論　説

Indonesian Counter-Terrorism Measures and Human Rights

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1. Introduction

Indonesian counter-terrorism measures started in 2003, when the Indonesian government enacted the Law on Anti-Terrorism. Indeed, there were several backgrounds for the government to issue the Law. Firstly, there was no special provision which regulated the act of terrorism in the Criminal Code (*KUHPidana*). Former regulations governing such situations - such as the Law on the state of emergency of 1959 and Law on Anti-subversion of 1963 - were abolished during the Habiebie Government. Secondly, many bomb attacks occurred in Indonesia in those days. It is reported that there were approximately 20 bombs explosing, in small and big scale.[1] The biggest one was the Bali Bombing on 12 October 2002 in which more than 300 people wounded and 200 people were killed; most of them were mainly Australian tourists. The attack was the one which took place on July 2009. It caused 9 deaths and 55 injures. Then, during May 2018 several attacks again took place in Indonesia. It is so call "family suicide attacks" where the terrorist used their children on the actions. More than

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1) Kompas: *Daftar Terroris di Indonesia*, December 15, 2008, at, http://www.kompas.com, last accessed on 10 May, 2010.

30 people died in terrorist attacks in Surabaya, Sidoarjo, and Pekanbaru.[2] It is clear the terrorist attacks in those periods led the Indonesian government to employ the Law on Anti- Terrorism in order to devise such insufficient system for prevention, investigation and prosecution of terrorists.

2. Legal System

To fight against terrorism, Indonesian government generally tries to respect human rights protected by the Constitution of 1945.[3] The Constitution states Indonesia is a country that based on the rule of law (*rechstaat*). Historically, Indonesian legal system adopted the Civil Law system, which was inherited from Dutch Colonial rule. After its independence on August 17, 1945, through the Constitution of 1945, Article II (the Transition Provision) of the Constitution acknowledged that laws and regulations before the independence still remained valid unless amended by new legislations.

Although the Indonesian legal system has an origin of European legal system, it was also influenced by *Adat* law, Islamic Law, and American Law system (Anglo-Saxon system). The latter system has gained spaces in Indonesian system since 1990s, such as Law on Banking, Law on Anti Money Laundering, and Law on Anti Terrorism.

The Law No. 12 of 2011 on the Formation of Laws and Legislations provides the hierarchy of Indonesian legislation as follows:[4]

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2) Indonesia church bombings: police say one family and their children behind attacks, https://www.theguardian.com/, last accessed on 14 February 2019.

3) US Department of State, Bureau of Democracy, Human Rights and Labor (2009), Indonesia Country Report on Human Rights Practice 2009, http://www.stat.gov/, last accessed on 1 July, 2010.

i) The Constitution of 1945 (*Undang-Undang Dasar 1945*).
ii) The People's Consultative Assembly Decree (*Ketetapan MPR*).
iii) Law or Act (*Undang-Undang*) / Law in Lieu/Interim Law (*Peraturan Pemerintah Pengganti Undang-Undang or Perpu*).
iv) Governmental Regulation (*Peraturan Pemerintah or PP*).
v) Presidential Regulation (*Peraturan President*).
vi) Ministerial Regulation (*Peraturan Menteri*).
vii) Regional Regulation (*Peraturan Daerah*).

Indonesian law is enacted by the Parliament (*Dewan Perwakilan Rakyat or DPR*) with joint approval of the President. In case of state emergency, the President can issue Law in Lieu (*Peraturan Pemerintah Pengganti Undang-Undang or Perpu*). However; such law has to be approved by the Parliament in the next session. The Law on Anti-Terrorism was enacted as a Law in Lieu, and then latter approved.[5]

3. Overview of Current Indonesian Law on Anti-Terrorism

3.1. Law on Anti Terrorism

The term "terrorism" began to appear in the Indonesian legal context since 9/11. Some say however that far before that date, the government had arrested the suspected terrorists through criminal proceedings under different names.[6] Before 9/11, terrorism was considered to be a crime of subversion which was regulated under the Criminal Code and the Law on

4) Law Nomor 12 of 2011 on Formation of Law and Legislation (Pembentukan Peraturan Perundang-Undangan), http://www.ditjenpp.kemenkumham.go.id, last accessed on 2 September, 2010.
5) The Law on Anti Terrorism of 2003 initially formed as Law in Lieu. In order to responds the Bali Booming I, it approved to be Law by the Parliament in the next sitting.

the Eradication of Subversion. The Law on the eradication of subversion has its origin in the Law on State of Emergency under Dutch rule. It was then reenacted through the Constitution of 1945.[7] It was further amended to be Law on the State of emergency of the 1959.[8] In 1963, the government enacted the Law on the Eradication of Subversion. However, both Laws terminated during President Habibie's rule.

On October 18, 2002, the government enacted the Government Regulation on eradication of terrorism in response to the Bali Bombing I on October 12, 2002. Article 1 of the Regulation states that the Regulation is applicable to the Bali Bombing I, it means it had a retroactive effect. In 2003, the President signed it to be Law on Anti Terrorism (hereinafter "Law on Anti-Terrorism").[9] Furthermore, in 2018, due to many terrorist attacks blast in several cities in Indonesia such as Jakarta, Surabaya, Sidoarjo, and Pekanbaru, then President on 25 May 2018 signed Law No. 5 of 2018 on Anti Terrorism as revised law of the previous one, Law No. 15 of 2003 on Anti Terrorism.

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6) International Crisis Group, Working to Prevent Conflict Worldwide, De radicalization and Prison in Indonesia, Asia Report No. 142, 19 November 2007, at, http://www.cricisgroup.com, last accessed on 10 June, 2010.

7) The Constitution of 1945, the Transition Provision, Article II provided all the law and regulation which exist before Independence Day, still remain to prevail unless there was a new law amended it.

8) Bivitri Susanti, "National Security, Terrorism, and Human Rights in Indonesia", at, http://dspace.anu.edu.au/bitstream/1885/42063/1/Bivitri.pdf, last accessed on 5 July, 2010.

9) Normally, based on the Constitution, President can issue only President Regulations (Peraturan Pemerintah or PP). However, it is an exceptional allowed by Constitution when state in emergency conditions, President under his/her emergency legislative powers can issue the Government Regulation in Liu of Law (Peraturan Pemerintah Pengganti Undang-Undang or PERPU or Interim Law). However, they must be approved by Parliament (Dewan Perwakilan Rakyat or DPR) at its following sitting to remain valid as Law. *See* Simon Butt, "Anti Terrorism Law and Criminal Process in Indonesia", http://www.alc.law.unimelb.edu.au, last accessed on 5 January, 2010.

The Considerations[10] of the Law on Anti-Terrorism of 2018 mentions that terrorism in Indonesia is a serious crime, threaten to national ideology, national security, and sovereignty, humanitarian valued as well. It is also characterized of well-organized transnational crime and worldwide link. Therefore, the eradication measures shall be carried out throughout special and continuously treatment.[11] It also admits that there are Indonesian citizenships that connect and take part into international terrorism groups.[12] In order to provide a legal basis for anti terrorism measures, the country needs a firmly legal standing.[13] The Law on Anti-Terrorism consists of 37 Articles[14] and Elucidations.[15] Article 1 mentions that several provisions on Law No. 15 of 2003 on Anti Terrorism amended by Law No. 5 of 2018 on Anti Terrorism[16]. The Law itself supplements existing criminal law: the Criminal Code and the Code of Criminal Procedure (Kitab Undang-Undang Hukum Acara Pidana or KUHAPidana). The Criminal Code consists of three Books: Book I on

10) According to the Indonesian legal system, in the first paragraph of the Law mentions a background the enactment of the Law under the title of Considerations. It usually explains reasons and legal basis of the Law.

11) Law on Anti-Terrorism: Considerations (a).

12) Law on Anti Terrorism: Considerations (b).

13) Law on Anti Terrorism: Considerations (c).

14) Article 1; General Term, Article 5; Scope of Application, Article 6; Definition of Terrorism, Article 10A-16A; The Terrorism Definition's Extensions, Article 25-34A; Court Investigation, Prosecution, and Article 35A-36B; Rights of Victims: Compensation, Retribution, and Rehabilitation, Article 43A-43D; Prevention, Article 43E-43I; Institutional, Article 43J; Supervision; Article 43K-46A, 46B; Closing Provision.

15) It is the Indonesian construction law system that the Law always encloses with the elucidation. Elucidation means an explanation upon article to article of the law. Legally, it composes and enact as joint approval by Legislative and Executive powers. Despite explanation, usually the elucidation also describes the historical background or the physiological considerations of the Law, and technical explanation upon the Law. It enclosed at the end of the Law, regarded as an integral part of the Law.

16) Law No. 5 of 2018, Article 1.

General Application, Book II on Crime, and Book III on Negligence. The Code of Criminal Procedure provides the procedure for criminal proceedings. Both Codes did not mention acts of terrorism. For completing such legal system, the government convinced that a special law with wide range of task was necessary. The Law makes it easier to prevent, investigate, and prosecute terrorists. In comparison with other legislations, the Law on Anti-Terrorism has some characteristics:

i) The period of detention for suspected terrorists are longer than that for those accused of other crimes to be 21 days.

ii) The Law allows the tapping and interception of communication related to terrorism.

iii) The Law allows law enforcement official to detain the suspected terrorists for maximum 9 months or 270 days.[17]

iv) The Law allows a direct involvement of the Indonesian Military on anti terrorism measures.

As can be seen, it is clear that the national security was in the priority for the Law on Anti-Terrorism. In the next section, the human rights problems related to the law are to be discussed.

3. 2. Human Rights Problems in the Law on Anti-Terrorism

As we have seen in the previous section, the overall observation of Indonesian legal structure for terrorism was done. In that context, the problems of legal practices on the Law of Anti-Terrorism from human rights perspectives will be examined here.

Article 2 of the Law on Anti-Terrorism of 2003 states,: "on behalf of

17) Article 25 (2) of the Law on Anti Terrorism: for investigation and prosecution purposes, the Police have authority to detain suspect terrorist maximum six (6) months.

national security and public order, the law respects the rule of law and human rights." However, we can easily find a problem of its implementation. It concerns equilibrium between effective counter-terrorism measures and human rights protection. We can see this kind of problem especially in three aspects: the definition of terrorism, period for interrogation, and intelligent report.

3. 2. 1. Definition of Terrorism

There is no agreeable definition of terrorism in international spheres, nor in Indonesian Law on Anti-Terrorism of 2018. The Law does not define the term "terrorism". Instead, Article 1 (1) simply states that crime of terrorism is any act that fulfils the elements of a crime under the present Law.

Article 6 stipulate a general description of terrorism as;

"any person who creates a widespread atmosphere of terror or causes mass causalities by using violence or threats of violence intentionally, and by taking the liberty or lives and property of other people, or causing damage or destruction to strategic vital objects, the environment, public facilities or international facilities, faces the death penalty, or life imprisonment, or between 5 and 20 year imprisonment".

The meaning of terms employed in the above are dealt in Article 1:

i) Person: individual, cooperation.

ii) Corporation: groups of individual and/or assets in legal/non-legal personality.

iii) Violence: any misuse of physical force, with or without an instrument which breaches the law and endangers human life, independence, including caused person to be faint or powerless.

iv) Threat of force: any act intended to frighten people by a sign or

warning on a situation which tends to create fear within people or community.

v) Asset: all moveable and immovable assets, tangible and intangible.

vi) Strategic vital object: places, locations or buildings with have a very high value in terms of economic, political, social, cultural, defense and security. It includes international facilities.

vii) Public facility: facility used for community interest.

viii) Exploded materials: materials which have power to explode: gun powder, boom, fire boom, mines, hand bomb, or any detonated material from chemical recipe or others material that could be used to be exploded.

In terms of meaning of terrorism as provided in Articles 6 and 7, the Elucidation[18] to article 6 further defines the term of "damaged or destruction to the environment" as follows:

"Devastation or damage to the ecosystem means pollution or destruction to the ecosystem, including humans, assets. The destruction ruins the continuation of the life and prosperity of humans and other creatures. The damage and destruction herein mean deliberate, release or discharging chemicals, energy and/ or other dangerous or poisonous components into the lands, air or water which endangers humans or assets."

The scope of Articles 6 is so broad that a wide variety of acts fall within this definition. In other words, the terms contained in Articles 6 may

18) The original document is in Bahasa Indonesia, the above statement was translated to English.

lead to subjective interpretation and may raise many questions of the applications of these provisions.[19]

3. 2. 2. Procedural Guarantee in conjunction with Interrogation Periods

According to Article 28 of the Law on Anti-Terrorism the police can arrest anybody who is suspected of terrorism based on initial evident. 21 days detention is permissible. After that period, the police have an authority to put the suspected terrorist under detention for further investigation for another nine months: otherwise the suspected terrorist has to be released. Compared with the Criminal Code, the Code allows only one day detention.

3. 2. 3. Intelligence Report

Article 26 of the Law on Anti-Terrorism states the police can take advantage of intelligence reports to obtain evidence of terrorist. In addition, the court can decide whether the said report can be accepted as an evidence. In the affirmative, the court may order the police to investigate based on that intelligence report. For collecting the initial evident, the police can examine the intelligence report which might came from various government institutions.[20]

The definition of "initial evident" depends on the evidence collected by intelligence report. According to the Elucidation of article 26, paragraph 1, the definition of intelligence report is one engaged with the meaning of

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19) Simon Butt, *supra* note 359.

20) Law on Anti Terrorism of 2003: Elucidation of Article 26 (1); "the intelligent report means the report which related with the national security matters. The intelligent reports can be obtained from Ministry of Home Affairs, Ministry of Foreign Affairs, Ministry of Defense, Ministry of Justice and Human Rights Protection, Ministry of Financial, National Police, National Army, Attorney General, National Intelligent Body, and other government institution concerns."

"national security". In such circumstances, some say that the Law on Anti-Terrorism does not take human rights into consideration which is recognized by the 1945 Constitution, as well as Law on Human Rights.[21] Especially, in counter-terrorism measures, specific duty of the State to protect human rights are not stated explicitly in the Law on Anti-Terrorism. The Article 2 of the Law on Anti-Terrorism only mentions the rule of law and human rights. In case of human rights violations during counter-terrorism measures, the effectiveness of the provisions in implementation is in question.

3. 2. 4. Organizational problems.

3. 2. 4. 1. National Police: *Densus 88.*

Indonesian National Police was formerly a part of the National Force since its independence. The Police was formally separated from the military in April 1999. Internally, there are some special branches called *"Brimob* or *mobile brigade"*[22], Air Police, Marine Police, Forensic and Special Detachment 88 or *Densus* 88. The Detachment 88 specially trained for anti-terrorism operations since its establishment in 2003 and went into operation in 2005. This special unit is being funded by the US Government through its State Department's Diplomatic Security Service. The unit is trained by CIA, FBI, and the US Secret Service. Most of the instructors were ex-US Special Force.[23]

According to the Law on Anti-Terrorism, court proceeding is based on the Civil Code and the Code of Civil Procedure.[24] Based on the Codes,

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21) The Law on Human Rights, Article 3 (2), Article 5 (1).

22) The *Brimob* have paramilitary role to conduct security stabilization operations and providing security protection for VIP and vital facilities.

23) Indonesia Police Detachment 88, at http://www.indonesiaelitforce.tripod.com/id37.htm, last accessed on 20 March, 2008.

24) Law on Anti-Terrorism of 2003: Article 25.

police has an authority in investigating function in counter-terrorism cases. However, the human rights protection issue by the police still remains one of the largest topics. The shoot to kill measure would be a typical example. The most recent case was in May, 2010: *Cawang, Cikampek, Pamulang* and *Aceh* attacks. Overall, around 13 suspected terrorist died on the stage.[25] Conversely, from the Police side, there were 3 deaths and 13 injures.[26] At the Press Conference, the police acknowledged that the suspected terrorists were killed. The Police firmly convinced that the suspected terrorists involved the act of terrorism in Aceh in July 2009. Most of them were armed and tried to attack the police when the operation held. Further, the police stand firmly with their arguments that all action was compatible with legal procedure, because the suspected terrorists did not want to surrender.[27] Further, the police also confirmed that two of the suspected terrorists were shot because they attacked some members of the police.[28]

In such circumstances, the question arises whether the police really respect to human rights in accomplishing its investigation functions. Indeed, the police have been reforming several internal organizations and mechanisms by accepting the use of force policy through the Chief Police Regulation (Peraturan Kepala Kepolisian or Perkap) of 2009.[29] The regulation strictly prescribes the use of deadly force and allows it to track and minimize the use of force by police.[30] The Code obliges three elements

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25) *KONTRAS*: "Penanganan Polri dalam Operasi Anti Terorisme Memprihatinkan", at http://www.kontras.org/, last accessed on 3 May, 2010.

26) Antara News: "Polri yakin tidak salah tembak mati terroris", May, 26, 2010, at http://www.antara.co.id/, last accessed on 15 May, 2010.

27) Republika: "Komnas Ham Sayangkan Polisi Soal Penembakan Terroris", at, http://www.republika.co.id/, last accessed on 20 August, 2010.

28) *Ibid.*

29) Polri: "Peraturan Kepolisian Negara Republik Indonesia tentang Implementasi Prinsip Standars Hak Asasi Manusia Dalam Penyelenggaraan tugas Kepolisian Negara Republik Indonesia", at http://www.polri.go.id/images/dat_turdur/20090703074238.pdf, last accessed on 2 September, 2010.

shall be carried out when the police take their task performances out: necessity, lawfulness, and accountability.[31] However, in practice, the regulation lack of provision in enforcement particular by failing to provide disciplinary measures in case of violation.[32]

In conclusion, under the Law on Anti-Terrorism, the organizational problem lies in the police itself. The circumstance brings the police into dilemma between respect of human rights and fight against terrorism. In counter-terrorism measures, there are some crucial objections, especially in the case of arbitrary deprivation of life. These cases are examined under the aspect of human rights, whether the police took into account the necessary conditions for the attack (proportionality, necessary, lawfulness, and accountability). Accordingly, these problems show us the legal ineffectiveness since the Chief Police Regulation does not provide disciplinary measures or an effective investigation in case of violation.

3. 2. 4. 2. BNPT (*Badan Nasional Penanggulangan Teroris* or National Counter Terrorism Agency)

Article 43E - Article 43H of Law No. 5 of 2018 on Anti Terrorism state that BNPT is under and responsible to President. Its functions are to formulate policy, national program, and de radicalitation program on anti-terrorism measures. It also shall coordinates among law enforcer on anti terrorism measures, including rehabilitation program and remedies for

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30) It was taken from UN Code of Conduct for Law Enforcement: Basic Principle on the use of Force and Firearms by Law Enforcement, adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offences, Havana, Cuba, 27 August to 7 September 1990. *See* also; The Chief Police Regulation: Article 45, 47, 48, 49.

31) *Ibid.*

32) Asian Human Rights Commission: "The State of Human Rights in Indonesia in 2009" at http://material.ahrchk.net/hrreport/2009/AHRC-SPR-004-2009-Indonesia-HRReport2009.pdf, last accessed on 13 June 2010.

victims[33].

3. 2. 4. 3. Indonesian Military (TNI)

According to Article 43I of Law No. 5 of 2018 on Anti Terrorism[34] stipulate that Indonesian Military function on anti-terrorism meusures is an military operation other than war. They would be addressed more in a separate decree within the next year. However, some said that it was unclear what the details of the military's involvement were.

4. The Indonesian Commission on Human Rights (*KOMNAS HAM*)

In order to understand human rights advocacy in counter-terrorism measures in Indonesia, the organizational problem of the Indonesian Commission on Human Rights (*KOMNAS HAM*) is examined. The Commission was initially established on June 7, 1993 by President Decree (Keputusan President or Keppres) on Human Rights Commission.[35] Following the collapse of Soeharto government in 1998, the transitional period began. The People' Consultative Assembly (*Majelis Permusyarawatan Rakyat or MPR*) issued a decree on Human Rights. On the basis of the Decree, government promulgated the Law on Human Rights of 1999, which also covered the *KOMNAS HAM* provisions.[36]

Article 1 (7) of the Law on Human Rights provides function of *KOMNAS HAM, inter alia:* research (Article 89 (1), education (Article 89

33) Law No. 5 of 2018 on Anti Terrorism, Article 43E-Article 43 H

34) Law No. 5 of 2018 on Anti Terrorism, Article 43I

35) *KOMNAS HAM*: Enny Soeprapto "Assets and Challenges in the Discharge of *KOMNAS HAM* mandate in the Promotion and Protection of Human Rights, Some Experience", at http://www.komnasham.go.id/, last accessed on 10 September, 2010.

36) The Law on Human Rights consisted of two main parts, firstly, a list of human rights and fundamental freedom that should be respected and protected and, secondly, provisions on various aspect on Human Rights Commission Provisions.

(2), monitor (Article 3), and non-judicial settlement of disputes or mediator (Article 76 (1), Article 89 (4). In addition, according to the Law on Human Right Court of 2000 in Article 18 conferred *KOMNAS HAM* with an additional function in judicial nature.[37] *The KOMNAS HAM* is recognized as the only inquiry institution for allegedly human rights violation.[38] In the quasi-jurisdictional competence under Article 19 of the Law on Human Rights Court of 2000, the *KOMNAS HAM* has a sub-*poena* power as authority to summon individual or entities to come and provide the additional necessitate information toward certain cases.[39] Article 7 of the Law also classifies crime of genocide and crimes against humanity as "gross violations of human rights" which could be challenged before an *ad hoc* Human Rights Court. The *ad hoc* Human Rights Court will be set up under *ad hoc* Human Rights Court Law for 4 years on duty. In case of the Court did not establish yet, Article 104 provides that the alleged gross violations of human rights case could be applied to normal proceedings.

Furthermore, according to the Law on Human Rights Court of 2000, the process for dealing human rights violation cases is shown as follows:

i) Human Rights violation complaints.

ii) If *KOMNAS HAM* finds a violation, then they set up a Committee to investigate the case further, and then *KOMNAS HAM* will issue a recommendation to proceed the case.

iii) The Recommendation will be transmitted to Attorney General (*Jaksa Agung*) for further investigation and possible prosecution under the Human Right Court or the "ordinary" Criminal

37) Under Indonesian legal system, criminal justice process consist of four stages; 1. Inquiry (to find initial evidence of a crime has been committed. 2. Investigation (to find evidence that a crime has been committed and to determine the suspect. 3 Prosecution. 4 Court Examination.

38) *See* also; the Law on Human Rights of 1999, Article 94.

39) Law on Human Rights, Article 95.

Courts.[40]

iv) Based on the Recommendation, the Attorney General can decide whether will carry further investigation into the case or not.

v) If the Attorney General decides to proceed the case then they will submit the decision to Parliament for consideration.

vi) Next, again, the Parliament will scrutinize the *KOMNAS HAM* recommendation, and then they will issue another Recommendation to President in order to set up an *ad hoc* Human Rights Court.

vii) President will issue a President Decree for establishing the *ad hoc* Human Rights Court.[41]

It is shown clearly that the human rights violation cases merely could be examined under government political will (the Attorney General decision). Due to the Condition of Admissibility of human rights violation complaints through *KOMNAS HAM,* Article 91 provides that t*he KOMNAS HAM* shall not deal with any application if;

i) The complaints are insufficient.

ii) The complaints are not about human rights violation in substance.

iii) The complainers are not in good faith.

iv) There is other effective mechanism.

v) The complaints are pending under other remedies.

Further, the Paris Principle on the status of National Institution for the

40) For ordinary human rights violation case is ruled by Law No. 39 of the 1999 on Human Rights, for gross violation of human rights is under Law No. 20 of the 2000 on Human Rights Court.

41) In case of the parties reached a compromise along the process, there is a mediation mechanism provided under Law on the Truth and Reconciliation Commission of 2004.

Promotion and Protection of Human Rights[42] provides a series of guidelines for the mandates of *KOMNAS HAM*. The Paris Principle suggests that, the competence and responsibilities of the National Institutions shall, *inter alia*, be given as broad a mandate as possible.[43] The mandate should be clearly set fort in constitutional or legislative text, specifying its composition and its sphere competence.[44] From that perspective, in *KOMNAS HAM* contexts, it is argued that the Commission does not have such broad mandate as stated in the Paris Principle.[45]

5. International Human Rights Contexts of Indonesian Counter-Terrorism

We can now examine the problem of current Indonesian counter-terrorism measures from another perspective, international human rights standards. One of the biggest problems related to counter-terrorism measures lies in the protection of right to life, especially arbitrary deprivation of life, which often occurs during the operation against terrorism. Basic standards on the right to life is provided in Article 3 of the Universal Declaration of Human Rights (UDHR), Article 6 of the International Covenant of Civil and Political Rights (ICCPR), Article 2 of the European Convention on Human Rights (ECHR), and Article 4 of the American Convention on Human Rights (ACHR). The Right to life has properly been characterized as the supreme human rights since without effective guarantee of this right; all other rights would be devoid of meaning.[46]

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42) *U. N. Doc.*, A/RES/48/134 of 20 December 1993: National Institutions for Promotion and Protection of Human Rights.

43) *Ibid.*, Annex: Principles Relating to the Status of National Institutions for the Promotion and Protection of Human Rights, para. 2.

44) *Ibid.*, para. 3 (a).

45) Law on Human Rights: Articles 1 (7), 76, 89, 94, 95.

The State has an obligation to avoid violations by the state agents, as well as duty to protect individuals from violation by third parties. The word was chosen in Article 6 (1) of the ICCPR with the intention of providing the highest possible level of protection to the right to life.[47] It also confines permissible deprivation. The limitations concern several principles. The principles includes on permissible, strict compliance, proportionality, an effective system of checks and controls. The State government also has duty to take all possible measures to safeguard an elaborate system for controlling the use of force by law enforcement officials, individual criminal and civil responsibility.[48] From that perspective, there is an urgent need that the deprivation of life in current Indonesian counter-terrorism measures policy shall be scrutinized from international legal framework.

5. 1. Human Rights Protection of Arbitrary Deprivation of Life

In order to examine the current Indonesian counter-terrorism measures and its problem of abuse, international cases on the right to life are examined in this section. It is regarded to be quite useful to address legal control upon terrorism action in Indonesia in years to come.

5. 1. 1. United Nations - Human Rights Committee

Before examining the cases before the Human Rights Committee (HRC), we shall confirm the scope of right to life under ICCPR (Article 6). In its General Comment No. 6 (1982), the HRC interprets the obligation

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46) Manfred Nowak, *UN Convention on Civil and Political Rights, CCPR Commentary, 2nd Revised Edition* (N. P Engel Publishers, 2005), p. 121. *See* also, Bertrand Mathieu, *The Rights to Life in European Constitutional and European Case Law* (Council of Europe Publishing, 2006).

47) B. G. Ramcharan, *The Right to Life in International Law* (Martinus Nijhoff Publishers, 1985), p. 21.

48) *Ibid.*

under Article 6 very broadly. The Committee states that the right to life is the supreme right from which no derogation is permitted even in time of public emergency which threaten the life of nation.[49] State parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces. In the broad meaning, State has an obligation to take positive measures to ensure the right to life protection from arbitrary deprivation of life in horizontal and vertical meanings: from the State agents itself and from the third party.

However, the ICCPR does not necessarily prohibit deprivation of life in any case. The use of the lethal force is permissible if there is a necessary reason to save human life.[50] To be lawful, the use of force must always comply with necessity and principle of proportionality. Non-lethal tactics for capture or prevention must always be attempted if feasible. The deprivation of life by the authorities of the State is a matter of the utmost importance. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life.[51] States policies should spell out clearly in guidelines to military commanders and complaints about the disproportionate use of force should be investigated promptly by an independence body.[52] In most circumstances, law enforcement officers also must give suspects the opportunity to surrender and employ "a graduated" resort to force.[53]

In case of *Pedro Pablo Camargo v. Colombia*,[54] the Human Rights Committee examined a case in which the alleged victims were killed during

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49) HRC General Comment No. 6, paragraph 1: *U. N. Doc.*, HRI/GEN/1/Rev.1 at 6 (1994).
50) *Ibid.*, para. 3.
51) *Ibid.*
52) *Ibid.*, para. 4.

a raid by the police operation. The raid was ordered in belief that Miquel de German Ribon, a former ambassador of Colombia to France, who has been kidnapped some days earlier by a guerilla organization, was being held prisoner in the house in question.[55] In spite of the fact that Miquel de German Ribon was not found, the Police decided to hide in the house to await the arrival of the "suspected kidnappers". Those suspects were killed as they arrived. The authors alleges that seven person, including Mrs. Maria Fanny Suarez de Guerrero were arbitrary killed by the unjustified action of the police. The case, at beginning, was shelved under Legislative Decree No. 0070 of 20 January 1978 because the Colombian authorities considered that the police had acted within the competence granted by the Decree. The author stated that the Decree has justified penal act and does not gives rise to penal responsibility when it is committed by member of police force. The author claims that the Decree violates Article 6, 7, 9, and 14 and 17 of the ICCPR.[56]

The state party refuted the allegations made by the author of the communication that the enactment of Legislative Decree No. 0070 of 20 January 1978 constitutes breach of Article 6, 7, 9, 14, and 17 of the Covenant.[57]

On 9 April 1981, the HRC therefore decided that the communication was admissible, as a fact that seven persons lost their lives as a result of

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53) *U. N. Doc.* A/CONF.144/28/Rev.1: the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials; *U. N. Doc.* GA/Res/34/169: the Code of Conduct for Law Enforcement Officials; *U. N. Doc.*ESC/Res/1989/65, annex, 1989 U. N. ESCOR Supp. (No. 1) at 52, *U. N. Doc.* E/1989/89 (1989): the Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions.

54) CCPR, Communication No. 45/1979, *Pedro Pablo Camargo v. Colombia*, 31 March 1982. U. N. Doc. CCPR/C/OP/1, p. 112.

55) *Ibid.*, para. 1, 2.

56) *Ibid.*, para. 4, 2.

57) *Ibid.*, para. 3, 1.

deliberation action of police that the deprivation of life intentional. Moreover, the police action was apparently taken without warning to the victims and without giving them any opportunity to surrender to the police patrol or to offer any explanation of their presence or intentions. There is no evidence that the action of the police was necessary in their own defense or that it was necessary to affect the arrest or prevent the escape of the persons concerned.[58]

The Committee is accordingly of the view that action of the police resulting in the death of Mrs. Maria Fanny Suarez de Guerrero was disproportionate to the requirements of law enforcement in the circumstances of the case and that she was arbitrarily deprived her, contrary to Article 6 (1) of ICCPR. In as much as, the police action was made justifiable as a matter of Colombian law by Legislative Decree No. 0070 of 20 January 1978, the right to life was not adequately protected by the law of Colombia as required 6 (1) [59] and that government was obliged to take the necessary measures to compensate the husband of Mrs. Maria Fanny Suarez de Guerrero for the death of his wife and to ensure that the right to life is duly protected by amending the law.[60]

5. 1. 2. The European Court of Human Rights

Article 2 of the European Convention of Human Rights provides protecting right to life. According to Article 2 (2), the intentional deprivation of life may be authorized only in conditions:[61]

i) In defense of any person from unlawful violence.

ii) In order to affect a lawful arrest or to prevent escape of a person

58) *Ibid.*, para. 13, 2.
59) *Ibid.*, para. 13, 3.
60) *Ibid.*, para. 15.
61) ECHR: Article 2 (2).

lawfully detained.

iii) In action lawfully taken for the purpose of quelling a riot or insurrection.

Under the Article 2, States parties to the Convention have an obligation to safeguard individuals' life under their jurisdiction, which consist of three main aspects;

i) The duty to refrain from unlawful killing by its agents.

ii) The duty to investigate suspicious death.

iii) A positive obligation (in certain circumstances) to take steps to prevent the avoidable loss of life.[62]

It should be borne in mind that those three points applies to the arbitrary deprivation of life, including in the situation of counter-terrorisms measures. The first point can be seen in the police's counter-terrorism operation in *Akhmatkhanovy v. Russia.*[63] The applicants complained under Article 2, based on the fact that investigation of Akhmatkhanovy's abduction by the Russian agents was not conducted appropriately.[64] The applicant argued that Artur Akhmatkhanovy had been detained by State servicemen and should be presumed dead in absence of any reliable news of him for several years. The applicants also argued that the investigation had not met the effectiveness and adequately requirements la down by the Court's case law.[65]

Conversely, the Government submitted that unidentified armed men

62) Clare Ovey and Robin White, *Jacob and White, the European Convention on Human Rights, Third Edition* (Oxford University Press, 2002), p. 42.

63) *ECrHR: Akhmatkhanovy v. Russia,* Application No. 20147/07, Judgment of 22 July 2010.

64) *Ibid.*, para. 107.

65) *Ibid.*, para. 123.

had kidnapped Artur Akhmatkhanovy. It further contended that the investigation of the incident was pending, that there was no evidence that the perpetrator abduction in question was state agent, therefore, no grounds for holding the state liable for the alleged violations of the applicants' rights.[66] The Government claimed that the investigation into kidnapping of applicants' relatives met the Convention the requirement of convention, as all measures available under national law were being taken to identify those responsible.[67]

The Court observed that the applicants, having no access to the case file and not being properly informed of the progress of the investigation, could not have effectively challenged acts or omissions of investigating authorities before a court.[68] The Court found that the complaint under Article 2 was to be admissible.[69] The Court held that the authorities failed to carry out an effective criminal investigation into the circumstances surrounding the disappearance of Artur Akhmatkhovy, which concludes the violation of Article 2 in its procedural aspect.[70]

The second point was shown on the police operation in the case of *Bazorkina v. Russian case,* [71] the applicant was a Russian national, Fatima Sergeyevna Bazorkina.[72] She claimed that her son, Khadzhi Murat Yandiyev's, had unlawfully killed by the agent of the State. It violated Article 2, 3, 5, 6, 8, 13, 34 and 38 of the Convention.[73] She also submitted that authorities failed to carry out an effective and adequate investigation into

66) *Ibid.*, para. 108.
67) *Ibid.*, para. 122.
68) *Ibid.*, para. 132.
69) *Ibid.*, para. 124.
70) *Ibid.*, para. 133.
71) ECrHR: *Bazorkina v. Russian,* Application No. 69481/01, Judgment of 11 December 2006.
72) *Ibid.*, para. 1.
73) *Ibid.*, para. 98.

the circumstances of his disappearance.[74]

In response the allegation failure to protect the right to life, the Russian government did not deny that Khadzi Murat Yandiyev was detained during a counter-terrorist operation in the village of Alkhan-Kala.[75] Nevertheless, responsibility for his disappearance was denied.[76] The Russian government further stated that the military prosecutor had opened a criminal investigation into his involvement in illegal armed group.[77] According to the government, his death had not been established and he had a strong reason to abscond.[78] Then, the Court takes all into considerations, including the videotape and numerous witness statement contained in the criminal investigation file. It confirms that he was interrogated by a senior military officer. But, there has been no reliable news of the applicant's son since 2 February 2000.

The Russian government does not submit any plausible explanation as to what happened to Khadzi Murat Yandiyev after his detention.[79] The Court decided that he must be presumed dead following unacknowledged detention.[80] There has been a violation of Article 2 of the Convention in respect of Khadzi-Murat Yandiyev.[81] Consequently, the Russian government can be attributable to the death.

In terms of the alleged inadequacy of the investigation, the applicant maintained that the Russian government failed to conduct an independence, effective, and through investigation into the circumstances of Khadzi Murat Yandiyev's detention and disappearance.[82] According to the

74) *Ibid.*
75) *Ibid.*, para. 100.
76) *Ibid.*, para. 101.
77) *Ibid.*, para. 102.
78) *Ibid.*
79) *Ibid.*, para. 110.
80) *Ibid.*, para. 111.
81) *Ibid.*, para. 112.

applicant, it was violating procedural aspect of Article 2. She questioned the effectiveness of the investigation since 2001. She also emphasized that no proper investigation had been conducted when discovered of five unidentified male bodies in Alkhan-Kala in February 2000.[83] The Russian government objected such applicant's claims. It pointed out that the applicant had been granted victim status and participates in the proceedings against the decision.[84] The Russian government also referred to the difficulties inherent in the prosecutors' work in Chechnya. [85]

The Court considered that it should be some form of effective official investigation when individuals have been killed as a result of the use of force.[86] The purpose of such investigation is to secure the effective implementation of domestic law which protects the right to life. In case of State agents allegedly involved, it purposes to ensure their accountability for death occurring under their responsibility. However, whatever mode is employed, the authorities must act of their own motion once the matter has come to their attention.[87] They can not leave to the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigatory procedures. The Court recalls that the obligations of State under Article 2 cannot be satisfied merely by awarding damages.[88] The investigations required under Article 2 of the Convention must be able to lead to the identification and punishment of those responsible.[89] It must be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. However, a prompt response by

82) *Ibid.*, para. 113.
83) *Ibid.*, para. 114.
84) *Ibid.*, para. 115.
85) *Ibid.*, para. 116.
86) *Ibid.*, para. 117.
87) *Ibid.*
88) *Ibid.*
89) *Ibid.*

the authorities in investigating the use of lethal force may generally be regarded as essential in maintaining public confidence in maintenance of the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.[90] The Court notes that between July 2001 and February 2006 the investigation was adjourned and reopened six times. In the light of these considerations, the Court finds that the authorities failed to carry out an effective criminal investigation into the circumstances surrounding the disappearance and presumed death of Khadzi Murat Yandiyev.[91] The Court accordingly holds that there has been a violation of Article 2 in this respect.[92]

In alleged violation of Article 3 of the Convention, the applicant claimed that Khadzi Murat Yandiyev had been subjected to inhuman and degrading treatment.[93] It can be seen from the scene portrayed in the video footage. She watched it on television when was broadcasted by NTV (Russian Independence TV) and CNN who entered Alkhan-Kala with the federal troops. The video showed that the soldiers kicking him on the wounded leg and causing him pain. She also stated that he had not received the requisite medical assistance.[94] However, the Russian government disputed that Yandiyev had been ill-treated by soldiers, because the video did not contain such evidence.[95] Relating to the question of whether medical assistance had been given to him could not be clarified in the absence of conclusive information about Yandiyev's whereabouts following his apprehension.[96]

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90) *Ibid.*, para. 119.
91) *Ibid.*, para. 124.
92) *Ibid.*, para. 125.
93) *Ibid.*, para. 126.
94) *Ibid.*, para. 127.
95) *Ibid.*, para. 128.
96) *Ibid.*

The Court observes that the facts concerning possible ill-treatment of Khadzi Murat Yandiyev are not well established.[97] It admittedly some witness submitted that Yandiyev had been wounded and he had been detained together with other patients from the Alkhan-Kala hospital. However, there were no witness statements nor the video recorded contained evidence to support the allegations that he was ill-treated on arrest.[98] The specific episode to which the applicant refers does not in itself appear to attain the threshold of severity required by Article 3. The Court mentioned that since the information before it unable the Court to find beyond all reasonable doubt that the applicant's son was subjected to treatment contrary to Article 3. The Court considered that there is no insufficient evidence for it. The Court conclude that the there has been no violation of Article 3 of the Convention.[99]

With regard to the alleged violation of Article 3 in respect of the applicant that she had suffered mentally watching the video tape in which her son had been mistreated by the soldiers.[100] Also it was caused by the authorities' complacency in the face of her son's disappearance and probable death. The Russian government denied that the applicant had been victim of treatment contrary to Article 3.[101] It noted that the applicant had been regularly informed of the progress of the case and her complaints had been dully considered. Her internal disappointment at the absence of positive outcome to the investigation could not be regarded as inflicting inhuman and degrading treatment.[102]

The Court reiterates that the question whether a family member of a

97) *Ibid.*, para. 132.
98) *Ibid.*, para. 133.
99) *Ibid.*
100) *Ibid.*, para. 137
101) *Ibid.*, para. 138.
102) *Ibid.*

disappeared person is a victim of treatment will depend on relevant element, including the proximity of family tie: the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, the involvement of the family member in the attempts to obtain information about the disappeared person, and the way in which the authorities responded to those inquires.[103] The Court further emphasize that the essence of such violation mainly lay in the fact of the concern of the authorities' reactions and attitudes to the situation.[104] The Court notes that the applicant is the mother of the disappeared victim. The applicant watch the video tape showing the questioning of her son, that ends with the words that he should be executed and with him being taken away by soldiers.[105] For more than six years she had not had any news of him.[106] During this period the applicant has applied to various official bodies with inquires about her son, both in writing and in person.[107] Despite her attempts, the applicant never received any plausible explanation on her son's existence after detention.[108] The response received by applicant mostly denied the State's responsibility for her son's detention and disappearance or simply inform that an investigation was ongoing.[109] The Court also found fact that the criminal investigation into disappearance started only one and a half year after the event. Having such considerations, the Court finds that the applicant suffered, distress, and anguish as a result of disappearance of her son and of her inability to find out what happened to him. The Court concluded that there has been a

103) *Ibid.*, para. 139.
104) *Ibid.*
105) *Ibid.*, para. 140.
106) *Ibid.*
107) *Ibid.*
108) *Ibid.*
109) *Ibid.*

violation of Article 3 of the Convention in respect to applicant.[110]

With regard to the alleged violation of Article 5 of the Convention, the applicant complained that Khadzi Murat Yandiyev's unacknowledged detention. This detention had not been authorized and documented in any way.[111] In answering the claims, the Russian government did not dispute that Yandiyav had been detained on 2 February 2000.[112] They noted that the arrest and detention had occurred during counter-terrorism operation. It complied with all formalities of the national legislation.

The Court stresses that the purpose of Article 5 is to protect the individual from arbitrary detention. It also intended that the act of deprivation of liberty be amendable to independent judicial scrutiny and secure the accountability of the authorities for that measure. The unacknowledged detention of an individual is a complete negation of these guaranties and discloses a grave violation of Article 5. Article 5 also requires the authorities to take effective measures to safeguards against the risk of disappearance and to conduct a prompt and effective investigation an arguable claim that a person has been taken custody and has not been seen. The applicant's son was detained on 2 February 2000 by the federal and has not been seen since. Yandiyev's detention was not lodged in the relevant custody records and there exist no official trace of his subsequent whereabouts or fate. Furthermore, the absence of detention records: date, time, location of detention, the name of detainee, the reasons for detention, and the name the person affect it. It must be seen as incompatible with the purpose of Article 5 of the Convention. The Court further considers that the authorities failed to take prompt and effective measures to safeguards Yandiyev against the risk disappearance.

110) *Ibid.*, para. 142.
111) *Ibid.*, para. 144.
112) *Ibid.*, para. 145.

Accordingly, the Court finds that Khadzi Murat Yandiyev was held in acknowledged detention in the complete absence of safeguards contained in Article 5 and there has been a violation of the right to liberty and security of person of the Convention.[113]

In respect to the allegation of violation of Article 6, the applicant stated that she had no effective access to a court because a civil claim for damages would depend entirely on the outcome of the criminal investigation into her son's disappearance.[114] In the absence of any findings, she could not effectively apply to a court. But, the Russian government disputed this allegation.[115] The Court finds that the applicant's complaint under Article 6 has been discussed under the procedural aspect of Article 2 and Article 13. The applicant did not submit information which proves her alleged intention to apply to a domestic court with a claim for compensation. The Court finds that no separate issues arise under Article 6 of the Convention.[116]

Due to alleged violation Article 8, the applicant argued that distress and anguish caused by her son's disappearance had amounted to a violation of her rights to family life.[117] However, the Russian government objected that complaints were unfounded.[118] The Court considers that such complaints as same facts as those examined under Article 2 and Article 3, therefore, it unnecessary to examine them separately.[119]

With regard to alleged violation of Article 13, the applicant complained that she had no effective remedies in respect of the violations alleged under

113) *Ibid.*, para. 149.
114) *Ibid.*, para. 151.
115) *Ibid.*, para. 152.
116) *Ibid.*, para. 153.
117) *Ibid.*, para. 154.
118) *Ibid.*, para. 156.
119) *Ibid.*, para. 157.

Article 2, 3, and 5 of the Convention.[120] Conversely, the Russian government disagreed, referring to her procedural position as a victim in a criminal case. It allows her to participate actively in proceedings.[121] They also contended that the applicant could have applied to the domestic courts with a complaint against the actions of officials or with a civil suit. The Court reiterates that Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substances of the Convention be secured in domestic level.[122] Nevertheless, the remedy required by Article 13 must be "effective" in practice as well as in law, capable of leading to the identification and punishment of those responsible and to award of compensation.[123] In this case, the criminal investigation into the disappearance and probable death was ineffective.[124] The Court finds that the State has failed in its obligations under Article 13 of the Convention. Consequently, there has been a violation of Article 13 of the Convention.[125]

The applicant disclosed that the Russian government failed to comply with their obligations under Article 38 (1) (a) of the Convention.[126] According to the applicant, the government refused to submit document from the investigation file upon the Court's request between November 2003 and November 2005.[127] Furthermore, she alleged that the government was still failing to close a number of documents, notably the documents related to the discovery of five dead bodies in Alkhan-Kala in 2000.[128] The applicant viewed that the government also had failed to

120) *Ibid.*, para. 158.
121) *Ibid.*, para. 159.
122) *Ibid.*
123) *Ibid.*, para. 161.
124) *Ibid.*, para. 163.
125) *Ibid.*, para. 164.
126) *Ibid.*, para. 167.
127) *Ibid.*

comply with their obligation under Article 34. She alleged that she was unable to substantiate her allegations about violations of Convention because of lack access to the document in question.[129] The Russian government noted that the documents comprising the investigation file had been submitted to the Court in their entity and within the time-limits stipulated by the Court.[130]

The Court found that the government had fallen short of their obligations under Article 38 in view of their repeated failure to submit the documents requested by the Court after the case had been declared admissible and the failure to ensure the attendance of key witnesses.[131] In March 2004, after the communication request, the Russian government submitted about half of the file, including the decisions to open a criminal investigation, a number of important witness statements and orders from the supervising prosecutors enumerating the findings of the investigation.[132] In November 2005, immediately after the case had been declared admissible, they submitted an entire copy of the file. After the hearing, they also supplied further update of the file.[133] Taking into account all the situation, the Court considers that there has been no breach of Article 38 of the Convention as regards the timing of the submission of the documents requested by the Court.[134] As to Article 34 of the Convention, there is no indication that there has been any hindrance with the applicant's right to individual petition.[135] The Court is of the opinion that the delay in submitting a full set of the documents requested raises no separate issues

128) *Ibid.*
129) *Ibid.*, para. 168.
130) *Ibid.*, para. 169.
131) *Ibid.*, para. 171.
132) *Ibid.*, para. 173.
133) *Ibid.*
134) *Ibid.*, para. 174.
135) *Ibid.*, para. 175.

under Article 34. The Court thus finds that there has been no failure on behalf of the respondent government to comply with Article 34 and 38 (1) (a) of the Convention.[136]

With regard to the application of Article 41 of the Convention, the applicant did not submit any claims for pecuniary damage.[137] As to non-pecuniary damage, the applicant stated that she had lost her son and endured years of stress, frustration, and helpless in relation to his disappearance and the authorities' passive attitude. She claimed non-pecuniary damage, but left the determination of the amount to the Court.[138] The Russian government considered that no damages should be awarded to the applicant in the absence of conclusive evidence of fault by the authorities in her son's death and when the investigation was ongoing.[139] The Court found a violation of Article 2, 5, and 13 of the Covenant on account of the unacknowledged detention and presumed death of the applicant's son in the hands of the authorities.[140] The Applicant herself has been found to be a victim of a violation of Article 3 in relation to emotional distress and anguish endured by her.[141] The Court thus accepts that she has suffered non-pecuniary damage which can not compensate for solely by finding of violations. It awarded the applicants EUR 35.000 in respect of non-pecuniary damage and EUR 12, 241 in respect of cost and expenses.[142]

In the latest case of *Al-Skeini and Others v. UK*,[143] the applicant's six

136) *Ibid.*, para. 176.
137) *Ibid.*, para. 178.
138) *Ibid.*, para. 179.
139) *Ibid.*, para. 180.
140) *Ibid.*, para. 181.
141) *Ibid.*
142) *Ibid.*
143) ECrHR: *Al Skeini and Others v. UK*, Application No. 55721/07, Judgment 7 July 2011.

close relatives of Iraqi nationals filed the case to the European Court of Human Rights.[144] This case has been before the UK courts between 2004 and 2007.[145] This case poses several important issues in international law, for instance, the protection of right to life, jurisdiction extra-territoriality, and State agent authority, as well effective control in occupied territory.[146] The discussion on the right to life in Article 2 of the European Convention on Human Rights is dealt in the present thesis. However, in determining a violation of Article 2, the issue of jurisdiction needs to be addressed.[147]

The applicant's relatives were killed in Basra when the United Kingdom was an occupying power in Iraq.[148] The applicants alleged that their relatives fell within the United Kingdom jurisdiction when they were killed. The first, second, fourth, and fifth of the victims were shot dead or shot and fatally wounded by British soldiers. The wife of the third applicant's was shot and fatally wounded during a firefight. The son of the sixth applicant's was seized by British troops during the work in a hotel in Basra. The troops took him to a British military base where he was beaten and died. There had been no effective investigation for the death. According to the applicants, the act breach Article 2 of the Convention.[149]

In domestic proceedings, on 14 December 2004, the Secretary of State for Defense decided not to conduct independent inquiries into the death, not to accept liability of the deaths, and not to pay just satisfaction.[150]

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144) *Ibid.*, para. 1.

145) UK Courts: *Al-Skeini v. Secretary of State of Defense*, (the Divisional Court in 2004 (2004) (ECHC 2911) (Admin), the Court of Appeal in 2005 (2005), (EWCA Civ 1609), the House of Lords in 2007 (2007) (UKHL 26)).

146) Alasdair Henderson, War, Power, and Control: The Problem of Jurisdiction, July 14, 2011, at http://www.ukhumanrightsblog.com/, last accessed on 21 September 2011.

147) *supra* note 172, para. 130.

148) *supra* note 172, paras.34, 39, 43, 47, 56, 64.

149) *Ibid.*, para. 3.

150) *Ibid.*, paras.72.

Subsequently, the applicants applied for judicial review for the decision, seeking declarations that the deaths violated the Convention on Article 2 (for the first fourth applicant) and Article 3 (for the sixth applicant).[151] On 11 May 2004, the Divisional Court rejected the claim of the first, second, third, fourth, and sixth applicants; would proceed to hearing, but the fifth applicants would be stayed pending the resolution of the preliminary issue.[152] On 14 December 2004, the Divisional Court rejected the claim of the first applicant but accepted the claim of the sixth applicant. The Divisional Court held it judgment by considering the issue of jurisdiction. It held that the jurisdiction essentially under Article 1 of the Convention was territorial, although there was exception. One exception applied where a State party has defective control of an area outside its own territory.[153] This basis of jurisdiction applied only where the territory of one Contracting State was controlled by another Contracting State, since the Convention operated essentially within its own regional sphere and permitted no vacuum within that space. This basis of jurisdiction could not, therefore, apply in Iraq.[154]

In case of the death of the sixth applicant, the Court contended that his death was under the jurisdiction of the UK territory, as British military prison operated in Iraq with the consent of the Iraq sovereign authorities and containing arrested suspects. The Court found that there had been a breach of the investigation duty under Article 2 and Article 3 of the Convention in respect of the sixth applicant's son.[155]

The first four applicants appealed against the Divisional Court's

151) *Ibid.*, paras.73.
152) *Ibid.*, paras.74-87.
153) *Ibid.*, paras.74.
154) *Ibid.*
155) *Ibid.*, paras.75- 77.

decision to the Court of Appeal. The Court of Appeal dismissed the appeals. It held that a State could exercise extra-territorial jurisdiction when it applied control and authority over the complainant and when it held effective control of an area outside its borders. But, in this case, UK did not carry out such legal obligation. Then, the first fourth applicants appealed to the House of Lords. The House of Lords found, in relation to the first four applicant's complaints, that the HRA 1998 had no jurisdiction over the deaths.[156]

In ECrHR proceedings, despite of jurisdiction and ineffective investigation disputes, the parties also disputed several issues such as the acts attributable to the UN and non-exhaustion of domestic remedies. In the present case, as to the question whether UK had jurisdiction and subsequently can be attributable to the deaths of applicants as result of their troops' acts in Iraq, the Court concluded that the United Kingdom assumed authority and responsibility for the maintenance of security in South East Iraq.[157] Thus, we can move forward to the allegation of breach of investigation duty of Article 2, as the applicants complained that the UK government had not fulfilled its procedural duty to carry out an effective investigation into the killings.[158] In the merits, the UK government accepted that the investigations into the death of the first, second, and the third applicants' relatives were not meet up with the purposes of Article 2, since in each case the investigation was carried out solely by the Commanding Officers. However, they submitted that the investigations

156) The Secretary of State of Defense also cross-appealed against the finding in relation to the sixth applicant's son. He accepted that the son in actual custody of British soldiers in military detention center in Iraq was within the UK's jurisdiction under Article 1 of the Convention. But he contended that the Human Rights Act had no extra-territorial effect and therefore, the sixth applicant's claim was not enforceable in the national courts.

157) *Ibid.*, paras.143-147.

158) *Ibid.*, para. 95.

carried out in respect of the fourth and fifth applicants complied with Article 2. Nor had there been any violation of the investigate duty in respect of the sixth applicants.[159] The Special Investigation Branch of the Royal Military was capable of conducting independent investigations. It was wholly independent from the military chain of command in relation to its prosecution function.[160]

The applicants submitted that the UK failed in its procedural duty as regard to the first, second, third, fourth, and fifth applicants. The Royal Military Police was an element of the British Army and was not, in either institutional or practical terms, independent from the military chain of command.[161] The applicants pointed out that Special Investigation Branch investigation into the fourth applicant's case had been discontinued at the request of military chain of command. The further investigatory phase, re-opened as a result of litigation in the domestic courts, was similarly deficient, given the lack of independent of the Special Investigation Branch and the extreme delay in interviewing the firer and securing other key evidence. In the fifth applicant's case, the investigation was initiated at the repeated urging of the family, after considerable obstruction and delay on the part of the British authorities. The investigators were not independent from the military chain of command and the victim's families were not sufficiently involved. The applicants contended that the UK government's objection that the fifth applicant lacked victim status should be rejected. The court-martial proceeding and the compensation he had received in settlement of the civil proceedings were inadequate to satisfy the procedural requirement under Article 2. In contras, the sixth applicant did not claim still to be a victim of the violation of his procedural rights under

159) *Ibid.*, para. 153.
160) *Ibid.*, para. 154.
161) *Ibid.*, para. 159.

Article 2 and 3.[162]

The Court's assesses the ineffective investigation disputes by considering on the object and purpose of the Convention. Article 2 of the Convention protects the right to life and set out the circumstances when deprivation of life may be justified. Article 2 covers both the intentional killing and also the situations in which it is permitted to use of force which may result deprivation of life. Any use of force must be no more than absolutely necessary for the achievement set out in sub paragraph.[163] The obligation to protect right to life under this provision, read in conjunction with the States' general duty under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention. There should be some form of effective official investigation when individuals have been killed as a result of the use of force by agents of State. The essential purpose of such investigation is to secure the effective implementation of the domestic laws safeguarding the right to life, to ensure their accountability for deaths occurring under their responsibility. The investigation shall also take consideration all surrounding circumstances, including such matters as the planning and control of the operations in question.[164]

The Court maintained that the obligation under Article 2, even in difficult security conditions, all reasonable steps must be taken to ensure that an effective, independent investigation are conducted into alleged breaches of the right to life.[165] The Court contended that whatever mode is employed, the authorities must act of their own motion once the matter has come to their attention. They can not leave it to the initiative of the next-of-

162) *Ibid.*, para. 160.
163) *Ibid.*, para. 162.
164) *Ibid.*, para. 163.
165) *Ibid.*, para. 164.

kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures.[166] The authorities must take the reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eye witness testimony, forensic evidence, and where appropriate an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical finding, including the cause of death.[167] A prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion or tolerance of unlawful acts.

There must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The victim's next-of-kin must be involved in the procedure to the extent necessary to safeguard his or her legitimate interest.[168] The Court maintained that the Special Investigation Branch was not, during the relevant period, operationally independent from the military chain of command to satisfy the requirement of Article 2.[169] The Court considers that Article 2 required an independence examination, accessible to the victim's family and to the public, of the broader issues of State responsibility for the death, including the instructions, training, and supervision given to soldiers undertaking tasks such as in the aftermath of the invasion. The Court notes that the sixth applicant accepts that he is no longer a victim of any breach of the procedural obligation under Article 2.[170] The Court found that there has been a failure to conduct an

166) *Ibid.*, para. 165.
167) *Ibid.*, para. 166.
168) *Ibid.*, para. 167.
169) *Ibid.*, para. 172.
170) *Ibid.*, para. 176.

independence and effective investigation into the deaths of the relatives of the first, second, third, fourth, and fifth of six applicants, violating of Article 2 of the Convention.[171] The Court holds that the respondent State is to pay each of the first five applicants for non-pecuniary damage, cost and expenses.

The *Al-Skeini* case attracted attentions both from public and international legal scholars.[172] Legal scholar commented that the case will be leading cases on the various issues for many years to come.[173] The Court decision shows that it still retains the basic recognition of extraterritorial jurisdiction must remain exceptional.[174] In this *case*, the Court held that the UK government exercised authority and control of public powers in Iraq.[175] It decided that it had jurisdiction over the territory as purpose of Article 1 of the Convention.[176] As legal consequence, the UK had responsibility to the protection of the right to life of Article 2 of the Convention in its occupied country, even though there was a limitation on procedural component of Article 2. It described that the protection of the right to life concept shall not substantively apply in an occupation territory. In the shoot to kill policy context, the judgment clearly indicated that the policy still remains in the UK counter-terrorism measures in the near future, including in the occupied land.

The above discussion demonstrated that right to life is protected

171) *Ibid.*, para. 177.
172) Marko Milanovic, "Al-Skeini and Al-Jedda in Strasbourg", *European Journal of International Law*, Vol. 23, (2012), unnumbered. *See* also at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id = 1917395, last accessed on 11 September 2011.
173) *supra* note 175.
174) *See:* ECrHR*: Bankovic and Others v. Belgium and 16 Other Contracting States,* Application No. 552207/99, Judgment 12 December 2001.
175) *supra* note 172, para. 163.
176) *Ibid.*

under European Convention on Human Rights. Similar to ICCPR, the protection right to life includes a non-derogating right under the Convention. In case of intentional deprivation of life can be lawfully, there are several conditions shall be met by the States party. In many cases law, the Court judgments demonstrated that it also obligates the States party to pay redress to the applicant's family as compensation.

6. Conclusion

The above discussions demonstrated that there are various backgrounds of the enactment of the Law on Anti-Terrorism in Indonesia. Due to Indonesian internal complicated conditions, many terrorism attacks occurred especially after 2000. It left no room for the Indonesian government to take counter-terrorism measures to maintain the national sovereignty and security. But, at the same time the Indonesian government should consider human rights protected by the Constitution, and legislations. Despite of that, there was no legal basis to regulate such violence action in Indonesian legislation, after similar Act on anti-subversion has been repealed during President Habiebie.

In counter-terrorism measures, Indonesia enacted Law on Anti Terrorism in 2003. In 2018, the Law No. 15 of 2003 0n Anti Terrorism was amended to be Law No. 5 of 2018 on Anti Terrorism. For further rule, the Indonesian government issued the Head of Police Regulation on the Police's Human Rights Standards in 2009. However, after almost one decade of its enactment, we can understand the problem of the Anti-Terrorism law, especially in the human rights issue. Further, the Head Police Regulation also does not mention penal responsibility, independence and effective investigation without delay when the Police did violation of Code or when a suspicious death occurred. As explained here, there are many alleged

arbitrary deprivations of life cases during counter-terrorism. There is no court decision over the cases yet. According to news reported that, in terms of data on handling terrorism cases by the police within 2000-2010, there were 583 detainees, 55 of them were died.[177] It indicated that there is ineffectiveness domestic law enforcement, no independence investigation established toward the suspicious deaths.

The practices of Human Rights Committee and European Court of Human Rights in protecting right to life from arbitrary deprivation to life show that there some points can be seen;

i) States shall protect right to life of their people. The right to life is a supreme right from no derogation is permitted even in time of emergency which threaten the life of nation.

ii) Right to life is not absolute. In other words, there are some conditions that deprivation of life may be justified only in condition; the law must strictly control and limit circumstances applied, State parties should spell out clearly in guidelines to military/police commanders and complaints about the disproportionate use of force should be investigated promptly by an independence and effective body.

These perspectives can be addressed into any case of arbitrary deprivation of life, including in counter-terrorism measures. It means that the International Law does not permit States to employ their police force to respond terrorism action. It was supported by C. Droege's explanations that International Human Rights Law "deals with the inherent rights of the person to be protected at all times from the power of the State".[178] R.

177) Media Indonesia: Gayatri, Tahun Ini Prestasi Polri Terganjal Kasus Mengambang, 29 December 2010, at http: //www. mediaindonesia. com/, last accessed on 10 November 2011.

Provost mentions "human right attach to individuals as against any State bound by the international norm".[179] In this regard, Indonesian government shall take "the authentic lesson" in order to release terrorism network in the grounds. Accordingly, the government can collect information beyond the real reasons of terrorist actions, in turn; it can reduce the terrorist action at once.

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