

WHY THE COMBINATION OF UNIVERSAL
JURISDICTION AND POLITICAL LAWFARE WILL
DESTROY THE SACRED SOVEREIGNTY OF STATES

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TABLE OF CONTENTS

INTRODUCTION..... 390

I. MODERN HISTORY OF ISRAEL..... 392

II. DEFINITIONS AND STATUS OF UNIVERSAL JURISDICTION AND POLITICAL
LAWFARE 398

III. DANGERS AND IMPLICATIONS OF INCREASED USAGE..... 406

*A. NGO political and legal power remaining unchecked would
 inevitably result in a NGO-ICC coalition that holds universal and
 international jurisdiction—threatening to make domestic and local
 courts obsolete in the face of NGO-ICC political and
 legal interests..... 406*

*B. Terrorists, extremist organizations, and other dangerous non-
 state actors will be able to use a NGO-ICC coalition to attack
 legitimate state officials while enjoying an expansion of impunity to
 their own actions in a judicial system that targets nationals of
 legitimate states..... 410*

*C. State government decisions will be subject to the approval of a
 NGO-ICC coalition, which would be able to settle political differences
 through the legal system. Political leaders will no longer be safe to
 govern or make decisions dealing with a state’s domestic affairs and
 concerns..... 415*

CONCLUSION..... 418

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“[A]ny universal system should contain procedures not only to punish the wicked but [also] to constrain the righteous. It must not allow legal principles to be used as weapons to settle political scores.”¹

Henry Kissinger

“[T]he greater the power, the more dangerous the abuse.”²

Edmund Burke

INTRODUCTION

The purpose of this Note is to highlight the importance of state sovereignty in the midst of legal wars being waged by non-state actors. This Note begins by briefly explaining the concept of sovereignty as it relates to the maintenance of a legitimate global political system that respects the cultural differences and internal affairs of all states. Next, this Note provides brief explanations of universal (and extraterritorial) jurisdiction and the use of law to fight political battles with opponents, which this Note refers to as “Lawfare.” Finally, this Note lists the three gravest dangers that could result in the foreseeable future if the use of universal jurisdiction and Lawfare continues through nongovernmental organization (“NGO”) and non-state actor manipulation of the international legal system—namely the International Criminal Court (“ICC”). In order to give current relevance to the suppositions posited, this Note uses the sovereign State of Israel as the prototype to clearly display the use of such legal avenues, and how that poses a serious danger for other sovereign states. Although this Note does not devote much of its discussion to determining the morality of either side in the political issues surrounding Israel, it is important for the reader to understand the factual implications of Israel’s loss of sovereign decision-making. To begin the discussion, a brief overview of Israel’s modern history and some of the current issues causing conflict in the region is presented.

In 1933, the Conference of American States drafted the Montevideo Convention of the Rights and Duties of States that broadly listed the elements required for statehood recognition: a permanent population, a defined territory, a government, and the capacity to conduct international relations.³ Although methods of obtaining official state recognition are somewhat contested, it is widely accepted that once a state obtains the four elements above and is recognized by other states, then that state begins to enjoy the rights of political autonomy and sovereignty—the

¹ HENRY KISSINGER, DOES AMERICA NEED A FOREIGN POLICY? 275 (2001).

² EDMUND BURKE, THE BEST OF BURKE 363 (Peter J. Stanlis ed., 1963).

³ Montevideo Convention on the Rights and Duties of States art. 1, Dec. 26, 1933, 49 Stat. 30971; 165 L.N.T.S. 19 [hereinafter Montevideo Convention].

ability to determine internal affairs without fear that outside forces will interfere.⁴ That is, state sovereignty inherently resides with “the people [of that state] and is exercised through representative bodies [It] is essentially the power to make laws [T]o have sovereign power is to be beyond the power of others to interfere.”⁵ Again, under international law, “[e]ven where individual [and civilian] rights are concerned . . . states are responsible for respecting, protecting, and fulfilling the rights of their citizens, and if they don’t, they are answerable as states.”⁶

Unlike legitimate states, which automatically enjoy rights and obligations, international organizations, individuals, NGOs, and others derive their rights and duties in international law directly from different instruments, such as an organizational document or charter.⁷ After World War II, the United Nations (the “UN”), through its member states, has continued to develop international law, determining the rights and obligations of the “state” (such as the duty to protect civilians during times of war)⁸ in order to prevent the type of conflicts seen in World War I and World War II, despite its heavy emphasis on maintaining state sovereignty.⁹ Recently, however, the laws prohibiting state overreach and

⁴ See *Oppenheim’s International Law* (Robert Jennings & Arthur Watts eds., Thomson Reuters/Foundation Press 2010) in THE INTERNATIONAL LEGAL SYSTEM 208, 208–209 (Robert C. Clark et al eds., 6th ed. 2010) [hereinafter INTERNATIONAL LEGAL SYSTEM]; see also Aaron Kreuter, Note, *Self-Determination, Sovereignty, and the Failure of States: Somaliland and the Case for Justified Secession*, 19 MINN. J. INT’L L. 363, 365–66 (2010).

⁵ *Sovereignty*, CORNELL U.: LEGAL INFO. INST., <https://www.law.cornell.edu/wex/sovereignty> (last visited Mar. 25, 2016).

⁶ INTERNATIONAL LEGAL SYSTEM, *supra* note 4, at 500.

⁷ See Grant L. Willis, *Security Council Targeted Sanctions, Due Process and the 1267 Ombudsperson*, 42 GEO. J. INT’L L. 673, 706 (2011).

⁸ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 13, *adopted* June 8, 1977, 1125 U.N.T.S. 609, 1991 A.T.S. 29, 16 ILM 1391 (entered into force Dec. 7, 1978) [hereinafter Protocol II]. Protocol II also contains a provision related to state sovereignty. *Id.* at art. 3 (demonstrating that the Geneva Convention drafters and state representatives feared that sovereignty of nations might be violated by allowing a legal justification for intervention in matters that are internal matters of a sovereign state).

⁹ See Press Release, General Assembly, Lessons of Second World War Must Continue to Guide United Nations Work, General Assembly Told During Meeting Marking Seventieth Anniversary, U.N. Press Release GA/11641 (May 5, 2015), <http://www.un.org/press/en/2015/ga11641.doc.htm> (explaining that the purpose of the United Nations is to prevent the scourge of war for future generations); Press Release, General Assembly, Questions Related to State Sovereignty and Role of Security Council in International Peacekeeping Addressed During Assembly Discussion, U.N. Press GA/9629 (Oct. 7, 1999), <http://www.un.org/press/en/1999/19991007.ga9629.doc.html> (explaining that respect for state sovereignty is a building block of the United Nations); *The Foundation of International Human Rights Law*, UNITED NATIONS, <http://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/index.html> (last visited Mar. 25, 2016).

aggression have failed to do the same with respect to the rising influence of NGOs and non-state actors who use the technological advancements of twentieth century communication to bring political differences with sovereign states to the forefront of international legal discourse.¹⁰ Moreover, although most states have a national court system and de facto jurisdiction to try its own nationals, NGOs have championed the concept of “universal jurisdiction” in efforts to prosecute state officials with whom NGO officers and affiliates disagree.¹¹ States, which are obligated to pursue legal avenues to resolve disputes, recently have begun to use the ability of NGOs to bring claims in international courts as a method of committing warfare of a political and legal nature (i.e., Lawfare) against their political adversaries.¹² To begin this discussion, it is important to retrace the historical roots of Israel and its modern-day statehood.

I. MODERN HISTORY OF ISRAEL

On July 24, 1922, the Council of the League of Nations passed the *Mandate of Palestine* (the “Mandate”), which codified the international community’s stance on the future of Palestine.¹³ The Mandate stated that Britain and the allied powers would be responsible for “the establishment in Palestine of a national home for the Jewish people . . . [and] that nothing should be done which might prejudice the civil and religious rights of existing non-Jewish communities in Palestine.”¹⁴ In its twenty-eight articles, the Mandate went on to list the steps that would be taken while Britain (the “Mandatory” or official state authority over Palestine) controlled the land.¹⁵ Among these provisions the most important was:

In the event of the termination of the mandate hereby conferred upon the Mandatory, the Council of the League of Nations shall . . . [ensure] that the Government of Palestine will fully honour the financial obligations legitimately incurred by the Administration of Palestine during the period of the mandate,

¹⁰ See, e.g., KISSINGER, *supra* note 1, at 280–81 (noting that Amnesty International supported a complaint against certain NATO officials for actions in the Balkans); see also Anne Aly, *The Media and International Relations*, in ENCOUNTERS WITH WORLD AFFAIRS: AN INTRODUCTION TO INTERNATIONAL RELATIONS 348, 348 (Emilian Kavalski ed., 2015).

¹¹ See ANNE HERZBERG, NGO MONITOR, NGO “LAWFARE”: EXPLOITATION OF COURTS IN THE ARAB-ISRAELI CONFLICT 9–11 (2d ed. 2010).

¹² See *id.* at 11.

¹³ See *Mandate for Palestine*, League of Nations Doc. C529M.314 1922 VI (1922), http://avalon.law.yale.edu/20th_century/palmanda.asp; Richard Wilner, *Nationalist Movements and the Middle East Peace Process: Exercises in Self-Determination*, 1 U.C. DAVIS J. INT’L L. & POL’Y 297, 320, 324 (1995). The Mandate was—and is—considered valid international law. See *id.* at 320.

¹⁴ *Mandate for Palestine*, *supra* note 13, pmb1.

¹⁵ See generally *id.* arts. 1–28.

including the rights of public servants [and uphold the rights and of all the peoples in the territory as well as the functions of governance over the land of Palestine].¹⁶

The purpose of the Mandate was to ensure respect for all people living in Palestine regardless of religion, race, or nationality.¹⁷ It further sought to create a *single* government in Palestine (referred to as “the Government of Palestine”) that would continue the maintenance of the communities established in Palestine once the Mandate expired and Britain relinquished control.¹⁸ The Mandate, therefore, sought to ensure that a single government for the entire area was created that would respect the rights of all peoples living in the territory, and would include a “national home for the Jewish people.”¹⁹ Once the land was turned over to a legitimate governing authority, it would be recognized as the representative government of the land of Palestine.²⁰ Shortly thereafter, the Montevideo Convention established that a representative government was one of the four elements necessary in order for the recognition of legitimate “statehood” under international law.²¹

After World War II, the former League of Nations was rebirthed as the UN.²² As part of a desire to maintain respect for the sovereignty of states, the UN General Assembly passed a “Partition Plan” in 1947 which sought to codify definite territorial boundaries of a two-state system for the Jewish and Arab communities living in the land called Palestine.²³ The Arab community living in Palestine rejected the Partition Plan, but the Jewish community accepted it and formulated a governing authority over the State of Israel.²⁴ Some believe the Partition Plan gave Israel authority over a certain territorial boundary as defined in the resolution.²⁵

¹⁶ *Id.* at art. 28.

¹⁷ See Gal Asael, *The Law in the Service of Terror Victims; Can the Palestinian Authority be Sued in Israeli Civilian Courts for Damages Caused by Its Involvement in Terror Acts During the Second Intifada?*, THE ARMY LAW., July 2008, at 9; see also *Mandate for Palestine*, *supra* note 13, art. 15.

¹⁸ See *Mandate for Palestine*, *supra* note 13, art. 28.

¹⁹ *Id.* p.mbl.

²⁰ *Id.* art. 2.

²¹ See Montevideo Convention, *supra* note 3, art 1 (highlighting the importance of the provisions in the British Mandate requiring that the land in Palestine be turned over to a legitimate government of Palestine).

²² See *History of the United Nations*, UN.ORG, <http://www.un.org/en/sections/history/history-united-nations/index.html> (last visited Mar. 25, 2016).

²³ G.A. Res. 181 (II) A, Partition Plan for Palestine, at 133 (Nov. 29, 1947) [hereinafter Partition Plan for Palestine].

²⁴ See IAIN SCOBIE & SARAH HIBBIN, THE ISRAEL-PALESTINE CONFLICT IN INTERNATIONAL LAW: TERRITORIAL ISSUES 44, 53 (2009) (ebook).

²⁵ *Id.* at 46.

However, under international law, UN General Assembly resolutions are not binding law, but rather are considered firm suggestions in order to improve and manage international relations between states.²⁶

The Partition Plan was introduced to provide territorial boundaries so that statehood for both parties would be plausible under the Montevideo Convention guidelines—mandating that there be territorial boundaries.²⁷ The Arab community refused to accept the Partition Plan, which would have created a governing authority within a defined territory, thus relinquishing any claim to be a governing body in the land of Palestine as a legitimate state.²⁸ In consideration of the Mandate, Britain relinquished control over Palestine now that a legitimate governing body had been created within the Mandate area.²⁹ This effectively made the officials and representatives in the State of Israel the first legitimate government of Palestine (as described in the British Mandate), and the international community formally recognized Israel as a sovereign state, and offered it UN membership in 1948.³⁰

The desire of surrounding Arab states to destroy Israel, therefore, began in 1948.³¹ Arab leaders were adamant throughout the 1960s about ensuring that Israel would cease to exist.³² Israeli foreign ministers attempted to restore peace between Israel and its Arab neighbors through the avenue of the UN in 1960, but Egyptian President Gamal Abdel Nasser rejected all peace proposals stating that Egypt would “never recognize [the existence of a] Jewish state.”³³ President Nasser later made the following remarks to a congenial group of fellow Arab state supporters:

Israel and the imperialism around us, which confront us, are two separate things. There have been attempts to separate them, in

²⁶ See *The UN in Brief in INTERNATIONAL LEGAL SYSTEM*, *supra* note 4, at 269.

²⁷ See Partition Plan for Palestine, *supra* note 23, at 133; Montevideo Convention, *supra* note 3, art. 1.

²⁸ Robert Weston Ash, *Is Palestine a “State”?*, in *IS THERE A COURT FOR GAZA?* 441, 456–57 (Chantel Meloni & Gianni Tognoni eds., 2012).

²⁹ SCOBIE & HIBBIN, *supra* note 24, at 38–39, 44.

³⁰ S.C. Res. 273 (III), ¶2 (May 11, 1949).

³¹ See *Arab League Declaration on the Invasion of Palestine*, ISR. MINISTRY OF FOREIGN AFFAIRS, <http://www.mfa.gov.il/mfa/foreignpolicy/mfadocuments/yearbook1/pages/5%20arab%20league%20declaration%20on%20the%20invasion%20of%20pales.aspx> (last visited Mar. 25, 2016).

³² See *The Six-Day War: Background & Overview*, JEWISH VIRTUAL LIBR. (citing SAMUEL KATZ, *BATTLEGROUND: FACT & FANTASY IN PALESTINE* 110 (1979); ISI LEIBLER, *THE CASE FOR ISRAEL*, 59-60 (1972); HOWARD SACHAR, *A HISTORY OF ISRAEL: FROM THE RISE OF ZIONISM TO OUR TIME* 618, 620 (1979)), http://www.jewishvirtuallibrary.org/jsource/History/67_War.html (last visited Mar. 25, 2016) (describing the history of the Six Day War through the 1960's).

³³ *Id.*

order to break up the problems and present them in an imaginary light as if the problem of Israel is the problem of the refugees, by the solution of which the problem of Palestine will also be solved and no residue of the problem will remain. The danger of Israel lies in the very existence of Israel as it is in the present and in what she represents.³⁴

In 1964, the Palestinian Liberation Organization (the “PLO”) was created with a Charter that called for the destruction of Israel.³⁵ Immediately after the PLO’s acceptance by the Arab community, there were over 110 violent terrorist attacks carried out by Palestinians targeting Israeli civilians within Israel’s territorial borders.³⁶ However, without a legitimate governmental representative, it was unlikely that Palestinian authorities were able to financially support these attacks or plan them.³⁷ Israeli intelligence soon discovered that the governments of Egypt and Syria were behind the funding of the mid-1960s terrorist attacks targeting Israeli civilians.³⁸ Syrian forces utilized the Golan Heights (which range about 3,000 meters high) to launch targeted attacks against Israeli civilians—namely, farmers and families living in community shelters.³⁹

Although the UN Security Council attempted to condemn the Syrian military attacks on Israeli civilians from the Golan Heights, the Soviet Union vetoed the resolution. Israel retaliated against Syria military targets to protect its civilians, only to be condemned by the UN Security Council directly thereafter.⁴⁰ Finally, in May 1967, Israel witnessed Egyptian troops gathering en masse on the Sinai border while Syrian troops continued to gather at the Golan Heights.⁴¹ Egypt ordered the UN Secretary General to remove the 1956 buffer force and the UNEF,⁴² and announced its true intent in association with Syria:

³⁴ *Id.* (quoting YEHOSEFAT HARKABI, ARAB ATTITUDES TO ISRAEL 27 (Misha Louvish trans., 1972)).

³⁵ *Id.* (citing HARKABI, *supra* note 34, at 27; KATZ, *supra* note 32, at 110).

³⁶ *Id.* (citing SACHAR, *supra* note 32, at 618, 620).

³⁷ See Barry Rubin, *Israel, the Palestinian Authority, and the Arab States*, 36 MIDEAST SECURITY & POL’Y STUD. 3 (1998) (quoting WALID W. KAZZIHA, PALESTINE IN THE ARAB DILEMMA 15-19 (1979); Yezid Sayigh, *Cobban: The Palestinian Liberation Organization*, 13 J. PALESTINE STUD. 114, 115 (1984)).

³⁸ *The Six-Day War*, *supra* note 32.

³⁹ *Id.*

⁴⁰ *Id.*; see also S.C. Res. 228, ¶ 2–3 (Nov. 25, 1966). *Contra* S.C. Res. S/5407 ¶¶ 1–2 (Aug. 29, 1963) (vetoed). See also S.C. Official Records Meeting 1063, ¶ 64 (Sept. 3, 1963) (noting that this resolution was vetoed by the Union of Soviet Socialist Republics).

⁴¹ *The Six-Day War*, *supra* note 32.

⁴² See *id.* (discussing the emergency force (UNEF) that the UN stationed as a buffer between Israel and Egypt in the Sinai Peninsula in 1956 to protect and prevent conflict).

As of today, there no longer exists an international emergency force to protect Israel. We shall exercise patience no more. We shall not complain any more to the UN about Israel. The sole method we shall apply against Israel is total war, which will result in the extermination of Zionist existence.⁴³

After signing a defense pact with President Nasser in May 1967, King Hussein of Jordan announced:⁴⁴

The armies of Egypt, Jordan, Syria and Lebanon are poised on the borders of Israel . . . to face the challenge, while standing behind us are the armies of Iraq, Algeria, Kuwait, Sudan and the whole Arab nation. This act will astound the world. Today they will know that the Arabs are arranged for battle, the critical hour has arrived. We have reached the stage of serious action and not declarations.⁴⁵

Understanding that Israel was at a vast disadvantage to defend itself once attacked on all sides from so many opposing forces, Israeli forces realized that the only way to avoid elimination was a surprise attack on the Egyptian forces in Sinai.⁴⁶ In the most unexpected victory of the twentieth century, Israel prevailed against the four Arab countries that sought to attack it, and the armistice lines were redrawn to protect Israel from future attacks by Arab forces.⁴⁷ These armistice lines are called the “1967 borders.”⁴⁸ They never belonged to Palestine because there was no Palestinian state in 1967.⁴⁹ Despite the end of hostilities, Arab heads of state convened in Khartoum, Sudan on September 1, 1967, announcing their famous “Three NOs’ to Israel: ‘No peace, [n]o recognition, [n]o

⁴³ LEIBLER, *supra* note 32, 59–60.

⁴⁴ *Id.*

⁴⁵ *Id.* at 60 (alterations in original).

⁴⁶ See *The Six-Day War*, *supra* note 32.

⁴⁷ See Kitty O. Cohen, *The Future of Jerusalem: A Symposium*, 45 CATH. U.L. REV. 861, 932 (1996).

⁴⁸ Amanda Berman, *Isn't It Ironic? The Undermining of American Public Policy by American Tax Law, and the Ramifications on Middle East Peace*, 10 CARDOZO PUB. L. POL'Y & ETHICS J. 81, 110 (2011).

⁴⁹ Ash, *supra* note 28, at 456.

negotiations.”⁵⁰ In short, this resolution called for continued belligerency towards Israel.⁵¹

Then in July 1968, at a meeting of the Palestine National Council (PNC) in Cairo, the original PLO Charter was amended naming the fedayeen (those who sacrifice themselves against Israel) as the “nucleus of the armed struggle.”⁵² Furthermore, the PNC suggested that Israel should be replaced by a “democratic, secular” state.⁵³ The 1968 PLO Charter also stated that, “the liberation of Palestine . . . is a national duty and it attempts to repel the Zionist and imperialist aggression against the Arab homeland, and aims at the elimination of Zionism in Palestine [which includes all the territory of Israel].”⁵⁴

Israel was the only legitimate governing authority over all of Palestine, and under the Mandate, was the only recognized government of Palestine, which maintained the duties and freedoms for the entire land.⁵⁵ All concessions, including the relinquishing of captured territories, that Israel has given to help establish a Palestinian state and to procure peace in the region have been met with belligerency and violence aimed at Israeli citizens.⁵⁶ Today, such belligerency is seen through the violence incited by the Islamic Resistance Movement (Hamas), which was popularly elected into political office in 2006.⁵⁷ Hamas used the impoverished conditions of Palestinians living in Gaza⁵⁸ to gain political

⁵⁰ League of Arab States [LAS], *The Khartoum Resolutions*, ¶ 3 (Sept. 1, 1967), http://www.cfr.org/world/khartoumresolution/p14841?breadcrumb=%2Fpublication%2Fpublication_list%3Ftype%3Dessential_document%26page%3D69 (last visited Mar. 25, 2016); see also *The Middle East Conflict Is Hard to Solve but Easy to Explain*, DENNIS PRAGER (July 18, 2006), <http://www.dennisprager.com/the-middle-east-conflict-is-hard-to-solve-but-easy-to-explain/>.

⁵¹ See generally *The Khartoum Resolutions*, *supra* note 50 at ¶¶ 3, 6 (noting that adopting this resolution forbade signatory nations to negotiate with Israel and required them to strengthen their militaries in preparation for “all eventualities”).

⁵² IAN J. BICKERTON & CARLA L. KLAUSNER, *A CONCISE HISTORY OF THE ARAB-ISRAELI CONFLICT* 163 (4th ed. 2002).

⁵³ *Id.*

⁵⁴ Palestinian Liberation Org. [PLO] Charter, arts. 15, 19.

⁵⁵ See Ash, *supra* note 28, at 455–57; see also Mandate for Palestine, *supra* note 13.

⁵⁶ See Jerrold L. Sobel, *Israel-Palestine’ Insanity Must Stop*, AM. THINKER (June 9, 2013), http://www.americanthinker.com/articles/2013/06/israel-palestine_insanity_must_stop.html.

⁵⁷ See Paul Alster, *Hamas Backers Spend Fortunes on Rockets and Tunnels While Gazans Live in Misery*, FOX NEWS (Aug. 08, 2014), <http://www.foxnews.com/world/2014/08/08/hamas-backers-spend-fortunes-on-rockets-and-tunnels-while-gazans-live-in-misery.html>; see also, AARON D. PINA, CONG. RESEARCH SERV., RL33269, *PALESTINIAN ELECTIONS* 6, n.13 (2006).

⁵⁸ See Aster, *supra* note 57 (describing the poverty of Gazans while Hamas spends money on weapons).

recognition by offering fresh water, electricity, food, and medical care.⁵⁹ However, since the election, Hamas has utilized public funding and power to continue its quest to “annihilate” Israel.⁶⁰

Despite Israel’s legal ascension to statehood and territorial boundaries, its enemies have used terminology (such as “occupied territory”) as propaganda to confuse the historical facts of Israel’s right to exist as a legitimate state in the land that was formally called Palestine: just as the Islamic Republic of Iran is a legitimate state that sits in the land that was formally called “Persia”; China and Russia sit in areas of the land formally called “Mongolia”; the U.S. state of California sits in the land formally called “Mexico.”⁶¹ The public propaganda to demonize Israel for its legitimate territorial victories has ignited a legal war utilizing hard and soft power attacks from Israel’s political enemies including Arab states, the European community, and NGOs.⁶² Allowing this to continue against a sovereign state sets a dangerous precedent: political enemies of sovereign states could use propaganda to distort facts, and dehumanize nation-states, ethnic groups, or religions.

II. DEFINITIONS AND STATUS OF UNIVERSAL JURISDICTION AND POLITICAL LAWFARE

This section will briefly define concepts of sovereignty, jurisdiction, and political Lawfare, which has emerged since the creation of the ICC and the Durban Conference of 2001.⁶³ The Treaty of Westphalia in 1648 marked the beginning of international law—asserting that each ruler of an individual state was free to dictate the internal affairs of his territory.⁶⁴ This was the first codification of “state sovereignty.”⁶⁵ Thereafter, the creation and expansion of intergovernmental organizations—such as the modern UN—have sought to strengthen the territorial integrity of each

⁵⁹ See Kim Murphy, *Hamas Victory Is Built on Social Work*, L.A. TIMES (Mar. 02, 2006), <http://articles.latimes.com/2006/mar/02/world/fg-charity2>.

⁶⁰ Alster, *supra* note 57.

⁶¹ See AVINOAM SHARON, WHY IS ISRAEL’S PRESENCE IN THE TERRITORIES STILL CALLED “OCCUPATION”? 3–4 (2009) (ebook) (demonstrating how what is happening in the West Bank is not an occupation); See, e.g., T. Cuyler Young, *Ancient Iran*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/place/ancient-Iran> (last updated Nov. 4, 2015); Alan J.K. Sanders, *Mongolia*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/place/Mongolia> (last updated Feb. 5, 2015); *Treaty of Guadalupe Hidalgo*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/event/Treaty-of-Guadalupe-Hidalgo> (last updated June 7, 2015).

⁶² See Gerald M. Steinberg, *Soft Powers Play Hardball: NGOs Wage War Against Israel*, 12 ISR. AFFAIRS 748, 748-49, 752–56 (2006).

⁶³ HERZBERG, *supra* note 11, at 17.

⁶⁴ Farid Mirbagheri, *Conflicting Interests: The United Nations Versus Sovereign Statehood*, 2 GLOBAL DIALOGUE 1, 1 (2000).

⁶⁵ See *id.*

sovereign state while also upholding the concept of intergovernmental dialogue and cooperation in order to maintain peace: “all Members [must] respect the sovereignty, territorial integrity and political independence of other states.”⁶⁶ In 2004, the UN General Assembly enacted a resolution declaring that, “the [s]tate enjoys immunity . . . from the jurisdiction of the courts of another [s]tate.”⁶⁷ Although the resolution is not yet in force, its articles have influenced subsequent legal decisions, and it is already considered customary international law.⁶⁸

Jurisdiction has been defined as “the geographic area over which authority extends; legal authority; the authority to hear and determine causes of action.”⁶⁹ That is, historically and traditionally “jurisdiction to adjudicate a case exists only if there is a territorial or national nexus between the court, the parties, and/or the events at issue.”⁷⁰ In international law and cases involving foreign nationals, three bases for jurisdiction are generally recognized: “the *Territorial Principle*, the *Nationality Principle*, and the *Effects Principle*.”⁷¹ Universal jurisdiction, however, is a process that allows states to exercise jurisdiction over an act committed by a foreigner on foreign soil when the act is so universally condemned that the prosecuting state has an interest in exercising jurisdiction to combat the act in question.⁷² In other words, these crimes are punishable by any state, even if there is no link to the crime at issue.⁷³

Those who advocate for the use of universal jurisdiction argue that individuals who violate international law are an enemy of all mankind, and therefore are subject to prosecution before any internationally

⁶⁶ See, e.g., *Purposes and Principles of the United Nations*, UNITED NATIONS, <http://www.un.org/en/sc/repertoire/principles.shtml> (last visited Mar. 25, 2016).

⁶⁷ G.A. Res. 59/38, United Nations Convention on Jurisdictional Immunities of States and Their Property, art. 5 (Dec. 2, 2004).

⁶⁸ See David P. Stewart, *The UN Convention on Jurisdictional Immunities of States and Their Property*, 99 AM. J. INT'L L. 194, 194, 210–11 (2005).

⁶⁹ *Jurisdiction*, FREE LEGAL DICTIONARY, <http://legal-dictionary.thefreedictionary.com/jurisdiction> (last visited Mar. 25, 2016).

⁷⁰ HERZBERG, *supra* note 11, at 8.

⁷¹ *Id.*

⁷² Susan W. Tiefenbrun, *Semiotic Definition of “Lawfare,”* 43 CASE W. RES. J. INT'L L. 29, 57 (2010); see also *United States v. Yousef*, 327 F.3d 56, 104 (2d Cir. 2003); *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex Parte Pinochet Ugarte* (No. 3) [2000] 1 A.C. 147 (HL) 275–76 (appeal taken from Eng.).

⁷³ *Universal Jurisdiction over War Crimes*, INT'L COMM. OF THE RED CROSS (Mar. 2014), <https://www.icrc.org/en/download/file/1086/universal-jurisdiction-icrc-eng.pdf>.

recognized tribunal through the exercise of universal jurisdiction.⁷⁴ Amnesty International is one of the major NGOs in favor of adjudicating international crimes locally,⁷⁵ and recently stated that, “universal jurisdiction is the principle that every country has an interest in bringing to justice the perpetrators of grave crimes, no matter where the crime was committed, and regardless of the nationality of the perpetrators or their victims.”⁷⁶ However, some adversaries of universal jurisdiction argue that it is unnecessary because only the “powerful countries” will be the victors, and will influence unduly the exercise of extraterritorial or universal jurisdiction.⁷⁷ Two ways universal jurisdiction claims have been brought are (1) through national courts of unattached states (states not connected to the perpetrators or victims of the alleged act), and (2) through the jurisdiction of the ICC or a court that tries specific instances of international crimes (such as the International Criminal Tribunal for the Former Yugoslavia, or the International Criminal Tribunal for Rwanda).⁷⁸

In the 1960s, Israel was one of the first states to invoke the use of universal jurisdiction in its groundbreaking case against Adolf Eichmann, one of the masterminds of the Holocaust.⁷⁹ Israeli forces went to Argentina to apprehend Adolf Eichmann, and prosecute him in an Israeli court of law.⁸⁰ Those who advocate for the spread of universal jurisdiction cite to the Eichmann case as precedent for states to exercise universal jurisdiction against foreign nationals.⁸¹ However, the Eichmann case is largely differentiated in that the crimes Adolf Eichmann committed

⁷⁴ See AMNESTY INT’L, UNIVERSAL JURISDICTION: A PRELIMINARY SURVEY OF LEGISLATION AROUND THE WORLD 1, 6 (Oct. 2011) (citing Permanent Rep. of Tanzania to the U.N., Letter dated June 29, 2009 from the Permanent Rep. of Tanzania to the United Nations addressed to the Secretary-General, U.N. Doc. A/63/237/Rev.1 (July 23, 2009)), <https://www.amnesty.org/en/documents/IOR53/019/2012/en/>.

⁷⁵ *Id.* at 10–11.

⁷⁶ *Universal Jurisdiction*, AMNESTY INT’L, <http://www.amnestyusa.org/our-work/issues/international-justice/universal-jurisdiction> (last visited Mar. 25, 2016); see also William J. Aceves, *Liberalism and International Legal Scholarship: The Pinochet Case and the Move Toward a Universal System of Transnational Law Litigation*, 41 HARV. INT’L L. J. 129, 153–155 (2000) (discussing why there needs to be an international consensus on prosecuting genocide crimes).

⁷⁷ See Lama Abu-Odeh, *A Radical Rejection of Universal Jurisdiction*, 116 YALE L. J. POCKET PART 393, 394 (2007), <http://yalelawjournal.org/forum/a-radical-rejection-of-universal-jurisdiction>.

⁷⁸ HERZBERG, *supra* note 11, at 9; PRINCETON PROJECT ON UNIVERSAL JURISDICTION, THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 23–24 (2001), https://lapa.princeton.edu/hosteddocs/unive_jur.pdf [hereinafter THE PRINCETON PRINCIPLES].

⁷⁹ Attorney General of Israel v. Adolf Eichmann, 36 I.L.R. 277, 287, 303–04 (Isr. S. Ct. 1962).

⁸⁰ See *id.* at 304–05.

⁸¹ See, e.g., AMNESTY INT’L, EICHMANN SUPREME COURT JUDGMENT 4–5 (2012), <https://www.amnesty.org/download/Documents/24000/ior530132012en.pdf>.

directly affected Jewish people currently residing in Israel—many who were survivors of the Holocaust.⁸² The District Court of Jerusalem established Israeli jurisdiction over the Eichmann trial by adhering to the effects principle of jurisdiction,⁸³ but also displayed its intent to abide by the rule of specifically applying the law to affected Israeli citizens only, and not extending its judicial reach:

These prefatory remarks do not mean that we disregard the great educational value implicit in the very holding of this trial; *both for those who live in Zion and for those beyond the confines of this State*. To the extent that this result has been achieved in the course of the proceedings, it is to be welcomed. Thus, the evidence given at this trial by survivors of the [Holocaust], who poured out their hearts as they stood in the witness box, will certainly provide valuable material for the research worker and the historian, but as far as this Court is concerned all these things are merely a by-products of the trial.⁸⁴

Universal jurisdiction should be used only in similar cases of genocide, and not merely to delegitimize standard defense tactics such as those used by Israel against the Hamas in Palestine.⁸⁵ Universal jurisdiction is only illegitimate if a purposeful assertion of an alleged international crime is incorrect, and the asserting power has knowledge of this.⁸⁶ Several states have attempted to exercise universal jurisdiction over Israeli officials for acts that did not affect that state.⁸⁷ The Spanish government's so-called "vigilante justice" has served only as a political stunt to punish individuals involved in conflicts that Spain politically

⁸² See *Eichman*, 36 I.L.R. at 304.

⁸³ See *Attorney General of Israel v. Adolf Eichmann*, 36 I.L.R. 18, 18-19, 25 (Isr. Dist. Ct. 1961).

⁸⁴ *Id.* at 19 (emphasis added).

⁸⁵ DIANE MORRISON & JUSTUS REID WEINER, *CURBING THE MANIPULATION OF UNIVERSAL JURISDICTION* 12 (2010) (ebook).

⁸⁶ See Michael P. Scharf, *Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States*, 35 *NEW ENG. L. REV.* 363, 378-79, 382 (2001).

⁸⁷ See Silvia Nicolaou Garcia, *European Efforts to Apply the Principle of Universal Jurisdiction Against Israeli Officials*, *MIDDLE E. MONITOR* (July 2009), <https://www.middleeastmonitor.com/reports/by-silvia-nicolaou-garcia/54-universal-jurisdiction-against-israeli-officials>.

differs with.⁸⁸ Another state that attempted to extend its judicial reach was Belgium, which arranged to arrest and indict Israeli Prime Minister Ariel Sharon in 2001.⁸⁹ The aim of Spain and Belgium's universal jurisdiction attempts was highlighted in the following statement from a Middle East Monitor article: "Israeli and US intervention was an unprecedented act of interference in a sovereign state's judicial and political processes which weakened a number of legally sound attempts at attaining international justice in Belgian courts."⁹⁰

In another effort to end impunity for individuals who perpetrate the most serious crimes against humanity, the global community passed the Rome Statute, which created the ICC in The Hague.⁹¹ One of its stated purposes was to reaffirm the principles of the Charter of the UN emphasizing that, "all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State."⁹² However, arguments that domestic courts should invoke universal jurisdiction came before the creation of the ICC.⁹³ According to its stated purposes, the ICC effectively ended any necessity for states to interfere in the foreign affairs of another state in the name of "ending impunity for international criminals," but since the ICC refused to add terrorism to the list of crimes under its jurisdiction, the court is only able to prosecute state officials who consent to ICC jurisdiction, or who are unwilling to prosecute

⁸⁸ See Soeren Kern, *Spain's Anti-Semitism: Continuing "Lawfare," Selective Application of the Law*, GATESTONE INST. (Nov. 3, 2010, 5:00 AM), <http://www.gatestoneinstitute.org/1644/spain-anti-semitism-lawfare>; see, e.g., Garcia, *supra* note 87. ("In Madrid, 6 years later and a few days after the Gaza invasion of January 2009, judge Fernando Andreu Merelles decided to open a criminal investigation, based on universal jurisdiction, against 7 politicians and Israeli officials and commanders allegedly guilty of war crimes and crimes against humanity (amongst them; Dan Halutz, chief of the IDF, Benjamin Ben-Eiezer, ministry of defense, Moshe Yaalon, Doron Almog, Giora Eiland, Michael Herzog and Abraham Dichter). Since Israel did not supply information about the existence of any judicial procedures related to that military operation and showed a lack of will to help the judge, the Spanish tribunal decided that the investigation would be carried out under Spanish jurisdiction.") Belgium has also improperly used international law. See Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.) Judgment, 2002 I.C.J. Rep. 6, ¶ 1 (Feb. 14) (demonstrating that when Belgium attempted to prosecute and arrest Chadean dictator, the International Court of Justice ruled that, "Belgium had violated international law by issuing an arrest warrant against a . . . foreign minister of another state.").

⁸⁹ See Diane F. Orentlicher, *Universal Jurisdiction after Pinochet: Prospects and Perils* 6 (Feb. 21, 2003) (unpublished manuscript) (on file with the Center for Global Peace & Conflict Studies, University of California, Irvine), http://www.cgpac.uci.edu/files/cgpacs/docs/2010/working_papers/diane_orentlicher_universal_jurisdiction.pdf.

⁹⁰ See Garcia, *supra* note 87.

⁹¹ See Rome Statute of the International Criminal Court, arts. 1–3, July 17, 1998, 2187 U.N.T.S. 90.

⁹² *Id.* p.mbl.

⁹³ See *Universal Jurisdiction*, GLOBAL POLY F., <https://www.globalpolicy.org/international-justice/universal-jurisdiction-6-31.html> (last visited Mar. 25, 2016).

certain international criminals.⁹⁴ Since the ICC's creation, extraterritorial claims have failed in national courts that invoked universal jurisdiction.⁹⁵ However, this leaves the ICC in a strategic position to police cases brought before them by any non-state actor who alleges that a political opponent is an international criminal, whether or not such opponent has consented to ICC jurisdiction.⁹⁶ The preamble of the Rome Statute states that the ICC shall be "*complementary* to national criminal jurisdictions."⁹⁷ This means that national criminal courts in sovereign states take precedent over the jurisdiction of the ICC and only in certain cases will the ICC be able to adjudicate a claim.⁹⁸ Applying a treaty or statute-based universal jurisdiction to nationals of non-party states is another obstacle that advocates and NGOs are attempting to remove.⁹⁹ In the case of Israeli officials, universal jurisdiction advocates argue that,

Because Israel did not ratify the Rome Treaty which established the International Criminal Court, universal jurisdiction remains the only mechanism whereby international law can extend to its citizens. This is strengthened by the fact that there is no chance of an ad hoc tribunal being established in the foreseeable future in the case of Israel, as the US would veto such a proposal at the UN Security Council.¹⁰⁰

This statement reflects the presupposition of some NGOs that Israeli actions are already violations of international law since it assumes the only obstacle to adjudicating Israeli officials is the "US veto."¹⁰¹ It offers no fact or detailed explanation of Israeli actions; and it does not apply basic legal principles in civilized societies that allow offenders innocence

⁹⁴ See Rome Statute, pmb., arts. 12, 13, 17; HERZBERG, *supra* note 11, at 14.

⁹⁵ Dalila V. Hoover, Universal Jurisdiction Not So Universal: A Time to Delegate to the International Criminal Court 25-26 (June 4, 2011) (unpublished manuscript) (on file with the Cornell Law Library), http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1081&context=lps_clap.

⁹⁶ See, e.g., Deborah Weiss, *Welcoming Terrorists at the International Criminal Court*, FRONTPAGE MAG (Jan. 12, 2015), <http://www.frontpagemag.com/fpm/249289/welcoming-terrorists-international-criminal-court-deborah-weiss> (demonstrating a recent example of Lawfare used by non-state actors with links to terrorism).

⁹⁷ Rome Statute, pmb. (emphasis added).

⁹⁸ See Hoover, *supra* note 95, at 20-21.

⁹⁹ See Scharf, *supra* note 86, at 374 (citing *United States v. Yunis*, 681 F. Supp. 896 (D.D.C. 1988); *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1991)) (asserting that, "there is no duty under existing customary international law for non-parties to prosecute or extradite persons But this does not necessarily signify that the State parties are prevented by international law from exercising treaty-based jurisdiction to prosecute offenders found in their territory who are nationals of Non-Party States.").

¹⁰⁰ Garcia, *supra* note 87.

¹⁰¹ See *id.*

until proven guilty. Lawfare is a form of “soft power” used by political enemies of a state in order to delegitimize and dehumanize that state in the public eye.¹⁰² It is a “weapon designed to destroy the enemy by using, misusing, and abusing the legal system and the media in order to raise a public outcry against that enemy.”¹⁰³ It is led by certain aggressive NGOs utilizing the rhetoric of international law and human rights (oftentimes advocating for the prosecution of so-called Israeli “war criminals”), and who are funded by “the European Union, European governments, George Soros, the Ford Foundation, and others.”¹⁰⁴ Therefore, it is no surprise that the European Union recently voted to remove Hamas from the list of terrorist organizations.¹⁰⁵

NGOs involved in Lawfare attacks against sovereign states issue press releases and lengthy “research reports” that condemn the states they politically differ with—using loaded terminology to sway global opinion.¹⁰⁶ The NGOs also submit written statements, regularly, to UN committees and other international bodies that, “quote other NGO publications, repeating and entrenching unsubstantiated, and in some cases, entirely false claims.”¹⁰⁷ UN special rapporteurs and UN or European Union commissioned studies also rely heavily upon these NGO reports to use as “substantial evidence” in political and diplomatic dialogue.¹⁰⁸

At the Durban Conference in 2001, NGOs gathered to publically condemn the State of Israel and promote a boycott of Israeli industries in order to strangle the Israeli economy.¹⁰⁹ It was reported that, “NGO superpowers with budgets in the tens of millions of dollars, such as Human Rights Watch, Amnesty International and the International Federation of Human Rights (France), have supported these efforts by providing publicity, organizing demonstrations and issuing reports

¹⁰² See Anne Herzberg, *Israel vs. the International Criminal Court*, JEWISH IDEAS DAILY (Nov. 29, 2010) [hereinafter *Israel v. ICC*], <http://www.jewishideasdaily.com/767/features/israel-vs-the-international-criminal-court>.

¹⁰³ Tiefenbrun, *supra* note 72, at 31.

¹⁰⁴ HERZBERG, *supra* note 11, at 6; *Israel v. ICC*, *supra* note 102.

¹⁰⁵ Conal Urquhart, *European Union Removes Hamas from Its Terrorist List*, TIME (Dec. 17, 2014), <http://time.com/3637355/european-union-hamas-terrorist-list>.

¹⁰⁶ HERZBERG, *supra* note 11, at 6.

¹⁰⁷ *Id.*

¹⁰⁸ See *id.* at 32.

¹⁰⁹ See *id.* at 17; see also, Tammi Rossman-Benjamin, *From Durban to Los Angeles: The BDS Movement's Long Trail of Anti-Semitism*, JNS.ORG (Mar. 12, 2015), <http://www.jns.org/latest-articles/2015/3/12/from-durban-to-los-angeles-the-bds-movements-long-trail-of-anti-semitism> (claiming that the Durban conference is associated with anti-Semitism).

dangerous form of Lawfare.¹¹⁶ Legal commentators recently noted that with the rise in Lawfare against Israel and the United States, if the UN wins the legal argument on criminally prosecuting nations who defend themselves when attacked, then those nations will no longer have a legal right to defend themselves.¹¹⁷ The next section will discuss three major dangers to an increase in universal jurisdiction claims, and the NGO targeting of sovereign states via Lawfare.

III. DANGERS AND IMPLICATIONS OF INCREASED USAGE

A. NGO political and legal power remaining unchecked would inevitably result in a NGO-ICC coalition that holds universal and international jurisdiction—threatening to make domestic and local courts obsolete in the face of NGO-ICC political and legal interests.

The International Court of Justice (the “ICJ”) issued a judgment noting its concern about the spread of universal jurisdiction. The decision expressed the ICJ’s strong preference for overarching safeguards that must be in place if a state conducts in absentia jurisdiction over another foreign national, and that the disregarding of impunity of such individuals would not disrupt relations among states.¹¹⁸ With no system of checks on NGO or ICC expansion and power, both organizations would be free to bring and adjudicate claims involving sovereign state policy and domestic affairs.¹¹⁹ The legitimate state system could be seen as weaker and less likely to promote human rights as NGOs or the ICC could act without any check on decisions or power.¹²⁰ The diplomatic protection that state officials traditionally enjoy in host or foreign countries would disappear in favor of politically-motivated arbitrary detentions by the ICC or other

¹¹⁶ See Lior A. Brinn, *The Israeli Anti-Boycott Law: Balancing the Need for National Legitimacy Against the Rights of Dissenting Individuals*, 38 BROOK. J. INT’L L. 346, 350–51 (2012).

¹¹⁷ See JAY SEKULOW ET AL., RISE OF ISIS: A THREAT WE CAN’T IGNORE 83 (2014).

¹¹⁸ See Arrest Warrant of 11 April 2000 (Dem. Rep. Congo. v. Belg.), Judgment, 2002 I.C.J. Rep. 33–34, ¶ 78 (Feb. 14) (holding that Belgium must cancel an international arrest warrant issued in absentia by a Belgian investigating judge against the Congolese former minister of foreign affairs, Mr. Abdulaye Yerodia Ndombasi, because the warrant failed to respect immunity from criminal jurisdiction and inviolability that Mr. Ndombasi enjoyed under international law).

¹¹⁹ See KISSINGER, *supra* note 1, at 279, 281.

¹²⁰ See *id.*

courts exercising universal jurisdiction on behalf of an NGO with a purely political agenda.¹²¹

[T]he immunities enjoyed under international law by an incumbent or former Minister of Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances. First, such persons enjoy no criminal immunity under international law in their own countries, and thus may be tried by those countries' courts in accordance with the relevant rules of domestic law. Secondly, they will cease to enjoy immunity from foreign jurisdiction if the state which they represent or have represented decides to waive that immunity.¹²²

In *Yerodia*, the ICJ concluded that Belgium violated its obligation toward the Democratic Republic of Congo by failing "to respect the immunity of the incumbent Minister for Foreign Affairs . . . and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law."¹²³ The power of judicial panels at the ICC would remain unchecked; and the court could potentially become a global judiciary whose ability to procure warrants and arrest any individual would exceed the powers and sovereignty of any state.¹²⁴ The ICJ also has noted that there are competing and equally important interests both for advocates and critics of universal jurisdiction: "[T]he interest of the community of mankind to prevent and stop impunity for perpetrators of grave crimes [is valid; however], on the other side, there is the interest . . . to allow [states] to act freely on the inter-State level without unwarranted interference."¹²⁵

The ICC has jurisdiction over individuals who commit international crimes falling under the following categories: war crimes, crimes against humanity, genocide, and the crime of aggression.¹²⁶ Although the Rome Statute claims that the ICC only may have jurisdiction over individuals

¹²¹ See David Leys, *Diplomatic Protection and Individual Rights: A Complementary Approach*, 57 HARV. INT'L L. J. ONLINE 1, 1–2 (2016), http://www.harvardilj.org/wp-content/uploads/January-2016_Vol-57_Leys1.pdf (describing how, in light of the fact that individuals are becoming the subject of international law at an increasing rate, diplomatic protection may seem redundant); KISSINGER, *supra* note 1, at 279, 281.

¹²² *Arrest Warrant*, 2002 I.C.J. Rep. at 26, ¶ 61.

¹²³ *Id.* at 30, ¶ 71.

¹²⁴ See, e.g., Human Rights Council Res. S-21/1, U.N. Doc. A/HRC, at 2–3 (July 23, 2014) (demonstrating how the international community is already mobilizing global resources, which indicates what a global force the ICC could become).

¹²⁵ *Arrest Warrant*, 2002 I.C.J. Rep. at 85, ¶ 75 (holding that the issuance of the warrant without an actual arrest constituted a violation of Belgium's duties to the Congo).

¹²⁶ See Rome Statute of the International Criminal Court, art. 5, July 17, 1998, 2187 U.N.T.S. 90.

who consent to it, those abusing the power of the ICC often utilize a narrow exception: the ICC may exert jurisdiction over any individual regardless of consent if the national judicial system of the accused is either ill-equipped, or the state wherein the accused resides is unwilling to prosecute the alleged criminal.¹²⁷ If the power of the ICC extends such that it ceases to require state consent, then it could easily become the global adjudicator—making courts of domestic and local jurisdiction fundamentally obsolete and subject to its rulings.¹²⁸ The International Committee on the Red Cross states on its website that the ICC “is not intended to take over jurisdiction exercised by national courts: the ICC is intended to exercise its jurisdiction only when the state is unwilling or genuinely unable to prosecute. States continue to have the primary duty to prosecute suspected war criminals before [their national] courts.”¹²⁹

However, if the accusations of state officials are used as Lawfare tactics, then it will certainly follow that sovereign states are unwilling to prosecute for false claims and political accusations.¹³⁰ The Supreme Court of Israel ardently protects the civil and political rights of Israeli citizens, and respects the separation of powers with the Knesset (i.e., Israel’s national legislature) to the point that the court has overturned Knesset laws that conflict with basic fundamental rights.¹³¹ In recent years, the court has begun to use such basic laws to judicially review the legislation of the Knesset, and when necessary, has conducted investigations of state officials.¹³² This clearly does not resemble a state that is incapable of prosecuting its citizens or officials for serious crimes. Yet the UN General Assembly operates on the basis of the equality of all member states. That

¹²⁷ *Id.* pmb1, art. 17.

¹²⁸ *See, e.g.,* Weiss, *supra* note 96 (implying that the ICC’s unchecked power could lead to any number of negative outcomes).

¹²⁹ *Rome Statute of the International Criminal Court, 17 July 1998*, INT’L COMMITTEE RED CROSS, <https://www.icrc.org/ihl/INTRO/585?OpenDocument> (last visited Mar. 25, 2016).

¹³⁰ *See* David Scheffer, *Whose Lawfare Is It, Anyway?*, 43 CASE W. RES. J. INT’L L. 215, 216 (2010).

¹³¹ *Israel: Supreme Court*, CODICES, [http://www.codices.coe.int/NXT/gateway.dll/CODICES/descriptions/eng/asi/isr?fn=document-frame.htm&f=templates\\$3.0](http://www.codices.coe.int/NXT/gateway.dll/CODICES/descriptions/eng/asi/isr?fn=document-frame.htm&f=templates$3.0) (last visited Feb. 19, 2016) This source states that, “the Knesset enacted [two] Basic Law[s]: [(1)] Freedom of Occupation, (which deals with the right to follow the vocation of one’s choosing)[,] and . . . [(2)] Human Dignity and Liberty, (which addresses protections against violation of a person’s life, body or dignity). These Basic laws, as well as the other nine Basic Laws . . . have constitutional status and therefore give the Court the power to overturn Knesset legislation which conflict with their principles.” *Id.* This displays that the Israeli national judiciary is more than capable of trying its leaders and civilians for crimes against humanity or other violations of law and is willing to try individuals for these crimes so ICC jurisdiction is not necessary from a legal standpoint.

¹³² *See, e.g., Dozens Arrested in Israel Corruption Probe*, AL JAZEERA (Dec. 25, 2014, 11:33 AM), <http://www.aljazeera.com/news/middleeast/2014/12/israeli-politicians-arrested-over-corruption-2014122510398592350.html>.

is, outspoken enemies of Israel (such as many Arab states) each have a vote that is equal to that of the United States or Canada, long-time diplomatic allies of Israel.¹³³ This means that any bloc of geopolitical enemies of a certain sovereign state will have enough influence to undermine that state's decisions if the bloc disagrees with the political status of the state.¹³⁴ This undermining of state sovereignty will inevitably lead to the stripping of state defense responses—as has been done in the case of Israel defensively responding to the rocket attacks within its territorial boundaries (i.e., Hamas militants remain unchallenged by the international community as the elected representatives of Gaza).¹³⁵

The ICC currently has no check on its judicial powers and enforcement.¹³⁶ If universal jurisdiction is allowed to trump non-consenting sovereign states, then the ICC will become a global court whose jurisdiction extends beyond sovereign borders, thus negating the consent-to-jurisdiction requirement on which the court currently grounds its legitimacy. There would be no body, organization or institution to balance or weigh-in on the decisions of the ICC—allowing its power to remain unchecked, and domestic judicial systems to become obsolete. Despite the international legal principle of non-intervention, the ICC's current strength seems to be contingent on trumping non-consenting state jurisdiction.¹³⁷ As stated previously, combining unrestricted NGO influence with the universal jurisdiction capabilities of the ICC would engender a new global system whereby sovereign states would be consistently scrutinized through the lens of an ad hoc, politically motivated NGO-ICC coalition—a state would conform its activities simply to prevent its internal affairs and decisions (or self-defense in the case of

¹³³ *What We Do: The General Assembly*, UNITED NATIONS FOUND., <http://www.unfoundation.org/what-we-do/issues/united-nations/the-general-assembly.html?referrer=https://www.google.com/?referrer=http://www.unfoundation.org/what-we-do/issues/united-nations/the-general-assembly.html> (last visited Mar. 25, 2016).

¹³⁴ UN, *Israel & Anti-Semitism*, UN WATCH, http://www.unwatch.org/site/c.bdKKISNqEmG/b.1359197/k.6748/UN_Israel_AntiSemitism.htm (last visited Mar. 25, 2016).

¹³⁵ *See id.* (explaining the predictable, continuing bias that the United Nations may conspicuously exhibit toward Israel).

¹³⁶ KISSINGER, *supra* note 1, at 281.

¹³⁷ *See id.* at 281–82 (noting that a vague principle of national sovereignty is not concomitantly sufficient to bridle an entity as powerful as the ICC).

Israel) from being attacked, and its leaders prosecuted.¹³⁸ Concepts of sovereignty would be minimized to allow for the spread of political Lawfare under the direction of an unelected and unaccountable NGO-ICC coalition.

B. Terrorists, extremist organizations, and other dangerous non-state actors will be able to use a NGO-ICC coalition to attack legitimate state officials while enjoying an expansion of impunity to their own actions in a judicial system that targets nationals of legitimate states.

Allowing Hamas to bring claims and investigations against Israel with no ramifications as to its own actions sets a frightening precedent: widely-known terrorist organizations or non-state actors (e.g., Hamas) are capable of inciting violence with impunity, and sovereign states (e.g., Israel) that respond to unprovoked attacks under obligations to legally protect its own citizens can be prosecuted.¹³⁹ Investigating Israel while ignoring Hamas is analogous to investigating the Jews or the Allied Powers rather than Hitler—the aggressor—during World War II.¹⁴⁰

In 1925, Adolf Hitler published his beliefs in a book entitled *Mein Kampf*.¹⁴¹ During the years of Hitler's rule in Germany, Winston Churchill stated that *Mein Kampf* deserved more intensive scrutiny; and Kenneth Burke wrote about how Hitler's rhetoric sparked the revolution and uniformity in the attempt to eliminate the Jewish people.¹⁴² Hitler had stated that he was warding off Jews in fighting the Lord's battle.¹⁴³ To

¹³⁸ See *supra* notes 124–27 and accompanying text. Although the U.N. General Assembly recognized the “State of Palestine” in 2012, that recognition is not binding per se under international law. John M. B. Balouziyeh, *Palestinian Statehood Under International Law*, LEXISNEXIS LEGAL NEWSROOM INT'L L. (Jan. 5, 2015, 12:31 PM), <http://www.lexisnexis.com/legalnewsroom/international-law/b/international-lawblog/archive/2015/01/05/palestinian-statehood-under-international-law.aspx>. Therefore, officials operating in the areas of “Palestine” such as Hamas, would be considered non-state, non-governmental actors analogous to non-profits such as Amnesty International, except Hamas is widely considered a terrorist organization—making the illegitimacy of the ICC much more egregious. See Weiss, *supra* note 96.

¹³⁹ See U.N. Charter art. 51 (stating that the charter itself could not inhibit an individual nation's right to defend itself); Justus Reid Weiner & Avi Bell, *The Gaza War of 2009: Applying International Humanitarian Law to Israel and Hamas*, 11 SAN DIEGO INT'L L.J. 5, 7–8, 11 (2009).

¹⁴⁰ See Joseph Spoerl, *Palestinians, Arabs, and the Holocaust*, JERUSALEM CTR. FOR PUB. AFF. (March 1, 2015), <http://jcpa.org/article/palestinians-arabs-and-the-holocaust>.

¹⁴¹ ADOLF HITLER, *MEIN KAMPF* (Ralph Manheim trans., Houghton Mifflin Co. 1971) (1925) [hereinafter *MEIN KAMPF*].

¹⁴² See MARTIN GILBERT, *WINSTON CHURCHILL—THE WILDERNESS YEARS: SPEAKING OUT AGAINST HITLER IN THE PRELUDE TO THE WAR* 140 (2012); KENNETH BURKE, *The Rhetoric of Hitler's Battle, in THE PHILOSOPHY OF LITERARY FORM: STUDIES IN SYMBOLIC ACTION* 191 (UNIV. OF CAL. PRESS, 3d ed. 1974).

¹⁴³ KENNETH BURKE, *supra* note 142, at 198.

correlate the similarities in Hitler's writings and the Hamas Charter is to become fully aware of the undeniable parallel that Hamas' ideologies of pleasing Allah by exterminating the Jews in Israel actually mirrors Hitler's sentiment that Jewish extermination meant to be on the path of righteousness.¹⁴⁴ Similarly, the Hamas Charter (or Covenant of Hamas) advocates a religious holy war aimed at creating a regional Islamic entity encompassing the territory of Israel—claiming that the Jewish people “were [also] behind World War II, through which they reaped enormous profits from commerce in war materials and paved the way for the establishment of their state.”¹⁴⁵ Hamas seems to use the same demonization and dehumanizing tactics that Hitler used against the Jewish people—blaming them for wars while Hitler blamed them for social and economic downfalls.¹⁴⁶ The Hamas Charter not only calls for the militant, perhaps genocidal, liberation of Palestine (e.g., “raise the banner of Allah over every inch of Palestine”), but also demonstrates anti-Semitic, murderous intent.¹⁴⁷ Article 7, for instance, states, “The hour of judgment shall not come until the Muslims fight the Jews and kill them, so that the Jews hide behind trees and stones, and each tree and stone will say: ‘Oh Muslim, oh servant of Allah, there is a Jew behind me, come and kill him’”¹⁴⁸ The text is infused with repulsive terminology such as the reference to “Nazi Zionist[s].”¹⁴⁹ The introduction also assures the world that “[Hamas] fight with the Jews is very extensive and very grave,” predicting “Israel will exist and will continue to exist until Islam abolishes it.”¹⁵⁰

Hamas's Charter was issued on August 18, 1988, after which the organization has launched thousands of rockets into Israel's territory, twice resulting in defensive fire from Israel, hundreds of deaths, and months of armed conflict between Israel and Hamas that prompted UN investigations.¹⁵¹ Richard Goldstone—an investigator of the 2009 Gaza conflict—wrote an article finding that even though Hamas had “purposely and indiscriminately aimed at [Israeli] civilian targets,” the Israeli

¹⁴⁴ See *id.*; see also MEIN KAMPF, *supra* note 141, at 284–86.

¹⁴⁵ Islamic Resistance Movement [IRM] Charter arts. 6, 22 (Aug. 18, 1988) [hereinafter Hamas Charter] (emphasis in the original), <http://www.memri.org/report/en/0/0/0/0/0/1609.htm>.

¹⁴⁶ *Id.*; see also Brendan Simms, *Against a 'World of Enemies': The Impact of the First World War on the Development of Hitler's Ideology*, 90 INT'L AFF. 317, 330 (2014) (noting that Hitler ascribed the economic downfall of Germany to Jews, whom he perceived as greedy).

¹⁴⁷ Hamas Charter, *supra* note 145, art. 6.

¹⁴⁸ *Id.* art. 7.

¹⁴⁹ *Id.* art. 31.

¹⁵⁰ *Id.* intro., pmb.

¹⁵¹ See Weiner & Bell, *supra* note 139, at 7–8, 14–17. See generally Hamas Charter, *supra* note 145.

investigation showed that Palestinian “civilians were not intentionally targeted as a matter of policy.”¹⁵² Goldstone noted that, “[t]he purpose of these investigations . . . [was] to ensure accountability for improper actions, not to second-guess, with the benefit of hindsight, commanders making difficult battlefield decisions.”¹⁵³ However, Hamas is rarely scrutinized the way Israel is, having been able to fire rockets from its civilian populations, and use numerous mosques to store weapons and train militants.¹⁵⁴

During the 2014 Gaza conflict between Israel and Hamas, Hamas officials carried out a public execution of eighteen Palestinian civilians who they claimed were aiding Israeli officials by supplying intelligence.¹⁵⁵ The public executions were carried out on the street without a trial or the presentation of evidence in direct violation of the Geneva Convention on the treatment of civilians, which states that, “[t]he carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples” is absolutely prohibited during a conflict.¹⁵⁶ Further, Hamas’ military wing violated several international humanitarian laws during the course of the 2014 conflict such as firing over 140 rockets from the Shuja’iya residential neighborhood into Israel.¹⁵⁷ By placing the entrances to its tunnel network within the densely populated Shuja’iya neighborhood and firing rockets from the same area, Hamas had intended to use the civilian population as a shield in an effort to render the neighborhood “immune from [Israeli] military operations.”¹⁵⁸ Several of the hidden Hamas tunnels discovered by Israel were found to lead back to the Shuja’iya neighborhood, and almost ten percent of all rockets fired against Israel during the conflict

¹⁵² Richard Goldstone, *Reconsidering the Goldstone Report*, WASH. POST (Apr. 1, 2011), http://www.washingtonpost.com/opinions/reconsidering-the-goldstone-report-on-israel-and-war-crimes/2011/04/01/AFg111JC_story.html.

¹⁵³ *Id.*

¹⁵⁴ See, e.g., Resolution Condemning Israel, *supra* note 124; see also Weiner & Bell, *supra* note 139, at 7–8, 11 (comparing the heightened scrutiny applied to the few, defensive actions of Israel with the myriad aggressions of Hamas, which have gone unnoticed by the international community).

¹⁵⁵ See Marc Schulman, *Tel Aviv Diary: Public Executions in Gaza Reveal the True Nature of Hamas*, NEWSWEEK (Aug. 22, 2014, 12:46 PM), <http://www.newsweek.com/tel-aviv-diary-public-executions-gaza-reveal-true-nature-hamas-266271>.

¹⁵⁶ Geneva Convention Relative to the Treatment of Prisoners of War art. 3, opened for signature Aug. 12, 1949, 6 U.S.T. 3520, 75 U.N.T.S. 138 (*entered into force* Oct. 21, 1950).

¹⁵⁷ SEKULOW ET AL., *supra* note 117, at 78.

¹⁵⁸ *Id.* (quoting Geneva Convention, *supra* note 156, 6 U.S.T. at 3365, 75 U.N.T.S. at 308).

were reported to have come from there.¹⁵⁹ William Booth, a correspondent for the *Washington Post*, was in Gaza City during the 50-day conflict and noted that the Shifa Hospital in Gaza City became “a de facto headquarters for Hamas leaders, who [could] be seen in the hallways and offices.”¹⁶⁰ In this same area, Hamas militants used loudspeakers to declare that the Palestinian Authority officials were “traitors” for supporting any ceasefire agreement.¹⁶¹

Throughout the 2014 Gaza conflict, there were accounts of Hamas militants (i.e., the Al-Qassam Brigade) setting up rocket-launching sites in the middle of heavily populated Palestinian neighborhoods composed of preschools and mosques.¹⁶² A correspondent from an Indian television network taped a Hamas militant setting-up and launching a rocket into a residential area through the unlikely vantage point of his hotel window.¹⁶³ Hours later, the same launching site was hit with a massive rocket explosion, and by the time anyone was able to react, the site had been entirely demolished.¹⁶⁴ When the correspondent and his crew returned to India, they noted that equally as important as highlighting Israeli defensive strikes was the importance of reporting “on how Hamas places those very civilians at risk by firing rockets deep from the heart of civilian zones.”¹⁶⁵

Further, Muhammad Alqadra (a Hamas militant) noted that Hamas leaders were hiding in the Shifa Hospital in Gaza City and other active hospitals (sometimes wearing police uniforms).¹⁶⁶ International humanitarian law also outlaws the use of human shields or medical units

¹⁵⁹ Patrick Martin, *Death Tolls Mount as Israel Expands Offensive, Hamas Resistance Hardens*, THE GLOBE & MAIL (July 21, 2014, 7:57 PM), <http://www.the-globeandmail.com/news/world/thousands-flee-gaza-homes-as-israel-expands-ground-assault/article19683732>.

¹⁶⁰ William Booth, *While Israel Held Its Fire, the Militant Group Hamas Did Not*, WASH. POST (July 15, 2014), http://www.washingtonpost.com/world/middle_east/while-israel-held-its-fire-the-militant-group-hamas-did-not/2014/07/15/116fd3d7-3e0f-4413-94a9-2ab16af1445d_story.html.

¹⁶¹ *Id.*

¹⁶² *E.g.*, NDTV, *How Hamas Assembles and Fires Rockets*, YOUTUBE (Aug. 5, 2014), https://www.youtube.com/watch?v=A_fp6mlNSK8 [hereinafter NDTV].

¹⁶³ *Id.*; see also Hamza Hendawi & Josef Federman, *Evidence Growing That Hamas Used Residential Areas*, AP (Sept. 12, 2014, 5:13 AM), <http://bigstory.ap.org/article/evidence-growing-hamas-used-residential-areas> (referring to news reports on YouTube).

¹⁶⁴ NDTV, *supra* note 162.

¹⁶⁵ Abraham Rabinovich, *Journalists Confirm Hamas Rockets Used in and Around Civilian Sites*, WASH. FREE BEACON (Aug. 7, 2014, 11:25 a.m.), <http://freebeacon.com/national-security/journalists-reveal-hamas-rockets-used-in-and-around-civilian-sites>.

¹⁶⁶ *Tactics in Gaza: Use of Human Shields Confirmed by Captured Hamas Operatives*, CIJA (Nov. 14, 2014), <http://www.cija.ca/resource/whats-the-situation-in-gaza/hamas-tactics-in-gaza>; William Booth, *supra* note 160 (confirming Hamas' use of hospitals).

to deter enemy attacks.¹⁶⁷ Therefore, Hamas does not have a legal right to launch rockets into Israel, or worse, to block Palestinian civilians from escaping when they are warned by Israel to evacuate.¹⁶⁸ Recently, Senator Harry Reid condemned Hamas in a press release:

But there is another evil organization in the world today that, like ISIS, has zero regard for humanity; they are kidnapers and executioners; they are violent extremists who murder innocent civilians; they are terrorists who cower behind women and children, using them as human shields; they are saboteurs of peace and provocateurs of bloody conflict who will not stop until their enemies are annihilated Yet, for some reason, Hamas' brutality doesn't elicit the same horror from the international community as ISIS.¹⁶⁹

Hamas has remained on the U.S. list of terrorist organizations for many years.¹⁷⁰ Having continually advocated for the condemnation of Israeli officials by NGOs, Hamas—a terrorist organization—has been able to effectively partner with NGOs to legally attack Israel—a legitimate state.¹⁷¹ For example, a recent report found that the UN Relief Works Agency located in Palestine has direct ties to members of Hamas' military wing, the Al-Qassam Brigade.¹⁷² Hamas' *intent* is to annihilate and exterminate Israel in order to take over governance of its territory.¹⁷³ The UN has not condemned Hamas or the Al-Qassam Brigade, but merely has investigated Israel, which emboldens and strengthens Hamas to continue funneling cash into its rocket launches and civilian shields in its quest to

¹⁶⁷ See, e.g., Protocol II, *supra* note 8, at 616 (prohibiting military action not concerned with the security of civilians).

¹⁶⁸ See Weiner & Bell, *supra* note 151, at 31 (recounting the various methods Hamas has used to attack Israeli fuel delivery).

¹⁶⁹ Press Release, U.S. Senator for Nev. Harry Reid, Reid Remarks Condemning Hamas (Sept. 11, 2014) (omission in the original), http://www.reid.senate.gov/press_releases/2014-11-09-reid-remarks-condemning-hamas.

¹⁷⁰ *Foreign Terrorist Organizations*, U.S. DEPT OF STATE, <http://www.state.gov/j/ct/rls/other/des/123085.htm> (last visited Mar. 25, 2016).

¹⁷¹ See *PCHR Weekly Report on Israeli Human Rights Violations in the Occupied Palestinian Territory*, INT'L MIDDLE EAST MEDIA CTR. (Oct. 27, 2014, 1:01 AM), <http://www.imemc.org/article/68090> (displaying how PCHR paints Hamas' casualties as those of heroes and victims while strongly condemning Israel and calling upon the ICC and the global community to do the same).

¹⁷² See Arlene Kushner, *UNRWA: Its Role in Gaza*, GATESTONE INST. INT'L POL'Y COUNCIL (Aug. 11, 2009, 5:52 PM), <http://www.gatestoneinstitute.org/733/unrwa-its-role-in-gaza>.

¹⁷³ See, e.g., *Latest Clips*, THE MIDDLE EAST MEDIA RES. INST., <http://www.memri.org/middle-east-video-news-media-clips.html> (last visited March 25, 2016) (For a more detailed look at Hamas' short-term goals regarding Israel, see the screen shots in the Hamas-run website).

annihilate Israel and reclaim the land.¹⁷⁴ This shows that in certain political situations the UN fails to adhere to its charter, which proclaims the importance of state governments to have the ability to act autonomously in efforts to protect its territory and civilians from the threat or use of force.¹⁷⁵

If Hamas is able to act with impunity in its use of the Palestinian civilian population as sacrifices in its quest to spread hatred and a dehumanizing indoctrination against the Israeli Jews, then other states who act to defend their territorial integrity when unprovoked rocket fire shakes their populations will be left helpless, limp, and incapable of responding without the ubiquitous fear of NGO-ICC retaliation.

C. State government decisions will be subject to the approval of a NGO-ICC coalition, which would be able to settle political differences through the legal system. Political leaders will no longer be safe to govern or make decisions dealing with a state's domestic affairs and concerns.

Israel has *legally* continued to hold that its barriers, lines, and border security are necessary to ensure its territorial integrity, and to protect its civilians from armed attack by Hamas militants.¹⁷⁶ However, with the investigations launched by the UN Human Rights Council into Israel for war crimes, its sovereignty is threatened by outside officials whose biases or opinions may preclude an objective finding of fact, especially if a particularly anti-Israel NGO's articles and reports are used in an UN investigation.¹⁷⁷ Such NGO reporting and targeting of Israeli actions is echoed throughout the UN,¹⁷⁸ even over-and-above the human rights abuses taking place in states like the Islamic Republic of Iran, where the government deprives innocent civilians of basic freedoms and necessities.¹⁷⁹ Like any legitimate state, Israel has a duty to protect its

¹⁷⁴ See Shadi Alshdaifat & Sanford R. Silverburg, *Islamic Hamas and Secular Fatah*, 2 *INDON. J. INT'L & COMP. L.* 583, 617 (2015) (explaining that as international scrutiny increases toward Hamas, the terrorist group may assume a more moderate position until scrutiny is lessened). See *generally* Human Rights Council Res. S-21/1, *supra* note 124 (expressing dissatisfaction with virtually all of Israel's actions pertaining to international relations).

¹⁷⁵ See U.N. Charter art. 2, ¶ 4.

¹⁷⁶ See Convention on the Prevention and Punishment of the Crime of Genocide art. 8, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention] (emphasis added) (demonstrating that Israel can take defensive actions in certain situations).

¹⁷⁷ See HERZBERG, *supra* note 11, at 12.

¹⁷⁸ See *generally* Human Rights Council Res. S-21/1, *supra* note 124 (isolating Israeli actions taken toward Palestine and treating these actions with disapprobation).

¹⁷⁹ See, e.g., Jay Sekulow, *Tragic Anniversary: American Pastor Saeed Abedini Marks Second Year in Iranian Prison*, FOX NEWS (Sept. 26, 2014), <http://www.foxnews.com/opinion/2014/09/26/tragic-anniversary-american-pastor-saeed-abedini-marks-second-year-in-iranian>.

civilians from the threat or use of force and the *legal* right to exercise self-defense against the threat or use of force “until the Security Council has taken measures necessary to maintain international peace and security.”¹⁸⁰ Arguably, the UN Security Council has not, given that Hamas militants still carry out attacks against Israeli civilians, and Israel responds according to UN stipulations:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.¹⁸¹

Palestine has a legal duty to protect its civilians, *and to prosecute* its nationals who are guilty of violating its international obligations such as the Genocide Convention, which states:

Genocide means any of *the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group*, as such: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part Persons committing genocide or any of the other acts enumerated in article III [such as “direct and public incitement to commit genocide,” and “attempt to commit genocide”] shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide¹⁸²

Rather than adopting and practicing the legal obligations of elected representatives, Hamas members operate among their civilian population

¹⁸⁰ U.N. Charter art. 51 ¶ 1.

¹⁸¹ *Id.*

¹⁸² Genocide Convention, *supra* note 176, at 3–5 (emphasis added). Compare Hamas Charter, *supra* note 125, art. 28 (calling for the annihilation of the State of Israel).

and deliberately ignore their duties to the Palestinian population.¹⁸³ The Genocide Convention requires signatory states to prevent and punish both the Hamas militants carrying out the violence, and the officials who publicly support Hamas Charter's, which calls for the annihilation of the Israeli people (i.e., according to the Geneva Convention, "to destroy, in whole or in part, a national, ethnical, racial or religious group" is a clear violation).¹⁸⁴ Palestinian representatives to the UN signed and accepted the terms of the Genocide Convention on April 2, 2014.¹⁸⁵ As such, in abiding by the terms, the Palestinian government has the international legal duty to expel Hamas members from political positions and turn Hamas members over to a Palestinian national court or a court of international jurisdiction for the intent to commit genocide on the State of Israel, and using civilians as targets.¹⁸⁶ Continual failure to classify terrorist organizations or non-state actors (e.g., Hamas) as international criminals constitutes deliberate complicity in the violence.¹⁸⁷ If the international community considers Hamas a legitimate and legal representative of Palestine, then Hamas officials are all subject to international court jurisdiction for the intent of and complicity in committing genocide against Israeli Jews, and for using the Palestinian civilian population as human sacrifices to perpetuate public outcry against Israel.¹⁸⁸

¹⁸³ See *Hamas' Human Shield Tactic as Reported by Foreign Journalists*, UN WATCH (July 22, 2014, 4:09 PM), <http://www.unwatch.org/hamas-human-shield-tactic-as-reported-by-foreign-journalists>.

¹⁸⁴ Genocide Convention, *supra* note 176, at 280.

¹⁸⁵ *Treaties and State Parties to Such Treaties*, INT'L COMMITTEE RED CROSS, https://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=357 (last visited Mar. 25, 2016).

¹⁸⁶ Genocide Convention, *supra* note 176, at 282 (stating that, "the Contracting Parties pledge themselves in [cases of genocidal intent] to grant extradition in accordance with their laws and treaties in force."). Additionally, "[p]ersons charged with genocide or any of the other acts enumerated in [the Genocide Convention] shall be tried by a competent tribunal of the State in the territory of which the act was committed [Gaza in Palestine], or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction." *Id.* at 281–282.

¹⁸⁷ U.S. STATE DEPARTMENT, PATTERNS OF GLOBAL TERRORISM 2003, at 120 (2004), <http://www.state.gov/documents/organization/31912.pdf> (stating that Hamas is a terrorist organization, and that it receives funding from Iran and private benefactors around the world, particularly in North America, the Persian Gulf region, and in Western Europe, thus demonstrating complicity).

¹⁸⁸ See Hamas Charter, *supra* note 145, pmb. (demonstrating the willingness of Hamas members to sacrifice themselves for Allah). It is important to note that Palestine has requested to become a state party to the ICC specifically in order to prosecute Israeli officials in a court of law. See *Palestine Faces Backlash over ICC Move*, AL JAZEERA (Jan. 19, 2015), <http://www.aljazeera.com/news/middleeast/2015/01/palestine-faces-backlash-over-icc-move-201511912371278649.html>.

However, Israel has continued to be the scrutinized party in conflicts involving Palestinian officials or military operations.¹⁸⁹ In order to merely defend its own civilians and territory, Israel is aware that any move of retaliation against the unprovoked and indiscriminate rocket launches from Hamas will result in international condemnation.¹⁹⁰ Israeli officials are expected to remain paralyzed in the defense of their fellow citizens because of the threat of anti-Israeli NGO and international outcry. Sovereignty protections and immunity allow a state to act in the best interest of its citizens and territory, but Israel is unable—indicating a frightening shift in global policies condemning state reaction and the protection of its citizens.¹⁹¹ The Israel example should serve as a warning for sovereign states since they could be subject to NGO scrutiny for any political motive. This scrutiny could then open-up states to Lawfare and universal jurisdiction claims in the court of public opinion.¹⁹²

CONCLUSION

It is possible to maintain state sovereignty in adherence to UN principles while still upholding human rights and the rule of law. If the goal is to ensure justice rather than arbitrary political moves in a court of law, then sovereign states should welcome furthering NGO and ICC *accountability*, but fear the weakening of sovereign immunity as has been done through the use of universal jurisdiction and political Lawfare. The danger in allowing for the combined efforts of political Lawfare and an expanded version of universal jurisdiction is that political disagreement between sovereign states could turn into opportunities to undermine the sovereign independence of states in how they conduct internal and international policies.¹⁹³ The international community cannot comingle the concept of political disagreements with legal venues especially when emerging precedents and procedures are still highly contested.¹⁹⁴

Today, Israel is the target of Lawfare, but tomorrow any sovereign state could be the new target of political attacks against its independent judgment, allowing the international community effectively to destroy the concepts of self-determination and the sovereign independence of law-abiding states and state officials.¹⁹⁵ As Lord Nicolas Brownse-Wilkinson stated in his notable rejection of widespread universal jurisdiction under

¹⁸⁹ See generally Human Rights Council Res. S-21/1, *supra* note 124 (proclaiming that various actions taken by the State of Israel were in violation of international law).

¹⁹⁰ See, e.g., Weiss, *supra* note 96.

¹⁹¹ See *id.*

¹⁹² *Id.*

¹⁹³ HERZBERG, *supra* note 11, at 9–11.

¹⁹⁴ *Id.* at 11.

¹⁹⁵ See Weiss, *supra* note 96.

the “Princeton Principles,” the use of Lawfare ignores concepts of sovereign immunity:

If the law were to be so established, states antipathetic to Western powers would be likely to seize both active and retired officials and military personnel of such Western powers and stage a show trial for alleged international crimes. Conversely, zealots in Western States might launch prosecutions against, for example, Islamic extremists for their terrorist activities. It is naïve to think that, in such cases, the national state of the accused would stand by and watch the trial proceed: resort to force would be more probable.¹⁹⁶

It is important to emphasize that, “[r]ather than protect universal human rights and mete out justice for the worst international crimes,” the interference of unscrupulous regimes or unrestricted NGOs could actually lead to greater conflict.¹⁹⁷ Sovereign states should be wary of the opportunity that NGOs have to unite with the ICC in Lawfare claims. Combining the power of a NGO-ICC coalition with the ability to relinquish sovereign immunity could pave the road for a global governing system that reigns as the sole determinant of state action. Allowing impunity for non-state actors that do not adhere to any legitimate state system of rules will open the door to extremist organizations rejecting the rule of law or principles of international humanitarian law. The rise in universal jurisdiction and political Lawfare would certainly result in the eventual loss of state sovereignty, sovereign immunity, and the eventual enforcement of the prescribed normative beliefs of unelected and unaccountable non-state actors and NGOs.

¹⁹⁶ THE PRINCETON PRINCIPLES, *supra* note 78, at 49 n.20.

¹⁹⁷ HERZBERG, *supra* note 11, at 11.