

CHAPTER II

LITERATURE REVIEW

A. The Overview of International Humanitarian Law

Law is the main instrument of society both nationally and internationally to preserve freedom as well as order from interference by individuals, public order, or the government. Public order is the most important element needed by human beings from the law. The realization of the purposes of human social order in society will also be fulfilled. Thus, the order of all aspects of human life should be regulated by law.

International humanitarian law is part of the body of international law that governs relations between states. It aims to protect persons who are not taking part in hostilities, the sick and wounded, prisoners and civilians, and to define the rights and obligations of the parties to a conflict in the conduct of hostilities.¹ According to Jeremy Bentham, International law is the body of legal rules, norms, and standards that apply between sovereign states and other entities that are legally recognized as an international actor. The objective from international law is to create a legal system that is regulated in international relations with regard to the principle of justice objectively. Considering that countries obtain fair treatment, modern law of nations also aims to ensure justice for mankind.

¹ International Committee of the Red Cross (ICRC) Overview, 2016, "War and International Humanitarian Law", available at www.icrc.org/eng/war-and-law/overview-war-and-law.htm, accessed on Thursday, November 17th, 2016 at 11.52pm.

International law has several branches, one of which is the International Humanitarian Law. As one part of International Law, International Humanitarian Law is one of the tools and means that can be used by each country, referred by the state of peace or a neutral country to participate and reduce the suffering endured by the people due to the war going on in various countries.² Humanitarian principles and human rights are protected in high regard by the International Humanitarian Law.

In the hostilities, International Humanitarian law govern the protection of victims of conflict and also restrictions on the means and methods of warfare. In addition, some weapons are prohibited and regulated its use based on with the general principles of International Humanitarian Law. The purpose of international humanitarian law is to limit the suffering caused by war by protecting and assisting its victims as far as possible. These principles applicable in the two conditions are good in condition *jus ad bellum* and *jus in bello*.

1. *Jus in Bello*

Jus in bello principle (law of war) the former regulates the initiation of armed conflict while the later, known also as International Humanitarian Law,³ controls the conduct of the warring factions one

²Ambarwati, Denny Ramdhany, Rina Rusman, 2010, *Hukum Humaniter Internasional*, Rajawali Press, Yogyakarta, p. 27.

³ Mohammad Naqib Ishan Jan, Abdulrashid Lawan Haruna, 2015, *International Humanitarian Law*, Malaysia, IIUM Press, p. 7.

armed force is used.⁴ Irrespective of whether the use of armed force was legal or illegal.

2. *Jus ad Bellum*

Jus ad bellum principle (law on the use of force) or *ius contra bellum* (law on the prevention of war) seeks to limit resort to force between States. Under the UN Charter, States must refrain from the threat or use of force against the territorial integrity or political independence of other state (Article 2, Paragraph 4). Exceptions to this principle are provided in case of self-defense or following a decision adopted by the UN Security Council under chapter VII of the UN Charter.⁵ Such principles have been used and stated in the Geneva Convention.

B. The Main Principles in International Humanitarian Law

International Humanitarian Law consist of some few basic principles and always underlie the rules contained in humanitarian law, namely: Distinction Principle, Military Necessity Principle, Principle Humanity, and Chivalry Principle. An expert named Kunz stated that “laws of war, to be accepted and to be applied in practice, must strike the connect balance

⁴ *Ibid.*

⁵ International Committee of the Red Cross (ICRC) Overview, 2016, “IHL and Other Legal Regimes-Jus ad Bellum and Jus in Bello”, available at <https://www.icrc.org/eng/war-and-law/ihl-other-legal-regmies/jus-in-bello-jus-ad-bellum/overview-jus-ad-bellum-jus-in-bello.htm>, accessed on Sunday, November 13th, 2016 at 4.08pm.

between, on the one hand, the principle of Distinction, humanity and chivalry, and military interest”.⁶

- a. Distinction Principle, “In order to ensure the respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly with their actions which only against military objectives.” [Additional Protocol 1, Article 48] The only legitimate object of attack in an armed conflict is military personnel or property. This does not mean that civilians cannot be legally harmed or killed under the law only that civilians and civilian property should not be the object or the purpose of the attack.⁷
- b. Military Necessity Principle, this principle implies that a dispute party (belligerent) have the right to take any measures that could lead to the success of a military operation, but at the same time it does not violate the laws of war.⁸
- c. Humanity Principle, according to article 23 paragraph (e) Hague Regulation “To employ arms, projectiles, or material of a nature to cause superfluous injury”. Based on this principle, the parties of the dispute are required to observe the principles of humanity, in which they are

⁶ Joseph L. Kunz, 1968, *The Changing Law of National*, Orbis, Fall, p. 873.

⁷ Anonymous, “4 Basic Principles”, available at <https://loacblog.com/loac-basics/4-basic-principles/>, accessed on Friday, November 25th, 2016 at 10.09pm.

⁸ Dictionary of Military Associated Terms, 2016, “US Department of Defense”, available at <http://usmilitary.about.com/od/glossarytermsm/g/m3987.hmt>, accessed on Friday, November 18th, 2016 at 1.14am.

forbidden to use violence which can cause excessive injury or unnecessary suffering.⁹

- d. Chivalry Principle, this principle implies that in a war, honesty must take precedence. The use of tools are illegal or contrary to humanitarian law as well as the ways in which war is treasonous prohibited.¹⁰

C. The Means and the Method of Warfare

The Hague Law consist of a series of rules governing the means and method of the warfare, both in the form of conventions and declarations, formed in the Peace conference in The Hague in 1899 and 1907, which resulted in a series of The Hague Conventions. However, the development of The Hague law did not start yet. The establishment of The Hague conventions was done in 1899 and 1907. In fact, it already established in the previous period, namely the Lieber Instruction (1863) and the Declaration of St. Hague. Petersburg (1868).¹¹

The St. Petersburg Declaration is a completely different instrument from the Lieber Code. If the full Lieber Code is titled **“Instructions for the Government of Armies of the United States in the Field”**¹², this rule is a very detailed national rule; the Declaration of St. Petersburg is fully titled **“Declaration Renouncing the Use, in Time of War, of Explosive**

⁹ Arlina Permasari, 1999, *Pengantar Hukum Humaniter*, Jakarta, International Committee of the Red Cross (ICRC), p. 11.

¹⁰ *Ibid.*

¹¹ Dietrich Schindler, 1981, *The Laws of Armed Conflict: A Collection of Conventions, Resolutions and Other Documents*, Geneva, Henry Dunant Institute, p. 25.

¹² This Document also known as Field Manual (FM) No. 27-10.

Projectiles under 400 Grammes Weight” This Treaty is an international treaty that regulates only a single aspect of warfare, which regulates arms, especially the development of explosive projectiles. The main purpose of this declaration is to limit its use to the development of flammable and explosive weaponry.

D. Targeting Attack

According to an uncontroversial principle of Customary International Humanitarian Law (IHL), parties to an armed conflict must distinguish between the civilian population and combatants and between civilian objects and military objectives. In order to spare civilians and the civilian population from hostilities and their effects, it is essential to define who and what may be attacked. The first rule regarding attacks (by acts of violence).¹³ is that the intended target must be a military objective. Once a military objective is the target, under additional rules, the attack may nevertheless become illegal if excessive collateral damage affecting civilians or civilian objects must be expected. Furthermore, even when attacking a lawful target, precautionary measures to spare civilians have to be taken.¹⁴

Military Object which may be targeted according to Article 52 Paragraph 2 is Attack shall be limited strictly to military objectives. In so far

¹³ It is suggested that attacks consist of acts of violence as soon as they have violent consequences, even if the attacker uses no violence. Michael N. Schmitt, “Wired warfare: Computer network attack and jus in bello”, 2002, 84 *International Review of the Red Cross* 365 at 377.

¹⁴ Marco Sassoli, 2003, *Legitimate Targets of Attack Under International Humanitarian Law*, International Humanitarian Law Research Initiative, Cambridge, Harvard Program on Humanitarian Policy and Conflict Research, p. 1.

as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization in the circumstances ruling at the time, offers a definite military advantage.¹⁵

Thus, we can conclude that military targets are not only composed from military objects only. Military objects such as tanks or armored vehicles are clear status, namely as a military object that can be destroyed in the event of war.

E. Untargeting Attack

Untargeting attack is a military strike against objects prohibited under the rules that have been existing. There are some places that should not be attacked during the war under the Geneva Convention. According to Geneva Convention Article 52¹⁶:

1. Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all object which are not military objectives as defined in paragraph 2.
2. Attack shall be limited strictly to military objectives. Military objectives are limited to those objects, such as their nature, location, purpose, or use make an effective contribution to military action and whose total and

¹⁵ Chapter III Article 52 Paragraph 2, Geneva Convention Additional Protocol I 1977

¹⁶ Arlina Permanasari, "Apakah Objek Sasaran Militer?", available at <https://arlina100.wordpress.com/2008/11/23/apakah-objek-sasaran-target-militer/>, accessed on Thursday, November 17th, 2016 at 2.40pm.

partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite advantage.

3. In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.

According to this article, attack shall be limited strictly to military objectives and a military object should have some certain requirements so that the destruction can be justified by military necessity principle. Therefore, it should be understood that all military objects are certainly military targets. However, not all military targets are military object, but there is also the possibility that the target is civilian objects. So that it should be emphasized on the destruction of civilian objects in that position.¹⁷

¹⁷ Arlina Permanasari, "Apakah Objek Sasaran Militer?", available at <https://arlina100.wordpress.com/2008/11/23/apakah-objek-sasaran-target-militer/>, accessed on Thursday, November 17th, 2016 at 2.40pm.