

Freshman Seminar 42U – Fall 2015

THE LAWS OF WAR AND THE WAR ON TERRORISM

COURSE DESCRIPTION

What are the Laws of War? Are they *really* laws? How do they intersect with U.S. domestic law? How do the Laws of War regulate and/or inform U.S. policies in the “Global War on Terror”?

This seminar will provide participants with the opportunity to explore the evolution of the two main branches of the Laws of War, *jus ad bellum* and *jus in bello*.

In the first part of the course, seminar participants will read and discuss the views of early and modern philosophers and jurists as to when war is legal. We will discuss the theory of the “Just War” and the argument that there is an “international common law” governing the behavior of nation-states. We will then look at treaties and conventions, paying particular attention to the United Nations Charter and the post-war international order. Participants will evaluate historical cases and controversies involving the use of force by nation states: from border skirmishes between the U.S. and British Canada, through both World Wars, to the first U.S.-Iraq war, the humanitarian intervention in Kosovo, and the NATO mission to aid Kosovo.

In the second part, we will examine the development of customary and conventional rules that govern the conduct of armed forces and the treatment of prisoners and non-combatants. We will read orders, diplomatic correspondence, and treaty texts. Participants will also see how jurists and statesmen have grappled with unsettled questions of how the laws of war relate to insurgents, looking at the American Civil War and various small wars of the twentieth century. Evaluating compliance with the laws of armed conflict, participants will discuss and debate the significance of U.S. legal approaches and the merits of international tribunals.

During the final third of the course, we will plunge into recent national debates and discuss the differing viewpoints on the legality and propriety of U.S. policies since 9/11/2001. We will look closely at the wars in Afghanistan and Iraq, and interventions in Specific attention will be paid to the use of “targeted killing,” particularly through the use of unmanned aerial vehicles. The seminar will conclude with a discussion of the emerging issues of “Killer Robots” and cyber-warfare, and how they relate to the War on Terror and to the future of the Laws of War.

The discussion topics and readings detailed below are flexible, and changes may be made to reflect current events and scholarship.

COURSE REQUIREMENTS

1. ATTENDANCE. Weekly attendance at seminar meetings is required.
2. READINGS. Participants are expected to complete assigned readings prior to weekly meetings, and be prepared to engage in discussion of the ideas and cases presented. Readings should total less than one-hundred pages per week. “Optional” or “recommended” readings are precisely that, and there is no expectation that students need complete any of these selections unless intellectual curiosity necessitates...
3. MIDTERM PAPER. Participants will complete a five page analytical paper on a topic to be provided at the end of the first module (Part I) of the course.
4. FINAL PAPER. All students will complete a 10-15 page final paper addressing a contemporary or historical controversy arising under the Laws of War. Topics/questions will be provided in early November, and each student will have the opportunity of an individual conference to review his/her paper topic and outline. Students will draw on seminar readings and modest research. The paper will be due the last day of reading period.

COURSE SYLLABUS

Note: A few refinements will still be made to this reading list. The majority of course readings will be available from open sources and the Harvard Library's online journal collection, minimizing recommended book purchases. All books will also be on reserve at the Harvard Library.

INTRODUCTION

Week 1 (September 9): Introduction to International Law and American Law... and Modern Warfare

What are the sources of international law? What is the relationship between customary international law and treaty law? Does international law truly function as "law" in the traditional sense (does it have coercive force)? How does international law interact with U.S. law?

Readings and Case for discussion:

- Authorization for Use of Military Force. Public Law 107-40 (September 18, 2001). <http://www.gpo.gov/fdsys/pkg/BILLS-107sjres23enr/pdf/BILLS-107sjres23enr.pdf>.
- Samantha Power, Letter to the President of the United Nations Security Council (June 17, 2014). <https://www.documentcloud.org/documents/1201215-power-letter-to-un-about-khattala.html>.
- Barack Obama, Letter from the President (August 17, 2014). <http://www.whitehouse.gov/the-press-office/2014/08/17/letter-president-war-powers-resolution-regarding-iraq>
- Barack Obama, Statement by the President (August 20, 2014). <http://www.whitehouse.gov/the-press-office/2014/08/20/statement-president>.
- The Paquete Habana, 175 U.S. 677 (1900). <http://supreme.justia.com/us/175/677/case.html>.

Some Optional/Recommended reading:

- David Kennedy, Of War and Law (Princeton University Press, 2006), Introduction "War Today" and Chapter 2 "The Historical Context: How did we get here?" pp 46-98.

PART I: *JUS AD BELLUM*

RULES GOVERNING THE USE OF FORCE IN INTERNATIONAL RELATIONS

Week 2 (September 16): Legal norms regarding the use of armed force by states prior to World War II. We will then examine the "Just War Theory," its critics, and begin discussing the modern legal concepts of Self-Defense, Necessity, and Proportionality.

Readings:

- Hugo Grotius, On the Law of War and Peace (1625), Book II – Chapter 1 (pages 60-71) and Chapter 22 (pages 226-232). Available at [I used this version for the page references listed here]: <http://socserv.mcmaster.ca/econ/ugcm/3ll3/grotius/Law2.pdf>.
- Carl von Clausewitz, On War, Book I, Chapters 1 and 2. (All of Book I is recommended). This book is available through Harvard Library's electronic resources at: http://nrs.harvard.edu/urn-3:hul.ebookbatch.NLIB_batch:ocm49293931.
- Catechism of the Catholic Church – The Fifth Commandment, #2307-2314. Available at http://www.vatican.va/archive/ccc_css/archive/catechism/p3s2c2a5.htm.
- The Webster-Ashburton Treaty –The Caroline Case (1837). Summary and primary documents available at http://avalon.law.yale.edu/19th_century/br-1842d.asp.

Week 3 (September 23): The U.N. Charter System and the War in Afghanistan (2001). Was the U.S. Invasion of Afghanistan in the fall of 2001 legal? Was it properly labeled an armed conflict in “Self-Defense?”

Readings:

- The Charter of the United Nations, Chapter 1, Article 2 and Chapter VII, Articles 39-51. Available at <http://www.un.org/en/documents/charter/>
- Quincy Wright, “The Outlawry of War and the Law of War,” The American Journal of International Law, Vol. 47, No. 3 (July, 1953), pp. 365-376. Available through JSTOR at <http://www.jstor.org.ezp-prod1.hul.harvard.edu/stable/pdfplus/2194678.pdf>.
- Authorization for Use of Military Force. Public Law 107-40 (September 18, 2001). Available at: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_public_laws&docid=f:publ040.107.pdf.
- U.N. Security Council Resolution 1368 (September 12, 2001). Available at: <http://www.un.org/Docs/scres/2001/sc2001.htm>.
- U.N. Security Council Resolution 1373 (September 28, 2001). Available at: <http://www.un.org/Docs/scres/2001/sc2001.htm>.
- NATO Secretary General Statement of 2 October, 2001. Available at: <http://www.nato.int/docu/speech/2001/s011002a.htm>.
- Letter from U.S. Permanent Representative to the President of the U.N. Security Council dated 7 October 2001. Available at: www.hamamoto.law.kyoto-u.ac.jp/kogi/2005kiko/s-2001-946e.pdf.
- U.N. Security Council Resolution 1378 (November 14, 2001). Available at: <http://www.un.org/Docs/scres/2001/sc2001.htm>.
- Jonathan Charney, “The Use of Force against Terrorism and International Law,” The American Journal of International Law, Vol. 95, No. 4 (Oct., 2001): 835-839. Available through JSTOR: <http://www.jstor.org.ezp-prod1.hul.harvard.edu/stable/pdfplus/2674628.pdf>.
- Thomas Franck, “Terrorism and the Right of Self-Defense,” The American Journal of International Law, Vol. 95, No. 4 (Oct., 2001): 839-843. Available through JSTOR. <http://www.jstor.org.ezp-prod1.hul.harvard.edu/stable/pdfplus/2674629.pdf>.

Week 4 (September 30): U.S. Strikes against ISIL in Iraq and Syria (2014-present).
FIRST PAPER DUE!!!!!!

Readings: TBD. Topic will server both for debate in class and for the first seminar paper.

PART II: *JUS IN BELLO* – THE LAW OF ARMED CONFLICT

Week 5 (October 7): Customs of War and the Geneva Conventions. We will investigate the history of rules governing (and limiting) the behavior of armed forces during actual conflict.

Readings:

- Martin van Creveld, “The Clausewitzian Universe and the Law of War,” Journal of Contemporary History, Vol. 26, No. 3/4 (Sept. 1991), 403-429. Available at: <http://www.jstor.org.ezp-prod1.hul.harvard.edu/stable/pdfplus/260653.pdf>.
- Francis Lieber, Instructions for the Government of Armies of the United States in the Field. General Orders No. 100. 24 April 1863. Read articles 11-30, 34-36, 40-47, 49-80, and 105-118. (available at: <http://www.yale.edu/lawweb/avalon/lieber.htm>).
- Burrus Carnahan, “Lincoln, Lieber, and the Laws of War: The Origins of and Limits of the Principle of Military Necessity,” The American Journal of International Law, Vol. 92, No. 2

(April, 1998). Available at: <http://www.jstor.org.ezp-prod1.hul.harvard.edu/stable/pdfplus/2998030.pdf>.

- Convention III and Convention IV of Geneva (1949). Read the first 6 Articles of the 3rd convention and then please JUST SKIM briefly through the rest of conventions III and IV to get a feel for what they are about. Available at: <http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/genevaconventions>.
- PURELY OPTIONAL! (but recommended) Hugo Grotius, On the Law of War and Peace (1625), Book III, Chapters 1, 4-5, 7, 11-12, 17, 19, and 25. Available at: <http://socserv.mcmaster.ca/econ/ugcm/3ll3/grotius/Law2.pdf>. If you have time to just read a bit of this to get a feel for Grotius' perspective, try Chapters 1 and then Chapters 11 pages 319-324 in this linked version.

Week 6 (October 14) Small Wars, Civil Wars, and Illegal Combatants. How do the Laws of War apply to insurgencies and civil wars? In conflicts where one party, does not abide by the rules?

Film: “Breaker Morant” (1979).

Readings:

- John Fabian Witt, “Lincoln’s Laws of War,” Slate Magazine (Feb 11, 2009). <http://www.slate.com/id/2210918/>.
- Francis Lieber, Instructions for the Government of Armies of the United States in the Field. General Orders No. 100. 24 April 1863. Articles 81-104 (available at: <http://www.yale.edu/lawweb/avalon/lieber.htm>).
- Quincy Wright, “The Bombardment of Damascus,” American Journal of International Law, Vol. 20, No. 2 (Apr. 1926): 263-80. Available at <http://www.jstor.org.ezp-prod1.hul.harvard.edu/stable/pdfplus/2188917.pdf>.
- Eldridge Colby, “How to Fight Savage Tribes,” American Journal of International Law, Vol 21, No. 2 (Apr. 1927), 279-288. Available at <http://www.jstor.org.ezp-prod1.hul.harvard.edu/stable/pdfplus/2189127.pdf>.
- Geneva Conventions Additional Protocols I and II (1977) – Read Articles 45-59 of Protocol I and skim Protocol II. Available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/genevaconventions>.

PART III: “THE GLOBAL WAR ON TERROR”

Week 7 (October 21): Classification of the “War” on terror and detention of terror suspects. What is the status of suspected terrorists under the law of war, and in particular the Geneva Conventions? Who may be detained as an enemy combatant, and without criminal charges, for the duration of the “war on terror”? How may detained enemy combatants be punished for violations of the laws of war?

Readings:

- John Yoo and James Ho, “The Status of Terrorists,” UC Berkeley School of Law Public Law and Legal Theory Research Paper No. 136 (2003). Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=438123.
- [RECOMMENDED] Greg Bybee, “Application of Treaties and Laws to al Qaeda and Taliban Detainees” (DOJ Memorandum dated January 22, 2002). Available at <http://news.findlaw.com/hdocs/docs/doj/bybee12202mem.pdf>.
- Hamdi v. Rumsfeld, 542 U.S. 507 (2004). <http://www.law.cornell.edu/supct/html/03-6696.ZS.html>. Read the Syllabus and Part II of Justice O’Connor’s opinion, pages 8-17.

- Hamdan v. Rumsfeld, 548 U.S. 557 (2006). Read Justice Steven's opinion, Part I, (pages 2-7 of the pdf version), Part V (pages 31-49) and Part VI D (pages 62-72 and MOST IMPORTANT). Then read Justice Thomas' dissenting opinion (pages 1-49).
<http://www.law.cornell.edu/supct/html/05-184.ZS.html>.

Optional:

- Ex Parte Quirin, 317 U.S. 1 (1942). Selections. Available at:
http://www.law.cornell.edu/supct/html/historics/USSC_CR_0317_0001_ZO.html.
- Boumediene v. Bush, 553 U.S. 723 (2008). Read the syllabus. Available at:
<http://www.law.cornell.edu/supct/html/06-1195.ZS.html>.

Week 8 (October 28): Torture (Part I): What techniques may the U.S. government use in interrogating suspected terrorists?

Film: "La battaglia di Algeri" (1966)

Readings:

- Michael Garcia, War Crimes Act: Current Issues, Congressional Research Service (2007). Available at: <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA471748&Location=U2&doc=GetTRDoc.pdf>.
- 18 U.S.C 118 Section 2441 – "War Crimes Act of 1996." Available at http://www.law.cornell.edu/uscode/18/usc_sec_18_00002441----000-.html.
 - a. Common Article III of the Geneva Conventions of 1949.
<http://www.icrc.org/ihl.nsf/WebART/375-590006>.
 - b. International Red Cross definition of "Grave Breaches."
<http://www.icrc.org/ihl.nsf/WebART/375-590006>.
- U.S. Code, Title 18, Sections 2340 and 2340A, "Torture." Available at: http://www.law.cornell.edu/uscode/18/usc_sup_01_18_10_I_20_113C.html.
- Memorandum from Greg Bybee, Asst. Atty. Gen. to John Rizzo, General Counsel at the CIA: "Interrogation of al Qaeda Operative," (August 1, 2002). Available at: http://luxmedia.com.edgesuite.net/aclu/olc_08012002_bybee.pdf.
- Secretary of Defense Action Memo on Counter-Resistance Techniques (December 2, 2002) Available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.12.02.pdf>.

Optional/Recommended Readings:

- Memorandum from Greg Bybee, Asst. Atty. Gen. to White House Counsel, Standards of Conduct for Interrogation under 18. U.S. C. Sections 2340-2340A, (August 1, 2002). Available at: http://www.humanrightsfirst.org/us_law/etn/gonzales/memos_dir/memo_20020801_JD_%20Gonzalez.pdf.
- Yoo Letter to Alberto Gonzales (dated August 1, 2002). Available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/020801.pdf>.

Week 9 (November 4): Torture (Part II): Did U.S. officials commit war crimes in using enhanced interrogations between 2001 and 2006? If so, should anyone be prosecuted? There will be an in class debate!

Readings:

- Executive Order 13491 (2009). <http://edocket.access.gpo.gov/2009/pdf/E9-1885.pdf>.
- Scott Shane, "Interrogations Effectiveness May Prove Elusive," New York Times, (April 22, 2009). <http://www.nytimes.com/2009/04/23/us/politics/23detain.html>.

- Bush on Waterboarding, “Damn Right” (Nov 5, 2010). Be sure to read all 4 pages! http://articles.cnn.com/2010-11-05/politics/bush.book_1_waterboarding-interrogation-bush?s=PM:POLITICS.
- Charles Fried, “History’s Verdict,” *The New York Times*, (Jan. 11, 2009). Available at: <http://www.nytimes.com/2009/01/11/opinion/11fried.html>.
- ACLU letter to Attorney General Eric Holder, dated Nov. 11, 2010. Available at: <http://www.aclu.org/national-security/aclu-letter-attorney-general-holder-urging-investigation-president-bush-violation>

Week 10 (November 11): Targeted Killing

Readings:

- Greg Miller, “Plan for hunting terrorists signals U.S. intends to keep adding names to kill lists, *The Washington Post*, October 23, 2012. Available at: http://www.washingtonpost.com/world/national-security/plan-for-hunting-terrorists-signals-us-intends-to-keep-adding-names-to-kill-lists/2012/10/23/4789b2ae-18b3-11e2-a55c-39408fbe6a4b_print.html.
- Memorandum from W. Hays Parks on Executive Order 12333. Available in *Army Law* (December 1989), **pages 4 - 9**. http://www.loc.gov/rr/frd/Military_Law/pdf/12-1989.pdf. Pay particular attention starting on page 7, where Parks deals with counterinsurgency and “peacetime operations.”
- Harold Koh, “The Obama Administration and International Law,” Speech delivered to the American Society of International Law on March 25, 2010. Available at: <http://www.state.gov/s/l/releases/remarks/139119.htm>. You only need to read the section of the speech labeled “Use of Force.” It is about 2/3-3/4 through the speech, in Part III B, which is titled “The Law of 9/11.”
- Philip Alston, “Statement of U.N. Special Rapporteur on U.S. Targeted Killings without Due Process,” (August 3, 2010). Available at: <http://www.aclu.org/national-security/statement-un-special-rapporteur-us-targeted-killings-without-due-process>.
- Robert Chesney, Who May be Killed? Anwar Al-Awlaki as a case study in the international legal regulation of Lethal Force. *Yearbook of International Humanitarian Law* (Forthcoming 2011). Draft electronic copy available at <http://s.srn.com/abstract=1754223>.
- President Obama letter to Congress (June 15, 2012). Available at: <http://www.whitehouse.gov/the-press-office/2012/06/15/presidential-letter-2012-war-powers-resolution-6-month-report>
- *Public Committee Against Torture in Israel v. Government of Israel*, High Court of Justice (Dec 11, 2005). Available at: http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf.

Week 11 (November 18): Targeted Killing Part II: Drones and Targeting U.S. Citizens. (note that some of these readings will be omitted).

Readings:

Drones?

- Peter Bergen and Katherine Tiedemann, “The Drone War,” *New America Foundation* (June 3, 2009). Available at http://www.newamerica.net/publications/articles/2009/drone_war_13672.
- Kurt Volker, “What the U.S. Risks by Relying on Drones,” *The Washington Post* (October 26, 2012). Available at: http://www.washingtonpost.com/opinions/we-need-a-rule-book-for-drones/2012/10/26/957312ae-1f8d-11e2-9cd5-b55c38388962_story.html.

- James Jeffery, "The Rules for Drone Warfare," The Washington Post (October 31, 2012). Available at: http://www.washingtonpost.com/opinions/the-rules-for-drone-warfare/2012/10/31/029659da-2156-11e2-92f8-7f9c4daf276a_story.html.
- Ken Anderson, "Targeted Killing and Drone Warfare: How we came to debate whether there is a 'Legal Geography of War'" (2011). Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1824783.

U.S. Citizens? Can U.S. Citizens be targeted or detained as enemy combatants in the War on Terror? Where is the line between criminal justice response and the military response?

- Charlie Savage, "Secret U.S. Memo Made Legal Case to Kill a Citizen," The New York Times (October 8, 2011). Available at: http://www.nytimes.com/2011/10/09/world/middleeast/secret-us-memo-made-legal-case-to-kill-a-citizen.html?_r=2.
- John Yoo, "The Administration's Strange Reasoning on Al-Awlaki," National Review Online (October 9, 2011). Available at: <http://www.nationalreview.com/corner/279613/administrations-strange-reasoning-al-awlaki-john-yoo>.

Week 12 (November 25): Covert Operations

- Robert Chesney, "'Carrying Arms Openly,' Drones, and Covert Action" (April 2013). Available at <http://www.lawfareblog.com/2013/04/carrying-arms-openly-drones-and-covert-action/>
- "CIA Personnel, Drones, and the Privilege of Combatancy." <http://www.liebercode.org/2013/04/cia-personnel-drones-and-privilege-of.html>.

Week 13 (December 2): Robots and Cyber-Warfare

TERM PAPERS DUE AT THE START OF CLASS!!!

Readings:

- P.W. Singer, Military Robots and the Laws of War, The New Atlantis, (Winter 2009) p. 25. Available at: http://www.thenewatlantis.com/docLib/20090203_TNA23Singer.pdf.
- Defense Science Board on Role of Autonomy. <http://www.acq.osd.mil/dsb/reports/AutonomyReport.pdf>.
- Law and Ethics for Robot Soldiers. Waxman and Anderson (Dec 2012). <http://www.hoover.org/publications/policy-review/article/135336>
- Department of Defense Directive (Nov 2012). <http://www.dtic.mil/whs/directives/corres/pdf/300009p.pdf>
- Others TBD

Optional Winter Reading!

- David Kennedy, Of War and Law (Princeton University Press, 2006), Chapter 1, pp. 13-45, Chapter 3, pp. 99-164.
- Major General Charles Dunlap, "Lawfare Today," Yale Journal of International Affairs, (Winter 2008). Available at <http://www.nimj.org/documents/Lawfare%20Today.pdf>.