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Lawfare in criminal law and law enforcement¹

Introduction

During a time when the lines separating law politics and warfare are becoming less distinct, the idea of 'lawfare' – utilizing law as a tool in conflict – has become increasingly relevant. This study investigates the complex strategies involved in legal warfare demonstrating how legal structures can be used to accomplish goals usually seen in conventional military confrontations. Through analysing strategic 'battlefields' and impactful 'weapons' within the realm of law this research shed light on the diverse nature of modern warfare.

The study presented here provides a thorough evaluation of different strategies used in legal warfare such as baseless lawsuit, unjustified pre-trial detention, overcharges in legal cases, and the denial of legal representation. It also delves into the influential function of media on influencing public opinion and the significant effect of lawfare on criminal law and law enforcement procedures. This extensive study not only illuminates the advanced techniques employed in legal warfare but also prompts important inquiries about the reliability of legal frameworks and the difficulty encountered by democratic nations in upholding justice despite these manoeuvres.

By examining these occurrences, the article adds to the expanding collection of methods on lawfare and its effects on global affairs, legal systems, and adherence to laws. Its goal is to offer academics, lawyers, and

¹ This study is the English version of the presentation delivered at the conference 'The Science and Practice of Law Enforcement' held in Pécs 27.06.2024.

decision-makers important perspectives on the changing dynamics of conflict where legal processes and courtrooms hold as much importance as conventional battlegrounds.

Choose beneficial battlefields and efficient weapons

In every war, strategic locations get chosen thoughtfully by considering pros and cons. In legal disputes, opting for the right plan and techniques hold significant weight.² Here, the term "strategic location" pertains to the jurisdiction in question. Picking jurisdiction thoughtfully can impact law enforcement strategies as it sets the stage for legal warfare.³ Equally crucial is selecting relevant criminal and procedural laws that, similarly to weaponry in armed conflicts, play a vital role in this scenario. The upcoming section explores the key legal establishments and strategies in legal warfare.⁴

Unfounded Lawsuits

Legal warfare involves baseless and aggressive tactics like slander and hate speech, claims against various individuals, including writers, politicians, journalists, and cartoonists. This targets often express their view boldly or crudely using satire on issues related to national security or public concern. This lawfare strategy also applies to action taken against scholars and experts discussing radicalisation that may lead to legal disputes such as work-

² Van Emde Boas, P. et al (2022): Sun Tzu and the Art of War. In: Analyzing the Logic of Sun Tzu in "The Art of War", Using Mind Maps, Studia Logica Library, Springer Publishing, Singapore, 80–94, Source: https://doi.org/10.1007/978-981-19-6250-9_2 Accessed: 18.08.2024

³ Van Emde Boas, P. et al (2022) Ibid, 80–87

⁴ Carr, J. (2012): Inside Cyber Warfare: Mapping the Cyber Underworld. O'Reilly Media, Inc., 35–44; Van Emde Boas, P. et al (2022) Ibid, 88–94.

place harassment lawsuits. These legal proceedings can also involve personal matters, thus eroding the unique aspect of lawfare in international public law.⁵

Unfounded Pre-trial Detention

A pre-trial detention, which could nominally even be justified, but is in fact unfounded, meaning that a person is detained without reasonable or sufficiently serious grounds or explanation for the offence.. This legal action limits a person's freedom according to law, typically affecting those who are accused of a crime but have not faced trial yet. Detention can only be authorised under strict circumstances, especially if the release of the person being prosecuted would make the investigation more difficult, if he or she might escape or commit a new offence. While detained before trial, an individual's personal liberty is curtailed; however, core rights such as the right of defence are still upheld. In situations where prerequisites for pre-trial detention are partially or entirely missing, this purpose of detention is to obtain the detainee's cooperation. Unproven and overly extended detainment could be seen as a form of torture. This mistreatment not only undermines the validity of information gathered through statements but is also widely recognised that individuals subjected to such practices may provide inaccurate details and make a statement only to alleviate their situation and possibly end their detainment even at the cost of a confession. A tell-tale sign of legal warfare might be when a person is set free shortly after making a statement, because it is hard to imagine that the grounds for his detention

⁵ Aust, H. Ph. (2021): Abuse of Rights: From Roman Law to International Law? Comments on the Contribution by Andrea Faraci and Luigi Lonardo. In: Cynical International Law. Berlin, Source: https://doi.org/10.1007/978-3-662-62128-8_17. Accessed: 31.07.2024

have suddenly disappeared. In essence, this type of legal tactic aims to ignore the legitimate grounds for arrest resulting in infringements of suspects' rights and coercing collaboration along with eliciting confessions.⁶

Overcharging

In legal battles during criminal cases, the prosecution might use tactics to pressure the accused by employing the strategy called "overcharging". In legal studies, two forms of overcharging are discussed: vertical and horizontal.⁷ Vertical overcharging involves overly harsh charges that surpass what is appropriate for the crime or the defendant's situation. For instance, the accused could face charges carrying excessive penalty or lengthy imprisonment. Horizontal overcharging entails filing numerous charges simultaneously for a single action. In certain situations a defendant may face multiple charges like corruption, money laundering, negligence, misappropriation of assets and embezzlement. Prosecutors leverage the threat of harsh penalties to encourage the defendant to confess to a lesser or fabricated crime. The idea is that if the accused admits to a minor or untrue offence, the charges for the more serious offences will be dropped. This tactic can result in defendants acknowledging actions they are not responsible for in return for leniency and decreased charges. Consequently, the accused might agree to a prearranged reduced penalty through a plea bargain to evade initial consequences.⁸ For example, a well-known entrepreneur who faces legal charges may find the legal process to be mentally taxing. The press is now treating him as a criminal and he wants to end his case by confessing. In sum, it can be concluded that, to rule out the above

⁶ Martins, M. et al (2010): Reflections on 'Lawfare' and Related Terms, Lawfare Blog. Source: <https://www.lawfareblog.com/reflections-lawfare-and-related-terms>. Accessed 07.31.2024

⁷ Faust, T. – Daftary-Kapur, T (2022): Prosecutorial Decision-Making. In: Prosecutorial Decision-Making Routledge, Source: <https://doi.org/10.4324/9780367198459-REPRW145-1>. Accessed: 23.07.2024

⁸ Lippke, R. L. (2011): The ethics of plea bargaining, Oxford monographs on criminal law and justice, New York: Oxford University Press, 31

abuse, the accused and his defence counsel should intervene at the very beginning of the proceedings.⁹

Exclusion of Legal Counsel

Authoritarian rulers and administrations often use the strategy of sidelining legal advisors, regularly viewing lawyers merely as hired abettors. This kind of warfare methodically obstructs detainees' access to legal defence with the intent to undermine their right to defence. Unwarranted limitations are frequently imposed, which prevent lawyers from sharing "confidential information" with clients. In reality, this does not mean passing any essential details or breaching confidentiality obligations. The prosecution understands that without communication and discussions between lawyer and client forming an effective defence is impossible. As well as not being able to meet their legal representative, the accused is often isolated from others (relatives, friends etc.) and may not receive mail. Legal representatives must be able to carry out their responsibilities freely for the justice system to function properly.¹⁰

Amplifying Role of Media

During times of war various presumed factual or fabricated atrocities are often brought to light in the media. This portrayal transforms the adversary into a figure resembling pure evil, thus validating one's own actions in war

⁹ Kiyanita, V.M. – Gunko, K.O. (2023): Regarding the Defense Counsel's Participation in Criminal Proceedings at the Pre-Trial Investigation Stage, Analytical and Comparative Jurisprudence, no. 4 (September 14, 2023) 465–470, Source: <https://doi.org/10.24144/2788-6018.2023.04.75>. Accessed: 31.07.2024

¹⁰ Camp Keith, L. – Tate, N. – Poe, S. C. (2009) Is The Law a Mere Parchment Barrier to Human Rights Abuse? The Journal of Politics Vol. 71 No. 2 644–660, Source: <https://doi.org/10.1017/S0022381609090513>; García-Sayán, G. (2017): Report of the Special Rapporteur on the Independence of Judges and Lawyers, Source: <https://typeset.io/papers/report-of-the-special-rapporteur-on-the-independence-of-29axsa9ukf>. Accessed: 07.31.2024

and justifying military operations. Even in peacetime, there is a common public outcry similar to that of war crimes: corruption.¹¹

Corruption incidents tend to attract exclusive focus. Inquiry into corruption can lead to widespread media coverage, which may harm the reputation, privacy and financial situation of those involved. Various types of media coverage, such as tabloid reports, investigative journalism, opinion pieces and television programmes can turn corruption into a scandal in the public eye.¹² Scandals are media-driven events that involve multiple stories with extensive detail, like information, statement, anecdote, and legal proceeding.¹³

The media and the internet can enhance legal battles by spreading scandalous information and going beyond their usual role as information providers. This is the multiplier effect offered by the media or by certain segments of the media, the key to which is the sophisticated communication tactics of the media. Overall, the media equipped with sophisticated tools for mass communication has a strong influence in shaping public perspectives in support of or against various agendas.¹⁴

¹¹ Forest, J. (2021): Political Warfare and Propaganda: Political Warfare and Propaganda: An Introduction. *Journal of Advanced Military Studies*. 12. 13-33. 10.21140/mcu.20211201001

Mutonyi, G. P. (2021): Warpreneurship: War as a Business, *Path of Science* Vol. 7 No. 9 Source: <https://doi.org/10.22178/pos.74-11>. Accessed: 07.31.2024.)

¹² Jain, A. K. (2001): Corruption: A Review, *Journal of Economic Surveys* Vol. 15 No. 1, 71–121. Source: <https://doi.org/10.1111/1467-6419.00133>. Accessed: 11.07.2024

¹³ Breit, E. (2010): On the (Re)Construction of Corruption in the Media: A Critical Discursive Approach, *Journal of Business Ethics* Vol. 92 No. 4. Source: <https://doi.org/10.1007/s10551-009-0177-y>. Accessed: 01.07.2024

¹⁴ Caled, D. –Silva, M. J. (2022): Digital Media and Misinformation: An Outlook on Multidisciplinary Strategies against Manipulation, *Journal of Computational Social Science* Vol. 5 No. 1, 123–59. Source: <https://doi.org/10.1007/s42001-021-00118-8>. Accessed: 23.07.2024

Impact of Lawfare on Criminal Law

Criminal law is essential for upholding social order and ensuring justice as highlighted by Prof. Paul H. Robinson, who states that it gains its ethical legitimacy by prioritising justice above everything else. Changes in societal values is mirrored in the development of criminal law, which seek to redress various forms of harm including physical injuries, property loss and broader community concerns.¹⁵ They uphold that justice requires a constant revision of legal principles and procedures and is not just a theoretical concept. High-profile cases add layers of complexity to criminal law. Such cases frequently involve constitutional matters such as fair trial guarantees and protection against unwarranted searches and seizures forcing higher courts to manoeuvre through intricate legal territory. The public scrutiny and the media focus on them highlight the delicate balance between legal procedures and public perceptions heightening the difficulty in seeking justice. A judgment in a well-known case underscores the challenge of balancing truth seeking with finality in legal processes. Those cases offer important insights for legal professionals and policymakers influencing future strategies for justice within changing legal and societal frameworks.¹⁶

Impact of Lawfare on Law Enforcement

In the last few years, some police headquarters have come under increased public scrutiny. This focus on activities of law enforcement officials has

¹⁵ Robinson, P: (2024): American Criminal Law: Its People, Principles, and Evolution News & Events Penn Carey Law, March 18, 2024, Source: <https://www.law.upenn.edu/live/news/16545-american-criminal-law-its-people-principles-and>. Accessed: 31.07.2024

¹⁶ Appeals in High-Profile Cases - Criminal Justice - iResearchNet, Criminal Justice, January 8, 2024, Source: <https://criminal-justice.iresearchnet.com/criminal-justice-process/appeal-and-post-conviction-remedies/appeals-in-high-profile-cases/>. Accessed: 11.08.2024

led to calls for prompt changes at various levels. Law enforcement professionals must navigate their crucial duty of serving communities while also meeting the rising public expectations for openness and responsibility.¹⁷

Policy and Reform Efforts

Efforts are being made to improve policing practices through legislative and policy changes, such as George Floyd Justice in Policing Act of 2021. This act aims to enhance accountability and decrease the use of excessive force by introducing measures like National Police Misconduct Registry. It also seeks to reform U.S. police practices by banning tactics like no-knock warrants and making it easier for prosecuting officers involved in violent acts. The act was named in honour of George Floyd who was killed by Minneapolis police officers in May 2020 that triggered nationwide demonstrations. The legislation aims to ban chokeholds among federal law enforcement agencies and requires state and local police departments that receive federal funding to adopt similar protocols. These requirements include outfitting officers with body cameras instituting anti-discrimination initiatives, and minimizing the use of lethal force. Despite being approved twice by the House during Democratic governance periods, the bill has faced obstacles in the Senate, primarily related to disputes surrounding "qualified immunity" which shields officers from civil litigation. The recent tragedy involving Tyre Nichols at the hands of Memphis law enforcement has reignited pleas for approval. If the Congress does not take action, President Biden has already signed an executive order addressing certain policing reforms, although contentious voices argue that it lacks efficacy, since it solely pertains to federal officers. The enactment is consid-

¹⁷ Rowley, M. (2022): Current Issues in Law Enforcement: What Will Departments Face in 2022? The Link, February 14, 2022, Source: <https://www.columbiasouthern.edu/blog/blog-articles/2022/february/current-issues-in-law-enforcement/>, .Accessed: 11.08.2024

ered crucial for guaranteeing uniform police reform and accountability nationwide.¹⁸ The registry seeks to tackle the problem of "roaming officers", who are reinstated by various departments after being fired for misconduct.¹⁹

The Role of Technology and Data

Modern technologies and the use of large datasets in law enforcement offer advantages and hurdles. Although these technologies can improve crime prevention tactics, they also raise worries about privacy and possible biases when interpreting data.²⁰ Law enforcement agencies must balance these concerns with the need to deploy new crime prevention methods effectively.

Training and Culture

Changing law enforcement to meet modern standards requires emphasis on accountability education and cultural changes within the Police. Experts from various backgrounds agree on the need for these updates to establish a more equitable approach to public safety. The essential component of these endeavors include impactful training initiatives and fostering a culture that values integrity and public confidence.²¹ Effective training programmes and a cultural emphasis on integrity and public trust are vital components of these efforts.

¹⁸ Greve, J. E. (2023): What Is the George Floyd Justice in Policing Act and Is It Likely to Pass? The Guardian, February 6, 2023, sec. US news, Source: <https://www.theguardian.com/us-news/2023/feb/06/george-floyd-justice-in-policing-act-explainer-tyre-nichols>. Accessed: 31.07.2024

¹⁹ Seo, S. - Richman, D. (2021): Toward a New Era for Federal and State Oversight of Local Police. Lawfare, June 1, 2021, Source: <https://www.lawfaremedia.org/article/toward-new-era-federal-and-state-oversight-local-police>. Accessed: 11.08.2024

²⁰ Rowley, M. (2022): Ibid.

²¹ Rashawn, R. - Orrel, B. (2021): A Better Path Forward for Criminal Justice: Police Reform - A Report by the Brookings-AEI Working Group on Criminal Justice Reform,

Summary and Conclusions

This research delves into the concept of 'lawfare' in contemporary legal procedures exploring its effects on criminal justice, law enforcement and democratic societies. It aims to identify and analyse specific strategies used in legal warfare, their consequences on individuals and institutions and wider implications for the rule of law. The main research inquiry focuses on how legal procedures and systems are manipulated to achieve strategic goals. Through a qualitative analysis approach, various tactics such as unfounded lawsuits, unfounded pre-trial detainment, overcharges in legal proceedings and exclusion of legal counsels are examined. Furthermore, the paper investigates how the media influences public perception and evaluates the impacts of lawfare on criminal law and law enforcement procedures. The approach includes extensive examination of current literature on lawfare, and the evaluation of recent legislative and policy changes in law enforcement.

The conclusion indicates that effectiveness of lawfare is greatly influenced by the strategic choice of legal battlefields and weapons with the media playing a vital role in amplifying its effects through scandal-mongering and shaping public opinion. Additionally, lawfare has shown to have significant impacts on criminal law, questioning its moral authority and complicating the pursuit of justice while simultaneously pressuring law enforcement agencies to reforms, due to these tactics and increased public scrutiny. These findings highlight the intricate and widespread implication of lawfare on legal systems, public perception and institutional practices within democratic societies. The study suggests that lawfare poses a substantial challenge to democratic institutions and the integrity of legal systems. It proposes further research into countermeasures along with establishing strong legal frameworks to guard against the abuse of legal procedures for strategic purposes. By exploring lawfare, it enhances our

(American Enterprise Institute, March 2021), Source: <https://www.brookings.edu/articles/a-better-path-forward-for-criminal-justice-police-reform/>, Accessed: 31.07.2024

comprehension of how conflicts are managed presently and the difficulties democratic nations encounter in upholding justice and legal principles. The study offers a complete review of lawfare strategies, their execution and outcomes along with an assessment of the larger significance for legal and law enforcement matters.²²

²² Martins, M et al (2010): Ibid, 47-52