

# What does *Lawfare* mean in Latin America? A new framework for understanding the criminalization of progressive political leaders\*

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## Abstract

This article addresses the origins of the term lawfare, as well as different definitions developed in the Global North and the Global South while proposing a conceptualization linked to the particularities of this socio-legal phenomenon in Latin America. Focusing on the cases of Brazil and Argentina the article deploys the notions of phyco-logical, judicial and media warfare to analyze the different dimensions that an analysis of lawfare opens in relation to democracy, the penal system, and mainstream media. The article also explores different dimensions of lawfare and a notion in Spanish with the potential to replace the anglicism: dripping coup (*golpe por goteo*). Finally, the article proposes different measures to counteract lawfare in the judicial, educational, media, and social spheres. In particular, the conclusions refer to the relevance of social movements in what can be conceptualized as a “cautionary popular criminology”.

## Keywords

lawfare, justice, criminal selectivity, Argentina, Latin America, coup

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In Argentina, Brazil, Bolivia, Colombia, Ecuador, Peru, and many other countries of the *Patria Grande*, the word “lawfare” is heard daily – in the media, as well as in the speeches of political leaders – concerning cases of corruption involving progressive political leaders and discussed in key electoral moments.

The term was coined twenty years ago in the Global North (Dunlap, 2001), but it was in the mid-2010s that it started to be broadly deployed in Latin America, particularly in Brazil and Argentina. In Brazil, the term appeared in the public discourse in 2014, when criminal charges were brought against former President and then presidential candidate Luiz Inácio “Lula” da Silva. He was accused of receiving an apartment as part of bribes in return for awarding contracts to specific construction corporations in a case that also implicated many other politicians and members of the state-owned oil company Petrobras. Lula ended up in pre-trial detention and was banned from competing in the national elections (Limongi, 2021). In Argentina, the first case labelled as lawfare occurred in 2016 and involved the then-President Cristina Fernández de Kirchner, accused of manipulating the price of the “dólar futuro” (future dolar) – an estimated price of how much a dollar would cost in relation to the local currency- in detriment of the Central Bank reserves (SAIJ, 2021). Cristina Fernández de Kirchner explicitly used the term lawfare when declaring in another case against her under charges of corruption in the adjudication of public work (el País, 2019).

In line with Lula and many other centre-left political leaders in the Latin-American region, Fernández de Kirchner described lawfare as the mechanism through which certain sectors of the judiciary, the mainstream media, and the opposition manipulate criminal cases based on corruption charges to delegitimize and ban progressive leaders from democratic politics. In contrast, part of the judiciary, the mainstream media, and politicians from the establishment argue that the notion of lawfare is deployed by progressive politicians to delegitimize serious criminal investigations aimed at ending corruption in the region (La Nación, 2020).

Amid these conflictive positions, the definition of lawfare is far from clear: What are its main features? Where does the term come from? Why even use an anglicism in Latin America? Is it a new phenomenon? Is it a negative one? If yes, how can it be fought? To delve into these questions, this article deploys the framework of critical criminology and key works such as those by Stanley Cohen and Jonathan Simon to provide a comprehensive perspective on the so-called “lawfare”, with a specific focus on the cases of Brazil and Argentina.

Part 1 of this article addresses the origins of the term lawfare and discusses the development of the term in the Global North (mainly in the United States). This brief overview allows to expose how the notion of lawfare, coined in the Global North, differs from the one used in Latin America. Thus, interestingly, this section exposes how Latin American actors have embraced an English word but reshaping its content under a different lens. In this vein, this first part includes elaborations of the notion advanced in the Global South, in particular Latin America. Focusing mainly on the cases of Brazil and Argentina, Part 2 deploys the notions of psychological, judicial and media warfare – developed in the book *Unrestricted Lawfare* (Liang and Xiangsui, 1999) to analyze the different dimensions that an analysis of lawfare opens in relation to democracy, the penal system, and mainstream

media. This section deals with geopolitics, the influence of the United States, domestic judiciaries in Latin America, and mainstream media. Part 3 explores different dimensions of lawfare and a notion in Spanish with the potential to replace the anglicism: dripping coup (*golpe por goteo*). Overall, Parts 2 and 3 claim that the concept of lawfare in Latin America can benefit from the three dimensions presented in *Unrestricted Lawfare*, and that this complex notion of lawfare is best encapsulated by the interesting idea of a “dripping coup”. Finally, the article proposes different measures to counteract lawfare in the judicial, educational, media, and social spheres. In particular, the conclusions refer to the relevance of social movements in what can be conceptualized as a “cautionary popular criminology”.

## **I. Origins and terminological development of lawfare in the global North and South**

At the beginning of the twenty-first century, US Air Force colonel, Charles Dunlap, used the term “lawfare” – a contraction of “law” and “warfare” – and described it in negative terms as the “use of law as a weapon of war” or, in other words, “a method of warfare where law is used as a means of accomplishing a military objective”(Dunlap, 2001: 2). He argued that lawfare was a by-product of the “hyperlegalism” deployed by other countries than the United States and the international community to discredit US interventions abroad and which put US national security at risk. More precisely, he argued that the origins of lawfare could be found in the international reaction to the NATO bombing of Kosovo and Serbia in 1999. It was then, Dunlap argued, that the media and the international community began to use legal language and, in particular, international human rights law to delegitimize both the military intervention and the role of the United States in geopolitics.

From then on, the term lawfare was applied extensively, particularly during the administration of US President George W. Bush, to weak actors who took advantage of “international fora, judicial processes, and terrorism” to undermine the United States (Carter, 2005). Within this context, Dunlap posed the following questions:

Is lawfare turning warfare unfair? In other words, is international law undercutting the ability of the U.S. to conduct effective military interventions? Is it becoming a vehicle to exploit American values in ways that actually increase the risks to civilians? In short, is law becoming more of the problem in modern warfare instead of part of the solution? (Dunlap, 2001: 1).

In parallel, Jack Goldsmith (Goldsmith, 2020) has argued that “various nations, NGOs, academics, international organizations, and other actors in the international community are weaving a web of international law and institutions that today threaten the interests of the U.S. government,” whereas Christi Bartman has described lawfare as “the manipulation or exploitation of the international legal system to complement military and political objectives” (Bartman, 2010: 3–4).

Several years later, however, Dunlap (2009) reconsidered his original conceptualization and began to argue that lawfare was in fact a neutral tool that could even be useful for the United States in its own defence of its geopolitical interests. In this vein, Dunlap proposed to define lawfare as the strategy of using (or even misusing) the law as a substitute for traditional military action to achieve an operational objective (Ansah, 2010). Similarly, Kittrie (2016) argued that, thus far, the United States had largely been a victim of lawfare. Even the reluctance to ratify international treaties or become a member of the International Criminal Court was due to US fears of the international community and their possible use of international law as a weapon of condemnation against the United States. Nonetheless, Kittrie argued, lawfare could also be understood as a positive tool for US interests and national security policy, insofar as it can allow for the creation of national laws that enable trials against terrorist groups and their financiers, among other modalities. In terms of definitions, Kittrie stated that lawfare had acquired two distinct forms; on the one hand, “instrumental lawfare” refers to the instrumentalization of legal tools to get the same or similar effects to those traditionally obtained through military intervention, *replacing* the latter. On the other hand, “disparate lawfare compliance-exploitation” refers to the use of the law to gain advantages *within* traditional armed conflicts, in particular through the law of war.

By contrast, Comaroff (2001) maintained Dunlap’s original negative conceptualization of lawfare, although he was not preoccupied with its possible harm to US interests. Instead, he argued that lawfare is a tool borne of the geopolitical dynamics dominated by imperialism and post-colonialism, and therefore defined it as the deployment of legal instruments to commit acts of political coercion. Together with Jean Comaroff, he later re-analyzed the term, which they then described as the imperialism’s use of “criminal codes, its administrative procedures, its states of emergency, its statutes and injunctions and court orders, to discipline its subjects by means of legible and legal violence” (Comaroff and Comaroff, 2007: 144). However, in view of the complexity of the concept, the authors noted that lawfare can also become “a weapon of the weak, turning authority against itself and demanding resources, recognition, voice, integrity and sovereignty in the courts” (Comaroff and Comaroff, 2007: 145).

Along these lines, it is possible to identify two opposing visions of lawfare. On the one hand, as the law of the empire, lawfare implies the deployment of the law by the most powerful states as part of the planning, execution, and legitimization of their controversial military objectives. In this sense, lawfare can operate as a replacement or support for traditional warfare. On the other hand, from the perspective of international human rights law, lawfare involves attempts by individuals, liberal human rights organizations, and other political entities to harness the law to restrict or rebuke violent state policies and practices.

To this is added that, before the turn of the current century, two Chinese colonels, Qiao Liang and Wang Xiangsui, had already published the book *Unrestricted Warfare* (Liang and Xiangsui, 1999), in which they also contended that current methods of war were insufficient in the new geopolitical landscape and proposed three, more subtle, dimensions of warfare that do not necessarily require the deployment of missiles. In line with the aforementioned Western authors, Liang and Xiangsui argued that “judicial warfare” was crucial to criminalize dissent. However, besides the role of the law, these

colonels also pointed out the role of psychological and media manipulation as a replacement of the traditional war. Concretely, they argued for a “psychological warfare” aimed at transforming emotions and influencing the psyche of the population, and a “media warfare” to control public opinion. Notably, both dimensions are interrelated, but there are significant differences. While lawfare is fostered by the media, the psychological warfare can be seen as an effect within the population mindset. At the same time, the psychological warfare can be fostered by the media, but also by domestic politicians, the members of the Judiciary (particularly prosecutors and judges) and international actors.

The question then becomes how this concept – created and conceptualized in the Global North – was normatively transferred (Duve, 2018) to Latin America, particularly since the continent is not currently engaged in wars or military conflicts. Further attention reveals that the distortion of the law, the creation of moral panics to shape the psychology of the population, and the manipulation of the media are nonetheless used in a warlike manner in Latin America *within* the borders of each state and against a particular enemy: progressive leaders that stand against the neoliberal agenda and promote social justice policies and the strengthening of national sovereignty. Just as in the Global North, lawfare has increasingly replaced the role of military interventions against this type of socially-oriented government. Instead of the traditional military coups that rocked Latin America during the twentieth century, criminal charges and labelling processes in the media and social media are now used by local and global powerholders to delegitimize and even remove from office those political leaders that, because of their social and political positions, are problematic for their interests. In the words of Rafael Bielsa and Pedro Peretti:

Judges and prosecutors have been co-opted to replace the military, who were already discredited in the eyes of the population for their leading role in the violation of human rights during the dictatorships. What is new is not the eruption of judges into the political sphere (judiciary and politics are not necessarily mutually exclusive concepts), but rather the brazenness and prominence acquired by the judicial clique. This is what is new... Real power no longer needs [military dictators such as] Jorge Rafael Videla (1925–2013) or Humberto de Alencar Castelo Branco (1897–1967), the marshal who seized the government of Brazil in 1964. Now they are being supplanted by judges like [Brazilian] Sergio Moro (Bielsa and Peretti, 2019: 12).

Moreover, the insights from *Unrestricted Warfare* are key to analyze Latin America and the warlike deployment of the global and local governance strategies surrounding accusations of corruption as well as the role of the law and the media within democratic frameworks. “Psychological warfare” takes shape through the top-down narratives that reinforce dichotomous and Manichean divisions between existing political leaders (populism vs. anti-populism) or between opposition and officialism (Kirchnerismo vs. anti-Kirchnerismo in Argentina, Petistas vs. anti-Petistas in Brazil), accusing the progressive/populist ones of corruption. This phenomenon has been fostered by the United States and international organizations as well as by local allies and is that striking that it has been described in Argentina as a “grieta” (a rift) (Barriera, 2021) that shapes the public debate

within a “politics of representation”. In other words, the psychological dimension is clear in how people at one or the other side of the “grieta” become passionately and personally involved in the accusation or defense of certain politicians. While a part of the population will embrace a mindset that will understand the accusations as “corruption”, the other part will understand that the accusations are part of the lawfare.

In turn, the notion of “judicial warfare” reflects the fact that the judiciary in Latin America is a non-democratic power, exempt from civil control, and did not experience the post-dictatorial transformation that reshaped the executive and legislative powers (Zunino, 2019). Instead, part of the judiciary was the main protagonist in various extra-electoral processes to remove politicians from power (Zanin et al., 2019). Finally, media warfare is exacerbated by the fact that, even though there are relevant and trustworthy independent journalists, most of the media is owned by a few corporations while social media often becomes a channel for the dissemination of fake news and/or of passionate claims that shape the Psyche of the population either in favour or against of those accused (Estepa and Maisonnave, 2020).

The following section will analyze these three pillars of lawfare (psychological, judicial, and media warfare) in the Global South, highlighting that it goes beyond legal-judicial processes and involves politics of governance influenced by the Global North as well as more local disputes in the public discourse by politicians and journalists.

## **2. Lawfare as a psychological, judicial, and media warfare in the Global South**

### *2.1. Psychological warfare: US influence on Latin American governments through the crime of corruption*

Jonathan Simon warns that, since the 1970s, there has been a change in US (and global) politics as the social justice agenda (including the fair distribution of wealth, access to education, and health care) was displaced with the notion of an imminent “emergency” (the increase in crime) that shaped the Psyche of the population. While reality did not necessarily confirmed a real increase in common crime, the fear and “feeling of insecurity” (Kessler, 2009) did spark neoliberal adjustment policies under the auspices of the “war on crime”.

Simon adds that this war was particular insofar as it turned over-concentrated power to the prosecutor’s office: “The war on crime has transformed US prosecutors into an important model of political authority, while giving them enormous jurisdiction over the welfare of communities with little regard for the lack of democratic accountability” (Simon, 2007: 33). Prosecutors have since emerged as not only the representatives of civic interests (including those of the victims of crime) but also as the great moral adversaries of defendants, putting the constitutional guarantees that protect the latter at risk.

In the context of lawfare, the “war on crime” has similarly been deployed to impose a neoliberal paradigm while keeping the population dulled by means of a steady stream of false emergencies broadly labelled as “corruption”. Invoking a supposed emergency, the

population' Psyche is shaped and dragged to accept that more power must be handed to federal judges and prosecutors, even at the cost of violating criminal law and procedural rules. Under the "emergency", the accused are morally isolated, and the judiciary becomes the legitimate representative of the interests of a distressed population, who ends up feeling that it has been betrayed by the political leadership. In turn, this focus on the "emergency" creates a smokescreen while measures aimed at imposing a neo-liberal agenda to the detriment of social justice go unnoticed among the distressed population.

This focus on corruption as a major regional problem is spread by members of Judiciary, domestic political leaders of the opposite party and the media but also by other relevant actors: the corporate (or real) power in engagement with, the United States, and international organizations, whose interests have systematically shaped the fate of Latin American politics. In relation to the United States, Rusconi's words (2019), "criminal law disciplines... with the sponsorship of the US". In this vein, Bielsa and Peretti underline that these criminalization processes are not arbitrary, but rather respond to the interests of "the most militarily powerful country on the planet, the United States" which targets governments of a certain political stripe that conflict with its agenda (Bielsa and Peretti, 2019: 18).

In relation to international organizations, "transparency" and the "fight against corruption" have been promoted with particular vehemence by financial institutions (the International Monetary Fund, the World Bank, the Inter-American Development Bank) and US bilateral organizations in Latin America (such as USAID). Through evaluation reports of specific countries (containing "recommendations" and "best practices"), these organizations disparage specific governments as "corrupt" and "inefficient" and argued for an expansion of the private sector, understood as "efficient" and "transparent". In the same vein, they promote the role of (ostensibly apolitical) experts and businesspeople who end up as substitutes for (intrinsically corrupt) professional politicians. Furthermore, the recommendations for judicial reforms made by these organizations focus on the struggle against the "inefficiency of the state" and the prosecution for "corruption" of those leaders who promote interventionist policies and the expansion of the state in contravention of the instructions to become more "efficient" and to privatize (Romano, 2019). In line with the psychological warfare, this "efficiency claim" is largely supported by emotions and ideals of corporate success rather than factual evidence.

As part of this logic, the US government in particular has shown a desire to expand the Foreign Corrupt Practices Act (FCPA) as a pillar of its foreign policy in Latin America (Koehler, 2015). Within this framework, conversations leaked by *The Intercept* revealed the connections between US officials and Judge Sergio Moro, who intervened in the case against Lula, in Brazil. Indeed, the case had its origins in proceedings initiated by the US Department of Justice in December 2016 against the transnational Brazilian corporation Odebrecht for works carried out in US territory. As part of that case, the United States requested the collaboration of the courts in those Latin American countries where Odebrecht had also been active (Brasil Wire, 2018). Similarly in Argentina, Wikileaks cable 1222 revealed a meeting between the staff of the US ambassador and the then

head of government of the City of Buenos Aires, Mauricio Macri, a neoliberal businessman turned politician, in which the former criticized the dismissal of criminal charges against social activist Luis D'Elía, who was, after that meeting, rapidly imprisoned (Estepa and Maisonnave, 2020).

In short, although during the previous century Simon warned about the use of ordinary crime as a strategy of governance, in the twenty-first century, it has become necessary to call attention to the use of accusations of white-collar crimes of political opponents as a strategy of governance through psychological warfare. In other words, although lawfare appears under the guise of the fight against corruption, it is better understood as a governance strategy that presents corruption as an emergency and shapes the Psyche of parts of the population to support the disciplining of certain Latin American leaders in the name of transparency.

## 2.2. *Judicial warfare: The driving force behind criminal selectivity*

This regional anti-corruption agenda requires local executioners, consisting of members of the executive and parliamentary branches when lawfare is performed through impeachment mechanisms, such as in the case of Dilma Rousseff (Azar and Tavares da Motta, 2020), but particularly of specific judges and prosecutors. Rather than a monolithic body controlled by political, economic, and patriarchal elites, the judiciary is complex, varies across countries and historical periods, and, even within a specific country and context, not all judges and prosecutors are involved in lawfare. Moreover, many judges and prosecutors have risked their positions to confront powerful political and economic actors. This is the case of the Supreme Court judges in Colombia, who indicted and sentenced high-ranking members of government for their criminal links to paramilitary groups, including former President Alvaro Uribe. In Argentina, judges and prosecutors seen as benefiting the government of Cristina Fernández de Kirchner, were transferred, removed, or forced to renounce once Mauricio Macri was elected President of the country (see, e.g. Unidiversidad, 2017). Furthermore, even those judges and prosecutors involved in lawfare might do so because they are promised a promotion or other benefits, but also because they are under threat of impeachment or fear the loss of an expected promotion.

To carry out the judicial warfare, the courts often twist criminal law to fit the case and/or violates the basic rules of criminal procedure<sup>1</sup>. In terms of criminal law, the misuse occurs through the application of open criminal types (e.g., illicit association, treason, abuse of power), the extensive application of criminal types (to the detriment of the principle of legality), and the expansion of authorship and assignments of responsibility in the governmental hierarchical chain (to the detriment of the principle of guilt) (Zaffaroni et al., 2020). In terms of criminal procedure, the judicial warfare engages: in a distortion of the rules of jurisdiction and the guarantee of the natural judge (*forum shopping*); in the use of the notion of repentance (not to seek the truth, but to blame the target of criminal prosecution); in wiretapping and other invasive intrusions of the private sphere without a court order or in cases in which they were not ordered (to humiliate and not to clarify the facts); in the (ab)use of pre-trial detention without legal justification, such as cutting

defendants off from any residual power base (even in cases that depend mostly on written evidence and even public documents, and not on witnesses); and/or in the assessment of flimsy evidence.

As Rusconi (2019) summarizes, far from representing an objective legal and judicial system, lawfare demonstrates the selective manipulation of dogmatic and criminal procedural law: it requires the state's willingness to carry out illegal intelligence tasks, the participation of prosecutors and judges with double standards who accept information that arrives surprisingly and anonymously to their offices, indiscriminate use of preventive detention, an executive branch that shamelessly shapes the agenda of docile judges and prosecutors, and legislators and powerful embassies that protect those who join in such illegitimate acts.

To this is added that judicial warfare is rarely disconnected from their everyday interventions in ordinary cases, shedding light on wider problems within the criminal justice system, including a lack of societal control over the judiciary violations of due process, anonymity (the accused not able to address the person who decides their fate), and a lack of clarity about when a case will be resolved are only some of the problematic aspects of the lawfare that reflect systematic flaws of the overall criminal justice system. The difference between lawfare and ordinary cases is that injustices in ordinary cases are even less visible because they tend to affect the poor, the young, and the marginalized (Vegh Weis 2017a).

In that vein, a central aspect of lawfare that is often overlooked is its entanglement within the general selectivity of the criminal justice system. Criminal selectivity operates in relation to ordinary crimes on a double basis. On the one hand, laws, policing, and the judicial system tend to "over-criminalize" the poor, the young, and the marginalized, regardless of whether the crimes committed involve actual social harm (e.g. drug possession). On the other hand, the selective mechanism implies that these same legal, policing, judicial and carceral measures tend to "under-criminalize" the powerful, even if the crimes they perpetrate are harmful events with great social impact (e.g. embezzlement, unlawful privatization of public spaces or environmental crimes) (Vegh Weis, 2017a, 2021b). Notably, over- and under-criminalization do not refer to areas of conduct that are or are not being criminalised but rather to the emphatic reaction of the criminal justice system (over-criminalization) contrasting with the lack of attention (under-criminalization) to certain behaviours in relation to the socio-demographic features of the accused.

To clarify this further, it is possible to argue that the "criminalization" of a certain behaviour takes place when the parliament assigns certain punishment in proportion to certain social harm, and when law enforcement agencies and the courts prove, in each specific case, that this proportion is met and that criminal procedures rules have been followed. In contrast, instances of "over-criminalization" expose those cases in which this proportion does not take place because the accusation involves behaviours that did not cause any social harm and/or because the pertinent criminal procedure was not followed. In other words, the indictment and, eventually, the sentencing is not in proportion to the behaviours attributed to the accused and the criminal procedure is not in proportion to the expected application of the rule of law. Instead, both indictment and sentencing, are

harsher (they go “over”) the expected legal standards and this outcome responds to the socio-demographic features of the accused (the poor, the young, and the marginalized). Instances of “under-criminalization”, on the other hand, occur when, although social harm has taken place, the indictment does not take place because of a favourable application of criminal procedure rules, or when the punishment is mild in relation to the harm perpetrated. These outcomes can be regarded as going below (“under”) the expected criminalization as they are, instead, based on the socio-demographic features of the accused (the powerful).

Interestingly, lawfare does not circumvent these dynamics of over- and under-criminalization. Instead, lawfare tends to be more effective when operationalized against leaders who possess or are associated with characteristics that make them more ‘criminalizable’. Lawfare can thus be defined then as a specific modality of criminal selectivity that manifests itself through the manipulation of the media-judicial system at the behest or with the support of corporate powers in a two-dimensional process. On the one hand, it is sought through the presentation and dissemination of various –often false – criminal charges against progressive leaders, even when they did not perpetrate a crime (over-criminalization). On the other hand, cases against those leaders who are useful to financial capitalism, regardless of the damage caused, are not as effective (under-criminalization) (Lijalad, 2021). Let us explore some examples.

In terms of over-criminalization, the persecution of Lula is perhaps the case par excellence. The accusation consisted of a vague criminal charge, constitutional safeguards were dismissed (forum shopping, illegal wiretapping, communications surveillance) and the sentence was based on poor evidence arbitrarily evaluated (the judge, Sergio Moro, stated that he lacked sufficient evidence, but was “convinced” that Lula was guilty). Moreover, both the media and social media were used to enhance the accusation (despite the lack of the evidence), discrediting his public image and his political career. As a whole, the sentence was used to disqualify Lula from participating in politics and deprive him of his physical freedom through pretrial detention, even though there was no evidence that he would attempt to evade justice. In short, the law was disproportionately applied to the former president of Brazil. Only years later was the case overturned and nullified by the Supreme Court. At that point, he had already been deprived of the right to stand in the 2018 general elections in which the extreme-right opposition candidate Jair Bolsonaro, who was involved in the case against Lula, became President.

Concerning instances of under-criminalization and continuing with the example of Brazil, lawfare did not end with the invalidation of the case that caused Lula’s over-criminalization. Instead, it continued through the under-criminalization of both Judge Sergio Moro and of Jair Bolsonaro himself, who are, respectively, a candidate in the next election and the President of the country, despite available evidence that they actively brought the false charges against Lula to manipulate the ballot.

Furthermore, under- and over-criminalization are not only marked by the issue of class, but also by the social status, gender, and skin colour of the accused. In this vein, over-criminalization operates differently (and more harshly) for non-white, indigenous

peoples, and women. In terms of gender, women are incarcerated at lower rates than men, as the former is subject to a wide range of social controls ranging from family, school, and neighbourhood to media and religion, consigning the penal system to a subsidiary role (Federici, 2009). But what happens with those women who escape patriarchal social control? What happens when strong, empowered female leaders position themselves at the centre of the political agenda, overcoming gender stereotypes to occupy decision-making positions traditionally reserved for men? (D’Adamo et al., 2014).

The foremost strategy in these cases is usually to discredit their leadership and attribute it instead to the “man next door”, as happened with Cristina Fernández de Kirchner when she won the presidential elections of 10 December 2007, succeeding her husband, Néstor Kirchner. As Azar and Tavares da Motta (2020) report, “her coming to power was preceded by a strong media campaign that referred to the ‘presidential marriage’ and warned that the real ‘strongman of the government’ would continue to be the former president”. Similarly, Dilma Rousseff’s presidency in Brazil was presented as a puppet administration with Lula as the real power behind her. When the “man next door” strategy proves insufficient, penal control through lawfare by over-criminalization becomes the next option: In contrast to the gender disparity in criminalization rates for ordinary crimes, female leaders are targeted by lawfare through over-criminalization to the same extent as their male counterparts.

That being said, lawfare waged against women has particular characteristics: the private sphere (“from which women should not have left”, according to patriarchal ideology) becomes part of the over-criminalizing strategy, in so far as “the focus of treatment shifts from political issues to issues of private order. Appearance, family, motherhood, feelings, intimacy become the center of concern of the journalistic discourse when it comes to women” (Pérez and Aymá, 2017: 527). This inclusion of the private sphere privileges attacks on motherhood, such as media reports that published personal details about the daughter of former Argentinean Attorney General, Alejandra Gils Carbo (Perfil, 2017) or questioned the quality of Fernández de Kirchner’s mothering through the publication of private information about her daughter’s health. It also includes attacks on the mental health of these women, such as portrayals of Fernández de Kirchner as psychotic and perverse (Badaro, 2020), or publicizations of their sexuality, as evinced by the magazine *Noticias*, which published a caricature of Fernández de Kirchner having an orgasm on the cover (ELA – Equipo Latinoamericano de Justicia y Género, 2012).

In terms of skin colour and ethnicity, the case of Milagro Sala, an Indigenous social activist and leader of the social movement Tupac Amaru in Argentina, is striking. She has been detained in the province of Jujuy since January 16, 2016, despite evidentiary flaws, abuse of pretrial detention, and violations of due process, and the division of powers – foundations of the democratic system. Her detention coincided with the decision by the provincial governor to urge his legislative majority to pass a law expanding the number of provincial high court judges and then to appoint those same partisan deputies who had voted for the law, many of them relatives of the governor himself, to these new positions. These judges will be the ones confirming each case against Sala. The question remains whether this massive violation of procedural guarantees would have been

tolerated by the population and the political elite if Milagro were not a woman, indigenous and poor – a definitional example of intersectionality (Zaffaroni, 2018).

In sum, the criminal justice system persecutes the poorest, the racialized and the marginalized, and those who defend the interests of those groups. In this vein, the over-criminalization of the marginalized (in ordinary cases) and of the leaders who defend the interests of the marginalized to a greater or lesser extent (in lawfare cases) is complemented by the under-criminalization of the powerful (in ordinary cases) and of the leaders who belong to their social group or represent them in the political sphere (in lawfare cases): “For all these reasons, criminal selectivity continues to be the great ethical problem. The same as always, but with the only difference that in the lawfare cases is even worse” (Rusconi, 2019).

### 2.3. *Media warfare: The creation and communication of moral panics through mainstream media and influencer criminology*

These selective practices from the Global North and implemented locally by a part of the judiciary would not necessarily meet the notice of the general public without the intervention of a third executioner: certain representatives of the mainstream media largely owned by powerful economic groups with vested interests and close ties to political elites. While the Latin American region also counts on independent and committed journalists that provide honestly and fact-checked information, even in corruption cases, it is mostly mainstream corporate media, which owns a great part of the radio, tv, and internet providers, the one that shapes the public discourse and establishes what shall be regarded as a crime and who shall be labelled as corrupt, in what has been conceptualized as “media criminology” (Zaffaroni, 2011).

Indeed, as mentioned, the common denominator in narratives articulated about lawfare is the “fight against corruption” or the “emergency of corruption”. However, this claim is not necessarily aligned with an actual increase in corruption in the region. Indeed, in his book *Juicio político al presidente y nueva inestabilidad política*, Perez-Linan (2009) presents data from the Foreign Broadcast Information Service (which collects media reports from all Latin American countries) that shows that, in the early 1980s, there were only eleven reports of corruption in Latin America, whereas ten years later, the number had skyrocketed to two hundred. Nonetheless, according to Pérez-Liñán, this increase does not prove that corruption has become more widespread, but that reporting on the accusations of corruption has become more frequent.

Such is the relevance of mainstream media to the labelling process of who is corrupt and who is not and, therefore, to the consolidation of lawfare that, in the words of Bielsa and Peretti, “without [its] massiveness, the discrediting [of the accused] is reduced to old village gossip, relatively harmless, stripped of its potential to demolish, to explode in the public sphere and to burst onto the political scene” (2019: 10). Furthermore, even a criminal case with no chances of success because of an absolute lack of evidence might still accomplish its nefarious goal if effectively transmitted to the public by the mainstream media. In this vein, the publication of a photo taken at the courtroom door with a

lawyer presenting a complaint against a targeted political or social leader, under the heading “new criminal charges against x” might be enough to disseminate the notion that the accused is guilty. This misleading transmission of information often implicitly or explicitly legitimizes violations of constitutional guarantees and undermines the basis of the rule of law.

Moreover, mainstream media has the power to escalate the situation, transforming a criminal complaint into a “moral panic” (Cohen, 2001). As Cohen explains, during moral panics, certain episodes, people, or groups are amplified, distorted, overstated, and defined as terrible threats to the values of society, giving rise to collective reactive processes. These panics are then operationalized by those in power to further their own interests. In terms of lawfare, mainstream media determine certain types of deviance as an emergency (“corruption”) by distorting them to the point of treating them as a modern all-devouring demon (“the cancer of corruption”). This dynamic then demands exaggeration (“the scandal of corruption”), speculation (“everyone in government is corrupt, and it is inevitable”), and negative symbolization (stereotypical politicians and photos under the heading “the missing photo”). In other words, the ostensible emergency is a tool to realize extra-legal communicative effects: to create moral panics and thus to pressure and condition leaders to carry out certain policies or to make their mandate or candidacy impossible.

Through these moral panics, individual journalists, whose decision-making capacity is often constrained by the media corporations they work for, end up labelling and publicly broadcasting the name of the ostensible offender (“the corrupt”), their “crime”, and even what punishment is required. In this way, voluntarily or involuntarily, journalists (and not legal experts) reify distorted ideas about crime and punishment as absolute truth (*fake news*). In addition, the power of the media is further enhanced by the lack of direct communication channels between citizens and the judiciary. In practice, the media has a monopoly over the transmission of judicial decisions to the public; they have become the only bridge between a self-isolated judiciary and a citizenry deprived of justice as a service.

Beyond the media criminology inherent to newspapers, television, and radio, social media has also become increasingly relevant as a means of continually transmitting information to users and creating meaning about crime and punishment. This “influencer criminology” comes about as individuals scroll through social networks and read the posts of individuals, the media, or robot influencers, all of which determine how the public understands what crime is, who the criminals are, and how to deal with this issue (Vegh Weis, 2021a). Here again, the scenario is not black and white. Instead, social media has been instrumental to spread fake news but has also been vital to exert social control over the state’s abuse of power when no traditional media is available to voice out critical perspectives. This was, for example, the case during the coup d’état in Bolivia. While fake accounts were used to legitimize the coup (Cafferata, 2019), users supporting Evo Morales and his cabinet also used social media to denounce that democracy has been interrupted (Social News, 2019).

In relation to fake news, a drastic difference between traditional and social media is that much of the information that circulates on social networks is not even created by individuals, but by robot accounts or paid employees purposefully disseminating false information. For

example, a study of one of the cases against Cristina Fernández de Kirchner showed that 80% of the comments generated on social networks were posted by *trolls*. That is to say: eight out of ten comments spread through social networks and consumed by unsuspecting users were produced by people hired to write them and thus create meaning and manipulate public opinion. Furthermore, influencer criminology has the benefit of disseminating information through more appealing forms than traditional media criminology, including jokes, memes, stickers, gifs, and other forms of entertainment. In sum, influencer criminology reaches more people and is consumed continually and almost mechanically, under the guise of entertainment or distraction, when in fact it is constantly spreading information. In this sense, influencer criminology complements media criminology expanding and disseminating distorted information that makes the lawfare possible.

### 3. Conceptualizing lawfare in the Global South

Against this backdrop, different scholars and jurists have conceptualized lawfare in Latin America considering the three dimensions described above, without restricting it to the legal aspect alone. Bielsa and Peretti describe lawfare as “the illegitimate use that the judiciary can make of national or international law with the aim of harming an opponent, in the struggle to obtain a certain political objective, such as the exclusion of a candidacy for public office”. The authors add that it is “a distortion in the application of the law executed by judges at the service of the *political-economic-media power*, which persecutes the opponents of the inequitable appropriation model” (Bielsa and Peretti, 2019: 12, emphasis added). In turn, Graciana Peñafort, the lawyer of a victim of lawfare in Argentina, Héctor Timmerman, who was denied the opportunity to travel to the United States for cancer treatment and died while awaiting trial, defines the term as a form of *political persecution through the misuse of the law and the media* (Perfil, 2020). With a focus on judicial warfare, Rusconi (2019) points out that lawfare is a violation of due process and when considering prosecutions of government officials committed to social justice, an example of a greater degree of criminal selectivity than in the ordinary criminal system. Meanwhile, in Brazil, Azar and Tavares da Motta (2020) highlights that lawfare involves the manipulation of legal institutions and the judiciary itself to obtain results in the political sphere and take political disputes beyond the ballot box. Building upon these definitions, this section will identify different dimensions of lawfare as well as a notion that can replace the anglicism.

#### 3.1. Dimensions of lawfare

3.1.a. *Lawfare as the “legal death” and/or “political death” of the opponent.* Based on the above precedents, it becomes possible to argue that while military coups, as in Bolivia and the physical destruction of political dissidents, as in the case of Marielle Franco in Brazil continue to occur in the region, these options have become secondary to the prevailing mechanism of lawfare. In other words, lawfare has replaced the direct use of force and “physical death” as the main political tool for taking a political opponent out of the game. Instead of physical death, lawfare produces the “legal and/or the political death” of

the opponents. This brings us to the first distinction within the lawfare mechanism, as it can pursue either the "legal death" of the opponent, their "political death" or both.

The "legal death" is mostly carried out by judicial warfare and seeks to disqualify those persecuted from the legal possibility of participating in politics, as in the cases of former vice-President of the country Amado Boudou in Argentina (Ámbito, 2021a). In extreme situations, this legal death can include preventing someone from running for office, as in the case of Evo Morales in Bolivia (Tiempo Argentino, 2020), and even their effective imprisonment, as in the case of Lula in Brazil.

In turn, lawfare also fosters the "political death" of the opponents, by seeking to erode their public image and political strength, delegitimizing them before the citizenry and presenting them as the cause of all of the country's problems – as in the case of Fernández de Kirchner (Infobae, 2021). This means that lawfare might use the law as only one part of a broader struggle within politics of representation fostered through psychological and media warfare (i.e. by adding to labelling processes around corruption) without effectively resulting in legal outcomes. This is particularly the case when there is no sufficient evidence to ensure a criminal conviction, accusations are very weak and likely to be overturned by the upper courts, or when the political death needs to be urgently pursued because crucial decisions are at stake (i.e. during an election campaign or the vote of a key law in parliament). In these cases, as lawfare seeks to influence concrete, time-limited political and electoral disputes, it does not require to commit to a process of legal persecution that ends in a conviction. Instead, psychological and media/social media warfare are often sufficient even if the criminal cases are not presented at all or are doomed to failure.

*3.1.b. Lawfare against "professional politicians" and/or "leaders of grassroots social movements".* Lawfare, either used to pursue the political and/or the legal death of the opponent, involves other dimensions that need to be explored. A second relevant distinction is that lawfare does not only involve "professional politicians" competing for electoral positions, such as Lula or Cristina Fernández de Kirchner, but also the "leaders of grassroots social movements". In Colombia, for instance, central-right and right-wing governments deployed the criminal justice system against the opposition and also against a broad range of perceived enemies of the establishment, including the student movement, unions, and social leaders (Aponte Cardona, 2006; Iturralde, 2008, 2009; Ruiz Morato 2021). In Argentina, the most striking case is the one of Milagro Sala, who has been in prison for more than five years even though the involvement of the Executive branch in the court decisions have been extensively proved. To this is added that lawfare not only affects the person specifically targeted by the criminalization process (either professional politicians or grassroots activists) but also operates as a sword of Damocles to discipline all those who seek to pursue a similar ideological line.

*3.1.c. Lawfare against "leaders representing progressive politics" and/or "leaders from the establishment".* Third, another relevant distinction has to do with the political orientation of the targets of lawfare. Are they always "leaders representing progressive politics" or also "leaders from the establishment" have claimed to be the target of lawfare? The most renowned cases presented under the label of lawfare include Fernández de

Kirchner, who was charged in ten criminal cases in Argentina; the parliamentary impeachment of Dilma Rousseff and Lula's preventive detention just before the general election in Brazil; the criminal prosecution of Rafael Correa as soon as he left office in Ecuador; the accusations against the son of former Chilean President Michelle Bachelet for influence peddling; the criminal cases against Evo Morales and his officials when leading the polls for a re-election in Bolivia; the impeachment and accusations of nepotism and overpricing against Fernando Lugo in Paraguay when he was in office; the Supreme Court's endorsement of the impeachment of Manuel Zelaya, the Honduran head of state, also in office; the attacks over the Odebrecht case that ended in the resignation of the president of Peru, Pedro Pablo Kuczynski; the incessant attacks and accusations of corruption against the president of Venezuela, Nicolás Maduro; the indictment of the Colombian presidential candidate and former Governor of the region of Antioquia, Sergio Fajardo for crimes against the public treasury, even without strong evidence to support the charges, and the one against Gustavo Petro, a former guerrilla fighter who has recently won the elections (Estepa and Maisonnave, 2020). Notably, all these cases involve progressive leaders.

However, it is relevant to highlight that also members of the establishment, when being accused of acts of corruption or alike, have claimed that they are being persecuted because of political reasons. This happened in Colombia when the Supreme Court of Justice ordered the pre-trial detention of Alvaro Uribe, former President of the country, for witness tampering, in only one of the 200 cases presented against him (Misión Verdad, 2020). Part of the media and the political allies of Uribe argued that the evidence is flawed and that Uribe is a victim of lawfare (Araújo Castro, 2021). In Brazil, the case of the Lava-Jato, while focused on the members of Lula's party, the PT, also spread out to affect many other political figures and parties, including some of PT's main opponents (Politize!, 2018). In Argentina, Mauricio Macri, who ran the country under a neoliberal agenda from 2015 to 2019, also declared himself as a victim of lawfare (Página/12, 2021).

The difference between cases involving right-wing and left-wing leaders is nevertheless clear in the asymmetries in the results of the processes, as exposed by the instances of under- and over-criminalization. Generally speaking, despite strong evidence of socially harmful behaviours, cases against leaders of the establishment tend to be downplayed both by the tribunals and by mainstream media and social media. In contrast, even when evidence is weak and the indicted behaviours do not even involve social harm, cases against the progressive leaders tend to be sustained throughout time in court, and/or in the public discourse. Importantly, these are tendencies and mean neither that the accusations against establishment leaders are always true nor progressive politicians are never involved in cases of corruption.

### 3.2. *Seeking a Spanish concept to discuss "lawfare"*

Having established the main characteristics of the phenomenon in Latin America, it is worth analyzing those concepts in the Spanish language that could replace the anglicism "lawfare", such as "soft coup" or "media-legal coup". That being said, these concepts do not account for situations in which lawfare is used against leaders who are not in the

government (e.g., the Argentinian grassroots leader Milagro Sala), and can also generate the misconception that lawfare necessarily takes place at a specific moment (the coup) through a particularly explosive denunciation. Instead, in most cases, lawfare occurs by means of multiple denunciations and accusations that erode the political and/or legal life of the leader under attack over time (see, e.g., the more than ten cases against Fernández de Kirchner) (Azar and Tavares da Motta, 2020; Infobae, 2021; Vegh Weis, 2021b).

A relevant concept here is the notion of “dripping”. Zaffaroni uses the term to describe genocides and massacres that do not occur only as a result of the mass annihilation of a group in a specific timeframe of unlawfulness, but that take place within democratic contexts through the daily actions of law enforcement agents acting against marginalized populations. In his words: “[drip massacres] do not produce all the deaths together; they produce them day by day... The clearest example of this is the violence in Mexico today, where the drip massacre is turning into an ordinary massacre, with a very high body count” (Zaffaroni, 2011: 306–7).

By extending the metaphor, it can be argued that soft coups can also occur by “dripping”, that is, through the daily accumulation of news, denunciations, and testimonies about a variety of charges and accusations against a particular political or social leader. A “dripping coup” (*golpe por goteo* in Spanish) does not require particularly solid accusations but is instead based on the trickle of smaller charges that may even consist of frivolous accusations, without evidence, presented in the courts and the media, despite the legal impossibility of those accusations advancing toward prosecution. A dripping coup thus overwhelms the citizenry with an abundance of data daily, while also creating the feeling that, with all these cases piling up – at least one must be “true”. At the same time, the use of numerous accusations benefits from the fact that, even when some of the charges are dismissed or nullified, numerous others remain, allowing the media-judicial maneuver to continue.

#### **4. Final reflections. The irreparability of lawfare and the path toward a popular cautionary criminology**

When considering the complexity of lawfare, it can be argued that the response to violations of judicial impartiality, the unlawful cooperation between countries, the courts, and the media, and the fabrication of false charges should be found in criminal law – by criminalizing lawfare itself. However, there is a risk of engaging in a punitive cycle in which the over-criminalization of progressive leaders sparks more punitive control measures until there is no one left to close the prison doors because we are all inside. There are serious risks in continuing to deploy criminal control as a response to political problems: Indeed, it should not be forgotten here that any consequences to the deployment of the criminal justice system in the wider sense are *irreparable*.

A person deprived of their liberty who is later acquitted cannot recover the time in detention or the physical and emotional damage it entails. When dealing with lawfare cases, this irreparable damage affects not only the individual but the population at

large. Lula's case is perhaps the best example of this: as mentioned, the Federal Supreme Court annulled all the charges against him arguing that the sentencing judge lacked jurisdiction. However, that nullification came long after he was labelled as corrupt before the Brazilian people, imprisoned, and deprived of the opportunity to stand in the 2018 elections. Can we then say that the actions of the Federal Supreme Court rectified a case of lawfare in Brazil?

There are at least three irreparable effects that the Supreme Court decision cannot reverse. First, there is the damage to Lula's life because of the time spent in prison, his suffering in the face of uncertainty, and the experiences he was deprived of (including spending time with his dying brother and grandson) (Pignotti, 2019). This damage to life is perhaps no more palpable than in the Argentinian judiciary's accusations against Héctor Timmerman, who, as mentioned above, was deprived of the opportunity to travel to the United States for cancer treatment, an illness that ultimately led to his death (Kollman, 2018). Second, an association with the label of "corruption" is also irreparable. Once the media-judicial mechanism of the trickle-down coup has inserted the notion of corruption into the public discourse, it is nearly impossible for a judicial decision, issued years after the fact, to reverse the social damage created. Furthermore, the long-term accusation of corruption also causes damage that transcends the figure of any progressive leader and affects the health of a given democracy by undermining the legitimacy of partisan politics.

While these first two dimensions of the effects of lawfare can also be identified in ordinary processes of criminalization, there is a third dimension that is unique to this phenomenon: the effect of lawfare on the electoral process and the legitimacy of partisan politics. Continuing with the example of Lula, his over-criminalization forced his removal from the last general elections, altering the democratic playing field and making the election of his opponent, the extreme-right Jair Bolsonaro, possible. The nullification of the charges against Lula does not allow him to participate in previous elections, nor can it repair the damage caused by Bolsonaro's administration, including his denialist policies during the pandemic, which caused hundreds of thousands of deaths and could be qualified as an international criminal offense (Idoeta, 2021). Therefore, this third effect of lawfare goes beyond the accused and impacts democratic politics as a whole. In other words, it is extremely unlikely that Bolsonaro could have won the elections if the lawfare against Lula had not taken place. Moreover, the effects of Lava-Jato did not end with the election of Bolsonaro. Instead, it also damaged democratic politics more generally by increasing citizens' distrust in the rule of law and the institutions. To this is added that the lawfare also shapes the judicialization of politics, transferring decision-making capacities that belong to the elected branches of the government to the courts (Limongi, 2021; Politize!, 2018; Tsavkko Garcia, 2019).

In this vein, by virtue of lawfare's irreparability, a judicial decision to overturn the charges is essential, but not sufficient. Even the most efficient criminal justice system requires time to process a case, causing the aforementioned irreparable damage in the interim. In other words, the response to lawfare cannot come only from the legal sphere or exclusively via judicial reform because the law arrives too late – after democracy has already been manipulated, a leader has been permanently labelled as corrupt in

the public discourse, and the damage to their lives completed. This reality is an inexorable consequence of the intrinsic characteristics of a justice system that acts on individuals and not on larger structures, intervenes *a posteriori* and not preventively, and operates from courts and with mechanisms and language disconnected from the population.

Instead, preventive mechanisms from the bottom-up might be a better path to circumvent the irreparable effects of lawfare. A key example took place in Argentina namely the mobilization against the application of the so-called  $2 \times 1$  rule for crimes against humanity. The Supreme Court had previously issued a ruling that privileged people convicted of crimes against humanity perpetrated during the last dictatorship in the calculation of their sentences (1976–1983). The calculation consisted of counting each day of pretrial detention as equivalent to two days of imprisonment after conviction. The human rights movement that emerged from the last dictatorship (Vegh Weis, 2017b) did not wait for national or supra-national judicial mechanisms to reverse this decision, or even for the other branches of government to intervene. Such a reversal, as has been pointed out elsewhere, would only have occurred after a certain period, likely after the accused had already been released from prison. Instead, the mobilization managed to pressure the government to the point that the judiciary overturned the sentence, and the parliament passed a law preventing the application of this rule to those convicted of human rights violations (d’Alessandro and Kraul, 2017).

Within the context of lawfare, encouraging this type of popular mobilization is a more complicated endeavour because, as of yet, no social movement specifically targets this kind of conflict and because the dynamics of lawfare are very complex and difficult to understand (including what the cases are about, whether the decisions are legitimate or not, whether constitutional guarantees are violated or respected). Looking at possible means of following the experience of the human rights movement in Argentina, a first step might be to create and consolidate a “popular legal culture” with the potential to provide social movements with the basic tools to comprehend legal phenomena. Popular legal culture consists, firstly, of incorporating the functioning of the criminal justice system into a social movement’s agenda. Secondly, it is about disseminating basic legal knowledge to allow an opening of the ivory tower in which the courts find themselves, facilitating a new level of civic control that can prevent lawfare. This can take place through a series of mechanisms, including informal education to make the law more accessible and understandable, the creation of alternative media outlets, and the use of social media to disseminate judicial news in a comprehensible manner (and weakening the power of the mainstream media), and through mechanisms that expose the prosecutors and judges engaging in lawfare to break through the protection of anonymity (Vegh Weis, 2021c).

In creating this popular legal culture, a dialogue with universities and activist academia can be enhanced through legal clinics and cooperation agreements between academia and grassroots organizations to democratize legal knowledge and to increase the input of these same grassroots organizations in the design of university curricula. Moreover, fake news and media-driven moral panics can be reversed with reliable and clear data from qualitative and quantitative studies on ongoing cases and media-judicial action through university-run monitoring bodies that can focus on the underlying facts

(who are the accused; who is presenting the charges; what rules are applied; how long does it take to resolve the cases; what role do gender, class, and ethnicity play; who is behind the parties involved, and even what are the interests at stake?). Similarly, the cooperation between universities and social movements can open up opportunities for the further development of alternative media outlets committed to the promotion of popular legal culture.

In short, instead of constraining rights through more criminal control, lawfare might be better addressed through a “popular precautionary criminology” focused on disseminating legal tools within grassroots movements to propel preventive strategies from the bottom-up. This path has the potential to pre-emptively identify when, under the guise of the fight against corruption, the criminal justice system ends participating in a strategy of governance to discipline progressive Latin American social and political leaders and to undermine the much-needed social justice agenda in the region.


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### **Note**

1. Notably, the misuse of criminal law and criminal procedure to defeat a perceived enemy was already conceptualized by Spanish and German scholars under the label of “derecho penal del enemigo” (criminal law of the enemy) (Cancio Meliá and Jakobs, 2003) in the context of the Western prosecution of terrorism. This criminal law of the enemy law promotes the existence of one type of legislation for “citizens” (who are treated under traditional liberal criminal law) and another for “enemies” (who can be treated under exceptional rules). The main difference that can be pointed out is that, while the USA and allies have explicitly sanctioned laws that establish a different procedure for those categorized as enemies (e.g., Patriot Act), those sectors of the judiciary, the media, and the opposition that are behind the lawfare cases deny the misuse of the criminal law and argue that are legitimate cases under the ordinary rule of law.

### **References**

- Ámbito (2021a) Amado Boudou: Me gustaría que se revierta la imposibilidad de ejercer cargos públicos. 13 July. Available at: <https://www.ambito.com/politica/amado-boudou/me-gustaria-que-se-revierta-la-imposibilidad-ejercer-cargos-publicos-n5230839> (accessed 30 November 2021).
- Ámbito (2021b) Persecución a Indalo: el método de Ercolini y Hornos para complacer intereses ajenos. 5 September. Available at: <https://www.ambito.com/politica/grupo-indalo/>

- persecucion-indalo-el-metodo-ercolini-y-hornos-complacer-intereses-ajenos-n5270765 (accessed 30 November 2021).
- Ansah T (2010) Lawfare: A rhetorical analysis. *Case Western Reserve Journal of International Law* 43, Available at: <https://heinonline.org/HOL/Page?handle=hein.journals/cwrint43&id=93&div=&collection=> (accessed 30 November 2021).
- Aponte Cardona AD (2006) *Guerra y Derecho Penal de Enemigo : Reflexión Crítica Sobre El Eficientismo Penal de Enemigo*. Bogotá: Ibañez.
- Araújo Castro S (2021) El Lawfare contra Uribe – Las2orillas. *Las 2 Orillas*, 15 November. Available at: <https://www.las2orillas.co/el-lawfare-contra-uribe/> (accessed 21 March 2022).
- Azar IR and Tavares da Motta L (2020) Violência de gênero no Lawfare: uma análise dos casos Dilma Rousseff e Cristina Fernández de Kirchner. In: Aguilar Viana AC (ed) *Pesquisa, Gênero & Diversidade Memórias Do III Encontro de Pesquisa Por/de/Sobre Mulheres*, Curitiba. pp. 269–271.
- Badaro M (2020) Cacerolas: rebelión y felicidad. *Revista Anfibia*. Available at: <https://www.revistaanfibia.com/cacerolas-rebelion-y-felicidad/> (accessed 30 November 2021).
- Barriera DG (2021) *Grietas Argentinas : Divisiones Ordinarias Para Pasiones Extraordinarias*. Buenos Aires: CB Ediciones.
- Bartman CS (2010) *Lawfare: Use of the Definition of Aggressive War by the Soviet and Russian Federation Governments*. NT: Cambridge Scholars Publishing.
- Bielsa R and Peretti P (2019) *Lawfare. Guerra Judicial-Mediática. Desde El Primer Centenario Hasta Cristina Fernández de Kirchner*. Buenos Aires: Planeta.
- Brasil Wire (2018) Lula's defence: New evidence shows illegal cooperation between United States & Lava Jato investigators. 16 March. Available at: <https://www.brasilwire.com/lulas-defence-new-evidence-shows-illegal-cooperation-between-united-states-lava-jato-investigators/> (accessed 30 November 2021).
- Cafferata M (2019) Las redes sociales y el golpe contra Evo. *Página/12*. Available at: <https://www.pagina12.com.ar/230693-las-redes-sociales-y-el-golpe-contra-evo> (accessed 21 March 2022).
- Cancio Meliá M and Jakobs G (2003) *Derecho Penal Del Enemigo*. Madrid: Civitas. Available at: <https://www.marcialpons.es/libros/derecho-penal-del-enemigo/9788447025367/> (accessed 26 November 2021).
- Carter P (2005) Legal combat: are enemies waging war in our courts. *Slate* 4, April. Available at: <http://slate.msn.com/id/2116169> (accessed 30 November 2021).
- Cohen S (2001) *States of Denial: Knowing about Atrocities and Suffering*. Oxford: Blackwell.
- Comaroff J and Comaroff J (2007) Law and disorder in the postcolony\*. *Social Anthropology* 15(2): 133–152. John Wiley & Sons, Ltd DOI: 10.1111/J.0964-0282.2007.00010.X.
- Comaroff JL (2001) Law, culture, and colonialism: A foreword. *Law and Social Inquiry* 26(2): 305–314.
- d'Alessandro A and Kraul C (2017) Argentina learns a lesson: You don't cross the Mothers and Grandmothers of the Plaza – Los Angeles Times. *Los Angeles Times*. Available at: <https://www.latimes.com/world/mexico-americas/la-fg-argentina-human-rights-20170511-story.html> (accessed 7 December 2021).
- D'Adamo O, García-Beaudoux V, Ferrari G, et al. (2014) Mujeres candidatas: percepción pública del liderazgo femenino. *Revista de Psicología Social* 23(1): 91–104. Routledge. DOI: 10.1174/021347408783399534.
- Dunlap C (2001) *Law and Military Interventions: Preserving Humanitarian Values in 21st Conflicts. Working Paper. Humanitarian Challenges in Military Intervention Conference, Carr Center for Human Rights Policy*. 29 November. Available at: <https://people.duke.edu/~pfeaver/dunlap.pdf> (accessed 30 November 2021).

- Dunlap C (2009) Lawfare: A decisive element of 21st-century conflicts? *Joint Force Quarterly* 54: 34–39. Available at: <https://apps.dtic.mil/sti/citations/ADA515192> (accessed 30 November 2021).
- Duve T (2018) Global legal history: setting Europe in perspective. In: Pihlajamäki H, Dubber MD and Godfrey M (eds) *The Oxford Handbook of European Legal History*. Oxford: OUP.
- el País (2019) Cristina Kirchner desafiante ante los jueces: “Me absolvió la historia” - 03/12/2019 – EL PAÍS Uruguay. 2 December. Available at: <https://www.elpais.com.uy/mundo/cristina-kirchner-desafiante-jueces-me-absolvio-historia.html> (accessed 21 March 2022).
- ELA – Equipo Latinoamericano de Justicia y Género (2012) *La tapa de Noticias y la violencia mediática*. Available at: <https://www.ela.org.ar/a2/index.cfm?muestra&codcontenido=1237&plcontempl=12&aplicacion=app187&cnl=79&opc=50> (accessed 30 November 2021).
- Estepa CM and Maisonnave MA (2020) Poder judicial, medios de comunicación y política: lawfare en Argentina. *NULLIUS: Revista de pensamiento crítico en el ámbito del Derecho* 1(2): 70–89. DOI: 10.33936/REVISTADERECHOS.V1I2.2685.
- Federici S (2009) *Caliban and the Witch. Women, the Body and Primitive Accumulation*. New York: Autonomedia.
- Goldsmith J (2020) The Soleimani Strike: One Person Decides. Available at: <https://www.lawfareblog.com/soleimani-strike-one-person-decides> (accessed 30 November 2021).
- Idoeta PA (2021) Bolsonaro pode ser julgado em Haia por gestão da pandemia?. *BBC News Brasil*, 26 June. Available at: <https://www.bbc.com/portuguese/brasil-57576293> (accessed 30 November 2021).
- Infobae (2021) Después del sobreesimiento en “dólar futuro”, qué causas tiene Cristina Kirchner y en qué estado se encuentran. 14 April. Available at: <https://www.infobae.com/politica/2021/04/14/después-del-sobresimiento-en-dolar-futuro-que-causas-tiene-cristina-kirchner-y-en-que-estado-se-encuentran/> (accessed 30 November 2021).
- Iturralde M (2008) Emergency penalty and authoritarian liberalism: recent trends in Colombian criminal policy. *Theoretical Criminology* 12(3): 377–397. SAGE Publications Sage UK: London, England: DOI: 10.1177/1362480608093312.
- Iturralde MA (2009) *Castigo, Liberalismo Autoritario y Justicia Penal de Excepción*. Universidad de Los Andes Bogotá.
- Kessler G (2009) *El Sentimiento de Inseguridad. Sociología Del Temor al Delito*. Buenos Aires: Siglo XXI.
- Kittrie OF (2016) *Lawfare Law as a Weapon of War*. Oxford: OUP.
- Koehler M (2015) The uncomfortable truths and double standards of bribery enforcement. *Fordham Law Review* 84, Available at: <https://heinonline.org/HOL/Page?handle=hein.journals/flr84&id=543&div=&collection=> (accessed 30 November 2021).
- Kollman R (2018) Con desprecio a la razón humanitaria. *Página/12*, 10 January. Available at: <https://www.pagina12.com.ar/88154-con-desprecio-a-la-razon-humanitaria> (accessed 30 November 2021).
- La Nación (2020) Qué es lawfare, el término que utilizó Cristina Kirchner para defenderse – LA NACION. 10 December. Available at: <https://www.lanacion.com.ar/politica/que-es-lawfare-termino-utilizo-cristina-kirchner-nid2312159/> (accessed 21 March 2022).
- Liang Q and Xiangsui W (1999) *Unrestricted Warfare*. Beijing: PLA Literature and Arts.
- Lijalad A (2021) Correo: la causa cumple 20 años y los Macri aún no pagaron. *El Destape* 19, September. Available at: <https://www.eldestapeweb.com/politica/correo-argentino/correo-la-causa-cumple-20-anos-y-los-macri-aun-no-pagaron-20219190550> (accessed 30 November 2021).

- Limongi F (2021) From birth to agony: The political life of Operation Car Wash (Operação Lava Jato). <https://doi.org/10.3138/utlj-2021-0043> 71. University of Toronto Press : 151–173. DOI: 10.3138/UTLJ-2021-0043.
- Misión Verdad (2020) La judicialización de Álvaro Uribe: ¿El inicio de una nueva narcoguerra en Colombia? | by Misión Verdad | Medium. 5 August Available at: <https://medium.com/@misionverdad2012/la-judicializaci%C3%B3n-de-%C3%A1lvaro-uribe-el-inicio-de-una-nueva-narcoguerra-en-colombia-bafd04ce0cd5> (accessed 21 March 2022).
- Página12 (2021) Macri dice que es víctima del lawfare. Available at: <https://www.pagina12.com.ar/342811-macri-dice-que-es-victima-del-lawfare> (accessed 21 March 2022).
- Pérez S and Aymá A (2017) Medios, Multimodalidad, Género y Política: Cristina Fernández de Kirchner en Noticias. *Revista Observatorio* 3(6): 517–556.
- Perez-Linan A (2009) *Juicio político al presidente y nueva inestabilidad política en América Latina*. EFE. Madrid
- Perfil (2017) Clarín publicó el teléfono de la hija de Gils Carbó y ahora recibe amenazas. 13 October. Available at: <https://www.perfil.com/noticias/politica/gils-carbo-dara-de-baja-el-celular-de-su-hija-porque-clarin-lo-hizo-publico.phtml> (accessed 30 November 2021).
- Perfil (2020) Graciana Peñafort y Nelson Castro, debate sobre lawfare y periodismo. 15 March. Available at: <https://www.perfil.com/noticias/periodismopuro/graciana-penafort-y-nelson-castro-debate-sobre-lawfare-y-periodismo.phtml> (accessed 30 November 2021).
- Pignotti D (2019) Lula llora la muerte de su nieto Arthur. *Página12*, 2 March. Available at: <https://www.pagina12.com.ar/178142-lula-llora-la-muerte-de-su-nieto-arthur> (accessed 30 November 2021).
- Politize! (2018) O impacto da Operação Lava Jato nas eleições 2018. 15 May.
- Romano S (2019) *Lawfare: Guerra Judicial y Neoliberalismo En América Latina*. Buenos Aires: Mármol-Izquierdo.
- Rusconi M (2019) Crisis del derecho penal en la región: selectividad social vs selectividad ideológica. *Infobae*, 15 July. Available at: <https://www.infobae.com/> (accessed 30 November 2021).
- Ruiz Morato N (2021) Colombia's murderous democracy pre- and post-covid-19: the assassination of social leaders and the criminalization of protest. In: Valeria Vegh Weis (ed.) *Criminalization of Activism. Historical, Present and Future Perspectives*. London: Routledge. pp. 170–179.
- SAIJ (2021) *Sobresseen a Cristina Fernández de Kirchner y a Axel Kicillof en la causa por el dólar futuro*. Available at: <http://www.saij.gov.ar/sobresseen-cristina-fernandez-kirchner-axel-kicillof-causa-dolar-futuro-nv29078-2021-04-13/123456789-0abc-870-92ti-lpssedadevon?&o=10&f=Total%7CFecha%7CEstado%20de%20Vigencia%5B5%2C1%5D%7CTema%5B5%2C1%5D%7COrganismo%5B5%2C1%5D%7CAutor%5B5%2C1%5D%7CJurisdicci%F3n%5B5%2C1%5D%7CTribunal%5B5%2C1%5D%7CPublicaci%F3n%5B5%2C1%5D%7CNovedad%7CColecci%F3n%20tem%Eltica%5B5%2C1%5D%7CTipo%20de%20Documento&t=25592> (accessed 21 March 2022).
- Simon J (2007) *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear*. NY: OUP.
- Social News (2019) Para las redes sociales, en Bolivia hubo un golpe de Estado. Available at: <https://socialnews.com.ar/politica/para-las-redes-sociales-en-bolivia-hubo-un-golpe-de-estado/> (accessed 21 March 2022).
- Stefoni JA (2016) El presidente Mauricio Macri y los Panama Papers. Periodismo, justicia y política entre las denuncias y el escándalo. *Questión* 1(51): 500–517.

- Tiempo Argentino (2020) Zaffaroni: “Con la proscripción de la candidatura a senador de Evo, ha comenzado el fraude electoral”. Available at: <https://www.tiempoar.com.ar/mundo/zaffaroni-con-la-proscripcion-de-la-candidatura-a-senador-de-evo-ha-comenzado-el-fraude-electoral/> (accessed 21 March 2022).
- Tsavkko Garcia R (2019) “Lava Jato” leaks in Brazil add to the erosion of democracy. *The Washington Post* Available at: <https://www.washingtonpost.com/opinions/2019/06/12/brazils-democracy-suffers-another-blow-with-operation-car-wash-leaks/> (accessed 21 March 2022).
- Unidiversidad (2017) Claves: por qué renunció Gils Carbó . 30 October. Available at: <https://www.unidiversidad.com.ar/el-motivo-que-peso-fuerte-en-la-renuncia-de-gils-carbo> (accessed 21 March 2022).
- Vegh Weis V (2017a) *Marxism and Criminology : A History of Criminal Selectivity*. Boston: Brill and Haymarket Books.
- Vegh Weis V (2017b) The Relevance of Victims’ Organizations in the Transitional Justice Process: The Case of the Grandmothers of Plaza de Mayo in Argentina. *Intercultural Human Rights Law Review* 60: 1–70.
- Vegh Weis V (2021a) Criminología Influencer . *Página/12*, 10 March. Available at: <https://www.pagina12.com.ar/328642-criminologia-influencer> (accessed 30 November 2021).
- Vegh Weis V (2021b) El sobreseimiento de Cristina y Axel: ¿Le ganamos al lawfare?. *Página/12*, 13 April. Available at: <https://www.pagina12.com.ar/335492-el-sobreseimiento-de-cristina-y-axel-le-ganamos-al-lawfare> (accessed 30 November 2021).
- Vegh Weis V (2021c) Para derrumbar el lawfare, la pelea es desde abajo . *El Destape*, 7 May. Available at: <https://www.eldestapeweb.com/opinion/lawfare/para-derrumbar-el-lawfare-la-pelea-es-desde-abajo-2021575025> (accessed 30 November 2021).
- Zaffaroni ER (2011) *La Cuestión Criminal*. Buenos Aires: Planeta.
- Zaffaroni R (2018) Milagro . *Página/12*, 7 August Available at: <https://www.pagina12.com.ar/9818-milagro> (accessed 30 November 2021).
- Zaffaroni R, Caamaño C and Vegh Weis V (2020) *Manual Para Destruir al Derecho Penal. Bienvenidos al Lawfare*. Buenos Aires: Capital Intelectual.
- Zanin C, Martins V and Valim R (2019) *Lawfare: Uma Introdução*. São Paulo: Contraconcorrente.
- Zunino M (2019) Judicial Vetting: The Forgotten Aspect of Argentina’s Transition. *Opinio Juris*. Available at: <http://opiniojuris.org/2019/02/18/judicial-vetting-the-forgotten-aspect-of-argentinas-transition/> (accessed 21 March 2022).

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