



SYRIA LEGAL NETWORK-NL

Ten Legal Questions

The war in Syria

explained in the framework of international law

2018

**The
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**WAR
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Ten Legal Questions

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international law**

Preface

Ten Legal Questions: The War in Syria in the Framework of International Law seeks to clarify some of the most basic questions on how international law applies to the current conflict in Syria. In ten concise chapters, we explain how we should understand the legal framework of the armed conflict in Syria and why the legal framing matters.

The idea for this reader was developed in 2016, during a series of meetings on legal topics related to the conflict in Syria, organized by the **Syria Legal Network-NL**. The meetings took place at the Law Faculty of the University of Amsterdam and were supported by the faculty's War Reparations Centre. During these meetings, the same questions on the highly complex conflict kept popping up. How should we qualify the conflict? Who are the parties to the conflict? Under what conditions could sieges or forced population transfers be considered legally justified? When is intervention defensible? And what are the mechanisms to establish accountability?

In February 2017, we decided to formulate the ten most pertinent questions and develop a student research project in order to find the answers. A group of Syrian lawyers and international students at the Law Faculty of the University of Amsterdam was soon formed. In cooperation with faculty staff, the group of students studied the legal framework of the conflict and analysed the relevance of international standards for the Syrian war. During the process, students learned about the horrifying facts of the ongoing war and Syrian lawyers familiarized themselves with several aspects of international law. The fruitful process was captured on video by a young Syrian filmmaker. The report and the film can be downloaded at www.syrialegalnetwork.nl. We invite you to broadly share and distribute both the book and the film to assist all those working towards a legally sound response to the gross injustice that has affected Syria. March 2018 is the closing date of the writing phase and we realize that important recent developments hereafter, i.e. chemical attacks on Ghouta of April 2018, the strikes by the US, the UK and France and Israel's strike in May 2018, are not included in our analysis.

We thank all authors who so enthusiastically participated in the numerous meetings and who energetically wrote their respective chapters. The process was not easy but our meetings were inspiring and fun. We thank the coordinators of the Syria Legal Network for their support and unreserved trust in us. We thank Azouz, the filmmaker, for making us believe that the camera loved us. We are grateful to Professor Terry Gill for his wisdom and critical comments. Last but not least, we thank the Amsterdam University Fund, more specifically the Paul F. van der Heijden Fund, PAX and Stichting Democratie en Media for their support without which we could not have realized our ideas.

We hope this reader will offer guidance into the most important legal aspects of the Syrian Conflict.

Ruby Kooter and Renée Grubben

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Colophon

Coordination and production

Renée Grubben & Ruby Kooter

Authors

Klodia Khajadourian, Ous Haidar, Renée Witte, Esther Wolthuis, Reina Maria van Pallandt, Caroline Feldbrugge, Esther van Gils, Gabriela-Petruta Radu, Laial Laham, Khaldoun Alshamli, Nataly Tzirtzipi, Karl Kemp, Jasmin Mäkinen, Ibraheem Jabr and Jóhann Thorvardarson

Editors

Frederiek de Vlaming, Terry Gill, Hope Rikkelman, Caroline Highland, Esther Wolthuis, Ruby Kooter and Renée Grubben

Front page

Stefan van Diepen

Editor Arabic version

Ibraheem Jabr

Translators Arabic version

Ghalia Mardam Bek, Ibraheem Jabr, Maymoun Youssef, Ahmad Bayazid, Klodia Khajadourian and Laial Laham

Sponsors/Partners

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1 The parties to the Syrian conflict

In March 2011 a revolution started in Syria. Within months, the uprising escalated into a full-scale civil war. The parties to the conflict received assistance from third States, alliances of States and foreign fighters. The stability of the entire region came under threat. The conflict in Syria has been perceived as a “situation [that] is fluid and characterized by a shifting pattern of alliances, cooperation and clashes between the various groups.”¹ It is important to identify the different parties to the conflict in order to classify the conflict as either an international or a non-international armed conflict and establish the legal obligations of the parties involved. In this first chapter, we will identify the various actors who are a party to the Syrian conflict.

The Syrian government and its supporters

The army of the Syrian Arab Republic, comprising over 300,000 troops before the civil war started in 2011, has shrunk significantly over the past seven years. Right from the beginning of the conflict, many left the army to join the opposition due to the violent response to the peaceful protests. Within a few years, the Syrian forces lost two thirds of their manpower, thus needing external support to regain strength.² On the 1st of October 2015, Russia joined the war to support the Syrian government. At the explicit request for military assistance by the Syrian Government, the Russian army launched air strikes on Syrian territory against ISIS and other opposition groups.³ The Islamic Republic of Iran already had military forces present in Syria since June 2013. While Iran’s influence was initially limited to technical and financial support to the Syrian government, it later sent members of its Law Enforcement Force and Revolutionary Guard ground forces to assist the Syrian government in training of their army and to provide them with logistical support. In 2016, the number of Iranian military personnel in Syria was estimated at somewhere between 6,000 and 9,000.⁴

¹ T D Gill, ‘Classifying the Conflict in Syria’ (2016) 92 *International Law Studies* 353, 355.

² A al-Masri, ‘Analysis: The Fifth Corps and the State of the Syrian Army’ *News Deeply* (Ottawa, 11 January 2017) <<https://www.newsdeeply.com/syria/articles/2017/01/11/analysis-the-fifth-corps-and-the-state-of-the-syrian-army>> accessed 25 September 2017; C E Humud et al, ‘Armed Conflict in Syria: Overview and U.S. Response’ (Congressional Research Service, 2018) <<https://fas.org/sgp/crs/mideast/RL33487.pdf>> accessed 25 September 2017, 12.

³ ‘Lawmakers Authorize Use of Russian Military Force for Anti-ISIS Airstrikes in Syria’ (*Tass*, 30 September 2015) <<http://tass.com/politics/824795>> accessed 25 September 2017.

⁴ A Bassiri Tabrizi and R Pantucci (eds), *Understanding Iran’s Role in the Syrian Conflict* (Royal United Services Institute for Defence and Security Studies, 2016) 4-5.

Pro-government non-State actors

Non-State actors fighting in support of the Syrian Government include the National Defence Forces (NDF), Hezbollah and other Shiite militias mainly from Iraq and Afghanistan. The NDF was established by the Syrian Government with Iranian support. They fight against the opposition forces and operate under the army's control.⁵ The Syrian government is believed to pay and arm NDF's fighters.⁶ The Lebanese group Hezbollah joined the conflict in 2013 in a primarily advisory capacity. Since 2014, the group expanded their influence towards a combat role at the government's side.⁷ It may be concluded that Hezbollah became a party to the armed conflict from that time onwards. Hezbollah fighters also trained Syrian military and paramilitary forces.⁸

The opposition

The factions opposing the Syrian government are numerous, and their frequently changing relations among each other make it difficult to keep track of their current positions. Nonetheless, it is possible to draw a few basic distinctions, for example by dividing the opposition into two main coalitions. The first is the coalition of secular and moderate Islamist opposition groups. The second coalition is composed of several jihadist groups, most importantly the former Al Nusra front, which at the time of writing operates under the name Hay'at Tahrir al-Sham, or 'Organization for the Liberation of the Levant'.⁹

The former - mixed - coalition of secular and Islamist insurgents comprises of three major organizations. The first is the Free Syrian Army (FSA), which started as a rebel movement in response to the Syrian government violent knock-down of the peaceful demonstrations in 2011. To this day, the FSA can be characterized as a loose alliance of several, mainly secular, units who associate themselves with the FSA brand. The FSA cannot be considered an actual organization, because it lacks a central command.¹⁰ Though it allegedly still exists of around 50,000 fighters,¹¹ its position has been weakened over the years, mostly in favour of the Islamist armed groups, such as Ahrar al-Sham (Free Men of the Levant) and

⁵ Gill (n 1) 356.

⁶ 'National Defence Force (NDF) – Syria' (*Terrorism Research & Analysis Consortium*, 2017) <<https://www.trackingterrorism.org/group/national-defense-force-ndf-syria>> accessed 23 September 2017.

⁷ M Sullivan, *Hezbollah in Syria: Middle East Security Report* (Institute for the Study of War, 2014) 19.

⁸ *ibid.*

⁹ BBC Monitoring, 'Tahrir al-Sham: Al-Qaeda's Latest Incarnation in Syria' *BBC News* (28 February 2017) <<http://www.bbc.com/news/world-middle-east-38934206>> accessed 26 September 2017.

¹⁰ C Lister, *The Free Syrian Army: A Decentralized Insurgent Brand* (Brookings Institution, 2016) 25.

¹¹ T Perry, S Al-Khalidi and J Walcott, 'Exclusive: CIA-Backed Aid for Syrian Rebels Frozen after Islamist Attack' *Reuters* (Beirut, Amman, Washington, 21 February 2017) <<http://www.reuters.com/article/us-mideast-crisis-syria-rebels-idUSKBN1601BD>> accessed 26 September 2017.

Jaysh al-Islam (The Islam Army). These armed groups are financially backed by Qatar, Turkey and Saudi Arabia,¹² and are active in the north-western provinces of Idlib, Aleppo, and the province of Damascus. Both organizations aim at the establishment of an Islamic State, but are critical of the jihadist ideology, which distinguishes them from the former Al Nusra front.¹³ Although the latter has split from Al-Qaeda in 2016, their ties are still believed to be strong.¹⁴ Al Nusras' position is powerful as it comprises around 30,000 fighters.¹⁵ They have clashed with almost all other parties, but their main enemy is the Syrian Government.

ISIS

ISIS initially emerged in Iraq and has spread their influence across the borders of several Middle-Eastern countries. The damage that ISIS has conflicted in the region is massive, especially when it comes to the numerous human rights violations they have committed. Their main aim was to achieve the creation of an independent Islamic State inspired by an extremist jihadist theology. The group has been fought by the Syrian government army, rebel groups, Kurdish forces and the US-led coalition and is rapidly losing control over Syrian territory and has at the time of writing been completely driven out of their self-declared capital Raqqa.¹⁶

The Kurds

Syrian Kurdish forces, together with Arab and Christian militias, form the Syrian Democratic Forces (SDF), which was established in late 2015. The group is led by the Kurdish People's Protection Units (YPG). They fight for increased autonomy in the northern-based Syrian Kurdistan, also named Rojava. Although they have fought Islamist opposition groups in the past,¹⁷ their attacks have lately been directed towards ISIS, in

¹² 'Ahrar al-Sham' (*Stanford University*, 5 August 2017) <<http://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/523>> accessed 1 November 2017; 'Jaysh al-Islam' (*Stanford University*, 31 August 2017) <<http://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/533>> accessed 1 November 2017.

¹³ Sam Heller, 'How Ahrar al-Sham Has Come to Define the Kaleidoscope of the Syrian Civil War' (*War on the Rocks*, 6 June 2016) <<https://warontherocks.com/2016/06/how-ahrar-al-sham-has-come-to-define-the-kaleidoscope-of-the-syrian-civil-war/>> accessed 26 September 2017.

¹⁴ 'The Syrian Conflict: Islamist Opposition' (*University of Illinois*, 5 May 2017) <<http://guides.library.illinois.edu/Syria/Islamist>> accessed 26 September 2017.

¹⁵ N Rida, 'Syria: Surfacing of 'Hai'at Tahrir al-Sham' Threatens Truce' (*Asharq al-Awsat*, 30 January 2017) <<https://english.aawsat.com/nazeer-rida/news-middle-east/syria-surfacing-haiat-tahrir-al-sham-threatens-truce>> accessed 26 September 2017.

¹⁶ B McKernan, 'From the Front Line in Raqqa: ISIS to Lose Syrian "Capital" in Days after "Surprise Attack" by US-backed Forces' (*Independent* (Raqqa), 20 September 2017) <<http://www.independent.co.uk/news/world/middle-east/isis-raqqa-front-line-in-syria-sdf-assad-islamic-state-iraq-forces-battle-a7957931.html>> accessed 26 September 2017.

¹⁷ Gill (n 1) 360.

order to expel the group from Raqqa and other parts of eastern Syria. In 2018, Kurdish forces in Afrin (northern Syria) have come to a confrontation with Turkish forces.

The United States led international coalition

Since August 2014, an international coalition of more than seventy members, led by the United States, started conducting air strikes targeting ISIS in Iraq. Shortly after some of the coalition members crossed the border into Syria, where over 13,500 (air-)attacks have been launched since then.¹⁸ The United States (US) is also involved on the ground, where they assist the SDF with the presence of special forces. The coalition has been requested by the Iraqis to aid them in the battle against ISIS, and claims to act out of the (collective) self-defence of Iraq against the threat that ISIS poses. Even though the Syrian government has not given explicit consent, the coalition's claim is based on the view that intervention is lawful as long as the action against the non-state actors meets the requirements of necessity and proportionality. Because of the absence of consent on the part of the Syrian government, it is argued by some observers that there is also an international armed conflict going on, or even that the use of force by the coalition is illegal.

The role of Turkey

Turkey is involved in the Syrian war on several levels. Firstly, the Turkish government has provided physical deployment of the Turkish Army against both ISIS and the Syrian Kurds in Jarablus, northern Syria. At the time of writing, they are fighting the Salafist group Tahrir-Al-Sham.¹⁹ Until August 2016, Turkey also provided support to opposition groups in Northern Syria, primarily by allowing them to use Turkish territory. As a result of the fighting in the border territory, a Syrian jet –allegedly violating the Turkish airspace – has been downed by the Turkish government.²⁰ In January 2018, the Turkish involvement reached a new level of intensity. Turkey started a ground operation against Kurds in the Afrin region in Northern Syria. Turkey claims to be acting out of self-defence against the

¹⁸ *Airwars* <<https://airwars.org/>> accessed 12 October 2017.

¹⁹ 'First Turkish Military Convoy Enters Syria's Idlib' *Reuters* (Beirut, 12 October 2017) <<https://www.reuters.com/article/us-mideast-crisis-syria-turkey/first-turkish-military-convoy-enters-syrias-idlib-idUSKBN1CH31K>> accessed 1 November 2017.

²⁰ R Spencer, 'Syrian Jet Shot Down by Turkey' *The Telegraph* (23 March 2014) <<http://www.telegraph.co.uk/news/worldnews/middleeast/syria/10717257/Syrian-jet-shot-down-by-Turkey.html>> accessed 1 November 2017; T Karadeniz and M Kiselyova, 'Turkey Downs Russian Warplane Near Syria Border, Putin Warns of "Serious Consequences"' *Reuters* (Beirut, 24 November 2015) <<http://www.reuters.com/article/us-mideast-crisis-syria-turkey/turkey-downs-russian-warplane-near-syria-border-putin-warns-of-serious-consequences-idUSKBN0TD0IR20151124>> accessed 1 November 2017.

attacks of the terrorist organisation YPG/PKK, and at the time of writing there is little consensus in the international arena about the validity of this claim.²¹

²¹ 'Turkey bombs Kurdish-controlled City of Afrin in Northern Syria' *The Guardian* (21 January 2018) <<https://www.theguardian.com/world/2018/jan/20/turkey-bombs-kurdish-controlled-city-of-afrin-in-northern-syria>> accessed 1 November 2017.

2 War in Syria: a non- international or international armed conflict?

The situation as described in chapter 1 begs the question whether the conflict in which so many non-Syrian parties became involved, has evolved into an international conflict or should be classified as a non-international conflict. This chapter discusses the legal classification of the conflict and answers the question whether an international armed conflict (IAC) or a non-international armed conflict (NIAC) takes place in Syria. The two categories of armed conflict apply different sets of legal rules.²² We will discuss the different legal regimes and why this is relevant. Most importantly, we will point out that the two categories of conflict differ in their legal responses when rules are violated.

International armed conflict and non- international armed conflict

The main difference between an IAC and a NIAC is that an IAC is a conflict between two States, and an NIAC is a conflict between a State and a non-State actor or multiple non-state actors. An IAC is defined as: “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties (States), even if the state of war is not recognized by one of them.”²³ “An IAC occurs when one or more States have recourse to armed force against another State, regardless of the reasons or the intensity of this confrontation.”²⁴

A NIAC can be defined as an armed conflict between one or more non-state armed groups and a State or between multiple non-state armed groups amongst themselves, which take place in the territory of that State.²⁵ International Humanitarian Law requires “a minimum degree of territorial control, organization (of the parties) sufficient to conduct and coordinate operations and a degree of intensity (of the conflict) that rises above internal unrest, sporadic violence or terrorist incidents.”²⁶ This is a higher threshold for a conflict or

²² *The Law of Armed Conflict: Non-International Armed Conflict* (ICRC, 2002) 2.

²³ Geneva Conventions I-IV (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 art 2; ICRC, ‘How is the Term “Armed Conflict” Defined in International Humanitarian Law?’ (ICRC, March 2008) <<https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>> accessed 27 September 2017; *Prosecutor v Tadic* (Decision) ICTY-94-1-A (2 October 1995) para 70.

²⁴ ‘How is the Term “Armed Conflict” Defined in International Humanitarian Law?’ (n 23) 1.

²⁵ Gill (n 1) 364.

²⁶ Geneva Conventions I-IV (n 23) art 3; F Kalshoven and L Zegveld, *Constraints on the Waging of War: an Introduction to International Humanitarian Law* (3rd edn, ICRC 2001) 132; Gill (n 1) 364.

set of conflicts to qualify as a NIAC than is the case with IAC.²⁷ The definition of the concept has been considerably developed in case law in the last twenty years.²⁸

Consent

A state can intervene in a conflict in another state in several ways. This will be discussed in chapter 3 of this reader. The central question here is whether an intervention by a third state on the territory of the host state which is directed at a *non-state actor* (for instance, ISIS) changes the legal classification of the armed conflict? In other words, does outside assistance during a civil conflict turn the conflict into an international one?

When States are *attacked* by other States, the conflict may be characterized as inter-state, and therefore as an IAC.²⁹ However, when an intervening state only targets a non-state armed group within the territory of the Host State and not the Host State itself, there are two different views on what this means for the classification of a conflict.

The first holds that ‘any State intervention by a State on another State’s territory will, in the absence of that State’s consent, constitute an IAC’.³⁰ The second view is that if the intervention solely targets the non-state armed groups operating on the territory of the Host State, such intervention does not automatically qualify the conflict as an IAC. According to Terry Gill, “such situations should be treated as NIACs unless there are specific reasons for determining the conflict is international in character”, focusing primarily on the *factual* situation of the conflict.³¹

Scholars argue that it is purely the *nature* of the parties (governmental or non-governmental) that determines the classification of the armed conflict as an IAC or a NIAC.³² Furthermore, the assumption that a NIAC can exist on a State’s territory when a foreign state comes to the aid of the host State *without* that State’s express invitation, is now supported by state practice.³³ In the case of Syria, consent to the intervention by the

²⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (Additional Protocol II) art 1(2); Gill (n 1) 364.

²⁸ *Tadic* (n 23).

²⁹ Gill (n 1) 366.

³⁰ *ibid.*

³¹ *ibid.*

³² S Vité, ‘Typology of armed conflicts in international humanitarian law: legal concepts and actual situations’ (2009) 91 *International Review of the Red Cross* 69, 92; N Lubell, ‘Transnational non-international armed conflicts’ in C Marchand and GL Beruto (eds), *The Distinction between International and Non-International Armed Conflicts: Challenges for IHL?* (International Institute of Humanitarian Law Milan 2016) 54; M N Schmitt, ‘Charting the Legal Geography of Non-International Armed Conflict’ (2014) 90 *International Law Studies* 1, 7; see also Gill (n 1) 373.

³³ See Gill (n 1) 371, where Gill points to examples like “drone strikes by the United States against various jihadist armed groups in Pakistan and Yemen, the intervention of Turkey against PKK positions in northern Iraq, cross-border action by

US-led Coalition against ISIS has not explicitly been given by the Syrian Government. The United States and its Coalition justify their intervention by the collective use of the self-defence of Iraq against ISIS³⁴ justifying their intervention.³⁵

Classification of the conflict

In general, it is the nature of the parties to a conflict that determines its character and classification. The non-governmental nature of the parties operating on the Syrian territory determines that a non-international conflict exists in Syria. The main parties to the Syrian conflict, such as ISIS and the Free Syrian Army, meet the level of organisation that is required to qualify the conflict as a non-international conflict. Also, the intensity of armed confrontations in the conflict certainly meets the threshold of a NIAC.³⁶ A spill-over into neighbouring territory (Iraq) does not automatically result into an internationalisation of the conflict. Gill argues that there are multiple NIACs on Syrian territory.³⁷

Applicable law

Now we have categorised the Syrian conflict as a multiple NIACs, we will discuss what the applicable law is with respect to the protection of the civilian population. The International Committee of the Red Cross (ICRC) states that “the rules of the law of armed conflict in situations of non-international armed conflict are found in both treaty and customary law.”³⁸

Common Article 3 of the Geneva Conventions serves as a minimum standard of protection of the civilian population.³⁹ The Syrian Government as well as non-state armed groups are bound to apply the rules laid down in this Article.⁴⁰ It stipulates “the minimum protection that must be afforded to all those who are not, or who are no longer, taking an active part

the armed forces of Kenya into Somalia in pursuit of Al Shabaab fighters, and Colombian incursions into Ecuador against FARC rebels.”

³⁴ Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 16 (UN Charter) art 51.

³⁵ L Arimatsu and M N Schmitt, ‘Attacking “Islamic State” and the Khorasan Group: Surveying the International Law Landscape’ (2014) 53 Columbia Journal of Transnational Law Bulletin 1, 10.

³⁶ Gill (n 1) 374.

³⁷ *ibid* 378.

³⁸ M Mack, *Increasing respect for international humanitarian law in non-international armed conflicts* (ICRC 2008) 7.

³⁹ Gill (n 1) 376.

⁴⁰ Although it is not possible for non-state parties to ratify the Geneva Conventions and their Protocols, Common Article 3 states that “each party to the conflict is bound to apply the provisions of this Article”, and therefore provide the level of protection laid down in it. Accordingly, also the non-state armed groups who did not sign these Conventions are obligated to do so under international law; T Rodenhäuser, ‘International Legal Obligations of Armed Opposition Groups in Syria’ (2015) 1 International Review of Law 14.

in hostilities (e.g. civilians, members of armed forces of the parties to the conflict who have been captured, are wounded, or have surrendered).”⁴¹

Additional Protocol II (AP II) to the Geneva Conventions, relating to NIACs, addresses “all persons affected by an armed conflict”.⁴² It extends the protection of IHL to those persons not necessarily “party” to the conflict. Syria is not a party to AP II and thus this protocol does not apply to the conflict.⁴³ However, the principles which make up the main part of the rules on the conduct of hostilities are part of customary IHL and applicable in both IACs and NIACs.⁴⁴ Thus, even though Syria is not a party to AP II, a number of customary rules must be observed by all those participating in hostilities. Especially noteworthy for the case of Syria is that rules of customary IHL are not only binding on States, but on all parties to the conflict, including non-State armed groups.⁴⁵

Consequences of classification

We established that a part of the rules applies to both IACs and NIACs because of their customary law status. Still, there are some differences between the two frameworks. The most important consequence is the difference in applicable law. An example is that in contrast to an IAC, non-state actors in a NIAC do not enjoy prisoner of war status when captured.⁴⁶ They remain entitled to a minimum standard of humane treatment, but they cannot claim a right to all the entitlements of regular combatants such as during an IAC.⁴⁷ In IACs, regular combatants are entitled to prisoner of war status and cannot be prosecuted for other acts than violations of IHL. Non-state actors, not being regular combatants, can be *criminally* held liable for such acts of violence under their domestic law, i.e. Syrian law.

⁴¹ Mack (38) 7.

⁴² Additional Protocol II (n 27) art 2.

⁴³ The State Parties to Additional Protocol II can be found via this link: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=475> accessed 1 November 2017; Additional Protocol II (n 27) art 1(1).

⁴⁴ N Melzer, *Targeted Killing in International Law* (Oxford University Press 2009) 298; G Gaggioli, *The Use of Force in Armed Conflicts: Interplay Between The Conduct of Hostilities and Law Enforcement Paradigms* (ICRC 2013) 7.

⁴⁵ W A Solf, ‘Protection of Civilians Against the Effects of Hostilities Under Customary International Law and Under Protocol I (1986) 1 American University International Law Review 117, 123; AJ Carswell (ed) *Handbook on International Rules Governing Military Operations* (ICRC 2013) 50.

⁴⁶ Geneva Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (Third Geneva Convention) article 4.

⁴⁷ Non- state actors cannot claim a right to all the entitlements of regular combatants under Geneva Conventions I – III (1949).

Conclusion

We conclude that despite the complexity and the numerous foreign players, the Syrian conflict can still be characterised as a non-international armed conflict due to the non-governmental nature of the parties operating on the Syrian territory. The possible non-consensual intervention by foreign States does not effect this.

As a result, the rules of written IHL that apply to NIACs, and Customary International Law are applicable to the conflict. Military intervention by a State with the consent of the State in question, is in accordance with international law.⁴⁸ It is stated in the jurisprudence of the International Court of Justice, that ‘intervention by invitation’, for as long as the given consent is valid, falls outside the scope of Article 2(4) of the UN Charter, in which the prohibition on the use of force by states in their international relations is laid down.⁴⁹ Withdrawal of consent would cause the intervention to become a breach of international law from that point onwards and it would make the intervening foreign State a party to the conflict.⁵⁰

⁴⁸ As has become clear from the *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* General List No 116 [2005] ICJ 168.

⁴⁹ Charter of the United Nations (n 34) ‘All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations’. This rule is commonly referred to as the prohibition on the use of force.

⁵⁰ L Visser, ‘Russia’s Intervention in Syria’ (*EJIL: Talk!*, 25 November 2015) <<https://www.ejiltalk.org/russias-intervention-in-syria/>> accessed 25 September 2017.

3 When is international intervention justified?

As indicated in chapter 2, a number of states are conducting military activities on Syrian territory. Each country has its own reasons for doing so. In principle, a country may not carry out such activities on another country's territory. However, there are exceptions to that rule.⁵¹ These exceptions include: intervention by invitation, individual and collective self-defence, intervention authorized by the United Nations Security Council, and humanitarian intervention. Syria presents a unique situation in which all of these justifications to use force on another state's territory are used. We will explore the ways in which military operations have been justified, and will evaluate the justifications.

Intervention by invitation

The government of any country is the sole institution that is allowed to use force within its territory. However, when a government is in a position that it cannot control a situation within its territory, it may request help from other entities. In other words, governments may request foreign military support in a particular situation. When such a request is made, the requested government 'consents' to the foreign military intervention.⁵² As long as such consent is given, the foreign government is allowed to carry out military operations.⁵³

The Syrian Government has requested foreign aid for its fight against ISIS. Most notably, it has explicitly asked Russia to intervene.⁵⁴ Iran is the closest ally of the Syrian regime and thus considered a party that is welcome on Syrian territory.⁵⁵ Russia and Iran accordingly have a legal justification for their military presence on Syrian territory. The explicit consent of the Syrian government is limited to these two States, and no other state can justify its presence on the territory on this basis

⁵¹ Prohibition on the use of force, article 2(4) of the United Nations Charter (n 34): 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations'.

⁵² G Nolte, 'Intervention by Invitation' (*Max Planck Encyclopedia of Public International Law*, 2010) <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1702?prd=EPIL%2015>> accessed 30 October 2017 para 15-16.

⁵³ ICJ: The ICJ has confirmed and applied the general rule that intervention is 'allowable at the request of the government' in the case of *Armed Activities* (n 48). This rule, however, is a general rule and it does not imply that every intervention by invitation of the government is allowable. General principles of international law and specific rules may, in certain circumstances, preclude the justificatory effect of an invitation. See Nolte (n 53) para 16.

⁵⁴ Tass (n 3).

⁵⁵ D Akande and M Milanovic, 'The Constructive Ambiguity of the Security Council's ISIS Resolution' (*EJIL: Talk!*, 21 November 2015) <<https://www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/>> accessed 31 October 2017; 'Iran Says Presence in Syria Not Depending On Other Party Consent' *Islamic Republic News Agency* (Tehran, 15 July 2017) <<http://www.irna.ir/en/News/82599450>> accessed 31 October 2017.

However, in addition to Russia and Iran, the United States (US) - and its coalition of countries against ISIS - has been invited by the Government of Iraq to provide military aid in the fight against ISIS.⁵⁶ While this does not readily justify military activity in Syria, a number of states consider that this self-defence also applies to coalition intervention against ISIS on Syrian territory, as this at the relevant time was its base of operations against Iraq. As discussed in the previous chapter, there is a division of opinions on whether the right to self-defence against non-state actors can be extended to the territory of third states.

Individual and collective self-defence

Self-defence is one of the exceptions to the prohibition of the use of force that is recognized in the United Nations Charter.⁵⁷ There are two forms of self-defence that may legally be exercised: individual and collective self-defence. A country may legally defend its territory and citizens that are under attack. There are rules pertaining to the notion of self-defence, so that it cannot be incurred on any occasion that a state considers itself under attack. There are conditions under which a state may respond to an attack. The main criteria include that the attack to which a country responds to can be classified as an armed attack, that the use of force in response to that armed attack is necessary, and that the degree of force used is proportionate to the armed attack.⁵⁸ Collective self-defence is used when a state which is not the victim of the armed attack, applies force against the aggressor on behalf of the victim State.⁵⁹

Several States have claimed that their involvement in Syria is justified on the basis of individual self-defence. The US, UK, Turkey, and France have all cited this as a reason for military actions in Syria, after their citizens suffered attacks carried out by ISIS.⁶⁰ Whether

⁵⁶ The US, Iran and Russia. See K Bannelier, 'Military Interventions Against ISIL in Iraq, Syria and Libya and the Legal Basis of Consent' (2016) 29 *Leiden Journal of International Law* 743. Specifically on US invitation: M R Gordon, 'Iraq's Leader Requests More Aid in Fight Against ISIS' *New York Times* (Brussels, 3 December 2014) accessed 30 October 2017; 'Iraq Formally Asks US to Launch Air Strikes Against Rebels' *BBC News* (18 June 2014) <<http://www.bbc.com/news/world-middle-east-27905849>> accessed 30 October 2017.

⁵⁷ Article 51 of the United Nations Charter (n 34) reads: "nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations (...)".

⁵⁸ Christopher Greenwood, 'Self-Defence' (*Max Planck Encyclopedia of Public International Law*, April 2011) <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e401?prd=EPIL>> accessed 31 October 2017 para 8.

⁵⁹ *ibid* paras 35-40.

⁶⁰ Turkey: UNSC 'Letter Dated 24 July 2015 From the Chargé d'Affaires A.I. Of the Permanent Mission of Turkey to the United Nations Addressed to the President of the Security Council' (24 July 2015) UN Doc S/2015/563; US after strikes against Khorasan Group: D Cantwell, 'The ETF and the Legality of US Intervention in Syria under

these claims are justified under international law is debatable - even if the attacks against their citizens would have reached the threshold of an “armed attack”, and the self-defence in response is necessary and proportionate, because the legitimacy of acting in self-defence against non-state actors is not firmly grounded in international law.⁶¹ Nevertheless, it has become widespread practice for states to use force against a non-state actor citing self-defence as the legal justification. The reasons cited by the countries present in Syria are thus far from unprecedented.⁶²

The most widely used form of self-defence in the Syrian conflict is collective self-defence. This argument is construed on the basis of the Iraqi consent to the US coalition to fight ISIS. It is generally accepted that collective self-defence may be used against a non-state actor on the territory of another country in certain cases. For the international community to accept such reasoning of collective self-defence, it has been suggested that it must be shown that the state in which the non-state actor is based, is “unwilling or unable” to confront the actor themselves.⁶³ The US argues that indeed, the Syrian government is not equipped to deal with the threat that ISIS poses against Iraq, and therefore their coalition has the right to attack ISIS in Syria within the boundaries of collective self-defence.⁶⁴ However, this reasoning is not undisputed and various States have spoken out against it.⁶⁵ On the other hand, it is clear that more States have joined the US coalition in the fight against ISIS on Syrian territory on the basis of collective self-defence.⁶⁶

International Law’ (*Lawfare*, 28 March 2016) <<https://www.lawfareblog.com/etf-and-legality-us-intervention-syria-under-international-law>> accessed 31 October 2017;

UK after air strike on a British citizen in 2015: HC Briefing Paper, Legal Basis for UK Military Action in Syria (1 December 2015) para 4.5;

France after Paris attacks: ‘France May Launch Strikes in Syria “in Self Defence”’: Fabius’ *RFI* (11 September 2015) <<http://en.rfi.fr/americas/20150911-france-may-launch-strikes-syria-self-defence-fabius>> accessed 30 October 2017.

⁶¹ M Milanovic, ‘Self-Defense and Non-State Actors: Indeterminacy and the Jus Ad Bellum’ (*EJIL: Talk!*, 21 February 2010) accessed 31 October 2017.

⁶² Greenwood (n 59) paras 9-24.

⁶³ Cantwell (n 61).

⁶⁴ UNSC ‘Letter Dated 23 September 2014 From the Permanent Representative of the United States of America to the United Nations Addressed to the Secretary-General’ (23 September 2014) UN Doc S/2014/695.

⁶⁵ K J Heller, ‘Do Attacks on ISIS in Syria Justify the “Unwilling or Unable” Test?’ (*Opinio Juris*, 13 December 2014) <<http://opiniojuris.org/2014/12/13/attacks-isis-syria-justify-unwilling-unable-test/>> accessed 31 October 2017.

⁶⁶ For example, while the Dutch government was still unsure about the legality of justification of collective self-defence in Syria in 2014 (Tweede Kamer der Staten-Generaal ‘Brief van de Ministers van Buitenlandse Zaken, van Defensie en voor Buitenlandse Handel en Ontwikkelingssamenwerking’ (30 September 2014) Kamerstuk 27925/506), it had decided to join the coalition in Syria on that basis in 2016 (Tweede Kamer der Staten-Generaal ‘Brief van de Ministers van Buitenlandse Zaken, van Defensie en voor Buitenlandse Handel en Ontwikkelingssamenwerking’ (3 February 2016) Kamerstuk 27925/570).

Intervention authorized by the United Nations Security Council

Unilateral humanitarian intervention was criticized and condemned as a justification for using force that was considered arbitrary. In 2004, the United Nations established a global system to tackle grave human suffering and endorsed the concept of Responsibility to Protect (R2P).⁶⁷ The concept includes both peaceful means and the legitimate use of force described in Chapter VII of the UN Charter. The use of force must only be applied as a last resort. The Security Council is the sole organ allowed to authorize intervention under Chapter VII in the following situations of mass atrocity: genocide, war crimes, crimes against humanity and ethnic cleansing.

R2P is not merely about military intervention by the international community in a wrongdoing State. It is an all-embracing concept that includes the responsibilities of all States to protect their own people, and is aimed at international cooperation with regard to the prevention of crimes and post war reconstruction.⁶⁸ There are three established pillars that comprise R2P.⁶⁹

1. The responsibility of the State to protect its population;
2. The responsibility of the international community to assist individual States;
3. The responsibility of the international community to intervene if State's protection fails.

Military intervention authorized by the Security Council falls under the third pillar.

The first case in which the Security Council resorted to the authorization of military intervention citing R2P was in Libya in 2011, because of the fact that crimes against humanity were being committed.⁷⁰ A vital element to the R2P system is the required unanimity in the Security Council in order to authorize any military intervention. Unanimity means that if any of the five permanent members of the Council disagrees on a certain course of action, a mandate for intervention cannot be adopted.⁷¹ The experiences in Libya and Cote d'Ivoire have increased the level of distrust within the Security Council, and have made it difficult for unanimity to be reached on military intervention. A total of eight

⁶⁷ K Annan, *We the Peoples: The Role of the United Nations in the 21st Century* (United Nations Department of Public Information 2000) 48.

⁶⁸ See for example ex-Secretary General Ban Ki-Moon's report: UNGA 'Implementing the Responsibility to Protect: Report of the Secretary-General' (12 January 2009) UN Doc A/63/677

⁶⁹ See 'About R2P' (*Global Centre for the Responsibility to Protect*) <http://www.globalr2p.org/about_r2p>.

⁷⁰ UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973.

⁷¹ The permanent five members of the Security Council are the US, Russia, China, France, and the UK.

resolutions have been submitted to the Security Council in an attempt to implement different preventive measures to protect civilians in Syria, but all have been vetoed by one or more of the permanent members. There has been one Resolution that seemingly expresses the approval by the Security Council of the foreign intervention in Syria against ISIS, but it does not authorize any military action.⁷² Therefore, the Council is in a deadlock concerning the Syria situation, and the system of R2P cannot be utilized.

Conclusion

The use of force has been justified on various occasions by referring to the concept of humanitarian intervention. It comprises the idea that even though intervention in a sovereign country is not allowed, an exception should be made when such intervention is carried out in response to a situation of overwhelming humanitarian necessity.⁷³ However, it remains very difficult to categorize humanitarian intervention as legitimate under international law, as it infringes upon the – all sacred – notion of territorial integrity and state sovereignty. The example of Syria shows how arbitrary the notion of the Responsibility to Protect is interpreted. While the international intervention to strike ISIS on Syrian territory is widely accepted, there is considerable debate regarding the US airstrikes against Syria's government as this cannot be justified by self-defence. Nevertheless, the usage of chemical weapons has been widely condemned, and some states have welcomed the US Shayrat strike in April 2017 in response to the chemical weapons attack on Syrian Civilians by the Syrian Government.⁷⁴ We will discuss the use of chemical weapons in chapter 5.

⁷² UNSC Res 2249 (20 November 2015) UN Doc S/RES/2249. For explanations, see for example: Akande and Milanovic (n 56);

S A Elgebeily, 'A Legal Analysis of UN Security Council Resolution 2249' (*Cambridge International Law Journal*, 27 February 2016) <<http://cilj.co.uk/2016/02/27/a-legal-analysis-of-un-security-council-resolution-2249/>> accessed 31 October 2017.

⁷³ M Shaw, *International Law* (7th edn Cambridge University Press 2014) 838.

⁷⁴ Angela Merkel once again condemned the "chemical weapons massacre of innocent people in Syria" and implied that the US missile strikes in response were justified: J Chase, 'Merkel, German Government Says US Missile Strikes in Syria "Understandable"' *DW* (7 April 2017) <<http://www.dw.com/en/merkel-german-government-say-us-missile-strikes-in-syria-understandable/a-38341124>> accessed 10 October 2017.

Dutch government: protect local population of Iraq and Syria from HR violations, war crimes, crimes against humanity: Kamerstuk 27925/506 (n 67).

UK: "if action through the UNSC were blocked by a veto, the UK would nevertheless be permitted under international law to use force in Syria in order to deter and disrupt the further use of chemical weapons." UK Government, *Chemical Weapon Use by Syrian Regime: UK Government Legal Position* (29 August 2013)

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/235098/Chemical-weapon-use-by-Syrian-regime-UK-government-legal-position.pdf> accessed 10 October 2017.

In this chapter, we have explained the arguments that are used by various States to justify their military presence in Syria. The most accepted justification is that of intervention by invitation, even though some scholars criticize that exception in this context. Self-defence is another justification that states have referred to. In the meantime the UN Security Council remains in deadlock on the application of the responsibility to Protect, and thus humanitarian intervention is a last resort.

4 Requirements under IHL for the conduct of hostilities

Since 2011, it has been widely reported that the violence in Syria has escalated to an unprecedented level.⁷⁵ The use of force is inherent to armed conflict. However, the use of means and methods of warfare in military action are subject to legal rules. International humanitarian law (IHL) regulates what is allowed and what is not allowed in armed conflict.⁷⁶ This chapter will describe the most important legal obligations of the parties to the conflict for the lawful use of force under IHL. This is an important basis to understand and establish accountability of those who break the rules.⁷⁷

Legal framework and terminology

In chapter 1 we discussed the legal framework of the non-international armed conflict (NIAC) in Syria which is primarily based on customary law. The principles to lawfully conduct military action will be discussed in this chapter. In a NIAC it is not only IHL, but

⁷⁵ See for example 'Impunity, Unprecedented Violence, Denial of Aid Hallmarks of Syria Conflict – UN Rights Panel' *UN News* (17 June 2014) <<http://www.un.org/apps/news/story.asp?NewsID=48070#.Wdlu1oVOLIU>> accessed 1 November 2017; 'Head of UN Panel Urges Concerted Action Amid Escalation in Syria Violence' *UN News* (27 June 2012) <<http://www.un.org/apps/news/story.asp?NewsID=42335#.WdlZ-4VOLIV>> accessed 1 November 2017; "Unprecedented Suffering" for Syrian Children in 2016 – UNICEF' *UN News* (13 March 2017) <<https://news.un.org/en/story/2017/03/553172-unprecedented-suffering-syrian-children-2016-unicef>> accessed 1 November 2017.

⁷⁶ JK Kleffner, 'Scope of Application of International Humanitarian Law' in D Fleck (ed), *The Handbook of International Humanitarian Law* (3rd edn, Oxford University Press 2013) 201. It is important to note that IHL is concerned with the legality of conduct in times of armed conflict. IHL is not concerned with the question whether the first resort to force by a party to the conflict was (un)lawful. This means that IHL is not concerned with the question whether the use of force by the Russian Federation or by the US-led anti-IS coalition on Syrian territory (without consent of the Syrian Government) was lawful. The latter question is regulated by the 'jus ad bellum' which is a separate body of law, codified in Article 2(4) of the Charter of the United Nations (n 34). See ME O'Connell, 'Historical Development and Legal Basis' in D Fleck (ed), *The Handbook of International Humanitarian Law* (3rd edn, Oxford University Press 2013) 101; UN Charter (n 34) art 2(4).

⁷⁷ D Wallace, A McCarthy and SR Reeves, 'Trying To Make Sense of the Senseless: Classifying the Syrian War under the Law of Armed Conflict' (2017) 25 *Michigan State International Law Review* 555, 557/594.

also domestic law that regulates the use of force.⁷⁸ Without prejudice to possible liability for using force under Syrian law, this chapter will only deal with the requirements for the conduct of hostilities under IHL.⁷⁹ Under IHL, the violence used by parties in an armed conflict is referred to as the *means and methods of warfare*. The general term ‘means of warfare’ includes weapons in the widest sense. It refers to any device (including arms, projectiles and material) which is able to inflict injury or suffering.⁸⁰ Examples of means of warfare are firearms, mines and poison.⁸¹ A ‘method of warfare’ refers to a military concept or military tactic. It encompasses the way means of warfare are used.⁸² Examples of (prohibited) methods of warfare are the deliberate bombardment of civilian objects, starvation of the civilian population and attacks on hospitals and associated personnel.⁸³ IHL places limitations on the use of means and methods of warfare, so that the parties to a conflict must carefully evaluate their strategies and weaponry in order for their military actions to be considered legitimate.

Applicable principles to the conduct of hostilities

IHL does not allow for ‘total war’⁸⁴ and the rules on the use of violence between organized adversaries in armed conflict – often referred to as *the conduct of hostilities* – are corollaries of the overarching, fundamental principles of military necessity and humanity.⁸⁵ To lawfully use force in armed conflict under IHL each party must act in accordance with a set of interrelated principles. The core of these principles lies in the balance between military and humanitarian objectives.

The principle of distinction

⁷⁸ J-M Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules* (Cambridge University Press 2005) r 3. The lack of international rules in NIACs stems from the principles of State sovereignty and territorial integrity - the notion that a State is in exclusive control of its people and territory, and other States may not intervene.

⁷⁹ WH Boothby, *The Law of Targeting* (Oxford University Press 2012) 433; Mack (n 38) 28.

⁸⁰ H Meyrowitz, ‘The Principle of Superfluous Injury or Unnecessary Suffering: From the Declaration of St. Petersburg of 1868 to Additional Protocol I of 1977’ [1994] 229 *International Review of the Red Cross* 103; C Pilloud et al, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Sandoz, Swinarski and Zimmermann eds, International Committee of the Red Cross 1987) 1402.

⁸¹ WH Boothby, *Weapons and the Law of Armed Conflict* (2nd edn, OUP New York 2016) 103, 133, 149.

⁸² Meyrowitz (n 81) 103; Pilloud (n 81) (1402).

⁸³ S Oeter, ‘Methods and Means of Combat’ in D Fleck (ed), *The Handbook of International Humanitarian Law* (3rd edn, Oxford University Press 2013) 457, 466, 478.

⁸⁴ *ibid* 401.

⁸⁵ All rules of IHL stem from a balance between military necessity and humanity (O’Connell (n 77) 133) Military necessity refers to the necessity for acts which are indispensable to attain the goals of war, such as the neutralization of enemy armed groups or military material, and which comply with IHL (Oeter (n 84) 402; Pilloud (n 81) 1389). Considerations of humanity prohibit all suffering, injury or destruction which is unnecessary to obtain the lawful goals of war: *International Humanitarian Law: Answers to Your Questions* (ICRC, 2015) 6.

The most important principle of IHL concerns the protection of civilians and civilian objects.⁸⁶ The principle of distinction dictates that the parties to an armed conflict must distinguish at all times between combatants (or ‘fighters’) on the one hand and civilians on the other,⁸⁷ as well as between military objectives and civilian objects.⁸⁸ An attack may thus only be directed against a combatant or a military objective.⁸⁹ Military objectives are “limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage”.⁹⁰ Examples of possible military objectives by nature are military platforms such as military vehicles or aircraft, military installations such as an enemy command centre or weapons depot, or members of State and non-State armed forces.⁹¹ Civilians may lose their protection from direct attack, but only if and for such time as they directly participate in hostilities and thus become a military object.⁹² Military objectives by use can include bridges, roads, airfields or buildings temporarily employed for a military purpose. Military objectives by purpose are objects which have been designated for future use for a military purpose such as a factory producing civilian goods which is in the process of being converted to an arms factory. Military objectives by location include geographical features which provide a clear military advantage under specific circumstances, such as a mountain pass or river crossing. Civilian objects are all objects which are not categorized as military objectives such as houses, schools and hospitals and are protected against attack.⁹³ They may only lose their protection if they are categorized as a military objective on the basis of use, purpose or location and only for such time as they are military objectives.⁹⁴ During the war in Syria, a huge number of breaches of the principle of distinction have been observed.

⁸⁶ Persons who are not identified as members of armed forces are civilians. A person *hors de combat* can refer to a combatant or civilian who is either in the power of an adverse party, who is defenceless (because of unconsciousness, shipwreck, wounds or sickness) or it can refer to someone who clearly expresses an intention to surrender, provided this person refrains from hostile acts and does not attempt to escape. See *ibid* 5 and 47.

⁸⁷ Under protected persons also fall persons *hors de combat*, which included everyone – also soldiers – who due to wounds or sickness are disabled and are unable to participate in the fighting.

⁸⁸ Henckaerts and Doswald-Beck (n 79) r 1, r 47; D Fleck, ‘The Law of Non-International Armed Conflict’ in D Fleck (ed) *The Handbook of International Humanitarian Law* (3rd edn, Oxford University Press 2013) 1203.

⁸⁹ Here, ‘combatant’ must be understood in the sense that it encompasses a person who does not enjoy protection against direct attack, but it does not necessarily imply a right to combatant status or prisoner-of-war status. See *ibid* r 1.

⁹⁰ Henckaerts and Doswald-Beck (n 79) r 8.

⁹¹ See also N Melzer, ‘The Principle of Distinction Between Civilians and Combatants’ in A Clapham and others (eds). *The Oxford Handbook of International Law in Armed Conflict* (Oxford Scholarly Authorities on International Law 2014) 310.

⁹² Henckaerts and Doswald-Beck (n 79) r 6.

⁹³ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (Additional Protocol I) art 52(1); Henckaerts and Doswald-Beck (n 79) r 9.

⁹⁴ Henckaerts and Doswald-Beck (n 79) r 10.

Human Rights Watch (HRW) observed that cluster munitions have been used by Syrian Government forces in over 400 attacks between July 2012 and August 2016. These munitions have also been used by Syrian-Russian joint military operations.⁹⁵ These types of weapons have been internationally banned because they affect a large area upon explosion, which makes it impossible to distinguish between combatants and civilians in that area.⁹⁶

From the principle of distinction follows that IHL prohibits indiscriminate attacks.⁹⁷ An attack is considered to be indiscriminate if it is either not aimed at a specific military objective⁹⁸ or if means or methods of warfare are applied whereby the resulting effects cannot be conducted in line with fundamental principles of IHL, like the principle of distinction or the principle of proportionality.⁹⁹ An example of prohibited attacks in the Syrian Conflict is the use of chemical weapons, which will be discussed in the next chapter.

The principle of proportionality

Even though IHL does not allow the targeting of civilians, this does not mean that every loss of a civilian life is a violation of IHL. Incidental injury to civilians and collateral damage to civilian objects resulting from an attack on a military objective is legal, if the principle of proportionality is adhered to. The proportionality principle prohibits attacks on military objectives that cause loss of civilian life or injury to civilians or damage to civilian objects that are excessive in relation to the anticipated concrete and direct military advantage.¹⁰⁰ This principle demands an assessment of the concrete and direct military advantage against the collateral damage which is expected to result from a specific attack before the attack is launched.¹⁰¹ It requires attacks to be cancelled or halted if there is an intention to launch an attack or an attack has already been launched, but excessive loss or damage is expected.¹⁰²

⁹⁵ *World Report 2017* (Human Rights Watch 2017) 572.

⁹⁶ *ibid*; The CoI found that although neither Syria nor the Russian Federation are currently a party to the Convention on Cluster Munitions, the use of cluster munitions in civilian-populated areas violates the principle of distinction because of their inherently indiscriminate nature due to their wide dispersal pattern and high dud rate. See UNGA 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (2 February 2017) UN Doc A/HRC/34/64, 44.

⁹⁷ Henckaerts and Doswald-Beck (n 79) r 11.

⁹⁸ For example if means or methods of warfare are used which cannot be directed at a specific military objective.

⁹⁹ For example setting fire to a building to flush a sniper out.

¹⁰⁰ H-P Gasser and K Dörmann, 'Protection of the Civilian Population' in D Fleck (ed), *The Handbook of International Humanitarian Law* (3rd edn, Oxford University Press) 509;

¹⁰¹ Melzer (n 92) 293.

¹⁰² E Cannizzaro, 'Proportionality in the Law of Armed Conflict' in A Clapham and others (eds), *The Oxford Handbook of International Law in Armed Conflict* (Oxford Scholarly Authorities on International Law 2014) 335. This proportionality

*The duty to take precautionary measures*¹⁰³

All parties to a conflict are obliged to take constant care to protect civilians and civilian objects while conducting military operations.¹⁰⁴ The principle of precaution relates to these principles, and concerns primarily the phase preceding and during the actual targeting. It requires all parties to the conflict to take all feasible precautions to avoid, and in any event to minimise, incidental loss of civilian life, injury to civilians and damage to civilian objects.¹⁰⁵ The determination of what is “feasible” depends on all circumstances at hand and are generally limited to precautionary measures which are practically possible.¹⁰⁶

Conclusion

In order to lawfully use force under IHL, both State and non-State armed groups must conduct their military operations in compliance with the principles of distinction, the principle of no superfluous injury or unnecessary suffering, the proportionality principle and the principle of precaution. Violations of these principles by parties to the conflict have been documented, and parties could be held accountable for their actions.

assessment is also considered to be a precautionary measure, which is required to comply with the principle of precaution, as well as the requirement to do everything feasible to cancel or halt an attack if it becomes apparent that excessive loss or damage is expected to result from a launched attack. Henckaerts and Doswald-Beck (n 79) r 18 and r 19.

¹⁰³ A number of more concrete obligations flow from this comprehensive principle. See for a comprehensive elucidation on these concrete obligations *ibid* Henckaerts and Doswald-Beck rr 16-24.

¹⁰⁴ *ibid* r 15.

¹⁰⁵ *ibid*.

¹⁰⁶ *ibid*.

5 How is the prohibition of chemical weapons regulated?

There have been credible allegations of the use of chemical weapons in Syria since the outbreak of the conflict in 2011. According to the UN Commission of Inquiry on Syria, at least 25 chemical attacks have been carried-out by the Syrian Government since the conflict began in 2011.¹⁰⁷ These include the use of sarin and chlorine as chemical weapons.¹⁰⁸ One of the most deadly attacks was the Khan al-Assal attack in Aleppo in March 2013.¹⁰⁹ The attack on Ghouta, in the suburbs of Damascus in August 2013 was considered the worst in 25 years by a UN team investigating the attack.¹¹⁰ The most recent attack occurred on 4 April 2017 in the rebel-held Khan Sheikhoun, a city in Idlib province. Dozens of civilians, the majority of whom were children and women, were killed as a result of the use of sarin.¹¹¹ The use of chemical weapons is prohibited under international law, due to its indiscriminate nature and inhumane character.

The Chemical Weapons Convention

The destructive effects of chemical weapons are not only the result of explosive force but also of the toxicity of chemical agents.¹¹² A chemical weapon comprises a toxic chemical contained in a delivery system such as a bomb or artillery shell. While technically correct, this description would only cover a small portion of weapons of this nature. The Chemical Weapons Convention (CWC), created a broader definition of what a chemical weapon is.¹¹³ All toxic chemicals and their precursors, except when used for purposes permitted by the CWC, are considered chemical weapons. The CWC also lists purposes for use not prohibited by the Convention in article II.9, such as medical, agricultural or other peaceful purposes. Any toxic or chemical intended for purposes other than these is considered a chemical

¹⁰⁷ UNGA 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (8 August 2017) UN Doc A/HRC/36/55 para 67.

¹⁰⁸ See inter alia UNGA 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic (12 February 2014) UN Doc A/HRC/25/65 paras 127 et seq; UNGA 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic (13 August 2014) UN Doc A/HRC/27/60 paras 115-118.

¹⁰⁹ 'United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic: Final Report' (*United Nations*, 12 December 2013) < <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/12/report.pdf>> accessed 29 October 2017.

¹¹⁰ J Borger, 'Syrian Chemical Attack Used Sarin and Was Worst in 25 Years, Aays UN' *The Guardian* (17 September 2013) <<https://www.theguardian.com/world/2013/sep/16/syrian-chemical-attack-sarin-says-un>> accessed 29 October 2017.

¹¹¹ K Khadder et al, 'Suspected gas attack in Syria reportedly kills dozens' *CNN* (7 April 2017) <<http://edition.cnn.com/2017/04/04/middleeast/idlib-syria-attack/index.html>> accessed 30 October 2017.

¹¹² T Marauhn, 'Chemical weapons and warfare' (*Max Planck Encyclopedia of Public International Law*, June 2016) < <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e264>> accessed 30 October 2017 para 1.

¹¹³ Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (adopted 3 September 1992, entered into force 29 April 1997) 1974 UNTS 45 (CWC).

weapon. Accordingly, production of toxic chemicals with no legitimate peaceful uses, including sarin, is banned. The second part of CWC definition includes any munitions or devices designed and built with the intent to inflict harm or cause death through the release of toxic chemicals. Lastly, any equipment specifically designed for use “directly in connection” with the employment of munitions and devices described above are identified as chemical weapons.¹¹⁴

Prohibition of chemical weapons

Legal restraints on the use of chemical weapons in warfare developed at the end of the 19th century. Today it is undisputed that the use of chemical weapons is prohibited.¹¹⁵ The principles underlying prohibition include: weapons in general are not intended to cause unnecessary harm and suffering; weapons must have reasonably precise targeting capabilities, and may only be used to achieve military objectives. Generally, chemical weapons do not meet any of these criteria.

International Humanitarian Law

The Geneva Conventions and related protocols do not generally ban any specific weapons. Until the creation of the CWC, the 1925 Geneva Protocol¹¹⁶ was the most important instrument for the prohibition of chemical warfare.¹¹⁷ This Protocol, however, only outlaws the use, and not the possession, of chemical weapons. Hence, the most important international instrument regulating chemical weapons is the CWC, which is of unlimited duration and considered to be comprehensive. More specifically, the CWC prohibits “to develop, produce, acquire, stockpile, or retain chemical weapons; to directly or indirectly transfer chemical weapons; to use chemical weapons or prepare for such use; to assist, encourage, or induce other states to engage in activity prohibited under the CWC; to use of riot control agents as a method of warfare”.¹¹⁸ These prohibitions apply in all circumstances, including by way of reprisal, and against non-parties.¹¹⁹ Exceptions are excluded by the wording “never under any circumstances”.¹²⁰ Syria acceded to the CWC on

¹¹⁴ *ibid* article 2(1)-(3).

¹¹⁵ Maruhn (n 113) para 18.

¹¹⁶ Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and the Bacteriological Methods of Warfare (adopted 17 June 1925, entered into force 8 February 1928) 1929 UNTS 94 (1925 Geneva Protocol).

¹¹⁷ Maruhn (n 113) para 20.

¹¹⁸ CWC (n 114).

¹¹⁹ N Ronzitti, ‘Relations Between the Chemical Weapons Convention and Other Relevant International Norms’ in D Bardonnet (ed), *The Convention on the Prohibition and Elimination of Chemical Weapons: a Breakthrough in Multilateral Disarmament* (Martinus Nijhoff 1995) 184.

¹²⁰ W Krutzsch et al, ‘The Chemical Weapons Convention – Objectives, Principles and Implementation Practice’ in W Krutzsch et al (eds), *The Chemical Weapons Convention: A Commentary* (OUP 2014) 7; CWC (114) arts 1, 22.

14 October 2013, after a UN-led negotiation process. States parties to CWC are obliged to take the necessary steps to enforce prohibitions in respect of both natural and legal persons within their jurisdiction.¹²¹ The use of chemical weapons is considered a war crime.¹²²

Customary International Law

Under customary law chemical weapons are prohibited under all circumstances.¹²³ It is prohibited to use chemical weapons against armed forces or against the civilian population in any type of conflict.¹²⁴ Also under customary international law, the use of chemical weapons in an armed conflict amounts to a war crime.¹²⁵ Usage of chemical weapons as a means of warfare is incompatible with the principle of distinction¹²⁶ and prohibition of indiscriminate attacks.¹²⁷ Chemical weapons have the potential to cause unnecessary suffering and superfluous injury rendering them as prohibited under customary law.¹²⁸

Conclusion

The use of chemical weapons is prohibited under international law as set out in treaty law, the Chemical Weapons Convention and customary law.

¹²¹ M Polaine and A Sambei, 'Syria, Chemical Weapons and International Law: A Legal Snapshot' (Public International Law Advisory Group) <<http://piladvisorygroup.org/syria-chemical-weapons-international-law-legal-snapshot>> accessed 30 October 2017.

¹²² Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (Rome Statute) article 8(2)(b)(xviii).

¹²³ Henckaerts and Doswald-Beck (n 79) r 74.

¹²⁴ *Tadic* (n 23) para 124.

¹²⁵ Henckaerts and Doswald-Beck (n 79) r 156.

¹²⁶ *ibid* r 7.

¹²⁷ *ibid* r 11.

¹²⁸ *ibid* r 70.

6 When do sieges and population transfers violate international humanitarian law?

This chapter seeks to clarify the legal framework of one of the most distressing aspects of the war in Syria, i.e. the forced transfer of civilians and the siege of a large number of cities. A 2017 report stated that “an estimated 744,860 people remain trapped in at least 33 besieged communities across the country and more than 1 million additional Syrians live in areas that are under threat of intensified siege and abuse”.¹²⁹ The dire living conditions in the besieged areas force people to leave to other parts of the country or abroad. Parties in the armed conflict in Syria have used starvation and bombarding of besieged areas as an instrument to forcibly transfer or relocate the population from one area to another. Such forced population transfers may ultimately constitute war crimes or crimes against humanity.

This chapter explains the rules of international humanitarian law and international criminal law that apply to sieges and population transfers. Under what conditions are sieges and population transfers justified under international humanitarian law? And when are sieges and forced population transfer considered to constitute an international crime?

What is a siege and when is it justified?

A siege is a method of warfare to “facilitate capture of a fortified place such as a city, in such a way as to isolate it from relief in the form of supplies or additional defensive forces [...]”.¹³⁰ Sieges are used as coercive means for bringing about the surrender or capture of the defended area. The objective is mostly for the surrounded area to fall under the control of the surrounding power.¹³¹ In practice, a siege “consists of encircling an enemy location, cutting off those inside from any communication in order to bring about their surrender.”¹³² Often, sieges are mostly carried out in the form of starvation and bombardment.¹³³

Protection of civilians

Sieges are not expressly forbidden under international humanitarian law *per se*: a siege “is a lawful method of warfare”.¹³⁴ However, sieges like other lawful methods of warfare must:

¹²⁹ *Siege Watch: Eighth Quarterly Report August – October 2017* (The Syria Institute 2017) 6.

¹³⁰ J Kraska, ‘Siege’ in F Lachenmann and R Wolfrum (eds), *The Law of Armed Conflict and the Use of Force* (Oxford University press 2016) 1163.

¹³¹ *ibid.*

¹³² Pilloud et al (n 81) 1457.

¹³³ Kraska (n 131) 1163

¹³⁴ *ibid.*

a) distinguish between military forces and civilians in the besieged areas, and b) the force used during the siege must be proportionate.¹³⁵

Civilians must be protected as far as possible during an armed conflict, including during sieges.¹³⁶ Sieges may only be justified as a method of warfare when the goal of the siege is to achieve a military objective and not to starve civilian population.¹³⁷ Once a siege is initiated, there are rules and obligations that arise for the besieging power as it controls the daily life in the besieged area, and therefore is responsible for the conditions in these areas.

According to the Convention Respecting the Laws and Customs of War on Land (Hague IV), “the right of belligerents to adopt a means of injuring the enemy is not unlimited.”¹³⁸ It is forbidden “to destroy or seize the enemy’s property, unless such destruction or seizure is imperatively demanded by the necessities of war.”¹³⁹ It is incumbent on the “besieging force to permit civilians to leave the area in advance of a siege [...]” and the besieging force is prohibited “to drive civilians who are escaping the siege back into the besieged area”.¹⁴⁰ Similarly, all necessary measures must be taken to spare, as far as possible, religious buildings, hospitals, art, science, historic monuments and places reserved for the sick and wounded.¹⁴¹

Attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population is prohibited.¹⁴² In addition, “the parties to the conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control”.¹⁴³ Similarly, the parties must “ensure the freedom of

¹³⁵ *ibid* 1164.

¹³⁶ Geneva conventions (n 23) common article 3; Additional Protocol I (n 94) article 51(3); Additional Protocol II (n 27) article 13(3); the Syrian Arab Republic did not make any reservations to article 51 of Additional Protocol II.

¹³⁷ Henckaerts and Doswald-Beck (n 79) 188.

¹³⁸ Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 187 CTS 227 Annex article 22.

¹³⁹ *ibid* annex article 23(g).

¹⁴⁰ Kraska (n 131) 1167.

¹⁴¹ J W Garner, ‘Some Questions of International Law in the European War’ in M N Schmitt and W H von Heinegg (eds), *The Development and Principles of International Humanitarian Law* (Routledge 2016) 132.

¹⁴² Henckaerts and Doswald-Beck (n 79) r 54 and 55

¹⁴³ *ibid* rule 55.

movement of authorized humanitarian relief personnel essential to the exercise of their functions”.¹⁴⁴

International humanitarian law does not prohibit the use of starvation as a method of warfare against the military and/or those actively participating in hostilities, but expressly prohibits the use of “starvation of civilians as a method of warfare [...]”.¹⁴⁵ See for example, the Additional Protocol II to the Geneva Convention applicable in non-international armed conflicts (NIAC) forbids starvation of civilians as a method of combat.¹⁴⁶

The prohibition of starving civilians as a method of warfare is a non-derogable norm. Thus, starving civilians in a besieged area is a direct violation of IHL.¹⁴⁷ Similarly, under the regime of the International Criminal Court, it is a war crime to “intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions.”¹⁴⁸

Although Syria is not a signatory to Additional Protocol II, the provisions of additional protocol II and practice in respect of Rules 54–56 further reinforces norms of customary international law. As such, one could argue that, Syria is bound to respect them.

Forced population transfers

Population transfer is the compulsory movement of people from one area to another within the same State.¹⁴⁹ The notion of population transfer has been used interchangeably and in some cases, misconstrued with the concept of deportation, which is the forced removal of people from one country to another.¹⁵⁰

Parties to an armed conflict may not order the displacement of the population, in whole or in part, for reasons related to the conflict except for the security of the civilians involved or if imperative military reasons demand ¹⁵¹ so, in other words, the transfer of a civilian population is only justifiable if the security of the people involved call for such action or

¹⁴⁴ *ibid* rule 55 and 56.

¹⁴⁵ Additional Protocol I (n 94) article 54(1); Additional Protocol II (n 27) article 14.

¹⁴⁶ Additional Protocol II (n 27) article 14.

¹⁴⁷ Henckaerts and Doswald-Beck (n 79) r 53.

¹⁴⁸ Rome Statute (n 123) article 8(2)(b)(xxv).

¹⁴⁹ M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (2nd edn, Kluwer Law International 1999) 312.

¹⁵⁰ *ibid*.

¹⁵¹ *ibid*.

because there is a military necessity to remove the population.¹⁵² When parties to a conflict create the situation leading to the transfer of the civilian population, the transfer is seen as violating IHL.

Although population transfer is less developed in non-international armed conflict than deportation of population in occupied territory in international armed conflict,¹⁵³ both population transfer and deportation of civilian population are in violation of International Humanitarian Law. (IHL) Under the Statute of the International Criminal Court (ICC), forcible transfer of population is a crime against humanity and/or a war crime. In NIAC, The Rome Statute considers forced population transfer as a war crime if the displacement is ordered “for reasons relating to the conflict, unless the security of the civilians involved or imperative military reasons so demand.”¹⁵⁴

For population transfer to be qualified as a crime against humanity, the transfer must be ‘forced’ or the result of a threat to force, coercion, psychological oppression or acts that would render a voluntary displacement impossible.¹⁵⁵ It can therefore be inferred that, the force required for forcible transfer is not necessarily physical in nature. Conversely, this includes other aspects of coercion and implied force. Therefore, “forcibly” is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detentions, psychological oppression or abuse of power, against such a person or persons or another person, or by taking advantage of a coercive environment.”¹⁵⁶ In any event, the transfer should be involuntary in nature, and that the victim had no other choice than to comply with the transfer. In order to determine the voluntariness or intent of any such movement on the part of the victim, such movements should not only be taken at face value but considered beyond the formalities of the circumstances surrounding the person’s displacement including but not limited to “shelling of civilian objects, the burning

¹⁵² This rule is codified in article 17 of the Additional Protocol II (n 27): “1. The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition. 2. Civilians shall not be compelled to leave their own territory for reasons connected with the conflict” (emphasis by author). Even though this is not directly applicable in the Syrian Conflict, it shows that when forced population transfer are carried out, certain measures must be kept in mind.”

¹⁵³ *ibid.*

¹⁵⁴ Rome Statute (n 123) article 8(e)(8).

¹⁵⁵ R Cryer, H Friman, D Robinson and E Wilmschurst, *An Introduction to International Criminal Law and Procedure* (2nd edn, Cambridge 2010) p 249.

¹⁵⁶ *Elements of Crimes* (International Criminal Court 2011) 3-4. See also: *Prosecutor v Radislav Krstic* (Judgment) IT-98-33-T (2 August 2001) para 529.

of civilian property, and the commission of – or the threat to commit – other crimes.”¹⁵⁷ Similarly, the genuine choice of an individual’s movement could be drawn from among other things such as: “threatening and intimidating acts that are calculated to deprive the civilian population of exercising its free will.”¹⁵⁸ Therefore, it can be drawn that, such an interpretation of force places the notion of force as a preventive tool for threats of future displacements and not just as a reactive tool.

The distance of the location from and to which an individual is transferred to, is immaterial, i.e. not relevant, in determining whether or not the transfer was forced. Once it can be established that, the victim is barred from successfully exercising his rights to stay in his or her home and community and the right not to be deprived of his or her property by being forcibly displaced to another location, forced population transfer can be drawn.¹⁵⁹

Customary IHL prohibits forced population transfers in both international and non-international armed conflicts.¹⁶⁰ Since the relevant rule of population transfers in customary IHL addresses only the forced displacement of civilians, the forced displacement of a population is examined along the lines of the legality of population transfer.¹⁶¹

Conclusion

The two discussed concepts in this chapter – sieges and population transfers – both do not violate IHL *per se*. However, under certain conditions they are not justifiable and therefore violate IHL. Sieges may, under certain circumstances, be a legal method of warfare but once the siege is aimed at attacking civilians, i.e. a non-combatant group, the siege may be considered a violation of IHL. This is also true for population transfers. Population transfers can be the result of a military necessity, for example to shield a population from harm caused by the conflict zone. But if the population is forced to leave their neighbourhoods because of conditions that were directly created to induce the transfer, the transfer may be in violation of IHL.

¹⁵⁷ *Prosecutor v Blagoje Simić et al* (Judgment) IT-95-9-T (17 October 2003) para 126.

¹⁵⁸ *ibid.*

¹⁵⁹ *Simić* (n 159) para 130.

¹⁶⁰ Henckaerts and Doswald-Beck (n 79) r 129.

¹⁶¹ *ibid.*

7 Does international human rights law apply during armed conflict?

Serious human rights violations occurred in Syria long before the war started in 2011, and continue to this day. Is human rights law applicable during armed conflict? And what are the obligations of non-State actors during the war? So far, this reader discussed the application of international humanitarian law (IHL) during the conflict in Syria. This chapter will delve into the relationship between IHL and international human rights law (IHRL).

On the one hand, international humanitarian law (IHL) is “a set of international rules, established by treaty or custom, which are specifically intended to solve humanitarian problems directly arising from international or non-international armed conflicts. It protects persons and property that are, or may be, affected by an armed conflict and limits the rights of the parties to a conflict to use methods and means of warfare of their choice.”¹⁶² On the other hand, we have international human rights law (IHRL) which is a set of international rules, established by treaty or custom, on the basis of which individuals and groups can expect and/or claim certain behaviour or benefits from governments. Human rights are inherent entitlements which belong to every person as a consequence of being human. Numerous non-treaty based principles and guidelines (“soft law”) belong to the body of international human rights standards.¹⁶³

The relationship between IHL and IHRL

While IHL consists of norms applicable only in times of armed conflict (both international and non-international) and on all those involved in hostilities (states and non-state actors), IHRL applies at all times, i.e. both during peace and war time.¹⁶⁴ In other words, the application of IHRL applies at all times,¹⁶⁵ while IHL only applies during an armed conflict.¹⁶⁶ In principle, IHRL is directed at States, although there is an increasing body of opinion which says that certain human rights obligations may pertain to other actors such as armed groups under particular circumstances.

¹⁶² ‘International Humanitarian Law and International Human Rights Law: Similarities and differences’ (ICRC, January 2003) <https://www.icrc.org/eng/assets/files/other/ihl_and_ihrl.pdf> accessed 30 October 2017.

¹⁶³ *ibid.*

¹⁶⁴ *ibid.*

¹⁶⁵ *ibid.*

¹⁶⁶ *ibid.*

The relationship between these two branches of law is that of ‘mutual complementarity and the *lex specialis* principle’. This means that human rights remain applicable during armed conflicts, and are binding in so far as they are relevant to the specific situation. If they clash with primary norms of international humanitarian law, the more specific one will apply.¹⁶⁷

Human rights obligations and matters of jurisdiction

States are bound by international human rights treaties, which they have signed and ratified.¹⁶⁸ States that are not signatories to human rights treaties are bound by customary IHRL.¹⁶⁹ The international human rights obligations naturally cover the citizens of the state but they also extend to any individual under the jurisdiction of that State.¹⁷⁰ In international law, the concept of jurisdiction is traditionally linked with territorial jurisdiction, but in present day the concept has become more complex.¹⁷¹ In the field of human rights law, the concept of “extraterritorial jurisdiction” is becoming more widely used.¹⁷² Extraterritorial jurisdiction in its simplest terms can be understood as; “the exercise of jurisdiction, or legal power, outside territorial borders”.¹⁷³ Thus, States might be responsible for human rights violations that took place outside their territory to the extent they control territory or persons by agents of the State.

While IHRL has developed along state-centric lines, the involvement of non-State actors, such as armed opposition groups, has grown in size and power throughout the globe.¹⁷⁴ As

¹⁶⁷ N Jorgensen, ‘The Protection of Freshwater in Armed Conflict’ (2007) 3 *Journal of International Law and International Relations* 57, 92; *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 (Advisory Opinion on Nuclear Weapons) para 25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 (Advisory Opinion on the Wall) paras 105, 106, 110, 114.

¹⁶⁸ Syria is a party to several human rights instruments, of which the most important ones are the ICESCR, ICCPR, and the CAT.

¹⁶⁹ Example of customary IHRL is the prohibition of racial discrimination.

¹⁷⁰ See for example International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) article 2.

¹⁷¹ C Ryngaert, ‘The Concept of Jurisdiction in International Law’ in A Orakhelashvili, *Research Handbook on Jurisdiction and Immunities in International Law* (Edward Elgar Publishing 2015) 52: ‘Territorial jurisdiction has a deep history entrenched with the Westphalian idea of international law: states are inherently sovereign over their territory, and things they do in their territory can be seen as lawful whereas acts taken by states on another states territory can be seen as unlawful. This concept is being challenged by modern-day concepts such as the territoriality of cyberspace and global climate change. Things that states do in their own territory may have an effect on another state’s territory.’

¹⁷² *Al-Skeini v UK* ECHR 2011-IV 99.

¹⁷³ A J Colangelo, ‘What is Extraterritorial Jurisdiction?’ (2014) 99 *Cornell Law review* 1303.

¹⁷⁴ A Clapham, ‘Non-State Actors’ in D Moeckli, S Shah, D Harris, S Sivakumaran (eds), *International Human Rights Law* (Oxford University Press 2014): “The concept of non-State actors is generally understood as including any entity that is not actually a state, often used to refer to armed groups, terrorists, civil society, religious groups, or corporations; the concept is occasionally used to encompass intergovernmental organisations. In the specific context of post-conflict

a result, international law, increasingly also addresses conduct by, and the obligations of non-state actors.¹⁷⁵ These actors may include opposition parties, business entities, international organisations and even individuals.¹⁷⁶ However, there is not yet (scholarly) consensus to what extent treaties concluded between states are applicable to non-state actor's conduct. The Syrian state is thus not the only actor who can be held responsible for human rights violations.¹⁷⁷ However, the question is whether non-State actors would have the *same* human rights obligations as states under IHRL.¹⁷⁸ Regarding the responsibility of the *protection* of human rights, it is argued that it is *primarily* States that have a duty to protect individuals from human rights violations, even if these are committed by third parties or non-State actors.¹⁷⁹

Those who are in favour of a more state-centric nature of IHRL and against the proliferation of human rights obligations of non-state entities argue that engaging with rebel groups and providing them with responsibilities similar to the state, might be seen as legitimising such groups.¹⁸⁰ One could thus argue that non-state actors may be bound by IHRL "particularly if they exercise government-like functions [...]"¹⁸¹

IHRL does not impose duties on individuals although individuals can be held accountable for grave human rights violations. But IHL imposes obligations on individuals and also provides that persons may be held individually criminally responsible for "grave breaches" of the Geneva Conventions and of Additional Protocol I, and for other serious violations of the laws and customs of war (war crimes).¹⁸²

Positive and negative obligations

Human rights treaties may entail both positive and negative obligations for state signatories. Positive obligations concern measures that must be adopted in order to be able to effectively guarantee the protection of human rights. Examples include social rights such as the right to education and economic rights. It may be clear that it is mainly

peace building, the expression non-State actor is being used in specialized literature to refer to a range of armed groups that operate beyond state control."

¹⁷⁵ D L Shelton, *Advanced Introduction to International Human Rights Law* (Edward Elgar Publishing, 2014) 203.

¹⁷⁶ Clapham (n 176) 535.

¹⁷⁷ See Chapter 2 of this book for more information regarding the different parties to the Syrian Conflict.

¹⁷⁸ Shelton (n 177) 204. See also the work of the former UN-Sub-Commission on the issue of individuals' duties and their relationship to human rights.

¹⁷⁹ OCHRC 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises' (21 March 2011) UN Doc A/HRC/17/31, 4, 6-7.

¹⁸⁰ Clapham (n 176) 544.

¹⁸¹ ICRC Similarities and Differences (n 164).

¹⁸² *ibid.*

States that have positive obligations under IHRL, and it is controversial whether non-State actors have such obligations. Negative obligations imply that the state must abstain from any act that would induce a human rights violation. Examples include the right to life and freedom of expression.

Derogations from human rights law

During times of peace, the applicability of IHRL can be constrained by limitations or derogations.¹⁸³ Limitations may explicitly provide circumstances under which the enjoyment of the right can be restrained.¹⁸⁴ Derogations permit States to suspend some of their obligations under human rights treaties.¹⁸⁵ Such derogations are permitted only under very specific circumstances. This may be during public emergency.¹⁸⁶ The International Covenant on Civil and Political Rights, defines a public emergency as ‘(An act) which threatens the life of the nation and the existence of which is officially proclaimed [...]’.¹⁸⁷ The concept of public emergency is open for interpretation. The Syrian government, for example declared a state of emergency during a period of almost 50 years (from 1963 until 2011).¹⁸⁸ The current situation in Syria could be considered to be a state of emergency, as the country is torn by conflict and mass violence. However, an armed conflict does not automatically justify the situation of public emergency and, as a result, derogations from certain human rights obligations. A public emergency should be formally declared, be proportionate and is to be of a temporal and exceptional nature. The geographical scope and the duration need to be specified. But under all circumstances, there are ‘core obligations of rights’ and these rights are non-derogable, even during a public emergency situation. Examples include the right to life, the prohibition of torture and the right to be free from slavery.¹⁸⁹

Conclusion

¹⁸³ F Mégret, ‘Nature of Obligations’ in D Moeckli, S Shah and S Sivaknumaran (eds), *International Human Rights Law* (2nd edn, Oxford University Press 2014) 110.

¹⁸⁴ *ibid*; an example of permitted limitation would be ICCPR (n 172) article 9, which guarantees the right to personal liberty and security, and protects from arbitrary arrest or detention, but allows deprivation of liberty “on such grounds and in accordance with such procedure as are established by law”.

¹⁸⁵ Mégret (n 185) 113.

¹⁸⁶ ICRC Similarities and Differences (n 164).

¹⁸⁷ ICCPR (n 172) article 4.

¹⁸⁸ K Y Oweis, ‘Syria Government Approves Lifting State of Emergency’ *Reuters* (Amman, 19 April 2011) <<https://www.reuters.com/article/us-syria-emergency/syria-government-approves-lifting-state-of-emergency-idUSTR73I3SC20110419>> accessed 30 October 2017.

¹⁸⁹ ‘Core Human Rights in Two Covenants’ (OHCHR, September 2013) <<https://nhri.ohchr.org/EN/IHRS/TreatyBodies/Page%20Documents/Core%20Human%20Rights.pdf>> accessed 30 October 2017.

During armed conflict, States are bound by the international human rights treaties that the State has signed and ratified, and by customary IHRL. Hence, IHRL and IHL simultaneously apply in times of armed conflict. However, States may derogate from certain human rights obligations during an armed conflict. Certain rights such as the right to life and the prohibition of torture are also non-derogable during an armed conflict.

8 Are humanitarian organisations protected under international law?

Since the beginning of the Syrian conflict, there have been over 13 million Syrians – including 6 million children – in desperate need of humanitarian assistance.¹⁹⁰ Many of the Syrians who are the most in need reside in hard-to-reach areas and more than 800,000 other Syrians reside in besieged areas.¹⁹¹ The Syrian government has repeatedly denied access to basic humanitarian assistance to civilians including water, food and medical supplies.¹⁹² Opposition groups have deliberately attacked convoys carrying aid supplies.¹⁹³

The question thus arises whether both state and non-state parties have an obligation to allow for the passage of humanitarian deliveries and whether humanitarian organizations have the right to international protection. This reader has concluded in Chapter 1 that the Syrian conflict can be classified as a Non-International Armed Conflict (NIAC), and therefore the legal framework for answering these questions will consist of is customary international law and provisions from the Additional Protocol I and II of the Geneva Convention.

Humanitarian organisations

States, and the so called ‘Occupying Power’, have the obligation to provide the civilians on their territory and under their jurisdiction with the basic necessities.¹⁹⁴ If the State cannot meet this obligation, humanitarian organisations may step in, which is subject to the State’s consent.¹⁹⁵ If the civilians in a conflict zone are being threatened with starvation and a humanitarian organisation has the means to assist them, the consent of the State to allow the aid to be delivered shall not be arbitrarily denied.¹⁹⁶ This ‘right’ to assist finds a

¹⁹⁰ Humanitarian assistance comprises goods, as well as services indispensable to the survival of the civilian population present in conflict areas.

¹⁹¹ ‘Humanitarian Response Plan’ (*United Nations Office for the Coordination of Humanitarian Affairs*, 12 March 2017) <<https://reliefweb.int/report/syrian-arab-republic/2017-syrian-arab-republic-humanitarian-response-plan-january-december>> accessed 31 October 2017.

¹⁹² ‘Access Denied: UN Aid Deliveries to Syria’s Besieged and Hard-to-Reach Areas’ (*Physicians for Human Rights*, March 2017) <<http://physiciansforhumanrights.org/assets/multimedia/phr-access-denied.pdf>> accessed 31 October 2017.

¹⁹³ ‘Major attacks on aid workers: Summary statistics (2006-2016)’ (*The Aid Worker Security Database*, January 2016) <<https://aidworkersecurity.org/incidents/search?detail=1&country=SY>> accessed 31 October 2017.

¹⁹⁴ Additional Protocol I (n 94) article 69: “In addition to the duties specified in Article 55 of the Fourth Convention concerning food and medical supplies, the Occupying Power shall, to the fullest extent of the means available to it and without any adverse distinction, also ensure the provision of clothing, bedding, means of shelter, other supplies essential to the survival of the civilian population of the occupied territory and objects necessary for religious worship.”

¹⁹⁵ *ibid* article 70(1); Additional Protocol II (n 27) article 18(2); UNGA Res 46/182 (19 December 1991) UN Doc A/Res/46/182; Customary IHL does not make mention of consent.

¹⁹⁶ Pilloud (n 81) article 70.

justificatory basis in IHL as it is to be regarded as corollary to the right of victims to receive humanitarian assistance.¹⁹⁷

Humanitarian organisations require state consent to deliver aid in conflict areas. Consequently, as long as the humanitarian organisations working within the Syrian territory have previously obtained the consent of the Syrian authorities to provide aid to civilians on its territory, then the obligation of consent is probably met. Syrian authorities have never provided any legal justification for denying their consent, nor have they shown that they have the capacity to provide assistance without external support.¹⁹⁸

Denying humanitarian access in order to weaken the opposition's capabilities to attack is not a basis for depriving the population of receiving essential supplies and services.¹⁹⁹ Equally, if a humanitarian organisation operates within a state territory without the State's consent, they do not automatically transform into a military target. They still have their civilian status and as such cannot be targeted by either the government forces or the non-State armed groups.

Once the humanitarian organisation has received the State's consent to operate on its territory, the assistance provided by the organisations must be guided by the principles of humanity, i.e. the assistance must be impartial and neutral, and it must be of an independent and impartial nature.²⁰⁰ The UN Security Council has emphasized 'the importance of such assistance being delivered on the basis of need, devoid of any political prejudices and aims'.²⁰¹ The organisations and personnel delivering the aid must ensure that the assistance is given only to proper beneficiaries and not the armed opposition forces. They must also provide assistance without distinction as to whether the civilians are supporters of the Syrian regime or of the parties opposing them.²⁰² They must ensure that any sensitive information they receive or come across during the performance of their activities is kept confidential. The organisations may only provide aid to civilians, as doing otherwise would breach their duty of neutrality. Finally, they are obliged to respect the national laws of Syria as well as any other more practical requirements imposed by the

¹⁹⁷ R A Stoffels, 'Legal Regulation of Humanitarian Assistance in Armed Conflict: Achievements and Gaps' (2004) 86 Independent Regulatory Review Commission 515, 521.

¹⁹⁸ C Ryngaert, 'Humanitarian Assistance and the Conundrum of Consent: A Legal Perspective' (2013) 5 Amsterdam Law Forum 5, 9.

¹⁹⁹ Stoffels (n 199) 542.

²⁰⁰ UNGA Res 46/182 (n 197); Henckaerts and Doswald-Beck (n 79) r 55.

²⁰¹ UNSC Res 2139 (22 February 2014) UN Doc S/Res/2139.

²⁰² *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) General List 70 [1986] ICJ Rep 14 para 242.

State's authorities. For example, the organisations may have to follow a time-frame of when they are allowed to deliver the assistance or using a particular route to conduct their operations.²⁰³

Protection of humanitarian organisations

Article 71(2) of Additional Protocol II (AP II) states that humanitarian relief personnel as well as their facilities and transport “must be respected and protected.”²⁰⁴ Without ensuring their safety and security, the delivery of humanitarian relief to the civilians trapped in areas of armed conflict would be impossible to fulfil. Although the above rule is not contained in APII, there is no contrary State practice that could refute the fact that it is a norm of customary international law that applies in both IACs and NIACs. According to the ‘Principle of Distinction’,²⁰⁵ the personnel providing aid would still be protected by virtue of their civilian status. As long as the personnel within the organisation does not take direct part in hostilities and only engage in humanitarian assistance, they will keep a protected status under IHL. This right does not cover members of the armed forces delivering aid as they still remain a valid military target. The Convention on the Safety of United Nations Personnel gives U.N. personnel protection.²⁰⁶ Harassment, intimidation, and the arbitrary detention of humanitarian relief personnel are prohibited.

The same principle applies to the objects used for the purpose of humanitarian relief operations, as they are considered to be civilian objects. Intentional attacks against such objects are strictly prohibited under IHL, which is discussed in chapter 4 of this reader.

The obligation to respect and to protect humanitarian organisations is complicated by Article 59(4) of the Fourth Geneva Convention. This article states that States have ‘control rights’ in terms of verification and supervision, and in particular, the right to check that the assistance is used for the population and not for the benefit of the belligerents.²⁰⁷

²⁰³ Additional Protocol I (n 94) article 71(4); Henckaerts and Doswald-Beck (n 79) r 55.

²⁰⁴ Additional Protocol I (n 94) article 71(2); Henckaerts and Doswald-Beck (n 79) r 31-32; UNSC Res 2139 (n 203).

²⁰⁵ Gasser and Dörmann (n 101) 591: “This principle protects civilians from the effects of military operations and it also requires that civilians taking direct part in hostilities lose protection against the effects of hostilities for the duration of each specific act amounting to direct participation, whereas persons assuming a permanent combatant function for a party to the conflict lose civilian protection for the duration of such conflict . . . The application of this principle in (NIACs) is based on customary law.”

²⁰⁶ UNGA Convention on the Safety of United Nations and Associated Personnel (adopted 9 December 1994, entered into force 15 January 1999) 2051 UNTS 363 article 7(2).

²⁰⁷ Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (Fourth Geneva Convention) article 59(4).

Authorized humanitarian relief personnel have the right to freedom of movement essential to the exercise of their functions,²⁰⁸ which may only be limited in case of absolute military necessity and on a temporary basis.²⁰⁹ Not only do these obligations to humanitarian organisations apply to state governments, they also apply to non-State armed groups. These groups are under a legal obligation to not interfere or attack the convoys deployed by humanitarian organisations.

Nonetheless, it is permissible for the parties to take certain measures to control the content and delivery of aid, including searching the relief consignments and supervising their delivery, but, any of the actions of the Syrian regime or the non-State armed groups in the Conflict which are determined to constitute a deliberate impediment can be tried as a war crime. Even more, any deliberate attack on humanitarian relief personnel, installations, material, units or vehicles are considered war crimes, provided the individuals are not directly participating in hostilities, or the material items are not being used for military purposes.²¹⁰

Conclusion

The Syrian conflict has seen obstruction of humanitarian assistance by several parties. Under the applicable legal framework humanitarian organisations enjoy protection under international humanitarian law. The obstruction of humanitarian aid can amount to a war crime. All parties in the conflict have legal obligations to allow the facilitation of effective humanitarian assistance.

²⁰⁸ Additional protocol I (n 94) article 71(3); *ibid* article 23; Henckaerts and Doswald-Beck (n 79) r 56.

²⁰⁹ *ibid*.

²¹⁰ Rome Statute (n 123) Article 8(2)(b)(iii) and article 8(2)(e)(iii).

9 Is the media protected under international law?

The central purpose of journalism is to provide citizens with the information they need to make the best possible decisions about their lives, their communities, their societies, and their governments.²¹¹ In the contemporary information era the ‘truth-seeking’ aspect of journalism seems to become more difficult. Reporting in conflict zones is inherently dangerous and Syria is arguably amongst the world’s most dangerous countries for journalists to operate in. The risk of being wounded, killed, detained, or kidnapped while reporting in armed-conflict situations is huge.²¹² This raises questions concerning the reliability of information on the conflict. Not only may this have implications for the development of the conflict itself, but also where it concerns evidence to establish accountability for war related crimes. The role of the media in the Syrian conflict may fall outside our legal framework on the conflict itself. However, this chapter is dedicated to the principles that concern the principles that are relevant for the protection of journalists working on the battlefield.

Legal framework

The Geneva Conventions and their Additional Protocols contain only two explicit references to media personnel.²¹³ Journalists engaged in dangerous professional missions in areas of armed conflicts, whether as independent journalists or as war correspondents accompanying the armed forces, are considered civilians under IHL.²¹⁴ Journalists are afforded the same protections as civilians²¹⁵ as long as they refrain from taking direct part in hostilities.²¹⁶ In non-international armed conflicts (NIACs) the rights and protections of journalists are secured by customary international law. Journalists who are engaged in professional missions in areas of armed conflict must be respected and protected as long as they are not taking a part in hostilities.²¹⁷ An armed journalist may lose his protected

²¹¹ ‘What is Journalism?’ (*American Press institute*, 2017) <<https://www.americanpressinstitute.org/journalism-essentials/what-is-journalism/>> accessed 30 October 2017: defines journalism as the activity of gathering, assessing, creating, and presenting news and information.

²¹⁴ ‘How Does International Humanitarian Law Protect Journalists in Armed-Conflict Situations?’ (*Interview*, 27 July 2010) <<https://www.icrc.org/eng/resources/documents/interview/protection-journalists-interview-270710.htm>> accessed 29 October 2017.

²¹³ Third Geneva Convention (n 46) article 79.

²¹⁴ Additional Protocol I (n 94) article 79: this is regarded as one of the most, if not the most important Article of IHL referring to the protection of journalists.

²¹⁵ According to Additional protocol I (n 94) article 51, civilians may not be made targets of military attacks or reprisals, shall enjoy general protection and may not be subjected to threats of violence. It prohibits indiscriminate attacks and the use of civilians as shields; art 57 emphasizes that constant care must be taken to spare civilians.

²¹⁶ Additional Protocol I (n 94) article 79(2).

²¹⁷ Henckaerts and Doswald-Beck (n 79) r 34: in Non-International Armed Conflicts, journalists are at least protected by the minimum guarantees enshrined in Common Article 3 of the 4 Geneva Conventions.

status as a civilian. Attacks against civilians, including journalists²¹⁸ – in any type of armed conflict – may amount to a war crime according to the Rome Statute of the International Criminal Court.²¹⁹

We may distinguish two types of journalists: independent journalists and war correspondents. Independent journalists are defined as “any correspondent, reporter, photographer, and their technical film, radio, and television assistants who are ordinarily engaged in any of these activities as their principal occupation”.²²⁰ They operate independently of institutions such as the military or government. As such they are always considered civilians and thus fall under the protection principles of IHL.

In contrast, war correspondents or ‘embedded’ journalists are considered journalists working for one of the adverse parties or accompanying a military unit.²²¹ They are not members of the armed forces as such but are embedded into a military subdivision. War correspondents may lose their status as civilians by joining military units of a conflict party during a conflict situation.²²² If taken captive while practicing their profession, they are entitled to protection of prisoners of war in an International Armed Conflict. The Syrian Conflict is a NIAC, and thus there is no protection of prisoners of war under IHL.²²³ War journalists, who are being used for military purposes or are suspected of combatant behaviour, may become legitimate military targets.²²⁴

Legal duties of the media

Journalism is not only about serving the public interest. Journalists must also comply with international and domestic law, in particular regarding privacy and confidentiality issues. Journalists must understand the laws regarding libel and invasion of privacy. However, these laws all generally fall within the sphere of domestic private law.

²¹⁸ Henckaerts and Doswald-Beck (n 79) Rule 1: attacks on civilian population are prohibited.

²¹⁹ Rome Statute (n 123) art 8 (2)(b)(i).

²²⁰ Draft United Nations Convention on the Protection of Journalists Engaged in Dangerous Missions in Areas of Armed Conflict (1 August 1975) UN Doc A/10147, Annex 1, art 2(1): including freelancers and those being employed full-time by media outlets.

²²¹ H Farthofer, ‘Journalists in armed conflicts – Protection measures in the International Humanitarian Law’ (Pan-European International Relations Conference, Stockholm, September 2010) 3.

²²² Additional Protocol I (n 94) article 79.

²²³ Third Geneva Convention (n 46) article 4(4).

²²⁴ C Greenwood, ‘Historical Development and Legal Basis’ in D Fleck (ed), *The Handbook of International humanitarian Law* (3rd edn, Oxford University Press 2013) 104.

While working in the context of an armed conflict, journalists are bound by a duty to not engage in any actions adverse to their status of civilian as they may be held accountable for acts of perfidy²²⁵ and for spying if they don't.²²⁶

Conclusion

Independent journalists operating in the context of the Syrian conflict are protected under IHL by their status as civilians. This protected status may cease to exist as soon as a journalist carries arms. An 'embedded' journalist who travels with a military unit may lose this protection when taking part in a military operation or when he or she is being used for military purposes.

²²⁵ Additional Protocol I (n 94) article 37(1)(c).

²²⁶ *ibid* article 46.

10 What are the accountability mechanisms for Syria?

Syria has been the theatre of mass human rights violations since the early 1960's. Since 2011, war crimes and crimes against humanity have been committed by several parties involved in the conflict.

Both during and in the aftermath of a conflict, the concerning State would ideally take the lead in prosecution of serious breaches of international law. However, neither the Syrian authorities nor any of the other parties to the armed conflict have taken any step in this direction. In particular, high-level Syrian perpetrators will unlikely be prosecuted before Syrian courts. The Syrian President enjoys immunity according to domestic law.

In this final chapter, we describe the international and national venues that may potentially investigate and prosecute perpetrators of international crimes. At the international level, The UN Commission of Inquiry (COI) and the International, Impartial and Independent Mechanism (IIIM) play a role in the field of investigations and prosecutions albeit in a very limited way. The International Criminal Court and a special ad hoc tribunal are given the current international political spectrum no options for accountability. We briefly explain why. The only successful route so far is through the principle of universal jurisdiction and takes place at the national level in a number of EU Member States and the US.

International mechanisms

In August 2011, the UN Human Rights Council established the Independent International Commission of Inquiry (COI) on the Syrian Arab Republic.²²⁷ The Commission is “tasked to establish the facts and circumstances that may amount to such violations and of the crimes perpetrated and, where possible, to identify those responsible with a view of ensuring that perpetrators of violations, including those that may constitute crimes against humanity, are held accountable”. Its mandate runs until 31 March 2018. Since 2011 the COI has submitted over 20 reports exposing thousands of violations of international law. The reports are based on interviews with over 5500 witnesses and victims.²²⁸ The atrocities include a wide range of crimes defined under international criminal law committed by most of the parties to the conflict.²²⁹

²²⁷ UNGA Res S-17/2 (18 October 2011) UN Doc A/HRC/S-17/2.

²²⁸ ‘Independent International Commission of Inquiry on the Syrian Arab Republic: About the Commission of Inquiry’ (OHCHR) <<http://www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/IndependentInternationalCommission.aspx>> accessed 31 October 2017.

²²⁹ M Lattimer, S Mojtahedi and L A Tucker, *A Step towards Justice: Current Accountability Options for Crimes Under International Law Committed in Syria* (Ceasefire Centre for Civilian Rights 2015) 9.

In December 2016, the UN General Assembly established the historic and unprecedented *International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011*, also known as the IIIM. The IIIM was created as a supportive body to the Commission of Inquiry. It is mandated to “collect, preserve, and analyse evidence of violations of international humanitarian law and human rights and to prepare files to facilitate and expedite fair and independent criminal proceedings, in accordance with international law standards, in national, regional, or international courts or tribunals that have or may in the future have jurisdiction over these crimes.”²³⁰ In short, the IIIM’s main goal is to prepare for future criminal trials. The files that are prepared by the IIIM can be used by national or international prosecutors. It is hoped that the IIIM may lead to the creation of an international ad hoc war crimes tribunal for Syria.²³¹

International Criminal Court

Among the most distressing disappointments for the victims of the grave crimes committed in Syria is the fact that there is currently no recourse with the International Criminal Court (ICC). The ICC is a permanent institution and has the power to exercise its jurisdiction over the most serious crimes of international concern. Though the origins of the ICC lay with a UN Security Council Resolution, the Court is a separate body from the UN. The ICC is mandated to prosecute genocide, crimes against humanity, and war crimes. It is a court of last resort which means that it steps in when states are unwilling or unable to prosecute the crimes themselves.²³² The ICC may exercise jurisdiction in three circumstances listed in Article 13 of the Rome Statute, its constituent document. First, a situation may be referred to the Prosecutor by a state party. Secondly, a situation may be referred to the ICC prosecutor by the UN Security Council acting under Chapter VII of the UN Charter. Thirdly, the Prosecutor may initiate investigations *proprio motu*, or on his own initiative.²³³ Syria is not a party to the Rome Statute and thus the Prosecutor cannot initiate investigations into the crimes that are being committed in Syria.²³⁴ Hypothetically, Syria could request a referral, thereby accepting the ICC’s jurisdiction for the current situation.

²³⁰ 'Syria: UN Approves Mechanism to Lay Groundwork for Investigations into Possible War Crimes' *UN News* (22 December 2016) <<http://www.un.org/apps/news/story.asp?NewsID=55862#.WfnM9FWGOUl>> accessed 30 October 2017.

²³¹ M Kersten, 'United We Stand, Divided We Fall – The UN General Assembly’s Chance to Bring Justice to Syria' (*Justice in Conflict*, 30 December 2016) <<https://justiceinconflict.org/2016/12/30/united-we-stand-divided-we-fall-the-un-general-assemblys-chance-to-bring-justice-to-syria/>> accessed 31 October 2017.

²³² Rome Statute (n 123) preamble.

²³³ *These Are the Crimes We are Fleeing* (Human Rights Watch 2017).

²³⁴ *ibid.*

However, there is little chance that this would happen. The Security Council could also make a recommendation to the ICC to investigate the situation but in May 2014, China and Russia vetoed the draft resolution that requested the UN Security Council to refer the situation in Syria to the ICC. In short, the ICC is not a feasible forum for pursuing accountability for international crimes that are committed in Syria.²³⁵

An international ad hoc tribunal?

Another option that has been examined by Syrian civil society and international NGO's is the creation of a special, temporary international ad hoc tribunal or a hybrid court. A temporary or ad hoc tribunal is an international criminal court that has its own statute and works with a fully international staff. The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda are examples of such temporary courts. A hybrid or internationalized court applies a mixture of domestic and international law.²³⁶ Examples of these courts are the Special Court for Sierra Leone (SCSL), Special Tribunal for Lebanon (STL), and the Extraordinary Chambers of Cambodia (ECC). The establishment of international tribunals and courts depends on the consent of the UN General Assembly or the UN Security Council. An international(ized) tribunal or court for Syria is not a realistic possibility as two of the five permanent members of the Security Council have been blocking resolutions that sought to create the basis for such an international accountability mechanism.²³⁷

Universal Jurisdiction

The principle of universal jurisdiction allows a national court to prosecute individuals for certain grave international crimes, such as crimes against humanity, war crimes, genocide, and torture even though these crimes were committed outside the territory of the prosecuting state by non-nationals of that state. The principle is based on the idea that these heinous crimes harm the international community as a whole. Therefore, any individual State that has accepted the principle in its criminal law may initiate proceedings, even though there is no nexus with the victims or the accused of the prosecuting State.²³⁸

²³⁵ UNSC Res 348 (22 May 2014) UN Doc S/2014/348.

²³⁶ L A Dickinson, 'The Promise of Hybrid Courts' (2003) 97 *The American Journal of International Law* 295.

²³⁷ Lattimer, Mojtahedi and Tucker (n 231) 9.

²³⁸ 'Universal Jurisdiction' (*International Justice Research Center*) <<http://www.ijrcenter.org/cases-before-national-courts/domestic-exercise-of-universal-jurisdiction/>> accessed 31 October 2017.

Over the past few years, Syrian victims and prosecutors in a number of EU countries and the US have cooperated in the investigation of international crimes in order to establish individual responsibility before national courts. Investigations were or are ongoing in, among others, the US, Sweden, Spain, France, Norway and Germany.²³⁹ In 2017, Sweden was the first country to convict a Syrian accused of war crimes. Some countries apply a limited form of universal jurisdiction. In the Netherlands, the International Crimes Act of 2003 allows Dutch Courts to exercise universal jurisdiction over international crimes only in the case that the suspect is on Dutch territory.²⁴⁰ The special units for international crimes exist within the Dutch National Police and the Public Prosecutor's office are currently investigating a number of Syrian crimes.²⁴¹ The highly specialised teams face a number of difficulties in the field of evidence gathering resulting from, among others, the distance from the place of the crimes, and the complexity of the cases. Evidence is obtained from refugees, UN organs and specialized NGO's.²⁴² Germany, Sweden and Norway use so-called "pure" universal jurisdiction meaning that neither the alleged perpetrator nor the victims need to actually be present on the State's territory.²⁴³ However, the German law allows for a number of restrictions and conditions.²⁴⁴

Conclusion

In this closing chapter of *The Ten Legal Questions on the Syrian Conflict* we have given an overview of the various avenues to hold perpetrators of the heinous crimes committed in Syria accountable. Though the Commission of Inquiry and the International Impartial and Independent Mechanism may be seen as a first step towards the creation of an international accountability mechanism, such an international venue for the prosecution of individual perpetrators seems far away. Neither the International Criminal Court nor an ad hoc tribunal or an internationalized court are feasible options given the international power balance within the United Nations system. Until either the Security Council refers the Syrian Conflict to the ICC, or until Syria itself accepts the ICC's jurisdiction, accountability through the ICC will not be achievable. The only option for victims at present is reflected in the efforts of a number of European countries claiming universal jurisdiction over Syrian crimes before national courts.

²³⁹ Human Rights Watch (n 235).

²⁴⁰ *The Legal Framework for Universal Jurisdiction in the Netherlands* (Human Rights Watch 2014).

²⁴¹ Tweede Kamer der Staten-Generaal 'Brief van de Minister en Staatssecretaris van Veiligheid en Justitie' (8 March 2017) Kamerstuk 34550/105.

²⁴² Human Rights Watch (n 235).

²⁴³ *ibid.*

²⁴⁴ *ibid.*

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