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The Relationship of International Human Rights Law with International Humanitarian Law in Situations of International Armed Conflicts

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Abstract

The existence between International Humanitarian Law and Human Rights Law has a different feel from each other, though equally universal. As an example of mistreatment of prisoners of war committed by US Occupation Forces in Iraq, surely all countries say it is an international crimes (war crimes). This paper would discuss concerning how the relationship the International Human Rights with International Humanitarian Law in Situations of International Armed Conflicts. The paper argued that the relationship between human rights and humanitarian law can be distinguished but not separated. The principles of the UDHR can apply to the International Humanitarian Law, but some of the principles of the UDHR and limited humanitarian law apply in times of peace and times of armed conflict alone. Argued that the gap between International Humanitarian Law by the Human Rights bridged together through the enactment of the principles of human rights and humanitarian law principles that cannot be postponed.

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INTRODUCTION

INTERNATIONAL humanitarian law was always close to human rights law, where both two concepts cannot be separated each other. When discussing about humanitarian law, we are also discussing concerning human rights in the context of armed conflict condition. Although both International humanitarian law and international human rights law has different basic sources, but that two concepts basically stipulated the same thing, namely the protection to the people issue.

Den Haag Convention of 1907 concerning Procedure of War, Four Geneva's Conventions of 1949 concerning to the Protection of Armed Conflict Victims, and two Additional Protocols of 1977: the Additional Protocol I of 1977 concerning to the Protection of International Armed Conflict Victims, and the Additional Protocol II concerning to the Protection of Non-International Armed Conflict Victims, were become sources of International Humanitarian Law. Those all sources, basically stipulates concerning to the procedure of war, and humanitarian law guarantees that although in the bad circumstances like war, the human rights should not to be violated by any reasons. Meanwhile, sources of human rights law should be based on the International Bill of Rights, such as Universal Declaration of Human Rights (UDHR) 1945, International Covenant on Civil and Political Rights (ICCPR) 1966, and two optional protocols and International Covenant on Economic Social Cultural Rights (ICESCR) 1966.

Looking for that context, the existence of International Humanitarian Law and International Human Rights Law has different nature from each other, though both two concepts universally same. As an example, the torture to the prisoners of war committed by the US Occupation Forces in Iraq, surely all countries should argue that this is an international crime (war crimes). Similarly the torture conducted by public officials to its own citizens to be condemned by all countries as gross violation of human rights. However, if deeply examined, actually both international humanitarian law and international human rights law has the unique linkages, where both two concepts should not be separated.

The paper would like to discuss and examine concerning the international humanitarian law and international human rights law in what context that two concepts would be used as the protection to the people.

HUMAN RIGHTS LAW

THE BASIC concept of protection to the universal human rights actually occur in World War II that caused enormous suffering to the people so as to

encourage the need for universal order that regulates the international community to be more respect for human rights.

"The idea of the International Declaration of Human Rights appears when World War II took place, and more stronger as the UN and UN Charter designed. The founders of UN should include the promotion of human rights in the UN goals, which is then manifested in the form of declaration that states the customs of international law.[2]

That comment emphasized that the universal order or regulation which accommodate the protection to the human rights was needed, because of the human rights issue was never finished to be discussed and discussing about the human rights directly means discussing about universal understanding concept. As universal in nature, human rights recognized as an international standard that across boundaries of cultures and as a system of international law applicable in the country's society.[3]

Vienna Declaration and Program of Action, June 1993 point E.83 concerning the implementation and monitoring methods stated that governments should combine (incorporate) the standards contained in international human rights instruments into national law (domestic legislation) and strengthen the various structures, national institutions, and organs of society which play a role in promoting and protecting human rights.[4] Muladi stated that although human rights have a universal nature, but as in other developing countries in the implementation of human rights itself known the principle of cultural relativism, which is universally already getting recognition in the context of that principle is not contrary to the universal principles and natures of human rights. The importance to consider the cultural and historical aspect of people and nation in the implementation of human rights, as stated as follows: "The Jakarta message (1992) point 8 affirmed that no country, however, should use its power to dictate its concept of democracy and human rights or impose conditionality on others."

Kuala Lumpur Declaration of 1993 on human rights formulated by ASEAN Inter Parliamentary Organization (AIPO), stated that: "The people of ASEAN accept that human rights exist in a dynamic and evolving context and that each country has inherent historical experiences, and changing economic, social, political and cultural and value system which should be

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2 Vratislav Pechota*, Kovenan Hak Sipil dan Politik dalam Materi Training Hukum dan HAM bagi Dosen Pengajar Hukum dan HAM di Fakultas Hukum pada Perguruan Tinggi Negeri dan Swasta di Indonesia,* held by PusHAM Universitas Islam Indonesia and University of Oslo Norway, Yogyakarta, 22-24 September 2005

3 Sonia Haris Short, "International Human Rights Law: Imperialist,Inept and Ineffective?Cultural Relativisme and the UN Convention on the Rights of the Child in Human Rights Quarterly*", A Comparative and International Journal of The Social Sciences, Humanities, And Law*, Volume 25 Number 1, February 2003, p.131.

4 Komisi Hak Asasi Manusia, *Hak Asasi Manusia dalam Perspektif Budaya*, Gramedia Pustaka Utama, Jakarta, 1997, p. 81.

taken into account."[5] Bangkok Declaration of 1993, also stated that: "While Human Rights are Universal in nature, they must be considered in the context of a dynamic and evolving process of international norms setting, bearing in mind the significance of national and regional peculiarities and various historical, cultural and religious background."[6] Vienna Convention and Action Program of 1993 also emphasized that: "All human rights are universal, indivisible and interdependent and interrelated while the significant of national and regional Particularities and various historical, cultural and religious background must be borne in mind, it is the duty of states, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms."[7]

The debate is indeed arise when discussing whether the Universal Declaration of Human Rights of 1948 (UDHR) has a universal principle or not. The theory of human rights as the middle range theory in this paper because of human rights itself could be generally defined as those rights which are inherent in our nature and without which we cannot live as human beings.[8]

Indonesian Human Rights Law, stated that *Human rights are a set of rights attached to nature and human existence as a creature of God Almighty and it is His grace that must be respected, upheld and protected by the state, law, government and everyone for the respect and protection of human dignity*.[9]"Whereas human rights are basic rights inherent in human beings by nature, universal, and eternal as the grace of God Almighty"[10], but another perspectives, although human rights was given by God, the application of the concept of human rights itself in the context of protection of human rights was a responsibility for Indonesia as a country with *rechtstaat* concept that upholds human rights. State responsibility under international law arising out of a violation of international law, although the national law considers an act is not an offense, however, if international law provides otherwise, the state must remain responsible.[11]

In terms of responsibility to the legal norms of international human rights, state actors can no longer hide behind sovereignty to avoid responsibility to the international community as it is said Hector Gross Espiell, that "The question of Human Rights is no longer the preserve of the domestic jurisdiction of states, but is now being recognized as governed by the

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5 Muladi, *Demokratisasi, Hak Asasi Manusia, dan Reformasi Hukum di Indonesia*,The Habibie Center, Jakarta 2002, p.56.

6 Final Declaration of the Regional Meeting For Asia of the World Conference on Human Rights which known as Bangkok Declaration 1993.

7 Viena Declaration and Programme of Action (June 1993)

8 United Nation, *Human Rights Question and Answer*, New York, United Nations Department of Public Informations, 1993.

9 Article 1 paragraph 1 of Law No. 39 of 1999 on Human Rights

10 Charter of Indonesian Human Rights, Introduction, Second Paragraph

11 F Sugeng Istanto, *Hukum Internasional,* Universitas Atmajaya Yogyarakarta, p. 77.

internal law and by international law, against the which internal special law cannot be invoked."[12]

In Indonesian context, Law No. 39 of 1999 concerning to Human Rights, in part of consideration on point (d), stated that: "Indonesian people as one of the members of United Nations that have a moral and legal responsibility to uphold and implement the Universal Declaration of Human Rights established by the United Nations, as well as other various international instruments which have been accepted by the Republic of Indonesia."[13]

The same thing is also contained in the Explanation of Law No. 26 of 2000 regarding Human Rights Court in paragraph 4 of Part I, said:

> "To carry out the mandate of the status MPR Decree No. XVII / MPR/1998 on Human Rights has been established Law No. 39 of 1999 on Human Rights. This Law is a manifestation of the responsibility of the Indonesian people as a member of the United Nations. In addition to these, the establishment of the Law on Human Rights also contains a mission to assume moral and legal responsibility to uphold and implement the Universal Declaration of Human Rights established by the United Nations, as well as contained in the various legal instruments more set up Human Rights, which has been ratified or accepted by the Republic of Indonesia."[14]

Those provision means that human rights as part of international law at the time implemented in national life issues was highly related to political, social and cultural issue. This view was reinforced by the results of historical research paper, which was then strengthened the belief that the human rights issue, not merely western thought, but it is a question of which values are associated with and underlying the Indonesian independence movement. In other words, the substance and the values of human rights have deep roots, in a dialectic struggle of this nation since before independence until today.[15]

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12 Hestor Gross Espiell, "Humanitarian Law and Human Rights", on Januzy Symonides (editor), *Human Rights: Concept and Standards*, Paris: UNESCO, 2000, p. 349

13 Law No. 39 of 1999 concerning to the Human Rights.

14 Explanation of Law No. 26 of 2000 regarding Human Rights Court.

15 Adnan Buyung Nasution*, Implementasi Perlindungan Hak Asasi Manusia dan Supremasi Hukum,* on Seminar Pembangunan Nasional (National Development Seminar) VII/ Denpasar Bali 14-18 July 2003.

HUMANITARIAN LAW

THE TERM of humanitarian law for Indonesian people was uncommon know as one of branches of law. The nature of humanitarian law itself related to the war and armed conflict and it occurred in world war situations. The terms of humanitarian law, or known as international humanitarian law is applicable in armed conflict is originated from the term of laws of war, and then in its development known as the laws of armed conflict. The change from the laws of war into the laws of armed conflict is done to avoid a traumatic condition caused by war.

According to Shigeki Miyosoki on Yasin Tasyrif (1990),[16] International Humanitarian Law is law concerning to the protection of human rights on armed conflict with some binding legal instruments. Jean Pictet on Haryomataram (1984) emphasized that international humanitarian law in the wide sense is constitutional legal provision from, whether written or customary, ensuring respect and individual and his well-being. [17]

Definition of humanitarian law itself, as emphasized by Gesa Herzegh, formulated international humanitarian law as "part of the rules of public international law which serve as the protection of individuals in time of armed conflict. Its place is beside the norm of warfare it is closely related to them but must be clearly distinguish from these its purpose and spirit being different."[18] Mochtar Kusumaatmadja stated that humanitarian law is one of parts in legal science that consisted of some provisions to protect the victim in armed conflict, and its different to the laws of war that only regulate the war itself and everything related to the conduct of war itself.[19] Committee of Humanitarian Law, Department of Law and Legislation, concerning to the Humanitarian Law emphasized that this law recognized as whole principles, rules and provisions of international whether it written or not that includes martial law and human rights, aimed at ensuring respect for the dignity of the person.[20]

Esbjorn Rosenbland distinguished between humanitarian law and the law of armed conflict, which is associated with the onset and cessation of hostilities, occupation of opponent territory, disputes party relationship with the neutral country. While the law of warfare, such as the methods and means of warfare, combatant status, protection of the sick, and combatants and civilians (non-combatants). F. Sugeng Istanto on Masyur Effendi (1994) concerning to the Rosenbland argument stated that, humanitarian law is one

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16 Yasin Tasyrif, *Hukum Humaniter Internasional, Buku Pegangan Kuliah Mahasiswa FH*, Undip, Semarang, 1990, pp. 10-11.

17 Haryomataram. 1984. *Hukum Humaniter*. Jakarta, CV Rajawali, p. 8

18 Arlina Permanasari *et al*. 1999. *Pengantar Hukum Humaniter*. Jakarta: *International Committe of The Red Cross,* p. 19.

19 Haryomataram, *Op.Cit.,* p. 9.

20 *Ibid.,*p. 10.

of legal provisions that part of public international law which is provide some rules conducting to human behavior on armed conflict that is based on humanitarian consideration with the aim of human protecting.[21] While the International Committee of the Red Cross (ICRC), stated that international humanitarian law as the provisions of international law contained on international treaties and costumes, which are intended to address all humanitarian problems that arise at times of international armed conflict or non-international. Such provisions limit—on behalf human rights—the rights of the parties involved in the dispute for the use of weapons and methods of warfare to protect people and property affected by armed conflict.

Thus international humanitarian law is a set of rules or legal provisions which arise because of the habits of international or international treaties governing the procedures and methods of warfare and the protection of victims of war on armed conflicts that are international or non-international.

Arlina Permanasari *et al* (1999)[22] explained that sources of international humanitarian law were consisted of some conferences, as follows:

1) The Hague Law

The Hague Law is a provision of humanitarian law providing the methods and means of war. The Hague Law is the result of the First Peace Conference held in 1899 and the Second Peace Conference held in 1907.

a) The Hague Convention of 1899

The Hague Conventions of 1899 is the result of the first peace conferences in The Hague (18 May-29 July 1899).

The conference, which began on May 20, 1899 that lasted for two months and produce the three conventions and three declarations on July 29, 1899.

The three conventions generated are:

a. 1st Convention on Dispute Settlement of International Conflict;
b. 2nd Convention on the Laws and Customs of War on Land;
c. 3rd Convention on Adaptation of the Principles of the Geneva Conventions of August 22, 1864 on the Law of War at Sea.

While three declarations produced is as follows:

a. Prohibit the use of bullets dum-dum (bullets packaging is not perfectly close the inside so that it can rupture and enlarged in the human body).
b. The launch projectiles and material of the balloon, over a period of five years ending in 1905 is also prohibited;

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21 H.A. Masyhur Effendi. 1994. *Hukum Humaniter Internasional dan Pokok-Pokok Doktrin Hankamrata*. Surabaya, Usaha Nasional, p. 24

22 Arlina Permanasari *et al*. 1999. *Op. Cit.,* pp. 22-46.

c. The use of projectiles that cause choking gases and toxic prohibited.

b) The Hague Conventions of 1907

Conventions are a result of the Second Peace Conference as a continuation of the First Peace Conference in 1899 in The Hague. Conventions generated by the Second Peace Conference at The Hague resulted in a number of conventions as follows:[23]

a. First Convention on the Peace International Dispute Settlement;
b. Second Convention on Limitation of Using Weapons in Demanding Debt Payments coming from the Civil Agreement;
c. Third Convention on How to Begin a War;
d. Fourth Convention concerning to the Laws and Customs of War on Land attached with the Hague Regulations;
e. Fifth Convention on the Rights and Duties of Neutral States and Citizens in the War on Land;
f. Sixth Convention on the Status of Trade Ships Starters Enemy at the Beginning of the War;
g. Seventh Convention on the Status of Trade Ships into Warships;
h. Eight Convention on Landmines Automatic Placements in the Sea;
i. Ninth Convention of bombing by the Navy in Time of War;
j. Tenth Convention on Adaptation Principles of the Geneva Conventions on War at Sea;
k. Eleventh Convention on Certain Restrictions on the Use of Rights of the Capturing on the Naval War;
l. 21st Convention on the Court of Confiscated Goods.
m. 22nd Convention on the Rights and Duties of Neutral States in the War at Sea.

2) The Geneva Convention

That The Hague Law and Geneva Law are two basic rules in humanitarian law, as proposed by Jean Pictet that the Humanitarian Law has two branches, one bearing the name of Geneva, and the other name of The Hague.

Geneva Law regulating the protection of victims of war and possessed four principal agreements. Fourth 1949 Geneva Convention are:

a. Geneva Convention for the amelioration of the condition of the Wounded and Sick in Armed Forces in the Field.

[23] *Ibid.,*p. 24.

b. Geneva Convention for the Amelioration of the condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea.
c. Geneva Convention relative to the Treatment of Prisoners of War.
d. Geneva Convention relative to the Protection of Civilian Persons in Time of War.

The Fourth Geneva Convention of 1949 that in 1977 were added to the 1977 Additional Protocol that is referred to:

a. Protocol Additional to the Geneva Convention of 12 August 1949, And Relating to the protections of Victims of International Armed Conflict (Protocol I); and
b. Protocol Additional to the Geneva Conventions of 12 August 1949, And Relating to the Protection of Victims of Non-International Armed Conflict (Protocol II).

According to sources and definitions of Humanitarian Law can be underlined that the objectives of humanitarian law, as follows:

1. Provide protection against combatants and civilians from unnecessary suffering.
2. Guarantee the fundamental human rights to their captured by enemy hands. Combatants who fall into enemy hands must be protected and cared for, and deserves to be treated as prisoner of war.
3. Preventing war and cruelly and without limits.

Masyhur Effendi (1994) emphasized that the purpose of international humanitarian law is the protection of individual victims of war are emphasized in certain situations (conflict or war) and the consequences of conflict.[24]Briefly, International Humanitarian Law was created with the aim of protecting and preserving the rights of victims and non-combatants in armed conflict.[25] As stated in the US Army Field Manual of the Law of Land-warfare that the purpose of the law of war is:[26]

1. Protects both combatants and non-combatants from unnecessary suffering ;
2. Guarantee certain rights of those who fall into enemy hands;
3. Allow the return of peace; and
4. Limits the power of party involved to the war.

Meanwhile, according to Mohammed Bedjaoui, humanitarian law is not intended to prohibit war, but is intended to humanize the war.[27]

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24 H.A. Masyhur Effendi, *Op.Cit.,* p.65

25 Fadillah Agus. 1997. *Hukum Humaniter Suatu Perspektif*. Jakarta: Pusat Studi Hukum Humaniter Fakultas Hukum Trisakti, pp. 84-85

26 Haryomataram. 1984. *Op.Cit*., p. 3

27 Mohammed Bedjaoui, *Modern Wars: Humanitarian Challenge. A Report for the Independent Commission on International Humanitarian Issues,* Zed Books Ltd., London, 1986, p. 2, stated that: "… his is precisely the concern of humanitarian law which seeks to apply a set of

There are several goals of humanitarian law can be found in the published literature, among others, as follows:

a. Providing the protection against combatants and civilians from unnecessary suffering.
b. Guaranteeing human rights is fundamental for those who fall into enemy hands. Combatants who fall into enemy hands must be protected and treated as well as the right to be treated as prisoners of war.
c. Preventing war and cruelly and without limits. And, the most important is the principle of humanity.[28]

Furthermore, humanitarian law is known, there are three main principles, namely:[29]

1. Principles of Military Interest
   Based on this principle, the parties to the dispute justified in using force to subdue an opponent in order to achieve the goals and success of the war
2. Principle of Humanity
   Based on this principle, the parties to the dispute are required to pay attention to humanity, where they were forbidden to use violence which can affect excessive injury or unnecessary suffering.
3. The Principle of Chivalry
   This principle implies that in war, honesty must take precedence. The use of tools that are not honored a wide variety of wiles and ways that are treasonous prohibited.

In its application, the third principle must be implemented in a balanced manner. As said by Kunz in Arlina Permanasari *et al* (1999):[30]"Law of war to be accepted and to be applied in practice, must strike the correct balance on the one hand the principle of humanity and chivalry, and the other hand, military interest." And besides of this, it is important to be considered in humanitarian law what is principle applied. The distinction principle is one of the important principles in International Humanitarian Law because the principle distinguish or divide the people of a country at war or are involved in armed conflict into two groups, namely combatants and civilian. Combatants are among those who participate actively in hostilities, while civilians are among those who do not participate in hostilities.[31] Distinguishing between combatant and civilian actually to make sure whether

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legal rules to humanize armed conflicts and protect the victims of situations of armed violence".

28 Frederic de Mullinen, *Handbook on the Law of the War for Armed Forces,* ICRC, Geneva, 1987, p. 2, stated that: "Law of Warfare purposed to limit and avoid a cruel things on war, that's why is needed a certain law to balance between military necessity in one side and humanity in other side".

29 Arlina Permanasari*et al*. Op. cit., p. 11

30 *Ibid.*

31 *Ibid.,* p. 73.

someone participating on the hostilities or not, so someone become a target of object of violence.

According to Jean Pictet, the principle of distinction is derived from the general principle called the principle of limitation *ratione personae* which states: "The civilian population and individual civilians shall enjoy general protection against danger arising from military operation". This principle requires further elaboration into a number of principles implementation (*principal of application*), namely:[32]

1. The parties to the dispute shall at all times distinguish between combatants and the civilian population in order to save the civilian population and civilian objects;
2. The civilian population as well as individual civilians, not may be made the object of attacks although in terms of reprisal (retaliation);
3. Actions or threats of violence the primary purpose of spreading terror against civilians is prohibited;
4. The parties to the dispute must take all precautionary measures that allow to rescue residents civilian or at least to emphasize the loss or damage unintentional as small as possible;
5. Only members of the armed forces that have rights to attack and resist the enemy.

According to the 1949 Geneva Conventions, the categories of combatants are: [33]

1. Those who have a leader who is responsible for subordinates;
2. Those who use certain signs that can be known from long distance;
3. Those who carrying arms openly; and
4. Those who in operation comply with the laws and customs of war.

So it can be said that the distinction principle is a principle to distinguish or set on the subject of war that will be participating actively or passively in armed conflict, which resulted in them can be used as a subject or target of the war as a subject that should be protected.

In addition, humanitarian law is also known in other principles, namely:

1. The principle of military necessity, that based on this principle the parties to the dispute justified in using force to subdue an opponent in order to achieve the goals and success of the war. In practice, to apply the principle of military necessity in the context of the use of violence against the opposition, an attack must pay attention to the following principles:
   a. The principle of proportionality, emphasized that "principle applied to limit the damage caused by military operations by requiring that the

[32] *Ibid.,*p. 74.
[33] *Ibid.,* p. 81

consequences of war means and methods used must not be disproportionate, meaning that have to be proportional to the expected military advantage."[34]

b. The principle restrictions or limitation principle, which is the principle that limits the use of tools and ways of warfare which may cause due to the extraordinary effect to the enemy.
d. Principle of Humanity, which is according to this principle, the parties to the dispute are required to pay attention to humanity, where they were forbidden to use violence which can cause excessive injury or unnecessary suffering. Therefore, this principle is often also referred to as "unnecessary suffering principle".
e. The principle of chivalry. This principle implies that in war, honesty must take precedence. The use of tools that are not honored, skullduggery and ways that are treasonous prohibited.
f. The principle of distinction. Based on these principles in times of war or armed conflict should be a distinction between civilians on the one hand with a combatant and between civilian objects on the one hand with the object of the military on the other. Based on this principle only combatants and military objects that may be involved in the war and targeted. Many experts contend that the principle of distinction is the most important principle of humanitarian law.

In accordance with the various definitions mentioned above, the International Humanitarian Law is a law that aims to solve humanitarian problems in both international and non-international provided in international law whether written or based on international practice. In other words, it can be argued that the international humanitarian law in the broadest sense is the protection of human rights in armed conflicts, because it involves the protection of victims of war.

Definition and Types of Armed Conflict

Definition of armed conflict, in the context of international humanitarian law was very diverse, but some experts explain that armed conflict as a certain condition, such as Pictet has been said that "the term armed conflict has been used here in addition to the word war which it is tending to supplant", and also Edward Kossoy stated that "as already mentioned, the term armed conflict tends to replace, at least in all relevant legal formulations, the older notion of war on purely legal consideration the replacement of war by armed conflict seem more justified and logical", Rosenbland also explained that "the

[34] Pietro *Verri*, *Dictionary of International Law of Armed Conflict,* International Committee of the Red Cross, Geneva, 1992, p. 90.

term international armed conflict is used here in the same traditional sense as that used by Oppenheim-Lauterpacht in their definition of an interstate war. In their words is contention between two or more states through their armed forces, for the purposes of overpowering each other, and imposing such conditions of peace as the victor please."[35]

Opinions above, cannot definitely and clearly explain about what is the armed conflict, but it can be concluded that the armed conflict is same with the war and presumably it can be said that both terms—armed conflict and war—be given the same meaning. In the 1949 Geneva Convention, armed conflict imagined and explained as "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. 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."[36]

Hans Peter Gasser ever been ask, that "when can an armed conflict be said to obtain? The convention themselves are of no help to us here, since they contain no definition of the term. We must therefore look at state practice, according to which any use of armed force by one State against the territory of another triggers the states. Why force was used is of no consequence to the international humanitarian law." Dieter Fleck, on Haryomataram (2002) stated that "an international armed conflict if one party uses force of arms against another party. The use of military force by individual person or group of person will not suffice. It is irrelevant whether the parties to the conflict consider themselves to be at war with each person and how they describe this conflict."[37]

Those all definition above concerning to armed conflict, concluded that in order to be regarded as *armed conflict* there must be the use of *armed forces* of one party against the other party. Not necessary to consider whether one or both parties reject the existence of the so-called *state of war*. Similarly, the length of the conflict took place and how many people who fell victim does not need to be considered.

Broadest definition of *armed conflict* affected some systematic for more elaborate and describe the notion of *armed conflict* happened. The first systematic stated by Starke that called by *Status Theory*, and Starke divided it into two types: (1) war proper between States; and (2) armed conflict which are not for the character of war.[38] Second systematic emphasized by Schindler

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35 Haryomataram. 2002. *Konflik Bersenjata dan Hukumnya*. Jakarta: Universitas Trisakti, p.1
36 *Ibid.,* p. 2
37 *Ibid.,* p.3
38 *Ibid.,* p. 3

on Haryomataram (2002) which is based on The 1949 Geneva Convention and The 1977 Protocol divided it into four types: (1) International Armed Conflict; (2) War of National Liberation: (3) Non International Armed Conflict According to Article; and (4) Non International Armed Conflict According to Protocol II of 1977.[39]

Third systematic more clearly stated by Shigeki Miyazaki *on* Haryomataram (2002), that Miyazaki divided it into six types, as follows:

1) The armed conflict between the participants of the 1949 Geneva Conventions and the Additional Protocols of 1977, according to Article 2 (1) of the Geneva Conventions, and Article 1 paragraph (3) of Protocol I;
2) The armed conflict between the Contracting Parties (countries) and the non-party participants (States/Authority) *de facto*, for example, the Authority or Potentate who led the national liberation campaign, which has received the Geneva Conventions or Protocols, according to Article 2 (4) of the Geneva Conventions, Article 1 (4), in conjunction with Article 96 paragraph (3) of Protocol I;
3) The armed conflict between the participants (State) and not the participant (States/Authority *de facto*) who have not received both the Geneva Conventions and Protocol I, according to Article 2 (4) of the Convention of Geneva, Martens Clause, Protocol II (Authority);
4) The armed conflict between the two countries not party (non-Contracting Parties) of Article 2 (4) of the Geneva Conventions, according to Article 3 of the Geneva Conventions (Authority), Martens Clause, Protocol II (Authority);
5) Serious armed conflicts are non-international (uprising), according to Article 3 of the Geneva Conventions, Protocol II, and also Public International Law; and
6) Other armed conflicts, according to International Covenant of Human Rights, and Public Law (Criminal Law).[40]

Fourth systematic stated by Haryomataram, which is divided the armed conflict as follows:

1) International Armed Conflict
   a. Pure armed conflict
   b. Pseudo armed conflict, such as:
      (1) War of National Liberation
      (2) Internal armed conflicts which internationalized.
2) Non-International Armed Conflict, which comply with:
   a. Article 3 of the Geneva Conventions of 1949; and
   b. Additional Protocol II of 1977[41]

[39] *Ibid.,* p.4
[40] *Ibid.,* p.6
[41] *Ibid.,* p.7

Regarding to various systematic disclosed by Starke, Schindler, Shigeki Miyazaki and Haryomataram can be drawn an outline that connects and has an affinity of various opinions or systematic nearly the same, namely the active participation of the countries involved in the conflict, both his role in international armed conflicts or non-international armed conflicts and arrangements that armed conflict is stipulated in the 1949 Geneva Conventions and the 1977 Additional Protocol II and in the event of armed conflict, then both rules will be automatically binding for the parties, despite the absence of a declaration or acknowledgment of the parties have armed conflicts.

In International Humanitarian Law perspective, armed conflict can be divided into three types, namely:

1) International Armed Conflicts

Article 2 of the 1949 Geneva Conventions stated that:

> "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 […]."

Although in Article 2 of the 1949 Geneva Convention does not explicitly explain the meaning of International Armed Conflicts, however it is known that the subject is the State.

In the 1977 Additional Protocol Article 1 (4) explained:

> "The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations."

From the article above, the government's war against the invaders (*fighting against colonial domination*), the war against the occupation government (*alien occupation*) and the war against the government operates a racist regime (*against racist regimes*) can be regarded as a war of independence (*war of national Liberation*). War of National Liberation can be said as the *car conflict*. However, not all *car conflict* can recognized as International Armed Conflicts, because the conditions are that there must be a declaration of universal issued by legitimate authority, representing the people who are dealing with the colonial government/population/ regime racist as a form requirements themselves bound by the 1949

Geneva Conventions and its Protocols. It is stipulated in Article 96 paragraph 3 of Protocol I in 1977.

2) Non-International Armed Conflicts

In the case of non-International Armed Conflicts, stipulated in Article 3 of the 1949 Geneva Convention IV.

3) Internal Disturbance and Tensions

Certain condition can be regarded as domestic chaos or internal tension is when the case of large-scale riots, acts of terrorism and sabotage which caused deaths and injuries, as well as their hostage.

If the tension in the country is really happening in a country so the laws used is the national law of the country itself.

Various Theories concerning to Relationship of International Humanitarian Law and International Human Rights Law

According to Caogeropolus there are three views of theories concerning to the differences in International Humanitarian Law and International Human Rights Law, explained as follows:

1) Integrationist

According to this tenet, human rights law is the basis of humanitarian law or otherwise that international humanitarian law is the basis of human rights law.[42]

2) Separatist *or* Separatism

Both human rights law and international humanitarian law has not relationship each other because they both contain some differences in terms of:

a. *Object,* that humanitarian law regulating armed conflict between States or between States with other entities, meanwhile human rights law regulates the relationship between the government and the citizens in their own country.
b. *Personality,* which is humanitarian law is mandatory apolitical and proprietary characteristic; whereas human rights is declaratory political character.
c. *Promulgation,* that international humanitarian applied in armed conflict but human rights law applies beside of armed conflict.

3) Complementarism

Human rights law and international humanitarian law through a gradual process of developing parallel and complementary each other.

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[42] *See* GPH Haryomataram, *Bunga Rampai Hukum Humaniter (Hukum Perang),* Bumi Nusantara Jaya, Jakarta 1998, pp. 4-7

Based on the three criteria of the relationship between human rights law and international humanitarian law, we can compare those all criteria with some expert opinions below which have different views from each other n explaining the relationship between human rights law and international humanitarian law.

According to Marion Muskhat stated that there are some different principles both international humanitarian law and human rights law, namely:

> "In general, the difference between humanitarian law and the law of human rights is that the humanitarian law deals with the consequences of conflicts among the states or between states and some other specifically defined belligerent, but the law of human rights is concerned with the controversies between the government and individuals inside the state borders."[43]

In accordance with these opinions, between international humanitarian law and human rights law there are some differences of principle, the difference is such that the International Humanitarian Law regulate inter-State conflict with any country or country with the belligerent and the conflict between the government and individuals regulated by the law on human rights.

The subsequent development of relationship between International Humanitarian Law and Human Rights basically contain in the UN Resolution No. MU 2444 (XXIII) in 1968 on The Respect for Human Rights in Armed Conflicts, contents:

1. The parties to the dispute rights is not limited in the use of tools to destroy the enemy;
2. A prohibition on direct attacks against civilians;
3. Mandatory always hold a separation between those participating in hostilities by civilians and the latter is as much need protection.

But according Drapper, although there are differences between international humanitarian law and human rights law but in the relationship between human rights law and international humanitarian law has a complementary relationship and filling, as stated by Drapper as follows:

> "[...] the two bodies of law have met, are fusing together at some speed, and that in number of practical instances the regime of human rights is setting general direction, as well as providing the main impetus, for the revision of the law of War."

[43] *Ibid.,* p.21

Referring to the opinion of Drapper above, the protection of international humanitarian law also include the protection of human rights that include rights that cannot be postponed, namely:

1. The right to life is granted a high degree of protection;
2. The right to be tried rather than detained without trial is protection;
3. The appears to be a continuing obligation to prosecute human right violations;
4. The primarty responsibility to ensuring compliance I imposed on the States;
5. The rights to shoot combatant is formally recognized;
6. The rights of combatants to be detainded but not tried is protected;
7. There is a tendenccy to grant an amnesty when the conflict is over for most conflict related crimes; and
8. Individuals as well as States may be held responsible for ensuring compliance.

According to Yoram Dinstein, noted that human rights in an armed conflict can be divided into two categories, namely:[44]

1. Rights granted to lawful or privilege combatants, i.e. combatants respecting the law of war and meeting the conditions which that body of law establishes; and
2. Rights accorded to civilians.

The essence of "the human rights lawful combatants" covers two things as follows:

1. They have rights to the status of prisoners of war once they are placed horse de combat by force of circumstance (being wounded, sick, or Shipwrecked) or by choice (Reviews their laying down arms);
2. Lawful combatants Also have the rights not to be the target of a biological or chemical weapons, poisons, and severed types of bullets or projectiles;

As for what is meant by "*the human rights accorded to civilians*" are:

1. The Civilians Populations anywhere;
2. Civilian enemy in the territory of a belligerent states; and
3. The civilian population in occupied territory.[45]

According to Dinstein's view of the foregoing, the protection of human rights in armed conflict (international humanitarian law) covers the rights given to combatants or *horse de combat* as well as the rights of the civilian population. The author argued that between international humanitarian law and human rights actually have a relation to one another, as the study authors

[44] Andrey Sudjatmiko, *Perlindungan HAM dalam Hukum HAM dan Hukum Humaniter Internasional*, Paper on Humanitarian Law (Proceeding), PSHM-FH Trisakti, Jakarta, 1999, pp. 90-91.

[45] *Ibid.*

based on the relationship between the Principles of the Law of Geneva 1949 and Principles of the Universal Declaration of Human Rights in 1948 which was formulated by Jean Pictet in his book "*Development and Principles*".[46]

Based on these descriptions above, the provision of international humanitarian law covers all human rights protection for victims of war and combatant. The human rights protection such as:

1. Prohibitions and restrictions on means and methods of warfare which only cause suffering excessive/unnecessary in the war itself. For example the use of chemical weapons and also use methods that lead to starvation of the civilian population;
2. Prohibition of attacks on civilians and civilian objects; and
3. Prohibition of attacks on the *horse de combat* (combatants who had surrendered/incapable of resistance to illness or a prisoner of war).

In accordance with these descriptions, the relationship between human rights and humanitarian law can be distinguished but not separated. The principles of the UDHR may apply in International Humanitarian Law, but some of the principles of the UDHR and limited humanitarian law only applied in times of peace and times of armed conflict. Thus it can be argued that the gap between international humanitarian law and human rights togetherness bridged through the enactment of the principles of human rights and humanitarian law principles that cannot be postponed, despite the state of emergency or war, namely the principle of inviolability, the principle of non-discrimination and the principle of security.

CONCLUSIONS

THE BACKGROUND and discussion above capture clear image concerning to the relationship of international humanitarian law and human rights law, and it can be concluded that under the protection of human rights in armed conflict (international humanitarian law) covers the rights given to combatants or *horse de combat* as well as the rights of the civilian population. The author argued that between international humanitarian law and human rights actually have a relation to one another, as the study authors based on the relationship between the Principles of the Law of Geneva in 1949 and the Principles of *the Universal Declaration of Human Rights*, 1948. The relationship between human rights and humanitarian law can be distinguished but not can be separated. The principles of the UDHR may apply in International Humanitarian Law, but some of the principles of the UDHR

[46] Dadang Siswanto, *Kebijakan Hukum Pidana dalam Mengantisipasi Pelanggaran-Pelanggaran Berat dan Pelanggaran HAM yang Diatur dalam Protokol Tambahan I dan II-1977* (Tesis), Magister Ilmu Hukum Undip Semarang, 2002, pp. 157-158

and limited humanitarian law only applies in times of peace and times of armed conflict. Thus it can be argued that the *gap* between international humanitarian law and human rights togetherness bridged through the enactment of the principles of human rights and humanitarian law principles that cannot be postponed.

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