

Submission date: 2 February 2007

**Agreement between Australia and the Republic of Indonesia on
the Framework for Security Cooperation
(the 'Lombok' Treaty)**

Matram, Lombok: 13 November 2006

Introduction

Civil Liberties Australia (CLA) supports the need for a formal treaty between Australia and the Republic of Indonesia on the Framework for Security Cooperation. The Treaty should comprise a partnership based on the highest achievable mutual standards of rights and liberties.

Any treaty should not effectively diminish Australia's standards and values, and discount our law and our policies.

CLA believes that any Australian Treaty with Indonesia should represent 'best practice' in terms of both Australian – and world – treaty regimes.

We cannot dictate to a neighbouring nation, but nor can we hide our colours without diminishing our nation and ourselves as individuals.

In formulating a treaty with Indonesia, it is important that Australia includes the best-possible clauses that ensure we can maintain our integrity – our national values, if you like – in dealings with a country which is based on a different cultural and language heritage; and legally, possessing a quite different tradition and way of operating.

We have two main concerns, covered in two separate parts of our submission: the death penalty, and the Province of Papua. In summary:

- On the death penalty, we believe the Committee must insist on better clauses protecting Australians (and people of Indonesia, and of other nations) from the application of the death penalty.
- On our relationship with Papua, which at least in part was the motivating factor for this Treaty, CLA believes there should be special consideration

given by Australia in its aid program, and that the Committee should institute a special monitoring process.

The Death Penalty

While we make the above comments in general on the draft Treaty, we particularly oppose the adoption and ratification of the Treaty as drafted in relation to exchange of intelligence and data where the death penalty is, or may become, applicable.

CLA believes the Joint Standing Committee is the final safeguard against an approach which would effectively substitute Indonesia's standards for Australia's. Whatever Treaty is agreed should not diminish Australia's national, cultural and human rights values, particularly when they are represented legally, as they are in the 1973 Federal legislation to remove the death penalty from Australia.

We believe the proposed Treaty need not offend Indonesia by arguing Indonesia should itself remove the death penalty – that, of course, would be our preferred option, and one which we believe should have been the starting point for negotiations.

However, the sticking point of negotiations must be that no intelligence or data exchanged with Indonesia would be capable of leading to an outcome where an Australia citizen – or a citizen of any other country, Indonesia included – could potentially face the death penalty, based on Australian-generated and/or supplied information. It is noted that of the particular crimes referred to in Article 3, Paragraph 7, the great majority bring the death penalty upon conviction in Indonesia.

CLA believes that the Joint Standing Committee must insist that the Treaty be amended to include provisions in Article 3 that:

- information provided by Australia shall not be used by Indonesian police and security authorities to seek the death penalty ; and
- if there is any doubt at all, Australia will not provide any detail which could lead to the death penalty being imposed on an Australian citizen or a citizen of any other country.

The Papuan Perspective

CLA's makes particular reference to the province of Papua because this was clearly the genesis or catalyst for negotiation of the Treaty. CLA also highlights the historical issues, close geographical ties and our responsibility as a modern

wealthy nation to continue our assistance to Indonesia, particularly through our aid program which has focused on some of the poorest parts of eastern Indonesia, including Papua.

CLA believes the Treaty marks an ideal opportunity for the Australian Parliament, with help from subject experts, to encourage further development in Indonesia in general, and Papua in particular, by undertaking an annual monitoring and reporting process. We make recommendations to that effect at the end of this paper.

Genesis of Indonesia's suspicions about Australia's interests in Papua¹

Australia shares with Indonesia an interest in the sovereign integrity of the Republic of Indonesia (RI), including the place of Papua in it. For historical reasons, however, there is ongoing suspicion in Indonesia about Australia's interests in Papua. This results from Australian support for Dutch retention of what was then known as West New Guinea (WNG) for a mix of reasons in the years after 1949 when sovereignty over the rest of the former Netherlands East Indies (NEI) was transferred to the new Republic of Indonesia. This support included a brief period of administrative cooperation with the Dutch², with a view to bringing the island of New Guinea to independence as one nation in the then-seen to be far future.

In 1962 however, United States pressure (WNG was seen as a small price to pay to keep Sukarno out of the Communist camp) convinced Australia to change its policy 180 degrees and support the increasingly bellicose Sukarno's claim at a time when he had launched his Confrontation of Malaysia and Australia had also made its first commitment (to 'training') in Vietnam (resulting in real fears that Australia would find itself with a war on three fronts).

Indonesia, with a longer memory than most Australians, has remained suspicious of Australia's interests in what is now Papua since those times. The suspicion has been unwavering, in spite of all declarations to the contrary, ever since the transfer of the territory from the brief United Nations Temporary Executive Authority (UNTEA) administration to Indonesia in 1962, and the subsequent (very flawed) Act of Free Choice in 1969.

¹ This background draws on *Australia, Papua New Guinea and the West New Guinea Question 1949-1969*, by June Raye Verrier, Ph.D. thesis, Monash University 1976. A copy is available in the Parliamentary Library and also on line at http://www.papuaweb.org/dlib/s123/verrier_phd.html

² Including, for example, school exchanges which involved students who were to become part of PNG's emerging elite and who thereafter were inclined to support for their 'wantoks' in WNG.

A primary reason for Indonesia's suspicions has been the concerns that have continued to be expressed over the years in some quarters in Australia about the fate of Papua as part of the RI. These have added to the history of Australia's opposition to Indonesia's claim until 1962 and Australia's status as the colonial power over the border in Papua New Guinea. Concerns have arisen, for example, from:

- serial border incidents with PNG over the years as refugees have fled Indonesian persecution or, more often, 'traditional' peoples who have always moved across this border, continued to do so and were pursued by the Indonesian army;
- the major programs of *transmigrasi* particularly from the overcrowded island of Java changing the nature and the balance of the mix of Papua's population;
- the exploitation of the territory's huge mineral wealth with little flow of benefit to its peoples; and
- a situation in which Indonesia's, at best, insensitive style of rule and intolerance of expression of Papuan nationalism has led to ongoing allegations of human rights abuses.

These circumstances have kept alive and stimulated a Papuan nationalism both inside and outside Papua which might have moderated had Indonesia been better colonists. The Dutch also shamelessly neglected the territory until its last twelve years in power: at the transfer of the rest of the former NEI to the new RI, the Netherlands decided to keep WNG and there was a burst of development activity.

But the Dutch left behind a very small educated elite, many of whom were willing to give Indonesia the benefit of the doubt and work with it. Others of the elite moved to Holland and kept alive a campaign for the territory's independence which won supporters in a number of quarters, including in Australia. RI largely ignored these opinion shapers, leading to international campaigns for Papuan independence over decades.

Indonesia appears unable to believe that such activity in Australia, or that commentary on issues arising in Papua, is not politically inspired or politically endorsed. This communication mismatch adds to the problems of two very different countries with different political systems and different values agreeing on how to manage their common interests.

Real politic then and now?

Papua has been the victim of *real politic* for a very long time. This began when the Dutch seized what was then known as WNG as part of its empire in the east to exploit its resources; the Dutch retained WNG/Papua for those same reasons and some others in 1949; Australia turned its back on it in the face of bigger interests in the form of the American alliance in 1962; and the international community did the same by acquiescing in the obviously farcical Act of Free Choice in 1969.

There is a danger that with the Lombok Treaty of 2006, Australia may be continuing the trend. It would be doing so if it put its relationship with Indonesia ahead of its obligations in International Law *re* human rights and refugees and ahead of its, to date, quiet and careful support for improving the lot of Papuans through the focus of its aid program.

The Treaty

CLA believes this Treaty can be seen at one level to be quite masterly. The Treaty seizes upon Indonesia's undoubted paranoia about Australia's interests in Papua and uses it to extract specific agreement about issues of great current concern to Australia, namely cooperation in terrorism management and control and associated intelligence arrangements.

Australia has made two major and significant concessions. Firstly, Australia has committed in treaty form to supporting the sovereign integrity of the RI. While not explicit – and Papua is not mentioned anywhere in the Treaty – it is clearly to Papua that this commitment is directed. It is likely that this Treaty will be seen by Indonesia as a far more meaningful commitment than all the verbal reassurances given to them about supporting their position in Papua over the past 40 years.

Secondly, the Treaty commits Australia to cooperation of a significant kind with Tentara Nasional Indonesia (TNI), the Indonesian military, which has a huge vested interest in Papua. The TNI has in reality administered Papua as a fiefdom – and source of profit – ever since Papua's administration was handed to Indonesia in 1962 after the short period of UNTEA administration pending an Act of 'Free Choice' in 1969.

CLA sees it as a positive if this Treaty lays the ghost of Indonesia's belief in Australian support for Papuan independence. But the Treaty can go much further and mean that Australian-Indonesian cooperation, particularly in the form of

Australia's aid focus on the poorest, far-eastern part of the RI, can proceed apace, confident that both Indonesia and Australia have the same goal of improving the quality of life in the province within the unitary state of Indonesia³.

CLA believes the new Treaty must not jeopardise growth in this important aspect of Australia's practical support for Indonesia. CLA also believes that improving how the TNI operates in Papua is fundamental to a long-term solution for the province: Australia must not shy away from discussing this bedrock issue and should use its renewed relationship with TNI to do so.

CLA's position re Papua

CLA recognises that Australia is as keen as Indonesia to ensure the sovereign integrity of the RI. CLA argues that Australia must be just as keen to see positive progress in the province of Papua. The best outcome for Australia – as it would be for Indonesia – is a rapidly-developing Papua where the economic, social and political benefits flow through to all its peoples.

Australia has a clear role and obligation to encourage the 'the right things' to happen in Papua without being seen to be critical or intrusive or, indeed, to be supporting anything other than Indonesian sovereignty. Nothing in this agreement should suggest we are wiping our hands of the continued encouragement of Indonesia in this respect.

The best thing that Australia can do for Papua is make sure the avenues of communication and cooperation with Indonesia are kept clear and open so that we can continue, quietly and diplomatically and bearing in mind the sensitivity of the issue and the centrality of Papua in Indonesia's nationalist history, to do very much better in Papua in terms of aiding economic, social and political development, to help advance the Papuan peoples through education, and to help promote significant regional autonomy for Papua within the framework of the larger RI.

For its part, Indonesia needs to recognise that for reasons of history, geography and security, Australia will always retain a close interest in Papua. Australians died in the long over-land and lightning leapfrog campaign to free mainland WNG

³ While Indonesia is the third largest recipient of Australian aid after PNG and the Solomons, and Australia is the second largest bilateral donor after Japan, what Australia provides is still only 10 per cent of aid that goes to Indonesia. As such, some years ago, because it is in Australia's national interests that this area be stable and secure, and because Australia has a comparative advantage in the kinds of aid most needed there – agriculture, health, community development – Australia decided to focus our aid effort to Indonesia in its easternmost reaches.

and nearby islands from Japanese occupation in World War Two. The Australian community will always be a close observer of the public commitments to civil liberties for the people of Papua, and will watch closely whether promises are delivered. The Australian Parliament similarly will want to see that the province of Papua receives at least its share of development funds and support from the Indonesia Government, and from the Australian aid program.

From the perspective of both the RI and Australia, the best way to reduce refugees from Papua is to make Papua more attractive to its people.

Recommendations relating to Papua

Just as, given the political will, this Treaty has great potential to do the opposite, it also has the potential to stimulate pro-Papuan independence support both inside Papua and outside, including in Australia. It is therefore in the interests of Indonesia and Australia that its implementation achieves all the outcomes intended for it and avoids what may be unintended effects such as exacerbating tensions in and over the province of Papua. For this reason CLA believes that the Treaty requires close and regular monitoring by the Australian Parliament for its impact especially on Papua, wherein was its genesis.

In negative terms, the monitoring is required to make sure that that the new Treaty does not inadvertently:

- provide a paper cover for human rights abuses in Papua, particularly by or under the control of the TNI;
- influence negatively Australia's commitments internationally to the support of human rights; or
- create an excuse for Australia to lessen its aid and people-to-people support for Papuans.

Positively, the monitoring is required to ensure that both Australia and Indonesia, and particularly Papua, is continuing to benefit from the Treaty.

There needs to be a special arrangement under which an existing Parliamentary Committee (or a specific sub-committee of a Parliamentary Committee), which is adequately resourced and able to draw on appropriate external expertise, monitors the Treaty's impact, and how it influences Australian support for Papua.

CLA proposes a specific sub-committee of the Joint Standing Committee on Foreign Affairs, Defence and Trade Committee with a brief to include:

- examining annually the impact of the Indonesian Treaty on the province of Papua, with special reference to the delivery of aid and community support to the province, and to report annually to the Parliament on:
 - refugee movement between Papua and Australia and the outcome;
 - the quality and quantity of assistance to Indonesia's armed forces under the Treaty;
 - the activities of the Indonesian armed forces, particular in terms of human rights and particularly in Papua;
 - the pattern of aid flows to eastern Indonesia and in particular to Papua (comparing before and after the Treaty signature); and
 - Indonesia's democratic progression, with particular reference to its commitment to autonomy for its provinces, and special reference to Papua.

ends main submission

Comment on the National Interest Analysis

CLA considers the NIA provided with this Treaty is of poor quality, and is particularly deficient in its examination of Indonesia's justice system over all, and the death penalty in particular. The NIA is a dereliction of the requirement to bring the best possible information before this Committee and the Parliament so it may make decisions based on all relevant data.

For some reason the drafters of the NIA decided to ignore flagrant and continuous human rights abuse in Indonesia and a flawed justice system. Quite frankly, we wonder why Australia would deliver any Australian or other citizen into its maw. CLA addresses that deficiency in Attachment A to this submission.

The Committee – and the Parliament – has a responsibility to ensure that, in any international dealings, Australia's standards are the minimum and not to sign up to a system that imposes Indonesia's standards, so that people will be executed because of data and intelligence supplied by Australia.

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Death penalty elements

Given the fact that there are currently six Australians on death row in Indonesia due to information provided to Indonesian police by the Australian Federal Police (AFP), we consider the same thing recurring highly likely unless formal safeguards are in place.

The Australian Parliament should not place the AFP in the position of having to make life and death decisions on Australian and other citizens of the world.

As Australia is against the death penalty – by statute, and by endorsed policy of the two major political parties – it is an invidious position for AFP officers to have to hand over intelligence and data which could lead to the state killing of the people in question.

This agreement appears to have been negotiated by people within Australia's Department of Foreign Affairs and Trade who are unaware of these facts.

The reasons we oppose the non-inclusion of death penalty safeguards in this Treaty are:

- It does not mention provision of information by Australia may lead to the death penalty. Silence on this issue is a calculated insult to the law of Australia, the policy of the major political parties, and to the AFP officers who will be faced with decisions that will lead to killing.

and

- Indonesia has carried out eight executions since 2004, three of which were on 21 September 2006. It is thought more people may be executed, as Amnesty International advises there are presently 90 people under sentence of death in jails in Indonesia, convicted by a justice system widely acknowledged to be in need of major reform. There is a lack of access to lawyers and interpreters and torture and ill-treatment of prisoners is believed to be widely practised.

This Treaty would have as a subsidiary Treaty the 1999 'Treaty between Australia and the Republic of Indonesia on Mutual Assistance in Criminal Matters', which also does not meet acceptable standards on the death penalty.

Article 4, Para 2(d) of this Treaty indicates 'assistance may be refused if: (d) the request relates to the prosecution or punishment of a person for an offence in respect of which the death penalty may be imposed or carried out'. The use of the word 'may' is unacceptable as it is vague and provides insufficient protection against the death penalty. Sub-paragraph (d) should have been included in Article 4, Para 1 where assistance 'shall' be refused.

Even this provision, flawed though it is, in the Indonesian Treaty was not enough to save the six Australian members of the so-called Bali 9 who are on death row in Indonesia. That came about because information was passed to the Indonesian police by the AFP under their own internal guidelines which, although recently revised, still allow the passage of information to Indonesia in criminal matters – which enables the AFP to 'export' state-sponsored killing.

In testifying before this Committee on 4 September 2006, an AFP representative stated 'all information provided to the Indonesian National Police (in relation to the so-called Bali 9) was obtained by voluntary means'. This was supported by the senior representative of the Attorney-General's Department. CLA would ask: So what? Why was the AFP providing information on offences in the first place when they were aware that information could result in the death penalty?

In the event, as indicated above, there are now six Australian's under sentence of death in Indonesia due to the AFP's actions. To say, as the AFP representative did during testimony, they could not know information provided had the 'potential' to 'attract the death penalty' is not believable. The entire testimony given by the AFP and Attorney-General's Department on this matter was evasive and unconvincing.



For the information of the Committee:

Background information on the authors of this submission:

Dr Kristine Klugman is President of Civil Liberties Australia. Her PhD in Politics at ANU analysed the two-way communication flow between MPs and electors. Earlier degrees were in Community Studies, and History. Kristine previously served on the NSW Legal Aid Commission, was a foundation member of the NSW Council for Civil Liberties, and worked with the NSW Bureau of Crime Statistics and Research, helping to establish the Criminal Justice tertiary course for police and prison officers in NSW. Her honours award was for '*services to education and the community*'. She was the first-ever female President of Australia's oldest museum, The Australian Museum. She was also the first female board member and full-time Deputy President of the Board of Fire Commissioners of NSW, running the NSW Fire Brigades and being closely involved with rescue and emergency services management across Fire, Police and Ambulance.

Mr Vic Adams is a graduate of RMC Duntroon and the Australian Army Staff College, Queenscliff. He has a BA in Politics and History and a graduate Diploma in Public Policy from ANU. He served in the Army as an infantry officer in operational and administrative positions in Australia, Vietnam, PNG, Egypt, Lebanon and Israel. He then served in administrative and training positions within the Australian Federal Police, with the Australian Protective Service as Deputy Director (Operations) and then Director. Prior to retirement he was the Regional General Manager for NSW and Queensland for the Department of Administrative Services, based in Sydney. He is a Director of Civil Liberties Australia.

Dr June Verrier has a first class honours degree in International Politics from the University of Wales, Aberystwyth, and a Ph.D. in International Relations from Monash University where she wrote her thesis on '*Australia, Papua New Guinea and the West New Guinea Question 1949-1969*'. She began her professional life in the British Foreign Office and has served in the Australian Department of Foreign Affairs, AusAid (when it was AIDAB) and the Department of Prime Minister and Cabinet. She was Head of the Parliamentary Library Information and Research Service from 1994 until 2005. She is currently a Visiting Fellow, Democratic Audit of Australia, at ANU, Director of Democracy Building for John Kerin & Associates, and a Director of Civil Liberties Australia.

