

The Syrian Conflict and International Humanitarian Law

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The current situation in Syria is well documented. There is little doubt that a threshold of sustained violence has been reached and that civil unrest has spiraled into civil war¹. This threshold is of critical importance from a legal viewpoint as it signals the commencement of international humanitarian law's (IHL) jurisdiction. As such, obligations and duties are imposed on all parties to the conflict. In spite of this, tragic events with devastating consequences are frequently reported and it is apparent that questions of legality are being ignored.

The history of the conflicting parties is complex and understanding is not easily found. Nevertheless it is clear that, for the main part, the conflict consists of various forces combatting the combined forces of President Assad's Governmental military and other pro-government bodies (both referred to as Government, or Governmental, forces). This portrayal in itself is however far too simplistic. There are two main opposition groups. The group which has received most attention by Western media outlets is the Syrian National Coalition (SNC). The SNC is an attempted merger of various smaller groups and appears far from settled with internal political strife apparent and doubt as to the difference this settlement has made on the front line². The second opposition group is the Kurdish Supreme Council (KSC). The Kurdish leadership has seized control of the region in the north east of the State and it seems to be their intent to maintain this position and resist the

¹ As concluded by the International Committee of the Red Cross's *Annual Report*, 2012, page 443

² Updated report on the work of the United Nation's Human Rights Council in their updated report on the work of the *Commission of Inquiry on the situation in the Syrian Arab Republic*, A/HRC/24/46, 16 August 2013, paragraph 16

influence of others in the surrounding regions. Even though the situation is complex, a constant theme remains throughout which appears to be, at least partially, fuelling the conflict; sectarian division.

In relying upon the above summary it is necessary to establish the actions of each party in order to assess their liabilities. It is, sadly, immediately clear that all three groups are reportedly responsible for the commissioning of horrific and often vile acts. Governmental forces have been accredited responsibility for acts of torture, unlawful killing of civilians, failing to distinguish between military and civilian personnel and objectives, attacking numerous hospitals, arbitrary arrests, kidnapping, sexual violence against women, and have also been accused of using chemical weapons. Similarly, the SNC forces are alleged to have perpetrated extrajudicial and quasi-judicial executions apparently for sectarian reasons, arbitrary arrest and illegal detentions, hostage taking, isolated incidents of torture of those in their custody, indiscriminate attacks, operating in civilian areas, attacking a hospital, and other acts. Finally KSC forces have been accused of shooting protestors including children, some arbitrary arrests and abductions, treating prisoners in a cruel and inhumane manner and using children as young as 12 years old as soldiers³.

While the above actions are undoubtedly horrendous and immoral, this in itself does not render the actions illegal. In order to establish this it is essential to ascertain which laws are applicable to each party and their actions in the conflict. This is not necessarily a straightforward assessment as the situation in Syria is a non-international conflict. The applicable laws in this scenario are, unfortunately, of a far more limited scope than those of

³Ibid, all of the acts listed are identified throughout the report.

an international nature. This a consequence of the law developing in a manner consistent with Rousseau's maxim which stipulates that war is a relationship between State and State rather than man and man⁴. The consequence of this maxim is that it instils a high level of respect for the principle of State sovereignty which has been difficult to overcome.

Nonetheless this maxim has been challenged in a number of significant ways, particularly since the conclusion of the Second World War. One such challenge is posed by the 1949 Geneva Conventions. Article 3, common to all four Conventions, is the most prevalent regulation of non-international conflicts. These regulations were subsequently supplemented by the 1977 Second Additional Protocol to the Geneva Conventions and later by the Rome Statute 1998. However caution is required because although Syria has both signed and ratified the Geneva Conventions, it has only signed the Rome Statute, and has done neither for the Second Additional Protocol. Accordingly, these latter regulations do not directly apply to the actions of the Syrian State. Nonetheless the Second Additional Protocol did, for the most part, codify customary law⁵ and therefore may still bind Syria, as customary law generally does. Furthermore Syrians may still be brought before the International Criminal Court for acts under their jurisdiction, if a particular case is referred to the Court by the United Nations Security Council⁶.

Common Article 3 imposes a minimum set of rules governing all parties' conduct in armed conflicts not of an international character⁷. In relation to the acts mentioned above it is

⁴ Antonio Cassese, *International Law*, 2nd Edition, Oxford University Press, 2005, page 400-402

⁵ ICRC, *'Increasing respect for international humanitarian law in non-international armed conflicts'*, 2008, page 9

⁶ Rome Statute of the International Criminal Court, 1998, Article 13(b)

⁷ *Military and Paramilitary Activities In and Against Nicaragua*, 1986 I.C.J. Reports, paragraph 218

clear many of them are covered by the Article. Specifically 3(1) sets out that *“Persons taking no active part in the hostilities... shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria”* and goes on to list the following acts as accordingly prohibited *“violence to life and person, in particular murder... and torture”, “taking of hostages”, “outrages upon personal dignity, in particular humiliating and degrading treatment”, and “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”*. Thus it is plain that the acts of murder, torture, extrajudicial executions, rape⁸, hostage taking and mistreatment of prisoners are all prohibited.

Furthermore, common Article 3 also states that *“impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict”* and while this has been allowed to happen, the International Committee of the Red Cross (ICRC) has not always been treated with the respect necessitated by the law. The ICRC reported that on 13th October 2013 six of their staff members and one volunteer from the Syrian Arab Red Crescent organisation had been abducted by unknown assailants while travelling in clearly marked vehicles⁹.

⁸ Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, 25th January 2005, paragraphs 357-359

⁹ Syria: ICRC and Syrian Arab Red Crescent team abducted in Idlib, News Release, 16/10/2013, accessed on 01/04/13 via <http://www.icrc.org/eng/resources/documents/news-release/2013/10-13-syria-team-abducted-idlib.htm>

With regards to the other acts listed above customary international law makes it clear that even in non-international conflicts parties must attempt to distinguish between civilians and combatants¹⁰. This should also ensure liability arises for the attacks on hospitals; however this would usually be covered by Articles 9 to 12 of the Second Additional Protocol. This itself however is also based on customary international law and therefore is applicable anyway¹¹. Additionally the use of child soldiers is similarly prohibited¹². Finally the use of chemical weapons is governed in a number of ways, including treaties¹³, but would most simply fail in terms of legality on the basis that these weapons fail to distinguish between civilian and military objects and the reported use of such weapons were in civilian areas¹⁴.

Thus it has been demonstrated that the acts mentioned above are indeed illegal under IHL. Therefore the last aspect in considering the law itself is its applicability to actors other than the Syrian State, which is obviously bound. This is not immediately apparent as customary law would usually bind only States and certain other bodies with international legal personality, for example the UN¹⁵. These rules do not recognise individuals as subject to it, and the conceptual difficulty accordingly lies within this nature of international law's application. However a general exception is made and non-State actors are deemed bound to Article 3, as it applies to "*each Party to the Conflict*"¹⁶. This may be explained by reference to notable international lawyer Antonio Cassese, who argues that once a rebel

¹⁰ Prosecutor v Pavlestrugar 2005, IT-01-42-T, paragraph 283

¹¹ Op cit, n.47, at page 9

¹² Prosecutor v Thoma Lubanga Dyilo 2012, No. ICC-01/04-01/06, paragraph 542

¹³ Syria is now a signatory of the *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction* as of 14/09/2013

¹⁴ 'Clear and convincing' evidence of chemical weapons use in Syria, UN team reports, 16/09/2013, accessed 01/04/03 via <http://www.un.org/apps/news/story.asp?NewsID=45856#.U1q8xvldWSo>

¹⁵ Reparation for Injuries suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. Reports 1949

¹⁶ Andrew Clapham, *Human Rights Obligations of Non-State Actors*, 2006, Oxford University Press, at page 275

group succeed “*in controlling a modicum of territory*” and are “*capable of wielding authority over the individuals living there*” then “*some measure of recognition as an international subject*” is conferred¹⁷. It would appear logical to infer therefore that international personhood, and therefore liability, is established on the basis that a party to such a conflict is attempting to carry out State-like functions.

The benefits of this finding are numerous. First of all the laws ability to bind both sides to the conflict promotes a States compliance with IHL. It has this effect by ensuring the opposing side cannot act with impunity with regards to means and method of warfare, thus preventing a potential military advantage. This in turn protects both sides as it counters the temptation for either side responding like-for-like with prohibited actions¹⁸.

While there is more debate as to the application of basic customary provisions, it is likely that at least the most basic, such as those discussed above, would also bind the opposition groups¹⁹. Accordingly, for the vast majority of the above acts, IHL ensures all parties incur liability for these actions.

Thus it would appear the law is generally adequate in the sense that the horrific actions of all the parties involved are covered therein and all may be held accountable, in theory at least. Although there are frequent breaches of the IHL occurring in Syria this does not, in itself, necessary mean the law is inadequate. To illustrate this point consider the illegality of

¹⁷ Op cit, n.46, at page 124

¹⁸ M. Sassòli, A. Bouvier and A. Quentin, *How Does Law Protect in War? Volume 1*, 3rd Edition, 2011, ICRC, page 347

¹⁹ Op cit, n47.

murder or rape in any domestic legal system and then also the sadly numerous instances in which it still occurs.

This therefore suggests that rather than considering the law inadequate, there is a lack of satisfactory enforcement mechanisms, or knowledge of IHL, or both. Conversely, perhaps it is too early to yet conclude that IHL has in some respect failed. Along this line of thought is evidence in the form of the International Criminal Tribunals for the Former Yugoslavia and Rwanda. These ad-hoc trials may not have delivered justice in the swift manner hoped for, but it is certainly justice they have pursued. A potential alternative to a similar form of ad-hoc justice remains via the possibility that the International Criminal Court may still hold Syrian's accountable to IHL following a reference from the United Nations Security Council. Accordingly, hope of justice should not yet be forgone.

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