War Crimes & Prosecutions

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SYLLABUS

I. WHAT IS WAR, WHEN IS A RESPONSE JUSTIFIED

A. QUESTIONS TO CONSIDER

1. What is the international definition of war? Is that a definition that the United States should follow?

2. What are the justifications and goals of the laws of war, and the benefits of following them?

3. What are the pros and cons, benefits and detriments, of war crimes prosecutions? How do those mesh with 2, above?

B. READINGS

1. Cases & Articles

   p. 2 Introduction to the laws of war:


   p. 34 Historical Adjudication: Courts of Law, Commissions of Inquiry and 'Historical truth', Asher Maoz, 18 Law & Hist. Rev. 559 (Fall, 2009) (OPTIONAL).


For additional recent scholarship on the above issues, see Joseph William Davids, “Why We Have International Crimes: The True Scope Of International Criminal Law,” 28 N.Y.

II. WHO SHOULD CONDUCT WAR CRIMES TRIALS

A. QUESTIONS TO CONSIDER

1. Under what circumstances should war crimes trials be held in domestic courts? International courts? Hybrid courts? E.g., are particular types of war crimes defendants, or conflicts, more appropriate for prosecution in certain fora?

2. How should international political strategy influence a country's decision to prosecute war crimes cases or even recognize war crimes after the fact (e.g., realpolitik)? Other external factors?

3. How should the prospect of impairing peace be considered in decisions to prosecute?

4. What are the advantages that truth commissions provide? How can truth commissions be employed to the benefit of war crimes cases?

B. READINGS

1. Statutes
   p. 58 ICC Statute, Art. 1, 5, 12, 13, 20

2. Cases & Articles
   p. 60 Summary of Charges Against Hussein.
Should Bashir Be Prosecuted, And By Whom: “The Case Against Omar Hassan Ahmad Al Bashir.”


Who should Prosecute Ghadafi’s Son: OPTIONAL: Tripoli vs. the Hague: The Courts Vie to try Gadhafi’s Son, Michael Petrou, Maclean’s, May 23, 2012.


International Courts: ICTY v. Tadic, Case No. IT-94-1-AR72, Prijedor (Decision on Jurisdiction), Indictment.


Truth Commissions: Note on Truth Commissions.


III. OBTAINING CUSTODY OF SUSPECTS & DEFENDANTS: IRREGULAR RENDITION & UNIVERSAL JURISDICTION

A. QUESTIONS TO CONSIDER

1. What is irregular rendition? When should it be permitted, if ever? How can you distinguish between cases like Eichmann and Nasr or El Masri?

2. How does rendition fit into the context of universal jurisdiction? What are the justifications for universal jurisdiction in prosecutions and extraditions, and to what extent are they valid or invalid? Is there such a thing as “universal” jurisdiction?

B. READINGS

1. Statutes: (p. 115)

   a. Geneva Convention (IV), art. 45, 49, 147
   b. Geneva Convention, Common Art. 3
   c. Rome Statute, ICC, Art. 7(1)(i)
   e. 18 U.S.C. § 2441

2. Cases and Articles


p. 167 Universal Jurisdiction In Extradition: OPTIONAL: Ntakirutimana v. Reno, 184 F.3d 491 (5th Cir. 1999).


IV. TORTURE

A. QUESTIONS TO CONSIDER

1. When, if ever, should torture be used during an interrogation?

2. When, if ever, should a country refrain from prosecuting torturers?

3. How much should popular opinion impact these questions?

B. READINGS

1. Statutes


2. Cases & Articles

   p. 178  Guantanamo Interrogations: “Inside the Interrogation of Detainee 063,”
   Adam Zagorin & Michael Duffy, Time Magazine, June 20, 2005.

   p. 183  Coercive Interrogations: “At a Secret Interrogation, Dispute Flared Over

   p. 186  Popular Opinion: Polls on Torture

   p. 188  Information From Torture: “Ends, Means and Barbarity,” Economist,

   p. 190  Information From Torture: Ugly Truth: Sometimes Torture Works,”
   Glenn Garvin, Miami Herald, May 6, 2013.

   p. 192  Information From Torture: “Harsh Tactics May Have Aided U.S. Raid,”

   p. 194  Information From Torture: OPTIONAL: “The Road To Abu Ghraib,”

   p. 199  Abu Ghraib: OPTIONAL: “Newly Released Reports Show Early

   p. 203  Torture Generally: OPTIONAL: “Did the Bush Administration
   experiment on detainees?”  Nick Bauman, Mother Jones, June 6th, 2010.

   p. 205  Torture Generally: OPTIONAL: “Even Faced with Monstrous
   Terrorism, Democracies Break the Taboo at their Peril,” Economist, Jan. 11,
   2003.
p. 206  Tradeoffs For Torture: The Question of Unit 731.


p. 213  Elements of Torture: Prosecutor v. Kvocka, IT-98-30/1, Omarska (Judgment).


V. GENOCIDE & CRIMES AGAINST HUMANITY

A. QUESTIONS TO CONSIDER

1. What are the legal elements of genocide? How do the different elements differ from Crimes Against Humanity?

2. Why are these crimes deemed so serious? When should genocide be charged, and when should it not?

3. Should genocide encompass a desire to kill an entire group, or just a portion? Should it be limited to the groups enumerated in the Convention, or other groups outside the Convention? Which ones?

B. READINGS

1. Statutes (p. 232)

   a. ICC Statute, Art. 6-7
   b. Genocide Convention, Art. 2

2. Cases & Articles


VI. ALIEN TORT STATUTE

A. QUESTIONS TO CONSIDER

1. Should United States federal courts provide a forum for civil proceedings resulting from war crimes violations abroad by foreign perpetrators against foreign victims? If so, when? Does it matter if the defendant is a U.S. citizen, resident, or company? Does it matter how much we trust other more logical foreign judicial systems (and how do we judge that)?

2. Does the Alien Tort Statute, as it has been interpreted, create a type of universal jurisdiction in U.S. courts? Should it? For what kind of crimes? Why shouldn’t there be a limit on extraterritorial claims?

3. Doesn’t it threaten to create private foreign policy making?

4. When should corporations be liable under the ATS, if ever? Why should corporations be liable but not states?

B. READINGS

1. Statutes (p. 332)
   a. 28 U.S.C. § 1350

2. Cases and Articles
   - p. 355 ATS Applicable Law, Extraterritoriality/Corporate Complicity: Sarei v. Rio Tinto, 671 F.3d 736 (9th Cir. 2011) (en banc).
   - p. 360 ATS Applicable Law, Corporate Complicity: OPTIONAL:
Presbyterian Church of Sudan v. Talisman Energy Inc., (2nd Cir. 2009).


