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Indonesia

Comments on the draft revised Criminal Procedure Code

1. Introduction

The right to a fair trial is a fundamental safeguard to ensure that individuals are not unjustly punished. It is also crucial to the protection of other human rights, such as the right to freedom from torture and other cruel, inhuman or degrading treatment or punishment (ill-treatment); the right to freedom from arbitrary detention; the right to freedom of expression and association; and, in the case of states like Indonesia which retain the death penalty, the right to life.

Indonesia's existing Code of Criminal Procedure (Kitab Undang-Undang Hukum Acara Pidana, KUHAP) determines the procedures and rights of individuals at the different stages of investigation and trial. While the existing KUHAP provides many safeguards for the protection of the rights of suspects and defendants, there are a number of areas where it does not meet international standards for fair trials. Further, those safeguards which the existing KUHAP does contain are often in practice ignored, with adherence to the KUHAP undermined by the absence of any penalty for failing to comply, including the absence of a clear prohibition on the admissibility of evidence obtained illegally.

The Indonesian government itself has recognised the need to reform the existing KUHAP to provide, among other things, greater legal protection to suspects, defendants, witnesses and victims. Under the auspices of the Director General for Legislation at the Ministry of Law and Human Rights a draft revised KUHAP has been prepared and is currently being discussed at a series of information sessions for members of the legal profession and other interested groups, before a final version is introduced into the national parliament for debate. Amnesty International acknowledges and welcomes the commitment of the Indonesian government to review and reform existing legislation with a view to strengthening human rights protection and the rule of law. There are notable improvements in the draft revised KUHAP.

However, the organization is concerned that in certain respects the draft revised KUHAP remains inconsistent with international fair trial standards and leaves suspects and defendants, particularly those in detention, vulnerable to human rights violations.

Amnesty International's main concerns are set out in the comments below. The comments are based on a draft of the revised KUHAP obtained on 15 September 2005 from the Ministry of Justice and Law website¹, which is the most recent draft Amnesty International has had access to. As the draft remains a work in progress, it may be that more recent versions have been, or are being prepared which address some of the concerns raised.

2. International Law Standards

These comments are based on the following human rights treaties:

¹ <http://www.depukumham.go.id/unit/pp/arsip/ranc/ruu/ruu-hapdn.htm>

- International Covenant on Civil and Political Rights (ICCPR)²;
- UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UN Convention Against Torture)³;
- Vienna Convention on Consular Relations⁴;

In addition, jurisprudence is cited from the Human Rights Committee (HRC), UN Special Rapporteur on Torture; UN Commission on Human Rights; and the Working Group on Arbitrary Detention.

According to section 7(2) of Indonesia's Law No.39/1999 on Human Rights, provisions of international treaties which concern human rights and which have been ratified by Indonesia form part of domestic law. Indonesia has ratified the ICCPR, the UN Convention Against Torture and the Vienna Convention on Consular Relations.

In addition to the international treaties listed, these comments also refer to a number of non-treaty standards which, although not legally binding, represent the consensus of the international community on standards to which states should aspire. The non-treaty standards referred to are:

- Universal Declaration of Human Rights (UDHR);
- UN Basic Principles on the Role of Lawyers;
- Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Body of Principles);
- UN Code of Conduct for Law Enforcement Officials;
- Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty (Death Penalty Safeguards);
- UN Standard Minimum Rules for the Treatment of Prisoners (Standard Minimum Rules).

3. Amnesty International's main fair trial concerns:

3.1 Right to be informed immediately of the reasons for arrest and detention and the right to notification of rights

According to international standards, anyone who is arrested or detained has the right to be informed, in a language which he or she understands, of the following:

- He or she must be informed immediately of the reasons why he or she is being deprived of his or her liberty.⁵
- He or she must be informed promptly of any charges against him or her.⁶

² On 30 September 2005, the Indonesian Parliament took necessary steps to authorize ratification. On 23 February 2006, the instrument of accession was deposited at the United Nations. The Covenant enters into force three months after the date of the deposit of the instrument of accession (Article 49(2) of ICCPR).

³ Ratified by Indonesia on 28 October 1998.

⁴ Ratified by Indonesia on 4 June 1982.

⁵ ICCPR, Art. 9(2) and Art. 14(3)(a); Body of Principles, Principle 10 and 11(2).

⁶ ICCPR, Art. 9(2); Body of Principles, Principle 10 and 11(2).

- He or she must be informed of his or her rights and be given an explanation of how he or she can exercise those rights.⁷

These requirements are designed to ensure that people arrested or detained have access to the necessary information to challenge the lawfulness of their detention and to avail themselves of their rights under the law. It also permits anyone facing trial on criminal charges, whether or not in custody, to begin the preparation of their defence.

The first two of these requirements are largely provided for under the draft revised KUHAP⁸, however, the third is not specifically provided for. Although Chapter 4 of the draft revised KUHAP sets out the rights of suspects and accused – with one exception⁹, there is no provision which specifically requires the authorities to inform a suspect or defendant of those rights in a timely way. In order to exercise his or her rights a suspect or defendant must know that they exist.

Recommendations:

At the time of arrest or detention, or as soon as possible thereafter, and before any interrogation, a suspect or defendant should be informed in simple non-technical language of their rights, including the right to access a lawyer and have a lawyer present at all stages of the investigation, the right to an interpreter, the right to access family members, the right to medical assistance and the right to remain silent.

3.2 Right to challenge the legality of detention and to be brought promptly before a judge or other judicial officer

The ICCPR provides that:

- anyone deprived of his or her liberty “shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”¹⁰
- anyone arrested or detained on a criminal charge “shall be brought promptly before a judge or other officer authorized by law to exercise judicial power.”¹¹ The Human Rights Committee has stated that the time taken for this to occur should not exceed a few days.¹²

Under the draft revised KUHAP, only the first of these two rights is provided for. There is no *requirement* that a person who is arrested or detained be brought promptly before a judge or other judicial officer. The purpose of prompt judicial review is to eliminate the risk of individuals being detained illegally and to reduce the risk of other human rights violations,

⁷ Body of Principles, Principle 13 and 14.

⁸ For example Sec.17(1)-(3)), Sec.20(2) and (3), Sec.49, Sec.135(2)-(4) and 136(3)).

⁹ Section 106 provides that where a suspect is alleged to have committed a criminal offence, before any interrogation begins, the investigator must inform the suspect of his or her right to be assisted by a lawyer.

¹⁰ ICCPR, Art. 9(4).

¹¹ ICCPR, Art. 9(3).

¹² Human Rights Committee, General Comment 8, Article 9 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.1 at 8 (1994), para. 2.

such as torture or ill-treatment and “disappearances”. Prompt judicial review also allows a judicial officer to ensure that detainees are aware of and can exercise their rights.

The draft revised KUHAP introduces the new post of Judicial Commissioner, to be appointed from ranks of the District Court Judges specifically to deal with pre-trial issues including challenges to the legality of arrest, detention and investigation. This is potentially a positive development and it is particularly noteworthy that Judicial Commissioners are to be based at or near detention centres to facilitate easier access to detainees. Under the draft revised KUHAP suspects who are arrested and detained have the right to challenge the legality and necessity of their detention before a Judicial Commissioner (sec. 72). The Judicial Commissioner is also authorised to review the legality and necessity of a suspect’s detention at his or her own initiative upon receipt of the warrant authorising arrest or detention (sec. 72).

However, these provisions do not satisfy the requirement that anyone arrested or detained on a criminal charge be brought promptly before a judge or judicial officer. The procedure for requesting a hearing before a Judicial Commissioner is dependent on detainees being aware of, and in a position to, exercise their right to challenge the legality of their detention. The draft revised KUHAP does not provide that the authorities must, by law, bring all persons arrested or detained before a judge without delay. In the absence of such a *requirement*, a person may be detained for significant periods of time without being afforded a review of the legality of their detention.

In fact, under the draft revised KUHAP there is a potential risk of considerable delay before a person in detention is brought before a judge or other judicial authority. The draft revised KUHAP makes provisions as to the maximum times for which a person may be detained as follows:

- A suspect may be arrested and held for 1 day (sec. 18(1)). An investigator, usually a police officer, may detain a person for 30 days, with an extension granted by Chief Attorney General for a further 30 days (sec. 22(1) & (2)). This is a total of 61 days. This is not significantly different to the existing KUHAP, under which the initial detention order was for 20 days and could be extended by a prosecutor for 40 days.
- A prosecutor may detain a person for 30 days with an extension granted by the head of the district court for a further 30 days (sec.23(1)&(2)). This is a total of 60 days. This is longer than under the existing KUHAP, which allowed the prosecutor to make an initial detention order for 20 days which could then be extended by a judge for 30 days.
- A district court judge trying the case may detain a person for 30 days, with an extension granted by the head of the district court for a further 30 days (sec.24(1)&(2)). This is a total of 60 days. This is shorter than under the existing KUHAP where the initial 30 day order could be extended for 60 days.

There is nothing in the draft revised KUHAP to suggest that investigators, prosecutors and judges are obliged to hear a suspect or defendant or his or her legal representative before deciding whether or not to order his or her detention or to extend the detention. It appears that decisions can be made on the basis of the information in the file. If a suspect or defendant wishes to be heard, then he or she must take steps to challenge the detention either with the investigator or his or her superior (sec 115) or before the Judicial Commissioner.

When the UN Working Group on Arbitrary Detention considered the time frames for detention in the existing KUHAP, which as noted above are similar to, and in some cases shorter than, those in the draft revised KUHAP, they commented that “*the length of*

permissible delay before presenting the accused before a prosecutor or judge represents a violation of the rights enshrined in article 9, paragraph 3, of the International Covenant on Civil and Political Rights.” They recommended that the relevant provisions be modified accordingly. Specifically, they recommended that “there should be a legal obligation to present the detained person before a judge or any other authority authorised by law to exercise such functions, promptly and in person.”¹³

Recommendation:

The revised KUHAP should require that any person arrested and detained on a criminal charge be brought in person before a judge or other judicial authority promptly. This role could be fulfilled by the Judicial Commissioner. The Judicial Commissioner should, in a timely fashion, review the legality of the arrest, the legality and necessity of further detention and whether the suspect has been advised of his or her rights and is able to exercise those rights. The Judicial Commissioner should also be authorised to enquire into all aspects of the treatment of the suspect.

3.3 Right to medical care

According to international standards, all detainees have a right to medical examination and appropriate medical care.¹⁴ The right to medical assistance is provided for in the draft revised KUHAP, but, as in the existing KUHAP, it is limited to the right to contact and be visited by a detainee’s own doctor (sec.55). The authorities are not obliged to inform the detainee of this right. In addition, contrary to international standards, there is:

- No rule which obliges the authorities to provide medical assistance where it is required.¹⁵
- No rules which oblige the authorities to offer a medical examination as promptly as possible after admission to a place of detention.¹⁶
- No right of access to dental treatment and psychiatric services for diagnosis or, in appropriate cases, treatment.¹⁷
- No requirement that detainees or prisoners needing special treatment be transferred to specialised institutions or civil hospitals for that treatment.¹⁸
- No requirement that necessary medical care and treatment be provided free of charge.¹⁹
- No right for detainees to request a second medical opinion, or to have access to their medical records.²⁰

Even if the provision of medical treatment to detainees is or could be dealt with in regulations concerning the administration of detention centres, these rights should also be clearly included in the draft revised KUHAP because they are integral to the right to a fair trial.

¹³ Report of the Working Group on Arbitrary Detention on its visit to Indonesia (31 January - 12 February 1999), UN Doc. E/CN.4/2000/4/Add.2, para. 99.

¹⁴ Body of Principles, Principle 24 and Standard Minimum Rules, Rule 24.

¹⁵ This is contrary to Code of Conduct for Law Enforcement Officials, Art.6.

¹⁶ This is contrary to Body of Principles, Principle 24.

¹⁷ This is contrary to Standard Minimum Rules, Rules 22(3) and 22(1).

¹⁸ This is contrary to Standard Minimum Rules, Rule 22(2).

¹⁹ This is contrary to Body of Principles, Principle 24.

²⁰ This is contrary to Body of Principles, Principles 25 and 26.

Recommendation:

The revised KUHAP should positively prescribe, in a way which is consistent with international standards, the duty of the authorities to offer and provide medical care and treatment whenever necessary, and for this care and treatment to be free of charge.

3.4 Right to legal counsel

3.4.1 Right to be assisted by counsel

According to international standards everyone detained or accused of a criminal offence has the right to counsel during detention, at trial and on appeal.²¹ Principle 1 of the UN Basic Principles on the Role of Lawyers²² provides that:

“All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings.”

The right to be assisted by counsel and to contact counsel is guaranteed in the draft revised KUHAP by sec. 52 and 54(1). If a suspect has been arrested or detained, legal counsel has the right to be present and to speak with their client, from the moment of arrest or detention and at all stages of the proceedings (sec.64 & 65(1)).

However, under the draft revised KUHAP the right of legal counsel to contact and talk to a suspect or defendant is limited to working days (sec.65(1)). It is not clear whether the ability of suspects or defendants to initiate contact with their legal counsel is limited in the same way. Amnesty International is concerned that, as a result of this restriction, people who are arrested or detained on weekends or a public holiday, may not be able to make prompt contact with their lawyer. This would be of particular concern if a suspect, because of the timing of his or her arrest, was subject to interrogation before they were able to avail themselves of the right to be assisted by counsel.

Another shortcoming with the provisions of the draft revised KUHAP is that the role of counsel during the interrogation of their client by an investigator is limited. Counsel has no right to intervene: they may only watch and listen (sec.107).²³ Amnesty International is concerned that this restriction limits the right of suspects to be assisted by counsel during interrogations, as well as limiting the ability of lawyers to intervene if the interrogation turns coercive.

Amnesty International is also concerned that under the draft revised KUHAP a trial may proceed without defence counsel in certain circumstances. According to section 193, if during the course of the trial defence counsel is prevented from attending, the head of the court must appoint a replacement. If there is no replacement or the replacement is also prevented from attending, then the trial may continue regardless. This would result in a defendant effectively being denied his or her right to be assisted by counsel.

²¹ ICCPR, Article 14(3), Basic Principles on the Role of Lawyers, Principle 1 and Body of Principles, Principle 17(1).

²² Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

²³ Positively, the draft KUHAP has removed the restriction that legal advisors may only watch but not listen to the examination of their client in the case of crimes against the security of the state.

Recommendations:

The revised KUHAP should provide that any person who is arrested should have immediate access to legal counsel and that counsel should be present during all interrogations.

The revised KUHAP should not restrict the role of legal counsel in interrogations in a way which limits the right of a suspect to be assisted by counsel. In particular there should be no limitation on the ability of legal counsel to intervene if an interrogation becomes coercive.

The revised KUHAP should provide that, where defence counsel is prevented from attending the trial, the trial should not proceed until counsel is able to attend or the defendant is able to find an alternative counsel or an experienced, competent and effective counsel is appointed.

3.4.2 Right to have defence counsel assigned, right to free legal assistance

International standards state that if a person is arrested or charged with a criminal offence and does not have legal counsel of their own choice; they are entitled to have a lawyer assigned by a judge or judicial authority, whenever the interests of justice require it. If the person cannot afford to pay, assigned counsel must be provided free of charge.²⁴ Whether the interests of justice require it depends primarily on the seriousness of the offence, the severity of the potential sentence and the complexity of the issues involved in the case.

Under the draft revised KUHAP, in cases where an individual is suspected of or charged with a crime which carries the death penalty or a term of imprisonment of 15 years or more, the authorities are obliged to appoint legal counsel, free of charge, if the suspect or defendant does not have his or her own counsel (sec.53(1)). Likewise, if a suspect or defendant is suspected of or charged with a crime which carries a prison term of five years or more and is unable to afford legal representation, the authorities are obliged to appoint legal counsel (sec.53(1)). Every lawyer appointed in this way must provide his or her assistance free of charge (sec.53(2)).

These provisions do not adequately guarantee the fair trial of the defendant as required by international standards. Under the provisions of the draft revised KUHAP the question of when a suspect or accused has the right to have a lawyer assigned and when a suspect or accused has the right to have a lawyer assigned free of charge are conflated. In addition, the test for when a suspect or accused has the right to have a lawyer assigned is too rigid, and leaves open the possibility of a suspect or accused being left to defend him or herself on serious charges without legal counsel. Amnesty International believes that no one should be left to defend him or herself on a charge which carries a prison sentence.

An example of the deficiency in the current provisions of the draft revised KUHAP is that a person may find him or herself unable to find and/or unable to afford legal representation but with no right to have legal counsel appointed because they are suspected of or charged with a crime which carries a prison term of less than five years. In addition such a person may be held in pre-trial detention.²⁵ A person in detention has already been denied his

²⁴ ICCPR, Article 14(3)(d).

²⁵ Under the draft revised KUHAP a suspect may be held in pre-trial detention if he or she is suspected of committing an offence which carries a prison sentence of five years or more, or is suspected of committing any of thirteen other offences in the Criminal Code which carry lesser maximum sentences,

or her liberty and as a result is at increased risk of human rights violations. A person in detention also faces a great disadvantage if he or she must prepare his or her own defence. Therefore, Amnesty International believes that the interests of justice require that the authorities must appoint legal counsel to assist any person in detention that is suspected of or charged with a criminal offence.

Recommendations:

The revised KUHAP should provide that the state must appoint a lawyer for any person who is suspected of or charged with a criminal offence which carries a prison term, if he or she does not have a lawyer and has not chosen to represent him or herself.

The revised KUHAP should provide that lawyers appointed by the state shall be free of charge in circumstances where the suspect or the defendant does not have the means to pay.

3.4.3 Right to experienced, competent and effective counsel

According to international standards, when a defendant is represented by assigned legal counsel, the authorities must ensure that the lawyer assigned has experience and competence commensurate with the nature of the offence with which the defendant is charged.²⁶ There is no requirement in the draft revised KUHAP that the counsel appointed be experienced in this way. This is of particular concern in cases where a suspect or defendant is alleged to have committed an offence which carries the death penalty.

Recommendation:

The revised KUHAP should explicitly provide that the authorities are obliged to appoint legal counsel with competence and experience commensurate with the nature of the offence with which their client is accused. Further, in cases where an offence is punishable by death, the revised KUHAP should explicitly state that the case cannot proceed if the accused is not represented by competent and independent counsel, unless the accused has made an informed decision to represent him or herself.

3.5 Right not to be compelled to testify or confess guilt and prohibitions on torture and other ill-treatment

3.5.1 Right to silence

In accordance with the presumption of innocence and the right not to be compelled to testify against oneself or to confess guilt, those charged with a criminal offence have the right to remain silent during police questioning and at trial.²⁷

Although there are a number of provisions which deal with this right (listed in paragraph (b) below), the revised KUHAP stops short in one respect. The defendant does not have the formal right to remain silent and to refuse to answer questions. More importantly, there is no duty on investigators, prosecutors or judges to inform a suspect or defendant that he or she has the right to remain silent without that silence being used as a consideration in the determination of guilt or innocence.

or is suspected of committing an offence under another law which so provides for pre-trial detention. (sec. 20)

²⁶ Basic Principles on the Role of Lawyers, Principle 6

²⁷ ICCPR, Art. 14(3)(g).

On the contrary, the revised KUHAP seems to presume an obligation to reply to questioning. For example, if a defendant in court does not answer or refuses to answer a question, the head of the court must advise him to answer (sec.168). The examination then continues. Practice under the existing KUHAP has also shown that a defendant's decision to remain silent may be treated as an aggravating circumstance in the verdict or penalty.

Recommendation:

The draft revised KUHAP should explicitly provide that every suspect and defendant has the right not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence. The draft revised KUHAP should also provide that the authorities are obliged to ensure that suspects are aware of and understand this right.

3.5.2 Prohibitions on torture and other ill-treatment

International law prohibits torture and other ill-treatment in all circumstances.²⁸ As noted above, international standards also require that no one who is charged with a criminal offence may be compelled to confess guilt or testify against themselves.²⁹ On the face of it, the draft revised KUHAP appears to reasonably guarantee this right. During questioning at the investigation and trial stage, suspects and defendants have the right to provide information freely to the investigator or judge (sec.50). Any information given by a suspect or witness to an investigator must be provided without any pressure by anyone in any form (sec.109(1)). A suspect or defendant must not be burdened with the duty of providing evidence (sec.61). During trial, judges are required to ensure that no action is taken and no questions are asked that result in the defendant or a witness being unable to answer freely: failure to do so results in the annulment of the judge's verdict (sec.146(3) and (5)). Questions in the nature of a trap also may not be asked (sec.159).

However, these provisions in the draft revised KUHAP do not extend far enough to combat and prevent the use of torture and other ill-treatment in all circumstances. Firstly, the draft revised KUHAP is silent on the use that may be made in court of information obtained as a result of torture and/or ill-treatment. Contrary to international standards,³⁰ there is no clear provision, which excludes the use of evidence or testimony in court which has been obtained as a result of torture. It is left to the discretion of the judge as to whether or not evidence allegedly obtained under torture is admitted, and if it is admitted, what weight to give to it.³¹ The judge does not have the authority to order an investigation by an impartial authority into an allegation that evidence or testimony was obtained under torture or ill-treatment.

Secondly, the new office of Judicial Commissioner, established, amongst other things, to hear pre-trial challenges to the legality of arrest, detention and investigation does not have explicit authority to inquire into the conditions of detention and the treatment of suspects in

²⁸ ICCPR, Arts. 7 and 4, UN Convention against Torture Art. 2(2).

²⁹ ICCPR, Art. 14(3)(g). This right is applicable both at the pre-trial and trial stages. The HRC has stated that coercion to provide information, coercion of confessions, and extraction of confessions by torture and/or ill-treatment are all prohibited.

³⁰ UN Convention against Torture, Art. 15.

³¹ Under the draft revised KUHAP, a criminal charge is proven when the judge is convinced, based on at least two pieces of evidence, that the criminal act has really been committed and that it is the defendant who is guilty of perpetrating it (sec.178).

detention. The pre-trial procedure under the existing KUHAP was limited in the same way. This was regarded as one of its weaknesses and one reason that it was not often utilised.

The Judicial Commissioner should be able to hear any statement from a suspect or accused about his or her treatment in custody. The Judicial Commissioner should ensure that detainees are able to address him or her in an atmosphere free from intimidation. If there is any sign of torture or ill-treatment, the Judicial Commissioner should be required to inquire into it without delay, even if the prisoner has not volunteered any statement. If the inquiry, or the detainee's own statement, gives reason to believe that torture or ill-treatment has been committed, the Judicial Commissioner should initiate an effective investigation and take effective steps to protect the detainee against any further ill-treatment, and, if the detention is unlawful or unnecessary, order the prisoner's immediate release under safe conditions.

Recommendations:

The revised KUHAP should be amended to explicitly prohibit the use of torture or other cruel, inhuman or degrading treatment against suspects or defendants.

The revised KUHAP should explicitly prohibit the admissibility in courts and any other proceedings of any evidence elicited as a result of torture or ill-treatment, except in proceedings brought against the alleged perpetrator as evidence of the torture or ill-treatment.

The Judicial Commissioner should have the obligation to inquire into the treatment of detainees in detention. If the inquiry, or the detainee's own statement, gives reason to believe that torture or ill-treatment has been committed, the Judicial Commissioner should be required to initiate an effective investigation and take effective steps to protect the detainee against any further ill-treatment, and, if the detention is unlawful or unnecessary, order the prisoner's immediate release under safe conditions.

Clear procedures should be put in place for those alleging torture or ill-treatment to make their claims and for their complaints to be investigated promptly and impartially, in a separate hearing, before evidence is admitted at trial.

3.6 Presumption of innocence

A fundamental principle of the right to fair trial is the right of every person suspected of or charged with a criminal offence to be presumed innocent until and unless proved guilty according to law after a fair trial.³² The presumption applies to suspects before criminal charges are filed, and carries through until a conviction is confirmed following a final appeal. The presumption of innocence encompasses the requirement that the prosecution must prove the guilt of an accused beyond reasonable doubt.

The right to the presumption of innocence is only indirectly provided for in the draft revised KUHAP which provides that a suspect or defendant must not be burdened with the duty of providing evidence (sec.61) – in other words, the burden of proof is on the prosecution. In relation to what must be established to meet this burden of proof, the draft revised KUHAP provides that a judge must not convict a defendant unless the judge has reached a state of certainty based on at least two valid pieces of evidence, that a crime

³² UDHR, Article 11, ICCPR, Article 14(2) and Body of Principles, Principle 36(1).

actually occurred and the defendant was responsible for committing that crime (sec.178). Section 186(1) provides that a defendant will be convicted if the judge believes that in the proceedings before the court the criminal offence as charged has been validly and certainly proven. If the panel of judges is unable to reach a majority decision, then the decision will be that of the judge whose decision is most favourable to the defendant (sec.177).³³

While these provisions capture important elements of the right to the presumption of innocence, nonetheless, the draft revised KUHAP fails to explicitly acknowledge and safeguard that right. The presumption of innocence is widely recognised in the Indonesian legal system (see for example sec.18(1) of Law No.39/1999) and this should be reflected more clearly in the draft revised KUHAP.

Integral to the presumption of innocence is that a detainee, a suspect or an accused must be treated in accordance with this right at all stages of the proceedings prior to final confirmation of the verdict. Judges, prosecutors, police and all other public authorities must refrain from making statements about the guilt or innocence of an accused before the outcome of the trial.³⁴ Most of these requirements are not provided for specifically in the draft revised KUHAP. Although, it does forbid a judge from exhibiting a demeanour or making a statement in court which indicates a certainty about the defendant's guilt or innocence (sec.151). It also requires that if a defendant is in pre-trial detention he or she must be brought before the court in a free state, by which it is understood to mean without the trappings of detention, such as a detention centre uniform or physical restraints (sec.147(2)).

Recommendations:

The revised KUHAP should specifically provide that every person suspected of or charged with a criminal offence must be presumed innocent until and unless proved guilty according to law after a fair trial.

The revised KUHAP should specifically provide that, by reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of the doubt. No guilt can be presumed until the charge has been proven beyond reasonable doubt.

The revised KUHAP should expressly prohibit judges, prosecutors, police or other public authorities from making statements about the guilt or innocence of a suspect or defendant before a trial has concluded.

3.7 Right to call and examine witnesses

According to international standards, all people charged with a criminal offence have the right to call witnesses on their behalf, and to examine, or have examined, witnesses against them³⁵. This right is largely provided for under the draft revised KUHAP³⁶; however, there is one broad exception. Under section 155, if a witness who has already given a statement during the

³³ The way the decision is reached, whether by unanimity, by majority decision or by decision that is most favourable to the defendant, is not made public: sec.177(2).

³⁴ Human Rights Committee, General Comment 13, Article 14 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.1 at 14 (1994), para.7.

³⁵ ICCPR, Art.14(3).

³⁶ See for example Sec.152 – 160.

investigation does not appear in court because: they have died; there is some other valid impediment to their appearance; they live far away; or something connected to the interests of the state prevent them from appearing, then their evidence may be read at the hearing. If the statement made during the investigation was given under oath, it will be treated as though it was given in evidence during the trial.

The right to examine or have examined witnesses against the accused means that all of the evidence must normally be produced in the presence of the accused at a public hearing, so the evidence itself and the reliability and credibility of the witness can be challenged. Exceptions to this principle should be narrow and should not infringe the rights of the defence. For example, the transfer of police or military personnel to another district or province, should not be used by the state to justify their non-appearance at court hearings. If their evidence is to be relied upon by the prosecution, the state should ensure that they appear in person at the trial so that they may be subject to cross-examination by the accused.

Section 155 as it is currently worded is very wide and does not place sufficient obligation on the state to secure the attendance of witnesses.

Recommendation:

The revised KUHAP should provide that when a witness is unable to, or does not, attend a trial in person to give evidence, any statement given by him or her during the course of the investigation may only be read at trial and relied upon as evidence if the defendant consents or if the reading of the statement does not infringe the rights of the defence and all available steps have first been taken by the authorities to locate the witness and secure his or her attendance at the trial.

3.8 Right to an interpreter and to translation

According to international standards, everyone charged with a criminal offence has the right to the assistance of a competent interpreter, free of charge, if they do not understand or speak the language used in court.³⁷ The right to be assisted by an interpreter during interrogation and at trial is provided for in the draft revised KUHAP (sec.51 and 170), although the service is not explicitly guaranteed to be free. There is also no requirement that the interpreter be competent, although the interpreter must swear to accurately interpret all that has to be interpreted (sec.170(1)).

There is no right under the draft revised KUHAP to have documents translated although suspects must be informed of the allegations against them in a language they understand and defendants must be informed of whatever it is they are indicted for (sec.49).

Further, there is no right of the suspect or defendant and his or her counsel to have an interpreter's assistance to aid in preparation of the defence.

Recommendation:

The draft revised KUHAP should explicitly provide that every suspect and defendant has a right to have, free of any cost, the assistance of a competent interpreter and such translations of documents as are necessary to meet the requirements of fairness if the

³⁷ ICCPR, Art.14(3)(f).

interrogation, court proceedings or any documents presented to the court are not in a language which he or she fully understands and speaks.

3.9 Right to be segregated from people who have been convicted and sentenced

Under international standards, except in exceptional circumstances, detained suspects should be separated from convicted prisoners and not be submitted to the same regime.³⁸

This right is not directly stipulated in the draft revised KUHAP. Under the draft revised KUHAP, suspects held in detention prior to and during trial must be detained in state detention centres (rumah tahan negara) (sec.21), as distinct from prisons (lembaga pemasyarakatan) where convicted prisoners are held. In practice, for logistical reasons, the same facility is sometimes designated both as a prison and as a detention centre. Although Amnesty International understands that at these joint facilities suspects are usually segregated from convicted persons. However, because there is no direct prohibition on holding suspects and convicted prisoners together, there is a risk that they may not be separated.

Recommendation:

The revised KUHAP should explicitly provide that suspects must be detained separately from convicted prisoners.

3.10 Women

There are no provisions of the draft revised KUHAP specifically designed to provide protection to women in custody and detention. Contrary to international standards,³⁹ there is no requirement that female staff must be present during the interrogation of female detainees or that only female staff be permitted to conduct physical searches of female suspects or defendants. Although in practice Amnesty International understands that male and female detainees are held separately, there is no formal requirement in the KUHAP that they be segregated in this way.

Recommendations:

The revised KUHAP should provide that female detainees are always held separately from male detainees.

The revised KUHAP should provide that female staff must be present throughout the interrogation of female detainees.

The revised KUHAP should provide that female staff should be solely responsible for conducting searches of female suspects and detainees.

³⁸ ICCPR, Art.10(2)(a).

³⁹ Human Rights Committee, General Comment 16, Article 17 (Thirty-second session, 1988), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.1 at 142 (1994), para.8.

3.11 Foreigners

Under the Vienna Convention on Consular Relations, to which Indonesia is a state party, if a foreign national is arrested or detained, they must be informed of their right to communicate with their embassy or consular post without delay.⁴⁰ If the detainee is a refugee or a stateless person, or a person under the protection of an intergovernmental organisation, he or she must be given the right to communicate with the appropriate international organisation.⁴¹

The draft revised KUHAP does not fully accord with these international standards. Under the draft revised KUHAP, while the case is being processed, a detained suspect or accused who is a citizen of a foreign country has the right to contact his or her consular representative in connection with the case (sec.54(2)). However, there is no provision as to when the suspect or defendant must be informed of his or her right to contact a consular official nor when communication may be initiated. In addition, if the suspect or defendant has no nationality, or their country has no representative in Indonesia, then he or she is given the right to contact legal counsel like other suspects and detainees (sec.54(3)) but is given no special right to contact the appropriate intergovernmental organisation, such as the United Nation High Commissioner for Refugees.

Recommendations:

The revised KUHAP should provide clearly that a foreign national who is arrested or detained must be informed, upon arrest, of his or her right to contact his or her consular representative and be afforded the opportunity to do so without delay.

The revised KUHAP should provide that a refugee or a stateless person, or a person under the protection of an intergovernmental organisation, who is arrested or detained must be informed, upon arrest of his or her right to communicate with the appropriate international organisation and be afforded the opportunity to do so without delay.

3.12 States of Emergency

Amnesty International believes that guarantees of fair trial are vital to the protection of human rights, particularly at times of emergency, and therefore should never be suspended. Rights such as the right to life and freedom from torture and ill-treatment, may never be suspended in any circumstances. Nor may the existence of a state of emergency be used as an excuse for any form of discrimination.⁴² The Human Rights Committee has expressed the view that “*the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency.*” This includes the right to habeas corpus.⁴³ This is a view supported by resolution 1994/32 of the UN Commission on Human Rights.⁴⁴

There must similarly be no derogation from the principle that only a court of law may try and convict a person for a criminal offence, and the presumption of innocence must be respected. If conditions preclude holding proper trials, this cannot be a pretext for holding summary or arbitrary proceedings. Where delays are unavoidable, suspects should, as a rule,

⁴⁰ Vienna Convention on Consular Relations, Art. 36.

⁴¹ Vienna Convention on Consular Relations, Art.36; Body of Principles, Principle 16(2).

⁴² ICCPR, Art. 4.

⁴³ Human Rights Committee, General Comment no. 29: States of emergency (article 4), UN Doc.

CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 16.

⁴⁴ UN Commission on Human Rights Resolution 1994/32, 4 March 1994, para. 16.

be released pending trial. In a state of emergency threatening the life of the nation certain rights may be suspended, but only “to the extent strictly required by the exigencies of the situation” and without discrimination.

In Indonesia, arrests, which normally can be carried out only by police under both the existing and draft revised KUHAP, may be carried out by the military during a military emergency under Law 23/1959 on States of Emergency. Under Law 23/1959 the military has the authority to detain suspects for up to 70 days. Law 23/1959 contains no provisions to safeguard the rights of detainees, except that arrests shall be carried out with a warrant (sec.32(4)). The safeguards contained in KUHAP are interpreted by the military not to apply because the arrest is not made pursuant to the provisions of KUHAP. This legal “loophole” leaves detainees arrested by the military in a very vulnerable position, without an enforceable right to access legal assistance; to inform their families of their whereabouts and be visited by them; and without any avenue for challenging the legality of their detention. The safeguards contained in KUHAP are rendered irrelevant at a time, and in circumstances, where suspects are at particular risk of human rights violations, thus frustrating the intent and purpose of the legislation.

Recommendation:

The revised KUHAP should explicitly state that the provisions which set out the rights of suspects and accused and the procedures designed to give effect to those rights, apply in all circumstances, including to people arrested and detained by the military, whether that be under Law 23/1959 or otherwise.

3.13 Enforcing the safeguards contained in the KUHAP

One of the weaknesses of the existing KUHAP that is of grave concern to Amnesty International is that the many fair trial safeguards which it does contain are often ignored in practice. Amnesty International has documented many cases, for example, where suspects have been arrested without warrants; where their families have not been advised of their arrest or detention; where suspects have been denied access to legal counsel and told that they do not require a lawyer or have been threatened if they asked to contact one; and where suspects have been forced to sign confessions under threat of force or subjected to torture or ill-treatment. All of these acts are in violation of the provisions of the existing KUHAP and yet they occur, often without any response from the authorities.

It is clear that in order for the revised KUHAP to provide effective protection to suspects and defendants, not only must the provisions of the Code accurately reflect international human rights standards, those provisions must also be adhered to and enforced.

As noted above, one method to guarantee greater compliance is for the draft revised KUHAP to provide that all people who are arrested and detained must be informed of their rights upon arrest or detention, and be brought promptly before the Judicial Commissioner. The Judicial Commissioner should have an active oversight role and to review the legality of arrest, the legality and necessity of further detention and whether the suspect has been advised of his or her rights and is able to exercise those rights.

However, there are some additional measures which would also ensure greater compliance with the KUHAP.

3.13.1 Admissibility of illegally obtained evidence

As noted in 3.5.2 there should be a clear provision which excludes the use of evidence or testimony in court which has been obtained as a result of torture or ill-treatment. There should also be a provision which excludes the admissibility of other evidence obtained illegally, in violation of the provision of the KUHAP. This might include a statement obtained from a suspect who did not have access to legal counsel and/or an interpreter and/or who was falsely informed by the investigator that he or she was required by law to make a statement. If evidence such as this, which is obtained in violation of legal safeguards, can be used freely in court to convict a person, then those safeguards have little meaning.

Recommendations:

The revised KUHAP should explicitly prohibit courts using evidence elicited as a result of torture or other cruel, inhuman or degrading treatment, in any proceedings except those brought against the alleged perpetrator of torture.

The revised KUHAP should prohibit the use of evidence otherwise obtained in violation of the provisions of the revised KUHAP if the violation casts substantial doubt on the reliability of the evidence; or if the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.⁴⁵

3.13.2 Training and disciplinary procedures

In part, this is a matter which can be addressed through training on international human rights standards and an increased understanding on the part of investigators, prosecutors, defence lawyers and judges about their duty to proactively implement those standards, as well as the provisions of the KUHAP. Training should emphasize that the KUHAP is not a statement of ideals but represents a binding procedure, and neither a lack of resources nor other circumstances can be used as a justification for failing to act in accordance with its provisions.

Improved implementation of the KUHAP is a matter which can also be addressed by ensuring that disciplinary, and where appropriate criminal proceedings, are instigated against officials who act in contravention of the KUHAP.

Recommendations:

Investigators, prosecutors and judges should be given training on international human rights standards and their duties and obligations according to both those standards and the KUHAP.

Disciplinary, and where appropriate criminal proceedings, should be instigated against officials who act in contravention of the KUHAP.

4. Amnesty International's Other Concerns:

One of the weaknesses of the existing KUHAP is that it contains very few provisions which address the need for the protection of witnesses and victims during the investigation of a criminal offence, and during and after trial. The absence of such protection has proven to be a

⁴⁵ This formulation of words is taken from Article 74 of the Rome Statute of the International Criminal Court.

substantial impediment to the effective investigation and prosecution of certain crimes, including those involving violence against women and human rights violations committed by state authorities.

Another weakness of the existing KUHAP is that it contains no specialised provisions designed to address the particular challenges of investigating gender-based crimes, including crimes involving sexual violence. Crimes involving sexual violence have proved difficult to prosecute successfully in the past because, among other things, they often occur in private where no witnesses are present and victims are often reluctant to report the crime or to testify in court for fear of reprisals and/or stigmatisation.

4.1 Provisions for the protection of victims and witnesses and for their participation in the proceeding

The draft revised KUHAP contains very few provisions which address the protection of witnesses and victims. Section 128 states that a complainant, anyone who reports a crime, any witness to a crime or victim of a crime must be given the protection of the law, both physical and non-physical. This protection extends to those involved in the prosecution process and trial and, if necessary, may be provided indefinitely. The cost of this protection is to be borne by the state (sec.129). The details of what such protection might entail or the principles which might guide it are not elucidated. The only provision of the draft revised KUHAP which contains a measure specifically directed towards witness protections is section 166 which, like section 173 of the existing code, allows for a witness to give evidence at the trial not in the presence of the accused.

Some specialist criminal legislation such as the Law regarding the Elimination of Violence in the Household (Law 23/2004) and the Law on Human Rights Courts (Law 26 /2000) contain provisions on witness protection, although in the case of the later they have proved ineffective in practice.⁴⁶

A general witness protection Act (Law 13/2006) has recently been passed by national parliament⁴⁷, and provides for protection of witnesses and victims at different stages of the judicial process. Although this new legislation marks a positive step towards better protection of witnesses and victims, it contains some shortcomings which limits its applicability for certain individuals and groups. In particular, by using the same definition of a 'witness' as in

⁴⁶ See for example *Indonesia & Timor-Leste, Justice for Timor-Leste: The Way Forward*, AI Index ASA 21/006/2004 and the Report to the Secretary-General of the Commission of Experts to Review the Prosecutions of Serious Violations of Human Rights in Timor-Leste (the then East Timor) in 1999, 26 May 2005 (UN Doc.S/2005/458. The Commission concluded that the existing protection regime for victims and witnesses in Indonesia was manifestly inadequate and recommended:

- i. Codification of a comprehensive range of protective measures in accordance with internationally accepted standards and include them in the Code of Criminal Procedure;
- ii. Establishment of an adequately staffed Victims and Witnesses Unit to provide support services such as counselling, information on the Indonesian judicial procedure, victims' rights and entitlements under Indonesian laws;
- iii. Ensuring that victims/witnesses are placed in a secured environment before and after testifying in court;
- iv. Providing training to investigators, prosecutors and judges on dealing with victims/witnesses;
- v. Installation of facilities in the court-rooms to comply with any legislation on protective measures.

⁴⁷ The new legislation was passed in July 2006.

the existing KUHAP⁴⁸, it excludes from protection individuals who can provide information on ‘non criminal’ cases (e.g. corruption cases) and ‘experts’, although both may be subject to various forms of threats⁴⁹.

Amnesty International believes that, notwithstanding recently passed Witness and Victims Protection Act, the draft revised KUHAP should incorporate provisions to ensure that appropriate measures are taken to protect the safety, physical and psychological well-being, dignity and privacy of all victims and witnesses before, during and after a trial.

Amnesty International further believes that the views and concerns of victims and witnesses should be presented and considered at appropriate stages of the proceedings, without prejudice to the rights of suspects and accused to a fair trial.

The draft revised KUHAP provides that a victim may petition the Judicial Commissioner to review a decision to cease a criminal investigation or prosecution (sec.72(2)). However, the draft revised KUHAP otherwise affords very little opportunity for the interests of the victims to be heard and protected during the investigation and trial process.

The Rome Statute of the International Criminal Court (Rome Statute) and the International Criminal Court Rules of Procedure and Evidence (ICC Rules of Procedure and Evidence) provide an excellent model for how to balance the protection of victims and witnesses and allow for their participation in the proceeding, without compromising the rights of a defendant to a fair trial.

The ICC operates in accordance with the general principle, as outlined in the Rules of Procedure and Evidence, which all organs of the Court “shall take into account the needs of all victims and witnesses ... in particular, children, elderly persons, persons with disabilities and victims of sexual or gender violence.”⁵⁰ This general principle has been expanded and developed into other more specific rules and procedures. Article 43(6) of the Rome Statute, for example, provides for the establishment of a Victims and Witnesses Unit that organizes protective measures for those at risk and counselling and other assistance for victims and witnesses appearing before the Court. As elaborated by the ICC Rules of Procedure and Evidence, the Unit also assists victims in finding legal representation and participating in proceedings and informs them of Court decisions that may have an impact on their interests.⁵¹

These provisions are designed specifically for the ICC and could not be transplanted directly into the draft revised KUHAP. However, Amnesty International believes that measures similar to those in the Rome Statute and ICC Rules of Procedure and Evidence should be incorporated into the draft revised KUHAP.

Recommendation:

The draft revised KUHAP should draw from the example of the Rome Statute of the International Criminal Court and its Rules of Procedure and Evidence, which contain model provisions for the protection of victims and witnesses, and due consideration of

⁴⁸ “A witness is a person who gives a testimony of importance in the investigation and prosecution stage in relation to a criminal act h/she has heard him/herself, saw him/herself or experienced him/herself”, Article 1, Law 13/2006.

⁴⁹ See “critical comments about the draft protection law on witnesses and victims discussed by the third commission and the government”, 11 July 2006, the Institute for Police Research and Advocacy (ELSAM) and the Coalition for Witness Protection.

⁵⁰ ICC Rules of Procedure and Evidence, Rule 86: General Principle.

⁵¹ ICC Rules of Procedure and Evidence, Rule 16.

*victims' interests during the proceedings. In particular, Amnesty International recommends that the draft revised KUHAP include provisions modelled on Article 43 and 68 of the Rome Statute and Rules 85 to 93 of the ICC Rules of Procedure and Evidence.*⁵²

4.2 Gender-sensitive criminal procedure for crimes of gender-based violence

The Law regarding the Elimination of Violence in the Household (Law 23/2004) sets out some special procedures to be followed in relation to offences involving sexual violence which occur in the context of the family. Amnesty International is aware that women's NGOs within Indonesia have also proposed a specific rape law. However, in the absence of comprehensive and specific legislation addressing procedures for the investigation and prosecution of crimes of sexual and gender based violence, it is important that the draft revised KUHAP incorporate additional provisions for this purpose.

Again, the Rome Statute of the International Criminal Court and the Rules of Procedure and Evidence of that Court include provisions relating to the prosecution of crimes of sexual violence, which represent international best practice and which can serve as a model for the draft revised KUHAP. Amnesty International believes that the Rome Statute strikes the appropriate balance in ensuring that trials involving crimes of sexual violence fully respect the right to a fair trial of the accused, and the rights of victims and witnesses. The Rome Statute addresses some of the most common problems with procedural and evidentiary rules that have traditionally made trials traumatic experiences for victims of gender-based violence.

4.2.1 Evidence of prior sexual conduct

Evidence of the prior or subsequent sexual conduct of the victim is often used during a trial for crimes of sexual violence in an attempt to demonstrate that the victim is not credible, of poor character or predisposed to sexual availability because of that conduct. The assumption behind the admission of evidence of prior sexual activity is either that because the woman (such cases almost invariably refer to women) has consented to sex on a previous occasion and she therefore did so on the occasion in question, or that because the woman has a sexual history she is an unreliable witness.

However, such reasoning is deeply flawed, as a woman has an unassailable right to refuse to have sex, however many times she has consented to sex before or after the incident in question. The credibility of a woman claiming to have been sexually assaulted should be assessed on its merits, and her sexual history has nothing to do with such credibility. In addition, the admission of evidence of the prior or subsequent sexual conduct of the victim increases the trauma of testifying, as the victim may be humiliated and forced to expose aspects of their private lives that are completely unrelated to the crime being tried.

The draft revised KUHAP should adopt the model of the ICC in regard to evidence of prior sexual conduct. Rules 70 and 71 of the ICC Rules of Procedure and Evidence together provide important safeguards preventing the ICC from inferring lack of credibility, "bad character" or predisposition to sexual availability of a victim or witness by reason of the prior or subsequent conduct of a victim or witness. These two rules were adopted in a carefully balanced consensus after intense debate between those who wished to exclude evidence of

⁵² See Annex 1 for text of Article 68 and Rules 85 to 93

prior or subsequent sexual conduct in all instances with regard to any aspect of the case and those who wished to leave open the possibility in rare instances that the ICC could consider such evidence in circumstances when the admission of such evidence could be essential in order to ensure the right of an accused to a fair trial.

Article 69 (4) of the Rome Statute, which incorporates the civil law approach of free evaluation of the evidence, rather than the common law approach with numerous rules excluding many classes of evidence from any consideration by a court, requires the International Criminal Court when ruling on the relevance or admissibility of evidence to take into account “the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence”. In making this determination, the ICC will need to conduct a preliminary *in camera* (closed) hearing to consider whether such conduct might be relevant to an issue other than the matters excluded by Rule 70 (d).

Recommendations:

Based on Rule 70 and 71 of the ICC Rules of Evidence and Procedure, the draft revised KUHAP should ban courts from drawing inferences about the credibility, character or predisposition to sexual availability of a victim based on the prior or subsequent sexual conduct of the victim.⁵³

If the court is asked to determine whether such evidence might be relevant to some other issue, the draft revised KUHAP should require that the court conduct a closed (in camera) hearing.

4.2.2 Evidence of Consent

The key issue in a trial for rape and other forms of sexual violence is often whether the victim consented to the act alleged. Evidence seeking to prove consent is often used in ways that potentially draw on the decision-maker’s gendered assumptions about women’s ability to consent to a sexual act, and can lead to the admission of irrelevant evidence that reinforces such assumptions in a manner that seriously prejudices the impartial consideration of victims’ claims. For example, evidence of what the victim said can be taken out of context to imply consent, despite evidence of the use of force or coercion by the perpetrator. In addition, the fact that the victim did not struggle or fight with the perpetrator is often used as evidence of consent, regardless of the circumstances.

These ICC Rules of Evidence and Procedure recognise that certain types of evidence cannot be used to imply consent. For example, silence or lack of resistance cannot be used to imply consent. Consent also cannot be inferred from words or conduct of the victim where the victim was subjected to force, threat of force or a coercive environment (which could include detention) or where there were other circumstances that would make the act non-consensual, such as mental incapacity or the youth of the victim. This rule is very important because it means that words or actions of the victim cannot be taken out of context when, for example, the victim is being threatened, forced or coerced. The rules also state that if the defence wishes to introduce evidence of consent, this evidence must be considered by the judges in an *in camera* (closed) hearing. This means that the evidence cannot be heard by the public unless the judges decide that it is admissible and that it should be made public.

⁵³ See Annex 1 for text of Article 68 and Rules 70 and 71.

Recommendation:

The draft revised KUHAP should include provisions in its rules of procedure and evidence modelled on Rule 70 of the ICC Rules of Evidence and Procedure that regulate the admission of evidence regarding the consent or lack thereof of the victim in a crime of sexual violence. Based on Rule 72 of the ICC Rules of Evidence and Procedure, a closed hearing to consider the admissibility or relevance of such evidence should be available as of right.⁵⁴

4.2.3 Corroboration

The requirement that a victim's testimony be corroborated can be extremely difficult to satisfy in cases involving sexual violence, which often occur in private without witnesses. The circumstances mean that the testimony of the victim may be the only available evidence. Under the draft revised KUHAP, a criminal charge is proven when the judge is convinced, based on at least two pieces of valid evidence, that the criminal act has really been committed and that it is the defendant who is guilty of perpetrating it (sec.178). Although Amnesty International agrees that a defendant should only be convicted of an offence if it has been proven *beyond reasonable doubt* that he or she committed the offence, a formal requirement that any conviction must be based on at least two pieces of valid evidence is likely to operate in a discriminatory way in cases involving sexual violence. If a judge is satisfied of a defendant's guilt *beyond reasonable doubt* on the basis of the victim's testimony alone, there should be no formal bar to conviction.

The International Criminal Tribunal for the Former Yugoslavia (ICTY) was the first international court to state in its Rules of Procedure and Evidence that corroboration is not required for crimes under the tribunal's jurisdiction.⁵⁵ The trial chamber of the ICTY has also confirmed that corroboration is not a requirement of any crime under international law.⁵⁶ The ICC Rules of Procedure and Evidence have adopted a similar rule. Rule 63(4) of the ICC Rules of Evidence and Procedure provides that while the International Criminal Court must, of course, be satisfied of the guilt of the accused beyond reasonable doubt, the Court shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, in particular, crimes of sexual violence.⁵⁷

Recommendation:

Given the discriminatory implications of the requirement of corroboration in cases of sexual violence, the draft revised KUHAP should expressly provide that, while a court must not convict a defendant unless satisfied of his or her guilt beyond reasonable doubt, corroboration is not required for any crime, particularly crimes of sexual violence.

4.2.4 Giving evidence in closed court, or via audio or video-link

The Rome Statute and the ICC Rules of Procedure and Evidence permit a victim to give evidence in closed court, or via video or audio-link provided that it is not prejudicial to the rights of the accused to a fair and impartial trial. This provision is very important not only to ensure the psychological well being of victims, but also to encourage more women to come

⁵⁴ See Annex 1 for text of Article 68 and Rules 70 and 72.

⁵⁵ ICTY Rules of Procedure and Evidence, Rule 96(I).

⁵⁶ *Prosecutor v Tadić*, Decision on Defence Motion on Jurisdiction, Case No IT-94-1-T (ICTY Trial Chamber, 10 August 1995 n. 93, at para. 539).

⁵⁷ See Annex 1 for Rule 63(4).

forward and give evidence in crimes of sexual violence. Testifying about such crimes is a traumatic event for most victims, and, therefore, all states should provide the option of a closed court, video-link or audio-link for the presentation of this type of evidence, especially to minimize the stress caused to the victim by being faced with the accused and being exposed to the public in the court room. Measures allowing for a closed court or for victims to give evidence through video or audio link should always be used in cases involving sexual violence, *unless otherwise ordered* by the presiding judge, taking into account the safety and views of the victim. A closed court for this type of case should not be mandatory, as some women may want to testify in public about their experience.⁵⁸

Under the draft KUHAP, hearings must be open to the public unless the case involves moral issues or the defendant is a child (sec.146(4)). Crimes involving sexual violence are listed in the Criminal Code as moral crimes. The way the section is worded suggests that such hearings must be closed, irrespective of the views of the victim, and that the basis for closing the hearing is the nature of the offence and its unsuitability for discussion in public, rather than any consideration about protection of the victim. As noted above, the draft revised KUHAP also allows for a witness to give evidence at the trial not in the presence of the defendant (sec.166). After the witness has given evidence, the defendant must be informed in full of the witness's testimony before the trial proceeds. The problem with this approach, as opposed to using video or audio-link, is that the defendant cannot hear the witness's testimony simultaneously and then advise his legal counsel on issues which might be relevant to any questioning of the witness by defence counsel.

Recommendation:

The draft revised KUHAP should permit victims or witnesses, where necessary for their protection or for other valid reason including in cases of sexual violence, to give their evidence in camera (closed proceedings), or via video or audio-link in a manner that fully respects the right of the accused to a fair trial. Closed hearings, however, should not be mandatory in such situations. The presiding judge should have the discretion to allow the victim or witness to testify in open court, having regard to all the circumstances, particularly the views of the victim or witness.

4.2.5 Support for victims and witnesses

The ICC Rules of Evidence and Procedure also allow for a victim or witness to be accompanied by someone who can support them while giving their testimony.⁵⁹ This rule is important in reducing the trauma and fear that victims and witnesses may have about testifying, by making the environment slightly less intimidating.

The draft revised KUHAP, like the existing KUHAP, appears to be silent on this matter – neither allowing a victim to be accompanied nor prohibited it.

⁵⁸ During the Rome Conference some countries, led by Syria, argued in favour of mandatory closed hearings in all cases of sexual violence in order to protect 'public morality'. Women's groups argued that this would reinforce the perception of these crimes as 'hidden' and shameful and therefore it should be up to the Court to decide, with a presumption in favour of closed hearings: Cate Steains, 'Gender Issues', in Roy S. Lee, ed., *The International Criminal Court: The Making of the Rome Statute – Issues – Negotiations – Results* (The Hague/London/Boston: Kluwer Law International 1999), p. 357.

⁵⁹ ICC Rules of Evidence and Procedure, Rule 88(2) – see annex 1 for the text of Rule 88(2).

Recommendation:

The draft revised KUHAP should explicitly permit victims and witnesses, where the court finds it appropriate, to be accompanied by a person of their choice while they give evidence, particularly in cases involving crimes of sexual violence.