

Developed by Professor Kate Jastram, University of Berkeley, Faculty of Law (United States)

"I didn't know what the parameters of the law were anymore."

Moazzam Begg, after signing a confession obtained by torture, in *Enemy Combatant: My Imprisonment at Guantanamo, Bagram, and Kandahar* (2006), p. 200.

Overview

International Humanitarian Law (IHL), also known as the Law of Armed Conflict, is a set of rules which seek, for humanitarian reasons, to limit the effects of war. It protects persons who are not, or are no longer, participating in the hostilities and restricts the means and methods of warfare. We will discuss rules regulating the conduct of international and other armed conflicts; the historical development of restraints on armed conflict; the distinction between rules governing when to go to war (recourse to armed coercion) and those governing how it should be fought (conduct of armed hostilities); the protections afforded by the 1949 Geneva Conventions and the 1977 Protocols to combatants and noncombatants, including civilians, POWs, the wounded, and the sick; the role of the International Committee of the Red Cross; and the relationship of IHL to other areas of public international law such as human rights and refugee law. We will also discuss current problems facing IHL such as its applicability to non-international armed conflict, the "war on terror", and the Guantanamo detainees. We will consider the means of implementation and enforcement of IHL, including the international tribunals for the former Yugoslavia and Rwanda, and the Statute of the International Criminal Court.

Course Materials

- O'Connell, *International Law and the Use of Force*, 2nd ed. (2009). Available at bookstore. Unless otherwise indicated, reading assignments refer to this.
- Other materials as assigned. Please be aware that we will make extensive use of supplements. Students should devote a paper binder and/or a virtual folder to the additional readings, and allow enough time to print and/or download when preparing for class.
- bSpace page. Please check it regularly for updates, as well as for links to readings.

Books and films on reserve

- *Nuremberg: Tyranny on Trial* (1995). (50 min)

- *The Reckoning: The Battle for the International Criminal Court* (2009). (100 min)
- *Taxi to the Dark Side* (2007). (106 min)
- *Begg, Enemy Combatant: My Imprisonment at Guantanamo, Bagram and Kandahar* (2006).
- Gardam and Jarvis, *Women, Armed Conflict and International Law* (2001).
- Lagouranis and Mikaelian, *Fear Up Harsh: An Army Interrogator's Dark Journey Through Iraq* (2007).
- Lewis, ed., *The War on Terror and the Laws of War: A Military Perspective* (2009).
- Wright, *Generation Kill: Devil Dogs, Iceman, Captain America, and the New Face of American War* (2004).
- Yoo, *War by Other Means: An Insider's Account of the War on Terror* (2006).

I. Introduction: Why study IHL?

Goals for the course (mine and yours) and course requirements

Reading: Introduction, pp. v-vii.

II. Nuremberg: Tyranny on Trial (1995)

Why start with Nuremberg?

Assignment:

Film to be screened in class (45 min)

Reading:

(22 pp.) Ch. 4, pp. 146 (start with 1st full para)-159; Ch. 5, 195-202.

Questions:

#5 – 7 on pp. 160-61 (7 is a preview, to think about)

Problem:

#8 on pp. 218-9.

III. Basics of public international law

Reading:

(16pp) Ch. 6, pp. 223, 229-33, 239-42, 245-8.

Questions:

#1 and 3 on p. 272.

IV. The relevance of law to war

Reading:

(20 pp) Ch. 3, pp. 94-114.

Questions:

#1, 2, and 4 on pp. 114-5, plus:

Based on the reading, what do you think of the argument that international law is an “academic sham”?

What aspects of international law might support that argument?

What are some of the criticisms of *jus in bello* and do you think they are justified? Would your answer have been different before the “Global War on Terror”?

V. Gender perspectives on IHL

Reading:

(32pp) Gardam and Jarvis, Ch. 1 on “Women, Armed Conflict and International Law” pp. 1-18 in *Women, Armed Conflict and International Law* (Kluwer, 2001). On reserve.

Myers, “Living and Fighting Alongside Men, and Fitting In”, *New York Times*, 17 August 2009. On bSpace.

Buss, “Rethinking ‘Rape as a Weapon of War’”, *Feminist Legal Studies* (2009) 17:145-163, read pp. 153-61 on the Hyper-visibility and Un-visibility of Sexual Violence, and the Conclusion. On bSpace.
Security Council Resolution 1325 (2000). Skim. On bSpace.

Questions:

How do you assess the claim that IHL has failed women? Does “The Raped Woman” help disguise or highlight sexual violence in armed conflict? Would you expect female soldiers to be more or less likely to follow the rules of *jus in bello*? What tools are available to the international community to address the particular problems of women in armed conflict?

VI. Historical development of *jus ad bellum*

Reading:

(37pp) Ch. 4, pp. 118-38 (skim Treaty of Westphalia, Vienna Congress Treaty, 1907 Hague Convention).

Read also excerpts from 3 articles in the *International Review of the Red Cross* (2005) No. 858, as follows. On bSpace.

(1) al-Zuhili, “Islam and International Law”, read pp. 278-82.

(2) Sinha, “Hinduism and IHL”, read 287-91.

(3) Solomon, “Judaism and the Ethics of War”, skim 296-309 for discussions of *jus ad bellum*.

Questions:

2 on pp. 159-60. Same question, using readings on Islam, on Hinduism, and on Judaism.

VII. When does the law of armed conflict apply?

Reading:

(31pp) Ch. 1, pp. 2-4 (stop at top of p. 4 before Brownlie excerpt), 7-19.

Wingfield, “When is a Cyber Attack an ‘Armed Attack?’ Legal Thresholds for Distinguishing Military Activities in Cyberspace.” *Cyber Conflict Studies Ass’n* (Feb. 1, 2006). Skim Appendix. On bSpace.

Questions:

#s 3, 4, 6, 8, and 9 on pp. 19-21.

VIII. Elements of self-defense: Iraq 1990

Reading:

(29pp) Ch. 2, pp. 22-51.

Questions:

#1, 4, and 5 on pp. 92-3 (re Iraq I)

IX. Elements of self-defense, cont'd**Reading:**

(34pp) Ch. 7, pp. 274 (1st ¶), 280-310, 322-5.

Questions:

#s 1, 3, and 4 on pp. 365-6.

X. Security Council authorization: Iraq 2003**Reading:**

(41pp) Ch. 2, pp. 51-92.

Questions:

#1, 4, 5, and 6 on pp. 92-3.

XI. Security Council authorization, cont'd**Reading:**

(17pp) Ch. 8, pp. 369-71, 379-80, 415-29.

Question:

#7 on p. 431.

XII. Humanitarian intervention and Responsibility to Protect (R2P)**Reading:**

(14pp) Ch. 6, pp. 262-3. Ch. 7, pp. 362-5.

Global Centre for the Responsibility to Protect, FAQ. On bSpace.

Malcomson, "When to Intervene", *New York Times*, Dec. 14, 2008. On bSpace.

Question:

Are the five criteria of legitimacy for military action in the notion of Responsibility to Protect, set forth in the FAQ as "Under what circumstances would military action be considered?" consistent with or even duplicative of existing law on the use of force, or do they represent an advance in thinking?

XIII. Historical development of jus in bello**Reading:**

(38pp) Ch. 5, pp. 162-72 (skim Lieber Code, but note Art. XVI), 177-83 (skim Hague Annex and Treaty of Versailles), 188 (bottom) – 195 (skim *Quirin*), 202-17.

Questions:

#s1, 3, 4, 5, and 6 on pp. 217-8.

XIV. Conduct of hostilities: Legal framework

Reading:

(35pp) Henckaerts, "Study on customary international humanitarian law," 87 *Int'l Rev. Red Cross* No. 857 (March 2005) 175-84, 187-97. (19pp) On bSpace. Note also that other excerpts from this article and some of the Rules appear in Ch. 9, pp. 486-99 of the casebook.

Two articles in Vol. 46 of *International Legal Materials*, at

<http://www.heinonline.org/HOL/Page?>

[handle=hein.journals/intlm46&id=1&size=2&collection=journals&index=journals/intlm](http://www.heinonline.org/HOL/Page?handle=hein.journals/intlm46&id=1&size=2&collection=journals&index=journals/intlm). You may choose the beginning page of each article from the drop down menu at the top of the page.

Bellinger and Haynes, "US Joint Letter re Customary International Law Study," 46 *ILM* 511-16 (2007). (6pp, including Introductory Note by Dennis Mandsager).

Henckaerts, "Response to Bellinger/Haynes Comments," 46 *ILM* 957-66 (2007). (10pp, including Introductory Note by Dennis Mandsager).

Note generally that excerpts from the Geneva Conventions and Protocols can be found in the casebook, pp. 440-65.

Question:

The ICRC and the Bush Administration differed on various aspects of the ICRC's *Study on Customary IHL* (2005). Without going into the merits of the actual rules identified by ICRC and disputed by the US, what are their respective positions on state practice and *opinio juris* as a means of methodology, and on the formulations of the rules and the implications of the Study?

XV. Means and methods of warfare: Targeting

Reading:

(24pp) Lewis, "The Law of Aerial Bombardment in the 1991 Gulf War," 97 *Am.J.Int'l.L.* 481 (July 2003). On bSpace. Skip Part II on Preparations. In Part III on Implementation, in the "Target Sets" subsection, read only "Leadership," "Command, control and communication sites," and "Electricity."

Explanatory note:

Horner's Black Hole staff = Lt. General Charles Horner's planning cell in Riyadh

JFACC = Joint forces air component commander

CENTAF = Air Force Component Central Command.

Questions:

How does Lewis evaluate the criticisms of the Al Firdos attack and the Iraqi electrical systems attacks? What is your opinion? Do you think that JAGs did (or can) play a meaningful role in ensuring compliance with IHL? What are the factors supporting, and undermining, the JAG's law-compliance role? What other responsibilities do JAGs have?

Rules of engagement

Reading: Ch. 11, p. 663, Note 8.

Read also Wright, *Generation Kill* (2004), p. 32 (last para) to mid-p. 33, and p.166 (start at bottom with "Still extremely worried...") through p. 176. On reserve.

Explanatory note:

Wright is a journalist who was embedded with a Marines special forces unit operating in Iraq at the very beginning of the US-led invasion, in advance of the main body of ground troops. In this excerpt, they were ordered to clear an airfield reportedly defended by anti-aircraft artillery (AAA) and tanks, in anticipation of a British parachute brigade's arrival.

Names:

It is helpful to have a sense of the chain of command, in descending order. The individuals' names are not so important (the author uses nicknames for officers who do not come off well in the book).

First Reconnaissance Battalion commander: Ferrando

Bravo Company commander: "Encino Man"

2nd platoon commander: Fick ("Captain America" is commander of the 3rd platoon)

2nd platoon's second-in-command: Gunny Wynn

Team leader: Colbert

Team gunner: Trombley

Acronyms:

MOPP: chemical weapons protective gear

ROE: rules of engagement

SAW: machine gun (squad automatic weapon)

Questions:

Do you think Colbert's order to Trombley to shoot was justified as a military necessity? Was it a proportionate response to the threat they perceived? Do you agree with Wright's conclusion (on p. 176) about the rules of engagement?

XVI. Richard B. Jackson, Colonel, US Army (Retired)

Special Assistant for Law of War Matters, Office of the Judge Advocate General

Reading:

(20pp) Jackson, "Restoring Law to the Battlefield: The Morality and Ethics of the Global War on Terror," 50 *South Texas L. Rev.* 825-36 (2009).

Skim Jackson, "Stick to the High Ground," *The Army Lawyer* (July 2005). Both on bSpace.

XVII. Lawyers and the use of force**Reading:**

(38pp) All four articles are on bSpace.

Krauss and Lacey, "Utilitarian vs Humanitarian: The Battle Over the Law of War," 32 *Parameters* 73-85 (Summer 2002).

Bilder and Vagts, "Speaking Law to Power: Lawyers and Torture," 98 *Am.J.Int'l L.* 689-95 (2004).

Paust, "Prosecuting the President and His Entourage," 14 *ILSA J. Int'l & Comp. L.* No. 2, 539-46 (Spring 2008).

Kramer and Schmitt, "Lawyers on Horseback? Thoughts on Judge Advocates and Civil-Military Relations," 55 *UCLA L.Rev.* 1407, 1423-36 (2008).

Questions:

At the Nuremberg Trial, von Ribbentrop was convicted for his legal memoranda justifying aggressive war.

(1) What do you think are or should be professional and ethical responsibilities of various types of lawyers in this area of law and policy? Consider civilian attorneys working in various government agencies, military lawyers (JAGs), ICRC legal advisers, human rights advocates, and "regular" non-expert lawyers.

(2) Of the various categories of lawyers listed above, which group(s) have been most skeptical about the law of war? Which are the strongest supporters? What strengths or perspectives would you expect each of these groups to bring? What weaknesses or blind spots? Were you surprised by the views expressed in any of the readings? If you think the law of war needs reform or revision, what role could or should each of these groups play?

XVIII. *Taxi to the Dark Side*(2007)

Assignment:

The film will be screened in class. It is 106 minutes, so one showing will take up all of Monday and part of Wednesday. You are also free to watch it on your own time instead of during the regularly scheduled class periods. It is on reserve.

Question:

Please write a brief (3-5pp) reflection essay on the film, and submit it to my assistant. What does the film reveal about the role played by military attorneys, civilian attorneys inside and outside the government, and policymakers, in Dilawar's death and/or in US detention and interrogation policies? I've seen the film many times, so you do not need to write a review in the sense of describing the film for someone who has not seen it. You may of course make reference to particular scenes or people in order to illustrate a point.

XIX. Protection of civilians in hostilities

Reading:

(23pp) Review GCIV:32 on p. 448.

Ch. 10 Intro, pp. 510-1; *Calley*, pp. 517-28.

Review API:51(3) on p. 459.

Wright, *Generation Kill* (2004), pp. 102- 104. On reserve.

Eichensehr, "On Target? The Israeli Supreme Court and the Expansion of Targeted Killings," 116 *Yale L. J.* 1873-81 (2007). On bSpace.

Questions:

- (1) *Calley* was decided under US law. What principle(s) of IHL was/were involved? Note that it was a 2-1 decision – how would you respond to the concerns expressed in the 1st paragraph of the dissent?
- (2) In the *Generation Kill* excerpt, were the three men killed combatants or civilians? If civilians, what factors would indicate that they were directly participating in the hostilities? What factors might cause you to doubt that they were directly participating in hostilities?
- (3) The Israeli Supreme Court interpreted "direct participation in hostilities" in the context of targeted killings. How might the Court's interpretation apply in other, non-'terrorist' situations, for example, the scenario described in the *Generation Kill* excerpt? What elements of Eichensehr's critique are particularly persuasive, or questionable, to you?

XX. Protection of civilians under occupation

Reading:

(30pp) Ch. 10, p. 554 Intro (top para); pp. 559-89.

Questions:

#7 on pp. 592-3.

XXI. Martin de Boer, Philip Sundel, and Paul Kong

Respectively, Deputy Head of Delegation of the International Committee of the Red Cross for the US and Canada; Deputy Legal Adviser; Public Affairs Officer.

Direct participation in hostilities

Reading:

Ch. 9, pp. 499-503.

ICRC, "Clarifying the notion of direct participation in hostilities," June 30, 2009. On bSpace.

XXII. Rights and duties of belligerents

Reading:

(40pp) *Hamdan*, 548 US 557, 628-35 (2006), starting with subsection "ii" until the end of the majority opinion.

Milanovic, "Lessons for human rights and humanitarian law in the war on terror: comparing *Hamdan* and the Israeli Targeted Killings case" 89 (no. 866) *ICRC Review* 373-89 (June 2007). On bSpace.

Begg, *Enemy Combatant: My Imprisonment at Guantanamo, Bagram, and Kandahar* (2006), pp. 153-62, 196-202. On reserve.

Explanatory note:

You may remember Begg from his appearance in *Taxi to the Dark Side*. He is a second-generation British-born Muslim of Pakistani descent. He was apprehended at his family home in Pakistan in January 2002, and held without charge for three years in US military prisons in Afghanistan and then Guantanamo. In the first excerpt, Begg recounts some of his interrogation and torture at Bagram. In the second, he describes the 'confession' he ultimately signed at Guantanamo.

Questions:

Type of conflict: What do the various readings conclude as to whether the "global war on terror" is an armed conflict? If it is an armed conflict, is it international, non-international, or a third category, and what law applies? If it is not an armed conflict, what law applies?

Status of "fighters": What do the various readings conclude regarding the status of alleged members of the Taliban, of al-Qaeda, and of other terrorist groups – are they combatants, civilians, or a third category? Are they entitled to POW status under GCIII? If not, what rules of law apply to their detention and interrogation? Does Begg know his actual legal status? What is his understanding of the legal rules that govern his detention and interrogation?

XXIII. The torture memos

Reading:

(48pp) Ch. 9, In GCIII: Common Article 3 on p. 442; arts. 13, 14, and 17 on pp. 443-4; art. 130 on pp. 445-6. In GCIV, arts. 31 and 32, on p. 448; art. 147 on pp. 449-50.

Jackson, "Interrogation and Treatment of Detainees in the Global War on Terror," Ch. 4 in *The War on Terror and the Laws of War: A Military Perspective* (Lewis, ed.), pp. 137-59 (2009). On reserve.

Yoo, "Interrogation: Law," Ch. 7 in *War by Other Means*, pp. 168-87 (2006). On reserve.

Lagouranis, "Torture", Ch. 26 in *Fear Up Harsh*, pp. 242-9 (2007). On reserve.

Explanatory note:

You may remember Lagouranis from his appearance in *Taxi to the Dark Side*. He was an interrogator for the US Army who participated in the torture of Iraqi detainees at Abu Ghraib and other sites. His book is a first hand account of his personal experiences in and reflections on his time in Iraq.

Questions:

Based on today's reading as well as *Taxi to the Dark Side*, what legal, policy and political perspectives informed the views of the authors of the torture memos and those who opposed them? What impact did the torture memos have on foreign captives and their American captors?

XXIV. Enforcement

Reading:

(26pp) Ch. 9, pp. 479-86.

Schabas, *An Introduction to the International Criminal Court*, 3rd ed., "United States Opposition", pp. 24-32 (2007). On reserve.

Wald, "Foreword: War Tales and War Trials," 106 (no. 6) *Michigan L. R.* 901-12 (April 2008)

XXV. The Reckoning: The Battle for the International Criminal Court (2009) screened in class

XXVI. The Reckoning: conclusion and discussion

(Pope Gregory Mon)

Questions:

What resources, political, financial and otherwise, are available to the ICC Prosecutor? What elements of the Court's record so far might indicate an optimistic or disappointing future for this new institution? What does the Prosecutor's relationship with the Security Council suggest about the relative values of peace and justice?

XXVII. Guantanamo and other dilemmas: Reviewing the lessons of *jus ad bellum* and *jus in bello* in light of current events

(Pope Gregory Wed)

XXVIII. Review session

Final exam to be taken during a 4 hour period