



**UNITED ARAB EMIRATES
NATIONAL DEFENSE COLLEGE**

ABU DHABI, UAE

Course Number NDC 60XX
International Law of the Use of Force
(3 credits)

Course Coordinator:
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Doctorate (Ph.D.) in Strategic Studies
Academic Year 2015-2016

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Course Schedule

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| Topic 1: The Profession of Arms | Date |
| Topic 2: State Formation and the Civil-Military Problematique | Date |
| Topic 3: Theoretical Foundations of Civil-Military Relations | Date |
| Topic 4: Civil-Military Friction | Date |
| Topic 5: The Coup: Causes and Consequences | Date |
| Topic 6: Military Power in the Domestic Context | Date |
| Topic 7: Military Power in the International Context | Date |
| Topic 8: The Civil-Military Gap and National Service | Date |
| Topic 9: 21 st Century Civil-Military Issues: Roles/Missions, Budget, Recruitment, Composition | Date |
| Topic 10: 21 st Century Civil-Military Issues: Privatization, Paramilitarism, Peacekeeping/Humanitarian Operations | Date |
| Topic 11: Case Study: Arab Spring | Date |
| Topic 12: Case Study: China | Date |
| Topic 13: Case Study: South Korea | Date |
| Topic 14: Student Presentations I | Date |
| Topic 15: Student Presentations II and Course Summary | Date |

| Topic | Lecture 1230-1400 | Topics |
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| | | |
| 1. | Tues, 16 Sept | Origins and Evolution: Martial Honor, Custom, Treaty, Caselaw |

| | | |
|-----|------------------|--|
| 2. | Tues, 23 Sept | Fundamental Principles: Necessity, Proportionality, Distinction, Humanity |
| 3. | Tues, 30 Sept | Individual Battlefield Status: Combatant or Civilian |
| 4. | Tues, 14 Oct | Targeting and Attacks: Things and People |
| 5. | Tues, 21 Oct | Prohibited Methods and Means: Ruses, Perfidy, Siege, Collective Punishment, Weapons |
| 6. | Tues, 28 Oct | War Crimes and Prosecutions |
| 7. | Tues, 4 Nov | INFOWAR: Propaganda and Lawfare |
| 8. | Tues, 11 Nov | Student Presentations/Discussion |
| 9. | Tues, 25 Nov | Student Presentations/Discussion |
| 10. | Tues, 2 Dec | Student Presentations/Discussion |

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Doctoral Program Outcomes

The National Defense College is a leading institute that contributes to the development of strategic thinking and promotes the examination of strategic and security studies. It is committed to preparing future leaders of the highest caliber, fostering in them the intellectual breadth, perspective and critical reflection skills needed to assess challenges to national, regional and international security and to skillfully manage state resources. The College seeks to provide an educational experience with a core commitment to intellectual rigor and the responsibility to use that rigor to safeguard the nation.

Graduates of NDC's doctoral (Ph.D.) program emerge with an expert ability to assess complex situations, challenge assumptions, identify pertinent contextual factors, formulate strategic approaches, conceptualize the strategic implications of those actions, and calculate the costs, risks, and consequences of such strategic choices. The holder of an NDC doctoral degree will achieve a mastery of Strategic Studies that is comprehensive, deep and overarching, at the frontier of the work in the discipline, and will demonstrate a clear capacity for critical analysis, evaluation and synthesis of new and complex ideas. Graduates will also have experience developing innovative solutions to critical problems using creative thinking skills and highly developed communication and information technology skills to present, explain and/or critique complex matters. The NDC doctoral qualification also includes an ability to analyze and critique the state of strategic studies as a discipline, contributing to its advancement.

The NDC Doctorate in Strategic Studies program, authorized in Federal Law No.1 of 2012, has the following program learning outcomes:

1. **Evaluate** current and future strategic environments, threats and challenges and their impact on national security at the national, regional and international levels in order to facilitate national decision-making;
2. **Demonstrate** evidence of expert research and scholarly strategic analysis in order to create studies and analyses to meet the needs of the nation;
3. **Apply** fundamental theories of strategic thinking and frameworks based upon enduring international security principles to **Produce** either specialized strategies (diplomatic/military/economic/informational) or national comprehensive strategies in response to strategic national challenges and opportunities;
4. **Critique** strategic crisis-management in response to challenges and opportunities;
5. **Evaluate** the use of national resources and overall governance of processes and systems;
6. **Synthesize** and clearly articulate comprehensive expertise in strategic issues supported by scholarly rationale and scientific evidence;
7. **Serve** as strategic leaders who can consistently and sensitively develop and implement policies and strategies in support of national security objectives.

Course Introduction

This course uses the ongoing armed conflict between Israel and Hamas in the Gaza Strip as a heuristic to identify and critique the moral theories and legal regimes that govern the resort to force (the *jus ad bellum*), the conduct of modern war (the *jus in bello*), and the process of peacemaking and post-conflict reconstruction. Students will be introduced to the normative principles and sources of the law of armed conflict—the *lex armorum*, the Lieber Code, the Hague Conventions, the Geneva Conventions, other treaties and customary international law relating to means and methods of warfare, and relevant domestic and international caselaw—that authorize the use of force and permit combatants to kill lawfully while at the same time protecting categories of persons and objects. Through an analysis of Israeli and Hamas war objectives and of specific issues arising in the conflict, including allegations of disproportionate attacks, deliberate attacks on civilians, the use of impermissible weapons and tactics, collective punishment of civilians, destruction of cultural property and infrastructure, and violation of the rights of detainees, students will learn that the creation, interpretation, implementation, observance, and adjudication of law generally and of the law of war particularly is a political process that, like all political processes, is governed by strategic interests and considerations. Given the limitations of time, this course will leave unaddressed the *jus ad bellum*—the law governing the initial decision to resort to force, as distinct from conduct during war—the *jus in bello*.

Although students will acquire substantive knowledge of the law of war, the goal is to invest participants with the ability to apply and evaluate law as an adjunct to the military and information instruments of power that explains, potentiates, rationalizes, and legitimates the use of force by one's own nation while criticizing, limiting, undermining, and delegitimizing the use of force by an opposed nation—thereby facilitating the achievement of national ends in the pursuit of which military power and information was employed. In other words, the law of war can create threats and opportunities, multiply or divide national power, and assist or hamper the attainment of national objectives and goals.

Thus, the goal of the course is to employ the Gazan armed conflict as a case study to build a foundation of knowledge about the how the law of war is created, understood, applied, observed, violated, and debated that will guide students, as future national security strategists and decisionmakers, as they identify, analyze, evaluate, and address legal issues that arise during the formation and execution of national strategy in wartime. Students will begin to create a template for a law of war strategy as a subcomponent of the broader national and military strategies they will devise and implement. References to the Peloponnesian War will underscore the universality and importance of law of war issues within this calculus while further developing critical thinking skills and linking the course to the broader curriculum.

Upon successful completion of this course, participants will be able to:

- Identify the applicable law of war and analyze allegations of “war crimes” in context.
- Analyze and critique the moral theories and legal regimes that govern the conduct of war.

- Employ the law of war as an adjunct to and force multiplier of the military and information instruments of national power.
- Create a template for a law of war strategy as a component of a broader national strategy.

Course Requirements

The required readings listed for each topic should be read before the seminar meets. Readings have been selected for their relevance, quality of ideas, readability, and timeliness. Generally, these readings are listed in an order reflecting the logical development of the topic and can most profitably be read in that order. Optional Readings (when listed) are offered for background reference and for those who might wish to pursue a particular topic in greater depth in their presentations or for general edification.

The specific graded elements of the course are:

- **Class Attendance and Contribution:** Students are expected to attend class, read the assigned readings, and engage actively in discussions following lecture. Contribution will be measured based on the student’s grasp of the reading materials and contribution to the discussion and question-and-answer periods that follow lecture. Students’ preparation for and contribution to class will constitute 50% of the final grade.
- **Presentation:** An individual presentation of approximately 30 minutes on a law of war topic chosen by agreement between the student and instructor will constitute 50% of the final course grade. Potential topics should relate to the ongoing Israel-Hamas armed conflict and reflect research and analysis that extends beyond the text and classroom discussion. Students will meet with the instructor to receive topic approval no later than the day of the second class meeting. A list of potential topics follows in the syllabus.

The final grade for the course will be computed with the following weights:

| | |
|------------------------------------|-----|
| Class Attendance and Contribution: | 50% |
| Presentation: | 50% |

| Letter Grade | Grade Points | Numerical Scale | Criteria |
|--------------|--------------|-----------------|--|
| A | 4.0 | 93.00-100 | Firm command of knowledge domain; High level of analytical development |
| B | 3.0 | 83.00-92.99 | Command of knowledge beyond minimum; Advanced analytical development |
| C | 2.0 | 73.00-82.99 | Command of only basic concepts of knowledge; |
| F | 0.0 | below 73.00 | Demonstrated basic analytical ability |

Course Materials and Syndicate Assignment

Readings are excerpted from Gary D. Solis, *The Law of Armed Conflict* (2010), which is available in electronic form on MERLN as of 18 September. Readings from Solis prior to that date will be available on Blackboard, along with supplementary and optional readings.

Topic I

Origins and Sources of the Law of War: Martial Honor, Custom, Treaties, and Caselaw

Topic 1 undertakes two related tasks. First, it describes the history and trajectory of the emergence of limitations on battlefield conduct and then offers moral and ethical arguments for imposing law upon warfare. Second, it elaborates and describes the sources of these limitations—religious imperatives, the self-regulation of the military profession, customary international law, treaties, judicial decisions, and the writings of academic experts in the field of the law of war—and demonstrates the process whereby the rules that comprise the law of war are created, interpreted, applied, and adjudicated when violations are alleged.

In conjunction with Topic I, the war objectives and strategies of Israel and Hamas will be sketched to form the basis for the subsequent analysis of the parties' decisions and actions with regard to the law of war during the Gazan conflict.

Learning Objectives:

1. Apply moral and ethical arguments to explain the emergence of limitations on conduct in warfare.
2. Identify the distinct sources of the law of war and analyze their application and interaction in practice.
3. Create a working set of alleged violations of the laws of war attributable to each party.

Discussion Questions:

1. Why impose any limits on battlefield conduct?
2. Who are the principal engineers of the evolution of the law of war, why do they urge its progressive development, and are the protections that have emerged coherent, normatively justified, and comprehensible to soldiers—the subjects of regulation?
3. Does adhering to limits on battlefield conduct support or undermine national strategy?

Required Readings:

- Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (2010), pp. 3-85.
- Gaza Conflict Strategies and Background Information Briefing Packet.

Exercise:

Prior to the first class meeting, read the Gaza Conflict Strategies and Background Information Briefing Packet in some detail. Then, in two written paragraphs or thereabouts, sketch the objectives of Israel and Hamas in the Gazan conflict. We will discuss and attempt to develop a common strategic picture for both parties to guide us throughout the course.

Topic II

Fundamental Principles of the Law of War: Necessity, Proportionality, Distinction, and Humanity

Topic II presents, contextualizes, and problematizes the four customary principles that form the core of the law of war around which all the rules and regulations that restrain battlefield conduct are constructed—necessity, proportionality, distinction, and humanity. “Necessity” relates military action to the submission of the enemy. “Proportionality” requires that military force used not be excessive in relation to the advantage gained over the enemy. “Distinction” obligates parties to direct operations against military rather than civilian objectives. “Humanity” mandates a prohibition against unnecessary suffering. Operationalizing these principles, determining what they require and prohibit in practice, and determining violations thereof is a complex process that invites considerations of interests and therefore strategy.

Learning Objectives:

1. Understand the origins, development, and meanings of the principles of military necessity, proportionality, distinction, and humanity, both in the abstract and as applied to the Gazan Conflict.
2. Evaluate claims of violations of the fundamental principles of the law of war in caselaw and in the Gazan Conflict.
3. Assess whether compliance with fundamental principles of the law of war in context is amenable to objective analysis as opposed to a function of interests and strategy.

Discussion Questions:

1. Does the reading or your analysis of the Gazan Conflict suggest that the fundamental principles of the law of war are infinitely malleable—in other words, they can be employed to mean whatever a party wants them to mean to support claims of compliance or violation?
2. Can you devise a mathematical formula for establishing whether an attack is proportionate? Can you specify the conditions under which the principle of distinction is satisfied? Isn't war necessarily a violation of the principle of humanity?
3. Does a determination of whether these principles would be or have been upheld or violated in respect to a planned or executed military operation depend at least as much upon policy and strategic considerations as upon legal analysis? Or is compliance an objective matter?

Required Readings:

- Solis, pp. 250-300.

Supplemental Readings:

- Aljazeera, UN Shelter in Gaza “Struck By Israeli Shells”
- Ami Ayalon, Israel’s Response is Proportionate to Hamas’s Threat
- Reuters, Israel Says Has Evidence 47 percent of Gaza Dead Were Combatants
- Gulf Today, Hamas Says All Israelis Will Be Targeted
- UNICEF: At Least 296 Children, Teenagers Killed in Gaza Op
- Colum Lynch, Foreignpolicy.com, The UN Takes Fire in Gaza

Topic III

Individual Battlefield Status: Combatant or Civilian

In war, status matters. The protections, rights, privileges, and duties available to and incumbent upon an individual depend entirely upon the status category to which s/he belongs. A host of rules established by custom and treaties—in particular the four Geneva Conventions—specify who may lawfully engage in combat and who cannot, which categories of persons may be targeted deliberately and which cannot, which categories of persons are subject to capture and detention and the conditions of that detention, which persons captured or detained during war are entitled to immunity from prosecution for which acts prior to capture or detention, how persons acquire and forfeit the benefits associated with various status categories, and the penalties associated with violations of these rules. The primary distinction—that between a “combatant” and a “civilian”—along with the meaning of the phrase “direct participation in hostilities”—will be analyzed in detail, as will the moral and ethical reasons for creating and enforcing differential protections, rights, privileges, and duties based on status.

Learning Objectives:

1. Apply the definitions of “combatant” and “civilian” to determine the status categories to which individuals belong during armed conflicts.
2. Analyze the Geneva Conventions and understand how to determine whether a particular detainee is entitled to claim the rights and privileges of POW status.
3. Evaluate the different sets of rights and privileges to which lawful and unlawful combatants are entitled and explain the reason for the distinction.

Discussion Questions:

1. Some commentators argue that there is no such thing as “unlawful combatancy” and that all detainees should be granted all the rights and protections to which POWs are entitled under the Geneva Conventions. Are there circumstances in which the best strategy might be to collapse the status categories and treat all individuals affiliated with the enemy as combatants? Consider the Peloponnesian War (Melian Dialogue, Syracusan killing of Athenian POWs) as well as the Gazan Conflict.
2. Does the development of the concept “direct participation in hostilities” have strategic utility for certain states or subnational actors? How do the determinations stronger powers are likely to make as to the question of direct participation in hostilities differ from the determinations weaker powers might make?
3. Is the “humane treatment” requirement under the minimum standards that apply to all detainees regardless of status under Common Article 3 sufficiently clear to prevent abuses such as occurred at Abu Ghraib? Why would detaining powers, as a matter of strategy, forswear the legal authority to subject prisoners to less than this minimum standard?

Required Readings:

- Solis, pp. 186-249.
- Excerpts from the Four Geneva Conventions.

Optional Readings:

- Richard Baxter, *So-Called Unprivileged Belligerency: Spies, Guerrillas, and Saboteurs*, 28 *British Yearbook of International Law* 323 (1951).

Topic IV

Targeting and Targeted Killing

“Targeting” is the process of selecting enemy objects to be attacked, choosing the weapons and tactics to be used in attacking those objects, and executing attacks on those objects. Only “military objects” may be attacked, yet precisely what, in practice, constitutes a military object is fiercely debated. Under applicable law, objects “which by their nature, location, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization...offers a definite military advantage” constitute lawful targets. Determining whether a particular object—building, vehicle, physical plant, airport, airplane, vessel, etc.—makes such a contribution and offers an advantage if destroyed is a fact-intensive inquiry that takes place behind the fog of war and within the strategic context. Defenders are better positioned to know whether an object is civilian or military in character, and also better positioned to convert what would otherwise be a civilian object—such as a school—into a military object by storing weapons therein or using it for the cover and concealment of their own forces. Moreover, some objects, while normally dedicated to civilian purposes, present military value as well, and thus fall within the range of acceptable targets.

Regardless of the lawfulness of targeting a particular object, however, attackers must comply with the principles of proportionality, distinction, and humanity; disproportionate and indiscriminate attacks are prohibited, as is the infliction of unnecessary suffering. Again, however, determining what is proportionate and discriminate and humane in practice can become not merely a legal but a political exercise as well, and thus is also an aspect of strategy.

“Targeted killing,” defined as the “intentional killing of a specific civilian or unlawful combatant who cannot reasonably be apprehended” and “is taking a direct part in hostilities,” has emerged as an important operational capability in the arsenal of major powers, particularly the U.S. and Israel, in the past fifteen years. The legality, utility, and strategic considerations attendant to targeted killing will be considered, generally and as applied to the Gazan Conflict.

Learning Objectives:

1. Apply the legal criteria, including nature, location, purpose, and use of an object, to determine whether a particular object is a lawful military objective subject to attack.
2. Evaluate the lawfulness of specific targeting decisions and resulting attacks by reference to the principles of proportionality and distinction.
3. Understand and apply the emerging law regarding the practice of “human shielding” of targets.
4. Evaluate the lawfulness and utility of instances of targeted killings.

Discussion Questions:

1. Is the defender always in a better position to know whether an object is a lawful military objective in fact? If so, should the attacker be entitled to some “margin of appreciation” in making targeting decisions? And should the legal onus rest upon the defender should civilian casualties, particularly of any “human shields,” result?

2. If a particular attack is conducted against what is determined after the fact to have been a civilian object, does this necessarily lead to the legal conclusion that the attack was illegal? If the attack results in many or exclusively civilian casualties, is this fact alone evidence or proof of illegality in the targeting or attack? Is there now a “zero tolerance” policy on civilian casualties? Can the defender ever be charged with violation of the law of targeting for failing to take measures to differentiate civilian from military objects or to exclude civilians from target zones? Does the “dual-use” concept qualify your answers to these questions?
3. Contrast contemporary targeting law with the regime that governed the U.S. nuclear attacks on Hiroshima and Nagasaki or the British attacks on Dresden in World War II. Are improvements in accuracy in ordnance delivery solely responsible for the change in the law of targeting? Do states with less capacity to deliver ordnance accurately have more latitude to kill civilians in the area of military objectives?
4. Does use of the Israeli practice of “roof knocking” establish that any subsequent attacks ipso facto have satisfied the requirements imposed by the principle of distinction?
5. Argue for and against targeted killing. Does targeted killing spare military and civilian casualties? Should states always have the duty to attempt to apprehend individuals listed for targeted killing? Notwithstanding the customary prohibition against assassination, particularly of heads of state, can subnational actors, e.g., Hamas, lawfully employ targeted killing against Israeli political leaders in Israel? Would an assassination attempt by Hamas against Israeli Prime Minister Binyamin Netanyahu be lawful as an instance of targeted killing? How about against Shaykh Shehade in Gaza?

Required Readings:

- Solis, pp. 519-55, 568-72.

Supplemental Readings:

- Jeremy Bown, I Saw No Evidence of Hamas Using Palestinians as Human Shields, BBC, 22 July 2014
- Kim Sngupta, Israel-Gaza Conflict: The Myth of Hamas’s Human Shields, Independent, 21 July 2014
- Harriet Sherwood, In Gaza, Hamas Fighters are Among Civilians. There is Nowhere Else for Them to Go, 24 July 2014
- Hamas Using Human Shields? Gazans Deny Claims, Northern Star, 22 July 2014
- Anne Barnard & Jodi Rudoren, Israel Says That Hamas Uses Civilian Shields, Reviving Debate, NY Times, 23 July 2014
- Lucy Westcott, Video Shows Gaza Residents Acting as Human Shields, Newsweek, 10 July 2014
- Meir Amit Intelligence and Terrorism Information Center, Hamas Again Uses Gaza Civilians as Human Shields..., 10 July 2014
- Lahav Harkov, Gaza Reporters’ Tweets: Hamas Using Human Shields, Jerusalem Post, 4 August 2014

- Bill Condemning Hamas on “Human Shields” Introduced in Congress, Jewish Telegraph Agency, 29 July 2014
- Israel/Palestine: Unlawful Israeli Airstrikes Kill Civilians, Human Rights Watch, 15 July 2014
- UNICEF Accuses Israel of Deliberately Targeting Palestinian Children, El-Balad, 1 August 2014
- Adam Taylor, “Roof Knocking”: The Israeli Military’s Tactic of Phoning Palestinians It Is About to Bomb, Washington Post, 9 July 2014
- Adam Withnall, Israel-Gaza Conflict: Israeli “Knock on Roof” Missile Warning Revealed in Remarkable Video, Independent, 13 July 2014
- Israel Rejects Gaza School Shelter Attack Blame, 27 July 2014
- Raphael Ahren, IDF Soldiers Uncover Tunnel Shaft in Mosque, Times of Israel, 31 July 2014.
- Human Rights Watch, Palestine/Israel: Indiscriminate Palestinian Rocket Attacks, Israeli Airstrikes on Homes Appear to be Collective Punishment, 9 July 2014.

Topic V

Prohibited Methods and Means

The fundamental principles of the law of war, expressed in custom and treaties, place limits on the methods and means that may be used to kill and capture enemy combatants and to attack the will of enemy civilian populations. Among such methods and means which are either limited or prohibited are the resort to perfidy, ruses, siege, collective punishment, and the use of certain conventional weapons. Perfidy, defined as an attempt to gain the confidence of an enemy by assuring his protection under the law of war while intending to kill, wound, or capture him, is expressly prohibited. Ruses, defined as the use of deception to mislead the enemy about one's own intentions or operations, are permitted. Differentiating perfidy and ruses requires the application of facts to law and often centers upon questions such as whether combatants are uniformed or otherwise marked with insignia, the locations from which combatants direct fires upon the enemy, how and when surrenders and captures are offered and made; answering these questions generates controversy, particularly on modern, urban battlefields densely populated with civilians where states engage nonstate actors. Yet because information and intelligence are critical commodities in war, and because information asymmetry can be exploited to defeat the enemy, the resort to perfidy and ruses, and to claims of violations of the law of war arising therefrom, forms an important part of the strategies and operations of parties to contemporary armed conflict.

Sieges—the deliberate walling-off of civilian populations from access to food, water, medicine, and other necessities as a technique designed to break their will and compel military surrender—was a feature of war in antiquity, and factored significantly into several campaigns in the Peloponnesian War, and more recently in the Yugoslav War of Dissolution against the city of Sarajevo. However, although sometimes effective, the use of sieges, economic sanctions, and sealed borders have in recent years been decried as “collective punishment” and restricted or prohibited entirely as violations of the principles of distinction, proportionality, and humanity. The contest to define and punish violations of these and other methods of war as collective punishments also forms a part of the war strategies in modern armed conflict, including in Gaza.

Finally, revolutions in military affairs combine with continuous advances in weapons technology to yield ever-more efficient and effective tools for killing, wounding, and capturing enemy combatants—white phosphorous, flechette ammunition, cluster bombs, stealth aircraft, guidance systems, nonlethal weapons, and so forth, not to mention nuclear, biological, and chemical weapons. In parallel, the laws of war have progressively evolved to impose more restrictions on the permissible means that may be used in battle. As examinations of the Battle of Amphipolis and the Gazan conflict reveal, the making of arguments about which weapons are permissible and which are prohibited in which environments, against which targets, and with what consequences also form part of the strategies of parties to armed conflicts.

Learning Objectives:

1. Differentiate the concepts of “perfidy” and “ruse” through application of the relevant law to sets of facts in caselaw and in the Gazan conflict.

2. Apply the law of war prohibiting “collective punishment” to evaluate the legality or illegality of economic sanctions, sealed borders, and import restrictions, with particular consideration of the principles of distinction, proportionality, and humanity, as applied to Gaza.
3. Evaluate whether the phrase “unnecessary suffering” counsels for the restriction or prohibition as it applies to the effects of weapons systems, and in particular flechette rounds, cluster bombs, and incendiary weapons.

Discussion Questions:

1. In the 7th century, Caliph Abu Bakr ordered his forces to “let there be no perfidy, no falsehood in [dealings] with the enemy[.]” Does Hamas adhere to this prohibition? Does Israel? If not, are the considerations that are or should be superordinate to strategy that would preclude perfidy even if perfidy aided the defeat of the enemy?
2. Is Gaza under siege, and/or subject to other collective punishments by Israel? If so, are some or all of these punishments illegal?
3. Do particular weapons systems in use in modern war and in the Gazan conflict produce unnecessary suffering either under all circumstances or as used? Consider white phosphorous, flechette rounds, rubber bullets, etc?

Required Readings

- Solis, pp. 420-35, 577-580, 590-97, 119-128

Supplemental Readings:

- Ian Black, Israel is Finding it Harder to Deny Targeting Gaza Infrastructure, Guardian, 29 July 2014
- Raphael Ahren, Is Israel’s Operation to Find Kidnapped Teens a War Crime? A Dozen Israeli Human Rights Organizations Say IDF Actions Constitute Collective Punishment, But Legal Experts Disagree, Times of Israel, 23 June 2014
- Israel Committed Serious Violations in West Bank Operations: HRW, Human Rights Watch, 3 July 2014
- UN Admits its Schools in Gaza Were Used to Store Hamas Rockets, WorldTribune.com, 23 July 2014.
- Ilan Ben Zion, Rockets Found in UNRWA School, For Third Time, Times of Israel, 30 July 2014

Topic VI

War Crimes and Prosecution

Not every violation of law committed during war constitutes a war crime. Some less serious violations may be classified as crimes under the domestic law of the state of nationality of the accused but not under the law of war; falling asleep while on sentry duty in the face of the enemy can be punished with death under the military law of most nations but does not constitute a war crime. Some violations of the law of war, such as failing to keep a record of disciplinary punishments meted out to a prisoner of war, are war crimes but considered insufficiently serious to be classified as “grave breaches” of the Geneva Conventions, and are typically not prosecuted as “war crimes.” By contrast, “war crimes” as that term is used colloquially are defined under the Geneva Conventions as serious violations or “grave breaches” of the laws of war, including but not limited to murder, rape, employment of slave labor, serious mistreatment of civilians or detainees, and wanton destruction of civilian property. “War crimes” are defined under domestic and international law and are prosecuted domestically and internationally, the former generally in courts-martial and the latter in international tribunals, either ad hoc such as at Nuremberg after World War II or in permanent settings such as the International Criminal Court in The Hague. They can be committed by combatants as well as by civilians alike, and no statute of limitations prohibits their prosecution even after the passage of many years.

Nevertheless, even with such a limiting definition of war crimes, enforcement of the law of war is a process that spans a continuum involving its creation, application, interpretation, prosecution, adjudication, and imposition of punishment. Thus, at every step, enforcement is freighted with considerations not only of law and fact but of politics and interests. War crimes are prosecuted, and not prosecuted, at the direction of politicians and under the influence of a host of considerations, including popular opinion, the media, and so on. Even under the most objective of circumstances, determining whether a war crime has been committed requires, in addition to all the other considerations including the defenses available to the accused, penetration of the fog and psychological stress of war. Questions such as whether escaping POWs may be killed, detainees may be interrogated “harshly,” mosques can be fired upon, hostages may be taken, human shields may be used, and enemy dead may be photographed or disposed or “double-tapped” to insure their mortality are but a few that have emerged in recent years. More such questions present in the Gazan conflict. The questions that follow, and which cannot be resolved absent strategic considerations, are whether, whom, and where to prosecute allegations of war crimes resulting from modern armed conflicts.

Learning Objectives:

1. Understand and distinguish the concepts of “crimes,” “war crimes,” and “grave breaches” of the Geneva Conventions.
2. Understand the substantive process whereby grave breaches are investigated and prosecuted in domestic and international courts.
3. Evaluate claims of war crimes in the Gazan conflict, applying the concept of grave breaches.

Discussion Questions:

1. Reprisal—resort by the injured party to the same illegal actions committed by the offending party—has a long pedigree (see The Peloponnesian Wars) as a remedy for war crimes. Prosecution of grave breaches is a relatively modern phenomenon; even now, far too often grave breaches go unpunished or only low-ranking soldiers are subject to criminal sanctions for unlawful acts ordered or condoned by superiors. Why would states prosecute or fail to prosecute war crimes as a matter of strategy? Several theories support prosecution—deterrence of future crimes by the state of the accused’s nationality, deterrence of the accused, punishment, vengeance, etc.—but is prosecution the best way to deter, punish, or express moral outrage? Can you devise better methods or instrumentalities?
2. Are international criminal tribunals convened to prosecute war crimes simply a matter of victor’s justice? The argument behind the creation of the ad hoc tribunals and the International Criminal Court is the notion that many states cannot or, more importantly, will not prosecute their own military personnel for grave breaches, and thus only an impartial international tribunal can do justice for the victims of war crimes. If this is so, should alleged war criminals in the Gazan conflict be referred to the ICC as many human rights organizations recommend? What are the strategic risks to both parties of accepting the jurisdiction of the ICC?
3. Are any war crimes missing from the list of grave breaches? What grave breaches can you identify as having been committed or allegedly committed in the Gazan Conflict? Does the commission of any of these grave breaches support or undermine the strategies of the parties?

Required Readings:

- Solis, pp. 301-40, 85-95, 104-118

Supplemental Readings:

- Amnesty International, Israel/Gaza: Prevent Further War Crimes After Israeli Ground Assault, 18 July 2014
- Amnesty International, Israel/Gaza: Attacks on Medical Facilities and Civilians Add to War Crime Allegations 04 August 2014
- Amnesty International, Israel and the Occupied Palestinian Territories: Israel/Gaza Conflict, July 2014, 25 July 2014
- Amnesty International, Israel/Gaza Conflict: Questions and Answers, 26 July 2014
- Nick Cumming-Bruce, U.N. Rights Panel Votes for Inquiry in Gaza Conflict, NY Times, 23 July 2014
- Ambassador Alan Baker, The Latest Hamas-Israel Confrontation—Some Pertinent Legal Points, 24 July 2014
- Aryeh Savir, Palestinian Diplomat Admits Hamas War Crimes, YNetNews.com, 13 July 2014

Topic VII

INFOWAR: Media Operations and Lawfare

“The first casualty in war is truth.”¹ War, and particularly modern war, is a battle as much over information and ideas as terrain and resources, and ideas and ideologies form a center of gravity. All parties use information as an instrument to leverage the effects of their combat operations, and in doing so selectively choose what to include and exclude, how much (if any) of the truth to tell, and what audience(s) they wish to receive their messages. All parties exploit, to greater or lesser effect, the information battlespace—the mainstream media, social media, other domains of cyberspace, the academy, and anywhere else messages are created and disseminated—to achieve their goals. Simultaneously, all parties seek to counter, undermine, check, or even silence the messages being disseminated by their adversaries—whether through publishing countervailing messages or undertaking physical and cyberattacks on media organizations and other transmitters of information and ideas about ongoing conflicts.

Propaganda,” “INFOWAR,” and “strategic communications” are but a few of the terms used to describe the intersection of information and military power during armed conflict, and this phenomenon implicates the law of war with increasing frequency and importance, particularly when a weaker or substate actor faces a powerful nation whose domestic public regards compliance as an important constituent of its national character. At the intersection of information warfare and the law of war, a space known as “lawfare,” parties not only advance different versions of battlefield “facts” but also allege different views about what the law of war requires to support claims that the other has violated the law of war and therefore not only its conduct in battle but also the reasons for which it fights are immoral, unjust, and worthy of sanction. Hoping that allegations of lawlessness will convince domestic publics, and especially those in liberal democratic states, that are concerned about the legality of their nations’ military operations to withdraw their political support, practitioners of lawfare disseminate claims of laws of war violations as weapons aimed directly at the center of gravity of their stronger opponents—the will to continue to fight. In this manner, “lawriors” hope to win political victories despite their overwhelming deficits in military capability relative to stronger powers. Examples abound in the Gazan and other recent conflicts and will be studied to illustrate the phenomenon.

Learning Objectives:

1. Understand how propaganda, INFOWAR, and strategic communications manifest at the intersection of the military and information instruments of national power and are used to leverage the effects of both.
2. Understand the increasing importance of the law of war as a variable that can be employed to limit the application of state military power in contemporary armed conflicts against weaker parties.

¹ Quote attributed to Aeschylus (525-455 BC).

Discussion Questions:

1. “Military operations are now combat support operations; combat primarily occurs in the information battlespace, and victory can now be achieved without defeating the enemy in a single military engagement—and even without fielding a traditional military force.” Do you agree?
2. Is Hamas or Israel more effective in using propaganda, INFOWAR, and strategic communications? What modalities or nodes does each party employ?
3. Do weaker powers invariably have an advantage in waging lawfare? Where is lawfare waged most effectively? What defensive measures might a powerful state take to counter adversaries employing lawfare?

Required Readings:

- Kenneth Payne, *The Media as an Instrument of War*, Parameters (Spring 2005), at 85.
- Julius Streicher Trial, Verdict, Nuremberg Military Tribunal, <http://avalon.law.yale.edu/imt/judstreir.asp>.
- Martin Imbleau, *Radio Television Libre des Mille Collines*, in Dinah Shelton, ed., *Encyclopedia of Genocide and Crimes Against Humanity*, v. 2.
- Gregory S. Gordon, *A War of Media, Words, Newspapers, and Radio Stations: The ICTR Media Trial Verdict and a New Chapter in the International Law of Hate Speech*, 45 *Virginia Journal of International Law* 139 (2004-2005).
- Hamas Threatening Journalists in Gaza who Expose Abuse of Civilians, *Times of Israel*, 28 July 2014.
- Israel Warns Foreign Journalists Covering Gaza Fighting, *Reuters*, 19 July 2014.
- Israeli Airstrikes Target Palestinian TV Station in Gaza, *Ma’an News Agency*, 30 July 2014.
- Israel/Gaza: Unlawful Attacks on Palestinian Media, *Human Rights Watch*, 20 December 2012.
- US Media Coverage of Gaza is Deeply Flawed, Both Sides in Conflict Say, *Christian Science Monitor*, 15 July 2014.
- Matthew Hall, *Israeli Propaganda War Hits Social Media*, 21 July 2014
- Charles J. Dunlap, Jr., *Lawfare: A Decisive Element of 21st-Century Conflicts?*, National Defense University Institute for National Strategic Studies (2009).
- Charles J. Dunlap, Jr., *Does Lawfare Need an Apologia?*, 43 *Case Western Reserve Journal of International Law* 121 (2010-2011).
- Charles J. Dunlap, Jr., *Lawfare Today: A Perspective*, 3 *Yale Journal of International Affairs* 146 (2008).

Topics 8-10:

Student Presentations and Discussion

In Topics 8-10, students will make individual presentations of approximately 25-30 minutes on a law of war topic chosen by agreement between the student and instructor. Potential topics, the range of which is theoretically unlimited, should build upon and answer questions posed for classroom discussion, extend debates presented in the reading, or explain and contextualize recent headlines, should relate to the ongoing Israel-Hamas armed conflict and reflect research and analysis that extends the text and classroom discussion. The sole nonnegotiable requirement is that each presentation link the law of war, strategy, and the Gazan conflict. Possible topics include but are not limited to the following:

(1) Choose a particular rule or fundamental principle of the law of war at issue in the Gazan conflict. How does it create threats and opportunities for Israel and Hamas? How and why does each party seek to exploit the rule's interpretation and application to its strategic advantage? What strategic options should each pursue with regard to compliance/noncompliance. What costs, benefits, and risks attend each strategic option? How should each seek to influence changes in the interpretation of the rule? What is the best "lawfare" strategy for each in regard to the rule?

(2) Is there an Islamic way of war? Does the conduct of Hamas reflect or deviate from the Islamic way of war? What strategic advantages or disadvantages does adherence to an Islamic way of war confer or impose upon a party to an armed conflict?

(3) Should a different legal regime apply in fighting barbarians/infidels? Should each party to the conflict have to abide by the same rules? Does the conduct of either party in Gaza reflect subscription to the view that differential legal regimes should apply? Is it good strategy to fight differently against such a foe?

(4) Which is the more useful law of war strategy—compliance with the law of war, the perception of compliance with the law of war, the will to violate the law of war to achieve objectives, the perception of the will to violate the law of war to achieve objectives, or something else entirely? Does the answer to this question depend upon the type of polity—democratic, autocratic, totalitarian, etc?

(5) Under conditions of extreme emergency, does national strategy urge that some or all of the laws of war be ignored? Is your answer consistent with what the law of war purports to claim? What conditions would have to exist for Hamas or Israel to claim extreme emergency as the predicate to ignore some or all of the laws of war?

(6) Law of war prohibitions notwithstanding, is it ever good strategy to target civilians deliberately?

(7) Is it lawful for Israel to bomb Hamas infrastructure? For Hamas to bomb Israeli infrastructure? If not, is it nevertheless a good strategy?

(8) Is the "duty to warn" as operationalized in Gaza legally required? If not, does it support Israeli strategy? If so, does it suggest that parties to an armed conflict might accept restrictions as a matter of strategy that are not legally required?

(9) Should Israel be required as a matter of law to give all combatants POW status regardless of legal entitlement? Should Israel do so as a matter of policy/strategy? If so, what are the advantages?

(10) Do the parties expand or contract the definition of “direct participation in hostilities” as part of their strategy in Gaza?

(11) Develop a policy argument in favor of or against targeted killing as part of a national and military strategy, to include the conditions and restrictions, if ever, under which it should be employed.

Required Readings:

None.

Topic 3
The Role of International Law in International Security

Insight into international law is fundamental to an understating of international relations. This topic considers the nature of international law as well as a debate about how effective international law is and under what circumstances it is likely to be useful.

Readings:

Posner, Eric. “Think Again: International Law,” *Foreign Policy*, September 17, 2009, 21-40.

Levy, Jack S. “Declining Power and the Preventive Motivation for War,” *World Politics* 40 (1987): 82-107.

Bouvier, Antoine A. *International Humanitarian Law and the Law of Armed Conflict*. 2nd edition, Williamsburg: Peace Operations Training Institute, 2012, found at:

http://cdn.peaceopstraining.org/course_promos/international_humanitarian_law/international_humanitarian_law_english.pdf.

Krasner, Stephen D. “Realist Views of International Law” *Proceedings of the Annual Meeting (American Society of International Law)*, Vol. 96, (March 13-16, 2002): 265-268.