



THE SYRIAN SITUATION - International Humanitarian Law Violations and the Call for Justice *A Summary*

Introduction

Since 2011 Syria has been devastated by a ferocious civil war that escalated into an internationalised conflict, in which government forces, rebel groups, extremist and terrorist groups, foreign fighters, and international powers are involved.

Syria has become the arena in which international interests are at dispute at the expense of civilians. The Syrian war has resulted in more than 250,000 victims, 7.6 million internally displaced persons and 4.2 million refugees.

It is Al-Marsad's view that those responsible for war crimes and crimes against humanity committed in Syria should be prosecuted under international and national jurisdictions, regardless of their political affiliations. Alongside prosecutions, non-judicial mechanisms should also be established to assist with the process of reconciliation for the Syrian people, in the long term.

The International Criminal Court and its jurisdiction

The International Criminal Court (ICC) is a permanent Court created with the purpose of investigating and prosecuting those individuals responsible for the most serious crimes of international concern: genocide, crimes against humanity and war crimes.

As a general rule, the ICC only has jurisdiction over state parties; that is over crimes committed within a territory of a state party or by a national of a state party. However, there are three exceptions which allow for the jurisdiction to be extended over non-state parties:

- Pursuant to Article 12.3 of the Rome Statute, a non-state party can refer a situation to the ICC, thus extending the ICC's jurisdiction over its territory. The state which accepts the jurisdiction of the ICC pursuant to Article 12.3 shall cooperate with the ICC with no delay or exception.
- A referral by the United Nations Security Council.

- In a situation where the ICC has jurisdiction over citizens of a non-state party for crimes committed against nationals of a state party, or in a territory where the ICC has jurisdiction.

Only the intervention of the Security Council under Chapter VII of the United Nations Charter, makes the jurisdiction of the ICC potentially universal.

The crimes within the jurisdiction of the ICC are listed in Article 5 of the Rome Statute: genocide, crimes against humanity, war crimes and aggression. It is important to underline that these crimes are unanimously considered 'jus cogens' (also called peremptory norms): norms accepted by the international community from which no derogation is permitted, regardless of membership, or not, of the specific treaties that prohibit the acts.

The jurisdiction of the ICC can be activated by a referral to the Prosecutor of the ICC by (a) a state-party;¹ (b) the Security Council, acting under Chapter VII of the Charter of the United Nations;² and (c) a non-state party which in so doing accepts the jurisdiction of the Court.³

In addition the Prosecutor in accordance with Article 15 of the Rome Statute may initiate an investigation *proprio motu*, providing that the Pre-Trial Chamber upon examination of the supporting material considers that there is a *reasonable basis* to proceed.⁴

The Syrian situation: political background

Prior to the outbreak of the conflict, the Syrian Arab Republic had a population of 22 million people (more than 4,6 million Syrians have fled the country since the conflict started),⁵ of whom 74% were Sunni Muslim, 10% Alawite, 3% other Shia Muslim, 10% Christian and 3% Druze. Major ethnic minority groups include Kurdish, Assyrian, Armenian, Turkmen and Circassian populations.⁶

¹ Rome Statute, Articles 13(a) and 14.

² Rome Statute, Article 13(b).

³ Rome Statute, Article 12.3.

⁴ Rome Statute, Article 15.4. Morten Bergsmo and Jelena Pejic, *Article 15: Prosecutor*, in COMMENTARY OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVER'S NOTES, ARTICLE BY ARTICLE, Otto Triffterer ed., 1999.

⁵ According to UNHCR data, see <http://data.unhcr.org/syrianrefugees/regional.php>.

⁶ "Report of the independent international commission of inquiry on the Syrian Arab Republic", United Nations Human Rights Council, 23 November 2011, A/HRC/S-17/2/Add.1; Section II.

In 1971 Hafez Al Assad became president of Syria after a military coup the previous year when a state of emergency, which suspended most of the constitutionally guaranteed protections and rights, had been in place for four years.⁷ Bashar Al Assad, his son, succeeded him in 2000.

Since the Assads' rule the Baath party has dominated social and political life in Syria⁸ and the key positions of the state (including the armed forces and the judiciary) have been occupied by the Alawite minority, to which the Assad family belongs.⁹

Political opponents, or people perceived as such, in Syria have been tortured and arbitrarily detained since the beginning of the Assads' rule, and in 1982, between 10,000 and 25,000 people, mostly civilians, were killed by the Syrian forces during an uprising by the Muslim Brotherhood.¹⁰ Strict surveillance, suppression and control of freedom of expression have been conducted by an extensive apparatus of intelligence, the Mukhabarat.¹¹

The Syrian situation: conflict background

Government forces, and its militias, have used lethal force (including unlawful killings, extrajudicial killings, torture, arbitrary detention and enforced disappearance) against civilians since the beginning of the uprising in March 2011.¹² Such an extensive and disproportionate use of lethal force against the demonstrators was the main reason why opposition groups started arming themselves, and in June 2011, the Free Syrian Army, composed of defectors from the army, was created.¹³ Shortly after the beginning of the uprising, the government forces began striking residential areas perceived to be under the control of opposition groups.¹⁴

In early 2012 the International Committee of the Red Cross (ICRC) qualified the violence in Syria as a non-international armed conflict, thus determining the applicability of international humanitarian law norms.¹⁵ Since then, however, the conflict has intensified, becoming an

⁷ On the Syrian political background, see the first "Report of the Independent International Commission of Inquiry on the Syrian Arab Republic", United Nations Human Rights Council, 23 November 2011, A/HRC/S-17/2/Add.1.

⁸ Ibid. Article 8 of the 1973 Constitution proclaims the Baath party as the leading party.

⁹ "Report of the Independent International Commission of Inquiry on the Syrian Arab Republic", United Nations Human Rights Council, 23 November 2011, A/HRC/S-17/2/Add.1, Section II.

¹⁰ Ibid.

¹¹ Ibid.

¹² See Security Council resolutions 2042 (2012), 2043 (2012), 2118 (2013), 2139 (2014), 2165 (2014), 2175 (2014), 2191 (2014), 2209 (2015), 2235 (2015), 2254 (2015) and 2258 (2015) and its Presidential Statements of 3 August 2011 (S/PRST/2011/16), 21 March 2012 (S/PRST/2012/6), 5 April 2012 (S/PRST/2012/10), 2 October 2013 (S/PRST/2013/15), 24 April 2015 (S/PRST/2015/10) and 17 August 2015 (S/PRST/2015/15).

¹³ See the first Report of the Independent Commission of Inquiry, of the 23 November 2011, A/HRC/S-17/2/Add.1, para.29.

¹⁴ Ibid.

¹⁵ ICRC, Syria: ICRC and Syrian Arab Red Crescent maintain aid effort amid increased fighting, at: <https://www.icrc.org/eng/resources/documents/update/2012/syria-update-2012-07-17.htm>.

internationalised “multi-sided and highly fluid war of attrition”,¹⁶ in which Syrian and foreign armed groups fight alongside international coalitions, external powers and governmental forces.

In 2015 the situation on the ground became even more fragmented and complex. Against the backdrop of the crisis in Yemen and Iraq, the polarisation of regional actors intensified. Whilst, extremist groups, such as ISIS and Jabhat al-Nusra, gained more and more ground, consolidating their strongholds and imposing extreme Islamist law in the areas under their direct control, causing a significant exacerbation of the sectarian dimension of the conflict. Additionally the external powers and international coalitions intervened on the ground with heavy operations, causing a multiplication of frontlines and battlefields, and civilian casualties.

According to available reports all actors involved, with no distinction, have deliberately targeted civilians. Indiscriminate, disproportionate and deliberate attacks against civilians, protected objects and hors de combat fighters; imposition of ferocious sieges and blockades; restriction of humanitarian access; use of banned weapons (such as chemical and incendiary shells, cluster munitions, antipersonnel landmines); unlawful use of indiscriminate weapons in densely populated areas or even directly against civilian objects (rockets, heavy artillery, fuel-air explosives and barrel bombs); terror and starvation;¹⁷ have been used as general means of warfare.

Applicable law to the conflict

Due to the direct and/or indirect intervention of external powers, foreign fighters and foreign armed groups, the internationalised character of the conflict is unquestionable. In any event, Common Article 3 to the Four Geneva Conventions and customary international humanitarian law would be applicable even assuming that the conflict were merely internal.

It is important to underline that every armed group bears the obligation to respect international humanitarian law norms, regardless of the compliance shown by the other actors, since such obligation does not depend on reciprocity.

The primary principle of humanitarian law is the principle of distinction, which has been plainly disregarded in Syria by all of the armed groups involved. This principle establishes that military attacks cannot be directed against civilians or civilian objects, but only against combatants who might include members of regular armed forces or of armed groups participating in military operations. Civilians lose their protected status and become legitimate military objectives, only by taking direct participation in hostilities. If there is any doubt a person must be considered a civilian.

¹⁶ <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16128&LangID=E>.

¹⁷ Ibid.

Deliberate attacks against civilians have been carried out by all parties involved with the intent to instil fear and terror among the population and/or as reprisals, both of which are serious violations of humanitarian law.

State and non-state actors: armed groups and government forces

State and non-state actors have committed war crimes and crimes against humanity. The main state and non-state parties involved in the war and in serious violations of international humanitarian law are listed below.

Government forces

Apart from the Syrian Army, the Syrian government is heavily relying on irregular and foreign forces, such as militias, Lebanese Shia Hezbollah fighters and Iranian fighters. Since 2015, the Syrian government has also received significant aerial support from Russia. President Assad has openly defended the involvement of Hezbollah, Iranian and Russian fighters alongside Syrian government troops.¹⁸

Since 2011 government forces have been carrying out indiscriminate and deliberate attacks against civilians, and given its superior firepower, it is safe to say that government forces are responsible for the majority of the indiscriminate aerial attacks on civilian-inhabited cities, towns, villages and makeshift IDP camps.¹⁹

Barrel bombs have been dropped by government forces on markets, schools, medical facilities and squares. Additionally, in order to maximise deaths and injuries, often a second round of bombs is dropped on those gathered to assist the injured.²⁰ In most of the incidents investigated by the International Commission of Inquiry on the Syrian Arab Republic and Human Rights Watch no evidence of the presence of military targets was found.²¹ Chemical weapons such as chlorine and phosgene gas have also been used.²²

¹⁸ <http://www.aljazeera.com/news/2015/08/assad-defends-presence-hezbollah-fighters-syria-150825203254106.html>

¹⁹ Oral Update of the Independent International Commission of Inquiry on the Syrian Arab Republic, 23 June 2015, A/HRC/29/CRP.3.

²⁰ The use of barrel bombs and indiscriminate bombardment in Syria: the need to strengthen compliance with international humanitarian law, Statement by Mr. Paulo Sérgio Pinheiro Chair of the Independent International Commission of Inquiry on the Syrian Arab Republic:
<http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/CoISyriaIndiscriminateBombardment12032015.pdf>.

²¹ See Reports of the International Commission of Inquiry: A/HRC/30/48 of the 13 August 2015; A/HRC/28/69 of the 5 February 2015; Conference Room Paper: Selected testimonies from victims of the Syrian conflict 16 September 2014; A/HRC/27/60 of the 13 August; A/HRC/25/65 of the 12 February; Conference Room Paper: "Without a trace: enforced disappearances in Syria" of the 19 December 2013; A/HRC/24/CRP.2 of the 13 September 2013; A/HRC/24/46 of the 11 September 2013; A/HRC/23/58 of the 4 June 2013; A/HRC/22/59 of the 5 February 2013; A/HRC/21/50 of the 15 August 2012; A/HRC/19/69 of the 22 February 2012; A/HRC/S-17/2/Add.1 of the 23 November 2011. See also: Human Rights Watch, "He Didn't Have to Die, Indiscriminate Attacks by Opposition Groups in Syria"; The use of barrel bombs and indiscriminate bombardment in Syria: the need to strengthen compliance with international humanitarian law,

Widespread and systematic use of torture, amounting to extermination,²³ has been documented in government run detention facilities - especially Security Branches 215, 227 and 235, Mazzeh military airport - including against women, children and the elderly.²⁴ Sexual violence and rape (against both male and female detainees); prolonged suspension; beatings resulting in death; executions; death as result of inhumane treatment; electrocution (including to genitals); have been proved.²⁵ The conditions, in general, in the detention centres are inhumane.

Government forces use starvation and terror as a means of war in the areas where they have been enforcing ferocious sieges, with the aim of making life unbearable for the population perceived to be close to the opposition, even if only because of their physical location. Sniper fire prevents civilians from leaving areas under siege; women, children and the elderly have also been targeted.²⁶ Humanitarian assistance is deliberately blocked.

The Independent Commission documented instances in the Yarmouk camp - kept under siege by the government forces for more than three years - in which inhabitants had to eat domestic animals and leaves in order to survive.²⁷

Non-state actors

The main non-state armed groups active in Syria are: Ahrar al-Sham, Al Qaeda, Jabhat al-Nusra, Ansar al-Sham, Hezbollah (which operates alongside the government forces), Jaish al-Islam, Liwa al-Haqq, Liwa al-Tawhid, Suqour al-Sham and the Islamic State (or Islamic State of Iraq and the Levant).

During the first half of 2015 anti-government groups achieved important gains and consequently the Assad regime lost territory. Opposition groups benefitted from the logistical, financial and military support given by external-proxy actors, and from the aerial support provided by the U.S. led international coalition. However, the intervention of Russia in the second half of 2015 changed the situation on the ground, significantly reinforcing the regime.

Statement by Mr. Paulo Sérgio Pinheiro Chair of the Independent International Commission of Inquiry on the Syrian Arab Republic:

<http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/CoISyriaIndiscriminateBombardment12032015.pdf>.

²² Report of the International Commission of Inquiry: A/HRC/30/48 of the 13 August 2015, para.39.

²³ United Nation Human Rights Council, *Out of Sight, Out of Mind: Deaths in Detention in the Syrian Arab Republic*, 3 February 2016, A/HRC/31/CRP.1, para.97; Report of the International Commission of Inquiry: A/HRC/30/48 of the 13 August 2015.

²⁴ For the crimes committed against detainees *see for all* United Nation Human Rights Council, *Out of Sight, Out of Mind: Deaths in Detention in the Syrian Arab Republic*, 3 February 2016, A/HRC/31/CRP.1. *See also*, Report of the International Commission of Inquiry: A/HRC/30/48 of the 13 August 2015.

²⁵ Report of the International Commission of Inquiry: A/HRC/30/48 of the 13 August 2015, paras.90-95.

²⁶ *Ibid.*

²⁷ *Ibid.*

In areas controlled by the government forces, opposition armed groups have shelled and used mortars, unmanned rockets, locally made rockets, artillery fashioned from domestic gas cylinders and car bombs - all inherently indiscriminate weapons when used in a populated area. In most instances no evidence of military targets was found in the vicinity of the explosion sites.

Anti-government groups have also heavily relied on suicide car attacks,²⁸ which are by their nature a deliberate indiscriminate attack against civilians.²⁹

In spite of the government's superior firepower and control over the fly zone, anti-government groups have also enhanced their power to carry out aerial bombardments.³⁰ The scale of the attacks, the weaponry and number of casualties resulting from indiscriminate shelling differ between the government and anti-government fighters, although in both instances the attacks are carried out in flagrant disrespect for the principle of distinction and with the intent to spread terror and punish the civilian population, since no precautions are taken to avoid or minimise incidental loss of civilian life.

Anti-government groups have imposed brutal sieges as well, especially around the towns of Nubul and Zahra, in Aleppo, and Foua'a and Kafria, in Idlib.³¹ The situation in the besieged areas is dire, no food or medical supplies are available to civilians. Non-state armed groups also control the electricity and water supply to government-held neighbourhoods of Dara'a and Aleppo cities, depriving civilians of access to potable water and sanitation.

Referral to the International Criminal Court

The facts above provide a compelling basis to proceed with an investigation into the Syrian situation pursuant to the criteria established by the Rome Statute. Since Syria is not a member of the Rome Statute and considering the magnitude of the conflict, its impact on the civilian population and on the security and stability of the whole area, the Security Council bears the obligation to activate the jurisdiction of the Court. A referral by the Security Council would ensure impartiality of justice, since it would give the Court jurisdiction upon crimes committed by all parties involved in the conflict.³²

²⁸ Human Rights Watch, "He Didn't have to die. Indiscriminate Attacks by Opposition Groups in Syria"; Human Rights Watch, "You Can Still See Their Blood" Executions, Indiscriminate Shootings, and Hostage Taking by Opposition Forces in Latakia Countryside.

²⁹ For indiscriminate attacks against civilians committed by the non-government forces *see for all*: the last report of the International Commission of Inquiry, A/HRC/30/48, 13 August 2015; Human Rights Watch Report, "He Didn't have to die. Indiscriminate Attacks by Opposition Groups in Syria"; Human Rights Watch, "You Can Still See Their Blood" Executions, Indiscriminate Shootings, and Hostage Taking by Opposition Forces in Latakia Countryside.

³⁰ *Ibid.*

³¹ *Ibid.*

³² Note - it is important to remember that whilst the prosecution of those most responsible is a necessary measure toward accountability and reconciliation, non-judicial mechanisms are required as well.

Obligations of states

States, either members or non-members of the Rome Statute, can play a significant role to end impunity and to prevent further abuses. Through diplomatic, economic and political activities, states can push the parties to the conflict to comply with international humanitarian law and end the targeting of civilians. States must suspend any kind of assistance to armed actors involved in the commission of crimes and must publicly condemn crimes committed by all groups.

Furthermore, torture, war crimes, genocide and crimes against humanity are subject to universal jurisdiction, which grants legal authority to the domestic judicial system (according to relevant domestic criminal systems) of other states to investigate and prosecute such crimes, even lacking any jurisdictional link (i.e., even if the crimes were not committed on the state's territory or by one of its nationals, or against one of its nationals).

In addition, the *aut dedere aut iudicare* obligation that the 1949 Geneva Conventions and the Convention against Torture embody obliges state parties to extradite or prosecute suspected offenders who are within their territory or otherwise under their jurisdiction.³³

Recommendations

Al-Marsad calls on *the government forces and all the armed groups* involved in the Syrian conflict to:

- Abide by the laws of war by ending all deliberate, indiscriminate and disproportionate attacks against civilians;
- Take disciplinary measures against subordinates responsible for violations of international human rights and humanitarian law or other norms;
- Allow unhindered passage of humanitarian aid, especially to the besieged areas;
- Cease the besieging of civilian areas;
- Refrain from all indiscriminate and disproportionate attacks;
- Prohibit and prevent torture or other cruel, inhuman or degrading treatment, including sexual violence;
- Ban the recruitment of child soldiers;
- Prevent the use of illegal weapons, including chemical weapons, and inherently indiscriminate weapons such as barrel bombs.

Al-Marsad calls on the *international community* to:

³³ Article 49, second paragraph, of the 1949 Geneva Convention I, Article 50, second paragraph, of the 1949 Geneva Convention II, Article 129, second paragraph, of the 1949 Geneva Convention III and Article 146, second paragraph, of the 1949 Geneva Convention IV

- End the proliferation and supply of weapons;
- Protect the human rights of migrants, internally displaced persons, asylum-seekers and refugees, thus abiding by the principle of *non-refoulement* and the international legal obligations on asylum;
- Demand safe access for humanitarian aid to Syria, in particular to the besieged areas;
- Demand the end of the sieges;
- Adopt sanctions against leaders and commanders implicated in serious violations of international human rights and humanitarian law in Syria;
- Investigate and prosecute, under the principle of universal jurisdiction and in accordance with national laws, members of armed groups from all sides, should they enter their territory;
- Ensure the implementation of all UN resolutions relating to the Syrian situation, in particular Resolution 2254 endorsing a road map for a peace process in Syria;
- Refer the situation in Syria to the International Criminal Court and ensure all states comply with their international obligations;