

Protection of Ex-Combatants Children in the International Law and Child Rights Perspective



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ABSTRACT: In 2019 there were pros and cons grew in the community regarding the repatriation of children of ex-ISIS combatants. BNPT data totaled 80 children. Those who objected were worried that these children would become radicals and would endanger the Unitary State of the Republic of Indonesia. The Presidential Staff Office proposed that for those under ten years old and orphans, the state must protect and ensure the survival of these children. Commission 1 of the DPR RI itself wanted restrictions; (1) The government should conduct an assessment involving various parties to see the extent to which these children were exposed to radicalism, (2) the government should prepare a rehabilitation and deradicalization plan, (3) the government should socialize the Indonesian people to accept the return of the children of ex-ISIS combatants. In addition, the government must also examine the perspective of international children's human rights because of the involvement of Indonesian children outside Indonesian territory.

KEYWORDS: Children of Ex-ISIS Combatant; Repatriation; International Human Rights.

A. PRELIMINARY

The BNPT Chairman, Komjen Pol Boy Rafli Amar, said his party had identified data on 80 Indonesian ex-ISIS children who are now in several countries. Boy Rafli explained the existence of these children abroad is already around 80 children with conditions under 10 years old, all of whom were brought by their parents who were influenced by the ISIS ideology and movement and were scattered in 3 or 4 countries. After being in refugee camps for a long time, they want to return to Indonesia (voice.com, 2020). However, President Joko Widodo (Jokowi) emphasized his reluctance to return ISIS combatants to Indonesia. The President stated that the government has a priority of security responsibility for Indonesia's 267 million population. Therefore, the government has no plans to repatriate the ISIS ex-Indonesian citizen. The next instruction was that Jokowi ordered 689 people to be identified. Their data will be entered into Immigration Office to be prevented from entering Indonesia. Jokowi did not explain further about their citizenship status. However, in his statement, Jokowi referred to the combatants as former Indonesian citizens (voa-islam.com, 2020).

Viewing the attitude of several countries regarding the issue of repatriating children of ex-ISIS combatants, the Australian Government refused to return ex-ISIS combatants to their countries and emphasized that they were not interested in bringing home their citizens who were members of ISIS because they considered the risk to the community even though the Australian PM is still considering that ISIS children can go home. Russia had 5,000 combatants in ISIS consisting of 1,000 Russian women and children, as of February 2020, Russia repatriated more than 200 ex-ISIS children. In 2019, the French president had repatriated 12 ex-ISIS orphans, although Foreign Policy stated that 89 percent of French people refused the repatriation of adult ex-ISIS combatants, and 67 percent refused the repatriation of children. Britain refused to return ex-ISIS combatants but British Foreign Secretary Dominic Raab is still considering returning children who were brought to ISIS to return to the UK. The European Union firmly rejected the repatriation of former ISIS combatants, EU counter-terrorism coordinator Gilles de Kerchove said these children could be the next generation of suicide bombers, as well as a ticking time bomb (liputan6.com, 2020).

If the government decides to accept repatriation, further intervention is needed. This is because the propaganda and nature of terrorism carried out by ISIS caused these children to be seen as a potential threat. After all, the penetration of ideology in childhood tends to leave more marks than learning in adulthood. Thus, the government must prepare facilities and infrastructure, as well as human resources to carry out the deradicalization process. In their supervisory function, Commission I and Commission VIII of the DPR RI must ensure the government's readiness to accept or reject ISIS combatant orphans with various consequences (Elga Andina, 2020).

The writings of Mohamad Rapik and Bunga Permatasari stated that until now, the legal basis that regulates the problem of children involved in terrorist networks, such as ISIS, does not specifically exist. The absence of specific rules regarding this issue causes the state to neglect the rights of child protection, even as far as the state's attitude towards children involved in the ISIS

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network is concerned. This neglect of children's human rights, in turn, causes the fate of children involved in the ISIS network to become unclear before the state (Rapik & Permatasari, 2020)

Another opinion can be seen in the writings of Muhammad Iqbal Baiquni that the Government must study, classify, and trace the track record of each person, and the policies taken shall not be generalized. In these sympathizers, some children were generally only victims, both victims of ISIS propaganda and victims of unequal power relations in the family. International and national law have regulated how to deal with citizens who are proven to have participated in armed training organizations by committing crimes, in this case, terrorism. But there are exceptions to international law, namely the repatriation of children. If the government considers that this triggers a threat that can disrupt security, then the government should be able to take the necessary steps which must comply with human rights standards, including the deradicalization process (Baiquni, 2021).

In his literature, Ryandi Manuel Sumedi stated that in the plan to return Indonesian children of former ISIS under 10 years old back to Indonesia, the government is obliged to properly regulate the repatriation procedure. This is because the propaganda and nature of terrorism carried out by ISIS makes these children a potential threat because of the penetration of ideology when children tend to be more imprinted than learning as adults. Therefore, the government is obliged to prepare facilities and infrastructure, as well as human resources (HR) to carry out the deradicalization process. In this case, assistance is needed from other government agencies such as the Commission I and Commission VIII of the House of Representatives of the Republic of Indonesia (DPR RI) who carry out the supervisory function and need to ensure the readiness and maturity of the government to accept the Indonesian children of ex-ISIS with various consequences. In addition to the DPR RI, the collaboration between the BNPT, Kemenkumham, and the Ministry of Women's Empowerment and Child Protection (Kemenpppa) is also needed (Sumendi, 2021)

According to Rizqo Dzulfornain's journal, in terms of positive law, the non-repatriation of ex-ISIS Indonesian citizens is the result of the loss of citizenship. The state in processing the citizenship loss of ex-ISIS Indonesian citizens has been legal and following the legal process regulated in Law No. 12 of 2006. The legality is not because ISIS is considered a foreign country, part of a foreign country, or an army service of a foreign country, but by looking at ISIS' capabilities which can be compared to the state in general, namely giving citizenship, ID cards, and also passports to its citizens. As long as ISIS can provide these three things legally (according to the constitution and legislation of ISIS), then ISIS' position is the same as foreign countries (Dzulfornain, 2021)

Based on the above background, the difference and uniqueness of this writing compared to previous studies is that this study focuses on the point of view of the provisions of International Law and Human Rights with the eyes of International Child Law and Rights applicable in the world because it involves the repatriation of children across international borders linked with the perspective of Indonesia's legal politics, namely the Constitution of the Republic of Indonesia to the regulations below it in responding to the plan to repatriate the child of the former ISIS combatant. The second is how should the government treat deradicalization so as not to injure the basic rights of these children according to Indonesian regulations and international child protection perspectives. In this writing, two things needed to be studied, first, how is the analysis of the plan to return children of ex-ISIS combatants from the perspective of international child rights and legal politics in Indonesia; second, what is the standard of treatment that should be in accordance with international child human rights standards and legal politics in Indonesia regarding deradicalization activities against these children.

B. DISCUSSION

1. Legal Analysis and Citizenship Status of Children Ex-ISIS Combatants.

The attitude of the Indonesian state regarding children is stated in the 1945 Constitution Article 28 B Paragraph (2) which reads: "Every child has the right to survive, grow and develop and has the right to protection from violence and discrimination." According to the article, the 1945 Constitution requires that for every Indonesian child who is born, the state has a role in guaranteeing the right to live, grow, develop, and also has the right to get protection from discrimination and violence. The state is obliged to ensure that Indonesian children are cared for and treated properly as human beings and the state is obliged to ensure that there is no violence or discrimination against these children by any party, including by their own families, let alone by the state. The state's omission of violence or other inappropriate treatment including discrimination against the child by his own family, other parties, including the state, this attitude must firmly be a guideline for the Indonesian state in seeing the fate of children, including how the state should behave regarding the fate of children of ex-ISIS combatant.

In Indonesia, ISIS has been declared a terrorist organization following the Central Jakarta District Court Order No. 11204/Pen.Pid/2014/PN.JKT.PST dated November 20, 2014, the order stipulated that the Islamic State of Iraq and Syria (ISIS) is one of the terrorist organizations. In the explanation of the Immigration Law, terrorists are part of a transnational crime. The explanation of Article 13 paragraph 1 letter 9 in full reads what is meant by "international crimes and organized transnational crimes" including crimes of terrorism, human smuggling, human trafficking, money laundering, narcotics, and psychotropic substances. From these 2 things, it is like a crime, it must be formulated how the position of the child is, whether it is included as a perpetrator or as a victim.

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The government must carefully look at the position of children towards the ISIS Movement. The ISIS movement has changed tactics: targeting women and children to be recruited in suicide bomb attacks. Jones explained how dangerous the indoctrination carried out by extremist groups was which resulted in six family members consisting of a father, mother, two sons, and two daughters aged 12 and nine, carrying out a terrorist attack on a church in Surabaya, East Java by blowing themselves up (Schulze: 2018). All of this cannot be separated from the contribution of ISIS which always tries to plant radical seeds among the Indonesian people, especially women and children (Jones: 2018)

Noor Huda Ismail, Founder of the Peace Inscription Foundation, said that Indonesian citizens who joined ISIS had more than one single reason. Some left because they want to live in a country with a caliphate system, some wanted to follow in the footsteps of the man they love. Those who departed were not only men but also women and children (CNN Indonesia, 2020). In connection with Article 28 B Paragraph (2) of the 1945 Constitution, Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection was issued whereas Article 59 Paragraph (1) of the Child Protection Law, was expressly stated that the government obliged to protect especially children who have certain conditions. Furthermore, Article 15 of Law 23 of 2002 also states that every child has the right to obtain protection from abuse in political activities, involvement in armed conflicts, involvement in social unrest, involvement in events containing elements of violence; and involvement in the war.

From the review of the law above, it is clear that children who are legally unable to act legally are victims of the wishes of their parents, especially in terms of involvement in political activities, armed conflicts, social unrest, and events that contain elements of violence and even war. The state must intervene following the mandate of the law. Children are legal subjects of national law that must be protected, nurtured, and fostered to achieve children's welfare, and are the responsibility of the community and government (Sudrajat: 2011). A child is obliged to get rights which then these rights can guarantee the growth and development of children development naturally, either physically, or socially. Children also have the right to care and protection both during the womb or after they was born (Soemitro, 1990).

In terms of Law No. 12 of 2006 people can lose their citizenship status for several reasons. One of them is if a person participating in the activities of foreign soldiers as regulated in Article 23 paragraph 1 point d, one of the indicators according to the Minister of Home Affairs Moeldoko that the citizenship status of the former ISIS citizen automatically died after they burned their citizenship passports, but then the Coordinating Minister for Political, Legal and Security Affairs Mahfud MD also said that according to Government Regulation Number 2 of 2007, the revocation was carried out by the President and had to go through a legal process, not a court. The administrative legal process is researched by the minister, then determined by the president (Republika, 2020). And until now the president has not issued a decision to revocation of citizenship, so of course, formally, the loss of citizenship status is not valid yet.

Regarding the recognition of ISIS' status as foreign military service or a recognized rebellion, there are still questions. This is in line with the opinion of Michael Hoffman in his journal "Terrorists are Unlawful Belligerents, Not Unlawful Combatants: A Distinction with Implications for the Future of International Humanitarian Law" which states that the position of terrorists in international humanitarian law is considered an illegitimate rebel (Hoffman: 2002). The term "illegal combatants" is appropriate for terrorist status because terrorists do not meet the requirements of legal servicemen under Section 43 of Additional Protocol I of 1977 (Sumedi: 2021).

From this explanation, ISIS itself as a terrorist entity is more worthy of being classified as a criminal group than state entities or rebels who are recognized as legitimate (Belligerent) so the loss of citizenship due to joining ISIS deserves to be re-examined, whether indeed joining ISIS can be interpreted as joining a military entity recognized by international law or simply joining a transnational armed criminal group explained by the Immigration Law, terrorists are part of a transnational crime. Following the Elucidation of Article 13 paragraph 1 letter 9 which reads in full what is meant by "international crimes and organized transnational crimes" including crimes of terrorism, human smuggling, human trafficking, money laundering, narcotics, and psychotropic substances.

In terms of Indonesian Criminal Law Article 5 paragraph (2) of the Criminal Code, criminal provisions in Indonesian legislation are applied to citizens outside Indonesia who commit acts that a criminal provision in Indonesian legislation considers a crime, while according to the laws of the country where the act is committed, is punishable by a criminal offense. So that even if a crime is committed outside the territory of Indonesia, the acts of terrorism by ex-ISIS Indonesian citizens should be processed according to Indonesian law. And this has not been done by the government, once again formally the government has not carried out the proper process even though it is in absentia.

Law Number 11 of 2012 concerning the Juvenile Criminal Justice System also significantly changes the paradigm regarding the courts. Where Law Number 3 of 1997 concerning Juvenile Court previously applied equates the handling of children with adults, namely retributive or retaliatory, however with Law Number 11 of 2012 children and adults are separated and distinguished. Law Number 11 of 2012 views that children who conflict with the law are victims of crime, and not perpetrators. In article 1 paragraph 4 of Law Number 11 of 2012, a child as a victim is a child who has suffered physical, mental, and/or economic loss caused by a criminal act. This crime certainly cannot be separated from the actions taken by his parents in the context of being a combatant of the ISIS terrorist organization.

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Regarding the citizenship status of children of former ISIS combatants, it can be said that citizenship status does not automatically disappear following their parents as stipulated in Article 25 paragraphs 1 and 2 of Law 12 of 2006 concerning citizenship, namely where the loss of citizenship of the Republic of Indonesia for a father and mother does not automatically apply to children who have a legal relationship with their father until the child is 18 (eighteen) years old or is married. Thus, the obligation of the state as stipulated in Article 28 B Paragraph (2) of the 1945 Constitution to protect Indonesian children is still attached until the child is 18 years old or married. This means that if it is later interpreted that adult ex-ISIS combatants lose their citizenship, then their children will not automatically lose their citizenship, they will remain as Indonesian citizens, until they decide otherwise when they are 18 years old or are married, then they are still the responsibility of the Government of the Republic of Indonesia.

2. International Child Human Rights Analysis of Children of Ex-ISIS Combatants

As a member of the world community, Indonesia cannot escape from all provisions that apply in the international community based on international law. As an independent and sovereign country, Indonesia is free to carry out its state activities but still has to adapt to the development of other countries. One of the goals of the Indonesian state is to participate in carrying out world order (Pawestri 2019). Many international treaties/agreements/conventions regulate the behavior of states and individuals, particularly those concerning human rights law and humanitarian law (Situngkir 2018). For example, in an atmosphere of war, children and women are generally classified as civilians or non-combatants who should not be the target of war. This is widely regulated in the Geneva Conventions (Supriyanto: 2011).

The review of the Geneva Conventions regarding children's rights also clearly stipulates that the interests of child victims of war must be protected. Ratification of the Geneva Conventions has been done with Law Number 59 of 1958. According to Article 14 KJ IV of 1949, children have the right to receive protection from the consequences of war (Kusumaatmadja: 1986).

In 1989, governments around the world promised equal rights for all children by adopting the United Nations Convention on the Rights of the Child. This convention regulates what the state must do so that each child can grow up as healthy as possible, go to school, be protected, be heard, and be treated fairly. Articles that are very relevant to the condition of Indonesian children who are victims of their parents who chose to become ISIS combatants are as follows (UNICEF, 2022): Article 2 Children's rights apply to all children without exception. Children must be protected from all kinds of discrimination against themselves or discrimination caused by the beliefs or actions of their parents or other family members. Furthermore, Article 3 states that all actions and decisions concerning a child must be carried out based on the best interests of the child. Article 9 Every child has the right to live with their parents unless it harms the child, for example, if the child is mistreated or neglected by one of the parents. Every child has the right to keep in touch with his parents if he lives separately from one or both parents. Article 12 Every child has the right to express his opinion and be heard and his opinion considered when making a decision that will affect his life or the lives of other children. Article 19 Every child has the right to receive proper care and to be protected from violence, abuse, and neglect. Article 25 Every child who is under the responsibility of the state—in terms of care, protection, or care, has the right to have his condition reviewed regularly. Article 38 Any child under 15 years of age shall not be obliged to join armed forces or participate in armed conflict. Children in war zones should receive special protection. Article 39 Every child who is injured, neglected, abused, or becomes a victim of exploitation, armed conflict, or imprisonment has the right to special treatment to restore their condition. Based on these articles, the rights of children are protected by law so the government must protect the rights of these children.

In The Declaration on the Protection of Women and Children in Emergency, the United Nations General Assembly in 1974 proclaimed that all forms of oppression and cruel and inhumane treatment of women and children including imprisonment, murder, torture, shootings, mass arrests, rape, destruction of residence, and forced eviction, carried out in war as part of a military operation or occupation of territory are considered war crimes. Inspired by humanitarian law, the United Nations continues to work to protect women and children from war, including efforts to prevent war and promote peace. On October 31, 2000, United Nations Security Council Resolution 1325 (S/RES/1325) on Women, Peace, and Security was agreed to be adopted. S/RES/1325 was the only resolution passed by the Security Council. This resolution describes and raises the impact of war on women, including expressing grave concern for the civilian population, especially women and children, who are most vulnerable to the effects of armed war (Triana: 200).

On March 3, 2020, many high-ranking representatives from Indonesia, Malaysia, Maldives, and the Philippines gathered in Bali entitled The Bali Call for Action for the Implementation of the UNODC Roadmap on Children Associated with Terrorism and Violent Extremist Groups. The meeting agreed that children who are associated or affected, with terrorist or extremist groups, are in fact victims and should be treated appropriately according to the interests of the children themselves, respecting their physical and psychological safety and paying attention to their health, dignity, and respect through a holistic approach taking into account their sensitivity (UNOCD: 2020).

The duty of the Republic of Indonesia under the 1945 Constitution of the Republic of Indonesia and other laws and legal regulations is to ensure the human rights of every citizen, including the rights of children. In addition, the guarantee of human

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rights regarding children is also guaranteed by the ratification of the International Convention on the Rights of the Child through and ratified by Presidential Decree No. 36 of 1990 concerning Ratification of the Convention on the Rights of the Child or the Convention on the Rights of the Child. This convention regulates the basic principles of children, namely the principle of non-discrimination, the principle of the best interest of children (best interest for children), the principle of the right to life, continuity, and development as well as the principle of respect for children's opinions. (United Nations: 2020).

C. CONCLUSION

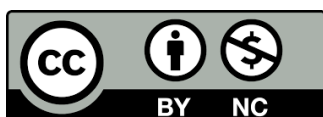
Regarding the issue of repatriation of the children of ex-ISIS combatants, the Government must determine its attitude, which will later become a guideline in the event of a similar incident. As a sovereign country, this attitude is of course based on Indonesian law and cannot be separated from the applicable international provisions concerning Indonesia as part of the International Community and has ratified the rules regarding the treatment of international children. Indonesian children who join their parents who join the international Terrorism Organization must be considered victims of crimes that must be protected and saved even though the perpetrators are their parents. According to the laws in force in Indonesia, children do not automatically become stateless, they have the right to decide when they are 18 years old or married so until that time comes, the government must save these children from any threat of danger and are obliged to make efforts rescue and repatriation. As an organization, ISIS is also not a state and is also not recognized as a legitimate insurgency activity under international law, they are recognized as a transnational terrorist group so joining these combatants cannot be interpreted as joining foreign military service. The Convention on the Right of the Child which has been ratified by Indonesia clearly states that the interests of children are very important to be saved. So based on Indonesian law and the principles of international law for children which have been ratified by Indonesia, it is clear that the Indonesian government must return all Indonesian children in the context of rescuing victims of transnational crimes and then treat them well and carry out deradicalization so that they become the hope of Indonesia's future.

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