

*Developed by Professor Yuval Shany, Hebrew University of Jerusalem (Israel)*

## Course description:

The course explores the normative, theoretical institutional development of international humanitarian law (IHL). After discussing the policy and philosophical justifications underlying the development of IHL, the course describes its historical growth from the traditional laws of war and surveys the principal instruments and institutions which comprise IHL. Particular attention will be given in this regard to issues such as eligibility for POW status, the norms governing the war on terror, limitations of the means and methods of warfare and the increasing merger of IHL and human rights law. The final part of the course critically examines international attempts to enforce IHL, particularly through the development of international criminal law instruments and institutions, such as the International Criminal Court.

## Treaties used throughout the course:

- Hague Convention IV – Laws and Customs of War on Land 1907, 205 Consol. T.S. 277
- Geneva Convention relative to the Treatment of Prisoners of War, 1949, 75 U.N.T.S. 135, entered into force Oct. 21, 1950.
- Geneva Convention relative to the Protection of Civilian Persons in Time of War, 1949, 75 U.N.T.S. 287
- Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977, 1125 U.N.T.S. 3
- Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1977, 1125 U.N.T.S. 609
- Rome Statute of the International Criminal Court, 1998, 2187 U.N.T.S.

## Program of Studies:

### Class 1:

#### The Case for the Legal Regulation of Inter-State Violence

The class discusses the justifications for restricting the conduct of warring parties in order to promote humanitarian goals, and introduces the distinction between *jus ad bellum* (the law governing resort to force) and *jus in bello* (the law governing the conduct of hostilities)

### Reading materials:

- Y. Dinstein, *The Conduct of Hostilities under the Law of Armed Conflict* (2004) 4-26

- M. Sassòli, A.A. Bouvier and A. Quintin, *How Does Law Protect in War?* (3rd edition, 2011), Ch. 1 & Ch. 2. II.

## **Class 2:**

### **Historical Development of IHL**

The class discusses the process of development of IHL from the battle of Solferino (1859) to the conclusion of the Rome Statute (1998). The main focus of discussion would be the classic distinction between Hague law (inter-state oriented IHL) and Geneva law (human-rights oriented IHL).

#### *Reading materials:*

- T. Meron, 'The Humanization of Humanitarian Law', 94 *A.J.I.L.* (2000) 239
- Declaration Renouncing the Use, in Time of War, of Certain Explosive Projectiles, 29 November/11 December 1868
- Convention [No. IV] on the Laws and Customs of War on Land, 18 Oct. 1907
- Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, art. 51

## **Class 3-4:**

### **The General Principles of IHL governing Military Operations**

The class will discuss the principles of military necessity, proportionality, distinction and the prevention of unnecessary suffering (principle of humanity), as they had been developed in treaty law, customary law and in the case law. It will use as primary case studies Israel's targeting killing policy, on the one hand, and NATO's bombing campaign over Yugoslavia, on the other hand.

#### *Reading Materials:*

- Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (2000), para. 1-13; 28-91 [See Case No. 226, Federal Republic of Yugoslavia, NATO Intervention [Part B.]]
- H.C.J. 769/02, Public Committee against Torture v. Government of Israel, Judgment of 13 Dec. 2006 [See Case No. 136, Israel, The Targeted Killings Case]
- H.C.J. 3799/02, *Adalah v. IDF Chief of Central Command*, judgment of 6 Oct. 2005

## **Class 5:**

### **Regulations of Means of Warfare**

The class will discuss the application of the general principles governing methods of warfare discussed in classes 3-4 to the choice of means of warfare – that is, to the international regime governing the lawfulness of specific weapons and munitions.

### Reading materials:

- *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, at para. 24-97 [See Case No. 62, ICJ, Nuclear Weapons Advisory Opinion]
- H.C.J. 8990/02, *Physicians for Human Rights v. Almog*, Judgment of 27 April 2003
- J-M. Henckaerts and L. Dosweld-Beck, *Customary International Humanitarian Law* (2005) 237-296

### Class 6:

#### Prisoners of War and Belligerent Status

The class will discuss the centrality of the institution of POW and belligerency status in regulating the conduct of warfare and elaborate on the various conditions for conferring or denying this status in the light of recent case law in the U.S. and Israel on the matter. The class discussion will also address the right to detain and target individuals taking part in hostilities.

### Reading Materials:

- Geneva Convention relative to the Treatment of Prisoners of War, 12 August 1949
- Y. Dinstein, *The Conduct of Hostilities under the Law of Armed Conflict* (2004) 27-54
- Cr A 8780/06, *Srur v. Israel*, ILDC 590
- D. Jinks, 'The Declining Significance of POW Status', 45 *Harv. Int'l L.J.* (2004) 367 (optional)

### Class 7:

#### The Law Governing Non-International Armed Conflicts

The class will address the changing nature of the distinction between international and non-international armed conflict and discuss the norms developed to regulate the latter type of conflicts.

### Reading materials:

- Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977
- Case IT-94-1-AR72, *Prosecutor v. Tadic*, Judgment of 2 Oct. 1995, at para. 65-145 [See Case No. 211, ICTY, *The Prosecutor v. Tadic* [Part A.]]
- Case IT-04-84-T, *Prosecutor v. Haradinaj*, Judgment of 3 April 2008, at para. 32-100 [See Case No. 211, ICTY, *The Prosecutor v. Tadic* [Part E.]]
- *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) [See Case No. 263, United States, *Hamdan v. Rumsfeld*]

### Class 8-9:

#### The War on Terror

The class discusses the applicability of IHL to the war on terror, in particular, to questions of targeted killings

and detention of “unprivileged” or “unlawful combatants”

*Reading materials:*

- Case IT-04-84-T, *Prosecutor v. Boskoski*, Judgment of 10 July 2008, at para. 175-206 [See Case No. 220, ICTY, *The Prosecutor v. Boskoski*]
- N. Melzer, *Targeted Killing in International Law* (2008) 243-298
- CrimA 6659/06, *A v. Israel*, Judgment of 11 June 2008 [See Case No. 138, Israel, *Detention of Unlawful Combatants* [Part A.]]
- D. Jinks, ‘The Applicability of the Geneva Conventions to the “Global War on Terrorism”’, 46 *Va. J. Int’l L.* (2005) 165 (optional)

### **Class 10-11:**

#### **The Law of Occupation**

The class will discuss the basic principles of law governing situations of belligerent occupation, focusing, in particular, on the Israeli/Palestinian and the Iraq case studies. Among the specific issues to be discussed are the conditions for applying the law of occupation, the prohibition against changing the status quo in occupied territories and the nature of the obligations of the occupier vis-à-vis the local population.

*Reading materials:*

- *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. 136, at para. 70-162 [See Case No. 123, ICJ/Israel, *Separation Wall/Security Fence in the Occupied Palestinian Territory* [Part A.]]
- *Armed Activities on the Territory of the Congo*, 2005 I.C.J., para. 167-180 [See Case No. 236, ICJ, *Democratic Republic of the Congo/Uganda, Armed Activities on the Territory of the Congo*]
- H.C.J. 2056/04, *Beit Sourik Village Council v. Government of Israel*, Judgment of 30 June 2004 [See Case No. 123, ICJ/Israel, *Separation Wall/Security Fence in the Occupied Palestinian Territory* [Part B.]]
- H.C.J. 4764/04, *Physicians for Human Rights v. IDF Chief in the Gaza Strip*, ILDC 17 (IL 2004) [See Case No. 135, Israel, *The Rafah Case*]
- Adam Roberts, ‘Transformative Military Occupation: Applying the Laws of War and Human Rights’, 100 *A.J.I.L.* (2006) 580 (optional)

### **Class 12:**

#### **Application of Human Rights Norms in Times of Armed Conflict**

The class will discuss the theory and practice concerning the co-application of human rights law and IHL in times of armed conflict, emphasizing the centrality of ‘effective control’ as a concept governing such potential co-application and assessing the implications of co-application

*Reading materials:*

- *Isayeva v. Russia*, Judgment of 24 Feb. 2005 (E.C.H.R.), para. 10-42, 168-200 [See Case No. 282, ECHR, *Isayeva v. Russia*]
- *Al-Skeini v. Secretary of State for Defence*, [2007] UKHL 26
- Michael J. Dennis, 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation', 99 *A.J.I.L.* (2005) 119
- Orna Ben Naftali and Yuval Shany "Living in Denial: The Application of Human Rights in the Occupied Territories", 37(1) *Israel Law Review* 17-58, 70-87(2003-2004)(optional)

### **Class 13-14 :**

#### **Enforcement of IHL**

The class will discuss the problem of enforcing IHL and survey different institutions designed to improve upon the dismal record of compliance of many parties to many conflict. The class will focus, in particular, on development in the field of international criminal law – e.g., the establishment of the ICC – which may serve as effective avenue for enforcing IHL norms.

#### *Reading materials:*

- *R v. Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinoche Ugarte* [1999] 2 All E.R. 97 (H.L.) (opinions of Lord Browne-Wilkinson and Lord Millet)
- G. Triggs, 'Australia's War Crimes Trials: All Pity Choked', in T.L.H. McCormack and G.J. Simpson, eds., *The Laws of War Crimes* (1997) 123
- A. Cassese, *International Criminal Law* (2nd ed., 2008) 317-335

### **Class 15:**

#### **Critical Perspectives**

The class will offer some concluding observations on the IHL discourse and on the degree in which it limits or legitimizes power.

#### *Reading materials:*

- David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (2005) 284-323
- David Kretzmer, *The Occupation of Justice* (2002) 19-29