

STUART EIZENSTAT

Senior Counsel at Covington & Burling LLP, former Chief White House Domestic Policy Advisor to President Jimmy Carter, former US Ambassador to the European Union

Laurent COHEN-TANUGI

I would now like to follow-up with Stuart Eizenstat to illustrate further the concept of lawfare at the political level.

Stuart EIZENSTAT

Andy Warhol said we should all have 15 minutes of fame, I am only given 10. Why is there an upswing in lawfare? There is a positive reason, that is that major nation states know it would be catastrophic to engage in shooting wars in a nuclear age. Therefore, there is an attempt to achieve the same geo-political objectives by non-lethal means, disinformation, cyberattacks and by lawfare.

Second, for non-state actors, the Taliban, ISIS, HAMAS, the POLISARIO, and to a lesser extent, the Palestinian authority, in an age of terrorism, it is a way of rebalancing the argument against stronger foes, an inexpensive, asymmetric way to attack stronger rivals.

Third, for rising powers like China, or for major nuclear powers like Russia, it is a way to enhance their influence with minimum effort, on the part of the US and NATO to respond, minimum provocation. For the US, in an age of terrorism, it is a way of striking back at terrorists, and of flexing economic muscle, backed up by the Dollar, and putting unparalleled economic pressure, as we have seen in this administration, to get better terms of trade, or better international agreements, even if it means totally and abjectly abandoning international norms and best-trade practices.

With that as a backdrop, let me give you some very frank and specific examples. For non-state actors, the Taliban and ISIS, whether it is in Syria, Afghanistan or Iraq, use human shields as a way of protecting themselves against the full brunt of western response, knowing that the West – the US, NATO – tries to abide by the law of armed conflict and to reduce the degree to which military intervention harms civilians. Therefore, they embed themselves in civilian neighborhoods. HAMAS shoots its rockets at southern Israel from densely-populated civilian neighborhoods.

In addition, if we go from there to Morocco, the country we are in, the conflict over the Western Sahara has been made a part of lawfare by the POLISARIO backed by Algeria, trying to deny Morocco the opportunity to exploit the natural resources, both in Morocco and offshore with fisheries, by using legal attacks. This has gone to the UN, it has gone to European Union, it has gone to the European Court of Justice, and in general, the UN has sided with Morocco and said that as a self-administered territory, as long as Morocco uses the resources and revenues from its exploitation of these resources for the people in the Western Sahara, it is appropriate. Yet, just this very year, 2019, the European Court of Justice, reversing itself from 2018, said no, it was illegal. This was ignored by the European Parliament and the European Commission that cleared the way for an EU/Morocco Fisheries agreement, but again, it is an example. Just last year, a South African court, in 2018, upheld South Africa's seizing a cargo ship full of phosphates made by OCP, manned by OCP, and kept it there until great political pressure was put and releasing it.

The Palestinian issue as a non-state actor is more complicated. I have negotiated, during the Clinton administration, when I was responsible for the peace process's economic dimension, more than a half dozen times with Chairman Arafat. I spent a great deal of time, both in Israel and in the territories, and to its credit, the Palestinian authority does not resort to the kind of violence that HAMAS, ISIS and the Taliban do. Indeed, they cooperate with Israel on security issues, but they have turned to lawfare from their perspective as a way of gaining a two-state solution they cannot get



at the negotiating table. However, from Israel's perspective, it is nothing short of the use of lawfare for what is called BDS, boycott, divestment and sanction.

This began in 2001 at the Durban conference on racism in which NGOs were activated by the Palestinians to isolate Israel, to call it an apartheid state, and in 2005, the BDS movement formally started with across the board efforts, in the UN, and US courts, and every forum possible, in Belgium, in the Netherlands, to sanction Israeli officials, bar them from coming in, sanction Israeli companies... I could give an hour's speech just on this alone, use of the International Criminal Court. It is an effort from Israel's perspective, a de-legitimizing Israel as a Jewish state rather than simply accomplishing and negotiating a deal by sitting down and making the tough compromises they are not prepared to make.

Now let us move from that to China. I was present with President Carter in the Cabinet Room when Deng Xiaoping made his historic first visit. We normalize not Nixon, we normalized relations with the People's Republic, and again, I have spent a good deal of time in China as well.

The change in China is profound because from Deng Xiaoping's time, in 1978/79, up to President Xi, all Chinese leaders tried, and with great success, to mobilize their internal resources to take hundreds of millions of people out of poverty. President Xi felt that was not enough. He wanted China to become a global power, and they have done so by using lawfare. I will give you some concrete, very specific examples. The misuse of the UN Convention on the Law of the Sea, and the extension of the economic zone. They have taken three coral reefs, they build them out into militarized islands with jet fighters and the like, and then claimed a 200-mile jurisdiction, as if this was a part of the coastline of China.

The Philippines took them to the World Court. The Philippines won. China ignored it. I was on the defense policy board in the Obama administration, and we urged them, and Obama did, and Trump has continued, not to allow China to treat the South China Sea as if it was a great lake in the US, and to have warships go by those islands. However, this is a major way of doing it, and China has extended this concept of lawfare to aviation law. For example, with the Chicago Convention on International Air Travel, they have taken this concept of militarizing the islands they claim as theirs, as an extension of their coastline, and have gone up and said, 'You cannot go over these islands by using US planes without our permission', or western planes. They have done it with outer space and with cyberspace as well. Their Belt and Road initiative is a very, very creative way of extending their influence globally, 750,000 Chinese workers in Africa alone building infrastructure, warm-water ports for their built-up Navy and their carriers. Just in the last week, the National Basketball Association was threatened with a cut-off of the transmission of their games because one general manager for one of the teams tweeted sympathy for Hong Kong. ESPN and major airlines are being told to redraw their maps of China to include Taiwan as well.

Russia is another example of the extension of lawfare. Putin has very cleverly maximized his influence by doing so. This fits very much with what Anne said. What has he done? He has taken over parts of Georgia by handing out fake Russian passports and saying he had to go in to protect the Russians. He has taken over and annexed Crimea and used little green men in Eastern Ukraine, who he says are not Russian military, and he has abrogated the 1994 Budapest Memorandum in which after the Cold War, Ukraine transferred all of its nuclear weapons to Russia in return for an international agreement, which the UK, the US and others signed onto, that the sovereignty of Ukraine would be protected. Well, it has not been, and what has been the lawfare excuse by Russia? Responding to simply the popular will of those in the Crimea, of the Russians in Eastern Ukraine. We are simply abiding by, we are not doing it anyway, it is only the militia's responding to popular will.

I will close on one positive note. One going back many years to Jimmy Carter, and one today. The US and NATO, and Afghanistan, in a positive way, are using a new lawfare concept, and that is when they take ISIS out of a territory, they immediately begin to employ the rule of law, set up conflict resolution efforts, and it is an operation called COIN. It is a very creative and positive use of lawfare. Last, my own President Jimmy Carter – I served Clinton and Obama as well –, put human rights at the center of his foreign policy. He applied it to the military dictators in Latin America, cut off their arms, activated the democratic movements there, got thousands of political prisoners released, and did the same thing with the Soviet Union.



Therefore, there are many examples of positive uses as well that I hope perhaps in the remaining time we can use. Thank you very much.