

## CHAPTER IV

### FINDING AND ANALYSIS

#### **A. The Overview of International Armed Conflict and Non-International Armed Conflict according to International Humanitarian Law**

Armed conflict can be classified into: (1) international armed conflict; (2) non-international armed conflict. The difference between international armed conflict and non-international armed conflict according to International Humanitarian Law is based on the nature and the number of countries that become parties to the armed conflict.<sup>1</sup> The international armed conflict is described as a war between two or more countries, while non-international armed conflicts are combat or war involving a country that is fighting a non-state armed group. Thus, if the state fights with rebel groups, the situation is still regarded as a non-international armed conflict even though fighting takes place outside the territory of the country.<sup>2</sup> However, in certain situations, non-international armed conflict could turn into an international armed conflict, which is also called by the internationalized internal armed conflict.<sup>3</sup>

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<sup>1</sup> Ambarwati, Denny Ramdhany, Rina Rusman, 2010, *Hukum Humaniter Internasional*, Yogyakarta, Rajawali Press, p. 53.

<sup>2</sup> *Ibid.*

<sup>3</sup> Arlina Permanasari, 1999, *Pengantar Hukum Humaniter*, Jakarta, International Committee of the Red Cross (ICRC), p. 3.

## 1. International Armed Conflict (IAC)

The definitions of the International Armed Conflict written in the Commentary Geneva Convention II 1949, stated: “Any difference arising between two states and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place”<sup>4</sup>, it can be regarded as international armed conflict and it is similar with inter-state war, in which the subject are countries.<sup>5</sup>

The provisions of Humanitarian Law regulating war or international armed conflicts can be seen in Common Articles 2 of the 1949 Geneva Conventions which stated: “In addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them ....” Article 2 Common Article of 1949 Geneva Convention, not explicitly explaining the terminology of the International Armed Conflict. However, if it is related to the provisions of Article 1 paragraph 3 of Protocol I of 1977 which states: “This protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referring to the

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<sup>4</sup> Jean S. Pictet, 1960, *Commentary Geneva Convention II*, Geneva, International Committee of the Red Cross (ICRC), p. 28.

<sup>5</sup> Fadillah Agus, 1997, *Hukum Humaniter Suatu Perspektif*, First Edition, Jakarta, Pusat Studi Hukum Humaniter Fakultas Hukum Universitas Trisakti, p. 4.

Article 2 common to those Conventions.” So it is clear that the subject matter of Article 2 Common Articles Geneva Convention 1949 is the terminology of International Armed Conflict.<sup>6</sup> Additional Protocol I of 1977 on reference to the provisions of Article 2 of the Geneva Conventions of 1949. Therefore, it can be concluded that the definition of International Armed Conflict is as contained in Article 2 of the Geneva Convention of 1949.<sup>7</sup>

## 2. Non-International Armed Conflict (NIAC)

There are two main legal sources must be examined in order to determine what a NIAC under International Humanitarian Law are: (1) Common Article 3 to the Geneva Conventions of 1949; (2) Article 1 of Additional Protocol II.<sup>8</sup>

### a) Common Article 3 of 1949 Geneva Convention

Common Article 3 to the Geneva Conventions of 1949 is applicable in case of armed conflict other than international character occurring in the territory of one of the contracting parties to the 1949 Geneva Convention.<sup>9</sup> It also applies to a situation where the conflict is within the State, between the

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<sup>6</sup> *Ibid*, p.5.

<sup>7</sup> Arlina Permanasari, *Op. Cit*, p.138.

<sup>8</sup> International Committee of the Red Cross (ICRC) Opinion Paper, 2008, “How is The Term “Armed Conflict” Defined in International Humanitarian Law?”, available at <https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>, downloaded on Friday, April 28<sup>th</sup>, 2017 at 1.27am.

<sup>9</sup> M. Gandhi, 2001, “Common Article 3 of Geneva Conventions, 1949 in the Era of International Criminal Tribunal”, p. 1, available at <https://www.worldii.org/int/journals/ISILYBIHRL/2001/11.html>, accessed on Tuesday, May 9<sup>th</sup>, 2017 at 10.54pm.

Government and the rebel forces or between the rebel forces themselves.<sup>10</sup> The Article also define the rules of International Humanitarian Law and obligations of the parties to the conflict is to protect the victims of war where the war categorized as international war.<sup>11</sup> Non-International Armed Conflict is only regulated in Common Article 3 of Geneva Convention 1949. Common Article 3 applies to “armed conflicts other than an international character occurring in the territory of one of the High Contracting Parties”. The article is used for “armed conflict other than an international character” for every kind of conflict that is not international armed conflict. These article does not give the clear criteria and definition of armed conflict not of an international character itself, these include armed conflicts in one or more non-governmental armed groups are involved. However, this Article is applicable to the situation of non-international armed conflict in a limited way as circumscribed in the provision itself. The agreement referred to above, the rules of International Humanitarian Law contained in Article 3 of the 1949 Geneva Convention<sup>12</sup> this Article can be

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<sup>10</sup> *Ibid.*

<sup>11</sup> Ambarwati, Denny Ramdhany, Rina Rusman, *Op. Cit*, p. 59.

<sup>12</sup> The 1949 Geneva Convention Art. 3 para. 1, “In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party 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

directly applicable in armed conflict which is not international. Depending on the situation, hostilities may occur between governmental armed forces and non-governmental armed groups or between such groups only.

b) Article 1 of Additional Protocol II

A more restrictive definition of Non-International Armed Conflict was adopted for the specific purpose of Additional Protocol II. This instrument applies to armed conflicts “which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol”<sup>13</sup>. This definition is narrower than the notion of NIAC under common Article 3 in two aspects. Firstly, it introduces a requirement of territorial control, by providing that non-governmental parties must exercise such territorial control “to allow them carry out sustained and concerted military operations and to implement this Protocol”. Secondly, Additional Protocol II expressly applies only to armed conflicts

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are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: a) violence 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.”

<sup>13</sup> The 1949 Geneva Convention Additional Protocol II, Art. 1, para. 1

between State armed forces and dissident armed forces or other organized armed groups. Contrary to common Article 3, the Protocol does not apply to armed conflicts occurring only between non-State armed groups.<sup>14</sup>

The criteria of non-international armed conflict are written in Additional Protocol II / 1977 on the Protection of Non-International Armed Conflict Victims. Non-International Armed Conflict which is referred in Additional Protocol II / 1977 is the armed conflict that occurred in the territory of a country between the armed forces of the country and the armed forces rebels or other armed groups which organized under responsible command, carry out control over a portion of its territory to enable the group to carry out a sustainable and unified military operation and to apply the International Humanitarian Law rules written in Additional Protocol II / 1977.<sup>15</sup>

The rules in Additional Protocol II / 1977 bind state if the rebels have met certain criteria. In other words, to determine the application of the rules of Additional Protocol II / 1977, it should be obvious that a particular country's armed forces is the rebel forces which have an element or the following criteria: <sup>16</sup>

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<sup>14</sup> International Committee of the Red Cross (ICRC) Opinion Paper, 2008, "How is the Term "Armed Conflict" Defined in International Humanitarian Law?", available at <https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>, downloaded on Friday, April 28<sup>th</sup>, 2017 at 1.27am.

<sup>15</sup> Ambarwati, Denny Ramdhany, Rina Rusman, *Op. Cit*, p. 60

<sup>16</sup> *Ibid.*

- a. An organized armed group;
- b. Under responsible command;
- c. Exercise control over such parts of the territory;
- d. Able to conduct sustainable and united military operations;
- e. Able to apply the International Humanitarian Law rules written in Additional Protocol II / 1977.

In its development, in particular in the agreement written in the Rome Statute of 1998, the enactment of the International Humanitarian Law for Non-International Armed Conflict rules no longer require that the rebel forces have controlled part of the territory and are under Command responsible. Provided that the ongoing conflict and the insurgents encountered are organized groups, the state and the rebel parties are bound to obey the International Humanitarian Law.

## **B. The Historical Background of Conflict in Syria**

Syria, officially named Syrian Arab Republic, is a country located in the region of West Asia. The west of Syria is bordered by Lebanon and the Mediterranean Sea. In the north side, Syria borders Turkey, while the east borders South Jordan, and Israel. The capital of Syria is Damascus.<sup>17</sup> In late 2010 and early 2011, Syria is a country that is more stable, especially when compared to Tunisia, Egypt, Yemen, Libya and Bahrain. All of these countries are an authoritarian system. It is kind of government that has led to revolutions

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<sup>17</sup> Ibnu Manshur, 2014, "Sekilas Mengenal Negara Suriah (Syria) dan Jumlah Penduduknya", available at <http://www.muslimedianews.com/2014/03/sekilas-mengenal-negara-suriah-syria.html>, accessed on Friday, Mei 5<sup>th</sup>, 2017 at 11.31pm.

in North Africa and the Middle East. However, Tunisia and Egypt, Syria was ruled by a one-party regime with an iron fist for many years: from the time of Hafez al-Assad (through the “Korectionist Movement” in 1970, he launched a bloodless coup and on 12 March 1971 he was declared as President of the Syrian Arab Republic until his death in 2000) and was succeeded by his son Bashar al Assad.<sup>18</sup>

Since the Arab Spring swept Syria on March 6<sup>th</sup> 2011 a wave of pro-rebel demonstrations spread all over Syria, especially in the city of Deraa. The armed conflict in Syria is a popular revolution that is continuation of the Arab Spring revolution which first takes place in Tunisia, continues to Egypt, Libya, Yemen, and Syria. The conflict in Syria originated from a protest against the arrest of some students in the small city Deraa.<sup>19</sup> On March 2011, 15 students aged between 9-15 years were writing slogans anti-government on the walls of the school.<sup>20</sup> The slogans of the revolution stated “*As-Shaab / Yoreed / Eskaat el nizam!*” Which means “People / want / overthrow the regime!”<sup>21</sup> The action of the children made Mukhabarat<sup>22</sup> angry.<sup>23</sup> Mukhabarat led by General Atef Najib, catch and jailing these children for a month. During the period of detention, these children are subjected to torture and this is known when these

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<sup>18</sup> Trias Kuncahyono, 2013, *Musim Semi di Suriah: Anak-anak Penyulut Revolusi*, Jakarta, Kompas, p. 77

<sup>19</sup> Stephen Starr, 2012, *Revolt in Syria: Eye-Witness to the Uprising*, London, C. Hurst & Co, p. 3.

<sup>20</sup> Dina Y. Sulaeman, 2013, *Praha Suriah: Membongkar Persekongkolan Multinasional*, Depok, Iman, p. 100.

<sup>21</sup> Siti Muti'ah, 2012, “Pergolakan Panjang Suriah: Masih Adakan Pan-Arabisme Dan Pan-Islamisme?”, *CMES' Journal*, Vol. V, No. 1, 2012, p. 5.

<sup>22</sup> Mukhabarat was one of the intelligence services or security, controlling, supervising residents and tasked with defending the regime from emerging threats both internal and external.

<sup>23</sup> Trias Kuncahyono, *Op. Cit*, p. 115.



children are released. As a result, there was a wave of demonstrations protesting against torture by the police. Security forces attempted to break up the demonstrations, but the demonstrators did not budge until the security forces opened fire on the demonstrators.<sup>24</sup> The army's reaction to the protesting masses was overwhelming and they fired on the mob and caused 4 people death.<sup>25</sup> The reaction did not end the protests. On the contrary the protests were widespread from Deraa to the suburbs of Latakia and Banyas on the Mediterranean Coast or the Mediterranean Sea, Homs, Ar Rasta, and Hama in Western Syria, and Deir es Zor in East Syria.<sup>26</sup>

### C. The Factor of Conflict in Syria

There are several factors causing of the Syrian conflict, such as economic disparities, military policies whose government is too aligned to the military. During Syrian conflict almost 50% of funds are allocated to the military field. Meanwhile, the issue of Sunni-Syiah war continues to be echoed by some western media.<sup>27</sup> Based on interviews conducted by the magazine *Hidayatullah* with Dr. Daud Abdullah (Middle East Observer of the Middle East Monitor, London, UK), experts in the West, such as Turkey and the Gulf states expect the fall of the government of Syria to be like what happened in Tunisia (internal insurgency) or Libya (interference Outside), while Russian

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<sup>24</sup> A. Muchaddam Fahham and A.M. Kartaatmaja, 2014, "Konflik Suriah: Akar dan Dampaknya", *Politica Journal*, Vol. V No. 1, 2014, p. 40.

<sup>25</sup> *Ibid*, p. 38.

<sup>26</sup> Siti Muti'ah, *Op. Cit.*

<sup>27</sup> M. Agastya, 2013, *Arab Spring: Badai Revolusi Timur Tengah*, Yogyakarta, IRSCiSoD, p. 173

experts say that the case of Syria is different from the others. It is based on several factors, among which are the non-heterogeneous population, fairly effective soldiers, and the ruling class are consolidated enough.<sup>28</sup> The basis factors of Syria's conflict:

#### 1. State Violence

Syria's powerful intelligence agency, the infamous Mukhabarat, penetrated all spheres of society. The fear of the State made Syrians apathetic. State violence was always high, such as disappearances, arbitrary arrests, executions and repression in general. However, the outrage over the brutal response of security forces to the outbreak of peaceful protests in spring 2011, which was documented on social media, helped generate the snowball effect as thousands across Syria joined in the uprising.

#### 2. Economic Disparities

Year to year, Syria continues to a decline in the economic field and coupled with overseas debt continues to swell. In times of trouble, evidenced by oil production to 400,000 barrels per day. Syria has difficulty running public services because of the crisis, high birth rate and per-capita income decline.<sup>29</sup> Cautious reform of the remnants of socialism opened the door to private investment, triggering an explosion of consumerism among

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<sup>28</sup> Fyodor Lukyanov, 2015, "Kasus Suriah Bukan Soal Kemenangan, Melainkan Jangan ada Campur Tangan", available at [https://indonesia.rbth.com/politics/2015/09/20/kasus-suriah-bukan-soal-kemenanganmelainkan-jangan-ada-campur-tangan\\_426141](https://indonesia.rbth.com/politics/2015/09/20/kasus-suriah-bukan-soal-kemenanganmelainkan-jangan-ada-campur-tangan_426141), accessed on Wednesday, March 22<sup>nd</sup>, 2017 at 10.59am.

<sup>29</sup> Jean Shaoul and Chris Marsden, 2000, "The Bitter Legacy of Syria's Hafez Al-Assad", available at <https://www.wsws.org/en/articles/2000/06/assa-j16.html>, accessed on Wednesday, March 22<sup>nd</sup>, 2017 at 3.23pm.

the urban upper-middle classes. However, privatization only favored the wealthy, privileged families with ties to the regime. Meanwhile, provincial Syria, later to become the center of the uprising, seethed with anger as living costs soared, jobs remained scarce and inequality took its toll.

### 3. Military Policy

Hafez Al-Assad is a figure worth reckoning with in the political arena in the Middle East while still in power.<sup>30</sup> Since the early 1980s, Hafez Al-Assad launched a policy of Syria in the Arab-Israeli conflict, namely military force Syria must continue to be built until able to compensate for Israel's military power even without the help of Arab countries another<sup>31</sup> and in 1985 he spent 3 , 5 billion US dollars or 35% of the state budget to build the defense sector. A year later, the defense sector budget was raised to 65% of the entire State Budget and in 1988 Hafez Al-Assad also purchased a number of medium-range missiles from China.<sup>32</sup> It seemed like the Syrian Government which only wanted to advance the military sector for the budget to fund military forces is very high.

### 4. Population Surge

Syria's rapidly growing young population was a demographic time bomb waiting to explode. The country had one of the highest-growing populations in the world, and Syria was ranked ninth by the United

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<sup>30</sup> Trias Kuncayono, *Op. Cit*, p. 40.

<sup>31</sup> M. Riza Sihbudi, 1991, *Islam, Dunia Arab, Iran: Barat Timur Tengah*, Bandung, Mizan, p. 116

<sup>32</sup> *Ibid*, p. 117

Nations as one of the fastest-growing countries in the world between 2005-2010. Unable to balance the population growth with the lack of economy, food, jobs and schools.

## 5. Drought

In 2006, Syria began suffering through its worst drought in over nine decades. According to the United Nations, 75% of Syria's farms failed and 86% of the livestock died between 2006-2011. Around 1.5 million impoverished farmer families were forced to move into rapidly expanding urban slums in Damascus and Homs, alongside Iraqi refugees. Water and food were almost nonexistent. With little to no resources to go around, social upheaval, conflict and uprising naturally followed.

In this case Russia has been cooperating with Syria for long time ago since the father of Bassar Al Assad era. The intervention conducted by Russia is not only based on the UN Resolution and the direct request of the Syrian government but because of the cooperation that has existed between Syria and Russia since the leadership of Hafez Al-Assad to date has been one of the causes of Russian involvement in the civil war in Syria. Russia also considers this battle to be a gamble of prestige between Russia and the United States.<sup>33</sup> There are several reasons why Russia is engaged in a civil war in Syria, such as:

### 1. Protecting investment and trading assets

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<sup>33</sup> [Republika.co.id](https://internasional.republika.co.id/berita/internasional/timur-tengah/13/09/01/msgb9k-konflik-suarah-picu-rusia-melawan-amerika), "Konflik surian Picu Rusia Melawan Amerika", *Republika Online*, September 2<sup>nd</sup>, 2013, available at <https://internasional.republika.co.id/berita/internasional/timur-tengah/13/09/01/msgb9k-konflik-suarah-picu-rusia-melawan-amerika>, accessed on Friday, May 5<sup>th</sup>, 2017 at 11.38pm.

Trade relations between Russia and Syria which are very significant in the field of economy (field of armaments) led to Russia having an important role against Syria. A total of 90 infrastructure and industrial facilities in Syria is also a joint venture with Russia. In industry, Syria and Russia cooperation includes the development of petroleum and natural gas, power plant construction projects, military bases, and infrastructure improvements in some industries.<sup>34</sup>

## 2. Maintain influence in the Middle East

Russia's presence in the Syrian crisis is clearly visible from a strategic political point of view, making it very clear that the existence of Russian and Syrian economic relations is more on Russian effort to return to a calculated force. All Russia's actions are not intended to perpetuate the government which is still in power (Bashar Al-Assad) but Russia is worried if Bashar Al-Assad is down, then the influence it has will disappear.

## 3. Creating Regional Stability

Russia continues to try to strengthen its influence in the Middle East. Geographically, Syria is located directly adjacent to Israel, Lebanon, Iraq, Turkey as well quite close to Saudi Arabia is a very strategic position against politics Russia in the Middle East. Coupled with the proximity of

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<sup>34</sup> Dhvani Adyatmika Nandanaardi, 2014, "Kebijakan Luar Negeri Rusia Terhadap Suriah Dalam Konflik Suriah Tahun 2011-2012", *Jurnal Hukum Yuridika Universitas Airlangga*, Vol. III, No.1, 2014, p. 147

these countries with The United States, of course, Russia does not want to lose its hegemony in the East Central.<sup>35</sup>

The cause of the conflict in Syria already explain in the previous page, it concludes that there are several groups in the conflict in Syria, such as: Government group, Pro-government group, Rebel group, and Pro-rebel group. The sharing of conflict groups makes them fragmented in terms of their respective interests, especially for outsiders who support groups in conflict. How to support it in the form of moral and materill is, of course by taking advantage also in its involvement.

#### **D. The Obstacles of Legal Enforcement of International Humanitarian Law Toward Untargeting Attack in Case of Syria and Its Sanctions**

##### **1. The Obstacles of Legal Enforcement of International Humanitarian Law Toward Untargeting Attack in Case of Syria**

The obstacles in the legal enforcement of international humanitarian law in armed conflict is Syria not a state party to several international conventions. The substance includes the facts that occurred in the armed conflict in Syria. Thus, these conventions are not applicable formally in the armed conflict. For example, in 2011 - October 2013 the use of weapons in armed conflict in Syria cannot be upheld by the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction because at the time the

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<sup>35</sup> Suarapembaharuan.com, 2016, "Rusia Tak Mau Suriah Seperti Libia", available at <http://sp.beritasatu.com/home/rusia-tak-mau-suriah-hancur-seperti-libia/14241>, accessed on Thursday, March 23<sup>rd</sup>, 2017 at 10.01am

weapon was used, basically Syria was not state party although in the end Syria ratified the Convention on October 14<sup>th</sup>, 2013.<sup>36</sup>

Additional Protocol II/1977 as an instrument of humanitarian law, cannot be applied because Syria did not ratify it. However, the protection of humanitarian law in armed conflict of non-international as stated in Common Article 3 of the Geneva Convention in 1949 explained: “In the case of armed conflict other than an international character occurring in the territory of one of the High Contracting Parties, each Party 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.

In the 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) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;

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<sup>36</sup> Organization for the Prohibition of Chemical Weapons (OPCW), “OPCW Member States-Syria”, available at <https://www.opcw.org/about-opcw/member-states/member-states-by-region/asia/member-state-syria/>, accessed on Saturday, May 6<sup>th</sup>, 2017 at 12.15am.

(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 endeavor 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.”

Indeed, this provision would still be appropriate considering that Syria is a party to the convention which is different from the Rome Statute which cannot prevail in Syria due to Syria did not ratify despite already signed on April 29<sup>th</sup>, 2000. The other obstacles in the legal enforcement of International Humanitarian Law in the case of Syria’ conflict is the presence Veto Right of two United Nations Security Council (UNSC) permanent members, namely China and Russia. Russia as one of the five permanent members of the UN Security Council as a whole has issued a veto to thwart the eight draft of UN Security Council resolution related to



the sanctions that will be given to Syria and also pressuring Damascus to cooperate with investigators. February 2017, Russia and China vetoed the sanctions against individuals and entities allegedly involved in the use of chemical weapons as determined by the jointly-investigative team of Organization for the Prohibition of Chemical Weapons and United Nations (OPCW-UN).

## **2. The Sanctions that can be granted to the disputing parties in the Syria' Conflict**

The United Nations Security Council Resolution was the decision of the United Nations Security Council (UNSC) in the maintenance or restoration of international peace and security that have the binding force that is essentially a reflection of an international legitimacy required by the principles and goals of the United Nations in accordance with the UN Charter. In fact, there are countries which are in dispute that do not need the Security Council resolution although the UN Charter already stated clearly on the binding strength of the resolution for the countries involved in international disputes and sanctions for countries that do not comply with the resolution. Such sanctions could be an act which uses force without military power (non-military) and the actions which use the military force.<sup>37</sup>

Sanction that can be given to the dispute parties in the Syrian conflict, namely the non-military sanctions and military sanctions. In international

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<sup>37</sup> Sri Setianingsih Suwardi, 2006, *Penyelesaian Sengketa Internasional*, Jakarta, Universitas Indonesia Press, p. 137.

law, non-military sanctions are set out under Article 41 Chapter VII of the UN Charter, and military sanctions are regulated under Article 42 Chapter VII of the UN Charter. Article 41 of Chapter VII of the UN Charter provides for non-military sanctions which stated: “The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. Reviews these may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.” Article 42 Chapter VII of the UN Charter stated: “Should the Security Council consider that measures Provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.” Article 42 of the UN Charter is the one which determines the authority of the UN Security Council to impose sanctions or land forces of Members of the United Nations.

In the fact, it is precisely regional organizations. In this case the European Union (EU) gives non-military sanction to Syria. There are three reasons why EU can impose sanction on Syria. Here, there are three

different major types of EU sanctions applied in combination with other sanctions regimes.

- a. There is the EU as an implementer of UN sanctions. All members of the UN are obliged to implement sanctions measures adopted under Chapter VII of the UN Charter, and the EU gives such measures standing in European law through two pieces of legislation: A Council decision under the CFSP followed by the adoption of a regulation. The EU sanctions on Liberia, Angola, Guinea Bissau, Somalia, the Democratic Republic of the Congo (DRC), the Central African Republic (CAR), and South Sudan are all examples of this type of EU sanction. The EU measures are thus ‘embedded’ in universally applicable UN sanctions, legitimated by the UN Security Council and, at least in theory, implemented by all member states of the UN. Since these measures simply give effect to United Nations Security Council (UNSC) decisions, no independent role or initiative of the EU is observable here.
- b. There are EU autonomous sanctions that go beyond UN sanctions, sometimes described as ‘supplementary’ measures. These are additional measures taken to strengthen UN sanctions regimes. Often, these are based upon the wording of UNSC resolutions. For example, when the UN Security Council urges member states to ‘exercise vigilance’ with regard to the implementation of sanctions taken under Chapter VII, the EU may decide to add supplementary

sanctions. The EU sanctions on Iran since 2010, the Democratic People's Republic of Korea (DPRK), Libya in 2011, and Côte d'Ivoire in 2011 are examples of this type of EU sanction. The legitimacy of these measures has recently been called into question by some UN members particularly UNSC permanent members Russia and China – in what is sometimes referred to as the 'floor versus ceiling' debate: i.e., whether UN sanctions should be considered the 'floor' on which other measures can be built or whether they constitute the 'ceiling' (or limit) on what is legitimate.

- c. There are EU autonomous sanctions applied in the absence of UN sanctions. These are employed in instances where the UN Security Council is unable to reach agreement due to opposition by a Permanent Member. They also serve as an instrument of EU foreign policy, with a view to expressing concern about what is believed to be unacceptable behavior and to reaffirming EU values on the international scene. The EU sanctions on Syria, Russia, Ukraine, Burma/Myanmar, Zimbabwe, Belarus, China, Uzbekistan or the Comoros are examples of this category of EU sanction. The EU sanctions are typically applied in conjunction with unilateral measures by the United States or by other countries or regional organizations. However, it is this category of measures, in particular, that has come under fire at the UN Human Rights

Council which in September 2014 adopted a resolution on the negative impact of unilateral coercive measures on the enjoyment of human rights.<sup>38</sup>

The sanctions that the EU imposed to Syria include an oil embargo, the embargo for the entire airline flying low in Syria, restrictions on certain investments, the freezing of assets of the Central Bank of Syria, restrictions on the export of equipment and technology. In addition, more than 200 Syrians and 70 entities are also subject to a travel ban and asset freeze. At the regional, Assad is also increasingly isolated as nations from the Arab League which agreed to suspend Syria's membership.

The EU originally imposed sanctions which came into force on May 10<sup>th</sup>, 2011. The current trade sanction measures in force are set out in Council Decision 2012/122/CFSP which was adopted and came into force on February 27<sup>th</sup>, 2012. On the same day, the EU also issued an implementing measure, Council Regulation (EU) No 168/2012, which amends Council Regulation (EU) No 36/2012 specifically states the restrictions on oil and gas equipment.<sup>39</sup> In addition the EU have imposed a travel ban and an asset freeze on specified Syrian officials. Having restrictive measures imposed to Syria, there are extensive trade restrictions on Syria. These include an arms embargo, which is a ban on

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<sup>38</sup> Thomas Biersteker and Clara Portela, 2015, "EU Sanction in Context: Three Types", available at <http://www.iss.europa.eu/publications/detail/article/eu-sanction-in-context-three-types/>, accessed on Saturday, May 6<sup>th</sup>, 2017 at 4.24pm.

<sup>39</sup> GOV.UK, "Embargoes and Sanctions on Syria", available at <https://www.gov.uk/guidance/sanctions-on-syria>, accessed on Friday, May 5<sup>th</sup>, 2017 at 10.57pm.

the export of ‘arms and related material’ (i.e. military ammunition, weapons and goods). This can be put in place by either the UN, the EU, the Organization on Security and Co-operation in Europe, or at a UK national level.

Other specific trade sanction measures adopted by the EU include:

- 1) a prohibition on the sale, supply, transfer or export of arms and related material of all types;
- 2) a prohibition on the sale, supply, transfer or export of a list of equipment that could be used for internal repression;
- 3) a prohibition on the trade of gold, precious metals and diamonds;
- 4) a prohibition on the provision of technical or financial assistance or of brokering services related to any of the above;
- 5) an asset freezes against, and prohibitions on making funds or economic resources available (including the supply of goods) to a specified list of people held responsible for the violent repression against civilians;
- 6) a ban on cargo flights operated by Syrian carriers;
- 7) a travel bans against specific listed individuals.<sup>40</sup>

There are limited exemptions in place, including the transport of supplies to the United Nations Disengagement Observer Force (UNDOF) and for supply of non-lethal equipment for humanitarian or protective use. Other measures include:

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<sup>40</sup> *Ibid.*

- 1) a prohibition on the sale, supply, transfer or export of equipment or software intended for use by the Syrian regime in monitoring or interception of internet and telephone communications. Provision of technical or installation assistance in support of such items will also be prohibited. There is an exemption for pre-existing contracts;
- 2) a prohibition on the supply or transfer of specified equipment or technology to be used in certain oil and gas natural sectors in Syria or to Syrian-owned enterprises outside Syria. There is no exemption for pre-existing contracts;
- 3) a prohibition on participation in the construction of new power plants for the production of electricity in Syria, including through the provision of finance or financial assistance for such projects or the acquisition of shares in, or formation of joint ventures with, enterprises in Syria engaged in such projects;
- 4) a prohibition on the sale, supply, transfer or export of listed luxury goods.

Additionally, the EU has also imposed a prior authorization (export licensing) requirement for the sale, supply, transfer or export of a further list of dual-use items which might be used for internal repression.

There are also additional restrictive measures placed on Syrian banks and insurance. These include:

- 1) a prohibition on Syrian banks from opening new branches, subsidiaries or representative offices in EU member states and from establishing joint ventures or acquiring an interest in banks in the EU. However, EU financial institutions are prohibited from doing the same activities in Syria;
- 2) member states are obliged not to provide loans or other forms of financial support to the Syrian government, together with restrictions on the supply of banknotes and coinage to the Central Bank of Syria;
- 3) a prohibition on the provision of re/insurance to the Syrian government or entities or controlled by it.<sup>41</sup>

Other sanctions that could be imposed on the Syrian sanctions issued from membership in international organizations as a result of violations of international humanitarian law in the Syrian conflict. In fact, this country has been sanctioned and removed from membership of the Arab League on November 16<sup>th</sup>, 2011. The Arab League's sanctions include a travel ban against scores of senior Officials, a freeze on Syrian government assets in Arab countries, a ban on transactions with Syria's central bank and end to all commercial exchanges with the Syrian government. Complementing previously-imposed US and EU sanctions, Arab League and Turkish sanctions have begun to cripple the Syrian

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<sup>41</sup> *Ibid.*



economy.<sup>42</sup> Syria also may be expelled from the UN , if deemed not perform the obligations under the UN Charter. The mechanism to be followed is the decision of the General Assembly upon recommendation of the UN Security Council under Article 6 of the UN Charter.<sup>43</sup>

The obstacle of the legal enforcement to the conflict in Syria is because Syria not a state party of same International Convention; namely, Additional Protocol II/1977 and Rome Statute 1998. Additional Protocol II/1977 as an instrument of humanitarian law and Rome Statute as the foundation of the establishment of the International Criminal Court, the statute which will constitute a trial for the most serious crimes of international concern, such as: Aggression, Genocide, Crimes against Humanity and War Crime. These provisions cannot be applied in Syria because Syria did not ratify it yet. So Syria cannot be punished if it violates the law.

In this case the sanction that can be given to dispute parties in the Syrian conflict is non-military sanction regulated in Article 41 Chapter VII of the UN Charter. The examples of non-military sanction are: an oil embargo, the embargo for the entire airline flying low in Syria, restrictions

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<sup>42</sup> Müjge Küçükkeleş, 2012, "Arab League's Syrian Policy", *SETA Foundation for Political, Economic and Social Research*, Brief No:59, Ankara-Turkey, p. 8. available at <http://www.setav.org/en/arab-leagues-syrian-policy/> accessed on Saturday, May 6<sup>th</sup>, 2017 at 3.57am.

<sup>43</sup> Article 6 of United Nations Charter "A Member of the United Nations which has persistently violated the Principles contained in the present Charter may be' expelled from the Organization by the General Assembly upon the recommendation of the Security Council."

on certain investments, the freezing of assets of the Central Bank of Syria, restrictions on the export of equipment and technology.

## **E. The Responsibilities Against Untargeting Attack**

### **1. Violation Categories**

The categories of war crimes are set out in Geneva Convention I, II, III, IV and their supplementary protocols. The Geneva Conventions as well as in Protocol I provide only a common legal framework, furthermore for the signatory country to supplement those provisions at the national level. Serious offenses are enrolled in the Geneva Conventions, but lists of all other acts contrary to the law are not drawn up. However, it is not necessarily unlawful and unregistered as a gross violation to be seen as a minor offense. In this case it is necessary to consider also the provisions of the law of other Conventions as well as international customary rules. Acts which may be categorized as gross violations under Geneva Conventions I, II, III and IV and Additional Protocols include, Intentional Murder, Persecution and inhumane treatment, including biological experiments, Acts which cause great suffering or serious injury to the body or health.

#### **(a) Geneva Convention I, II and III.**

This provision states that the destruction and property which is not justified by the interests of the military and which will be widely implemented, illegally and arbitrarily not justified by military interests and which will be widely implemented.

(b) Geneva Convention III and IV:

- (1) Forcing a prisoner of war or a person protected by the Geneva Conventions to serve in an army of enemy nations.
- (2) The deliberate intention of the rights of prisoners of war or persons protected by the Geneva Conventions of the fair and reasonable tribunals prescribed in the Convention.

(c) Geneva Convention IV:

- (1) Deportation and unauthorized;
- (2) Unauthorized detention;
- (3) Hostage

(d) Article 85 Paragraph 3 Additional Protocol I / 1977:

By deliberately committing an act that causes death or serious injury to the body or health, as follows:

- a. Attack on civilian;
- b. Indiscriminate attack that harms civilian/civilian object.
- c. Attacks directed at installations that contain dangerous power.
- d. Attacks directed at unsupervised villages and areas outside of military operations.
- e. Attacks on people who no longer participate in combat.
- f. Misuse of protective marks.

Violations may also be non-compliance with the obligations granted by the Geneva Law. The violations categorized as not severe are any violations that are not expressed as gross violations but which are caused by

the non-fulfillment of obligations to act in accordance with International Humanitarian Law.

## **2. The Responsibilities of State and Individual against Untargeting attack under International Humanitarian Law**

As part of law, the International Humanitarian Law is perfectly applicable to the law. Generally, the state is responsible for International Law for acts or actions that are contrary to the country's international obligations. International Law Commission (ILC) has discussed the issue of the responsibility of this country since 1956 but it was only in 2001 succeeded in formulating the Draft Articles on Responsibility of States for Internationally Wrongful Acts which was then circulated by the UN General Assembly<sup>44</sup>. In Resolution A / RES / 59/35 (2004) the General Assembly invited member states of the United Nations to respond to further steps and decided to consider the matter again in 2007. International law on state responsibility is an international law sourced by law International customs. It develops through the practice of states and decisions of international courts. ILC accepts all Articles by acclamation. International trials have even long cited and approved the draft of the Article made by the ILC, so even if the draft of the Article does not take effect as a convention, it

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<sup>44</sup> I Dewa Gede Palguna, 2008, "Tanggung Jawab Individu dan Negara Menurut Hukum Internasional", available at [https://www.google.co.id/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0ahUKEwjGotHE6tTAhWLuI8KHMYMqBAYQFggsMAE&url=http%3A%2F%2Ffl.unud.ac.id%2Fblock-book%2FHI%2Fcourse%2520materials%2FTgjbw%2520Individu%2520dan%2520Negara.doc&usg=AFQjCNGY7RuNowVqPZHejtgdesNbFcMFlw&sig2=\\_b5lr65CAc4LGmTCGOVjaQ](https://www.google.co.id/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0ahUKEwjGotHE6tTAhWLuI8KHMYMqBAYQFggsMAE&url=http%3A%2F%2Ffl.unud.ac.id%2Fblock-book%2FHI%2Fcourse%2520materials%2FTgjbw%2520Individu%2520dan%2520Negara.doc&usg=AFQjCNGY7RuNowVqPZHejtgdesNbFcMFlw&sig2=_b5lr65CAc4LGmTCGOVjaQ), accessed on Wednesday, May 3<sup>rd</sup>, 2017 at 1.56am.

is certain that it will continue to have a major effect on the international courts.<sup>45</sup> Therefore, in accordance with the provisions of Article 38 Paragraph (1) Statute of the ICJ (*International Court of Justice*), such practice will further strengthen the position of Customary International Law (which regulates the state responsibility) as the primary source of international law.

Customary International Humanitarian Law in Part VI, Chapter 40 about Compliance with International Humanitarian Law, Rule 139<sup>46</sup> explains that the parties to the conflict either non-international armed conflict and international armed conflict must abide by and respect International Humanitarian Law. Rule 140 of Customary International Humanitarian Law stated that “The obligation to respect and ensure respect for International Humanitarian Law does not depend on reciprocity.” This Rule also applies in non-international armed conflict as well as international armed conflict. Customary International Humanitarian Law also explained that “States may not encourage violations of international humanitarian law by parties to an armed conflict. They must exert their influence, to the degree possible, to stop violations of international humanitarian law”<sup>47</sup>.

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<sup>45</sup> *Ibid.*

<sup>46</sup> Customary Humanitarian Law Part VI, Chapter 40 about Compliance with International Humanitarian Law, Rule 139 stated “Each party to the conflict must respect and ensure respect for international humanitarian law by its armed forces and other persons or groups acting in fact on its instructions, or under its direction or control [IAC/NIAC]”.

<sup>47</sup> Customary Humanitarian Law Part VI, Chapter 41 about Enforcement of International Humanitarian Law, Rule 144.

**a. State Responsibility of Untargeting Attack Toward International Humanitarian Law**

State responsibility is a set of international rules governing the legal consequences of violations of international obligations of states. This international obligation comes from tracts, international customary law, court decisions, and other matters. So that the accountability of the state here is the actions that are declared wrong internationally. It means that the final analysis of state accountability is determined by international norms and depends on international law, the extent to which state acts or omissions are considered unlawful.<sup>48</sup> According to Joseph P. Harris, the responsibility of the state is an obligation of the state to bear any errors or violations of international law resulting in losses to the state or another international subject in a way to improve the situation, rehabilitate or compensate for damage or acts that violate the law or obligation conducted by the state.<sup>49</sup> Similarly, there is an obligation on States to make legal advisers available, when necessary, to advise military commanders at the appropriate level on the application of international humanitarian law, but not on armed opposition groups.<sup>50</sup>

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<sup>48</sup> JG Starke, 2010, *Pengantar Hukum Internasional*, Jakarta, Sinar Grafika, p. 193.

<sup>49</sup> Joseph P. Harris – Consulting editor, 1935, *Introduction to the Law of Nations*, McGraw Hill Series Inc., New York-Toronto-London, Political science, p. 133.

<sup>50</sup> Jean-Marie Henckaerts, 2005, “Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict”, *International Review on the Red Cross*, Vol. 87, No. 857, 2005, p. 196.

Furthermore, in international law, state liability arising in that country harm another State, and is limited only to acts that violate international law<sup>51</sup> and a State which violated the international humanitarian law attributable to it and is required to make full reparation for the loss or injury caused by such violations. It is unclear whether armed opposition groups incur an equivalent responsibility for violations committed by their members and what the consequences of such responsibility would be. As stated above, armed opposition groups must respect international humanitarian law and they must operate under a “responsible command.”<sup>52</sup> As a result, it can be argued that armed opposition groups incur responsibility for acts committed by persons forming part of such groups. The consequences of such responsibility, however, are not clear. In particular, it is unclear to what extent armed opposition groups are under an obligation to make full reparation, even though in many countries victims can bring a civil suit for damages against the offenders.<sup>53</sup> Under Customary Humanitarian Law Part VI, Chapter 42 about Responsibility and Reparation, Rule 149, “A State is responsible for violations of international humanitarian law attributable to it, including:

- (a) violations committed by its organs, including its armed forces;

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<sup>51</sup> Yordan Gunawan, 2014, “Transboundary Haze Pollution in the Perspective of International Law of State Responsibility”, *Jurnal Media Hukum*, Vol. 21, No. 2, 2014, p. 179

<sup>52</sup> Additional Protocol II, Art. 1 para. 1

<sup>53</sup> Jean-Marie Henckaerts, *Op. Cit.*

- (b) violations committed by persons or entities it empowered to exercise elements of governmental authority;
- (c) violations committed by persons or groups acting in fact on its instructions, or under its direction or control; and
- (d) violations committed by private persons or groups which acknowledges and adopts as its own conduct.”

The provisions above are applicable in non-international armed conflict and international armed conflict. In Customary International Humanitarian Law Part VI, Chapter 42 about Responsibility and Reparation, Rule 150 “A State responsible for violations of International Humanitarian Law is required to make full reparation for the loss or injury caused.” This rule clearly stated about the responsibility of State for violations which is applicable in non-international armed conflict and also international armed conflict. Syrian Government and Russia have to make full reparation for the loss and injury of Syrian civilian caused by the conflict.

#### **b. The Command Responsibility of Untargeting Attack Toward International Humanitarian Law**

The first postulate of the responsibility of military leaders originated from the law of war and was codified in The Hague



Convention No. IV of 1907 and its Regulations respecting the laws and customs of war on land.<sup>54</sup> Humanitarian law set two main points:

- 1) gives the reason that a war can be justified that war is the last resort, just cause, based on a political mandate (political decision, political authority) that is democratic, and for the right purpose;
- 2) limit the Use of armed force in battle on the basis of Principle of proportionality and discrimination.<sup>55</sup>

The two subjects which became the basic principle of Command responsibility is that a commander has a responsibility to enforce the law Armed conflict or law War on the basis of two basic points mentioned above. Some humanitarian laws govern command responsibility, among other things:

a) Article 1 of The Hague Regulations

The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

1. To be commanded by a person responsible for his subordinates;
2. to have a fixed distinctive emblem recognizable at a distance;
3. to carry arms openly; and

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<sup>54</sup> Regulations, Art. 1 Para. 1, according to which the members of armed forces must be commanded by a person responsible for his subordinates.

<sup>55</sup> Listyo Budi Santoso, 2008, "Perang, Hukum Humaniter, dan Perkembangan Internasional", *Pena Justicia*, Vol. VII, No. 14, Year 2008, p. 18.

4. to conduct their operations in accordance with the laws and customs of war.

b) Article 86 of Geneva Convention 1977 Additional Protocol I of Failure to Act

1. The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.

2. The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.

c) Article 87 of Geneva Convention Additional Protocol 1977 of Duty of Commanders;

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 authority breaches of the Conventions and of this Protocol.

2. In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.
  3. 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 violators thereof.
- d) Article 28 of Rome Statute 1998.

“A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

1. That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
  2. That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.”
- e) Rule 153 of Customary International Humanitarian Law Part VI, Chapter 42 about Responsibility and Reparation.

“Commanders and other superiors are criminally responsible for war crimes committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish the persons responsible.”

Legal provisions Humanitarian Regulating Command responsibility above contains 3 important aspects which must be met for determine an officer or the commander must be responsible for crimes conducted by his Subordinates, such as:

1. There is a relationship of superior subordinates in the case the occurrence of crime which has been done. This is indicated by clear evidence, witnesses, documents, etc.

2. Commanders or Superiors known or suspected to be aware of any crimes committed by subordinates.
3. Commander or superior fails to prevent or crack down (punish) Perpetrators of such crimes or submit the culprit to the party authorized.<sup>56</sup>

To determine a person whether the commander is guilty for doing war crimes and humanity crimes need to be proven that:

1. Soldier offender under Command or supervisor's control the accused.
2. The Command/Superior accused actual notice, I.e. knowing or Notified of the occurrence war crimes and humanity at the time the crime take place.
3. The Command/Superior accused knew contractive notice is there has been violation actions on a scale. So large that the defendant or Someone must be up at the conclusion that he knew the crime.
4. The superior of the accused, knows there is a crime but shows an attitude deliberately indifferent against the consequences of attitude let it (imputed notice).

The accused's Command/Superiors failed taking steps that need to be within its authority to prevent or punish acts of crime when he has the authority and power to do so.<sup>57</sup> The superior is not directly responsible for the crimes committed by his subordinates, but for his

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<sup>56</sup> *Ibid*, p. 25.

<sup>57</sup> *Ibid*, p. 26.

omission, failure to properly discharge his duty, i.e. to prevent the crimes or punish the perpetrators. This is not a form of vicarious responsibility, where one may assume that superior is certainly responsible for his subordinates no matter what. To be held criminally liable, it must be shown that the superior had actual or constructive knowledge of the crimes in question and failed to take “necessary and reasonable measures”, within his power, to prevent or punish. Case law emphasizes that the possession of actual authority over subordinates is decisive (de facto superiors), while an official position does not equal effective control (de jure superiors) and may be some evidence of such control.

**c. Individual Responsibility of Untargeting Attack Toward International Humanitarian Law**

Based on Article 58 of Draft Articles on Responsibility of States for Internationally Wrongful Acts stated “These Articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.” A person who acts on behalf of a country can also be responsible individually. Based on the Customary International Humanitarian Law Rule 151 “Individuals are criminally responsible for war crimes they commit”. The Rule stated clearly that someone who commits a crime in the armed conflict has individual responsibility. Furthermore, obeying a superior

order does not relieve a subordinate of criminal responsibility as defined in the Customary International Humanitarian Law Rule 155 stated “Obeying a superior order does not relieve a subordinate of criminal responsibility if the subordinate knew that the act ordered was unlawful or should have known because of the manifestly unlawful nature of the act ordered.” Thus, every combatant has a duty to disobey a manifestly unlawful order.

The accused’s Command/Superiors failed taking steps that need to be within its authority to prevent or punish acts of crime when he has the authority and power to do so.<sup>58</sup> The superior is not directly responsible for the crimes committed by his subordinates, but for his omission, failure to properly discharge his duty, i.e. to prevent the crimes or punish the perpetrators. This is not a form of vicarious responsibility, where one may assume that superior is certainly responsible for his subordinates no matter what. To be held criminally liable, it must be shown that the superior had actual or constructive knowledge of the crimes in question and failed to take “necessary and reasonable measures”, within his power, to prevent or punish. Case law emphasizes that the possession of actual authority over subordinates is decisive (de facto superiors), while an official position does not equal effective control (de jure superiors) and may be some evidence of such control.

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<sup>58</sup> Listyo Budi Santoso, 2008, “Perang, Hukum Humaniter, dan Perkembangan Internasional”, *Pena Justicia*, Vol. VII, No. 14, Year 2008, p. 18.

Based on Customary International Humanitarian Law and Draft Article on Responsibility of State for Internationally Wrongful Acts, Syria and Russia are responsible for making full reparation for the injury on untargeting attack in the conflict in Syria and they cannot be requested responsibility for any offence committed by individuals belonging to any organization or state. Then, the individuals belonging to an organization or state are personally responsible before the law. Individuals can be asked for fully responsible if he is intentionally and plotted a criminal offence, in this case is untargeting attack in the conflict in Syria, although the person concerned at the time conducting the act was domiciled as a state organ. However, this form of responsibility is incurred *de jure* and *de facto* by military leaders and other superiors who fail to take the necessary and reasonable measures to prevent or suppress the commission of unlawful acts by those who are subordinate to them. This provision is important to prevent the situation where someone argued behind its status as an organ of state to avoid its responsibility for a criminal offense he has committed. Individuals who commit crimes are fully responsible for any criminal offense that in reality has indeed occurred both in its own conduct and within an organization which helped to conduct criminal offence.