

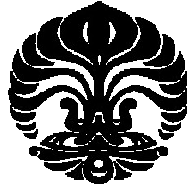
UNIVERSITAS INDONESIA

**HAK PENDUDUK SIPIL ATAS BANTUAN KEMANUSIAAN
DALAM KONFLIK BERSENJATA DAN PERLINDUNGAN
TERHADAP KAPAL BANTUAN KEMANUSIAAN: ANALISIS
TERHADAP PENYERANGAN KAPAL MAVI MARMARA**

SKRIPSI

**ADHININGTYAS SAHASRAKIRANA DJATMIKO
0706276614**

**FAKULTAS HUKUM
PROGRAM STUDI ILMU HUKUM
KEKHUSUSAN HUKUM TENTANG HUBUNGAN
TRANSNASIONAL
DEPOK
JULI 2011**



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**Diajukan Sebagai Salah Satu Syarat untuk Memperoleh Gelar
Sarjana Hukum**

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0706276614**

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PROGRAM STUDI ILMU HUKUM
KEKHUSUSAN HUKUM TENTANG HUBUNGAN
TRANSNASIONAL
DEPOK
JULI 2011**

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Tanda Tangan : 

Tanggal : 8 Juli 2011

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Telah berhasil dipertahankan di hadapan Dewan Penguji dan diterima sebagai bagian persyaratan yang diperlukan untuk memperoleh gelar Sarjana Hukum pada Program Studi Ilmu Hukum Fakultas Hukum, Universitas Indonesia

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KATA PENGANTAR

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Depok, Juli 2011

Penulis

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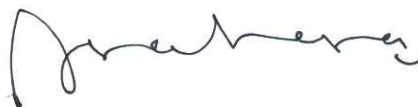
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ABSTRAK

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Judul Skripsi : Hak Penduduk Sipil atas Bantuan Kemanusiaan dalam Konflik Bersenjata dan Perlindungan terhadap Kapal Bantuan Kemanusiaan: Analisis terhadap Penyerangan Kapal Mavi Marmara

Skripsi ini membahas mengenai pengaturan dan perlindungan penduduk sipil serta bantuan kemanusiaan menurut hukum internasional, dan juga secara spesifik membahas tentang perlindungan terhadap kapal sipil yang membawa bantuan kemanusiaan di laut bebas. Analisis akan dilakukan terhadap penyerangan kapal Mavi Marmara oleh Israel, di mana Israel dinilai telah melanggar sejumlah ketentuan dalam hukum hak asasi manusia, hukum humaniter internasional, serta hukum laut. Skripsi ini menggunakan pendekatan kualitatif. Pada akhirnya, skripsi ini berusaha menggarisbawahi pentingnya akses penduduk sipil dalam daerah konflik bersenjata terhadap bantuan kemanusiaan dan perlindungan yang harus diberikan terhadap bantuan kemanusiaan tersebut.

Kata kunci : bantuan kemanusiaan, penduduk sipil, laut bebas, Mavi Marmara

ABSTRACT

Name : Adhiningtyas Sahasrakirana Djatmiko
Study Program : Ilmu Hukum
Title : Civilians Rights of Humanitarian Assistance in Armed Conflict and the Protection of Ships Carrying Humanitarian Asssistance: An Analysis of Mavi Marmara Attack

This thesis studies the provision and protection of civilians and humanitarian assistance under international law. This thesis also specifically discusses the protection of civilian ships carrying humanitarian assistance in high seas. Further analysis will be conducted with regard to Israel's attack to MV Mavi Marmara, where Israel is considered to violate human rights law, international humanitarian law, and the law of the sea. This thesis uses qualitative approach. In conclusion, this thesis attempts to underline the importance of civilians' access to humanitarian assistance in armed conflict and the protection that must be given to such humanitarian assistance.

Keywords : humanitarian assistance, civilians, high seas, Mavi Marmara

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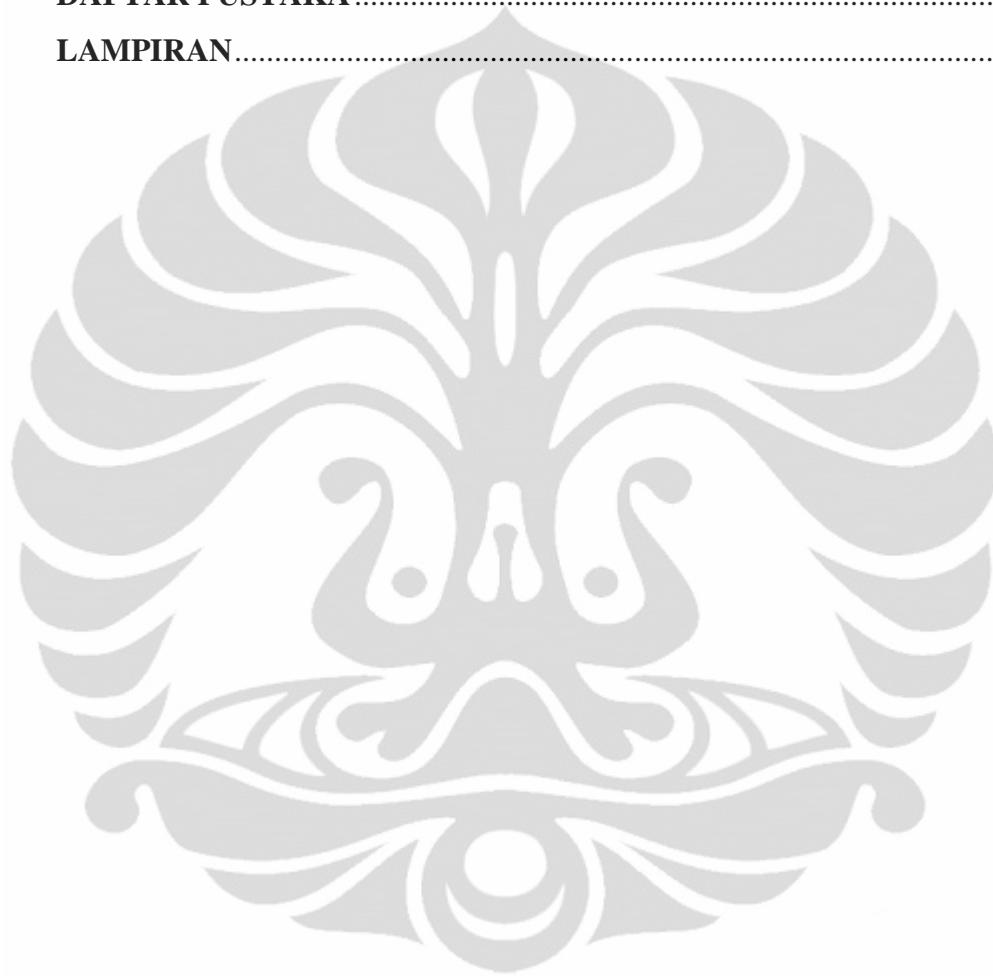
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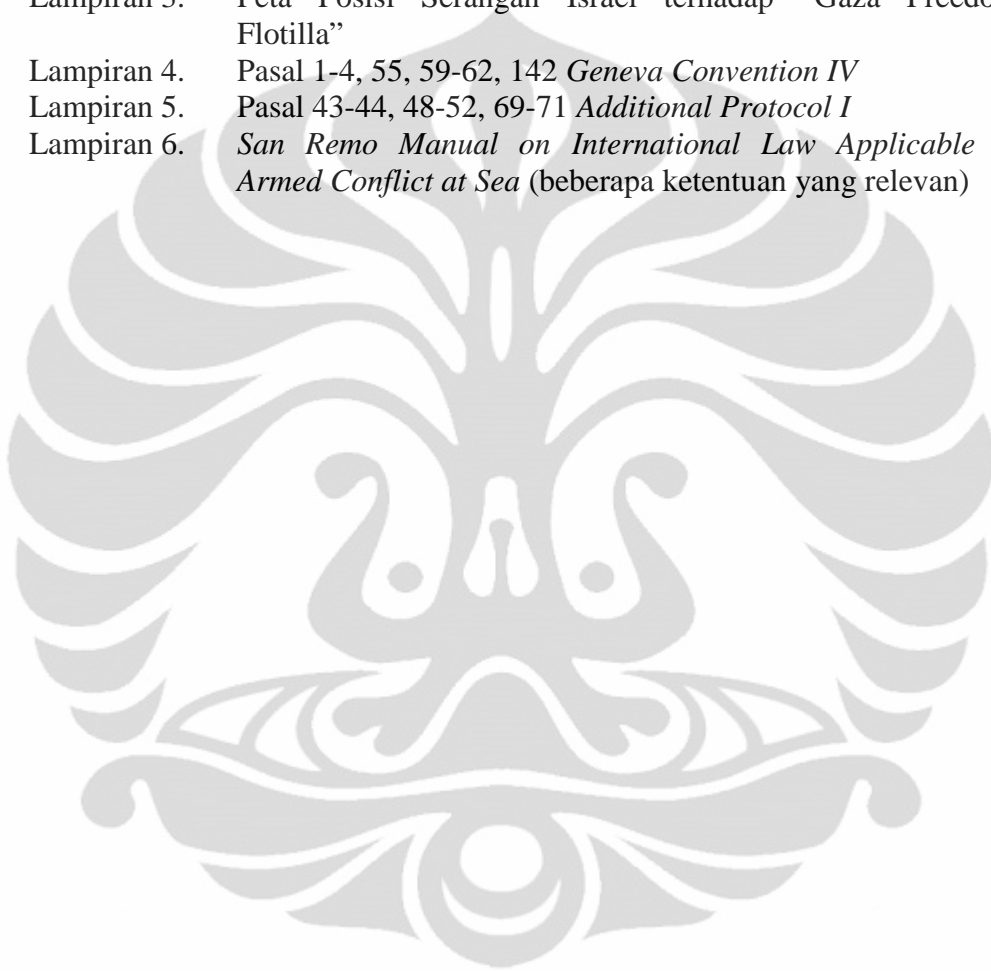
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BAB 1 PENDAHULUAN

1.1.Latar Belakang

Tidak dapat dipungkiri, perang telah menjadi bagian dalam sejarah manusia sejak zaman dulu. Pada abad ke-20, dunia telah mengalami 2 kali perang dunia. Perang-perang lain yang memberikan dampak luas antara lain adalah Perang Vietnam, Perang Korea, dan Perang Teluk. Bahkan di penghujung abad 20 sekalipun, masih terdapat konflik-konflik bersenjata dan perang, seperti yang terjadi di Rwanda dan Bekas Yugoslavia. Selain itu, tentu dunia tidak dapat begitu saja menutup mata terhadap keberadaan konflik bersenjata yang masih belum menemukan titik penyelesaian sampai saat ini, seperti konflik Israel-Palestina.

Perang atau konflik bersenjata¹ itu sendiri pada umumnya terbagi menjadi dua. Yang pertama adalah konflik bersenjata internasional (*international armed conflict / IAC*) dan yang kedua adalah konflik bersenjata non-internasional (*non-international armed conflict / NIAC*).² Dalam konflik bersenjata, terdapat seperangkat hukum khusus yang berlaku, yakni hukum humaniter internasional. Hukum humaniter internasional pada awalnya berkembang sebagai hukum kebiasaan, namun kemudian hukum humaniter internasional ini juga berkembang dalam bentuk hukum perjanjian internasional.³ Adapun instrumen-instrumen perjanjian internasional tersebut antara lain adalah:

¹ Jean S. Pictet berpendapat bahwa istilah “konflik bersenjata” (*armed conflict*) seharusnya lebih digunakan daripada istilah “perang” (*war*), karena istilah “konflik bersenjata” lebih umum dan dapat pula mencakup perang. Lihat Jean S. Pictet, ed., *Commentary to the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Jenewa: International Committee of the Red Cross, 1958), hal. 20.

² International Committee of the Red Cross (ICRC), “International Humanitarian Law and International Human Rights Law : Similarities and Differences,” www.ehl.icrc.org/images/resources/pdf/ihl_and_ihrl.pdf, diunduh tanggal 16 April 2011.

³ Mochtar Kusumaatmadja, *Konvensi-konvensi Palang Merah Tahun 1949 Mengenai Perlindungan Korban Perang* (Binacipta, 1979), hal. 9.

- *1949 Geneva Conventions*, yang terdiri dari:
 1. *Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (“*Geneva Convention I*”);
 2. *Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (“*Geneva Convention II*”);
 3. *Geneva Convention (III) Relative to the Treatment of Prisoners of War* (“*Geneva Convention III*”);
 4. *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War* (“*Geneva Convention IV*”).
- *Additional Protocol for the 1949 Geneva Conventions*:
 1. *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict* (“*Additional Protocol I*”)
 2. *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts* (“*Additional Protocol II*”).
- Konvensi hasil rangkaian *International Peace Conference*, yakni:
 1. *1899 Hague Convention*
 2. *1907 Hague Convention*.

Meskipun hukum humaniter internasional berlaku secara khusus dalam konflik bersenjata, bukan berarti hukum hak asasi manusia berhenti diberlakukan. Pengaturan hukum humaniter internasional tidak dapat dipisahkan dari hukum hak asasi manusia. Meskipun mengambil segi yang berbeda, baik hukum humaniter internasional maupun hukum hak asasi manusia sama-sama bertujuan untuk melindungi hidup manusia.⁴ Peter van Dijk memberikan penjelasan bahwa hak asasi manusia, sebagai bagian dari hukum internasional, paling tidak dimulai dari pengakuan hukum humaniter internasional, yang bertujuan memberikan jaminan

⁴ ICRC, “International Humanitarian Law and International Human Rights Law.”

penghormatan terhadap manusia serta membatasi kerugian dan penderitaan manusia akibat peperangan.⁵ Dari pendapat ini dapat ditarik kesimpulan bahwa bahkan dalam situasi konflik bersenjata sekalipun, hak asasi manusia tetap diakui.

Pengaturan mengenai hukum hak asasi manusia diatur dalam berbagai instrumen hukum internasional seperti *International Covenant on Civil and Political Rights* (“ICCPR”), *International Covenant on Economic, Social, and Cultural Rights* (“ICESCR”), *Universal Declaration of Human Rights* (“UDHR”), dan tersebar pula di berbagai instrumen lainnya. Konsep hukum hak asasi manusia memang bersifat dinamis dan dapat berubah atau meluas seiring perkembangan zaman, namun penting untuk menjaga esensi perlindungan dalam konsep tersebut agar tetap sama.⁶ Menurut ranah hukum hak asasi manusia, hak-hak yang harus dilindungi tersebut termasuk hak untuk hidup, hak untuk bebas, hak untuk tidak disiksa, hak atas keamanan, dan lain-lain.⁷ Meskipun terdapat beberapa penyesuaian, hak-hak tersebut pada umumnya tetap harus dihormati dan dijunjung pada saat konflik bersenjata.

Dengan demikian, pada intinya hukum hak asasi manusia dan hukum humaniter internasional sama-sama berfungsi untuk melindungi manusia dan perlindungan ini tetap berlaku dalam hal adanya konflik bersenjata sekalipun. Perlindungan penduduk sipil menurut hukum hak asasi manusia maupun hukum humaniter internasional tentu merupakan hal yang esensial. Sejak konflik bersenjata pada paruh pertama abad ke-20, penduduk sipil banyak yang menderita akibat metode perang berupa blokade yang mengakibatkan minimnya persediaan barang dan jasa yang esensial bagi penduduk sipil untuk bertahan hidup.⁸

⁵ Adnan Buyung Nasution dan A. Patra M. Zen, *Instrumen Internasional Pokok Hak-hak Asasi Manusia*, ed.3 (Jakarta: Yayasan Obor Indonesia, 2006), hal. 4, mengutip artikel Pieter Van Dijk, “Hukum tentang Hak-hak Asasi Manusia” dalam *Instrumen Internasional Pokok Hak-hak Asasi Manusia*, ed.2 (Jakarta: Yayasan Obor Indonesia, 2001), hal. 3-57.

⁶ Peter Malanczuk, *Akehurst’s Modern Introduction to International Law*, ed.7 (New York: Routledge, 1997), hal. 209.

⁷ Lihat *International Covenant on Civil and Political Rights* (‘ICCPR’), ps. 6, 7, dan 9. Lihat pula *Universal Declaration of Human Rights* (‘UDHR’), ps.3 dan 5.

⁸ Heike Spieker, “The Right to Give and Receive Humanitarian Assistance,” dalam *International Law and Humanitarian Assistance: A Crosscut Through Legal Issues Pertaining to Humanitarianism* (Springer, 2011), hal. 7.

Penduduk sipil membutuhkan akses terhadap bahan-bahan makanan dan kebutuhan lainnya. Namun pada konflik bersenjata, Penguasa Pendudukan (*occupying power*) seringkali tidak memberikan akses tersebut.⁹ Padahal tindakan ini dapat mengakibatkan terlanggarnya berbagai hak-hak asasi manusia penduduk sipil.

Atas dasar alasan kemanusiaan, tentu hal ini tidak dapat dibiarkan. Salah satu upaya yang dapat diberikan adalah dengan menyalurkan bantuan kemanusiaan. Tidak ada definisi spesifik mengenai misi bantuan kemanusiaan di konvensi-konvensi hukum humaniter internasional¹⁰, namun terdapat pengaturan di *Geneva Convention IV* dan *Additional Protocol I* mengenai tindakan bantuan (*relief actions*).¹¹ Bantuan kemanusiaan meliputi tindakan memberikan barang dan jasa yang penting untuk keselamatan pihak-pihak yang terkena dampak dari konflik bersenjata.¹² Suatu Penguasa Pendudukan harus mempersilakan masuknya bantuan-bantuan yang membawa pasokan barang-barang yang esensial bagi keselamatan manusia dan melindungi bantuan kemanusiaan tersebut.¹³

Sayangnya menurut studi terakhir, tindakan kekerasan terhadap pekerja bantuan kemanusiaan (termasuk pembunuhan, penculikan, dan tindakan kekerasan lainnya) meningkat secara tajam sejak tahun 1997.¹⁴ Jumlah insiden yang dilaporkan pada periode tahun 2002 – 2005 meningkat 92 % dari insiden-insiden yang terjadi

⁹ Dalam konflik bersenjata seperti di Liberia, Pantai Gading, Kongo, Somalia, Palestina, Irak, Penguasa Pendudukan seringkali mempersulit akses penduduk sipil terhadap kebutuhan hidup yang penting seperti makanan dan yang lainnya. Lihat United Nations General Assembly Economic and Social Council, “Strengthening the Coordination of Emergency Humanitarian Assistance of the United Nations,” *UN Doc. A/58/89 – E/2003/85. General Assembly 58th Session*.

¹⁰ Knutt Dormann, *Elements of War Crime under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge: Cambridge University Press, 2003), hal. 158.

¹¹ Lihat *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict* (‘Additional Protocol I’), ps. 70.

¹² Spieker, “The Right to Give and Receive Humanitarian Assistance”, hal. 8.

¹³ *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War* (‘Geneva Convention IV’), ps. 59. Lihat pula *Additional Protocol I*, ps. 68-71.

¹⁴ Lihat Kate Mackintosh, “Beyond the Red Cross: The Protection of Independent Humanitarian Organizations and Their Staff in International Humanitarian Law,” dalam *International Law and Humanitarian Assistance: A Crosscut Through Legal Issues Pertaining to Humanitarianism* (Springer, 2011), hal. 33.

dalam periode tahun 1997 – 2001. Total tindakan kekerasan pada tenaga kerja bantuan kemanusiaan dari tahun 1997 – 2005 adalah 408 kasus, dengan 947 korban.¹⁵

Salah satu kasus penyerangan terhadap tenaga kerja bantuan kemanusiaan yang cukup menggemparkan adalah kasus penyerangan terhadap kapal Mavi Marmara di laut bebas pada tanggal 31 Mei 2010 yang juga dikenal sebagai ‘*Gaza Flotilla Raid*.’ Penyerangan terhadap kapal bantuan kemanusiaan Mavi Marmara ini tidak dapat dilepaskan dari konflik yang terjadi antara Israel dan Palestina. Israel melakukan okupasi militer lengkap di jalur Gaza pada Juni 1967 sampai pada bulan Mei 1994. Setelah itu, beberapa perjanjian perdamaian berusaha dijalankan. Namun sejak permulaan Intifada Kedua di tahun 2001, pembatasan terhadap akses di Gaza kembali dilakukan. Selanjutnya tindakan-tindakan ekonomi dan politik mulai dikenakan di jalur Gaza sejak bulan Februari 2006, menyusul kemenangan Hamas dalam pemilihan legislatif. Sementara itu, blokade laut di jalur Gaza oleh Israel dimulai pada 3 Januari 2009 dan diumumkan oleh Angkatan Laut Israel pada tanggal 6 Januari 2009.¹⁶

Legalitas dari blokade laut oleh Israel terhadap jalur Gaza ini kembali memancing perhatian. Banyak pihak dan negara mengecam blokade ini dengan alasan blokade tersebut tidak sesuai prinsip kemanusiaan.¹⁷ Berbagai upaya dilakukan untuk menembus blokade ini, baik demi tujuan kemanusiaan seperti menyalurkan bantuan kemanusiaan ke penduduk sipil di daerah yang diblokade tersebut, atau demi menggagalkan blokade Israel tersebut. Salah satu upaya untuk menembus blokade tersebut dilakukan oleh enam kapal yang tergabung dalam gerakan “Gaza Freedom Flotilla”, yang diorganisir oleh *Free Gaza Movement* dan

¹⁵ *Ibid.*

¹⁶ United Nations Human Rights Council (‘UNHRC’), “Report of the International Fact-Finding Mission to Investigate Violations of International Law, including International Humanitarian and Human Rights Law, Resulting from the Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance”, dalam *UN General Assembly Fifteenth Session (27 September 2010)*, UN Doc/ A/HRC/15/21, hal. 7-8.

¹⁷ Sebagai contoh, Nicaragua memutuskan hubungan dengan Israel, Ekuador dan Afrika Selatan memulangkan duta besar mereka, Uni Eropa dan Cina meminta dibukanya blokade Gaza, dan berbagai reaksi lain. Lihat Carol Migdalovitz, “Israel’s Blockade of Gaza, the Mavi Marmara Incident, and its Aftermath,” (laporan dibuat oleh Congressional Research Service tanggal 23 Juni 2010 untuk *Committees of Congress*), hal. 6.

Turkish Foundation for Human Rights and Freedoms and Humanitarian Relief (“IHH”).

Sesuai dengan salah satu tujuan gerakan ini, enam kapal yang membawa bantuan kemanusiaan seperti bahan kebutuhan pokok manusia, bahan-bahan konstruksi, serta uang ini bermaksud untuk menembus blokade Israel di jalur Gaza.¹⁸ Tindakan ini akhirnya memancing tindakan kekerasan dari Israel. Lima kapal (Challenger 1, Eleftheri Mesogios/Sofia, Sfondoni/ Sfondonh, Gazze 1, serta Defne Y)¹⁹ relatif tidak mendapat perlakuan kekerasan yang berarti, namun terdapat korban luka dan korban jiwa di kapal Mavi Marmara.²⁰

Kasus ini memancing protes keras dari dunia internasional²¹ dan juga menimbulkan pro-kontra. Bantuan kemanusiaan memang sudah selayaknya dilindungi. Apalagi dalam kasus penyerangan kapal Mavi Marmara ini, kapal bantuan kemanusiaan itu sedang berada di laut bebas. Menurut hukum laut, suatu kapal memiliki kebebasan untuk berlayar di laut bebas.²² Pada kasus ini, kapal Mavi Marmara dan kelima kapal lainnya adalah kapal sipil dan bukan kapal perang. Yurisdiksi di laut bebas dimiliki oleh Negara bendera kapal tersebut, sehingga pihak lain tidak dapat menyerang dengan sewenang-wenang, kecuali ada dugaan-dugaan kejahatan seperti pembajakan,²³ perdagangan narkoba dan obat-obatan terlarang,²⁴ dan lainnya.

¹⁸ Douglas Guilfoyle, “The Mavi Marmara Incident and Blockade in Armed Conflict,” http://www.ucl.ac.uk/laws/staff/docs/staffseminars/2011_guilfoyle_d.pdf, diunduh tanggal 13 April 2011.

¹⁹ UNHRC, “Report of... Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance,” hal. 19.

²⁰ Terdapat 9 korban jiwa, 23 korban luka berat, serta 31 orang luka-luka dalam penyerangan ini. Lihat Turkish Foundation for Human Rights and Freedoms and Humanitarian Relief (‘IHH’), “Palestine Our Route Humanitarian Aid Our Load Flotilla Campaign Summary Report,” (Istanbul: Turkish Foundation for Human Rights and Freedoms and Humanitarian Relief, 2010), hal. 32-33.

²¹ “Protests over Israel Gaza Aid Action,” <http://www.bbc.co.uk/news/10247762>, diunduh tanggal 17 April 2011.

²² *United Nations Convention on the Law of the Sea* (‘UNCLOS’), ps.87.

²³ *Ibid.*, ps. 107.

²⁴ *Ibid.*, ps. 108.

Selain itu, perlu juga diperhatikan bahwa penduduk sipil yang menjadi anggota dari bantuan kemanusiaan yang dibawa MV Mavi Marmara tersebut juga tetap mendapat perlindungan. Perlindungan ini meliputi perlindungan hakiki dari hukum hak asasi manusia serta perlindungan lebih khusus sebagai penduduk sipil dan bantuan kemanusiaan, sebagaimana yang diatur dalam hukum humaniter internasional.

Jadi terdapat beberapa hal yang perlu disorot dari kasus ini. Pertama-tama, perlu diperhatikan bagaimana hukum internasional mengatur mengenai pelayaran kapal sipil di wilayah laut bebas. Kemudian, perlu dipertanyakan pula legalitas dari blokade ini. Selanjutnya, seandainya blokade laut ini legal, perlu dipertanyakan apa pengaruhnya terhadap perlindungan atas kapal sipil yang sedang berlayar di laut bebas.

Penting pula untuk dijabarkan bagaimana hukum hak asasi manusia dan hukum humaniter internasional mengatur mengenai penggunaan kekuatan militer kepada para penduduk sipil yang menjadi anggota dari bantuan kemanusiaan. Sebagai pihak yang melakukan penyerangan, Israel terikat oleh seperangkat pengaturan hukum hak asasi manusia²⁵ dan hukum humaniter internasional (baik melalui perjanjian internasional seperti 1949 *Geneva Conventions*²⁶ atau hukum kebiasaan perang yang lainnya). Jadi, Israel sebagai Penguasa Pendudukan di wilayah Gaza, memiliki kewajiban menurut hukum humaniter internasional untuk tetap memastikan akses penduduk sipil terhadap bantuan kemanusiaan dan juga kewajiban untuk melindungi sedapat mungkin bantuan kemanusiaan tersebut. Tindakan kekerasan atau penyerangan dari pihak militer Israel tentu merupakan suatu kejahatan perang yang juga merupakan pelanggaran terhadap seperangkat hukum humaniter internasional dan hukum hak asasi manusia.

Israel mungkin berargumen bahwa penumpang kapal Mavi Marmara tidak mengindahkan peringatan dan melawan prajurit Israel, sehingga Israel perlu

²⁵ Israel telah meratifikasi ICCPR pada tanggal 3 Oktober 1991. Lihat http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en, diunduh tanggal 23 April 2011.

²⁶ Israel telah meratifikasi Geneva Conventions 1949. Lihat <http://www.icrc.org/ihl.nsf/Pays?ReadForm&c=IL>, diunduh tanggal 16 April 2011.

melakukan suatu tindakan bela diri (*self defense*).²⁷ Prinsip *self-defense* diakui dalam hukum humaniter internasional²⁸ maupun hukum internasional secara umum.²⁹ Meskipun begitu, perlu dipertanyakan pula apakah justifikasi-justifikasi ini dapat dibenarkan. Memang, terdapat kondisi-kondisi yang dapat mengecualikan suatu perlindungan, namun pada esensinya, bantuan kemanusiaan dalam konflik bersenjata harus dilindungi. Kajian terhadap isu-isu inilah yang perlu diteliti. Penulis akan membahas secara umum mengenai perlindungan terhadap penduduk sipil dan bantuan kemanusiaan menurut hukum hak asasi manusia dan hukum humaniter internasional dalam karya tulis ini. Kemudian, pembahasan akan lebih dikhususkan kepada persoalan bagaimana hukum internasional mengatur mengenai penyerangan kapal sipil yang membawa bantuan di wilayah laut bebas, seperti yang terjadi pada kasus penyerangan kapal Mavi Marmara oleh tentara Israel pada tanggal 31 Mei 2010. Hal-hal tersebut akan Penulis bahas dalam penulisan skripsi berjudul **“Hak Penduduk Sipil Atas Bantuan Kemanusiaan dalam Konflik Bersenjata dan Perlindungan Terhadap Kapal Bantuan Kemanusiaan: Analisis Terhadap Penyerangan Kapal Mavi Marmara.”**

1.2. Pokok Permasalahan

Yang menjadi pokok permasalahan dalam penelitian ini antara lain adalah:

1. Bagaimanakah pengaturan mengenai penduduk sipil dan bantuan kemanusiaan dalam hukum internasional?
2. Bagaimanakah perlindungan terhadap kapal sipil yang membawa bantuan kemanusiaan di wilayah laut bebas dalam konflik bersenjata?
3. Bagaimanakah implementasi hukum internasional dalam kasus penyerangan kapal bantuan kemanusiaan Mavi Marmara oleh Israel?

²⁷ Guilfoyle, “The Mavi Marmara Incident and Blockade in Armed Conflict,” hal. 3.

²⁸ Lihat *International Criminal Court Statute* (‘ICC Statute’), ps. 31 (1) (c).

²⁹ Lihat *Charter of United Nations*, ps. 51.

1.3. Tujuan Penulisan

Secara umum, penelitian ini bertujuan untuk mengetahui perlindungan menurut hukum internasional terhadap kapal sipil yang membawa bantuan kemanusiaan dan diserang di laut bebas. Secara khusus, penelitian ini bertujuan untuk:

1. Menjelaskan pengaturan mengenai penduduk sipil dan bantuan kemanusiaan dalam hukum internasional
2. Menjelaskan perlindungan apa yang dapat diberikan terhadap kapal sipil yang membawa bantuan kemanusiaan di wilayah laut bebas dalam suatu konflik bersenjata
3. Menganalisis implementasi hukum internasional dalam kasus penyerangan kapal bantuan kemanusiaan Mavi Marmara oleh Israel.

1.4. Kerangka Konseptual

Suatu kerangka konseptual merupakan “kerangka yang menggambarkan hubungan antara konsep – konsep khusus, yang ingin atau akan diteliti.”³⁰ Pada penelitian ini Penulis membatasi hal – hal berikut :

1. Bantuan Kemanusiaan meliputi tindakan memberikan barang dan jasa yang esensial untuk keselamatan para pihak yang terkena dampak bencana yang diakibatkan manusia, termasuk konflik bersenjata.³¹
2. Blokade Laut adalah tindakan suatu pihak untuk mencegah masuk atau keluarnya kapal dan/atau pesawat terbang dari setiap Negara, baik Negara musuh maupun pihak netral ke dalam suatu pelabuhan, landasan udara, daerah pantai yang dimiliki atau diduduki atau dikontrol oleh suatu Negara.³²

³⁰ Soerjono Soekanto, *Pengantar Penelitian Hukum* (Jakarta: Penerbit Universitas Indonesia, 2010), hal. 132.

³¹ Spieker, “The Right to Give and Receive Humanitarian Assistance,” hal. 7. (*Humanitarian assistance” thus comprises providing goods and services essential for the survival of those being directly affected by man-made disasters, including armed conflict.*)

³² Roger W. Barnett, “Technology and Naval Blockade: Past Impact and Future Prospects,” *Naval War College Review Volume 58 Number 3* (Summer 2005), hal. 89. (*Blockade is a belligerent operation to prevent vessels and/or aircraft of all nations, enemy as well as neutral, from entering or exiting specified ports, airfields, or coastal areas belonging to, occupied by, or under the control of an enemy nation.*)

3. Hukum Hak Asasi Manusia adalah seperangkat aturan hukum yang dibentuk baik melalui konvensi-konvensi internasional ataupun kebiasaan internasional dengan berdasar pada perlindungan dan jaminan hak-hak dasar manusia sehingga individu-individu ataupun kelompok individu dapat berharap ataupun mengajukan tuntutan terhadap pelaksanaan ketentuan tersebut.³³
4. Hukum Humaniter Internasional adalah seperangkat aturan yang dibuat untuk membatasi akibat-akibat dari pertikaian senjata karena alasan-alasan kemanusiaan. Hukum ini melindungi mereka yang tidak atau tidak lagi terlibat dalam pertikaian, dan membatasi cara-cara dan metode berperang.³⁴
5. Hukum Kebiasaan Internasional adalah kebiasaan internasional yang merupakan kebiasaan umum yang diterima sebagai hukum.³⁵
6. Kombatan adalah pihak bersenjata suatu pihak dalam konflik yang terdiri dari seluruh pihak bersenjata yang terorganisir, kelompok, dan unit di bawah komando orang yang bertanggungjawab terhadapnya, meskipun bila pihak tersebut direpresentasikan oleh pemerintah atau suatu kekuasaan yang tidak diakui oleh pihak lawan.³⁶
7. Orang-orang yang Dilindungi (*protected person*) adalah mereka yang dalam suatu sengketa bersenjata atau kejadian pendudukan, pada suatu saat tertentu dan dengan cara bagaimanapun juga, ada dalam tangan suatu pihak dalam sengketa atau kekuasaan pendudukan yang bukan negara mereka.³⁷

³³ Heribertus Jaka Triyana, "Kedudukan Individu dalam Hukum Internasional," *Mimbar Hukum Volume 18 Nomor 3* (Oktober 2006), hal. 328.

³⁴ Wahyu Wagiman, "Hukum Humaniter Internasional dan Hak Asasi Manusia," (makalah disampaikan pada Kursus HAM untuk Pengacara X, 2005 oleh Lembaga Studi dan Advokasi Masyarakat), hal. 5.

³⁵ Mochtar Kusumaatmadja dan Etty R. Agoes, *Pengantar Hukum Internasional*, (Bandung: Penerbit PT Alumni, 2003), hal. 143. Lihat pula *Statute of the International Court of Justice* ('ICJ Statute'), ps. 38 (1).

³⁶ *Additional Protocol I*, ps. 43. (*The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct or its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party.*)

1.5. Metode Penulisan

Penulis menggunakan bentuk penelitian yuridis normatif karena Penulis bermaksud “mengarahkan penelitian pada hukum positif dan norma tertulis,”³⁸ yang dalam hal ini adalah *United Nations Convention on the Law of the Sea* (UNCLOS), 1949 *Geneva Conventions* yang mengatur mengenai perlindungan di masa konflik bersenjata, *Additional Protocol I*, *Additional Protocol II*, *International Covenant on Civil and Political Rights* (‘ICCPR’), serta hukum kebiasaan yang berlaku. Penelitian ini bersifat deskriptif, karena dimaksudkan untuk memberikan data yang seteliti mungkin tentang manusia, keadaan atau gejala-gejala lainnya, untuk mempertegas hipotesa yang ada.³⁹ Penelitian ini juga akan dilakukan dengan menggunakan tipe penelitian evaluatif, dimana Penulis “memberikan penilaian atas kegiatan atau program yang telah dijalankan.”⁴⁰ Penulis memberikan penilaian atas perlindungan yang diberikan hukum internasional terhadap hak penduduk sipil pada konflik bersenjata dan perlindungan atas kapal bantuan kemanusiaan di laut bebas.

Penelitian akan menggunakan data sekunder, yaitu data yang didapatkan dari kepustakaan dengan cara membaca peraturan perundang-undangan, buku-buku, majalah, artikel, atau bahan-bahan lain yang berhubungan dengan penelitian yang dapat membantu Penulis dalam melakukan penelitian.

Bahan hukum penelitian primer meliputi peraturan perundang-undangan, yurisprudensi, perjanjian serta konvensi internasional. Dalam penelitian ini, Penulis menggunakan konvensi internasional, khususnya *Geneva Convention II* dan *IV* beserta *Additional Protocol I* dan *II*, ICCPR, serta UNCLOS. Bahan hukum sekunder meliputi rancangan undang-undang, laporan penelitian, makalah, dan buku. Dalam penelitian ini, Penulis menggunakan beberapa buku diantaranya

³⁷ *Geneva Convention IV*, ps. 4. (*Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupy ing Power of which they are not nationals.*)

³⁸ Sri Mamudji *et. al.*, *Metode Penelitian dan Penulisan Hukum* (Jakarta: Badan Penerbit Fakultas Hukum Universitas Indonesia, 2005), hal. 10.

³⁹ Soekanto, *Pengantar Penelitian Hukum*, hal. 10.

⁴⁰ *Ibid.*

adalah seperti yang telah diuraikan pada tinjauan pustaka juga jurnal-jurnal yang membahas mengenai hukum internasional, khususnya tentang hukum humaniter internasional. Bahan hukum tersier meliputi kamus, bibliografi, dan lain-lain.

Penelitian akan menggunakan studi dokumen sebagai alat pengumpulan data, di mana “studi dokumen dipergunakan untuk mencari data sekunder.”⁴¹ Studi dokumen ini bertujuan untuk mempelajari pengetahuan-pengetahuan dasar mengenai bentuk masing-masing tanggung jawab, cara aplikasi tanggung jawab dalam kasus, serta hubungan antara kedua tanggung jawab tersebut.

Penelitian menggunakan pendekatan kualitatif yang “menghasilkan data deskriptif analitis, yaitu apa yang dinyatakan oleh sasaran penelitian yang bersangkutan secara tertulis atau lisan, dan perilaku nyata”.⁴² Analisis data akan dilakukan Penulis melalui elaborasi data-data yang telah ada. Sesuai dengan tipe penelitian yang berbentuk deskriptif, maka bentuk hasil laporan penelitian ini akan berupa laporan deskriptif analitis yang memberikan data seteliti mungkin tentang perlindungan dalam hukum internasional terhadap bantuan kemanusiaan dan kapal bantuan kemanusiaan Mavi Marmara.

1.6.Sistematika Penulisan

Sistematika penulisan yang menjadi pedoman penulis untuk membuat skripsi ini adalah sebagai berikut:

BAB 1: PENDAHULUAN

Bab ini berisikan latar belakang, perumusan pokok permasalahan, tujuan penulisan, kerangka konseptual yang berisi definisi operasional, metode penulisan, dan sistematika penulisan.

⁴¹ Mamudji, *Metode Penelitian dan Penulisan Hukum*, hal. 6

⁴² *Ibid.*, hal. 7.

BAB 2: PENGATURAN DAN PERLINDUNGAN ATAS PENDUDUK SIPIL SERTA BANTUAN KEMANUSIAAN MENURUT HUKUM INTERNASIONAL

Pada bab ini, akan dibahas mengenai perlindungan yang diberikan kepada penduduk sipil secara umum dan bantuan kemanusiaan secara lebih khususnya. Pembahasan akan dilakukan untuk mengetahui perlindungan bagi keduanya dalam rezim hukum hak asasi manusia dan hukum humaniter internasional.

BAB 3: PERLINDUNGAN TERHADAP KAPAL SIPIL YANG MEMBAWA BANTUAN KEMANUSIAAN DI WILAYAH LAUT BEBAS DALAM KEADAAN KONFLIK BERSENJATA

Bab ini akan membahas mula-mula mengenai pengaturan terhadap kapal sipil yang berlayar di laut bebas menurut hukum laut. Selanjutnya, pembahasan akan dikhususkan kepada legalitas blokade laut di laut bebas dan apa saja yang harus dipenuhi oleh para pihak agar blokade laut tersebut legal. Selanjutnya, akan dibahas pula mengenai perlindungan terhadap kapal sipil yang membawa bantuan kemanusiaan dalam konflik bersenjata menurut hukum hak asasi manusia dan hukum humaniter internasional.

BAB 4: PENYERANGAN KAPAL BANTUAN KEMANUSIAAN MAVI MARMARA OLEH ISRAEL

Pada bab ini mula-mula akan dibahas mengenai latar belakang dari penyerangan kapal bantuan kemanusiaan Mavi Marmara dan legalitas dari blokade laut Israel. Selanjutnya akan dilakukan analisis terhadap penggunaan kekuatan militer terhadap kapal sipil Mavi Marmara dan apakah justifikasi-justifikasi yang diberikan oleh Israel dapat dibenarkan.

BAB 5: PENUTUP

Bab ini berisi mengenai kesimpulan pembahasan yang telah ditulis di Bab 2 sampai dengan Bab 4. Di bab ini juga akan disampaikan saran-saran Penulis untuk meningkatkan perlindungan bagi penduduk sipil dan bantuan kemanusiaan dalam suatu konflik bersenjata.

BAB 2

PENGATURAN DAN PERLINDUNGAN ATAS PENDUDUK SIPIL SERTA BANTUAN KEMANUSIAAN MENURUT HUKUM INTERNASIONAL

2.1. Pengaturan Mengenai Penduduk Sipil

Secara umum, penduduk sipil meliputi semua orang yang tidak termasuk anggota angkatan bersenjata, baik yang reguler maupun non-reguler.⁴³ Definisi penduduk sipil tersebut mungkin baru menjadi relevan saat membahas suatu keadaan konflik bersenjata yang memungkinkan keberlakuan hukum humaniter internasional secara khusus. Namun perlu diperhatikan bahwa dalam konflik bersenjata sekalipun, hukum hak asasi manusia tetap berlaku. Sebelum masuk ke pembahasan mengenai perlindungan penduduk sipil pada saat konflik bersenjata, perlu dibahas terlebih dahulu secara singkat hubungan antara hukum hak asasi manusia dan hukum humaniter internasional.

Rezim pengaturan hukum secara normatif dapat dibagi ke dua bagian, yakni rezim hukum pada situasi konflik bersenjata dan situasi damai. Walaupun hukum humaniter internasional berlaku pada keadaan konflik bersenjata dan hukum hak asasi manusia biasanya mengatur pada saat kondisi damai, namun karena batas di antara keduanya sangat tipis,⁴⁴ hubungan di antara kedua rezim hukum ini sesungguhnya lebih kompleks dari pembagian tersebut.⁴⁵ Keberlakuan

⁴³ F. Sugeng Istanto, *Perlindungan Penduduk Sipil dalam Perlawanan Rakyat Semesta dan Hukum Internasional* (Yogyakarta: Penerbit Andi, 1992), hal.254. Lihat pula *Additional Protocol I*, ps. 50.

⁴⁴ Lihat Hans-Joachim Heintze, "Convergence Between Human Rights Law and International Humanitarian Law and the Consequence for the Implementation," dalam *International Law and Humanitarian Assistance: A Crosscut Through Legal Issues Pertaining to Humanitarianism* (Springer, 2011), hal. 85.

⁴⁵ Kenneth Watkin, "Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict," *American Journal of International Law Volume 98* (Januari 2004), hal. 2.

hukum hak asasi manusia memang lebih luas, yakni berlaku dalam keadaan damai maupun dalam keadaan konflik bersenjata.⁴⁶ Untuk menjamin perlindungan hak manusia yang seluas-luasnya, maka pembahasan dalam tulisan ini akan banyak menghubungkan hukum hak asasi manusia dengan hukum humaniter internasional, meskipun pembahasan mengenai hukum humaniter internasional hanya dapat digunakan dalam pembahasan yang berkaitan dengan konflik bersenjata.

2.1.1. Pengaturan dan Perlindungan Penduduk Sipil Dalam Hukum Hak Asasi Manusia

2.1.1.1. Hukum Hak Asasi Manusia Pada Umumnya

Memang, dalam rezim hukum hak asasi manusia, tidak terlalu dipermasalahkan perbedaan antara penduduk sipil maupun pihak militer atau angkatan bersenjata.⁴⁷ Alasannya adalah karena pada hakekatnya, hak asasi manusia dimiliki oleh setiap manusia, tidak peduli apa ras, warna, jenis kelamin, agama, pandangan politik, kewarganegaraan, maupun status lainnya.⁴⁸ Jadi, perbedaan antara penduduk sipil dan penduduk non-sipil tidak terlalu dipermasalahkan. Namun dalam bagian ini, pembahasan akan tetap difokuskan pada penduduk sipil yang memiliki hak-hak asasi sebagai manusia.

Pengaturan hak asasi manusia itu sendiri tersebar di banyak instrumen hukum, seperti ICCPR, *International Convenants on Economic, Social, and Cultural Rights* ('ICESCR'), *1948 Conventions on Genocide*, *Convention on the Elimination of All Forms of Racial Discrimination* ('CERD'), *Convention on the Elimination of All Forms of Discrimination Against Women* ('CEDAW'), *United Nations Convention Against Torture* ('CAT'), *Conventions on the Rights of the Child* ('CRC'), *European Convention on Human Rights*, *African Charter on Human and Peoples' Right*, dan masih banyak lagi.

⁴⁶ ICRC, "International Humanitarian Law and International Human Rights Law..."

⁴⁷ Lihat Louise Doswald-Beck, "The Right to Life in Armed Conflict: Does International Humanitarian Law Provide all the Answers?" *International Review of the Red Cross Volume 88 No. 864* (Desember 2006), hal. 899.

⁴⁸ *Universal Declaration of Human Rights* ("UDHR"), ps.2.

Hukum Hak Asasi Manusia berlaku dalam keadaan apapun, namun hukum ini memperbolehkan negara untuk menanggihkan keberlakuan hukum tersebut dalam hal adanya keadaan darurat yang mengancam bangsa.⁴⁹ Penanggihan dari hak asasi manusia tersebut tentu harus dilakukan secara proporsional, tidak diskriminatif, dan tidak melanggar hukum internasional yang lain.⁵⁰ Selain itu, secara umum, tetap ada hak-hak yang tidak dapat ditanggihkan pelaksanaannya, seperti hak untuk hidup dan hak untuk tidak disiksa.⁵¹

Mengingat banyaknya hak asasi manusia yang ada, maka pembahasan di bawah ini tidak akan meliputi seluruh hak asasi manusia yang ada tersebut. Dikaitkan dengan perlindungan bagi penduduk sipil dalam konflik bersenjata, maka yang akan dibahas adalah hak untuk hidup, hak untuk kebebasan, hak untuk tidak disiksa, hak atas kesehatan, dan juga hak atas bantuan kemanusiaan.

2.1.1.2. Hak untuk Hidup

Hak untuk hidup merupakan hak yang tidak dapat ditanggihkan dalam situasi apapun (*non-derogable rights*).⁵² Hak ini diatur dalam berbagai instrumen hukum seperti dalam pasal 6 ICCPR, pasal 3 UDHR, pasal 6 CRC, dan berbagai instrumen hukum lainnya. Tidak ada seorangpun yang boleh dicabut hak untuk hidupnya dengan semena-mena.⁵³ Memang terdapat beberapa pengecualian yang dimungkinkan. Sebagai contoh, dapat dilihat perumusan dalam *European Convention for the Protection of Human Rights and Fundamental Freedom* ('ECHR') berikut:

Deprivation of life shall not be regarded as inflicted in contravention of the Article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

⁴⁹ ICCPR, ps. 4 (1) dan (3).

⁵⁰ ICRC, "International Humanitarian Law and International Human Rights Law..."

⁵¹ *Ibid.*

⁵² Nasution dan Zein, *Instrumen Internasional Pokok Hak-Hak Asasi Manusia*, hal.88.

⁵³ Lihat Pasal 6 (1) ICCPR; pasal 4 (1) *American Convention on Human Rights*; pasal 4 *African Charter on Human and Peoples' Rights*.

- (b) *in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;*
- (c) *in action lawfully taken for the purpose of quelling a riot or insurrection.*⁵⁴

Jadi dapat dilihat bahwa sekalipun terdapat pengecualian atau pencabutan-pencabutan terhadap hak untuk hidup, pencabutan tersebut hanya dapat dilakukan dalam situasi tertentu yang sangat terbatas. Bahkan apabila diperhatikan, pengaturan mengenai pencabutan hak untuk hidup sebagaimana diatur dalam ECHR itu merupakan upaya untuk melindungi hak hidup yang lain.

Dalam situasi damai, penegakkan hak untuk hidup relatif lebih mudah dijalankan. Namun dalam situasi konflik bersenjata, terdapat beberapa hal kompleks yang perlu dibahas. Salah satu pertanyaan penting adalah apakah penduduk sipil dalam konflik bersenjata tetap memiliki perlindungan hak untuk hidup dari rezim hukum hak asasi manusia? Dalam rezim hukum hak asasi manusia, hak untuk hidup merupakan suatu hak yang tidak boleh ditangguhkan, meskipun terdapat keadaan gawat darurat umum yang mengancam bangsa (*public emergency which threatens the life of the nation*) sekalipun.⁵⁵ Jadi, dalam hal situasi perang sipil, gangguan internal, kerusuhan, serta konflik bersenjata sekalipun, perampasan nyawa orang tidak diperbolehkan.⁵⁶ Bila perampasan nyawa tersebut dilakukan, hal tersebut tidak boleh dilakukan dengan sewenang-wenang.⁵⁷ Meskipun tidak ada penangguhan yang boleh dilakukan terhadap hak untuk hidup ini dalam situasi konflik bersenjata, namun terdapat pendapat yang menyatakan adanya pengecualian terhadap hak untuk hidup dalam konflik

⁵⁴ Pencabutan hak untuk hidup tidak boleh dianggap bertentangan dengan Pasal ini apabila hal tersebut disebabkan oleh penggunaan kekuatan militer yang benar-benar sangat dibutuhkan:

- (a) Untuk bela diri seseorang dari kekerasan yang tidak sah;
- (b) Untuk melakukan penahanan yang sah atau untuk mencegah kaburnya tahanan yang sah;
- (c) Dalam tindakan yang diambil secara sah untuk memadamkan kerusuhan atau pemberontakan (terjemahan Penulis), *European Convention on Human Rights* ('ECHR'), ps. 2 (2).

⁵⁵ ICCPR, ps. 4 (1) dan (2).

⁵⁶ J. Patrnoic dan B. Jakovljevic, *International Humanitarian Law in the Contemporary World* (San Remo: International Institute of Humanitarian Law, 1991), hal. 33.

⁵⁷ *Ibid.*

bersenjata. Pengecualian tersebut adalah kematian yang diakibatkan dari tindakan sah atau legal dalam konflik bersenjata.⁵⁸ Untuk melihat yang mana saja tindakan sah atau legal dalam konflik bersenjata, tentu perlu dilihat pengaturan dalam hukum humaniter internasional. Apalagi keberlakuan hak untuk hidup dalam hukum hak asasi manusia di konflik bersenjata merupakan peraturan pelengkap dari hukum humaniter internasional.⁵⁹

Salah satu kasus terkait hak untuk hidup ini adalah kasus *Ergi v. Turkey* yang diadili di *European Court of Human Rights* pada tahun 1998.⁶⁰ Pada kasus ini, Havva Ergi meninggal karena terkena peluru akibat baku tembak antara PKK (*Parti Karkerani Kurdistan / Kurdistan Workers' Party*) melawan tentara keamanan Turki. Turki dituntut telah melanggar Pasal 2 ECHR yang melindungi hak untuk hidup. Memang, pengadilan tidak dapat memutus Turki secara sengaja telah melakukan pembunuhan karena kurangnya bukti-bukti pada saat kejadian. Namun pengadilan memutus bahwa Turki tetap melanggar Pasal 2 ECHR karena telah terdapat perencanaan dan pelaksanaan tindakan tembak menembak dari tentara keamanan Turki serta kegagalan Turki dalam menginvestigasi kasus ini. Dari kasus ini dapat ditarik kesimpulan bahwa negara memiliki tanggung jawab yang besar untuk melindungi hak untuk hidup, meskipun dalam situasi yang sulit sekalipun.

Jadi, penduduk sipil tetap memiliki hak untuk hidup sebagai manusia. Saat konflik bersenjata sekalipun, tidak ada penduduk sipil yang boleh dibunuh atau dirampas hak hidupnya dengan semena-mena. Yang perlu digarisbawahi adalah pengaturan lebih lanjut mengenai hak untuk hidup harus merujuk pada pengaturan dalam hukum humaniter internasional, karena hukum hak asasi manusia hanya mengatur beberapa aspek saja dari hak untuk hidup dalam situasi konflik

⁵⁸ Lihat Pasal 15 *European Convention on Human Rights and Fundamental Freedoms of 1950*.

⁵⁹ Hal ini sesuai dengan teori aliran “complementarist” yang menekankan bahwa hukum hak asasi manusia dan hukum humaniter internasional merupakan dua hal yang berbeda, namun dapat saling melengkapi.

⁶⁰ Council of Europe: European Court of Human Rights, “Ergi v. Turkey,” Case Application no. 23818/94, Judgment of 28 July 1998.

bersenjata.⁶¹ Meskipun begitu, karena hak untuk hidup adalah suatu hak yang fundamental, maka dalam keadaan konflik bersenjata (dan khususnya pada keadaan damai), hak untuk hidup ini harus dijamin dengan sebaik-baiknya.

2.1.1.3. Hak atas Kebebasan

Hak atas kebebasan (*right to liberty*) juga merupakan salah satu hak yang tidak dapat ditangguhkan menurut hukum hak asasi manusia. Pengaturannya dapat dilihat di pasal 9 ICCPR, pasal 5 ECHR, pasal 3 UDHR, pasal 37 CRC, dan lainnya. Sebagai contoh, dapat dilihat perumusan dari pasal 9 (1) ICCPR:

*Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.*⁶²

Perumusan pasal 9 (1) ICCPR tersebut berlaku untuk setiap pencabutan kebebasan, baik dalam kasus pidana maupun kasus lain seperti penyakit jiwa, gelandangan, ketergantungan obat, keperluan pendidikan, kontrol imigrasi, dan lainnya.⁶³ Setiap negara peserta ICCPR juga harus memastikan bahwa adanya pemulihan yang efektif (*effective remedy*) dalam hal adanya individu yang hak untuk kebebasannya dicabut tidak sesuai dengan pengaturan di ICCPR.⁶⁴

Apabila diadakan penahanan atas alasan keamanan umum sekalipun, beberapa syarat tertentu tetap harus dilakukan. Syarat-syarat tersebut antara lain adalah:

⁶¹ Patrnoic dan Jakovljevic, "International Humanitarian Law in the Contemporary World," hal. 34.

⁶² Setiap orang memiliki hak untuk kebebasan dan keamanan. Tidak ada seorangpun yang dapat secara semena-mena ditangkap atau ditahan. Tidak ada seorangpun yang boleh dicabut kebebasannya, kecuali karena alasan dan sesuai dengan prosedur yang telah ditentukan oleh hukum (terjemahan Penulis), ICCPR, ps. 9 (1).

⁶³ United Nations, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, HRI/GEN/1/Rev.7 (12 May 2004), hal. 130.

⁶⁴ ICCPR, ps. 2 (3).

- a. penahanan tersebut tidak boleh secara semena-mena dan harus berdasarkan prosedur hukum;
- b. informasi mengenai alasan penahanan harus diberikan;
- c. harus ada pengadilan yang dapat mengatur mengenai penahanan tersebut;
- d. harus tersedia kompensasi dalam hal penahanan tersebut tidak sah.⁶⁵

Hak untuk kebebasan merupakan salah satu hak yang sangat penting, karena pencabutan atasnya bisa berakibat secara langsung atau tidak langsung terhadap hak-hak lain, seperti hak atas keluarga dan kehidupan pribadi, hak kebebasan berkumpul, hak kebebasan berekspresi serta bergerak, dan lain-lainnya.⁶⁶ Manusia, termasuk penduduk sipil, harus dijamin hak atas kebebasannya. Tidak ada penduduk sipil yang boleh ditahan secara semena-mena.

Perlindungan ini juga berlaku dalam situasi konflik bersenjata, meskipun perlindungannya tidak sekuat hak untuk hidup. Hak atas kebebasan termasuk salah satu hak yang dapat ditangguhkan dalam hal adanya keadaan gawat darurat umum yang mengancam bangsa.⁶⁷ Penangguhan ini mungkin terjadi pada situasi di mana negara mengalami kesulitan untuk menghadapi suatu konflik bersenjata.⁶⁸ Contohnya adalah hak pihak yang berperang untuk menahan tahanan perang. Namun sekali lagi, untuk menjamin perlindungan yang sebesar-besarnya bagi penduduk sipil dari pelanggaran hak atas kebebasan dalam situasi konflik bersenjata, maka diperlukan hukum humaniter internasional untuk mengisi relung-relung tersebut. Sementara itu pada kondisi normalnya, penahanan atau penangkapan yang tidak sah tidak boleh dilakukan. Apabila hal tersebut terpaksa

⁶⁵ United Nations, *Compilation of General Comments...by Human Rights Treaty Bodies*, hal. 131.

⁶⁶ Monica Macovei, *The Right to Liberty and Security of the Person: A Guide to the Implementation of Article 5 of the European Convention of Human Rights –Human Rights Handbook No. 5*, (Strasbourg: Council of Europe, 2003), hal. 6.

⁶⁷ ICCPR, ps. 4 (1).

⁶⁸ Peter J. Rowe, *The Impact of Human Rights Law on Armed Forces* (Cambridge University Press, 2006), hal. 190.

dilakukan, maka penahanan atau penyimpangan dari hak atas kebebasan tersebut harus dilakukan sesuai prosedur hukum yang berlaku.

2.1.1.4. Hak untuk Tidak Disiksa

Hak untuk tidak disiksa diatur dalam pasal 7 ICCPR, pasal 5 UDHR, pasal 37 CRC, dan lainnya. Pada perumusannya, biasanya hak untuk tidak disiksa dirumuskan bersama-sama dengan hak untuk tidak mendapatkan perlakuan atau hukuman yang kejam, tidak manusiawi atau merendahkan martabat. Penyiksaan (*torture*) itu sendiri didefinisikan sebagai:

Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.⁶⁹

Tujuan dari hak ini adalah untuk melindungi integritas dan martabat seseorang.⁷⁰ Perlindungan penduduk sipil dari penyiksaan atau perlakuan kejam lainnya harus dijamin. Menurut ICCPR, negara memiliki kewajiban untuk memastikan perlindungan bagi tiap orang dari penyiksaan atau tindakan sejenis, melalui tindakan legislatif atau tindakan lain.⁷¹ Sama halnya dengan hak untuk

⁶⁹ Setiap tindakan yang dengan sengaja mengakibatkan penderitaan atau rasa sakit yang amat sangat, baik secara fisik maupun mental, dengan tujuan untuk mendapatkan informasi atau pengakuan darinya atau dari orang ketiga, untuk menghukumnya atas perbuatan yang ia atau orang ketiga lakukan atau dicurigai melakukan, atau untuk mengintimidasi atau memaksa dirinya atau orang ketiga, atau untuk alasan lain yang didasarkan atas diskriminasi dalam bentuk apapun, dan di manapenderitaan atau rasa sakit tersebut diakibatkan oleh atau atas hasutan atau persetujuan atau persetujuan diam-diam dari pejabat umum atau orang lain yang bertindak secara resmi. Penyiksaan tidak termasuk rasa sakit atau penderitaan yang diakibatkan dari, inheren, atau secara kebetulan dari hukuman yang sah (Terjemahan penulis), *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ('CAT'), ps.1.

⁷⁰ United Nations, *Compilation of General Comments...by Human Rights Treaty Bodies*, hal. 129.

⁷¹ *Ibid.*, hal. 150.

hidup, hak untuk tidak disiksa ini tidak boleh ditangguhkan dalam hal adanya keadaan gawat darurat umum yang mengancam bangsa sekalipun.⁷²

Salah satu contoh pelanggaran terhadap hak untuk tidak disiksa ini dilakukan oleh Rusia pada perang Chechnya. Salambek Khadisov dan Islam Tsechoyev ditahan oleh pihak Rusia dan dipaksa untuk mengaku bahwa mereka terlibat dalam tindakan kelompok paramiliter pada perang Chechnya. Selama masa penahanan, kedua orang ini dipukuli, disekap, disundut oleh rokok, serta dicambuki. Akibat dari perilaku tersebut, Khadisov dan Tsechoyev mengalami berbagai permasalahan kesehatan. *European Court of Human Right* memutuskan bahwa Rusia bersalah karena melakukan penyiksaan.⁷³

Jadi, penduduk sipil dalam konflik bersenjata juga harus mendapat perlindungan dari siksaan. Perlindungan ini memiliki arti yang penting dalam konflik bersenjata, karena Penguasa Pendudukan (*occupying power*) bisa saja melakukan penyiksaan terhadap penduduk sipil demi mendapat informasi, mengintimidasi, atau melakukan hukuman tidak adil.⁷⁴ Negara harus memastikan perlindungan semaksimal mungkin untuk penduduk sipil dari pelanggaran hak untuk tidak disiksa, baik dalam keadaan damai maupun keadaan konflik bersenjata.

2.1.1.5. Hak atas Kesehatan

Hak atas kesehatan merupakan hak yang sangat berhubungan dengan hak untuk hidup, mengingat pemenuhan terhadapnya dapat menjadi salah satu upaya untuk memenuhi hak manusia untuk hidup. Hak ini dijamin oleh berbagai instrumen hukum internasional seperti yang dapat dilihat dalam Pasal 25 UDHR, Pasal 12 ICESCR, Pasal 5 CERD, Pasal 12 CEDAW, serta Pasal 24 (1) CRC. Dalam Pasal 12 ICESCR, hak atas kesehatan ini sesungguhnya lebih dirumuskan sebagai ‘hak untuk mendapat standar kesehatan tertinggi yang dapat dicapai’

⁷² ICCPR, ps. 4 (1).

⁷³ Council of Europe: European Court of Human Rights, “Khadisov and Tsechoyev v. Russia,” *Case Application No. 21519/02*, Judgment of 5 February 2009.

⁷⁴ Lihat ICTY, “Prosecutor vs. Delalic,” *Judgment of 16 November 1998*, para. 458 – 459; Lihat pula perumusan dalam CAT, ps.1.

(*right to the highest attainable standard of health*), sehingga hak atas kesehatan ini harus dipahami sebagai suatu hak untuk mendapatkan berbagai fasilitas, benda, dan kondisi yang diperlukan untuk merealisasikan standar kesehatan tertinggi yang dapat dicapai tersebut.⁷⁵ Dalam menjalankan perannya, negara tentu tidak dapat menjamin bahwa seluruh warga negaranya berada dalam kondisi sehat. Hak atas kesehatan memberikan kewajiban negatif bagi negara untuk tidak mengganggu akses seseorang terhadap pengobatan dan kewajiban positif untuk sedapat mungkin membantu akses warga negaranya terhadap pengobatan.⁷⁶ Hak ini biasanya meliputi dua tipe tindakan, yakni tindakan preventif untuk menjaga kesehatan serta tindakan yang dilakukan dalam hal adanya luka atau penyakit.⁷⁷

Hak atas kesehatan ini juga harus dipenuhi dalam situasi yang terkait masalah sosial, seperti pada situasi kekerasan dan konflik bersenjata.⁷⁸ Dalam konflik bersenjata, hak atas kesehatan memiliki posisi yang penting dan sering dibandingkan dengan hak untuk hidup. Apalagi karena bahaya terhadap hak untuk hidup dan hak atas kesehatan biasanya sama: operasi militer, perlakuan tidak manusiawi, penahanan, larangan untuk mengakses kebutuhan hidup primer, dan lainnya.⁷⁹ Dalam kondisi konflik bersenjata, demi memenuhi pelaksanaan hak atas kesehatan ini, Penguasa Pendudukan atau para pihak yang berperang tidak boleh menghalangi akses penduduk sipil terhadap pengobatan dan harus memperbolehkan masuknya bantuan-bantuan medis atau pengobatan lainnya. Sebetulnya pengaturan di hukum humaniter sudah cukup komprehensif untuk melindungi kesehatan para penduduk sipil dalam konflik bersenjata. Namun tentu tidak ada salahnya perlindungan tersebut dilengkapi dengan pengaturan hak atas kesehatan dalam rezim hukum hak asasi manusia.

⁷⁵ Curtis Francis Doebbler, *International Human Rights Law: Cases and Materials* (CD Publishing, 2004), hal. 333.

⁷⁶ Holger P. Hestermeyer, "Access to Medication as a Human Right," *Max Planck Yearbook of United Nations Law Volume 8* (2004), hal. 114.

⁷⁷ Patnogic dan Jakovljevic, "International Humanitarian Law in the Contemporary World," hal. 37.

⁷⁸ Doebbler, *International Human Rights Law*, hal. 333.

⁷⁹ Patnogic dan Jakovljevic, "International Humanitarian Law in the Contemporary World," hal. 38.

Jadi, hak atas kesehatan merupakan salah satu hak penting yang harus dijalankan oleh Negara, baik dalam keadaan damai maupun keadaan konflik bersenjata. Penduduk sipil, khususnya dalam keadaan konflik bersenjata, kerap mengalami ancaman atau perlakuan-perlakuan yang dapat membatasi hak atas kesehatannya. Bila dibiarkan tanpa ada penanganan lebih lanjut, maka pelanggaran terhadap hak atas kesehatan bisa saja justru berubah menjadi pelanggaran terhadap hak untuk hidup. Mengingat pentingnya pemenuhan hak ini, maka sudah sewajarnya penduduk sipil mendapatkan perlindungan yang sebesar-besarnya agar kesehatannya terjaga.

2.1.1.6. Hak atas Bantuan Kemanusiaan

Hak atas bantuan kemanusiaan merupakan hak asasi manusia tambahan yang berfungsi untuk menunjang realisasi dari hak-hak asasi manusia dasar lainnya, terutama hak untuk hidup serta hak atas kesehatan.⁸⁰ Hak ini memang tidak dijelaskan secara khusus di instrumen hak asasi manusia, namun hak ini diimplikasikan dari hak-hak lain. Beberapa hak yang sangat berhubungan adalah hak untuk terbebas dari kelaparan⁸¹ dan hak untuk hidup.⁸²

Relevansi antara hak atas bantuan kemanusiaan ini dengan hak-hak asasi lainnya tidak dapat dipungkiri lagi. Pemenuhan hak-hak lain, khususnya hak untuk hidup, kadang-kadang tergantung pada akses bantuan kemanusiaan yang masuk. Meskipun hak atas bantuan kemanusiaan sendiri dalam rezim hak asasi manusia memang tidak secara eksplisit dikenal, namun hak ini merupakan salah satu hak penting bagi penduduk sipil dalam konflik bersenjata. Alasannya adalah karena dalam kondisi konflik bersenjata, sering terjadi kelangkaan terhadap berbagai barang kebutuhan dasar yang penting, seperti makanan, obat-obatan, dan sebagainya. Selain itu, terdapat beberapa celah dalam pengaturan mengenai bantuan kemanusiaan yang hanya dapat diisi dengan hukum hak asasi manusia,

⁸⁰ *Ibid.*, hal. 43.

⁸¹ UNHRC, "...Report of the United Nations Fact Finding Mission on the Gaza Conflict," hal. 260.

⁸² Ruth Abril Stoffels, "Legal Regulation of Humanitarian Assistance in Armed Conflict: Achievements and Gaps," *International Review of the Red Cross Volume 86 Number 855* (September 2004), hal. 517.

contohnya kewajiban negara untuk menjamin penduduk di negaranya tetap mendapatkan pasokan bahan-bahan esensial dalam situasi konflik bersenjata internasional.⁸³

Hak atas bantuan kemanusiaan ini harus dipenuhi, apalagi dalam situasi di mana suatu populasi atau penduduk sipil tidak dapat lagi memenuhi kebutuhannya sendiri. Pada situasi tersebut, tentu dibutuhkan campur tangan dari pihak lain dalam bentuk penyaluran bantuan kemanusiaan, baik dari negaranya sendiri atau negara lain. Mengingat urgensi pemenuhan kebutuhan ini, maka sudah pasti tidak ada pihak yang boleh menghalangi masuknya bantuan kemanusiaan tersebut.

Pembahasan lebih mendalam mengenai hak atas bantuan kemanusiaan akan dilakukan di bawah, namun yang perlu ditekankan pada bagian ini adalah bahwa hak atas bantuan kemanusiaan ini dapat menunjang pelaksanaan hak-hak asasi manusia yang lain, sehingga keberadaannya tidak dapat dihiraukan begitu saja.

2.1.2. Pengaturan dan Perlindungan Penduduk Sipil Dalam Hukum Humaniter Internasional

2.1.2.1. Hukum Humaniter Internasional Pada Umumnya

Hukum humaniter internasional adalah hukum khusus yang berlaku pada saat adanya konflik bersenjata dan bertujuan untuk mengatur masalah-masalah kemanusiaan yang lahir dari konflik bersenjata serta membatasi hak-hak para pihak yang berperang dengan memperhatikan alasan kemanusiaan.⁸⁴ Pada intinya, hukum humaniter internasional berisikan seperangkat pengaturan yang bermaksud untuk meminimalisir sebanyak mungkin korban-korban akibat konflik bersenjata. Bahkan hukum humaniter internasional mengatur bahwa para kombatan⁸⁵ dalam konflik bersenjata juga bisa mendapat perlindungan, apalagi bila mereka termasuk

⁸³ *Ibid.*, hal. 516.

⁸⁴ Hans-Peter Gasser, "International Humanitarian Law – An Introduction," dalam *Humanity for All: The International Red Cross and Red Crescent Movement* (P. Haupt, 1993), hal. 509.

⁸⁵ Yang dimaksud dengan kombatan secara luas adalah pihak yang turut serta berpartisipasi dalam pertempuran (*direct part in hostilities*) atau pihak yang berperang.

hors de combat.⁸⁶ Esensi dari hukum humaniter internasional memang untuk melindungi penduduk sipil dan *hors de combat*, serta untuk mengurangi akibat-akibat yang tidak perlu dari suatu konflik bersenjata.⁸⁷

Pengaturan mengenai penduduk sipil dapat dilihat khususnya pada *Geneva Convention IV* serta hukum dan kebiasaan perang (*laws and customs of war*). Oleh karena itu, pembahasan di bawah mengenai perlindungan atas penduduk sipil akan dibagi menjadi dua bagian, yakni menurut *Geneva Convention IV* dan menurut hukum kebiasaan perang. Namun sebelumnya, perlu dilakukan dahulu analisa terkait definisi penduduk sipil menurut hukum humaniter internasional.

2.1.2.2. Definisi Penduduk Sipil Menurut Hukum Humaniter Internasional

Meskipun terdapat perlindungan dasar terhadap penduduk sipil dalam hal adanya konflik bersenjata, definisi penduduk sipil itu sendiri tidak secara eksplisit dijelaskan dalam *Geneva Convention IV*. Oleh karena itu terminologi penduduk sipil pada pembahasan ini akan merujuk pada pengaturan di *Additional Protocol I*, khususnya pasal 50 (1) berikut:

*A civilian is any person who does not belong to one of the categories of persons referred to in Article 4A(1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.*⁸⁸

Dari pendefinisian di atas, sayangnya tidak dapat ditarik kesimpulan yang jelas, karena harus ada rujukan ke Pasal 4 A (1), (2), (3) dan (6) dari *Geneva Convention III* dan pasal 43 dari *Additional Protocol I*. Oleh karena itu, sekarang

⁸⁶ *Hors de combat* adalah istilah dari Bahasa Perancis yang artinya ‘di luar peperangan.’ Artinya adalah para kombatan dalam perang yang tidak dapat berperang lagi karena situasi tertentu, seperti terluka parah atau sudah menyerah. Lihat *Additional Protocol I*, ps. 41.

⁸⁷ Paulus dan Vashakmadze, “Assymetrical War and the Notion of Armed Conflict...” hal. 95.

⁸⁸ Penduduk sipil adalah setiap orang yang tidak termasuk dalam kategori orang yang dimaksud dalam Pasal 4 A (1), (2), (3) dan (6) dari *Geneva Convention III* dan dalam pasal 43 dari Protokol ini. Apabila terdapat keraguan apakah seseorang termasuk penduduk sipil atau tidak, orang tersebut harus dianggap sebagai penduduk sipil (terjemahan Penulis), *Additional Protocol I*, ps. 50 (1).

akan dilihat perumusan di Pasal 4 A (1), (2), (3), dan (6) *Geneva Convention III* tersebut:

- (1) *Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.*
- (2) *Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:*
 - (a) *that of being commanded by a person responsible for his subordinates;*
 - (b) *that of having a fixed distinctive sign recognizable at a distance;*
 - (c) *that of carrying arms openly;*
 - (d) *that of conducting their operations in accordance with the laws and customs of war.*
- (3) *Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.*
- (6) *Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.*⁸⁹

⁸⁹ Tahanan perang, yang dimaksud dalam konvensi ini, adalah orang-orang yang berasal dari salah satu kategori di bawah ini, dan yang sudah jatuh ke tangan musuh:

- (1) Anggota dari angkatan bersenjata salah satu pihak yang bersengketa, termasuk juga anggota milisia atau tentara sukarela yang membentuk suatu kekuatan bersenjata.
- (2) Anggota dari tentara sukarela atau anggota milisia lain, termasuk gerakan perlawanan yang terorganisir, yang berasal dari salah satu pihak yang bersengketa dan beroperasi di dalam atau di luar teritori mereka, bahkan apabila teritori ini diduduki, dengan syarat bahwa milisia atau tentara sukarela, termasuk gerakan perlawanan yang terorganisir tersebut memenuhi persyaratan berikut:
 - (a) Dipimpin oleh seseorang yang bertanggungjawab atas bawahannya
 - (b) Memiliki tanda pembeda yang tetap dan dapat dikenali dari kejauhan
 - (c) Jelas-jelas bersenjata;
 - (d) Menjalankan operasi mereka sesuai dengan hukum dan kebiasaan perang.
- (3) Anggota dari angkatan bersenjata reguler yang menyatakan kesetiannya kepada suatu pemerintahan atau kekuasaan yang tidak diakui oleh Pihak yang Menahan.

Sementara itu, pasal 43 dari *Additional Protocol I* sendiri berbunyi sebagai berikut:

*The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct or its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.*⁹⁰

Dari perumusan di atas, dapat disimpulkan bahwa yang menjadi penduduk sipil adalah setiap orang yang tidak termasuk angkatan bersenjata, milisia, tentara sukarela yang mengangkat senjata, atau penduduk yang mengangkat senjata pada saat invasi sebuah pihak dalam konflik bersenjata. Dengan kata lain, penduduk sipil adalah mereka yang tidak menjadi kombatan. Perumusan definisi secara negatif tersebut dimaksudkan sebagai solusi yang memuaskan untuk mengikutsertakan kategori-kategori berbeda dari orang-orang yang mendapat perlindungan.⁹¹

2.1.2.3. Perlindungan Menurut Geneva Convention IV

Pasal 4 *Geneva Convention IV* mengatur mengenai *protected persons* atau orang-orang yang mendapat perlindungan menurut *Geneva Convention IV*.

(6) Penghuni dari teritori yang tidak diduduki, yang karena kedatangan kekuatan yang menginvasi, secara spontan mengangkat senjata untuk melawan kekuatan yang menginvasi tersebut, tanpa sempat membentuk diri mereka ke dalam unit bersenjata reguler, dengan syarat bahwa mereka terang-terangan mengangkat senjata dan menghormati hukum dan kebiasaan perang. (terjemahan Penulis), *Geneva Convention (III) Relative to the Treatment of Prisoners of War* ('*Geneva Convention III*'), ps. 4A (1), (2), (3), (6).

⁹⁰ Angkatan bersenjata dari suatu pihak dalam konflik terdiri atas seluruh angkatan bersenjata yang terorganisir, kelompok atau unit yang berada dibawah komando yang bertanggungjawab terhadap pihak tersebut atas tindakan atau bawahannya, bahkan apabila Pihak tersebut direpresentasikan oleh suatu Pemerintahan atau Kekuasaan yang tidak diakui oleh Pihak Lawan. Angkatan bersenjata semacam itu harus tunduk pada suatu sistem disiplin internal yang, antara lain, harus memaksakan ketaatan terhadap hukum internasional yang berlaku pada saat konflik bersenjata (terjemahan Penulis). *Additional Protocol I*, ps. 43.

⁹¹ Jean S. Pictet, ed., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Jenewa: International Committee of the Red Cross, 1987), hal. 610.

Termasuk dalam kategori ini adalah setiap orang yang dalam konflik atau pendudukan, berada dalam tangan salah satu pihak dari konflik atau Penguasa Pendudukan (*occupying power*) yang berbeda kewarganegaraan dengan *protected persons* tersebut. Jadi, terdapat dua tipe orang-orang yang dilindungi oleh *Geneva Convention IV*, yakni warga negara pihak musuh yang berada dalam wilayah konflik dan setiap orang atau populasi dalam wilayah pendudukan/okupasi. Dapat disimpulkan bahwa memang kedua tipe ini layak mendapat perlindungan, karena posisi mereka yang cenderung lemah, apalagi bila dibandingkan dengan pihak yang berperang atau Penguasa Pendudukan.

Agar mendapat perlindungan yang seluas-luasnya, maka harus dikaitkan konsep ‘orang-orang yang dilindungi’ dengan ‘penduduk sipil.’ Sesungguhnya hubungan keduanya sangat erat, sebagaimana ditunjukkan dalam perlindungan di *Geneva Convention IV*. Pengkategorian ‘orang-orang yang dilindungi’ menjadi dua kelompok besar sesungguhnya berasal dari pengkategorian ‘penduduk sipil’ menjadi dua kelompok besar yang sama tersebut, yakni orang-orang yang berada dalam pendudukan dan orang-orang yang berada dalam wilayah pihak yang berperang.⁹² Jadi sesungguhnya, penduduk sipil dan orang-orang yang dilindungi memiliki perlindungan yang sama. Hal ini juga terbukti dari judul *Geneva Convention IV* itu sendiri yakni “*Geneva Convention...to the Protection of Civilian Persons...*” dan pengaturan pada Pasal 4 *Geneva Convention* yang hendak melindungi orang-orang yang dilindungi. Sehingga dapat disimpulkan bahwa ruang lingkup perlindungannya sama saja.

Perlindungan terhadap penduduk sipil ini lahir dari potensi bahaya operasi militer. Konsekuensinya, kewajiban para pihak dalam konflik tidak hanya untuk berhenti menyerang penduduk sipil, tapi juga menghindari atau meminimalisir kerusakan-kerusakan insidental dan juga untuk senantiasa mempersiapkan tindakan-tindakan pengamanan.⁹³ Termasuk dalam kerusakan-kerusakan insidental

⁹² Pictet, *Commentary to the Fourth Geneva Convention...*, hal. 45.

⁹³ Pictet, *Commentary on the Additional Protocols...*, hal. 1449. Tindakan pengamanan dapat berupa identifikasi obyek serangan, pemberian peringatan, dan lain-lain. Lihat pula *Additional Protocol I*, ps. 57.

ini adalah kerusakan terhadap penduduk atau objek sipil akibat penyerangan yang sesungguhnya telah diarahkan kepada suatu sasaran militer.

Selaras dengan pengaturan dalam hukum hak asasi manusia, *Geneva Convention IV* sebetulnya juga bermaksud melindungi hak untuk hidup, hak untuk tidak disiksa, hak atas kesehatan, serta hak atas bantuan kemanusiaan. Meskipun terdapat perbedaan perumusan hukum, namun esensi perlindungannya sama. Hal tersebut dapat dilihat dari pengaturan-pengaturan dalam *Geneva Convention IV* berikut:

- a. Larangan pembunuhan yang disengaja⁹⁴
- b. Larangan penyiksaan⁹⁵
- c. Larangan menghancurkan benda tanpa kebutuhan militer dan yang dilakukan dengan tidak sah serta semena-mena⁹⁶
- d. Larangan untuk melakukan kekerasan kepada orang yang dilindungi⁹⁷
- e. Larangan untuk melakukan penyiksaan dan hukuman semena-mena⁹⁸
- f. Perlindungan umum terhadap orang sakit dan terluka⁹⁹

Di luar enam pengaturan tersebut, tentu masih terdapat banyak perlindungan yang diberikan *Geneva Convention IV* terhadap penduduk sipil. Bahkan apabila tiga larangan yang disebut pertama (poin a – c) dilanggar, pelanggaran tersebut dianggap sebagai pelanggaran berat (*grave breaches*) dari 1949 *Geneva Convention*. Pelanggaran berat terhadap 1949 *Geneva Conventions* dapat ditindak secara pidana dan Negara Peserta memiliki kewajiban untuk memastikan pelanggaran berat ini tidak terjadi.¹⁰⁰ Hal ini menunjukkan betapa

⁹⁴ *Geneva Convention IV*, ps. 147.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*, ps. 31.

⁹⁸ *Ibid.*, ps. 32.

⁹⁹ *Ibid.*, ps. 16.

¹⁰⁰ Yves Sandoz, "The History of the Grave Breaches Regime," *Journal of International Criminal Justice Volume 7* (September 2009), hal. 674.

kuatnya perlindungan yang diberikan kepada penduduk sipil atau orang-orang yang dilindungi agar mereka tidak dibunuh secara sengaja atau disiksa.

Sayangnya memang pelanggaran terhadap pengaturan ini tetap kerap terjadi dalam konflik bersenjata. Contohnya adalah pada kasus *Prosecutor v Kordic & Cerkez*, di mana seorang tokoh politik Bosnia-Kroasia bernama Dario Kordic terlibat dalam perencanaan serta penyuruhan pembunuhan penduduk sipil Bosnia Muslim di berbagai tempat pada saat perang di bekas Yugoslavia.¹⁰¹ *International Criminal Tribunal for Former Yugoslavia* (ICTY) akhirnya memutuskan bahwa Kordic melakukan pelanggaran terhadap *1949 Geneva Convention* dengan melakukan pembunuhan penduduk sipil secara sengaja.

Jadi, dapat dilihat bahwa *Geneva Convention IV* bermaksud untuk melindungi hak-hak esensial dari penduduk sipil. Meski dalam wilayah konflik bersenjata sekalipun, penduduk sipil tidak boleh dibunuh ataupun disiksa. Apalagi bila penduduk sipil tersebut sakit atau terluka, perlindungannya maka akan berlipat ganda, karena orang tersebut sudah pasti tidak boleh diserang dan bahkan harus dilindungi.¹⁰² Selain dari perlindungan yang telah disebut di atas, terdapat pula beberapa pengaturan khusus dalam wilayah yang diduduki, seperti:

- a. pemberian fasilitas perawatan dan pendidikan anak¹⁰³
- b. kewajiban Penguasa Pendudukan untuk memastikan pasokan makanan dan obat-obatan untuk populasi sipil¹⁰⁴
- c. kewajiban Penguasa Pendudukan untuk memastikan adanya layanan kesehatan dan kebersihan¹⁰⁵
- d. kewajiban Penguasa Pendudukan untuk mempersilakan bantuan kemanusiaan bila pasokan makanan dan obat-obatan dalam wilayah yang diduduki tidak mencukupi¹⁰⁶

¹⁰¹ ICTY, "Prosecutor vs. Kordic and Cerkez," *Judgment of 26 February 2001*

¹⁰² Pictet, *Commentary to the Fourth Geneva Convention...*, hal. 134.

¹⁰³ *Geneva Convention IV*, ps. 50.

¹⁰⁴ *Ibid.*, ps. 55.

¹⁰⁵ *Ibid.*, ps. 56.

¹⁰⁶ *Ibid.*, ps. 59.

Penguasa Pendudukan memang berhak untuk melakukan perubahan-perubahan dalam wilayah yang didudukinya tersebut, namun hal ini tidak boleh sampai menghalangi pemenuhan hak penduduk sipil di wilayah tersebut.¹⁰⁷ Sayangnya, karena penguasaan terbesar di wilayah yang diduduki tersebut dimiliki oleh Penguasa Pendudukan, penduduk sipil dalam wilayah tersebut kerap mengalami kesulitan untuk memenuhi hak-haknya sendiri. Oleh karena itu, muncullah kewajiban-kewajiban di atas bagi Penguasa Pendudukan agar hak-hak penduduk sipil sedapat mungkin tidak terpengaruh.

Namun tidak dapat dipungkiri, dalam situasi pendudukan, Penguasa Pendudukan tidak selamanya dapat menjamin pemenuhan hak-hak penduduk sipil tersebut. Dalam situasi tersebut, maka perlu dibuka pilihan untuk menerima bantuan dari pihak luar agar hak-hak penduduk sipil tetap terpenuhi. Maka lahirlah kewajiban Penguasa Pendudukan untuk mempersilakan bantuan kemanusiaan dari luar masuk, khususnya bila Penguasa Pendudukan itu sendiri tidak mampu menjamin pelaksanaan hak-hak penduduk sipil. Bila dibandingkan dengan rezim hukum hak asasi manusia, dapat dilihat bahwa kewajiban ini selaras dengan hak atas bantuan kemanusiaan. Pembahasan lebih detil mengenai bantuan kemanusiaan ini akan dilakukan di bawah. Pada esensinya, dapat dilihat bahwa *Geneva Convention IV* ini bermaksud untuk melindungi hak-hak penduduk sipil, baik yang mungkin secara langsung terpengaruh oleh konflik bersenjata, maupun hak-hak lain yang mungkin akan terpengaruh oleh jangka panjang konflik bersenjata.

2.1.2.4. Perlindungan Menurut Hukum Kebiasaan Perang

Hukum kebiasaan perang, sebagai salah satu hukum kebiasaan paling tua,¹⁰⁸ telah berusaha untuk memberikan perlindungan semaksimal mungkin terhadap penduduk sipil. Sebagai suatu hukum kebiasaan internasional, tentu

¹⁰⁷ Pictet, *Commentary to the Fourth Geneva Convention...*, hal. 274.

¹⁰⁸ Nicole Barrett, "Holding Individuals Leaders Responsible for Violations of Customary International Law: The US Bombardment of Cambodia and Laos," *Columbia Human Rights Law Review Volume 32* (2001), hal. 443.

hukum ini mengikat negara-negara, terlepas dari keikutsertaan negara tersebut terhadap suatu konvensi atau tidak. *International Committee of the Red Cross* (“ICRC”) berupaya melakukan kodifikasi terhadap berbagai hukum kebiasaan internasional dalam perang. Dikaitkan dengan perlindungan penduduk sipil, dapat dilihat bahwa terdapat pengaturan-pengaturan seperti kewajiban membedakan kombatan dan penduduk sipil (*Rule 1*),¹⁰⁹ larangan tindakan atau ancaman kekerasan untuk menyorot populasi penduduk sipil (*Rule 2*),¹¹⁰ larangan menyerang objek-objek sipil/non-militer (*Rule 7*),¹¹¹ larangan melakukan penyerangan yang dapat mengakibatkan kematian atau luka penduduk sipil atau kerusakan terhadap objek sipil, yang berlebihan dan tidak sebanding dengan keuntungan militer yang konkret dan langsung (*Rule 14*),¹¹² kewajiban melakukan tindakan pencegahan (*precautions*) untuk menghindari atau meminimalisir dampak buruk yang tak disengaja terhadap penduduk sipil (*Rule 15*),¹¹³ larangan pembunuhan (*Rule 89*),¹¹⁴ larangan melakukan penyiksaan (*Rule 90*),¹¹⁵ dan masih banyak lagi.

Keseluruhan perlindungan terhadap penduduk sipil ini berhubungan dengan salah satu prinsip paling fundamental dalam hukum humaniter internasional, yakni prinsip perbedaan.¹¹⁶ Prinsip perbedaan mengharuskan perbedaan antara kombatan yang dapat diserang dengan penduduk sipil (baik individu maupun populasi) yang tidak boleh diserang.¹¹⁷ Memang, dalam prakteknya, prinsip perbedaan ini tidak dapat dengan mudah dijalankan. Dalam konflik bersenjata, penduduk sipil dan kombatan tidak selalu secara jelas

¹⁰⁹ Jean-Marie Henckaerts dan Louise Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules* (Cambridge University Press, 2009), hal. 3.

¹¹⁰ *Ibid.*, hal. 8.

¹¹¹ *Ibid.*, hal. 25.

¹¹² *Ibid.*, hal. 46.

¹¹³ *Ibid.*, hal. 51.

¹¹⁴ *Ibid.*, hal. 311.

¹¹⁵ *Ibid.*, hal. 315.

¹¹⁶ Susan C. Breau, “Protected Persons and Object,” dalam *Perspective on the ICRC Study on Customary International Humanitarian Law* (Cambridge University Press, 2007), hal. 169.

¹¹⁷ Lihat *Additional Protocol I*, ps. 51 (2).

tergariskan perbedaannya.¹¹⁸ Kombatannya bisa saja terlihat (atau menyamar) sebagai penduduk sipil, atau sebaliknya, penduduk sipil bisa saja terlihat sebagai kombatan. Namun bukan berarti tidak ada standar yang mengatur perbedaan ini. Perlindungan terhadap penduduk sipil baru hilang bila ia terlibat langsung dalam penyerangan. Suatu tindakan dapat dikualifikasikan sebagai suatu bentuk partisipasi langsung dalam penyerangan bila tindakan tersebut benar-benar merugikan operasi militer atau dapat mengakibatkan kematian, luka, atau kerusakan terhadap suatu pihak; terdapat hubungan kausalitas antara tindakan tersebut dan bahaya yang mungkin terjadi; serta bila tindakan tersebut memang sengaja dirancang untuk merugikan suatu pihak dalam konflik bersenjata.¹¹⁹

Selain perlindungan terhadap akibat-akibat langsung konflik bersenjata seperti penyerangan (baik sengaja maupun tidak) terhadap penduduk sipil tersebut, hukum kebiasaan perang juga mengenal perlindungan terhadap efek-efek tidak langsung dari perang, seperti bencana kelaparan akibat minimnya akses penduduk sipil terhadap bahan makanannya. Dalam situasi seperti inilah, hukum kebiasaan internasional juga mengedepankan pentingnya jaminan terhadap bantuan kemanusiaan (*Rule 55*).¹²⁰

Kewajiban ini juga tercermin dari manual perang berbagai negara, seperti Colombia, Jerman, serta Kenya.¹²¹ Praktek yang menentang kewajiban untuk mempersilakan bantuan kemanusiaan juga mendapat kecaman, sebagaimana yang terjadi pada rezim Mengistu di Ethiopia yang menolak pergerakan bantuan kemanusiaan terhadap bencana kelaparan di akhir tahun 1989.¹²² Kecaman dunia internasional ini merupakan salah satu bukti adanya praktek negara terkait kewajiban untuk mempersilakan masuknya suatu bantuan kemanusiaan untuk membantu penduduk sipil yang tidak mampu memenuhi haknya sendiri.

¹¹⁸ Jaworski, ““Military Necessity” and “Civilian Immunity...,” hal. 177-178.

¹¹⁹ Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (Jewewa: ICRC, 2009), hal. 46.

¹²⁰ Henckaerts dan Doswald-Beck, “*Customary International Humanitarian Law Volume I...*,” hal. 193.

¹²¹ *Ibid.*, hal. 195.

¹²² *Ibid.*

Jadi, hukum kebiasaan perang juga melindungi hak-hak penduduk sipil, baik yang terkena dampak langsung dari perang (seperti penyerangan penduduk sipil) atau dampak tidak langsung (seperti bencana kelaparan). Adapun pembahasan pada bagian berikutnya akan difokuskan kepada salah satu perlindungan yang dikenal oleh baik hukum humaniter internasional maupun hukum hak asasi manusia, yakni perlindungan terhadap bantuan kemanusiaan.

2.2. Pengaturan Mengenai Bantuan Kemanusiaan

Dunia tentu masih mengingat adanya dua perang besar di awal dan pertengahan abad ke-20, yakni Perang Dunia I dan Perang Dunia II. Kedua perang ini memakan banyak korban jiwa, tak hanya dari para kombatan saja, namun juga penduduk sipil. Konflik bersenjata di Irak, Palestina, Sudan, dan negara-negara lain telah memberikan contoh bahwa penduduk sipil menderita tidak hanya akibat serangan langsung terhadap penduduk sipil, namun juga akibat minimnya akses terhadap kebutuhan vital seperti makanan, air, dan obat.¹²³ Justifikasi yang mungkin banyak diberikan oleh para pihak yang bersengketa adalah pengaturan di *Lieber Code* yakni “*war is not carried on by arms alone. It is lawful to starve the hostile belligerent, armed or unarmed, so that it leads to the speedier subjection of the enemy.*”¹²⁴ Tapi sesungguhnya, pengaturan tersebut sama sekali tidak dimaksudkan untuk memungkinkan komandan perang secara semena-mena menelantarkan penduduk sipil. Pengaturan tersebut memasukkan syarat kepentingan militer melalui kalimat “*it leads to the speedier subjection of the enemy*”, dan juga dapat dilihat dari esensi *Lieber Code* itu sendiri yang mementingkan prinsip-prinsip kemanusiaan.¹²⁵ Prinsip-prinsip kemanusiaan inilah

¹²³ Mominah Usmani, “Restrictions on Humanitarian Aid in Darfur: The Role of the International Criminal Court” *Georgia Journal of International and Comparative Law* (2007), hal. 258. Lihat pula UN Office for the Coordination of Humanitarian Affairs (‘OCHA’), “Special Report: Civilian Protection in Armed Conflict,” *Integrated Regulation Info Network* (2003).

¹²⁴ Perang tidak hanya dalam bentuk penggunaan senjata saja. Merupakan suatu tindakan legal untuk membiarkan pemberontak yang menyerang kelaparan, baik bersenjata atau tidak, sehingga dapat mempercepat menyerahnya musuh (terjemahan Penulis). United States Department of War, *Instructions for the Government of the Armies of the United States in the Field, General Orders No. 100 (1863)* (‘Lieber Code’), ps.17.

¹²⁵ Allen, “Civilian Starvation and Relief During Armed Conflict...” hal. 33-34.

yang menjadi salah satu dasar pertimbangan utama akan pentingnya bantuan kemanusiaan bagi penduduk sipil yang membutuhkan.

Berbagai organisasi yang memiliki fokus untuk memantau pemberlakuan hukum humaniter internasional dan hukum hak asasi manusia sering terlibat dalam aksi untuk menyalurkan bantuan kemanusiaan. Namun sayangnya, beberapa pasokan bahkan kebutuhan vital tersebut justru ditolak oleh para pihak yang berperang dan justru digunakan oleh para pihak yang berperang tersebut sebagai bahan pasokan mereka.¹²⁶ Padahal upaya untuk mempersilakan akses penduduk sipil terhadap bantuan kemanusiaan merupakan salah satu upaya pemenuhan hak-hak asasi manusia yang lain, seperti hak atas kesehatan dan juga hak untuk terbebas dari kelaparan. Mengingat pentingnya peran bantuan kemanusiaan, khususnya dalam konflik bersenjata, maka berikut akan dibahas mengenai sejarah, bentuk-bentuk, serta perlindungan yang diberikan terhadap bantuan kemanusiaan.

2.2.1. Sejarah Bantuan Kemanusiaan

Bantuan kemanusiaan lahir karena adanya situasi-situasi di mana kondisi hidup manusia secara kolektif memburuk. Situasi-situasi ini bisa terjadi akibat hal-hal seperti bencana alam atau konflik bersenjata. Apabila difokuskan kepada konflik bersenjata, maka dapat dilihat bahwa salah satu akibat konflik bersenjata adalah penderitaan kelaparan, yang dapat terjadi secara sengaja atau sebagai hasil penyamarataan perlakuan antara penduduk sipil dan kombatan.¹²⁷

Konflik bersenjata dan perang sudah ada sejak zaman dahulu kala. Namun sampai pertengahan abad ke-19, tidak ada sistem atau mekanisme perawatan bagi korban perang yang terorganisir. Suatu hari, Henry Dunant merintis suatu organisasi yang berfokus untuk memberikan bantuan kemanusiaan terhadap korban-korban perang. Organisasi bernama *International Committee of the Red Cross* (ICRC) ini didirikan pada tahun 1863, dan memiliki mandat untuk tetap

¹²⁶ Stoffels, "Legal Regulation of Humanitarian Assistance in Armed Conflict..." hal. 515.

¹²⁷ Charles A. Allen, "Civilian Starvation and Relief During Armed Conflict: The Modern Humanitarian Law," *Georgia Journal of International and Comparative Law Volume 19* (Spring, 1989), hal. 4.

menjadi suatu organisasi yang independen dan netral dalam memberikan bantuan kemanusiaan.¹²⁸ Fokus awal dari ICRC adalah untuk membantu para prajurit yang terluka, namun pada perkembangannya, fokus organisasi ini juga meliputi penduduk sipil di zona perang.¹²⁹ Meskipun ICRC memiliki peran besar dalam mengirimkan bantuan kemanusiaan, bukan berarti ICRC memiliki monopoli dalam pengiriman bantuan kemanusiaan. ICRC memang disebut secara khusus di *1949 Geneva Conventions* dan protokol tambahannya,¹³⁰ namun ICRC hanya salah satu contoh badan kemanusiaan yang bersifat imparial.¹³¹ Organisasi atau badan kemanusiaan lain yang bersifat imparial juga tetap layak mendapat perlindungan yang sama dengan ICRC.

Pada perkembangannya, lahirlah organisasi-organisasi lain selain ICRC, yang berfokus untuk memberikan bantuan kemanusiaan. Salah satu organisasi internasional terbesar yang tentunya tidak boleh dilupakan adalah Persatuan Bangsa-bangsa (PBB). Meskipun PBB tidak secara spesifik memiliki fokus untuk memberikan bantuan kemanusiaan kepada korban perang, namun PBB memiliki peran yang tidak kecil. PBB telah mendirikan berbagai organ subsider (*subsidiary organs*) seperti *United Nations Children's Fund* (UNICEF), *United Nations Human Rights Council* (UNHCR), *United Nations Relief and Works Agency* (UNRWA), *World Food Program* (WFP), *United Nations Development Programs* (UNDP), dan *Office for the Coordinator of Humanitarian Affairs* (OCHA).¹³² Badan-badan PBB tersebut memiliki keistimewaan dan imunitas tertentu, sebagaimana diatur dalam *UN Charter*, *1946 Convention on the Privileges and Immunities of the United Nations*, *1946 Convention on the Privileges and Immunities of Specialized Agencies*, dan dalam perjanjian bilateral

¹²⁸ ICRC, "About the International Committee of the Red Cross," <http://www.icrc.org/eng/who-we-are/index.jsp>, diunduh tanggal 5 Mei 2011.

¹²⁹ David P. Forsythe, "International Humanitarian Assistance: The Role of the Red Cross," *Buffalo Journal of International Law* (Winter, 1996-1997), hal. 236.

¹³⁰ Lihat *Geneva Convention IV*, ps.10, 30, 59; *Additional Protocol I*, ps.81.

¹³¹ Forsythe, "...The Role of the Red Cross," hal. 239.

¹³² Lance Bartholomeusz, "The Legal Framework of Humanitarian Assistance in the UN System" (makalah disampaikan pada the 7th AIDA IHL Forum, 10 Mei 2006), hal. 2.

antara PBB atau organ PBB (seperti UNRWA) dengan Pemerintah dari Israel, *Palestinian Authority*, PLO, Lebanon, dan lainnya.¹³³

Selain PBB, organisasi non-pemerintah/*Non-Governmental Organizations* (NGOs) memiliki peran penting dalam mengirimkan bantuan kemanusiaan. Bahkan sekitar 50 % dari total pekerja bantuan kemanusiaan berasal dari NGO, sementara 25 % berasal dari ICRC serta Red Crescent Movement, dan 25 %-nya lagi berasal dari sistem PBB.¹³⁴ Perkembangan NGO sebagai aktor penting dalam pengiriman bantuan kemanusiaan dimulai pada tahun 1970an.¹³⁵ Beberapa NGO penting meliputi *Medecines Sans Frontieres* (MSF), Oxfam, Care, dan masih banyak lagi.¹³⁶

Bila sejarah bantuan kemanusiaan dilihat dari rezim hukum yang melindunginya, tentu peran *Geneva Convention IV* di tahun 1949 dan *Additional Protocol I* dan *II* di tahun 1977 tidak dapat diabaikan. Pengaturan-pengaturan ini tidak hanya melarang pihak yang berperang mengakibatkan kelaparan bagi penduduk sipil, namun juga memberi kewajiban bagi pihak yang berperang untuk mempersilakan masuknya bantuan kemanusiaan ke daerah konflik.¹³⁷ Selain itu, dalam keadaan globalisasi ini, masyarakat internasional cenderung menganggap bahwa situasi krisis kemanusiaan seperti di Irak, Somalia, bekas Yugoslavia, Afghanistan, Gaza, serta wilayah-wilayah lain, sebagai suatu permasalahan internasional.¹³⁸ Jadi, dilihat dari sisi perkembangan sejarah, bantuan kemanusiaan semakin dihargai dan diperkuat perlindungannya.

¹³³ *Ibid.*, hal. 4.

¹³⁴ Paul Harvey, *et al.*, *The State of the Humanitarian System: Assessing Performance and Progress, a Pilot Study* (London: ALNAP, 2010), hal. 18. Dari total 210.800 pekerja lapangan bantuan kemanusiaan, 112.900 berasal dari NGO, 48.400 berasal dari ICRC dan Red Crescent, sementara 49.500 berasal dari lembaga PBB.

¹³⁵ "The History of Humanitarian Assistance," <http://www.iupui.edu/~histwhs/h699.dir/HumanitChrono.htm>, diunduh tanggal 6 Mei 2011.

¹³⁶ Philippe Ryfman, "Non-Governmental Organizations: An Indispensable Player of Humanitarian Aid," *International Review of the Red Cross* Volume 89 Number 865 (March, 2007), hal. 25.

¹³⁷ Spieker, "The Right to Give and Receive Humanitarian Assistance", hal. 8.

¹³⁸ *Ibid.*

2.2.2. Ruang Lingkup Bantuan Kemanusiaan

Bantuan kemanusiaan diberikan untuk meningkatkan taraf hidup manusia dalam hal adanya bencana, baik bencana alam maupun bencana buatan manusia (*man-made disaster*), seperti perang atau konflik bersenjata. Dari sudut pandang praktek, sesungguhnya perbedaan antara bencana alam dan konflik bersenjata merupakan suatu hal yang artifisial, karena dalam realitanya, keadaan darurat bisa lahir dari kombinasi dua macam bencana tersebut.¹³⁹ Menurut perumusan Palang Merah (*Red Cross*), istilah bantuan kemanusiaan mencakup seluruh kegiatan yang memberikan bantuan darurat kepada orang-orang yang terkena bencana atau berada dalam keadaan darurat, telah berkembang menjadi perumusan yang lebih luas lagi.¹⁴⁰ Dewasa ini, sering dirumuskan bahwa bantuan kemanusiaan melingkupi setiap kegiatan yang dilakukan untuk meningkatkan kondisi manusia.¹⁴¹ Jadi, dapat dilihat bahwa pada umumnya bantuan kemanusiaan disalurkan dalam dua keadaan, namun perbedaan ini tidak seharusnya diberlakukan secara kaku, karena bantuan kemanusiaan mencakup segala situasi di mana kondisi hidup manusia sedang dalam keadaan sangat buruk dan butuh pertolongan. Meskipun begitu, penelitian ini akan lebih difokuskan pada bantuan kemanusiaan dalam hal adanya konflik bersenjata.

Pembagian kategori lain dalam hal bantuan kemanusiaan adalah bantuan kemanusiaan secara kolektif dan bantuan kemanusiaan individual. Maksud bantuan kemanusiaan individual ini adalah bantuan kemanusiaan yang ditujukan kepada individu tertentu dalam wilayah yang diduduki.¹⁴² Pada esensinya, bantuan kemanusiaan individual ini juga harus dipersilakan masuk, kecuali ada alasan

¹³⁹ Cheng Leng Sun, "Humanitarian Assistance by International Organization: A Question of Compulsory Access to Victims," *Singapore Journal of Legal Studies* (December, 1991), hal. 339.

¹⁴⁰ Deborah Maresko, "Development, Relief Aid, and Creating Peace: Humanitarian Aid in Liberia's War of the 1990s," *The Online Journal of Peace and Conflict Resolution Vol.6.1* (Fall, 2004), hal. 102.

¹⁴¹ Larry Minear dan Thomas G. Weiss, *Mercy Under Fire: War and the Global Humanitarian Community* (Boulder: Westview Press, 1995), hal. 18.

¹⁴² Pictet, *Commentary to the Fourth Geneva Convention...*, hal. 329.

keamanan yang sangat penting.¹⁴³ Namun pembahasan pada penelitian ini akan lebih berfokus pada bantuan kemanusiaan secara kolektif.

2.2.3. Syarat-syarat Bantuan Kemanusiaan

Suatu organisasi yang hendak menyalurkan bantuan kemanusiaan harus bersifat imparisial dan kemanusiaan.¹⁴⁴ Ukuran bahwa bantuan tersebut bersifat kemanusiaan dapat dilihat dari tujuannya untuk menolong korban perang.¹⁴⁵ Kegiatan kemanusiaan tersebut tidak boleh terpengaruh oleh alasan politis atau militer apapun.¹⁴⁶ Sementara imparisialitas suatu tindakan dapat dilihat dari pemenuhan suatu tindakan tanpa adanya diskriminasi.¹⁴⁷

Salah satu organisasi yang dianggap oleh *Geneva Convention 1949* memiliki kelayakan untuk mengantarkan bantuan kemanusiaan adalah ICRC. Meskipun memang pembuatan *Geneva Convention 1949* serta *Additional Protocols* banyak melibatkan peran ICRC itu sendiri, namun imparisialitas dan misi kemanusiaan ICRC itu sendiri tidak dapat dipungkiri. Selama bertahun-tahun sejak penciptaannya, ICRC telah berkomitmen untuk menyalurkan bantuan kemanusiaan, sehingga keabsahan ICRC dalam melakukan perannya tidak perlu dipertanyakan lagi. Justru organisasi-organisasi lainlah yang perlu dipertanyakan pemenuhan syaratnya. Syarat sifat imparisialitas serta kemanusiaan tersebut sebetulnya bukan dimaksudkan untuk menghambat pergerakan organisasi-organisasi yang hendak menyalurkan bantuan kemanusiaan. Dapat disimpulkan bahwa syarat tersebut sesungguhnya bertujuan untuk mencegah penyalahgunaan dari kewenangan bantuan kemanusiaan itu sendiri. Meskipun begitu, perlu ditekankan bahwa prinsip kemanusiaan tetap menjadi landasan utama gerakan bantuan kemanusiaan. Dalam hal bantuan kemanusiaan untuk suatu wilayah yang

¹⁴³ *Geneva Convention IV*, ps. 62.

¹⁴⁴ *Additional Protocol I*, ps. 70.

¹⁴⁵ UNHRC, "Report of.... Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance," hal. 19. Lihat pula Pictet, *Commentary on the Additional Protocols....*, hal. 817.

¹⁴⁶ Pictet, *Commentary to the Fourth Geneva Convention....*, hal. 97.

¹⁴⁷ Pictet, *Commentary on the Additional Protocols....*, hal. 818.

diduduki, klaim belaka bahwa suatu organisasi tidak bersifat imparisial tidak boleh digunakan sebagai alasan untuk menolak bantuan kemanusiaan.¹⁴⁸

Organisasi-organisasi yang bergerak di bidang kemanusiaan ini boleh berasal dari wilayah pihak yang menahan (*detaining power*), negara lain, atau boleh juga bersifat internasional.¹⁴⁹ Penting juga untuk diingat bahwa bantuan kemanusiaan perlu mendapat persetujuan para pihak dalam konflik.¹⁵⁰ Syarat ini mungkin terkesan kurang manusiawi, namun memang dalam konflik bersenjata, pihak yang berkonflik tidak memiliki kewajiban untuk toleran terhadap tindakan organisasi asing dalam teritori konflik tersebut.¹⁵¹ Meskipun begitu, tentu saja untuk menjamin tersalurkannya bantuan kemanusiaan tersebut, para pihak dalam konflik memiliki kewajiban-kewajiban tersendiri.

2.2.4. Hak dan Kewajiban Organisasi yang Menyalurkan Bantuan Kemanusiaan

Hak untuk menyalurkan bantuan kemanusiaan kepada penduduk sipil di daerah yang diduduki akibat konflik bersenjata merupakan hak yang diakui.¹⁵² Pada intinya, organisasi yang bertugas menyalurkan bantuan kemanusiaan ini memiliki hak untuk mendapatkan berbagai fasilitas dari pihak yang menahan untuk:

- a. Mengunjungi penduduk sipil;
- b. Mendistribusikan pasokan dan bahan-bahan esensial;
- c. Membantu penduduk sipil dalam mengatur waktu senggang mereka selama penahanan.¹⁵³

¹⁴⁸ *Ibid.*, hal. 817.

¹⁴⁹ *Geneva Convention IV*, ps. 142.

¹⁵⁰ *Ibid.*, ps. 10 dan 60.

¹⁵¹ Pictet, *Commentary to the Fourth Geneva Convention...*, hal. 98.

¹⁵² Forsythe, "...The Role of the Red Cross," hal. 237.

¹⁵³ *Geneva Convention IV*, ps. 142.

Memang sudah sewajarnya organisasi yang menyalurkan bantuan kemanusiaan tersebut mendapat hak-hak atau fasilitas-fasilitas tersebut. Alasannya adalah karena apabila hak-hak untuk menyalurkan bantuan kemanusiaan lebih dijamin, maka penduduk sipil yang membutuhkan akan lebih mudah dan cepat menerima bantuan kemanusiaan. Hal ini tentu sejalan dengan prinsip kemanusiaan dan tujuan *Geneva Convention IV* untuk melindungi penduduk sipil. Meskipun begitu, perlu diperhatikan bahwa fasilitas-fasilitas yang dapat diberikan oleh pihak yang menahan tersebut memiliki batasan, yakni harus berada dalam lingkup yang telah ditentukan dari pertimbangan keamanan dan militer dari pihak yang menahan.¹⁵⁴

Selain memiliki hak-hak, organisasi yang hendak menyalurkan bantuan kemanusiaan juga memiliki kewajiban tertentu. Salah satu kewajiban utama sebelum menyalurkan bantuan kemanusiaan adalah memohon izin kepada pihak yang berperang atau Penguasa Pendudukan agar bantuan kemanusiaan boleh masuk ke wilayah tersebut. Meskipun sesungguhnya pengaturan ini lebih cenderung sebagai hak pihak yang berperang atau Penguasa Pendudukan untuk menolak bantuan kemanusiaan yang tidak ia setujui,¹⁵⁵ namun dapat disimpulkan bahwa tanpa persetujuan tersebut, bantuan kemanusiaan akan menjadi sia-sia. Bantuan kemanusiaan yang tetap dijalankan tanpa persetujuan negara pihak yang berperang atau Penguasa Pendudukan tidak akan mendapat perlindungan dari hukum humaniter internasional dan dapat dianggap melanggar prinsip kedaulatan dari negara yang ingin dimasuki tersebut.¹⁵⁶ Jadi, sudah selayaknya dan demi kemudahan dalam proses penyaluran bantuan kemanusiaan, organisasi yang hendak menyalurkan bantuan kemanusiaan tersebut mendapat izin dari pihak yang berperang atau Penguasa Pendudukan.

¹⁵⁴ Pictet, *Commentary to the Fourth Geneva Convention...*, hal. 563.

¹⁵⁵ *Additional Protocol I*, ps. 70 (1).

¹⁵⁶ Stoffels, "Legal Regulation of Humanitarian Assistance in Armed Conflict..." hal. 535.

2.2.5. Hak dan Kewajiban Pihak yang Berperang atau Penguasa Pendudukan

Pihak yang berperang atau Penguasa Pendudukan memiliki hak untuk memberikan persetujuan terkait di mana bantuan kemanusiaan ini hendak dilaksanakan atau dikirimkan.¹⁵⁷ Selain itu, pihak yang telah menyetujui masuknya bantuan kemanusiaan tersebut ke teritorinya, memiliki hak untuk:

- a. memeriksa atau menggeledah kiriman bantuan;¹⁵⁸
- b. mengatur waktu dan rute masuknya bantuan.¹⁵⁹

Sesungguhnya pihak yang berperang atau Penguasa Pendudukan memiliki hak untuk mengendalikan tidak hanya cara-cara pengiriman bantuan, namun juga perihal persetujuan terhadap bantuan kemanusiaan itu sendiri. Hal ini sebetulnya suatu hal yang wajar saja apalagi mengingat pada faktanya, memang pihak-pihak inilah yang memiliki kendali di wilayah di mana bantuan kemanusiaan hendak disalurkan. Tentu tidak mengherankan bila segala tindakan di wilayah tersebut tunduk pada pengaturan dari pihak yang berperang atau Penguasa Pendudukan.

Hak suatu negara untuk menyetujui atau menolak bantuan kemanusiaan ini merupakan salah satu hambatan terbesar dalam penyaluran bantuan kemanusiaan. Hal ini berkaitan dengan prinsip kedaulatan negara, di mana suatu negara tidak boleh mengganggu urusan dalam negeri negara lain.¹⁶⁰ Bahkan *Final Report on the Reappraisal of the Red Cross* menyebutkan bahwa hukum internasional yang didasarkan pada praktek-praktek tradisional tidak mewajibkan negara untuk menerima bantuan bahkan saat populasinya berada dalam bahaya.¹⁶¹

¹⁵⁷ Lihat pasal 10 *Geneva Convention IV*, pasal 70 *Additional Protocol I*, serta pasal 18 *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts* ('*Additional Protocol II*').

¹⁵⁸ *Geneva Convention IV*, ps. 59; *Additional Protocol I*, ps. 70 (3).

¹⁵⁹ *Geneva Convention IV*, ps. 59.

¹⁶⁰ Chan Leng Sun, "Humanitarian Assistance by International Organisations: A Question of Compulsory Access to Victims," *Singapore Journal of Legal Studies* (Desember 1991), hal. 321.

¹⁶¹ *Ibid.* Lihat pula Donald D. Tansley, ed., *Final Report: An Agenda for Red Cross* (Jenewa: Joint Committee for the Reappraisal of the Red Cross, 1975), hal. 80.

Namun yang penting untuk digarisbawahi adalah pada perkembangannya, hukum internasional dan hak asasi manusia bergerak bersama-sama.¹⁶² Mulai terdapat pergeseran perhatian dari konsep kedaulatan ke konsep hak-hak asasi yang fundamental.¹⁶³ Hal ini didukung oleh pendapat ICJ,¹⁶⁴ pengakuan atas UDHR, dan juga ratifikasi besar-besaran terhadap ICCPR dan ICESCR. Bukan berarti konsep kedaulatan ditinggalkan. Konsep ini tentunya akan tetap ada dalam hukum internasional, namun dalam pelaksanaannya, harus pula diimbangi dengan pelaksanaan konsep hak-hak asasi manusia.

Dengan kata lain, meskipun suatu Penguasa Pendudukan atau pihak yang berperang atau suatu negara yang berdaulat memiliki hak untuk menolak bantuan kemanusiaan, pada perkembangannya, hak ini harus dilaksanakan dengan memperhatikan pelaksanaan hak asasi manusia. Prinsip kemanusiaan itu sendiri terkait erat dengan hak asasi manusia. Rasio pemikiran inilah yang mungkin melahirkan suatu kewajiban yang cenderung kontradiktif dengan hak awal Penguasa Pendudukan atau pihak yang berperang untuk menolak bantuan kemanusiaan. Kewajiban tersebut adalah kewajiban untuk mempersilakan masuknya bantuan kemanusiaan ke wilayah yang membutuhkan.¹⁶⁵

Kewajiban ini menjadi unik karena terkesan berbenturan dengan hak pihak yang berperang atau Penguasa Pendudukan untuk menolak suatu bantuan kemanusiaan. Namun karena hukum humaniter internasional sangat dipengaruhi oleh prinsip perikemanusiaan, maka sudah sewajarnya persyaratan bagi bantuan kemanusiaan untuk memperoleh persetujuan juga harus diimbangi dengan

¹⁶² Rohan J. Hardcastle dan Adrian T. L. Chua, "Humanitarian Assistance: Towards a Right of Access to Victims of Natural Disasters," <http://www.icrc.org/eng/resources/documents/misc/57jpid.htm>, diunduh tanggal 30 Juni 2011.

¹⁶³ *Ibid.*

¹⁶⁴ International Court of Justice, "Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South West Africa," *Advisory Opinion of 7 June 1955*, ICJ Report, 1955, hal. 77. ICJ mengindikasikan bahwa mustahil memberlakukan norma lama atau norma tradisional tanpa merujuk pada perubahan fundamental dalam sistem hukum internasional. Dikaitkan dengan pembahasan, maksudnya adalah konsep tradisional kedaulatan harus ditinjau juga dengan merujuk pada suatu konsep yang relatif lebih modern, yakni konsep hak asasi manusia.

¹⁶⁵ *Geneva Convention IV*, ps. 59; *Additional Protocol I*, ps. 70 (2); Henckaerts dan Doswald-Beck, "*Customary International Humanitarian Law Volume I...*," hal. 193.

persyaratan untuk memberi persetujuan.¹⁶⁶ Bila analisis dilakukan terhadap tujuan dari hukum humaniter internasional itu sendiri, maka dapat ditarik kesimpulan bahwa kewajiban untuk mempersilakan akses bagi bantuan kemanusiaan ini lebih berat bobotnya, karena tujuannya adalah untuk sedapat mungkin melindungi penduduk sipil. Apalagi bila penduduk sipil di daerah tersebut sangat kekurangan makanan, maka timbul kewajiban untuk *memberikan persetujuan* bagi masuknya bantuan kemanusiaan tersebut.¹⁶⁷

Selain kewajiban untuk mempersilakan masuknya bantuan kemanusiaan tersebut, pihak yang berperang atau Penguasa Pendudukan juga memiliki kewajiban untuk:

- a. Memfasilitasi sedapat mungkin pihak yang melindungi (*protecting power*)¹⁶⁸ dalam melaksanakan tugasnya.¹⁶⁹
- b. Sedapat mungkin menjamin keberadaan makanan dan pasokan obat-obatan di populasi tersebut dan wajib membawa masuk bahan makanan dan pasokan obat-obatan masuk bila hal-hal tersebut tidak cukup tersedia di wilayah yang diduduki.¹⁷⁰

Pengaturan mengenai kewajiban pihak yang berperang atau Penguasa Pendudukan terhadap bantuan kemanusiaan tidak hanya diatur di *Geneva Convention IV* dan protokol tambahannya. ICRC yang telah melakukan kodifikasi terhadap ketentuan hukum kebiasaan perang. Menurut hukum kebiasaan perang, para pihak dalam konflik harus mempersilakan dan memfasilitasi masuknya bantuan kemanusiaan yang imparial, meskipun para pihak dalam konflik ini juga memiliki hak untuk mengontrol bantuan kemanusiaan tersebut.¹⁷¹

¹⁶⁶ Stoffels, "Legal Regulation of Humanitarian Assistance in Armed Conflict..." hal. 535.

¹⁶⁷ *Geneva Convention IV*, ps. 59.

¹⁶⁸ Yang dimaksud dengan "Protecting Power" adalah negara yang melindungi suatu negara dalam konflik dan/atau merepresentasikan kepentingan warga negara yang ia lindungi di negara ketiga.

¹⁶⁹ *Geneva Convention IV*, ps.9.

¹⁷⁰ *Ibid.*, ps.55; *Additional Protocol II*, ps. 18 (2).

Sebagai ilustrasi, dapat dilihat contoh kasus penolakan bantuan kemanusiaan oleh Sri Lanka. Pada tahun 1980-an, terdapat konflik bersenjata di Sri Lanka di mana kelompok etnis Tamil melakukan beberapa pemberontakan besar-besaran melawan pemerintah Sri Lanka.¹⁷² Pada tahun 1987, Pemerintah Sri Lanka juga mengenakan blokade ekonomi di Jaffna Peninsula untuk melawan pemberontakan Tamil.¹⁷³ Namun blokade ini merugikan penduduk sipil sehingga pada perkembangannya Pemerintah India mengirimkan armada kapal yang membawa pasokan makanan dan obat-obatan untuk penduduk sipil di Jaffna. Konvoy ini tidak bersenjata dan tidak ditemani oleh kapal perang, namun Angkatan Laut Sri Lanka mencegat kapal-kapal tersebut dan memerintahkan kapal India tersebut untuk kembali.¹⁷⁴ Memang tidak terdapat penggunaan kekuatan militer terhadap kapal India tersebut, namun kapal yang membawa bantuan kemanusiaan tetap mendapat halangan untuk menjalankan misinya. Kasus ini memang menjadi salah satu contoh di mana salah satu pihak yang berperang memiliki hak yang besar untuk menolak bantuan kemanusiaan. Namun tindakan Sri Lanka ini bukannya tidak dikritik. Mengingat kondisi penduduk sipil di Jaffna, seharusnya pemerintah Sri Lanka tidak menolak bantuan kemanusiaan tersebut. Pada perkembangannya, kasus ini mengakibatkan masyarakat internasional memiliki perhatian lebih terhadap hak penduduk sipil untuk mendapat bantuan kemanusiaan.

Jadi, dapat disimpulkan bahwa terdapat seperangkat kewajiban yang harus dilaksanakan oleh pihak yang berperang atau Penguasa Pendudukan demi menjamin tersalurkannya bantuan kemanusiaan di wilayah yang membutuhkan. Kewajiban ini tentu harus dijalankan dengan sungguh-sungguh agar korban-korban dari penduduk sipil dapat diminimalisir.

¹⁷¹ Henckaerts dan Doswald-Beck, “*Customary International Humanitarian Law Volume I...*,” hal. 193.

¹⁷² Nirmala Chandrahasan, “Use of Force to Ensure Humanitarian Relief – A South Asian Precedent Examined,” *International and Comparative Law Quarterly Volume 42 Number 3* (Juli 1993), hal. 665.

¹⁷³ *Ibid.*, hal. 666.

¹⁷⁴ *Ibid.*

2.2.6. Perlindungan terhadap Bantuan Kemanusiaan

Meskipun pengaturan mengenai berbagai pihak demi menyalurkan bantuan kemanusiaan sudah diatur dengan jelas melalui berbagai konvensi internasional maupun hukum kebiasaan internasional, sayangnya penyerangan terhadap personel bantuan kemanusiaan atau bantuan kemanusiaan itu sendiri masih sering terjadi. Pada tahun 2008, 122 pekerja bantuan kemanusiaan dibunuh dan 260 lainnya diserang.¹⁷⁵ Sementara itu, negara-negara yang dianggap sebagai negara paling tidak aman untuk operasi bantuan kemanusiaan adalah Somalia dan Afghanistan.¹⁷⁶

Penyerangan terhadap bantuan kemanusiaan merupakan suatu tindakan tidak bertanggungjawab dan tidak berperikemanusiaan. Apalagi bila mengingat tujuan mulia dari bantuan kemanusiaan itu sendiri. Dewan Keamanan PBB bahkan telah menyatakan bahwa gangguan terhadap masuknya bantuan kemanusiaan termasuk suatu kejahatan perang, tidak peduli apakah hal tersebut dilakukan di konflik bersenjata internasional atau internal.¹⁷⁷ *Geneva Convention IV* itu sendiri sesungguhnya telah menjamin bahwa tidak boleh ada halangan terhadap kegiatan kemanusiaan yang dijalankan oleh ICRC atau organisasi kemanusiaan lain untuk melindungi dan memberikan bantuan kepada penduduk sipil.¹⁷⁸ Bahkan perlindungan terhadap bantuan kemanusiaan adalah suatu kewajiban yang senantiasa menemani kewajiban lain pihak yang berperang atau Penguasa Pendudukan untuk mempersilakan masuknya bantuan kemanusiaan.¹⁷⁹

Jadi, perlindungan terhadap barang-barang yang disalurkan melalui bantuan kemanusiaan tersebut dijamin oleh setiap negara yang terikat dalam *Geneva Convention IV*.¹⁸⁰ Sementara itu, para pekerja atau orang-orang yang

¹⁷⁵ Abby Stoddard, Adele Harmer, dan Victoria DiDomenico, "Providing Aid in Insecure Environments: 2009 Update," *HPG Policy Brief 34* (April 2009), hal. 3. (1-12)

¹⁷⁶ *Ibid.*

¹⁷⁷ United Nation Security Council, *Resolution 1502* (2003). Lihat pula ICC Statute, ps. 8 (2) (b) (iii) dan ps. 8 (2) (e) (iii).

¹⁷⁸ *Geneva Convention IV*, ps.10.

¹⁷⁹ Pictet, *Commentary to the Fourth Geneva Convention...*, hal. 322.

¹⁸⁰ *Geneva Convention IV*, ps.59.

menyalurkan bantuan kemanusiaan juga mendapat perlindungan menurut *Additional Protocol I*.¹⁸¹ Perlindungan ini dapat diwujudkan dengan pemberitahuan dan instruksi yang diberikan oleh pihak yang berperang kepada angkatan bersenjata untuk tidak menyerang personel atau pekerja yang menyalurkan bantuan kemanusiaan.¹⁸² Meskipun begitu, perlindungan ini tidak berlaku pada situasi-situasi yang memang sudah ditentukan sebagai suatu zona yang berbahaya. Alasannya adalah karena tentu pada kenyataannya pihak yang berperang tidak akan memiliki kemampuan untuk selalu melindungi personel bantuan kemanusiaan, apalagi saat pihak yang berperang tersebut harus berkonsentrasi terhadap penyerangan pihak lawan.

Selain dari perlindungan khusus, tersebut, perlu diingat bahwa personel bantuan kemanusiaan juga tetap memiliki status sebagai penduduk sipil, sehingga hukum hak asasi manusia tetap menjamin hak untuk hidupnya, sementara hukum humaniter internasional tetap menjamin larangan penyerangan terhadapnya. Bahkan, pekerja dalam "*clandestine mission*" atau bantuan kemanusiaan tersembunyi¹⁸³ sekalipun tetap memiliki perlindungan, karena status mereka yang tetap sebagai penduduk sipil dan karena barang-barang yang mereka bawa sebagai bantuan kemanusiaan tetap dianggap sebagai objek / barang sipil.¹⁸⁴

Perlu diperhatikan pula bahwa dalam hal bantuan kemanusiaan yang dibawa oleh organ PBB, terdapat perlindungan khusus. Ada tiga bentuk hak istimewa dan imunitas khusus bagi PBB, yaitu:

- a. Imunitas barang-barang dan kendaraan PBB dari penggeledahan dan penyitaan;
- b. Imunitas pekerja PBB atas tindakan yang mereka lakukan serta perkataan yang mereka katakan dalam kapasitas jabatan resmi mereka;

¹⁸¹ *Additional Protocol I*, ps. 71 (2).

¹⁸² Pictet, *Commentary on the Additional Protocols*..., hal. 834.

¹⁸³ Bantuan kemanusiaan yang tidak mendapatkan izin untuk masuk ke daerah konflik bersenjata.

¹⁸⁴ Stoffels, "Legal Regulation of Humanitarian Assistance in Armed Conflict..." hal. 535.

c. Kebebasan staf PBB untuk bergerak.¹⁸⁵

Jadi, dapat disimpulkan bahwa masuknya bantuan kemanusiaan ke dalam wilayah konflik bersenjata merupakan hal yang harus dijamin, bahkan oleh para pihak yang sedang berkonflik sekalipun. Memang, pihak yang sedang berkonflik harus menyetujui terlebih dahulu masuknya bantuan kemanusiaan. Pihak yang sedang berkonflik juga memiliki hak untuk menggeledah barang-barang yang dibawa oleh misi bantuan kemanusiaan. Namun, mengingat misi kemanusiaan dan komitmen para pihak untuk meminimalisir korban penduduk sipil, sudah sepatutnya pihak yang sedang berkonflik menyetujui masuknya bantuan kemanusiaan. Perlindungan harus tetap diberikan kepada para pekerja dalam bantuan kemanusiaan dan juga kepada barang-barang yang dibawa dalam misi bantuan kemanusiaan tersebut.

¹⁸⁵ Bartholomeusz, "...Humaitarian Assistance in the UN System," hal. 5.

BAB 3

**PERLINDUNGAN TERHADAP KAPAL SIPIL YANG MEMBAWA
BANTUAN KEMANUSIAAN DI WILAYAH LAUT BEBAS DALAM
KEADAAN KONFLIK BERSENJATA**

**3.1. Pengaturan Terhadap Kapal Sipil yang Berlayar di Laut Bebas Menurut
Hukum Laut**

3.1.1. Laut Bebas

Laut terbagi atas berbagai zona maritim, yang diukur dari garis pangkal (*baseline*).¹⁸⁶ Zona maritim ini memiliki status hukum yang berbeda-beda dan terdiri atas laut pedalaman, laut teritorial, selat yang digunakan untuk pelayaran internasional, zona tambahan, zona ekonomi eksklusif, landas kontinen, daerah dasar laut samudra dalam, dan laut bebas.¹⁸⁷ Perbedaan prinsip hukum di tiap zona maritim ini juga mempengaruhi daerah operasi militer atau perang di laut.¹⁸⁸

Tiap Negara memiliki kedaulatan penuh di dalam perairan pedalaman dan laut teritorial,¹⁸⁹ dan hak berdaulat (*sovereign rights*) di zona ekonomi eksklusif serta landas kontinen.¹⁹⁰ Namun pengaturannya berbeda dalam zona laut bebas. Pengaturan di laut bebas memiliki kaitan dengan konsep laut tertutup (*mare clausum*) dan laut terbuka atau laut bebas (*mare liberum*). Awalnya, konsep laut ini memang tertutup, sebagaimana yang diproklamasikan oleh Spanyol dan

¹⁸⁶ R.R. Churchill dan A.V. Lowe, *The Law of the Sea*, ed.3 (Manchester: Manchester University Press, 1999), hal. 31. Lihat pula pasal 5, 7, 47 UNCLOS tentang 3 macam *baseline*, yakni *normal baseline*, *straight baseline*, serta *archipelagic baseline*.

¹⁸⁷ Kusumaatmadja dan Agoes, *Pengantar Hukum Internasional*, hal. 171.

¹⁸⁸ Enny Narwati, "Aturan Perang di Laut: San Remo Manual Sebagai Sumber Hukum Internasional," *Mimbar Hukum Volume 20 No.3* (Oktober 2008), hal. 445.

¹⁸⁹ Meskipun memiliki kedaulatan di dalam laut teritorial, namun negara pantai harus memperbolehkan kapal menjalankan hak lintas damai di daerah laut teritorialnya tersebut. Lihat UNCLOS, ps.2 dan ps. 17.

¹⁹⁰ *Ibid.*, ps.56 dan ps.77.

Portugal.¹⁹¹ Namun pada perkembangannya, di abad ke-18, dikenalah konsep laut terbuka, yang diusung oleh Hugo Grotius dalam bukunya *Mare Liberum*.¹⁹² Meskipun sempat ditentang oleh beberapa ahli seperti Scot Welwood dan John Selden,¹⁹³ pada akhirnya disepakati bahwa laut bebas terbuka untuk seluruh negara dan tidak ada negara di dunia yang boleh mengakui laut bebas sebagai bagian dari kedaulatannya.¹⁹⁴

Laut bebas itu sendiri diatur dalam UNCLOS sebagai “*all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State.*”¹⁹⁵ Menurut hukum laut, pada dasarnya di laut bebas yurisdiksi yang berlaku adalah yurisdiksi dari negara bendera kapal¹⁹⁶ atau yurisdiksi universal untuk kasus-kasus tertentu, seperti pembajakan, perdagangan budak, penyiaran ilegal dan, kejahatan-kejahatan lain sebagaimana diatur dalam UNCLOS.¹⁹⁷

Laut bebas juga memiliki peran penting dalam hal konflik bersenjata di laut. Pada zaman dulu, secara umum hukum internasional membagi laut menjadi 2 zona yurisdiksi utama, yakni laut teritorial¹⁹⁸ dan laut bebas.¹⁹⁹ Karena laut bebas dapat digunakan oleh setiap pihak, konsekuensinya operasi militer di laut banyak dilakukan di manapun di laut bebas selain di wilayah laut teritorial pihak negara

¹⁹¹ Malcolm N. Shaw, *International Law*, ed.6 (Cambridge: Cambridge University Press, 2008), hal.609.

¹⁹² Churchill dan Lowe, *The Law of the Sea*, hal. 4.

¹⁹³ *Ibid.*

¹⁹⁴ *Ibid.*, hal. 204. Lihat pula pasal 2 dari 1958 High Seas Convention dan pasal 87 serta 89 dari UNCLOS.

¹⁹⁵ Seluruh bagian laut yang tidak termasuk zona ekonomi eksklusif, laut teritorial atau perairan pedalaman suatu Negara, atau perairan kepulauan sebuah Negara kepulauan (terjemahan Penulis), UNCLOS, ps. 86.

¹⁹⁶ Shaw, *International Law*, hal. 611.

¹⁹⁷ *Ibid.*, hal.668.

¹⁹⁸ Pada saat itu, laut teritorial dibatasi hanya sejauh kurang lebih 3 mil laut dari garis pangkal.

¹⁹⁹ J. Ashley Roach, “The Law of Naval Warfare at the Turn of Two Centuries,” *American Journal of International Law Volume 94* (Januari 2000), hal. 67.

netral.²⁰⁰ Setelah masa keberlakuan UNCLOS, wilayah atau zona di mana perang diperbolehkan menyempit, karena diakuinya perairan kepulauan dan zona selat internasional yang tumpang tindih dengan laut teritorial.²⁰¹ Meskipun begitu, laut bebas tetap dianggap sebagai salah satu wilayah di mana perang di laut dapat dilaksanakan.²⁰² Penting untuk diperhatikan bahwa meskipun laut bebas dapat dijadikan area perang di laut, namun pihak yang berperang di laut bebas tetap harus memperhatikan hak-hak negara lain (khususnya negara netral) di laut bebas.²⁰³

3.1.2. Status dan Yurisdiksi Kapal yang Berlayar di Laut Bebas

Bila merujuk pada pengaturan mengenai laut bebas di UNCLOS, dapat disimpulkan bahwa terdapat penggolongan kapal menjadi: kapal biasa,²⁰⁴ kapal dengan bendera PBB, badan khusus PBB, dan *International Atomic Energy Agency* (IAEA);²⁰⁵ kapal perang;²⁰⁶ serta kapal yang digunakan untuk dinas pemerintah non-komersial.²⁰⁷ Hal ini sesuai dengan pembagian kapal yang ada di laut teritorial.²⁰⁸

²⁰⁰ *Ibid.*

²⁰¹ Kedua wilayah laut ini dianggap sebagai zona perairan netral (kecuali perairan kepulauan tersebut dimiliki oleh salah satu pihak yang berperang), sehingga operasi militer tidak diperbolehkan untuk dijalankan di kedua wilayah laut ini.

²⁰² Lihat *1994 San Remo Manual on International Law Applicable to Armed Conflicts at Sea* ('*San Remo Manual*'), ps. 10. Termasuk dalam area perang di laut adalah: laut teritorial, perairan pedalaman, zona ekonomi eksklusif, dan landas kontinen dari negara-negara yang sedang berperang, serta laut bebas.

²⁰³ Roach, "The Law of Naval Warfare at the Turn of Two Centuries," hal. 67.

²⁰⁴ UNCLOS, ps.91.

²⁰⁵ *Ibid.*, ps. 93.

²⁰⁶ *Ibid.*, ps. 95.

²⁰⁷ *Ibid.*, ps.96. Tidak ada definisi khusus yang diberikan oleh UNCLOS. UNCLOS hanya memberi penjelasan bahwa kapal ini adalah kapal yang dimiliki atau dioperasikan oleh suatu negara dan digunakan hanya untuk dinas pemerintah non-komersial.

²⁰⁸ Lihat *Part II, Section III, Subsection A, B, dan C* UNCLOS.

Status dan kewarganegaraan kapal di laut bebas ditentukan oleh bendera kapalnya.²⁰⁹ Konsep bendera kapal ini lahir dari kebiasaan penggunaan bendera kapal sebagai bentuk identifikasi dan simbol negara saat kapal tersebut berlayar di laut bebas.²¹⁰ Perihal bendera kapal ini sangatlah penting, karena selain menentukan kewarganegaraan kapal, bendera kapal juga menunjukkan yurisdiksi negara apa yang berlaku di kapal tersebut.

Persoalan yurisdiksi ini diatur sedikit berbeda bila terkait kapal perang atau kapal pemerintah yang digunakan untuk dinas non-komersial. Kedua kapal ini memiliki kekebalan penuh dari yurisdiksi negara apapun selain yurisdiksi negara bendera kapal perang atau kapal pemerintah tersebut.²¹¹ Konsekuensinya, pihak dari kapal asing tidak boleh menaiki kapal perang negara lainnya meskipun ada alasan yang masuk akal telah terjadi pembajakan sekalipun.²¹²

Penting untuk diperhatikan mengenai beberapa pengaturan khusus terkait status dan yurisdiksi kapal di laut bebas dalam hal adanya suatu konflik bersenjata. Secara garis besar, dapat disimpulkan bahwa dalam hal adanya berlakunya hukum perang di laut (*law of naval warfare*), penggolongan kapal dapat dibagi menjadi kapal perang (*warship*), kapal bantuan (*auxiliary vessel*), kapal rumah sakit (*hospital ship*), kapal dagang (*merchant vessel*).²¹³

Dapat dilihat definisi kapal perang berikut:

“Warship means a ship belonging to the armed forces of a State bearing the external marks distinguishing the character and nationality of such a ship, under the command of an officer duly commissioned by the government of that State and whose name appears in the appropriate

²⁰⁹ UNCLOS, ps. 91.

²¹⁰ Nivedita M. Hosanee, “A Critical Analysis of Flag State Duties as Laid Down Under Article 94 of UNCLOS,” (presentasi disampaikan pada Seminar The United Nations-Nippon Foundation Fellowship Programme 2009 -2010).

²¹¹ UNCLOS, ps. 95 dan ps.96.

²¹² *Ibid.*, ps. 102. Lihat pula Bernard H. Oxman, “The Regime of Warships Under the United Nations Convention on the Law of the Sea,” *Virginia Journal of International Law Volume 24* (1983-1984), hal. 827.

²¹³ Lihat *San Remo Manual*, para. 13.

*service list or its equivalent, and manned by a crew which is under regular armed forces discipline.*²¹⁴

Yang dimaksud dengan kapal perang ini meliputi juga kapal perang di atas permukaan dan kapal perang di bawah permukaan.²¹⁵ Yurisdiksi di kapal perang ini juga dimiliki oleh negara kapal perang tersebut,²¹⁶ yang ditunjukkan dari tanda eksternal yang menunjukkan kewarganegaraan kapal tersebut. Pengaturan mengenai hak dan kewajiban kapal perang ini akan dibahas lebih lanjut di bawah.

Sementara itu, yang dimaksud dengan kapal bantuan adalah:

*“Auxiliary vessel means a vessel, other than a warship, that is owned by or under the exclusive control of the armed forces of a State and used for the time being on government non-commercial service.”*²¹⁷

Apabila ditarik analogi dengan rezim di UNCLOS, dapat dilihat persamaan antara definisi kapal bantuan ini dengan kapal yang digunakan untuk dinas pemerintah non-komersial,²¹⁸ karena keduanya sama-sama dimiliki atau dikendalikan oleh negara dan digunakan untuk dinas pemerintah non-komersial. Perbedaannya adalah UNCLOS mengualifikasikan kapal dinas pemerintah non-komersial secara lebih umum, yakni bahwa kapal tersebut tidak harus dimiliki atau dikendalikan oleh angkatan bersenjata negara tersebut. Seperti dalam halnya kapal perang, hukum perang di laut memang tidak mengatur secara khusus

²¹⁴ Kapal perang adalah kapal yang dimiliki oleh angkatan bersenjata suatu negara dan memiliki tanda eksternal untuk membedakan karakter dan kewarganegaraan kapal tersebut, berada di bawah komando petugas yang ditugaskan oleh Pemerintah Negara tersebut dan yang namanya ada di daftar dinas yang sesuai atau yang setara, dan berawakkan kru yang berada di bawah disiplin angkatan bersenjata regular (Terjemahan Penulis), *San Remo Manual*, para. 13 (g). Lihat pula UNCLOS, ps. 29.

²¹⁵ Wolff Heinstschel von Heinegg, “Law of Naval Warfare and Neutrality at Sea,” (makalah disampaikan pada Seminar The Academy Lecture Series di Auditoire Jacques Freymond, Jenewa pada tanggal 3 Maret 2010), hal. 12.

²¹⁶ Hal ini sejalan dengan pengaturan mengenai kapal perang di Pasal 95 UNCLOS.

²¹⁷ Kapal bantuan adalah kapal selain kapal perang yang dimiliki atau berada di bawah kendali eksklusif angkatan bersenjata suatu negara dan digunakan pada saat itu sebagai layanan non-komersial Pemerintah (terjemahan Penulis), *San Remo Manual*, para. 13 (h).

²¹⁸ Lihat UNCLOS, ps. 96. Salah satu jenis kapal yang dikenal dalam UNCLOS adalah kapal yang dimiliki atau dioperasikan oleh suatu Negara dan digunakan hanya untuk dinas pemerintah non-komersial.

mengenai yurisdiksi kapal ini. Oleh karena itu, bila dibandingkan dengan pengaturan menurut UNCLOS, dapat dilihat bahwa kapal ini juga memiliki kekebalan penuh dan yurisdiksi dari negara kapal tersebut.²¹⁹

Kemudian dikenal juga kapal dagang, yang memiliki arti sebagai berikut:

*“Merchant vessel means a vessel, other than a warship, an auxiliary vessel, or a State vessel such as a customs or police vessel, that is engaged in commercial or private service.”*²²⁰

Meskipun digolongkan sebagai kapal dagang, dari perumusan definisi di atas dapat disimpulkan bahwa kapal ini meliputi semua kapal yang bukan kapal militer atau kapal perang, sehingga penggolongan ini juga bermaksud untuk mengikutsertakan kapal-kapal sipil atau kapal yang tidak terlibat dengan urusan pemerintahan atau militer. Hal ini sesuai ketentuan larangan penyerangan kapal dagang dengan alasan bahwa kapal dagang merupakan suatu objek sipil.²²¹ Oleh karena itu, dapat disimpulkan bahwa kapal dagang adalah kapal sipil. Bila dianalogikan dengan pengaturan di UNCLOS, maka yurisdiksi yang berlaku bagi kapal ini adalah yurisdiksi dari negara bendera kapal tersebut.²²²

3.1.3. Hak dan Kewajiban Kapal Sipil di Laut Bebas

UNCLOS memberikan pengaturan yang jelas mengenai hak dan kewajiban kapal yang berlayar di laut bebas. Penggolongan sebagai ‘kapal sipil’ pada bagian ini dimaksudkan untuk membedakan hak dan kewajiban kapal perang dengan kapal-kapal lain yang tidak bersifat militer, seperti kapal dagang serta kapal pribadi lainnya yang dapat digolongkan sebagai kapal sipil karena sifat non-militernya tersebut.²²³

²¹⁹ *Ibid.*

²²⁰ Kapal dagang adalah kapal selain kapal perang, kapal bantuan, atau kapal negara seperti kapal polisi atau kapal bea cukai, yang terlibat dengan layanan/urusan komersial atau privat (terjemahan Penulis), *San Remo Manual*, para. 13 (i).

²²¹ *San Remo Manual*, para. 41.

²²² Lihat UNCLOS, ps. 91 dan 92.

²²³ UNCLOS memang tidak mengenal pembedaan kapal sipil dengan kapal militer, namun untuk kepentingan penulisan ini, istilah ‘kapal’ atau ‘kapal sipil’ dapat digunakan bersamaan untuk membedakan dengan kapal jenis lainnya yakni kapal perang atau kapal militer.

Hak untuk berlayar dimiliki oleh setiap negara, baik negara pantai (*coastal state*) maupun negara terkurung daratan (*land-locked state*).²²⁴ Kapal setiap negara memiliki hak dan kebebasan di laut bebas sebagai berikut:²²⁵

- a. Kebebasan berlayar
- b. Kebebasan penerbangan
- c. Kebebasan untuk meletakkan kabel dan pipa di dasar laut
- d. Kebebasan membangun pulau buatan dan instalasi lain yang diperbolehkan dalam hukum internasional
- e. Kebebasan memancing
- f. Kebebasan untuk melakukan riset ilmiah.

Kebebasan yang paling penting untuk disorot dalam pembahasan kali ini adalah kebebasan untuk berlayar. Kebebasan berlayar ini berasal dari prinsip *non-interference* atau prinsip yang melarang adanya gangguan, dan sudah mendominasi rezim hukum laut selama lebih dari dua abad.²²⁶ Esensi dari prinsip kebebasan di laut bebas adalah larangan bagi suatu kapal untuk mengganggu kapal dengan kewarganegaraan negara lain.²²⁷ Dalam situasi damai, hak kebebasan berlayar ini relatif lebih mudah dipertahankan karena pengecualian hak kebebasan berlayar ini hanya berlaku apabila kapal tersebut dicurigai terlibat dalam kejahatan pembajakan, perdagangan budak, tidak memiliki kewarganegaraan, membawa ancaman kepada negara lain, atau bila kapal tersebut sesungguhnya dimiliki oleh kapal yang melakukan pemeriksaan.²²⁸ Apabila tidak ada kecurigaan-kecurigaan ini, tentu suatu kapal tetap memiliki hak untuk

²²⁴ UNCLOS, ps. 90.

²²⁵ *Ibid.*, ps. 87.

²²⁶ Michael A. Becker, "The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea," *Harvard International Law Journal Volume 46* (Winter, 2005), hal. 169.

²²⁷ Efthymios Papastavridis, "The Right of Visit on the High Seas in a Theoretical Perspective: Mare Liberum versus Mare Clausum Revisited," *Leiden Journal of International Law* (2011), hal. 46.

²²⁸ Robert C.F. Reuland, "Interference with Non-Natioanl Ships on the High Seas: Peacetime Exceptions to the Exclusivity Rule of Flag-State Jurisdiction," *Vanderbilt Journal of Transnational Law Volume 22* (1989), hal. 1161-1162.

berlayar dengan sebebas-bebasnya di laut bebas. Kebebasan untuk berlayar tidak hanya tetap menjadi suatu prinsip esensial dari di laut, namun juga tetap diakui oleh UNCLOS dalam situasi di mana adanya yurisdiksi yang tumpang tindih sekalipun.²²⁹

Dalam situasi konflik bersenjata yang lebih pelik sekalipun, hak bagi suatu kapal untuk bebas berlayar juga tetap diakui sebagai salah satu hak yang harus diutamakan. Meskipun hak pihak yang berperang untuk memeriksa dan menggeledah juga diakui sebagai salah satu hak yang penting, namun terdapat pembatasan-pembatasan terhadap pelaksanaan hak ini. Hak untuk memeriksa dan menggeledah hanyalah suatu hak pengecualian, yang berlaku bila terdapat alasan-alasan yang layak terkait keterlibatan kapal untuk membantu pihak lawan. Bahkan, suatu kapal dagang atau kapal sipil dapat menghindari pemeriksaan tersebut bila:

- a. Kapal dagang tersebut menuju pelabuhan yang netral;
- b. Kapal dagang tersebut berada dalam konvoy kapal perang negara netral yang memiliki kewarganegaraan sama dengan kapal dagang tersebut atau bila kapal dagang tersebut berada dalam konvoy kapal perang negara netral lain yang sudah melakukan perjanjian dengan kapal dagang tersebut untuk menjalankan konvoy;
- c. Negara bendera kapal dari kapal perang netral menjamin bahwa kapal dagang tersebut tidak membawa barang-barang selundupan atau terlibat dalam aktivitas yang bertentangan dengan status netralnya; dan
- d. Komandan dari kapal perang netral tersebut menyediakan segala informasi terkait kapal dagang dan kargonya apabila diminta oleh komandan kapal perang pihak yang berperang.²³⁰

Apabila kecurigaan yang melandasi tindakan pemeriksaan dan pengeledahan tersebut tidak terbukti, pemilik kapal kemudian memiliki hak untuk menuntut kompensasi dari akibat tindakan pihak yang berperang tersebut.²³¹

²²⁹ Becker, "...Freedom of Navigation and the Interdiction of Ships at Sea," hal. 173.

²³⁰ *Ibid.*, para. 120.

Jadi, dapat disimpulkan bahwa hak-hak kapal sipil di laut bebas memiliki jaminan yang kuat. Pelaksanaan hak-hak lain dari kapal perang atau kapal militer yang mungkin dapat mengganggu hak kapal sipil ini hanyalah merupakan suatu pengaturan pengecualian dan tidak dapat menghapus hak kapal sipil untuk secara bebas berlayar pada esensinya.

Meskipun memiliki berbagai hak, negara bendera kapal yang berlayar di laut bebas harus pula memenuhi kewajiban-kewajiban tertentu. Pada intinya, seluruh hak yang diberikan kepada kapal yang berlayar di laut bebas harus dijalankan dengan memperhatikan kepentingan negara lain (*due regard for the interests of other States*) yang juga menjalankan hak dan kebebasan mereka.²³² Dalam hal adanya konflik kepentingan, kewajiban untuk memperhatikan negara lain tersebut akan dilakukan tergantung pada tiap kasusnya.²³³ Selain kewajiban secara umum tersebut, terdapat kewajiban khusus lain²³⁴ yaitu:

1. Kewajiban untuk menjalankan kontrol atau kendali administratif dan yurisdiksi secara efektif
2. Kewajiban untuk mendaftarkan kapal
3. Kewajiban untuk menjaga keselamatan di laut, dengan memperhatikan:
 - a. Konstruksi, peralatan, dan kelayakan laut kapal
 - b. Kondisi buruh, pelatihan kru/awak kapal
 - c. Penggunaan sinyal, pemeliharaan komunikasi, dan pencegahan tabrakan.
4. Kewajiban untuk menjalankan investigasi pada saat negara lain melaporkan adanya ketidaklayakan kapal tersebut dalam menjalankan kontrol/kendali dan yurisdiksi
5. Kewajiban untuk melaksanakan investigasi atau bekerjasama dengan negara lain untuk menginvestigasi kecelakaan dalam pelayaran kapalnya

²³¹ D.R. Humphrey, "Belligerent Interdiction of Neutral Shipping in International Armed Conflict," *Journal of Armed Conflict Law Volume 2 Number 1* (Juni 1997), hal. 39.

²³² UNCLOS, ps. 87.

²³³ Churchill and Lowe, *The Law of the Sea*, hal.206.

²³⁴ UNCLOS, ps. 94.

Kewajiban-kewajiban tidak hanya terbatas terhadap apa yang termaktub dalam Pasal 94 UNCLOS tersebut. Suatu kapal juga harus memperhatikan kewajiban-kewajiban dari hukum internasional lain serta pengaturan dari organisasi internasional yang relevan seperti *International Maritime Organization* (IMO) dan lainnya.²³⁵

Jadi, dapat dilihat bahwa kapal yang berlayar di laut bebas memiliki hak di satu sisi, namun kapal tersebut juga memiliki kewajiban-kewajiban tertentu. Penggunaan laut bebas harus dijalankan dengan sebaik-baiknya, agar negara-negara dapat secara merata memanfaatkan laut bebas secara bebas dan bertanggung jawab.

3.1.4. Hak dan Kewajiban Kapal Perang di Laut Bebas

Kapal perang memiliki hak untuk memeriksa (*right to visit*) atau mendarat di kapal lainnya²³⁶ dan juga hak untuk pengejaran seketika (*right of hot pursuit*).²³⁷ Namun bukan berarti hak ini dapat dijalankan dengan semena-mena, Bahkan, pada awalnya, hak untuk melakukan pemeriksaan dan menggeledah kapal asing di laut bebas hanya merupakan hak dari pihak yang berperang dalam konflik bersenjata dan tidak diberlakukan pada saat damai.²³⁸

Meskipun pada perkembangannya UNCLOS mengadopsi hak untuk melakukan pemeriksaan ini, namun terdapat beberapa persyaratan khusus. Hak kapal perang untuk melakukan pemeriksaan terhadap kapal lain tersebut hanya dapat dijalankan dalam hal adanya alasan yang layak bahwa kapal yang akan diperiksa tersebut terlibat dalam aktivitas terlarang, yakni pembajakan, perdagangan budak, penyiaran tanpa izin, serta apabila kapal tersebut tidak memiliki kewarganegaraan.²³⁹ Selain dari alasan-alasan tersebut, hak untuk

²³⁵ Hosanee, "A Critical Analysis of Flag State Duties..."

²³⁶ Kecuali pada kapal perang lain atau kapal pemerintah yang tidak digunakan untuk urusan komersial. Lihat UNCLOS, ps.110.

²³⁷ *Ibid.*, ps. 111.

²³⁸ Reuland, "Interference with Non-Natioanl Ships on the High Seas...", hal. 1170.

melakukan pemeriksaan untuk alasan lain hanya boleh dijalankan apabila hal tersebut diatur dalam perjanjian lain yang relevan atau dengan adanya persetujuan dari negara bendera kapal yang diperiksa.²⁴⁰

Sementara itu, hak untuk pengejaran seketika hanya bisa dijalankan apabila terdapat alasan yang cukup untuk menduga bahwa suatu kapal telah melanggar hukum di suatu negara. Hak untuk mengejar ini harus dimulai dari perairan pedalaman, perairan kepulauan, laut teritorial, atau zona tambahan si negara yang melakukan pengejaran.²⁴¹ Jadi, dapat disimpulkan bahwa pelaksanaan hak-hak kapal perang atau militer di laut bebas hanya dapat dijalankan pada situasi dan kondisi tertentu.

Pada konflik bersenjata, terdapat hak serupa dari kapal perang untuk melakukan pemeriksaan dan pengeledahan.²⁴² Hak melakukan pemeriksaan atau menggeledah merupakan cara dari suatu kapal perang para pihak yang berperang untuk menentukan apakah status sesungguhnya dari suatu kapal (kapal musuh atau kapal netral), sifat dari barang yang dibawa oleh kapal tersebut (barang-barang yang dilarang/*contraband* atau barang yang tidak dilarang/*free goods*), cara kapal tersebut berlayar (damai atau siap perang), serta hal-hal lain yang berhubungan dengan suatu konflik bersenjata.²⁴³ Namun hak melakukan pemeriksaan atau menggeledah ini tidak dapat dijalankan di wilayah netral (termasuk selat internasional yang tumpang tindih dengan laut teritorial netral dan alur laut kepulauan).²⁴⁴

Kewajiban dari kapal perang memang tidak diatur secara khusus dalam UNCLOS. Namun di laut bebas, tentu setiap kapal wajib memperhatikan

²³⁹ UNCLOS, ps. 110.

²⁴⁰ Douglas Guilfoyle, "International Law of the Sea and Maritime Interception," http://www.euromed-migration.eu/.../prsnIntLawofSeaMaritimIntercep_eng.pdf, diunduh tanggal 20 Juni 2011.

²⁴¹ UNCLOS., ps. 111.

²⁴² *San Remo Manual*, para. 118 dan 121.

²⁴³ Department of the Navy, Office of the Chief of Naval Operations, "The Commander's Handbook on the Law of Naval Operations," http://www.lawofwar.org/naval_warfare_publication_N-114M.htm, diunduh tanggal 8 Juni 2011.

²⁴⁴ *Ibid.* Lihat pula *San Remo Manual*, para.118.

pelaksanaan dari hak kapal negara lain, dan ketentuan ini tidak terbatas hanya pada kapal sipil saja.²⁴⁵ Jadi, dalam menjalankan haknya, kapal perang juga tetap memiliki kewajiban untuk memastikan hak kapal negara lain tetap dapat dijalankan. Selain itu, dalam hal tidak terbuktinya alasan-alasan yang melandasi pelaksanaan hak melakukan pemeriksaan serta hak untuk melakukan pengejaran seketika tersebut, kapal perang memiliki kewajiban untuk membayar kompensasi terhadap kerugian yang mungkin ditimbulkan.²⁴⁶

3.1.5. Penggunaan Kekuatan Militer terhadap Kapal Sipil di Laut Bebas

Pada dasarnya penggunaan kekuatan militer (*use of force*) hanya dapat dilakukan dalam situasi-situasi dan kondisi-kondisi tertentu, seperti dalam hal adanya pengesahan dari Dewan Keamanan PBB dan dalam hal bela diri (*self defense*).²⁴⁷ Larangan penggunaan kekuatan militer ini tentu dimaksudkan agar sedapat mungkin perdamaian di antara negara-negara di dunia dapat terjaga. Larangan penggunaan kekuatan militer ini juga diperkuat dengan putusan *International Court of Justice* (ICJ) dalam kasus *Nicaragua*.²⁴⁸

UNCLOS mengatur bahwa negara-negara harus menahan diri dari ancaman atau penggunaan kekuatan militer dalam melaksanakan hak dan kewajiban mereka di laut.²⁴⁹ UNCLOS juga merujuk pada piagam PBB terkait pengaturan hal ini.²⁵⁰ Pengaturan mengenai penggunaan kekuatan militer di UNCLOS ini sesungguhnya tidak terbatas pada pengaturan di laut bebas. Namun memang karena di laut bebas, kapal dari berbagai negara diperbolehkan berlayar, maka selayaknya terdapat penekanan tersendiri mengenai pentingnya larangan penggunaan kekuatan militer di laut bebas.

²⁴⁵ Lihat UNCLOS, ps. 87.

²⁴⁶ *Ibid.*, ps. 110 (3) dan 111 (8).

²⁴⁷ Churchill dan Lowe, *The Law of the Sea*, hal. 422. Lihat pula *Charter of United Nations*, ps. 42, 43, 51.

²⁴⁸ ICJ, "Military and Paramilitary Activities in and Against Nicaragua," (*Nicaragua v United States of America*) ('Nicaragua Case'), *Judgment of 27 June 1986*, ICJ Report, 1986, hal.14.

²⁴⁹ Lihat UNCLOS, ps.301.

²⁵⁰ *Ibid.*

Seperti yang telah dijelaskan di atas, penggunaan kekuatan militer di laut dapat ditilik dari dua sudut pandang. Yang pertama adalah dalam keadaan damai, di mana justifikasi penggunaan kekuatan militer yang disahkan oleh Dewan Keamanan PBB dan yang lahir dari hak untuk membela diri. Yang kedua adalah justifikasi penggunaan kekuatan militer dalam situasi perang.²⁵¹ Pada situasi pertama, yakni dalam keadaan damai, penggunaan kekuatan militer hanya boleh dilakukan apabila ada pengesahan Dewan Keamanan PBB atau untuk melakukan upaya bela diri. Pasal 39 dan 42 dari Piagam PBB memberikan implikasi bahwa kekuatan militer boleh digunakan untuk mencegah terjadinya suatu ancaman. Dewan Keamanan PBB memiliki hak untuk menentukan situasi atau keadaan mana yang merupakan suatu ancaman terhadap perdamaian dunia,²⁵² dan kemudian Dewan Keamanan PBB ini juga menentukan apakah kekuatan militer diperlukan untuk mengatasi permasalahan.²⁵³

Beberapa kali Dewan Keamanan PBB telah melahirkan resolusi-resolusi yang mengesahkan penggunaan kekuatan militer di laut.²⁵⁴ Namun selain dengan pengesahan dari Dewan Keamanan PBB tersebut, penggunaan kekuatan militer

²⁵¹ Perbedaan pandangan ini bisa membawa dampak yang signifikan. Dalam rezim hukum perang (termasuk juga hukum perang di laut atau *law of naval warfare*), para pihak yang berperang memiliki hak untuk memberhentikan, mengebek, dan menahan perahu atau kapal netral. Sedangkan dalam rezim penggunaan kekuatan militer menurut pasal 51 Piagam PBB, kombatan hanya memiliki hak untuk memberhentikan dan mengebek kapal yang dengan alasan yang masuk akal diduga turut membantu pihak musuh. Jalan tengah yang banyak diusulkan adalah bahwa setidaknya prinsip-prinsip (dan bukannya pengaturan detail) dari hukum perang tetap berlaku dalam hal adanya konflik bersenjata internasional di laut. Salah satu alasan diberlakukannya hal ini adalah karena prinsip-prinsip tersebut dianggap dapat menerangkan bagaimana hak penggunaan kekuatan militer dalam rangka bela diri atau dalam pengesahan dari Dewan Keamanan PBB *seharusnya* dijalankan. Lihat Churcil dan Lowe, *The Law of the Sea*, hal. 422-423.

²⁵² *Charter of the United Nations*, ps. 39.

²⁵³ Pasal 41 *Charter of the United Nations* mengatur mengenai kewenangan Dewan Keamanan PBB untuk mengambil tindakan yang tidak meliputi penggunaan kekuatan militer, sementara Pasal 42 *Charter of the United Nations* mengatur mengenai kewenangan Dewan Keamanan PBB untuk menggunakan kekuatan militer.

²⁵⁴ Contohnya Resolusi 221 (1966) di mana Inggris diperbolehkan untuk menggunakan kekuatan militer terhadap kapal-kapal yang membawa minyak untuk Southern Rhodesia; Resolusi 665 (1990) di mana anggota PBB yang menggunakan kekuatan militer laut di Teluk Persia untuk secara proporsional memberhentikan kapal dalam rangka sanksi ekonomi di Irak; Resolusi 820 (1993) yang memperbolehkan negara menggunakan kekuatan yang dibutuhkan untuk melarang lalu lintas maritim komersial memasuki laut teritorial Federal Republic of Yugoslavia.

juga dapat digunakan oleh suatu negara dengan dalil bela diri.²⁵⁵ Hak untuk bela diri ini diakui sebagai suatu hak yang inheren apabila ada serangan bersenjata yang ditujukan kepada negara anggota PBB.²⁵⁶ Namun hak untuk bela diri menurut Pasal 51 Piagam PBB ini akan berakhir bila tindakan Dewan Keamanan dapat mengembalikan situasi keamanan dan kedamaian.²⁵⁷ Selain itu, bela diri ini harus dijalankan apabila memang bela diri tersebut benar-benar dibutuhkan dan harus dijalankan secara proporsional.²⁵⁸ Suatu bela diri dianggap tidak proporsional bila sarana/alat, metode, serta tingkat pembelaan yang digunakan tidak sebanding dengan level bahaya dari suatu serangan.²⁵⁹ Jadi, di laut sekalipun, penggunaan kekuatan militer tidak boleh dijalankan secara sembarangan karena hanya ada dua dalil pembeda penggunaan kekuatan militer, yang masing-masing juga memiliki batasan tersendiri.

Laut bebas harus digunakan untuk tujuan yang damai.²⁶⁰ Meskipun begitu, tidak dapat dipungkiri bahwa tidak selamanya laut bisa digunakan untuk urusan damai. Penggunaan kekuatan militer di laut banyak terjadi dalam keadaan konflik bersenjata. Pada keadaan perang di laut ini, penggunaan laut bebas secara sebebaskan-bebasnya sering dipertanyakan.²⁶¹ Meskipun penggunaan kekuatan militer dalam perang di laut tidak terelakkan, hanya pihak-pihak tertentu yang diperbolehkan untuk melakukan tindakan-tindakan perang di laut,²⁶² yakni hanya unit-unit di bawah komando militer dan yang termasuk dalam lingkup disiplin

²⁵⁵ *Charter of the United Nations*, Ps. 51.

²⁵⁶ *Ibid.*

²⁵⁷ Todd A. Wynkoop, "The Use of Force Against Third Party Neutrals to Enforce Economic Sanctions Against a Belligerent," *Naval Law Review Volume 42* (1995), hal. 98.

²⁵⁸ *Ibid.*, hal.99. Lihat juga ICJ, "...Paramilitary Activities in and Against Nicaragua."

²⁵⁹ Bruno Simma dan Hermann Mosler, *ed.*, *The Charter of the United Nations: A Commentary* (Oxford University Press, 1995), hal. 677.

²⁶⁰ UNCLOS, ps. 88.

²⁶¹ Dieter Fleck dan Michael Bothe, *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford University Press, 1999), hal. 414.

²⁶² Tentu pengecualian akan diberikan dalam hal pihak-pihak lain menggunakan kekerasan demi melindungi diri mereka sendiri.

militer.²⁶³ Pihak-pihak yang tidak diperbolehkan melakukan tindakan-tindakan perang di laut antara lain adalah kapal negara yang bukan kapal perang, kapal pedagang, kapal nelayan, serta kapal-kapal sipil lainnya.²⁶⁴

*San Remo Manual*²⁶⁵ memang mengatur bahwa penyerangan atau penangkapan orang atau objek serta pemasangan ranjau juga boleh dilakukan.²⁶⁶ Namun terdapat pembatasan utama terhadap tindakan-tindakan tersebut, yakni bahwa para pihak yang berperang harus menghargai hak-hak dari negara netral.²⁶⁷ Penggunaan kekuatan militer tersebut tidak dapat dilaksanakan dalam perairan netral, yang termasuk pula selat internasional dan juga alur laut kepulauan.²⁶⁸ Di laut bebas, para pihak yang berperang juga harus menghargai hak-hak negara netral dalam mengeksplorasi dan mengeksploitasi sumber daya alam. Selain itu, para pihak yang berperang harus menghindari adanya kerusakan terhadap kabel atau pipa yang dipasang di wilayah tersebut.²⁶⁹

Secara umum, penggunaan kekuatan militer di laut dalam suatu konflik bersenjata juga dibatasi dengan prinsip kebutuhan militer dan proporsionalitas.²⁷⁰ Justifikasi suatu negara dalam menggunakan kekerasan juga ditentukan oleh

²⁶³ Fleck dan Bothe, *The Handbook of Humanitarian Law in Armed Conflict*, hal. 417.

²⁶⁴ *Ibid.*

²⁶⁵ Sebagai suatu manual perang, memang *San Remo Manual* tidak mengikat. Namun banyak ahli menganggap bahwa prinsip-prinsip dalam *San Remo Manual* sudah merupakan hukum kebiasaan internasional yang mengikat negara-negara sesuai ketentuan di Pasal 38 (1) ICJ Statute. Telah terjadi praktek negara yang seragam dan konsisten dalam penggunaan *San Remo Manual* sebagai acuan perang di laut. Selain itu, para ahli hukum juga berpendapat bahwa telah terdapat *opinio juris* terkait penerimaan *San Remo Manual* terbukti dari konsistensi negara dalam memberlakukan *San Remo Manual* dan juga dari tidak adanya protes dari negara-negara. Lihat pula Narwati, "Aturan Perang di Laut: San Remo Manual Sebagai Sumber Hukum Internasional," hal. 455.

²⁶⁶ *San Remo Manual*, para. 16.

²⁶⁷ *Ibid.*, para.12.

²⁶⁸ *Ibid.*, para. 15.

²⁶⁹ *Ibid.*, para. 36 dan 37.

²⁷⁰ *Ibid.*, para.4. Lihat pula Patricia Jimenez Kwast, "Maritime Law Enforcement and the Use of Force: Reflections on the Categorisation of Forcible Action at Sea in the Light of the Guyana/Suriname Award," *Journal of Conflict and Security Law Volume 13* (Spring, 2008), hal. 61.

intensitas, skala serangan, serta ancaman yang dilakukan oleh pihak lawannya.²⁷¹ Seperti layaknya hukum yang berlaku dalam keadaan perang di darat, penggunaan kekuatan militer dalam perang di laut juga harus memperhatikan prinsip pembedaan dan prinsip kebutuhan militer.²⁷²

Salah satu contoh kasus penggunaan militer di laut adalah kasus *Rainbow Warriors* antara Selandia Baru dan Perancis.²⁷³ Di tahun 1985, agen intelijen Perancis menembak dan menenggelamkan kapal milik Greenpeace Internasional yang bernama *Rainbow Warrior* di pelabuhan di Selandia Baru. Alasan penyerangan ini adalah untuk mencegah kapal *Rainbow Warrior* tersebut mengganggu tes nuklir di Moruroa. Hasil arbitrase ini menyatakan bahwa Perancis harus membayar kompensasi ke New Zealand. Tekanan masyarakat internasional juga mengakibatkan Perancis membayar kompensasi ke Greenpeace.

Pada kasus ini, penyerangan memang tidak dilakukan di laut bebas. Namun yang penting untuk digarisbawahi adalah penggunaan kekuatan militer di laut yang pada esensinya memang dilarang kecuali terdapat justifikasi tertentu. Dapat dilihat bahwa pada kasus ini, Perancis diminta bertanggungjawab akibat tindakan penggunaan kekuatannya, yang bahkan tidak mendapat pengesahan Dewan Keamanan dan juga tidak dilakukan atas dasar bela diri. Jadi, tanpa justifikasi ini, penggunaan kekuatan militer akan dianggap ilegal dan sebagai konsekuensinya, negara yang menggunakan kekuatan militer tersebut akan dimintai pertanggungjawaban.

3.2. Legalitas Blokade Laut

Blokade Laut adalah tindakan suatu pihak untuk mencegah masuk atau keluarnya kapal dan/atau pesawat terbang dari setiap Negara, baik Negara musuh maupun pihak netral ke dalam suatu pelabuhan, landasan udara, daerah pantai yang dimiliki atau diduduki atau dikontrol oleh suatu Negara.²⁷⁴ Konsep blokade

²⁷¹ *San Remo Manual*, para. 5.

²⁷² *Ibid.*, para. 39 dan 40.

²⁷³ France-New Zealand Arbitration Tribunal, "Rainbow Warrior," (New Zealand v. France) *Decision of 30 April 1990*.

banyak melahirkan kontroversi. Beberapa pihak menentang adanya blokade laut karena dianggap tidak sesuai dengan prinsip kebebasan berlayar di laut bebas, namun beberapa pihak berusaha menjustifikasi blokade laut sebagai suatu cara berperang yang sah dalam konflik bersenjata di laut.²⁷⁵ Pada bagian ini akan dibahas secara berturut-turut mengenai sejarah blokade, penetapan blokade di laut bebas, syarat sah blokade, serta kewajiban pihak yang melakukan blokade. Pembahasan juga akan diikuti dengan contoh-contoh blokade sebagai ilustrasi.

3.2.1. Sejarah Blokade Laut

Para ahli menduga bahwa blokade laut pertama dilakukan oleh Belanda pada tanggal 27 Juli 1584 dengan maksud membatasi Pelabuhan Flemish untuk menghalangi pasokan bagi tentara Spanyol.²⁷⁶ Pada sekitar abad ke-17, muncul pula suatu gagasan “blokade fiktif”²⁷⁷ di mana suatu kapal ditangkap meskipun kapal tersebut masih berjarak jauh dari daerah blokade, dengan syarat bahwa memang kapal tersebut dimaksudkan untuk menembus blokade.²⁷⁸

Praktek blokade saat itu telah mengancam dan membatasi pergerakan kapal dagang negara netral. Czarina Rusia Katherine II kemudian mengeluarkan *Declaration of 28 February 1780*, di mana dinyatakan bahwa blokade baru bisa legal apabila blokade tersebut efektif.²⁷⁹ Efektivitas yang dimaksud di sini adalah bahwa blokade tersebut hanya boleh diberlakukan pada suatu wilayah atau

²⁷⁴ Barnett, “Technology and Naval Blockade...” hal. 89.

²⁷⁵ Robert Churchill merupakan salah satu dari para ahli hukum yang berpendapat bahwa blokade laut yang dilakukan Israel merupakan suatu hal yang illegal dan bertentangan dengan hukum laut. Lihat http://www.salon.com/news/feature/2010/05/31/ml_israel_palestinians_7, diunduh tanggal 8 Juni 2011. Sementara itu, Profesor Wedgewood menyatakan bahwa blokade laut, khususnya yang dilakukan Israel merupakan suatu hal yang legal, Lihat http://www.pbs.org/newshour/bb/middle_east/jan-june10/gaza2_06-02.html, diunduh tanggal 8 Juni 2011.

²⁷⁶ Bruce A. Elleman dan Sarah C.M. Paine, *Naval Blockades and Seapower: Strategies and Counter-strategies, 1805-2005* (Taylor & Francis, 2006), hal. 11.

²⁷⁷ Disebut juga “paper blockades,” “blocus de Cabinet,” “blocus per notificationem”.

²⁷⁸ Elleman dan Paine, *Naval Blockades and Seapower...*, hal.11.

²⁷⁹ *Ibid.*, hal. 12.

pelabuhan yang akan terancam bahaya apabila kapal musuh berada dalam wilayah di dekat pelabuhan tersebut.²⁸⁰

Penetapan blokade dan efektivitasnya merupakan syarat adanya hak untuk campur tangan terhadap kapal netral di laut bebas sampai dengan tahun 1914.²⁸¹ Sejak Perang Dunia I, senjata banyak berkembang dan blokade jarak dekat sulit dilaksanakan. Kapal perang mengalami perubahan sehingga perang dapat dilakukan tidak terbatas pada perang antara kapal di permukaan laut saja, namun juga dengan menggunakan kapal selam, misil, dan teknologi lainnya. Dengan perkembangan senjata ini, Inggris menjalankan strategi baru, yakni blokade jarak jauh di mana wilayah blokade menjadi lebih luas, karena blokade dimulai ratusan mil dari pantai musuh dan jarak ratusan mil tersebut menjadi daerah blokade.²⁸²

Tindakan Inggris tersebut dikecam karena blokade tersebut secara tidak sah menghalangi pergerakan kapal-kapal pihak netral di laut.²⁸³ Pro-kontra pun kerap mewarnai sejarah blokade. Pihak yang berperang di masa kini memang tetap menggunakan blokade sebagai bagian dari strategi mereka, baik dengan menggunakan blokade jarak jauh atau zona blokade.²⁸⁴ Blokade juga diakui sebagai suatu tindakan yang sah oleh PBB.²⁸⁵ Setelah Perang Dunia II, Piagam PBB mengikutsertakan konsep blokade laut sebagai suatu instrumen legal

²⁸⁰ “Blockades – Development of the Law,” <http://www.americanforeignrelations.com/A-D/Blockades-Development-of-the-law.html>, diunduh tanggal 8 Juni 2011.

²⁸¹ Daniel Patrick O’Connell, *The Influence of Law on Sea Power* (Manchester University Press, 1975), hal.114. Lihat pula 1909 *London Declaration Concerning the Laws of Naval War* (‘*London Declaration*’).

²⁸² Michael G. Fraunces, “The International Law of Blockade: New Guiding Principles in Contemporary State Practice,” *Yale Law Journal Volume 101* (Januari 1992), hal. 900 dan 902.

²⁸³ *Ibid.*, hal. 901.

²⁸⁴ *Ibid.* Fraunces menyebutkan dan merangkum bahwa alasan para pihak yang berperang di masa kini tetap menggunakan metode blokade adalah karena: (1) pentingnya penggunaan metode perang ekonomi bersamaan dengan konflik bersenjata; (2) perkembangan senjata-senjata dan teknologi dalam perang; (3) penyebaran senjata-senjata modern kepada negara-negara yang kurang kuat. Karena alasan-alasan inilah, dinilai blokade tradisional tidak lagi mampu membawa keuntungan signifikan, sementara blokade jarak jauh atau zona blokade dinilai dapat menguntungkan para pihak yang sedang berperang.

²⁸⁵ Lihat *Charter of the United Nations*, ps. 42. Namun perlu diperhatikan bahwa blokade itu sendiri harus memenuhi syarat-syarat tertentu agar dapat dinyatakan legal.

penggunaan kekuatan militer oleh Dewan Keamanan PBB.²⁸⁶ San Remo Manual di tahun 1994 juga mengakui blokade sebagai suatu metode perang di laut yang legal.

Jadi, sejarah telah mengenal blokade laut sebagai salah satu metode perang yang sering digunakan. Namun bukan berarti bahwa blokade ini dapat dijalankan dengan semena-mena. Tidak seluruh wilayah laut dapat diblokade dan terdapat syarat-syarat tertentu agar suatu blokade laut dapat dianggap sah. Hukum laut maupun hukum perang di laut sama-sama mengenal pembatasan terhadap pelaksanaan blokade laut ini.

3.2.2. Syarat-syarat Blokade Laut yang Legal

Meskipun legalitas suatu blokade laut sering diperdebatkan, keberadaan blokade laut sebagai suatu metode perang secara historis tidak dapat dikesampingkan. Dari perkembangan hukum laut dan hukum perang di laut, dapat dirangkum bahwa syarat sah suatu blokade adalah:

- a. Blokade hanya dapat diberlakukan dalam konflik bersenjata²⁸⁷
- b. Blokade tidak boleh dikenakan sampai ke laut bebas
- c. Blokade tidak boleh memiliki tujuan utama untuk membuat penduduk sipil kelaparan atau membawa dampak buruk yang berlebihan kepada penduduk sipil,²⁸⁸
- d. Blokade harus diumumkan dan diberitahukan kepada setiap pihak yang berperang dan juga negara-negara netral;²⁸⁹
- e. Blokade harus bersifat efektif,²⁹⁰

²⁸⁶ James Kraska, "Rule Selection in the Case of Israel's Naval Blockade of Gaza: Law of Naval Warfare or Law of the Sea?" <http://ssrn.com/abstract=1830267>, diunduh tanggal 8 Juni 2011.

²⁸⁷ Rene-Jean Dupuy dan Daniel Vignes, *A Handbook on the New Law of the Sea* (Martinus Nijhoff Publishers, 1991), h.1330.

²⁸⁸ *San Remo Manual*, para. 102.

²⁸⁹ *Ibid.*, para. 93.

²⁹⁰ *Ibid.*, para. 95. Lihat pula 1780 *Declaration of Armed Neutrality*, 1856 *Paris Declaration Respecting Maritime Law*, dan lainnya.

- f. Blokade tidak boleh menghalangi akses ke pelabuhan dan pantai dari negara netral;²⁹¹
- g. Blokade harus diberlakukan secara imparsial.²⁹²

Ketujuh syarat ini akan dijelaskan lebih lanjut satu per satu dalam pembahasan di bawah.

3.2.2.1. Blokade Hanya Dapat Diberlakukan dalam Konflik Bersenjata

Suatu blokade hanya dapat berlaku legal dalam hal adanya suatu konflik bersenjata, karena blokade adalah tindakan dari pihak yang berperang.²⁹³ Pengaturan ini masuk akal, karena pada saat damai, kebebasan berlayar suatu kapal lebih longgar. Hal ini terbukti dari keberadaan hak lintas damai di laut teritorial²⁹⁴ juga atau hak lintas transit.²⁹⁵ Kedua hak ini memang tidak pasti hilang dalam konflik bersenjata, namun kenyataannya memang pergerakan kapal cenderung lebih terhambat pada saat ada konflik bersenjata. Hambatan-hambatan ini, termasuk blokade, tentu pada esensinya tidak boleh diberlakukan pada saat damai. Namun pada saat konflik bersenjata, blokade dapat digunakan sebagai salah satu metode perang.

3.2.2.2. Blokade Tidak Boleh Dikenakan Sampai ke Laut Bebas

Blokade yang dilakukan suatu negara hanya boleh dikenakan sampai batas laut teritorialnya saja, karena hanya hingga laut teritorial negara memiliki kedaulatan untuk melakukan suatu tindakan. Memang hingga Perang Dunia II, terdapat praktek blokade yang dikenakan hingga wilayah laut bebas, namun hal ini bukannya tidak dikecam oleh masyarakat internasional.²⁹⁶ Jadi, praktek

²⁹¹ *San Remo Manual*, para. 99.

²⁹² *Ibid.*, para. 100.

²⁹³ Leslie C. Green, *The Contemporary Law of Armed Conflict* (Manchester University Press ND, 1993), hal. 170.

²⁹⁴ UNCLOS, ps. 17.

²⁹⁵ *Ibid.*, ps. 37.

beberapa negara yang melakukan blokade di laut bebas bukanlah suatu praktek yang secara seragam disepakati oleh masyarakat internasional.

Batas kedaulatan suatu negara hanya sampai di laut teritorialnya²⁹⁷ dan hak berdaulat tertentu hanya dimiliki negara di zona tambahan dan ZEE saja.²⁹⁸ Di luar wilayah tersebut, merupakan laut bebas yang lepas dari kedaulatan maupun hak berdaulat negara. Di laut bebas, yang berlaku adalah prinsip kebebasan berlayar pada saat damai dan prinsip penghargaan hak-hak pihak netral pada saat konflik bersenjata. Jadi, meskipun perang dapat dilakukan di laut bebas, perang tersebut tidak boleh sampai menghalangi pergerakan kapal lain, khususnya kapal dari pihak netral. Karena alasan inilah blokade di laut bebas dinilai ilegal bila sampai menghalangi kebebasan berlayar pihak lain (khususnya pihak netral) di laut bebas, meski dalam situasi konflik bersenjata sekalipun.

3.2.2.3. Blokade Tidak Boleh Memiliki Tujuan Utama untuk Membuat Penduduk Sipil Kelaparan atau Membawa Kerugian yang Berlebihan Kepada Penduduk Sipil

Syarat ini memiliki hubungan erat dengan larangan untuk mengakibatkan penduduk sipil kelaparan, sebagaimana dikenal dalam hukum kebiasaan perang²⁹⁹ dan *Additional Protocol I*.³⁰⁰ Blokade laut dapat diakui sebagai suatu metode perang yang legal selama tujuannya adalah untuk mencapai tujuan militer dan bukan dengan sengaja memawa bencana kelaparan bagi penduduk sipil.³⁰¹ Namun dalam praktek, dampak buruk ini kerap sulit dihindari. Salah satu hasil utama dan sangat memungkinkan dari blokade adalah bencana kelaparan, sehingga tidak aneh bila terdapat indikasi bahwa blokade yang diaplikasikan secara luas bisa

²⁹⁶ Salah satu contoh utama adalah blokade yang dilakukan oleh Inggris terhadap Jerman pada Perang Dunia II yang juga mencapai wilayah laut bebas.

²⁹⁷ UNCLOS, ps. 2.

²⁹⁸ *Ibid.*, ps. 33, 56 dan 77.

²⁹⁹ Rule 53 Customary International Humanitarian Law. Lihat Henckaerts dan Doswald-Beck, "*Customary International Humanitarian Law Volume I...*," hal. 189.

³⁰⁰ *Additional Protocol I*, ps. 54.

³⁰¹ Henckaerts dan Doswald-Beck, "*Customary International Humanitarian Law Volume I...*," hal. 189.

menjadi *prima facie*³⁰² suatu hal yang ilegal.³⁰³ Hal ini tentu berbeda dengan pelaksanaan blokade demi membatasi akses pihak musuh yang berperang atau kombatan musuh terhadap pasokan senjata.

3.2.2.4. Blokade Harus Diumumkan Dan Diberitahukan Kepada Setiap Pihak Yang Berperang Dan Juga Negara-Negara Netral

Pemberitahuan merupakan salah satu syarat paling tua dalam hukum blokade.³⁰⁴ Termasuk dalam informasi yang harus diumumkan atau diberitahukan tersebut adalah keterangan mengenai waktu mulai, durasi, lokasi, dan jarak blokade, serta jangka waktu suatu kapal negara netral diperbolehkan meninggalkan pantai yang diblokade.³⁰⁵ Persyaratan untuk menginformasikan pihak-pihak netral sejalan dengan prinsip imparialitas, di mana blokade harus dilaksanakan kepada setiap kapal dan pesawat dengan kewarganegaraan apapun.³⁰⁶ Oleh karena itu, sudah merupakan hal yang wajar agar seluruh pihak terkait (termasuk negara netral) diberitahukan agar pihak-pihak tersebut dapat mempersiapkan diri menghadapi blokade.

3.2.2.5. Blokade Harus Bersifat Efektif

Efektivitas blokade merupakan suatu syarat yang sudah dikenal sejak praktek awal pelaksanaan blokade itu sendiri. Yang dimaksud dengan blokade yang efektif adalah blokade yang menggunakan kekuatan yang cukup untuk mencegah akses ke daerah pantai yang ingin dilindungi.³⁰⁷ Tujuan prinsip

³⁰² *Prima Facie* merupakan suatu istilah latin yang memiliki arti literal “pada pandangan pertama.” Maksud dari penggunaan istilah ini adalah pada pandangan pertama sebelum dapat diselidiki lebih jauh, blokade merupakan hal yang ilegal.

³⁰³ Wynkoop, “The Use of Force Against Third Party Neutrals to Enforce Economic Sanctions...,” hal. 103.

³⁰⁴ Fraunces, “The International Law of Blockade...,” hal. 913. Lihat pula *London Declaration*; Fleck dan Bothe, *The Handbook of Humanitarian Law in Armed Conflict*, hal.472.

³⁰⁵ *San Remo Manual*, para. 94.

³⁰⁶ *Ibid.*

³⁰⁷ Kraska, “Rule Selection in the Case of Israel’s Naval Blockade...” Lihat pula *London Declaration*, ps.2.

efektivitas ini adalah untuk mencegah *paper blockade* di mana pihak yang berperang mengumumkan blokade namun tidak sungguh-sungguh menjalankan blokade tersebut.³⁰⁸ Memang, di pertengahan abad ke-20, beberapa negara mengakui bahwa pemberlakuan blokade yang efektif hampir tidak mungkin dijalankan, namun bukan berarti prinsip ini ditinggalkan.³⁰⁹ Penilaian terhadap efektivitas suatu blokade akan dilakukan dengan bergantung pada fakta dari masing-masing kasus.³¹⁰

Sebagai contoh dapat dilihat dua strategi blokade yang dilakukan oleh Amerika Serikat untuk melawan pemberontak dari Vietnam Utara yang beroperasi di Vietnam Selatan pada saat perang Vietnam. Strategi pertama, yakni blokade diri atau “self-blockade” yang dilakukan di laut teritorial Vietnam Selatan sendiri,³¹¹ dianggap kurang efektif karena Vietnam Utara masih cukup mendapatkan pasokan persenjataan.³¹² Sementara itu, blokade kedua berjalan lebih efektif karena Amerika Serikat memberi fokus pada blokade Pelabuhan Haiphong dan pelabuhan-pelabuhan utama lainnya di Vietnam Utara.³¹³ Blokade kedua yang dikenal sebagai *Operation Pocket Money* ini lebih efektif karena mampu secara substansial memperlambat pergerakan Vietnam Utara.

3.2.2.6. Blokade Tidak Boleh Menghalangi Akses ke Pelabuhan dan Pantai dari Negara Netral

Larangan blokade yang dapat mencegah akses ke pelabuhan atau pantai negara netral merupakan upaya agar kegiatan pihak netral tidak terganggu.³¹⁴ Pada

³⁰⁸ Fraunces, “The International Law of Blockade...,” hal. 897.

³⁰⁹ Fleck dan Bothe, *The Handbook of Humanitarian Law in Armed Conflict*, hal.472.

³¹⁰ *San Remo Manual*, para. 95.

³¹¹ “Blockades – World War I and After,” <http://www.americanforeignrelations.com/A-D/Blockades-World-war-i-and-after.html>, diunduh tanggal 18 Juni 2011.

³¹² Matt D. Hamilton, “Blockade: Why this 19th Century Nelsonian Tool Remains Operationally Relevant Today,” <http://www.dtic.mil/cgi-bin/GetTRDoc?Location=U2&doc=GetTRDoc.pdf&AD=ADA476501>, diunduh tanggal 18 Juni 2011.

³¹³ *Ibid.*

taraf pengaturan yang lebih khusus, sungai, kanal, serta selat yang merupakan akses ke wilayah netral juga tidak boleh diblokade.³¹⁵ Hal ini sejalan dengan ketentuan di mana blokade tidak boleh dilakukan sampai wilayah teritorial negara atau pihak netral.³¹⁶ Pengaturan ini dapat dikatakan merupakan salah satu syarat paling esensial dalam penerapan blokade, mengingat tujuan blokade adalah untuk melemahkan pihak musuh dan bukannya untuk merugikan pihak netral atau pihak ketiga yang tidak terlibat dengan konflik.

3.2.2.7. Blokade Harus Diberlakukan Secara Imparsial

Maksud dari pengaturan ini adalah agar apabila suatu blokade telah diberlakukan, maka pemberlakuan tersebut harus secara sama rata terhadap kapal atau pesawat dengan kewarganegaraan apapun. Dengan kata lain larangan untuk berdagang di suatu pelabuhan atau wilayah yang diblokade harus diberlakukan secara serupa di antara pihak yang berperang dengan pihak netral serta di antara para pihak netral itu sendiri.³¹⁷ Pengaturan ini muncul dari protes negara-negara terhadap praktek blokade Inggris di abad ke-18, di mana Inggris melarang kapal-kapal lain dari pelabuhan tertentu, namun mempersilakan kapal yang dapat menguntungkan Inggris secara komersial untuk tetap berdagang di wilayah tersebut.³¹⁸ Jadi, suatu blokade harus diberlakukan dengan sama rata kepada setiap pihak, baik pihak negara netral maupun pihak yang berperang.

3.2.3. **Kewajiban Pihak yang Melakukan Blokade (*Blockading Party*)**

Pihak yang melakukan blokade (*blockading party*) yang dimaksud adalah pihak yang mengeksekusi jalannya blokade dan yang berkuasa di daerah blokade tersebut. Secara umum, dapat diamati bahwa kewajiban pihak yang melakukan

³¹⁴ Fleck dan Bothe, *The Handbook of Humanitarian Law in Armed Conflict*, hal.471.

³¹⁵ Dupuy dan Vignes, *A Handbook on the New Law of the Sea*, hal. 1330.

³¹⁶ Fraunces, "The International Law of Blockade..," hal. 914.

³¹⁷ William R. Kennedy, "Some Points in the Law of Blockade," Makalah dipresentasikan dalam *Conference of the International Law Association* di Budapest pada tahun 1908, hal. 245.

³¹⁸ Fraunces, "The International Law of Blockade..," hal. 897.

blokade terbagi menjadi dua, yakni kewajiban terhadap pihak netral serta kewajiban terhadap penduduk sipil yang wilayahnya terkena dampak blokade.

Hak pihak netral untuk tetap menjalankan aktivitas-aktivitasnya, terutama aktivitasnya di bidang perdagangan, melahirkan kewajiban bagi pihak yang berperang atau pihak yang melakukan blokade agar senantiasa menghormati hak tersebut.³¹⁹ Kewajiban awal pihak yang melakukan blokade adalah dengan memberikan pemberitahuan yang layak bagi para pihak atau negara netral mengenai penetapan blokade tersebut.³²⁰ Kewajiban selanjutnya bagi pihak yang melakukan blokade adalah untuk tidak menghalangi akses ke pelabuhan atau pantai dari negara atau pihak netral.³²¹ Memang pada akhirnya tetap dimungkinkan adanya perbedaan signifikan pada hak pihak netral dalam situasi blokade dan dalam situasi normal tanpa blokade. Namun apabila pihak yang melakukan blokade melaksanakan kewajiban-kewajiban minimal seperti yang telah disebut di atas tersebut, setidaknya hak pihak netral tidak sepenuhnya hilang.

Kewajiban selanjutnya dari pihak yang melakukan blokade adalah untuk menjamin pemenuhan hak-hak dasar dari penduduk sipil di daerah yang diblokade. Blokade memang menjadi ilegal apabila blokade tersebut dengan sengaja bertujuan untuk membawa bencana kelaparan pada penduduk sipil.³²² Namun bukan berarti kewajiban pihak yang melakukan blokade selesai bila blokade tersebut tidak bertujuan untuk menelantarkan penduduk sipil. Meskipun tujuan blokade hanya untuk melemahkan kekuatan militer musuh sekalipun, blokade tetap dapat membawa efek buruk terhadap penduduk sipil di daerah yang diblokade tersebut.³²³ Oleh karena itu, penting bagi pihak yang melakukan blokade untuk menjalankan kewajiban-kewajiban berikut:

³¹⁹ Lihat Wynkoop, "The Use of Force Against Third Party Neutrals to Enforce Economic Sanctions..." hal. 111.

³²⁰ Fraunces, "The International Law of Blockade..." hal. 913. Lihat pula *San Remo Manual*, para. 94.

³²¹ *San Remo Manual*, para. 99.

³²² *Ibid.*, para. 102.

³²³ Lihat Green, *The Contemporary Law of Armed Conflict*, hal. 171.

- a. Mempersilakan masuknya pasokan makanan dan bahan-bahan kebutuhan hidup lainnya kepada penduduk sipil,³²⁴
- b. Mempersilakan masuknya pasokan obat-obatan untuk penduduk sipil atau untuk angkatan bersenjata yang terluka atau sakit.³²⁵

Sayangnya, tidak dapat dipungkiri bahwa pihak yang melakukan blokade berhak untuk menentukan pengaturan teknis mengenai alur masuk pasokan barang-barang kebutuhan hidup bagi penduduk sipil dan tetap memiliki hak untuk menggeledah pasokan tersebut.³²⁶ Namun hak untuk menggeledah maupun mengatur alur masuk pasokan barang-barang kebutuhan hidup tersebut tidak memberikan wewenang bagi pihak yang melakukan blokade untuk menolak masuknya pasokan barang-barang kebutuhan hidup.³²⁷

3.2.4. Wewenang Pihak yang Melakukan Blokade dalam Hal Adanya Upaya Pihak Lain untuk Melanggar Blokade

Penetapan suatu blokade yang legal membawa wewenang bagi pihak yang melakukan blokade untuk menjalankan serta melindungi wilayah yang sudah diblokade tersebut. Umumnya diakui bahwa kapal asing yang melanggar/memasuki atau *mencoba* untuk melanggar/memasuki blokade dapat ditangkap.³²⁸ Apabila kapal asing tersebut tetap menolak untuk ditangkap meskipun sudah diberi peringatan, maka kapal asing tersebut dapat diserang.³²⁹ Namun sebagaimana diakui oleh praktek negara-negara, khususnya dalam menyikapi tindakan Jerman di Perang Dunia I, sebelum penyerangan kapal

³²⁴ *San Remo Manual*, para. 103. Lihat pula Elleman dan Paine, *Naval Blockades and Seapower...*, hal.17.

³²⁵ *San Remo Manual*, para. 104.

³²⁶ *Ibid.*, para. 103.

³²⁷ Apabila pihak yang melakukan blokade melarang masuknya pasokan barang-barang kebutuhan hidup penduduk sipil, maka akan terjadi pelanggaran terhadap hukum kebiasaan perang, Pasal 70 *Additional Protocol I*, serta Pasal 59 dan 60 *Geneva Convention IV*.

³²⁸ *San Remo Manual*, para. 98.

³²⁹ Elleman dan Paine, *Naval Blockades and Seapower...*, hal.19.

dilakukan, peringatan dan pemeriksaan terlebih dahulu agar awak kapal dapat menyelamatkan diri sebelum kapal ditenggelamkan.³³⁰

Selain dengan alasan adanya upaya untuk melanggar blokade, suatu kapal dagang dapat ditangkap apabila terdapat alasan-alasan yang layak bahwa:

- a. Kapal tersebut membawa barang-barang yang dilarang (*contraband goods*);
- b. Kapal tersebut beroperasi di bawah kontrol atau perintah musuh;
- c. Kapal tersebut mengantarkan pasukan bersenjata atau agen intelijen musuh.³³¹

Namun yang kerap menjadi permasalahan adalah tindakan mana yang dapat dikategorikan sebagai percobaan atas pelanggaran blokade. Unsur penting yang harus ada sebelum penangkapan atau penyerangan dilakukan adalah unsur “alasan yang layak” akan keberadaan upaya pelanggaran blokade.³³² Unsur ini penting karena bila tidak dibatasi, pihak yang melakukan blokade dapat semena-mena menetapkan bahwa setiap kapal asing yang masuk wilayah blokadanya dapat ditangkap.

Salah satu isu yang penting dibahas mengenai kewenangan pihak yang melakukan blokade ini untuk menangkap atau menyerang kapal asing yang masih berada di wilayah laut bebas. Meskipun banyak diperdebatkan, terdapat pandangan yang menyatakan bahwa suatu kapal asing yang memiliki niat untuk melanggar blokade dapat ditahan atau ditangkap bahkan saat kapal asing tersebut masih berada di wilayah laut bebas.³³³ Di satu sisi, hal ini bisa saja bertentangan dengan prinsip kebebasan berlayar yang ada di laut bebas.³³⁴ Di sisi lain, terdapat

³³⁰ Fraunces, “The International Law of Blockade..,” hal. 900.

³³¹ William J. Fenrick, “The Merchant Vessel as Legitimate Target in the Law of Naval Warfare,” dalam *Humanitarian Law of Armed Conflicts: Challenges Ahead: Essays in Honour of Frits Kalshoven* (Martinus Nijhoff Publishers, 1991), hal. 427.

³³² *San Remo Manual*, para. 98.

³³³ Ruth Lapidoth, “The Legal Basis of Israel’s Naval Blockade of Gaza,” <http://www.jcpa.org/JCPA/Templates/ShowPage.asp?DBID=1&LNGID=1&TMID=111&FID=442&PID=0&IID=4402>, diunduh tanggal 18 Juni 2011.

³³⁴ UNCLOS, ps. 87.

pembelaan bahwa di laut bebas sekalipun, kapal perang memiliki hak untuk memeriksa dan menggeledah.³³⁵ Hak ini sering dijadikan dasar untuk analogi penerapan serupa dalam situasi konflik bersenjata dan blokade, di mana pihak yang berperang memiliki hak untuk memeriksa kapal yang dicurigai akan menembus blokade atau kapal yang dicurigai membawa pasokan barang untuk pihak kombatan musuh.³³⁶

Sebagai ilustrasi, dapat dilihat blokade dalam perang untuk memperebutkan Pulau Falklands/Malvinas dengan Argentina, di mana Inggris menetapkan *Total Exclusion Zone* (TEZ) sejauh 200 mil di pulau yang sama.³³⁷ Beberapa pihak menganggap strategi TEZ tersebut dapat digolongkan sebagai tindakan blokade.³³⁸ Inggris kemudian menyerang kapal Argentina *General Belgrano* yang mengakibatkan kematian yang tidak proporsional sekitar 350 awak kapal *Belgrano*.³³⁹ Yang banyak dipermasalahkan adalah posisi kapal *Belgrano* masih berada di luar TEZ,³⁴⁰ sehingga dapat disimpulkan bahwa kapal *Belgrano* bahkan belum menembus atau melanggar blokade Inggris. Namun memang terdapat alasan yang kuat bahwa *Belgrano* hendak melanggar blokade, sehingga Inggris melakukan penyerangan. Selain justifikasi tersebut, Inggris juga menggunakan Pasal 51 Piagam PBB atau hak bela dirinya untuk menjustifikasi tindakan blokade total serta penyerangannya tersebut.³⁴¹ Meskipun pada perkembangannya masyarakat internasional tidak mempermasalahkan serangan

³³⁵ *Ibid.*, ps. 110.

³³⁶ Fraunces, "The International Law of Blockade..," hal. 898.

³³⁷ Elleman dan Paine, *Naval Blockades and Seapower...*, hal.194.

³³⁸ Saad Gul, "The Bells of Hell: An Assessment of the Sinking of ANR General Belgrano in the Context of the Falklands Conflict," *New York International Law Review Volume 18* (Summer 2005), hal. 83-84.

³³⁹ Elleman dan Paine, *Naval Blockades and Seapower...*, hal.194.

³⁴⁰ Pada konflik ini, Inggris menetapkan wilayah pertahanan laut atau *defensive sea area* (DSA) dan menetapkan *total exclusion zone* (TEZ) sejauh 200 mil di sekitar pulau Falklands/Malvinas. Penetapan ini juga diikuti dengan peringatan bahwa setiap kapal yang memasuki TEZ akan ditenggelamkan.

³⁴¹ *Ibid.*

ini lagi, namun kecaman masyarakat internasional³⁴² menunjukkan pentingnya unsur proporsionalitas dalam pelaksanaan penyerangan. Jadi, terdapat pembatasan-pembatasan tertentu terkait wewenang pihak yang melakukan blokade.

3.3. Perlindungan terhadap Kapal Sipil yang Membawa Bantuan Kemanusiaan di Laut Bebas

Bantuan kemanusiaan sering diantarkan dalam jumlah besar melalui sarana kapal laut, mengingat besarnya kuota barang yang dapat dibawa dalam suatu kapal. Sayangnya, perjalanan mengantarkan bantuan kemanusiaan ini tidak selalu berjalan mulus. Kapal yang membawa bantuan kemanusiaan acapkali dipersulit untuk masuk ke daerah tempat mereka akan menyalurkan bantuan, seperti insiden penyerangan kapal bantuan PBB oleh perompak Somalia pada bulan Mei 2007,³⁴³ insiden pengecatan kapal bantuan kemanusiaan oleh pihak militer Sri Lanka pada tahun 2009,³⁴⁴ penyerangan kapal bantuan kemanusiaan Mavi Marmara oleh tentara Israel pada tahun 2010,³⁴⁵ juga serangan dari Gaddafi terhadap pelabuhan Misrata yang mengganggu kinerja kapal bantuan kemanusiaan di wilayah tersebut pada bulan Mei 2011.³⁴⁶

Perlindungan yang dapat diberikan kepada kapal bantuan kemanusiaan sebenarnya dapat dibagi ke dalam dua rezim hukum, yakni rezim hukum hak asasi manusia yang seiringan dengan hukum laut yang berlaku pada saat damai (*the law*

³⁴² Lihat Gul, "...An Assessment of the Sinking of ANR General Belgrano in the Context of the Falklands Conflict," hal. 119-120.

³⁴³ "[Somalia: Pirates Attack UN Aid Ship, Prompting Call for Actions.](http://www.un.org/apps/news/story.asp?NewsID=22609&Cr=Somalia&Cr1=)" <http://www.un.org/apps/news/story.asp?NewsID=22609&Cr=Somalia&Cr1=>, diunduh tanggal 9 Juni 2011.

³⁴⁴ "Sri Lanka Stops Aid Ships Sent by Overseas Tamil," http://www.etaiwannews.com/etn/news_content.php?id=967797&lang=eng_news, diunduh tanggal 9 Juni 2011.

³⁴⁵ "Israeli Assault on Gaza-bound Flotilla Leaves At Least 9 Dead," http://articles.cnn.com/2010-05-31/world/gaza.protest_1_free-gaza-israeli-israel-defense-forces?s=PM:WORLD, diunduh tanggal 9 Juni 2011.

³⁴⁶ "Gaddafi Targets Relief Ship as it Evacuates Misrata Wounded in Libya," <http://shabablibya.org/news/gaddafi-targets-relief-ship-as-it-evacuates-misrata-wounded-in-libya>, diunduh tanggal 9 Juni 2011.

of the sea)³⁴⁷ atau rezim hukum humaniter internasional yang seiringan dengan hukum laut yang berlaku pada saat perang (*the law of naval warfare*).³⁴⁸ Seperti yang telah dibahas di atas, pembagian ke dalam dua rezim hukum ini sebetulnya tidak mengurangi perlindungan terhadap kapal bantuan kemanusiaan, karena keberlakuan keduanya dapat saling melengkapi satu sama lain.

3.3.1. Perlindungan Terhadap Kapal Sipil yang Membawa Bantuan Kemanusiaan di Laut Bebas menurut Hukum Hak Asasi Manusia dan Hukum Laut pada Saat Damai

Seperti yang telah dipaparkan di atas, pada prinsipnya laut bebas merupakan wilayah di mana setiap kapal memiliki hak untuk berlayar dengan sebebas-bebasnya. Jadi, suatu kapal tidak dapat dihentikan apalagi diserang selama ia berlayar di laut bebas.

Hukum laut maupun hukum hak asasi manusia memang tidak mengenal perlindungan khusus bagi kapal sipil yang membawa bantuan kemanusiaan. Perlindungan utama yang dapat diberikan adalah larangan bagi suatu kapal untuk memeriksa (apalagi menyerang) kapal asing lain yang berlayar di laut bebas, kecuali bila ada alasan yang masuk akal bahwa kapal yang diperiksa tersebut diduga terlibat dalam aktivitas yang dilarang.³⁴⁹ Secara ideal, suatu kapal yang membawa bantuan kemanusiaan tentu tidak akan melakukan tindakan kejahatan seperti pembajakan, perdagangan budak, penyiaran ilegal, dan lainnya. Jadi dapat dilihat bahwa penyerangan suatu kapal yang berlayar di laut bebas merupakan hal yang dilarang, meskipun dikenal beberapa hak pengecualian.

Perlindungan lain dari hukum laut yang diberikan kepada suatu kapal bantuan kemanusiaan yang berlayar di laut bebas dapat ditarik dari kewajiban

³⁴⁷ Meskipun rezim hukum laut seperti UNCLOS hanya berlaku pada saat damai, bukan berarti pengaturannya tidak memiliki pengaruh besar pada saat adanya situasi konflik bersenjata. Hal yang serupa juga terjadi dalam rezim hukum hak asasi manusia, yang tetap berlaku dalam hal adanya konflik bersenjata.

³⁴⁸ Kraska, "Rule Selection in the Case of Israel's Naval Blockade..."

³⁴⁹ Douglas Guilfoyle, "The Proliferation Security Initiative: Interdicting Vessels in International Waters to Prevent the Spread of Weapons of Mass Destruction?" *Melbourne University Law Review Volume 29* (Desember 2005), hal. 741. Lihat pula UNCLOS, ps. 110.

memberikan bantuan (*duty to render assistance*).³⁵⁰ Menurut Pasal 98 UNCLOS, Kapal negara apapun yang sedang berlayar (termasuk kru dan penumpangnya) memiliki kewajiban untuk:

- a. membantu orang yang berada dalam situasi hampir hilang di laut;
- b. menolong orang yang berada dalam situasi sulit (*distress*) di laut;
- c. membantu kapal yang menabrak.³⁵¹

Selain itu, Pasal 98 UNCLOS juga memberikan kewajiban bagi setiap negara pantai terdekat untuk menjaga dan menjalankan pencarian dan bantuan terkait keselamatan jiwa di laut.³⁵² Kewajiban untuk memberi bantuan ini termasuk sebagai salah satu hukum kebiasaan internasional³⁵³ Kewajiban universal untuk memberi bantuan ini merupakan salah satu respon praktikal dari perlindungan hak untuk hidup.³⁵⁴

Pasal 98 UNCLOS ini memang tidak secara langsung memberikan perlindungan kepada suatu kapal yang membawa bantuan kemanusiaan yang sedang berlayar di laut bebas. Perlindungan yang diberikan oleh pasal ini juga tidak bersifat preventif, karena kewajiban ini baru lahir saat bahaya sudah timbul. Namun dengan adanya kewajiban untuk memberi bantuan ini, dapat ditarik rasio bahwa keselamatan kapal yang sedang berlayar di laut bebas merupakan suatu hal yang penting dan harus diperhatikan.³⁵⁵ Apalagi kewajiban ini berlaku di setiap situasi, baik dalam kondisi perang atau damai dan tanpa memperdulikan status hukum kapal atau orang yang dalam bahaya tersebut.³⁵⁶

³⁵⁰ UNCLOS, ps. 98.

³⁵¹ *Ibid.*

³⁵² *Ibid.*

³⁵³ Sophie Cacciaguidi-Fahy, "The Law of the Sea and Human Rights," *Panoptica Year 1 No.9* (Juli-Agustus 2007), hal.3.

³⁵⁴ B. H. Oxman, "Human rights and the United Nations Convention on the Law of the Sea" dalam *Politics, Values and Functions, International law in the 21st Century, Essays in Honor of Professor Louis Henkin* (The Hague: Kluwer Law International, 1997), hal. 391.

³⁵⁵ Cacciaguidi-Fahy, "The Law of the Sea and Human Rights."

³⁵⁶ *Ibid.*

3.3.2. Perlindungan Terhadap Kapal Sipil yang Membawa Bantuan Kemanusiaan di Laut Bebas menurut Hukum Humaniter Internasional dan Hukum Perang di Laut

3.3.2.1. Larangan Penyerangan Kapal Bantuan Kemanusiaan

Meskipun pada prinsipnya semua kapal tidak boleh diserang kecuali kapal tersebut merupakan sasaran militer (*military objectives*), pada perkembangannya dibutuhkan suatu daftar jenis-jenis kapal yang secara khusus tidak boleh diserang.³⁵⁷ San Remo Manual menggolongkan kapal-kapal yang tidak boleh diserang tersebut ke dalam tiga kategori utama, yakni:

- a. Kapal musuh yang tidak boleh diserang³⁵⁸
- b. Kapal dagang musuh yang tidak menjadi sasaran militer³⁵⁹
- c. Kapal dagang netral (*neutral merchant vessels*).³⁶⁰

Termasuk dalam kategori pertama (kapal musuh yang tidak boleh diserang) adalah:

- a. Kapal rumah sakit (*hospital ships*);
- b. Kapal/perahu kecil yang digunakan dalam operasi penyelamatan atau dalam transportasi medis lainnya
- c. Kapal yang telah dijamin keamanannya menurut perjanjian para pihak yang berperang, termasuk:
 - (i) Kapal kartel. Contohnya kapal yang didesain untuk mengangkut tahanan perang
 - (ii) Kapal yang terlibat misi kemanusiaan, termasuk kapal yang membawa pasokan penting demi keselamatan populasi sipil, serta kapal yang terlibat dalam gerakan bantuan kemanusiaan

³⁵⁷ Louise Doswald-Beck, "Current Development: The San Remo Manual on International Law Applicable to Armed Conflicts at Sea," *American Journal of International Law Volume 89* (Januari 1995), hal. 202.

³⁵⁸ *San Remo Manual*, para. 47.

³⁵⁹ *Ibid.*, para. 59.

³⁶⁰ *Ibid.*, para. 67.

- d. Kapal yang terlibat dalam transportasi barang-barang kebudayaan yang dilindungi secara khusus
- e. Kapal penumpang yang hanya membawa penumpang sipil
- f. Kapal yang disewa untuk misi keagamaan, misi kedermawanan atau non-militer
- g. Kapal nelayan dan perahu kecil yang terlibat dengan perdagangan lokal, dengan syarat kapal-kapal ini tunduk kepada inspeksi serta pengaturan komandan laut pihak yang berperang di daerah tersebut;
- h. Kapal yang didesain atau disesuaikan secara eksklusif untuk menindak polusi di lingkungan laut;
- i. Kapal yang sudah menyerah
- j. Rakit dan sekoci penyelamat jiwa.³⁶¹

Jadi, dapat disimpulkan bahwa daftar di *San Remo Manual* tersebut mencakup kapal-kapal yang tidak membawa ancaman bagi suatu operasi militer pihak yang berperang. Tentu pengaturan ini merupakan suatu hal yang rasional karena tidak sepatutnya suatu kapal diserang di laut bebas padahal kapal tersebut tidak terlibat dalam perang.

Penting untuk diperhatikan bahwa perlindungan yang dimiliki oleh kesepuluh jenis kapal dalam kategori pertama ini baru dapat berlaku bila kapal-kapal tersebut menjalankan fungsi atau peran mereka secara damai, tunduk pada proses inspeksi dan identifikasi bila dibutuhkan, serta tidak secara sengaja mengganggu pergerakan kombatan serta mematuhi perintah untuk berhenti atau berpindah tempat bila diminta.³⁶² Apabila terdapat alasan yang layak bahwa kapal-kapal dalam daftar tersebut melakukan aktivitas yang dicurigai dapat membantu pihak musuh, maka kapal tersebut akan kehilangan perlindungannya dan dapat menjadi sasaran penyerangan.³⁶³

³⁶¹ *Ibid.*, para. 47.

³⁶² *Ibid.*, para. 48.

³⁶³ *Ibid.*, para. 67.

Selain dari 10 kapal dalam kategori pertama, *San Remo Manual* juga mengatur bahwa kapal dagang dari negara/pihak musuh tidak boleh diserang, kecuali bila kapal dagang musuh tersebut menjadi sasaran militer.³⁶⁴ Sangat disayangkan bahwa pengaturan ini menjadi lebih longgar setelah Perang Dunia II. Sebelum Perang Dunia II, hukum kebiasaan internasional melarang penghancuran kapal dagang musuh apabila keselamatan penumpang dan awaknya belum dapat dijamin.³⁶⁵ Seiring berkembangnya perang, para pihak yang berperang sering mempersenjatai kapal dagang mereka dalam konvoy, sehingga konsekuensinya, kapal dagang musuh sering dianggap sebagai sasaran militer yang legal dan dapat dihancurkan atau diserang.³⁶⁶ Meskipun begitu, tentu tidak akan adil bila setiap kapal dagang musuh dianggap sebagai sasaran militer yang legal. Jadi, sebelum dilakukan penyerangan, harus dipastikan dulu apakah kapal dagang musuh tersebut benar-benar suatu sasaran militer yang sah atau tidak.

Penyerangan juga tidak boleh dilakukan kepada kapal dari negara netral karena penghormatan terhadap hak-hak dari pihak netral merupakan salah satu pembatasan utama dari tindakan penggunaan kekuatan militer di laut dalam kondisi konflik bersenjata.³⁶⁷ Perlindungan terhadap kapal negara netral ini sangat kuat, bahkan kapal perang milik negara netral sekalipun sesungguhnya tidak boleh dijadikan sasaran pemeriksaan atau pengeledahan.³⁶⁸ Namun tentu perlu diperhatikan bahwa kapal negara netral ini tidak boleh terlibat apalagi berusaha membantu pihak musuh. Fakta bahwa kapal dari negara netral dipersenjatai tidak dapat menjadi alasan penyerangan kapal tersebut.³⁶⁹

³⁶⁴ Kapal dagang musuh dapat menjadi sasaran militer bila memenuhi kondisi di pasal 40 *San Remo Manual*.

³⁶⁵ Roach, "The Law of Naval Warfare at the Turn of Two Centuries," hal. 70. Lihat pula *Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London of 22 April 1930* ('London Protocol').

³⁶⁶ Roach, "The Law of Naval Warfare at the Turn of Two Centuries," hal. 70.

³⁶⁷ *San Remo Manual*, para.12.

³⁶⁸ Robert W. Tucker, *The Law of War and Neutrality at Sea* (The Lawbook Exchange, 2005), hal. 334.

³⁶⁹ *San Remo Manual*, para. 69.

Dari pemaparan pengaturan di atas, timbul pertanyaan terkait perlindungan terhadap kapal bantuan kemanusiaan. Dapat dilihat bahwa kapal bantuan kemanusiaan termasuk dalam salah satu dari 10 jenis kapal pada kategori pertama yang memang sudah tidak boleh diserang kecuali dalam hal-hal tertentu.³⁷⁰ Artinya, meskipun kapal bantuan kemanusiaan tersebut berasal dari negara musuh sekalipun, kapal tersebut pada esensinya tetap tidak boleh diserang. Bagaimana bila kapal musuh yang membawa bantuan kemanusiaan tersebut sudah jelas-jelas merupakan suatu kapal perang? Pihak yang berperang dalam konflik bersenjata di laut berhak menjadikan kapal perang musuh sebagai sasaran militer.³⁷¹ Namun penting untuk dilihat kembali pengaturan yang melarang penyerangan atas kapal yang membawa bantuan kemanusiaan, sekalipun itu kapal musuh.³⁷² Pada prakteknya, tentu akan sulit untuk menyeimbangkan kedua pengaturan ini. Pihak yang berperang tentu tidak dapat benar-benar dipersalahkan apabila menyerang suatu kapal perang musuh yang ternyata membawa bantuan kemanusiaan.

Apabila kapal bantuan kemanusiaan tersebut merupakan kapal dari negara netral atau negara yang tidak terlibat dalam konflik, maka perlindungannya akan semakin kuat karena kapal tersebut tidak boleh diserang kecuali dapat dibuktikan bahwa kapal tersebut membantu pihak musuh.³⁷³ Permasalahan mengenai kapal perang yang membawa bantuan kemanusiaan juga tidak sepele bila kapal perang tersebut berasal dari pihak atau negara netral. Bahkan dalam prakteknya, banyak bantuan kemanusiaan diantarkan oleh kapal perang pihak netral.³⁷⁴ Sehingga dapat disimpulkan bahwa kapal perang pihak netral yang membawa bantuan

³⁷⁰ *Ibid.*, para 47 poin (a) dan (c)(ii).

³⁷¹ Heinegg, "Law of Naval Warfare and Neutrality at Sea," hal. 28. Lihat pula *San Remo Manual*, para. 65.

³⁷² *San Remo Manual*, para. 47.

³⁷³ *Ibid.*, para. 67.

³⁷⁴ Contohnya adalah kapal USS Kearsarge (LHD-3) milik Angkatan Laut Amerika Serikat yang sering digunakan untuk mengangkut bantuan kemanusiaan. Selain itu, baru-baru ini kapal perang Italia juga digunakan untuk mengirim bantuan kemanusiaan dalam konflik di Libya.

kemanusiaan pada esensinya tidak boleh diserang, mengingat posisinya sebagai suatu kapal pihak netral.

3.3.2.2. Pengecualian Terhadap Larangan Penyerangan Kapal Bantuan Kemanusiaan

Sebagaimana yang telah dibahas di atas, terdapat tiga kategori utama kapal yang dilarang untuk diserang. Pengecualian terhadap larangan penyerangan tersebut akan dibahas satu persatu terhadap tiga kategori kapal tersebut.

Kapal dari negara musuh yang pada hakekat awalnya tidak boleh diserang³⁷⁵ dapat diserang apabila terlibat dalam situasi-situasi berikut:

- a. Kapal tersebut tidak menjalankan fungsi atau peran mereka secara damai;
- b. Kapal tersebut tidak mau tunduk pada proses inspeksi dan identifikasi bila dibutuhkan; dan
- c. Kapal tersebut sengaja mengganggu pergerakan kombatan serta tidak mematuhi perintah untuk berhenti atau berpindah tempat bila diminta.³⁷⁶

Jadi, suatu kapal yang awalnya dilindungi akan kehilangan status perlindungannya ketika mereka tidak lagi menjalankan peran normalnya.³⁷⁷ Contohnya adalah apabila kapal yang awalnya dilindungi tersebut ternyata membawa atau mengangkut senjata untuk angkatan bersenjata pihak musuh.³⁷⁸ Penting pula untuk diperhatikan bahwa situasi-situasi pengecualian dari larangan penyerangan suatu kapal berbeda dan lebih luas dari sekedar pengaturan tentang kapal musuh menjadi sasaran militer yang sah.³⁷⁹ Dalam situasi ini, kesepuluh jenis kapal musuh yang tidak boleh diserang ini *bukan* sasaran militer pada

³⁷⁵ Lihat *San Remo Manual*, para. 47, di mana disebutkan 10 jenis kapal dari negara musuh yang tidak dapat diserang.

³⁷⁶ *Ibid.*, para. 48.

³⁷⁷ Fleck dan Bothe, *The Handbook of Humanitarian Law in Armed Conflict*, hal. 358.

³⁷⁸ *Ibid.*

³⁷⁹ *Ibid.*

awalnya, namun karena kondisi-kondisi tertentu sajalah penyerangan yang dilakukan kepada kesepuluh jenis kapal musuh ini dapat dijustifikasi.

Selain pengaturan mengenai 10 jenis kapal musuh tersebut, terdapat pengaturan mengenai kapal dagang militer, yang sesungguhnya mendapat perlindungan dari serangan. Namun suatu kapal dagang negara musuh menjadi target sasaran militer apabila kapal tersebut:

- a. Terlibat dalam tindakan kekerasan atau pemberontakan yang dilakukan atas nama pihak musuh, seperti memasang ranjau, memotong pipa dan kabel bawah laut, atau terlibat dalam penyerangan kapal dagang lain;
- b. Berperan dan membantu angkatan bersenjata pihak musuh, seperti dengan membawa tentara atau mengisi kembali kapal perang
- c. Menjadi satu bagian dengan bagian badan intelijen musuh
- d. Berlayar dalam konvoy kapal perang musuh
- e. Menolak perintah untuk berhenti atau secara aktif menolak untuk diperiksa, digeledah, atau ditangkap
- f. Dipersenjatai sedemikian rupa (tidak termasuk senjata individual untuk keperluan bela diri) sehingga mungkin membawa kerugian pada kapal perang
- g. Memberikan kontribusi efektif terhadap tindakan militer, seperti misalnya membawa bahan-bahan atau peralatan militer.³⁸⁰

Jadi, kapal dagang pihak musuh baru dapat diserang bila memang kapal tersebut memenuhi standar sasaran militer. Standar sasaran militer meliputi dua elemen, yang pertama adalah seberapa substansial kontribusi kapal tersebut kepada kemampuan pihak musuh, dan yang kedua adalah seberapa pasti keuntungan militer yang dapat diraih oleh si penyerang apabila ia menyerang kapal tersebut.³⁸¹ Ketujuh tindakan yang telah dirinci di atas merupakan bentuk-

³⁸⁰ *San Remo Manual*, para. 60.

³⁸¹ Francis V. Russo, Jr., "Targeting Theory in the Law of Armed Conflict at Sea: The Merchant Vessel as Military Objective in the Tanker War," dalam *The Gulf War of 1980-1988*:

bentuk tindakan yang mengakibatkan suatu kapal dagang musuh dapat dikategorikan sebagai sasaran militer.

Selain kapal dagang pihak musuh, tentu kapal pihak netral tidak boleh diserang. Seperti yang telah dipaparkan sebelumnya, perlindungan terhadap kapal pihak netral ini sesungguhnya sangat kuat. Namun larangan untuk menyerang kapal dari negara netral juga mungkin dikecualikan apabila kapal tersebut:

- a. Dengan alasan yang masuk akal dipercayai membawa barang selundupan atau dipercayai akan melanggar blokade, dan setelah diperingati sebelumnya, kapal tersebut tetap menolak untuk berhenti atau menolak untuk diperiksa, dicek, atau ditangkap;
- b. Terlibat dalam tindakan pemberontak atas nama pihak musuh;
- c. Bertindak membantu angkatan bersenjata pihak musuh;
- d. Bergabung atau membantu dalam badan intelijen musuh;
- e. Berlayar dalam konvoy kapal perang pihak musuh; atau
- f. Memberikan kontribusi efektif terhadap tindakan militer.³⁸²

Keenam situasi tersebut di atas merefleksikan praktek negara secara modern serta realita yang terjadi dalam aktivitas komersial di laut serta keadaan konflik bersenjata di laut.³⁸³ Keenam situasi ini tidak dirumuskan secara kumulatif. Artinya, bila suatu kapal pihak netral memenuhi satu saja kondisi dari keenam kondisi yang disebut di atas, maka kapal pihak netral tersebut dapat diserang. Tentunya penyerangan terhadap kapal pihak netral harus tunduk pada ketentuan-ketentuan tertentu yang akan dibahas pada bagian selanjutnya.

Jadi, apabila suatu kapal bantuan kemanusiaan (baik yang berasal dari pihak musuh atau dari pihak netral) terlibat dalam situasi-situasi yang dapat mengecualikan perlindungan bagi mereka tersebut, maka penyerangan terhadap kapal tersebut dapat dianggap sebagai suatu hal yang legal menurut hukum perang

The Iran-Iraq War in International Legal Perspective (Martinus Nijhoff Publishers, 1992), hal. 168.

³⁸² *San Remo Manual*, para. 67.

³⁸³ Roach, "The Law of Naval Warfare at the Turn of Two Centuries," hal. 70.

di laut. Namun sekalipun penyerangan dapat dilakukan, bukan berarti suatu penyerangan dapat dengan serta merta dilakukan.

Sebagai contoh, dapat dilihat kasus penyerangan kapal bantuan kemanusiaan PBB oleh pembajak Somalia. Pada konflik bersenjata di Somalia antara *Transitional Federal Government* (TGF) yang didukung oleh Ethiopia dengan kelompok anti-TGF,³⁸⁴ PBB mengirimkan bantuan kemanusiaan kepada penduduk sipil di daerah Somalia melalui *World Food Programme* (WFP). Namun di tahun 2007, serangan dilancarkan oleh bajak laut Somalia terhadap kapal yang membawa bantuan kemanusiaan tersebut.³⁸⁵ Tindakan tersebut tentu banyak dikecam oleh masyarakat internasional.³⁸⁶ Pada perkembangannya, beberapa bajak laut Somalia telah setuju untuk tidak menargetkan kapal yang membawa bantuan kemanusiaan, namun hingga tahun 2009, terkadang masih ada insiden penyerangan serupa.³⁸⁷ Sayangnya, kasus ini tidak pernah diusut lebih lanjut lagi. Meskipun begitu, alasan tidak diusutnya kasus ini bukan karena masyarakat internasional toleran atau setuju bahwa bantuan kemanusiaan dapat diserang, melainkan karena bajak laut Somalia sendiri telah berkomitmen untuk tidak mengulangi perbuatannya tersebut.

3.3.2.3. Pembatasan Hak atau Wewenang untuk Menyerang Kapal yang Membawa Bantuan Kemanusiaan

Pada konflik bersenjata, metode dan alat yang digunakan untuk berperang bukannya tidak tak terbatas.³⁸⁸ Pada esensinya, prinsip pembedaan (*principle of distinction*) dan prinsip proporsionalitas tetap harus diberlakukan. Jadi, mula-mula harus diperhatikan dulu apakah kapal tersebut bersifat kapal sipil atau bukan,

³⁸⁴ [“Somalia: Pirates Attack UN Aid Ship, Prompting Call for Actions,”](http://www.un.org/apps/news/story.asp?NewsID=22609&Cr=Somalia&Cr1=) <http://www.un.org/apps/news/story.asp?NewsID=22609&Cr=Somalia&Cr1=>, diunduh tanggal 18 Juni 2011.

³⁸⁵ *Ibid.*

³⁸⁶ *Ibid.*

³⁸⁷ United Nations, *Globalization of Crime: A Transnational Organized Crime Threat Assessment* (United Nations Publications, 2010), hal. 196.

³⁸⁸ Lihat *Additional Protocol I*, ps. 35; San Remo Manual, para. 38.

selanjutnya perlu diperhatikan apakah penyerangan tersebut proporsional atau tidak. Proporsionalitas ini menjadi penting karena dengan adanya prinsip ini maka sedapat mungkin fungsi militer dan kemanusiaan dapat berjalan dengan seimbang.³⁸⁹

Metode dan alat yang digunakan pada suatu penyerangan juga harus memperhatikan lingkungan hidup.³⁹⁰ Penyerangan juga tidak boleh membawa penderitaan yang tidak perlu atau berlebihan.³⁹¹ Selain itu, tindakan hati-hati (*precautionary measures*) juga harus senantiasa diambil. Tindakan ini penting diambil karena dapat mengurangi korban penduduk sipil yang mungkin tidak dapat dihindari dalam melakukan serangan ke suatu tujuan atau sasaran militer.³⁹² Tindakan-tindakan tersebut meliputi:

- a. Mengumpulkan informasi untuk menentukan apakah suatu sasaran serangan benar-benar merupakan suatu sasaran militer atau tidak;
- b. Memastikan dan melakukan segala hal yang mungkin dilakukan untuk memastikan bahwa serangan hanya terbatas pada target atau apa yang menjadi sasaran militer saja;
- c. Secara hati-hati harus memilih metode dan alat untuk sedapat mungkin menghindari atau meminimalisir kerusakan atau kerugian yang mengiringi serangan;
- d. Berhenti atau tidak melakukan serangan apabila serangan tersebut diperkirakan akan membawa kerugian atau kerusakan yang berlebihan bila dibandingkan dengan keuntungan militer langsung dan konkret yang diharapkan dari serangan.³⁹³

³⁸⁹ William J. Fenrick, "The Rule of Proportionality and Protocol I in Conventional Warfare," *Military Law Review Volume 98* (1982), hal. 94.

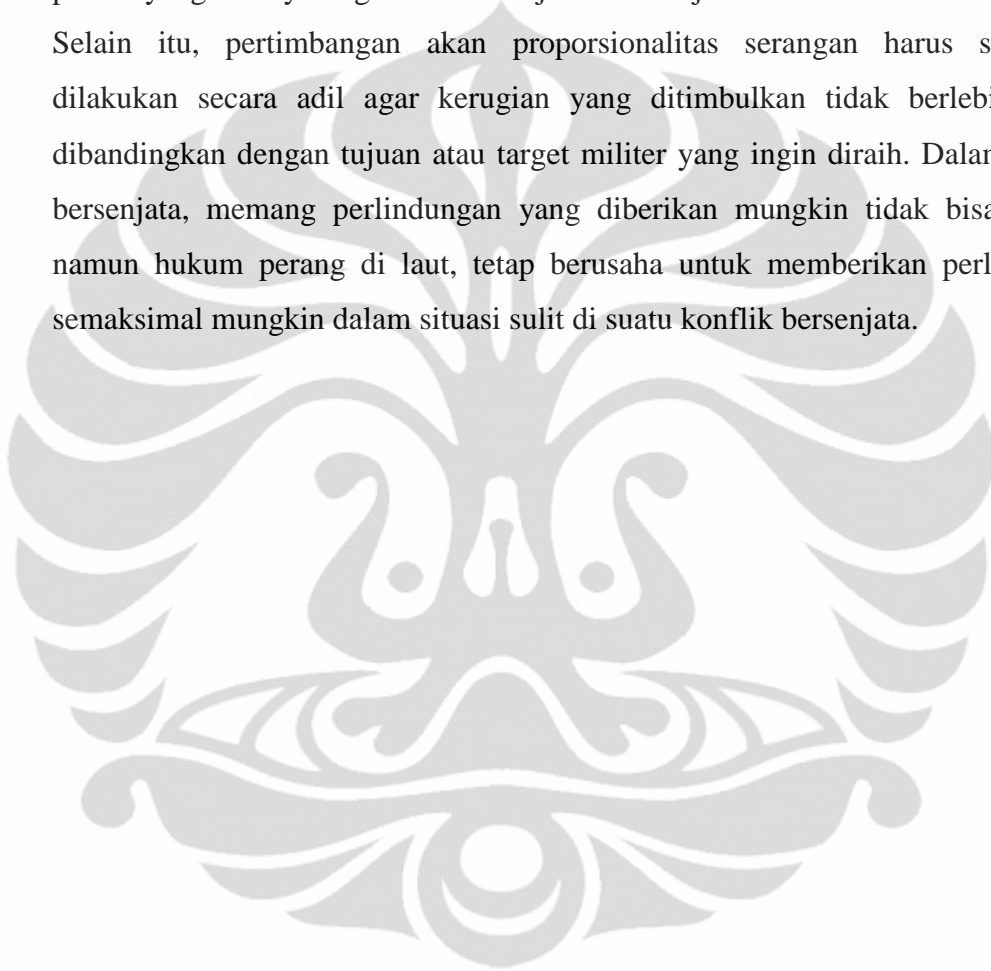
³⁹⁰ *San Remo Manual*, para. 44.

³⁹¹ *Additional Protocol I*, ps. 35; *San Remo Manual*, para.42.

³⁹² Jean-Francois Queguiner, "Precautions Under the Law Governing the Conduct of Hostilities," *International Review of the Red Cross Volume 88 No. 864* (Desember 2006), hal. 794.

³⁹³ *San Remo Manual*, para. 46. Sebagai perbandingan, lihat juga perumusan tindakan kehati-hatian di Pasal 57 *Additional Protocol I*.

Jadi, dikaitkan secara khusus dengan kapal bantuan kemanusiaan, dari pembahasan di atas dapat disimpulkan bahwa kapal bantuan kemanusiaan tidak boleh diserang. *Sekalipun* tindakan penyerangan ke suatu kapal bantuan kemanusiaan mendapat justifikasi, tetap terdapat pembatasan-pembatasan yang harus diperhatikan oleh pihak yang menyerang. Sebelum penyerangan dilakukan, pihak yang menyerang harus menjalankan sejumlah tindakan kehati-hatian. Selain itu, pertimbangan akan proporsionalitas serangan harus senantiasa dilakukan secara adil agar kerugian yang ditimbulkan tidak berlebihan bila dibandingkan dengan tujuan atau target militer yang ingin diraih. Dalam konflik bersenjata, memang perlindungan yang diberikan mungkin tidak bisa mutlak, namun hukum perang di laut, tetap berusaha untuk memberikan perlindungan semaksimal mungkin dalam situasi sulit di suatu konflik bersenjata.



BAB 4

PENYERANGAN KAPAL BANTUAN KEMANUSIAAN MAVI MARMARA OLEH ISRAEL

4.1. Latar Belakang

4.1.1. Kondisi Konflik antara Israel dan Palestina

Selepas Perang Dunia II dan runtuhnya Kekhalifahan Ustmani Turki, Liga Bangsa-bangsa memberikan mandat kepada Inggris untuk mempersilakan orang-orang Yahudi menetap di Palestina.³⁹⁴ Namun tingginya tingkat konflik yang terjadi antara pihak Yahudi Zionis dengan Arab Palestina menyulitkan upaya pasukan dan pejabat Inggris untuk menyatukan dan menyeimbangkan kepentingan di antara mereka.³⁹⁵ Pihak Inggris akhirnya menyerahkan masalah penentuan status di daerah Palestina kepada PBB.³⁹⁶ Melalui keputusan yang diambil dalam Majelis Umum PBB³⁹⁷, ditetapkanlah *UN Partition Plan*, di mana diusulkan bahwa 42 % bagian dari wilayah yang dipersengketakan akan diberikan kepada Arab Palestina.³⁹⁸

Keputusan yang diambil melalui Resolusi Majelis Umum PBB 181 ini berujung pada pemberontakan dan perang sipil di Palestina. Perang ini berakhir dengan hasil Israel memiliki wilayah kurang lebih 1/3 lebih banyak dari yang ditentukan dalam *UN Partition Plan* dan juga mengakibatkan 600.000-700.000

³⁹⁴ Joel Beinin dan Rebecca L. Stein, *The Struggle for Sovereignty: Palestine and Israel, 1993-2005* (Stanford University Press, 2006), hal. 3.

³⁹⁵ John B. Quigley, *Palestine and Israel: A Challenge to Justice* (Duke University Press, 1990), hal. 31.

³⁹⁶ *Ibid.*, hal. 32.

³⁹⁷ United Nations General Assembly, "Resolution Adopted on the Report of the Ad Hoc Committee on the Palestinian Question" *UN General Assembly Resolution 181*, 29 November 1947.

³⁹⁸ Alan Dowty, *Israel/Palestine* (Polity, 2008), hal. 83.

orang Palestina mengungsi keluar wilayah yang kemudian diduduki Israel.³⁹⁹ Sementara itu, Israel sebagai suatu negara dideklarasikan oleh bangsa Yahudi pada tanggal 15 Mei 1948.⁴⁰⁰ Konflik terus berlanjut dan negara-negara Arab tetap menolak mengakui keberadaan Israel. Pada bulan Juni 1967, Israel melakukan penyerangan dan penaklukan terhadap daerah Gaza Strip (“Jalur Gaza”), Sinai Desert, Golan Heights, West Bank (“Tepi Barat”), serta Yerusalem Timur dari Yordania dalam perang yang dikenal sebagai “Six Day War”.⁴⁰¹ Setelah tahun 1967 inilah, fokus gerakan pemberontak Palestina beralih pada pembebasan Jalur Gaza dan Tepi Barat.

Meskipun begitu, upaya-upaya perdamaian terus diupayakan. Di tahun 1993, pemimpin *Palestine Liberation Organization* (PLO) dan Pemerintah Israel sepakat untuk mengakui masing-masing pihak dan menandatangani *Declaration of Principles on Interim Self-Government Arrangements* (“Oslo I Accord”).⁴⁰² Kemudian dibentuklah *Palestinian Authority* sesuai ketentuan pada Oslo I Accord dan ditandatangani “The Israel-Palestinian Interim Agreement on the West Bank and the Gaza Strip” (“Oslo II”) yang mengatur detail pelaksanaan dari segi praktis terkait status wilayah tersebut.⁴⁰³ Namun sayangnya, upaya perdamaian mengalami kendala sejak pemberontakan Intifada Kedua pada tahun 2001 yang kembali mengakibatkan Israel membatasi akses di Gaza.⁴⁰⁴

Pada tanggal 6 Juni 2004, Kabinet Israel menjalankan rencana pemisahan (*disengagement plan*), di mana penduduk sipil serta pasukan keamanan Israel

³⁹⁹ Galia Golan, *Israel and Palestine: Peace Plans and Proposals from Oslo to Disengagement* (Markus Wiener Publishers, 2008), hal. 3.

⁴⁰⁰ *Ibid.*

⁴⁰¹ *Ibid.*

⁴⁰² Perjanjian ini juga mengatur mengenai penetapan kekuatan polisi yang kuat untuk menjamin ketertiban dan keamanan internal bangsa Palestina di daerah Jalur Gaza dan West Bank. Lihat pula “Declaration of Principles on Interim Self-Government Arrangements (‘Oslo Accords’),” <http://www.reliefweb.int/rw/rwb.nsf/db900SID/MHII-62DANP?OpenDocument>, diunduh tanggal 13 Juni 2011.

⁴⁰³ United Nations Human Rights Council (‘UNHRC’), “Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact Finding Mission on the Gaza Conflict,” UN Doc. A/HRC/12/48 (15 September 2009), hal. 53.

⁴⁰⁴ UNHRC, “Report of.... Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance,” hal. 7-8.

dipindahkan dari Jalur Gaza, sehingga yang tersisa di Jalur Gaza hanya penduduk sipil Palestina. Meskipun begitu, dalam rencana pemisahan tersebut, angkatan bersenjata Israel tetap memiliki kendali di perbatasan, garis pantai, dan ruang udara Gaza. Israel juga menekankan hak inherennya untuk melakukan tindakan bela diri, baik preventif maupun reaktif, termasuk hak untuk menggunakan kekerasan dalam hal adanya ancaman yang berasal dari Jalur Gaza.⁴⁰⁵ Jadi, meskipun dihuni oleh penduduk sipil yang berasal dari Palestina, daerah ini tetap diduduki dan dikendalikan oleh Israel.

Berbagai upaya menuju perdamaian tetap tidak membuahkan hasil.⁴⁰⁶ Pada tahun 2006, Hamas memenangkan pemilihan umum di Palestina dan konflik bersenjata di antara Hamas dengan Israel kembali memanas. Pada tanggal 19 September 2007, Pemerintah Israel mengumumkan Gaza sebagai suatu wilayah perang (*hostile territory*), diikuti dengan tindakan Israel untuk mengurangi secara drastis pasokan barang, bahan bakar, serta listrik di Jalur Gaza.⁴⁰⁷ Selain tindakan-tindakan tersebut, serangan-serangan tetap dilancarkan ke wilayah Gaza dan juga wilayah Israel lain.⁴⁰⁸ Pada perkembangannya, konflik juga memanas akibat adanya blokade laut yang dikenakan Israel di jalur Gaza pada tahun 2009.⁴⁰⁹ Konflik bersenjata yang panjang antara Israel dan pihak militan di Palestina telah memakan banyak korban jiwa dan belum menemukan solusi permanen sampai pada saat tulisan ini dibuat.

⁴⁰⁵ *Ibid.*, hal. 56.

⁴⁰⁶ Meskipun Palestina dan Israel sama-sama menyepakati “Road Map to Peace” yang diusung oleh Kuartet Amerika Serikat, PBB, Uni Eropa, dan Russia di tahun 2003, tidak pernah ada negosiasi perdamaian serius di antara Palestina dan Israel.

⁴⁰⁷ UNHRC, “...Report of the United Nations Fact Finding Mission on the Gaza Conflict,” hal. 58.

⁴⁰⁸ Sejak *Disengagement Plan* di tahun 2004 sampai dengan November 2006 saja, dilaporkan bahwa angkatan bersenjata Israel telah menembakkan kurang lebih 15.000 tembakan artileri dan 550 serangan udara ke daerah Gaza. Serangan ini mengakibatkan kematian 525 orang di Gaza. Pada periode yang sama, dilaporkan bahwa 1.700 roket dan mortar ditembakkan oleh militan Palestina ke wilayah Israel, mengakibatkan 41 korban luka dari pihak Israel. Lihat UNHRC, “...Report of the United Nations Fact Finding Mission on the Gaza Conflict,” hal. 59.

⁴⁰⁹ UNHRC, “Report of... Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance,” hal. 7-8.

4.1.2. Kondisi Penyerangan terhadap Misi Bantuan Kemanusiaan “Gaza Freedom Flotilla” pada 31 Mei 2010

Sebagai konsekuensi pendudukan Israel di Jalur Gaza, penduduk sipil di wilayah ini kerap kesulitan mendapat akses terhadap bahan-bahan kebutuhan hidup yang penting. Bahkan Dewan Keamanan PBB turut menekankan keberadaan krisis kemanusiaan di jalur Gaza dan pentingnya alur masuk serta distribusi bantuan kemanusiaan di seluruh penjuru Gaza.⁴¹⁰

Salah satu misi kemanusiaan tersebut diwujudkan dalam gerakan yang kemudian dikenal sebagai “Gaza Freedom Flotilla.” Gerakan ini merupakan gerakan gabungan dari berbagai organisasi internasional, seperti *Foundation for Human Rights and Freedoms and Humanitarian Relief* (“IHH”), *Ship to Gaza*, *European Campaign to Break the Siege on Gaza*, dan beberapa organisasi lain.⁴¹¹ Pada rencana awal misi, gerakan ini akan diikuti oleh 8 kapal dengan total 748 penumpang. Kedelapan kapal tersebut adalah Mavi Marmara yang berbendera kapal Comoros, Defne, Gazze I, Eleftheri Mesogios (Sofia), Sfondoni (Boat 8000), Challenger I, Challenger II, serta Rachel Corrie. Pada kenyataannya, kapal *Challenger 2* dan *Rachel Corrie* ditunda keberangkatannya, sehingga kedua kapal ini tidak terlibat dalam insiden pada tanggal 31 Mei 2011.⁴¹² Sementara itu, keenam kapal lainnya berangkat dari pelabuhan yang berbeda dan bertemu di suatu titik di laut bebas, kurang lebih 40 mil laut di sebelah selatan Cyprus. Setelah keenam kapal tersebut berkumpul, gerakan armada dimulai menuju Gaza pada tanggal 30 Mei 2010 dari posisi 65 mil laut sebelah barat pantai Lebanon.⁴¹³

Mavi Marmara dan kapal-kapal lain dalam gerakan “Gaza Freedom Flotilla” menjaga agar tetap di posisi 70 mil laut dari pantai karena *Navigational Telex* (NAVTEX) telah memperingatkan adanya penjagaan dari Angkatan Bersenjata Israel sampai pada jarak 68 mil laut dari pantai di Gaza.⁴¹⁴ Kapal-kapal

⁴¹⁰ Lihat United Nation Security Council, *Resolution 1850* (2008) dan 1860 (2009).

⁴¹¹ UNHRC, “Report of.... Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance,” hal. 19.

⁴¹² *Ibid.*, hal. 20.

⁴¹³ *Ibid.*, hal. 22.

⁴¹⁴ *Ibid.*, hal. 24.

yang tergabung dalam “Gaza Freedom Flotilla” menerima kontak pertama dari Angkatan Laut Israel pada tanggal 30 Mei 2010 pukul 22.30, di mana Israel mengingatkan keberadaan blokade terhadap armada “Gaza Freedom Flotilla” dan memerintahkan setiap kapal untuk mengidentifikasi diri.⁴¹⁵ Sebagai respon, kapten dari beberapa kapal dalam “Gaza Freedom Flotilla” dan perwakilan dari “Free Gaza Movement” menyatakan bahwa penumpang dalam kapal merupakan penduduk sipil yang tidak bersenjata serta bahwa tujuan gerakan ini adalah untuk mengantarkan bantuan kemanusiaan.⁴¹⁶

Namun kemudian, kapal perang dan helikopter Angkatan Bersenjata Israel mendekati kapal Mavi Marmara. Armada kapal dalam “Gaza Freedom Flotilla” diserang oleh Angkatan Bersenjata Israel di laut bebas, 72 mil laut dari pantai terdekat, dan 64 mil laut dari zona laut yang diblokade Israel.⁴¹⁷ Kapal-kapal *zodiac* Israel menembakkan senjata yang tidak mematikan ke kapal Mavi Marmara⁴¹⁸ dan kemudian berupaya untuk menaiki kapal Mavi Marmara kira-kira pukul 04.30.⁴¹⁹ Beberapa saat kemudian, helikopter-helikopter Israel yang terbang di atas kapal Mavi Marmara mulai menurunkan prajurit-prajuritnya.⁴²⁰ Pertarungan dimulai antara penumpang kapal Mavi Marmara dan prajurit Israel. Para penumpang berusaha merebut senjata-senjata pasukan Israel untuk dibuang ke laut.⁴²¹ Menurut pengakuan dari prajurit Israel atau *Israel Defense Force* (“IDF”), prajurit-prajurit yang mendarat dari helikopter pertama di kapal Mavi

⁴¹⁵ *Ibid.* Lihat juga Turkish National Commission of Inquiry, *Interim Report on the Israel Attack on the Humanitarian Aid Convoy to Gaza on 31 May 2010*, (Ankara, 2010), hal. 12

⁴¹⁶ UNHRC, “Report of.... Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance,” hal. 24.

⁴¹⁷ Turkish National Commission of Inquiry, “Interim Report on the Israel Attack ...,” hal. 11. Menurut laporan dari UNHRC, kapal diserang pada posisi kira-kira 70 mil laut.

⁴¹⁸ Termasuk dalam serangan yang dilancarkan pada tahap ini adalah bom asap, granat granat setrum, gas air mata, serta *paintballs*.

⁴¹⁹ UNHRC, “Report of.... Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance,” hal. 25.

⁴²⁰ *Ibid.*

⁴²¹ *Ibid.*, hal. 26.

Marmara diserang⁴²², dilucuti senjatanya, serta ditahan.⁴²³ Sementara itu, menurut laporan dari pihak Turki, IDF menyerang para penumpang yang berusaha membela diri.⁴²⁴ Pada akhirnya, serangan ini mengakibatkan 9 penumpang kapal Mavi Marmara meninggal, 24 penumpang lain mengalami luka berat, serta puluhan lainnya menalami luka.⁴²⁵ IDF kemudian memeriksa dan menggeledah penumpang-penumpang lain di kapal Mavi Marmara. Selama proses penahanan ini, beberapa kali terdapat siksaan fisik dari prajurit Israel kepada penumpang kapal.⁴²⁶

4.2. Hak Penduduk Sipil di Jalur Gaza atas Bantuan Kemanusiaan

4.2.1. Israel sebagai Penguasa Pendudukan dan Penduduk Sipil di Jalur Gaza Sebagai Orang-orang yang Dilindungi

Israel telah menjadi Penguasa Pendudukan di Jalur Gaza.⁴²⁷ Hal ini terlihat dari adanya kendali efektif atau *effective control* yang dimiliki Israel di wilayah tersebut.⁴²⁸ Meskipun di tahun 2005 Israel telah memindahkan penduduknya dari Gaza, namun Angkatan Bersenjata Israel tetap mengendalikan laut teritorial dan

⁴²² Menurut pengakuan dari IDF, penyerangan terhadap prajurit Israel dilakukan dengan menggunakan pisau, kapak, rantai besi, serta tongkat. Lihat The Meir Amit Intelligence and Terrorism Information Center, "Detailed Testimony from IDF Officers and Soldiers, Supported by Documentation, Reveals for the First Time the Aggressive, Brutal Fighting Carried Out by IHH Operatives and Their Accomplices Against Israeli Forces Abroad the Mavi Marmara," (Tel Aviv: The Meir Amit Intelligence and Terrorism Information Center, 2011), hal. 2.

⁴²³ Lihat The Meir Amit Intelligence and Terrorism Information Center, "Detailed Testimony from IDF Officers...", hal. 5.

⁴²⁴ Menurut laporan dari pihak Turki, Angkatan Bersenjata Israel menyerang dengan senjata mesin, senapan laser, granat listrik, taser, pistol, dan senapan *paintball* yang dimodifikasi. Lihat Turkish National Commission of Inquiry, "Interim Report on the Israel Attack ...," hal. 11.

⁴²⁵ UNHRC, "Report of.... Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance," hal. 28.

⁴²⁶ *Ibid.*, hal. 31.

⁴²⁷ UNHRC, "...Report of the United Nations Fact Finding Mission on the Gaza Conflict," hal. 85, para 276. Lihat pula Noam Lubell, "Key Issues in the Israeli-Palestinian Conflict From the Viewpoint of International Law," (makalah disiapkan untuk *Independent Panel Appointed to Review the Impartiality of the BBC's Coverage of the Conflict*, Februari 2006), hal. 12.

⁴²⁸ Guilfoyle, "The Mavi Marmara Incident and Blockade...", hal. 10. Sebagai referensi tambahan, lihat pula Yorman Dinstein, *The International Law of Belligerent Occupation* (Cambridge University Press, 2009), hal. 40-45.

ruang udara di Gaza, melarang pergerakan orang ataupun barang dari/ke Gaza melalui udara atau laut, mengendalikan listrik, air, serta telekomunikasi di Gaza.⁴²⁹ Kendali di berbagai bidang esensial ini menunjukkan kendali efektif Israel di Jalur Gaza dan mengukuhkan posisi Israel sebagai Penguasa Pendudukan di Jalur Gaza.

Sementara itu, penduduk sipil di Jalur Gaza termasuk ke dalam definisi orang-orang yang harus dilindungi (*protected persons*). Menurut Pasal 4 *Geneva Convention IV*, orang-orang yang dilindungi meliputi orang-orang yang dalam keadaan pendudukan, berada dalam tangan Penguasa Pendudukan yang berbeda kewarganegaraan dengannya.⁴³⁰ Penduduk sipil di Jalur Gaza yang tidak berkewarganegaraan Israel berada dalam kendali dan penguasaan Israel sebagai Penguasa Pendudukan. Oleh karena itu penduduk sipil di Jalur Gaza ini termasuk sebagai orang-orang yang dilindungi. Tentu penting pula untuk diperhatikan bahwa perlindungan yang dapat diterima penduduk sipil ini akan hilang bila mereka terlibat secara langsung dalam penyerangan.⁴³¹

4.2.2. Kewajiban Israel Mempersilakan Masuknya Bantuan Kemanusiaan di Jalur Gaza

Kewajiban Penguasa Pendudukan untuk mempersilakan masuknya bantuan kemanusiaan lahir sebagai perwujudan dari rezim hukum hak asasi manusia yang juga mengenal hak atas bantuan kemanusiaan, serta dari rezim hukum humaniter internasional yang mengatur pentingnya bantuan kemanusiaan, khususnya bila penduduk sipil di wilayah pendudukan kurang mendapatkan pasokan makanan dan kebutuhan hidup lainnya. Kewajiban ini ditanggung oleh Israel karena Israel adalah Penguasa Pendudukan.⁴³²

⁴²⁹ Israel mengendalikan laut teritorial Lihat Amnesty International, *The Conflict in Gaza: A Briefing on Applicable Law, Investigations, and Accountability* (London: Amnesty International Publications, 2009), hal. 7.

⁴³⁰ *Geneva Convention IV*, ps. 4.

⁴³¹ *Additional Protocol I*, ps. 51 (3).

⁴³² *Geneva Convention IV*, ps. 59; *Additional Protocol I*, ps. 70.

Kewajiban ini sendiri lahir karena situasi kemanusiaan di Jalur Gaza sudah sangat memprihatinkan. Awalnya, kewajiban Israel sebagai Penguasa Pendudukan hanyalah untuk menjamin ketersediaan obat, makanan, serta bahan kebutuhan hidup lainnya di wilayah yang diduduki.⁴³³ Namun pada kenyataannya tindakan blokade Israel menghalangi akses barang-barang masuk ke Gaza dan mengakibatkan kondisi di Gaza menjadi sangat memprihatinkan. Level kemiskinan penduduk sipil di Jalur Gaza mencapai 80 %, tingkat pengangguran mencapai 42 %, dan 80 % dari keseluruhan penduduk sipil di Gaza tergantung pada kiriman makanan dari bantuan kemanusiaan untuk bertahan hidup.⁴³⁴

Dari situasi memprihatinkan inilah lahir kewajiban untuk mempersilakan masuknya bantuan kemanusiaan di Jalur Gaza. Jadi, kewajiban Israel untuk mempersilakan bantuan kemanusiaan masuk ke Jalur Gaza lahir akibat ketidakmampuan Israel sebagai Penguasa Pendudukan untuk menjamin ketersediaan bahan-bahan kebutuhan penting bagi penduduk sipil di Jalur Gaza.

4.2.3. Pelanggaran terhadap Kewajiban Israel untuk Mempersilakan Masuknya Bantuan Kemanusiaan di Jalur Gaza

Meskipun rezim hukum hak asasi manusia, *Geneva Convention IV*,⁴³⁵ serta hukum kebiasaan perang⁴³⁶ mewajibkan Israel untuk mempersilakan masuknya bantuan kemanusiaan bagi penduduk sipil di Jalur Gaza, Israel melanggar kewajiban ini. Hal ini dapat dilihat dari hambatan dan pembatasan yang sering Israel lakukan terhadap bantuan kemanusiaan tersebut.

Sampai dengan bulan Januari 2010, impor barang-barang ke Gaza yang diperbolehkan masuk hanya kurang lebih 25 % dari apa yang sesungguhnya dibutuhkan.⁴³⁷ Israel sangat membatasi bantuan kemanusiaan, seperti makanan,

⁴³³ *Geneva Convention IV*, ps. 55.

⁴³⁴ Lihat Palestinian Centre for Human Rights (PCHR), "23 Days of War, 928 Days of Closure," (Gaza: Palestinian Centre for Human Rights, 2009), hal. 15.

⁴³⁵ *Geneva Convention IV*, ps. 59.

⁴³⁶ Lihat Henckaerts dan Doswald-Beck, "*Customary International Humanitarian Law Volume I...*," hal. 193 (Rule 55); Lihat pula *Additional Protocol I*, ps. 70.

yang boleh masuk ke Gaza,⁴³⁸ dan juga sering memperlambat bantuan kemanusiaan tersebut untuk masuk ke wilayah Gaza.⁴³⁹ Selain itu, penyerangan kapal Mavi Marmara membawa konsekuensi tidak langsung, yakni terhambatnya penyaluran bantuan kemanusiaan di Jalur Gaza. Pada gerakan “Gaza Freedom Flotilla,” termasuk di kapal Mavi Marmara, pekerja bantuan kemanusiaan, obat-obatan, serta bahan makanan untuk penduduk sipil di Jalur Gaza diangkut.⁴⁴⁰ Penyerangan terhadap kapal Mavi Marmara mengakibatkan terhambatnya pemberian bantuan kemanusiaan serta obat-obatan yang sudah sangat dibutuhkan oleh penduduk sipil di Jalur Gaza. Tidak hanya kapal, namun juga bantuan kemanusiaan, termasuk uang donasi untuk penduduk sipil di Gaza,⁴⁴¹ disita oleh IDF.⁴⁴²

Israel melanggar kewajiban untuk mempersilakan bantuan kemanusiaan masuk karena tindakan-tindakan yang dilakukan Israel justru menghambat masuknya bantuan kemanusiaan tersebut. Sebagai Penguasa Pendudukan, Israel harus menyetujui masuknya bantuan kemanusiaan, apalagi karena situasi pemenuhan kebutuhan hidup penduduk sipil di Jalur Gaza sudah sangat memprihatinkan.

Israel mungkin berdalih bahwa sebagai Penguasa Pendudukan, ia juga memiliki hak untuk menolak bantuan kemanusiaan tersebut masuk. Di satu sisi, justifikasi ini memang dapat dibenarkan karena terdapat dasar hukum yang sah.⁴⁴³ Namun di sisi lain, justifikasi ini bertentangan dengan esensi kewajiban untuk mempersilakan masuknya bantuan kemanusiaan dan juga tidak selaras dengan

⁴³⁷ Sebelum tahun 2007, 10.400 bantuan boleh memasuki Gaza. Namun setelah bulan Juni 2007, hanya 2.500 bantuan yang diperbolehkan masuk. Lihat “Restrictions on the Transfer of Goods to Gaza: Obstruction and Obfuscation,” http://www.gisha.org/UserFiles/File/publications/Restrictions_transfer_goods_Gaza.pdf, diunduh tanggal 22 Juni 2011, hal. 3.

⁴³⁸ Guilfoyle, “The Mavi Marmara Incident and Blockade...,” hal. 25.

⁴³⁹ *Ibid.*

⁴⁴⁰ IHH, “...Flotilla Campaign Summary Report,” hal. 14.

⁴⁴¹ UNHRC, “Report of.... Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance,” hal. 49.

⁴⁴² IHH, “...Flotilla Campaign Summary Report,” hal. 35.

⁴⁴³ *Additional Protocol I*, ps. 70 (1).

esensi *Geneva Convention IV* yang hendak melindungi penduduk sipil. Dilihat dari rasio *Geneva Convention IV* dan situasi krisis kemanusiaan di Jalur Gaza,⁴⁴⁴ maka Penulis menilai bahwa bobot kewajiban Israel untuk mempersilakan masuknya bantuan kemanusiaan lebih besar daripada hak Israel untuk menolak bantuan kemanusiaan tersebut. Penilaian ini juga sejalan dengan pertimbangan hak-hak manusia yang fundamental yang harus dilakukan pada kondisi kedaulatan suatu negara diakui sekalipun. Seperti yang telah dibahas di bab-bab sebelumnya, hak asasi manusia yang fundamental harus digunakan untuk menyeimbangkan pelaksanaan kedaulatan negara.

Atas dasar pertimbangan kemanusiaan, maka sudah selayaknya hak Israel untuk menolak dibatasi. Selain itu, yang harus ditekankan adalah kewajiban Israel untuk mempersilakan bantuan kemanusiaan masuk. Oleh karena itu, dengan menghambat masuknya bantuan kemanusiaan bahkan menyerang kapal-kapal yang mengangkut bantuan kemanusiaan, Israel telah melanggar kewajibannya.

4.3. Legalitas Blokade Laut Israel

Pada bagian ini akan dilakukan analisa terkait terpenuhi atau tidak terpenuhinya syarat-syarat sah blokade yang dilakukan Israel. Sebagaimana telah dipaparkan sebelumnya, syarat-syarat blokade laut yang sah adalah:

- a. Terdapat situasi konflik bersenjata;
- b. Blokade tidak boleh ditetapkan sampai ke wilayah laut bebas
- c. Blokade tidak boleh memiliki tujuan utama untuk membuat penduduk sipil kelaparan atau membawa dampak buruk yang berlebihan kepada penduduk sipil;
- d. Blokade harus diumumkan dan diberitahukan kepada setiap pihak yang berperang dan juga negara-negara netral;
- e. Blokade harus bersifat efektif;
- f. Blokade tidak boleh menghalangi akses ke pelabuhan dan pantai dari negara netral; serta
- g. Blokade harus diberlakukan secara imparsial.

⁴⁴⁴ Lihat United Nation Security Council, *Resolution 1850* (2008) dan *1860* (2009).

Blokade laut yang dilakukan Israel merupakan suatu blokade laut yang ilegal. Penulis tidak memperdebatkan bahwa beberapa syarat dari blokade telah diterapkan oleh Israel. *Pertama*, telah ada situasi konflik bersenjata antara Israel dengan Palestina (atau Hamas) di *Occupied Palestinian Territory* (OPT), yang juga meliputi Jalur Gaza,⁴⁴⁵ dan bahkan konflik inilah yang mendasari Israel untuk mengenakan blokade. *Kedua*, blokade laut telah diumumkan oleh Angkatan Laut Israel pada tanggal 6 Januari 2009⁴⁴⁶ dan secara khusus Angkatan Laut Israel telah memperingatkan gerakan “Gaza Freedom Flotilla” mengenai keberadaan blokade pada tanggal 30 Mei 2010.⁴⁴⁷ *Ketiga*, blokade laut dinilai telah dijalankan secara efektif,⁴⁴⁸ karena blokade laut telah dijalankan dengan ketat oleh Angkatan Laut Israel. Sehingga dapat disimpulkan bahwa Israel memang berniat untuk melaksanakan blokade dan bukan hanya sekedar mengumumkannya belaka. *Keempat*, blokade laut Israel tidak mempengaruhi akses ke negara atau pelabuhan negara netral.⁴⁴⁹ *Kelima*, pemberlakuan blokade dilakukan secara imparial terhadap kapal-kapal setiap negara tanpa diskriminasi tertentu.⁴⁵⁰

Meskipun Israel berhasil memenuhi kelima syarat tersebut, sayangnya terdapat syarat-syarat esensial lain yang gagal dipenuhi Israel. Syarat-syarat blokade yang telah disebutkan di atas harus dipenuhi secara kumulatif,⁴⁵¹ sehingga kegagalan untuk memenuhi satu syarat saja sudah mengakibatkan blokade tersebut ilegal. Adapun blokade Israel tersebut ilegal karena alasan-alasan berikut:

⁴⁴⁵ Lihat Alina Kaczorowska, *Public International Law*, ed.4 (Taylor & Francis, 2010), hal. 841.

⁴⁴⁶ Israel telah mengumumkan blokade laut pada tanggal 6 Januari 2009. Lihat UNHRC, “Report of.... Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance,” hal. 7-8.

⁴⁴⁷ *Ibid.*, hal. 24.

⁴⁴⁸ Maksud dari pengaturan ini adalah agar tidak terjadi praktek *paper blockade*, di mana blokade sekedar diumumkan namun tidak dijalankan. Blokade juga harus Lihat Fraunces, “The International Law of Blockade...,” hal. 897.

⁴⁴⁹ International Military Cooperation Department Strategic Division Israel Defense Forces, “Operation ‘Sea Breeze’ ...,” hal. 3.

⁴⁵⁰ *Ibid.*

⁴⁵¹ Lihat perumusan kata ‘dan’ pada syarat-syarat blokade. Lihat pula Guilfoyle, “The Mavi Marmara Incident and Blockade in Armed Conflict,” hal. 24.

4.3.1. Blokade Laut Israel Dikenakan Hingga Wilayah Laut Bebas

Pada tanggal 4 Januari, Angkatan Laut Israel menyatakan blokade laut terhadap Jalur Gaza diperpanjang dari 6 mil laut menjadi 20 mil laut⁴⁵² dan menyatakan bahwa kapal yang mencoba menerobas masuk akan dicegat oleh Angkatan Laut Israel dan dialihkan ke Pelabuhan Ashdod.⁴⁵³ Area blokade laut Israel sesungguhnya kurang jelas. IDF juga menginformasikan “Gaza Freedom Flotilla” bahwa *no-go-zone* telah diperpanjang dari 20 mil laut menjadi 48 mil laut, kemudian menjadi 60 atau 68 mil laut.⁴⁵⁴

Batas maksimal laut teritorial adalah 12 mil laut,⁴⁵⁵ dan wilayah setelahnya merupakan zona laut bebas. Meskipun terdapat rezim zona tambahan hingga 24 mil laut sekalipun, yang dapat dilakukan oleh suatu negara di zona ini hanyalah kendali di bidang fiskal, cukai, sanitasi, serta imigrasi saja.⁴⁵⁶ Sementara itu, panjang ZEE sejauh 200 mil laut hanya berlaku untuk kolom air di bawah permukaan laut saja.⁴⁵⁷ Permukaan laut di atas kolom air ZEE juga tetap merupakan zona laut bebas. Jadi, permukaan air di luar batas teritorial 12 mil laut adalah laut bebas, di mana berlakulah prinsip kebebasan berlayar pada saat damai dan prinsip larangan mengganggu pihak netral di laut pada saat terjadi konflik bersenjata. Seperti yang telah dijelaskan sebelumnya, blokade dapat menghalangi kebebasan berlayar suatu kapal dan menghalangi hak-hak pihak netral di laut bebas, sehingga pelaksanaan blokade di laut bebas merupakan suatu hal yang ilegal. Batas kedaulatan suatu negara hanya sampai di laut teritorialnya saja,⁴⁵⁸

⁴⁵² “Israel Ground Troops Enter Gaza,” <http://english.aljazeera.net/news/middleeast/2009/01/20091322357629723.html>, diunduh tanggal 20 Juni 2011.

⁴⁵³ “Israel Navy Intercepts Gaza Blockade Aid Boat,” <http://www.bbc.co.uk/news/world-middle-east-11425408>, diunduh tanggal 20 Juni 2011.

⁴⁵⁴ “Israel’s Naval Blockade,” <http://un-truth.com/israel/israels-naval-blockade>, diunduh tanggal 20 Juni 2011.

⁴⁵⁵ UNCLOS, ps. 3.

⁴⁵⁶ *Ibid.*, ps. 33.

⁴⁵⁷ *Ibid.*, ps. 57.

⁴⁵⁸ *Ibid.*, ps. 2.

sehingga pihak yang ingin melakukan blokade hanya berhak melakukannya sampai batas laut teritorialnya saja.

Meskipun Israel tidak terikat dengan UNCLOS, namun ketentuan mengenai batas maksimal laut teritorial dan status laut bebas sudah merupakan suatu hukum kebiasaan internasional.⁴⁵⁹ Dilihat dari fakta yang ada, Israel melakukan blokade di wilayah laut bebas karena Israel mengenakan blokade hingga jarak 60 mil laut. Fakta tersebut menunjukkan bahwa Israel telah melanggar salah satu syarat sah blokade yang utama. Israel telah melakukan blokade di wilayah laut bebas, padahal di zona laut bebas tersebut tidak boleh dilakukan blokade.

4.3.2. Blokade Laut Israel Mengakibatkan Penduduk Sipil di Jalur Gaza Kelaparan atau Mengakibatkan Penduduk Sipil Mengalami Dampak Buruk yang Berlebihan

Salah satu syarat penting blokade yang lainnya adalah bahwa blokade tersebut tidak boleh dengan sengaja mengakibatkan penduduk sipil di daerah yang diblokade tersebut kelaparan atau menderita kerugian/kerusakan yang tidak proporsional. Syarat ini selaras dengan pengaturan di Pasal 59 *Geneva Convention IV*, Pasal 54 dan 70 *Additional Protocol I, paragraph 103* dari *San Remo Manual*, serta hukum kebiasaan internasional. Keseluruhan pengaturan yang telah disebut tersebut pada intinya mengatur bahwa metode perang yang dengan sengaja membuat penduduk sipil kelaparan adalah metode perang yang dilarang. Selain itu, bantuan kemanusiaan yang membawa makanan harus diperbolehkan masuk ke wilayah yang diblokade, apalagi bila penduduk sipil di wilayah tersebut kekurangan makanan. Syarat inilah yang dinilai tidak dapat dipenuhi oleh Israel.

Memang menurut pengakuan Israel, blokade laut ini dikenakan untuk alasan keamanan negara Israel.⁴⁶⁰ Dengan asumsi hal tersebut dapat dibenarkan sekalipun, Israel tetap tidak boleh mengakibatkan penduduk sipil di daerah Jalur

⁴⁵⁹ *Conventions on the Law of the Sea: Hearing before the Committee on Foreign Relations, United States Senate, Eighty-sixth Congress, Second Session, on Executive 86TH Congress, 2nd Session, January 20, 1960* (Wm. S. Hein Publishing, 1985), hal. 85.

⁴⁶⁰ UNHRC, "Report of.... Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance," hal. 8.

Gaza kelaparan atau mengalami penderitaan yang tidak proporsional. *United Nations Food and Agriculture Organization* (FAO) mengestimasi bahwa 61 % rumah tangga di Jalur Gaza mengalami kekurangan pangan.⁴⁶¹ Selain itu, UNHRC juga menyatakan bahwa blokade membawa kerugian yang tidak proporsional bagi penduduk sipil di Gaza.⁴⁶² Penduduk sipil di Jalur Gaza juga sangat tergantung dengan bantuan kemanusiaan dari luar.⁴⁶³ Dewan Keamanan PBB sudah menggolongkan situasi di Jalur Gaza sudah “tidak berkelanjutan” (“*not sustainable*”) dan menekankan kebutuhan akan pasokan makanan dan obat-obatan secara regular untuk penduduk sipil di Jalur Gaza.⁴⁶⁴ Bahkan 80 % dari penduduk di Gaza sangat tergantung dengan *United Nations Relief and Works Agency for Palestine Refugees in the Near East* (UNRWA) untuk pasokan makanan.⁴⁶⁵

Dari data-data yang telah disebut di atas, telah terlihat bahwa metode blokade yang dilakukan Israel membuat penduduk sipil kelaparan atau menderita kerugian yang tidak proporsional. Melihat kondisi ini, Israel memiliki kewajiban untuk mempersilakan bantuan kemanusiaan masuk.⁴⁶⁶ Namun pada kenyataannya blokade yang digunakan Israel justru mempersulit masuknya bantuan kemanusiaan, sebagaimana yang terjadi pada penyerangan kapal Mavi Marmara yang membawa bantuan kemanusiaan. Israel mungkin berdalih bahwa bantuan-bantuan kemanusiaan tetap dipersilakan masuk melalui Pelabuhan Ashdod.⁴⁶⁷

⁴⁶¹ UN Food and Agriculture Organization, “Consolidated Appeals 2010: West Bank and Gaza Strip,” <http://www.fao.org/emergencies/tce-appfund/tce-appeals/consolidated-appeals-2010/wbgs10/en/>, diunduh tanggal 20 Juni 2011.

⁴⁶² UNHRC, “Report of.... Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance,” hal. 13.

⁴⁶³ UNHRC, “...Report of the United Nations Fact Finding Mission on the Gaza Conflict,” hal. 259.

⁴⁶⁴ United Nations Security Council, *Resolution 1850* (2008). Lihat pula United Nations Security Council, *Resolution 1860* (2009).

⁴⁶⁵ Wawancara UNHRC dengan John Ging dari IRIN pada tanggal 20 Januari 2009. Lihat pula UNHRC, “...Report of the United Nations Fact Finding Mission on the Gaza Conflict,” hal. 259.

⁴⁶⁶ *San Remo Manual*, para. 103.

⁴⁶⁷ International Military Cooperation Department Strategic Division Israel Defense Forces, “Operation ‘Sea Breeze’ – Legal Aspects – June 2010,” <http://miami.mfa.gov.il/mfm/Data/180869.doc>, diunduh tanggal 20 Juni 2011, hal.1.

Namun tindakan ini tetap tidak efektif dan memperlambat masuknya bahan-bahan penting seperti makanan ke Jalur Gaza. Padahal situasi kemanusiaan di Jalur Gaza sudah sangat memprihatinkan, sehingga tindakan-tindakan tidak efektif semacam ini seharusnya tidak dilakukan. Jadi, Israel juga tidak memenuhi syarat blokade ini karena penduduk sipil di wilayah Gaza menderita kelaparan dan kerugiannya tidak proporsional.

Dapat disimpulkan bahwa blokade laut Israel adalah suatu hal yang ilegal. Alasannya adalah karena blokade dilaksanakan di laut bebas dan karena membawa dampak buruk yang tidak proporsional bagi penduduk sipil di Jalur Gaza. Dari pembahasan di bagian ini, dapat dilihat bahwa blokade laut yang dilaksanakan Israel merupakan suatu hal yang tidak legal.

4.4. Status, Yurisdiksi, Hak, dan Kewajiban Kapal Mavi Marmara yang Membawa Bantuan Kemanusiaan

4.4.1. Status dan Yurisdiksi Kapal Mavi Marmara Sebagai Kapal Sipil yang Berlayar di Laut Bebas

Kapal Mavi Marmara merupakan kapal yang dimiliki oleh suatu NGO Turki yang bernama IHH, namun negara bendera kapal ini adalah Comoros.⁴⁶⁸ Menarik untuk dibahas mengenai isu absennya *genuine link* antara kapal Mavi Marmara dengan negara bendera kapalnya, yakni Comoros, akibat penggunaan “*flags of convenience*.” Meskipun begitu, isu ini tidak mengubah status dan yurisdiksi kapal Mavi Marmara. Suatu kapal memang sebaiknya memiliki *genuine link* atau hubungan sesungguhnya dengan negara bendera kapalnya.⁴⁶⁹ Namun hukum internasional masih mengatur bahwa suatu kapal yang didaftar secara layak di negara tertentu (suatu kapal yang berbendera negara tertentu) akan memiliki kewarganegaraan negara tempat kapal tersebut didaftar.⁴⁷⁰ Jadi, karena bahkan NGO Turki (IHH) yang memiliki kapal Mavi Marmara ini sudah sepakat

⁴⁶⁸ UNHRC, “Report of.... Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance,” hal. 66.

⁴⁶⁹ Misalnya, kapal yang dimiliki oleh suatu negara *sebaiknya* memiliki kewarganegaraan yang sama pula.

⁴⁷⁰ Reuland, “Interference with Non-Natioanl Ships on the High Seas...,” hal. 1204.

bahwa kapal ini akan berbendera Comoros, maka menurut hukum internasional, kewarganegaraan kapal Mavi Marmara adalah Comoros, meskipun pemiliknya suatu organisasi Turki sekalipun.

Kapal Mavi Marmara juga bukanlah kapal perang atau kapal yang digunakan untuk dinas Pemerintah. Hal ini terbukti dari titel “MV” pada kapal Mavi Marmara yang berarti “*Merchant Vessel*.”⁴⁷¹ Artinya, kapal Mavi Marmara merupakan suatu kapal dagang biasa. Yurisdiksi yang berlaku pada kapal ini ketika berlayar di laut bebas adalah yurisdiksi negara Comoros sebagai negara bendera kapal, sesuai dengan ketentuan di UNCLOS.⁴⁷² Jadi, selama berada di laut bebas, tidak ada yurisdiksi negara lain di kapal Mavi Marmara, kecuali bila diduga kapal Mavi Marmara ini terlibat dalam pembajakan, perdagangan budak, atau penyiaran ilegal. Karena kapal ini hanyalah kapal penumpang biasa yang membawa bantuan kemanusiaan, maka pengecualian-pengecualian tersebut tidak berlaku. Satu-satunya yurisdiksi yang berlaku untuk kapal Mavi Marmara di laut bebas hanyalah yurisdiksi Comoros.

Penting pula untuk ditarik pembedaan antara yurisdiksi yang berlaku terhadap kapal dengan yurisdiksi yang berlaku pada penumpang kapal. Telah dijelaskan bahwa yurisdiksi yang berlaku bagi kapal Mavi Marmara adalah yurisdiksi Comoros, meskipun pemilik dari kapal tersebut adalah NGO Turki. Turki tidak memiliki yurisdiksi terhadap kapal Mavi Marmara, namun Turki memiliki yurisdiksi personal terhadap mayoritas penumpang kapal Mavi Marmara yang berkewarganegaraan Turki.⁴⁷³

Sebagai perbandingan, akan dipaparkan pula mengenai yurisdiksi kapal Mavi Marmara pada situasi di mana diasumsikan terjadi konflik bersenjata. Pada keadaan konflik bersenjata sekalipun, kapal Mavi Marmara dapat digolongkan sebagai kapal dagang pihak netral.⁴⁷⁴ Alasannya adalah karena kewarganegaraan

⁴⁷¹ Deborah W. Cutler, Thomas J. Cutler, dan Bill Wedertz, *Dictionary of Naval Abbreviations*, ed. 4 (Naval Institute Press, 2005), hal. 258.

⁴⁷² UNCLOS, ps. 92.

⁴⁷³ UNHRC, “Report of.... Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance,” hal. 66.

⁴⁷⁴ *San Remo Manual*, para. 67.

kapal ini adalah Comoros, yang merupakan pihak netral dalam konflik bersenjata antara Israel dengan Palestina/Hamas. Sebagai kapal dagang pihak netral, yurisdiksi yang berlaku di kapal Mavi Marmara tetap yurisdiksi negara benderanya, yakni Comoros.

4.4.2. Hak dan Kewajiban Kapal Mavi Marmara di Laut Bebas

Sebagai suatu kapal yang berlayar di laut bebas, kapal Mavi Marmara memiliki hak-hak sebagaimana yang diatur dalam Pasal 87 UNCLOS. Salah satu hak yang paling penting yang dimiliki oleh kapal ini adalah hak untuk berlayar dengan bebas,⁴⁷⁵ yang lahir dari prinsip kebebasan suatu kapal untuk berlayar di laut bebas. Hak ini harus dijalankan dengan memperhatikan kepentingan negara lain yang juga menjalankan hak dan kebebasan mereka.⁴⁷⁶ Sementara itu, kewajiban-kewajiban yang harus dilaksanakan oleh negara bendera kapal ini meliputi kewajiban untuk menjalankan yurisdiksinya secara efektif, mendaftarkan kapal tersebut, mengambil tindakan-tindakan tertentu untuk menjamin keselamatan kapal di laut, serta melakukan investigasi apabila ditemukan dugaan yurisdiksi negara bendera kapal tidak dijalankan secara pantas.⁴⁷⁷ Dilihat dari fakta bahwa kewajiban pendaftaran telah dilakukan dengan pendaftaran kapal Mavi Marmara di Comoros,⁴⁷⁸ maka dapat disimpulkan bahwa kewajiban lain seperti uji kelayakan kapal telah dilakukan sebagai salah satu syarat pendaftaran.

4.4.3. Kapal Mavi Marmara Sebagai Kapal yang Membawa Bantuan Kemanusiaan

Salah satu karakteristik khusus yang dimiliki oleh kapal Mavi Marmara adalah perannya sebagai suatu kapal yang membawa bantuan kemanusiaan. Berikut akan dibahas secara beturut-turut mengenai pemenuhan syarat imparialitas dan kemanusiaan oleh IHH yang menyalurkan bantuannya melalui

⁴⁷⁵UNCLOS, ps. 90.

⁴⁷⁶ *Ibid.* ps. 87.

⁴⁷⁷ *Ibid.*, ps. 94.

⁴⁷⁸ UNHRC, "Report of.... Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance," hal. 19.

kapal Mavi Marmara, serta mengenai hak dan perlindungan kapal Mavi Marmara sebagai kapal yang membawa bantuan kemanusiaan.

4.4.3.1. Bantuan Kemanusiaan yang Dibawa oleh Kapal Mavi Marmara Memenuhi Syarat Imparsialitas dan Sifat Kemanusiaan

Syarat utama suatu bantuan kemanusiaan adalah imparsialitas dan sifat kemanusiaan dari organisasi yang menyalurkan bantuan kemanusiaan tersebut.⁴⁷⁹ Bantuan kemanusiaan di kapal Mavi Marmara disalurkan oleh IHH. Bantuan ini jelas bersifat kemanusiaan karena tujuannya adalah untuk menolong penduduk sipil di Jalur Gaza.⁴⁸⁰ Sementara imparsialitas suatu tindakan dapat dilihat dari pemenuhan suatu tindakan tanpa adanya diskriminasi.⁴⁸¹ Meskipun begitu, dalam hal bantuan kemanusiaan untuk suatu wilayah yang diduduki, klaim belaka bahwa suatu organisasi tidak bersifat imparsial tidak boleh digunakan sebagai alasan untuk menolak bantuan kemanusiaan.⁴⁸²

Sejak pendiriannya di tahun 1992, menurut IHH, organisasi ini telah berupaya menyalurkan bantuan kemanusiaan tanpa memperdulikan kebangsaan, agama, bahasa, atau ras.⁴⁸³ Jadi dapat dilihat bahwa unsur imparsialitas telah dipenuhi oleh organisasi ini. Selain itu, bantuan kemanusiaan yang disalurkan IHH melalui kapal Mavi Marmara ini memang ditujukan untuk membantu penduduk sipil di Jalur Gaza, sehingga kedua unsur bantuan kemanusiaan telah terpenuhi.

⁴⁷⁹ Yang dimaksud adalah bahwa sifat kegiatan tersebut harus prihatin terhadap keadaan manusia dan tidak boleh terpengaruh oleh alasan politis atau militer apapun. Lihat pula Pictet, *Commentary to the Fourth Geneva Convention...*, hal. 97.

⁴⁸⁰ UNHRC, "Report of.... Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance," hal. 19. Lihat pula Pictet, *Commentary on the Additional Protocols....*, hal. 817.

⁴⁸¹ Pictet, *Commentary on the Additional Protocols....*, hal. 818.

⁴⁸² *Ibid.*, hal. 817.

⁴⁸³ IHH, "...Flotilla Campaign Summary Report," hal. 6.

4.4.3.2. Kewajiban, Hak, dan Perlindungan atas Kapal Mavi Marmara sebagai Kapal yang Membawa Bantuan Kemanusiaan

Kapal yang membawa suatu bantuan kemanusiaan memang perlu mendapat persetujuan para pihak dalam konflik.⁴⁸⁴ Inilah yang kerap menjadi permasalahan, karena Penguasa Pendudukan sering menggunakan pengaturan ini untuk menghambat masuknya bantuan kemanusiaan.⁴⁸⁵ Namun penting pula untuk dilihat dari konteks yang lebih besar bahwa Penguasa Pendudukan selalu memiliki kewajiban untuk menyalurkan bantuan kemanusiaan.⁴⁸⁶ Hal ini sejalan dengan pemikiran bahwa pelaksanaan konsep-konsep tradisional seperti kedaulatan harus selalu diiringi dengan pertimbangan konsep hak asasi manusia, seperti yang telah dibahas sebelumnya. Selain itu, sejalan dengan tujuan utama dari *Geneva Convention IV* yang berusaha untuk melindungi penduduk sipil dari tindakan sewenang-wenang pihak musuh,⁴⁸⁷ maka dapat disimpulkan bahwa pengaturan mengenai persetujuan para pihak tidak boleh mengesampingkan pengaturan mengenai perlindungan penduduk sipil sebagai esensi dari *Geneva Convention IV* itu sendiri.

Dapat disimpulkan bahwa pada esensinya, bantuan kemanusiaan di kapal Mavi Marmara harus mendapat izin dari pihak Israel agar dapat disalurkan di Jalur Gaza. Namun pertimbangan harus dilakukan dengan melihat situasi di Jalur Gaza. Terdapat suatu krisis kemanusiaan di Jalur Gaza, sebagaimana telah ditekankan oleh Dewan Keamanan PBB. Atas dasar kemanusiaan, sudah sewajarnya Israel menjalankan kewajibannya untuk menyetujui masuknya bantuan kemanusiaan yang dibawa oleh kapal Mavi Marmara. Hal ini sejalan dengan esensi dari *Geneva Convention IV*. Jadi seharusnya, Israel mempersilakan masuknya kapal Mavi Marmara yang membawa bantuan kemanusiaan untuk menolong penduduk sipil di Jalur Gaza.

⁴⁸⁴ Lihat *Geneva Convention IV*, ps. 10 dan 60.

⁴⁸⁵ Yoram Dinstein, "The Right to Humanitarian Assistance," <http://ihl.ihlresearch.org/index.cfm?fuseaction=page.viewPage&pageID=808&nodeID=2>, diunduh tanggal 20 Juni 2011.

⁴⁸⁶ *Geneva Convention IV*, ps. 59; *Additional Protocol*, ps. 70 (1).

⁴⁸⁷ Pictet (ed), *Commentary to the Fourth Geneva Convention...*, hal. 10.

Israel juga lebih lanjut lagi harus menjamin pelaksanaan hak-hak yang selayaknya dapat diberikan kepada IHH yang menyalurkan bantuan kemanusiaan melalui kapal Mavi Marmara. Berdasarkan Pasal 142 *Geneva Convention IV*, IHH serta pekerja bantuan kemanusiaan di kapal Mavi Marmara berhak difasilitasi oleh Israel untuk mengunjungi penduduk sipil, mendistribusikan pasokan dan bahan-bahan esensial, serta membantu penduduk sipil dalam mengatur waktu senggang mereka selama penahanan.⁴⁸⁸ Sayangnya, bahkan sebelum hak-hak tersebut dapat dijalankan, perjalanan kapal Mavi Marmara justru dihambat oleh Israel sendiri.

Padahal penumpang di kapal Mavi Marmara yang merupakan pekerja bantuan kemanusiaan serta barang-barang yang akan disalurkan melalui kapal Mavi Marmara itu sendiri memiliki jaminan perlindungan dari *Geneva Convention IV* dan hukum kebiasaan perang.⁴⁸⁹ Namun Israel tidak melaksanakan kewajibannya untuk melindungi kapal Mavi Marmara. Israel seharusnya menginstruksikan IDF untuk tidak menyerang pekerja yang menyalurkan bantuan kemanusiaan di kapal Mavi Marmara.⁴⁹⁰ Kejadian yang ada justru sebaliknya, IDF malah menyerang kapal Mavi Marmara dan membunuh beberapa penumpang yang merupakan pekerja bantuan kemanusiaan.⁴⁹¹ Jadi, Israel telah melakukan pelanggaran terhadap kewajibannya untuk melindungi pekerja bantuan kemanusiaan yang merupakan penumpang kapal Mavi Marmara dan misi bantuan kemanusiaan itu sendiri.

4.5. Pelanggaran Hukum pada Penyerangan dan Penggunaan Kekuatan Militer terhadap Kapal Bantuan Kemanusiaan Mavi Marmara di Laut Bebas

Dalam penyerangan kapal Mavi Marmara, terdapat beberapa pelanggaran yang dilakukan oleh Israel. Namun sebelum membahas secara terperinci

⁴⁸⁸ *Geneva Convention IV*, ps. 142.

⁴⁸⁹ *Ibid.*, ps. 59; *Additional Protocol I*, ps. 71 (2).

⁴⁹⁰ Pictet, *Commentary on the Additional Protocols....*, hal. 834.

⁴⁹¹ UNHRC, "Report of.... Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance," hal. 25 dan 28.

pelanggaran-pelanggaran yang terjadi, mula-mula akan dilakukan pembahasan terkait atribusi tindakan IDF sebagai tindakan Israel.

4.5.1. Atribusi dalam Pertanggungjawaban Israel Sebagai Suatu Negara

Secara khusus, tindakan penyerangan yang dilakukan terhadap kapal Mavi Marmara dilakukan oleh Angkatan Bersenjata Israel, yakni IDF. Salah satu pengaturan utama dalam hukum internasional yang telah dikodifikasikan oleh *International Law Commission* adalah bentuk atribusi tindakan suatu organ negara sebagai tindakan negara itu sendiri.⁴⁹² Hal ini telah ditegaskan beberapa kali dalam hukum internasional.⁴⁹³ Bentuk atribusi ini meliputi tindakan setiap organ resmi negara tersebut dan tidak memperdulikan apakah organ tersebut melaksanakan fungsi eksekutif, legislatif, yudikif, atau fungsi lainnya.⁴⁹⁴

Sebagai angkatan bersenjata resmi negara Israel, maka tindakan yang dilakukan oleh IDF akan dianggap sebagai tindakan Israel sebagai suatu negara. Oleh karena itu, pelanggaran-pelanggaran hukum yang dilakukan di IDF juga diatribusikan sebagai pelanggaran hukum Israel.

4.5.2. Pelanggaran Hukum Hak Asasi Manusia

Terdapat beberapa pelanggaran hak asasi manusia dalam kasus penyerangan ini, yakni pelanggaran terhadap hak untuk hidup, hak untuk tidak disiksa, hak atas kebebasan, serta hak atas kesehatan dari penumpang kapal Mavi Marmara. Berikut akan dibahas pelanggaran tersebut satu per satu.

⁴⁹² International Law Commission, "Articles on the Responsibility of States for Internationally Wrongful Acts," *UN Doc. A/56/10* (2001) ('ASR'), ps. 4.

⁴⁹³ Lihat kasus "Salvador Commercial Company," *UNRIAA Vol. XV (Sales No. 66.V.3)*, 1902, hal. 477; "Finnish Shipowners (Great Britain/Finland)," *UNRIAA Vol. III (Sales No. 1949.V.2.)*, 1934, hal. 1501.

⁴⁹⁴ James Crawford, ed., *The International Law Commission's Articles on State Responsibility: Introduction, Text, and Commentaries* (Cambridge University Press, 2002), hal.95.

4.5.2.1. Pelanggaran Hak untuk Hidup

Salah satu hak asasi manusia paling fundamental yang dilanggar dalam kasus ini adalah hak untuk hidup. Serangan IDF terhadap kapal Mavi Marmara telah mengakibatkan 9 orang meninggal. Sebagaimana telah dipaparkan di atas, hak untuk hidup ini telah dijamin oleh berbagai instrumen hukum internasional⁴⁹⁵ dan tidak ada seorangpun yang nyawanya boleh dirampas dengan semena-mena. Israel sebagai suatu negara juga seharusnya memiliki kewajiban untuk memastikan angkatan bersenjata tidak melakukan pembunuhan yang sewenang-wenang.⁴⁹⁶ Namun pada kasus ini, Israel, melalui IDF, justru menyerang penumpang kapal Mavi Marmara. Dapat dilihat dari jarak tembakan dan luka tembakan pada korban, IDF setidaknya memiliki kesadaran bahwa tembakannya tersebut akan mengakibatkan hilangnya nyawa orang.⁴⁹⁷ Meninggalnya kesembilan penumpang tersebut akibat tembakan peluru IDF menunjukkan adanya pelanggaran terhadap hak untuk hidup.

Israel mungkin berdalih bahwa tindakan penggunaan kekuatan militer tersebut merupakan suatu bentuk bela diri yang legal menurut Pasal 51 Piagam PBB. Namun justifikasi ini tidak dapat dibenarkan karena dua alasan. *Pertama*, hak bela diri dalam Pasal 51 Piagam PBB merupakan hak bela diri untuk *negara* dalam hal adanya suatu serangan bersenjata terhadap negara tersebut.⁴⁹⁸ Selain itu, skala dan efek serangan yang memicu bela diri tersebut haruslah sedemikian rupa sehingga seakan-akan serangan tersebut dilakukan oleh suatu angkatan bersenjata

⁴⁹⁵ Contohnya adalah Pasal 6 ICCPR dan Pasal 3 UDHR.

⁴⁹⁶ United Nations, *Compilation of General Comments...by Human Rights Treaty Bodies*, hal. 128.

⁴⁹⁷ Paling tidak 6 dari 9 penumpang yang tewas ditembak dengan cara yang semena-mena, dilihat dari dekatnya jarak tembakan dan posisi tembakan pada daerah-daerah vital korban. Lihat UNHRC, "Report of... Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance," hal. 37.

⁴⁹⁸ Jean Allain, "The True Challenge to the United Nations System of the Use of Force: The Failure of Kosovo and Iraq and the Emergence of the African Union," *Max Planck Yearbook of United Nations Law Volume 8* (2004), hal. 242. Lihat pula International Court of Justice ('ICJ'), "Legal Consequence of the Construction of a Wall in the Occupied Palestinian Territory," *Advisory Opinion of July 2004*, ICJ Report (2004), para 139.

suatu negara.⁴⁹⁹ *Kedua*, hak bela diri dalam Pasal 51 Piagam PBB maupun hak bela diri untuk individu,⁵⁰⁰ harus dilakukan secara proporsional.⁵⁰¹

Dalam kasus ini, serangan yang dilakukan IDF bukan hak bela diri suatu negara, tidak dipicu oleh serangan bersenjata suatu negara, dan tidak proporsional. Data dari UNHRC memang menyebutkan bahwa IDF yang diturunkan dari helikopter ke kapal Mavi Marmara mengalami perlawanan yang signifikan dan tidak terduga dari para penumpang kapal.⁵⁰² Terdapat inkonsistensi laporan untuk menjawab apakah penumpang Mavi Marmara menggunakan senjata api.⁵⁰³ Namun semisalnya penumpang Mavi Marmara menggunakan senjata api sekalipun, dapat dilihat bahwa serangan IDF merupakan suatu hal yang tidak proporsional. UNHRC berpendapat bahwa suatu angkatan bersenjata yang dilatih dengan baik seperti IDF seharusnya dapat menahan sekelompok penumpang, yang merupakan penduduk sipil tak terlatih, tanpa mengakibatkan hilangnya nyawa atau luka serius.⁵⁰⁴ Sementara pada kasus ini, banyak penyerangan dilakukan oleh prajurit Israel terhadap orang-orang yang bahkan tidak dalam posisi melawan pada saat mereka ditembak.⁵⁰⁵ Dengan kata lain, alat, cara, metode penyerangan yang dilakukan penumpang Mavi Marmara tidak sebanding dengan alat, cara, atau metode penyerangan yang dilakukan oleh IDF terhadap penumpang Mavi

⁴⁹⁹ Lihat ICJ, "...Paramilitary Activities in and Against Nicaragua," para. 139. Lihat pula paragraph 33 dari *Separate Opinion Judge Higgins* atas "Legal Consequence of the Construction of a Wall..."

⁵⁰⁰ Robert Cryer, et.al., *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 2007), hal. 337. Lihat ICTY, "Prosecutor vs. Kordic and Cerkez," *Judgment of 26 February 2001*, para. 448 – 452. Lihat pula *ICC Statute*, ps. 31 (1) (c).

⁵⁰¹ Cryer, et al., *An Introduction to International Criminal Law...*, hal. 338. Lihat pula Allain, "The True Challenge to the United Nations System of the Use of Force..." hal. 234; ICJ, "...Paramilitary Activities in and Against Nicaragua," para. 176; Simma dan Mosler, *The Charter of the United Nations...*, hal. 677.

⁵⁰² UNHRC, "Report of.... Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance," hal. 36.

⁵⁰³ Laporan dari UNHRC, Turki, serta IHH menyebutkan bahwa penumpang Mavi Marmara tidak menggunakan senjata api untuk melawan prajurit Israel. Sementara itu laporan dari testimoni IDF menyebutkan adanya penggunaan senjata api oleh penumpang.

⁵⁰⁴ UNHRC, "Report of.... Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance," hal. 37.

⁵⁰⁵ *Ibid.*, hal. 27 dan 37.

Marmara tersebut. Jadi, IDF telah melakukan pelanggaran terhadap hak untuk hidup dari sembilan penumpang kapal Mavi Marmara. Terhadap pelanggaran ini, tidak terdapat justifikasi yang dapat dibenarkan.

4.5.2.2. Pelanggaran Hak atas Kebebasan

Selain pelanggaran hak untuk hidup, terdapat pula isu pelanggaran hak atas kebebasan. Dasar hukumnya adalah Pasal 9 (1) ICCPR dan Pasal 3 UDHR. Tidak ada unsur-unsur khusus dalam hak atas kebebasan. Namun pelanggaran terhadap hak atas kebebasan ini akan terjadi bila seseorang ditahan secara semena-mena dan tidak berdasar prosedur hukum.⁵⁰⁶ Jadi bila terdapat penahanan yang semena-mena terhadap seseorang, maka hak atas kebebasan orang tersebut terlanggar.

Pelanggaran terhadap hak atas kebebasan dalam kasus ini terlihat dari fakta adanya penahanan massal selama kurang lebih 12 jam dari 700 penumpang dan kru dari kapal-kapal dalam “Gaza Freedom Flotilla.” Selain itu, tidak ada satupun penumpang atau kru yang diinformasikan alasan penahanan mereka. Padahal, pemberian informasi alasan penahanan merupakan salah satu kewajiban pihak yang melakukan penahanan.⁵⁰⁷ Penahanan ini juga sewenang-wenang karena tidak melewati prosedur hukum terlebih dahulu. Jadi, dengan menahan penumpang kapal Mavi Marmara secara massal dan tanpa alasan yang sah, Israel telah melakukan pelanggaran terhadap hak atas kebebasan.

4.5.2.3. Pelanggaran Hak untuk Tidak Disiksa

Pelanggaran juga dilakukan terhadap hak untuk tidak disiksa, yang memiliki dasar hukum Pasal 7 ICCPR dan pasal 5 UDHR. Pada kasus ini, terdapat 24 penumpang mengalami luka berat dan 1 orang yang mengalami luka serius sehingga masih berada pada keadaan koma.⁵⁰⁸ Perlakuan yang diberikan terhadap

⁵⁰⁶ United Nations, *Compilation of General Comments...by Human Rights Treaty Bodies*, hal. 131.

⁵⁰⁷ *Ibid.*

⁵⁰⁸ UNHRC, “Report of.... Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance,” hal. 28 dan 30.

penumpang lain juga tidak manusiawi dan kejam. Para penumpang tidak hanya dipaksa untuk berlutut di dek dalam kondisi tidak baik selama berjam-jam, namun juga mendapat perlakuan fisik tidak baik.⁵⁰⁹ Selain itu, tangan dari mayoritas para penumpang dibelenggu dengan sangat ketat sampai menimbulkan penderitaan.⁵¹⁰ Sebagai tambahan, para penumpang juga tidak diizinkan untuk memenuhi kebutuhan hidup manusianya, seperti kebutuhan untuk makan dan menggunakan fasilitas toilet.⁵¹¹

Tindakan-tindakan tersebut tergolong sebagai suatu bentuk penyiksaan menurut *Convention Against Torture (CAT)*. Menurut perumusan CAT, termasuk dalam definisi penyiksaan adalah tindakan yang dengan sengaja mengakibatkan penderitaan atau rasa sakit yang amat sangat, dengan tujuan untuk mengintimidasi atau menghukum, dan di mana penderitaan tersebut diakibatkan oleh atau atas persetujuan atau persetujuan diam-diam dari pejabat umum atau orang lain yang bertindak secara resmi. Pada kasus ini, keseluruhan unsur telah terpenuhi. *Pertama*, adanya suatu tindakan yang dengan sengaja dilakukan oleh Israel seperti telah dirinci di atas. *Kedua*, tindakan tersebut mengakibatkan penderitaan atau rasa sakit.⁵¹² *Ketiga*, tujuan penyiksaan Israel tersebut adalah untuk mengintimidasi atau menghukum para penumpang yang hendak menyalurkan bantuan.⁵¹³ *Keempat*, penderitaan tersebut diakibatkan oleh IDF yang merupakan angkatan bersenjata resmi dari Israel. Jadi, Israel juga telah melakukan pelanggaran terhadap hak penumpang kapal Mavi Marmara untuk tidak disiksa.

4.5.2.4. Pelanggaran Hak atas Kesehatan

Pemenuhan hak atas kesehatan tidak hanya meliputi tindakan preventif, namun juga melalui tindakan yang dilakukan dalam hal adanya luka (tidak hanya

⁵⁰⁹ *Ibid.*, hal. 39.

⁵¹⁰ *Ibid.*

⁵¹¹ *Ibid.*

⁵¹² Banyak penumpang yang mengeluh sakit atau menderita akibat tindakan kejam Israel selama masa penahanan tersebut. Lihat UNHRC, "Report of.... Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance," hal. 39-40.

⁵¹³ *Ibid.*, hal. 40.

akibat penyakit).⁵¹⁴ Sebagaimana telah dipaparkan di atas, serangan yang dilancarkan IDF kepada penumpang kapal Mavi Marmara mengakibatkan banyaknya korban luka. Laporan dari UNHRC menyebutkan beberapa perlakuan yang berbeda dari IDF. Memang pada akhirnya prajurit Israel memberikan perawatan medis terhadap beberapa penumpang Mavi Marmara yang terluka.⁵¹⁵ Namun butuh waktu beberapa jam sebelum IDF setuju untuk membantu penumpang-penumpang yang terluka. Pengangkutan penumpang-penumpang yang terluka ke rumah sakit di Israel juga baru dilakukan beberapa jam setelah penyerangan. Selain itu, beberapa penumpang tidak mendapat pengobatan medis yang layak sampai akhirnya kapal Mavi Marmara sampai di Pelabuhan Ashdod di Israel beberapa waktu kemudian.⁵¹⁶

Mungkin terjadi perdebatan apakah Israel telah melanggar hak atas kesehatan atau justru telah membantu pemenuhan hak atas kesehatan para penumpang kapal Mavi Marmara. Isu di kasus ini adalah jangka waktu pemenuhan hak tersebut. Sebetulnya memang dalam situasi serangan sebagaimana yang terjadi pada kasus penyerangan kapal Mavi Marmara, secara logis tidak dimungkinkan bahwa seluruh penumpang langsung mendapat bantuan kesehatan dari pihak musuh dalam waktu yang cepat. Di sisi lain, mengingat urgensi perawatan medis yang dibutuhkan oleh penumpang kapal Mavi Marmara yang terluka, maka sudah selayaknya bantuan kesehatan diberikan secepatnya. Oleh karena itu, Penulis berpendapat bahwa pelanggaran terhadap hak atas kesehatan telah dilakukan oleh Israel, meskipun tidak tertutup kemungkinan untuk meringankan bobot pelanggaran ini.

4.5.3. Pelanggaran Hukum Laut yang Berlaku pada Saat Damai

Penyerangan kapal Mavi Marmara oleh Israel menunjukkan adanya pelanggaran beberapa prinsip mendasar dalam hukum laut. Bila dirangkum, dapat

⁵¹⁴ Patrnoic dan Jakovljevic, "International Humanitarian Law in the Contemporary World," hal. 37.

⁵¹⁵ UNHRC, "Report of... Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance," hal. 31. Menurut pengakuan Chief of General Staff Ashkenazi kepada Turkel Committee, operasi di tempat dilakukan terhadap 14 penumpang di kapal Mavi Marmara.

⁵¹⁶ *Ibid.*

dilihat bahwa Israel melanggar prinsip kebebasan berlayar di laut bebas dan melanggar prinsip penggunaan laut bebas untuk tujuan damai. Kedua pelanggaran ini akan dianalisis di bawah.

4.5.3.1. Israel Melanggar Prinsip Kebebasan Berlayar di Laut Bebas

Telah berulang kali ditekankan bahwa prinsip kebebasan berlayar di laut bebas merupakan prinsip yang sangat penting. Pasal 87 dan 90 UNCLOS menggarisbawahi pentingnya prinsip kebebasan berlayar di laut bebas ini. Konsekuensi dari pengaturan ini adalah kapal Mavi Marmara seharusnya bebas berlayar di mana saja, selama masih berada di wilayah laut bebas.

Pada kasus ini, kapal Mavi Marmara mula-mula diberhentikan, diperiksa, dan kemudian diserang pada posisi kira-kira 70 mil laut dari garis pangkal pantai Israel.⁵¹⁷ Artinya, kapal Mavi Marmara berada di laut bebas pada saat kapal perang Israel memberhentikan, memeriksa, dan kemudian menyerangnya. Tindakan Israel untuk memberhentikan atau memeriksa kapal Mavi Marmara saja sudah merupakan pelanggaran terhadap Pasal 87 dan 90 UNCLOS, karena kapal Mavi Marmara tidak bisa menjalankan haknya untuk berlayar, padahal posisinya masih di laut bebas.

Selain itu, tidak ada alasan-alasan yang layak bagi Israel untuk melaksanakan hak untuk memeriksanya. Hak untuk memeriksa hanya dapat dilakukan bila suatu kapal dicurigai terlibat dalam tindakan-tindakan seperti pembajakan, perdagangan budak, penyiaran ilegal, atau bila kapal tersebut berlayar tanpa kewarganegaraan.⁵¹⁸ Pada kasus ini, kapal Mavi Marmara yang berbendera kapal Comoros telah menyatakan bahwa kapal ini merupakan kapal sipil dengan misi untuk mengantarkan bantuan kemanusiaan kepada penduduk sipil di Jalur Gaza.⁵¹⁹ Oleh karena itu, sudah jelaslah bahwa kapal Mavi Marmara tidak terlibat dengan aktivitas terlarang tersebut. Jadi, tidak ada hak yang

⁵¹⁷ Turkish National Commission of Inquiry, "Interim Report on the Israel Attack ...," hal. 11.

⁵¹⁸ UNCLOS, ps. 110.

⁵¹⁹ UNHRC, "Report of.... Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance," hal. 24.

mendasari perbuatan prajurit Israel untuk memaksa kapal tersebut berhenti, apalagi memeriksanya.

4.5.3.2. Israel Tidak Menggunakan Laut Bebas untuk Tujuan Damai

UNCLOS mensyaratkan penggunaan laut bebas untuk tujuan damai dan bahwa negara-negara tidak seharusnya menggunakan kekuatan militer dengan cara yang tidak konsisten dengan Piagam PBB.⁵²⁰ Jadi, Israel seharusnya tidak menggunakan kekuatan militer terhadap kapal Mavi Marmara yang berlayar di laut bebas, apalagi tanpa adanya justifikasi dari Piagam PBB.

Pada kasus ini, kapal perang Israel menyerang dan menggunakan kekuatan militer terhadap penumpang dan kapal Mavi Marmara.⁵²¹ Deskripsi detail dari penyerangan telah dipaparkan sebelumnya. Namun terhadap penggunaan kekuatan militer ini, tidak terdapat justifikasi yang dapat digunakan Israel.

Pertama, telah jelas bahwa tidak ada pengesahan Dewan Keamanan PBB terkait penggunaan kekuatan militer terhadap kapal yang membawa bantuan kemanusiaan seperti Mavi Marmara. *Kedua*, Israel juga tidak dapat menggunakan dalil pembelaan diri. Alasannya adalah karena tidak ada serangan bersenjata yang dilakukan oleh penumpang kapal Mavi Marmara yang dapat mengancam Israel. Telah dipaparkan di pembahasan sebelumnya bahwa Israel kehilangan haknya untuk menggunakan pembelaan diri karena serangan yang dilakukan oleh para penumpang kapal Mavi Marmara bukan merupakan serangan bersenjata⁵²² yang cukup untuk mengancam Israel sebagai suatu negara. Bahkan boleh dikatakan bahwa penyerangan dari penumpang kapal Mavi Marmara tersebut hanyalah suatu bentuk pembelaan diri individual⁵²³ yang proporsional,

⁵²⁰ UNCLOS, ps. 88 dan 301.

⁵²¹ UNHRC, "Report of.... Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance," hal. 25.

⁵²² Meskipun dibantah oleh Israel, namun laporan dari 3 institusi yang berbeda serta bukti-bukti di lapangan menyebutkan bahwa penumpang kapal Mavi Marmara tidak menggunakan senjata api dan hanya menggunakan senjata-senjata seperti tongkat, pisau dapur, dan bahkan tangan kosong.

⁵²³ Bukan pembelaan diri dalam Pasal 51 *Charter of the United Nations*, melainkan usaha pembelaan diri individual sebagaimana yang juga diakui dalam kasus *Kordic & Cerkez* juga Pasal 31 ICC Statute.

karena bela diri penumpang kapal Mavi Marmara merupakan suatu respon dari serangan bersenjata yang dilakukan secara sewenang-wenang oleh IDF. Unsur proporsionalitas inilah juga yang tidak berhasil dipenuhi oleh IDF, yang menggunakan senjata api dan mengakibatkan 9 penumpang meninggal dan 24 orang luka berat. Tidak proporsionalnya serangan dapat dilihat dari senjata, cara, serta metode yang digunakan IDF dalam menyerang penumpang Mavi Marmara. Tidak hanya menggunakan senjata api untuk melawan senjata yang bukan senjata api, IDF juga menggunakan senjata tersebut dengan cara-cara yang tidak seimbang, seperti dengan menembakkan peluru dari jarak dekat terhadap orang yang sedang terbaring karena luka di dek.⁵²⁴ Selain itu, posisi kekuatan IDF yang sudah terlatih tentu tidak dapat dibandingkan dengan posisi kekuatan penumpang kapal Mavi Marmara yang hanya merupakan penduduk sipil tak terlatih dalam suatu penggunaan kekuatan militer. Jadi, karena ‘bela diri’ tersebut tidak dilaksanakan secara proporsional, justifikasi Israel terhadap penggunaan kekuatan militer terhadap kapal Mavi Marmara di laut bebas tidak dapat dibenarkan.

4.5.4. Pelanggaran Hukum Perang di Laut

Meskipun terdapat konflik bersenjata antara Israel dengan Palestina/Hamas, sesungguhnya tidak ada situasi konflik bersenjata antara Israel dengan Turki atau Comoros.⁵²⁵ Jadi, hukum yang seharusnya berlaku pada kasus ini adalah hukum laut pada keadaan damai. Namun Israel kerap menjustifikasi tindakannya dalam penyerangan kapal Mavi Marmara dengan menggunakan pengaturan hukum perang di laut, yang banyak dikodifikasi dalam *San Remo Manual*. Pada bagian ini, sebagai argumen alternatif, analisis akan dilakukan dengan asumsi keberlakuan hukum perang di laut, untuk melihat apakah justifikasi-justifikasi Israel dapat berlaku dalam rezim hukum perang di laut sekalipun.

⁵²⁴ UNHRC, “Report of.... Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance,” hal. 37.

⁵²⁵ Mayoritas penumpang kapal Mavi Marmara berkewarganegaraan Turki, sementara kapal Mavi Marmara itu sendiri memiliki kewarganegaraan Comoros.

Terdapat dua argumen yang akan dibahas pada bagian ini. Argumen pertama membahas pelanggaran Israel terhadap larangan menyerang kapal netral yang membawa bantuan kemanusiaan. Argumen kedua membahas ilegalitas penyerangan Israel dalam menegakkan hak blokadenya.

4.5.4.1. Israel Melanggar Pengaturan Mengenai Larangan Menyerang Kapal Netral yang Membawa Bantuan Kemanusiaan

Menurut hukum perang di laut, kapal dari negara/pihak netral tidak boleh diserang kecuali kapal dari negara netral tersebut melakukan tindakan-tindakan yang dapat membantu pihak musuh dari negara yang berperang.⁵²⁶ Pada kasus ini, kapal Mavi Marmara jelas merupakan suatu kapal dari negara/pihak netral, yakni Comoros. Pemilik dan pengatur perjalanan kapal tersebut juga merupakan pihak netral, yakni Turki. Meskipun salah satu tujuan utama kapal Mavi Marmara adalah untuk menolong penduduk sipil di Jalur Gaza,⁵²⁷ tidak ada bukti bahwa kapal Mavi Marmara membawa persenjataan⁵²⁸ ataupun membantu pihak musuh dari Israel, yakni Hamas. Jadi karena tidak ada bukti atau alasan bahwa kapal Mavi Marmara hendak membantu pihak musuh Israel, penyerangan yang dilakukan terhadap kapal Mavi Marmara merupakan suatu hal yang dilarang dalam hukum perang di laut sekalipun.

Selain itu, salah satu karakter khusus dari kapal Mavi Marmara tersebut adalah bahwa kapal ini membawa bantuan kemanusiaan. *San Remo Manual* menegaskan bahwa pada esensinya, kapal yang membawa bantuan kemanusiaan tidak boleh diserang, meskipun kapal tersebut merupakan kapal pihak musuh sekalipun.⁵²⁹ Apalagi dalam kasus ini, kapal Mavi Marmara merupakan kapal pihak netral. Sehingga terdapat perlindungan ganda yang diberikan oleh hukum perang di laut.

⁵²⁶ *San Remo Manual*, para. 67.

⁵²⁷ UNHRC, "Report of.... Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance," hal. 19.

⁵²⁸ Setelah melewati tahap pengeledahan, yang ditemukan memang hanya barang-barang pribadi milik penumpang serta barang-barang untuk keperluan bantuan kemanusiaan di Jalur Gaza.

⁵²⁹ *San Remo Manual*, para. 47.

4.5.4.2. Meskipun Israel Menganggap Blokadanya Legal Sekalipun, Tidak Ada Justifikasi atas Serangan Israel terhadap Kapal Mavi Marmara

Pada awalnya, dalam konflik bersenjata melawan Palestina/Hamas, Israel memang memiliki hak untuk menerapkan blokade sebagai salah satu metode perang.⁵³⁰ Namun seperti yang telah dipaparkan pada pembahasan sebelumnya, beberapa syarat blokade Israel tidak terpenuhi, sehingga blokade tersebut menjadi ilegal. Meskipun begitu, pada kenyataannya Israel tetap menganggap bahwa blokade tersebut adalah suatu hal yang legal dan berpendapat bahwa serangannya terhadap kapal Mavi Marmara dapat dijustifikasi karena kapal Mavi Marmara diduga akan menembus blokade tersebut. Sekalipun Israel menganggap blokade lautnya legal dan karenanya Israel menganggap terdapat hak untuk menindak kapal yang hendak melanggar blokade tersebut, *cara* Israel melaksanakan hak tersebut tetap ilegal menurut hukum perang di laut.

Apabila diasumsikan blokade laut Israel legal, maka Israel memiliki kewenangan untuk memeriksa dan menyerang kapal yang bermaksud menembus atau melanggar blokade.⁵³¹ Pada kasus ini, keadannya menjadi sulit, karena memang kapal Mavi Marmara serta kapal lain dalam “Gaza Freedom Flotilla” memiliki tujuan untuk menembus atau melanggar blokade yang menurut mereka ilegal tersebut.⁵³² Konsekuensinya, Israel memiliki hak untuk memeriksa kapal Mavi Marmara tersebut. Hal ini telah dilakukan oleh Israel, di mana IDF menghubungi kapal Mavi Marmara, memerintahkannya untuk mengidentifikasi diri, serta melakukan pemeriksaan lain.⁵³³

Setelah mendapat peringatan, kapten kapal Mavi Marmara menyatakan bahwa Israel tidak memiliki hak untuk memberhentikan atau memerintahkan

⁵³⁰ Salah satu alasan utama Israel mengenakan blokade di laut adalah untuk menghambat pergerakan tentara Hamas dan juga untuk mencegah masuknya barang-barang selundupan yang dapat digunakan untuk memperkuat kekuatan Hamas.

⁵³¹ *San Remo Manual*, para. 98.

⁵³² UNHRC, “Report of.... Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance,” hal. 19.

⁵³³ *Ibid.*, hal. 24.

kapal Mavi Marmara memutar arah.⁵³⁴ Tindakan ini, beserta tujuan kapal Mavi Marmara untuk menembus blokade, mungkin dikategorikan oleh Israel sebagai suatu alasan yang layak untuk menyerang kapal Mavi Marmara.

Pada kasus ini, *sekalipun* penyerangan boleh dilakukan karena adanya upaya kapal Mavi Marmara untuk menembus blokade Israel, penyerangan Israel tersebut tetap tidak legal karena tidak memperhatikan salah satu prinsip paling utama dalam hukum perang di laut, yakni proporsionalitas.⁵³⁵ Batas justifikasi tindakan suatu negara dalam menyerang atau menggunakan kekuatan militer di laut tergantung pada intensitas dan skala serangan bersenjata musuh serta seberapa mengancamnya penyerangan pihak musuh tersebut.⁵³⁶

Telah dibahas di atas bahwa penyerangan yang dilakukan oleh prajurit Israel tidak seimbang dengan serangan yang dilakukan oleh penumpang di kapal Mavi Marmara. Prajurit Israel adalah kombatan yang terlatih dalam suatu perang, sementara mayoritas besar penumpang kapal Mavi Marmara hanyalah penduduk sipil yang tidak memiliki pengetahuan militer apapun. Prajurit Israel memiliki senjata api serta menggunakannya dalam penyerangan kapal, sementara senjata-senjata yang digunakan oleh para penumpang di kapal Mavi Marmara hanyalah senjata-senjata sederhana. Selain itu, seperti yang telah dipaparkan di atas, cara atau metode penyerangan Israel cenderung dilakukan secara semena-mena, dilihat dari jarak tembak dan posisi luka tembakan pada penumpang kapal Mavi Marmara. Jadi dapat dilihat bahwa intensitas dan skala serangan dari penumpang kapal Mavi Marmara tidak sampai pada titik 'sangat mengancam' sampai-sampai dibutuhkan serangan balik dengan menggunakan senjata api yang ditembakkan dengan cara yang sewenang-wenang. Akibat dari serangan juga menggambarkan betapa tidak seimbangnyanya penyerangan. 9 orang penumpang di kapal Mavi Marmara meninggal, 24 lainnya mengalami luka berat, serta puluhan lainnya juga menderita luka. Sementara di pihak Israel, 7 prajurit mengalami luka.⁵³⁷ Jadi dapat

⁵³⁴ *Ibid.*

⁵³⁵ *San Remo Manual*, para. 4.

⁵³⁶ *Ibid.*, para. 5.

dilihat betapa tidak proporsionalnya serangan dan akibat serangan yang dilancarkan oleh prajurit Israel ke kapal Mavi Marmara.

4.6. Kesimpulan Singkat terkait Penyerangan Kapal Mavi Marmara

Benang merah dari keseluruhan pembahasan di atas terlihat dari kondisi krisis kemanusiaan di Jalur Gaza yang diakibatkan pendudukan dan blokade laut ilegal yang Israel lakukan. Adanya kondisi krisis kemanusiaan ini memancing datangnya bantuan kemanusiaan melalui kapal Mavi Marmara. Bukannya menjalankan kewajibannya untuk menyetujui bantuan kemanusiaan ini, Israel justru mencegat kapal Mavi Marmara di laut bebas dan menyerang kapal yang dimaksudkan untuk membantu pemulihan kondisi penduduk sipil di Jalur Gaza tersebut.

Selanjutnya, seperti yang telah dipaparkan pada pembahasan sebelumnya, dalam penyerangan kapal Mavi Marmara itu sendiri terjadi pelanggaran di berbagai bidang hukum, yakni bidang hukum hak asasi manusia, hukum laut, hukum humaniter internasional, serta hukum perang di laut. Sebagai konsekuensinya, sudah seharusnya Israel bertanggung jawab dan mereparasi kerugian-kerugian yang telah ia timbulkan.

⁵³⁷ Joshua Mitnick, "Flotilla Assault Spurs Crisis," <http://online.wsj.com/article/SB10001424052748703704575277632709673018.html>, diunduh tanggal 21 Juni 2011.

BAB 5

PENUTUP

5.1. Simpulan

Penyerangan yang dilakukan oleh Israel terhadap kapal Mavi Marmara merupakan salah satu permasalahan yang kontroversial dan memancing perdebatan di antara para ahli hukum internasional. Terdapat beberapa isu lain yang harus ikut dianalisis untuk menelaah masalah penyerangan kapal Mavi Marmara ini karena isu-isu tersebut memiliki hubungan yang kuat dengan latar belakang maupun konsekuensi dari penyerangan kapal Mavi Marmara itu sendiri. Isu-isu tersebut antara lain adalah isu pendudukan Israel di Jalur Gaza, isu urgensi bantuan kemanusiaan bagi penduduk sipil di Jalur Gaza, serta isu blokade laut Israel. Oleh karena itu, Penulis juga berupaya untuk menelaah isu-isu tersebut.

Pada bagian awal penulisan penelitian ini, telah disebutkan bahwa terdapat tiga pokok permasalahan yang hendak diteliti Penulis. Setelah pembahasan secara terperinci dilakukan sebelumnya, pada bagian ini Penulis hendak memberikan simpulan terhadap tiga pokok permasalahan tersebut.

5.1.1. Pengaturan Mengenai Penduduk Sipil dan Bantuan Kemanusiaan dalam Hukum Internasional

Perlindungan terhadap penduduk sipil dan bantuan kemanusiaan diatur oleh seperangkat hukum, khususnya hukum hak asasi manusia serta hukum humaniter internasional. Kedua rezim hukum ini memiliki keberlakuan di bidang yang berbeda. Hukum hak asasi manusia lebih mengatur pemenuhan hak-hak dalam situasi damai, sementara hukum humaniter internasional memiliki fokus pengaturan dalam keadaan konflik bersenjata. Meskipun begitu, kedua hukum ini dapat digunakan pada situasi konflik bersenjata karena keduanya bersifat saling melengkapi. Dalam rezim hukum hak asasi manusia, terdapat beberapa hak penting manusia (meliputi penduduk sipil) yang harus senantiasa dilindungi, yakni

hak untuk hidup, hak atas kebebasan, hak untuk tidak disiksa, hak atas kesehatan, serta hak atas bantuan kemanusiaan. Sementara itu, dalam rezim hukum humaniter internasional, perlindungan terhadap penduduk sipil dapat dilihat dari larangan penyerangan penduduk sipil serta objek yang bukan target militer, kewajiban Penguasa Pendudukan untuk memastikan cukupnya pasokan makanan bagi penduduk sipil, kewajiban untuk mempersilakan bantuan kemanusiaan masuk, dan lainnya. Perlindungan hak-hak penduduk sipil ini juga berkaitan erat dengan perlindungan bantuan kemanusiaan, karena sering kali dalam keadaan konflik bersenjata, penduduk sipil kekurangan akses terhadap barang-barang kebutuhan hidup pokok dan harus bergantung pada bantuan kemanusiaan yang bersifat imparial. Perlindungan ini dapat dilihat dari kewajiban Penguasa Pendudukan atau pihak yang berperang untuk mempersilakan masuknya bantuan kemanusiaan, serta melindungi personel serta bantuan kemanusiaan tersebut. Jadi, baik penduduk sipil maupun bantuan kemanusiaan yang dimaksudkan untuk menolong penduduk sipil dalam konflik bersenjata sama-sama mendapatkan perlindungan menurut hukum internasional.

5.1.2. Perlindungan terhadap Kapal Sipil yang Membawa Bantuan Kemanusiaan di Laut Bebas pada saat Konflik Bersenjata

Suatu kapal, termasuk kapal yang membawa bantuan kemanusiaan, tunduk pada yurisdiksi eksklusif dari negara bendera kapal selama kapal tersebut berlayar di laut bebas. UNCLOS memberikan jaminan bagi suatu kapal untuk bebas berlayar di laut bebas, kecuali bila kapal tersebut terlibat dengan aktivitas yang dilarang. Hanya apabila terdapat alasan yang layak bahwa suatu kapal melakukan aktivitas yang dilarang, barulah muncul hak kapal perang untuk memeriksa kapal tersebut. Dalam hal adanya blokade, maka terdapat hal-hal yang perlu diperhatikan, yakni blokade tersebut sepatutnya tidak dilaksanakan di laut bebas. Terdapat beberapa syarat sah blokade lain, namun salah satu yang terpenting adalah larangan penggunaan blokade bila blokade tersebut bisa mengakibatkan penduduk sipil di daerah yang diblokade kelaparan. Selain itu, kapal perang juga tidak boleh sembarangan menggunakan kekuatan militer di laut, karena justifikasi terhadap penggunaan kekuatan militer tersebut dalam situasi damai hanya apabila

terdapat pengesahan Dewan Keamanan PBB atau dalam rangka pembelaan diri. Dalam situasi konflik bersenjata, penggunaan kekuatan militer harus dilakukan dengan sedapat mungkin menghargai hak-hak negara netral serta dilaksanakan secara proporsional. Selain itu, kapal yang membawa bantuan kemanusiaan termasuk dalam kategori kapal yang pada esensinya tidak boleh diserang menurut hukum perang di laut. Jadi pada esensinya suatu kapal yang membawa bantuan kemanusiaan mendapatkan perlindungan dari UNCLOS serta hukum perang di laut selama ia berlayar di laut bebas.

5.1.3. Implementasi Hukum Internasional dalam Kasus Penyerangan Kapal Bantuan Mavi Marmara oleh Israel

Penyerangan Israel terhadap kapal Mavi Marmara memiliki hubungan erat dengan isu blokade laut yang dilakukan Israel, yang mengakibatkan hak-hak penduduk sipil di Jalur Gaza terabaikan. Konflik bersenjata yang terjadi antara Israel dengan Palestina/Hamas berujung pada penetapan blokade laut yang menghalangi akses kapal-kapal yang membawa bantuan kemanusiaan untuk penduduk sipil di Jalur Gaza yang diduduki Israel. Keadaan ini mengakibatkan keberlakuan hukum hak asasi manusia dan hukum humaniter internasional, di mana penduduk di Jalur Gaza berhak atas pemenuhan hak-haknya, termasuk hak untuk mendapat bantuan kemanusiaan. Israel telah melakukan pelanggaran terhadap pemenuhan hak-hak tersebut dengan menghambat masuknya bantuan kemanusiaan di Jalur Gaza. Blokade laut yang Israel juga ilegal dan tidak dapat menjadi dasar justifikasi perlakuan Israel terhadap bantuan kemanusiaan yang ditujukan untuk Jalur Gaza. Blokade laut ini ilegal karena dikenakan sampai ke zona laut bebas dan karena blokade tersebut mengakibatkan penduduk sipil kelaparan atau menderita kerugian yang tidak proporsional. Selain itu, penyerangan dan penggunaan kekuatan militer Israel terhadap kapal Mavi Marmara merupakan suatu pelanggaran terhadap hukum internasional. Alasannya adalah karena penyerangan tersebut melanggar hak untuk hidup, hak untuk tidak disiksa, hak atas kebebasan, serta hak atas kesehatan dari beberapa penumpang kapal Mavi Marmara. Alasan lain adalah karena penyerangan Israel terhadap kapal Mavi Marmara, yang membawa bantuan kemanusiaan, di laut bebas

merupakan suatu pelanggaran terhadap hukum laut. Justifikasi-justifikasi yang kerap digunakan oleh Israel tidak dapat diterima. Tidak ada alasan yang layak bahwa kapal Mavi Marmara terlibat dalam aktivitas yang dilarang, sehingga kapal perang Israel tidak memiliki hak untuk memeriksa kapal tersebut. Selain itu, justifikasi Israel dengan menggunakan hukum perang di laut juga tidak dapat dibenarkan karena penyerangan Israel tidak dilakukan secara proporsional. Sehingga dapat disimpulkan bahwa baik blokade laut maupun penyerangan kapal Mavi Marmara oleh Israel telah melanggar berbagai ketentuan dalam hukum internasional.

5.2. Saran

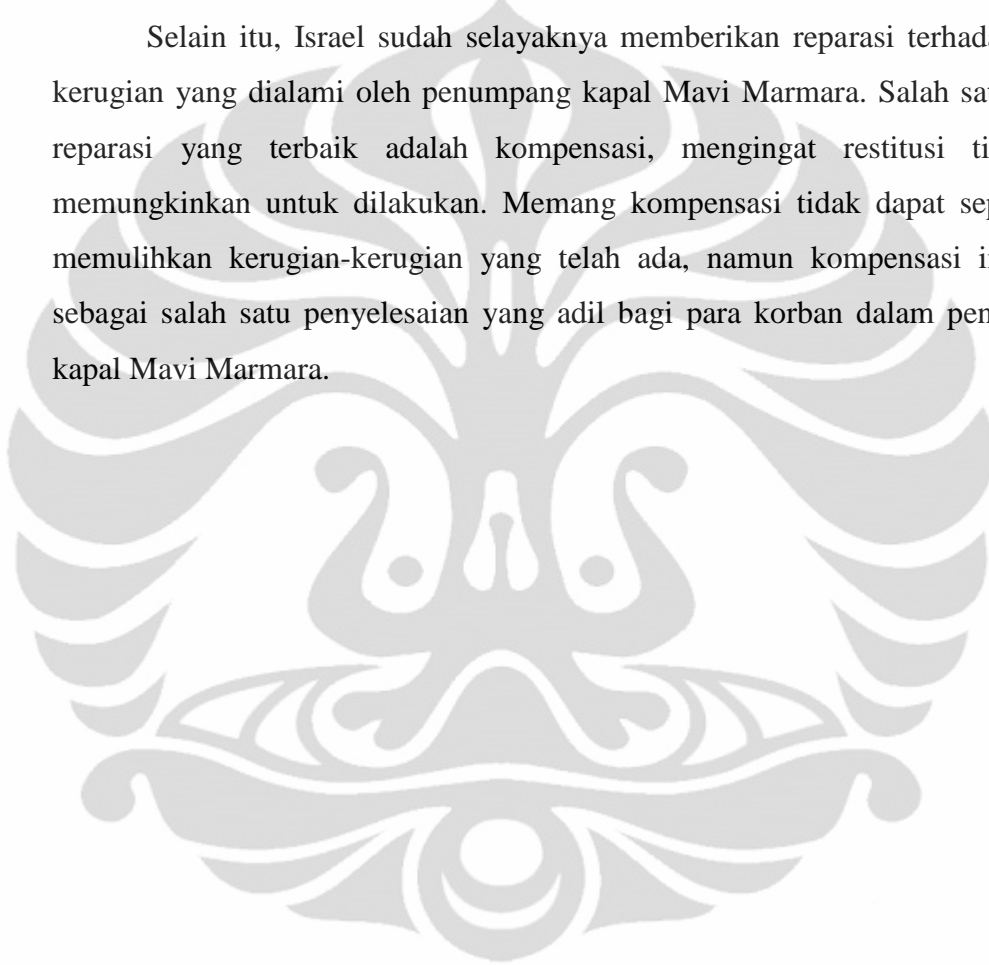
Dari penelitian yang dilakukan Penulis, dapat dilihat bahwa ada kalanya pengaturan hukum yang tersedia tidak diimplementasikan oleh suatu Negara. Mengingat pentingnya pengaturan hukum serta alasan yang melandasi pengaturan hukum tersebut, Penulis hendak memberi beberapa saran berikut.

Israel seharusnya menghentikan atau setidaknya melonggarkan perlakuannya yang menghambat masuknya bantuan kemanusiaan terhadap penduduk sipil, khususnya di wilayah Jalur Gaza. Apalagi bila pada kenyataannya penduduk sipil di Jalur Gaza sulit mengakses bahan kebutuhan hidup, sehingga harus tergantung kepada bantuan kemanusiaan yang datang dari luar. Israel sudah selayaknya mempersilakan dan bahkan melindungi personel maupun bantuan kemanusiaan tersebut.

Israel juga seharusnya segera menghentikan blokade lautnya di wilayah Jalur Gaza, karena blokade ini lebih banyak membawa kerugian bagi penduduk sipil di Jalur Gaza. Apabila blokade tetap perlu untuk dilaksanakan sekalipun, blokade tersebut tidak seharusnya dijalankan sampai ke zona laut bebas. Bila Israel memang sangat perlu untuk melakukan blokade, maka blokade tersebut hanya dapat dilakukan maksimal sampai wilayah laut teritorialnya. Selain itu, Israel harus memastikan bahwa syarat-syarat sah suatu blokade dipenuhi, agar blokade tersebut sedapat mungkin tidak merugikan penduduk sipil dan pihak-pihak atau negara netral.

Apabila Israel ingin menjalankan haknya untuk memeriksa, menggeledah, menangkap, atau menyerang suatu kapal, Israel seharusnya memastikan terlebih dahulu apakah kapal tersebut memang pantas untuk diperiksa, digeledah, ditangkap, atau diserang. Israel juga seharusnya tidak melakukan penyerangan tersebut di laut bebas. Israel sudah selayaknya menghormati yurisdiksi negara bendera kapal selama kapal tersebut berlayar di laut bebas.

Selain itu, Israel sudah selayaknya memberikan reparasi terhadap segala kerugian yang dialami oleh penumpang kapal Mavi Marmara. Salah satu bentuk reparasi yang terbaik adalah kompensasi, mengingat restitusi tidak lagi memungkinkan untuk dilakukan. Memang kompensasi tidak dapat sepenuhnya memulihkan kerugian-kerugian yang telah ada, namun kompensasi ini dinilai sebagai salah satu penyelesaian yang adil bagi para korban dalam penyerangan kapal Mavi Marmara.



DAFTAR PUSTAKA

I. BUKU

- Amnesty International. *The Conflict in Gaza: A Briefing on Applicable Law, Investigations, and Accountability*. London: Amnesty International Publications, 2009.
- Beinin, Joel dan Rebecca L. Stein. *The Struggle for Sovereignty: Palestine and Israel, 1993-2005*. Stanford University Press, 2006.
- Bothe, Dieter Fleck dan Michael. *The Handbook of Humanitarian Law in Armed Conflicts*. Oxford University Press, 1999.
- Breau, Susan C. "Protected Persons and Object." Dalam *Perspective on the ICRC Study on Customary International Humanitarian Law*. Cambridge University Press, 2007.
- Churchill, R.R. Churchill dan A.V. Lowe. *The Law of the Sea*. Ed.3. Manchester: Manchester University Press, 1999.
- Crawford, James. Ed. *The International Law Commission's Articles on State Responsibility: Introduction, Text, and Commentaries*. Cambridge University Press, 2002.
- Cryer, Robert *et al.* *An Introduction to International Criminal Law and Procedure*. Cambridge University Press, 2007.
- Cutler, Deborah W. Thomas J. Cutler, dan Bill Wedertz. *Dictionary of Naval Abbreviations*. Ed.4. Naval Institute Press, 2005.
- Dinstein, Yorman. *The International Law of Belligerent Occupation*. Cambridge University Press, 2009.
- Doebbler, Curtis Francis. *International Human Rights Law: Cases and Materials*. CD Publishing, 2004.
- Dormann, Knutt. *Elements of War Crime under the Rome Statute of the International Criminal Court: Sources and Commentary*. Cambridge: Cambridge University Press, 2003.
- Dowty, Alan. *Israel/Palestine*. Polity, 2008.
- Dupuy, Rene-Jean dan Daniel Vignes. *A Handbook on the New Law of the Sea*. Martinus Nijhoff Publishers, 1991.
- Elleman, Bruce A. dan Sarah C.M. Paine. *Naval Blockades and Seapower: Strategies and Counter-strategies, 1805-2005*. Taylor & Francis, 2006.
- Fenrick, William J. "The Merchant Vessel as Legitimate Target in the Law of Naval Warfare." Dalam *Humanitarian Law of Armed Conflicts: Challenges Ahead: Essays in Honour of Frits Kalshoven*. Martinus Nijhoff Publishers, 1991.

- Gasser, Hans-Peter. "International Humanitarian Law – An Introduction." Dalam *Humanity for All: The International Red Cross and Red Crescent Movement*. P. Haupt, 1993.
- Golan, Galia. *Israel and Palestine: Peace Plans and Proposals from Oslo to Disengagement*. Markus Wiener Publishers, 2008
- Green, Leslie C. *The Contemporary Law of Armed Conflict*. Manchester University Press ND, 1993.
- Harvey, Paul et al. *The State of the Humanitarian System: Assessing Performance and Progress, a Pilot Study*. London: ALNAP, 2010.
- Heintze, Hans-Joachim. "Convergence Between Human Rights Law and International Humanitarian Law and the Consequence for the Implementation." Dalam *International Law and Humanitarian Assistance: A Crosscut Through Legal Issues Pertaining to Humanitarianism*. Springer, 2011.
- Henckaerts, Jean-Marie dan Louise Doswald-Beck. *Customary International Humanitarian Law Volume I: Rules*. Cambridge University Press, 2009.
- Istanto, F. Sugeng. *Perlindungan Penduduk Sipil dalam Perlawanan Rakyat Semesta dan Hukum Internasional*. Yogyakarta: Penerbit Andi, 1992.
- Jr., Francis V. Russo. "Targeting Theory in the Law of Armed Conflict at Sea: The Merchant Vessel as Military Objective in the Tanker War." Dalam *The Gulf War of 1980-1988: The Iran-Iraq War in International Legal Perspective*. Martinus Nijhoff Publishers, 1992.
- Kaczorowska, Alina. *Public International Law*. Ed.4. Taylor & Francis, 2010.
- Kusumaatmadja, Mochtar dan Ety R. Agoes. *Pengantar Hukum Internasional*. Bandung: Penerbit PT Alumni, 2003.
- Kusumaatmadja, Mochtar. *Konvensi-konvensi Palang Merah Tahun 1949 Mengenai Perlindungan Korban Perang*. Binacipta, 1979.
- Mackintosh, Kate. "Beyond the Red Cross: The Protection of Independent Humanitarian Organizations and Their Staff in International Humanitarian Law." Dalam *International Law and Humanitarian Assistance: A Crosscut Through Legal Issues Pertaining to Humanitarianism*. Springer, 2011.
- Macovei, Monica. *The Right to Liberty and Security of the Person: A Guide to the Implementation of Article 5 of the European Convention of Human Rights – Human Rights Handbook No.5*. Strasbourg: Council of Europe, 2003.
- Malanczuk, Peter. *Akehurst's Modern Introduction to International Law*. Ed.7. New York: Routledge, 1997.
- Mamudji, Sri et. al. *Metode Penelitian dan Penulisan Hukum*. Jakarta: Badan Penerbit Fakultas Hukum Universitas Indonesia, 2005.
- Melzer, Nils. *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*. Jewewa: ICRC, 2009.

- Minear, Larry dan Thomas G. Weiss. *Mercy Under Fire: War and the Global Humanitarian Community*. Boulder: Westview Press, 1995.
- Nasution, Adnan Buyung Nasution dan A. Patra M. Zen. *Instrumen Internasional Pokok Hak-hak Asasi Manusia*. Ed.3. Jakarta: Yayasan Obor Indonesia, 2006.
- O'Connell, Daniel Patrick. *The Influence of Law on Sea Power*. Manchester University Press, 1975.
- Oxman, B. H. "Human rights and the United Nations Convention on the Law of the Sea" dalam *Politics, Values and Functions, International law in the 21st Century, Essays in Honor of Professor Louis Henkin*. The Hague: Kluwer Law International, 1997.
- Patnogie, J. dan B. Jakovljevic. *International Humanitarian Law in the Contemporary World*. San Remo: International Institute of Humanitarian Law, 1991.
- Pictet, Jean S. *Ed. Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*. Jenewa: International Committee of the Red Cross, 1987.
- _____. *Ed. Commentary to the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War*. Jenewa: International Committee of the Red Cross, 1958.
- Quigley, John B. *Palestine and Israel: A Challenge to Justice*. Duke University Press, 1990.
- Rowe, Peter J. *The Impact of Human Rights Law on Armed Forces*. Cambridge University Press, 2006.
- Shaw, Malcolm N. *International Law*. Ed.6. Cambridge: Cambridge University Press, 2008.
- Simma, Bruno dan Hermann Mosler. *Ed. The Charter of the United Nations: A Commentary*. Oxford University Press, 1995.
- Soekanto, Soerjono. *Pengantar Penelitian Hukum*. Jakarta: Penerbit Universitas Indonesia, 2010.
- Spieker, Heike. "The Right to Give and Receive Humanitarian Assistance." Dalam *International Law and Humanitarian Assistance: A Crosscut Through Legal Issues Pertaining to Humanitarianism*. Springer, 2011.
- Tansley, Donald D. *Ed. Final Report: An Agenda for Red Cross*. Jenewa: Joint Committee for the Reappraisal of the Red Cross, 1975.
- Tucker, Robert W. *The Law of War and Neutrality at Sea*. The Lawbook Exchange, 2005.
- United Nations. *Globalization of Crime: A Transnational Organized Crime Threat Assessment*. United Nations Publications, 2010.

II. ARTIKEL/JURNAL

- Allain, Jean. "The True Challenge to the United Nations System of the Use of Force: The Failure of Kosovo and Iraq and the Emergence of the African Union." *Max Planck Yearbook of United Nations Law Volume 8* (2004). Hal. 237-289.
- Allen, Charles A. "Civilian Starvation and Relief During Armed Conflict: The Modern Humanitarian Law." *Georgia Journal of International and Comparative Law Volume 19* (Spring, 1989). Hal. 1-85.
- Barnett, Roger W. "Technology and Naval Blockade: Past Impact and Future Prospects." *Naval War College Review Volume 58 Number 3* (Summer 2005). Hal. 87-98.
- Barrett, Nicole. "Holding Individuals Leaders Responsible for Violations of Customary International Law: The US Bombardment of Cambodia and Laos." *Columbia Human Rights Law Review Volume 32* (2001). Hal. hal. 429-476.
- Becker, Michael A. "The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea." *Harvard International Law Journal Volume 46* (Winter, 2005). Hal. 131-230.
- Cacciaguidi-Fahy, Sophie. "The Law of the Sea and Human Rights." *Panoptica Year 1 No.9* (Juli-Agustus 2007). Hal. 1-21.
- Chan, Leng Sun. "Humanitarian Assistance by International Organisations: A Question of Compulsory Access to Victims." *Singapore Journal of Legal Studies* (Desember 1991). Hal. 320 – 347.
- Chandrasahana, Nirmala. "Use of Force to Ensure Humanitarian Relief – A South Asian Precedent Examined." *International and Comparative Law Quarterly Volume 42 Number 3* (Juli 1993). Hal. 664-672.
- Doswald-Beck, Louise. "Current Development: The San Remo Manual on International Law Applicable to Armed Conflicts at Sea." *American Journal of International Law Volume 89* (Januari 1995). Hal. 192-208.
- _____. "The Right to Life in Armed Conflict: Does International Humanitarian Law Provide all the Answers?" *International Review of the Red Cross Volume 88 No. 864* (Desember 2006). Hal. 881-904.
- Fenrick, William J. "The Rule of Proportionality and Protocol I in Conventional Warfare." *Military Law Review Volume 98* (1982). Hal. 91-127.
- Forsythe, David P. "International Humanitarian Assistance: The Role of the Red Cross." *Buffalo Journal of International Law* (Winter, 1996-1997). Hal. 235-260.
- Fraunces, Michael G. "The International Law of Blockade: New Guiding Principles in Contemporary State Practice." *Yale Law Journal Volume 101* (Januari 1992). Hal. 893-918.

- Guilfoyle, Douglas. "The Proliferation Security Initiative: Interdicting Vessels in International Waters to Prevent the Spread of Weapons of Mass Destruction?" *Melbourne University Law Review Volume 29* (Desember 2005). Hal. 733-764.
- Gul, Saad. "The Bells of Hell: An Assessment of the Sinking of ANR General Belgrano in the Context of the Falklands Conflict." *New York International Law Review Volume 18* (Summer 2005). Hal. 81-120.
- Hestermeyer, Holger P. "Access to Medication as a Human Right." *Max Planck Yearbook of United Nations Law Volume 8* (2004). Hal. 101-180.
- Humphrey, D.R. "Belligerent Interdiction of Neutral Shipping in International Armed Conflict." *Journal of Armed Conflict Law Volume 2 Number 1* (Juni 1997). Hal. 23-44.
- Kwast, Patricia Jimenez. "Maritime Law Enforcement and the Use of Force: Reflections on the Categorisation of Forcible Action at Sea in the Light of the Guyana/Suriname Award." *Journal of Conflict and Security Law Volume 13* (Spring, 2008). Hal. 49-91.
- Maresko, Deborah. "Development, Relief Aid, and Creating Peace: Humanitarian Aid in Liberia's War of the 1990s." *The Online Journal of Peace and Conflict Resolution Vol.6.1* (Fall, 2004). Hal. 94-120.
- Narwati, Enny. "Aturan Perang di Laut: San Remo Manual Sebagai Sumber Hukum Internasional." *Mimbar Hukum Volume 20 No.3* (Oktober 2008). Hal. 443-457.
- _____. "The Right of Visit on the High Seas in a Theoretical Perspective: Mare Liberum versus Mare Clausum Revisited." *Leiden Journal of International Law* (2011). Hal. 45-69.
- Paulus, Andreas dan Mindia Vashakmadze. "Assymetrical War and the Notion of Armed Conflict – a Tentative Conceptualization." *International Review of the Red Cross Volume 91 Number 873* (Maret 2009). Hal. 95-125.
- Queguiner, Jean-Francois. "Precautions Under the Law Governing the Conduct of Hostilities." *International Review of the Red Cross Volume 88 No. 864* (Desember 2006). Hal. 793-821.
- Reuland, Robert C.F. "Interference with Non-Natioanl Ships on the High Seas: Peacetime Exceptions to the Exclusivity Rule of Flag-State Jurisdiction." *Vanderbilt Journal of Transnational Law Volume 22* (1989). Hal. 1161-1229.
- Roach, J. Ashley. "The Law of Naval Warfare at the Turn of Two Centuries." *American Journal of International Law Volume 94* (Januari 2000). Hal. hal. 64-77.
- Ryfman, Philippe. "Non-Governmental Organizations: An Indispensable Player of Humanitarian Aid." *International Review of the Red Cross Volume 89 Number 865* (March, 2007). Hal. 21-45.
- Sandoz, Yves. "The History of the Grave Breaches Regime." *Journal of International Criminal Justice Volume 7* (September 2009). Hal. 657-682.

- Stewart, James G. "Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict." *International Review of the Red Cross Volume 85 Number 850* (Juni 2003). Hal. 313-350.
- Stoddard, Abby, Adele Harmer, dan Victoria DiDomenico. "Providing Aid in Insecure Environments: 2009 Update." *HPG Policy Brief 34* (April 2009). Hal. 1-12.
- Stoffels, Ruth Abril. "Legal Regulation of Humanitarian Assistance in Armed Conflict: Achievements and Gaps." *International Review of the Red Cross Volume 86 Number 855* (September 2004). Hal. 515-546.
- Sun, Cheng Leng. "Humanitarian Assistance by International Organization: A Question of Compulsory Access to Victims." *Singapore Journal of Legal Studies* (December, 1991). Hal. 320-347.
- Triyana, Heribertus Jaka. "Kedudukan Individu dalam Hukum Internasional." *Mimbar Hukum Volume 18 Nomor 3* (Oktober 2006). Hal. 325-344.
- Usmani, Mominah. "Restrictions on Humanitarian Aid in Darfur: The Role of the International Criminal Court" *Georgia Journal of International and Comparative Law* (2007). Hal. 257-289.
- Watkin, Kenneth. "Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict." *American Journal of International Law Volume 98* (Januari 2004). Hal.1-34.
- Wynkoop, Todd A. "The Use of Force Against Third Party Neutrals to Enforce Economic Sanctions Against a Belligerent." *Naval Law Review Volume 42* (1995). Hal. 91-119.
- Yihdego, Zeray. "Darfur and Humanitarian Law: The Protection of Civilians and Civilian Objects." *Journal of Conflict and Security Law* (Spring, 2009). Hal. 37-69.

III. MAKALAH

- Bartholomeusz, Lance. "The Legal Framework of Humanitarian Assistance in the UN System." Makalah disampaikan pada the 7th AIDA IHL Forum, 10 Mei 2006.
- Heinegg, Wolff Heinstschel von. "Law of Naval Warfare and Neutrality at Sea." Makalah disampaikan pada Seminar The Academy Lecture Series di Auditoire Jacques Freymond, Jenewa pada tanggal 3 Maret 2010.
- Hosanee, Nivedita M. "A Critical Analysis of Flag State Duties as Laid Down Under Article 94 of UNCLOS." Presentasi disampaikan pada Seminar The United Nations-Nippon Foundation Fellowship Programme 2009 -2010.
- Kennedy, William R. "Some Points in the Law of Blockade." Makalah dipresentasikan dalam *Conference of the International Law Association* di Budapest pada tahun 1908.

Lubell, Noam. "Key Issues in the Israeli-Palestinian Conflict From the Viewpoint of International Law." Makalah disiapkan untuk *Independent Panel Appointed to Review the Impartiality of the BBC's Coverage of the Conflict* pada bulan Februari 2006.

Wagiman, Wahyu. "Hukum Humaniter Internasional dan Hak Asasi Manusia." Makalah disampaikan pada Kursus HAM untuk Pengacara X, 2005 oleh Lembaga Studi dan Advokasi Masyarakat.

IV. PERATURAN PERUNDANG-UNDANGAN / PERJANJIAN INTERNASIONAL

Additional Protocol I. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict.

African Charter on Human and Peoples' Rights.

American Convention on Human Rights

Charter of United Nations.

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Convention on the Elimination of All Forms of Discrimination Against Women.

Convention on the Elimination of All Forms of Racial Discrimination,

Conventions on the Rights of the Child.

European Convention on Human Rights and Fundamental Freedoms of 1950.

European Convention on Human Rights.

Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea.

Geneva Convention (III) Relative to the Treatment of Prisoners of War.

Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War.

International Covenant on Economic, Social, and Cultural Rights.

International Covenant on Civil and Political Rights.

International Criminal Court Statute.

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts.

Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London of 22 April 1930.

Statute of the International Court of Justice

United Nations Convention Against Torture.

United Nations Convention on the Law of the Sea.

United States Department of War. *Instructions for the Government of the Armies of the United States in the Field, General Orders No. 100 (1863).*

Universal Declaration of Human Rights.

V. DOKUMEN LAIN

1780 *Declaration of Armed Neutrality.*

1856 *Paris Declaration Respecting Maritime Law.*

1909 *London Declaration Concerning the Laws of Naval War.*

1994 *San Remo Manual on International Law Applicable to Armed Conflicts at Sea.*

International Law Commission. "Articles on the Responsibility of States for Internationally Wrongful Acts." *UN Doc. A/56/10 (2001).*

Migdalovitz, Carol. "Israel's Blockade of Gaza, the Mavi Marmara Incident, and its Aftermath." Laporan dibuat oleh Congressional Research Service tanggal 23 Juni 2010 untuk *Committees of Congress.*

Palestinian Centre for Human Rights. "23 Days of War, 928 Days of Closure." Gaza: Palestinian Centre for Human Rights, 2009.

The Meir Amit Intelligence and Terrorism Information Center. "Detailed Testimony from IDF Officers and Soldiers, Supported by Documentation, Reveals for the First Time the Aggressive, Brutal Fighting Carried Out by IHH Operatives and Their Accomplices Against Israeli Forces Abroad the Mavi Marmara." Tel Aviv: The Meir Amit Intelligence and Terrorism Information Center, 2011.

Turkish Foundation for Human Rights and Freedoms and Humanitarian Relief. "Palestine Our Route Humanitarian Aid Our Load Flotilla Campaign Summary Report." Istanbul: Turkish Foundation for Human Rights and Freedoms and Humanitarian Relief, 2010.

Turkish National Commission of Inquiry. *Interim Report on the Israel Attack on the Humanitarian Aid Convoy to Gaza on 31 May 2010.* Ankara, 2010.

United Nations General Assembly Economic and Social Council. "Strengthening the Coordination of Emergency Humanitarian Assistance of the United Nations." *UN Doc. A/58/89 – E/2003/85. General Assembly 58th Session.* 3 Juni 2002.

United Nations General Assembly, "Resolution Adopted on the Report of the Ad Hoc Committee on the Palestinian Question." *UN General Assembly Resolution 18.* 29 November 1947.

United Nations Human Rights Council. "Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact Finding Mission on the Gaza Conflict." *UN Doc. A/HRC/12/48*. 15 September 2009.

_____. "Report of the International Fact-Finding Mission to Investigate Violations of International Law, including International Humanitarian and Human Rights Law, Resulting from the Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance." *UN Doc. A/HRC/15/21. General Assembly 15th Session*. 27 September 2010.

United Nations Office for the Coordination of Humanitarian Affairs ('OCHA'), "Special Report: Civilian Protection in Armed Conflict," *Integrated Regulation Info Network* (2003).

United Nations Security Council. *Resolution 1502* (2003).

United Nations Security Council. *Resolution 1850* (2008).

United Nations Security Council. *Resolution 1860* (2009).

United Nations Security Council. *Resolution 221* (1966).

United Nations Security Council. *Resolution 665* (1990).

United Nations Security Council. *Resolution 820* (1993).

United Nations. "Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies." *HRI/GEN/1/Rev.7*. 12 May 2004.

United States, Congress, Senate, Committee on Foreign Relations. *Conventions on the Law of the Sea: Hearing before the Committee on Foreign Relations, United States Senate, Eighty-sixth Congress, Second Session, on Executive 86TH Congress, 2nd Session, January 20, 1960*. Wm. S. Hein Publishing, 1985.

VI. INTERNET

"Blockades – Development of the Law." <http://www.americanforeignrelations.com/A-D/Blockades-Development-of-the-law.html>. Diunduh tanggal 8 Juni 2011.

"Blockades – World War I and After." <http://www.americanforeignrelations.com/A-D/Blockades-World-war-i-and-after.html>. Diunduh tanggal 18 Juni 2011.

"Declaration of Principles on Interim Self-Government Arrangements ('Oslo Accords')." <http://www.reliefweb.int/rw/rwb.nsf/db900SID/MHII-62DANP?OpenDocument>. Diunduh tanggal 13 Juni 2011.

"Gaddafi Targets Relief Ship as it Evacuates Misrata Wounded in Libya." <http://shabablibya.org/news/gaddafi-targets-relief-ship-as-it-evacuates-misrata-wounded-in-libya>. Diunduh tanggal 9 Juni 2011.

- “Israel Ground Troops Enter Gaza.” <http://english.aljazeera.net/news/middleeast/2009/01/20091322357629723.html>. Diunduh tanggal 20 Juni 2011.
- “Israel Navy Intercepts Gaza Blockade Aid Boat.” <http://www.bbc.co.uk/news/world-middle-east-11425408>. Diunduh tanggal 20 Juni 2011.
- “Israel’s Naval Blockade.” <http://un-truth.com/israel/israels-naval-blockade>. Diunduh tanggal 20 Juni 2011.
- “Israeli Assault on Gaza-bound Flotilla Leaves At Least 9 Dead.” http://articles.cnn.com/2010-05-31/world/gaza.protest_1_free-gaza-israeli-israel-defense-forces?s=PM:WORLD. Diunduh tanggal 9 Juni 2011.
- “Protests over Israel Gaza Aid Action.” <http://www.bbc.co.uk/news/10247762>. Diunduh tanggal 17 April 2011.
- “Restrictions on the Transfer of Goods to Gaza: Obstruction and Obfuscation.” http://www.gisha.org/UserFiles/File/publications/Restrictions_transfer_goods_Gaza.pdf. Diunduh tanggal 22 Juni 2011.
- “Somalia: Pirates Attack UN Aid Ship, Prompting Call for Actions.” <http://www.un.org/apps/news/story.asp?NewsID=22609&Cr=Somalia&Cr1>. Diunduh tanggal 9 Juni 2011.
- “Sri Lanka Stops Aid Ships Sent by Overseas Tamil.” http://www.etaiwannews.com/etn/news_content.php?id=967797&lang=eng_news. Diunduh tanggal 9 Juni 2011.
- “The History of Humanitarian Assistance.” <http://www.iupui.edu/~histwhs/h699.dir/HumanitChrono.htm>. Diunduh tanggal 6 Mei 2011.
- Department of the Navy, Office of the Chief of Naval Operations. “The Commander’s Handbook on the Law of Naval Operations,” http://www.lawofwar.org/naval_warfare_publication_N-114M.htm. Diunduh tanggal 8 Juni 2011.
- Dinstein, Yoram. “The Right to Humanitarian Assistance.” <http://ihl.ihlresearch.org/index.cfm?fuseaction=page.viewPage&pageID=808&nodeID=2>. Diunduh tanggal 20 Juni 2011.
- Guilfoyle, Douglas. “International Law of the Sea and Maritime Interception.” http://www.euromed-migration.eu/.../prntIntLawofSeaMaritimIntercep_eng.pdf. Diunduh tanggal 20 Juni 2011.
- , “The Mavi Marmara Incident and Blockade in Armed Conflict,” http://www.ucl.ac.uk/laws/staff/docs/staffseminars/2011_guilfoyle_d.pdf. Diunduh tanggal 13 April 2011.
- Hardcastle, Rohan J. dan Adrian T. L. Chua. “Humanitarian Assistance: Towards a Right of Access to Victims of Natural Disasters.”

<http://www.icrc.org/eng/resources/documents/misc/57jpid.htm>. Diunduh tanggal 30 Juni 2011.

Hamilton, Matt D. "Blockade: Why this 19th Century Nelsonian Tool Remains Operationally Relevant Today." <http://www.dtic.mil/cgi-bin/GetTRDoc?Location=U2&doc=GetTRDoc.pdf&AD=ADA476501>. Diunduh tanggal 18 Juni 2011.

http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-4&chapter=4&lang=en. Diunduh tanggal 23 April 2011.

<http://www.icrc.org/ihl.nsf/Pays?ReadForm&c=IL>. Diunduh tanggal 16 April 2011.

http://www.pbs.org/newshour/bb/middle_east/jan-june10/gaza2_06-02.html. Diunduh tanggal 8 Juni 2011.

http://www.salon.com/news/feature/2010/05/31/ml_israel_palestinians_7. Diunduh tanggal 8 Juni 2011.

International Committee of the Red Cross. "About the International Committee of the Red Cross." <http://www.icrc.org/eng/who-we-are/index.jsp>. Diunduh tanggal 5 Mei 2011.

International Committee of the Red Cross. "International Humanitarian Law and International Human Rights Law: Similarities and Differences." www.ehl.icrc.org/images/resources/pdf/ihl_and_ihrl.pdf. Diunduh tanggal 16 April 2011.

-----, "The Geneva Conventions of 1949 and their Additional Protocols." <http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/index.jsp>. Diunduh tanggal 25 April 2011.

International Military Cooperation Department Strategic Division Israel Defense Forces. "Operation 'Sea Breeze' – Legal Aspects – June 2010." <http://miami.mfa.gov.il/mfm/Data/180869.doc>. Diunduh tanggal 20 Juni 2011.

Kraska, James. "Rule Selection in the Case of Israel's Naval Blockade of Gaza: Law of Naval Warfare or Law of the Sea?" <http://ssrn.com/abstract=1830267>. Diunduh tanggal 8 Juni 2011.

Lapidot, Ruth. "The Legal Basis of Israel's Naval Blockade of Gaza," <http://www.jcpa.org/JCPA/Templates/ShowPage.asp?DBID=1&LNGID=1&TMID=111&FID=442&PID=0&IID=4402>. Diunduh tanggal 18 Juni 2011.

Mitnick, Joshua. "Flotilla Assault Spurs Crisis." <http://online.wsj.com/article/SB10001424052748703703704575277632709673018.html>. Diunduh tanggal 21 Juni 2011.

United Nations Food and Agriculture Organization. "Consolidated Appeals 2010: West Bank and Gaza Strip." <http://www.fao.org/emergencies/tce-appfund/tce-appeals/consolidated-appeals-2010/wbgs10/en/>. Diunduh tanggal 20 Juni 2011.

VII. KASUS

- “Finnish Shipowners (Great Britain/Finland).” *UNRIAA Vol. III (Sales No. 1949.V.2)*. 1934.
- “Salvador Commercial Company.” *UNRIAA Vol. XV (Sales No. 66.V.3)*. 1902.
- Council of Europe: European Court of Human Rights. “Ergi v. Turkey.” *Case Application No. 23818/94. Judgment of 28 July 1998*.
- _____. “Khadisov and Tsechoyev v. Russia.” *Case Application No. 21519/02. Judgment of 5 February 2009*.
- France-New Zealand Arbitration Tribunal. “Rainbow Warrior.” (New Zealand v. France) *Decision of 30 April 1990*.
- International Court of Justice. “Legal Consequence of the Construction of a Wall in the Occupied Palestinian Territory.” *Advisory Opinion of July 2004*. ICJ Report, 2004.
- _____. “Military and Paramilitary Activities in and Against Nicaragua.” (Nicaragua v United States of America) *Judgment of 27 June 1986*. ICJ Report, 1986.
- _____. “Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South West Africa.” *Advisory Opinion of 7 June 1955*. ICJ Report, 1955.
- International Criminal Court for Former Yugoslavia. “Prosecutor vs. Kordic and Cerkez.” *Judgment of 26 February 2001*.
- _____. “Prosecutor vs. Delalic.” *Judgment of 16 November 1998*.
- Judge Higgins. *Separate Opinion of ICJ Advisory Opinion on “Legal Consequence of the Construction of a Wall in the Occupied Palestinian Territory.”*

Daftar Kapal dalam “Gaza Freedom Flotilla”

No	Nama Kapal	Bendera Kapal	Total Penumpang dan Awak	Tipe Kapal	Organiser	Pemilik
1.	Mavi Marmara	Comoros	589	Kapal Penumpang	IHH	IHH
2.	Defne	Kiribati	20	Kapal Kargo	IHH	IHH
3.	Gazze I	Turki	18	Kapal Kargo	IHH	IHH
4.	Eleftheri Mesogios / Sofia	Yunani	30	Kapal Kargo	Ship to Gaza (Yunani); Ship to Gaza (Swedia)	Eleftheri Mesogios Marine Company
5.	Sfendoni / Boat 8000	Togo	43	Kapal Penumpang	Ship to Gaza (Yunani); Ship to Gaza (Swedia)	Sfendohn S.A.
6.	Challenger I	Amerika Serikat	17	Kapal Penumpang	Free Gaza Movement	F.G. (Human Rights) Project
7.	Challenger II	Amerika Serikat	20	Kapal Penumpang	Free Gaza Movement	F.G. (Human Rights) Project
8.	Rachel Corrie	Kamboja	19	Kapal Kargo	Free Gaza Movement	F.G. (Human Rights) Project

(Sumber : UNHRC, “Report of the International Fact-Finding Mission to Investigate Violations of International Law, including International Humanitarian and Human Rights Law, Resulting from the Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance,” hal. 66.)

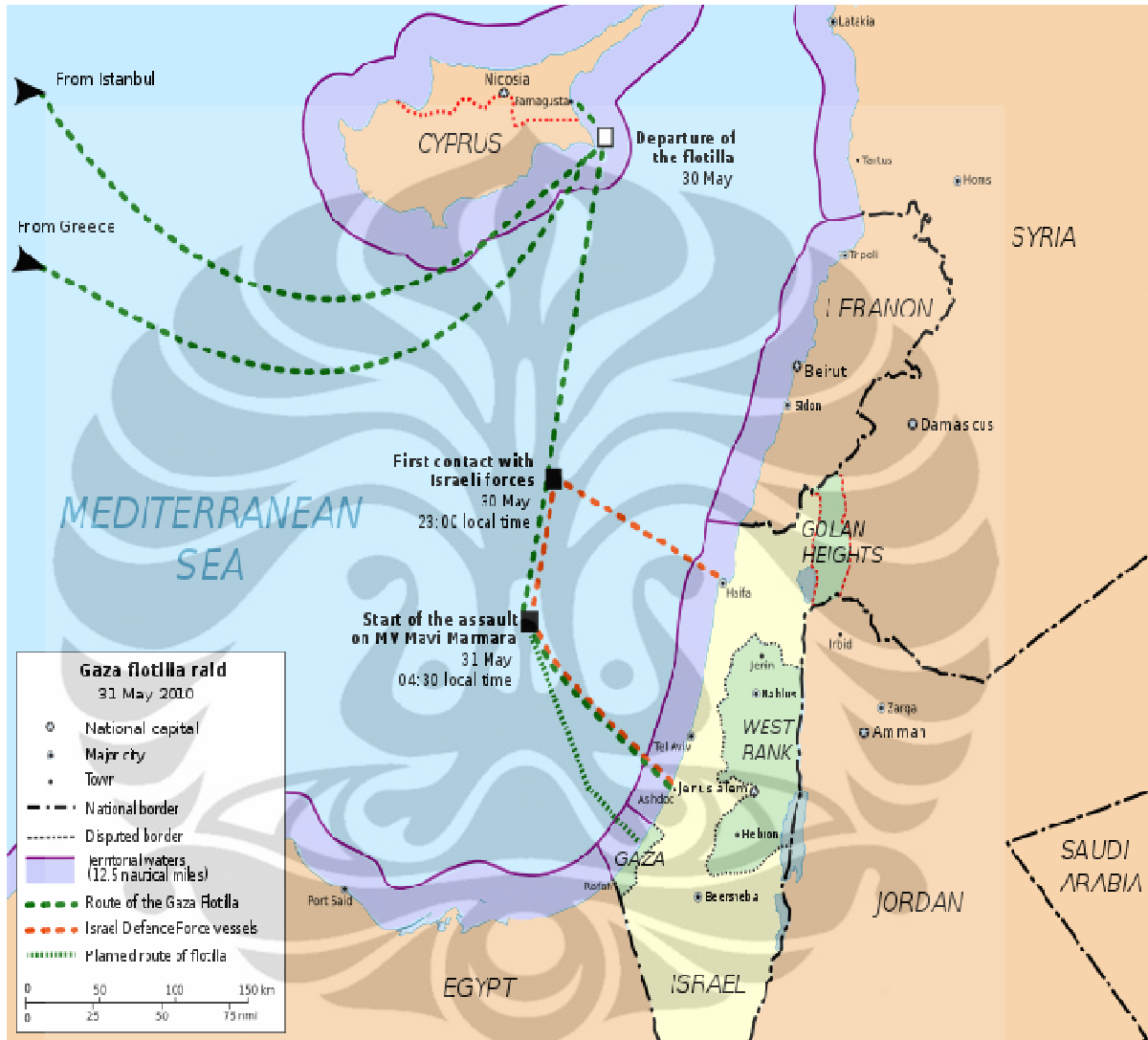
Daftar Korban Jiwa Dalam Penyerangan Kapal Mavi Marmara

No.	Nama & Usia	Kewarganegaraan	Alasan Kematian
1.	Furkan Dogan (19 tahun)	Kewarganegaraan ganda Turki dan Amerika Serikat	Dipukul dengan senjata hingga pingsan di dek. Saat terbaring di dek, Furkan ditembak dari jarak dekat. Terdapat total 5 luka tembakan di wajah, kepala, <i>thorax</i> belakang, tungkai kiri, dan kaki.
2.	Ibrahim Bilgen (60 Tahun)	Turki	Ibrahim ditembak dari atas dalam jarak tidak dekat, di mana peluru menembus dada. Ibrahim juga menerima dua peluru lain di sisi depan dan belakang tubuhnya. Ibrahim meninggal karena kehabisan darah. Selain itu, kepala Ibrahim juga dipukul dengan tongkat dan merusak otaknya.
3.	Fahri Yaldiz (42 tahun)	Turki	Fahri menerima 1 tembakan peluru di dada, 1 tembakan di kaki kiri, dan 3 kaki kanan.
4.	Ali Heyder Bengi (38 tahun)	Turki	Ali menerima 6 tembakan peluru (1 di dada, 1 di perut, 1 di tangan kanan, 1 di paha kanan, dan 2 di tangan kiri). Ali diduga meninggal karena kehabisan darah dan kurang mendapat perawatan. Saksi mata menyatakan bahwa Ali ditembak dari jarak dekat saat Ali sedang terbaring di dek karena luka.
5.	Cevdat Kiliclar (38 tahun)	Turki	Cevdat diduga meninggal seketika akibat sebuah peluru yang ditembakkan ke dahinya.
6.	Cengiz Akyuz (41 tahun)	Turki	Cengiz Akyuz mendapat tembakan di kepala dan diduga ia meninggal seketika.
7.	Cengiz Songur (46 tahun)	Turki	Cengiz Songur mendapat 4 luka di leher, wajah, dada, dan paha. Ia juga menerima sebuah peluru di bagian bawah leher. Dokter di kapal sudah mencoba untuk menyelamatkan nyawanya namun gagal.

8.	Cetin Topcuoglu (54 tahun)	Turki	Cetin terlibat dalam upaya menolong penumpang lain yang terluka, namun ia sendiri terkena 3 luka tembak. Terdapat indikasi bahwa Cetin sedang dalam posisi membungkuk atau merayap pada saat menerima tembakan.
9.	Necdet Yildirim (31 tahun)	Turki	Necdet menerima dua tembakan di <i>thorax</i> bagian depan dan belakang.

(Sumber : UNHRC, “Report of the International Fact-Finding Mission to Investigate Violations of International Law, including International Humanitarian and Human Rights Law, Resulting from the Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance,” hal. 29-30.)

Peta Posisi Serangan Israel Terhadap “Gaza Freedom Flotilla”



GENEVA CONVENTION (IV) RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR (GENEVA CONVENTION IV)

Signed at Geneva, 12 August 1949

The undersigned Plenipotentiaries of the Governments represented at the Diplomatic Conference held at Geneva from 21 April to 12 August 1949, for the purpose of establishing a Convention for the Protection of Civilians in Time of War, have agreed as follows:

PART I GENERAL PROVISIONS

Article 1

The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.

Article 2

In addition to the provisions which shall be implemented in peace-time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

Article 3

In the case of armed conflict not of an international character occurring in the territory of

one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Article 4

Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.

The provisions of Part II are, however, wider in application, as defined in Article 13.

Persons protected by the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, or by the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, or by the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949, shall not be considered as protected persons within the meaning of the present Convention.

Article 5

Where in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State.

Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention.

In each case, such persons shall nevertheless be treated with humanity and, in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be.

Article 6

The present Convention shall apply from the outset of any conflict or occupation mentioned in Article 2.

In the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations.

In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143.

Protected persons whose release, repatriation or re-establishment may take place after such dates shall meanwhile continue to benefit by the present Convention.

Article 7

In addition to the agreements expressly provided for in Articles 11, 14, 15, 17, 36, 108, 109, 132, 133 and 149, the High Contracting Parties may conclude other special agreements for all matters concerning which they may deem it suitable to make separate provision. No special agreement shall adversely affect the situation of protected persons, as defined by the present Convention, not restrict the rights which it confers upon them.

Protected persons shall continue to have the benefit of such agreements as long as the Convention is applicable to them, except where express provisions to the contrary are contained in the aforesaid or in subsequent agreements, or where more favourable measures have been taken with regard to them by one or other of the Parties to the conflict.

Article 8

Protected persons may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention, and by the special agreements referred to in the foregoing Article, if such there be.

Article 9

The present Convention shall be applied with the cooperation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict. For this purpose, the Protecting Powers may appoint, apart from their diplomatic or consular staff, delegates from amongst their own nationals or the nationals of other neutral Powers. The said delegates shall be subject to the approval of the Power with which they are to carry out their duties.

The Parties to the conflict shall facilitate to the greatest extent possible the task of the representatives or delegates of the Protecting Powers.

The representatives or delegates of the Protecting Powers shall not in any case exceed their mission under the present Convention.

They shall, in particular, take account of the imperative necessities of security of the State wherein they carry out their duties.

Article 10

The provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organization may, subject to the consent of the Parties to the conflict concerned, undertake for the protection of civilian persons and for their relief.

Article 11

The High Contracting Parties may at any time agree to entrust to an international organization which offers all guarantees of impartiality and efficacy the duties incumbent on the Protecting Powers by virtue of the present Convention.

When persons protected by the present Convention do not benefit or cease to benefit, no matter for what reason, by the activities of a Protecting Power or of an organization provided for in the first paragraph above, the Detaining

Power shall request a neutral State, or such an organization, to undertake the functions performed under the present Convention by a Protecting Power designated by the Parties to a conflict.

If protection cannot be arranged accordingly, the Detaining Power shall request or shall accept, subject to the provisions of this Article, the offer of the services of a humanitarian organization, such as the International Committee of the Red Cross, to assume the humanitarian functions performed by Protecting Powers under the present Convention.

Any neutral Power or any organization invited by the Power concerned or offering itself for these purposes, shall be required to act with a sense of responsibility towards the Party to the conflict on which persons protected by the present Convention depend, and shall be required to furnish sufficient assurances that it is in a position to undertake the appropriate functions and to discharge them impartially.

No derogation from the preceding provisions shall be made by special agreements between Powers one of which is restricted, even temporarily, in its freedom to negotiate with the other Power or its allies by reason of military events, more particularly where the whole, or a substantial part, of the territory of the said Power is occupied.

Whenever in the present Convention mention is made of a Protecting Power, such mention applies to substitute organizations in the sense of the present Article.

The provisions of this Article shall extend and be adapted to cases of nationals of a neutral State who are in occupied territory or who find themselves in the territory of a belligerent State in which the State of which they are nationals has not normal diplomatic representation.

Article 12

In cases where they deem it advisable in the interest of protected persons, particularly in cases of disagreement between the Parties to the conflict as to the application or interpretation of the provisions of the present Convention, the Protecting Powers shall lend their good offices with a view to settling the disagreement.

For this purpose, each of the Protecting Powers may, either at the invitation of one Party or on its own initiative, propose to the Parties to the conflict a meeting of their representatives, and in

particular of the authorities responsible for protected persons, possibly on neutral territory suitably chosen. The Parties to the conflict shall be bound to give effect to the proposals made to them for this purpose. The Protecting Powers may, if necessary, propose for approval by the Parties to the conflict a person belonging to a neutral Power, or delegated by the International Committee of the Red Cross, who shall be invited to take part in such a meeting.

PART II

GENERAL PROTECTION OF POPULATIONS AGAINST CERTAIN CONSEQUENCES OF WAR

Article 13

The provisions of Part II cover the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race, nationality, religion or political opinion, and are intended to alleviate the sufferings caused by war.

Article 14

In time of peace, the High Contracting Parties and, after the outbreak of hostilities, the Parties thereto, may establish in their own territory and, if the need arises, in occupied areas, hospital and safety zones and localities so organized as to protect from the effects of war, wounded, sick and aged persons, children under fifteen, expectant mothers and mothers of children under seven.

Upon the outbreak and during the course of hostilities, the Parties concerned may conclude agreements on mutual recognition of the zones and localities they have created. They may for this purpose implement the provisions of the Draft Agreement annexed to the present Convention, with such amendments as they may consider necessary.

The Protecting Powers and the International Committee of the Red Cross are invited to lend their good offices in order to facilitate the institution and recognition of these hospital and safety zones and localities.

Article 15

Any Party to the conflict may, either direct or through a neutral State or some humanitarian organization, propose to the adverse Party to establish, in the regions where fighting is taking place, neutralized zones intended to shelter from the effects of war the following persons, without distinction:

(a) wounded and sick combatants or non-combatants;

(b) civilian persons who take no part in hostilities, and who, while they reside in the zones, perform no work of a military character.

When the Parties concerned have agreed upon the geographical position, administration, food supply and supervision of the proposed neutralized zone, a written agreement shall be concluded and signed by the representatives of the Parties to the conflict. The agreement shall fix the beginning and the duration of the neutralization of the zone.

Article 16

The wounded and sick, as well as the infirm, and expectant mothers, shall be the object of particular protection and respect.

As far as military considerations allow, each Party to the conflict shall facilitate the steps taken to search for the killed and wounded, to assist the shipwrecked and other persons exposed to grave danger, and to protect them against pillage and ill-treatment.

Article 17

The Parties to the conflict shall endeavour to conclude local agreements for the removal from besieged or encircled areas, of wounded, sick, infirm, and aged persons, children and maternity cases, and for the passage of ministers of all religions, medical personnel and medical equipment on their way to such areas.

Article 18

Civilian hospitals organized to give care to the wounded and sick, the infirm and maternity cases, may in no circumstances be the object of attack but shall at all times be respected and protected by the Parties to the conflict.

States which are Parties to a conflict shall provide all civilian hospitals with certificates showing that

they are civilian hospitals and that the buildings which they occupy are not used for any purpose which would deprive these hospitals of protection in accordance with Article 19.

Civilian hospitals shall be marked by means of the emblem provided for in Article 38 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, but only if so authorized by the State.

The Parties to the conflict shall, in so far as military considerations permit, take the necessary steps to make the distinctive emblems indicating civilian hospitals clearly visible to the enemy land, air and naval forces in order to obviate the possibility of any hostile action.

In view of the dangers to which hospitals may be exposed by being close to military objectives, it is recommended that such hospitals be situated as far as possible from such objectives.

Article 19

The protection to which civilian hospitals are entitled shall not cease unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy. Protection may, however, cease only after due warning has been given, naming, in all appropriate cases, a reasonable time limit and after such warning has remained unheeded. The fact that sick or wounded members of the armed forces are nursed in these hospitals, or the presence of small arms and ammunition taken from such combatants which have not yet been handed to the proper service, shall not be considered to be acts harmful to the enemy.

Article 20

Persons regularly and solely engaged in the operation and administration of civilian hospitals, including the personnel engaged in the search for, removal and transporting of and caring for wounded and sick civilians, the infirm and maternity cases shall be respected and protected.

In occupied territory and in zones of military operations, the above personnel shall be recognizable by means of an identity card certifying their status, bearing the photograph of the holder and embossed with the stamp of the responsible authority, and also by means of a stamped, water-resistant armband which they shall wear on the left arm while carrying out their

duties. This armband shall be issued by the State and shall bear the emblem provided for in Article 38 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949.

Other personnel who are engaged in the operation and administration of civilian hospitals shall be entitled to respect and protection and to wear the armband, as provided in and under the conditions prescribed in this Article, while they are employed on such duties. The identity card shall state the duties on which they are employed.

The management of each hospital shall at all times hold at the disposal of the competent national or occupying authorities an up-to-date list of such personnel.

Article 21

Convoys of vehicles or hospital trains on land or specially provided vessels on sea, conveying wounded and sick civilians, the infirm and maternity cases, shall be respected and protected in the same manner as the hospitals provided for in Article 18, and shall be marked, with the consent of the State, by the display of the distinctive emblem provided for in Article 38 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949.

Article 22

Aircraft exclusively employed for the removal of wounded and sick civilians, the infirm and maternity cases or for the transport of medical personnel and equipment, shall not be attacked, but shall be respected while flying at heights, times and on routes specifically agreed upon between all the Parties to the conflict concerned.

They may be marked with the distinctive emblem provided for in Article 38 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949.

Unless agreed otherwise, flights over enemy or enemy occupied territory are prohibited.

Such aircraft shall obey every summons to land. In the event of a landing thus imposed, the aircraft with its occupants may continue its flight after examination, if any.

Article 23

Each High Contracting Party shall allow the free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians of another High Contracting Party, even if the latter is its adversary. It shall likewise permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases.

The obligation of a High Contracting Party to allow the free passage of the consignments indicated in the preceding paragraph is subject to the condition that this Party is satisfied that there are no serious reasons for fearing:

- (a) that the consignments may be diverted from their destination,
- (b) that the control may not be effective, or
- (c) that a definite advantage may accrue to the military efforts or economy of the enemy through the substitution of the above-mentioned consignments for goods which would otherwise be provided or produced by the enemy or through the release of such material, services or facilities as would otherwise be required for the production of such goods.

The Power which allows the passage of the consignments indicated in the first paragraph of this Article may make such permission conditional on the distribution to the persons benefited thereby being made under the local supervision of the Protecting Powers.

Such consignments shall be forwarded as rapidly as possible, and the Power which permits their free passage shall have the right to prescribe the technical arrangements under which such passage is allowed.

Article 24

The Parties to the conflict shall take the necessary measures to ensure that children under fifteen, who are orphaned or are separated from their families as a result of the war, are not left to their own resources, and that their maintenance, the exercise of their religion and their education are facilitated in all circumstances. Their education shall, as far as possible, be entrusted to persons of a similar cultural tradition.

The Parties to the conflict shall facilitate the reception of such children in a neutral country for the duration of the conflict with the consent of the

Protecting Power, if any, and under due safeguards for the observance of the principles stated in the first paragraph.

They shall, furthermore, endeavour to arrange for all children under twelve to be identified by the wearing of identity discs, or by some other means.

Article 25

All persons in the territory of a Party to the conflict, or in a territory occupied by it, shall be enabled to give news of a strictly personal nature to members of their families, wherever they may be, and to receive news from them. This correspondence shall be forwarded speedily and without undue delay.

If, as a result of circumstances, it becomes difficult or impossible to exchange family correspondence by the ordinary post, the Parties to the conflict concerned shall apply to a neutral intermediary, such as the Central Agency provided for in Article 140, and shall decide in consultation with it how to ensure the fulfilment of their obligations under the best possible conditions, in particular with the cooperation of the National Red Cross (Red Crescent, Red Lion and Sun) Societies.

If the Parties to the conflict deem it necessary to restrict family correspondence, such restrictions shall be confined to the compulsory use of standard forms containing twenty-five freely chosen words, and to the limitation of the number of these forms despatched to one each month.

Article 26

Each Party to the conflict shall facilitate enquiries made by members of families dispersed owing to the war, with the object of renewing contact with one another and of meeting, if possible. It shall encourage, in particular, the work of organizations engaged on this task provided they are acceptable to it and conform to its security regulations.

PART III

STATUS AND TREATMENT OF PROTECTED PERSONS

SECTION I

Provisions Common to the Territories of the Parties to the Conflict and to Occupied Territories

Article 27

Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.

Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion.

However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.

Article 28

The presence of a protected person may not be used to render certain points or areas immune from military operations.

Article 29

The Party to the conflict in whose hands protected persons may be, is responsible for the treatment accorded to them by its agents, irrespective of any individual responsibility which may be incurred.

Article 30

Protected persons shall have every facility for making application to the Protecting Powers, the International Committee of the Red Cross, the National Red Cross (Red Crescent, Red Lion and Sun) Society of the country where they may be, as well as to any organization that might assist them.

These several organizations shall be granted all facilities for that purpose by the authorities, within the bounds set by military or security considerations.

Apart from the visits of the delegates of the Protecting Powers and of the International Committee of the Red Cross, provided for by Article 143, the Detaining or Occupying Powers shall facilitate, as much as possible, visits to protected persons by the representatives of other organizations whose object is to give spiritual aid or material relief to such persons.

Article 31

No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties.

Article 32

The High Contracting Parties specifically agree that each of them is prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands. This prohibition applies not only to murder, torture, corporal punishments, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person, but also to any other measures of brutality whether applied by civilian or military agents.

Article 33

No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.

Pillage is prohibited.

Reprisals against protected persons and their property are prohibited.

Article 34

The taking of hostages is prohibited.

SECTION II

Aliens in the Territory of a Party to the Conflict

Article 35

All protected persons who may desire to leave the territory at the outset of, or during a conflict, shall be entitled to do so, unless their departure is contrary to the national interests of the State. The applications of such persons to leave shall be decided in accordance with regularly established procedures and the decision shall be taken as rapidly as possible. Those persons permitted to leave may provide themselves with the necessary funds for their journey and take with them a reasonable amount of their effects and articles of personal use.

If any such person is refused permission to leave the territory, he shall be entitled to have refusal reconsidered, as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose.

Upon request, representatives of the Protecting Power shall, unless reasons of security prevent it, or the persons concerned object, be furnished with the reasons for refusal of any request for permission to leave the territory and be given, as expeditiously as possible, the names of all persons who have been denied permission to leave.

Article 36

Departures permitted under the foregoing Article shall be carried out in satisfactory conditions as regards safety, hygiene, sanitation and food. All costs in connection therewith, from the point of exit in the territory of the Detaining Power, shall be borne by the country of destination, or, in the case of accommodation in a neutral country, by the Power whose nationals are benefited. The practical details of such movements may, if necessary, be settled by special agreements between the Powers concerned.

The foregoing shall not prejudice such special agreements as may be concluded between Parties

to the conflict concerning the exchange and repatriation of their nationals in enemy hands.

Article 37

Protected persons who are confined pending proceedings or subject to a sentence involving loss of liberty, shall during their confinement be humanely treated.

As soon as they are released, they may ask to leave the territory in conformity with the foregoing Articles.

Article 38

With the exception of special measures authorized by the present Convention, in particularly by Article 27 and 41 thereof, the situation of protected persons shall continue to be regulated, in principle, by the provisions concerning aliens in time of peace. In any case, the following rights shall be granted to them:

- (1) they shall be enabled to receive the individual or collective relief that may be sent to them.
- (2) they shall, if their state of health so requires, receive medical attention and hospital treatment to the same extent as the nationals of the State concerned.
- (3) they shall be allowed to practise their religion and to receive spiritual assistance from ministers of their faith.
- (4) if they reside in an area particularly exposed to the dangers of war, they shall be authorized to move from that area to the same extent as the nationals of the State concerned.
- (5) children under fifteen years, pregnant women and mothers of children under seven years shall benefit by any preferential treatment to the same extent as the nationals of the State concerned.

Article 39

Protected persons who, as a result of the war, have lost their gainful employment, shall be granted the opportunity to find paid employment. That opportunity shall, subject to security considerations and to the provisions of Article 40, be equal to that enjoyed by the nationals of the Power in whose territory they are.

Where a Party to the conflict applies to a protected person methods of control which result in his being unable to support himself, and especially if such a person is prevented for reasons of security from finding paid employment on reasonable conditions, the said Party shall ensure his support and that of his dependents.

Protected persons may in any case receive allowances from their home country, the Protecting Power, or the relief societies referred to in Article 30.

Article 40

Protected persons may be compelled to work only to the same extent as nationals of the Party to the conflict in whose territory they are.

If protected persons are of enemy nationality, they may only be compelled to do work which is normally necessary to ensure the feeding, sheltering, clothing, transport and health of human beings and which is not directly related to the conduct of military operations.

In the cases mentioned in the two preceding paragraphs, protected persons compelled to work shall have the benefit of the same working conditions and of the same safeguards as national workers in particular as regards wages, hours of labour, clothing and equipment, previous training and compensation for occupational accidents and diseases.

If the above provisions are infringed, protected persons shall be allowed to exercise their right of complaint in accordance with Article 30.

Article 41

Should the Power, in whose hands protected persons may be, consider the measures of control mentioned in the present Convention to be inadequate, it may not have recourse to any other measure of control more severe than that of assigned residence or internment, in accordance with the provisions of Articles 42 and 43.

In applying the provisions of Article 39, second paragraph, to the cases of persons required to leave their usual places of residence by virtue of a decision placing them in assigned residence, by virtue of a decision placing them in assigned residence, elsewhere, the Detaining Power shall be guided as closely as possible by the standards of welfare set forth in Part III, Section IV of this Convention.

Article 42

The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary.

If any person, acting through the representatives of the Protecting Power, voluntarily demands internment, and if his situation renders this step necessary, he shall be interned by the Power in whose hands he may be.

Article 43

Any protected person who has been interned or placed in assigned residence shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose. If the internment or placing in assigned residence is maintained, the court or administrative board shall periodically, and at least twice yearly, give consideration to his or her case, with a view to the favourable amendment of the initial decision, if circumstances permit.

Unless the protected persons concerned object, the Detaining Power shall, as rapidly as possible, give the Protecting Power the names of any protected persons who have been interned or subjected to assigned residence, or who have been released from internment or assigned residence. The decisions of the courts or boards mentioned in the first paragraph of the present Article shall also, subject to the same conditions, be notified as rapidly as possible to the Protecting Power.

Article 44

In applying the measures of control mentioned in the present Convention, the Detaining Power shall not treat as enemy aliens exclusively on the basis of their nationality *de jure* of an enemy State, refugees who do not, in fact, enjoy the protection of any government.

Article 45

Protected persons shall not be transferred to a Power which is not a party to the Convention.

This provision shall in no way constitute an obstacle to the repatriation of protected persons, or to their return to their country of residence after the cessation of hostilities.

Protected persons may be transferred by the Detaining Power only to a Power which is a party to the present Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the present Convention. If protected persons are transferred under such circumstances, responsibility for the application of the present Convention rests on the Power accepting them, while they are in its custody. Nevertheless, if that Power fails to carry out the provisions of the present Convention in any important respect, the Power by which the protected persons were transferred shall, upon being so notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the protected persons. Such request must be complied with.

In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.

The provisions of this Article do not constitute an obstacle to the extradition, in pursuance of extradition treaties concluded before the outbreak of hostilities, of protected persons accused of offences against ordinary criminal law.

Article 46

In so far as they have not been previously withdrawn, restrictive measures taken regarding protected persons shall be cancelled as soon as possible after the close of hostilities.

Restrictive measures affecting their property shall be cancelled, in accordance with the law of the Detaining Power, as soon as possible after the close of hostilities.

SECTION III

Occupied Territories

Article 47

Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the

Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.

Article 48

Protected persons who are not nationals of the Power whose territory is occupied, may avail themselves of the right to leave the territory subject to the provisions of Article 35, and decisions thereon shall be taken in accordance with the procedure which the Occupying Power shall establish in accordance with the said Article.

Article 49

Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.

Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.

The Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated.

The Protecting Power shall be informed of any transfers and evacuations as soon as they have taken place.

The Occupying Power shall not detain protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand.

The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.

Article 50

The Occupying Power shall, with the cooperation of the national and local authorities, facilitate the proper working of all institutions devoted to the care and education of children.

The Occupying Power shall take all necessary steps to facilitate the identification of children and the registration of their parentage. It may not, in any case, change their personal status, nor enlist them in formations or organizations subordinate to it.

Should the local institutions be inadequate for the purpose, the Occupying Power shall make arrangements for the maintenance and education, if possible by persons of their own nationality, language and religion, of children who are orphaned or separated from their parents as a result of the war and who cannot be adequately cared for by a near relative or friend.

A special section of the Bureau set up in accordance with Article 136 shall be responsible for taking all necessary steps to identify children whose identity is in doubt. Particulars of their parents or other near relatives should always be recorded if available.

The Occupying Power shall not hinder the application of any preferential measures in regard to food, medical care and protection against the effects of war which may have been adopted prior to the occupation in favour of children under fifteen years, expectant mothers, and mothers of children under seven years.

Article 51

The Occupying Power may not compel protected persons to serve in its armed or auxiliary forces. No pressure or propaganda which aims at securing voluntary enlistment is permitted.

The Occupying Power may not compel protected persons to work unless they are over eighteen years of age, and then only on work which is necessary either for the needs of the army of occupation, or for the public utility services, or for the feeding, sheltering, clothing, transportation or health of the population of the occupied country. Protected persons may not be compelled to undertake any work which would involve them in the obligation of taking part in military operations. The Occupying Power may not compel protected persons to employ forcible means to ensure the security of the installations where they are performing compulsory labour.

The work shall be carried out only in the occupied territory where the persons whose services have been requisitioned are. Every such person shall, so far as possible, be kept in his usual place of employment. Workers shall be paid a fair wage and the work shall be proportionate to their physical and intellectual capacities. The legislation in force in the occupied country concerning working conditions, and safeguards as regards, in particular, such matters as wages, hours of work, equipment, preliminary training and compensation for occupational accidents and diseases, shall be applicable to the protected persons assigned to the work referred to in this Article.

In no case shall requisition of labour lead to a mobilization of workers in an organization of a military or semi-military character.

Article 52

No contract, agreement or regulation shall impair the right of any worker, whether voluntary or not and wherever he may be, to apply to the representatives of the Protecting Power in order to request the said Power's intervention.

All measures aiming at creating unemployment or at restricting the opportunities offered to workers in an occupied territory, in order to induce them to work for the Occupying Power, are prohibited.

Article 53

Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.

Article 54

The Occupying Power may not alter the status of public officials or judges in the occupied territories, or in any way apply sanctions to or take any measures of coercion or discrimination against them, should they abstain from fulfilling their functions for reasons of conscience.

This prohibition does not prejudice the application of the second paragraph of Article 51. It does not affect the right of the Occupying Power to remove public officials from their posts.

Article 55

To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate.

The Occupying Power may not requisition foodstuffs, articles or medical supplies available in the occupied territory, except for use by the occupation forces and administration personnel, and then only if the requirements of the civilian population have been taken into account. Subject to the provisions of other international Conventions, the Occupying Power shall make arrangements to ensure that fair value is paid for any requisitioned goods.

The Protecting Power shall, at any time, be at liberty to verify the state of the food and medical supplies in occupied territories, except where temporary restrictions are made necessary by imperative military requirements.

Article 56

To the fullest extent of the means available to it, the public Occupying Power has the duty of ensuring and maintaining, with the cooperation of national and local authorities, the medical and hospital establishments and services, public health and hygiene in the occupied territory, with particular reference to the adoption and application of the prophylactic and preventive measures necessary to combat the spread of contagious diseases and epidemics. Medical personnel of all categories shall be allowed to carry out their duties.

If new hospitals are set up in occupied territory and if the competent organs of the occupied State are not operating there, the occupying authorities shall, if necessary, grant them the recognition provided for in Article 18. In similar circumstances, the occupying authorities shall also grant recognition to hospital personnel and transport vehicles under the provisions of Articles 20 and 21.

In adopting measures of health and hygiene and in their implementation, the Occupying Power shall take into consideration the moral and ethical susceptibilities of the population of the occupied territory.

Article 57

The Occupying Power may requisition civilian hospitals of hospitals only temporarily and only in cases of urgent necessity for the care of military wounded and sick, and then on condition that suitable arrangements are made in due time for the care and treatment of the patients and for the needs of the civilian population for hospital accommodation.

The material and stores of civilian hospitals cannot be requisitioned so long as they are necessary for the needs of the civilian population.

Article 58

The Occupying Power shall permit ministers of religion to give spiritual assistance to the members of their religious communities.

The Occupying Power shall also accept consignments of books and articles required for religious needs and shall facilitate their distribution in occupied territory.

Article 59

If the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf of the said population, and shall facilitate them by all the means at its disposal.

Such schemes, which may be undertaken either by States or by impartial humanitarian organizations such as the International Committee of the Red Cross, shall consist, in particular, of the provision of consignments of foodstuffs, medical supplies and clothing.

All Contracting Parties shall permit the free passage of these consignments and shall guarantee their protection.

A Power granting free passage to consignments on their way to territory occupied by an adverse Party to the conflict shall, however, have the right to search the consignments, to regulate their passage according to prescribed times and routes, and to be reasonably satisfied through the Protecting Power that these consignments are to be used for the relief of the needy population and are not to be used for the benefit of the Occupying Power.

Article 60

Relief consignments shall in no way relieve the Occupying Power of any of its responsibilities under Articles 55, 56 and 59. The Occupying Power shall in no way whatsoever divert relief consignments from the purpose for which they are intended, except in cases of urgent necessity, in the interests of the population of the occupied territory and with the consent of the Protecting Power.

Article 61

The distribution of the relief consignments referred to in the foregoing Articles shall be carried out with the cooperation and under the supervision of the Protecting Power. This duty may also be delegated, by agreement between the Occupying Power and the Protecting Power, to a neutral Power, to the International Committee of the Red Cross or to any other impartial humanitarian body.

Such consignments shall be exempt in occupied territory from all charges, taxes or customs duties unless these are necessary in the interests of the economy of the territory. The Occupying Power shall facilitate the rapid distribution of these consignments.

All Contracting Parties shall endeavour to permit the transit and transport, free of charge, of such relief consignments on their way to occupied territories.

Article 62

Subject to imperative reasons of security, protected persons in occupied territories shall be permitted to receive the individual relief consignments sent to them.

Article 63

Subject to temporary and exceptional measures imposed for urgent reasons of security by the Occupying Power:

(a) recognized National Red Cross (Red Crescent, Red Lion and Sun) Societies shall be able to pursue their activities in accordance with Red Cross principles, as defined by the International Red Cross Conferences. Other relief societies shall be permitted to continue their humanitarian activities under similar conditions;

(b) the Occupying Power may not require any changes in the personnel or structure of these societies, which would prejudice the aforesaid activities.

The same principles shall apply to the activities and personnel of special organizations of a non-military character, which already exist or which may be established, for the purpose of ensuring the living conditions of the civilian population by the maintenance of the essential public utility services, by the distribution of relief and by the organization of rescues.

Article 64

The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention.

Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.

The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.

Article 65

The penal provisions enacted by the Occupying Power shall not come into force before they have been published and brought to the knowledge of the inhabitants in their own language. The effect of these penal provisions shall not be retroactive.

Article 66

In case of a breach of the penal provisions promulgated by it by virtue of the second paragraph of Article 64 the Occupying Power may hand over the accused to its properly constituted, non-political military courts, on condition that the said courts sit in the occupied country. Courts of appeal shall preferably sit in the occupied country.

Article 67

The courts shall apply only those provisions of law which were applicable prior to the offence, and which are in accordance with general principles of law, in particular the principle that the penalty shall be proportionate to the offence. They shall take into consideration the fact the accused is not a national of the Occupying Power.

Article 68

Protected persons who commit an offence which is solely intended to harm the Occupying Power, but which does not constitute an attempt on the life or limb of members of the occupying forces or administration, nor a grave collective danger, nor seriously damage the property of the occupying forces or administration or the installations used by them, shall be liable to internment or simple imprisonment, provided the duration of such internment or imprisonment is proportionate to the offence committed. Furthermore, internment or imprisonment shall, for such offences, be the only measure adopted for depriving protected persons of liberty. The courts provided for under Article 66 of the present Convention may at their discretion convert a sentence of imprisonment to one of internment for the same period.

The penal provisions promulgated by the Occupying Power in accordance with Articles 64 and 65 may impose the death penalty on a protected person only in cases where the person is guilty of espionage, of serious acts of sabotage against the military installations of the Occupying Power or of intentional offences which have caused the death of one or more persons, provided that such offences were punishable by death under the law of the occupied territory in force before the occupation began.

The death penalty may not be pronounced on a protected person unless the attention of the court has been particularly called to the fact that since the accused is not a national of the Occupying Power, he is not bound to it by any duty of allegiance.

In any case, the death penalty may not be pronounced on a protected person who was under eighteen years of age at the time of the offence.

Article 69

In all cases the duration of the period during which a protected person accused of an offence is

under arrest awaiting trial or punishment shall be deducted from any period of imprisonment of awarded.

Article 70

Protected persons shall not be arrested, prosecuted or convicted by the Occupying Power for acts committed or for opinions expressed before the occupation, or during a temporary interruption thereof, with the exception of breaches of the laws and customs of war.

Nationals of the occupying Power who, before the outbreak of hostilities, have sought refuge in the territory of the occupied State, shall not be arrested, prosecuted, convicted or deported from the occupied territory, except for offences committed after the outbreak of hostilities, or for offences under common law committed before the outbreak of hostilities which, according to the law of the occupied State, would have justified extradition in time of peace.

Article 71

No sentence shall be pronounced by the competent courts of the Occupying Power except after a regular trial.

Accused persons who are prosecuted by the Occupying Power shall be promptly informed, in writing, in a language which they understand, of the particulars of the charges preferred against them, and shall be brought to trial as rapidly as possible. The Protecting Power shall be informed of all proceedings instituted by the Occupying Power against protected persons in respect of charges involving the death penalty or imprisonment for two years or more; it shall be enabled, at any time, to obtain information regarding the state of such proceedings. Furthermore, the Protecting Power shall be entitled, on request, to be furnished with all particulars of these and of any other proceedings instituted by the Occupying Power against protected persons.

The notification to the Protecting Power, as provided for in the second paragraph above, shall be sent immediately, and shall in any case reach the Protecting Power three weeks before the date of the first hearing. Unless, at the opening of the trial, evidence is submitted that the provisions of this Article are fully complied with, the trial shall not proceed. The notification shall include the following particulars:

- (a) description of the accused;
- (b) place of residence or detention;
- (c) specification of the charge or charges (with mention of the penal provisions under which it is brought);
- (d) designation of the court which will hear the case;
- (e) place and date of the first hearing.

Article 72

Accused persons shall have the right to present evidence necessary to their defence and may, in particular, call witnesses. They shall have the right to be assisted by a qualified advocate or counsel of their own choice, who shall be able to visit them freely and shall enjoy the necessary facilities for preparing the defence.

Failing a choice by the accused, the Protecting Power may provide him with an advocate or counsel. When an accused person has to meet a serious charge and the Protecting Power is not functioning, the Occupying Power, subject to the consent of the accused, shall provide an advocate or counsel.

Accused persons shall, unless they freely waive such assistance, be aided by an interpreter, both during preliminary investigation and during the hearing in court. They shall have at any time the right to object to the interpreter and to ask for his replacement.

Article 73

A convicted person shall have the right of appeal provided for by the laws applied by the court. He shall be fully informed of his right to appeal or petition and of the time limit within which he may do so.

The penal procedure provided in the present Section shall apply, as far as it is applicable, to appeals. Where the laws applied by the Court make no provision for appeals, the convicted person shall have the right to petition against the finding and sentence to the competent authority of the Occupying Power.

Article 74

Representatives of the Protecting Power shall have the right to attend the trial of any protected person, unless the hearing has, as an exceptional

measure, to be held in camera in the interests of the security of the Occupying Power, which shall then notify the Protecting Power. A notification in respect of the date and place of trial shall be sent to the Protecting Power.

Any judgement involving a sentence of death, or imprisonment for two years or more, shall be communicated, with the relevant grounds, as rapidly as possible to the Protecting Power. The notification shall contain a reference to the notification made under Article 71 and, in the case of sentences of imprisonment, the name of the place where the sentence is to be served. A record of judgements other than those referred to above shall be kept by the court and shall be open to inspection by representatives of the Protecting Power. Any period allowed for appeal in the case of sentences involving the death penalty, or imprisonment of two years or more, shall not run until notification of judgement has been received by the Protecting Power.

Article 75

In no case shall persons condemned to death be deprived of the right of petition for pardon or reprieve.

No death sentence shall be carried out before the expiration of a period of at least six months from the date of receipt by the Protecting Power of the notification of the final judgment confirming such death sentence, or of an order denying pardon or reprieve.

The six months period of suspension of the death sentence herein prescribed may be reduced in individual cases in circumstances of grave emergency involving an organized threat to the security of the Occupying Power or its forces, provided always that the Protecting Power is notified of such reduction and is given reasonable time and opportunity to make representations to the competent occupying authorities in respect of such death sentences.

Article 76

Protected persons accused of offences shall be detained in the occupied country, and if convicted they shall serve their sentences therein. They shall, if possible, be separated from other detainees and shall enjoy conditions of food and hygiene which will be sufficient to keep them in good health, and which will be at least equal to those obtaining in prisons in the occupied country.

They shall receive the medical attention required by their state of health.

They shall also have the right to receive any spiritual assistance which they may require.

Women shall be confined in separate quarters and shall be under the direct supervision of women.

Proper regard shall be paid to the special treatment due to minors.

Protected persons who are detained shall have the right to be visited by delegates of the Protecting Power and of the International Committee of the Red Cross, in accordance with the provisions of Article 143.

Such persons shall have the right to receive at least one relief parcel monthly.

Article 77

Protected persons who have been accused of offences or convicted by the courts in occupied territory, shall be handed over at the close of occupation, with the relevant records, to the authorities of the liberated territory.

Article 78

If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.

Decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned.

Appeals shall be decided with the least possible delay. In the event of the decision being upheld, it shall be subject to periodical review, if possible every six months, by a competent body set up by the said Power.

Protected persons made subject to assigned residence and thus required to leave their homes shall enjoy the full benefit of Article 39 of the present Convention.

SECTION IV

Regulations for the Treatment of Internees

CHAPTER I

General Provisions

Article 79

The Parties to the conflict shall not intern protected persons, except in accordance with the provisions of Articles 41, 42, 43, 68 and 78.

Article 80

Internees shall retain their full civil capacity and shall exercise such attendant rights as may be compatible with their status.

Article 81

Parties to the conflict who intern protected persons shall be bound to provide free of charge for their maintenance, and to grant them also the medical attention required by their state of health.

No deduction from the allowances, salaries or credits due to the internees shall be made for the repayment of these costs.

The Detaining Power shall provide for the support of those dependent on the internees, if such dependents are without adequate means of support or are unable to earn a living.

Article 82

The Detaining Power shall, as far as possible, accommodate the internees according to their nationality, language and customs. Internees who are nationals of the same country shall not be separated merely because they have different languages.

Throughout the duration of their internment, members of the same family, and in particular parents and children, shall be lodged together in the same place of internment, except when separation of a temporary nature is necessitated for reasons of employment or health or for the purposes of enforcement of the provisions of Chapter IX of the present Section. Internees may

request that their children who are left at liberty without parental care shall be interned with them.

Wherever possible, interned members of the same family shall be housed in the same premises and given separate accommodation from other internees, together with facilities for leading a proper family life.

CHAPTER II

Places of Internment

Article 83

The Detaining Power shall not set up places of internment in areas particularly exposed to the dangers of war.

The Detaining Power shall give the enemy Powers, through the intermediary of the Protecting Powers, all useful information regarding the geographical location of places of internment.

Whenever military considerations permit, internment camps shall be indicated by the letters IC, placed so as to be clearly visible in the daytime from the air. The Powers concerned may, however, agree upon any other system of marking. No place other than an internment camp shall be marked as such.

Article 84

Internees shall be accommodated and administered separately from prisoners of war and from persons deprived of liberty for any other reason.

Article 85

The Detaining Power is bound to take all necessary and possible measures to ensure that protected persons shall, from the outset of their internment, be accommodated in buildings or quarters which afford every possible safeguard as regards hygiene and health, and provide efficient protection against the rigours of the climate and the effects of the war. In no case shall permanent places of internment be situated in unhealthy areas or in districts, the climate of which is injurious to the internees. In all cases where the district, in which a protected person is temporarily interned, is an unhealthy area or has a climate which is

harmful to his health, he shall be removed to a more suitable place of internment as rapidly as circumstances permit.

The premises shall be fully protected from dampness, adequately heated and lighted, in particular between dusk and lights out. The sleeping quarters shall be sufficiently spacious and well ventilated, and the internees shall have suitable bedding and sufficient blankets, account being taken of the climate, and the age, sex, and state of health of the internees.

Internees shall have for their use, day and night, sanitary conveniences which conform to the rules of hygiene, and are constantly maintained in a state of cleanliness. They shall be provided with sufficient water and soap for their daily personal toilet and for washing their personal laundry; installations and facilities necessary for this purpose shall be granted to them. Showers or baths shall also be available. The necessary time shall be set aside for washing and for cleaning.

Whenever it is necessary, as an exceptional and temporary measure, to accommodate women internees who are not members of a family unit in the same place of internment as men, the provision of separate sleeping quarters and sanitary conveniences for the use of such women internees shall be obligatory.

Article 86

The Detaining Power shall place at the disposal of interned persons, of whatever denomination, premises suitable for the holding of their religious services.

Article 87

Canteens shall be installed in every place of internment, except where other suitable facilities are available. Their purpose shall be to enable internees to make purchases, at prices not higher than local market prices, of foodstuffs and articles of everyday use, including soap and tobacco, such as would increase their personal well-being and comfort.

Profits made by canteens shall be credited to a welfare fund to be set up for each place of internment, and administered for the benefit of the internees attached to such place of internment. The Internee Committee provided for in Article 102 shall have the right to check the management of the canteen and of the said fund.

When a place of internment is closed down, the balance of the welfare fund shall be transferred to the welfare fund of a place of internment for internees of the same nationality, or, if such a place does not exist, to a central welfare fund which shall be administered for the benefit of all internees remaining in the custody of the Detaining Power. In case of a general release, the said profits shall be kept by the Detaining Power, subject to any agreement to the contrary between the Powers concerned.

Article 88

In all places of internment exposed to air raids and other hazards of war, shelters adequate in number and structure to ensure the necessary protection shall be installed. In case of alarms, the measures internees shall be free to enter such shelters as quickly as possible, excepting those who remain for the protection of their quarters against the aforesaid hazards. Any protective measures taken in favour of the population shall also apply to them.

All due precautions must be taken in places of internment against the danger of fire.

CHAPTER III

Food and Clothing

Article 89

Daily food rations for internees shall be sufficient in quantity, quality and variety to keep internees in a good state of health and prevent the development of nutritional deficiencies. Account shall also be taken of the customary diet of the internees.

Internees shall also be given the means by which they can prepare for themselves any additional food in their possession.

Sufficient drinking water shall be supplied to internees. The use of tobacco shall be permitted.

Internees who work shall receive additional rations in proportion to the kind of labour which they perform.

Expectant and nursing mothers and children under fifteen years of age, shall be given additional food, in proportion to their physiological needs.

Article 90

When taken into custody, internees shall be given all facilities to provide themselves with the necessary clothing, footwear and change of underwear, and later on, to procure further supplies if required. Should any internees not have sufficient clothing, account being taken of the climate, and be unable to procure any, it shall be provided free of charge to them by the Detaining Power.

The clothing supplied by the Detaining Power to internees and the outward markings placed on their own clothes shall not be ignominious nor expose them to ridicule.

Workers shall receive suitable working outfits, including protective clothing, whenever the nature of their work so requires.

CHAPTER IV

Hygiene and Medical Attention

Article 91

Every place of internment shall have an adequate infirmary, under the direction of a qualified doctor, where internees may have the attention they require, as well as appropriate diet. Isolation wards shall be set aside for cases of contagious or mental diseases.

Maternity cases and internees suffering from serious diseases, or whose condition requires special treatment, a surgical operation or hospital care, must be admitted to any institution where adequate treatment can be given and shall receive care not inferior to that provided for the general population.

Internees shall, for preference, have the attention of medical personnel of their own nationality.

Internees may not be prevented from presenting themselves to the medical authorities for examination. The medical authorities of the Detaining Power shall, upon request, issue to every internee who has undergone treatment an official certificate showing the nature of his illness or injury, and the duration and nature of the treatment given. A duplicate of this certificate shall be forwarded to the Central Agency provided for in Article 140.

Treatment, including the provision of any apparatus necessary for the maintenance of

internees in good health, particularly dentures and other artificial appliances and spectacles, shall be free of charge to the internee.

Article 92

Medical inspections of internees shall be made at least once a month. Their purpose shall be, in particular, to supervise the general state of health, nutrition and cleanliness of internees, and to detect contagious diseases, especially tuberculosis, malaria, and venereal diseases. Such inspections shall include, in particular, the checking of weight of each internee and, at least once a year, radioscopic examination.

CHAPTER V

Religious, Intellectual and Physical Activities

Article 93

Internees shall enjoy complete latitude in the exercise of their religious duties, including attendance at the services of their faith, on condition that they comply with the disciplinary routine prescribed by the detaining authorities.

Ministers of religion who are interned shall be allowed to minister freely to the members of their community. For this purpose the Detaining Power shall ensure their equitable allocation amongst the various places of internment in which there are internees speaking the same language and belonging to the same religion. Should such ministers be too few in number, the Detaining Power shall provide them with the necessary facilities, including means of transport, for moving from one place to another, and they shall be authorized to visit any internees who are in hospital. Ministers of religion shall be at liberty to correspond on matters concerning their ministry with the religious authorities in the country of detention and, as far as possible, with the international religious organizations of their faith. Such correspondence shall not be considered as forming a part of the quota mentioned in Article 107. It shall, however, be subject to the provisions of Article 112.

When internees do not have at their disposal the assistance of ministers of their faith, or should these latter be too few in number, the local

religious authorities of the same faith may appoint, in agreement with the Detaining Power, a minister of the internees' faith or, if such a course is feasible from a denominational point of view, a minister of similar religion or a qualified layman. The latter shall enjoy the facilities granted to the ministry he has assumed. Persons so appointed shall comply with all regulations laid down by the Detaining Power in the interests of discipline and security.

Article 94

The Detaining Power shall encourage intellectual, educational and recreational pursuits, sports and games amongst internees, whilst leaving them free to take part in them or not. It shall take all practicable measures to ensure the exercise thereof, in particular by providing suitable premises.

All possible facilities shall be granted to internees to continue their studies or to take up new subjects. The education of children and young people shall be ensured; they shall be allowed to attend schools either within the place of internment or outside.

Internees shall be given opportunities for physical exercise, sports and outdoor games. For this purpose, sufficient open spaces shall be set aside in all places of internment. Special playgrounds shall be reserved for children and young people.

Article 95

The Detaining Power shall not employ internees as workers, unless they so desire. Employment which, if undertaken under compulsion by a protected person not in internment, would involve a breach of Articles 40 or 51 of the present Convention, and employment on work which is of a degrading or humiliating character are in any case prohibited.

After a working period of six weeks, internees shall be free to give up work at any moment, subject to eight days' notice.

These provisions constitute no obstacle to the right of the Detaining Power to employ interned doctors, dentists and other medical personnel in their professional capacity on behalf of their fellow internees, or to employ internees for administrative and maintenance work in places of internment and to detail such persons for work in the kitchens or for other domestic tasks, or to require such persons to undertake duties

connected with the protection of internees against aerial bombardment or other war risks. No internee may, however, be required to perform tasks for which he is, in the opinion of a medical officer, physically unsuited.

The Detaining Power shall take entire responsibility for all working conditions, for medical attention, for the payment of wages, and for ensuring that all employed internees receive compensation for occupational accidents and diseases. The standards prescribed for the said working conditions and for compensation shall be in accordance with the national laws and regulations, and with the existing practice; they shall in no case be inferior to those obtaining for work of the same nature in the same district. Wages for work done shall be determined on an equitable basis by special agreements between the internees, the Detaining Power, and, if the case arises, employers other than the Detaining Power to provide for free maintenance of internees and for the medical attention which their state of health may require. Internees permanently detailed for categories of work mentioned in the third paragraph of this Article, shall be paid fair wages by the Detaining Power. The working conditions and the scale of compensation for occupational accidents and diseases to internees, thus detailed, shall not be inferior to those applicable to work of the same nature in the same district.

Article 96

All labour detachments shall remain part of and dependent upon a place of internment. The competent authorities of the Detaining Power and the commandant of a place of internment shall be responsible for the observance in a labour detachment of the provisions of the present Convention. The commandant shall keep an up-to-date list of the labour detachments subordinate to him and shall communicate it to the delegates of the Protecting Power, of the International Committee of the Red Cross and of other humanitarian organizations who may visit the places of internment.

CHAPTER VI

Personal Property and Financial Resources

Article 97

Internees shall be permitted to retain articles of personal use. Monies, cheques, bonds, etc., and valuables in their possession may not be taken from them except in accordance with established procedure. Detailed receipts shall be given therefor.

The amounts shall be paid into the account of every internee as provided for in Article 98. Such amounts may not be converted into any other currency unless legislation in force in the territory in which the owner is interned so requires or the internee gives his consent.

Articles which have above all a personal or sentimental value may not be taken away.

A woman internee shall not be searched except by a woman.

On release or repatriation, internees shall be given all articles, monies or other valuables taken from them during internment and shall receive in currency the balance of any credit to their accounts kept in accordance with Article 98, with the exception of any articles or amounts withheld by the Detaining Power by virtue of its legislation in force. If the property of an internee is so withheld, the owner shall receive a detailed receipt.

Family or identity documents in the possession of internees may not be taken away without a receipt being given. At no time shall internees be left without identity documents. If they have none, they shall be issued with special documents drawn up by the detaining authorities, which will serve as their identity papers until the end of their internment.

Internees may keep on their persons a certain amount of money, in cash or in the shape of purchase coupons, to enable them to make purchases.

Article 98

All internees shall receive regular allowances, sufficient to enable them to purchase goods and articles, such as tobacco, toilet requisites, etc.

Such allowances may take the form of credits or purchase coupons.

Furthermore, internees may receive allowances from the Power to which they owe allegiance, the Protecting Powers, the organizations which may assist them, or their families, as well as the income on their property in accordance with the law of the Detaining Power. The amount of allowances granted by the Power to which they owe allegiance shall be the same for each category of internees (infirm, sick, pregnant women, etc.) but may not be allocated by that Power or distributed by the Detaining Power on the basis of discriminations between internees which are prohibited by Article 27 of the present Convention.

The Detaining Power shall open a regular account for every internee, to which shall be credited the allowances named in the present Article, the wages earned and the remittances received, together with such sums taken from him as may be available under the legislation in force in the territory in which he is interned. Internees shall be granted all facilities consistent with the legislation in force in such territory to make remittances to their families and to other dependents. They may draw from their accounts the amounts necessary for their personal expenses, within the limits fixed by the Detaining Power. They shall at all times be afforded reasonable facilities for consulting and obtaining copies of their accounts. A statement of accounts shall be furnished to the Protecting Power, on request, and shall accompany the internee in case of transfer.

CHAPTER VII

Administration and Discipline

Article 99

Every place of internment shall be put under the authority of a responsible officer, chosen from the regular military forces or the regular civil administration of the Detaining Power. The officer in charge of the place of internment must have in his possession a copy of the present Convention in the official language, or one of the official languages, of his country and shall be responsible for its application. The staff in control of internees shall be instructed in the provisions of the present Convention and of the administrative measures adopted to ensure its application.

The text of the present Convention and the texts of special agreements concluded under the said Convention shall be posted inside the place of internment, in a language which the internees understand, or shall be in the possession of the Internee Committee.

Regulations, orders, notices and publications of every kind shall be communicated to the internees and posted inside the places of internment, in a language which they understand.

Every order and command addressed to internees individually must, likewise, be given in a language which they understand.

Article 100

The disciplinary regime in places of internment shall be consistent with humanitarian principles, and shall in no circumstances include regulations imposing on internees any physical exertion dangerous to their health or involving physical or moral victimization. Identification by tattooing or imprinting signs or markings on the body, is prohibited.

In particular, prolonged standing and roll-calls, punishment drill, military drill and manoeuvres, or the reduction of food rations, are prohibited.

Article 101

Internees shall have the right to present to the authorities in whose power they are, any petition with regard to the conditions of internment to which they are subjected.

They shall also have the right to apply without restriction through the Internee Committee or, if they consider it necessary, direct to the representatives of the Protecting Power, in order to indicate to them any points on which they may have complaints to make with regard to the conditions of internment.

Such petitions and complaints shall be transmitted forthwith and without alteration, and even if the latter are recognized to be unfounded, they may not occasion any punishment.

Periodic reports on the situation in places of internment and as to the needs of the internees may be sent by the Internee Committees to the representatives of the Protecting Powers.

Article 102

In every place of internment, the internees shall freely elect by secret ballot every six months, the members of a Committee empowered to represent them before the Detaining and the Protecting Powers, the International Committee of the Red Cross and any other organization which may assist them. The members of the Committee shall be eligible for re-election.

Internees so elected shall enter upon their duties after their election has been approved by the detaining authorities. The reasons for any refusals or dismissals shall be communicated to the Protecting Powers concerned.

Article 103

The Internee Committees shall further the physical, spiritual and intellectual well-being of the internees.

In case the internees decide, in particular, to organize a system of mutual assistance amongst themselves, this organization would be within the competence of the Committees in addition to the special duties entrusted to them under other provisions of the present Convention.

Article 104

Members of Internee Committees shall not be required to perform any other work, if the accomplishment of their duties is rendered more difficult thereby.

Members of Internee Committees may appoint from amongst the internees such assistants as they may require. All material facilities shall be granted to them, particularly a certain freedom of movement necessary for the accomplishment of their duties (visits to labour detachments, receipt of supplies, etc.).

All facilities shall likewise be accorded to members of Internee Committees for communication by post and telegraph with the detaining authorities, the Protecting Powers, the International Committee of the Red Cross and their delegates, and with the organizations which give assistance to internees. Committee members in labour detachments shall enjoy similar facilities for communication with their Internee Committee in the principal place of internment. Such communications shall not be limited, nor considered as forming a part of the quota mentioned in Article 107.

Members of Internee Committees who are transferred shall be allowed a reasonable time to acquaint their successors with current affairs.

CHAPTER VIII

Relations with the Exterior

Article 105

Immediately upon interning protected persons, the Detaining Powers shall inform them, the Power to which they owe allegiance and their Protecting Power of the measures taken for executing the provisions of the present Chapter. The Detaining Powers shall likewise inform the Parties concerned of any subsequent modifications of such measures.

Article 106

As soon as he is interned, or at the latest not more than one week after his arrival in a place of internment, and likewise in cases of sickness or transfer to another place of internment or to a hospital, every internee shall be enabled to send direct to his family, on the one hand, and to the Central Agency provided for by Article 140, on the other, an internment card similar, if possible, to the model annexed to the present Convention, informing his relatives of his detention, address and state of health. The said cards shall be forwarded as rapidly as possible and may not be delayed in any way.

Article 107

Internees shall be allowed to send and receive letters and cards. If the Detaining Power deems it necessary to limit the number of letters and cards sent by each internee, the said number shall not be less than two letters and four cards monthly; these shall be drawn up so as to conform as closely as possible to the models annexed to the present Convention. If limitations must be placed on the correspondence addressed to internees, they may be ordered only by the Power to which such internees owe allegiance, possibly at the request of the Detaining Power. Such letters and cards must be conveyed with reasonable despatch; they may not be delayed or retained for disciplinary reasons.

Internees who have been a long time without news, or who find it impossible to receive news from their relatives, or to give them news by the ordinary postal route, as well as those who are at a considerable distance from their homes, shall be allowed to send telegrams, the charges being paid by them in the currency at their disposal. They shall likewise benefit by this provision in cases which are recognized to be urgent.

As a rule, internees' mail shall be written in their own language. The Parties to the conflict may authorize correspondence in other languages.

Article 108

Internees shall be allowed to receive, by post or by any other means, individual parcels or collective shipments containing in particular foodstuffs, clothing, medical supplies, as well as books and objects of a devotional, educational or recreational character which may meet their needs. Such shipments shall in no way free the Detaining Power from the obligations imposed upon it by virtue of the present Convention.

Should military necessity require the quantity of such shipments to be limited, due notice thereof shall be given to the Protecting Power and to the International Committee of the Red Cross, or to any other organization giving assistance to the internees and responsible for the forwarding of such shipments.

The conditions for the sending of individual parcels and collective shipments shall, if necessary, be the subject of special agreements between the Powers concerned, which may in no case delay the receipt by the internees of relief supplies. Parcels of clothing and foodstuffs may not include books. Medical relief supplies shall, as a rule, be sent in collective parcels.

Article 109

In the absence of special agreements between Parties to the conflict regarding the conditions for the receipt and distribution of collective relief shipments, the regulations concerning collective relief which are annexed to the present Convention shall be applied.

The special agreements provided for above shall in no case restrict the right of Internee Committees to take possession of collective relief shipments intended for internees, to undertake their distribution and to dispose of them in the interests of the recipients. Nor shall such

agreements restrict the right of representatives of the Protecting Powers, the International Committee of the Red Cross, or any other organization giving assistance to internees and responsible for the forwarding of collective shipments, to supervise their distribution to the recipients.

Article 110

An relief shipments for internees shall be exempt from import, customs and other dues.

All matter sent by mail, including relief parcels sent by parcel post and remittances of money, addressed from other countries to internees or despatched by them through the post office, either direct or through the Information Bureaux provided for in Article 136 and the Central Information Agency provided for in Article 140, shall be exempt from all postal dues both in the countries of origin and destination and in intermediate countries. To this effect, in particular, the exemption provided by the Universal Postal Convention of 1947 and by the agreements of the Universal Postal Union in favour of civilians of enemy nationality detained in camps or civilian prisons, shall be extended to the other interned persons protected by the present Convention. The countries not signatory to the above-mentioned agreements shall be bound to grant freedom from charges in the same circumstances.

The cost of transporting relief shipments which are intended for internees and which, by reason of their weight or any other cause, cannot be sent through the post office, shall be borne by the Detaining Power in all the territories under its control. Other Powers which are Parties to the present Convention shall bear the cost of transport in their respective territories.

Costs connected with the transport of such shipments, which are not covered by the above paragraphs, shall be charged to the senders.

The High Contracting Parties shall endeavour to reduce, so far as possible, the charges for telegrams sent by internees, or addressed to them.

Article 111

Should military operations prevent the Powers concerned from fulfilling their obligation to ensure the conveyance of the mail and relief shipments provided for in Articles 106, 107, 108 and 113, the Protecting Powers concerned, the

International Committee of the Red Cross or any other organization duly approved by the Parties to the conflict may undertake to ensure the conveyance of such shipments by suitable means (rail, motor vehicles, vessels or aircraft, etc.). For this purpose, the High Contracting Parties shall endeavour to supply them with such transport, and to allow its circulation, especially by granting the necessary safe-conducts.

Such transport may also be used to convey:

(a) correspondence, lists and reports exchanged between the Central Information Agency referred to in Article 140 and the National Bureaux referred to in Article 136;

(b) correspondence and reports relating to internees which the Protecting Powers, the International Committee of the Red Cross or any other organization assisting the internees exchange either with their own delegates or with the Parties to the conflict.

These provisions in no way detract from the right of any Party to the conflict to arrange other means of transport if it should so prefer, nor preclude the granting of safe-conducts, under mutually agreed conditions, to such means of transport.

The costs occasioned by the use of such means of transport shall be borne, in proportion to the importance of the shipments, by the Parties to the conflict whose nationals are benefited thereby.

Article 112

The censoring of correspondence addressed to internees or despatched by them shall be done as quickly as possible.

The examination of consignments intended for internees shall not be carried out under conditions that will expose the goods contained in them to deterioration. It shall be done in the presence of the addressee, or of a fellow-internee duly delegated by him. The delivery to internees of individual or collective consignments shall not be delayed under the pretext of difficulties of censorship.

Any prohibition of correspondence ordered by the Parties to the conflict either for military or political reasons, shall be only temporary and its duration shall be as short as possible.

Article 113

The Detaining Powers shall provide all reasonable execution facilities for the transmission, through

the Protecting Power or the Central Agency provided for in Article 140, or as otherwise required, of wills, powers of attorney, letters of authority, or any other documents intended for internees or despatched by them.

In all cases the Detaining Powers shall facilitate the execution and authentication in due legal form of such documents on behalf of internees, in particular by allowing them to consult a lawyer.

Article 114

The Detaining Power shall afford internees all facilities to enable them to manage their property, provided this is not incompatible with the conditions of internment and the law which is applicable. For this purpose, the said Power may give them permission to leave the place of internment in urgent cases and if circumstances allow.

Article 115

In all cases where an internee is a party to proceedings in any court, the Detaining Power shall, if he so requests, cause the court to be informed of his detention and shall, within legal limits, ensure that all necessary steps are taken to prevent him from being in any way prejudiced, by reason of his internment, as regards the preparation and conduct of his case or as regards the execution of any judgment of the court.

Article 116

Every internee shall be allowed to receive visitors, especially near relatives, at regular intervals and as frequently as possible.

As far as is possible, internees shall be permitted to visit their homes in urgent cases, particularly in cases of death or serious illness of relatives.

CHAPTER IX

Penal and Disciplinary Sanctions

Article 117

Subject to the provisions of the present Chapter, the laws in force in the territory in which they are detained will continue to apply to internees who commit offences during internment.

If general laws, regulations or orders declare acts committed by internees to be punishable, whereas the same acts are not punishable when committed by persons who are not internees, such acts shall entail disciplinary punishments only.

No internee may be punished more than once for the same act, or on the same count.

Article 118

The courts or authorities shall in passing sentence take as far as possible into account the fact that the defendant is not a national of the Detaining Power. They shall be free to reduce the penalty prescribed for the offence with which the internee is charged and shall not be obliged, to this end, to apply the minimum sentence prescribed.

Imprisonment in premises without daylight, and, in general, all forms of cruelty without exception are forbidden.

Internees who have served disciplinary or judicial sentences shall not be treated differently from other internees.

The duration of preventive detention undergone by an internee shall be deducted from any disciplinary or judicial penalty involving confinement to which he may be sentenced.

Internee Committees shall be informed of all judicial proceedings instituted against internees whom they represent, and of their result.

Article 119

The disciplinary punishments applicable to internees shall be the following:

(1) a fine which shall not exceed 50 per cent of the wages which the internee would otherwise receive under the provisions of Article 95 during a period of not more than thirty days.

(2) discontinuance of privileges granted over and above the treatment provided for by the present Convention

(3) fatigue duties, not exceeding two hours daily, in connection with the maintenance of the place of internment.

(4) confinement.

In no case shall disciplinary penalties be inhuman, brutal or dangerous for the health of internees. Account shall be taken of the internee's age, sex and state of health.

The duration of any single punishment shall in no case exceed a maximum of thirty consecutive days, even if the internee is answerable for several breaches of discipline when his case is dealt with, whether such breaches are connected or not.

Article 120

Internees who are recaptured after having escaped or when attempting to escape, shall be liable only to disciplinary punishment in respect of this act, even if it is a repeated offence.

Article 118, paragraph 3, notwithstanding, internees punished as a result of escape or attempt to escape, may be subjected to special surveillance, on condition that such surveillance does not affect the state of their health, that it is exercised in a place of internment and that it does not entail the abolition of any of the safeguards granted by the present Convention.

Internees who aid and abet an escape or attempt to escape, shall be liable on this count to disciplinary punishment only.

Article 121

Escape, or attempt to escape, even if it is a repeated offence, shall not be deemed an aggravating circumstance in cases where an internee is prosecuted for offences committed during his escape.

The Parties to the conflict shall ensure that the competent authorities exercise leniency in deciding whether punishment inflicted for an offence shall be of a disciplinary or judicial nature, especially in respect of acts committed in connection with an escape, whether successful or not.

Article 122

Acts which constitute offences against discipline shall be investigated immediately. This rule shall be applied, in particular, in cases of escape or attempt to escape. Recaptured internees shall be handed over to the competent authorities as soon as possible.

In cases of offences against discipline, confinement awaiting trial shall be reduced to an absolute minimum for all internees, and shall not exceed fourteen days. Its duration shall in any case be deducted from any sentence of confinement.

The provisions of Articles 124 and 125 shall apply to internees who are in confinement awaiting trial for offences against discipline.

Article 123

Without prejudice to the competence of courts and higher authorities, disciplinary punishment may be ordered only by the commandant of the place of internment, or by a responsible officer or official who replaces him, or to whom he has delegated his disciplinary powers.

Before any disciplinary punishment is awarded, the accused internee shall be given precise information regarding the offences of which he is accused, and given an opportunity of explaining his conduct and of defending himself. He shall be permitted, in particular, to call witnesses and to have recourse, if necessary, to the services of a qualified interpreter. The decision shall be announced in the presence of the accused and of a member of the Internee Committee.

The period elapsing between the time of award of a disciplinary punishment and its execution shall not exceed one month.

When an internee is awarded a further disciplinary punishment, a period of at least three days shall elapse between the execution of any two of the punishments, if the duration of one of these is ten days or more.

A record of disciplinary punishments shall be maintained by the commandant of the place of internment and shall be open to inspection by representatives of the Protecting Power.

Article 124

Internees shall not in any case be transferred to penitentiary establishments (prisons, penitentiaries, convict prisons, etc.) to undergo disciplinary punishment therein.

The premises in which disciplinary punishments are undergone shall conform to sanitary requirements: they shall in particular be provided with adequate bedding. Internees undergoing punishment shall be enabled to keep themselves in a state of cleanliness.

Women internees undergoing disciplinary punishment shall be confined in separate quarters from male internees and shall be under the immediate supervision of women.

Article 125

Internees awarded disciplinary punishment shall be allowed to exercise and to stay in the open air at least two hours daily.

They shall be allowed, if they so request, to be present at the daily medical inspections. They shall receive the attention which their state of health requires and, if necessary, shall be removed to the infirmary of the place of internment or to a hospital.

They shall have permission to read and write, likewise to send and receive letters. Parcels and remittances of money, however, may be withheld from them until the completion of their punishment; such consignments shall meanwhile be entrusted to the Internee Committee, who will hand over to the infirmary the perishable goods contained in the parcels.

No internee given a disciplinary punishment may be deprived of the benefit of the provisions of Articles 107 and 143 of the present Convention.

Article 126

The provisions of Articles 71 to 76 inclusive shall apply, by analogy, to proceedings against internees who are in the national territory of the Detaining Power.

CHAPTER X

Transfers of Internees

Article 127

The transfer of internees shall always be effected humanely. As a general rule, it shall be carried out by rail or other means of transport, and under conditions at least equal to those obtaining for the forces of the Detaining Power in their changes of station. If, as an exceptional measure, such removals have to be effected on foot, they may not take place unless the internees are in a fit state of health, and may not in any case expose them to excessive fatigue.

The Detaining Power shall supply internees during transfer with drinking water and food sufficient in quantity, quality and variety to maintain them in good health, and also with the necessary clothing, adequate shelter and the necessary medical attention. The Detaining Power

shall take all suitable precautions to ensure their safety during transfer, and shall establish before their departure a complete list of all internees transferred.

Sick, wounded or infirm internees and maternity cases shall not be transferred if the journey would be seriously detrimental to them, unless their safety imperatively so demands.

If the combat zone draws close to a place of internment, the internees in the said place shall not be transferred unless their removal can be carried out in adequate conditions of safety, or unless they are exposed to greater risks by remaining on the spot than by being transferred.

When making decisions regarding the transfer of internees, the Detaining Power shall take their interests into account and, in particular, shall not do anything to increase the difficulties of repatriating them or returning them to their own homes.

Article 128

In the event of transfer, internees shall be officially advised of their departure and of their new postal address. Such notification shall be given in time for them to pack their luggage and inform their next of kin.

They shall be allowed to take with them their personal effects, and the correspondence and parcels which have arrived for them. The weight of such baggage may be limited if the conditions of transfer so require, but in no case to less than twenty-five kilograms per internee.

Mail and parcels addressed to their former place of internment shall be forwarded to them without delay.

The commandant of the place of internment shall take, in agreement with the Internee Committee, any measures needed to ensure the transport of the internees' community property and of the luggage the internees are unable to take with them in consequence of restrictions imposed by virtue of the second paragraph.

CHAPTER XI

Deaths

Article 129

The wills of internees shall be received for safe-keeping by the responsible authorities; and if the event of the death of an internee his will shall be transmitted without delay to a person whom he has previously designated.

Deaths of internees shall be certified in every case by a doctor, and a death certificate shall be made out, showing the causes of death and the conditions under which it occurred.

An official record of the death, duly registered, shall be drawn up in accordance with the procedure relating thereto in force in the territory where the place of internment is situated, and a duly certified copy of such record shall be transmitted without delay to the Protecting Power as well as to the Central Agency referred to in Article 140.

Article 130

The detaining authorities shall ensure that internees who die while interned are honourably buried, if possible according to the rites of the religion to which they belonged and that their graves are respected, properly maintained, and marked in such a way that they can always be recognized.

Deceased internees shall be buried in individual graves unless unavoidable circumstances require the use of collective graves. Bodies may be cremated only for imperative reasons of hygiene, on account of the religion of the deceased or in accordance with his expressed wish to this effect. In case of cremation, the fact shall be stated and the reasons given in the death certificate of the deceased. The ashes shall be retained for safe-keeping by the detaining authorities and shall be transferred as soon as possible to the next of kin on their request.

As soon as circumstances permit, and not later than the close of hostilities, the Detaining Power shall forward lists of graves of deceased internees to the Powers on whom deceased internees depended, through the Information Bureaux provided for in Article 136. Such lists shall include all particulars necessary for the

identification of the deceased internees, as well as the exact location of their graves.

Article 131

Every death or serious injury of an internee, caused or suspected to have been caused by a sentry, another internee or any other person, as well as any death the cause of which is unknown, shall be immediately followed by an official enquiry by the Detaining Power.

A communication on this subject shall be sent immediately to the Protecting Power. The evidence of any witnesses shall be taken, and a report including such evidence shall be prepared and forwarded to the said Protecting Power.

If the enquiry indicates the guilt of one or more persons, the Detaining Power shall take all necessary steps to ensure the prosecution of the person or persons responsible.

CHAPTER XII

Release, Repatriation and Accommodation in Neutral Countries

Article 132

Each interned person shall be released by the Detaining Power as soon as the reasons which necessitated his internment no longer exist.

The Parties to the conflict shall, moreover, endeavour during the course of hostilities, to conclude agreements for the release, the repatriation, the return to places of residence or the accommodation in a neutral country of certain classes of internees, in particular children, pregnant women and mothers with infants and young children, wounded and sick, and internees who have been detained for a long time.

Article 133

Internment shall cease as soon as possible after the close of hostilities.

Internees in the territory of a Party to the conflict against whom penal proceedings are pending for offences not exclusively subject to disciplinary penalties, may be detained until the close of such proceedings and, if circumstances require, until the completion of the penalty. The same shall

apply to internees who have been previously sentenced to a punishment depriving them of liberty.

By agreement between the Detaining Power and the Powers concerned, committees may be set up after the close of hostilities, or of the occupation of territories, to search for dispersed internees.

Article 134

The High Contracting Parties shall endeavour, upon the Repatriation close of hostilities or occupation, to ensure the return of all internees to their last place of residence, or to facilitate their residence repatriation.

Article 135

The Detaining Power shall bear the expense of returning released internees to the places where they were residing when interned, or, if it took them into custody while they were in transit or on the high seas, the cost of completing their journey or of their return to their point of departure.

Where a Detaining Power refuses permission to reside in its territory to a released internee who previously had his permanent domicile therein, such Detaining Power shall pay the cost of the said internee's repatriation. If, however, the internee elects to return to his country on his own responsibility or in obedience to the Government of the Power to which he owes allegiance, the Detaining Power need not pay the expenses of his journey beyond the point of his departure from its territory. The Detaining Power need not pay the cost of repatriation of an internee who was interned at his own request.

If internees are transferred in accordance with Article 45, the transferring and receiving Powers shall agree on the portion of the above costs to be borne by each.

The foregoing shall not prejudice such special agreements as may be concluded between Parties to the conflict concerning the exchange and repatriation of their nationals in enemy hands.

SECTION V

Information Bureaux and Central Agency

Article 136

Upon the outbreak of a conflict and in all cases of occupation, each of the Parties to the conflict shall establish an official Information Bureau responsible for receiving and transmitting information in respect of the protected persons who are in its power.

Each of the Parties to the conflict shall, within the shortest possible period, give its Bureau information of any measure taken by it concerning any protected persons who are kept in custody for more than two weeks, who are subjected to assigned residence or who are interned. It shall, furthermore, require its various departments concerned with such matters to provide the aforesaid Bureau promptly with information concerning all changes pertaining to these protected persons, as, for example, transfers, releases, repatriations, escapes, admittances to hospitals, births and deaths.

Article 137

Each national Bureau shall immediately forward information concerning protected persons by the most rapid means to the Powers in whose territory they resided, through the intermediary of the Protecting Powers and likewise through the Central Agency provided for in Article 140. The Bureaux shall also reply to all enquiries which may be received regarding protected persons.

Information Bureaux shall transmit information concerning a protected person unless its transmission might be detrimental to the person concerned or to his or her relatives. Even in such a case, the information may not be withheld from the Central Agency which, upon being notified of the circumstances, will take the necessary precautions indicated in Article 140.

All communications in writing made by any Bureau shall be authenticated by a signature or a seal.

Article 138

The information received by the national Bureau and transmitted by it shall be of such a character

as to make it possible to identify the protected person exactly and to advise his next of kin quickly. The information in respect of each person shall include at least his surname, first names, place and date of birth, nationality last residence and distinguishing characteristics, the first name of the father and the maiden name of the mother, the date, place and nature of the action taken with regard to the individual, the address at which correspondence may be sent to him and the name and address of the person to be informed.

Likewise, information regarding the state of health of internees who are seriously ill or seriously wounded shall be supplied regularly and if possible every week.

Article 139

Each national Information Bureau shall, furthermore, be responsible for collecting all personal valuables left by protected persons mentioned in Article 136, in particular those who have been repatriated or released, or who have escaped or died; it shall forward the said valuables to those concerned, either direct, or, if necessary, through the Central Agency. Such articles shall be sent by the Bureau in sealed packets which shall be accompanied by statements giving clear and full identity particulars of the person to whom the articles belonged, and by a complete list of the contents of the parcel. Detailed records shall be maintained of the receipt and despatch of all such valuables.

Article 140

A Central Information Agency for protected persons, in particular for internees, shall be created in a neutral country. The International Committee of the Red Cross shall, if it deems necessary, propose to the Powers concerned the organization of such an Agency, which may be the same as that provided for in Article 123 of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949.

The function of the Agency shall be to collect all information of the type set forth in Article 136 which it may obtain through official or private channels and to transmit it as rapidly as possible to the countries of origin or of residence of the persons concerned, except in cases where such transmissions might be detrimental to the persons whom the said information concerns, or to their relatives. It shall receive from the Parties to the

conflict all reasonable facilities for effecting such transmissions.

The High Contracting Parties, and in particular those whose nationals benefit by the services of the Central Agency, are requested to give the said Agency the financial aid it may require.

The foregoing provisions shall in no way be interpreted as restricting the humanitarian activities of the International Committee of the Red Cross and of the relief Societies described in Article 142.

Article 141

The national Information Bureaux and the Central Information Agency shall enjoy free postage for all mail, likewise the exemptions provided for in Article 110, and further, so far as possible, exemption from telegraphic charges or, at least, greatly reduced rates.

PART IV

EXECUTION OF THE CONVENTION

SECTION I

General Provisions

Article 142

Subject to the measures which the Detaining Powers may consider essential to ensure their security or to meet any other reasonable need, the representatives of religious organizations, relief societies, or any other organizations assisting the protected persons, shall receive from these Powers, for themselves or their duly accredited agents, all facilities for visiting the protected persons, for distributing relief supplies and material from any source, intended for educational, recreational or religious purposes, or for assisting them in organizing their leisure time within the places of internment. Such societies or organizations may be constituted in the territory of the Detaining Power, or in any other country, or they may have an international character.

The Detaining Power may limit the number of societies and organizations whose delegates are

allowed to carry out their activities in its territory and under its supervision, on condition, however, that such limitation shall not hinder the supply of effective and adequate relief to all protected persons.

The special position of the International Committee of the Red Cross in this field shall be recognized and respected at all times.

Article 143

Representatives or delegates of the Protecting Powers shall have permission to go to all places where protected persons are, particularly to places of internment, detention and work.

They shall have access to all premises occupied by protected persons and shall be able to interview the latter without witnesses, personally or through an interpreter.

Such visits may not be prohibited except for reasons of imperative military necessity, and then only as an exceptional and temporary measure. Their duration and frequency shall not be restricted.

Such representatives and delegates shall have full liberty to select the places they wish to visit. The Detaining or Occupying Power, the Protecting Power and when occasion arises the Power of origin of the persons to be visited, may agree that compatriots of the internees shall be permitted to participate in the visits.

The delegates of the International Committee of the Red Cross shall also enjoy the above prerogatives. The appointment of such delegates shall be submitted to the approval of the Power governing the territories where they will carry out their duties.

Article 144

The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to the entire population.

Any civilian, military, police or other authorities, who in time of war assume responsibilities in respect of protected persons, must possess the text of the Convention and be specially instructed as to its provisions.

Article 145

The High Contracting Parties shall communicate to one another through the Swiss Federal Council and, during hostilities, through the Protecting Powers, the official translations of the present Convention, as well as the laws and regulations which they may adopt to ensure the application thereof.

Article 146

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949. Article 147. Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of

property, not justified by military necessity and carried out unlawfully and wantonly.

Article 148

No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article.

Article 149

At the request of a Party to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention.

If agreement has not been reached concerning the procedure for the enquiry, the Parties should agree on the choice of an umpire who will decide upon the procedure to be followed.

Once the violation has been established, the Parties to the conflict shall put an end to it and shall repress it with the least possible delay.

SECTION II

Final Provisions

Article 150

The present Convention is established in English and in French. Both texts are equally authentic.

The Swiss Federal Council shall arrange for official translations of the Convention to be made in the Russian and Spanish languages.

Article 151

The present Convention, which bears the date of this day, is open to signature until 12 February 1950, in the name of the Powers represented at the Conference which opened at Geneva on 21 April 1949.

Article 152

The present Convention shall be ratified as soon as possible and the ratifications shall be deposited at Berne.

A record shall be drawn up of the deposit of each instrument of ratification and certified copies of this record shall be transmitted by the Swiss Federal Council to all the Powers in whose name the Convention has been signed, or whose accession has been notified.

Article 153

The present Convention shall come into force six months after not less than two instruments of ratification have been deposited.

Thereafter, it shall come into force for each High Contracting Party six months after the deposit of the instrument of ratification.

Article 154

In the relations between the Powers who are bound by the Hague Conventions respecting the Laws and Customs of War on Land, whether that of 29 July 1899, or that of 18 October 1907, and who are parties to the present Convention, this last Convention shall be supplementary to Sections II and III of the Regulations annexed to the above-mentioned Conventions of The Hague.

Article 155

From the date of its coming into force, it shall be open to any Power in whose name the present Convention has not been signed, to accede to this Convention.

Article 156

Accessions shall be notified in writing to the Swiss Federal Council, and shall take effect six months after the date on which they are received.

The Swiss Federal Council shall communicate the accessions to all the Powers in whose name the Convention has been signed, or whose accession has been notified.

Article 157

The situations provided for in Articles 2 and 3 shall have immediate effect to ratifications deposited and accessions notified by the Parties to the conflict before or after the beginning of hostilities or occupation. The Swiss Federal Council shall communicate by the quickest

method any ratifications or accessions received from Parties to the conflict.

Article 158

Each of the High Contracting Parties shall be at liberty to denounce the present Convention.

The denunciation shall be notified in writing to the Swiss Federal Council, which shall transmit it to the Governments of all the High Contracting Parties.

The denunciation shall take effect one year after the notification thereof has been made to the Swiss Federal Council. However, a denunciation of which notification has been made at a time when the denouncing Power is involved in a conflict shall not take effect until peace has been concluded, and until after operations connected with release, repatriation and re-establishment of the persons protected by the present Convention have been terminated.

The denunciation shall have effect only in respect of the denouncing Power. It shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience.

Article 159

The Swiss Federal Council shall register the present Convention with the Secretariat of the United Nations. The Swiss Federal Council shall also inform the Secretariat of the United Nations of all ratifications, accessions and denunciations received by it with respect to the present Convention.

In witness whereof the undersigned, having deposited their respective full powers, have signed the present Convention.

Done at Geneva this twelfth day of August 1949, in the English and French languages. The original shall be deposited in the Archives of the Swiss Confederation. The Swiss Federal Council shall transmit certified copies thereof to each of the signatory and acceding States.

ANNEX I

Draft Agreement Relating to Hospital and Safety Zones and Localities

Article 1

Hospital and safety zones shall be strictly reserved for the persons mentioned in Article 23 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, and in Article 14 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, and for the personnel entrusted with the organization and administration of these zones and localities, and with the care of the persons therein assembled.

Nevertheless, persons whose permanent residence is within such zones shall have the right to stay there.

Article 2

No persons residing, in whatever capacity, in a hospital and safety zone shall perform any work, either within or without the zone, directly connected with military operations or the production of war material.

Article 3

The Power establishing a hospital and safety zone shall take all necessary measures to prohibit access to all persons who have no right of residence or entry therein.

Article 4

Hospital and safety zones shall fulfil the following conditions:

(a) they shall comprise only a small part of the territory governed by the Power which has established them

(b) they shall be thinly populated in relation to the possibilities of accommodation

(c) they shall be far removed and free from all military objectives, or large industrial or administrative establishments

(d) they shall not be situated in areas which, according to every probability, may become important for the conduct of the war.

Article 5

Hospital and safety zones shall be subject to the following obligations:

(a) the lines of communication and means of transport which they possess shall not be used for the transport of military personnel or material, even in transit

(b) they shall in no case be defended by military means.

Article 6

Hospital and safety zones shall be marked by means of oblique red bands on a white ground, placed on the buildings and outer precincts.

Zones reserved exclusively for the wounded and sick may be marked by means of the Red Cross (Red Crescent, Red Lion and Sun) emblem on a white ground.

They may be similarly marked at night by means of appropriate illumination.

Article 7

The Powers shall communicate to all the High Contracting Parties in peacetime or on the outbreak of hostilities, a list of the hospital and safety zones in the territories governed by them. They shall also give notice of any new zones set up during hostilities.

As soon as the adverse party has received the above-mentioned notification, the zone shall be regularly established.

If, however, the adverse party considers that the conditions of the present agreement have not been fulfilled, it may refuse to recognize the zone by giving immediate notice thereof to the Party responsible for the said zone, or may make its recognition of such zone dependent upon the institution of the control provided for in Article 8.

Article 8

Any Power having recognized one or several hospital and safety zones instituted by the adverse Party shall be entitled to demand control by one or more Special Commissions, for the purpose of

ascertaining if the zones fulfil the conditions and obligations stipulated in the present agreement.

For this purpose, members of the Special Commissions shall at all times have free access to the various zones and may even reside there permanently. They shall be given all facilities for their duties of inspection.

Article 9

Should the Special Commissions note any facts which they consider contrary to the stipulations of the present agreement, they shall at once draw the attention of the Power governing the said zone to these facts, and shall fix a time limit of five days within which the matter should be rectified. They shall duly notify the Power which has recognized the zone.

If, when the time limit has expired, the Power governing the zone has not complied with the warning, the adverse Party may declare that it is no longer bound by the present agreement in respect of the said zone.

Article 10

Any Power setting up one or more hospital and safety zones, and the adverse Parties to whom their existence has been notified, shall nominate or have nominated by the Protecting Powers or by other neutral Powers, persons eligible to be members of the Special Commissions mentioned in Articles 8 and 9.

Article 11

In no circumstances may hospital and safety zones be the object of attack. They shall be protected and respected at all times by the Parties to the conflict.

Article 12

In the case of occupation of a territory, the hospital and safety zones therein shall continue to be respected and utilized as such.

Their purpose may, however, be modified by the Occupying Power, on condition that all measures are taken to ensure the safety of the persons accommodated.

Article 13

The present agreement shall also apply to localities which the Powers may utilize for the same purposes as hospital and safety zones.

ANNEX II

Draft Regulations concerning Collective Relief

Article 1

The Internee Committees shall be allowed to distribute collective relief shipments for which they are responsible to all internees who are dependent for administration on the said Committee's place of internment, including those internees who are in hospitals, or in prison or other penitentiary establishments.

Article 2

The distribution of collective relief shipments shall be effected in accordance with the instructions of the donors and with a plan drawn up by the Internee Committees. The issue of medical stores shall, however, be made for preference in agreement with the senior medical officers, and the latter may, in hospitals and infirmaries, waive the said instructions, if the needs of their patients so demand. Within the limits thus defined, the distribution shall always be carried out equitably.

Article 3

Members of Internee Committees shall be allowed to go to the railway stations or other points of arrival of relief supplies near their places of internment so as to enable them to verify the quantity as well as the quality of the goods received and to make out detailed reports thereon for the donors.

Article 4

Internee Committees shall be given the facilities necessary for verifying whether the distribution of collective relief in all subdivisions and annexes of their places of internment has been carried out in accordance with their instructions.

Article 5

Internee Committees shall be allowed to complete, and to cause to be completed by members of the Internee Committees in labour detachments or by the senior medical officers of infirmaries and hospitals, forms or questionnaires intended for the donors, relating to collective relief supplies (distribution, requirements, quantities, etc.). Such forms and questionnaires, duly completed, shall be forwarded to the donors without delay.

Article 6

In order to secure the regular distribution of collective relief supplies to the internees in their place of internment, and to meet any needs that may arise through the arrival of fresh parties of internees, the Internee Committees shall be allowed to create and maintain sufficient reserve stocks of collective relief. For this purpose, they shall have suitable warehouses at their disposal; each warehouse shall be provided with two locks, the Internee Committee holding the keys of one lock, and the commandant of the place of internment the keys of the other.

, Letter, and Correspondence Card, not included]

Article 7

The High Contracting Parties, and the Detaining Powers in particular, shall, so far as is in any way possible and subject to the regulations governing the food supply of the population, authorize purchases of goods to be made in their territories for the distribution of collective relief to the internees. They shall likewise facilitate the transfer of funds and other financial measures of a technical or administrative nature taken for the purpose of making such purchases.

Article 8

The foregoing provisions shall not constitute an obstacle to the right of internees to receive collective relief before their arrival in a place of internment or in the course of their transfer, nor to the possibility of representatives of the Protecting Power, or of the International Committee of the Red Cross or any other humanitarian organization giving assistance to internees and responsible for forwarding such supplies, ensuring the distribution thereof to the recipients by any other means they may deem suitable.

[ANNEX III, illustrations of Internment Card

The following is mirrored from its source at: <http://www.unhchr.ch/html/menu3/b/93.htm>

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1)

Adopted on 8 June 1977 by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts

entry into force 7 December 1979, in accordance with Article 95

Preamble

The High Contracting Parties,

Proclaiming their earnest wish to see peace prevail among peoples,

Recalling that every State has the duty, in conformity with the Charter of the United Nations, to refrain in its international relations from the threat or use of force against the sovereignty, territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.

Believing it necessary nevertheless to reaffirm and develop the provisions protecting the victims of armed conflicts and to supplement measures intended to reinforce their application,

Expressing their conviction that nothing in this Protocol or in the Geneva Conventions of 12 August 1949 can be construed as legitimizing or authorizing any act of aggression or any other use of force inconsistent with the Charter of the United Nations,

Reaffirming further that the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflicts,

Have agreed on the following:

PART I

GENERAL PROVISIONS

Article 1.-General principles and scope of application

1. The High Contracting Parties undertake to respect and to ensure respect for this Protocol in all circumstances.
2. In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.
3. This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 common to those Conventions.
4. The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter

of the United Nations.

Article 2.-Definitions

For the purposes of this Protocol:

(a) "First Convention", "Second Convention", "Third Convention" and "Fourth Convention" mean, respectively, the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949; the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949; the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949; the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949; "the Conventions" means the four Geneva Conventions of 12 August 1949; for the protection of war victims;

(b) "Rules of international law applicable in armed conflict" means the rules applicable in armed conflict set forth in international agreements to which the Parties to the conflict are Parties and the generally recognized principles and rules of international law which are applicable to armed conflict;

(c) "Protecting Power" means a neutral or other State not a Party to the conflict which has been designated by a Party to the conflict and accepted by the adverse Party and has agreed to carry out the functions assigned to a Protecting Power under the Conventions and this Protocol;

(d) "Substitute" means an organization acting in place of a Protecting Power in accordance with Article 5.

Article 3.-Beginning and end of application

Without prejudice to the provisions which are applicable at all times:

(a) The Conventions and this Protocol shall apply from the beginning of any situation referred to in Article 1 of this Protocol;

(b) The application of the Conventions and of this Protocol shall cease, in the territory of Parties to the conflict, on the general close of military operations and, in the case of occupied territories, on the termination of the occupation, except, in either circumstance, for those persons whose final release, repatriation or re-establishment takes place thereafter. These persons shall continue to benefit from the relevant provisions of the Conventions and of this Protocol until their final release, repatriation or re-establishment.

Article 4.-Legal status of the Parties to the conflict

The application of the Conventions and of this Protocol, as well as the conclusion of the agreements provided for therein, shall not affect the legal status of the Parties to the conflict. Neither the occupation of a territory nor the application of the Conventions and this Protocol shall affect the legal status of the territory in question.

Article 5.-Appointment of Protecting Powers and of their substitute

1. It is the duty of the Parties to a conflict from the beginning of that conflict to secure the supervision and implementation of the Conventions and of this Protocol by the application of the system of Protecting Powers, including inter alia the designation and acceptance of those Powers, in accordance with the following paragraphs. Protecting Powers shall have the duty of safeguarding the interests of the Parties to the conflict.

2. From the beginning of a situation referred to in Article each Party to the conflict shall without delay designate a Protecting Power for the purpose of applying the Conventions and this Protocol and shall, likewise without delay and for the same purpose, permit the activities of a Protecting Power which has been accepted by it as such after designation by the adverse Party.

3. If a Protecting Power has not been designated or accepted from the beginning of a situation referred to in Article 1, the International Committee

of the Red Cross, without prejudice to the right of any other impartial humanitarian organization to do likewise, shall offer its good offices to the Parties to the conflict with a view to the designation without delay of a Protecting Power to which the Parties to the conflict consent. For that purpose it may, inter alia, ask each Party to provide it with a list of at least five States which that Party considers acceptable to act as Protecting Power on its behalf in relation to an adverse Party, and ask each adverse Party to provide a list of at least five States which it would accept as the Protecting Power of the first Party; these lists shall be communicated to the Committee within two weeks after the receipt of the request; it shall compare them and seek the agreement of any proposed State named on both lists.

4. If, despite the foregoing, there is no Protecting Power, the Parties to the conflict shall accept without delay an offer which may be made by the International Committee of the Red Cross or by any other organization which offers all guarantees of impartiality and efficacy, after due consultations with the said Parties and taking into account the result of these consultations, to act as a substitute. The functioning of such a substitute is subject to the consent of the Parties to the conflict; every effort shall be made by the Parties to the conflict to facilitate the operations of the substitute in the performance of its tasks under the Conventions and this Protocol.

5. In accordance with Article 4, the designation and acceptance of Protecting Powers for the purpose of applying the Conventions and this Protocol shall not affect the legal status of the Parties to the conflict or of any territory, including occupied territory.

6. The maintenance of diplomatic relations between Parties to the conflict or the entrusting of the protection of a Party's interests and those of its nationals to a third State in accordance with the rules of international law relating to diplomatic relations is no obstacle to the designation of Protecting Powers for the purpose of applying the Conventions and this Protocol.

7. Any subsequent mention in this Protocol of a Protecting Power includes also a substitute.

Article 6.-Qualified persons

1. The High Contracting Parties shall, also in peacetime, endeavour, with the assistance of the national Red Cross (Red Crescent, Red Lion and Sun) Societies, to train qualified personnel to facilitate the application of the Conventions and of this Protocol, and in particular the activities of the Protecting Powers.

2. The recruitment and training of such personnel are within domestic jurisdiction.

3. The International Committee of the Red Cross shall hold at the disposal of the High Contracting Parties the lists of persons so trained which

the High Contracting Parties may have established and may have transmitted to it for that purpose.

4. The conditions governing the employment of such personnel outside the national territory shall, in each case, be the subject of special agreements between the Parties concerned.

Article 7.-Meetings

The depositary of this Protocol shall convene a meeting of the High Contracting Parties, at the request of one or more of the said Parties and upon the approval of the majority of the said Parties, to consider general problems concerning the application of the Conventions and of the Protocol.

PART II

WOUNDED, SICK AND SHIPWRECKED

SECTION I.-GENERAL PROTECTION

Article 8.-Terminology

For the purposes of this Protocol:

(a) "Wounded" and "sick" mean persons, whether military or civilian, who, because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility. These terms also cover maternity cases, new-born babies and other persons who may be in need of immediate medical assistance or care, such as the infirm or expectant mothers, and who refrain from any act of hostility;

(b) "Shipwrecked" means persons, whether military or civilian, who are in peril at sea or in other waters as a result of misfortune affecting them or the vessel or aircraft carrying them and who refrain from any act of hostility. These persons, provided that they continue to refrain from any act of hostility, shall continue to be considered shipwrecked during their rescue until they acquire another status under the Conventions or this Protocol;

(c) "Medical personnel" means those persons assigned, by a Party to the conflict, exclusively to the medical purposes enumerated under subparagraph (e) or to the administration of medical units or to the operation or administration of medical transports. Such assignments may be either permanent or temporary. The term includes:

(i) Medical personnel of a Party to the conflict, whether military or civilian, including those described in the First and Second Conventions, and those assigned to civil defence organizations;

(ii) Medical personnel of national Red Cross (Red Crescent, Red Lion and Sun) Societies and other national voluntary aid societies duly recognized and authorized by a Party to the conflict;

(iii) Medical personnel of medical units or medical transports described in Article 9, paragraph 2;

(d) "Religious personnel" means military or civilian persons, such as chaplains, who are exclusively engaged in the work of their ministry and attached:

(i) To the armed forces of a Party to the conflict;

(ii) To medical units or medical transports of a Party to the conflict;

(iii) To medical units or medical transports described in Article 9, paragraph 2; or

(iv) To civil defence organizations of a Party to the conflict.

The attachment of religious personnel may be either permanent or temporary, and the relevant provisions mentioned under sub-paragraph (k) apply to them;

(e) "Medical units" means establishments and other units, whether military or civilian, organized for medical purposes, namely the search for, collection, transportation, diagnosis or treatment-including first-aid treatment-of the wounded, sick and shipwrecked, or for the prevention of disease. The term includes, for example, hospitals and other similar units, blood transfusion centres, preventive medicine centres and institutes, medical depots and the medical and pharmaceutical stores of such units. Medical units may be fixed or mobile, permanent or temporary;

(g) "Medical transportation" means the conveyance by land, water or air of the wounded, sick, shipwrecked, medical personnel, religious personnel, medical equipment or medical supplies protected by the Conventions and by this Protocol;

(g) "Medical transports" means any means of transportation, whether military or civilian, permanent or temporary, as signed exclusively to medical transportation and under the control of a competent authority of a Party to the conflict;

(h) "Medical vehicles" means any medical transports by land;

(i) "Medical ships and craft" means any medical transports by water;

(j) "Medical aircraft" means any medical transports by air;

(k) "Permanent medical personnel", "permanent medical units" and "permanent medical transports" mean those assigned exclusively to medical purposes for an indeterminate period. "Temporary medical personnel", "temporary medical units" and "temporary medical transports" mean those devoted exclusively to medical purposes for limited periods during the whole of such periods. Unless otherwise specified, the terms "medical personnel", "medical units" and "medical transports" cover both permanent and temporary categories;

(l) "Distinctive emblem" means the distinctive emblem of the red cross, red crescent or red lion and sun on a white ground when used for the protection of medical units and transports, or medical and religious personnel, equipment or supplies;

(m) "Distinctive signal" means any signal or message specified for the identification exclusively of medical units or transports in Chapter III of Annex I to this Protocol.

Article 9.-Field of application

1. This Part, the provisions of which are intended to ameliorate the condition of the wounded, sick and shipwrecked, shall apply to all those affected by a situation referred to in Article 1, without any adverse distinction founded on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria.

2. The relevant provisions of Articles 27 and 32 of the First Convention shall apply to permanent medical units and transports (other than hospital ships, to which Article 25 of the Second Convention applies) and their personnel made available to a Party to the conflict for humanitarian purposes:

(a) By a neutral or other State which is not a Party to that conflict;

(b) By a recognized and authorized aid society of such a State;

(c) By an impartial international humanitarian organization.

Article 10.-Protection and care

1. All the wounded, sick and shipwrecked, to whichever Party they belong, shall be respected and protected.

2. In all circumstances they shall be treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. There shall be no distinction among them founded on any grounds other than medical ones.

Article 11.-Protection of persons

1. The physical or mental health and integrity of persons who are in the power of the adverse Party or who are interned, detained or otherwise deprived of liberty as a result of a situation referred to in Article I shall not be endangered by any unjustified act or omission. Accordingly, it is prohibited to subject the persons described in this Article to any medical procedure which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the Party conducting the procedure and who are in no way deprived of liberty.

2. It is, in particular, prohibited to carry out on such persons, even with their consent:

(a) Physical mutilations;

(b) Medical or scientific experiments;

(c) Removal of tissue or organs for transplantation,

except where these acts are justified in conformity with the conditions provided for in paragraph 1.

3. Exceptions to the prohibition in paragraph 2 (c) may be made only in the case of donations of blood for transfusion or of skin for grafting, provided that they are given voluntarily and without any coercion or inducement, and then only for therapeutic purposes, under conditions consistent with generally accepted medical standards and controls designed for the benefit of both the donor and the recipient.

4. Any wilful act or omission which seriously endangers the physical or mental health or integrity of any person who is in the power of a Party other than the one on which he depends and which either violates any of the prohibitions in paragraphs 1 and 2 or fails to comply with the requirements of paragraph 3 shall be a grave breach of this Protocol.

5. The persons described in paragraph I have the right to refuse any surgical operation. In case of refusal, medical personnel shall endeavour to obtain a written statement to that effect, signed or acknowledged by the patient.

6. Each Party to the conflict shall keep a medical record for every donation of blood for transfusion or skin for grafting by persons referred to in paragraph 1, if that donation is made under the responsibility of that Party. In addition, each Party to the conflict shall endeavour to keep a record of all medical procedures undertaken with respect to any person who is interned, detained or otherwise deprived of liberty as a result of a situation referred to in Article 1. These records shall be available at all times for inspection by the Protecting Power.

Article 12.-Protection of medical units

1. Medical units shall be respected and protected at all times and shall not be the object of attack.

2. Paragraph I shall apply to civilian medical units, provided that they:

(a) Belong to one of the Parties to the conflict;

(b) Are recognized and authorized by the competent authority of one of the Parties to the conflict; or

(c) Are authorized in conformity with Article 9, paragraph 2, of this Protocol or Article 27 of the First Convention.

3. The Parties to the conflict are invited to notify each other of the location of their fixed medical units. The absence of such notification shall not exempt any of the Parties from the obligation to comply with the provisions of paragraph 1.

4. Under no circumstances shall medical units be used in an attempt to shield military objectives from attack. Whenever possible, the Parties to the conflict shall ensure that medical units are so sated that attacks against military objectives do not imperil their safety.

Article 13.-Discontinuance of protection of civilian medical units

1. The protection to which civilian medical units are entitled shall not cease unless they are used to commit, outside their humanitarian function, acts harmful to the enemy. Protection may, however, cease only after a warning has been given setting, whenever appropriate, a reasonable time-limit, and after such warning has remained unheeded.

2. The following shall not be considered as acts harmful to the enemy;

(a) That the personnel of the unit are equipped with light individual weapons for their own defence or for that of the wounded and sick in their charge;

(b) That the unit is guarded by a picket or by sentries or by an escort;

(c) That small arms and ammunition taken from the wounded and sick, and not yet handed to the proper

service, are found in the units;

(d) That members of the armed forces or other combatants are in the unit for medical reasons.

Article 14.-Limitations on requisition of civilian medical units

1. The Occupying Power has the duty to ensure that the medical needs of the civilian population in occupied territory continue to be satisfied.

2. The Occupying Power shall not, therefore, requisition civilian medical units, their equipment, their mat,riel or the services of their personnel, so long as these resources are necessary for the provision of adequate medical services for the civilian population and for the continuing medical care of any wounded and sick already under treatment.

3. Provided that the general rule in paragraph 2 continues to be observed, the Occupying Power may requisition the said resources, subject to the following particular conditions:

(a) That the resources are necessary for the adequate and immediate medical treatment of the wounded and sick members of the armed forces of the Occupying Power or of prisoners of war;

(b) That the requisition continues only while such necessity exists; and

(c) That immediate arrangements are made to ensure that the medical needs of the civilian population, as well as those of any wounded and sick under treatment who are affected by the requisition, continue to be satisfied.

Article 15.-Protection of civilian medical and religious personnel

1. Civilian medical personnel shall be respected and protected.

2. If needed, all available help shall be afforded to civilian medical personnel in an area where civilian medical services are disrupted by reason of combat activity.

3. The Occupying Power shall afford civilian medical personnel in occupied territories every assistance to enable them to perform, to the best of their ability, their humanitarian functions. The Occupying Power may not require that, in the performance of those functions, such personnel shall give priority to the treatment of any person except on medical grounds. They shall not be compelled to carry out tasks which are not compatible with their humanitarian mission.

4. Civilian medical personnel shall have access to any place where their services are essential, subject to such supervisory and safety measures as the relevant Party to the conflict may deem necessary.

5. Civilian religious personnel shall be respected and protected. The provisions of the Conventions and of this Protocol concerning the protection and identification of medical personnel shall apply equally to such persons.

Article 16.-General protection of medical duties

1. Under no circumstances shall any person be punished for carrying out medical activities compatible with medical ethics, regardless of the person benefiting therefrom.

2. Persons engaged in medical activities shall not be compelled to perform acts or to carry out work contrary to the rules of medical ethics or to other medical rules designed for the benefit of the wounded and sick or to the provisions of the Conventions or of this Protocol, or to refrain from performing acts or from carrying out work required by those rules and provisions.

3. No person engaged in medical activities shall be compelled to give to anyone belonging either to an adverse Party, or to his own Party except as required by the law of the latter Party, any information concerning the wounded and sick who are, or who have been, under his care, if such information would, in his opinion, prove harmful to the patients concerned or to their families. Regulations for the compulsory notification of

communicable diseases shall, however, be respected.

Article 17.-Role of the civilian population and of aid societies

1. The civilian population shall respect the wounded, sick and shipwrecked, even if they belong to the adverse Party, and shall commit no act of violence against them. The civilian population and aid societies, such as national Red Cross (Red Crescent, Red Lion and Sun) Societies, shall be permitted, even on their own initiative, to collect and care for the wounded, sick and shipwrecked, even in invaded or occupied areas. No one shall be harmed, prosecuted, convicted or punished for such humanitarian acts.

2. The Parties to the conflict may appeal to the civilian population and the aid societies referred to in paragraph 1 to collect and care for the wounded, sick and shipwrecked, and to search for the dead and report their location; they shall grant both protection and the necessary facilities to those who respond to this appeal. If the adverse Party gains or regains control of the area, that Party also shall afford the same protection and facilities for so long as they are needed.

Article 18.-Identification

1. Each Party to the conflict shall endeavour to ensure that medical and religious personnel and medical units and transports are identifiable.

2. Each Party to the conflict shall also endeavour to adopt and to implement methods and procedures which will make it possible to recognize medical units and transports which use the distinctive emblem and distinctive signals.

3. In occupied territory and in areas where fighting is taking place or is likely to take place, civilian medical personnel and civilian religious personnel should be recognizable by the distinctive emblem and an identity card certifying their status.

4. With the consent of the competent authority, medical units and transports shall be marked by the distinctive emblem. The ships and craft referred to in Article 22 of this Protocol shall be marked in accordance with the provisions of the Second Convention.

5. In addition to the distinctive emblem, a Party to the conflict may, as provided in Chapter III of Annex I to this Protocol, authorize the use of distinctive signals to identify medical units and transports. Exceptionally, in the special cases covered in that Chapter, medical transports may use distinctive signals without displaying the distinctive emblem.

6. The application of the provisions of paragraphs 1 to 5 of this Article is governed by Chapters I to m of Annex I to this Protocol. Signals designated in Chapter m of the Annex for the exclusive use of medical units and transports shall not, except as provided therein, be used for any purpose other than to identify the medical units and transports specified in that Chapter.

7. This Article does not authorize any wider use of the distinctive emblem in peacetime than is prescribed in Article 44 of the First Convention.

8. The provisions of the Conventions and of this Protocol relating to supervision of the use of the distinctive emblem and to the prevention and repression of any misuse thereof shall be applicable to distinctive signals .

Article 19.-Neutral and other States not Parties to the conflict

Neutral and other States not Parties to the conflict shall apply the relevant provisions of this Protocol to persons protected by this Part who may be received or interned within their territory, and to any dead of the Parties to that conflict whom they may find.

Article 20.-Prohibition of reprisals

Reprisals against the persons and objects protected by this Part are prohibited.

SECTION II.-MEDICAL TRANSPORTATION

Article 21.-Medical vehicles

Medical vehicles shall be respected and protected in the same way as mobile medical units under the Conventions and this Protocol.

Article 22.-Hospitals ships and coastal rescue craft

1. The provisions of the Conventions relating to:

(a) Vessels described in Articles 22, 24, 25 and 27 of the Second Convention,

(b) Their lifeboats and small craft,

(c) Their personnel and crews; and

(d) The wounded, sick and shipwrecked on board, shall also apply where these vessels carry civilian wounded, sick and shipwrecked who do not belong to any of the categories mentioned in Article 13 of the Second Convention. Such civilians shall not, however, be subject to surrender to any Party which is not their own, or to capture at sea. If they find themselves in the power of a Party to the conflict other than their own they shall be covered by the Fourth Convention and by this Protocol.

2. The protection provided by the Conventions to vessels described in Article 25 of the Second Convention shall extend to hospital ships made available for humanitarian purposes to a Party to the conflict:

(a) By a neutral or other State which is not a Party to that conflict; or

(b) By an impartial international humanitarian organization,

provided that, in either case, the requirements set out in that Article are complied with.

3. Small craft described in Article 27 of the Second Convention shall be protected even if the notification envisaged by that Article has not been made. The Parties to the conflict are, nevertheless, invited to inform each other of any details of such craft which will facilitate their identification and recognition.

Article 23.-Other medical ships and craft

1. Medical ships and craft other than those referred to in Article 22 of this Protocol and Article 38 of the Second Convention shall, whether at sea or in other waters, be respected and protected in the same way as mobile medical units under the Conventions and this Protocol. Since this protection can only be effective if they can be identified and recognized as medical ships or craft, such vessels should be marked with the distinctive emblem and as far as possible comply with the second paragraph of Article 43 of the Second Convention.

2. The ships and craft referred to in paragraph I shall remain subject to the laws of war. Any warship on the surface able immediately to enforce its command may order them to stop, order them off, or make them take a certain course, and they shall obey every such command. Such ships and craft may not in any other way be diverted from their medical mission so long as they are needed for the wounded, sick and shipwrecked on board.

3. The protection provided in paragraph I shall cease only under the conditions set out in Articles 34 and 35 of the Second Convention. A clear refusal to obey a command given in accordance with paragraph 2 shall be an act harmful to the enemy under Article 34 of the Second Convention.

4. A Party to the conflict may notify any adverse Party as far in advance of sailing as possible of the name, description, expected time of sailing, course and estimated speed of the medical ship or craft, particularly in the case of ships of over 2,000 gross tons, and may provide any other information which would facilitate

identification and recognition. The adverse Party shall acknowledge receipt of such information.

5. The provisions of Article 37 of the Second Convention shall apply to medical and religious personnel in such ships and craft.

6. The provisions of the Second Convention shall apply to the wounded, sick and shipwrecked belonging to the categories referred to in Article 13 of the Second Convention and in Article 44 of this Protocol who may be on board such medical ships and craft. Wounded, sick and shipwrecked civilians who do not belong to any of the categories mentioned in Article 13 of the Second Convention shall not be subject, at sea, either to surrender to any Party which is not their own; or to removal from such ships or craft; if they find themselves in the power of a Party to the conflict other than their own, they shall be covered by the Fourth Convention and by this Protocol.

Article 24.-Protection of medical aircraft

Medical aircraft shall be respected and protected, subject to the provisions of this Part.

Article 25.-Medical aircraft in areas not controlled by an adverse Party

In and over land areas physically controlled by friendly forces, or in and over sea areas not physically controlled by an adverse Party, the respect and protection of medical aircraft of a Party to the conflict is not dependent on any agreement with an adverse Party. For greater safety, however, a Party to the conflict operating its medical aircraft in these areas may notify the adverse Party, as provided in Article 29, in particular when such aircraft are making flights bringing them within range of surface-to-air weapons systems of the adverse Party.

Article 26.-Medical aircraft in contact or similar zones

1. In and over those parts of the contact zone which are physically controlled by friendly forces and in and over those areas the physical control of which is not clearly established, protection for medical aircraft can be fully effective only by prior agreement between the competent military authorities of the Parties to the conflict, as provided for in Article 29. Although, in the absence of such an agreement, medical aircraft operate at their own risk, they shall nevertheless be respected after they have been recognized as such.

2. "Contact zone" means any area on land where the forward elements of opposing forces are in contact with each other, especially where they are exposed to direct fire from the ground.

Article 27.-Medical aircraft in areas controlled by an adverse Party

1. The medical aircraft of a Party to the conflict shall continue to be protected while flying over land or sea areas physically controlled by an adverse Party, provided that prior agreement to such flights has been obtained from the competent authority of the adverse Party.

2. A medical aircraft which flies over an area physically controlled by an adverse Party without, or in deviation from the terms of, an agreement provided for in paragraph 1, either through navigational error or because of an emergency affecting the safety of the flight, shall make every effort to identify itself and to inform the adverse Party of the circumstances. As soon as such medical aircraft has been recognized by the adverse Party, that Party shall make all reasonable efforts to give the order to land or to alight on water, referred to in Article 30, paragraph 1, or to take other measures to safeguard its own interests, and, in either case, to allow the aircraft time for compliance, before resorting to an attack against the aircraft.

Article 28.-Restrictions on operations of medical aircraft

1. The Parties to the conflict are prohibited from using their medical aircraft to attempt to acquire any military advantage over an adverse Party. The presence of medical aircraft shall not be used in an attempt to render military objectives immune from attack.

2. Medical aircraft shall not be used to collect or transmit intelligence data and shall not carry any equipment

intended for such purposes. They are prohibited from carrying any persons or cargo not included within the definition in Article 8, subparagraph (t). The carrying on board of the personal effects of the occupants or of equipment intended solely to facilitate navigation, communication or identification shall not be considered as prohibited.

3. Medical aircraft shall not carry any armament except small arms and ammunition taken from the wounded, sick and shipwrecked on board and not yet handed to the proper service, and such light individual weapons as may be necessary to enable the medical personnel on board to defend themselves and the wounded, sick and shipwrecked in their charge.

4. While carrying out the flights referred to in Articles 26 and 27, medical aircraft shall not, except by prior agreement with the adverse Party, be used to search for the wounded, sick and shipwrecked

Article 29.-Notifications and agreements concerning medical aircraft

1. Notifications under Article 25, or requests for prior agreement under Articles 26, 27, 28 (paragraph 4), or 31 shall state the proposed number of medical aircraft, their flight plans and means of identification, and shall be understood to mean that every flight will be carried out in compliance with Article 28.

2. A Party which receives a notification given under Article 25 shall at once acknowledge receipt of such notification.

3. A Party which receives a request for prior agreement under Articles 26, 27, 28 (paragraph 4), or 31 shall, as rapidly as possible, notify the requesting Party:

(a) That the request is agreed to;

(b) That the request is denied; or

(c) Of reasonable alternative proposals to the request. It may also propose a prohibition or restriction of other flights in the area during the time involved. If the Party which submitted the request accepts the alternative proposals, it shall notify the other Party of such acceptance.

4. The Parties shall take the necessary measures to ensure that notifications and agreements can be made rapidly.

5. The Parties shall also take the necessary measures to disseminate rapidly the substance of any such notifications and agreements to the military units concerned and shall instruct those units regarding the means of identification that will be used by the medical aircraft in question.

Article 30.-Landing and inspection of medical aircraft

1. Medical aircraft flying over areas which are physically controlled by an adverse Party, or over areas the physical control of which is not clearly established, may be ordered to land or to alight on water, as appropriate, to permit inspection in accordance with the following paragraphs. Medical aircraft shall obey any such order.

2. If such an aircraft lands or alights on water, whether ordered to do so or for other reasons, it may be subjected to inspection solely to determine the matters referred to in paragraphs 3 and 4. Any such inspection shall be commenced without delay and shall be conducted expeditiously. The inspecting Party shall not require the wounded and sick to be removed from the aircraft unless their removal is essential for the inspection. That Party shall in any event ensure that the condition of the wounded and sick is not adversely affected by the inspection or by the removal.

3. If the inspection discloses that the aircraft:

(a) Is a medical aircraft within the meaning of Article 8, subparagraph (i);

(b) Is not in violation of the conditions prescribed in Article 28; and

(c) Has not flown without or in breach of a prior agreement where such agreement is required; the aircraft and those of its occupants who belong to the adverse Party or to a neutral or other State not a Party to the conflict shall be authorized to continue the flight without delay.

4. If the inspection discloses that the aircraft:

(a) Is not a medical aircraft within the meaning of Article 8, subparagraph (j);

(b) Is in violation of the conditions prescribed in Article 28; or,

(c) Has flown without or in breach of a prior agreement where such agreement is required; the aircraft may be seized. Its occupants shall be treated in conformity with the relevant provisions of the Conventions and of this Protocol. Any aircraft seized which had been assigned as a permanent medical aircraft may be used thereafter only as a medical aircraft.

Article 31.-Neutral or other States not Parties to the conflict

1. Except by prior agreement, medical aircraft shall not fly over or land in the territory of a neutral or other State not a Party to the conflict. However, with such an agreement, they shall be respected throughout their flight and also for the duration of any calls in the territory. Nevertheless they shall obey any summons to land or to alight on water, as appropriate.

2. Should a medical aircraft, in the absence of an agreement or in deviation from the terms of an agreement, fly over the territory of a neutral or other State not a Party to the conflict, either through navigational error or because of an emergency affecting the safety of the flight, it shall make every effort to give notice of the flight and to identify itself. As soon as such medical aircraft is recognized, that State shall make all reasonable efforts to give the order to land or to alight on water referred to in Article 30, paragraph 1, or to take other measures to safeguard its own interests, and in either case, to allow the aircraft time for compliance, before resorting to an attack against the aircraft.

3. If a medical aircraft, either by agreement or in the circumstances mentioned in paragraph 2, lands or alights on water in the territory of a neutral or other State not Party to the conflict, whether ordered to do so or for other reasons, the aircraft shall be subject to inspection for the purposes of determining whether it is in fact a medical aircraft. The inspection shall be commenced without delay and shall be conducted expeditiously. The inspecting Party shall not require the wounded and sick of the Party operating the aircraft to be removed from it unless their removal is essential for the inspection. The inspecting Party shall in any event ensure that the condition of the wounded and sick is not adversely affected by the inspection or the removal. If the inspection discloses that the aircraft is in fact a medical aircraft, the aircraft with its occupants, other than those who must be detained in accordance with the rules of international law applicable in armed conflict, shall be allowed to resume its flight, and reasonable facilities shall be given for the continuation of the flight. If the inspection discloses that the aircraft is not a medical aircraft, it shall be seized and the occupants treated in accordance with paragraph 4.

4. The wounded, sick and shipwrecked disembarked, otherwise than temporarily, from a medical aircraft with the consent of the local authorities in the territory of a neutral or other State not a Party to the conflict shall, unless agreed otherwise between that State and the Parties to the conflict, be detained by that State where so required by the rules of international law applicable in armed conflict, in such a manner that they cannot again take part in the hostilities. The cost of hospital treatment and internment shall be borne by the State to which those persons belong.

5. Neutral or other States not Parties to the conflict shall apply any conditions and restrictions on the passage of medical aircraft over, or on the landing of medical aircraft in, their territory equally to all Parties to the conflict.

SECTION.-MISSING AND DEAD PERSONS

Article 32.-General principle

In the implementation of this Section, the activities of the High Contracting Parties, of the Parties to the

conflict and of the international humanitarian organizations mentioned in the Conventions and in this Protocol shall be prompted mainly by the right of families to know the fate of their relatives.

Article 33.-Missing persons

1. As soon as circumstances permit, and at the latest from the end of active hostilities, each Party to the conflict shall search for the persons who have been reported missing by an adverse Party. Such adverse Party shall transmit all relevant information concerning such persons in order to facilitate such searches.

2. In order to facilitate the gathering of information pursuant to the preceding paragraph, each Party to the conflict shall, with respect to persons who would not receive more favourable consideration under the Conventions and this Protocol:

(a) Record the information specified in Article 138 of the Fourth Convention in respect of such persons who have been detained, imprisoned or otherwise held in captivity for more than two weeks as a result of hostilities or occupation, or who have died during any period of detention;

(b) To the fullest extent possible, facilitate and, if need be, carry out the search for and the recording of information concerning such persons if they have died in other circumstances as a result of hostilities or occupation.

3. Information concerning persons reported missing pursuant to paragraph 1 and requests for such information shall be transmitted either directly or through the Protecting Power or the Central Tracing Agency of the International Committee of the Red Cross or national Red Cross (Red Crescent, Red Lion and Sun) Societies. Where the information is not transmitted through the International Committee of the Red Cross and its Central Tracing Agency, each Party to the conflict shall ensure that such information is also supplied to the Central Tracing Agency.

4. The Parties to the conflict shall endeavour to agree on arrangements for teams to search for, identify and recover the dead from battlefield areas, including arrangements, if appropriate, for such teams to be accompanied by personnel of the adverse Party while carrying out the missions in areas controlled by the adverse Party. Personnel of such teams shall be respected and protected while exclusively carrying out these duties.

Article 34.-Remains of deceased

1. The remains of persons who have died for reasons related to occupation or in detention resulting from occupation or hostilities and those of persons not nationals of the country in which they have died as a result of hostilities shall be respected, and the gravesites of all such persons shall be respected, maintained and marked as provided for in Article 130 of the Fourth Convention, where their remains or gravesites would not receive more favourable consideration under the Conventions and this Protocol.

2. As soon as circumstances and the relations between the adverse Parties permit, the High Contracting Parties in whose territories graves and, as the case may be, other locations of the remains of persons who have died as a result of hostilities or during occupation or in detention are situated, shall conclude agreements in order:

(a) To facilitate access to the gravesites by relatives of the deceased and by representatives of official graves registration services and to regulate the practical arrangements for such access;

(b) To protect and maintain such gravesites permanently;

(c) To facilitate the return of the remains of the deceased and of personal effects to the home country upon its request or, unless that country objects, upon the request of the next of kin.

3. In the absence of the agreements provided for in paragraph 2 (b) or (c) and if the home country of such deceased is not willing to arrange at its expense for the maintenance of such gravesites, the High Contracting Party in whose territory the gravesites are situated may offer to facilitate the return of the remains of the deceased to the home country. Where such an offer has not been accepted the High Contracting Party may, after

the expiry of five years from the date of the offer and upon due notice to the home country, adopt the arrangements laid down in its own laws relating to cemeteries and graves.

4. A High Contracting Party in whose territory the gravesites referred to in this Article are situated shall be permitted to exhume the remains only:

(a) In accordance with paragraphs 2 (c) and 3; or

(b) Where exhumation is a matter of overriding public necessity, including cases of medical and investigative necessity, in which case the High Contracting Party shall at all times respect the remains, and shall give notice to the home country of its intention to exhume the remains together with details of the intended place of reinterment.

PART III

METHODS AND MEANS OF WARFARE

COMBATANT AND PRISONER-OF-WAR STATUS

SECTION I.-METHODS AND MEANS OF WARFARE

Article 35.-Basic rules

1. In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.

2. It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.

3. It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.

Article 36.-New weapons

In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party.

Article 37.-Prohibition of perfidy

1. It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy. The following acts are examples of perfidy:

(a) The feigning of an intent to negotiate under a flag of truce or of a surrender;

(b) The feigning of an incapacitation by wounds or sickness;

(c) The feigning of civilian, non-combatant status; and

(d) The feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict.

2. Ruses of war are not prohibited. Such ruses are acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of international law applicable in armed conflict and which are not perfidious because they do not invite the confidence of an adversary with respect to protection under that

law. The following are examples of such ruses: the use of camouflage, decoys, mock operations and misinformation.

Article 38.-Recognized emblems

1. It is prohibited to make improper use of the distinctive emblem of the red cross, red crescent or red lion and sun or of other emblems, signs or signals provided for by the Conventions or by this Protocol. It is also prohibited to misuse deliberately in an armed conflict other internationally recognized protective emblems, signs or signals, including the flag of truce, and the protective emblem of cultural property.

2. It is prohibited to make use of the distinctive emblem of the United Nations, except as authorized by that Organization.

Article 39.-Emblems of nationality

1. It is prohibited to make use in an armed conflict of the flags or military emblems, insignia or uniforms of neutral or other States not Parties to the conflict.

2. It is prohibited to make use of the flags or military emblems, insignia or uniforms of adverse Parties while engaging in attacks or in order to shield, favour, protect or impede military operations.

3. Nothing in this Article or in Article 37, paragraph 1 (d), shall affect the existing generally recognized rules of international law applicable to espionage or to the use of flags in the conduct of armed conflict at sea.

Article 40.-Quarter

It is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis.

Article 41.-Safeguard of an enemy hors de combat

1. A person who is recognized or who, in the circumstances, should be recognized to be hors de combat shall not be made the object of attack.

2. A person is hors de combat if:

(a) He is in the power of an adverse Party;

(b) He clearly expresses an intention to surrender; or

(c) He has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself; provided that in any of these cases he abstains from any hostile act and does not attempt to escape.

3. When persons entitled to protection as prisoners of war have fallen into the power of an adverse Party under unusual conditions of combat which prevent their evacuation as provided for in Part m, Section I, of the Third Convention, they shall be released and all feasible precautions shall be taken to ensure their safety.

Article 42.-Occupants of aircraft

1. No person parachuting from an aircraft in distress shall be made the object of attack during his descent.

2. Upon reaching the ground in territory controlled by an adverse Party, a person who has parachuted from an aircraft in distress shall be given an opportunity to surrender before being made the object of attack, unless it is apparent that he is engaging in a hostile act.

3. Airborne troops are not protected by this Article.

SECTION.-COMBATANT AND PRISONER-OF-WAR STATUS

Article 43.-Armed forces

1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.

2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.

3. Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.

Article 44.-Combatants and prisoners of war

1. Any combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war.

2. While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant or, if he falls into the power of an adverse Party, of his right to be a prisoner of war, except as provided in paragraphs 3 and 4.

3. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:

(a) During each military engagement, and

(b) During such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.

Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1 (c).

4. A combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol. This protection includes protections equivalent to those accorded to prisoners of war by the Third Convention in the case where such a person is tried and punished for any offences he has committed.

5. Any combatant who falls into the power of an adverse Party while not engaged in an attack or in a military operation preparatory to an attack shall not forfeit his rights to be a combatant and a prisoner of war by virtue of his prior activities.

6. This Article is without prejudice to the right of any person to be a prisoner of war pursuant to Article 4 of the Third Convention.

7. This Article is not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict.

8. In addition to the categories of persons mentioned in Article 13 of the First and Second Conventions, all members of the armed forces of a Party to the conflict, as defined in Article 43 of this Protocol, shall be entitled

to protection under those Conventions if they are wounded or sick or, in the case of the Second Convention, shipwrecked at sea or in other waters.

Article 45.-Protection of persons who have taken part in hostilities

1. A person who takes part in hostilities and falls into the power of an adverse Party shall be presumed to be a prisoner of war, and therefore shall be protected by the Third Convention, if he claims the status of prisoner of war, or if he appears to be entitled to such status, or if the Party on which he depends claims such status on his behalf by notification to the detaining Power or to the Protecting Power. Should any doubt arise as to whether any such person is entitled to the status of prisoner of war, he shall continue to have such status and, therefore, to be protected by the Third Convention and this Protocol until such time as his status has been determined by a competent tribunal.

2. If a person who has fallen into the power of an adverse Party is not held as a prisoner of war and is to be tried by that Party for an offence arising out of the hostilities, he shall have the right to assert his entitlement to prisoner-of-war status before a judicial tribunal and to have that question adjudicated. Whenever possible under the applicable procedure, this adjudication shall occur before the trial for the offence. The representatives of the Protecting Power shall be entitled to attend the proceedings in which that question is adjudicated, unless, exceptionally, the proceedings are held in camera in the interest of State security. In such a case the detaining Power shall advise the Protecting Power accordingly.

3. Any person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol. In occupied territory, an such person, unless he is held as a spy, shall also be entitled, notwithstanding Article 5 of the Fourth Convention, to his rights of communication under that Convention.

Article 46.-Spies

1. Notwithstanding any other provision of the Conventions or of this Protocol, any member of the armed forces of a Party to the conflict who falls into the power of an adverse Party while engaging in espionage shall not have the right to the status of prisoner of war and may be treated as a spy.

2. A member of the armed forces of a Party to the conflict who, on behalf of that Party and in territory controlled by an adverse Party, gathers or attempts to gather information shall not be considered as engaging in espionage if, while so acting, he is in the uniform of his armed forces.

3. A member of the armed forces of a Party to the conflict who is a resident of territory occupied by an adverse Party and who, on behalf of the Party on which he depends, gathers or attempts to gather information of military value within that territory shall not be considered as engaging in espionage unless he does so through an act of false pretences or deliberately in a clandestine manner. Moreover, such a resident shall not lose his right to the status of prisoner of war and may not be treated as a spy unless he is captured while engaging in espionage.

4. A member of the armed forces of a Party to the conflict who is not a resident of territory occupied by an adverse Party and who has engaged in espionage in that territory shall not lose his right to the status of prisoner of war and may not be treated as a spy unless he is captured before he has rejoined the armed forces to which he belongs.

Article 47.-Mercenaries

1. A mercenary shall not have the right to be a combatant or a prisoner of war.

2. A mercenary is any person who:

(a) Is specially recruited locally or abroad in order to fight in an armed conflict;

(b) Does, in fact, take a direct part in the hostilities;

(c) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;

(d) Is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;

(e) Is not a member of the armed forces of a Party to the conflict; and

(f) Has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

PART IV

CIVILIAN POPULATION

SECTION I.-GENERAL PROTECTION AGAINST EFFECTS OF HOSTILITIES

CHAPTER 1.-BASIC RULE AND FIELD OF APPLICATION

Article 48.-Basic rule

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

Article 49.-Definition of attacks and scope of application

1. "Attacks" means acts of violence against the adversary, whether in offence or in defence.
2. The provisions of this Protocol with respect to attacks apply to all attacks in whatever territory conducted, including the national territory belonging to a Party to the conflict but under the control of an adverse Party.
3. The provisions of this Section apply to any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land. They further apply to all attacks from the sea or from the air against objectives on land but do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air.
4. The provisions of this Section are additional to the rules concerning humanitarian protection contained in the Fourth Convention, particularly in Part II thereof, and in other international agreements binding upon the High Contracting Parties, as well as to other rules of international law relating to the protection of civilians and civilian objects on land, at sea or in the air against the effects of hostilities.

CHAPTER 11.-CIVILIANS AND CIVILIAN POPULATION

Article 50.-Definition of civilians and civilian population

1. A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.
2. The civilian population comprises all persons who are civilians.
3. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.

Article 51.-Protection of the civilian population

1. The civilian population and individual civilians shall enjoy general protection against dangers arising from

military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in circumstances.

2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

3. Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.

4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:

(a) Those which are not directed at a specific military objective;

(b) Those which employ a method or means of combat which cannot be directed at a specific military objective; or

(c) Those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

5. Among others, the following types of attacks are to be considered as indiscriminate:

(a) An attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and

(b) An attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

6. Attacks against the civilian population or civilians by way of reprisals are prohibited.

7. The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.

8. Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take the precautionary measures provided for in Article 57.

CHAPTER III.-CIVILIAN OBJECTS

Article 52.-General protection of civilian objects

1. Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.

2. Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military of advantage.

3. In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.

Article 53.-Protection of cultural objects and of places of worship

Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and of other relevant international instruments, it is prohibited:

- (a) To commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples;
- (b) To use such objects in support of the military effort;
- (c) To make such objects the object of reprisals.

Article 54.-Protection of objects indispensable to the survival of the civilian population

1. Starvation of civilians as a method of warfare is prohibited.
2. It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.
3. The prohibitions in paragraph 2 shall not apply to such of the objects covered by it as are used by an adverse Party:
 - (a) As sustenance solely for the members of its armed forces; or
 - (b) If not as sustenance, then in direct support of military action, provided, however, that in no event shall actions against these objects be taken which may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement.
4. These objects shall not be made the object of reprisals.
5. In recognition of the vital requirements of any Party to the conflict in the defence of its national territory against invasion, derogation from the prohibitions contained in paragraph 2 may be made by a Party to the conflict within such territory under its own control where required by imperative military necessity.

Article 55.-Protection of the natural environment

1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.
2. Attacks against the natural environment by way of reprisals are prohibited.

Article 56.-Protection of works and installations containing dangerous forces

1. Works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population. Other military objectives located at or in the vicinity of these works or installations shall not be made the object of attack if such attack may cause the release of dangerous forces from the works or installations and consequent severe losses among the civilian population.
2. The special protection against attack provided by paragraph 1 shall cease:
 - (a) For a dam or a dyke only if it is used for other than its normal function and in regular, significant and direct

support of military operations and if such attack is the only feasible way to terminate such support;

(b) For a nuclear electrical generating station only if it provides electric power in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support;

(c) For other military objectives located at or in the vicinity of these works or installations only if they are used in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support.

3. In all cases, the civilian population and individual civilians shall remain entitled to all the protection accorded them by international law, including the protection of the precautionary measures provided for in Article 57. If the protection ceases and any of the works, installations or military objectives mentioned in paragraph 1 is attacked, all practical precautions shall be taken to avoid the release of the dangerous forces.

4. It is prohibited to make any of the works, installations or military objectives mentioned in paragraph 1 the object of reprisals.

5. The Parties to the conflict shall endeavour to avoid locating any military objectives in the vicinity of the works or installations mentioned in paragraph 1. Nevertheless, installations erected for the sole purpose of defending the protected works or installations from attack are permissible and shall not themselves be made the object of attack, provided that they are not used in hostilities except for defensive actions necessary to respond to attacks against the protected works or installations and that their armament is limited to weapons capable only of repelling hostile action against the protected works or installations.

6. The High Contracting Parties and the Parties to the conflict are urged to conclude further agreements among themselves to provide additional protection for objects containing dangerous forces.

7. In order to facilitate the identification of the objects protected by this article, the Parties to the conflict may mark them with a special sign consisting of a group of three bright orange circles placed on the same axis, as specified in Article 16 of Annex I to this Protocol. The absence of such marking in no way relieves any Party to the conflict of its obligations under this Article.

CHAPTER IV.-PRECAUTIONARY MEASURES

Article 57.-Precautions in attack

1. In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.

2. With respect to attacks, the following precautions shall be taken:

(a) Those who plan or decide upon an attack shall:

(i) Do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them;

(ii) Take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects;

(iii) Refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

(b) An attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

(c) Effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.

3. When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.

4. In the conduct of military operations at sea or in the air, each Party to the conflict shall, in conformity with its rights and duties under the rules of international law applicable in armed conflict, take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.

5. No provision of this Article may be construed as authorizing any attacks against the civilian population, civilians or civilian objects.

Article 58.-Precautions against the effects of attacks

The Parties to the conflict shall, to the maximum extent feasible:

(a) Without prejudice to Article 49 of the Fourth Convention, endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives;

(b) Avoid locating military objectives within or near densely populated areas;

(c) Take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.

CHAPTER V.-LOCALITIES AND ZONES UNDER SPECIAL PROTECTION

Article 59.-Non-defended localities

1. It is prohibited for the Parties to the conflict to attack, by any means whatsoever, non-defended localities.

2. The appropriate authorities of a Party to the conflict may declare as a non-defended locality any inhabited place near or in a zone where armed forces are in contact which is open for occupation by an adverse Party. Such a locality shall fulfil the following conditions:

(a) All combatants, as well as mobile weapons and mobile military equipment must have been evacuated;

(b) No hostile use shall be made of fixed military installations or establishments;

(c) No acts of hostility shall be committed by the authorities or by the population; and

(d) No activities in support of military operations shall be undertaken.

3. The presence, in this locality, of persons specially protected under the Conventions and this Protocol, and of police forces retained for the sole purpose of maintaining law and order, is not contrary to the conditions laid down in paragraph 2.

4. The declaration made under paragraph 2 shall be addressed to the adverse Party and shall define and describe, as precisely as possible, the limits of the non-defended locality. The Party to the conflict to which the declaration is addressed shall acknowledge its receipt and shall treat the locality as a non-defended locality unless the conditions laid down in paragraph 2 are not in fact fulfilled, in which event it shall immediately so inform the Party making the declaration. Even if the conditions laid down in paragraph 2 are not fulfilled, the locality shall continue to enjoy the protection provided by the other provisions of this Protocol and the other rules of international law applicable in armed conflict.

5. The Parties to the conflict may agree on the establishment of non-defended localities even if such localities do not fulfil the conditions laid down in paragraph 2. The agreement should define and describe, as precisely as

possible, the limits of the non-defended locality; if necessary, it may lay down the methods of supervision.

6. The Party which is in control of a locality governed by such an agreement shall mark it, so far as possible, by such signs as may be agreed upon with the other Party, which shall be displayed where they are clearly visible, especially on its perimeter and limits and on highways.

7. A locality loses its status as a non-defended locality when it ceases to fulfil the conditions laid down in paragraph 2 or in the agreement referred to in paragraph 5. In such an eventuality, the locality shall continue to enjoy the protection provided by the other provisions of this Protocol and the other rules of international law applicable in armed conflict.

Article 60.-Demilitarized zones

1. It is prohibited for the Parties to the conflict to extend their military operations to zones on which they have conferred by agreement the status of demilitarized zone, if such extension is contrary to the terms of this agreement.

2. The agreement shall be an express agreement, may be concluded verbally or in writing, either directly or through a Protecting Power or any impartial humanitarian organization, and may consist of reciprocal and concordant declarations. The agreement may be concluded in peacetime, as well as after the outbreak of hostilities, and should define and describe, as precisely as possible, the limits of the demilitarized zone and, if necessary, lay down the methods of supervision.

3. The subject of such an agreement shall normally be any zone which fulfils the following conditions:

- (a) All combatants, as well as mobile weapons and mobile military equipment, must have been evacuated;
- (b) No hostile use shall be made of fixed military installations or establishments;
- (c) No acts of hostility shall be committed by the authorities or by the population; and
- (d) Any activity linked to the military effort must have ceased.

The Parties to the conflict shall agree upon the interpretation to be given to the condition laid down in sub-paragraph (d) and upon persons to be admitted to the demilitarized zone other than those mentioned in paragraph 4.

4. The presence, in this zone, of persons specially protected under the Conventions and this Protocol, and of police forces retained for the sole purpose of maintaining law and order, is not contrary to the conditions laid down in paragraph 3.

5. The Party which is in control of such a zone shall mark it, so far as possible, by such signs as may be agreed upon with the other Party, which shall be displayed where they are clearly visible, especially on its perimeter and limits and on highways.

6. If the fighting draws near to a demilitarized zone, and if the Parties to the conflict have so agreed, none of them may use the zone for purposes related to the conduct of military operations or unilaterally revoke its status.

7. If one of the Parties to the conflict commits a material breach of the provisions of paragraphs 3 or 6, the other Party shall be released from its obligations under the agreement conferring upon the zone the status of demilitarized zone. In such an eventuality, the zone loses its status but shall continue to enjoy the protection provided by the other provisions of this Protocol and the other rules of international law applicable in armed conflict.

CHAPTER VI.-CIVIL DEFENCE

Article 61.-Definitions and scope

For the purposes of this Protocol:

(a) "Civil defence" means the performance of some or all of the undermentioned humanitarian tasks intended to protect the civilian population against the dangers, and to help it to recover from the immediate effects, of hostilities or disasters and also to provide the conditions necessary for its survival. These tasks are:

- (i) Warning; (ii) Evacuation;
 - (iii) Management of shelters;
 - (iv) Management of blackout measures;
 - (v) Rescue;
 - (vi) Medical services, including first aid, and religious assistance;
 - (vii) Fire-fighting;
 - (viii) Detection and marking of danger areas;
 - (ix) Decontamination and similar protective measures;
 - (x) Provision of emergency accommodation and supplies;
 - (xi) Emergency assistance in the restoration and maintenance of order in distressed areas;
 - (xii) Emergency repair of indispensable public utilities;
 - (xiii) Emergency disposal of the dead;
 - (xiv) Assistance in the preservation of objects essential for survival;
 - (xv) Complementary activities necessary to carry out any of the tasks mentioned above, including, but not limited to, planning and organization;
- (b) "Civil defence organizations" means those establishments and other units which are organized or authorized by the competent authorities of a Party to the conflict to perform any of the tasks mentioned under subparagraph (a), and which are assigned and devoted exclusively to such tasks;
- (c) "Personnel" of civil defence organizations means those persons assigned by a Party to the conflict exclusively to the performance of the tasks mentioned under sub-paragraph (a), including personnel assigned by the competent authority of that Party exclusively to the administration of these organizations;
- (d) "Material" of civil defence organizations means equipment, supplies and transports used by these organizations for the performance of the tasks mentioned under sub-paragraph (a).

Article 62.-General protection

1. Civilian civil defence organizations and their personnel shall be respected and protected, subject to the provisions of this Protocol, particularly the provisions of this Section. They shall be entitled to perform their civil defence tasks except in case of imperative military necessity.
2. The provisions of paragraph 1 shall also apply to civilians who, although not members of civilian civil defence organizations, respond to an appeal from the competent authorities and perform civil defence tasks under their control.
3. Buildings and material used for civil defence purposes and shelters provided for the civilian population are covered by Article 52. Objects

used for civil defence purposes may not be destroyed or diverted from their proper use except by the Party to which they belong.

Article 63.-Civil defence in occupied territories

1. In occupied territories, civilian civil defence organizations shall receive from the authorities the facilities necessary for the performance of their tasks. In no circumstances shall their personnel be compelled to perform activities which would interfere with the proper performance of these tasks. The Occupying Power shall not change the structure or personnel of such organizations in any way which might jeopardize the efficient performance of their mission. These organizations shall not be required to give priority to the nationals or interests of that Power.

2. The Occupying Power shall not compel, coerce or induce civilian civil defense organizations to perform their tasks in a manner prejudicial to the interests of the civilian population.

3. The Occupying Power may disarm civil defense personnel for reasons of security.

4. The Occupying Power shall neither divert from their proper use nor requisition buildings or mat,riel belonging to or used by civil defense organizations if such diversion or requisition would be harmful to the civilian population.

5. Provided that the general rule in paragraph 4 continues to be observed, the occupying Power may requisition or divert these resources, subject to the following particular conditions:

(a) That the buildings or mat,riel are necessary for other needs of the civilian population; and

(b) That the requisition or diversion continues only while such necessity exists.

6. The Occupying Power shall neither divert nor requisition shelters provided for the use of the civilian population or needed by such population.

Article 64.-Civilian civil defence organizations of neutral or other States not Parties to the conflict and international co-ordinating organizations

1. Articles 62, 63, 65 and 66 shall also apply to the personnel and mat,riel of civilian civil defence organizations of neutral or other States not Parties to the conflict which perform civil defense tasks mentioned in Article 61 in the territory of a Party to the conflict, with the consent and under the control of that Party. Notification of such assistance shall be given as soon as possible to any adverse Party concerned. In no circumstances shall this activity be deemed to be an interference in the conflict. This activity

should, however, be performed with due regard to the security interests of the Parties to the conflict concerned.

2. The Parties to the conflict receiving the assistance referred to in paragraph 1 and the High Contracting Parties granting it should facilitate international co-ordination of such civil defence actions when appropriate. In such cases the relevant international organizations are covered by the provisions of this Chapter.

3. In occupied territories, the Occupying Power may only exclude or restrict the activities of civilian civil defence organizations of neutral or other States not Parties to the conflict and of international co-ordinating organizations if it can ensure the adequate performance of civil defence tasks from its own resources or those of the occupied territory.

Article 65.-Cessation of protection

1. The protection to which civilian civil defence organizations, their personnel, buildings, shelters and mat,riel are entitled shall not cease unless they commit or are used to commit, outside their proper tasks, acts harmful to the enemy. Protection may, however, cease only after a warning has been given setting, whenever appropriate, a reasonable time-limit, and after such warning has remained unheeded.

2. The following shall not be considered as acts harmful to the enemy:

(a) That civil defence tasks are carried out under the direction or control of military authorities;

(b) That civilian civil defence personnel co-operate with military personnel in the performance of civil defence tasks, or that some military personnel are attached to civilian civil defence organizations;

(c) That the performance of civil defence tasks may incidentally benefit military victims, particularly those who are hors de combat.

3. It shall also not be considered as an act harmful to the enemy that civilian defence personnel bear light individual weapons for the purpose of maintaining order or for self-defence. However, in areas where land fighting is taking place or is likely to take place, the Parties to the conflict shall undertake the appropriate measures to limit these weapons to handguns, such as pistols or revolvers, in order to assist in distinguishing between civil defence personnel and combatants. Although civil defence personnel bear other light individual weapons in such areas, they shall nevertheless be respected and protected as soon as they have been recognized as such.

4. The formation of civilian civil defence organizations along military lines, and compulsory service in them, shall also not deprive them of the protection conferred by this Chapter.

Article 66.-Identification

1. Each Party to the conflict shall endeavour to ensure that its civil defence organizations, their personnel, buildings and materiel, are identifiable while they are exclusively devoted to the performance of civil defence tasks. Shelters provided for the civilian population should be similarly identifiable.

2. Each Party to the conflict shall also endeavour to adopt and implement methods and procedures which will make it possible to recognize civilian shelters as well as civil defence personnel, buildings and materiel on which the international distinctive sign of civil defence is displayed.

3. In occupied territories and in areas where fighting is taking place or is likely to take place, civilian civil defence personnel should be recognizable by the international distinctive sign of civil defence and by an identity and certifying their status.

4. The international distinctive sign of civil defence is an equilateral blue triangle on an orange ground when used for the protection of civil defence organizations, their personnel, buildings and materiel and for civilian shelters.

5. In addition to the distinctive sign, Parties to the conflict may agree upon the use of distinctive signals for civil defence identification purposes.

6. The application of the provisions of paragraphs 1 to 4 is governed by Chapter V of Annex I to this Protocol.

7. In time of peace, the sign described in paragraph 4 may, with the consent of the competent national authorities, be used for civil defence identification purposes.

8. The High Contracting Parties and the Parties to the conflict shall take the measures necessary to supervise the display of the international distinctive sign of civil defence and to prevent and repress any misuse thereof.

9. The identification of civil defence medical and religious personnel, medical units and medical transports is also governed by Article 18.

Article 67.-Members of the armed forces and military units assigned to civil defence organizations

1. Members of the armed forces and military units assigned to civil defence organizations shall be respected and protected, provided that:

(a) Such personnel and such units are permanently assigned and exclusively devoted to the performance of any of the tasks mentioned in Article 61;

(b) If so assigned, such personnel do not perform any other military duties during the conflict;

(c) Such personnel are clearly distinguishable from the other members of the armed forces by prominently displaying the international distinctive sign of civil defence, which shall be as large as appropriate, and such personnel are provided with the identity card referred to in Chapter V of Annexe I to this Protocol certifying their status;

(d) Such personnel and such units are equipped only with light individual weapons for the purpose of maintaining order or for self-defence. The provisions of Article 65, paragraph 3 shall also apply in this case;

(e) Such personnel do not participate directly in hostilities, and do not commit, or are not used to commit, outside their civil defence tasks, acts harmful to the adverse Party;

(f) Such personnel and such units perform their civil defence tasks only within the national territory of their Party.

The non-observance of the conditions stated in (e) above by any member of the armed forces who is bound by the conditions prescribed in (a) and (b) above is prohibited.

2. Military personnel serving within civil defence organizations shall, if they fall into the power of an adverse Party, be prisoners of war. In occupied territory they may, but only in the interest of the civilian population of that territory, be employed on civil defence tasks in so far as the need arises, provided however that, if such work is dangerous, they volunteer for such tasks.

3. The buildings and major items of equipment and transports of military units assigned to civil defence organizations shall be clearly marked with the international distinctive sign of civil defence. This distinctive sign shall be as large as appropriate.

4. The materiel and buildings of military units permanently assigned to civil defence organizations and exclusively devoted to the performance of civil defence tasks shall, if they fall into the hands of an adverse Party, remain subject to the laws of war. They may not be diverted from their civil defence purpose so long as they are required for the performance of civil defence tasks, except in case of imperative military necessity, unless previous arrangements have been made for adequate provision for the needs of the civilian population.

SECTION II.-RELIEF IN FAVOUR OF THE CIVILIAN POPULATION

Article 68.-Field of application

The provisions of this Section apply to the civilian population as defined in this Protocol and are supplementary to Articles 23, 55, 59, 60, 61 and 62 and other relevant provisions of the Fourth Convention.

Article 69.-Basic needs in occupied territories

1. In addition to the duties specified in Article 55 of the Fourth Convention concerning food and medical supplies, the Occupying Power shall, to the fullest extent of the means available to it and without any adverse distinction, also ensure the provision of clothing, bedding, means of shelter, other supplies essential to the survival of the civilian population of the occupied territory and objects necessary for religious worship.

2. Relief actions for the benefit of the civilian population of occupied territories are governed by Articles 59, 60, 61, 62, 108, 109, 110 and 111 of the Fourth Convention, and by Article 71 of this Protocol, and shall be implemented without delay.

Article 70.-Relief actions

1. If the civilian population of any territory under the control of a Party to the conflict, other than occupied

territory, is not adequately provided with the supplies mentioned in Article 69, relief actions which are humanitarian and impartial in character and conducted without any adverse distinction shall be undertaken, subject to the agreement of the Parties concerned in such relief actions. Offers of such relief shall not be regarded as interference in the armed conflict or as unfriendly acts. In the distribution of relief consignments, priority shall be given to those persons, such as children, expectant mothers, maternity cases and nursing mothers, who, under the Fourth Convention or under this Protocol, are to be accorded privileged treatment or special protection.

2. The Parties to the conflict and each High Contracting Party shall allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel provided in accordance with this Section, even if such assistance is destined for the civilian population of the adverse Party.

3. The Parties to the conflict and each High Contracting Party which allow the passage of relief consignments, equipment and personnel in accordance with paragraph 2:

(a) Shall have the right to prescribe the technical arrangements, including search, under which such passage is permitted;

(b) May make such permission conditional on the distribution of this assistance being made under the local supervision of a Protecting Power;

(c) Shall, in no way whatsoever, divert relief consignments from the purpose for which they are intended nor delay their forwarding, except in cases of urgent necessity in the interest of the civilian population concerned.

4. The Parties to the conflict shall protect relief consignments and facilitate their rapid distribution.

5. The Parties to the conflict and each High Contracting Party concerned shall encourage and facilitate effective international co-ordination of the relief actions referred to in paragraph 1.

Article 71.-Personnel participating in relief actions

1. Where necessary, relief personnel may form part of the assistance provided in any relief action, in particular for the transportation and distribution of relief consignments; the participation of such personnel shall be subject to the approval of the Party in whose territory they will carry out their duties.

2. Such personnel shall be respected and protected.

3. Each Party in receipt of relief consignments shall, to the fullest extent practicable, assist the relief personnel referred to in paragraph 1 in carrying out their relief mission. Only in case of imperative military necessity may the activities of the relief personnel be limited or their movements temporarily restricted.

4. Under no circumstances may relief personnel exceed the terms of their mission under this Protocol. In particular they shall take account of the security requirements of the Party in whose territory they are carrying out their duties. The mission of any of the personnel who do not respect these conditions may be terminated.

SECTION III.-TREATMENT OF PERSONS IN THE POWER OF A PARTY TO THE CONFLICT

CHAPTER 1.-FIELD OF APPLICATION AND PROTECTION OF PERSONS AND OBJECTS

Article 72.-Field of application

The provisions of this Section are additional to the rules concerning humanitarian protection of civilians and civilian objects in the power of a Party to the conflict contained in the Fourth Convention, particularly Parts I and m thereof, as well as to other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict.

Article 73.-Refugees and stateless persons

Persons who, before the beginning of hostilities, were considered as stateless persons or refugees under the relevant international instruments accepted by the Parties concerned or under the national legislation of the State of refuge or State of residence shall be protected persons within the meaning of Parts I and III of the Fourth Convention, in all circumstances and without any adverse distinction.

Article 74.-Reunion of dispersed families

The High Contracting Parties and the Parties to the conflict shall facilitate in every possible way the reunion of families dispersed as a result of armed conflicts and shall encourage in particular the work of the humanitarian organizations engaged in this task in accordance with the provisions of the Conventions and of this Protocol and in conformity with their respective security regulations.

Article 75.-Fundamental guarantees

1. In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons.

2. The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:

(a) Violence to the life, health, or physical or mental well-being of persons, in particular:

(i) Murder;

(ii) Torture of all kinds, whether physical or mental;

(iii) Corporal punishment ; and

(iv) Mutilation;

(b) Outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault;

(c) The taking of hostages;

(d) Collective punishments; and

(e) Threats to commit any of the foregoing acts.

3. Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.

4. No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following:

(a) The procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;

- (b) No one shall be convicted of an offence except on the basis of individual penal responsibility;
- (c) No one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;
- (d) Anyone charged with an offence is presumed innocent until proved guilty according to law;
- (e) Anyone charged with an offence shall have the right to be tried in his presence;
- (f) No one shall be compelled to testify against himself or to confess guilt;
- (g) Anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (h) No one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgement acquitting or convicting that person has been previously pronounced under the same law and judicial procedure;
- (i) Anyone prosecuted for an offence shall have the right to have the judgement pronounced publicly; and
- (i) A convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised.

5. Women whose liberty has been restricted for reasons related to the armed conflict shall be held in quarters separated from men's quarters. They shall be under the immediate supervision of women. Nevertheless, in cases

where families are detained or interned, they shall, whenever possible, be held in the same place and accommodated as family units.

6. Persons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by this Article until their final release, repatriation or re-establishment, even after the end of the armed conflict.

7. In order to avoid any doubt concerning the prosecution and trial of persons accused of war crimes or crimes against humanity, the following principles shall apply:

(a) Persons who are accused of such crimes should be submitted for the purpose of prosecution and trial in accordance with the applicable rules of international law; and

(b) Any such persons who do not benefit from more favourable treatment under the Conventions or this Protocol shall be accorded the treatment provided by this Article, whether or not the crimes of which they are accused constitute grave breaches of the Conventions or of this Protocol.

8. No provision of this Article may be construed as limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law, to persons covered by paragraph 1.

CHAPTER 11.-MEASURES IN FAVOUR OF WOMEN AND CHILDREN

Article 76.-Protection of women

1. Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault.

2. Pregnant women and mothers having dependent infants who are arrested, detained or interned for reasons related to the armed conflict, shall have their cases considered with the utmost priority.

3. To the maximum extent feasible, the Parties to the conflict shall endeavour to avoid the pronouncement of the death penalty on pregnant women or mothers having dependent infants, for an offence related to the armed conflict. The death penalty for such offences shall not be executed on such women.

Article 77.-Protection of children

1. Children shall be the object of special respect and shall be protected against any form of indecent assault. The Parties to the conflict shall

provide them with the care and aid they require, whether because of their age or for any other reason.

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

3. If, in exceptional cases, despite the provisions of paragraph 2, children who have not attained the age of fifteen years take a direct part in hostilities and fall into the power of an adverse Party, they shall continue to benefit from the special protection accorded by this Article, whether or not they are prisoners of war.

4. If arrested, detained or interned for reasons related to the armed conflict, children shall be held in quarters separate from the quarters of adults, except where families are accommodated as family units as provided in Article 75, paragraph 5.

5. The death penalty for an offence related to armed conflict shall not be executed on persons who had not attained the age of eighteen years at the time the offence was committed.

Article 78.-Evacuation of children

1. No Party to the conflict shall arrange for the evacuation of children, other than its own nationals, to a foreign country except for a temporary evacuation where compelling reasons of the health or medical treatment of the children or, except in occupied territory, their safety, so require. Where the parents or legal guardians can be found, their written consent to such evacuation is required. If these persons cannot be found, the written consent to such evacuation of the persons who by law or custom are primarily responsible for the care of the children is required. Any such evacuation shall be supervised by the Protecting Power in agreement with the Parties concerned, namely, the Party arranging for the evacuation, the Party receiving the children and any Parties whose nationals are being evacuated. In each case, all Parties to the conflict shall take all feasible precautions to avoid endangering the evacuation.

2. Whenever an evacuation occurs pursuant to paragraph 1, each child's education, including his religious and moral education as his parents desire, shall be provided while he is away with the greatest possible continuity.

3. With a view to facilitating the return to their families and country of children evacuated pursuant to this Article, the authorities of the Party ar

ranging for the evacuation and, as appropriate, the authorities of the receiving country shall establish for each child a card with photographs, which they shall send to the Central Tracing Agency of the International Committee of the Red Cross. Each card shall bear, whenever possible, and whenever it involves no risk of harm to the child, the following information:

(a) Surname(s) of the child;

(b) The child's first name(s);

- (c) The child's sex;
- (d) The place and date of birth (or, if that date is not known, the approximate age);
- (e) The father's full name;
- (f) The mother's full name and her maiden name;
- (g) The child's next-of-kin;
- (h) The child's nationality;
- (i) The child's native language, and any other languages he speaks;
- (j) The address of the child's family;
- (k) Any identification number for the child;
- (l) The child's state of health;
- (m) The child's blood group;
- (n) Any distinguishing features;
- (o) The date on which and the place where the child was found;
- (p) The date on which and the place from which the child left the country;
- (q) The child's religion, if any;
- (r) The child's present address in the receiving country;
- (s) Should the child die before his return, the date, place and circumstances of death and place of interment.

CHAPTER III.-JOURNALISTS

Article 79.-Measures of protection for journalists

1. Journalists engaged in dangerous professional missions in areas of armed conflict shall be considered as civilians within the meaning of Article 50, paragraph 1.
2. They shall be protected as such under the Conventions and this Protocol, provided that they take no action adversely affecting their status as civilians, and without prejudice to the right of war correspondents accredited to the armed forces to the status provided for in Article 4 A (4) of the Third Convention.
3. They may obtain an identity card similar to the model in Annex II of this Protocol. This card, which shall be issued by the government of the State of which the journalist is a national or in whose territory he resides or in which the news medium employing him is located, shall attest to his status as a journalist .

PART V EXECUTION OF THE CONVENTIONS AND OF THIS PROTOCOL

SECTION I._GENERAL PROVISIONS

Article 80.-Measures for execution

1. The High Contracting Parties and the Parties to the conflict shall without delay take all necessary measures for the execution of their obligations under the Conventions and this Protocol.

2. The High Contracting Parties and the Parties to the conflict shall give orders and instructions to ensure observance of the Conventions and this Protocol, and shall supervise their execution.

Article 81.-Activities of the Red Cross and other humanitarian organizations

1. The Parties to the conflict shall grant to the International Committee of the Red Cross all facilities within their power so as to enable it to carry out the humanitarian functions assigned to it by the Conventions and this Protocol in order to ensure protection and assistance to the victims of conflicts; the International Committee of the Red Cross may also carry out any other humanitarian activities in favour of these victims, subject to the consent of the Parties to the conflict concerned.

2. The Parties to the conflict shall grant to their respective Red Cross (Red Crescent, Red Lion and Sun) organizations the facilities necessary for carrying out their humanitarian activities in favour of the victims of the conflict, in accordance with the provisions of the Conventions and this Protocol and the fundamental principles of the Red Cross as formulated by the International Conferences of the Red Cross.

3. The High Contracting Parties and the Parties to the conflict shall facilitate in every possible way the assistance which Red Cross (Red Crescent, Red Lion and Sun) organizations and the League of Red Cross Societies extend to the victims of conflicts in accordance with the provisions of the Conventions and this Protocol and with the fundamental principles of the Red Cross as formulated by the International Conferences of the Red Cross.

4. The High Contracting Parties and the Parties to the conflict shall, as far as possible, make facilities similar to those mentioned in paragraphs 2 and 3 available to the other humanitarian organizations referred to in the Conventions and this Protocol which are duly authorized by the respective Parties to the conflict and which perform their humanitarian activities in accordance with the provisions of the Conventions and this Protocol.

Article 82.-Legal advisers in armed forces

The High Contracting Parties at all times, and the Parties to the conflict in time of armed conflict, shall ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject.

Article 83.-Dissemination

1. The High Contracting Parties undertake, in time of peace as in time of armed conflict, to disseminate the Conventions and this Protocol as widely as possible in their respective countries and, in particular, to include the study thereof in their programmes of military instruction and to encourage the study thereof by the civilian population, so that those instruments may become known to the armed forces and to the civilian population.

2. Any military or civilian authorities who, in time of armed conflict, assume responsibilities in respect of the application of the Conventions and this Protocol shall be fully acquainted with the text thereof.

Article 84.-Rules of application

The High Contracting Parties shall communicate to one another, as soon as possible, through the depositary and, as appropriate, through the Protecting Powers, their official translations of this Protocol, as well as the laws and regulations which they may adopt to ensure its application.

SECTION II.-REPRESSION OF BREACHES OF THE CONVENTIONS AND OF THIS PROTOCOL

Article 85.-Repression of breaches of this Protocol

1. The provisions of the Conventions relating to the repression of breaches and grave breaches, supplemented by this Section, shall apply to the repression of breaches and grave breaches of this Protocol.

2. Acts described as grave breaches in the Conventions are grave breaches of this Protocol if committed against

persons in the power of an adverse Party protected by Articles 44, 45 and 73 of this Protocol, or against the wounded, sick and shipwrecked of the adverse Party who are protected by this Protocol, or against those medical or religious personnel, medical units or medical transports which are under the control of the adverse Party and are protected by this Protocol.

3. In addition to the grave breaches defined in Article 11, the following acts shall be regarded as grave breaches of this Protocol, when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health:

- (a) Making the civilian population or individual civilians the object of attack;
- (b) Launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a) (iii);
- (c) Launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a) (iii);
- (d) Making non-defended localities and demilitarized zones the object of attack;
- (e) Making a person the object of attack in the knowledge that he is hors de combat;
- (f) The perfidious use, in violation of Article 37, of the distinctive emblem of the red cross, red crescent or red lion and sun or of other protective signs recognized by the Conventions or this Protocol.

4. In addition to the grave breaches defined in the preceding paragraphs and in the Conventions, the following shall be regarded as grave breaches of this Protocol, when committed wilfully and in violation of the Conventions of the Protocol;

- (a) The transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention;
- (b) Unjustifiable delay in the repatriation of prisoners of war or civilians;
- (c) Practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination;
- (d) Making the clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of Article 53, sub-paragraph (b), and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives;
- (e) Depriving a person protected by the Conventions or referred to in paragraph 2 of this Article of the rights of fair and regular trial.

5. Without prejudice to the application of the Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes.

Article 86.-Failure to act

1. The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.

2. The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.

Article 87.-Duty of commanders

1. The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol.

2. In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.

3. The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.

Article 88.-Mutual assistance in criminal matters

1. The High Contracting Parties shall afford one another the greatest measure of assistance in connexion with criminal proceedings brought in respect of grave breaches of the Conventions or of this Protocol.

2. Subject to the rights and obligations established in the Conventions and in Article 85, paragraph 1, of this Protocol, and when circumstances permit, the High Contracting Parties shall co-operate in the matter of extradition. They shall give due consideration to the request of the State in whose territory the alleged offence has occurred.

3. The law of the High Contracting Party requested shall apply in all cases. The provisions of the preceding paragraphs shall not, however, affect the obligations arising from the provisions of any other treaty of a bilateral or multilateral nature which governs or will govern the whole or part of the subject of mutual assistance in criminal matters.

Article 89.-Co-operation

In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter.

Article 90.-International Fact-Finding Commission

1. (a) An International Fact-Finding Commission (hereinafter referred to as "the Commission") consisting of fifteen members of high moral standing and acknowledged impartiality shall be established.

(b) When not less than twenty High Contracting Parties have agreed to accept the competence of the Commission pursuant to paragraph 2, the depositary shall then, and at intervals of five years thereafter, convene a meeting of representatives of those High Contracting Parties for the purpose of electing the members of the Commission. At the meeting, the representatives shall elect the members of the Commission by secret ballot from a list of persons to which each of those High Contracting Parties may nominate one person.

(c) The members of the Commission shall serve in their personal capacity and shall hold office until the election of new members at the ensuing meeting.

(d) At the election, the High Contracting Parties shall ensure that the persons to be elected to the Commission individually possess the qualifications required and that, in the Commission as a whole, equitable geographical representation is assured.

(e) In the case of a casual vacancy, the Commission itself shall fill the Z vacancy, having due regard to the provisions of the preceding sub paragraphs.

(f) the depositary shall make available to the Commission the necessary administrative facilities for the performance of its functions.

2. (a) The High Contracting Parties may at the time of signing, ratifying or acceding to the Protocol, or at any other subsequent time, declare that they recognize ipsofacto and without special agreement, in relation to any other High Contracting Party accepting the same obligation, the competence of the Commission to enquire into allegations by such other Party, as authorized by this Article.

(b) The declarations referred to above shall be deposited with the depositary, which shall transmit copies thereof to the High Contracting Parties.

(c) The Commission shall be competent to:

(i) Enquire into any facts alleged to be a grave breach as defined in the Conventions and this Protocol or other serious violation of the Conventions or of this Protocol;

(ii) Facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and this Protocol.

(d) In other situations, the Commission shall institute an enquiry at the request of a Party to the conflict only with the consent of the other Party or Parties concerned.

(e) Subject to the foregoing provisions of this paragraph, the provisions of Article 52 of the First Convention, Article 53 of the Second Convention, Article 132 of the Third Convention and Article 149 of the Fourth Convention shall continue to apply to any alleged violation of the Conventions and shall extend to any alleged violation of this Protocol.

3. (a) Unless otherwise agreed by the Parties concerned, all enquiries shall be undertaken by a Chamber consisting of seven members appointed as follows:

(i) Five members of the Commission, not nationals of any Party to the conflict, appointed by the President of the Commission on the basis of equitable representation of the geographical areas, after consultation with the Parties to the conflict;

(ii) Two ad hoc members, not nationals of any Party to the conflict, one to be appointed by each side.

(b) Upon receipt of the request for an enquiry, the President of the Commission shall specify an appropriate time limit for setting up a Chamber. If any ad hoc member has not been appointed within the time limit, the President shall immediately appoint such additional member or members of the Commission as may be necessary to complete the membership of the Chamber.

4. (a) The Chamber set up under paragraph 3 to undertake an enquiry shall invite the Parties to the conflict to assist it and to present evidence. The Chamber may also seek such other evidence as it deems appropriate and may carry out an investigation of the situation in loco.

(b) All evidence shall be fully disclosed to the Parties, which shall have the right to comment on it to the Commission.

(c) Each Party shall have the right to challenge such evidence.

5. (a) The Commission shall submit to the Parties a report on the findings of fact of the Chamber, with such

recommendations as it may deem appropriate.

(b) If the Chamber is unable to secure sufficient evidence for factual and impartial findings, the Commission shall state the reasons for that inability.

(c) The Commission shall not report its findings publicly, unless all the Parties to the conflict have requested the Commission to do so.

6. The Commission shall establish its own rules, including rules for the presidency of the Commission and the presidency of the Chamber. Those rules shall ensure that the functions of the President of the Commission are exercised at all times and that, in the case of an enquiry, they are exercised by a person who is not a national of a Party to the conflict.

7. The administrative expenses of the Commission shall be met by contributions from the High Contracting Parties which made declarations under paragraph 2, and by voluntary contributions. The Party or Parties to the conflict requesting an enquiry shall advance the necessary funds for expenses incurred by a Chamber and shall be reimbursed by the Party or Parties against which the allegations are made to the extent of fifty per cent of the costs of the Chamber. Where there are counter-allegations before the Chamber each side shall advance fifty per cent of the necessary funds.

Article 91.-Responsibility

A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

PART VI FINAL PROVISIONS

Article 92.-Signature

This Protocol shall be open for signature by the Parties to the Conventions six months after the signing of the Final Act and will remain open for a period of twelve months.

Article 93.-Ratification

This Protocol shall be ratified as soon as possible. The instruments of ratification shall be deposited with the Swiss Federal Council, depositary of the Conventions.

Article 94.-Accession

This Protocol shall be open for accession by any Party to the Conventions which has not signed it. The instruments of accession shall be deposited with the depositary.

Article 95.-Entry into force

1. This Protocol shall enter into force six months after two instruments of ratification or accession have been deposited.

2. For each Party to the Conventions thereafter ratifying or acceding to this Protocol, it shall enter into force six months after the deposit by such Party of its instrument of ratification or accession.

Article 96.-Treaty relations upon entry into force of this Protocol

1. When the Parties to the Conventions are also Parties to this Protocol, the Conventions shall apply as supplemented by this Protocol.

2. When one of the Parties to the conflict is not bound by this Protocol, the Parties to the Protocol shall remain bound by it in their mutual relations. They shall furthermore be bound by this Protocol in relation to each of the

Parties which are not bound by it, if the latter accepts and applies the provisions thereof.

3. The authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in Article 1, paragraph 4, may undertake to apply the Conventions and this Protocol in relation to that conflict by means of a unilateral declaration addressed to the depositary. Such declaration shall, upon its receipt by the depositary, have in relation to that conflict the following effects:

(a) The Conventions and this Protocol are brought into force for the said authority as a Party to the conflict with immediate effect;

(b) The said authority assumes the same rights and obligations as those which have been assumed by a High Contracting Party to the Conventions and this Protocol; and

(c) The Conventions and this Protocol are equally binding upon all Parties to the conflict.

Article 97.-Amendment

1. Any High Contracting Party may propose amendments to this Protocol. The text of any proposed amendment shall be communicated to the depositary, which shall decide, after consultation with all the High Contracting Parties and the International Committee of the Red Cross, whether a conference should be convened to consider the proposed amendment.

2. The depositary shall invite to that conference all the High Contracting Parties as well as the Parties to the Conventions, whether or not they are signatories of this Protocol.

Article 98.-Revision of Annex I

1. Not later than four years after the entry into force of this Protocol and thereafter at intervals of not less than four years, the International Committee of the Red Cross shall consult the High Contracting Parties concerning Annex I to this Protocol and, if it considers it necessary, may propose a meeting of technical experts to review Annex I and to propose such amendments to it as may appear to be desirable. Unless, within six months of the communication of a proposal for such a meeting to the High Contracting Parties, one third of them object, the International Committee of the Red Cross shall convene the meeting, inviting also observers of appropriate international organizations. Such a meeting shall also be convened by the International Committee of the Red Cross at any time at the request of one third of the High Contracting Parties.

2. The depositary shall convene a conference of the High Contracting Parties and the Parties to the Conventions to consider amendments proposed by the meeting of technical experts if, after that meeting, the International Committee of the Red Cross or one third of the High Contracting Parties so request.

3. Amendments to Annex I may be adopted at such a conference by a two-thirds majority of the High Contracting Parties present and voting.

4. The depositary shall communicate any amendment so adopted to the High Contracting Parties and to the Parties to the Conventions. The amendment shall be considered to have been accepted at the end of a period

of one year after it has been so communicated, unless within that period a declaration of non-acceptance of the amendment has been communicated to the depositary by not less than one third of the High Contracting Parties.

5. An amendment considered to have been accepted in accordance with paragraph 4 shall enter into force three months after its acceptance for all High Contracting Parties other than those which have made a declaration of non-acceptance in accordance with that paragraph. Any Party making such a declaration may at any time withdraw it and the amendment shall then enter into force for that Party three months thereafter.

6. The depositary shall notify the High Contracting Parties and the Parties to the Conventions of the entry into force of any amendment, of the Parties bound thereby, of the date of its entry into force in relation to each Party, of declarations of non-acceptance made in accordance with paragraph 4, and of withdrawals of such declarations.

Article 99.-Denunciation

1. In case a High Contracting Party should denounce this Protocol, the denunciation shall only take effect one year after receipt of the instrument of denunciation. If, however, on the expiry of that year the denouncing Party is engaged in one of the situations referred to in Article 1, the denunciation shall not take effect before the end of the armed conflict or occupation and not, in any case, before operations connected with the final release, repatriation or re-establishment of the persons protected by the Conventions or this Protocol have been terminated.

2. The denunciation shall be notified in writing to the depositary, which shall transmit it to all the High Contracting Parties.

3. The denunciation shall have effect only in respect of the denouncing Party.

4. Any denunciation under paragraph I shall not affect the obligations already incurred, by reason of the armed conflict, under this Protocol by such denouncing Party in respect of any act committed before this denunciation becomes effective.

Article 100.-Notifications

The depositary shall inform the High Contracting Parties as well as the Parties to the Conventions, whether or not they are signatories of this Protocol, of:

(a) Signatures affixed to this Protocol and the deposit of instruments of ratification and accession under Articles 93 and 94;

(b) The date of entry into force of this Protocol under Article 95;

(c) Communications and declarations received under Articles 84, 90 and 97.

(d) Declarations received under Article 96, paragraph 3, which shall be communicated by the quickest methods; and

(e) Denunciations under Article 99.

Article 101.-Registration

1. After its entry into force, this Protocol shall be transmitted by the depositary to the Secretariat of the United Nations for registration and publication, in accordance with Article 102 of the Charter of the United Nations.

2. The depositary shall also inform the Secretariat of the United Nations of all ratifications, accessions and denunciations received by it with respect to this Protocol.

Article 102.-Authentic texts

The original of this Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the depositary, which shall transmit certified true copies thereof to all the Parties to the Conventions.

ANNEX I

Regulations concerning identification

CHAPTER 1.-IDENTITY CARDS

Article I.-Identity card for permanent civilian medical and religious personnel

1. The identity card for permanent civilian medical and religious personnel referred to in Article 18, paragraph

3, of the Protocol should:

- (a) Bear the distinctive emblem and be of such size that it can be carried in the pocket;
 - (b) Be as durable as practicable;
 - (c) Be worded in the national or official language (and may in addition be worded in other languages);
 - (d) Mention the name, the date of birth (or, if that date is not available, the age at the time of issue) and the identity number, if any, of the holder,
 - (e) State in what capacity the holder is entitled to the protection of the Conventions and of the Protocol;
 - (f) Bear the photograph of the holder as well as his signature or this thumbprint, or both;
 - (g) Bear the stamp and signature of the competent authority;
 - (h) State the date of issue and date of expiry of the card.
2. The identity card shall be uniform throughout the territory of each High Contracting Party and, as far as possible, of the same type for all Parties to the conflict. The Parties to the conflict may be guided by the single-language model shown in Figure 1. At the outbreak of hostilities, they shall transmit to each other a specimen of the model they are using, if such model differs from that shown in Figure 1. The identity card shall be made out, if possible, in duplicate, one copy being kept by the issuing authority, which should maintain control of the cards which it has issued.

3. In no circumstances may permanent civilian medical and religious personnel be deprived of their identity cards. In the event of the loss of a card, they shall be entitled to obtain a duplicate copy.

Article 2.-Identity card for temporary civilian medical and religious personnel

1. The identity card for temporary civilian medical and religious personnel should, whenever possible, be similar to that provided for in Article I of these Regulations. The Parties to the conflict may be guided by the model shown in Figure 1.
2. When circumstances preclude the provision to temporary civilian medical and religious personnel of identity cards similar to those described in Article I of these Regulations, the said personnel may be provided with a certificate signed by the competent authority certifying that the person to whom it is issued is assigned to duty as temporary personnel and stating, if possible, the duration of such assignment and his right to wear the distinctive emblem. The certificate should mention the holder's name and date of birth (or if that date is not available, his age at the time when the certificate was issued), his function and identity number, if any. It shall bear his signature or his thumbprint, or both.

CHAPTER 11.-THE DISTINCTIVE EMBLEM

Article 3.-Shape and nature

1. The distinctive emblem (red on a white ground) shall be as large as appropriate under the circumstances. For the shapes of the cross, the crescent or the lion and sun, the High Contracting Parties may be guided by the models shown in Figure 2.
2. At night or when visibility is reduced, the distinctive emblem may be lighted or illuminated; it may also be made of materials rendering it recognizable by technical means of detection.

Article 4.-Use

1. The distinctive emblem shall, whenever possible, be displayed on a flat surface or on flags visible from as many directions and from as far away as possible.

2. Subject to the instructions of the competent authority, medical and religious personnel carrying out their duties in the battle area shall, as far as possible, wear headgear and

clothing bearing the distinctive emblem.

CHAPTER 111.-DISTINCTIVE SIGNALS

Article 5.-Optional Use

1. Subject to the provisions of Article 6 of these Regulations, the signals specified in this Chapter for exclusive use by medical units and transports shall not be used for any other purpose. The use of all signals referred to in this Chapter is optional.

2. Temporary medical aircraft which cannot, either for lack of time or because of their characteristics, be marked with the distinctive emblem, may use the distinctive signals authorized in this Chapter. The best method of effective identification and recognition of medical aircraft is, however, the use of a visual signal, either the distinctive emblem or the light signal specified in Article 6, or both, supplemented by the other signals referred to in Articles 7 and 8 of these Regulations .

Article 6.-Light signal

1. The light signal, consisting of a flashing blue light, is established for the use of medical aircraft to signal their identity. No other aircraft shall use this signal. The recommended blue colour is obtained by using, as trichromatic co-ordinates:

green boundary $y = 0.065 + 0.805x$

white boundary $y = 0.400 - x$

purple boundary $x = 0.133 + 0.600y$

The recommended flashing rate of the blue light is between sixty and one hundred flashes per minute.

2. Medical aircraft should be equipped with such lights as may be necessary to make the light signal visible in as many directions as possible.

3. In the absence of a special agreement between the Parties to the conflict reserving the use of flashing blue lights for the identification of medical vehicles and ships and craft, the use of such signals for other vehicles or ships is not prohibited.

Article 7.-Radio signal

1. The radio signal shall consist of a radiotelephonic or radiotelegraphic message preceded by a distinctive priority signal to be designated and approved by a World Administrative Radio Conference of the International Telecommunication Union. It shall be transmitted three times before the call sign of the medical transport involved. This message shall be transmitted in English at appropriate intervals on a frequency or frequencies specified pursuant to paragraph 3. The use of the priority signal shall be restricted exclusively to medical units and transports.

2. The radio message preceded by the distinctive priority signal mentioned in paragraph I shall convey the following data:

(a) Call sign of the medical transport;

(b) Position of the medical transport;

(c) Number and type of medical transports;

(d) Intended route;

(e) Estimated time en route and of departure and arrival, as appropriate;

(f) Any other information such as flight altitude, radio frequencies guarded, languages and secondary surveillance radar modes and codes.

3. In order to facilitate the communications referred to in paragraphs 1 and 2, as well as the communications referred to in Articles 22, 23, 25, 26, 27, 28, 29, 30 and 31 of the Protocol, the High Contracting Parties, the Parties to a conflict, or one of the Parties to a conflict, acting in agreement or alone, may designate, in accordance with the Table of Frequency Allocations in the Radio Regulations annexed to the International Telecommunication Convention, and publish selected national frequencies to be used by them for such communications. These frequencies shall be notified to the International Telecommunication Union in accordance with procedures to be approved by a World Administrative Radio Conference.

Article 8.-Electronic identification

1. The Secondary Surveillance Radar (SSR) system, as specified in Annex 10 to the Chicago Convention on International Civil Aviation of 7 December 1944, as amended from time to time, may be used to identify and to follow the course of medical aircraft. The SSR mode and code to be reserved for the exclusive use of medical aircraft shall be established by the High Contracting Parties, the Parties to a conflict, or one of the Parties to a conflict, acting in agreement or alone, in accordance with procedures to be recommended by the International Civil Aviation Organization.

2. Parties to a conflict may, by special agreement between them, establish for their use a similar electronic system for the identification of medical vehicles, and medical ships and craft.

CHAPTER IV.-COMMUNICATIONS

Article 9.-Radiocommunications

The priority signal provided for in Article 7 of these Regulations may precede appropriate radiocommunications by medical units and transports in the application of the procedures carried out under Articles 22, 23, 25, 26, 27, 28, 29, 30 and 31 of the Protocol.

Article 10.-Use of international codes

Medical units and transports may also use the codes and signals laid down by the International Telecommunication Union, the International Civil Aviation Organization and the Inter-Governmental Maritime Consultative Organization. These codes and signals shall be used in accordance with the standards, practices and procedures established by these Organizations.

Article 11.-Other means of communication

When two-way radiocommunication is not possible, the signals provided for in the International Code of Signals adopted by the Inter-Governmental Maritime Consultative Organization or in the appropriate Annex to the Chicago Convention on International Civil Aviation of 7 December 1944, as amended from time to time, may be used.

Article 12.-Flight plans

The agreements and notifications relating to flight plans provided for in Article 29 of the Protocol shall as far as possible be formulated in accordance with procedures laid down by the International Civil Aviation Organization.

Article 13.-Signals and procedures for the interception of medical aircraft

If an intercepting aircraft is used to verify the identity of a medical aircraft in flight or to require it to land in

accordance with Articles 30 and 31 of the Protocol, the standard visual and radio interception procedures prescribed by Annex 2 to the Chicago Convention on International Civil Aviation of 7 December 1944, as amended from time to time, should be used by the intercepting and the medical aircraft.

CHAPTER V.-CIVIL DEFENCE

Article 14.-Identity card

1. The identity card of the civil defence personnel provided for in Article 66, paragraph 3, of the Protocol is governed by the relevant provisions of Article I of these Regulations.
2. The identity card for civil defence personnel may follow the model shown in Figure 3.
3. If civil defence personnel are permitted to carry light individual weapons, an entry to that effect should be made on the card mentioned.

Article 15.-International distinctive sign

1. The international distinctive sign of civil defence provided for in Article 66, paragraph 4, of the Protocol is an equilateral blue triangle on an orange ground. A model is shown in Figure 4:
2. It is recommended that:
 - (a) If the blue triangle is on a flag or armlet or tabard, the ground to the triangle be the orange flag, armlet or tabard;
 - (b) One of the angles of the triangle be pointed vertically upwards;
 - (c) No angle of the triangle touch the edge of the orange ground.
3. The international distinctive sign shall be as large as appropriate under the circumstances. The distinctive sign shall, whenever possible, be displayed on flat surfaces or on flags visible from as many directions and from as far away as possible. Subject to the instructions of the competent authority, civil defence personnel shall, as far as possible, wear headgear and clothing bearing the international distinctive sign. At night or when visibility is reduced, the sign may be lighted or illuminated; it may also be made of materials rendering it recognizable by technical means of detection.

CHAPTER VI.-WORKS AND INSTALLATIONS CONTAINING DANGEROUS FORCES

Article 16.-International special sign

1. The international special sign for works and installations containing dangerous forces, as provided for in Article 56, paragraph 7, of the Protocol, shall be a group of three bright orange circles of equal size, placed on the same axis, the distance between each circle being one radius, in accordance with Figure 5 illustrated below.
2. The sign shall be as large as appropriate under the circumstances. When displayed over an extended surface it may be repeated as often as appropriate under the circumstances. It shall, whenever possible, be displayed on flat surfaces or on flags so as to be visible from as many directions and from as far away as possible.
3. On a flag, the distance between the outer limits of the sign and the adjacent sides of the flag shall be one radius of a circle. The flag shall be rectangular and shall have a white ground.
4. At night or when visibility is reduced, the sign may be lighted or illuminated. It may also be made of materials rendering it recognizable by technical means of detection.

<http://www.ratical.org/ratville/CAH/GenevaPI1977.html>

San Remo Manual on International Law Applicable to Armed Conflicts at Sea, 12 June 1994

PART I : GENERAL PROVISIONS

SECTION I : SCOPE OF APPLICATION OF THE LAW

1. The parties to an armed conflict at sea are bound by the principles and rules of international humanitarian law from the moment armed force is used.
2. In cases not covered by this document or by international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of the public conscience.

SECTION II : ARMED CONFLICTS AND THE LAW OF SELF-DEFENCE

3. The exercise of the right of individual or collective self-defence recognized in Article 51 of the Charter of the United Nations is subject to the conditions and limitations laid down in the Charter, and arising from general international law, including in particular the principles of necessity and proportionality.
4. The principles of necessity and proportionality apply equally to armed conflict at sea and require that the conduct of hostilities by a State should not exceed the degree and kind of force, not otherwise prohibited by the law of armed conflict, required to repel an armed attack against it and to restore its security.
5. How far a State is justified in its military actions against the enemy will depend upon the intensity and scale of the armed attack for which the enemy is responsible and the gravity of the threat posed.
6. The rules set out in this document and any other rules of international humanitarian law shall apply equally to all parties to the conflict. The equal application of these rules to all parties to the conflict shall not be affected by the international responsibility that may have been incurred by any of them for the outbreak of the conflict.

SECTION IV : AREAS OF NAVAL WARFARE

10. Subject to other applicable rules of the law of armed conflict at sea contained in this document or elsewhere, hostile actions by naval forces may be conducted in, on or over:
 - (a) the territorial sea and internal waters, the land territories, the exclusive economic zone and continental shelf and, where applicable, the archipelagic waters, of belligerent States;
 - (b) the high seas; and
 - (c) subject to paragraphs 34 and 35, the exclusive economic zone and the continental shelf of neutral States.
11. The parties to the conflict are encouraged to agree that no hostile actions will be conducted in marine areas containing:
 - (a) rare or fragile ecosystems; or
 - (b) the habitat of depleted, threatened or endangered species or other forms of marine life.
12. In carrying out operations in areas where neutral States enjoy sovereign rights, jurisdiction, or other rights under general international law, belligerents shall have due regard for the legitimate rights and duties of those neutral States.

SECTION V : DEFINITIONS

13. For the purposes of this document:
 - (a) international humanitarian law means international rules, established by treaties or custom, which limit the right of parties to a conflict to use the methods or means of warfare of their choice,

or which protect States not party to the conflict or persons and objects that are, or may be, affected by the conflict;

(b) attack means an act of violence, whether in offence or in defence;

(c) collateral casualties or collateral damage means the loss of life of, or injury to, civilians or other protected persons, and damage to or the destruction of the natural environment or objects that are not in themselves military objectives;

(d) neutral means any State not party to the conflict;

(e) hospital ships, coastal rescue craft and other medical transports means vessels that are protected under the Second Geneva Convention of 1949 and Additional Protocol I of 1977;

(f) medical aircraft means an aircraft that is protected under the Geneva Conventions of 1949 and Additional Protocol I of 1977;

(g) warship means a ship belonging to the armed forces of a State bearing the external marks distinguishing the character and nationality of such a ship, under the command of an officer duly commissioned by the government of that State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline;

(h) auxiliary vessel means a vessel, other than a warship, that is owned by or under the exclusive control of the armed forces of a State and used for the time being on government non-commercial service;

(i) merchant vessel means a vessel, other than a warship, an auxiliary vessel, or a State vessel such as a customs or police vessel, that is engaged in commercial or private service;

(j) military aircraft means an aircraft operated by commissioned units of the armed forces of a State having the military marks of that State, commanded by a member of the armed forces and manned by a crew subject to regular armed forces discipline;

(k) auxiliary aircraft means an aircraft, other than a military aircraft, that is owned by or under the exclusive control of the armed forces of a State and used for the time being on government non-commercial service;

(l) civil aircraft means an aircraft other than a military, auxiliary, or State aircraft such as a customs or police aircraft, that is engaged in commercial or private service;

(m) civil airliner means a civil aircraft that is clearly marked and engaged in carrying civilian passengers in scheduled or non-scheduled services along Air Traffic Service routes.

PART II : REGIONS OF OPERATIONS

SECTION I : INTERNAL WATERS, TERRITORIAL SEA AND ARCHIPELAGIC WATERS

14. Neutral waters consist of the internal waters, territorial sea, and, where applicable, the archipelagic waters, of neutral States. Neutral airspace consists of the airspace over neutral waters and the land territory of neutral States.

15. Within and over neutral waters, including neutral waters comprising an international strait and waters in which the right of archipelagic sea lanes passage may be exercised, hostile actions by belligerent forces are forbidden. A neutral State must take such measures as are consistent with Section II of this Part, including the exercise of surveillance, as the means at its disposal allow, to prevent the violation of its neutrality by belligerent forces.

16. Hostile actions within the meaning of paragraph 15 include, inter alia:

(a) attack on or capture of persons or objects located in, on or over neutral waters or territory;

(b) use as a base of operations, including attack on or capture of persons or objects located outside neutral waters, if the attack or seizure is conducted by belligerent forces located in, on or over neutral waters;

(c) laying of mines; or

(d) visit, search, diversion or capture.

17. Belligerent forces may not use neutral waters as a sanctuary.

18. Belligerent military and auxiliary aircraft may not enter neutral airspace. Should they do so, the neutral State shall use the means at its disposal to require the aircraft to land within its territory and shall intern the aircraft and its crew for the duration of the armed conflict. Should the aircraft fail to follow the instructions to land, it may be attacked, subject to the special rules relating to medical aircraft as specified in paragraphs 181-183.

19. Subject to paragraphs 29 and 33, a neutral State may, on a non-discriminatory basis, condition, restrict or prohibit the entrance to or passage through its neutral waters by belligerent warships and

auxiliary vessels.

20. Subject to the duty of impartiality, and to paragraphs 21 and 23-33, and under such regulations as it may establish, a neutral State may, without jeopardizing its neutrality, permit the following acts within its neutral waters:

- (a) passage through its territorial sea, and where applicable its archipelagic waters, by warships, auxiliary vessels and prizes of belligerent States; warships, auxiliary vessels and prizes may employ pilots of the neutral State during passage;
- (b) replenishment by a belligerent warship or auxiliary vessel of its food, water and fuel sufficient to reach a port in its own territory; and
- (c) repairs of belligerent warships or auxiliary vessels found necessary by the neutral State to make them seaworthy; such repairs may not restore or increase their fighting strength.

21. A belligerent warship or auxiliary vessel may not extend the duration of its passage through neutral waters, or its presence in those waters for replenishment or repair, for longer than 24 hours unless unavoidable on account of damage or the stress of weather. The foregoing rule does not apply in international straits and waters in which the right of archipelagic sea lanes passage is exercised.

22. Should a belligerent State be in violation of the regime of neutral waters, as set out in this document, the neutral State is under an obligation to take the measures necessary to terminate the violation. If the neutral State fails to terminate the violation of its neutral waters by a belligerent, the opposing belligerent must so notify the neutral State and give that neutral State a reasonable time to terminate the violation by the belligerent. If the violation of the neutrality of the State by the belligerent constitutes a serious and immediate threat to the security of the opposing belligerent and the violation is not terminated, then that belligerent may, in the absence of any feasible and timely alternative, use such force as is strictly necessary to respond to the threat posed by the violation.

SECTION IV : HIGH SEAS AND SEA-BED BEYOND NATIONAL JURISDICTION

36. Hostile actions on the high seas shall be conducted with due regard for the exercise by neutral States of rights of exploration and exploitation of the natural resources of the sea-bed, and ocean floor, and the subsoil thereof, beyond national jurisdiction.

37. Belligerents shall take care to avoid damage to cables and pipelines laid on the sea-bed which do not exclusively serve the belligerents.

PART III : BASIC RULES AND TARGET DISCRIMINATION

SECTION I : BASIC RULES

38. In any armed conflict the right of the parties to the conflict to choose methods or means of warfare is not unlimited.

39. Parties to the conflict shall at all times distinguish between civilians or other protected persons and combatants and between civilian or exempt objects and military objectives.

40. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

41. Attacks shall be limited strictly to military objectives. Merchant vessels and civil aircraft are civilian objects unless they are military objectives in accordance with the principles and rules set forth in this document.

42. In addition to any specific prohibitions binding upon the parties to a conflict, it is forbidden to employ methods or means of warfare which:

- (a) are of a nature to cause superfluous injury or unnecessary suffering; or
- (b) are indiscriminate, in that:

- (i) they are not, or cannot be, directed against a specific military objective; or
- (ii) their effects cannot be limited as required by international law as reflected in this document.

43. It is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis.

44. Methods and means of warfare should be employed with due regard for the natural environment taking into account the relevant rules of international law. Damage to or destruction of the natural environment not justified by military necessity and carried out wantonly is prohibited.

45. Surface ships, submarines and aircraft are bound by the same principles and rules.

SECTION III : ENEMY VESSELS AND AIRCRAFT EXEMPT FROM ATTACK

Classes of vessels exempt from attack

47. The following classes of enemy vessels are exempt from attack:

- (a) hospital ships;
- (b) small craft used for coastal rescue operations and other medical transports;
- (c) vessels granted safe conduct by agreement between the belligerent parties including:
 - (i) cartel vessels, e.g., vessels designated for and engaged in the transport of prisoners of war;
 - (ii) vessels engaged in humanitarian missions, including vessels carrying supplies indispensable to the survival of the civilian population, and vessels engaged in relief actions and rescue operations;
- (d) vessels engaged in transporting cultural property under special protection;
- (e) passenger vessels when engaged only in carrying civilian passengers;
- (f) vessels charged with religious, non-military scientific or philanthropic missions, vessels collecting scientific data of likely military applications are not protected;
- (g) small coastal fishing vessels and small boats engaged in local coastal trade, but they are subject to the regulations of a belligerent naval commander operating in the area and to inspection;
- (h) vessels designated or adapted exclusively for responding to pollution incidents in the marine environment;
- (i) vessels which have surrendered;
- (j) life rafts and life boats.

Conditions of exemption

48. Vessels listed in paragraph 47 are exempt from attack only if they:

- (a) are innocently employed in their normal role;
- (b) submit to identification and inspection when required; and
- (c) do not intentionally hamper the movement of combatants and obey orders to stop or move out of the way when required.

Loss of exemption

Hospital ships

49. The exemption from attack of a hospital ship may cease only by reason of a breach of a condition of exemption in paragraph 48 and, in such a case, only after due warning has been given naming in all appropriate cases a reasonable time limit to discharge itself of the cause endangering its exemption, and after such warning has remained unheeded.

50. If after due warning a hospital ship persists in breaking a condition of its exemption, it renders itself liable to capture or other necessary measures to enforce compliance.

51. A hospital ship may only be attacked as a last resort if:

- (a) diversion or capture is not feasible;
- (b) no other method is available for exercising military control;
- (c) the circumstances of non-compliance are sufficiently grave that the hospital ship has become, or may be reasonably assumed to be, a military objective; and
- (d) the collateral casualties or damage will not be disproportionate to the military advantage gained or expected.

All other categories of vessels exempt from attack

52. If any other class of vessel exempt from attack breaches any of the conditions of its exemption in paragraph 48, it may be attacked only if:

- (a) diversion or capture is not feasible;
- (b) no other method is available for exercising military control;
- (c) the circumstances of non-compliance are sufficiently grave that the vessel has become, or may be reasonably assumed to be, a military objective; and
- (d) the collateral casualties or damage will not be disproportionate to the military advantage gained or expected.

Classes of aircraft exempt from attack

53. The following classes of enemy aircraft are exempt from attack:

- (a) medical aircraft;
- (b) aircraft granted safe conduct by agreement between the parties to the conflicts; and
- (c) civil airliners.

Conditions of exemption for medical aircraft

54. Medical aircraft are exempt from attack only if they:

- (a) have been recognized as such;
- (b) are acting in compliance with an agreement as specified in paragraph 177;
- (c) fly in areas under the control of own or friendly forces; or
- (d) fly outside the area of armed conflict.

In other instances, medical aircraft operate at their own risk.

Conditions of exemption for aircraft granted safe conduct

55. Aircraft granted safe conduct are exempt from attack only if they:

- (a) are innocently employed in their agreed role;
- (b) do not intentionally hamper the movements of combatants; and
- (c) comply with the details of the agreement, including availability for inspection.

Conditions of exemption for civil airliners

56. Civil airliners are exempt from attack only if they:

- (a) are innocently employed in their normal role; and
- (b) do not intentionally hamper the movements of combatants.

Loss of exemption

57. If aircraft exempt from attack breach any of the applicable conditions of their exemption as set forth in paragraphs 54-56, they may be attacked only if:

- (a) diversion for landing, visit and search, and possible capture, is not feasible;
- (b) no other method is available for exercising military control;
- (c) the circumstances of non-compliance are sufficiently grave that the aircraft has become, or may be reasonably assumed to be, a military objective; and
- (d) the collateral casualties or damage will not be disproportionate to the military advantage gained or anticipated.

58. In case of doubt whether a vessel or aircraft exempt from attack is being used to make an effective contribution to military action, it shall be presumed not to be so used.

SECTION IV : OTHER ENEMY VESSELS AND AIRCRAFT

Enemy merchant vessels

59. Enemy merchant vessels may only be attacked if they meet the definition of a military objective in paragraph 40.

60. The following activities may render enemy merchant vessels military objectives:

- (a) engaging in belligerent acts on behalf of the enemy, e.g., laying mines, minesweeping, cutting undersea cables and pipelines, engaging in visit and search of neutral merchant vessels or attacking other merchant vessels;
- (b) acting as an auxiliary to an enemy's armed forces, e.g., carrying troops or replenishing warships;
- (c) being incorporated into or assisting the enemy's intelligence gathering system, e.g., engaging in reconnaissance, early warning, surveillance, or command, control and communications missions;
- (d) sailing under convoy of enemy warships or military aircraft;
- (e) refusing an order to stop or actively resisting visit, search or capture;
- (f) being armed to an extent that they could inflict damage to a warship; this excludes light individual weapons for the defence of personnel, e.g., against pirates, and purely defensive systems such as chaff; or
- (g) otherwise making an effective contribution to military action, e.g., carrying military materials.

61. Any attacks on these vessels is subject to the basic rules set out in paragraphs 38-46.

Enemy warships and military aircraft

65. Unless they are exempt from attack under paragraphs 47 or 53, enemy warships and military aircraft and enemy auxiliary vessels and aircraft are military objectives within the meaning of paragraph 40.

66. They may be attacked, subject to the basic rules in paragraphs 38-46.

SECTION V : NEUTRAL MERCHANT VESSELS AND CIVIL AIRCRAFT

Neutral merchant vessels

67. Merchant vessels flying the flag of neutral States may not be attacked unless they:

- (a) are believed on reasonable grounds to be carrying contraband or breaching a blockade, and after prior warning they intentionally and clearly refuse to stop, or intentionally and clearly resist visit, search or capture;
- (b) engage in belligerent acts on behalf of the enemy;
- (c) act as auxiliaries to the enemy's armed forces;
- (d) are incorporated into or assist the enemy's intelligence system;
- (e) sail under convoy of enemy warships or military aircraft; or
- (f) otherwise make an effective contribution to the enemy's military action, e.g., by carrying military materials, and it is not feasible for the attacking forces to first place passengers and crew in a place of safety. Unless circumstances do not permit, they are to be given a warning, so that they can re-route, off-load, or take other precautions.

68. Any attack on these vessels is subject to the basic rules in paragraphs 38-46.

69. The mere fact that a neutral merchant vessel is armed provides no grounds for attacking it.

PART IV : METHODS AND MEANS OF WARFARE AT SEA

SECTION II : METHODS OF WARFARE

Blockade

93. A blockade shall be declared and notified to all belligerents and neutral States.

94. The declaration shall specify the commencement, duration, location, and extent of the blockade and the period within which vessels of neutral States may leave the blockaded coastline.

95. A blockade must be effective. The question whether a blockade is effective is a question of fact.

96. The force maintaining the blockade may be stationed at a distance determined by military requirements.

97. A blockade may be enforced and maintained by a combination of legitimate methods and means of warfare provided this combination does not result in acts inconsistent with the rules set out in this document.

98. Merchant vessels believed on reasonable grounds to be breaching a blockade may be captured. Merchant vessels which, after prior warning, clearly resist capture may be attacked.

99. A blockade must not bar access to the ports and coasts of neutral States.

100. A blockade must be applied impartially to the vessels of all States.

101. The cessation, temporary lifting, re-establishment, extension or other alteration of a blockade must be declared and notified as in paragraphs 93 and 94.

102. The declaration or establishment of a blockade is prohibited if:

- (a) it has the sole purpose of starving the civilian population or denying it other objects essential for its survival; or
- (b) the damage to the civilian population is, or may be expected to be, excessive in relation to the concrete and direct military advantage anticipated from the blockade.

103. If the civilian population of the blockaded territory is inadequately provided with food and other objects essential for its survival, the blockading party must provide for free passage of such foodstuffs and other essential supplies, subject to:

- (a) the right to prescribe the technical arrangements, including search, under which such passage is permitted; and
- (b) the condition that the distribution of such supplies shall be made under the local supervision of a Protecting Power or a humanitarian organization which offers guarantees of impartiality, such as the International Committee of the Red Cross.

104. The blockading belligerent shall allow the passage of medical supplies for the civilian population or for the wounded and sick members of armed forces, subject to the right to prescribe technical arrangements, including search, under which such passage is permitted.

PART V : MEASURES SHORT OF ATTACK: INTERCEPTION, VISIT, SEARCH, DIVERSION AND CAPTURE

SECTION II : VISIT AND SEARCH OF MERCHANT VESSELS

Basic rules

118. In exercising their legal rights in an international armed conflict at sea, belligerent warships and military aircraft have a right to visit and search merchant vessels outside neutral waters where there are reasonable grounds for suspecting that they are subject to capture.

119. As an alternative to visit and search, a neutral merchant vessel may, with its consent, be diverted from its declared destination.

Merchant vessels under convoy of accompanying neutral warships

120. A neutral merchant vessel is exempt from the exercise of the right of visit and search if it meets the following conditions:

- (a) it is bound for a neutral port;
- (b) it is under the convoy of an accompanying neutral warship of the same nationality or a neutral warship of a State with which the flag State of the merchant vessel has concluded an agreement providing for such convoy;

(c) the flag State of the neutral warship warrants that the neutral merchant vessel is not carrying contraband or otherwise engaged in activities inconsistent with its neutral status; and
(d) the commander of the neutral warship provides, if requested by the commander of an intercepting belligerent warship or military aircraft, all information as to the character of the merchant vessel and its cargo as could otherwise be obtained by visit and search.

Diversion for the purpose of visit and search

121. If visit and search at sea is impossible or unsafe, a belligerent warship or military aircraft may divert a merchant vessel to an appropriate area or port in order to exercise the right of visit and search.

Measures of supervision

122. In order to avoid the necessity of visit and search, belligerent States may establish reasonable measures for the inspection of cargo of neutral merchant vessels and certification that a vessel is not carrying contraband.

123. The fact that a neutral merchant vessel has submitted to such measures of supervision as the inspection of its cargo and grant of certificates of non-contraband cargo by one belligerent is not an act of unneutral service with regard to an opposing belligerent.

124. In order to obviate the necessity for visit and search, neutral States are encouraged to enforce reasonable control measures and certification procedures to ensure that their merchant vessels are not carrying contraband.

