

## **“LEGAL JIHAD”: HOW ISLAMIST LAWFARE TACTICS ARE TARGETING FREE SPEECH**

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### I. WELCOME TO LAWFARE

Lawfare is usually defined as the use of the law as a weapon of war<sup>1</sup>, or the pursuit of strategic aims through aggressive legal maneuvers.<sup>2</sup> Traditionally, lawfare tactics have been used to obtain moral advantages over the enemy in the court of public opinion,<sup>3</sup> and to intimidate heads of state from acting out of fear of prosecution for war crimes.<sup>4</sup> Al Qaeda training manuals instruct its captured militants to file claims of torture or other forms

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<sup>1</sup> David B. Rivkin & Lee A. Casey, *Lawfare*, WALL ST. J. (Asia), Feb. 23, 2007, at 15, available at <http://online.wsj.com/article/SB117220137149816987.html> (last visited Mar. 12, 2009).

<sup>2</sup> Jeremy Rabkin, ‘*Lawfare*’ *The International Court of Justice Rules in Favor of Terrorism*, WALL ST. J., July 17, 2004, at A14, available at <http://www.opinionjournal.com/forms/printThis.html?id=110005366> (last visited Mar. 12, 2009).

<sup>3</sup> Rivkin, *supra* note 1.

<sup>4</sup> Israeli Minister Avi Dichter cancelled a trip to Britain after being threatened with arrest over a 2002 incident. David Byers, ‘*War Crimes*’ *Israeli Minister Cancels UK Trip*, TIMES ONLINE, Dec. 6, 2007, <http://www.timesonline.co.uk/tol/news/uk/article3012503.ece> (last visited Mar. 12, 2009). Also, current Israeli Deputy Prime Minister and former Israel Defense Forces Chief of Staff Shaul Mofaz cut short a trip to Britain after, “the director of public prosecutions in England asked police in London to investigate war crimes allegations.” Chris McGreal & Brian Whitaker, *Police Investigate New Israeli Defence Minister Over War Crimes*, Nov. 2, 2002, THE SYDNEY MORNING HERALD, available at <http://www.smh.com.au/articles/2002/11/01/1036027036796.html> (last visited Mar. 12, 2009).

of abuse so as to reposition themselves as victims against their captors.<sup>5</sup> The 2004 decision by the United Nation's International Court of Justice declaring Israel's security fence a crime against humanity, while pointedly ignoring the fact that the fence contributed to a sharp decline in terror attacks, is another example of lawfare aimed at public opinion.<sup>6</sup>

Yet, lawfare has moved beyond gaining mere moral advantages over nation-states and winning lawsuits against government actors. Over the past ten years, we have seen a steady increase in Islamist lawfare tactics directly targeting the human rights of North American and European civilians in order to constrain the free flow of public information about radical Islam.

## II. THE ISLAMIST MOVEMENT

The Islamist movement is that which seeks to impose tenets of Islam, and specifically Shari'a law, as a legal, political, religious and judicial authority both in Muslim states and in the West. It is generally composed of two wings - that which operates violently, propagating suicide-homicide bombing and other terrorist activities, and that which operates lawfully, conducting a "soft jihad" within our media, government and court systems, through Shari'a banking<sup>7</sup> and within our school systems.<sup>8</sup>

Both the violent and the lawful arms of the Islamist movement can and do work apart, but often, their work re-enforces each other's. For example, one tenet of Shari'a law is to punish those who criticize Islam and to silence speech considered blasphemous of its prophet Mohammad. While the violent arm of the Islamist movement attempts to silence speech by burning cars when Danish cartoons of Mohammed are published, by murdering film directors such as Theo Van Gogh and by forcing thinkers such as Wafa Sultan into hiding out of fear for her life, the lawful arm is skillfully maneuvering within Western court systems, hiring lawyers and suing to silence its critics.

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<sup>5</sup> Rivkin, *supra* note 1.

<sup>6</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 131 (July 9), available at <http://www.icj-cij.org/docket/files/131/1671.pdf?PHPSESSID=e77146e18891904c7e0c5c12efe1d16f> (last visited Mar. 12, 2009).

<sup>7</sup> For more information on Shari'a compliant financing, see David Yerushalmi, *Sharia's Black Box: Civil Liability and Criminal Exposure Surrounding Sharia-Compliant Finance*, 2008 UTAH L. REV. 1019 and Stop Shariah Now Home Page, <http://www.stopshariahnow.org> (last visited Mar. 12, 2009).

<sup>8</sup> Much has been said about the Saudi effort to produce school textbooks for American grade schools and the establishment of Islamic-language public schools such as the Khalil Gibran Academy in New York, raising issues of Establishment Clause violations and contravening separation of church and state, or more accurately, Mosque and state. Cinnamon Stillwell, *Islam in America's Public Schools: Education or Indoctrination?*, SAN FRANCISCO CHRONICLE, <http://www.sfgate.com/cgi-bin/article.cgi?f=/g/a/2008/06/11/cstillwell.DTL> (last visited Mar. 12, 2009); see Posting of Daniel Pipes, On New York's Khalil Gibran International Academy, <http://www.danielpipes.org/blog/2007/03/on-new-yorks-khalil-gibran-international.html> (Mar. 7, 2007) (last visited Mar. 12, 2009).

### III. LEGAL JIHAD

Islamist states, organizations and individuals with financial means have launched a "legal jihad," filing a series of malicious lawsuits, in American courts and abroad, designed to punish and silence those who engage in public discourse about radical Islam. Such lawsuits are being used as a weapon of war against counter-terrorism experts, law enforcement personnel, politicians and anyone working to disseminate information on Islamist terrorism and its sources of financing. The lawsuits are often predatory, filed without a serious expectation of winning, and undertaken as a means to intimidate, demoralize and bankrupt defendants. Claims are often based on frivolous charges ranging from defamation to workplace harassment, from "hate speech" to "Islamophobia," and have resulted in books being banned and pulped, in thousands of dollars worth of fines and in publishing houses and newspapers rejecting important works on counter-terrorism out of fear of being the next target.

By suing to impose penalties and gag orders on counter-terrorism experts, government officials, authors and the media, non-combatants who engage in Islamist lawfare are assuming critical support roles, whether intentionally or not, for violent operations that seek to establish principles Shari'a law in the West. The following cases represent a small percentage of Islamist lawfare in the U.S. but are illustrative.

In 2003, the Washington-based Council on American Islamic Relations (CAIR), sued former U.S. Congressman Cass Ballenger after an interview with the Congressman revealed that he had reported the group to the CIA and FBI as a "fundraising arm for Hezbollah."<sup>9</sup> Fortunately, the Judge in Ballenger's case ruled the Congressman's statements were made in the scope of his public duties and were therefore constitutionally protected speech in the interest of public concern.<sup>10</sup>

The following year, CAIR instituted a 1.3 million dollar lawsuit against Andrew Whitehead, an American activist and blogger, for maintaining the website Anti-CAIR-net.org, on which CAIR is described as an Islamist organization with ties to terrorist groups. After refusing Whitehead's discovery requests, seemingly afraid of what internal documents the legal process it had initiated would reveal, CAIR withdrew its claims against Whitehead, a settlement was reached, and the case was dismissed by the court with prejudice.<sup>11</sup>

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<sup>9</sup> Ballenger made the comment in a phone conversation to journalist Tim Funk of the Charlotte Observer on Oct. 1, 2003. Council of Am. Islamic Rel. v. Cass Ballenger, 444 F.3d 659, 662 (2006).

<sup>10</sup> *Id.* at 666.

<sup>11</sup> CAIR v. Whitehead, No. CL04000926-00 (Vir. Cir. Ct. Dec. 9, 2005), available at <http://wasdmz2.courts.state.va.us/CJISWeb/circuit.html> (select "Virginia Beach Circuit" from drop down

In 2005, The Islamic Society of Boston (ISB) filed a lawsuit charging defamation against over a dozen defendants including the Boston Herald, FOX 25 News, counter-terrorism expert Steven Emerson and several others.<sup>12</sup> The defendants were targeted by ISB for publicly speaking about the Islamic Society's connections to radical Islam and for raising questions about the construction of its Saudi-funded mosque in Boston. A full two years after it had initiated the lawsuit, and just a few months after the discovery process was initiated into ISB's financial records, ISB dropped its case and abandoned all of its claims against all of the defendants, without receiving any form of payment.<sup>13</sup>

In line with the old adage that actions speak louder than words, the fact that both ISB and CAIR abandoned their claims right before they would have been required, by court order, to turn over internal documents speaks volumes about whether the two Plaintiffs had ever intended to pursue their legal claims on their merit or had instead, intended to use the court system to intimidate the Defendants as well as other journalists, into not reporting on their activities.

On the police front, Bruce Tefft, a former CIA official and counter-terrorism consultant for the New York Police Department, was sued by a Muslim John Doe police officer for “workplace harassment” after Tefft sent out emails to a voluntary recipient list of officers containing information about radical Islamic terrorism.<sup>14</sup> Tefft’s suit is ongoing.

Sometimes American authors and publisher wrongfully targeted are able to take advantage of Anti-SLAPP statutes, the acronym being Anti-Strategic Litigation Against Public Participation. Anti-SLAPP statutes have been enacted in several, but not all, US states and are aimed at preventing lawsuits designed to hinder legitimate public dialogue. The problem, however, with Anti-SLAPP statutes is threefold – not all states have enacted them, there is no federal equivalent, and one must wait to be sued in order to take advantage of them.

Such was the case when American author Matthew Levitt and his publisher Yale Press were sued by KinderUSA for Levitt's book *Hamas*, in which Levitt describes KinderUSA as a charitable front for terror financing.<sup>15</sup> In response to the lawsuit, Levitt and Yale Press instituted a counter-claim based on California's Anti-SLAPP statute arguing that KinderUSA's suit was

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list; then select “Begin”; select “Civil” radio button under “Division”; search “CL04000926- 00” under “Case Number”) (last visited Mar. 21, 2009).

<sup>12</sup> *Islamic Soc’y of Boston v. Boston Herald*, 2006 WL 2423287 (2006).

<sup>13</sup> Jamie Glazov, *Islamist Warfare*, FRONTPAGE MAGAZINE, May 12, 2008, <http://frontpagemagazine.com/Articles/Read.aspx?GUID=3AA08648-E127-458F-BAF1-69A7993D5869> (last visited Mar. 12, 2009).

<sup>14</sup> Jamie Glazov, *Sued for Terror Watching*, FRONT PAGE MAGAZINE.COM, Oct. 26, 2007, <http://frontpagemagazine.com/Articles/Read.aspx?GUID=AF613BFA-8E34-4A07-8DB4-20D89DE3D84B> (last visited Mar. 12, 2009).

<sup>15</sup> *See* Complaint, Kids in Need of Dev. Educ., and Relief, Inc. v. Yale Univ. Press, No. BC370155 (Cal. Super. Ct. Apr. 26, 2007).

a disguised attempt at wrongfully intimidating them into silence.<sup>16</sup> Shortly after the counter-claim was filed, KinderUSA mysteriously dropped its lawsuit, claiming only that it found the suit too costly to pursue.<sup>17</sup>

Most disturbing however, are the examples of parties sued for reporting on official U.S. government investigations into terrorist activities or for formally appealing to government authorities to conduct investigations into suspected illegal activity. In 2001, the New York Times reported on the U.S. government's investigation of the Global Relief Foundation and was subsequently sued.<sup>18</sup> In 2002, The Wall Street Journal reported on the monitoring of Saudi bank accounts and was also sued.<sup>19</sup> Also in 2002, the Anti-Defamation League (ADL) called for the investigation of a public school superintendent named Khadija Ghafur, based on indications that schools under her supervision were teaching religion in violation of the Establishment Clause.<sup>20</sup> Ghafur predictably sued ADL for libel and lost, but only after much time and money was spent by ADL defending itself.<sup>21</sup>

The cumulative effect of these lawsuits, combined with the looming threat of future lawsuits, is creating a detrimental chilling effect on the exercise of free speech within this country, and raising the cost of public debate about the war on terrorism. Islamist lawfare has also sparked a wave of self-censorship, with publishing houses going as far as hiring security experts to assess the potential for violent reactions in the Muslim community to printed words.

Most recently, Random House Publishing Group pulled a fiction novel entitled "The Jewel of Medina" by journalist Sherry Jones about the Prophet Mohammad's child bride.<sup>22</sup> The publishing house feared it would prove offensive to some in the Muslim community and "incite acts of violence."<sup>23</sup> Prior to making its decision public, Thomas Perry, deputy publisher at Random House, consulted with security experts and scholars on

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<sup>16</sup> KinderUSA claimed that its resources were better spent on charity. *LibraryJournal.com, No Apologies: CUP Authors To Seek U.S. Publishing Deal for Banned Book*, Aug. 21, 2007, <http://www.libraryjournal.com/info/CA6470780.html> (last visited Mar. 12, 2009).

<sup>17</sup> *Id.*

<sup>18</sup> See *Global Relief Found., Inc. v. N.Y. Times, Co.*, 390 F.3d 973 (2004). In affirming the decision, the 7th Circuit Court of Appeals reiterated that "Truth is an absolute bar to recovery for defamation." *Id.* at 974.

<sup>19</sup> The bank dropped the suit in 2005, but the Wall Street Journal published a 'clarification' that it had not, in fact, reported any allegation that linked the bank to terrorism. Glenn R. Simpson, *Terror Finance: U.S. Tracks Saudi Bank Favored by Extremists; Officials Debated What To Do About Al Rajhi, Intelligence Files Show*, WALL ST. J., July 26, 2007, at A1, available at <http://online.wsj.com/article/SB118530038250476405.html> (last visited Mar. 12, 2009).

<sup>20</sup> Joe Eskenazi, *Court Throws Out Muslim Educator's Suit Against ADL*, JEWISH NEWS WEEKLY OF NORTHERN CALIFORNIA, July 11, 2007, available at [http://www.jewishsf.com/content/20/module/displaystory/story\\_id/20626/edition\\_id/422/format/html/displaystory.html](http://www.jewishsf.com/content/20/module/displaystory/story_id/20626/edition_id/422/format/html/displaystory.html) (last visited Mar. 12, 2009).

<sup>21</sup> *Ghafur v. Bernstein*, 32 Cal. Rptr. 3d 626, 634 (2005).

<sup>22</sup> Edith Honan, *Random House Pulls Novel on Islam, Fears Violence*, REUTERS, Aug. 7, 2008, <http://www.reuters.com/article/newsOne/idUSN0736008820080807> (last visited Mar. 12, 2009).

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

Islam and received "from credible and unrelated sources,"<sup>24</sup> cautionary advice not to publish the work.

#### IV. LAWFARE IN EUROPE & CANADA

Islamist lawfare is achieving a high degree of success in Canada and Europe because their judicial systems and laws do not afford their citizens, or American citizens for that matter, the level of free speech protection granted under the U.S. Constitution. With their "hate speech" legislation, liberal libel laws and virtual codification of "Islamophobia" as a cause of action, European and Canadian legislatures have laid down what could be called the ideal framework for litigious Islamists to achieve their goals.

In February of 2006, the European Union and former UN Secretary General Kofi Annan issued a joint statement with the Organization of the Islamic Conference, in which they recognized the need "to show sensitivity" in treating issues of special significance for the adherents of any particular religion, "even by those who do not share the belief in question."<sup>25</sup> In June of 2006, the Council of Europe hosted a "Programme of the Hearing on European Muslim Communities confronted with Extremism," for which a 'Point of View on the Situation of Europe' was presented by none other than Tariq Ramadan.<sup>26</sup> Based on a draft resolution and the proceedings of June 2006, the Council of Europe recently released Resolution 1605, asserting widespread 'Islamophobia' and calling all member nations to "condemn and combat Islamophobia."<sup>27</sup>

Persons held accountable to the EU's new legal standards include actress Brigitte Bardot, who was charged this past April, for the fifth time, with "inciting racial hatred" against Muslims and forced to pay a fine of 12,000 pounds.<sup>28</sup> On May 13, 2008, Dutch police actually arrested a cartoonist using the pseudonym Gregorius Nekschot, "for the criminal offense of "publishing cartoons which are discriminating for Muslims and

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<sup>24</sup> Catherine Elsworth, *Random House Scraps Publication of Novel on Prophet Mohammed's Child Bride*, DAILY TELEGRAPH, Aug. 8, 2008, available at <http://www.telegraph.co.uk/news/uknews/2524540/Random-House-scraps-publication-of-novel-on-Prophet-Mohammeds-child-bride.html> (last visited Mar. 12, 2009).

<sup>25</sup> Press Release, Secretary General, Joint U.N., European Union, Islamic Conference Statement Shares 'Anguish' of Muslim World at Mohammed Caricatures, but Condemns Violent Response, U.N. Doc. SG/2105 (July 2, 2006), available at <http://www.un.org/News/Press/docs/2006/sg2105.doc.htm> (last visited Mar. 12, 2009).

<sup>26</sup> Eur. Parl. Ass'n, *European Muslim Communities Confronted with Extremism*, Doc. No. 11540 (2008), available at <http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc08/EDOC11540.htm> (last visited Mar. 12, 2009).

<sup>27</sup> Eur. Parl. Ass'n, *European Muslim Communities Confronted with Extremism*, 13th Sess., Doc. No. 1605 (2008), available at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta08/ERES1605.htm> (last visited Mar. 12, 2009).

<sup>28</sup> Francois Murphy, *Brigitte Bardot on Trial for Muslim Slur*, REUTERS, Apr. 15, 2008, available at <http://www.reuters.com/article/entertainmentNews/idUSL1584799120080415?feedT> (last visited Mar. 12, 2009).

people with dark skin.”<sup>29</sup> After Italian Minister Roberto Calderoli publicly wore a T-shirt depicting Mohammad, he was forced to resign.<sup>30</sup> Upon his re-nomination to Prime Minister Berlusconi’s reformed government, thinly veiled threats of “catastrophic consequences” emerging from Libya forced Calderoli to issue a full public apology for his wardrobe.<sup>31</sup> At the time of her death in 2006, noted Italian author Orianna Fallaci was being sued in Italy<sup>32</sup>, France, Switzerland,<sup>33</sup> and other jurisdictions by groups dedicated to preventing the dissemination of her work.

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<sup>29</sup> Thomas Landen, *Dutch Police Arrests Cartoonist*, BRUSSELS J., Mar. 16, 2008, available at <http://www.brusselsjournal.com/node/3257> (last visited Mar. 12, 2009).

<sup>30</sup> BBC NEWS, *Italy Cartoon Row Minister Quits*, Feb. 18, 2006, <http://news.bbc.co.uk/2/hi/europe/4727606.stm> (last visited Mar. 12, 2009).

<sup>31</sup> Gavin Jones, *Libya, Italy Patch Up Mohammed T-shirt Row*, STAR ONLINE, May 10, 2008, [http://thestar.com.my/news/story.asp?file=/2008/5/10/worldupdates/2008-05-10T052806Z\\_01\\_NOOTR\\_RTRMDNC\\_0\\_-335051-2&sec=Worldupdates](http://thestar.com.my/news/story.asp?file=/2008/5/10/worldupdates/2008-05-10T052806Z_01_NOOTR_RTRMDNC_0_-335051-2&sec=Worldupdates) (last visited Mar. 12, 2009).

<sup>32</sup> National Secular Society, *Oriana Fallaci Prosecuted Again for “Insulting Islam”*, May 27, 2005, <http://www.secularism.org.uk/39371.html#oriana> (last visited Mar. 12, 2009).

<sup>33</sup> The Milli Gazette, *Swiss Muslims File Suit Over “Racist” Fallaci Book*, <http://www.milligazette.com/Archives/01072002/0107200263.htm> (last visited Mar. 12, 2009).

## V. ENGLAND

Because of their libel laws, United Kingdom courts are particularly friendly jurisdictions for Islamists who want to restrict the dissemination of material drawing attention to radical Islam and terror financing.<sup>34</sup>

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A major player on this front is Khalid bin Mahfouz, a wealthy businessman who resides in Saudi Arabia and who has been accused by several parties of financially supporting Al Qaeda. A notable libel tourist, Mahfouz has sued or threatened to sue more than 30 publishers and authors in British courts, including several Americans, whose written works have linked him to terrorist entities. Faced with the prospect of protracted and expensive litigation, most of the parties targeted by Mahfouz have issued apologies and retractions, while some have also paid fines and "contributions" to his charities.

In 2007, when Mahfouz threatened to sue Cambridge University Press for publishing the book *Alms for Jihad*, by American authors Robert Collins and J Millard Burr, Cambridge Press immediately capitulated, offered a public apology to Mahfouz, took the book out of print, destroyed the unsold copies of the book, and made the outrageous demand that libraries all over the world remove the book from their shelves.

Shortly after the US publication of Rachel Ehrenfeld's book entitled *Funding Evil*, Mahfouz sued Ehrenfeld for defamation because she too had written about financial ties between Mahfouz and terrorist entities. The allegations against Ehrenfeld were heard by the UK court despite the fact that neither Mahfouz nor Ehrenfeld resides in England, while and the court asserted jurisdiction over her merely because approximately 23 copies of *Funding Evil* were sold to UK buyers online via Amazon.com. Unwilling to travel to England or acknowledge the authority of English libel laws over herself and her work, Ehrenfeld lost on

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<sup>34</sup> Where, in the United States, with our First Amendment rights to free speech, libel plaintiffs not only have the burden to prove that the speech in question is false and defamatory, but where matters of public concern are at issue, the libel Plaintiff must also show that the speech was published with a reckless disregard for the truth. In England, on the other hand, the burden is in exactly the opposite direction: the offending speech is presumed to be false, and it is up to the defendant to prove that it is in fact true. While on the surface the difference may seem trite, UK libel jurisprudence, in direct contrast to US law and due process considerations, effectively operates to declare Defendants guilty before proven innocent and UK courts have become a magnet for libel suits that would otherwise fail miserably in the US. And so heavy is the burden of proof put on the defendant that the mere threat of suit in a UK court is enough to intimidate publishers into silence, regardless of the merit of their author's works.



default and was ordered to pay heavy fines, apologize, and destroy her books -- all of which she refused to do.<sup>35</sup>

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In response to Ehrenfeld's case, the New York State legislature unanimously passed the Libel Terrorism Protection Act, noting that, "the English judgment will forever hang over Dr. Ehrenfeld's head like the sword of Damocles."<sup>36</sup> In short, the new law instructs courts to not recognize foreign defamation judgments unless it first makes a determination that "the foreign court's adjudication provided at least as much protection for freedom of speech and press in that case as would be provided by both the United States and New York Constitutions."<sup>37</sup>

The issue has been also brought before Congress, and the House of Representatives passed a bill modeled after the NY Act, by unanimous voice vote.<sup>38</sup> Stronger measures however, may be necessary as the Federal law does not provide for an affirmative cause of action on behalf of the American victim to declare the foreign suit null and void,<sup>39</sup> so the matter will be on the Senate agenda for an upcoming session.

Yet even for journalists and bloggers protected by the New York law domestically, their ability to travel to the United Kingdom and Europe is seriously constrained by a judgment against them. Failure to comply with a UK judgment may give rise to a finding of contempt under British law without the need to show specific intent to disobey the court order,<sup>40</sup> and penalties can include committal.<sup>41</sup> Moreover, the holder of a British judgment may request its enforcement elsewhere in the European Union,<sup>42</sup> with the

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<sup>35</sup> Instead, Ehrenfeld went on the offensive and counter-sued Mahfouz in a New York State court seeking to have the foreign judgment declared unenforceable in the United States. Ironically, Ehrenfeld lost her case against Mahfouz, because the New York court decided it lacked jurisdiction over the Saudi resident who, the court said, did not have sufficient connections to the state. Shortly afterwards and in direct response to the court's ruling, the NY state legislature, in an unprecedented show of cross party solidarity, unanimously voted to enact the Libel Terrorism Protection Act which prevents the enforcement of foreign libel judgments over American authors and provides the opportunity for the claim to be tried in the US, on its merits, and according to American principles of free speech. A similar piece of legislation has been introduced in Congress by Arlen Specter and Joseph Lieberman in the Senate and by Joseph King in the House of Representatives, along with several co-sponsors. Glazov, *supra* note 13.

<sup>36</sup> Memorandum from N.Y. State Assembly in Support of Legislation 5 (Jan. 10, 2008), available at <http://www.meforum.org/legal-project-ltpa.pdf> (last visited Mar. 12, 2009).

<sup>37</sup> Kelly O'Connell, *Internet Law—NY Libel Terrorism Protection Act 2008*, INTERNET BUSINESS LAW SERVICES, May 15, 2008, [http://www.ibls.com/internet\\_law\\_news\\_portal\\_view.aspx?id=2060&s=latestnews](http://www.ibls.com/internet_law_news_portal_view.aspx?id=2060&s=latestnews) (last visited Mar. 12, 2009).

<sup>38</sup> H.R. 6146, 110th Cong. (2008) (which passed by unanimous voice vote).

<sup>39</sup> Posting of Aaron Eitan Meyer, *A Shield for Free Speech, but No Sword Against Islamist Lawfare*, Yet to [http://www.terrorfinance.org/the\\_terror\\_finance\\_blog/2008/10/a-shield-for-fr.html](http://www.terrorfinance.org/the_terror_finance_blog/2008/10/a-shield-for-fr.html) (Oct. 6, 2008, 7:58 EST) (last visited Mar. 12, 2009).

<sup>40</sup> *Heatons Transport (St. Helens) Ltd. v. Transport and General Workers Union*, (1973) AC 3 Eng. Rep. 101, 117 (H.L.).

<sup>41</sup> Rules of Supreme Court Order 45 Enforcement of Judgments and Orders, 2005, Rule 5(1)(b)(iii), available at [http://www.justice.gov.uk/civil/procrules\\_fin/pdf/schedule1/rscorder45.pdf](http://www.justice.gov.uk/civil/procrules_fin/pdf/schedule1/rscorder45.pdf) (last visited Mar. 12, 2009); County Court Rules Order 29 Committal for Breach of Order or Undertaking, 2008, available at [http://www.justice.gov.uk/civil/procrules\\_fin/pdf/schedule2/ccrorder29.pdf](http://www.justice.gov.uk/civil/procrules_fin/pdf/schedule2/ccrorder29.pdf) (last visited Mar. 12, 2009).

<sup>42</sup> By means of a European Enforcement Order, pursuant to Commission Regulation No 1869/2005

corresponding limitation on travel that entails and subsequent involvement of Interpol. Though the state of New York and the House of Representatives have provided a domestic shield to protect free speech against foreign lawfare, there is still no sword with which to legally strike back at those who are attempting to silence American journalists, researchers and academics from abroad.

## VI. CANADA

Canada, with its human rights commissions, joins the list of countries whose laws are being used to attack the free speech rights of authors and activists. Section 13 of the Canadian Human Rights Act (CHRA) bans the electronic transmission of material that is deemed “likely to expose persons to hatred or contempt by reason of the fact that those persons are identifiable on the basis of a prohibited ground of discrimination,”<sup>43</sup> which prohibited grounds include both ethnic origin and religion.<sup>44</sup> Such vagaries in what was probably a well-meaning, yet democratically incompatible and short-sighted law, has enabled a wave of “human rights” complaints in the Canadian Human Rights Commissions (CHRC) against outspoken critics of radical Islam and their publishers.

Those summoned to appear before the CHRC include Maclean's magazine, award-winning author Mark Steyn, and noted Canadian lawyer and blogger, Ezra Levant. The complaints against Maclean's and Steyn were initiated by the Canadian Islamic Congress (CIC) and based on Maclean's' re-publication of excerpts from Steyn's book entitled *America Alone*, which details Europe's capitulation to radical Islam, and projects America as potentially the last bastion of freedom, and which the CIC argued in its complaint is “flagrantly Islamophobic.” Nearly a year after the complaints were filed, the British Columbia Human Rights Tribunal issued a ruling on the case on October 10, 2008, holding that the complainants did not fulfill their burden of establishing that the article would in fact expose them to hatred or contempt due to their religion. Levant was likewise hauled before the Commissions on charges of “hate crimes” against Muslims after re-publishing the Danish Cartoon of Mohammad in the now defunct Western Standard Magazine. Though the charges against him were dropped the outcome could hardly be considered a “win” for free speech, as he details on his website.<sup>45</sup>

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<sup>43</sup> What is particularly disturbing about Section 13 “hate speech” laws is that the court costs of any one Plaintiff who files a section 13 complaint are entirely subsidized by the government, while the defendants are left to endure the financial burden of litigation alone. This is a rule that, on its face, obviously encourages frivolous litigation. Moreover the CHRC has had a one hundred percent conviction rate on section 13 charges.

<sup>44</sup> The Canadian Human Rights Act, R.S.C., ch. 3(1) (1985).

<sup>45</sup> Brooke Goldstein, *Legal Jihad: How Islamist Lawfare is Stifling Western Free Speech on Radical*

In Levant's own words, he remains furious, "[b]ecause I haven't been given my freedom of the press. I've simply had the government censor approve what I said. That's a completely different thing."<sup>46</sup>

In the Notice of Dismissal, the judge commented that while the cartoons by themselves reinforce existing stereotypes of Muslims, in context they don't constitute hatred and contempt for Muslims.<sup>47</sup>

Meanwhile, costs incurred by a blogger defending against even the most frivolous lawsuit are considerable enough that the Media Bloggers Association has introduced blogger insurance, as a response to data that lawsuits against bloggers have increased exponentially over the past decade.<sup>48</sup>

## VII. THE NETHERLANDS

The most frightening predicament of all is that of Dutch politician, filmmaker and outspoken critic of radical Islam, Geert Wilders. After releasing a ten-minute self-produced film entitled "Fitna," Wilders has found himself wound up in a litany of "hate speech" litigation. One such suit was filed by a radical Imam featured in the film, who is demanding 55,000 Euros in compensation for his hurt feelings. Ironically, the film's narrative is primarily comprised of quotes from the Koran and scenes of an Imam preaching death to Infidels.<sup>49</sup>

Meanwhile, the Dutch organization "Day of Respect Foundation" issued a booklet for a state-sponsored educational "Day of Respect" that likened Wilders to Hitler.<sup>50</sup> The booklet, which was aimed at school-children aged ten to twelve years, was amended to include an inserted page that was not defamatory of Wilders after the Freedom Party successfully argued the matter before Parliament, forcing under-Minister Sharon Dijksma to issue the change.<sup>51</sup>

More disturbing however, is the fact that the State of Jordan, most likely acting as a stalking house for the Organization of the Islamic

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*Islam*, THE HENRY JACKSON SOCIETY, Nov. 25, 2008, available at <http://www.henryjacksonsociety.org/stories.asp?id=899> (last visited Mar. 12, 2009) (text of speech given to U.K. Parliament).

<sup>46</sup> Posting of Ezra Levant, *Punished First, Acquitted Later* to <http://ezrelevant.com/2008/08/punished-first-acquitted-later.html> (Aug. 6, 2008, 10:34 EST) (last visited Mar. 12, 2009).

<sup>47</sup> Letter from Pardeep S. Gundara, Alberta Human Rights and Citizenship Commission Southern Director to Yasmin Nizam, Edmonton Council of Muslim Communities (Aug. 1, 2008), available at <http://ezrelevant.com/Complaint%20rejected.pdf> (last visited Mar. 12, 2009).

<sup>48</sup> Posting of David Ardia, *New Insurance Program for Bloggers Offered by the Media Bloggers Association* to <http://www.citmedialaw.org/blog/2008/new-insurance-program-bloggers-offered-media-bloggers-association> (Sept. 23, 2008) (last visited Mar. 12, 2009).

<sup>49</sup> FITNA (Geert Wilders 2008), available at <http://www.nmatv.com/video/1132/Fitna> (last visited Mar. 18, 2009).

<sup>50</sup> Geert Wilders, "Wilders is Hitler", HUDSON NEW YORK, Nov. 3, 2008, <http://www.hudsonny.org/2008/11/wilders-is-hitler.php> (last visited Mar. 12, 2009).

<sup>51</sup> Posting of Robert Spencer, *Dutch Cabinet Gives In: Wilders is No Hitler Anymore* to <http://www.jihadwatch.org/dhimmiwatch/archives/023360.php> (Nov. 4, 2008, 11:57A.M. EST) (last visited Mar. 12, 2009).

Conference (OIC), has issued a an extradition request for Wilders' to stand in Jordan for blasphemy of Islam, a crime for which Shari'a law declares the penalty to be death.<sup>52</sup>

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The Dutch parliament [is taking] the extradition request very seriously, and has shut out Wilders from any multi-lateral negotiations. As a precaution, Wilders no longer travels abroad unless he can obtain a diplomatic letter from the destination state promising he [will not] be extradited. [At present], Wilders live[s] under looming death threats complemented by the threat that any day, Interpol may issue a warrant for his arrest at Jordan's behest.<sup>53</sup>

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If Jordan succeeds in extraditing a democratically elected official to stand trial in a non-democratic country for speech made in the scope of his duties while educating his constituents vis-à-vis their national security, all under the guise of blasphemy of Islam, what kind of precedent would be set? As much as the Islamists wish to punish Wilders, there is no question that his case is a dry run for bigger game. How long until some convenient court in an OIC nation decides to find another government official guilty of 'blasphemy' and demands their extradition?

In January 2009, Wilders was invited by a member of the U.K. House of Lords to privately screen his film *Fitna*. In response, Pakistani-born Lord Nazir Ahmed declared that he would gather 10,000 British Muslims to physically block Wilders' entry, after which the invitation was rescinded.<sup>54</sup> Undaunted, in February of 2009, Lord Malcolm Pearson re-invited Wilders to screen *Fitna* for the United Kingdom Parliament.<sup>55</sup> In response, the U.K.'s Home Office declared him *persona non grata* on the absurd ground that he represented "a threat to public security and public harmony,"<sup>56</sup> and refused him entry when he arrived at Heathrow airport.<sup>57</sup> In marked contrast, the

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<sup>52</sup> Posting of Jordan Charges Geert Wilders with "Blasphemy and Contempt of Muslims"; OIC "Deeply Annoyed" at Dutch Decision Not to Prosecute Him to <http://jihadwatch.org/archives/2008/07/021595print.html> (July 1, 2008, 6:15P.M. EST) (last visited Mar. 12, 2009).

<sup>53</sup> Brooke M. Goldstein & Aaron Eitan Meyer, *Death to Free Speech in the Netherlands*, AMERICAN SPECTATOR, Jan. 22, 1009, <http://spectator.org/archives/2009/01/22/death-to-free-speech-in-the-ne> (last visited Mar. 23, 2009).

<sup>54</sup> Posting of Thomas Landon, Muslims in the Lords to <http://www.brusselsjournal.com/node/3765> (Jan. 26, 2009, 11:16 EST)

<sup>55</sup> Posting of Thomas Landon, Will Geert Wilders be Arrested at Heathrow? to <http://www.brusselsjournal.com/node/3793> (Feb. 10, 2009, 17:57 EST)

<sup>56</sup> *Id.*

<sup>57</sup> Geert Wilders detained at Heathrow Airport, [http://www.geertwilders.nl/index.php?option=com\\_content&task=view&id=1511&Itemid=1](http://www.geertwilders.nl/index.php?option=com_content&task=view&id=1511&Itemid=1) (Feb. 12, 2009)

U.K. did permit entry to Ibrahim Moussawi, an official of the terrorist organization Hezbollah.<sup>58</sup>

### VIII. THE INTERNATIONAL SCENE

National lawfare efforts are being complemented with similar International efforts to outlaw blasphemy of Islam as a crime against humanity. Islamist organizations such as the Muslim World League are calling for the establishment of an independent commission to take action against parties who defame their Prophet Mohammed.<sup>59</sup> At the Dakar summit, taking legal action against parties who slander Islam was a key issue debated at length, with the final communiqué adopted by the Organization of the Islamic Conference (OIC) denouncing the “rise in intolerance and discrimination against Muslim minorities, which constitute[s] and affront to human dignity.”<sup>60</sup> In May 2007, the Islamic Conference of Foreign Ministers at its thirty-fourth session in Islamabad, condemned the “growing trend of Islamophobia” and emphasized “the need to take effective measures to combat defamation.”<sup>61</sup> The Islamic Society of North America and the Muslim Public Affairs Council have both stated publicly that they are considering filing defamation lawsuits against their critics<sup>62</sup> and CAIR has announced an ambitious fundraising goal of one million, in part to; “defend against defamatory attacks on Muslims and Islam.”<sup>63</sup>

Most recently, Muslim states and organizations have successfully lobbied the United Nations’ Human Rights Commission to enact Resolution 7/19,<sup>64</sup> a document that turns the concept of “human rights” into an instrument of Orwellian thought control. The Resolution makes reference to the Durban Declaration, and expresses the intent “to complement legal strategies” aimed at criminalizing the defamation of religion.<sup>65</sup> The

<sup>58</sup> Posting of David Taub, *Betrayed by this Labour Government* to [www.hurryupharry.org/2009/03/12/betrayed-by-this-labour-government](http://www.hurryupharry.org/2009/03/12/betrayed-by-this-labour-government) (Mar. 12, 2009, 8:000 EST)

<sup>59</sup> Goldstein, *supra* note 45; Abdul Ghafur, *MWL Wants Lawsuits for the Abuse of Islam and the Prophet*, ARAB NEWS, Dec. 28, 2006, <http://www.arabnews.com/?page=4&section=0&article=77639&d=28&m=12&y=2006> (last visited Mar. 12, 2009).

<sup>60</sup> Goldstein, *supra* note 45.

<sup>61</sup> *Id.* See U.N. Human Rights Council [H.R.C.], *Racism, Racial Discrimination, Xenophobia and Related Forms of Intolerance, Follow-Up to and Implementation of the Durban Declaration and Programme of Action*, U.N. Doc. A/HRC/7/L.15 (Mar. 20, 2008).

<sup>62</sup> Robert King, *Muslims Aim to Challenge Critics in America*, FAITH FREEDOM, Sept. 5, 2005, <http://www.faithfreedom.org/oped/RobertKing50905.htm> (last visited Mar. 12, 2009); Steven Emerson, *Threatened by the Jihad*, FRONTPAGE MAGAZINE, Mar. 14, 2007, <http://www.frontpagemag.com/Articles/Printable.aspx?GUID={1E2DE909-C6F5-4A5F-B852-0D90BE4FEA9C}> (last visited Mar. 12, 2009).

<sup>63</sup> Council on American-Islamic Relations-Chicago, *Each U.S. Mosque Urged to Raise \$1,000 for Ramadan Campaign*, Oct. 26, 2005, [http://chicago.cair.com/actionalerts.php?file=aa\\_campaign10262005](http://chicago.cair.com/actionalerts.php?file=aa_campaign10262005) (last visited Mar. 12, 2009); Meghan Clyne, *Treasury Department Tars Almodi, Founder of the Islamic Society of Boston*, N.Y. SUN, Dec. 9, 2005, available at <http://www.nysun.com/national/treasury-department-tars-alamoudi-founder-of/24211/> (last visited Mar. 12, 2009).

<sup>64</sup> H.R.C. Res. 7/19, U.N. Doc. A/RES/7/19 (Mar. 27, 2008).

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

Resolution “urges States to provide, within their respective legal and constitutional systems, adequate protections against acts of...discrimination,”<sup>66</sup> and prohibits “the dissemination of racist and xenophobic ideas.”<sup>67</sup> Note that it is *ideas* that are prevented here. Not published words but defamatory *thoughts* against Islam.

Resolution 7/19 further expresses its “deep concern at the attempts to identify Islam with terrorism, violence and human rights violations...”<sup>68</sup> What are the chances that this provision will be applied to those who behead journalists in the name of Islam, or to Palestinian terrorist groups that call themselves “Islamic Jihad”?

To add insult to injury, signatories to the Resolution take the opportunity to “[e]mphasize (emphasis not added) that everyone has the right to freedom of expression” but that this freedom may “be subject to certain restrictions” while stipulating that “the prohibition of the dissemination of *ideas* based on racial superiority or hatred is compatible with the freedom of opinion and expression...”<sup>69</sup> Signatories to U.N. Human Rights Council Resolution 7/19 include China, Egypt, Indonesia, Jordan, Malaysia, Nigeria, Pakistan, Philippines, Qatar, the Russian Federation, Saudi Arabia and Sri Lanka, amongst others.<sup>70</sup>

Resolution 7/19 looks like an initial attempt to establish a body of international law to be used in the future against heads of state who speak out against radical Islam as a threat to national security. Hence, instead of Muslim states unilaterally seeking the extradition of a Geert Wilders – or perhaps, a Donald Rumsfeld – Islamists can now employ UN mechanisms to force politicians to abide by a standard of “sensitivity” to Islam defined solely by Islamists themselves.

The European Center for Law and Justice, a not for profit public interest law firm submitted an engaging report to the UN High Commissioner arguing, correctly, that freedom of religion does not entail *carte blanche* freedom to practice your religion absent criticism.<sup>71</sup> In fact, Resolution 7/19 is itself a violation of international law undermining the inalienable human right to free speech, especially on matters of important public concern such as religion and national security.<sup>72</sup>

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<sup>66</sup> *Id.* ¶ 9.

<sup>67</sup> *Id.* ¶ 8.

<sup>68</sup> *Id.* ¶ 2.

<sup>69</sup> U.N. H.R.C. Res. 7/19, *supra* note 59, ¶12–13.

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

<sup>71</sup> Goldstein, *supra* note 45.

<sup>72</sup> *Id.*

## IX. CONCLUSION

The war against Islamism is as much a war of ideas as it is a physical battle, and therefore the dissemination of information in the free world is paramount. The manipulation of Western court systems, the use of Western “hate speech laws” and other products of political correctness to destroy the very principles that democracies stand for, must be countered.

Unfortunately, Islamist lawfare is beginning to limit and control public discussion of Islam, particularly as it pertains to comprehending the threat posed by Islamic terrorist entities. As such, the Islamist lawfare challenge presents a direct and real threat not only to our constitutional rights, but also to our national security.

Yet, what are the positions of the American Civil Liberties Union and the Center for Constitutional Rights (CCR) on this issue? Where is the international media? Why is this issue being met with virtual silence on their behalves while American citizens’ basic human rights to free speech are being trampled on? Perhaps the CCR is too busy with its suit against former Defense Secretary Donald Rumsfeld in Spain for alleged “war crimes” in Iraq, since the German case against him was dismissed.<sup>73</sup>

As the United States shifts politically, one must be particularly on guard against creating lawfare-exploitable laws and regulations. For example, statements by several prominent Democrats favoring the reimposition of the constitutionally questionable Fairness Doctrine, focus on the aspect of the doctrine that mandates that radio stations devote equal time to conservative and liberal hosts.<sup>74</sup> However, the actual chilling effect of the old Fairness Doctrine was that, “[s]tation owners were afraid that their licenses would be yanked if there was the slightest possibility that they could be accused of violating the doctrine; it was far safer to simply avoid controversial matters.”<sup>75</sup> One can scarcely imagine a more controversial matter than Islamism, or the harmful effects of providing even more time to Islamism’s apologists.

Meanwhile, self-censorship has been increasing over the past year even within the Bush administration, highlighted by the release of two documents issued by the National Counterterrorism Center that specifically called for US officials to cease referring publicly to terrorist groups as

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<sup>73</sup> German Prosecutor Rejects War Crimes Complaint Against Rumsfeld, <http://jurist.law.pitt.edu/paperchase/2007/04/german-prosecutor-rejects-war-crimes.php> (Apr. 27, 2007, 16:08 EST) (last visited Mar. 21, 2009).

<sup>74</sup> Bob Cusak, *Schumer on Fox: Fairness Doctrine ‘Fair and Balanced’*, THE HILL, Nov. 4, 2008, available at <http://thehill.com/leading-the-news/schumer-defends-fairness-doctrine-as-fair-and-balanced-2008-11-04.html> (last visited Mar. 12, 2009).

<sup>75</sup> William Tate, *The Fairness Doctrine at Work*, AMERICAN THINKER, Jun. 20, 2008, [http://www.americanthinker.com/2008/06/the\\_fairness\\_doctrine\\_at\\_work.html](http://www.americanthinker.com/2008/06/the_fairness_doctrine_at_work.html) (last visited Mar. 12, 2009).

Muslim or Islamic,<sup>76</sup> irrespective of the fact that any number of such organizations contain those terms in their self-titles.

Some have argued that the anti-Americanism of radical Islamists has little to do with anti-imperialism but reflects a profound contempt for the liberal social democratic society we have built and its emphasis on individual liberties and freedoms.<sup>77</sup> Freedom of expression is the cornerstone of democratic liberty - it is a freedom that Western civilizations have over time paid for with blood. We must not give it up so easily. The true imperialists are those who seek to impose their perception on others, through violent or legal means, and who seek to conquer and subjugate contradictory points of view.

The reality is that the Muslim community has nothing to gain from supporting the censorship of debate about Islam. If a cartoon with Mohammad is "hate speech" now, how much longer before the Koran gets the same treatment? As Jonathan Kay, National Post columnist, has aptly pointed out "human rights mandarins haven't gone after mosques or mullahs - yet," but it doesn't take much to recognize that two can play at the same game.<sup>78</sup> The actions of CAIR and the CIC and others who engage in Islamist lawfare offer a great rebuttal to those who see Islamism as compatible with democracy.

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<sup>76</sup> Shaun Waterman, *Analysis: U.S. Drops Islam in Terror Talk*, MIDDLE EAST TIMES, May 6, 2008, available at [http://www.metimes.com/Security/2008/05/06/analysis\\_us\\_drops\\_islam\\_in\\_terror\\_talk/54ad/](http://www.metimes.com/Security/2008/05/06/analysis_us_drops_islam_in_terror_talk/54ad/) (last visited Mar. 12, 2009); Posting of Robert Spencer, *U.S. Urges Officials to Stop Linking Islam with Terrorism-Now if They Could Only Convince the Jihadists to Stop Also* to <http://jihadwatch.org/archives/020914.php> (May 7, 2008 12:18 P.M. EST) (last visited Mar. 12, 2009).

<sup>77</sup> Tarek Fatah, *Triggering a State of Islam*, KHLAFAH, May 15, 2008, <http://www.al-waie.orgwww.khilafah.com/index.php/news-watch/middle-east/2784-triggering-a-state-of-islam> (last visited Mar. 12, 2009).

<sup>78</sup> Jonathan Kay, *The Company Muslims Keep: Canada's Islamic Community Has Nothing to Gain By Allying Itself with Human Rights Censors*, NATIONAL POST, July 22, 2008, available at <http://www.nationalpost.com/scripts/story.html?id=0b5adf8f-98af-4111-a04b-cb257eb08fa3&k=85307> (last visited Mar. 21, 2009).