17 March 2016

Dr. H. Ade Komarudin, M.H.
Speaker of the House of Representatives of the Republic of Indonesia
Jl. Jenderal Gatot Subroto, Senayan
Jakarta 10270, Indonesia
Tel no. +62 21 571 5328
Email: katuapr@yahoo.com

Re: Comments on the amendments to Indonesia's Anti-Terrorism Law

Your Excellency,

We are writing to you today to express our concerns regarding the proposed provisions amending Indonesia's Anti-Terrorism Law (ATL) that are currently under consideration by the House of Representatives.

Because some of the amendments proposed are inconsistent with Indonesia's obligations under international human rights law, we urge you and the members of the House of Representatives to reject these amendments and to allow more time for consideration and debate on revisions on the law.

It is our hope that the discussion and recommendations laid out below will help the House of Representatives as it goes through the process of considering revisions to the ATL so that it would better protect the people from acts of terrorism.

The International Commission of Jurists (ICJ), the Indonesian Human Rights Monitor (IMPARSIAL), and the Commission for the Disappeared and Victims of Violence (KontraS) share your condemnation of the horrific act of terrorism perpetrated in Jakarta on 14 January 2016, and acknowledge the real threat of militants attacking civilians in Indonesia. Under international law, the Government of Indonesia has the obligation to protect its people from acts of terrorism. It has the duty to prosecute and hold accountable those responsible for acts of terrorism not only as a matter of national security, but also to protect the protect the human rights, including personal security of the individual, and acts of terrorism impair the enjoyment of human rights.

We must emphasize, however, that whatever measures the Government of Indonesia uses to counter terrorism must comply with international law. Reflecting the undersigned organizations' experience in the country and from around the globe, and as has been repeatedly stressed by the UN Security Council and other international bodies, "States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law."[1] "There is no conflict between the duty of States to protect the rights of persons threatened by terrorism and their responsibility to ensure that protecting security does not undermine other rights. On the

[1] International Commission of Jurists, *ICJ Berlin Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism,* 6 September 2004.

contrary, safeguarding persons from terrorism acts and respecting human rights both form part of a seamless web of protection incumbent upon the State."[2]

We would like to point out five key flaws in the proposed amendments that particularly concern us, as we believe that if adopted, will place Indonesia in contravention of its obligations under international human rights law.

The comments below refer to provisions in the draft submitted by the Government of Indonesia to the House of Representatives on 28 January 2016.

Unlawful deprivation of liberty

Under the proposed amendments, a person may be detained up to 30 days prior to being charged with the crime of terrorism and up to 360 days after charges have been filed.

Under Article 28 of the proposed amendments, police authorities may detain a person suspected of committing acts of terrorism for up to 30 days, prior to being charged.

After charges have been filed, under Article 25 of the proposed amendments, police authorities may hold the suspect for up to 120 days for investigation. This period may be extended twice by the prosecutor for 60 days at a time. During this period, police authorities or the prosecutor are not required to bring the detainee before a judge.

When the case has been forwarded to the court, the judge of the district court may extend the period of detention of the detainee for up to 60 days. This period may be extended again for another 60 days by the head of the district court.

A further provision, the proposed Article 43 (A)(3), states that a person suspected of being about to commit the crime of terrorism may be brought by an investigator or prosecutor to a "certain location" within the investigator's or prosecutor's jurisdiction and detained there for a period of up to six months.

Indonesia is a party to the International Covenant on Civil and Political Rights (ICCPR). Article 9 of the ICCPR recognizes and protects the right to liberty and the right not to be arbitrarily deprived of liberty. Any deprivation of liberty must conform to the following general principles: legality, legitimacy, necessity, proportionality, and the protection of human rights.

There are three types of deprivation of liberty in the abovementioned provisions: detention purely for investigation purposes, pretrial detention, and administrative detention.

Detention for investigation purposes without filing charges, as provided in Article 28 of the proposed amendments, constitutes arbitrary deprivation of liberty and incompatible with international human rights law. It is a violation of the right to personal liberty and the principle of the presumption of innocence.[3]

Proposed Article 25, on the other hand, constitutes extremely prolonged pretrial detention that also jeopardizes the presumption of innocence under Article 14, paragraph 2 of the ICCPR. [4] Under the abovementioned provision, the suspect would be detained for up to 240 days prior to being brought before a judge.

[2] Ibid.
[3] Report of the UN Special Rapporteur on the independence of judges and lawyers, *Mission to Mexico*, UN Doc. A/HRC/17/30/Add.3 (18 April 2011), para. 92.
[4] *Geniuval M. Cagas, Wilson Butin and Julio Astillero v. The Philippines*, Human Rights Committee Communication No. 788/1997, views of 23 October 2001, UN Doc. CCPR/C/73/D/788/1997, para. 7.3

Persons who are not released pending trial must be tried as expeditiously as possible, to the extent consistent with their rights of defence.[5]

It must also be noted that under international law and Article 9 of the ICCPR, it shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

It cannot be emphasized enough that it is important for a judge or judicial authority to examine whether there are sufficient legal reasons for the arrest or detention, and to order release if not; to safeguard the well-being of the detainee; and to prevent violations of the detainee's rights.

Furthermore, if the initial detention or arrest was lawful, the judge or judicial authority shall assess whether the individual should be released from custody and if any conditions should be imposed, or whether remand in detention pending trial is necessary and proportionate.

Finally, proposed Article 43 (A)(3) constitutes administrative detention on security grounds, which under international law, is generally impermissible. In the most exceptional circumstances and particularly pursuant to a lawful derogation from the ICCPR under Article 4, administrative detention may be contemplated.[6] It should, however, only be for a short period of time, and should not be indefinite.[7]

As the Human Rights Committee has underscored, to the extent that administrative detention is imposed, "such detention presents severe risks of arbitrary deprivation of liberty." [8] Administrative detention would normally constitute arbitrary detention, as other effective measures addressing the threat, including the criminal justice system, would be available.

Administrative detention can be justified under the most exceptional circumstances and where a present, direct, and imperative threat is invoked by the State. The State must also prove that the persons who will be placed under administrative detention poses such a threat and it cannot be addressed by alternative measures. The State carries the burden to prove that these circumstances exist and that burden increases with the length of the detention.[9]

States must also prove that the period of administrative detention is limited and necessary, and that they fully respect the guarantees under Article 9 of the ICCPR, in all cases. Prompt and regular review by an independent and impartial court or tribunal is a necessary guarantee for these conditions. The detainee must also be given access to independent legal counsel, preferably of his own choice. There must also be disclosure to the detainee of, at least, the essence of the evidence used to put him under administrative detention.[10]

Furthermore, the proposed amendments also do not reference anywhere how persons detained under this provision can challenge the lawfulness of their detention. It is a general principle of law, and one contained in Article 9(4) of the ICCPR, that all detained persons have the right to challenge the lawfulness of their detention at any point before a judicial authority.

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[5] UN Human Rights Committee, *General Comment No. 35, Article 9 (Liberty and security of person),* UN Doc. CCPR/C/GC/35 (16 December 2014) para. 37.
[6] *Concluding observations of the Human Rights Committee on Jordan*, UN Doc. A/49/40, paras. 226-244.
[7] Concluding observations of the Human Rights Committee on Zambia, CCPR/C/79/Add. 62, para. 14.
[8] UN Human Rights Committee, *General Comment No. 35, Article 9 (Liberty and security of person),* UN Doc. CCPR/C/GC/35 (16 December 2014), para. 15.
[9] Ibid.
[10] Ibid.

In principle, detainees have the right to bring proceedings challenging their detention from the moment of their arrest. Any substantial waiting period before a detainee can bring a first challenge to detention is impermissible. Detainees also have the right to appear in person before the court, especially where such presence would serve the inquiry into the lawfulness of detention or where questions regarding ill treatment of the detainees arise. The court has the authority to order detainees brought before it, whether or not the detainees asked to appear.[11]

We also emphasize that the right to *habeas corpus* or *amparo* is in itself non-derogable because it is essential for the protection of non-derogable rights.[12]

For all detention, security-related or otherwise, those detained must be informed of the reasons for their detention, have prompt access to family and legal counsel (within 48 hours), have access to habeas corpus, and the right to appeal to a competent court. Prolonged incommunicado and indefinite detention must be absolutely prohibited.

Furthermore, the law should expressly provide that all detainees shall be held in official places of detention and the authorities must keep a record of their identity.

There should also be provisions stating that appropriate judicial bodies and proceedings shall review detentions on a regular basis when detention is prolonged or extended. Any such detention must continue only as long as the situation necessitates.[13]

Loss of citizenship

Proposed Article 46(A) of the amendments state that an "authorized officer" shall revoke the passport and declare the loss of citizenship of any Indonesian citizen who goes abroad to conduct military or paramilitary training, and/or participates in war, related to the crime of terrorism.

The right to a nationality is recognized in international legal instruments, such as the ICCPR, the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination Against Women, and the Convention on the Persons with Disabilities. Indonesia is a party to all these international legal instruments. Furthermore, Article 15(2) of the Universal Declaration on Human Rights explicitly prohibits the arbitrary deprivation of nationality.

Depriving persons of their nationality would be inconsistent with international law, if such deprivation would render them stateless. Nationality is what legally binds an individual to a particular State. It is an essential prerequisite to the enjoyment and protection of the full range of human rights. The State has the duty under international law to guarantee the rights of its citizens and to refrain from violating these rights. When stripped of one's nationality and rendered stateless, an individual is left without these said guarantees and protections that the State is obliged to provide him.

The offence of "incitement to terrorism" and the right to freedom of expression

As a State party to the ICCPR, Indonesia has a legal obligation to respect and protect the right to freedom of expression under article 19.

[11] Ibid. at para. 42.
[12] UN Human Rights Committee, *General Comment No. 29, States of emergency (Article 4),* UN Doc. CCPR/C/21/Rev.1/11 (31 August 2001), para. 16.
[13] See the International Commission of Jurists, *International Legal Framework on Administrative Detention and Counter-Terrorism*, Geneva, March 2006.

Article 13(A) of the proposed amendment imposes a punishment of a minimum of three years and a maximum of twelve years imprisonment upon persons found guilty of knowingly spreading words, attitudes or behavior, writing or display, that may cause (a) an act or acts of violence or anarchy (b) actions that harm individuals or specific groups and/or offend their dignity, and (c) intimidate an individual or group that lead to the crime of terrorism.

Indonesia can, of course, legitimately criminalize incitement to acts of terrorism, as it is part of its legal obligation to protect its people against of acts of terrorism through criminal law. However, Article 13(A) and prosecutions for incitement to acts of terrorism, expressly limit the right to freedom of expression, and often have an impact on "the right to receive and impart information of all kinds", also protected under Article 19 of the ICCPR.

Freedom of expression under the ICCPR is not absolute, but it may only be restricted under narrow circumstances. It must therefore be examined whether the limitations to freedom of expression contemplated under Article 13(A) are permissible and meet the requirements under international law. Those requirements are that any limiting measures (a) be prescribed by law, (b) be necessary in a democratic society to serve specified legitimate aims (in this case the aim of protecting national security), and (c) be non-discriminatory.[14]

Article 13 (A) would appear to fail in at least the first two requirements. Regarding "prescription by law", the prescriptions contained in Article 13(A) are vague and overbroad, in contravention of the principle of legality. Acts of "anarchy" are not at all defined, and therefore proscription of any act that may purportedly be associated with anarchy, (for example in its expression as a political philosophy) even where engaged in non-violently, could be criminalized. Similarly "harm to individuals" or "offense to dignity" are ill-defined and also overbroad, capturing a whole range of conduct and expression that is protected under human rights law.

Freedom of expression applies not only to the flow of "information" or "ideas" that is received favorably or with indifference, or as regarded as inoffensive, but it also covers all kinds of expression, including that which some people might find disturbing or even offensive. This pluralism of ideas is essential in a democratic society. There can be no democracy without pluralism.

The proposed Article 13(A) will unduly limit political expression and could be prone to be used to restrict views that are contrary to those of State authorities or other powerful figures, including advocacy of self-determination or changes to the legal and constitutional structures. These types of speech are not in themselves incompatible with the principles of democracy and hence, cannot be considered to be jeopardizing the integrity or the national security of a country.

Furthermore, the UN Human Rights Committee, the UN supervisory body providing the authoritative interpretation of ICCPR, has affirmed that "the provisions of Article 20, paragraph 1 (on the prohibition of any propaganda for war) "do not prohibit advocacy of the sovereign right of self-defense or the right of peoples to self-determination and independence in accordance with the Charter of the United Nations."[15]

The proposed Article 13(A) aims to define and punish "incitement to terrorism" and hence, it must also be further examined whether it follows the principle of legality of offenses, a core principle of the rule of law. We believe, however, that

[14] Principle 3 of the The Global Principles on National Security and the Right to Information (The Tshwane Principles)
[15] UN Human Rights Committee General Comment No. 11, *Prohibition of propaganda for war and inciting national, racial or religious hatred* (Article 20), para. 2.

Article 13(A)'s definition of what constitutes "incitement to terrorism" is so broad that individuals cannot foresee to a reasonable extent the application of the law and to regulate their conduct to avoid breaching the law.

Furthermore, Principle 6 of the Johannesburg Principles on National Security, Freedom of Expression and Access to Information, states:

> *"Expression may be punished as a threat to national security only if a government can demonstrate that:*
> *(a) the expression is intended to incite imminent violence;*
> *(b) it is likely to incite such violence; and*
> *(c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence."*

Incitement to terrorism should be a criminal offence only where there is a subjective intention to incite violent acts of terrorism, and where the speech concerned causes the commission of an act of terrorism or an imminent risk of such an act.

Death penalty and acts of terrorism

Finally, we are concerned that the proposed amendments maintain the death penalty as a punishment in proposed Articles 6 and 14. The death penalty constitutes a violation to the right to life and the right not to be subjected to cruel, inhuman, and degrading treatment. The UN General Assembly has by large majorities in repeated resolution, called on all States to impose an immediate moratorium on the use of the death penalty with a view to abolition.

Articles 6 and 14 of the proposed amendments go against the growing international consensus to abolish the death penalty. According to a report by the UN Secretary General to the General Assembly in 2012, 150 of the 193 UN Member States have either abolished the death penalty or introduced a moratorium on it.

More recently, the UN General Assembly adopted a resolution calling for an international moratorium on the use of the death penalty. The resolution, which was passed December 2014, was supported by 117 member states.[16] This is a notable increase since the resolution was first adopted in 2007, when only 104 member states voted "yes".

We reiterate our call for the Government of Indonesia to immediately impose a moratorium on the use of the death penalty, as well as to promptly review laws and policies with a view to the total abolition of the death penalty.

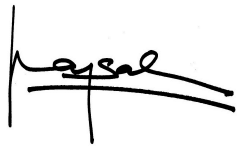
Thank you for your consideration. We hope the discussion above will contribute to your discussions on the amendments proposed to the ATL. We stand ready to provide any further information or clarifications that may help your debate in this important matter.

[16] UN General Assembly Resolution 69/186, Moratorium on the use of the death penalty, UN Doc. A/Res/69/186 (18 December 2014).

Yours sincerely,

Sam Zarifi
Regional Director for Asia and the Pacific
International Commission of Jurists

Poengky Indarti
Board Member
Indonesian Human Rights Monitor (IMPARSIAL)



Haris Azhar
National Executive Coordinator
Commission for the Disappeared and Victims of Violence (KontraS)