

CHAPTER II

LITERATURE REVIEW

A. International Humanitarian Law

International humanitarian law are divided into two types of the characteristic of armed conflicts, namely international armed conflict and non-international armed conflict. International armed conflict is armed dispute which involve two or more countries by means of war. While, the meaning of non-international armed conflict is armed dispute that occurs in the area or region of a country without any interference of other country by *vis-a-vis*. 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.¹⁰

Basically, international humanitarian law is to provide protection. The meaning of protection itself is the protection to the parties involved in the battlefield, the protection is broadly divided into two terms, first, the protection of combatants and status as a prisoner of war, and second, the protection of civilians and protected buildings as schools, hospitals, houses which were forbidden to make them as an attack target.

In the practice, humanitarian law or the law of war embrace several principles that should be implemented in a balanced way in the war, namely:

¹⁰Arlina Permanasari, *et.al*, 1999, *Pengantar Hukum Humaniter*, International Committee of the Red Cross, Jakarta.p. 3.

1. Military Necessity Principle

The parties involving in the conflict which are allowed to use force means to defeat the opponents in order to achieve the aims and success in the battle field.

2. Humanity Principle

The parties involving in the disputes are prohibited from using excessive of force that caused injury or excessive suffering.

3. Chivalry Principle

The purpose of this principle is honest help in the war. Use the tools that are not honored, intrigue and betrayal, all prohibited.¹¹

War or armed conflict is an act of force to defeat an opponent with forcibly imposed requirements. During the warfare took place, there will be a lot of casualties and damages raising losses caused by the war. It was undertaken the efforts to reduce the harms in battle field by giving birth to the concept of Just War and the concept of Unjust War. International humanitarian law governs when and how the war should be conducted (*jus ad bellum*), and how the war should be performed and the rules about what could and could not be done do during the war (*jus in bello*).

¹¹*Ibid* p.11.

1. *Jus ad Bellum*

Jus (or *ius*) *ad bellum* is one of the branches of the international humanitarian law that govern the parties or countries involving in the war and how the war should be conducted in order to create a just war to every party involving in the warfare. The main sources of the modern law of *Just ad Bellum*, come from the Article 2 of United Nations Charter: “All members shall refrain in their international relations from the threat or the use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations”; and in Article 51: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations.”¹²

2. *Jus in Bello*

In the event of states turning from the procedures prescribed by international law for the settlement of their disputes by peaceful means, it will occur hostiles. However, there still exist legal regimes which states are required to respect—*jus in bello* is the laws governing about how the states or parties have to conduct after the war itself begin (during the war). These fall into two categories—those relating to the actual conduct of hostilities and those which afford a minimum protection to the individual.¹³ In the practice, *Jus in bello* have characteristic to humanize war which gave birth to international humanitarian law.

¹² Sean D. Murphy, 2012, *Principles of International Law*, Second Edition, Washington D.C.: West. p. 491.

¹³ Rebecca MM Wallace and Olga-Martin Ortega, 2013, *International Law*, Seventh Edition, UK: Sweet and Maxwell. p. 324

In order to humanize war, humanitarian law has two branches: first;how to conduct of war and permissible of war (Hague Declaration and Regulations), second; the condition of war victims (Geneva Protocols).¹⁴

The former is to be found principally in the Hague Convention 1899 and 1907, and it referred to as “The Law of Hague”, while the Four Geneva Convention 1949 and two Additional Protocols adopted in 1977 comprise the latter, and are known as “The Law of Geneva”. However, as noted by the ICJ the two “have become so closely inter-related that they are considered to have gradually formed one single complex system, known today as international humanitarian law.”¹⁵

B. The Methods of Warfare

The means through which armed conflicts are fought must be lawful means. The warfare is prohibited to use weapons that cause unnecessary suffering or superfluous injury.¹⁶ By using the weapons, there are certain weapons which are prohibited to use indiscriminate weapons, that is, ‘weapons that cannot, because of their design or function, be directed with any degree of certainty at military objectives’.¹⁷

¹⁴Tolib Effendi, 2014, *Hukum Pidana Internasional*, Pustaka Yustisia, Yogyakarta.

¹⁵ *Advisory Opinion on the Legality of the Threat of Use of Nuclear Weapons* I.C.J. Rep. 1996, p. 226

¹⁶ Additional Protocol I, *Article 35*.

¹⁷ Mohammad Naqib Ishan Jan, 2008, *Principle of International Law: A Modern Approach*, First Edition, Malaysia, International Islamic University Press. p. 450.

During the armed conflicts to injure the enemies are not unlimited. Some weapons are specifically prohibited, such as poisons, biological, and bacteriological weapons, gas, and other chemical weapons.¹⁸ The proper targets of armed attack may be military persons (military forces, fighters, spies or mercenaries) and military objects (military buildings or buildings used for military purpose, military installations such as barracks and naval bases), but it does not include civilians and civilian installations, or in other words legitimate targets include combatants including 'unlawful combatants' and military objectives.

The 1949 Geneva Convention I-IV and the 1977 prohibit reprisals against protected persons, namely: prisoners of war, the wounded, sick, or shipwrecked, and civilians who find themselves in the hands of the enemy.¹⁹ Protocol I, however, has extended the prohibition to civilian persons or civilian objects finding themselves on the battlefield.²⁰

Every party has their own right to hold the methods of armed conflict, but the methods of warfare are limited. During the warfare, it is prohibited to use certain methods; like 'denial of quarter', starvation, rape and perfidy. An order

¹⁸ See eg. Geneva Protocol for the Prohibition of the use in war of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (1925); Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and Their Destruction (1972); Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (1993).

¹⁹ See 1949 Geneva Convention I, Art 46; Convention II, Art 47; Convention III, Art 13; Convention IV, Art 33.

²⁰ See Additional Protocol I, Arts 51 (6), 53 (4), 55 (2) and 56 (4).

that “no quarter” will be given to an enemy population, that is, everyone will be massacred, is clearly unlawful.²¹

A better categorization of war crimes would perhaps consist of considering objective criteria linking similar crimes. For example, it should be possible to list war crimes depending on the subject matter to which they relate. Thus, one could distinguish between various classes of war crimes depending on whether they are intended to deal with (i) attacks against civilians or civilians objects; (ii) unlawful taking of life (murder of civilians, murder of prisoners of war); (iii) unlawful attacks to personal integrity (torture, wounding of civilians or prisoners of war, sexual violence); (iv) limitations of personal freedoms (deportation, slavery, forced labor, forced enlisting, hostage taking); (v) illicit appropriation of property (plunder, appropriation of cultural property); (vi) deportation and forcible transfer person; (vii) violations of rules on means of combat (ordering that no quarter be given, use of human shields, use of prohibited weapons) and (viii) violations of rules on belligerent occupation. A further distinction would of course still need to be made within each category between crimes only applicable to international armed conflict and those applicable to non-international armed conflicts as well (for which the legal regulation is more sparse and rudimentary). Arguably, a scheme along these lines would better allow interprets to understand and apply the rules of war crimes.²²

²¹ Art 40, *Ibid*, AP I

²² Antonio Cassese, *et.al.* 2011, *International Criminal Law: Cases and Commentary*, Oxford University Press, UK. p.121.

On the other side related to the use of the chemical weapons, the Geneva Gas Protocol 1925 prohibited the first use of asphyxiating, poisonous or other gases and bacteriological methods of warfare, and is now generally recognized as representing customary international law. It has been supplemented by Biological Weapons Convention 1972 and the Chemical Weapons Convention 1993. Although they are more in the nature of disarmament treaties, the prohibition on the possession of such weapons means that their use is also banned. They specifically prohibit their use retaliation for an attack using them, so casting doubt on whether this would still be possible under the Gas Protocol, as some parties to it have asserted.²³

The Chemical weapons using the toxic properties (as opposed to explosive properties) of chemical to produce physical or physiological effects, while biological weapons disseminates infectious diseases or natural toxins. Chemical weapons include chlorine, phosgene, mustard gas and nerve gas (*sarin*). Biological weapons include bacteria (anthrax), viruses (smallpox), or toxins (ricin).²⁴The use of chemical weapons and biological weapons in warfare is a serious war crime, in ICC Statute adopted in Rome 1998 did not mention chemical weapon by name. However, Article 8(2) (b) of the Statute dealing with war crimes includes 3 provisions that might be interpreted as applying to chemical weapons. Article 8(2) (b) *xvii* makes it a war crime to employ “poison or poisoned weapons”. Paragraph *xviii* refers to “employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices. Paragraph *xx* makes it a war

²³ Anthony Aust, *op.cit*, p. 240.

²⁴ Sean D. Murphy, 2012, *op.cit*, p. 531.

crime to employ “weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict. . .

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Article 8 of the Rome Statute is one of the most substantial provisions in the Statute, and it is all the more striking when compared with the relatively laconic texts of the Nuremberg Charter and Geneva Convention. To some extent it represents a progressive development over these antecedents, because it expressly covers non-international armed conflicts. Furthermore, several war crimes are defined in considerable detail, focusing attention on their forms and variations.²⁶

The international humanitarian law regarding on the methods of war is traditionally divided into two categories: laws governing the state or parties about how to conduct the war before the war begin (*jus ad bellum*), and laws governing about how the states parties have to conduct after the war begins (*jus in bello*), means that this law is governs about how to conduct the war when the war is occur.

C. The Chemical Weapons

Chemical weapons are defined as together or separately, (1) a toxic chemical or its precursor, except when intended for a purpose not prohibited under

²⁵ Dapo Akande, *Can the ICC Prosecute for Use of Chemical Weapons in Syria?*, see at: <http://www.ejiltalk.org/can-the-icc-prosecute-for-use-of-chemical-weapons-in-syria/>, accessed on March 10, 2014, at 1.19 am.

²⁶ William A. Schabas, *An Introduction to International Criminal Court*, United Kingdom, Cambridge University Press, p. 124.

the international Chemical Weapons Convention; (2) ammunition or device specifically designed to cause death or other harm through toxic properties of those chemicals specified in definition 1 above, which would be released as a result of employment of such munitions or device; or any equipments specifically designed for the use directly in connection with the employment of munitions or devices specified in definition 2 above.²⁷

Furthermore, Article II Paragraph of 1993 Chemical Weapons Convention explained the chemical weapon and the criteria of chemical weapons which are prohibited to use. In its Article it is said that chemical weapons is any toxic chemicals and their precursors, munitions and devices or equipment in the types and quantities inconsistent with such purposes specifically designed to cause death or other harm through the toxic properties of those toxic chemicals, which would be released as a result of the employment of such munitions and devices, including the old chemicals weapons, abandoned chemical weapons, riot control agent, and its production capacity.

The latest allegation of chemical weapons use in Syria causing thousand casualties shocked the world and prompted reactions from a cross section of the international community. UN Secretary General, Ban Ki Moon, has re-iterated

²⁷ Michael Keane, 2005, *Dictionary of Modern Strategy and Tactics*, Annapolis, Naval Institute Press.

that the use of chemical weapons will amount to crimes against humanity and would result to serious consequences for perpetrators.²⁸

Responding to the violation committed by Syria, the President of U.S., Barack Obama threw his White House Counsel, Kathryn Ruemmler, who said that if U.S. strike against Syria, it would be lawful, both in International law and domestic law, even if neither the Security Council nor Congress approve it. Even though Mr. Obama in the late of his decision looked for support to his legitimacy, he seeks Congressional concurrence.²⁹

The Western States feared about if Assad wins. It would produce significant regional gains for Iran, Russia and Hezbollah. If Syria Free Army and its Nusra Front and Al Qaeda allies win, it is feared that it would give violent extremist forces a base on operation that would be likely to work strongly against Western interest. It would be an obstacle for the Western States with all their reasons to intervene Syria.³⁰

Syrian rebels have accused Assad regime of perpetrating a chemical weapons attack on civilians in a village outside Damascus. This attack – which is said to have killed more than 1,300 people, including women and children – was

²⁸ UN News Centre, 2013, Use of Chemical Weapons would be ‘Crimes against Humanity’ – Ban, see: <http://www.un.org/apps/news/story.asp?NewsID=45684&Cr=syria&Cr1=>, accessed on March 11, 2014 at: 10.25 am.

²⁹ New York Times, 2013, Obama Tests Limits of Power in Syrian Conflict, see: http://www.nytimes.com/2013/09/09/world/middleeast/obama-tests-limits-of-power-in-syrian-conflict.html?pagewanted=all&_r=0, accessed on March 12, 2014 at 11.10 am.

³⁰ Falk Richard, 2013, *Contra Syria Attack*, see at: <http://richardfalk.wordpress.com/2013/08/30/contra-syria-attack/>, accessed on March 12, 2014 at 12.50 pm.

committed as U.N. researchers arrived in the country to investigate the suspected use of chemical weapons.³¹

³¹Human Right First, *5 Things You Should Know About Chemical Weapons and International Law*, Fact Sheet: August 2013.