

**COMBATING TERROR:
INDONESIA'S LEGISLATIVE AND LAW
ENFORCEMENT
RESPONSE TO TERRORISM**

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DECLARATION

I hereby declare that the work herein, now submitted as a thesis for the Degree of Doctor of Philosophy of the Charles Darwin University, is the result of my own investigations, and all references to the ideas or work of other researchers have been specifically acknowledged.

I hereby certify that the work embodied in this thesis has not already been accepted in substance for any degree, and is not being currently submitted in candidature for any other degree.

ABSTRACT

The thesis examines Indonesia's state responses to terrorism and provides a critical analysis of the major legislative instruments for prosecuting and eradicating the crime of terrorism – most notably, Law No. 15 of 2003 the 'ATL' – enacted in the aftermath of coordinated bomb attacks which killed hundreds of civilians, both local residents and foreign tourists, on the island of Bali in October, 2002. In providing context to the enactment of the law, the thesis takes account of the complex socio-political factors existing during the early part of Indonesia's transition from authoritarian regime to democracy – a period known as *reformasi* – which contributed indirectly to a major resurgence of jihadist terrorism.

The thesis also gives attention to tracing the historical trajectory of Islamist groups which have perpetrated religiously inspired violence in Indonesia for almost two centuries – and which have continued to operate in various forms since 2002 – adapting their strategies to evade infiltration by police. While pre-*reformasi* governmental responses, both colonial and post-independence, were primarily military in nature, the thesis shows that two major events, the fall of Soeharto and the Bali bombing of 2002, provided a catalyst for a complete transformation of Indonesian state responses to terrorism. This transformation included the enactment of specific anti-terrorism legislation and the subsequent creation of dedicated counter-terrorism bodies such as Densus 88 and the National Counter-terrorism Agency. It also opened Indonesia's foreign policy and allowed unprecedented levels of cooperation and funding from international allies in counter-terrorism. This transformation led to a criminal law-based approach to terrorism, as distinct from a military insurgency approach, which has led to the prosecution, arrest and execution of hundreds of terrorist suspects and has garnered much international praise for Indonesian authorities due to their ostensible successes in counter-terrorism.

However, closer examination of the provisions of Indonesia's legislation and its application by police, prosecutors and the courts indicates a number of serious flaws. The 'definition' of terrorism contained in Indonesia's ATL is out of step with international norms and its politically-influenced application has led to illogical and inconsistent prosecutorial and sentencing outcomes. Calls to revise terrorism laws to close loopholes and address new developments such as the rise of ISIS have gone unheeded, leaving enforcement authorities in a compromised position.

The thesis accounts for the latest phase of terrorist activity in Indonesia, the growth of support for ISIS from 2014, and the legal position relating to Foreign Terrorist Fighters and Indonesia's commitments under international law and concludes with a number of recommendations to enhance Indonesia's counter-terrorism regime.

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LIST OF ABBREVIATIONS

9/11: Coordinated terrorist attacks on New York and Washington attributed to terrorist organisation Al Qaeda which occurred on September 11, 2001.

ABRI: Angkatan Bersenjata Republic Indonesia (Indonesian Armed Forces)

AFP: Australian Federal Police

APG: Asia Pacific Group (Regional sub-group of the FATF)

AML: Anti Money Laundering

AMLL: Law No. 8 of 2010 on Anti Money Laundering

Art: Article

ASEAN: Association of Southeast Asian Nations

ATL: Interim Law No. 1 of 2002 on the Eradication of the Crime of Terrorism

BNPT: Badan Nasional Penanggulangan Terorisme (National Counter-Terrorism Agency)

Brimob: Brigade Mobile (elite police paramilitary response unit)

CBRN: Chemical, Biological, Radiological and Nuclear

CT: Counter-terrorism

CFT: Countering financing of terrorism

CFTL: Law No. 9 of 2013 on Eradicating the Crime of Financing of Terrorism

CVE: Countering Violent Extremism

DENSUS: Detasemen Khusus (Special Detachment)

DNFBP: Designated Non-financial Businesses and Professions

DPR: Dewan Perwakilan Rakyat (the People's Representative Council)

FATF: Financial Action Task Force

FBI: Federal Bureau of Investigations

FPI: Front Pembela Islam (Islamic Defenders Front)

FTF: Foreign Terrorist Fighter

GAM: Gerakan Aceh Merdeka (Free Aceh Movement)

GWOT: Global War on Terror

HAM: Hak Asasi Manusia (Human Rights)

HRW: Human Rights Watch

ICG: International Crisis Group

IPAC: Institute for Policy Analysis of Conflict

IS: Islamic State

ISA: Internal Security Act

ISIS: Islamic State of Iraq and Al-Sham

ISIL: Islamic State of Iraq and the Levant

IT: Information Technology

JAT: Jemaah Anshorut Tauhid

JAS: Jemaah Anshorusy Syahid

JCLEC: Jakarta Center for Law Enforcement Cooperation

Jl: Jemaah Islamiyah

JIL: Jaringan Islam Liberal

Jo: Juncto (read in conjunction with)

KOMNAS HAM: Komisi Nasional HAM (National Human Rights Commission)

KOMPAK: Komite Aksi Penanggulangan Akibat Krisis

KUHP: Kitab Undang-undang Hukum Pidana (Indonesian Criminal Code)

KUHAP: Kitab Undang-undang Hukum Acara Pidana (Indonesian Criminal Procedural Code)

KYC: Know Your Customer

LPP: Lembaga Pengawas dan Pengatur (Regulatory and Supervisory Body in AML/CFT)

MA: Mahkamah Agung (Indonesian Supreme Court)

MIB: Mujahidin Indonesia Barat (Western Indonesian Mujahidin)

MIT: Mujahidin Indonesia Timor (Eastern Indonesian Mujahidin)

MK: Mahkamah Konstitusi (Indonesian Constitutional Court)

MMI: Majelis Mujahidin Indonesia (Indonesian Mujahidin Council)

MPR: Majelis Permusyawaratan Rakyat (the People's Consultative Assembly)

Muh: Muhammad

MUI: Majelis Ulama Indonesia (Indonesian Council of Islamic Scholars)

ML: Money laundering

NGO: Non-Governmental Organisation

NII: Negara Islam Indonesia (Islamic State of Indonesia)

NKRI: Negara Kesatuan Republik Indonesia (Unitary State of the Republic of Indonesia)

No: Nomor (number)

OJK: Otoritas Jasa Keuangan (Financial Services Authority in AML/CFT)

OPM: Organisasi Papua Merdeka (Free Papua Movement)

PERPU: Peraturan Pemerintah sebagai Pengganti Undang-undang (Interim Law)

PJK: Penyedia Jasa Keuangan (Financial Services Provider)

PN: Pengadilan Negeri (District Court)

POLRI: Kepolisian Republik Indonesia (Indonesian National Police)

RUU: Rancangan Undang-undang (bill)

SARA: Suku, Agama, Ras dan Antar Golongan (Group, Religion, Race and Sect)

SE: Surat Edaran (Official Circular Letter)

SEA: Southeast Asia

SEARCCT: Southeast Asia Regional Center for Counter Terrorism

STR: Suspicious Transaction Report

TNI: Tentara Nasional Indonesia (Indonesian National Army)

TPM: Tim Pembela Muslim (Muslim Defence Team)

UK: United Kingdom

UN: United Nations

UNSC: United Nations Security Council

US: United States of America

UU: Undang-undang (legislation)

UUD: Undang-undang Dasar (Indonesian Constitution)

WNI: Warga Negara Indonesia (Indonesian citizen)

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CHAPTER 1 – INTRODUCTION: OVERVIEW OF THE THESIS

INTRODUCTION AND BRIEF OVERVIEW

The primary objective of the thesis is to provide a critical analysis of Indonesia's counter-terrorism laws, to give an account of socio-political developments which led to their enactment, to assess their application and effectiveness, and to provide some idea of possible future directions in law reform.

The thesis is first and foremost, a study of the law; the law as it exists, the law as it has been applied, and the law as it may exist in future. However, it is also grounded in research which examines the social and political forces which shaped the laws and led to their creation – and is therefore inherently inter-disciplinary in its approach. A historical understanding of the phenomenon of terrorist violence within Indonesia, and state responses to it, both colonial and post-colonial, informs an understanding of contemporary issues in Indonesian law enforcement. This also links in to an analysis of the use of the term 'terrorism' in both political and legal contexts. A significant part of the thesis is devoted to discussing the definition of terrorism and its particular relevance to Indonesian manifestations of terrorism.

Forming the core of Indonesia's legislative responses to terrorism, the thesis discusses – in detail – Indonesia's two main counter-terrorism statutes, Law No. 15 of 2003 on the Eradication of the Crime of Terrorism and Law No. 9 of 2013 on the Prevention and Eradication of the Crime of Financing Terrorism. It then examines the application of the laws, which, due to poor legislative drafting, and a politically biased interpretation of the term 'terrorism', has seen them applied only to certain forms of religiously inspired violence, and not to other forms of political violence which also qualify as 'terrorism'. This, combined with flawed practices within the Indonesian judicial system, has led to illogical and inconsistent prosecutorial and sentencing

outcomes, and a significant portion of the thesis is dedicated to discussing and analysing these flaws.

The thesis takes account of the latest phase of Indonesian terrorist activity that is the growth of support for ISIS (the so-called Islamic State of Iraq and al-Sham') from 2014 onwards. A mismatch between government rhetoric and law reform has left police and prosecution authorities hampered in their attempts to tackle the growth of ISIS and a number of ISIS supporters in Indonesia have escaped prosecution due to deficiencies in the law. With test cases before the courts and talk of revisions to the terrorism laws, developments in this area continue to occur at the time of writing – however the thesis only considers developments up to January 2016. The thesis concludes by offering a set of recommendations to enhance the performance of Indonesia's counter-terrorism regime.

This thesis attempts to fill a gap in the literature, not only with regard to Indonesia's anti-terrorism laws themselves, but also their impact in the ultimate goal of reducing, or eradicating, terrorism. As an inter-disciplinary study, the thesis considers the laws in their societal and historical contexts to examine the rationale behind their enactment, and the subsequent impacts of their enforcement.

SIGNIFICANCE OF THE STUDY

As the nation with the world's largest population of Muslims, Australia's largest and closest neighbour, and a country which is considered an integral part of the so-called 'Second Front' in the Global War on Terror (GWOT), Indonesia is of key strategic importance to regional and global security. Whereas the primary front in the US-led GWOT is Afghanistan and the Middle East, the presence of terrorist groups within Southeast Asia with the capacity to conduct deadly attacks against civilian targets has

underlined the importance of the region in the global efforts to combat terrorism.¹ US-led military operations which derived from the threat of jihadist terrorism continue in places such as Afghanistan, Syria and Iraq and will do so for at least several more years.² Afghanistan has been in a state of continuous conflict with coalition forces for the 14 years since 2001, the direct result of the Taliban regime's complicity in terrorist attacks on the US on September 11, 2001. The thesis does not consider the root causes of conflict in Iraq and the Middle East, however, instability in the region has led to the rise of terrorist groups there, in particular ISIS, which has ramifications for the development of terrorist activity in Indonesia. The approaches of Southeast Asian countries and Indonesia in particular, in eradicating terrorist groups and stemming the flow of foreign terrorist fighters to other regions such as the Middle East, carry serious implications for regional and global security.

While Southeast Asian nations have agreed, through forums such as ASEAN, to in-principle support for integration and cooperation in countering terrorism,³ differences in domestic politics, terrorist presence, threat perception and public opinion have led to country-specific responses to terrorism based on domestic imperatives.⁴

In the case of Indonesia, global allies in countering Islamist terrorism such as the US, UK and Australia have committed significant resources to assist Indonesia in

¹ While the term 'the Second Front' has been used by a number of commentators to describe Southeast Asia's position in global anti-terrorism strategies, the use of the term 'the Second Front' has been challenged see: Amitav Acharya and Arabinda Acharya, "The Myth of the Second Front: Localizing the 'War on Terror' in Southeast Asia" (2007) *The Washington Quarterly* vol. 30 no. 4, 75.

² In October 2015, the US president announced military operations would continue in Afghanistan until at least 2017, and a planned troop drawdown would be postponed. Matthew Rosenberg and Michael Shear, "In Reversal, Obama Says U.S. Soldiers Will Stay in Afghanistan to 2017," *The New York Times* (online) 16 October 2015 <<http://nytimes.com/2015/10/16/world/asia/obama-troop-withdrawal-afghanistan.html>>.

³ *ASEAN Convention on Counter Terrorism*, Association of Southeast Asian Nations [ASEAN] (ratified by Indonesia 20 March 2012).

⁴ Andrew Chau, "Security Community and Southeast Asia: Australia, the US, and ASEAN's Counter-Terror Strategy" (2008) *Asian Survey* vol. 48 no. 4, 626.

these efforts and therefore monitor the results with close interest. The outcome will shape and influence regional and sub-regional security issues in the years to come. Indonesia's approach to counter-terrorism has been unique and arguably very effective and therefore deserves particular attention.

Perhaps the most important key to understanding Indonesia's 'war on terrorism' is that it has not been characterised as a 'war' which would require a primary response to be led by the Indonesian military. A complex intermix of factors playing out in the post 9/11 and post-Bali 2002 bombing socio-political sphere led to a criminal law-based approach to counter-terrorism – rather than a military insurgency approach. The thesis argues that this represents a clear departure from a military based approach to security issues which has predominated throughout Indonesia's history, both during the colonial and post-colonial eras. Central to the criminal law-based approach have been the various anti-terrorism laws and regulations and their application by law enforcement agencies. The thesis will primarily examine and analyse those laws.

While there is a significant amount of media reporting of terrorism attacks in Indonesia in general, very little policy or academic analysis has been directed to the question of Indonesia's counter-terrorism laws. None, to the author's knowledge, have provided an in-depth critical analysis of the impact of those laws. This absence of literature on the topic is not because a discussion of anti-terrorism laws is not relevant in the Indonesian context. It is of great relevance, as Indonesia has been credited with having implemented a counter-terrorism legal regime which has been one of the most effective in the world.⁵ Much of this success was driven by a new set of laws enacted in

⁵ Statements made by a number of different commentators support this idea, for example: 'In so doing, just as Indonesia has probably been more effective than any other nation in dealing with modern terrorism, it has done so without discarding new democratic values' Colin McDonald, "'The Republic Is Ours': The Indonesian Response to the So-Called 'War on Terror'" (2006) *Bar News* vol. Summer 2005/2006, 21. 'Since the international community launched its collective

the immediate aftermath of the terrorist attacks in Bali in October, 2002, as well as an evolution in police practices, including international cooperation in counter terrorism investigations.

In the years since the fall of the authoritarian Soeharto regime in 1998, Indonesia has undergone a dramatic transformation in its social, political and legal fabric. Among the many changes and additions to Indonesia's laws has been the enactment of two key pieces of legislation which form the backbone of the thesis. Those laws are:

Law No. 15 of 2003 on the Eradication of the Crime of Terrorism, (the 'ATL'); and

Law No. 9 of 2013 on the Prevention and Eradication of the Crime of Financing Terrorism (The 'CFTL').

Enacted a decade apart, these two laws form the legislative framework for Indonesia's attempts to prevent and eradicate the crime of terrorism. The laws, however, do not exist in a vacuum. Their creation is the result of complex social and political processes which include external influences such as the US-led GWOT. Further, the laws are enforced through the actions of state organs such as the police, prosecutors and the courts, all of which have been both praised for their successes and criticised for breaches and weaknesses.

assault on terrorism, the most successful nation in the world at combating Islamo-fascism has been Indonesia' Drew Davis, "Al-Qaeda in the Malay Archipelago: A Case Study of the July 2009 JW Marriott & Ritz-Carlton Bombings in Jakarta, Indonesia" (2010) *Pax Americana Institute Report* March 2010. 'Over the past two years [Indonesia] has prosecuted and convicted more terrorists than any other national government' Greg Fealy and Aldo Borgu, "Local Jihad: Radical Islam and Terrorism in Indonesia" (2005) *ASPI Strategy Report* The Australian Strategic Policy Institute, 5. 'The Indonesian government, to its credit, sees terrorism as a law enforcement problem, not an insurgency, to be addressed by the police, not the military. In general, it has done better than most Western democracies in preserving the rule of law and basic civil rights while addressing terrorism – although in this day and age, that's not saying much' Sidney Jones, "Terrorism, Counter-Terrorism and Human Rights in Indonesia" (2006) *Submission to the International Commission of Jurists, Jakarta, 4 December 2006*, 2. In 2010, Allard called the Indonesian police 'the finest exponents of anti-terrorism in the world' Tom Allard, "Indonesia Terror Laws to Change " *The Age* (online) 5 June, 2010 <<http://www.theage.com.au/world/indonesia-terror-laws-to-change>>.

While the laws have provided effective and sufficient legal structure for authorities to combat terrorism on various fronts, in both cases, their enactment was only realised following intense international pressure for the Indonesian parliament to act. In the immediate post-9/11 global political environment, the UN, the US and other foreign governments made it imperative for the Indonesian parliament to enact specific legislation for countering terrorism. While drafting of a counter-terrorism law was in process throughout 2002, it was the catastrophic attacks in Bali of October of that year that led to the rapid finalisation and enactment of the law. Similarly, the 2013 law for countering the financing of terrorism was only enacted following significant pressure from the United Nations, and the Financial Action Task Force – an international watchdog for the implementation of laws for countering the financing of terrorism and money laundering. Calls to reform and strengthen the ATL have also, thus far, gone unheeded, and the ATL remains unamended since it was enacted in 2002. Whether this legislative inertia indicates a systemic reluctance on the part of the Indonesian government and legislature to seriously address terrorism issues is therefore a question of importance to the thesis.

The first part of the thesis takes account of the historical and cultural forces, the socio-political conditions and the strategic developments which gave rise to the criminal phenomenon of political or religious violence which we regard as being 'terrorism' within the territory known as Indonesia – formerly the Dutch East Indies. This leads into a discussion of how the international community has conceptualised terrorism, academically and legally, which informs the discussion of terrorism in the Indonesian context and clarifies the concept of what terrorism actually is. The thesis then considers how the Indonesian state has responded to the criminal phenomenon of terrorism in written legislative instruments, and how those instruments have been applied in practice by state institutions; the police, prosecutors and courts. Finally, considering the evolution of new manifestations of terrorism, the thesis examines how

state mechanisms, laws and law enforcement, are able to cope with those evolving threats. The thesis argues that a number of deficiencies in both the legislation and its enforcement, notably by prosecutors and the courts, has led to a failure to adequately address terrorism and leaves open the likelihood of further terrorist attacks.

THEORETICAL APPROACHES TO THE STUDY OF TERRORISM

Bakker outlines three broad theoretical approaches to the study of terrorism: rational, social-psychological, and multi-causal.⁶ The rational or instrumental approach, favoured by political science scholars such as Martha Crenshaw⁷, attempts to understand terrorism as the rational acts of rational actors seeking to achieve political goals. The social psychology approach, epitomised in the writing of Jerrold Post for example, focusses on the psychology and thought processes of individual terrorists.⁸ The multi-causal approach is a less well-defined qualitative approach premised on an underlying complexity of causes in terrorism.⁹

The thesis takes a multi-causal, inter-disciplinary approach to the examination of terrorism and counter-terrorism in Indonesia. While the dominant theme of the thesis is an examination of state legislative responses to terrorism and their impacts – this approach necessarily entails some analysis and discussion of the historical context of terrorism in Indonesia, and some understanding of its causes, motivations and goals.

⁶ Edwin Bakker, "Video Lecture Transcripts" *Terrorism and Counter Terrorism: Comparing Theory and Practice*, (2014) International Centre for Counter Terrorism, Leiden University, 1.

⁷ Martha Crenshaw, "The Debate over "New" Vs. "Old" Terrorism," *Presentation to the Annual Meeting of the American Political Science Association* (2007) http://www.start.umd.edu/sites/default/files/files/publications/New_vs_Old_Terrorism.pdf

⁸ For a psychological analysis of terrorism and terrorist actors in Indonesia, including the Bali bombers see *Asian Journal of Social Psychology* vol. 16 no. 2. The special issue of the journal 'brings together three studies on the motivations and development of terrorists in Indonesia.' Charles Harb and Ronald Fischer, "Terrorism and Jihad in Indonesia: Questions and Possible Ways Forward," *Asian Journal of Social Psychology* (2013) vol. 16 no. 2. Also: Luis de la Corte, "Explaining Terrorism: A Psychosocial Approach," (2007) *Perspectives on Terrorism* vol. 1 no. 2 <http://www.terrorismanalysts.com/pt/index.php/pot/article/view/8/18>.

⁹ Bakker, above n 6, 6.

Understanding the root causes of terrorism, informs the discussion of the effectiveness of laws to eradicate it.

NOTE ON SOURCES

In light of the inherent weaknesses of research with an over-reliance on secondary sources, primary sources have been preferred to inform the analysis where possible. However, the research methodology was limited to written sources and interviews with non-terrorist subjects. Accordingly primary interview subjects have included government officials from the National Counter Terrorism Agency, Densus 88, the Ministry of Law and Human Rights and The Financial Transactions Reporting and Analysis Centre. Academic sources from several universities across Indonesia and Australia have also been consulted in interviews as well as experts from NGOs including Kontras, the International Institute for Peace Building and the International Crisis Group.

Primary written sources include statutes and reported cases from Indonesia's higher courts, that is the Supreme Court and the Constitutional Court whose decisions are available online. Decisions from lower courts are much more difficult to access. Judgements in these matters are required to be made available only to the parties in the case, and are generally not publicly accessible. However, some progress is being made to increase public online accessibility of court decisions.¹⁰

Secondary sources such as books and journal articles have also been used throughout to inform certain aspects of the analysis. Governmental and NGO reports,

¹⁰ 'Court Reaches Transparency Milestone: A Million Decisions Published Online' *Australia Indonesia Partnership for Justice* 24 September 2014 http://www.aipj.or.id/court_reform. The online announcement claimed that one million decisions had been uploaded to the Supreme Court's website stating 'at the end of 2013, 98 courts had still not published any of their decisions. However, thanks to intensive efforts almost all courts in the country have now published their decisions online'.

so-called 'grey literature' have also been valuable sources, particularly reports by the International Crisis Group and the Institute for Policy Analysis of Conflict.

Media reports are used as a source of opinion and sometimes facts. In general, less emphasis is placed on opinion or analysis offered in such articles and more on reported facts and direct quotes from primary sources, such as political or religious leaders, terrorist suspects and police.

Some quantitative measures of terrorist activity and prosecutions have been used. Factual information of this sort was compiled from a combination of open source data, primarily the Global Terrorism Database, and privately sourced data from interviews with government, NGOs and expert monitors. Some analysis of statistics relating to terrorism suspects apprehended and prosecuted, as well as lengths of sentences are included in Chapter 6. Elsewhere, the thesis takes a legal, qualitative approach.

As primarily legal research, the thesis seeks to provide, firstly a critical analysis of legislative and law enforcement responses to terrorism as well as related issues such as judicial application of the laws and law reform. This aspect of the research relies on legal methodology primarily a study of the available academic literature, case law, attending court cases and examination of court documents, including case dossiers, briefs of evidence and written judgements. Also, a study of the existing legislation and proposed reforms to the current legislation is essential – draft revisions to the ATL were sourced from contacts at the Ministry of Law and Human Rights, Directorate General of Legislation. Expert commentary on these aspects of the research was also sought through semi-structured interviewing of legal experts, academics and practitioners.

Human sources therefore fall into four main categories:

1. Academic experts, Indonesian, Australian or other;
2. Legal practitioners
3. Media/Journalists/Commentators/NGOs/Lobby Groups
4. Government officials

Also, examination of relevant media articles and reports are important as developments in actual cases can occur very quickly and these reports are often the only available source of information, except when the researcher was able to attend court sessions.

Apart from a handful of books and journal articles, in both Indonesian and English, very little academic literature exists which specifically examines Indonesia's anti-terrorism laws and their application. However, since 2003 approximately 800 terrorism suspects have been apprehended and prosecuted and the court records of these cases represent a large untapped body of jurisprudential research material of enormous importance in analysing Indonesia's application of its terrorism laws. In completing chapter 6, which is primarily an analysis of sentencing in terrorism cases, approximately 30 cases were researched and analysed, however it is acknowledged that this is small percentage of the total number of cases. Further, more comprehensive research and analysis of the hundreds of terrorism cases which have come before the Indonesian courts is recommended and could provide important insight into, not only the application of terrorism laws, but information about the operational methods and capabilities of terrorist networks which are still active in Indonesia.

THE LITERATURE ON TERRORISM

Bakker notes the 'enormous growth' in the output of terrorism research and publications since the Al Qaeda attacks of September 11, 2001 ('9/11').¹¹ To illustrate the point Professor Bakker, Director of the International Center for Terrorism and

¹¹ Bakker, above n 6, 2.

Counter-terrorism at Leiden University, conducted an analysis of the aggregated totals of books and journal articles with 'terrorism' in the title. The results show that the total quantity of publications on terrorism in approximately 13 years since 9/11 is more than double the aggregated total publications in all the decades prior to 9/11. Not only has the number of publications increased exponentially, the number of scholars, experts, research centres, training, policy advice and consultancy, has also seen a dramatic increase – 'as governments wanted answers to all kinds of questions. Who was threatening us? Why? What can we do about it?'¹² Tinnes argues that 9/11 was a 'trigger event for terrorism research'¹³ while Young and Findley note 'the amount of research on terrorism being published in political science journals has doubled several times over what it was pre-9/11'.¹⁴

Despite this enormous growth in scholastic interest however, the quality of the output has been questioned. Schuurman and Eijkman point to a 'scarcity of primary-source based research' and an 'over-reliance' on secondary sources.¹⁵ Eminent terrorism scholar Alex Schmid wrote '[T]here are probably few areas [...] where so much is written on the basis of so little research'.¹⁶ In 2001, Andrew Silke argued that despite thirty years of effort, the study of terrorism has failed to reach academic maturity and as a result 'struggles in its efforts to explain terrorism or to provide

¹² Ibid.

¹³ Judith Tinnes, "The Art of Searching: How to Find Terrorism Literature in the Digital Age" (2013) *Perspectives on Terrorism* vol. 7 no. 4, 79

¹⁴ Joseph K. Young and Michael G. Findley, "Promise and Pitfalls of Terrorism Research" (2011) *International Studies Review* vol. 13 no. 3, 411.

¹⁵ Bart Schuurman and Quirine Eijkman, "Moving Terrorism Research Forward: The Crucial Role of Primary Sources" (2013) *ICCT Background Note Policy Brief* <www.icct.nl/download/file/Schuurman-and-Eijkman-Moving-Terrorism-Research-Forward-June-2013.pdf>. Adam Dolnik, "Conducting Field Research on Terrorism: A Brief Primer" (2011) *Perspectives on Terrorism* vol. 5 no. 2, 5.

¹⁶ Alex Schmid and Albert Jongman, *Political Terrorism: A New Guide to Actors, Authors, Concepts, Data Bases, Theories, and Literature* (New Brunswick: Transaction Books, 1988) 179.

findings of genuine predictive value'.¹⁷ Silke points out that the share of terrorism publications that actually presents *new* information is therefore worryingly low at about 20 percent. Adam Dolnik and Magnus Ranstorp referred to 'a highly unreliable closed and circular research system, functioning in a constantly reinforcing feedback loop'.¹⁸

In discussing the current state of terrorism studies publications, Schmid posits 'while some topics are 'fashionable' and obtain an extraordinary amount of attention (e.g. CBRN threats, radicalization, suicide terrorism, jihadist terrorism) other (sub-) topics are un- or under-researched.' Under the auspices of the Terrorism Research Initiative, Schmid, seeking 'to stimulate individual and collaborative research on terrorism and other forms of political violence threatening human security,' (p.1) formulated a list of '50 Un- and Under-researched Topics in the Field of (Counter-) Terrorism Studies'.¹⁹

The list catalogues, according to Schmid, the areas that have been neglected by scholars – and which could be usefully researched. Among the topics included on the list are:

25. The rehabilitation of terrorists vs. the rehabilitation of common criminals in prison: recidivism records compared;
26. Prisons: new ways of preventing and countering radicalization of prisoners and advancing rehabilitation of convicted offenders;
31. Differentiating between terrorism, other forms of political violence and human rights violations: towards a more balanced approach to assessing armed conflict and repression;

¹⁷ Andrew Silke, "The Devil You Know: Continuing Problems with Research on Terrorism" (2001) *Terrorism and Political Violence* vol. 13 no. 4, 1.

¹⁸ Schuurman and Eijkman, above n 15, 2.

¹⁹ Alex P. Schmid, "50 Un- and under-Researched Topics in the Field of (Counter-) Terrorism Studies," (2011) *Perspectives on Terrorism* vol. 5 no. 1, 76.

- 33. Measuring the actual effectiveness of terrorism: findings from empirical research on the tactical and strategic outcomes of uses of terrorism;
- 34. State human rights violations in response to terrorism – how widespread, how serious?;
- 37. Careers of ex-terrorists and their role in countering terrorism;
- 38. Terrorists released from prison: subsequent careers;
- 48. The Arab Awakening and its possible implications for terrorism and international counter-terrorism cooperation;
- 49. Terrorist groups and political parties - same goals, different tactics: between cooperation and rivalry;

While many of the items on the list relate to specific countries such as Pakistan and Afghanistan, scholars of Indonesian studies should note that many of the topics on the list are of direct relevance to the Indonesian situation, including those mentioned above.

Also on Schmid's list, is the following:

- 44. New legislation on terrorism: inventory, comparison and impact.

Schmid could have had Indonesia in mind when he included this item on the list. Indonesia, like many other countries, enacted specific anti-terrorism following the terrorist attacks of 9/11, however very little research has been directed at providing an inventory of the laws, a comparison with other jurisdictions or analysing their impacts. It is submitted that another item of equal importance to those enunciated by Schmid in item 44, which links into an analysis of their impacts, is the question of whether there is a need to reform the laws, and, if so, what revisions may be necessary to enhance their effectiveness. This element has also been given significant attention in the thesis.

LITERATURE REVIEW

As noted above, while academic analysis and discussions of terrorism issues globally has increased dramatically since 9/11, academic discussion of Indonesian terrorism,

and Indonesia's terrorism laws in particular has received very little academic attention and analysis. Therefore it is appropriate to consider these two areas separately.

In examining underlying broad legal theories as a foundation for the discussion, the thesis considers issues of law reform and the creation of the Indonesian constitution. In this discussion, the collection of essay chapters contained in *Indonesia Law and Society* are of authoritative value.²⁰ Particular reliance is placed on chapters 1 to 4 in *Part I. A Reformed Republic* for the constitutional and broad theoretical background to the development of legal issues in Indonesia, and on chapters 21, 23 and 24 in *Part VI. Human Rights, Gender and Law* in exploring issues relating to human rights and the Indonesian criminal justice system.

Academic contributions on the broader socio-political context of religious extremism and terrorism in Indonesia have been relied on in the background discussion in Chapter 3.²¹ Also, for broader background issues relating to Islam and its practice within Indonesia, Merle Ricklefs' authoritative historical work *A History of*

²⁰ Tim Lindsey (ed), *Indonesia Law and Society* (2nd Edition, Federation Press, 2008).

²¹ Anthony L. Smith, "The Politics of Negotiating the Terrorist Problem in Indonesia" (2005) *Studies in Conflict & Terrorism* vol. 28 no. 1, 33; Bruce Vaughn, Congressional Research Service "Terrorism in Southeast Asia" (2009) *CRS Report for Congress* <https://www.fas.org/sgp/crs/terror/RL34194.pdf>; Marcus Mietzner, "Politics of Engagement: The Indonesian Armed Forces, Islamic Extremism, and the War on Terror" (2002) *Brown Journal of World Affairs* vol. IX no. 1, 71; Greg Barton, "Indonesia's Year of Living Normally" (2008) *Southeast Asian Affairs*, 123; Greg Barton *Jemaah Islamiyah: Radical Islamism in Indonesia* (Singapore University Press, 2004); Anthony L Smith, "Reluctant Partner: Indonesia" (2003) *Asian Affairs: An American Review* vol. 30 no. 2, 142; Adrianus Harsawaskita and Evan A Laksmana, "Rethinking Terrorism in Indonesia: Lessons from the 2002 Bali Bombing" (2007) *UNISCI (Research Unit on International Security and Cooperation) Discussion Papers*, no. 15 <https://www.researchgate.net/publication/26497553_Rethinking_Terrorism_in_Indonesia_Lessons_from_the_2002_Bali_Bombing>; Bernard Adeney-Risakotta, "Power, Religion and Terror in Indonesia" (2003) *International Institute for Asian Studies Newsletter* March 2003, 30; Garth N. Jones, "'Istana Stands Firm: Indonesia's Quelling Islamic Terror' Culture Matters" (2009) *Journal of Third World Studies* vol. 26 no. 2, 51; Kumar Ramakrishna, "'The Southeast Asian Approach to Counter-Terrorism': Learning from Indonesia and Malaysia" (2005) *The Journal of Conflict Studies* vol. Summer, 1; Edward V. Schneier, "Reformasi and the Indonesian 'War on Terror': State, Military and Legislative-Executive Relations in an Emerging Democracy" (2009) *Journal of Legislative Studies* vol. 15 no. 2/3, 294. Amitav Acharya and Arabinda Acharya, "The Myth of the Second Front: Localizing the 'War on Terror' in Southeast Asia" (2007) *The Washington Quarterly* vol. 30 Autumn, 75.

Modern Indonesia Since C.1200, and *Islamisation and Its Opponents in Java*²² were used. *Understanding Islam in Indonesia: Politics and Diversity* by Robert Pringle is also cited.²³ Other sources were relied on for the history of violent extremism and Darul Islam.²⁴ On terrorism issues, the collection of essays contained in *After Bali: The Threat of Terrorism in Southeast Asia* by Kumar Ramakrishna and See Sent Tan (eds) is cited.²⁵

A number of Indonesian authors, including current and former practitioners in counter-terrorism have written works discussing terrorism with specific focus on Indonesia. While they may touch on legal aspects of the discussion, these discussions pay little attention to legal issues. Golose, a police general and BNPT official has written two works, focussing on the root causes of radicalisation,²⁶ and cyberterrorism and methods for combating it²⁷ respectively. Hendropriyono a former TNI general and head of BIN under President Megawati published his doctoral thesis on the philosophical and linguistic aspects of terrorism²⁸ and a work on links between terrorism and wider social issues in Indonesia.²⁹ Former BNPT head, Mbai, wrote a useful summary of the operations of contemporary terrorist groups and their links to DI.³⁰

²² M.C. Ricklefs, *Islamisation and Its Opponents in Java: A Political, Social, Cultural and Religious History, C. 1930 to Present* (Singapore: National University of Singapore Press, 2012). Dong Sull Choi, "The Process of Islamization and Its Impact on Indonesia" (1996) *Comparative Civilizations Review* vol. 34 no. Spring, 11.

²³ Robert Pringle, *Understanding Islam in Indonesia: Politics and Diversity* (Singapore: Editions Didier Millet, 2010).

²⁴ Fealy and Borgu, above n 5; Hiroko Horikoshi, "The Darul-Islam Movement in West Java (1948-62): An Experience in the Historical Process" (1975) *Indonesia* vol. 20 October, 58; C. van Dijk, "Rebellion under the Banner of Islam: The Darul Islam in Indonesia" (PhD Thesis, Leiden University, 1981).

²⁵ Kumar Ramakrishna and See Seng Tan, *After Bali: The Threat of Terrorism in Southeast Asia* (Singapore: World Scientific, 2003).

²⁶ Petrus Reinhard Golose, *Deradikalisasi Terorisme: Humanis, Soul Approach Dan Menyentuh Akar Rumput* (Jakarta: Yayasan Pengembangan Kajian Ilmu Kepolisian, 2009).

²⁷ Petrus Reinhard Golose, *Invasi Terorisme Ke Cyberspace* (Jakarta: Yayasan Pengembangan Kajian Ilmu Kepolisian, 2015).

²⁸ A.M. Hendropriyono, *Terorisme: Fundamental Kristen, Yahudi, Islam* (Jakarta: Kompas, 2009).

²⁹ A.M. Hendropriyono, *Dari Terorisme Sampai Konflik TNI-Polri: Renungan Dan Refleksi Menjaga Keutuhan NKRI* (Jakarta: Kompas, 2013).

³⁰ Ansyaad Mbai, *Dinamika Baru Jejaring Teror* (Jakarta: Squad Publishing, 2014).

For discussions directly related to Indonesia's anti-terrorism laws, sources are far scarcer. One attempt at analysing Indonesian anti-terror legislation by an Australian academic is provided by Simon Butt in *Anti-Terrorism Law and Criminal Process in Indonesia*.³¹ It provides a useful analysis of the law, its advantages and developments on the Criminal Code

There are very small number of Indonesian books and journal articles with specific focus on terrorism laws. One book text of use is that of Wahid which considers terrorism from the perspective of religion, human rights and law.³² On broader questions of criminal law, Hiariej's work *Prinsip-prinsip Hukum Pidana* was useful, especially for the section on sentencing.³³ On questions of prosecutorial procedure in terrorism cases, the *Guide to Handling Terrorism* issued by the Attorney General's office was helpful.³⁴ Juwana published some notes on the terrorism bill before it was enacted.³⁵ Santoso's discussion of the ATL outlined the enactment of the law and some of its main features however offered little by way of critical analysis or discussion of law reform.³⁶

An analysis of the operation of Indonesia's constitutional court, with specific reference to its application in terrorism trials is supplied by Butt and Hansell. The article covers the controversial Constitutional Court decision considering the validity of

³¹ Simon Butt, "Anti-Terrorism Law and Criminal Process in Indonesia" *ARC Federation Fellowship Islam and Modernity: Syari'ah, Terrorism and Governance in South-East Asia report* (Asian Law Centre, University of Melbourne, 2008).

³² Abdul Wahid, Sunardi, and Muhammad Imam Sidik, *Kejahatan Terorisme: Perspektif Agama, HAM Dan Hukum*, ed. Aep Gunarsa (PT Refika Aditama, 2004).

³³ Eddy O.S. Hiariej, *Prinsip-Prinsip Hukum Pidana* (Yogyakarta: Cahaya Atma Pustaka, 2014).

³⁴ Kejaksaan Agung, *Panduan Penanganan Perkara Tindak Pidana Terorisme*, ed. Satuan Tugas Penanganan Perkara Tindak Pidana Terorisme dan Tindak Pidana Lintas Negara (Jakarta: Kejaksaan Agung Republik Indonesia, 2013).

³⁵ Hikmahanto Juwana, "Catatan Singkat RUU Anti Terorisme. Brief Notes on the Draft Anti Terrorism Laws" (2002) *Hukum Online* <<http://www.hukumonline.com/berita/baca/hol5697/catatan-singkat-ruu-anti-terorisme>>.

³⁶ Topo Santoso, "Anti-Terrorism Legal Framework in Indonesia: Its Development and Challenges" (2012) *Mimbar Hukum* vol. 25 no. 1, 88.

laws which attempted to retrospectively apply Law No.15 2003 to the Bali bombing of 2002³⁷.

In the absence of academic journal articles or book chapters³⁸, another important source of commentary is the grey literature of governmental and NGO reports and background papers. Of particular note are the reports issued by the International Crisis Group (ICG), the Institute for Policy Analysis of Conflict (IPAC) and Human Rights Watch (HRW) which provide well-researched background information on terrorism and wider issues related to peace-building. HRW released a comparative report on anti-terrorism laws which is cited in chapter 6.³⁹ Journal articles on ASEAN regional and sub-regional responses to terrorism were also used.⁴⁰ On issues of global and regional counter-terrorism financing laws several journal articles are cited.⁴¹

However, while some reports touch on legal issues, they tend not to be the main focus. KOMNAS HAM (the National Commission for Human Rights in Indonesia) also releases reports and letters relating to terrorism, albeit with a human rights focus.⁴² These reports indicate significant independence of thought and do not hesitate to criticise governmental actions regarding human rights. Other NGOs such as the Setara Institute, Imparsial and KontraS are also useful sources of information and analysis, particularly on human rights related issues.

³⁷ Simon Butt and David Hansell, "The Masykur Abdul Kadir Case: Indonesian Constitutional Court Decision No 013/PUU-I/2003" (2004) *Australian Journal of Asian Law* vol. 6 no. 2, 176.

³⁸ For example, one of the most important academic works on Indonesian law, *Indonesia Law and Society* (Lindsey above n 20), contains relatively little discussion of the anti-terrorism laws and is almost exclusively restricted to the issue of constitutional retrospectivity outlined above.

³⁹ "In the Name of Security Counterterrorism Laws Worldwide since September 11" (2012) Human Rights Watch report <http://www.hrw.org/sites/default/files/reports/global0612ForUpload_1.pdf>.

⁴⁰ Chau above n 4; Jonathan T. Chow, "ASEAN Counterterrorism Cooperation since 9/11" (2005) *Asian Survey* vol. 45 no. 2, 302; Ralf Emmers, "Comprehensive Security and Resilience in Southeast Asia: ASEAN's Approach to Terrorism" (2009) *Pacific Review* vol. 22 no. 2, 159.

⁴¹ Richard Barrett, "Preventing the Financing of Terrorism" (2012) *Case Western Reserve Journal of International Law* vol. 44, 719; Nicola McGarrity, "The Criminalisation of Terrorist Financing in Australia" (2013) *Monash University Law Review* vol. 38 no.3, 55.

⁴² Idfhal Kasim, "Upaya Pemberantasan Tindak Terorisme Harus Menghormati Prinsip-Prinsip Hak Asasi Manusia," (2009) National Human Rights Commission of Indonesia [KOMNAS HAM] report.

Other primary sources are the laws themselves – including legislation, draft legislation and judicial decisions. While advances are being made in bringing some of these sources online and making them freely available, results are varied. Finding most legislation online is now possible whereas finding judgments and draft laws can be problematic – with the notable exception of the Constitutional Court. Decisions of lower Indonesian courts are not reliably publicly reported (some selected decisions are published on websites of particular district courts but this is by no means a standardised process), which forms a significant barrier to legal research in this area.

While recognising the concerns raised through reliance on media reports and newspaper items,⁴³ these reports form an indispensable source of facts relating to current issues in terrorism in Indonesia, such as types of attacks, numbers of victims, and statements from political and religious leaders. A further source of factual data on terrorism incidents has been taken from the Global Terrorism Database compiled by the National Consortium for the Study of Terrorism and Responses to Terrorism.⁴⁴

ESSENTIAL TERMS

Some key terms which will be used throughout the analysis are discussed here.

ISLAMIST

The term Islamist has been used with increasing frequency in post 9-11 discourse and some would say with increasing ambiguity. Some, particularly Muslim scholars, object to the pejorative connotations that the term has taken on – as though to seek to apply the principles of Islam is regarded as being inherently negative. Within this thesis it is taken to generally indicate groups or individuals who advocate a stricter application of

⁴³ Schuurman and Eijkman stated 'The heavy use of newspaper items and other media-based sources of information raises concerns about the accuracy and objectivity of the information being presented by scholars. As Schmid points out, data in the public domain is frequently unable to clarify seemingly basic questions such as who was responsible for a certain attack.' Schuurman and Eijkman, above n 15, 2.

⁴⁴ "Global Terrorism Database" (2015) National Consortium for the Study of Terrorism and Responses to Terrorism [START] <http://www.start.umd.edu/gtd/>

fundamental Islamic teachings and law in both public and private life. The non-specific term 'fundamentalist' could also be used. Within a political context, Islamist groups see the world primarily through the prism of Islamic teachings and seek to structure the state and society in accordance with Islamic principles.⁴⁵ This position extends from the belief, held by some, that Islam is not just a religion but rather a set of principles which ought to govern every aspect of public and private life, of trade, commerce, politics, interpersonal relations and so on. Within the specific Indonesian political context there are *Islamic* political parties which are essentially pluralist and apply the neutral state philosophy of Pancasila; such as Partai Amanat Nasional (PAN) and Partai Kebangkitan Bangsa (PKB). There are also parties such as Partai Persatuan Perkembangan (PPP), Partai Bintang Bulan (PBB) and Partai Kesejahteraan Sosial (PKS) which advocate the stricter application of Islamic laws and are seen as being *Islamist*. The term Islamist does not necessarily imply a preference or willingness to use violence to pursue Islamist goals. However, most terrorists who use violence for religious goals within Indonesia could be described as Islamist.

RADICAL OR EXTREMIST ISLAMIST

Radical or extremist groups and individuals take the view that the world is currently in a state of urgent crisis. That is, that foreign infidel or *kafir* forces, i.e. Christian and Jewish, conspire to victimise and attack the Islamic community; that, internally, portions of the Islamic community are too irresolute, too willing to compromise, and neglect the true teachings of Islam. The antidote to this crisis is seen as the immediate and strict application of Shari'a law to create a more pious, just society, including *hudud* or prescribed punishments for transgressors including stoning, scourging and amputation. Indonesian radical Islamists usually advocate the special recognition of Islam within the state ideology, and the creation of Indonesia as an Islamic caliphate,

⁴⁵ Fealy and Borgu, above n 5, 23.

i.e. an Islamic state headed by a caliph, or a political and spiritual head of the *umat*.⁴⁶ The ideology of groups such as Darul Islam, Jemaah Islamiyah and their offshoots are strongly aligned with radical Islamist thinking. When a radical or extremist group or individual decides to use shocking violence against civilians in the pursuit of their politico-religious goal of an Islamic state, only then can they be labelled *terrorist*.

JIHADIST

Along with *violent extremist/Islamist* or *militant extremist/Islamist* are used within the context of this thesis to mean radical or extremist Islamists who are demonstrably willing to use violence in order to achieve their religious goals. The Koranic concept of *jihad* is far more complex than simply a directive or permission to use violence or war to advance or defend the Islamic community. The religious concept of *jihad* entails many peaceful means and forms. However, a detailed discussion of the religious and theological roots of *jihad* is outside the scope of this thesis. Conceptually, *jihadist* and *terrorist* indicate two separate meanings and criteria. In reality however, within the Indonesian context there is considerable overlap between the two, since there are no declared or 'justified' conflicts, between Indonesian Islamists and the state, one who is committed to using violence in pursuit of their religious or political goals will most likely be considered a terrorist in accordance with the definitions discussed above.

TERRORIST

Defining 'terrorist' or 'terrorism' is an issue of surprising complexity as discussed in detail in Chapter 3 – various definitions have been offered by governments, international bodies such as the UN, legislatures, academics, even insurance companies. While noting that no universal definition of terrorism exists (and that the definition of terrorism under Indonesian law is substantially different) in the thesis, unless otherwise specified in the discussion, a terrorist act is considered to consist of the

⁴⁶ Ibid.

following elements: serious violence (that is violence which endangers human life or causes serious injury); aimed at civilians or non-combatants; with an ideological, political or religious motivation; for the purpose of intimidating a populace or coercing a government.

STRUCTURE OF THE THESIS

Chapter 1 introduces the thesis. It provides a brief introductory overview and discusses the significance of the study. It describes the methodology used, and discusses the existing state of the literature in the field. The chapter defines some important terms which are used frequently throughout the thesis such as 'Islamist' and 'jihadist' and concludes with a chapter-by-chapter summary of the overall structure of the thesis.

Indonesia's laws, like all laws, are a product of the social and political context in which they were created. Chapter 2 therefore addresses the socio-political background to the study. It begins by considering some attempts to conceptualise violence in Indonesia, and concludes that due to its complex historical, political and social fabric, Indonesia does not follow broad global trends in terrorism and counter-terrorism which have been outlined by some terrorism scholars. Indonesia is home to the world's largest population of Muslims; however it is also a complex and heterogeneous society, based on the over-arching theocratic principles of the state ideology of Pancasila. Indonesian laws and law enforcement, therefore, are shaped and influenced by broad social, historical, cultural, political and religious forces which must be considered in the analysis of terrorism and counter-terrorism. This chapter considers the trends, issues and history of terrorism in Indonesia in order to inform the discussion on current laws and their impacts. It also gives detailed attention to the evolution of terrorist strategies post-2002 as important background to a discussion of the effectiveness of anti-terrorism laws.

Chapter 3 discusses the question of defining terrorism with particular reference to the Indonesian context. A clear understanding of the term 'terrorism' is vital to an

academic discussion of the topic. The imprecise, biased and politicised usage of the term 'terrorist' and 'terrorism' by politicians, echoed in the international media, blurs collective intellectual understanding of terrorism issues. Settling the question of the academic and legal definition of 'terrorism' is therefore an essential first step in analysing the crime of terrorism itself, and the formulation and application of laws aimed at preventing it. Despite multiple attempts to define terrorism at international law, no universal definition of the crime has been settled. The UN has not been able to arrive at an international consensus definition, leaving the term open to biased political usage. The chapter discusses developments in terrorist strategies in Indonesia, notably shootings of police officers, as a means of discussing the salient legal elements of the crime, that is: political, religious or ideologically motivated violence; targeted at civilians; with the aim of creating widespread fear or coercing a government.

Chapter 4 examines the enactment of Indonesia's Anti-terrorism Law (the 'ATL') – Law No. 15 of 2003. The ATL has provided the underpinning legal framework for Indonesia's counter-terrorism regime since 2002. It 'defines' the crime of terrorism and outlines additional powers available to enforcement agencies in carrying out counter-terrorism operations and prosecutions. It also stipulates extra-normal judicial processes such as special evidentiary procedures and harsher sentences than those contained in the Criminal Code. Despite being a hastily drafted interim law, and despite calls for significant revisions, the ATL remains in its original, unamended form. This chapter considers why this is so, and gives detailed attention to discussing and analysing proposed revisions to the law.

Chapter 5 considers the development of Indonesia's law for countering the financing of terrorism, Law No. 9 of 2013 (the 'CFTL'). Enacted 10 years after the ATL, the CFTL is intended to fulfil Indonesia's international obligations under the United Nations Convention for the Suppression of Financing of Terrorism. CFT laws provide an extra tool for law enforcers in countering terrorism by criminalising the act of financing

terrorism and providing powers to freeze and seize funds which are suspected of being connected with terrorist activities. Global CFT regimes, particularly aimed at Al Qaeda, have had a disabling impact on the capabilities of terrorist groups, which in turn has impacted the functioning of Indonesian terrorist groups with connections to Al Qaeda, such as Jemaah Islamiyah. The chapter considers why Indonesia was included on the FATF's list of 'high risk and non-cooperative' jurisdictions, and the steps which were taken – including the creation of a domestic list of terrorist individuals and groups – to be removed from that list in mid-2015.

Chapter 6 examines issues in sentencing of convicted terrorists. The chapter draws on case studies and court judgements to examine inconsistencies in the application of the various articles contained in Indonesia's anti-terrorism laws and subsequent sentences handed down. Significant inconsistencies have been pointed to in this area, which will provide a basis for discussing the details of how Indonesia's ATL, CFTL and any other relevant laws, have been applied by Indonesia's courts. The chapter discusses some flaws in the drafting of the laws themselves, and flaws in the application of the laws by police, prosecutors and the courts. It argues that, as 90% of Indonesia's convicted terrorists are sentenced to 10 years of imprisonment or less, current sentencing practices are insufficient to achieve the main recognised objectives of punishment; that is, general deterrence, specific deterrence, retribution and rehabilitation.

Chapter 7 provides a detailed analysis of Indonesia's legal position with regard to ISIS and Foreign Terrorist Fighters (FTFs). Following a string of military victories in Iraq and Syria in 2014, the self-declared caliphate has made global calls on its supporters to renew terrorist attacks against communities and governments which oppose it. Certain groups and individuals within Indonesia have publicly declared their support for ISIS – sometimes in demonstrations with supporters numbering in the thousands. As a signatory to UN Security Council Resolution 2170, Indonesia is obliged

under international law to ensure that support for ISIS, in the form of funding or FTFs does not flow out of Indonesia. Despite a government ban on ISIS, there have been numerous instances of public support for the international terrorist group, and police, in most cases, have been powerless to act. This chapter examines the current state of Indonesian law in addressing the issue of ISIS and its Indonesian supporters.

Chapter 8 summarises the thesis, draws conclusions and makes recommendations. It does this by drawing together the main points contained in each chapter to develop an overall line of argument which runs throughout and binds the thesis. It then draws overall conclusions and makes recommendations to enhance terrorism laws and their enforcement, and recommendations on specific areas that could benefit from further research. The chapter concludes by discussing terrorism in the context of Indonesia's manifold social, political, ecological and economic problems and concludes that, while terrorism may not be the country's most pressing issue, especially if measured by the numbers of casualties caused, the ability of terrorists to manipulate and destabilise the public's sense of security is their greatest power. As such, it must be addressed urgently.

CHAPTER 2 – TERRORISM AND COUNTER-TERRORISM: THE EVOLUTION OF TERRORIST STRATEGIES AND STATE RESPONSES IN INDONESIA

THEORIES OF VIOLENCE IN A UNIQUELY INDONESIAN CONTEXT

Manifestations of political violence in the Indonesian archipelago throughout the modern era have undergone transformations in response to externalities such as repressive actions by the state, developments in technology, law, politics and evolving strategic and ideological motivations. This section discusses the theoretical conceptualisation of political and religious violence in Indonesia, in the context of global ‘waves’ of terrorist violence.

Discussing global trends in terrorism, Rapoport posits a theory of waves of revolution-inspired political violence beginning in the 1880s with the ‘Anarchist Wave’, succeeded by the ‘Anti-colonial Wave’ of the 1920s, the ‘New Left Wave’ of the 1960s and the fourth ‘Religious Wave’ beginning in 1979. Each wave lasts ‘approximately 40-45 years’ which ‘suggests a human life cycle pattern, where dreams that inspire fathers lose their attractiveness for the sons’.¹ According to the theory, the current Religious Wave, of which Indonesian jihadist terrorism forms a part, still has five to ten years to run.

Berger’s account of a rise in anarchist ‘terror’ – manifested in the destruction of property such as ATM machines by ‘anarcho-punk collectives’ – may signify the beginnings of a new wave of anti-capitalist terror perpetrated by ‘a new breed of Indonesian anarchists’.² The emergence of anarchist doctrine within Indonesia’s youth fringe, which links into global anti-capitalist movements such as ‘Occupy Wall Street’,

¹ David Rapoport, "The Four Waves of Rebel Terror and September 11" (2002) *Anthropoetics - the Journal of Generative Anthropology* vol. 8 no. 1 Spring/Summer, 2.

² Dominic Berger, "Indonesia's New Anarchists" (2013) *Inside Indonesia* vol. 113 Jul-Sep <<http://www.insideindonesia.org/indonesia-s-new-anarchists>>.

reinforces the Rapoport model and suggests the possibility of a fading of religious/jihadist-inspired terror and a 'return' to the Anarchist Wave.³

The neatness of Rapoport's theory is challenged by the 'messiness' of Indonesia. Recalling Friedman's observation that Indonesia is 'too big to fail, yet too messy to work'⁴ Indonesia's history shows that the ideological roots of religiously inspired political violence do not conform to Rapoport's timeline. A tradition of violence which drew ideological justification from a strict interpretation of Islam stretches back well before 1979, to at least the 1800s, and its trajectory links into unique historical interactions between the evolution of a complex blend of religious ideologies, the formation of the Indonesian state and Constitution, and the evolution of state coercive responses.

Hadiz describes the irony of hunting 'radical Islamist' terrorists in areas of Central Java which, 'half a century ago were solid support bases of the Indonesian Communist Party'.⁵ Again, the case appears to reinforce Rapoport's theory – communist activism falls neatly into the 'New Left' wave of the 1960s. However, the apparent reinforcement of the Rapoport model is confounded on closer inspection; Indonesia's communists did not 'lose faith in the dreams of their fathers', they were 'massacred' in anti-communist purges of the 1960s and they 'converted' out of necessity.⁶ Conversion to Islam to avoid arbitrary imprisonment or summary execution was an 'easy sell' for

³ Berger notes that 'The designation 'Informal Anarchist Federation (FAI)' has been used since the early 2000s by autonomous cells throughout Europe to identify adherence to a particular form of anarchism that explicitly rejects classical anarchism and Marxist-inspired forms of resistance' *ibid*, 2. Despite this rejection of links to classical anarchism, the emergence of the movement in Indonesia suggests that the Rapoport model may be plausible. Prosecutors attempted to charge two individuals who destroyed an ATM machine with terrorism offences, claiming that the ATM was a 'strategic object'. However, the two were later convicted of the lesser charge of arson and sentenced to one year and eight months imprisonment.

⁴ Thomas Friedman, "Country Too Big to Fail, yet Too Messy to Work," (2000) *The New York Times*, 4 October 2000.

⁵ Vedi R. Hadiz, "Islamism Yes, Communism No!" (2012) *Inside Indonesia* vol. 107 Jan-Mar <<http://www.insideindonesia.org/islamism-yes-communism-no>>.

⁶ *Ibid*.

the Indonesian Islamic Predication Council, the vehicle to which, former leader of the major Islamic party Masyumi, Mohammad Natsir, devoted himself. Natsir officiated at the opening of the Al Mukmin *pesantren* in Ngruki, near Solo, co-founded by Abu Bakar Ba'asyir and Abdullah Sungkar, who later went on to establish the terrorist organisation, Jemaah Islamiyah.

These accounts indicate the significance of consecutive waves of ideologies such as Communism, Islam and Anarchism, in manifestations of violence in Indonesia, and suggest the possibility that Islamist violence may fade. However, upon considering the historical roots of Islam and the layered complexity of Indonesian society, the Rapoport theory, which is global in its outlook, cannot account for the longevity and endurance of Islamist violence which dates back at least two centuries, or for other forms of ideological tension leading to violence in Indonesia. It does not account for instances of state, or state-sponsored, violence perpetrated by police or military personnel such as a series of anonymous shootings of street-criminals known as *petrus* in the 1980s⁷ or violence committed by military-backed militias against East Timorese communities around the time of the independence referendum. It does not account for inter-religious pogroms in Sulawesi and Maluku, 'anti-witchcraft' killings, provincial inter-town rioting,⁸ violence toward ethnic Chinese communities during the rioting of 1998, or ethno-separatist violence committed by groups such as OPM or GAM in the 1990s and early 2000s. Islamist or jihadist violence, is but one expression of violence in the Indonesian archipelago, however it is unique insofar as it alone has come to be synonymous with 'terrorism' where other forms of political violence have not.

⁷ Jacqui Baker, "After Justice: What Happens after Three Police Officers Are Found Guilty of Manslaughter and Torture?" (2013) *Inside Indonesia* vol. 114 Oct-Dec <<http://www.insideindonesia.org/weekly-articles/after-justice>>. Also, for a discussion of state sponsored death squads in Indonesia see: Robert Cribb, "From Petrus to Ninja: Death Squads in Indonesia," in *Death Squads in Global Perspective: Murder with Deniability*, ed. Bruce B. Campbell and Arthur D. Brenner (New York: St. Martin's Press, 2000).

⁸ John Sidel, *Riots Pogroms Jihad: Religious Violence in Indonesia* (Singapore: NUS Press Singapore, 2007). Cribb, above n 7, 52.

Jones' theory of the causes of political violence in Indonesia explores the underlying rivalry of two competing memes struggling for dominance. The two ideologies are symbolised by the 'Indic-Hindu imperial tradition [which] rested in the core notion of the *istana*, a palace within a walled enclosure...[and] the Islamic Near East imperial tradition [which] rested in the core notion of the *umma*, the universal community of believers'.⁹ The Islamic *umma* conflicts with, and is incompatible with, the symbol and seat of nationhood, the *Istana*.

Risakotta posits that understanding terrorist violence in Indonesia requires 'a new theoretical framework...that moves beyond simple categories of antagonistic groups'. 'Power and violence in Indonesia cannot be understood within a Weberian framework of social evolution from traditional to modern, nor through an ideal-type dichotomy between Java and the West.' Risakotta's thesis is that violence is the product of tension between three conceptual worlds which 'interpenetrate each other and form the conscious and unconscious identity of all Indonesians'. The three worlds are defined as 'modernity, religion and the culture of the ancestors'.¹⁰ According to Risakotta, violence, including terrorist attacks, is caused by conflict within and between these three structures of power.¹¹

Carnegie, citing Temby's thesis about *Darul Islam* and *Negara Islam Indonesia* and combining it with Colombijn and Lindblad's concept of 'reservoirs of violence', notes Indonesia's 'complex history of radicalism, separatism and rebellion'¹² and that 'group identities often forged and crystallized in opposition to the emergence of the

⁹ Garth N. Jones, "'Istana Stands Firm: Indonesia's Quelling Islamic Terror' Culture Matters" (2009) *Journal of Third World Studies* vol. 26 no. 2, 54.

¹⁰ Bernard Adeney-Risakotta, "Power, Religion and Terror in Indonesia" (2003) *International Institute for Asian Studies Newsletter* March 2003, 30.

¹¹ Ibid.

¹² Paul J. Carnegie, "Countering the (Re-)Production of Militancy in Indonesia: Between Coercion and Persuasion" (2015) *Perspectives on Terrorism* vol. 9 no. 5, 15.

modern nation-state and its coercive/exclusionary practices. This fuelled demands for autonomy and sometimes precipitated violent action.¹³

A search for the theoretical causes of violence in Indonesia reveals the complexity of the country's historical, political and social fabric.

Within that fabric, violence based on radical religious doctrine is but one thread, however it is an extraordinarily durable thread, resistant to fraying or breakage; it extends deep into Indonesia's past, and likely, will continue to extend into Indonesia's future. An underlying strain of radical religious ideology has existed in the Indonesian archipelago for at least two centuries and continues to sustain the changing strategies of jihadist violence, albeit in a tiny percentage of Indonesia's Muslim populace.¹⁴ Strict doctrinal interpretation of Koranic text is not a new phenomenon as some reports in the mass media suggest. Its roots stretch back at least as far as the 1800s with the outbreak of violent conflicts between those urging a stricter, scripturalist application of Islam, and those adhering to traditionalist and colonialist ideologies – culminating in the Padri war of West Sumatra, 1821-38.¹⁵

Harsh coercive state responses which involve the extrajudicial killing of suspects feed into a cycle of violence which perpetuates conflict. It is sustained, and evolved, by a symbiotic relationship between prevailing waves of extremist dogma and state coercive responses. However, expert reports on terrorism in Indonesia also repeatedly point to the importance of kinship ties in cementing relationships between jihadist groups.¹⁶ Religious ideologies handed down from parent to child may be more

¹³ Ibid, 16.

¹⁴ Adam Fenton, "Change and Continuity in Indonesian Islamist Ideology and Terrorist Strategies" (2014) *Al-Jamiah Journal of Islamic Studies* vol. 52 no. 1 <<http://aljamiah.or.id/index.php/AJIS/article/download/23/1>>.

¹⁵ Greg Fealy and Aldo Borgu, "Local Jihad: Radical Islam and Terrorism in Indonesia" (2005) *ASPI Strategy Report* [The Australian Strategic Policy Institute] 23.

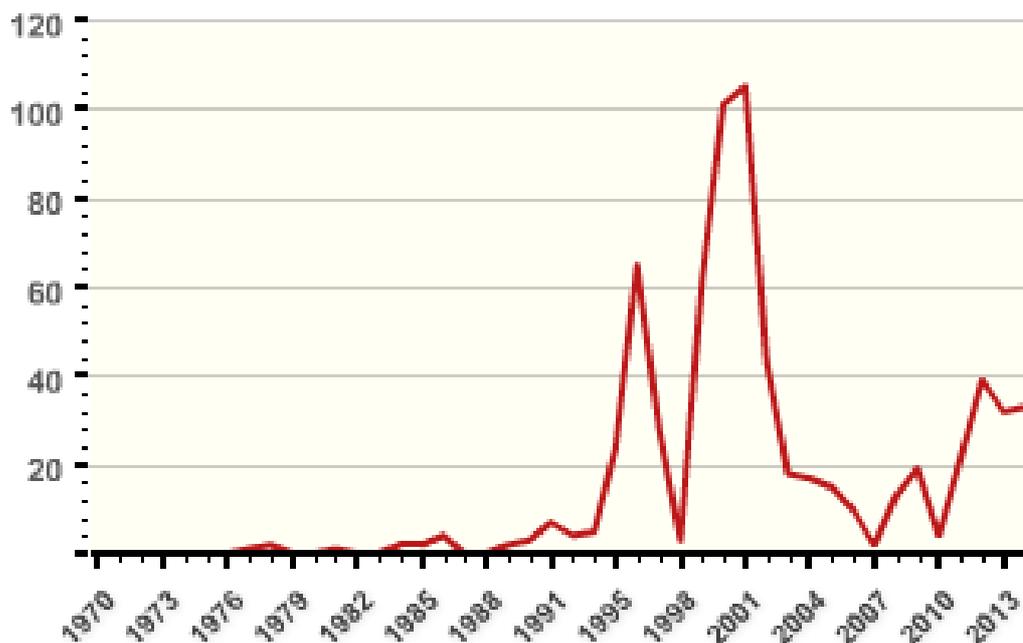
¹⁶ Institute for Policy Analysis of Conflict [IPAC] *Weak, Therefore Violent: The Mujahidin of Western Indonesia* IPAC Report No. 5, 2 December 2013 <http://www.understandingconflict.org/read/index/3/types_of_conflict.html>.

resistant to change than secular ideologies and may explain the resilience of Islamist doctrines and the jihadist meme; in contrast to secular waves such as communism, anarchism and other ideological motivations for political violence.

SHIFTING STRATEGIES OF VIOLENCE AND STATE RESPONSES

Modern extremist ideologues, such as Abu Bakar Ba'asyir and Aman Abdurrahman urge their followers toward violent conflict and terrorist actions based on an ideology of strict 'Middle Eastern' interpretation of fundamental Islamic tenets.¹⁷ While virulent jihadist ideology has sustained violent actions for centuries, strategies of jihadist groups have undergone significant change; as have the strategies of law enforcement authorities.

Diagram 1: Terrorist Incidents in Indonesia from 1970 to 2014



Source: National Consortium for the Study of Terrorism and Responses to Terrorism (START) (2015) Global Terrorism Database. Retrieved from <http://www.start.umd.edu/gtd>.

¹⁷ Greg Barton *Jemaah Islamiyah: Radical Islamism in Indonesia* (Singapore University Press, 2004) 20.

To take an example from recent years, since 2010, jihadist groups have displayed a shift away from large-scale, well-planned attacks on symbolic foreign targets (such as bombings of hotels and embassies), towards low-level violence primarily aimed at law enforcement authorities. Over the same period, police have shown a greater tendency toward fatal shootings of terrorism suspects.

While the number of civilian fatalities from terrorist attacks has declined significantly since 2010, a significant number of less lethal attacks have continued to occur each year. Periods of upheaval in the Indonesian political process have been accompanied by spikes in terrorist attacks, followed by troughs which correspond to repressive state actions.

The Global Terrorism Database (GTD) contains data on terrorist attacks in Indonesia from 1970.¹⁸ The period from 1996 onwards, which saw the fall of the Soeharto regime and a process of enormous social, constitutional and political change known as *reformasi*, is accompanied by a dramatic increase in terrorist activity.

Commenting on the violence of that time, Sidel highlighted a shifting pattern of religious violence from the mid-1990s onwards: riots in provincial towns and cities (1995-1997), anti-witchcraft campaigns in Java and inter-religious pogroms in Sulawesi and Maluku (1998-2001) followed by paramilitary mobilisation and terrorist bombings under the banner of 'jihad' (2000-2005).¹⁹

Jones noted 'with the downfall of the authoritarian Soeharto regime on 21 May 1998, Indonesia became more fragmented, and more prone to random acts of violence than at any other time in its history'.²⁰ A combination of political uncertainty, increased democratic freedoms, the return of jihadist ideologues such as Ba'asyir and Sungkar

¹⁸ "Global Terrorism Database" (2015) National Consortium for the Study of Terrorism and Responses to Terrorism [START] <http://www.start.umd.edu/gtd/>.

¹⁹ John Sidel, *Riots Pogroms Jihad: Religious Violence in Indonesia* (Singapore: NUS Press Singapore, 2007).

²⁰ Jones, above n 9, 52.

from self-imposed exile in Malaysia, a 'rise of political and radical Islam'²¹ and the activities of regional independence movements,²² catalysed a sharp increase in terrorism, which reached its peak in 2002. In that year, the terrorist bombings of two nightclubs in Kuta on October 12 signalled a turning point in the legislative and executive responses to terrorism, in particular, religiously inspired terrorism.

A sharp decline in terrorist attacks from 2002 onwards coincides with both the enactment of Indonesia's special anti-terrorism legislation (PERPU No.1 of 2002) and the beginning of international cooperation between Indonesian police and foreign police agencies such as the Australian Federal Police and the FBI. The cooperation was crucial to solving the Bali bombing of 2002 and apprehending the terrorist perpetrators.²³ Other intervening factors contributed to peace-building and a decline in terrorist attacks such as the independence process in East Timor in 1999 and events in Aceh including the tsunami of 2004 and the subsequent peace process.

Following a drop to almost zero incidents in 2007, terrorist activity has continued with the number of recorded incidents ranging from five to forty per year. These are mostly low-level violent activities, including shootings, stabbings, attempted poisoning and small explosives, directed at the Indonesian state apparatus, in particular police – committed by both jihadist groups and Papuan separatist groups. No major attacks or bombings of foreign targets had occurred since 2009; the year of the synchronised bombings of the foreign-owned Marriott and Ritz-Carlton hotels in Jakarta's Kuningan business district.

²¹ Zachary Abuza, *Political Islam and Violence in Indonesia* (Routledge, 2007).

²² Of the 406 terrorist incidents recorded during the period 1996 – 2002, around a quarter can be attributed to religious groups such as JI, FPI, Laskar Jihad or other 'muslim militants'. The remainder are either attributed to non-religious movements such as the Free Aceh Movement, Fretilin/East Timorese fighters, and the Free Papua movement or, for around a quarter of the attacks, listed as 'unknown'. Global Terrorism Database, above n 18.

²³ Barton, above n 17.

The emergence of support for the Islamic State of Iraq and Al-Sham (ISIS) raises the possibility of a reinvigoration of the jihadist terrorist movement and presents a set of challenges for state agencies, particularly police and prosecutors who claim to be faced with a legal vacuum.²⁴

COLONIAL RESPONSES TO RELIGIOUS/POLITICAL VIOLENCE

Throughout the colonial period, religiously-inspired violence was treated as a state security issue, and state responses to it were military in nature. Rebellions such as that led by Surapati, a Balinese slave who had lived in Batavia, would arguably be labelled 'terrorism' if they occurred today. After escaping to the highlands south of Batavia, Surapati led an attack against a VOC (Vereenigde Oost-Indische Compagnie – Dutch East India Company) force killing 20 of the 39 European troops.²⁵

Responses to such rebellions and acts of political violence were invariably military in nature. In 1706, 1707 and 1708 'furious campaigns were fought by the VOC, Madurese and Kartasura forces in East Java'.²⁶ Surapati was killed by Dutch forces in a military action in 1706. Religion was also a factor in some of these conflicts, such as the siege of Dutch forces at Semarang in 1741. Victorious Javanese forces gave the vanquished Dutch captives a choice between death or conversion to Islam. Pakubuwana II characterised himself as a leader of a Holy War against the *kafir* company.²⁷

²⁴ Farouk Arnaz, "Legal Vacuum Frustrates Indonesia's Anti-Terror Agencies" *The Jakarta Globe* 18 March 2015 <http://thejakartaglobe.beritasatu.com/news/legal-vacuum-frustrates-indonesias-anti-terror-agencies/>; Adam Fenton and David Price, "Breaking ISIS: Indonesia's Legal Position on the 'Foreign Terrorist Fighters' Threat" (2015) *Australian Journal of Asian Law* vol. 16 no. 1, 2.

²⁵ M.C. Ricklefs, *A History of Modern Indonesia since C.1200* (London: Palgrave Macmillan, 2008) 100.

²⁶ Greg Fealy and Sally White, ed. *Expressing Islam: Religious Life and Politics in Indonesia* (Singapore: Institute of Southeast Asian Studies, 2008) 104.

²⁷ Ricklefs, above n 25.

During the Dutch administration of the 1800s, several wars were fought including the Padri War, the Java War and the Aceh War – each of which could be characterised as Islamist insurgencies containing elements of what would today, very likely, be labelled ‘terrorism’.²⁸ In the 19th century, the Dutch defeat of the Diponegoro uprising (1825-1830) led to the consolidation of their power and in 1830 the ‘truly colonial period of Javanese history began’.²⁹

Around this time, Christiaan Snouck Hugronje an influential advisor to the Dutch administration, authored the late colonial Dutch Muslim policy, under which a clear distinction was made between Islam as a religion, which was to be tolerated, ‘while ruthlessly suppressing political fanatics promoting rebellion’.³⁰

INDEPENDENCE AND THE RISE OF DARUL ISLAM

Given the importance of Darul Islam (DI) to many of Indonesia’s modern jihadist terrorist groups – which trace their ideological roots back to DI and its leader Kartosoewirjo – the movement is discussed here before examining the post-independence security responses of the Soekarno and Soeharto regimes.

The growth and actions of Darul Islam must be viewed in the context of the historical struggle for Indonesian independence from Dutch colonial rule. Sekarmadji Maridjan Kartosoewirjo, a charismatic Javanese political leader with a long history of fundamentalist Muslim principles, rejected the secular foundations of the newly-proclaimed Indonesian republic as well as peace treaties with the Dutch. While disappointed with the failure of Soekarno to include *Negara Islam* in the independence proclamation Kartosoewirjo nevertheless continued the nationalist struggle against the Dutch. However, the early military failures of republican forces combined with

²⁸ Robert Pringle, *Understanding Islam in Indonesia: Politics and Diversity* (Singapore: Editions Didier Millet, 2010) 22.

²⁹ Ricklefs, above n 25, 144.

³⁰ Pringle, above n 28, 48.

diplomatic concessions to the Dutch led Kartosoewirjo to the conclusion that an Islamic state could only be established on and by his initiative. He therefore concentrated on building up forces loyal to him in the mountainous regions of West Java. In 1947, ignoring a cease-fire, he and his *hizbullah* forces began fighting to recapture areas of South Priangan. In 1948 the first 'DI' conference was held. A loose coordination between Islamic and non-Islamic groups the main goal was *not* the immediate establishment of an Islamic state but rather to coordinate remaining forces in the campaign to expel the Dutch.

At the very earliest stages of its inception therefore, DI was an inclusive resistance force encompassing both Islamic and non-Islamic groups. The chief aim was the defence of West Java and the expulsion of Dutch forces seeking to re-establish control over Java. The appellation 'DI' originated not as a reference to the Islamic concept of *Darul Islam* but from the designation of *Daerah I* (Area I) that is, parts of West Java where there were concentrated numbers of Indonesian troops.³¹ *Daerah II* (Area II) on the other hand referred to areas under Dutch control. Kartosoewirjo's stated goal of invoking *jihad* and establishing an Indonesian Islamic state in opposition to the Indonesian republic, even then, was considered by some fellow Islamic groups as extreme and untenable. While all of the Indonesian forces in Area I accepted the goal of the defence of West Java, 'the Holy War concept was generally acceptable only to the Islamic forces. But, in addition, the idea of establishing a Negara Islam, abandoning the unitary Republic, was beyond what most of the Islamic groups...were seeking'.³² This underlines the fact that establishing an Islamic State of Indonesia through violence directed against the Indonesian republic was then, as now, one that is attractive only to a small number of radical Islamist groups.

³¹ Hiroko Horikoshi, "The Darul-Islam Movement in West Java (1948-62): An Experience in the Historical Process" (1975) *Indonesia* vol. 20 October, 70.

³² *Ibid*, 71.

This ideological impasse led Kartosoewirjo to convene a conference at which a Supreme Council, Constitution, ten ministries and an Imam were established to form the framework for the government of Negara Islam Indonesia. Initially, DI remained pro-Republic. However, with the ignominious capture of Republican leaders in late 1948 and early 1949, support for DI swelled as the *de facto* core of the resistance movement. However, fearing a resurgence of the Republican government, DI forces actively began to oppose them, and this indicated an important turning point in public support for DI.

Notwithstanding the reluctance of other resistance groups to follow his lead, on 7 August 1949 Kartosoewirjo unilaterally promulgated *Negara Islam Indonesia* or the Islamic State of Indonesia and simultaneously declared himself the *imam* and supreme military commander.³³ While firmly centred on the heartland of West Java, Kartosoewirjo's proclamation was influential enough to spark rebellions in four provinces under the banner of Darul Islam. At the height of the fighting in the mid-50s it is estimated that there may have been as many as 13,000 men under arms in West Java and 30,000-40,000 men across Indonesia.³⁴

Kartosoewirjo was known for being 'an ardent advocate of uncompromising doctrinal radicalism'.³⁵ His rhetoric was absolutist and appealed to religious and jihadist concepts. DI's fighters were referred to as *hizbullah* who were waging a holy war against the apostates and communists of the republican government. DI employed a combination of guerrilla tactics and terrorist attacks. It was able to mobilise armies of up to 600 fighters. It attacked government offices and public spaces and facilities such as cinemas, markets and railways. However as the nascent republic gained strength, towards the end of the 1950s and early 1960s, support for DI declined rapidly, in large

³³ Fealy and Borgu, above n 15, 19.

³⁴ C. van Dijk, "Rebellion under the Banner of Islam: The Darul Islam in Indonesia" (PhD Thesis, Leiden University, 1981) 36.

³⁵ Horikoshi, above n 31, 63.

part due to massacres and destruction of villages which were committed in its name. Applying the contemporary definition, these shocking attacks on civilians committed in the pursuit of a political/religious goal should rightly be considered terrorist acts.

The transition from targeting and resisting a 'foreign' colonial enemy, to targeting fellow Indonesians, both military personnel and civilians, on the ideological grounds of creating an Islamic state signalled an important turning point in public support for DI.

A combination of factors meant that DI was able to continue its anti-republican campaign throughout most of the 1950s. The goal of an Islamic state was still popular among some Islamic parties and the republic's military resources were spread out on a number of fronts. The Islamic Masyumi factions of parliament had lobbied for a peaceful resolution to the DI conflict, meanwhile the army was not eager to conduct military operations against fellow Indonesians. However, after President Soekarno was able to consolidate his power under the 'guided democracy' principle in the early 1960s, the conditions existed to conclusively deal with the DI insurgency. It was now possible 'for the first time to turn all the state's resources against the DI.'³⁶

It may be noted that in the Bratayudha Operation to eradicate DI, civilian cooperation was extremely important and effective. Large numbers of civilians were instrumental in forming a *pagar betis* or human fence to surround and capture DI fighters. Many DI fighters deserted and turned themselves in, lured by promises of clemency. By early 1962 the group itself was very small in number, and Kartosoewirjo who had been wounded in April 1962, was finally captured in June of that year. By radio announcement he then ordered his remaining followers to surrender. In August 1962 Kartosoewirjo was put on trial along with five of his followers who were accused of attempting to assassinate President Soekarno in the Idul Adha affair of May 19, 1962.

³⁶ Ibid, 77.

All were convicted and sentenced to death. Kartosoewirjo was executed on September 12, 1962.

There are several parallels between the DI uprising of the 1940s and 50s, and modern jihadist groups in Indonesia. The twin goals of establishing an Indonesian Islamic state and the full application of Shari'a law remain the same. The willingness to use violence against the legitimate Indonesian republic, specifically against symbols of state power such as the president and police, as well as civilians, also remains. As discussed above, modern terrorist groups have altered their tactics away from foreign targets or the 'far' enemy to a strategy of targeting the 'near' enemy. In parallel, DI which began by targeting the foreign enemy, i.e. the Dutch colonial forces, began to target Indonesian forces and it was after this strategic change of direction that the group lost important support from within the community. By targeting and terrorising local villages it perceived as being pro-Republic, DI ensured that it lost the support of the community within which it existed. When local communities, with the support of government and the military, mobilised against DI, the group was effectively crushed. However, importantly, remnants of the group and its ideology lived on and gave inspiration to later generations of fighters.

Finally, with regard to Kartosoewirjo himself, it may be noted that despite his staunchly jihadist rhetoric, he actually had very little Islamic education. He was attracted to a mystical, syncretic form of Islam, rather than the austere Middle Eastern form. He cultivated a cult of personality around himself in which he was cast as a divine leader with *sakti* or mystical powers, and strictly maintained a distance and aloofness between himself and his followers.³⁷

Of the DI fighters who surrendered to government forces, some were accepted into military service. As they were staunchly anti-communist, they proved especially

³⁷ Horikoshi above n 31, 73-75.

effective in the anti-communist military operations of 1965/66. DI's revival began in the late 60s and early 70s as former members began to covertly reactivate the movement. However it was little more than 'an informal and ramshackle structure, but continuing loyalty to the cause and its leaders was undeniable.'³⁸

During the 1970s the DI movement continued to exist but was successfully infiltrated and manipulated by Soeharto regime intelligence agents. In 1977 an anti-government plot was uncovered and several DI recruits were arrested and gaoled on subversion charges for their alleged involvement.

In the 1980s and 1990s, DI was characterised by internal fragmentation as it struggled to find a leader who could unite the movement. Several contenders emerged including Kartosoewirjo's sons and former commanders. It is now thought to have splintered into five main factions with one of the most powerful factions headed by Kartosoewirjo's son, Tahmid. DI has also undergone an ideological transformation towards Middle Eastern thinking via the Dewan Dakwah Islamiyah Indonesia.³⁹ And its members have shown a greater proclivity towards extreme jihadism. Following the group's revival in the late 1960s violent attacks were rare. But from the mid-1980s onwards members were increasingly willing to become involved in conflicts such as Afghanistan, Mindanao, Ambon and Poso. There is also *prima facie* evidence that the perpetrators of the Australian Embassy bombing of 2004 were drawn from a DI group in West Java.⁴⁰

Finally, Jemaah Islamiyah (JI) was founded in 1993 when Abdullah Sungkar and Abu Bakar Ba'asyir left DI to establish their own organisation. JI's aim was to create a

³⁸ Fealy and Borgu, above n 15, 21.

³⁹ International Crisis Group [ICG], *Indonesia: The Dark Side of Jama'ah Ansharut Tauhid* (2010) Update Asia Briefing No. 107 <<http://www.crisisgroup.org/~media/Files/asia/south-east-asia/indonesia/B107-Indonesia%20The%20Dark%20Side%20of%20Jamaah%20Ansharut%20Tauhid%20JAT.pdf>>.

⁴⁰ Ibid.

space in which exemplary Muslims could act according to the strict guidelines of the teachings of the pious ancestors (*as-salaf as-salih*). The move away from an informal community, to a formal structure was in part due to Sungkar and Ba'asyir's belief in the need for Muslims to become more emphatic in waging jihad.

They believed that only through the tactical use of violence could Muslims hope to strike back against the 'Islamophobic' Indonesian state and its Jewish and Christian supporters, both domestically and abroad. This required a well-coordinated, covert organisation able to plan major long-term operations and carry them out with precision and lethal effect.⁴¹

The Bali bombing of 2002 was in many ways the culmination of this jihadist JI strategy. In the post-9/11 era, the Bali bombing brought Indonesian violent Islamic extremism, a phenomenon which had simmered unnoticed within 'moderate' Indonesia for decades, even centuries, to the full notice of the world's western powers – transforming Indonesia almost overnight into one of the most important and visible arenas in the global war on terror.

In 2015, Carnegie explained the importance of DI as a kind of ideological 'touchstone' to the contemporary jihadist groups operating in Indonesia today. He wrote:

This constitutes the substance of perception for a temporally and spatially dislocated 'imagined community' of sporadic groupings to re-coalesce in militancy and action around a resiliently 'powerful myth' and 'imagined' object.

In other words, the formation and structures of militias that emerged in the context of the anti-colonial struggle and mobilized to action by the idea of *Negara Islam Indonesia* provide a touchstone, no matter how tenuous, for several contemporary militant Islamist offshoots in Indonesia. The roots of *Jemaah Islamiyah* (JI-Islamic Community), *Ring Banten*, *Abu Bakar Battalion*, *Abu Umar Network*, and *Angkatan Mujahidin Islam Nusantara* (AMIN-Nusantara Islamic Jihad Forces) all trace a link and in some sense a

⁴¹ Fealy and Borgu, above n 15, 26.

nebulous feeling of loyalty, kinship, connection and belonging to the 'imagined community' of *Darul Islam* and the vision of *Negara Islam Indonesia*. A bit like gravity, you can't see it but it exerts a decisive pull nonetheless.⁴²

Virtually all of Indonesia's contemporary jihadist groups draw inspiration from the goals and ideology of *Darul Islam*. This fact underlines the ability of this ideology to regenerate itself despite repressive state actions. The jihadist ideology is as the body of the mythical Hydra, while the various groups and labels are the heads which morph and regenerate despite being cut off.

POST-INDEPENDENCE SECURITY RESPONSES – SOEKARNO AND THE NEW ORDER

As noted above, Soekarno's response to crushing DI was primarily military with a veneer of judicial legality added as an afterthought. This broadly military approach would prove effective and continued throughout Soekarno's 'Guided Democracy' period and Soeharto's 'New Order' regime. Despite the existence of a criminal code throughout the colonial and post-colonial eras, outbreaks of political dissent and/or violence were crushed by uncompromising military or political means. Discussing the resistance of Santri Muslims to the un-Islamic notion of a *pancasila*-based 'homeland' Jones notes that the *Darul Islam* 'states' which emerged after the proclamation of independence 'were all ruthlessly suppressed by the Indonesian army' in a 'repeat of Dutch Imperial times'.⁴³

This subjugation of law to policy was evident in each of the periods of colonial rule, and under Soekarno and Soeharto, all of which at different times utilised Anti-subversion laws to silence political opposition.⁴⁴

There was, again, some irony in the reliance of the New Order on the same Dutch colonial anti-subversion provisions that were once used to imprison nationalist leaders

⁴² Paul J. Carnegie, "Countering the (Re-)Production of Militancy in Indonesia: Between Coercion and Persuasion" (2015) *Perspectives on Terrorism* vol. 9 no. 5, 17.

⁴³ Jones, above n 9, 62.

⁴⁴ Tim Lindsey, ed. *Indonesia: Law and Society* (2nd Edition. Sydney: Federation Press, 2008) 11.

including Soekarno and which he himself sometimes used in the Guided Democracy period to contain dissent.⁴⁵

Under President Soeharto 'political violence was primarily perpetrated by the state'⁴⁶ often utilising the provisions of the Anti-subversion Law and dubious trials of suspects in the aftermath of a major incident to lend legitimacy to state actions. Soeharto's use of the *dwifungsi* principle which legitimised a unique role for the Indonesian military in both national defence and national politics meant that the military was a predominant force in government administration at all levels. Crouch noted 'military officers dominated both the central and regional administration'.⁴⁷ Officers were appointed to key cabinet posts and as senior bureaucrats. Provincial governors, district heads and members of legislatures at all levels were also drawn from the armed forces. Military thinking and tactics therefore dominated New Order responses to perceived internal threats to national harmony.

In 1974, major rioting was sparked off by a visit by the Japanese Prime Minister, Tanaka Kakuei, to Jakarta. The event became known as *Malari* (*Malapetaka Januari*, January Disaster). The armed forces (ABRI) responded by clamping down harshly – killing 11 people and seriously injuring 200.⁴⁸ Some 770 people were arrested, most of whom were released, however among those arrested were journalists and publishers such as Mochtar Lubis whose publications were forced to close.

Through the period 1983-5 a crime wave was met with state-sanctioned murders across the country. Up to 5000 alleged criminals were killed in what would become known as *petrus*; (*penembakan misterius*, mysterious shootings) extra-judicial killings which were carried out by the police and military. While denying any

⁴⁵ Ibid.

⁴⁶ Abuza, above n 21, 1.

⁴⁷ Harold A. Crouch, *Political Reform in Indonesia After Soeharto* (Singapore: Institute of Southeast Asian Studies, 2010) 16.

⁴⁸ M.C. Ricklefs, *A History of Modern Indonesia since C.1200* (London: Palgrave Macmillan, 2008) 341.

knowledge of the shootings at the time, Soeharto later admitted in his autobiography that the state-sponsored killings were a kind of 'shock therapy'.⁴⁹ Baker has argued that the '*petrus* culture' of police violence and impunity continues today, with shootings, beatings and torture of suspected criminals being common.⁵⁰

Meliala's analysis of POLRI's 'paramilitary style of policing'⁵¹ which stems from its origins as an arm of the military, indicates that it tends to 'rely on physical power, domination and the use of force where torture, extrajudicial violence and killing become legitimate and indeed required.'⁵² This analysis explains some of POLRI's continuing practices in the treatment of criminal suspects. In the context of post-2002 CT operations, and the international assistance in training equipment and funds given to Densus 88, Meliala's observations about the 'militaristic' styles of 'police paramilitary units' in the US, UK and Australia are relevant. Recalling that these three countries have been the largest donors and trainers of Indonesia's CT detachment, Meliala notes how US police paramilitary units, with direct links to special operations groups in the armed forces, have become a normalised mainstay of policing in the United States; and that similar paramilitary police units exist in both Australia and UK.⁵³

In 1984, rioting in Tanjung Priok sparked off by Islamic, anti-government protests denouncing the state ideology, *Pancasila*, was met with harsh military tactics. ABRI opened fire on the crowd, killing at least 28 and possibly several hundred. Anti-government sentiment spread rapidly in the wake of the incident causing a series of

⁴⁹ Ibid, 354.

⁵⁰ Baker, above n 7.

⁵¹ Adrianus Meliala, "Police as Military: Indonesia's Experience" (2001) *Policing: An International Journal of Police Strategies & Management* vol. 24 no. 3, 420.

⁵² Ibid, 421.

⁵³ Ibid.

bombings and arson attacks. 'About thirty people were gaoled for up to three years for the Tanjung Priok incident...An Islamic preacher was given a life sentence'.⁵⁴

Discussing the use of state violence during the New Order regime, Ricklefs commented on the role of Prabowo Subianto (a candidate in the 2014 presidential elections) as head of the army's special forces – Kopassus – 'Under Prabowo's leadership the special forces fought separatist movements in Papua, East Timor and Aceh. Their record of using terror against civilians was probably the worst of any element in ABRI'.⁵⁵

From 1988 onwards, rebel activity in Aceh became a cause for major concern for the New Order government. Kostrad troops under the command of Prabowo were sent to the province in 1990.

Jakarta's main response to Acehnese protest was thus to remain military in nature. Terror was a standard tactic. Suspected GAM sympathisers were captured, tortured and executed without trial. Bodies were left in public places to intimidate the populace. ABRI successfully reduced the level of GAM activity, but at a high cost to its own reputation and to Acehnese feelings of commitment to Indonesia. From this time onward, local animosity towards ABRI and Jakarta was the rebels' most powerful recruiting tool.⁵⁶

While trials of dissidents were sometimes held to provide the appearance of due process to repressive military actions, the outcomes of such trials were never in doubt as judicial independence was subject to executive control. Commenting on the role of the judiciary during the New Order regime, Lindsey commented 'the Indonesian political system continued to be dominated by the executive with the legislature and the judiciary firmly under its control'.⁵⁷ Commenting on Soekarno's, and Soeharto's, approach to judicial disobedience, Butt stated:

⁵⁴ Fealy and White, above n 26, 358.

⁵⁵ Ricklefs, above n 48, 354.

⁵⁶ Ibid, 364.

⁵⁷ Fealy and White, above n 26, 10.

Soekarno...despised Indonesia's inherited Dutch laws and legal institutions, particularly because they encroached upon his power. He took control of what had been a reasonably independent judiciary in the 1950s, formalising the judiciary's subordination with Law No 19 of 1964 on Judicial Power. This law explicitly rejected the *trias politika* ('political triad' or separation of powers); declared the courts as instruments of the national revolution; and enabled the President to interfere in, or retrospectively alter, the decision of an Indonesian court...Soeharto's New Order government used different methods to control the judiciary, but they were equally if not more, effective.⁵⁸

Butt describes the use of the *surat sakti* or sacred letter, which was handed down from senior judges to judges in lower courts to ensure their compliance in protecting the interests of the New Order government.⁵⁹ In 2000, Cribb noted:

Indonesia's administrative-legal culture after independence was remarkably unregulated...Indonesia's parliament passed relatively few laws, and those that were passed tended to be brief and general. Much was left to administrative regulation, and the regulations in turn left much to the discretion of the authorities...The court system was not separate from the civil bureaucracy, so that judges and prosecutors could not assert judicial independence of state power.⁶⁰

Commenting on the role of the National Police under Soeharto, a period when the police force was still an arm of the military, Meliala wrote 'police accountability is clearly not to the public, but in reality, to the Government.'⁶¹

Pre-*reformasi* state responses to 'subversive' political or religiously inspired violence were therefore dictatorial and military in nature and marked by a clear subjugation of legitimate judicial and criminal law processes – which were sometimes used, after the fact, to legitimise state actions.

⁵⁸ Simon Butt, "*Surat Sakti: The decline of the authority of judicial decisions in Indonesia*" in Lindsey above n 44, 346.

⁵⁹ Ibid. Butt further argues that *surat sakti* are not just a New Order phenomenon and that their use is actually increasing, producing a significant distorting effect on the administration of justice in Indonesia's courts.

⁶⁰ Robert Cribb, "From Petrus to Ninja: Death Squads in Indonesia," in *Death Squads in Global Perspective: Murder with Deniability*, ed. Bruce B. Campbell and Arthur D. Brenner (New York: St. Martin's Press, 2000) 183.

⁶¹ Meliala, above n 51, 426.

These observations are of key importance in understanding the prevailing responses to terrorism in the contemporary Indonesian context. Prevailing cultures in state institutions such as the police and the courts during the New Order continue to influence the attitudes and practices of those institutions today. A results-driven paramilitary style of policing deemphasises due process of law and sees judicial processes as a necessary but relegated sub-process. In turn, the courts, whose subordination to the executive deemphasised a legitimate judicial process, continue to see their primary role as being to support the policies of the executive. Moral condemnation, and genuine deterrence of crimes, has, in the past, been the domain of the executive. Executive actions to repress and deter crime came from the highest levels of political control. This context explains the courts' flawed treatment of suspects in terrorism cases. Whereas virtually 100% of defendants are convicted, the sentences imposed by the courts have been insufficient to achieve any of the philosophical goals of punishment, primarily general deterrence. Any kind of deterrence which has been achieved has, most likely, come from the forceful actions of paramilitary police units in their violent CT operations to neutralise terrorist cells. Sentencing of terrorists is discussed further in chapter 6.

POST-REFORMASI STATE RESPONSES TO TERRORISM

To understand post-*reformasi* Indonesian legislative responses to terrorism they must be viewed in both their geo-political context and through the prism of domestic political imperatives. A complex blend of political, social, religious, military and historical factors, both domestic and international, influenced and shaped a uniquely Indonesian legislative and law enforcement counter-terrorism model.

While religious terrorism existed in Indonesia prior to the fall of Soeharto in 1998, it was the immediate aftermath of 9/11 and the Bali bombings of 2002 which catalysed the creation of Indonesia's anti-terrorism laws and shaped the paradigms of

their enforcement. Political and constitutional reform, already in process at the time of those seminal attacks, was determinative of many issues which would have profound impacts on shaping the Indonesian counter-terrorism response.

Between 1999 and 2003, the Indonesian parliament passed amendments to nine of the 37 articles of the Constitution resulting in a significant shift of power away from the president and the executive to the legislature and the judiciary. The amended Constitution 'established a separately elected president, limited to two terms; required legislative advice and consent for major executive appointments; defined the grounds for presidential impeachment; made all seats in both legislative chambers elective; gave constitutional force to the legislature's investigatory and interpolatory powers and separated the Indonesian National Army (renamed the *Tentara Nasional Indonesia* TNI) from the police'.⁶²

Two issues are of particular importance to the current discussion: presidential impeachment, and the separation of the Indonesian police from the armed forces. Just six weeks prior to the 9/11 attacks, Indonesia underwent a change of president, with the impeachment of Abdurrahman Wahid by the parliament and the appointment of Megawati Soekarnoputri. Having failed to secure the support of large sections of the civil service, police, the Supreme Court and the military during a stand-off with the national parliament, Wahid was removed as president; an event which would have been unthinkable under the New Order regime. This event determined that the Indonesian president who would face the critical and daunting task of responding to both the 9/11 attacks and the Bali bombings of 2002, was Megawati Soekarnoputri – the daughter of Indonesia's founding president and leader of one of the largest secular parties, *Partai Demokrasi Indonesia Perjuangan* (the Indonesian Democratic Party of

⁶² Edward V. Schneier, "Reformasi and the Indonesian 'War on Terror': State, Military and Legislative-Executive Relations in an Emerging Democracy" (2009) *Journal of Legislative Studies* vol. 15 no. 2/3, 298.

Struggle, PDI-P). The Megawati administration's response was of key importance in shaping Indonesia's overall counter-terrorism position and strategy; including both its domestic legislation and the response to international calls from the US to join the Global War on Terrorism (GWOT).

The separation of the police from the armed forces, effective from 1 April 1999, is also significant. In the wake of 9/11, the US political and military elite sought to enlist the support of Indonesia in its GWOT; partly through the offer of funding and technical assistance to Indonesia's under-equipped military. 'Many governments in the US-led 'coalition against terror' believed that the provision of additional equipment, professional training and increased defence cooperation would translate into an intensified campaign by Indonesia's security forces against radical Islamist cells in the country'.⁶³ International concerns over human rights abuses in East Timor had led to the cessation of military-to-military cooperation between the US and Indonesia in 1999. The US congress was therefore asked to review its ban on military cooperation with Indonesia, but despite the support of several senators, little evidence was found to support the notion that Indonesia's military had made sufficient progress in addressing the concerns. More surprising was that the Indonesian military itself showed very little interest in receiving any kind of military support or training from the US.⁶⁴

The history and structure of Indonesia's military is such that it is primarily focused on internal affairs and domestic interests, is indifferent to international engagement and is ambivalent in its efforts to become a world-class defence force.⁶⁵ The aid, technical assistance and training which would have flowed to Indonesia's military were therefore channelled to the newly independent police force. US Secretary of State, Colin Powell, in a state visit in August 2002 announced a \$50 million aid

⁶³ Marcus Meitzner, "Politics of Engagement: The Indonesian Armed Forces, Islamic Extremism, and the 'War on Terror'" (2002) *The Brown Journal of World Affairs* vol. IX no. 1, 71.

⁶⁴ Ibid.

⁶⁵ Ibid, 72.

package half of which was to be channelled to the Indonesian police.⁶⁶ The money was to be used for training, the establishment of a new CT police unit and a regional CT scholarship.⁶⁷ The assistance underscored the importance to the US of an effective counter-terrorism strategy in Indonesia to decisively deal with Al Qaeda-linked terrorism in the country. It was to mark the beginning of extensive multi-lateral assistance to Indonesia's police force, from countries such as the US, Australia, UK and Canada, and helped to shape the Indonesian criminal law-based response to terrorism.

Also important in the political context was the public response of Indonesia's new president. Immediately following 9/11, she travelled to the US, met with President Bush and made the 'significant gesture' of publicly condemning the attacks and expressing her sympathies.⁶⁸ On returning to Indonesia however, domestic political imperatives meant that her support for the US GWOT was quickly watered down. Taking account of the opinions of conservative Muslims such as her own Vice-President Hamzah Haz, who blamed the attack on America's 'sins'⁶⁹ Megawati found it necessary to equally condemn the US counter attack against Afghanistan. Finding herself in a delicate political position – dependant on the support of conservative Muslim factions which view the US as a threat to Islam and a supporter of Israel – President Megawati was careful to show her independence from US imperatives. Many in Indonesia's political elite refused to believe that trans-national religious terrorist networks were even present in Indonesia – or that groups such as Jemaah Islamiyah were a threat to national security.⁷⁰

⁶⁶ Anthony L Smith, "Reluctant Partner: Indonesia" (2003) *Asian Affairs: An American Review* vol. 30 no. 2, 147.

⁶⁷ Bvitri Susanti, "National Security, the Media, and the Promotion of Human Rights in Indonesia" (2003) *Asia Rights* September/October, Issue 2, 2.

⁶⁸ Amitav Acharya and Arabinda Acharya, "The Myth of the Second Front: Localizing the 'War on Terror' in Southeast Asia" (2007) *The Washington Quarterly* vol. 30 no. 4, 75.

⁶⁹ Smith, above n 66, 144.

⁷⁰ Acharya, above n 68.

Megawati therefore found herself in a situation where her government was unable to act decisively against radical suspects for fear of being broadsided by opponents making political capital out of her secular background.⁷¹

Noting Jakarta's hesitance to ban JI, Acharya observed 'counterterrorism and electoral politics make uneasy bedfellows in a newly democratic nation'.⁷² Following the Bali bombing of 2002, while she did visit Bali, Megawati issued no public statements on the terrorist attack.⁷³ Smith remarked that it would be 'inconceivable' that an American president would have nothing to say following a comparable attack.⁷⁴

MOVING TOWARD A NEW ANTI-TERRORISM REGIME

Between 1999 and 2002, after the fall of Soeharto but prior to the Bali bombing, there were a series of terror attacks in the capital, committed by both Islamist and ethno-separatist terrorist groups including Jemaah Islamiyah and GAM (the 'Free Aceh Movement'). Jakarta's main mosque, Istiqlal, was bombed, and there was an attempted assassination of then-Minister of Defence, Matori Abdul Djalil. There was a bombing of the residence of the ambassador of the Philippines and a series of Christmas Eve bombings in 2000. The Jakarta Stock Exchange was bombed by GAM, as well as the Atrium Shopping Mall, which was bombed twice, by Islamists and GAM.⁷⁵

However, as the Anti-Subversion law – a key piece of supporting legislation in the authoritarian Soeharto regime for suppressing political dissent – had been repealed, these attacks were prosecuted using the existing Criminal Code, which covers crimes such as murder and arson, and the State Emergency Law which criminalises the illegal use of explosives.

⁷¹ Smith, above n 66, 144.

⁷² Acharya, above n 68.

⁷³ Anthony L. Smith, "The Politics of Negotiating the Terrorist Problem in Indonesia" (2005) *Studies in Conflict & Terrorism* vol. 28 no. 1, 42.

⁷⁴ Ibid.

⁷⁵ Tito Karnavian, "Transcript of Interview with Tito Karnavian Deputy of National Counter Terrorism Agency" (13 April 2012) 1.

Following 9/11, and under intense international pressure from the US and the UN, the Indonesian parliament began drafting an anti-terrorism law in early 2002. Susilo Bambang Yudhoyono, then Coordinating Minister for State Security was quoted by Wahid in April 2002 as saying that government and the community needed to work together to wipe out terrorism, 'but, we don't want to be dictated to by another country or to implement a foreign scenario. Efforts to eliminate terrorism must be within a national system and laws'.⁷⁶ Yudhoyono's words reflected a widely held view that Indonesia's legislative and political agenda should not be dictated by foreign powers, especially the US.

The first draft of the law was considered too draconian for a parliament and public wary of a return to Soeharto-style political oppression. Of most concern were articles which removed basic legal rights such as the right to a lawyer, the right to remain silent, or to refuse to answer investigators' questions, and the right to contact family members. It also provided a 90-day period of preventive detention that could be extended up to nine months.⁷⁷ In the face of public opposition the bill was withdrawn.⁷⁸

Following the withdrawal of the initial draft of the ATL, a working group that included police, military, lawyers, academics and activists who had been imprisoned during the Soeharto era went to work drafting a new version of the ATL.⁷⁹ The process of drafting and debating the new law would have continued far longer, however the

⁷⁶ Abdul Wahid, Sunardi, and Muhammad Imam Sidik, *Kejahatan Terorisme: Perspektif Agama, HAM Dan Hukum*, ed. Aep Gunarsa (PT Refika Aditama, 2004) 11.

⁷⁷ Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (New York: Cambridge University Press, 2011).

⁷⁸ The withdrawal of the first terrorism bill links into notions of 'securitization' theory outlined by Febrica. Despite the scale of the 9/11 attacks the Indonesian public would not accept the level of state coercive powers adopted in other nations. However, following the Bali attack, a watered-down version of the terrorism law was quickly passed with little resistance. See Senia Febrica, "Securitizing Terrorism in Southeast Asia: Accounting for the Varying Responses of Singapore and Indonesia," (2010) *Asian Survey* vol. 50 no. 3, 569.

⁷⁹ The working group was conscious of distancing the new draft from the previous draft and included article 5 which specifically distinguishes terrorist crimes from political crimes. 'Terrorist crimes are neither politically criminal acts...nor criminal acts with political motives.' Roach, above n 77.

Bali bombings of October 12, 2002 dramatically sped up the process of finalising and enacting the law. Interim Laws No. 1 and No.2 of 2002 were signed into effect by Megawati six days after the bombing, using special constitutional powers to enact laws during a state of emergency.

While the ATL was hastily drafted and passed, it remains in its unamended form and has provided sufficient legal cover to allow police to investigate, apprehend and prosecute terrorist suspects with 'extraordinary success'.⁸⁰ As it addresses a *pidana khusus* (an 'extraordinary crime', other examples are corruption, narcotics and money laundering each of which has its own specific legislation)⁸¹ the ATL contains significant additional powers to those contained in the criminal code, which have been of key importance in police counter-terrorism operations. In particular, the ATL allows longer periods of detention; it provides harsher penalties (including the death penalty) and allows prosecutors to adduce additional types of evidence at trial. It also grants police the power to intercept electronic communications related to terrorism, which has arguably been the greatest single factor in infiltrating and crippling terrorist networks. The ATL also contains a brief chapter (art 43) which facilitates international cooperation in the areas of intelligence and policing.

International police cooperation between POLRI and agencies such as Australia's AFP, the FBI and Scotland Yard was a key aspect of early successes in counter terrorism investigations. In the immediate aftermath of the Bali bombing, Australian and Indonesian police were able to use counter-terrorism Memorandum of Understanding which had been signed by Prime Minister John Howard and President Megawati in the wake of 9/11 to provide the legal framework for an unprecedented

⁸⁰ Greg Fealy, "Transcript of Interview with Professor Greg Fealy Head, Department of Political and Social Change School of International, Political and Strategic Studies College of Asia and the Pacific Australian National University" (3 May 2013) 2.

⁸¹ For example, under Law Number 31 of 1999 on the Eradication of the Crime of Corruption police have the power to intercept mail, telecommunications or other devices which may have a connection to a corruption case under investigation (Article 30).

level of cooperation between investigators from both countries.⁸² The investigation involved 400 Indonesian police alongside 110 foreign investigators mostly from the AFP.⁸³

The cooperation between Australian and Indonesian forensic investigators led to the breakthrough discovery of a concealed chassis number on the minivan used by the bombers. This number in turn led them along a chain of vehicle owners to Amrozi – and the other participants. These key breakthroughs could not have been possible without the joint forensic analysis of the crime scene conducted by both AFP and POLRI working side-by-side.

The swift arrests of several of the bombers, and their subsequent transparent trials persuaded some sections of the public that the bombers were in fact home-grown (although some Muslim political leaders and President Yudhoyono continued to deny it for several more years); and that the threat of Indonesian terrorist groups, with international links to Al Qaeda, was real. It also set the stage for Indonesia's future policing successes in counter-terrorism operations over the following decade.

Following *reformasi* and the withdrawal of the military from its position of prominence in social and political affairs, POLRI was well-placed to assume the lead role in CT affairs. Jones argues 'one of Indonesia's great [post-*reformasi*] achievements has been to ensure that terrorism remains a law enforcement issue to be handled by the police, not the military'.⁸⁴ This may be contrasted against the US 'rubric of war'

⁸² Presentation by Assistant Commissioner Steve Lancaster, National Manager Counter Terrorism, Australian Federal Police at Global Terrorism Research Centre Conference "Terrorism and Counter-terrorism in Australia and Indonesia: 10 Years After Bali" 26 September 2012, Monash University, Melbourne, Australia. The MOU was signed by Howard and Megawati in February 2002 "Isolated Indonesia Eyes Australia for Support" (2002) *Stratfor Geopolitics Analysis* <<http://members.pcug.org.au/~wildwood/02febeyes.htm>>.

⁸³ Barton, above n 17, 8.

⁸⁴ Sidney Jones, "What Is the State of Indonesia's Fight against Terror?" *indonesiamedia.com* (online) 16 August 2010 <<http://www.indonesiamedia.com/2010/08/16/what-is-the-state-of-indonesias-fight-against-terror/>>.

response to terrorism⁸⁵ which has left 'the Coalition of the Willing bogged down defending guerrilla wars with no exit strategies'⁸⁶ and the repercussions of military actions in the Middle East which continue to play out.⁸⁷

While Jones' observation of a post-*reformasi* shift to a criminal law, police-led approach is correct, it does not provide guarantees on three important related issues. First, it does not guarantee the effective and consistent application of the rule of law (discussed below). Second, it does not guarantee that the Indonesian military may not retake control of terrorism operations in the right circumstances. And third, it does not guarantee that the courts will adequately perform their function when terrorism cases are brought before them.

Reports of a push for increased military involvement in CT operations indicate the continuing ambition of the Indonesian military to reassert its influence in the area.⁸⁸ Commentators point out that each of the military's branches, including the elite special forces unit Kopassus, has specialised CT detachments.⁸⁹ Mardigu, cited by Rahman, argues that the army's anti-terrorism detachment 'Gultor' is well-equipped and ought to be deployed in the fight against terrorism especially in places like Poso.⁹⁰ The military's own enabling legislation, Law No 34 of 2004 includes 'responses to acts

⁸⁵ Leila Nadya Sadat, "Terrorism and the Rule of Law" (2004) *Washington University Global Studies Law Review* Vol.3, 135.

⁸⁶ Colin McDonald, "'The Republic Is Ours': The Indonesian Response to the So-Called 'War on Terror'" (2006) *Bar News* Summer 2005/2006, 21.

⁸⁷ In December 2002, Susilo Bambang Yudhoyono, Indonesia's then-coordinating minister for security and next president, urged a 'peaceful solution for the Iraq crisis'. Yudhoyono's warning reflected the overwhelming opinion of the Indonesian community which was opposed to a unilateral invasion of Iraq without UN approval. Smith, above n 65, 146.

⁸⁸ Institute for Policy Analysis of Conflict [IPAC] *The Expanding Role of the Indonesian Military* (2015) IPAC Report No. 19, 25 May 2015.

⁸⁹ Muradi, "The 88th Densus AT: The Role and the Problem of Coordination on Counter-Terrorism in Indonesia" (2009) *Journal of Politics and Law* vol. 2 no. 3, 85.

⁹⁰ Deni Muliya Barus and Amran Amier Mujib Rahman, "Kejahatan Khusus Menyerang Polisi" *GATRA Magazine* 03 January 2013, 16.

of terrorism' in its remit of 'military operations other than war'.⁹¹ Following the terrorist attacks of 2009, and recognising terrorism was a 'state security' issue, President Yudhoyono granted a role to the military within the newly-formed BNPT.⁹² However, police maintained control of the key divisions of operations and international relations, leaving the military with the Prevention Division – a role for which they were not prepared.⁹³ While the Indonesian military has indicated its 'readiness' to join the fight in boots-on-the-ground CT operations, and is in a sense 'waiting in the wings', human rights groups warn of the dangers of a shift 'from law enforcement into waging war'.⁹⁴

TERRORIST ACTIVITY AND STATE RESPONSES FROM 2002 ONWARDS

Following the Bali 2002 attack, groups with links to JI made a major bomb attack an 'almost annual event' – including the Marriott Hotel in 2003, the Australian Embassy in 2004, the second Bali bombs in 2005, an attempted attack on a tourist café in West Sumatra in 2007 and the Marriott and Ritz-Carlton hotels in Jakarta in 2009.⁹⁵ The tactics of the bombings – 'the targeting of Western icons, often diplomatic in nature; the use of multiple explosions; a propensity for car bombs; and a preference for suicide bombings' indicated possible links to Al Qaeda.⁹⁶

⁹¹ See Article 7(2)(b)(3) of Law No 34 of 2004 on the Indonesian Military.

⁹² Institute for Policy Analysis of Conflict [IPAC] *Countering Violent Extremism in Indonesia: Need for a Rethink* (2014) IPAC Report No. 11, 30 June 2014, 3.

⁹³ *Ibid.*

⁹⁴ Nani Afrida, "TNI Ready for Bigger Role in Poso," *The Jakarta Post* (online) 15 March 2015 <<http://www.thejakartapost.com/news/2015/02/11/tni-ready-bigger-role-poso.html>>.

⁹⁵ Jones, above n 84, 2. Ansyaad Mbai, *Dinamika Baru Jejaring Teror* (Jakarta: Squad Publishing, 2014) 9.

⁹⁶ Drew Davis, "Al-Qaeda in the Malay Archipelago: A Case Study of the July 2009 JW Marriott & Ritz-Carlton Bombings in Jakarta, Indonesia" (2010) *Pax Americana Institute Report* March 2010, 4.

The Indonesian police, armed with the new terrorism law, responded by waging 'one of the world's most determined campaigns against terrorism'.⁹⁷ As of March 2015, a total of over 1000 terrorist suspects had either been caught, or killed, by police.⁹⁸ There were no major attacks between 2005 and 2009, and when police infiltrated a terrorist base in Poso in 2007, Indonesia was hailed by TIME magazine as 'one of the world's few triumphs in fighting terrorism'.⁹⁹ Given the ongoing terrorist activities in intervening years, it now appears that the declared 'triumph' over terrorism was premature.

Despite significant delays in apprehending or neutralising some perpetrators – for example, seven years in the case of Noordin M. Top¹⁰⁰ and ten years for Umar Patek – all of those responsible for the Bali bombing and subsequent attacks were either caught and prosecuted or killed.¹⁰¹ Patek, the last of the Bali bombers to be located was arrested in Abbottabad, Pakistan in 2011 and may have provided information which led US authorities to discover the location of Al Qaeda leader Osama Bin Laden.¹⁰² In 2012, Patek was repatriated, stood trial in an Indonesian court and was sentenced to

⁹⁷ Hannah Beech, "What Indonesia Can Teach the World About Counterterrorism" *TIME* (online) 7 June 2010 <<http://www.time.com/time/magazine/article/0,9171,1992246,00.html>>.

⁹⁸ Ibid.

⁹⁹ Joshua Kurlantzick, "Doing It Indonesia's Way" *TIME* (online) 9 August 2007 <<http://content.time.com/time/magazine/article/0,9171,1651213,00.html>>.

¹⁰⁰ Hannah Beech, "Why Indonesia's War on Terror Is Far from Over" *TIME* (online) 18 September 2009 <<http://www.time.com/time/world/article/0,8599,1924804,00.html>>.

¹⁰¹ Mbai, above n 95. One report claims that there is still one perpetrator who remains at large. Noting that 'all 36 terrorists who were not sentenced to life are now free' (not technically correct as Umar Patek was sentenced to 20 years and is still imprisoned) Toohey writes that 'Zulkarnaen, aged 50, remains the only major player unaccounted for over Bali 2002. The US Department of State accuses Zulkarnaen of a senior role in the 2003 Marriott bombing, that killed 12 people, and of helping make the 2002 Bali bombs.' Paul Toohey, "Paradise for Terrorists: 36 Bali Bombers That Killed 92 Australians Are Walking Free" *Daily Telegraph* (online) 4 May 2014 <<http://www.dailytelegraph.com.au/news/nsw/paradise-for-terrorists-36-bali-bombers-that-killed-92-australians-are-walking-free/story>>.

¹⁰² Amanda Hodge, "Bali Bomber Helped Lead World to Bin Laden's Hideaway" *The Australian* (online) 5 May 2011 <<http://www.theaustralian.com.au/in-depth/bali-bomber-umar-patek-helped-lead-world-to-osama-bin-ladens-hideaway/story-fn8ljzlv-1226050116997>>.

20 years for his involvement in the Bali bombing and other attacks.¹⁰³ It may be noted that all of the surviving bombers from the 2002 attack were arrested *alive* and went on to stand trial; three of the most culpable and recalcitrant bombers were executed by firing squad in 2008.

Events in 2009 caused a significant shift in state responses to terrorism. The synchronised bombings of the Marriott and Ritz-Carlton hotels in Jakarta, and a foiled plot to assassinate the president, were enough to convince SBY that terrorism was 'now a matter of state security'.¹⁰⁴ The formation of a national counter-terrorism agency to coordinate a whole-of-government approach to CT was fast-tracked. Fatal shootings of terrorist suspects by police also showed a marked increase from around this time, prompting the National Human Rights Commission to pen a press release reminding authorities to respect due legal process and the International Covenant on Civil and Political Rights.¹⁰⁵ Bhakti noted:

Prior to 2009 there were instances of non-lethal shootings of terrorist suspects, for example Suparjo alias Sarwo Eddy was shot in the shoulder in Sleman in 2007. Abu Dujana was shot in the leg in 2007 after he struggled with his captors, who, according to him, were wearing plain black clothes and did not identify themselves as police officers when they attempted to arrest him. Dujana was on a motorbike with his children at the time. Prior to 2009, I can think of no lethal shootings of terrorist suspects. It is only after the Marriott bombing and the hunt for Noordin M. Top that lethal shootings began to escalate.¹⁰⁶

The change in tactics raises the question of whether the president, a former military officer, after being personally targeted by jihadist terrorist groups, issued an informal

¹⁰³ Bayu Marhaenjati, "Bali Bomber Patek Gets 20 Years in Prison," *The Jakarta Globe* (online) June 21 2012 <<http://www.thejakartaglobe.com/home/bali-bomber-patek-gets-20-years-in-prison/525916>>.

¹⁰⁴ IPAC, above n 92, 3.

¹⁰⁵ Ifdhal Kasim, "Upaya Pemberantasan Tindak Terorisme Harus Menghormati Prinsip-Prinsip Hak Asasi Manusia," (2009) Report of National Human Rights Commission of Indonesia [KOMNAS HAM].

¹⁰⁶ Personal communication with Mohammad Adhe Bhakti, Executive Director of the Centre for Radicalism and Deradicalization Studies (PAKAR) 08 July 2015.

directive for a harsher approach to CT operations. The ATL contains a provision which supports such a move. Article 45 provides that the president may take steps to formulate policy *and* operational responses to terrorism. Thontowi noted that the inclusion of this article opened the door for unwarranted 'executive intervention into what should be judicial authority' and that it exposes the ATL to the 'danger of an abuse of power'.¹⁰⁷ If it is correct that the President issued a directive which led to a dramatic increase in the number of fatalities in CT operations, Thontowi's concerns have been borne out.

While acknowledging this as a possible cause of the shift in tactics, Bhakti points out that plots targeting the Indonesian president existed prior to 2009:

Both Megawati and Gus Dur were targeted by terror groups. My theory is that it is due to the training of the police units. When Densus 88 conducts CT operations they bring in members of other tactical units for support, such as the CRT (Crisis Response Team) and the SW (Silent Warriors) from Mabes Polri.¹⁰⁸ These 'SWAT' teams are trained overseas. Units trained in the US are trained by the military, whereas units trained in Europe are trained by police and tend to be less lethal. There may be a link, but Densus 88 sources will not respond on the question of whether there was a change in training methods after 2009.¹⁰⁹

While plots to target the president may have existed prior to 2009, the main targets of large-scale terror attacks before that time were foreign. After 2009, there was a shift in targeting to the Indonesian state apparatus. 'After 2009 police realised that they really were a target for the jihadist groups and this changed their mindset'.¹¹⁰ Regardless of the cause of the increase in lethal shootings of terror suspects by police, there was a marked increase of violence and revenge attacks between police and jihadist groups

¹⁰⁷ Jawahir Thontowi, "The Islamic Perspective of the War on Terrorism and Current Indonesian Responses" (Paper presented at Human Rights 2003: The Year in Review Conference Castan Centre for Human Rights Law, Monash Law School, 4 December 2003) 20.

¹⁰⁸ MABES POLRI is an acronym derived from *Majelis Besar Kepolisian Nasional Republik Indonesia* – The Indonesian National Police Headquarters.

¹⁰⁹ Bhakti, above n 106.

¹¹⁰ Ibid.

after 2009. The president further strengthened the state's CT structure in 2010 with Presidential Regulation Number 46 of 2010 on BNPT.¹¹¹ The regulation formed the BNPT and created its structure and mission. The BNPT is tasked with formulating policy, strategy and national CT programs and coordinating related government agencies, and the formation of task-forces. The regulation also explicitly tasks BNPT with prevention, deradicalisation, operations and national alertness. Under the regulation, the BNPT is directly responsible to the president (art 1), and it is divided into three sub-sections: Prevention, Protection and Deradicalisation; Operations and Capacity Development; and International Cooperation (art 6). In 2012, the BNPT's status was further elevated by an amending regulation which raised the position of the head of BNPT from an Echelon 1 public servant, to the level of Minister (art 1(2)). The move indicates the importance placed on BNPT and its position within the Indonesian government to have a public official on the same level as a minister whose sole responsibility is counter-terrorism policy.

By 2009, JI had effectively been crippled. Azhari Husin and Noordin M Top had effectively left the organisation in 2003, and another of its influential leaders and ideologues, Abu Bakar Ba'asyir was behind bars. In recent years, JI's relevance and threat has faded even further as committed jihadists deride it for being ineffectual and waging 'jihad by the pen'.¹¹²

While there have been no major attacks since the Marriott bombing of mid 2009 which killed nine civilians and wounded 53, other groups have emerged and terrorist activity has continued. Like the multi-headed hydra, a head which is cut off is replaced by another. And, in this process of perpetual renewal, it is important to

¹¹¹ *Peraturan Presiden Republik Indonesia Nomor 46 Tahun 2010 Tentang Badan Nasional Penanggulangan Terorisme* (2010) (Presidential Regulation No. 46 of 2010 on the National Counter-terrorism Agency).

¹¹² International Crisis Group [ICG], *Indonesia: The Dark Side of Jama'ah Ansharut Tauhid* Asia Briefing Report No. 107, 6 July 2010, 6.

recognise that actions taken by the state, can and do play a role. Harsh repressive violent actions, which sacrifice the rule of law and standard legal processes, serve to further antagonise extremist groups and assist them in attracting new recruits. Max Boon for example, an anti-terrorism activist and victim in the 2009 Marriott bombing, (quoted by Ai-lien) warned against a hard-line approach of 'killing, shooting and locking people up' which can 'create more hate among the families involved, and give potential recruits more reason to join'.¹¹³

Showing a remarkable capacity to 'adapt, regenerate and learn lessons from the past'¹¹⁴ Indonesia's jihadist groups have displayed tenacity and resourcefulness even in the face of significant setbacks such as the killing or capture of leaders, and large scale CT operations by police resulting in the arrests of hundreds of suspects. Jihadist and extremist groups such as JAT, JAS, HASMI, DI, NII, FPI, MIT and MIB¹¹⁵ share members and ideologies, and provide much-needed shelter and funding especially in times of trouble. One report identified five 'vectors through which interaction takes place' and which facilitate the continued linkages and cooperation between the jihadist groups. They are: flight; prisons and prison visits; training; internet forums; and marriage.¹¹⁶ The groups are united and sustained by two over-arching ideological goals: the establishment of an Islamic state and the application of Shari'a law. Most radical groups see the two as being inextricably linked.

¹¹³ Chang Ai-lien, "Jakarta Marriott Bombing Survivor Fights Terrorism with a Soft Touch" *Jakarta Globe* (online) 14 October, 2012 <http://www.thejakartaglobe.com/home/jakarta-marriott-bombing-survivor-fights-terrorism-with-a-soft-touch/550155#Scene_1>.

¹¹⁴ ICG, above n 112.

¹¹⁵ Jemaah Anshorut Tauhid, Jemaah Harakah Sunni for the Indonesian Society, Darul Islam, Negara Islam Indonesia, Front Pembela Islam, Mujahidin Indonesia Timur, Mujahidin Indonesian Barat.

¹¹⁶ International Crisis Group [ICG], *How Indonesian Extremists Regroup* Asia Report No. 228, 16 July 2012 <[http://www.crisisgroup.org/~media/Files/asia/south-east-asia/indonesia/228-how-indonesian-extremists-regroup.pdf](http://www.crisisgroup.org/~/media/Files/asia/south-east-asia/indonesia/228-how-indonesian-extremists-regroup.pdf)>.

Convicted on the 'thinnest of grounds' of inciting the Marriott bombing of August 2003 Ba'asyir was sentenced to two and a half years in prison and was released in 2006.¹¹⁷ Upon his release he wasted little time in establishing a new organisation, Jemaah Anshorut Tauhid which he claimed was devoted only to 'legal activities'.¹¹⁸ The group quickly attracted followers and Ba'asyir was drawn into the next major development in Indonesia's jihadist scheme, a terrorist training camp in Jalin Jantho, Aceh – the Indonesian province on the northernmost tip of Sumatra.

ACEH TRAINING CAMP AND ITS AFTERMATH POST-2010

The Aceh training camp was the 'brainchild' of Dulmatin¹¹⁹ who worked with Ubaid and later Ba'asyir.¹²⁰ Prison played a key role in bringing together members of different extremist groups into a kind of think-tank which facilitated the camp. Karnavian stated 'The Aceh training camp was planned in Cipinang prison and involved leaders from several radical groups like JI, JAT and NII, while they were in prison'.¹²¹ Ba'asyir welcomed the idea and made available the resources of JAT including its offices and chief administrator, Abu Tholut, a key player in organising and funding the venture.¹²² It involved an alliance of almost all of Indonesia's jihadist groups to establish a secure

¹¹⁷ ICG, above n 112, 11.

¹¹⁸ Ibid, 10.

¹¹⁹ Ibid, 12.

¹²⁰ While it has been reported that Ba'asyir was convicted of financing terrorism this is technically incorrect. See for example: "Abu Bakar Bashir Spared Death Penalty" SKY News (online) 9 May 2011 <http://skynews.com.au/topstories/article.aspx?id=610678&vId=2390732>; Karishma Vaswani, "Indonesia Jails Cleric Abu Bakar Ba'asyir for 15 Years" *BBC News* (online) 16 June 2011 <http://www.bbc.co.uk/news/world-asia-pacific-13781199>. On appeal, the Supreme Court convicted Ba'asyir under art 14 jo. 7 of the ATL 'planning or mobilising others to attempt to commit terrorism' and sentenced the defendant to 15 years imprisonment. While the courts ultimately did not convict Ba'asyir on the financing charge, the prosecution remained convinced that the financing charge under art 14 jo. 11 of the ATL 'planning or mobilising others to provide funds where it is known or ought to be known that they will be used for terrorism' was most strongly supported by the evidence. The prosecution also pointed out that this case was a breakthrough in evidentiary terms as, previously, few trials had focussed on the preliminary stages of financing a terrorist act. Kejaksaan Agung, *Panduan Penanganan Perkara Tindak Pidana Terorisme*, ed. Satuan Tugas Penanganan Perkara Tindak Pidana Terorisme dan Tindak Pidana Lintas Negara (Jakarta: Kejaksaan Agung Republik Indonesia, 2013) 165.

¹²¹ Karnavian, above n 75, 3.

¹²² Mbai, above n 95, 18.

base of operations (*qoidah aminah*) for military training in preparation for further terrorist acts with the ultimate goal of establishing an Islamic state. The camp was a major operation and involved several hundred individuals from a broad range of backgrounds in the areas of funding, operations and administration. Admissions made by members of the camp following their capture indicate the ease with which the group was able to source funding and recruit followers numbering in the hundreds.¹²³

Aceh was chosen as the location of the camp for a variety of reasons, some of which were flawed. It has remote, densely forested mountainous areas which are suited to guerrilla warfare. The Acehese Independence Movement (GAM) conducted guerrilla resistance in the province for many years without being defeated by the Indonesian army – the group was even able to recruit some former GAM members.¹²⁴ Aceh is also one of the only provinces in Indonesia to implement a form of Shari'a law – so it was assumed, wrongly, that the local populace would support the project. It was also thought that the years of resistance fighting would facilitate the sourcing of weapons, and that locals would be more used to this kind of guerrilla activity and the sound of weapons firing – as discussed below these assumptions were also flawed.

The training took place in a remote jungle location seven hours walk from the nearest village. Members were indoctrinated with jihadist ideology; that the use of force to defend Islam is every Muslim's duty, and that this entailed mental and physical preparation in military tactics. Further, that Islam is being attacked by western/liberal/Christian forces which seek to weaken and destroy it at both a global and local level. The camp organisers referred in particular to a Gubernatorial decree in Aceh which allowed Christians to build a church where there is a minimum of 120

¹²³ See for example: Decision of Jakarta High Court in Adi Munadi Nomor: 100/PID/2011/PT.DKI. Also, the cases of Syarif Usman indictment: No.Reg.Perkara: PDM-1430/10/2010 and Hariyadi Usman indictment: No.Reg.Perkara: PDM/JKT.Barat/09/2010. 4 November 2010

¹²⁴ Mbai, above n 95, 21.

individuals of Christian religion. Stated targets included foreign NGOs, UN offices, USAID, and tourist locations frequented by non-Muslim tourists.¹²⁵

Members were instructed in the use of military assault rifles such as M-16s and AK-47s and practiced target shooting, physical training, marching and running, battle tactics and hand to hand combat. The camp had around 20,000 rounds of ammunition. The members were indoctrinated that the use of force was justified for anyone who stood in the way of achieving their goals. The group was named Al Qaeda Serambi Mekkah although it appears the name was aspirational as no direct links to Al Qaeda were proven.¹²⁶

By one account, a group of four locals from a nearby village were returning home after checking their deer traps when they encountered an armed group from the camp who pointed their weapons at them and threatened them.¹²⁷ Another account says that 'a local villager collecting rattan nearby reported unusual activity'.¹²⁸ In any event, the group's presence was noticed and reported by local residents – likely because of the jihadists' own ineptitude and aggressiveness. A massive police operation was mounted and members of the camp attempted to flee. In the 'contact' that followed, three police officers from the Brimob tactical response unit were killed and eleven injured and one local resident was killed.¹²⁹

Dozens of camp members were arrested and some of Indonesia's most experienced jihadist fighters were killed including, Dulmatin, Enceng Kurnia and Kang Jaja.¹³⁰

¹²⁵ Munadi, above n 123.

¹²⁶ ICG, above n 116, 3.

¹²⁷ Munadi, above n 123, 33.

¹²⁸ ICG, above n 116, 3.

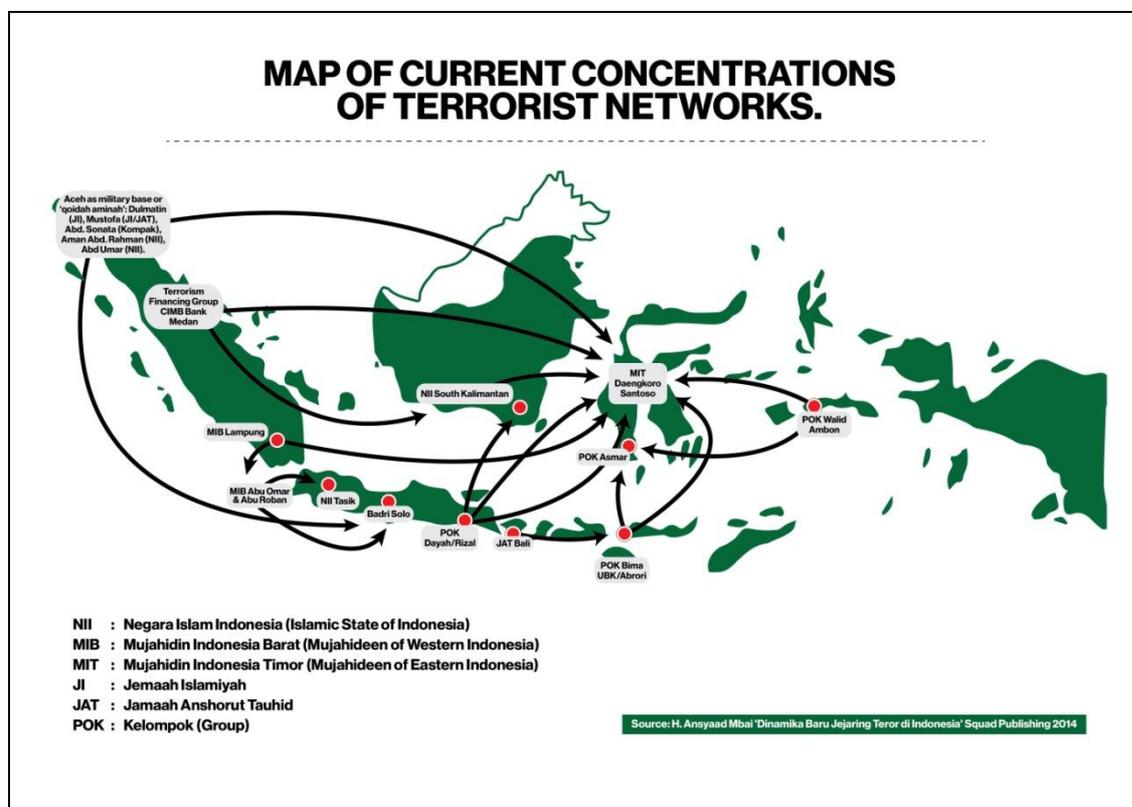
¹²⁹ Munadi above n123, 24.

¹³⁰ ICG, above n 116, 3.

This also led to the dispersal of fugitives across the country in a way that helped blur organisational and geographical divisions within the jihadi movement and gave police a wealth of new information which they used to track down hundreds of suspects over the next two years.¹³¹

As the camp's participants dispersed and sought refuge from police actions, concentrations of terrorist activity emerged in various parts of the country, including Medan, Lampung, Jakarta, Solo, Bali, Bima and Poso as shown in Diagram 2.

Diagram 2: Map of Active Indonesian Terrorism Networks as at 2014



Source: Ansyaaad Mbai 'Dinamika Baru Jejaring Teror' 2014

Virtually all jihadist terrorist activity conducted by various groups in Indonesia since 2010, bar one (the Pepi Fernando cell), can be traced back in some way to an

¹³¹ Ibid.

involvement or connection with the Aceh training camp.¹³² Cells of jihadists emerged in various cities around the country with a renewed vigour for violence, motivated to a large degree by a desire for revenge against police.

In August 2010, Toni Togar, ordered a group of his followers to conduct a bank robbery in order to get funds to break him out of prison.¹³³ A group of nineteen of his followers, led by Hidayat, conducted an armed robbery of a CIMB Niaga bank, killing a police officer and wounding a security guard and made off with around Rp340 million. The group planned to use the money to break Togar out of prison and to fund further terrorist attacks against foreign-owned companies such as Chevron and Caltex and on tourist destinations like Batam and Krakatau. Money was also used to attempt to buy weapons in Malaysia and Thailand and indicated ideological and operational links with the Pattani United Liberation Organisation (PULO).¹³⁴ The group went on to conduct a deadly raid on a police station at Perak Hamparan, which killed three police officers. Police retaliated by killing most of the members of the group.

Around the end of 2010 and beginning of 2011, a group led by Roki Aprisdianto conducted a series of mostly-unsuccessful bombings in Klaten, Central Java.¹³⁵

In March 2011, a group led by Pepi Fernando conducted a series of book bombs which unsuccessfully targeted prominent Indonesians and a senior police official.¹³⁶ The book bombs failed to kill or injure their intended targets but a police officer who attempted to defuse one of the bombs lost his forearm when the bomb exploded. The group also conducted a number of smaller bombings with no fatalities and constructed

¹³² See for example: ICG above n 115; International Crisis Group [ICG] *Indonesian Jihadism: Small Groups Big Plans* Asia Report No. 204, 19 April 2011; International Crisis Group [ICG] *Indonesia: From Vigilantism to Terrorism In Cirebon* Asia Briefing No. 132, 26 January 2012.

¹³³ Munadi, above n 123, 16.

¹³⁴ Ibid.

¹³⁵ Mbai, above n 95, 24.

¹³⁶ Bayu Marhaenjati, "Indonesian Book Bomb Mastermind Gets 18 Years in Jail" *Jakarta Globe* (online) 5 March 2012 <<http://www.thejakartaglobe.com/home/indonesian-book-bomb-mastermind-gets-18-years-in-jail/502603>>.

a larger bomb for an attack on the Christ Church cathedral in Serpong near Jakarta. The bomb was planted near the cathedral but the group was arrested by police before it exploded as intended. It was later discovered by a local resident and exploded killing him.¹³⁷ Fernando was arrested and sentenced to 18 years as the mastermind of the group¹³⁸.

In Jakarta in June 2011, a group led by Ali Miftah and Santhanam hatched an abortive and poorly executed plan to poison police with ricin. The group was arrested before they were able to carry out the scheme, although they succeeded in preparing the ricin.¹³⁹

In April 2011, the Ashabul Kahfi group led by Yadi Al Hasan¹⁴⁰ conducted a suicide bomb attack on the Adz Zikra mosque at the police headquarters in Cirebon.¹⁴¹ The explosion killed only the suicide bomber, but injured at least 28 others. In September 2011, the same group conducted a suicide bombing of the Gereja Bethel Injil Sepenuh church in Solo.¹⁴² The bombing killed only the suicide bomber but injured dozens.¹⁴³ Yadi al Hasan was arrested in October 2011 as the mastermind of the

¹³⁷ Fransisco Rosarians, "Divonis 18 Tahun Penjara, Pepi Fernando Senyum" *TEMPO Interaktif* (online) 5 March 2012 <<http://nasional.tempo.com>>.

¹³⁸ Marhaenjati, above n 136.

¹³⁹ ICG, above n 132, 10.

¹⁴⁰ Mbai, above n 95, 25.

¹⁴¹ Suryanto, "Lima Orang Ditangkap Hari Ini Terkait Bom Cirebon" *ANTARA News* (online) 8 October 2011 <<http://www.antaraneews.com/berita/278840/lima-orang-ditangkap-hari-ini-terkait-bom-cirebon>>.

¹⁴² "Suicide Bomber Attacks Packed Indonesian Church" *Channel News Asia* (online) 25 September 2011 <http://www.channelnewsasia.com/stories/afp_asiapacific/view/1155414/1/.html>.

¹⁴³ Reports of terrorist attacks often stress the number of fatalities, however it is important to remember that there may be permanent mental and physical effects on the survivors of terrorist attacks which must be taken into account. For example, Max Boon was a survivor of the Jakarta Marriott bombing of 2009 and suffered life threatening injuries as well as losing both of legs in the attack. He endured a long painful process of learning to walk again with the aid of computerised prosthetic limbs. He is now involved in a project to fight terrorism the 'soft' way by focusing on prevention and outreach. Ai-lien, above n 112.

bombing.¹⁴⁴ The group represented a 'generational shift' from jihadis who got their training abroad or who were veterans of the Ambon and Poso conflicts a decade earlier.¹⁴⁵ They went from using 'sticks and stones in the name of upholding morality and curbing 'deviance' to using bombs and guns'¹⁴⁶ blurring the lines between anti-vice actions and terrorism.

Five alleged terrorists were shot and killed in Bali in March 2012. Police said they were in the advanced stages of planning a third Bali bombing.¹⁴⁷ The group was led by Hilman Jayakusumah who was killed in the police raid.

In September 2012, a spate of explosions and police operations dominated local media reporting¹⁴⁸ with a bomb explosion at an 'orphanage' in Depok¹⁴⁹, shoot-outs between police and suspected terrorists in Solo¹⁵⁰ and arrests and discovery of guns and ammunition in Ambon.¹⁵¹ In October 2012, two police officers searching for a terrorist training camp in Central Sulawesi were found in a grave with their throats cut after being missing for a week.¹⁵² In November 2012, a man with connections to the Poso training camp, Awaluddin, attempted to assassinate the Governor of South

¹⁴⁴ "Indonesia Arrests Alleged Terrorist Mastermind" *Jakarta Globe* (online) 20 October 2011 <<http://www.thejakartaglobe.com/home/indonesia-arrests-alleged-terrorist-mastermind/472908>>.

¹⁴⁵ ICG, above n 132.

¹⁴⁶ *Ibid*, 1.

¹⁴⁷ Made Arya Kencana, "Indonesian Police Kill 5 Terror Suspects in Bali Raid" *Jakarta Globe* (online) 18 March 2012 <<http://www.thejakartaglobe.com/home/indonesian-police-kill-5-terror-suspects-in-bali-raid/505683>>.

¹⁴⁸ "As Terrorism Incidents Rise, Bali Ups Security" *Jakarta Globe*, 25 September, 2012, 3.

¹⁴⁹ Farouk Arnaz, "Terrorism Suspect Toriq Surrenders to Police, Cancels Suicide Bomb Plot" *Jakarta Globe* (online) 10 September 2012 <<http://www.thejakartaglobe.com/home/terrorism-suspect-toriq-surrenders-to-police-cancels-suicide-bomb-plot/543498>>.

¹⁵⁰ "Alleged Solo Terrorist Apologizes" *Jakarta Globe* (online) 6 September 2012 <<http://www.thejakartaglobe.com/home/alleged-solo-terrorist-apologizes/542774>>.

¹⁵¹ "Densus 88 Arrest Six Terrorism Suspects in Ambon" *Jakarta Globe* (online) 10 September 2012 <<http://www.thejakartaglobe.com/home/densus-88-arrest-six-terrorism-suspects-in-ambon/543475>>.

¹⁵² George Roberts, "Indonesian Anti-Terror Police Found with Throats Cut" *ABC News* (online) 18 October 2012 <<http://www.abc.net.au/news/2012-10-18/indonesian-terrorism-investigators-found-with-throats-cut/4319704>>.

Sulawesi, Syahrul Yasin Limpo, with a pipe bomb.¹⁵³ The situation at this time was considered so grave that then-Vice President Boediono was 'assigned to spearhead a new effort to combat terrorism'.¹⁵⁴

In December 2012, a group of a dozen men in Bandung declared themselves the Mujahidin of West Indonesia.¹⁵⁵ 'Five months, ten robberies and one murder later, they were a spent force'.¹⁵⁶ The case demonstrated how leaders of weak groups with no hope of domestic, let alone international clout, have a need to plan acts of violence to keep their followers together and establish their own legitimacy.

In January 2013, police raids in the provinces of South Sulawesi and West Nusa Tenggara left seven alleged terrorists dead.¹⁵⁷ Reports state that they were planning to attack tourist destinations such as Tana Toraja and Bima, a gateway to the popular Komodo islands.¹⁵⁸ An investigator from the police's elite Densus 88 counter-terrorism detachment commented that those killed were linked to the terrorist training camp in Poso, and, in turn, the Aceh training camp. In May 2013, a group of around 10 young men were arrested by police as they were on their way to plant bombs at the residence of the Myanmar ambassador in Jakarta.¹⁵⁹ Also in May, in Tasikmalaya West Java, a pipe bomb was thrown at a police post seriously injuring a police officer. The offender was fatally shot by police at the scene when he drew a home-made firearm and threatened

¹⁵³ Rahmat, "Man Hurls Bomb at South Sulawesi Governor" *Jakarta Globe* (online) 12 November 2012 <<http://www.thejakartaglobe.com/news/man-hurls-bomb-at-south-sulawesi-governor/>>.

¹⁵⁴ Yanto Soegiarto, "The Thinker: A Lack of Intelligence" *Jakarta Globe* (online) 12 September 2012. <<http://www.thejakartaglobe.com/columns/the-thinker-a-lack-of-intelligence/543863>>.

¹⁵⁵ Institute for Policy Analysis of Conflict [IPAC], *Weak, Therefore Violent: The Mujahidin of Western Indonesia* IPAC Report No. 5, 2 December 2013 <http://www.understandingconflict.org/read/index/3/types_of_conflict.html>.

¹⁵⁶ Ibid, 1.

¹⁵⁷ Farouk Arnaz, "Are Terrorist Networks in Indonesia Spreading?" *Jakarta Globe* (online) 7 January 2013 <<http://www.thejakartaglobe.com/lawandorder/are-terrorist-networks-in-indonesiaspreading>>.

¹⁵⁸ "Siap Menyerang Obyek Wisata," *Jawa Pos*, 7 January, 2013, 2.

¹⁵⁹ "Perencana bom kedubes Myanmar dituntut 8 tahun" BBC News (online) 18 December 2013 http://www.bbc.com/indonesia/berita_indonesia/2013/12/131218_tuntutan_bom_myanmar.

police.¹⁶⁰ In August 2013, a bomb exploded inside the Ekayana Buddhist Vihara in west Jakarta, injuring three people.¹⁶¹

In the second half of 2013, five police officers were fatally shot in a series of separate attacks which included the shooting of Second Brigadier Sukardi in front of the Corruption Eradication Commission headquarters in central Jakarta.¹⁶² A report noted that an Indonesian translation of Carlos Marighella's Mini-manual of the Urban Guerrilla had appeared on radical Islamist websites and could have been linked to the change in strategy.¹⁶³

In May 2014, police arrested nine suspected terrorists and uncovered a cache of weapons including rifles, ammunition and bladed weapons in Klaten, near Yogyakarta.¹⁶⁴

With the disbanding of the Aceh training camp in 2010, Poso came to take on a greater role as the centre of jihadist activity.¹⁶⁵ A JAT branch was established in Poso in 2009 and Santoso, as the head of the military wing, set up a training camp in the area of Gunung Biru and started training his first recruits in 2011.¹⁶⁶ When the group needed more weapons they undertook a series of raids and shootings of police officers. In September 2014, a group which had completed their training in Poso returned to their

¹⁶⁰ Rio Kuswandi, "Dibacok Teroris, Makanan Keluar Ke Rongga Perut Aiptu Widartono" *Kompas* (online) 16 May 2013 <<http://regional.kompas.com/read/2013/05/16/1616402/Dibacok.Teroris..Makanan.Keluar.ke.Rongga.Perut.Aiptu.Widartono>>.

¹⁶¹ "Buddhist Vihara in Jakarta Bombed, 3 Injured" *The Jakarta Post* (online) 5 August 2013 <<http://www.thejakartapost.com/news/2013/08/05/buddhist-vihara-jakarta-bombed-3-injured.html>>.

¹⁶² Tri Artining Putri, "Drop Box, Terrorists New System" *TEMPO Interaktif* (online) 13 September 2013 <<http://en.tempo.co/read/news/2013/09/13/057512912/Drop-Box-Terrorists-New-System>>.

¹⁶³ Institute for Policy Analysis of Conflict [IPAC], *A Note on Recent Police Shootings around Jakarta IPAC Reports* (online) 20 August 2013 <<http://www.understandingconflict.org/conflict/read/19/A-NOTE-ON-RECENT-POLICE-SHOOTINGS-AROUND-JAKARTA>>.

¹⁶⁴ Farouq Arnaz, "Densus 88 Operation Nets 2 Tentena Bombing Suspects" *Jakarta Globe* 16 May 2014, 3.

¹⁶⁵ Mbai, above n 95, 28.

¹⁶⁶ ICG, above n 116, 7.

home town of Bima and committed a string of police shootings which included the Ambalawi Chief of Police, Abdul Salam. 'The shooting came two months after Second Brig. Muhamad Yamin, head of the Bima Police intelligence unit, was fatally shot near his home in Bima. And in March, the head of the Bima Police's anti-drug unit, Second Insp. Hanafi, was also gunned down, by a pair of armed men on a motorbike'.¹⁶⁷

Despite operational responses by both police and military units in the Poso region, Santoso and his small group have continued to evade capture, and, with the rise of the Islamic State of Iraq and al-Sham (ISIS) from 2014 onwards, the Santoso group, and many other terrorist groups and leaders, successfully raised their profile by developing links with the Middle Eastern group.

2014 ONWARDS – THE RISE OF ISIS

The development of support for ISIS in Indonesia, and the government's responses, are discussed in more detail in chapter 7. However, it may be noted here that from 2014, with the emergence of ISIS in the Middle East, discussion of terrorism issues in Indonesia underwent an almost-overnight shift of focus. Government and expert commentators alike turned to discussing the spreading influence of ISIS and the risks posed by fighters returning from the conflict. On 29 June 2014, Abu Bakr al-Baghdadi declared himself the caliph of a new Islamic State. In July 2014, two of Indonesia's most senior and influential ideologues, Ba'asyir and Aman Abdurrahman, swore allegiance to the caliph, from prison.¹⁶⁸ In August 2014, a YouTube video entitled 'Joining the Ranks' appeared, in which an Indonesian using the name Abu Muhammad al Indonesi, urged Indonesians to join the fight in Syria.¹⁶⁹ Clandestine support for ISIS started appearing

¹⁶⁷ Farouq Arnaz, "Sutarman: Latest Bima Police Shooting an Act of Terrorism" *Jakarta Globe* (online) 19 August 2014 <<http://www.thejakartaglobe.com/news/sutarman-latest-bima-police-shooting-act-terrorism/>>.

¹⁶⁸ Institute for Policy Analysis of Conflict [IPAC], *Support for "Islamic State" in Indonesian Prisons* IPAC Report No. 15, 19 January 2015.

¹⁶⁹ Peter Lloyd and Suzanne Dredge, "ISIS Recruitment Video Join the Ranks Urges Indonesian Muslims to Migrate to the Islamic State," *ABC News* (online) 29 July 2014

in cities around the country¹⁷⁰ as a small group connected to the Al-Mustaqbal website, and with links to Indonesia's still-active jihadist groups like MIT, organised ceremonies across Indonesia to pledge loyalty to ISIS.¹⁷¹

President Yudhoyono's government, responded by announcing a ban on ISIS on 4 August 2014.¹⁷² However, without a clear legislative or regulatory framework the ban amounted to little more than a statement of policy¹⁷³ and left police frustrated by a legal vacuum.¹⁷⁴ While a number of legal remedies were suggested by various legal experts, including forfeiture of citizenship, or charges of 'rebellion against a friendly state',¹⁷⁵ at the time of writing, the legal situation with regard to charging supporters of ISIS remains unclear.

The development of ISIS in the Middle East threatens Indonesia in two ways. First, foreign fighters who take part in the conflict may return to Indonesia and reinvigorate jihadist groups with their deadly skills in weapons and explosives. Second, some Indonesians who declare support for ISIS may feel bound to follow the violent exhortations of ISIS such as the one issued by Al-Adnani on 22 September to attack 'the infidels of America or France or their allies' by any means necessary.¹⁷⁶

<<http://www.abc.net.au/news/2014-07-28/ISIS-releases-recruitment-video-target-indonesian-muslims/5629960>>.

¹⁷⁰ Agus Maryono and Yuliasri Perdani, "Clandestine Support for ISIL Uncovered in Several Cities" *The Jakarta Post* 14 August 2014, 2.

¹⁷¹ Institute for Policy Analysis of Conflict [IPAC], *The Evolution of ISIS in Indonesia* IPAC Report No. 13, 24 September 2014.

¹⁷² Yuliasri Perdani and Ina Parlina, "Govt Bans Support, Endorsement of ISIL" *The Jakarta Post* (online) 5 August 2014 <<http://www.thejakartapost.com/news/2014/08/05/govt-bans-support-endorsement-isil.html>>.

¹⁷³ Dominic Berger, "Why Indonesia Banned ISIS" *New Mandala* (online) 1 October 2014 <<http://asiapacific.anu.edu.au/why-indonesia-banned-isis/>>.

¹⁷⁴ Farouk Arnaz, "Legal Vacuum Frustrates Indonesia's Anti-Terror Agencies" *Jakarta Globe* (online) 18 March 2015 <<http://thejakartaglobe.beritasatu.com/news/legal-vacuum-frustrates-indonesias-anti-terror-agencies/>>.

¹⁷⁵ Chris Brummitt, "Indonesia Dusts Off 1920s Law to Tackle Islamic State" *Bloomberg News* (online) 28 May 2015 <<http://www.bloomberg.com/news/articles/2015-05-27/indonesia-dusts-off-forgotten-1920s-law-to-tackle-islamic-state>>.

¹⁷⁶ IPAC, above n 171, 1.

Despite reigniting the debate about the need for reform to Indonesia's anti-terrorism laws,¹⁷⁷ clear legislative or regulatory direction from the President or government has not been forthcoming on the issue.¹⁷⁸ This lack of legal clarity and decisive action by the state has failed to halt activities in support of ISIS, and plans to commit violent terrorist attacks within Indonesia have continued to be detected from various sources.

In Poso, Central Sulawesi, terrorist operations with links to ISIS continued, and several Uighur Muslims from Western China, were arrested travelling on false Turkish passports as they attempted to join Santoso's group¹⁷⁹ – in the case, the court drew clear links from the evidence between Santoso's group and ISIS.¹⁸⁰, indicating an internationalisation of that pocket of terrorist activity.¹⁸¹ Indonesian terrorism observer, Adrianus Meliala, referring to the Uighur recruits, commented that 'international assistance from non-state entities can be in the form of money transfers, weapons, or human resources. Indonesia must be vigilant.'¹⁸²

Authorities detected numerous instances of support for ISIS around Indonesia, including two Indonesian commercial airline pilots who were being tracked by Australian Federal Police.¹⁸³

¹⁷⁷ Novianti Setuningsih, Farouk Arnaz, and Kennial Caroline Laia, "Ban Islamic State to Stop Supporters, Analysts Argue Police Struggle to Charge Islamic State Supporters" *Jakarta Globe* (online) 23 March 2015 <<http://thejakartaglobe.beritasatu.com/news/ban-islamic-state-stop-supporters-analysts-argue/>>.

¹⁷⁸ Fenton and Price, above n 24.

¹⁷⁹ "Terdakwa Terorisme Warga Uighur Divonis Enam Tahun" *BBC Indonesia* (online) 29 July 2015 <http://www.bbc.com/indonesia/berita_indonesia/2015/07/_indonesia_vonis_uighur>.

¹⁸⁰ Author's observations at North Jakarta District court, in the case of Ahmed Bozoglan, 29 July 2015.

¹⁸¹ IPAC, above n 88, 11.

¹⁸² "Teroris Di Indonesia Didukung Negara Asing" *Metro Siantar* (online) 23 September 2014 <<http://www.metroSiantar.com>>.

¹⁸³ Muhammad Shamil and Sucipto, "RI Verifikasi Dua Pilot Terduga ISIS" *Koran Sindo*, 10 July 2015, 5.

In December 2015, Indonesian police conducted raids in several cities across Java and arrested five members of an extremist network and seized chemicals, laboratory equipment and an ISIS flag. Head of Indonesian police, Badrodin Haiti confirmed that the raids had been conducted after information had been received from the AFP and FBI. Among those arrested was Asep Urip a teacher at an Islamic pesantren and Zaenal, who was allegedly being groomed as a suicide bomber, for attacks scheduled to take place on New Year's 2016. Police said the nationwide operation - the largest of its kind for some time - was targeting an organised terror cell. Indonesian police also arrested three people in August with links to ISIS planning to launch attacks during Independence Day celebrations.¹⁸⁴ Also in December, an ethnic Uighur was arrested by Indonesian police in Jakarta who was allegedly preparing to carry out a suicide bombing. Police suspected that the man had connections to a terrorist bombing in Bangkok in August 2015.¹⁸⁵

Furthermore, cooperation between Australian and Indonesian financial tracking agencies uncovered funds flowing from Australia to Indonesian terrorist groups. However authorities would not state the amount of the funds or identify which groups the money was flowing to.¹⁸⁶

In March 2015, the Indonesian military mobilised 'thousands of troops backed up by missile launchers, fighter jets and attack helicopters' and hit targets in the hills near Poso.¹⁸⁷ However, the operation, which authorities insisted was just an 'exercise', failed to achieve its thinly-veiled objective of locating or neutralising terrorist leader Santoso. A police operation in April 2015, in the same area, which mobilised around

¹⁸⁴ "Indonesia's Densus 88 Unit Arrest Six Islamic State Supporters, Foil Bomb Plot" *The Weekend Australian* (online) 20 December 2015 <<http://theaustralian.com.au>>.

¹⁸⁵ Farouk Arnaz, "Uighur Arrested by Densus 88 Suspected to Be Preparing for Suicide Bombing" *Jakarta Globe* (online) 24 December 2015 <<http://jakartaglobe.beritasatu.com>>.

¹⁸⁶ George Roberts, "Money to Fund Terrorism Networks Detected Flowing into Indonesia: Authorities" *ABC News* (online) 24 March 2015 <<http://abc.net.au>>.

¹⁸⁷ "Indonesian Military Mount Major Show of Force in Terror Leader's Mountain Stronghold" *ABC News* (online) 1 April 2015 <<http://abc.net.au>>.

1000 officers from a number of units including, Densus 88, Brimob, POLRI and Central Sulawesi Regional Police, engaged a group of 12 suspected terrorists in a gun battle which killed two suspects¹⁸⁸ including Santoso's 'right hand man', Daeng Koro.¹⁸⁹ The incident is a further illustration of the tension which exists between POLRI and TNI discussed above.

CONCLUSION

Theoretical conceptualisations of political violence in Indonesia indicate the complexity of underlying political, social, religious and historical factors which contribute to the evolving nature of terrorism and counter-terrorism. Religious justifications for violence display extraordinary resilience compared with other secular justifications – it is likely that this links into the importance of family relations in reinforcing and strengthening religious beliefs.

The greatest challenge for government therefore will be the prevention of terrorism and stemming radical Islamist ideology which advocates violence and which can lead to recruitment into terrorist groups. Commentators are divided on the question of whether Islamist tendencies in the socio-political sphere are rising or falling. Fealy argues that the unexpectedly good election results for Islamic parties do not indicate 'a rise in ideological Islam' but rather astute politics and because the major Islamic parties 'have moved closer to the centre of the political spectrum, and away from a doctrinaire Islamic position'.¹⁹⁰ There are political parties within Indonesia, such as PBB and PKS, which support Islamist ideals and goals such as the widespread application of Shari'a law, and the establishment of an Islamic Indonesian state –

¹⁸⁸ Basuki Rahmat, "Dua Teroris Kelompok Santoso Tewas Ditembak" *CNN Indonesia* (online) 25 May 2015 <<http://m.cnnindonesia.com/nasional/20150525003616-20-55374/dua-teroris-kelompok-santoso-tewas-ditembak/>>.

¹⁸⁹ Helmi Firdaus, "Santoso-Daeng Koro Sempat Menantang Densus 88 Perang Terbuka" *CNN Indonesia* (online) 6 April 2015 <<http://m.cnnindonesia.com/nasional/20150405192145-20-4438/santoso-daeng-koro-sempat-menantang-densus-88-perang-terbuka/>>.

¹⁹⁰ Greg Fealy, "Resurgent Political Islam, or Astute Islamic Parties" *New Mandala* (online) 14 April 2014 <<http://asiapacific.anu.edu.au>>.

remembering that the external and internal agendas of some Islamic parties may be significantly different. Effective application of the rule of law, and access to the democratic processes will therefore be of key importance in dampening tendencies among Indonesian Muslims to engage with jihadist ideology and terrorist violence in the future.

CHAPTER 3 – COP KILLERS AND KILLER COPS: THE DEFINITION OF TERRORISM AND THE INDONESIAN CONTEXT

INTRODUCTION

As discussed in the previous chapter, the strategies of jihadist groups in Indonesia have undergone continual change and adaptation in response to evolving technology, ideological influences and repressive state actions. Particularly dramatic shifts were observed following the police raid of the Aceh training camp in 2010 which had a number of repercussions as terrorist cells struggled to regroup and continue operating in other parts of the country.

One major strategic shift was a move away from large-scale, high-cost, highly planned bomb attacks against symbolic foreign targets like embassies, hotels and tourist destinations, to focus on domestic targets such as police, provincial governors, and the Indonesian President.¹ Assassinations of police officers accounted for almost all fatalities from 2010-2015. In some cases, the targets were low-ranking officers at remote posts; in others, they were senior officers – but the strategy of *ightiyalat* or targeted, religiously justified, assassinations of enemies, was clear.² In the context of this shift in terrorist tactics, this chapter will examine the key issue of defining terrorism.

Throughout history, pejorative labels – ‘communist’, ‘witch’, ‘terrorist’, to name a few – have been used to delegitimise and demonise political enemies. An objective definition of a word allows a rational approach which defuses emotional, biased and political usage of the word. The search for a definition of terrorism is a search for its

¹ Seth Mydans, "Plot to Kill Indonesian President Foiled" *The New York Times* (online) 8 August 2009 <<http://www.nytimes.com/2009/08/09/world/asia/09indo.html>>.

² International Crisis Group [ICG] *Indonesian Jihadism: Small Groups Big Plans* Asia Report No. 204, 19 April 2011, 1. The report discusses the increased popularity of *jihad fardiyah* (individual jihad), which uses the tactic of *ightiyalat*, over *jihad tanzim* (organised jihad) after 2010.

core elements, which if present, qualify that thing, whether an act or a person, as terrorism or terrorist.

This chapter examines, first, the international approach towards defining terrorism, both legal and academic. It will then take account of the Indonesian legislative definition which essentially focuses on two main elements: the use of violence; to create widespread fear – and makes no mention of political or ideological motivations. With reference to actual cases, the chapter will give detailed consideration to the legal elements of the crime of terrorism, and question whether a violent attack which is not intended to, or does not in fact, cause terror within the community, should be called terrorism.

The chapter argues that, in practice, the legal definition of terrorism has been made irrelevant, and, due to a number of factors, has been subjugated to political forces which control and dictate, which groups will, or will not be, labelled and prosecuted as terrorist. The ATL, enacted in the context of the post-9/11 global response to jihadist terrorism, was explicitly targeted at jihadist terrorism, and, apart from a few failed attempts, has been exclusively applied to acts committed by jihadist groups – despite the presence or absence of the legal elements of the crime. The determinative factor of whether an act is ‘terrorism’ is, in practice, whether it has connections to jihadism. The chapter points to examples of acts, which are connected to jihadism but which do not cause widespread fear, which are prosecuted as terrorism; and conversely, acts which may cause widespread fear, but which are not connected to jihadism, that are not prosecuted as terrorism. It also discusses the related question of whether a single act of violence which does not cause widespread fear, but which, when considered as part of a wider sustained campaign of violence using multiple tactics, such as bombings, assassinations and other violent methods, should be prosecuted as terrorism.

In conclusion, the chapter argues that the ATL needs to be revised to bring its 'definition' of terrorism into line with international norms, and, that increased training of police, prosecutors and the courts is needed to promulgate a balanced understanding of terrorism laws and their application in line with rule of law principles.

In the context of violent, and often lethal, attacks on police, the discussion takes account of equally lethal responses by police during CT operations and their implications for human rights and counter-terrorism in Indonesia.

BACKGROUND

The last major bombings of symbolic foreign-owned targets in Indonesia were the synchronised bombings of the Marriott and Ritz-Carlton hotels in Jakarta's Kuningan business district in July 2009, which killed eight and injured at least 50 people.³ A month after the Marriott/Ritz-Carlton bombings, police infiltrated a plot in the advanced stages of planning to assassinate the President – a truck rigged with explosives was to be detonated at the Presidential residence.⁴ This event signalled a dramatic, almost overnight, shift in targeting strategies of Indonesia's manifold jihadist groups. Post 2009, targets of terrorist attacks have been predominantly domestic, most notably police officers.⁵ Likewise, in the same period, instances of fatal shootings of terrorist suspects by police increased dramatically.

There are several possible reasons for the shift in targeting strategies of terrorist groups. The success of police, particularly the elite counter-terrorism detachment, Densus 88, in infiltrating, neutralising and arresting suspected terrorists – 2015 statistics show that over 800 have been arrested and around 100 killed in

³ Lee Glendinning and Matthew Weaver, "Eight Dead as Bombers Target Western-Owned Jakarta Hotels" *The Guardian* (online) 17 July 2009 <<http://www.theguardian.com/world/2009/jul/17/bombs-explode-hotels-indonesia>>.

⁴ Mydans, above n 1.

⁵ Institute for Policy Analysis of Conflict [IPAC], *The Evolution of ISIS in Indonesia* IPAC Report No. 13, 24 September 2014.

counter-terrorism raids since 2003 – is a factor.⁶ Arrests and killings, especially of influential and violent leaders such as Noordin M Top, have an impact on the operational capabilities of groups to commit terrorist acts. An ideological shift towards focusing on educational and religious outreach may also be a factor.⁷ The number of innocent Muslims killed in indiscriminate bombings is also likely to deter some jihadists from pursuing that tactic, especially where groups are trying to build public support for the cause of establishing an Islamic state in Indonesia. Revenge is also an important factor. The leader of the Eastern Indonesian Mujahidin (Mujahidin Indonesia Timur; MIT), Santoso, has made comments which indicate that Densus 88 are ‘the real enemy’ and should be targeted. In a video uploaded to YouTube in July 2013, a man claiming to be Santoso incited war against Densus 88, saying ‘Hopefully, we are the generation who will battle against the hostility of Densus 88. Densus 88 is the real enemy, the real demon’.⁸

In 2011, in a report titled *Indonesian Jihadism: Small Groups, Big Plans*, the International Crisis Group commented that:

The emergence of small groups has been accompanied by a change in tactics and targets. The preferred method of operation (*amaliyah*) is no longer the bombing of iconic buildings but secret assassinations (*ightiyalat*) that are less likely to cause inadvertent Muslim deaths or prompt massive arrests. The targets are increasingly local. Police are top of the list.⁹

In December 2012, Indonesian terrorism expert Al Chaidar commented on prior attacks on Christians at Christmas, saying that ‘At present attacks on Christmas are

⁶ Sara Schonhardt, "10 Years after Bali Bombings, Local Militants Still Pose Threat" *The New York Times* (online) 11 October 2012 <<http://www.nytimes.com/2012/10/12/world/asia/10-years-after-bali-bombings-local-militants-still-pose-threat.html?pagewanted=all>>. Also, see data in Diagram 5.

⁷ JI for example has allegedly renounced the use of violence to concentrate on non-violent methods of outreach. International Crisis Group [ICG], *Indonesia: The Dark Side of Jama'ah Ansharut Tauhid* Asia Briefing Report No. 107, 6 July 2010.

⁸ Yuliasri Perdani and Ruslan Sangadji, "Most Wanted Fugitive Incites War against Densus 88" *The Jakarta Post* (online) 10 July 2013 <<http://www.thejakartapost.com/news/2013/07/10/most-wanted-fugitive-incites-war-against-densus-88.html>>.

⁹ ICG, above n 2, 5.

decreasing... because they [the terrorists] are now targeting police or police stations'.¹⁰ In January 2013, Jones observed that 'particularly since 2009, all but one of those killed by jihadists or in terrorist attacks in Indonesia have been police: ten in 2010, three in 2011 and eight in 2012'.¹¹

In 2014, three senior police officers were killed in Bima on the island of Sumbawa.¹² The killers were allegedly connected to MIT and Santoso. In October 2014, a team of police investigating a bomb explosion in Poso Pesisir were ambushed by individuals suspected to be connected to the MIT network.¹³ One officer was injured in the attack, which was thought to be retaliation for the prior arrest of three men suspected of being members of MIT.

In the second half of 2013, Indonesia Police Watch reported 22 incidents of shootings of members of Indonesia's national police force, POLRI.¹⁴ At least five of those attacks were thought to have connections to jihadist terrorist groups.¹⁵ These shootings included the murder of Second Brigadier Sukardi in front of the headquarters of the National Corruption Eradication Commission (KPK) – leading some commentators to question whether there was any connection between the shooting and any of the

¹⁰ Bayu Marhaenjati, "Terrorists Prefer Attacking Police Instead of Churches: Analyst" *Jakarta Globe* (online) 13 December 2012 <http://www.thejakartaglobe.com/home/terrorists-prefer-attacking-police-instead-of-churches-analyst/561445#Scene_1>.

¹¹ Note that attacks against police and civilians in the Indonesian Papuan provinces are not charged as terrorism; however, the sentences handed down are generally much harsher than those given to jihadist terrorists. See: Sidney Jones, "Papuan 'Separatists' vs Jihadi 'Terrorists': Indonesian Policy Dilemmas" *International Crisis Group Report* 22 January 2013 <<http://www.crisisgroup.org/en/publication-type/speeches/2013/jones-papuan-separatists.aspx>>.

¹² Farouk Arnaz, "Sutarman: Latest Bima Police Shooting an Act of Terrorism" *Jakarta Globe* (online) 19 August 2014 <<http://www.thejakartaglobe.com/news/sutarman-latest-bima-police-shooting-act-terrorism/>>.

¹³ Ruslan Sangadji, "Terrorists Attack Police in Poso, Injuring One" *The Jakarta Post* 8 October 2014, 5.

¹⁴ "22 Shootings Occur Only in Three Months: IPW" *The Jakarta Post* (online) 11 September 2013 <<http://www.thejakartapost.com/news/2013/09/11/22-shootings-occur-only-three-months-ipw.html>>.

¹⁵ Al Araf, "Teror Polisi" *Kompas* (online) 30 October 2013 <http://nasional.kompas.com/read/2013/10/30/0902349/Teror.Polisi>.

sensitive and controversial investigations¹⁶ conducted by the KPK into corruption among Indonesia's public officials.¹⁷ The shooting of Sukardi, which attracted much media attention at the time, demonstrated two salient points about the murders of police. Firstly, those conducting the attacks possessed a high level of skill and training. Second, as the police force deals with a wide variety of criminal activities on a day-to-day basis, it was uncertain whether such shootings were done for an ideological/jihadist/terrorist purpose, or whether there were other motives, such as narcotics, corruption or organised crime.

In October 2012, two police officers were found with their throats cut, reportedly while searching for a terrorist training camp in an area near Poso, Central Sulawesi.¹⁸ In 2011, a suicide bomber targeted a police mosque in Cirebon, injuring 23 officers, but only succeeding in killing himself.¹⁹ Also in Poso, in October 2011, two police officers and a security guard were seriously injured after a bomb attack on a police post.²⁰ According to IPAC, 'the death toll from terrorism was ten in 2010, all police; three in 2011, all police; and 10 in 2012, eight of them police'.²¹

¹⁶ Simon Butt, "Anti-Corruption Reform in Indonesia: An Obituary?" (2011) *Bulletin of Indonesian Economic Studies*. vol. 47 no. 3, 381.

¹⁷ Bayu Marhaenjati and Aris Cahyadi, "Police Officer Fatally Shot near KPK Headquarters" *Jakarta Globe* (online) 10 September 2013 <<http://www.thejakartaglobe.com/news/jakarta/police-officer-fatally-shot-near-kpk-headquarters/#more>>; Hans Nicholas Jong, "Business as Usual at KPK after Police Shooting" *The Jakarta Post* (online) 12 September 2013 <<http://www.thejakartapost.com/news/2013/09/12/business-usual-kpk-after-police-shooting.html>>.

¹⁸ George Roberts, "Indonesian Anti-Terror Police Found with Throats Cut" *ABC News* (online) 18 October 2012 <<http://www.abc.net.au/news/2012-10-18/indonesian-terrorism-investigators-found-with-throats-cut/4319704>>.

¹⁹ Rajaratnam School of International Studies [RSIS], *Suicide Bombing at the Police Mosque in Cirebon, Indonesia* International Centre for Political Violence and Terrorism Research Report April 2011 <<http://www.pvtr.org/pdf/RegionalAnalysis/SouthEastAsia/SpotReport-CirebonMosqueBombing.pdf>>.

²⁰ Deni Muliya Barus and Amran Amier Mujib Rahman, "Kejahatan Khusus Menyerang Polisi" *GATRA Magazine* 03 January 2013, 16.

²¹ Institute for Policy Analysis of Conflict [IPAC] *Countering Violent Extremism in Indonesia: Need for a Rethink* (2014) IPAC Report No. 11, 30 June 2014.

The IPAC report not only demonstrates the regular occurrence of attacks on police, but also the common ground attribution of such attacks to terrorism. However, the attacks on police have been characterised as being utilitarian rather than ideological, insofar as they provide a source of weapons, and are used as a training and initiation exercise for those *mujahidin* that have undergone training but need a live target. Jones commented:

It used to be that jihadis saw the creation of fear as a very specific objective. One man involved in the 2004 Australian embassy bombing, when asked what his aim was, said, 'We wanted to make Western nations tremble.' The aim now isn't that cosmic; it's much more instrumental. It's about getting weapons, taking revenge, and giving militants something to do, particularly after they've undergone training. While the attacks are sometimes couched – usually after the fact – in terms of moving against *thaghut* (anti-Islamic oppressors supported by the West), that kind of rationalisation is less frequent these days. The main aim of killing police is certainly not to create fear.²²

TERRORISM WITHOUT TERROR?

If the main aim of a 'terrorist' attack is *not* to create fear or terror, ought these attacks be described and prosecuted as acts of terrorism, or some other crime?²³ The question is of real relevance to law enforcement for several reasons. It is a core principle of criminal law that, for an accused person to be found guilty of a crime, each element of an offence must be proven beyond doubt through the use of admissible evidence. The consistent and logical application of the law is a safeguard against the introduction of bias and assumptions about the guilt or innocence of an accused person. The rule of law, enshrined in Article 1(3) of the Indonesian Constitution, dictates that each case

²² International Crisis Group [ICG], *Papuan 'Separatists' vs Jihadi 'Terrorists': Indonesian Policy Dilemmas* 22 January 2013 <http://www.crisisgroup.org/en/publication-type/speeches/2013/jones-papuan-separatists.aspx>

²³ Ibid, 'At the same time, some units of the OPM and an extremist faction of KNPB, the West Papua National Committee, a militant pro-independence organisation composed largely of activists from the central highlands, have moved toward more consciously creating a sense of fear in particular communities. They are not just going after police and military but also after civilians, including non-Papuan Indonesian migrants, workers for the gigantic gold and copper mine, Freeport; and most recently tourists'. This creates the counter-intuitive situation where groups which commit crimes which do not create terror are being charged as terrorists, and groups which commit crimes which do create terror are not charged as terrorists.

must be considered on its merits, without regard for a person's background or status. Furthermore, in practical terms, whether a person is charged under Indonesia's anti-terrorism legislation, the Interim Law on the Eradication of the Crime of Terrorism No. 1 2002²⁴ (hereinafter 'the ATL') or under the Criminal Code²⁵ will have implications for criminal procedure. Under the ATL, criminal procedural laws differ from the Criminal Procedural Code²⁶ (hereinafter 'the KUHAP'); for example, a suspect under the ATL may be held for seven days, compared with one day under the KUHAP. Also, certain types of evidence are admissible under the ATL which are not admissible under the KUHAP.²⁷

There are also social consequences for the suspect from being labelled 'terrorist'. Greater social stigma may attach to someone labelled a terrorist – in jihadist circles the stigma may actually be desirable and lead to greater social standing. Also, some reports have noted the better treatment of terrorist prisoners, including cash payments.²⁸ It is not difficult to imagine that in some circumstances, in Indonesia, a suspect may prefer to be labelled a terrorist, than an ordinary criminal.

On the question of whether low-level attacks on police are terrorism or ordinary crime, IPAC observed:

The failure of most plots to materialise and the criminal aspects of those that do - bank robberies, assaults on police – underscore how much 'terrorism' in Indonesia looks more and more like ordinary crime, even if motivated by jihadist ideology. Any large-scale attack along the lines of those on Kenya's Westgate Mall, Algeria's In Amenas oilfields or India's Taj Mahal Hotel is almost unthinkable in Indonesia today. Not only are there no unstable or unfriendly neighboring states from which such an operation

²⁴ Perpu Nomor 1 2002 Tentang Pemberantasan Tindak Pidana Terorisme, *Interim Law No. 1 of 2002 on the Eradication of the Crime of Terrorism*.

²⁵ Kitab Undang-Undang Hukum Pidana, *Indonesian Criminal Code 1958*.

²⁶ Undang-undang Nomor 8 Tahun 1981 Kitab Undang-Undang Hukum Acara Pidana, *Law No. 8 of 1981 The Indonesian Criminal Procedural Code*.

²⁷ Simon Butt, "Anti-Terrorism Law and Criminal Process in Indonesia" *ARC Federation Fellowship Islam and Modernity: Syari'ah, Terrorism and Governance in South-East Asia report* (Asian Law Centre, University of Melbourne, 2008).

²⁸ International Centre for the Study of Radicalisation and Political Violence [ICSR], *Prisons and Terrorism: Radicalisation and De-Radicalisation in 15 Countries Policy Report* (2010) 53.

could be launched, but no one is even thinking on that scale. The focus remains very much on domestic targets and on operations that do not require resources much beyond one's own cell. To some degree this may be a question of ideological orientation, but it is also a lack of training and a (fortunate) failure of imagination.²⁹

While establishing a universal definition of terrorism has been described as the 'Bermuda triangle of terrorism studies'³⁰ and is prone to endless controversy and debate, the single element that can be universally agreed upon – that is essential to the core notion of terrorism – is that it creates terror or fear. Muladi notes the Latin root of the word *terrere* means to shake with fear.³¹ The central question, therefore, is whether a mere connection to a jihadist group or ideology is sufficient nexus for a violent crime against police to be categorised as a terrorist attack.

Before continuing to consider international attempts to define terrorism, three things should be noted about the absence of attacks on symbolic, foreign targets in Indonesia in the years following 2009. First, prior to the Marriott/Ritz-Carlton bombings of 2009, there had been a pause of around four years without a major terrorist attack. The last successfully executed bombing prior to 2009 were the synchronised bombings in Kuta and Jimbaran, Bali, of October 2005, which killed 26 and injured over 100.³² A pause of several years in terrorist bombings does not therefore mean that terrorist groups are not planning further attacks or do not have aspirations for more large-scale bomb attacks against foreign targets.

²⁹ Institute for Policy Analysis of Conflict [IPAC], *Weak, Therefore Violent: The Mujahidin of Western Indonesia* IPAC Report No. 5, 2 December 2013 <http://www.understandingconflict.org/read/index/3/types_of_conflict.html> 1.

³⁰ Alex Schmid, ed. *The Routledge Handbook of Terrorism Research* (Routledge Taylor & Francis Group, 2011). Joshua Sinai, "How to Define Terrorism" (2010) *Perspectives on Terrorism* vol. 2 no. 4, 9. Sinai states 'Defining terrorism is the most ambiguous component of terrorism studies, with no universally accepted definition that differentiates attacks against civilian noncombatants or armed military or takes into account the latest trends in terrorist objectives and warfare,' 9.

³¹ Muladi, *Demokrasi Hak Asasi Manusia Dan Reformasi Hukum Di Indonesia* (Jakarta: Habibie Centre 2002).

³² Elaine Quijano et al., "Bali Terrorist Blasts Kill at Least 26" *CNN.com* (online) 2 October 2005 <<http://edition.cnn.com/>>.

Second, the success of police in apprehending large numbers of terrorists has had a double-edged effect. Many of those terrorists arrested and convicted have been, or are shortly due to be, released from prison, having served their sentences. Government statistics from 2015 show that almost 500 terrorist convicts have served their sentences and been released (see diagram 5), while over two hundred more will be released before the end of 2020. Some reports argue that Indonesia's prisons are 'incubators' for spreading terrorist ideology, and a lack of monitoring and deradicalisation programs leaves many convicted terrorists more skilled, connected and committed to their violent cause, than when they entered prison.³³ Studies have shown that many of the terrorist attacks over recent years in Indonesia have involved at least one member who was a former inmate with terrorist skills and connections³⁴ and Karnavian noted that the prison system actually facilitated the planning of Indonesian jihadists' last grand scheme; the establishment of a safe base of operations and training in Aceh in 2010.³⁵

Third, the rise of violent Islamist movements in the Middle East, such as ISIS, could lead to renewed attacks against foreign targets, as well as the threat of returning foreign fighters re-joining and reinvigorating Indonesian jihadist cells.³⁶ In September 2014, ISIS spokesperson Al-Adnani exhorted supporters of ISIS to kill foreigners linked to the US-led coalition. The statement was translated into Indonesian within 24 hours by convicted terrorist Aman Abdurrahman, a cleric who is currently imprisoned at

³³ Margot O'Neill, "Indonesian Jails Used as Terrorist Incubators" *Lateline* (online) 18 May 2011 <<http://www.abc.net.au/news/2011-05-18/indonesian-jails-used-as-terrorist-incubators/2718998>>.

³⁴ Carl Ungerer, "Jihadists in Jail: Radicalisation and the Indonesian Prison Experience," Special Report of Australian Strategic Policy Institute/Rajaratnam School of International Studies Issue 40 May 2011; International Crisis Group [ICG] *Indonesian Jihadism: Small Groups Big Plans* Asia Report No. 204, 19 April 2011.

³⁵ Tito Karnavian, "Transcript of Interview with Tito Karnavian Deputy of National Counter Terrorism Agency" (13 April 2012) 3.

³⁶ Institute for Policy Analysis of Conflict [IPAC], *The Evolution of ISIS in Indonesia* IPAC Report No. 13, 24 September 2014.

Nusa Kambangan maximum security prison. IPAC wrote that the call from ISIS 'could also provide an incentive to Indonesian ISIS supporters to target westerners as a way of earning approval from the leaders of the self-declared caliphate'.³⁷ At the time of writing, such attacks on foreigners had not occurred, but it would be dangerous to assume that jihadist groups have no further interest in planning such attacks.

THEORY AND DEFINITIONS OF TERRORISM

NO UNIVERSAL DEFINITION – ONE MAN'S FREEDOM FIGHTER...

It may seem extraordinary to a casual observer that, given the pervasiveness of terrorism in the post-9/11 social and political discourse, there is no agreed comprehensive definition of terrorism. This is not, however, from a lack of trying. Institutions such as the United Nations, national and state parliaments, legions of academic researchers, and even insurance companies have formulated and proposed many various definitions for terrorism, none of which have been deemed universally acceptable. Disagreement usually arises due to issues related to the 'legitimate' use of violence in the context of nationalist independence movements.

For this reason, terrorism is a 'contested concept'³⁸ and, as a label, it is susceptible to emotive and imprecise usage driven by biased political interests. It can be used as a label to delegitimise and demonise enemies. Conversely, the label 'freedom fighter' connotes allegiance, a noble cause and approbation. In both cases, the targets and methods of the violence used, become, if not irrelevant, secondary to the question of the political goal sought. Whether that political goal aligns with the viewpoint of the observer becomes the determinative factor. The notion is summed up in the now ubiquitous phrase 'one man's freedom fighter is another man's terrorist'. Nelson Mandela for example, the beloved former president of South Africa, was once labelled a

³⁷ Ibid, 1.

³⁸ Schmid notes other contested concepts such as 'Imperialism'. Edwin Bakker, "Video Lecture Transcripts" *Terrorism and Counter Terrorism: Comparing Theory and Practice*, (2014) International Centre for Counter Terrorism, Leiden University, 6.

terrorist.³⁹ Yasser Arafat, recipient of the Nobel Peace Prize, was once considered a terrorist as the leader of the Palestinian Liberation Organisation. A less well-known illustration of the concept arises from statements made by United States President Reagan in 1985 at a meeting with leaders of Afghanistan's Mujahidin. In the context of a global anti-Soviet struggle, Reagan praised them as 'our brothers, these freedom fighters, and we owe them our help'.⁴⁰ At the time, political advantage was to be gained by praising the violent struggle of anti-Soviet fighters against a common enemy. An offshoot of the Afghani Mujahidin, who were armed and supported by the US, later became their terrorist enemies in the form of the Taliban.

Similarly, groups on both sides of the Israel-Palestine conflict are regularly labelled 'terrorist'. This raises the issue of whether states can commit terrorism, or whether it is a crime which can only be committed by 'sub-national or clandestine groups' as United States government definitions⁴¹ generally stipulate.

The biased and imprecise usage of the term 'terrorist' can only be addressed by creating a clear, objective standard for classifying an act as terrorism. The focus of the debate ought to be on the tactics used, not their political alignment, particularly the deliberate targeting of civilians to cause fear and intimidation for a political or ideological cause.

³⁹ Fergal Davis, "One Man's Freedom Fighter...Can We Ever Define Terrorism?" *The Conversation* (online) 8 January 2013 <http://theconversation.com/one-mans-freedom-fighter-can-we-ever-define-terrorism-11051>.

⁴⁰ Ronald Reagan, "Remarks at the Annual Dinner of the Conservative Political Action Conference" *The American Presidency Project* (1985) <http://www.presidency.ucsb.edu/ws/?pid=38274>.

⁴¹ References to violence committed by 'unlawful' or 'clandestine' groups such as those contained in most US government definitions of terrorism preclude the possibility of terrorism being committed by the state. The definition provided by the US National Counterterrorism Center (NCTC) is typical and the same as United States Code 22 USC § 2656f(d)(2) and defines a terrorist act as: '... premeditated; perpetrated by a sub-national or clandestine agent; politically motivated, potentially including religious, philosophical, or culturally symbolic motivations; violent; and perpetrated against a noncombatant target.'

ACADEMIC DEFINITION

Schmid and Jongman conducted seminal research on the question of defining terrorism in 1988 and again in 2011.⁴² From the definitions provided by hundreds of scholars throughout the world, they were able to distil 22 recurring words or phrases with commonalities in definitional elements, and arrive at an *academic* consensus definition. The academic definition, while it incorporates most of the elements seen as important by academic researchers and commentators, is long and unwieldy, and not suited to criminal prosecutions.⁴³

The concise academic consensus definition of terrorism, which Schmid contends is a 'distillation of the best current thinking available on the subject', is as follows.

Terrorism refers on one hand to a doctrine about the presumed effectiveness of a special form or tactic of fear-generating, coercive political violence and, on the other hand, to a conspiratorial practice of calculated, demonstrative, direct violent action without legal or moral restraints, targeting mainly civilians and non-combatants,

⁴² Alex P. Schmid (Ed.), *The Routledge Handbook of Terrorism Research* (London and New York: Routledge, 2011).

⁴³ In discussing the academic definition of terrorism, Schmid states: Terrorism is a contested concept. While there are many national and regional definitions, there is no universal legal definition approved by the General Assembly of the United Nations (the one proposed by the Security Council in Res. 1566 (2004) is non-binding, lacking legal authority in international law). The Ad Hoc Committee on Terrorism of the 6th (legal) Committee of the General Assembly has, with some interruptions, been trying to reach a legal definition since 1972 – but in vain. In the absence of a *legal* definition, attempts have been made since the 1980s to reach agreement on an *academic* consensus definition. The latest outcome is the revised definition. It is the result of three rounds of consultations among academics and other professionals. A description how it was arrived at can be found on pp. 39 - 98 of Alex P. Schmid (Ed.). *The Routledge Handbook of Terrorism Research*. London and New York: Routledge, 2011. The same volume also contains 260 other definitions compiled by Joseph J. Easson and Alex P. Schmid, Schmid above n42, 99-200.

The revised academic definition contains twelve elements. The first element states: "1. Terrorism refers, on the one hand, to a doctrine about the presumed effectiveness of a special form or tactic of fear-generating, coercive political violence and, on the other hand, to a conspiratorial practice of calculated, demonstrative, direct violent action without legal or moral restraints, targeting mainly civilians and non-combatants, performed for its propagandistic and psychological effects on various audiences and conflict parties; The 5th element states: At the origin of terrorism stands terror – instilled fear, dread, panic or mere anxiety – spread among those identifying, or sharing similarities, with the direct victims, generated by some of the modalities of the terrorist act – its shocking brutality, lack of discrimination, dramatic or symbolic quality and disregard of the rules of warfare and the rules of punishment". Schmid above n 42, 86.

performed for its propagandistic and psychological effects on various audiences and conflict parties.⁴⁴

INTERNATIONAL LAW DEFINITIONS

The United Nations (UN) has devoted enormous amounts of time and resources to defining terrorism – which has been debated, inconclusively, since the 1960s. Unable to agree on a comprehensive definition of terrorism, the UN has created 12 sectoral treaties dealing with separate aspects of terrorism.⁴⁵ The UN's project to create a Comprehensive Convention on International Terrorism has failed to reach a conclusion, largely due to irreconcilable differences over the definition.⁴⁶

According to Scharf, the UN Convention for the Suppression of the Financing of Terrorism (the SFT Convention)⁴⁷ which contains a definition of terrorism at Article 2(b) and has been ratified by over 140 countries 'was as close as the international community has ever come to adopting a widely accepted general definition of terrorism'.⁴⁸ The Convention defines terrorism as any act falling into one of the 12 terrorism conventions⁴⁹, or:

⁴⁴ Ibid.

⁴⁵ Michael Scharf, "Defining Terrorism as the Peacetime Equivalent of War Crimes: Problems and Prospects" (2004) *Case Western Reserve Journal of International Law* vol. 36 no. 2/3, 359.

⁴⁶ Thalif Deen, "Politics: U.N. Member States Struggle to Define Terrorism" *Inter Press Service* (online) 25 July 2005 <<http://www.ipsnews.net/2005/07/politics-un-member-states-struggle-to-define-terrorism/>>.

⁴⁷ *International Convention for the Suppression of the Financing of Terrorism* United Nations Resolution 54/109 of 9 December 1999, opened for signature 10 January 2000.

⁴⁸ Scharf, above n 45, 360.

⁴⁹ In the absence of a comprehensive definition of 'terrorism', the UN has created a series of twelve conventions which proscribe specific acts which are considered to be terrorist in nature. This includes acts such as hijacking aircraft, taking hostages, and terrorist bombings. As Scharf points out, however, there are gaps in the existing anti-terrorist conventions – for example, an attack by a means other than explosives on a passenger train or bus, would not be covered, nor would assassinations of businessmen, or journalists, while similar attacks on diplomats are prohibited. Scharf above n 45, 10. This situation therefore underlines the need for a comprehensive consensus definition of terrorism. The twelve conventions listed in the Convention Annex include the following: Convention for the Suppression of Unlawful Seizure of Aircraft, 1970; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1971; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1973; International Convention against the Taking of Hostages, 1979; Convention on the Physical Protection of Nuclear Material, 1980; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil

(2) any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.

In 2005, then UN Secretary General Kofi Annan endorsed the findings of a High Level Panel on Threats, Challenges and Change and called on the international community to put aside their differences and agree on a definition of terrorism. He said:

It is time to set aside debates on so-called 'State terrorism'. The use of force by states is already thoroughly regulated under international law. And the right to resist occupation must be understood in its true meaning. It cannot include the right to deliberately kill or maim civilians. I endorse fully the High-level Panel's call for a definition of terrorism, which would make it clear that, in addition to actions already proscribed by existing conventions, *any action constitutes terrorism if it is intended to cause death or serious bodily harm to civilians or non-combatants with the purpose of intimidating a population or compelling a Government or an international organization to do or abstain from doing any act.* I believe this proposal has clear moral force, and I strongly urge world leaders to unite behind it and to conclude a comprehensive convention on terrorism before the end of the sixtieth session of the General Assembly.⁵⁰ (emphasis added)

Commenting on the world's first international tribunal with jurisdiction over the crime of terrorism, the UN Special Tribunal for Lebanon (STL), Scharf wrote:

Of the several issues on which the Appeals Chamber issued guidance, by far the most important concerned the definition of terrorism to be applied by the STL...[An] interpretive approach opened the door for the Appeals Chamber to then opine on whether a defined offense of terrorism exists under customary international law. To that end, the Appeals Chamber found that 'although it is held by many scholars and other legal experts that no widely accepted definition of terrorism has evolved in the world society because of the marked difference of views on some issues, closer scrutiny reveals that in fact such a definition has gradually emerged.'

Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1988; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988; Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, 1988; and the International Convention for the Suppression of Terrorist Bombings, 1997.

⁵⁰ Kofi Annan, "In Larger Freedom: Towards Development, Security and Human Rights for All" *Report of the Secretary-General* Chapter 3 (2005) 91.

Based on its review of state practice and indicators of *opinio juris*, the Appeals Chamber declared that the customary international law definition of terrorism consists of the following three key elements: (i) the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act; (ii) the intent to spread fear among the population (which would generally entail the creation of public danger) or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; (iii) when the act involves a transnational element...This is the first time that an international tribunal has authoritatively confirmed a general definition of terrorism under international law.⁵¹

A Human Rights Watch report of 2012 noted that:

Since 1994...the UN General Assembly has defined terrorism as 'criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes' and condemned them as 'in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.'⁵²

CONSENSUS ON KEY ELEMENTS THWARTED BY POLITICAL INTERESTS OF STATES

An examination of all the proposed definitions offered above points to the conclusion that, in practice, agreement on the key elements of a universal definition are closer than many observers realise. That is, a definition along the lines of those set out by the SFT Convention, Kofi Annan and the STL for instance – all of which essentially cover the same elements. It may be asked then, why, when there is such high level support and agreement on the essential elements of terrorism, has the international community failed to finalise a definition. The answer is bound up with issues of the legitimacy of struggles for independence from foreign rule, and state terrorism. If states agreed on a universal definition of terrorism, it may leave some open to liability for their own past

⁵¹ Michael Scharf, "Special Tribunal for Lebanon Issues Landmark Ruling on Definition of Terrorism and Modes of Participation" (2011) *Insights* vol. 15 no. 6 <http://www.asil.org/insights/volume/15/issue/6/special-tribunal-lebanon-issues-landmark-ruling-definition-terrorism-and.p1>

⁵² Human Rights Watch [HRW], *In the Name of Security Counterterrorism Laws Worldwide since September 11*. HRW Report June 2012 <http://www.hrw.org/sites/default/files/reports/global0612ForUpload_1.pdf> 17; See *UN Declaration on Measures to Eliminate International Terrorism*, annex to UN General Assembly Resolution 49/60, December 9, 1994, UN Doc. A/Res/60/49, <<http://www.un.org/documents/ga/res/49/a49r060.html>>.

acts. Davis discusses the ambivalence of states to define terrorism in the following terms:

States maintain this ambiguity because it enables them to utilise the phrase 'terrorism' without having to clarify what it means. Simultaneously it allows states to avoid condemning behaviour which conforms to the definition of terrorism. Agreeing on a definition of terrorism would restrain its use. It does not suit the purposes of many states to have terrorism defined: either because they do not want some actions to be defined as 'terrorist'; or because they want to term something 'terrorist', where in reality the word is inappropriate.⁵³

This has been a stumbling block to the finalisation of a consensus definition of terrorism within the UN. If terrorism is defined as something which can only be committed by a sub-national or clandestine group, states will be effectively immune from any charges. As Annan stated, the use of force by states is already highly regulated, for example through international law as it relates to war crimes and crimes against humanity.

DOMESTIC LEGISLATIVE DEFINITIONS AND A UNIVERSAL DEFINITION TO AID LAW ENFORCEMENT

Despite the lack of a consensus, terrorist attacks continue to occur and 'people die every day from acts of terrorism'.⁵⁴ Schmid points out that 'when governments ask young men and women to fight a war on terrorism the soldiers, policemen and other first line responders are entitled to a proper answer to the question of what exactly they are supposed to fight'.⁵⁵ While there is currently no universal definition of terrorism, agreement on a definition and limitations on what is, or is not, categorised as terrorism is needed on a practical level in order to bring about legal certainty. Davis notes:

This matters – and not just because it makes terrorism research more difficult. In the aftermath of the terrorist attacks of 11 September 2001, the United Nations Security

⁵³ Davis, above n 39, para 2.

⁵⁴ Schmid, above n 42, 376.

⁵⁵ Ibid.

Council issued Resolution 1373 calling on member states to take co-operative legislative action against terrorism. Unhelpfully, Resolution 1373 left 'terrorism' undefined.⁵⁶

A lack of international consensus on what constitutes terrorism complicates and impedes the ability of states to cooperate in their efforts to eradicate it. Cross-border law enforcement is likewise hindered through a lack of international agreement on a legislative definition of terrorism. Groups or actions which are considered terrorist in one country may not be seen as such in another country. The urgency of these issues demonstrates the need for a settled international definition of terrorism.

In the absence of an agreed international definition, by necessity, legislatures around the world, including Indonesia, have enacted definitions of terrorism within their domestic legislation. There are differences across the various jurisdictions.⁵⁷ However, there are some common elements which point to a core understanding of terrorism.

Davis and colleagues surveyed the legislative definitions of terrorism from six different countries and 'identified a surprising amount of agreement in an area usually characterised by discord'.⁵⁸ As a result of their research they formulated a 'modest proposal' for a legislative consensus definition of terrorism:

Terrorism is some form of purposive and planned violence that has a political, religious, or ideological motivation. It is intended to coerce or intimidate and is targeted at civilians or government. Legislation prohibiting terrorism ought to have extra-territorial effect.⁵⁹

Each of the definitions outlined above (that is, the SFT Convention, the Kofi Annan proposal, the STL definition, the Schmid and Jongman academic consensus definition,

⁵⁶ Davis, above n 39.

⁵⁷ HRW, above n 52, 17. See Chapter II Definitions of Terrorism and Terrorist Acts. The report argues that there are wide differences between domestic definitions of terrorist acts, and that 'overbroad and vague' definitions often cover non-violent acts, and 'fail to give reasonable notice of what actions are covered.'

⁵⁸ Davis, above n 39.

⁵⁹ Ibid, para 11.

and the Davis legislative consensus definition) contains a reference to an act which is intended to create fear or intimidate a population, a political or ideological motivation, or the intention to compel a government to do or abstain from doing, an act.

THE INDONESIAN POSITION⁶⁰

The ATL⁶¹ does not define terrorism along the lines discussed above, but states, at art 1(1):

The crime of terrorism is any act that fulfils the elements of a crime under this interim law.

The label of 'terrorism' can therefore be applied to a number of different substantive offences under Indonesian law. When read in conjunction with art 8(d) for example, a conviction on this offence ('negligently causing damage to aviation safety facilities') would be classified as terrorism. The ATL includes a 'description' of terrorism at art 6 which states:

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/or property of other people, or causes 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.

Article 7 is worded in the same terms, however 'intends to' is inserted before 'creates a widespread atmosphere of terror/fear.' The article is used to prosecute acts which intend to cause terror but which do not actually succeed in causing terror.

As some commentators point out, art 6 is not a definition of terrorism *per se*. Rather; it is a statement of elements which may constitute a terrorist act.⁶²

⁶⁰ Indonesia's Criminal Code (KUHP) does not contain a reference to terrorism. However, it does contain other relevant crimes, such as murder and arson. Further, other laws may be of relevance in prosecuting terrorist crimes, such as the Emergency Law No. 12 of 1951, which contains articles relating to the possession and unlawful use of firearms and explosives.

⁶¹ Interim Law No. 1 of 2002 on the Eradication of the Crime of Terrorism.

⁶² Zulakrial, "Terorisme" (2009) *Kegelisahan Intelektual* no. 3 April 2009 <<http://zulakrial.blogspot.com.au/2009/04/terorisme.html>>.

To prove an offence under arts 6 or 7 of the ATL, the key terrorism offences, the prosecution must therefore prove the requisite combination of elements set out below:

- 1) Intentionally using violence or threats of violence
- 2) Creating a widespread atmosphere of terror/fear *or*
- 3) Causing mass casualties
- 4) By taking liberty or lives and/or Property *or*,
- 5) Causing damage or destruction to:
 - a) strategic vital objects,
 - b) the environment,
 - c) public facilities or
 - d) international facilities

The description in art 6 makes no mention of ideological motivation, intimidation, or the coercion of a government or authority. Elements 3, 4 and 5 refer more to the effects or methods of committing the offence, than to motivations. The art 6 'definition' therefore contains no reference to political motivations or consequences, and is out of step with most definitions of terrorism.

A Human Rights Watch report which surveyed 140 countries which enacted post-9/11 terrorism laws cautioned against broad definitions of terrorism. It stated:

Dozens of the counterterrorism laws passed since 2001 include broadly worded definitions of terrorism and terrorist acts... The most common and frequently the most serious problem in legal definitions of terrorism under national laws is that they are overbroad and vague. As a basic legal principle, such laws fail to give reasonable notice of what actions are covered. Many are so broad that they cover common crimes that should not reasonably be deemed terrorist or acts that should not be considered crimes at all. Their scope leaves them susceptible to arbitrary and discriminatory enforcement by the authorities—often against religious or ethnic communities, political parties, or other particular groups.⁶³

The HRW report warns against legal definitions of terrorism which rely on phrases such as 'public order' or public safety' and can be used to 'quash legitimate activities and speech under the guise of countering terrorism.'⁶⁴ The Indonesian ATL does not refer to 'public safety' or 'public order', however it is broadly worded and may

⁶³ HRW, above n 52, 17.

⁶⁴ Ibid, 18.

potentially be applied to non-violent acts such as incitement to commit terrorism (art 14), and even to acts which negligently cause damage (art 8(d)).

Wahid argues that art 6 is broadly worded, elastic and subject to interpretation due to its emphasis on effects over motives. The elucidation to art 6 explains that 'damage or destruction to the environment' includes 'contamination or damage to any objects, powers, state of affairs, and living beings, including humans, which influences the continuation of life and the prosperity of humans or other beings'.⁶⁵ Wahid argues that the article could therefore cover every-day acts such as 'a motorist who pollutes the air...or a farmer who uses pesticides'.⁶⁶ Wahid recommends that art 6 be revised. He does not however, account for the requirement of the use of violence contained in element (1) above. As the word 'or' is not present at the end of element (1) it is submitted that the element of intentionally using violence is a necessary element for an offence under art 6. If the article were construed otherwise, acts which unintentionally created widespread fear by causing mass casualties could be covered. For example, a supervisor at a power plant who, by his negligence, unintentionally caused an explosion could create mass casualties and widespread fear. However, as there is no ideological motivation for the crime, it is absurd to call it an act of terrorism. Article 6 could, however, be revised to make this distinction more clear.

Butt notes '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

⁶⁵ Interim Law No. 1 of 2002 above n 24. Elucidation to art 6, 36.

⁶⁶ Abdul Wahid, Sunardi, and Muhammad Imam Sidik, *Kejahatan Terorisme: Perspektif Agama, HAM Dan Hukum*, ed. Aep Gunarsa (PT Refika Aditama, 2004) 77.

could be applied'.⁶⁷ Butt raises three important questions in relation to the 'creation of fear' element:

- how 'widespread' would the fear need to be – would fear in one village be enough, or would it need to spread to the district, provincial or even national level?
- As a matter of evidence, how would you prove the creation of a widespread atmosphere of terror? Would you need to take a poll or call witnesses, or would the judge make a determination based on their own perceptions? And;
- Does the terror need to be an objectively reasonable response to the threat, or does a subjective test apply? What if parts of a community overreacted to the violence or threat of violence and what if it was overblown by media reporting?⁶⁸

In answer to the second of Butt's questions, Indonesian courts do hear evidence from expert witnesses regarding the psychology of the community following a terrorist attack. Expert witnesses were called following an attack on a bank in Medan to testify as to a state of fear in and around the city of Medan.⁶⁹ Also, following the Bali attacks of 2002, prosecutors called expert witnesses to testify as to the economic effects on the Balinese community.⁷⁰

Importantly, Article 1(2) of the ATL defines 'any person' to include 'individuals or groups of people, whether civil, military or police who are individually responsible, or corporations'. The Article is significant in that state authorities, i.e. the police and military, are *not* excluded from the operation of the ATL. Given the evasiveness of states at the UN level to be exposed to charges of terrorism, it is significant that the Indonesian legislature took this step, although there have been no prosecutions of state agencies for terrorism to date.

⁶⁷ Butt, above n 27, 4.

⁶⁸ Ibid.

⁶⁹ Police dossier in the case of Marwan, alias Wak Geng, mastermind of the violent robbery of the CIMB Niaga Bank in Medan in August 2010.

⁷⁰ Mathew Zilko, "Bali Bombers: A Very Different Kind of Trial" (2003) *Brief* August 2003, 27.

APPLYING THE TERRORISM LAWS

Returning to the main theme of this chapter, it is debatable whether isolated attacks on police, such as the shooting of officer Sukardi mentioned previously, can be characterised as 'terrorist'. According to Indonesian law, such attacks do not fulfil the elements required under arts 6 or 7 of the ATL if they do not create a widespread atmosphere of terror/fear, or are not intended to do so. It is equally debatable whether the attacks on police in fact created fear or were intended to create fear. Jones' comments above indicate that the intention is no longer to create fear. Neta Pane, head of IPW Indonesia Police Watch, claims that the community is *resah* (worried/restless) with the inability of police to ensure the safety of the community and themselves.⁷¹ Whether this 'restlessness' qualifies as a widespread atmosphere of terror would be a question for judicial determination.

Ramelan, a professor of criminal law and former terrorism prosecutor, has argued that in assessing a terrorist act, the complete background and context of the act should be considered – that is, whether it is part of a wider, systematic campaign of violence. 'Are actors' motivations the overthrow of the legitimate government and the establishment of an Islamic state? Are there connections to international terrorist groups which have committed clearly terrorist acts such as beheadings?'⁷² In this wider context, it is more likely that non-terror-inducing attacks on police would be regarded terrorist attacks rather than isolated instances of ordinary criminal violence.

THE FATAL SHOOTING OF BRIPKA SUKARDI

⁷¹ Sandro Gatra, "Pesan Untuk Sutarman: Jangan Lupakan Penembakan Polisi!" *Kompas* (online) 9 October 2013 <<http://nasional.kompas.com/read/2013/10/09/0952184/Pesan.untuk.Sutarman.Jangan.Lupakan.Penembakan.Polisi>>.

⁷² National Counter-terrorism Agency [BNPT], *Penggalangan Aparat Penegak Hukum Dalam Penanganan Perkara Tindak Pidana Terorisme* Transcript of National Meeting of Law Enforcement Agencies on the Handling of Terrorism Crimes, Jakarta, 8 October 2014.

On September 10, 2013, an Indonesian police officer, Second Brigadier Sukardi bin Said, was fatally shot by four assailants in the centre of Jakarta.⁷³ Shortly after the shooting, Ansyad Mbai, head of Indonesia's National Counterterrorism Agency, publicly announced that the killings were linked to terror groups, namely, the so-called Mujahidin Indonesia Barat (West Indonesia Mujahidin or 'MIB')⁷⁴ in cooperation with Mujahidin Indonesia Timor (East Indonesia Mujahidin or 'MIT').⁷⁵ However, the claim led some to speculate whether the police were too hasty in their assumptions, and to question whether police had solid evidence to prove that 'terrorist' groups were actually involved in the killings.⁷⁶ Some of the circumstances surrounding the shooting of Sukardi were notable and possibly pointed to alternative motives, unrelated to jihadist terrorism.⁷⁷

Firstly, the location of the killing – directly in front of Indonesia's high profile anti-corruption commission (the KPK) – led some to question whether there was a connection to any of the commission's investigations.⁷⁸ Then there was the manner of the killing; a well-planned and executed assassination.⁷⁹ The killers shot Sukardi at close range, only about 2–3 metres from the victim, similar to previous attacks.⁸⁰ A

⁷³ "Provost Officer Shot Dead in Front of KPK Headquarters" *The Jakarta Post* 11 September 2013 <<http://www.thejakartapost.com/news/2013/09/11/provost-officer-shot-dead-front-kpk-headquarters.html>>; Hans Nicholas Jong, "Business as Usual at KPK after Police Shooting" *The Jakarta Post* 12 September 2013 <<http://www.thejakartapost.com/news/2013/09/12/business-usual-kpk-after-police-shooting.html>>;

⁷⁴ Institute for Policy Analysis of Conflict [IPAC], *Weak, Therefore Violent: The Mujahidin of Western Indonesia* IPAC Report No. 5, 2 December 2013 <http://www.understandingconflict.org/read/index/3/types_of_conflict.html>.

⁷⁵ Rahmat Rahman Patty, "Kepala BNPT: Aksi Penembakan Polisi Didalangi Kelompok Mujahidin" *Kompas* (online) 26 September 2013 <<http://nasional.kompas.com/read/2013/09/26/1507196/Kepala.BNPT.Aksi.Penembakan.Polisi.Didalangi.Kelompok.Mujahidin>>.

⁷⁶ Araf, above n 15.

⁷⁷ Yuliasri Perdani and Bagus BT Saragih, "Cop Shooting May Not Be Related to Terrorism" *The Jakarta Post* (online) 13 September 2013 <<http://www.thejakartapost.com/news/2013/09/13/cop-shooting-may-not-be-related-terrorism.html>>.

⁷⁸ Jong, above n 73.

⁷⁹ Yuliasri Perdani and Bagus BT Saragih, "Police up against Trained Killers" *The Jakarta Post* (online) 12 September 2013 <<http://www.thejakartapost.com/news/2013/09/13/police-up-against-trained-killers.html>>.

⁸⁰ Perdani and Saragih, above n 77.

police spokesman, Senior Commissioner Rikwanto, said that the 'gunmen used 9-millimeter pistols, the same type of firearms used in a recent string of attacks that killed three police officers in Greater Jakarta in the last two months'.⁸¹

It is also relevant that, at the time of the shooting, Sukardi was reportedly 'moonlighting'⁸² (as described by the local media) by providing a security escort for trucks carrying construction materials. Sukardi was not on official police duty at the time of the incident, although he was wearing his police uniform. This led Indonesia Police Watch Chair Pane to question whether 'commercial rivalries could lie behind Sukardi's murder'.⁸³ Bhakti commented that 'the last information I received about this shooting is that it was connected to 'competing interests' in the illegal business of providing armed escorts for valuable shipments of goods. It is possible that it involved individuals from different units of the police, or even from a different branch of the TNI. The perpetrators of other shootings of police in Tangerang and other areas around the same time as the shooting of Bripka Sukardi also claimed that they were not responsible for the shooting'.⁸⁴

The question of whether Sukardi's death was connected to jihadist terrorist groups remains unsolved, and this goes to the heart of the issue at hand. Ought the question of whether this crime is categorised as 'terrorist' or not, turn solely on whether it was connected to a jihadist group? The question of the motive of the killing is critical. Davis' 'modest proposal' for a legislative definition (set out above) includes reference to a 'political, religious or ideological motivation'. The other definitions discussed previously refer to 'intimidating a population or compelling a government'.

⁸¹ Perdani and Saragih, above n 79.

⁸² Yuliasri Perdani, "Slain Cop Took Risky Job to Make Ends Meet" *The Jakarta Post* (online) 12 September 2013 <http://www.thejakartapost.com/news/2013/09/12/slain-cop-took-risky-job-make-ends-meet.html>.

⁸³ Perdani and Saragih, above n 77.

⁸⁴ Personal communication with Mohammed Adhe Bhakti, Executive Director Center for Radicalism and Deradicalization Studies (PAKAR), 15 August 2015.

Purely economic or commercial motives do not qualify as terrorism under these definitions.

The 'description' of terrorism set out in art 6 of the ATL, however, contains no reference to motivations of any kind – political, religious or ideological – as an element of the offence. Rather, it focuses on the use of violence, or threats of violence, to create fear or cause mass casualties or damage to the environment or important facilities. However, in a way, the 'definition' of the offence in the ATL has become irrelevant. Despite the elastic and undefined nature of these terms, and despite no legislative reference to the motivation for the crime, in practice, the law has been, with a few exceptions,⁸⁵ applied exclusively to acts committed by jihadist groups and individuals. Papuan ethno-separatists, who commit acts of violence, are not charged as terrorists.⁸⁶ Out of approximately 900 arrests for suspected terrorism, around 10, or 1.1% have been for offences not connected to jihadist groups. In the overwhelming majority of cases therefore, the label 'terrorist' is applied to jihadist actors motivated by Islamist ideology and, it is argued that this is in line with a politically biased, post-9/11 usage of the term.

Several events in 2015 indicate the continued threat posed by terrorism and extremism and provided concrete illustrations of the complexities, and the importance, of categorising an attack as terrorist or not. In March, a chlorine bomb which was designed to send poisonous chlorine fumes through a mall's ventilation failed to

⁸⁵ Dominic Berger, "Indonesia's New Anarchists" (2013) *Inside Indonesia* vol. 113 Jul-Sep <<http://www.insideindonesia.org/indonesia-s-new-anarchists>>. Police attempted to charge individuals who destroyed ATM machines as an expression of their anarchist ideology with terrorism. They were convicted of the lesser crime of arson. In Aceh, a group which attacked migrant Javanese workers for political reasons were successfully charged as terrorists, see the case of Usria et.al. Five negotiators from the Free Aceh Movement were arrested and charged with terrorism soon after the ATL was enacted. They were convicted and sentenced to between 12-15 years. However they were released after the Helsinki agreement between GAM and the government in August 2005, and the ATL has not been used to prosecute separatists since then. Sidney Jones, "Terrorism, Counter-Terrorism and Human Rights in Indonesia" Submission to the International Commission of Jurists, Jakarta, 4 December 2006, 4.

⁸⁶ Jones above n 22.

properly detonate at a mall in Depok, south of Jakarta.⁸⁷ The use of chlorine gas sparked concerns that the attack may have been linked to ISIS.⁸⁸

An explosive device was detonated at the Alam Sutera Mall in Tangerang, west of Jakarta in July, and a second explosion occurred in October. Police were unable to apprehend the offender after the July explosion, but suspected that it may have been connected to a *fatwa* issued by IS 'calling for jihad in the holy month of Ramadhan'.⁸⁹ Following the second explosion in October, police apprehended a suspect within hours after viewing security footage.⁹⁰ After investigating the motive for the bombing, police announced that it was not ideologically motivated and had no connections to terrorist networks. The suspect was a Catholic ethnic Chinese Indonesian⁹¹ who had acted alone and learned to make the high explosive Triacetate Triperoxide bomb from the internet. While the suspect may have intended to cause 'havoc'⁹² his motives were allegedly financial extortion.⁹³ This suggests that it is not terrorism; however, Bhakti argues that as there is no reference to political/ideological motives in the ATL, it could be applied to this act – from a legal perspective this analysis seems reasonable. To avoid doubt, prosecutors may choose to use the State Emergency Law, which carries the death

⁸⁷ Farouk Arnaz, "Police: Syria Returnees Tied to Depok Chlorine Bomb" *The Jakarta Globe* (online) 23 March 2015 <<http://jakartaglobe.beritasatu.com/news/police-syria-returnees-tied-depok-chlorine-bomb/>>.

⁸⁸ Catriona Croft-Cusworth, "Chlorine Bomb Reveals Indonesia's ISIS Worries" *The Interpreter* (online), 23 March 2015 <<http://lowyinterpreter.org/>>.

⁸⁹ "Alam Sutera Bomb Attack May Be Linked to IS: Police" *The Jakarta Post* (online), 11 July 2015 <<http://thejakartapost.com/news/2015/alam-sutera-bomb-may-be-linked-is/>>.

⁹⁰ "One Suspect Named in Alam Sutera Bomb Explosion" *TEMPO Interaktif* (online) 30 October 2015 <<http://en.tempo.co/read/news/2015/10/30/057714401/one-suspect-named-in-alam-sutera-bomb-explosion>>. The suspect referred to as 'L' was an IT expert employed in a company near the mall. He was identified from CCTV footage and arrested at his home near the shopping mall. The report, which quotes Head of Jakarta Metropolitan Police Tito Karnavian, states that the man will be charged under the ATL. Which indicates a possible shift in terrorism policy under Karnavian.

⁹¹ Erik Purnama Putra, "BNPT Mules Perutnya Pelaku Bom Alam Sutera Bukan Orang Islam" *Republika* (online) 30 October 2015 <<http://republika.co.id/>>.

⁹² Giacomo Tognini, "Solving Conflict in Papua, South Moluccas" *Jakarta Globe* (online) 13 June 2014 <<http://www.thejakartaglobe.com/news/solving-conflict-papua-south-moluccas/>>.

⁹³ Adanti Pradita and Hanz Jimenez Salim, "All You Need to Know About Alam Sutera Mall 'Bomber'" *Liputan 6* (online) 29 October 2015 <<http://www.liputan6.com/>>.

penalty for unlawful use of explosives. At the time of writing the case had not come before the courts.

Other events in 2015 also underlined the real possibility of violence which may be sparked by inter-communal tension – and which test the limits of what is, or is not, terrorism. In July, a mosque in the Tolikara district of Papua was burned down following inter-ethnic tension sparked by allegations of religious intolerance by the majority Christian population against Muslims.⁹⁴ Officials feared a backlash after some Muslim leaders called for retaliations.

Also in Papua, in September, two timber workers were kidnapped, allegedly by individuals from the Free Papua Movement⁹⁵ near the border with Papua New Guinea. Following diplomatic negotiations, the PNG military successfully freed the two hostages, without violence, and they were returned to Indonesia.⁹⁶

The perpetrators demanded a hostage swap for two prisoners being held on drugs charges. However, the Indonesian government refused to negotiate, instead enlisting the assistance of PNG military to resolve the matter. After initial negotiations failed, several women from the group later handed the men over and ‘not one shot was fired’ in the operation near Vanimo on the north coast of PNG. Churches and aid groups operating in the area commented that ‘there has been a recent increase in tension and

⁹⁴ "Officials Fear Backlash after Papua Mosque Burning" *Jakarta Globe* (online) 21 July 2015 <<http://www.thejakartaglobe.com/news/officials-fear-backlash-after-papua-mosque-burning/>>.

⁹⁵ "PNG Secures Release of Two Indonesian Hostages" *The Jakarta Post* (online) 18 September 2015 <<http://www.thejakartapost.com/news/2015/09/18/png-secures-release-two-indonesian-hostages.html#sthash.Ryj2gK0n.dpuf>>; Bruce Hill, "PNG Defence Force Rescues Indonesian Hostages from West Papuan Rebels, Military Commander Says" *ABC News* (online) 18 September 2015 <<http://www.abc.net.au/news/2015-09-18/png-defence-force-rescues-indonesian-hostages/6786154>>.

⁹⁶ "President to Talk with PNG on Hostage Situation" *The Jakarta Post* (online) 17 September 2015 <<http://www.thejakartapost.com/news/2015/09/17/president-talk-with-png-hostage-situation.html>>.

alleged human rights abuses in Papua province, where pro-independence activists are waging a long-running separatist movement.⁹⁷ A news report stated:

The police and TNI claim that the group is part of the Free Papua Organization (OPM) led by Jeffry Pagawak. 'Jeffry's group is a new criminal group that creates terror in Jayapura and Keerom,' said Papua Police chief Insp. Gen. Paulus Waterpauw. The group has reportedly carried out several terrorist acts in Papua, including attacking a police station in 2012.

The taking of hostages has long been recognised as an act of terrorism. The International Convention against the Taking of Hostages, was adopted by the General Assembly of the United Nations on 17 December 1979. Methods such as the taking of hostages and attacks on police and civilians mark the OPM as using clearly terrorist tactics.⁹⁸ However, such groups and individuals are not charged with terrorism offences.

THE SUBJUGATION OF LAW TO POLITICS

The almost exclusive application of terrorism offences to jihadist actors is the product of a number of overlapping factors. As discussed in the previous chapter, Indonesia's leaders around the time of the 9/11 attacks were forced to tread a fine line between appeasing US and UN imperatives, UNSC resolution 1373 for example, which required states to take firm action in the area of countering jihadist terrorism. The US and its allies could not directly force Indonesia to take action against jihadist groups, so, to borrow a concept from Chomsky,⁹⁹ they were forced to 'manufacture' Indonesia's consent. As noted, they did this by providing funds and assistance to Indonesia's police force. This period of international cooperation in law enforcement, it is argued, while successful in rooting out jihadist networks, had the effect of severely skewing the understanding of the concept of terrorism among enforcement institutions such as the

⁹⁷ Hill, above n 95.

⁹⁸ Jones, above n 11.

⁹⁹ Noam Chomsky and Edward S Herman, *Manufacturing Consent: The Political Economy of the Mass Media* (New York: Pantheon Books, 1988).

police and prosecutors – to the extent that ‘terrorism’ became synonymous with ‘jihadist terrorism’.

This perception was reinforced by the fact that the ATL, Indonesia’s new law for combating terrorism, was, by the enactment of a second law (Law No 16 of 2003) purported to specifically apply, retrospectively, to a single act of jihadist terrorism, committed on October 12, 2002, in Bali. The full title of Interim Law No 2 of 2002 is illustrative, it is: ‘Interim Law No 2 of 2002 on the Application of Interim Law No 1 of 2002 on the Eradication of Terrorism to the Bomb Explosion Which Occurred in Bali on 12 October 2002’. The paradigm of applying terrorism laws to jihadist groups began with the enactment of the ATL, and was reinforced by international training and cooperation in counter-terrorism with countries such as the US, UK and Australia. Despite the Constitutional Court’s decision to strike down Interim Law No 2 of 2002 for being retrospective, the enforcement paradigm of viewing terrorism as meaning jihadist terrorism was already firmly entrenched, and other political violence, committed by separatist groups, as something else entirely.

Further evidence of the subjugation of legal processes to political influence came when the newly formed Constitutional Court, in one of its earliest highly controversial rulings, acted to strike down a law of parliament as unconstitutional – which it did by a slim majority – deciding that to retrospectively apply the terrorism law was contrary to art 28I(1) of the Constitution. However, subsequent to the decision being handed down by the court, it was, in effect, overruled by political manoeuvring. Butt explains:

Apparently fearing that the convictions would be lost, Justice Minister Yusril Ihza Mahendra and Constitutional Court Chief Justice Professor Dr Jimly Asshiddiqie announced their own interpretation of the decision to the press. They claimed that the bombers would remain in jail because the Constitutional Court’s decision itself could not operate retrospectively. In other words, the decision, whilst binding, only prevents future investigations, prosecutions and convictions being carried out retrospectively. It

would not, therefore, impact upon convictions that have already been obtained. This statement, particularly from Asshiddiqie, constitutes an inappropriate politicisation of the court. That Asshiddiqie's statement and that of the Justice Minister were announced at around the same time, and conveyed the same view, gives the impression that Asshiddiqie may have collaborated with the government, even though he might not actually have done so. Just as bad, any implications of the decision should have been contained in the decision itself; Asshiddiqie has attempted to unilaterally alter the logical implications of the court's decision.¹⁰⁰

In a nation based on the rule of law pursuant to art 1(3) of the Indonesian Constitution, such political bias in the administration of justice cannot be supported. The situation underscores the importance of depoliticising the term 'terrorism', and the importance of a clear and objective definition of terrorism.¹⁰¹ Accordingly, the Indonesian parliament and law enforcement authorities have two choices, either to enforce the law as it exists, which turns predominantly on the creation of an atmosphere of fear – or, revise the law and include a definition of terrorism which is more in line with international norms.

That the original drafters of the ATL wished to ensure that peaceful political dissent would not be labelled terrorism, by a state bent on retaking repressive control of society, in the context of *reformasi* and the early post-Soeharto period is understandable. However, democratic reforms in Indonesia have proven to be robust, and law enforcement officials have been 'scrupulous' in abiding by the controls and limits contained in the law, such as the 7-day pre-charge detention rule. Jones argues 'the discrepancy between the ways the two groups are treated by the legal system is untenable. Papuans may not get charged with terrorism, but they tend to get much

¹⁰⁰ Simon Butt and David Hansell, "The Masykur Abdul Kadir Case: Indonesian Constitutional Court Decision No 013/PUU-I/2003" (2004) *Australian Journal of Asian Law* vol. 6 no. 2, 181.

¹⁰¹ While this paper argues for a depoliticised usage of the term 'terrorism' – one which focuses on defined legal elements rather than political expediency – some academic literature argues that the processes of depoliticisation actually serves to propagate power even as they claim to be 'neutral'. See for example, James Ferguson, *The Anti-Politics Machine: "Development," Depoliticization and Bureaucratic Power in Lesotho* (Cambridge University Press, 1990). Depoliticisation as a concept is, therefore, not perfect and has its critics. However, it remains a core argument of this thesis that a settled, universal definition of terrorism is better than none.

heavier sentences, because separatism tends to be seen as a worse offense than jihadism.¹⁰² Either the law should be extended to apply to Papuan separatists, or it should be pulled back in the cases of jihadists whose crimes do not cause widespread fear. Jones points out that the obstacles to pulling back on the use of the terrorism law are 'huge'. The extra powers it gives police would not be relinquished easily, there is a considerable state apparatus set up – the BNPT, special police and prosecutions branches – whose livelihood depends on continued use of the terrorism laws.

A 'RESTLESS' COMMUNITY AND ANTAGONISM TOWARD POLICE

Responding to the shooting of Sukardi, vice chairman of the Indonesian parliament Priyo Budi Santoso stated that the community's sense of security was in the 'red zone'.¹⁰³ Santoso added that if the shootings weren't solved quickly it would cause speculation about the police's ability to ensure public safety.¹⁰⁴ In examining the public response to the killings of police, what is remarkable is the lack of sympathy expressed by the community. Rather, the tone of the public response was to criticise police for their failure to uncover the killers immediately – that the police's 'homework' was to solve the murders as soon as possible.¹⁰⁵ Imanuddin Razak, for example, commented in the *Jakarta Post* on 13 September 2013, just three days after the killing of Sukardi:

A large number of people from various walks of life have expressed their discontent and anxiety about the police's inability to uncover the truth behind the incidents, particularly as to who the perpetrators are and their motives. ... Such discontent and anxiety are understandable as people have started to worry about their safety,

¹⁰² Jones, above n 11.

¹⁰³ Indra Akuntoto, "Rasa Aman Masyarakat Berada Di Zona Merah" *Kompas* (online) 11 September 2013 <<http://nasional.kompas.com/read/2013/09/11/1109093/Rasa.Aman.Masyarakat.Berada.di.Zona.Merah>>. See also: extensive investigative reporting on the shooting of Sukardi by TEMPO magazine of 11 September 2013 (online) <<https://m.tempo.co/read/news/2013/09/11/064512229/kronologi-penembakan-bripka-sukardi>>.

¹⁰⁴ Sandro Gatra, "Komentar SBY Soal Penembakan Polisi" *Kompas* (online) 19 September 2013 <<http://nasional.kompas.com/read/2013/09/19/1050103/Komentar.SBY.soal.Penembakan>>.

¹⁰⁵ Sabrina Asril, "Penembakan Polisi, Ini PR Besar Polri" *Kompas* (online) 11 September 2013 <<http://nasional.kompas.com/read/2013/09/11/1029178/Penembakan.Polisi.Ini.PR.Besar>>.

especially upon learning that the police have made little progress in their investigation into the attacks, let alone uncover the identity of the perpetrators and their motives.¹⁰⁶

Such direct, unsympathetic commentary on the murder of a police officer belies a public which remains deeply suspicious of police motives and methods. In the same vein, Razak continues:

A failure to uncover the truth behind the serial attacks on police officers will create a backlash from the general public due to the continuing public distrust of the police's capability and credibility. Such a failure would also encourage speculation and conspiracy theories, most of which might be wild speculation, although some might have a degree of validity.¹⁰⁷

The conspiracy theories alluded to by Razak included an inference that the police themselves had orchestrated the killings in order to garner sympathy and support from the public. If that was the real motive, it failed. Another conspiracy theory, perhaps more plausible, is that the police, by deliberately increasing the sense of threat and fear in the community, can justify demands for greater levels of funding. Some observers, including prominent NGO representatives and members of parliament have 'expressed concern that terrorism was being 'preserved as a project' in order to justify disbursement of state funds to the agencies concerned.'¹⁰⁸

The fact that the killers stole Sukardi's pistol would tend to support Jones' argument outlined above, that the killings are utilitarian in nature, though, in itself, it does not point to whether the killers were linked to a jihadist group.

In examining the question of whether this murder was a terrorist act, it is necessary to consider whether it created, or was intended to create, a widespread atmosphere of terror. As discussed above, the community response was a kind of

¹⁰⁶ Imanuddin Razak, "News Analysis: Attacks on Police, the Truth and Conspiracy Theories" *The Jakarta Post* (online) 13 September 2013 <<http://www.thejakartapost.com/news/2013/09/13/news-analysis-attacks-police-truth-and-conspiracy-theories.html>>.

¹⁰⁷ Ibid.

¹⁰⁸ Yanto Soegiarto, "The Thinker: A Lack of Intelligence" *Jakarta Globe* (online) 12 September 2012. <<http://www.thejakartaglobe.com/columns/the-thinker-a-lack-of-intelligence/543863>>.

unsympathetic exasperation at the police's own failings. However, whether the shooting caused a widespread atmosphere of terror or fear is uncertain, bordering on unlikely. As during the trial of the 2002 Bali bombers, to answer the question, evidence could be sought as to any kind of disruption to the normal course of affairs in the affected area. On that measure, it would appear that normal activities in the vicinity of the killing were not seriously affected. Jong reported on 12 September that it was 'business as usual' at the KPK headquarters. The killing having occurred on a Tuesday night, 'as of Wednesday afternoon, the police had retracted the police line on the crime scene, returning the traffic in the vicinity of the KPK building to normal'.¹⁰⁹

In late October, 2013 police arrested eight suspects in connection with the killings of police in August and September 2013 in Ciputat, Cireundeu and Tangerang, and confirmed that they were linked to jihadist terrorist networks.¹¹⁰ This would appear to settle the question of whether those killings had links to 'terrorist' groups, although it does raise the further question of whether revenge played a role in the killings. Police have been severely criticised in the past for alleged abuses of human rights and legal processes in their past handling of terrorism suspects.¹¹¹ The elite counter-terrorism detachment, Densus 88, has killed 99 suspects in counter-terrorism operations over the past twelve years, some of them allegedly in circumstances in which the suspects showed no resistance.¹¹² Police have been accused of torturing captured suspects, and a YouTube video emerged in 2013 depicting the torture and

¹⁰⁹ Jong, above n 73.

¹¹⁰ Ananda Badudu, Reza Aditya, and Nurhasim, "Police Arrest Shooter Suspects" *TEMPO Interaktif* (online) 1 November 2013 <<http://en.tempo.co/read/news/2013/11/01/055526422/Police-Arrest-Shooter-Suspects>>.

¹¹¹ Muhammad Saifullah, "Investigasi Komnas Ham Sebut Terduga Teroris Tak Melawan" *okezone.com news portal* (online) 4 August 2013 <<http://news.okezone.com/read/2013/08/04/337/847437/investigasi-komnas-ham-sebut-terduga-teroris-tak-melawan>>.

¹¹² International Crisis Group [ICG], *Indonesia: The Deadly Cost of Poor Policing* Asia Report No. 218, 16 February 2012.

non-fatal shooting of a bound terror suspect.¹¹³ Following the publication of the video, some prominent politicians called for Densus 88 to be dissolved.¹¹⁴ Commenting on community anger towards police tactics, IPAC stated:

Police tactics need to be examined as well. The tactics that were appropriate in the face of al-Qaeda-style bombings ten years ago probably need to change to take the new 'terrorist-as-petty-criminal' phenomenon into account. Anger at the police over arrests and killings of family members has created a new generation of younger brothers and sons – and probably sisters and daughters, though harder to tell – who want revenge. When that motivation is combined with ongoing extremist preaching and radical recruitment, it becomes another problem waiting in the wings.¹¹⁵

However, police representatives counter with the argument that terrorist groups and individuals are armed and extremely dangerous, and that police will take no chances when dealing with them. According to Karnavian, the acquisition of weapons is a key moment in the police response. 'If they possess weapons... Then it is time to move, with any price including a gun fight'.¹¹⁶

In the context of breaking the cycle of violence, and accusations that Densus 88 are 'trigger happy' and have 'fuelled jihad'¹¹⁷ it may be noted out that other counter terrorism options are available to police. Law No. 9 of 2013 on the Prevention and Eradication of the Financing of Terrorism¹¹⁸ presents enforcement officials with a range of new powers and processes to list and freeze the assets and property of

¹¹³ Farouk Arnaz, "Densus 88 Alleged Torture Video Dates Back in 2007, Police Chief Says" *Jakarta Globe* (online) 4 March 2013 <<http://www.thejakartaglobe.com/home/densus-88-alleged-torture-video-dates-back-in-2007-police-chief-says/575856>>.

¹¹⁴ Ezra Sihite, "No Need to Disband Densus 88, Says Minister," *Jakarta Globe* (online) 5 March 2013 <<http://www.thejakartaglobe.com/home/no-need-to-disband-densus-88-says-minister/577054>>.

¹¹⁵ IPAC, above n 74.

¹¹⁶ Karnavian, above n 35.

¹¹⁷ Angela Dewan, "Indonesian Anti-Terror Cops Accused of Fueling Jihad" *Jakarta Globe* (online) 29 March 2013 <<http://www.thejakartaglobe.com>>.

¹¹⁸ *Undang-Undang No. 9 2013 Pencegahan Dan Pemberantasan Tindak Pidana Pendanaan Terorisme*, Law No. 9 of 2013 on Preventing and Eradicating the Crime of Financing Terrorism.

suspected terrorists and terrorist financiers.¹¹⁹ Used effectively, the law can form a 'powerful tool' in the fight against terrorism. However it is currently not being fully implemented. The Financial Action Task Force, has reprimanded Indonesia for failing to implement the laws in line with international commitments (see chapter 5).

As discussed above, the definition of terrorism used in the thesis, emphasises the targeting of civilians, as compared to combatants – in a war or war-like setting, combatants are considered legitimate targets for violence. There are no war zones within the sovereign territory of Indonesia – therefore, ostensibly, there are no *combatants*. Therefore there are no *legitimate* targets of violence. There *are* however areas where separatist movements exist and some violence continues to occur in those areas, most notably Papua.

The case of Papua provides an important counter-point to *Islamist* terrorism, within the Indonesian context, as it has no connection to Islamic ideology or religion. The Papuan 'ethno-separatist' movement is regarded by some as a freedom fighter scenario where a local group employs political violence to pursue political aspirations, that is, the forcible ejection of what they claim is a foreign occupying force and the establishment of an independent state. Papuan separatists, and those who support them, would probably seek to argue that a war-like setting exists in Papua, therefore providing some justification for their attacks on police and military personnel. Legally and politically however, this issue is settled beyond doubt. That is, Papua forms part of the Unitary Republic of Indonesia, as recognised by the United Nations. Australia, which has sometimes been seen by Indonesia's elite as being supportive of independence movements within Indonesia (East Timor for example) has been asked for, and provided, repeated assurances that the Australian government formally recognises Papua as part of the Republic of Indonesia. Attacks on police in Papua should therefore

¹¹⁹ Adam Fenton and David Price, "Forbidden Funds: Indonesia's New Legislation for Countering the Financing of Terrorism" (2014) *Australian Journal of Asian Law* vol. 15 no. 1.

be seen as terrorist attacks. However, Papuan activists committing political violence have not been charged as terrorists.

In conceptualising terrorism targeted against civilians, and why it is such a repugnant act Schmid explains:

What terrorism shares with genocide is the unilateral attack of the armed against the unarmed and defenceless. It is this asymmetry, in combination with the fact that the capitulation of the direct victim is not possible because it is not accepted or respected, that creates terror.¹²⁰

This explanation raises questions of *when* it is justified to use violence against the members of a state's armed forces. But it also raises the question of whether terrorism can *only* be committed by non-state actors. Where *armed* state actors, (whether police, military or clandestine agents of the state) commit violence against unarmed citizens, ought not that be considered terrorism as well? If, as Schmid states, there is 'no good reason to exclude terrorism conducted by organs of a state from the conceptual reach of the term 'terrorism'' then we must be open to the possibility that terrorist acts may be committed by a state, even in its pursuit of counter-terrorism.

In all the discussions relating to terrorism in the Indonesian context, it should be remembered that there is no necessary connection between terrorism and religion. Religion may be abused by some to justify or motivate others to commit terrorist violence. The religious promise of rewards in the afterlife, of 'martyrdom' or the righteousness of violence against non-believers can be employed to persuade and coerce others to commit terrorism or to justify terrorism, but there is no intrinsic link between terrorism and violence committed in the name of any particular religion. The majority of writing on Indonesian terrorism focuses on so-called Islamist terrorism. This is because in the current course of Indonesian events, the majority of terrorist attacks, particularly within the capital Jakarta and central provinces of Java where the

¹²⁰ Schmid, above n 42, 47.

majority of Indonesia's population are located, are committed by those who are allegedly motivated by Islamist ideology. This does not mean that persons of other religions, or indeed atheists, cannot or do not commit acts of terrorism. They can, and do. Schmid points out that individuals claiming to belong to or be inspired by *all* of the world's major religions have resorted to terrorist violence at some point or other in global history. Within the current Indonesian context however, most instances of terrorist bombings, police shootings, or individuals or groups planning such attacks do so within a stated *jihadist* or *Islamist* ideological framework. As noted, separatist violence such as that occurring in Papua provides an important counter point to Islamist terrorism. The question of the government's labelling of these groups as terrorist and the mobilisation of anti-terrorist forces and funding against these groups is an issue that requires further attention.

POLICE VIOLENCE AND THE COMMUNITY

Questions may be asked about the numbers of terrorist suspects killed in police raids and the human rights issues raised by this practice, in a country where the presumption of innocence exists as a legal principle. At least one terrorism commentator claims that disciplinary measures for violent police actions are virtually non-existent:

The fact is that the police are able to conduct operations in this way because they are under no pressure whatsoever. None. Not locally or internationally. Every time it has happened since 2010, people have been killed. Objections are raised by the human rights groups but then it just fades away.¹²¹

In 2012, Indonesia Police Watch recorded 37 cases of wrongful shootings by police resulting in 49 victims and 17 fatalities. These figures do not include the numbers of suspected terrorists, or ordinary criminals, shot and killed in police operations – but they do include examples of innocent bystanders being fatally shot in police shootouts

¹²¹ Sidney Jones, "Transcript of Interview with Sidney Jones Director International Crisis Group, Indonesia" (11 April 2012, Jakarta) 3.

with terrorists. One such case is that of Nur Iman, an *ankringan* (mobile cafe stall) trader, who was shot by a stray bullet during a police operation to hunt down two suspected terrorists, Sigit Qurdowi and Hendro, in May 2012 in Sukoharjo.¹²² Police claim to have established that the bullet which killed Iman came from the weapon of one of the terrorists, and not from police.

Then there are cases of terror suspects who have been shot and killed in police operations but where the family of the victim dispute any involvement in terrorism. Such is the case with two shooting victims in police raids in Sumbawa in January 2013. Bahtiar, a 35-year-old male was shot dead by police in Dompu on 5 January 2013. However, his wife strongly denies that her husband was involved in terrorism claiming that he was a bread salesman who was in Dompu to collect a debt from a customer.¹²³ In a separate incident, the mother of terror suspect Anas Wiryanto intends to bring a claim against what she believes was the wrongful shooting of her son by Densus 88 in Bima in January 2013. Fatma claims that only after her son had been shot dead did police ask for his identity documents. With the assistance of the Muslim Centre for Human Rights she announced through her lawyer that she would submit an official report of the matter to the National Committee for Human Rights (Komnas HAM) and the national parliament. 'It is right to question whether in the shootings of terrorism suspects the police have failed to follow correct procedures and committed wrongful shootings,' commented Komnas HAM Commissioner Siane Indriani. 'We do not support terrorism but the government needs to evaluate the performance of Densus 88,' she said.¹²⁴

¹²² Taufik Alwie and Deni Mulya Barus, "Main Tembak Sudah Biasa" *GATRA Magazine*, 3 January 2013, 16.

¹²³ "Polisi Dituduh Salah Tangkap Oleh Keluarga Terduga Teroris" *NTB Terkini* (online) 7 January 2013 <<http://www.ntbterkini.com/2013/01/07/polisi-dituduh-salah-tangkap-oleh-keluarga-terduga-teroris/>>.

¹²⁴ "Ibu Terduga Teroris Protes Polisi" *Lombok Post*, 16 January 2013, 1.

Responding to questions raised in relation to the case of Anas Wiryanto, Police spokesperson Brigadier General Boy Rafli Amar said that police respect the rights of victims to make complaints against the police. To victims' families he commented 'Please go ahead and make use of the available mechanisms'. However in defence of police actions he responded that the terrorists' actions also contravene human rights. 'If they commit a bombing, or shooting of our officers, is that not also a violation of human rights?' he said. Baker's research indicates that police internal complaint mechanisms are ineffectual and hostile to complainants.¹²⁵

Neta S. Pane, chairperson of Indonesia Police Watch commented that incidents like these indicate a need to review police standard operating procedures (SOPs). He also remarked the incidents indicate a breakdown between intelligence agencies and operational forces. He pointed out that during early operations to hunt down the perpetrators of the two Bali bombings, there were no shootouts, and the suspects were able to be apprehended alive, and go on to face trial. This observation tends to indicate a changing trend in police tactics towards the fatal shootings of terror suspects, over apprehension and trial.¹²⁶

Other recorded wrongful shooting cases in 2012 included instances of police shooting individuals from ages 15 to 57 in a variety of situations and for a variety of reasons.¹²⁷ Reports of the shootings reveal a notable disregard for public safety and standardised weapons procedures and safeguards. Shootings were ascribed to drunkenness, jealousy, mistaken identity, and 'stray bullets' among other reasons. There were at least two recorded cases of police wrongfully shooting individuals while

¹²⁵ Ibid; Jacqui Baker, "After Justice: What Happens after Three Police Officers Are Found Guilty of Manslaughter and Torture?" (2013) *Inside Indonesia* vol. 114 Oct-Dec <<http://www.insideindonesia.org/weekly-articles/after-justice>>.

¹²⁶ Fajar Pratama, "Nur Iman, Korban Kurang Kompaknya Intelijen Dan Densus 88" *Detik News*, 17 May 2011 <<http://news.detik.com/berita/1641049/nur-iman-korban-kurang-kompaknya-intelijen-dan-densus-88>>.

¹²⁷ Alwie above n 122, 33.

drunk, in one case in North Sulawesi a drunk police officer was discharging his weapon 'membabi buta', in a blind rage, and shot a bystander in the head. In another instance a drunken police officer shot dead a patron of a cafe in Magetan, East Java. Of the 37 instances, only two resulted in punishments of the offending officers – neither of which were the cases of drunken shootings mentioned above.¹²⁸

Where there is an apparent lack of disciplinary consequences for police in wrongful shooting incidents this must give an idea of the likely disciplinary responses in cases of 'legitimate' fatal shootings of terrorist suspects. Beyond the objections raised by human rights organisations and NGOs such as Kontras, Imparsial, the Setara Institute, KOMNAS HAM and from the Islamist groups¹²⁹ little is done by way of formal investigation into the circumstances and/or justification for the shootings.

Where police are able to summarily conduct operations where fatalities of suspects are common and disciplinary consequences rare, the potential for abuses of human rights and police powers is significant. Police on one hand emphasise the grave dangers posed when dealing with armed criminals who are ready to die for their cause – and therefore have no hesitation shooting them. The real question is whether there are cases where suspects could have been taken alive. Capturing suspects alive not only allows their guilt to be established through a trial, thus allowing them some measure of procedural fairness – it also may serve the utilitarian purpose of preserving a source of intelligence. The case of Dulmatin is one example. According to eyewitnesses Dulmatin, at the time one of Indonesia's most wanted terror suspects, was on the second floor of an internet cafe in Pamulang, on the outskirts of West Jakarta. Reports say he was reading *Google news* at the time of the incident on March 9, 2010, and evidently unaware of the impending raid. Internet cafe owner Rinda Riana said she was shocked when a dozen men in black uniforms with automatic weapons burst into the shop and

¹²⁸ Alwie above n 122, 34.

¹²⁹ "Siap Menyerang Obyek Wisata," *Jawa Pos*, 7 January, 2013, 2.

told her to get out as there was a terrorist upstairs. She heard gunfire and later saw the man, Dulmatin, slumped dead in his cubicle.¹³⁰

Dulmatin's involvement in jihadism has not been questioned, however the police's tactics of fatally shooting a suspect where there was apparently no danger posed to the public, are questionable. While caution must be exercised in passing judgment on frontline responders who make snap life-and-death decisions, it appears that in this case the police could have taken the suspect alive by simply waiting until he exited the building and apprehending him.

In a 2012 report entitled *Indonesia: The Deadly Cost of Poor Policing* ICG outlined a raft of recommendations to improve Indonesian policing standards. The recommendations included imposing higher standards and stricter requirements for officers' acquisition and use of firearms; better training in non-lethal methods of crowd control; and setting up a civilian oversight commission to receive and 'aggressively' act on public complaints. At the time of writing none of these recommendations had been taken up by police.

In early March 2013, alleged human rights abuses of terror suspects by police came under widespread public scrutiny with the release of a YouTube video which allegedly shows Densus 88 officers torturing terrorism suspects.¹³¹ Calls for greater monitoring of Densus 88 operations have come from several different groups including KOMNAS HAM and some factions within parliament. There have even been calls for the special detachment to be disbanded.

¹³⁰ Calum MacLeod, "Killing Top Terrorist a Start for Indonesia" *USA Today* (online) 23 March 2010 <http://www.usatoday.com/news/world/2010-03-22-indonesia-terror_N.htm>. Cubicle number 9, used by Dulmatin at the time of his shooting and 'still marred by six bullet holes' when this *USA Today* report was written became the most frequently requested cubicle for customers at the internet cafe.

¹³¹ Sihite, above n 114; Zubaidah Nazeer, "Indonesia's Counterterrorism Unit Hit by Torture Claims" *Jakarta Globe* (online) March 6 2013 <<http://www.thejakartaglobe.com/lawandorder/indonesias-counterterrorism-unit-hit-by-torture-claims/577630>>.

INCONSISTENCY OF ENFORCEMENT

An editorial of August 15, 2014 on the website of Islamist group Jamaah Anshorusy Syari'ah (JAS) refers to an attack on police in Papua in July 2014 by 'armed groups' resulting in the deaths of two officers.¹³² Two other police officers suffered serious injuries, and several police weapons were stolen by the group. The editorial states that this was not the first fatal attack on police by groups which seek independence from Indonesia, however 'groups in Papua are never referred to as 'terrorist'. Police and the mainstream media refer to them as 'armed criminal groups'.¹³³

The Antara news report of the same incident in Lanny Jaya district referred to the attack on eight police officers and attributed it to 'armed criminal groups' (*kelompok kriminal bersenjata*).¹³⁴ The JAS article continues to allege an international element to the Papuan groups with 'foreign funding' and overseas 'branches', and claims that the anti-terrorism unit Densus 88 is not mobilised in Papua. The article concludes that due to its foreign funding, Densus 88 was formed only to act against Muslims.

Densus 88 is only mobilised when it is Muslims who are to be raided and arrested. Therefore, we ought to question, for whose interests was Densus 88 created. Was it for Indonesia?...Or for a small elite who use terrorism as a tool to rise through the ranks and profit from foreign funds.¹³⁵

The JAS article contains some questionable assertions, such as that Densus 88 has not been mobilised in Papua. The claim that the movement has international funding and branches may be correct – a media report in 2014 stated that the Free West Papua

¹³² Kangbud, "Untuk Siapa Densus 88 Dibentuk; Indonesia, Asing Atau Segelintir Elit?" *Jama'ah Anshorusy Syari'ah* (online) 15 August 2014 <<http://www.ansharusyariah.com>>

¹³³ Ibid.

¹³⁴ Yuni Arisandy, "Delapan Polisi Tertembak Kelompok Bersenjata Di Papua" *ANTARA News* (online) 28 July 2014 <<http://www.antaraneews.com/berita/446162/delapan-polisi-tertembak-kelompok-bersenjata-di-papua>>.

¹³⁵ Kangbud above n 132.

campaign had opened offices in Britain, the Netherlands and Perth, Australia.¹³⁶ It is also correct in stating that Papuan ethno-separatists are not referred to by police or the media as terrorists, or prosecuted as terrorists by the judicial system. And, that Densus 88 has received funding and training from foreign governments such as Australia, the US and UK.¹³⁷

The policing of political violence in Papua has led to the ironic situation where Papuan activists claim that they have been victimised by police units such as Densus 88 who they accuse of killing peaceful political activists, whereas on the other hand Indonesia's conservative Islamic community feels it is being victimised by being singled out with the label of 'terrorist' and claims only they bear the brunt of Densus 88's violent actions. An ABC report from 2012 stated:

An elite counter-terrorism unit trained and supplied by Australia is being accused of acting as a 'death squad' in Indonesia's troubled West Papua province. The group, known as Detachment 88, receives training, supplies and extensive operational support from the Australian Federal Police. But there's growing evidence that the squad is involved in torture and killings as parts of efforts by the Indonesian authorities to crush the separatist movement in West Papua.¹³⁸

The report went on to implicate Densus 88 in the killing of 'non-violent political activist' Mako Tabuni.

Jones, in analysing the Papuan 'Separatists' vs. Jihadi 'terrorists' dilemma, concluded that the discrepancy with which the two groups are treated by the legal system is untenable and suggests two possible outcomes. First, to start charging Papuan separatists as terrorists, or second, to stop charging Jihadists as terrorists.

¹³⁶ Tognini, above n 92. The same report alleges that 'many peaceful protesters' campaigning for independence in both Papua and South Maluku have been prosecuted under arts 106 and 107 of the KUHP for the crime of 'separatism' and for breaching Presidential Decree 77/2007 issued by President Yudhoyono banning the display of the 'rainbow' and 'morning star' flags of the RMS and OPM groups. However police have been careful not to charge separatists from either of these groups as 'terrorists'.

¹³⁷ "Australia Faces Link to West Papua Torture" *7:30 Report* (online) 28 August 2012 <<http://www.abc.net.au/7.30/content/2012/s3578010.htm>>.

¹³⁸ Ibid.

Jones concludes by arguing against 'pulling back from the use of the anti-terror law' for several reasons, chief among them that the anti-terrorism unit has built up considerable expertise and intelligence of jihadist terrorism which would be lost if the unit was disbanded. Meliala refers to the 'massive terrorist database that has been built up by Densus over the last 10 years' as one of the reasons the police detachment has been so much more effective than army intelligence units.¹³⁹

Jones concludes for several reasons that 'if the government is consistent, then it should acknowledge that attacks motivated by ethno-nationalism and separatism be considered terrorism because they are carried out by an organization with a political vision that uses terrorism to influence the security environment and challenge(s) the sovereignty of the state'.¹⁴⁰

The analysis was criticised by McWilliams for 'failing to acknowledge' the complex reality of the situation – that the 'authors of violence in the Indonesian archipelago are never so clear cut' and that 'police-military rivalries over access to resources' plays a role in orchestrating acts of violence with hidden agendas. Further, that the Indonesian government has long sought to smear peaceful dissent in West Papua as 'separatist'.¹⁴¹ The ramifications of shifting the Indonesian government's approach in Papua to a 'terrorism' paradigm are complex. However, while the current situation continues it signifies an unsustainable and illogical inconsistency in Indonesia's counter-terrorism regime – and contributes to a sense of double standards

¹³⁹ "Pelaku Penembakan Polisi 'Sulit Ditangkap'" *BBC Indonesia* (online) 11 September 2013 <<http://bbc.com>.>

¹⁴⁰ Jones, above n 11.

¹⁴¹ Ed McWilliams, "Applying Indonesia's Anti-Terrorism Law in West Papua" *Scoop Independent News* (online) 5 February 2013 <<http://www.scoop.co.nz/stories/HL1302/S00013/applying-indonesias-anti-terrorism-law-in-west-papua.htm>>.

and victimisation among Indonesia's Muslim community, which is repeatedly expressed in editorials in Muslim media.¹⁴²

In response to those who point to the abuses and impunity of Indonesian state apparatus towards the citizenry, in places such as Papua, it should be noted that under art 1(2) of the ATL, 'any person' is defined to specifically include 'individuals or groups, whether civil, military or police who are responsible individually or as corporations'. State authorities, including, military, police and prosecutors in particular, who are deployed in Papua, should be reminded and trained that there is no legal impediment to charging state officials with terrorism, where their actions fulfil the elements of any of the offences contained in the ATL.

In the context of discussing human rights, the role of the National Human Rights Commission (KOMNAS HAM) to monitor, research and mediate human rights issues must be taken into account.¹⁴³ The commission's role was expanded in 2000 to be a 'pre-trial 'inquirer' into human rights abuses.'¹⁴⁴ However, the commission's subpoena powers have been difficult to enforce and some witnesses have refused or failed to appear. In some cases the commission has 'successfully resorted to publicity in the media or formal and informal lobbying to exert pressure'.¹⁴⁵ The establishment of an ad hoc human rights court formed a part of the peace negotiations in Aceh and following human rights abuses in East Timor. A similar court or Truth and Reconciliation Commission might be useful in addressing claims of state human rights abuses in Papua. In the context of police CT operations and fatal shootings of jihadist terrorist

¹⁴² See for example this opinion piece on arrahmah.com following the Alam Sutera Mall bombing in October 2015, Ary Herawan, "Makna Oportunistik Terorisme" *Arrahmah.com* (online) 31 October 2015 <<http://www.arahmah.com>>.

¹⁴³ Jeff Herbert, "Chapter 21: The Legal Framework of Human Rights in Indonesia," in *Indonesia Law and Society*, ed. Tim Lindsey (Sydney: Institute of South East Asian Studies, 2008).

¹⁴⁴ *Ibid*, 461.

¹⁴⁵ *Ibid*, 463.

suspects, KOMNAS HAM was one of very few bodies to publicly flag the potential human rights and rule of law abuses taking place.

CORRELATION BETWEEN TERRORISM AND THE RULE OF LAW

In the context of widespread community dissatisfaction with police abuses of power, it should be noted (particularly by police) that statistical studies indicate a causal link 'in which a high-quality rule of law is considered to dampen ordinary citizens' opportunity and willingness to engage in political violence; protecting democracies from becoming victims of terrorism'.¹⁴⁶

On the correlation between the rule of law and terrorist activity, Seung posits:

People who live in countries lacking the rule of law have a much smaller chance of resolving grievances peacefully and are more likely to turn to international terrorist violence. In this context, the underlying cause of international terrorism should be traced back to a poor quality rule of law, not religion or ideology. Simply put, a weak rule of law tradition provides international terrorist recruiters with some of their most effective recruitment materials, thereby leading to a rise of international terrorism.¹⁴⁷

The concept has been echoed by Schmid:

Where the rule of law is firmly in place, it ensures the responsiveness of government to the people as it enables enhanced critical civil participation. The more citizens are stakeholders in the political process, the less likely it is that some of them form a terrorist organization. In this sense, it can be argued that the rule of law has a preventive effect on the rise of terrorism.¹⁴⁸

Incidences of terrorism are linked into wider perceptions of the national democratic process, government and police corruption, and 'unfair' treatment by police and state agencies of members of the community.

¹⁴⁶ Seung-Whan Choi, "Fighting Terrorism through the Rule of Law?" (2010) *Journal of Conflict Resolution* vol. 54, 940.

¹⁴⁷ Ibid, 957.

¹⁴⁸ Alex Schmid, "Terrorism - the Definitional Problem" (2004) *Case Western Reserve Journal of International Law* vol. 36 no. 2/3, 28.

Public perceptions of widespread police corruption and impunity have impacted severely on the image of Indonesia's national police as a public institution designed to serve and protect the community.¹⁴⁹ Approval ratings for counter-terrorism operations remain much higher than that of the general police.¹⁵⁰ However, continued abuses of process such as corrupt practices, torture and extra-judicial killings have the potential to severely impact on positive gains made in counter-terrorism operations and feed back into cycles of violence and terrorist recruitment.

A broader approach to CT issues should be combined with a firm approach to corruption and rule of law issues. High levels of corruption and lack of rule of law correlate with high levels of terrorist activity. The Corruption Perceptions Index published by Transparency International ranks countries and territories based on how corrupt their public sector is perceived to be.¹⁵¹ A country or territory's score indicates the perceived level of public sector corruption on a scale of 0 (highly corrupt) to 100 (very clean). A country or territory's rank indicates its position relative to the other countries and territories in the index. The 2014 index included 175 countries and territories. Indonesia ranked at 107.¹⁵²

Indonesia's institutions for the creation and enforcement of laws, including the national parliament, police, prosecutors and the courts have not performed adequately the task of legislating against, investigating and punishing jihadist terrorism. Serious flaws in each of these processes exist. Legislative inertia, caused by a backlog of legislation in the national parliament means that the DPR seldom enacts terrorism laws and usually only under intense, international pressure.¹⁵³ Abuses of police processes exist, including fatal shootings and torture of suspects, wrongful arrests and unlawful

¹⁴⁹ ICG, "Indonesia: The Deadly Cost of Poor Policing."

¹⁵⁰ Jones, above n 121.

¹⁵¹ www.transparency.org/research/cpi/overview

¹⁵² www.transparency.org/cpi2014

¹⁵³ Fenton and Price, above n 119.

detention.¹⁵⁴ Prosecutors apply laws in a haphazard manner; and the treatment of terrorist suspects by Indonesia's courts is inconsistent, opaque and overly lenient (see Chapter 7). Overall, Indonesia's performance in the area of counter-terrorism could be categorised as being flawed but effective in some areas – it has served the purpose of incarcerating (or killing) Indonesia's most dangerous jihadists such as Ba'asyir, Noordin Top, Aman Abdurrahman, Imam Samudera, Umar Patek and others, broadly in line with international demands and norms, including UN Security Council resolutions – however some of the hallmarks of authoritarian rule remain in state institutions like the courts and police.

Commenting on Indonesia's post-*reformasi* evolution towards the Rule of Law, Lindsey posits that 'the broad principles of a more just and democratic system are now agreed upon, rhetorically at least. Art 1(3) for example, now clearly states that Indonesia is a state based on law'.¹⁵⁵ The statement, previously found in the elucidation of the Constitution, was moved to the first Article in 'an act of great symbolism'¹⁵⁶ in the Constitutional amendments of 2002.

Another significant amendment to the 1945 Constitution was the insertion, in 2000, of a Bill of Rights 'closely modelled on the United Nations Universal Declaration of Human Rights (UDHR) – albeit with important caveats in some areas'.¹⁵⁷

The most important specific protections and freedoms in this context are:

- The right not to be prosecuted under retrospective laws – a 'basic human right that may not be diminished under any circumstances (Art 28I(1))
- Freedom from torture and other degrading or inhumane acts (Arts 28G(2), 28I(1))

¹⁵⁴ ICG, above n 112.

¹⁵⁵ Lindsey, above n 143, 24.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid, 457.

In considering the question of retrospectivity with regard to Indonesia's ATL in the Masykur Abdul Kadir case, the Constitutional Court upheld the Article 28I(1) guarantee and demonstrated its independence from political processes, to a degree.¹⁵⁸

Indonesia's CT response has been a combination of 'hard' repressive state actions, and 'soft' deradicalisation measures. The hard approach, which has seen not only arrests of hundreds of suspects, but also killings of around 100 suspects in shootouts, has had the combined effect of deterring and incapacitating terrorist groups. While the killings during CT operations have, in the opinion of some observers, constituted a breach of human rights and rule of law,¹⁵⁹ they have arguably had a stronger deterrent effect than judicial processes which in many cases have imposed lenient terms of imprisonment, and only very rarely imposed the death sentence (see chapter 6). Fatalities of terrorist suspects during CT operations also have a significant incapacitating effect on terrorist groups by permanently removing some of the most able, dangerous and recalcitrant operators such as, for example, Noordin Top and Syaifuddin Zuhri.

For this approach to be taken in Papua, in the context of a separatist struggle, would be highly problematic for Indonesia's international and diplomatic relations in light of criticisms that Densus 88 has been involved in killings of political activists. Allegations that Densus 88, funded and trained by Australia and the US, was involved in the murder of Papuan independence leader, Mako Tabuni, received international media attention, and prompted then-Foreign Minister Bob Carr to request Indonesia to conduct an investigation into Tabuni's death.¹⁶⁰

¹⁵⁸ Butt, above n 100; Ross Clarke, "Retrospectivity and the Constitutional Validity of the Bali Bombing and East Timor Trials" (2003) *Australian Journal of Asian Law* vol. 5 no. 2, 32.

¹⁵⁹ Ifdhal Kasim, "Upaya Pemberantasan Tindak Terorisme Harus Menghormati Prinsip-Prinsip Hak Asasi Manusia," (2009) National Human Rights Commission of Indonesia [KOMNAS HAM] report.

¹⁶⁰ Richard Chauvel, "Fifty Years on, Australia's Papua Policy Is Still Failing" *Inside Story* (online) 27 September 2012 <<http://inside.org.au/fifty-years-on-australias-papua-policy-still-failing/>>.

However, such criticisms also highlight the glaring inconsistency of some foreign governments in applauding, or tolerating, police extra-judicial killings of jihadists, and speaking out against repressive actions against separatists. Responding to Carr's interview, Mahfudz Siddiq, the head of the Indonesian parliament's Commission for Foreign Affairs and Security, suggested that Carr's call for an investigation into Mako Tabuni's murder reflected 'double standards'. Mahfudz stated that he had never heard an Australian politician complain when security forces killed Muslim terror suspects.¹⁶¹

CONCLUSION

Despite the lack of international consensus on a definition of terrorism – a process which has been hampered by the political self-interest of UN member states – there is a widespread understanding of the core elements of terrorism. That is, terrorism is the use of violence or threats of violence against civilians with the intention to create fear or intimidate a population or a government for a political purpose.

Adopting such a definition allows the de-politicisation of the debate surrounding terrorism. It also facilitates a criminal law approach to terrorism, where each violent act is prosecuted on a case-by-case basis. The shootings of police officers in Indonesia over recent years, and particularly in the second half of 2013, were immediately labelled as terrorist, before all facts were known. This indicates the potential circumvention of legal processes by judging a suspect as guilty of a crime before each of the elements is proven. In breaking the cycle of violence between POLRI and jihadist groups, police need to pay due attention to legal processes, refrain from shooting suspects where non-lethal alternatives exist, preserve sources of operational intelligence, and defuse violence. Paying due respect to legal process will enhance the image of police in the community and contribute to reconciliation of a public which is

¹⁶¹ Ibid.

deeply distrustful. Doing so will form an important step forward in preventing violence, increasing respect and standing of Indonesian police in the community, and ensuring the impartial application of the Rule of Law to the Indonesian citizenry.

On the central question of whether shootings of police by jihadist groups are acts of terrorism or ordinary criminal acts, according to Indonesian law, an act of terrorism should cause, or be intended to cause terror within the community. Where the creation or the intention to create terror does not exist, it is arguable that the act is not terrorist in nature, but rather an ordinary crime to be prosecuted under the Criminal Code. However, in alleging a crime of terrorism, all of the surrounding facts of the case should be examined, including the wider context, the motivations and any links to terrorist groups, domestic or international, and their long term aims. In this context, it is much more likely that the shootings of police may be seen as acts of terrorism. Ultimately the question is one for the courts to determine, whether each of the elements of an offence as charged by the prosecution has been fulfilled.

CHAPTER 4 – THE ATL OF 2003: INDONESIA’S ANTI-TERRORISM LAW AND ITS PROPOSED REVISIONS

INTRODUCTION

Since 2003, the Indonesian parliament has enacted two key laws in the area of terrorism eradication. They are Law No 15 of 2003 on the Eradication of the Crime of Terrorism (the ‘ATL’), and, Law No 9 of 2013 on the Prevention and Eradication of the Financing of Terrorism (the ‘CFTL’). Other supporting laws and regulations exist, and other laws sometimes refer to terrorism, for example both the BNPT and the Directorate General for Public Prosecutions have created regulations regarding terrorism, and both the Money Laundering Law No 8 of 2010 and the National Military Law No 34 of 2004 make references to terrorism. However, these two laws, the ATL and the CFTL, are the two main legislative pillars which support Indonesia’s police and law enforcement agencies in combating terrorism. As such, they form the basis of the discussion in the following two chapters. This chapter focusses on the ATL and chapter 5 will give detailed attention to the CFTL.

In order to understand the reasons for the ATL’s enactment, it is necessary to discuss the existing legislation and the socio-political environment which led to the creation of the law. The chapter will consider the salient provisions of the ATL and discuss how it differs from the Criminal code and what extra powers it provides for police and law enforcement. Since its enactment, there have been repeated calls from multiple commentators and stakeholders, including the president, NGOs and government ministers to revise the law. The chapter will examine whether the law should be amended and give detailed consideration to proposed amendments and consider why, despite repeated calls for revisions, the ATL has remained in its original form for over a decade.

THE LEGISLATIVE POSITION PRIOR TO 2003

Prior to 1998, most prosecutions of what would now be considered terrorist acts were brought pursuant to the provisions of the Criminal Code (Kitab Undang-undang Hukum Pidana 1953), its supporting Criminal Procedural Code (Kitab Undang-undang Hukum Acara Pidana Law No 8 of 1981), the State Emergency Law No 12 of 1951 and the Anti-Subversion Law No 11 of 1963. The *Orde Baru* regime of President Soeharto was known for its harsh responses to activities, and activists, which were considered a threat to state security, including prosecuting individuals under the Anti-Subversion law.¹

For example, Abu Bakar Ba'asyir and Abdullah Sungkar, the founders of Jemaah Islamiyah, were arrested and prosecuted in November 1978 using the Anti-Subversion law for plotting to overthrow the government and publicly campaigning for an Islamic state. They were both convicted and sentenced to nine years jail for subversion; however the sentence was later reduced on appeal.² After their release, Ba'asyir and Sungkar went into self-imposed exile in Malaysia and did not return to Indonesia until after the fall of Soeharto in 1998. Around this time terrorist attacks increased dramatically.

While Soeharto's uncompromising use of the Anti-Subversion law to remove threats to state security undoubtedly sacrificed democratic values such as freedom of expression and association, it was arguably effective in containing violent threats to the community, at least temporarily.

The Anti-Subversion law has been described as the 'harshest of the repressive legislation available in the history of Indonesia to silence a government's alleged

¹ Tito Karnavian, "Transcript of Interview with Tito Karnavian Deputy of National Counter Terrorism Agency" (13 April 2012) 1.

² Colin McDonald, "'The Republic Is Ours': The Indonesian Response to the So-Called 'War on Terror'" (2006) *Bar News* vol. Summer 2005/2006, 21.

opponents'³ and its abuse 'provides important contextual background that helps explain initial resistance to a post-9/11 anti-terrorism law'.⁴

Article 1 of the Anti-Subversion law defined subversive activities to include 'distorting, stirring up trouble or digressing the state ideology' and 'overthrowing, damaging, or undermining state power or the authority of the legal Government.' The vagueness of these terms 'made it possible to prosecute persons merely for peaceful expressions of views contrary to those of the government'.⁵ The law allowed for investigative detention of up to one year and the accused could be tried in military or civilian courts. There were no provisions for legal counsel or in favour of ordinary criminal procedures.

Therefore, as part of the extensive legal, political and social reforms following the fall of Soeharto in 1998 (an era known as *reformasi*) the draconian Anti-Subversion law was repealed. The end of Soeharto's 31-year dictatorship also corresponded with greater civic freedoms, including freedom of the media and speech. Islamist networks such as JI⁶ saw their long-awaited chance to foment discontent and conflict. Barton noted:

The collapse of the Soeharto regime in May 1998 opened up new opportunities for JI to pursue its aims in Indonesia. Prior to May 1998 JI had concentrated on *dakwah*, building 'pure' Islamic communities and sending *mujahidin* for training abroad. From late 1998 onwards JI worked in a low-key fashion on supporting local *jihad* in Maluku

³ Nadirsyah Hosen, *Emergency Powers and the Rule of Law in Indonesia*, ed. Victor Ramraj and Arun Thiruvengadam, *Emergency Powers in Asia* (New York: Cambridge University Press, 2010), 281.

⁴ Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (New York: Cambridge University Press, 2011) 144.

⁵ Hosen, above n 3, 281.

⁶ Note: during this period non-religious separatist groups such as GAM and Fretilin also committed terrorist attacks. Source: "Global Terrorism Database" (2015) National Consortium for the Study of Terrorism and Responses to Terrorism [START] <http://www.start.umd.edu/gtd/>.

and Sulawesi. Throughout 2000 JI carried out a series of small to medium terrorist bombings throughout Indonesia.⁷

Throughout the early *reformasi* period, between 1998 and 2002, there were a series of terrorist bombings, including a bombing of Jakarta's Istiqlal mosque, a bombing of the residence of the Ambassador of the Philippines, the Christmas Eve bombings of 2000, a bombing of the Stock Exchange and two bombings of the Atrium shopping mall.⁸ During that early post-Soeharto period, the attacks were prosecuted using the Criminal Code which contains substantive provisions criminalising murder and assault, and the State Emergency Law No. 12 of 1951 which criminalises the unlawful use of explosives.

In the absence of either the Anti-Subversion Law or a specific anti-terrorism law, Indonesia's extant criminal laws were arguably adequate for prosecuting violent terrorist attacks – had police been able to apprehend the suspects. Thontowi, noting the 'dramatic increase' in terrorist bombings in the post-Soeharto era, pointed out that 'no less than thirty eight times have terrorist bombings occurred, with the police generally failing to capture the perpetrators'.⁹ It was only after the Bali bombings of 2002, the enactment of the ATL and cooperation with foreign law enforcement agencies that the Indonesian police 'succeeded in arresting bombers'.¹⁰

While most of the attacks were attributed to Jemaah Islamiyah, others like the Jakarta Stock exchange bombing were attributed to Acehnese separatists, and some, remain a mystery.¹¹ In contrast to the current application of Indonesia's anti-terrorism

⁷ Greg Barton, "Indonesia's Year of Living Normally" (2008) *Southeast Asian Affairs*, vol. 2008, 131.

⁸ Karnavian, above n 1.

⁹ Jawahir Thontowi, "The Islamic Perspective of the War on Terrorism and Current Indonesian Responses" (Paper presented at Human Rights 2003: The Year in Review Conference Castan Centre for Human Rights Law, Monash Law School, 4 December 2003) 9.

¹⁰ *Ibid*, 9.

¹¹ Questions remain about what role Soeharto himself, and his supporter and son-in-law Prabowo Subianto may have had in orchestrating political violence in the aftermath of Soeharto's fall in May 1998, to destabilise the country and 'raise the level of public alarm in order to pave the way for a return to authoritarian rule'. Cribb noted that 'Prabowo seems to have played a key role in fomenting violence and raising levels of tension in the capital, perhaps

laws, which focusses almost exclusively on jihadist terrorism,¹² the religious, ethno-separatist or other possible political motivations for these attacks was not a conclusive means of determining whether they were labelled 'terrorist' or not.

Following the terrorist attacks in the United States of September 11 2001, and subsequent UN resolutions which required states to take action, the Indonesian government announced that a special law would be drafted to address terrorism directly. The proposal was met with considerable resistance, as the public and academia, wary of governmental excesses in the name of state security, questioned the need for anti-terrorism laws dictated by foreign interests. Hikmahanto Juwana, a Professor of Law at the University of Indonesia, wrote in June 2001:

For Indonesia needs to ask the question, are these laws based on an actual need in Indonesia, or external needs? Why can't they be incorporated into the Criminal code? Will these laws be effective? Who will enforce them? If they are widened is it not possible they will be abused?¹³

An initial, much harsher, draft of the anti-terrorism legislation included draconian provisions such as a denial of certain basic legal rights including, the right to a lawyer, the right to remain silent or to refuse to answer investigators' questions, and the right to contact family members. It also provided for a 90-day period of preventive detention

with the intention of bolstering the view that only his father-in-law could keep order in the country, perhaps with his own private ambitions behind'. Robert Cribb, "From Petrus to Ninja: Death Squads in Indonesia," in *Death Squads in Global Perspective: Murder with Deniability*, ed. Bruce B. Campbell and Arthur D. Brenner (New York: St. Martin's Press, 2000) 195.

¹² There are very few examples of the ATL being successfully applied to non-jihadist terrorist acts. Police attempted, unsuccessfully, to apply it to anarcho-punk groups in Sulawesi see: Dominic Berger, "Indonesia's New Anarchists" (2013) *Inside Indonesia* vol. 113 Jul-Sep <<http://www.insideindonesia.org/indonesia-s-new-anarchists>>. In 2013, police attempted to charge an Italian national Andrea Giovanni Soretti with attempted terrorism under art 7 of the ATL for allegedly making a bomb threat by telephone to Lion Air staff at Yogyakarta airport in October 2012. Syaifullah, "Teror Lion Air, Warga Italia Bisa Dibui 15 Tahun" *TEMPO Interaktif* (online) 7 February 2013 <<http://www.nasional.tempo.co>>. The suspect died in hospital four days after his first court appearance on 11 February 2013. Kunto Wibisono, "Andrea Giovanni, Terdakwa Peneror Lion Air Meninggal di RSUD Sleman" *ANTARA News* (online) 11 February 2013 <<http://www.antaranews.com>>. The charges were formally dropped after a death certificate was tendered to the Sleman district court as evidence of Soretti's death.

¹³ Hikmahanto Juwana, "Catatan Singkat RUU Anti Terorisme. Brief Notes on the Draft Anti Terrorism Laws" (2002) *Hukum Online* <<http://www.hukumonline.com/berita/baca/hol5697/catatan-singkat-ruu-anti-terorisme>>.

that could be extended up to nine months. In the face of public opposition the bill was withdrawn.

Following the official withdrawal of the initial draft of the ATL, a working group which included police, military, lawyers, academics and activists who had been imprisoned during the Soeharto era, went to work drafting a new version of the ATL.¹⁴ Commenting on this period Thontowi notes:

There had been considerable uneasiness and uncertainty in Indonesia prior to the Bali bombing concerning the manner in which law enforcement agencies were tackling the issue of counter-terrorism. The key issues were whether the Indonesian government and its agencies were acting in a way that contradicted democratic and human rights principles. Such arguments were suspended when the tragedy of 12 October 2002 struck.¹⁵

THE 2002 BALI BOMBING AND THE ENACTMENT OF LAW NO 15 OF 2003

The Bali bombing of 2002 dramatically sped up the process of approving and enacting the law that was in the process of being drafted and debated. Butt observed:

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 but clearly the Bali bombing accelerated its finalisation.¹⁶

Despite the urgency of the prevailing conditions, the creation of the law was criticised for being 'premature and unlawful' and lacking any 'clear legal foundation in national as well as international law'.¹⁷ Thontowi further claimed that as 'the drafting process only involved the President and the Minister of Justice, there had been insufficient debate

¹⁴ The working group was conscious of distancing the new draft from the previous draft and included art 5 which specifically distinguishes terrorist crimes from political crimes. 'Terrorist crimes are neither politically criminal acts...nor criminal acts with political motives'.

¹⁵ Thontowi, above n 9, 19.

¹⁶ Simon Butt, "Anti-Terrorism Law and Criminal Process in Indonesia" *ARC Federation Fellowship Islam and Modernity: Syari'ah, Terrorism and Governance in South-East Asia report* (Asian Law Centre, University of Melbourne, 2008) 2.

¹⁷ Thontowi, above n 9, 19.

allowed during its passage through the House of Representatives'¹⁸ and that existing laws, namely the KUHP, were sufficient to prosecute the perpetrators of the attacks.

Despite the criticisms, various experts and stakeholders have commented on the adequacy and performance of the ATL in achieving its eponymous objective of eradicating terrorism.

Fealy commented that it was 'a hasty and in some ways bare-bones piece of legislation but clearly it has provided sufficient legal framework for the police to go about their work with considerable legal cover'.¹⁹ Jones said of the ATL 'it is not a good law, but...it is not nearly as draconian as it could have been. It has several provisions that are open to abuse, but with a couple of glaring exceptions...it has not been abused'.²⁰ While recognising the successes of police in investigating and capturing terrorists, Karnavian pointed out that the law fails to adequately address the key issues of prevention and rehabilitation.²¹ Hiariej commented that the ATL's reciprocity provisions, which allow cooperation with foreign law enforcement agencies, are its main strength. However, he also pointed to its failure to address prevention and deradicalisation. 'That is not included in the law. If it is going to be revised, it should be more towards preventive and persuasive measures to prevent terrorist acts'.²² Bhakti said 'the law needs to be amended but you have to remember that it was enacted in an emergency, there was no academic paper prepared as there are with most laws'.²³ Mbai said 'if everybody is really concerned about terrorism, there is no other choice than

¹⁸ Ibid.

¹⁹ Greg Fealy, "Transcript of Interview with Professor Greg Fealy Head, Department of Political and Social Change School of International, Political and Strategic Studies College of Asia and the Pacific Australian National University" 2.

²⁰ Sidney Jones, "Terrorism, Counter-Terrorism and Human Rights in Indonesia" (2006) *Submission to the International Commission of Jurists, Jakarta, 4 December 2006*.

²¹ Karnavian, above n 1.

²² Eddy Hiariej, "Transcript of Interview with Professor Eddy Hiariej Professor of Criminal Law, Gadjah Mada University, Yogyakarta" (30 May 2014) 2.

²³ Personal communication with Mohammad Adhe Bhakti, Executive Director of the Centre for Radicalism and Deradicalization Studies (PAKAR) 29 June 2015.

improving the law'.²⁴ In responding to the rise of ISIS, President Widodo accepted the need to revise the terrorism law and said 'but it is not yet finalized because there are pluses and minuses'.²⁵ Clearly, the law is the subject of divergent opinion and debate from many different sectors, including political, academic and operational stakeholders.

Most commentators would agree that the goals of eradicating and preventing terrorism could be enhanced through amendments to the ATL or the creation of more laws regarding terrorism. However, the stumbling block has been finding agreement on both the form of the new laws or amendments, and their specific content. The ATL itself is the product of complex socio-political processes. Decisions to amend, or not amend, the ATL are likewise political in nature and have socio-political consequences. Understanding the law's limitations requires an appreciation of the hasty way in which it was enacted. Similarly, understanding the vehement resistance which meets any attempts to broaden the coercive powers of the state in the name of national security requires a discussion of the law's historical and socio-political context – that is, coming soon after the fall of a harsh and repressive regime which abused legal instruments to contain political dissent. The discussion here focuses on the legislative aspects of the background to the ATL and its predecessors.

The Bali bombing of 2002 had an international element that had not been seen in Indonesian terrorist attacks with a majority of the victims being foreign tourists, and it signalled a dramatic paradigm shift in the Indonesian governmental response to terrorism. The bombing, the first attack in the formerly peaceful province of Bali, and the first incidence of a suicide bombing in Indonesia, caused a torrent of pressure from foreign governments.

²⁴ "Indonesia: Agency Chief Urges Improvement in Anti-Terrorism Law" *Jakarta Post* (online) 13 October 2010 <<http://thejakartapost.com/news/indonesia-agency-chief-urges-improvements-terrorism-law/>>.

²⁵ Ezra Sihite, Yustinus Paat, and Natasia Christy Wahyuni, "New Rules Proposed to Stem Outflow to Islamic State" *Jakarta Globe* (online) 20 March 2015 <<http://thejakartaglobe.beritasatu.com/news/new-rules-proposed-stem-outflow-islamic-state/>>.

Following the Bali bombings, the Megawati Government's responses improved dramatically. The Indonesian Government allowed unprecedented cooperation between Indonesian police and intelligence agencies and their foreign counterparts, in particular Australia, and over the past two years has prosecuted and convicted more terrorists than any other national government.²⁶

Antagonisms arising from Australia's participation in the UN intervention in East Timor were set aside, and Indonesia welcomed Australian police and intelligence officers to work alongside their own officers on Indonesian soil. The joint task force created to bring the perpetrators to account reaped results and arrests were made and suspects charged under the new ATL.²⁷

Under normal circumstances the president can only issue 'regulations'. However, under article 22 of the Indonesian Constitution, the president has the power, in emergency situations, to issue legislation equal in authority to statutes passed by the parliament. The power is relatively rarely used, and to remain in force they must be passed by the parliament at its next sitting. The laws are known as Government Regulations in Lieu of Law (*Peraturan Pemerintah sebagai Pengganti Undang-undang* or PERPU) also known as 'Interim Laws'.

The test of what constitutes an 'emergency' was considered by the Indonesian courts after President Megawati issued an emergency law in relation to a forestry and mining issue. The Constitutional Court determined that it is a subjective decision for the president. 'A pressing crisis is not measured objectively by reference to whether there exists a national emergency which cannot be dealt with by Parliament. Instead it is a subjective measurement at the discretion of the president. The court cited as

²⁶ Greg Fealy and Aldo Borgu, "Local Jihad: Radical Islam and Terrorism in Indonesia" (2005) *ASPI Strategy Report* The Australian Strategic Policy Institute, 5.

²⁷ Greg Barton *Jemaah Islamiyah: Radical Islamism in Indonesia* (Singapore University Press, 2004).

precedents previous PERPUs, most of which date from the time of Soeharto's New Order regime'.²⁸

President Megawati therefore used the emergency power to pass the ATL, as PERPU No 1 of 2002. That PERPU was then duly passed by the parliament at its next sitting in April 2003, and it became Law No 15 of 2003. Law No. 15 of 2003 is merely a declaration that PERPU No 1 of 2002 is ratified as law; therefore the substantive provisions of the law remain in the PERPU itself. This law remains the current ATL in Indonesia.

A second PERPU was also issued by Megawati which purported to retroactively apply the first PERPU to the Bali bombing of 12 October 2002. The law was later successfully challenged in the Constitutional Court for contravening section 28I(1) of the Constitution which forbids the state from charging citizens with retrospective laws.²⁹ However, the convictions of terrorists under the ATL up to that point were not overturned as the Constitutional Court also ruled that its own decision would not have retrospective force.³⁰

SALIENT FEATURES OF LAW NO 15 OF 2003 'THE ATL'

Much of the legal academic discussion of the ATL centres on the argument that terrorism is an 'extraordinary crime' which therefore requires extraordinary legislation. Indonesia's Attorney General commented in 2013 that:

The victims of terrorism are random, indiscriminate and innocent including women, children and the elderly and it may involve the use of weapons of mass destruction. Therefore, terrorism is considered an extraordinary crime which requires

²⁸ Hosen, above n 3, 289.

²⁹ Simon Butt and David Hansell, "The Masykur Abdul Kadir Case: Indonesian Constitutional Court Decision No 013/PUU-I/2003" (2004) *Australian Journal of Asian Law* vol. 6 no. 2, 176.

³⁰ Topo Santoso, "Anti-Terrorism Legal Framework in Indonesia: Its Development and Challenges" (2012) *Mimbar Hukum* vol. 25 no. 1, 98.

extraordinary measures distinct from the general criminal law, including both formal and material laws as set out in PERPU No 1 of 2002.³¹

Other 'extraordinary' crimes also have their own specific legislation such as corruption and narcotics which provide enhanced enforcement powers and penalties which differ from those under the ordinary criminal law.³² The ATL therefore supplements the existing criminal law, and where the laws are inconsistent the ATL is superior.

Butt posits 'the main function of the ATL appears to be to make investigating, prosecuting and convicting terrorists easier'.³³ The ATL allows longer periods of detention, it makes certain types of evidence admissible which are not admissible for other crimes, and it provides wiretapping powers for police. All of these factors have been critical to the successes of police in countering terrorism. The ATL also offers advantages to police and prosecutors with higher maximum penalties than those available under the KUHP and other laws. It also makes inchoate offences such as attempt, conspiracy, complicity and incitement, offences in their own right. Under the general criminal law, attempts are punishable by a maximum penalty of up to two-thirds of the maximum penalty for the head offence. Under extraordinary laws such as the ATL this limitation does not apply. Further the broad elements of the offence of terrorism contained in Articles 6 and 7 arguably make them easier to prove than their equivalent KUHP offences such as arson, murder, property damage and assault.

With regard to the rules of evidence the ATL is complementary to the KUHAP and sets out different procedures relating to arrests, detention periods, freezing of assets, evidence, intelligence reports and wire taps.

³¹ Kejaksaan Agung, *Panduan Penanganan Perkara Tindak Pidana Terorisme*, ed. Satuan Tugas Penanganan Perkara Tindak Pidana Terorisme dan Tindak Pidana Lintas Negara (Jakarta: Kejaksaan Agung Republik Indonesia, 2013) v.

³² See: Law No 35 of 2009 on Narcotics; Law No 31 of 1999 on the Eradication of Corruption.

³³ Butt, above n 16, 2.

The preamble to the ATL refers to the Indonesian Constitution which tasks the state with protecting the people and advancing the broad goals of prosperity and global order, based on the principles of independence, peace and social justice. Further, that terrorism by claiming lives and causing fear in the community requires that the government take steps to eradicate it by reference to international conventions and national laws. Also, that the existing laws are not sufficient to comprehensively achieve these goals and based on these considerations the law is enacted.

The ATL does not define terrorism *per se*. Article 1(1) of the ATL states that:

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

Article 1(2) defines 'any person' and includes 'individuals or groups whether civilian, military or police responsible individually, or corporations' therefore state apparatus such as police and prosecutors are included. The definition of a corporation at art 1(3) includes both legal and non-legal entities – clandestine organisations are therefore included despite their non-lawful status. The article also defines 'violence' 'threats of violence' 'the government of Indonesia' 'vital and strategic objects' 'explosives' and 'property'.

Articles 3 and 4 deal with matters relating to extra-territoriality. The ATL applies to any person, Indonesian or foreign, who commits a terrorist act in Indonesia. In certain circumstances other nations may have jurisdiction to prosecute, for example where an attack is committed by, or aimed at, citizens of that nation, or where there is some other connection to that nation. Likewise, the ATL may be applied to Indonesian citizens who commit terrorist acts outside the territory of Indonesia, or to persons who commit attacks against Indonesian interests abroad or where the attack has some connection to Indonesia.

Article 5, expressly excludes terrorism from the category of non-extraditable political offences. The elucidation to the article states:

This provision is intended to ensure that acts of terrorism cannot hide behind political motivations and goals to avoid investigation, prosecution or scrutiny in court and punishment of the offender. It is also to increase the efficiency and effectiveness of extradition treaties and mutual legal assistance in matters between the government of Indonesia and other governments.³⁴

According to Wahid, the article is included so that 'demonstrators demanding their political, economic or social rights can do so without fear of being labelled terrorists'.³⁵ The political offences exception is also included in the ASEAN Convention for Counterterrorism. How to construe terms such as 'political offences', and how this article interacts with other articles of the ATL has not been tested, however, as noted above, the ATL has not been used to prosecute offences with political motivations in the vast majority of cases. One notable exception was the prosecution of an anarchist group which damaged ATMs in Yogyakarta where police unsuccessfully attempted to apply the ATL.³⁶

Section 6 of the ATL provides 'a generally-worded description of terrorism'.³⁷ It states:

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/or property of other people, or causes 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 Elucidation³⁸ 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. Damage and destruction includes

³⁴ Author's translation.

³⁵ Abdul Wahid, Sunardi, and Muhammad Imam Sidik, *Kejahatan Terorisme: Perspektif Agama, HAM Dan Hukum*, ed. Aep Gunarsa (PT Refika Aditama, 2004) 74.

³⁶ Berger, above n 12, 2.

³⁷ Butt, above n 16, 3.

³⁸ The Elucidation (Penjelasan) is the formal explanatory memorandum that accompanies all Indonesian statutes and many other types of laws, such as Presidential Decisions and Government Regulations.

deliberately releasing or discharging chemicals, energy and or other dangerous or poisonous components into the land, air or water that endangers people or assets.

Butt refers to the 'broad wording' of art 6 which includes a 'wide variety of acts' within its ambit.³⁹ Wahid categorises art 6 as a 'material offence' (*delik materiil*) which focuses on the effects of the criminal act, that is the loss of life or damage or destruction of property or the environment. Wahid posits that the inclusion of 'damage or destruction to the environment' makes the definition absurdly elastic and could include acts such as 'driving a car which pollutes the environment...or a farmer who uses pesticides' as being terrorist acts.⁴⁰ Concerns about a very wide application of the ATL have not been borne out. Apart from a handful of cases, the vast majority of prosecutions under the ATL have only applied to violent acts, or acts preparatory to violence, which have been motivated by jihadist ideology.

The wording of art 7 is identical to art 6 except that it refers to an act which is *intended* to cause terror or mass casualties, but which does not *actually* cause either. The maximum penalty is life imprisonment. Wahid argues that the maximum penalty for the offence is 'too heavy for a formal offence (*delik formil*) which has not yet caused any effects...the article makes it possible for the state to conduct repressive actions based on inaccurate reasoning'.⁴¹ Again, alarmist concerns about the unwarranted abuse of the section by a repressive state have not been supported by the facts. Article 7 has been key to prosecutors' ability to charge individuals for preparatory acts and where planned attacks have been stopped due to police intervention (e.g. the Myanmar Embassy bombing). Heavy penalties are warranted in such circumstances due to the deterrent effect produced and the gravity of danger to public safety.

³⁹ Butt, above n 16, 4.

⁴⁰ Wahid, Sunardi, and Sidik, above n 35, 77.

⁴¹ *Ibid*, 80.

Drafted in the aftermath of 9/11, a significant portion of the ATL deals with 9/11-style attacks. Section 8, the longest section in the law, includes 18 sub-sections which address terrorist attacks using aircraft or air traffic facilities. Jones commented, 'If you read the law it almost reads as though the main problems in Indonesia would be plane hijackings and mass casualty attacks'.⁴² Apart from an abortive hijacking of a Garuda aircraft in 1981, there have been no major terrorist attacks in Indonesia committed by using or hijacking aircraft or aircraft facilities. Although in 2009, Noordin Top was allegedly planning to target commercial aviation at Jakarta's main airport with the assistance of a former Garuda Indonesia mechanic.⁴³

Any acts of terrorism under art 8 are subject to the same maximum punishments as art 6, i.e. death, life imprisonment or 4-20 years. Butt notes that article 8 is almost a 'word-for-word reproduction of articles 479(a)-(r) of the KUHP'.⁴⁴ The major difference is that the ATL provides minimum punishments, and much harsher maximum penalties than under the KUHP. Considering that art 8 includes offences based on omission (for example art 8(d) – 'by omission causing an aviation sign or safety device to be destroyed, damaged, removed or moved'. Applying the maximum penalties from art 6, i.e. death, to acts where no intention to cause damage or widespread fear exists is overly harsh and ought to be reviewed.

Articles 9 to 15 are key provisions which are regularly used to prosecute terrorist crimes in Indonesia.

⁴² Sidney Jones, "Transcript of Interview with Sidney Jones Director International Crisis Group, Indonesia" (11 April 2012, Jakarta) 1.

⁴³ Ben Brandt, "Terrorist Threats to Commercial Aviation: A Contemporary Assessment" *CTC Sentinel West Point* (online) 30 November 2011 <<http://www.ctc.usma.edu/posts/terrorist-threats-to-commercial-aviation-a-contemporary-assessment>>; John Harrison and V. Arianti, "Almost Another 9/11: JI's Planned Aviation Attack" *RSIS Commentaries Report 116/2009*, 25 November 2009 <<http://www.rsis.edu.sg/publications/Perspective/RSIS1162009.pdf>>.

⁴⁴ Butt, above n 16, 6.

Article 9 mirrors art 1 of the State Emergency Law No 12 of 1951. It is broadly worded to cover any person who unlawfully makes, receives, attempts to procure, transports or in any way uses, firearms, ammunition or explosives or other dangerous materials with the intention of committing a terrorist act. The maximum penalty is death, life or 3 – 20 years imprisonment. The presence of the article provides a clear line where activities which are purely ideological or hypothetical cross over into terrorist territory. Commenting on when authorities will move to intervene and arrest terrorist suspects Karnavian stated:

On the ground, we tend to arrest only when we possess sufficient evidence, for example, where the suspects possess weapons or explosives. So even where we know there is a plot, if we don't have sufficient evidence we won't arrest. Therefore any arrest will be legally accountable – of our arrests, none have been acquitted for lack of evidence...You know the second battle is on the stage of the trial. It is a battle of ideas. Indonesia has open and televised trials, something many other countries don't have. The terrorists know they cannot be captured if they're not in possession of weapons or explosives, so the momentum at the moment of possessing weapons is crucial, for both sides. The police desperately try to find the momentum at the same time the terrorists know that when they possess the weapons the police will crush them. In Bali, we knew there was a plot so we monitored the group closely to determine the point where they possessed weapons or a bomb. That is a critical time because sometimes the terrorists may change their mindset – for example and decide to raise funds. If they possess weapons for an armed robbery, then it is time to move, with any price including a gun fight.⁴⁵

For this reason, art 9 forms a key provision which has helped shape the Indonesian CT operational paradigm in responding to terrorist threats.

Article 10 criminalises the use of unconventional weapons such as chemical, biological, radiological, radioactive or micro-organic weapons or components to create terror or mass casualties. Very few, if any, terrorist attacks in Indonesia have used such methods to date. Article 12 may be read as an extension of art 10 and covers providing

⁴⁵ Karnavian, above n 1, 6.

assets for the use of unconventional weapons such as chemical, biological radiological and nuclear weapons.

CALLS TO AMEND THE ATL REPEATEDLY EMERGE

Internal weaknesses in the ATL were recognised virtually immediately after its enactment. The day after the legislation came into force in February 2003, the Indonesian Minister of Justice, Yusril Ihza Mahendra 'proposed that there would need to be some amendments'.⁴⁶

The issue was discussed in a national workshop organised by the University of Indonesia Law Faculty which concluded that: a better 'philosophical foundation' for the law was needed and the law would be better based on the principle of achieving 'Everlasting Peace and Social Justice'. The workshop also made recommendations for deleting and rephrasing several articles.⁴⁷

Periodically, over the twelve years since its enactment, calls have emerged from various commentators and stakeholders for the ATL to be amended to enhance its effectiveness or bring it into line with community expectations. These calls usually emerge in the aftermath of an attack, or when new threats emerge, such as ISIS.

Susanti posits 'a few months after the enactment there was another bombing at J.W. Marriott in August 2003. Yet, instead of admitting that there were weaknesses in the work of intelligence and the police, Matori Abdul Jalil, the Minister of Defence, stated that Indonesia needed an Internal Security Act in order to prevent terrorist attacks'.⁴⁸ There was some support for the idea among high-ranking officials; however

⁴⁶ Thontowi, above n 9, 20.

⁴⁷ Ibid, 21.

⁴⁸ Bvitri Susanti, "National Security, the Media, and the Promotion of Human Rights in Indonesia" (2003) *Asia Rights* September/October, Issue 2, 3.

'human rights activists and academics immediately issued critical statements'⁴⁹ and then-Security Minister Yudhoyono was reportedly against the idea.⁵⁰

The years between 2005 and 2009 saw relatively low terrorist activity and likewise calls to revise the laws were silenced, albeit temporarily. Following the attacks of 2009 and 2010, debate about the adequacy of the terrorism laws was reignited. In 2009, the National Human Rights Commission issued a statement referring to the government's 'tendency to discuss the need for an ISA like that of Malaysia or Singapore, or even the US Patriot Act'.⁵¹ The Commission's Chairman Ihdhal Kasim warned against 'following the policies of other countries in creating harsh legislation' and said that the current legislation was sufficient. Another commissioner, Yoseph Adi Prasetyo warned against 'regressing' to the practices of the past and urged authorities to respect human rights and professionalism in combating terrorism.

In 2010, the year which saw the breakup of the Aceh terrorist training camp and a number of reprisal attacks, then head of the BNPT Ansyad Mbai said 'if everyone is really concerned about terrorism, there is no other choice than improving the law'.⁵² Mbai recommended changes to create 'more severe punishments for those convicted of terrorism and for better coordination between the police, military and the judiciary'.⁵³ In 2011, the head of Nahdlatul Ulama, Hasyim Muzadi, responded to the suicide bombing of the Bethel Injil Sepenuh Church in Solo and blamed failings of the intelligence services and weaknesses in the ATL for being unable to foresee and prevent the attack. Reflecting community frustration at continued terror attacks he said

⁴⁹ Ibid.

⁵⁰ Thontowi, above n 9, 23.

⁵¹ Wisnu Dewabrata, "Komnas Ham: Indonesia Tak Butuh Aturan Hukum Keras" *Kompas* (online) 18 August 2009 <<http://nasional.kompas.com/read/xml/2009/08/14/20091199/komnas.ham.indonesia.tak.butuh.aturan.hukum.keras>>.

⁵² Jakarta Post, above n 24.

⁵³ Ibid.

'don't worry about human rights. The concept of human rights is not clear. Is it a human right to terrorise? We should not sacrifice everything for a slogan of human rights'.⁵⁴

However, not all commentators were calling for greater preventive powers. In 2011, Indonesian human rights NGO, Imparsial, criticised the ATL for creating a 'substantial imbalance between state security and human rights through its broad definition of terrorism, and greater state powers which threaten civil and political freedoms'. Rather than expanding the powers of the state, the NGO urged the law to be revised to remove the threats to civil freedoms.⁵⁵

In 2010, Karnavian, quoted by Allard, commented that revisions were urgently needed as the ATL was unable to grapple with the continuing recruitment and ideological activities of terrorist networks. 'As long as they are doing the things not violating the law, like regrouping or discussing with one another, we cannot stop it. This is our weakness' he said.⁵⁶ Karnavian advised revising the ATL to criminalise preparatory acts.

The revised legislation should therefore include precursor activities or preparatory acts, being recognised as crimes, like recruitment, hate speech and financing.⁵⁷

The BNPT took the lead in discussing and developing a raft of proposed amendments to the ATL which were announced in 2010.⁵⁸ NGO groups again warned of threats to civil liberties. In May 2011, Saragih wrote 'the new anti-terror bill, set to enter deliberation

⁵⁴ "Hasyim Muzadi: UU Antiterorisme Masih Lemah" *Metro TV News* (online) 26 September 2011 <<http://www.metrotvnews.com>>.

⁵⁵ Imparsial, "Critical Review Terhadap RUU Pemberantasan Tindak Pidana Terorisme" *RIMA News.com* (online) 11 May 2011 <<http://rimanews.com/read/20110511/27443/critical-review-terhadap-ruu-pemberantasan-tindak-pidana-terorisme>>.

⁵⁶ Tom Allard, "Indonesia Terror Laws to Change" *The Age* (online) 5 June, 2010 <<http://www.theage.com.au/world/indonesia-terror-laws-to-change-20100604-xkxf.html#ixzz1VMPPFrSxp>>.

⁵⁷ Karnavian, above n 1, 2.

⁵⁸ "Indonesia to Revise Anti-Terrorism Law" *ANTARA News* (online) 14 May 2010 <<http://www.antaraneews.com/en/news/1273854835/indonesia-to-revise-anti-terrorism-law>>.

this year, provides stronger prevention measures, but contains articles that potentially threaten freedom of expression and speech'.⁵⁹

With the emergence of the ISIS threat in 2014 and the government ban on the organisation, once again the need for new terrorism laws was raised. Coordinating Minister for Security Affairs Pudijatno said that amendments to 'beef up' the law to deal with ISIS were 'urgent'.⁶⁰ Despite a government 'ban' of ISIS, police struggled with a legal vacuum and the question of how to charge domestic supporters of the caliphate.⁶¹ ISIS-related charges brought against Afief Abdul Majid, under the ATL and the Criminal Code, failed when the case went to trial in June 2015.⁶² In October 2015, prosecutors brought a number of charges under the ATL⁶³ against seven individuals for varying roles in supporting and funding ISIS.⁶⁴

INCHOATE OFFENCES

Articles 11, 13, 14, 15 and 16 cover the inchoate offences of funding, assisting, conspiring, and attempting to commit terrorism. Jones notes that this is a significant advancement in the ATL, as, while inchoate offences are covered under the Criminal

⁵⁹ Bagus BT Saragih, "New Terrorism Bill 'Threatens the Press'" *The Jakarta Post* (online) 21 May 2011 <<http://thejakartapost.com/news/2011/05/21/new-terrorism-bill-'threatens-press'.html>>.

⁶⁰ Ina Parlina and Margareth Aritonang, "Government, House to Amend Terror Law" *The Jakarta Post* (online) 2 April 2015 <<http://www.thejakartapost.com/news/2015/04/02/government-house-amend-terror-law.html>>; Adam Fenton and David Price, "Breaking ISIS: Indonesia's Legal Position on the 'Foreign Terrorist Fighters' Threat" (2015) *Australian Journal of Asian Law* vol. 16 no. 1, 2.

⁶¹ Farouk Arnaz, "Legal Vacuum Frustrates Indonesia's Anti-Terror Agencies" *Jakarta Globe* (online) 18 March 2015 <<http://thejakartaglobe.beritasatu.com/news/legal-vacuum-frustrates-indonesias-anti-terror-agencies/>>

⁶² Adam Fenton and Hery Firmansyah, "Has Indonesia Gone Soft on Terrorism?" *The Jakarta Post* (online) 10 July 2015 <<http://www.thejakartapost.com/news/2015/07/10/has-indonesia-gone-soft-terrorism.html>>.

⁶³ Fedina Sundaryani, "IS Followers Accused of Conspiracy, Separatism" *The Jakarta Post* (online) 4 September 2015 <http://www.thejakartapost.com/news/2015/04/09/is-followers-accused-conspiracy-separatism.html>.

⁶⁴ Adhe Bhakti, "Tujuh Pendukung ISIS Didakwa Terorisme" *Radicalism Studies* (online) 14 October 2015 <<http://www.radicalismstudies.org/home/2015-04-19-13-37-27/terrorism-daily/245-tujuh-pendukung-ISIS-didakwa-terorisme.html>>. ISIS supporters were charged under art 15 jo. 7 of the ATL, conspiracy to attempt to commit terrorism, and art 13(c) aiding or assisting a terrorist. M. Fachri, operator of the al-mustaqbal.net website, was charged under art 28(2) jo. 45(2) of Law No 11 of 2008 on Information and Electronic Transactions.

Code, the reality is that they are difficult to prove. By making them crimes in their own right, combined with the broader categories of evidence has been a major step in prosecuting acts which contribute to the commission of terrorism.⁶⁵

Article 11 criminalises any act of providing or collecting funds with the aim of using them, or where it ought to be suspected, that they will be used in whole or in part, for terrorist acts as set out in arts 6,7,8,9 or 10. The article has been used multiple times to charge intellectual actors behind the financing of the Aceh training camp of 2010, including Abu Bakar Ba'asyir, Hariyadi Usman and Dr Syarif Usman and Afief Abdul Majid.

Article 13 criminalises giving aid or assistance to a terrorist by (a) giving or loaning money or assets (b) concealing the terrorist or (c) concealing information about a terrorist act; punishment between 3 and 15 years. The article has been used frequently by prosecutors to catch sympathisers who are not directly involved in committing terrorist offences but who assist terrorists.

Article 14 criminalises planning or mobilising others to commit terrorism as set out in arts 6,7,8,9, 10, 11 and 12. Penalty: death or life imprisonment. It is designed to catch the 'intellectual actors' behind terrorism. Wahid points to individuals such as Amrozi, Ali Gufon and Imam Samudra who were planners of the Bali bombings of 2002. Ba'asyir was charged under this article for the Bali bombings but acquitted for lack of evidence.⁶⁶ HRW points out that art 14 provides the maximum penalty of death for the non-lethal crime of 'incitement' to commit terrorism.⁶⁷ The article however has not been used to silence political dissent as it has in some countries such as Swaziland, Ethiopia and Russia where it may be illegal to express support for terrorist acts. UNSC

⁶⁵ Jones, above n 20, 3.

⁶⁶ Wahid, Sunardi, and Sidik, above n 35, 94.

⁶⁷ Human Rights Watch [HRW] "In the Name of Security Counterterrorism Laws Worldwide since September 11" (2012) Human Rights Watch report <http://www.hrw.org/sites/default/files/reports/global0612ForUpload_1.pdf> 93.

resolution 1624 of 2005 explicitly calls on states 'to adopt such measures as may be necessary and appropriate and in accordance with international law to prohibit incitement to commit a terrorist act'.⁶⁸ The ICCPR protects freedom of expression but limits it where it incites criminal acts, article 19(2). While written materials which express jihadist ideology are regularly seized as evidence to prove a connection between violent activities and jihadist networks, such materials are not, on their own, used to establish offences of supporting or inciting terrorism. For example when police arrested suspects in Solo, they 'seized 12 homemade bombs along with other partially assembled bombs, three rifles, four swords and several jihadist books'.⁶⁹

This part of the ATL is significant in that recognises various levels of involvement in the planning and execution of terrorist attacks. Butt outlines how inchoate offences are treated under the Criminal code and how they differ from the ATL:

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.⁷⁰

⁶⁸ United Nations [UN] Security Council Resolution 1624 (2005), S/RES/1624, <http://www.un.org/Docs/sc/unscreolutions05.htm> (accessed October 29, 2015), para. 1(c).

⁶⁹ Niniek Karmini, "Indonesian Police Arrest 10 Terror Suspects" *Yahoonews.com* (online) 23 September 2012 <<http://news.yahoo.com/indonesian-police-arrest-10-terror-suspects-092802215.html>>.

⁷⁰ Butt, above n 16, 10.

The ATL is a significant advancement on the KUHP insofar as it makes inchoate offences crimes in their own right and the maximum penalties are much more severe. Under arts 14 and 15 attempts, assistance or incitement to commit terrorism are punishable by death. Also, the punishment for conspiracy under art 15 is considerably harsher than the KUHP art 187 conspiracy to commit arson or to use explosives which carries a maximum of five years imprisonment.

PROCEDURAL PROVISIONS

Another of the ATL's advancements lies in the area of evidence. By greatly expanding the categories of evidence set out under art 184 of the KUHP. Under the KUHP categories of admissible evidence are limited to five:

- Witness testimony
- Expert testimony
- Documents
- Circumstantial evidence
- Testimony of the accused

The KUHP requires a conviction to be supported by at least two *alat bukti*. Under the law therefore it may be possible for incontrovertible evidence such as a video of the accused committing the crime to be insufficient to secure a conviction.

Article 27 of the ATL expands the categories of evidence to include all of the categories of evidence under the KUHP, *and* any information capable of being sent or received electronically, and any 'data, recordings or information'. Article 28 expands the powers of police by allowing 7 days detention prior to charge as compared with one day under the KUHP. Art 25(2) of the ATL effectively lengthens the allowable detention of a suspect during investigation and trial by an additional 70 days.⁷¹

⁷¹ Ibid, 19.

Articles 20, 21, and 22 establish prohibitions on interfering in terrorism cases. Using violence or intimidation, obstructing or providing false testimony are all specifically criminalised. The articles are significant because they are 'Indonesia's first attempt at statutory prohibition of acts that appear to constitute contempt of court'.⁷²

Art 31(1)(b) allows police to conduct wire taps with judicial oversight which has been one of the most effective methods of infiltrating communications between terrorist groups and has been key to police successes in the area.

One of the most controversial provisions of the ATL is art 26 which empowers authorities to use intelligence reports (IR) as 'sufficient preliminary evidence' for an arrest. The article creates a new mechanism for judicial oversight of the power by requiring the Chief Judge of a district court to approve the IR before it is used for an arrest. Objections to the article argued that IRs are subjective rather than factual and therefore the system is open to abuse. Wahid posits only IRs which are 'factual not analytical' may be used.⁷³ In response to objections to the article, the BNPT points out that the power has never been used by police to make an arrest. Karnavian noted, 'under the current ATL there is a provision for arrests based on IRs but in practice it has never been used, simply because of difficulties in interpreting the power'.⁷⁴ Once again, concerns about the abuse of powers available under expanded terrorism laws have not been borne out by the facts.

HUMAN RIGHTS

A Human Rights Watch report of 2012 notes that prior to September 11, 2001 at least 51 countries had anti-terrorism laws, while in the following 11 years 'more than 140 countries enacted or revised one or more counterterrorism laws' 130 of which were

⁷² Ibid, 20.

⁷³ Wahid, Sunardi, and Sidik, above n35, 110.

⁷⁴ Karnavian, above n 1, 5.

examined for the report.⁷⁵ The report warned against ‘a dangerous expansion’ of government powers, and the erosion of individuals’ legal rights to ‘due process, judicial oversight and public transparency’ in the name of combating terrorism.⁷⁶ The report noted the ‘tendency of these laws to cover a wide range of conduct far beyond what is generally understood as terrorist’ and identified eight areas of particular concern:

- 1) definitions of terrorism and terrorist acts;
- 2) designations of terrorist organizations and banning membership in them;
- 3) restrictions on funding and other material support to terrorism and terrorist organizations;
- 4) limitations on expression or assembly that ostensibly encourage, incite, justify, or lend support to terrorism;
- 5) expansions of police powers that undermine basic rights, including powers to conduct warrantless arrests, searches, surveillance, and property seizures, and to detain suspects incommunicado and without charge; as well as restrictions on challenging wrongful detention or seeking accountability for police abuses;
- 6) creation of special courts and modifications of trial procedures (including evidentiary rules) to favor the prosecution by limiting defendants’ due process rights;
- 7) imposition of the death penalty for terrorism-related offenses; and
- 8) creation of administrative detention and ‘control order’ mechanisms.

The 100-page report mentions Indonesia’s ATL only three times. With reference to the police’s expanded powers to seize mail and conduct wire taps under art 31, the increased pre-charge detention period of 7 days, and the availability of the death sentence (particularly in regard to offences which do not cause death or serious injury, such as art 9 which includes the death penalty for transporting, concealing or dealing in any way with a firearm or explosive, and art 14 on planning or inciting others to commit terrorism).

⁷⁵ HRW, above n 67, 5.

⁷⁶ *Ibid*, 4.

While Indonesia has a broad definition of terrorism, it has not been applied broadly. While the death penalty is available under 12 articles, it has been applied very rarely – only in five cases since 2002. Despite calls to do so, Indonesia has not unambiguously criminalised membership of terrorist groups. Likewise, incitement to violence and hate speech, are not clearly criminalised under the ATL – ‘mobilising’ others to commit terrorism is included under art 14 but in practice this has not been interpreted to include purely verbal exhortations to violence.

While some special criminal procedural laws were introduced, these have had the positive effect of bringing outdated evidence laws, at least in the extraordinary area of terrorism, into line with global technological advances. A special terrorism court has been suggested, but at the time of writing has not eventuated. It is argued that such a court would be a positive development for Indonesia’s counter-terrorism regime as it would develop much-needed judicial expertise in the area. Indonesia’s ATL did not introduce administrative detention or control orders, although some have argued that they should be introduced with amendments to the law. Seeking accountability for police abuses is one area where there is an urgent need for attention; however this applies to the police’s handling of *all* criminal suspects.

Much of the worry, therefore, surrounding a dangerous expansion of the government’s powers in the name of countering terrorism, have proven unwarranted and alarmist. Thontowi warned that the existence of art 45, which allows the president to directly intervene in CT matters, would ‘make open and independent judicial processes impossible’ and that the consequences of leaving it in the legislation would ‘ultimately be the failure to provide fair trials and...the violation of human rights’.⁷⁷ Similarly, Susanti warned that the ATL would somehow open the door for the Indonesian military to fight its way back into national politics under the guise of

⁷⁷ Thontowi, above n 9, 21.

national security. She wrote 'it is suspected that the military wants to use the issue of national security as a way of winning back power in the political arena'.⁷⁸

Several senior ministers of the day claimed that the ATL was insufficient and an ISA⁷⁹ was needed. In particular, preventive detention was pointed to as an effective weapon in counter-terrorism. Although, Yudhoyono, security minister at the time, denied that Indonesia would enact laws like those of Malaysia and Singapore. While recognising that the ATL was an 'established, legitimate piece of legislation' Thontowi still warned that it could be 'open to later, incremental amendment which could make it more preventive, and thus repressive.'⁸⁰ Again these concerns have proven unwarranted.

Thontowi raises the issue of deterrence with reference to the death sentences of Imam Samudra and Amrozi and posits 'it is now a case of seeing whether or not that has acted as a deterrent, and whether the trade-off between human rights and security has proven effective.'⁸¹

Thontowi pointed to the 'arbitrary arrests of Muslim activists, and the abuse directed at the Bali bombers' lawyers' to show that the law was being abused by the government and that it therefore needed to be revised to ensure that 'terrorism is prevented, yet also protects the human rights of Indonesian Muslims'.⁸²

A National Law Reform Working group was formed in 2010 and completed a draft revision to the current ATL in 2012. It was presented to the President in October 2012 for his approval and signature however President Yudhoyono chose not to forward the bill to parliament for debate. To date, President Widodo has also chosen

⁷⁸ Susanti, above n 48, 3.

⁷⁹ Thontowi, above n9, 23.

⁸⁰ Ibid, 24.

⁸¹ Ibid.

⁸² Ibid.

not to forward the bill to parliament; however there has been some discussion of amendments to terrorism laws, following the emergence of ISIS.⁸³ The bill, remains on the shelf and could be introduced to parliament in the event of a pressing emergency. Securitisation theory suggests in the event of another major terrorist attack, public opinion would swing towards greater law enforcement and acceptance of a curtailment of civic freedoms.⁸⁴ In such an event it is likely the draft bill would be resurrected and could very speedily be forwarded to parliament for debate and enactment. The enactment of the ATL itself in the wake of the Bali bombings of 2002 demonstrates the speed with which counter-terrorism laws can be passed in exceptional circumstances. It is therefore worthwhile to give detailed consideration to the kinds of expanded powers that would likely be granted to police in such a scenario.

FAILURE TO LAUNCH

Despite being presented to the president in late 2012, a draft bill to amend the ATL was not forwarded to the parliament for debate and enactment, and the law has therefore remained in its original, unamended form for over a decade.⁸⁵

The failure of successive presidents to push ahead with reforms to anti-terrorism laws which would grant greater coercive powers to police indicates the socio-political tension which exists between the competing political interests of security and maintaining good relations with a predominantly Muslim electorate and Islamic political parties. This position explains the reluctance to take actions which may be seen as anti-Islamic. In discussing why the Megawati administration was 'so slow to investigate the problem of violence perpetuated in the name of religious identity' Smith

⁸³ Parlina and Aritonang, above n 60.

⁸⁴ Ralf Emmers, "ASEAN and the Securitization of Transnational Crime in Southeast Asia" (2003) *Pacific Review* vol. 22 no. 2, 159.

⁸⁵ Reza Febriansyah, "Transcript of Interview with Reza Febriansyah Secretary Indonesian Counter Terrorism Law Drafting Team, Department of Law and Human Rights, Directorate General of Legislation, (Peraturan Perundangan) Jakarta" 23 May 2012.

stated 'politicians in Jakarta have been cautious in acting against Islamic groups'.⁸⁶ The same observation was made of the Yudhoyono administration. Commenting on attacks by Islamic militant groups, Bigg commented that President Yudhoyono had been 'criticized for doing too little to curb religious intolerance in the country with the world's largest Muslim population'.⁸⁷

Noting the complexity of the task facing Indonesia's political leaders, Hainsworth pointed out that while Yudhoyono won his first presidential election in a landslide with 61% of the vote, his Democratic Party secured only 10% of seats in the national parliament. This required him to 'carefully select a coalition cabinet'.⁸⁸ Yudhoyono's six-party coalition included all four Islamic parties from the House of Representatives: the Prosperous Justice Party, or PKS; the United Development Party, or PPP; the National Mandate Party, or PAN; and the National Awakening Party, or PKB.⁸⁹ Both PAN and PKB promote a moderate interpretation of Islam, while PPP and PKS in particular are known to take a more fundamentalist approach – noting that their public and private agendas may differ significantly. Both parties subsequently joined the coalition of presidential candidate Prabowo Subianto.

Yudhoyono's position as president was compromised when dealing decisively with hard-line Islamist groups and those who share their ideological outlook. While Yudhoyono promised to end sectarian violence and track down perpetrators of terrorist violence, he also refused to declare Jemaah Islamiyah a terrorist group – claiming that 'under Indonesian law no process existed for designating it an unlawful

⁸⁶ Anthony L. Smith, "The Politics of Negotiating the Terrorist Problem in Indonesia" (2005) *Studies in Conflict & Terrorism* vol. 28 no. 1, 38.

⁸⁷ Matthew Bigg, "Indonesia's FPI-Linked Militant Arrests Show Shift to Violence" *Jakarta Globe* October 28, 2012, 1.

⁸⁸ Geoffrey Hainsworth, "Rule of Law, Anti-Corruption, Anti-Terrorism and Militant Islam: Coping with Threats to Democratic Pluralism and National Unity in Indonesia" (2007) *Asia Pacific Viewpoint* vol. 48 no. 1, 128.

⁸⁹ Josua Gantan, "Behind Church Closures, the Specter of Intolerance" *Jakarta Globe* (online) 4 June 2014 <<http://www.thejakartaglobe.com/news/behind-church-closures-specter-intolerance/>>.

organisation as it did not legally exist' – the approach was seen as 'obscurantist and devious to the US and other western governments'.⁹⁰ Under the Counter-terrorism Financing legislation enacted in 2013 (Law No. 9 of 2013 – discussed in Chapter 5) the mechanism for declaring a list of terrorist individuals and organizations now exists under Indonesian law. Despite government announcements that new laws would be created to tackle ISIS⁹¹ the promised changes to the ATL have not been forthcoming.

In a country where the vast majority of the population are Muslim, sitting presidents depend on the support of Islamic parties of varying degrees of conservatism. President Yudhoyono's coalition included PPP and PKS, both conservative Muslim parties – which made Yudhoyono overly sensitive to criticism from Islamist groups and reluctant to act decisively to condemn religious bigotry and violence against religious minorities. At a conference on inter-faith dialogue in 2004 Yudhoyono emphasised moderation and tolerance, while not 'compromising the fundamentals of one's faith.'⁹² In response, the MUI – the quasi-governmental authority on Islamic faith – issued a series of 11 *fatwa* (religious edicts) condemning the trend towards 'secular liberalism' and 'freedom of thought'⁹³ and, most contentiously, a *fatwa* which outlawed 'pluralism and secularism'. The delicacy of the president's position is thus clear. Any actions taken which can be seen as clamping down on Islamist ideology will be stridently opposed in certain quarters of the Islamic community, and this may lead to political consequences. Given the success of Indonesia's CT operations there was, and perhaps still is, no

⁹⁰ Hainsworth, above n 88, 133.

⁹¹ "ISIS Prompts Ministry to Consult on Revision of Anti-Terror Law" *Jakarta Globe* (online) 27 March 2015 <<http://thejakartaglobe.beritasatu.com/news/isis-prompts-ministry-consult-revision-anti-terrorism-law/>>.

⁹² Hainsworth, above n 88, 138.

⁹³ *Ibid.*

political advantage to be gained by granting greater powers to a police detachment which the FPI's grand imam accused of 'murdering Muslims'.⁹⁴

During President Widodo's term in office, the most pressing terrorism related issue has been the growth of domestic and international support for ISIS, and once again, calls to revise the ATL have emerged⁹⁵ and, while political statements of support have been made at the highest levels⁹⁶ no concrete action has been taken. At the time of writing, the ATL remains unamended and police and courts are struggling to adapt the existing law to deal with a legal vacuum.⁹⁷

Legislative inertia created by competing priorities and a large backlog of bills on the national legislation agenda is also a major barrier to law reform and has contributed to the inability of the parliament to enact timely legislation on a range of issues.⁹⁸ In the first two of four annual sittings in 2015, the parliament was only in successful in passing two out of 37 laws scheduled for debate and finalisation.⁹⁹ The parliament further proposed increasing the number of month-long recesses from four to five per year.

In April 2015, in response to the growing threat posed by ISIS in Indonesia, the BNPT announced that it was coordinating discussions between government

⁹⁴ Josua Gantan and Farouk Arnaz, "Behind Claim of Resurgent Terror, the Shadow of Political Intrigue" *Jakarta Globe* (online) 24 May 2014 <<http://www.thejakartaglobe.com/news/behind-claim-resurgent-terror-shadow-political-intrigue/>>.

⁹⁵ Jakarta Globe, above n 91.

⁹⁶ Sihite, Paat, and Wahyuni, above n 25.

⁹⁷ Farouk Arnaz, "Legal Vacuum Frustrates Indonesia's Anti-Terror Agencies" *Jakarta Globe* (online) 18 March 2015 <<http://thejakartaglobe.beritasatu.com/news/legal-vacuum-frustrates-indonesias-anti-terror-agencies/>>; Chris Brummitt, "Indonesia Dusts Off 1920s Law to Tackle Islamic State" *Bloomberg News* (online) 28 May 2015 <<http://www.bloomberg.com/news/articles/2015-05-27/indonesia-dusts-off-forgotten-1920s-law-to-tackle-islamic-state>>.

⁹⁸ Fenton and Price, above n 60.

⁹⁹ Metro TV, "8-11 Morning News" Television Broadcast 7 March 2015.

departments for the formulation of a 'legal umbrella' to deal with 'extremist' groups.¹⁰⁰ BNPT's Deputy for Enforcement and Capacity Building Arief Dharmawan indicated the difficulties faced by law enforcers, stating 'if police take actions without regulations they are accused of acting arbitrarily. Therefore we want movements like that to be banned, whatever their name is.'¹⁰¹

Around the same time, President Widodo used the Asia Africa Conference to announce his government's war against the threat of terrorist violence and, in particular, ISIS.¹⁰² Following the terrorist attacks attributed to ISIS in Paris in November 2015, President Widodo reiterated his position that 'terrorism, whatever its form or reasons, cannot be tolerated.'¹⁰³

In mid-2015, Vice President Kalla held high level inter-ministerial meetings to discuss the government's response to new terrorist threats such as ISIS. However, the influential Indonesian Council of Ulemas (MUI) voiced its opposition to a new law. The MUI's Chairman for International Cooperation and Foreign Affairs, Muhidin Junaidi, stated that 'the government need not enact a new law, because the existing Law No. 15 of 2003 already deals with that issue'.¹⁰⁴ A news report stated that:

According to Junaidi, the MUI was concerned that a new law might be abused by state agencies to act arbitrarily against members of the community who are in fact not involved in terrorist actions. The concern of the MUI was based on its assessment that police frequently accuse people of involvement in terrorism without legal evidence. Therefore, Junaidi continued, the government was asked not to rush through the process of discussing a new law. The BNPT was also asked to consider the Freedom of

¹⁰⁰ Rosmiyati Dewi Kandi, "Pemerintah Rumuskan Aturan Pelarangan ISIS" *CNN Indonesia* (online) 22 April 2015 <<http://www.cnnindonesia.com/nasional/20150422135514-12-48437/pemerintah-rumuskan-aturan-pelarangan-ISIS/>>.

¹⁰¹ Ibid.

¹⁰² Rosmiyati Dewi Kandi "MUI Tak Setuju Pemerintah Terbitkan Perppu Larang ISIS" *CNN Indonesia* (online) 22 April 2015 <<http://www.cnnindonesia.com/nasional/20150422180800-12-48552/mui-tak-setuju-pemerintah-terbitkan-perppu-larang-ISIS/>>.

¹⁰³ "Jokowi, Kalla Condemn Paris Attacks" *Jakarta Globe* (online) 15 November 2015 <<http://thejakartaglobe.beritasatu.com/news/>>.

¹⁰⁴ Kandi, above n 102.

Expression law so that people would not feel that their actions were being ‘tamed’ by the government.¹⁰⁵

The MUI’s claim that police ‘frequently accuse people of involvement in terrorism without legal evidence’ was not elaborated on and did not account for the statistical fact that almost 100% of suspected terrorists brought before Indonesian courts result in convictions. Similarly, the MUI spokesperson did not provide further elaboration for his claim that the existing ATL, ‘already deals with’ the issue of banned groups and being a member of a banned group. Law No. 15 of 2003 currently contains no reference to any mechanism for banning terrorist groups, nor does it contain sanctions relating to being a member of a banned group. Junaidi’s comments therefore reflect the kind of knee-jerk thinking of some sections of Indonesia’s Muslim population which view with deep suspicion any move by the government to combat terrorism as signalling an attack on the Islamic community. A clear and unbiased definition of terrorism and CT operations is therefore essential to dispelling the sense of victimisation of Indonesia’s conservative Muslim communities.

As of November 2015, there was no public announcement regarding new terrorism laws, the momentum of earlier in the year was lost, hitting the multiple speed bumps of internal disagreement on a definition of an ‘extremist group’, the specific form of legal instrument (i.e. legislation passed by parliament, interim law, governmental or presidential regulations), a slothful parliament and opposition from the country’s highest-ranking quasi-governmental Muslim organisation, the MUI. In a July news broadcast, Metro TV announced that while the parliament had only passed a handful of laws from the national legislative agenda, it had simultaneously sought to increase the number of annual parliamentary recesses from four to five.¹⁰⁶ Indonesia’s legislative inertia once again thwarted any attempt to revise its terrorism legislation,

¹⁰⁵ Ibid.

¹⁰⁶ Metro TV, above n 99.

while its politicians continued to score political points by paying mere lip service to commitments to revamp the legal framework and prosecute a 'war' on terrorism.

In a speech at the opening of the Asia Africa Conference today (22/04/15) Jokowi declared war against terrorist acts. He invited all nations in the Asia Africa region to face the challenge to stability presented by the increase of terrorist acts throughout the world. 'We must face the violence, conflict and radicalism of ISIS' he said.¹⁰⁷

In an interview in July 2015, President Widodo said "it is very important to improve our regulations on this. We will put more provisions in our laws so we can prevent anyone planning to launch a terror attack."¹⁰⁸

A number of legislative amendments, which could significantly enhance counter-terrorism efforts, have been drafted and await debate by parliament; however they have been placed on hold at the Ministry of Law and Human Rights since late 2012. Proposed amendments to deal with acts of a preparatory nature, becoming a member of a terrorist group, supporting or spreading terrorist ideology, hate speech, and a revised definition of terrorism are among the possible amendments which have been indefinitely shelved.

SUBSTANTIVE REVISIONS TO THE ATL

The draft revision to the ATL includes amendments and additions which will provide increased powers to authorities in the investigation and prosecution of terrorist offences. The explanatory notes to the draft legislation set out the reasons for the amendments explaining that due to developments and the emergence of 'new phenomena' in the commission and preparation of terrorist acts it is necessary to create new laws specifically to 'create new crimes and penalties against certain new modes of terrorist criminal acts including various preparatory acts, strengthening the

¹⁰⁷ Rosmiyati Dewi Kandi and Aghnia Adzka, "Kementerian Hukum Setuju Diterbitkan Perppu Larang ISIS" *CNN Indonesia* (online) 22 April 2015 <<http://www.cnnindonesia.com/nasional/20150422142453-12-48449/kementerian-hukum-setuju-diterbitkan-perppu-larang-ISIS/>>. (Author's translation)

¹⁰⁸ Warren Fernandez et al., "ST Interview with President Jokowi: Indonesia to Widen Anti-Terror Laws" *Straits Times* (online) 27 July 2015 <<http://straitstimes.com>>.

powers of police, prosecutors and the courts in dealing with these extraordinary crimes’.

PREAMBLE

A preamble to the RUU states that: (paraphrasing)

Terrorism has disrupted security and civil society as well as being a serious threat to humanity and national sovereignty such that its prevention and elimination must be conducted in a planned, sustainable and integrated way, while preserving life, peace and prosperity in accordance with the Constitution.

To provide a firm legal foundation for guaranteeing security and legal certainty in the prevention and elimination of terrorism, it is necessary to revise Law No.15 2003.

Based on (a) and (b) it is therefore necessary to create an Act which revises Law No.15 2003.

The section then refers to the Constitutional basis for enacting laws, and begins with the substantive sections to be inserted or amended.

10A AND B. PREPARATORY ACTS – DEALING OR TRADING BIOLOGICAL, RADIOACTIVE OR CHEMICAL WEAPONS OR EXPLOSIVES

While section 10 of the ATL criminalises the use of chemical, biological, radioactive etc. weapons in terrorist acts, two new sections (10A and B) are to be inserted between sections 10 and 11, which relate to *dealing with* biological, radioactive or chemical weapons, and trading in explosives.

Article 10A sets out the offence of: bringing to Indonesia, making, receiving, attempting to procure, transferring or attempting to transfer, having control of, conveying, making available or having in possession, storing, transporting, concealing, or taking out of Indonesia any chemical, biological weapon, radiological, micro-organism, or radioactive material or component with the intention of committing a terrorist act. Penalty: 3 – 20 years imprisonment.

Article 10B creates an offence of intentionally trading in materials which *potentially* may be used as explosives or trading in *components* of chemical weapons,

biological, radiological, micro-organic or radioactive weapons, with the intention of committing a terrorist act as set out in Sections 9 and 10. Penalty: 3 – 7 years imprisonment (where the attack does not actually occur). (Emphasis added)

Where it is proven that the materials or components have been used in a terrorist act, the penalty range increases to 4 – 15 years. This section attempts to address criticisms such as this one from Jones:

Police are right in saying that there is not enough attention to factors leading up to terrorism. For example it is very difficult to prosecute someone for purchasing explosives. It needs to be shown that the purchase was for the purpose of a terrorist attack, and that is very difficult to prove under the current law.¹⁰⁹

The intention is to criminalise dealing with or trading in raw materials which, on their own, may not be dangerous but which may, in the right hands, be made into weapons; a preparatory act not caught under arts 9 or 10 of the ATL. Given the significant public safety risks involved in only apprehending terrorist suspects after they have acquired weapons capacity, allowing police to intervene at an earlier stage is advisable. However, prosecutors must still prove an intention to use the materials for terrorism.

12A. BECOMING A MEMBER OR A LEADER OF A TERRORIST ORGANIZATION

Section 12A creates a new offence, inserted between sections 12 and 13 of the ATL:

Any person who intentionally becomes a member, or recruits others to become members of an organization, association or group which has been declared a terrorist organization by the decision of a court with the force of law commits an offence. Penalty: 3 – 7 years imprisonment.

A founder, leader, caretaker or person who has control over an organization, association or group as set out in subsection (1) commits an offence. Penalty: 5 – 12 years.

Where a member, founder, leader, caretaker or person who controls a terrorist organization as set out in (1) and (2) voluntarily resigns, they shall not be subject to prosecution where the resignation is made by declaration in the presence of investigators.

¹⁰⁹ Jones, above n 20, 4.

The intention of this section is clearly to assist authorities in cracking down on persons who openly support or become members of terrorist groups, but which cannot be touched as they have committed no offence, such as supporters of international terrorist organisations like ISIS, or domestic groups like JI, JAT or MIT. The inability of prosecutors to punish ISIS supporters despite a government 'ban' on the group indicates that such a section which criminalises membership of a listed group is needed. Karnavian referred to this situation where he said:

Second, we need a deterrent effect not only freezing and seizing assets and disbanding the group. Anyone who is actively supporting the group needs to be subject to punishment. That would have a really great impact – if we could arrest anyone engaged with the group. As it is today we are not able to touch them. They are effectively playing in front of our eyes spreading their ideology, recruiting, evading prosecution.¹¹⁰

Under international law, art 22 of the ICCPR guarantees the right to freedom of association and restrictions on that right must be necessary for national security or public safety.¹¹¹ HRW warns that UN's Al Qaeda Sanctions list created pursuant to resolution 1267, according to the UN Special Rapporteur on human rights and counter-terrorism, does 'not meet international human rights standards for due process or fair trial.'¹¹²

Criminalising membership of terrorist groups would significantly facilitate police and prosecutors to gain convictions in cases where they are currently unable to, for example Afief Abdul Majid and other ISIS supporters. However, two aspects of the proposed article potentially reduce its effectiveness. First, the terrorist group must have been declared a terrorist group by a previous decision of a court, as distinct from a government listing of terrorist groups such as that which exists in other jurisdictions.

¹¹⁰ Karnavian, above n 1, 6.

¹¹¹ United Nations General Assembly [UN], *International Covenant on Civil and Political Rights* 16 December 1966, Treaty Series vol. 999, 171 (entered into force 23 March 1976) <<http://www.refworld.org/docid/3ae6b3aa0.html>>, art. 22; See also: Manfred Nowak, "UN Covenant on Civil and Political Rights: CCPR Commentary" (2007) *EJIL* vol. 18, 213 <<http://www.ejil.org/pdfs/18/1/222.pdf>> 504-508.

¹¹² HRW, above n 67, 27.

However, since 2013 such a power has existed in Indonesia pursuant to Chapter VII of the CFTL. There is only one group in Indonesia which has been subject of a judicial declaration, Jemaah Islamiyah (JI).¹¹³ This section would therefore not apply to members of Abu Bakar Ba'asyir's splinter organization Jemaah Ansyarut Tauhid (JAT), which has been declared a terrorist organization by the US¹¹⁴ but not by Indonesia. It is therefore suggested that the article be amended to take account of the CFTL listing procedure. Second, members or leaders of the group may avoid prosecution for the offence by simply resigning their position in the presence of investigators. The provision essentially provides the suspect with a defence, or a means of avoiding prosecution, and may have been included for the deterrent effect it would have on other members and would-be members, by seeing their leaders and colleagues publicly renounce their positions.

12B. PARAMILITARY TRAINING

Section 12B creates two new offences for anyone who:

- (1) Organizes, provides or joins paramilitary training or any other training within, or outside, Indonesia with the intention of committing, planning or preparing for a terrorist act, or recruits or sends others to such training. Penalty: 5 – 15 years.
- (2) Makes, collects, and/or distributes writings or documents whether written or digital which are known or ought to have been known will be used for the training set out in (1). Penalty 3 – 12 years.

This section was designed to catch terrorist training camps such as the one which was uncovered in Aceh in 2010 and addresses comments such as this from Jones:

¹¹³ Decision of Supreme Court of Indonesia in Abdurrahim Bin M. Thoyib No. 1465 K/Pid.Sus/2009.

¹¹⁴ Farouk Arnaz, "JAT Leader Hits out at Terror Listing, Calling US Label 'Ridiculous and Stupid'" *Jakarta Globe* (online) 27 February 2012 < <http://www.thejakartaglobe.com/home/jat-leader-hits-out-at-terror-listing-calling-us-label-ridiculous-and-stupid/500729>>.

Also, paramilitary training camps are not specifically illegal. There is a law against illegal weapons, but if these are not present there is no crime. So these are some of the areas that police want to cover in a strengthened law.¹¹⁵

Drafters were conscious of the task of criminalising activities where illegal weapons are not present, yet which represented a threat, while not criminalising legitimate outdoor activities like 'shooting, martial arts or outdoors clubs'.¹¹⁶ Criminalising the possession or making of documents has serious freedom of expression implications and ought to require a clear link to terrorist intent, rather than merely ideological agreement.

13A. GIVING MONEY OR SUPPORT TO A TERRORIST GROUP

Any person who intentionally provides, collects, gives, or loans money or goods to an organization, association or group, as set out in 12A(1) or receives same from such an organization, is guilty of an offence. Penalty: 3 – 12 years.

Any person who intentionally provides, collects, gives or loans money or goods to organize, provide, join, recruit, or send a person to join, paramilitary or any other type of training as set out in 12B commits an offence. Penalty: as subsection (1).

These suggested amendments seek to criminalise acts of support for a terrorist organization which were previously not covered in the ATL. Section 11 of the ATL covers 'providing or collecting' funds with the aim of using them for a terrorist act'. However, this section will criminalise the act of providing funds to a 'declared' terrorist group. The article has, however, been superseded by the enactment of CFTL of 2013 which criminalises funding a listed organisation.

14. PLANNING, INCITING AND PREPARING

Article 14(1) of the RUU provides life imprisonment, or the death penalty, for any person who plans, *prepares* or incites others (*merencanakan, mempersiapkan atau menggerakkan orang lain*) to commit terrorist acts as set out in Sections 6,7,8,9,10,11 and 12 of the ATL.

¹¹⁵ Jones, above n 20, 3.

¹¹⁶ Reza Febriansyah, "Transcript of Second Interview with Reza Febriansyah Secretary Indonesian Counter Terrorism Law Drafting Team, Department of Law and Human Rights, Directorate General of Legislation, (Peraturan Perundangan) Jakarta" 10 September 2012.

Subsection (2) provides a penalty of 3 – 15 years in the event that the terrorist act does not occur.

The only amendment to this offence is the addition of the word 'prepares'. The severity of the penalty for this offence indicates its seriousness. The explanatory notes to section 14 in the ATL state that it is aimed at the 'intellectual actors' of terrorism – the ones behind the scenes who command others to commit acts of terror. Planning is defined to include 'physical, financial or human resources' preparations. *Menggerakkan* is defined as 'inciting, provoking, providing an incentive or money, or enticements.' Inserting 'prepares' gives clear authority to police to intervene at preparatory stages of an offence, that is, prior to attaining functional weapons which is currently the cut-off point for police intervention. The amendment is warranted for the purposes of ensuring public safety where police are able to establish the intention to commit a terrorist act which goes beyond mere ideological agreement with terrorist actions.

15A. FAILING TO NOTIFY AUTHORITIES

Section 15A creates a new offence for any person:

Who knows of a conspiracy, plan or preparations to commit a terrorist act and does not report it to authorities, where there is time to prevent the act. Maximum penalty 7 years.

In the event that the terrorist act actually occurs the penalty is increased to 5 – 12 years.

The section does not apply to family members of those committing or planning the terrorist act. Family members include siblings, husband/wife and family up to two or three degrees of separation, or ex-husbands or wives.

The effectiveness of the proposed article is compromised by the exception granted to family members, who are the most likely to know about a terrorist plot during its planning stages. The exception follows the principle that spouses and family

members ought not to be compelled to testify against their loved ones, however it may be questioned why the exemption was drafted as broadly as it is here.

In practice, authorities currently charge suspects for withholding information under art 13(c) 'concealing information about a terrorist act' see for example the case of Deni Carmelita (chapter 6). This proposed article could have implications for the media, for example where a journalist receives information from a source of a planned attack. The information would need to be of a specific attack rather than a broad ideological approval of terrorist attacks. In such a situation it is argued that withholding information which could prevent injuries and fatalities ought to be criminalised, and should override confidentiality principles of journalism and other professions.

17. CORPORATIONS

Section 17 is amended as follows: (1) where a terrorist act is committed by, or in the name of, a corporation (defined as both legal and non-legal groupings of people or resources) the charge and penalty applies to both the corporation and its caretakers.

The BNPT has expressed the need for a system 'for listing and delisting that covers not only corporations but secret organizations. We need to bring in a system of recognising organized criminal enterprises such as they have in the US'.¹¹⁷ While there are provisions relating to corporations including illegal organizations, they can only be subject to corporate penalties such as seizing and freezing of assets, there are no penalties for the individuals controlling the corporation under the current ATL. This provision would make the penalties enforceable against individuals controlling the 'company'.

Subsection (2) states that a corporation commits a terrorist act if it is committed by persons who represent, control or exercise authority on behalf of the

¹¹⁷ Karnavian, above n 1, 6.

corporation, whether based on a legal relationship or other, whether alone or together. And (3) where the corporation is charged it shall be represented by its officials. So the assignation of fault and responsibility may go both ways from the individuals to the organization and from the organization to individuals.

25. DETENTION PERIODS

Section 25 is substantially amended as follows:

The Criminal Procedural Code (KUHP) applies except where this legislation alters it.

For the purposes of an investigation, a suspect may be detained for a maximum period of 120 days.

For the purposes of a prosecution, prosecutors may detain the accused for a maximum of 60 days.

The detention periods set out in (2) and (3) can be extended by application to the Chief Judge of a District Court.

The extension set out in subsection (4) is for a maximum of 60 days and may be extended (again) for 60 days.

This amendment clarifies and extends the time limits for the detention of suspects in the current ATL which states only that for the purposes of investigation and prosecution the maximum period of detention is six months. Currently, the section is unclear on the question of the maximum length of detention periods which is allocated to police and prosecutors. Under this amendment it is specified: 120 days to police, 60 days to prosecutors. Also, it appears that a total of two extensions are available to prosecutors and police, of 60 days each giving a total allowable detention period, post charge, of 300 days or approximately 10 months. However, at least one commentator has read this section to mean that it provides a maximum detention period of 14 months or 420 days.¹¹⁸ Presumably that total is arrived at by reading the section as allowing two extensions each for police and prosecutors. More accurate drafting could put this ambiguity beyond any doubt. It should also be noted here that the initial

¹¹⁸ Imparsial, above n 55.

detention period, pre-charge is set out in Section 28 and allows 30 days giving a total of 11 months (or 15 months) detention from arrest to finalisation of the trial.

Given that prosecutors have been able to obtain an almost 100% conviction rate under the current detention provisions of the ATL, it is questionable why they need to be increased. This amendment would likely be the subject of intense debate in parliament.

26. INTELLIGENCE REPORTS

The proposed amendment to art 26 states:

For the purposes of obtaining sufficient preliminary evidence investigators may use intelligence reports.

A determination of whether the intelligence report forms sufficient preliminary evidence must be made by a judge of a District Court by examining the report.

The examination of the report by the judge is to be conducted in private (*secara tertutup*) within 3 days of receipt of the report.

If during the examination as set out in (3) a determination is made that there is sufficient preliminary evidence investigators must immediately begin their investigation.

The power for police to use intelligence reports as a basis for arrest already exists under the ATL however this proposed amendment would relax the judicial oversight mechanism by allowing *any* District Court Judge to provide the requisite judicial approval, rather than the approval of the Chief Judge or Deputy Chief Judge of a District Court which is currently required. This would significantly increase the number of judges authorised to sign off on intelligence reports as sufficient preliminary evidence for an arrest – and could therefore greatly facilitate the use of this provision. The amendment would likely be opposed by human rights groups, however in practice, intelligence reports have not been used by police for arresting suspects. Karnavian stated:

Under the current ATL there is a provision for arrests based on IRs but in practice it has never been implemented. It has simply never been realised because of the difficulties in interpreting the power. Until today there has been no clarification of the format of the report, the contents and what would be legally acceptable. There needs to be training for police and judges to clarify these issues before the power can be used.¹¹⁹

Natural justice issues arise in relation to the use of intelligence reports which are examined in secret, and used as the basis of an arrest, with no opportunity for the suspect to answer or challenge the claims in the report. It should also be noted that the reference to s26(2), that is the judicial oversight process of examining and approving the sufficient preliminary evidence, has been removed from the amended section. It must be questioned whether it was the intention of the drafters to remove the requirement for judicial oversight of this power.

28. ARREST AND INITIAL DETENTION

Article 28 of the ATL states that investigators may arrest any person who is strongly suspected of committing a terrorist act based on sufficient preliminary evidence, as set out in article 26(2), for a maximum period of 30 days.

The proposed amendment extends the period of initial detention from 7 to 30 days. Under the KUHAP, the pre-charge detention period for crimes, including serious crimes such as murder, is one day. Given Indonesia's history of repressive authoritarian government, this amendment would be highly controversial during parliamentary debate. Law enforcement authorities claim that due to the complex nature of terrorism networks, international connections, differences in time zones and evidentiary cross-checking, they need more time to conduct their investigations.

Critics of extending the detention period point out that police have achieved success in dismantling terrorist networks and prosecuting individuals using the current

¹¹⁹ Karnavian, above n 1, 7.

laws so there is no need to extend them.¹²⁰ They also point out that prisoners are routinely tortured in prison and extending the detention period would expose them to further abuses in contravention of Indonesia's international convention obligations.¹²¹ Human rights group Imparsial points out that in the period 2004 – 2009 there were 36 cases of wrongful arrest by police in relation to terrorism offences, and that the revised law should contain provisions for compensating persons who are wrongfully arrested and detained by police.¹²²

31. SURVEILLANCE

Under article 31 investigators are granted the power to seize and open mail; and to use wire taps on telephones or other communications devices where it is suspected they are being used to prepare for, plan, or commit a terrorist act. This power has been perhaps the most important tool available to police in infiltrating and dismantling terrorist networks in Indonesia.

As Barton discussed in relation to the investigation into the Bali bombing of 2002:

Initially, Amrozi's mobile phone revealed even more than did Amrozi. His arrest was kept secret for two days; when it was announced on 7 November the Polri-AFP team carefully monitored the sudden flurry of communications that took place between numbers recorded in Amrozi's phone before the chatter abruptly stopped. In a number of cases the calls were long enough for the investigators to locate the position of the phones and they closed in for a series of arrests.¹²³

Similarly, Jones pointed out the importance of the wiretap powers:

Much of their intelligence comes from wire taps. The US Department of Justice has been working with BNPT on the wiretapping provisions in the ATL. Currently information

¹²⁰ Munawwaroh, "Delapan Pasal RUU Terorisme Ini Jadi Sorotan Aktivist" *TEMPO Interaktif* (online) 12 May 2011 <<http://www.tempo.co/read/news/2011/05/12/078333938/Delapan-Pasal-RUU-Terorisme-Ini-Jadi-Sorotan-Aktivist-160>>

¹²¹ "Ini Dia Pasal-Pasal Kontroversi Di RUU Terorisme " *Muslim Daily* (online) 23 May 2011 <<http://muslimdaily.net/berita/lokal/ini-dia-pasal-pasal-kontroversi-di-ruu-terorisme.html>>.

¹²² Munawwaroh and Febriyan, "Aktivist Sebut 8 Pasal RUU Antiterorisme Multitafsir" *TEMPO Interaktif* (online) 12 May 2011 <<http://www.tempo.co/read/news/2011/05/12/078333937/Aktivist-Sebut-8-Pasal-RUU-Antiterorisme-Multitafsir>>.

¹²³ Barton, above n 27, 11.

from wire or phone taps cannot be used as evidence in court. However, Densus 88 has authority to use wire taps, and while that information may not be used as evidence in court, it is used as intelligence.¹²⁴

Bhakti posits that a reading of art 27, which allows the use of electronic evidence such as voice recordings, text messages, emails etc., implies that evidence obtained from wire taps may be used as evidence at trial; as long as it is lawfully obtained.¹²⁵ However, he also posits that as most wire taps are done unlawfully, that is without judicial pre-approval, they may not, and are not, used as evidence at trial. Bhakti argues that this procedure contributes to increased levels of torture of suspects, since the recorded evidence cannot be used at trial; therefore there is a greater need for confessions. Bhakti said 'I estimate around 90% of terrorism cases are exposed due to information obtained from wire taps, however, I have never seen wiretap evidence used at trial. On the other hand I estimate around eight out of ten suspects are beaten while in custody. If police obtained the proper authorisation and were able to use wiretap evidence at trial they wouldn't need to torture suspects so much.'¹²⁶

The proposed amendment to the section is to relax the requirement for approval of the wiretap from the Chief Judge of a district court to any judge of a district court. The maximum period for the wiretap is one year. The provision also states that the judge must make a determination on the wiretap within three days of receiving the request from investigators. Where a wiretap authority is denied there is no process set out for investigators to challenge the determination or reapply. The requirement for the wiretap to be reported to a superior officer of the investigating officer is retained. The amended article ought to clarify the use of wire taps as evidence at trial.

¹²⁴ Jones, above n 20, 5.

¹²⁵ Personal communication with Mohammad Adhe Bhakti, Executive Director of the Centre for Radicalism and Deradicalization Studies (PAKAR) 3 November 2015. A reading of the 'Guidebook for Terrorism Prosecutors' appears to support this view. At page 7 it refers to art 27(b) and (c) and outlines that the use of electronic evidence must be supported by digital forensic evidence which identifies the source, and that it must be a 'lawful interception'. Kejaksaan Agung, above n 31, 7.

¹²⁶ Ibid.

33. PROTECTION FOR LEGAL OFFICERS AND WITNESSES

Article 33 is amended to include new categories of people who must be provided with protection by the state against threats to their lives or property to include not only witnesses, investigators, prosecutors and judges (and their families) but also advocates, informants and experts (and their families), before during and after trial. Further regulations on the details of state protection shall be issued by government regulation.

It has been pointed out¹²⁷ that prosecutors are seeking the right to carry weapons and may use this section as justification to push for that right. While police conduct security operations to and from the trial, prosecutors have reportedly claimed that they do not have protection at other times, e.g. travelling from their homes to their offices and therefore will invoke this section, requiring the state to provide them with adequate protection, for the right to carry firearms for self-protection. Given Indonesia's budget restrictions, and inability to sufficiently equip its police force,¹²⁸ it seems unlikely, and of questionable wisdom, that it would provide weapons and training to the staff of the national prosecutions service. Danger posed to eyewitnesses and expert witnesses from testifying in court and the appropriate levels and duration of state protection requires further research and analysis.

34A. TELECONFERENCE EVIDENCE

Article 34 states that in providing protection as set out in art 33 authorities must protect (a) against physical and mental threats (b) the identity of witnesses and (c) by allowing evidence to be given without being 'face to face' with the accused. The amendment in 34A gives further clarification with regard to subsection 34(1)(c), i.e. that a monitor and teleconferencing may be used to allow the witness to give evidence. It further sets out that normal rules of evidence must be observed, including that

¹²⁷ Febriansyah, above n 116.

¹²⁸ "Police Lack Bulletproof Vests, Helmets as Shootings Continue" *The Jakarta Post* (online) 14 September 2013 <<http://www.thejakartapost.com/news/2013/09/14/police-lack-bulletproof-vests-helmets-shootings-continue.html>>.

evidence must not be given under duress or coercion, no leading of witnesses, and an advocate, investigating officer, prosecutor or consular officer be present. It further states that the monitor be positioned so that it is facing the judge(s) only.

The rationale for these special conditions for giving evidence is meant to address the unusual level of persuasion and control that leaders of terrorist groups may exert over their followers – through their personality or perceived spiritual powers (*sakti*).

There have been cases of witnesses showing up to court, and upon coming face to face with, or shaking hands with, their (former) leader, have reneged on their previous statements to police and refused to give evidence in the trial.¹²⁹ Ba'asyir's conviction was challenged on the basis that it used inadmissible video conference evidence. This amendment puts any legal doubt in that area to rest.

CHAPTER VIIA PREVENTION AND COUNTER-TERRORISM

In emphasising the need to address prevention, Hiariej commented 'so if the law is going to be revised, then it should be more towards preventive and persuasive measures to prevent terrorist acts. There should be a new chapter, which is essentially about prevention',¹³⁰

This proposed insertion of Chapter VIIA addresses that suggestion – however provides very little detail other than to appoint the BNPT as the responsible agency.

The chapter contains extra articles relating to the BNPT as follows:

43A: the President sets national policies and strategies for prevention and counter terrorism.

43B(1): the national policy and strategy as set out in 43A is to be carried out by a non-ministerial institution which will organize counter terrorism through the involvement of relevant government agencies and the community.

¹²⁹ Rahardi Ramelan, "Transcript of Interview with Professor of Criminal Law Rahardi Ramelan Tri Sakti University Law School" 23 May 2012.

¹³⁰ Hiariej, above n 22.

43B(2): the institution set out in 43B(1) shall perform the duties and functions related to prevention, security, deradicalisation, enforcement and national preparedness.

43C: further details on the structure and funding of the institution set out in 43B shall be by Presidential decree.

The amendments place control of the BNPT firmly under the president with the power to appoint its head, and determine its funding and structure. Previous drafts of the bill attempted to establish the BNPT as a statutory body, which would then come under the control of the parliament to determine its budget and structure. As such it is likely that appointments to the top positions of the body will continue to come from the police or military rather than civilians. The head of BNPT is equal to that of a ministerial appointment. The head of BNPT reports directly to the President, and this current arrangement appears to be reinforced by this section. Section 43B(2) is also significant as it gives specific authority to BNPT to coordinate efforts for prevention and deradicalisation. This is the first time the term *deradikalisasi* has been used in the ATL. It highlights the many criticisms which have been levelled at authorities that Indonesian prisons are 'breeding grounds' for terrorism, and that not enough is done while convicted terrorists are in prison to rehabilitate and deradicalise them.¹³¹ This section would give BNPT a clear mandate to embark on a systemic, integrated, national program of prevention and deradicalisation. How this interacts with Vice President Boediono's own multi-agency integrated initiative for combating terrorism is unclear at the time of writing.¹³²

¹³¹ Niniek Karmini, "3 Killed in Anti-Terrorism Raid in Indonesia" *The Jakarta Post* (online) 1 September 2012 <<http://www.thejakartapost.com/news/2012/09/01/3-killed-anti-terrorism-raid-indonesia.html>>; Carl Ungerer, "Jihadists in Jail: Radicalisation and the Indonesian Prison Experience," Special Report of Australian Strategic Policy Institute/Rajaratnam School of International Studies Issue 40 May 2011; Margot O'Neill, "Indonesian Jails Used as Terrorist Incubators" *Lateline* (online) 18 May 2011 <<http://www.abc.net.au/news/2011-05-18/indonesian-jails-used-as-terrorist-incubators/2718998>>.

¹³² Yanto Soegiarto, "The Thinker: A Lack of Intelligence" *Jakarta Globe* (online) 12 September 2012 <<http://www.thejakartaglobe.com/columns/the-thinker-a-lack-of-intelligence/543863>>.

SECTIONS WHICH WERE CONSIDERED BUT NOT INCLUDED:

Spreading hatred or enmity

A proposed article to criminalise ‘spreading hatred’ which was included in earlier drafts of the bill was removed. Hate speech by radical clerics inciting their followers to violence is a serious issue however, currently, prosecutors do not take action. Withdrawing the article from the bill may represent a missed opportunity. However a majority of the working group considered there was a high risk of abuse by government, that it was an ‘excessive policy’ that it was like ‘killing a mosquito with a bomb’ and prone to abuse.¹³³ Also, it was seen as being contrary to Section 28 of the Constitution which enshrines the rights to gather and associate, and to verbal and written expression.

Meanwhile, both Karnavian and Hiariej have pointed out that ‘hate speech’ is already a crime under the Criminal Code (KUHP). Article 134 of the KUHP criminalises insults (*penghinaan*) against the president and vice-president with a maximum penalty of six years. Article 156 criminalises the act of publicly expressing feelings of enmity, hatred or insult against another group, with a maximum penalty of four years. Article 160 criminalises the incitement of violence with a maximum penalty of six years. Hiariej criticised the current provisions in the KUHP and recommended increasing the maximum penalties ‘in the case of hate speech against a group or incitement to violence, if it actually occurs, then I think the penalty should be 10-12 years’.¹³⁴ In Karnavian’s opinion the penalty should be increased to 10 - 15 years to have ‘a real deterrent effect’.¹³⁵

¹³³ Febriansyah, above n 116.

¹³⁴ Hiariej, above n 22, 6. Arts 154 and 156 of the KUHP make it a crime for anyone to ‘declare, in public, enmity, hatred or offence’ against the government (7 years imprisonment) or a particular group of people (4 years).

¹³⁵ Karnavian, above n 1, 4.

Indonesia has a real problem with how to deal with militant clerics and above-ground hard-line groups which appear to be growing in strength.¹³⁶ The question for the government is what laws can be enacted, or which existing laws, can be used to deal with the issue as it involves the right to freedom of speech.

In the context of a prosecution for spreading hatred, under the Information and Electronic Transactions law, in November 2015, the chief of Indonesian police, Badrodin Haiti, issued an official letter of instruction (*surat edaran*) relating to hate speech and its handling by police.¹³⁷ The document refers to the dangers of hate speech which can lead to violence and instructs police to take action when they encounter it in the community. First, police are instructed to facilitate a mediated solution where possible. If this is not possible, police are instructed to take criminal action under a number of legislative provisions, including the Criminal Code, Law No. 40 of 2008 on the Eradication of Racial and Ethnic Discrimination, Law no. 7 of 2012 on Management of Social Conflict and Law No. 11 of 2008 on Information and Electronic Transactions. The provisions referred to in the letter refer mainly to the expression of hatred between Indonesian ethnic groups – leaving it uncertain as to how they could be applied in cases of hate speech against foreign entities, such as the US or Israel for example.

An article on the website of Islamist group JAS dated 27 October 2015 is illustrative. Beneath a photo of two Indonesian children standing on flags of Israel and Russia, the author refers to an event in Jakarta to raise funds for Syrian communities. It stated:

¹³⁶ The head of hard-line Islamist group *Front Pembela Muslim* (Muslim Defenders Front – FPI) Munarman was approached in 2013 by the PPP political party to run for election to parliament. Markus Junianto Sihaloho, "FPI Commander Munarman Recruited by PPP for 2014 Elections" *Jakarta Globe* (online) 30 January 2013 <http://www.thejakartaglobe.com/home/fpi-commander-munarman-recruited-by-ppp-for-2014-elections/568554#Scene_1>.

¹³⁷ Official Instruction Letter Issued by Chief of Indonesian National Police No. Se/06/X/2015 on Hate Speech. "Surat Edaran No. Se/06/X/2015 Tentang Penanganan Ujaran Kebencian (Hate Speech)" (Indonesian National Police Headquarters, 30 October 2015).

Ustadz Wildan as the coordinator of the collection drive for Syria said 'We Jama'ah Ansharusy Syari'ah are their brothers; their children are our children, their blood is our blood, so their enemies are our enemies and we want to show the infidels of Israel and Russia that we hate you, we will also make you our enemies as you have made enemies of our brothers in Syria and Palestine'...In connection to the act of trampling the flags of Israel and Russia, the Islamic teacher said 'we tread on the flags of Russia and Israel so that our Muslim brothers in Syria and Palestine know that they are not alone, their brothers will not accept them being treated like that, so we remind them nothing is free, life for life, blood for blood.' (Author's translation)¹³⁸

The article, which certainly stirs sentiments of hatred falls short of calling for, or supporting/financing, *specific* acts of violence, but it must fall very close to the line of activity criminalised under the provisions referred to in Haiti's *surat edaran*. The case illustrates the difficulties created by the competing policy interests of protecting freedom of speech while eradicating hate speech and incitement to violence. While some media outlets speculated that Haiti's main purpose may have been to silence political dissent against the current administration, it remains to be seen how it will be applied in cases relating to jihadist activity.

Control Orders/Preventive Detention

Officials from the BNPT expressed a need for both control orders, and preventive detention in counter terrorism legislation. Control orders could require a suspect, or a parolee, to use only preapproved telecommunications services including email and telephone accounts, and make it an offence to use any other means of communication. The idea came from an examination of Australia's anti-terrorism laws. While control orders exist under Australian law, they are very rarely used due to the high costs and resources required to enforce them. The subject must effectively be under 24 hour surveillance and monitoring of their communications and movements. There have only

¹³⁸ Ibnu Yusuf, "Penggalangan Dana Ansharusy Syari'ah Jakarta Untuk Syam" *Jama'ah Ansharusy Syari'ah* (online) 27 October 2015 <<http://ansharusyariah.com>>.

been two cases since the legislation was enacted where control orders have been used, David Hicks and Jack Thomas.¹³⁹

Control orders were considered too controversial by the working group and were not included in the draft law, despite being lobbied for by BNPT. The amendment to art 28, if enacted, allows an initial detention period of 30 days and is, in effect, preventive detention, especially if the removal of the reference to section 26(2) is taken to be a removal of the judicial oversight requirement. It is likely that given Indonesia's history, this kind of state power will not be passed at the committee stage. However as Karnavian pointed out, the willingness of a community to accept a state power to detain without judicial process depends on how the power is applied:

If we talk about preventive detention for 7 days based on an IR, whether that is acceptable or not depends very much on how it is applied. For example the ISA, if it is misused for detaining political opponents the government loses legitimacy from the public, and then there is increased pressure to revoke the power. Singapore is a good example, the power exists but it is only exercised in very exceptional circumstances of national security. In that case the public agrees with and supports the existence of such a power.¹⁴⁰

UNLEGISLATED POLICY ISSUES

The following section discusses a number of policy issues which are key factors in terrorism and counter-terrorism, but which are currently not specifically addressed in legislation. These issues include; recidivism, recruitment, rehabilitation, countering violent extremism (CVE) and cyberterrorism. While these areas are currently not addressed by legislation, it is submitted that specific legislation may assist in clarifying and achieving policy objectives in these areas. As such, further research and policy analysis at a governmental level is recommended.

¹³⁹ Bronwen Jagers, "Anti-Terrorism Control Orders in Australia and the United Kingdom: A Comparison" Department of Parliamentary Services Research Paper No. 28, 29 April 2008 <<http://gees.org/documentos/Documen-02968.pdf>>.

¹⁴⁰ Karnavian, above n 1, 4.

RECRUITMENT, REGENERATION AND RADICALISM

Despite Indonesia's post-2002 successes in counter terrorism, the head of the BNPT stated in an interview in 2011 that the danger from terrorism had actually increased – that Al-Qaeda-linked Jemaah Islamiyah had 'metamorphosised' into multiple new threats. 'They have high militancy levels due to their strong belief in their ideology, and they're very fanatical...The fact is these groups are becoming stronger'.¹⁴¹ Dr Carl Ungerer a former Australian government intelligence analyst echoed that opinion in a report he authored for the Australian Strategic Policy Institute (ASPI). Commenting on the increasing number of so-called 'freelance terrorists' he said:

We're no longer dealing with organisations or organisational hubs, we're dealing with individuals, some call them lone wolves, some call them freelancers. Nonetheless, individuals who will go out and simply conduct operations in groups of two or three, which is pretty much all it took to do the Marriott hotel bombing in 2009. It means that the threat is not going away, if anything, it's getting worse.¹⁴²

The greatest danger is now posed by small cells, or individuals, who self-radicalise through internet resources, possibly with links to ISIS, and learn to create their own weapons. The Separiano case from 2013 provides such an example. One member of the group learned to make bombs from materials available online then proceeded to teach others in the cell. They were discovered and arrested by police before detonating the bomb intended for the Myanmar ambassador, but a similar group which was more careful about its communications and secrecy might have succeeded where the Separiano group failed.

The continuous replenishment of the ranks of willing foot soldiers to the cause of terrorism allows groups to continue operating even where large numbers are arrested or killed. Breaking this cycle of recruitment-through-radical-ideology will

¹⁴¹ "Ten Years Later, Asia's 'War on Terror' Still Rages" *The Australian* (online) 6 September 2011 <<http://www.theaustralian.com.au/national-affairs/world-politics/ten-years-later-asias-war-on-terror-still-rages/story-fn9vliqg-1226130311811>>; O'Neill, above n 131.

¹⁴² Ungerer, above n 131; O'Neill, above n 131.

prove to be one of the most important, if not *the* most important, step in successfully short-circuiting the terrorism cycle. There are currently no laws which specifically address the issue.

Experiences of individuals such as Noor Huda Ismail can provide insights into why young Indonesians are lured into terrorism. Ismail, a graduate of Ba'asyir's Ngruki *pesantren*, teetered on the edge of radicalism but decided to pursue a career in journalism. He commented 'at the time the government back then wasn't very open toward Islam, and I must be candid with you, radicalism was really appealing to me. I found it as a way of getting back at the regime'.¹⁴³

Ideological outreach in the form of Islamic university study groups and *pesantrens* (Islamic boarding schools) have provided recruits to the jihadist cause. According to a *TIME* report, Negara Islam Indonesia (NII) aggressively recruited students on university campuses such as the Syarif Hidayatullah State Islamic University (UIN) in Jakarta.

Students here say it is becoming more and more common to hear about a friend or class mate who has been asked to attend a religious study group that inevitably turned to topics like jihad, an Islamic state, and the necessity for Shari'a law.¹⁴⁴

One student stated: 'They will come to your house. They will keep calling you. They will keep texting you and telling you that you have to stay away from the world, you have to come with me.' A 19-year-old female student explained how she was recruited in her freshman year, saying that she wanted to make friends. She was approached by someone claiming to be a fellow student who invited her to attend a religious discussion group. She later found out that the group was a front for NII. Of the 19

¹⁴³ Thomas Roberson, "My Jakarta: Noor Huda Ismail, Founder Institute for International Peace Building" *Jakarta Globe* 31 March 2012 <<http://www.thejakartaglobe.com/myjakarta/my-jakarta-noor-huda-ismail-founder-institute-for-international-peace-building/508195>>.

¹⁴⁴ Jacob Templin, "Keeping Radical Islamists from Recruiting on Indonesia's Campuses" *TIME International Reporting Project 2013* (online) <http://www.time.com/time/video/player/0,32068,1118418176001_2089992,00.html>.

individuals arrested for the book-bombing attacks in 2011, five were later shown to have been recruited from within Universitas Islam Negara.¹⁴⁵ While some universities have responded with public awareness campaigns to warn students about the dangers of becoming involved with radical groups – this remains one area where little preventive government intervention has been directed.

Pesantrens or Islamic boarding schools, of which there are tens of thousands¹⁴⁶ around the country, vary in their methods and approaches to teaching Islam. While the majority are moderate in their interpretations of Koranic text, others take a more radical approach.¹⁴⁷ In November 2012, police raided the Pondok Darul Akhfiya *pesantren* in East Java arresting approximately 50 students and their teacher after local residents reported witnessing military-style training exercises being conducted in the school's grounds. Weapons and books on jihad were found at the school, but the teacher, Nasiruddin Ahmad denied that the children were being taught terrorism. 'We're not teaching terrorism, but only religious studies, as other Islamic boarding schools do,' Nasiruddin said. 'Besides that, we teach them martial arts'.¹⁴⁸ Police raided the Umar bin Khatab *pesantren* in Sumbawa after an apparently accidental explosion killed one staff member. It was later discovered that the school's principal Abrory M Ali

¹⁴⁵ Ibid.

¹⁴⁶ Robert Pringle, *Understanding Islam in Indonesia: Politics and Diversity* (Singapore: Editions Didier Millet, 2010). Pringle states that *pesantren* are always boarding schools, and any Islamic school that is not a boarding school may be called *madrasah*. 'There are about 14,000 *pesantren* and 38,000 *madrasah* in Indonesia, with about ten million students, or approximately one-fifth of Indonesia's secondary enrollment' 120.

¹⁴⁷ For a study of Islamic *pesantren* in East Java see: Nathan Franklin, "Reproducing Political Islam in Java: The Role of Nahdlatul Ulama and Muhammadiyah Pesantren in the Political Socialisation of the Umat" (PhD Thesis, Charles Darwin University, 2015).

¹⁴⁸ "Fifty Alleged Terrorists from Islamic School in Nganjuk Detained" *Jakarta Globe* (online) 13 November 2012 <http://www.thejakartaglobe.com/home/fifty-alleged-terrorists-from-islamic-school-in-nganjuk-detained/555943#Scene_1>.

was actively radicalising students and training them in assembling bombs and explosives.¹⁴⁹

Cases such as these support arguments that these Islamic schools are ‘*mujahid*-producing machines’¹⁵⁰ and illustrate several aspects of Indonesia’s struggle with terrorism. On one hand, they underline the importance of vigilance on the part of local communities in detecting and reporting suspicious activities. A 2014 report emphasised the importance of direct community action in ‘taking back’ radical mosques without any help from counter-terrorism agencies.¹⁵¹ However, the cases also indicate the logistical difficulties of monitoring and policing a country with Indonesia’s enormous population and geographical spread. A 2009 report warned ‘if officials of the [Indonesian] religious affairs ministry visit these schools, as they periodically do, and announce there is nothing amiss, it is because they are not looking in the right place.’¹⁵² The Umar bin Khatab explosion shows that the ineptitude of the terrorists themselves can sometimes play a role in their detection rather than effective policing.

Apart from the roles played by universities and *pesantren* in recruitment, it is not only ‘callow youth’¹⁵³ who are targets for radicalisation. Study groups attached to mosques which lean towards fundamentalist interpretations of religious texts, have been shown in various case studies to be linked to intolerance and violent acts. Jones commented that ‘there is a direct linkage between the kind of increasing religious intolerance that we see in Indonesia and some of these other forms of violence, because

¹⁴⁹ "Indonesia School Principal on Trial on Terror Charges" *MSN News* (online) 11 January 2012 <<http://news.asiaone.com/News/AsiaOne+News/Asia/Story/A1Story20120111-321292.html>>.

¹⁵⁰ International Crisis Group [ICG], *Indonesia: The Dark Side of Jama'ah Ansharut Tauhid* (2010) Update Asia Briefing No. 107 <<http://www.crisisgroup.org/~media/Files/asia/south-east-asia/indonesia/B107-Indonesia%20The%20Dark%20Side%20of%20Jamaah%20Ansharut%20Tauhid%20JAT.pdf>> 12.

¹⁵¹ Institute for Policy Analysis of Conflict [IPAC] *Countering Violent Extremism in Indonesia: Need for a Rethink* (2014) IPAC Report No. 11, 30 June 2014, 3.

¹⁵² Hannah Beech, "Why Indonesia's War on Terror Is Far from Over" *TIME* (online) 18 September 2009 <<http://www.time.com/time/world/article/0,8599,1924804,00.html>>.

¹⁵³ *Ibid.*

increasingly the groups that are advocating on the religious intolerance side are merging in to the terrorist side.¹⁵⁴

A group of around ten men in Cirebon for example started down the path to terrorism by participating in anti-vice campaigns. 'The group went from carrying out anti-vice attacks on TV stations and convenience stores selling alcohol to orchestrating suicide attacks on a police mosque and a church on Java island'.¹⁵⁵ In another example, HASMI emerged as 'a small above ground extremist' organization in 2009 and subsequently descended into violence with several of its members arrested with bomb-making materials in October 2012.¹⁵⁶ Groups such as FPI which openly espouse intolerant views towards the minority Ahmadiyah sect have been involved in violent actions including the callous murders of Ahmadiyah members.¹⁵⁷ The murderers of three Ahmadis received lenient sentences of between three and six months¹⁵⁸ leading

¹⁵⁴ Matt Brown, "New Terrorism Fears in Indonesia" *ABC Radio* (online) 19 April 2011 <<http://www.abc.net.au/am/content/2011/s3195160.htm>>.

¹⁵⁵ Angela Dewan, "Indonesia's Islamic Vigilantes 'Turning to Terrorism'" *Jakarta Globe* (online) 26 January 2012 <http://www.thejakartaglobe.com/news/indonesias-islamic-vigilantes-turning-to-terrorism/493871#Scene_1>; International Crisis Group [ICG] *Indonesia: From Vigilantism to Terrorism In Cirebon* Asia Briefing No. 132, 26 January 2012.

¹⁵⁶ Matthew Bigg, "Indonesia's FPI-Linked Militant Arrests Show Shift to Violence" *Jakarta Globe* (online) 28 October 2012 <<http://jakartaglobe.beritasatu.com/archive/indonesias-fpi-linked-militant-arrests-show-shift-to-violence/>>.

¹⁵⁷ Niniek Karmini, "No Shame for Religious Killings in Indonesian Town" *Jakarta Globe* (online) 9 August 2011 <<http://www.thejakartaglobe.com/home/no-shame-for-religious-killings-in-indonesian-town/458163>>. Karmini's article is a shockingly frank account of brutal mob attacks on Ahmadiyah sect members in West Java. Dani Bin Misra was sentenced to three months imprisonment after repeatedly smashing a rock into the head of sect member Roni Pasaroni, while the surrounding mob cheered and shouted 'Kill! Kill!' Three Ahmadis were killed in the attacks and around 30 others escaped before their houses were looted and burned. The President and government have been criticised for failing to adequately deal with this kind of rising intolerance. The Ahmadiyah sect, while nominally Muslim, do not ascribe to the belief that Muhammad was the final prophet.

¹⁵⁸ In a country where petty thefts have led to longer custodial sentences than those in the Ahmadiyah murder case (above n 157), serious issues of fairness and consistency in Indonesian sentencing must be raised – discussed further in Chapter 6. In one case, an illiterate farmer was detained for almost three months and charged with stealing (maximum 10 years imprisonment) after taking a 'branch of a teak tree that had been cut and left behind by the owner of the plantation'. In another case a 55 year old grandmother was detained for over four months, longer than the sentence of convicted murderer Dani Bin Misra, before being prosecuted for stealing a plate of oxtail soup. Markus Junianto Sihalo, "Illiterate Farmer Faces 10-Year Sentence after Taking Piece of Wood" *Jakarta Globe* (online) 13 May 2012

some to criticise the President claiming that 'Susilo Bambang Yudhoyono, who relies heavily on Islamic parties for support in parliament, has remained silent'¹⁵⁹. It was not the only time the President was singled out for criticism. In discussing the failure of authorities to decisively deal with terrorism, Prasantyo recommended a cross-institutional approach, but that it could only be on the initiative of the President. According to Prasantyo 'the issue of conflict in Poso or elsewhere in Indonesia will be difficult to end as long as the president is still *peragu* (doubtful/indecisive). This indecisive attitude from the president spreads to his subordinates in the police, the military and the BNPT'.¹⁶⁰

While 'planning and/or mobilising' others to commit or attempt to commit terrorism is criminalised under art 14 of the ATL, a law which clearly criminalised becoming a member of a terrorist group, or facilitating others to become members, would be a significant step in criminalising the recruitment process. This should be combined with government awareness programs, clear condemnation of violent acts by political and religious leaders, and harsher penalties from courts.

RECIDIVISM AND REHABILITATION

A related but separate issue to recruitment is that of recidivism and the treatment of convicted terrorists in prison. Growing numbers of active jihadists are recidivists – terrorists who have been convicted, imprisoned and released, only to return to their old networks and activities. Indonesia's lax prisons have been called 'incubators' for

<http://www.thejakartaglobe.com/home/illiterate-farmer-faces-10-year-sentence-after-taking-piece-of-wood/517462#Scene_1>.

¹⁵⁹ Karmini, above n 157.

¹⁶⁰ Deni Muliya Barus and Amran Amier Mujib Rahman, "Kejahatan Khusus Menyerang Polisi" *GATRA Magazine* 03 January 2013, 16. Author's translation.

terrorism, where radical ideologues are free to preach their doctrine of hate and recruit willing, impressionable new foot soldiers to their cause.¹⁶¹ Jones commented that:

Indonesia's prison regime is open to serious criticism in terms of handling inmates convicted of terrorist crimes, but because it is too lax rather than too harsh. Virtually all inmates have handphones or access to them, some of them state-of-the-art communicators. Several appear to have regular access to internet chat rooms that they access through a combination of hand-phones and laptop computers. Some of the most hard-core ideologues have produced audio cassettes, CDs, and books from prisons and have found ways of disseminating these to their followers on the outside and beyond. It would be perfectly possible to meet all the U.N. Standard Minimum Rules for the Treatment of Prisoners and still exert more control over communications and over what goes in and out of prison. To do so would require a few ministerial regulations and better oversight from the Ministry of Justice and Human Rights that is responsible for the prison system. It would also require a determined crackdown on prison corruption. Neither seems likely.¹⁶²

Confirming a worrying lack of control or monitoring of even the most influential ideologues, in February 2013, while imprisoned, Ba'asyir was able to publish a book espousing his radical views. He was moved to a 'super maximum' prison shortly after the launch of the book.¹⁶³

After completing research involving direct interviews with over thirty convicted terrorists both in prison and post-release, Ungerer discovered that a significant number returned to violence after being released from prison:

Terrorism stemming from the actions of these Islamist militants continues to be a real threat to Indonesia and the region. A worrying aspect of the lintas tandzim group is that recidivists appear to be at the centre of these latest operations...Abdullah Sunata and Aman Abdurrahman, for instance, the men central to the establishment of the militant

¹⁶¹ O'Neill, above n 131; Ungerer, above n 131; Niniek Karmini, "Teaching Jihad in Indonesian Prisons" *Jakarta Globe* (online) 30 June 2011 <http://paywall.thejakartaglobe.com/archive/teaching-jihad-in-indonesian-prisons/?doing_wp_cron=1386649956.14122700691223144531>.

¹⁶² Jones, above n 20, 2.

¹⁶³ "Siap Menyerang Obyek Wisata," *Jawa Pos*, 7 January, 2013, 2.

cell in Aceh, were previously imprisoned for instigating violence against local Christians in Ambon and for running a bomb-making school, respectively.¹⁶⁴

Released prisoners are also able to pass on vital skills such as bomb making to other would-be jihadists. For example, Heri Sigu Simboja (known as Sogir), the son of a Jemaah Islamiyah Afghanistan veteran, was jailed in 2005 for helping to build the bomb that exploded outside the Australian embassy, but was released early for good behaviour. After his release he was subsequently recaptured and sentenced to eight years imprisonment for his role in a new terrorist plot. 'He passed on his bomb making skills to one of a growing number of radical small cells whose members, unlike Sogir, don't start off as part of a centrally organised group. Instead, they decide to sow terror off their own bat'.¹⁶⁵ Sogir was known to have bomb making skills, and he was approached by two radical groups in the area where he was preaching to pass on those skills. This new form of small, independent, self-starting radical groups represent a serious threat as they are much harder to track than larger organisations. 'These small cells often begin as study groups in a hard-line mosque but they evolve into self-powered hit squads dedicated to assassination and small-scale attacks'.¹⁶⁶

'The majority of those who have been arrested, and tried, and ended up in the prison system have in fact not yet gone back to their old networks. But the 30 odd per cent that have are the more dangerous ones,' commented Dr Carl Ungerer. 'Their time spent in prison has not diluted in any way their sense of wanting to be part of a violent extremist group prepared to kill both Indonesians and Westerners.' Dr Ungerer says the prisoners are contributing to a surge in violent jihadi literature in Indonesia. 'Much of this publishing material is actually being done inside the prisons. There are people, convicted terrorists, who are writing, getting messages out from inside the prison system,' he said.¹⁶⁷

¹⁶⁴ Ungerer, above n 131, 2.

¹⁶⁵ Brown, above n 154.

¹⁶⁶ "Indonesia Battles Terrorist Hit Squads" *ABC Radio AM* (online) 19 April 2011 <<http://www.abc.net.au/news/2011-04-19/indonesia-battles-terrorist-hit-squads/2609854>>.

¹⁶⁷ O'Neill, above n 131.

According to government statistics, as of mid-2015 around 500 convicted terrorists have served their sentences and been released.¹⁶⁸ This number will continue to rise, with a further 200 more prisoners to be released before the end of 2020 (see chapter 6). While clearly not all released terrorists return to crime, some do, and those may be the most radical, influential and dangerous ones, who possess deadly skills which can be passed on to others.¹⁶⁹ Ungerer also pointed to the rise of so-called 'freelance terrorists' who no longer need the backing of a large organisation such as JI and are able to conduct smaller random attacks on their own or in small groups.

The difficulties presented by the release of several hundred convicted terrorists, is identifying which individuals pose a further risk to the community, and in monitoring and evaluating such a large number post release. This should be a coordinated effort of police and intelligence agencies, with the BNPT as coordinating body.

In some notable cases such as Nasir Abbas and Ali Imron, prison has signalled a dramatic shift in the personal orientation of the individuals.¹⁷⁰ In those cases prisoners have not only undertaken deradicalisation programs, but have also committed to assist in the deradicalisation of other prisoners. For others however, prison strengthens their jihadist ideology and provides an opportunity to radicalise others from the general prison population.

Standardised formal programs to rehabilitate and/or deradicalise prisoners have been absent from the prison system. Programs to 'deradicalise' terrorist prisoners have shown variable success. 'For some prisoners, gaol leads to their disengagement from terrorist activities. For other people it has a further radicalising effect, and it

¹⁶⁸ See Diagram 5, p 263.

¹⁶⁹ Ungerer, above n 131, 17.

¹⁷⁰ Fealy, above n 19.

enables them to further radicalise others in gaol.¹⁷¹ Those programs that have been tried are *ad hoc* at best and at the initiative of individual prison administrators.

Some hope may lie in non-governmental rehabilitation and prevention programs such as those being run by Max Boon and Noor Huda Ismail.

Boon, a victim of the Jakarta Marriott bombing of 2009, runs an outreach program to fight terrorism the 'soft' way. He is bringing together victims, former terrorists and Islamic scholars – 'peace ambassadors' who will visit neighbourhoods which are potential breeding grounds for violent radicalism. 'What I want to highlight is that terrorists are also hurting and killing their fellow Indonesians, people who look just like their mother, uncle, son,' he said.¹⁷² The program is sponsored by the Dutch government with support from the Indonesian government.

Author and anti-terrorism activist Noor Huda Ismail runs an NGO which attempts to rehabilitate convicted terrorists by integrating them back into the community through small business. 'We encourage critical thinking. Some of the former criminals work in a restaurant with an Australian chef. In a cafe, you cannot choose your customers; every visitor must be served equally nicely. It helps to show them that all people are equal. It gives them what I call a cognitive opening, which provides them different perspectives on things. These interactions allow them to establish a level of trust,' said Noor.¹⁷³

INTERNET RECRUITMENT AND CYBER-TERRORISM

In the context of breaking the cycle of recruitment, the role of the internet and cyber-terrorism must be recognised as part of any comprehensive anti-terrorism regime. At

¹⁷¹ Ibid, 3.

¹⁷² Chang Ai-lien, "Jakarta Marriott Bombing Survivor Fights Terrorism with a Soft Touch" *Jakarta Globe* (online) 14 October, 2012 <http://www.thejakartaglobe.com/home/jakarta-marriott-bombing-survivor-fights-terrorism-with-a-soft-touch/550155#Scene_1>.

¹⁷³ Roberson, above n 143.

present there is no specific legislation which encompasses the use of the internet in terrorism offences.

The emergence of ISIS throughout 2014 and 2015 has the potential to reinvigorate the recruitment of young Indonesians through Islamist ideology freely available on the internet. Government attempts to block radical websites that support ISIS were brief and met with protests of being 'Islamophobic' and a threat to freedom of speech.¹⁷⁴

In 2015, government officials acted to block a number of websites considered to contain 'extremist' material however the legal basis for doing so was called into question and the websites were soon allowed to resume operating as long as they promised not to publish content which supported extremist views.¹⁷⁵ The incident illustrated both the lack of legal clarity and the blurred line between supporting terrorism and freedom of expression.

A report by IPAC released in October 2015 traced the evolution of online use by extremists and concluded that, in general, Indonesians are not self-radicalising online, rather 'personal contacts and direct face-to-face engagement in religious discussion groups (*pengajian*) remain important, with friendships reinforced through internet messaging and mobile phone communication'.¹⁷⁶ The report also noted the use of encrypted mobile communications apps such as 'Telegram' and 'Zello' which present challenges for law enforcement.

¹⁷⁴ Jakarta Globe, "'Editors' Hit Back against Govt Ban on 'Radical' Websites" *Jakarta Globe* (online) 5 April 2015 <<http://thejakartaglobe.beritasatu.com/news/editors-hit-back-govt-ban-radical-websites/>>.

¹⁷⁵ Ryan Dagur, "Rights Activists Slam 'Radical' Islam Website Ban as a Threat to Freedoms" *Jakarta Globe* (online) 7 April 2015 <<http://thejakartaglobe.beritasatu.com/news/rights-activists-slam-radical-islam-website-ban-threat-freedoms/>>.

¹⁷⁶ Institute for Policy Analysis of Conflict [IPAC], *Online Activism and Social Media Usage among Indonesian Extremists* IPAC Report No.24, 30 October 2015.

Cyber-terrorism has not been a major issue in Indonesia. However, in July 2015 a 21-year-old Indonesian university student was questioned by police after transmitting a bomb threat by twitter and email regarding a Singapore Airlines flight from Singapore to Sydney.¹⁷⁷ The threat caused the delay of several flights. The incident underlines what Golose referred to as the 'expanding opportunities' to utilise technology and cyberspace for terrorist purposes.¹⁷⁸ The suspect was arrested within one week of transmitting the bomb threat after receiving information from Singapore police, and charged under art 27(4) of Law No. 11 of 2008 on Information and Electronic Transactions.¹⁷⁹ The cooperation between Singapore and Indonesian police is noteworthy, and may indicate technical deficiencies of Indonesian police who were only able to locate the offender after receiving information from their Singaporean counterparts.

In a work published in October 2015, Golose notes the increasing use of the internet for terrorist activity referring to beheading videos of ISIS, a similar video released by MIT in Poso, recruitment videos, and internet hacking by Rizky Gunawan which successfully stole five billion rupiah.¹⁸⁰ Discussing possible responses, Golose refers to the European Union's progress in the area of criminalising internet use for terrorist purposes, the establishment of the International Multilateral Partnership Against Cyber Threats (IMPACT) headquartered in Malaysia, and recommends the need for a comprehensive new anti-terrorism legislation which covers cyberspace terrorism.¹⁸¹ Golose recommends that all legislation relating to counter-terrorism, both

¹⁷⁷ Hafizd Mukti Ahmad and Rinaldy, "Bareskrim Polri Periksa Pengancam Bom Singapore Airlines" *CNN Indonesia* (online) 8 July 2015 <<http://cnnindonesia.com>>.

¹⁷⁸ Petrus Reinhard Golose, *Invasi Terorisme Ke Cyberspace* (Jakarta: Yayasan Pengembangan Kajian Ilmu Kepolisian, 2015).

¹⁷⁹ Anggi Kusumadewi and Rinaldy, "Kronologi Ancaman Bom Singapore Airlines Oleh Mahasiswa RI" *CNN Indonesia* (online) 8 July 2015 <<http://cnnindonesia.com>>.

¹⁸⁰ Golose, above n 178.

¹⁸¹ *Ibid*, 170-182.

conventional terrorism and cyber-terrorism should be contained in one comprehensive law to improve synergy between enforcement agencies.

CONCLUSION

Indonesia's ATL contains significant provisions designed to make it easier to investigate and prosecute terrorist crimes. It has provided a sufficient level of legal cover for counter-terrorism law enforcement agencies to conduct CT operations with a high level of success. Arguably the most potent weapon in infiltrating terrorist networks has been the provisions which allow wiretapping of communications devices and longer detention periods than are allowed under the criminal code. The ATL also provides for harsher maximum penalties than are generally found in the criminal code. However, despite these strengths the ATL has been criticised for its lack of provisions which adequately deal with questions of preparatory acts, membership of terrorist groups, prevention, deradicalisation and the curtailment of hate speech. This has meant that terrorist groups have been able to continue raising funds and spreading an ideology of violence and enmity which attracts new recruits. The ATL contains no provisions for listing groups and individuals as terrorist. While a court may declare an organisation as terrorist, this has only been done in the case of one group; Jemaah Islamiyah.

Despite calls to amend and strengthen the provisions of the ATL it has remained for over a decade in its original form, and it appears that it will not be amended any time soon. Whether the ATL is amended will depend on evolving political conditions, both domestically and internationally. Developments in Syria and Iraq demonstrate how events in the Middle East can affect terrorism issues in Indonesia. As police have been successful in infiltrating, prosecuting and neutralising terrorist groups and individuals – and there have been no major terrorist attacks or bombings since 2009 – it appears likely that the president will prefer, for political reasons, to let sleeping dogs lie. However, in the event of a catastrophic terrorist attack, the situation could change

rapidly, and the draft amendments to the ATL, as outlined in this chapter, could be enacted very swiftly, as occurred in the case of the first Bali bombing.

Whether the ATL needs to be amended to address issues of prevention may also depend largely on the approach of the relevant body, the BNPT, to issues of prevention and deradicalisation. If the BNPT designs and implements an effective national strategy for prevention and deradicalisation it may prove unnecessary to amend the current legislation to insert a new chapter on prevention. A report by the Institute for Policy Analysis of Conflict (IPAC) of June 2014 noted that prevention, deradicalisation and countering violent extremism (CVE) have seen some successes in Indonesia – but was critical of the BNPT for failing to contribute to those successes noting that most of them had been ‘natural’ community-driven reactions to extremism. The report warned that efforts in the area of CVE ‘have not been well-served by top-down programs heavy on rhetoric and formal meetings, divorced from detailed knowledge of radical networks’.¹⁸² Rather the report recommends examining specific instances of successful community-driven counter-radicalisation to see what lessons could be drawn from them in the implementation of a broader CVE policy. The report concludes by recommending a restructure of the BNPT to remove the divide between its intelligence/operations division, run by police, and the prevention division, run by military staff. It also recommends greater engagement of other ministries, such as the education ministry. If a new chapter on prevention were added to the current ATL more detailed policy direction for issues of prevention and CVE should be considered for inclusion in the bill.

While some of the proposed amendments to the ATL are to be commended, such as criminalising membership, preparatory acts and paramilitary training, any proposals to increase the states powers of surveillance and detention must be viewed

¹⁸² IPAC, above n 151.

through the prism of the country's authoritarian history and past abuses of the draconian Anti-Subversion laws to silence political opposition. As such they are likely to be highly controversial and subject to extensive scrutiny and debate. This explains why both presidents Yudhoyono and Widodo have, thus far, chosen to avoid pushing for amendments to the law.

It remains to be seen how many of the proposed amendments outlined above will remain in the final draft of the legislation, how many will be altered or watered down, or indeed whether amendments to the ATL will ever be passed by parliament at all.

CHAPTER 5 – FORBIDDEN FUNDS: THE COUNTER TERRORISM FINANCING LAW OF 2013

INTRODUCTION

In March 2013 the Indonesian Parliament passed the *Prevention and Eradication of Terrorism Financing Act* (Law No.9 of 2013) (hereinafter the 'CFTL'). Enactment of the legislation ostensibly brought Indonesia into line with its commitments under international law as a signatory to the *International Convention for the Suppression of Financing of Terrorism* (1999) which Indonesia signed in September 2001 and ratified in 2006. While Indonesia's existing, hastily-drafted anti-terrorism legislation (Law No.15 of 2003) contained a brief provision criminalising the funding of terrorism, this latest and much more significant statute is intended to shore up any gaps in the existing legislative regime. It also provides for a central governmental agency, namely the Centre for Financial Transactions and Reporting (PPATK – Pusat Pelaporan Analisis Transaksi Keuangan), to have both authority and responsibility for the monitoring of suspicious financial transactions. While the legislation establishes the legal basis for PPATK's role in countering the financing of terrorism, it also places significant obligations on financial services providers (FSPs) to monitor and report any suspicious transactions to PPATK – as well as obligations to 'know your customer' – with significant penalty provisions for failure to do so. Despite the enactment of the CFTL in 2013, the Financial Action Task Force (FATF), an inter-governmental standard-setting agency under the auspices of the Organization for Economic Co-operation and Development (OECD), kept Indonesia on its public statement of 'high risk and non-cooperative jurisdictions' for over two years. Indonesia was only removed from the list in mid-2015 after the FATF assessed that the Indonesian government had made sufficient progress in enforcing the provisions of the CFTL.

This chapter examines the international law background to the counter-terrorism financing legislation, the substantive sections of the CFTL, and the obligations it places on commercial financial services providers. It also considers the legislative regime's deficiencies and criticisms.

The rest of the chapter examines the background to Indonesia's enactment of the CFTL in 2013, taking account of the various international conventions and United Nations resolutions which gave impetus to the Act's emergence. It locates the Act within Indonesia's counter terrorism legislative framework and considers whether the salient features of the new law appropriately meet the CFTL's objectives. It considers the steps taken by Indonesia which led to its removal from the FATF list of 'high-risk' jurisdictions and takes account of current issues in enforcement of countering the financing of terrorism in Indonesia – including the creation of a domestic list of terrorist individuals and entities and the freezing of their assets.

A NEW ACT FOR COUNTERING THE FINANCING OF TERRORISM

On 13 March 2013, Indonesian President Susilo Bambang Yudhoyono, and Minister for Law and Human Rights Amir Syamsudin signed into existence the CFTL. At 49 pages, including explanatory notes, the Act is a substantial yet economically-worded piece of legislative drafting. The Act represents Indonesia's visible, legislative commitment to the principles of the *International Convention for the Suppression of Financing of Terrorism 1999* (hereinafter the 'SFT Convention'), and the complementary special recommendations of the FATF. Despite the enactment of this comprehensive legislation for countering the financing of terrorism,¹ FATF, in June 2013, publicly acknowledged that Indonesia had made some progress to give effect to its obligations under the Convention, but continued to include Indonesia on its list of 'high risk and non-

¹ In this chapter, FATF usage of the acronym 'CFT' is followed, namely, 'countering the financing of terrorism'. The acronym CTF 'counter-terrorism financing' is also commonly seen in discussions of this topic.

cooperative jurisdictions.² It noted that Indonesia had ‘not made sufficient progress in implementing its action plan within the agreed timelines’ and that ‘certain strategic AML/CFT³ deficiencies remain regarding the establishment and implementation of an adequate legal framework and procedures for identifying and freezing of terrorist assets.’⁴ In June 2015, following a plenary meeting of the FATF in Brisbane, under the Presidency of Australia, Indonesia was moved to the list of “Jurisdictions no longer subject to the FATF’s On-Going AML/CFT Compliance Process”.⁵ A statement of 26 June 2015 welcomed Indonesia’s ‘significant progress’ in improving its AML/CFT regime, and removed Indonesia from its monitoring process. However, it noted that Indonesia was required to continue to work with the APG to address the ‘full range of AML/CFT issues identified in its mutual evaluation report.’⁶

BACKGROUND TO THE CFT ENVIRONMENT

While CFT has not been a central element in Indonesia’s counter terrorism operations to date, globally, CFT has been of key importance in the war on terror and the prevention of major international terrorist attacks.⁷ In 2012, Barrett argued:

Ten years after 9/11 it is inconceivable that any terrorist group, let alone one connected to al-Qaeda, could raise enough money to launch an attack on a similar scale through donations. Given the scrutiny of and visibility of transactions in the formal banking

² Financial Action Task Force [FATF], *Financial Action Task Force Annual Report 2011-2012* <<http://www.fatf-gafi.org/media/fatf/documents/brochuresannualreports/FATF%20annual%20report%202011%202012%20website.pdf>> 31-32; Financial Action Task Force [FATF], *Financial Action Task Force Public Statement – 21 June 2013* <<http://www.fatf-gafi.org/countries/d-i/indonesia/documents/public-statement-june-2013.html>>.

³ ‘AML/CFT’ – Anti-money laundering/countering financing of terrorism.

⁴ FATF, Public Statement - 21 June 2013 above n 2, 3.

⁵ Financial Action Task Force [FATF], *Improving Global AML/CFT Compliance: On-Going Process - 26 June 2015* <<http://www.fatf.gafi.org/documents/documents/fatf-compliance-october-2015.html>>.

⁶ Ibid.

⁷ Anne L. Clunan, "The Fight against Terrorist Financing" (2007) *Political Science Quarterly* vol. 121 no. 4 (Winter, 2006/2007) 569.

system any financier of terrorism would take a huge risk were he to transfer money to a known terrorist entity.⁸

Barrett's comments however predate the rise of ISIS and indicate how current UN-mandated CFT regimes,⁹ which grew out of a response to 9/11, may be insufficient to counter contemporary terrorist groups which operate along the lines of a state rather than a clandestine group (this will be considered further below).

Regardless of the mechanism used, the underlying principle of cutting off funds to terrorist groups is of utmost importance. The effective implementation of CFT laws by enforcement agencies can cut off the flow of money to terrorist groups, depriving them of vital funds needed to purchase weapons and continue operations. But CFT laws also function by criminalising the act of *funding* terrorism, so that persons or organisations knowingly providing any kind of funds for a terrorist act, individual or group, are committing a crime – even when they had no intention of taking part in an actual terrorist attack themselves. CFT laws also expose 'money trails' which may generate previously unknown leads, and which can force terrorists to use more costly and high risk means of funding their activities – making them more susceptible to detection.¹⁰ CFT laws, therefore, have great potential to disable terrorist groups and individuals.

The last terrorist attacks on symbolic western targets within Indonesia were the synchronised bombings of the Marriott and Ritz-Carlton hotels in Jakarta's

⁸ Richard Barrett, "Preventing the Financing of Terrorism" (2012) *Case Western Reserve Journal of International Law* vol. 44, 719.

⁹ United Nations [UN], "United Nations Security Council Resolution 1373" in *S/RES/1373(2001) 4385 mtg*, (2001).

¹⁰ Financial Action Task Force [FATF], "International Best Practices Targeted Financial Sanctions Related to Terrorism and Terrorist Financing (Recommendation 6)" (June 2013) <<http://www.fatf-gafi.org/media/fatf/documents/recommendations/BPP-Fin-Sanctions-TF-R6.pdf>>.

Kuningan business district in 2009.¹¹ However, terrorism, and the funding of terrorism, remain serious and pressing issues in Indonesia. While there have been no major bomb attacks on foreign targets, low level violence, primarily between terrorist groups and police, continues – four police officers were killed by suspected terrorists in the month of August 2013 alone.¹² Another police officer was fatally shot in Central Jakarta in September 2013¹³ and six suspected terrorists were shot and killed in police raids in January 2014.¹⁴ And the threat of a major bomb attack also remains – in August 2013, a bomb exploded in a Jakarta Buddhist temple injuring three people; the attack was allegedly in response to violence against Rohingya Muslims in Myanmar.¹⁵ The emergence of support for ISIS in Indonesia from 2014 onwards presents the real threat of renewed attacks in Indonesia from returning foreign terrorist fighters (FTFs) and domestic groups following the directives of ISIS leaders in the Middle East.¹⁶

¹¹ Markus Sihaloho, "Indonesia Passes Law to Stop Terrorism Funding" *Jakarta Globe* (online) 12 February 2013 <http://www.thejakartaglobe.com/home/indonesia-passes-law-to-stop-terrorism-funding/571184#Scene_1>.

¹² Ariane Meida, "Penembakan Polisi Bisa Jadi Tren Bila Kasusnya Tak Terbongkar" *Kompas* (online) 18 August 2013 <<http://megapolitan.kompas.com/read/2013/08/18/1625064/Penembakan.Polisi.Bisa.Jadi.Tren.Bila.Kasusnya.Tak.Terbongkar>>.

¹³ Bayu Marhaenjati and Aris Cahyadi, "Police Officer Fatally Shot near KPK Headquarters" *Jakarta Globe* (online) 10 September 2013 <<http://www.thejakartaglobe.com/news/jakarta/police-officer-fatally-shot-near-kpk-headquarters/#more->>.

¹⁴ Zubaidah Nazeer, "Raids in Indonesia Dent 'Ring' of Terror Groups" *The Jakarta Post* (online) 3 January 2014 <<http://www.thejakartapost.com/news/2014/01/03/raids-indonesia-dent-ring-terror-groups.html>>.

¹⁵ Nadya Natahadibrata, "Bomb Threatens Pluralism" *The Jakarta Post* (online) 6 August 2013 <<http://www.thejakartapost.com/news/2013/08/06/bomb-threatens-pluralism.html>>; Sandro Gatra and Ariane Meida, "Rohingya: Hentikan Teror Atas Nama Rohingya Di Indonesia!" *Kompas* (online) 6 August 2013 <<http://nasional.kompas.com/read/2013/08/06/1932561/Rohingya.Hentikan.Teror.atas>Nama.Rohingya.di.Indonesia>>.

¹⁶ Peter Lloyd and Suzanne Dredge, "ISIS Recruitment Video Join the Ranks Urges Indonesian Muslims to Migrate to the Islamic State" *ABC News* (online) 29 July 2014 <<http://www.abc.net.au/news/2014-07-28/isis-releases-recruitment-video-target-indonesian-muslims/5629960>>; Institute for Policy Analysis of Conflict [IPAC], *The Evolution of ISIS in Indonesia* IPAC Report No. 13, 24 September 2014; Graeme Wood, "What ISIS Really Wants" *The Atlantic* (online) 24 February 2015 <<http://www.theatlantic.com/magazine/archive/2015/03/what-isis-really-wants/384980>>; Lim Yan Liang, "Foreign ISIS Fighters 'Will Be a Threat for Decades'" *The Jakarta Post* (online) 17 April 2015 <<http://www.thejakartapost.com/news/2015/04/17/foreign-ISIS-fighters-will-be-a-threat-decades.html>>.

Indonesian terrorist networks have shown remarkable resilience and ingenuity, in respect of their funding efforts. Groups have resorted to many forms of crime to fund their activities, including bank robbery, motorcycle and jewellery theft, smuggling, narcotics trading, posing as mobile phone-card agents, and operating businesses under the guise of corporate social responsibility or welfare activities.¹⁷ Internet fraud has also been used on at least one occasion as a major source of funds. In May 2012, the head of the National Counter-terrorism Agency, Ansyaad Mbai, commented that counter-terrorism officers had arrested 11 suspects who had hacked into multi-level marketing websites and stole over Rp8 billion (over US\$800,000) to fund terrorist training camps, and purchase explosive materials.¹⁸ Indonesian terrorist groups have not yet resorted to kidnapping for ransom as a source of funds, a common practice among African terrorist groups. Nor have they resorted to illegal trade in endangered species, like some al-Qaeda linked groups in India and Bangladesh.¹⁹

The examples outlined above, while indicating a continuing threat of resilient and innovative domestic terrorist groups, also arguably point to the success of international CFT efforts. Whereas the Bali bombing of 2002 was funded directly from foreign funds connected to Al Qaida, recent terrorist activities indicate that groups have been forced into the position of funding, and fending for, themselves. At his trial in 2012, convicted Bali bomber Umar Patek spoke of weakening ties between Indonesian jihadist groups such as Jemaah Islamiyah and Al Qaida, which formerly funded their

¹⁷ International Crisis Group [ICG], *How Indonesian Extremists Regroup* Asia Report No. 228, 16 July 2012 <<http://www.crisisgroup.org/~media/Files/asia/south-east-asia/indonesia/228-how-indonesian-extremists-regroup.pdf>>.

¹⁸ "Financing of Terrorism Set to Face Scrutiny under Bill before House" *Jakarta Globe* (online) 12 September 2012 <<http://www.thejakartaglobe.com/home/financing-of-terrorism-set-to-face-scrutiny-under-bill-before-house/543879>>.

¹⁹ Lorraine Elliott, "Fighting Transnational Environmental Crime" (2012) *Journal of International Affairs* vol. 66 Fall/Winter no. 1, 87.

operations.²⁰ While the nature of terrorist financing in Indonesia has undergone transformation in recent years, the fact remains that terrorist groups remain active and committed to their cause, and they will use any means necessary to fund their activities.

Given the continued activity of terrorist groups, particularly in light of efforts to finance FTFs to travel to Syria in support of ISIS,²¹ an effective means of disrupting and completely cutting off funds to terrorist groups is urgently needed in Indonesia. However, to function effectively as a method of law enforcement, a CFT regime requires the knowledge and cooperation of several stakeholders; government departments, law enforcement agencies and Financial Services Providers (FSPs). It is therefore essential for all stakeholders to be aware of, and implement, these CFT laws – for the common good of fighting and preventing terrorist violence. All FSPs operating in Indonesia, both formal and informal, are now subject to the provisions of the Act, which includes substantial penalties for non-compliance. For example, Article 13 of the Act provides that FSPs which fail to report a ‘suspicious transaction’ to PPATK within three days of becoming aware of it, face a penalty of up to Rp1 billion (approximately US\$100,000).

THE INTERNATIONAL LAW BACKGROUND

In her analysis of CFT, McGarrity argues that the international counter-terrorism financing regime ‘can best be described as a ‘patchwork’ of international instruments. Whilst each of these instruments requires states to criminalise the financing of terrorism, there are important points of distinction in the detail’.²²

²⁰ "Al Qaeda's Links with SE Asia Fraying: Patek" *The Jakarta Globe* (online) 19 February 2012 <http://www.thejakartaglobe.com/home/al-qaedas-links-with-se-asia-fraying-patek/498998#Scene_1>.

²¹ "Indonesia Arrests Six Heading to Syria" *Sydney Morning Herald* (online) 28 December 2014 <<http://www.smh.com.au>>.

²² Nicola McGarrity, "The Criminalisation of Terrorist Financing in Australia" (2013) *Monash University Law Review* vol. 38 no.3, 55.

The international law response to terrorism and terrorism financing goes back well before 9/11. For example, the UN has, for several decades, condemned acts of aggression and terrorism by both states and non-state actors. General Assembly Resolution 2625 (XXV) *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States* of October 1970 and General Assembly Resolution 3034 (XXVII) *Measures to Prevent International Terrorism* of December 1972 both condemn terrorist acts without prescribing clearly and unequivocally what constitutes terrorism.

Twenty years later, General Assembly Resolution 46/51 *Measures to Eliminate International Terrorism* of December 1991 recalls no less than nine of the UN's resolutions and declarations from the 1970s and 1980s. The Preamble again expresses the UN's deep disturbance at 'the world-wide persistence of acts of terrorism in all its forms ... including those in which States are directly or indirectly involved'.

General Assembly Resolution 49/60 *Measures to Eliminate International Terrorism* of December 1994 contains the first specific reference to the act of financing terrorism. Reminiscent of the wording of Resolutions 2625 (XXV) of October 1970 and 46/51 of December 1991, Resolution 49/60 once again recalls the growing list of resolutions, declarations, treaties and conventions²³ on terrorism, and condemns all acts of international terrorism. An important difference, however, is the inclusion of the

²³ United Nations Security Council Resolution 49/60 Preamble recalls that 'the existing international treaties relating to various aspects of the problem of international terrorism [include], inter alia, the Convention on Offences and Certain Other Acts Committed on Board Aircraft 1963, the Convention for the Suppression of Unlawful Seizure of Aircraft 1970, the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents 1973, the International Convention against the Taking of Hostages 1979, the Convention on the Physical Protection of Nuclear Material 1980, the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1988, the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988, the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf 1988, and the Convention on the Marking of Plastic Explosives for the Purpose of Detection 1991.'

crucial term 'financing' in its language. Article 5(a) of Resolution 49/60 calls on states to 'refrain from organizing, instigating, facilitating, *financing*, encouraging or tolerating terrorist activities' within their respective territories (emphasis added).

But, as McGarrity points out, 'a substantial portion of the funds used for terrorist activities is now provided by private individuals and organisations rather than states'.²⁴ General Assembly Resolution 51/210 *Measures to Eliminate International Terrorism* of December 1996 recognised this weakness and, stressing the need for international and regional cooperation, specifically called upon States, at paragraph 3(f):

To take steps to prevent and counteract, through appropriate domestic measures, the financing of terrorists and terrorist organizations, whether such financing is direct or indirect through organizations which also have or claim to have charitable, social or cultural goals or which are also engaged in unlawful activities such as illicit arms trafficking, drug dealing and racketeering, including the exploitation of persons for purposes of funding terrorist activities...and in particular to consider, where appropriate, adopting regulatory measures to prevent and counteract movements of funds suspected to be intended for terrorist purposes without impeding the freedom of legitimate capital movements.²⁵

Importantly, paragraph 9 establishes an *ad hoc* committee to develop a 'comprehensive legal framework of conventions dealing with international terrorism'.²⁶ While work on this comprehensive framework is ongoing, importantly for this discussion, the *ad hoc* committee's deliberations led to the creation and adoption by the General Assembly, by Resolution 54/109 of 9 December 1999,²⁷ of the *International Convention for the Suppression of the Financing of Terrorism* ('the Convention'). As later discussed, the Convention (along with FATF recommendations) provides the legal framework and

²⁴ McGarrity, above n 22, 57.

²⁵ United Nations [UN], "General Assembly Resolution 51/210 Measures to Eliminate International Terrorism" A/RES/51/210 (1996) para 3(f).

²⁶ *Ibid*, para 9.

²⁷ United Nations [UN], *International Convention for the Suppression of the Financing of Terrorism* United Nations Resolution 54/109 of 9 December 1999, opened for signature 10 January 2000.

principles upon which Indonesia's domestic legislation is based. Indeed, several of the provisions in the domestic legislation mirror key articles of the Convention.

Firstly, art 1(1) of the Convention provides a very broad definition of 'funds' which includes 'assets of every kind whether tangible or intangible, moveable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including, but not limited to, bank credits, travellers cheques, bank cheques, money orders, shares, securities, bonds, drafts and letters of credit.'

Secondly, it sets out a definition of a 'terrorist act' and criminalises financial support for that act. Given that defining terrorism has been described as 'a futile polemical exercise' and 'the Bermuda Triangle of terrorism,'²⁸ this is a significant achievement – even if the definition is only for the limited purposes of the CFT regime in the Convention. Article 2(1) creates an offence for any person who, directly or indirectly, unlawfully and wilfully provides or collects funds with the intention that they should be used in full or in part in order to carry out:

- (a) An act defined in one of the treaties listed in the Annex²⁹, or:

²⁸ Alex Schmid, ed. *The Routledge Handbook of Terrorism Research* (Routledge Taylor & Francis Group, 2011) 42.

²⁹ In the absence of a comprehensive definition of 'terrorism' the UN has created a series of twelve conventions which proscribe specific acts which are considered to be terrorist in nature. This includes acts such as hijacking aircraft, taking hostages, and terrorist bombings. As Scharf points out however, there are gaps in the existing anti-terrorist conventions – for example, an attack by a means other than explosives on a passenger train or bus, would not be covered, nor would assassinations of businessmen, or journalists, while similar attacks on diplomats are prohibited. (Scharf, 2011: Para 10) This situation therefore underlines the need for a comprehensive consensus definition of terrorism. (Schmid, 2004: p19) The twelve conventions listed in the Convention Annex include the following:

Convention for the Suppression of Unlawful Seizure of Aircraft, 1970; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1971; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1973; International Convention against the Taking of Hostages, 1979; Convention on the Physical Protection of Nuclear Material, 1980; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1988; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988; Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms

(b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

Article 2(1)(a) above may be problematic as it not only gives rise to gaps; it also depends on which of the twelve terrorism conventions a state has ratified. Article 2(1)(b) rectifies this to some extent by effectively providing a working definition of a terrorist act – in a nutshell, any act intended to cause death or serious injury to civilians with the purpose of creating fear or coercing a government. Article 2(3) establishes that it is not necessary for the funds to *actually* have been used to carry out a terrorist act. Articles 2(4) and 2(5) create additional offences for those who attempt, participate as an accomplice, organize or direct others, or contribute to the commission of an offence under art 2(1) – that is, inchoate offences.

The Convention further requires, pursuant to art 4, that State Parties create criminal offences (with corresponding penalties that reflect the seriousness of the offences) in their domestic law based on the offences set forth in art 2. Further, the offences must also apply to ‘legal entities’ which commit the offences and extra-territoriality provisions must be applied as well. For example, where an offence is committed on board a ship flying the flag of the state, or where a national of that state commits a terrorist act in another country, that state may establish jurisdiction to prosecute the offence.

State Parties are also required to take measures to provide for the freezing, seizure and forfeiture of funds allocated for terrorist acts (art 8), and to prosecute or extradite, where they become aware that an offender is within their jurisdiction (arts 9 and 10). The offences set out in art 2 are expressly extraditable offences, and the

located on the Continental Shelf, 1988; International Convention for the Suppression of Terrorist Bombings, 1997.

Convention stresses the need for international cooperation in the investigation and prosecution of offenders.

Convention art 18 stipulates the obligations and regulations to be applied to financial institutions such as identification of customers and the reporting of suspicious transactions. As discussed later, these principles are enunciated in more detail in FATF's Special Recommendations.

It is worth noting that the Convention opened for signature from 10 January 2000 until 31 December 2001 (art 25.1), and required 22 ratifications to enter into force (art 26). By early September 2001, it had been ratified by only four states. However, following the 9/11 terrorist attacks and UN Resolution 1373, the Convention was rapidly ratified by many states and came into force on 10 April 2002. Indonesia signed the Convention on 24 September 2001,³⁰ and ratified it by Act of Parliament in 2006.

In considering the UN response to CFT, two Security Council resolutions are of particular significance, namely Resolution 1267 of 1999,³¹ and Resolution 1373 of 2001.³² Resolution 1267 was aimed specifically at disabling the Taliban, and Al Qaida, and required states to freeze any funds connected to the Taliban. It also established the '1267 Committee', tasked with creating a list of individuals and organisations associated with Al Qaida, for whom states are required to freeze their assets 'without delay'. The list contains several Indonesian nationals and organisations including Abu Bakar Ba'asyir, Umar Patek, Jemaah Anshorut Tauhid (JAT), Mujahidin Indonesia Timur

³⁰ Yunus Husein, "Naskah Akademik RUU Pemberantasan Pendanaan Terorisme" (Badan Pembinaan Hukum Nasional Kementrian Hukum dan HAM RI, 2012).

³¹ United Nations Security Council [UNSC], "UN Security Council Resolution 1267" in *S/RES/1267* (1999).

³² UN above n 9.

(MIT) and ISIL (listed as 'Al-Qaida in Iraq') among others.³³ As discussed below, the implementation of this list and the significance of freezing of assets 'without delay' has been one of the main stumbling blocks faced by Indonesia.

Resolution 1373 was issued on 28 September 2001, just over two weeks after 9/11, and is broader in its application than Resolution 1267. Scharf points out:

Resolution 1373 in essence transformed the Terrorist Financing Convention into an obligation of all UN member states, requiring them to prohibit financial support for persons and organizations engaged in terrorism.³⁴

Amongst other provisions, it 'decided' that all states shall 'prevent and suppress the financing of terrorist acts' by criminalising the provision or collection of funds for terrorism and by freezing funds of persons who commit terrorist acts. Broadly speaking, the obligations of Resolution 1373 are similar to those under the Convention with one major exception – the Convention defines a terrorist act. This may be one reason why under Article 3(d) of Resolution 1373 States are called upon to 'become parties as soon as possible to the relevant international conventions...including the Convention for the Suppression of the Financing of Terrorism of 1999'.³⁵

While there are considerable overlaps between the Convention and Resolution 1373, together they form a much stronger and more comprehensive CFT regime. For example, the Convention contains provision for preventative mechanisms – such as Know Your Customer (KYC) procedures and Suspicious Transactions Reports (STRs) – that are not mentioned in Resolution 1373. On the other hand, Resolution 1373 creates the Counter-Terrorism Committee which is specifically tasked with pursuing implementation by various State Parties of the Resolution and Convention provisions.

³³ United Nations [UN], "The List Established and Maintained by the 1267 Committee with Respect to Individuals, Groups, Undertakings and Other Entities Associated with Al-Qaida" in *List of Groups and Individuals associated with Al Qaida* UN 1267 Committee (2013).

³⁴ Michael Scharf, "Defining Terrorism as the Peacetime Equivalent of War Crimes: Problems and Prospects" (2004) *Case Western Reserve Journal of International Law* vol. 36 no. 2/3, 361-2.

³⁵ UN, above n 9, art 3(d)

Resolution 1373 also provides that in respect of terrorist groups not linked to Al Qaida or the Taliban, states will be responsible for compiling their own domestic lists of terrorist individuals or organisations – and consequently freezing their assets. The compilation of this domestic list was a key issue in Indonesia's non-compliance, and the creation of the list in late 2014 led to Indonesia's removal from the FATF watch list in mid-2015.

Outside the UN arena, FATF has had a significant impact on the introduction of CFT laws. Established in 1989 under the auspices of the OECD, FATF's original mandate was to examine issues of combating international money laundering. However, following 9/11 it expanded its role to include CFT; since then it has issued IX Special Recommendations on Terrorist Financing.³⁶ As Lindholm and Realuyo note, while FATF's recommendations are non-binding, inclusion on its list of non-compliant countries may have serious consequences for a country's ability 'to do business in the international financial system and discourage investors from engaging in a country.'³⁷ This 'name and shame' process has been extremely effective in bringing countries into line with international standards on both AML and CFT. Indeed, a prominent Indonesian lawmaker and politician, Eva Kusuma Sundari, criticized the CFTL, arguing that its introduction 'was mainly triggered by the critical report of the Financial Action Task Force (FATF) on Indonesia'.³⁸

FATF's IX Special Recommendations mirror the Convention, in that they direct states to ratify the Convention, criminalise acts of terrorist financing, freeze assets,

³⁶ Financial Action Task Force [FATF], *Financial Action Task Force IX Special Recommendations on Terrorist Financing* (February 2008) <<http://www.fatf-gafi.org/recommendations>>.

³⁷ Danielle Camner Lindholm and Celina B. Realuyo, "Threat Finance: A Critical Enabler for Illicit Networks" in *Convergence: Illicit Networks and National Security in the Age of Globalization* (Washington D.C.: Institute for National Strategic Studies, National Defence University, 2013) 124-5.

³⁸ "New Terror (Finance) Bill May 'Contradict Other Prevailing Laws'" *The Jakarta Post* (online) 2 July 2012 <<http://www.thejakartapost.com/news/2012/07/02/new-terror-bill-may-contradict-other-prevailing-laws.html>>.

report suspicious transactions and cooperate internationally. But Recommendations VI, VII, VIII and IX add detail relating to issues of alternative remittances, wire transfers, non-profit organisations and cash couriers – all areas on which the Convention remains silent.

THE INDONESIAN CFT LEGISLATIVE FRAMEWORK

While there has been much international academic literature devoted to global terrorism issues, very little has given detailed attention to Indonesia's domestic anti-terrorism legislation, and even less on its CFT laws. This is no doubt due to the fact that the comprehensive counter terrorism financing legislation was enacted relatively recently in March, 2013. However, this is only part of the story. While it can now be said that Indonesia's domestic legislation is largely, if not completely, compliant with the provisions of the Convention and the FATF IX Special Recommendations, that was not the case beforehand. Twelve years elapsed between Indonesia's ratification of the Convention, and its enactment of domestic legislation. Critics of the Indonesian government might argue that this demonstrates a lack of commitment to counter-terrorism. On the other hand, legislation criminalising the financing of terrorism has existed since October 2002 with the creation of Interim Law No.1 of 2002 and subsequently the ATL.

Following the Bali bombing of October 2002, Indonesia hastily enacted the ATL. A detailed discussion of this law, Indonesia's *general* anti-terrorism legislation – first enacted using the President's emergency powers and subsequently ratified by Parliament – is contained in Chapter 4. However it may be noted that the ATL contains several articles which are relevant to terrorism financing.

Articles 11, 12, 13 and 29 of the ATL, all relate to financing of terrorism. Article 11 criminalises the financing of terrorism. It states:

Any person who wilfully provides or collects funds with the intention that they be used, or ought reasonably suspect that they will be used in whole or in part for the

commission of a terrorist act as set out in Articles 6, 7, 8, 9 and 10 is subject to a punishment of between 3 and 15 years imprisonment

Article 29 also empowers investigators, prosecutors and judges to order banks and other financial institutions to immediately freeze the assets/property (*harta kekayaan*) of any person, where it is known or suspected that they are the result (*hasil*) of a terrorist act and/or a crime connected with terrorism. The assets/property are ordered to remain in the bank.

Commenting on the terrorism financing provisions in the ATL, the Asia Pacific Group (APG) a regional sub-group of the FATF said in its Mutual Evaluation Report of Indonesia in 2008:

Terrorist financing is criminalised in articles 11-13 of *Law No.15 of 2003 Concerning Government Regulation in Lieu of Law Number 1 Year 2002 concerning Combating Criminal Acts of Terrorism* (the Anti-Terrorism Law), which came into force in October 2002. Article 11 covers the collection and provision of funds for terrorist acts, but does not cover indirect provision or collection. 'Funds' is not defined and would be limited to its common meaning. Article 12 provides for the collection and provision of the more widely defined 'assets', to support terrorist acts related to nuclear materials, chemical & biological weapons etc. Article 13 covers provision of funds and other assets to the perpetrator of a specific criminal act of terrorism. The TF offence does not cover funding for all of the terrorist offences that are listed in UN TF Convention (1999). The TF offence appears to require that funds were actually used to carry out or attempt to carry out a criminal act of terrorism. The activity of collecting funds for terrorists or terrorist organisations (either for the purpose of committing a terrorist act or any other purpose) is not clearly criminalised. Corporate criminal liability is available for the TF offence; however the assessment team has raised concern with the application of corporate liability. Sanctions for natural persons are limited to imprisonment, but available terms are dissuasive (3-15 years). Only fines are available for legal persons and these are dissuasive (up to US\$100 million).

8. Despite the very serious terrorism threats in Indonesia, there has been very limited use of the TF offence and very few TF investigations. At the time of the onsite visit, only one TF prosecution had been carried forward and this resulted in a conviction.

9. The regime to seize, freeze and confiscate criminal property is generally limited.³⁹

Despite the deficiencies in the CFT regime raised in the report, by October 2002, Indonesia had complied with its international CFT obligations to the extent that it had criminalised the act of financing terrorism, and provided a mechanism by which the assets known or suspected to be the result of a terrorist act or a crime connected with terrorism could be 'frozen'.

These few relatively brief sections, part of a hastily drafted response to a catastrophic terrorist attack, essentially formed the extent of Indonesia's CFT regime for almost a decade. According to a PPATK representative, as of 2013 there had been 15 prosecutions of terrorism funding using Article 11.⁴⁰ Among the most notable cases was the 2011 trial of Islamist cleric Abu Bakar Ba'asyir who was convicted of financing a terrorist training camp in Aceh and sentenced to 15 years imprisonment.⁴¹ Another is the case of Abdul Haris, who in 2011 was convicted of collecting funds for the Aceh training camp and sentenced to nine years imprisonment.⁴² The APG report refers to the case of Ainul Bahri, a JI supporter who was convicted and sentenced to 15 years for several offences, including terrorist financing, and 'appears to apportion criminal liability to JI and applies sanctions against a legal person JI.'⁴³ In 2013, three men were convicted of committing internet fraud and using the funds to finance a terrorist training camp in Poso, Central Sulawesi.⁴⁴ In July 2015, Afief Abdul Majid was convicted

³⁹ Asia Pacific Group [APG], *APG 2nd Mutual Evaluation Report on Indonesia against the FATF 40 Recommendations (2003) and 9 Special Recommendations* Asia/Pacific Group on Money Laundering/Financial Action Task Force (July 2008).

⁴⁰ Syahril Ramadhan, "Transcript of Interview with Syahril Ramadhan Directorate of Compliance and Supervision Indonesian Financial Transaction Reports and Analysis Centre" 16 September 2013.

⁴¹ "Australia Welcomes Bashir Verdict" *News.com.au* (online) 16 June 2011 <<http://www.news.com.au/breaking-news/australia-welcomes-bashir-verdict/story-e6frfku0-1226076604101#ixzz1TYwE9VGq>>.

⁴² Edward Panggabean, "Pengumpul Dana Teroris Dituntut Sembilan Tahun" *Liputan 6* (online) 1 March 2011 <<http://berita.liputan6.com/read/322431/pengumpul-dana-teroris-dituntut-sembilan-tahun>>.

⁴³ APG, above n 39.

⁴⁴ Ramadhan, above n 40.

and sentenced to four years imprisonment for his role in funding the Aceh training camp in 2010.⁴⁵

After the enactment of the 2002 anti-terrorism law, no further legal developments occurred in relation to CFT until 2006, when Indonesia officially ratified the Convention by Act of Parliament. However, this Act alone is not sufficient to place the Convention on an equal footing with other national legislation. A further Act was required, which did not occur until 2013.

The only other CFT-related development came in 2010 with the enactment of the Anti-Money Laundering Act (Law Number 8 of 2010 – hereinafter the ‘AMLL’). Money laundering and countering the financing of terrorism are two distinct phenomena. Money laundering concerns the act of concealing the illicit origin of funds of crime. CFT is concerned with preventing funds of any kind, licit or illicit, from making its way into the hands of terrorists.

However, the enactment of the AMLL is significant for several reasons. It creates the central governmental agency for monitoring financial transactions, the PPATK. As a central governmental authority for monitoring money laundering and counter terrorism financing, the PPATK is not part of any government ministry and reports directly to the President (art 37(2)). Ramadhan posits that this places the PPATK on an equal footing with the other major non-ministerial terrorism body, the National Counter Terrorism Agency (BNPT).⁴⁶

The AMLL is also significant to CFT in that it places reporting obligations on FSPs where they detect transactions which are suspected of being connected to

⁴⁵ Adam Fenton and Hery Firmansyah, "Has Indonesia Gone Soft on Terrorism?" *The Jakarta Post* (online) 10 July 2015 <<http://www.thejakartapost.com/news/2015/07/10/has-indonesia-gone-soft-terrorism.html>>.

⁴⁶ Ramadhan, above n 40, 10.

criminal funds.⁴⁷ Under art 2(2) of the AMLL, assets which are known or suspected of being used in connection with terrorist groups or individuals are specifically included, and must be reported to the PPATK (art 23(1)(a)).

Therefore, prior to the enactment of the CFTL, Indonesia's banks and other FSPs were already required to report any transactions they suspected of being connected to terrorism. However, the AMLL does not set out any specific penalties for non-compliance, other than to say it is the responsibility of the PPATK to monitor compliance (art 40(c)) and that FSPs that fail to report suspicious transactions within three days will be subject to an 'administrative sanction' (art 25(4)).⁴⁸ Under the AMLL (art 26) banks and other FSPs are empowered to conduct temporary freezes, without any oversight, on suspicious transactions, and funds are frozen for a period of five days. The PPATK must be notified within 24 hours of such an action (art 26(5)). As Ramadhan pointed out, the system has worked quite well and has been used in 'around 100' instances to freeze assets. Following the initial five-day freeze, and report, the PPATK 'has to coordinate quickly with police or the anti-corruption authorities. If they say 'continue freeze' then usually the PPATK or the investigator will issue a new freezing order for a longer period.'⁴⁹

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Indonesia's counter-terrorism efforts to date have focussed on enforcement rather than preventative measures – that is, capturing and prosecuting terrorist suspects.⁵⁰

⁴⁷ Ibid.

⁴⁸ The elucidation to art 40(c) points to the role of the Supervisory and Regulatory Agencies (Lembaga Pengawas dan Pengatur 'LPPs') in assisting the PPATK in monitoring compliance of banks and other FSPs.

⁴⁹ Ramadhan, above n 40, 7.

⁵⁰ In a comparison of CFT laws across Southeast Asia, Croissant concludes that Indonesia has done more than most SEA nations in combating financing of terrorism. Aurel Croissant and Daniel Barlow, "Following the Money Trail: Terrorist Financing and Government Responses in Southeast Asia" (2007) *Studies in Conflict & Terrorism* vol. 30 no. 2, 131.

Indonesia's special counter-terrorism police detachment, Densus 88, has garnered international praise for their success in CT operations. The APG report of 2008 noted:

Indonesia has achieved significant success in preventing and combating terrorism. Up until May 2008 Indonesia had made 423 arrests...Authorities indicate that this is the largest number of arrests and convictions in the world to date.⁵¹

However, there has also been considerable criticism of their actions concerning human rights abuses; having, at last count, apprehended over 800 suspects over the past decade.⁵² In fact, while the Indonesian police have been praised for their 'significant success' in combating terrorism – police and the government have both been criticised for having done, and achieved, much less in the area of prevention – Vice President Boediono was quoted as saying that 'there has been too much emphasis on repressive actions and not enough on preventative'.⁵³

In Indonesia's post-dictatorship era much more critical attention has been given to sections of the anti-terrorism laws which provide police with greater coercive powers of arrest and detention, than to CFT issues. Apart from some media reporting when the CFTL was passed in March, 2013 there has been very little public forum discussion of CFT issues. In fact, it has been a deliberate policy of PPATK not to draw public attention to the CFT laws, for fear of challenge in the Constitutional Court.⁵⁴

One exception is a governmental report entitled 'The Final Report of the Academic Team on the Draft Law for the Prevention and Eradication of Terrorism

⁵¹ APG, "APG 2nd Mutual Evaluation Report on Indonesia against the FATF 40 Recommendations (2003) and 9 Special Recommendations." p16

⁵² "House to Bring Densus 88 to Heel over Human Rights Abuses" *The Jakarta Post* (online) February 16 2013 <<http://www.thejakartapost.com/news/2013/02/16/house-bring-densus-88-heel-over-human-rights-abuses.html>>.

⁵³ Arientha Primanita and Markus Junianto Sihaloho, "Prevention on Top of Government's New Anti-Terrorism Agenda" *Jakarta Globe* (online) 11 September 2012 <<http://www.thejakartaglobe.com/home/prevention-on-top-of-governments-new-anti-terrorism-agenda/543654>>.

⁵⁴ Ramadhan, above n 40.

Financing' ('the Report')⁵⁵ issued in 2012 in advance of enactment of the CFTL. Prepared by the Ministry of Law and Human Rights' Centre for Planning and Legal Development in conjunction with various government agencies including the National Police, the Indonesian Central Bank (BI) and PPATK, the 96-page report was intended as a background paper and resource for lawmakers when considering the draft version of the CFTL. The Report echoes the sentiment that, while much has been done by government agencies in the area of investigating and capturing terrorist suspects, less has been done in the area of prevention:

Efforts to eradicate terrorism through conventional methods ('follow the suspect') that is, by capturing and punishing terrorists, is not sufficient for preventing and eradicating terrorism. Other efforts are required...by applying a 'follow the money' approach which involves the PPATK, Financial Services Providers and law enforcement agencies to detect the flow of funds which are used or suspected of being used to fund terrorism.⁵⁶

It goes on to explain however, in repeated references to both the Convention and FATF IX Special Recommendations that:

The existing legislation relating to terrorism financing has not yet dealt with the prevention or eradication of the crime of terrorism financing in a satisfactory or comprehensive way...ratifying a convention is not sufficient for it to become operational, this requires a further action. The Prevention and Eradication of Terrorism Financing Bill will form a part of Indonesia's positive law equal to other national legislation...The need for counter terrorism financing to be dealt with in its own legislation is also triggered by the IX Special Recommendations of the FATF. These recommendations form the international standard for blocking access by terrorist groups and their supporters to the financial system.⁵⁷

Given that the Report is firmly based on the Convention and IX Special Recommendations principles, it is no surprise that the CFTL is very much in line with those provisions, and frequently mirrors the provisions.

⁵⁵ Husein, above n 30.

⁵⁶ *Ibid*, 2.

⁵⁷ *Ibid*, 3.

The Report in some ways attempts to justify Indonesia's failure to fully implement the Convention's provisions by arguing that the provisions in the then-existing CFT legislation were sufficient to cover its obligations. It also asserts that since 2008 PPATK and the Central Bank have been publishing and implementing the UN's consolidated list of terrorist individuals and groups to assist financial services providers in detecting and reporting suspicious transactions. It adds that from 2008 to 2010 PPATK found 128 transactions suspected of being connected to terrorism. Further, 35 suspicious financial transactions were reported to law enforcement agencies.⁵⁸

The Report argues that 'having already accommodated the obligations on State Parties as set out in the Convention, the ratification or enactment of the Convention by the Indonesian government tends more towards strengthening or confirming that commitment...Nonetheless, ratifying or enacting the convention is very important in strengthening Indonesia's anti-money laundering regime.'⁵⁹ These arguments are, however, flimsy. The reality is that, prior to March 2013, Indonesia was in significant contravention of its commitments under the Convention and it was the name and shame process of the FATF which drove legislators to act. It is not suggested that CFT is not taken seriously by the Indonesian parliament – rather it is a question of competing priorities. Indonesia's parliamentary website www.parlemen.net reveals a large backlog of laws to be considered and passed.

Whether this is really the case, it can now be said that Indonesia's domestic legislation is largely, albeit not yet completely, in line with international best practices and its obligations under the Convention. Whether this legislative conformity translates into greater detection and prevention in practice remains to be seen. In light of the

⁵⁸ Ibid, 20.

⁵⁹ Ibid.

critical importance of the Act to Indonesia's CFT regime, the Act's salient features warrant further attention.

PREAMBLE

The Preamble of the Act defers to the 1945 Indonesian Constitution as the basis of the state's duty to ensure the security and prosperity of the people. It states that in implementing and participating in a world order based on independence, peace and social justice the state must take firm action against any threats which disrupt the security of the people or the sovereignty of the state, including terrorism and any activities which support terrorism. Paragraph (b) states that financing is an essential element of terrorist acts and therefore any efforts to combat it must include the prevention of the financing of terrorism.

CHAPTER I – DEFINITIONS

Terrorism financing is defined in art 1(1) in terms similar to the Convention as 'any act of providing, collecting, giving or loaning funds, whether directly or indirectly, with the intention that they be used, or in the knowledge that they will be used, for a terrorist act, a terrorist organisation or a terrorist individual.' Convention art 2(1) makes no reference to 'loaning' of funds, hence this definition is wider and would catch that circumstance if it were ever to be raised as a defence. The Indonesian definition has dropped the phrasing 'in full or in part'. It is not made clear why this was done, and effectively leaves the door open to a defence along the lines of 'only a small percentage of the funds we collected were used for terrorism.' To prevent this situation the phrase 'in full or in part' ought to be inserted in any future amendments of the CFTL.

Article 1(2) of the CFTL defines a 'terrorist act' by reference to the ATL. Article 6 of the ATL 'defines' a terrorist act as being when: 'any person intentionally uses violence or the threat of violence to create a widespread atmosphere of terror or fear or which causes mass casualties by taking the liberty or lives and property of any person,

or which causes damage or destruction to vital strategic objects or the environment or public facilities or international facilities.’

By comparison, as discussed above, the Convention’s definition of a terrorist act is two-part, and refers to (a) any acts contained in the 12 terrorism conventions and (b) any act intended to cause death or serious injury to a civilian where the purpose is to intimidate a population or to compel a government or other organisation to do or abstain from doing any act.

While the wording of the ATL art 6 definition is unusual by its reference to the creation of mass casualties through the taking of liberty, lives and property, its references to damage and destruction of property, strategic vital facilities, and the environment arguably make the ATL art 6 definition far wider than the Convention. Whereas the Convention requires an act intended to cause death or serious injury, the CFTL (by reference to the ATL) therefore requires, taken at its most minimal interpretation, merely an act which causes a widespread atmosphere of fear by intending or threatening to cause damage to the environment or a public facility.

The author is aware of one case where the issue of creation of an atmosphere of terror was raised. Rusli Amiludin was convicted of terrorism offences relating to the killing of two men in Ambon in 2005. In his defence it was argued that, as a state of rioting, conflict and terror already existed in Maluku and Ambon at the time, the defendant could not be held responsible for creating a widespread atmosphere of terror.⁶⁰ Discussions of an atmosphere of terror in the Amiludin case, and the Abu Bakar Ba’asyir case of 2012, appear to focus on the creation of fear at a provincial level.⁶¹ Testimony adduced in the Bali Bombing trials indicates that detrimental effects

⁶⁰ Decision of Central Jakarta District Court in Jamaludin, Putusan Pengadilan Negeri Jakarta Pusat No. 1402/Pid.B/2012/PN.Jkt.Pst (2012).

⁶¹ Decision of Supreme Court of Indonesia in Abu Bakar Baasyir, Putusan Mahkamah Agung No. 2452 K/Pid.Sus/2011 Abu Bakar Baasyir (2012).

on the local economy are routinely raised in establishing the creation of an atmosphere of fear.⁶²

As noted by Jones in relation to cases of shootings of police officers 'it used to be that jihadis saw the creation of fear as a very specific objective...The aim now is much more instrumental. It's about getting weapons, taking revenge, and giving militants something to do...The main aim of killing police is certainly not to create fear.'⁶³ Yet shootings of police officers continue to be labelled terrorist acts, due to alleged connections to jihadist groups.⁶⁴

Article 1(3) of the CFTL expressly defines 'persons' to include corporations and art 1(4) defines corporations as including 'a collection of people and/or assets whether legal entities or non-legal entities'. This definition of a terrorist group or organisation is an improvement on the definition in the ATL – which doesn't refer to 'groups of people' only legal or non-legal bodies. Arguably this wider definition of a 'corporation' is wide enough to capture clandestine terrorist groups and networks. However, in terms of listing Indonesian terrorist groups, while there are a great number of different groups with different names, there is also a high level of permeability between the groups, in respect of assisting or harbouring other group members, exchanging information, strategies, funds and skills.⁶⁵ This 'blurring of the lines' between terrorist groups potentially creates a hurdle for police who are responsible for maintaining the list of terrorist organisations.

⁶² Mathew Zilko, "Bali Bombers: A Very Different Kind of Trial" (2003) *Brief* August 2003, 27; Elisabeth Oktofani, "Witnesses Detail Impact of Bali Bombings" *Khabar South East Asia* (online) 13 April 2012 <http://khabarsoutheastasia.com/en_GB/articles/apwi/articles/features/2012/04/13/feature-01>.

⁶³ Sidney Jones, "Papuan 'Separatists' vs Jihadi 'Terrorists': Indonesian Policy Dilemmas" *International Crisis Group Report* 22 January 2013 <<http://www.crisisgroup.org/en/publication-type/speeches/2013/jones-papuan-separatists.aspx>> 1.

⁶⁴ Gatra, "Memutus Rantai Terorisme Dengan Senjata Undang-Undang" *Indonesia Media* (online) 13 September 2012 <<http://www.indonesiamedia.com/2012/09/13/memutus-rantai-terorisme-dengan-senjata-undang-undang/>>.

⁶⁵ ICG, above n 17.

Article 1(6) defines a 'suspicious transaction related to terrorism financing' in two parts, namely, (a) a financial transaction where there is an intention to be used and/or where it is known that it will be used for terrorist acts; or (b) transactions involving any person on the list of suspected terrorists or terrorist organisations. The definition of 'suspicious transaction' will be of essential importance to those in the financial services industry, for it is such transactions that employees are required to report within three days of becoming aware of them. In the absence of an admission or incriminating statement from a customer, it is difficult to imagine how a bank employee could establish that a transaction was intended or known to be used for terrorism. In the absence of such an admission therefore it would arguably be very difficult to prove that a FSP had failed to report a suspicious transaction on this basis. A more likely situation is a failure by the FSP employee to check a current list for a listed individual or organisation, and allowed the transaction to proceed. Considering the enormous volume of daily transactions, it is conceivable, probably inevitable, that an inestimably large number of transactions will proceed without being checked in this manner.

It is here that criticisms of CFT as being akin to trying to 'find a needle in a haystack' come to the fore. Barrett for example speaks of 'the near impossibility of achieving full compliance with all nine Special Recommendations, let alone of assuring effective implementation.'⁶⁶ He also warns that where a perception of disproportionality seeps in between the burden of implementing the laws and the benefits of doing so, those implementing them will become less rigorous and those complying less caring.

Under art 1(10) a FSP is any person providing services in the field of finance or related services whether formal or informal. According to Ramadhan this definition would include designated non-financial businesses and professions (DNFBPs), such as

⁶⁶ Barrett, above n 8, 727.

lawyers, which offer any kind of financial service. A lawyer who offers only advocacy services, on the other hand, would not be included.⁶⁷ The Explanatory Notes to the Act list a number of examples of FSPs including, among others: banks, financial institutions, insurance companies and insurance brokers.

A Supervisory and Regulatory Agency (LPP) is one responsible for supervision, regulation and sanction of Financial Services Providers. The relationship between LPPs and the PPATK is expanded on further in the CFTL. In practice, there are two LPPs – for banks, the relevant LPP is Bank Indonesia; Indonesia’s central bank. For non-banks, the relevant LPP is the Financial Services Authority (Otoritas Jasa Keuangan or OJK). Whereas the PPATK can *recommend* sanctions against FSPs, it is the relevant LPP which will actually make a final determination on the execution of sanctions against FSPs.⁶⁸

CHAPTER II – SCOPE

Chapter II details the extraterritoriality provisions in the SFT Convention, that is, that the CFTL may apply within the territory of the Indonesia or outside Indonesia in certain cases where there is a nexus with Indonesia. External acts listed include those committed outside Indonesia by an Indonesian national, or acts committed against the Indonesian government or Indonesian flagged vessels or aircraft.

CHAPTER III – THE CRIME OF TERRORISM FINANCING

Article 4 criminalises terrorism financing, providing for a maximum penalty of 15 years imprisonment and a maximum fine of Rp1 billion. Article 5 criminalises attempts, conspiracies, or aiding terrorism financing with the same penalties as art 4.

Article 6 states ‘any person who wilfully plans, organises or moves/incites/encourages (*menggerakkan*) others to commit the offence set out in art 4 commits the offence of terrorism financing with a penalty of life imprisonment or a

⁶⁷ Ramadhan, above n 40.

⁶⁸ Ibid.

maximum penalty of 20 years imprisonment. The penalty here, a life sentence, or a temporary sentence of maximum twenty years, for planning, organising or inciting is harsher than the penalty in art 4 (15 years), and arguably far wider in scope. It is conceivable that the section applies to fiery speeches by Islamist clerics (*taklim*) which include a call to make donations to jihadist groups. Where the group is listed this would likely constitute a crime – however much would depend on how a court construed the term '*menggerakkan*'.⁶⁹ Where it is known or ought to be known that the funds would be used for a specific terrorist act, this would also constitute a crime under art 6 and expose the speaker to a maximum penalty of life imprisonment. The penalty's harshness presumably reflects the gravity of the offence for those in positions of authority, such as clerics or teachers, to abuse their position by encouraging others to commit the crime of funding terrorism.

CHAPTER IV – OTHER CRIMES RELATED TO TERRORIST FINANCING

Chapter IV stipulates the potential criminal liabilities of those working within the terrorism financing regime and financial services providers. Article 9 (the 'anti-tipping off' article) provides that any officer or employee of PPATK, investigating or prosecuting agencies, judges, or any person receiving documents or information relating to a suspicious transaction in the course of their duty is obligated to treat that information as secret. Leaking of any such document or information attracts a maximum penalty of four years imprisonment. Given the level of corruption within Indonesia's criminal justice system,⁷⁰ the maximum penalty of four years imprisonment is dissuasive to the leaking of such information.

⁶⁹ The author suggests that a useful legal test would be where a reasonable member of the target audience would be moved to make a donation or contribute funds.

⁷⁰ Simon Butt, "Anti-Corruption Reform in Indonesia: An Obituary?" (2011) *Bulletin of Indonesian Economic Studies*. vol. 47 no. 3, 381; Simon Butt, "Unlawfulness' and Corruption under Indonesian Law" (2009) *Bulletin of Indonesian Economic Studies* vol. 45 no. 2, 179.

Article 10 forbids directors, commissioners, managers or staff of FSPs from providing information regarding a suspicious transaction to any customer and provides a maximum penalty of 5 years imprisonment and a fine of Rp1 billion. The penalty here is higher as it specifies the giving of information to the customer (or any other person). Given the public safety consequences which may flow from the leaking of such information to a terrorist organisation it may be asked whether the penalty should not be even higher.

CHAPTER V – PREVENTION

Chapter V sets out provisions relating to prevention of CFT, with art 11 setting out four mechanisms by which prevention may be achieved. They are: (a) application of the principle of 'know your customer' (b) adherence to monitoring and reporting by FSPs (c) monitoring of money transfer systems and (d) monitoring the movement of cash in and out of Indonesia.

Article 13 on 'Reporting' is one which may cause most concern for those working in the financial services industry and requires any FSP to report any financial transaction suspected of being connected to the financing of terrorism within three days of becoming aware of the transaction. Subsection (2) however softens the impact of the preceding section by stating that where a provider 'intentionally' contravenes the section it may incur an administrative fine of up to one billion rupiah. This fine is to be administered by the LPP.

With regard to the reporting requirement set out in art 13 of the CFTL, former head of PPATK, Yunus Husein, has commented that, in practice, suspicious transaction reporting is initiated by the PPATK rather than the FSPs themselves. He acknowledged the difficulties faced by FSPs in monitoring transactions, but also pointed to a need for a

comprehensive database.⁷¹ These comments point to what is potentially the greatest weakness in the implementation of these CFT laws, and will be discussed further in the concluding remarks.

Articles 14-17 outline the legal framework for the monitoring and compliance with the reporting requirements. Monitoring and compliance is to be carried out by LPPs in cooperation with PPATK. Where an LPP discovers a suspicious transaction that has not been reported to PPATK, the LPP must immediately report this discovery to PPATK.

Articles 18, 19 and 20 set out the conditions for money transfers, including requirements for full details to be obtained with regard to both the sender and receiver of funds. Without those the transfer must be rejected. FSPs are also required to store details from all money transfers for at least five years from the date of the transfer. In the event of non-compliance providers will be liable to a sanction to be set out in further regulations.

CHAPTER VI – FREEZING ASSETS

Chapter VI stipulates the regime by which PPATK, investigators, prosecutors or judges may request or order a FSP to freeze assets where it is known, or ought to be known that the funds will be used for terrorism. It should be noted that the regime provided in Chapter VI is significantly different from that set out in art 29 of the ATL. The main difference is that the CFTL regime provides for judicial oversight of the power to freeze assets or funds. The CFTL regime expressly supersedes and repeals the provisions of art 29 of the ATL.

Article 22 sets out that a freeze may be executed where it is known or suspected⁷² that funds will be used for terrorism. Articles 23 through 26 then go on to

⁷¹ Ayu Prima Sandi, "Laporan Pendanaan Terorisme Perlu Libatkan PPATK" *TEMPO* (online) 2 May 2013 <<http://www.tempo.co/read/news/2013/05/02/090477338/Laporan-Pendanaan-Terorisme-Perlu-Libatkan-PPATK>>.

set out the procedure by which a freeze may be requested, executed and objected to. The operation of arts 23(1) and 23(2) is somewhat ambiguous as they appear to be contradictory. Under art 23(1) a request for a freeze on funds may originate from the PPATK, an investigator, a prosecutor, or a judge – and must be set out in writing in a letter of request to the FSP. This is expressly ‘an administrative request’ and it must set out the name and position of the person requesting the freeze, the identity of the corporation or person whose funds are being blocked, the reasons for the request and the location of the funds.

Article 23(2) sets out a parallel mechanism by which a court order may be sought from the Central Jakarta District Court – but does not provide further details.⁷³ In either case, art 23(5) requires FSPs to execute a block immediately after receiving a letter of request or an order – the freeze then remains in force for 30 days – and the FSP must provide a notice of compliance with the freeze to the requesting agency, and the party whose funds have been frozen, within one day. The frozen funds must remain with the FSP. After 30 days the FSP is then required to terminate the freeze on the funds. This would appear to contradict FATF Best Practices which require a block of ‘indeterminate duration’.⁷⁴ When questioned on the apparent contradiction of having one ‘administrative’ mechanism which does *not* require a court order, as well as a second mechanism which does require a court order, a representative of PPATK concurred that the two articles do appear to contradict each other.⁷⁵ He also pointed to the AMLL which contains a provision for administrative freezes of funds without any

⁷² The explanatory note to this article states that the standard of proof in this instance is that of *bukti permulaan yang cukup*, sufficient preliminary or ‘prima facie evidence’.

⁷³ This ‘dual’ mechanism of administrative and judicial proceedings accords with the process outlined in the FATF’s ‘Best Practices’ document. FATF, above n 10, 5.

⁷⁴ FATF, above n 10, 6.

⁷⁵ Fitriadi Muslim, "Transcript of Interview with Fitriadi Muslim, Executive Director, Indonesian Financial Transactions and Reports Centre, Pusat Pelaporan Dan Analisis Transaksi Keuangan (PPATK)" 29 October 2013, 2.

judicial oversight and argued that it has worked well in over 30 cases.⁷⁶ It may be reasonably asked why an investigator of terrorism funding would voluntarily seek judicial oversight of a freeze of funds, when he or she is also empowered under the CFTL to order an administrative freeze of the funds without any oversight.

Articles 24 to 26 set out a procedure for challenging a freeze by the holder of the funds. This may be done by lodging a notice of objection within 14 days with PPATK, investigator, prosecutor or judge, i.e. the party which requested the freeze. The notice must include the reasons for the objection and be accompanied by any relevant documentary evidence which may explain the legitimate origin of the funds. In the event of a notice of objection the requesting agency must either revoke the freeze or reject the notice of objection. Where it is rejected, art 25(6) advises that the complainant may bring a civil action in court. It seems potentially inequitable that an objection to a freeze on funds should be made to the same agency which sought the block. At the time of writing the author was not aware of any case law on this point.

CHAPTER VII – LIST OF SUSPECTED TERRORISTS AND TERRORIST ORGANISATIONS ISSUED BY GOVERNMENT

Chapter VII, arts 27 to 35 outline the procedure for issuing a list of terrorist organisations, the freezing of funds of listed persons or organisations, and a procedure for objecting. In brief, the Chief of the Indonesian Police shall submit an application to the Central Jakarta District Court of suspected terrorist individuals and organisations. Identities and reasons must be included as well as any documentary evidence or recommendations from relevant government departments or ministries.⁷⁷ The Court must then make a determination on the application within 30 days. Where the court grants the request, the name of the person or organisation is included on the list and

⁷⁶ Ibid.

⁷⁷ The explanatory note for art 27 mentions agencies such as the National Counter Terrorism Agency, Ministry of Foreign Affairs and the National Intelligence Agency.

the person or organisation must be notified within 10 days. The list is maintained by the Chief of Police.

The list is then forwarded, via the LPPs' to all FSPs who are required to block all funds belonging to those persons or groups. The blocked parties may object providing reasons and documents to the Chief of Police. The Chief of Police must then determine whether to remove the person from the list, or reject the application; in which case the party may bring an action in the Central Jakarta District Court.

REMAINING CHAPTERS

Chapter VIII sets out a procedure for law enforcement agencies to request information relating to funds from FSPs. Chapter IX relates to international cooperation including requests from foreign agencies for freezing of funds of terrorist organisations within Indonesia. Under Chapter IX a request for the freezing of assets of a person originates from an overseas jurisdiction and is forwarded to the Foreign Affairs Ministry. This request is then forwarded to the Chief of Police, and on to the Central Jakarta District Court in a process similar to that contained in Chapter VI. Chapters X and XI are administrative covering transitional arrangements and repealing previous legislation.

CRITICISMS OF INDONESIA'S CFT REGIME

In evaluating Indonesia's CFT legislative regime, it can be argued that Indonesia has fulfilled its obligations under the Convention. All of the major requirements of the Convention are met, namely funding terrorism (both specific terrorist acts and listed terrorist groups or individuals) is criminalised with serious penalties; a regime exists for the designation of terrorist groups and the freezing of their assets; laws exist requiring FSPs to apply KYC principles and to report suspicious transactions; procedures exist for extradition and international cooperation in CFT – and so on.

However, according to FATF, prior to 2015 Indonesia had not gone far enough.⁷⁸ And while FATF recommendations are not binding, being on the FATF's public statement of high-risk and non-compliant jurisdictions can provide a powerful incentive to act.

In a statement posted on 21 June 2013, FATF stated:

Indonesia has taken steps towards improving its AML/CFT regime, including by adequately criminalising terrorist financing through the CFT law enacted in February 2013. However, despite Indonesia's high-level political commitment to work with the FATF and APG to address its strategic AML/CFT deficiencies, Indonesia has not made sufficient progress in implementing its action plan within the agreed timelines, and certain strategic AML/CFT deficiencies remain regarding the establishment and implementation of an adequate legal framework and procedures for identifying and freezing of terrorist assets. The FATF encourages Indonesia to address these remaining issues, in compliance with international standards.

In 2013, PPATK representative Syahril Ramadhan confirmed these comments saying that the FATF's concerns could be divided into three areas: Indonesia's failure to create a domestic list of terrorism financiers; freezing assets of individuals on the Resolution 1267 list 'without delay'; and the *evidentiary standards* applied by Indonesian courts when determining whether to include a person on the domestic list.⁷⁹

As of June 2015 however, FATF had reversed this position and stated that it welcomed 'Indonesia's significant progress in improving its AML/CFT regime' and that Indonesia was 'no longer subject to the FATF's monitoring process'.⁸⁰ Indonesia's significant progress was, in part, that it had successfully, albeit quietly, issued a domestic list of terrorist individuals and organisations in line with the mechanism set

⁷⁸ Marc Posthouwer, "Australia's Enhanced Anti-Money Laundering and Counter-Terrorism Financing Regime: New Compliance Challenges for the Financial Services Industry" (2008) *Law in Context* vol. 25 no. 2, 161.

⁷⁹ Ramadhan, above n 40.

⁸⁰ FATF, above n 5.

out in Chapter VII of the CFTL, and had successfully blocked the assets of a number of individuals and entities totalling over Rp2 billion.

Diagram 3: Total assets seized by PPATK pursuant to CFTL since 2013

No.	Name of Bank	No. of accounts	Nominal (Rp)	Nominal (USD)
1.	PT. BMI	9	41,390,910.29	293
2.	PT. BCI	3	154,000.00	
3.	PT. BS	6	2,011,205,157.00	
4.	PT. BC	2	5,999,829.00	
5.	PT. BM	6	24,934,978.00	
Total		26	2,083,684,874.29	293

Source: Pusat Pelaporan dan Analisis Transaksi Keuangan (PPATK) Indonesian Financial Transactions and Reports Analysis Centre.

A series of lists (Daftar Terduga Teroris dan Organisasi Teroris 'DTTOT') have been issued and are available on the PPATK website. The first, DTTOT 2723 was issued in November 2014, and includes only one domestic terrorist group, Jemaah Islamiyah. Subsequent lists include other organisations such as MIT and JAT.

As outlined in Diagram 3, as of November 2015 26 related accounts had been frozen with a total value of over two billion rupiah.

Notwithstanding the creation of the DTTOT lists, FATF flagged two further issues related to Indonesia's judicial oversight mechanism which may remain relevant. First, that the freezing of assets of individuals on the 1267 list must be conducted 'without delay' and the judicial oversight mechanism provides an indefinite lag time during which a court considers whether to list the person or not (see the procedure set out in Chapter IX of the Act). Second, FATF requested further information regarding the evidentiary standards used by Indonesian courts in making such a determination.

In relation to the second issue, FATF's *International Best Practices* document, explains that in making determinations of whether individuals should be listed 'the

competent authority of each jurisdiction will apply the legal standards of its own legal system regarding the kind and quantum of evidence...to enhance and expedite cooperation...all countries are encouraged to share information on how the legal standard is applied...with examples.’⁸¹

At the time of writing no information was publicly available regarding the judicial process of listing a terrorist individual or organisation. In fact it appears to be a deliberate strategy to not publicise the move given the potential for political backlash. Surprisingly little or no media attention appears to have emerged on the issue of listing terrorist groups.

It may be noted that requests originating from a foreign country or jurisdiction, follow the procedure set out in Articles 43 to 46 of the CFTL (Chapter IX). As such, there is no time limit placed on the court in making its determination, unlike the procedure for designations from domestic authorities which is set out in Article 27 and includes a 30-day time limit.

Regarding the delays inherent in Indonesia’s judicial oversight mechanism, there are competing policy objectives at stake. On one hand the expedient freezing of assets of suspected terrorist financiers before they are able to be withdrawn or moved; on the other, notions of due process and fairness.⁸² In commenting on these issues, PPATK representative Fitriadi Muslim commented:

There is UNSC resolution number 1267, which sets out the obligation for jurisdictions to conduct freezing without delay of names listed in the UNSC resolution. It is very difficult for Indonesia to fulfil this obligation. The recommendation says there is no need for an order or permission from a court, but I think this recommendation goes against the presumption of innocence and human rights protections. So the parliament DPR and government agreed to have authority to conduct freezing but with an order

⁸¹ FATF above n 10, 6.

⁸² Further details on the application of Special Recommendation 6 can be found in the FATF Special Report on International Best Practices, FATF above n 10.

from the Jakarta District Court (JDC). So this is a problem, as it doesn't meet the FATF requirements.⁸³

Indeed, FATF's *International Best Practices* document which is intended to 'assist countries in developing and implementing' financial sanctions regimes refers to both of these competing policy objectives. It stresses that 'efforts to combat terrorist financing are greatly undermined if countries do not freeze the funds or other assets of designated persons and entities quickly and effectively.'⁸⁴ However, it also emphasises the importance of following established legal guidelines, the rule of law and due process.

Yunus Husein, Chairman of the committee which authored the draft CFT Bill Report, and former head of PPATK, criticised the Act for that reason. In discussing the mechanism contained in Articles 27 and 28 he pointed out that it would be possible for funds to be moved while this process proceeds.⁸⁵ One alternative, as adopted in the United States for example, is that the funds of anyone on the 1267 list are *automatically* frozen.⁸⁶ Further, the US mechanism for listing terrorist organisations provides no automatic judicial oversight mechanism. Instead an 'administrative record' is prepared by the US State Department which is a compilation of information demonstrating that the criteria for designation have been satisfied. Congress is then notified of the intention to designate and given 7 days to review the designation. The organization may apply to have the designation revoked.⁸⁷

⁸³ Muslim, above n 75, 1.

⁸⁴ FATF, above n 10, 4.

⁸⁵ "Pemblokiran Di UU Pendanaan Terorisme Dikritik" *Hukumonline* (online) 3 May 2013 <<http://www.hukumonline.com/berita/baca/lt5183810a35729/pemblokiran-di-uu-pendanaan-terorisme-dikritik>>.

⁸⁶ Ramadhan, above n 40.

⁸⁷ United States Department of State, "Designated Foreign Terrorist Organizations List" <<http://state.gov/md123085.htm>. The list of Designated FTOs is maintained and updated by the US Department of State.

A change to the Indonesian CFT laws, however, would require an amendment to the CFTL, and that is unlikely to happen given Indonesia's past record on revising terrorism laws. While it might seem easy to dismiss concerns related to the 1267 list, due to the decreasing relevance of Al Qaida in the years since 9/11, Ramadhan has pointed out that the United States continues to add Indonesian nationals to the list. Therefore, the list and concerns relating to its implementation continue to be regarded as being of high importance to FATF, the United Nations and the United States in particular.

A related issue in the area of implementation of these laws is a reluctance of police and enforcement authorities to use them. Under the CFTL, police are required to inform the affected party within one day of their funds being frozen (Article 23(7)(b)). The potential to jeopardize an ongoing investigation thus arises. Further, as mentioned above, there is a perception that police, particularly Densus 88, have been very successful in their general counter terrorism operations – which may lead them to ask why they even need other forms of enforcement.

Given Indonesia's experiences with terrorism in recent years, and the global focus on terrorism issues, the creation and enforcement of new laws for counter-terrorism financing ought reasonably to garner some attention from local and international media. On the contrary, the creation of the DTTOT lists and judicial determinations of terrorist individuals and groups appear to be virtually unknown to the public. Countries which have been affected by international jihadist terrorism such as the United States and Australia monitor how Indonesia is implementing its CFT laws. However, it seems to be a deliberate policy of the PPATK to keep a low profile in this matter and not draw any media attention to the case – perhaps or presumably because of PPATK concern about a public backlash. In a country of 240 million people where the vast majority of the population are Muslim, many with 'Muslim-sounding' names, it is reasonable to expect that some level of anxiety could arise due to the possibility of

mistaken identities, and wrongful freezing of assets. Indeed, such cases have already occurred. One of the names on the UNSC Resolution 1267 list is given only as 'Zulkarnien' – in response to which the PPATK received over 40 suspicious transaction reports. Similarly, an Indonesian student studying in Romania with the same name as a similarly aged male suspect on the 1267 list was wrongfully detained by Romanian authorities for several days.⁸⁸ Given that these mistakes have occurred in the past, and will likely occur again, it is understandable that the PPATK is concerned about a widespread backlash to the implementation of the laws.

However, despite some nervousness related to wrongful freezing of their customers' assets, banks and FSPs have generally been very supportive of the laws. Although, the worry remains that a customer whose account is wrongfully frozen will claim compensation in the event that it results in some kind of loss.

The Chairman of the parliamentary committee which considered the bill, Adang Daradjatun, a former national police deputy chief defended the CFT law and its oversight mechanisms, commenting that his committee had scrutinized the bill to ensure that it did not infringe on civil or human rights. He added:

The idea is that while this legislation calls for tighter supervision of financial transactions, it won't inconvenience the general public, but only those who are involved in terrorist activities...It provides legal protection to citizens, so that in the event that their bank accounts are blocked on suspicion of terrorism-related funding or they are blacklisted as suspected terrorists, both of which require the authorities to obtain court warrants, the individuals in question can go to court to challenge the decisions.⁸⁹

In discussing the limitations and criticisms of the Act, it should be noted that an unquantifiable amount of transactions which finance terrorism in Indonesia are at a micro level, rather than a macro level. An ICG report refers to terrorists funding their

⁸⁸ Ramadhan, above n 40, 7.

⁸⁹ Sihaloho, above n 11.

existence and activities through itinerant sales of *bakso* meatball soup, mobile phone cards, and *jamu* traditional medicine.⁹⁰

Funding is rarely available and then only for limited periods; following the Aceh camp dispersal, helping mujahidin in hiding became a rationale for *fa'i*. Sooner or later, the fugitives will have to support themselves, and many take up itinerant trading to meet basic expenses.⁹¹

While this tactic gives terrorists mobility and the ability to meet and network with many contacts, it also makes these suspects, and their financial transactions extremely difficult to detect. It may reasonably be asked then, how these CFT laws will ever be able to detect and stop the flow of those funds.

Another criticism of Indonesia's ability to implement an effective CFT regime focuses on the high numbers and ease of obtaining false identification documents (KTPs or Kartu Tanda Penduduk) which allow terrorists (and other criminals) to travel, seek accommodation, open bank accounts, and so on, using a false identity. As outlined in FATF's Best Practices document 'for the effective implementation of an asset freeze, robust identifying information is essential'.⁹² This factor, combined with the common practice of individuals to use only one name, could potentially lead to significant issues in providing a positive identity match for a suspected terrorism financier.⁹³ However this is obviously an issue outside the control of PPATK.

A reading of Posthouwer's analysis of the Australian legislative regime⁹⁴ indicates a level of nuanced detail in the various regulations and procedures which is not yet present within the Indonesian system. For example, AUSTRAC, Australia's

⁹⁰ ICG, above n 17.

⁹¹ Ibid, 16.

⁹² FATF, above n 10, 6.

⁹³ Pradipta Nugrahanto, "Karena Lalai, Aliran Dana Terorisme Terus Mengalir Di Bank" *detik.com* (online) 25 March 2010 <<http://news.detik.com/bandung/read/2010/03/25/110644/1325045/486/karena-lalai-aliran-dana-terorisme-terus-mengalir-di-bank>>.

⁹⁴ Posthouwer, above n 78.

equivalent of PPATK, has issued detailed supplementary rules and regulations governing the fine details of implementation of 'know your customer' procedures. However, further regulations may be forthcoming from PPATK to govern the kind of procedural details which are present in other jurisdictions.

PPATK needs to work closely with FATF to further develop the detailed regulations and rules required to bring Indonesia fully into line with FATF's directives. These regulations would then require a concerted whole-of-government approach in their application with the full commitment of the private financial services sector to implement the principles of KYC and suspicious transaction reporting.

CONCLUDING REMARKS

With the enactment, in March 2013, of its *Eradication and Prevention of Terrorism Financing Act*, Indonesia has finally brought its domestic legislation into line with its commitments under the *International Convention for the Suppression of Terrorist Financing* – 12 years after signing the Convention.

However, having been criticised by FATF for failing to implement the new laws in accordance with the agreed timeline, Indonesia remained on FATF's public statement of high-risk and non-cooperative jurisdictions until mid-2015. Following the issuance of a domestically approved list of terrorist groups and individuals and the subsequent freezing of the related assets, Indonesia had shown FATF the requisite level of commitment to implementing the laws. It may be argued that the enactment of the CFTL and its subsequent enforcement were only realised as the result of constant international pressure, especially inclusion on the FATF's 'name and shame' list. This may be correct; however it only serves to prove the effectiveness of such processes.

On the other hand, it may be said that Indonesia has achieved more than most in the area of general counter terrorism operations, and while the enactment and implementation of its CFT legislation may have lagged somewhat, the sincere political

will was there, and it was simply a matter of time before the legislation was fully implemented by both public and private institutions.

An effective application of the CFT statutory regime will require further implementing regulations, which have yet to be issued. The regulations will require greater detail in respect of the implementation and infrastructural regime, particularly concerning the monitoring and application of compliance and sanctions by PPATK and the sustained and coordinated efforts of government agencies and the financial services sector. These are all outcome objectives which are achievable given the continuing goodwill and cooperation of the financial services sector. While a functioning CFT regime, capable of satisfying the FATF has now been achieved, authorities and FSPs should not become complacent about the challenges posed by the financing of terrorism. In late 2015, several individuals were charged under the CFTL for gathering funds which were used to facilitate the departure of Indonesian fighters to join ISIS. The CFT regime as it currently exists was not able to detect or prevent these transactions, and they serve as a reminder that continued vigilance, and law enforcement on a number of fronts, is required to effectively counter the financing of terrorism.

Chapter 6: CRIME AND PUNISHMENT: ISSUES IN ENFORCEMENT AND SENTENCING OF TERRORISTS IN INDONESIA

INTRODUCTION

This chapter examines the mechanisms for prosecuting and sentencing prisoners, with particular focus on terrorism offences, using case studies to illustrate where inconsistencies and discrepancies arise. It attempts to explain the underlying legal theory relating to sentencing of prisoners and the realities of sentencing in the Indonesian context. In attempting to explain enforcement and sentencing practices the paper will take account of unofficial and irregular processes such as judicial bribery, plea bargaining and other deviations from normal judicial processes as set out in legislation, as well as highlight some of the common flaws in the practices of judicial institutions such as the police, prosecutors and the courts.

The rise of new transnational terrorist movements, such as ISIS in the Middle East, carries the potential to reinvigorate jihadist activity in Indonesia.¹ Indonesia's treatment of its convicted terrorists is of transnational significance to policy makers seeking to ensure the best prospects for regional, and global, security. The executions of eight prisoners, including seven foreigners, by the Indonesian government in April 2015² illustrates several key points about the international dynamics of Indonesia's judicial treatment of prisoners. First, foreign governments seek to influence Indonesian judicial processes where they have vested political interests, and second, the commentary will vary depending on the political and legal context. In the case of the April 2015 executions of drugs offenders, international objections focussed on the

¹ Institute for Policy Analysis of Conflict [IPAC], *Support for "Islamic State" in Indonesian Prisons* IPAC Report No. 15, 19 January 2015.

² Jewel Topsfield, "Bali Executions: Eight Prisoners Refused to Wear Blindfolds as They Were Shot" *Sydney Morning Herald* (online) 30 April 2015 <<http://smh.com.au/world/bali-executions-eight-prisoners-refused-to-wear-blindfolds-as-they-were-shot>>.

'barbarity', and excessive severity of imposing the death penalty. The governments of several countries and the United Nations³ expressed their strong disapproval for imposing the death penalty for a crime which is not considered to fall under the category of 'the most serious crimes'. The Australian government responded by temporarily withdrawing its ambassador, while the French, Brazilian and Philippines governments voiced protests. When the Indonesian state executed three terrorists convicted of committing the 2002 Bali bombing in 2008, no such protests were raised.

Article 6(2) of the International Covenant on Civil and Political Rights provides that the death penalty may only be imposed for the 'most serious crimes' defined as 'intentional crimes with lethal or other extremely grave consequences'.⁴ As terrorism, distinct from drugs offences, falls into this category international scrutiny of sentencing in Indonesian terrorism cases is likely to focus on sufficiency and consistency in sentencing standards. A politico-legal regime which is excessively tough on drugs offences ought to be expected to take an even tougher stance on the more serious crime of terrorism. This is not the case. While Indonesian courts convict virtually 100% of terrorist defendants the sentences handed down are overwhelmingly lenient.

Foreign civilians, foreign commercial interests and diplomatic premises have all been the targets of violent attacks by Indonesian terrorist groups in the past; and have resulted in intentional deaths and injuries to several hundreds of people, both foreign and local. While terrorist attacks themselves have a transnational dimension, state judicial responses to terrorism, equally, have transnational and regional consequences.

³ Secretary General of the United Nations, Ban Ki-moon, appealed to the Indonesian President to declare an immediate moratorium on capital punishment, stating that 'under international law, if the death penalty is to be used at all, it should only be imposed for the most serious crimes, namely those involving intentional killing...Drug-related offenses generally are not considered to fall under the category of 'most serious crimes' Ban Ki-moon, "Statement Attributable to the Spokesman for the Secretary-General on Announcement of Executions in Indonesia" 25 April 2015 <www.un.org/sg/statements/index.asp?nid=8578>.

⁴ Cornell University "Most Serious Crimes" *Death Penalty Worldwide Database* (2011) <http://www.deathpenaltyworldwide.org/most-serious-crimes.cfm>.

While Indonesia's anti-terrorism legislation (Law No. 15 of 2003) carries a maximum penalty of death under 12 of its articles, the death sentence is rarely used in terrorism cases. Out of 130 death row prisoners in Indonesia in 2013, only two were sentenced to death on terrorism charges, for their involvement in the bombing of the Australian embassy in 2004 (two terrorism convicts, Edi Setiono and Taufik bin Abdullah Halim, who were sentenced to death for their involvement in the Atrium Mall bombing of 2001, had their death sentences converted to life imprisonment). Further, the vast majority, around 90%, of Indonesia's convicted terrorists are sentenced to imprisonment of ten years or less – of the 268 currently imprisoned Indonesian terrorists, 80% (215) are due for release before the end of 2020. Since 2004, less than 2% of convicted terrorists have been sentenced to life imprisonment, and 0.3% were sentenced to death (see Diagram 5 page 263). An analysis of sentencing in Indonesian terrorism cases indicates significant internal and external discrepancies in the severity of punishments for offences of comparable culpability. This indicates a level of demonstrable unfairness which exists within the Indonesian judicial system and compromises principles of natural justice and the rule of law, and consequently carries the potential to impact on perceptions of justice within the Indonesian community and on Indonesia's international relations.

LEGAL THEORY

THE CONSTITUTION, THE BASIS OF JUDICIAL POWER AND NATURAL JUSTICE

The Indonesian Constitution of 1945, as amended, states at Article 1(3) that Indonesia is a nation based on the Rule of Law⁵. Further, at Article 28D(1) it states:

Every person shall have the right of recognition, guarantees, protection, and certainty before a just law, and *of equal treatment before the law*. (Emphasis added)

⁵ "Undang Undang Dasar Negara Republik Indonesia" (1945). Constitution of the Republic of Indonesia. Article 1(3) 'Negara Indonesia adalah negara hukum'.

Judicial power is set out in Chapter IX of the Constitution. Article 24(1) states that 'judicial power shall be independent and shall possess the power to organise the judicature in order to enforce law and justice'. Further, article 24(2) states that 'judicial power shall be implemented by the Supreme Court and judicial bodies underneath it in the form of public courts.'

Further legislative guidance on the administration of justice, and which may be relevant to sentencing processes, is found in Law No 48 of 2009 on Judicial Power (hereinafter 'the Judicial Power law'). Article 2 states that the judicial system is administered for the sake of justice based on the divinity of the one and only God – 'Ketuhanan yang Maha Esa'. Article 3 reiterates the duty of judges to protect the independence of the judiciary in the exercise of their duties, and at subsection (2) forbids the interference of external parties. Article 4 directs courts to administer justice without prejudice or bias to anyone. Article 5 states that judges have a duty to understand community values of justice. Article 8(2) states 'in considering the gravity of an offence, a judge has a duty to also consider 'the good or evil character of the accused'. Article 53(1) states 'in examining and determining a case, judges are responsible for the orders and decisions that they make'. And, at art 53(2) 'orders and determinations as set out in subsection (1) must include the legal considerations of the judge which must be based on legal reasoning and principles which are accurate and correct.'

The Constitutional and legislative provisions set out above clearly establish some principles of natural justice as being fundamental bases of the Indonesian state and its administration of justice. That is, among others, that all persons should be treated equally before the law and should not be subject to arbitrary treatment. Also, that the law should be administered independently and without external interference, and it should be based on correct and accurate legal reasoning.

However, Indonesian statutes and jurisprudence do not emphasise other natural justice concepts such as consistency and fairness as fundamental elements of the administration of justice. Rather, a judge's personality, experience and conscience (*hati nurani*) are highly influential factors in sentencing.⁶ Also, justice, as stated in the Judicial Power law is seen as ultimately deriving from the divinity of God, which serves to mitigate the vagaries of human intervention in the judicial process. This is in line with the basic principles of the Indonesian state or Pancasila which establishes a belief in God as the first and most fundamental principle of the state. This tenet of the Pancasila permeates into virtually every layer of the community and is a key to understanding Indonesian political, social and judicial practices. Contrary to frequent statements in western mass media,⁷ Indonesia is not the 'largest Muslim country on earth', as it is not a nation based on Islam. However, it is also not a secular state; it is a theocracy, a state based on a belief in an omnipotent deity, as manifested in the six recognised religions. A belief in God, therefore, is central to the concept of the state⁸ and this belief continues to inform and influence institutions such as the courts.

Indonesian law is often described as being a member of the 'civil law' or 'Continental' group of legal systems found in European countries such as the Netherlands and France. The system emphasises an interrogative role of the judiciary

⁶ Eddy Hiariej, "Transcript of Interview with Professor Eddy Hiariej Professor of Criminal Law, Gadjah Mada University, Yogyakarta" (30 May 2014) 2.

⁷ See for example headline from *The Washington Post* 'The World's Largest Muslim Country Bans Support for the Islamic State' which inaccurately reinforces the assumption that Indonesia is a 'muslim country' Ishan Tharoor, "The World's Largest Muslim Country Bans Support for the Islamic State" *The Washington Post* (online) 7 August 2014 <<http://www.washingtonpost.com/blogs/worldviews/wp/2014/08/07/the-worlds-largest-muslim-country-bans-support-for-the-islamic-state/>>.

⁸ The first principle of the official philosophical foundation of the Indonesian state, the Pancasila, is 'Belief in the one and only God'. The preamble to the Indonesian Constitution also states that Indonesia is 'a sovereign state based on a belief in the One and Only God' among other bases. How an underlying belief in God interacts with corrupt judicial practices deserves analysis. How judges, or other Indonesian public officials including government ministers, reconcile a belief in God with corrupt practices which cause loss and damage to the state, and engender injustice in political and legal processes is outside the scope of this paper and requires further examination and analysis.

in the trial process, as distinct from the adversarial 'common law' or 'Anglo-Saxon' legal systems of the United Kingdom and its former colonies. While this is an oversimplification which does not account for the complex amalgam of various legal systems, including customary and religious law,⁹ it is true that Indonesia's criminal code and criminal procedure are based closely on the Dutch codes which existed at the time of independence. The Indonesian Criminal Code and Criminal Procedural Code are closely modelled on the Dutch legislation (*Wetboek Van Strafrecht*) which existed in 1945 when Indonesia's independence was proclaimed, subject to adaptations and subsequent amendments. As such, the Indonesian system does not incorporate the Common Law Doctrine of Precedent, under which, cases of the same or similar circumstances should be decided in the same or similar ways. However, in recent times there has been some suggestion of a trend towards Common Law reasoning. Pascoe states 'Over the past 20 years there has been an increasing trend in Indonesia towards 'common law' reasoning where previous case law is cited to supplement statutory interpretation.'¹⁰ However, in current practice, courts will have much greater regard for both the relevant legislation, and the evidence in the case before them, than the decisions of other courts, when making their decisions.¹¹

Butt's discussion of decisions in death penalty cases demonstrates that the Supreme Court and the Constitutional Court have issued contradictory decisions on the constitutionality of capital punishment. The Supreme Court itself has issued contradictory decisions on the death penalty at different times, which indicates:

⁹ Tim Lindsey (ed), *Indonesia Law and Society* (2nd Edition, Federation Press, 2008) 3. Also see: Helen Creese, "Old Javanese Legal Traditions in Pre-Colonial Bali" (2009) *Journal of the Humanities & Social Sciences of Southeast Asia & Oceania/Bijdragen tot de Taal-, Land- en Volkenkunde* vol. 165, no. 2/3, 241.

¹⁰ Daniel Pascoe, "Three Coming Legal Challenges to Indonesia's Death Penalty Regime" (2015) *The Indonesian Journal of International and Comparative Law* vol. II no. 2, 250.

¹¹ Eddy O.S. Hiarij, *Prinsip-Prinsip Hukum Pidana* (Yogyakarta: Cahaya Atma Pustaka, 2014).

At best...that different judges hold different views about the constitutionality and appropriateness of applying the death penalty. At their worst, these decisions might be the product of judicial bribery...various credible allegations of impropriety have been made.¹²

Lindsey's assessment of the Indonesian judicial system points out that it 'remains deeply flawed. Its low levels of competence and, worse still, corruption, have been publicly acknowledged by every president and chief justice since Soeharto. The Indonesian courts are now certainly capable of making good decisions from time to time, but there are few Indonesians who would feel they can be trusted with everyday litigation, let alone life-and-death decisions.'¹³

A number of factors may be pointed to which contribute to inconsistency in judicial reasoning and sentencing in Indonesia; an over-riding emphasis on judicial discretion in determining cases; low competency of the judiciary; an ascription of God as the ultimate source of justice; the absence of the doctrine of precedent; a lack of open access to past decisions of other courts,¹⁴ and the persistence of corrupt practices within the judiciary.¹⁵ These factors create an environment where manifest inconsistency in judicial decisions, and ultimately the denial of natural justice for individuals who come before the courts, is common.

THE PHILOSOPHY OF PUNISHMENT

¹² Simon Butt, "Asia-Pacific: Judicial Responses to the Death Penalty in Indonesia" (2014) *Alternative Law Journal* vol. 39 no. 2, 1.

¹³ Tim Lindsey, "7 Reasons Why Bali Pair Should Not Have Been Killed" *The Age* (online) 29 April 2015 <www.theage.com.au/7-reasons-why-bali-pair-should-not-have-been-killed/>

¹⁴ Judicial decisions of the district courts (*pengadilan negeri*) are only required to be made available to the parties to the dispute. Note, however, selected decisions of the district courts are uploaded to the Mahkamah Agung (Supreme Court) website. The selection criteria for which decisions are published in this way is uncertain.

¹⁵ Note the actions of the Corruption Eradication Commission (KPK) which arrested four judges of the National Administrative Court, as well as a senior lawyer on suspicion of bribery in August 2015. See: Adam Fenton and Hery Firmansyah "Gatekeepers: the noble profession of lawyers" *The Jakarta Post* (online) 14 August 2015 <<http://thejakartapost.com/news/2015/08/14/gatekeepers-the-noble-profession-lawyers.html>>

The concept of commensurate punishment is not alien to the Indonesian judicial system. Indonesian judgements routinely make reference to punishments which are *setimpal* or fitting to the crime. For example, in the case of Erwin Mardani, charged with terrorism offences for his involvement in an attack on a police post in Ambon in 2005, the judge commented at page 117:

Considering that throughout the trial there was no evidence of remorse on the part of the accused, or any other mitigating factors, a sentence must be passed which is equitable (*setimpal*) with the offence.¹⁶ (Author's translation)

However, the vague notion that a punishment should 'fit' a crime provides little by way of practical guidance to assist a judge in determining the correct level of harshness for a sentence in a particular case. A discussion of the sentencing of terrorists in Indonesia therefore requires an analysis of the underlying purposes and philosophy of punishment.

Not all agree that expiation or atonement of a crime is the purpose of punishment. Benthamite utilitarian philosophy emphasises the public good that is engendered by criminal sanctions. This approach emphasises the future benefits of 'condemning the particular defendant as a criminal and depriving him of his liberty [which] outweigh the costs imposed on the imprisoned convict and his or her family'.¹⁷ Among the expected benefits, are general deterrence, special deterrence, rehabilitation and incapacitation of the offender. By incapacitating the offender he or she is no longer a threat to the wider community during their term of imprisonment, during which time rehabilitation may occur. Public punishments also deter the prisoner him/herself (special deterrence) and, by publicising them, other would-be criminals (general deterrence) from committing further crimes. President Joko Widodo, who wanted to

¹⁶ Decision of District Court of East Jakarta in Erwin Mardani Nomor: 263/PID.SUS/2014/PN.JKT.TIM.

¹⁷ George P. Fletcher, *Basic Concepts of Criminal Law* (New York: Oxford University Press, 1998) 30.

'send a strong message to drugs smugglers', placed particular emphasis on the latter in defending his decision to allow the executions of convicted drug traffickers to proceed in April 2015.¹⁸

None of these 'social protection' values suggests that atonement, expiation or retribution for a crime is the underlying purpose of punishment. However, using a solely benefit-to-society approach leads to serious problems – such as the indeterminate and indiscriminate use of punishment by the state. If the only purposes of punishment are the social benefits derived from deterrence, incapacitation and rehabilitation of the offender, the temporal term of a prison sentence need not be set at the time of sentencing. Until the 1960s in the US, indeterminate sentencing 'a general practice of sentencing convicted persons to undefined terms in prison, with parole authorities entrusted with the responsibility of setting a release date' were relatively common.¹⁹ The attack on indeterminate sentencing, which ultimately ended the practice, stressed two values, the need for equality in sentencing, and the right of prisoners to know, at the start of their prison term, when they are likely to be released.

Further, focussing only on the social good that might follow from punishment could lead to ignoring the justice of punishing the particular suspect. Many tyrannical regimes have propped themselves up by inflicting punishment indiscriminately and thereby deterring disobedience.²⁰ Hiariej describes the rise of the Classical approach to criminal law in the 18th century as a reaction to arbitrary regimes characterised by a lack of legal certainty, and to protect the interests of the individual.²¹ Justice therefore requires prosecutors to identify, and prove, a nexus between the commission of a particular offence and a particular individual. Consistency, and the rights of the

¹⁸ Step Vaessen, "Interview with Jokowi" Al Jazeera TV News, March 7(2015).

¹⁹ Fletcher, above n 17, 27.

²⁰ Ibid, 31.

²¹ Hiariej, above n 11, 24.

offender, requires that the parameters of the punishment, including the maximum duration of incarceration, be established at the time of sentencing – and that the sentences of similar offences should be of similar harshness.

The concept that the severity of the punishment should be proportionate to the gravity of the offence derives from both Biblical sources and Kantian philosophy. Matthew (5:38) provides a succinct statement of the theory of proportionality in sentencing: ‘you have heard the law that states the punishment must match the injury: an eye for an eye, a tooth for a tooth’. Kantian philosophy views human individuals as ends in themselves, not means to an end. The utilitarian construction which views punishment of individuals as a means for creating benefits to the community is abhorrent to a Kantian outlook. The Kantian approach recognises the moral significance of both the offender and the victim. Many retributivists defend this commitment to do justice on the ground that it incidentally serves to affirm the dignity of the offender. Retribution, it is said, recognises the criminal as a responsible human actor, someone who deserves punishment for his crime.’²² The core of the retributive view is that it speaks to the wrong represented in the criminal act; it should expiate the crime and restore balance to the universe. In less metaphysical terms, it attempts to redress the imbalance between the criminal and the victim which is created by the commission of an offence. Retribution brings the offender down to the level of the victim and has a retrospective corrective function.

Distributive justice means that the benefits and burdens of living in society are distributed to each according to his due. Distributive justice mandates that the state, as the distributor of justice, abide by strict criteria in distributing justice and punishments and not discriminate in selecting some to suffer more for their crimes than others.²³

²² Fletcher, above n 17, 32.

²³ *Ibid*, 36.

In determining the severity of a punishment therefore, a judge should have regard to both the utilitarian benefits of the punishment, the gravity of the offence and consistency with the punishments of others for similar offences. Sentences which are grossly disproportionate to the crimes committed, or which are demonstrably inconsistent, cause damage to the image of the law as an institution in the eyes of the community which it is meant to serve.

In describing the sentencing procedures for terrorists in Australian courts, Crowley outlines the 'two-tier' process by which judges consider first, the objective gravity of the offence (the legislative maximum penalty can be used as a guide) and then to increase or 'discount' the sentence by reference to circumstances which are particular to the accused.²⁴

Careful attention to maximum penalties will almost always be required, first because the legislature has legislated for them; secondly because they invite comparison between the worst possible case and the case before the court at the time; and thirdly, because in that regard they do provide, taken and balanced with all other factors, a yardstick.²⁵

An emphasis on general deterrence and the extraordinary objective seriousness of terrorism offences (reflected by the legislatively mandated maximum penalties) has seen extraordinarily severe sentences handed down in Australian terrorism cases.²⁶ For example 'intentionally being a member of a terrorist organisation' without participating in any kind of terrorist planning or attack carries a maximum penalty of 10 years and several cases have seen sentences of around six to seven years for this offence alone. Any further acts of support for the organisation will form the basis of further charges. 'Intentionally providing resources' carries a maximum of 25 years,

²⁴ Michael G. Crowley, "Tough on Terrorists: Challenging Traditional Sentencing Principles in Australia" (2010) *Federal Sentencing Reporter* vol. 22 no. 4, 280.

²⁵ High Court *Markarian v R* (2005) 79 ALJR 1048 at 31.

²⁶ Crowley, above n 24. Nicola McGarrity, "'Let the Punishment Match the Offence': Determining Sentences for Australian Terrorists" (2013) *International Journal for Crime and Justice* vol. 2 no. 1, 1.

while 'directing activities of a terrorist organisation' also carries a maximum of 25 years. 'Possession of a thing connected with preparation for a terrorist act' carries a maximum 15 years penalty.²⁷ In the case of Belal Khazaal, the defendant did not participate in any specific violent act, but compiled a book with instructions on terrorist acts and was convicted of 'knowingly making a document in connection with preparation for a terrorist act' and sentenced to 12 years imprisonment.²⁸

In the Australian Operation Neath case, five men were arrested and charged with 'conspiracy to do an act in preparation for a terrorist act' (ss11.5 and 101.6, Criminal Code). It was alleged that the group was planning to commit a suicide attack on an army base. The group had not acquired any weapons and was in the very earliest stages of planning. Justice King concluded that the plan of the Operation Neath terrorists, who had not stockpiled weapons or conducted training operations, had not 'advanced to any significant degree' and therefore did not warrant the kind of sentences handed down in the Operation Hammerli trial."²⁹ Saney Aweys, one of the alleged co-conspirators, did nothing more than 'contact a sheikh in his home country to inquire as to whether it would be permissible to engage in a terrorist attack on an army barracks in Australia. The offence carried a maximum penalty of life imprisonment and each man was sentenced to 18 years imprisonment.'³⁰

A sentence of 18 years for a minor role in a foiled terrorist plot which did not result in any fatalities or injuries, and where the group had not yet acquired any capacity to commit an attack, would be unthinkable in Indonesia. In fact, under current Indonesian law enforcement procedures the group would not have been arrested until

²⁷ Crowley, above n 24, 285.

²⁸ McGarrity, above n 26, 21.

²⁹ Ibid, 27.

³⁰ Ibid, 23.

they had acquired weapons.³¹ Merely contacting a religious leader to inquire about the permissibility of jihad would incur no criminal liability in Indonesia. Under current laws, Indonesian jihadist leaders can urge their followers to commit terrorist acts without fear of prosecution.

In passing sentence on terrorism offences, Australian courts have had regard for several factors including; the objective seriousness of the offence by reference to the maximum penalty, the nature of the attack, the intended harm, the proximity of the attack (how far advanced the plan was), the nature and history of the group; the role of deterrence, and prospects for rehabilitation.³² Crowley argues that Australian courts have emphasised the objective gravity of terrorism offences and the need 'to deter and incapacitate with rehabilitation playing a minor (if any) part at all.'³³ In *Lodhi v R* (2006) 199 FLR 364 at 91, Justice Whealy stated:

The obligation of the court is to denounce terrorism and voice its strong disapproval of activities such as those contemplated by the offender here. In my view the courts must speak firmly and with conviction in matters of this kind. This does not mean that general sentencing principles are undervalued or that matters favourable to an offender are to be overlooked. It does mean, however, that in offences of this kind, as I have said, the principles of denunciation and deterrence are to play a substantial role.

US terrorism prosecutions have, similarly, seen extraordinarily severe sentences.³⁴ US federal sentencing law uses a system of adjustments to raise, and in some cases lower, the offence level and criminal history. Of all the adjustments in the federal sentencing

³¹ Tito Karnavian, "Transcript of Interview with Tito Karnavian Deputy of National Counter Terrorism Agency" (13 April 2012).

³² McGarrity, above n 26.

³³ Crowley, above n 24, 279; Mindy S. Bradley-Engen, Kelly R. Damphousse, and Brent L. Smith, "Punishing Terrorists: A Re-Examination of U.S. Federal Sentencing in the Postguidelines Era" (2009) *International Criminal Justice Review* vol. 19 no. 4, 433. "Terrorists received substantially longer sentences than similarly situated non-terrorists...governmental response is significantly more severe and uncompromising than for traditional federal offenders convicted of similar federal crimes" 434.

³⁴ Human Rights Watch [HRW], *Illusion of Justice: Human Rights Abuses in US Terrorism Prosecutions* Human Rights Watch and Human Rights Institute Columbia Law School Report (July 2014).

guidelines ‘the terrorism adjustment has the most dramatic effect of lengthening sentences.’³⁵ The Human Rights Watch report notes:

In real terms, application of the terrorism adjustment results in an absolute minimum sentence of 17.5 years for an offense (unless the offense carries a lesser statutory maximum). On its own, an increase of 12 offense levels can add as much as 20 years to a sentence, while a jump to the highest criminal history categorization can also add several years to a sentence. Taken together, the two aspects of the terrorism adjustment have the potential to add 30 years to a sentence or lead to life imprisonment for a crime that, without the adjustment, might otherwise entail only a sentence of five years.³⁶

By further comparison, under Singapore’s Terrorism (Suppression of Bombings) Act, pursuant to art 3(1)(i), any person who intentionally causes an explosion in a public place which is intended to cause death, serious injury or destruction, and in fact causes death, is subject to a mandatory death sentence;³⁷ and, pursuant to art 3(1)(ii) in any other case, life imprisonment. Under this law, the perpetrator of the Alam Sutera Mall bombing in Jakarta in October 2015, which injured a security guard, would be subject to a mandatory life sentence. Any perpetrators of an attack in a public place which caused death, for example the Marriott/Ritz-Carlton bombings of 2009, would be subject to mandatory death sentences. The act includes conspiracy, incitement, attempts, aiding, counselling or procuring the commission of the offence.

In Malaysia in 2015, parliament passed the Prevention of Terrorism Act which allows terrorism suspects to be detained for up to two years (extendable by order of the ‘Prevention of Terrorism Board’) without trial.³⁸ The government argued that the power to detain terrorism suspects without trial, court challenges or legal representation is necessary to combat the rising threat of extremists drawn to groups

³⁵ Ibid, 124.

³⁶ Ibid, 125.

³⁷ *Terrorism (Suppression of Bombings) Act 2008* (Singapore) (Chapter 324a) *Original Enactment: Act 50 of 2007*.

³⁸ *Prevention of Terrorism Act 2015* (Malaysia).

such as ISIS. Police claimed that 17 militants arrested across Malaysia in April 2015 were plotting to attack army camps and police stations.³⁹

In Canada, the decision of the Ontario Court of Appeal in *R v Khawaja* had held, based on British and Australian precedents, that very little attention should be given to the likelihood of rehabilitation of terrorist offenders, and raised the sentence imposed at trial. The 'Supreme Court upheld the raising of the sentence in the particular circumstances but took the position that rehabilitation should not be abandoned as a goal in terrorism sentencing in general'.⁴⁰

INDONESIAN CRIMINAL SENTENCING PROCESS

The Indonesian Criminal Code and the Criminal Procedural Code provide very little guidance to judges on the method of determining the sentence of a convicted person.

Hiariej stated 'that is one of the weaknesses of the current Indonesian criminal code, we don't have sentencing guidelines. In the draft bill of the new criminal code, we have 11 sentencing standards, such as the motivation, social disadvantage etc. which will provide a kind of guide (*pedoman*) for sentencing'.⁴¹

Some discussion of Indonesian criminal procedure is needed to understand the processes prosecutors and courts use in determining sentences. Under Indonesia's Criminal Procedural Code, verdict and sentencing are carried out simultaneously – unlike common law jurisdictions where determination of guilt and sentencing are two separate stages. A panel of judges delivers its finding on guilt or innocence, and sentence, in the same sitting at the conclusion of the trial.

Articles 153-4 of the KUHAP mandate that judges must arrive at a guilty verdict based on a minimum of two of the five accepted categories of admissible evidence (see

³⁹ Lindsay Murdoch, "Malaysia Resurrects Indefinite Detention, Passes Anti-Terror Act" *The Sydney Morning Herald* (online) 9 April 2015 <<http://smh.com.au>>.

⁴⁰ Robert Diab, "R v Khawaja and the Fraught Question of Rehabilitation in Terrorism Sentencing" (2014) *Queen's Law Journal* vol. 39 no. 2, 587.

⁴¹ Hiariej, above n 6, 3.

page 151). The testimony of one witness, including the accused himself, is therefore not sufficient to establish guilt.

Article 189 (4) of the KUHAP states:

The testimony or confession of the accused, on its own, is not sufficient to prove guilt of the offence with which he is charged, rather it must be accompanied by other evidence. (Author's translation).

This is a significant divergence from Common Law legal systems, where, at the reading of the indictment the accused is asked how they plead to the charges. If an accused admits the charge and pleads guilty, the need for a trial to establish guilt is bypassed and the trial proceeds directly to the sentencing stage. In such cases the accused saves the time of the court and all parties involved, and this may be taken into consideration in mitigation of sentence. It also facilitates the process known as 'plea bargaining' in some common law jurisdictions whereby prosecutors may reduce the severity of the charges faced by the defendant in return for a plea of guilty. Commenting on the significant effect of plea deals in US terrorism prosecutions, Human Rights Watch noted:

Defendants who went to trial received a median sentence of 11.3 years, while those who took plea agreements received a median sentence of 3.2 years. More than one-third of those who took a plea deal received either no prison sentence or a sentence of time served.⁴²

Under Indonesian law, even where an accused person admits commission of the offence, a trial to establish guilt proceeds, including the calling of witnesses and other evidence. Therefore, the offender may not expect a reduction of sentence or charges in recognition of pleading guilty and obviating the need for a full trial. This is especially

⁴² HRW, above n 34, 122.

significant because in most cases⁴³ Indonesian terrorism defendants admit the facts relating to their charges.

De-emphasising the importance of the accused's confessions arguably increases the likelihood of the suspect making admissions of fact, as is frequently seen in Indonesian terrorism cases. The over-riding emphasis, observed in common law jurisdictions, on advising a suspect that they are entitled to remain silent during questioning does not exist. While suspects may refuse to answer questions both during the investigation and trial, it may negatively affect their defence – judges may comment that a defendant has prevaricated (*berbelit-belit*) or been uncooperative which can be used as an aggravating factor in sentencing.

The reprehensible practice of beating or torturing suspects to obtain confessions still occurs in Indonesian criminal investigations⁴⁴ and has been alleged in some terrorism cases.⁴⁵ The practice ought to be urgently addressed, for reasons of both human rights and the inherent unreliability of forced confessions. In 2013, a YouTube video emerged of police torturing and non-fatally shooting a terrorist suspect.⁴⁶ Another terrorism suspect, Syaifuddin Umar, alleged that he was illegally detained and tortured (see below).

While the accused may not expect a sentence reduction for 'pleading guilty' – and 'plea bargaining' as such does not exist – there are other recognised mechanisms

⁴³ Further research is required to analyse the exact percentage of the 800-900 terrorism defendants who admitted their offences, but it is likely that it would be around 90%. Whereas the number that express remorse or moral culpability for their actions is far lower.

⁴⁴ Jacqui Baker, "After Justice: What Happens after Three Police Officers Are Found Guilty of Manslaughter and Torture?" (2013) *Inside Indonesia* vol. 114 Oct-Dec <<http://www.insideindonesia.org/weekly-articles/after-justice>>.

⁴⁵ Zubaidah Nazeer, "Indonesia's Counterterrorism Unit Hit by Torture Claims" *Jakarta Globe* March 6 2013 <<http://www.thejakartaglobe.com/lawandorder/indonesias-counterterrorism-unit-hit-by-torture-claims/577630>>.

⁴⁶ "Indonesia Probes Densus 88 Police 'Torture'" *BBC News* (online) 4 March 2013 <<http://www.bbc.co.uk/news/world-asia-21656957>>.

which may be used. The concept of 'justice collaborator'⁴⁷ exists as a customary element of Indonesian criminal procedure whereby an accused who provides information to police or prosecutors may adduce evidence of such cooperation at trial in order to mitigate the sentence.⁴⁸ Collaborating with authorities may be sufficient to persuade prosecutors to reduce their sentence request at the *tuntutan* stage.

The actions and demeanour of the accused throughout the investigation and trial are important to sentencing outcomes. Judges routinely consider the attitude of the accused, their general demeanour, politeness and cooperation, as factors for reducing sentences. Further, younger offenders with better prospects for rehabilitation may expect more lenient treatment.

Article 197 of the KUHAP is the sole article which provides directions for judges in their sentencing comments. It states (among others):

(1) The written decision shall include:

...(f) The Articles of legislation which form the basis of the crime or act and the Articles of legislation which form the legal basis of the decision *as well as circumstances which aggravate the offence or mitigate the accused*. (Author's translation, emphasis added).

Apart from this brief subsection, the KUHAP provides no further direction to judges on what factors to consider when determining the severity or leniency of a sentence. Rather the judges' conscience, experience and regard for the evidence in the case before them are the determinative factors. Hiariej stated:

There are currently three main elements in sentencing: first, the motivation of the accused to commit terrorism; second, the maximum and minimum penalties stipulated under the terrorism Act; and third, community perceptions of the crime. However, all of them will depend on the personality of the judge which has a major influence on determining the length of sentence. So, one judge can give very different sentences from

⁴⁷ In common law jurisdictions this would be known as an 'informant' or 'state's witness'.

⁴⁸ Hiariej, above n 6.

another judge, there is no standard, and we therefore see very big disparities in sentencing.⁴⁹

However, a proposed revision to the KUHP attempts to address the issue of sentencing standards:

One new area in the draft revisions to the KUHP, which did not exist previously, concerns guidance in sentencing. This issue is extremely important so that judges have clear parameters for determining sentences. The guide includes the following factors: First, the culpability of the offender. Second, the motive and aim of committing the offence. Third, the inner attitude of the accused. Fourth, whether the offence was premeditated or not. Fifth, the method of committing the offence. Sixth, the attitude and actions of the offender after committing the offence. Seventh, the background, social and economic circumstances of the offender. Eighth, the effects of the offence for the offenders future. Ninth, the effects of the offence on the victim and the victim's family. Tenth, forgiveness from the victim or the victim's family. Eleventh, community views toward the offence.⁵⁰ (Author's translation).

A complete overhaul of the criminal code has been under discussion for over a decade.⁵¹ While the Indonesian government has indicated that the revision to the criminal code is a priority, and the draft bill has been included in the national parliament's schedule for legislative debate at the time of writing neither the draft bill nor the accompanying academic paper had been received by parliament indicating significant barriers to debating and passing the bill.⁵²

⁴⁹ Ibid, 5.

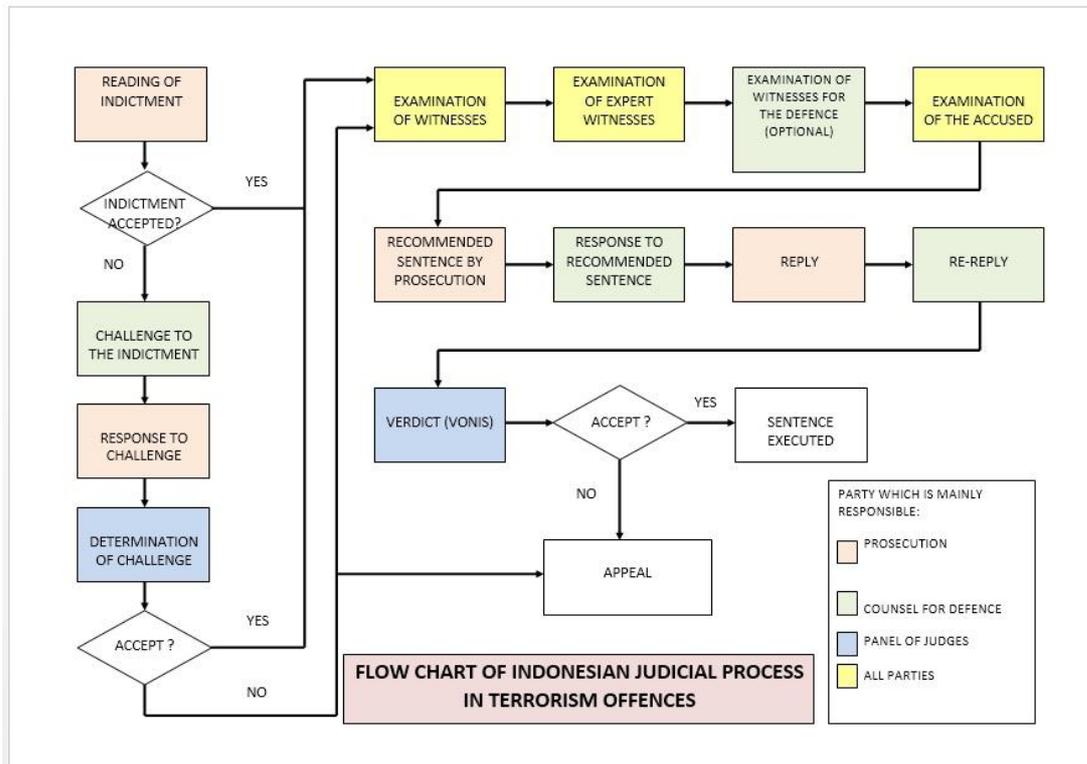
⁵⁰ Hiariej, above n 11, 409.

⁵¹ Tari Oktaviani, "RUU KUHP Tak Kunjung Direvisi, DPR Salahkan Pemerintah" *Harian Nasional* (online) 30 April 2015 <<http://www.harnas.co/2015/04/30/ruu-kuhp-tak-kunjung-direvisi-dpr-salahkan-pemerintah>>; "Pemerintah Lambat Soal RUU KUHP" *Republika Online* (online) 13 May 2015 <<http://www.republika.co.id/berita/nasional/politik/15/05/13/no9jt9-pemerintah-lambat-soal-ruu-KUHP>>; Simon Butt, "Indonesia: Can Legal Diversity Exist within a Single National Law?" (2003) *Alternative Law Journal* vol. 93, no. 28, 6. Butt's examination of the legal diversity of Indonesian customary legal systems notes the difficulty of creating a single national law. The article notes that, as of 2003, revisions to the Criminal Code had already been discussed for decades, and that the reforms were expected to be completed in 2004. By 2016, the revisions still had not been finalised by the Indonesian parliament.

⁵² *Republika*, above n 51; Ashari Purwo, "Revisi RUU KUHP, Komisi III: Pemerintah Segera Kirim Naskah Akademik" *Kabar24.com* (online) 25 February 2015 <<http://kabar24.bisnis.com/read/20150225/15/406437/revisi-ruu-KUHP-komisi-iii-pemerintah-segera-kirim-naskah-akademik>>; A. Ali, "Revisi KUHP Jalan Di Tempat" *Hukum*

The existing criminal law therefore continues to be applied in criminal trials and sentencing. Diagram 4 outlines the criminal trial process. As discussed below, the *tuntutan* or ‘recommended sentence by prosecution’ is of particular significance.

Diagram 4: Flow Chart of Indonesian Criminal Prosecutions



Source: PAKAR – Pusat Kajian Radikalisme dan Deradikalisasi (The Centre for Radicalism and Deradicalisation Studies).

Under Article 10 of the Criminal Code there are four categories of ‘basic punishments’ for criminal offences, and three categories of ‘additional punishments’, namely:

Criminal offences:

1. Capital punishment
2. Imprisonment
3. Light imprisonment
4. Fine

Additional Offences:

1. Deprivation of certain rights
2. Forfeiture of specific property
3. Publication of judicial verdict

Article 12 states that 'imprisonment' may be either 'for life', or 'temporary' imprisonment. Subsection 2 specifies that 'temporary' imprisonment shall be 'at least one day and at most fifteen consecutive years'. Subsection 3 provides that 'a maximum temporary imprisonment of 20 years may be imposed in cases, where in the discretion of the judge the crime is punishable by capital punishment, life-long and temporary imprisonment, or life-long or temporary imprisonment, and also in those cases where the term of fifteen years is exceeded by reason of a conjunction of crimes, repeated offences or because of the provisions of Article 52.⁵³ Subsection 4 states 'in no cases may the term of 20 years imprisonment be exceeded'.

Offences under the KUHP specify a maximum penalty, and no minimum. A judge may therefore impose any sentence, from one day up to the maximum sentence allowed under the code. For example, Article 362 provides a maximum imprisonment of five years for the crime of theft.

Indonesian judges therefore are accorded wide discretion in determining sentences with minimal legislative guidance or 'common law precedent' to influence or inform their decision. Apart from brief comments required pursuant to art 197 of the KUHP, Indonesian written judgements in general make very little mention of factors relating to sentencing, and routinely do not apportion sentences for separate offences.

Following the close of evidence by the prosecution, the defence may call witnesses and present evidence which is favourable to, or mitigates, the accused (Article 65 KUHP). Also, pursuant to art 116(3) during the investigation of the offence,

⁵³ Under art 52, of the Criminal Code where a public official commits an offence in the course of their duties or by using the power, opportunity or facilities provided by their office, the punishment may be increased by one third.

the suspect should be asked whether he wishes to call upon exculpatory witnesses and if so this must be noted in the police brief of evidence. Witnesses during this stage of the trial may give evidence regarding either, or both, the innocence of the accused, or the general character of the accused.

Following the presentation of evidence by the defence, the trial proceeds to the *tuntutan pidana* stage. During this stage, the prosecution presents its recommendations for sentence⁵⁴ to the panel of judges. The recommendations however are non-binding and judges may accept or ignore them, and impose sentences which are heavier, lighter or equal to those 'demanded' by the prosecution. The defence has the right to rebut the recommended sentence of the prosecution (*pleidoi*). In practice, Indonesian courts rarely impose sentences which are heavier than those recommended by prosecutors. In general, courts usually pass sentences which are around 70% of the *tuntutan* reflecting a view that prosecutor's demands are predominantly 'subjective' and the courts more lenient sentences are therefore regarded as being more 'objective'.⁵⁵ This widespread approach of the courts is formulaic and indicates a serious flaw in sentencing processes.

While the panel of judges may ignore the requests for sentence of the prosecution, non-acceptance of the length of sentence is grounds for appeal for both the prosecution and defence.⁵⁶ As a rule of thumb, prosecutors will generally be satisfied

⁵⁴ Literally 'tuntutan' is a 'demand' however in this context the prosecution's 'demands' for sentence are not binding on the panel of judges.

⁵⁵ Hiariej, above n 11, 3.

⁵⁶ Pursuant to Article 56 of the KUHAP where a person is charged with an offence with a maximum penalty of more than 5 years, the state officials handling the case are obliged to appoint legal counsel for the person at no cost to the person. Following the announcement of the verdict and sentence the parties have three options; accept the verdict and sentence, reserve their response pending further consideration, or appeal. If the response is reserved, the party has 7 days within which to determine whether to appeal or not. If the party does not appeal within 7 days, the verdict of the court will attain permanent legal authority (*kekuatan hukum tetap*) and the sentence is then executed by the state. Where a sentence is appealed, the appellate court may affirm, reduce, or increase the sentence, or acquit the defendant. A member of the Muslim Defence Team (TPM) commented in interview that, of the cases their organisation

with, and not appeal, a sentence that is at least two-thirds of the *tuntutan*.⁵⁷ In practice, prosecutors who do not appeal sentences which are less than two-thirds of the *tuntutan* will face administrative consequences from their superiors at the Attorney General's department.⁵⁸ According to one terrorism observer:

A range of factors may influence judges when determining sentence, including the subjective experiences and views of the judges themselves, the wording and structure of the indictment (whether offences are cumulative or alternative), the strength of evidence as it relates to each of the elements of the offence, the quality of the defence, the demeanour and attitude of the offender, the reasons/motive for committing the offence, provocation, premeditation, whether the accused cooperated with police, prosecutors and the court, whether the accused has shown remorse for their actions, whether they have shown respect for the judicial process, and been polite, cooperative, truthful and forthcoming during the trial.⁵⁹

The extent of a judge's personal experience in terrorism trials is likely to contribute to increased consistency in sentencing, and the practice of selecting 'expert' judges for terrorism cases should be encouraged. The idea of a specialised terrorism court has received some support however it is a long term prospect.

When determining sentence, judges may consider whether the accused has prior convictions, and this may aggravate the sentence. While the accused's own prior offences may be considered, as a matter of general practice, prosecutors do not 'hand up' cases of a similar nature and facts for judges to use as a guide in sentencing. It is

had appealed, none of the sentences had been increased by the appellant court. Personal communication with Mohammad Asludin, legal counsel Muslim Defence Team, at trial of Afief Abdul Majid, Central Jakarta District Court, 15 July 2015.

⁵⁷ Personal communication with Mohammad Adhe Bhakti, Executive Director of the Centre for Radicalism and Deradicalization Studies (PAKAR) 7 August 2015.

⁵⁸ Hiariej, above n 11.

⁵⁹ Bhakti above n 57. Under Indonesian criminal procedure the accused will be examined, but may refuse to answer questions, however his responses and demeanour will be factors in sentencing. In effect, a refusal to cooperate in the trial or answer questions from the bench, or the prosecution, will result in a negative perception. Prevarication (*berbelit-belit*) is a commonly cited submission to increase a sentence. Whether the accused was polite will also be a factor. It is common in Indonesian criminal proceedings for the accused to shake the hands of prosecution lawyers and judges at the conclusion of proceedings, sometimes at the conclusion of each session of the trial (author's personal observations of trial proceedings).

suggested that while judicial corruption and bribery has been admitted by every President and Chief Justice since the Soeharto regime⁶⁰ the miniscule number of defendants acquitted in terrorism trials indicates that it is most likely not a factor in sentencing terrorism offenders. Unlike narcotics defendants, most terrorism defendants are not in a position to supply large amounts of money to the panel of judges hearing their case. It is possible that it was a factor in the one known case of a terrorism defendant who was acquitted of all charges, Ali Abdullah, an alleged Al Qaeda financier, discussed below.

According to Professor Hiariej, of serious concern is the paucity of standards in written judgements which frequently contain spelling and grammatical errors, as well as large slabs of copied and pasted text from the indictment and the brief of evidence. Even more concerning are judgements where the legal reasoning and final outcome are inconsistent or contradictory. It is likely that in many cases judges do not write the decisions themselves, but pass them to their administrative staff (*panitera*) to complete.⁶¹

The overall impression of the Indonesian judiciary is that it is formulaic in its approach to sentencing, routinely handing down sentences that are around 70% of the recommended sentence of prosecutors. This is so in the vast majority of cases, except in isolated instances where international political or diplomatic pressures are brought to bear or where there is significant media coverage of the trial. This indicates that a prevailing judicial culture, which stems from decades of authoritarian oversight still prevails which is characterised by a lack of independence, creative thinking, breaking established patterns, competence in legal reasoning and decision writing. The courts' view of their role as supporters of government policy may be inferred from the not-

⁶⁰ Lindsey, above n 13.

⁶¹ Hiariej, above n 11.

infrequent practice of referring to an accused's failure 'to support the government's anti-terrorism strategy' as an aggravating factor in sentencing. The commission and conviction of the crime itself is evidence enough of a contravention of 'government strategy'. For example, it would seem illogical for a court to convict a person of murder, and then take account of the person's failure to support the government's 'anti-murder strategy' as a reason to increase the sentence it would otherwise have imposed.

DATA ON ARRESTS, DEATHS AND SENTENCING IN TERRORISM CASES

An examination of statistics in terrorism cases since 2003, and some basic calculations, shows that a total of 1017 suspects have been arrested, convicted, released, or died (as suicide bombers or in police raids). A total of 482 prisoners have been convicted, served their sentences and released, and 86 were released for insufficient evidence.

Diagram 5: Data of Terrorist Suspects in Indonesia as at March 2015

No.	Description	Total No. (persons)
1.	Detained and under investigation	30
2.	On trial	37
3.	Imprisoned	268
4.	Died during raid operation	99
5.	Died as suicide bombers	12
6.	Executed – Capital Punishment	3
7.	Acquitted due to weak evidence	86
8.	Released after serving prison sentence	482
Total		1017

Source: Presentation by Tito Karnavian, ASRENA Kapolri (Assistant Chief Of Indonesian Police for Planning and Budgeting), Jakarta Foreign Correspondents Club, Jakarta, March 2015.

An analysis which includes the sentences of the 268 currently imprisoned terrorists, shows that out of the 750 convicted terrorists since 2003 (not including those killed or released for lack of evidence) 63, that is around 8.4%, have been sentenced to more than 10 years imprisonment.⁶² Allowing for statistical error, it may be concluded that over 90% of Indonesia's terrorists are sentenced to 10 or less years in prison.

The number of prisoners who are sentenced to more than 15 years imprisonment is 3.9% (29 cases). In 1.9% of cases (14 cases), the sentence was life imprisonment. In two cases, i.e. 0.3%, (not including three prisoners from the 2002 Bali bombing), convicted terrorists were sentenced to death.⁶³ Since the executions of three of the 2002 Bali bombers in 2008, no further convicted terrorists have been executed, although two terrorists Achmad Hasan and Iwan Dharmawan, convicted of the Australian Embassy bombing, remain on death row. They are the only two to receive the death sentence since 2004. By comparison, as of 2013, a total of 128 prisoners were on death row for other, non-terrorism, offences; 68 for murder, and 60 for drugs offences.⁶⁴ Of the 268 currently imprisoned Indonesian terrorists 80% (215) are due for release by the end of 2020, a number which includes influential, dangerous and recalcitrant terrorists such as Aman Abdurrahman and Abdullah Sunata. This figure does not take account of remissions, so the actual number released by that date will be higher.

It has been argued that one reason the number of terrorists who receive the death sentence is low is due to the fact that some, possibly the most culpable, are killed

⁶² This analysis assumes that prisoners who have served their sentences and been released were sentenced to less than 10 years. In some cases it is possible that the prisoner was sentenced to more than 10 years however after remissions actually served 10 years or less. Complete data on this point is not available, therefore some room for error is allowed.

⁶³ Source: Centre for Radicalism and Deradicalization Studies, PAKAR.

⁶⁴ Commission for the Disappeared and Victims of Violence [Kontras], *Capital Punishment in Indonesia Update 2012-2013* report (2013) <<http://www.kontras.org>>.

before they get to trial. Some kill themselves in suicide attacks, others are killed by police. As of 2015, 99 terrorist suspects had been killed in police operations and 12 were suicide bombers. In 2013, Kontras, arguing that the death penalty does not deter terrorists, noted:

Authorities seem to have caught onto this [that the death penalty is not a deterrent], and appear now to rely on extra-judicial killings to eliminate terrorist cells. Notably, there are two convicted terrorists sentenced to death, despite regular raids of terrorist cells by Densus 88, the elite Indonesian anti-terrorism brigade. This is in large part because few of the suspects tracked down by Densus 88 ever make it to trial; many are gunned down in the field.⁶⁵

Diagrams 6 and 7 demonstrate two important facts. First the higher numbers of convicted drugs offenders and murderers are sentenced to death than terrorists. Second, a trend towards higher use of death sentence for foreigners than Indonesians, in drugs cases. The most likely category of offender to receive the death sentence in Indonesia based on these statistics is a foreign drug smuggler, rather than an Indonesian convicted of terrorism offences.

Despite varying opinions on the operational necessity of killing terrorist suspects in police raids, to argue that 'few of the suspects tracked down by Densus 88 ever make it to trial' ignores the over-700 suspects who have in fact made it to trial, and significantly misrepresents the reality. The number of suspects killed in police raids (just under 10%) is arguably too high, and indicates a possible need for police to review their use of force procedures.⁶⁶ A case may be made for the greater use of non-lethal weapons such as flash-bang grenades and knock-out gas 'designed to temporarily incapacitate, disable or disorient targets rather than kill them' during police CT

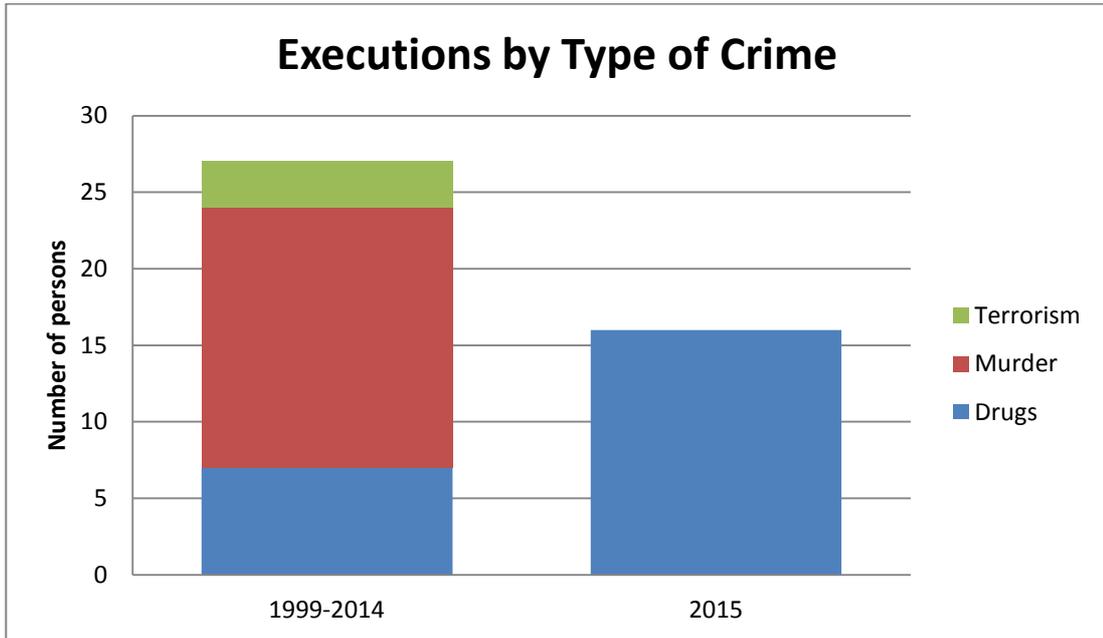
⁶⁵ Ibid, 5.

⁶⁶ International Crisis Group [ICG], *Indonesia: The Deadly Cost of Poor Policing* Asia Report No. 218, 16 February 2012.

operations.⁶⁷ However, it does not follow that 'few suspects ever make it to trial'. The vast majority of terrorist suspects do make it to trial, and the vast majority of those are convicted of a terrorism offence.

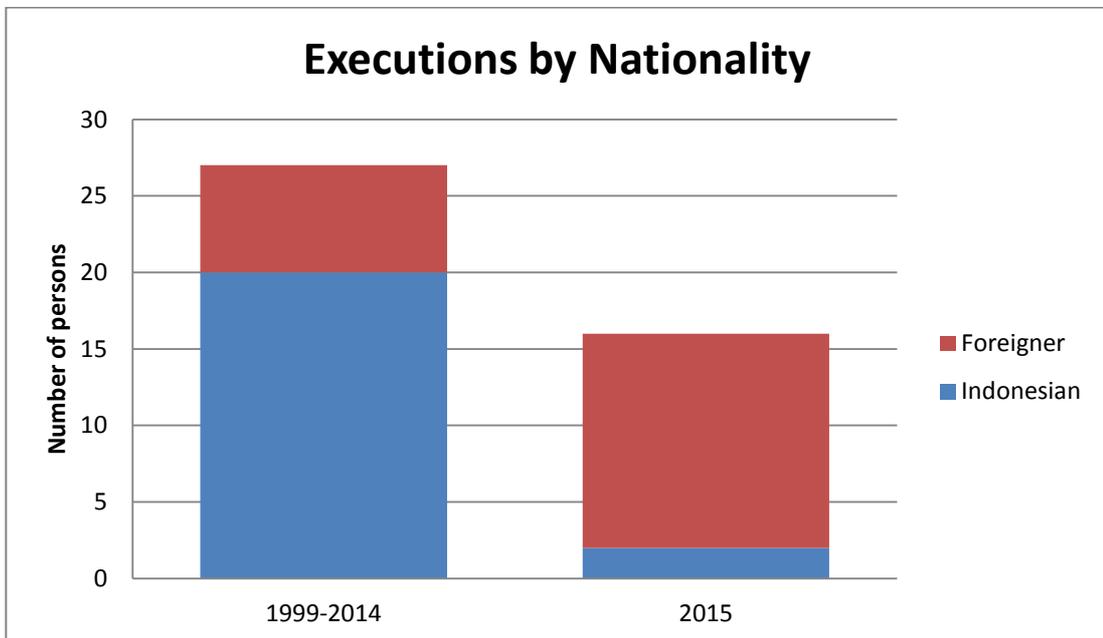
⁶⁷ Dian Firmansyah, "Non-Lethal Weapons Needed for More Effective Counter-Terrorism" (2010) *Military, Intelligence, Security & Foreign Policy* 1 June 2010 <<https://hankamindonesia.wordpress.com/>>.

Diagram 6: Executions Based on Category of Crime 1999-2015



Source: Kontras.org

Diagram 7: Executions Based on Category of Nationality 1999-2015



Source: Kontras.org

Whether the death penalty is a deterrent to terrorists is a worthy question. In the most heinous cases, life imprisonment may represent a greater punishment insofar as it thwarts the individual's desire to become a martyr. However, it is also worth questioning why so few terrorists who come before the courts are sentenced to death, or even life imprisonment. Sentences of convicted jihadist terrorists appear lenient by comparison with other offenders. Jones noted that while Papuan separatists are not charged with terrorism, the sentences they receive are far heavier than those for jihadists. Jones referred to the case of a jihadist terrorist who 'helped kill two police in April 2010 in Java' who was sentenced to six years imprisonment, then continued to discuss how Papuan ethno-separatists are treated by the courts:

When the perpetrators are caught, which is rare, they get the book thrown at them. A group involved in the killing of two soldiers and the theft of guns in Wamena in 2003 got 18 years to life; the men involved in killing security officers at a demonstration in Abepura in 2006 got 15 years. A six-year sentence in Papua for a crime involving the death of a policeman would be unthinkable.⁶⁸

The lighter sentencing and better treatment of Jihadist terrorists, is due to a prevalent perception within Indonesian political and judicial thinking that separatism is a worse offence than jihadism, and that jihadists 'are fundamentally decent men gone astray.'⁶⁹ The much higher numbers of drugs offenders and murderers on death row suggests that the courts also view them as being more morally culpable than jihadist terrorists.

On the question of lighter sentences for jihadist terrorists, Hiariej posits:

The reason the death penalty is much more frequent in drugs and murder cases than terrorism cases, is because terrorism is regarded as being based on Islamic ideology. Therefore judges are very careful in deciding the sentence for the accused. Eighty percent of Indonesians are Muslim. International pressure is definitely a factor, cases like the Bali bombing where most of the victims were Australian. For other terrorism

⁶⁸ Sidney Jones, "Papuan 'Separatists' vs Jihadi 'Terrorists': Indonesian Policy Dilemmas" *International Crisis Group Report* 22 January 2013 <<http://www.crisisgroup.org/en/publication-type/speeches/2013/jones-papuan-separatists.aspx>>.

⁶⁹ Ibid.

cases, where the victims are only Indonesians, then there is no international pressure, and the sentences are lighter. It has a big influence on the courts' treatment of the accused.⁷⁰

The issue of Indonesian courts' lenient treatment of terrorist suspects raises the question of whether the sentences imposed are sufficient to achieve the aims of punishment as outlined in the previous section – those of deterrence, rehabilitation and retribution. It may be argued that where 90% of terrorists receive sentences of less than 10 years after planning or participating in violent attacks, especially where they result in injuries or fatalities, and given the virulent ideology of hatred attached to terrorism crimes, the sentences are insufficient to achieve any of the three stated goals of punishment. A sentence of four to six years for a violent terrorism offence, especially after remissions are taken into account, is arguably insufficient to deter either the offender or others, to successfully rehabilitate the offender or to appease the sense of retribution in the eyes of the victims and the community. Demonstrably lenient sentences in the vast majority of terrorism cases do not therefore sufficiently serve the aims of punishment, or the broader interests of justice.

The analysis must however, take account of the varying degrees of culpability of defendants. A 'layer system' has been described by the BNPT and divides suspects into four categories based on their levels of culpability:

1. The central or hard core leaders and ideologues. These are the most radical and the most radicalizing.
2. Militants/radicals/operatives. These are less radical than the first layer, but they are the ones who carry out the operations.
3. Supporters – those who provide support in the form of funding, information, harbouring criminals.
4. Sympathisers – those who are sympathetic to terrorist ideals and operations.⁷¹

⁷⁰ Hiariej, above n 11.

⁷¹ Karnavian, above n 31.

Sentences must therefore reflect the culpability of defendants and their level of involvement in a terrorist act.

Sentences may be measured by comparison to the objective yardstick of the maximum legislative penalty allowable, or by comparison to sentences in other categories of crime, or by internal comparison with other sentences in the same category. Illustrating the inconsistencies and irregularities in the charges brought by prosecutors and the sentences handed down in cases of jihadist terrorism will form the next part of the chapter.

CASE ANALYSIS OF IRREGULARITIES IN SENTENCING AND JUDICIAL PROCESS⁷²

The argument presented in this chapter is that a significant number of irregularities and inconsistencies exist in the arrests, charging and treatment of terrorist suspects within the Indonesian judicial system which may ultimately affect sentencing outcomes. These include: sentences which are demonstrably inconsistent i.e. too lenient or harsh in the circumstances; sentences which may be the result of irregular external pressures such as judicial bribery; or political or diplomatic pressure; inaccurate or insufficient charging of offenders by prosecutors; opaque reasoning and poor standards of written decisions handed down by judges; wrongful arrests by police; or arrests where police exceeded their legislative powers; wrongful shootings of suspects by police; and torture of suspects in detention. The following section will use summaries and selected details of cases where necessary to illustrate key points.

⁷² Data regarding terrorism cases in Indonesia is not easily obtained by researchers. Judicial decisions of the lower courts are not readily available to the public. For example, the network of District Courts do not publish their decisions online, and there are no court reports which publish notable or important decisions from the lower courts. Researchers and law students may approach the administrative staff at the courts, and may be able to obtain copies of decisions and transcripts, but this is not always possible. The vast geographical spread of District Courts also make this approach difficult. The Constitutional Court and the Supreme Court do publish their decisions online. In most cases these will be important appeals on points of law, however they are exceptional cases, and do not assist in a broad analysis of the application of the law in day-to-day cases. The number of terrorism cases which are heard on appeal in the Supreme court is low. Out of approximately 800 terrorism trials, the decisions in 72 cases are published on the Supreme Court website, that is, less than 10%.

Suspects often make extensive admissions of their actions including violent acts; however deny the moral culpability of their actions, citing religious justification. The admissions of suspects may be used as evidence and significantly facilitate prosecutions in this area. Were suspects to suddenly stop making such admissions, the job of police and prosecutors in securing convictions would be made significantly more difficult.

Whether Indonesian courts have been too lenient or too harsh may be measured against a number of different benchmarks. Terrorism observer, Andrie has commented that 'I think the deradicalisation outcomes are better from softer sentences, harsher sentences serve only to, in many cases, further radicalise and antagonise terrorists'.⁷³ Others have argued that terrorists 'must get heavier sentences' and for a minimum ten-year sentence for any person convicted of terrorism.⁷⁴ The thesis argues that the sufficiency of sentences ought to be measured by reference to the philosophical purposes of punishment outlined above, that is, special deterrence, general deterrence, retribution and rehabilitation. Where sentences are not sufficient to achieve these aims, they are too lenient. However, given the concerns outlined by Andrie, further research is needed to determine which sentencing approaches are most effective in achieving desired rehabilitation outcomes. Government deradicalisation programs are also relevant in this context; however a detailed consideration of this area is outside the scope of the thesis.

Former head of BNPT Ansyad Mbai said "we have the weakest legal system to counter terrorism and radicalism" and that "no system existed in the surveillance of the approximately 250 terrorists released from prison, adding the court sentences handed

⁷³ Personal communication Taufik Andrie, Director International Institute for Peace Building, Jakarta September 7, 2015.

⁷⁴ Dicky Christanto and Bagus Saragih, "Terrorists 'Must Get Heavier Sentences'" *The Jakarta Post* 19 May 2010 <<http://thejakartapost.com/news/national/terrorists-must-get-heavier-sentences/>>.

to terrorists were relatively light, such as Abdullah Sonata whose prison term was cut to 3.5 years from the original seven."⁷⁵

Emphasising the need for more experienced judges who have greater background knowledge of the issue and can therefore hand down more nuanced sentences, Karnavian commented that special terrorism judges were needed as is the case on France, judges with greater background knowledge in order to aid in "accurate sentencing". "Mere sympathisers can turn radical if they are sentenced too heavily...those difficult to deradicalise should be given harsher sentences and kept in isolation, if necessary".⁷⁶

TOO LENIENT

In 2010, evidence discovered during the police raid on the Aceh terrorist training camp indicated Abu Bakar Ba'asyir's involvement as an ideologue, organiser, and financier. Ba'asyir was charged with seven offences under the ATL, and sentenced to 15 years. On appeal to the Jakarta High Court his sentence was reduced to nine years. Following a further appeal to the Supreme Court, he was found guilty of 'planning or mobilising others to use or possess weapons and ammunition for a terrorist act'. Though both the death penalty and life imprisonment were available as penalties, the Supreme Court reinstated the original punishment of 15 years imprisonment. Some observers note that Ba'asyir is not a generator of ideas, rather a puppet who can be manipulated by those close to him who 'whisper' in his ear.⁷⁷ However, his influence as leader of JAT cannot be denied. Given Ba'asyir's pivotal role as ideological driver, financier and recruiter for the Aceh camp, an enterprise which was responsible for the deaths of multiple police officers and civilians, the sentence is overly lenient, especially given that Ba'asyir refused to show remorse and denied the validity of the court itself.

⁷⁵ "Weak Legal System Cripples Anti-Terror Fight" *The Jakarta Post* 30 July 2010 <<http://thejakartapost.com/news/weak-legal-system-cripples-anti-terror-fight/>>.

⁷⁶ Ibid.

⁷⁷ Andrie, above n 73.

Indonesia is a polite, stratified society placing high value on contrition and seeking forgiveness from social superiors. An important, perhaps dominant, factor in sentence mitigation is the behaviour of the accused during the investigation and trial. Umar Patek was sentenced to 20 years for terrorist acts such as the Bali bombing, even though his crimes included repeated terrorist offences which caused the deaths of hundreds of individuals, and evading capture for over ten years. Patek's cooperative, remorseful attitude, whether genuine or not, was a factor in avoiding death or life imprisonment. Patek admitted his involvement in mixing explosives for the Bali bombing of 2002 which killed over 200 people; however he apologised to families of the victims at the trial.

Fadli Sadama was a core JI member since 2003 with international terrorist links to Malaysia and Southern Thailand. He was a weapons supplier and leader of Kumpulan Mujahidin Indonesia in Medan, he was actively involved in the deadly bank robbery of the CIMB Niaga bank in Medan in 2010, has been arrested three times and escaped from prison once. In his trial for the bank robbery and attack on the Hamparan Perak police station he was sentenced to 11 years imprisonment. Andrie commented 'his sentence should have been at least 20 years. He's a dangerous individual on the inside or the outside.'⁷⁸

Abdullah Sunata was an important driver of the Aceh training camp in 2010. He was responsible for sourcing weapons and as a military commander. He was previously arrested on terrorism charges in June 2006, sentenced to seven years and released on parole in May 2009 (in itself this raises serious questions about parole procedures i.e. sentenced to seven years and released after less than three years).⁷⁹ Prosecutors said

⁷⁸ Ibid.

⁷⁹ Elin Yunita Kristanti and Eko Huda, "Divonis 10 Tahun, Abdullah Sunata Pikir-Pikir" *Vivanews* (online) 27 April 2011 <<http://news.viva.co.id>>.

Sunata could face the death penalty,⁸⁰ but at trial recommended 15 years; the court sentenced Sunata to 10 years even after taking account of his prior offences. In mitigation the court considered Sunata's politeness during the trial and that he had a family and young children. The indictment could have included further charges such as 'conspiracy to use weapons' art 15 jo. 9, but did not for unknown reasons.

TOO HARSH

By comparison to the sentences of individuals such as Ba'asyir (15 years), Sadama (11 years) and Sunata (10 years), Pepi Fernando's sentence of 18 years for masterminding a series of, largely ineffectual, attacks is arguably too harsh. By reference to the objective gravity of the offences however, which indirectly resulted in one fatality and serious injury to a police officer who attempted to defuse a book bomb, the sentence is sufficient, or may be regarded as too lenient. The judge asserted that Fernando had been polite and cooperative, and admitted clearly and honestly all his actions. The case illustrates the paradoxes of sentencing in the Indonesian context, as it is capable of being viewed as both too harsh and too lenient depending on the perspective. It is noteworthy that Fernando, currently serving his sentence in a maximum security prison on Nusa Kambangan, has become more radicalised in prison.⁸¹ On the contrary, his wife Carmelita, involved in the same set of attacks, and given a light sentence of two years after cooperating with police, has since divorced Fernando, deradicalised, expressed regret, and is no longer involved in jihadism.⁸²

On the other hand, there have been instances of courts handing down harsh sentences to minor players. Harry Setya Rahmadi was sentenced to five years for providing lodging to wanted fugitive Noordin M Top for approximately one week at his

⁸⁰ "Indonesia Terror Suspect Abdullah Sunata Goes on Trial" *BBC Indonesia* (online) 29 December 2010 <<http://bbc.com>>.

⁸¹ Andrie, above n 73.

⁸² *Ibid.*

residence in Semarang. Prior to meeting Top, the defendant did not know him and was not a member of a terrorist group, nor did he actively participate in any terrorist attacks. By objective standards the sentence of five years sends a strong message to the community, that anyone who becomes even peripherally involved in terrorism will be dealt with sternly. By comparison with sentences in other cases of clearly greater culpability – for example Mohammad Jibriel (see below) a key player in financing and executing the Marriott bombing of 2009 who was sentenced to five and a half years – Rahmadi's sentence seems grossly unfair.

The 'Semarang Group' led by Subur Sugiato was responsible for the second Bali bombing of 2005 and the perpetrators received relatively harsh sentences. The leader Sugiato was one of the few terrorist defendants to be sentenced to life imprisonment. Dwi Widiarto and Wawan Suprihatin played only minor logistical support roles, essentially as couriers, and were sentenced to 10 years each. Anif Sulhannudin, who volunteered for the role of suicide bomber but was rejected by the leaders of the plot, was sentenced to 14 years even though his eventual involvement was also minimal. Again, viewed from the perspective of the objective gravity of the offence and general deterrence, the sentences send a clear message. However, by comparison to the sentences of major ideologues, repeat offenders, drivers and organisers of terrorist attacks, such as Ba'asyir, Sadama and Sunata, the sentences of these minor players seem incongruously harsh. Similarly, a number of participants who had relatively minor roles in the Aceh training camp received harsh sentences, such as Munir, whose only role was to direct people to the camp and was sentenced to seven years. Compare that with the sentences of, for example Mohammad Jibriel (five and a half years), Afief Abdul Majid (four years) Sunata (10 years) or Aman Abdurrahman (nine years) all of whom are much more influential and entrenched in their terrorist ideology yet whose sentences do not reflect their vastly greater culpability.

Cases which attract significant international media and political attention tend to result in the harshest sentences from Indonesian courts. Iwan Darmawan and Ahmad Hasan were sentenced to death for their pivotal involvement in the bombing of the Australian Embassy in Jakarta on September 9, 2004, which killed 10 people and wounded 150. Of the hundreds of defendants in terrorism trials, other than three convicted of involvement in the Bali bombing of 2002, these two defendants are the only ones to receive the death penalty. Though the three Bali bombers were executed in 2008, as of mid-2015 Darmawan and Hasan remain on death row. The case displays serious inconsistencies in sentencing, which are exacerbated by the gravity of the death sentence handed down. It is unclear why these two defendants received the death sentence, when their co-defendants, or others in cases of analogous culpability, such as the Marriott bombings or the second Bali bombing of 2005, did not. The defendants' lack of remorse was likely a factor in the final sentence. Hasan rejected the verdict saying that it was the result of foreign intervention and that his conviction was a sham.⁸³ Following the verdict, the Australian Prime Minister John Howard released a statement expressing his faith in the Indonesian legal system.⁸⁴ The influence of foreign parties over the outcome, whether through political or diplomatic channels, seems likely.

JUSTICE COLLABORATORS

There have been several cases where individuals have provided information and become prosecution witnesses (*saksi yang memberatkan*), assisting in the capture and conviction of fellow terrorists, and received significantly reduced sentences as a result. Luthfi Haidaroh (aka Ubaid – see below) is one notable example. Deni Carmelita is another. Khairul Ghazali was a member of a group which committed multiple attacks in

⁸³ Dian Yuliasuti, "Ahmad Hasan Juga Dihukum Mati" *TEMPO Interaktif* (online) 14 September 2005 <<http://www.nasional.tempo.co.id>>.

⁸⁴ "Howard Tak Raguan Sistem Hukum Indonesia" *TEMPO Interaktif* (online) 15 September 2005 <<http://www.nasional.tempo.co.id>>

Medan resulting in fatalities and was sentenced to five years. It was the lowest sentence from his group and half of the recommended sentence, and it is likely that his cooperation with police, participation in anti-radicalism programs and authoring of a book which praised the work of Densus 88 was a factor in his lenient sentence.

Salahuddin⁸⁵ was a key actor in the bombing of a Christian church in July 2001 which killed five people and injured dozens, and the Atrium mall bombing in August 2001 in Jakarta which injured six people. He was charged with two co-accused, Edi Setiono and Taufik bin Abdul Halim who were convicted and sentenced to 20 years and life imprisonment respectively. It is likely that Salahuddin, whose arrest in 2006 during a police raid to capture Noordin Top was followed by a string of arrests, gave extensive information to police, and was rewarded with a lenient sentence of just four and a half years.

Luthfi Haidaroh (aka Ubaid) was a key functionary within JAT. He acted as treasurer, training manager, recruiter and sat on the JAT's Shari'a Council. He was sentenced to 10 years for conspiracy and assisting the use of weapons for terrorism for his involvement in the Aceh training camp. Considering the objective gravity of his offences and his role in JAT his sentence seems light; however as a justice collaborator he gave evidence as a prosecution witness in the trial of Ba'asyir thereby earning a significant reduction. In light of this, some have argued that his sentence should have been in the region of six to eight years.⁸⁶ The case also illustrates the questionable practice of using an element of the offence as an aggravating factor in sentencing. Among the reasons cited for lengthening the sentence was that the defendant had 'caused fear or anxiety in the community'. As one of the elements of a charge of terrorism itself, it should not be taken into consideration for sentencing.

⁸⁵ Facts taken from the police brief of evidence (*berita acara pemeriksaan*).

⁸⁶ Andrie above n 73.

BRIBERY

Given the documented corruption within the Indonesian judiciary, it is tempting to conclude that lenient sentences, for example those of Patek, Jibriel, Sunata, Sadama or even Ba'asyir (some of whom should arguably have been sentenced to death or life imprisonment) could be the result of judicial bribery. However, it appears unlikely that bribery is a factor in most terrorism cases. Observers note that they have seen no indication of bribery by lawyers from the Muslim Defence Team, who represent virtually all terrorist suspects.⁸⁷

An examination of the circumstantial evidence surrounding the case of Saudi national Ali Abdullah, alleged to have partially financed the Marriott bombing of 2009, cannot rule out judicial bribery. Abdullah's case is the only known instance of an Indonesian court completely acquitting a defendant of all terrorism charges. Despite clear evidence which linked the accused to one of the main actors in the bombing, Syaifuddin Zuhri, the charge of providing financial or material aid to a terrorist, while found proven by the Supreme Court, was overturned on judicial review. Abdullah had spent considerable time with Zuhri, including attending Islamic study sessions also in the company of Dani Dwi Permana, one of the suicide bombers in the attack. Evidence also showed he transferred money to an acquaintance who was introduced to the defendant by Zuhri, which was allegedly used to purchase materials for the bombing. The defendant claimed he had no knowledge that Zuhri was involved in terrorism, which formed the basis of his defence. The prosecution seems to have substantially weakened their case by charging the defendant with intentionally giving aid, rather than under article 11 which criminalises collecting funds for a purpose that ought to be suspected will be used for a terrorist attack. Given that almost all terrorist cases brought to trial result in convictions, the case is anomalous. Andrie commented:

⁸⁷ Bhakti above n 57; Andrie above n 73.

I believe he knew what he was doing. People like Syaifuddin Zuhri and Ibrahim are not good guys. If you give them money, it is reasonable to assume they will use it for terrorism.⁸⁸

Given that there was considerable evidence against the accused, his is the only case of complete acquittal on terrorism charges and as a financier he would have had direct access to funds, bribery cannot be ruled out.

INACCURATE/INSUFFICIENT INDICTMENTS

The case of Muhammad Jibriel Abdul Rahman illustrates two separate aspects of irregularities in the judicial system: inaccurate drafting of the indictment and external influence on the sentence. Police alleged that the accused was tasked by Noordin Top (a wanted fugitive at the time, and a friend of the accused) to source funds for the Marriott bombing of 2009 from an Al Qaeda contact in Saudi Arabia. A witness also testified that he overheard the accused giving instructions and motivation to the suicide bomber, Dani Dwi Permana, just prior to the bombing, and he destroyed identification cards and other evidence after the attack. Given the accused's position in facilitating the financing of the attack, in conditions where he knew or ought to have suspected the money's purpose, it is anomalous that he was not charged with financing terrorism; only with the lesser charge of concealing information, for which he received a five-year, six-month sentence. The defendant's father's position as head of the MMI (Majelis Mujahidin Indonesia) an influential, radical Muslim council, may have assisted in putting political pressure on Densus 88 during the investigation and trial.⁸⁹

Aman Abdurrahman is considered one of the most influential Indonesian jihadist ideologues, on a level equal to, or greater than, Abu Bakar Ba'asyir. He contributed funds to the Aceh training camp, recruited participants, and assisted in concealing fugitives after the camp was raided by police. He was charged with

⁸⁸ Andrie above n 73.

⁸⁹ Ibid.

conspiracy, unlawful use of weapons and explosives as well as aiding and concealing terrorists. However, he was only convicted of assisting a terrorist financially and sentenced to nine years. It is not clear why Abdurrahman was not convicted on the other charges, despite considerable evidence. The sentence is lenient given Abdurrahman's senior role as an influential ideologue, and by comparison to sentences handed to minor players such as Munir, whose job was to direct people to the camp; sentenced to 7 years imprisonment during the same court session. Notably Abdurrahman continues to issue fatwahs from his jail cell on Nusa Kambangan island,⁹⁰ including one where he pledged to serve his entire nine-year sentence without applying for remissions, and thereby earn 'pure freedom' (*bebas murni*) rather than conditional freedom (*bebas bersyarat*) with parole conditions. He also urged his incarcerated followers to do the same. He is due for release in 2018.

Another convicted financier of the Aceh camp, Afief Abdul Majid, was also the first prosecution for ISIS-related activities to come before the courts in Indonesia and acted as a test case for prosecutions under provisions of the ATL and the Criminal Code. Though the defendant admitted travelling to Syria, joining ISIS, swearing allegiance to the caliph and participating in military training, the court only sentenced Afief to four years imprisonment for the funding Aceh charge, including time served. The sentence was slightly lighter than those of Syarif and Usman (four and a half years), also convicted of financing the Aceh camp, and did not reflect Afief's senior position in JAT as an influential ideologue, or, his involvement with ISIS. Further arrests for ISIS-related activities are before the courts at the time of writing.⁹¹

⁹⁰ See: millahibrahim.wordpress.com

⁹¹ Adhe Bhakti, "Tujuh Pendukung ISIS Didakwa Terorisme" *Radicalism Studies* (online) 14 October 2015 <<http://www.radicalismstudies.org/home/2015-04-19-13-37-27/terrorism-daily/245-tujuh-pendukung-ISIS-didakwa-terorisme.html>>.

A significant development in the case of senior JAT ideologue Afief Abdul Majid occurred in late 2015. After being sentenced to four years by the Central Jakarta District Court for funding the Aceh training camp in 2010 (the court ruled that the defendant's self-confessed actions in support of ISIS did not constitute criminal acts)⁹² the case was appealed by prosecutors to the Jakarta High Court. The appeal court affirmed the conviction for funding and, importantly, convicted Afief under art 15 jo. 7 of the ATL for his activities in support of ISIS, which included travelling to Syria and participating in military training, swearing allegiance, and declaring support for ISIS. The High Court's decision reversed the trial court's ruling that defendant's ISIS activities did not constitute criminal activity. Lawyers for the defendant however announced that they would appeal the decision to the Supreme Court. Among the bases for the appeal was an objection on a technicality that expert evidence read out at the appeal was inadmissible as the expert witnesses did not appear to testify at trial.⁹³

OPAQUE AND POOR JUDGEMENTS

Usria was a driver and general assistant for a group who carried out random shootings of Javanese workers in Aceh, causing three fatalities, and attempted a bombing assassination of the Governor of Aceh. He was sentenced to four years. The written judgement illustrates the flawed, albeit common, practice of cutting and pasting large slabs of facts from the indictment and brief of evidence directly into the court's decision. No attempt was made to distinguish between the shootings – actual terrorist acts – with the factually separate charge of attempted assassination.⁹⁴ The judgement is not only therefore opaque and lacking in legal reasoning, it also, like many other

⁹² Adam Fenton and Hery Firmansyah, "Has Indonesia Gone Soft on Terrorism?" *The Jakarta Post* (online) 10 July 2015 <<http://www.thejakartapost.com/news/2015/07/10/has-indonesia-gone-soft-terrorism.html>>.

⁹³ Adhe Bhakti, "Afief: ISIS Calon Kekuatan Dunia" *Radicalism Studies* (online) 22 October 2015 <<http://www.radicalismstudies.org>>.

⁹⁴ Andrie, above n 73. These attacks were one of very few instances of politically motivated terrorism, as distinct from jihadist terrorism, prosecuted using the ATL.

judgements, displays frequent typographical errors and computer 'glitches' which affect the visual presentation of the decision, and in some cases blurs the substantive meaning.

WIVES OF TERRORISTS

Because of the nature of fundamentalist Islam and other aspects of Indonesian social culture, wives of jihadist terrorists are not likely to be in a position to exercise independent judgement even though their actions or omissions carry criminal consequences. However, wives of terrorists have been successfully prosecuted in several cases which illustrate some key aspects of Indonesia's judicial processing of terrorists. Putri Munawaroh, the wife of Adib Susilo, was sentenced to three years for assisting her husband in providing food and lodging to Noordin M Top and two others, considerably less than the prosecution demand of ten years. The court noted that the defendant was polite, cooperative, and had an infant son.

Rukayah, the wife of convicted terrorist and Bali bomber, Umar Patek, was sentenced to 2 years and 3 months for falsifying data relating to her passport application, two-thirds of the recommended four years. The prosecutors did not appeal, illustrating the unofficial rule of thumb that they are generally satisfied with sentences which are no less than two-thirds of the recommendation. The sentence of over two years for a fraud offence where it was not alleged that the defendant had knowledge of the actual attacks committed by her husband, stands in stark contrast with the case of Deni Carmelita, wife of Pepi Fernando, who was actively involved in, and had knowledge of, terrorist attacks and who received a sentence of two years. In their sentencing comments the judges noted that Carmelita was the mother of three young children (one of which she had been pregnant with at the time of the trial). Given the defendant's position as wife of the leader of the group, and knowledge of the actions of her husband, which caused death and injuries, the sentence which is at the very lightest end of the spectrum does not reflect the gravity of her offences.

Notably, these three women, all of whom received similar sentences had completely different rehabilitation outcomes. Munawaroh, whose husband was killed in the same police raid which killed Noordin Top in 2009 and who received the staunch support of the Islamist community during her trial, has remained radicalised. Rukayah on the contrary acted as a deradicalising influence on her husband Patek and may have played an important role in his decision not to continue waging jihad in Indonesia, and to seek forgiveness for his crimes. Carmelita, who expressed remorse and cooperated with police, divorced her husband and has become deradicalised.⁹⁵

CHILD TERRORISTS

Children are deemed under the law as not fully capable of making informed, independent decisions, and so lenience is generally warranted. However, this concept becomes problematic in the case of child terrorists such as Fajar Novianto, a self-radicalised and self-taught bomb-maker who was actively involved in training other militants in bomb-making while under 18 years of age.⁹⁶ He was charged with both conspiracy and unlawful use of explosives, but was sentenced to two years, in accordance with the rule that child defendants are entitled to a one-third reduction of sentence. However, for acts as potentially dangerous as those committed by the defendant in this case, in particular instructing others in bomb-making, the sentence is extremely lenient by both objective and subjective standards and arguably does not achieve any of the objectives of punishment. A group in Klaten was infiltrated by police planning bombings of several targets including a police station and a church. Three of the defendants were under 18 and received sentences of four to six years.⁹⁷ The cases illustrate the real danger posed by terrorism committed by Indonesian children and the

⁹⁵ Andrie, above n 73.

⁹⁶ Septiana Ledysia, "Fajar Novianto Pelaku Teroris Solo Divonis 2 Tahun Penjara" *Detik News* (online) 29 November 2012 <<http://www.detik.com>>.

⁹⁷ Andrie, above n 73.

challenges of determining appropriate sentences for child defendants accused of terrorism.

THE ROLE OF ADMISSIONS/CONFESSIONS BY DEFENDANTS

Mohammad Imran was recruited by ISIS and attempted to leave Indonesia with his wife and child using false travel documents. He was arrested at Soekarno-Hatta international airport after a tip off from Densus 88. He freely admitted falsifying his, and family members', passports to fulfil his desire to join ISIS and live under Shari'a law, and because of the enticement of a large monthly salary. The court sentenced him to 1 year and six months for falsifying travel documents.⁹⁸ The case illustrates four important aspects of terrorist prosecutions in Indonesia. First, suspects frequently make incriminating admissions of fact. Second, while they make admissions of fact they do not admit the culpability or criminality of their actions, citing religious justifications as being superior in authority to the laws of the government. Third, despite their admissions, Indonesian law requires further corroborating evidence for a court to convict – one source of evidence alone, i.e. the accused's admissions, is not sufficient. Fourth, the legal vacuum relating to support for ISIS, or any other terrorist organisations, means that prosecutors are unable to obtain convictions for supporting or being members of such groups even where sufficient evidence exists.

WRONGFUL ARRESTS AND ILLEGAL POLICE ACTIONS

Police are authorised to detain a person who is strongly suspected of committing a terrorism offence based on sufficient preliminary evidence for up to seven days. After that time, if the evidence is insufficient to support a charge the person must be released. Despite the claim that 'the Indonesian police have been scrupulous about

⁹⁸ "Didakwa Palsukan Dokumen di Paspor Terduga Simpatisan ISIS Diadili di PN Tangerang" *Pos Kota* (online) 23 March 2015 <<http://www.poskotanews.com>>; "Terduga ISIS Divonis 1,6 Tahun Penjara" *Republika* (online) 4 May 2015 <<http://www.republika.co.id/berita/nasional/hukum/15/05/04/nntqon-terduga-ISIS-divonis-16-tahun-penjara>>.

releasing those they have decided not to charge'⁹⁹ there have been cases where the police have acted outside their legal powers.

Thontowi refers to the arrests of 13 'activists, some of whom had been to Afghanistan' who were arrested from a number of mosques following the Marriott bombing of 2003.¹⁰⁰ The police were accused of abduction because 'in some cases it was only after twenty three days that the police passed on any information to the families as to what had occurred.'¹⁰¹ The Legal Aid Institute handling the complaint took 'legal action against police' and was handling 'sixteen reports of missing persons who had allegedly been detained by the police.'¹⁰²

Ikhsan Miarso, a religious leader from Solo, was arrested on suspicion of terrorism, and detained for 30 days before being released without charge.¹⁰³ Syaifudin Umar (also known as Abu Fida) was arrested in 2004 in connection with Noordin Top and Azahari, held for more than 10 days, and allegedly beaten and tortured before being released. He allegedly suffered amnesia as a result of torture. He was found partially dressed in a dazed state at a hospital. His body was bruised, lacerated and burned allegedly from cigarettes and some finger nails were missing or partially removed.¹⁰⁴ No police files or BAP, exist in relation to the case. No further investigation or judicial process occurred. Umar's legal team argued that his arrest had not been

⁹⁹ Sidney Jones, "Terrorism, Counter-Terrorism and Human Rights in Indonesia" (2006) *Submission to the International Commission of Jurists, Jakarta, 4 December 2006*, 2.

¹⁰⁰ Jawahir Thontowi, "The Islamic Perspective of the War on Terrorism and Current Indonesian Responses" (Paper presented at Human Rights 2003: The Year in Review Conference Castan Centre for Human Rights Law, Monash Law School, 4 December 2003) 22.

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ Bhakti above n 57.

¹⁰⁴ Khairunnisa, "Tim Pengacara Muslim Yakin Benar Abu Fida Dianiaya" *TEMPO Interaktif* (online) 20 August 2004 <<http://www.nasional.tempo.co>>.

accompanied by any official warrant or documentation. In 2014, he was arrested again on ISIS-related charges.¹⁰⁵

Other credible allegations of torture have been referred to above. Some reports indicate that the Indonesian police have not only mistreated terrorism suspects, but also their legal representatives. Lawyers representing Amrozi, during his trial for the Bali bombing of 2002, claimed they were 'slapped and hit in the face' by plain-clothes police in 'an attempt to influence the fair and independent judicial process'.¹⁰⁶

COOPERATIVE COURTS, INSUFFICIENT SENTENCES

From the perspective of the Indonesian government, or foreign governments, engaged in sustained anti-jihadist campaigns, Indonesia's courts have performed admirably by achieving a very high conviction rate of defendants brought before them for terrorist crimes. This has been the case despite deficiencies in both the approaches taken by police and prosecutors outlined in Chapter 6 and deficiencies in the ATL itself outlined in Chapter 4.

Comments by Judge Arsyad Sundusin of the West Jakarta District Court in the case of Agung Prastyo are indicative of the accommodating attitude of Indonesian courts in construing the ATL and its purposes.¹⁰⁷ Addressing the legal definition of an 'attempt' the court stated:

With regard to attempts, according to article 53(1) of the Criminal Code an attempt to which criminal consequences may be attached occurs where 'the intention to commit a crime is evident from the commencement of performance, however performance of the crime is not completed, for reasons not solely due to the will of the offender himself'. The limits of an attempt therefore require the 'commencement of performance'.

¹⁰⁵ Farouk Arnaz, "Ketua Harian JAT Resmi Ditahan, Abu Fida Masih Didalami" *Berita Satu* (online) 17 August 2014 <<http://www.beritasatu.com/>>; Theresia Felisiani, "Abu Fida Bertugas Rekrut Anggota ISIS Dari Kalangan Mahasiswa" *Tribunnews.com* (online) 14 August 2014 <<http://www.tribunnews.com>>.

¹⁰⁶ Thontowi, above n 100, 23.

¹⁰⁷ Decision of the West Jakarta District Court in Agung Prastyo No. 2030/PID.SUS/2012/PN.JKT.BAR, 21 March 2013.

According to the Academic Paper on the draft ATL this requirement does not provide sufficient protection for the community against acts of terrorism...This issue may limit the options available to police and prosecutors and limit the ability of law enforcement agencies to anticipate and stop disasters (acts of terrorism) before they occur. Therefore law enforcers need a stronger legal framework to stop attempted terrorist crimes before they happen.¹⁰⁸

Thus the court supported a broad approach to the question of attempts to allow law enforcement authorities to lawfully intervene at an earlier stage than would be allowed under the general criminal law, in order to prevent attacks. This approach is significant as it indicates a willingness of the courts to accept a derogation of rights for the cause of countering terrorism, even more so as the ATL itself is silent on the question of broadening the definition of a criminal attempt. The court also expressed its support for a broader approach to aiding and abetting than that contained in the Criminal Code. The court stated:

According to the Academic Paper on the ATL it is stated that terrorism often relies on individuals who possess expertise in different areas. One person might procure explosive materials, while another might construct an explosive device and another will transport it. The elucidation (explanatory memorandum) states that 'assisting' covers assistance which is given before, during or after the terrorist act. This broadens the reach of criminality beyond what is in the Criminal Code, to clearly cover individuals who are involved and provide contributions in the same way as those who directly participate in the commission of the offence. This forms an important broadening of the definition of assisting a criminal act in the context of counter terrorism for the elimination of terrorist cells. Part of the strength of modern terrorism lies in the ability of terrorist cells to plan acts and assist others to avoid detection from security forces.¹⁰⁹

Again, the court showed its willingness to expand the understanding of aiding and abetting beyond ordinary criminal law limits to catch accomplices who assist at earlier or later stages of the offence. As Indonesia's legal system, based on the Continental model, does not incorporate the doctrine of precedent it cannot be guaranteed that

¹⁰⁸ Ibid, 45 (Author's translation).

¹⁰⁹ Ibid.

other courts would follow this broad approach to legislative interpretation in future terrorism cases.

However, this judicial willingness to accommodate extraordinary methods in countering terrorism may be seen as commendable from the perspective of governments seeking to implement a firm CT regime. From the perspective of defendants it may be viewed as an unwarranted derogation of long-held rights under the criminal law. Further, the approach of Indonesian courts which emphasises judicial discretion frequently leads to results which may be viewed as unfair and inconsistent when compared with results in other cases (chapter 6). From the point of view of terrorist defendants, the prospect of acquittal after being charged with a terrorist offence is very small and significantly diminished due to the extraordinary approach of the courts.

However, while conviction rates are high, sentences handed down in terrorism cases are relatively light. Around 90% of convicted terrorists are sentenced to 10 years or less, with the average sentence around 6-8 years.¹¹⁰ As offenders may apply for parole after serving two-thirds of their sentence, the actual average length of prison time served for terrorist offences is therefore less than five years. The number of terrorists on death row is far less than the numbers of convicted murderers or drug offenders. This raises the serious issue of whether Indonesian courts' sentencing of terrorists is sufficient to achieve any of the core purposes of criminal punishment such as general and specific deterrence, rehabilitation and retribution.

CONCLUSIONS AND RECOMMENDATIONS

Indonesia's counter-terrorism authorities have compiled an impressive record of identifying, tracking, and capturing around 1000 terrorism suspects since 2004 using a dedicated counterterrorism police force. Despite some deficiencies in the drafting of

¹¹⁰ Andrie, above n 73.

indictments as outlined above, a special task force of 40-50 specially-trained prosecutors has brought the cases to trial with an almost-perfect conviction rate. However, the sentencing stage has been characterised by poorly stated judgements which lack clear legal reasoning and detailed explanations of how convictions and sentences are arrived at.

Large inexplicable discrepancies exist in the sentences of terrorist offenders, indicating serious flaws in sentencing processes. Some offenders whose culpability is demonstrably high have received inexplicably lenient sentences, while others have received inexplicably harsh sentences. The opacity of such results produced by the judicial process indicates major deficiencies in the capacity of Indonesian courts to deliver clear, reasoned, consistent judgements in terrorism trials, and further, that external factors such as international media, political or diplomatic pressure likely influence the decisions handed down in Indonesian courts in some cases. While there is ample evidence to conclude that corruption is commonly a factor in the outcomes of other criminal trials, there is little to suggest that this is the case in terrorism trials. Most likely this is because the defendants themselves are unable to pay large cash sums for their defence (most of them rely on the Muslim Defence Team) or because they have ideological objections to both bribery, and/or seeking to mitigate the sentences for acts which they do not consider to be morally culpable. Some defendants go so far as to deny the validity of the court itself, and to refuse to seek early release when it is available.

There are a number of factors which may contribute to inconsistency in sentencing; the absence of the doctrine of precedent, poor access to prior decisions of other courts, and an emphasis on judicial discretion in determining sentences. Most important perhaps is a lack of specialised training for the judiciary. Unlike police and prosecutors, both of which have dedicated terrorism units, the judiciary does not have specially-trained members to preside over terrorism trials. At most, judges who have

tried a previous terrorism case are often assigned to another, becoming terrorism specialists by default. Calls to establish a special terrorism court appear to be gaining some traction, and the BNPT is the logical body to champion this cause. At the time of writing however, it appears that little progress has been made in this area.

Some judicial practices of duplicating information from prosecution documents with little legal analysis and/or assigning court functionaries to complete written judgements, has led to opacity in judicial outcomes which should be addressed. Judgements sometimes show misspellings, inconsistencies in the spellings of names, grammatical errors, computer glitches, repeated copying and pasting of facts and aliases, all of which can affect the substantive meaning of the judgment – and therefore demand greater attention to detail to improve their coherence, readability, flow and logical analysis.

Further, judgements routinely fail to apportion sentences for separate convictions on different offences; rather, one sentence is given at the conclusion of the decision which may cover multiple counts of the same offence, or multiple convictions on different offences. A judge may consider repeated offences as a reason for increasing the sentence, and he or she may also consider whether the accused has prior convictions as a reason for increasing, or a lack of prior convictions for reducing, the sentence. Courts' sentencing comments however are, in most cases, very brief and commonly include trivial considerations such as whether the accused was polite during the trial. Other considerations such as whether the accused showed remorse, or cooperated with police may also be included, and can lead to significant reductions of sentence.

In general, it may be argued that Indonesian courts, with some notable exceptions, have been overwhelmingly lenient in their treatment of convicted terrorists. Around 90% of offenders are sentenced to imprisonment of 10 years or less.

Some 14 offenders have been sentenced to life imprisonment and a total of five individuals have been sentenced to death, since 2002,¹¹¹ despite frequent terrorist attacks which have killed police and civilians numbering in the hundreds. In terms of achieving the three main purposes of punishment, that is deterrence, rehabilitation and retribution, sentences in Indonesian terrorism trials are insufficient. While some argue that longer sentences, especially in the case of minor players, serve only to further radicalise those who have good prospects for rehabilitation – longer sentences which fulfil the aims of general deterrence, and retribution should be combined with more effective and standardised prison programs for deradicalisation and further training of prison staff in handling terrorist inmates. Further, attention should be given to the processes for remissions to ensure that only deserving prisoners, those who are truly remorseful and reformed, receive cuts to their sentence.

While a wide-ranging overhaul of Indonesian criminal law and procedure is beyond the scope of this paper, certain specific actions are proposed in order to create greater levels of effectiveness, consistency and predictability in judicial responses to terrorism.

First, special training for judges and court staff to instruct them in the special characteristics of terrorism and counter-terrorism. Such training should emphasise the extraordinary gravity of terrorism offences and therefore the special need for general deterrence. It should also emphasise the de-politicisation of the definition of terrorism, the independence of the judiciary, and a logical approach to analysing terrorism in accordance with its legal elements. Such training should act as a precursor to the creation of a special terrorism court, modelled on other special courts such as the

¹¹¹ In both cases, the targets of the attacks were foreign, however in comparable attacks such as the Marriott bombing of 2009, or the second Bali bombing of 2005 no death sentences were given.

corruption or fisheries courts, and the BNPT should take responsibility for advancing this initiative in cooperation with the Ministry of Law and Human Rights.

Courts should clearly identify which articles of the law the accused is convicted of and clearly apportion sentences based on each count of each offence where multiple offences are brought – rather than taking the formulaic approach of a blanket sentence of around two-thirds of the prosecution's *tuntutan*. Prosecutors likewise should pay more attention to careful construction of the indictment and clearly deconstructing and analysing facts and law to determine precisely the applicable articles and the number of counts of each offence.

Judicial training should include standards and practices of written judgements. Judgements should begin with a brief statement of the salient facts of the case, not blindly copy and paste the facts from the indictment. They should establish which facts are agreed on, identify the matters in contention, whether legal or factual, and relate the articles of law to the facts. By not doing so, the opacity of judgements creates inaccessibility to the law which is equivalent to a denial of natural justice to those who seek it, and makes a coherent study of the law near to impossible. It adds to the arbitrariness of the judiciary and its negative image in the eyes of the public.

In total, the counter-terrorism efforts of police have been very effective at infiltrating and disabling terrorist groups. The laws and mechanisms have proven to be effective in obtaining convictions and putting terrorists behind bars, however as a system which produces fair, accountable, transparent results, the judicial system is an almost complete failure. This may be a secondary concern to governments, including Indonesian and foreign, whose main concern is the effectiveness of counter-terrorism regimes and the safety of their constituents. However, a Kantian analysis would condemn this approach which marginalises the rights of individuals to fair treatment before the law, and to be viewed as moral ends rather than means to an end. While the

situation continues, the perceived integrity of the Indonesian judicial system remains compromised.

CHAPTER 7 – BREAKING THE ISIS – INDONESIA’S LEGAL POSITION ON THE ‘FOREIGN TERRORIST FIGHTERS’ THREAT

INTRODUCTION

This chapter examines the background of the ISIS threat and its specific relevance for, and connections to, Indonesia. It takes account of the UN position on counter terrorism generally and the ISIS threat specifically, including UNSC resolutions which address ISIS. It analyses the current Indonesian legal position on preventing and punishing those who support or participate in violent activities in connection with ISIS through an analysis of the laws that currently exist that could be used to handle the foreign fighter threat. Finally, it considers the laws’ strengths and weaknesses, and suggests changes to shore up their effectiveness.

In August 2014 the United Nations Security Council (UNSC) unanimously adopted Resolution 2170 (2014) (‘the Resolution’) calling on all member states to act to suppress the flow of foreign fighters, financing and other support to Islamist extremist groups in Iraq and Syria¹ – including ISIS.² As a member state of the United Nations (UN), a co-sponsor of the resolution, and home to the world’s largest population of Muslims, Indonesia is therefore of key importance in global attempts to stop the flow of fighters and finance to ISIS. While Indonesia has given its support to UN Resolution 2170, its domestic legal position on how to enforce the spirit of the resolution remains unclear and the subject of controversy and debate. While Indonesia currently has no legislation that specifically addresses the foreign fighter phenomenon,

¹ "Security Council Adopts Resolution 2170 (2014) Condemning Gross, Widespread Abuse of Human Rights by Extremist Groups in Iraq, Syria" United Nations Press Release (online) 15 August 2014 <www.un.org/press/en/2014/sc11520.doc.htm>.

² United Nations Security Council Resolution 2170 refers to ISIL (Islamic State in Iraq and the Levant), ANF (Al Nusra Front) and Al-Qaida. This thesis, however, uses the term ISIS (Islamic State of Iraq and Al-Sham), to refer to the organisation that declared a caliphate in regions of Iraq and Syria on 29 June 2014. This is the term used almost exclusively in Indonesia, and particularly in Indonesian media.

senior government officials have recently announced to the media that the terrorism laws would be revised to address ISIS and foreign terrorist fighters (FTF).³ A report by the Jakarta-based NGO, the Institute for Policy Analysis of Conflict (IPAC) notes 'Indonesia does need a number of stronger laws to enforce its commitment to banning ISIS. For example, at present it is not illegal for Indonesians to travel overseas to take part in military training'.⁴ In the meantime, police and prosecutors are using existing laws to deal with ISIS and its supporters, and this has led to significant uncertainty regarding legal outcomes.

BACKGROUND

Terrorism expert Martha Crenshaw outlines two main threats posed by ISIS. First, a hostile organisation with 'a long history of lethal attacks against the West...now has a territorial base from which to plan and organize terrorism against the US and its allies'. And second, the possibility that 'citizens or legal residents of Western countries who have travelled to Syria and Iraq to fight with ISIS, so-called foreign fighters, might return home to commit acts of violence. Their training and experience make them particularly dangerous'.⁵

Crenshaw's analysis, while it correctly identifies two serious ISIS threats, shows a western bias. The so-called foreign fighters do not only pose a threat to the West and its allies. And they do not only originate from citizens or legal residents of Western countries. It is clear that Indonesia is at risk from attacks by jihadist terrorists. It is also clear that a number of Indonesian citizens have answered the call to fight in the ISIS conflict – and therefore pose a risk to Indonesia of engaging in further acts of terrorism

³ Rosmiyati Dewi Kandi and Aghnia Adzkia, "Kementerian Hukum Setuju Diterbitkan Perppu Larang ISIS" *CNN Indonesia* (online) 22 April 2015 <<http://www.cnnindonesia.com/nasional/20150422142453-12-48449/kementerian-hukum-setuju-diterbitkan-perppu-larang-ISIS/>>.

⁴ Institute for Policy Analysis of Conflict [IPAC], *The Evolution of ISIS in Indonesia* IPAC Report No. 13, 24 September 2014, 23.

⁵ Martha Crenshaw, "ISIS Terrorist Group Is a Potential Threat to U.S. Stanford Scholar Says" *Stanford News* (online) 10 July 2014 <<http://www.news.stanford.edu/>>.

upon their return home. In recent years the apparatus of the Indonesian state, most notably the police, and the President and heads of regional governments, have been targeted by jihadist terrorist groups based in Indonesia.⁶

The number of Indonesians currently involved overseas in the ISIS conflict is unclear, and differing estimates from a range of sources - government agencies, police, media and academe - just add to that lack of clarity. In July 2014, Colvin cited security expert Greg Barton estimating the number to be around 150 but added that 'that may well be severely underestimating it.'⁷ In September 2014, Alford reported that 350 Indonesians had left within the last three years to join ISIS and its rival al-Nusra front.⁸ A news report from December 2014 estimated 514 Indonesians had travelled to Iraq and Syria to fight alongside ISIS.⁹ An IPAC report from January 2015 quotes a Densus 88 figure, (also from January 2015), of 123 but states that the 'true figure of fighters is higher, because not all fighters have been identified, but there is no reason to believe it has reached '264' or '350' or some of the other numbers bandied about in the media'.¹⁰ In November 2015, Chief of Jakarta Police and former head of Densus 88 Inspector General Tito Karnavian cited a figure of 384 Indonesians who have joined ISIS. He also noted 'the total number of Indonesians who have departed may be more than that.'

⁶ See for example: Institute for Policy Analysis of Conflict [IPAC] *Weak, Therefore Violent: The Mujahidin of Western Indonesia* IPAC Report No. 5, 2 December 2013 <http://www.understandingconflict.org/read/index/3/types_of_conflict.html>.

⁷ Mark Colvin, "New Terror Threat Taking Shape in Indonesia" *ABC News* (online) 28 July 2014 <<http://www.abc.net.au/pm/content/2014/s4055639.html>>.

⁸ Peter Alford, "Indonesia Lauds Australia Security Code to Keep out Militants" *The Australian* (online) 18 September 2014 <<http://www.theaustralian.com.au/national-affairs/foreign-affairs/indonesia-lauds-australia-security-code-to-keep-out-militants/story>>.

⁹ "Indonesia Arrests Six Heading to Syria" *Sydney Morning Herald* (online) 28 December 2014 <<http://www.smh.com.au>>.

¹⁰ Institute for Policy Analysis of Conflict [IPAC], *Support for "Islamic State" in Indonesian Prisons* IPAC Report No. 15, 19 January 2015, 17.

Karnavian also noted that 46 Indonesians have returned from the region and are being 'closely monitored' by police.¹¹

The level of involvement domestically of ISIS supporters is, unfortunately, unknown. In November 2014, the BNPT estimated that there are up to 800 Indonesians who are domestically involved with ISIS activities. The agency stated that 286 of those individuals have been identified, with a further 500 who remain unidentified.¹² The nature of their domestic activities in support of ISIS is also difficult to accurately determine. The activities may range from ideological agreement and support of ISIS goals, public swearing of allegiance, active promotion of ISIS ideology to displays of flags and other paraphernalia, fundraising, and event organisation. Swearing an oath of allegiance to the caliph would, in principle, bind the individual to follow the exhortations of the leader of the caliphate. In reality, however, many of those who swear allegiance may take no further action, although dedicated jihadists would take their oaths seriously and feel duty-bound to follow directives from the caliphate. The possibility of violent attacks in Indonesia attributable to direct links with, or ideological support for, ISIS is therefore real.

THE DOMESTIC TERRORIST CAPACITY AND THREAT

IPAC notes that the capacity of Indonesian terrorist groups currently 'remains low' and that 'would-be terrorists in Indonesia for the last four years have focused exclusively on domestic targets, mostly the police.'¹³ However, it also points to an exhortation by IS

¹¹ Taufik Ridwan, "Kapolda Metro Catat 384 WNI Gabung ISIS" *ANTARA News* (online) 18 November 2015 <<http://www.antaranews.com>>; At the same meeting, terrorism expert Sidney Jones stated 'in my opinion Indonesian terrorist groups do not currently have the capacity to commit an attack like the Paris attack' but warned that government must remain vigilant about the potential for returning fighters to form cells and stage attacks. The numbers cited by Karnavian in this report are probably the most accurate and up to date at the time of writing.

¹² National Counter-terrorism Agency [BNPT], "Kesimpulan Sementara Pertemuan Koordinasi BNPT Bersama Pengadilan Tinggi Jakarta dan Pengadilan Negeri Se-DKI Jakarta Dengan Topik 'Tindakan Hukum Terhadap Pelaku Gerakan ISIS (IS)'" (Summary of Coordination Meeting between BNPT and the High Court and District Courts of Jakarta on the Topic 'Legal Actions Against Supporters of ISIS') National Counter-terrorism Agency Report, 5 November 2014.

¹³ IPAC, above n 4, 1.

spokesman Al-Adnani to 'kill foreigners linked to the US-led coalition – which could lead to a return to targeting of westerners in Indonesia as a way of earning approval from leaders of the self-declared caliphate.'¹⁴ It is uncertain how the continuing conflict in Iraq and Syria will affect events in Indonesian terrorism, but some things are evident. An unspecified but significant number of Indonesian nationals have travelled to the area to participate in the conflict, and there have been a number of demonstrations of loyalty, recruitment and swearing of allegiance to ISIS in Indonesia – in some cases attended by supporters numbering in the thousands.

Public declarations of support and allegiance to ISIS are known in Indonesia as *baiat*.¹⁵ Pro-ISIS campaigns were organised by FAKSI, a pro-Islamic law forum established by Muhammad Fachry with links to the Sharia4Indonesia website. In 2014 it organised events in Tangerang and Bekasi, near Jakarta, and Bima Sumbawa. In March 2014, FAKSI organised an event in Central Jakarta which was attended by hundreds of supporters, mostly from the group GARIS.¹⁶ The rector of the Islamic State University in Ciputat admitted that they had been unaware that one of their meeting rooms had been used for a *baiat* event in August 2014 which was attended by hundreds of people.¹⁷ Other reports stated that support for ISIS in the form of banners and flags were appearing in various cities around Indonesia.¹⁸

While ISIS has caused controversy and even splits within Indonesian jihadist groups, there is no doubt that some groups and individuals support the caliphate and have made public declarations of allegiance to it. Indonesia's most famous terrorist inmate and founder of both Jemaah Islamiyah (JI) and its offshoot, Jemaah Anshorut

¹⁴ Ibid.

¹⁵ From the Arabic word 'bay'ah' meaning to swear allegiance to a caliph.

¹⁶ IPAC, above n 4, 11.

¹⁷ "UIN Syarif Hidayatullah Ciputat Kecolongan Ada Baiat ISIS di Kampus" *Tribun Jogja* 7 August 2014, 3.

¹⁸ Agus Maryono and Yuliasri Perdani, "Clandestine Support for ISIL Uncovered in Several Cities" *The Jakarta Post* 14 August 2014, 2.

Tauhid (JAT), Abu Bakar Ba'asyir, swore allegiance in writing to ISIS in July 2014. The declaration of allegiance led to a split within JAT and Ba'asyir's own sons formed a new organisation called Jamaah Ansharusy Syariah (JAS).¹⁹ Other key influential Indonesian jihadist figures who have expressed their support and allegiance to ISIS include Aman Abdurrahman (currently imprisoned), and Santoso, leader of the Eastern Indonesian Mujahidin (currently at large).²⁰ Calls by these extremist leaders to support ISIS and follow their instructions could potentially influence their followers to commit terrorist acts. The number of Abu Bakar Ba'asyir's supporters alone is estimated to be in the thousands.²¹ Colvin cited Barton as stating 'Ba'asyir's influence at the moment, we don't know definitive numbers but there's probably a community of several thousand that are directly affiliated and loyal to him, and many thousands of fellow travellers who feel duty-bound to at least offer hospitality and support.'²²

Therefore, the threat posed by ISIS in Indonesia is two-fold. First, Indonesian supporters of ISIS may be influenced to commit terrorist attacks in Indonesia, without ever leaving the country, spurred on by 'the appeal of ISIS.'²³ That appeal consists of several factors, namely, 'a combination of religious prophecies involving Sham (Greater Syria); the string of victories in Iraq in June that gave a sense of backing a winner; the resonance of the concept of the caliphate; and sophisticated use by ISIS of social media.'²⁴ Second, foreign terrorist fighters who depart Indonesia, gain experience and skills in a violent conflict, and return as veterans to commit further terrorist acts and influence others in their networks to do the same.

¹⁹ IPAC, above n 4, 18.

²⁰ National Counter-terrorism Agency [BNPT], *Penggalangan Aparat Penegak Hukum Dalam Penanganan Perkara Tindak Pidana Terorisme* Transcript of National Meeting of Law Enforcement Agencies on the Handling of Terrorism Crimes, Jakarta, 8 October 2014.

²¹ Mark Colvin, "New Terror Threat Taking Shape in Indonesia" *ABC News* (online) 28 July 2014 <www.abc.net.au/pm/content/2014/s4055639.html>.

²² *Ibid.*

²³ IPAC, above n 4, 2.

²⁴ *Ibid.*

Indonesia has already experienced the destruction which can be caused by the return of foreign terrorist fighters. As Indonesian terrorism expert Taufik Andrie points out, the Christmas Eve bombings of 2000 were conducted by a radical group of Afghanistan 'alumni'.²⁵ Many of those involved in the Bali bombing of October 2002 had undergone training in Afghanistan prior to their return to Indonesia.²⁶ Commenting on the importance of the Afghanistan conflict of the 1980s to developments in Southeast Asian terrorism in subsequent years, Fealy and Borgu write:

Perhaps the most important development was the internationalisation of jihad from the late 1970s, culminating in the anti-Soviet war in Afghanistan during the 1980s. This was critical to the rise of terrorism in Southeast Asia. Several hundred Indonesians went to Afghanistan to fight as mujahidin, and this had a deep impact on them. They gained skills as soldiers in arduous battlefield conditions, learned terrorist-related skills such as bomb making and running clandestine operations, and were indoctrinated with pan-Islamic and virulently anti-Western ideologies. The experiences of the Indonesian volunteers greatly intensified their sense of global Islamic solidarity. Importantly, they were able to establish relations with Muslim radicals from across the Islamic world. These contacts would later prove invaluable in gaining financial assistance, access to technical know-how and connections into global terrorist networks. The practical effect of the 'mujahidin-isation' of Indonesian radical groups has been a great increase in their capacity to wreak havoc and destruction—critical elements in terror campaigns. Money, explosives, technical expertise and covert operational methods were available to experienced and resourceful Afghanistan veterans and their associates. Without this direct personal experience of the war and without the networks that it fostered, Indonesian terrorist acts such as the 2002 Bali bombings would have been far more difficult to mount.²⁷

Experience in a foreign jihadist conflict can provide bomb-making and weapons skills, leadership skills, combat experience and international contacts which are essential to a sustained jihadist terrorist campaign.

²⁵ "Jangan Sampai Kecolongan: 7 Orang dengan Atribut NIIS Dibekuk" *Kompas* 14 August 2014, 3.

²⁶ Greg Fealy and Aldo Borgu, "Local Jihad: Radical Islam and Terrorism in Indonesia" *ASPI Strategy Report* The Australian Strategic Policy Institute (September 2005).

²⁷ *Ibid*, 18.

Azca drew parallels between the return of 'foreign fighters' from communal conflicts in Ambon and Poso in the early 2000s and returning fighters from Syria and Iraq in the ISIS conflict. He concluded that international borders are not considered important to jihadist terrorists, and while some may choose to stay in the region, others will return to Indonesia, and may be further radicalised by their experiences which will likely lead to a new wave of attacks.²⁸ The Singaporean Deputy Prime Minister voiced his opinion in April 2015, that returning foreign terrorist fighters would pose a threat to the region for 'decades to come'.²⁹

With the release from prison of hundreds of convicted terrorists who have served their sentences³⁰ and the threat of returning fighters from the ISIS conflict, the situation has been described by Barton as potentially 'a perfect storm' for terrorism in Indonesia.³¹ With the world's largest population of Muslim believers, Barton described Indonesia as a 'fertile recruiting ground' for would-be terrorists.

THE GOVERNMENT BAN ON ISIS

In August 2014, a YouTube video entitled 'Joining the Ranks' appeared, in which an Indonesian using the name Abu Muhammad al Indonesi (aka Bahrumisyah), urged Indonesians, in the Indonesian language, to join the fight in Syria. The video spurred a rapid response from President Yudhoyono's government which announced a ban on

²⁸ Muhammad Najib Azca, "Talking Indonesia: Indonesia's Foreign Fighters" *Talking Indonesia: Violent Extremism* (online) 16 July 2015 <<http://www.indonesiaatmelbourne.unimelb.edu.au>>.

²⁹ Lim Yan Liang, "Foreign ISIS Fighters 'Will Be a Threat for Decades'" *The Jakarta Post* (online) 17 April 2015 <<http://www.thejakartapost.com/news/2015/04/17/foreign-ISIS-fighters-will-be-a-threat-decades.html>>.

³⁰ Paul Toohey, "Paradise for Terrorists: 36 Bali Bombers That Killed 92 Australians Are Walking Free" *Daily Telegraph* (online) 4 May 2014 <<http://www.dailytelegraph.com.au/news/nsw/paradise-for-terrorists-36-bali-bombers-that-killed-92-australians-are-walking-free/story>>; Institute for Policy Analysis of Conflict [IPAC], *Prison Problems: Planned and Unplanned Releases of Convicted Extremists in Indonesia* IPAC Report No. 2, 2 September 2013 <[http://file.understandingconflict.org/file/2013/09/Prison_Problems_FINAL_\(1\).pdf](http://file.understandingconflict.org/file/2013/09/Prison_Problems_FINAL_(1).pdf)>.

³¹ Peter Lloyd and Suzanne Dredge, "ISIS Recruitment Video Join the Ranks Urges Indonesian Muslims to Migrate to the Islamic State," *ABC News* (online) 29 July 2014 <<http://www.abc.net.au/news/2014-07-28/ISIS-releases-recruitment-video-target-indonesian-muslims/5629960>>.

ISIS on 4 August 2014. While the Widodo Administration has reiterated the commitment to eradicate ISIS in Indonesia and 'improve our regulations on this'³² it has not yet clarified the legal position or status of the so-called 'ban'.

The ban was announced by some of Indonesia's most senior government officials of the day, including Coordinating Minister for Political, Legal and Security Affairs, Djoko Suyanto, Head of the Military, General Moeldoko, National Police Chief, General Sutarma, Chief of the National Intelligence Agency, Marciano Norman, and Minister of Religious Affairs, Lukman Hakim Syaifuddin. The presence of these high-ranking ministers and department heads at the announcement indicates the high level of political will and interdepartmental cooperation in support of the ban.

The ban reportedly generated several strategies for curbing domestic support for ISIS, such as an educational awareness campaign by the Ministry of Religious Affairs, the blocking of online materials (such as YouTube videos) and websites with 'radical content'³³ that endorse ISIS, and the joint monitoring of high-risk individuals by the Foreign Ministry, the Ministry for Law and Human Rights and the BNPT.³⁴

Announcing the ban, Coordinating Minister for Political, Legal and Security Affairs, Djoko Suyanto stated 'the government rejects and bans the teachings of ISIS...from growing in Indonesia. It [ISIS] is not in line with state ideology, Pancasila, or the philosophy of *kebhinekaan* [diversity] under the unitary state of the Republic of Indonesia.'³⁵

³² Warren Fernandez et al., "ST Interview with President Jokowi: Indonesia to Widen Anti-Terror Laws" *Straits Times* (online) 27 July 2015 <<http://straitstimes.com>>.

³³ Ryan Dagur, "Rights Activists Slam 'Radical' Islam Website Ban as a Threat to Freedoms" *Jakarta Globe* (online) 7 April 2015 <<http://thejakartaglobe.beritasatu.com/news/rights-activists-slam-radical-islam-website-ban-threat-freedoms/>>.

³⁴ Yuliasri Perdani and Ina Parlina, "Govt Bans Support, Endorsement of ISIL" *The Jakarta Post* (online) 5 August 2014 <<http://www.thejakartapost.com/news/2014/08/05/govt-bans-support-endorsement-isil.html>>.

³⁵ *Ibid.*

The announcement was reported in the local and international media and framed as an unequivocal ban on ISIS, which appeared to satisfy most observers that the Indonesian government had taken a clear step to counter the influence and threat of ISIS. However, the motivation for the ban, and its legal foundations, may, nonetheless, be questioned.

Berger argues that the real motivation behind the government ban was not the threat of terrorist violence posed by ISIS and its Indonesian supporters to the wider community, but rather the political threat posed to the integrity of the Indonesian state and the state philosophy of Pancasila.³⁶

The threat that Indonesians with battlefield experience in Syria and Iraq would pose on their return to Indonesia was clear to experts. But instead of justifying the ISIS-ban based on the threat posed by returning fighters, such as those that had appeared in the video, statements during the announcement emphasised ISIS's ideological incompatibility with Indonesia's national ideology of Pancasila.³⁷

In a similar vein, IPAC argues that the real catalyst for banning the organisation was not its use of violence, rather its incompatibility and challenge to the unity of the Indonesian state:

Here was an Indonesian [Muhammad Al-Indonesi] urging other Indonesians to join a political entity other than the Indonesian republic. It was not that IS was more violent or more of a security risk than earlier movements, although both may well be true; it was that it constituted a direct challenge to national loyalty that so alarmed officials.³⁸

Both IPAC and Berger call into question the underlying motive for banning ISIS – expressed in terms of the government's concern about threats to state unity and ideology rather than threats of violence to the community. IPAC's report on the origins of ISIS in Indonesia, states that pro-ISIS Indonesian fighters in Syria 'have formed an Indonesian-Malaysian unit of ISIS in Syria that reportedly aims at eventually

³⁶ Dominic Berger, "Why Indonesia Banned ISIS" *New Mandala* (online) 1 October 2014 <<http://asiapacific.anu.edu.au/why-indonesia-banned-isis/>>.

³⁷ Ibid.

³⁸ IPAC, above n 4, 22.

establishing an archipelagic Islamic State in Southeast Asia, to be called Daulah Islamiyah Nusantara.³⁹ The same report quotes a tweet, following a pro-ISIS demonstration in March 2014, stating that "The Islamic State will soon come to Indonesia, *insya'allah*, and change the name of Indonesia to 'Islamic State of Southeast Asia'".⁴⁰

The possibility of Islamist extremists establishing control over a small area of Indonesian territory and proclaiming an Islamic state in Indonesia, while unlikely, warrants consideration.⁴¹ The terrorist training camp in Aceh, which was raided and

³⁹ Ibid, 1.

⁴⁰ Ibid, 12.

⁴¹ Indonesia's large and diverse population makes it unlikely that small, relatively poorly funded and organised extremist groups such as those affiliated with ISIS would be able to establish a viable Islamic state in opposition to Indonesian state forces. The Aceh camp experiment of 2010 is evidence of the failure of such a project even in a strongly Islamic province. However, scholars and independent research have noted, at certain times and places, fluctuating levels of public tolerance towards and community support for Islamist ideology and grievances. Support for persecuted muslim communities overseas, such as Palestine, Myanmar and Syria is strong in some quarters. Latent acquiescence towards religious minorities which are considered deviations from Islam is documented. It is not inconceivable that, in the event of changes in the geo-political responses to Islamic communities and/or countries, possibly combined with deteriorating inter-ethnic conditions within Indonesia, such as was seen in Sulawesi and Maluku in the early 2000s, that support for Islamist ideals and goals may not rise dramatically and lead to increased instability within Indonesia. See: Rizal Sukma, Jamhari Ma'ruf, and Kamarulnizam Abdullah, "The Attitude of Indonesian Muslims Towards Terrorism" (2011) *Journal of Human Security* vol. 7 no.1, 16; "Pew's Conclusions on Shariah Law Branded 'Potentially Dangerous'" *Jakarta Globe* (online) 30 May 2013 <<http://www.thejakartaglobe.com/news/pews-conclusions-on-shariah-law-branded-potentially-dangerous/>>; Arientha Primanita & Ethan Harfenist, "Seventy-Two Percent of Indonesian Muslims Favor Shariah Law: Pew Forum" *Jakarta Globe* (online) 1 May 2013 <<http://www.thejakartaglobe.com/news/seventy-two-percent-of-indonesians-favor-shariah-law-pew-forum/>>; Camelia Pasandaran, "Bekasi Government Targets Al-Misbah Mosque in Ahmadiyah Crackdown" *Jakarta Globe* (online) 14 February 2013 <http://www.thejakartaglobe.com/home/bekasi-government-targets-al-misbah-mosque-in-ahmadiyah-crackdown/571664#Scene_1>; Josua Gantan, "Behind Church Closures, the Specter of Intolerance" *Jakarta Globe* (online) 4 June 2014 <<http://www.thejakartaglobe.com/news/behind-church-closures-specter-intolerance/>>; "FPI Member Gets 3.5-Month Prison Sentence for Vandalizing Ahmadiyah Mosque" *Jakarta Globe* (online) 5 February 2013 <http://www.thejakartaglobe.com/home/fpi-member-gets-35-month-prison-sentence-for-vandalizing-ahmadiyah-mosque/569699#Scene_1>; United Nations High Commissioner for Refugees [UNHCR], "Indonesia: Protect Ahmadiyah Community from Violence" *Human Rights Watch UNHCR* (2011) <<http://www.unhcr.org/refworld/docid/4d4ba53dc.html>>; Bernhard Plattdasch, "Religious Freedom in Indonesia: The Case of the Ahmadiyah" Institute of Southeast Asian Studies Working Paper Politics and Security Series No. 2 (2011) <<http://web1.iseas.edu.sg/wp-content/uploads/2010/11/Religious-Freedom-in-Indonesia1.pdf>>; "Indonesia Urged to Tackle Religious Intolerance" *BBC News* (online), 28 February 2013 <<http://www.bbc.co.uk/news/world-asia-21612156>>.

dispersed by police in 2011, was established with the intent of being a territorial base from which to launch further jihadist campaigns (although it failed to realise this objective). Using the ISIS Syria-Iraq Islamic state as a model,⁴² it is not unreasonable to consider the possibility of jihadist groups attempting to seize control of tracts of Indonesian territory as a base from which to conduct their operations. In August 2014, National Police Chief General Sutarma admitted that Indonesia was 'vulnerable' to ISIS and reiterated the need for 'preventive measures'.⁴³

The activities of Santoso are a case in point. The leader of Eastern Indonesian Mujahidin (MIT), Santoso, currently claims to control a small tract of land on Gunung Biru, near Poso in Central Sulawesi. An IPAC report stated:

It is not possible to understand Indonesian pro-ISIS networks without understanding Poso, the former conflict area in central Sulawesi. Since 2000, extremists have seen it as a secure base (*qoidah aminah*) and training centre with the potential to expand into a community that applies Islamic law.⁴⁴

The same report refers to ISIS's media efforts that featured the Poso jihad to give it international attention. IPAC suggests that the efforts may have led to three Uighurs from Xinjiang heading to the area to join Santoso's operations 'as if it were a major international struggle that needed its own foreign fighters'.⁴⁵ In March 2015, a major police and military operation was launched against Santoso.⁴⁶ While several of his lieutenants and supporters have been captured or killed, but the operation did not succeed in its primary objective. This military operation could potentially signal a

⁴² Chatterji's discussion of the establishment of an ISIS-linked South or Southeast Asian Caliphate concludes 'every state in South and Southeast Asia with terror movements, either simmering or operational, is at risk of an upsurge in terrorist activity...The most likely point of entry for the Islamic State into South and Southeast Asia is Pakistan, a nation already enflamed.' SK Chatterji, "Islamic State and a South Asian Caliphate" *The Diplomat* (online) 23 November 2014 <<http://www.thediplomat.com>>.

⁴³ Yuliasri Perdani, "Police Detain Two Terror Suspects, ISIL Supporters" *The Jakarta Post* 9 August 2014.

⁴⁴ Institute for Policy Analysis of Conflict [IPAC], *Indonesia's Lamongan Network: How East Java, Poso and Syria Are Linked* IPAC Report No. 18, 15 April 2015, 1.

⁴⁵ *Ibid*, 15.

⁴⁶ *Ibid*, 14.

significant shift in the Indonesian approach to counter-terrorism from a criminal law based approach to an insurgency/military approach.⁴⁷

Despite issues related to the motivations behind the announcement of the ISIS ban, its legal foundations may also be questioned. Following the announcement of the ban at a press conference in August, no government regulation or presidential decree was issued, and no clear mechanisms for enforcing the ban or specific sanctions were set out. This led Berger to argue that the declaration was in effect 'a political statement' rather than a legal ban.⁴⁸ In the absence of any supporting legislation or regulations this assertion seems reasonable.

In attempting to enforce the ban, police have encountered difficulties stemming from its ambiguous (or even absent) legal foundations. Indonesian police, military and government departments have taken a number of actions to investigate and arrest those who are suspected of supporting ISIS, as well as preventive and educational measures.⁴⁹ The police in particular have, however, pointed to a 'legal loophole' that prevents them from prosecuting ISIS supporters.⁵⁰ Seven supporters of ISIS, including self-proclaimed leader of the ISIS Indonesia chapter Chep Hermawan, were arrested by police in August, 2014, with ISIS paraphernalia, including flags, in their possession. They were released after 24 hours in custody because police had no basis for charging them. Police spokesperson General Ronny F Sompie acknowledged that legal loopholes

⁴⁷ Nani Afrida, "TNI Ready for Bigger Role in Poso," *The Jakarta Post* (online) 15 March 2015 <<http://www.thejakartapost.com/news/2015/02/11/tni-ready-bigger-role-poso.html>>. It is worth considering the hypothetical conditions which would see Indonesia's CT response transition from a police-led civil response to a military response. Rising levels of terrorist activity leading to widespread instability would likely lead to a rapid increase in military involvement in CT operations. The Poso situation is a case in point where TNI has indicated its willingness to be involved, and has in fact launched CT operations under the guise of training exercises.

⁴⁸ Berger, above n 36.

⁴⁹ Yuliasri Perdani, "MUI Joins Nationwide Campaign against ISIL" *The Jakarta Post* (online) 8 August 2014 <<http://www.thejakartapost.com/news/2014/08/08/mui-joins-nationwide-campaign-against-isil.html>>.

⁵⁰ Maryono above n 18.

would probably allow ISIS supporters, like Hermawan, to avoid prosecution.⁵¹ He added that police were only empowered to break up events endorsing ISIS using the 2013 Social Organizations Law No. 17 of 2013,⁵² and the Freedom of Expression Law No.9 of 1998.⁵³

Doubts over the legal position of police in curbing ISIS-related activities have led to further instances where suspects have been arrested and later released. In Depok an ice cream seller, Firman Hidayat, was arrested for hanging an ISIS flag on his balcony. However, he was released after police concluded that he was just a 'fan'.⁵⁴ Another individual, Edy Darwanto was arrested in Lamongan for allegedly supporting ISIS. However, he was released after police determined there was insufficient evidence to charge him. Edy claimed that he was just an ISIS sympathiser and had not committed any radical acts. After his release from custody, Edy was required to report to police twice a week, according to a statement by police spokesperson, Arif Mukti.⁵⁵ The legal basis for requiring an individual, who has not been charged with an offence, to report to police, is unclear. In any case, the arrest and release of those believed to support a 'banned' organisation demonstrates the manifest difficulties faced by police in enforcing a ban on an allegedly unlawful organisation such as ISIS, while maintaining respect for the democratic principles of freedom of association and expression. UNSC Resolution 2170 declares ISIS (albeit called ISIL) an unlawful terrorist organisation but

⁵¹ Ibid.

⁵² The Social Organisations Law No. 17 of 2013 art 2 forbids social organisations from being based on ideologies which are opposed to the state ideology of Pancasila, or the Indonesian Constitution.

⁵³ The Freedom of Expression Law No. 9 of 1998 recognises the basic right of all citizens to express their opinion in public in the form of demonstrations or rallies. However, art 6(e) requires demonstrations to protect national unity. Article 10 requires demonstrations to be notified in advance to police, and police may disperse the demonstration where it has not complied with regulations.

⁵⁴ Berger, above n 36.

⁵⁵ Hanif Manshuri, "Edy Darwanto Terduga ISIS Wajib Laporkan" *Suryaonline* (online) 10 August 2014 <<http://www.surabaya.tribunnews.com>>.

at Indonesian law its status is unclear, as it is subject to a government-sponsored ban that lacks any underlying authorising legislation or regulation.

In October, trials of seven ISIS supporters began in Jakarta. The defendants were charged with various activities in support of the terrorist group, such as travelling to Syria to join the group, participate in military training, collecting funds and supporting others to travel to the region. Most of the defendants were charged under arts 7 and 13 of the ATL for attempting to commit terrorism, and concealing information of a terrorist act. One defendant, Muhamad Fachry who operated an extremist website, al-mustaqbal.net, was charged under Law No 11 of 2008 on Information and Electronic Transactions, for intentionally distributing information intended to create hatred and enmity: art 28(2) – the offence carries a maximum penalty of six years imprisonment.⁵⁶ The ruling of the High Court in the Afief case makes convictions for ISIS-connected activities more likely in these cases; however the cases were ongoing at the time of writing, and the outcomes, and sentences, were uncertain.

INDONESIA'S LEGAL POSITION

Since the adoption of UNSC Resolution 2170 (of which Indonesia was a co-sponsor) the government has been under international pressure to take action to prevent support for ISIS from spreading or flowing out of Indonesia. The Resolution condemns the recruitment of FTFs 'whose presence is exacerbating conflict and contributing to violent radicalisation'. Paragraph 8 of the Resolution, calls on member states to take 'national measures to suppress the flow of foreign fighters and to bring to justice, in accordance with applicable international law, foreign terrorist fighters of ISIL'⁵⁷

⁵⁶ Adhe Bhakti, "Tujuh Pendukung ISIS Didakwa Terorisme" *Radicalism Studies* (online) 14 October 2015 <<http://www.radicalismstudies.org/home/2015-04-19-13-37-27/terrorism-daily/245-tujuh-pendukung-ISIS-didakwa-terorisme.html>>.

⁵⁷ UN above n 1.

Indonesia does not have any specific laws which address the FTF threat. At the time of writing, there have, as mentioned, been calls for the government and president to address the ISIS threat through the enactment of a new law or revisions to the existing anti-terrorism laws but little has actually been done. A kind of legislative inertia acts as an inherent obstacle to Indonesian law reform. This is caused by a backlog of draft bills before the national legislature (the DPR, Dewan Perwakilan Rakyat, People's Representative Assembly) and lengthy delays in debating and passing laws. For example, a revision to Indonesia's Criminal Code 1958, has been discussed for decades.⁵⁸ Over the past twelve years, only two new terrorism laws have been enacted: Law No 15 of 2003 on the Eradication of the Crime of Terrorism (ATL); and Law No 9 of 2013 on the Prevention and Eradication of the Crime of Financing Terrorism (CFTL).⁵⁹ Each of these laws was only passed after immense social and political pressure was brought to bear on the DPR to act. The ATL was passed quickly after the Bali bombings in October 2002, which acted as a catalyst for the President to use her emergency power to create an interim law (PERPU).⁶⁰ The CFTL passed only after international pressure on Indonesia by the Financial Action Task Force (an inter-governmental watchdog agency established under the G-8 Summit), which included Indonesia on its

⁵⁸ Simon Butt, "Indonesia: Can Legal Diversity Exist within a Single National Law?" (2003) *Alternative Law Journal* vol. 93, no. 28, 6; Tari Oktaviani, "RUU KUHP Tak Kunjung Direvisi, DPR Salahkan Pemerintah" *Harian Nasional* (online) 30 April 2015 <<http://www.harnas.co/2015/04/30/ruu-kuhp-tak-kunjung-direvisi-dpr-salahkan-pemerintah>>; Surya Perkasa, "Revisi KUHP-KUHAP Disandera Pemerintah?" *Metro TV News* (online) 25 May 2015 <<http://news.metrotvnews.com/read/2015/05/25/399278/revisi-KUHP-kuhap-disandera-pemerintah>>.

⁵⁹ Respectively, Undang-Undang Nomor 15 Tahun 2003 Tentang Penetapan PERPU Nomor 1 2002 Tentang Pemberantasan Terorisme, Menjadi Undang-Undang and Undang-undang Nomor 9 2013 tentang Pencegahan dan Pemberantasan Tindak Pidana Pendanaan Terorisme.

⁶⁰ Ordinarily the Indonesian President can only issue regulations. However, under art 22 of the Constitution in emergency situations the president may issue Perpus – Peraturan Pemerintah Sebagai Pengganti Undang-undang or Government Regulations in Lieu of Law. Perpus are relatively rare but they have the same authority as statutes passed by the DPR. To remain in force they must be passed at the next sitting of the DPR. Simon Butt, "Anti-Terrorism Law and Criminal Process in Indonesia" *ARC Federation Fellowship Islam and Modernity: Syari'ah, Terrorism and Governance in South-East Asia report* (Asian Law Centre, University of Melbourne, 2008) 3.

list of 'high risk and non-cooperative jurisdictions'.⁶¹ Indonesia's parliament has a poor record in the expeditious passing of laws, and the situation appears unlikely to change under the new president with a parliament which is dominated by the opposing Merah-Putih coalition.⁶²

Sherlock refers to a 'policy paralysis' in Indonesian politics which prevents the implementation of policies to address pressing issues such as dilapidated roads and infrastructure, health, education, unemployment, urban pollution and congestion. 'An especially alarming development was the indecisive and ineffectual response by the Yudhoyono administration to the rise of religious intolerance and persecution of minorities which threatens the pluralist compact on which the stability of the post-independence Indonesian state has been based.'⁶³ In the same ANU report, Mishra referred to 'a huge backlog of legislation in the national parliament and complaints of senior civil servants of spending too much time at the beck and call of parliamentary commissions, to the detriment of policy implementation needs.'⁶⁴

In the absence of legislation specifically designed to address the ISIS/FTF threat, Indonesia's legal position in this area remains, as mentioned, very uncertain. Reports throughout 2015 indicated that President Widodo was considering issuing a PERPU to address the ISIS issue. It was reported that the law could include criminalisation of travel to conflict zones without a lawful purpose⁶⁵ and the revocation

⁶¹ Adam Fenton and David Price, "Forbidden Funds: Indonesia's New Legislation for Countering the Financing of Terrorism" (2014) *Australian Journal of Asian Law* vol. 15 no. 1.

⁶² Tiola Javadi and Adhi Priamarizki, "Coalition Collision: Jokowi vs the Opposition in Parliament" *RSIS Commentaries* S Rajaratnam School of International Studies Nanyang Technological University 24 October 2014.

⁶³ Australian National University [ANU], *Indonesia at Home and Abroad: Economics, Politics and Security* National Security College Briefs (May 2014) 20.

⁶⁴ *Ibid*, 15.

⁶⁵ Ezra Sihite, Yustinus Paat, and Natasia Christy Wahyuni, "New Rules Proposed to Stem Outflow to Islamic State" *Jakarta Globe* (online) 20 March 2015 <<http://thejakartaglobe.beritasatu.com/news/new-rules-proposed-stem-outflow-islamic-state/>>.

of citizenship of ISIS supporters.⁶⁶ The capture by Turkish authorities of 16 Indonesian nationals who were allegedly attempting to enter Syria to join ISIS in March 2015 helped focus political and media attention on the issue.⁶⁷ Whether the President does enact a Perpu to address ISIS will ultimately depend on his assessment of whether a state of emergency exists.

The case of Afief Abdul Majid is illustrative of the inability of Indonesia's current laws to cope with prosecutions for supporting ISIS. In July 2015, Afief, a JI-turned-JAT leader and teacher⁶⁸ was charged for his involvement with, and support for, ISIS. He admitted travelling to Syria in December 2014, participating in military training, and swearing allegiance to the Caliph, Al Baghdadi, and, on his return to Indonesia, speaking publicly in support of ISIS. Bundled together with the charges of supporting ISIS, were financing terrorism charges which dated back to 2010 and the Aceh training camp, which Afief provided money for. The ISIS charges, brought, in the alternative under art 15 (in conjunction with art 7) of the ATL and art 139(a) of the Criminal Code, for 'rebellion against the government of a friendly nation' were both rejected by the court. Afief was however found guilty of the charge of financing the Aceh training camp and sentenced to four years imprisonment.⁶⁹ On appeal to the High Court his sentence was increased to six years.⁷⁰

⁶⁶ Ezra Sihite, "Jokowi Still Mulling Revoking Citizenship of Indonesians Joining IS" *Jakarta Globe* (online) 20 March 2015 <<http://thejakartaglobe.beritasatu.com/news/jokowi-still-mulling-revoking-citizenship-indonesians-joining-isis/>>

⁶⁷ Novianti Setuningsih, Farouk Arnaz, and Kennial Caroline Laia, "Ban Islamic State to Stop Supporters, Analysts Argue Police Struggle to Charge Islamic State Supporters" *Jakarta Globe* (online) 23 March 2015 <<http://thejakartaglobe.beritasatu.com/news/ban-islamic-state-stop-supporters-analysts-argue/>>.

⁶⁸ IPAC, above n 10.

⁶⁹ Adam Fenton and Hery Firmansyah, "Has Indonesia Gone Soft on Terrorism?" *The Jakarta Post* (online) 10 July 2015 <<http://www.thejakartapost.com/news/2015/07/10/has-indonesia-gone-soft-terrorism.html>>.

⁷⁰ Personal communication with Mohammad Adhe Bhakti, Executive Director of the Centre for Radicalism and Deradicalization Studies (PAKAR) 3 November 2015. A copy of the High Court's decision was not available at the time of writing.

At the time of writing, several further prosecutions of ISIS supporters were before the courts, and it is uncertain whether these will prove more successful in obtaining convictions.⁷¹

FORFEITURE OF CITIZENSHIP

Several commentators have pointed out that under Indonesia's Citizenship Law No 12 of 2006⁷² (hereinafter the 'Citizenship Law') an individual's citizenship can be forfeited where the person swears allegiance to a foreign state or joins a foreign military.

Indonesia's Chief of Police, General Sutarman, in discussing the measures which could be taken against Indonesian combatants in the ISIS conflict, states 'there have been discussions about charging them under the [2006] Citizenship Law in order to revoke their citizenship.'⁷³ An observer and commentator on intelligence issues, Wawan Purwanto, referring to the aforementioned YouTube ISIS video, argues that a persuasive approach should be used to deter Indonesians from heeding the call mentioned above: 'If they join a foreign military, their citizenship can be revoked. That's why we should use a persuasive approach and urge people to think twice about joining that group.'⁷⁴ Juwana states 'in the case of those who have sworn an oath of allegiance, whether to ISIS or another state, in my opinion they have forfeited their citizenship.'⁷⁵ The Citizenship Law states, inter alia, at Article 23:

Indonesian citizenship is forfeited if a person:

- a. voluntarily obtains foreign citizenship;...
- d. voluntarily joins a foreign military without prior permission from the President;...

⁷¹ Bhakti, above n 56.

⁷² Attorney General's Department [AGD], *Australia/Indonesia Working Group on Legal Cooperation Working Group Report*, 27 June 2006.

⁷³ Perdani, above n 43.

⁷⁴ "Terlibat ISIS, Status Kewarganegaraan WNI Bisa Dicabut" *Tribun Kaltim* (online) 1 August 2014 <<http://kaltim.tribunnews.com/2014/07/31/terlibat-ISIS-status-kewarganegaraan-wni-bisa-dicabut>>.

⁷⁵ BNPT, above n 20, 9.

f. voluntarily declares allegiance or swears an oath of loyalty to a foreign state or part of a foreign state; (author's translation)

Applying the Citizenship Law to FTFs potentially creates both a deterrent effect (those considering joining ISIS may think twice about it) and a practical solution (those who have departed Indonesia to join ISIS will be unable to return). There are, however, significant legal and practical issues that must be considered in applying this law to FTFs and supporters of ISIS.

With regard to the application of Article 23(f), there is significant legal doubt about whether ISIS can be regarded as a foreign state, or part of a foreign state. Under the *Montevideo Convention on the Rights and Duties of states 1933*⁷⁶ there are certain elements which must pre-exist in order to qualify as a state in international law. That is, a state must possess: (a) a permanent population, (b) a defined territory, (c) government and (d) capacity to enter into relations with the other states. Applying those prerequisites to ISIS, it is clear that it does not qualify as a state. While ISIS may currently exercise military control over some territories within Syria and Iraq, the nature of the ongoing conflict means that the borders are undefined, therefore subsections (a) and (b) of the Convention are in doubt. Whether ISIS possesses a system of government is debatable. A report from the Terrorism Research and Analysis Consortium (TRAC) states:

ISIS has evolved into an organised and structured extremist organisation that is in the process of consolidating its power as a government within the Islamic Caliphate. The ISIS controlled areas are managed by a hierarchy of governance structures that manage the day to day life of residents, collect income, maintain law and order and enforces its ideology of Islamic Extremism.⁷⁷

In any case, ISIS does not meet subsection (d) of the Convention. UNSC Resolution 2170 'condemns in the strongest terms the terrorist acts of ISIL' and demands it to disarm

⁷⁶ United Nations [UN], *Montevideo Convention on the Rights and Duties of States* 1933.

⁷⁷ Terrorism Research and Analysis Consortium [TRAC], *Islamic State of Iraq and Al Sham/Islamic State (Islamic State of Iraq, ISIS or ISIL, IS)* (2014).

and disband immediately.⁷⁸ Clearly ISIS is not recognised by the international community as a state, and has no legal capacity to enter into relations with other states. It is beyond the scope of this paper to consider in detail whether, over time, ISIS may be able to establish stable borders, a population and government, and subsequently be recognised as a legitimate state. Considering that possible eventuality, Juwana stated 'however we know that if ISIS is successful in defeating the governments of Iraq or Syria it could be established as an official government. The question would then be whether our citizens who join that movement by ISIS could be caught under the provisions of the Citizenship Law.'⁷⁹ The conclusion that ISIS does not constitute a state under international law suggests that Article 23(f) of the Citizenship Law is not applicable to Indonesian FTFs.

Juwana nevertheless argues that a broad definition of a 'state' exists in customary international law and may be applied to ISIS, which would then render Article 23(f) valid. In support of this legal approach, Juwana points out that, following 9/11, the United States invoked Article 51 of the UN Charter which recognises the right of self-defence against armed attacks and its use of this article to justify the invasion of Afghanistan.⁸⁰ In the context of the 9/11 response by the US, Byers notes:

The right of self-defence is conditioned on the occurrence of 'an armed attack against a member of the United Nations'. It will probably be argued that the atrocities of 11 September did not constitute an armed attack since they did not involve the use of force by a State, and that the relevant framework of analysis is instead international criminal law.⁸¹

Juwana argues that since the right of self-defence only exists for armed attacks by enemy *states*, the US, by invoking this Article against an attack by al-Qaeda, implies

⁷⁸ UN, above n 1.

⁷⁹ BNPT, above n 20, 6

⁸⁰ United Nations [UN], *Charter of the United Nations* 1945.

⁸¹ Michael Byers, "Terrorism, the Use of Force and International Law after 11 September" (2002) *International Relations* vol. 16 no. 2, 155, 163.

that, logically, al-Qaeda was regarded as being, in some broad sense, a state. This approach however may be questioned on its factual and legal accuracy, as well as its logical implications.

Byers' analysis of the legal approach of the US following 9/11 points out that the US did invoke Article 51, however it did this by claiming a close connection between the non-state actor, al-Qaeda, and the state of Afghanistan. In legal terms, the state of Afghanistan was joined as a party to the dispute – thus legitimising the use of Article 51. It was not done by regarding al-Qaeda itself as a state, but rather by regarding the 9/11 attacks as an act of state-sponsored terrorism. Legal precedent for this approach exists. In the Nicaragua Case, the International Court of Justice held that 'an armed attack exists only when the link between the State and the non-state actor is very close, and the attack is of seriousness akin to an attack by a State.'⁸² However, the approach does not endorse the view that the non-state actor be regarded as a State.

Juwana points to the legal regime in the United States. He argues that a citizen relinquishes their citizenship upon joining a terrorist movement such as ISIS and concludes 'therefore it is possible that the US government has already reached the point where it regards ISIS as a state, even though it is not a state as we know it under international law.'⁸³ Applying this broad interpretation of a state to the Indonesian Citizenship Law, art 23(f) could arguably be applied to forfeit the citizenship of those persons who declare allegiance to ISIS.⁸⁴ It must be considered however, that were the government of Indonesia, to formally recognise ISIS as a state, for the purposes of

⁸² Ibid, 160.

⁸³ BNPT, above n 20, 8

⁸⁴ In the context of forfeiture of citizenship due to swearing allegiance to a foreign state, it may be necessary to draw a distinction between fighters who have sworn allegiance to the movement, and mercenaries. Mercenaries make no oath of allegiance and fight purely for payment, therefore their citizenship arguably should not be forfeited pursuant to art 23(f) of the Citizenship Law. In that case, mercenaries who make no oath may return to Indonesia, and may be liable to face legal process in Indonesia. Juwana states 'but in the case of those who have sworn an oath of allegiance, whether to ISIS or another state, in my opinion they have forfeited their citizenship' BNPT above n 20, 9.

applying the Citizenship Law, this could have the unintended consequence of strengthening the position of ISIS, and its claim to statehood. In taking such actions to weaken the so-called Islamic State, Indonesia may, in fact, add to its legitimacy.

If, despite the debate about its validity and consequences, the broad definition of a state was accepted as a basis for applying art 23(f) to Indonesians who swear allegiance to ISIS, then it should be promulgated as government policy, and that policy should be clearly communicated to the public. To provide legal certainty, the policy should take the form of a government regulation, or a presidential decree, if not the higher ranked form of a statute (*undang-undang*). Whatever form it takes, however, for the policy to have the desired deterrent effect, and to provide legal certainty to the community, it is important to clarify that, as a matter of government policy, where a person swears an oath to ISIS they will forfeit their Indonesian citizenship. In practical terms, those whose citizenship is forfeited would not be entitled to any measure of protection or assistance by Indonesia's overseas consular representatives, nor would they be entitled to enter or remain in Indonesia.

There are two categories of persons to whom art 23(f) could apply; those who travel to ISIS-controlled territories and swear allegiance to ISIS, and those who swear allegiance from within Indonesia. It is debatable whether art 23(f) should be applied as a matter of policy to persons who have attended a *baiat* event within Indonesia and sworn allegiance to ISIS. Despite the legal doubts outlined above, there are further practical aspects to be considered, such as whether those persons would then become, in effect, 'stateless' within Indonesia. Under art 14 of the Immigration Law No. 6 of 2011,⁸⁵ Indonesian citizens may not be refused entry to Indonesia. However, under art 14(2) where there is doubt about the status of a person's Indonesian citizenship, that person must provide proof of their citizenship. If individuals or groups who had sworn

⁸⁵ See: Law No. 6 of 2002 on Immigration.

allegiance to ISIS were declared non-citizens, presumably their passports and/or national identity cards would be revoked and seized. As a matter of government policy it would then need to be determined what would be done with those persons. Arguably international law as it relates to stateless persons could apply. The government would determine whether they could, or should, be forcibly ejected from Indonesia. Deporting them to any country where they could continue their terrorist activities would be a clear violation of the Resolution, but as persons suspected of supporting a terrorist organisation, it is highly unlikely any other recognised state would accept them. Further, seizing the identity documents of those persons may have the end result of making it more difficult to identify a group of individuals suspected of supporting terrorist organisations. This is of questionable wisdom. Whether or not their identity documents were seized, Indonesia's intelligence services would need to continue to monitor those individuals closely.

In discussing art 23 of the Citizenship Law, Juwana did not consider art 23(d) which refers only to a foreign military/armed force⁸⁶ and makes no mention of a 'foreign state'. It is arguable that those who join ISIS could be caught under this section, and the legal uncertainty surrounding ISIS as a state, could potentially be circumvented. Neither 'foreign state' nor 'foreign military' are defined in the Citizenship Law. Whether ISIS constitutes a foreign military under international law is debatable. Article 4(A) of Geneva Convention III (1949) and the Additional Protocol I (1977) set out several elements which distinguish an armed force. They include:

- Being organised into groups or units which are under the command of a person responsible for his/her subordinates
- Having a fixed distinctive sign recognisable at a distance
- Carrying arms openly
- Conducting their operations in accordance with the laws and customs of war

⁸⁶ In this chapter the terms 'military' and 'armed force' mean the same.

- Being subject to an internal disciplinary system which shall enforce compliance with the laws of war

Applying this definition to ISIS it could be argued that it does not constitute a foreign military/armed force for the purposes of Indonesia's Citizenship law. This is because the Resolution condemns ISIS as a terrorist organisation and refers to its 'ongoing and multiple criminal terrorist acts'. Ongoing media reports on ISIS activity clearly demonstrate that the terrorist organisation does not conduct its operations in accordance with the laws and customs of war and therefore cannot be regarded by the international community as a state, or an armed force whose actions are attributable to a state.

PRACTICAL IMPLICATIONS OF FORFEITURE OF CITIZENSHIP

For art 23(d) or 23(f) to be lawfully applied it would, as mentioned, need to be shown that ISIS constitutes a foreign state, part of a foreign state or a foreign military. While Juwana has argued for a broad definition of state under customary international law, it is possible that a decision to forfeit an individual's citizenship based on the swearing of an oath to ISIS, or joining the ISIS military, whether it is done in Indonesia or another country, could be subject to challenge in the courts. Considering the elements of a state as set out in the Montevideo Convention and international law as it relates to the definition of armed forces, an Indonesian court may form the opinion that ISIS is not a state or a regular armed force. In the absence of an unequivocal governmental or presidential direction to the contrary, the court might therefore choose to invalidate the forfeiture of citizenship.

In practice, most cases of forfeiture of citizenship occur when a person who has taken citizenship in a recognised foreign state reports that fact to an Indonesian consular outlet.⁸⁷ It is then an administrative process to issue a formal decision from the minister of immigration, recognising the forfeiture of citizenship. A decision to

⁸⁷ BNPT, above n 20, 59.

forfeit an individual's citizenship where the individual is outside Indonesia, and has engaged in violent activities as part of a foreign military or terrorist campaign (as opposed to persons who have merely sworn an oath of allegiance from within Indonesia) would appear to be less problematic than in the case of Indonesians who swear allegiance within Indonesia. Their intention to support ISIS is more clearly evident, and practical issues relating to their relocation are avoided.

To avoid the legal and practical difficulties arising from forfeiture of a person's citizenship, Indonesian authorities and policy makers may wish to consider the option of temporarily suspending a person's passport. Under Australia's amendments to the terrorism legislation⁸⁸ section 22A empowers the Director-General of Security to request the suspension of a person's passport where it is suspected 'the person may leave Australia to engage in conduct that might prejudice the security of Australia or a foreign country'.⁸⁹ This kind of power could potentially be granted to BNPT, in consultation with the National Police's counter-terrorism detachment Densus 88, as the relevant authority on terrorism issues in Indonesia. Legal questions surrounding forfeiture of citizenship, as outlined above, could be circumvented by such a process. This would, however, require amendments to the current legislation – or at least should be clarified and set out in government or presidential regulations. It would also require BNPT and intelligence agencies to closely monitor the actions of those persons who are considered supporters of ISIS.

ACTIVITIES AS ACTS OF TERRORISM

Prior to the enactment of the ATL following the Bali bombing in October 2002, terrorist or 'subversive' acts were generally prosecuted using the now-repealed Anti-subversion Law No 11 of 1963 or the Criminal Code and Emergency Law No 12 of 1951.

⁸⁸ "Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Australia).

⁸⁹ Office of the Prime Minister [OPM], "Prime Minister - New Counter-Terrorism Measures for a Safer Australia" (online) 5 August 2014 <<http://www.liberal.org.au/latest-news/2014/08/05/prime-minister-new-counter-terrorism-measures-safer-australia>>.

The ATL, which was still in the process of parliamentary debate at the time of the Bali bombing, was enacted swiftly using the President's emergency power to enact 'interim' laws under art 22 of the Indonesian Constitution.⁹⁰ Application of the ATL to ISIS and FTFs relies upon its Articles 6 and 7. Article 6 states, in full:

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/or property of other people, or causes 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.

Article 7 is worded in the same terms, however 'intends to' is inserted before 'creates a widespread atmosphere of terror/fear.' The maximum penalty under Article 7 is life imprisonment.

Considering the activities of ISIS supporters in Indonesia, as outlined above, it has been suggested by former prosecutor and terrorism law expert Dr Ramelan of Tri Sakti University that the ATL may be used to charge ISIS supporters with terrorism offences. Ramelan argues for the application of the ATL to ISIS supporters in Indonesia.⁹¹ In doing so, he emphasises the need to take a broad approach in examining all of the facts surrounding each case, including the background and planning of any ISIS-linked activities.

Ramelan states 'ISIS is a terrorist organisation which operates like a military force to destroy and conquer Iraq and Syria. There are several videos which illustrate how they invite people to join ISIS. There are even videos of them beheading British

⁹⁰ See: Constitution of the Republic of Indonesia 1945 art 22. Such laws have the same authority as legislation (*undang-undang*) but to remain in force, must be passed at the next sitting of the national parliament. The Interim Laws (Peraturan Pemerintah Pengganti Undang-undang) or PERPU No.1. of 2002 was passed at the next sitting of the parliament in early 2003, and became Law No.15 of 2003 which merely states that PERPU No. 1 of 2002 is passed as a law. The substantive provisions of the law therefore remain in the PERPU.

⁹¹ Rahardi Ramelan, "ISIS Indonesia Dalam Kajian Hukum Pidana Indonesia" (ISIS Indonesia A Study in Indonesian Criminal Law) paper presented by Professor of Criminal Law Rahardi Ramelan Tri Sakti University Law School at BNPT above n 20.

and American citizens.⁹² Ramelan refers to particular instances of ISIS-related activity in Indonesia, such as the swearing of allegiance ceremonies attended by ‘more than 1000 people’, and the arrest and subsequent release of ISIS supporters.

In bringing criminal charges under the ATL, or any criminal legislation, it is necessary to adduce sufficient evidence to support each of the elements of any charge. Under Indonesian law, sufficient evidence requires a minimum of two different supporting *alat bukti* (types of evidence), before an asserted fact can be accepted by a court as an established fact. There are five recognised categories of evidence under Indonesian law (see page 155) as set out in art 184 of the Criminal Procedural Code (KUHAP).

On the question of whether swearing allegiance to ISIS would constitute an offence under the anti-terrorism law, it is necessary to examine the elements of the offences in arts 6 and 7 of the ATL. Article 6 requires the actual creation of a widespread atmosphere of terror or fear, whereas art 7 requires only the intention to create such an atmosphere. Whether a swearing of allegiance ceremony creates, or intends to create, a widespread atmosphere of terror/fear would require an examination of the surrounding circumstances, including an examination of the background of the organisation conducting the activity, its intellectual actors, its links to ISIS in Iraq and Syria, and its motivations and aims.

Ramelan argues that, on its own, a swearing of allegiance ceremony would not be sufficient, as individuals have the right to gather and swear allegiance. Examining the background facts, including the planning of events and their motivations, ideology and aims, it may, however, be possible to link events organised by ISIS in Indonesia, with the ‘parent’ organisation. If such a link could be proven, Ramelan argues it may be sufficient to prove a charge under art 7, that is, the intention to create a widespread

⁹² BNPT, above n 20, 11.

atmosphere of terror/fear, namely regarding the creation of an Islamic state in Indonesia. A beheading video for example is a clear act intended to create terror through the use of violence. Taking this broad approach, if a link could be proven between groups operating in Indonesia and ISIS, prosecution under art 7 could be supported. Ramelan proposed this theory despite prevailing Indonesian legal thought, which is generally antithetical to broad approaches.

Despite the failure of the prosecution of Afief Abdul Majid,⁹³ further prosecutions of ISIS supporters were underway as of November 2015, with charges brought under art 15 (in conjunction with art 7) of the ATL (conspiracy to commit terrorism, using the broad construction outlined by Ramelan to link the accused to the terrorist acts committed by ISIS), art 13(c) (concealing information about terrorism) and art 4 of the CFTL (financing terrorism) for activities related to both participating in ISIS activities in Syria, and facilitating others to depart to Syria.⁹⁴ One individual, Muhammad Fachry, has been charged under art 28(2) of Law No 11 of 2008 on Information and Electronic Transactions for distributing information intended to create hatred and enmity.

Referring to art 55 of the Criminal Code on *penyertaan* (complicity), Ramelan reminds prosecutors that it is designed to catch the intellectual actors behind criminal acts, who often do not actually commit the acts themselves. This would require proof of a conspiracy, meetings, planning, supporting actions etc., and identifying the precise roles of each person in the criminal conspiracy.

⁹³ Source: Indictment (*surat dakwaan*) trial documents in the Afief Abdul Majid case No PDM-10/JKT.PST/02/2015.

⁹⁴ Bhakti, above n 56.

Applying arts 6 and 7 of the ATL to ISIS in Indonesia, Ramelan concludes 'if we look at the events surrounding ISIS in Indonesia as outlined above, I do not believe a charge under art 6 would apply, however, it is highly possible to apply art 7'.⁹⁵

On closer analysis this approach appears flawed. The maximum penalty under art 7, life imprisonment, indicates the gravity of the offence. To be established, there must be an intention to commit a specific violent act, or threats of a violent act. Taking the case of an ISIS-supporter, a person may attend an ISIS event, they may swear allegiance to ISIS, they may even agree in principle with the violent acts undertaken by ISIS, such as beheading non-Muslims, however unless the person intends to commit such an act themselves, it is argued that art 6 or 7 of the ATL cannot apply. Ultimately it would be for an Indonesian court to determine whether the elements of offences under the ATL were supported. It seems unlikely that acts that merely indicate in-principle support for the goals and methods of ISIS (flying or possessing a flag, swearing allegiance) can be considered acts of terrorism *per se*. Where the support offered is more than merely in-principle support only then may it qualify as a criminal offence. For example, providing or collecting funds for a terrorist act or organisation is a criminal offence under art 4 of the CFTL. Where persons undertake preparations to commit an actual act of violence with the intention of causing widespread fear they have arguably attempted to commit the offence under art 7 of the ATL. Whether travelling to Syria and participating in military training is sufficient may be determined by the outcome of the cases before the courts.

Discussing the ATL, former BNPT official Tito Karnavian emphasises the acquisition of weapons as the critical element in commission of a terrorism offence:

We tend to arrest only when we possess sufficient evidence, for example, where the suspects possess weapons or explosives. So even where we know there is a plot, if we

⁹⁵ BNPT, above n 20, 16.

don't have sufficient evidence we won't arrest. Therefore any arrest will be legally accountable – of our arrests, none have been acquitted for lack of evidence.⁹⁶

It should be noted that a draft bill⁹⁷ to revise the ATL contains several articles that could be used to charge supporters of ISIS. The bill, which has not yet been tabled in DPR, includes a number of relevant articles.⁹⁸ For example:

Article 13 B

Imprisonment of between 3 and 15 years for any person who intentionally:

- a. Becomes a member of an organisation or group which aims to commit actual acts of terrorism
- b. Procures or loans money and/or goods from an organisation or group which aims to commit actual acts of terrorism
- c. Organises paramilitary training for the purposes of committing acts of terrorism
- d. Participates in paramilitary training, whether within or outside Indonesia, with the aim of committing acts of terrorism
- e. Attends a place for the purposes of participating in military or paramilitary training, whether within or outside Indonesia
- f. Spreads hatred or enmity which encourages or influences others to commit acts of violence or terrorism
- g. Spreads hatred or enmity towards members of a religion, or others for terrorist purposes
- h. Spreads terrorist messages/declarations

Article 14

Any person who plans, or encourages others to commit terrorism as set out in Articles 6, 7,8,9,10,11 and 12. Punishable by death, or life imprisonment.

Notwithstanding some issues relating to legislative drafting, it is suggested that, if passed, these draft articles in the revised ATL could be effective in shoring up many of the legal gaps that currently exist with regard to acts supporting ISIS in Indonesia that would not meet the threshold of acts of terrorism under the current legislation but which should, nonetheless be criminalised. At the time of writing, the proposed

⁹⁶ Tito Karnavian, "Transcript of Interview with Tito Karnavian Deputy of National Counter Terrorism Agency" (13 April 2012) 7.

⁹⁷ "Rancangan Undang Undang Republik Indonesia tentang Perubahan atas Undang-undang Nomor 15 Tahun 2003 tentang Pemberantasan Tindak Pidana Terorisme 2010" (Draft Bill on Revisions to Law Number 15 of 2003 on the Eradication of Terrorism) Directorate General of Legislation (online) <<http://www.djpp.info/rapat-harmonisasipembahasan-peraturan-lainnya/icalrepeat.detail/2010/terorisme.html>>.

⁹⁸ Ibid.

revisions to the ATL have not been included on the legislative agenda of bills for consideration (the Program Legislasi Nasional or 'Prolegnas'). As outlined above, the fastest and most likely legal mechanism for introducing new legislation is therefore by the president issuing an emergency PERPU. This mechanism bypasses lengthy legislative debate, at least initially. Any bill introducing significant revisions to the existing ATL, including lengthening periods of detention, is likely to encounter significant debate and resistance.

As IPAC noted when discussing the need for new legislation:

Police frequently complain that they lack the legal tools for dealing with home-grown terrorism, and in the case of the Syria issue, they are right. They can be as vigilant as possible...and they can coordinate with...neighbouring countries such as Singapore, Malaysia or even Turkey. But as long as joining foreign military or terrorist organisations is not a crime, it is difficult to prosecute.⁹⁹

The report refers to the plan to prosecute ISIS supporters using art 139 of the Criminal Code and continues:

A full-fledged law banning assistance to or involvement in foreign terrorist organisations would still be desirable, but there are political tactics to consider. Any effort to embed some clauses to this effect in a strengthened anti-terrorist law that also included, for example, provisions lengthening the allowable period of pre-trial detention, would likely run afoul of both conservative Muslim and civil liberties advocates. A separate bill, put on the legislative agenda while concern about ISIS remains high, might have more success.¹⁰⁰

According to legal experts such as Professor Hiariej, joining a foreign military or terrorist organisation such as ISIS is, in fact, a crime which may be prosecuted using the Criminal Code under art 139, which criminalises rebellion or conspiracy to commit rebellion against the government of a friendly nation. While, as discussed below, Hiariej may be correct in this assertion, the approach has yet to be endorsed by a court. To remove any doubt, enactment of a specific law which criminalises involvement with

⁹⁹ IPAC, above n 44, 20.

¹⁰⁰ Ibid.

ISIS or organisations like it, is preferable. Enacting an anti-ISIS law using the presidential emergency power would bypass legislative debate, initially. If the law was not subsequently ratified by the DPR it would lapse.¹⁰¹

On the question of applying the ATL to Indonesian citizens outside Indonesia, art 4 of the ATL gives extra-territorial effect to the laws where attacks are committed against Indonesian citizens or Indonesian facilities outside Indonesia. Article 5 of the Criminal Code also makes criminal laws applicable to Indonesian citizens outside Indonesia where the crime is also an offence under the law of the country where it is committed. Therefore, terrorist acts committed by Indonesian citizens outside the territory of the Republic of Indonesia could be prosecuted in Indonesia, although gathering sufficient evidence could be a barrier to supporting such charges. Under art 26 of the ATL, intelligence reports may be used as evidence but are subject to judicial review and approval. To circumvent difficulties surrounding the gathering of evidence in foreign countries in adverse conditions, policy makers might consider the possibility of relaxing the rules of admissibility as they relate to material obtained from overseas in terrorism-related cases (section 17 of the Foreign Fighters Bill) or creating an offence of entering 'declared areas'. In this case the onus of proof is effectively reversed. Where a suspect has visited, or intends to visit, a declared area, they will be required to show proof of legitimate purpose for their travel.

It is relevant to the discussion of the ATL and ISIS that some support for the idea of a special terrorism court has been expressed,¹⁰² modelled on Indonesia's specialist Corruption Courts. The BNPT might take on the role of the KPK (Komisi Pemberantasan Korupsi, the Corruption Eradication Commission) in the corruption

¹⁰¹ Butt, above n 60, 3.

¹⁰² Professor Eddie Hiariej of Gadjah Mada University Law Faculty has, for example, expressed support for the idea (personal communication, 17 September 2014). All further references to Hiariej in this chapter taken from personal communication (17 September 2014) and views expressed by Hiariej at BNPT above n 20.

courts, although it lacks the degree of probity and public confidence that the KPK enjoys. The aim of this proposal is to establish a level of expertise and consistency in terrorism judicial decisions and sentencing. At the time of writing this remained merely a proposal that has emerged from the BNPT's terrorism forums. It would likely take a number of years before it could be realised through the enactment of new legislation.

REBELLION AGAINST A FRIENDLY NATION

Some experts and commentators have proposed that those who pledge allegiance to ISIS, or who commit violent acts in the name of ISIS may be charged with rebellion. The former head of the BNPT, Ansyad Mbai, has reportedly 'argued that Indonesians who pledge allegiance to ISIS could be charged with *makar* (rebellion).'¹⁰³ Similarly, Hiariej identified arts 139 (a)(b) and (c) of the Criminal Code as applicable to the FTF situation. The articles come under the section headed 'Crimes Against Friendly Nations and Against the Heads of Friendly Nations and their Representatives'. Article 139 of the Code states, in full:

Article 139(a)

Rebellion (*makar*) with the intention of seceding a territory or area from a friendly nation in whole or in part from the control of the authorised government, punishable by up to five years imprisonment.

Article 139(b)

Rebellion with the intention to illegally overthrow or alter the form of government of a friendly nation, punishable by up to four years imprisonment.

Article 139(c)

Criminal conspiracy to commit crimes as set out in Articles 139(a) and 139(b), punishable by up to one year and six months imprisonment. (Author's translation)

Hiariej points out that the origins of art 139 extend back to the Dutch *Wetboek van Strafrecht voor Nederlandsche-Indie* and that any interpretations of the article should take account of the wording in the original text. In this case, the original art 139 was

¹⁰³ Berger, above n 36.

repealed, and replaced with arts 139 a, b and c during the period of Dutch colonisation, to criminalise attacks, or conspiracies to attack, friendly nations, from within the Dutch East Indies.

Attacks aimed at overthrowing the government of Indonesia are also crimes against the state pursuant to Chapter 2 of the Criminal Code, specifically art 111 and 111(bis). In that context, the state is construed as the Indonesian state. The articles provide penalties of up to 15 and 20 years.

The purpose of Chapter 3 is to criminalise attacks against friendly nations. The term 'friendly nation' is not defined in the Criminal Code. According to Juwana, one of Indonesia's leading international law experts, the question of whether Syria or Iraq may be categorised as 'friendly nations' is settled by the fact that Indonesia has diplomatic relations with those countries.

In construing the meaning of *makar*, Hiariej refers to art 87 of the Criminal Code. Intention to commit rebellion exists where the intention to commit the act is evident from the commencement of performance, as set out in art 53 of the Code. Article 53 explains 'attempts':

(1) Attempting to commit a crime is punishable, where the intention is evident from the existence of the commencement of performance of the crime, and if the commission of the offence is not completed, not solely because of the will of the offender.

(2) The maximum punishment for an offence, in the case of an attempt, is reduced by one third.

(3) Where an offence is punishable by death or life imprisonment, the maximum punishment is fifteen years. (author's translation)

Hiariej points out that the meaning of 'attempt' as it relates to arts 53 and 87 is different. An 'attempt' as set out in art 53 allows reducing the penalty otherwise available for a certain offence because commission of the offence was not completed due to a reason that was not solely the will of the offender. Article 87 does not make

any reference to non-completion. It is sufficient for the commission of the element of *makar* to have begun implementation. Hiariej further clarifies that under Dutch and Indonesian law a distinction is drawn between *voornemen* as intention (*niat*) and *opzet* as deliberate act or attempt (*sengaja*). Intention is a subjective state. When that subjective state is realised through acts that are visible to outside observers, *niat* then becomes *opzet* or an attempt. In the case of *makar*, intention is inferred from acts that are visible to observers. These could include acts such as giving lectures, discussions and gatherings, displaying flags and declaring oneself president, training and recruiting. All these acts show an intention to commit *makar* from an objective perspective.

Hiariej states that preparatory acts and the commencement of performance 'are difficult to distinguish because they do overlap. Moeljatno defines preparatory acts as the gathering of power, and beginnings of implementation as the releasing of power.'¹⁰⁴

Hiariej's analysis categorises various acts which may contravene art 139 of the Code as follows:

- a. Acts in the form of: making a flag or other attributes, displaying the flag or attributes constitutes *voorbereidingshandelingen* (preparatory acts). Therefore, art 139a and/or art 139b apply.
- b. Acts in the form of: Participating in lectures and discussions constitutes *Samenspaning* (criminal conspiracy). Article 139c applies.
- c. Material acts in the form of: Departing Indonesia, encouraging others to join, swearing allegiance, recruiting, training, providing funds, declaring oneself the leader of ISIS, managing online facilities constitutes *begin van uitvoering* the commencement of performance. Article 139a and/or 139b applies.¹⁰⁵

Hiariej's analysis neatly summarises the varying levels of support for ISIS and varying levels of culpability. Attacks against friendly states or *makar* may be directed toward

¹⁰⁴ BNPT, above n 20, 20.

¹⁰⁵ BNPT above n 12.

the head of state or his/her representatives, or towards the legal government with the aim of its overthrow or secession from its authority. The aim may be to bring that state or area of the state under the control of another state, or to establish a new state.

Hiariej points out that in the case of special crimes such as terrorism, or attacks against the state, or friendly states, pursuant to arts 87 and 53 of the Criminal Code, preparatory acts and the commencement of performance are regarded as being equivalent. The effect is to lower the standard of proof in such special cases, such that preparatory acts are sufficient to support a charge.

In the case of art 15 of the ATL (conspiracy to commit terrorism) preparatory acts would be sufficient to support a charge. Therefore, the holding of discussions, displaying flags, making plans would, in the opinion of Hiariej, suffice to prove a charge of conspiracy to commit terrorism.

Applying this to the facts surrounding the ISIS presence in Indonesia, Hiariej concludes there is a material fit between the facts outlined above, that is, gatherings of hundreds or thousands of supporters to declare allegiance to ISIS, use of ISIS symbols and flags, spreading ISIS ideology through lectures and online forums, recruiting others to the ISIS cause, and/or providing funds and support. Hiariej concludes that these acts committed within Indonesia would be sufficient to support charges under art 139 (a) (b) or (c) of the Criminal Code. He urges Indonesia's law enforcement agencies to 'have no hesitation whatsoever to take actions to enforce the law.'¹⁰⁶

Where charges are brought under the Criminal Code, the various extraordinary powers set out in the ATL would not apply. For example, police would have one day instead of seven days to detain a suspect before charge (art 28). Also, the extraordinary evidentiary rules would not apply, for example, an intelligence report could not be used as sufficient preliminary evidence (art 26(1)).

¹⁰⁶ BNPT above 20, 21.

Further, the penalties under arts 139 a, b and c are significantly lower (5 years, 4 years and 18 months respectively) than those contained in the ATL, arts 6 and 7, which carry maximum penalties of death and life imprisonment respectively. Where an individual has travelled to the ISIS conflict zone and engaged in violent acts, for example participating in a bombing or an attack against the official militaries of those countries, despite any evidentiary difficulties, it is likely that they will have fulfilled the elements of offences under the ATL, which has extra-territorial effect.

The Social Organisations Law No. 17 of 2013 sets out a detailed process for registering an organisation as a legal entity within Indonesia. Hizbut Tahrir's Indonesian branch is registered as a legal entity for example.¹⁰⁷ An organisation that has never been registered cannot, however, be banned using the Social Organisations Law.

While Indonesia has a law against expressing hatred and enmity against other groups or religions,¹⁰⁸ it is rarely, if ever, used to curb the hate speech of radical preachers. Using false documents is a criminal offence under art 266 of the Criminal Code. Persons who travel on false passports are therefore subject to prosecution under this article.

Indonesia does not currently have any kind of control order regime. It was advocated by the BNPT¹⁰⁹ during the proposed ATL reforms but legislative drafters considered it too controversial to include in the draft bill. Similarly, Indonesia does not have a preventative detention regime, although the ATL allows police to arrest and hold a suspect for up to seven days, prior to charge (art 28).

¹⁰⁷ Berger, above n 36; Ken Ward, "Non-Violent Extremists? Hizbut Tahrir Indonesia" (2009) *Australian Journal of International Affairs* vol. 63 no. 2, 149.

¹⁰⁸ See arts 156 and 156a of the Indonesian Criminal Code which criminalise expressing hatred or enmity against other groups or religions within Indonesia – this Article would apparently not apply to expressions of hatred against groups from outside Indonesia. Also see art 160 which criminalises incitement to commit criminal acts, or violence against public authorities.

¹⁰⁹ Karnavian, above n 96.

CONCLUDING REMARKS

Indonesia's international obligation to prevent support for ISIS derives from UNSC Resolution 2170. Although the Yudhoyono administration announced a government ban on ISIS, the absence of any specific regulations or decrees left police hampered by a 'legal loophole'. Despite calls for a new law, or revisions to the existing anti-terrorism laws, there are no laws that deal specifically with the issue of ISIS and FTFs at the time of writing. However, there are a number of existing laws that may be applied to Indonesian nationals who provide support for ISIS. These laws include the Citizenship Law, the ATL and the Criminal Code. The question of which laws and specific articles may apply will, of course, depend on the circumstances of each case.

With regard to the forfeiture of citizenship as allowed under art 23(d) or art 23(f) of the Citizenship Law, Indonesia could, as a matter of policy and statute, revoke the citizenship of individuals who travel to ISIS controlled areas or join a foreign military. It is suggested, however, that art 23(d) rather than art 23(f) be used for this purpose, to avoid any suggestion that ISIS is recognised as a state by the Indonesian government. Applying art 23(d) to FTFs who have departed Indonesia has the important effect of preventing such persons from re-entering their home country. Individuals who swear oaths of allegiance to ISIS within Indonesia should not forfeit their citizenship, as this would lead to practical difficulties in determining subsequent treatment of those persons. Rather, such people should be monitored closely by intelligence agencies. In the event that a new decree or regulations on ISIS are created, authorities may wish to consider the option of temporarily suspending the passports of persons who are suspected of travelling with the intention of supporting ISIS.

It is submitted that persons who provide merely in-principle support for ISIS have not committed an offence under Indonesia's current anti-terrorism legislation. Possession of a flag, attending a pro-ISIS event, becoming a member, or expressing

agreement with the goals or methods of ISIS are not, on their own, sufficient to support a charge of terrorism under art 6 or 7 of the ATL. Support that goes beyond being merely in-principle may, however, contravene other anti-terrorism offences, such as providing funds (CFTL, art 4), inciting or encouraging others to commit terrorism (ATL, art 14) or criminal conspiracy to commit terrorism (ATL, art 15). A draft bill to revise the ATL contains articles that could be applied to the ISIS/FTF issue, such as articles 13B and 14 which criminalise joining a terrorist organisation, participating in military training, spreading hatred or enmity, and declaring support for terrorism. It is recommended that the DPR quickly finalise and pass these revisions to the ATL.

Articles 139 a, b and c of the Criminal Code, which criminalise acts of rebellion against friendly states, could be used to charge supporters of ISIS within Indonesia. However, the outcome in the case of Afief Abdul Majid indicates that the courts are not willing to apply this law to supporters of ISIS. According to Hiariej, acts of support for ISIS such as displaying flags, participating in lectures, swearing allegiance, recruiting, training, providing funds, declaring oneself the leader of ISIS, or managing online facilities may constitute offences under art 139, and carry maximum penalties of up to five years imprisonment.

Political will to enforce the ban on ISIS and the spirit of UNSC Resolution 2170 are evidenced by a high level of government support – the ban was directed by the President and announced by high-ranking government officials of the day. The current administration has reiterated its commitment to continue efforts to eradicate support for ISIS. President Widodo used his speech at the 2015 Asia Africa Summit to call on governments to work together to eradicate ISIS. Vice-President Kalla held inter-departmental meetings with related ministers to discuss approaches to tackling ISIS.¹¹⁰

¹¹⁰ Kandi, above n 3.

The BNPT has also taken a lead role in fostering inter-departmental understanding and cooperation on the ISIS/FTF issue, including organising several forums and seminars.

While law enforcement agencies support the notion that there are a suite of laws available, they have pointed to difficulties in gathering sufficient evidence to support charges – especially where the alleged offences have occurred overseas.

In considering enactment of new legislation or decrees on the issue, the government and/or DPR may consider alternatives, such as suspending passports or creating an offence of travelling to a ‘declared zone’. Such an approach effectively shifts the onus of proof onto the individual to justify their intention to travel to the area (for example, working for an aid organisation, or family connections). Given Indonesia’s legislative inertia, a backlog of unpassed legislation in the DPR and its track-record on counter-terrorism legislation it is questionable whether new laws will be passed. In the event of widespread ISIS-linked terrorist attacks caused by returning foreign terrorist fighters, it is highly likely, however, that the DPR or President Widodo will be forced to take further steps – possibly using the President’s constitutional power to enact interim laws during a state of emergency.

While the will of Indonesian enforcement agencies to tackle terrorism (and specifically ISIS and foreign fighters) is evident, and the cooperative inter-agency spirit is commendable, there are significant practical hurdles to the application of Indonesia’s existing laws to FTFs.

CHAPTER 8 – CONCLUSION: COMBATING TERROR, THE INDONESIAN WAY

INTRODUCTION

This concluding chapter will summarise the thesis and draw conclusions. It will do this by summarising the main points contained in each chapter to develop an overall line of argument which runs throughout and binds the thesis. It will then draw overall conclusions and make recommendations to enhance terrorism laws and their enforcement, and recommendations on specific areas that could benefit from further research.

A CRITICAL ANALYSIS AND ‘INVENTORY’

As stated in the introduction, a key aim of the thesis is to provide a critical analysis of Indonesia’s legislative and law enforcement responses to terrorism. As such, the thesis takes its cue from Schmid’s list of ‘50 Un- and Under-researched Topics in the Field of (Counter-) Terrorism Studies’ which included, at number 44, “New legislation on terrorism: inventory, comparison and impact.”¹

This was, in some respects, the intellectual starting point for the thesis. That is, first, to provide an inventory – to take stock of – Indonesia’s relatively new anti-terrorism laws. The main substance of the thesis is therefore contained in Chapters 4 and 5 which focus on discussing and analysing the ATL and the CFTL respectively. Very little academic analysis existed, particularly in English, prior to the writing of the thesis, of the ATL – Indonesia’s main law for countering terrorism, and the law under which the vast majority of terrorism prosecutions have been brought since 2003. In the case

¹ Alex P. Schmid, “50 Un- and under-Researched Topics in the Field of (Counter-) Terrorism Studies” (2011) *Perspectives on Terrorism* vol. 5 no. 1, 76.

of the CFTL there was no detailed, academic account or analysis of this law, in English or Indonesian, to the knowledge of the writer, prior to the writing of Chapter 5.²

Beyond providing a mere inventory of the laws however, Chapters 4 and 5 also provide a critical analysis of these two legislative instruments to assess their effectiveness in achieving their stated aims of eradicating terrorism and the financing of terrorism. A detailed analysis of the wording of the legislation reveals flaws in the legislative drafting and, in many cases, suggests revisions which may rectify those flaws. For example, the analysis of the ATL reveals that it contains no provisions which criminalise membership of terrorist organisations. A suggested amendment, therefore, is to insert an article which criminalises becoming a member of a terrorist organisation. Chapters 4 and 5 contain a number of such recommendations for revisions and improvements to the terrorism laws.³

However, to consider only the black letter law contained in the CT legislation is to view only part of the picture. Therefore, inserted prior to Chapter 4 are two important pieces of the puzzle which provide essential context, or stepping stones, necessary for a consideration of the CT laws and an assessment of their application and effectiveness. First, is a discussion of the social and political context which preceded and coincided with the enactment of the terrorism laws. Second, is a discussion of the definition of terrorism – how the term ‘terrorism’ is understood, used and defined in international law, domestic law and political discourse. Doing so provides important insight into understanding how the term terrorism is understood and applied by Indonesian authorities.

² Similarly, no academic analysis of the Indonesian legal position with regard to the emergence of ISIS and foreign terrorist fighters existed prior to the writing of chapter 7, a version of which was published during the period of candidature.

³ A reference to the ‘terrorism laws’ or the ‘CT legislation’ is taken here to mean the ATL and the CFTL together, both of which are defined in the key to abbreviations.

Indonesia's terrorism laws do not exist in a vacuum. They are a product of social and political forces, and the effectiveness of laws is only equal to the performance of state agencies entrusted with their enforcement. Political, social and historical factors exert an important influence on the way in which state institutions such as the parliament, courts, police and the military react to challenges such as terrorism. A political paradigm of undermining the independence of the courts for example, to make them subordinate to the president, developed throughout the Soekarno and Soeharto eras, continues to shape the flawed approaches and practices of the courts in contemporary cases. An examination of the workings of Indonesia's parliament and its interactions with the president, explains why laws are, in many cases, slow to be passed, and why revisions to laws, such as the terrorism laws, are almost non-existent. A police culture of impunity and extra-judicial treatment of criminal suspects, exemplified in the Soeharto-era practice of *petrus* (mysterious shootings of criminals) and the routine beating and torture of suspects, continues to taint police practices, and the image of Indonesia's police in the eyes of the community, to the present day.

HISTORICAL, SOCIAL AND POLITICAL BACKGROUND SHAPES CT

Theoretical conceptualisations of political violence in Indonesia indicate the complexity of underlying political, social, religious and historical factors which contribute to the evolving nature of terrorism and counter-terrorism. Religious justifications for violence display extraordinary resilience compared with other secular justifications – it is likely that this links into the importance of family relations in reinforcing and strengthening religious beliefs.

Exploring such factors which shape and influence Indonesia's CT response, Chapter 2 discusses the manifold social and political factors which inspired and sustained what is now labelled 'jihadist terrorist' violence throughout Indonesia's history and the state responses throughout the colonial and post-colonial eras. Through

this analysis it is evident that throughout most of Indonesia's history, political violence, including religiously inspired or religiously justified violence, was met with military force. This is particularly true during the period of Dutch colonial administration – the Padri and Java Wars of the 1800s are examples of Dutch military responses to violent insurrection containing elements of religious-jihadist ideological underpinnings.

During the post-independence administrations of Soekarno and Soeharto, responses to similar forms of political violence containing elements of religious justification were also met with uncompromising military force, sometimes using judicial processes after the fact to lend an air of legitimacy to their actions. Several examples may be pointed to, such as the Darul Islam uprising led by Kartosoewirjo which was active from the late 1940s until the early 1960s.

During the New Order regime of Soeharto, uncompromising force was coupled with military intelligence and the subjugation of the courts to suppress most forms of political dissent, including religiously inspired opposition. One illustrative example is the Tanjung Priok incident of 1984 which was sparked off by Islamist protests against the state ideology of Pancasila. The approach emphasised military intelligence to infiltrate such 'subversive' groups, military tactics in repressing them and a veneer of judicial process applied after the fact, by subservient courts where convictions were guaranteed, to give the appearance of legitimacy. The broadly worded provisions of the Anti-Subversion law were the main tool of prosecutors to obtain convictions for all forms of political dissent, including peaceful dissent.

Importantly, the use of authoritarian, military force coupled with the subjugation of the courts, developed a paradigm whereby deterrence of crime was understood to be a responsibility assumed by a central, political executive – exercised primarily through the use of military force, occasionally supported by police, which was, at that time, an arm of the military anyway. Courts saw their role as being to

validate acts of the executive rather than assume a genuine role of moral condemnation and deterrence of crime. This paradigm continues to influence the practices of the courts and explains the leniency of treatment and sentencing of terrorist suspects. While virtually 100% of terrorism suspects are convicted, they are treated leniently, in some cases almost apologetically, by the courts, and the sentences handed down have been insufficient to express the moral condemnation of the community towards jihadist terrorism, or to have a sufficient deterrent effect for both the defendants themselves or for the wider public.

A similar line of argument, that is the subjugation of the parliament which was a rubber-stamping agency for presidential policies during the New Order, explains, to some extent, the poor performance of the parliament in aggressively, and expeditiously tackling issues of social urgency, such as reforming the terrorism laws. And has left police agencies, who have generally performed well in CT operations, without the tools they need to lawfully apprehend and secure convictions in many cases.

THE EFFECT OF REFORMASI AND 9/11

With the downfall of Soeharto in 1998, a process of political, constitutional and social reform, known as *reformasi*, began, with several important consequences for counter terrorism. Constitutional amendments passed between 1999 and 2002 resulted in a shift of power away from the president and the executive to the legislature and the courts.⁴ All seats in parliament were made elective, the grounds for presidential impeachment were defined, and the police were officially separated from the military. Of particular note in the CT context are the presidential impeachment processes and the separation of the police from the military.

⁴ However, as outlined above, it is argued that the courts and the parliament were not ready to assume that responsibility, at least not in the field of CT.

The task of navigating Indonesia's response to the US-led GWOT and responding to Indonesia's largest terrorist bombing in Bali in 2002 therefore fell on the shoulders of President Megawati and her administration.

However, Megawati's domestic political position proved to be precarious. Many Indonesians, both in the elite and the community did not wish to see Indonesia become a lackey of US interests, and were deeply sceptical of the US-led 'war on terror' which was seen as being, in reality, a war on Islam. The situation illustrates the precarious position faced by all Indonesian presidents who must tread a fine line between appeasing the competing interests of a Muslim-majority electorate (which is by no means homogenous and displays a wide range of differences across the political spectrum) as well as the interests of minority groups, foreign governments and the UN, all of which make demands on the Indonesian government in its handling of CT issues.

Prior to the Bali bombing of 2002 however, the events of 9/11 in the US would shape the global response to terrorism, and by implication Indonesia's CT response. On 28 September 2001, the UN Security Council passed Resolution 1373. In an unprecedented act, the resolution, passed under Chapter VII of the UN Charter, forced countries to revise their domestic legislation to bring them into line with UN requirements; that is to criminalise terrorism and terrorism financing among others, under threat of sanctions for non-compliance. The resolution signalled a significant expansion of the powers of the UN Security Council. Indonesia responded by initiating the process of drafting an anti-terrorism law. Having scrapped the draconian Anti-Subversion Law in 1998, the people, just emerging from decades of authoritarian rule, would not easily surrender the hard earned freedoms of democracy which they were just beginning to enjoy.

A POLICE-LED, CRIMINAL LAW PARADIGM

The Bali bombing of October 2002 caused a major transformation in Indonesia's CT enforcement. The Indonesian government allowed unprecedented cooperation with foreign law enforcement agencies such as the AFP, Scotland Yard and the FBI. The cooperation yielded success with the capture of most of the perpetrators of the Bali bombing and set the stage for continued transnational CT cooperation in the following years. Foreign countries including Australia, US and UK provided extensive funding, training and equipment for Indonesia's special CT unit, Densus 88, which spearheaded CT operations.

The paradigm shift from a military approach, to a criminal-law, police-led approach to counter terrorism is arguably Indonesia's greatest post-*reformasi* achievement in anti-terrorism. Over nine hundred jihadist terrorists have been either caught and prosecuted or fatally shot during police raids. By thus disabling terrorist networks, the state has been able to make significant progress in increasing general security for the community against large-scale terrorist attacks. There were no major bombings in Indonesia between 2009 and 2015, and very few civilians were killed as the result of jihadist terrorism in those intervening years. The qualified success of the Indonesian model should serve as an example⁵ to the international community of the benefits of a criminal-law-based approach to countering terrorism as opposed to a military campaign of bombings and drone-strikes which inevitably cause significant collateral damage, reinforce the cycle of violence and serve to strengthen the resolve and recruitment of terrorist groups.

However, while the police-led response has had a number of successes there are a number of caveats which must be noted. While, the foreign-influenced, paramilitary policing, approach of Densus 88 has, by and large, been lauded by most

⁵ Kumar Ramakrishna, "'The Southeast Asian Approach to Counter-Terrorism': Learning from Indonesia and Malaysia" (2005) *The Journal of Conflict Studies* vol. Summer, 1

governments and commentators, human rights groups have warned of a number of cases of fatal shootings of terrorism suspects in circumstances where it may have been possible to apprehend the suspects alive. The police-led approach does not guarantee the application of the rule of law, and important links between an absence of the rule of law, and increased terrorist activity have been noted in terrorism research. Further, the current police-led approach does not guarantee that at some future point in time the Indonesian military may not re-assert control over counter-terrorism. In fact, there have been several instances where the military has demonstrated its willingness to take on a greater role in counter-terrorism, including during operations in Poso in 2015 to infiltrate the MIT group led by Santoso. The police-led approach does also not guarantee that the courts will adequately perform their function when terrorist suspects are brought before them.

The enactment of the ATL, the formation of the paramilitary police unit Densus 88 with its foreign funding and influence, and later the formation of the BNPT under the leadership of President SBY in 2009 have all contributed to Indonesia's successes in countering terrorism – however it is argued that they have also contributed to a deeply skewed understanding of terrorism, which equates 'terrorism' with 'jihadist terrorism'. Throughout Indonesia's long and often violent history, the label 'terrorist' has only consistently been applied to terrorists who draw their inspiration from jihadist doctrine, or the basic ideology espoused by Darul Islam; that is, that Indonesia ought to be an Islamic state based on the application of Shari'a law. Separatist groups which commit acts of violence which would generally be recognised as terrorist acts, such as killings of police or kidnappings in provinces such as Aceh and Papua, are generally not referred to as terrorists; rather they are referred to as 'armed criminal groups'.

Several factors – the post-9/11 global environment during which the ATL was enacted; the influence of foreign police agencies and funding on the Indonesia police; the enactment of the ATL which was accompanied by a second law which purported to

apply the terrorism law to a single act of jihadist terrorism; and a prevailing Indonesian view that separatists are different and more culpable than religious terrorists – all contribute to a widespread perception, in Indonesia and arguably throughout the world, that ‘terrorism’ means ‘jihadist terrorism’.

The importance of defining terrorism, as a fundamental, logical step in discussing and addressing it in any meaningful way, can almost not be overstated. Yet despite the best efforts of academics, governments, legislatures and the UN, no universal definition has ever been agreed upon.

DEFINING TERRORISM

Chapter 3 gives detailed consideration to the vexed question of defining terrorism. It considers the issue at international law and the unsuccessful efforts of the UN to arrive at a universal definition. It considers attempts at an academic definition, and also definitions provided by legislatures in various countries, including Indonesia. The chapter concludes that despite a deliberate ‘muddying of the waters’ to protect vested political interests conducted at the very highest levels, there is in fact wide-spread agreement on the fundamental, defining aspects of terrorism. Boiled down to its most basic elements, it is; serious violence, or threats of violence (that is violence which causes death or serious injury) which targets civilians (or non-combatants), intended to intimidate a population, or coerce a government, committed for political, religious or ideological reasons. Basically those are the agreed defining elements of terrorism and may be applied consistently to determine whether something is, or is not, terrorism.

The bombing of a nightclub filled with tourists to bring attention to a political or religious cause, is quite clearly an act of terrorism. The bombing of a shopping mall for personal reasons of revenge, as occurred at the Alam Sutera Mall in Jakarta in

2015,⁶ is probably not an act of terrorism as it is not done for political or ideological reasons. The kidnapping of civilians as part of an armed resistance movement which occurred in Papua in 2015,⁷ is an act of terrorism under the definition offered above. Killings of police for a political or religious reason ought to be regarded as terrorist acts however, in Indonesia only jihadist terrorists are prosecuted under terrorism laws for such acts. The killings of military personnel in the context of an armed independence movement, which also occurred in Indonesia in 2015,⁸ present a challenging question. As terrorism is generally understood to mean violence directed at civilians, how should attacks on military personnel be characterised? The question links into the right of occupied populations to conduct armed resistance against an illegitimate occupying force. It is a cornerstone principle of the UN and dates back to the struggles of colonised countries, including Indonesia, to struggle for independence from illegitimate, foreign domination. It can be recognised only in cases where a state of war or a war-like setting exists. As such settings cannot be said to exist in Papua, and certainly not in Aceh since the Helsinki MoU was finalised in 2004, acts which deliberately target military personnel and in particular police, ought to be labelled as terrorism, and prosecuted as such. At present, however, this is not the case.

Papuan cases of political violence are prosecuted using the Criminal Code; however the sentences handed down by courts in those cases are far heavier than the sentences given to jihadist terrorists. Papuan cases are handled by the district courts in Papua, whereas virtually all jihadist terrorism cases are handled by district courts in

⁶ Adanti Pradita and Hanz Jimenez Salim, "All You Need to Know About Alam Sutera Mall 'Bomber'" *Liputan 6* (online) 29 October 2015 <<http://www.liputan6.com>>.

⁷ Bruce Hill, "PNG Defence Force Rescues Indonesian Hostages from West Papuan Rebels, Military Commander Says" *ABC News* (online) 18 September 2015 <<http://www.abc.net.au/news/2015-09-18/png-defence-force-rescues-indonesian-hostages/6786154>>.

⁸ Hotli Simanjuntak, "Aceh Armed Group Surrenders, Gets Amnesty" *The Jakarta Post* (online) 30 December 2015 <<http://thejakartapost.com>>.

Jakarta. Even where the offences occurred in other provinces, the suspects are usually transported to Jakarta to face trial.

To complicate matters further, Indonesia's 'definition' of terrorism contained in art 6 of the ATL, contrary to most internationally accepted norms, contains no reference to political, religious or ideological motivations. On the surface, this would appear to make the law capable of being applied more broadly. Human rights groups criticised the law as such saying that it could be applied broadly and arbitrarily by police. However this has not been the case. Rather than applying the law too broadly, the thesis argues that police and prosecutors have in fact applied the law too narrowly.

THE ATL AND CFTL

As mentioned above, chapter 4 is a discussion of the ATL itself. A relatively short piece of legislation of about 30 pages, it contains a number of key provisions that have facilitated police in CT operations. Apart from the procedural provisions, such as allowing seven days pre-charge detention and allowing electronic evidence, its other great achievement was to criminalise inchoate offences such as attempting, aiding, or concealing information about terrorist acts – these provisions have allowed police to secure a number of convictions where it would have been difficult to do so under the general criminal law. In fact police and prosecutors have achieved a near-perfect record of almost 100% convictions in terrorism cases (discussed further below).

The ATL however is by no means perfect and there are a number of areas where revisions would be beneficial. A bill to revise the ATL was completed in 2012, and included provisions to criminalise membership of a terrorist group, and participating or organising paramilitary training, among other reforms, however the bill was not presented to parliament. With the emergence of ISIS in 2014, calls to reform the laws again emerged, without result (discussed further below).

In 2013, under considerable international pressure, the Indonesian parliament passed the CFTL which purported to give force to the UN Convention for the Suppression of the Financing of Terrorism. A reading of the legislation itself led to the conclusion that Indonesia had done everything necessary to be in compliance with the convention. However, for several years following the enactment of the CFTL Indonesia remained on an international watch list of non-compliant jurisdictions because it had failed to fully implement the laws. Cutting off the funds from terrorist groups has the potential to be a very effective means of disabling terrorist groups, and tracing their activities, leading to prosecutions.

Several things may be noted regarding the CFTL. Firstly, the parliament only acted after it had been placed under great pressure and the name and shame list prepared by the FATF – the watchdog agency. This indicates the legislative inertia which exists within Indonesia’s parliament and the lengths which must be gone to get the parliament to act. An important revision to Indonesia’s Criminal Code, for example, has been before the parliament for over three decades.

The thesis argues that the provisions of the CFTL have not been applied rapidly or forcefully enough by police and prosecutors. There may be a reluctance of police to use the CFTL for a number of reasons, for example they see that the coercive paramilitary responses have been very successful and therefore other methodology is not needed. Also, police see that using such provisions may compromise ongoing investigations. Nonetheless, it would likely be beneficial for police and prosecutors to receive further training in the use of the CFT laws as another tool available in their arsenal for countering terrorism. It can also be noted that given Indonesia’s developing economy, it is likely that a number of transactions which are used for terrorist purposes are too small to be detected by the STR mechanisms in the CFTL. However, PPATK and police could apply the law to freeze accounts of groups such as JAT and JAS

which publicly solicit donations on their websites. Police must also be vigilant to continually update the terrorist listings to include all active groups connected with terrorist activity.

SENTENCING TERRORISTS

Chapter 6 focuses on the application of the laws and examines the issue of sentencing in terrorism cases. It concludes that while Indonesian courts have convicted virtually 100% of terrorist defendants brought before them, the sentences handed down are overwhelmingly lenient. Apart from a handful of high profile cases, such as the death sentences handed down to three of the Bali bombers in 2003, the death sentence is almost never imposed on terrorist defendants. Life sentences are also very rare. The average length of prison sentence for terrorism offences is around six years. After remissions and parole applications, which may be made after serving two-thirds of the head sentence, a terrorist sentenced to six years imprisonment may in fact end up serving less than four years in prison. This is despite the fact that the terrorist may have played a critical role in a violent attack which caused the death of civilians. The thesis argues that sentencing practices of Indonesia's courts are inconsistent, illogical and insufficient for the underlying purposes of punishment, that is, to rehabilitate the offender, to exact retribution for the victims of the crime and to deter the commission of future crimes by both the offender himself and the general public. The role of prosecutors in constructing an accurate and full indictment must also be stressed, as there are many cases where further charges could have been listed but were not. Also, written judgements of the courts are flawed as they routinely cut and paste text from the indictment, lack a clear analysis of facts as they relate to the law, and they fail to apportion sentences for different charges, or for separate counts of the same offence.

There may be several reasons Indonesian courts are lenient on jihadist terrorists. Courts see the defendants as fundamentally decent, religious men who have gone astray. A deeply ingrained sense of uneasiness about disintegration of the

Indonesian state, which dates back to the Soeharto era, continues to prevail in political and community thinking which sees separatism as a different and more serious threat than jihadist terrorism. Also a hangover from Soeharto era, the courts see their role as cosmetic, to give the appearance of something happening whether or not anything is actually achieved. Culturally, expressing outrage of any kind is not acceptable in Indonesia; however there is a general sense that the courts see their role as being more to give the appearance of justice being done, than for actually achieving real judicial outcomes of deterrence and rehabilitation. This stems back to an outdated judicial culture dating back to previous authoritarian regimes.

By comparison to other jurisdictions such as Australia or US, sentences imposed by Indonesian courts in terrorism cases are far lighter, and the handling of terror suspects in the court room, far more lax. To achieve a greater sense of condemnation and deterrence for these crimes it is suggested that significant training and reform in the criminal justice sector is required. It may be argued that the good work of law enforcement agencies in infiltrating and capturing terrorists, is being let down by prosecutors and the courts, who fail to sufficiently indict suspects or impose sufficiently heavy sentences which allows terrorists to serve their sentences and be released back into the community within a matter of years, able to reconnect with their old networks and, in some cases, with a renewed vigour for jihadist violence. The role of the Department of Corrections in sufficiently rehabilitating convicted terrorists must also be examined.

BREAKING THE ISIS

With the emergence of ISIS in 2014 in the Middle East, almost immediately the repercussions and implications for Indonesia were felt and talked about. As the nation with the world's largest Muslim population and a country with a clear presence of active jihadist terrorist groups, it was expected that there would be serious implications from international developments.

In some cases, police officials showed their over-eagerness to attribute attacks to ISIS connections before all the facts were known. Some early police comments linked the bombing of the Alam Sutera mall to ISIS whereas in fact the bomber was motivated by personal reasons. However, there clearly have been groups and individuals who have expressed their support for ISIS, who have travelled or attempted to travel to Syria to join ISIS.

ISIS reignited the debate about law reform, however without any concrete results. Some commentators, including academics, media commentators and government officials, argued that ISIS supporters should forfeit their Indonesian citizenship. Under Indonesia's Citizenship Law any person who swears allegiance to a foreign state or serves in a foreign military, automatically forfeits their citizenship. Other experts argued that the colonial era offence of rebellion against a friendly state could apply, or that the ATL itself could be applied for 'attempting' to commit terrorism.

In the first test case of an ISIS supporter, Afief Abdul Majid, the courts failed to convict him for his ISIS-related activities. Encouragingly, on appeal to the Jakarta High Court the ISIS-related ATL charges were confirmed and Afief's sentence was increased from four to six years.

Chapter 7 concludes that a solution to the question of forfeiture of citizenship could be to forfeit the citizenship of individuals who have departed overseas to join ISIS, for 'joining a foreign military'; this would prevent them from returning to Indonesia. As returning FTFs may be an important source of intelligence, the state may consider waiving the forfeiture in some cases to allow selected individuals to return to Indonesia to stand trial.

Forfeiture of citizenship for domestic supporters of ISIS is problematic for legal and practical reasons. It could effectively make a significant number of Indonesians who have sworn allegiance to ISIS stateless, which would then pose a dilemma of how

the people should be dealt with. Other alternatives may include reversing the onus of proof for travel to 'declared conflict zones', suspending or holding passports of suspected supporters of ISIS so they are unable to exit the country, or creating an offence of supporting or declaring support for a listed organisation. Such measures would allow police and prosecutors to obtain convictions instead of having to adapt existing laws to suit cases, where the results are uncertain.

CONCLUSION

Indonesia's post-*reformasi* 'war' on jihadist terrorism has been firm, non-military, arguably very successful, yet flawed in multiple areas. Indonesia's president acted swiftly in the wake of the Bali bombings of 2002 to enact anti-terrorism laws which were subsequently upheld by parliament and have provided sufficient legal cover for police to take firm action in CT operations. However, upon closer inspection, significant cracks in Indonesia's image of total success in counter-terrorism begin to appear. While Indonesia's parliament enacted major pieces of CT legislation in 2003 and 2013, it did so only after enormous international pressure was brought to bear. This legislative inertia indicates at its worst, a deliberate reluctance on the part of the legislature to meet the politically sensitive challenges posed by terrorist violence – at best, it indicates an inherent sluggishness in the ability of the Indonesian parliament to respond to pressing issues in a timely manner. Further, serious questions remain about the sufficiency of the laws, their implementation and the failure to amend them.

The application of Indonesia's ATL, in particular by prosecutors and the courts, has been inconsistent and flawed and has led to some illogical and unjust outcomes – which erode already-limited public confidence in judicial processes. The ATL itself contains serious flaws such as its 'definition' of terrorism which is out of step with international norms, and has led to counter-intuitive results. Non-jihadist, politically motivated terrorist acts, such as attacks committed by Papuan separatists, are not prosecuted as terrorism, whereas under international law they would be considered as

such. In Indonesia, 'separatism' is viewed as being distinctly different from 'terrorism'. This approach demonstrates a deeply skewed understanding of the concept of terrorism. It also continues to antagonise jihadist groups who claim, correctly, that they are being unjustly singled out. This, combined with police abuses, feeds into a virulent jihadist discourse of victimisation and opposition to the Indonesian state.

Despite repeated calls for the government to revise the ATL it has not done so, leaving police in a tenuous position when faced with the challenge of capturing and prosecuting supporters of new terrorist movements such as ISIS. According to data from the Global Terrorism Database, terrorist incidents, which peaked at over one hundred per year around 2002, fell to almost zero in 2007, but have risen again and plateaued at around 30-40 incidents per year since 2012. These statistics include acts of violence by Papuan separatists as terrorist acts although they are not prosecuted as such by Indonesian authorities.

When the ISIS phenomenon emerged in Indonesia in 2014, discussions to amend the ATL were once again raised – draft revisions to the ATL, which include criminalising membership of terrorist groups, were prepared several years ago however were not forwarded to parliament. The president and vice president both referred to the need to bring the laws up to date, and provide new measures to counter support for ISIS, and any other banned groups.⁹ However, discussions between the Ministry of Law and Human Rights, BNPT and MUI were reportedly bogged down by debate and confusion over the definition of an 'extremist' group.¹⁰

⁹ Rosmiyati Dewi Kandi "MUI Tak Setuju Pemerintah Terbitkan Perppu Larang ISIS" *CNN Indonesia* (online) 22 April 2015 <<http://www.cnnindonesia.com/nasional/20150422180800-12-48552/mui-tak-setuju-pemerintah-terbitkan-perppu-larang-ISIS/>>.

¹⁰ Rosmiyati Dewi Kandi and Aghnia Adzkie, "Kementerian Hukum Setuju Diterbitkan Perppu Larang ISIS" *CNN Indonesia* (online) 22 April 2015 <<http://www.cnnindonesia.com/nasional/20150422142453-12-48449/kementerian-hukum-setuju-diterbitkan-perppu-larang-ISIS/>>.

While 'extremist' may be a difficult term to define, the definition of a 'terrorist' group need not be subject to confusion. The line between a legitimate political or religious group and an illegal terrorist group, is simple – violence. Where a group plans or incites the use of violence in the pursuit of its political or religious goals, it has clearly crossed a line, ought to be labelled as terrorist, and the full weight of the law should be brought to bear to disband the group and punish its members without fear or prejudice by the state.¹¹

Indonesia has failed to amend or enact the laws necessary to take such clear, unequivocal action against groups which espouse violence, and its counter-terrorism regime therefore remains subject to the vagaries of unseen domestic and foreign political forces, and lacks consistency in its purpose and application by state institutions.

Indonesia's jihadists are sustained by a resilient Islamist ideology which has received a boost from the emergence of ISIS in the Middle East¹² and which links into unique historical and socio-political conditions which do not follow global terrorism trends such as those outlined by Rapoport.¹³

While there have been few terrorist attacks throughout 2015, the goal of establishing an Islamic State of Indonesia remains for some groups, and may be reinvigorated by the military successes of ISIS, and from fighters returning from the

¹¹ Edwin Bakker, "Exclusion: Who Decides — and on What Grounds? Hizb Ut-Tahrir and the HDIM" (2007) *Helsinki Monitor: Security and Human Rights* vol. 4, 278. Where an organisation such as Hizb ut-Tahrir has branches in multiple countries, the factual question of designation as a terrorist group may be complicated.

¹² Jakarta Globe, "Military Chief Challenges IS Militants to Come to Indonesia Gen. Moeldoko: Let Them Come and We'll Take Them All Out" *The Jakarta Globe* (online) 14 April 2015 <<http://thejakartaglobe.beritasatu.com/news/military-chief-challenges-militants-come-indonesia/>>; Rosmiyati Dewi Kandi, "BNPT: Sudah Ada 600 WNI Yang Diduga Bergabung ISIS" *CNN Indonesia* (online) 24 April 2015 <<http://www.cnnindonesia.com/nasional/20150422153247-12-48476/bnpt-sudah-ada-600-wni-yang-diduga-bergabung-ISIS/>>.

¹³ David Rapoport, "The Four Waves of Rebel Terror and September 11" (2002) *Anthropoetics - the Journal of Generative Anthropology* vol. 8 no. 1 Spring/Summer, 2.

region with renewed skills and motivation for violence.¹⁴ Comments by Indonesia's Head of Police, General Badrodin Haiti, confirmed this, saying the government had foiled "nine planned terrorist attacks and arrested 74 terrorism-related criminals in 2015".¹⁵

Terrorism is not Indonesia's most pressing problem. Drugs,¹⁶ traffic accidents¹⁷ infant mortality,¹⁸ natural disasters like tsunamis¹⁹ and earthquakes²⁰ – all kill far more Indonesians, than terrorism. Corruption is a widespread social ill which dominates news reports and also arguably causes more daily damage than terrorism.²¹

When considered in the context of the raft of serious and pressing social, political and ecological issues confronting Indonesia's policy makers, it is perhaps not surprising that reforming terrorism laws is not a top priority for the parliament.

However, the power and the threat of terrorists, the world over, is that they use terror tactics to attract a disproportionate amount of attention and to inflate their

¹⁴ On the other hand, fighters who return to Indonesia disillusioned by the conflict and broken promises of their time in the 'caliphate' may serve to deradicalise other would-be fighters. One example is Ahmad Junaidi, who served in Syria for six months then returned to Indonesia. He testified that he had been promised a monthly salary of Rp15 million, but actually received less than Rp1 million. Adhe Bhakti, "Tujuh Pendukung ISIS Didakwa Terorisme" *Radicalism Studies* (online) 14 October 2015 <<http://www.radicalismstudies.org/home/2015-04-19-13-37-27/terrorism-daily/245-tujuh-pendukung-ISIS-didakwa-terorisme.html>>.

¹⁵ Ardi Wirdana, "Indonesia Foils Year-End Terror Attack but Must Remain Cautious" *Indonesia Expat* (online) 11 January 2016 <<http://www.indonesiaexpat.biz/>>.

¹⁶ Claudia Stoicescu, "Indonesia Uses Faulty Stats on 'Drug Crisis' to Justify Death Penalty" *The Conversation* (online) 5 February 2015 <<http://theconversation.com/indonesia-uses-faulty-stats-on-drug-crisis-to-justify-death-penalty-36512>>.

¹⁷ "Indonesia's Traffic Deaths on Rise: WHO" *The Jakarta Globe* (online) 1 June 2014 <<http://jakartaglobe.beritasatu.com/news/indonesias-traffic-deaths-on-rise-who/>>. The vast majority of deaths are motorcyclists (35%) and bus passengers (35%). The report noted that around 50% of motorcycle passengers do not wear helmets.

¹⁸ United Nations International Children's Emergency Fund [UNICEF], "Indonesia - from Birth to 5 Years Old" *The Early Years Report* (online) 2015 <<http://www.unicef.org>>.

¹⁹ Tsunami2004, "Tsunami 2004 Facts and Figures" *Tsunami 2004 Report* (online) <<http://www.tsunami2004.net>>.

²⁰ Elnashai et al., "The Yogyakarta Earthquake of May 27, 2006," *MAE Center Reports* (Mid-America Earthquake Center, Newmark Civil Engineering Lab, University of Illinois (2006) vol. 7 no. 2.

²¹ "AGO Name Gatot Pujo as Suspect" *TEMPO Interaktif* (online) 3 November 2015 <<http://en.tempo.co>>.

sense of importance and power. Terrorist attacks, especially those which target civilians, in particular foreign civilians, receive disproportionate attention from the world's media, and feed into a global counter-terrorism narrative.²² Terrorist groups have been aware of the propaganda effects of terrorism for centuries,²³ and it is one of the reasons the tactic is so effective. Measured against achievement of political goals, terrorist groups are rarely successful in achieving their stated aims.²⁴ However, in terms of achieving attention and recognition of their cause, terror tactics can be extremely effective.²⁵

Terrorism's power lies in its ability to destroy life, disrupt commerce, deter investment, challenge the rule of law, and sap energy of human capital. It distracts Indonesia from fixing its serious endemic problems, and distorts the perception of Indonesia to foreigners. Indonesia's jihadists may not be able to achieve the goal of overthrowing the government, but they can have a seriously destabilising influence on Indonesia's trajectory toward fully functioning democracy with social justice and equitable wealth distribution. Flare ups of communal fighting, which may act as a trigger for extended bursts of terrorist violence, remain a real and potential threat to the fragile social balance. Terrorism, which sinks away from the public's attention in times of relative inactivity, will burst back in to the public spotlight with a single headline-grabbing attack.

At such times, when the focus is firmly back on terrorism issues, the public, in the midst of attempting to heal the pain and anguish caused, will ask what failures

²² Mark Hobart, "Round up the Usual Suspects: Some Radical Implications of Indonesian and Euro-American Media Coverage of 'Terrorist' Attacks in Media and Political Violence" (Cresskill, NJ: Hampton Press, 2007).

²³ Rapoport, above n 13.

²⁴ Max Abrahms, "Why Terrorism Does Not Work" (2006) *International Security* vol. 31 no. 2, 42.

²⁵ Seth G. Jones and Martin C. Libicki, *How Terrorist Groups End: Lessons for Countering Al Qa'ida* (RAND Corporation, 2008).

occurred in the overall counter-terrorism regime which allowed it to happen. The thesis has attempted to answer that question.

RECOMMENDATIONS

Based on the discussion contained in the preceding chapters, the thesis makes the following recommendations to enhance Indonesian counter-terrorism legislation and law enforcement.

1. Develop and articulate an integrated CT strategy. The BNPT should, through public information campaigns aimed at the wider community, and specialised training for CT stakeholders, propagate a clear message that there is a generally understood international definition of terrorism which has arisen through academic and legal discourse which focuses on three main elements and which depoliticises the use of the term 'terrorism'. Those three elements are: the use of violence; for a political/religious/ideological cause; to create widespread fear in the community or to coerce a government.
2. Any kind of violence committed for political, religious or ideological reasons should be prosecuted consistently as terrorism. This includes violence committed by so-called 'separatist' movements in various parts of the country, or any other groups or individuals.
3. The strategy outlined in 2 should be combined with a similar information campaign aimed at political groups from all backgrounds which emphasises the peaceful expression of political opposition and highlights the immorality, illegality and terrorist nature of using violence to pursue a political/religious cause. Groups at the fringe of the political process should be encouraged to move into the political sphere and express their goals and ambitions in a peaceful way which respects the rights of others.
4. With regard to the criminal justice system, recognition should be given for the successes of police, prosecutors and the courts in countering terrorism

and increased levels of community safety from acts of terrorism. However, further training is needed to increase levels of expertise, particularly among prosecutors and judges, to understand the grave nature of terrorism, the relevant provisions of the ATL, and consistency in sentencing levels. Subpoena laws should be re-evaluated to ensure that witnesses, particularly expert witnesses attend court when called. Also, lax court security procedures need to be revised – prisoners are free to move around with minimal limitations, or restraints, and are freely able to talk and interact with their supporters. Detention conditions at court are far more lax than in western jurisdictions. Security processes are likewise lax – for example at the Central Jakarta District Court, metal detectors are present at the entrance but not used.

5. The national parliament ought to act to amend the current ATL to include revising the definition of terrorism which is out of step with international norms, also to clearly criminalise membership of banned terrorist organisations, preparatory acts, incitement, and hate speech. Clarify grey areas such as the blocking of ‘extremist’ websites, membership or support for groups such as ISIS, and communicate the risks and punishments to the public. Proposals to increase the periods of pre- and post-charge detention should be abandoned as they are unnecessary and will bog down and/or prevent passage of the bill. The forfeiture of citizenship of supporters of terrorist groups should be clarified.

6. Develop a culture of respect for rule of law, due process, accountability, transparency within the police. This can be combined with more emphasis/training/equipment for non-lethal responses in CT operations. Extra-judicial killings of suspects may have a short-term incapacitating and deterrent effect, however in the long term they serve to radicalise and polarise anti-government reactions and increase violence.

7. Maintain the intelligence capacities of POLRI's terrorism detachment which has been effective at infiltrating terrorist groups – at least, more effective than the general intelligence services. Maintain the lead role of police in CT with military capacities maintained as a backup in extraordinary situations. Be vigilant against mission creep on the part of military elements that wish to retake control over CT operations.

8. Formation of a terrorism court will allow the judiciary to develop expertise in the field, and fine tune judicial responses to terrorism particularly in the drafting of written decisions, consistency in sentencing, and judicial independence.

9. Conventions and regional instruments agreed under ASEAN to increase regional cooperation, mutual legal assistance and intelligence sharing should be continued and developed along with regional law centres of excellence for law enforcement such as JCLEC which facilitates important person-to-person links between regional law enforcement agencies, as well as cutting edge training in operations, law, ethics etc.

10. Further research and analysis are required in the following four areas (points 10-13): the correlation between severity of prison sentences and deradicalisation outcomes – the research ought to systematically consider the outcomes in the approximately 900 cases of terrorism convictions to answer the question of whether harsher sentences lead to better deradicalisation outcomes, or, whether a softer approach is better. This could inform policy decisions on whether mandatory minimum sentences should be implemented for certain types of offences.

11. Legal processes for granting remissions and parole – including a statistical analysis of the actual lengths of sentences served by convicts compared with the sentences handed down by the courts.

12. Statistical analyses of numbers of terrorism suspects who make confessions (including an analysis of how many were tortured or coerced) relating to their criminal prosecution. Likely effects to prosecutions in the event defendants stopped making admissions of fact, and recommendations for addressing the situation.

13. Legislative responses to internet use for terrorist purposes. There is currently no law which specifically criminalises the use of the internet for acts of terrorism or supporting acts of terrorism. This should be rectified through the creation of a new law or by amendments to the current anti-terrorism laws.

POSTSCRIPT

On 14 January 2016, very near to the end of writing of the thesis, a major terrorist attack occurred in the heart of central Jakarta.¹ The ISIS-linked attack, which combined home-made bombs and firearms, caused the deaths of four civilians, and four attackers. It is highly significant for a number of reasons. First, the targets chosen for suicide bomb attacks were a Starbucks coffee shop (next to a Burger King and a Pizza Hut – places which attract significant numbers of expatriates) and a traffic police post. This indicates a shift in targeting strategies to combine older strategies of targeting western symbolic targets/western civilians – the ‘far enemy’, with targeting the ‘near enemy’ of the Indonesian state. It also indicates a merging of tactics, to include a combination of suicide bombings, followed up by small arms fire to shoot at targets.

Early reports announced that the attack was orchestrated from abroad by Bahrūn Naim, an Indonesian ISIS supporter in Syria, who was not only known to police as a suspected terrorist, but had previously been charged and convicted of possessing illegal weapons and ammunition, and was believed to have been plotting a terrorist attack during US President Obama’s visit to Indonesia in 2011.² He was convicted under the Emergency Law, despite suspected links to jihadist groups, sentenced to 36 months imprisonment and served one year, before he was released.³

The attack was committed by, among others, Afief Sunakim who was previously convicted for his involvement in the Aceh training camp, sentenced to seven years and released after less than four years, in 2014. Terrorism observer Al Chaidar was also reported as saying that the attackers met with Aman Abdurrahman in prison prior to

¹ Niniek Karmini and Ali Kotarumalos, "Islamic State Militants Claim Deadly Attack in Jakarta" *Jakarta Post* (online) 15 January 2016 <<http://www.thejakartapost.com/news/2016/01/15/islamic-state-militants-claim-deadly-attack-jakarta.html>>.

² "Jakarta Attacks: Convicted Militant Named as Attacker" *BBC Indonesia* (online) 15 January 2016 <<http://www.bbc.com>>.

³ *Ibid.*

the attacks,⁴ which suggests the convicted terrorist ideologue may have had a role in planning or directing the attack.

The attacks – their planning, funding, and perpetrators – confirm virtually every argument presented in the thesis; that is: that resilient jihadist ideology continues to sustain terrorist attacks; that the emergence of ISIS has reinvigorated and inspired jihadists to commit attacks in Indonesia and the government’s legislative attempts to address ISIS are insufficient; that the sentencing of terrorists is insufficient to achieve either general or special deterrence (at least two of the attackers were recidivists); that the CFT laws are being insufficiently enforced to prevent financing of terrorism (funds were allegedly transferred from Naim to Indonesia for the attack); programs to rehabilitate and deradicalise convicted terrorists are clearly, in some cases, not working; that Indonesia’s treatment of prison inmates is too lax (as it appears the attackers were able to meet with, and receive direction from, imprisoned leader Aman Abdurrahman); that Indonesia’s laws are insufficient to handle the threat of ISIS and allow police to take preventative actions against ‘members’ of terrorist groups; and that a major attack would reignite debate and give momentum (possibly only briefly) to revising the terrorism laws.⁵

If police had been able to apprehend all supporters of ISIS in Indonesia, interrogate and charge them, it is conceivable they may have obtained intelligence which could have prevented the attack. However, this is not to detract from the efforts of police who have achieved great successes in infiltrating terrorist groups, and displayed extraordinary courage in CT operations, including the frontline police who responded to the attackers on 14 January 2016.

⁴ Hannah Beech, "ISIS Opens a New Battlefield in Asia with Jakarta Attacks" *TIME* (online) 15 January 2016 <<http://www.time.com>>.

⁵ Adam Fenton, "Legal Reform Urgently Needed to Confront Terrorism" *The Jakarta Post* 21 January 2016, 7.

At the time of writing it was uncertain whether the ATL would be revised or whether a new comprehensive terrorism law would be enacted, however, based on contemporary media reports there was significant political momentum for such a move. Time will tell whether the Indonesian president and parliament follow through on promises to strengthen the terrorism laws, and what the precise content of those revisions will be.

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Indictment No.Reg.Perkara: PDM-JKT.BRT/09/2015 (Abdul Hakim Munabari)
Indictment No.Reg.Perkara: PDM-JKT.BRT/09/2015 (Aprimul Henry)
Indictment No.Reg.Perkara: PDM-JKT.BRT/08/2015 (Helmi Muhamad Alamudi alias
Abu Royan)
Indictment No.Reg.Perkara: PDM-174/JKT.BRT/07/2015 (Koswara)
Indictment No.Reg.Perkara: PDM-JKT.BRT/09/2015 (Ahmad Junaidi)
Indictment No.Reg.Perkara: PDM-JKT.BRT/09/2015 (Tuah Febriwansyah alias
Muhammad Fachry)
Indictment No.Reg.Perkara: PDM-198/JKT.TM/12/2014 (Muhammad Saifuddin Umar
alias Abu Fida)
Indictment No.Reg.Perkara: PDM-/JKT.TM//2015 (Muhammad Shibhotullah)
Indictment No.Reg.Perkara: PDM-JKT.BRT/09/2015 (Muhammad Amin Mude)
Indictment No.Reg.Perkara: PDM-JKT.BRT/09/2015 (Robby Risa Putra)
Indictment No.Reg.Perkara: PDM-JKT.BRT/09/2015 (Muhammad Basri)
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