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**INTERNATIONAL COMMISSION OF JURISTS (ICJ) SUBMISSION FOR THE
PREPARATION BY THE HUMAN RIGHTS COMMITTEE OF A LIST OF ISSUES TO BE
CONSIDERED DURING THE EXAMINATION OF THE INITIAL REPORT OF
INDONESIA**

Submitted December 2012

Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952, in consultative status with the Economic and Social Council since 1957, and active on the five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.

ICJ submission for the Human Rights Committee preparation of a List of Issues on Indonesia

1. During its 108th session, to take place on 8 to 26 July 2013, the Human Rights Committee (the Committee) will undertake its examination of the initial report of Indonesia under the International Covenant on Civil and Political Rights (ICCPR). Ahead of this, during its 107th session in March 2013, the Committee will prepare and adopt a List of Issues. The International Commission of Jurists (ICJ) welcomes the opportunity to contribute to the Committee's preparation of the List of Issues. In this submission, the ICJ brings to the attention of the Committee issues related to articles 2, 18, 21 and 22 of the ICCPR.

ARTICLE 2: ACCOUNTABILITY AND ACCESS TO JUSTICE

2. Article 2(2) of the ICCPR provides that "...each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant". As explained by the Committee in its General Comment 31, this requires States parties to adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfill their legal obligations.¹ Article 2 of the Covenant is binding on every State as a whole, encompassing all branches of government and other public or governmental authorities, at whatever level – national, regional, or local.²

3. The positive obligation on States to ensure the enjoyment of rights under the Covenant can only be fully satisfied if all persons are protected by the State against violations committed by both agents of the State and private persons or entities.³ Furthermore, as explained by the Committee, "...the purposes of the Covenant would be defeated without an obligation... to take measures to prevent a recurrence of a violation".⁴

4. Article 2(3)(a) of the ICCPR provides that "...any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity". It is therefore important for States parties to establish "...appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law".⁵ Where investigations reveal that there have been violations of rights under the ICCPR, States parties must ensure that perpetrators are brought to justice. The obligation to bring perpetrators to justice arises especially with respect to those violations recognized as crimes under international law, including enforced disappearances.⁶

5. Three issues are raised in this context, pertaining to the forthcoming examination of the Indonesia: (i) the need for more effective investigation of abuses that impair ICCPR rights; (ii) the need to make accountable persons who commit violations of ICCPR rights; and (iii) the need to ensure oversight and accountability of intelligence services.

(i) The need for more effective investigation of abuses that impair ICCPR rights

6. In 2006, Indonesia's National Human Rights Commission (Komnas HAM) submitted its Final Report on the Inquiry on Enforced Disappearances, revealing that at least 13 political activists remain missing from among the numerous abductions that occurred from 1997 to 1998 allegedly perpetrated by the Indonesian Special Forces Command (Kopassus). The 13 political activists are Sonny, Yani Afri, Ismail, Abdun Nasser, Dedi Hamdun, Noval Alkatiri, Wiji Thukul, Suyat, Herman Hendrawan, Bimo Petrus Anugerah, Ucok Munandar Siahaan, Yadin

¹ Human Rights Committee, General Comment 31, *Nature of the General Legal Obligation on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev. 1/ Add.13 (2004), para 7.

² General Comment 31, *ibid*, para 4.

³ General Comment 31, *ibid*, para 8.

⁴ General Comment 31, *ibid*, para 17.

⁵ General Comment 31, *ibid*, para 15.

⁶ General Comment 31, *ibid*, para 18.

Muhidin and Hendra Hambali. Komnas HAM also recommended the establishment of an *ad hoc* Human Rights Court and the prosecution of the alleged perpetrators of these abuses.⁷

7. In September 2006, the Indonesian Parliament (DPR) made recommendations echoing those of Komnas HAM, particularly on the establishment of an *ad hoc* Human Rights Court and providing rehabilitation and compensation to the families of victims.⁸ Under Article 1(1) of Law No 26 (2000) on Establishing the Ad Hoc Human Rights Court, when read together with Articles 36 to 42, "a person" who may be held criminally responsible under the said Law is defined as "an individual, group of people, civil or military, or police, having individual responsibility".

8. Article 43 of the Law also provides that cases of gross violations of human rights that occurred prior to 2000 shall be heard by an *ad hoc* Human Rights Court. It further provides that the President shall establish an *ad hoc* Human Rights Court, upon recommendation of the DPR. Despite the recommendations from Komnas HAM and the DPR, the President has yet to establish an *ad hoc* Human Rights Court to investigate the alleged enforced disappearance of the 13 activists and to undertake investigations and prosecutions of the perpetrators.⁹

9. The ICJ recommends that the following questions be included in the List of Issues for the examination of Indonesia:

- ***What steps have been taken by Indonesia to investigate and prosecute the perpetrators in the case of the 13 political activists who "disappeared" from 1997 to 1998?***
- ***What steps have been taken by Indonesia to implement the recommendations of the Commission on Human Rights (Komnas HAM) and the Parliament of Indonesia, (DPR) pursuant to Article 43 of Indonesia's Law 26/2000 to establish an ad hoc Human Rights Court to investigate this case?***

(ii) The need to make accountable persons who commit violations of ICCPR rights

10. After confirming the occurrence of gross human rights violations during the period of rule under former president Suharto and the military, the National Human Rights Commission called for military officers involved in five prominent cases to be brought to trial, namely: Trisakti-Semanggi I-Semanggi II; the May 1998 violence; Talangsari; Wasior Wamena (Papua); and the enforced disappearance of activists from 1997 to 1998.¹⁰ The Attorney General's Office has rejected the call to investigate based on the view that the files were administratively incomplete.¹¹

11. In 2004, Indonesia enacted the Law on TNI (National Armed Forces), an Act that requires members of the armed forces to stand trial in civilian courts for alleged crimes against civilians. This legislation implements the international standard that persons charged with serious human rights violations must be tried in ordinary, not military, courts.¹² Despite this, no cases have yet been brought under this law, notwithstanding the recommendation of Komnas HAM.¹³ Trials by military tribunals have often failed to hold to account senior commanders concerning crimes committed by their subordinates, while lowly ranked soldiers have received only lenient penalties and have been allowed to continue serving in the armed forces, with a few of those individuals even receiving promotions.¹⁴

⁷ International Commission of Jurists, with other human rights groups, "Open letter to the President of Indonesia on enforced disappearances", 29 August 2012, available at URL: <http://www.icj.org/open-letter-to-the-president-of-indonesia-on-enforced-disappearances/>.

⁸ Ibid.

⁹ Ibid.

¹⁰ A Joint Report by ICTJ and KontraS, *Derailed: Transitional Justice in Indonesia since the Fall of Soeharto*, March 2011, available at URL: <http://www.stopimpunity.org/page42.php>, page 4

¹¹ Ibid page 3.

¹² See, eg, Principle 9, UN Principles Governing the Administration of Justice Through Military Tribunals, UN Doc. E/CN.4/2006/58.

¹³ Ibid page 5.

¹⁴ Ibid.

12. To illustrate this, on 24 January 2011, a military tribunal sentenced three soldiers to eight to twelve months' imprisonment, despite the video evidence showing six soldiers torturing and ill-treating two Papuans (the individuals were kicked, slapped, had sandals pressed to their faces and chests, had a knife put to their noses and necks, and one of them had his penis burnt).¹⁵ Rather than being charged with offences constituting an act of torture, the soldiers were charged with the lesser offense of disobeying orders. No superiors were punished.¹⁶ In August 2011, three soldiers from the same Battalion (753/AVT Nabire) were convicted by a military tribunal of torturing and killing a Reverend. Before being shot, the Reverend was beaten while being interrogated.¹⁷ The three soldiers were sentenced to between six and 15 months in prison.¹⁸

13. The ICJ recommends that the following questions be included in the List of Issues for the examination of Indonesia:

- ***What measures have been taken to hold to account persons responsible for human rights violations, including alleged violations committed by security forces?***
- ***What steps have been taken to ensure that corresponding investigations and trials are conducted in a fair, prompt and impartial manner?***

(iii) Oversight and accountability of intelligence services

14. On 11 October 2011, Indonesia's House of Representatives enacted the State Intelligence Law, which grants expanded powers to intelligence agencies.¹⁹ Human rights groups immediately challenged the validity of this law before the Indonesian Constitutional Court.²⁰ On 10 October 2012, the Constitutional Court dismissed the petition challenging the law, concluding that the law appropriately regulated intelligence practices in Indonesia, and thus did not violate the Constitution and the right to freedom of expression.²¹

15. Notwithstanding the decision of the Constitutional Court, the ICJ remains concerned by certain provisions under the law that prevent investigations that would lead to holding persons accountable for human rights violations, or preventing the public disclosure of information that would allow victims of human rights violations to seek and obtain remedies.²² Under the law, accountability for conduct under State intelligence operations would be ensured by provision of a written report to the President.²³ The law also provides that

¹⁵ Human Rights Watch, 'Indonesia: Investigate Torture Video from Papua', 20 October 2010, available at URL: <http://www.hrw.org/news/2010/10/20/indonesia-investigate-torture-video-papua>.

¹⁶ Nethy Dharma Somba and Bagus BT Saragih, 'Papua ruling blasted as 'miscarriage of justice' The Jakarta Post, 25 January 2011, available at URL: <http://www.thejakartapost.com/news/2011/01/25/papua-ruling-blasted-%E2%80%98miscarriage-justice%E2%80%99.html>. See also Human Rights Watch, World Report 2012: Indonesia, January 2012, available at URL: http://www.hrw.org/sites/default/files/related_material/indonesia_2012.pdf.

¹⁷ Banjir Ambarita, 'Low-Ranking Soldiers Indicted over Torture, Killing in Papua's Puncak Jaya', The Jakarta Globe, 21 July 2011, available at URL: <http://www.thejakartaglobe.com/home/low-ranking-soldiers-indicted-over-torture-killing-in-papuas-puncak-jaya/454213>.

¹⁸ 'Soldier gets off lightly for killing Papuan reverend', The Jakarta Post, 11 August 2011, available at URL: <http://www.thejakartapost.com/news/2011/08/11/soldier-gets-lightly-killing-papuan-reverend.html>.

¹⁹ Ezra Sihite and Anita Rachman, 'Indonesia's intelligence bill passage prompts 'big brother' fears', 12 October 2011, *Jakarta Globe*, available at URL: <http://www.thejakartaglobe.com/home/indonesias-intelligence-bill-passage-prompts-big-brother-fears/471058>.

²⁰ Alliance of Independent Journalists (AJI), 'Indonesia: State intelligence law challenged in court', 25 January 2012, available at URL: <http://www.seapabkk.org/alerts/36-updates/100558-indonesia-state-intelligence-law-challenged-in-court.html>.

²¹ Markus Junianto Sihalohe, 'Constitutional Court rejects appeal of intelligence law', *Jakarta Globe*, 11 October 2012, available at URL: <http://www.thejakartaglobe.com/home/constitutional-court-rejects-appeal-of-intelligence-law/549467>.

²² International Commission of Jurists, *Submission to the Universal Periodic Review of Indonesia*, submitted on November 2011, para 7, available at URL: <http://www.icj.org/icj-submission-to-the-universal-periodic-review-of-indonesia/>.

²³ Article 42(1) of Law No. 17/2011 on State Intelligence (the State Intelligence Law).

supervision of State intelligence agents would be undertaken by internal mechanisms,²⁴ and a special commission created within the House of Representatives.²⁵

16. The ICJ believes that the abovementioned provisions are insufficient to ensure genuinely accountable intelligence agencies, mainly due to concerns that a lack of independence by the President may lead to his unwillingness to ensure effective accountability and to address any alleged participation of State intelligence agents in the violation of human rights.²⁶ For instance, from 1968 to 1998, President Suharto used State intelligence agents to suppress legitimate dissent in a manner that violated the rights or political opponents.²⁷

17. The ICJ recommends that the following question be included in the List of Issues for the examination of Indonesia:

- ***What mechanisms has the Government of Indonesia undertaken to ensure effective oversight and accountability of State intelligence agencies?***
- ***What measures are being undertaken to ensure that provisions under the State Intelligence Act may not be used to prevent prompt, independent and effective investigations into alleged human rights violations?***

ARTICLE 18: RELIGIOUS TOLERANCE

18. Article 18 of the ICCPR provides that everyone has the "right to freedom of thought, conscience, and religion". Indonesia's Constitution guarantees this right by expressly providing that all persons have the freedom to worship²⁸ and to freely "...practice the religion of his/her choice...".²⁹ While the Government of Indonesia has recognized the fact that this freedom is non-derogable, as provided for in article 4(3) of the ICCPR, it has also expressed the view that this freedom should be exercised responsibly and with respect for others' rights, so that friction, horizontal conflict, unrest, disunity and enmity can be avoided or prevented.³⁰

19. In the first half of 2012, the Setara Institute recorded that out of the 179 instances of alleged infringements³¹ against freedom of religion in Indonesia, 68 of them involved state officials.³² Setara has classified the violations carried out by State actors as falling into four categories: judicial, commission, condoning and omission.³³ Judicial violations include the disproportionately light sentences given to perpetrators charged with crimes related to religious intolerance; an act of commission includes the arbitrary arrests carried out by security forces without concrete evidence;³⁴ condoning refers to verbal provocation or hate speech; and omission refers to the non-response from State officials when they have the responsibility to prevent or protect religious minorities from attacks.³⁵ In a recent incident in Cikeusik, Banten province, three Ahmadis were unlawfully killed due to an attack caused by 1,500 individuals. The 12 arrested perpetrators were sentenced to a range of three to six

²⁴ Article 43(1) of the State Intelligence Law.

²⁵ Article 43(2) of the State Intelligence Law.

²⁶ Supra note 19.

²⁷ Steven Erlanger, "The Fall of Suharto: The Legacy; Suharto Fostered Rapid Economic Growth, and Staggering Graft", 22 May 1998, *The New York Times*, available at URL: <http://www.nytimes.com/1998/05/22/world/fall-suharto-legacy-suharto-fostered-rapid-economic-growth-staggering-graft.html?pagewanted=all&src=pm>.

²⁸ Article 29 of the 1945 Constitution.

²⁹ Article 28E of the 1945 Constitution.

³⁰ Human Rights Committee, *Consideration of reports submitted by States parties under article 40 of the Covenant*, UN Doc CCPR/C/IDN/1 (19 March 2012), para 251.

³¹ Apart from violations committed by state actors, those actions carried out by citizens include the prohibition of worship or service, destruction towards places of worship and other acts of religious intolerance. See Setara Institute, "Report on Freedom of Religion and Belief in January-June 2012", 2 July 2012, available at URL: <http://www.setara-institute.org/en/content/report-freedom-religion-and-belief-january-june-2012>

³² Ibid.

³³ Interview with Mr. Ismail Hasani, Researcher of Setara Institute (6 December 2012)

³⁴ Ibid.

³⁵ Ibid.

months' imprisonment, while an injured member of the Ahmadiyya community was charged for provocation and sentenced to seven months in prison.³⁶

20. The ICJ recommends that the following questions be included in the List of Issues for the examination of Indonesia:

- ***What positive measures has the Government of Indonesia undertaken to improve religious tolerance amongst its diversified population?***
- ***What training is provided to Indonesian law enforcement officials, including security forces, for the purpose of increasing their awareness of their role in protecting the rights of the marginalized religious groups?***
- ***If training has been provided, how have such courses helped to ensure effective police responses to religious attacks?***

ARTICLES 21 AND 22: FREEDOMS OF PEACEFUL ASSEMBLY AND OF ASSOCIATION

21. Article 21 of the ICCPR guarantees the right to peaceful assembly. Article 22 guarantees the right of every person to freely associate with others. In a resolution adopted on 11 October 2012, the UN Human Rights Council reminded States of their obligation to fully protect the rights of individuals to assemble peacefully, including human rights defenders and persons espousing minority views.³⁷ The UN Special Rapporteur on the right to freedom of peaceful assembly and of association emphasized in his 2012 report to the Human Rights Council that States have a positive obligation to actively protect peaceful assemblies. This obligation includes protection of those who participate in peaceful assemblies from those groups who aim at disrupting or dispersing such assemblies.³⁸

22. The ICJ has been monitoring reports of attacks committed by certain religious groups against lesbian, gay, bisexual and transgender (LGBT) defenders in Indonesia. On 26 March 2010, a conference organised by the International Lesbian and Gay Association Asia (ILGA-Asia), was abruptly cancelled following protests by those groups.³⁹ In the past, ILGA-Asia had successfully held conferences in India, the Philippines and Thailand. Gaya Nusantara, one of Indonesia's oldest LGBT organisations, had offered to host the fourth annual conference in Surabaya. The local police had originally endorsed the conference, which was scheduled to be held at Mercure Hotel. Allegedly, the permit that police had originally issued held the wrong date and it was to be amended and collected before the conference would start. However, before the organizers could collect the amended permit, news of the conference made the front page of a local newspaper and alerted certain groups such as the United Islamic Defenders Front (FPUI).⁴⁰

23. After the arrival of participants from all over Asia, and as news of the conference became known, fundamentalist groups staged protests and threatened to disrupt activities. Participants were forced to relocate to a different hotel. Representatives of the groups entered the hotel lobby and demanded that participants leave the country. The police then ordered that the conference be cancelled.⁴¹ The police have explained that its ban of the event was

³⁶ Jakarta Globe, "Indonesian Protection of Religious Freedom Deteriorating: US", 31 July 2012, available at URL: <http://www.thejakartaglobe.com/home/indonesian-protection-of-religious-freedom-deteriorating-us/534033>.

³⁷ UN Human Rights Council Resolution 21/16, *The rights to peaceful assembly and association*, UN Doc A/HRC/RES/21/16 (2012), para 1.

³⁸ UN Human Rights Council, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai*, UN Doc A/HRC/20/27 (21 May 2012), para 33.

³⁹ Grace Poore, *LGBT Activism Under Attack in Surabaya, Indonesia*, IGLHRC Blog, 1 April 2010, available at URLs: Part I: <http://iglhrc.wordpress.com/2010/04/01/threats-to-lgbt-in-surabaya-part-1/> Part II: <http://iglhrc.wordpress.com/2010/04/02/lgbt-activism-under-attack-in-surabaya-indonesia/>.

⁴⁰ Sylvia Tan, *Islamic Protesters Force Evacuation of ILGA Conference Participants in Surabaya*, 26 March 2010, available at URL: <http://www.fridae.asia/newsfeatures/2010/03/26/9786.islamic-protestors-force-evacuation-of-ilga-conference-participants-in-surabaya>.

⁴¹ Niniek Karmini, "Indonesian police ban regional gay conference", 24 March 2010, *Associated Press*, available at URL: <http://www.businessweek.com/ap/financialnews/D9EL1B8G0.htm>.

based on the risk that the meeting could prompt 'social unrest' and that the police force could not adequately protect the intended participants from harm.⁴²

24. On 30 April 2010 the Islamic Defenders Front (FPI) attacked a closed-door human rights training for transgender persons in Depok.⁴³ There were at least 25 participants in this training, which was conducted under the auspices of Komnas HAM. Instead of investigating the attack, the police accused the local organizer, the Indonesian Transsexuals' Communication Forum (FKWI), for conducting the event without a permit.⁴⁴ Police failed to protect participants from attack.⁴⁵

25. According to LGBT groups in Indonesia, complaints have been filed concerning the two cases to various agencies, including Komnas HAM. To date, no concrete action has been taken to respond to these complaints.

26. The ICJ recommends that the following questions be included in the List of Issues for the examination of Indonesia:

- ***What measures have been taken by the Government of Indonesia to investigate reports of attacks against LGBT groups by certain religious groups?***
- ***What measures have been taken by the Government of Indonesia to ensure that LGBT groups are able to exercise their right of peaceful assembly?***
- ***What mechanisms have been put in place by the Government of Indonesia to prevent recurrence of further attacks against LGBT groups exercising their right of peaceful assembly?***
- ***What training is provided to Indonesian law enforcement officials, including security forces, for the purpose of increasing their awareness of their role in protecting peaceful assemblies, especially those of LGBT human rights defenders?***

⁴² Ibid.

⁴³ Position Paper of Arus Pelangi, *Restricted freedom of association and freedom of expression for LGBT groups in Indonesia*, 16 December 2010, available at URL: www.aruspelangi.or.id/.../Position%20Paper%20diplomat%20briefing.pdf.

⁴⁴ Dessy Sagita, "Raided transgenders vent anger over Satpol's 'unfair' treatment", 3 May 2010, *Jakarta Globe*, available at URL: <http://www.thejakartaglobe.com/home/raided-transsexuals-vent-anger-over-satpols-unfair-treatment/372732>.

⁴⁵ Ibid.