

## International Law

Academic year 2020-2021

## Laws of War

### DI135 - Autumn - 6 ECTS

Wednesday 16h15 - 18h00

## Course Description

This course will focus on the concept of war in international law and as applied today in national law. We will use a draft version of my new book "War" which covers most aspects of the international law applicable to wars and armed conflicts. Starting with a look at the continuing relevance of the concept of War we will then examine how War became outlawed as an institution within international law and the use of force became regulated through the UN Charter with the most recent codification of the crime of aggression. Turning to the application of humanitarian law and the principles applicable to the conduct of hostilities, the focus is on the underlying references back to war - as has occurred with the notion of 'law of war detainees' in Guantanamo and Afghanistan and the targeting of objects and people from ISIS and other groups directly contributing to the 'war sustaining economy'. Particular attention will be paid to the traditional law of economic warfare at sea (Prize law) which allows for the seizure of enemy property and interception of all shipping to seize 'contraband of war'. Lastly we look at recent developments concerning war reparations and accountability war crimes. The aim is to evaluate the uses and abuses of the concept of war in law.

## > PROFESSOR

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## Syllabus

This class is open to international law MIL and international law PhD students. It is open to PhD students from another discipline who are doing a minor in international law.

## Course Requirements

The class will take place on Wednesdays from 16.15 to 18.00. Students are asked to prepare each class by reading the relevant chapters and materials. The Additional Readings are optional. Active participation in class is expected. Evaluation is by a final test (more details below).

## Materials

We will be using a draft of my forthcoming book entitled *War* (to be published in 2021 by Oxford). The book is designed for Graduate Institute students and so you are encouraged to send in comments where you think the text is not clear and could be improved or rearranged.

Draft Chapters will be posted on Moodle before each class in time for you to be able to read the relevant sections.

In addition, reading includes:

- Chapters from A. Clapham and P. Gaeta (eds), [\*The Oxford Handbook of International Law in Armed Conflict\*](#), (Oxford: OUP, 2014) - the book started out as lectures in Geneva and many of the original lectures can be viewed [here](#).
- Cases and materials from the online version of M. Sassòli, A.A. Bouvier, and A. Quintin, [\*How Does Law Protect in War?\*](#) Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law, 3rd edn, (Geneva: ICRC, 2011).

[An online introduction, available free in English, French, Russian and Arabic, with useful links in the online text is](#) Nils Melzer's *International Humanitarian Law: A Comprehensive Introduction* (Geneva: ICRC, 2016).

## Final evaluation

The final evaluation will consist of a written test. In the written test students will have to answer either an essay question or write a legal opinion based on a set of imagined facts. There will be one week to complete the test so the electronic files will be due by 6pm on 23 December. This test is based on the former written exam under exam conditions so:

- Students should take around two hours to answer the questions. The questions will not require research but rather reflection.
- The answers may be written either in English or in French.
- The answer must not exceed 2,500 words including footnotes and other references.

Further details on the exam will be provided during the year, including a mock set of questions to consider.

## The syllabus week by week

### Class 1 – Introduction

16 September

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#### Compulsory:

- Clapham, *War*, Preface
- The White House, [Remarks by President Obama at the National Defense University](#), 23 May 2013
- French Ministry of Foreign Affairs, [Speech by President Hollande before a Joint Session of Parliament](#), 13 November 2015 [consider and compare the use of the word “war” in the two instances] [French version available [here](#)]
- [Why we should shut down Guantanamo: Prison camp's jailer-in-chief makes jaw-dropping U-turn and says it should never have been built](#) *Daily Mail Online* 2013
- J. Gaillot and C. Gailliot, 'Asymmetry in Modern Combat: Explaining the Inadequacy of *Jus ad bellum* and *Jus in bello*', J. Gaillot, (ed), *Force Short of War in Modern Conflict*, (Edinburgh: Edinburgh University Press, 2019) 13-35

#### Optional:

- Edward Luttwak, ["Give War a Chance"](#), in *Foreign Affairs* (July/August 1999 issue)

### Class 2 – The Changing Meanings of War

23 September

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#### Compulsory:

- Clapham, *War*, Chapter 1 'The Changing Meanings of War'
- Q. Wright, ['Changes in the Conception of War'](#), vol. 18 *AJIL* (1924) 755-67
- *Dalmia Cement Ltd v National Bank of Pakistan*, Award, Case No 1512, (1984) 67 ILR 611, 18 December 1976
- WTO Panel, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R, 5 April 2019
- Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (1989), [available here](#)

#### Optional:

- *United States of America and State of California, v Shell Oil Company*, No 00-55027, United States Court of Appeals, Ninth Circuit, 294 F.3<sup>rd</sup> 1045 (2002) [paragraphs 75-82](#)
- *Re September 11 Litigation*, Docket 10-4197, United States Court of Appeals for the Second Circuit (2014), [available here](#)
- A.H. Hudson, 'Effect on Commercial Law of Non-Declaration of War', in P. Rowe, (ed), *The Gulf War 1990-91 in International and English Law*, (London: Routledge, 1993) 333-47
- Christopher Greenwood, ["The Concept of War in Modern International Law"](#), 36 *ICLQ* (1987), pp. 283-306

- P. Haggemacher, 'On the Doctrinal Origins of *Ius in Bello*: From Rights of War to the Laws of War', in T. Marauhn and H. Steiger, (eds), *Universality and Continuity in International Law*, (The Hague: Eleven, 2011) 325-58

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### **Class 3 – The Legal Significance of Declarations of War and Neutrality**

**30 September**

Compulsory:

- Clapham, War, Chapter 2, 'The Legal Significance of Declarations of War and Neutrality'
- Hague Convention (III) on the Opening of Hostilities of 1907, [available here](#)
- Institut de Droit International, [1906 Resolution on the declaration of war](#)
- Paul Seger, "The Law of Neutrality" in the A. Clapham and P. Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (Oxford: OUP, 2014)
- Institut de Droit International, [1906 Resolution on the regime of neutrality](#)
- [Summary of Switzerland's neutrality policy during the Iraq conflict](#) (2005)

Optional:

- [Declarations of War](#) and Authorizations for the Use of Military Force: Historical Background and Legal Implications Jennifer K. Elsea and Matthew C. Weed (2014) (US Law)
- [Swiss Neutrality](#) (brochure for the general public)
- Christopher Greenwood, "The Applicability of International Humanitarian law and the Law of Neutrality to the Kosovo Campaign", 78 *International Law Studies* (2002), pp. 35-69

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### **Class 4 – Outlawing War**

**7 October**

Compulsory:

- Clapham, War, Chapter 3, 'Outlawing War'
- Baty, 'Abuse of Terms: "Recognition": "War"', 30 *AJIL* (1936) 377-99
- Hathaway and Baty 'International law and its transformation through the outlawry of war', *International Affairs* (2019) 45-62

Optional:

- R. Werner, 'Just War Theory: Going to war and collective self-deception', in F. Allhof, N. G. Evans, and Henschke, (eds), *Routledge Handbook of Ethics and War: Just war theory in the 21st century*, 35-46, (Abingdon: Routledge, 2013)
- Levinson 'The Legal Status of War', *The New Republic* (9 March 1918) 171-73

Compulsory:

- Clapham, *War*, Chapter 4, 'Use of Force After the UN Charter' sections 4.1 and 4.2
- Terry Gill '[Twelve Key Questions on Self-Defense against Non-State Actors](#)' *International Law Studies* (2020)
- William H. Taft IV, '[Self-Defense and the Oil Platforms Decision](#)', 29 *Yale J. Int'l L.* (2004)
- Akande & Milanovic, '[The Constructive Ambiguity of the Security Council's ISIS Resolution](#)' *EJIL Talk* 2015

**Class 6 – Use of Force: Non-Intervention, Aggression and Humanitarian Intervention****21 October**

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Compulsory:

- Clapham, *War*, Chapter 4, 'Use of Force After the UN Charter' sections 4.3, 4.4, 4.5
- Harold H. Koh, "[The War Powers and Humanitarian Intervention](#)", 53 *Houston Law Review* (2016), pp. 971-1033 (pages 998-1033)
- Kevin Jon Heller '[Why Unilateral Humanitarian Intervention Is Illegal and Potentially Criminal](#)' *Opinio Juris* 2017

Optional:

- J. McMahan, 'Can Soldiers be Expected to Know Whether their War is Just?', in F. Allhof, N. G. Evans, and Henschke, (eds), *Routledge Handbook of Ethics and War: Just war theory in the 21st century*, (Abingdon: Routledge, 2013) 13-22.
- Ntina Tzouvala '[TWAIL and the "Unwilling or Unable" Doctrine: Continuities and Ruptures](#)' *AJIL Unbound* 2015
- Michael Reisman, "[Reflections on the Judicialization of Aggression](#)", in (2014) *Faculty Scholarship Series*, paper 4926
- M. Jamnejad and M. Wood, 'The Principle of Non-intervention', vol. 22 *Leiden Journal of International Law* (2009) 345-81
- C. Kreß, 'On the Activation of the ICC Jurisdiction over the Crime of Aggression', vol. 16 *JICJ* (2018) 1-17

**Class 7 – War Powers in National Law****28 October**

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Compulsory:

- Clapham, *War*, Chapter 5, 'War Powers in National Law'
- *Harold H. Koh, "The War Powers and Humanitarian Intervention" 53 Houston Law Review (2016), pp. 971-1033 (pages 971-998)*

- House of Lords of the United Kingdom, [Waging war: Parliament's role and responsibility](#), 2005 (especially Appendix 4: Parliamentary Oversight of the Deployment Power: International Comparisons)
- Sandra Dieterich, Hartwig Hummel and Stefan Marschall, [Parliamentary War Powers: A Survey of 25 European Parliaments](#), (DCAF, Geneva, 2010)
- Scott R Anderson, [When Does the President Think He Can Go to War With Iran?](#), 24 June 2019
- Brian Egan and Tess Bridgeman, [Top Experts' Backgrounder: Military Action Against Iran and US Domestic Law](#), June 21, 2019
- Amin v Brown, Decision on preliminary question, [2005] EWHC 1670 (Ch), ILDC 375 (UK 2005), 27 July 2005, United Kingdom; England and Wales; High Court [EWHC]; Chancery Division [ChD], [available here](#), paragraphs 21ff

Optional:

- R. Ekins, P. Hennessey, K. Mahmood, and T. Tugendhat, [Aiding the Enemy: How and why to restore the law of treason](#), (London: Policy Exchange, 2018)

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**Class 8 – Triggering the Law of Armed Conflict**

**4 November**

Compulsory:

- Clapham, *War*, Chapter 6, 'Triggering the Law of Armed Conflict'
- Andrew Clapham, "The Concept of International Armed Conflict", in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds.), *The 1949 Geneva Conventions: A Commentary* (Oxford, Oxford University Press, 2015)
- Lindsay Moir, "The Concept of Non-International Armed Conflict" in *The 1949 Geneva Conventions: A Commentary*

Optional:

- *Prosecutor v Boškoski* (ICTY) excerpted in [How does Law Protect in War?](#) as case 220 at page 2015 of volume III
- Marija Sulce '[The Syrian Armed Conflict: Nearing the End](#)' in A. Bellal, *The War Report, Armed Conflict in 2018*, Geneva Academy of International Humanitarian Law and Human Rights (January 2019)
- Marko Milanovic "The Applicability of the Conventions to 'Transnational' and 'Mixed' Conflicts" in *The 1949 Geneva Conventions: A Commentary*

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**Class 9 – The Conduct of Hostilities: Distinction and Proportionality**

**11 November**

Compulsory:

- Clapham, *War*, Chapter 7, 'Warfare – The Conduct of Hostilities', sections 7.1 and 7.2

- Kenneth Watkin, "Targeting 'Islamic State' Oil Facilities", *90 International Law Studies* (2016), pp. 499-513
- Ryan Goodman, "The Obama Administration and Targeting "War-Sustaining" Objects in Non-International Armed Conflict", 110 (4) *AJIL* (2016), pp. 663-679
- Jann K. Kleffner, "[Section IX of the ICRC Interpretive Guidance on Direct Participation in Hostilities: The End of \*Jus in Bello\* Proportionality as We Know It?](#)", 45 *Israel Law Review* (2012), pp. 35-52

Optional:

- Jennifer O'Connor, "[Applying the Law of Targeting to the Modern Battlefield](#)", lecture at NYU (Nov 2016)
- Luban, 'Risk Taking and Force Protection', in Benbaji and Sussmann, (eds), *Reading Walzer*, (2014) 277-30

**Class 10 – The Conduct of Hostilities: Necessity, the Morality of Killing, and Prohibited Weapons**

**18 November**

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Compulsory:

- Clapham, *War*, Chapter 7, 'Warfare – The Conduct of Hostilities', sections 7.3, 7.4 and 7.5
- Ryan Goodman, "The Power to Kill or Capture Enemy Combatants", 24 *EJIL* (2013), pp. 819-853
- Michael N. Schmitt, "[Wound, Capture, or Kill: A Reply to Ryan Goodman's 'The Power to Kill or Capture Enemy Combatants'](#)", 24 *EJIL* (2013), pp. 855-861
- D. Rodin, 'The Moral Inequality of Soldiers: Why *jus in bello* Asymmetry is Half Right', in D. Rodin and H. Shue, (eds), *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, (Oxford: OUP, 2008) 44-68

Optional:

- Seth Lazar, [War](#) in Stanford Encyclopedia of Philosophy 2016  
(note this is not an international piece but rather an example of influential revisionist just war theory and a more general encyclopaedia entry explaining the different approaches in contemporary just war theory)

**Class 11 – Belligerent Rights in Naval Warfare and the Future of Economic Warfare**

**25 November**

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Compulsory:

- Clapham, *War*, Chapter 8, 'Belligerent Rights in Naval Warfare and the Future of Economic Warfare'
- W. Heintschel von Heinegg, 'Maritime Warfare', in A. Clapham and P. Gaeta, (eds), *The Oxford Handbook of International Law in Armed Conflict*, (Oxford: Oxford University Press, 2014) 145-81



Optional:

- 'Dinstein, 'Booty in Warfare', *MPEPIL* (2015)
- Heintschel von Heinegg, 'Blockade', *MPEPIL* (2015)
- V. Lowe and A. Tzanakopoulos, 'Economic Warfare', *MPEPIL* (2013)

**Class 12 – Victims of War**

**2 December**

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Compulsory:

- Clapham, *War*, Chapter 9, 'Victims of War'
- [Serdar Mohammed](#) UK Supreme Court 2017
- Aeyal Gross, "The *Righting* of the Law of *Occupation*, in *Nehal Bhuta* (ed), "The Frontiers of Human Rights" (Oxford, 2016)
- Yutaka Arai-Takahashi, Preoccupied with occupation: critical examinations of the historical development of the law of occupation, 94 *International Review of the Red Cross* (2012) pp. 51-80

Optional:

- Adam Roberts, "[Transformative Military Occupation: Applying the Laws of War and Human Rights](#)", 100 *American Journal of International Law* (2016) pp. 580-622
- Steven R. Ratner, "[Law Promotion Beyond Law Talk: The Red Cross, Persuasion, and the Laws of War](#)", 22 *EJIL* (2011), pp. 459-506

**Class 13 – Accountability for Violations of the Laws of War**

**9 December**

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Compulsory:

- Clapham, *War*, Chapter 10, 'Accountability for Violations of the Laws of War'
- Chapter 29 of *The Oxford Handbook of International Law in Armed Conflict*, Paola Gaeta, "War Crimes and Other International 'Core' Crimes" (*focusing on war crimes*)
- Chinkin, 'Gender and Armed Conflict', in Clapham and Gaeta, (eds), *The Oxford Handbook of International Law in Armed Conflict*, (2014) 675-99
- I. Henderson, 'The Firebombing of Tokyo and Other Japanese Cities', Y. Tanaka, T. McCormack, and G. Simpson, (eds), *Beyond Victor's Justice The Tokyo War Crimes Trial Revisited*, (Leiden: Nijhoff, 2010) 311-21

Optional

- Boister, 'Punishing Japan's 'Opium War-Making' in China: The Relationship between Transnational Crime and Aggression at the Tokyo Tribunal', Tanaka, McCormack, and Simpson, (eds), *Beyond Victor's Justice The Tokyo War Crimes Trial Revisited*, (2010) 323-49
- Luedke and Logan, "'That thing of human rights": discourse, emergency assistance, and sexual violence in South Sudan's current civil war', 42 *Disasters* (2018) 99-118



- Nicola Henry, [The Fixation on Wartime Rape: Feminist Critique and International Criminal Law](#) (Social & Legal Studies 2014)
- Marsha Henry, [ten-reasons-not-to-write-your-masters-dissertation-on-sexual-violence-in-war/](#)
- Mariella de la Cruz Taboada, [10-reasons-why-i-am-writing-a-dissertation-on-sexual-violence-in-war/](#)
- ICC, Trial Chamber VI, [Decision](#), The Prosecutor v. Bosco Ntaganda, ICC-01/04-02/06-2359, 08 July 2019 (to get a flavour of what a war crimes judgment looks like)

## **Class 14 – Conclusions on the significance of war in international law**

**16 December**

### **Compulsory:**

- Clapham, *War*, Conclusion
- Jessup 'Intermediacy', 23 *Nordisk Tidsskrift for International Ret* (1953) 16-26, at 25

### **Optional:**

- Levenfeld, 'Israel's Counter-Fedayeen Tactics in Lebanon: Self-Defense and Reprisal under Modern International Law', 21 *Columbia Journal of Transnational Law* (1982), pp. 1-48