

# International Humanitarian Law Review on the Involvement of the Indonesian National Military (TNI) in Combating Terrorism

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## Abstract

Changes in the international humanitarian legal system in a global context have shifted, as the first war identified with an inter-state ceasefire. Today, the war party is not only a state but also the aftermath of the 9/11 tragedy marked by non-state war actors, a terrorist attack. Terrorism has become an increasingly serious concern in Indonesia since the Bali Bombings and other, consequent terrorist tragedies. TNI discourses regarding their involvement in eradicating terrorism in Indonesia have manifested in the formation of the Anti-Terrorism Act. According to the issue, the research problems are: (1) TNI's authority to combat terrorism in the Indonesian legal system; (2) the IHL system that regulates the military's involvement in combating terrorism. This research uses a statute and conceptual approach. This study finds that: (1) after the fall of the New Order regime in 1998, the dual function of ABRI (Indonesian Armed Forces during Suharto's era) had dissolved, and this implied the limited authority of TNI to maintain the unitary state of the Republic of Indonesia (NKRI) sovereignty at the border. Act No.34, 2004 section 7 article (3) about TNI, mentions that the fight against terrorism deals with criminal methods. Except for war aggression related to terrorism that threatens the State sovereignty and not against terrorism in the community on the Anti-Terrorism Act. Suppose TNI wants to be involved in combating terrorism. In that case, it must be following the 1945 constitution, of which terrorism is part of non-international armed conflict, in which the power of command is in the hands of the President.

Keywords: *Indonesian National Military (TNI), Anti-Terrorism, International Humanitarian Law*

## I. INTRODUCTION

Changes in the international legal order, as well as the events of war itself, cannot be separated from the development of international humanitarian law (IHL). War can involve combatants attacking or causing harm to civilians and damaging state infrastructure, including the State's strategic sectors. IHL not only regulates the procedures for engaging in war (*Jus ad Bellum*) but also regulates wartime behavior (*Jus in Bello*). IHL establishes the guidelines of warfare, including the provision of health assistance to prisoners of war, the role of civil society in occupied territories,

and prohibited methods of warfare.<sup>1</sup>

The significant global changes in international humanitarian law become the identified interstate ceasefire. Today, states are not the only actors able to engage in conflict, non-state actors such as terrorist organisations or revolutionary movements can become a major actor in conflicts. In IHL, such conflicts involving non-state actors are considered non-international armed conflicts. In the wake of the 9/11 attacks in New York, changes can be seen in the in means and methods of warfare not only in the dimensions of inter-state war but also regarding participants of war, increasingly involving non-state actors, including terrorist organisations.

The first Bali Bombing set a negative precedent for the terrorist tragedy. The Government<sup>2</sup> was furious, responding by issuing the Law substitution regulation (henceforth Perppu) No. 1 of 2002 on combating terrorism and (Perppu) No. 2 of 2002 on Combating Terrorism. The second Bali Bombing Incident on October 12, 2002, led to the retroactive repression of the perpetrators of the first bombing incident. Perppu was changed into Law Number 15 in 2003, on Combating Terrorism.

Between 2001 and 2017 182 terrorist incidents have occurred in. All those suspected of terrorist crimes (henceforth terrorists) during this period have been found guilty.<sup>3</sup> Various terrorist cases, including the Bali Bombings, the Australian Embassy Bombing, the Ritz Charlton Bombing, and Terrorism Poso have raised interesting discussion over combating terrorism, both in terms of prevention and prosecution. Most recently, the case of terrorism in Surabaya shocked all Indonesian people. A bomb attack in three Churches in Surabaya (the Immaculate Santa Maria at Ngagel Street, GKI in Arjuno Street, and GPPS in Diponegoro Street), and also in Wonocolo Sidoarjo Rusun killed 18 people and wounded 57 people.<sup>4</sup> The bombers were members of the same family, allegedly members of the Indonesian terrorist organizations Jama'ah Anshorul Tauhid (JAT) and Jama'ah Anshorul Daulah (JAD), affiliated with the international terrorist network, Islamic States of Iraq and Syria (ISIS).<sup>5</sup>

After the suicide bombing in Surabaya and Sidoarjo on 13-14 May 2018, the revision of Law Number 15 of 2003 about the eradication of terrorist acts sparked public attention and upheaval. The public were urged to support the quick passing of the anti-terrorism bill, particularly due to the authority it granted the TNI to combat terrorism. The public considered that the anti-terrorism bill, which has not

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1 Malcolm N Shaw, *International Law*, 6th ed (Cambridge: Cambridge University Press, 2008).

2 as a decision-maker understand the view of the developed of a terrorist act, to prevent acts of terrorism, and combat terrorist attacks as a part of organized crimes, see Robert O Slater, *Current Perspectives on International Terrorism*, Michael Stohl, ed (London: Macmillan Press, 1988) at 41-43.

3 *List Suspect of Terrorist, and it is organization No: DTTOT/P-4c/5519/XI/2017*, s. 4-109, (July 1, 2018) online: Indonesian Police Headquarters

4 Surya, "Three Churches in Surabaya Bombed, Smoke has seen in Diponegoro St.", *Tribun Kaltim* (13 May 2018).

5 BBC News Indonesia, "Bomb Attacks on Three Surabaya Churches: a Woman Bomber Carrying Suicide Two Children", (13 May 2018).

yet been legitimized, could cause poor responses to terrorist threats in Indonesia.<sup>6</sup> There are several points of concern in the legalization of the Anti-Terrorism Bill. Perhaps the most prominent is the involvement of the TNI in combating terrorism, primarily as regulated in Article 43b paragraph (1) of the Anti-Terrorism Bill, which reads:

"(1) The national policies and strategies for combating Terrorism Crime shall be implemented by the Indonesian National Police of the Indonesian Armed Forces and the relevant government agencies following their respective authorities coordinated by non-ministerial government agencies that administer counter-terrorism."

Authority without a constitutional foundation and the footing of the TNI's role in non-international armed conflict can increase cases of terrorism and threaten Indonesian sovereignty. Considering the facts presented, this article discusses the following legal issues: (1) The Mechanism of Combating Terrorism and TNI Involvement in the study of international and national law; and (2) The relationship between counter-terrorism practices and TNI's involvement in combating terrorism in Indonesia in international law.

This article's research method examines the relationship between international humanitarian law and statute approaches to combating terrorism. The research method explains how legislation was used to ensnare the involvement of the TNI in combating terrorism in Indonesia. Whether this involvement was contrary to the principles of international humanitarian law depends on particular instances of the abuse of authority. The legal research approach became a process of finding legal rules, doctrinal legal principles to answer the raised legal issues. This method, derived from legal regulation in both the international and national law aspects, both vertical and horizontal, examines the rule of law that is parallel or hierarchical concerning TNI involvement in eradicating terrorism.<sup>7</sup>

This article integrates a conceptual and case-study approach, analyzing the aforementioned legal issues based on doctrines, the views of experts, and conceptual and theoretical perspectives.<sup>8</sup> This approach moves beyond the limited analysis based solely on legislation. The legislative and conceptual approach was expected to describe the position of the TNI and its authority in combating terrorism. Those were both in the mechanisms of national law and the study of international humanitarian law.

## II. ANALYSIS

### 1. International Humanitarian Law Regarding Combating of Terrorism

The international framework of humanitarian law emerged in 1864 in the first Geneva Convention, establishes basic treatment for the wounded during wartime. This Convention was inspired by the bloodiest battles of the nineteenth century at

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6 Yoga Sukmana, "Anti Terrorism Bill that Respond to the Terror", *Kompas* (1 July 2018).

7 Peter Mahmud Marzuki, *Penelitian hukum* (Jakarta: Kencana Prenada Grup, 2005) at 96-101.

8 *Ibid* at 137-140.

Solferino. Henry Dunant was an instrumental figure in promoting and providing humanitarian aid during the Franco-Austrian War, in which nearly 6,000 people were killed and 40,000 injured. Medical personnel were overwhelmed and lacked any international laws or regulations to govern it.<sup>9</sup>

Henry Dunant also called on countries to establish an aid institution to treat the wounded in wartime. This culminated in the establishment of the International Committee of Red Cross (ICRC) on August 22, 1864, providing greater regulation for behavior in wartime. In 1899 and 1907, agreed upon at the Hague Peace Conference, the conference was also stipulated using chemical weapons. This model influenced the formation of The League of Nations in 1919.<sup>10</sup> In the aftermath of World War II (WWII), the international community was unsettled by the mass scale of atrocity experienced across the world, including both the destruction of innocent human life, state infrastructure, and economies. What may be considered worse is the deliberate disobedience to the laws of war that makes so many civilians victims in warfare. The 1949 Geneva Conventions provide useful guidance for warfare procedures in the post-WWII era.<sup>11</sup>

Furthermore, IHL aims to protect human values. Today, the term 'humanitarian' is associated with alleviating the suffering of the perpetrators of severe crimes in war. One of the most serious war crimes is that of genocide; this is highlighted in the *ad hoc statute* for the former courts of Rwanda and Yugoslavia. Perpetrators of war crimes may be held accountable by IHL frameworks in international tribunals. IHL not only focuses on armed conflict but is considered international customary law and also referred to as jurisprudence, which complements Geneva Conventions 1949 and two additional protocols of 1977 referred to as sources of international humanitarian law.<sup>12</sup>

The main objective of IHL is to regulate both the resort to, and conduct of war. It aims to limit the impact of conflict on civilians, particularly women and children, and safeguard wounded combatants and prisoners of war.<sup>13</sup> It is considered to be the core of the existence of international law to date.

Differences in the types of humanitarian crime violations can be categorized based on the time they were committed in relation to World War I (WWI) and WWII. Prior to WWI, many states had already agreed on a basic regulatory framework for the laws of war, with several codified provisions in the Hague Conventions of 1899 and 1907. The crimes codified here can be categorized as international crimes. In the wake of WWII, the Geneva Convention for the

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9 Michael Crowley, *Introduction to international humanitarian law & IHL moot in Asia-Pacific region* (Hong Kong: ICRC Hong Kong, 2012) at 2.

10 Rhona KM Smith, *Hukum Hak Asasi Manusia*, Knut D. Asplund, Suparman Marzuki & Eko Riyadi, eds (PUSHAM UII, 2008) at 31-32.

11 Humanrightsch, "The History of International Humanitarian Law", (19 August 2011).

12 Shane Darcy, *Judges, Law and War: The Judicial Development of International Humanitarian Law* (Cambridge: Cambridge University Press, 2014) at 4-5.

13 Marco Odello, *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law*, Roberta Arnold & Noëlle N. R. Quéniwet, eds (Leiden: Martin Nijhoff Publishing, 2008) at 15.

Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field was established on August 12, 1949 (1949 Geneva Convention).

The 1949 Geneva Convention classifies 'war crimes' as distinct from 'ordinary crimes', but it is included in "lawless violations of the custom of war."<sup>14</sup> During WWII the international community witnessed what is widely believed to constitute the most profound violation of humanitarian law, the *Holocaust* tragedy. This genocide of ethnic Jews perpetrated by Nazis is perceived as the pinnacle of crimes against humanity. Therefore, the 1949 Geneva Convention aims to safeguard against similar crimes in the future.<sup>15</sup>

The Convention regulates the protection of injured and sick combatants where medical officers have the right to assist with distinguishing identities, then the actions for repressive perpetrators who violate the provisions of the customary law of war, then for crimes of violation will be sanctioned by international law.

The establishment of the 1949 Geneva Conventions serves as a binding framework for all participating countries to raise awareness of, and contribute to, international peace. The Conventions, and their Additional Protocols, contribute toward the regulation of wartime behavior.<sup>16</sup>

The battle procedure provisions are further stipulated in the additional protocol II, the tap's point. Crucially, conflicts do not always involve multiple states, but may involve non-state actors threatening the sovereignty of a state. Such conflicts are known as non-international armed conflict (NIAC) and are not covered by the same legal framework for international armed conflict (IAC). The 1977 Additional Protocol II to the Geneva Conventions is the first provision in international law to address non-international armed conflict, providing basic protections for victims of internal conflicts. Combatants must be cautious in carrying out attacks on civilian populations suspected of being belligerent, as they are extremely dangerous and the individual rights of civil society protected by IHL in this context, following the provisions of Article 13 paragraph (2)—Additional Protocol II.

The provisions of IHL have provided insight into not only the manner of warfare but also the conduct of warfare and the subjects of those involved in the war so that the post-WWII nations do not recover the resulting sorrow of human behavior in the ceasefire that harms both the innocent lives of victims also killed, the infrastructure destroyed. The economic conditions ravaged it happened again. The development of IHL is largely to safeguard against the occurrence of similar humanitarian tragedies as witnessed in WWII. States in the international community can demonstrate their commitment to these laws by signing and ratifying relevant humanitarian conventions. Humanitarian crimes can be prosecuted both in the ad hoc tribunal and in the International Criminal Court (ICC) for violating customary humanitarian law.<sup>17</sup>

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14 *Ibid* at 330-331.

15 I Wayan Parthiana, *Hukum pidana internasional dan ekstradisi* (Bandung: Yrama Widya, 2006) at 211-212.

16 ICRC, *Report Document: International Humanitarian Law and the Challenges of Contemporary armed conflict* (Geneva: ICRC, 2007) at 720-721.

17 Darcy, *supra* note 12 at 3-4.

Given the lack of a universally accepted definition of non-international armed conflict, it is necessary to consider each conflict's specific features. The main difference between international armed conflict and non-international armed conflict is the legal status of each Party. In international armed conflict, both parties' status is the same. In non-international armed conflict, the two parties' status is asymmetrical: one is a state while the other is a non-state entity. Non-international armed conflict is described as a conflict between the armed forces of a state and an organized armed cluster in a country. There is the possibility of a battle between armed factions without the intervention of the authorized Government armed forces.<sup>18</sup>

As an essential part of IHL, Combatant was a party to direct responsibility during the war. The affinity associated with Combatant can be found in Article 3 of the 1907 Hague Convention, which does not explicitly mention who Combatant is, but is called the Belligerent Party.<sup>19</sup> The prosecution action is part of the accountability of any form of arms attack after the war ends. It means Combatant is those who are involved in the battlefield during wartime.<sup>20</sup>

More comprehensive provisions that relate to Combatants can be found in Article 43 paragraph (2) of Additional Protocol I. Here, armed forces are defined as: "...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, among other things, shall enforce compliance with the rules of international law applicable in armed conflict".

In that sense, it is clear that the armed forces in wartime are responsible for the order of a sovereign government (the Head of State as the supreme commander of the military) for the Combatant of various weapons of attack against the enemy, obliged to obey various rules of international humanitarian law as part of a ruling based system during wartime. As such, military action shall be initiated through an official declaration by the Head of State to commence war. After the official declaration of war both international armed conflict and non-international armed conflict, since that time the parties shall be subject to the system and mechanism of international humanitarian law.<sup>21</sup>

In non-international armed conflict, one of its parties is a non-state actor. The matter discussed in Common Article 2 of the 1949 Geneva Conventions explains the mechanisms of accountability for non-state actors: "In addition to the implemented provisions in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict, which may arise between two

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18 Ibid at 12-13.

19 In IHL there are two means according to belligerent in international armed conflict-related to the side who fight in a war, while belligerents in a non-international armed conflict are often called armed rebel groups, they may also fight for the right to be independent.

20 Jean-Marie Henckaerts & Loise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge: Cambridge University Press, 2005) at 11.

21 Ibid at 12.

or more of the High Contracting Parties, even if the state of war is not recognized by one of them... although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties to that shall remain bound by it in their mutual relations...”.

The article explains that both in the international armed conflict and in the non-international armed conflict where the parties in peace and the masses of war, both state actors and non-state actors, must accept the 1949 Geneva Convention's provisions a rule binding the parties to war and ceasefire relations.

Common Article 3 of the 1949 Geneva Conventions and Additional Protocol II regulate the conduct of armed forces in non-international armed conflict. Non-state actors engaged in the conflict may include: "dissident armed forces and other organized armed groups." These actors can also be held liable to the aforementioned international law and are required to use distinctive emblems to distinguish them from civilians who are necessarily forbidden to be attacked.<sup>22</sup>

Recent developments in Indonesia's non-international armed conflict have responded to the changing context and the international community's insistence to endorse it immediately. This pattern is similar to UN resolutions made after the 9/11 terror attacks that shook the international community. Allegedly, Osama bin Laden, al-Qaeda, and Taliban's network are also increasing in Iraq, Afghanistan, and Pakistan. Israeli attacks on opposition factions in Palestine are often categorized as Hamas terrorists in Lebanon as Hezbollah. Until recently, terrorist networks based in Iraq and Syria are spreading terrorism today. The Islamic State of Iraq and Syria (ISIS) constitutes a non-state actor in non-international armed conflicts with their host countries and contribute to the spread of terrorist attacks in other countries in the world.<sup>23</sup>

The United States' War on Terror has set a precedent in the international arena for combatting terrorism. This approach relies on extra-territorial principles to seek the perpetrators of 9/11. The invasions of Afghanistan and Iraq have killed approximately 700,000 innocent civilians and destroyed infrastructure, civil and historical buildings. This has become a bad precedent for the enforcement of international humanitarian law.<sup>24</sup>

The presence of terrorism as one of the parties in non-international armed conflict has made the mechanism of international humanitarian law increasingly sophisticated, especially concerning the international legal personality, rather than belligerent, to see the comparison between belligerent and terrorism as a non-state actor in non-international armed conflict, then we can classify as follows:

Comparison	Belligerent	Terrorist
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22 Roberta Arnold & Noëlle N R Quéniwet, *International humanitarian law and human rights law: towards a new merger in international law* (Leiden; Boston: Martinus Nijhoff Publishers, 2008) at 59.

23 Derek Jinks, Jackson N Maogoto & Solon Solomon, *Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies: International and Domestic Aspects* (New York: Springer, 2014) at 4-6.

24 Leonard Weinberg, *Democratic Responses to Terrorism* (London: Routledge, 2008) at 73-74.

Domain	Parent Country	Parent Country and outside the parent country
Citizenry	Parent Country	Parent Country and outside the parent country
Symbol	Own	Own
Structure	Like the Government	Like the Government and/or own international network
Motif	Free from its parent country	Free from its parent country and/or spreading terror and global fear
Recognition	From its parent country	From its parent country, and also the non-parent country that considers terrorists hostile together, ex: declaration war on terrorism United States

**Table 1:** Comparison of Belligerent and Terrorism as non-state actors in non-international armed conflict<sup>25</sup>

From an IHL perspective, when the President of Indonesia recognizes Terrorists as a ‘war party’, the legal status of the Terrorists is strengthened. Malcolm N. Shaw reviews the Recognition implications: “Because Recognition is fundamentally a political act, it is a government's private executive branch. It means that the judiciary must, as a general principle, accept the discretion of the executive and give effect to its decision”.<sup>26</sup> In other words, even though the President's Recognition is political, it has an impact on the principles of international law. This can be seen in the Recognition of the TNI and terrorist groups in non-international armed conflict.

Related to the authorities who have the authority to produce a confession, if it is related to the terrorists as one of the war parties, then the legal implications that have an impact on terrorists are owned by an international legal personality which can make terrorist groups have the power to negotiate then. The codification of TNI's role in combating terrorism grants them the authority to represent Indonesia in their efforts to eradicate terrorism. This indicates the existence of a non-international armed conflict. As such, TNI are required to uphold the principles of humanitarian law in combating terrorism and act in accordance with Common Article 3 of the Geneva Conventions and Additional Protocol II, as a minimum. If the TNI violates these provisions they can be held accountable for violating IHL.

Meanwhile, for terrorists, the existence of a non-international armed conflict can be seen as recognition of their status as a belligerent party. This recognition of status impacts terrorist groups' capacity to increase and have an international legal personality.

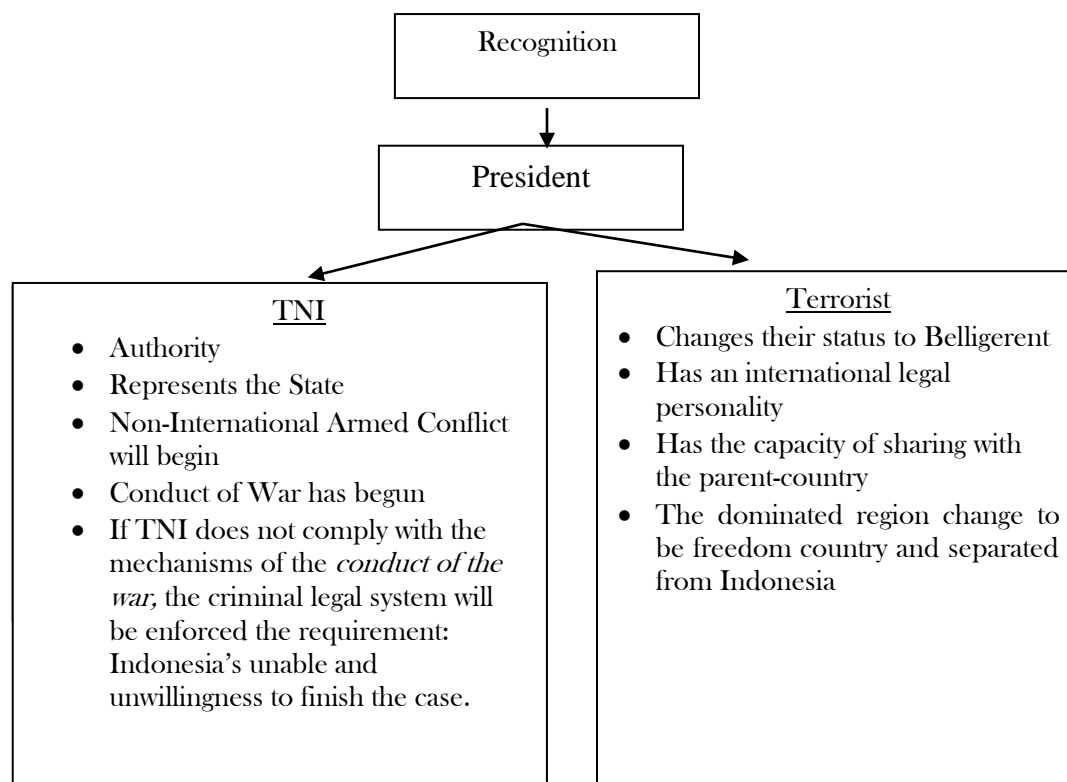
The Recognition of terrorist groups as a war party also affects the territory under control, the people who are under their captivity and power, symbols and

25 Vincenzo Bove, Maurico Rivera & Chiara Ruffa, “Beyond Coups: Terrorism and Military Involvement in Politics” (2020) 26:1 *European Journal of International Relations* 263–288.

26 Shaw, *supra* note 1 at 467.



structure, will be like an independent state so that in resolving the conflict, the bargaining power of terrorists can act to separate the Indonesian territory from its sovereign power.



Pict.1. The effect of Recognition given by the President on TNI dan Terrorist<sup>27</sup>

This means that the President, as a supreme military command authority, has the right to determine the status of both the TNI and the terrorists, by recognising their involvement as a war parties in a non-international armed conflict. Thus, the principles of the conduct of war must be obeyed by the parties. When the laws of war are violated during the ceasefire period, the violating parties can be tried as war criminals.<sup>28</sup>

Additional Protocol II, Article 4, paragraphs (1) and (2)(d) regulate the responsibility of the State (TNI) not to take action against terrorist groups as prisoners of war, namely:

1. All people with no direct part or who have ceased to take part in hostilities, whether or not their restricted liberty is entitled to respect for their person, honor, and convictions, and religious practices. They shall, in all circumstances, be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors.

27 Sidney Jones, "TNI and Counter-Terrorism: Not a Good Mix", (9 January 2012), online: *Crisis Group*.

28 L Ali Khan, *A Theory of International Terrorism: Understanding Islamic Militancy*, *Developments in International Law* (Leiden: Martinus Nijhoff Publishing, 2006) at 249-250.

2. Without prejudice to the generality, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever.

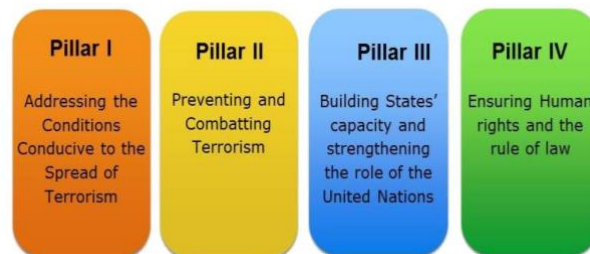
(d). Act of Terrorism

The instruction above guides non-international armed conflict and the State's responsibility not to attack or treat terrorist groups as part of protecting arbitrary prisoners of war, maintaining attention to human rights protection. This means that the principle of presumption of innocence and the prohibition of arbitrary attacks must be emphasized regarding the TNI involvement in eradicating terrorism.

Therefore, the Mechanism of Recognition and accountability of terrorism should be a party to non-international armed conflict in international humanitarian law mechanisms and a more comprehensive regulation on combating terrorism. International security will be realized as part of the mandate for establishing the international legal mechanism under the UN.<sup>29</sup>

The UN, through the General Assembly and the Security Council, has drafted an international legal regulation that departs from existing international mechanisms of humanitarian, human rights, criminal law, the principle of protection for refugees who are victims of terrorism crimes under UN General Assembly Resolution 60/1, adopted on September 20 2005,<sup>30</sup> and the global Counter-Terrorism Strategy adopted on September 8, 2006.<sup>31</sup> The counter-terrorism strategy can be drawn according to the following pillars:

**UN Global Counter-Terrorism Strategy**



<sup>29</sup> Nigel D White, Katja Samuel & Ana María Salinas de Frías, eds, *Counterterrorism: International Law and Practice* (Oxford University Press, 2012) at 55–56.

<sup>30</sup> United Nations General Assembly, “UN Resolution Adopted by the General Assembly on September 16, 2005 (UN Doc A/RES/60/1)”, (2005).

<sup>31</sup> United Nations General Assembly, “UN Resolution adopted by the General Assembly on Global Counter-Terrorism Strategy, on September 8, 2006 (UNGA Res 60/288) articles 46 and 120”,

Pict. 2. UN Global Counter-Terrorism Strategy Pillars<sup>32</sup>

These Pillars can be interpreted as: (Pillar I) relating to the prevention of terrorism spreading all over the world; (Pillar II) preventing and combating the crime of terrorism; (Pillar III) builds the country's capacity to strengthen the role of counterterrorism under UN mechanisms; (Pillar IV) ensures the protection of human rights and the rule of law.

As such, the eradication of global terrorism shall be conducted in harmony with the objectives of IHL and the use of attacks to cripple terrorism shall uphold human rights and respect the principles of law and civil protection interests.

The global community has made comprehensive international law regulations for the eradication of terrorism. Since 1963, 19 international legal instruments have been developed as part of the international community's framing of terrorist crimes as a threat to international peace and international. The relevant instruments can be divided into 7 sections, namely:

1. *International legal instruments related to terrorism and attacks on civil aviation*
  - a. 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft.
  - b. 1970 Convention for the Suppression of Unlawful Seizure of Aircraft.
  - c. 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation.
  - d. 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation.
  - e. 2010 Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation.
  - f. 2010 Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft.
  - g. 2014 Protocol to Amend the Convention on Offences and Certain Acts Committed on Board Aircraft.

The purpose of international treaties related to civil aviation is to enforce international legal regulations against flight criminals, starting from countering civilian aircraft piracy carried out by terrorism, making it a violation of international law for acts of violence against a person on a plane, if the action is likely to endanger the safety of the airplane.<sup>33</sup> Placing an explosive device on an airplane or other attempts to blow up a civilian airplane is strictly prohibited. Measures to enforce this include cracking down on terrorist groups in airports to prevent the use

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<sup>32</sup> *Ibid.*

<sup>33</sup> Courtney Hougham, *A New Understanding of Terrorism: Case Studies, Trajectories and Lessons Learned*, M. R. Haberfeld & Agostino von Hassell, eds (London: Springer, 2009) at 143-152.

of civilian airplanes to release biological, chemical, or nuclear weapons or similar substances to cause death, injury, or damage, or use these substances to attack the civilian aircraft. Cyberattacks on aviation navigation facilities, carried out by terrorist groups, can make the crime of terrorism a part of transnational crime.

2. *International legal instruments related to terrorist attacks on international staff*

a. 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons

This international agreement protects heads of State, foreign ministers, diplomats, consulates, and representatives of a country or international organization. It entitles them to international protection from attacks of murder and threats from terrorist groups.

3. *International legal instruments related to the treatment of prisoners*

a. 1979 International Convention against the Taking of Hostages

This international agreement provides an appeal on acts of terrorism involving hostage-taking, enshrining provisions for the best possible treatment of hostages including protections against the murder, physical or mental injury of prisoners.

4. *International legal instruments related to terrorist threats to maritime navigation*

- a. 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation;
- b. 2005 Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation.
- c. 1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf.
- d. 2005 Protocol to the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms located on the Continental Shelf

International agreements related to terrorist crimes in the interruption of international shipping reflect those concerning international civil aviation. The ways terrorist crimes are dealt with depends on the transnational context they occur within and their relevant mechanisms.<sup>34</sup>

5. *International legal instruments related to plastic explosives*<sup>35</sup>

1991 Convention on the Marking of Plastic Explosives for Detection

This international agreement was designed for the effective control of plastic explosives. It highlights the steps needed to curtail the use of explosives as part of terrorist efforts to carry out active attacks against a country.

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<sup>34</sup> *Ibid* at 160–189.

<sup>35</sup> United Nations General Assembly, *supra* note 31.

6. *International legal instruments related to terrorist bombings*

1997 International Convention for the Suppression of Terrorist Bombings

This international agreement creates a universal international legal regime for the use of explosives that use civil objects to cause widespread destruction, murder and severe injury to civilians and civil objects.

7. *International legal instruments related to terrorism financing*

1999 International Convention for the Suppression of the Financing of Terrorism

An international agreement requires parties to develop steps to prevent and fight various forms of terrorist financing, either directly or indirectly, through groups aimed at the charity, business groups or obtaining funding from the trade-in firearms and drug practice. Participating countries are obliged to create a comprehensive framework to overcome this problem.

8. *International legal instruments related to the use of nuclear weapons*<sup>36</sup>

2005 International Convention for the Suppression of Acts of Nuclear Terrorism

This international agreement aims to prevent terrorist groups obtaining and using nuclear weapons. It stipulates that terrorists who use atomic weapons must be extradited according to the inter-state legal mechanism. It works toward the establishment of a comprehensive framework to assist countries affected by terrorist attacks using nuclear weapons. The international legal mechanism names the International Atomic Energy Agency (IAEA) as the body authorized to resolve the issue.

Members of ASEAN have agreed to combine efforts to tackle terrorist crime as part of the coordinated regional fight against terrorism. This multilateral cooperation has been concretely proven to build an effective framework for combating terrorism in the region. Cooperation in attempts to combat terrorism have been largely motivated by the 9/11 terrorist bombing and Bali Bombing in October 2002. This has prompted an ethical commitment to cooperation between Southeast Asian countries under the ASEAN, bilateral, and even extra-territorial mechanisms with countries interested in combating terrorism such as the United States.<sup>37</sup>

Through the ASEAN Convention on *Counter-Terrorism*, 2007, ASEAN hopes to combine efforts to eradicate terrorism in a more coherent, collaborative

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36 Alex P Schmid et al, *After the war on terror: regional and multilateral perspectives on counter-terrorism strategy* (London: The Royal United Services Institute, 2009) at 5-36.

37 Jonathan T Chow, "ASEAN Counterterrorism Cooperation Since 9/11" (2005) 45:2 University of California Press 302-321 at 305.

and concentrated manner, developing the principles of the UN system relating to regional mechanisms. Article II defines the objects of terrorist crimes following the 19 international legal instruments related to combating terrorism. Article III and IV regulate the principles of sovereignty, equality, and non-intervention in combating terrorism in the region.

Article VI aims toward the strengthening of cooperation between ASEAN countries, in combating terrorism while taking into account the principle of territorial integrity of each member states – discussed in Articles VI-VIII about the best ways to address terrorism across territorial borders with mutual legal assistance between member states. Furthermore, the crucial points that can be carried out by ASEAN countries are contained within Article IX, concerning the steps of adoption into the national legal mechanisms as part of the commitment to the implementation of the ASEAN Convention on *Counter-Terrorism*.

The threat of terrorism in the region is escalating. It develops from terrorist groups including the Moro Islamic Liberation Front (MILF), Abu Sayyaf, the Jama'ah Anshorul Daulah (JAD), and the Jama'ah Anshorul Tauhid (JAT) which have direct connections to the network. Global terrorist attacks have penetrated the region. The ASEAN Convention on Counter-Terrorism is the most appropriate means of combatting terrorism in the region. Notwithstanding, there needs to be a more comprehensive regional technical protocol complemented by national legal frameworks for participating countries to tackle terrorism. Strengthening cooperation between member states in the face of terrorism contributes to stability and integrity in the region in the fight against terrorism.

The rules for international law's mechanism have complemented the mechanism of international humanitarian law to eradicate terrorism. Using IHL as the basis for TNI involvement in combating terrorism indicates that terrorism has escalated into a form of transnational crime.

As the largest country in Southeast Asia, Indonesia is vulnerable to terrorist attacks. The Government and legislative of the State of Indonesia is responsible for national mechanisms of humanitarian law enforcement in relation to terrorism.

## 2. Indonesian Context: Involvement of the TNI in Combating Terrorism

Indonesia has a long and growing history of terrorist attacks. The movement of Salafi Jihadism is the forerunner of the emergence of radical movements that have since transformed into organizations often displaying terrorist sentiments. In 1950 *Negara Islam Indonesia* (NII) was established, led by Sekarmadji Maridjan Kartosuwirjo who formulated Salafi Jihadism to establish an Islamic state in Indonesia and a movement of rebellion against the State's sovereignty. even though in 1962, the Soekarno Government could be crushed at that time.<sup>38</sup>

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38 Solahudin, *The Roots of Terrorism in Indonesia: From Darul Islam to Jem'ah Islamiyah* (New South Wales: University of New South Wales Press, 2013) at 3-4.

The establishment of the Darul Islam movement, continuing the mission of the NII Kartosuwiryo-style commanded by Aceng Kurnia in the 1970s, to the Islamic Radicalism movement brought by Abdullah Sungkar and Abu Bakar Ba'asyir at the Al-Mukmin Islamic Boarding School in Ngruki, Sukoharjo, Central Java. In this decade, radicalism has increasingly taken root with its affiliation into Jemaah Islamiyah, a terrorist group in Indonesia.<sup>39</sup>

The Indonesian legal system addresses the crime of terrorism in (Perppu) No. 1 of 2002 and is enacted in Law Number 15 Year 2003. These provisions illustrate the translation of IHL into national law. Article 6 of Law Number 15 Year 2003 defines the crime of terrorism are:

"Anyone employing violence/threat of violence creates an atmosphere of terror or fear of a widespread person and leads to the loss of life and property of another person or causes damage or destruction of strategic or environmental vital objects or public facilities or international facilities, shall be subject to capital punishment or life imprisonment or imprisonment of a minimum 4 (four) years and a maximum of 20 (twenty) years imprisonment".

In addition to those mentioned in the provisions of Article 8 and Article 10 of Law Number 15 of 2003, acts which may also be considered terrorism, include: damaging air traffic facilities, hijacking accompanied by the seizure of property, deprivation of liberty, or inciting terror using dangerous chemical weapons. It could endanger mass acted as the perpetrators of terrorist crimes, including enacting the principle of active nationality and the principle of passive nationality (extra-territorial principles) for the perpetrators of terrorist acts against both Indonesian citizens and outside Indonesia that threatens the sovereignty of the State. Based on Article 43 of Law No. 15 of 2003, this facilitates international cooperation for intelligence, Police, and other technical activities, in the context of counter terrorism.<sup>40</sup>

Many international terrorist groups have contributed to and influenced the complexity terrorism in Indonesia. Terrorist crimes that previously would have been classified as crimes of rebellion have been transformed into crimes against state sovereignty and security. In this context, if we locate the authority of the Police, in the eradication of terrorism, in Special Detachment 88 (Densus 88), BIN, and the TNI, we can see how the authority of each institution is based on their prevailing laws and regulations.

Densus 88 authority refers to Law Number 2 of 2002, concerning the Indonesian National Police, and Law Number 15 of 2003, concerning the Eradication of Terrorism Crimes, which gives delegates the authority for Densus 88 in combating terrorism in Indonesia. Article 23 paragraph (1) and (2) of the Presidential Regulation Number 52 of 2010, concerning the Organizational

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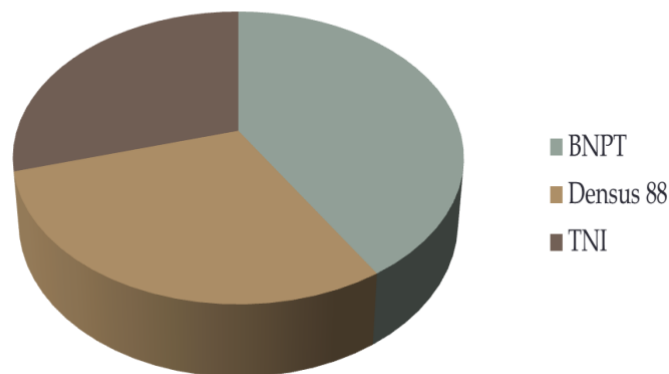
<sup>39</sup> *Ibid* at 5-6.

<sup>40</sup> Hikmahanto Juwana, "Anti-Terrorism in Indonesia" in Kent Roach & George Williams, eds, *Global Anti-Terrorism Law and Policy*, 2d ed (Cambridge: Cambridge University Press, 2005) at 295-296.

Structure and Work Procedure of the Indonesian National Police, provides further clarification of this. It reads:

- a. Densus 88 AT is an executing element of the main task in counter-terrorism crime under the Indonesian National Police.
- b. Densus 88 AT, as referred to in paragraph (1), served organizing intelligence functions, prevention, investigation, prosecution, and operational assistance in the framework of investigating and investigating criminal acts of terrorism.

Meanwhile, the BIN authority related to the eradication of terrorism follows Article 31 letter (b) of Law Number 17 of 2011 concerning State Intelligence, namely: The State Intelligence Agency has the authority in tapping, checking the flow of funds, and extracting information on targets... “(b). Terrorism, separatism, espionage, and sabotage activities threaten national safety, security, and sovereignty, including those undergoing legal proceedings”.



Pict. 3. Leading Sector Combating Terrorism in Indonesia

Since 1998 the authority of TNI has been very limited. This is in part due to the dual function of the Armed Forces of the Republic of Indonesia (ABRI) separates the authority of the TNI and POLRI. ABRI's dual function is a base concept in the military that allows it to play its political, social role in the country. The dual function of ABRI is known by society non-ABRI as a form of militarism, military intervention in political problems, and other countries' important problems related to people's interests. These functions can be seen as military intervention and a militaristic device used to legitimate violence toward society. Such conditions can cause disfunction in civil society through human resource training, regeneration, and leadership. Civil society is still considered 'incompatible' and cannot govern or organize a State. After the Reformation era, the dual function of ABRI was deleted. The authoritative function of civil society was given to POLRI and TNI to establish a national sovereignty function.<sup>41</sup>

41 Iswara N Raditya, "Dual Function of Military and The Way of Indonesian Political Military / Dwifungsi ABRI dan Jalan Terbuka Politik Tentara", *Tirto.id* (10 January 2018).



Democratic State governing the mechanism of national defense and security in the Indonesian of the 1945 Constitution, the task of the

As set out in the 1945 Constitution, the democratic Indonesian government is responsible for defending the state's sovereignty and territorial integrity, whether at sea, in the air, or on land. Articles 10 and 11 of the 1945 Constitution read: "The President holds the highest authority over the Army, Navy and Air Force" and "the President with the approval of the House of Representatives declares war, makes peace and agreements with other States" respectively. Thus, the President is a symbol of state power. In addition to regulating issues relating to territory and sovereignty with the assistance of the TNI (or in IHL terms the *armed forces*) the President is also authorized to declare war, declare peace, and establish international treaty mechanisms.

Based on Article 3 paragraph (1) of Law No. 3 of 2002, the principles of the defense and security of the people are: "State defense is based on the principles of democracy, human rights, public welfare, environment, national law provisions, and international customs, and the principle of peaceful coexistence." Article 6 explains the implementation of state defense: "State defense is carried out through efforts to build and foster the ability, as well as to overcome any threats." Those who are entitled to implement the provisions of Article 6 are described in Article 7:

- (1) As referred to Article 6, the state defense is administered by the Government and prepared early with the state defense system.
- (2) In the face of military threats, the state defense system places the Indonesian National Army as the main component supported by reserve components and supporting components.
- (3) In the face of non-military threats, the state defense system places government agencies outside the defense field as a key element, following the form and nature of threats encountered with the support of other aspects of the nation's power.

After the reforms, it dissolved the dual function of ABRI and limited the authority of the TNI to guard the sovereignty of the Unitary State of the Republic of Indonesia (NKRI) exclusively on the border. Article 7 Paragraph (2) Sub-Paragraph 3 of Law Number 34 the Year 2004 regarding the TNI mentions the Resistance to Terrorism, that terrorism is a territory that is handled by TNI criminal methods other than war aggression. Terrorism is classified as crimes that threaten the State's sovereignty, not against the terrorism in civil society on the bill Anti-Terrorism. If the TNI wants to be involved in combating terrorism, it must follow the 1945 Constitution. As terrorism is identified as non-international armed conflict, referring to the Passover 11 of the 1945 Constitution, the power of command is in the hands of the President. Whenever the President officially declares that terrorism as opposed to and TNI as the pillar of eradicating terrorism, since then non-international armed conflict has started.

Densus 88, who are the lead sectors of the eradication of terrorism, are obliged to seek adequate information before acting. This can be gathered by spies, the

Police, prosecutors, National Intelligence Body (BIN), and TNI. Its role is primarily to detect warnings and early stages of terrorist activity in the State of Indonesia.

The proposed involvement of the TNI in combating terrorism through the Anti-Terrorism Bill is considered the last option. From an IHL perspective, if the TNI has acted, the Government of Indonesia has recognized a terrorist threat as a non-state actor in non-international armed conflict. TNI has done this to represent the Indonesian Government through the President's declaration. The TNI's supreme command implies the crime committed and the sovereignty of the State, where terrorists can negotiate on the settlement of the conflict, and for territories controlled by terrorists the potential to separate self from a higher state.

The escalation of terrorism has strengthened terrorists' position bargaining power in the context of the termination of war. Thus, the dual function of ABRI, running in the New Order era with TNI involvement in areas where the Police have taken over the leading sector, demonstrates that the escalation of TNI authority in combating terrorism is only used for non-aggression purposes.

The clause involving the TNI in combatting acts of terrorism also has the potential to open up space for vast TNI involvement in the civil and domestic security sphere. The scope of counterterrorism and the extent of TNI's authority in the Anti-Terrorism Bill, is discussed in Article 43A paragraph (3). It is mentioned that the national policies and strategies for combating Terrorism Crime include prevention, protection, de-radicalization, enforcement, preparation of national preparedness, and international cooperation.<sup>42</sup>

The next challenge for the involvement of the TNI in combating terrorism is about the promotion and protection of human rights. As the largest Muslim majority country and supported by the fact that the TNI has a poor history of protecting the interests of civil society in conflicts, the spirit of reform in Indonesia intends to eliminate the two repressive functions of the Armed Forces in resolving various types of legal problems. Moreover, allegations of terrorism were addressed to Muslim radicalist groups. TNI authority and involvement is the last option for combatting terrorism. It arises only when the sovereignty of the State is threatened and must be based on legitimate orders from the President of Indonesia. Such an order is subject to careful consideration to ensure the protection of human rights, especially for civil society groups accused of terrorist activity. All proceedings must be processed according to existing legal mechanisms fairly and impartially, not on a repressive basis.

There are at least some factors that provide a barrier to the implementation of IHL in Indonesia. These include: an inferior awareness of the implementation actions to be taken at the national level; the limited level of the country's expertise; constrained bureaucratic problems; and the contradictions of various interests. The political interests of a country tend to contribute to their reluctance to enshrine the rules of IHL into their national legal system. This is especially prevalent regarding

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<sup>42</sup> *Kertas Posisi Koalisi SSR RUU Perubahan UU Terorisme*, by Kontras et al (Jakarta: Kontras, 2018) at 44.

the mechanism of eradicating terrorism by the TNI.

### III. CONCLUSION

After the reform ABRI's dual function was dissolved and the TNI's authority to protect the sovereignty and territory of the Republic of Indonesia was limited to its border. The power of the TNI in combating terrorism, under Article 7 paragraph (2) letter 3 of Law Number 34 Year 2004, deals with criminal methods other than war aggression, related to terrorism that threatens the sovereignty of the State, not against terrorism that occurs in the community civilians on the Anti-Terrorism Bill. If TNI wants to be involved in combating terrorism it must adhere to the constitution of 1945 of Indonesia, where terrorism is deemed part of non-international armed conflict. The power of command is in the hands of the President.

Additional Protocol II, and various other IHL, regulations have been discussed in relation to non-international armed conflict, stating that the use of armed force to eradicate terrorism is permitted if the terrorists are considered war participants. However, this implies that in some situation's terrorists have significant bargaining power to negotiate the resolution of the conflict. In terrorist-dominated territories where there is a potential for separation from the higher State, the involvement of the TNI in combating terrorism is considered unconstitutional and prone to the unity of the Republic of Indonesia.

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