



# **Indonesia’s Draft Law on Intelligence: A Threat to the Nation?**

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## **Introduction**

After reviewing the draft law on national intelligence, Human Rights Watch has numerous concerns about the ambiguous language of the proposed bill, the expansive powers it grants, and the potential for conflict with both Indonesian criminal law and international human rights law. Human Rights Watch hopes that legislators will find these comments helpful in their evaluation of the draft bill, and if the bill is to be passed by the parliament in some form, that legislators consider amending the current draft to take into account human rights concerns.

The draft law on national intelligence is poorly drafted and based on a vague and overbroad definition of a “threat to the nation” that could have serious consequences for civil liberties.<sup>1</sup> The draft governs the activities of the National Intelligence Agency (BIN) and a wider “intelligence community,” which is defined to include numerous government and possibly non-government entities under the direction of the BIN Director. The draft law generally blurs the line between criminal investigation and intelligence activity and conflates the role of the military, police, and intelligence operatives. The draft’s empowerment of such an amorphous and unregulated body could undermine efforts to make both the police and military more accountable to civilian leaders since the separation of the two bodies in 1999.

Among the draft’s most troubling provisions are those allowing intelligence operatives to:

- interrogate or question any person;
- detain suspects for as long as nine months;
- issue firearms licenses;
- deport or prohibit entry of certain persons into the country.

The draft denies detainees many of the rights provided for in the Indonesian Criminal Procedure Code (KUHAP),<sup>2</sup> while at the same time invoking vague legal standards without any provision defining a role for the judiciary. While the draft provides for very limited budgetary oversight by the Indonesian parliament (DPR), it makes no mention of judicial oversight of the intelligence bureau’s comprehensive powers.

Below, Human Rights Watch offers an article-by-article commentary to those provisions that it finds most problematic from a human rights perspective.

## **I. Vague and Overbroad Definitions of National Security**

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<sup>1</sup> This analysis is based on the draft dated [January 2002].

<sup>2</sup> Undang-undang Republik Indonesia Nomor 8 Tahun 1981 Tentang Hukum Acara Pidana

The draft is based on an overbroad and alarmist understanding of national security, or “threats to the nation” (*ancaman nasional*). Identifying and preventing these threats provides the justification for the bill itself, and the phrase is repeated in many of the bill’s provisions.

Article 1(1) defines “threat to the nation” very broadly as “efforts taken conceptually through various sectors of life and/or transnational criminal acts calculated to endanger the order and interests of the state and the nation.”<sup>3</sup> Article 2 defines the “vision” of the intelligence regime in a similarly broad fashion, including the protection of national integrity, the state ideology (*Pancasila*) and the Constitution from “various domestic and international threats.”<sup>4</sup>

The general provisions of the Elucidation<sup>5</sup> elaborate on the purpose of the bill, recapitulating a common theme in Indonesian state rhetoric—the image of external forces provoking internal unrest. For instance, the Elucidation speaks of the increasingly fluid nature of international borders,<sup>6</sup> and how the presence of foreigners within national borders can create the conditions from which threats to national unity can emerge.<sup>7</sup>

*Human Rights Watch is particularly concerned that the definition of “threat to the nation” (“ancaman nasional”) is overbroad and susceptible to abuse by overzealous intelligence agents without proper mechanisms for oversight and accountability. The term must be specifically defined to cover only acts or planned acts of a criminal nature. It should not cover peaceful political or expressive activity, such as meetings of opposition parties or groups, grass-roots activists, and indigenous groups.*

## **II. The Structure of the Intelligence Regime: the National Intelligence Bureau and The Intelligence Community**

The draft establishes the National Intelligence Bureau (BIN) as the chief intelligence body in the country, under the direct authority of the President.<sup>8</sup> Under the draft, the position of BIN Director is a ministry-level position. The

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<sup>3</sup> Article 1 (1): Ancaman nasional adalah usaha yang dilakukan secara konsepsional melalui berbagai segi kehidupan dan atau kejahatan transnasional, yang diperkirakan dapat membahayakan tatanan serta kepentingan bangsa dan negara.

<sup>4</sup> Visi intelijen adalah terwujudnya integritas nasional, tetap tegaknya Negara Kesatuan Republik Indonesia, terhindarnya Pancasila dan Undang-Undang Dasar 1945 dari berbagai ancaman baik yang datang dari dalam maupun luar negeri, dalam kerangka tercapainya tujuan nasional.

<sup>5</sup> Indonesian Laws and Regulations are commonly accompanied by an official, authoritative, article-by-article guide to the interpretation of the law’s text, called an Elucidation (*Penjelasan*).

<sup>6</sup> Batas negara satu dengan lainnya terkesan semakin menipis yang berakibat derasnya arus lalu lintas warga negara dunia bermigrasi.

<sup>7</sup> kehadiran warga negara asing seringkali menimbulkan masalah. Mereka sering memanfaatkan kondisi semacam itu untuk perbuatan negatif yang memperkeruh situasi.

<sup>8</sup> Article 5 (2): Badan Intelijen Negara berada dibawah dan bertanggungjawab langsung kepada Presiden.

draft makes provision for a Vice-Director, a Secretary and five Deputies (Articles 5 & 6).

BIN itself is defined as having both a national and a departmental presence (Article 4 (2)).<sup>9</sup> The Elucidation states ambiguously that “while not explicitly called intelligence, [the departments] nonetheless fulfill intelligence functions.”<sup>10</sup> The draft elsewhere describes the function of national intelligence as collecting intelligence in “all aspects of life,” including ideology, politics, economy, the socio-cultural sphere, defense and security.<sup>11</sup>

*Human Rights Watch is concerned that the draft’s articulations of the role of BIN’s departmental presence and the function of intelligence activities are both ambiguous and overbroad. Without further clarification, we are concerned that the draft’s expansive language may be used as a justification for the violation of the civil and privacy rights of Indonesian civilians. Human Rights Watch suggests that the role of BIN at the departmental level be clarified and carefully limited, and the official focus of intelligence activities be aimed at the investigation of potential threats to national security.*

Article 22 empowers the BIN Director to form, lead and implement intelligence activities, including directing members of the “Intelligence Community” as defined in Article 39.<sup>12</sup> Article 39 gathers together the national and departmental level of government intelligence in an Intelligence Community “forum” and restates BIN’s authority to “coordinate and direct” (*mengkoordinasikan dan mengarahkan*) activities conducted by members of the Intelligence Community.<sup>13</sup>

The Elucidation includes a wide array of government actors in the Intelligence Community, including the BIN, military intelligence, police intelligence, attorney general’s intelligence, the director general of immigration and human rights, and

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<sup>9</sup> Disamping penyelenggara intelijen tingkat nasional, terdapat penyelenggara intelijen tingkat departemental.

<sup>10</sup> Yang dimaksud intelijen tingkat departemental adalah intelijen yang merupakan unit sesuatu departemen atau unit yang ada di departemen, walaupun tidak secara eksplisit disebut intelijen; tetapi melaksanakan fungsi intelijen.

<sup>11</sup> Elucidation to Article 12 (a): Semua aspek kehidupan meliputi bidang-bidang Ideologi, Politik, Ekonomi, Sosial Budaya, pertahanan dan Keamanan.

<sup>12</sup> Dalam keadaan khusus: Kepala Badan Intelijen Negara berwenang membentuk, memimpin dan menyelenggarakan aktifitas intelijen dengan melibatkan anggota-anggota Komunitas intelijen, sebagaimana dimaksud pasal 39;

<sup>13</sup> Badan Intelijen Negara berwenang mengkoordinasikan dan mengarahkan aktifitas intelijen yang dilakukan oleh anggota Komunitas Intelijen;

the director general of customs.<sup>14</sup> Article 43 (1) further suggests that the Intelligence Community encompasses police, military and ordinary citizens.<sup>15</sup>

*Human Rights Watch believes that the role and scope of the “Intelligence Community” requires clarification. Through the amorphous entity called the Intelligence Community, the bill in effect extends the BIN Director’s power into almost every branch of government, and potentially even into civil society. This dangerously and unnecessarily extends the vast powers and the near total lack of accountability of BIN operatives to a potentially endless array of official and unofficial actors. The inclusion of the Attorney General’s office, the police, and the military in the Intelligence Community threatens to undermine any mechanisms for accountability that may exist in current law governing the military and law enforcement.*

#### *i. The Power of the President and the Intelligence Chief*

The draft places the BIN firmly “under” Presidential control and makes the BIN Director “responsible directly to the President.”<sup>16</sup> Article 37 likewise establishes that the President is the “single client” of national intelligence activity.<sup>17</sup> Future organization of the BIN structure is to be regulated by Presidential Regulation (Article 11 (2)).

Article 22 empowers the BIN Director in “special cases” (*dalam keadaan khusus*) to form, lead and implement intelligence activities. It is not clear whether or not such activity always requires the approval of the President, nor is there anything in the Elucidation clarifying what constitutes a “special circumstance.” Under Article 35, intelligence activities are to be reported in written form to the BIN Director.

*Human Rights Watch is concerned that the frequency and depth of disclosure to the President is not completely clear, nor is it clear when, if ever, the BIN Director can act without explicit presidential authority.*

#### *ii. The DPR and Budgetary Power*

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<sup>14</sup> Yang dimaksud dengan Komunitas Intelijen, yakni Badan Intelijen Negara, Badan Intelijen Strategis (BAIS) TNI, Asisten Intelijen Mabes POLRI, Jaksa Agung Muda Bidang Intelijen Kejaksaan Agung, Direktur Jenderal Imigrasi-Depkeh & HAM, Direktur Jenderal Bea & Cukai-Depkeu dan Direktur Jenderal Pembinaan Kesatuan Bangsa-Depdagri serta Direktur Jenderal Politik-Deplu.

<sup>15</sup> Sumber tenaga penyelenggara intelijen berasal dari masyarakat, Mabes TNI, Mabes Polri dan anggota Komunitas Intelijen lainnya;

<sup>16</sup> Article 5 (2): Badan Intelijen Negara berada dibawah dan bertanggungjawab langsung kepada Presiden.

<sup>17</sup> Presiden merupakan pengguna tunggal (single client) intelijen negara.

While Article 38 (1) gives the parliament (DPR) the right to exercise “control” over national intelligence activities,<sup>18</sup> clause (3) defines the control narrowly as “supervision of the budget for intelligence and other matters related to national security.”<sup>19</sup> Article 38 (2) also confines DPR authority to the DPR Committee on Intelligence, the members of which will be required to take a “special oath,” which the bill leaves undefined.<sup>20</sup> While 17 (a) states that intelligence organizations will be funded through an allocation from the national budget,<sup>21</sup> 17 (b) provides for a special budget available directly from the President to pay for intelligence activities or operations.<sup>22</sup>

*Human Rights Watch notes that while the principal of presidential control seems relatively well articulated in the bill, the DPR’s power to oversee intelligence activity is undercut by Article 17. If the President can at any time allocate funds directly for intelligence operations notwithstanding the DPR’s budget allocation, this could undermine the DPR’s role as a check on presidential abuse of the intelligence system. At a minimum, the bill might impose a requirement that use of discretionary funds be accounted for to a DPR committee, elected by the DPR, not appointed by the President.*

### **III. Powers of BIN and Intelligence Operatives: Investigative Powers**

Under Article 18 (a) of the draft, intelligence operatives are given incredibly broad and poorly defined power to conduct surveillance, monitor and seize correspondence, and electronically monitor (“bug”) the conversations of those strongly suspected (*diduga kuat*) of involvement (*terlibat*) in a threat to the nation.<sup>23</sup> Article 18 (b) grants intelligence operatives an even broader power to “summon” (*memanggil*) any person for questioning about any issue related to a threat to the nation.<sup>24</sup>

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<sup>18</sup> Dewan Perwakilan Rakyat berhak melakukan kontrol terhadap penyelenggara intelijen negara (sic).

<sup>19</sup> Kontrol sebagaimana dimaksud ayat (2) pasal ini, dilakukan melalui pengawasan terhadap anggaran intelijen serta substansi yang berkaitan dengan keamanan negara.

<sup>20</sup> Kontrol sebagaimana dimaksud ayat (1) pasal ini, dilakukan oleh Komisi intelijen Dewan Perwakilan Rakyat yang keanggotaannya terdiri dari beberapa anggota Dewan yang telah disumpah secara khusus.

<sup>21</sup> Dalam mendukung keberhasilan tugas, penyelenggara intelijen negara berhak memperoleh alokasi anggaran yang memadai melalui Anggaran Pendapatan dan Belanja Negara;

<sup>22</sup> memperoleh alokasi anggaran khusus dari Presiden dalam rangka pembiayaan kegiatan dan atau operasi-operasi intelijen yang dilakukannya.

<sup>23</sup> Dalam rangka penyelidikan awal, petugas intelijen negara berwenang: melakukan pengamatan, penyensoran, penyadapan serta penjejakkan terhadap kegiatan setiap orang yang diduga kuat terlibat dalam ancaman nasional;

<sup>24</sup> memanggil setiap orang untuk didengar keterangannya tentang hal-hal yang diketahuinya berkaitan dengan ancaman nasional.

Article 19 empowers intelligence operatives to enter and search any building, public or private, including residences.<sup>25</sup> Article 20 further empowers the BIN Director to authorize the examination and freezing of the bank account of any person “strongly suspected” of conducting activities that constitute a threat to the nation.<sup>26</sup>

Article 21 empowers intelligence officials to arrest, detain, interrogate, search, or restrict the movement of any person strongly suspected of being “directly or indirectly” involved in activities related to a threat to the nation.<sup>27</sup>

Article 31 and 32 empower officials to conduct raids on individuals, bodies, clothes, things, houses or other structures<sup>28</sup> and seize any objects or documents which are “strongly suspected” of being tied to threatening activities.<sup>29</sup>

These articles, by references to the broad definitions in Article 1 of the draft law, incorporate a dangerously broad range of ill-defined and often overlapping powers, including investigation,<sup>30</sup> surveillance,<sup>31</sup> bugging/tapping,<sup>32</sup> detention,<sup>33</sup> interrogation,<sup>34</sup> raid,<sup>35</sup> seizure<sup>36</sup> and arrest.<sup>37</sup> The intelligence strategies set forth

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<sup>25</sup> Dalam rangka melakukan penyelidikan terhadap ancaman nasional, petugas intelijen negara berwenang memasuki pekarangan, gedung, rumah tinggal, bangunan, sarana angkutan dan atau proyek vital milik perorangan, swasta maupun negara

<sup>26</sup> Article 19: Dalam rangka melaksanakan penyelidikan terhadap ancaman nasional, Kepala Badan Intelijen Negara berwenang memerintahkan kepada bank untuk membuka dan atau membekukan rekening orang oratng yang diduga kuat melakukan kegiatan ancaman tersebut.

<sup>27</sup> Dalam rangka melaksanakan penyelidikan, sebagai upaya memberikan perlindungan terhadap ketentraman dan keselamatan masyarakat, petugas intelijen negara berwenang melakukan: (a) penangkapan, penahanan, pemeriksaan, penggeledahan serta pencegahan dan penangkalan terhadap setiap orang yang diduga kuat terlibat langsung maupun tidak langsung-dalam kegiatan ancaman nasional.

<sup>28</sup> Penggeledahan dalam rangka pemeriksaan sebagaimana dimaksud pasal 21 huruf a, dilakukan terhadap orang, badan, pakaian, barang, rumah dan atau bangunan.

<sup>29</sup> Apabila dari hasil penggeledahan sebagaimana dimaksud pasal 31 diketemukari atau terdapat dokumen atau benda-benda lain yang diduga kuat berkaitan dengan kegiatan ancaman nasional, maka atas benda tersebut dilakukan penyitaan.

<sup>30</sup> Penyelidikan adalah semua usaha, pekerjaan, dan kegiatan yang dilakukan secara terencana dan terarah untuk memperoleh keterangan yang berhubungan dengan ancaman nasional untuk dapat membuat perkiraan mengenai masalah yang dihadapi, guna memungkinkan penentuan kebijakan dengan mempertimbangkan, resiko yang diperhitungkan. (“the efforts, work and activities conducted in a planned and focused manner to obtain clarification of matters related to a threat to the nation, in order to identify potential threats for the purpose of creating policies that take into account existing risks”)

<sup>31</sup> Pengamatan adalah pengawasan terhadap perbuatan, kegiatan, keadaan orang, rumah atau bangunan dengan seksama (“the systematic monitoring of the behavior, activities and condition of any person, home or building”)

<sup>32</sup> Penyadapan adalah proses, cara, perbuatan mendengarkan atau merekam informasi atau pembicaraan orang lain dengan sengaja, tanpa sepengetahuan orangnya, dengan atau tanpa mempergunakan alat; tapping dan bugging termasuk bagian tindakan penyadapan. (“intentionally listening to or recording information or speech of another person without the knowledge of that person, with or without equipment”)

<sup>33</sup> Penahanan adalah penempatan tersangka ditempat tertentu oleh petugas intelijen dalam rangka pemeriksaan (“the placing of a suspect in a particular location by intelligence operatives for the purpose of interrogation”)

<sup>34</sup> Pemeriksaan adalah segala kegiatan untuk mendapatkan keterangan dari orang tentang hal-hal yang berkaitan dengan ancaman nasional yang sedang dalam pemeriksaan, untuk menemukan dan mendapatkan keterangan lain yang memperkuat barang bukti (“all activities to obtain information from a person about matters related to a threat to the nation, and while undergoing interrogation, to identify and obtain other information that strengthens evidence”)

in the definitions section of the law neither suggest any reasonable limits nor propose any mechanism for oversight. Some definitions, such as censorship<sup>38</sup> and intelligence investigation,<sup>39</sup> seem to incorporate legal standards (strong reason to suspect—*dicurigai dengan alasan yang kuat*—and strongly suspected—*diduga kuat*—respectively), while others do not.

*Human Rights Watch is concerned that the broad array of poorly defined powers invoked in these provisions and defined in Article 1 could create confusion and legal ambiguity which might allow them to be used as a pretext by intelligence officials to violate the rights of Indonesian civilians with no links to terrorism. These definitions require serious clarification and re-drafting, keeping in mind the requirements of due process under international law, which prohibit arbitrary or unlawful arrest and detention, or interference with privacy, family, home or correspondence.*

*In addition, legislators should consider whether these provisions are compatible with the Indonesian Criminal Procedure Code (KUHAP). Currently, the draft's provisions on search and seizure conflict with the KUHAP search warrant requirement, requirements that witnesses be present during the search of a residence (KUHAP Article 33), limitations on the seizure of items without a warrant from a judge (KUHAP 38-39) and similar provisions for the examination of correspondence (KUHAP 47). Human Rights Watch is concerned that the draft law lacks clear language requiring intelligence officers to comply with the warrant requirements of the KUHAP.*

*Human Rights Watch further suggests that the draft's invocation of the rule of law is meaningless without a mechanism for judicial oversight. Many provisions of the bill contain legal terms, such as strongly suspected*

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<sup>35</sup> Pengegedahan adalah suatu pekerjaan dan kegiatan untuk melakukan pemeriksaan terhadap orang, barang, pakaian rumah tinggal dan atau bangunan untuk menemukan barang bukti yang berkaitan dengan ancaman nasional. ("the work and activity of searching a person, thing, clothes, residence and/or other building to find evidence related to a threat to the nation")

<sup>36</sup> Penyitaan adalah serangkaian tindakan untuk mengambil alih dan atau penyimpanan barang bergerak maupun barang tetap dibawah penguasaan petugas intelijen negara. ("measures by national intelligence operatives to take control and/or possession of animate or inanimate objects")

<sup>37</sup> Penangkapan adalah suatu usaha, pekerjaan, kegiatan berupa pengekangan sementara waktu, kebebasan tersangka apabila terdapat bukti-bukti guna kepentingan penyelidikan. ("temporarily restraining the freedom of a suspect in order to collect evidence important to an investigation")

<sup>38</sup> Penyensoran adalah pekerjaan membuka, memeriksa, dan atau menyita surat lain yang dikirim melalui Kantor Pos dan Telekomunikasi, Jawatan atau Perusahaan Komunikasi atau pengangkutan, jika benda tersebut dicurigai dengan alasan yang kuat mempunyai hubungan dengan ancaman nasional ("the opening, examining and/or seizing of correspondence ... where there is a *strong reason to suspect* a connection with a threat to the nation")

<sup>39</sup> Penjejukan adalah usaha, pekerjaan dan kegiatan pengamatan yang dilakukan secara tertutup terhadap orang atau benda secara fisik maupun menggunakan tehnik yang bertujuan untuk mengetahui aktifitas atau kegiatan orang yang diduga kuat melakukan ancaman nasional ("clandestine surveillance of a person or object physically or through the use of technology with the goal of detecting the activities of a person *strongly suspected* of constituting a threat to the nation")



*(diduga kuat) and involved (terlibat,) which give the impression that some legal standard is being applied, while in reality the bill offers no such mechanisms at all, much less a judicial one, for oversight. The evaluation of when these standards have been met is seemingly left up to the intelligence establishment itself, without any checks and balances in place to prevent or remedy an arbitrary arrest and detention.*

#### **IV. State Secrets and Criminal Penalties for Disclosure**

The General Provisions of the Elucidation simultaneously invoke the benefits of increased transparency<sup>40</sup> and reiterate that any intelligence organization must function in a closed (*secara tertutup*) manner.<sup>41</sup> The underlying principle of state secrecy is further reiterated in Article 11 (1).<sup>42</sup> Article 15 seems to grant a blanket power to maintain complete secrecy about intelligence activities conducted by BIN or by members of the Intelligence Community under BIN's direction.<sup>43</sup> Of particular concern to Human Rights Watch is Article 47, which mandates the death penalty for persons convicted of working for foreign intelligence.

*Human Rights Watch opposes the death penalty in all circumstances because of its inherent cruelty, irreversibility, and arbitrariness. Human Rights Watch strongly urges that the provision for capital punishment in Article 47 be removed from the bill.*

Human Rights Watch finds the provisions on the intentional and negligent leaking of state secrets to be particularly troubling. Article 48 provides for a criminal sentence of up to 20 years for individuals intentionally leaking state secrets. Article 49 provides for a criminal sentence of up to 5 years for negligently leaking state secrets.

*Human Rights Watch is concerned that criminal provisions punishing the intentional or negligent leaking of state secrets might be used to intimidate or imprison Indonesian journalists or "whistleblowers" exercising their right to report on government activity. The penalties proposed in draft Articles 48 and 49, in light of the overbroad and ambiguous language in the Bill, are excessive. A five-year penalty for the negligent leaking of*

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<sup>40</sup> Transparansi, menghendaki semua langkah aparat, lebih-lebih yang bersinggungan dengan HAM harus didasarkan pada Undang-Undang.

<sup>41</sup> dalam mengatur organisasi intelijen harus berdasarkan premise-premise pengaturan organisasi dinas rahasia. Sedangkan dalam memanager aktifitas (kegiatan/operasi) telah terdapat kesamaan persepsi, pelaksanaannya dilakukan secara tertutup.

<sup>42</sup> Pengorganisasian Badan Intelijen Negara disusun berdasarkan premise-premise penyusunan organisasi dinas rahasia;

<sup>43</sup> Article 15: Penyelenggara intelijen berhak merahasiakan: (a) seluruh informasi yang berkaitan dengan bidang tugasnya; (b) seluruh instalasi dan peralatan yang merupakan fasilitas aktifitasnya; (c) personil yang melaksanakan aktifitas intelijen; (d) akses-akses yang berkaitan dengan pelaksanaan aktifitasnya.

*state secrets, if enforced, would likely lead to serious self-censorship in the press, and the threat of such severe criminal penalties could be easily abused by unaccountable intelligence officials to silence critics or discourage journalists from pursuing legitimate stories. Human Rights Watch suggests that if such provisions are left in the bill at all, the crimes should be narrowly construed and contain adequate safeguards to prevent their misuse, such as by allowing for a “public interest” defense in the language of Articles 48 and 49.*

## **V. Arrest and Detention**

Article 26 of the draft gives intelligence operatives the power to “arrest” any person strongly suspected of direct or indirect involvement with a threat to the nation for up to 7 days.<sup>44</sup> Article 27, however, provides for the “detention” of suspects for up to 90 days for the purpose of interrogation,<sup>45</sup> extendable up to 9 months,<sup>46</sup> in a location to be determined by the BIN Director.<sup>47</sup> “Location” as defined in the Elucidation includes military prisons, as well as police and prosecution detention facilities.<sup>48</sup>

*Human Rights Watch is concerned at the extension of the time frame for detention without any criminal charge. These provisions represent a dramatic departure from the requirements of the Indonesian Criminal Procedure Code. Indeed, these provisions violate KUHAP requirements for an arrest warrant (KUHAP 18) and extend the length of a preliminary detention from 1 to 7 days (KUHAP 19). The provisions on detention further extend the total length of detention allowed under the KUHAP, which cannot exceed 20 days without the intervention of some judicial authority (KUHAP 24, Section Two generally).*

*The bill makes no provision for a habeas corpus-type proceeding in which detainees or their representatives can challenge the legality of an arrest or detention. At the very least, it should be made clear in the draft that these provisions do not override provisions in the Criminal Procedure Code such as KUHAP 124, which allows a suspect, family member or lawyer to seek a determination of the legality of a detention before a*

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<sup>44</sup> Penangkapan sebagaimana dimaksud pasal 21 huruf a, dilaksanakan paling lama untuk 7 x 24 jam (tujuh kali dua puluh empat jam)

<sup>45</sup> Article 27 (1): Penahanan dalam rangka pemeriksaan intelijen sebagaimana dimaksud pasal 21 huruf a, berlaku paling lama 90 (sembilan puluh) hari

<sup>46</sup> Article 27 (2): Jangka waktu sebagaimana dimaksud ayat (1) pasal ini, apabila diperlukan guna kepentingan pemeriksaan yang belum selesai dapat diperpanjang paling lama 3 x 90 (tiga kali sembilan puluh) hari

<sup>47</sup> Article 27 (3): Penahanan sebagaimana dimaksud ayat (1) dan ayat (2) pasal ini dilaksanakan disuatu tempat yang ditentukan oleh Kepala Badan Intelijen Negara.

<sup>48</sup> Yang dimaksud dengan di suatu tempat antara lain dapat di rumah tahanan militer, rumah tahanan, tempat penahanan kepolisian atau tempat penahanan kejaksaan

*judge,<sup>49</sup> and KUHAP 95, which gives detainees the right to seek restitution for an unlawful detention.<sup>50</sup>*

*Human Rights Watch also expresses concern at the inclusion of military prisons as a possible place of detention of civilians under the provisions of the draft law. Human Rights is concerned that the use of military detention facilities may contribute to a lack of accountability and increased violation of detainee rights.*

Article 28 explicitly denies suspects fundamental due process rights. It states that suspects have no right to counsel,<sup>51</sup> no right to remain silent or to refuse to answer questions,<sup>52</sup> no right to bail,<sup>53</sup> no right to house or city arrest,<sup>54</sup> and no right to communicate to the outside parties including family.<sup>55</sup> The Elucidation to Article 28 (a) further states that a suspect will not be entitled to a presumption of innocence, and will be considered an “object of interrogation” (*obyek pemeriksaan*).<sup>56</sup>

Article 30 seems once again to invoke a legal standard of some kind stating that if sufficiently strong evidence (*cukup kuat bukti-bukti awal*) that the suspect is involved in threatening activity exists, the suspect will be given over to the national police or attorney general’s office for prosecution,<sup>57</sup> and if insufficient evidence is found, the person will be released.<sup>58</sup> Article 29 interestingly seems to indicate that information gathered during an intelligence interrogation cannot be used as the basis for an indictment.<sup>59</sup>

*Article 28 conflicts with Indonesia’s own Criminal Procedure Code. Article 28 of the current bill fails to address or directly conflicts with the rights of a suspect as set forth in the KUHAP, including the right to a speedy trial before a judicial body (KUHAP 50), to be informed of the*

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<sup>49</sup> KUHAP Article 124: Dalam hal apakah suatu penahanan sah atau tidak sah menurut hukum, tersangka, keluarga atau penasihat hukum dapat mengajukan hal itu kepada pengadilan negeri setempat untuk diadakan pra pengadilan guna memperoleh putusan apakah penahanan atas diri tersangka tersebut sah atau tidak sah menurut undang-undang ini.

<sup>50</sup> KUHAP, Article 95 (1): Tersangka, terdakwa atau terpidana berhak menuntut ganti kerugian karena ditangkap, ditahan, dituntut dan diadili atau dikenakan tindakan lain, tanpa alasan yang berdasarkan undang-undang atau karena kekeliruan mengenai orangnya atau hukum yang diterapkan.

<sup>51</sup> (b) tidak mempunyai hak untuk didampingi advokat

<sup>52</sup> (c) tidak mempunyai hak untuk diam atau tidak menjawab pertanyaan pemeriksa

<sup>53</sup> (d) tidak mempunyai hak atas penangguhan penahanan dengan jaminan orang ataupun uang;

<sup>54</sup> (e) tidak mempunyai hak untuk dilakukan penahanan rumah maupun penahanan kota

<sup>55</sup> (f) tidak mempunyai hak untuk berhubungan dengan pihak luar, termasuk keluarganya

<sup>56</sup> Yang dimaksud dengan sistem inquisitor adalah suatu cara yang memperlakukan tersangka sebagai obyek pemeriksaan dan bukan sebagai pihak sebagaimana dalam sistem aduatuor. Disini tidak berlaku adagium praduga tak bersalah.

<sup>57</sup> Apabila dari hasil pemeriksaan intelijen sebagaimana dimaksud pasal 21 huruf a: terdapat cukup kuat bukti-bukti awal bahwa tersangka terlibat dalam kegiatan ancaman nasional, maka tersangka dan barang-barang sitaan sebagaimana dimaksud pasal 21 huruf b, diserahkan kepada Kepolisian Negara Republik Indonesia atau Kejaksaan Agung Republik Indonesia, untuk diproses sesuai ketentuan hukum yang berlaku.

<sup>58</sup> tidak terdapat cukup kuat bukti-bukti awal, maka tersangka harus dilepaskan dari penahanan.

<sup>59</sup> Hasil pemeriksaan intelijen sebagaimana dimaksud pasal 21 huruf a, bukan merupakan bahan pro justisia.

*reasons for their arrest (KUHAP 18) and suspicions against him or her at the beginning of an interrogation (KUHAP 51), right to a translator (KUHAP 53), right to a lawyer during interrogation (KUHAP 54),<sup>60</sup> right to contact family and children (KUHAP 59-60), and the possibility of city or house arrest (KUHAP 22).*

*Human Rights Watch is concerned that the provisions of Article 28 are also in conflict with fundamental principles of international human rights law on the treatment of criminal suspects. For instance, the denial of a presumption of innocence is irreconcilable with the International Covenant on Civil and Political Rights (ICCPR) Article 14 (2) and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (“Principles”), Principle 36. The denial of prompt hearings before a judicial authority is similarly incompatible with ICCPR, Article 9 and Principle 11. The denial of a right against self-incrimination (ICCPR, Article 14 (g)), the denial of the right to counsel (ICCPR Article 14 (3) (d); Principle 17) and the denial of access to family members (Principle 19; Standard Minimum Rules for the Treatment of Prisoners, Rule 37) are similarly troubling.*

*Human Rights Watch is also concerned at the lack of clarity in the law regarding the relationship between intelligence bodies and the criminal justice system. The provisions of Article 29 and 30 require clarification in this regard.*

## **VI. Immigration and Firearms**

Article 33 and 34 give the BIN Director the authority to order the Director General of Immigration to deport or prohibit entry to anyone strongly suspected of being directly or indirectly involved in threatening activity.<sup>61</sup>

Article 25 empowers the BIN Director to procure firearms and issue firearms licenses to intelligence operatives.<sup>62</sup> The Elucidation (to Article 26 (a) – a

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<sup>60</sup> It should be noted that the KUHAP has special provision that for those suspected of crimes against the state, a lawyer can be present to watch but cannot listen to an interrogation (KUHAP 115)

<sup>61</sup> Article 33: Dalam rangka melaksanakan penyelidikan, Kepala Badan Intelijen Negara berwenang memerintahkan kepada Direktur Jenderal Imigrasi untuk mencegah atau melarang orang-orang tertentu yang diduga kuat terlibat baik langsung maupun tidak langsung dalam kegiatan ancaman nasional, untuk meninggalkan wilayah kekuasaan Republik Indonesia;

Article 34: Sebagai langkah antisipasi serta preventif, berdasarkan informasi yang dipercaya dan bukti-bukti awal yang kuat, Kepala Badan Intelijen Negara berwenang memerintahkan kepada Direktur Jenderal Imigrasi untuk menangkai atau melarang orang-orang tertentu yang diduga kuat terlibat baik langsung maupun tidak langsung dalam kegiatan ancaman nasional, untuk masuk ke dalam wilayah kekuasaan Republik Indonesia

<sup>62</sup> Kepala Badan Intelijen Negara berwenang: (a) melakukan pengadaan senjata api yang dipergunakan, langsung kepada produsen dan atau melalui agen yang berdomisili di dalam maupun di luar negeri; (b) menertibkan surat senjata api bagi penyelenggara intelijen.

mistake) clarifies that the BIN Director has an independent source of authority and does not need permission from any other source in this matter.<sup>63</sup>

*Given the near total lack of accountability of intelligence operatives apparent in the draft law, Human Rights Watch is concerned over the expansive authority granted to the BIN Director to prohibit entry and to deport persons, and to issue firearms, powers which normally reside in other, more accountable, departments of government. Human Rights Watch is concerned that the ambiguous legal language (“strongly suspected of being... indirectly involved”) of Articles 33 and 34, without proper judicial review or oversight, could be abused by intelligence authorities to curtail the rights of Indonesian citizens to move freely into and out of the country and place arbitrary restraints on the movements of foreigners.*

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<sup>63</sup> Kewenangan pengadaan senjata api yang dimiliki oleh Kepala Badan Intelijen Negara adalah kewenangan yang dikuasakan dan bersumber dari Undang-Undang ini. Dengan demikian, apabila Kepala Badan Intelijen Negara melakukan pengadaan senjata api untuk kepentingan instansinya, tidak memerlukan ijin dari sesuatu instansi lain