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Committee Secretary  
Joint Standing Committee on Treaties  
Department of House of Representatives  
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Dear Joint Standing Committee on Treaties

Please accept this short submission to your inquiry into the **Australia Indonesia Security Cooperation Agreement**. I am an international law academic and barrister, and author of *Defining Terrorism in International Law* (Oxford University Press, Oxford, 2006). The Agreement is a positive step towards advancing and regulating security cooperation.

### **Non-Traditional Security Threats: Preamble**

The recognition of non-traditional security threats in a bilateral security agreement is a welcome development, and reflects the new global consensus on human security which has emerged from the UN World Summit (2006), the UN Secretary-General's report *In larger freedom* (2006), the UN High-Level Panel on Threats, Challenges and Change (2005), and the Commission on Human Security (2003): see generally Ben Saul, "Human Security" in the Asia-Pacific Region' (2006) 1 *Asian Journal of Comparative Law*.

While the Agreement extends security cooperation to non-traditional threats such as disasters, WMDs, terrorism and transnational organized crime, it does not fully reflect the new security consensus. The UN High-Level Panel report identified six major global threats to security:

1. economic and social threats (poverty, infectious disease, and environmental degradation);
2. inter-State conflict;
3. internal conflict (including civil war, genocide, and large-scale atrocities);
4. weapons of mass destruction;
5. terrorism; and
6. transnational organised crime.

While the Agreement appears to cover threats 2, 4, 5 and 6, it is silent on the other threats. This omission is of considerable concern, since poverty, infectious disease, environmental degradation, civil conflict and serious human rights abuses are among the greatest threats facing the Indonesian people. As UN Secretary-General Kofi Annan observes in his report, 'freedom from fear' and 'freedom from want' are equally important, and 'development, security and human rights are mutually independent'.

### **Non-Interference in Internal Affairs: Article 2(2) and 2(3)**

Article 2(2) embodies the classical international law principle of non-interference in internal affairs, as reflected in the UN Charter and the 1970 Declaration on Friendly Relations. It is the cornerstone of the modern international law on the use of force. The difficulty is that Australia and Indonesia may have different perceptions about the scope of domestic jurisdiction and the duty of non-interference.

It is now well accepted in public international law that human rights violations by a government are of international concern and no longer fall within the exclusive domain of domestic jurisdiction. As a result, expressions of concern by one government about the human rights situation in another country can no longer be seen as interference in internal affairs. Likewise, under the modern law, the grant of refugee status by one country to citizens or residents of another does not amount to interference in its internal affairs.

In relation to Article 2(3), to the extent that a separatist movement is grounded in human rights claims concerning self-determination, minority or indigenous rights, a government which supports lawful human rights claims is acting legitimately and cannot be seen as interfering in the internal affairs of the other country. If, for instance, West Papuans have a legitimate self-determination claim, in the context of decolonization or independence from foreign occupation, then Australian support for such a movement would be entirely consistent, and indeed demanded, by Australia's international law obligations.

More generally, if non-traditional security threats do include poverty, infectious disease, environmental degradation, civil conflict and serious human rights abuses, then such threats are elevated to matters of international concern and are no longer mere internal affairs. In accordance with the new global security consensus, Australian interest in and support for measures which combat such threats arguably cannot be seen as internal interference.

### **Defence Cooperation: Article 3**

It is recommended that 'military education and training, exercises, study visits and exchanges' should include, where appropriate, instruction in the international humanitarian law and international human rights law obligations of armed forces. Humanitarian law and human rights training of Indonesian military personnel could be implemented through the conclusion of separate arrangements for specific cooperation under article 6 of the Agreement.

There is evidence of violations of humanitarian law by Indonesian military personnel in East Timor and in other counter-insurgency campaigns. Australia and Indonesia are both parties to the four 1949 Geneva Conventions, which require State parties 'in time of peace as in time of war' to disseminate the Conventions 'as widely as possible in their respective countries' and 'in particular, to include the study thereof in their programmes of military and, if possible, civil instruction' (articles 47, 48, 127 and 144 respectively of the four Conventions).

### **Law Enforcement Cooperation: Article 3**

It is submitted that Australian law enforcement cooperation with Indonesian authorities should not continue where it would result in any person (Australian, Indonesian or other) being exposed to a credible risk of the death penalty, torture, or inhuman or degrading treatment or punishment.

It is further submitted that cooperation in relation to people smuggling and people trafficking must be undertaken with full respect for both country's obligations under international refugee law, including the elementary obligation not to return a person to persecution.

### **Counter-Terrorism Cooperation: Article 3**

The provisions of the Agreement on counter-terrorism cooperation are of considerable concern given the absence of any agreed definition of terrorism, both in the Agreement itself and in international law generally: see generally Ben Saul, *Defining Terrorism in International Law* (Oxford, 2006). Australia and Indonesia have very different definitions of terrorism, so the extent of both countries' obligations to cooperate under the treaty is unclear.

In sum, Australia defines terrorism as certain types of serious harm to people, property, public health or safety, or an electronic system, where it is intended to coerce a government or an international organization, or to intimidate the public, in order to advance a political, religious or ideological cause: see section 100.1 of the *Commonwealth Criminal Code*. There is an exception for advocacy, protest, dissent or industrial action which is not intended to cause serious physical harm to a person, endanger life, or seriously risk public health.

In contrast, Indonesian law has ambiguously defined terrorism as 'any violent act that could create terror or insecurity among the public, violate the public's freedom, cause the death of other people or cause the destruction of vital or strategic objects': see, for instance, *Regulation in Lieu of Law No 1/2002 on the Eradication of Criminal Acts of Terrorism*. There is no exception for democratic protest as found in Australian law.

Consequently, what Indonesian law characterises as terrorism may not amount to terrorism under Australian law or international law. In addition, the law in neither country defines the vague, indeterminate and unhelpful concept of 'extremism', which the Agreement requires both countries to cooperate against. The Agreement is entirely unclear on what happens if one country characterises an act as terrorism but the other country regards it as, for instance, legitimate political protest or freedom of expression.

There is a real risk that Australia will be legally compelled to cooperate in repressing democratic activities, human rights or even legitimate armed resistance movements who act in accordance with humanitarian law.

### **Intelligence Cooperation: Article 3**

It is noted that the exchange of security information and intelligence under article 3 must comply with Australian privacy and human rights legislation.

### **Proliferation of Weapons of Mass Destruction: Article 3**

Cooperation to prevent the proliferation of WMDs is welcome. However, it must be noted that despite the potential threat of WMDs, the harm actually caused by WMDs has been minimal over many years. In practice, a far greater security threat stems from the proliferation of small arms and light weapons, both as a result of their illicit and licit trade and production – in both cases by governments and private actors. Between 60 and 90% of direct conflict deaths in armed conflicts are caused by small arms and light weapons, or around 80,000 to 108,000 deaths in 2003 alone: UN Small Arms Review Conference 2006. Millions more die because small arms impede access to humanitarian and medical relief.

Indonesia itself is concerned about the smuggling of small arms and light weapons, stating that it poses ‘grave threats to our territorial integrity by fostering separatist movements and promoting criminal activities’: *National Report by Indonesia on the Implementation of the UN Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons* (2005). The Centre for Humanitarian Dialogue notes that in Indonesia:

Arms also circulate from abroad to counter-government, ethnically based organisations waging autonomy and independence struggles. There is also insecurity fed by current uncertainty and change increasing demand for weapons among the civilian population throughout the archipelago; by increasing and sometimes unregulated business competition; and criminal gangs. (*Curbing the Demand for Small Arms: Focus on South-East Asia*, Report of Workshop in Phnom Penh, 26-31 May 2002, p 20.)

Indonesia has adopted the 2001 *UN Programme of Action to Prevent, Combat, and Eradicate the Illicit Trade in Small Arms and Light Weapons* and has participated in ASEAN efforts to control small arms proliferation in the region: K Kramer, *Legal Controls on Small Arms and Light Weapons in Southeast Asia*, Small Arms Survey, Occasional Paper No 3, 2001.

However, in addition to illicit private trade, parts of the Indonesian military and government are involved in arms trafficking. The Indonesian military possesses 2.2 million firearms: Graduate Institute of International Studies, *Small Arms Survey 2006* (Geneva). Corruption is endemic in Indonesia and its military and the country ranks 130<sup>th</sup> in the global corruption index: Transparency International (2006). As the Centre for Humanitarian Dialogue notes:

Some elements of the military are unhappy with their loss of status and power and appear to be arming elements in society which will further their agenda. Many of these weapons come from the state owned weapons factory, PINDAD. (*Curbing the Demand*, above, p 20.)

In this light, it is submitted that the illicit (and licit) trade in small arms and light weapons is a far more serious and material threat to Australian and Indonesian security than the over-emphasized threat of WMDs. While the Agreement provides for law enforcement cooperation on illicit arms trafficking (article 3(7)(h)), efforts to combat it should arguably be given as much – if not more – emphasis as the special measures against WMDs. Small arms threaten not only national security in civil conflicts, but also human security due to gun-related crime.

### **Community Understanding and People to People Cooperation: Article 3**

It is recommended that pursuant to article 6 of the Agreement, separate arrangements for people-to-people cooperation in the field of *academic exchanges* should be concluded.

### **Confidentiality: Article 4**

It is observed that the protection of confidential and classified information received under the Agreement must be in accordance with Commonwealth freedom of information legislation.

### **Settlement of Disputes: Article 8**

Although not expressed here, it should be noted that the amicable settlement of disputes by mutual consultation or negotiation should be undertaken consistently with international law.

Please be in touch if you require any further assistance. Yours sincerely

