

## **CHAPTER II**

### **LITERATURE REVIEW**

This chapter consists of three types of frameworks, namely Conceptual Framework, Legal Framework, and Theoretical Framework.

#### **A. Conceptual Framework**

The conceptual framework that the researcher uses for this research are:

##### **1. International Humanitarian Law**

###### **a. Definition of International Humanitarian Law**

International humanitarian law (IHL) is a part of international law, which is the body of rules governing relations between States. International law is contained in agreements between States – treaties or conventions –, in customary rules, which consist of State practise considered by them as legally binding, and in general principles, while IHL applies to armed conflicts. It does not regulate whether a State may actually use force; this is governed by an important, but distinct, part of international law set out in the United Nations Charter.

IHL is a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. It is the new name of Laws of War and consists of The Hague Law,

Geneva Law, and Protocol 1977, which only used for the armed conflict.<sup>14</sup> Even though there are some changes in the term of IHL, the main goal of it is to limit the effects of war on people and property and to protect particularly vulnerable persons.

Some definition of IHL according to experts are:

- 1) According to Jean Pictet (Jean Pictet, 1966:10)<sup>15</sup>

*"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."*

- 2) According to Geza Herczegh (Geza Herczegh, 1977:86)<sup>16</sup>

*"International Humanitarian Law is a part of the rule of public international law which serves 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 distinguished from these, its purpose and spirit being different."*

<sup>14</sup> Haryomataram, *Pengantar Hukum Humaniter, Op.cit*, pg.44.

<sup>15</sup> *Ibid*, pg.18.

<sup>16</sup> *Ibid*, pg.20.

3) According to J.G Starke (J.G Starke, 1977:585)<sup>17</sup>

*"The laws of war consist of the limit set by international law within which the force required to overpower the enemy may be used, and the principles thereunder governing the treatment of individual in the course of war and armed conflict."*

4) According to Mochtar Kusumaatmadja<sup>18</sup>

*"Part of laws of war that protects persons who become the war victims in contrast to the part of laws of war that regulates the methods of war or anything relating to war."*

5) According to the *International Community of the Red Cross (ICRC)*<sup>19</sup>

*"International humanitarian law is part of international law, which is the body of rules governing relations between States. It is a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. It protects persons who are not or are no longer participating in the*

<sup>17</sup> *Ibid*, pg. 22.

<sup>18</sup> *Ibid*, pg. 21.

<sup>19</sup> International Committee of the Red Cross, "What is International Humanitarian Law?", [https://www.icrc.org/eng/assets/files/other/what\\_is\\_ihl.pdf](https://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf) downloaded Wednesday, 10 December 2014.

*hostilities and restricts the means and methods of warfare.*

*International humanitarian law applies to armed conflicts. It does not regulate whether a State may actually use force; this is governed by an important, but distinct, part of international law set out in the United Nations Charter."*

It can be concluded that IHL is a set of rules or regulations in cause of international customaries or agreements which regulate the conduct of warfare and the protection of victims whether it is international or non-international armed conflict, which aims to 'humanise' warfare by limiting the human suffering caused by armed conflict.

#### b. History of International Humanitarian Law

Although IHL traces its philosophical origins back to antiquity, it was not until the 19th century that nations began in earnest to adopt binding treaties and military codes to govern armed conflict. The beginning of humanitarian law was in 1864 with the first Geneva Convention; the Convention for the Amelioration of the Condition of the

Wounded in Armies in the Field; influenced by one of the bloodiest battles of the nineteenth century in Solférino.

In 1859, Henry Dunant, a Swiss businessman traveling through Solférino, Italy, witnessed the aftermath of a bloody battle between French and Austrian armies. As the armies departed, Dunant saw the suffering of thousands of wounded and dying men who lay unattended on the battlefield. Dunant enlisted nearby residents to provide what relief they could, but despite their efforts, thousands died. Greatly moved by the experience, Dunant wrote “A Memory of Solférino,” which described the plight of the victims of war.<sup>20</sup> Dunant called for an international agreement on the treatment of battlefield casualties and proposed the establishment of a civilian volunteer relief corps to care for the wounded. He wrote:

*“Would it not be possible, in time of peace and quiet, to form relief societies for the purpose of having care given to the wounded in wartime by zealous, devoted, and thoroughly qualified volunteers?”*

In his book, Dunant not only described the battle, but tried to suggest and publicize possible measures to

<sup>20</sup> American Red Cross, “Development of IHL”, [http://www.redcross.org/images/MEDIA\\_CustomProductCatalog/m3640105\\_IHL\\_Development.pdf](http://www.redcross.org/images/MEDIA_CustomProductCatalog/m3640105_IHL_Development.pdf) downloaded Wednesday, 10 December 2014, pg.1.

improve the fate of war victims. He presented three basic proposals designed to mitigate the suffering of the victims of war.<sup>21</sup> To this end he proposed:

- 1) That voluntary societies be established in every country which, in time of peace, would prepare themselves to serve as auxiliaries to the military medical services.
- 2) That States adopt an international treaty guaranteeing legal protection to military hospitals and medical personnel.
- 3) That an international sign of identification and protection of medical personnel and medical facilities be adopted.

These three proposals were simple, but they have had deep and lasting consequences.

- 1) The whole system of National Red Cross or Red Crescent Societies (of which there are today 188 around the world) stems from the first proposal;
- 2) The second proposal gave birth to the “First Geneva Convention” in 1864;
- 3) The third proposal led to the adoption of the protective emblem of the Red Cross or the Red Crescent.

<sup>21</sup> Peace Operations Training Institute, *International Humanitarian Law and the Law of Armed Conflict*, second edition, (USA: Peace Operations Training Institute, 2012), pg.14-15.

Dunant's call for an international conference to draft an agreement on the treatment of battlefield casualties was answered in 1864 when the Swiss government hosted a conference in Geneva at the suggestion of Dunant's newly formed International Committee for the Relief of Military Wounded (which would become the International Committee of the Red Cross or ICRC in 1876).<sup>22</sup> Diplomats from a number of nations, as well as representatives of military medical services and humanitarian societies, adopted a treaty known as the first Geneva Convention, containing 10 articles specifying that:

- 1) Ambulances, military hospitals, and the personnel serving with them are to be recognized as neutral and protected by parties to a conflict;
- 2) Civilians and medical personnel who assist the wounded are to be protected;
- 3) Wounded or sick combatants are to be collected and cared for by either party; and
- 4) The symbol of a red cross on a white background (the reverse of the Swiss flag) will serve as a protective

<sup>22</sup> American Red Cross, "Development of IHL", *Op.cit.*, pg.2.

emblem to identify medical personnel, equipment, and facilities.

Developing alongside the Geneva Conventions were The Hague Conventions created by states in order to govern the conduct of war. Then in 1977, two Additional Protocols to the Geneva Conventions were adopted.<sup>23</sup> The Additional Protocols supplement the protections under the Geneva Conventions. Protocol I expands protection for the civilian population and military and civilian medical workers in international armed conflicts. Protocol II extends similar protections during non-international armed conflicts. As of 2011, 170 nations have ratified Protocol I and 165 have ratified Protocol II.

Following the development of the first two Additional Protocols in the 1970s, the past three decades have brought further updates in the field of international law applicable to armed conflict. A number of legal instruments were drafted specifically restricting or regulating the use of certain weapons including:<sup>24</sup>

- 1) 1980 Convention on Certain Conventional Weapons (CCW).

<sup>23</sup> *Ibid.* pg.3.

<sup>24</sup> *Ibid.*



- 2) 1993 Convention on Chemical Weapons, 1995 Protocol on Blinding Laser Weapons (part of CCW).
- 3) 1997 Convention on Anti-personnel Mines (Ottawa Treaty).
- 4) 2008 Convention on Cluster Munitions.

With an estimated 300,000 children engaged in armed conflicts throughout the world, the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict was adopted in 2000 to strengthen their legal protections and prevent their exploitation during hostilities. Some key provisions of the Optional Protocol include the prohibition of children under 18 years of age from taking direct part in armed conflict and being forcibly recruited into the armed forces of their countries.

1859 - The Battle of Solferino

A Swiss businessman, Henry Dunant, witnesses the suffering of thousands left to die on the battlefield.



1862 - A memory of Solferino

Dunant publishes a gripping account of the tragedy and distributes it throughout Europe. In the book, he proposes formation of permanent national relief societies of volunteers to care for wounded and sick in wartime.

1863 - The establishment of:

- The forerunner of the International Committee of the Red Cross (ICRC) .
- Lieber Code.
- National committees for relief of military wounded.



1864 - Geneva Convention  
International treaty for care of wounded and sick soldiers on the battlefield adopted by governments. It is the protection granted for medical workers to provide humanitarian care. Red cross symbol adopted as the protective emblem.



1867 - First International Conference of the Red Cross  
Conference of nine governments, 16 national committees, and the ICRC meets to discuss humanitarian issues.



1899 - IIIrd Hague Convention  
Regulations adopted respecting laws and customs of war on land. It is the principles of the 1864 Geneva Convention adapted to maritime warfare.



1906 - Geneva Convention  
1864 GC for the care of wounded and sick soldiers on the battlefield is revised and expanded.



1907 - Xth Hague Convention  
1899 HC revised and expanded. It is the principles of 1906 GC adapted to maritime warfare.



1925 - Geneva Protocol  
Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gasses and of Bacteriological Methods.

1929 - Geneva Conventions

1906 GC revised and expanded. Another new convention adopted protecting prisoners of war. And red crescent symbol designated as a protective emblem.



1949 - the four of Geneva Conventions

GC I (1929 GC revised and expanded); GC II (Xth HC revised and expanded); GC III (1929 GC revised and expanded); GC IV (new Convention adopted protecting civilians).



1954 - Cultural Property Convention

HC for the Protection of Cultural Property in the Event of Armed Conflict.



1972 - Biological Weapons Convention

Convention on the Prohibition, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction.



1977 - Additional Protocols (to the GC 1949)

Relating to the protection of victims of international armed conflicts (Protocol I) and non-international armed conflicts (Protocol II).



1980 - Convention on Certain Conventional Weapons

Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects.

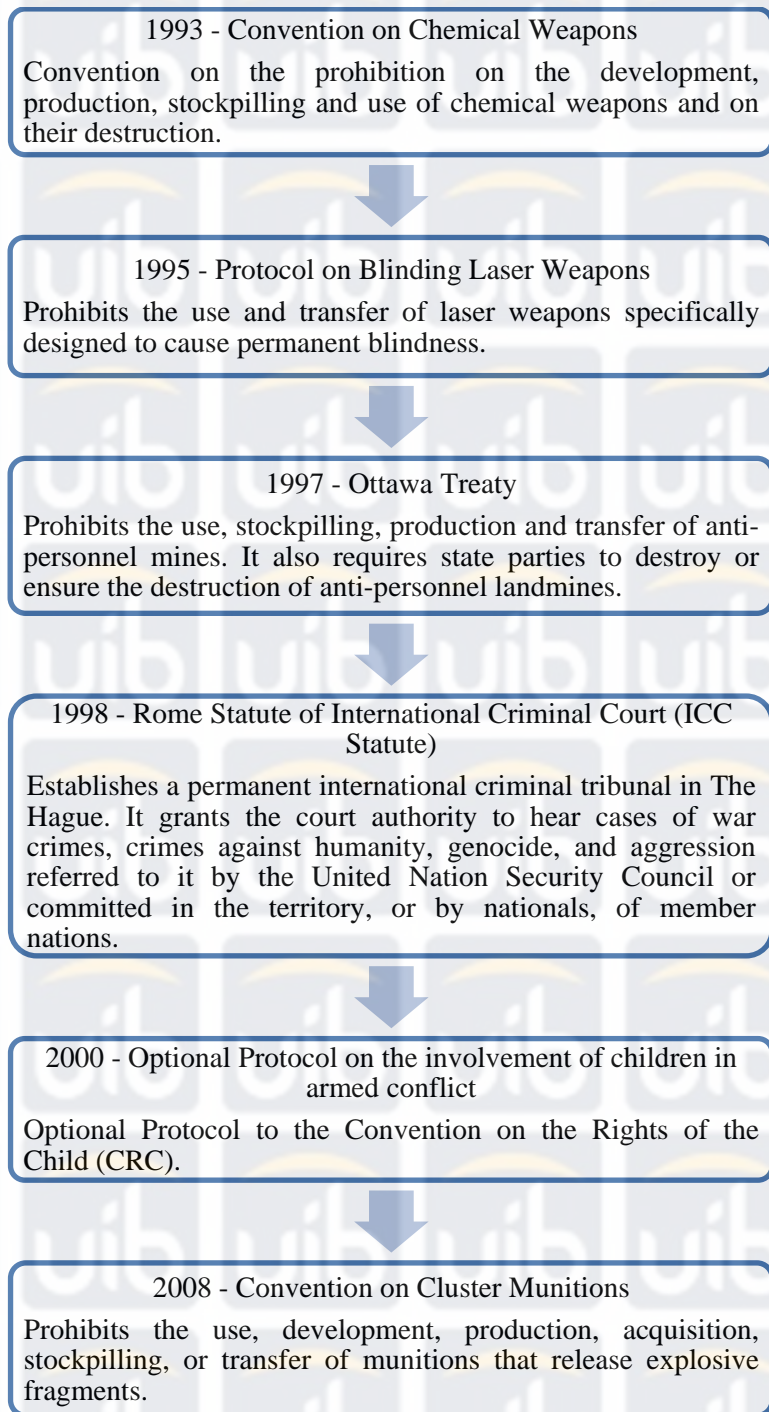


Figure 2.1 Development Of Modern International Humanitarian Law.

Sources: American Red Cross, *"Development of IHL"*, [http://www.redcross.org/images/MEDIA\\_CustomProductCatalog/m3640105\\_IHL\\_Development.pdf](http://www.redcross.org/images/MEDIA_CustomProductCatalog/m3640105_IHL_Development.pdf) downloaded Wednesday, 10 December 2014, pg.4-5.

All of these represent the continued evolution of the law as it reacts and responds to changes in the nature of today's conflicts. And it can also be concluded that Geneva Conventions 1949 and the Additional Protocols 1977 are the main regulations of international humanitarian law.

### c. Sources of International Humanitarian Law

Since IHL is an integral part of Public International Law, its sources defined in Article 38 of the Statute of the International Court of Justice (ICJ Statute).

Article 38:

- 1) "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
  - a) **international conventions**, whether general or particular, establishing rules expressly recognized by the contesting states;
  - b) **international custom**, as evidence of a general practice accepted as law;
  - c) the **general principles of law** recognized by civilized nations;
  - d) subject to the provisions of Article 59, [i.e. that only the parties bound by the decision in any particular case,] **judicial decisions** and the **teachings of the most highly qualified publicists** of the various nations, as subsidiary means for the determination of rules of law."



Figure 2.2 Sources Of International Humanitarian Law

### 1) International Conventions/Treaties

Treaties (conventions) and custom are the main sources of international law. In respect to IHL, the main treaties are the Hague Convention 1907, the Geneva Conventions of 1949 and the Protocols Additional of 1977.

#### a) The Hague Convention 1907

The Hague Convention 1907 is one of the main conventions of IHL, which setting out restrictions on the means and methods of warfare. It was emerged from Hague conferences in 1907. The convention consists of

thirteen treaties, of which twelve were ratified and entered into force, and one declaration.<sup>25</sup>

- Convention I for the Pacific Settlement of Disputes;
- Convention II respecting the limitation of the employment of force for the recovery of Contract Debts;
- Convention III relative to the Opening of Hostilities;
- Convention IV respecting the laws and customs of War on Land;
- Convention V respecting the Rights and Duties of Neutral Powers and Persons in case of War on Land;
- Convention VI relating to the status of Enemy Merchant Ships at the outbreak of Hostilities;
- Convention VII relating to the Convention of Merchant Ships into War Ships;
- Convention VIII relating to the Laying of Automatic Submarine Contact Mines;

<sup>25</sup> Haryomataram, *Pengantar Hukum Humaniter*, *Op.cit.*, pg.47.

- Convention IX concerning Bombardment by Naval Forces in Time of War;
- Convention X for the Adoption to Maritime Warfare of the Principles of the Geneva Convention;
- Convention XI relative to Certain Restrictions with regard to the exercise of the Right of Capture in Naval War;
- Convention XII relative to the Creation of an International Prize Court;
- Convention XIII concerning the Rights and Duties of Neutral Powers in Naval War; and
- Declaration XIV Prohibiting the Discharge of Projectiles and Explosives from Balloons.

b) The Geneva Conventions 1949

The Geneva Conventions 1949 is another main conventions of IHL. It is providing protection to certain categories of vulnerable persons and consists of four conventions:



- The Geneva Convention I - *Geneva Convention for the Amelioration of the condition of the Wounded and Sick in Armed Forces in the Field.*
- The Geneva Convention II - *Geneva Convention for the Amelioration of the condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea.*
- The Geneva Convention III - *Geneva Convention relative to the Treatment of Prisoners of War.*
- The Geneva Convention IV - *Geneva Convention relative to the Protection of Civilian Persons in Time of War.*

The Geneva Conventions regulate both international and non-international armed conflict. It also has Common Articles, the important articles which were written in the four of Geneva Conventions in the same articles.<sup>26</sup>

c) Protocols Additional to the Geneva Conventions  
1977

<sup>26</sup> *Ibid.*, pg.49.

The two branches of law covered in the Hague and Geneva Conventions are further developed by the first two Protocols Additional to the Geneva Conventions on the protection of the Civilians 1977. These are referred to as:

- Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I).
- Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).

d) Other International Conventions

In addition to the three conventions above, there are some international conventions as another sources of IHL, such as:<sup>27</sup>

- 1925 Geneva Protocol for the prohibition of the Use in War of Asphyxiating, Poisonous of the Gasses,

<sup>27</sup> *Ibid.*, pg.51-52.

and of Bacteriological Methods of Warfare.

- 1954 First Hague Protocol for the Protection of Cultural Property in the Events of Armed Conflict.
- Convention on the Prohibition of Military or other hostile use of Environmental Modification Techniques (Enmod Convention 1976).
- Convention on the Prohibition or Restrictions on the use of Certain Conventional Weapons which may be deemed do be excessively injurious or to have indiscriminate effects (1980 Conventional Weapons Conventions).
- Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their or Destruction (CCW).
- 1995 Protocol on Blinding Laser Weapons.
- 1977 Ottawa Convention on the Prohibitions of the Use, Stockpiling,

Production and Transfer of Antipersonnel Mines and on their Destruction.

- 1999 Second Hague Protocol for the Protection of Cultural Property in the Event of Armed Conflict.

## 2) International Custom

While treaties are only binding upon parties to a treaty, states can also be bound by rules of customary international law. However, this requires that there is usage to be found in the practice of states and considered by those states as practice.

A comprehensive study by the International Committee of the Red Cross (ICRC) on IHL and customary law indicates that the majority of rules enshrined in treaty law have received widespread acceptance and have had a far-reaching effect on practice. They thus have the force of customary law.

Some provisions in the Hague and Geneva Conventions were reflections of existing customary law, whereas others have developed into customary law.<sup>28</sup> They are therefore binding on all states regardless of ratification,

<sup>28</sup> Governance Social Development Humanitarian Conflict, "Overview of the International Humanitarian Law", <http://www.gsdrc.org> downloaded Friday, 2 January 2015.

and also on armed opposition groups in the case of non-international armed conflict.

### 3) General Principles of Law

States are also bound by general principles of law. It is the legal principles common to major legal systems.

In regard of IHL, one may think of the fundamental principles of IHL such as the principle of distinction or the principle of proportionality.

### 4) Judicial Decisions and Teachings

The decisions of international courts and tribunals, as well as those of municipal (domestic) courts and significant scholarly writing relative to armed conflict may play a subsidiary role in helping to determine rules of IHL.

## d. Purposes of International Humanitarian Law

There are three purposes of IHL such as:<sup>29</sup>

- 1) To give protection to combatants and civilians from excessive suffer.
- 2) To guarantee the fundamental human rights for captured combatants and other persons whose freedom has been restricted.

<sup>29</sup> Arlina Permanasari dkk, *Pengantar Hukum Humaniter*, (Jakarta: International Committee of the Red Cross, 1999), pg.12.

- 3) To limit human suffering caused by war or armed conflict.

The purpose of IHL is to limit the suffering caused by war by protecting and assisting its victims as far as possible.<sup>30</sup> The law therefore addresses the reality of a conflict without considering the reasons for or legality of resorting to force. It regulates only those aspects of the conflict which are of humanitarian concern. IHL is intended to protect war victims and their fundamental rights, no matter to which party they belong.

#### e. Principles of International Humanitarian Law

IHL is founded upon the following principles:<sup>31</sup>

##### 1) The Principle of Distinction

In order to spare the civilian population, armed forces shall at all times distinguish between the civilian population and civilian objects on the one hand, and military objectives on the other. Neither the civilian population as such nor individual civilians or civilian objects shall be the target of military attacks.

<sup>30</sup> ICRC, "International Humanitarian Law - Answers to Your Questions", [http://www.redcross.org/images/MEDIA\\_CustomProductCatalog/m22303661\\_IHL-FAQ.pdf](http://www.redcross.org/images/MEDIA_CustomProductCatalog/m22303661_IHL-FAQ.pdf) downloaded Friday, 2 January 2015, pg.14.

<sup>31</sup> Diakona - International Humanitarian Law - Resource Centre, "Basic Principles of IHL", <http://www.diakona.se> downloaded Friday, 2 January 2015.

The principle of distinction underpinning many rules of IHL is that only fighters may be directly targeted. This is a necessary compromise that IHL provides for in order to protect civilians in armed conflict. Without the principle of distinction, there would be no limitation on the methods of warfare. The specific rules where the principle of distinction is set out concern Article 48 of Additional Protocol I to the Geneva Conventions and Article 4(1) of the draft Additional Protocol II submitted by the ICRC to the Steering Committee for Human Rights (CDDH). This defines who is a combatant and a military object that can be lawfully attacked. Any direct attack against a civilian or civilian object is not only a violation of IHL but also a grave breach. Direct attacks against civilians and/or civilian objects are categorised as war crimes. Additionally, any weapon which is incapable of distinguishing between civilians/civilian objects and fighters/military objects is also prohibited under IHL. The principle is also a rule of customary international law,<sup>32</sup> binding on all states.

<sup>32</sup> Customary IHL, Rule 1.

## 2) Prohibition of Attacks against those *Hors de Combat*

The prohibition to attack any person *hors de combat* (those who are sick and wounded, prisoners of war) is a fundamental rule under IHL. For example, while a soldier could be targeted lawfully under normal circumstances, if that soldier surrenders or is wounded and no longer poses a threat, then it is prohibited to attack that person.

## 3) Prohibition on the Infliction of Unnecessary Suffering

While IHL does permit violence, it prohibits the infliction of unnecessary suffering and superfluous injury. While the meaning of such terms is unclear and the protection may as such be limited, even fighters who may be lawfully attacked, are provided protection by this prohibition. The right of parties to an armed conflict to choose methods or means of warfare is not unlimited. No superfluous injury or unnecessary suffering shall be inflicted.

## 4) Principle of Proportionality

The principle of proportionality limits and protects potential harm to civilians by demanding that the least amount of harm is caused to civilians, and when harm to civilians must occur it needs to be proportional to the



military advantage. The article where proportionality is most prevalent is in Article 51(5)(b) of Additional Protocol I to the Geneva Conventions concerning the conduct of hostilities which prohibits attacks when the civilian harm would be excessive in relation to the military advantage sought. Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.

#### 5) Notion of Necessity

A dominant notion within the framework of IHL is military necessity, often the principle which clashes most with humanitarian protection. Military necessity permits armed forces to engage in conduct that will result in destruction and harm being inflicted. The concept of military necessity acknowledges that under the laws of war, winning the war or battle is a legitimate consideration. However, the concept of military necessity does not give the armed forces the freedom to ignore humanitarian considerations altogether and do what they want. It must be interpreted

in the context of specific prohibitions and in accordance with the other principles of international humanitarian law.

#### 6) Principle of Humanity

The principle of humanity, and its absence during the battle of Solferino of 1859, was the central notion that inspired the founder of the International Committee of the Red Cross (ICRC), Henry Dunant. The principle stipulates that all humans have the capacity and ability to show respect and care for all, even their sworn enemies. The notion of humanity is central to the human condition and separates humans from animals.

#### f. Types of Armed Conflict

IHL distinguishes two types of armed conflicts, namely: international armed conflicts and non-international armed conflicts. IHL establishes a distinction between non-international armed conflicts in the meaning of common Article 3 of the Geneva Conventions of 1949 and non-international armed conflicts falling within the definition provided in Art. 1 of Additional Protocol II.

## 1) International Armed Conflict (IAC)

Common Article 2 to the Geneva Conventions of 1949 states that:

"In addition to the provisions which shall be implemented in peacetime, 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. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance".

According to this provision, IACs are those which oppose "High Contracting Parties", meaning States. An IAC occurs when one or more States have recourse to armed force against another State, regardless of the reasons or the intensity of this confrontation. Additional Protocol I extends the definition of IAC to include armed conflicts in which peoples are fighting against colonial domination, alien occupation or racist regimes in the exercise of their right to self-determination (wars of national liberation).

The International Criminal Tribunal for the former Yugoslavia (ICTY) proposed a general definition of international armed conflict. In the Tadic case, the Tribunal stated that "*an armed conflict exists whenever there is a resort to armed force between States*". This

definition has been adopted by other international bodies since then.

According to D. Schindler,<sup>33</sup>

*"the existence of an armed conflict within the meaning of Article 2 common to the Geneva Conventions can always be assumed when parts of the armed forces of two States clash with each other. [...] Any kind of use of arms between two States brings the Conventions into effect."*

The German Joint Services Regulations (ZDv) says that:<sup>34</sup>

*"an international armed conflict exists if one party uses force of arms against another party. [...] The use of military force by individual persons or groups of persons will not suffice".*

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

Non-international armed conflicts (or, to use an outdated terminology: civil wars) are those restricted to the territory of a single State, involving either regular armed forces fighting groups of armed dissidents, or armed groups fighting each other. It is an armed

<sup>33</sup> International Committee to the Red Cross, "How is the Term 'Armed Conflict' Defined in International Humanitarian Law?", <https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf> downloaded Friday, 2 January 2015, pg.2.

<sup>34</sup> *Ibid.*, pg.3.

conflict not of an international character occurring in the territory of one of the High Contracting Parties.<sup>35</sup>

Traditionally NIACs were considered purely internal matters for states, for which no international law provisions applied. This view was radically modified with the adoption of Article 3 common to the four Geneva Conventions of 1949. For the first time, the community of States agreed on a set of minimal guarantees to be respected during non-international armed conflicts. In the event of a non-international conflict, Article 3 common to the four Geneva Conventions and Protocol II apply.

Judgments and decisions of the ICTY throw also some light on the definition of NIAC. determine the existence of a NIAC as:<sup>36</sup>

*"whenever there is [...] protracted armed violence between governmental authorities and organised armed groups or between such groups within a State".*

According to H.-P.Gasser, it is generally admitted that:<sup>37</sup>

<sup>35</sup> *Geneva Conventions 1949*, Common Art. 3.

<sup>36</sup> International Committee to the Red Cross, "How is the Term 'Armed Conflict' Defined in International Humanitarian Law?", *Op.cit.*, pg.4.

<sup>37</sup> *Ibid.*, pg.5.

*"non-international armed conflicts are armed confrontations that take place within the territory of a State between the government on the one hand and armed insurgent groups on the other hand. [...] Another case is the crumbling of all government authority in the country, as a result of which various groups fight each other in the struggle for power".*

So, it can be concluded that IACs are armed conflicts opposing two or more States, and NIACs are armed conflicts between governmental forces and non-governmental armed groups, or between such groups only.

#### g. State Responsibility

Under international law, a state's responsibility may be engaged in three different ways:<sup>38</sup>

- 1) Where an armed group is acting on instruction or under the direction or control of a state, even when the group does not have a legal basis and is not officially recognised by the state, its members are *de facto* state officials and the state is directly responsible for their acts.

<sup>38</sup> Child Soldiers International, "State Responsibility to Prohibit the Recruitment and Use of Children by State-Allied Armed Groups", [http://www.child-soldiers.org/user\\_uploads/pdf/part3stateresponsibilitytoprohibittherecruitmentuseofchildrenbystatealliedarmedgroup\\_s951239.pdf](http://www.child-soldiers.org/user_uploads/pdf/part3stateresponsibilitytoprohibittherecruitmentuseofchildrenbystatealliedarmedgroup_s951239.pdf) downloaded Friday, 2 January 2015.

2) Even when a state does not exercise effective or overall control over armed groups with which it is allied, it may still be directly responsible for human rights violations committed by state officials in support of these armed groups. Such would be the case, for example, if the armed forces or other state officials assist or are complicit in the recruitment and use of children by state-allied armed groups. State officials' support for the commission of crimes by allied armed groups, such as unlawful recruitment and use of children, may also carry individual criminal responsibility.

3) Under human rights and IHL, states have an obligation to protect individuals from abuses committed by non-state armed groups. The triggering of this obligation does not require proof of any sort of state support to the armed groups: the state has a stand-alone obligation to act with due diligence to protect individuals from human rights abuses. The state clearly fails to fulfil this obligation if, instead of taking measures to protect children from being recruited and used by armed groups, it turns a blind eye and supports these groups with weapons or in other ways.

## 2. Child and Child Soldiers

Child has two meanings in law. In the law of domestic relations, and as to descent and distribution, it is used strictly as the correlative of parent, and means a son or a daughter considered as in relation with the father or mother. In the law of negligence, and in laws for protection of children, etc., it means the young of the human species, generally under the age of puberty, without any reference to parentage and without distinction of sex.<sup>39</sup>

Biologically, a child is generally anyone between birth and puberty or in the developmental stage of childhood, between infancy and adulthood.<sup>40</sup> The Convention on the Rights of the Child defines child as any person below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.<sup>41</sup> In many cultures, a child is considered an adult after undergoing a rite of passage, which may or may not correspond to the time of puberty.

Soldier is person who fights as part of an army or armed forces. It referred to an individual who take active part in armed conflict. While about the term of child soldiers, there are some international legal standards relating to the it. According to the

<sup>39</sup> The Law Dictionary - Featuring Black's Law Dictionary Free Online Legal Dictionary 2nd Ed., "What is CHILD?", <http://www.thelawdictionary.org> downloaded Wednesday, 10 December 2014.

<sup>40</sup> Oxford University Press, "Oxford English Dictionary > Child", <http://www.oup.com> downloaded Wednesday, 10 December 2014.

<sup>41</sup> *Convention on the Rights of the Child 1989*, Art. 1.



Paris Principles, a child associated with an armed force or armed group refers to any person under eighteen years old who is, or has been recruited or used by an armed force or armed groups in any capacity, including but not limited to children, boys and girls, used as fighters, cooks, porters, messengers, spies or for sexual purposes.<sup>42</sup> Same as the Paris Principles, the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (OPAC) also sets eighteen as the minimum age for direct participation in hostilities and for compulsory recruitment by state armed forces.<sup>43</sup>

The Convention on the Rights of the Child generally defines a child as any person under the age of eighteen. However, it explains that the lower age of fifteen is the minimum age for recruitment or participation in armed conflict.<sup>44</sup> This language is drawn from the two Additional Protocols to the four Geneva Conventions of 1949. The protocols set fifteen as the minimum age for recruitment or use in armed conflict. This minimum standard applies to all parties, both governmental and non-governmental, in both international and internal armed conflict. The Rome Statute of International Criminal Court (ICC Statute) also explains that

<sup>42</sup> The Paris Principles, *Principles and Guidelines on Children Associated with Armed Forces or Armed Groups*, (February, 2007).

<sup>43</sup> *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict 2000*, Art. 2.

<sup>44</sup> *Convention on the Rights of the Child 1989*, *Op.cit*, Art. 38.

conscripting or enlisting children under the age of fifteen years into armed forces or participate actively in hostilities is one of the definition of war crimes for both international or internal armed conflict.<sup>45</sup>

### 3. Combatants and Civilians

In the armed conflict, there are civilians and combatants. Combatants are all members of the armed forces of a party to the conflict, except medical and religious personnel.<sup>46</sup> It can be argued that persons taking a direct part in hostilities, even in international or non-international armed conflicts are labelled combatants. While civilians are persons who are not members of the armed forces and the civilian population comprises all persons who are civilians.<sup>47</sup> It also can be argued that civilians are persons who are not taking a direct part in hostilities.

### 4. Elements of Crimes

Elements of Crimes is the structure of the elements of the crimes of genocide, crimes against humanity, and war crimes follows the structure of the corresponding provisions of Article 6, 7, and 8 of the ICC Statute. It will assist the International Criminal Court (ICC) in the interpretation and application of the articles of

<sup>45</sup> *Rome Statute of International Criminal Court*, ICC Statute 1998, *Op.cit*, Art. 8(2)(b)(xxvi) jo. Art. 8(2)(e)(vii).

<sup>46</sup> *Customary IHL*, *Op.cit*, Rule 3.

<sup>47</sup> *Ibid.*, Rule 5.

the ICC Statute defining the crimes under its jurisdiction.<sup>48</sup> These will not only be necessary for the future work of the ICC in interpreting the crimes provisions, but also for national courts, which have primary responsibility in the prosecution of international crimes under the Rome Statute.

#### 5. Individual Criminal Responsibility;<sup>49</sup>

A person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the ICC if that person:

- a. Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
- b. Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
- c. For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
- d. In any other way contributes to the commission or attempted commission of such a crime by a group of

<sup>48</sup> Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court*, Sources and Commentary, first edition, (United Kingdom: The Press Syndicate of the University of Cambridge, 2002), pg.1.

<sup>49</sup> *Rome Statute of International Criminal Court*, ICC Statute 1998, *Op.cit*, Art. 25(3).

persons acting with a common purpose. Such contribution shall be intentional and shall either:

i. Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

ii. Be made in the knowledge of the intention of the group to commit the crime;

e. In respect of the crime of genocide, directly and publicly incites others to commit genocide;

f. Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

#### 6. International Criminal Court

International Criminal Court (ICC) is an independent international organisation, and is not part of the United Nation system. Governed by the Rome Statute of International Criminal

Court (ICC Statute), the ICC is the first permanent, treaty based, international criminal court established to help end impunity for the perpetrators of the most serious crimes of concern to the international community.<sup>50</sup> Although the Court's expenses are funded primarily by States Parties, it also receives voluntary contributions from governments, international organisations, individuals, corporations and other entities.

The most serious crimes regulate under the ICC Statute are genocide, war crimes and crimes against humanity. Crimes of Genocide is explained under Article 6 of the ICC Statute, which define as "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such".<sup>51</sup> The definition is followed by a series of acts representing serious violations of the right to life, and the physical or mental integrity of the members of the group. The Statute states that it is not just the acts of genocide themselves that are punishable, but also "conspiracy to commit genocide," "direct and public incitement to commit genocide," the "attempt to commit genocide" and "complicity in genocide". While the term of War Crimes refers to serious breaches of IHL committed against civilians or enemy combatants during an international or non-

<sup>50</sup> International Criminal Court - Cour Pénale Internationale, "About the Court", *Op.cit.*

<sup>51</sup> Office of the United Nations High Commissioner for Human Rights, "War Crimes, Crimes Against Humanity, and Genocide", [http://www.ohchr.org/Documents/Countries/CD/FS-2\\_Crimes\\_Final.pdf](http://www.ohchr.org/Documents/Countries/CD/FS-2_Crimes_Final.pdf) downloaded Tuesday, 10 February 2015.

international armed conflict, for which the perpetrators may be held criminally liable on an individual basis.<sup>52</sup> Such crimes are derived primarily from the Geneva Conventions and their Additional Protocols I and II, and the Hague Conventions of 1899 and 1907. Their most recent codification can be found in Article 8 of the ICC Statute. For the term of Crimes Against Humanity, it is codified in article 7 of the ICC Statute which explains “The notion encompasses crimes such as murder, extermination, rape, persecution and all other inhumane acts of a similar character (wilfully causing great suffering, or serious injury to body or to mental or physical health), committed ‘as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack’”.<sup>53</sup> There is difference between war crimes and crimes against humanity. Although these terms refer to acts that are committed during times of conflict, the term war crimes is a much broader term. Crimes against humanity refer to acts, before or during the war, that target a specific group of people, be it for their race, religion or political orientation that is condoned or even promoted by the government. War crimes, on the other hand, is any act that violates treaties of war or any act that does not follow normal procedures or protocols. The shooting of a surrendering enemy or the killing of civilians are examples of war crimes.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*

The ICC, located in The Hague, Netherlands, is the court of last resort for prosecution of genocide, war crimes, and crimes against humanity. Its founding treaty, the ICC Statute, entered into force on July 1, 2002, after ratification by 60 countries. As of July 2013, the ICC had 122 states parties, and opened investigations in eight countries.

The Court is composed of four organs. These are the Presidency, the Judicial Divisions, the Office of the Prosecutor and the Registry.<sup>54</sup>

a. The Presidency

The Presidency is responsible for the overall administration of the Court, with the exception of the Office of the Prosecutor, and for specific functions assigned to the Presidency in accordance with the Statute. The Presidency is composed of three judges of the Court, elected to the Presidency by their fellow judges, for a term of three years..

b. The Judicial Divisions

The Judicial Divisions consist of eighteen judges organized into the Pre-Trial Division, the Trial Division and the Appeals Division. The judges of each Division sit in Chambers which are responsible for conducting the proceedings of the Court at different stages. Assignment of

<sup>54</sup> International Criminal Court - Cour Pénale Internationale, "Structure of the Court", <http://www.icc-cpi.int/> downloaded Thursday, 18 September 2014.

judges to Divisions is made on the basis of the nature of the functions each Division performs and the qualifications and experience of the judge. This is done in a manner ensuring that each Division benefits from an appropriate combination of expertise in criminal law and procedure and international law.

c. The Office of the Prosecutor

The Office of the Prosecutor is responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court..

d. The Registry

The Registry is responsible for the non-judicial aspects of the administration and servicing of the Court. The Registry is headed by the Registrar who is the principal administrative officer of the Court. The Registrar exercises his or her functions under the authority of the President of the Court.

e. Other Offices

The Court also includes a number of semi-autonomous offices such as the Office of Public Counsel for Victims and the Office of Public Counsel for Defence.



These Offices fall under the Registry for administrative purposes but otherwise function as wholly independent offices. The Assembly of States Parties has also established a Trust Fund for the benefit of victims of crimes within the jurisdiction of the Court and the families of these victims.

There are three ways for the ICC to receive a situation to investigate.<sup>55</sup> The first way is that a State Party of the ICC Statute refers a situation to the Prosecutor. The second way is for the United Nation (UN) Security Council to request an investigation of a situation in any State that is a member of the UN. Even if the State to be investigated has not ratified the ICC Statute, they may still be investigated because all member states of the UN are bound by UN resolutions. The third way is on the Office of the Prosecutor's own initiative. Under this course of action, the Prosecutor must request authorization to proceed with an investigation from a Pre-Trial Chamber.

## **B. Legal Framework**

The international community have provided many contribution for the development of international humanitarian law. Some of the contributions are regulations relating to child and armed conflict.

Regulations concerning child and the use of child soldiers in armed

<sup>55</sup> Heidi Bucheister, "The International Criminal Court: An Overview" <http://www.beyondintractability.org/essay/international-criminal-court-overview> downloaded Tuesday, 10 February 2015.

conflict are regulated under many international conventions, either in the scope of international humanitarian law such as the four Geneva Conventions 1949 and two Additional Protocols to the four Geneva Conventions of 1949, or in another scope of international law such as Convention on the Rights of the Child, the Optional Protocols of the Conventions on the Rights of the Child, the Rome Statute of International Criminal Court, etc.

The regulations relative to the recruitment of child soldiers which have been ratified by the DRC are:

- a. Additional Protocol to the Geneva Conventions of 12 August 1949 - Protocol I (AP I); Ratified by DRC in 1982,<sup>56</sup> Article 77(2), provides:

"The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, the Parties to the conflict shall endeavour to give priority to those who are oldest."

- b. Additional Protocol to the Geneva Conventions of 12 August 1949 - Protocol II (AP II); Ratified by DRC in 2002,<sup>57</sup> Article 4(3), provides:

<sup>56</sup> International Committee of the Red Cross, "Treaties and States Parties to Such Treaties", *Op.cit.*

<sup>57</sup> *Ibid.*

"Children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities."

- c. Convention on the Rights of the Child 1989 (CRC);  
Ratified by DRC in 1990,<sup>58</sup> Article 38 (3), provides:

"States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest."

- d. Rome Statute of International Criminal Court (ICC Statute); Ratified by DRC in 2002,<sup>59</sup> provides:

Article 8(2):

"For the purpose of this Statute, "war crimes" means...

- b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:...

xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities...

- e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:...

vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities."

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*

- e. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict

2000; Ratified by DRC in 2001,<sup>60</sup> provides:

Article 2:

"States Parties shall ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces."

Article 3:

- 1) "States Parties shall raise the minimum age for the voluntary recruitment of persons into their national armed forces from that set out in article 38, paragraph 3, of the Convention on the Rights of the Child, taking account of the principles contained in that article and recognizing that under the Convention persons under the age of 18 years are entitled to special protection.
- 2) Each State Party shall deposit a binding declaration upon ratification of or accession to the present Protocol that sets forth the minimum age at which it will permit voluntary recruitment into its national armed forces and a description of the safeguards it has adopted to ensure that such recruitment is not forced or coerced.
- 3) States Parties that permit voluntary recruitment into their national armed forces under the age of 18 years shall maintain safeguards to ensure, as a minimum, that:
  - a) Such recruitment is genuinely voluntary;
  - b) Such recruitment is carried out with the informed consent of the person's parents or legal guardians;
  - c) Such persons are fully informed of the duties involved in such military service;
  - d) Such persons provide reliable proof of age prior to acceptance into national military service ...
- 5) The requirement to raise the age in paragraph 1 of the present article does not apply to schools operated by or under the control of the armed forces of the

<sup>60</sup> *Ibid.*

States Parties, in keeping with articles 28 and 29 of the Convention on the Rights of the Child."

Article 4:

- 1) "Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit ... persons under the age of 18 years.
- 2) States Parties shall take all feasible measures to prevent such recruitment ... including the adoption of legal measures necessary to prohibit and criminalize such practices ..."

Article 6(3):

"States Parties shall take all feasible measures to ensure that persons within their jurisdiction recruited or used in hostilities contrary to the present Protocol are demobilized or otherwise released from service. States Parties shall, when necessary, accord to such persons all appropriate assistance for their physical and psychological recovery and their social reintegration ..."

Article 7(1):

"States Parties shall cooperate in the implementation of the present Protocol, including in the prevention of any activity contrary thereto and in the rehabilitation and social reintegration of persons who are victims of acts contrary thereto, including through technical cooperation and financial assistance. Such assistance and cooperation will be undertaken in consultation with the States Parties concerned and the relevant international organizations."

## **C. Theoretical Framework**

### **1. Legal Protection Theory/*Rechtsbscherming Theory***

Legal protection is a representation of the implementation of the function of law to reach three purposes of law, such as

justice, expediency, and legal certainty. According to Satjipto Raharjo, Legal Protection is to give aegis towards the human rights which were violated and the protection is given to the society so they can benefit all the rights that law have given to them.<sup>61</sup>

According to Phillipus M. Hadjon, there are two types of legal protection, such as Preventive Legal Protection and Repressive Legal Protection.<sup>62</sup> The preventive legal protection is aiming to prevent conflicts using the rules and regulations, while the repressive legal protection is aiming to prevent conflicts using the agreement of the parties.<sup>63</sup> It means that legal protection is a protection given to a society or subject of law according to the rules or regulations of law, even if it is the preventive legal protection or repressive legal protection, written or unwritten, in order to establish the rule of law.

The use of this theory is to examine whether the DRC as a state had already did or had not did the main purpose of this theory to prevent and protect the subject of law, individuals of their state, in this case children, for being recruited and used as soldiers in the Ituri conflict.

<sup>61</sup> Satjipto Raharjo, *Ilmu Hukum*, (Bandung: PT. Citra Aditya Bakti, 2000), pg.54.

<sup>62</sup> Phillipus Hadjon, *Perlindungan Hukum Bagi Rakyat di Indonesia*, first edition, limited edition, (Surabaya: Peradaban, 2007), pg.2.

<sup>63</sup> *Ibid*, pg.3-5.