



promoting peace, human rights and
democracy in Indonesia



Human Rights Council
Universal Periodic Review (second cycle)
13th session, May/June 2012
Information on Indonesia

21 November 2011

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Introduction

1. This submission is made to the OHCHR by TAPOL and BUK (*Bersatu untuk Kebenaran - United for Truth*). TAPOL is a UK-based NGO formed in 1973 that promotes human rights, peace and democracy in Indonesia. BUK is a Papuan grassroots NGO founded in Biak in 2008 by Papuan survivors of violence. It has branches across Papua and seeks to build the capacity of victims and victims' groups so that they can campaign for their rights, and the rights of their families, in particular to justice and reparations. Both TAPOL and BUK are relevant stakeholders under Human Rights Council Resolution 5/1 of 18 June 2007 as reaffirmed by Resolution 16/21 of 25 March 2011. Information provided by TAPOL was included in the summary of stakeholders' submissions for the first cycle review of Indonesia in April 2008.

2. The main focus of the submission is freedom of expression and treason in the conflict region of Papua.¹ An initial section with background information on the human rights situation in Papua and general recommendations is also included.

Methodology

3. The information in this submission is based on research and monitoring activities undertaken by TAPOL and BUK over a period of at least two years, in addition to materials, data and analysis provided by TAPOL's other Papua-based partners and network contacts.

Priority issue: Freedom of expression and treason in Papua

4. The submission highlights a particular violation of the right to freedom of expression that involves the punishment of individuals for peaceful political activities, most notably in Papua and Maluku. It calls into question the regular practice of charging such individuals with the offence of '*makar*' (treason) under Article 106 of the Indonesian Criminal Code and draws on specific research undertaken by TAPOL, BUK, and TAPOL's other partners in relation to political prisoners in Papua.

5. This is a priority issue because freedom of expression is an essential instrument for the promotion and protection of other human rights. In relation to Papua, freedom of expression is required in order to create the conditions in which the political problems of the territory can be resolved. The criminalisation of free expression also restricts the ability of human rights defenders to undertake their vital work in promoting and protecting human rights.

6. Indonesia's obligation to comply with international standards on freedom of expression arises from its accession in 2006 to the International Covenant on Civil and Political Rights (ICCPR). Freedom of expression is also guaranteed by the Indonesian Constitution and Law 39 of 1999 on Human Rights (see Annex A).

Summary of recommendations to the Government of Indonesia

On freedom of expression

7. The Indonesian government should comply with its international and national obligations to respect the right to freedom of expression and should recognise that the use of treason laws to punish peaceful political activities is a violation of those obligations.

8. In accordance with the conclusion of the first Universal Periodic Review concerning the enablement of a vibrant civil society, Indonesia should ensure that policies and practices that prevent civil society groups and individuals, especially human rights defenders, from exercising their right to freedom of expression are discontinued.

9. Indonesia should address the question of how it will ensure the full enjoyment of freedom of expression in relation to legitimate political activities in Papua and

¹ For the purposes of this submission, Papua includes the Indonesian provinces of Papua and West Papua.

elsewhere; it should further issue invitations to relevant UN special mechanisms to visit Indonesia and Papua, including the Special Rapporteur on Freedom of Expression, the Working Group on Arbitrary Detentions and the Special Rapporteur on the Situation of Human rights Defenders.

10. Indonesia should immediately end the practice of charging persons engaged in non-violent political activities with criminal offences such as *makar* under Article 106.

11. Indonesia should expedite the revision of its Criminal Code in consultation with relevant stakeholders and review and amend or repeal provisions that restrict the right to freedom of expression, including Article 106.

12. As a trust-building measure with the Papuan people and in response to the 2011 request of the UN Working Group on Arbitrary Detentions, the Indonesian Government should order the unconditional release of all those in detention for non-violent political activities as part of a comprehensive policy to end of the punishment of free expression; it should also ensure that victims of arbitrary detention and torture and ill-treatment in detention, and their families, receive adequate reparations and assistance to access services needed for recovery and rehabilitation.

General

13. Indonesia should review its political and security policies relating to Papua with a view to reducing its military presence in Papua and focusing on the political rather than security approach to resolving the Papua conflict.

14. Indonesia should further strengthen the rule of law in Papua by ending impunity for violations of human rights by security forces personnel in accordance with the commitment it made to the HRC at the time of the first Universal Periodic Review.

15. In the interests of peace and reconciliation, Indonesia should apologise to the Papuan people for the violations of human rights committed under its administration.

Background: Human rights in Papua, 2008-2011

16. Despite persistent calls for political dialogue by Papuan leaders and indigenous community representatives, the security approach continues to be the dominant means of dealing with the Papua problem by the Government of Indonesia. According to BUK's monitoring, armed forces personnel in Papua currently number 14,842 and the government is understood to have plans to significantly increase numbers over the next 14 years. Military operations and a heavy-handed approach to security pose a serious threat to the human rights and lives of the Papuan people. A culture of violence is linked to the belief held by the security forces that political activity and advocacy for Papuan rights is associated with a separatist agenda and should be met with a harsh response. Violent and repressive practices of the military and police forces include: intimidation; terror tactics; arbitrary arrests and detentions; interrogations conducted without the presence of lawyers and access denied to visiting family members; torture, ill-treatment and denial of healthcare during detention; mysterious shootings; forced disappearances; and extra-judicial executions. The atmosphere of repression was underlined by the publication in August 2011 of leaked military documents confirming that widespread surveillance and intelligence operations in Papua continue.² Most recently, up to six people were killed during the violent dispersal by the security forces of the Third Papuan Peoples' Congress held in the regional capital, Jayapura, from 16-19 October 2011. The Congress was called by indigenous Papuan leaders to discuss their basic rights.

17. While Papuans are often severely punished for peaceful political activities, by contrast security forces personnel involved in egregious violations of human rights routinely escape punishment or are given derisory sentences. In January 2011, three soldiers were sentenced to between eight and ten months imprisonment for the procedural offence of 'disobeying

² See 'Under the long arm of Indonesian intelligence', Sydney Morning Herald, 13 August 2011 and 'Indonesia: Military Documents Reveal Unlawful Spying in Papua', Human Rights Watch, 15 August 2011.

orders' for their involvement in the brutal torture of two Papuan men in May 2010.³ In its submission to the first cycle review of Indonesia, TAPOL referred to the Wasior (2001) and Wamena (2003) cases of gross violations of human rights in Papua that had become dormant after being passed to the Indonesian Attorney General's office. Four years later this remains the situation. The Conclusions and Recommendations of the first review welcomed Indonesia's 'reaffirmation of its commitment to combat impunity' and encouraged it 'to continue efforts in this regard' (Recommendation 4). TAPOL and BUK believe that Indonesia's progress in addressing impunity has been unsatisfactory and that the problem of impunity should be considered in further detail during this second review of human rights in Indonesia.

Recommendations

18. Indonesia should review its political and security policies relating to Papua with a view to reducing its military presence in Papua and focusing on the political rather than security approach to resolving the Papua conflict.

19. Indonesia should further strengthen the rule of law in Papua by ending impunity for violations of human rights by security forces personnel in accordance with the commitment it made to the HRC at the time of the first Universal Periodic Review.

20. In the interests of peace and reconciliation, Indonesia should apologise to the Papuan people for the violations of human rights committed under its administration.

The use of treason laws in Papua

21. Papuan activists are regularly arrested and detained for peaceful actions, such as raising the Papuan 'Morning Star' flag or attending demonstrations and public events that are associated with Papuan nationalism. They are frequently charged with *makar* and if convicted under Article 106, face prison sentences of up to twenty years or life. According to data recorded by TAPOL, there are currently at least 30 Papuans in prison awaiting trial or serving time for *makar* and related offences.

22. The prisoners are held in a number of detention facilities across Papua, including in Abepura, Biak, Manokwari, Wamena, Nabire, and Fak Fak. Complaints have been made about the torture and ill-treatment of a number of the prisoners, in particular concerning their lack of access to adequate medical treatment.

23. The offence of *makar* was introduced into Indonesian law as part of the Criminal Code that came into force under the Dutch colonial administration in the early twentieth century. Since the downfall of the 'New Order' regime under former president Suharto, Indonesia has made commendable efforts to remove repressive colonial and New Order-era legislation from its statute book. The 1969 Anti-Subversion law was repealed in 1999 while the notorious 'hate-sowing' articles (154 and 155 of the Criminal Code) were declared unconstitutional by the Indonesian Constitutional Court in 2007. However, Indonesia has so far failed to complete its review of the Criminal Code. Furthermore, according to the observations of local activists, it would appear that the practice of charging Papuan activists with *makar* became prevalent only after the repeal of the Anti-Subversion Law.⁴ This suggests that the authorities are simply using a different means to punish free expression in Papua.

Recommendation

24. The Indonesian government should comply with its international and national obligations to respect the right to freedom of expression and should recognise that the use of treason laws to punish peaceful political activities is a violation of those obligations.

³ See 'Light Sentences for Rights Violators Spark Calls for Suspension of Aid to Abusive and Unaccountable Indonesian Military' TAPOL, WPAT, ETAN press release, 25 January 2011.

⁴ Source protected.

Local demands for policy change

25. There have been persistent demands by TAPOL's local partners and other Papuan civil society groups for an end to the use of *makar* laws and for a review of the *makar* Article and related provisions in the Criminal Code.

26. Yan Christian Warinussy, the executive director of the Institute of Research, Analysis and Development for Legal Aid (*Penelitian Pengkajian dan Pengembangan Bantuan Hukum*, LP3BH) in Manokwari, West Papua province, has called for a judicial review of Article 106:

*"I call [for] a judicial review of the makar article before the Constitutional Court because it is no longer appropriate for such a law to remain in force in a democratic country like Indonesia. Other democratic states around the world don't have such a law because it is so out-of-date. If this article continues to remain in force, the police will be able to make use of it to arrest Papuan activists when they give expression to their political aspirations to the government. This includes rejecting the special autonomy law and calling for dialogue as the way to resolve the Papuan issue and various other problems in Papua. This article can also be used by prosecutors and judges to convict Papuan civilians and activists when raising problems that they confront. In my opinion, this article will continue to be used to round up and imprison indigenous Papuans whenever they give voice to their aspirations."*⁵

27. In August 2010, a group of Papuan lawyers and human rights NGOs issued a statement entitled 'Makar: an Injustice for the Papuan People', which pointed out that *makar* charges were in violation of Article 28 of Indonesian Constitution and that the *makar* offence was a hangover from the criminal code in force during the Dutch colonial era. They called on the Indonesian Parliament, (*Dewan Perwakilan Rakyat*, DPR); the Papuan provincial legislature, (*Dewan Perwakilan Rakyat Papua*, DPRD); and the Papua branch of the National Human Rights Commission, Komnas HAM, to review the practice of using *makar* and to call for the release of all political prisoners.

28. Another group of lawyers and NGOs, in discussing a possible judicial review of the *makar* article in April 2011, described it as being inappropriate in present-day Indonesia. They said:

*"The makar article[s] have been used to prevent Papuan people from freely expressing their views and aspirations, particularly criticisms of the injustices and discrimination experienced by Papuan people for several decades."*⁶

29. In April 2010, Indonesian government official Nazaruddin Bunas expressed concern about the use of *makar*, according to a local newspaper.⁷ Mr Bunas, who is the Head of the Law and Human Rights Ministry in Papua, noted that when certain groups carried out actions to express their opinions, such actions were immediately judged by the police as treasonous, despite the fact that they did not pose any immediate threat to the security of the state or public order.

30. In July 2011, a Papua Peace Conference, attended by indigenous Papuan leaders and some 800 participants from across West Papua produced a set of political, social, economic and human rights 'indicators' for a peaceful Papua that included:

*'Indigenous Papuans have freedom of expression, opinion and assembly' and 'Policies that hinder the freedoms of expression, opinion and assembly are no longer in force.'*⁸

⁵ Jubi, 31 March 2011 (translated by TAPOL).

⁶ Notes of discussion provided to and translated by TAPOL.

⁷ Papua Pos, 17 April 2010, "The handling of makar cases should be selective"

⁸ See *Indonesia: Hope and Hard Reality in Papua*, International Crisis Group, August 2011, Appendix D.

31. The need to address the practice of charging Papuan activists with the offence of *makar* has long been recognised by a range of other local, national and international stakeholders. They include the UN Working Group on Arbitrary Detentions, the UN Special Representative of the Secretary-General on Human Rights Defenders, Amnesty International, and Human Rights Watch (see Annex B).

Makar laws: Developments since the first cycle review of Indonesia

32. According to data recorded by TAPOL, there has been no significant change in the practice of using *makar* to criminalise peaceful political activities since the first cycle review. If anything the number of arrests and convictions overall during 2008–2011 has increased compared with the period reviewed under the first cycle. A minimum of 77 Papuans⁹ have been detained and charged with *makar* and/or related charges since 2008,¹⁰ and those convicted were given sentences ranging from 10 months to six years. Collectively, these political prisoners have been condemned to over 91 years in prison, either through sentencing or time served in detention before acquittal.¹¹ Most recently, five Papuans were arrested and charged with *makar* following the violent dispersal by the Indonesian security forces of the Third Papuan Peoples' Congress in October 2011.

33. In the Conclusions and Recommendations to its first review of Indonesia, the HRC Working Group commended Indonesia for 'enabling a vibrant civil society, including with respect to those engaged in defending human rights' and encouraged it to 'support and protect their work, including at the provincial and local level as well as in regions with special autonomy' (Recommendation 3). TAPOL believes that further progress in this area, particularly in Papua as a region with special autonomy, is essential if Indonesia is to sustain its transition to democracy. The continued suppression of freedom of expression through the criminalisation of political activities poses a serious threat to civil society which should be addressed as a matter of urgency.

Recommendation

34. In accordance with the conclusion of the first Universal Periodic Review concerning the enablement of a vibrant civil society, Indonesia should ensure that policies and practices that prevent civil society groups and individuals, especially human rights defenders, from exercising their right to freedom of expression are discontinued.

Ensuring freedom of expression

35. The issue of freedom of expression as it relates to political activities was raised by several countries in advance questions submitted to Indonesia ahead of the first review. The use of Article 106 and related provisions was specifically addressed by the Netherlands:

It is reported that a number of individuals that used regional symbols such as flags have been sentenced on the basis of Articles 106 and 107 of the Penal Code and Government Regulation 77/2007. Could Indonesia elaborate on how this law relates to the freedom of expression?

The issue was also addressed by Ireland:

What measures have been taken to ensure full enjoyment of the freedoms of expression, assembly and association, with particular regard to the right to protest?

⁹ While sources suggest the true figure to be far higher, not all cases have been documented or fully reported.

¹⁰ Detainees were most commonly charged with treason under article 106, although a small number were charged with attempting to start a revolution (article 107), rebellion (article 108) and incitement (article 160). Those not charged with actually committing these crimes were subject to auxiliary charges such as conspiracy to commit the crime (110), or ordering, aiding and/or abetting (articles 55 and 56).

¹¹ The true figure is likely to be higher as in many cases, data on the sentence was not available, and some detainees are still awaiting trial.

And Canada:

What is being done to ensure that legitimate democratic activity by civil society, including peaceful public protest and criticism, are not stigmatized as 'separatist' in regions of heightened security and intelligence activity such as Papua?

It appears that none of these questions were answered by Indonesia at the time of the first review.

Recommendations

36. Indonesia should address the question of how it will ensure the full enjoyment of freedom of expression in relation to legitimate political activities in Papua and elsewhere; it should further issue invitations to relevant special mechanisms to visit Indonesia and Papua, including the Special Rapporteur on Freedom of Expression, the Working Group on Arbitrary Detentions and the Special Rapporteur on the Situation of Human rights Defenders.

37. Indonesia should immediately end the practice of charging persons engaged in non-violent political activities with criminal offences such as *makar* under Article 106.

Makar laws: Review of the Indonesian Criminal Code

38. The need for a review of the Criminal Code was considered at the first cycle review. It was also earlier addressed by the UN Working Group on Arbitrary Detentions following its visit to Indonesia in 1999.¹² With references to certain chapters of the Criminal Code, including Chapter I which covers Article 106, the Working Group stated:

'Most of these provisions are, especially inasmuch as the intentional element of the crime is concerned, drafted in such general and vague terms that they can be used arbitrarily to restrict the freedoms of opinion, expression, assembly and association.

'...these provisions...carry grave risks of arbitrary detentions, as long as they have not been abrogated or their content amended to make them compatible with international standards guaranteeing the freedoms of expression and opinion.

39. In its presentation to the HRC Working Group for the first cycle review, Indonesia referred to its efforts to finalise the long-standing review of its Criminal Code to produce a new 'more human' Code which guarantees the rights of the citizens. In its recommendations, the Working Groups encouraged the Indonesian Government to 'finalise the draft code, taking into account comments received from relevant stakeholders' (Recommendation 6). This process has been underway for many years and the new Code has gone through at least four drafts and it is still under review. Little progress seems to have been made since the 2008 UPR.

Recommendation

40. Indonesia should expedite the revision of its Criminal Code in consultation with relevant stakeholders and review and amend or repeal provisions that restrict the right to freedom of expression, including Article 106.

Release of prisoners

41. TAPOL and BUK understand the sensitive political nature of some of the activities that give rise to charges under Article 106, but firmly believe that political problems require political solutions and that any response that involves violence or the punishment of free expression only exacerbates the problems and increases resentment against, and distrust of, the state

¹² See UN Doc. E/CN.4/2000/4/add.2. Also Annex B to this submission.

authorities. Peaceful political gatherings and actions such as flag-raising are not a threat to the security of the state or public order and so do not justify any restriction on the right to freedom of expression.

42. One of the longest serving prisoners is Filep Karma who was convicted of *makar* under Article 106 and other offences under Articles 110, 154 and 155 of the Criminal Code in May 2005 for raising the Morning Star flag at a political rally in December 2004. In a decision adopted in September 2011, the UN Working Group on Arbitrary Detentions ruled that the detention of Mr Karma was in violation of international human rights standards including Article 19 of the Universal Declaration on Human Rights and Article 19 of the ICCPR. It requested the Government of Indonesia to immediately release Mr Karma and provide him with adequate reparations. The UN Working Group further reminded Indonesia of its duties 'to comply with international human rights obligations not to detain arbitrarily, to release persons who are arbitrarily detained and to provide compensation to them'.¹³

Recommendation

43. As a trust-building measure with the Papuan people and in response to the 2011 request of the UN Working Group on Arbitrary Detentions, the Indonesian Government should order the unconditional release of all those in detention for non-violent political activities as part of a comprehensive policy to end of the punishment of free expression; it should also ensure that victims of arbitrary detention and torture and ill-treatment in detention, and their families, receive adequate reparations and assistance to access services needed for recovery and rehabilitation.

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¹³ UN Working Group on Arbitrary Detentions Opinion No 48/2011 (Indonesia) available at <http://tinyurl.com/7f27ewj>

Annex A

Indonesia's international and national obligations to uphold freedom of expression

Indonesia's obligation to comply with international standards on freedom of expression arises from its accession in 2006 to the International Covenant on Civil and Political Rights, Article 19 of which concerns freedom of expression. The obligation is incorporated into Indonesian law by Article 67 of Law 39 of 1999 on Human Rights:

'Everyone within the territory of the Republic of Indonesia is required to comply with Indonesian legislation and Indonesian Law, including unwritten law and international law concerning human rights ratified by Indonesia.'

Freedom of expression is furthermore guaranteed by Article 28(E)(3) of the Indonesian Constitution:

'Every person shall have the right to the freedom to associate, to assemble and to express opinions.'

And by Articles 23 and 25 of Law 39 of 1999 on Human Rights:

Article 23

(1) Everyone has the freedom to choose and hold his political beliefs.

(2) Everyone has the freedom to hold, impart and widely disseminate his beliefs, orally or in writing through printed or electronic media, taking into consideration religious values, morals, law and order, the public interest and national unity.

Article 25

Every citizen has the right to express his opinion in public, and this includes the right to strike, according to prevailing law.

Annex B

International concerns

The need to address the practice of charging Papuan activists with the offence of *makar* has long been recognised by a range of international stakeholders.

UN Working Group on Arbitrary Detentions: At the very beginning of the *reformasi* period in Indonesia, the UN Working Group on Arbitrary Detentions, following its visit to Indonesia in January/February 1999, noted that a number of activists arrested in Wamena and Biak in July 1998 and charged with *makar* under Article 106 were being subjected to arbitrary detention because their detention related to their peaceful exercise of their right to freedom of opinion and other fundamental rights.¹⁴

UN Special Representative on Human Rights Defenders: Following her visit to Indonesia in June 2007, the Special Representative, Hina Jilani, noted that activists engaged in defending the rights of indigenous peoples in West Papua were at particular risk. She expressed concern about cases where indigenous people had been arrested in relation to flag-raising.¹⁵

Amnesty International and LBH Masyarakat: In 2009, in an open letter to the DPR on the reviewing and passing of a new Indonesian Criminal Code, Amnesty International and LBH Masyarakat expressed concerns that the Criminal Code still contained provisions which violated the right to freedom of expression and recommend provisions such as Article 106 should be reviewed, amended and in some cases repealed to ensure that the new Criminal Code conformed with international standards on freedom of expression.¹⁶

Amnesty International has consistently called for an end to the punishment of free expression. In a statement issued on 14 June 2011, 'Indonesia must end criminalization of peaceful political protests in Papua', referring to seven persons arrested Manokwari, it said: 'Their case highlights the continued failure of the Indonesian government to distinguish between armed groups and peaceful political activists.'¹⁷

Human Rights Watch: A Human Rights Watch report, 'Prosecuting Political Aspiration: Indonesia's Political Prisoners', published in June 2010, profiled 10 prominent and Papuan and Moluccan activists imprisoned for expressing their political views. They were among a total of at least 100 Papuans and Moluccans in prison for peaceful political expression. The report called for the unconditional release of the prisoners and urged the Government of Indonesia to 'amend or repeal all articles of the Indonesian Criminal Code that have been used to imprison individuals for their legitimate peaceful activities, including articles 106 and 110...to bring Indonesian criminal law into conformity with international standards'.¹⁸

NGO Coalition: In a joint letter to President Yudhoyono in August 2010, a number of NGOs, including Human Rights Watch and KontraS Jakarta, while recognising the democratic progress made in Indonesia, expressed deep concern 'that dozens of Papuans are incarcerated in prisons in Papua and West Papua simply for having been involved in non-violent demonstrations or expressions of opinion'. They pointed out that there was no evidence that the prisoners' actions represented a threat of imminent violence that would have justified any restriction on their right to freedom of expression. They called for the

¹⁴ See UN Doc. E/CN.4/2000/4/add.2.

¹⁵ See UN Doc. A/HRC/7/3/Add.7.

¹⁶ Available at <http://www.amnesty.org/en/library/info/ASA21/022/2009/en>.

¹⁷ Statement available at <http://www.amnesty.org/en/library/info/ASA21/012/2011/en>.

¹⁸ Report available at http://www.hrw.org/sites/default/files/reports/indonesia0610webwcover_0.pdf.

repeal of Article 106 and the related Article 110 concerning conspiracy and for the release of all political prisoners.¹⁹

¹⁹ Available at <http://tapol.gn.apc.org/letters/16Aug2010lettertoSBY.pdf>