LAWFARE: DEFINITIONS AND CONCEPTS

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Introduction

Lawfare is an umbrella term for a wide variety of practices and techniques that are increasingly deployed by State as well as non-State actors to achieve tactical advantages or politico-military objectives or both, in a manner that minimizes (sometime to zero) the need to use military force for achieving aforesaid advantages or objectives. This article, which the inaugural one of a trilogy, seeks to unpack the term and explore some of the definitions and concepts associated with it.

Lawfare: Definitions and Concepts

A variety of definitions, conceptions and justifications are to be found in the literature associated with the term 'lawfare'. David Kennedy, for instance, characterized it as a *"struggle"* (or *the* struggle) in international law and/or international relations. According to him, this struggle is characterized-by (and even constituted-of) *"distribution through coercion"*, and the law is a means to inflict such coercion. His views define and contextualize lawfare, and are reproduced below:

> *"Warfare is but one instance, one tactic, one tendentious label applied to particular struggles and adversaries. Even war is not only or even mainly a matter of bombs, bullets, or boots on the ground. Sometimes threats can work. Sometimes the Security Council—or the global financial system—can do the work for you. Enemies can be coerced by economic rearrangements, physical changes in the landscape, shifts in the arrangement of allies and enemies, changes in community sentiment or in the economies of honor and shame, legitimacy and illegitimacy, or the application of effective administration. As the neologism "lawfare" suggests, war can also be waged by law: law as a weapon, a strategic asset, a force multiplier. As a result, global struggle is a matter of persuasive arguments, strong armies and big bank accounts at the same time. It is at once a material struggle waged with words and a struggle over values and ideas waged by force. Bargaining power is as much a matter of knowledge as leverage is a matter of persuasive authority. When distribution is accomplished without the use of force, the coercion may not be obvious on the surface. But it is there."*[1]

[1] David Kennedy, "A World of Struggle: How Power, Law and Expertise Shape Global Political Economy" (Princeton University Press (2016), 59.

General Charles Dunlap distinguished between the use and misuse of law:

> *"Although I've tinkered with the definition over the years, I now define "lawfare" as the strategy of using – or misusing – law as a substitute for traditional military means to achieve an operational objective. As such, I view law in this context much the same as a weapon. It is a means that can be used for good or bad purposes."*[2]

However, the Dunlap's distinction between the use and misuse of law is, in the opinion of this author, tenuous at best, since what may be the 'use' of law to one person may well be its 'misuse' to another, and *vice versa*. Jill Goldenziel, who broadened the definitions provided by General Dunlap and by Orde Kittrie (the latter referred to it as "compliance leverage disparity lawfare"),[3] offered the following two definitions of lawfare:

> *"1) the purposeful use of law taken toward a particular adversary with the goal of achieving a particular strategic, operational, or tactical objective, or*
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> *2) the purposeful use of law to bolster the legitimacy of one's own strategic, operational, or tactical objectives toward a particular adversary, or to weaken the legitimacy of a particular adversary's particular strategic, operational, or tactical objectives."*[4]

On the issue of using law to attain sociopolitical objectives, the concept of 'climate-change lawfare', introduced by Gloppen and Lera St Clair, is noteworthy. It emphasises the social use and/or utility of lawfare outside war or conflict — that is, in peacetime. Apart from climate change, such use may also take the form of legal advocacy to address class fault lines, or public interest litigation initiated to address deficiencies in governance. Gloppen and Lera St Clair defined and explained lawfare, and in particular their idea of climate change lawfare, in the following words:

> *"The concept of climate change lawfare builds on the concept of social lawfare. The role of law in social transformation has been growing and evolving over the last few decades. An array of diverse factors — operating very differently in different contexts — have combined to increase the importance of rights, courts, and various legal and quasi-legal institutions as sites of political struggle.*
> *These include systematic weakness in political systems, with (more or less) democratic institutions marked by elite capture and lack of responsiveness and a consequent unwillingness or inability to tackle pressing social problems, from severe poverty and inequality to environmental challenges.*

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[2] Major General Charles J Dunlap, Jr, USAF, "Lawfare today: A Perspective", *Yale Journal of International Affairs* (Winter 2008), 146-154, 146.

[3] Orde F Kittrie, "Lawfare: Law as a Weapon of War", Oxford University Press, January 2016.

[4] Jill I Goldenziel, "Law as a Battlefield: The U.S., China, and the Global Escalation of Lawfare", *Cornell Law Review,* Print Vol. 106, Issue 5, www.cornelllawreview.org/2021/09/23/law-as-a-battlefield-the-u-s-china-and-the-global-escalation-of-lawfare/

> *Alongside a sometimes-deteriorating political opportunity structure, the legal opportunity structure has, in many cases, improved. Many countries have adopted new rights-rich constitutions; many policy areas see denser national and international regulation; judiciaries have been reformed; and many places are experiencing a stronger rights consciousness. In some places, of course, law remains distant from these debates. But where these conditions obtain, actors within the state and civil society, nationally and internationally, have turned to legal strategies and arenas to fight battles that traditionally had been resolved in the political domain. This battling of legal perspectives and use of the law is what is meant by the concept lawfare. Included in this is the notion that "the weak may use the law strategically to thwart the will of the powerful."*[5]

Howsoever one were to define or justify it, the basic premise and idea of lawfare is unsurprising. The political nature and content of the law is pervasive and even fierce; law contains and confers power(s) to legitimise, authorise, humanise, tame, restrain, declare, limit, justify or condemn. These powers extend in varying degrees to individuals, organisations, regimes, and States, and the strategic potential and application of such powers forms the subject-matter of these articles.

The idea of lawfare is not new either. Its history goes back to at least the seventeenth century when Hugo Grotius, a Dutch jurist widely considered to be the father of international law, used law to achieve an objective for which he was hired by the Dutch East India Company — that of strengthening Dutch military and maritime power against the Portuguese in the Indian Ocean. Towards achieving the immediate objective(s) for which he was commissioned, Grotius wrote the treatise *Mare Liberum* in which he made the case that the sea is common to all and all nations are free to use it for seafaring trade. As time progressed through the 1700s, most States adopted the idea of the freedom of the seas. Grotius thus, in the process of satisfying his immediate objective(s), also became instrumental in embedding (to the extent it is embedded) the concept of freedom of the seas in modern international law.[6]

In the contemporary world, decision(s) by social media companies like Facebook and Instagram to *"temporarily"* allow hateful and/or violent online content against Russia during the conflict in Ukraine, by creating overnight exceptions to company rules and policies is only the latest demonstration of lawfare.[7]

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[5] Siri Gloppen and Asuncion Lera St Clair, "Climate Change Lawfare", *Social Research*, Winter 2012, Vol. 79, No. 4, *Human Rights and the Global Economy* (Winter), 899-930, 907.

[6] Orde F Kittrie, *Lawfare: Law as a Weapon of War* (Oxford University Press, New York, 2016), 4-5.

[7] Munsif Vengattil and Elizabeth Culliford, "Facebook allows war posts urging violence against Russian invaders", *Reuters*, 11 March 2022, https://www.reuters.com/world/europe/exclusive-facebook-instagram-temporarily-allow-calls-violence-against-russians-2022-03-10/

See also: Andy Stone, "Our statement on what's happening", *Twitter* (11 March 2022, https://twitter.com/andymstone/status/1502048035458719746?s=20&t=oIOEutEOO87yPSoPs-PLaQ

To summarise the arguments set forth thus far, lawfare may be defined as the shaping of power — or the battlefield — through epistemic means. It may also be understood as a very precise form - and clinical use of perception management.

Critical perspectives on lawfare remain important.[8] It is true, as Dunlap observed, that *"substituting lawfare methodologies for traditional military means can reduce the destructiveness of war, if not its frequency,"*[9] However, much like the State or the individual, lawfare is not necessarily or always benign. The moral and ethical context within which it is practiced, including the moral content of the laws of war (*Jus in Bello* and *Jus ad Bellum*), has not been sufficiently explored. Instead, notions and invocations of morality have been used as yet another tool in the practice of lawfare.

The political content and nature of law is real. For instance, law is invoked or used — presumably in good faith — in public interest litigations to attain a political objective, and it is unclear if such litigation constitutes law or lawfare. To the extent that law as well as lawfare can be used to attain a social or political objective, it is difficult to functionally differentiate between the two. Further, distinguishing between 'good faith invocations of law' and 'bad faith invocations of law', or between ethical and unethical lawfare, is also conceptually difficult. Answering such questions about the moral content of law — and its moral and ethical relevance to practitioners, policymakers, decision-makers and statesmen — will require exploration(s) separately and outside the importance accorded to it within the 'legal' domain and in ontologies of legal expertise.

To be sure, these questions and answers thereto deserve attention and scrutiny because the morality of law and/or lawfare is a significant issue. As a case study of lawyers being reduced to the cause of the State *alone* and the wide-scale consequences thereof, one may consider the role of lawyers, judges and the bar in Nazi Germany.[10] Scholars have variously observed and recorded as follows on aforesaid roles and consequences:

> *"The solution which the Hitler state embarked upon was the gradual elimination of the lawyer's role in modern society as an independent servant of justice. Instead, the entire profession was to be transformed into a facile instrument for state, i.e., National Socialist, rule. This*

See also: Elisabeth Dwoskin, "Facebook Breaks its Own Rules to Allow for Some Calls to Violence against Russian Invaders", *The Washington Post* (March 10, 2022), https://www.washingtonpost.com/technology/2022/03/10/facebook-violence-russians/.

[8] Robert W Gordon, "The Independence of Lawyers", 68 *B.U. L. Rev.* 1, 20 (1988), < https://core.ac.uk/download/pdf/72827877.pdf > Last accessed 22nd Aug 2023.

[9] Dunlap, "Lawfare today", 147.

[10] Udo Reifner, "The Bar in the Third Reich: Antisemitism and the Decline of Liberal Advocacy", *McGill Law Journal* 32, no.1 (December 1986): 96-124; Kenneth CH Willig, "The Bar in The Third Reich", *The American Journal of Legal History* , Jan., 1976, Vol. 20, No. 1 (Jan., 1976), pp. 1-14; Cynthia Fountaine, "Complicity in the Perversion of Justice: The Role of Lawyers in Eroding the Rule of Law in the Third Reich", 10 *St. Mary's Journal on Legal Malpractice & Ethics* 198 (2020), <https://commons.stmarytx.edu/cgi/viewcontent.cgi?article=1051&context=lmej > Last accessed 25th May 2022.

> *confrontation from 1933 to 1945 between the German Bar and National Socialism witnessed a major reversal in the historical development of the legal profession and raises serious questions of professional responsibility and fidelity to the law which remain relevant to our own contemporary period."*[11]
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> *"The Third Reich was not a state without law, or without concern for legitimation. In fact, the National Socialist (Nazi) State began its tyranny in the name of "law and order": Legal zur Macht (Lawfully to Power) was an oft-repeated Nazi slogan. Industry, army and high-ranking state officials, the leading forces behind the 1933 putsch by the Nazi Party, did not seek to overthrow a legal order which had hitherto allowed them to dominate German society. They did seek, however, in collusion with the Nazi party, to abolish the limitations imposed by the legal order on their power by denying the individual and collective rights of those who opposed their political and military aims. The fascist legal order developed into a system of law without rights, an order of duties."*[12]

Therefore, even as one proceeds on this study of lawfare, it is important to reiterate that the jurisprudence of lawfare as *application of law* — including in particular the ethical, moral and critical aspects thereof and therein — remain relevant-to and an intrinsic part of the study of *law itself*.

With a basic exploration of definitions and concepts associated with lawfare having been undertaken, the next article will examine the 'techniques and tactics' of lawfare.

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[11] Willig, "The Bar", 1.

[12] Reifner, "The Bar in the Third Reich", 99.