

Protection of in Civil Citizens International Armed Conflict Based Geneva IV Convention in 1949

Gorga Alam Harahap¹ Amad Sudiro^{1,*} Thelisia Kristin¹

¹*Faculty of Law, Universitas Tarumanagara, Jakarta 11440, Indonesia*

^{*}*Corresponding author. Email: ahmads@fh.untar.ac.id*

ABSTRACT

Changes in the nature of armed conflict with the support of weapons of mass destruction which in turn resulted in many casualties and property. Recognizing such conditions, the desire of States arises to make international regulations to avoid suffering as a result of armed conflict. Wars from time to time always take a very large number of victims which leads to suffering, both for those who fight and those who do not participate in the war (civilians). When international humanitarian law cannot be applied to a conflict, it does not mean that the conflict is independent of international humanitarian law because there is a Marten Clause. This study aims to analyze the position of the Martens clause based on the Geneva Conventions of 1949 in the protection of civilians in international armed conflicts and the background of the need to protect civilians in international armed conflicts. The Marten clause's position is to provide protection until the laws on war law that are issued, outside the agreement remain under the protection of the principles of international law, arising from customs between civilized countries, which are principled in humanitarian law and from the conscience of the people. Protection of civilians is needed as the essence of human rights which guarantees minimum protection that is absolutely respected to anyone, both in times of peace and in times of war.

Keywords: *International Humanitarian Law, Marten Clause, Geneva Conventions of 1949, Protection of Civilians*

1. INTRODUCTION

International Humanitarian Law has a short but full history of events, namely armed conflict or war. Changes in the nature of armed conflict with the support of weapons of mass destruction which in turn resulted in many casualties and property. Recognizing such conditions, the desire of countries to create international regulations arises in order to avoid suffering as a result of undue armed conflict. Because in essence humans as God's creatures have the right to get treatment in accordance with their dignity. There is a guarantee of protection in humans, because in humans human features such as his soul that cannot die, his unique personality, and his transcendent mind, which opens the possibility for him to be treated in accordance with these privileges.²

International humanitarian law, also known as International Humanitarian Law, commonly referred to as humanitarian law, is a new name for laws of war, where humanitarian law includes the provisions in the Hague Law (Den Haag

Convention 1907) and Geneva Law (Geneva Convention 1949) along with two Additional Protocols, namely Additional Protocol I and Additional Protocol II.³ Providing protection and assistance to those who suffer / become victims of war, both those who are actually / actively participating in hostilities (kombat), as well as those who do not participate in hostilities (civilians) are the objectives of Humanitarian Law.⁴

Humanitarian law can be said to start from Henry Dunant's care and concern based on his experiences during the war in Solferino (Northern Italy) in 1859 and he wrote in a book "Un Souvenir de solferino" published in 1862. In his book, Dunant gave two ideas namely first, in order to create an international institution that specializes in dealing with sick and injured people, regardless of nationality, religion or race. Second, countries in the world are called upon to make agreements that recognize the existence of such institutions, including providing guarantees that sick people and injuries are given more attention. Dunant also acted with some of his friends by establishing the International Committee for Aid to the Wounded - which was later given the name International Committee of the Red Cross (ICRC). This

¹ Master of Law (M.H.) from Tarumanagara University (2020).

² Purwanto., *Hukum Humaniter Internasional*, "Mimbar Hukum Volume 18 Nomor 2", (2006), 187.

³ Prof.KGPH. Haryomataram,S.H. , *Pengantar Hukum Humaniter* (Jakarta: PT Raja Grafindo Persada, 2005), 26-27.

⁴ *Ibid.*, 3.

committee finally received positive responses from a number of countries and subsequently produced the first Geneva convention, which was adopted by 16 European States through the Geneva Convention I in 1864, and this Convention was called the Convention for the Amelioration of Conditions of the Wounded in Armies in the Field..⁵

The Geneva Convention of 1864 underwent several changes, namely in 1906 and 1929 based on experience in World War I and the development of technology as a means of fighting. Changes were continued in 1907 with the adoption of the 1907 Hague Convention which consisted of: Convention on the Settlement of International Disputes in Peace (Convention I); Convention on How to Start Hostilities (Convention III); Conventions on Law and Customs of War on Land (convention IV) and annex (Hague Regulations); Convention on the Rights and Obligations of States and Neutrals in War on Land (Convention V).

After World War II ended, the development of international conventions was with the birth of the Geneva Conventions of 1949 on Protection of War Victims (Geneva Convention of 1949 for the Protection of Victims of War) consisting of 4 Conventions, namely:⁶ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, of August 12, 1949; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members or Armed Forces at Sea, of August 12, 1949; Geneva Convention relative to the Treatment of Prisoners of War, of August 12, 1949; Geneva Convention relative to the Protection of Civilian Persons in the Time of War, of August 12, 1949.

The Hague Convention IV (Convention on the Law and Customs of War on Land) contains provisions regarding the Marten Clause Principle implicitly, specifically in its appendix or Annex entitled Regulating Respecting Laws and Customs of War or better known as the Hague Regulations (HR). For the armed forces, the provisions in this HR are very important and are dubbed as The Soldier's Vadamecum. In addition to the Hague Convention IV, the Marten Clause Principles are also found in the Preamble of the 1980 Conventional Weapons Convention, Article 63 of the Geneva Convention I 1949, Article 1 paragraph (2) of Additional Protocol I 1977.

The Martens Clause Principle explains that until the law on war laws is issued, the parties to the agreement consider their right to declare that cases that are not in the rules they have agreed to, warring citizens and countries remain under the protection of the principles of international law, arising from the customs of civilized countries that are principled in humanitarian law and from the conscience of the people. This means placing both combatant and non-combatant civilians, and the military who are not protected by the Hague Convention, remain in protection from the principles of humanitarian law that originate from civilized inter-state customs and from the conscience of the people.

International Humanitarian Law applies in armed conflicts both international armed conflicts and non-international armed conflicts that cause casualties. Some forms of armed conflict where International Humanitarian Law can be applied are armed conflict between Israel and Hezbollah in Lebanon in 2006, Palestinian Israeli conflict, Syrian civil war since 2011. In reality it still often happens that the provisions in the Geneva Conventions of 1949 and international treaties and international customs others related to humanitarian law are not obeyed by parties involved in armed conflicts, both in international and non-international armed conflicts. On the other hand, it turns out that the parties who committed violations were not given effective criminal sanctions, so the provisions in humanitarian law were still not effective in their implementation.

Armed conflict between Israel and Hezbollah in Lebanon in 2006, Israeli Palestinian conflict, Syrian civil war since 2011 caused many victims not only from hostile parties, but civilians rather than combatants. Tensions and ongoing attacks in conflict areas threaten the protection of non-combatant civilians including women and children and cause damage to civilian objects. In this case, people who are not directly involved in the situation also become victims where all people must remain protected by their human rights, whether in a state of peace or war.

From the above problems, it is necessary to further discuss the protection of civilians and civilian objects that can be provided by international law, especially humanitarian law, because based on the reality of the war that took place in Lebanon, Israel, Palestine and Syria, it will not end so that victims and objects civilian deaths have increased in number among civilians who do not know and are not involved in armed conflicts that have arisen. Civilians who died tend to occur due to a customary war that has no legal basis, ineffective rules governing it, war participants who do not understand how to avoid the fall of civilian casualties and civilian objects in areas of armed conflict and the absence of a basic principle humanity who conducts surveillance of war habits by not using conscience.

This discussion is expected to provide a refresher and explanation for the protection of civilians and civilian objects so that they avoid the target of war which causes suffering to death in every country in the world in situations of armed conflict (war).

2. PROBLEMS

Based on this background, the following problems are formulated:

1. What is the position of the Martens Clause based on Geneva Convention IV 1949 in the protection of civilians in international armed conflicts?

⁵ Arlina Permansari, Aji Wibowo, Fadilah Agus, International Committee of the Red Cross, *Pengantar Hukum Humaniter* (Jakarta : Miamita Printa, 1999), 1.

⁶ Prof.KGPH. Haryomataram,S.H., *Loc.cit.*

2. Why protection of civilians is needed in international armed conflicts?

3. ANALYSIS

3.1 Position of the Martens Clause Based on Geneva IV Convention 1949 in Protection of Civilians in International Armed Conflict

When international humanitarian law cannot be applied to a conflict, it does not mean that conflict is independent of international humanitarian law. In humanitarian law is known as what is called "Marten's clause". Marten's clause is a clause that determines that if humanitarian law does not regulate certain problems, then the provisions used must refer to the principles of international law that are formed from customs between countries, humanitarian law and from public opinion.⁷

Marten's clause is formulated for solving specific problems relating to humanitarian principles in war. But in the years that followed after the declaration of this clause, this clause was almost present in every agreement on armed conflict between nations. The problem with this clause is having a difficult understanding or interpretation. Not a few countries that misinterpret / interpret this clause, for example England. The Martens clause is also contained in the Preamble of the Hague Convention IV 1907, Preamble of the 1980 Conventional Weapons Convention, Article 63 of Geneva Convention I 1949, Article 1 paragraph (2) of Additional Protocol I 1977. The purpose of the contents of the clause is to place both combatant and non-combatant civilians, as well as the military which are not protected by the Hague Convention, remain in protection from the principles of humanitarian law that originate from the customs of civilized inter-countries and from the conscience of the people.

The position of this principle as an effort to flexibility the dynamic rules of war regarding the protection of civilians related to the principle of humanity in war. This is consistent with what was disclosed by Prof. Martens who wants to explain his declaration that if an armed conflict agreement does not regulate something, as long as it continues to run must refer to the principles of international law (humanity, militer

necessity, chivalry, proportionality, distinction, dan limitation).⁸

The objectives of humanitarian law that can be seen from various sources include the following: Providing protection against combatants and civilians from unnecessary suffering; Guaranteeing fundamental human rights for those who fall into enemy hands. Combatants who fall into enemy hands must be protected and cared for and entitled to be treated as prisoners of war; Prevents war from being cruelly without knowing boundaries. Here, the most important thing is the principle of humanity.

Geneva IV Convention on the Protection of Civilians during the War is a convention regulating the position of the civilian population of the disputing parties, both in battle zones and occupied territories and in neutral countries. The status of this Martens clause is to provide protection until the law on war laws is issued, the parties to the agreement consider their right to declare that cases that are not in the rules they have agreed to, residents and countries of war remain under protection of principles of international law, arising from the customs of civilized countries, which are based on humanitarian law and from the conscience of the people.

Although the Martens Clause is not mentioned in the Geneva Conventions of 1949,⁹ but the clause was included in the 1977 additional protocol. This clause is contained in article 1 paragraph 2 of Protocol I which covers international conflicts,¹⁰ and the fourth paragraph of the Preamble to Protocol II which covers non-international conflicts. The words in the protocol are identical but are slightly modified from the version used in the 1907 Hague Convention, which reads:¹¹ "Given that, in cases not covered by applicable law, the human person remains under the protection of humanitarian principles and orders from the public conscience. "

In its commentary, the RC IC stated that although Martens Clause is considered part of customary international law,¹² the full authority considers its participation appropriate as follows:

1. Although there has been a considerable increase in the number of subjects covered by the law of armed conflict, and regardless of the details of the codification, it is not possible for any codification to be completed at any given moment. Therefore, the Martens clause prevents the assumption that anything not explicitly

⁷ Arlina Permansari, Aji Wibowo, Fadilah Agus, Op.cit., 50.

⁸ *Ibid.*,

⁹ ICRC, Commentary on the Additional Protocols to the Geneva Convention

¹⁰ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977"

¹¹ ICRC, Commentary on the Additional Protocols to the Geneva Convention, *Loc. cit.*

¹² *Ibid.*

prohibited by the relevant agreement is therefore permitted.

2. The Martens clause must be seen as a dynamic factor which states the application of the principles mentioned regardless of the subsequent development of the type of situation or technology.¹³

This dynamic martens clause movement also provides protection for civilians related to the principles of international law (humanity, military necessity, chilvary, proportionality, distriction, and limitation) in war. So there is no reason for the disputing State or an armed conflict agreement that does not regulate something, as long as it continues to run must refer to the principles of international law (humanity, military necessity, chilvary, proportionality, distriction, and limitation).

3.2 Protection of Civilians in International Armed Conflict

There are several aspects to regulating the protection of civilians, including:

1. Protected persons contained in article 4 of Geneva Convention IV concerning Protection of Civilians in Wartime.
2. Position and Treatment of Protected People. In connection with the regulation regarding the position and treatment of protected people, it has been regulated in Articles 27 to 34. In brief, in articles 27-34 it is determined that prohibited actions are: Forcing, both physical and rokhani, to obtain information; Cause physical suffering; Imposing collective punishment; Carry out intimidation, terrorism, robbery; Retaliation against civilians; Arresting civilians to be held hostage¹⁴

Humanitarian law tries to arrange for a war to be carried out by paying more attention to humanitarian principles. Mohammed Bedjaoui said that the purpose of humanitarian law is to humanize war. Therefore, the development of the law of war into the law of armed disputes and then into humanitarian law is actually inseparable from the objectives of humanitarian law, namely: Provide protection against combatants and civilians from unnecessary suffering; Guaranteeing fundamental human rights for those who fall into enemy hands. Combatants who fall into enemy hands must be protected and cared for and entitled to be treated as prisoners of war; Prevents war from being cruelly without knowing boundaries. Here the most important is the principle of humanity.

4. CONCLUSION

The status of this martens clause is to provide protection until the law on war laws is issued, the parties to the agreement consider their right to declare that cases that are not in the rules they have agreed to, residents and countries of war remain under protection of principles of international law, arising from the customs of civilized countries, which are based on humanitarian law and from the conscience of the people. The Martens clause is very important This clause refers to international customary law, this clause emphasizes the importance of customary norms in the regulation of armed disputes. Furthermore, this clause also refers to the principles of humanity and the conscience of the people. The martens clause is an effort to flex the dynamic rules of war regarding the protection of civilians related to the principle of humanity in war.

Protection of civilians is needed as the essence of human rights (hard core rights) or can also be called the most basic rights, guaranteeing minimal protection that is absolutely respected to anyone, both in peacetime and during war. These rights are part of both legal systems. Therefore, these two fields are legal instruments that provide legal protection to individuals. Legal instruments that provide legal protection to individuals can be classified into four groups. First, legal instruments aimed at protecting individuals as members of the community. This protection covers all aspects of individual and social behavior. This protection is general. This category actually includes international human rights law. Second, instruments aimed at protecting individuals relating to conditions in society, such as international law concerning the protection of women and international law relating to the protection of children. Third, legal instruments aimed at protecting individuals in relation to their functions in society, such as international law on labor. Fourth, legal instruments aiming to protect the emperor in an emergency, in the event of an extraordinary situation and which result in threats of human rights violations of his rights which are usually guaranteed by applicable law, such as international law on refugees and international humanitarian law that protects victims from armed dispute.

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¹³ *Ibid.*, 38-39.

¹⁴ GPH. Haryomataram, *Sekelumit Tentang Hukum Humaniter*, 96-97.

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