

Lawfare is a polysemic term now widely used to signify deployments of the force of law for diverse ends, ends political and military, economic and social. With consummate erudition and a flair for the well-chosen example, Jaume Castan Pinos and Mark Friis Hau bring welcome conceptual clarity to the topic, providing a cogent model of the different species of legal means covered by the term. In so doing, they demonstrate that lawfare can yield ends that are sometimes lethal, sometimes laudable, sometimes lamentable, usually contentious. A very informative, important study of a phenomenon of growing significance across the world.”

John Comaroff, *Professor of African and African American Studies and of Anthropology, Harvard University, USA*

“The book provides an excellent introduction to the concept and phenomenon of lawfare in its many facets. Using diverse examples from across the globe, it effectively illustrates how state and non-state actors – powerful and weak – engage in lawfare, strategically using rights and law to advance their political goals.”

Siri Gloppen, *Professor of Comparative Politics, Bergen University, Norway*

Lawfare is a controversial concept. Can the application of the Law be illegitimate or abusive? Jaume Castan Pinos and Mark Friis Hau have written a brief but comprehensive volume in which, with great clarity and insight, they examine the phenomenon of lawfare in all its complexity. A masterful analysis.”

Ignacio Sánchez-Cuenca, *Professor of Political Science, Carlos III University of Madrid, Spain*

Lawfare

This book develops a new conceptualisation of lawfare that recognises the polysemantic nature of the term.

Drawing on theoretical developments from legal anthropology, international relations, and social theory, the book scrutinises the multiple dimensions of this phenomenon. It illustrates the multifaceted character of lawfare with a wide range of historical and contemporary cases from across the globe and analyses the implications of actors pursuing political objectives through legal means. This includes the use of lawfare by states as a legal instrument to accomplish geopolitical objectives, domestic lawfare, or the use of legal instruments to undermine internal opposition, and state lawfare used by governments to 'protect' the state from internal territorial-secessionist challenges. Finally, the book shows that lawfare is not exclusively a tool for hegemonic actors, as it can also be used by civil society actors that aim to uphold their rights through legal instruments in asymmetric lawfare.

This book contributes to new developments in lawfare without shying away from controversy, acknowledging its sometimes-brutal efficacy as well as its potential pitfalls. The book will appeal to scholars and students of law, international relations, political science, anthropology, and sociology.

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Lawfare

New Trajectories in Law

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Introduction

For the sake of academic honesty, we begin this book by acknowledging that lawfare is not, strictly speaking, a ‘new trajectory’ in law. What arguably constitutes a novelty is the new meanings that various actors are currently attributing to the term lawfare and the evolving understanding of the concept. Our conceptualisation, which follows from this, opens up for further, multiple applications of the term in different analytical contexts. We therefore follow Werner’s claim that ‘the meanings of terms such as lawfare are not set in stone, but rather, evolve through their use in different social practices’ (2010: 62). One of the key objectives of this book is to scrutinise this multifaceted concept *in relation to* the social practices where it is applied, developing it as a novel concept with great analytical possibilities.

The semantic building blocks of the concept ‘lawfare’ are rather plain and unmysterious. This bicephalous term derives from blending two basic ideas: ‘law’ and ‘warfare’ (Kittrie, 2016: 6). Originally, lawfare was first coined by two Australian scholars, John Carlson and Neville Yeomans, in 1975. Unfortunately, the authors did not provide their newly created nomenclature with a comprehensive definition. In fact, the concept only appears once in their book chapter, when they point out that ‘[l]awfare replaces warfare and the duel is with words rather than swords’ (1975). This sentence must be understood in the context of their critique of Western law, which they saw as excessively aimed at punishment (*ibid.*). This lack of conceptual substance has had critical consequences for the understanding and trajectory of lawfare, paving the way for different conceptualisations of the term.

According to the dominant academic understanding of lawfare, this phenomenon primarily occurs in military contexts where it is used as an instrument of defence or foreign policy (see Dunlap, 2008, 2009, 2010). This connects well with the understanding of lawfare as

a legal ‘weapon of war’ (Kennedy, 2006). In this book, we argue that such an understanding accounts for just one of the dimensions of lawfare, namely ‘geopolitical lawfare’. Conversely, we view the concept as much more polysemantic and complex. Hence, we understand lawfare as a *multifaceted law-based instrument that can be used by a wide range of actors in both military and non-military contexts to pursue political objectives*. In other words, lawfare is a rich concept with multiple dimensions and, crucially, with multiple users. Our definition is deliberately inclusive in the sense that it does not challenge any of the existing, narrower conceptualisations. Instead, it is aimed at having a wider scope that incorporates – and acknowledges – different dimensions of lawfare.

The emergence of *new* types of lawfare inevitably generates a discrepancy between the dominant military-grounded definition and the very different nature and meaning of some contemporary applications. With a few notable exceptions (Comaroff and Comaroff, 2006, 2007, 2009; Gloppen, 2018), the conceptual diversity of lawfare has so far not been met with a rigorous academic conceptualisation. We contend that the new applications of lawfare are not only a popular term in contemporary societal and political debates but have rich analytical potential and terminological value. Following Anthony Giddens’s (1984) ‘double hermeneutic’, or the mutual interpretative interplay between the social sciences and those studied, we acknowledge that just as theories help to reconstitute the social world, real-life ideas about the world are the very foundation for theoretical insights.

Similar to other concepts, lawfare is susceptible to different interpretations, applications, and transformations as the meaning of the concept mutates by virtue of social practices and political context. As McGinn eloquently puts it, ‘words . . . don’t have meaning nonderivatively’ (2017: 82) but derive from specific contexts. For this reason, we seek to follow empirical reality – the increasing use of lawfare in geopolitical domestic, territorial, and asymmetric conflicts – to develop a scholarly conceptualisation of the term that widens its meaning and encapsulates its multifaceted and polysemantic character.

To this end, we propose a new multidimensional conceptualisation of lawfare fitting the term’s current popularity and general use in society as well as its previous academic interpretations (see Figure 1.1). Our scrutiny of the multiple dimensions of lawfare is theoretically well-grounded, drawing on developments from legal anthropology, international relations, and social theory. Further, our study aims to shed light on the different uses of lawfare by considering which actors use it, in which context, and with which political objectives.

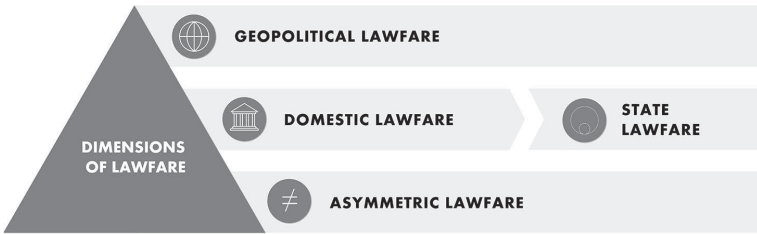


Figure 1.1 The multiple dimensions of lawfare

Source: elaborated by authors

Our first dimension of lawfare is ‘**geopolitical lawfare**’. This is currently the most prevalent meaning of lawfare in academia, understood as the use of legal instruments in international security and geopolitical struggles for power. It is less financially costly and more discreet than other power instruments on the international scale. Geopolitical lawfare is being increasingly incorporated into the security strategy documents of the US, the People’s Republic of China, and the Russian Federation, often as a method of hybrid warfare.

The second dimension, ‘**domestic lawfare**’, is perhaps the most potentially pernicious variant of lawfare for liberal democratic systems. We define it as the strategy, pursued by domestic political actors, of using – and often misusing – legal instruments to undermine their political opponents. This instrumentalisation of the law is typically carried out by governmental actors that aim to increase their political power and may include various tools such as (packed) courts, constitutional amendments, excessive litigation, or partisan legal interpretations.

We also advance ‘**state lawfare**’ as an important subdivision of domestic lawfare used in internal territorial conflicts. Internal territorial conflicts often take place against a backdrop of divided loyalties and competing politico-legal systems where two polities lay claim to the same territory, as in the case of secessionist movements. States of exception, special orders, incarceration of political and civil society leaders, and temporary loss of civil liberties are all key elements of how governments employ state lawfare to ‘solve’ disputes with minority territorial groups. While this can be brutally effective in the short run, it may weaken the possibility for long-term settlements due to furthering grievances between political opponents.

