

GLOBAL WAR ON TERROR BY THE UNITED STATES FROM THE PERSPECTIVE OF INTERNATIONAL HUMANITARIAN LAW

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ABSTRACT:

Terrorism is used to intimidate the civilian population, influence government policies, and influence the organization of the state by means of kidnappings and killings. The terminology of terrorism itself is actually nothing new, until now terrorism remains an actual thing and continues to grow. Its development is in line with the development of human thought, science and technology and the development of high human movement between countries. These acts of terrorism are a global issue that affects the political policies of all countries in the world, making it a starting point for the perception to fight terrorism as an international enemy. In the War on Terror, the U.S. government is committing an "armed attack" against Afghanistan, with the aim of "self-defense" under article 51 of the U.N. Charter. The war on terror has raised new problems in International Humanitarian Law. The purpose of the study was to determine the status of terrorists in war on terror and understand the relevance of International Humanitarian Law in the context of the Global War on Terror imposed by the United States. In this study, it can be concluded that the status of terrorists in the war on terror based on International Humanitarian Law can be considered as combatants if there is a declaration or order from the leader, but on the condition of interference both from the country of origin of the terrorist group and from other countries that recognize the group and place it under one command with the armed forces of the country in accordance with Article 43 Paragraph (3) of the Additional Protocol I of 1977, then the state or the warring parties need to notify its opponents of the participation of these members. The relevance of International Humanitarian Law in the context of the Global War on Terror imposed by the United States shows that in its enactment the United States committed irregularities to International Humanitarian Law, even the United States has not ratified Protocol I of the Geneva Conventions. Regardless, the provisions in the protocol have become customary international law, so any dignified country will certainly abide by it.

Keywords: *Humanitarian Law, Terrorism, War on Terror.*

A. Introduction

The word "terrorism" was first used during the French revolution (1789-1799), in which demonstrators wanted a new system of government with threats and acts of violence. Terrorism is currently defined as an activity involving elements of violence.¹ Terrorism is used to intimidate civilians, influence government policies, and influence the organization

¹ Ali Mahsyar, *Gaya Indonesia Menghadang Terorisme; Sebuah Kritik Atas Kebijakan Hukum Pidana Terhadap Tindak Pidana Terorisme Di Indonesia*, CV. Mandar Maju, Bandung, 2009, p. 43.

of the state by kidnapping and murder. The terminology of terrorism itself is actually not something new, until now terrorism remains an actual thing and continues to grow. Its development is in line with the development of human thought, science and technology and the development of high human movement between countries. These acts of terrorism are a global issue that affects the political policies of all countries in the world, thus becoming a starting point for the perception to fight terrorism as an international enemy.²

According to A.C, Manullang, the background or motive of terrorism nationally can be derived from several things, including: 1) religious extremism, 2) tribal nationalism that leads to separatism and 3) certain interest groups that want to cause chaos. First, the motivation of terrorist groups is based on the attitude of religious radicalism, namely building exclusive communities as the capital and identity of the group. They believe themselves to be the truest and closest to God's threshold. Fighting against the unbelievers is an obligation, while death is the way to the heavenly home. It is this kind of radicalism that can at any time give birth to sociopolitical disasters. Second, terrorist groups carry out acts of terror with the aim of gaining political independence driven by a desire for greater or greater autonomy in the region in question. The trigger is because they feel they are treated unfairly by the Central Government, causing economic and social inequality. In this motive that is often targeted are buildings and government offices. Third, terrorist groups tend to carry out their actions for political, economic and social purposes with the aim of protecting certain interests such as covering up legal proceedings for crimes or violations that have been committed in the past or as bargaining to gain positions in the political, economic and social fields.³

On September 11, 2001, an attack on the United States killed about 3.000 civilians and caused damage to some of the vital infrastructure in the United States. The events of September 11, 2001, or nine eleven resulted in the United States declaring and launching a war on terrorism or known as the "war on terror".⁴ This was done by the United States after the attack on the World Trade Center (WTC) building, on September 11, 2001, as evidenced as an act of terrorism carried out by an organization called Al-Qaeda led by Osama Bin

² Ivan Fatoni Purnomo and Sri Lestari Rahayu, "Status Teroris Dalam War On Terror (Kajian Berdasarkan Hukum Humaniter Internasional)," *Belli Ac Pacis* Vol. 2, No. 1, 2016, p. 25.

³ Aulia Rosa Nasution, "Penegakan Hukum Terhadap Tindakan Terorisme Sebagai 'Extraordinary Crime' Dalam Perspektif Hukum Internasional Dan Nasional," *Talenta Conference Series: Local Wisdom, Social, and Arts (LWSA)* Vol. 1, No. 1, 2018, p. 008.

⁴ Ivan Purnomo and Sri Lestari Rahayu, *Op.Cit*, p.26.

Laden, and under the Taliban regime in Afghanistan. The reason the U.S. government says this is that military operations are effective in preventing terrorist attacks.

In the war on terror, the United States Government did carry out an "armed attack" against Afghanistan, with the aim of conducting "self-defense" or self-defense under article 51 of the UN Charter.⁵ However, the act of self-defense referred to by the United States is an act of self-defense from a terrorist attack, not an act of self-defense against an attack by the armed forces of a country, or an organized group. It's just that the attacks carried out by the United States against Afghanistan, based on Oppenheim's opinion and the laws of war as follows, a contention between two or more states through their armed forces, for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases, then can be categorized as a war, so humanitarian law must be enforced.

The war on terror has created a new paradigm in international humanitarian law. Criteria or boundaries regarding armed conflict between warring parties are clear on the territory, parties and arrangements, but the development of the war on terror has obscured this. The war on terrorism raises new problems in International Humanitarian Law. Especially in the question of the criteria for armed conflict such as the parties to the dispute, as well as the increasingly vague and unclear arrangements. The problem of armed conflict eventually further obscures the legal position of the terrorists, which will cause new problems, especially in terms of which humanitarian law is enforced in the war on terror. On the basis of the above description, the researcher then formulates the problem to be; 1). What is the status of terrorists in the war on terror? 2). What is the relevance of International Humanitarian Law in the context of the Global War on Terror imposed by the United States? The purpose of this study is to find out the status of terrorists in the war on terror and understand the relevance of International Humanitarian Law in the context of the Global War on Terror imposed by the United States.

B. Research Method

The research method used is normative juridical using a statute approach and a conceptual approach. Data obtained and processed in normative law research is secondary data derived from a library source consisting of primary legal materials consisting of The

⁵ Article 51 of the UN Charter Provides for the Right of All UN Members to Take Acts of Self-Defense in the Event of an 'Armed Attack' or Armed Attack.

Geneva Conventions of 1949, The Additional Protocol I 1977, Hague Convention of 1907, and Charter of the United Nations 1945, and also secondary legal materials consisting of books, legal journals, and legal dictionaries.⁶

C. Discussion

1. The Status of a Terrorist in the War on Terror

The term war on terror first appeared when two planes crashed into the twin towers of the World Trade Center on September 11, 2001, killing as many as 2.792 people in New York. Since then the War on Terror was declared by George W. Bush in response to the United States after the September 9, 2001 attacks. The statement indicated that the Bush administration would retaliate with militaristic action and was supported by representatives of administration officials.⁷

This problem when linked between status in the war on terror can be connected with the use of sources of international humanitarian law. The war on terror is complex with its perpetrators who have no clear identity in international humanitarian law. This has implications for the enactment of international humanitarian law in the fight against terrorists. The determination of the legal status of terrorists in the fight against terrorism cannot be separated from the study of existing instruments of international humanitarian law, even if the rules have not accommodated completely and integrated regarding the legal status of terrorists. The benchmark used in identifying the legal status of terrorists based on distinction principles is to use two actors in armed conflict, namely combatants and civilians.

a. Combatants

The definition of combatants has been regulated in Article 4 paragraph A of the 1949 Geneva Convention on the treatment of prisoners of war. From Article 4 paragraph A of the Geneva Conventions of 1949 Part III on prisoners of war, it can be known that combatants are persons who meet the following criteria:

1. Regular members of the armed forces active in the military service.
2. Organized militia members, volunteers and resistance movements, who meet the following criteria:

⁶ Peter Mahmud Marzuki, *Penelitian Hukum Edisi Revisi*, Kencana Prenada Media, Jakarta, 2013, p. 181.

⁷ Marco Sasoli, *Transnational Armed Groups and International Humanitarian Law*, Program on Humanitarian Policy and Conflict Research Harvard University, Occasional Paper Series, Winter 2006.

- a. Led by the commander in charge of his subordinates.
 - b. It has a fixed symbol that can be recognized.
 - c. Openly use weapons.
 - d. Operate and are subject to the laws and customs of war.
3. Civilians accompanying members of the armed forces on duty. Including civilians who serve for military purposes, for example war reporters, civilian crews on warships, and so on.
 4. The crew of civilian ships and aircraft of the country involved in the conflict, when there is no other law protecting them.
 5. The masses/inhabitants of an area who take up arms to defend themselves from enemy incursions without having time to form an organized military unit.

Article 43 Paragraph (2) of The Additional Protocol I of 1977 expressly specifies that those who can be classified as combatants are those who belong to the understanding of the armed forces of a country. Under these requirements, a terrorist's legal status is not a member of a country's armed forces or a conflicting group even if they participate directly in warfare and carry weapons. In general, terrorists do not use weapons openly but in secret or secret. This indicates that terrorists cannot be considered qualified as combatants.

A terrorist group can be said to be a combatant depending on the declaration or order of its leader, but on the condition of interference both from the country of origin of the terrorist group and from other countries that recognize the group and place it under one command with the armed forces of its country in accordance with Article 43 Paragraph (3) of The Additional Protocol I of 1977, then the state or the warring parties need to notify its opponents of the participation of these members. If it meets this, then the terrorist has entered the first requirement as a combatant.

b. Civilians

When associated as civilians, referring to the provisions of Article 2 of the Hague Regulation on *levee en masse*, that "inhabitants of unoccupied territories, who spontaneously take up arms to provide resistance without having time to organize themselves in accordance with Article 1, shall be considered belligerent if they take up arms openly and if they obey the laws and customs of war". Terrorists cannot be categorized as *levee en masse* understands. Although it has been discussed before that terrorists are considered civilians

related to the war against terrorists as long as terrorists do not take up arms, terrorists are not civilians of countries that have not been occupied. Terrorists are also not residents who immediately put up a fight without self-organization, considering that some terrorist groups have adequate weaponry and have been given military training before. Terrorists also cannot be considered belligerent when taking up arms openly because it has been discussed before that terrorists do not obey the laws and customs of war. These things that invalidate the status of terrorists to be categorized as *levee en masse*. It can be concluded that terrorists participating in armed conflicts cannot be categorized as legitimate combatants, nor civilians.

Terrorists are "new actors" in armed conflict. This is because their position is still not fully identifiable as one of the parties present in an armed conflict, it can be seen from the characteristics and characteristics possessed by terrorists who do not meet all the criteria when they have taken up arms and are directly involved in armed conflict. It cannot be identified as a whole as one of the parties to the armed conflict. This is because the nature, characteristics, and characteristics of terrorists do not meet any criteria when they have taken up arms and are directly involved in armed conflict. Terrorists can be categorized as non-state actors who are not legitimized in international law. Terrorists are actors who are not recognized for their existence in the world and have an impact because they have goals that are contrary to the interests of a country.

Terrorists can be considered unlawful belligerents when they participate directly in war. Terrorists do not meet the requirements as a legitimate belligerent under Article 43 of The Additional Protocol I of 1977, so the term unlawful belligerent is more appropriate to answer about the status of the terrorist. Basically, unlawful belligerent is indeed part of unlawful combatant. But when looking at the characteristics of terrorists in depth, the term unlawful belligerent is more suitable than unlawful combatant. The difference between the two lies in the time and the object of the target. Unlawful combatants are not suitable for answering questions about terrorist status because terrorists are not combatants. Terrorists are also not armed forces originating from a country or a major participating party. Terrorists who are non-state actors and belong to the unlawful belligerent hold a considerable role in the war on terror in modern times.

So, it can be concluded that the status of terrorists in the war on terror under international humanitarian law can be regarded as civilians as long as they are not involved in combat. If the terrorist is involved in combat, then his legal status becomes an Unlawful Belligerent.

2. Relevance of International Humanitarian Law in the Context of the Global War on Terror Imposed by the United States

International Humanitarian Law recognizes two categories of armed conflict, namely International Armed Conflict and Non-International Armed Conflict. An International Armed Conflict is an armed conflict involving two or more countries of an international nature, while a Non-International Armed Conflict is an armed conflict fought between the armed forces of a country's government and an organized armed forces or a showdown between two or more organized armed forces, which is domestic in nature. When the United States declared a war on terror and carried out attacks on Afghanistan in October 2001 and into Iraq in March 2003, the arms dispute was categorized as an international armed conflict.

At the heart of the implementation of International Humanitarian Law is armed infighting. Humanitarian law cannot be applied to situations other than war situations, such as riots, chaos or sporadic crimes including attacks carried out by terrorists. Terrorism itself has been regulated in several anti-terrorism conventions, such as the International Convention for the Suppression of Terrorist Bombing, the International Convention for the Suppression of the Financing of Terrorism and ten other counter-terrorism conventions. However, the United States did not ratify any of the anti-terrorism conventions on the grounds that they were not strong enough to tackle the current problem of terrorism.

The U.S. government concluded that attacks carried out by al-Qaeda groups “may be considered” as “armed attacks” as provided for in article 51 of the U.N. Charter. In the 2003 Instruction of the Secretary of Defense of the United States, concluded that: “single hostile act or attempted act may provide sufficient basis for the nexus (between the conduct and armed hostilities) so long as its magnitude or severity rises to the level of an 'armed attack', or the number, power, stated intent or organization of the force with which the actor associated is such that the act or attempted act is tantamount to an attack by an armed forces.” This is certainly contrary to the custom of international law that requires mutual hostilities between the two sides to conclude an armed attack the international community finally

recognizes that the global war on terror launched by the United States does not have a solid legal basis, because the main problem of the existence of a global war on terror is solely a political issue, then include international law to legitimize the act.⁸

Then if the United States recognizes that the global war on terror is an 'armed conflict' or war as stipulated in the laws of war, then humanitarian law must also be implemented in the context of this global war on terror. In fact, however, in cases of arrests of al-Qaeda members or people associated with Al-Qaeda, the U.S. military makes out-of-place interpretations of humanitarian law. The U.S. government often deviates from humanitarian law and even the United States has not ratified Protocol I of the Geneva Conventions. Regardless, the provisions in the protocol have become customary international law, this is because the basic principles of the Additional Protocol I has been received very widely, more widely than can be concluded of the number of countries that have ratified it. That way any dignified country will certainly abide by it. The reason for not ratifying Protocol I of the Geneva Conventions is that the United States does not want to give speciality as a combatant to people with ties to Al-Qaeda.

D. Conclusion

In this study, it can be concluded that the status of terrorists in the war on terror based on International Humanitarian Law can be considered as combatants if there is a declaration or order from the leader, but on the condition of interference both from the country of origin of the terrorist group and from other countries that recognize the group and place it under one command with the armed forces of the country in accordance with Article 43 Paragraph (3) of the Additional Protocol I of 1977, then the state or the warring parties need to notify its opponents of the participation of these members. Then the status of terrorists can be regarded as civilians as long as they are not involved in combat. If the terrorist is involved in combat, then his legal status becomes an Unlawful Belligerent. The relevance of International Humanitarian Law in the context of the Global War on Terror imposed by the United States shows that in its enactment the United States committed irregularities to International Humanitarian Law, even the United States has not ratified Protocol I of the

⁸ Intan Innayatun Soparna, "'Global War on Terror' Oleh Amerika Serikat Dalam Perspektif Hukum Internasional," *Jurnal Hukum Internasional*, Vol. 1, No. 1, 2017, p. 7.

Geneva Conventions. Regardless, the provisions in the protocol have become customary international law, so any dignified country will certainly abide by it.

E. Suggestion

In this study the author gave some suggestions, among others, that the absence of clear rules in the international setting on the definition of terrorist causes the status of terrorists to become unclear. This makes it difficult to categorize the war on terror into one of the armed conflicts that have been regulated in International Humanitarian Law. In this case it is necessary to establish a law in the form of conventions, international treaties, or protocols that thoroughly regulate and provide limits that are considered appropriate to apply to terrorists and also regarding the use of armed force against terrorists. So as to create legal certainty with the aim of preventing violations of International Humanitarian Law and human rights. Furthermore, United States has committed violations of the provisions set out in The Geneva Conventions of 1949 and their Additional Protocols. Countries and international organizations, such as the United Nations, should be able to more firmly look at and investigate whether the actions taken by the United States have violated the rules in International Humanitarian Law or not.

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