



Q & A on Laws of War Issues in Syria

August 10, 2012

The following Questions and Answers (Q & A) address aspects of international humanitarian law (the laws of war) governing the armed conflict between the government of Syria and the Free Syrian Army and other opposition armed groups. The purpose is to provide legal guidance on the fighting, including to the parties to the conflict and those with the capacity to influence them. This Q & A does not address the justifications or the legitimacy of resorting to armed force by any party.

1. Who is bound by international humanitarian law?

All parties to an armed conflict—both states and non-state armed groups—are responsible for complying with the requirements of international humanitarian law. That is, each party must respect and ensure respect for the laws of war by its armed forces and other people or groups acting on its orders or under its direction or control. This obligation does not depend on reciprocity—parties to a conflict must respect the requirements whether or not the opposing side abides by them. It also does not depend on the reason the parties go to war, whether a government or an armed group. And all parties to an armed conflict are held to the same standards, regardless of any disparity in the harm caused by alleged violations.

2. What international humanitarian law is applicable in Syria?

Fighting between the Syrian armed forces and pro-government shabiha militias on one side, and the Free Syrian Army and other opposition armed groups on the other amounts to a non-international (internal) armed conflict under international law. It is regulated by Common Article 3 to the Geneva Conventions of 1949, which sets forth minimum standards for the proper treatment of people within a warring party's control—namely civilians and wounded and captured combatants, and customary laws of war, concerning the methods and means of warfare.

3. Does international human rights law still apply in Syria?

Even during armed conflict situations, in which the laws of war apply, international human rights law remains in effect. Syria is a party to a number of human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. These treaties outline guarantees for fundamental rights, many of which correspond to the rights to which combatants and civilians are entitled under international humanitarian law (e.g. the prohibition on torture, inhuman and degrading treatment, nondiscrimination, right to a fair trial).

While the ICCPR permits some restrictions on certain rights during an officially proclaimed public emergency that “threatens the life of the nation,” any derogation of rights during a public emergency must be of an exceptional and temporary nature, and must be “limited to the extent strictly required by the exigencies of the situation.” Certain fundamental rights—such as the right to life and the right to be secure from torture and other ill-treatment, the prohibition on unacknowledged detention, the duty to ensure judicial review of the lawfulness of detention, and rights to a fair trial—must always be respected, even during a public emergency.

4. What are the basic principles of the laws of war?

The laws of war seek to minimize unnecessary pain and suffering during wartime, particularly by protecting civilians and other noncombatants from the hazards of armed conflict. They address the conduct of hostilities—the means and methods of warfare—by all sides to a conflict. A fundamental principle is that parties must distinguish at all times between combatants and civilians. Civilians and civilian objects may never be the object of attacks. Warring parties are required to take all feasible precautions to minimize harm to civilians and civilian objects and not to conduct attacks that would disproportionately harm civilians or fail to discriminate between combatants and civilians.

International humanitarian law also provides a number of fundamental protections for noncombatants, such as civilians, captured or surrendered combatants, and those who are unable to fight because of wounds or illness. It prohibits violence against such

people—particularly murder, cruel treatment and torture—as well as outrages against their personal dignity and degrading or humiliating treatment.

5. What targets are subject to military attack?

The laws of war limit attacks to “military objectives.” Military objectives are personnel and objects that are making an effective contribution to military action and whose destruction, capture, or neutralization offers a definite military advantage. This would include enemy fighters, weapons and ammunition, and objects being used for military purposes. While humanitarian law recognizes that some civilian casualties are inevitable during armed conflict, it imposes a duty on warring parties at all times to distinguish between combatants and civilians, and to target only combatants and other military objectives. Civilians lose their immunity from attack during the time they are “directly participating in the hostilities.”

The laws of war also protect “civilian objects,” which are defined as anything not considered a military objective. Prohibited are direct attacks against civilian objects, such as homes, apartments and businesses, places of worship, hospitals, schools, and cultural monuments -- unless they are being used for military purposes and thus become military objectives. This would be the case if military forces are deployed in what are normally civilian objects. Where there is doubt about the nature of an object, the warring party must presume it to be civilian.

6. What kinds of attacks are prohibited?

Direct attacks on civilians and civilian objects, as discussed above, are prohibited.

The laws of war also prohibit indiscriminate attacks. Indiscriminate attacks are those that strike military objectives and civilians or civilian objects without distinction. Examples of indiscriminate attacks are those that are not directed at a specific military objective or that use weapons that cannot be directed at a specific military objective. Prohibited indiscriminate attacks include area bombardment, which are attacks by artillery or other means that treat as a single military objective a number of clearly separated and distinct military objectives located in an area containing a concentration of civilians and civilian objects.

Military commanders must choose a means of attack that can be directed at military targets and will minimize incidental harm to civilians. If the weapons used are so inaccurate that they cannot be directed at military targets without imposing a substantial risk of civilian harm, then they should not be deployed.

Attacks that violate the principle of proportionality are also prohibited. An attack is disproportionate if it may be expected to cause incidental loss of civilian life or damage to civilian objects that would be excessive in relation to the concrete and direct military advantage anticipated from the attack.

Anti-personnel landmines and cluster munitions are prohibited by international treaty and should never be used because of their inherently indiscriminate nature.

7. What are the obligations of warring parties regarding fighting in populated areas?

International humanitarian law does not prohibit fighting in urban areas, although the presence of many civilians places greater obligations on warring parties to take steps to minimize harm to civilians.

The laws of war require parties to a conflict to take constant care during military operations to spare the civilian population and to “take all feasible precautions” to avoid or minimize the incidental loss of civilian life and damage to civilian objects. These precautions include doing everything feasible to verify that the objects of attack are military objectives and not civilians or civilian objects, and giving “effective advance warning” of attacks when circumstances permit.

Forces deployed in populated areas must avoid locating military objectives near densely populated areas, and endeavor to remove civilians from the vicinity. Belligerents are prohibited from using civilians to shield military objectives or operations from attack. “Shielding” refers to purposefully using the presence of civilians to protect render military forces or areas immune from attack.

At the same time, the attacking party is not relieved from its obligation to take into account the risk to civilians simply because it considers the defending party responsible for having located legitimate military targets within or near populated areas.

The use of heavy artillery (weapons with a wide blast radius) and other indirect-fire artillery without adequate spotting (weapons for which the target is wholly unseen) against military objectives in populated areas heightens concerns of unlawful indiscriminate and disproportionate attacks.

8. Are warring parties permitted to target infrastructure such as airports, roads, and bridges?

Civil airports, roads and bridges are civilian objects that become military objectives subject to attack if they are actually used for military purposes or military objectives are located on or within them. Even then, the rule of proportionality applies, requiring the parties to the conflict to weigh the short- and long-term harm on civilians against the military advantage served; they must consider all ways of minimizing the impact on civilians; and they should not undertake attacks if the expected civilian harm outweighs the definite military advantage.

9. Are radio and television stations prohibited subjects of attack?

Attacks on broadcast facilities used for military communications are legitimate under the laws of war. Civilian television and radio stations are legitimate targets only if they meet the criteria for a legitimate military objective: that is, if they are used in a way that makes an “effective contribution to military action” and their destruction in the circumstances ruling at the time offers “a definite military advantage.” Specifically, Syrian government broadcast facilities could become military targets if, for example, they are used to send military orders or otherwise concretely to advance Syrian military operations. However, civilian broadcasting facilities do not become legitimate military targets simply because they broadcast pro-government or pro-opposition propaganda. It is unlawful to attack facilities that solely shape civilian opinion—these facilities do not directly contribute to military operations.

Should broadcast facilities become legitimate military objectives because of their use to transmit military communications, the principle of proportionality in attack must still be

respected. This means that attacking forces should verify at all times that the risks to the civilian population in undertaking any such attack do not outweigh the anticipated military benefit. They should take special precautions with buildings in urban areas, including giving advance warning of an attack whenever possible.

Opposition forces are not prohibited under international law from occupying broadcast facilities (or other civilian structures except hospitals) and making use of them. However, the presence of opposition fighters or the use of the broadcast facilities for military purposes makes the facilities military objectives subject to attack.

10. How must people in custody be treated under international law?

Common Article 3 to the four Geneva Conventions of 1949, applicable during non-international armed conflicts, requires protecting anyone in custody, including captured combatants and civilians, against “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture” and “outrages upon personal dignity, in particular humiliating and degrading treatment.” No sentences may be handed down except by a “regularly constituted court” that meets international fair trial standards.

The ban against torture and other ill-treatment is one of the most fundamental prohibitions in international human rights and humanitarian law. No exceptional circumstances can justify torture. Syria is a party to key international treaties that ban torture under all circumstances, even during recognized states of emergency, and require investigation and prosecution of those responsible for torture. When committed as part of a widespread and systematic attack against the civilian population, torture constitutes a crime against humanity under customary international law and the Rome Statute of the International Criminal Court.

Anyone deprived of liberty must be provided with adequate food, water, clothing, shelter and medical attention. Detained women must be held in quarters separate from those of men. Children deprived of their liberty, unless with their families, must have quarters separate from adults.

Under fundamental human rights law that applies even during a publicly declared emergency, detainees are entitled to judicial review of the legality of their detention, and

all the rights to a fair trial, including the right to be tried and convicted for a criminal offense only by a court of law. Unacknowledged detention is prohibited at all times.

11. What are perfidious attacks?

International law prohibits attacks on enemy forces by resorting to what is called perfidy. A perfidious attack is one carried out by combatants who have led opposing forces to believe that the attackers are noncombatants. Acts of perfidy include pretending to be a civilian (who cannot be attacked) or feigning surrender (surrendering soldiers also cannot be attacked) so that opposing forces will let down their guard at the moment of attack. Other examples include feigning protective status by the misuse of emblems of the United Nations or the Red Cross and Red Crescent of the Red Cross movement.

Perfidy poses particular dangers because it blurs the distinction between enemy fighters, who are valid targets, and civilians and other noncombatants, who are not. Soldiers fearful of perfidious attacks are more likely to fire upon civilians and surrendering soldiers, however unlawfully. Attacks carried out by openly armed belligerents in civilian clothes with no attempt to feign civilian status do not constitute perfidy.

Perfidy is distinguished from ruses of war, such as mock operations, misinformation, surprises, ambushes, or the use of camouflage or decoy. Ruses are permissible acts of warfare intended to trick the enemy; they do not violate international law to the extent that they do not depend on taking advantage of an enemy's willingness to abide by the law protecting noncombatants.

12. What is meant by using human shields?

The war crime of “shielding” has been defined as intentionally using the presence of civilians to render certain points, areas, or military forces immune from military attack. While it may be unlawful, as noted above, to place forces, weapons and ammunition within or near densely populated areas, it is only shielding when there is a specific intent to use the civilians to deter an attack.

Opposing forces may attack a military target that is making use of human shields, but it is still obligated to determine whether the attack is proportionate—that is, that the expected

loss of civilian life and property is not greater than the anticipated military advantage of the attack.

13. What obligations do warring parties have to populations in need?

Under international humanitarian law, parties to a conflict must allow and facilitate the rapid and unimpeded passage of impartially distributed humanitarian aid to the population in need. The belligerent parties must consent to allow relief operations to take place and may not refuse such consent on arbitrary grounds. They may take steps to control the content and delivery of humanitarian aid, such as to ensure that consignments do not include weapons. However, deliberately impeding relief supplies is prohibited.

In addition, international humanitarian law requires belligerent parties to ensure the freedom of movement of humanitarian relief personnel essential to the exercise of their functions. This movement can be restricted only temporarily for reasons of imperative military necessity.

14. Who can be held responsible for violations of international humanitarian law?

Serious violations of international humanitarian law that are committed with criminal intent—that is, deliberately or recklessly—are war crimes. War crimes, listed in the “grave breaches” provisions of the Geneva Conventions and as customary law in the International Criminal Court (ICC) statute and other sources, include a wide array of offenses, including deliberate, indiscriminate, and disproportionate attacks harming civilians, hostage taking, using human shields, and imposing collective punishment, among others. Individuals also may be held criminally liable for attempting to commit a war crime, as well as assisting in, facilitating, aiding or abetting a war crime.

Responsibility also may fall on people planning or instigating a war crime. Commanders and civilian leaders may be prosecuted for war crimes as a matter of command responsibility when they knew or should have known about the commission of war crimes and took insufficient measures to prevent them or punish those responsible.

15. Who is primarily responsible for ensuring accountability for serious violations of international law?

Ensuring justice for serious violations is, in the first instance, the responsibility of the state whose nationals are implicated in the violations. Governments have an obligation to investigate serious violations that implicate their officials or other people under their jurisdiction. The government must ensure that military or domestic courts or other institutions impartially investigate whether serious violations occurred, identifying and prosecuting the individuals responsible for those violations in accordance with international fair-trial standards, and imposing punishments on individuals found guilty that are commensurate with their deeds. While non-state armed groups do not have the same legal obligation to prosecute violators of the laws of war within their ranks, they are nonetheless responsible for ensuring compliance with the laws of war and have a responsibility when they do conduct trials to do so in accordance with international fair trial standards.

16. Can war crimes and crimes against humanity committed in Syria be tried before the International Criminal Court?

The International Criminal Court (ICC) is a permanent international court with a mandate to investigate, charge, and try people suspected of genocide, crimes against humanity, and war crimes committed after July 1, 2002. However, it can only exercise jurisdiction over these crimes if:

- The crimes occurred in the territory of a state that is a party to the ICC treaty;
- The person accused of the crimes is a citizen of a state that is a party to the ICC treaty;
- A state that is not a party to the ICC treaty accepts the court's authority for the crimes in question by submitting a formal declaration to the court; or
- The United Nations Security Council refers the situation to the ICC prosecutor.

Syria is not a member state of the Rome Statute, the treaty establishing the ICC. Therefore, in the absence of the Syrian government ratifying the statute, or accepting the jurisdiction of the court through a declaration, the ICC could only obtain jurisdiction over crimes in Syria if the Security Council refers the situation there to the court.

17. Can other countries prosecute international crimes committed in Syria?

Certain categories of grave crimes in violation of international law, such as war crimes and torture, are subject to “universal jurisdiction,” which refers to the ability of the domestic judicial system of a state to investigate and prosecute certain crimes, even if they were not committed on its territory, by one of its nationals or against one of its nationals. Certain treaties, such as the 1949 Geneva Conventions and the Convention against Torture, oblige states parties to extradite or prosecute suspected offenders who are within that country’s territory or otherwise under its jurisdiction. Under customary international law, it is also generally agreed that states are allowed to try those responsible for other crimes, such as genocide or crimes against humanity, wherever these crimes took place.