyds TSB Bank had to pay the U.S. government \$350 million in fines and forfeiture as a result of a scheme in which Lloyds altered or "stripped" wire-transfer information to hide the identities of Iranian and Sudanese clients in order to deceive American financial institutions and enable the clients to access the U.S. banking system. <sup>89</sup> The stripping of wire-transfer information "made it appear that the transactions originated at Lloyds TSB Bank" in the U.K. rather than in the sanctioned countries. <sup>90</sup> Most recently, in August 2010, Barclays PLC agreed to a \$298 million settlement with U.S. prosecutors in connection with allegations that it violated U.S. financial sanctions against countries including Iran. <sup>91</sup>

What has been the impact on Iran of the pressure on foreign banks doing business with Iran? With most leading foreign banks curtailing their business with Iran, Iranian companies and their business partners are finding it difficult to arrange letters of credit, a central requirement for conducting trade. <sup>92</sup> Many companies doing business in or with Iran have been forced to use smaller banks or go through intermediaries to arrange new letters of credit, adding twenty to thirty percent to their costs. <sup>93</sup>

### 3. Legal pressure on foreign energy companies supplying refined petroleum to Iran

Although Iranian oil wells produce far more petroleum (crude oil) than Iran needs, Iran has relatively little capacity to refine that petroleum (turn it into gasoline and diesel fuel). <sup>94</sup> Remarkably for a country that is investing so much in its nuclear programs, Iran has developed insufficient

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<sup>88</sup> Michael Jacobson, *Sanctions Against Iran: A Promising Struggle*, 31 WASH. Q. 69, 73 (2008).

<sup>89</sup> Chad Bray, *Lloyds TSB Settles with U.S. Officials*, WALL ST. J., Jan 10, 2009, at B8.

<sup>90</sup> *Id.*

<sup>91</sup> *Barclays Deal with U.S. Over Trade Sanctions is Approved*, N.Y. TIMES, Aug. 19, 2010, at B9.

<sup>92</sup> See, e.g., Mark Trevelyan, *More Companies Suspend Business with Iran*, INT'L HERALD TRIB., Jan. 17, 2008, at 15 (quoting a senior German banking and finance consultant as stating that "[i]t is today impossible more or less in Europe, with a couple of exceptions, to get a letter of credit" for trade with Iran); *No Letters of Credit, No Steel for Iranian Importers, say Traders*, METAL BULLETIN WEEKLY, Sept. 13, 2010, <http://www.metalbulletin.co.uk/Article/2675316/No-letters-of-credit-no-steel-for-Iranian-importers-say-traders.html>.

<sup>93</sup> Michael Jacobson, *Putting the Squeeze on Iran*, THE GUARDIAN ONLINE, July 22, 2008, <http://www.guardian.co.uk/commentisfree/2008/jul/22/iran.usforeignpolicy>.

<sup>94</sup> U.S. ENERGY & INFO. ADMIN., COUNTRY ANALYSIS, IRAN, <http://www.eia.doe.gov/cabs/Iran/Oil.html>.

capacity to refine the petroleum it pumps out of its own soil. As a result, in 2009, Iran imported some forty percent of the gasoline it was consuming.<sup>95</sup>

Iran had been purchasing nearly all of this gasoline from a handful of foreign companies including Reliance Industries, an Indian firm.<sup>96</sup> In 2008, nonproliferation law experts and members of Congress began looking into how they might use law as a tool to pressure those companies to stop doing business with Iran. *Newsweek* put it as follows:

An Arizona State University law professor and former State Department nuclear-nonproliferation official, Orde Kittrie, discovered that Reliance had benefited from two U.S. Export-Import Bank loan guarantees totaling \$900 million. Members of Congress—led by Democratic Rep. Brad Sherman of California and Republican Mark Kirk of Illinois—demanded that the Ex-Im Bank cut off U.S. taxpayer assistance. After consulting with its high-priced Washington lobbying firm, BGR, Reliance quietly passed the word to members of Congress: it was halting all sales to Iran and would insist that its trading partners do the same.<sup>97</sup>

The idea of squeezing Iran's gasoline supplies came to the attention of Presidential candidate Barack Obama. In a June 2008 speech, then-Senator Obama said: "We should work with Europe, Japan and the Gulf states to find every avenue outside the United Nations to isolate the Iranian regime—from cutting off loan guarantees and expanding financial sanctions, to banning the export of refined petroleum to Iran."<sup>98</sup> Obama repeated this sentiment during the presidential candidates' debate on Oct. 7, 2008: "Iran right now imports gasoline . . . if we can prevent them from importing the gasoline that they need . . . that starts changing their cost-benefit analysis. That starts putting the squeeze on them."<sup>99</sup>

After Iran's leadership rebuffed the Obama Administration's initial attempts to engage Iran, Congress stepped up its efforts to place legal pressure on foreign energy companies supplying gasoline to Iran. In October 2009, both houses of Congress passed, and President Obama signed into law, a prohibition on foreign companies selling to the U.S. government's

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<sup>95</sup> See, e.g., David E. Sanger, *U.S. Weighs Iran Sanctions if Talks Are Rejected*, N.Y. TIMES, Aug. 3, 2009, at A4, available at <http://www.nytimes.com/2009/08/03/world/middle-east/03nuke.html>.

<sup>96</sup> Orde F. Kittrie, *How to Put the Squeeze on Iran*, WALL ST. J., Nov. 13, 2008, at A19, available at <http://online.wsj.com/article/SB122654026060023113.html>.

<sup>97</sup> Michael Hirsh, *Obama's Enforcer*, NEWSWEEK, Dec. 12, 2009, available at <http://www.newsweek.com/2009/12/11/obama-s-enforcer.html>.

<sup>98</sup> Transcript: Obama's Speech at AIPAC, National Public Radio, June 4, 2008, <http://www.npr.org/templates/story/story.php?storyId=91150432>.

<sup>99</sup> Transcript: Second McCain, Obama Debate, CNN, Oct. 7, 2008, <http://www.cnn.com/2008/POLITICS/10/07/presidential.debate.transcript/>.

Strategic Petroleum Reserve if they are significantly involved in providing refined petroleum to Iran.<sup>100</sup>

Then, on July 1, 2010, President Obama signed the Comprehensive Iran Sanctions, Accountability, and Divestment Act (CISADA).<sup>101</sup> CISADA principally mandates that the President impose sanctions (up to and including being barred from doing business in the U.S.) on any foreign company that does various types of business with Iran's energy sector, including being involved with providing gasoline to Iran.<sup>102</sup> CISADA notably also:

- Requires each prospective contractor submitting a federal government bid to certify that the contractor or a person owned or controlled by the contractor does not conduct any activity sanctionable under a key provision of CISADA<sup>103</sup>
- Prohibits most remaining trade between Iran and the United States<sup>104</sup>
- Requires the Secretary of the Treasury to restrict the opening or maintaining in the United States of a correspondent or payable-through account by a foreign financial institution if that institution knowingly engages in various types of transactions with proscribed Iranian entities<sup>105</sup>
- Directs the Secretary of the Treasury to prohibit any person owned or controlled by a domestic financial institution from knowingly engaging in a transaction with or benefiting the Iranian Revolutionary Guard Corps or its designated affiliates<sup>106</sup>
- Prohibits U.S. executive agencies from entering into procurement contracts with entities that have exported to Iran sensitive communications technology intended to be used to monitor or disrupt the free flow of communications to, or restrict the speech of, the people of Iran<sup>107</sup>
- Increases criminal penalties for violations of various sanctions provisions<sup>108</sup>
- Clarifies that certain types of state and local divestment from companies doing business with Iran are not preempted<sup>109</sup>

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<sup>100</sup> Tom Doggett, *U.S. Lawmakers Vote to Punish Iran's Fuel Suppliers*, REUTERS, Oct. 1, 2009, <http://uk.reuters.com/article/idUKTRE59072H20091001>; Energy and Water Development and Related Agencies Appropriations Act of 2010, Pub. L. No. 111-85, § 313 (2009).

<sup>101</sup> Comprehensive Iran Sanctions, Accountability and Divestment Act of 2010, Pub. L. No. 111-195 (2010).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at § 102.

<sup>104</sup> *Id.* at § 103(b).

<sup>105</sup> *Id.* at § 104(c).

<sup>106</sup> *Id.* at § 104(d).

<sup>107</sup> *Id.* at § 106.

<sup>108</sup> *Id.* at § 107.

CISADA had a significant impact on gasoline exports to Iran even before it was signed into law. Different companies stopped their varied forms of involvement in providing gasoline to Iran at different stages in the legislative process. For example, several companies stopped such business once the bill passed both houses of Congress, another company stopped once the conferenced legislation had been passed by both house of Congress, and another stopped conducting such business with Iran a few days after President Obama signed the bill into law.<sup>110</sup>

Since CISADA's enactment in July 2010, the Obama Administration has, with foreign companies doing business with Iran's energy sector, taken an analogous approach to the Treasury Department's unprecedented direct outreach to key foreign private financial institutions. William Burns, the Under Secretary of State for Political Affairs, put it as follows in his December 1, 2010 statement to the House Committee on Foreign Affairs:

[W]e have used the powerful instrument provided by CISADA's "special rule" to persuade major European and Asian firms, including Shell, Statoil, ENI, Total and INPEX, to terminate or take significant verifiable steps toward stopping potentially sanctionable activities in Iran and provide clear assurances that they would not undertake any sanctionable activities in Iran's energy sector in the future. According to reliable estimates, Iran may be losing as much as \$50-60 billion overall in potential energy investments, along with the critical technology and know-how that comes with them. More specifically, major international oil companies such as Shell, Statoil, ENI, Total and INPEX have decided not to undertake any new activities in Iran. In addition, major fuel suppliers such as Vitol, Shell, Reliance, IPG, Glencore, and Trafigura have announced that

<sup>109</sup> *Id.* at § 202.

<sup>110</sup> H.R. 2194, the Iran Refined Petroleum Sanctions Act of 2009, passed the House on December 15, 2009. S. 2799, the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2009, passed the Senate on January 28, 2010. The Senate named its Iran sanctions legislation conferees in early March 2010, and the House named its conferees in late April 2010. The bill that emerged from conference, H.R. 2194, the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, passed both the House and the Senate on June 24, 2010. For a complete bill summary and status, see <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR02194:@@X>; Swiss energy traders Vitol, Glencore and Trafigura publicly committed in March 2010 not to supply refined petroleum to Iran. Press Release, U.S. Dep't of State, Companies Reducing Energy-related Business with Iran, Sept. 30, 2010, <http://www.state.gov/r/pa/prs/ps/2010/09/148458.htm> (last visited Nov. 15, 2010). The French energy firm Total suspended gasoline shipments to Iran a few days after the conferenced legislation passed both houses of Congress. Paul Sampson, *Iran Sanctions Open Way for Chinese*, INTERNATIONAL OIL DAILY, July 6, 2010. Lloyds of London announced on July 9, 2010 that it would not insure or reinsure petroleum shipments going into Iran. Press Release, U.S. Dep't of State, *Companies Reducing Energy-related Business with Iran*, Sept. 30, 2010, available at <http://www.state.gov/r/pa/prs/ps/2010/09/148458.htm>.

they will no longer sell refined petroleum products to Iran. Investment in Iran's upstream oil and gas sector has dropped dramatically, forcing Iran to abandon liquefied natural gas projects for lack of foreign investment and technical expertise.<sup>111</sup>

The "special rule" contained in Section 102(g) of CISADA allows the President to on a case-by-case basis terminate, or not initiate, an investigation of certain sanctionable activities under the Act if the President certifies that the sanctionable entity has stopped the sanctionable activity or has "taken significant verifiable steps toward stopping the activity" and the President has "received reliable assurances" that the sanctionable entity "will not knowingly engage in [such activities] in the future."<sup>112</sup>

As discussed in section B.2 of this article, the Treasury Department has in recent years persuaded foreign banks to stop doing business with Iran by directly reaching out to those foreign banks and reminding them of the risks of doing business with Iran, a risk exemplified by the steep fines levied against banks caught conducting illicit trade with Iran. In much the same way, the State Department has in recent months persuaded foreign energy companies to stop doing business with Iran by directly reaching out to those foreign energy companies and advising them of the risks of doing business with Iran, a risk exemplified by the CISADA sanctions (on companies doing business with Iran's energy sector), imposition of which can be halted if the President receives reliable assurances that the company is stopping such business with Iran's energy sector.<sup>113</sup> In both cases, an implied or explicit threat of legal action pursuant to U.S. law, delivered to the foreign company directly by U.S. officials, persuades the foreign company to stop doing business with Iran, even though such business is not prohibited by the government of the country in which the foreign company is headquartered.

As a result of this creative new form of lawfare, by October 2010, each of the companies that had, two years before, been one of the top five

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<sup>111</sup> *Hearing on Iran Sanctions*, H. Comm. On Foreign Affairs, 111<sup>th</sup> Cong. (Dec. 1, 2010) (written statement of William Burns, Under Secretary of State for Political Affairs), <http://foreignaffairs.house.gov/111/bur120110.pdf>.

<sup>112</sup> Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, Pub. L. No. 111-195, § 102 (g) (2010).

<sup>113</sup> *See, e.g.*, U.S. DEP'T OF STATE, SPECIAL BRIEFING BY DEPUTY SECRETARY OF STATE JAMES B. STEINBERG ON IRAN SANCTIONS IMPLEMENTATION (Sept. 30, 2010), <http://www.state.gov/s/d/2010/148479.htm> ("[F]our major international oil companies . . . have pledged to end their investments in Iran's energy sector . . . . These companies have provided assurances to us that they have stopped or are taking significant verifiable steps to stop their activity in Iran and have provided assurances not to undertake new energy-related activity in Iran that may be sanctionable. . . . as a result, the Secretary has decided to use the Special Rule to avoid making a determination of sanctionability for these companies.").



suppliers of gasoline to Iran, had dropped out of supplying gasoline to Iran.<sup>114</sup> The volume of gasoline imported by Iran in September 2010 was reportedly as much as ninety percent less than what Iran imported in months prior to the July 1, 2010 enactment of CISADA.<sup>115</sup> Meanwhile, Iran's remaining gasoline suppliers have demanded higher premiums from Iran for their willingness to risk U.S. penalties.<sup>116</sup> By using lawfare, the United States and its allies have managed to drastically reduce Iran's gasoline supplies without intercepting a single tanker or firing a single shot.

#### 4. Litigation strategies

The small cadre of private sector American attorneys who sue terrorist groups and the national governments which support them are an exceptional example of the use of lawfare in the war against terrorism. These lawsuits have been extremely effective at times, including by bringing attention to the harm done by terrorists to Americans, using the American judicial system to find facts and make determinations as to the connections between countries such as Iran and terrorist attacks by groups such as Hezbollah, and putting financial pressure on terrorist-supporting states such as Libya and Iran. For example, the lawsuit against Libya by the American victims of Libya's bombing of Pan Am 103 was a vehicle by which Libya, in August 2003, formally accepted responsibility for the bombing and paid \$2.7 billion in compensation to the victims' families.<sup>117</sup>

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<sup>114</sup> As of November 2008, the top five suppliers of gasoline to Iran were the Swiss firm Vitol; the Swiss/Dutch firm Trafigura; the French firm Total; British Petroleum; and the Indian firm Reliance Industries. Orde F. Kittrie, *How to Put the Squeeze on Iran*, WALL ST. J., Nov. 13, 2008, at A19, available at <http://online.wsj.com/article/SB122654026060023113.html>. As of September 30, 2010, all five firms had stopped supplying gasoline to Iran. Press Release, U.S. Dep't of State, Companies Reducing Energy-related Business with Iran, Sept. 30, 2010, <http://www.state.gov/r/pa/prs/ps/2010/09/148458.htm> (last visited Nov. 27, 2010).

<sup>115</sup> Reem Shamseddine & Luke Pachymuthu, *Iran Fuel Imports Dive in Sept on Sanctions-Trade*, REUTERS, Sept. 24, 2010, <http://af.reuters.com/article/energyOilNews/idAFLDE68N0ZF20100924> (last visited Nov. 27, 2010); *Hearing on Iran Sanctions*, H. Comm. On Foreign Affairs, 111<sup>th</sup> Cong. (Dec. 1, 2010) (oral testimony of William Burns, Under Secretary of State for Political Affairs)(stating that Iran's imports of refined petroleum products were 85 percent less in October 2010 than they were before July 2010).

<sup>116</sup> See, e.g., *US-led Sanctions Force Iran to Pay 25pc More for Gasoline*, OIL & GAS NEWS, Aug. 25, 2010; Samuel Cizuk, *Gasoline Import Premiums Rise Sharply Ahead of Tighter Sanctions for Iran*, GLOBAL INSIGHT, Apr. 5, 2010.

<sup>117</sup> Kirit Radia & Maddy Sauer, *Pan Am 103 Families Finally Compensated*, ABC NEWS, Oct. 31, 2008, <http://abcnews.go.com/Blotter/story?id=6158491&page=1>; See also Andrea Koppel & Elise Labott, *Libya Offers \$2.7 billion Pan Am 103 Settlement*, CNN, May 29, 2002, [http://articles.cnn.com/2002-05-28/us/libya.lockerbie.settlement\\_1\\_libyan-offer-commercial-sanctions-families-of-terror-victims?\\_s=PM:US](http://articles.cnn.com/2002-05-28/us/libya.lockerbie.settlement_1_libyan-offer-commercial-sanctions-families-of-terror-victims?_s=PM:US).

Iran is already a major target of these litigators as a result of terrorist acts including the 1983 Marine barracks bombing in Beirut, Lebanon.<sup>118</sup> On October 23, 1983, a truck bomb struck a barracks housing U.S. Marine participants in the multinational peacekeeping force in Beirut, killing 241 Marines.<sup>119</sup> In July 1987, Iran's then-Minister of Revolutionary Guards, Mohsen Rafiqdoost, admitted that, "both the TNT and the ideology which in one blast sent to hell 400 officers, NCOs, and soldiers at the Marines headquarters were provided by Iran."<sup>120</sup> There is a broad consensus among Western experts that the planning of the attacks was supervised by Iran's ambassador to Syria.<sup>121</sup>

In May 2003, in a case brought by relatives of some of the U.S. Marines who were killed, U.S. District Court Judge Royce C. Lamberth ruled that the Islamic Republic of Iran was responsible for the Marine barracks attack.<sup>122</sup> Lamberth based his conclusion on testimony by expert witnesses, including a Hezbollah member who participated in the group that planned the attack, and a declassified National Security Agency intercept of a September 1983 message sent from Iranian intelligence headquarters in Tehran instructing the leader of Hezbollah (then known as Islamic Amal) to "take a spectacular action against the United States Marines."<sup>123</sup> In 2007, Lamberth ordered Iran to pay \$2.7 billion in compensation to the victims' families.<sup>124</sup> In 2008, Lamberth's ruling served as the basis for the U.S. District Court for the Southern District of New York freezing \$2 billion in Iranian assets, held in a Citibank account in New York City, at the behest of an attorney for the victims' families.<sup>125</sup>

U.S. nonproliferation officials, these private sector attorneys, and others are now considering how to use these civil litigation tactics, and the

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<sup>118</sup> Readers interested in a more detailed discussion of Iran's long state sponsorship of terrorism and the international community's response may wish to refer to Orde F. Kittrie, *Emboldened by Impunity: The History and Consequences of Failure to Enforce Iranian Violations of International Law*, 57 SYRACUSE L. REV. 519 (2007), from which this discussion is adapted.

<sup>119</sup> KENNETH M. POLLACK, *THE PERSIAN PUZZLE: THE CONFLICT BETWEEN IRAN AND AMERICA* 203 (2005).

<sup>120</sup> Rafiqdoost's comments were published in the Tehran daily *Resalat* on July 20, 1987. Ladan Boroumand & Roya Boroumand, *Terror, Islam, and Democracy*, 13 J. DEMOCRACY, 5, 19 n.18 (2002).

<sup>121</sup> POLLACK, *supra* note 119, at 203.

<sup>122</sup> *Peterson v. Islamic Republic of Iran*, 264 F. Supp. 2d 46, 61 (D.C. 2003).

<sup>123</sup> *Id.* at 54.

<sup>124</sup> *Judge Fines Iran \$2.65B Over 1983 Beirut Marine Barracks Bombing*, Sept. 8, 2007, <http://www.foxnews.com/story/0,2933,296141,00.html>.

<sup>125</sup> Jay Solomon, *U.S. Freezes \$2 Billion in Iran Case*, WALL ST. J., Dec. 12, 2009, at A1.

legal precedents they have set, to go after proliferators and their suppliers.<sup>126</sup> Civil litigation options being considered include:

- Lawsuits against foreign suppliers of dual-use items to Iran, for example for aiding and abetting Iran's violations of international nonproliferation law.<sup>127</sup> One key question raised by this option is who, including prospective victims of an illicit Weapons of Mass Destruction program, could get standing to sue.<sup>128</sup>
- Lawsuits based on the apparent personal involvement of senior Iranian leaders in Hezbollah terrorist attacks. In 2008, the European Union designated the current Iranian defense minister, Ahmed Vahidi, as "a person linked to Iran's proliferation-sensitive nuclear activities or Iran's development of nuclear weapon delivery systems."<sup>129</sup> Separately, an Argentinian judge has issued an arrest warrant for Vahidi, who is accused by Argentina of having masterminded Hezbollah's 1994 bombing of a Jewish cultural center in Argentina, which killed eighty-five people.<sup>130</sup> Despite assistance from Interpol,<sup>131</sup> Argentina has not yet succeeded in bringing Vahidi to justice. Perhaps civil litigation could be more effective in reaching Vahidi and his assets.
- Legal actions for intellectual property theft based on the fact that Iran's nuclear program uses designs originally stolen from a European company, Urenco, by A.Q. Khan, the father of the Pakistani nuclear bomb.<sup>132</sup>

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<sup>126</sup> See Elaine M. Grossman, *Proliferation Watchdogs Eye Litigation to Combat Illicit Trafficking*, Global Security Newswire, Oct. 30, 2009, at [http://www.globalsecuritynewswire.org/gsn/nw\\_20091030\\_3540.php](http://www.globalsecuritynewswire.org/gsn/nw_20091030_3540.php).

<sup>127</sup> *Id.*

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

<sup>129</sup> Yaakov Lappin, *Interpol: No warrant out for Iranian defense minister. Ahmad Vahidi wanted by Argentina for allegedly masterminding the 1994 Buenos Aires Jewish center bombing*, Jerusalem Post, Sept. 8, 2009, at 5.

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

<sup>131</sup> *Id.*

<sup>132</sup> Global Security, *Weapons of Mass Destruction, A.Q. Khan*, <http://www.globalsecurity.org/wmd/world/pakistan/khan.htm>. It is worth noting that efforts to criminally prosecute Khan for stealing the designs have thus far proven a failure. See, e.g., *Chronology: A.Q. Khan*, N.Y. TIMES, Apr. 16, 2006, at [http://www.nytimes.com/2006/04/16/world/asia/16chron-khan.html?\\_r=1](http://www.nytimes.com/2006/04/16/world/asia/16chron-khan.html?_r=1) (noting that his conviction of nuclear espionage by a Dutch court was "overturned based on an appeal that he had not received a proper summons" and that Dutch prosecutors did not renew charges "because of the impossibility of serving Khan a summons given Pakistan security.") Khan's only punishment was a period of house arrest in Pakistan. Joby Warrick, *Nuclear Scientist A.Q. Khan is Freed from House Arrest*, WASH. POST, Feb. 7, 2009, at A1.

It may also be possible to promote U.S. and allied national security objectives vis a vis Iran through action before international tribunals. For example:

- It may be possible to bring an action before the International Criminal Court (ICC) against Iranian Defense Minister Vahidi for his involvement in the AMIA bombing.<sup>133</sup> Alan Baker, former legal adviser to the Foreign Ministry of Israel, has stated that Vahidi “carried out a crime which could probably be defined as a crime against humanity,” noting that “this has all the components of being a crime that is within the framework of the ICC.”<sup>134</sup>
- Various international experts have called for pursuing legal action against Iranian President Ahmadinejad on the basis that his calls for the destruction of Israel are tantamount to incitement to genocide,<sup>135</sup> which is prohibited by Article III (a) of the United Nations Convention on the Prevention and Punishment of the Crime of Genocide.<sup>136</sup>

#### IV. CONCLUSION

The increasing legalization of international relations has made lawfare an increasingly powerful alternative to traditional military means to achieve operational objectives. Terrorist groups and their state sponsors are seizing on this development by making explicit and sometimes effective use of lawfare to achieve their operational objectives.

In contrast, the U.S. executive branch’s response to law’s potential as a tool for advancing military objectives has thus far been predominantly defensive. The U.S.’s advantage in sophisticated legal weapons has thus far been underutilized.

The remarkable impact of the limited deployment of lawfare against Iran to date indicates that lawfare, deployed systematically and effectively, may in some circumstances be able to save U.S. and foreign lives by signif-

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<sup>133</sup> Yaakov Lappin, *Interpol: No warrant out for Iranian defense minister. Ahmad Vahidi wanted by Argentina for allegedly masterminding the 1994 Buenos Aires Jewish center bombing*, Jerusalem Post, Sept. 8, 2009, at 5.

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

<sup>135</sup> See, e.g., Irwin Cotler, *Canada Must Get Serious About Iran*, National Post, July 12, 2010, at <http://fullcomment.nationalpost.com/2010/07/12/irwin-cotler-canada-must-get-serious-about-iran/> (Cotler is the former Minister of Justice and Attorney General of Canada); Tovah Lazaroff & Allison T. Hoffman, *Lawyers Lobby Against Iran’s Incitement*, Jerusalem Post, Oct. 9, 2008, at <http://www.jpost.com/Home/Article.aspx?id=123779>; “The Danger of a Nuclear, Genocidal and Rights-Violating Iran: The Responsibility to Prevent Petition,” at [http://genocidepreventionnow.org/Portals/0/docs/2010-R2P\\_IRAN\\_RESOLUTION.pdf](http://genocidepreventionnow.org/Portals/0/docs/2010-R2P_IRAN_RESOLUTION.pdf).

<sup>136</sup> Convention on the Prevention and Punishment of the Crime of Genocide, <http://www2.ohchr.org/english/law/genocide.htm>.

icantly advancing U.S. national security objectives that would otherwise require traditional warfare. These successes call into question the dominant paradigm in the scholarly literature regarding sanctions, which derides multilateral sanctions as predominantly ineffective and unilateral sanctions as almost always ineffective in a globalized economy.<sup>137</sup> Perhaps the innovative types of lawfare-style sanctions described in this article represent a new breed of more effective sanctions than those derided in the scholarly literature.

In light of lawfare's advantages over kinetic warfare, and the remarkable impact of the limited deployment of lawfare against Iran to date, strong consideration should be given to broadening lawfare's application by the United States and its allies. Each of the types of lawfare identified by this article as being deployed against Iran in limited fashion could be replicated in additional sectors and applied to additional security challenges.

There is clearly room for much more vigorous deployment of state and local lawfare measures. For example, the fact that twenty-seven states have divested pension funds from companies doing business with Sudan and nineteen states have divested pension funds from companies doing business with Iran means there are twenty-three more states that still could divest from Sudan and thirty-one additional states that still could divest from Iran. In addition, Governor Pawlenty's effectiveness in putting Essar to a choice between investing in Minnesota and building a refinery in Iran means that there may be merit in putting together a comprehensive list of where else in the United States Iran's key business partners are seeking to invest and requesting subsidies and permits. Consideration could also be given to applying state and local lawfare measures to a broader set of target countries.

In light of the success of the Treasury Department's unprecedented direct outreach to foreign banks and the success of the State Department's subsequent similar direct outreach to foreign energy companies doing business with Iran, the Obama Administration, or a future administration, may decide to try to replicate in other sectors the willingness to use economic

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<sup>137</sup> See, e.g., DANIEL DREZNER, *THE SANCTIONS PARADOX: ECONOMIC STATECRAFT AND INTERNATIONAL RELATIONS* 10 (1999)(providing numerous quotes in which "pundits and policymakers have disparaged the use of sanctions in foreign policy" and noting that "this disdain mirrors the scholarly community's consensus about sanctions"); DAVID BALDWIN, *ECONOMIC STATECRAFT* 51 (1985)(describing "the literature on economic statecraft" as characterized by "the nearly universal tendency to denigrate the utility of such tools of foreign policy.") See also, e.g., Richard N. Haass, *Sanctioning Madness*, *Foreign Affairs*, Nov/Dec. 1997, at 75 ("the problem with economic sanctions is that they frequently contribute little to American foreign policy goals while being costly and even counterproductive"); *id.* at 77 ("In a global economy, unilateral sanctions impose higher costs on American firms than on the target country"); Robert A. Pape, *Why Economic Sanctions Do Not Work*, 22 *INT'L SECURITY* 90-136 (1997).

and regulatory muscle to pursue national security objectives and the novel tactic of direct outreach to individual foreign private institutions. If so, foreign companies in exceptionally globalized, strategic, regulated and information-rich sectors such as mobile telecommunications, the internet, and transportation could be next in line. Before the U.S. government takes such steps, it should analyze and weigh very carefully both the risk posed by such measures to U.S. economic and regulatory preeminence in those sectors and the risk that such steps might set problematic precedents that could be used against the United States by current or future adversaries.<sup>138</sup> Moves into additional sectors should be designed with an eye to minimizing those risks.

Finally, the creative use of civil litigation and international tribunals to achieve U.S. national security objectives is still at an early juncture. For example, the application against proliferators of the types of civil litigation tactics and precedents deployed against state sponsors of terrorism is still mostly at the conceptual stage, and the efforts to bring Iranian President Ahmadinejad before an international tribunal for incitement to genocide have yet to succeed. The potential for the United States to more effectively use civil litigation and international tribunals to achieve national security objectives traditionally achieved by military means merits further study by scholars, private practitioners, and government officials.

Lawfare's success in its limited deployment against Iran demonstrates lawfare's considerable potential as a tool for advancing U.S. national security objectives with far less bloodshed than traditional warfare. The U.S.'s advantage in sophisticated legal weapons should not remain underutilized.

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<sup>138</sup> For example, the United States depends heavily on Chinese purchases of American debt, a dependence which provides China with significant leverage over the United States. See, e.g., Keith Bradsher, *China Losing Taste for Debt from the U.S.*, N.Y. TIMES, Jan. 8, 2009, at A1.