

International Humanitarian Law: The Principles, State Parties Obligation, and its Implementation in Indonesia

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For some years, it has been customary to call Humanitarian Law that considerable portion of international law which owes its inspiration to a feeling for humanity and which is centered on the protection of the individual. This expression of humanitarian law appears to combine two ideas of a different character, the one legal and the other moral. Now, the provisions which are the subject under the study are precisely a transposition in international law of considerations of a moral order, and more especially humanitarian.

The term of Humanitarian Law may be considered under two different aspects, the one wide and the other narrow. International Humanitarian Law, in the wide sense, is constituted by all the international legal provisions, whether written or customary, ensuring respect for the individual and his well-being.¹

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¹ Jean Pictet, *The Principles of International Humanitarian Law*, (Geneva: ICRC), pp. 9-10.

The Principles of Humanitarian Law

The International Law which becomes the basis humanitarian law is Geneva Conventions 1949 that consist of 4 (four) Conventions, they are (1) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; (2) Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; (3) Geneva Convention relative to the Treatment of Prisoners of War; and (4) Geneva Convention relative to the Protection of Civilian Persons in Time of War.

Offering a more specifically humanitarian character, a primary element of civilization and peace, the law of Geneva incarnates the very ideal of the Red Cross. It was moreover the International Committee in Geneva which gave it its initial impulse and origin. It is therefore sometimes called the "law of the Red Cross".²

In 1949, a vast portion of the Hague law passed, considerably extended, into the sphere of Geneva; such, for example, as the protection of civilians, notably in the occupied countries. This meant that, for the first time, the Geneva Conventions covered individuals who did not belong to the fighting forces and who were neither wounded, sick, shipwrecked nor captives. The purpose of the new provisions was, to some extent, to prevent civilians from becoming the direct victims of war. One can however also claim that from the mere fact of their finding themselves under enemy occupation,

civilians no longer enjoy their full liberty and have to submit to hostilities to a larger or less degree.

Other than above mentioned Conventions, there are two additional protocols. Additional Protocol I concerns on International Armed Conflict and Additional Protocol II concerns on Non-International Armed Conflict. These Protocols are completing and adding new things to Geneva Conventions 1949 because such Conventions have not fulfilled the needs and are also not suitable to current world situation, where since 1949 there are many liberation movements against the foreign occupation, and also the forms and the method of war are no longer matched to provisions contained in Geneva Convention 1949.

The Obligation of State Parties

There are some obligations that have to be fulfilled by State Parties to Geneva Conventions, as follow:³

1. The obligation to Article 48, 49, 128, and Article 145 of Geneva Conventions I-IV; Each State Party shall make the law and other regulations related to the providing of official translation of Conventions to the public in State Party.
2. The obligation based on Articles 49-50 of Geneva Convention I, Articles 50-51 of Geneva Convention II, Articles 129-130 of Geneva Convention III, and Articles 146-147 of Geneva Convention IV; The obligation is to make laws related to effective penal sanction to

² Ibid, p. 11.

³ See Geneva Conventions 1949.

person who commits or order to commit serious violation to these Conventions.

3. The obligation to Articles 53-54 of Geneva Convention I and Articles 43-45 of Geneva Convention II; According to these articles, each State Party is obliged to make laws needed to prevent the violation of provisions on the use of Protection Emblems (Red Cross and Red Crescent), also other emblem including the provision on its penal sanction. If there is violation, it is also needed the regulation to stipulate penal law to person/organization/association who commit violation to protection emblem or other identifications. The use of protection emblem or other identification by unauthorized party or using the imitation of such emblems and identifications are violations as stipulated by Articles 53-54 of Convention I and Articles 43-45 of Convention II. To fulfill such obligation, the Government of Indonesia through Minister of Law and Human Rights has drafted the Bill on Red Cross Emblem and included in Bill Priority List of National Legislation Program in 2005. This Bill is at number 56 as additional program in 2005.
4. The obligation based on Article 49 Paragraph (2) jo Article 3 of Geneva Conventions I, II, III, dan IV ; Each State Party is obliged to make laws needed to settle all acts against articles other than article which stipulates a serious violations in Convention. Law Number 39 Year 1999 concerning Human Rights and Law Number 26 Year 2000 concerning Human Rights Court have

accommodated the provision stipulated in 3 of Geneva Conventions 1949.

5. Other obligations stipulated in Articles 76-77 of Additional Protocol I 1977. These Articles oblige each State Party to harmonize national laws that regulate death sentence to children and pregnant women, also mothers with young children. To ensure the implementation oh Humanitarian Law, there are some laws need adjustments including all kind of aspects: military, criminal, medical and civil defence. In example, for State who signs Protocol I, it applies some provisions as follow: if national penal laws stipulate death sentence to certain crime, Protocol I requires exception that a death sentence not imposed to a person under 18 years old, or to pregnant woman also a mother with young children for the violation they committed concerning the armed conflict, according to Articles 76-77 of that Protocol.

Indonesia as State Party

Indonesia has become a State Party in Geneva Conventions 1949 relating the Protection of Victims of War without reservation based on Law Number 59 Year 1958 concerning the participation of Republic of Indonesia on August 12, 1949.⁴

As consequences, according to Article 1 of Geneva Conventions, Indonesia is obliged to respect and to ensure International Humanitarian Law (IHL) in all conditions. Such obligation is re-emphasized in Article 2 which mentions that these Conventions apply to all wars

⁴ Terjemahan Konvensi Jenewa Tahun 1949, (Departemen Kehakiman, 1999), p. iii.

or armed conflicts, even such conflicts not recognized by one party to the conflict. These Conventions also apply to all occupations of region of State Party, even such occupations hold without armed resistance.

Humanitarian Law in Indonesia

The provisions of IHL, in principle, apply automatically to all States who sign the Conventions. In order to implement such international provisions effectively in national level, they should be formulated into some strategic measures.⁵

In practice, the implementation of some international agreements is only possible if such agreements have been stipulated in national laws. For example is the provision concerning the IHL violation which is only effective if State has fulfilled its obligation to specify the criminal provision which determines punishment related to violation on humanity. But, there is a provision which can be implemented directly even its implementation should be supported by national legislation. For example is the provision concerning the protection given to the recognized National Red Cross and Red Crescent associations. The provision mentions that if the protection is to be effective, such State is required to take a measure for recognizing such associations through official process.

In Indonesia, the implementation of humanitarian law is as follow.⁶

- The Government through the Decree of Minister of Justice Number M.01-PR.09.01-1980, on January 2, 1980 creates National Committee to

prepare the Implementation and Research for International Humanitarian Law (PANTAP HUMANITER) which has duties to :1) formulate the principles of government policy on Humanitarian Law matters; 2) to hold a research and study related to the implementation and development of Indonesia national concepts on Humanitarian Law in armed conflict; and 3) to formulate the principles of policy on the standardized socialization of Humanitarian Law through education and information.

- The Government of Republic of Indonesia has drafted the bill of Penal Code since 1990, but until recently there are some adjustments to some articles that stipulate certain types of crime. The draft of Penal Code bill has given to the Office of State Secretariat to be enacted soon. Though it is not put in Bill Priority List of National Legislation Program in 2005 and 2009. In Penal Code Bill especially in Paragraph (3), it is stipulated on Sabotage Act of Crime and The Time of War which is in Articles 235-241.

- The Government of Republic of Indonesia through Minister of Law and Human Rights has drafted bill on Red Cross Emblem and has put in Bill Priority List of National Legislation Program in 2005. This bill is on number 56 as additional program in 2005.⁷

- Law Number 39 Year 1999 on Human Rights and Law Number 26 Year 2000 on Human Rights Court have accommodated the provision stipulated in Article 3 of Geneva Conventions 1949.

⁵ Jean Pictet, *op.cit*, 25-26.

⁶ The Report of PANTAP Hukum Humaniter in 2003.

⁷ www.legalitas.org

- Indonesia is not obliged to implement two additional Protocols because Indonesia has not ratified such Protocols and has not been a state party to such provision. Even though, the Government of Indonesia has ratified the Convention on Rights for Children and has Law Number 3 Year 1997 on Court for Children so Indonesia shall implement and respect the provisions related to rights of children.
 - Indonesia is also planning to ratify the Additional Protocols I and II 1977 of Geneva Conventions 1949. Currently, Directorate General of Legislations of Department of Law and Human Rights is preparing the Bill for ratifying Additional Protocol I concerning non-international armed conflict.
- g. attend 26th International Conference of the Red Cross and the Red Crescent in Geneva;
 - h. hold a comparative studies;
 - i. attend a meeting of National Committee in Geneva;
 - j. hold a seminar on Woman and War in Jakarta ;
 - k. translate Additional Protocols I and II ;
 - l. attend 42nd AALCO Meeting in Seoul ;
 - m. participate in Bill Drafting of Red Cross Emblem;
 - n. draft the Bill for Ratification Additional Protocols I and II;
 - o. participate in Bill Drafting of Military Penal Law;
 - p. attend ICRC Conference in Geneva;
 - q. organize a Workshop, Discussion Forum and Seminar in cooperation with ICRC.

The Role of PANTAP Hukum Humaniter (National Committee for Humanitarian Law)

In its duty implementation from 1980 to 2004, PANTAP has done some activities as follow.⁸

- a. attend academic meeting in Jakarta ;
- b. hold a training for knowledge development for lecturers, officials and journalists;
- c. attend a first ASEAN seminar on International Humanitarian Law;
- d. attend 25th conference of International Committee of the Red Cross in Geneva;
- e. organize socialization of Humanitarian Law in 20 Provinces of Indonesia;
- f. attend International Conference on Protection of Victims of War in Geneva;

Recently, on September 4th 2007, PANTAP Hukum Humaniter held a seminar to celebrate the 30th anniversary of Additional Protocols I and II 1977 of Geneva Conventions 1949 in Jakarta.

Conclusion

It can be said that IHL can be implemented well, if it is preceded by a process which makes international provisions becoming part of national laws system. Accordingly, such provisions apply to institutions which have authority to implement them and such institution can be prosecuted if there is a violation.

The national implementation measures taken to ensure the IHL implementation can not be hold simultaneously. Consequently, each State

⁸ The Report of PANTAP Hukum Humaniter in 2004.

will set some priorities. And it is certain that the priority will be different in every State.

The IHL provisions are not operative which means they can not be implemented directly. For example, the provision on IHL violations can not be applied to impose a sentence to a person who commits such violation. To make a consideration for IHL in a criminal procedure, it requires a national law

which stipulates a penal sentence to act regarded as violation to IHL. To make international law to be effective, it requires some national implementation laws.

Finally, each State Party must take active role by doing some measures in national level, so IHL can be implemented effectively

