



# Prohibition of Civilians Transfer Under International Humanitarian Law and Its Relation to Genocide

Rina Rusman<sup>1\*</sup>, Syofirman Syofyan<sup>2</sup>

<sup>1,2</sup> Fakultas Hukum, Universitas Andalas, Padang

\* Corresponding author's e-mail: [rinarusman11@gmail.com](mailto:rinarusman11@gmail.com)

## ARTICLE INFO

### Keywords :

Civil Population; Displacement; Forced To Move; Forcible Transfers; War.

### How To Cite :

Rusman, R., & Syofyan, S. (2024). Prohibition of Civilians Transfer Under International Humanitarian Law and Its Relation to Genocide. *Nagari Law Review*, 7(3), 455-465.

### DOI :

10.25077/nalrev.v.7.i.3.p.455-465.2024

## ABSTRACT

Forcible transfers or forced displacements due to an international or non-international war often happen and cause suffering to those who become displaced by loss of their homes and livelihoods and survival resources. As an example of the current situation, there are many civilians from Gaza, especially Palestinians, who have had to leave their homes and have to seek shelter. Alarmingly, some of them have fled to refugee camps that have been housing Palestinian refugees since the 1948 and 1967 conflicts with limited conditions. While, it is commonly known that evacuation should only be temporary. This fact invites us to discuss and answer the following questions: 1) How is the rule of international humanitarian law or the law of war regarding the transfer of population and civilians in time of war?; 2) How could the displacement of civil population and civilian in time of war amount to genocide or ethnic cleansing?; and 3) How is the law enforcement against the violations of international humanitarian law on the transfer of civilian population? It is expected that the answers of these questions could be a reference to comment any news of displacement due to armed conflict. To answer these questions, normative research is conducted by literature study for collecting secondary data from international treaties and other sources of international law such as customary international law, court rulings, expert opinions and information or news from the field, including the implementation of international law in Indonesian national legislation. Analysis of data for taking conclusion is carried out qualitatively, and the reporting is made in an explanatory descriptive manner. The results showed that the international humanitarian law system has contained sufficient rules containing certain prohibitions and obligations for parties to the conflict. There are several prohibitions against deportation and forcible transfer of population. There are several obligations to prevent the forcible transfer or forced displacement of population. There are several obligations to strive for the safety and fulfillment of basic needs of civilians in the event of evacuation and to ensure that the displaced civilians can immediately return to their places of origin. In circumstances, acts that cause forcible transfers or forced displaced civilians might be categorized as war crimes, crimes against humanity and/or genocide. Concerning the violations of the international humanitarian law relating the forcible transfer of civilian population due to war, the state is obliged to carry out the law enforcement against the persons involved who are under its jurisdiction. In addition, no State shall be allowed to absolve itself of any liability incurred by itself in respect of breaches referred to the rules discussed.

## 1. Introduction

The number and suffering of war victims, including those of people displaced by war, often contribute to the information that accompanies news about every war. An example about the number and sufferint of casualties due to armed clashes that have occurred in Gaza since October 7, 2023 between Hamas as a Palestinian Militia group and Israeli State Army that continues and doses not stop until mid March 2024.

In fact since 1967, it has been common knowledge that the land of Palestine territories, including Gaza, is under Israeli occupation that many fightings or military operations have taken place and followed by casualties and sufferings on the part of the civilian population. However, the humanitarian problem arising since the October 2023 events are of serious concern because the number and suffering of casualties in that period are considered more severe than previous war events. Reportedly, at the beginning of the incident on October 7, 2023, when 3000 Hamas militamen hit Gaza's border with Israeli territory and carried out attacks on Israeli military bases and their surroundings, there were 1,139 Israeli deaths, 695 civilians, 373 soldiers and foreigners.<sup>1</sup> With Israeli retaliatory attacks and attacks between the two warring groups, it was reported on December 22, 2023, that until then 22,000 Palestinians were killed, most of whom were civilians, and thousands were missing under the rubble of the collapse of the building.<sup>2</sup> It was also reported that 1,900,000 Palestinians (out of 2,200,000 Palestinians) and 500 Israelis were displaced by being forced to flee their homes or forced to move from their homes or seek refuge due to the war situation.<sup>3 4</sup>

Regarding the number of victims who were displaced or had to move because of their homelessness, it turned out that many attacks (no less than 25 airstrikes) from October 9, 2023 to January 9, 2024 were directed at a number of refugee camps (no less than 7 refugee camps) on the Gaza Strip (Gaza Strip) and West Bank (West Bank) that housing Palestinians who missing their homes and livelihoods as well as direct sources of survival in the place where they had lived since 1948.<sup>5</sup> It is quite concerning that when the Jabalia Camp in the Gaza Strip suffered a second airstrike on October 12, 2024 that killed 45 people and injured at least 4, at that time the camp was also housing people from Beit Hanoun (a town on the Northeastern edge of the Gaza Strip) who were homeless.

As is known, due to the armed conflict in 1948 and 1967 in Palestine, until 2019 there were 68 refugee camps scattered in the Palestinian territories (Gaza Strip and West Bank), Jordan, Lebanon and Syria. Of the 68 camps, 58 are officially registered refugee camps assisted by the United Nations Relief and Works Agency (UNRWA). It is recorded from this official refugee camp that the number of registered refugees in 1950 amounted to 750,000 people and until 2019 became more than 6 million people.

While some lamented the civilian casualties and suffering from October 7 to 31, 2023, there were also some comments stating that the heavy casualties reported were unnecessary because the army, especially the Israelis, had warned several days before the attack in certain areas.<sup>6</sup> However, there have also been comments from legal observers who argue that warnings from soldiers cannot justify civilian casualties in attacks, nor can they justify attacks on civilian settlements.

A number of legal observers also warn that the act of transferring civilians or forcing civilians to leave their homes for reasons of war is prohibited under international humanitarian law as the law applicable in time of war. Some warn that the displacement of civilians may be indicative of ethnic cleansing and even genocide, i.e. the killing of an entire or part of a particular nation, race, ethnicity or religious group.

<sup>1</sup> AFP, 'Israel Social Security Data Reveals True Picture of Oct 7 Deaths', *AFP France* 24, 2023. <https://www.france24.com/en/live-news/20231215-israel-social-security-data-reveals-true-picture-of-oct-7-deaths>.

<sup>2</sup> AFP Euronews with AP, 'Gaza Death Toll Reaches 20,000 as UN Ceasefire Vote Postponed \_ Euronews', *Euronews with AP*, *AFP*, 2023. <https://www.euronews.com/2023/12/21/gaza-death-toll-reaches-20000-as-un-ceasefire-vote-postponed>.

<sup>3</sup> Gabrielle Tétrault-Farber, 'UN Warns of Heightened Risk of Genocide and Atrocity Crimes in Ethiopia | UN News' (Tétrault-Farber, Gabrielle, 2023).

<sup>4</sup> AFP, 'Around Half A Million Israelis Displaced Inside Israel\_ Military \_ Barron's', *AFP*, 2023.

<sup>5</sup> The Guardian, 'Israeli Airstrikes Kill 80 in Palestinian Refugee Camp', *The Guardian*, 2023.

<sup>6</sup> Andrew (CNN) Rene, "Children Were Carrying Other Injured Children" \_ Witness Describes Aftermath of Israeli Strike on Gaza Refugee Camp \_ News \_ Wsiltv', *Rene, Andrew (CNN)* (CNN, 2023) [https://www.wsiltv.com/news/children-were-carrying-other-injured-children-witness-describes-aftermath-of-israeli-strike-on-gaza-refugee/article\\_bc982719-2fbd-51b0-bc0f-01ce823a7376.html](https://www.wsiltv.com/news/children-were-carrying-other-injured-children-witness-describes-aftermath-of-israeli-strike-on-gaza-refugee/article_bc982719-2fbd-51b0-bc0f-01ce823a7376.html).

With regard to the number and suffering of civilians displaced by being forced to flee their homes, it is natural to reiterate that in fact the rule of war or international humanitarian law has established a prohibition on the forced transfer of civilians for reasons of war. Based on research and review of applicable law, this paper contains a description to answer the following questions: 1) How does International Humanitarian Law (IHL) govern the transfer of civilians? 2) Can the forcible destruction of civilians amount to genocide or ethnic cleansing? 3) What are the rules on law enforcement regarding violations of the prohibition on forced transfer of civilians? It is hoped that the answer to the problem and its description can be a reference to the laws that apply during war regarding unjustified transfer of population and the conditions that must be met so that an event of population movement can be justified.

## **2. Methode**

To write an explanation or description in order to answer the problems mentioned above, normative research is carried out by collecting data which are mostly secondary data, namely the rules of international humanitarian law contained in various international treaties, international customs, international court decisions and other documents related to international resolutions on these problems. Data analysis to draw conclusions is carried out with a content analysis approach and qualitative methods. The research report is made in an explanatory descriptive form.

## **3. Discussion and Research Results**

From the results of the study, it can be seen that IHL contains a ban on forced transfer of civilians and also contains certain rules or prohibitions whose purpose includes preventing the forced transfer of civilians. From the rules prohibiting genocide contained in the Convention on the prohibition of genocide and documents related to genocide, including international court rulings, the forcible transfer of civilians carried out directly or indirectly in some way, can be categorized as genocide or ethnic cleansing. Regarding law enforcement against violations of the prohibition of forced civil transfer in war, as with other violations of IHL, the perpetrator's home country is obliged to carry out law enforcement, especially prosecuting perpetrators. However, if the state concerned is unwilling or incapacitated, then the international court can take over the enforcement of the law.

### **3.1. International Humanitarian Law (IHL) regulates the transfer of civilians by providing rules which prohibit and prevent forced displacement and its exceptions.**

IHL rules containing explicit or direct prohibitions against forced civilian transfers can be found, among others, in Article 49 of the IV Geneva Convention of 1949 concerning the Protection of the Civilian Population (hereinafter abbreviated as Geneva Convention 1V/1949), which is one of the 4 (four) Geneva Conventions of 1949 concerning the Protection of War Victims (hereinafter abbreviated as Geneva Convention 1949), Article 54.2 and Article 85.4.a. of Additional Protocol I /1977 on the Protection of Victims of International Armed Conflict (hereinafter abbreviated as Additional Protocol I/1977) as well as Article 17 of Additional Protocol II / 1977 on the Protection of Victims of Non-International Armed Conflicts (hereinafter abbreviated as Additional Protocol II / 1977) which are additional or supplement to the Geneva Conventions of 1949.

### **3.2. Prohibition of Forcible Transfer of Civilians According to IHL and the Situation in where it Applies.**

As is known, the Geneva Conventions of 1949 is one of the main international treaties in the field of IHL whose rules it contains mostly apply to war or international armed conflict and few rules to non-international armed conflicts. The rules of Additional Protocol I/1977 contained in 102 Articles apply to situations of international war, while the rules of Additional Protocol II/1977 contained in 28 Articles apply to non-international wars.

In terms of numbers, the IHL rules that apply to non-international armed conflict situations are far less than the rules that apply to international armed conflict situations. However, based on research that has been carried out by experts from various countries coordinated by IHL experts from the International Committee of the Red Cross (ICRC) and Cambridge University in the UK, on the practice and laws of various countries regarding the application of certain IHL rules for international warfare in non-international wars, it turns out that the number of IHL rules for non-international armed conflicts has grown on the basis of international customary law. According to the results of the study in 2005, which continues to be monitored today, of the 161 rules that have become customary international law in the field of IHL, a total of 146 rules apply to international and non-international warfare.<sup>7</sup> Specifically with regard to displacement and displaced persons, of the 6 Rules, 3 apply to international and non-international wars, 2 only to international wars and 1 only to non-international wars. 1 rule that only applies to international wars because only in international wars might the occupying authority transfer residents from their original territory to occupied territories, while the other 1 rule only differs in formulation and terms from 1 rule that only applies to non-international wars. In the rules for international warfare, the term used for the transfer of civilians is deportation or forcible transfer while in the rules for non-international wars and also international wars is displacement.

When related to the example of the situation in Palestine including Gaza, which has been occupied by Israel since 1967, the rules of the 1949 Geneva Conventions and Additional Protocol I / 1977 contain the obligations of the Warring Parties and the Occupying Authorities to provide protection to civilians in the territories where war or occupation occurs. That is, both the Israeli Party with its Army and the State of Palestine with its army, as Warring Parties must comply with the IHL rules contained in the 1949 Geneva Convention and Additional Protocol I / 1977.<sup>8 9</sup> In addition, in the event of armed resistance against the State or the Ruling Party, namely resistance from the part of Non-State Armed Groups, such as from the Hamas armed group, both Israel and Hamas must comply with the rules contained in the Geneva Conventions of 1949, namely in particular Article 3 of Geneva Convention IV 1949, and all rules contained in Additional Protocol II/1977. In addition, at the desire of Non-State Armed Groups in the territory being occupied by Foreign State Forces, with certain requirements or procedures, the rules contained in Additional Protocol I/1977 may also apply to situations of armed disputes between these 2 parties.<sup>10</sup>

The rules contained in Article 49 of Geneva Convention IV / 1949 provide rules that the Occupying Authority is prohibited from forcible transfers of civilians or civilians en masse or individually for any motive to the territory of the Occupying Authority or to any other country. However, if for the security of the population or urgent military reasons an evacuation of the population is required, the evacuation must be carried out under certain conditions or requirements.<sup>11</sup> In the event that an evacuation is forced to occur, evacuated civilians must be returned to their homes immediately after the cessation of fighting in the area where they live.

Article 54.2 of Protocol I/1977 stipulates that the invading or occupying Party shall not take acts that may cause civilians to move away, especially those that cause civilians to starve. Likewise, Parties to the invaded country, including the ones conducting and the defense effort of its territory are not

<sup>7</sup> Jean Marie Henckaerts and Louise Doswald-Beck, *International Committee of the Red Cross: Customary International Humanitarian Law*, International Committee of the Red Cross: Customary International Humanitarian Law, 2005, 1. <https://doi.org/10.1017/CBO9780511804700>.

<sup>8</sup> International Committee of The Red Cross, 'IHL Treaties - Additional Protocol (II) to the Geneva Conventions, 1977', *Icrc* (ICRC). <https://ihl-databases.icrc.org/en/ihl-treaties/apii-1977>.

<sup>9</sup> Diplomatic Conference of Geneva of 1949, 'IHL Treaties - Geneva Convention (IV) on Civilians, 1949' (ICRC, 1950).

<sup>10</sup> ICRC Indonesia, 'Protokol Tambahan I Dan II Tahun 1977 - The ICRC in Indonesia | The ICRC in Indonesia', *Hukum Humaniter/ICRC & HHI*, 2012.

<sup>11</sup> ICRC, 'IHL Treaties - Geneva Convention (IV) on Civilians, 1949 - Commentary of 1958 Article \_ Article 49 - Deportations, Transfers, Evacuations \_ Article 49' (ICRC, 1958). <https://ihl-databases.icrc.org/en/ihl-treaties/gciv-1949/article-49/commentary/1958>.



allowed to take actions that could cause its population to starve or be forced to move away unless there is an urgent military interest.

The violation of this prohibition on population transfer, in particular in the form of unlawful deportation, as stated in Article 147 of the 1949 Geneva Conventions, is a serious violation of IHL. It is affirmed in Article 85.4.a of Protocol I/1977 that the deportation or transfer of all or part of the civilian population in occupied territories within and outside these territories is a serious violation of IHL because it violates Article 49 of Geneva Convention IV/1949. This grave violation, in the 1998 Rome Statute of the International Criminal Court (hereinafter abbreviated as the Rome Statute 1998), is particularly in Article 8.2. (a) (vii) and Section 8.2. (b) (viii), categorized as War Crimes.

For non-international warfare, Article 17.1. PT II/1977 stipulates that belligerents, both State and Non-State parties, may not order the displacement of the civilian population for conflict-related reasons, unless necessary for civilian security or urgent military reasons. It is also affirmed in Article 17.2. that civilians should not be expelled from their areas of residence for reasons related to the conflict.

Violations committed in non-international war situations against the prohibition on the transfer of civilians are also considered war crimes. This can be seen in the Rome Statute of 1998, specifically Article 8.2. (e) (viii). It is affirmed that ordering the displacement of civilian population for conflict-related reasons is a serious violation of the laws and customs applicable to non-international armed conflicts.

Forced transfers committed during war or non-war, especially acts of deportation or forcible transfer of population, can be categorized as crimes against humanity if they meet certain criteria. This is affirmed in Article 7.1.d) of the Rome Statute. In general, the criterion is if the act is deliberately carried out as part of a widespread or systematic attack directed at any civilian population. Regarding crimes against humanity, Article 7.2.d) of the 1998 Rome Statute states that deportation or forcible transfer of a civilian population is the forced displacement of persons targeted by expulsion or other coercive measures from areas where they are lawfully present, carried out without any basis permitted under international law.

### **3.3. Prohibition of Moving Residents from Outside the Occupied Territory**

Not only does it contain a prohibition on the forcible transfer of civilians in the occupied territory, International Humanitarian Law (IHL) also contains a prohibition for the Foreign Occupying Party to transfer or bring parts of its own civilian population to the occupied territory. This rule or prohibition is contained in Article 49 paragraph 6 of Geneva Convention 14/1949. Against the background of experience during World War II, this prohibition or this rule was enacted with the aim of preventing the practice carried out by several countries during World War II, namely the practice of bringing in their own civilians for political or racial reasons or to occupy or colonize occupied territories.<sup>12</sup>

The prohibition on bringing in residents from the territory of origin of the Occupying Forces, is a protection for the civilian population of the occupied territories. As is known, the transfer or arrival of people from outside risks causing economic deterioration of the indigenous population and harming the existence of indigenous people as a race.<sup>13</sup>

In relation to the prohibition on the transfer or population of the Occupying Authority, this prohibited action is also called transfer. To distinguish the act of transfer or bringing in outsiders, the act of transferring indigenous civilians in the occupied territory outside the occupied territory is often referred to as expulsion or if the expulsion is directed abroad it is called deportation. The term

<sup>12</sup> Christopher Gane and Mark Mackarel, 'Geneva Convention Relative to the Protection of Civilian Persons in Time of War', *Human Rights and the Administration of Justice*, 2023, pp. 579-81.

<sup>13</sup> Gane and Mackarel Geneva Convention Relative to the Protection of Civilian Persons in Time of War.

evacuation is often used to describe that the transfer of indigenous civilians is for the safety of the population and seems temporary.

### 3.4. Prohibition of Destruction of Civil Facilities to Prevent Forced Displacement

In order to protect the civilian population and prevent situations that force civilians to leave their homes, the IHL system provides rules that prohibit warring parties from damaging property or facilities that are the needs of the civilian population. This prohibition is also purposed so that, in the event that evacuation for the safety of the civilian population is forced to occur, residents and civilians are able to return to their homes or lands of origin.

Article 53 of Geneva Convention IV/1949 affirms that civilian property facilities in areas controlled by Foreign Occupying Forces shall not be destroyed. Article 53 of Geneva Convention IV/1949 stipulates that the Occupying Party or the Ruling Party shall not carry out destruction of real property or private property individually or collectively owned by private persons, or States, or other public authorities, or social or cooperative organizations, unless such destruction is absolutely necessary for the purposes of military operations.

As part of the protection of civilian property, civic facilities such as places of worship, homes or other residences or schools may not be attacked.<sup>14</sup> Protection of these facilities may only be lost if they fulfill the following 2 things: 1) their existence, location, function or use makes an effective contribution to military action and part or all of their destruction, and 2) in such circumstances, will provide a definite military advantage.<sup>15</sup> <sup>16</sup> In the event that civilian property is still doubtful of making an effective contribution to military action, it should still be considered not to be used as such.<sup>17</sup> Thus it is still protected.

Still related to the protection of the population and civilians, it is affirmed in 2 Additional Protocols of 1977, that belligerents are prohibited from carrying out any hostile acts against historical monuments, works of art or places of worship that constitute the cultural or spiritual heritage of mankind. In addition, there is a prohibition on acts that cause starvation on the part of civilians as a method of warfare. Therefore, it is forbidden to attack or damage objects that are indispensable for the survival of the civilian population, such as foodstuffs, agricultural areas for producing food, crops, livestock, installations and supplies of drinking water and irrigation. There are also rules prohibiting attacks on work or installations that contain hazardous forces, namely dams, embankments and nuclear power stations.

### 3.5. Security of the Civilian Population and Urgent Military Interests of Prohibition Exemptions

With regard to the prohibition of the transfer of civilians, population security factors and factors of urgent military interest should not be used to evacuate civilians, as long as they do not meet the clear criteria set out in the IHL system. As provided in Article 49 of the 1949 Geneva Conventions and their Commentaries, an allowable evacuation is a temporary evacuation for the safety of the population or military interests.

Evacuation due to the safety of residents can occur if the residence or area is at risk of being affected by military attacks. In the event of an evacuation, the safety of residents during the process must be maintained. During the evacuation of that population or civilians, the occupying authority shall try to ensure as much as possible that the resident or civilian receives adequate accommodation. It must be

<sup>14</sup> ICRC, 'IHL Treaties - Additional Protocol (II) to the Geneva Conventions, 1977 - Article 52', *IHL Databases- International Humanitarian Law Databases* (ICRC, 1987).

<sup>15</sup> CRC: IHL Treaties, 'Additional Protocol (I) to the Geneva Conventions, 1977 - Commentary of 1987 Article | Article 47 - Mercenaries | Article 47 (Icrc.Org)'

<sup>16</sup> Jean Henckaert, 'International Customary Humanitarian Law, Rule 8' (Jean Henckaert).

<sup>17</sup> L. I. Gidez and others, 'Separation and Quantitation of Subclasses of Human Plasma High Density Lipoproteins by a Simple Precipitation Procedure', *Journal of Lipid Research*, 23.8 (1982), 1206–23.

ensured that they obtain good hygiene, health, safety and safety conditions and are inseparable from family members who are equally evacuated.

Military interests have become a principle in international humanitarian law, even underpinning the establishment of international humanitarian law on the basis of its balance with humanitarian urgency. The Principle of Military Interest is the principle that permits actions that are strictly necessary to achieve a legitimate military objective. A legitimate military objective is to declare that a legitimate military interest or purpose in an armed conflict is merely to weaken the military capacity of opposing parties.<sup>18</sup>

An example that a civilian facility may at one time be considered a military target but not meet the legitimate military importance of being attacked is the Mostar Bridge in Bosnia Herzegovina territory attacked during the Bosnian, Serb and Croat wars. At that time the bridge was used by the Bosnian side to transport military logistics and also the needs of war victims. The attack, as mentioned by a ruling judgement of the International Criminal Tribunal for Former Yugoslavia (ICTY) was deemed illegitimate because it did not meet urgent military interests. In addition, the Mostar Bridge is a cultural property or historical heritage for the Bosnian Muslim community.

### **3.6. Other Restrictions to Prevent Forced Displacement**

IHL regulations related to the protection of civilians and civilians from the risk of harm arising from military operations, generally include preventing civilians from moving or forcibly leaving their homes. One example is the rules contained in Article 51.2 of Additional Protocol I/1977 and Article 13.2 of Additional Protocol II/1977 which affirm that parties to the conflict are prohibited from carrying out acts or threats of violence whose main purpose is to spread terror among the civilian population.

Including as protection for civilians and reducing the risk of fear or insecurity among civilians, the IHL system prohibits of using the presence or movement of civilian population or individual civilians as a military shield. This is affirmed in Article 51.7 of Additional Protocol I/1977 which states that the presence and movement of civilian population or individual civilians shall not be used to make certain points or areas immune from military operations, especially in an attempt to shield or shelter from military targets. Therefore, parties to the conflict are not allowed to direct the movement of civilians or civilians in order to protect military targets from attack or to serve as a shield for military operations.

### **3.7. Early warning is not a justification for attacking civilian people and property**

With regard to the prohibition of attacks on civilian facilities that may cause residents to move because they are forced, the warning actions from the part of the attacker before carrying out an attack cannot be a justification for the attack carried out. This is in line with the principle of distinction for which warring parties must always separate military targets from civilian objects. As mentioned earlier, attacking civilian facilities is prohibited as long as they do not contribute to military operations. The warning that must be carried out by the warring parties is if there is concern that the population or civilians and their facilities could be affected by attacks aimed at military targets. Such warnings are needed as part of efforts to prevent disproportionate attacks.

As one example of the proportional or disproportionate size of the attack, we can see the opinion of the ICTY judges of first instance and the appeal in the Gotovina case regarding the forcible transfer of civilians. In the court decision, it contained the judge's opinion clarifying that damage to civilian objects claimed as a result of attacks on military objects, cannot be said to be an impact if the location of the civilian object is located far or at least 200 meters from the military object targeted by the attack. That is, if the civilian object that suffered damage was located in a location that was far away or not

<sup>18</sup> Marco Sassoli and Antoine Bouvier, Anne Quintin. in collaboration with Juliane Garcia, How Does Law to Protect in War, ICRC, Geneve, 2012 (Military necessity | How does law protect in war? - Online casebook (icrc.org).

close to the military object, then the damage that occurred was not an impact but was intentional through the attack carried out.

To see the relationship between forced displacement and genocide, it will be easier to first look at the relationship between forced displacement and ethnic cleansing. This is given that genocide is often viewed as ethnic cleansing accompanied by a desire or goal to eliminate the ethnic group or race or nation or religion being targeted. Ethnic cleansing in legal terms can be found in persecution, which is a crime against humanity committed as part of a widespread or systematic attack directed against civilians as contained in the 1998 Rome Statute. More clearly in Article 7.1. (h) The Rome Statute of 1998 states that persecution amounting to crimes against humanity is persecution committed against a group or collectivity identifiable on the basis of politics, race, nation, ethnicity, culture, religion, gender (sex) or other basis, which is universally recognized as impermissible under international law, in relation to any act that constitutes a crime against humanity or any act of war crime or genocide or crime of aggression. In other words, acts of deportation or forcible transfer of population, including if accompanied by certain other acts can be categorized as crimes against humanity. However, proving it to be genocide by the International Criminal Court, forced displacement of the population needs to be indicated along with one of the acts of genocide specified in the 1998 Rome Statute.

### **3.8. Displacement of Civilians in Relation to Genocide and Ethnic Cleansing**

At least three of the five acts of genocide specified in the 1998 Rome Statute were likely committed through or in conjunction with acts of forcible transfer of civilians. The 3 acts that are each when done with the aim of eliminating all or part of a particular national, ethnic, racial or religious group are: 1) the killing of members of the group; 2) cause serious physical or mental harm to members of the group; and 3) intentionally inflict on the living conditions of the group that are calculated to cause its physical destruction in whole or in part. With regard to the third act, it is stated in the note to the Annex on the Criminal Elements of the Rome Statute of 1998, that the term "living conditions" may include but should not be limited to the deliberate deprivation of resources indispensable for survival, such as food or medical services, or the systematic expulsion from the home.<sup>19</sup> The mention of systematic expulsion means that the forcible transfer of civilians may be carried out not by directly ordering the population, but by gradually rendering the neighborhoods in which the residents, especially the facilities necessary for their survival, become dysfunctional.

Referring back to the act of forcible transfer of civilians, especially that committed during times of war and prohibited by international humanitarian law, this act can be the indication of an existing motive element or desire for genocide, whether in relation to the genocide act of causing loss of life, causing physical or mental harm or creating living conditions that bring physical destruction to the lives of the population. This is because the transfer of civilians can form one or a combination of these 3 acts and can have a similar effect to each of the 3 acts. Thus, such forcible displacement of civilians is associated with the formulation and elements of genocide, if carried out in the context of a clear pattern and directed at a certain group of nations or races or ethnicities or religions so as to have a devastating effect on all or part of the group can be categorized as genocide. Therefore, in order to prevent or stop genocide, the act of forcibly transferring civilians or causing forced displacement of civilians must be prevented or stopped. It is the duty of States to prevent and stop genocide as contained in Article 1 of the Convention on the Prevention and Punishment of Genocide of 12 January 1951 (hereinafter referred to as the 1951 Genocide Convention). Similarly, States are obliged to ensure that the rules of international humanitarian law prohibit the transfer of civilians in time of war as indicated in Article 1 of Geneva Convention IV/1949.

### **3.9. Law enforcement rules against violations of the prohibition on forcible transfer of civilians.**

<sup>19</sup> William A. Schabas, 'AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT', *American Journal of International Law*, 2001, 1-396.



As mentioned earlier, the forcible transfer of civilians is a gross violation of international humanitarian law and is a war crime under the jurisdiction of the international criminal court (ICC) under the 1998 Rome Statute. Similarly a crimes against humanity and a genocide involving the forcible transfer of civilians are under the jurisdiction of ICC. In accordance with the nature of ICC which are a last resort if national courts are unable or unwilling to try perpetrators of serious violations, the national court system is the mechanism that is expected to try perpetrators of these serious violations. As stipulated in the Geneva Conventions of 1949, in particular Article 146 of Geneva Convention IV/1949, each State is obliged to prepare and enforce legislation containing sanctions and enforcement mechanisms for violations of the rules of international humanitarian law with respect to war-related transfers of civilian populations.

Indonesian national legislation does not yet contain sanctions and enforcement of war crimes related to deportation and forcible transfer of civilians although the Dutch prepared and tried such rules in Indonesia in 1946 after Indonesia proclaimed its independence. However, there is an Indonesian law that contains sanctions and court rules for deportation and forced transfer if related to crimes against humanity or genocide, namely Law number 26 of 2000 concerning Human Rights Courts.

In addition to the responsibility of the perpetrators as individuals, the State cannot be exempt from the losses caused by the forced transfer of civilians. The same thing is related to genocide.<sup>20</sup> If the State concerned does not perform its responsibilities voluntarily or in a peaceful mechanism, it is possible for States or members of the international community who feel aggrieved to file a claim against the State alleged through the mechanism of the International Court of Justice (ICJ) based on the ICJ Statute of October 24, 1945. Proceedings at the ICJ do not have to wait for results or criminal litigation against individuals. Vice versa, national or international criminal court proceedings against individuals need not be hampered by the absence of related proceeding at the ICJ. However, criminal responsibility for the forcible transfer of civilians in connection with war, whether the responsibility of the perpetrators, or the planner or the commandor or superior cannot be eliminated. This is because displacement due to war is different from forced population displacement due to natural disasters. In the case of forced displacement due to war, there is always a culprit or party that caused it.

#### 4. Conclusion

From the description above, it can be concluded, as an answer to the problems mentioned in the introduction, namely: The first. That the system of Humanitarian Law, as a law that must be applied in time of war has contained fairly complete rules regarding the transfer of civilians in time of war, namely in particular by containing prohibition for parties to international and non-international wars from committing deportations or forcible transfers of civilians in areas that are at war or occupied, except temporary evacuation for the safety of the population or due to urgent military interests. If an evacuation is compelled to be made, the authorities or belligerents shall ensure the safety and basic needs of the population concerned and return them as soon as the situation permits. Therefore, including to prevent forced displacement and ensure immediate return in the event of evacuation, the IHL system also prohibits actions that may damage civilian facilities needed by the population. In addition, in order to maintain the economic conditions and continuity and rights of the indigenous population, the occupying Foreign Party is not allowed to move its own population to the territory it occupies.

The second. Deportation or forcible transfer of civilians can be categorized as ethnic cleansing or crimes against humanity if it forms persecution committed as part of a widespread and systematic attack against a particular group such as political, or racial, national, ethnic, cultural among others. If

<sup>20</sup> Fakultas Hukum Universitas Trisakti, 'Jurnal Hukum Humaniter, Pusat Studi Hukum Humaniter Dan HAM', *Revista Brasileira de Linguística Aplicada*, 5.1 (2016), 1689-99, Pasal 148 Konvensi Jenewa IV/1949

the forcible displacement or systematic expulsion is carried out against the group with the aim of exterminating all or part of the group, then the displacement of the population can be categorized as genocide.

The last, Law enforcement against persons involved in the forcible transfer of civilian population is the responsibility of the person's home country to administer prosecutions and trials under the laws in force in that country. The courts of other countries or the international court (ICC) can take over the law enforcement measure if it is necessary and the country is unable or unwilling to do so. With regard to violations of law related to the transfer of populations, the country involved or the country of origin of the persons involved in the violation also cannot discharge its responsibility, especially if there are claims from the aggrieved party. If the responsibility of the state is not resolved voluntarily and peacefully, then it is possible to prosecute through the ICJ. ICJ proceedings or other mechanisms chosen with regard to state responsibility do not have to wait for criminal court proceedings. Likewise, criminal courts need not wait for the enforcement of state responsibilities in the ICJ or other mechanisms.

Related to the above conclusions, there are several things that need to be suggested for the completeness of national laws in order to prevent the forced transfer of civilians. Given the risk of forced transfer of civilians, to prevent it, every country, including Indonesia, needs to supplement its national law with a law prohibiting the transfer of civilians in wartime. This includes laws governing courts having jurisdiction over the forcible transfer of civilians and other grave violations of international humanitarian law. The existence of law enforcement mechanisms against people, including commanders and officials involved in the transfer of civilians and those involved in other war crimes, is also an effort to prevent crimes against humanity and genocide. This is because proving crimes against humanity and genocide requires more elements than war crimes.

## Reference

- AFP, 'Around Half A Million Israelis Displaced Inside Israel\_ Military \_ Barron's', AFP, 2023. <https://www.barrons.com/news/around-half-a-million-israelis-displaced-inside-israel-military-139782b3>
- AFP, 'Israel Social Security Data Reveals True Picture of Oct 7 Deaths', AFP France 24, 2023. <https://www.france24.com/en/live-news/20231215-israel-social-security-data-reveals-true-picture-of-oct-7-deaths>
- Diplomatic Conference of Geneva of 1949, 'IHL Treaties - Geneva Convention (IV) on Civilians, 1949' (ICRC, 1950). <https://ihl-databases.icrc.org/en/ihl-treaties/gciv-1949?activeTab=1949GCs-APs-and-commentaries>
- Euronews with AP, AFP, 'Gaza Death Toll Reaches 20,000 as UN Ceasefire Vote Postponed \_ Euronews', Euronews with AP, AFP, 2023. <https://www.euronews.com/2023/12/21/gaza-death-toll-reaches-20000-as-un-ceasefire-vote-postponed>
- Gane, Christopher, and Mark Mackarel, 'Geneva Convention Relative to the Protection of Civilian Persons in Time of War', *Human Rights and the Administration of Justice*, 2023, pp. 579–81. [https://doi.org/10.1163/9789004637450\\_057](https://doi.org/10.1163/9789004637450_057)
- Gidez, L. I., G. J. Miller, M. Burstein, S. Slagle, and H. A. Eder, 'Separation and Quantitation of Subclasses of Human Plasma High Density Lipoproteins by a Simple Precipitation Procedure', *Journal of Lipid Research*, 23.8 (1982), 1206–23. [https://doi.org/10.1016/s0022-2275\(20\)38059-7](https://doi.org/10.1016/s0022-2275(20)38059-7)
- Henckaert, Jean, 'Intrenational Customary Humanitarian Law, Rule 8' (Jean Henckaert).

- Henckaert, Jean Marie, and Louise Doswald-Beck, *International Committee of the Red Cross: Customary International Humanitarian Law*, 2005, I. <https://doi.org/10.1017/CBO9780511804700>.
- ICRC, 'IHL Treaties - Additional Protocol (II) to the Geneva Conventions, 1977 - Article 52', IHL Databases- International Humanitarian Law Databases (ICRC, 1987). <https://ihl-databases.icrc.org/en/ihl-treaties/apii-1977/article-14>
- ICRC, 'IHL Treaties - Geneva Convention (IV) on Civilians, 1949 - Commentary of 1958 Article \_ Article 49 - Deportations, Transfers, Evacuations \_ Article 49' (ICRC, 1958). <https://ihl-databases.icrc.org/en/ihl-treaties/gciv-1949/article-49/commentary/1958>
- ICRC Indonesia, 'Protokol Tambahan I Dan II Tahun 1977 - The ICRC in Indonesia | The ICRC in Indonesia', *Hukum Humaniter/ ICRC & HHI*, 2012.
- International Committee of The Red Cross, 'IHL Treaties - Additional Protocol (II) to the Geneva Conventions, 1977', *Icrc (ICRC)*. <https://ihl-databases.icrc.org/en/ihl-treaties/apii-1977>
- Marco Sassoli and Antoine Bouvier, Anne Quintin, in collaboration with Juliane Garcia, 'Geneva Convention Relative to the Protection of Civilian Persons in Time of War', *Human Rights and the Administration of Justice*, August 1949, 2023, 579–81. [https://doi.org/10.1163/9789004637450\\_057](https://doi.org/10.1163/9789004637450_057)
- Rene, Andrew (CNN), "'Children Were Carrying Other Injured Children"\_ Witness Describes Aftermath of Israeli Strike on Gaza Refugee Camp \_ News \_ Wsiltv', Rene, Andrew (CNN) (CNN, 2023). [https://www.wsiltv.com/news/children-were-carrying-other-injured-children-witness-describes-aftermath-of-israeli-strike-on-gaza-refugee/article\\_bc982719-2fbd-51b0-bc0f-01ce823a7376.html](https://www.wsiltv.com/news/children-were-carrying-other-injured-children-witness-describes-aftermath-of-israeli-strike-on-gaza-refugee/article_bc982719-2fbd-51b0-bc0f-01ce823a7376.html)
- Schabas, William A., 'AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT', *American Journal of International Law*, 2001, 1–396. <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://catdir.loc.gov/catdir/samples/cam033/00069751.pdf>
- ICRC, 'PROTOCOLS ADDITIONAL ADDITIONAL TO THE CONVENTIONS CONVENTIONS OF 12 August 1949', August, 1949. [https://www.icrc.org/en/doc/assets/files/other/icrc\\_002\\_0321.pdf](https://www.icrc.org/en/doc/assets/files/other/icrc_002_0321.pdf)
- Tetrault-Farber, Gabrielle, 'UN Warns of Heightened Risk of Genocide and Atrocity Crimes in Ethiopia | UN News' (Tetrault-Farber, Gabrielle, 2023). <https://news.un.org/en/story/2023/10/1142142>
- The Guardian, 'Israeli Airstrikes Kill 80 in Palestinian Refugee Camp', *The Guardian*, 2023. <https://www.theguardian.com/world/2023/nov/18/israeli-airstrikes-kill-80-in-palestinian-refugee-camp>
- Treaties, ICRC: IHL, 'Additional Protocol (I) to the Geneva Conventions, 1977 - Commentary of 1987 Article | Article 47 - Mercenaries | Article 47 (Icrc.Org)'
- Trisakti, Fakultas Hukum Universitas, 'Jurnal Hukum Humaniter, Pusat Studi Hukum Humaniter Dan HAM', *Revista Brasileira de Linguística Aplicada*, 5.1 (2016), 1689–99. <https://revistas.ufrj.br/index.php/rce/article/download/1659/1508%0Ahttp://hipatiapress.com/hpjournals/index.php/qre/article/view/1348%5Cnhttp://www.tandfonline.com/doi/abs/10.1080/09500799708666915%5Cnhttps://mckinseysociety.com/downloads/reports/Educa>