



MLDI

Media Legal
Defence Initiative

Before the Court of Appeals of the Kingdom of Cambodia

Observations by Media Defence-Southeast Asia and the Media Legal Defence Initiative in the case of Mam Sonando concerning the appeal against criminal judgment No. 65 K.B5 dated 01 October 2012

February 2013

IN THE COURT OF APPEALS OF THE KINGDOM OF CAMBODIA

OBSERVATIONS BY MEDIA DEFENCE – SOUTHEAST ASIA AND THE MEDIA LEGAL DEFENCE INITIATIVE

I. Introduction

1. This submission from Media Defence Southeast Asia (MD-SEA) and the Media Legal Defence Initiative (MLDI) to the Court of Appeals of the Kingdom of Cambodia outlines Cambodia's obligations under international law regarding freedom of expression. These observations are submitted to the Court of Appeals to assist the Court in its consideration of the appeal of Mr Mam Sonando against his conviction on 1 October 2012 to 20 years imprisonment on charges of instigating violence against the state, instigating insurrection, instigating rebellion with aggravating circumstances and instigating the unlawful interference in the performance of public functions. This judgment was handed down by the Magistrate Court of Phnom Penh on 1 October 2012 (judgment No. 65 K.B5).
2. MD-SEA and MLDI are concerned that the Magistrate Court did not take into account Cambodia's binding legal obligations as regards free expression in general, and failed to consider Mr Sonando's role as a journalist in particular. These observations are intended to assist the Court of Appeals in taking these issues duly into account in its consideration of Mr Sonando's appeal.

Interest of Media Defence-Southeast Asia and the Media Legal Defence Initiative

3. Media Defence Southeast Asia (MD-SEA) is a regional non-governmental organisation of lawyers, journalists and media activists that has a focus on defending and promoting freedom of expression across Southeast Asia. MD-SEA provides legal assistance to journalists and news media organisations, supports training in media law and promotes the exchange of information, litigation tools and strategies for lawyers working on media freedom cases.
4. The Media Legal Defence Initiative (MLDI) is a non-governmental organisation and registered charity that works in all regions of the world to provide legal support to journalists and media outlets who seek to protect their right to freedom of expression. It is based in London and works closely with a world-wide network of experienced media and human rights lawyers, local, national and international organisations, donors, foundations and advisors who are all concerned with defending media freedom.

Request to the Court of Appeals of The Kingdom of Cambodia to consider these observations

5. The Cambodian Code of Criminal Procedure does not proscribe the Court's acceptance of third party observations. MD-SEA and MLDI respectfully request the Court to use its discretionary power to accept these observations and submit that this would be in line with practice within other bodies in the Cambodian court system, as well as wider practice in the region.
6. The Extraordinary Chambers in the Courts of Cambodia (ECCC) were established within the existing court structure of Cambodia.¹ Its practices were intended to provide a new role model for court operations in Cambodia² and, in the words of Prime Minister Hun Sen, to serve as a "successful model for Cambodia".³ The Internal Rules of the ECCC allow it to invite or grant leave to third parties to submit an *amicus curiae* brief.⁴ Given that the Court of Appeals and the ECCC form part of the same court structure within Cambodia and the practices of the ECCC should positively influence those of other courts – such as the Court of Appeals – within it, the ECCC's practice of considering third party observations allows this Court to do so as well.
7. In this regard, the Court should also look towards the developing practice in France, upon whose legal framework Cambodia's legal system was modelled. French courts have been accepting *amicus curiae* briefs for more than two decades⁵ and are doing so to an increasing degree.⁶
8. Allowing third party observations would also be in line with wide practice in the region. The courts of Hong Kong,⁷ Malaysia,⁸ Indonesia,⁹ Singapore¹⁰ and the Philippines¹¹ all accept *amicus curiae* briefs, while the majority of these countries, like Cambodia, have no specific legislation to this end.

¹ Article 2, Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea.

² See the introduction on the website of the ECCC: <http://www.eccc.gov.kh/en/about-eccc>.

³ "An Introduction to the Khmer Rouge Trials", 4th edition, p. 3, available at <http://www.eccc.gov.kh/sites/default/files/publications/ECCCBooklet4ed%28Eng%29.pdf>

⁴ Rule 33(1): "At any stage of the proceedings, the Co-Investigating Judges or the Chambers may, if they consider it desirable for the proper adjudication of the case, invite or grant leave to an organization or person to submit an *amicus curiae* brief in writing concerning any issue. The Co-Investigating Judges and the Chambers concerned shall determine what time limits, if any, shall apply to the filing of such briefs." Internal Rules of the Extraordinary Chambers in the Courts of Cambodia, available at <http://www.eccc.gov.kh/en/document/legal/internal-rules>.

⁵ Paris Court of Appeal, 21 June and 6 July 1988, Gaz. Pal. 1988, 2, 700.

⁶ See, for example, French Supreme Court, Plenary Assembly, 31 May 1991, *Pourvoi* no, 90-20.105; Paris Court of Appeal, 27 November 1992, D. 1993, p. 172; French Supreme Court, Mixed Chamber, 23 November 2004, *Pourvois* no. 02-17.507, 03-13.673, 02-11.352 and 01-13.592; Paris Court of Appeal, 29 October 2009, Docket no. 2008/23812.

⁷ See for example *Secretary for Justice and Another v. Chan Wah and Others* [2000] HKCFA 3

⁸ See *TSC Education Sdn Bhd v. Kolej Yayasan Pelajaran Mara & Anor* [2002] 5 MLj 577 High Court.

⁹ See *Suharto v. Time Magazine*, Supreme Court Decision No. 3215 K/PDT/200.

¹⁰ See *PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA* [2007] 1 SLR 597.

¹¹ See, for example, *Leo Echegaray y Pilo, Petitioner, v. the Secretary of Justice and the Director of the Bureau of Corrections* (1998).

Background information

9. The accused, Mam Sonando, is a 71 years old Khmer national and the Director of the independent radio station Beehive Radio. Mr Sonando is also a prominent human rights defender and President of the Democrat Association.
10. On 1 October 2012, the Magistrate Court of Phnom Penh sentenced Mr Sonando to 20 years in prison and fined him 10,000,000.00 Riel under 4 charges:
 - (a) inciting people to take up arms against the state authority (Article 464 Cambodian Penal Code);
 - (b) instigating insurrection (Article 28, Article 456 and 457 Cambodian Penal Code);
 - (c) instigating the unlawful interference in the performance of public functions (Article 28 and Article 609 Cambodian Penal Code) ; and
 - (d) instigating rebellion (Article 28 and Article 504 Cambodian Penal Code).
11. All acts were allegedly committed in Pro Ma Village, Kampong Damrei Commune, Chhlaung District, Kratie Province, during the months of March, April and May of 2012. The arrest of Mr Sonando took place one day after a report was broadcast on Beehive Radio, discussing a communication brought to the Office of the Prosecutor of the International Criminal Court by the head of the Khmer People Power Movement, Mr Suon Serey Rath, alleging involvement of the government of Cambodia in crimes against humanity.
12. MD-SEA and MLDI are greatly concerned that Mr Sonando's conviction violates his right to freedom of expression as guaranteed under Article 19 of the International Covenant on Civil and Political Rights (ICCPR), to which Cambodia is a party. MD-SEA and MLDI therefore call on the Court of Appeals to guarantee and protect Mr Sonando's right to freedom of expression by applying the requisite international law standards it is bound by, and to quash the convictions of Mr Sonando.
13. The following paragraphs elaborate on the right to freedom of expression as guaranteed under international law, as it applies to Mr Sonando's case.

Observations

Mr Sonando's right to freedom of expression is guaranteed and protected both under the Cambodian Constitution and the International Covenant on Civil and Political Rights

14. The right to freedom of expression is a basic human right that lies at the very foundation of a democratic society. In 1946, during the first session of the United Nations, the General Assembly declared that freedom of expression is:

a fundamental human right and...the touchstone of all the freedoms to which the United Nations is consecrated.¹²

15. The right to freedom of expression is guaranteed and protected under international law. It is recognized by the Universal Declaration of Human Rights¹³ and the ASEAN Human Rights Declaration,¹⁴ as well as a number of treaties, including the International Covenant on Civil and Political Rights,¹⁵ the European Convention of Human Rights,¹⁶ American Convention on Human Rights,¹⁷ and the African [Banjul] Charter on Human and Peoples' Rights.¹⁸

16. The United Nations Human Rights Committee (UN HRC), which oversees the implementation of the ICCPR, has stated in its General Comment No. 34 that:

Freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society. They constitute the foundation stone for every free and democratic society. The two freedoms are closely related, with freedom of expression providing the vehicle for the exchange and development of opinions.

Freedom of expression is a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights.¹⁹

17. All Southeast Asian nations except Brunei provide for freedom of expression in their constitutions: Indonesia,²⁰ Laos,²¹ Malaysia,²² Myanmar,²³ Philippines,²⁴ Singapore,²⁵ Thailand,²⁶ Timor Leste,²⁷ and Vietnam.²⁸ Like these countries, the

¹² Resolution 59(1), 14 December 1946.

¹³ Article 19, UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: <http://www.unhcr.org/refworld/docid/3ae6b3712c.html>

¹⁴ Article 23, Association of Southeast Asian Nations (ASEAN), ASEAN Human Rights Declaration, 18 November 2012, available at: <http://www.unhcr.org/refworld/docid/50c9fea82.html>.

¹⁵ Article 19, UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.unhcr.org/refworld/docid/3ae6b3aa0.html>.

¹⁶ Article 10, Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, available at: <http://www.unhcr.org/refworld/docid/3ae6b3bo4.html>.

¹⁷ Article 13, Organization of American States, American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969, available at: <http://www.unhcr.org/refworld/docid/3ae6b36510.html>.

¹⁸ Article 9, Organization of African Unity, African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at: <http://www.unhcr.org/refworld/docid/3ae6b3630.html>

¹⁹ U.N.G.A., U.N. H.R. Committee, General Comment No. 34: Article 19: Freedoms of opinion and expression, U.N. Doc. No.CCPR/C/GC/34 (Sep. 12, 2011) (hereinafter "General Comment No. 34"), para. 2-3.

²⁰ Article 28F, *Constitution of the Republic of Indonesia* (last amended 2002) [Indonesia], 1945, available at: <http://www.unhcr.org/refworld/docid/46af43f12.html>.

²¹ Article 44, Constitution of the Lao People's Democratic Republic [Lao People's Democratic Republic], No. 25/NA, 6 May 2003, available at: <http://www.unhcr.org/refworld/docid/3ae6b5221a.html>.

The Constitution of the Kingdom of Cambodia also guarantees the right to freedom of expression of its citizens. Article 41 of the Cambodian Constitution provides:

Khmer citizens shall have freedom of expression, press, publication and assembly. No one shall exercise this right to infringe upon the rights of others, to effect the good traditions of the society, to violate public law and order and national security.

The regime of the media shall be determined by law.²⁹

The Cambodian judiciary has an obligation under international law to ensure that Mr Sonando's right to freedom of expression is guaranteed

18. Cambodia acceded to the ICCPR on 26 May 1992. The ICCPR protects and guarantees the right to freedom of expression under Article 19:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

19. Under Article 19(3) of the ICCPR, the right to freedom of expression may be restricted only when three separate conditions have been met:

²² Article 10, Federal Constitution [Malaysia], 31 August 1957, available at:

<http://www.unhcr.org/refworld/docid/3ae6b5e40.html>.

²³ Section 354, Constitution of the Republic of the Union of Myanmar, 2008, available at:

<http://www.burmalibrary.org/show.php?cat=1140>.

²⁴ Section 4, Article III, Constitution of the Republic of the Philippines [Philippines], 2 February 1987, available at:

<http://www.unhcr.org/refworld/docid/3ae6b5470.html>.

²⁵ Article 14, Constitution of the Republic of Singapore [Singapore], Act 8/65, 9 August 1965, available at:

<http://www.unhcr.org/refworld/docid/3ae6b5054.html>.

²⁶ Article 45, Constitution of the Kingdom of Thailand (B.E. 2540) [Thailand], B.E. 2540 (1997), 11 October 1997,

available at: <http://www.unhcr.org/refworld/docid/3ae6b5b2b.html>.

²⁷ Section 40 and Section 41, *Constitution of the Democratic Republic of East Timor* [Timor-Leste (East Timor)], 20

May 2002, available at: <http://www.unhcr.org/refworld/docid/3dd8dd484.html>.

²⁸ Article 69, Constitution of the Socialist Republic of Vietnam [Viet Nam], 15 April 1992, available at:

<http://www.unhcr.org/refworld/docid/3ae6b573c.html>.

²⁹ Constitution of the Kingdom of Cambodia, 21 September 1993, available at:

<http://www.unhcr.org/refworld/docid/3ae6b5a40.html> [accessed 30 January 2013]

- (1) the restriction must pursue a legitimate aim, such as protecting public order or the rights of others;
- (2) the restriction must be provided for by law; and
- (3) the restriction must be necessary.

20. This “three-level test” set out in Article 19(3) ICCPR must be applied to any restrictions on the right to freedom of expression. That includes restrictions imposed by the levelling of criminal charges, as in the case of Mr Sonando. As stated by the UN Human Rights Committee:

Paragraph 3 lays down specific conditions and it is only subject to these conditions that restrictions may be imposed: the restrictions must be “provided by law”; they may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of paragraph 3; and they must conform to the strict tests of necessity and proportionality.³⁰ [*Emphasis added*]

21. This also means that any restrictions of the right to freedom of expression should not jeopardize the right itself:

Paragraph 3 expressly states that the exercise of the right to freedom of expression carries with it special duties and responsibilities. For this reason two limitative areas of restrictions on the right are permitted, which may relate either to respect of the rights or reputations of others or to the protection of national security or of public order (*ordre public*) or of public health or morals. However, when a State party imposes restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself. The Committee recalls that the relation between right and restriction and between norm and exception must not be reversed. [...] ³¹ [*Emphasis added*]

22. Further, the UN HRC cautions, restrictions must not be utilised to silence persons exercising their right to freedom of expression:

States parties should put in place effective measures to protect against attacks aimed at silencing those exercising their right to freedom of expression. Paragraph 3 may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights. [...] ³² [*Emphasis added*]

23. As a State Party to the ICCPR, Cambodia has the obligation to ensure that the right to freedom of expression of anyone within its territory are guaranteed and protected.³³

³⁰ General Comment No. 34, para. 22.

³¹ General Comment No. 34, para. 21.

³² General Comment No. 34, para. 23.

³³ Article 2, ICCPR: (1) Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of

The Cambodian Constitution refers explicitly to international human rights law. Article 31 states:

The Kingdom of Cambodia recognizes and respects human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights, women's and children's rights.

24. The obligation to ensure that the rights contained in the ICCPR are guaranteed and protected is not limited to the executive department, but also includes the Cambodian judiciary. This was expressly stated by the UN Human Rights Committee:

The obligation to respect freedoms of opinion and expression is binding on every State party as a whole. All branches of the State (executive, legislative and judicial) and other public or governmental authorities, at whatever level – national, regional or local – are in a position to engage the responsibility of the State party. Such responsibility may also be incurred by a State party under some circumstances in respect of acts of semi-State entities. The obligation also requires States parties to ensure that persons are protected from any acts by private persons or entities that would impair the enjoyment of the freedoms of opinion and expression to the extent that these Covenant rights are amenable to application between private persons or entities.³⁴ [Emphasis added]

25. As an organ of the Cambodian State, an act of the Cambodian judiciary is an act of the Kingdom of Cambodia. As held by the International Law Commission, as cited by the International Court of Justice in its Advisory Opinion *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*:

The conduct of an organ of the State shall be considered as an act of that State under international law, whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character, and whether it holds a superior or a subordinated position in the organization of the State. (Yearbook of the International Law Commission, 1973, Vol. II, p. 193).³⁵

26. Consequently, the Cambodian judiciary has an obligation under international law to ensure in the exercise of its duties that the right to freedom of expression under the ICCPR is guaranteed and protected. Nevertheless, in its 1 October 2012 judgment, the Magistrate Court of Phnom Penh failed to consider Mr Sonando's right to freedom of expression as set

any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. (2) Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

³⁴ General Comment No. 34, para. 7.

³⁵ *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, I.C.J. Reports 1999, p. 87, para. 62.

out in the previous paragraphs: the judgment made no reference to Mr Sonando's rights under Article 41 of the Cambodian Constitution or Article 19 ICCPR, nor did the judgment in any manner imply that these rights had played a role in the Court's consideration of the charges.

27. The failure of the Magistrate Court to consider in its verdict Mr Sonando's right to freedom of expression constitutes a violation of Cambodia's international obligation under the ICCPR. This violation consist of two main omissions, as shall be further discussed in the following paragraphs:

(1) the failure to verify if the laws under which Mr Sonando was convicted were in accordance with the conditions under which free expression may be curtailed under Article 19 ICCPR; and

(2) the failure to demonstrate that there was an actual threat to national security as well as the failure to establish a direct link between Mr Sonando's expression and such threat.

The right to freedom of expression may only be restricted under limited circumstances

28. As outlined above, expression may be limited only on limited grounds, and under limited circumstances. In this context, particular caution should be exercised when placing restrictions on political speech. Free political speech is what makes a democracy function: it allows the electorate to be properly informed and hold to account those who govern. The media have a special role to play in this regard, as the main conduit for political speech and information:

The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion. The public also has a corresponding right to receive media output.³⁶

29. Any restrictions placed on political statements made in the media should therefore be strictly scrutinised. As the Supreme Court of Sri Lanka held in *Perera v. Attorney General*:

Laws that trench on the area of speech and expression must be narrowly and precisely drawn to deal with precise ends. Over-breadth in the area has a peculiar evil – the evil of creating chilling effects which deter the exercise of that freedom. The threat of sanctions may deter its exercise as patently as application of the sanctions. The State may regulate in that area only with narrow specificity...³⁷

³⁶ General Comment No. 34, para. 13.

³⁷ *Perera v. Attorney General & Ors*, [1992] 1 Sri L.R. 199, pp. 215 and 228 (Sharvananda, CJ).

30. Consequently, Cambodia must ensure that its criminal laws do not infringe on the protected right to freedom of expression. This includes Cambodia's sedition and national security laws, under which charges were brought against Mr Sonando.

Restrictions on the grounds of national security laws should be interpreted narrowly

31. The UN Human Rights Committee has specifically addressed the need to ensure that sedition and national security laws meet the strict requirements of Article 19(3) ICCPR:

Extreme care must be taken by States parties to ensure that treason laws and similar provisions relating to national security, whether described as official secrets or sedition laws or otherwise, are crafted and applied in a manner that conforms to the strict requirements of paragraph 3. It is not compatible with paragraph 3, for instance, to invoke such laws to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information. Nor is it generally appropriate to include in the remit of such laws such categories of information as those relating to the commercial sector, banking and scientific progress. The Committee has found in one case that a restriction on the issuing of a statement in support of a labour dispute, including for the convening of a national strike, was not permissible on the grounds of national security.³⁸ [Emphasis added]

46. When invoking laws that are ostensibly aimed at protecting national security, States need to establish a direct link between the expression and a specific threat, and not just a mere risk:

When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.³⁹

32. In practice, national security laws are often used as an excuse to silence government critics. One example of such case was considered by the UN HRC in 1999, concerning the conviction of a Korean individual for national security offences. The Committee considered the case and pointed out that there was no evidence of any risk to national security. The Committee held that the conviction therefore violated the right to freedom of expression:

[It is not clear] what was the nature and extent of any . . . risk [to national security]. There is no indication that the courts, at any level, addressed those questions or considered whether the contents of the speech or the documents had any additional effect upon the audience or readers such as to threaten

³⁸ General Comment No. 34, para. 30.

³⁹ General Comment No. 34, para. 35.

public security, the protection of which would justify restriction within the terms of the Covenant as being necessary.⁴⁰

33. National courts in other Southeast Asian countries have similarly held that national security laws must not be used as an excuse to suppress one's right to freedom of expression. For example, the Supreme Court of the Philippines, in *David v. Arroyo*,⁴¹ used the strict “*clear and present danger*” test to conclude that the arrests of Prof. Randy David et al. were illegal and the charges against them of inciting sedition were a mere afterthought:

“Assembly” means a right on the part of the citizens to meet peaceably for consultation in respect to public affairs. It is a necessary consequence of our republican institution and complements the right of speech. As in the case of freedom of expression, this right is not to be limited, much less denied, except on a showing of a clear and present danger of a substantive evil that Congress has a right to prevent. [...] ⁴² [*Emphasis added*]

34. The Supreme Court of Indonesia declared that Indonesia's criminal law provisions that prohibited inciting hatred against the authorities violated the right to freedom of expression. The Indonesian Supreme Court stated:

[These provisions] may allow power abuse to occur because they may be easily interpreted according to the will of the authority. A citizen whose intention was to express his criticism or opinion against the Government, which is a constitutional right, would be easily qualified by the authority as expressing a statement of “feelings of hostility, hatred and contempt” towards the Government ...

[These provisions] disproportionately hinder the freedom to express thoughts and the freedom to express opinions.⁴³

35. In similar vein, the Indian Supreme Court emphasised the importance of the existence of an actual threat as well as a direct link between such threat and the expression:

The anticipated danger should not be remote, conjectural or far-fetched. It should have proximate and direct nexus with the expression. The expression should be intrinsically dangerous.... In other words, the expression should be inseparably locked up with the action contemplated like the equivalent of a ‘spark in a powder keg’⁴⁴

⁴⁰ *Keun-Tae Kim v. Republic of Korea*, Communication No. 574/1994, UN Doc. CCPR/C/64/D/574/1994 (4 January 1999), para. 12.4.

⁴¹ *Prof. Randy David v. Gloria Macapagal-Arroyo*, G.R. No. 171396, May 3, 2006, available at <http://sc.judiciary.gov.ph/jurisprudence/2006/may2006/G.R.%20No.%20171396.htm>.

⁴² *Id.*

⁴³ Constitutional Court of the Republic of Indonesia, Decision 6/PUU-V/2007, 17 July 2007.

⁴⁴ *S. Rangarajan v. P.J. Ram* [1989](2) SCR 204, para. 226.

36. The mere expression of criticism or comment on government action does not meet this test, even if such criticism is strongly worded. The Supreme Court of India held in this regard that:

Criticism of public measures or comment on Government action, however strongly worded, would be within reasonable limits and would be consistent with the fundamental right of freedom of speech and expression. It is only when the words, written or spoken, etc, which have the pernicious tendency or intention of creating public disorder or disturbance of law and order that the law steps in to prevent such activities in the interest of public order.⁴⁵

37. The Johannesburg Principles on National Security and Freedom of Expression, which elaborate on the implication of Article 19 ICCPR in the context of national security risks and which have been endorsed by the UN Special Rapporteur on Freedom of Expression and the UN Human Rights Commission, summarise and amalgamate these judicial pronouncements as follows:

[E]xpression may be punished as a threat to national security only if a government can demonstrate that:

- (a) the expression is intended to incite imminent violence;
- (b) it is likely to incite such violence; and
- (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.⁴⁶

38. While the Magistrate Court considered that the words of Mr Sonando were “likely” to endanger the Kingdom of Cambodia, thus fulfilling the second of these conditions, it failed to consider whether Mr Sonando intended to do so or whether there was a direct and immediate connection between the alleged ‘incitement’ and the likelihood of violence occurring. By merely assuming that any words of Mr Sonando would “likely” endanger the Kingdom of Cambodia and convicting him on this basis, the Magistrate Court has failed to demonstrate a direct link between Mr Sonando’s expression and the perceived threat, falling short of the standards under Article 19 ICCPR.

CONCLUSION

39. MD-SEA and MLDI submit that the Magistrate Court, in its consideration of the charges brought against Mr Mam Sonando, failed to apply the requisite standards of freedom of expression that are binding upon Cambodia under international law. In particular, the Court

⁴⁵ *Kedar Nath v. State of Bihar* AIR [1962] SC 955.

⁴⁶ Article 19, *The Johannesburg Principles on National Security, Freedom of Expression and Access to Information*, 1 October 1995, available at: <http://www.unhcr.org/refworld/docid/4653fa1f2.html>. The Principles were developed in 1996 and have been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression, in his reports to the 1996, 1998, 1999 and 2001 sessions of the United Nations Commission on Human Rights, and have been referred to by the Commission in their annual resolutions on freedom of expression every year since 1996. The current Rapporteur, Mr Frank La Rue, uses the Principles as his point of reference for the state of international human rights law as regards national security considerations: e.g. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 16 May 2011, UN Doc. A/HRC/17/27

failed to assess the compatibility of the national security laws under which Mr Sonando was charged and convicted with Cambodia's obligations under Article 19 ICCPR and did not establish a direct link between Mr Sonando's expression and any real threat to national security. For these reasons, MD-SEA and MLDI call upon the Court of Appeals of Cambodia to quash the conviction of Mr Mam Sonando under articles 28, 464—paragraphs 2, 456, 457, 609, and 504, of the Penal Code of Cambodia.