Topic 1: Sources and History of the Law of Armed Conflict

Sources of Law of Armed conflict

(a) Customary IL

CIL binds all states regardless of treaties they have ratified. If we can show that states act in a particular way because they feel they are obliged to do so, then the rules, which bind them, may be discussed as being customary laws. In order to be accepted as part of custom, it must satisfy two tests:

1. State Practice
   Conduct must be *practiced by a large number of states for a reasonably long period of time*. State practice has to do with what the state does, not necessarily what it says

2. Opinio Juris
   It is not enough that the state’s practice is in accordance with a particular rule; there must be enough states that *believe that the rule is legally binding* (circular argument). This is a difficult test to apply, because it goes to the ‘state of mind’ of a state – hard to ascertain

Problem: customs are not written down. They are mainly academic/court decisions postulations – therefore still open to interpretation and argument about what should be included as ‘customs’.

(b) Treaties

Once a state becomes a *party to a treaty*, they are bound by international obligations to obey/follow that treaty. International treaties, in and of themselves have no inherent enforcement powers, but states that ratify have jurisdiction over their citizen-treaty offenders. Those states may enact national legislation in furtherance of the ratified treaty, furthering administrative or criminal enforcement in their domestic law.

(c) Judicial Decisions

Decisions of domestic courts, military tribunals and international courts relating to IHL and LOAC. These have provided important interpretation of IHL/LOAC and the customs and usages of war – i.e. ICTY, ICTR, Nuremberg & Tokyo Tribunals.

However, there is no system of precedent in international law.

(d) Legislation

4 major Geneva conventions (1949)

1. Convention for the amelioration of the condition of the *wounded* and *sick* in armed forces in the *field*
2. Convention for the amelioration of the condition of wounded, sick and shipwrecked members of armed forces at *sea*
3. Convention relative to the *treatment of prisoners at war*
4. Convention relative to the *protection of civilian persons in time of war*

Ratified by 196 countries (majority of state parties)
- But non-state actors are a problem as they are not parties to the GCs
Common Article 2: applies to international conflicts

- Convention applies to all cases of declared war or of any other armed conflict which may arise b/w two or more of the high contracting party, even if the state of war is not recognised by one of them
- Applies to all cases of partial or total occupation of the territory of a high contracting party, even if the occupation meets no armed resistance
- One group in the conflict may not be party to the convention. The groups who are party to it shall remain bound by it in their mutual relations, and in relation to groups who are not party to convention, but who accept and apply the provisions there

Common Article 3: applies to non-international conflicts

- Armed conflict not of an international character
- Occurring in the territory of one of the contracting parties
- Each party to the conflict shall be bound to apply as a minimum:
  o Treat persons not taking part in hostilities (including people who have laid down arms) humanely, without distinction for race, colour etc
- Prohibited acts against persons not taking part in hostilities:
  o Violence to life and person, murder, cruel treatment, torture
  o Taking hostage
  o Outrage upon personal dignity
  o Passing of sentence/execution without judgment by a regularly constituted court

These were updated in 1977 and 2 additional protocols were added.

Additional Protocol 1: applies to international armed conflicts

- Art 1(4): armed conflicts in which peoples are fighting against colonial domination, alien occupation or racist regimes are to be considered international conflicts
- Part II (art 8-34): develops rules on:
  o wounded, sick and shipwrecked
  o extends protection of conventions to civilian and medical personnel, equipment and supplies and to civilian units and transports
  o detailed provisions on medical transportation
- 174 State parties

Additional Protocol 2: applies to non-international armed conflicts

- Art 1: does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of similar nature, as not being armed conflicts
- Only applies if:
  o Meets a certain intensity
- Part IV: protect cultural property (Art 16)
- HR aspect: no distinction based on race, colour etc
- Art 4(3): care for children
- Protection for people whose liberty has been restricted (Art 5)
- 168 State Parties

Terminology

- Combatant/Belligerent
- Irregular combatant: not part of army but take part in conflict
- Occupied territory: under temporary control of an enemy army. Authority of the occupied State is retained but diminished
- Rules of Engagement: domestic rules
- Command responsibility: chain of responsibility – take orders from superior
- POW
- Collateral damage
History

**Lieber Code: 1860s – US civil war**
- War is between two states – individuals should not be targeted.
  - Art 148: need trial before killing an individual belonging to enemy, or a citizen.
- Art 57 Combatant’s privilege:
  - as soon as a man is armed by sovereign govt and takes oath, he is a belligerent. His killing, wounding or other acts are not individual crimes.
- Military necessity:
  - military forces are permitted to take into account the imperative of winning the battle. Think of the practical requirements of the military situation. Have to consider this in light of other considerations, eg protect civilians.
- Art 15: military necessity allows all direct destruction of life and limb of armed enemies, and other persons whose destruction is incidentally unavoidable (collateral damage). Also allows the destruction of property and withholding sustenance from the enemy.

**Hague Peace Conferences 1899 and 1907**
- Belligerents cannot use unlimited means to injure the enemy.
- Cannot inflict treacherous wounds, use rounds that cause unnecessary suffering
- Cannot harm those that have surrendered
- Cannot force enemy or POW to fight
- Cannot use false flags of truce or enemy uniforms
- Cannot attack civilians

**1907 Hague convention**
- 38 ratifications
- POW: treat humanely, not give them excessive tasks, pay them, set up inquiry offices.
- Means of warfare (Art 23): forbidden to use poison, kill or wound treacherously, kill someone who surrendered, employ arms calculated to cause unnecessary suffering, make improper use of flag of truce, national flag or military insignia and uniform of enemy, force nationals of another party to take part in operations directed against their own party.

**1929 Geneva Convention:**
- Protect POW
- Repatriate seriously wounded and sick

**Humanitarian emblem**
- Red cross, red crescent, red crystal
- Use brings special protection

**IHL and HR overlap**
- There is a lot of overlap
- One important difference: IHL cannot be suspended, but HR law can sometimes be suspended when there is a state of emergency.
- Another difference: individuals can bring complaints under HR law. IHL doesn’t have an individual complaints mechanism.
- In situation of armed conflict, HR law can compliment IHL
- ICRC: the regimes are distinct but complimentary. Both concerned with the protection of life, health and dignity.
- Some argue that IHL is Lex Specialis, and therefore displaces HR law
  - Some disagree
- ICJ opinion on legality of the threat or use of nuclear weapons (1996): the ICCPR doesn't cease in times of war, unless there’s an emergency (Art 4).
- Art 72 AP1: refers to other applicable rules of int'l law relating to the protection of fundamental HR during int'l armed conflict.
- Preamble, APII: international instruments relating to HR offer a basic protection.
**Declarations of war**
- US: Congress and President.
  - Congress declares war.
  - Some flexibility for president to be able to respond quickly when necessary, but have to provide written notification to Congress within 48 hours, and has to terminate use of force after 60 days unless Congress has declared war or extended the period, or if there is attack on US.
  - Once war is declared, president leads armed forces
- Aus: Cabinet and Plt
  - Not a requirement for declarations of war to be passed in Plt
  - BUT usually done as good practice
- Japan: no use of force
  - Consti renounces war. No use of force to resolve intl disputes

**ICRC and CIL**
- ICRC CIL Principles are not binding. They are what the Red Cross thinks CIL is but are not actually customary IL
- Court doesn’t have to accept ICRC CIL rules
- CIL comes from consistent state practice (see above)
Use of force on another state is prohibited under UN charter and customary int'l law

- UN Charter:
  - Art 1: Purpose of UN is to maintain peace and security, suppress acts of aggression, develop friendly relations among nations, achieve international cooperation
  - Art 2(4): all members shall refrain from threat or use of force

**Three exceptions (possible 4th)**

1. UN Security Council authorisation
   - **Article 42** (Ch VII) – the Security Council may authorise sanctions, including the use of force, against a State if it deems that that State is threatening international peace and security
   - Phases:
     - Determination of threat to international peace and security
     - Definition of the objectives
     - Decision to allow armed forces
   - Problem of UN SC authorisation
     - Veto power of the P5 – hard to get China and Russia to agree, US will veto resolutions that work against Israel
     - No standing army so few resources
     - Need 9 affirmative votes to pass a resolution

2. Consent of the State

3. Individual & collective self defence
   - Accepted as customary int'l law and;
   - **Article 51** UN Charter
     - The Charter does not prohibit the inherent right of individual or collective self-defence if an armed attack occurs – States can ‘take such action’ as it deems necessary to maintain/restore international peace and security.
   - What constitutes an ‘armed attack’?
   - Issue of non-state actors (Al-Qaeda/ISIS)
   - ‘As it deems necessary’ to maintain/restore peace – how far does this extent?

**Possible exception (not clear) – humanitarian intervention**

- **Humanitarian intervention** = the threat/use of force by a State against another State for the purposes of preventing or stopping the latter State from committing extensive and grave violations of HRs

- **Responsibility to protect** = duty on each state to protect its people from grave HRs abuses
  - UNGA endorsed this in 2005

- If the state fails, R2P devolves to international community
  - Sarah Joseph: R2P at best seems to be an evolving norm with moral force rather than legal force

- Sarah Joseph – disagrees with the notion of humanitarian intervention as being legal under IL where it involves the use of force (e.g. Libya). Why?
  - War, even when carried out for humanitarian purpose is ugly and deadly
  - Unilateral hum intervention is far more likely to be abused by those States than collective action authorised by the Security Council
  - It may pour fuel on the fire and destabilise the relevant region
  - Humanitarian intervention may not work. Eg – Somalia remains a mess nearly 20 years after the UN authorised intervention in 1992
Arguments for humanitarian intervention:
- Early intervention → saved lives and prevent a large scale war
- People are being murdered, how can we sit back and watch

Case studies on Use of Force

Conflict in Former Yugoslavia – UN Authorisation/humanitarian intervention

(i) Bosnian War (1992-1995)
- Conflict between Serbs (Orthodox) and Bosniaks (Muslim)
- UN Resolutions became very important:
  - Res 743: created UNPROFOR (UN Protection Force) → initially peacekeeping
  - Res 819 and 824: certain areas designated as safe areas
  - Res 816: authorisation for states to use measures to “ensure compliance” with the no-fly zone over Bosnia. However, Serbs on ground still continued to attack UN “safe areas” in Bosnia.
  - Res 836: authorised use of force by UN Protection Force in protecting safe zones – acting in self defence (nb – wording wasn’t use of force!)

Srebrenica Massacre (July 1995)
- 8000 Bosniaks massacred by Serb forces
- In response → increased NATO bombing (still justified pursuant to UN Resolution)

(ii) Kosovo war (1998 – 1999)
- Conflict between Fed Republic of Yugoslavia and Kosovo Albanian rebel group – KLA
- Res 1199: expressed grave concern re reports of displacement by excessive and indiscriminate use of force by Serbs (approx. 250,000)

Peace talks failed
- Racak Massacre (Jan 1999) – Kosovan Albanians massacred

March 1999 – NATO bombing
- NATO starts bombing campaign against Yugoslavia → NO UN authorisation (criticised by Gazzini)
- Justified on the basis:
  - Preventing HR abuses. End ethnic cleansing.
  - US argued that Fed Republic of Yugoslavia constituted threat to peace and security in the region
  - UK argued a humanitarian emergency
- Relied on UNSC Res 836 from the Bosnian War as a legal basis for a military offensive
- Condemnation: unlawful and disproportionate
  - Aerial strikes targeted electricity, water supplies and TV stations as well as military targets
- Independent International Commission on Kosovo: illegal but legitimate
- June – Milosevic accepted terms of int’l peace plan.

Iraq (1991)
- Iraq invaded Kuwait 1990.
- UNSC Res 660: demanded Iraq withdraw troops from Kuwait
- UNSC Res 661: imposed full trade embargo on Iraq
- UNSC Res 678: authorised all necessary means to uphold and implement Res 660
  - Q: does this include use of force bc Iraq did not withdraw?
- UNSC Res 687: created a UN Observer force to monitor demilitarised done. Called for the deconstruction of weapons.
- UNSC Res 688: condemn repressive measures exercised by Iraq against civilians, demanded access for humanitarian groups
- Iraq didn’t comply so → Intervention in Northern Iraq, and implementation of no fly zone
Iraq (2003)
- Aimed to disarm Iraq of weapons of mass destruction, end Hussein’s supports for terrorism and free the Iraqi people (post 9/11 environment)
- **UNSC Res 1441**: Iraq remains in material breach of obligations under resolutions (see above)
  - Problem: NO UN AUTHORISATION FOR USE OF FORCE
  - **Claimed Res 678** was still valid authorisation.
  - There was an **invasion in 1991**, airstrikes in 1998, and invasion in 2003 – is this a continuum?
  - **Sifris (Reading)**: once there is a cease-fire is in place, Art 2(4) prohibition against use of force applies. Need a **new resolution**. (US said one continuum)
  - **Gazzini (Reading)**: disagreement on the necessity of an immediate military intervention, so UN decision-making process was incomplete.

Libya 2011 – **UN authorised humanitarian intervention**
- Arab Spring protests – first Libyan Civil War, ousting and death of Gaddafi – long history of HR abuses
- Gov committing atrocities, **NATO intervened to protect civilians** against attacks (humanitarian intervention)
- **UNSC Res 1973**: UN SC passed a resolution which authorised the taking “of all necessary measures” to protect civilians and “civilian populated areas” from Gaddafi’s government

Sarah Joseph analysis
- “Despite humanitarian purposes, humanitarian intervention is war; purity of motive does not change that characterization…as it involves international war, it is largely illegal”
- Orthodox position = unilateral humanitarian is illegal
- “It is now legal for international forces in Libya to **use force in** Libya (however, the force used will be illegal if it goes beyond the mandate of Res. 1973 or breaches the international law of armed conflict). Indeed, Res. 1973 is possibly the most aggressive resolution ever passed by the SC.”

**Case study on self-defence**

**Syria – self-defence**
- US air strikes against ISIS (non-state actor) in Syria
- US justification – Res 1368 (2011) which says that the US can assert:
  - **collective self-defence** → stronger argument (self-defence of Syrian ppl)
  - **individual self-defence** (ISIS’s direct threat to US)
- If we class ISIS as a non-state actor, can defensive action in the territory of another state (Syria) require consent from Syria?
  - Some argue that operations against ISIS in Syria need consent of Syria
  - Some argue that a **victim state** can engage in limited military operations to prevent further attacks of the territorial state is unwilling or unable to put an end to the group’s activities
  - Don’t want to legitimate non-state actor group