

Handling Deportants and Returnees of Former Foreign Terrorist Fighter: International and Domestic Law Perspectives

Kurnia Wijaya 

ABSTRACT

The defeat of the Islamic State of Iraq and Syria (ISIS) after the last war in Baghouz, Syria, by the Syrian Democratic Forces (SDF) in 2019 was not the end of the problem of global terrorism today. ISIS, which has sympathizers from different countries, currently leaves the problem of handling its deportees and returnees, including in Indonesia. This paper intends to examine the problems of deportants and returnees of former Foreign Terrorist Fighters (FTF) in Indonesia normatively, focusing on the political aspects of law, positive criminal law, and international criminal law. Based on the type of normative research, legislative, comparative, and conceptual approaches, this paper argues that the handling of deportants and returnees of former foreign terrorist fighters in Indonesia within the framework of positive criminal law still seems to be dominated by a paradigm of legal thinking that leans on aspects of restraint and retribution rather than prioritizing aspects of reformation and deterrence. In addition, positive criminal law instruments are still not sufficiently accommodating in supporting law enforcement in handling deportants and returnees of former FTFs in Indonesia.

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Faculty of Law, University of Tujuh Belas
Agustus Surabaya, Indonesia.

*Corresponding Author:
e-mail: kurniawijaya@gmail.com

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1. INTRODUCTION

The issue of repatriating Indonesians formerly affiliated with ISIS is highly sensitive. Indonesia, with its predominantly Muslim population, has been targeted by IS since 2014. The emergence of radical Islamic groups supporting IS in Indonesia, revealed in August 2014, poses a major challenge. Indonesia's unexpected role as a potential source of support for IS, given its status as the world's most populous Muslim country, has prompted many Indonesian Muslims to join IS in Syria and Iraq.

News of the plan comes on the heels of IS's defeat. Rudskoi mentioned that Syrian government forces, with the support of Russian troops, managed to expel ISIS through massive operations over the past few months, with an average of 250 attacks per day (Bleker, 2020). The militant group Islamic State in Iraq and Syria was declared a total defeat by the Syrian Democratic Forces (SDF), and the military operation was officially considered over on Saturday, March 23, 2019. The National Counter-terrorism Agency (BNPT) recorded that around 1,200 ISIS ex-combatants are in refugee camps, with indications that some have moved to conflict-prone countries such as Yemen (Arifin, 2020).

From 2016 to 2019, 196 ex-ISIS Indonesians and their children have been deported to Indonesia from several countries. However, the latest policy denies the return of 689 ex-ISIS Indonesians who are still in Syria and surrounding areas. Although there has been a rehabilitation program, the effectiveness of the deradicalization process against them is still in doubt, as evidenced by the suicide bombing incident by married couple Ruille Zeke and Ulfah, who had undergone a deradicalization program. Handling the return of FTF families requires a balanced approach between law enforcement and prevention efforts. Law enforcement, such as trials, are not considered to create sustainable outcomes. Therefore, focusing on deradicalization, rehabilitation, and social reintegration is important to achieve sustainable outcomes.



The Government's decision not to repatriate some ex-ISIS Indonesians has sparked debate in the community. Pro groups adhered to human rights, while contra groups were concerned about the negative impact on society. This debate subsided after a cabinet meeting in February 2020, where it was decided not to repatriate ex-ISIS citizens. However, the latest news states that the Government has a desire to repatriate some ex-ISIS Indonesians.

The policy of countering Foreign Terrorist Fighters (FTF) is aimed at maintaining a balance in protecting state sovereignty, the human rights of victims and witnesses, and the human rights of suspects or defendants. The countermeasures involve repressive and preventive measures, such as national preparedness, counter-radicalism, and deradicalization. The Indonesian Government recognizes the importance of protecting human rights and the precautionary principle in counter-terrorism efforts.

This article aims to analyze the legal politics of criminalizing deportants and returnees of former FTFs, as well as how it is regulated from the perspective of positive law in Indonesia and international criminal law. The result is expected to be a reference, consideration, and evaluation material to implement criminal law enforcement in the field of terrorism that specifically discusses the handling of FTFs in Indonesia.

2. RESEARCH METHOD

The method used as a scientific framework in the preparation of this writing is normative legal research with a statute approach, comparative approach, and conceptual approach. More specifically, the legal materials used are primary, secondary, and tertiary legal materials in the type of related documents, which are then analyzed in three steps: identification, processing, and conclusion.

3. RESULTS AND DISCUSSION

3.1. *Legal Politics of Criminalizing Foreign Terrorist Fighters in Indonesia*

As part of the research analysis that aims to describe how the position of national law is faced with the problem of the return of ex-ISIS FTFs in Indonesia on a micro level and other terrorism crimes on a macro level, it is important first to highlight the legal politics behind the need to criminalize an FTF-even though it does not directly harm the state.

More specifically, first, the politics of criminal law, also known as 'criminal law policy' or 'criminal law reform,' involves efforts to create criminal regulations appropriate to current and future conditions. This context reflects how the state seeks to develop and formulate effective criminal laws for the present and the future. The term criminal law politics in foreign literature is often referred to by various terms such as 'penal policy,' 'criminal law policy,' or 'strafrechtspolitiek' (Arief, 1998).

Meanwhile, from the perspective of 'Criminal Politics,' it refers to policies that aim to address crime through criminal law. In accordance with Marc Ancel's view, 'Penal Policy' is a scientific discipline and art that ultimately aims to structure positive legal regulations better and provide guidance not only to lawmakers but also to the courts that apply the law and the executors of court decisions. Thus, 'Criminal Law Policy' can be interpreted as a policy effort to overcome crime by forming criminal laws (Arief, 1998, p. 6).

Indonesia first adopted an official legal instrument to address the issue of FTFs through Article 12 B of Law Number 5 of 2018 on the Amendment to Law Number 15 of 2003 on the Stipulation of Government Regulation in Lieu of Law Number 1 of 2002 on the Eradication of the Criminal Acts of Terrorism into Law (Law on the Eradication of the Criminal Acts of Terrorism Amendment). This law includes one of the key articles that categorize the act of organizing, supporting, or participating in military or paramilitary training, both at home and abroad, to plan, prepare, or carry out acts of terrorism as an act that can be subject to punishment.

Referring to the description clearly stated in the General Elucidation of the Law on the Eradication of the Criminal Acts of Terrorism, the reason behind the criminalization of FTFs is because a series of events involving Indonesian citizens joining organizations that have radical views and have been recognized as terrorist organizations or terrorist groups, or other organizations that plan to commit crimes that lead to the criminal act of terrorism, both at home and abroad, have raised concerns in the community and have an impact on various aspects of life such as politics, economy, socio-culture, security, and public order.

This reason is also closely correlated with the fourth paragraph of the Preamble of the Constitution of the Republic of Indonesia that the purpose of the establishment of the Government of the Republic of Indonesia-one of which is-"to participate in the implementation of world order based on independence, lasting peace, and social justice." It can be known and understood then that the

participation of Indonesian citizens, especially without the official permission of the Indonesian Government, in acts of terrorism abroad is not in accordance with what (Syaukani & Thohari, 2015, pp. 30–33) call the legal politics of law formation in Indonesia.

The General Elucidation of the Law on the Eradication of the Criminal Acts of Terrorism Amendment in the last paragraph also explains in detail that the new content material regulated in the law on the Eradication of the Criminal Acts of Terrorism Amendment is related to the criminalization of those who have a new mode of participating in military training, paramilitary training, or other training oriented to carry out acts of terrorism both at home and abroad.

3.2. Positive Criminal Law in the Context of Repatriation of Ex-ISIS Foreign Terrorist Fighters in Indonesia

Positive criminal law is the current criminal law in the context of legislation in Indonesia. It is known that the presence of Law Number 1 Year 2023 on the Criminal Code (KUHP), which is also often referred to as the new KUHP, has marked a new chapter on the punishment system in Indonesia. The provisions of this Criminal Code apply as *lex posteriori derogat legi priori* (the new law defeats the old law), so it should indeed annul the provisions contained in Law Number 5 of 2018 on the Amendment to Law Number 15 of 2003 on the Stipulation of Government Regulation in Lieu of Law Number 1 of 2002 on the Eradication of the Criminal Acts of Terrorism into Law (hereinafter referred to as the law on the Eradication of the Criminal Acts of Terrorism Amendment). However, in the Closing Provisions section of Article 622 paragraph (7), it is determined that only Article 6 and Article 7 of the Law on the Eradication of the Criminal Acts of Terrorism Amendment apply the provisions of Article 600 and Article 601 of the Criminal Code. This implies that the applicability of the Criminal Code only partially revokes the law on the Eradication of the Criminal Acts of Terrorism Amendment.

The provisions of Article 600 of the Criminal Code address the issue of acts of terrorism in the form of the use of violence or the threat of violence so as to create an atmosphere of terror or fear on a widespread basis, mass casualties through deprivation of property or loss of life or damage to public facilities, strategic vital objects or international facilities, which were originally punishable by imprisonment for a minimum of five years and a maximum of 20 years, life imprisonment, or death penalty. The provisions of Article 601 of the Criminal Code amend the provisions of Article 7 of Government Regulation in Lieu of Law Number 1 of 2002 on the Eradication of the Crime of Terrorism.

Article 6 and Article 7 of the Law on the Eradication of the Criminal Acts of Terrorism, as explained by Mudzakkir (as cited in Ali, 2012), can be considered as “the basic definition of the criminal act of terrorism (genus).” In other words, Article 6 and Article 7 are basic criminal offenses that cover all terrorism offenses in general. Meanwhile, other terrorism crimes regulated in Article 8 to Article 19 are specific or special crimes that are included in the category of terrorism crimes.

Article 7 of Government Regulation in Lieu of Law Number 1 of 2002 on the Eradication of the Criminal Acts of Terrorism, which has not been amended in the Amended Law on the Eradication of the Criminal Acts of Terrorism, can be summarized that every individual who intentionally uses acts of violence or threats of violence with the aim of creating a sense of terror or widespread fear in the community or producing many victims by depriving freedom, taking lives, or depriving other people of their property, or with the intention of damaging or destroying objects that have vital and strategic value, or the environment, or public facilities, or international facilities, will be subject to imprisonment with a maximum sentence of life imprisonment.

The provisions regarding FTFs are only specifically regulated in the provisions of Article 12 B of the Law on the Eradication of the Criminal Acts of Terrorism Special Amendments to the provisions of Article 12 B paragraph (1) of the law on the Eradication of the Criminal Acts of Terrorism above are related to the criminal threats that can be given to those who become foreign terrorist militias or FTFs by emphasizing the actions that precede them, namely participation in military or paramilitary training. This act must be considered complete when it is proven that there is a purpose to carry out acts of terrorism both at home and abroad.

Not much different from the explanation of the provisions that distinguish between Article 6 and Article 7 of the Law on the Eradication of the Criminal Acts of Terrorism, as stated by (Ali, 2012, pp. 44–46) above, that the nomenclature ‘with the intention’ is a formal offense that determines that an FTF does not need to prove his participation in warfare-in the context of ISIS, but it is enough to prove the actions that lead to participation in various kinds of training. This is made clear again in the authentic interpretation of Article 12 B paragraph (1) of the law on the Eradication of the Crime of Terrorism Amendment, which outlines that the term ‘other training’ also includes information technology training and bomb assembly training, while the term participating in war also includes the meaning of assisting either directly or indirectly. Examples described here are couriers, medical personnel, or logistics.

3.3. *International Criminal Law in the Context of Handling Terrorism in General and Foreign Terrorist Fighters Ex-ISIS in Particular*

Terrorist activities are considered international crimes because they meet several characteristics, such as clear recognition of acts that are considered violations of international law. The acts are also expressly recognized as crimes based on specific acts that trigger obligations to establish punishment, prevent it, prosecute it, criminalize it, or obligations related to punishment. In addition, there are obligations in terms of prosecution, rights or obligations regarding extradition, and cooperation in prosecution, all of which fall under the criminal category. The basics of criminal jurisdiction are explained, referring to the international criminal justice form, and the command order rationale is omitted (Nitibaskara, 2002).

Terrorist activities fall under the category of extraordinary crime for a specific reason (Schinkel, 2009, p. 182) as it is defined as “using the threat of violence against civilians for political purposes” or “acts of intimidation against civilians to influence the Government” or “creating a situation that utilizes civilians by using violence and threats to achieve the goal of political change” (Goodwin, 2006, p. 2029).

Several references show that terrorism has existed and developed for centuries. History records that humans have experienced acts of terror since the age of psychological warfare, as described by Xenophon (431–450 BC). Emperors Tiberius (14–37 BC) and Caligula (37–41 BC) of Rome were also known to commit acts of terror by expelling, seizing property, and destroying their political opponents. During the French Revolution, Robert S. Pierre (1758–1794) terrorized his enemies. In post-Civil War America, a racist terrorist group known as the Ku Klux Klan emerged. Similarly, acts of terror committed by figures such as Hitler and Joseph Stalin became part of the history of terrorism (Wahid *et al.*, 2004).

Etymologically, the term terrorism, according to (Rahmawati, 2020, p. 43), comes from the word “le terreur,” which was first used during the French Revolution period known for its ruthlessness in using violence to suppress anti-government activities. At that time, around 40,000 people were beheaded and killed by guillotine, accused of being opponents of the revolution (Christmas & Purwanti, 2020). Currently, there are around 27 international terrorism organizations that have grown since 1974 and operate in several countries. These organizations come from various backgrounds, such as religion, politics, ethnicity, and race. They have certain features, including a well-organized structure, significant power, potentially dangerous nature, exclusivity, lack of transparency, high commitment, and special forces supported by large resources. They use this power to create instability in the government system that eventually makes the target country succumb to their goals.

Acts of terrorism almost always do not stand alone as a single act but are part of a series of connected criminal acts. These further criminal acts include things such as income from illegal trading activities, the use of narcotics as a source of funding for terrorism activities, and so on (Koro, 2011). Therefore, it requires the participation of various countries in dealing with, overcoming, and preventing it.

From a historical perspective, international regulations related to terrorism have always been produced through various conventions. According to the literature review, there are currently several conventions that initiated the emergence of international regulations on terrorism. These include the Convention on the Prevention and Suppression of Terrorism of 1937, the International Convention for the Suppression of Terrorist Bombing of 1997, the International Convention for the Suppression of Financing of Terrorism of 1999, UN Security Council Resolution No. 1333 of 2000 issued on December 19, 2000, relating to the prevention of the supply of weapons or aircraft and military equipment to Afghanistan, as well as the call for all UN member states to freeze the assets of Osama bin Laden. Also, there is UN Security Council Resolution 1368 of 2001, issued on December 12, 2001, which expresses the UN's sympathy for the victims of the September 11, 2001 tragedy and encourages all UN member states to take steps in response to terrorist attacks. In addition, there are also UN Security Council Resolution No. 1373 of 2001 and UN Security Council Resolution No. 1438 issued on October 15, 2002, which express the UN's condolences and sympathy to the Government and people of Indonesia for the victims and their families, and affirm measures to eradicate terrorism, and encourage all nations to cooperate and provide assistance to Indonesia in finding and bringing the perpetrators of the bombings to justice.

After reviewing various conventions and resolutions related to terrorism, the next discussion focuses on the history of handling terrorism crimes in the international legal framework. To answer this question, it is important to understand the views of countries in handling terrorism crimes. During the discussion on the 1998 Draft Rome Statute of the International Criminal Court, terrorism and drug trafficking were among the crimes proposed to be under the jurisdiction of the International Criminal Court. However, this proposal was rejected by most participants at the Rome Convention. The reason for this rejection is that the two crimes have been regulated in existing special conventions so that the

implementation of law enforcement against the two crimes remains under the national jurisdiction of each country involved (Irham, 2020).

The consequence of categorizing terrorism as a “crime against humanity” is that its handling can be carried out under international law. This is based on one of the principles stated in the 1945 London Agreement, which became the basis for the establishment of the International Military Tribunal Tokyo in 1950, namely Principle VI, which states that criminal acts punishable under international law include “crimes against humanity.”

The crime of terrorism that is subject to international law shows that terrorism is not only a national-level problem, even though the place of crime occurs in the territory of a particular country. The role of international states in combating this crime can be illustrated through examples such as the Bali bombing case. Three days after the tragic event, in which 120,203 people were killed, of which more than 80% were foreign tourists while the rest were Indonesian citizens who were in the vicinity of the bombing and 300 others were injured, the United Nations Security Council (UNSC) passed Resolution No. 1438. This resolution condemned the attack and made a request to all UN members to support the Indonesian Government in arresting and prosecuting the perpetrators, organizers, and supporters of the attack (Sulardi & Ramadhan, 2019).

In response to the resolution, the Government of Indonesia took action by issuing regulations in lieu of laws on October 18, 2002. This included Law Number 1 of 2002 on the Eradication of Terrorism and Regulation Number 2 of 2002 related to the implementation of Law Number 1 of 2002. Then, to support these two regulations, there is Law No. 15 of 2003 on the Stipulation of Government Regulation in Lieu of Law No. 1 of 2002 on the Eradication of the Criminal Acts of Terrorism into Law and Law No. 16 of 2003 on the Stipulation of Government Regulation in Lieu of Law No. 2 of 2002 on the Enforcement of Government Regulation in Lieu of Law No. 1 of 2002 on the Eradication of the Criminal Acts of Terrorism, in the Event of the Bali Bomb Blast on October 12, 2002, into law. Furthermore, Law No. 9 of 2013 on the Prevention and Eradication of Financing of Terrorism was also enacted (Pape, 2003).

From a series of meetings, from the first to the last, which took place on October 2 to 4 and November 3 and 10, 2017, the legal affairs committee has produced a report. The report discussed measures in an effort to combat the crime of international terrorism. In the report, delegates expressed their concern regarding the increase in terrorist activities and reiterated the importance of reaching agreement on a comprehensive draft convention on international terrorism. Delegates also emphasized the need to accelerate the process of reaching a consensus on the draft convention. Several delegations encouraged all countries to show compromise and flexibility, arguing that endless delays in the discussion of the draft convention were unacceptable. They also highlighted the importance of definitions in the draft convention to distinguish the crime of terrorism from legitimate struggles by people in exercising their right to self-determination, especially in relation to foreign occupation or colonial domination.

Furthermore, a number of delegations expressed the view that, overall, the draft convention should include the concept of state terrorism, including acts committed by the state’s military. In this context, it was explained that the definition of terrorism should include the activities of individuals who command a state’s armed forces or control armed groups, especially when such activities are incompatible with international humanitarian law. However, it should be noted that there is controversy regarding the principle of granting independence to colonial states and peoples, which was recognized by UN General Assembly Resolution 1514 (XV) on December 14, 1960. This paved the way for the recognition and legalization of so-called “wars of national liberation” (Melzer & Kuster, 2019, pp. 103–104).

The political controversy over the distinction between national liberation groups and terrorist groups can be illustrated by the famous phrase that “a person seen as a freedom fighter by one side may be considered a terrorist by another” (as presented by Pejic, 2012). Although conflicts of interest and differences in each country’s context are significant factors (as noted by Zeidan, 2004), efforts to reach mutual agreement remain a top priority.

4. CONCLUSION

The handling of deportants and returnees of former foreign terrorist fighters in Indonesia within the framework of positive criminal law still seems to be dominated by a paradigm of legal thinking that leans on aspects of restraint and retribution rather than prioritizing aspects of reformation and deterrence. The formulation of the provisions of Article 12 B paragraph (1) of Law Number 5/2018 on the Amendment to Law Number 15/2003 on the Stipulation of Government Regulation in Lieu of Law Number 1/2002 on the Eradication of the Criminal Acts of Terrorism into Law still requires the application of criminal law that is *primum remedium*, rather than *ultimum remedium*. On the other hand, the handling of deportants and returnees who become foreign terrorist fighters ex-ISIS in the study of international criminal law still requires more concrete tactical steps through certain international

agreements, so the use of international criminal instruments in this matter is far from being ‘easy’ to implement.

CONFLICT OF INTEREST

The author declares that they do not have any conflict of interest.

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