

Jakarta, Oct. 23, 2023

Subject : Submission of a written statement in connection with the Makar case in Masohi, Maluku

Noble Chairman and members of the panel of judges who investigated and tried the case with defendant Antonius Latumutuany.

Best wishes to all judges, may you always be healthy in performing all your duties and obligations.

On behalf of Amnesty International, please allow me to submit a written opinion on the case of the accused of treason in the case of raising the flag of the Maluku Sovereignty Front or Republic of South Maluku, who is being tried in Masohi District Court, Maluku. Namely Antonius Latumutuany.

I will first introduce myself and introduce Amnesty International as an organization. Then I will give a general opinion in the field of international human rights law that is certainly related to the treason case. I will develop this opinion in three parts: 1) the guarantee of freedom of expression in international human rights law; 2) the attention of UN bodies in cases of freedom of expression related to treason; 3) the alignment of the perspectives of international law and national law such as the Penal Code.

I am director of the national office of AI. During the day, I teach at the UPN Veteran in Jakarta on international humanitarian law and at the Indonesian College of Law in Jentera on international human rights law. I am also a lawyer and sit on Peradi's board of experts.

Amnesty International is a human rights organization based in London, United Kingdom. Amnesty International's vision is that all people should enjoy the rights enshrined in the Universal Declaration of Human Rights and international human rights standards. We work independently of governments, political ideologies, economic or religious interests and are funded solely by membership and public donations.

We object to the trial of Moluccans for raising the RMS flag or Benang Raja, as this is still part of their right to peaceful expression and speech.

Amnesty International takes no position on the political position of any province in Indonesia, but we believe that the right to freedom of expression, including the right to advocate for self-determination, independence or any other political issue, should be protected peacefully.

Freedom of opinion and expression is clearly guaranteed in Article 19 of the ICCPR, which was ratified by the Government of Indonesia in 2005, and in General Comment No. 34 to Article 19 of the ICCPR. This instrument is binding on all countries that ratify it, and Indonesia is no exception. Political expression is also part of freedom of expression whose existence is guaranteed by international human rights instruments and the Indonesian Constitution.

International law on freedom of expression

As a member of the United Nations (UN) Human Rights Council and a non-permanent member of the UN Security Council, Indonesia has a mandate to lead by example in fulfilling its commitment to respect, observe and protect human rights, including the right to freedom of expression and opinion, the protection of which is guaranteed in international and national human rights instruments;

In international human rights instruments, the right to freedom of expression and political expression is guaranteed in Article 19 of the Universal Declaration of Human Rights¹ which states, "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas by any means and regardless of frontiers."

The right to freedom of opinion and expression is also regulated by Article 19, paragraphs (1) and (2) of the International Covenant on Civil and Political Rights (ICCPR), ratified by Indonesia through Law Number 12 of 2005², which states: "Everyone has the right to hold opinions without interference" and "Everyone has the right to freedom of expression; this right shall include freedom, without restrictions, to seek, receive or impart information or ideas of any kind, orally, in writing, in the form of works of art or through other media of his choice."

In General Comment No. 34, the authoritative interpretation of Article 19 of the ICCPR, the UN Human Rights Committee explains that "freedom of expression on political, moral or religious grounds may not be restricted by any provision of law" and that any diminution or limitation of this right to expression in the form of "intimidation, threats or stigmatization of persons, including arrest, attempted arrest or detention on account of their beliefs, constitutes a violation of Article 19(1) of the ICCPR."³

Freedom of speech and political expression is also a right of every citizen guaranteed by the state and explicitly stated in Article 28E(3) of the 1945 Constitution, which states, "Everyone has the right to freedom of association, assembly and expression."

In the right to freedom of expression and opinion, there are certain limitations that must be taken into account, as stated in Article 28J (2) of the 1945 Constitution, which states, "In the exercise of his rights and freedoms, everyone is subject to limitations established by law for the sole purpose of ensuring recognition and respect for the rights and freedoms of others and meeting justifiable requirements in accordance with moral considerations, religious values, security and public order in a democratic society."

Such limitations are also contained in the ICCPR, in particular in Article 19(3), which states, "The exercise of the rights set forth in paragraph 2 of this Article gives rise to particular obligations and responsibilities. It may therefore be subject to certain limitations, but these may only be exercised in accordance with the law and to the extent necessary to: (1) respect the rights or good name of others; and (2) protect national security or public order or public health or morals."

The limitation based on national security, a basis often used to justify the application of treason, is elaborated in the Siracusa Principles,⁴ which is a human rights instrument from the consensus of opinion of international human rights law experts;

¹ Universal Declaration of Human Rights, December 10, 1948, 217 A (III), available at <https://www.un.org/en/about-us/universal-declaration-of-human-rights>

² Indonesia became a party to the ICCPR on Feb. 23, 2006, following the adoption of Law No. 12 of 2005 on the Ratification of the International Covenant on Civil and Political Rights. The treaty body of the ICCPR is the UN Human Rights Committee, which has the mandate and authority to oversee the implementation of the ICCPR in each state party, and to issue authoritative interpretations to update and contextualize the provisions (articles) in the ICCPR to suit the times.

³ UN Human Rights Committee General Comment No. 35 on Article 9 Freedom and Security of Persons (ICCPR), paragraphs 10-23.

⁴ Principles of Siracusa on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Sept. 28, 1984, UN Doc. E/CN.4/1984/4 (annex), available at <https://www.refworld.org/docid/4672bc122.html>

The Siracusa Principles explain that "national security can be used to justify measures restricting certain rights only when they are taken to protect the nation's existence or its territorial integrity or political independence from an act of violence or threat of violence." ⁵

Moreover, the Siracusa Principles also state that "national security reasons cannot be used to impose restrictions on rights to prevent threats of violence of a local nature that can be relatively addressed through public policy approaches." ⁶

In addition, the Johannesburg Principles clarify and strengthen the protection of the right to freedom of expression for national security purposes, identifying forms of expression that do not threaten national security, such as: (1) Expressions that advocate a change in state policy or the state form itself that is carried out without violence; (2) Expressions that criticize, insult or mock a nation, state or state symbols, government (and its organs), government officials, foreign nation, state or foreign state symbols, foreign government or foreign government officials; and (3) Communicating human rights violations;⁷

The Johannesburg Principles view these forms of expression as "manifestations of protected speech" and prohibit the state from criminalizing or punishing those who do so; ⁸

The European Convention on Human Rights (ECHR) states that "Everyone has the right to freedom of expression. This right includes the right to hold opinions and to receive or impart information or ideas without interference by public authority and regardless of restrictions. This article should not be used to restrict the state from licensing broadcasting, TV and film. The exercise of this freedom, since it comes with duties and responsibilities, may be subject to formalities, conditions and restrictions or sanctions in accordance with legal provisions and is necessary in a democratic society, for reasons of state security, territorial integrity or public safety, for the prevention of crime, for the protection of health or morals, for the protection of the good name and the rights of others, for the prevention of the dissemination of confidential information or for maintaining the authority and impartiality of the judiciary." ⁹

In the practical implementation of Article 10 of the ECHR, anyone who expresses a political opinion on a highly controversial subject should be able to do so without fear of insult, and the state is obliged to take measures to enable that person to exercise his right safely; ¹⁰

Under the ECHR, restrictions on the exercise of the right to express a political opinion are acceptable in a democratic society only if the government can prove that: (1) the person expressing the opinion intends to incite the public to violence; (2) serious harm will result; and (3) there is no other way to stop the person expressing the opinion;

In *Stern Taulats and Roura Capellera v. Spain*, the European Court of Human Rights ruled that Spain's criminalization of citizens violated Article 10 of the ECHR. The Court emphasized that Stern and Roura's act of burning a picture of the royal family was a political expression of disapproval of the

⁵ Principles of Siracusa, Para. 29.

⁶ Principles of Siracusa, Para. 30

⁷ The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Oct. 1, 1995, available at <https://www.article19.org/wp-content/uploads/2018/02/joburg-principles.pdf>

⁸ The Johannesburg Principles, Principle 7. See also UN Human Rights Committee General Comment No. 34, paragraph 38.

⁹ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, Nov. 4, 1950, ETS, available at https://www.echr.coe.int/documents/d/echr/Convention_ENG

¹⁰ Andreas Svahn, Freedom of political expression, Thesis, Lund Faculty, 2006, p. 74.

monarchy that did not go beyond the permissible degree of provocation to convey a message of criticism within the framework of freedom of expression. Moreover, the Court also affirmed that by doing so, Stern and Roura did not intend to incite anyone to violence against the king and that such behavior should be interpreted as symbolic expressions of discontent and protest;¹¹

From the above examples, it can be concluded that political expression can take many forms, as long as it does not exceed restrictions on the exercise of rights, does not incite violence, and does not cause serious harm;

UN attention: arbitrary deprivation of liberty

There is one working group within the UN that has addressed the issue of arresting people in Maluku on charges of treason. That is the UN Working Group on Arbitrary Detention (UNWGAD), which has a mandate to develop the concept of arbitrary deprivation of liberty;¹²

Another important mandate of UNWGAD is to conduct country visits¹³ and provide opinions¹⁴ on cases of suspected arbitrary detention or deprivation of liberty;

In carrying out its mandate, UNWGAD examined several cases in Indonesia, particularly the application of articles of treason that led to human rights violations;

After years of requests, UNWGAD traveled to Indonesia, including East Timor, in early 1999. After its visit, UNWGAD published a report and made two crucial points;

First, UNWGAD believes that there has been arbitrary detention or deprivation of liberty of those arrested for peaceful political activities based on their political views and beliefs in this case:

¹¹ Stern Taulats and Roura Capellera v. Spain, petition number 51168/15

¹² The term "deprivation of liberty" includes all forms of physical detention that restrict voluntary freedom of movement (whether lawful or unlawful/arbitrary), including persons detained or incarcerated for legal matters, persons placed in psychiatric institutions, administrative detention of asylum seekers or immigration detention centers, home detention, detention centers for children, detention centers at airports or ports, and so on. Human rights violations occur when the "deprivation of liberty" is arbitrary or unlawful. The importance of the guarantee against "arbitrary deprivation of liberty" is such that this provision cannot be derogated from, even in times of war or other emergencies, and UNWGAD has stated that the prohibition against "arbitrary deprivation of liberty" is a peremptory norm of international law (*jus cogens* or a peremptory norm of international law). UN Human Rights Committee General Comment No. 35 on Article 9 Freedom and Security of Persons (ICCPR), UN Doc. Dec. 16, 2014, paras. 5 and 66, UN Doc. CCPR/C/GC/35. See also UN Human Rights Council, Report of the Working Group on Arbitrary Detention, Dec. 24, 2012, UN Doc. A/HRC/22/44, paragraphs 52-60 and 75, available at

https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.44_en.pdf

¹³ UNWGAD's country visits are conducted following an invitation (approval) from the relevant government and a meeting with relevant stakeholders. During the visit, UNWGAD may visit detention centers, interview detainees or their lawyers, meet with government officials and civil society organizations, and examine relevant policies or legislation. Following the country visit, UNWGAD will prepare a report on key issues and make recommendations to the country. The report is not only addressed to the state in question, but will also be taken up by UNWGAD with other UN bodies. See UN Human Rights Council, Proceedings of the Working Group on Arbitrary Detention, UN Doc. A/HRC/36/38, paras. 25 - 32 and UNWGAD, Factsheet No. 26, Advance unedited version, pp. 9 - 10.

¹⁴ An opinion is UNWGAD's mandate to investigate and decide whether a case can be brought by the alleged victim of a human rights violation, his legal representative or a civil society organization. In considering its opinions, UNWGAD also seeks input, responses or clarifications from relevant governments. After UNWGAD issues its opinion, it also includes relevant recommendations to the state concerned. See UN Human Rights Council, Proceedings of the Working Group on Arbitrary Detention, UN Doc. A/HRC/36/38, paragraphs 15-21 and UNWGAD, Factsheet No. 26, Advance unedited version, pp 7-8.

a. The raising of the Morning Star flag in Biak, Papua July 2-6, 1998, which led to the indiscriminate shooting of hundreds of protesters and the criminalization of several Papuan political activists under Article 106 of the Criminal Code;¹⁵ and

b. The criminalization of those accused of being involved in the 1965 coup or being members of or affiliated with the Indonesian Communist Party;¹⁶

Second, UNWGAD believes that the articles on treason in the Penal Code (Chapter I on crimes against state security) are too general and vague as to the intentional element of the crime, so these articles can be used arbitrarily to restrict freedom of opinion, expression, assembly and association;¹⁷

In addition, UNWGAD has also issued opinions on specific cases in Indonesia:

a. The conviction of Republik Maluku Selatan activists Carel Tahiya, Neuhustan Parinussa, Louis Werinussa, John Rea, Poltja Anakota and Dominggus Pattiwaelapia, who had political aspirations related to the right to self-determination for South Maluku. In Opinion No. 11/1999, UNWGAD stated that their convictions constituted arbitrary detention because their political activities were peaceful;¹⁸

b. The conviction of the leader of the East Timorese pro-independence movement, José Alexander Gusmao, using various legal instruments, including articles on treason (Articles 106 and 108 of the Penal Code). In Opinion No. 12/1999, UNWGAD found that Gusmao had indeed committed acts of violence in the pursuit of his political aspirations, but had been denied access to a lawyer of his choice. In its conclusion, UNWGAD stated that there had been a serious violation of the right to a fair trial;¹⁹

c. The conviction of 35 activists from the Republic of South Maluku who were involved in a peaceful demonstration by dancing the cakelele and unfurling the Benang Raja flag, a symbol of the RMS pro-independence movement, during the National Family Planning Day commemoration ceremony on June 29, 2007. Most of them were subsequently convicted under Articles 106 and 110 of the Penal Code (treason). In addition, UNWGAD also raised allegations of torture or other ill-treatment during interrogations by police officers. The Indonesian government then sent a response stating that although the actions of the RMS activists did not involve violence, their peaceful political expression posed a threat to national security. This argument was rejected by UNWGAD, which stressed that the element of nonviolence is essential to prevent arbitrary detention or deprivation of liberty. In its Opinion No. 41/2008, UNWGAD concluded that the sentencing of the RMS activists constituted arbitrary detention and a violation of the right to a fair trial;²⁰

d. The conviction of Filep Jacob Samuel Karma, a Papuan pro-independence activist, who was convicted and imprisoned for 15 years for unfurling a flag with the Morning Star and charged with treason (Articles 106 and 110 of the Indonesian Penal Code) when he participated in a peaceful

¹⁵ UN Commission on Human Rights, Report of the Working Group on Arbitrary Detention on its visit to Indonesia (Jan. 31 - Feb. 12, 1999), paras. 64-65.

¹⁶ UN Human Rights Committee, Report of the Working Group on Arbitrary Detention on its visit to Indonesia (January 31-February 12, 1999), paragraphs 67-68.

¹⁷ UN Commission on Human Rights, Report of the Working Group on Arbitrary Detention on its visit to Indonesia (January 31 - February 12, 1999), para. 50.

¹⁸ UNWGAD, Opinion No. 11/1999 (Indonesia), 20 May 1999, UN Doc. E/CN.4/2000/4/Add.1, pp. 56-57.

¹⁹ UNWGAD, Opinion No. 12/1999 (Indonesia), 21 May 1999, UN Doc. E/CN.4/2000/4/Add.1, pp. 58-61.

²⁰ UNWGAD, Opinion No. 41/2008, 25 November 2008, UN Doc. A/HRC/13/30/Add.1, pp. 105-108.

ceremony commemorating Papua's declaration of independence in Abepura, Jayapura, Papua Province on December 1, 2004. In Opinion No. 48/2011, UNWGAD stated that Filep Karma's political activities for which he was convicted were non-violent and constituted a human right guaranteed by international human rights law. UNWGAD also concluded that Filep Karma's right to a fair trial had been violated, resulting in arbitrary detention;²¹

Based on the country visit report and various views of UNWGAD, it is no exaggeration to conclude that the article on treason continues to be frequently used to restrict freedom of opinion, expression, assembly and association exercised peacefully, making it a form of arbitrary restriction of freedom by the state. All political aspirations, including those relating to the right to self-determination, exercised peacefully are human rights that must be protected and upheld;

Articles on treason under the criminal code

In the domestic legal framework, treason is regulated in several articles of the Penal Code (KUHP), which is a translation of the WvSNI enacted in Indonesia by Law No. 1/1946 on Criminal Provisions;

In the *present case*, article 106 of the Penal Code, before translation into Bahasa Indonesia, reads as follows: "*De aanslag ondernomen met het oogmerk om het grondgebied van den staat geheel of gedeeltelijk onder vreemde heerschappij te brengen of om een deel daarvan af te scheiden. Wordt gestraft met levenslange gevangenisstraf of tijdelijke van ten hoogste twintig jaren*";

If the provisions of Article 106 are translated on the basis of the BPHN translation of the Penal Code as, "Makar with intent to bring all or part of the territory of the state into the hands of the enemy or to secede part of the territory of the state shall be punishable by life imprisonment or a maximum term of imprisonment of 20 years."

In reading the criminalization of treason, the College of Judges cannot read Article 106 of the Penal Code in isolation from the provisions of Article 87 of Book I of the Penal Code, which reads, "There is treason to commit an act if the intention to do so is apparent from the commencement of the execution referred to in Article 53."

Article 53 paragraph (1) of the Penal Code states that "Attempt to commit a crime shall be punished if the intention to do so is evident from the beginning of the crime, and the failure to complete the crime is not due to his own will."

Although there is a debate as to whether makar should take the form of an attack, where makar is indeed called an attack in the original translation, but in the historical research conducted by Imam Nasima, the offense of makar must have a strong consequence between the act and the goal, so political expression cannot be categorized as a makar offense;²²

The term attack in Article 106 must be read and interpreted in the context of a crime directed against the security of the state, so that the attack referred to in the provisions of the article must be understood and related to the presence or absence of a threat to the security of the state;²³

²¹ UNWGAD, Opinion No. 48/2011 (Indonesia), September 2, 2011, UN Doc. A/HRC/WGAD/2011/48

²² Testimony of Imam Nasima in Decision No. 7/PUU-XV/2017 of the Constitutional Court regarding substantive review of the Criminal Code (KUHP).

²³ To see this, it is necessary to know the true meaning of makar, which is the translation of assault. First, Prof. Noyon and Prof. Langemeijer define makar as an act of violence or at least an attempt to commit an act of violence. However, Prof. Noyon and Prof. Langemeijer emphasize that not every attack should always be interpreted as an act of violence, because in

Taking into account the elements in Article 106, makar or attack committed by the perpetrator should be interpreted as committed with the purpose or intent that all or part of the state territory fall into the hands of the enemy or secede part of the state territory;

To be charged under Article 106 of the Penal Code, a person must actually know and intend that the act committed will result in "the falling of all or part of the state territory into the hands of the enemy or the secession of part of the state territory."

In practice, this can also be seen in the case of Spain, where Catalonia's parliament declared independence on Oct. 27, 2017. The Spanish government then sued the leaders of Catalonia's independence movement, claiming that the referendum violated the Spanish constitution and was declared illegal;²⁴

In a ruling by Spain's Constitutional Court, however, the Court stated that although acts of violence were undeniably committed by the leaders of Catalonia's independence movement, this was not enough to constitute treason. According to the Court, violence must be intended to achieve the goal of secession and not merely to create an objective or scenario for a future negotiated vote;²⁵

The Court concluded that there was no treason by the leaders of Catalonia's independence movement, on the grounds that the violence committed was not sufficient for the purpose of secession. The Court also noted that political advocacy by individuals or groups for any purpose, such as declaring the independence of part of the national territory, does not necessarily constitute a criminal offense;

Therefore, looking back at the prosecutor's charge against the defendant, it must be determined that there are circumstances that actually indicate the existence of acts that could logically point to the perpetrator's intent to achieve this goal;

In the context of the application of treason to Maluku prisoners of conscience, almost all convictions are based on the possession, distribution, hoisting or unfurling of banned flags or symbols often unilaterally associated by the state as separatist or pro-independence symbols;

However, it should be clear that these banned flags or symbols cannot necessarily be interpreted as an invitation to commit violent crimes;

CONCLUSIONS

National security, often used to restrict freedom of expression, should refer to international instruments recognized by the UN, namely the Siracusa Principles and the Johannesburg Principles. Stroking the red and white flag, unfurling prohibited flags and/or symbols, holding demonstrations

practice there are also some attacks that are committed without any violence preceding them. Second, Djoko Prakoso, based on the conclusion of the book "The Crime of Makar According to the Criminal Code" written and published in 1985, the word "Makar" is a translation of the word "Assault" meaning "Attack." Our Criminal Code does not give a definition, but only an authentic (special) interpretation in Article 87 of the Criminal Code. Third, R. Soesilo stated in his commentary on the Penal Code that "assault (makar or attack) is usually carried out by force." That then the act of treason (assault) is intended depends on the purpose, for example, in Article 106 of the Penal Code, the purpose in this assault is the sovereignty of the state. Fourth, "attack" is defined in several Dutch dictionaries as "violent attack," which is translated as "violent attack" in English; that "attack" also has the same meaning as onslaught in English, which means "violent attack, fierce attack" or any forceful attack.

²⁴ Tom Ginsburg, et al, "From Catalonia to California: Secession in Constitutional Law," Alabama Law Review, Volume 70, Number 4, 2019, pp. 923-985.

²⁵ Centre d'etudes juridiques europeennes, 2019 Spanish Supreme Court ruling on Catalan separatist leaders, available at <https://ceje.ch/fr/actualites/divers/2019/10/2019-spanish-supreme-courts-judgment-catalan-separatist-leaders/>

and/or discussions and/or chanting do not symbolize a call to violence and cannot be interpreted as such;

The evidence of the crime of treason must correlate between the act and the purpose of treason, that is, the act must have a logical consequence with the purpose of committing treason, which is that all or part of the territory of the state falls into the hands of the enemy or separates part of the territory from the state;

Political expression by holding demonstrations or discussions of any kind does not necessarily mean that part of the country or the whole country will fall into the hands of the enemy or that part of the country will be seceded;

Thus, the actions of the defendant, who expressed his political expression as an expression of the exercise of the right to freedom of expression, are protected by the Constitution and cannot be convicted under the treason article. **Therefore, the defendant should be found not guilty of treason as charged by the prosecution and should be acquitted of all charges.**

This is the statement that I can make. I make this statement truthfully so that it may be considered by the honorable jury.

Jakarta, Oct. 23, 2022

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