

# In Defense of Lawfare

---

- [read the rest of this Forum](#)
- [Supplementary Materials](#) (“Lawfare”)

**Rocío Lorca\***

*The first thing we do, let's kill all the lawyers.*  
William Shakespeare, Henry VI, pt. II

In current academic literature and public debates, the term “lawfare” often (though not always) appears as a pejorative. Lawfare is a problem, a critique, a denunciation, an abuse that in one way or another expresses the contemporary democratic deficits of both international and domestic legal orders. While both the definition and the assessment of lawfare respond to real problematic phenomena, I believe there is as much risk in formulating the critique as in the practices criticized.

Therefore, for the reasons I will now offer, I think we are better off refraining from criticizing lawfare and directly addressing the problems underlying it.

The origins of the idea of lawfare are related to international armed conflicts. According to David Luban “lawfare” is the use of “law as a weapon of war against a military adversary.”<sup>[1]</sup> In domestic political contexts, lawfare typically consists of using the law as an instrument to disqualify a political adversary without having to compete through elections. Of course, the law was not conceived either as a mechanism to give military advantage to a party in an armed conflict or as a mechanism to win or lose an election. But law is a conventional creation to organize social life and, as such, treating it instrumentally seems *prima facie* irrelevant from a normative point of view and perfectly natural (perhaps even desirable) from a prudential point of view.

So, what is so wrong with lawfare? And should we take issue with it?

## **Lawfare in International Armed Conflicts**

In the context of war, lawfare consists of ‘abusing’ the law by using it as a tool to gain an advantage against an enemy. Of course, the problem cannot be just using the law as a tool of war. If you ‘fight through the law,’ you invite an impartial third party into the conflict and an abstract standard to adjudicate it. The third party may not be fully impartial, the standard may

not be valid for all parties involved, and the legal decision may not be enforceable. Still, even with all these deficiencies, it seems better than bare force. The whole purpose of international humanitarian law and international criminal law is to replace the language of power with the language of the law, not to make self-interest and a nation's abusive behavior disappear.<sup>[2]</sup> The law will not end conflict or political struggles but perhaps alter the mechanisms through which these are pursued.

As Judith Shklar persuasively argued, law—and particularly international law—has always overlapped with power. Yet law and power are not the same. Law has its own logics and ideology, which differ from brute force.<sup>[3]</sup> It may be naïve to think, for example, that wars can be regulated by law and that there can be such a thing as a “just war.” But it does not follow that law cannot contribute to making wars shorter and less bloody; and the way in which law can do this is by being an instrument that can be used strategically.

So, when is instrumentalizing the law a problem we should worry about?

Perhaps the problem is that sometimes the law is being instrumentalized to an extreme where it can no longer be recognized as law but only as a facade of someone's will. We have many examples of this. Authoritarian regimes use “law” to administer their power and programs, but, used in this way, the law may be nothing but a set of “lawless statutes.”<sup>[4]</sup> In the context of war, the issue of lawfare, however, is not just one of legal philosophy or legal validity but one of political fairness.

Consider perfidy-based lawfare, where a party deliberately breaches its own legal duties in order to make compliance with humanitarian law too onerous for its enemy. The classic example is presented as a dilemma: an armed group hides in a hospital, thus ‘forces’ its opponents to either break the laws of war or accept military disadvantages.

However, the dilemma is false.

If the behavior of the group hiding in the hospital is problematic *qua* lawfare, I would argue that the accusation against them of engaging in lawfare can be as—or even more—problematic when it is meant as a justification for breaking the law. The accusation of lawfare is problematic because it is intended to give the accuser a military advantage without justifying its position of law's own terms. As Luban also argued, if someone raises the accusation of lawfare to explain a violation of humanitarian law (bombing schools, hospitals, or refugee shelters) instead of responding to the accusation with the legal reasons that could make those actions permissible (e.g. self-defense, necessity), then he places the conflict beyond the reach of the law. This is, of course, a tactical move. Whoever bombs the hospital diverts attention from the accusation against them by focusing on the accuser's perfidious use of the law.

Yet this is not a valid defense. The fact that the law was used strategically by one party is no defense for another party's illegal behavior: the party bombing the hospital must still demonstrate it was acting within the contours of necessity or self-defense.

This shows that the dilemma is false and opportunistic. Every rule of behavior can sometimes be broken under the logic of justification or excuse, but you have to show that you meet the conditions for justification or excuse. The legal question is simply: did the armed group hiding in the hospital violate international humanitarian law by committing a war crime? Did the country that bombed the hospital violate international humanitarian law? In both cases, an accusation of legal warfare has nothing to add and can only distract from holding the parties accountable.

When it comes to armed conflict, the logic of lawfare seems, at best, unnecessary and, at worst, opportunistic and abusive. Parties to an armed conflict will, of course, use whatever mechanisms are available to them in a prudential way, looking out for their own interests, and will all be accountable for breaking the law.

In the current context, where international institutions are challenged and attacked from many sides, raising an accusation of lawfare seems dangerous because it feeds authoritarian ideologies that question the value of democracy and the rule of law. The issue is even more troubling when the accusation of lawfare comes from those who hold more *de facto* power and thus legal advantage in the current global order.

### **Lawfare in Domestic Politics**

Applied to the domestic context, the idea of lawfare can take different shapes. Sometimes, such as in the Latin American feminist fight for abortion rights, lawfare just refers to using the legal field to promote legal change in a way that is not necessarily a problem for democracy.<sup>[5]</sup> But often, when legal change is pursued through legal battles instead of through the legislature, tensions with the rule of law principle may arise. A salient example of a more problematic case of domestic lawfare is activist judges, namely, judges who, in deciding a particular case, alter the normative landscape of a community and thus encroach on legislative powers. In these cases, a decision that is supposed to have effects only among the parties of the case ends up having a general impact on all the members of a legal order. This is most likely to happen when judges apply laws that are considered to have an elevated status, such as constitutional or international norms, or when judges consider that there is a normative lacuna or an unregulated situation and see themselves 'forced' to offer a solution. These cases can be problematic both from the point of view of the ethics of judging and the rule of law principle.<sup>[6]</sup>

A different type of lawfare is the use of criminal law as a tool to suppress political opposition. A traditional example of this has been the use of political crimes and crimes of expression, such as sedition, to quash political resistance. A set of interesting examples and materials about this political use of the crime of sedition can [be found on this website](#). However, contemporary discussions of lawfare in this context are not so much focused on the selective use of political crimes like sedition, but rather on the use of the law to disqualify a contender in the political electoral “game.”

In this kind of lawfare, contenders instrumentalize law in order to win a game without playing by the rules, and using the law to disqualify someone from a competition can be unfair from the point of view of the rules of the game that are being circumvented. In the last World Cup in 2022, Chile, having lost its chance to compete after the qualifying tournament, attempted to get Ecuador disqualified by challenging the validity of eight games in which the player Byron Castillo had appeared, which would give Chile the opportunity to play in the World Cup. Chile initiated a legal dispute on the grounds that Byron Castillo was Colombian, not Ecuadorian, because he had provided false information in order to receive his Ecuadorian passport. [The case was eventually dismissed](#), and Chile did not play in the World Cup. However, had it won the case, its participation in the World Cup would have been less than honorable.

The unfairness here is relative to the value of sportsmanship (‘fair play’) in soccer, which to some may be very important but is arguably less crucial than the value of fairness in political elections and representative democracy. In these cases, the problematic example of lawfare consists of accusing a political contender of an infraction or crime in order to disqualify him or her from a political election or from a political position that he or she fairly obtained through elections. Cases such as the legal prosecution of Lula or Dilma Rousseff in Brazil, Fernando Lugo in Paraguay, Rafael Correa in Ecuador, Evo Morales in Bolivia, or Cristina Fernández de Kirchner in Argentina have been considered examples of lawfare of this kind. The concern here is the use of law as a way to force authoritarian leaders into power by disqualifying progressive political leaders.<sup>[7]</sup> But accusations of lawfare have also been raised by the ‘other side.’ Some examples are the prosecution of Donald Trump in the United States, the international prosecution against Vladimir Putin, and the attempts of the Office of the Prosecutor of the International Criminal Court to get an arrest warrant against Benjamin Netanyahu.

The mere mention of the examples above should suggest the risk associated with using the idea of lawfare as an accusation against fair play in democracy. An accusation of lawfare raises suspicion against legal prosecutions and the idea that law can be used as a means to control power. Now, of course, the use of the law to circumvent an electoral game

is real and dangerous, as it undermines the legitimacy and credibility of our legal system. But so does criticism of lawfare, as today such criticism is frequently used to delegitimize legal and democratic systems, opening the door to those who want to be exempt from all control. A remarkable example is the United States Supreme Court's recent immunity ruling<sup>[8]</sup> which has been described as a "defensive solution" to lawfare.<sup>[9]</sup>

In a world where power seems to become increasingly boundless and authoritarian figures are gaining a lot of traction in the electorates of well-established democracies, discourses that question the validity and usefulness of the law are risky ventures. Ironically, I believe the lawfare critique is one of these. It is particularly risky when raised by those who have more *de facto* power, but I think it always comes with a cost that must be carefully considered. Commenting on the Shakespeare quote above, U.S. Supreme Court Justice John Paul Stevens once [remarked](#): "As a careful reading of that text will reveal, Shakespeare insightfully realized that disposing of lawyers is a step in the direction of a totalitarian form of government."<sup>[10]</sup>

Law is undeniably an instrument of power, biased towards the privileged both in its application and its design: the powerful are often just beyond its reach, and the worse off are often unprotected by it.<sup>[11]</sup> We must, of course, point out when this happens and aim to correct it, but in a way that does not disqualify the use of the law as a tool to navigate politics and conflict because, as imperfect as it is, law is the best we have.

If we undermine the law, where will the least powerful turn to find protection, to have their rights respected, and ultimately to control power? E. P. Thompson's warning not to belittle the law seems more pertinent today than ever. In his view, for law to serve power, it must take a form of impartiality and equality that also serves the powerless. In a context where, to paraphrase Thompson, "the resources and pretensions of power continue to enlarge," we should defend the rule of law more strongly than ever and validate it as a tool to adjudicate the most contentious and crucial human conflicts despite the reality that it is often abused.<sup>[12]</sup>

---

\* Associate Professor, University of Chile, School of Law  
([rlorca@derecho.uchile.cl](mailto:rlorca@derecho.uchile.cl)).

<sup>[1]</sup> Luban, David. Carl Schmitt and the critique of lawfare. *Case W. Res. J. Int'l L.*, 2010, vol. 43, p. 457.

<sup>[2]</sup> Kahn, Paul W. Speaking law to power: popular sovereignty, human rights, and the new international order. *Chi. J. Int'l. L.*, 2000, vol. 1, p. 1.

<sup>[3]</sup> Shklar, Judith N. *Legalism: Law, morals, and political trials*. Harvard University Press, 1986.

- [4] Radbruch, Gustav. Statutory lawlessness and supra-statutory law (1946). *Oxford Journal of Legal Studies*, 2006, vol. 26, no 1, p. 1-11.
- [5] Gloppen, Siri. Conceptualizing abortion lawfare. *Revista Direito GV*, 2021, vol. 17, p. e2143.
- [6] See generally, Waldron, Jeremy, The Core of the Case against Judicial Review, *Yale Law Journal* 115 (2006): 1346.
- [7] Vegh Weis, Valeria. What does Lawfare mean in Latin America? A new framework for understanding the criminalization of progressive political leaders. *Punishment & Society*, 2023, vol. 25, no 4, p. 909-933; see also Vegh Weis, Valeria. [Indicators of Lawfare: Assessing the criminalization of progressive politics in Latin America](#). MCLR+ (crimlrev.net) (Oct. 28, 2024).
- [8] *Trump v. United States*, 603 U.S. \_\_\_, 144 S. Ct. 2312 (2024) ([https://www.supremecourt.gov/opinions/23pdf/23-939\\_e2pg.pdf](https://www.supremecourt.gov/opinions/23pdf/23-939_e2pg.pdf)).
- [9] McCarthy, Andrew C., Trump Is Far from the Only Target of Dems' Lawfare Abuse, *National Review*, Sept. 14, 2024 (<https://www.nationalreview.com/2024/09/trump-is-far-from-the-only-target-of-dems-lawfare-abuse/>).
- [10] *Walters v. Radiation Survivors*, 473 U.S. 305, 371 n.24 (1985) (Stevens, J., dissenting).
- [11] Lorca, Rocío. Impunity thick and thin: The International Criminal Court in the search for equality. *Leiden Journal of International Law*, 2022, vol. 35, no 2, p. 425-427.
- [12] Thompson, Edward P. *Whigs and hunters*. Harmondsworth, Middx: Penguin Books, 1975, p. 266.

---

Suggested Citation: Rocío Lorca, "In Defense of Lawfare," MCLR+ (crimlrev.net) (Oct. 28, 2024) (<https://crimlrev.net/2024/10/28/in-defense-of-lawfare-rocio-lorca/>).