Terrorism and the Crime of ISIS as a Crime Against Humanity in the Perspective of International Law and Human Rights

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Received: 10 October 2016, Accepted: 4 November 2016
Published online: 14 February 2017

Abstract: Terrorism has become a worldwide phenomenon today. Acts of terrorism can be classified as a crime against humanity, which has threatened and endangered the peace and the security of mankind. The acts of terrorism which committed by the ISIS group shows that this crime is seriously threatens the human civilization.

The purpose of this study is to analyze the acts of terrorism and the crime of ISIS as a crime against humanity in the perspective of international law, human rights, and the impact on the international community. This study will review three things. First, the acts of terrorism and the crime of ISIS as a new phenomenon in the 21st century. Secondly, the acts of terrorism and the crime of ISIS as a crime against humanity. Thirdly, the law enforcement for the acts of terrorism as a crime against humanity in the perspective of international law and human rights.

This study is using statute approach, legal doctrines, and regulations which related to the acts of terrorism and crime against humanity. The first section is the introduction which explains about the acts of terrorism and the crime of ISIS as a global phenomenon in the 21st century, the definitions of terrorism, the elements of terrorism, and the classification of terrorism. The second section will review the definitions of crime against humanity, the elements of crime against humanity, the acts of terrorism and the crime of ISIS as a crime against humanity. The third section will discuss about the law enforcement against the acts of terrorism which leads to a crime against humanity in the perspective of international law and human rights. The fourth section is conclusion.

Keywords: Acts of Terrorism; Crime Against Humanity; Human Rights; ISIS; International Criminal Court.

1. Introduction

1.1. Definitions of Terrorism

Terrorism is one of the global issues which became a trending topic since the incidents of September 11 2001 in World Trade Centre that has threatened and endangered the peace and security of mankind. Terrorism internationally condemned as the unlawful use and the manifestation of political movement. There are many definitions of terrorism but no universally accepted definition of terrorism until now, even the United Nation agencies haven’t succeeded in making the official definition of terrorism. Noam Chomsky as one of the international terrorism expert said that the term of terrorism began to used in the end of the 18th century which shows the actions of violence from the ruling government in order to ensure that the people will obey the government. In other words, the term of terrorism refers to coercion from the

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ruling government. Walter Laquaer said that terrorism is the unlawful use of force for political purposes which targeting many civilian population; Walter Reich said that terrorism is a strategy of violence which designed to achieve certain desires from individual or certain groups by means of terror to frighten the public in large scale. Meanwhile, Brian Jenkins said that terrorism is the unlawful use of force which designed to achieve the political purposes. From those definitions, we can identify the main component of terrorism. First, the use of unlawful force. Second, the actors which led by state actors or non state actors. Third, acts of terrorism is using the unconventional methods. Forth, commit of the attack to the civilian population and targeting the military objects. Fifth, the act of terrorism aimed to influence the audiences. Historically, the definition of terrorism is compiled in many international convention of terrorism. In article 1 paragraph (2), of the international convention from League of Nations, 1937 which is the first international convention of terrorism, stated that terrorism is the criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons or a group of persons or the general public. A better definition of terrorism can be seen in the International Convention for the Suppression of Terrorist Bombings, 1997 in article 2 paragraph (1) stated; ny person commits an offence within the meaning of this Convention if that person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility: (a) with the intent to cause death or serious bodily injury; or (b) with the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss. The definition of terrorism has been stated also in other twelve international conventions of terrorism. On the other hand, the UN Security Council has issued four UN Resolution which related to international terrorism. The UN Security Council Resolution No. 1368 which issued at September 2001 and UN Security Resolution No. 1373 issued at October 15th, 2002, has insisted all countries to make action to respon the terrorist attacks. The UN Security Council Resolution No. 1373 and No. 1438 also expressed condolences and deep sympathy for the government and the people of Indonesia, for all victims and its family and insisted many countries in the world to fight against terrorism and called the entire nations to work together to help Indonesia in finding and prosecuting the perpetrators of terrorism to justice. There are two kinds of terrorism. First is a State Terrorism or State Sponsored Terrorism and second is a Non-State Terrorism. State Terrorism is a use of terror by a government as an instrument to subjugate other party to achieve governments purposes. State Terrorism is likely occurred in the authoritarian and repressive government. In other words, this kind of authoritarian and repressive government always using terror as their instrument to intimidate anyone against their policies. State Sponsored Terrorism can transformed into transnational crime if a country commits acts of terror against other countries by giving assistance, protection, financing plan, and facilitating terrorist group to other countries. For example, State Terrorism in Adolf Hitler authoritarian regime in Germany and Joseph Stalin totalitarian government in Uni Soviet which commits many acts of terror like kidnapping, punishing, torturing, and executing many innocent civilian which make a lot of people terrified. On the other hand, Non-State

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2 Gus Martin, Op.cit., hal. 37
3 Ibid.
Terrorism is a terror used by non-state actor by individual or certain group of people against the people or government with any motives behind.\textsuperscript{8} For example, the terrorist group of Bali Bombing which was led by Imam Samudera, the terrorist group of Noordin M. Top from Jemaah Islamiyah, the terrorist Group of Santoso which commits many acts of terrorism in Sulawesi, and also the terrorist group of Abu Sayyaf who commits murder and hostages in the south areas of Philippine.

1.2. The Phenomenon of Global Terrorism and ISIS in the 21st Century

ISIS which known as the Islamic State in Iraq and Syria or Islamic State in Iraq and Levant (ISIL), is a new phenomenon inside the global and regional strategic environment, specially in the Middle East.\textsuperscript{9} ISIS was formed officially in the year of 2013 and 2014 which gradually changed its name into Islamic State (IS). Islamic State is one example of the Non-State Actor terrorism that expanding rapidly. ISIS also became one of the most heinous terrorist group in the world, which recruiting its members from European to Asian, and became one of the most powerful terrorist group in the world today beyond other terrorist group such as Al-Qaida or Jemaah Islamiyah. As a political group, ISIS was a result of the dynamics of the regional politic in the areas of the Middle East after the fall of the Former Iraqi President Saddam Hussein, which led to the emergence of the movement of pro-democracy movement in the Middle East and North Africa which widely known as ‘the Arab Spring’ particularly in Syria. The purpose of the ISIS is none other than to establish the Islamic Caliphate State where Islamic Sharia Law can be enforced radically and exclusively to the entire population.\textsuperscript{10} Since its emergence in 2013, ISIS has undertaken various actions against the Iraqi and Syirian government that have killed hundreds of thousands of civilian innocent people and destroyed many possessions in both countries. The ISIS often conducts brutal acts to innocent civilians such as performing public execution in the presence of the children, decapitating or beheading the civilians, mass murder, raping hundreds of non-muslim women, and other inhumane acts which is condemned by the international community. Not only that, the ISIS has destroyed and damaged Muslim and Non-Muslim worship places, looting and burning all the civilized Islamic historical heritages in Syria and Iraq.\textsuperscript{11} The ISIS has become a global phenomenon, a non-state power which transformed into a powerful forces that ruled on many areas and population. The influence of ISIS have exceeded their territory, as evidenced by the presence and the merger of some 170 thousands ‘Jihadis’ from 40 countries. The ISIS also conducts campaigns that spreading their influences in the Islamic countries and also in other countries, in order to recruit more volunteers who will be involved in a battle against their enemies. The ISIS also calling the Indonesian society to get out of Indonesia, to declare its compliance under the Caliphate of Abu Bakar Al - Baghdadi.\textsuperscript{12} Beside spreading their ideology and influence, the members of ISIS has executed more foreigners such as the execution of American Journalist, James Foley, and Steven Sotloff, as well as some journalists from United Kingdom and Japan, which signs that ISIS is a part of a transnational and anti-imperialist movement. It is also a form of anger and revenge to countries that are considered responsible for the condition of Muslims in the world and in the Middle East.\textsuperscript{13} Not only globally, but the influence of ISIS also has entered Indonesia. In the opinion of a former deputy of National Counter-Terrorism Agency in Indonesia, Major General Agus Surya Bhakti, radical ideology that has been used by ISIS has spread in Indonesia, long before the ISIS established in 2013. The ISIS radical ideology has entered to Indonesia through the internet, that is easily accessible by Indonesian society. The influence of ISIS radical ideology

\textsuperscript{8} Ali Mahsyar, \textit{Op.cit.}, hal. 50
\textsuperscript{9} Muhammad, A.S. Hikam, \textit{Deradikalisasi: Peran Masyarakat Sipil Indonesia membendung Radikalisme}, Penerbit: Buku Kompas, Jakarta, hal. 1, (2016)
\textsuperscript{10} \textit{Op.cit.}, hal. 2
\textsuperscript{11} \textit{Ibid.}
\textsuperscript{12} \textit{Ibid.}
\textsuperscript{13} \textit{Ibid.}
also accepted by majority of some leaders and members of a radical Islamic Organizations in Indonesia. The ISIS radical ideology offers a special attention for those who believe that the war together with ISIS in Syria has higher religious values than any other war in order to fight against the power of Bashar Al-Assad’s regime in Syria and its considered as an effort to establish and to enforce the Islamic Chaliphate which influence many Islamic radical organization in Indonesia to join the battle together with ISIS.\textsuperscript{14}

2. Acts of Terrorism as a Crime Against Humanity

The term of a crime against humanity was first recognized in the joint declaration between France, United Kingdom and Russia on 24\textsuperscript{th} of May, 1915. This declaration was intended to condemn the Turkish atrocities that have been made during the war against Armenians in Turkey. This massacre of Armenia’s population known as a ‘crime against humanity’.\textsuperscript{15} The 1945 Charter of the Military Tribunal at Nuremberg identified three classes of international crime; a) Crime Against Peace; b) War Crimes; c) Crimes Against Humanity.

Even the Statute of International Criminal Court list four categories of crimes to be prosecuted by the ICC: a) the crime of genocide; b) the crime of aggression; c) war crimes and crimes against humanity.\textsuperscript{16} Crime against humanity usually done in a systematic way and causing physical or mental suffering, or killing of human beings that are contrary to human civilization as well as violating the principles of international law.\textsuperscript{17} Crime against humanity is a criminal act which creates the condition of individuals and communities in an atmosphere of terror. In the perspective of human rights, crimes against humanity can be classified to gross violation of human rights, if the acts committed as part of a ‘widespread’ and ‘systematic’ attack, directed against the civilian population, which is committed against innocent civilians like the Bali bombing incidents.\textsuperscript{18} Crime against humanity was known for the first time in the London Charter of the International Military Tribunal, 1915, which resulted the Nuremberg Trial that prosecuted the German NAZI war criminals. In the Article 6 (c) of Nuremberg Charter, crime against humanity is defined as murder, extermination, enslavement, deportation and other inhuman acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.\textsuperscript{19} In the Judgment of the International Military Tribunal for the Trial of German Major War Criminals it was also stated that the Tribunal therefore cannot make a general declaration that the acts before 1939 were crimes against humanity within the meaning of the Charter, but from the beginning of the war in 1939 war crimes were committed on a vast scale, which were also crimes against humanity; and insofar as the inhumane acts charged in the indictment, and committed after the beginning of the war, did not constitute war crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted crimes against humanity.\textsuperscript{20} Crimes against humanity completely and clearly stated in the Statute of the International Criminal Court (ICC) which known as the Rome Statute, 1998. In the article 7 of the Statute, crime against humanity defined as any of the following acts when committed as part of a

\textsuperscript{14} Muhammad A.S. Hikam, \textit{Op.cit.}, hal. 13  
\textsuperscript{15} Eddy, O.S., Hiearij (2010), \textit{Pengadilan atas Beberapa Kejahatan Serius Terhadap HAM}, Penerbit: Erlangga, Jakarta, hal.15  
\textsuperscript{20} \textit{Ibid.}
widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) murder; (b) extermination; (c) enslavement; (d) deportation or forcible transfer of population; (e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) torture; (g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) persecution against any identifiable group or collective on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) enforced disappearance of persons; (j) the crime of apartheid; (k) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.\textsuperscript{21} Crimes Against Humanity can be done in times of peace, as well as during internal wars and international wars.\textsuperscript{22} Thus, from the formulation of Article 7 we can see that the Rome Statute of 1998 already contained the basics of an act or acts that qualify as crimes against humanity which condemned by the international community as a crime against human civilization (\textit{Hostis Humanis Generis}). Based on the elements of crimes against humanity that have been regulated in Article 7 of the Statute of the International Criminal Court, the acts of terrorism and the crime of ISIS can be classified as 'crimes against humanity'.

3. THE LAW ENFORCEMENT AGAINST TERRORISM AS A ‘CRIME AGAINST HUMANITY’

3.1. International Law Enforcement

In the international criminal law system, the law enforcement system for international crime can be divided in two categories; a) Direct enforcement system and b) Indirect enforcement system. Direct Enforcement System is an international criminal law enforcement which is conducted by the International Criminal Court (ICC) permanently or temporarily.\textsuperscript{23} The ICC is a permanent international court that was established on July 17, 1998 by the Rome Statute, which was passed through voting by 148 countries, of which 120 countries voted in favor, 7 opposed and 21 countries abstained including Indonesia. Among the 7 countries who opposed are United States, China and Irak. More than 108 countries have ratified the Rome Statute of 1998. The ICC is an international court that initiated by the United Nations, which located in Den Haag, Netherland. There are around 15 to 20 judges from various nations who carried out their duty. According to Article 4 paragraph (1) of this Statute, the ICC have international legal capacity which means that the court has a position as a subject of international law. The ICC also have national legal capacity, which means that the ICC has a legal status either as subjects of international law as well as the subject of the national law in the territory of the participant and non participant countries.\textsuperscript{24} The ICC criminal jurisdiction includes 4 crimes which stated in the Article 5 of the Statute as follows; a) Crime of aggression; b) Genocides; c) Crimes Against Humanity; d) War Crimes. The first principles of ICC is a complementary principle. The complementary principle means that if the crime was part of ICC’s jurisdiction, the ICC will submit it to the national legal system of the country where the crime occurred. If a country is unwilling or unable to prosecute then the ICC can prosecute the crime. The

\textsuperscript{23} Eddy, O.S., Hiearij, \textit{Pengantar Hukum Pidana Internasional}, Penerbit: Erlangga, Jakarta, hal. 70,(2009).
\textsuperscript{24} I Wayan Parthiana, \textit{Hukum Pidana Internasional}, Penerbit: Yrama Widya, Bandung, hal.206,(2006)
complementary principle also means that a state may request an assistance from other countries to cooperate in dealing with crimes such as extradition. The existence of complementary principles are influenced by four factors as follows; a) mutual interest; b) national sovereignty; c) humanistic and humanitarian values; d) needs of world order. The second principle is the principle of legality. The principle of legality in international criminal law should be able to maintain the harmony, the social justice and the world order. The third principle is ‘ne bis in idem’. It’s a legal doctrine to the effect that no legal action can be instituted twice for the same cause of action. But this principle can’t be applied absolutely, which means the ICC can prosecute all crimes within the ICC jurisdiction if the national court unable to run the judicial process fairly. In other words, the ICC shouldn’t play a role if the national court began to investigate and examine those crimes. The fourth principle is the individual criminal responsibility. The term ‘individual criminal responsibility’ is also commonly employed to describe the scenario where an individual is criminally responsible for his own unlawful actions as opposed to being criminally responsible for the unlawful actions of others, namely ‘collective criminal responsibility’. Meanwhile, Indirect Enforcement Law System is a law enforcement system by the national law system. In Indonesia, it has been implemented in the case of East Timor by establishing a Human Rights Court under the Human Rights Court Law No. 26 of 2000. This Human Rights Court was established as a respect and recognition to the Universal Declaration of Human Rights. According to Article 4, Human Rights Court of Indonesia can prosecute two crimes as follows; a) Crime of Genocides; b) Crimes Against Humanity. The definition of both crimes is taken nearly word for word from the definition of the same crimes in Articles 6 and 7 the Rome Statute. Article 9 defines crimes against humanity as the commission of one of ten predicate crimes when the crime is committed as part of a ‘widespread’ and ‘systematic’ attack that is directed at civilians. The Human Rights Court Law is accompanied by an official elucidation, which stated on Article 9 that the phrase ‘attack directed at civilians’ in furtherance of a policy of the authorities or an organization. The Human Rights Court only prosecute individuals, groups of civilians, police and military officers who commits the genocide and crimes against humanity and also prosecute the violation of human rights inside or outside the territory of Indonesia.

4. Conclusion

The conclusions of this study are as follows. First, terrorism and the crime of ISIS which done systematically, widespread and directed to innocent civilians by a state or a group and contains elements of crimes such as murder, extermination, torture, imprisonment or other severe deprivation of physical liberty, rape, sexual slavery, and other inhumane acts can be classified as a crime against humanity. Secondly, the acts of terrorism and the crime of ISIS which leads to crime against humanity has the potential to be prosecuted on the International Criminal Court if the national court unable or unwilling to prosecute both crimes. Thirdly, the national law enforcement for terrorism in Indonesia still uses the Anti-Terrorism Law No. 15 of 2003, otherwise the Human Rights Court Law (Law No. 26/2000) has jurisdiction to prosecute the acts of terrorism which leads to a crime against humanity. It means that the law enforcement in Indonesia is not strong enough to prosecute the terrorist because the Anti-Terrorism Law No. 15 of 2003 does not regulate actions or acts of terrorism that leads to a crime against humanity.

27 Op.cit. hal 102
28 Ciara Damgaard, Individual Criminal Responsibility for Core International Crimes, Springer-Verlag, Copenhagen- Denmark, pp.13
29 Ontoeng Wahjoe, Op.cit., hal. 157
30 See Article 9 of Human Rights Court Law (Law No.26/2000)
31 See the explanation of Article 9 of Human Rights Court Law (Law No. 26/ 2000)
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Researcher also suggests few things. First, every non-participant country of the Rome Statute of International Criminal Court should sign the Rome Statute immediately with the aim that the perpetrators of terrorism can be prosecuted in the International Criminal Court. Second, the Rome Statute of International Criminal Court should be amended by adding acts of terrorism to its jurisdiction. Third, every country should be able to cooperate in combating terrorism and using the International Criminal Court as one of the legal instrument to respond the acts of terrorism in addition to its domestic law.

References