

**Juridical Aspect of the Use of Military Force in the War Model Approach
in Overcoming Terrorism in Indonesia
(Multiple Comparison)**

Arief Fahmi Lubis

Military Law School–PTHM/AHM

Jalan Matraman Raya No. 126, Jakarta Pusat

E-mail: ariefahmilubis0@gmail.com

Abstract. The approach of using military force in dealing with acts of terrorism does seem authoritarian and undemocratic so the “War Model” is considered to be at risk of human rights violations as a result of military involvement. The involvement of military force is most likely to trigger a bigger response from terrorist groups. Terrorism is an extraordinary crime that also requires handling in extraordinary ways. The purpose of this study is to analyze the polemic that currently perceived that the role of the military in overcoming acts of terrorism is not a taboo subject, especially against acts of terrorism carried out by a worldwide network. Terrorist networks that can grow quickly and spread like cancer must be trimmed first. This qualitative research used a descriptive approach to collect data systematically, factually, and quickly according to the description when the research was conducted. The results of this study indicate that the use of military force in overcoming acts of terrorism in the country is appropriate because it is based on the fact that acts of terrorism are not ordinary crimes that can be resolved through the law enforcement process.

Keywords: Terrorism, Military Power, War Model

INTRODUCTION

The evolution of the Terrorism movement and network requires the state to continue to adapt in responding proportionally in dealing with terrorism, including using military force in overcoming every act of terrorism.

Terrorism is a global phenomenon in the form of a threat that become a problem throughout the world, including in Indonesia. Since its inception, which later became a global phenomenon, acts of terrorism have continued to transform; both in terms of organization, targets, and operation mode. The evolution of movements and networks created by radical parties, who use terrorism as a method of achieving goals, requires the state to continue to adapt in responding proportionally in dealing with terrorism. The anti-terrorism strategy has undergone tremendous development at the beginning of the 21st century. Clark McCauly, a Social Psychology Professor from the University of Pennsylvania, divides two approaches to dealing with terrorism, namely the criminal justice model and the war model. The pattern of the criminal justice model approach identifies terrorism as an act that is categorized as a criminal act whose settlement is

carried out through a criminal justice system, starting from the process of investigation, and prosecution to court.

Nowadays, Indonesia has used the first approach to the criminal justice model, where the police institution is at the forefront to deal with terrorism. In the context of the criminal justice system, acts of terrorism have fulfilled the elements of criminal acts in the Criminal Code or special legislation such as Law Number 15 of 2003 concerning Stipulation of Government Regulations in Lieu of Law Number 1 of 2002 concerning Eradication of Criminal Acts of Terrorism into Law as amended by Law Number 5 of 2018 concerning Amendments to Law Number 15 of 2003 concerning Stipulation of Government Regulations in Lieu of Law Number 1 of 2002 concerning Eradication of Criminal Acts of Terrorism into Law.

In the context of democracy, the criminal justice model approach is considered a more suitable approach than the war model. In the pattern of the criminal justice model, the military (Indonesian National Army) is placed as a supporting element that will only be involved in the Police need assistance from them in overcoming acts of terrorism. The pattern of the "War Model" approach as a counterterrorism strategy was established and developed after the September 11, 2001 attacks when "The Global War on Terror" was declared by President George W. Bush. The incident which resulted in more than 3,000 casualties was defined as an act of war against state sovereignty, which then moved the context/right of national self-defense. The US Congress allowed the use of military force within days of 9/11 and the state of war continues, even today, between the United States against Al Qaeda, ISIS, and other organizations allegedly linked to terrorism. In the war model approach, the counterterrorism strategy defines terrorism not only as a violation of ordinary criminal law but also as a threat to national security, which requires national self-defense, including the use of military force. The approach of using military force in dealing with acts of terrorism does seem authoritarian and undemocratic. With this approach, the risk of human rights violations as a result of military involvement is very possible and very likely to trigger a greater response from terrorist groups, but terrorism is an extraordinary crime that requires extraordinary handling.

RESEARCH METHODOLOGY

This research was conducted using a normative juridical research method by conducting a comprehensive study based on legislation and empirical juridical research, namely conducting an assessment based on observations of the handling of acts of terrorism in Indonesia involving the Indonesian National Army(TNI).

This research was legal research that used several approaches to answer the problems studied, namely: 1) the statutory approach, 2) the conceptual approach, 3) the comparative approach, and 4) historical and philosophical approaches.

The main data needed in this research was secondary data. Secondary data was obtained by conducting a study of the following documents:

- a. Primary legal materials, namely binding legal materials in the form of the Constitution to the laws and regulations under it and other legal documents;
- b. Secondary legal materials that explain primary legal materials, namely the minutes of the trial starting from the minutes of the Investigating Committee for Preparatory Work for Independence (BPUPKI), the Preparatory Committee for Indonesian Independence (PPKI), amendments to the 1945 Constitution, and research materials related to the main theme of this research and the results of discussions in various other scientific forums;
- c. Tertiary legal materials or supporting legal materials such as dictionaries, encyclopedias, and other materials that complement research data.

Data processing was done qualitatively. The written legal materials that had been collected were then systematized according to the research problem. Furthermore, the legal material was reviewed and described in accordance with the problem using the relevant theoretical basis. To answer the problem, the legal material that had been systematized was then assessed so that it can answer correctly the meaning and position, and legal implications of the State Policy in the Indonesian legal system.

RESULTS AND DISCUSSION

Recently, there has been a debate among the public about the extent to which the Indonesian National Army(TNI) can be involved in dealing with acts of radicalism and terrorism in the country. Article 43I of Law Number 5 of 2018 concerning Amendments to Law Number 15 of 2003 concerning Stipulation of Government Regulations in Lieu of Law Number 1 of 2002 concerning Eradication of Criminal Acts of Terrorism into Law,

states "The Duties of the Indonesian National Army in Overcoming Acts of Terrorism are part of military operations other than war." This provision is in line with the provisions of Article 7 paragraph (2) letter b number 3 of Law Number 34 of 2004 concerning the Indonesian National Army (TNI) which among other things states that in military operations other than war, the TNI also has the task of overcoming acts of terrorism. Based on this provision, it is very clear that the TNI does have a duty to deal with acts of terrorism, only the debate that then arises is on what acts of terrorism are under the authority of the TNI. It is impossible for the TNI to be tasked with carrying out ordinary (criminal) law enforcement against acts of terrorism because this is the authority of the Indonesian National Police.

Perspective on Terrorism as A Crime

The TNI must intervene when acts of terrorism have threatened the security of the state; this is in line with one of the functions of the TNI as referred to in the provisions of Article 6 paragraph (1) letter c of Law Number 34 of 2004 which states that the TNI as a means of state defense functions as a "restorer to state security conditions that are disrupted due to security disturbances." It is very difficult to place the TNI on the front line in overcoming terrorism if terrorism is only considered a criminal act which is the domain of the authority of the civilian apparatus. The view that terrorism is only seen as an ordinary crime must be changed. The threat of terrorism continues to grow and is increasingly dynamic, acts of terrorism are not only hostage-taking or piracy involving several small people or organizations. Global dynamics show that terrorists have carried out massive attacks in an organized manner involving international networks. Like it or not, the state must be present to prevent action that threatens state security, terrorism is not an ordinary crime that can be solved by law enforcement only.

Terrorism must also be handled in an extraordinary way that involves not only law enforcement but all relevant stakeholders. In Indonesian history, the presence of the military in dealing with terrorism will be the entry point for the return of authoritarianism; military control over civilians. The implication of this action is the exclusion of civil rights like the New Order era. During the New Order era, the terrorist attack on the hijacking of the DC9 Garuda Indonesia Airways No 209 (Jakarta Medan) or known as Operation Woyla 1981 triggered the formation of a special unit from the Armed Forces of the Republic of Indonesia (ABRI); namely the unit of the Counter-Terrorism Detachment 81 or Den Gultor 81 Kopassus. In addition, the Navy and Air Force formed a

unit known as Denjaka Mariner (Detachment Jalamangkara) and Den Bravo Paskhas (Detachment Bravo).

The authority and war model approach during the New Order era made the police institution function as a supporting guard. The repositioning of the roles and duties of the TNI and Polri has placed the Indonesian National Police as the institution authorized to resolve criminal acts of terrorism. Meanwhile, the role of the TNI in overcoming acts of terrorism is still a discourse and does not yet have operational regulations in accordance with the mandate of the law. The absence of implementing regulations for the provisions of the Act causes uncertainty in the implementation of the role of the TNI in overcoming acts of terrorism and how it is implemented. The dissemination of a Presidential Regulation that regulates the role of the TNI in dealing with acts of terrorism is very important to identify in more detail the tasks of the TNI in dealing with acts of terrorism so that the implementation of the TNI's duties can run optimally. This article is intended to provide a comparative description of the role of the military in overcoming acts of terrorism in several countries, especially against acts of terrorism that occur in the country.

The United States of America

In the early days of United States independence, Army and Marine Corps troops had been used in law enforcement and the country's domestic affairs. Federal troops have been used to control unrest, protect minorities from violence, and guard borders. The role of the military then changed in 1878, after the Presidential election in 1876, with the promulgation of a provision known as the Posse Comitatus Act 1878 which stated, among other things: "Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both". This provision of the Posse Comitatus Act limits the role of the United States military in dealing with domestic events, including acts of terrorism. In principle, the United States military only carries out bond operations in order to maintain state sovereignty, as if there is no concept of domestic operations for the United States military.

Even so, the United States has a National Guard and a Coast Guard that is responsible for protecting the United States. One of the remarkable things is the composition of the National Guard and Coast Guard, most of whom are retired (veterans)

from the military, including the United States Army, Navy, Air Force, and Marines. Thus, in practice, the United States military remains involved in overcoming domestic security disturbances. Terrorism as a threat has only become a major concern after the September 11, 2001 attacks on the twin towers of the World Trade Center (WTC) in New York. This attack incident has informed the world that the international terrorist network has been so massive and capable of carrying out extraordinary actions. The War on Terrorism, also known as the Global War on Terrorism was launched by President George W. Bush in the aftermath of the September 11, 2001 attacks (9/11 attacks). It is an international military campaign sponsored by the United States and its allies targeting mainly Sunni Islamic fundamentalist armed groups located in several Muslim countries, with the most prominent groups such as Al Qaeda, ISIS, the Taliban, and various other groups being identified as a terrorist organization.

The campaign was entitled using the metaphor of war referring to various actions that do not constitute conventional war as traditionally defined. The 9/11 attacks have become a momentum for how an act of terrorism is not only seen as an ordinary crime/criminal act, but also a structured action that endangers state security. "The War on Terror" that is administered and published to the public by Bush is an international campaign led by the United States to fight terrorism. The United States Military Operations in Afghanistan (2001), Iraq (2003), and lastly in Syria (2011) are evidence of how the United States sees the problem of terrorism not only as a crime or an ordinary crime but as a threat to national security that must be overcome by military means. The occurrence of an unprecedented event in history, which later became a global phenomenon such as terrorism, has underpinned changes in United States regulations. The Posse Comitatus Act as a federal law that "prohibits military personnel from enforcing the law in the United States" is considered an obstacle to the policy of "The Global War on Terror". The decision of the United States Supreme Court in the case of Hamdi vs. Rumsfeld and the case of Hamdan vs. Rumsfeld has facilitated the United States military to also be involved in overcoming threats to national security, especially those related to acts of terrorism. Although there is a continuous debate regarding the use of military force in dealing with acts of terrorism, in fact up to now, the United States Military has played a role directly or indirectly in dealing with acts of terrorism.

France

France has a long history of terrorist attacks carried out by various groups including the extreme right, extreme left, extreme Basque, Breton and Corsican nationalists, Algerian rebel groups, and Islamic extremists. Anarchists carried out a series of bombings and assassination attempts in the 19th century. Several attacks related to the conflict with Algeria occurred in the 1950s and 1960s, including the deadliest terrorist attack in France of the 20th century, the 1961 VitryLe-François train bombing by the pro-colonialist French nationalist organization *armée secrète*. Various Middle Eastern factions were shot and bombed in the 1970s and 1980s, mainly in Paris. While during the Algerian Civil War of the 1990s, insurgents from the Armed Islamic Group conducted a series of large-scale attacks on Paris' public transport system. Moreover, nationalist extremists from the Basque, Breton, and Corsican communities carried out several killings and targeted bomb attacks in the 1990s and 2000s. Islamic extremists launched numerous attacks in the 2010s, with the November 2015 attacks in Paris being the bloodiest to date, resulting in the death of around 130 people. The legislation in France is quite detailed in regulating the authority to handle various acts of terrorism that occur in the country.

Before the acts of terrorism in November 2015, the principle of the French military was only dealing with threats that came from outside or maintaining the existence of French colonies in Africa. Following the attacks on Charlie Hebdo, Bataclan, and Stade de France The War on Terrorism is also known as the Global War on Terrorism launched by President George W. Bush in the aftermath of the September 11, 2001 attacks (9/11 attacks). It was the largest American-sponsored international military campaign which was sponsored by The United States and its allies targeting mainly international terrorist groups (2015), and in Nice (2016). President Hollande made a policy that "the state is at war against terrorism." In January 2015, the French government launched one of the largest military operations since the Second World War. It does not concern with international conflicts or the protection of France's territorial integrity against external adversaries. In contrast, it was known as *Opération Sentinelle*, which involved more than 13,000 troops, in which at one point it required the deployment of troops to guard tourist sites and patrol the streets of French cities against any violent terrorist threat that might come from within or from outside the state.

Australia

The controversy about the role of the military in dealing with acts of terrorism also takes place in Australia. Following changes to Australia's new national security law, in 2017, the military is given greater powers to deploy troops and even take over during terrorist attacks. By applying the new system, state Police remain first responders to domestic terror incidents, but no longer maintain sole command of attack or hostage situations. The military will also be allowed on the streets to support a broader police response, including blocking potential suspects from leaving the scene. Elite special forces will have the full legal authority to shoot and kill terrorists. The fallout from the deadly 2014 Sydney Lindt cafe siege sparked a year-long review of the so-called callout provisions of the Defense Act amid fears the law contained so many legal and administrative barriers that it would hinder the military's rapid response to a terrorist attack in Australia. This is the first major review of Defense's contribution to domestic counter-terrorism in more than a decade.

The Australian Defense Force has two tactical strike groups, in Sydney and Perth, which are on the alert to rapidly deploy to a terrorist attack. Under the previous system, the Australian Defense Force (ADF) could only be used if state or territory police belief in their ability or capacity to respond had been exceeded. That provision would have been revoked during the Turnbull administration, meaning that states could seek federal help even if they remained in control of the situation. In exceptional circumstances, the Australian Federal Government does not have to wait for a request from a state and may decide to deploy the ADF. The system also only allows the ADF to be deployed if the governor-general signs at the request of the prime minister, attorney general and minister of defense in which all of whom must agree state forces are unable to respond properly. The recent system will better support states in preparing for terrorist incidents and improving the flow of information between the ADF and police during incidents. Analysis of the Military's Role in Overcoming Terrorism and The repositioning of the military's role in several countries such as the United States, France, and Australia or other western countries (which are claimed to promote democracy and civilian supremacy) has expanded the use of armed forces for domestic purposes in recent years. Whether it is driven by the perceived threat of terrorism, organized crime, irregular immigration, or lawlessness in the aftermath of a natural disaster, many countries have indeed moved toward greater involvement of armed forces in domestic security,

including support for national and local police forces. The police and military are usually known as two different entities with different tasks and logic.

Traditionally, the police were responsible for internal security and the enforcement of public order, while the military's main task was to defend the territory and interests of the state against foreign enemies. However, these definitions, which are built on the strict separation between state and public security, have been criticized by many scholars. Since the beginning of state development, state governments need armed forces to provide external and internal security. However, in line with the times and the era of democratization that prioritizes civil supremacy, the role of the Police is put forward to overcome various problems related to disrupting public order, including also in overcoming acts of terrorism. The expansion of the Terrorism network, which is not only local or national but across national borders, has shifted the policy of using the military in dealing with acts of terrorism. Revision of laws and regulations is a necessity that occurs in many countries. The Posse Comittee Act, which has been around for more than two centuries in the United States, must be redefined to accommodate the use of military force in dealing with acts of terrorism. It is also found in France and Australia as well as many other western countries. The argument against the use of military force in overcoming acts of terrorism in the country is based on the fact that acts of terrorism are not ordinary crimes/criminal acts that can be resolved only through the law enforcement process. The Armed Forces must be involved in overcoming acts of terrorism because every act of terrorism has the ultimate goal of destroying the state/government and replacing it with the desired concept of government. The concept of a "Caliphate" State promoted by an organization linked to ISIS is evidence that acts of terrorism have been used as a method for achieving goals that threaten state sovereignty. Terrorism is a threat to not only public security/order but also state security as the domain of the Armed Forces. The military cannot only be used as an alternative which is only used when law enforcement officers such as the police are unable to deal with acts of terrorism. The military must be at the forefront of dealing with acts of terrorism that have been identified as threatening state sovereignty.

CONCLUSION

Fear of human rights violations occurs when the military is involved in dealing with acts of terrorism, is indeed a global phenomenon to prevent policy changes that reposition the military's role in overcoming conflicts in the country. The treatment of military detainees at Guantanamo, United States, which is always used as a comparison, should not be taken to predict that similar incidents would occur if the Armed Forces were prioritized in dealing with acts of terrorism. Identification of the military's authority in dealing with acts of terrorism and procedures for actions taken by the Armed Forces are the key to preventing human rights violations when the military is involved in dealing with acts of terrorism in the country. Prioritizing the role of the military in overcoming acts of terrorism is not a taboo matter, especially against acts of terrorism carried out by a worldwide network. The terrorist organization that can grow quickly and spread like cancer must be trimmed first. The military in any country including the Indonesian National Armed Forces can detect and deal with various acts of terrorism, the only issue that remains unclear is whether Indonesia will give this opportunity to the Indonesian National Armed Forces. If it was given authority in dealing with acts of terrorism, the achievement of the ultimate goal of every act of terrorism, namely replacing the existence of a legitimate state/government with the desired concept of government, can be avoided and even stopped.

REFERENCES

- Ansyaad Mbai, (28 Februari 2011), *Terorisme dan Kebijakan Pemerintah dalam Penanggulangannya*, PPSA XVII Lemhannas, Jakarta.
- A. Gunawan Setiardi, *Dialektika Hukum dan Moral dalam Pembangunan Masyarakat Indonesia*, (Yogyakarta: Kanisius, 1990).
- Didik Novi Harmanto, (2019), Ringkasan Disertasi tentang ISIS-Indonesia pada Program Pascasarjana Kriminologi FISIP UI.
- Edy Imran, (2018), *Kewenangan TNI Dalam Mengatasi Aksi Terorisme Berdasarkan Peraturan Perundang-Undangan*, „Advokasi Hukum & Operasi, Edisi 46.
- Fajar Purwawidada, MH., M.Sc., *Kontra Terorisme Indonesia, Konflik dan Perbatasan*, <http://analisis Hankamnas.blogspot.co.id/2014/02/kelompok-teroris-mujahidin-indonesia.html>, Diakses pada 29 Mei 2017, pukul 18.30 Wib .
- Jerrold M. Post, (2005), *The Socio-Cultural Underpinning of Terrorist Psychology*, dalam Tore Borge (ed), *Root Cause of Terrorism, Myths, Reality and Ways Forward*, Routledge London and New York.
- Jenderal Purn. Profesor M. Tito Karnavian, (2020), Dalam Kuliah mahasiswa angkatan ke-5 Pendidikan S3 STIK PTIK.
- Johannes Jenius Sanjata, (2020), Strategi dan Kebijakan Pemerintah dalam menghadapi ancaman WMD, Tesis Master Kajian Terorisme UI, Jakarta. Lihat Hasil Riset Cefas Fisipol UKI.
- Miriam Budiardjo, *Dasar-Dasar Ilmu Politik*, (Jakarta: Gramedia Pustaka Utama, 1998).
- Nalesti, Yustina Trihoni, *Kejahatan Perang dalam Hukum Internasional Dan Hukum Nasional*, Jakarta: PT Raja Grafindo Persada, 2013.
- Pengertian Kewenangan, diakses dari <http://www.negarahukum.com/hukum/pengertian-kewenangan.html>, pada tanggal 3 Maret 2017 pukul 10.00 Wib.
- Richardson, Louise, (2015), “What Terrorist Want: understanding the Enemy, Containing the Threat, dalam Muhammad Tito Karnavian (Explaining Islamist Insurgencies).
- Sageman, Marc. (2008), “Understanding Terror Networks”. Pennsylvania: University of Pennsylvania Press.
- Sidratahta Mukhtar, (08 Maret 2008), *Dinamika Islam dan Demokrasi di Indonesia*, makalah Dialog Masyarakat Indonesia di Washington DC, AS.
- Sidratahta Mukhtar, (2018), “*Strategic Role of ASEAN in Fighting ISIS*,” *A Paper*, Published in ISEAS Journal, Vietnam.
- Sidratahta Mukhtar, (2019) Kebijakan Anti Terorisme di Indonesia, Studi proses Politik dalam pembahasan UU No 15 Tahun 2003 Tentang Pemberantasan Terorisme, Draf Buku Disertasi Universitas Indonesia.
- Suwoto Mulyosudarmo, *Kekuasaan dan Tanggung Jawab Presiden Republik Indonesia, Suatu Penelitian Segi-Segi Teoritik dan Yuridis Pertanggungjawaban Kekuasaan*, (Surabaya: Universitas Airlangga, 1990).

Walker Lacquer, *The Age of terrorism*, (1997), International Security Vol 27/2002, Paul Wilkinson, *Terorism and liberal states*, Macmillen Press, London.

Republik Indonesia, Undang-undang No. 34 Tahun 2004 Tentang TNI.

Wahab, Solichin Abdul, *Analisis Kebijaksanaan, Dari Formulasi Ke Implementasi Kebijakan Negara*, Jakarta : Bumi Aksara, 2004.