

The Law of War
Political Science W3962
Spring 2013
Mondays, 6:10 - 8:00PM
302 Hamilton Hall

Instructor: Brooke Greene

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Office Hours: Mondays 5:00 - 6:00, Butler Library Lounge, and by appointment

Course Description:

The law of war is a necessarily interdisciplinary topic, which is partly what makes it so fascinating as a subject of inquiry. To understand the law of war, you must understand something about law, something about war, something about politics, and something about history. While this is a political science course primarily concerned with the study of the law of war in that discipline, we will attempt to incorporate insights from these other perspectives in order to have the richest possible understanding of this puzzling and significant topic.

The first part of the course will make the law of war itself the puzzle we attempt to explain. Why do states choose to create law in the first place, let alone in a realm as tenuous as that of war? Here we will consider rationalist explanations of regime creation as well as realist alternatives rooted in power and sociological explanations rooted in cultural understandings of wartime morality. We will also consider variation in law itself - why are some behaviors prohibited while others with comparable consequences are not? The primary rationale for this section of the course is that because the law of war is itself the product of states we need to understand when and how it is created in order to be able to understand its effects. We are, in essence, trying to explore the selection effect at work here.

The second part of the course will turn to the law of war as independent variable and probe the effects of law on the behavior of states. What factors influence state behavior vis-a-vis the law of war? Are states more likely to comply with some laws than others? Are democracies more likely to comply than other regime types? What consequences other than compliance might ensue from the law of war and attempts by states and non-state actors to encourage compliance?

The course will conclude with a consideration of the future of the law of war, focusing on the ways in which new technology shapes and is shaped by the law.

Though this course focuses on the law of war, it may usefully be viewed as an extended case study of the causes and consequences of international law more generally.

Course Materials:

All reading materials will be posted on Courseworks. In addition, you may find the following blogs helpful:

www.lawfareblog.com

www.liebercode.org

duckofminerva.blogspot.com

Course Requirements and Grading:

Attendance and Participation (Including Weekly Discussion Posts): 30%

Presentation: 10%

Paper: 60% if you choose Option 1; 3x 20% if you choose Option 2 (see below).

Attendance and Participation (30%):

In an upper-level seminar, all students are expected to attend class regularly and to make regular contributions to the course discussion. Students are permitted to miss one class without penalty. Additional absences will negatively impact your attendance and participation grade unless planned in advance for an excusable reason (such as religious holiday) or the result of a true emergency (you or someone you love is very sick).

In regard to participation, we will all strive to create an atmosphere in which everyone feels comfortable speaking up and trying out new ideas. I encourage especially those of you who tend to be on the quieter side to use this as an opportunity to practice developing and using your voice. If this is particularly difficult for you, please come see me, as we will discuss alternate ways to earn participation points.

Computers are permitted in class provided they are only used to take notes. Other computer activities are distracting to the entire class and are not permitted - if students are found checking email, surfing the internet, or engaging in other inappropriate computer activities during class time, points will be deducted from their participation grade.

Discussion Posts:

Students are expected to post one comment about the week's readings by midnight the Sunday before the course. Please try to address at least two readings in your comment. A wide range of comments is acceptable - you might raise a question about a reading, offer a critique, apply a reading to a relevant current event, or discuss how the reading relates to another course reading or discussion. Each student is permitted to skip discussion posts two times without penalty. This means each student should write ten posts throughout the semester, as no posts are required for the first and last class. Students who complete these posts regularly will earn full credit for the assignment.

Presentation:

Each student will give a ten minute presentation during one of the last two weeks of the class. If you choose Option 1 (see below), you will present your research paper. If you choose Option 2, you may present the assignment of your choice. Students are expected to briefly summarize their question and argument and then respond to student questions. The purpose of this exercise is to give all students the chance to practice their scholarly presentation skills. It's also an occasion for us to celebrate together all of the work we accomplish during the semester.

Options for the Major Writing Assignment(s)

In order to maximize the likelihood that you get something meaningful out of this course, there are two discrete grading options. You must let me know which one you choose by **Course 4 on February 18.**

Option 1. Recommended for students who aspire to graduate study in political science or a related discipline.

Research Paper.

Write a 25 - 30 page research paper on a topic of your choice related to the law of war, broadly defined. Choose a theoretical and/or empirical puzzle with potential to advance our understanding of some aspect of the law of war. In your paper, you should propose one or two hypotheses and begin to evaluate them using empirical evidence. While difficult, purely theoretical papers (for instance, an argument about normative theory) are acceptable if approved in advance. (60%)

1 - 2 page paper proposal outlining your question, hypothesis, and how you plan to evaluate the hypothesis due in class on **March 11**.

First draft of your paper due on **Monday, April 22**.

Final Paper is due on the last class, **Monday, May 6**.

Option 2. Complete **3** out of the following 4 assignments by the stated deadline. (20% each)

Assignment 1.

Compare a law of war that exists to one that does not exist. Discuss two hypotheses that might explain this variation and articulate briefly a research design that might be used to test these hypotheses. (8 - 10 pages)

OR

Why does the law of war exist? Articulate at least two arguments for its existence using course readings and use empirical evidence to evaluate which is more persuasive. If empirical evidence to arbitrate between the competing explanations is not yet available, briefly describe a research project that might remedy this omission. (8-10 pages)

Assignment 1 Due **Sunday, March 10 at 12:00 Noon** on Courseworks. Bring hard copy to class on March 11.

Assignment 2.

Choose one international or civil armed conflict and evaluate the compliance of the belligerents with the major applicable laws of war. What arguments considered in the course best explain the level of compliance that you observe? Is compliance a good indicator in this case of the effects of the law? Depending on the conflict, it may be helpful to focus on 2 or 3 relevant laws of war rather than the full range of applicable laws. External research required. (8-10 pages).

Assignment 2 Due **Sunday, April 7 at 12:00 Noon** on Courseworks. Bring hard copy on Monday, April 8.

Assignment 3.

Choose one of the following law of war issue areas and review the existing arguments on the determinants of violation and compliance: torture, targeting of civilians, rape, WMD. Consider the circumstances in which violation of the applicable law is most likely to be militarily efficacious. What would it take to dramatically improve state compliance in this law of war domain? Be very specific and take seriously the task of realistically incentivizing compliance. It may be helpful to use empirical examples. External research may be required. (8 - 10 pages)

Assignment 3 Due **Sunday, April 21 at 12:00 Noon**. Bring hard copy to class April 22.

Assignment 4. Choose a law of war issue area in which technological change is necessitating legal evolution and adjustment. You may consider, for instance, the legal implications of drone use or cyber warfare, among other innovations. In what way does this particular technological innovation challenge extant law? In what ways do you predict that law will adjust to technology or vice versa? (8-10 pages)

OR

Consider one of the legal controversies that have attached to the wartime behavior of the United States in the post-9/11 period. You may focus, for instance, on the use of torture, the designation of unlawful combatants, the use of drones or another issue that interests you. Consider the legal and military-strategic implications of the behavior in question. Imagine you are policy advisor to the president. What recommendations would you make in regard to the issue at hand? What implications does this have for the on-going relevance of the law of war to statecraft?

Assignment 4 Due in class **May 6.**

Note on plagiarism

Plagiarism in any form will not be tolerated. You are responsible for learning how to properly attribute ideas that you borrow from others. Please ask if you have any questions about proper citation. Plagiarism will result in an F in the course.

Course Schedule and Assigned Readings

Class 1. January 28. *Introduction. Major Debates on the Law of War.*

Part I. Law as Puzzle

Class 2. February 4. *Historical Antecedents of the Law of War; Ethics, Custom, and Law*

Ober, Josiah. 1994. "Classical Greek Times," in *The Laws of War: Constraints on Warfare in the Western World*. Michael Howard, George J. Andreopoulos and Mark R. Shulman, eds., Yale University Press.

Dinstein, Yoram. *The Conduct of Hostilities Under the Law of International Armed Conflict*. Cambridge: Cambridge University Press, 2004. Ch. 1. [Available as an electronic book from Columbia University library]

Roberts, Adam. "Land Warfare: From Hague to Nuremburg," in Michael Howard, et. al, eds, *The Laws of War: Constraints on Warfare in the Western World*.

Walzer, Michael. *Just and Unjust Wars*, Chapters 1 - 3.

D'Amato, Anthony. 2010. "Is International Law Really Law?" Northwestern Law School Faculty Working Papers 103.

Class 3. February 11. *Jus Ad Bellum and its Obsolescence*

Walzer, Chapters 4 and 5. Chapter 6 Recommended.

Becker, Jo and Shane, Scott. "Secret Kill list proves a test of Obama's principles and will." *New York Times*. May 29, 2012. Available: <http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html>.

Read 2 of the following 3 articles:

Sloan, Robert. 2008. The Cost of Conflation: Preserving the Dualism of *Jus Ad Bellum* and *Jus in Bello* in the Contemporary Law of War. *Yale Journal of International Law* 34.

Murphy, Sean. 2009. Protean Jus Ad Bellum. *27 Berkeley Journal of International Law* 22 - 52.

Österdahl, Inger. 2010. Dangerous Liaison? The Disappearing Dichotomy between *Jus ad Bellum* and *in Bello*. *Nordic Journal of International Law*. 78(4): 553-566.

Class 4. February 18. Codification of IHL - Why Law?

Koremenos, Barbara, Charles Lipson, and Duncan Snidal. "The Rational Design of Institutions." *International Organization* 55 (2001).

Morrow, James D. "The Institutional Features of the Prisoners of War Treaties," *International Organization*, 55 (2001).

R. Charli Carpenter "Setting the Advocacy Agenda: Issues and Non-Issues Around Children and Armed Conflict." *International Studies Quarterly* 51 no. 1 (March 2007).

Wallace, Geoffrey. 2012. "Regulating Conflict: Historical Legacies and State Commitment to the Laws of War." *Foreign Policy Analysis* (8: 2).

Finnemore, Martha. 1999. "Rules of War and War of Rules: the International Red Cross and the Restraint of State Violence." in John Boli and George M. Thomas (eds.), *Constructing World Culture: International Nongovernmental Organizations Since 1875*. Stanford, CA: Stanford University Press, 149-65.

*You must tell me by the end of class whether you choose Option 1 or Option 2 as your course requirement.

Class 5. February 25. The Combatant and the Civilian

Kinsella, Helen. *The Image before the Weapon: A Critical History of the Distinction between Combatant and Civilian*. Ithaca: Cornell University Press, 2011. Chapters 1 - 3.

Carpenter, R. Charli. "‘Women and Children First’: Gender, Norms, and Humanitarian Evacuation in the Balkans, 1991-1995." *International Organization* 57: 4 (Autumn 2003), pp. 661-694.

Dinstein, Chapter 2. [Available as e-book from Columbia University library]

Class 6. March 4. Weapons of Mass Destruction

Tannenwald, Nina. 1999. "The Nuclear Taboo: The United States and the Normative Basis of Nuclear Non-use." *International Organization* 53 (3): 433-468.

Price, Richard. 1995. "A Genealogy of the Chemical Weapons Taboo." *International Organization* 49 (1).

Price, Richard. 1998. "Reversing the Gun Sights. International Civil Society Targets Land Mines." *International Organization* 52(3): 613-644.

Walzer, Chapter 16.

Part II. Law as Independent Variable

Class 7. March 11. *What is Compliance? Why Comply with the Law of War?*

Morrow, James D. and Jo, Hyeran. "Compliance with the Laws of War: Dataset and Coding Rules." *Conflict Management and Peace Science* Volume 23, Issue 1 February 2006, pp. 91-113.

Hathaway, Oona. "Do Human Rights Treaties Make a Difference?" *The Yale Law Journal*, Vol. 111, No. 8 (Jun., 2002), pp. 1935-2042.

von Stein, Jana. "Do Treaties Constrain or Screen? Selection Bias and Treaty Compliance." *American Political Science Review*. Vol. 99, No. 4, November 2005.

Lisa Martin, "Against Compliance." Unpublished Manuscript.

Morrow, James D. "When Do States Follow the Laws of War?" *American Political Science Review*, Volume 101, Issue 03, August 2007, pp 559-572.

Option 1: 2-page Paper Proposal Due.

Option 2: Assignment 1 due by Sunday, March 10 at noon. Hard copy due in class today.

March 18 - Spring Break. No Class. Bon Voyage!

Class 8. March 25. *Civilian Targeting*

Downes, Alexander B. *Targeting Civilians in War* (Ithaca: Cornell University Press, 2008). Chs. 1, 2, 7 plus a case study chapter of your choice.

Valentino, Benjamin, Paul Huth, and Sarah Croco. "Covenants without the Sword: International Law and the Protection of Civilians in Times of War." *World Politics* 58:3 (2006), pp. 339-377.

Fazal, Tanisha M. and Greene, Brooke C. "A Particular Difference: European Identity and Compliance with *Jus in Bello*." Unpublished paper - Columbia University.

Class 9. April 1. *Genocide as Special Case of Civilian Targeting?*

Christopher Browning. 1993. *Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland*. Harper Perennial. Chapters 5, 7, and 18.

Valentino, Benjamin. 2004. *Final Solutions. Mass Killing and Genocide in the Twentieth Century*. Cornell University Press. Chapters 1 and 2.

Class 10. April 8. *Torture and Sexual Violence in Warfare*

Rejali, Darius. *Torture and Democracy*. Princeton University Press. Introduction, Chapters 1, 2, and 20.

Wallace, Geoffrey P.R. 2013. "International Law and Public Attitudes toward Torture: An Experimental Study." *International Organization* 67(1): 105-140

Wallace, Geoffrey P.R. 2012 "Welcome Guests, or Inescapable Victims? The Causes of Prisoner Abuse in War." *Journal of Conflict Resolution* (56)2: 955-981

Wood, Elizabeth J. 2012. "Rape during War Is Not Inevitable: Variation in Wartime Sexual Violence." In Morten Bergsmo, Alf B. Skre, and Elisabeth Jean Wood, eds., *Understanding and Proving International Sex Crimes*.

Catherine MacKinnon. 2006. "Women's September 11. Rethinking the International Law of Conflict." *Harvard International Law Journal* 47(1): 1- 32.

Option 2: Assignment 2 due at noon on Sunday, April 7 and hard copy in class on Monday.

Class 11. April 15. *Compliance in Civil Conflict*

Hicks, Lee, Sundberg & Spagat. 2011. "Global Comparison of Warring Groups in 2002-2007: Fatalities from Targeting Civilians vs. Fighting Battles."

<http://www.humansecuritygateway.com/showRecord.php?RecordId=35847>

Andreopoulos, George J. "The Age of National Liberation Movements," in Michael Howard et. al, eds. *The Laws of War: Constraints on Warfare in the Western World*.

Kalyvas, Stathis. 1999. "Wanton and Senseless? The Logic of Massacres in Algeria." *Rationality and Society* 11(3):243-285.

Humphreys, Macartan and Jeremy Weinstein. "Handling and Manhandling Civilians in Civil War." *American Political Science Review*, 100(3), August 2006.

Jo, Hyeran. "Legitimacy and Compliance with International Law: Access to Detainees in Civil Conflicts 1991-2006." Unpublished paper, Texas A&M University.

Class 12. April 22. *The International Criminal Court and Jus post bellum*

Busby, Joshua. *Moral Movements and Foreign Policy*. (Cambridge: Cambridge University Press, 2010). Ch. 6.

Kelley, Judith. "Who Keeps International Commitments and Why? The International Criminal Court and Bilateral Non-Surrender Agreements." 2007. *American Political Science Review*, 101(3): 573-589.

Goldsmith, Jack. "The Self-Defeating International Criminal Court." *University of Chicago Law Review* Winter 2003.

Branch, Adam. "Uganda's Civil War and the Politics of ICC Intervention." *Ethics and International Affairs* Vol 21.2 (Summer 2007).

Wechsler, Lawrence. "Exceptional Cases in Rome: The United States and the Struggle for an ICC." in Sarah B. Sewall and Carl Kaysen, eds. *The United States and the International Criminal Court: National Security and International Law*. (Boulder: Rowman & Littlefield, 2000).

Option 1: First draft of paper due in class.

Option 2: Assignment 3 due Sunday, April 21 at 12:00 noon. Bring hard copy to class.

Class 13. April 29. Future of Law of War

Smith, Thomas. 2002. "The New Law of War: Legitimizing Hi-Tech and Infrastructural Violence." *International Studies Quarterly* 46: 355-374.

Carvin, Stephanie. 2008. "Linking Purpose and Tactics: America and the Reconsideration of the Laws of War During the 1990s." *International Studies Perspectives*. (Vol. 9, Issue 2), pp. 128-143.

Sitaraman, Ganesh. "Counterinsurgency, The War on Terror, and The Laws of War." *The University of Virginia Law Review* 95(7), November 2009.

For the readings below, you may choose one reading on cyber-warfare and one on drones:

Handler, Stephanie. 2012. "The New Cyber Face of Battle: Developing a Legal Approach to Accommodate Emerging Trends in Warfare." *Stanford Journal of International Law* 48(1).

Waxman, Matthew C. 2011. "Cyber-Attacks and the Use of Force: Back to the Future of Article 2(4)." *Yale Journal of International Law* (36)

Dunlap, Charles J., Jr., "Perspectives for Cyber Strategists on Law for Cyberwar." *Strategic Studies Quarterly* 81-99 (2011).

Sharkey, Noel. 2011. "The Automation and Proliferation of Military Drones and the Protection of Civilians." *Law, Innovation, and Technology* (3: 2).

Schmitt, Michael N. 2010. "Drone Attacks Under the *Jus ad Bellum* and *Jus in Bello*: Clearing the 'Fog of War.'" in *Yearbook of International Humanitarian Law, 2010*

Begin student presentations.

Class 14. May 6. Student Presentations

Option 1: Final paper due.

Option 2: Assignment 4 due.