INTERNATIONAL
COMMISSION
OF JURISTS

ICJ AUSTRALIA

GPO Box 173
Sydney NSW 2001
Australia
+61 (0)2 9266 0950
+61 (0)2 9266 0742
info@ICJ-Aust.org.au

WWW.ICJ-AUST.ORG.AU

22 February 2007

Mr James Rees
Committee Secretary
Joint Standing Committee on Treaties
Parliament House
CANBERRA ACT 2600

Dear James,

RE: Agreement between Australia and the Republic of Indonesia on the Framework for Security Cooperation (Mataram, Lombok, 13 November 2006)

The International Commission of Jurists, Australia lodges this submission for the assistance of your Committee.

It is made on the basis that we wish to take any opportunity to address the Joint Standing Committee on the submission.

Yours sincerely,
ICJ AUSTRALIA

The Hon John Dowd AO QC
President

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SUBMISSION TO THE INQUIRY BEFORE THE JOINT STANDING COMMITTEE ON TREATIES ON THE AGREEMENT BETWEEN THE COMMONWEALTH OF AUSTRALIA AND THE REPUBLIC OF INDONESIA ON THE FRAMEWORK FOR SECURITY COOPERATION.

The International Commission of Jurists, Australia (ICJA) submits:

1. That the generality of the terminology used in the treaty will result in differing interpretations and emphasis between the government of Australia and the Republic of Indonesia. This will mean that Indonesia is likely to pressure the Australian Government to interpret any treaty that comes into existence from a different point of view to that of the Australian Government, and may well result in pressure being brought to bear civil servants and government agencies to carry out the Indonesian interpretation of the treaty rather than an Australian point of view or an objective point of view

   This will mean that such pressures will be obscured from public review and may well involve distortions in the proper application but the terms of the treaty.

2. That the use of the terms "terrorism", "traditional and non traditional security threats" and "new global challenges" will mean that a large number of activities previously not covered by the criminal law, will be encompassed by this treaty. The terminology is appallingly vague and in any event, the term "terrorism", as defined in various Australian terrorist legislation, encompasses a wide range of activity and these terms are therefore vague and dangerous in an international treaty. The ambiguity of these terms will have dangerous repercussions in an international arena as perspectives differ on the importance of individual human rights.

3. That the expression in the Preamble "Emphasising the importance of working together through regional and international fora on security matters to contribute to the maintenance of international peace and security;" encompasses wording of the widest general import and the use of the word "security" and the terms "maintenance of international peace and security" will encompass an extremely wide range of activities, including matters of migration and refugee movements which are covered by international treaties. This could be used to justify Australian police surveillance of Human Rights' groups and activities within Australia.

4. That the use of the expression "Adhering to their respective laws and regulations;" allows for an alteration of circumstances by the unilateral passing of laws within one or other country. This terminology gives the individual parties an opportunity to change the effect of the agreement by the unilateral passage of laws without reference to the other Party to the treaty.

5. That the expressed objectives of the agreement encompasses terminology which can be interpreted to interfere with such width that each Party is obliged to look to the other Party's determination of the subjective term "National security". This will mean that Indonesia will be able to give an interpretation on the various issues which Australia may then consider itself bound by.

6. The Second objective under Article 1 of the proposed treaty is of such width as to cover almost any conceivable level of activity and thus exceeds the normal precise purposes of a treaty. This terminology ought to be expressed in less expansive terms, otherwise the freedom of Australia's right to speak out on matters of international concern will be severely curtailed.

7. Under Article 2, the principles expressed in the general Preamble to Article 2 require only that they be consistent with the Charter of the United Nations. This should be expressed also to be consistent with all existing treaties by which the Parties are already bound as this treaty should not be able to be interpreted as overriding existing obligations, such as under the International Covenant on Civil and Political Rights or the Refugee Conventions and the Protocols thereto.

8. It is submitted that Principle 1, Article 2 will limit Australia's capacity to comment on matters of general public interest concerning Indonesia, and will limit the right which every nation in the world has, to comment on Humanitarian, criminal, social or cultural events. There has been no case made out to limit Australia's capacity to comment on activities occurring within Indonesia, and would, indeed, have limited any right to criticise the invasion of Timor L'Este in 1975.

9. Similarly, Principle 2 of Article 2 is couched in such terms as will severely limit the capacity of Australia to comment on human rights abuses or any breaches of humanitarian law and thus limit Australia as against every other country in the world having the right to criticise. Foreign Affairs' officers may feel inhibited from making people such as the widow of the human rights' lawyer Munir.

10. Principle 3 of Article 2 is clearly designed to limit Australia's capacity to deal with the internal problems of Indonesia. Although Indonesia, at the moment, has the right to criticise matters within Australia, any limitation on that right of criticism will have little effect within Australia, whereas the large number of existing conflicts within Indonesia give rise to international comment by other countries, and rightly so, the Defence Forces of Indonesia are not employed in defending its external territorial integrity as it is not under attack. Its current activities involve attacks on its own citizens.

11. Principle 3 of Article 2 would prevent Australia with its existing obligations to countries like Papua New Guinea and Timor L'Este for criticising any activity which may involve an incursion by Indonesia into the territory of Timor L'Este or Papua New Guinea under the contention that there are activities across the border which affect the "sovereignty or territorial integrity" of Indonesia. This could easily be justified in a case of activities of the rebel freedom movement now in Papua New Guinea, extending across into Indonesia. Australia has existing military obligations and projective obligations to Papua New Guinea, as it does to Timor L'Este. The terminology of this principle is potentially very restrictive of Australian activity, or Australia's right to comment.

12. Principle 3 of Article 2 may be made to give rise to Indonesian pressure to prevent funding of non-government organisations which carry out humanitarian relief or monitor military activity within Indonesia. Organisations funded by the Australia government may well consider themselves limited in speaking out about humanitarian and human rights issues on the basis that the Australian government may be pressured to withdraw funding from those organisations.

13. Since the Australian defence forces will in fact be training existing and armouring forces of the Republic of Indonesia under the treaty, any abuse by the Indonesian armed forces of that training and equipment could not be the subject of criticism by Australia. It is absurd to suggest that we should arm and train Indonesian armed forces which are largely going to be used internally and not for matters of defence, and abandon and indeed preclude proper comment as to any abuses.

14. The final paragraph under Article 2 should be expressed not only affecting "existing rights and obligations under international law" are excepted, but also should include existing treaty obligations of both Parties.

15. In Article 3, the Defence Cooperation will obviously involve both parties educating the armed forces of the Others, but it may well be that if any conflict arose on the border, for instance of Timor L'Este, that this may arm the forces of the Republic of Indonesia with knowledge of how Australian Forces within Timor L'Este, as part of its international treaty obligations to the United Nations, are likely to react to a particular situation. They are obviously in cooperation in any tense situation that may arise, but the two potentially dangerous borders of Timor L'Este and Papua New Guinea with Indonesia may well give rise to situations where this could be dangerous to Australian Armed Forces. This is particularly so given that the Indonesian forces will know how Australian forces will react and respond.

16. Under the Maritime Security provisions, there is a danger that naval cooperation between the parties may inhibit lawful refugee and asylum seekers from exercising rights to attempt to come to Australia or to pass near Australia and Indonesia through international waters.

17. There is no provision for the access by the media or Human Rights' monitors. History shows that violations have continued in Indonesia. Australia should not be precluded from comment. If this treaty had existed at the time of the lead-up to the popular consultations in Timor L'Este, the government of Australia would have been precluded from agitating for the process which led to the freedom for the people of Timor L'Este.

18. There should be provision in the treaty that where there is provision of information by Australian police authorities which may lead to a conviction in Indonesia for a death-penalty offence, then such provision be subject to agreement that the death penalty will not be carried out.

19. As there is no immediate need for the treaty, one would ask that there be a more protracted discussion time allowed before a treaty is agreed to. In the meantime, the existing agreement should be withdrawn.

The Hon. John Dowd AO QC
President
International Commission of Jurists
Australian Section
23 February 2007