

# INTERNATIONAL LAW AND THE WAR ON TERRORISM: ASSESSING CITIZEN BECOMING COMBATANT FOR TERRORIST GROUP

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## ABSTRACT

*Investigate International Law and the War on Terrorism: Assessing Citizen Becoming Combatant for Terrorist Group in Foreign Country. This study is a qualitative study related to policy and implementation of International Law and the War on Terrorism: Assessing Citizen Becoming Combatant for Terrorist Group in Foreign Country. Terrorism is an extraordinary crime that requires extraordinary handling. Civilians who become combatants in a foreign country is a new issue in international law, because there has never been a similar case before. In Indonesian law, this issue has not been regulated in the applicable law. Therefore, the combatants could not be punished under legal law when they return to Indonesia. This causes an issue, as based on international law, these people are clearly in the same position as the foreign military. They have to undergo punishment similar to military forces and are deprived of their Indonesian citizenship status. The originality of this paper exhibits a comprehensive investigation of civilian, international law, terrorism, and combatant. One of the problems that recently emerged was civilians becoming combatants abroad. This phenomenon was caused by development of digital information that effectively eliminate boundary between one country with another. Brainwashing process that previously had to go through face to face, long and systematic process can be conducted by anyone. Anyone could be a victim of brainwashing as well.*

**Keywords:** Civilian, Combatant, International Law, Terrorism

## INTRODUCTION

Ideologization through face-to-face processes or the process of value internalization was previously conducted through simple manners utilizing internet or digital means. Internet was initially a means of international communication. Nevertheless, it created a new issue by creating combatants from civilians. This phenomenon especially occurs for ISIS (Islamic State of Iraq and Syria). ISIS is the English acronym for the Islamic State in Iraq and the Levant, a Sunni jihadist group whose sudden capture of Mosul, Tikrit and extensive swaths of Iraqi territory has triggered a new crisis, complete with atrocities targeting Iraqi army soldiers and volunteers.<sup>1</sup> Known in Arabic as Da'ash, it grew out of the Islamic State in Iraq, an al-Qaida affiliate which, in turn, came into existence after the 2003 US-led invasion. This group has been given the title of “terrorist organization” by the United Nations, European Union, the United States, Saudi Arabia, and many others. The leader or emir (prince) of ISIS is a 43-year-old Sunni, known by his nom de guerre as Abu-Bakr al-Baghdadi, or Abu Dua. His real name is Awwad Ibrahim Ali al-Badri al-Samarrai. He was held prisoner by US forces from 2005 to 2009. According to some accounts he was radicalized by his experience of captivity. But others describe him as having been a firebrand preacher under Saddam Hussein's rule. He studied at the University of Baghdad and was listed as a terrorist by the

UN in 2011.<sup>2</sup> The combatants who came to defend Islam are mostly foreigners. They are victims of brainwash conducted by ISIS through internet and social media.

In fact, the bombing happened outside the Sacred Heart Cathedral of Makassar in March 28th, 2021, while a Palm Sunday service was being conducted inside. The explosion occurred at the southeastern gate of the cathedral. According to police, the perpetrators were riding a motorcycle and intended to enter the church when they were stopped by police in front of the cathedral. When the perpetrators were asked to get off the motorcycle, the blast occurred. Ian Wilson,<sup>3</sup> a senior lecturer in Murdoch University, stated that the attacker's possible previous arrest, or the arrests of other members of the JAD group, may provide an insight into his motivation.

For this reason, every national law stated that every citizen joining foreign military institutions will have their citizenship revoked. This law applies to Indonesian citizen as Indonesia embraces the principle of single citizenship. However, arisen issue is whether ISIS deserves to be called a state in the modern context or not. There are conditions that must be fulfilled as mentioned in the Montevideo Convention. A nation requires permanent population; a defined territory; government; and capacity to enter into relations with the other states<sup>4</sup>.

In the context of permanent population, it is still too early to determine whether ISIS jihadist fighters from various countries could meet this requirement. Ideologically, these fighters may have some similarities. One thing to note is ISIS citizen status who is mainly foreigners. Nevertheless, should these combatants be determined to remain as ISIS citizens, hence the permanent population requirement is fulfilled.

Secondly, a defined territory. There is no concrete definition on this requirement. For example, Israel's unclear border region is recognized as a state based on international law. In this context, ISIS currently has power in a number of places. The territory may increase or decrease depending on current ISIS battles against Iraqi and Syrian military troops. However, based on international law, ISIS is considered to possess defined territory.

Third, the sovereign government. International law does not regulate this requirement concretely. Government system in any form is accepted international law perspective, even constitutional monarchy, democracy or absolute monarchy. In this context, ISIS enforces the Chalipate in a brutal way, i.e. mass murder, property, and property confiscation, even torture against certain groups. It is considered as a violation in an international sense, but existing ISIS sovereign government fulfilled this requirement.

Fourth, capacity to enter into relations with the other states. Despite being the final requirement, ISIS failed to fulfill this particular requirement. There is no country which is interested in establishing diplomatic relations with ISIS so far.

In consequence, based on international law, ISIS does not meet the requirements to be called as a state. Therefore, what is the status of foreign citizens who became combatants in Iraq and Syria? Referring to the international law, they did not join foreign military institutions as ISIS is not recognized as a state. However, the question arises: How could international law be applied to issues as this?

Citizens' actions, in private or group, as long as they have the intention to disturb the peace of society, can be classified as acts of terrorism. This is confirmed by United Nation (UN): In 1994, the General Assembly reaffirmed that terrorist acts are "criminal and unjustifiable, wherever and by whoever committed [...]." It was further declared that: "Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them"

Therefore, every citizen, regardless of their origin and identity, as long as they committed acts of terrorism voluntarily or without any coercion from any party, then their act is considered as a

criminal act. Nevertheless, arisen issue is the manner to distinguish combatant and civilian as both of them have different war treatment based on international law.<sup>5</sup> The Geneva Convention Relative to the Protection of Civilian Persons in Time of War, commonly referred to as the Fourth Geneva Convention, “affords protections to civilians” in warring territories and outlaws the practice of total war. Most of these countries does not possess appropriate law to overcome this problem. Thus, how should state government behave when one of its citizens are involved in the terrorist movement?

Several previous studies were used as references in this research separately, such as the Civilian by de Guzman<sup>6</sup>; Dick and Metcalfe<sup>7</sup>; Hipple and McGarrell<sup>8</sup>; Väsquez<sup>9</sup>; international law by de Jonge<sup>10</sup>; Gallant<sup>11</sup>; Storrier and da Costa<sup>12</sup>; Terrorism by Acharya<sup>13</sup>; Mazhar<sup>14</sup>; Sawalha<sup>15</sup>; Combatant by Jones<sup>16</sup>; Wahidin and Powell<sup>17</sup>; Zirker<sup>18</sup>. The originality of this paper exhibits a comprehensive investigation of civilian, international law, terrorism, and combatant.

## **The Distinction between Combatants and Civilians**

The history of war is as old as the history of human civilization. Almost all human civilizations always begin or end with the war. In ancient civilizations, it is very hard to find any peace among communities. Even countries possessing advanced civilization, science, and virtues could not escape war. China, as an example, is the land where the ancient philosophers such as Lao Tze, Confucius, Mencius promotes love and peace. These figures promote virtue as well. A country possessing an established military system has greater survival ability compared to those that does not strengthen itself with a military system. Mongolia Dynasty, for example, was able to conquer China and its surroundings. Romans emperor was another ancient story related to the glory of the past.

In ancient war history, the differences between civil and military were significant. The military is a civilian who is trained enough through special training and functioned as a means of war (mostly adult male). On the other hand, civilians is a group of unarmed citizens, possessing no skills related to warfare and generally weak physically (usually women, children and the elderly). The distinction is described clearly in the code of ethics that the military is forbidden to harm civilians. In Islamic context, Al-Quran (2:190) explained:

“Fight in the cause of Allah those who fight you, but do not transgress limits; for Allah loveth not transgression”.

In addition, there is also hadith that regulate this issue. Prophet Muhammad SAW described it as follows:

“It is narrated by Ibn 'Umar that a woman was found killed in one of these battles; so, the Messenger of Allah (may peace be upon him) forbade the killing of women and children.”

The phrase indicates that Prophet Muhammad SAW forbade killing women and children even during a warring state.

Civilians are hence protected by international law. Nevertheless, this issue had become a grey area since a huge number of civilians have become combatants. This distinction begins in Afghanistan (2001) and Iraq (2003) war. The United States military engages in war with armed civilian groups or later known as combatant.<sup>19</sup>

## **Combatants**

What is a combatant in international law context? There are a number of international law regulation. Hague Regulations, Article 3 of the 1899 Hague Regulations regulated: “The armed forces of the belligerent parties may consist of combatants and non-combatants”. Furthermore, in Article 3 of the 1907 Hague Regulations described: “The armed forces of the belligerent parties may consist of combatants and non-combatants.”

However, Hague Regulations haven't provided a clear definition on combatants and their position in the perspective of international law. Article 43(2) of the 1977 Additional Protocol described: Members of the armed forces of a Party in a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants. Therefore, they have the right to participate directly in hostilities. This convention also explained that there is no ambiguity between civilian and combatant anymore.

The Conference considered that all ambiguity should be removed and that it should be explicitly stated that all members of the armed forces (with the above-mentioned exceptions) can participate directly in hostilities, *i.e.*, attack and be attacked.

The international law managing combatant was then ratified by a number of countries, especially those often involved in a war of attrition. The following are combatant definitions in some countries:

- a) **Australia:** Based on Australia's Defense Force Manual (1994), it described combatant as: "Combatants comprise all organized armed forces, groups, and units (except medical service and religious personnel)". The description was reaffirmed in Australia's LOAC Manual (2006) which states: Combatants comprise all organized armed forces, groups, and units (except medical service and religious personnel) which are under the command of a party to a conflict and are subject to an internal disciplinary system, which enforces compliance with the LOAC. Persons who are not members of armed forces, must possess fixed distinctive sign recognizable at a distance and carry arms openly.
- b) **Cameroon:** Cameroon's Instructor's Manual (2006) states that: "All members of the Armed Forces are combatants, except religious and medical personnel. Members of the armed forces, members of militias, volunteer corps, and resistance movements belonging to a party to a conflict, and civilians who spontaneously take up arms as combatants. Members of the regular armed forces who profess allegiance to a government or an authority not recognized by the Sovereign to which they belong, as well as members of the armed forces of a third State who are at the disposal of a State party to a conflict, are equally considered combatants.
- c) **Israel:** According to Israel's Manual on the Laws of War (1998), legal combatants are "soldiers serving in the army (regular and reserve) or in well-ordered militia forces (e.g. the SLA or the State National Guards in the United States)".
- d) **United Kingdom:** The UK LOAC Manual (1958) states that: A combatant is one who is permitted by the law of armed conflict to take a direct part in an armed conflict on behalf of a belligerent State. Combatant status is very closely related to entitlement to Prisoner of War (PoW) status. The following are entitled to combatant status.<sup>20</sup> The UK LOAC Manual (2004), as amended in 2010, states: The expression "combatant" has been used in two senses in the past. Sometimes it has been used to describe any person who are physically engaged in hostile acts of an armed conflict on behalf of a party to the conflict, whether or not he is permitted to do so. It has also been used to describe persons with a right to take a direct part in hostilities. For this reason, it has often been qualified by the use of the adjectives "lawful" or "unlawful". The use of the words "lawful" or "unlawful" is unhelpful and possibly misleading in view of the status definition of "combatant" in [1977] Additional Protocol I, set out in paragraph 4.2 [quoted above]. A person who takes a direct part in hostilities when not entitled to do so is not a "combatant" under this definition simply by such conduct.
- e) **United States of America:** The US Naval Handbook (1995) states that the term "combatants" embraces those persons who have the right under international law to participate directly in armed conflict during hostilities. Combatants, therefore, include all members of the regularly organized armed forces of a party to the conflict (except medical personnel, chaplains, civil defense personnel and members of the armed forces who have acquired civil defense status), as well as irregular forces who [fulfill the conditions for being considered armed forces].
- f) **Rwanda.** The Report on the Practice of Rwanda (1997) refers to a statement by Rwanda's Minister of Defense on 18 August 1997 which stated that government troops may only target enemies who carry arms and/or kill people. Hence, the report concludes that in an internal armed conflict combatant are defined as persons who carry arms and/or commit inhumane acts against the population in relation to the hostilities. Wearing uniform or not has no significance in this respect.

## Civilians

Apart from combatant which is armed civilian, there is also defined on a civilian in international law. Civilians are persons who are not members of the armed forces. The civilian

population comprises all persons who are civilians. Civilian suffering in war is not a new phenomenon. Throughout history, civilians have been targeted by belligerents, who often have made no distinction between combatants and civilians during a fight. Massacres, rape, torture, starvation, enslavement, forced conscription, and displacement are common features of war at different times and places. Sometimes civilian suffering has been an unintended result of fight itself, and at other times it has been inflicted as a deliberate military strategy.<sup>21</sup> Making civilians a military target is against international law. Furthermore, targeting civilians demonstrates a lack of ethics and disrespect for the law: massacres as an act of revenge, as a means to control a population, or merely in order to spread terror and increase power.<sup>22</sup>

The definition of civilians as persons who are not members of the armed forces is set forth in Article 50 of Additional Protocol I, to which no reservations have been made. It is also contained in numerous military manuals. It is reflected in reported practice. This practice includes States which are not, or not at the time, party to Additional Protocol I. During Blasick case in 2000, the International Criminal Tribunal for the Former Yugoslavia defined civilians as “persons who are not, or no longer, members of the armed forces”.

No official contrary practice was found. Some practice adds the condition that civilians are persons who do not participate in hostilities. This additional requirement merely reinforces the rule that a civilian who participates directly in hostilities loses protection against attack (see Rule 6). However, such a civilian does not thereby become a combatant entitled to prisoner-of-war status and, upon capture, may be tried under national law for the mere participation in the conflict, subject to fair trial guarantees (see Rule 100).

The definition of civilian change due to the emergence of the new definition of combatant in international law. The definition that "any person who is not a member of armed forces is considered to be a civilian" and that "the civilian population comprises all persons who are civilians" was included in the draft of Additional Protocol II. The first part of this definition was amended that "a civilian is anyone who is not a member of the armed forces or of an organized armed group" and both parts were adopted by consensus in Committee III of the Diplomatic Conference leading to the adoption of the Additional Protocols.

However, this definition was dropped at the last moment of the conference as part of a package aimed at the adoption of a simplified text. As a result, Additional Protocol II does not contain a definition of civilians or the civilian population even though these terms are used in several provisions. It can be argued that the terms "dissident armed forces or other organized armed groups ... under responsible command" in Article 1 of Additional Protocol II inferentially recognized the essential conditions of armed forces, as they apply in international armed conflict (see Rule 4), and that it follows that civilians are all persons who are not members of such forces or groups. Subsequent treaties, applicable to non-international armed conflicts, have similarly used the terms civilians and civilian population without defining them.

### **Civilian who became Combatant in Foreign Country**

One of the problems that recently emerged was civilians becoming combatants abroad. This phenomenon was caused by development of digital information that effectively eliminate boundary between one country with another. Brainwashing process that previously had to go through face to face, long and systematic process can be conducted by anyone. Anyone could be a victim of brainwashing as well.

This condition triggered a new issue in international law. In the first place, these combatants are civilians. As civilians, they are citizens who are not legally required to fight in the territory. The definition of combatant is very clear and universal. Anyone who fought in conflicted area could be

called a combatant. Nevertheless, what if they declare to return to their country of origin for certain reasons? What would their status be?

A civilian may become a combatant. In fact, every combatant is a former civilian: nobody is born as a combatant. A combatant may retire and become a civilian. But a person cannot (and is not allowed to) be both a combatant and a civilian at the same time, nor can one constantly shift from one status to the other.<sup>23,24</sup>

International law stated that any combatant is able to return to civilian status with certain conditions. According to A. Rosas, the combatant wishing to return their status as civilian must be treated as a prisoner of war. In international law, the subject is called *hors de combat*. Based on the 1949 Geneva Conventions, unlawful combatants *hors de combat* are granted the same privilege and to be treated with humanity while in captivity. Unlike lawful combatants, however, they are subject to trial and punishment, which includes capital punishment. Based upon article 41- Safeguard of an *hors de combat* adversary, it is stated that a person who is recognized or who, in the circumstances, should be recognized to be *hors de combat* shall not be made as an object of attack.<sup>25</sup>

Therefore, in international law perspective, combatants who wish to return as civilians' status must be protected and treated similar to other prisoners of war. It is conducted not in order to punish, but rather to keep the detainee from re-engaging in military-related activities. The following problem emerge when the said combatant turned civilian returned to their respective country of origin which was not involved in the conflict or war. This occurrence would indirectly cause conflict between national law and international law. But what is the position of international law in the state? International law and national law have unique relationship. Law experts described two opinions regarding the relationship between national law and international law. First, monism places the position of international law and national law as an inseparable unity, as Hans Kelsen,<sup>26, 27</sup> stated:

Since the international legal order not only requires the national legal orders as a necessary complementation but also determines their sphere of validity in all respect, international and national law form one inseparable whole.

That opinion reinforces Kelsen's view national law and international law as inseparable union. As a further form of explanation, Kelsen stated "... the fact that state as acting persons are organ international law, or the community constituted by it". A State's clear intention is the international organ and the international community established by the state. According to Kelsen, "the creation and execution of an order are the functions of its organ and the international legal order is created and executed by state". Kelsen states that the international legal base is the state. International law is correlated with national law. Therefore, he stated that, "it is from standpoint of international law that its connection with national law and hence with a universal legal order is seen". Aside from Monism which focuses on national law, there is also the type of monism which focuses on international law. This view brings the state in intrinsic relation to international law. Therefore, all the elements of the state are determined by international law.

The problem arises is the presence of the state in an international convention cannot be separated from the sovereignty of national law. Therefore, the basis of the formation of international agreements is none other than the national law respective individual countries. Should a country be subject to the agreement, it is inseparable from the national law which became the basis of its validity in formalizing international law. Therefore, the manner of response to the combatant who returned to civilian status and country of origin cannot solely rely on international law. It is also required to heed to respective country's national law and the manner of law regulation.

## **Indonesian Law on Combatant**

Discussing combatants cannot be separated from acts of terrorism. Because both have an inseparable historical attachment. Combatant and Terrorism both are born through the same ideology, to legalize violence to form a new government. The word terrorism is derived from French “le terrier”. It was originally used to refer to action’s French government actions against members of revolution. The government used brutal and excessive violence by beheading 40,000 people accused of anti-government activities. The word terrorism was originally used to refer to acts of violence conducted by government and anti-government activities. The terrorist term means perpetrators of terror acts which could be used in plural or singular manner. Terrorism generally means intimidation, violence, and civil brutality based on certain backgrounds, causes, and motives.<sup>28</sup>

Based on Webster's New School and Office Dictionary by Noah Webster, A Fawcett Crest Book mentioned that terror as a noun means: Extreme a fear, terrified fear. One who excites extreme a fear, or someone who is nervous in extreme fear.<sup>29, 30</sup> It is the ability to cause extreme fear. Terrorism is one of the most acute issues in Indonesia. This issue reached its peak when a series of acts of terrorism occurred in a number of major cities which killed hundreds of foreigners and Indonesian citizens.

The act of terrorism has been regulated in Indonesian law. It is based on Law Number 15 of 2003 on Stipulation of Government Regulation In lieu of Law Number 1 of 2002 on Combating Terrorism Crime. It was revised into Government Regulation In lieu of Law Number 1 of 2002 on Combating Terrorism Crime and Law Number 9 of 2013 on the Prevention and Eradication of Criminal Acts of Terrorism Financing. The mentioned regulations described the definition of terrorism. It is described as acts that meet the element of criminal acts in accordance with the provisions in the Law that regulates the eradication of terrorism acts.

Indonesian Government had issued Government Regulation In lieu of Law No. 1 of 2002 on the Eradication of Criminal Acts of Terrorism. It was then stipulated as Law Number 15 of 2003 on Stipulation of Government Regulation In lieu of Law Number 1 Year 2002 on Combating Terrorism Crime, in Lieu of Law of the Republic of Indonesia Number 1 Year 2002 on Combating Terrorism Crime. Government Regulation In lieu of Law Number 1 the Year 2002 was issued due to the prevailing legislation to date is neither comprehensive nor adequate to combat criminal acts of terrorism.

Law on terrorism is only regulated in the Criminal Code, whereas the act of terrorism includes extraordinary crime which should be punished extraordinarily. The law also regulates the jurisdiction of a country. Terrorism is an international issue; therefore, settlement requires cross-country methods. Another nation’s jurisdiction is defined in Section 3(1) where the crime is committed:

- a) Crime conducted by a nationality of the concerned nation;
- b) Crime against a nationality of the concerned nation;
- c) Crime conducted in the concerned nation;
- d) Crime against the concerned nation or the overseas government facilities of a concerned nation, including diplomatic facilities or the residences of diplomatic and consular officials;
- e) Crime utilizing violence or the threat of violence to force a concerned nation to take an action or not;
- f) Crime against an aircraft operated by the government of a concerned nation; or
- g) Crime on board a vessel sailing under the flag of a concerned nation or an aircraft registered under the laws of the nation where the crime occurs.

When this Law was enacted, the case of Indonesian citizens who become combatants has not yet appeared in Indonesia. ISIS is a phenomenon of contemporary terrorism which has not been regulated in Law of Terrorism. Therefore, Indonesian could not be criminalized in legal manner

because it does not include acts of terrorism as provided in Law Number 15 of 2003 on Stipulation of Government Regulation In lieu of Law No. 1 of 2002 on Combating Terrorism Crime.

This phenomenon differs from combatants who perform extremist acts in Indonesia, such as GAM (Aceh Separatist Movement) or Santoso in Poso, Central Sulawesi. In this case, they are the subject of war and can be categorized as a combatant as stated in Human Rights Watch (2001). In addition, this issue may involve citizenship issue. In the Indonesian legal perspective, any person who joins the foreign military institution without the consent of the president automatically loses their Indonesian citizenship. The absence of norms regulating civilian combatants in foreign country is a matter of national law in Indonesia. Yet by international law, every citizen who became combatant foreign territory has the same legal position as the foreign military. Therefore, future law of terrorism should regulate this issue in more depth.

## CONCLUSION

Terrorism is an extraordinary crime that requires extraordinary handling. Civilians who become combatants in a foreign country is a new issue in international law, because there has never been a similar case before. In Indonesian law, this issue has not been regulated in the applicable law. Therefore, the combatants could not be punished under legal law when they return to Indonesia. This causes an issue, as based on international law, these people are clearly in the same position as the foreign military. They have to undergo punishment similar to military forces and are deprived of their Indonesian citizenship status.

These facts prove that there is now a lacunae law in the terrorism law associated with the combatant. For the future, the rules relating to combatants should be more closely regulated and maintain its relevance to international law. Indonesia needs a strict rule to respond to combatants returning to Indonesia. For example, is the deprivation of Indonesian citizenship, as based on international law these combatants having equal positions with a foreign military.

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