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# *Lawfare*, Between its (Un)Limits and Transdisciplinarity***

## *El* lawfare, *entre sus (no)límites y la transdisciplinariedad*

## Lawfare, *entre seus (in)limites e transdisciplinaridade*

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**Abstract**

This research explores the chameleon concept of *lawfare* and its impact on legal systems and society in general, focusing on the interplay between its (im)boundaries and transdisciplinarity. The analysis focuses on a kaleidoscope of fundamental aspects of justice, including the tactics and strategies used in judicial proceedings, in civil or military conflicts, in the abuse of legal procedures, and in the manipulation of the legal system to achieve illegal ends, in the regulation of law at the global level and nationally, highlighting the different forms this phenomenon can take and its impact on the rule of law and democracy. An important aspect of the research is the analysis of the limits of the law, in the sense that there are certain ethical, legal, and moral restrictions on the abusive use of the legal system, regardless of the circumstances. The conclusions are based on the finding that clearer regulations are needed to protect the integrity of the legal system and to prevent legal abuses, a fact that requires a series of future research, establishing the conditions that mark the transition from legal to illegal. This article has been developed using the method of transdisciplinary introspection, based on primary and secondary data from scientific journals, books, documents, and other publications.

**Keywords:** *Lawfare*; Transdisciplinarity; Legal System; Strategy; Integrity; Collaboration; Transparency; Democratic Society; International Law.

**Resumen**

Esta investigación explora el concepto camaleónico de *lawfare* y su impacto en los sistemas legales y la sociedad en general, centrándose en la interacción entre sus (in)fronteras y la transdisciplinariedad. El análisis se centra en un caleidoscopio de aspectos fundamentales de la justicia, incluyendo las tácticas y estrategias utilizadas en los procesos judiciales, en los conflictos civiles o militares, en el abuso de los procedimientos legales y en la manipulación del sistema legal para lograr fines ilegales, en la regulación de derecho a nivel mundial y nacional, destacando las diferentes formas que puede tomar este fenómeno y su impacto en el Estado de derecho y la democracia. Un aspecto importante de la investigación es el análisis de los límites del derecho, en el sentido de que existen ciertas restricciones éticas, legales y morales al abuso del sistema legal, independientemente de las circunstancias. Las conclusiones se fundamentan en la constatación de que se necesitan regulaciones más claras para proteger la integridad del ordenamiento jurídico y para prevenir abusos legales, hecho que requiere una serie de investigaciones futuras, estableciendo las condiciones que marcan el tránsito de lo legal a lo ilegal. Este artículo fue desarrollado utilizando el método de introspección transdisciplinaria, basado en datos primarios y secundarios de revistas científicas, libros, documentos y otras publicaciones.

**Palabras clave:** *lawfare*; transdisciplinariedad; sistema legal; estrategia; integridad; colaboración; transparencia; sociedad democrática; derecho internacional.

**Resumo**

Esta pesquisa explora o conceito camaleônico de 'lawfare' e seu impacto nos sistemas jurídicos e na sociedade em geral, com foco na interação entre suas (im)fronteiras e transdisciplinaridade. A análise centra-se num caleidoscópio de aspectos fundamentais da justiça, incluindo as tácticas e estratégias utilizadas em processos judiciais, em conflitos civis ou militares, no abuso de procedimentos legais e na manipulação do sistema jurídico para atingir fins ilícitos, na regulamentação do direito em nível global e nacional, destacando as diferentes formas que esse fenômeno pode assumir e seu impacto no estado de direito e na democracia. Um aspecto importante da pesquisa é a análise dos limites do direito, no sentido de que existem certas restrições éticas, legais e morais ao uso abusivo do ordenamento jurídico, independentemente das circunstâncias. As conclusões partem da constatação de que são necessárias regulamentações mais claras para proteger a integridade do ordenamento jurídico e prevenir abusos jurídicos, fato que demanda uma série de pesquisas futuras, estabelecendo as condições que marcam a transição do legal para o ilegal. Este artigo foi desenvolvido utilizando o método de introspecção transdisciplinar, com base em dados primários e secundários de revistas científicas, livros, documentos e outras publicações.

**Palavras-chave:** *lawfare*; transdisciplinaridade; sistema jurídico; estratégia; integridade; colaboração; transparência; sociedade democrática; direito internacional.

## Introduction

Issues relating to the meaning, significance and *modus operandi* of what constitutes *lawfare* have been discussed in recent years in both theory and practice. Presently, the phenomenon of *lawfare* continues to be debated globally. Given the terminological meaning of this new emergence, which has been coined as *lawfare*, we note that it can be particularly useful to develop research on this topic in a new scientific and even cultural approach: through transdisciplinarity, the aim of which is to highlight the nature and characteristics of the flow of information that circulates between the different branches of knowledge. In this way we can begin to identify cases of lawfare in society and in everything that can be or is affected by this phenomenon. How is this possible in the context of lawfare? It has been observed that law is strategically used in several states to achieve illegitimate geopolitical, political, commercial, financial and military goals.[1] At the heart of these problems are human rights. At international level, multidisciplinary research in the field of law has been initiated, efforts aimed at diagnosing and reporting on cases of lawfare around the world, which in fact means defending the law itself (protecting the norm that provides protection) and fully affirming human rights, i.e., precisely ensuring that global view of the human being and beyond.

Connected to these considerations, our work aims to launch a rich research topic that has not been extensively covered in the existing literature, despite its great relevance. For the first time, lawfare and the transdisciplinary method are brought together to observe as many particularities of this subject as possible. The results obtained have far-reaching theoretical implications that go beyond the scope of this discussion and will not be addressed in this study. The proposed methodology for the article is structured to emphasize key elements, including: an introduction that presents the context, novelty and importance of the subject; a content section, where key concepts are defined, lawfare is analyzed and evaluated, and relevant current examples are presented to provide a basis



1 See the work of the Lawfare Institute, founded in São Paulo, in 2017, through the initiative of lawyers Valeska Teixeira Martins, Cristiano Zanin Martins and Rafael Valim, in a context of increasing number of lawfare cases around the globe. The opening ceremony of the Institute took place at SOAS University in London on 5 December 2017. The mission of the Lawfare Institute is to produce scholarly content about justice and analysis of emblematic cases of the phenomenon.

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for our analysis; the formulation of proposals and recommendations; and closes with conclusions and directions for future research.

Going beyond the hope of multidisciplinarity and entering the realm of transdisciplinarity, we see how the issue has a significant impact on the very function and purpose of law in relation to the whole of social relations. A proliferation of the use of legal regulations to achieve various ends may call into question both the work of some public authorities (such as the creation of legislative regulations for the purpose of later use in lawfare, the use of anti-corruption for certain purposes, or the use of abusive fiscal instruments) and the work of international intergovernmental organisations; for example, organisations working in different fields, such as economy, health, culture, education, environment, peace and security, etc. That is why it would be ideal to foster cooperation and engage in a transdisciplinary dialogue to first identify cases of lawfare, and then to find the best solutions to stop and eliminate them.

As the lawfare phenomenon is generally known, it is used to destroy someone through the following tactics: by abusing existing laws to delegitimise and damage their public image; by using legal proceedings to restrict their freedom, intimidate them or silence them; by negatively influencing public opinion to pre-empt court rulings and restrict the right to an impartial defence; by coercing public officials to retaliate against politicians in order to obstruct legal defence mechanisms; by randomly selecting individuals to be charged or by tactically manipulating a false case and attempting to harass and embarrass defence lawyers.

From these particular cases of lawfare to its use in wars (military or economic), it was a short step. It remains to be seen how much attention has been paid to the development of principled limits on legal conduct, without which the law cannot be applied. Alongside the specific problems of legal interpretation, the meanings of terms such as *legal events* or *legal phenomena* are also brought to the forefront. Closely linked to social life, the idea of law will be found in all its phenomena. As the cause or effect of social phenomena, law coexists with them (Peretz, 1915, p. 3). A science is not just a collection of facts. Facts are the material of science. Science is the whole edifice in which the facts are coordinated. The cause-and-effect relationships between facts intertwine, revealing the illuminated emergence of invariable relations, which are the laws of science. It is only when we extract these relations between specific concrete facts and the invariable relations known as laws that knowledge earns the distinction of being called science (Peretz, 1915, p. 13).

For these reasons, lawfare affects the very essence, purpose, and functions of law. When we refer to law, we can fall into reductionism. Transdisciplinary dialogue is important because legal science is inherently humanistic, with strong connections to psychology, sociology, philosophy, history, morality, and even religion. The forms that civilisation has taken in its historical development are family, property, state and religion (Nordau, 1921, p. 45).

Lawfare is primarily a deviation from the fundamental principles of law: liberty, justice, equality and accountability. Law is obliged to keep pace with new trends (Popa, 2014, p. 11). The phenomenon of globalisation, with repercussions in the field of law, is interpreted by some authors as a natural adaptation of law to the new forms of interdependence and global awareness (Giddens, 1990).

The positive aspect that emerges from this is the effort made by specialists to analyse and re-establish the limits through appropriate regulations. The role of transdisciplinarity is identical to that of a foundation, because, as the Transdisciplinarity Charter (1994) states, transdisciplinarity is complementary to the disciplinary approach; from the confrontation between disciplines, it brings out new results and new bridges between them; it gives us a new vision of nature and reality. Transdisciplinarity does not seek to develop a super-discipline encompassing all disciplines, but to open all disciplines to what they have in common and to what lies beyond their boundaries (art. 3).[2] The Charter was adopted with the following guidelines in mind:

> 1) believing that only an intelligence capable of understanding the planetary dimension of today's conflicts could face the complexity of our world and the contemporary danger of the material and spiritual self-destruction of our species; 2) believing that life is seriously threatened by a triumphant techno-science that submits only to the frightening logic of efficiency in the service of efficiency; 3) considering that the contemporary rupture between an ever richer knowledge and an ever poorer inner being leads to the emergence of a new obscurantism whose consequences on the individual and social level are incalculable; 4) considering that the accumulation of knowledge, unprecedented in history, accentuates the inequality between those who possess it and those who do not, thus causing inequality within nations and between



2 The Charter of Transdisciplinarity (1994) paved the way for numerous studies that have made a huge contribution to the evolution of scientific research worldwide.

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> nations on our planet; and 5) considering, at the same time, that all these dangers have a positive counterpart, as the extraordinary growth of knowledge may eventually lead to a mutation comparable to that of the transformation of primates into homo sapiens.[3]

Proponents of legal post-modernism have pointed to the inadequacy of the legal norm and law in general. In these circumstances, in which the question is whether legal globalisation will be achieved, there is a need to accept other, extra-state or supra-state formulas of regulation that go beyond the classical positivist conception.

Law crosses borders as an export product. Increasingly, the rules that organise our lives will have been devised elsewhere, and those that have been devised here will be used to construct laws in foreign countries. Modest engineers, rather than great architects, trade with each other across borders, exchange arguments, decisions, ideas... This new international judicial sociability is disrupting the ways in which law is produced and reproduced in relation to the sensitive issues of life. (Allard, 2005, pp. 1-19)

Whether lawfare is used in a war, against a single person, or even against a single being (such as in cases of the misuse of hunting laws or the protection of habitats), the damaging effect remains the same and can have global ramifications beyond control.

International law plays a leading role in finding the most effective solutions. Still referring to transdisciplinarity, when we look at the human being (the natural person) through the prism of their dignity and nationality, it can indeed be said that "the recognition by international law of this double belonging - to a nation and to the Earth - is one of the aims of transdisciplinary research" (Transdisciplinarity Charter, 1994, art. 8).



3 See the preamble to the Charter.

## The terminological meaning of the new *lawfare*

The definitions that currently exist mainly focus on the following aspects:

- The strategic use of legal proceedings to intimidate or thwart an adversary (Collins English Dictionary, 2022). The term *lawfare* originates from the combination of *law* and *war* or "law-warfare".
- The term lawfare has been around for some time, but its modern use first appeared in a 2001 paper (Dunlap, 2001). Lawfare is an effort to provide the military and lay audience with an easy-to-understand "bumper sticker" for how belligerents, and especially those who cannot challenge high-tech military capabilities (e.g., America's, as presented in the literature), attempt to use law as a form of "asymmetric" warfare.
- According to the Lawfare blog, authored by Robert Chesney, Jack Goldsmith and others, the term refers to that nebulous area in which actions taken or contemplated to protect the nation interact with the nation's laws and legal institutions. This broad interpretation encompasses various issues, including cybersecurity,[4] Guantánamo habeas litigation, targeted killing, insecurity, universal jurisdiction, the Alien Illegality Statute, the state secrets privilege, and countless other interconnected topics. Lawfare refers both to the use of law as a weapon of conflict and, perhaps more importantly, to the depressing reality that America remains at war with itself because of the law governing war with others, the blog's authors believe. They also provide a brief history of the term, highlighting its controversial nature and diverse range of interpretations and uses. While the term has been used in unrelated contexts, such as divorce law, courtroom advocacy, colonialism, and even airfare for lawyers dating back to the 1950s, its most prominent use today pertains to national security. Its first use in this context seems



4 States quickly realized that national security heavily depends on international cooperation. International efforts to counter cybersecurity risks debuted with Russia's introduction of a first United Nations (UN) resolution on this topic in 1998. Numerous cyber policy fora have proliferated since then in diverse formats, such as the UN Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security (GGE), the subsequent U.N. These multistakeholder initiatives started to shape cooperative tools, norms of behavior, and confidence-building measures (CBMs) in support of collective cybersecurity. See Ponta (2021, p. 412).

to have appeared in *Unrestricted Warfare* (Liang & Xiangsui, 2002), a military strategy book written in 1999 by two People's Liberation Army officers,[5] who used the term to refer to a nation's use of legalized international institutions to achieve strategic ends.[6]

- *Lawfare* is utilized by both non-state actors vulnerable to technology and states possessing formidable military capabilities, although the manner in which lawfare is employed varies.
- The *lawfare* concept combines "traditional forces governed by law/law, military tradition and custom with unregulated forces acting without restrictions on violence or target selection" (Dunlap, 2001).

Hence the differences between lawfare and abuse of law. *Abuse of law* is just one of the countless ways in which *lawfare* is used.

## Example of lawfare

A modern example is the Russo-Ukrainian war. Ukraine has developed a "Lawfare Project" against Russia, designed to use law to achieve military objectives and delegitimise the actions of the adversary. According to publicly available information, Ukraine has gone so far as to publicise its comprehensive "legal warfare" tactics on a dedicated website (Ukrainian Government, n.d.). Analysing this situation is of practical importance as it provides a rare opportunity to observe lawfare as a war tactic, wherein a new principle is emerging: the use of this new concept as a defensive measure; essentially a form of self-defense that exempts from liability. This is a government website that can also be accessed in English, in which the Ukrainian State says:



5 True or not, this bestseller presents the following situation as real: Incredible as it may be to believe, three years before the 9/11 World Trade Center bombing, a Chinese military manual entitled Unrestricted Warfare / Război sans restrições promoted such an attack, suggesting that it would be difficult for the American military to cope. Here's an excerpt from Unrestricted Warfare: "Whether it's hacker intrusions, a major explosion at the World Trade Center, or a bin Laden bombing, all of these are far beyond the breadth of frequency understood by the U.S. military...." Surprisingly, Osama bin Laden is mentioned frequently in this book. Now, publisher NewsMax.com is making the CIA translation of this shocking book available to all Americans.

6 For more details, see the Lawfare blog, available here: https://www.lawfareblog.com/about-lawfare-brief-history-term-and-site, retrieved November 22, 2022.

> We are moving from the sometimes-chaotic hit-skip tactics to a well-thought-out, comprehensive and coordinated legal defence of our rights and interests, and to this end we have engaged leading foreign legal consultants to help develop a strategy of legal confrontation.

It is recognised that hybrid warfare is not just about open hostilities, but includes specific tactics such as economic, propaganda, bribery, intimidation, zombieing and more. By delving into this phenomenon, we see how the Ukrainian lawfare offers a captivating glimpse into a war that takes place in the legal, psychological and informational realms as much as on the battlefield. Conversely, Russia has long used law in its aggression towards neighboring states and territories. It has enacted laws to justify "humanitarian operations" as part of its "responsibility to protect" populations friendly to Russia - whether or not they are ethnic Russians, Orthodox or Russian-speaking. This approach was evident in Moldova in 1992, Georgia in 2008 and 2014, Syria in 2011, and Ukraine in 2014. In 2018, the Duma retroactively justified Russia's annexation of Crimea by passing a law commemorating 1783 as the date of Crimea's "accession" to the Russian empire (Goldenziel, 2022).

China, for example, has been found to have a highly sophisticated "legal warfare" doctrine, designating such strategies as one of their "three wars". According to Dean Cheng, "the People's Liberation Army approaches law from a different perspective: as an offensive", a weapon capable of stopping its opponents and seizing political initiative. Quoting Chinese sources, Cheng says: legal warfare, in its most fundamental sense, involves "claiming that one's own side obeys the law/law, criticizing the other side for breaking the law, and making arguments in favor of one's own side in cases where there are also violations of the law." (Cheng, 2012) Current events indicate how China appears to be implementing its lawfare strategy. Indeed, some observers see this strategy as the main impetus for their expansion into the South China Sea. Another example today is Russia, which is often recognized as a prominent practitioner of what is known as "hybrid warfare", in which law is one element. In military known parlance, the term *hybrid threat* captures the seemingly increased complexity of operations, the multiplicity of actors involved and the blurring of some of the traditional elements of conflict.

Based on the aspects of application presented so far, it can be concluded that lawfare can manifest in various forms specific to different regions such as Ukraine, Russia, the United States, China, and Africa, among others.



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Additionally, lawfare can be observed in different contexts, including political, military, economic, legal, environmental (greenlawfare),[7] communications or new technologies (digitalisation, internet), as well as normative, doctrinal or jurisprudential lawfare.

For example, some authors have noted a lack of sufficient studies on the journalistic representation of legal strategies used by environmental NGOs (i.e. there is not much media debate about how the law itself is used and the understanding of the use of the law by environmental NGOs). In contrast, legal studies are increasingly examining the role of public interest litigation in environmental issues. There are states or even regions where the news media does not play a significant role in shaping and mobilising public opinion in the context of environmental litigation as an activist strategy. Environmental public interest litigation not only develops important legal and administrative principles but should be brought into the public debate to influence political decisions and drive law reform (Konkes, 2018, pp. 191-193).

In line with these ideas, for the purpose of better understanding, let us consider an example of a mining[8] dispute in Australia, similar in part to the mining dispute of Rosia Montana Gold Corporation, a Romanian mining company, co-owned with a State-owned entity.[9] This is the example[10] of the litigation that was pending in the Federal Court of Australia over the Adani

7 1Central to this area of "green lawfare" is the issue of "standing", which refers to the rules used to determine whether a person or group is recognised by the courts as an appropriate party to commence legal proceedings. See in this regard McGrath (2008).



8 Mining investments, although they occupy a reduced percentage on a global level, are still classified at the top of special importance investments due especially to their side effects on the global economy, on the environment, on human rights and, last but not least, on international law. However, the boom of foreign investments in mining projects over the last two decades is only a herald of the global competition for access to mineral resources in the decades to come. See Popa (2017).

9 Gabriel Resources Ltd. and Gabriel Resources (Jersey) v. Romania, (ICSID Case No. ARB/15/31), concerning claims arising out of the allegedly discriminatory measures relating to the approval of an environmental impact assessment and the issuance of an environmental permit required to start exploitation of the claimant's mining project.

10 In January of this year, the Federal Environment Minister approved Adani's $16 billion Carmichael coal mine in Queensland's Galilee Basin. The Mackay Conservation Group has challenged it in the Federal Court, claiming the project would have harmful effects on the climate and endangered species. In August 2015, the Federal Court overturned the decision to approve the mine; a decision that prompted the withdrawal of one of Australia's largest banks, Commonwealth Bank of Australia, from its role as Adani's financial adviser.

mine approval decision. This litigation is seen as a strategy that utilizes the law and the media to "disrupt and delay" coal mining projects as part of a broader project to erode public and political support (the Adani Mining lawfare case came to a head when, after the court decision, the threat of the government responding that it would change the law emerged). In this case law was used as a tool of social communication, where the media can serve as a platform for those engaged in social, political and legal competitions (Carvalho, 2005).

SLAPP (Strategic lawsuits against public participation) can be exemplified here. As Raynaldo Sembiring (2019) has pointed out, Strategic Lawsuits Against Public Participation (SLAPP) is a form of intimidation carried out by corporations with the primary purpose of silencing/eliminating public participation perceived as an obstacle to corporate interests. Such practices are considered questionable, potentially criminal, or subject to civil action. Measures that can be taken to protect public participation from SLAPP attacks include the responsible exercise of the right to free speech, increased regulation, use of media and technology, and development of a culture of process. Even in the absence of specific laws governing the protection of public participation from SLAPP attacks, the existence of such measures at least helps strengthen the protection of public participation, as can be evidenced by the experience of many countries, including Indonesia, which still faces a number of difficulties (Priyatno, Kamilah & Mulyana, 2023).

From the presented example, a logic emerges according to which the media coverage of conflicts arising from conflicting interests can lead to influence as pressure on the courts in their decisions, but, on the other hand, can also lead to changes in the poles of power (strong political but also economic pressures, in the short term) (Lazarus, 2009, p. 1153). This may lead in the future to the adoption of a new specific standard of protection for international investment, which may be called: "prohibition of lawfare".

These trans-disciplinary issues make lawfare a pervasive phenomenon.



## Human rights at the heart of lawfare threats

The use of lawfare tactics in armed conflict poses a serious problem for international humanitarian law from the outset. Over time, the rights and duties of belligerents have become clearer, as insurgents have been given rights and duties in international law that are analogous to those of states (Shaw, 1983). International humanitarian law and international human rights law

are two distinct but complementary branches of law, both concerned with the protection of life, health and dignity. International humanitarian law applies in armed conflict, while human rights law applies at all times, whether in peacetime or during war. Although the wording may differ, the essence of some of the rules is similar, if not identical. Human rights deal with aspects of life in peacetime that are not covered by humanitarian law, such as freedom of the press, the right to assemble, to vote and to strike, etc. "The vision of international humanitarian law begins with humanitarianism and assigns human dignity and human rights primary status [...]; in the shadow of the *lawfare* debate [...] military and humanitarian advocates increasingly see themselves as competing teams," whose aim is to ensure that their own vision of law prevails (Hasian, 2014, pp. 344-351).[11]

Forced labour is another problem that is highly exposed to lawfare. An example of this can be seen in the efforts of the International Labour Organization (ILO), which invested considerable material and time resources to persuade the State Peace and Development Council, the military regime that ruled Burma from 1997 to March 2011, to adopt effective measures to eradicate the use of forced labour. The practice found in Burma was internationally regarded as a contemporary form of slavery and, therefore, a violation of *jus cogens*. This practice falls into four broad categories: 1) military operations, including forced recruitment and/or minors; 2) commercial operations owned by the military and private corporations affiliated with the armed forces; 3) construction and maintenance of small-scale infrastructure such as military barracks, roads, bridges and fences; and 4) completion of large-scale development projects such as highways, railways, dams and irrigation works (Maclean, 2012, pp. 189-190).



Human dignity continues to be a subject exposed to lawfare tactics. For example, law enforcement is on the rise in Indonesia, demonstrated by the increasing number of blasphemy trials since 1998. It is worth mentioning in this context the amendments to the Constitution, which introduced a number of human rights into the Constitution, the establishment of a Constitutional Court

11 This article discusses how, "in 2006, for example, journalists for ABC News reported that US officials were trying to assess just how much of a threat this was by 'calculating their body-mass index,' which was a 'measurement of weight in relation to height.' While human rights activists at this time attributed this to the fact that detainees were not allowed to exercise enough, defenders of the soldiers across the internet used this as empirical evidence that showed that the detainees were really pampered enemies who had nothing substantive to complain about" (Hasian, 2014, pp. 353-356).

and other specialised courts, and the strengthening of various mechanisms for non-judicial control of government action. Indonesian democracy has come hand in hand with a judicialisation invoked by various interest groups who have resorted to legal means to express their claims. The example encountered both in Indonesia and around the world is that of election trials as another kind of political tool initiated by political candidates seeking to invalidate election results.[12] The reputation of the already damaged Indonesian judicial mechanism has, thus, been hit by the perception that the courts serve certain interests, confirming the assumption that the power of law is always used for certain purposes, with potentially "tonic" as well as "toxic" effects (Butt & Timothy, 2013, pp. 189-213; Telle, 2018, pp. 378-383).

In this example of lawfare in Indonesia, which symbolizes cases of this kind around the world, Kari Telle shows how the policing of non-standard religions received a boost in January 1965 when President Sukarno signed Presidential Order No. 1 on the Prevention of Misuse/Insult of Religion. The order specified that six religions (Islam, Catholicism, Protestantism, Buddhism, Hinduism and Confucianism) were recognized by the Constitution and that deviations from their "basic" principles should be prohibited. It is a clear example of how the law has been a tool to secure the State, especially as this presidential order was introduced as tensions grew between large Muslim mass organisations and the Indonesian Communist Party. Subsequently, it is pointed out that General Suharto's New Order regime (1966-1998) emerged in the aftermath of the failed coup of 1 October 1965, for which the military blamed the Indonesian Communist Party. As a result, at least 500,000 people were killed, and thousands were imprisoned without trial, enduring further persecution upon their release (Cribb, 1990; Telle, 2018, pp. 372-376).



There are numerous examples of lawfare threats to human rights in the context of digitalization. One such example, discussed in recent studies, involves increased government control over encrypted online communication, which is believed to encroach upon the right to privacy and freedom of expression of ordinary internet users (Veen & Boeke, 2020, pp. 10-11). Considering security against possible terrorist attacks, for example, theorists have shown that terrorists are usually inclined to exploit only open-source technologies. Even if governments were to introduce these highly controversial regulations into

12 Observations can be found in Mietzner (2010) and Telle (2018).

*mainstream* applications, there is a high likelihood that alternative, unofficial applications would emerge. Al Qaeda and Daesh are already notorious for creating such software themselves (Graham, 2016; Nance & Sampson, 2017, pp. 66-67; Lakomy, 2022, p. 11). However, doctrinal analyses have revealed that greater government and corporate control over Internet communications is perceived as a direct path to digital totalitarianism: "The dream of digital emancipation may turn into a nightmare of digital totalitarianism" (Hendricks & Vestergaard, 2019, pp. 117, 119-137).

Building upon this argument, Lakomy (2022, p. 14) highlights that the emphasis on controlling online content has been *fetishised* by governments, leading to increased pressure on internet companies to introduce stricter mechanisms. However, these measures have proven ineffective to solve the problem of digital jihad, while simultaneously raising concerns about the protection of human rights, such as freedom of expression and the right to privacy on the internet.

On a broader, global level, the doctrine has identified the existence of another technological lawfare event; Sieber (2021) states in a study:

> Without doubt, the newest human development is the relationship between human beings and their increasingly sophisticated technologies. Modern technologies have grown up without watchdogs capable of raising legal opposition to what might be called the colonization of the mind through modern technologies. (p. 252)



In his study, he discusses modern platforms and neurotechnological devices that he sees as colonizing minds in the absence of adequate regulation to safeguard human rights. He emphasizes the need for scientists to demonstrate courage in developing human rights protections "to protect not only the psychological life of human beings but also the human spirit itself, as both remain largely unaddressed" (Sieber, 2021, p. 252). These threats to human rights protections are often likened to a colonialism of the mind, drawing on the definition of colonialism provided by the Oxford Advanced American Dictionary as "the practice by which a powerful country controls another country or countries" (Hornby, 1995, p. 257). According to Sieber (2021, p. 256), this form of colonialism persists today through less visible means, such as lawfare, aligning with other theorists who have sought to unveil the phenomenon of lawfare.

Many other instances of lawfare have been observed in contexts such as slavery law, colonialism, feudalism, Nazi law, the communist system, but further research is needed to explore these cases in detail.

## Possibilities of transdisciplinary methodology in lawfare

Referred to in theory as the "carnival" of the law, lawfare has also had a positive effect in that it has somewhat solidified the meaning of *legality* at the heart of the many and wide-ranging debates among socio-legal theorists and anthropologists concerning the value of seeking justice and also the efficacy of judicial decisions that often clash with raw politics. In such circumstances, ethics, morality and the law, when mobilised alongside concerted political and civic activism, play an important role (Werbner, 2021). It is not a coincidence that human rights have been chosen as the focal point of my arguments. Additionally, the issue of refugees and migrants alone would have been quite appropriate material for our study, as people who leave their homes are exposed to many risks, including violence, poverty and disease. These issues can be further compounded by other aspects of lawfare or concerns related to the legal status of refugees and displaced persons (Lochak, 2018).[13] Looking at the map of foreigners' law, we note, as Danièle Lochak has pointed out, that it too "has experienced 'transdisciplinary migrations', being successively claimed by - or attached to - different disciplines."( Lochak, 2018, p. 279).

Before drawing conclusions, we consider that an applied exercise, in which the transdisciplinary toolkit reveals its relevance and from which we can glimpse some recommendations or regulatory proposals, is welcome. For this we will always bear in mind that legal education plays the most important role, as a paradigm shift is needed through an overview that can be achieved in consideration of the dynamics of international law. In doctrine, some proposals have already been launched suggesting that legal education should focus on the interconnectedness between international law and other disciplines, such as international relations, political science, economics, history, sociology and anthropology



13 "It is thus today primarily from the angle of international protection of human rights or refugee law that international law raises the question of the rights of foreigners - with this paradoxical effect that at the very moment when foreigners are seized by international law, the discipline seems to lose interest in the question."

ISSN 1657-6535 | e-ISSN 2805-993X

(Nicolescu, 2014).[14] It is important to reframe issues such as the conflict between self-determination and state integrity, as well as examine the effects and limits of state sovereignty in an increasingly globalised world.[15] Last but not least, the analysis of different theoretical and practical aspects of international law, such as international human rights law, international criminal law and international economic law, has been taken into account. This approach enables a comprehensive understanding of the different *types/sub-types* of international law, whether they are classical or hybrid in nature (Joyner, 2005).[16]

Professor Basarab Nicolescu (2002) arrived at the application of the following three axioms of transdisciplinarity methodology, which, if applied even to lawfare research, would lead to more concrete results: 1) the ontological axiom: there are, in nature and in our knowledge of nature, different levels of object reality and, correspondingly, different levels of subject reality; 2) the logical axiom: the transition from one level of reality to another is ensured by the logic of the included third party; and 3) the epistemological axiom: the structure of the totality of the levels of reality is a complex structure: each level is what it is because all levels exist at the same time.[17]

The ontological axiom, also known as the ontological principle, states that reality exists independently of our perception of it, suggesting that there is an objective reality independent of our consciousness and that things really exist outside our minds. In the context of lawfare, the focus is on the use of the legal system as a tool of political struggle, which raises questions about the objectivity and independence of the legal system. Thus, lawfare often involves the use of judicial forums and legal procedures in a way that can distort or manipulate reality, rather than



14 In this article, Professor Nicolescu notes that "There is a real discontinuity between disciplinary boundaries: there is nothing, strictly nothing, between two disciplinary boundaries, if we insist on exploring this space between disciplines through old laws, norms, rules and practices. Radically new laws, norms, rules and practices are needed if we are to explore this space"; and: "We define disciplinary boundary as the totality of the results-past, present, and future-obtained by the laws, norms, rules, and practices of a given discipline."

15 See a comprehensive analysis in Morss (2013).

16 See also Nicolescu (2006).

17 See also Piaget (1972, pp. 127-139).

objectively reveal it. Applying the ontological axiom in this context could mean that, despite the manipulations and distortions that can occur in the legal system, there is an objective reality that can be uncovered and demonstrated by fair and impartial means, from which we can conclude that we must seek truth and justice in a way that goes beyond political interests and manipulative legal strategies.

The logical axiom can also be applied to arguments and reasoning in court or in legal debates, and can help build a coherent case and avoid logical contradictions in arguments. Although logical principles leave more room for discretion than other axioms, they are generally important in critical thinking and in the accurate construction of an argument. Their application in lawfare depends on how they are used by the parties and whether they are followed in the legal process.

Interesting is the application of the ontological axiom in lawfare, in which actors should strive to discover and present objective truth in court. In other words, instead of being concerned with manipulating or distorting reality, the focus should be on presenting sound evidence and coherent arguments in accordance with objective principles of law. The ontological axiom stresses the idea that reality exists independently of our subjective perceptions. In lawfare, we have seen that it is essential to respect and protect judicial independence. Judicial decisions should be made impartially, free from political influence or manipulative strategies. When a case of lawfare is identified, it is important that all those involved rely on sound reasoning, logical arguments and factual evidence to support their case. From this point of view, the ontological axiom can be used in encouraging a fact-based and logical approach throughout the legal process. By applying this axiom, certain differences between subjects of international law can be highlighted, depending on their legal nature and their ability to take part in the normative elaboration and application process. For example, the widely held idea that law is concrete, normative and objective in a way that political ideologies are not has often been questioned. This critique includes the progressive structural transformation aimed at achieving human rights, taking into account its social and political implications (Matthews, 2023).

If we conduct the analysis from the perspective of broader struggles for legal reform and social justice, we can identify two different currents. The



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first is a rejection of skeptical interpretations of theories that challenge the long-term impact of progressive legislation and litigation. The second is a restoration of "critical optimism" within the legal field, which incorporates elements of legal sociology. These currents, which we have observed in this study, highlight the importance of keeping our focus on transdisicplinarity (Lobel, 2007; McCann, 1994, pp. 278-295).[18]

In the previous chapter we presented specific human rights issues, precisely because this choice is the most appropriate for our transdisciplinary "inquiry". Building on this line of thought, we will further explore this exercise through a humanity-specific comparison. According to Basarab Nicolescu's model, there are four levels of reality: 1) the physical or empirical level perceptible by the senses and which can be studied by the scientific methods in physics, chemistry and biology; 2) the quantitative or mathematical level which deals with mathematical models and mathematical symbols, used in the exact sciences; 3) the mental or psychological level, which encompasses thought and consciousness, and can be studied through psychology, philosophy and other humanities; and 4) the transmental or transpersonal level, which transcends individual limits of consciousness and pertains to the connection with a higher level of existence and knowledge.

What would applying these levels of reality to lawfare management generally mean?

In answering this question, we see how the physical or empirical level is applied by gathering and presenting hard evidence and facts in support of a legal position, using empirical means such as documents, records, expert testimony, testimony and other tangible evidence to build a strong argument in a legal process or dispute. In the digital age, data gathering and analysis can play a significant role in lawfare by analysing metadata, retrieving electronic data, and presenting statistical data to support a particular claim or identify relevant patterns.

The quantitative or mathematical level can be found in the use of mathematical methods and concepts to analyse and interpret data and



18 The view that legal mobilization, a term coined by Michael McCann, must be assessed in the context of broader social movements for reform or social justice, in which legal battles are invariably embedded, as Pnina Werbner (2021) observes.

information relevant in a given situation, including risk assessment. Calculation methods, statistics and other mathematical tools are employed in this context to bolster arguments and inform decisions made in legal proceedings. When dealing with a damage case, an expert may use mathematical models to quantify the incurred losses or to estimate the impact of specific factors.

The mental or psychological level is reached through the study of thought and consciousness within the realm of lawfare, where we consider in particular the analysis of human rights and the responsibility of states in protecting them. This involves the study of values, morals and ethics, as established in the preceding chapters of this work.

Less commonly observed in lawfare is the transmental or transpersonal level, because it focuses on more subjective and deeper aspects of human experience. However, in terms of a person's criminal responsibility or mental competency, experts in the field of psychiatry or psychology may be called upon to assess mental state and determine whether a person is capable of understanding the charges and participating appropriately in the legal proceedings. The transmental level may be relevant in assessing the emotional and psychological harm endured by victims.

Mediation and other alternative dispute resolution methods focus on facilitating communication and understanding between the parties, covering not only legal issues but also emotional and interpersonal issues. One can imagine how assessing the credibility of a witness or a person's intentions means interpreting non-verbal language, facial expression, gestures and other subtle cues. Although we can continue the list of examples, the transmental or transpersonal level is not as objective and verifiable as the physical or mathematical levels, that are more commonly utilised.



It follows that the seeds of lawfare exist in everything. Transdisciplinarity brings an opportunity to find symmetry and serves as an appropriate and valuable accompanying method for those cases of great complexity and ambiguity, where imaginative thinking becomes essential (Duczyinski, Bachmann & Smith, 2021). The aforementioned descriptions further explain the ways of lawfare speculated in certain contexts, whereby traditional political goals can be pursued through legal and judicial means that can be courted by litigants attempting to use legal arguments in the

courtroom to achieve their own political and social goals (Davis & Le Roux, 2019; Roux, 2020).

At the military level, historiography includes various instances of conflicts in which participants, such as states and non-state actors, have attempted to achieve their strategic and political/military goals through the mixed use of several different media, and a combination of conventional and/or unconventional methods. Even warfare as a concept is emerging in multidisciplinary approaches: civilian and military, legal and illegal, kinetic and non-kinetic, high-tech and low-tech, social media, etc., while at the same time and continuously manifesting tangential capabilities in different domains, whether acknowledged or declared by practitioners or academia (Muñoz Mosquera & Muñoz Bravo, 2017).

Discussions can be numerous, but by analysing the context, systemic approach, collaboration and dialogue, we can gain new insights and potentially pave the way for the development of effective solutions.

## Conclusions

The particularity of this article lies in its analysis of lawfare with the help of transdisciplinarity, in order to identify both the most extensive and different ways of manifestation of this phenomenon and the most comprehensive solutions. *Lawfare* is a concept that emerged in recent years as a reaction to complex societal challenges. It can be described as a transdisciplinary construct arising from the use of legal frameworks, processes and institutions to achieve the desired result, often under the guise of the phrase "using law for lawlessness". It seeks to integrate knowledge and perspectives from different disciplines, almost without limit, to provide different interpretations or applications of the multifaceted, interconnected and interdependent nature of law.[19]



Transdisciplinarity in lawfare combines strategies for researching, analysing, managing and solving different problems, incorporating multiple components, including those of legal researchers, policy or social decision-makers, journalists and other stakeholders (Aalberts, Rajkovic & Gammeltoft-Hansen, 2016). As practitioners, if we consider these four levels of reality, we could potentially develop a more appropriate and comprehensive system of exploration, which

19 Some issues are presented under trans aspects in Hirsch Hadorn et al. (2008).

would lead to one result: a well-deserved attempt to develop an international law system that is more attuned to the complexity and diversity of the realities it confronts. Of course, in these endeavours we will also consider some of the criticisms that can be raised regarding the application of transdisciplinary theories to lawfare. We refer first of all to the complexity that may appear overwhelming at times, which may discourage the adoption of transdisciplinary methodologies. This may be compounded by the challenge of measurement, as it may seem difficult to assess the effectiveness of transdisciplinary theories when applied to the field of lawfare. But is there another applicable theory that is exempt from such criticism? Additionally, beyond the aforementioned critiques, transdisciplinary theories are sometimes criticized for their accessibility primarily to experts, making it challenging to implement them on a broader scale. And, even if we overcome this set of possible criticisms, practical application may encounter obstacles due to institutional limitations and issues of cooperation among different organisations, states or other international actors.

Theoretically, it would be possible to create a mechanism for applying transdisciplinary methodologies in lawfare by bringing together key capabilities such as: the participation of an interdisciplinary group of experts; a transparent process of debate and decision-making; the use of technology and advanced analytical methods (such as mathematical models and simulations); and implementing monitoring and evaluation systems for policies and decisions to enable necessary adjustments. In the future, we are likely to see increased utilization of technology and artificial intelligence, especially as the formulation of a public international law problem in mathematical terms requires a clear understanding of the relevant data, the key variables, the relationships between them and the objectives and criteria for evaluation.



All of this requires a paradigm shift, moving away from a one-dimensional approach and towards a complex and interconnected perspective. The challenge is significant, as it is tantamount to accepting changes in culture and mindsets among decision-makers and society at large.

Ultimately, the phenomenon of lawfare can affect the DNA of law, potentially resulting in errors, which in turn can lead to harm and subsequent legal liability. Under specific circumstances, lawfare has been observed to be employed as a means of self-defence, which forces legal research to work on the causal link between possible self-defence and liability exemptions. This concept is particularly significant as it directly influences human rights, affecting the

functioning of almost all social relations. From a conceptual point of view, we observe that Lawfare has been treated in theory as follows: 1) the definition of *lawfare*, which provides an overview of previous attempts; 2) the identification of the prevalence of two interdependent forms: (a) "instrumental lawfare" - the use of legal instruments to achieve the same or similar effects as those traditionally sought from kinetic military action, and (b) "disparity lawfare with compliance leverage" - legislation designed to gain advantage from the greater influence that law and its processes exert over an adversary; 3) government's approach to lawfare to date; 4) analysis of the reasons behind the increasing impact and prevalence of lawfare, including the proliferation and expansion of international laws and tribunals, the rise of non-governmental organizations focused on the law of armed conflict and related issues, and the progress of globalization and hence economic interdependence (Kittrie, 2016, pp. 1-50).

Even international humanitarian law is reaching a stage where it is necessary to impose new regulations to effectively and efficiently identify, coordinate and sanction lawfare practices when required. It is advisable to consider a multilateral treaty to subject this issue to international regulation. As for other treaties in different fields, the recommendations are for amendments imposing standards on lawfare. Treaty amendment through subsequent practice extends to all areas of international law, from the law of the sea, environmental law and investment law to humanitarian law and human rights. Amendments of this kind can have significant practical consequences, from revising or creating new rights and obligations to establishing new institutional arrangements.[20] The positive norm whose violation may entail state responsibility is mainly established on the basis of the incidence of various international law institutions that may justify attribution of a wrongful act, including obligations related to human rights or the environment. For instance, in the United States, the Alien Tort Claims Act of 1876 established the jurisdiction of US courts over violations of public international law, such as tort liability. American courts had jurisdiction to try acts constituting torts committed during the exploitation of natural resources or the construction of building projects by multinational corporations. However, it is worth noting that no damages were ever awarded under this act and no tort attributable to a state authority has been established (Sornarajah, 2010, p. 27).



20 For details, see Buga (2018).

This is not a limitation, but rather a competence of international law. Several works have examined this issue, and the debate on legality and lawfare in the implementation of regimes has been initiated. The power of legality is further dissected (Ranganathan, 2016). Even in the context of potential discussions for a multilateral treaty, a significant challenge would arise concerning the potential deterrent effects on states that engage in lawfare. As lawfare is currently perceived as an uncontrolled and unlimited weapon, some states may be reluctant to limit or subject it to international regulation, as it remains their most effective tool in the present era. These features are closely related to some important functions of international law and include: maintaining international peace and security; ensuring fundamental freedoms and human rights; refraining from the threat or use of force by a state against the territorial integrity or political independence of any state; the right to self-determination; achieving international cooperation in solving international problems of an economic,[21] social, cultural and humanitarian character; and settling disputes.

Lawfare can be mitigated by implementing protective measures that are tailored to address the various forms it can take: appropriate protections for human rights and freedoms so that threats of this kind are eradicated as far as possible; appropriate international regulations; and education that can achieve the level of legal literacy necessary to prevent any form of use of the law for lawlessness. Finally, we stress the importance of protecting the independence of the judiciary and promoting transparency and accountability in the exercise of lawfare. Cross-disciplinary tools and collaboration between different fields can contribute to the development of effective solutions to counter abuses of lawfare and maintain the integrity of legal systems in a democratic and just society.



Journalists, legal specialists (practitioners and theorists) and activists from different fields have a key role to play in identifying cases of lawfare, for which cooperation is essential.

21 Economic integration triggers a continuous process of codifying international legal norms, doubled by a rich jurisprudence within the broader framework of international economic relationships. These relationships constitute the basis of multi - and bilateral agreements aimed at their effective implementation and the outlining of what is called "international economic order" in a globalized world. This universal system interconnects the economic dimension with social and legal realities, blending common interests such as the environmental protection, the green economy, biotechnology, artificial intelligence, digital technology, etc. These efforts are designed to promote the development of adequate governmental policies. See Didea & Ilie (2019, pp. 94-95).

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