

## CHAPTER TWO

### LITERATURE REVIEW

#### A. Human Rights

Human rights in general can be interpreted as the basic rights that someone has because of his position as a human being. Human rights are universal (applicable everywhere) and egalitarian (applicable to everyone).<sup>1</sup> Human Rights have been given from birth until death and no one can take it.

The general idea of human rights is to give practical effect to respect the dignity of all individual human beings. Especially the States and Government respected in laws, policies, and practices must ensure the dignity of each individual.<sup>2</sup>

Based on Article 1 of ECHR, it is stated that everyone within their jurisdiction the rights and freedoms shall be protected by the High Contracting parties.<sup>3</sup> While, the ICCPR explains in Article 2 (1) that Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>4</sup>

Human rights are rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, color, religion, language, or any other

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<sup>1</sup> Triyanto, 2013, *Regulasi Perlindungan Hak Asasi Manusia Tingkat Internasional*, *Jurnal PPKn*, Vol.1 No.1

<sup>2</sup> Howard Davis, 2009, *Human Rights Law Directions*, New York, Oxford University Press, p. 4

<sup>3</sup> United Nation, 1950, *European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)*

<sup>4</sup> United Nation, 1966, *International Covenant on Civil and Political Rights (ICCPR)*

status. All people are equally entitled to human rights without discrimination. These rights are all interrelated, interdependent and indivisible.

Universal human rights are often expressed and guaranteed by law, in the forms of treaties, customary international law, general principles and other sources of international law. International human rights law lays down obligations of governments to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups.<sup>5</sup>

Based on Black's Law Dictionary, the definition of human rights is:  
"The freedom, immunities, and benefits that, according to modern values (esp. at an international level), all human beings should be able to claim as a matter of right in the society in which they live."<sup>6</sup>

There are two basic human rights, the first one is universal human rights treaties and regional human rights treaties. Universal human rights treaties began with pledged of the Member states of the United Nations to promote respect for the human rights of all people. To achieve this goal, the UN established a Commission on Human Rights and charged it with the task of drafting a document spelling out the meaning of the fundamental rights and freedoms declared in the Charter. The Commission was guided by Eleanor Roosevelt with very strong leadership. On December 10, 1948, the Universal Declaration of Human Rights (UDHR) was adopted by the 56 members of the United Nations. The vote was unanimous, although eight nations chose to abstain.

The influence of the UDHR has been substantial. Its principles have been incorporated into the constitutions of most of the more than 185 nations now in the UN. Although a declaration is not a legally binding document, the Universal Declaration has

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<sup>5</sup> OHCHR (Office of the High Commissioner of Human Rights), Human Rights, taken from <http://www.ohchr.org/EN/Issues/Pages/WhatAreHumanRights.aspx>, accessed on 8 April 2018 at 8:20 pm

<sup>6</sup> B.A. Garner, *Black's Law Dictionary*, Ninth Edition, West Group, Dallas, Texas, p. 125

achieved the status of customary international law because people regard it "as a common standard of achievement for all people and all nations."

## **B. Protection on the Rights of Child**

One of the international legal instruments governing the rights of children is the UN Convention on the Rights of the Child 1989. This Convention differs in many ways among other international agreements and unique in the case of international law in general. The Convention was made after a long compilation process began in 1978. The participation of non-governmental organizations and government organizations, both in the process of drafting and reporting mechanisms is also very important. Another remarkable picture is where countries are eager to sign and ratify this convention. On the first day, the Convention on the Rights of the Child was opened for signature (January 26, 1990) of not less than 61 signed participating countries, which is a record for international treaties. The Convention on the Rights of the Child applies (in international law) on 2 September 1990.<sup>7</sup>

The Convention on the Rights of the Child is an international treaty that recognizes and guarantees the respect, protection and fulfilment of the rights of the child. The Convention regulates the civil, political, economic, social and cultural rights of children. The Convention on the Rights of the Child is legally binding and is a political agreement between various countries governing matters relating to the rights of the children. The Convention on the Rights of the Child affirms the enforcement of human rights for all ages, raises human rights standards to better suit children, and regulates special issues related to children.

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<sup>7</sup> Endang Ekowarni, 2001, Konvensi Hak Anak: Suatu Fatamorgana Bagi Anak Indonesia, Buletin Psikolog, Yogyakarta, *Universitas Gadjah Mada*, Tahun IX, No.2

There are 2 (two) additional protocols that were also adopted on May 25, 2000, the first of which is protocol on the involvement of children in armed conflict, which limit the involvement of children in military conflicts. The second protocol is on child trafficking, child prostitution, and child pornography. This addition is ratified by more than 120 countries.

Every child's rights that is the right to live, the right to be with family and society, the right to be healthy, the right to develop personality, and the right to be preserved and protected (War always sacrifices the rights of children to live, the right to live with family and society, the right to develop personality, and the right to be preserved and protected) has been violated because of the war.

Before the UN made the convention in 1989 on Rights of Children, a woman activist Mrs. Eglantyne Jebb as founder of the Save the Children organization has made 10 statements of Rights of Children and transforms their movements into child rights in 1923 which were then adopted by United Nation as a draft, namely:<sup>8</sup>

1. Playing;
2. Getting the name as an identity;
3. Getting food;
4. Obtaining citizenship as a nationality;
5. Getting the equality;
6. Getting education;
7. Obtaining protection;
8. Obtaining recreation facilities;

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<sup>8</sup> UNICEF Indonesia, "Mengenal Hak Anak", taken from [https://www.unicef.org/indonesia/id/01\\_mengenal\\_hak\\_anak.pdf](https://www.unicef.org/indonesia/id/01_mengenal_hak_anak.pdf), accessed on 23 April 2018 at 3:50 pm

9. Gaining access to health;
10. Gaining opportunities to participate in development.

Eglantyne Jebb also had a vision to achieve and protect the rights of children worldwide. She believed that all children – whoever they are, wherever they are – have the right to a healthy, happy, fulfilling life.<sup>9</sup>

The effectiveness of child protection systems needs the existence of components that are interrelated. These components include social welfare system for children and family, justice system in accordance with the international standards, and mechanisms to encourage appropriate behavior in society. It needs legal framework which is supporting the data and information systems for child protection itself.<sup>10</sup>

### **C. International Humanitarian Law**

Based on Black's Law Dictionary, the definition of armed conflict is:

“A state of open hostility between two nations, or between a nation and an aggressive force. A state of armed conflict may exist without a formal declaration of war by either side. A military action taken under Article 42 of the United Nation Charter, - also termed police action.”<sup>11</sup>

The terminology of humanitarian law is called international humanitarian law application in armed conflict.<sup>12</sup> The term of humanitarian law is originated from the term law of war then continues to develop until finally became the term of humanitarian law. Humanitarian law is one of the branches of public international law, the legal field

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<sup>9</sup> Save the Children Federation Inc, “Our Founder: Eglantyne Jebb The Woman who Started Save the Children”, taken from <https://www.savethechildren.org/us/about-us/why-save-the-children/eglantyne-jebb>, accessed on 16 April 2018 at 11:10 am

<sup>10</sup> UNICEF Indonesia, 2012, “Ringkasan Kajian Perlindungan Anak”, UNICEF Indonesia, p. 1

<sup>11</sup> B.A. Garner, *Op.cit.*, p. 328

<sup>12</sup> Soerjono Soekanto dan Sri Mamudji, 2001, *Penelitian Hukum Normatif: Suatu Tinjauan Singkat*, Jakarta, Raja Grafindo, p. 13-14

governing cross-border issues between countries. Other branches of international public law include diplomatic law, sea law, international treaty law and space law.<sup>13</sup>

The term humanitarian law is a new term as a substitute for the term law of war that is not favored by the international community. The legal term of humanitarians was born around the 1970s marked by the holding of the Conference of Government Experts on the reaffirmation and development in armed conflict in 1971.<sup>14</sup>

Some experts try to give legal insight of the International Humanitarian Law. According to Jean Pictet as one of the senior executive and Vice-President of the International Committee of the Red Cross (ICRC) stated that the International Humanitarian Law in the sense of constitutional legal provision, written and customary ensuring respect for individual and his wellbeing.<sup>15</sup>

International humanitarian law also distinguishes two types of armed conflicts, namely:

1. International armed conflicts, opposing two or more States;
2. Non-international armed conflicts, between governmental forces and nongovernmental armed groups, or between such groups only. IHL treaty law also 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.

From the above description it can be concluded also that in order to be an armed conflict then there must be armed use forces from one party to the other. No need it is

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<sup>13</sup> *Ibid*

<sup>14</sup> Soerjono Soekanto and Sri Mamudji, *Op.cit*, p. 17

<sup>15</sup> Haryomataram, 1994, *Sekelumit tentang Hukum Humaniter*, Surakarta, Sebelas Maret University Press, p. 15

considered whether one or both of the parties reject anything called state of war. Likewise the length of the conflict took place and how many fallen victims do not need to be noticed.<sup>16</sup>

Humanitarian law is intended to protect multiple categories from people who do not or no longer participate in battle as well as to limit the weapon and ways of war.<sup>17</sup>

Humanitarian laws, based on that purpose, set up two main points, namely:

1. Give the reason that a war can be justified, which is as an option (the last resort), cause or the right reasons (just cause), based on the mandate politics (political, political decisions) (authority), and for the right purpose (right intention)
2. Limit the use of armed force in the battle over basic principles of proportionality and discrimination (proportionality and discrimination)

International humanitarian law in its development issued one more legal product that regulates more comprehensively the protection of the civilian population.<sup>18</sup> This international legal product is known by the name of Protocol 1 of 1977.<sup>19</sup> Protocol I of 1977 regulates a new organization not yet known in previous agreements, namely Civil Defense Organization.

The actual emergence of humanitarian law is as a result of concerns about the impact of armed conflict or war blindly. Therefore there needs to be a set of rules ordinances of war and rules that provide protection for victims of war. In connection with the principles

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<sup>16</sup> Enny Narwati, Lina Hastuti, 2008, *Perlindungan Hukum Terhadap Anak dalam Konflik Bersenjata*, Jurnal Dinamika Sosial, Surabaya, *Universitas Airlangga*, Vol. 7, No. 1

<sup>17</sup> Frits Kalshoven, Liesbet Zegbeth, 2001, *Constraints on the Waging of War*, Third Edition, ICRC, Geneva, p. 11-12

<sup>18</sup> Arlina Permanasari, *et al*, 1999, *Pengantar Hukum Humaniter*, Jakarta, ICRC, p. 207

<sup>19</sup> Additional Protocol to Geneva Conventions of 12 August 1949

and principles of Humanitarian law, in humanitarian law the following principles are known.<sup>20</sup>

1. Principle of Military necessity. Under this principle the disputing party is justified in using force to subdue the opponent for the sake of the achievement of the aims and success of the war. In practice, to apply the principle of military interest in the use of force against the parties' opponent, an attack must pay attention to the principles, such as:<sup>21</sup>
2. Proportionality principle is principles applied for limiting the damage caused by military operations by requiring that the consequences of the means and methods of fighting used should not be proportional (to be proportional) with the expected military advantage.
3. The principle of limitation is limiting principles use of tools and ways of fighting that can have consequences outstanding to the enemy.
4. The Principles of Humanity based on this principle disputes parties are required to pay attention on humanity, where they are forbidden to using violence which may arise excessive injury or suffering that is not needed. Therefore this principle is often called as "unnecessary suffering principle."
5. Principles of Chivalry, this principle contains meaning that in war, honesty should take precedence. The use of dishonorable tools, cheating and treasonous means are prohibited.

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<sup>20</sup> Frederic de Mullinen, 1987, *Handbook on the Law of the War for Armed Forces*, ICRC, Geneva, p. 2

<sup>21</sup> Pietro Verri, 1992, *Dictionary of International Law of Armed Conflict*, International Committee of the Red Cross, Geneva, p. 90.



6. The principle of distinction. Under this principle in times of war / armed conflict there must be a distinction between civilians on the one hand and the "combatant" and between civilian objects on the one hand and the military object on the other. Based on this principle, only combatants and military objects may be involved in the war and targeted. Many scholars argue that this principle of distinction is the most important in the principles of humanitarian law.