

RESEARCH ARTICLE

The Legality of Military Involvement in Law Enforcement Operations Against Criminal Armed Groups in Indonesia's Papua Province

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Abstract: This paper intends to (a) analyze whether the conflict in Papua meets the requirements to be categorized as a non-international armed conflict (NIAC) and (b) analyze the legality of the involvement of Indonesian National Armed Forces (*Tentara Nasional Indonesia*, TNI) in the Papuan conflict using the principles found in international human rights law and international humanitarian law. This normative juridical research employs the conceptual, statutory, and comparative approaches. The results of the study indicate that the threshold of NIAC has not been met in the Papuan conflict, especially the requirements for determining the organized armed groups, as well as the intensity of attacks. Attacks in Papua are sporadic, disorganized, disjointed, and conducted without a clear chain of command. Considering the NIAC status, which has not been achieved, what is then applicable in the Papuan conflict is law enforcement operation under international human rights law as opposed to conduct of hostilities under international humanitarian law. Under the standards of law enforcement operation, the involvement of TNI in the law enforcement operation against criminal armed groups is not absolutely prohibited as long as it satisfies the principles of law enforcement operation, namely legality, proportionality, accountability, necessity, and precautionary in carrying out their operations. This study establishes that the involvement of TNI in law enforcement operations against the KKB in Papua has not satisfied the aforesaid principles.

Keywords: Papua, Criminal Armed Groups, Law Enforcement Operations, Military Involvement, Legality.

Papua is an Indonesian province located on the western side of the New Guinea island. Throughout history, the name of this region has changed several times, starting with the name West Papua, which was used when it remained a colony under the Dutch East Indies until 1963. The name referred to the entire island of New Guinea, including the eastern part of the neighboring country, Papua New Guinea. Later, the name West New Guinea was used by the 1962 *New York Agreement*, which regulated the transfer of West

Papua from the Netherlands through the United Nations Temporary Executive Authority as well as the United Nations General Assembly Resolution Number 2504 on the *Agreement Between the Republic of Indonesia and the Kingdom of the Netherlands Concerning West New Guinea (West Irian)* on the 19th of November 1969, which confirmed the results of the *Act of Free Choice (Penentuan Pendapat Rakyat, 'PEPERA')* in 1969 which stated that Papua remained part of the Republic of Indonesia (UNGA Resolution 7723, 1969).

The name West Irian had been used since 1963, but then it was altered to Irian Jaya in 1973. In 2000, the name was changed once more to Papua. The region is currently divided into two districts: Papua and West Papua. For the purposes of this article, we will use the term Papua, which covers the entire district of Papua and West Papua.

The conflict in Papua that has lasted more than 50 years is very complex indeed. It cannot be separated from the history of the existence of the 1962 *New York Agreement* as well as the United Nations General Assembly Resolution Number 2504 on the *Agreement between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian)*, which was previously mentioned as a dissatisfaction towards PEPERA; jealousy of the unfair distribution of the development, wherein development in Papua is far behind the other provinces in Indonesia; various discriminations suffered by the Papuans; the presence of Freeport which drains the wealth and customary lands of the Papuans; and repressive actions carried out by the Indonesian Armed Forces (*Tentara Nasional Indonesia*, 'TNI') and the Indonesian National Police (*Polisi Republik Indonesia*, 'POLRI'), especially in the period 1961–1995 with no less than 44 military operations.

The escalation of violence increased in 2017 (Doherty, 2019), which was marked by a series of violent terrors carried out by a certain group of people labeled by the government as the "Criminal Armed Group" (*Kelompok Kriminal Bersenjata*, 'KKB'; Puspita, 2021). There are various designations for armed groups in Papua aside from KKB, such as Security Disturbance Movement (*Gerakan Pengacau Kedamaian*, 'GPK'), Armed Separatist Group (*Kelompok Separatis Bersenjata*, 'KSB'), Free Papuan Organization (*Operasi Papua Merdeka*, 'OPM'); the last one the government officially calls it a terrorist group through Press Release No.72/SP/HM.01.02/POLHUKAM/4/2021 (Kemenkopolhukam, 2021). These terrors were directed against both civilians as well as the TNI-POLRI. Naturally, they are to be responded to by the equal use of violence by TNI and POLRI.

Yet, to this date, it seems as if the government is cautiously handling this KKB situation for fear of being accused of violating human rights and being cornered in international forums, such as when Vanuatu Prime Minister Bob Loughman raised the issue of

human rights (*Hak Asasi Manusia*, 'HAM') violations in Papua at the 75th Session of the United Nations General Assembly on September 26, 2020. Many parties were triggered by the weakness of the TNI in handling the KKB in Papua and, therefore, asked the TNI to be stricter, especially after they were classified as a terrorist organization by the government on April 29, 2021 (Fajarta, 2021; Purnamasari, 2021).

Human rights violations are often blamed on the TNI and POLRI in Papua, considering the circumstances in which the government seemingly does not recognize the Papuan territory as a non-international armed conflict ('NIAC'); hence, the human rights approach that should be taken is not humanitarian law. But is it true that the status of NIAC is not met in the Papua situation? This paper intends to present the answer to that.

Purpose of the Present Study

Taking off from the discussions above, this study will provide an overview of the law enforcement operations in Papua as it is not a simple task to determine the legal status of the so-called armed conflict happening thereon, whether it falls within NIAC or is limited to security or national disturbances. Therefore, this study aims to answer: (a) has the status of NIAC been achieved in Papua? (b) is the law enforcement operations involving the military aimed at armed criminal groups in Papua in accordance with the principles found in international human rights law and international humanitarian law?

Method

Instruments

The present research utilizes the legal instruments of both Indonesian law and international law that are classified into primary and secondary legal materials. The primary legal materials that originate from international law and are used for the completion of this research refer to the Geneva Conventions of 1949 (with a highlight on Common Article 3), the Additional Protocol II of 1977, International Human Rights Conventions, and a number of judicial decisions relevant to the Papuan conflict. The Indonesian counterpart primarily refers to the Indonesian

Constitution of 1945. The secondary legal materials are comprised of books, journal articles, documents, news, and other legal and official documents that are within the reach of the multi-layered aspects of this particular issue and were written by relatively highly qualified writers.

Design

This is a normative juridical research with conceptual, statutory, and comparative approaches. A conceptual approach is needed to analyze ambiguous meanings in the KKB situation in Papua. A statutory approach is needed to analyze legal sources in relevant human rights and humanitarian law in the KKB case in Papua. A comparative approach is needed to look at the handling of similar cases in various countries and courts, both nationally and internationally. This research deduced the data by means of a qualitative method. In doing so, the data obtained and all the other knowledge and relevant information were presented in a descriptive manner. The laws and regulations, opinions of the experts, and, most importantly, the authors' arguments were fashioned as the tools to assess the data.

Results

The Papua Task Force from the Faculty of Social and Political Science, Gadjah Mada University in Yogyakarta, Indonesia, has reported that from 2010 to 2020, there have been at least 118 cases of violence whose perpetrators were the personnel of KKB. In comparison, the number of TNI counterpart were 15 cases, and the police were 13 cases. The results of the same research have also shown that the death toll from

the cases of KKB violence has reached at least 356 people, consisting of 93% of civilians and the TNI, and the remaining 7% were members of the KKB (Ansyari & Edi, 2020). The Armed Conflict Location and Event Data Project ('ACLED') has presented a report described in Table 1.

Pursuant to the latest news up until March 2, 2022, there was another massacre by KKB that killed eight employees of Palapa Timur Telematics ('PTT') at the PTT camp in Tower B3, Jenggeran Village, Beoga District, Puncak Regency, Papua (Tim Detikcom, 2022; Nguyen, 2022). The above description shows that there have been abundant victims, both from the civilians and the TNI-POLRI, as a consequence of the terror carried out by the KKB in Papua, not to mention the countless material losses such as the destruction of public facilities that were destroyed by KKB (Saputra, 2021).

Discussion

The Situation in Papua has not Satisfied the Threshold of NIAC

Does the happenstance of armed conflict in a region constitute NIAC? This is a seemingly simple question, yet it is not all too simple to answer (Hathaway et al., 2012). In the context of the Papuan conflict, the circumstances that contribute to the complexities are the complicated nature of the conditions in Papua on the one hand (Sefriani, 2003) and the ambiguity of the NIAC regulations on the other.

NIAC is one of, if not the most, complex areas in the realm of international humanitarian law ('IHL'). As Hersch Lauterpacht acclaimed, "if international law is at the vanishing point of law, the law of war is

Table 1

Number of Conflicts in Papua and West Papua, 2019 and 2020

Papuan Conflicts	1 January-31 December 2019	1 January-26 September 2020
Events	96	100
Battles	27	40
Riots	19	22
Violence Against Civilians	50	38
Fatalities	145	57

Source: (ACLED, 2020)

at the vanishing point of international law” (1952, p. 381). Rein Müllerson (1997) added that “international humanitarian law applicable in internal armed conflicts is at the vanishing point of international humanitarian law” (pp. 148-79).

The governance of NIAC under IHL, including its determining threshold, remains minimalistic when compared to international armed conflict (IAC), and most of it dwells in ambiguities. Common Article 3 of the 1949 Geneva Conventions is the only provision that regulates NIAC across all four other Geneva Conventions of 1949. In addition to that, Additional Protocol II (1977) on NIAC came into being to patch the aperture that Common Article III had left. Furthermore, the *Tadić* jurisprudence offers a deeper interpretation of Additional Protocol II, hence shedding a clearer right on the threshold of NIAC.

Common Article 3 merely states its application to NIAC cases without explaining the very definition of NIAC itself (Radin & Coats, 2016). This results in a significant number of ambiguities in regard to the NIAC threshold, although customary international law agrees that Common Article 3 only applies to violence whose level is above internal tensions and disturbances—this provision is found in Article 1(2) of Additional Protocol II, but is considered to apply also to Common Article 3 and Commentary on the Additional Protocols, ¶¶ 4472-73; Rome Statute, art. 8(2)(d).

This ambiguity is thought to have been intentional to “avoid rigid formulations that could limit the field of application of the law” (Bergala, 2011). This also emphasizes that the Article is only intended to provide a standardized humane treatment for the victims of armed conflict, not to interfere in the internal affairs of the State (Cullen, 2004).

With that being said, it is even more crucial to determine NIAC, with its inherent *armed conflict* nature that is distinguished as being at the level above internal tensions and disturbances. In response to that, the existence of Additional Protocol II is intended to offer more clarity on the threshold to determine the happenstance of NIAC within the territorial jurisdiction of a state. In that regard, Article 1(2) of Additional Protocol II has specifically excluded “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature” from its definition of NIAC. Instead, Additional Protocol II set the threshold of NIAC comprises of two elements: first, the organizational

level of the armed group (or groups); and second, the intensity of the attack. Under the same light, the ICTY Appeal Chamber’s ruling in *Tadić* determines NIAC as a situation of “prolonged armed violence between governmental authorities and organized armed groups or between such groups within a State” (*Prosecutor v. Tadić*, 1995, par. 63). Thus, this ruling combines the aspect of intensity and organization that have been adopted in Article 8(2f) of the Rome Statute on the International Criminal Court.

On a closer look, Sassòli et al. (2006) established that thresholds contained in Article 8(2)(f) of the Rome Statute differ from the thresholds in Common Article 3. Instead of the requirement for armed conflict to occur between the State armed force and the insurgent armed group, for the latter to control a portion of territory or for there to be a command responsibility, the conflict must be prolonged and the armed groups must be organized (Sassòli et al. (2006).

The Organizational Level of the Armed Group

The first threshold for achieving NIAC, according to Additional P II, is that the non-state party to the conflict must be an organized armed group, similar to the structure of regular armed forces, and has reached an organizational level that allows the group to control certain territory and carry out sustained attacks against the state (Cullen, 2004). The International Committee of the Red Cross (‘ICRC’) insisted that these forces must come under a certain structure of command and have the capacity to sustain military operations (Bergala, 2011).

There are three main reasons underlying organizational requirements, namely: (a) to exclude individual or personal action; (b) a sufficient level of violence can only be deemed so by the level of synchronized efforts of an organized armed violence group; and (c) to allow the compliance with international humanitarian law by armed groups ((Radin & Coats, 2016); Sivakumaran, 2012). The *Prosecutor v. Boškoski* (2008) ruling confirms that the key indicator of an organization is the level of the command structure in the said armed group, the ability to carry out operations in an organized manner, the level of logistics, the level of discipline, and the ability to apply IHL and the unanimous voice (*Prosecutor v. Boškoski*, 2008).

Similarly, to be considered “organized,” a group must be able to operate in a coordinated manner,

although not to the extent of a State armed force. This requirement implies the group's ability to plan and carry out their activities, collect and share intelligence, establish communication among members, deconflict operations, and provide logistical support for combat operations. Mere actions conducted collectively against the State (or other organized armed group) is not sufficient in establishing the organized character of the group.

However, it should be emphasized that the above factors are not absolute requirements. The lack of several factors—as found in the present case—does not necessarily imply the failure to meet the said requirements of the organizational level of the armed groups (Radin & Coats, 2016). However, to date, it is not clear whether organized armed groups other than belligerent armed forces comprise groups directly participating in hostilities or constitute a separate category of non-civilian. Neither Common Article 3 nor Additional Protocol II directly addresses the scope of the civilian concept in this regard. It is to be noted that Common Article 3 avoided the term altogether, instead extending protection only to those not taking an active part in hostilities. In comparison, Additional Protocol II used the term without defining it.

For the context of Papua, we believe that the requirements for an organized armed group with a clear chain of command similar to that of a regular government military organization have not been fulfilled in Papua. For one, the armed groups (not group) in Papua do not operate on behalf of one united party. Instead, there are five large active groups operating in the districts of Puncak, Nduga, Paniai, Intan Jaya, and Mimika (Suwandi & Belarnimus, 2022), as well as many other smaller groups or splinter groups. However, the police have recorded that the number of KKB members has reached no less than 150 personnel (Suwandi & Belarnimus, 2022). There is also another notable group calling itself the West Papua National Liberation Army-Free Papua Organization (*Tentara Pembebasan Nasional Papua Barat-Organisasi Papua Merdeka*), whose spokesman has claimed the group's responsibility for shooting TNI members several times. Despite having a spokesman, the chain of command in the KKB was unclear, and the attacks were sporadic, disorganized and unsustainable.

There is a reasonable prejudice that KKB might have intentionally neglected to correct the misperception of themselves as a collective armed group. In light of that,

ICRC Commentaries on Common Article 3 shed light on the intention of the drafters, which is to preclude the application of the provision to general criminalities. It was done so in response to mutual concern on the risk of ordinary criminals being encouraged to resemble themselves with an organization as a ploy to generate benefits from the Convention by labeling their supposedly generic criminal actions as “acts of war” to dodge the criminal punishment (Schmitt, 2012).

In addition to not meeting the requirements for being organized, their sources of weapons are either the ones that have been looted from the TNI and POLRI or unlawfully smuggled in small quantities. In the end, they remain separate groups from one another. Thus, they are more appropriate to be included in the movement of security disturbances (*Gerakan Pengacau Kedamaian*; Suwandi & Belarnimus, 2022) or criminal armed groups as per the government's version. In this regard, it is the domestic law and the general norms of human rights that should be applied to regulate them and their actions (Schmitt, 2012).

The Intensity of the Attack

The second threshold required by Article 1 of Additional Protocol II for NIAC is the intensity of the conflict. However, the threshold of “intensity” has not been determined in any existing Conventions. Instead, it was first introduced in *Tadić* as the threshold required to establish the level of violence that corresponds to “prolonged armed violence” in order to distinguish the armed conflicts from banditry, disorganized and short-lived insurgencies, or terrorist activities which are not subject to IHL. It is to be underlined that the *Tadić* threshold triggers the application of customary IHL rules along with the provisions of Additional Protocol II that have achieved the statutes of customary international law as confirmed by ICRC in their 2016 Commentaries. Additionally, it has become the mutual consensus among IHL scholars that article 8(2) (f) of the Rome Statute is the “replica” of the definition in *Tadić*.

All in all, we argue that the intensity threshold has not been reached either. In general, the intensity can be seen from the presence of violence and damage, establishing the necessity for the deployment of military force (Radin & Coats, 2016). The *Prosecutor v. Boškoski* (2008) verdict provides several indicators of intensity such as the presence of serious attacks, the spread of clashes in the area and over a certain period

of time, number of civilians forced to flee the battle zone, types of weapons used, blocking or encircling cities, rate of destruction and number of the casualties, number of the troops deployed, presence and alteration of the frontline between parties, occupation of territory, deployment of government troops, road closures, truce orders and agreements, and government methods use of violence (Radin & Coats, 2016). It should be noted that these indicators are not absolute nor cumulative requirements; rather, they serve merely as a guideline (Radin & Coats, 2016). The number of casualties of either the personnel of the armed forces as well as the civilians or material damage in armed conflicts is also an indication of the intensity. But there are no absolute figures on this. The use of an autonomous weapon system, for example, has the potential to result in a significant reduction in property destruction as well as loss of human life, but this does not mean changing the intensity parameter standard.

One thing to note, however, is that the threshold of intensity is removed from the aspect of *duration* (Bradley, 2020). Both ICTY and ICRC Commentaries have noted that to satisfy the notion of intensity in terms of NIAC, duration is not a defining indicator but must be considered when deciding whether a situation is intense enough to establish an NIAC as per Common Article 3. This understanding is apparent in the *Juan Carlos Abella v. Argentina* (1997) ruling, where the Inter-American Commission on Human Rights (IACHR) considers a short-lived armed confrontation (lasting only 30 hours) suffices to be an NIAC due to other factors indicating the intensity level, which is the level of hostilities and violence that took place in those 30 hours, hence disregarding the duration factor. Instead of the duration, the key point of intensity threshold lies in the aspect of “ongoing conflict,” “ongoing violence,” or “ongoing military operation,” as found in the rulings of *Prosecutor v. Jean-Paul Akayesu* (1998) that disregarded the conflict as being an NIAC solely by the element of “prolonged violence” as well as *Prosecutor v. Issa Hassan Sesay* (2009) in Sierra Leone Appeal Chamber that confirms the element of ongoing military operations is significant to establish the existence of NIAC.

Even though there are indicators such as the depiction above, in practice, it is often difficult to assess whether these conditions have been satisfied or not, which then results in uncertainty when NIAC starts to exist. Likewise, in terms of measuring the

intensity of conflict and the conditions of prolonged armed conflict (protracted armed violence), it is often very difficult to decide when the intensity has been met (Grignon, 2014).

As an illustration for comparison, in the case of Syria, the intensity threshold is believed to have been reached when both sides of the dispute used weapons, the inability of government troops to recapture certain areas, there were tens of thousands of casualties, mass flight of civilians to neighboring countries, increased violence, involvement of the United Nations in efforts to restore peace, and the continued and intensive use of force on the part of the government, combined with the fact that the situation has been going on for almost three years (Grignon, 2014). The organizational threshold is believed to be reached when most of the rebels involved in armed clashes admit to being members, take coordinated action, have a general staff, control certain parts of the territory, are able to prevent the Syrian army from entering certain areas, and have spokespersons and representatives. This shows an indication of the existence of a chain of command that is able to give orders to subordinates who will carry them out (Grignon, 2014).

In the context of Papua, we believe that the intensity threshold has not been sufficiently met, even though the number of attacks may be considered large, because they are sporadic, small, unsustainable, not continuous, and uncoordinated. They only occurred in random locations chosen for no specific reason and at an unscheduled, irregular pace. Somewhere along the timeline, an attack might burst at a certain time, but then the whole situation would return to peace and quiet for months afterward. In terms of the number of victims, it is also relatively not massive (Siagian, 2021). In addition, there was no massive damage to the infrastructure. Blockades of territory were absent, and there was no mass evacuation to neighboring countries. Indeed, at this time, Indonesia was asked to clarify the reports that were submitted to the Human Rights Council regarding the existence of approximately 60,000 to 100,000 Papuans that have been displaced due to violence that has continued to increase since the shooting of Trans Papua workers by KKB in Nduga in December 2018. However, this is still not enough to include the situation in Papua as NIAC, given the clarification provided by the government stating that the refugees occurred due to natural disasters, inter-tribal wars in Papua, houses destroyed by armed

groups, as well as tribal and election conflicts (Siagian, 2021).

Based on these facts, we conclude that conditions in Papua are still at the national disturbance level and, thus, have not met the NIAC threshold.

The Absence of Recognition From the Indonesian Government

Another argument in favor of our point that NIAC has not been achieved in Papua is the absence of recognition from the Indonesian government. It is true that the acknowledgment cannot be used as an objective measure of the presence or absence of NIAC, but more or less, it may still be taken into account. Generally, the government does not want to raise the status of these insurgent groups as separatists or to recognize the status of NIAC; rather, they prefer to treat it as a mere internal nuisance and then aggressively suppress it. For example, to the end of Alvaro Uribe's 2002-2010 regime, the Colombian government denied involvement in NIAC with armed separatist groups such as the *Fuerzas Armadas Revolucionarias de Colombia* and *Ejército de Liberación Nacional* in its territory but instead claimed that its actions were law enforcement actions against criminal groups only (Fellmeth & Sylvester, 2017). Another example is where the application of international humanitarian law has been rejected in the West Bank, Kuwait, and Timor Leste (Meron, 2000).

There are several reasons why many countries do not want to recognize and enact humanitarian law (Cullen, 2004):

1. Recognition will show the failure of the state in preventing situations of armed conflict within its territory.
2. State does not want its confession to contribute to making the rebel groups legitimate combatants (in fact, the Common Article 3 of the Geneva Convention of 1949 has emphasized that the application of IHL: "shall not affect the legal status of the Parties to the conflict.").
3. Recognizing the existence of armed conflict automatically enforces the most basic provisions of international humanitarian law, which limit the use of repressive measures by States.
4. State does not want to be interfered with by international law in their domestic affairs.
5. Countries do not want IHL rules to disrupt their capacity to enforce law and order as well as cause an impact to their state of national security (Radin & Coats, 2016).

What should be noted is that although many countries do not want to recognize the existence of NIAC, this de facto denial of recognition does not make international humanitarian law inapplicable, as the ICRC has affirmed that in determining whether there has been a situation of NIAC does not depend on the subjective judgment of the parties conflicted. Rather, it must be determined based on the objective criteria set by the Geneva Convention.

Addressing Other Points of View

Although we believe that NIAC has not been achieved in Papua, there are several matters which might raise doubts on whether NIAC has not actually been achieved. The first refers to the presence of the military throughout the Papuan conflict. The justification for the existence of the military by the Indonesian government is in the context of law enforcement operations assisting the police, not in the context of military operations (Aditya, 2021). A critical question would then be, if it is a law enforcement operation instead of a military one, why has it been no member of the KKB ever been brought to justice? Rather, they were generally shot directly. The so-called operations that have been carried out so far (such as sweeping, blocking a village, and detention) in practice resemble military operations but only wrapped in the polite language of "law enforcement operations" (Aditya, 2021).

Another fact that has the potential to raise doubts about the NIAC status in Papua is the fact that the armed conflict has been going on for more than 50 years (Mishaal et al., 2016). The OPM rebellion has been recorded since July 26, 1965, allegedly inspired by the emergence of Papua New Guinea as an independent country on September 16, 1957, as well as anti-Indonesian attitudes due to neglected development in the area and discrimination against indigenous Papuans—repressive actions taken by the government to solve the security problem in Papua. The question is, then, whether the period of 50 years has met the criteria of prolongation. ICTY verdict in the

case of *Tadić* defines NIAC as a situation in which there is “prolonged armed violence between government authorities and organized armed groups or between such groups within a State” (*Prosecutor v. Tadić*, 1995, ¶ 63). This formulation has been adopted in state military manuals, international legal instruments, international jurisprudence, and the opinions of academics that is considered to have become customary international law (Jinks, 2003; Quénivet, 2014) even Article 8(2) of the Rome Statute. This fact in NIAC alone is actually analogous to the requirement for territorial control in Additional Protocol II (Bergala, 2011; Jinks, 2003)

The condition for the existence of prolonged armed violence in *Tadić* judgment is also universally understood as a threshold of intensity and is used solely to distinguish NIAC from cases of bandit, rioters, disorganized and short-lived insurgency, or terrorist activity, which are not subjected to international humanitarian law (Hathaway et al., 2012). Although there is little doubt, considering that there is no organized armed group with a clear chain of command, it does not have the ability to control the area and to detain the government from entering the area, as well as the intensity. Despite it often occurring, the acts have been sporadic, small in scale, uncoordinated, and unsustainable, in the sense that sometimes the KKB actively attacks civilians and TNI-POLRI, yet some other times there is no security disturbance in Papua for months. In light of that, we unwaveringly conclude that NIAC has not been achieved in Papua.

The Law Enforcement Operations in Papua Have Not Satisfied the Principles Set in the International Human Rights Law

The situation in Papua has not met the NIAC threshold; hence, the IHL is not activated, and there should be no military operations in the first place, but simply law enforcement operations that do not involve the military. However, that is not saying that military involvement is entirely impossible, considering the military can, as a matter of fact, carry out military operations other than war to assist in maintaining order during a state of national emergency that the police are unable to control. Under the Indonesian legal system, the Government Regulation in lieu of Law Number 23 of 1959 (*Peraturan Pemerintah Pengganti Undang-Undang*, ‘PERPU’) plays the key instrument in not only establishing the state of national

emergency but also implementing martial law in such emergency. The said PERPU reaffirms the position of the President of the Republic of Indonesia, who doubles as the Commander-in-Chief of the Indonesian Army as regulated in article 12 of the Indonesian Constitution of 1945, hence bearing the inherent authority to declare the state of emergency. One of the three situations that activate the President’s power to declare a state of emergency is the “security or law and order throughout the territory or part of the territory of the Republic of Indonesia is threatened by rebellions, riots or the result of natural disasters, so it is feared that it cannot be handled by means of normal equipment” (Indonesian Constitution of 1945). This is exactly what develops in Papua. Given the increasing security escalation and the loss of lives and properties, the Indonesian government was forced to use force, which involves the military to assist the police in maintaining or restoring order and security, as well as threats to territorial integrity carried out by the Papuan KKB.

Presently, the law enforcement operation that activates the role of the military in Papua is known as the Damai Cartenz Task Force (*Satuan Tugas/Satgas Damai Cartenz* – translates as the Cartenz Peace). Damai Cartenz Task Force is a combined operation of both TNI and POLRI, which has successfully maintained control over at least 11 out of 32 conflicted districts in the Nduga Region (Indonesia Defence, 2023). However, the facts show that military involvement in Papua has actually been carried out since 1961, when President Soekarno made the *Trikora* Declaration and formed the *Mandala* Command to carry out military operations in Papua. Military involvement in Papua is still ongoing, although the current government does not call it a military operation but a law enforcement operation against the KKB in Papua.

The Indonesian National Committee of Human Rights (*Komisi Nasional Hak Asasi Manusia*, KOMNAS HAM) team has noted that there were 44 military operations in the Papua region during the period 1961–1998. The types of military operations were divided into two stages: before the implementation of PEPERA with the aim of winning the said PEPERA, and after the implementation of PEPERA with the aim of maintaining its results, succeeding in the election, and eliminating the KKB movement, including the OPM (Franky, 2016). In doing so, several military operations carried out in Papua aimed to eliminate KKB were: Operation *Wisnumurti* in 1963–1965

(Mishaël et al., 2016), Operation *Sadar* (1965), Operation *Bharatayuda* (1966–1967), Operation *Pamungkas* (1971–1977), Operation *Koteka* (1977–1978), Operation *Senyum* (1979–1980), Operation *Gagak I* (1985–1986), Operation *Gagak II* (1986), Operation *Kasuari I* (1987–1988), Operation *Kasuari II* (1988–1989), Operation *Rajawali I* (1989–1990), and Operation *Rajawali II* between 1990–1995 (Lembaga Studi dan Advokasi Masyarakat, 2014).

The Legality of the Military Operations

The legality of the military operations carried out in Papua is doubtful considering the lack of evidence that has been found so far, which may indicate that after West Papua has officially joined Indonesia, there has been any official declaration that determines West Papua as a region is in fact in a state of emergency (Mishaël et al., 2016)

The deployment of military forces in Papua requires a basis for instructions that must be issued by the President and approved by the House of Representatives (*Dewan Perwakilan Rakyat*). In addition, to this date, it is not precisely known how many military members are stationed in Papua, as there is no official information from the government. A response from TNI Headquarters to the Commission for Missing Persons and Victims of Violence (*Komisi untuk Orang Hilang dan Korban Kekerasan*, Kontras) asserted that the information regarding data on the deployment of members of the TNI/POLRI in Papua was an “excluded information” (Kontras, 2021)

In 2001, a joint report by various NGOs stated that military posts (TNI-POLRI) were concentrated in five districts in the Central Highlands of Papua Province: Intan Jaya, Mimika, Nduga, Puncak, and Puncak Jaya districts. This is because the escalation of conflict in these areas tends to be elevated in recent years.

Victor Yeimo, International Spokesperson for the West Papua National Committee (*Komisi Nasional Papua Barat*), suspects that the number of non-organic personnel of TNI sent to Papua in the last three years (2019–2021) alone has reached 21,609 personnel (Belau, 2021). This number does not include the number of organic troops and POLRI at each point. Meanwhile, according to data from I Made Supriatma’s (2013) research, the ratio of security personnel to population per capita in Papua is 1:97. In other words, there is one police or army for every 97 Papuans. Nationally, the ratio is 1:296. This shows

that the concentration of security forces in Papua is much superior to that of residents in other regions (Supriatma, 2013).

Military deployments for law enforcement operations are actually common in countries confronting armed separatist groups. The British government, for example, used law enforcement operations with military assistance to counter attacks by the Irish Republican Army (Watkin, 2004). Similarly, Colombia faced *Fuerzas Armadas Revolucionarias de Colombia* and *Ejército de Liberación Nacional*, the Philippines faced the Moro rebels, and Sri Lanka faced the Tamil Tiger rebels, among others.

Likewise, there is no problem with the policy of law enforcement operations with the involvement of the TNI in Papua, as long as it complies with the rules of international human rights law such as *the European Convention on Human Rights* (ECHR), *The UN Code of Conduct for Law Enforcement Officials* (CCLEO) of 1979, *The UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* 1990 (BPUFF; Lieblich, 2014), as well as the relevant Indonesian national law. The role of the TNI is included in the category of Military Operations Other than War (*Operasi Militer Selain Perang*, OMSP), which is carried out based on state political policies and decisions (Lieblich, 2014). In conditions of danger or emergency, including security disturbances, the government can deploy the TNI to implement OPMS. The legal basis for a state of emergency or danger in Indonesia is regulated in Law Number 23 of 1959 on the Revocation of Law Number 74 of 1957 on the Determination of the State of Emergency.

According to the ECHR, deprivation of life shall not be arbitrary when it results from the use of force that is absolutely necessary, (a) to defend any person against unlawful violence; (b) to make a lawful arrest or to prevent the escape of a person who is lawfully detained; and (c) to quell riots or rebellions (ECHR, Art. 2 (2)). The European Court of Human Rights (ECtHR), in cases that do not meet the threshold of armed conflict, has recognized the lawfulness of killing a person believed to be a bomber by the authorities. However, the court found that inadequate planning of operations would still violate the right to life guaranteed by the ICCPR (*McCann v. United Kingdom*, 1995; Sassòli & Olson, 2008). With regard to arrests, ECtHR insists that the life of a fugitive should not be at stake for the purpose of his arrest if he does not pose a threat to

life and is not suspected of a violent offense, even if otherwise he cannot be arrested (*Nachova v. Bulgaria*, 2005). The Inter-American Commission on Human Rights, in the Las Palmeras case, also takes the same approach as the EctHR (*Las Palmeras v. Colombia*, 1998).

The Principles of Law Enforcement Operation

CCLEO 1979 and BPUFF 1990 provide *Guidelines on the Use of Force in Law Enforcement Operations*, through legal principles that must be met, including the principles of legality (BPUFF, Principle 1), necessity (CCLEO, Art. 3), proportionality (BPUFF, Principle 5(a)), precautionary (BPUFF, Principles 2, 3, and 5(b)), and accountability (BPUFF, Principles 7, 22-24). These principles are designed to protect the right to life to the fullest extent possible (Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, 1990; Yeini, 2019).

The results of our research indicate that the above principles have not been fulfilled by Indonesia. The first is the principle of legality. The legality of the involvement of the TNI in the Papuan KKB was not fulfilled as there was no evidence of a declaration or stipulation that Papua as a region was in a state of emergency, which was a condition for military involvement (Mishael et al., 2016). This handling is different from the case of handling the Aceh Merdeka Movement (*Gerakan Aceh Merdeka*) in Aceh, where there is a statement or declaration of a state of danger before the deployment of the TNI, and even a declaration or statement of revocation of the state of danger through presidential decrees and regulations after the situation is conducive, as has been regulated in Law No. 23 of 1959 on the Revocation of Law No. 74 of 1957 on the Determination of the State of Emergency (Mishael et al., 2016).

Second, the principle of accountability wherein the requirements can be found in the *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions* (UNSC Resolution 1989/65). According to this principle, the Government must ensure that its use of force and firearms or abuse of power and firearms arbitrarily by law enforcement officers is punished as a crime (Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, 1989, p. 112). Currently, the government has begun to show its seriousness in carrying out law enforcement against

members of the TNI-POLRI who are suspected of being involved in committing gross human rights violations in Paniai, Papua Province, in 2014. The Attorney General's Office has formed an investigation team based on the Attorney General's Decree Number 267 of 2021, dated December 3, 2021 (Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, 1989, p. 112). This follows up on the findings of the KOMNAS HAM regarding allegations of gross human rights violations in the region as reflected in Letter No. 153/PM.03/0.1.0/IX/2021 dated 27 September 2021 (*Tanggapan atas Pengembalian Berkas Perkara terhadap Hasil Penyelidikan Pelanggaran HAM Yang Berat Peristiwa Paniai Tahun 2014 di Provinsi Papua* [Response to the Return of Case Files as the Results of the Investigation of the Serious Human Rights Violation], 2021).

However, law enforcement should not only be in the Paniai case (Amnesty International, 2020). There are many other cases that have not been disclosed, such as the Wasior 2001 and Wamena 2003 cases. Amnesty International found at least 95 cases of Papuans dying at the hands of the security forces between January 2010 and May 14, 2020. The law should apply not only to the TNI-POLRI but also to members of the KKB who also commit murders and abuses against civilians and security forces. To date, there is no effective and impartial independent mechanism for public complaints about human rights violations by the security forces or the criminal acts of the KKB. Victims find it difficult to get justice, truth, and reparations.

Investigations into extrajudicial killings that are often executed by security forces are also rarely carried out (Amnesty International, 2020). Included in the realm of implementing the principle of accountability is the necessity of establishing a reporting system when law enforcement officers utilize the said arms and report any incidents of casualty or injury as the result of the use of force (Watkin, 2004). Furthermore, currently, it is very rare to report that KKB members have been tried in court for committing murder, assault, and destroying public facilities in Papua. This certainly raises a curiosity about whether they get shot right away. For example, Ananias Yalak, the leader of the Papuan KKB Yakuhimo, was killed a few days after being shot by a joint TNI-POLRI officer (RMOL Network, 2021) Yalak was shot for resisting officers during the arrest process. Previously, it was reported

that Anas had been tried and ruled in absentia at the Jayapura III-19 Military Court for dissertation and defecting to the KKB in Papua. Yalak is suspected of being involved in the shooting of Yahukimo KPU employee, Kenan Moh, the burning of an ATM in Dekai District, Yahukimo Regency on November 30, 2019 as well as the death of two TNI soldiers, and taking away two organic firearms and ammunition (Aco, 2021).

The third is the proportionality principle. BPUFF requires states to enact rules and regulations on the use of force and firearms; encourage the development and use of weapons to incapacitate but not lethal; establish clear warnings about limits on the use of firearms; and state that firearms should be used in a way that minimizes the risk of unnecessary suffering or harm as much as possible. Firearms should only be used intentionally when it is absolutely unavoidable to protect a greater life force, including the limited use of firearms only if any other means were deemed ineffective or cannot achieve the desired result (Watkin, 2004). Law enforcement operations to address the KKB problem in Papua are often carried out with excessive force when dealing with peaceful protests, riots, fights, or attempts to arrest suspects (Aco, 2021). This clearly violates the principle of proportionality, which requires that the amount of force used will not exceed the amount necessary to achieve a legitimate purpose. Circumstances such as the internal political instability of the state or other state of emergencies must not be used to validate deviations from the aforementioned principles of proportionality and accountability for the use of firearms (Watkin, 2004).

The fourth is the principle of necessity. In the field, TNI-POLRI often does not heed the principle of necessity that the use of lethal weapons can only be carried out in very limited cases as regulated in article 9 of the ECHR as well as the BPUFF, which has been described previously. The fact is that in the Paniai case, for example, members of the TNI-POLRI easily shot a crowd of unarmed civilians who were only demonstrating to demand that the TNI be held accountable for the mistreatment of teenagers in Paniai.

The fifth is the precautionary principle. This principle is often violated in the handling of KKB in Papua, along with the violation of the principle of proportionality. In the 2014 Paniai, there was carelessness in making decisions to shoot at residents who were demonstrating peacefully, resulting in four people being killed and 13 people injured (Arigi &

Amirullah, 2020). In the Wamena case, due to the burglary of the weapons warehouse at the Kodim 1702/Wamena Headquarters carried out by the KKB, the TNI-POLRI without careful and careful planning, the TNI carried out sweeping and forcibly displaced residents of 25 villages, resulting in two TNI killed and 42 civilians died of starvation (Sitepu, 2017).

From the explanation above, it appears that law enforcement operations against KKB in Papua have not fulfilled international human rights principles such as proportionality, necessity, accountability, legality, and precautionary.

Conclusion

Following the discussions and analysis above, we present the following conclusions:

1. The conflicts circling around the existence of KKB in Papua have not met the NIAC threshold as required by Additional Protocol II and the ICTY rulings in both *Tadić* and *Boškoski* in the sense that the requirements relating to the level of organization have not been met, considering there is no organized armed group with a clear chain of command, nor the ability to control certain areas effectively and to restrain the government's entry to the region at the same time. Likewise, the intensity requirement is yet to be satisfied. Even though this conflict has been going on for more than 50 years, the attacks are small-scale, sporadic, unsustainable, do not cause refugees to flow to neighboring countries, there is no massive damage or casualties, and there is no blockade.
2. The partaking of TNI in this whole law enforcement operation scheme constitutes Military Activity Other Than War; hence, it is subjected to international human rights law as opposed to IHL. In its implementation, however, this operation has not complied with the principles of legality, proportionality, necessity, accountability, and precautionary that are mandatory in law enforcement operations.

Declaration of Ownership

This report is our original work.

Conflict of Interest

None.

Ethical Clearance

This study was approved by our institution.

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