

## **CHAPTER II**

### **LITERATURE REVIEW**

#### **A. International Humanitarian Law**

##### **1. Definition of International Humanitarian Law**

International Humanitarian Law is a set of rules which is protect persons who do not take part in the hostilities (civilians, medical personnel, aid workers) and those who can no longer fight (wounded, sick, shipwrecked troops, and the prisoners of war).

Its primary purpose is to limit and prevent human suffering in times of armed conflict.<sup>12</sup> Thus international humanitarian law tries to prevent the brutality and barbarism of war. That purpose is in line with the three principles of humanitarian law<sup>13</sup>:

##### **1. Military necessity principle**

This principle explains that all of the parties who take part on the hostilities could use force to subjecting the enemy to achieve the goal and success of the war itself. In the US Air Force Manual, there are four basic elements of military necessity as follows:

- 1) That force is regulated;
- 2) That force is necessary to achieve as quickly as possible the

partial or complete submission of the adversary.

- 3) That the force is no greater than needed to achieve this;
  - 4) That is not otherwise prohibited.
2. Humanity principle

All the parties who conduct in hostilities have to observe the humanity. It is forbidden to causing unnecessary suffer for both parties. International humanitarian law reflects a system of check and balance, intended to minimize human suffering without undermining the effectiveness of military operations.

3. Principle of Distinction

This principle reflected in article 48 of Additional Protocol I:

“The parties to the conflict shall at all times distinguish between the civilian population and combatant and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives”. This shown that the idea of this principle is more concern on humanity aspect.

The preamble of St. Petersburg Declaration stated:

“War is waged against the enemy’s armed forces, not against its civilian population. Attacks are to be directed at military targets, not at civilian object”<sup>14</sup>. There should be a distinction between combatants and civilians. Combatant is any member of the armed forces of a party to the conflict.<sup>15</sup> All other persons are non-

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<sup>14</sup>Preamble of St. Petersburg Declaration

<sup>15</sup> Additional Protocol I of 1977, Article 43

combatant or civilian.<sup>16</sup> Only combatants are permitted to take part in hostilities.<sup>17</sup> Civilians may not take direct part in hostilities and for so long as they refrain from doing so are protected from attack.<sup>18</sup>

#### 4. Principle of Proportionality

Principle of proportionality is one of the efforts to balance the conflicting concepts of military necessity and humanity. This principle prohibited an attack which may be indiscriminate.<sup>19</sup> And also requires commanders to cancel attacks if they may be expected to offend the proportionality principle.<sup>20</sup>

## 2. The Sources of International Humanitarian Law

There are two-main international treaties as follows Hague Convention and Geneva Convention. Humanitarian Law has two branches, one bearing the name of Geneva, and the other name of Hague<sup>21</sup>. The Hague Convention regulates of the means and methods of warfare or in the other word means the conduct of hostilities.

The Hague Conventions of 1899 and 1907 adopted at the Hague Conferences of 1899 and 1907 respectively, cover a wide range of areas: the conduct of hostilities on land, sea and even the air.

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<sup>16</sup> Ibid., Article 50 (1)

<sup>17</sup> Ibid., Article 43 (1)

<sup>18</sup> Ibid., Article 51(2), (3)

<sup>19</sup> Additional Protocol 1, Article 51 (5) (b)

<sup>20</sup> Ibid., Article 57 (2) (a) (iii), (b)

<sup>21</sup> Jean Pictet, *op. cit.* p. 32

Altogether six conventions and declarations were adopted in 1899, and fourteen in 1907<sup>22</sup>.

The other source of International Humanitarian Law is the four Geneva Convention 1949. Geneva Convention more concern on the protection of war victims consist of several primary agreement as follows<sup>23</sup>:

1. Geneva Convention for the Amelioration of The Condition of the Wounded and Sick in Armed Forces in the Field;
2. Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea;
3. Geneva Convention relative to the Treatment of Prisoners of War;
4. Geneva Convention relative to the Protection of Civilians Persons in Time of War.

International humanitarian law was required to adapt to more complex situations of armed conflict. To deal with some these problems, the Diplomatic Conference of June, 8, 1977 adopted two kinds of Additional Protocol to the 1949 Geneva Convention<sup>24</sup>:

- a. Additional Protocol to the 1949 Geneva Conventions relating to the Protection of Victims of International Armed Conflicts;

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<sup>22</sup> Abdul Ghafur Hamid, *op. cit.* p. 445

<sup>23</sup> 1949 Geneva Conventions

<sup>24</sup> Additional Protocol to the 1949 Geneva Conventions

- b. Additional Protocol to the 1949 Geneva Conventions relating to the Protection of Victims of Non-International Armed Conflicts.

## **B. International Armed Conflict and Non-International Armed Conflict**

From the protocol above, kinds of armed conflict divided into two namely International Armed Conflict and the Non-International Armed Conflict. The first step that we must do if there was a conflict in a state is try to define the kinds of conflict and then we could define which law could be apply during the armed conflict. The purpose is to make sure which provisions that could be apply during the conduct of hostilities.

According to International Committee of the Red Cross (ICRC), Non-International Armed Conflicts are those in which government forces are fighting with armed insurgents, or armed groups are fighting among themselves.

While Dieter Fleck define the Non-International Armed Conflict as: a Non-International Armed Conflict it is a confrontation between the existing governmental authority and groups of persons sub-ordinate to his authority, which is carried out with arms within national territory and reaches the magnitude of an armed riot or civil war.<sup>25</sup>

The main distinction between Non-International Armed Conflict (NIAC) and International Armed Conflict (IAC) could be seen from the

legal status of each party. In International Armed Conflict, all of the parties have similar legal status because both of them are states.

While in a Non-International Armed Conflict, legal status of all parties isn't similar, the one is state and the other one is non-state entity.<sup>26</sup> In certain cases there would be a transformation from an international armed conflict to non-international armed conflict. According to article 1 additional protocol II characteristic of non-international armed conflict are as follows:

1. The conflict happen in one of the territory of High Contracting Parties;
2. The conflict happen between High Contracting Party and the dissidents;
3. The dissidents must be under a commando in charge;
4. The dissidents controls most of the territory of the state;
5. *The dissidents can implement this protocol.*

The conflict would transform from an international armed conflict to a non-international armed conflict only when<sup>27</sup>:

1. The old regime has lost control over most of the country, and the likelihood of it regaining such control in the short to medium term is small or none (negative element) ;

<sup>26</sup>Ibid., p. 20

<sup>27</sup>Marko Milanovic, 2011, How to Qualify Armed Conflict in Libya, *European Journal of*

2. The new regime has established control over a significant part of the country, and it is legitimized in an inclusive process that makes it broadly representative of the people (positive element);
3. The new regime achieves broad international recognition (external element).

Treaties on international humanitarian law do not contain any definition of a non-international armed conflict. Common article 3 of Geneva Conventions, rather describes it only as an armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.<sup>28</sup> When it comes to the Libya, it was initially a mixed between IAC and NIAC; an IAC between Libya and the coalition states, and NIAC between the Gaddafi's regime and the Benghazi rebels.<sup>29</sup>

The Gaddafi regime has sustained serious blows, but the NTC has not yet secured its authority in most of the country; the vacuum has not been filled with reasonable degree of stability. Even the NTC already recognized as a legitimate government in Libya at the time of conflict, but the recognition still not widespread enough.<sup>30</sup>

One of the characteristic of non-international armed conflict is the organized group of rebel have to able to understand and apply the International Humanitarian Law (IHL). In Libya case, as the conflict

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<sup>28</sup> Kubo Macak and Noam Zamir, 2012, *The Applicability of International Humanitarian Law to*

progressed, the National Transition Council (NTC) affirmed its commitment to IHL by issuing codes of conduct on the treatment of detainees and prisoners and a frontline manual on the fundamental rules of IHL.<sup>31</sup>

This is shown that there was an organized structure on the side of the rebels. Around February, 24, 2011, the opposition forces were able to effectively implement IHL in their activities, as evidenced by the coordination of their military operations and gradual acquisition of control over a large part of Libyan territory.<sup>32</sup>

While the international armed conflict in Libya happen when there were several interventions from outside such as French, U.S, and others. In summary, non-international armed conflict in Libya commenced most likely in late February 2011 and the international armed conflict commenced when the interventions from outside comes.

There are two provisions in Humanitarian Law that regulates the Non-International Armed Conflict namely Article 3 common to the 1949 Geneva Conventions and Additional Protocol II 1977. Article 3 common to the Geneva Convention stated<sup>33</sup>:

“In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party

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<sup>31</sup> Kubo Macak and Noam Zamir, *op. cit.* 409

<sup>32</sup> *Ibid.*, p. 410

<sup>33</sup> Article 3 of 1949 Geneva Convention



to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed "hors de combat" by sickness, wounds, detention, or any other cause, 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. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) To life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) Taking of hostages;
- (c) Outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) 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.

(2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the parties to the conflict.

From the content of the article above clearly seen that 1949 Geneva Convention considering the foundation of respect for human persons in cases of Non-International Armed Conflicts. Each party of the conflict have to obey the provisions of article 3 common to the Geneva Convention not only the state party but also rebels non state parties

During 25 years, article 3 of 1949 Geneva Convention stood alone in the sphere of internal armed conflict and then in 1977 there was an Additional Protocol II that regulates the Non-International Armed Conflict also. There is a possibility that a Non-International Armed Conflict is under 1977 Additional Protocol II. Article 1 of Additional Protocol II<sup>34</sup>:

“This protocol, which develops and supplements article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflict which are not covered by article 1 of the protocol additional to Geneva Conventions of 12 August 1949, and relating to the protection of Victims of International Armed Conflict (Protocol I) and which take place in the territory of H.C.P between its armed forces and dissident armed forces or other organized armed groups which under responsible as to enable them to carry out sustained and concerted military operations and implement this protocol”.

As we know that one of the important aspects of the rule of law is the enforcement of its laws. A legal instrument can be said effective if it can be implemented properly and its sanctions can be enforced. To handle that issue we need such mechanism that regulates and define how these rules can be enforced. International Humanitarian Law mechanism can be found in the provisions of 1949 Geneva Convention, 1977 Additional Protocol, and the other rules governing war crimes tribunal either ad hoc or permanent.<sup>35</sup>

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<sup>34</sup> Article 1 Additional Protocol II to the 1949 Geneva Conventions

<sup>35</sup> Article 1, 1949 Geneva Convention, 1977 Additional Protocol, and the other rules governing war crimes tribunal either ad hoc or permanent.

### **C. Enforcement Mechanism of International Humanitarian Law based on 1949 Geneva Conventions**

Article 1 of 1949 Geneva Convention provides obligation to the parties to respect and ensure respect for the convention. It means that all the parties who conduct in the hostilities have to obey all the provisions in that convention. And it also means that the State must take the necessary measures in case of violation of the provisions of the convention, including sanctions.

#### **Article 49 (1) 1949 Geneva Convention:**

“The high contracting parties undertake to enact any legislation necessary to provide effective penal sanction for person committing, or ordering to be committed, any of the grave breaches of the present convention defined in the following article”.

Under the provision above, the State that has been ratified the Geneva Convention should be subject to the convention and required to make a national law that provide effective penal sanctions for every person who committed or orders a grave violation of the convention.

**D. Enforcement Mechanism of International Humanitarian Law based  
on 1977 Additional Protocol**

**Article 87 Protocol 1**

“The high contracting parties and the parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and where necessary, to suppress and report to competent authorities breaches of the convention and of this protocol”.

“The high contracting parties and parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the conventions or of this protocol, to initiate such steps as are necessary to prevent such violations of the conventions or this protocol, and where appropriate, to initiate disciplinary or penal action against

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### **A. Type of Research**

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international humanitarian  
conventions that regulate it,

### **B. The Data**

This research will use  
literatures consist of primar  
tertiary legal material.

#### **(1) Primary legal material c**

- a. Hague Convention;
- b. 1949 Geneva Conve
- c. 1977 Additional Pro
- d. 1977 Additional Pro

#### **(2) Secondary material coi**

- primary legal material s
- a. Scientific journal;
  - b. Books that related w
  - c. Seminars papers rel
  - d. Others related docur

e. Trusted sites interne

f. Other non legal documents related with this research.

(3) Tertiary legal material

a. Black laws dictionary;

b. English dictionary;

c. Indonesian dictionary.

**C. Technique of Collecting Data**

The methods of collecting data in this research will be done through library research by literature learning. This method will collect data from reading, analyze, and try to make conclusion from related documents namely convention, laws books, legal journals, and others which related to the main problem as the object of this research.

**D. Analysis**

The data will be analyzed systematically through juridische qualitative. Systematically means the research will be analyzed based on international law, especially the international humanitarian laws. Juridical thinking means it would be connected with the principle of law, conventions, and other related regulations.