



Legal analysis regarding the targeting of civilians and civilian objects in Syria

For more than 5 years, Syria has been suffering a terrible conflict that has caused death and destruction, resulting in gross international law violations, in a seemingly endless and indescribable cruel chaos. The Independent International Commission of Inquiry on the Syrian Arab Republic reported in February 2016 the common and daily violations against civilians and civilian objects committed by the warring parties, violating basic international human rights and humanitarian law.¹

Parties to the conflict in Syria, on all sides, have deliberately targeted and bombarded civilian-inhabited areas, launching missiles and rockets on areas containing no discernible military targets. Unarmed civilians are killed in their own homes or on the streets. Medical and humanitarian personnel and teachers are denied protection and are intentionally targeted and killed.

Parties to the conflict are deliberately targeting civilian objects and necessary structures of civilian life such as houses, business, bakeries, schools, university parks, markets, mosques, churches and other religious places, clinics and hospitals. Additionally, food, potable water, electricity and medical supplies are often cut off by the warring parties or due to incidental destruction and damage, which directly impacts civilians. The Commission of Inquiry is also investigating allegations of the illegal use of chemical weapons which lead to severe harm or death.

Parties to the conflict are deliberately destroying the Syrian cultural heritage. Scholars of antiquity have been killed and irreplaceable objects have been destroyed. Millennia-old structures and objects are intentionally and indiscriminately targeted.

These indiscriminate and seemingly disproportionate attacks have resulted in thousands of civilian casualties. Children and students are consequently denied access to education. Drinking, cooking with and bathing in untreated water, may cause bacterial infections

The Commission of Inquiry has concluded that “flagrant violations of human rights and international humanitarian law” are committed with blatant impunity. Crimes against

¹ Facts and findings are based on investigations, medical records and interviews conducted from 10 July 2015 to 10 January 2016 by the Independent International Commission of Inquiry on the Syrian Arab Republic, Human Rights Council (A/HRC/31/68), published in their report on the 11 February 2016; and by their report (A/HRC/33/55), published on the 6 September 2016

humanity are perpetrated by government forces and by Islamic State in Iraq and Al-Sham; and war crimes are committed by all the warring parties.²

Applicable law

The situation in Syria has been qualified as a non-international armed conflict by the ICRC in July 2012. Similarly, the Commission of Inquiry concluded in its August 2012 report that “the intensity and duration of the conflict, combined with the increased organizational capabilities of anti-government armed groups, had met the legal threshold for a non-international armed conflict”.³ Additionally, the Commission’s last two reports argued that the “conflict has devolved into a multisided proxy war steered from abroad by an intricate network of alliances”.⁴

International Humanitarian Law (IHL)

Syria is party to the four 1949 Geneva Conventions, the 1977 Additional Protocol I of the Geneva Convention but not to the 1977 Additional Protocol II. It is also party to the 1972 Convention on the Prohibition of Biological Weapons, the 1993 Convention prohibiting Chemical Weapons (since 2013), the first Hague Convention for the Protection of Cultural Property (but not the second) and the 1948 Convention on the Prevention and Punishment of Genocide. However, Syria is not party to the 1997 Anti-Personnel Mine Ban Convention or the 2008 Convention on Cluster Munitions, and has not ratified the 1998 Statute of the International Criminal Court.⁵

International Human Rights Law (IHRL)

Syria is also party to, notably, the 1966 International Covenant on Civil and Political Rights, the 1966 International Covenant on Economic, Social and Cultural Rights, the 1984 Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, the 1979 Convention on the Elimination of All Forms of Discrimination against Women, the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, the 1989 Convention on the Rights of the Child, and the 2007 Convention on the Rights of Persons with Disabilities.

Thus, IHL and IHRL are applicable in Syria and all the parties to the conflict in Syria are bound by both customary IHL and IHRL, including IHL customary principles (necessity, distinction, proportionality, precaution). In particular, all parties to the conflict must respect Common Article 3 to the 1949 Geneva Conventions, which provides for minimum standards and stipulates the minimum protection that must be afforded to all those who are not, or who are no longer, taking an active part in hostilities.

² Commission of Inquiry, February 2016 para. 92,148; Commission of Inquiry, September 2016, para. 65,70,71,76

³ Commission of Inquiry, August 2012, para 143.

⁴ Commission of Inquiry, February 2016, para 17; Commission of Inquiry, September 2016, para 10.

⁵ ICRC, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=SY

Legal Analysis

Warring parties to any armed conflict are required to distinguish, at all times, between civilians and combatants and between civilian objects and military objectives. Additionally, an attack must be necessary and may not be launched if it is anticipated to cause incidental loss of civilian life, injury to civilians, or damage to civilian objects that would be excessive with regard to the direct military advantage anticipated. Additional IHL principles require the parties to the conflict to take precautions in order to ensure the safety of the civilian population before and during an attack. The parties are prohibited to inflict unnecessary suffering or superfluous injury, and to launch indiscriminate attacks. Finally, some categories of people and objects are specifically protected by IHL.

First, the parties to the Syrian conflict must respect the principle of necessity.

The parties to the conflict deliberately target civilian areas with seemingly no military objective. For instance, on 4 August 2013, Government forces struck a “crowded Sunday market [...] killing 100 people [with] no military justification for these attacks.”⁶

The principle of necessity is a customary law⁷ and refers to military necessity. According to the ICRC, this principle “permits measures which are actually necessary to accomplish a legitimate military purpose and are not otherwise prohibited by IHL.”⁸ It indicates that any type or degree of force is used only if indispensable to accomplish a reasonable military objective, that is to weaken the military capacity of the other parties to the conflict, or for the achievement of the “ends of the war”, even though such force is not prohibited by IHL.⁹ In other words, a direct attack on a target which is a legitimate military target violates IHL if the use of force is not required for the submission of the enemy. In its judgement, the ICTY considered that “targeting civilians or civilian property is an offence when not justified by military necessity”.¹⁰ Additionally, an illegal conduct may be lawful if such conduct is necessary for the success of an attack. In the absence of necessity, the conduct becomes unlawful. Thus, military necessity may allow the parties to the conflict some derogations

⁶ Commission of Inquiry, February 2016, para 77.

⁷ International courts and tribunals generally accept necessity in principle as an autonomous customary rule. Balance between the principle of humanity and military necessity must be made at all times, in all places, and in all circumstances. It is essential that these rules are known by all combatants. They must permanently be taken into consideration in every activity of assessment, planning, and military training or operation. Blaskic, IT-95-14-T, Judgement (“Blaskic Trial Judgement”), 3 March 2000, para. 180; Kordic and Cerkez, IT-95-14/2-T, Judgement, 26 February 2001, para. 328.

⁸ ICRC, Military Necessity, Glossary, Mai 6 2012. <https://casebook.icrc.org/casebook/doc/glossary/military-necessity-glossary.htm>

⁹ Rauch, E., « Le concept de nécessité militaire dans le droit de la guerre, Military Law and Law of War Review, 1980, p. 209-218.

¹⁰ ICTY Blaškić Appeal Judgement, 29 July 2004, para 109.

from international law in order to resort to measures indispensable for the conduct of hostilities or for the needs of an armed conflict.¹¹

Second, the parties to the Syrian conflict must respect the principle of distinction.

In areas held by the opposition, pro-government forces conduct intensive and indiscriminate aerial bombardments. Likewise, anti-government armed groups shell civilian-inhabited areas under Government control, or perceived to support the Government. Such indiscriminate attacks consistently result in civilian casualties.¹²

Rule 1 of the Study on Customary International Humanitarian Law conducted by the ICRC refers to the principle of distinction between civilians and combatants as: “the parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.”

The ICRC Customary Rule 7 refers to the principle of distinction between civilian objects and military objectives as: “the parties to the conflict must at all times distinguish between civilian objects and military objectives. Attacks may only be directed against military objectives. Attacks must not be directed against civilian objects.”

The principle of distinction between civilians and combatants¹³ and civilian objects and military objectives¹⁴ has been considered as part of customary law in both international and non-international conflicts. It aims to ensure respect for and protection of the civilian population and civilian objects.

The principle of distinction observes two obligations. First, parties to the conflict must constantly distinguish between civilians and combatants. The latter may be targeted in regard with their status as combatants while the former cannot be subjected to attack. Second, attacks must solely be directed against military objects and objectives and not against civilian objects. In order to respect this second aspect, combatants have to distinguish themselves from the civilian population.

It is worth mentioning that Commentary to Additional Protocol I has demonstrated that “every Power must take [measures] in its own territory in favour of its nationals”,¹⁵ and

¹¹ ILC, Report 32nd Session, Yearbook 1980, Vol. II/2 (State Responsibility), p. 45.

¹² Commission of Inquiry, February 2016, para 50.

¹³ ICRC Study on Customary International Humanitarian Law; ICJ, Nuclear Weapons case, Advisory Opinion (§§ 61 and 434); ICTY, Tadić case, Interlocutory Appeal (§ 435), Martić case, Review of the Indictment (§§ 437 and 552) and Kupreškić case, Judgement (§§ 441 and 883); Inter-American Commission on Human Rights, Case 11.137 (Argentina) (§§ 64, 443 and 810).

¹⁴ ICRC; ICJ, Nuclear Weapons case, Advisory Opinion (§ 179); ICTY, Kupreškić case, Judgement (§ 180) and Kordić and Čerkez case, Decision on the Joint Defence Motion and Judgement (§ 182).

¹⁵ ICRC, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, at 692, ¶¶ 2239-2240 (Yves Sandoz et al. eds., 1987)

“ensure that military objectives are not placed in close proximity to the civilian population.”¹⁶

Civilians are described by the Interpretive Guidance issued by the ICRC as “all persons who are neither members of the armed forces of a party to the conflict nor participants in a levée en masse”. Such individuals are “entitled to protection against direct attack unless and for such time as they take a direct part in hostilities”. However, article 51(3) of Additional Protocol I suspends civilian protection “for such time as [civilians] take a direct part in hostilities”. As a consequence, when civilians are considered to directly take part in the hostilities, they may be attacked. “In non-international armed conflict, armed groups constitute the armed forces of a non-State party to the conflict and consist only of individuals whose continuous function is to take a direct part in hostilities”.¹⁷ IHL requires that these armed groups, on the basis of common Article 3 to the 1949 Geneva Conventions, as well as regular State forces, avoid civilian casualties and distinguish themselves from civilians.

The prohibition of the use of human shields must be respected.

In an attempt to dissuade further aerial strikes and to send a clear message to the Government, captured civilians and government soldiers are used as human shields by some Syrian opposition groups.¹⁸

IHL prohibits all non-civilians intentionally using civilians as a shield from being attacked. This is considered to be a customary rule.¹⁹ The Geneva Conventions, Additional Protocol I and the Statute of the International Criminal Court define such behaviour as using the presence (or movements) of civilians or other protected persons to render certain points or areas (or military forces) immune from military operations.²⁰

If the civilians are not forced to stay close to the fighting, there is no violation of IHL.²¹ While the illegality of such behaviour has been clearly expressed by the ICRC, it has also insisted that the “use of civilians as human shields does not release the attacker from his obligations with respect to the civilian population”.²² Thus, any attack on targets protected by human shields would violate IHL if the attacker knew of the use of human shields (and the attack generated disproportionate civilian casualties).²³

¹⁶ Lewis & Crawford, *Drones and Distinction: How IHL Encouraged the Rise of Drones*, University of Georgia, 2013.

¹⁷ DPHIG at 1002.

¹⁸ Commission of Inquiry, February 2016, para 105;

¹⁹ ICRC, Customary Rule 97.

²⁰ Third Geneva Convention, Article 23, first paragraph; Fourth Geneva Convention, Article 28; Additional Protocol I, Article 12(4) (adopted by consensus) and Article 51(7); ICC Statute, Article 8(2)(b)(xxiii).

²¹ Human Rights in Palestine and Other Occupied Arab Territories Report of the United Nations Fact Finding Mission on the Gaza Conflict, A/HRC/12/48, 23 September 2009. § 123 (hereafter Goldstone Report).

²² DPHIG 57.

²³ Lewis & Crawford (2013)

Third, the parties to the Syrian conflict must respect the principle of proportionality.

The Commission of Inquiry “has grave concerns”²⁴ about numerous attacks perpetrated by the parties to the conflict resulting in significant civilian casualties. Available and reliable information is difficult to obtain. Consequently, an assessment of proportionality cannot be conducted.

The principle of proportionality has been interpreted by the ICRC as the prohibition of “launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated” (Customary rule 14).

This principle has been considered by the ICTY as a rule of IHL and customary law.²⁵ Additionally, it is worth noting that ICTY chambers often held that attacks that are disproportionate have been indiscriminate.²⁶

Moreover, reflecting this principle, Article 8(2)(a)(iv) of the Rome Statute, in relation to war crimes, prohibits the “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly”. It also states that “intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects... which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated”.

Thus, attacks resulting in civilian casualties do not by themselves constitute a war crime. However, uncontrolled attacks resulting in civilian losses or destructions of civilian objects, or attacks creating casualties undoubtedly in excess of what is needed for accomplishing the military objective may infringe the principle of proportionality and constitute war crimes. Therefore, a military operation may be lawfully executed even if harm is likely, only if the “collateral” harm inflicted on peaceful bystanders is not excessive to the concrete and direct military advantage anticipated. As a consequence, if no collateral damage is to be expected, only the respect of the principle of necessity is to be required. Contrariwise, any attacks or strikes that are expected to cause excessive collateral damage are prohibited regardless of considerations of the principle of necessity. As mentioned in the Saint-Petersburg Declaration, the principle of proportionality establishes absolute “limits at which the necessities of war ought to yield to the requirements of humanity”.²⁷

²⁴ Commission of Inquiry, February 2016, para 41.

²⁵ Prosecutor v. Galic, Case No. IT-98-29-T, Judgement and Opinion, §§ 11, 58-61 (Int’l Crim. Trib. For the Former Yugoslavia Dec. 5, 2003). And also: Prosecutor v. Kupreškić, Judgment (Trial Chamber), IT-95-16-T, ICTY (Jan. 14, 2000), §524 (describing the “principle of proportionality, whereby an incidental (and unintentional) damage to civilians must not be out of proportion to the direct military advantage gained” as “now part of customary law” where it “does not appear to be contested by any State, including those which have not ratified the Protocol”).

²⁶ Iain Bonomy, Principles of Distinction and Protection at the ICTY, 3 FICHL OCCASIONAL PAPER SERIES 39 (2013); Prosecutor v. Stanislav Gali, Trial Judgement, supra note 10, para. 58, fn. 104.

²⁷ St. Petersburg Declaration (1868).

Fourth, the parties to the Syrian conflict must respect the principle of precaution.

“Many missile and rocket attacks [are] launched on areas containing no discernible military targets,”²⁸ regardless of the presence of civilians and the risk of civilian casualties.

The ICRC stated that “in the conduct of military operations, constant care must be taken to spare the civilian population, civilians and civilian objects. All feasible precautions must be taken to avoid, and in any event to minimise, incidental loss of civilian life, injury to civilians and damage to civilian objects” (Customary rule 15).

Codified in conventional IHL,²⁹ the principle of precaution has reached customary nature in both international and non-international armed conflict.³⁰ This principle requires “the application of a range of steps to ensure that civilians and civilian objects are spared the effects of military operations”.³¹ This principle intends to prevent erroneous targeting and to avoid or, at least, minimize incidental harm to civilians. It consists of a basic rule and several distinct obligations.

The principle of precaution in attack also requires two other commitments. First, the attacking party must give “effective advance warning of attacks which may affect the civilian population, unless circumstances do not permit”.³² Second, decision makers must select, “among several military objectives available to obtain a similar military advantage, that objective which may be expected to involve the least danger to civilian lives and to civilian objects when attacked”.³³

Fifth, the parties to the Syrian conflict must respect the specific protection in favour of certain categories of people.

Medical personnel “exclusively assigned to medical duties must be respected and protected in all circumstances” (ICRC Customary Rule 25). This rule is implicit in common Article 3 of the Geneva Conventions and is explicitly stated in the 1949 Geneva Conventions³⁴ and Article 9(1) of Additional Protocol II. It has been considered as a customary law and intentional direct attacks against such personnel constitute a war crime in non-international armed conflict.³⁵ However, hospitals, medical personnel,

²⁸ Commission of Inquiry, February 2016, para 35.

²⁹ 1907 Hague Convention (IX), Article 2(3); Additional Protocol I, Article 57(1)

³⁰ ICTY, Kupreškić case, Judgement (§§49 and 132); Inter-American Commission on Human Rights, Case 11.137 (Argentina).

³¹ Jean-Francois Queguiner, “Precautions Under the Law Governing the Conduct of Hostilities”, International Review of the Red Cross, Vol. 88, No. 864, 2006; More content is given by the specific obligations contained in ICRC Customary Rules 16–21.

³² Rule 20 CLS. See also Art 57(2)(c) AP I.

³³ Rule 21 CLS. See also Art 57(3) AP I.

³⁴ First Geneva Convention, Articles 24–26 (ibid., §§ 6–8); Second Geneva Convention, Article 36 (ibid., § 9); Fourth Geneva Convention, Article 20 (ibid., § 10).

³⁵ ICC Statut, Article 8(2)(e)(ii).

medical clinics and any health-care infrastructures are targeted by government forces or DAESH. The Commission of Inquiry reported that less than 10 hospitals (out of 33 originally) remained in Aleppo.³⁶ Additionally, United Nations officials strongly condemned attacks against an aid convoy and warehouse that happened on 19 September 2016 in rural Aleppo, killing about 20 civilians and one Syrian Arab Red Crescent worker, and destroying vital food and medical assistance intended for approximately 78,000 people.³⁷

To the extent that cultural property is civilian, it may not be made the object of attack (see Rule 7). It may only be attacked in case it qualifies as a military objective (see Rule 10). As a consequence, “special care must be taken in military operations to avoid damage to buildings dedicated to religion, art, science, education or charitable purposes and historic monuments unless they are military objectives” (ICRC Customary rule 38). Intentional direct attack against buildings dedicated to religion, education, art, science or charitable purposes or historic monuments is a war crime in both international and non-international armed conflicts, “provided they are not military objectives”.³⁸ However, irreplaceable objects of cultural heritage are destroyed or sold through illegal trafficking and employees are killed. The Commission of Inquiry notably mentioned the systematic razing of millennia-old structures and objects of Palmyra by DAESH, violating the 1954 Convention of the Protection of Cultural Property in the Event of Armed Conflicts.

Additionally, “attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population” is prohibited (ICRC Customary rule 54). These are civilian objects and may not be attacked as such (Rule 7). The prohibition on attacking objects indispensable to the survival of the civilian population is set forth in Additional Protocol II and is defined therein as a corollary to the prohibition of starvation. As stated in the Commentary on the Additional Protocols, this provision “develops the principle prohibiting starvation from being used against civilians by pointing out the most usual ways in which starvation is brought about”.³⁹ In addition, this rule is contained in other instruments pertaining also to non-international armed conflicts.⁴⁰

Last but not least, “Civilian journalists engaged in professional missions in areas of armed conflict must be respected and protected as long as they are not taking a direct part in hostilities” (ICRC Customary rule 34). It is considered as a customary rule and it is applicable

³⁶ Commission of Inquiry, February 2016, para 60.

³⁷ UN News Centre, <http://www.un.org/apps/news/story.asp?NewsID=54969#.V-eGOPCLTIV>

³⁸ ICC Statute, Article 8(2)(b)(ix) and (e)(iv).

³⁹ Yves Sandoz, Christophe Swinarski, Bruno Zimmermann (eds.), Commentary on the Additional Protocols, ICRC, Geneva, 1987, § 4800.

⁴⁰ See, e.g., Memorandum of Understanding on the Application of IHL between Croatia and the SFRY, para. 6 (cited in Vol. II, Ch. 17, § 194); Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina, para. 2.5 (ibid., § 195).

in non-international armed conflicts.⁴¹ However, the Committee to Protect Journalists reported that more than 100 journalists have been killed since the beginning of the conflict.

Recommendations

Al-Marsad reiterates the call from the Commission of Inquiry and recommends that all parties comply effectively and comprehensively with international human rights and international humanitarian law, as well as international principles and customary law, and in particular:

- to cease all indiscriminate and disproportionate attacks on the civilian population, and on areas inhabited by civilians, and to take all feasible measures to avoid civilian casualties;

- to distinguish efficiently between civilians and civilian objects from military objectives;

- to respect the protection of humanitarian personnel, including medical, religious personnel or teachers;

- to ensure the arrival and distribution of humanitarian aid notably in besieged areas, to civilians;

- to cease the deliberate targeting of civilian facilities, including homes, markets, schools, hospitals, transport, and water, food and aid infrastructures, to respect the 2139 (2014) Security Council resolution;

- to refrain from attacking cultural sites, to assist in the safeguarding of these sites, and to cease the trade and trafficking of cultural objects;

Al-Marsad recommends referring the Syrian case to the ICC to ensure that all perpetrators of war crimes and crimes against humanity are brought to justice, ensuring that the commission of prohibited acts is not left unpunished.

Al-Marsad recommends that the international community ensures that the warring parties comply with these recommendations.

⁴¹ Memorandum of Understanding on the Application of IHL between Croatia and the SFRY, para. 4 (ibid., § 2); Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina, para. 2.3 (ibid., § 3).

Al-Marsad is an independent, not-for-profit, legal human rights organisation – it is the only human rights organisation operating in the Occupied Syrian Golan.

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