

Human Rights Council, Universal Periodic Review mechanism

1st session review, 7-18 April 2008

Information on Indonesia

1. This submission is made to the OHCHR by TAPOL, a UK-based NGO, formed in 1973, which promotes human rights, peace and democracy in Indonesia. TAPOL is a relevant stakeholder under Human Rights Council Resolution 5/1 of 18 June 2007.

Priority issue: Impunity

2. The submission highlights the issue of impunity and recommends that the Human Rights Council (HRC) addresses four particular concerns in its review of Indonesia:

- a) the normative and institutional problems associated with the investigation, prosecution, and delivery of justice in relation to cases of past violations of human rights;
- b) the need for dissemination and implementation in Indonesia of the report of Timor-Leste's Commission for Reception, Truth and Reconciliation (CAVR).
- c) the inadequacies of the Indonesia/Timor-Leste Commission of Truth and Friendship; and
- d) the need for national and regional truth and reconciliation mechanisms to be established.

Recommendations to the OHCHR/HRC

3. General

The Indonesian government should be encouraged to:

- implement in full the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights and all other human rights treaties it has ratified;
- fulfill the commitment it has made to sign and ratify the International Convention for the Protection of All Persons from Enforced Disappearance; and
- improve its co-operation with the UN special procedure mechanisms and treaty monitoring bodies and its record of implementing their recommendations.

4. Accountability for past violations

- The HRC should explore with the Indonesian government ways in which problems relating to the involvement of the President and Parliament in proceedings under Law 26/2000 on Human Rights Courts, and the failure of the Attorney General to pursue cases vigorously, can be addressed, possibly by enhancing the involvement of the National Commission on Human Rights, Komnas HAM.
- The HRC should encourage Indonesia to review Law 26/2000 and related legislation to ensure that the human rights courts have comprehensive jurisdiction over serious human rights crimes that do not amount to crimes against humanity or genocide.
- The HRC should consider ways of enhancing technical co-operation for the training of judges and other judicial personnel involved in human rights cases.

5. CAVR report

- The HRC should propose that the Indonesian government and parliament formally consider the CAVR report and act on its recommendations without further delay;
- The HRC should consider how it can support Indonesian civil society efforts to disseminate the report and raise awareness about its findings.

6. Commission of Truth and Friendship (CTF)

- The HRC should make clear its disapproval of outcomes of the CTF process that contravene international standards concerning the denial of impunity for serious crimes. It should urge Indonesia to co-operate with Timorese and international efforts to secure

accountability for serious crimes committed in Timor-Leste. In particular, given Indonesia's failure to deliver credible justice, the HRC should consider lending its support to recommendations by the UN Commission of Experts and CAVR concerning the creation of an international criminal tribunal for Timor Leste.

7. Truth and Reconciliation mechanisms

- The HRC should consider providing technical and other support to the Indonesian government and civil society groups for their efforts to establish national and regional TRC mechanisms based on public consultation and international standards.

Background: International human rights commitments and compliance

8. Indonesia has made significant progress in its transition to democracy since the downfall of the authoritarian Suharto regime in May 1998, notably with the holding of multi-party elections in 2004 and the achievement of peace in Aceh. However, much more remains to be achieved. In particular, the country's record on human rights, the rule of law and impunity falls short of the standards expected of a fully-functioning democracy. Little progress has been made in investigating and prosecuting those responsible for Suharto-era and subsequent atrocities – most notably the slaughter of hundreds of thousands of left-wing suspects following the rise to power of Suharto in 1965, the widespread killings in Timor-Leste, Aceh and West Papua, and the murder of the leading human rights defender and critic of impunity, Munir, in 2004. One means of addressing past abuses, Indonesia's Truth and Reconciliation Commission, has been declared unconstitutional by the Constitutional Court.

9. The government has demonstrated an intention to uphold international human rights norms by its ratification of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights in May 2006. **It should be pressed by the HRC and the treaty monitoring bodies to implement in full these and other treaties it has ratified.** On 12 March 2007, Indonesia's Minister of Law and Human Rights, Hamid Awaluddin, made a commitment to the HRC to sign and ratify the International Convention for the Protection of All Persons from Enforced Disappearance. **The government should be encouraged to fulfil that commitment as soon as possible.**

10. The government has improved its outward co-operation with the UN special procedure mechanisms. The Special Rapporteur on Torture is visiting in November 2007 following requests dating back to 1993. The Special Representative of the Secretary-General on Human Rights Defenders visited in June 2007 and the Special Rapporteur on the Human Rights of Migrants visited in December 2006. However, the government has failed to respond to requests to visit by the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, the Special Rapporteur on Freedom of Religion, and the Working Group on Arbitrary Detentions and its record of acting on the recommendations and communications of the special mechanisms and treaty monitoring bodies is unsatisfactory. The situation of human rights defenders in West Papua, for example, has deteriorated significantly since the visit of the Secretary-General's special representative. **The Government should be pressed to improve its substantive co-operation with the UN special procedure mechanisms and treaty monitoring bodies and its record of implementing the recommendations of those bodies.**

11. The Special Representative on Human Rights Defenders noted several positive steps that had been taken to strengthen the legal and institutional framework for the promotion of human rights. She referred in particular to the establishment of the Ad hoc Human Rights Courts, the National Human Rights Commission (Komnas HAM), the National Commission on Violence Against Women (Komnas Perempuan) and the adoption of the National Plan of Action. However, she also observed 'serious constraints on the functioning of many of these organizations [sic.] and their ability to fulfil their mandates effectively'. She concluded that 'there is a resistance to changing attitudes and institutional culture which has made it difficult for these institutions to make a full commitment to eliminate impunity for human rights violations' and 'even less commitment to removing impunity for past abuses'

Accountability for past violations

12. TAPOL wishes to provide further information about some of the systemic problems that have precluded the successful resolution of past cases of abuse and consequently prevented the ending of impunity. The practice of impunity has serious implications for Indonesia's transition to democracy. It encourages the expectation that human rights violations will go unpunished and creates the risk that patterns of abuse will be repeated, especially in conflict areas such as West Papua where alleged perpetrators of gross human rights violations in Timor-Leste have emerged in key positions of responsibility (see for example the case of Col. Burhanuddin Siagian indicted on crimes against humanity charges in Timor-Leste, TAPOL press release, 28 June 2007, at <http://tapol.gn.apc.org/press/files/pr070628.htm>).

13. The information in this submission is prefaced by the observation that at the heart of the problem of impunity lies a lack of political will to ensure accountability and address adequately some of the root causes, such as judicial corruption and the need for effective military reform. The lack of political will is related to the ongoing political influence of the Indonesian military and its ability to ensure that military personnel are effectively beyond the law. Cases of gross violations of human rights are often politically sensitive, but that cannot be used as a reason to avoid the fair and effective prosecution of alleged perpetrators. The government, with the assistance of the UN human rights mechanisms, must find ways of neutralising the political dimension of such cases so that justice and the rule of law can prevail.

14. A number of substantive and procedural problems have arisen from the implementation of a key piece of legislation, Law 26/2000 on Human Rights Courts, many of which were identified at the drafting stage. The law was passed in 2000 in response to international pressure for accountability for serious crimes committed in Timor-Leste. It establishes *ad hoc* and permanent human rights courts with jurisdiction over gross violations of human rights amounting to genocide or crimes against humanity. It provides that initial inquiries (*penyelidikan*) into cases of gross violations should be conducted by Komnas HAM. If there is sufficient preliminary evidence of a gross violation, the case is referred to the Attorney General, whose office is required to conduct an investigation (*penyidikan*). Violations occurring after the law came into force are then heard by a permanent human rights court. Violations occurring before the law are heard by an *ad hoc* human rights court. An *ad hoc* court can be set up only by a Presidential decree following a recommendation by parliament (this is supposed to address concerns that the prosecution of crimes that pre-date the law may offend the principle against retroactivity).

15. A number of cases have been dealt with under Law 26/2000. Some have resulted in unsuccessful prosecutions (notably those relating to the Timor-Leste, Tanjung Priok and Abepura 2000 cases), partly because the indictments and prosecutions did not make use of the findings of the associated Komnas HAM inquiry; others have not proceeded beyond the inquiry or investigation phase (including the Trisakti and Semanggi I and II shooting of students in 1998 and 1999; the May 1998 riots that accompanied Suharto's fall from power; the forced disappearance of 13 pro-democracy activists prior to Suharto's downfall, which all pre-dated the law; and the Wasior (2001) and Wamena (2003) killings in West Papua, which took place after the law was passed). There is concern that certain cases have been halted or become dormant since being passed to the Attorney-General's office. Victims' groups and Komnas HAM have expressed dissatisfaction with the handling of the cases. Although the main fault does not lie with Komnas HAM itself, its new chairman Ildhal Kasim, appointed in September 2007, has acknowledged decreasing trust in Komnas HAM's ability to perform because of its failure to meet public expectations concerning the delivery of justice (see 'Komnas HAM must be realistic in setting targets: Chairman', The Jakarta Post, 12 November 2007).

16. The proceedings of the *ad hoc* human rights court for Timor-Leste have been examined at length by numerous observers and experts and widely regarded by them as a failure. In particular, a UN Commission of Experts concluded in May 2005 that the prosecutions were 'manifestly inadequate' and showed 'scant respect for relevant international standards'. They were 'undertaken at a time when there was an evident lack of political will to prosecute'. The prosecuting authorities were described as lacking commitment, expertise, experience and training and were accused of conducting 'deficient investigations' and of 'inadequate presentation of inculpatory material at trial'.

17. More generally, there is uncertainty about the parliamentary mechanism for addressing *ad hoc* cases (the practice has developed whereby cases are considered initially by a parliamentary commission, but some commission recommendations have been rejected by the full house) and the stage at which parliament should become involved. According to Law 26/2000 (Art 43), parliament's only role is to provide a recommendation that an *ad hoc* human rights court be established. This suggests that parliament should not intervene until the Attorney General's office has completed its investigation and decided there is sufficient evidence to prosecute. However, in some cases, the Attorney General's office appears reluctant even to start an investigation without parliament's approval. The Attorney General has also resorted to seeking parliamentary approval for the prosecution of violations that occurred after the law came into force in 2000 (e.g. the Wasior and Wamena in West Papua), which is not a legal requirement.

18. The involvement of parliament and the President at any stage is controversial since it allows for political interference in a judicial process. The fact that the Attorney General is deferring to parliament at an earlier stage than necessary and in cases in which parliament is not a legitimate interlocutor heightens concern about the politicisation of such cases. **The HRC is encouraged to explore with the Indonesian government ways in which this problem can be addressed.** There may, for example, be scope for greater involvement of Komnas HAM as a non-political body. It may be appropriate to consider allowing Komnas HAM to undertake prosecutions in the same way as Indonesia's Corruption Eradication Commission (KPK). Certainly, Komnas HAM's ability to conduct inquiries could be strengthened by enabling it to subpoena witnesses without court approval.

19. The limited substantive jurisdiction of Law 26/2000 is also problematic in that it extends only to gross violations amounting to genocide and crimes against humanity. 'Lesser' human rights crimes are not included. The current right of military and police personnel to be tried before a military tribunal for 'lesser' crimes even if they are of a non-military nature is a further source of impunity. The limitations of Law 26/2000 may have contributed to the prosecution's failure to secure a conviction in the Abepura 2000 case. This concerned the killing of three students and the torture of dozens more in Abepura, West Papua in December 2000. Two senior officers were indicted under the crimes against humanity provisions of Law 26/2000. They were charged with command responsibility for abuses committed by their subordinates. The court found that there was evidence of abuse and torture, but that it was not systematic and could not support a conviction under Law 26/2000. The court pointed out that the abuse should have given rise to charges under Indonesia's ordinary criminal law.

20. This outcome was predicted by the then head of Komnas HAM, Abdul Hakim Nusantara, who said many serious crimes would go unpunished because of the need to prove they were part of a 'systematic and widespread' attack on the civilian population, a key element of crimes against humanity: 'I think such an extraordinary standard should be reviewed as it is too demanding a requirement to meet,' he said. 'Torture and rape and extrajudicial killings are serious offences and should be heard in a human rights court even though they may not be systematic and widespread.' ['General to Face Indonesia's Rights Court', Sydney Morning Herald, 8 May 2004.] **The HRC should encourage Indonesia to review law 26/2000 and related legislation to ensure that the human rights courts have comprehensive jurisdiction over serious human rights crimes that do not amount to crimes against humanity or genocide.** The court's jurisdiction should in particular include the crime of torture, which is not currently an offence in Indonesia despite a recommendation in November 2001 by the Committee against Torture that it should be prohibited under criminal law.

21. The understandable lack of expertise of judges, prosecutors and investigators in such cases is also an obstacle to the delivery of fair and credible justice. Judges, for example, who have been brought up in a corrupt system with little or no training in international human rights law are expected to suddenly handle complicated crimes against humanity cases which are beyond their competence. **The HRC and OHCHR should consider ways of enhancing technical co-operation for the training of judges and other judicial personnel.**

CAVR report

22. The report of Timor-Leste's UN-established Commission for Reception, Truth and Reconciliation (CAVR), completed in October 2005, provides the most detailed and comprehensive documentation of the human rights abuses committed by the Indonesian military and police and their militia proxies in Timor-Leste. The Commission recommended that the Indonesian government table the report in the Indonesian parliament, contribute to a reparations fund for the victims, and take a number of other steps to foster reconciliation between the two countries. To date, the government has publicly ignored the report and President Susilo Bambang Yudhoyono has dismissed it as a domestic matter for Timor-Leste. **The HRC should propose that the Indonesian government and parliament formally consider the CAVR report and act on its recommendations without further delay.**

23. Part of the process of addressing impunity is educating the Indonesian public about the truth of Indonesia's record of abuse in Timor-Leste. Indonesian civil society groups have taken steps to disseminate the report and raise awareness about its findings, but more needs to be done. **The HRC should consider how it can support their efforts in this regard.**

Commission of Truth and Friendship

24. The CTF, set up by the governments of Indonesia and Timor-Leste in March 2005 (without the involvement of either parliament), is widely perceived as a mechanism established to avoid international justice for those accused of serious crimes in Timor-Leste. The UN Commission of Experts expressed concern that it does not enjoy public support in Timor-Leste and that its terms of reference include provisions that contradict international standards on the denial of impunity for serious crimes. The CTF cannot recommend prosecution or other judicial measures and amnesty provisions allow alleged perpetrators to avoid accountability. The CTF hearings have been used by the perpetrators to wrongly blame the UN and other actors for the violence in Timor-Leste.

25. The CTF is supposed to operate under the principles of Indonesia's Truth and Reconciliation Commission (TRC) and doubt has been cast on its legal basis by a decision of Indonesia's Constitutional Court to declare the TRC unconstitutional because of its amnesty provisions (see below). However, the CTF appears to be proceeding to a conclusion. Its final report may be available to the HRC at the time of its 1st session review. **The HRC should make clear its disapproval of outcomes of the CTF process that contravene international standards concerning the denial of impunity for serious crimes. It should urge Indonesia to co-operate with Timorese and international efforts to secure accountability for serious crimes committed in Timor-Leste. In particular, given Indonesia's failure to deliver credible justice, it should consider lending its support to recommendations by the UN Commission of Experts and CAVR concerning the creation of an international criminal tribunal for Timor Leste.**

Truth and Reconciliation mechanisms

26. In December 2006, Indonesia's Constitutional Court ruled that a 2004 law establishing the Indonesian TRC was unconstitutional because it empowered the President to grant amnesties to perpetrators of gross human rights violations and made compensation and rehabilitation for victims dependent on the granting of amnesties. The TRC now has no legal basis and cannot be set up until new legislation is passed. The Court's decision to annul the law in its entirety, rather than just the offending amnesty provisions, has left the victims without an important means of restitution and redress. The ruling has implications for truth and reconciliation in Aceh since Article 229 of Law 11/2006 on the Governance of Aceh provides for an Aceh TRC to be established as part of the national TRC. There are also provisions in Law 21/2001 on special autonomy for West Papua for the establishment of a West Papuan TRC.

27. Civil society groups in Aceh are drafting a model for an Aceh TRC and new enabling legislation since this process is seen as integral to the sustainability of peace in Aceh. **The HRC should consider providing technical and other support to the Indonesian government and civil society groups for their efforts to establish national and regional TRC mechanisms based on public consultation and international standards.**