

CHAPTER FOUR

FINDINGS AND ANALYSIS

A. Development of Combating Terrorism in Indonesia

Before 1998, in Indonesia the terrorism action is never happen. The national disorder only in the form of internal conflict and it could be settled by th government by deliberation solution. Terrorism is not only a crime but also an extraordinary crime and crime againts humanity. Every state needs to combate the terrorism action including Indonesia. In this chapter, the author will elaborate the history and development of combating terrorism in Indonesia.

The history of prevention of terrorism in Indonesia could be divided into two kinds of approaches, namely hard approach and soft approach. Two kinds of approaches have emerged because of the background of terrorism and the foundation used to combate terrorism.

Hard approach is distinctively armed action against the terror organizations through military force. This approach is based on Presidential Decree No. 11/1963 on the Eradication of Subversive Activities, issued in the era of the Old Order. This rule was used to crack down on activities that interfere the sovereignty of countries, including acts of terrorism. While soft approach emphasizes integrated methods and comprehensive action in addressing the problem of radicalism, starting from the roots. This method used persuasive ways, dialogue, encourage

community involvement in counteracting radicalism. This approach was started from the formation of National Counter Terrorism Agency (BNPT).¹

In the era of the Old Order, there were various acts of terror motivated by separatism motivation or want to stage a coup.² All these movements were addressed by the state through the hard approach, involving armed confrontations with the military force.

In the New Order era there was a crackdown on the uprising G30S PKI that had occurred since 1948 and peaked in 1965. The movement was eventually disbanded by the government of the New Order that was later declared any organization or movement banned in Indonesia.³

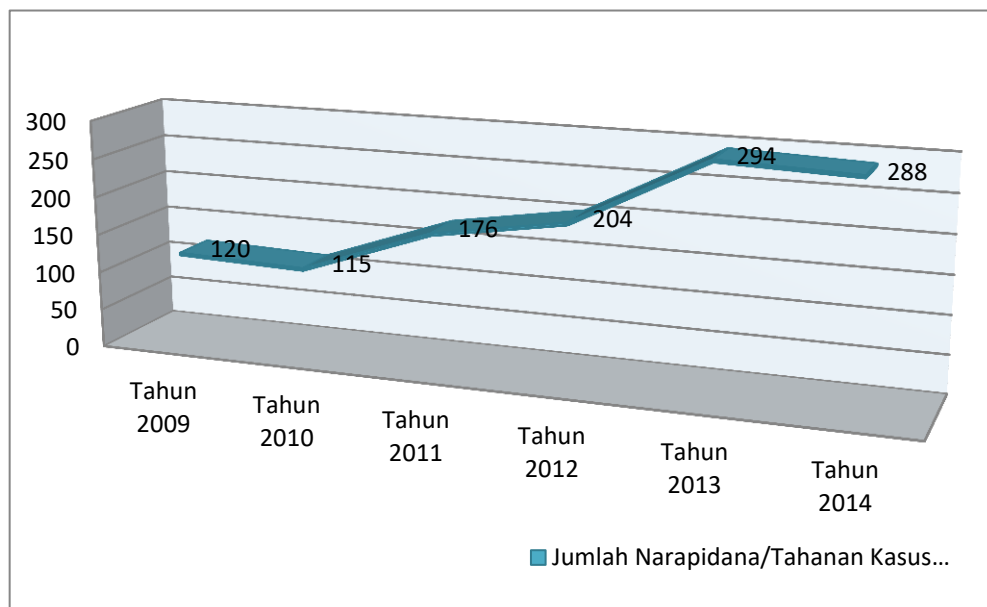
Then in the Reform Era, the terrorism action can be concluded as the action of bombing in several location in Indonesia. Bombing actions in Indonesia are classified as terrorist attacks that begun in 1998, in the case of bomb explosion in the building Atrium Senen, Jakarta. Since that bombing happened, a series of bomb explosions occurred in various parts of Indonesia with various targets.⁴ The data of Suspect and Prisoners of Terrorism in Indonesia from 2009 to 2014 are summarized as follows:

¹ Anonymous, Sejarah Penanggulangan Terorisme di Indonesia available at <https://damailahindonesiaku.com/terorisme/sejarah-terorisme> accessed on Monday, March 27 at 19.42pm

² Muhammad Nur Islami, 2017, *Terorisme Sebuah Upaya Perlawanan*, Yogyakarta, Pustaka Pelajar, p. 5

³ *Ibid*, p. 6

⁴ Bahtar Marpaung, "Aspek Hukum Pemberantasan Terorisme di Indonesia" *Journal Equality*, Vol. 12, 2007, p. 120



Source: Desk Anti Teroris, www.polkam.co.id

Responding to the development of terrorism that occurred particularly in Kuta Bali bombing, the government through the executive power issued Government Regulation on Lieu of Law (PERPU) No.1/2002 on Combating Terrorism, effectively enforced since October 18, 2002 and the stairs PERPU No.2/2002 on the Implementation of PERPU 1/2002 on the events in Bali on 12 October 2002, which was followed by the Law No. 15 Year 2003 on the Eradication of Terrorism.

National mission in fighting against terrorism is to stop terrorist action which threatens the life of the nation, citizens and national interests and to create an international environment that does not nourish terrorism. To achieve this mission, the government implements strategic measures as follows: First, defeat the terrorists and their organizations destroyed the hideout, its leadership, command, control, communications material and

financial support. Second, improve preparedness and vigilance of all components of the nation against the threat of terrorism to prevent the homeland territory of Indonesia as a hideout of terrorists and the flourishing of the ideology of terrorism. Third, eliminate the cause of the correlative factors which may be exploited as justification for terrorist actions such as social inequality, poverty, political conflict and racism. Fourth, protecting the nation, citizens and national interests.⁵

B. Brief Description of Siyono Case

1. Description case according to National Human Right Commission

According to the description of National Human Right Commission, Siyono case had the following events:⁶

- a. On Tuesday, March 8th, 2016 Siyono was arrested at 18.30 WIB after being the imam of Maghrib Praying at Klaten. The person who arrested him were 3 persons who wear civilians clothes without warrant then force him to enter into the police car. At is time, Siyono was still healthy and in good condition;
- b. On Thurday, the family of Siyono had no information regarding Siyono. Then the Siyono's house was rummaged by the Special Detachment 88. The process of rummaging was also be done at the kindergarden area which is near from

⁵ *Ibid*, p. 125

⁶ Anugerah Perkasa, Ini Kronologi PenangkapanTerduga Kasus Terorisme Siyono di Klaten at <http://kabar24.bisnis.com/read/20160414/16/537798/ini-kronologi-penangkapan-terduga-teroris-siyono-di-klaten> accessed on Monday, December 26th, 2016 at 4.05 PM

Siyono's house. The Special Detachment 88 members also addressed pointing a rifle to some kids at the kindergarden school. When the process of rummaging, Siyono's wife also did not get any warrant from the member of Special Detachment 88. At the rummaging process, the explosives were not found. Finally, the Special Detachment 88 seized a motorbike with the police number of B and now the motorbike has been returned back to the family of Siyono.

- c. On Friday, Siyono's wife and his sister and a person as the representative of Desa Pogung and one of the police member also went together with them to Jakarta. On Saturday morning, when they arrived at Jakarta at 10.00 am they got the information that Siyono has passed away. Not only the information but also they got 2 large envelopes filled with money. At 11.00 am they were invited to see Siyono's body at Bhayangkara Hospital Said Sukanto Hospital. In afternoon, the death body of Siyono was sent back to Klaten.
- d. When the body arrived at Klaten, the police ordered people to burry the death body of Siyono as soon as possible without changing the shroud. But the family kept forcing to change the shroud of Siyono and the body of Siyono was full with injured.
- e. On these issues, the victim's family on March 14, 2016 appointed attorney Mr. Sri Kalono, S.H. and legal counsel of

the Center for Human Rights of Indonesia (PUSHAMI). Although it has been getting assistance from legal counsel by Mufida and his extended family still get the alleged intimidation of Members of the Police of Republic of Indonesia even had time to get into the victim's home to see the dynamics and magnitude of pressure on the family of the victim, The victim's wife also asked for legal assistance from the Cenral Board Muhammadiyah. Finally, on March 23, 2016 the victim's wife signed a Statement to the Human Rights Commission requested that an autopsy conducted on the corpse of Siyono to obtain evidence of the violence suffered by victims.

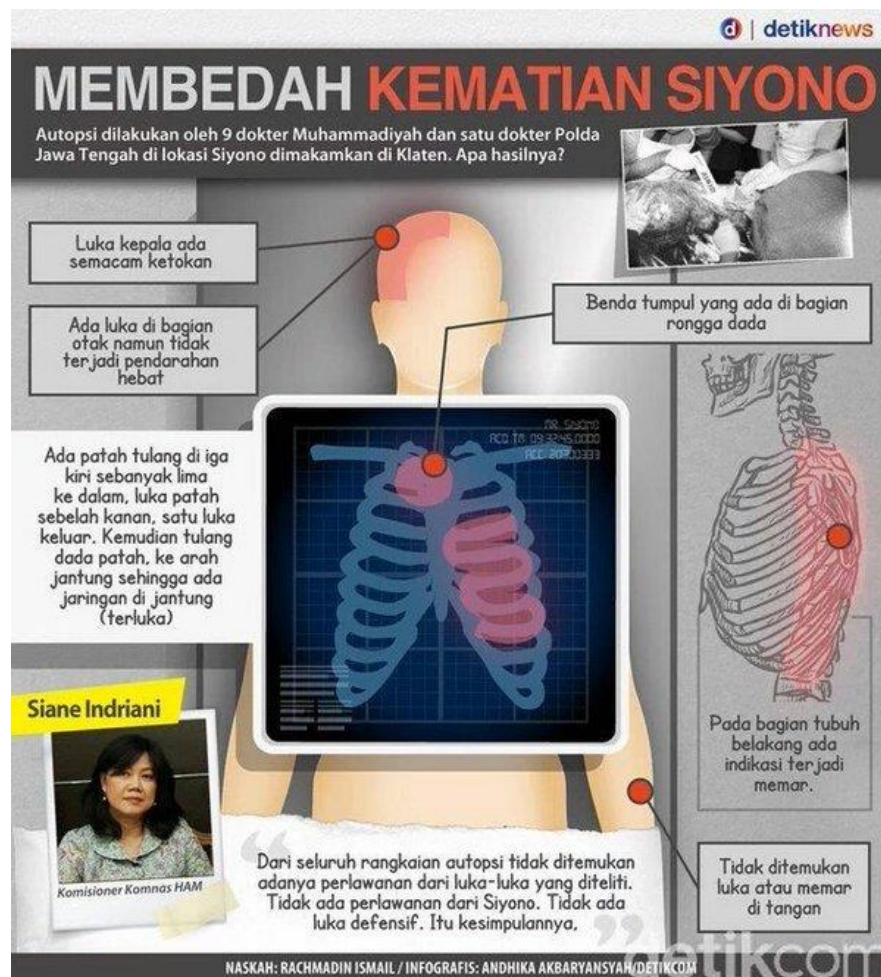
In March 2016, the National Commission of Human Rights reported that at least there were 121 individuals detained during counter-terror operations have died in custody since 2007.⁷ In the illustration of Siyono case explained by the National Commission of Human Rights, Siyono as an alleged terrorism suspected died while in the custody of the *Datasement Densus 88* on March 2016. In the explanation of the autopsy examination result of the death body of Siyono can be found six breaking ribs and causing the heart fail.⁸

⁷ ASA, Amnsety International Public Statement, available at <https://www.amnesty.org/download/Documents/ASA2143902016ENGLISH.pdf>, accesse on March 17, 2017 at 16.03 pm.

⁸ Nabilla Tashandra, Muhammadiyah Umumkan Hasil Otopsi Jenazah Siyono, available at <http://nasional.kompas.com/read/2016/04/11/07381661/Muhammadiyah.Umumkan.Hasil.Otopsi.Jenazah.Siyono>, accessed on March 17, 2017, at 16.16 pm.

Figure 1

The result of Siyono's autopsy



Source: <http://www.rappler.com/indonesia/129083-penyebab-kematian-siyono-terungkap>

Based on the case, there are two member of *Densus 88* were imposed administrative punishment for their action, demoted and transferred to other police unit by an internal police process.⁹ So far, there is no criminal investigation relating to the violence action taken

⁹ Dinda Leo Listi, *Kontras Kecewa Hasil Sidang Etik Densus 88*, available at <https://m.tempo.co/read/news/2016/05/16/063771354/kontras-kecewa-hasil-sidang-etik-densus-88>, accessed on March 17, 2017 at 16.32 pm.

by the Densus 88. According to Ma'ruf Amin as the Chairman of *Majelis Ulama Indonesia* (MUI) if the torture actor is proven fault, it must be imposed the punishment according the law.¹⁰

2. The case of Siyono according to The Police of Republic of Indonesia

According to Brigjen Agus Priyanto as *Karopenmas (Kepala Biro Penerangan Masyarakat)* of Indonesian Police of Republic of Indonesia Siyono as the suspected of terrorist was died in hospital. He argued that Siyono was not died when the process of investigation. His statement explain that after arrested, Siyono tried to fight the polices who guarded him and finally the fighting happened in the car.¹¹

After the situation is under control, then Siyono was brought by the police members to the Bhayangkara Hospital. Unfortunately, Siyono died at the hospital. Then, Siyono was brought to Kramat Jati Hospital at Jakarta.¹²

C. Evaluation of Combating Terrorism: Lesson learned from Siyono Case

In the effort of combating terrorism, the Indonesian police must be based on what has been regulated in the laws. The Indonesian Datasement Police must run and execute the effort for combating terrorism according

¹⁰ Nur Aini, MUI Minta Pelaku Keserasan Terhadap Siyono Dinidak Tegas, available at <http://www.republika.co.id/berita/nasional/hukum/16/04/06/o56qe0382-mui-minta-pelaku-kekerasan-terhadap-siyono-ditindak-tegas>, accessed on March 17, 2017 at 16.44 pm.

¹¹ Rahmat Fajar, Mabas Polri Klaim Terduga Teroris Siyono Tewas Di Rumah Sakit at <http://republika.co.id/berita/nasional/hukum/16/03/13/o3xxth354-mabas-polri-klaim-terduga-teroris-siyoni-tewas-di-rumah-sakit> accessed on Monday, February 20th, 2017 at 20.11 pm.

¹² *Ibid.*

to law without ignoring the human right protection which is also regulated and protected in the 1945 Constitution and Human Rights laws.

According to what has been regulated in the 1945 Constitution and Human Rights law, every people has right to live. It is as the reflection of fundamental rights which is owned by every people. Then, the most riskable that is obtained in the effort of combating terrorism is death penalty as the punishment. Of course, it is very contrary to the protection of human rights. Moreover, the suspect is unprovable. It is absolutely a violation of human rights. So, the Indonesian Datasement Police must obey laws of terrorism and laws of human rights. Siyono case could be seen from two approaches, Security Approach and Human Rights Approach.

1. Security Approach

When talking about security, it means the protection. Indonesia has also formulated laws to protect this nation from the terrorism action. Not only law but some actions have been conducted by Indonesia to protect this nation from terrorism action such as:

- a. Indonesia established *Desk Antiteror* which has divided into some level of territorial such as Regional Military Command (KODAM), District Military Command (KODIM), Military Command (KORAMIL), and Resorts Military Command

- (KOREM) which aims to support Indonesian National Police for combating the terrorism¹³;
- b. Indonesia also established a Special Force (*Datasemen Khusus/Densus 88*) on August 26th, 2004. Initially, the *Datasemen Khusus* was established because of the Presidential Instruction No. 4 Year 2002 about Terrorism. This instruction exists because there are so many terrorism actions happened from 2001. Because of this regulation then Indonesia established The Government Regulation in Lieu of Law No. 1 and 2 Year 2002.¹⁴;
 - c. Indonesia also provides bilateral agreement with some countries related the effort on combating terrorism in line with national security;
 - d. Indonesia also tries to improve the international treaties to prevent and combat the terrorism by multilateral or bilateral agreement which proposed to enhance the quality, law enforcement, exchange the information, sending the expert any other effort;

¹³ Anonymous, Penanganan Terrorisms: TNI AD buat Desk Antiteror di setiap tingkatan territorial at <http://www.kontras.org/home/index.php?module=berita&id=707> accessed on Tuesday, February 21st, 2017 at 12.27 PM

¹⁴ Fathkurrohman Taufiq, Begini Datasemen Khusus 88 Antiteror Dibentuk at <http://m.tempo.co/read/news/2013/03/08/063465820/begini-datasemen-khusus-88-antiteror-dibentuk> accessed on Tuesday, February 21st, 2017 at 12.45 PM

- e. Indonesia also enacted the Law No. 17 of 2011 on National Intelligence which have the role on early detection and warn in accordance with the threat to the national security;
- f. The Indonesian Government has conducted some contributive agendas in combating terrorism as explained by Marti Natalegawa. According to Marti Natalegawa the actions have been taken, such as:¹⁵
 - a. Increasing the support at national and regional level priory to the global level;
 - b. Preventing the root of problem which cause the supporting and motivating terrorism
 - c. Decreasing the root cause of terrorism by preventing the factors that encourage terrorism and mutually cooperate with one another in order to combate terrorism;
 - d. Upholding the law and human rights and democracy on track to increase effort at the global, regional and national as well as by maintaining peace, social justice and common good.

¹⁵ Silvia Haryani, 2010, "Kerjasama Kontra Terrorism Indonesia-Australia: Perbandingan antar Masa Pemerintahan Megawati Soekarno Putri dan Susilo Bambang Yudhoyono", *Jurnal Masyarakat Kebudayaan dan Politik*, Vol 2, Nomor 4, 2010.

2. Siyono Case from the Human Rights Perspective

A. The 1945 Indonesian Constitution

In the Indonesian Constitution also regulates about the protection of Human Rights especially rights of life. It is regulated in some articles in the constitution, such as Article 28 A, Article 28 D Paragraph (1), Article 28 G Paragraph (1), Article 28 G Paragraph (2), Article 28 H Paragraph (1), Article 28 H Paragraph (2), and Article 28 I Paragraph (1).

The article 28 A stated that, “Every person shall have the right to live and to defend his/her life and existence.”¹⁶ This article clearly explains that every human being has right to life without any intervention. Every human has an equal right to protect their life in front of the law without any discrimination. It means every human being has a right to life and the state need to protect that right because that right is guaranteed in the constitution.

The article 28 D Paragraph (1) set out the rights to legal certainty that is just and right to equal treatment before the law. This article explicitly state, “every person has right recognition, security, protection and legal certainty of fair and equal treatment before the law.”¹⁷ This article ensure that every human being has right and equal treatment before the law

¹⁶ 1945 The Contitution of Republic Indonesia

¹⁷ Indonesian Constitution 1945 Article 28 D Paragraph (1)

whoever it is and whatever the status of this human being, they still have right of fair and equal treatment before the law and it is guaranteed in the 1945 Constitution.

Then, the article 28 G Paragraph (1) also explains about the right of the protection of human dignity. This article said that, “Every person shall have the right to protection of his/herself, family, honor, dignity, and property, and shall have the right to feel secure against and receive protection from the threat of fear to do or not do something that is a human right.”¹⁸ This article also explain that every people has equal right on the protection of human dignity, protection of feeling safe and also be respected by all human being without any discrimination or intervention.

Article 28 G Paragraph (2) in the Constitution of Republic of Indonesia said that, “Every person shall have the right to be free from torture or inhumane and degrading treatment, and shall have the right to obtain political asylum from another country.”¹⁹ This article explain that every human being has equal right to be free from the torture action without any discrimination. If we connect this article to Siyono case, Siyono must not get bad treatment by the police in the process of investigation because he is protected by the Constitution.

¹⁸ Indonesian Constitution 1945 Article 28 G Paragraph (1)

¹⁹ Indonesian Constitution 1945 Article 28 H Paragraph (2)

Article 28 H Paragraph (2) in the Indonesian Constitution also regulates about human rights protection especially about the equal right to get justice and similar treatment in front of law. This article said that, “Every person shall have the right to receive facilitation and special treatment to have the same opportunity and benefit in order to achieve equality and fairness.”²⁰ In this article, it is must noted that every human being has an equal right to get the protection on fair law and justice. In the Siyono case, actually Siyono has right to fight for the fair law and punishment on justice.

Then, the Article 28 I Paragraph (1) in the 1945 Indonesian Constitution states about the right for every human being to be free from the torture action. This article said that, “the rights to life, freedom from torture, freedom of thought and conscience, freedom of religion, freedom from enslavement, recognition as a person before the law, and the right not to be tried under a law with retrospective effect are all human rights that cannot be limited under any circumstances.”²¹ In Siyono case, as what has been explained in the history of Siyono case about the death of Siyono, the torture action has been violated the right of Siyono which has been guaranteed in the 1945 Indonesian Constitution.

²¹ Indonesian Constitution 1945 Article 28 I Paragraph (1)

B. Laws

1. Indonesian Human Rights Law (Law No. 39 Year 1999)

This law absolutely claims that human rights are the rights which owned by every human being without any intervention by any other human being. In the first article and also first paragraph in this law also states that every human rights that owned by every human being need to be respected and protected by state. It means that state has responsibility to protect and respect the fundamental rights citizen.

Basically, the formulation of human rights law for Indonesia is to improve the quality of human rights protection in Indonesia. In order to improve the protection of human rights and develop a situation conducive to the implementation of human rights in line with the Indonesian Ideology of Pancasila, the Indonesian Constitution of 1945 and the Universal Declaration of Human Rights, a national commission called as the National Commission of Human Rights was established.²² Within the framework of increasing of the protection of human rights, the establishment of National Commission of Human Rights was very strategic. The role of National Commission of

²² This statement was in Presidential Decree No. 50 Year 1993 regarding the National Human Rights Commission, and was then inaugurated by article 105 Paragraph 2 point in Law No. 39 Year 1999 about Human Rights.

Human Rights is to elucidate, examine, observe, research and mediate on the human rights issues, as determined by law.²³

The existence of National Commission of Human Rights within the framework of observation and reporting of the cases of human rights violations is strengthening the national legal system in the field of human rights. As a part of law enforcement elements involved in matters of serve human rights violations, National Commission of Human Rights have been legally inaugurated as the sole initial investigator.²⁴

In the case of siyono, National Commission of Human Rights claims that there were allegation torture action in the process of investigation of Siyono before the case is processed in the court. According to the Head of Indonesian Human Right Commission, there was a force action when Siyono arrested by *Densus 88*.²⁵ In Addition , there were no evidences that the death of Siyono was caused by the fighting between Siyono and police like what

²³ Article 5 TAP MPR RI No. XVII/MPR/1998

²⁴ Junaedi, "The Existence of Human Rights Court as A National Effort to Eliminate the Severe Violation of Human Rights in Indonesia" available at https://www.casematrixnetwork.org/fileadmin/documents/L._Sunga__How_Can_UN_Special_Procedures_Sharpener_ICC_Fact-Finding.pdf, accessed on Wednesday, March 15, 2017 at 8.34 am

²⁵ Yeni Handayani, "Desus 88 dan Isu HAM dalam Kasus Kematian Siyono" available at <http://www.gresnews.com/berita/opini/90114-densus-88-dan-isu-ham-dalam-kasus-kematian-siyono/0/>, accessed on Wednesday, March 15, 2017 at 8.39 am

has been claimed by the Head of Police of Republic of Indonesia.²⁶

On the other hand, if we connected this case with the Human Rights Law it must be sure that the process of investigation of Siyono has violated the law. There are some articles violated by the Indonesian Police such as Article 4, Article 5 Paragraph (2), Article 7 Paragraph (1), Article 17, Article 18 Paragraph (1) and (2), and Article 29 Paragraph (2).

The Indonesian Human Rights Laws state in Article 4 about the freedom of torture. It says:²⁷

“The right to life, not to be tortured, the right to freedom of individual, to freedom thought and conscience, the right not to be enslaved, the right to acknowledged as an individu before the law, and the right not to be prosecuted retroactively under the law are human rights that cannot be diminished under any circumstances whatsoever.”

Then, according to Imdadun Rahman as the Head of National Commission of Human Rights, there are some violations of law in the case of Siyono such as the violation of 1945 Indonesian Constitution on the rights of life, article 4 and article 9 in the Law of Human Rights, Article 1 and

²⁶ Ambarani Nadia KM, Komnas HAM Duga Adanya Pelanggaran HAM Soal Tewasnya Siyono, Ini Komentar Kapolri at <http://nasional.kompas.com/read/2016/04/13/13302871/Komnas.HAM.Duga.Ada.Pelanggaran.HAM.soal.Tewasnya.Siyono.Ini.Komentar.Kapolri>, accessed on Wednesday, February22nd, 2017 at 11.04 AM

²⁷ Indonesian Human Rights Law No. 39 Year 1999 Article 4

Article 6 of ICCPR which has been ratified as Indonesian Law No. 12 Year 2005.²⁸ Article 9 of Indonesian Human Rights Law explicitly states:²⁹

- 1) Everyone has right to live, to sustain life, and to improve his or her standard of living
- 2) Everyone has right to peace, happiness, and well-being
- 3) Everyone has right to an adequate and health environment.

It can be noticed the Human Rights Law ensure the right to life for every human being and it is assumed that it has been violated by the *Desus 88*. Article 1 of ICCPR also mentions about the protection of right to life as stated:

“All peoples have the right of self-determination by virtue of that right they freely determine the political status and freely pursue their economic, social, and cultural development.”³⁰ On the other hand, the article 6 of ICCPR also mentions on the protection of the right of life as stated, “... Every Human being has the inherent right to life...”³¹ to

²⁸ M. Asari, “Komnas HAM Menyimpulkan Ada Indikasi Pelanggaran Hukum dalam Kasus Siyono”, available at <https://www.nahimunkar.com/densus-88-diduga-melanggar-ham-kasus-kematian-siyono/> accessed on Wednesday, March 15, 2017 at 9.01 am

²⁹ Indonesian Human Rights Law No. 39 Year 1999 Article 9

³⁰ ICCPR Article 1

³¹ Article 6 of ICCPR said: 1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life. 2. In countries which have not abolished death penalty, sentence of death may be imposed only for most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the

ensure the improvement of human rights protection in every State Party of this Covenant.

The state also has responsibility to guarantee the human rights of every citizen. It is regulated in Article 71 and Article 72 in Human Rights Law No. 39 Year 1999. Article 71 said, “The government shall respect, protect, uphold and promote human rights as laid down in this Act, other legislation, and international law concerning human rights ratified by the Republic of Indonesia.”³²

Furthermore, the article 72 of Human Rights Law said that, “The duties and responsibilities of the government as referred to in Article 71, include measures towards effective implementation in law, politics, economics, social and cultural aspects, state security, and other areas.”³³

In the case of Siyono, it is regulated in various articles in Indonesian Human Rights Law. Siyono case is

provision of the present Covenant and the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can be carried out pursuant to a final judgement rendered by a competent law. 3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provision of the Convention on the Prevention and Punishment of the Crime of Genocide. 4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases. 5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women. 6. Nothing in this article shall be invoked to delay or prevent the abolition of capital punishment by any State Party to the present Covenant.

³² Indonesian Human Rights Law No. 39 Year 1999 Article 71

³³ Indonesian Human Rights Law No. 39 Year 1999 Article 72

assumed as torture action. According to what has been regulated in Article 1 Paragraph 4 of Indonesian Human Rights Law defines the meaning of torture as:³⁴

“Torture is any act committed intentionally, causing pain or suffering severe, physical, and spiritual, on a person to obtain a confession or information from a person or a third person, punishing him for an act he has committed or is suspected of having committed by a person or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by, at the instigation of, with the approval or knowledge of anyone and or political officials.”

In the case of Siyono, he is a person who is presumed as a terrorist. It needs to be emphasized that he is a person who is presumed. According to Article 18 of Indonesian Human Rights Law explicitly explain about every one who arrested, detained, or charged for penal offence has right to be presumed innocent until the proven guilty according to law in the trial at which he has had all the guarantees necessary for his defense, according to prevailing law. This article notices that the person who presumed as a suspect person still has a right to be presumed innocent.

On the other hand, the Indonesian Laws on Human Rights not only regulate about the right to life, but also other

³⁴ Indonesian Human Rights Law No. 39 Year 1999 Article 1 Paragraph (4)

human rights, such as right to belief on the religion, right on education, rights to get justice, rights to life in welfare, rights to free from torture and many else. These regulations aims to ensure the protection of human rights.

2. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment as well as Indonesian Laws No. 5 Year 1998

Actually Indonesia is one of some countries which ratified the convention as the realization of the effort on combating torture action. By ratifying this convention, Indonesia will implement this convention. Indonesia also formulates the national law as well as Law No. 5 Year 1998 about the ratification of Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

In this convention, the committee against Torture (CAT) clearly state its position on the right to freedom from torture reinforcing the attitude of the HRC. "... The State Parties to this Convention..."³⁵ precluded from rising

³⁵ Article 1 of CAT: 1. For the purposes of this convention, the term of "torture" means any act by which serve by pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other

before the committee exceptional circumstances on justification for and prohibited by article 1 in this convention. Furthermore, the article 2 in this convention explain that the use of torture is not allowed in the circumstances of the judicial jurisdiction.³⁶ Means that if the torture action happened, the state must make an action on the administrative or legislative or juridical measures. On the other hand, the superior command for the public interest cannot categorized as torture action.

Then, in the case of the human rights protection for terrorism action is also issued by the office of the United Nations High Commissioner for Human Rights on Human Rights, Terrorism and Counter-terrorismt. This issue discusses about the impact of terrorism on human rights.³⁷ Its explanation on the impact of terrorism to human rights is on the enjoyment of life for every human being.³⁸ It means that every human being has equal rights in the rights of life.

person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. 2. This article is without prejudicate to any international instrument or national legislation which does or may contain provisions of wider application.

³⁶ Article 2 of CAT: 1. Each state party shall take effective legislative, administrative, juridical or other measure to prevent acts of torture in any territory under its jurisdiction. 2. No any exceptional circumstances whatsoever, whether state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture. 3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

³⁷ Anex, United Nation Global Counter-Terrorism Strategy, (year not available), accessed on February 3rd, 2017 at 2.52 PM

³⁸ Terrorism has direct impact on the enjoyment of a number of human rights, in particular the rights of life, liberty and physical integrity. Terrorist acts can destabilized Governments,

According to article 16 CAT states that every state by its constitution recognize the prevention of any acts of cruel, torture and inhuman, or degrading treatment in the territory. Article 16 CAT said:³⁹

“1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts committed by or any investigation of or with the consent or acquiescence of public official or other person acting in official capacity. In particular, the obligation contained in article 10, 11, 12 and 13 shall apply with the substitution for references to torture in references to other forms of cruel, inhuman or degrading treatment or punishment.”

Then, according to article 10 in this convention ensure “.....the prohibition against torture ...”⁴⁰ to get the information by the police in the process of investigation, arrest, detention or imprisonment. In the other hand, the article 11 of CAT also regulates about the ethic on the process of interrogation rules as mention:⁴¹

“Each State Party shall keep under systematic review interrogation rules, instruction, methods and practices as well as arrangements for the

undermine civil society, jeopardize peace and groups. All security, threaten social and economic development, and may especially negatively affect certain groups. All of these have a direct impact on enjoyment of fundamental human rights.

³⁹ CAT Article 16

⁴⁰ Article 10 of CAT: 1. Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.

⁴¹ CAT Article 11

custody and treatment of person subjected to any form of arrest, detention, imprisonment in any territory under its jurisdiction, with a view or preventing any cases of torture.”

The article above describes that every state party has responsibility to control the process of investigation, instruction, methods and practices in the form of arrest, detention or even imprisonment.

In Indonesian Law No 5 Year 1998 also regulates about the Convention. This Law regulates about the ratification of Covenant against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

The reasons why Indonesia ratify the Convention are because:⁴²

- a. Pancasila as the philosophy and outlook of the Indonesian nation and the 1945 Constitution of as the source and basis of national law, uphold human dignity and values as reflected in Fair and Civilized Humanity Principle. This principle is a constitutional mandate that Indonesia try to prevent and prohibit all forms of torture, in accordance with the Convention;

⁴² The explanation on Law No. 5 Year 1998 about The Ratification Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, part III on The Reasons of Indonesia as a State Party in this Convention.

- b. In order to implement Pancasila and the 1945 Constitution, Indonesia has been basically set of legislation directly governing the prevention and prohibition of all forms of torture inhuman and degrading. However, some legislations seems not in line with the Convention, therefore it needs some harmonization;
- c. To complete of the national legislation, State will increase legal protection more effectively, so that it will better ensure the rights of every citizen is free from torture and other acts of cruel, inhuman or degrading, in order to achieve an Indonesian society that is orderly , organized, and cultured;
- d. Indonesian society that is orderly, organized, and cultured will be able to realize joint efforts to maintain peace, order, and prosperity of the world as well as to preserve human civilization;
- e. Ratification and implementation of the Convention in a responsible manner Indonesia demonstrates its seriousness in the promotion and protection of human rights, especially the right to freedom from torture. This right will

also further enhance the positive image of Indonesia in the international community and strengthen the confidence of the international community towards Indonesia.

Then, Law No. 5 Year 1998 also explains about the implementation of the Convention. It is stated in the explanation of the Law No. 5 Year 1998 that the implementation of the Convention is under Committee Against Torture (*Komite Menentang Penyiksaan*) which has high integrity on the field of human rights.⁴³ The State is responsible for every cost that incurred by the committee in examining their duties. Then, according to Article 19 of the Convention, State must give periodic report to the committee through Secretary General of United Nation that this State has perform their responsibility in examining the implementation of the Convention. The Article 19 of CAT state that:⁴⁴

“1. The States Parties shall submit to the Committee, through the Secretary-General of the United Nations, reports on the measure they have taken to give effect to their undertaking under this Convention, within one year after the entry into force of the Convention for the State Party concerned. Thereafter the State Party shall submit supplementary reports every four years on any new measures taken and such other reports as Committee may request. 2. The Secretary-

⁴³ Law No. 5 Year 1998 Part of IV Number 3 about the Implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

⁴⁴ CAT Article 19

General of the United Nations shall transmit the reports to all State Party. 3. Each Report shall be considered by Committee which may take such general comments on the report as it may consider appropriate and shall forward these to the State Party concerned. That State Party may respond with any observation it chooses to the Committee. 4. The Committee may, at its discretion, decide to include any comments made by it in accordance with paragraph 3 of this article, together with one observation thereon received from the state party concerned, in its annual report made in accordance with article 24. If so requested by the State Party concerned, the Committee may also include a copy of report submitted under paragraph 1 of this article.”

It is clearly regulated in this article that every State has responsibility on the implementation of the Convention. Every State Parties also has responsibility to give the report for the Committee through the Secretary General of the United Nation in certain periodic according to what has been regulated in the Convention.

There is a universal consensus in the international community that the torture and other forms of cruel, inhuman, or degrading punishment or treatment cannot be reconciled with a global order fundamentally committed to basic respect and human dignity. Torture attack is essential physical and psychological integrity of human being. It is therefore, not surprising that the torture is prohibited by international, regional and also national law. So it is a must

to every state to ensure the prohibition of torture action, not become a torture actor.

When the torture becomes routine practice in governance, the state does not represent the moral order of the community, but instead the respriority of authorized violence and impermissible coercion.⁴⁵ The practice of torture is a powerful institutional expression of state craft, power and social control. The use of torture is used in practice. It means that the state or a organ of state or association use these power as critical components of security to intimidate or sometime to eliminate an object or person called as enemies or even non enemies.⁴⁶

The prohibition of torture is also stated in Article 5 of the Universal Declaration of Human Rights 1948 which mention as “*No one shall be subjected to a torture or cruel, inhuman or degrading treatment or punishment.*”⁴⁷ This article widely regarded as expressing customary international Law.⁴⁸ Within the United Nation framework, torture and other cruel, inhuman or degrading treatment or punishment are explicitly binding on those States which

⁴⁵ Winston P Nagan, “The International Law Torture: From Universal Proscription to Effective Application and Eforcement”, *Harvard Humant Rigths Journal*, Volume 14, 2001, p. 91

⁴⁶ *Ibid.*

⁴⁷ Declaration of Human Rights Article 5

⁴⁸ Center of Justice and International Law (CEJIL), “Torture in Interational Law: A Guide to Jurisprudence”, available at http://www.apt.ch/content/files_res/jurisprudencguide.pdf accessed on Monday, March 13, 2017 at 12.24 pm.

ratified them, including Indonesia. The Universal Declaration of Human Rights is adopted by Indonesia become Indonesian Human Rights Law. It means that Indonesia is responsible for the implementation of what have been stated in the Article 5 of the Universal Declaration of Human Rights.

All human beings know that free from torture is kind of human rights and need to be protected by the nation. All human beings also know that terrorism is an action which violate the human rights, especially the right to life. Respecting for human rights and the rule of law must be a bedrock of the global fight against terrorism.⁴⁹ Then the nation which measure an action to fight the terrorism need to ensure the protection of human rights by creating cooperation in international or global through several international treaties and also ensure the implementation of the international treaties.

Then, Indonesian Law No. 5 Year 1998 also states that the Delaration of this Convention guarantees the protection of every human being to be free from the torture action and cruel treatment or punishment, inhuman, or degrading, and expressed the need for measures the

⁴⁹ Ankit Gautam, "Human Right and Terrorism: An Overview", *International Journal of Multidiciplinary Research and Development*, Vol. 2, 2015, p.422

effectiveness to ensure the implementation of the Declaration.

3. The Law No. 15 Year 2003 about The Government Regulation in Lieu of Law No. 1 Year 2002 about Terrorism

The preamble of the 1945 Indonesian Constitution states that Indonesia participates toward the establishment of a world order based on freedom, perpetual peace and social justice, Indonesia must give a contribution to realize the freedom and security of the world order which has been stated in the Charter of United Nation. According to what has been stated in the Preamble of 1945 Indonesian Constitution, Indonesia needs to support and participate in the establishment the world order based on freedom including the action on combating terrorism.⁵⁰

Terrorism should be understood as a human right violation. Terrorist attacks, depending on the nature of particular incident, have the potential to decimate human dignity and to violate human rights across all categorized:

⁵⁰ Jeanne Darc Noviayanti Manik, "Tindak Pidana Terorisme" available at <https://www.google.co.id/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwjNubP5v9jSAhWKQ48KHWIGBvMQFggZMAA&url=http%3A%2F%2Fjournal.ubb.ac.id%2Findex.php%2Fhukum%2Farticle%2Fdownload%2F6%2F4&usg=AFQjCNG35Vtkh9XTW0gDvTSIDoGVD6kR5Q&sig2=dBODDyHbqNQTNvrrlccZRw&bvm=bv.149397726,d.c2I> accessed on Wednesday, March 15th, 2017 at 19.46 pm

civil, cultural, economic, political and social rights, as well individual and groups rights, women's rights and children's rights.⁵¹

Terrorism has direct impact on the enjoyment of a number of human rights, particularly the right to life, liberty and physical integrity. Terrorist acts have a direct impact on the enjoyment of human rights. These destructive impact of terrorism on human rights are as follows:⁵²

- a. Threatens the dignity and security, endangers or takes away innocent lives, creates an environment of fear jeopardizing fundamental freedoms, and aims at destruction of human rights;
- b. Has an effect on the establishment of the rule of law, aims at the destruction of democratic bases of society, and destabilized legitimately constituted government;
- c. Has links with transnational organized crime, drug trafficking in arms, as well as illegal transfer of nuclear, chemical and biological material;
- d. Has adverse consequence for economic and social development of state, jeopardized friendly relation among states;

⁵¹ Karima Bennoune, "Terror and Torture", *Berkeley Journal of International Law*, Volume 26, 2008, p. 17

⁵² Ankit Gautam, *Op.Cit.* 422

- e. Threatens the territorial integrity and security of states, constitute a grave violation of purpose and principles of the United Nations, is a threat to international peace.

Article 1 Number 1 Government Regulation in Lieu of Law No. 1 Year 2002 about Terrorism defines terrorism as the criminal act of terrorism is any act that satisfies elements of criminal acts according to what has been regulated in this Government Regulation in Lieu of Law No. 1 Year 2002. In common law, criminal liability can be held only if the element of *actus reus* and *mens rea* are present. The offender must meet the formulation of guilty act and guilty mind and get the conviction as the result.⁵³

The establishment of this law shows the Indonesian participation on combating the terrorism. According to the consideration of the Government Regulation in Lieu of Law No. 1 of 2002 about Terrorism one of the purpose of the establishment this regulation is to realize the freedom for the world order as well as national purpose based on the Preamble of the 1945 Constitution.

Indonesian law about terrorism explains how the Indonesia combate the terrorism. Article 2 Law on

⁵³ Muh Endriyo Susila, "The Criminal Law", 2014, Yogyakarta, Pensil Komunika, p. 42

Terrorism explains the purpose of combating terrorism to strengthen the national security, society security by respecting the human rights and law without any discrimination of religion, ethnic, race and grouplines. This article regulates about the effort of Indonesia state on combating terrorism must also respect human rights without any kind of discrimination.

In line with the Article above in case of Siyono according to what had been reported by the National Commission of Human Rights, what had been done by the *Datasemen Khusus 88* can be assumed as violation of human rights. The death of Siyono is assumed as torture action violated by the *Datasemen Densus 88* because according to what had been reported by National Commission of Human Rights there are some injured found in Siyono's body.

This law of terrorism also regulates the kind of actions can be categorized as terrorism action⁵⁴ and the punishment for the terrorism.⁵⁵ Punishment for terrorism action is also divided into some kinds such as fine, imprisonment and capital punishment.⁵⁶ The Law of

⁵⁴ Article 4 Government Regulation in Lieu of Law No. 1 of 2002

⁵⁵ Article 8 Government Regulation in Lieu of Law No. 1 of 2002

⁵⁶ Article 6, 8, 9, 10, 11, 12, 13, 15, and 16 Regulation in Lieu of Law No. 1 of 2002

Terrorism also regulates about the right of investigator on the process of investigation.⁵⁷

D. Problem Facing the Combating Terrorism in Indonesia

1. Focus more on Security Approach

Indonesia has shown an effort to combat the terrorism action by making some regulations and joining the international convention and moreover by establishing several bodies for the implementation of the regulation or Convention. The effort of combating terrorism as the Indonesian State is stated in the Preamble of the 1945 Constitution of Republic of Indonesia.

The effort on combating of terrorism is also based on the reason to limit the bad effects that can be caused by terrorism action. Indonesian effort on combating terrorism must be based on the law without ignoring the human rights protection as well as guaranteed in the Constitution.

2. Ignoring the Human Rights Protection as guaranteed in the 1945 Constitution and Laws

According to what has been regulated in the Indonesian Law of Terrorism, the effort for combating terrorism must respect the human rights without any discrimination of religion, race and ethnic.⁵⁸ The

⁵⁷ Article 25 and 31 Regulation in Lieu of Law No. 1 of 2002

⁵⁸ Article 2 Government Regulation in Lieu of Law No. 1 of 2002

effort on combating terrorism must be based on human rights respect before the law.⁵⁹

Din Syamsudin as the former chairman of the Central Board of Muhammadiyah stated that there are several violations of human rights which is conducted by *Densus 88* in executing the case of terrorism.⁶⁰ *Densus 88* has responsible for ensuring the national security.⁶¹ The efforts on combating terrorism must not ignore the human rights asprotected by the 1945 Constitution and the applicable law.⁶²

The 1945 Constitution states that Indonesia is is a State based on the rule of law.⁶³ It is similar to the statement of Busyro Maqodas as the Head of Central Board of Muhammadiyah that the efforts to combat terrorism must be in line with the norms of law.⁶⁴ In other words, the application of law and human rights should be emphasized in combating terrorism.

Haedar Hashir, the Chairman of the Central Board of Muhammadiyah also adds that the effort on combating terrorism must be based on the cultural approach and must be in the line with law and

⁵⁹ Karima Bennoune, Op.Cit.

⁶⁰ *Anonymous*, Pemberantasan Terorisme Jangan Menggunakan Cara-cara Teror available at http://www.muhammadiyah.or.id/id/news-2452-detail-din-syamsuddin-pemberantasan-terorisme-jangan-gunakan-cara-%E2%80%93-cara-teror-berita_Pimpinan_Pusat_Muhammadiyah.html accessed on Monday, March 20, 2017 at 12.00pm

⁶¹ Putu Ayu, Muhammadiyah Dukung Pemberantasan Terorisme available at <https://www.harianbernas.com/berita-5936-Muhammadiyah-Dukung-Pemberantasan-Terorisme.html> accessed at Monday, March 20, 2017 at 12.20pm

⁶² *Ibid.*

⁶³ Indonesian Constitution 1945 Article 1 Paragraph 3

⁶⁴ Nabilla Tashandra, Muhammadiyah Tolak Penambahan Wewenang TNI dalam Pemberantasan Terorisme available at <http://nasional.kompas.com/read/2016/07/25/15585631/muhammadiyah.tolak.penambahan.wewenang.tni.dalam.pemberantasan.teroris> accessed on Monday, March 20, 2017 at 12.39 pm.

respect the human rights.⁶⁵ Haedar claims there are several things that must be evaluated, started from the law aspect to the implementation of the law. Terrorism, radicalism, and other reductive action must be faced by using the preventive action.⁶⁶

Based on some opinions of the scholars and activists, it may highlight that most people agree to combate terrorism action. However, the implementation of combating the terrorism action also has to respect the human rights approach as guaranteed in the 1945 Constitution and other applicable laws.

⁶⁵ *Anonymous*, Pemberantasan Terorisme dengan Pendekatan Kultural available at <http://mediaindonesia.com/news/read/37864/pemberantasan-terorisme-dengan-pendekatan-kultural/2016-04-02> accessed on Monday, March 20, 2017 at 13.16pm.

⁶⁶ *Ibid.*