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# **Anti-Terrorism Law and Criminal Process in Indonesia**

By Simon Butt<sup>1</sup>

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<sup>1</sup> The author thanks Professor Tim Lindsey, Director of the Asian Law Centre and ARC Federation Fellow at the University of Melbourne, for helpful advice in the preparation of this paper.

This paper describes and analyses Indonesia's Anti-terrorism Law (ATL) of 2002 – a statute that has caused significant legal controversy in Indonesia. The ATL was signed into law by Indonesia's then President Megawati Soekarnoputri on 18 October 2002, six days after the Bali bombings took place. The Law had first been drafted in April 2002, in response to the September 11 incident in New York in 2001,<sup>2</sup> but clearly the Bali bombing accelerated its finalisation.

The ATL has been used to investigate and convict those involved in the bombing of the Marriot Hotel in Jakarta in August 2003, the Australian Embassy in Jakarta in September 2004, and the second round of Bali bombings in October 2005. More controversially – for reasons discussed below – the ATL was also used to convict many of those involved in the October 2002 Bali bombings. It has also relied on to investigate, prosecute and convict in cases arising in regional conflict settings, such as in Poso and Maluku.<sup>3</sup>

At the time of the ATL's enactment, then President Megawati Soekarnoputri announced that Indonesia lacked a 'legal basis to act quickly and strongly to handle terrorism'.<sup>4</sup> In a similar vein, the then Minister for Justice and Human Rights, Yusril Izra Mahendra, announced that the perpetrators of the 2002 Bali bombings could not be effectively pursued under the then existing laws. This paper now assesses the extent to which the ATL does, in fact, alter or improve Indonesia's legal infrastructure to enable more effective responses to acts of terrorism.

The ATL supplements existing criminal law, most of which is contained in the Indonesian Criminal Code (*Kitab Undang-undang Hukum Pidana*, or KUHP) and Code of Criminal Procedure (*Kitab Undang-undang Hukum Acara Pidana*, or KUHAP). The main function of the ATL appears to be to make investigating, prosecuting and convicting terrorists easier. The ATL contains a range of broad descriptions of acts that constitute terrorism. It also provides substantial penalties, including death, for those who commit, or attempt to commit, terrorist offences and those who incite and assist them. Further, the Law prohibits interfering in terrorism investigations and trials.

The ATL also provides to law enforcers – that is, police, prosecutors and judges – a number of powers that are not available in cases governed by the KUHAP. For example, the ATL allows for the arrest and detention of suspects for longer periods than is permitted for those accused of most other crimes; allows types of evidence to be adduced in terrorism cases that are not always permitted in trials for other offences; and permits the tapping and interception of communications relating to terrorism.

After providing a brief background to the ATL and its enactment, I will set out the elements of all crimes of terrorism described in the ATL and compare them with provisions of the Criminal Code (KUHP) that might be applied to acts of terrorism. I then turn to the special procedural rules on evidence, arrest and detention provided by the ATL for use in terrorism cases and contrast them with the KUHAP's procedural rules in those areas. I then briefly discuss other features of the ATL, including prohibitions on interfering in terrorism cases, provisions on witness protection, the tapping and

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<sup>2</sup> Prof Dr Romli Atmasasmita, *Masalah Pengaturan Terorisme dan Perspektif Indonesia*, BPHN, 2002.

<sup>3</sup> International Crisis Group, *Weakening Indonesia's Mujahidin Networks: Lessons from Maluku and Poso*, Asia Report N°103, 13 October 2005.

<sup>4</sup> 'DPR dan Pemerintah Sepakati Perpu Antiterorisme', *Kompas*, 17 October 2002.

interception powers it provides to investigators, attempts to permit its retrospective application, and several other provisions.

## **Background to the ATL and its enactment**

The full title of Indonesia's ATL is 'Interim Law No 1 of 2002 on the Eradication of the Crime of Terrorism'. It was issued by former President Megawati Soekarnoputri under her emergency 'legislative' powers. Ordinarily, the Indonesian President can issue only Regulations,<sup>5</sup> however, Article 22 of the Constitution permits the President to issue Government Regulations in Lieu of Law (*Peraturan Pemerintah sebagai Pengganti Undang-undang* (PERPU), herein referred to as 'Interim Laws'. Interim laws are relatively rare but they have authority equivalent to a statute.<sup>6</sup> They must, however, be ratified by the DPR at its following sitting to remain valid (see Article 22 of Indonesia's Constitution).<sup>7</sup>

As required by the Constitution, the DPR adopted Interim Law No 1 of 2002 at its next sitting – on 4 April 2003 – through Law No 15 of 2003.<sup>8</sup> This statute simply confirms the Interim Law, so that Interim Law No 1 – or, at any rate, its substantive provisions remains Indonesia's Anti-Terrorism Law.

## **What constitutes terrorism under the Law?**

The Law does not define terrorism *per se*. Rather, Article 1(1) simply states that:

The crime of terrorism is any act that fulfils the elements of a crime under this Interim Law.

These elements are set out in Articles 6-23.

### ***Basic descriptions***

Article 6 provides a generally-worded description of terrorism:

any person who by intentionally using violence or threats of violence, creates a widespread atmosphere of terror/fear or causes mass casualties, by taking the liberty or lives and property of other people, or causing damage or destruction to strategic vital objects, the environment, public facilities or international facilities, faces the death penalty, or life imprisonment, or between 4 and 20 years' imprisonment.

The wording of Article 7 is almost identical to that of Article 6, except that it, first, refers to an act which is intended to create terror or mass casualties, but which does not actually cause either; and, second, the maximum penalty available under Article 7 is life imprisonment.

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<sup>5</sup> See Articles 1(6) and 7(1) of Law No 10 of 2004 on Lawmaking.

<sup>6</sup> Article 7(1)(b) of Law No 10 of 2004 on Lawmaking.

<sup>7</sup> What situations constitute an 'emergency' and, hence allow the President to issue an Interim Law, remains a matter of debate. The Constitutional Court has, however, ruled that the President has the exclusive power to subjectively determine what is an emergency that requires an Interim Law (*Forestry Law case*, No 3 of 2005, p. 14, available at [www.mahkamahkonstitusi.go.id](http://www.mahkamahkonstitusi.go.id)).

<sup>8</sup> The full reference is: Law No 15 of 2003 on the Stipulation of Interim Law No 1 of 2002 on the Eradication of the Crime of Terrorism as a Statute

Other provisions in the ATL define terms used in Articles 6 and 7:

- 'Person' means civilian, military or police individuals and groups, or corporations (Article 1(2)).
- 'Violence' is any misuse of physical force, with or without a target, which breaks the law and endangers another's person, life and independence, including causing the person to faint or become powerless (Article 1(4)).
- 'Threat of force' is any act intended to provide a sign or warning about a situation which tends to be able to cause a feeling of fear within a person or the broader community (Article 1(5)).
- 'Assets' are all movable and immovable assets, both tangible and intangible (Article 1(9)).
- 'Vital objects' are places, locations or buildings with very high economic, political, social, cultural, defence and security value, including international facilities (Article 1(10)).
- 'Public facilities' are places used for the interests of the general community (Article 1(11)).

The Elucidation<sup>9</sup> to Article 6 defines 'damage or destruction to the environment' as

The pollution or damage of [a space] by any item, force, situation, or living creature, including humans and human behaviour, which influences the continuation of life and prosperity of humans and other creatures. Damaging and destruction includes deliberately releasing or discharging chemicals, energy and or other dangerous or poisonous components into the land, air or water that endangers people or assets.

Clearly, Articles 6 and 7 are so broadly worded that a wide variety of acts fall within their ambits. In particular, critical terms such as 'widespread atmosphere of terror or fear', 'mass casualties' and 'very high' are not defined. This leaves them open to subjective interpretation and raises many questions about how these provisions could be applied. For example:

- Would terror or fear instilled in most inhabitants of one village suffice, or must the terror spread through a sub-district, province or, indeed, the whole of Indonesia?
- How high is the economic, political, social, cultural, defence and security value required to be in order that a place or building can be categorised as a 'vital object'?
- How is the presence of fear or terror to be proven? Must a poll be taken, or witnesses called; or would judges accept that fear had in fact occurred based on their own perceptions?
- Does the terror or fear caused need to be a 'reasonable' response to the threat or violence? For example, what if parts of the community overreacted to the violence or threat of violence? And, what if the terror or fear was, in part, caused or worsened by overblown media reporting?

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<sup>9</sup> The Elucidation is the formal explanatory memorandum that accompanies all Indonesian statutes and many other types of laws, such as Presidential Decisions and Government Regulations.

The loose and broad wording of Articles 6 and 7 has been criticised for being susceptible to application to a range of activities that might not, in fact, be related to terrorism. Wahid, for example, argues that Article 6 is 'subject to wide interpretation and is very elastic – its boundaries are unclear'.<sup>10</sup> Some legal commentators have argued that the ATL is so multi-interpretable that it may evolve into a tool of political oppression. In particular, some have expressed concern that the Law might become a de facto replacement for the notorious Anti-Subversion Law (now revoked), which was used extensively by the Soeharto regime to silence its critics.<sup>11</sup>

Although these concerns of misuse for political purposes have not entirely borne out in practice,<sup>12</sup> potential remains for the ATL to be used in this way in the future.

### ***New penalties for pre-existing crimes: aviation and weapons offences***

Several provisions of the ATL reaffirm offences that were provided for in other statutes long before the ATL itself was enacted. The main purpose of including these offences appears to be to increase the penalties applicable when the offences are perpetrated as part of an act of terrorism.

Article 8 covers offences relating to aviation safety and security. The ATL provides the same penalties as Article 6 – that is, death, life imprisonment, or between four and 20 years' imprisonment – to people who:

- a. destroy, make unusable or damage air traffic safety buildings or thwart efforts to make those buildings secure;
- b. cause destruction to, the non-usability of, or damage to air traffic safety buildings, or thwart efforts to make those buildings secure;
- c. intentionally and illegally destroy, take or move signs or equipment for flight safety; make the signs or equipment fail to work; or install the incorrect sign or equipment;
- d. by omission, cause signs or equipment for flight safety to be destroyed, damaged, taken or shifted, or to cause the installation of the incorrect signs or equipment for flight safety;
- e. intentionally and illegally destroy or render unusable an aircraft owned entirely or in part by another person;
- f. intentionally and illegally cause an aircraft to have an accident; or destroy, make unusable or damage an aircraft;
- g. by omission, cause an aircraft to have an accident; or destroy, make unusable or damage an aircraft;
- h. with intent to enrich oneself or another illegally, obtain insurance and cause the burning, explosion, destruction, damage or inoperability of an aircraft insured against danger, [loss of] its cargo, or [loss of] income from the receipt of its cargo;
- i. in an aircraft by means of an illegal act, seize or take control the aircraft in flight;

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<sup>10</sup> Drs Abdul Wahid, Sunardi, Muhammad Imam Sidik, *Kejahatan Terorisme*, 2004, p. 77.

<sup>11</sup> 'Pimpinan Fraksi DPR Dukung Perpu Antiterorisme', *Kompas*, 17 October 2002; 'SB Yudhoyono: Pemerintah Jangan Ragu-ragu Tindak Teroris', *Kompas*, 23 October 2002.

<sup>12</sup> Although see 'Weakening Indonesia's Mujahidin Networks: Lessons from Maluku and Poso', *International Crisis Group*, Asia Report N°103, 13 October 2005.

- j. in an aircraft with violence, threats of violence, or threats of another kind, seize or take control the aircraft in flight;
- k. as part of a conspiracy with another person, and with premeditation, cause serious injury to a person or damage to a aircraft thereby endangering the flight, with intent to steal the independence of a person;
- l. intentionally and illegally commit an act of violence against a person on an aircraft during a flight, if that act could jeopardise the safety of the aircraft;
- m. intentionally and illegally damage an official aircraft or cause damage to that aircraft so that it cannot fly or jeopardises the safety of the flight;
- n. intentionally and illegally put in place or causes to be put in place on an official aircraft, using any means, equipment or materials which could damage the aircraft, making it unable to fly or causing damage to that aircraft which could jeopardise safety on the flight;
- o. as part of a conspiracy with another person, with premeditation, and causing serious injury to a person, perform the acts referred to in (l), (m) and (n);
- p. provide false information, knowing that the information is false, which jeopardises the safety of an aircraft in flight;
- q. in an aircraft, perform an act which could jeopardise the safety of the aircraft in flight; or
- r. in an aircraft, perform an act which could disrupt the order and procedures of the aircraft in flight.

According to the Elucidation to Article 8, these aviation-related offences are an ‘elaboration’ of the provisions contained in Chapter XXIX of the KUHP. In reality, however, Article 8 is almost a word-for-word reproduction of Articles 479(a)-(r) of the KUHP. The major difference between the ATL and KUHP is that, for most offences, the KUHP provides a variety of penalties depending on the consequences of the act in question: higher penalties apply to acts causing death than, for example, those which cause injury. The KUHP provisions do not provide for minimum penalties and, for the most part, the KUHP’s penalties are significantly lower than those provided for under the ATL. The KUHP, for example, allows judges to impose life sentences for some of these acts if they cause death. By contrast, the ATL’s provides life imprisonment or the death penalty for any Article 8 offence.

Article 9 of the ATL describes firearm and explosives offences relating to terrorism. It states that

Any person who illegally brings into Indonesia, makes, accepts, attempts to obtain, transfers or tries to transfer, controls, carries, has supply of, possesses, stores, transports, hides, uses or takes to or from Indonesia: a firearm, ammunition, explosives or other dangerous materials with intent to perform an act of terrorism, faces the death penalty, life imprisonment, or between 3 and 20 years’ imprisonment.

Wahid observes that this is virtually a reproduction of Article 1(1) of Indonesia’s Emergency Law No 12 of 1951 on the Possession of Firearms and Explosives.<sup>13</sup> Article 9 of the ATL provides the same maximum penalty as its 1951 source: death. Given that imprisonment – including for life – is also available under the 1951 Emergency Law, the

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<sup>13</sup> Drs Abdul Wahid, Sunardi, Muhammad Imam Sidik, *Kejahatan Terorisme*, Rafika Aditara, 2004, p. 84.

only significant difference between it and the ATL is that the ATL provides a minimum sentence.

### ***Chemical and biological terrorism***

Employing similar elements and wording to that of Article 6, Article 10 of the ATL relates to the use of biological and chemical weapons:

Any person who intentionally uses chemical weapons, biological weapons, radiology, micro-organisms, or radioactivity or its components, thereby causing an atmosphere of terror or widespread fear, causing mass casualties, endangering health, disrupting the life, security and rights of people, or damaging strategic vital objects, the environment, public facilities or international facilities, faces the same penalty as contained in Article 6.

Article 12 is probably best viewed as an extension to Article 10 because it covers further offences relating to chemical and biological weapons, including the provision of assistance or funds to obtain them. Article 12 states that:

Any person who supplies or collects assets to be used, or which that person should have known will be used, entirely or in part to perpetrate the following, faces between three and 15 years' imprisonment:

- a. illegally accepting, possessing, using, transferring, altering, or disposing of nuclear materials, chemical weapons, biological weapons, radiology, micro-organisms, or radioactivity and its components that cause or could cause death or serious injury or damage to property.
- b. stealing or seizing nuclear materials, chemical weapons, biological weapons, radiology, micro-organisms, or radioactivity and its components.
- c. smuggling or obtaining illegally nuclear materials, chemical weapons, biological weapons, radiology, micro-organisms, or radioactivity and its components.
- d. seeking through force, threat of force or any form of intimidation nuclear materials, chemical weapons, biological weapons, radiology, micro-organisms, or radioactivity and its components.
- e. threatening to
  1. use to nuclear materials, chemical weapons, biological weapons, radiology, micro-organisms, or radioactivity and its components to cause death, serious injury or property destruction.
  2. perpetrate the crime referred to in (b) in order to force another person, international organisation or other state to do something or refrain from doing something.
- f. attempting to perpetrate the crimes referred to in (a), (b), or (c).
- g. participating in the perpetration of the crimes referred to in (a)-(f).

### ***Inchoate offences: financing, accessories, incitement, attempt***

In this section, I will discuss the ATL's provisions applicable to those who in some way contribute to the commission of a terrorist act.

Article 11 prohibits financing any of the acts set out in the ATL that constitute terrorism:

Any person who supplies or collects funds to be used, or which that person should have known will be used, entirely or in part to perpetrate the crime of terrorism within the meaning of Articles 6, 7, 8, 9 and 10, faces between three and 15 years' imprisonment.

Article 13 imposes a prison sentence of between three and 15 years to those who provide assistance for, or facilitate, an act of terrorism by:

- a. giving or lending money, property or assets to the perpetrator of a terrorism crime; or
- b. hiding the perpetrator of a terrorism crime; or
- c. concealing information about a terrorism crime.

The Elucidation to Article 13 states that 'assistance' means the provision of 'assistance before or during the commission of the crime'. 'Facilitation' is defined as the provision of 'assistance after the commission of the crime'.

Article 14 covers 'incitement'. It states that:

Any person who plans or incites others to commit crime of terrorism referred to in Articles 6-12, faces the death penalty or life imprisonment.

The Elucidation to Article 14 makes it clear that the provision is 'directed towards the intellectual actors' of terrorism. It defines plan to include 'preparing physically, financially or human resources' and inciting to be 'incitement and provocation, and the provision of gifts, money or promises'.

According to Article 15

Any person who conspires to, attempts, or assists with, the commission of a crime of terrorism referred to in Articles 6-12, faces the same penalty as the perpetrator of the crime.

Article 16 of the ATL states that:

Any person outside of the territory of Indonesia who provides assistance, facilitation, the means or information for the commission of a terrorism crime referred to in Articles 6-12, faces the same penalty as the perpetrator.

### ***Is the ATL a significant advance upon the KUHP?***

As indicated above, most acts that constitute 'terrorism' are probably acts covered also by the KUHP and other criminal laws.

Offences relevant to terrorism and their associated penalties under the KUHP might include the following.

- **Murder:** penalties range from a maximum of 15 years' imprisonment for general murder (Article 338 of the KUHP) to life imprisonment or death for premeditated murder (Article 340 of the KUHP).

- **Arson:** anyone who deliberately creates a fire or explosion:
  - and endangers property faces a maximum of 12 years' imprisonment (Article 187(1) of the KUHP);
  - and endangers human life, faces a maximum of 15 years' imprisonment (Article 187(2) of the KUHP);
  - and causes death, faces a maximum of life imprisonment or 20 years' imprisonment (Article 187(3) of the KUHP).
- **Property damage:** anyone who deliberately destroys or damages a building:
  - and endangers property, faces a maximum of 12 years' imprisonment (Article 200(1) of the KUHP);
  - and endangers human life, faces a maximum of 15 years' imprisonment (Article 200(2) of the KUHP);
  - and causes death, faces a maximum of life imprisonment or 20 years' imprisonment (Article 200(3) of the KUHP).
- **Group violence:** a groups of two or more people who use violence against a person or property, face 5 years and 6 months imprisonment (Article 170 of the KUHP). The term of imprisonment can be increased to up to seven years if the violence damages property causes injury, up to nine years if the violence causes serious injury, and up to 12 years if it causes death.
- **Dealing with explosives:** people who make, receive, attempt to obtain, hide, transport or import into Indonesia material that is, or could reasonably be expected be, used to create an explosion which endangers the life of a person or property face up to eight years' imprisonment (Article 187 bis (1) of the KUHP).
- **Assault:** Article 351 of the KUHP provides a maximum of 2 years 8 months for minor assault, a maximum of five years for assault causing serious injury and a maximum of 7 years for assault causing death.

And as explained above, the ATL adds nothing new to the 1951 Emergency Law on the Possession of Weapons and Explosives and adds only tougher penalties to the KUHP's existing aviation security offences.

Proponents of the ATL could point to several advantages of the ATL over the KUHP. First, the ATL's broad definitions of the elements of the offences that constitute terrorism – particularly those contained in Articles 6 and 7 – arguably make them easier to prove than their equivalent KUHP offences. Due to lack of space, I will, however, not set out the elements of each of the KUHP offences mentioned above.

Second, penalties under the KUHP for offences that could be used to pursue terrorism such as murder, arson and assault are generally not as severe as those that can be obtained under the ATL. For example, death, life imprisonment and minimum sentences are conspicuous penalties provided for the majority of the ATL's offences, but are far less commonly encountered in the KUHP. Against this, however, the death penalty would still be available if perpetrators were found guilty of premeditated murder under Article 380 of the KUHP. And, given that terrorism is often well planned, and that murder often occurs in conjunction with terrorism, the death penalty is a real possibility in such cases.

Third, another perceived benefit of the ATL is that it clearly makes inchoate offences – such as attempt, conspiracy, complicity and incitement – offences in their own right and provides significant criminal penalties for offenders.

The KUHP's provisions on inchoate offences apply to all crimes contained in the KUHP and in some cases offenders are subject to the same penalties as perpetrators. For example, those who incite, compel or are complicit in the commission of a crime are treated as perpetrators under Article 55 of the KUHP. However, those who attempt to commit a crime or who are accessories to a crime, face lighter sentences than the perpetrators. Article 53(1) of the KUHP states, for example, that attempting to commit a crime is criminally culpable, if intent to commit the crime is evident from the commencement of performance of the crime, but the crime is not completed for reasons outside the control or will of the would-be perpetrator. Article 53(2) provides for a maximum penalty of two-thirds of the maximum penalty that would have applied if the crime had been committed successfully; and Article 53(3) states that a maximum of 15 years' imprisonment applies to attempts to commit crimes that carry the death penalty or life imprisonment.

Under Article 56, accessories are defined as:

1. those who deliberately provide assistance at the time the crime is committed;
2. those who deliberately provide the opportunity, means or information for the commission of a crime (Article 56).

Article 57(2) provides for a maximum penalty of two-thirds of the maximum penalty that would apply to the perpetrators of the crime - unless the crime carries the death penalty or life imprisonment, in which case the maximum penalty is 15 years' imprisonment (Article 57(3)).

Clearly, the ATL is much less forgiving than the KUHP for these types of offences. As mentioned above, under Articles 14 and 15 of the ATL, attempts, assistance and incitement to commit a terrorist offence are punishable by death or life imprisonment.

Article 15 of the ATL also provides a significant boost to the criminal penalties for conspiracy under the KUHP. The KUHP defines conspiracy (*permufakatan jahat*) in Article 88 as an agreement between two or more people to commit a crime. However, the KUHP does not contain a general prohibition on people conspiring to commit a crime. For most offences, criminal culpability arises only after the crime has been committed, or has begun to be committed. There are some important exceptions to this general rule. A number of provisions of the Criminal Code make conspiracy illegal for particular acts. Article 110 states, for example, that *permufakatan jahat* to commit crimes under Articles 104, 106, 107 and 108 are punishable using the penalties contained in those provisions. These provisions deal with crimes against national security, such as acts intended to overthrow the government or to kill or debilitate the president or vice president. Article 169 states that participation in an association that intends to commit a crime, or participation in an otherwise illegal association carries a maximum of six years' imprisonment. Most relevant, however, is Article 187ter, which states that conspiracy to commit a crime referred to in Article 187 (arson) or 187 bis (dealing with explosives) carries a maximum of only 5 years' imprisonment.

## Special procedural rules for terrorism cases: a comparison with the KUHAP

The ATL makes it clear in Article 25(1) that the KUHAP rules generally applicable to criminal investigations, prosecutions and trial apply also in terrorism cases, unless the ATL provides otherwise. The ATL then sets out several provisions that diverge from the KUHAP on matters relating primarily to arrests, detentions, the freezing of assets, matters of evidence, and the use of intelligence reports, mail intercepts, and phone tapping. In this section, I will address these matters, first setting out the KUHAP rules, if they exist, that apply generally to criminal cases, then describing the variations made to those rules by the ATL.

### ***Evidence law under the KUHAP***

For the purposes of this discussion, the most notable feature of general Indonesian evidence law is that it very significantly restricts the types of evidence that can be formally adduced to those most commonly used in 1981, when the KUHAP was enacted.

So, for example, the KUHAP does not refer to electronic and other ‘newer’ types of evidence such as emails, SMS messages, internet transactions and even sound recordings, videos and photographs. This means that these types of evidence cannot be solely relied upon to prove guilt, and, indeed, are simply disregarded by some judges.<sup>14</sup>

According to Article 183 of the KUHAP, judges cannot convict a defendant unless they have the strong belief (*memperoleh keyakinan*) that a crime has taken place and that the accused committed it. This strong belief must be supported by at least two ‘valid pieces of evidence’ (*alat bukti*) (Article 183 of the KUHAP). The rationale for this rule, according to most commentators, is that it provides minimum standards of protection for the accused, whilst retaining some judicial flexibility.<sup>15</sup> On the one hand, the rule requires judges to support their decisions with a minimum level of recognised types of evidence (the so-called ‘objective’ element). The rule prevents judges convicting on anything less – such as a sole piece of evidence, evidence that might be unreliable by nature, or a hunch. On the other hand, judges may still refuse to convict an accused if, even in the face of many pieces of valid evidence pointing to guilt, they are not entirely convinced of that guilt because the weight or persuasiveness of the evidence (*nilai pembuktian*) is, in their view, insufficient (the so-called ‘subjective’ element).

Critically, not all types of evidence fall within the meaning of *alat bukti*. Article 184 of the KUHAP ‘limitatively’ (*secara limitatif*) defines ‘valid pieces of evidence’ to be:

- (a) witness testimony (*keterangan saksi*);
- (b) expert testimony (*keterangan ahli*);

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<sup>14</sup> Wicaksono Wahyu Santoso, *Keberadaan Rancangan Undang-undang Tandatangani Digital dan Transaksi Elektronik*, available at [www.lkht.net/artikel\\_lengkap.php?id=14](http://www.lkht.net/artikel_lengkap.php?id=14); Edmon Makarim, *Apakah Transaksi secara Elektronik mempunyai Kekuatan Pembuktian?*, available at [www.lkht.net/artikel\\_lengkap.php?id=16](http://www.lkht.net/artikel_lengkap.php?id=16).

<sup>15</sup> See Prof Dr Andi Hamzah, *Hukum Acara Pidana Indonesia*, Rineka Cipta, Jakarta, 1985; Prof R Subekti, *Hukum Pembuktian*, Pradnja Paramita, Jakarta, 2003; Drs Hari Sasangka & Lily Rosita, *Hukum Pembuktian dalam Perkara Pidana*, Mandar Maju, Bandung, 2003; Djoko Prakoso, *Alat Bukti dan Kekuatan Pembuktian di dalam Proses Pidana*, Liberty, Yogyakarta, 1988.

- (c) documents (*surat*);
- (d) circumstantial evidence (*petunjuk*); and
- (e) testimony from the accused (including an admission of guilt).

In this context, it is important to raise the distinction and interrelation between the commonly-used and commonly-confused Indonesian terms *barang bukti* and *alat bukti*.<sup>16</sup> *Barang bukti* is any type of physical evidence adduced in court, whereas *alat bukti* is any of the five types of evidence mentioned in Article 184 of the KUHAP. *Barang bukti* might contain *alat bukti*, but it is not *alat bukti* itself, meaning that it cannot be directly used as one of the 'valid' pieces of evidence to convict an accused within the meaning of Article 183 of the KUHAP.

So, for example, a gun (which would be *barang bukti*) with fingerprints on it cannot, by itself, be used as one of the two pieces of evidence required to convict the accused. However, expert testimony (*alat bukti*) from a forensic scientist, for example, explaining that the fingerprints on the gun were those of the accused, is likely to fall within Article 184(b) of the KUHAP and could, therefore, constitute one of the two pieces of valid evidence required for a conviction under Article 183 of the KUHAP. It is, therefore, inaccurate to translate *barang bukti* as exhibit, given that this implies that it is 'valid evidence' (*alat bukti*) in its own right, which under Indonesian law it is not. A gun would be 'valid' in the sense that a judge could consider it, but it cannot on its own be 'valid' in the sense of being determinative or decisive of guilt.

Subsequent provisions in the KUHAP appear to limit the circumstances in which the types of evidence mentioned in Article 184 can be used as *alat bukti*. For example, the testimony of only one witness does not constitute *alat bukti*. Instead, the testimony of at least two witnesses is required (Article 185(2)), or the testimony of a single witness supported by another piece of valid evidence (Article 185(3)). More obvious safeguards are also provided for. A witness can only, for example, give evidence as to what he or she did, knows or experienced (Articles 189(1) and Article 27(1) of the KUHAP), a rule that clearly forces hearsay evidence outside the ambit of Article 184. Likewise, opinions or assumptions provided by witnesses will not constitute *alat bukti* (Article 185(5)); and testimony not provided under oath is not considered *alat bukti*, but rather can only be used to support evidence provided by other witnesses under oath. And Article 185(6) alerts judges to something of which one assumes they should already be well aware: the possibility that witness testimony might be unreliable and, therefore, presumably not worthy of being considered *alat bukti*:

judges should carefully consider the consistency of evidence as between witnesses; as between other pieces of evidence; motives that might cause a witness to provide particular testimony; the lifestyle and morality of the witness and anything else that might influence the believability of the testimony.

The use of documentary evidence is restricted under Article 184(1)(c). This provision limits documents with *alat bukti* status to 'official documents' produced by 'public officials' about events or circumstances they heard, saw or experienced, including records of interview (Article 187(a)); and documents containing expert opinions (Article 187(b)), including affidavits; and 'other documents', provided they 'have a connection with the substance of another piece of evidence' (Article 187(c)).

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<sup>16</sup> Ratna Nurul Afifah, *Barang bukti dalam proses pidana*, Sinar Grafika, Jakarta, 1988.

According to one former judge,<sup>17</sup> the *petunjuk* category of ‘circumstantial’ evidence – included as *alat bukti* under Article 184(d) – is perhaps the most difficult to describe and apply, even for judges. It is so problematic, Harahap explains,<sup>18</sup> that *petunjuk* evidence should be used only as a last resort; other types of evidence should be evaluated and relied upon before *petunjuk* evidence is even considered.

The formal definition of *petunjuk* evidence is provided in Article 188(1):

*Petunjuk* are acts, events or circumstances that, because they are consistent with each other, or with the crime itself, indicate that a crime has been committed and the identity of the perpetrator.

As indicated above, the closest English-language equivalent to *petunjuk* is probably ‘circumstantial evidence’, because it is indirect evidence, usually relied upon when direct evidence – such as eye witness testimony – is lacking. Like other forms of evidence, its use is limited by the KUHAP. For example, like witness testimony, a single piece of *petunjuk* evidence will be insufficient. It must be corroborated by at least one other form of *petunjuk* evidence before it can formally be considered *alat bukti*. It appears also that judges can easily disregard *petunjuk* evidence:

A judge is to wisely evaluate a *petunjuk*’s evidentiary value after he/she has investigated it carefully in accordance with his or her conscience (Article 188(3)).

Perhaps the most significant limitation imposed upon the use of *petunjuk* evidence by the KUHAP is that *petunjuk* can only be obtained from witness testimony, documents and testimony from the accused (Article 188(2)). *Petunjuk* cannot, therefore, be used as a medium to ‘get in’ some of the more modern types of evidence.

Because under the KUHAP evidence that is not contained in Article 184 cannot be used as *alat bukti*, it is conceivable that incontrovertible evidence - such as a reliable video that clearly shows the accused committing a crime - might not be sufficient to ensure a conviction, *even* if corroborated by one of the types of evidence acknowledged in Article 184. And the use of even those types of evidence that are contained in Article 184 such witness testimony, documents, and *petunjuk*, is rather limited. Nevertheless, most types of evidence – even if not contained in Article 184 – can be considered by judges *if* they make existing *alat bukti* more persuasive. It is important to recognise that, given that such evidence can never of itself lead to a conviction, the judge is not actually obliged to consider this type of evidence, or even allow it to be adduced, although he or she may do so if so inclined.

These outdated KUHAP provisions have certainly made the job of Indonesian law enforcement officials rather difficult in the face of ‘new’ types of offences – such as white collar crimes – and more technologically-advanced ways of planning and committing them. For example, consider a crime that was planned by email and perpetrated through the internet. If no witnesses ‘saw, heard, or experienced’ the crime and the defendant did not formally admit to the crime, then what forms of evidence could be adduced to

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<sup>17</sup> Yahya Harahap, *Pembahasan permasalahan dan penerapan KUHP: Pemeriksaan siding pengadilan, banding, kasasi dan peninjauan kembali*, 2<sup>nd</sup> edition, Sinar Grafika, Jakarta, 2000.

<sup>18</sup> *Ibid*, p. 291.

secure a conviction? Could the emails or transaction records be considered 'documents' within the meaning of Article 184(c)? It would appear not, given that they must either be formal documents produced by public officials, or tied in with another type of evidence recognised under Article 184(c). Similar problems arise with other types of evidence commonly relied upon in other countries, such as photographs, video and sound recordings and SMS messages. Some Indonesian judges might allow these types of evidence to be adduced indirectly 'via' the testimony of an expert. However, other judges would not permit evidence to be 'got in' through experts, because they would see this as attempted circumvention of Article 184 of the KUHAP. In the case of terrorism, however, these types of evidence are now specifically permitted by the ATL.

### ***Evidence law under the ATL***

Several Indonesian statutes – including the Money Laundering Law (Law No 25 of 2003, Article 38); the Anti-Corruption Law (Law No 20 of 2001, Article 26A); and the ATL – recognise the problems raised by Article 184 and subsequent provisions of the KUHAP and specifically allow other types of evidence to be treated directly as *alat bukti*.

Article 27 of the ATL states, for example, that *alat bukti* for terrorism cases includes:

- a. all *alat bukti* referred to in the KUHAP;
- b. other *alat bukti* in the form of information expressed, sent, received or stored electronically using an optical device or something similar to it;
- c. data, recordings, or information which can be seen, read and/or heard, and which can be expressed with or without the assistance of a medium, including that which is contained on paper, any item other than paper, or which is recorded electronically, including, but not limited to:
  1. writing, sounds, or pictures;
  2. maps, plans, photo and the like;
  3. letters, signs, numbers, symbols, or perforations which have meaning or which can be understood by a capable person.

Clearly, these reforms make it easier for prosecutors, who bear the burden to prove guilt (Article 66), to satisfy the requirements for conviction stipulated in Article 183 of the KUHAP in terrorism cases. Although they must still produce at least two pieces of *alat bukti* to make a conviction possible, the types of evidence that judges can consider as *alat bukti* is now greatly expanded for terrorism cases.

### ***Arrests under the KUHAP***

The Indonesian police are responsible for the majority of investigations under Indonesia's KUHAP. Police will usually begin their investigations by determining whether a crime has in fact been committed. This is referred to as the *penyelidikan* stage of the criminal process (Article 4 of the KUHAP). Once investigators have determined that a crime has taken place, further investigations (*penyidikan*) to identify suspects and gather evidence and witness statements for the purposes of prosecution may be conducted by the police or other civil servants, including prosecutors (Article 6(1)).<sup>19</sup>

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<sup>19</sup> Ibrahim Assegaf, 'Legends of the Fall: An Institutional Analysis of Indonesian Law Enforcement Agencies Combating Corruption', in T Lindsey & H Dick, *Corruption in Asia: Rethinking the Governance Paradigm*, Federation Press, Sydney, 2002, p. 130, fn 11.

Arrests can be made during both these stages of investigations. A warrant will usually be required unless the accused is caught in the act (*tertangkap tangan*) and is alleged to have committed a serious crime (Article 17 of the KUHAP). It is not necessary for the warrant to be issued by a court – an order from a superior officer will usually suffice.<sup>20</sup> A suspect must be released one day after being arrested unless he or she is formally detained (*ditahan*) (Article 19(1) of the KUHAP).

According to Article 17 of the KUHAP, to obtain a warrant, investigators must ‘strongly suspect’ that the potential arrestee has committed a crime on the basis of ‘sufficient initial evidence’. The Elucidation to Article 17 states that ‘initial evidence’ is

evidence indicating a suspicion that a crime has been committed...[Article 17] indicates that an arrest warrant cannot be issued without cause, rather, [it can only be issued] against those who have actually committed a crime.

As to the form of the ‘evidence’, it seems well-accepted that it must be *alat bukti* – that is, one of the five types of evidence set out in Article 184 discussed above.<sup>21</sup>

There is, however, less consensus or theorising in the literature as to what constitutes ‘sufficient’ evidence, or, to use the words of the Elucidation to Article 17, the degree of ‘cause’ that should exist for a warrant to be issued. Harahap, a former Supreme Court judge, points out that the term ‘sufficient’ initial evidence is intended to prevent investigators arresting on a whim and concludes that, by choosing those terms, lawmakers have given investigators great discretion to determine what is sufficient initial evidence.<sup>22</sup>

This is not entirely true. Article 77 of the KUHAP provides the general courts with jurisdiction to review the validity of arrests and detentions in a pre-trial hearing (*praperadilan*). If the court finds that the arrest or detention was or is unlawful, then it is to immediately release the detainee and determine the amount of any compensation (Article 82(3) of the KUHAP).<sup>23</sup> Theoretically, then, it is the courts, rather than investigators, that have the final say on whether the initial evidence relied upon to issue an arrest warrant was ‘sufficient’.

However, in practice, *praperadilan* applications rarely succeed.<sup>24</sup> Estimates vary, but some commentators claim that only between 5 to 10 per cent of *praperadilan* challenges

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<sup>20</sup> For less serious crimes, an arrest may be made only if the suspect has been called several times for questioning, but has failed to attend and has no lawful excuse for non-attendance (Article 19(2) of the KUHAP).

<sup>21</sup> See Yahya Harahap, *Pembahasan permasalahan dan penerapan KUHP: Pemeriksaan sidang pengadilan, banding, kasasi dan peninjauan kembali*, 2<sup>nd</sup> edition, Sinar Grafika, Jakarta, 2000, pp. 154, 164.

<sup>22</sup> *Ibid.*, p. 154.

<sup>23</sup> Government Regulation No 27 of 1983 sets very low amounts of compensation – between Rp 5,000 and 3 million (at time of writing, between US 50 cents and \$300): Daniel Fitzpatrick, ‘Culture, ideology and human rights: The case of Indonesia’s Code of Criminal Procedure’, in T Lindsey (ed), *Indonesia: Law and Society*, Federation Press, Sydney, 1999, p. 346.

<sup>24</sup> ‘Indonesia: Country Reports on Human Rights Practices’, US State Department, 28 February 2005 (<http://www.state.gov/g/drl/rls/hrrpt/2004/41643.htm>).

are decided in favour of the applicant.<sup>25</sup> To the knowledge of the author, the causes of, or reasons for, this failure rate has not been the subject of scholarly attention.

Ironically, then, even though Harahap's assertion that investigators have ultimate discretion as to what constitutes 'sufficient initial evidence' appears to ignore the legal reality of the existence of *praperadilan*, his statement is probably a reasonably accurate description of the practical reality in most cases.

### **Arrests under the ATL**

Articles 26 and 28 of the ATL govern arrests in terrorism cases. Article 28 allows investigators to arrest any person

strongly suspected of committing a crime of terrorism on the basis of sufficient initial evidence as referred to in Article 26(2) for a maximum of 7 days.

Article 26(2) states that:

A determination that sufficient initial evidence as referred to in Article 26(1) exists or has been obtained must be made [by means of] a process of investigation by a Chairperson or Deputy Chairperson of a District Court.

Article 26(1) states that, 'to obtain sufficient initial evidence, investigators can use any intelligence report'. The Elucidation to Article 26(1) defines 'intelligence report' as a report 'connected to and related to matters of national security', which can be obtained from the Department of Home Affairs, the Department of Foreign Affairs, the Department of Defence, the Department of Justice and Human Rights, the Department of Finance, the Police Force, the Army, the Attorney General's Office, the State Intelligence Body or another related institution.

The judicial determination referred to in Article 26(2) is to be made in a closed hearing (Article 26(3)). And if the judge finds that sufficient initial evidence exists, then the Chairperson of the District Court is to order that further investigations (*penyidikan*) may proceed (Article 26(4)).

What is the net effect of these provisions? Two interpretations of the provisions appear to be open. The first is that 'sufficient initial evidence' in Articles 28, 26(2) and 26(1) of the ATL refers to any type of initial evidence. On this interpretation, the effect of these Articles would appear to be to require investigators to seek judicial approval to arrest a suspect in a terrorism case. The rationale for requiring judicial approval might be that, unlike the KUHAP, which allows suspects to be arrested for only one day, the ATL allows suspects to be arrested for seven days. Judicial approval might, therefore, be seen to be an additional safeguard, thought necessary to ensure respect for the rights of suspects.

However, a more convincing interpretation is that Articles 28, 26(2) and 26(1) of the ATL apply only to the use of intelligence reports, and not other types of evidence. Three

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<sup>25</sup> Daniel Fitzpatrick, 'Culture, ideology and human rights: The case of Indonesia's Code of Criminal Procedure', in T Lindsey (ed), *Indonesia: Law and Society*, Federation Press, Sydney, 1999, p. 346.

arguments support this interpretation. First, linguistically, it might be argued that Article 26(1)'s reference to 'initial evidence' refers only to initial evidence provided in intelligence reports. It is arguable that this limited reference to 'initial evidence' is transported into Article 28 via Article 26(2), which appears to rely on Article 26(1) for its definition of 'initial evidence'.

Second, and more practically, Article 26(3)'s requirement that the judicial hearing to consider the initial evidence be conducted in a closed court seems to indicate a concern to keep the evidence put forward confidential – a concern often expressed over sensitive intelligence documents.

Finally, one purpose of the ATL is to make investigating terrorism cases easier. However, this purpose would be undermined if all types of evidence required judicial approval. Of course, arrests under the ATL - if approved - can be for a longer period than those under the KUHAP, but, the need for judicial approval in terrorism cases might make it more difficult or complicated to arrest suspects in terrorism cases than in general cases governed by the KUHAP (for which judicial approval is not required). The balance of convenience for police may well lie in securing a guaranteed arrest for one day before they formally detain the suspect (see below), rather than the more unpredictable process of seeking judicial approval for a seven day period of arrest.

It is, therefore, more likely that the net effect of Articles 26(1), 26(2) and 28 is as follows. If investigators wish to arrest a suspect on the basis of information contained in an intelligence report, then a senior district court judge must first examine the information to determine whether it constitutes sufficient initial evidence upon which to base further investigations.

Several significant implications flow from the 'intelligence report only' interpretation being favoured over the 'any type of evidence' interpretation. I will discuss three of these. The first is that, contrary to popular belief<sup>26</sup> – and even assertions made by Indonesian police<sup>27</sup> – the ATL does not allow suspects to be arrested for seven days before being formally detained in all circumstances. If this interpretation is accepted, the ATL applies only to arrests made on the basis of intelligence reports. Arrests made on the basis of other types of evidence – such as a report from a member of the community or an intercepted letter – would be governed by the KUHAP. As discussed above, the KUHAP would permit suspects to be arrested for only one day before being formally detained.

Second, these provisions seem to contradict the fundamental principle referred to above that there be two pieces of *alat bukti* in order for an investigation to proceed and, ultimately, for a conviction to be obtained. As mentioned above, according to Article 26(3), if the judge finds that the intelligence reports contains sufficient initial evidence, then he or she is to order that further investigations be conducted. But how can the judge order further investigation on the basis of only one piece of *alat bukti* – that is, the intelligence report? Does this provision make the assumption that a judge will not order further investigations without investigators providing an additional piece of *alat bukti*; or

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<sup>26</sup> See eg 'First arrest over Bali bombings', *BBC*, 11 October 2005 <http://news.bbc.co.uk/2/hi/asia-pacific/4329630.stm>; ICJ, *Press release: Indonesia – International penal ends hearing in Southeast Asia*, 6 December 2006, [http://ejp.icj.org/hearing.php3?id\\_rubrique=91](http://ejp.icj.org/hearing.php3?id_rubrique=91).

<sup>27</sup> See eg 'Arrests of Terrorist Suspects Prone to Abuses, Say Activists', *Jakarta Post*, 8 December 2005.

is it implicit permission for further investigations to commence on the basis of only one piece of *alat bukti*, thereby creating an exception to Article 183 of the KUHAP?

Third, an intelligence report – provided that it is in written form, from a government agency and compiled by a government official – probably constitutes *bukti surat* within the meaning of Article 184(c) of the KUHAP. It remains unclear why investigators would want to seek an arrest warrant under Article 28 of the ATL, particularly if they thought that there was a chance that the judge might find that the evidence contained in the intelligence report was insufficient or lacked an adequate factual basis, or if investigators were concerned that involving the judiciary in the process might jeopardise the confidentiality of sensitive information in the report.

Surely a more practical – and probably legal – way for police to proceed would be to arrest a suspect, treating the intelligence report as *bukti surat*, rather than invoking Article 28. Investigators could hold the suspect for one day and then formally detain the suspect. Any adverse consequence of this approach is unlikely to be significant. If the suspect contests the sufficient initial evidence that formed the basis for his or her arrest in *praperadilan* proceedings, investigators will probably enjoy several days at least to continue their investigations before proceedings commence. In any event, as was discussed above, it is unlikely that a suspect or defendant would be successful in their *praperadilan* application.

### ***Detention under the KUHAP***

In ordinary cases, police can detain suspects who have been accused of committing, or assisting in the commission of, a crime for which a punishment of five or more years could apply if he or she was convicted (Article 21(4)(a) of the KUHAP) or of a crime that is listed in Article 21(4)(b) of the KUHAP, provided that sufficient evidence indicates that the accused will attempt to flee, to damage or destroy evidence, or re-offend (Article 21(1) of the KUHAP).

Police can issue detention orders themselves.<sup>28</sup> Prosecutors can then detain suspects when preparing their cases; and judges can detain suspects during court proceedings involving those suspects (Article 20 of the KUHAP). Police can detain suspects for 20 days for the purposes of their investigations (Articles 20 and 24(1) of the KUHAP). A prosecutor can approve a further 40-day extension if the police investigation has not been completed within the initial 20 days (Article 24(2) of the KUHAP). The suspect must be released from detention if the investigation has concluded (Article 24(3)) or if the suspect has been detained for the entire 60 days (Article 24(4) of the KUHAP) and has not yet been handed over to prosecutors.

Prosecutors can then detain suspects for up to 20 days for the purposes of preparing the prosecution of cases involving those suspects (Articles 20 and 25(1) of the KUHAP). A district court chairperson can extend the detention period by a further 30 days if the investigation is not completed within the initial 20 days (Article 25(2) of the KUHAP). The suspect must be released if the prosecutor's investigation has concluded (Article 25(3))

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<sup>28</sup> Daniel Fitzpatrick, 'Culture, ideology and human rights: The case of Indonesia's Code of Criminal Procedure', in T Lindsey (ed), *Indonesia: Law and Society*, Federation Press, Sydney, 1999, p. 345.

or if the suspect has been detained for the full 50 days (Article 25(4) of the KUHAP) and has not yet been brought to trial.

A district court judge can detain an accused for the purposes of trial for a maximum of 30 days (Article 26(1)) and a district court chairperson can extend this period by a further 60 days (Article 26(2) of the KUHAP). If the trial is concluded within this period, or if the 90 days expire, then the accused must be released (Articles 26(3) and (4) of the KUHAP). The relevant high court has the power to initially detain for the same number of days (Article 27 of the KUHAP). With one extension, the Supreme Court can detain accused for a maximum of 110 days (Article 28 of the KUHAP). The authorities are said to generally respect these limits in practice.<sup>29</sup>

The net result is that in many cases a defendant might legally remain in detention for up to 400 days, presuming the case is appealed all the way to the Supreme Court and that all extensions are applied for and granted.

In exceptional circumstances or in serious cases, however, further extensions might be available. Article 29(1) provides an 'exception to [these] time limits for detention', allowing an extension 'for appropriate and unavoidable reasons' where the suspect or defendant 'suffers from severe physical or mental disturbance', or where the offence being investigated could result in a sentence of imprisonment of nine years or more. This extension can be granted for a maximum of thirty days but can be extended for another thirty days (Article 29(2)). Judicial approval for these extension must be sought – a district court chairperson's to extend a detention during police investigations and prosecutions; a high court chairperson's during a district court trial; the Supreme Court's during an appeal; and the Supreme Court Chief Justice's during a cassation hearing (Article 29(3)). Article 29 does not appear to prevent an extension being sought at each of these four stages. The provisions could, therefore, be interpreted as allowing an additional four extensions, each of 60 days, totalling 240 days.

Presuming, then, that most people accused of crimes connected to terrorism would face penalties of nine years or over, the KUHAP, if applied, would have allowed their detention for a total of 640 days if their case was appealed all the way up to the Supreme Court.

### ***Detention under the ATL***

To what extent does the ATL alter the time limits for detention provided for under the KUHAP? The ATL contains only one provision on the detention of terrorism suspects and defendants. Article 25(2) provides authority for investigators to detain suspects for a maximum of six months, 'for the purposes of investigation and prosecution'. According to the Elucidation to Article 25(2), of these six months, four months can be allocated to investigations, and two months to prosecutions. The provision and its Elucidation make no mention of the possibility of an extension of this time limit.

Given that the ATL overrides the KUHAP only to the extent to which the two Laws are inconsistent, it would appear that Article 25(2) of the ATL overrides only Articles 24 and 25 of the KUHAP – the provisions which deal with detention during police investigations

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<sup>29</sup> 'Indonesia: Country Reports on Human Rights Practices', *US State Department*, 28 February 2005 (<http://www.state.gov/g/drl/rls/hrrpt/2004/41643.htm>).

and prosecutions. Presumably, then, the 110 days (including extensions) provided for in Articles 24 and 25 of the KUHAP would be substituted for the six months provided for in Article 25(2) of the ATL in terrorism cases. On this analysis, the remaining provisions of the KUHAP relating to detention during trials – Articles 26, 27, 28 and 29 – would apply in terrorism cases, given that the ATL is silent on detention during trials.

The effect of the ATL with respect to detentions, then, is to provide police and prosecutors with an additional 70 days or so for detentions to the time that it is provided for under the KUHAP.

### ***Prohibitions on interfering in terrorism cases***

The ATL establishes criminal culpability for interfering in terrorism investigations, prosecutions and trials. Article 22 states that

Any person who intentionally directly or indirectly prevents, obstructs or thwarts the investigation, prosecution or trial of a terrorism case, faces between 2-7 years' imprisonment.

Article 20 provides more serious penalties for impeding the criminal process using violence or threats of violence:

Any person who uses violence, the threat of violence or intimidation against police prosecutors, legal advisors and/or judges handling a terrorism case, thereby impeding the judicial process, faces between 3-15 years' imprisonment.

Unlike Articles 20 and 22, which appear to apply to any conduct during police investigations, prosecutions or trials, Article 21 covers conduct during terrorism trials only:

Any person who provides false testimony or evidence, illegally influences a witness during the trial, or attacks a witness or court official in a terrorism trial, faces between 3-15 years' imprisonment.

Articles 20, 21 and 22 are particularly significant, because they appear to be Indonesia's first attempt at statutory prohibition of acts that appear to constitute contempt of court. Currently, Indonesia has no generally-applicable statute prohibiting the range of acts that might be seen in other jurisdictions to constitute contempt of court.<sup>30</sup> Several KUHP provisions are commonly-cited as being available to pursue some such acts. For example, the KUHP prohibits:

- causing a disturbance in court and not leaving after being ordered to do so (Article 217);
- failing to show respect towards the court (Articles 218(1) and 218(2));
- offending a power-holder (*penguasa*) or general body (*badan umum*), which presumably encompasses courts and judges (Article 207);

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<sup>30</sup> A Draft Code of Criminal Procedure in circulation at time of writing does, however, contain a number provisions on contempt of court.

- using violence or threats of violence to oppose an official performing their duties (Article 212), or to force an official to perform and act or not perform an act relating to their official duties (Article 211).

Clearly, these provisions are very general in nature and, with the exception of Article 217, appear to apply to any public official performing their duties – not only judges and courts. And, according to *Hukumonline*,<sup>31</sup> these provisions are very rarely applied: in most circumstances, they are used only as a basis to remove offenders from the court. The ATL is, therefore, a significant advance because it refers specifically to offences relating to judicial processes and provides penalties that are likely to have real deterrent effect.

### ***Witness protection***

The ATL specifically provides state protection for witnesses, investigators, prosecutors and judges – and their families – involved in terrorism cases (Article 33). The ATL requires that this protection be provided against threats against physical and mental well-being and property before, during and after the trial (see Article 34).

Prior to 2006, the ATL was one of only a few statutes that provided for witness protection in specific types of cases. For example, Article 15 of Law No 30 of 2002 on the Corruption Eradication Commission and Article 34 of Law No 26 of 2002 on the Human Rights Court contained provisions on witness protection.<sup>32</sup> However, these provisions lacked detail and were rarely used in practice.

In 2006, Law No 13 of 2006 on the Protection of Witnesses and Victims was enacted. This Law applies generally to all criminal cases and provides greater detail and protection than the ATL. The witness protection provisions in the ATL are, therefore, now all but redundant.

Specifically, Article 5(1) of the Witness and Victim Protection Law provides a number of rights to witnesses and victims, including the rights to:

- protection for themselves, their families and their assets, and to be free from threats relating to the testimony that will be, is being, or has been provided by them;
- participate in choosing and determining the form of protection and security;
- legal advice;
- provide testimony without duress;
- an interpreter;
- be free from entrapping questions;
- information about the development of the case;
- information about the judicial decision;
- be informed if the convict is released;
- a new identity;

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<sup>31</sup> 'IKAH! Perlu UU Yang Mengatur *Contempt of Court*', *Hukumonline*, 23 August 2005.

*Hukumonline* is Indonesia's leading legal affairs online service and a key source of information on the legal sector.

<sup>32</sup> 'Babak Baru Pembahasan RUU Perlindungan Saksi di DPR', *Hukumonline*, 14 June 2005.

- relocation; and/or
- living expenses until the protection ceases.

Article 6 of the Witness and Victim Protection Law grants victims of gross violations of human rights a number of rights in addition to those referred to in Article 5(1), such as to medical assistance and rehabilitation. Article 7 allows victims, through the Witness and Victim Protection Institution, to seek a court order for compensation.

Criminal penalties apply to those who thwart the witness' or victim's protection (see Articles 37-43 of the Witness and Victim Protection Law).

These rights appear, however, to be subject to approval by the Witness and Victim Protection Institution established under the Law (see Article 5(2) of the Witness and Victim Protection Law). This Institution is to be based in Jakarta, with representatives in other parts of Indonesia (Article 11). It is to handle the provision of protection and assistance to witnesses and victims under the Act (Article 12 of the Witness and Victim Protection Law). The Law covers the Institution's composition and the procedures pursuant to which it is to provide protection and assistance (see Articles 14-36 of the Witness and Victim Protection Law).

Protection and assistance is to be provided to the witness or victim from the time the initial investigations begin (Article 8). Witnesses and victims who feel that they are in grave danger can provide testimony without attending the trial, provided that they obtain the presiding judges' permission (Article 9(1) of the Witness and Victim Protection Law). If permitted, their testimony can be given in writing or through an electronic medium (Articles 9(2) and 9(3) of the Witness and Victim Protection Law).

Importantly, witness, victims and whistleblowers are to be immune from criminal and civil action lodged in response to their reports or testimony, although witnesses cannot escape conviction if they are themselves implicated in the crime (Article 10 of the Witness and Victim Protection Law). This provision would, it appears, prevent witnesses or victims from being countersued for, or charged with, defamation by the person against whom they make an allegation of wrongdoing, as has happened in some recent cases.<sup>33</sup>

### ***Tapping and interception powers***

Investigators have had power to obtain recordings of conversations for the purposes of their investigations under Indonesian law for some time. Article 42(2) of Law No 36 of 1999 on Telecommunications permits telecommunications service providers to record information upon the request of law enforcement agencies. However, as mentioned above, whether such recordings could be used as evidence at trial has been questionable (although in corruption cases, the Corruption Eradication Commission [*Komisi Pemberantasan Korupsi*] or KPK has powers to tap and record conversations as part of their investigations and prosecutions, under Article 12(1) of the KPK Law).

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<sup>33</sup> Hamid Chalid, 'A Personal Experience in Combating Corruption in Indonesia: The Wrongful Dissolution of the Joint Investigating Team against Corruption' *Australia-Indonesia Legal Fellowship Seminar*, Asian Law Centre, Faculty of Law, the University of Melbourne, Australia, 18 October 2001.

The ATL now provides investigators with powers to tap or record conversations and to intercept deliveries that are suspected to relate to an act, or a planned act, of terrorism. Article 31 states that:

On the basis of sufficient initial evidence as referred to in Article 26(4), investigators have the right to:

- (a) open, examine and confiscate letters or other items sent through the post, or other delivery services, which are connected to terrorism cases under investigation; and
- (b) tap conversations conducted by telephone or other communication devices which are suspected to be used to prepare, plan or commit terrorism.

Article 31(2) states that tapping can be performed only with the permission of a district court chairperson and that it can be permitted for a maximum of one year.

Much depends on the way the terms 'sufficient initial evidence as referred to in Article 26(4)' is interpreted. As was discussed earlier, there is uncertainty as to whether the evidence referred to in Article 26(4) is limited to evidence contained in intelligence reports, or whether it refers more broadly to any type of evidence. If these terms are given a limited interpretation - which, as I argued earlier, is probably the most justifiable interpretation - then investigators can seek permission to intercept or record only on the basis of an intelligence report. Police could not, therefore, obtain a court order to record or tap on the basis of witness testimony or other documentary evidence unless they are contained in an intelligence report.

### ***The ATL's attempt to permit retrospective application***

Article 46 of the ATL states that provisions of the ATL can be applied retrospectively by statute or interim law to acts perpetrated before the ATL came into force. This provision might be open to constitutional challenge on the ground that it appears to breach the non-derogable right, contained in Article 28I(1) of the Constitution to be free from the operation of retrospective laws. Nevertheless, the constitutional validity of Interim Law No 1 of 2002 and the legislation that confirmed it - Law No 15 of 2003 - has not yet been tested.

However, the constitutionality of Law No 16 of 2003, which purported to allow the retrospective application of the ATL to the Bali bombings, has been successfully challenged in Indonesia's Constitutional Court. I will not discuss this case in detail here as it has been covered elsewhere.<sup>34</sup> What follows is a brief summary only.

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<sup>34</sup> See Clarke, R, 'Retrospectivity and the Constitutional Validity of the Bali Bombing and East Timor Trials' *Australian Journal of Asian Law*, vol 5(2), 2003; and Butt, S & Hansell, D, 'The Masykur Abdul Kadir Case: Indonesian Constitutional Court decision No 013/PUU-I/2003' (2004) 6(2) *Australian Journal of Asian Law* 1.

Law No 16 of 2003<sup>35</sup> confirmed Interim Law No 2 of 2002<sup>36</sup> as a statute. Interim Law No 2 was enacted on the same day as Interim Law No 1 of 2002 and stated simply that Interim Law No 1 could be used to investigate, prosecute and try those involved in the first Bali bombings. In other words, Interim Law No 2 purported to allow the retrospective operation of Interim Law No 1 because Interim Law No 1 was not in existence when the Bali bombings were planned or took place.

Masykur Abdul Kadir, who the Denpasar District Court had sentenced to 15 years' imprisonment for assisting the Bali bombers, challenged the constitutionality of Law No 16 of 2003. The Constitutional Court, by bare majority, held that Law No 16 of 2003 was unconstitutional, because it breached the Constitution's non-derogable right to be free from prosecution under a retrospective law (Article 28I(1)).

It would appear that Article 46 of the ATL might be susceptible to a similar challenge in the future, given that, like Interim Law No 2 of 2002, it purports to permit the retrospective application of Interim Law No 1 of 2002.

However, incidentally, the Constitutional Court's decision has had no impact on convictions already obtained under Interim Law No 2. This is because from its very first case the Constitutional Court has made it clear that its decisions operate only prospectively.<sup>37</sup> That is, statutes that the Court declares unconstitutional are invalid only from the time the court declares them unconstitutional, not from the time they were passed. The net result of this, applied to the Bali bombing cases, is that the convictions of those involved in the Bali bombings cannot be 'undone'. Perversely, only those convicted under the anti-terrorism laws for a crime committed before those retrospective laws were passed, but were tried after the Constitutional Court's decision in the Bali bombing case, could arguably have their convictions overturned.

### ***Other provisions***

Finally, the ATL contains other provisions that, for reasons of space, will not be discussed in detail here and are referred to only for completeness.

- Articles 17 and 18 cover the application of the ATL to corporations.
- Articles 19 and 24 stipulate that minors cannot be subject to the death penalty, life imprisonment and some of the minimum sentences provided for under the ATL.
- Article 29(1) permits investigators, prosecutors and judges to order banks and financial services institutions to freeze any persons' assets which are suspected of being the proceeds of a crime of terrorism or a crime related to terrorism.
- Article 35 states that defendants can be tried and convicted *in absentia* if they have been legally summonsed yet fail to attend court.
- Article 36(1) states that each victim of the crime of terrorism has the right to obtain compensation or restitution, the amounts of which will be determined by the court.

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<sup>35</sup> The full name of the Law is: Law No 16 on the Stipulation of Interim Law No 2 of 2002 on the Application of Interim Law No 1 of 2002 on the Eradication of the Crime of Terrorism in the Bali bomb explosion on 12 October 2002 as a Statute.

<sup>36</sup> Interim Law No 2 of 2002 on the Application of Interim Law No 1 of 2002 on the Eradication of the Crime of Terrorism to the Bali bomb explosion of 12 October 2002.

<sup>37</sup> MK Decision No 001-021-022 / PUU-I/2003, reviewing Law No 20 of 2002 on Electricity.

Compensation is to be paid by the state (Article 36(2)) and restitution by the perpetrator to victims (Article 36(3)). Articles 37-42 cover this in more detail.

- Article 43 declares that the Indonesian government cooperates with other states in combating terrorism.

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