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LAWFARE: TACTICS AND TECHNIQUES

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The preceding article of this trilogy explored the definitions and concepts associated with lawfare. This follow-on piece explores the tactics and techniques of lawfare, and focuses upon the practice of offensive as well as protective facets of lawfare — for the most part in the USA.

As the following paragraphs will indicate, the exploitation of the various provisions of international law for lawfare is much more common than the current sharp focus on the usage of lawfare by the People's Republic of China (PRC) might indicate. It is, of course, true that the PRC has elevated lawfare to the level of formally enunciated Statecraft. For those strategic analysts who are increasingly concerned (and quite rightly, too!) about the ongoing attempt by the PRC to engage in what some are terming 'narrative-warfare' through the promulgation of the Global Civilizational Initiative (GCI), the Global Development Initiative (GDI) and the Global Security Initiative (GCI), it would be instructive to examine other tactics and techniques that have been effectively deployed (and which continue to be so deployed) in international forums and that may well be the inspiration propelling the PRC's own efforts in terms of lawfare through subtle narrative changes.

Indeed, a review of the existing literature on the subject shows multiple tactics or techniques as having been deployed by State as well as non-State actors. Orde Kittrie refers collectively to these tactics and techniques as *"Instrumental lawfare"* or the **instrumental use of legal methods and/or forums to achieve outcome(s) that would otherwise have had to be achieved through weaponry, the expenditure of ordnance, or military operations**.[1]

According to Kittrie, tactics and techniques of lawfare can incorporate legal 'location', i.e., international — and even national — legal 'forums' or legal 'provisions' (i.e., provisions of the law') or both.

'Offensive Lawfare'

A series of examples of techniques and tactics used in 'offensive lawfare' are presented in the succeeding paragraphs.

Linguistic Alterations to Create International Law(s) so as to Disadvantage another Party/State. A telling example of this technique or approach may be seen in the strong and persistent advocacy by the Arab League (as a collective) that led to the legally problematic but nevertheless successful insertion into the Rome Statute of a completely new offence that was

[1] Orde F Kittrie, "Lawfare: Law as a Weapon of War", Oxford University Press, New York, 2016, 11.

specifically designed to categorise Israeli settlements as 'war crimes'. This was done through the addition of the words *"directly or indirectly"* into Article 8(2)(b)(viii) of The Rome Statute. For successful advocacy of this addition, the State of Palestine invoked Article 12(3) of The Rome Statute when "*[I]n January 2009, Palestine's justice minister flew to The Hague and sought an ICC* [International Criminal Court] *investigation. In so doing, Palestine relied on a provision of the Rome Statute that allows non-member states to give the court jurisdiction on their territory*."[2] Although newly formed, this legal provision nevertheless takes away *de jure* legitimacy from settlements that the State of Israel sees as vital to its strategic interests. Further, it exposes Israeli State officials to the risk(s) and stresses of ICC prosecution(s). Finally, it serves as ammunition (with kinetic as well as deterrent potential) for lawfare in fora *other than* the ICC.

Reinterpreting the Provisions of Existing International Law so as to Disadvantage an Adversary. The People's Republic of China (PRC) is engaged in a variety of initiatives to reinterpret the law of the sea, space law, and cyber law, in its favour. If it succeeds, these 'reinterpretations' will considerably tilt future maritime, space, and cyber battlefields in favour of the PRC. A fuller examination of PRC lawfare is contained as a case study in a subsequent article.

Generating Criminal Prosecutions Relevant to International Law, in International Tribunals. Ever since the Palestinian Authority (PA) joined the ICC, it has proactively sought to initiate prosecutions of Israeli officials under Article 14 of the Rome Statute for alleged war crimes relating to combat in Gaza and Israeli settlements in the West Bank. Although it is yet to be formally initiated by the PA, this proactive quest is nevertheless used as a bargaining chip by it at the negotiating table with Israel.[3] Even before joining the ICC, the PA's practice of lawfare was effective. This can be gauged from the fact that Israel released 78 Palestinian prisoners (many of whom had been convicted of murdering Israeli civilians) in exchange for the PA slowing down its own movement (the PA accordingly stopped itself for 8 months) on the latter's membership of the ICC and other international organisations and treaties.[4]

Exploiting International Law to Generate Intrusive and Protracted Investigations by International Organisations. This method is frequently adopted by Palestinian Non-Governmental Organisations against the State of Israel.[5] The BDS ("Boycotts, Divestment, and Sanctions") movement against the State of Israel generated a 17-month long government investigation, in the UK, of G4S — a British vendor of security technology to Israel. The BDS, in its complaint, asserted that G4S contributed to alleged Israeli war-crimes in violation of

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[2] David Bosco, "Palestine in The Hague: Justice, Geopolitics, and the International Criminal Court", *Global Governance*, Jan-Mar 2016, Vol 22, No 1, 155-171 and 157.

[3] Kittrie, "Lawfare: Law as a Weapon of War", 219.

[4] Ibid, 206-207.

[5] Orde F Kittrie, "Palestinian NGOs and their Allies Wage Lawfare against Israel", 239-281

See Also: Anne Herzberg, "NGO "Lawfare": Exploitation of Courts in the Arab-Israeli Conflict", December 2010, https://www.ngo-monitor.org/data/images/File/lawfare-monograph.pdf **and** "Weaponizing the Law Conference in the Gaza Strip to Discuss the Legal Battle against Israel", *The Meir Amit Intelligence and Terrorism Information Center*, 26 March 2023, https://www.terrorism-info.org.il/app/uploads/2023/03/E_063_23.pdf

guidelines issued by the Organisation for Economic Cooperation and Development (OECD).[6] This investigation contributed to G4S announcing its withdrawal from future business in Israel.[7]

Generating Votes Within an International Organisation/Forum to Disadvantage an Adversary. The PA and its allies successfully campaigned for passage of the UN General Assembly (UNGA) Resolution that granted 'Non-Member Observer State' status to Palestine.[8] The new status, as well as other provisions of the resolution, strengthened Palestine's claim to statehood and the legal rights that come with it — without the PA having to make any concessions to Israel or defeat it on the kinetic battlefield.[9]

Generating Advisory Opinions in International Legal Forums. The PA won a major 'lawfare' victory against Israel through an International Court of Justice (ICJ) Advisory Opinion of 2004 entitled, *"Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory"*.[10] This Advisory Opinion came about when the PA and its allies (e.g., the Arab League) campaigned against a 2002 Israeli decision to construct a security fence separating Israel from much of the West Bank territory. First, Arab States successfully campaigned for a UN General Assembly resolution requesting the ICJ for the aforesaid Advisory Opinion.[11] Subsequently, the ICJ declared that the security barrier and Israel's West Bank settlements were in violation of international law,[12] and that Israel was *"under an obligation"* to dismantle the barrier.[13] This Advisory Opinion is contentious because it came about despite assertions by Israeli officials —— as well as reported admissions by Hamas leaders — that the security barrier hindered suicide bombing attacks against Israel.[14] While it is true that in this case, Palestinian lawfare did not make the wall or the settlements go away, it did succeed in putting continual pressure on the UN Secretary General who, in turn, applied pressure on the State of Israel to dismantle the wall and the settlements. This Advisory Opinion also subsequently became the basis for actions in European courts against companies doing business with the settlements.[15] It served as the basis for a three-year long Dutch criminal investigation of a Dutch company for alleged war crimes. The alleged war crime/offence was that the Dutch Company had rented out to the Israeli government — for a total of 16 days — construction equipment used in construction of the wall

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[6] Organisation for Economic Cooperation and Development, "OECD Guidelines for Multinational Enterprises", OECD Publishing (2011), http://www.oecd.org/daf/inv/mne/48004323.pdf

[7] Kittrie, "Lawfare: Law as a Weapon of War", 243-245.

[8] United Nations General Assembly, "Resolution A/RES/67/19", https://documents-dds-ny.un.org/doc/UNDOC/GEN/N12/479/74/PDF/N1247974.pdf?OpenElement

[9] Kittrie, "Lawfare: Law as a Weapon of War", 200-202, 211, 218.

[10] Advisory Opinion, "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory", *ICJ Reports 2004*, 136, https://www.icj-cij.org/public/files/case-related/131/131-20040709-ADV-01-00-EN.pdf

[11] "Written Statement of the League of Arab States, Request for Advisory Opinion: Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (January 2004)", *ICJ-CIJ*, https://www.icj-cij.org/public/files/case-related/131/1545.pdf >,

See Also: "General Assembly Adopts Text Requesting International Court of Justice to Issue Advisory Opinion on West Bank Separation Wall," Press Release GA/10216, *United Nations*, https://www.un.org/press/en/2003/ga10216.doc.htm

[12] Advisory Opinion, "Legal Consequences", paras 143, 146-147.

[13] Ibid, paras 151, 153.

[14] Kittrie, "Lawfare: Law as a Weapon of War", 13-14.

[15] Ibid, 14, 266

and settlements.[16] It is apparent that this Advisory Opinion could in future, too, serve as the basis for more criminal prosecution(s) in national courts.

Exploiting International Law for 'Universal Jurisdiction' Prosecutions for Alleged War Crimes. In the past, the Iraqis have brought prosecutions to Belgian courts — using the principle of universal jurisdiction in international law and invoking a domestic Belgian law — against then US Secretary of Defence, Donald Rumsfeld, and Secretary of State, Colin Powell, for allegedly committing war crimes in Iraq.[17] After the US threatened to withdraw NATO from Belgium (exposing Belgium to its own security risks), the Belgian law was changed and prosecutions eliminated. On the domestic Belgian law, amendments thereto and subsequent dropping of prosecutions, it was observed that:

> *"The contentious law caused Brussels much diplomatic grief because it gave courts the power to try war crimes cases irrespective of where the alleged crimes were committed and regardless of the victim or perpetrator's identity. It flooded the country's courts with cases against a number of world leaders including Cuban President Fidel Castro and Palestinian leader Yasser Arafat. Under intense international pressure, Belgian legislators drastically amended it last month. The changes stipulated that human-rights complaints can be filed only if the victim or suspect was a Belgian citizen or long-term resident at the time of the alleged crime. In addition, the Belgian parliament also guaranteed diplomatic immunity for world leaders and other high-level officials visiting the country."*[18]

However, many States other than Belgium continue have such laws that allow invocation of universal jurisdiction for certain offences. For instance, US President, George W Bush, was forced to cancel a trip to Switzerland in 2011 amid talks of legal action against him — in Switzerland and during his official visit — for alleged maltreatment of suspected militants at the US extra-territorial prison / detention camp at Guantanamo Bay in Cuba.[19]

Exploiting International Law for Criminal Prosecutions of Domestic Companies in National Courts for Alleged War Crimes. The Palestinian NGO *Al-Haq* instituted a Dutch criminal investigation of the Dutch company Riwal for war crimes allegedly committed in Riwal's

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[16] Kittrie, "Lawfare: Law as a Weapon of War", 266-268

[17] "Belgium: Act of 1999 Concerning the Punishment of Grave Breaches of International Humanitarian Law (10 February 1999)", *Refworld*, https://www.refworld.org/docid/3ae6b5934.html; Translated and reprinted in Stefaan Smis and Kim Van der Borght, "Belgium: Act of 1999 Concerning the Punishment of Grave Breaches of International Humanitarian Law", *38 ILM 918 (1999)*, https://www.jstor.org/stable/20698931

[18] "Belgium Drops War Crimes Cases", 25 September 2003, *DW*, https://www.dw.com/en/belgium-drops-war-crimes-cases/a-978973;

See Also: Malvina Halberstam, "Belgium's Universal Jurisdiction Law: Vindication of International Justice or Pursuit of Politics?", *25 Cardozo Law Review 247 (2003)*, https://larc.cardozo.yu.edu/cgi/viewcontent.cgi?article=1066&context=faculty-articles

See Also: Stefaan Smis and Kim Van der Borght, "Belgian Law Concerning the Punishment of Grave Breaches of International Humanitarian Law: A Contested Law with Uncontested Objectives", 04 July 2003, *American Society of International Law*, https://www.asil.org/insights/volume/8/issue/18/belgian-law-concerning-punishment-grave-breaches-international

[19] Kittrie, Lawfare: Law as a Weapon of War, 14

See Also: Ewen MacAskill and Afua Hirsch, "George Bush calls off trip to Switzerland", 06 February 2011, *The Guardian*, https://www.theguardian.com/law/2011/feb/06/george-bush-trip-to-switzerland;

See Also: Stephanie Nebehay, "Bush's Swiss Visit off after Complaints on Torture", 05 February 2011, *Reuters*, https://www.reuters.com/article/us-bush-torture-idUSTRE7141CU20110205

rental to Israel of equipment that Israel used in constructing the separation fence and settlements in the West Bank. The complaint referenced the ICJ's Advisory Opinion (mentioned above) that the fence and settlements violated international law. The investigation lasted three years, included Dutch police raids on Riwal's headquarters and the homes of its officials, and concluded without prosecution only after Riwal halted all activities anywhere in Israel.[20]

Exploiting International Law as a Defence against Criminal Prosecution. Activists of the NGO, 'BDS', twice broke into and damaged the Northern Ireland site of Raytheon (a major weapons manufacturer and exporter) yet managed to get acquitted on both occasions. Their defence was that Raytheon was a supplier arms to Israel and that they were acting to prevent alleged Israeli war crimes against the people of Gaza and Lebanon. Citing these acquittals, Raytheon eventually closed its facility.[21]

Protective 'Lawfare'

It is instructive to note that in order to protect American and Israeli officials from the techniques and tactics of 'offensive lawfare', the US, amongst other nations, has developed a set of techniques and tactics of 'protective lawfare'.

One technique deployed by the US government is entering into what are referred to as "Article 98 Agreements" with many foreign governments, especially U.S. allies.[22] These 'Article 98 Agreements' are also referred-to as 'Bilateral Immunity Agreements' or 'Bilateral Non-surrender Agreements' or 'Impunity Agreements' ('impunity' literally means exemption from punishment). Article 98 of the Rome Statute is reproduced below to demonstrate its potential for 'lawfare', which the US government continues to utilise:

> *"**Article 98***
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> *Cooperation with respect to waiver of immunity and consent to surrender*
>
> *1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.*
> *2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender."*

Article 98 agreements are signed pursuant to a US law called the **"American Service-Members' Protection Act of 2002"** (ASPA), which incorporates language that seeks to protect US citizens

[20] Kittrie, "Lawfare: Law as a Weapon of War", 266-268
[21] Ibid, 248-249
[22] Ibid, 231.

and those of close US allies.[23] Section 2008 of this Act specifies that *"the President is authorized to use all means necessary and appropriate to bring about the release of any person described in subsection (b) who is being detained or imprisoned by, on behalf of, or at the request of the International Criminal Court."* The persons described in subsection (b) include *"covered United States persons"* and *"covered allied persons."* Countries that enter into such Article 98 agreements with the USA agree — as a matter of law — to ***not*** surrender US persons to the jurisdiction of the ICC.[24] The US has since concluded such agreements with at least 100 countries.[25] Further, US Congress even made US military aid to some countries contingent upon their agreeing to enter into such Article 98 agreements with the USA.[26]

If, as was stated in Part 1 of this trilogy, 'lawfare' is a collective term to describe practices and techniques to achieve politico-military objectives without the use of kinetic military force, it must be admitted that a very large number of nations engage in more proactive forms of **'protective lawfare'** by creating or exploiting their ***domestic*** law in a manner that seeks to shape and/or control the ***international*** behaviour of parties over which the domestic law in question would normally not be applicable. This is most commonly used by States to curb 'terrorist' activity. This, of course, is in and of itself a problematic concept, given that a universally acceptable definition of a 'terrorist' continues to elude the community of nations. However — and more disturbingly — it is also used to control adversarial or 'presumed-to-be-threatening' sovereign States by labelling them as 'rogue States' in an entirely subjective — if not arbitrary — fashion. Both categories are touched upon in the succeeding paragraphs.

Creation of National Laws to Enable Litigation against Terrorist Groups and their Supporters and State Sponsors. An illustrative example of this technique is the case of Mr Stephen Flatow. This lawyer and father of a victim of Iranian-sponsored terrorism, successfully worked for multiple amendments to US law that led to the success of his subsequent lawsuit holding Iran accountable for his daughter's death.[27] These amendments also facilitated numerous successful lawsuits by other plaintiffs against Iran and other state sponsors of terrorism including Cuba, Iraq, Libya, North Korea, and Syria.[28]

Criminal Prosecutions of Organisations that Fund Terrorist Groups. The US government criminally prosecuted the "Holy Land Foundation" and multiple individuals for providing assistance to Hamas, which the US had declared as being a terrorist organisation. These

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[23] American Service-Members' Protection Act of 2002, Section 2008, 22 USC Section 7427 (2002), https://www.govinfo.gov/content/pkg/COMPS-3074/pdf/COMPS-3074.pdf
See Also: Julian Bava and Kiel Ireland, "The American Servicemembers' Protection Act: Pathways to and Constraints on US Cooperation with the International Criminal Court", *Stanford Law School*, https://law.stanford.edu/wp-content/uploads/2016/07/Bava_Ireland_Article_FINAL.pdf

[24] Kittrie, "Lawfare: Law as a Weapon of War", 232
See Also: "International Criminal Court - Article 98 Agreements Research Guide", *Georgetown Law Library*, https://guides.ll.georgetown.edu/article_98

[25] "International Criminal Court - Article 98 Agreements Research Guide", *Georgetown Law Library*, https://guides.ll.georgetown.edu/article_98

[26] Kittrie, "Lawfare: Law as a Weapon of War", 232.

[27] Ibid, 15.

[28] Ibid, 70-75.

prosecutions resulted in the incarceration of multiple leading Hamas funders, contributed to the closure of the Holy Land Foundation, and helped reduce Hamas' fundraising in the US.[29]

However, once the concept of 'rogue States' is introduced, techniques and tactics adopted by States become far murkier and difficult to outrightly defend, since it is State practice that is now predominant. Tactics and techniques adopted against 'rogue States are often sought to be given legitimacy or at least acceptability through the inclusion of 'terrorist groups' as an adjunct expression.

A good example is the institution of criminal or civil proceedings against banks that provide financial services to terrorist groups and, by extension, to 'rogue States'. In this context, the Treasury of a State can act as a new front for 'lawfare' that may be opened at a time of the State's choosing — including at any time in the future — by that State. For example, the US Government mounted a multifaceted campaign of enforcement actions to discourage foreign banks from transacting financial business with Iran and other States that the US considered to be 'rogue States'. These efforts resulted in most of the world's top financial organisations stopping or significantly reducing their transactions with Iran. Iran's total foreign currency reserves dropped by as much as US$ 110 billion, and the value of Iran's currency dropped by more than 50 per cent. Such economic lawfare created pressure(s) and thereby coerced Iran to make concessions regarding its nuclear program.[30] Elaborating the legal provisions invoked by the US government to do this, Kittrie states that:

> *"U.S. financial lawfare against Iran relied heavily on two Executive Orders: Executive Order 13224 and Executive Order 13382. The key statutory authority for both executive orders was the International Emergency Economic Powers Act (IEEPA), a little-known statute that provides the President with extraordinarily powerful authority "to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat. In addition, the Executive Order authorized Treasury to block the assets of persons that provide support, services, or assistance to, or are "otherwise associated with" terrorists and terrorist organizations designated under the Order.*
>
> *"Blocking (sometimes also referred to as "freezing") assets is a principal tool deployed by Treasury in its financial lawfare against Iran and other targets. When an asset is blocked, the title to it remains with the targeted person or entity. However, the exercise of the powers and privileges normally associated with ownership, including transfers or transactions of any kind, is prohibited without authorization from Treasury's Office of Foreign Assets Control."*[31]

Another example is that of the use by the US of its Comprehensive Iran Sanctions, Accountability and Divestment Act of 2010 (CISADA).[32] This law allows the US Government

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[29] Ibid, 54-60.

[30] Ibid, 119-125.

[31] Ibid, 125-126.

[32] "Comprehensive Iran Sanctions, Accountability and Divestment Act of 2010", *Public Law*, 111-195-July 1, 2010, https://www.congress.gov/111/plaws/publ195/PLAW-111publ195.pdf;

to present foreign companies with a mafia-like choice between providing petroleum-products to Iran and facing sanctions including exclusion from US markets. As a result, the US managed to reduce Iran's imports of petroleum-products by nearly 90 per cent without having to resort to kinetic means such as the interception and interdiction of tankers or the firing of ordnance/ ammunition — classic 'lawfare'. Elaborating on how it was used, Kittrie states:

> *"Following CISADA's enactment, the Obama administration took, with foreign companies doing business with Iran's energy sector, an analogous approach to the Treasury Department's direct outreach to key foreign private financial institutions. In doing so, the administration applied a "special rule" contained in Section 102(g) of CISADA, which allowed the President to, on a case-by-case basis, terminate, or not initiate, an investigation of certain sanctionable activities under the Act if the President certified that the sanctionable entity had stopped the sanctionable activity or had "taken significant verifiable steps toward stopping the activity" and the President had "received reliable assurances" that the sanctionable entity would "not knowingly engage in [such activities] in the future.*
>
> *"As a result, by October 2010, Reliance Industries, Vitol, and each of the other companies that had, two years before, been one of the top five suppliers of gasoline to Iran, had dropped out of supplying gasoline to Iran. The total volume of gasoline imported by Iran in September 2010 was reportedly as much as 90 per cent less than what Iran imported in months prior to the July 1, 2010, enactment of CISADA.*[33]

Sometimes, the mere *intention* to enact new legislation or exploit existing legislation can be enough to have an effect. For example, in 2008, eight members of the US Congress corresponded with the US Export-Import Bank, asking it to re-evaluate over US$ 900 million in loan guarantees for Reliance Industries, an Indian company that was providing 10 per cent of Iran's monthly consumption of petroleum-products.[34] On the first day of trading after the story broke in the Indian press, shares of Reliance Industries on the Indian stock exchange dropped by over a billion US dollars. Reliance soon stopped supplying petroleum-products to Iran. Additionally, just the awareness that the CISADA was likely to be enacted had a notable effect on the export of petroleum-products to Iran — even before the enactment of the Act — with multiple companies stopping their exports at different stages of the CISADA Bill's passage.[35]

Another example of this tactic is offered by the "Shurat HaDin Law Center" (Shurat) — an Israeli NGO headed by an Israeli private sector litigator.[36] Shurat put dozens of maritime insurers on notice that they could be sued and held liable in U.S. courts for any terrorist acts by Hamas if they provided material support to Hamas by insuring boats departing from Greece to breach the Gaza blockade. The insurers withdrew their insurance coverage, and the flotilla was

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See also: US Department of State, "Factsheet: Comprehensive Iran Sanctions, Accountability, and Divestment Act (CISADA)", https://2009-2017.state.gov/e/eb/esc/iransanctions/docs/160710.htm

[33] Kittrie, "Lawfare: Law as a Weapon of War", 95-96.

[34] Ibid, 15.

[35] Ibid, 94-96.

[36] Id, 311.

See also: Shurat HaDin, Israel Law Center Home Page, https://israellawcenter.org/

prevented from departing for Gaza or breaching the Israeli blockade imposed on Gaza.[37] Documenting how Shurat did this, Kittrie elaborates:

> *"Shurat HaDin sent letters to each of the several dozen relevant maritime insurance companies. The letters placed the companies "on notice" concerning the Gaza flotilla. Specifically, the letters warned that if the companies knowingly insured boats being used to breach the Gaza blockade and conduct smuggling into Gaza, the companies would find themselves open to charges of materially supporting terrorism and legally liable for any future terrorist or rocket attacks perpetrated by Hamas, on the grounds that the boats provided material support to Hamas…* [Shurat's head] *said that in her letters, she referenced or included copies of the US Supreme Court decision in Holder v. Humanitarian Law Project in support of her assertion that the flotilla's breach of Israel's blockade and its transportation of goods to Gaza was tantamount to providing material support or resources to Hamas and thus inconsistent with US law. The Humanitarian Law Project case centred on USC Section 2339B, which makes it a federal crime to "knowingly provide material support or resources to a foreign terrorist organization…* [where] *"material support or resources" is defined to include "any property, tangible or intangible, or service."*"[38]

Greek officials subsequently confirmed the lack of insurance and stopped the ships from sailing.

Civil Lawsuits as an Instrument of Coercive Lawfare

Civil lawsuits, too, can be used to achieve the results of what might otherwise have been possible only through military kinetic action against a targeted State.

An example of this is the lawsuit filed in a US federal court by three families of "Brothers to the Rescue" pilots shot down by the Cuban Air Force, which resulted in a US$ 187.6 million judgment against the State of Cuba and resulted in three families collected this amount by seizing US$ 96.7 million in Cuban assets in the United States.[39]

Likewise, a lawsuit in a US court led to Arab Bank being held liable for damages suffered by victims and family members of victims killed or injured in terrorist attacks by Hamas.[40] The amount by way of damages was estimated to be around US$1 billion. This verdict did not just set a precedent that deterred other banks from providing financial services to terrorist groups, but also galvanized other subsequent lawsuits against such providers. Thus, a litigation in a US court, on behalf of the family of a seventeen-year-old U.S. citizen killed by Hamas, resulted in a judgment worth US$ 156 million in damages, etc., against multiple US-based funders of Hamas.[41] This judgment also helped end Hamas' fundraising network in the US, contributed to US executive action against the aforesaid network, and set a precedent that continues to deter others

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[37] Kittrie, "Lawfare: Law as a Weapon of War", 314-315.

[38] Ibid, 314.

[39] James Lawrence King, "Final Judgement: Alejandre v. Republic of Cuba", Casetext Website, https://casetext.com/case/alejandre-v-republic-of-cuba

See Also: Kittrie, "Lawfare: Law as a Weapon of War", 74.

[40] Kittrie, "Lawfare: Law as a Weapon of War", 60-65.

[41] Boim v. Holy Land Foundation 549 F.3d 685 (7th Cir. 2008).

considering raising funds for terrorists. Once again, it, too, mobilised a number of subsequent lawsuits against material supporters of terrorism in the US.[42]

In somewhat similar fashion, a lawsuit was successfully litigated against Iran in a US court on behalf of victims and family members of victims of the 1983 bombing of the US Marine barracks in Beirut, a terrorist attack allegedly sponsored by Iran.[43] In this and subsequent similar cases, Iran was ordered to pay over US$ 9 billion to the aforesaid victims. The plaintiffs also succeeded in freezing nearly US$ 2 billion in Iranian government funds when the US government informed them about the funds' location in a bank account in New York.[44]

Even outside of the legal process, there are instances of Non-Governmental Organisations (NGOs) coercing private companies into stopping business with targeted nation-States through a process of 'naming and shaming' companies. For instance, the US-based NGO, "United Against Nuclear Iran' has systematically uncovered and publicised information about US companies that were doing business with Iran in violation of US sanctions. Faced with massive and uniformly adverse public reactions, these companies responded by cutting ties with Iran.[45]

Similar techniques have been deployed by the US Government at different points in time against targeted State actors such as Iran, Cuba, and even South Africa (against apartheid). Some illustrative examples of the effectiveness of these techniques are as follows:[46]

- 27 US states and 22 US cities were divested from foreign companies engaged in specific types of business with Sudan.[47]
- 24 US states were divested-from — and six states have prohibited — public contracts with foreign companies with substantial investments in Iran's energy sector. Levers like these pressured Iran to make concessions regarding its nuclear program.
- Multiple US states and cities carried out targeted divestments during the anti-apartheid movement against South Africa.[48]
- Several US states/cities — particularly centres of knowledge or industry such as Berkeley, California, Ann Arbor, Michigan, Cambridge, Massachusetts, and New York City — enacted selective purchasing legislation as part of the 'Free Burma' movement. Subsequently, the US Supreme Court did strike down a Burma-related Massachusetts law in the case of *Crosby v. National Foreign Trade Council*.[49] This decision was widely expected

[42] Kittrie, "Lawfare: Law as a Weapon of War", 60.

[43] Royce C Lamberth, "Peterson v. Islamic Republic of Iran", 264 F Supp 2d 46, 61 (DDC 2003), https://casetext.com/case/peterson-v-islamic-republic-of-iran-9

[44] Kittrie, "Lawfare: Law as a Weapon of War", 76-79.

[45] Ibid, 16-17, 91.

[46] Ibid, 83.

[47] Perry S Bechky, "The Politics of Divestment", in *The Politics of International Economic Law*, eds Tomer Broude et al, Cambridge University Press, May 2011, https://ssrn.com/abstract=1634046

[48] Francis Njubi Nesbitt, "The People's Sanctions", *Foreign Policy in Focus*, 6th Dec 2013, https://fpif.org/peoples-sanctions/

[49] Certiorari to the United States Court of Appeals for the First Circuit, "Crosby v. National Foreign Trade Council", 530 US 363 (2000), https://supreme.justia.com/cases/federal/us/530/363/

to lead to fewer laws enacting foreign policy sanctions. However, the enactment of such laws has continued unabated. One reason is that the decision in *Crosby* did not specifically prohibit states and localities from imposing their own sanctions when expressly authorised to do so by US federal law. Such federal laws expressly authorising state sanctions have subsequently been enacted with regard to both Iran and Sudan.[50]

- The US state of Massachusetts divested itself from corporate entities that were supplying military hardware which was found being used in Northern Ireland.[51]
- Multiple US states enacted laws to legally counter the Arab League's boycott of Israel.
- The U.S. state of Florida enacted multiple laws penalizing companies doing business with Cuba.

Concluding Comments

As maybe observed from the foregoing accounts and examples, lawfare is not restricted to the increasingly aggressive and assertive actions of China. Yet, while it is almost certain that the Chinese playbook on lawfare draws heavily from that of the US, Chinese applications of lawfare are less subtle, more 'in-your-face' and, at least for the nations that are located in the South China Sea and the East China Sea, even more effective.

In this regard, and before drawing this particular trilogy on lawfare to a conclusion, two contemporary case studies merit serious examination — one demonstrates lawfare in the ongoing Ukraine conflict, while the other focuses upon lawfare practices adopted by the People's Republic of China. These will be set-forth on the third and concluding article of this trilogy, which will, thereafter, examine judicial responses to lawfare and offer recommendations for Indian policymakers.

As an endnote to this second article, it is prudent to bear in mind that this trilogy is itself but one portion of the ongoing project on lawfare being undertaken by the National Maritime Foundation (NMF).

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[50] Kittrie, "Lawfare: Law as a Weapon of War", 84.

[51] Shira Schoenberg, "Pension Politics: The History of Divestment in Massachusetts", *MassLive*, 08 May 2014, https://www.masslive.com/politics/2014/05/the_history_of_divestment_in_m.html