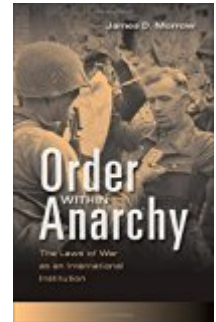


**James D. Morrow.** *Order within Anarchy: The Laws of War as an International Institution.* Cambridge: Cambridge University Press, 2014. 240 pp. \$90.00, cloth, ISBN 978-1-107-04896-6.



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The law of war is a body of international law governing the conduct of armed conflicts between states. This law, also referred to as the law of armed conflict or international humanitarian law, has mushroomed over the last 150 years. The initial Geneva Convention on the treatment of the sick and wounded in war, concluded in 1864, had only 10 articles. Its contemporary counterparts, the four 1949 Geneva Conventions, contain a total of 427 articles, and the two 1977 Additional Protocols to those Conventions add another 130 articles. These treaties cover not only the sick and wounded but also shipwrecked sailors, prisoners of war (POWs), civilians, and the conduct of military attacks. In addition to treaty law, the law of war also includes various rules of customary international law.

While the law has expanded, serious and sometimes widespread violations of its rules have marked the twentieth and twenty-first centuries. Explaining the reasons for noncompliance in order to find ways to increase compliance has become a central concern for students of the law of

war. James D. Morrow's *Order within Anarchy: The Laws of War as an International Institution* applies game theory as an analytic tool “to explain when the laws of war have been violated and when they have been observed,” and “to arrive at clear tests of when actors should observe norms and when they should not” (pp. 12, 13).

The book is addressed primarily to scholars familiar with game theory. The author does try to make the work accessible to readers interested in the law of war and its development, but who do not have a background in game theory. For example, the author has taken care to write two versions of chapters 3 and 4, the first intended for general readers and the second for experts in game theory. To accomplish this, chapter 3 for general readers is on pages 58 to 88 and a version for game theory experts (designated as chapter 3') is on pages 89 to 110; similarly the basic chapter 4 is at pages 111-145, followed by chapter 4' at pages 146-191. Despite these intentions, the work uses game theory jargon (“iterative prisoners’ dilemma,” “Nash equilibrium,” etc.) so frequently

that it is a challenging read for anyone unfamiliar with game theory. Since I am not a game theory expert, I will primarily approach the book from a traditional international law standpoint.

In the first four chapters, the author constructs gaming models to develop hypotheses on how and when states at war will comply with the law. The models focus on three levels of “strategic expectations”: general government policy, practical compliance by soldiers on the battlefield, and the willingness of governments to enforce the law of war on their own troops. The historical data used to test the models are generally limited to the first half of the twentieth century and are primarily derived from belligerent practices in the First and Second World Wars.

At the end of chapter 4, Morrow draws general conclusions from his study of compliance with the law of war during both world wars in light of the models developed in the earlier chapters. In general, these conclusions support his hypotheses. The most sweeping conclusion is that swift retaliation in kind to enemy violations (reciprocity) produces better compliance with the law. Reciprocity is strengthened, and produces a higher level of compliance, where both parties have ratified the applicable treaties, and treaties themselves are important because they clarify what the standards are. Treaty ratification is a more significant signal of intent to comply for democracies than for authoritarian states.

Chapters 5 and 6 are more detailed case studies of state practice in the two world wars. Chapter 5 is devoted to POW treatment, the main source of the data leading to the general conclusions at the end of chapter 4. In contrast, chapter 6 examines state practice in a wide range of other fields, including chemical warfare, strategic bombing, and naval warfare. These are the most profitable chapters for readers primarily interested in the historical development of the law of war in this period and who have little background in game theory.

Chapter 7 examines how common conjectures evolve during game play and in real world international institutions. This involves the concept of the iterative prisoners’ dilemma game, where players repeatedly replay the game, either for a fixed number of rounds or indefinitely, and can react to the adversary’s play in earlier rounds. If the adversary commits a violation, the player might retaliate with a violation of his or her own, and then return to compliance in the following round to see if the adversary ceases violation. In the final chapter, the author offers his thoughts on the current state of the law of war and the challenges facing it, including the problem of dealing with terrorist groups. For example, he rejects both the criminal law and law of war approaches to dealing with terrorist organizations in favor of the development of a new regime tailored to this threat.

As sources of law, Morrow focuses on treaties formally ratified by the combatants, to the exclusion of customary international law. Ratification is “public evidence that the ratifying state has accepted” the rules set out in the treaty (p. 17). He rejects customary international law as lacking clarity, as compared to treaty provisions. Also, ratification is a “public signal” by a state that it intends to adhere to the standards of conduct in the treaty (p. 59). The author further posits that failure to ratify a treaty signals an intention to violate it. (It is never explained how a state can “violate” a treaty that does not bind it.)

Treatment of prisoners during World War II provides the strongest support for the thesis that failure to ratify a treaty signals an intention to “violate” its provisions. During World War I, Morrow concludes, “with notable exceptions,” the belligerent powers treated prisoners in accordance with the 1907 Hague Regulations on Land Warfare (p. 205). Nevertheless, disputes arose over the adequacy of food supplied to prisoners and the types of work the detaining power could require of them. The 1929 Geneva Convention on Prisoners

of War was negotiated to clarify and expand the provisions of the Hague Regulations. Germany, the United Kingdom, and the United States all ratified the 1929 Convention, and the author concludes that during World War II these powers followed the Convention, “in its broadest terms,” on the western front (p. 213). However, neither the Soviet Union nor Japan ratified the 1929 Convention. In the fighting between the Soviet Union and Nazi Germany, 57 percent of the prisoners held by the latter died in captivity, while between 15 and 37 percent of German POWs held by the Soviets met the same fate (p. 207). Between these authoritarian regimes, reciprocity did not produce better treatment. “Law is powerless,” Morrow concludes, “in the face of those who want lawlessness” (p. 224).

On the Pacific front, the Japanese also treated POWs brutally, despite public assurances that they would follow the 1929 Convention “as far as possible” even though not a party to it (p. 224). The death rate of American prisoners was over 35 percent, while the death rate of soldiers from the British Commonwealth was over 28 percent. The central governments of the Allied Powers did not retaliate in kind for several reasons, including the difficulty of determining actual conditions in Japanese POW camps before the end of the war, and the fact that few Japanese were taken prisoner. On actual Pacific battlefields, however, reciprocity was practiced. As the result of Japanese acts of perfidy early in the war, US soldiers and marines often refused to take Japanese prisoners on the rare occasions when they could.

Data on chemical warfare and strategic bombing are also cited to show how reciprocity and clear treaty provisions support compliance with the law of war. After the initial chemical attack by Germany in 1915, both sides made widespread use of chemical weapons in the First World War. However, chemical weapons were not widely used in the Second World War due to widespread ratification of the 1925 Protocol ban-

ning the use of these weapons, reinforced by the threat of retaliation in kind. On the other hand, strategic bombing in the Second World War escalated from attacks on military targets to indiscriminate bombing of civilians due both to inaccurate attacks, perceived by the enemy to be deliberate, and to the lack of a clear legal standard for conducting aerial bombing.

However, even clear treaty rules cannot always withstand strong national interests. As an example, Morrow points to the practice of unrestricted submarine warfare against merchant ships by both Germany and the United States in the Second World War, despite a treaty ban in force during that conflict. He concludes that warfare “on the high seas was successfully limited in some areas” during the Second World War, but failed when the law “conflicted with the realities of combat” (p. 263). It is worth noting that when Admiral Karl Doenitz, commander of the German submarine service during much of the Second World War, was charged with the war crime of conducting unrestricted submarine warfare, the International Military Tribunal at Nuremburg refused to punish him for this offense after his defense counsel demonstrated that the United States had adopted the same tactics in the Pacific theater of war.[1]

The principal weakness of this work is that the analysis is not firmly grounded in the law. As noted above, the work rejects applying customary international law due to its ambiguity, and stresses the importance of clear treaty language and the formal ratification of treaties as signals to the international community. Yet elsewhere the author states that he is measuring compliance not just with the legal obligations but also with “general normative principles” (p. 131). Unlike legal rules, Morrow states, these norms “prescribe broad standards of conduct without the detail necessary to judge which specific acts violate those standards” (p. 274). Yet the work does judge whether specific acts of belligerents in the world wars

have violated a nonlegal norm. It is concluded that Allied strategic bombing in the Second World War violated a general norm, and this judgment is included in the data on compliance. This assessment forms the main basis for the author's conclusion that while democracies respect their legal obligations, they do not comply with "general norms of conduct in the absence of legal obligation" (p. 144). Other examples can be given. Morrow cites the internment of German nationals in 1914 as a "violation" by France (p. 142). We are not told what rule this act violated. There was, and is, no treaty article or rule of customary law prohibiting internment of enemy aliens in wartime, so Morrow must believe that there was some kind of nonlegal norm that prohibited the practice.

We are not told how these general normative principles are formed, or how their content can be determined. The norms must not be based on customary international law, which the author rejects as lacking clarity. In the case of Allied bombing, he relies on draft treaties that were never adopted. It has already been mentioned that Morrow believes that states can violate treaties that have not been ratified. In any event, at least some of the data forming the basis of his conclusions do not really reflect violations of the laws of war but rather of other, undefined norms.

Finally it should be noted that the author has stalwartly taken positions outside the mainstream of Western thinking on international law. It is generally accepted that compliance with the four 1949 Geneva Conventions does not depend on reciprocity. A state party is obligated to continue abiding by the Conventions even though an enemy state is blatantly violating them. Also, the four Conventions have now been "universally" adopted, that is, every state in the world has become a party to them, and this is widely believed to be a welcome development.

Given his conclusions that reciprocity strengthens compliance, and that ratification or

non-ratification can serve as a diplomatic signal, it is not surprising that Morrow is critical of both "universalism" and "unilateralism," the latter being his term for the doctrine that states that the Conventions remain binding even in the face of enemy violations (pp. 315, 316). I share his opinion that there should be more room for retaliation as a means of enforcing the law of war, but it is unlikely that present trends will be reversed soon.

#### Note

[1]. Trial of the Major War Criminals before the International Military Tribunal (1945-1946) in *The Law of War: A Documentary History*, vol. 2, ed. Leon Friedman (New York: Random House, 1972), 922, 998.

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