

# LEGAL PROTECTION OF PALESTINIANS FROM HUMANITARIAN LAW PERSPECTIVE



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**B011201386**



**UNDERGRADUATE STUDY PROGRAM IN LAW  
FACULTY OF LAW  
HASANUDDIN UNIVERSITY  
MAKASSAR  
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**TITLE PAGE**

**LEGAL PROTECTION OF PALESTINIANS FROM  
HUMANITARIAN LAW PERSPECTIVE**

Submitted as One of the Requirements to Achieve a Bachelor's Degree In  
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Compiled and submitted by:

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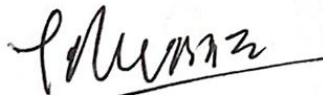
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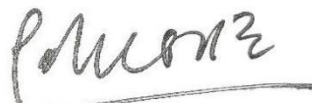
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I declare that the thesis entitled **LEGAL PROTECTION OF PALESTINIANS FROM HUMANITARIAN LAW PERSPECTIVE** is truly my own work. Anything that is not my work in writing this thesis is given a citation mark and shown in the bibliography. If in the future it is proven that my statement is not true, I am willing to accept sanctions in accordance with the regulations of the Minister of National Education of the Republic of Indonesia Number 17 of 2010 and applicable laws and regulations.



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## RESEARCH FOREWORD

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making of this final project that the researcher cannot write down  
one by one.

## **ABSTRACT**

**BRESTELYSIA WARDANA TANGALAYUK (B011201386). *Legal Protection of Palestinians from Humanitarian Law Perspective.* Supervised by Abdul Maasba Magassing and Kadaruddin.**

*This research aims to determine of the legal protection of Palestinians from humanitarian law perspective.*

*The type of research used is normative juridical legal research conducted based on primary legal materials by examining theories, legal principles and laws and regulations*

*The research results show that the violation of the Israel-Palestinians war violate international humanitarian law, including of Palestinians government's strategy to protect civilians. With this research of Legal Protection of Palestinians from Humanitarian Law Perspective, in the application of international humanitarian law, it can be considered and concluded that international humanitarian law remains useful and applicable. From any point of view, if we compare it with the perspective of International Humanitarian Law, it is clear that Israel violated the existing provisions from the beginning.*

*From the perspective of humanitarian law, war is an unavoidable reality so that humanitarian law tries to regulate so that a war can be carried out by taking into account humanitarian principles or humanizing war. The main purpose of humanitarian law is to provide protection and assistance to those who suffer/become victims of war, both those who actively participate in hostilities and those who do not participate in hostilities.*

*Keywords: Legal Protection, Humanitarian Law, War, Genocide*

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## CHAPTER I

### PRELIMINARY

#### 1.1. Background

War is one of the most feared things by everyone because of the impact it produces, not only physical losses, but also spiritual losses. The victims of war are not only military or soldiers (combatants), but also the civilians, including women and children, who are generally outside the realm of the conflict environment. For decades, some territories have committed aggression against other countries. The application of International Law, many countries build relationships with other countries to establish good relations. The main purpose of countries in the world is to establish international relations, in order to fulfill the national interests of the country concerned. In building relationships between countries, there are often conflicts in fulfilling the national interests of each country, where the conflicts that occur more exclusively concern state sovereignty. Whether it is a conflict or dispute that can be resolved by diplomacy.

As for the history of war as well as human history, war is actually a large-scale killing between warring parties. War is also a form of human instinct for self-preservation, both in relations between humans and in relations between nations or countries. As Morgenthau emphasized in his classic work, he asserted that "*the urge to live, reproduce and dominate is common to everyone*". This instinct for self-preservation further gives us



the realization that a war that knows no bounds will be detrimental to humanity itself.

The purpose of war is actually to win a difference of opinion on an issue, but in the end, war itself is a problem. Various problems that occur as a result of war include the killing of civilians, violence and extermination of a particular tribe, slavery, and so on. Speaking of war, there are many more problems caused by war but there is a problem that occurs quite intensely, namely related to legal protection.

The existence of International Humanitarian Law (IHL) or the Laws of War is a very essential provision for members of the military to then be obeyed during armed conflict or war, it aims to regulate military behavior towards enemies, militias or people who do not participate in war. Conflict affects the changes and development of human life, including in the field of law. This is in accordance with the opinion that the law is created but develops in accordance with the development of society put forward by Hans Kelsen.<sup>1</sup> Similar to the opinion expressed by Cicero *ubi societas ibi ius* which means where there is society, there is law). In the sense that the law itself has been born by itself in society, and for that consciously or unconsciously there are always variables that play a role as a form and application of law.<sup>2</sup>

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<sup>1</sup> Sajipto Rahardjo, *Ilmu Hukum*, (Bandung: Citra Aditya Bakti, 2006), mold VI p. 278.

<sup>2</sup> Shidarta, *Moralitas Profesi Hukum Suatu Tawaran Kerangka Berfikir*, Refika Aditama, (Bandung 2006), p.11

International law can be defined as a set of rules and regulations that bind and regulate relations between states and other legal subjects in the life of the international community. According to J.G. Starke provides a definition of international law, as follows:

*International law may be defined as that body of law which is composed for its greater part of principles and rules of conduct which states feel themselves bound to observe, and therefore, do commonly observe in their relations with each other, and which includes also: (a). The rules of law relating to the functioning of international institutions of organisations, their relations with each other, and their relations with states and individuals; and (b). Certain rules of law relating to individuals and non-states entities so far the rights or duties of such individuals and non-states entities are the concern of the international community.*<sup>3</sup>

IHL emerged because as stated by Morris Greenspan who stated "War, like most other fields of humanity, today is regulated and contained by a body of laws".<sup>4</sup> That is, conflict is another field of human activity contained in the body of law, this is what is meant by the regulation of conflict which was originally called the Law of Conflict and then gradually developed into humanitarian law because it was felt by the international community that the word conflict was a word that was not in accordance with conscience or could be said to be hated by the majority of humanity.

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<sup>3</sup> Irwansyah, *Refleksi Hukum Indonesia*, Mirra Buana Media, (Yogyakarta 2020), p. 238.

<sup>4</sup> KGPB Haryomataram, *Pengantar Hukum Humaniter*, (Jakarta: Raja Grafindo, print II, 2005), p. 5.

The law of conflict is part of IHL and today is mostly written law. Kunz argues that the Law of Conflict is the oldest part of International Law and the first to be codified: half of the law of conflict is written law. The conflict between Israel and Palestine has been going on for a long time, this happened because of the struggle for territory as their residence. The initial conflict between Palestine and Israel occurred after World War I. At that time, Britain as the winner of World War I gave territory to the Jewish nation through the Balfour Declaration in 1917. With this agreement, Jews consider the Palestinian area to be their homeland. On the other hand, the Palestinian Islamic community considers that the British forced the establishment of a Jewish state in the Palestinian region.

The existence of the Jewish people to Palestine was due to the holocaust that occurred in the aftermath of World War II. The Holocaust was a genocide of approximately six million Jews in Europe by Nazi Germany. The document stated that Jewish immigration to Palestine was limited to 75,000 people until 1944. Where there are only 10 thousand immigrants per year or 25 thousand people in case of emergency. On May 14, 1948, the day before the British Mandate over Palestine ended, the Jewish community in Palestine declared the establishment of the state of Israel in front of 259 invitations to the museum in Tel Aviv. The day before the declaration of independence, fighting began and lasted for ten months, mostly in British Mandate territory. During the 10-month war, around 400 Palestinian villages were destroyed by Israel forces and around 760,000

Palestinian refugees fled to the West Bank, Gaza and neighboring Arab countries. In this case, the UN has also recognized that Israel's blockade of Gaza is a war crime.<sup>5</sup>

The surprise attack that was carried out at that time claimed many lives. The Israel attacks on Palestine resulted in the destruction of many homes, mosques, UN aid offices and other infrastructure. Most countries around the world, especially those that are predominantly Muslim, condemned Israel's aggression against Palestine. Even Israel's own human rights body condemned the action. IHL is a law that is part of public International Law, which regulates the procedures for fighting wars and protecting victims of war, and this theory is not widely known by the public.<sup>6</sup> There are many definitions of IHL, both put forward by experts and national and international institutions. Related to this, one of them is Humanitarian Law and Legislation has formulated the definition of IHL as "*all international principles, rules and provisions, both written and unwritten, which include the laws of war and human rights, aimed at ensuring respect for the dignity of a person*".

Hamas, in Palestine, is the acronym for harakat al-muqawamah al islamiyya (Islamic resistance movement). Hamas means spirit and courage in Arabic. Hamas is a resistance movement that has been active since the beginning of the intifada in 1987. Hamas's area of operation is

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<sup>5</sup> See [Satu Lagi Warga Palestina Tewas di Jalur Gaza \(cnnindonesia.com\)](https://www.cnnindonesia.com), got accessed December 20<sup>th</sup> of 2023.

<sup>6</sup> Kushartoyo BS, *Pengantar Hukum Humaniter* (Jakarta: PT Raja Grafindo, 2005) p. 1.

the West Bank and the Gaza Strip. Because of its consistency in carrying out a resistance against Israel, it was declared a banned movement by Israel.

Hamas was originally an action organ used to mobilize the masses in the first intifada in 1987. It was formed by Abd Al Aziz Al Rantisi (a lecturer in medicine at the Islamic University of Gaza) and two of his students (Salah Sahada and Yahya Al-Sinuwwar) who were then chairmen of the student council.

Although known as the Islamic fundamentalist movement, Hamas is very tolerant. This is evidenced by the fact that one of the legislative members is a non-Muslim. He is Hosam Al-Taweel, a Palestinian Christian who was elected from the Gaza district. Al-Taweel served as an activist in the international movement Young Men & Resque Christian Association (YMCA) for 30 years in Gaza.<sup>7</sup>

Hamas is a phenomenal movement. In the eyes of the West, Hamas is considered a radical, destructive and anti-democratic movement. So, they labeled the movement as a terrorist group. But in the eyes of Palestine, Hamas is considered a hero who consistently fights to bring Palestine out of Israeli colonization.

The intifada cannot be separated from Hamas. Because the intifada is why Hamas was born. Evidence of the persistence of Hamas resistance

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<sup>7</sup>See [https://search.jawapos.com/?index.php?act+detail\\_s&f\\_search+%20kampanye%20hama s&id+209464](https://search.jawapos.com/?index.php?act+detail_s&f_search+%20kampanye%20hama s&id+209464), got accessed on May 20<sup>th</sup> of 2024.

is the number of fighters who have become Israeli prisoners since 1989 Israel has detained thousands of Hamas members. But the detention is not an excuse and an obstacle to reduce the frequency of resistance. Die one grow a thousand, is a proverb and slogan that describes Hamas resistance in defending the territory in Gaza.

According to Rahman, the Hamas style of resistance has the first characteristic, clear in choosing the target enemy (Israel). Second, it uses small brigades. Third, it minimizes internal conflicts and concentrates on the enemy. According to Dr. Rantisi, the leader of Hamas, Hamas' resistance strategy is essentially defensive. He said, "*We want to do the same to Israel as they have done to us*".<sup>8</sup>

The presence of Hamas in Palestine is for the world to see the Palestinian issue with the right and different point of view. Dr. Rantisi when interviewed by Juergensmeyer said, "*You think we are the aggressors it is important for you to understand that we are the victims in this struggle, not the cause of it*".<sup>9</sup> So, the opinion that Hamas wants to develop is the opinion that Hamas is a fighter who defends its pride and dignity from Israeli aggression.

In theory, resolving a dispute involving various parties can be done in several ways, including peacefully, using legal channels and by using

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<sup>8</sup> Mark Juergensmeyer, *Terror in the mind of God: The Global Rise of Religious Violence*, (California: university of California Press, 2003), Revised Edition, p. 75.

<sup>9</sup> Ibid, p. 75

violence.<sup>10</sup> Peaceful dispute resolution, among others, can be done by negotiation, mediation, good offices, inquiry. Meanwhile, dispute resolution using legal channels can be carried out by arbitrate, International Court of Justice (ICJ) or other International Courts in accordance with their competence.

The International Court of Justice (ICJ) held the second hearing of a South African lawsuit about alleged genocide by Israel against Palestinians in Gaza on Friday (12/1/2024). Israel's defense team insisted on rejecting all allegations against them. South Africa says Israel's military operation in Gaza is a genocidal campaign led by the Israeli state with the aim of eliminating the Palestinian population.

Tembeka Ngcukaitobi, a South African High Court lawyer, told the ICJ that "Israel's genocidal intentions are clear" from the way the military offensive is being conducted. According to Adila Hassim, who is also representing South Africa, "every day there is an irreparable increase in the loss of life, property, dignity and humanity of the Palestinian people. She reiterated that "nothing can stop this suffering, except an order from this court".

Under IHL, the legality of war is recognized when reasons such as self-defense-right or proportional relation with the intention that both

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<sup>10</sup> Adolf Huala, *Hukum Penyelesaian Sengketa Internasional* (Jakarta: Sinar Grafikasi, 2004), p. 24.

parties can refrain from stopping greater violence.<sup>11</sup> Related to this, IHL divides the doctrine of "*just war*" into two, namely the law of war (*ius ad bellum*) and the law applicable in war (*ius in bello*). *Ius ad bellum* is the law governing how states are justified in using armed violence and the justice of the choice to go to war. Meanwhile, *ius in bello* governs the behavior of the parties involved in armed conflict.

Basically, the icrc is a neutral and independent organization that aims to ensure protection and humanitarian assistance for victims of armed conflict and other situations of violence. In particular, the icrc has the right to visit prisoners of war and civilian internees. The ICRC states that according to international law, East Jerusalem is occupied territory, and the Palestinian population is protected by Article 4 of the Fourth Geneva Convention. This is because until now Israel has detained 27 members of parliament amid peace talks mediated by four Egyptian parties. But ultimately, the Palestinian parliament has been dormant since Hamas expelled Fatah from the Gaza Strip in 2007, a year after Hamas won the parliament.

The conditions that occur at the stage of the Israel-Palestinian conflict are a genocidal conflict that has occurred around 2023 to the present. For the Jewish people, Palestine is the home of their ancestors, but the Palestinians claim the territory and oppose the unilateral claims of

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<sup>11</sup> ICRC Indonesia delegation, *Hukum Humaniter Indonesia*, Terjemahan oleh International Committee of the Red Cross 19 avenue De La Paix 1202 Geneva, Switzerland 2002, Jakarta 2008, p.30



the Jewish community until now. In 1967, Israel occupied Gaza and remained there until 2005. During this time Israel established colonies and built Jewish settlements in the area. It was only in 2005 that Israel withdrew its troops.

Basically, this prolonged conflict has claimed thousands of lives. From the data that has been obtained, from 2008 to April 2024. It is known that there were around 7,000 fatalities from the Palestinian side and 153,560 people who were injured or injured. While from the Israeli side in that period, around 308 fatalities and 6,500 people were injured or wounded. If the number of injured and dead victims is added up, over the past 16 years, there have been around 6 thousand victims from Israel and more than 153 thousand victims from the Palestinian side.<sup>12</sup>

Exactly a few years after the occupation of the land by Israel, this year military aggression occurred in the West Bank or commonly called the Palestinian Gaza Strip. Israel deployed war equipment to invade the area. Nearly 3,000 people were killed and more than 10,000 wounded on both the Palestinian and Israel sides. The Palestinian health ministry reported that around 1500 Palestinians died and more than 7000 were injured. The Israel side said about 1300 Israels were killed and about 3400 were injured.<sup>13</sup> Starting from the attack period in October to January 2024, around 24,000 Palestinians were killed due to attacks from Israel. While

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<sup>12</sup> See <https://tirto.id/konflik-israel-palestina-telan-ribuan-korban-jiwa-sejak-2008>, got accessed on 25<sup>th</sup> May 2024

<sup>13</sup> See [Akar-Akar Konflik Israel-Palestina - UIN Sunan Gunung Djati Bandung \(uinsgd.ac.id\)](https://uinsgd.ac.id), got accessed December 20<sup>th</sup> of 2023.

60,834 were injured as a result of the conflict, Anadolu Agency (AA) reports.<sup>14</sup>

The condition in Palestine territory very terrible. Israel attack Palestinians with their all armies. All of this situation we can call it the act of genocide. Genocide in the genocide convention has a specifically meaning in article II, defined genocide 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:*

- a. Killing members of the group;*
- b. Causing serious bodily or mental harm to members of the group;*
- c. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;*
- d. Imposing measures intended to prevent births within the group;*
- e. Forcibly transferring children of the group to another group.<sup>15</sup>*

Author believes in her opinion that condition has connected with the genocide because of the characteristic matched with the real condition in Palestine of course. Genocide is distinguished from other serious offense by the element of intent. For genocide, victimization of human beings is a necessary, but not the sole element. Acts directed against human beings must be committed with an intent to destroy a group to which the immediate victims belong. No matter how culpable the actor towards these

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<sup>14</sup> See [Perang Gaza: Korban Tewas Serangan Israel 24.000-Titah Baru Xi Jinping \(cnbcindonesia.com\)](https://www.cnbcindonesia.com), got accessed December 20<sup>th</sup> of 2023.

<sup>15</sup> *The Genocide Convention an International Law Analysis*, John Quigley, The Ohia State University, USA, p.10.

immediate victims, this additional element is required. The act against the immediate victims must reflect a culpable state of mind in regard to the group. Thus, genocide encompasses a dual mental element one directed against the immediate victims, and a second against the group.<sup>16</sup>

## **1.2. Research Questions**

1. Does the Israel-Palestinian war violate international humanitarian law?
2. What is the Palestinian government's strategy to protect the civilians?

## **1.3. Research Objective**

Based on the formulation of the problem above, this researcher has the following objectives:

1. To find out whether the war in Israel-Palestine violates international humanitarian law
2. To find out the Palestinian government's strategy to protect civilians

## **1.4. Research Contribution**

Research contribution for related parties are as follows:

### **1. Academics**

The usefulness for academics is as an alternative scientific material to increase knowledge about the Geneva Conference

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<sup>16</sup> *Ibid.*

Theory, especially focusing on the Palestinian-Israel region. In addition, it can be used as a supporting reference in the development and improvement of further researchers.

## **2. Practical**

So that the research that the author does can be useful for parties such as society, especially law enforcement.

## **3. Theoretical**

- a. train the ability to conduct scientific research and formulate the results of the research into writing
- b. applying the theories that have been obtained from the lecture bench and connecting them with practices in the field

### **1.5 Originality of Research**

This research has passed various stages of examination and selection, if there is a title that is almost the same as this title, but the substance and discussion will be different from the title. This research is entitled Legal Protection of Palestinians from Humanitarian Law Perspective. This research is the work of the researcher herself with input from various parties who helped for the sake of the completeness of this writing, so that it can be fully responsible for its authenticity. Quoting or taking from various works of other parties has been done by mentioning

the source as listed in the Bibliography. Research with similar topics is used as a comparison described as follows:

1. Thesis research entitled "Israeli military aggression against Palestine from the perspective of international humanitarian law", by Aryuni Yuliantiningsih, a lecturer of Jenderal Soedirman University Purwokerto in 2021. This thesis examines Israeli military aggression against Palestine by carrying out attacks blindly which are contrary to humanitarian principles. The difference with the research that the author describes in this thesis is that this paper analyzes the strategy of the Palestinian government in protecting its people, the similarities are that each still uses the perspective of international humanitarian law.
2. Thesis research entitled "International Law Review of Gross Human Rights Violations in the conflict in Syria", by Patra Kulu Tandirerung, a student of Hasanuddin University in 2012. This thesis examines the conflict in Syria that has occurred gross violations of human rights, which in this case are crimes against humanity as regulated in the ICC.

The difference with the research that the author describes, in this thesis raised related to violations of the law of war committed by Israel against Palestine. In this case the author discusses more about the overall conflict that occurred in Palestine.

## CHAPTER II

### LITERATURE REVIEW

#### 2.1. Overview of International Law

In general, international law is defined as a collection of rules and regulations that bind and regulate relations between states and other legal subjects in the life of the international community. Public international law is the entirety of legal rules and principles governing international relations or where they work is not covered.

Similarly, the violation of the criminal provisions of the Geneva Conventions of 1949 by individuals cannot be said to be an inter-state issue. On the contrary, the above issues are difficult to classify in the traditional fields of administrative law or criminal law.<sup>17</sup>

Indeed, the existence of international law presupposes, the existence of an international society, governed by the legal order. In other words, to be able to believe in the existence or more precisely the need for international law, it must first be shown that there is an international society as a sociological basis in the field of law.<sup>18</sup>

The international law of mutual need between nations in various fields of life which results in the emergence of permanent and continuous relations between nations, also results in the emergence of interests, to maintain and regulate such relations. Because the needs between nations

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<sup>17</sup> Mochtar kusumaatmadja, *Pengantar Hukum Internasional*, P.T. Alumni, (Bandung 2021), p. 2.

<sup>18</sup> *Ibid.*, p. 11.

are reciprocal, the interest in maintaining and regulating such beneficial relations is a common interest.

In the international legal system, which is a reference for sovereign states in the world, one of the sources of law is customary international law. Customary law comes from the practices of states through the attitudes and actions they take towards a problem. If a state takes a policy and the policy is followed by other states and is done many times and without any protests or challenges from other parties, then gradually a custom is formed.<sup>19</sup>

In international law, the term customary international law results from the common practice of a number of states following their legal obligations, such that it becomes customary. When that happens, it is not an obligation for a state to sign a treaty to implement the customary international law.

## **2.2. International Humanitarian Law Review**

War as one of the forced dispute resolutions should be avoided by disputing countries to resolve conflicts. This is stated in Article 2 paragraph 4 of the UN principles which determine: *all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state any other manners inconsistency with the purpose of the United Nations*. The term humanitarian law originated from the term law of war, which later became

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<sup>19</sup> Irwansyah, *Refleksi Hukum Indonesia*, Mirra Buana Media, (Yogyakarta 2020), p. 244.

the law of armed conflict and is now known as international humanitarian law.<sup>20</sup>

From the perspective of humanitarian law, war is an unavoidable reality so that humanitarian law tries to regulate so that a war can be carried out by taking into account humanitarian principles or humanizing war. The main purpose of humanitarian law is to provide protection and assistance to those who suffer/become victims of war, both those who actively participate in hostilities and those who do not participate in hostilities.<sup>21</sup>

### **2.3. Sources of International Humanitarian Law**

#### **1. Geneva Convention 1949**

Humanitarian law provides stricter limits on the use of tools and methods of war. In addition, the Martens Clause states that under any circumstances humanitarian treatment must be considered. The Geneva Law governing the protection of victims of war consists of four main treaties, namely:

- 1) Geneva Convention I concerning the improvement of the condition of wounded and sick soldiers on the ground battlefield.

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<sup>20</sup> Arlina Permanasari et al, 1999, *Pengantar Hukum Internasional*, Jakarta: ICRC, p. 1.

<sup>21</sup> Haryomataram, 2005, *Pengantar Hukum Internasional*, Jakarta: PT Rajawali Press, p. 3.



- 2) Geneva Convention II concerning the Improvement of the Condition of Wounded and Sick Soldiers on the Sea Battlefield.
- 3) Geneva Convention III on the Treatment of Prisoners of War
- 4) Geneva Convention IV concerning the Protection of Civilian Persons in Time of War.

Basically, the fate of Palestine comes from a prolonged conflict that has been going on for a long time. Israel's occupation of Palestine violates international law. According to Retno, "any support or recognition of Israeli policies or practices that impede the right of the Palestinian people to self-determination is unlawful".<sup>22</sup> The main points that underpin Geneva Convention IV.

In addition to the aforementioned regulations, humanitarian law recognizes the principles of humanitarian law that must also be considered when conducting war. The main principles in humanitarian law consist of:<sup>23</sup>

- 1) The principle of military necessity, meaning that the parties to the dispute are justified in using force to subdue the opponent in order to achieve the goals and success of the war.

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<sup>22</sup> See Pemenuhan hak Palestina yang menentukan nasib sendiri adalah kewajiban - ANTARA News, got accessed on 27th May 2024.

<sup>23</sup> Arlina Permanasari, *op.cit*, p. 11

- 2) Humanity based on this principle, disputants are required to pay attention to humanity, where they are prohibited from using violence that can cause excessive injury and unnecessary suffering.
- 3) The principle of chivalry. This principle means that in war, honesty must be prioritized. The use of dishonorable means, various kinds of trickery and treacherous methods are prohibited.

In the event of a violation of humanitarian law there are three alternative enforcement mechanisms that can be taken, to punish the perpetrators of war crimes, namely:<sup>24</sup>

- 1) According to the 1949 Geneva Conventions and the 1977 Additional Protocols Pursuant to article 49, paragraph 1 of the 1949 Geneva Conventions, a State that has ratified the Geneva Conventions must enact national legislation that provides for effective criminal sanctions against any person who commits or orders the commission of a grave breach of the Conventions.
- 2) Ad hoc war crimes tribunals Historically, there have been two tribunals that tried World War II criminals, namely, the Tokyo Tribunal to try Japanese war criminals and the Nuremberg Tribunal to try Nazi German war criminals. After World War II,

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<sup>24</sup> Arlina Permanasari, *op.cit*, p. 181

the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda were established.

- 3) Through the International Criminal Court (ICC) The ICC was established by the 1998 Rome Statute. It is a permanent court to try the most serious crimes. The ICC is authorized to prosecute four types of crimes, namely: genocide, crimes against humanity, crimes of war and crimes of aggression.<sup>25</sup>

## **2. Additional Protocols I 1977**

Chapter IV of Additional Protocol (AP) I of 1977 deals with the civilian population. Article 50 of (AP) I of 1977 expressly distinguishes between civilians and civilian populations. Article 48 stipulates: parties to a dispute shall distinguish between civilian populations and military targets, and shall therefore direct their operations against military targets only.

In this case we can read in the provisions of Article I of protocol II 1977 which reads as follows:

- a. Article 1 (1). "This Protocol, which regulates and supplements Article 3 of the Geneva Conventions of 1949 without modifying the terms of its application, shall apply to all armed conflicts not provided for in Article 1 of Additional Protocol I of 1977 and to all armed conflicts occurring within the territory of

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<sup>25</sup> Arie Siswanto, 2005, *Yurisdiiksi Material Mahkamah Pidana Internasional*, Jakarta: Ghalia Indonesia, p. 45.

a state party to the Protocol, between the armed forces of that state and defector forces or other organized armed groups, which have leaders responsible for their men, exercise control over part of the state's territory and can carry out continuous and simultaneous military operations and can implement this Protocol.

- b. Article 1 paragraph (2). "This Protocol does not apply to situations of domestic violence and tension, such as riots, isolated and sporadic acts of violence, and other similar acts of violence, which do not constitute armed conflict".

Broadly speaking, the regulation of civilian objects that may not be attacked during a conflict is contained in:

1. Buildings of religion, art, science, historical monuments, hospitals (places of care for the wounded and sick), Article 27 Hague Convention IV 1907.
2. Port, city, village, dwelling, or building. Article 1 Paragraph (1) Hague Convention IX 1907.
3. Foodstuffs, agricultural areas producing foodstuffs, crops, livestock, drinking water installations and supplies. Article 54 Paragraph (2) of Additional Protocol I 1977.
4. Waterworks, natural environment. Article 55 of Additional Protocol I 1977.

In armed conflict, civilians and civilian objects are not spared from the targets of the conflict, against civilian objects usually the following things happen:

1. The destruction of public facilities such as hospitals, schools, places of worship, legal institutions, and others.
2. The destruction of sources of survival for civilians, such as food sources, drinking sources, electricity sources, and others.

Article 53 provides for the protection of cultural objects and shrines. Protection of objects necessary for the survival of the civilian population is provided for in article 54. Parties to a conflict are prohibited from starving civilians to death as a means of waging war. Article 56 stipulates the protection of dams, dykes, power stations shall not be subjected to war.

### **3. Den Haag Convention 1899**

The main sources of humanitarian law are the law of Den Haag and the Law of Geneva. The law of Den Haag consists of the 1899 and 1907 Den Haag conventions on the means and instruments of war. The 1899 Den Haag Convention consists of 3 conventions of three declarations, including convention II on the laws and customs of war on land and a declaration of prohibition of the use of projectiles that cause choking and poisonous gases to be prohibited. Meanwhile, the 1907 Den Haag convention consists of 13 conventions. The

conventions in question include convention III on how to start hostilities and convention IV on the laws and customs of war on land. Convention IV is often referred to as the Hauge Regulation (HR). The HR provides stricter restrictions on the use of tools and methods of war. In addition, there is the Martens Clause, which in theory states that under any circumstances humanitarian treatment must be considered.

#### **4. Convention of Montevideo**

The occurrence of a conflict between Palestine and Israel attracts public attention, including attracting the attention of several countries to issue statements on the conflict that occurred. Some countries positioned themselves on the side of Israel and some countries positioned themselves on the side of Palestine.

In accordance with the context of the Montevideo Convention, there is the involvement of several countries in the conflict that occurred, the involvement of several countries expressed their attitude by issuing a condemnation of the State of Israel, and there are several countries expressed their attitude by stating that Palestine must be independent.

Countries that issued a condemnation to stop attacking Palestine are Qatar, South Africa, Turkey, Saudi Arabia and China. Countries that state that Palestine must be fully independent in accordance with the context of the Montevideo Convention are Indonesia and Iran.

The state as a subject of international law must have qualifying elements that provide a definition or understanding of the state as well as the elements of state formation.<sup>26</sup> According to article 1 of the 1993 Montevideo convention, the elements that comprise a state are:

1. Permanent residents

People or society is the most important element in the formation of a state. When discussing a state, what is actually being discussed is human society, so the existence of humans is a must, and humans are in the form of community groups. The formation of community groups because humans in reality are social creatures (*zoon politicon*), as Aristotle argued. Social life is a group that has ideas and ideals and the desire to unite.

In general, the population of a country consists of 2 (two) typologies. First, the population that is a citizen in each country is the majority of the population, where the population is permanently within the territory of the country concerned and has a special and reciprocal relationship with the country. Second, non-citizens are foreigners or people who are not citizens of the country concerned or there are also people who do not have the status of citizenship (Stateless). Likewise, International Law does not regulate the minimum and maximum number of residents that are a condition for the establishment of a state.

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<sup>26</sup> Suryo Sakti Hadiwijoyo, 2011. *Perbatasan Negara Dalam Dimensi Hukum Internasional*, Yogyakarta: Graha Ilmu, p. 3.

## 2. Definite territory

A definite area is an area that functions as a place for its inhabitants to live. An area can be said to be certain or fixed if the area already has clear boundaries that are outlined through demarcation and delineation of territorial boundaries.

The definition of territory is a space that includes land, sea and airspace. Airspace includes space in accordance with the boundaries of land and sea territory. Land territory is an area that has been authorized and confirmed by clear boundaries into state territory. The sea area is the water area close to the coast. The state occupies a territory with certain boundaries that are considered the main essence of a state.

## 3. Sovereign government

People who inhabit or live in an area, live by organizing themselves which is then referred to as a state. In order to regulate the use and security of the territory and to regulate the relationship between society and the territory in order to regulate and foster order in society, it is necessary to have a power. This power is held and exercised by the state government. The government and state representatives to exercise state power in order to achieve a state goal.

According to Mochtar Kusumaatmadja, sovereignty is an essential characteristic of the state where the state is sovereign,



but has its limits, namely the space for the exercise of supreme power which is limited by the boundaries of the state's territory, outside its territory, the state no longer has such power. Sovereignty is not seen as something round and intact, but within certain limits it is subject to restrictions in the form of international law and the sovereignty of other fellow states.<sup>27</sup>

#### 4. Ability to establish relations with other countries.

The rapid development of the international community provides a new dimension in international law that has provided implementation guidelines in the form of international conventions in the implementation of this relationship. The provisions of these conventions then become the basis for countries in carrying out their relations with other countries in the world.

A state, to be referred to as a subject of international law, refers to Article 1 of the Montevideo (Pan American) Convention on Rights and Duties of State in 1933, which reads as follows: *"The state as a person of international law should progress the following qualifications: (a) a permanent population; (b) defined territory; (c) government; and (d) capacity to enter the relations with other states."*

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<sup>27</sup> Mochtar Kusumaatmadja, 1982. *Pengantar Hukum Internasional*, Buku 1-Bagian Umum, Bandung: Bina Cipta, p.15.

In connection with the above, international relations are needed by a country in order to interact with other countries. These interactions must be fostered based on the principle of equal rights of self-determination by not interfering in a country's domestic affairs, as stated in Article 1 paragraph (2) of the UN Charter, namely:

*"Develop friendly relations among nations based on respect for the principles of equal rights and the right to self-determination, and take other measures to strengthen universal peace."*

Initially, the conduct in diplomatic relations between states was based on the principle of custom adopted by the practices of the state in which the principle of custom developed, including property, representative premises, and diplomat communications.

Immunities and privileges for foreign representatives in a country can essentially be classified into three categories, namely:

1. The immunity includes the inviolability of diplomats and their residences and property.
2. The privileges or concessions given to diplomats are exemptions from paying taxes, customs, social security and personal allowances.
3. The immunities and privileges granted to diplomatic representatives not only concern the inviolability of the

foreign representative's premises in a country including archives and freedom of communication, but also exemption from any taxation from the receiving country.<sup>28</sup>

## **5. Genocide Convention**

The crime of genocide is a result of international efforts to deal with a phenomenon that has plagued the international community. In 1947 and 1948, the UN worked along two tracks to protect human rights. One track aimed at getting state in purpose to observe rights in their treatment of individuals. This task was complex, since it required defining a broad range of rights. As a preliminary step to an aspirational document. This became the Universal Declaration of Human Rights (UDHR), adopted by the UN General Assembly on 10 December 1948.

In this context, the term of “genocide” appeared for the first time in a formal document. The UN General Assembly adopted a resolution asking the UN Economic and Social Council, which was responsible under the UN structure for human rights, to draft a treaty on “the crime of genocide”.

Raphael Lemkin conceived the term to include not only an aim of physically destroying a group, but also an aim of forced assimilation, he was written,

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<sup>28</sup> Sumaryo Suryokusumo, 2005. *Hukum Diplomatik Teori dan Kasus*, Bandung: PT Alumni, p.71.

*“Genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation. .... Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group.”<sup>29</sup>*

In the 1948 genocide convention in the article, genocide is any act committed with the aim of destroying in whole or in part, aimed at certain nationalities, ethnicities, flavors or religious groups. In the crime of genocide, the element of intent is emphasized. Whereas in crimes against humanity, the element of intent is not included.

The act of (deliberate) destruction is within the elements of genocide. However, in crimes against humanity, the form of action is an attack that is carried out systematically. The crime of genocide is also not directed exclusively at the civilian population, but rather emphasizes nationality, race, ethnicity and religion. This is what distinguishes crimes against humanity, which emphasize the civilian population as the target of their crimes.

Genocide according to Article 8 of the Law is any act committed with the intent to destroy or annihilate all or part of a national group, race. ethnic group, religious group, by means of:

- a. killing group members
- b. causing severe physical or mental suffering to members of  
the group

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<sup>29</sup> John Quigley, 2006, *The Genocide Convention: an International Law Analysis*, Ashgate Publishing Limited, p.9.

- c. groups that will result in physical destruction in whole or in part
- d. impose measures aimed at preventing births within the group
- e. forcibly removing children from certain groups

Although international law prohibits war crimes, crimes against humanity and genocide through various forms of international treaties (conventions, protocols, rules, standards, etc.) and norms of customary international law, effective enforcement to hold individuals accountable for these violations has yet to materialize in the global order.

#### **2.4. History of Israel-Palestinian Conflict**

The existence of the State of Israel is still a controversial dispute. But apart from the different contexts of assessment, the state of Israel itself has always experienced an unsolvable dilemma. The problem is not only related to one aspect, not only ideology, but also political conditions that contribute to the formulation of political policies towards Palestine. In terms of ideology, the core and roots of Israel's dilemma actually lies in one of two very difficult realities, namely abandoning the identity of the State of Israel which is ideologically based on Zionism because of the existence of new internal realities both among Jews and Israelis themselves and within the Palestinian people, or meeting the demands for recognition of Palestinian independence.

Faced with a choice that is both like the fruit of the malachite, Jewish society and the State of Israel face an extremely difficult social, religious and political crisis. Eating the first malachite means abandoning the *raison d'être* of Israel's existence. While taking the second malachite means taking the path of peace that leads to the establishment of an independent Palestinian State, as the late Prime Minister Yitzhak Rabin did through the Oslo Accords and the peace framework that Prime Minister Ehud Barak tried to pursue in the summit formula (Camp David II Summit).

In a more specific study, show an increase in radicalization and fundamentalization occurring not only among Palestinian "*fighters*", but also among Israelis. This trend in turn cannot be separated from the increasing symptoms of a global "*religious awakening*", which has swept almost all religions ranging from Christianity, Judaism, Islam, Hinduism and others. The spirit of fundamentalization and radicalization can be seen in the rapid growth among the Jewish people of what is called New Zionism, which questions the issue of "*identity*". The issue of identity was deliberately not addressed when Israel was proclaimed in 1948, as it was highly controversial. The ideological fragmentation then developed and impacted Israel's political life. Israel's domestic political problems will ultimately greatly affect the formulation of Israel's political policy towards Palestine. Politically, there are two major groups in Israel society, related to the way they view the Palestinian issue.

The first camp is the pragmatic Israel camp, which views Palestinian-Israel peace as a strategy to realize the interests (short-term, intermediate and long-term) and security of Israel. So that in an effort to realize these goals Israel must be willing to pay the appropriate political price. According to this camp, the Palestinian-Israel conflict has a touch of morals, humanity, and rights in the context of the relationship between the occupier and the colonized people that must be considered. This group in the Israel party-political scene is incorporated in the Israel Labor Party (*Mifleget Ha'avoda Ha-Israelit*).

The second camp is the Israel idealist camp, which sees Israel's strength as a guarantee of its security and interests. According to this camp, peace brings benefits, but the political price must be reduced as little as possible, especially since Israel has a far more modern military advantage over all Arab countries. This group was later organized into the Likud Party.

However, the Zionist movement was able to achieve, it was declared on Balfour Declaration in 1917 that British government decided to support of a home for the Jews people in Palestine, which is paved the way for Jewish immigration to Palestine, then the plan to establish the state for them in it. The Balfour Declaration constituted a gross violation of the principles of international law. It paved the way for the attack on the Palestinian people and the occupation of their land by military force and granting it to strangers, which constituted direct aggression and a war

crime. By adopting the British Mandate of Palestine in 1922, the Balfour Declaration was given the force of binding law, as the Mandate Deed was formulated in such a way that most of its articles favor the establishment of a Jewish national home in Palestine. Given the small space, we can mention a part of the preamble to the Mandate Deed and then its most prominent articles:

*“Whereas the Principal Allied Powers have also agreed that the Mandatory should be responsible for putting into effect the declaration originally made on November 2<sup>nd</sup>, 1917, by the Government of his Britannic Majesty, and adopted by the said Powers, in favour of the establishment in Palestine of a national home for the Jewish people...”*

But despite the differences in terms of the perspective of conflict resolution, they still have common ground in the principle of the so-called Israel red line, namely that Israel will not return to the 1967 borders, there is no full Palestinian sovereignty over the Al Aqsa Mosque complex, and there is no right of return for Palestinian refugees. In addition to internal Israel factors that tend to hinder peace efforts, there are several factors causing the Palestinian-Israel conflict, namely; Strengthening Israel's position because it is always supported by the United States and the European Union, the emergence of extreme figures in Israel who are increasingly aggressive and confrontational. On the other hand, the Palestinian position is becoming weaker due to the weakening unity of the Arab nations, as well as internal conflicts within the Palestinian body itself.



Palestine represents a strategic and vital geographical area, which is why it has always been coveted by the colonial powers. Palestine is one of the oldest countries in the history of mankind, as man lived in it since the early ages, and several civilizations were built on it, as well as it was ruled by many empires. That is why the Palestinian people are considered one of the oldest peoples.

The reasons that led to the establishment of the State of Israel are due to two main factors, the emergence of the Zionist movement in Europe, and the recommendation of the Campbell-Bannerman conference that held between the European colonial powers. The Zionist movement emerged as a result of the growing Western hatred of the Jews, and its goal was to establish a homeland for the Jews to get rid of Western oppression for them.<sup>30</sup>

In this regard, the British government supported the establishment of a national homeland for the Jews in Palestine by imposing its mandate on Palestine, which aimed to gather the Jews in Palestine and establish a state for them there. Consequently, the interests of the Zionist movement were linked to the interests of British colonialism, which made the British government support the Zionist project in Palestine, thus establishing its influence in the Middle East and dismantling the Ottoman Empire. However, the British Mandate Deed contradicted the text of Article 22 of

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<sup>30</sup> Abdelrahman M. Alasttal, *Historical Palestine between the True Reasons behind the Establishment of the State of Israel and the Correct Concept of the Question of Palestine*, International Journal of Law and Politics Studies,

the League of Nations Covenant. On the other hand, modern medical studies have revealed that the origins of the current Jews do not go back to the descendants of the Prophet Israel (Jacob), who stayed for a period in ancient Palestine. Moreover, archaeological and historical discoveries in Palestine, as well as a European court ruling in this regard, have shown that the historical arguments and religious narratives invoked by the Zionist movement are completely inconsistent with the facts and facts on the ground in Palestine.<sup>31</sup>

United Nations (UN) adopted several mechanisms to monitor human rights violations, also violation of humanitarian international law, and contribute to protecting them from these violations. All of that mechanisms include conducting studies and making recommendations to enhance the implementation of human rights, issuing periodic reports on the human rights situation as well as creating Complaint Procedures.

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<sup>31</sup> Abdelrahman M. Alasttal, *Palestine between Reasonableness of Zionist Claims and the Legitimacy of the British Mandate*, International Journal of Law and Politics Studies, p.8.