

Teaching a Law of War Class

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Introduction

When I was a managing editor of the *Saint Louis University Law Journal* in 2001, I had the privilege of working on an issue on teaching property law. This issue, part of an annual series on teaching specific areas of the law, was aimed at helping professors teach the basic property law course.¹ My experience as an editor for the issue gave me a great appreciation for the value of articles aimed at helping teachers teach specific classes. Because I do not expect the *Saint Louis University Law Journal* to publish an entire issue on teaching the law of war² anytime soon, I offer this brief article to assist teachers who either are teaching or are considering teaching a survey class on the law of war. Also, by submitting this article for publication in *The Army Lawyer*, I hope it may inspire military judge advocates, especially those in the Reserve component, to consider teaching a law of war class as adjunct professors at American law schools. By teaching this course, Army (and other service) lawyers can do a great service to law schools and students at a time when interest in the law of war is high and understanding low.³ In addition, their presence in the classroom can help recruit and mold potential members of our Judge Advocate General's Corps by introducing law students to this dynamic and exciting area of law and practice.

¹ See 44 ST. LOUIS U. L.J. 1193 (2000) (on teaching contracts); 45 ST. LOUIS U. L.J. 709 (2001) (on teaching torts); 46 ST. LOUIS U. L. J. 561 (2002) (on teaching property); 47 ST. LOUIS U. L.J. 3 (2003) (on teaching civil procedure); 48 ST. LOUIS U. L.J. 1143 (2003–2004) (on teaching criminal law); 49 ST. LOUIS U. L.J. 633 (2004–2005) (on teaching constitutional law); 50 ST. LOUIS U. L.J. 995 (2005–2006) (on teaching evidence); 51 ST. LOUIS U. L.J. 935 (2006–2007) (on teaching professional responsibility and ethics); 52 ST. LOUIS U. L.J. 715 (2007–2008) (on teaching intellectual property law); 53 ST. LOUIS U. L.J. 693 (2008–2009) (on teaching federal courts).

² This article uses the term “law of war” to describe the body of law that regulates a state’s conduct of hostilities. This body of law is also referred to as the law of armed conflict (LOAC) and international humanitarian law (IHL).

³ After 11 September 2001, law student and faculty interest in the law of war has increased substantially; however, coverage in U.S. law schools remains limited. According to a recent study conducted by the International Committee of the Red Cross and The American University Washington College of Law, only thirty-five of seventy-three law schools polled (less than half) offered a stand-alone course in the law of war or international humanitarian law (IHL). HADAR HARRIS, AM. UNIV. WASH. COLL. OF LAW, & LIZ DEMAREST, INT’L COMM. OF THE RED CROSS, TEACHING INTERNATIONAL HUMANITARIAN LAW AT U.S. LAW SCHOOLS 7–8 (n.d.) [hereinafter TEACHING IHL AT U.S. LAW SCHOOLS], available at <http://www.wcl.american.edu/humright/center/documents/IHLSurveyReort.pdf?rd=1>.

As a professor in the International and Operational Law Department (ADI)⁴ at The Judge Advocate General’s Legal Center and School (TJAGLCS), I teach a two-credit law of war class entitled “Advanced Topics in the Law of War” to an outstanding group of judge advocates and University of Virginia (UVA) law students each year. This course is always popular among the TJAGLCS LL.M. students and tends to draw the best and brightest, and most operationally experienced, members. In addition, having UVA law students in the class is both a great plus and a challenge because it means the class is composed of students with vastly different experience levels—from 1Ls with no previous exposure to the law of war to experienced judge advocates coming off their second or third deployment where they advised commanders on the law of war. Typically between fifteen and thirty members are enrolled in the class, with the ideal class size being at the lower end of that range. The class meets weekly for two hours for fourteen weeks beginning in January. In this article, I will discuss class structure, class materials, conducting the class, and evaluation. However, before I get into the nuts and bolts of the class, I would like to spend a few moments describing the reasons for teaching a survey class on the law of war.

Why Teach a Law of War Survey Course?

Obvious reasons exist for teaching a law of war class at TJAGLCS, which I will not belabor. If you are a law professor, or perhaps a judge advocate looking to get involved in teaching, you should consider teaching such a class. One need not spend much time reading the headlines of major newspapers to realize the significance of this body of law to a host of matters affecting our national security, particularly post-9/11. As I write this article, members of Congress are debating whether the Obama Administration should have detained and interrogated Christmas bomber Umar Farouk Abdulmutallab as an enemy combatant under the law of war or arrested and Mirandized him as a criminal

⁴ The International and Operational Law Department (ADI) at The Judge Advocate General’s Legal Center and School is the only department of its kind in the world. This is partly because The Judge Advocate General’s Legal Center and School is the only school of its kind in the world. The ADI is one of four departments at the school dedicated to a particular subject matter—in this case, international and operational law. The ADI is composed of operationally experienced judge advocates from all four services (Army, Navy, Air Force, and Marines) and aims to prepare judge advocates, our primary student population, to advise commanders and train servicemembers on law of war matters.

under U.S. domestic law. Newspapers are reporting on civilian casualties associated with targeted killings in Pakistan and airstrikes in Afghanistan. The 9/11 mastermind Khalid Sheikh Mohammed is awaiting a decision whether his trial will be in federal court or a military commission while the men responsible for the USS *Cole* attack await their trials by military commission at a location yet to be determined. States are turning more and more to robots and the tools of cyberspace to carry out attacks to which the application of the laws of war is unclear. Since 9/11, hardly a day has gone by without a major news story that does not in some way have a law of war component or question embedded within it.

Despite this, based on a recent survey conducted by the International Committee of the Red Cross (ICRC) and The American University Washington College of Law, less than half of U.S. law schools offer a stand-alone course on the law of war.⁵ Instead, as reported in the study, it is more common to include some limited coverage of the law of war in a course on public international law or national security law.⁶ Interest in national security law or international law courses, which may include a lesson or two on the law of war,⁷ demonstrates American law students' desire to understand the difficult legal issues contained in the news stories I describe above. However, I would argue that a lesson or two in a national security law or international law course is insufficient for the average law student to gain the kind of nuanced understanding of the law of war that might equip him or her to apply it correctly as a lawyer, judge advocate, or policy-maker. For this reason, I must recommend teaching the law of war as its own stand-alone class. I will now discuss the class materials, structure, conduct, and evaluation of such a course.

Class Materials

To successfully teach a stand-alone law of war class, I would recommend, at a minimum, that teachers use a documentary supplement that includes all of the main law of war treaties and a comprehensive casebook or text book that includes a narrative description of the history, sources, and principles of the law of war. Teachers may also decide to create a separate course supplement that includes selected pieces of the most up-to-date scholarship, reports, and articles on the law of war and its contemporary application. The ADI publishes its own documentary supplement, which

is available online through the Library of Congress website;⁸ however, there are other good supplements available for purchase.⁹

Unfortunately, very few comprehensive law of war textbooks are available. In fact, the study on teaching international humanitarian law (IHL) at U.S. law schools noted the lack of materials as a key impediment to the teaching of IHL.¹⁰ Fortunately, this void is beginning to be filled with the recent publication of Gary Solis' book, *The Law of Armed Conflict: International Humanitarian Law at War*,¹¹ and the upcoming publication of a casebook entitled *International Humanitarian Law*¹² edited by Professors Ryan Goodman, Derek Jinks, and Michael Schmitt. The two textbooks that I am most familiar with, Marco Sassoli's *How Does Law Protect in War*¹³ and Gary Solis's book are both solid texts with different strengths and weaknesses. This year, I used Solis's new book with a good deal of satisfaction; it is relevant, comprehensive, and very accessible. In his preface, Solis explained the purpose of the book is to "introduce law students and undergraduates to the law of war in an age of terrorism."¹⁴ In addition, Solis acknowledged that his book is a "United States-weighted text that incorporates lessons and legal opinions from jurisdictions worldwide."¹⁵ If there is a weakness to Solis's text it is that some of the case excerpts included at the end of each chapter are truncated, with very few associated discussion questions. In this sense, it is less of a casebook than it is a narrative text. *How Does Law Protect in War*, the text I used prior to this year, is a more traditional law school casebook. This two-volume text is designed specifically for teaching the law of war. In fact, Volume I is a teacher's guide with narrative text written by Marco

⁸ INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, LAW OF WAR DOCUMENTARY SUPPLEMENT (2009), available at http://www.loc.gov/rr/frd/Military_Law/pdf/law-of-war-documentary-supplement_2009.pdf. This is only one of many great sources on the Library of Congress's Military Legal Resources website. The resources that prospective teachers and scholars can find on this website include war crimes materials, Geneva Conventions materials, and even entire electronic copies of books, such as MARCO SASSOLI & ANTOINE A. BOUVIER, *HOW DOES LAW PROTECT IN WAR* (2d ed. 2006) and FRITS KALSHOVEN & LIESBETH ZEGVELD, *CONSTRAINTS ON THE WAGING OF WAR: AN INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW* (3d ed. 2001) (both books are under the Geneva Conventions materials). See Library of Congress, Military Legal Resources, http://www.loc.gov/rr/frd/Military_Law/ (last visited May 17, 2010).

⁹ E.g., DOCUMENTS ON THE LAWS OF WAR (Adam Roberts & Richard Guelff eds., 3d ed. 2000) (recommendation by the author).

¹⁰ TEACHING IHL AT U.S. LAW SCHOOLS, *supra* note 3 at 8.

¹¹ GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW AT WAR* (2010).

¹² INTERNATIONAL HUMANITARIAN LAW (Ryan Goodman et al eds., Oxford University Press) (forthcoming Sept. 2011).

¹³ SASSOLI & BOUVIER, *supra* note 8.

¹⁴ *Id.* at preface.

¹⁵ *Id.*

⁵ TEACHING IHL AT U.S. LAW SCHOOLS, *supra* note 3, at 9.

⁶ *Id.* at 9-10. Professor Scott Silliman of the Duke University School of Law has written that student interest in National Security Law is as strong as ever. Scott L. Silliman, *Teaching National Security Law*, 1 J. NAT'L SEC. L. & POL'Y 161, 162 (2005).

⁷ For example, Professor John Norton Moore's course in national security law at the University of Virginia School of Law devotes two class periods to the law of war.

Sassoli and Antoine Bouvier, and volume II is a collection of more than 200 cases and reports, each followed by discussion questions.

Because *How Does Law Protect in War* contains cases that I want my students to read, as well as excerpts from certain Geneva commentaries and important law review articles, I typically compile a separate course supplement containing additional class readings. Some of these readings are required while others are supplemental or optional. Especially when using a text as up-to-date as Solis's text, a teacher may rely on the textbook and documentary supplement without creating a separate course supplement.

Structuring the Class

As mentioned above, my law of war seminar class is a two-credit elective that meets fourteen times for two hours each session. I divide these fourteen sessions up into the following three broad areas of the *jus in bello*:¹⁶ (1) Scope and Application of the Law of War; (2) "Hague Law"; and (3) "Geneva Law." In the "scope and application" portion of the class, we begin by exploring the philosophy of regulating the law of war and how this unique body of law is at the "vanishing point" of international law. We then spend a day looking at the history and principal sources of the law of war, followed by two weeks discussing the "triggering clauses" of the law of war. Our examination of these clauses involves a close look at the United States' objections to Additional Protocol I, the nature and application of Common Article 3 to the Geneva Conventions, and the law governing noninternational armed conflicts, the most prominent type of conflict today. We conclude our examination of the scope and application of the law of war by examining how the law of war interfaces with international human rights law and whether and to what degree it is the appropriate body of law to govern the United States response to modern transnational terrorism.¹⁷

Next, we turn our attention to "Hague law," also known as the targeting tradition in the law of war. Perhaps because the bulk of my students are judge advocates who may soon be advising commanders on targeting decisions, we examine Hague law before examining Geneva law.¹⁸ The Hague law classes are relatively straightforward and are based on the

¹⁶ In a two-credit class, there is simply not enough time to thoroughly cover both *jus ad bellum* and *jus in bello*. Consequently, the focus of my class is on *jus in bello* topics. However, many of the students in my law of war seminar will have also taken my national security law class, which devotes two class sessions to *jus ad bellum* questions.

¹⁷ One might also choose to conclude a course on the law of war with discussions on the application of human rights law and the war on terrorism.

¹⁸ There is another reason for using this order. Hague law deals with the conduct of hostilities (the use of force against pre-submission opponents) whereas Geneva law deals with treatment of post-submission opponents in the hands of the enemy. Hence, studying Hague law before Geneva law provides an order consistent with the typical order of battle.

four core principles of the law of war.¹⁹ Day one is dedicated to military necessity and distinction and the associated targeting concept of military objective; day two is dedicated to proportionality; and day three is dedicated to unnecessary suffering and new technologies (e.g., robots). Our last "Hague law" class is spent examining the targeting of civilians who are directly participating in hostilities. These Hague law classes tend to present some great possibilities to discuss modern developments on the battlefield, as well as issues from recent headlines.²⁰

The course concludes with a two to three week examination of substantive Geneva law, with a focus on the Third and Fourth Geneva Conventions. These classes focus on combatant status issues, modern detention operations, and how the Fourth Geneva Convention protects civilians both in times of conflict and occupation. Tying together the Hague and Geneva traditions, we conclude the class by examining the difference between lawful ruses and unlawful perfidy with a focus on uniform use. Our last class is typically devoted to a discussion of the future of the law of war, often with a guest speaker.

Conducting the Class

I've learned that the best class sessions are the ones in which the students participate most. For this reason, I do my best to foster robust class discussion while also providing enough structure to ensure that students understand, and can apply, the black letter law. To strike this balance, I use a mixture of a lecture and seminar approach. I typically use a short PowerPoint presentation to make preliminary points about the day's subject matter and to structure class discussion. The presentation includes key rules and questions I would like the class to explore. Of course, providing a roadmap does not preclude the class from going down different roads or exploring other questions they have identified.

In order to ensure that students come to class prepared and ready to participate, I allocate class participation points based on both reading and class participation. Half of the class participation points are awarded solely based on completion of assigned readings. The remainder of the class participation points come from actual class participation. For this, I use a technique I call "on-the-hook." Every day, between three and five students are "on-the-hook" for that day's class. This means that they are my primary "targets" for class participation that day. Prior to class, I typically let my "on-the-hook" students know what I would like them to

¹⁹ These principles are military necessity, distinction, unnecessary suffering, and proportionality.

²⁰ For example, my recent class on "Direct Participation in Hostilities" devoted a portion of class discussing the law of war implications of last summer's CIA Predator drone strike against Pakistan Taliban leader Baitullah Mehsud.

focus on (often a supplementary reading) during their class preparation. Sometimes I give them a specific question I expect them to discuss in class. This technique has generated some great class discussions and ensures that all students—even the quiet ones—participate. I also allocate some class participation points to general class participation.

I close each class with a PowerPoint slide providing “concluding observations.” These are basically the main points I want students to “take-away” from the class. Sometimes the list is short; sometimes it is long. Sometimes, I ask the students to add their own concluding observations. In order to tie classes together and reinforce these main points, I always begin the next class with a brief review of the previous week’s “concluding observations.” During my review, I ask the class if they have thoughts or questions related to the previous week. In addition, I use this time to address any questions left unanswered during the previous week or to reiterate main themes from the previous week. Students seem to appreciate this.

Evaluation

I base grades on the following exercises: a short paper (10-14 pages), a “take-home” examination, class participation, and response memoranda. The short paper addresses a topic chosen by the student and gives the student a chance to delve into an area of particular interest to the individual. I work with students to develop their topics and often publish a list of possible topics for their consideration. The “take-home” examination, which I now give to them as a “mid-term,” may be a single essay question, a multi-part question or set of questions. Finally, I require students to write 1-2 page response memoranda considering a certain aspect (or aspects) of the assigned reading where appropriate to foster greater reflection on a particular issue. Of course, I realize my approach may not be best for every professor. A variety of factors affect the choice of an evaluation method, including class size, class make-up, and style of instruction. Professors should use what works best for them given their particular situation.

Conferences and Outside Classes

I encourage professors considering teaching a class in the law of war to attend a conference or class focused on law of war teaching. Each year, the ICRC co-hosts a two-day workshop on teaching IHL.²¹ The ICRC does a great job of partnering with experienced law of war professors to share best practices with each other at the workshop. Because the conference is dedicated to the teaching of IHL at law schools, it provides an excellent forum for gathering ideas

²¹ This year’s workshop occurred in April of 2010 and was co-hosted by the University of California, Berkeley, Boalt Hall School of Law’s Miller Institute for Global Challenges and the Law.

on everything from how to build a syllabus, to teaching methods, to evaluation. In fact, the conference materials include several syllabi from respected law of war teachers. For these reasons, I can think of no better way for a budding law of war professor to prepare for success than to attend a course such as this.

Another useful course is the National Security Law Faculty Workshop hosted by Professor Bobby Chesney, now at the University of Texas at Austin, given in the spring. While slightly broader in scope than the Teaching IHL workshop, Professor Chesney’s workshop involves a substantial law of war component. In fact, this year’s workshop included six hours of law of war instruction provided jointly by the ICRC and the Army JAG School.

Finally, judge advocates and other U.S. Government attorneys should consider attending the Army JAG School’s Operational Law of War Course. This course meets twice annually for two weeks²² and is another great means by which to deepen one’s knowledge of the law of war in preparation for teaching a law of war class.

Conclusion

Whether you are a legal academic interested in developing expertise in the law of war or a judge advocate who is thinking about entering the world of legal academia, teaching a stand-alone law of war class is something I would highly recommend. Recent studies demonstrate that interest in the law of war is extremely high²³ but coverage in U.S. law schools is quite low. This presents an opportunity for both law professors and judge advocates. Anyone who has taught a course at any level knows how much more satisfying it is to teach when students are highly interested in the subject matter. The law of war is a fascinating area of the law, and my experience is that students enjoy studying it. Today, the resources and texts available to aid would-be teachers of such a class are only getting better. Moreover, there are now multiple workshops and other courses designed to help professors prepare to teach the law of war. For these reasons, as well as the importance of this body of law, law professors and judge advocates should both strongly consider how they might serve our nations’ law students by teaching a stand-alone class on the law of war.

²² The Operational Law of War Course is offered yearly in late February and late July.

²³ Law professors polled by the ICRC and The American University Washington College of Law perceived that 96% of law students are interested in legal issues relating to armed conflict. TEACHING IHL AT U.S. LAW SCHOOLS, *supra* note 3 at 8.