

REPUBLIC OF THE PHILIPPINES
SUPREME COURT

Padre Faura St. , Manila

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REYNALDO SANTOS JR. ,
MARIA ANGELITA RESSA, and
RAPPLER, INC. ,
Petitioners,

-versus-

G.R. No. 263584

PEOPLE OF THE PHILIPPINES
Respondent.

X-----X

**MOTION FOR LEAVE OF COURT
TO INTERVENE TO ALLOW THE UNITED NATIONS (UN)
SPECIAL RAPPORTEUR ON THE PROMOTION AND
PROTECTION OF THE RIGHT TO FREEDOM OF OPINION
AND OF EXPRESSION - IRENE KHAN TO APPEAR AS AMICUS
CURIAE AND TO ADMIT HER AMICUS BRIEF**

THE UNITED NATIONS SPECIAL RAPPORTEUR ON THE PROMOTION AND PROTECTION OF THE RIGHT TO FREEDOM OF OPINION AND OF EXPRESSION - IRENE KHAN, by Counsel, unto this Honorable Court, most respectfully states the following, to wit:

1. Movant- intervenor is the United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and of Expression, IRENE KHAN. She is a citizen of Bangladesh and of the United Kingdom, with resident address at Rangs Waterfront, House 1, Road 15, Gulshan, Dhaka 1212, Bangladesh. For purposes of this case, she is represented by Atty. Rodel A. Taton, DCL, with address at Taton Law, Unit 234 Mile Long Bldg. Amorsolo cor. VA Rufino Sts., Makati City 1230 Philippines, where summons and other processes will be served for purposes of this case. Attached is the Special Power of Attorney as *Annex A* hereof.
2. Irene Khan was appointed on 1 August 2020 as the United Nations

Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression and has served in such capacity until the present. The mandate of this Office was defined under UN Human Rights Council) Resolution 7/36 as follows:¹

(a) To gather all relevant information, wherever it may occur, relating to violations of the right to freedom of opinion and expression, discrimination against, threats or use of violence, harassment, persecution or intimidation directed at persons seeking to exercise or to promote the exercise of the right to freedom of opinion and expression, including, as a matter of high priority, against journalists or other professionals in the field of information;

(b) To seek, receive and respond to credible and reliable information from Governments, non- governmental organizations and any other parties who have knowledge of these cases;

(c) To make recommendations and provide suggestions on ways and means to better promote and protect the right to freedom of opinion and expression in all its manifestations; and

(d) To contribute to the provision of technical assistance or advisory services by the Office of the United Nations High Commissioner for Human Rights to better promote and protect the right to freedom of opinion and expression.

3. Movant Irene Khan is preeminently qualified to provide opinions on issues relevant to the instant case to assist the Honorable Court to reach its decision as can be discerned from her professional engagements as follows:²

An internationally recognized advocate for human rights, gender equality and social justice, Irene Khan teaches at the Graduate Institute of International and Development Studies in Geneva, and is co-author of *The Unheard Truth: Poverty and Human Rights*, which has been published in seven languages.

Ms. Khan was Secretary General of Amnesty International from 2001 to 2009. Under her leadership, Amnesty strengthened its work on political and civil rights, especially in the context of counter-terrorism and armed conflicts, while also expanding its mandate to include economic, social and cultural rights. The first woman to

¹ A/HRC/RES/7/36 Mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

² <https://www.ohchr.org/en/special-procedures/sr-freedom-of-opinion-and-expression/ms-irene-khan>

head Amnesty International, she launched its first global campaign to stop violence against women and girls.

From 2012 to 2019, Ms. Khan headed the International Development Law Organization (IDLO), the only intergovernmental organization exclusively devoted to the rule of law and sustainable development. In that capacity she co-convened the UN Conference in Preparation of the Review of SDG 16 in 2019, the High Level Group on Justice for Women in 2018 and the Conference on Rule of Law in Africa in 2016. She expanded programs on access to justice and championed Sustainable Development Goal 16 on peace, justice, access to information and effective institutions.

As Consulting Editor of The Daily Star in Bangladesh from 2010 to 2011, Ms. Khan covered human rights, democracy and gender issues and supported independent media. She was Visiting Professor at the State University of New York Law School in 2011 and Chancellor of Salford University in the UK from 2009 to 2015.

She began her professional career with the UN High Commissioner for Refugees, working for 21 years at headquarters and in various country operations, including Chief of Mission in India and Deputy Director, Division of International Protection.

Ms. Khan collaborates with the Columbia Global Freedom of Expression program, including as a member of the Jury of the Global Freedom of Expression Awards. She was a member of the World Bank Gender Advisory Council, the UNAIDS High Level Panel on HIV Prevention and Human Rights, and the UN Global Compact Advisory Council. She sits on the governing boards of the Overseas Development Institute (UK), BRAC (Bangladesh) and Barefoot Law (Uganda).

Ms. Khan has received several awards, including the Sydney Peace Prize in 2006, for her contribution to human rights. Born in Bangladesh, she studied at Manchester University and Harvard Law School.

4. Since its creation in 1993, the United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression has analyzed and made recommendations to the then UN Commission on Human Rights and now the UN Human Rights Council, providing expert recommendations on ways and means to better promote and protect the right to freedom of opinion

and expression in all its manifestations.

5. Movant Irene Khan recalls in her written submission the relevant principles of international law on the rights of journalists as summarized in her 2022 report to the UN General Assembly on “Reinforcing media freedom and the safety of journalists in the digital age” as follows:³

The right to freedom of opinion and expression provides the international legal basis for uncensored and unhindered news media, and the right of journalists to work safely and without fear. This right is enshrined in article 19 of both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, which state that everyone is entitled to seek, receive and impart information and ideas of all kinds regardless of frontiers through any media of their choice, and is reaffirmed in regional instruments. It encompasses the right to information, provides an expansive understanding of protected expression – whether true, false, offensive or enlightened – and anticipates the continued development of media, including new technologies that enable data to cross borders in an instant.

The Human Rights Committee has called on States to consider abolishing criminal defamation. Nevertheless, criminal laws against defamation persist in 160 countries in the world, including some in the European Union, a strong champion of media freedom. The Special Rapporteur repeats her call for a global ban on the criminalization of defamation and seditious libel online and offline.

6. Given the relevance of the issues discussed in herein movant’s written submission and the fact that the Republic of the Philippines is subject to the obligations set out in the International Covenant on Civil and Political Rights and therefore required to take steps to protect the rights of journalists, it is respectfully submitted that herein movant’s brief will provide this Honorable Court with a greater understanding of the role of journalists and the special protection that all Member States must accord.
7. While traditionally, in this jurisdiction, Amicus briefs are solicited by the Honorable Supreme Court itself, not volunteered, the Amended Rules of Court as well as the Internal Rules of the Supreme Court do not, however, prescribe specific requirements as to the submission and admission of Amicus Curiae briefs.

³ A/HRC/50/29 at para. 10.

8. Furthermore, while tradition and technical regulations may find value in certain processes of the Honorable Supreme Court, the court of the last resort in this country, the same may give way to serve the substantial ends of justice.
9. The High Court, writing through J. Inting in the case of **Latogan v. People of the Philippines**, G. R. No. 238298, January 22, 2020 had the instance to state:

The Court is fully aware that procedural rules are not to be simply disregarded as they insure an orderly and speedy administration of justice. Nonetheless, it is equally true that courts are not enslaved by technicalities. They have the prerogative to relax compliance with procedural rules of even the most mandatory character, mindful of the duty to reconcile both the need to speedily put an end to litigation and the parties' right to an opportunity to be heard. Cases should be decided only after giving all parties the chance to argue their causes and defenses. Technicality and procedural imperfection should, as a rule, not serve as bases of decisions. In that way, the ends of justice would be served⁴. [Emphasis supplied]

10. As to the propriety of intervention, it is submitted that the intervention for the purpose of submitting an *Amicus Curiae* Brief is proper and is not pregnant of any prohibitive implications.
11. It is most respectfully submitted that the permission to intervene is subject to the sound discretion of the court, and considering the circumstances of the intervenor-movant herein, the exercise of which will not unduly delay or prejudice the adjudication of the rights of the original parties and that her opinion can best be read in the instant case.
12. In the discourse on human rights involved herein, the Supreme Court of the Philippines have always been in the forefront of protecting inalienable and basic human rights. This year, in celebration of the Human Rights Day, it even unveiled a marker at the lobby of the highest court of the land that memorializes the adoption of Universal Declaration of Human Rights 74 years ago. Citing Senior Associate Justice Marvic M.V.F. Leonen, chairperson of the SC's Committee on Human Rights, he said that "**human rights** "consist not only of a penumbra of autonomies for the

⁴ Latogan v. People of the Philippines, G.R. No. 238298, January 22, 2020

individual – it can also be framed as part of our duties to each other, our communities, and our societies.”⁵

13. Time and again, the Honorable Supreme Court in a catena of cases has put value in the recognition, preservation and protection of human rights. Not only the domestic laws, rules and practices were interpreted to put effect to the inalienable and fundamental human rights but even the international law as domesticated by virtue of incorporation clause, treaty commitments and customary practices have been adopted and observed, that is ---to protect the fundamental freedom of speech, expression and of opinion.
14. This written intervention as amicus curiae will not prejudice the rights of the parties but, on the contrary, it will help to ensure universal protection of human rights. Given the broad impact of the Supreme Court’s decision on the ability of the media to function in the Philippines, and in the ability of the public to access information shared by the media, especially online, the movant’s intervention here is wholly appropriate.
15. In the performance of her mandate, the Special Rapporteur is accorded certain privileges and immunities as expert on mission for the United Nations pursuant to the Convention on the Privileges and Immunities of the United Nations, adopted by the United Nations General Assembly on 13 February 1946.
16. Should leave to intervene be granted by the Supreme Court of the Philippines, this intervention will be made on a voluntary basis without prejudice to, and should not be considered as a waiver, express or implied, of the privileges and immunities of the United Nations, its officials and experts on mission, pursuant to the 1946 Convention on the Privileges and Immunities of the United Nations, to which the Philippines is a Party since 28 October 1947. Authorization for the positions and views expressed by the Special Rapporteur, in full accordance with her independence, were neither sought nor given by the United Nations, the Human Rights Council, the Office of the High Commissioner for Human Rights, or any of the officials associated with those bodies.

⁵ Panaligan, Rey. *SC assures ‘judiciary’s respect, protection of Filipinos’ human rights’* – CJ Gesmundo December 10, 2022. <https://mb.com.ph/2022/12/10/sc-assures-judiciarys-respect-protectionof-filipinos-human-rights-cj-gesmundo/> Accessed December 21, 2022

17. A copy of the Amicus Curiae Brief is hereto attached for reference by this Honorable Court as Annex B.
18. As herein movant is currently resident in Bangladesh, it is further requested that all notices and processes of this Honorable Court be directed to undersigned counsel at his address indicated herein below.

PRAYER

In the light of the foregoing, it is most respectfully PRAYED of this Honorable Supreme Court:

1. TO GRANT the MOTION FOR INTERVENTION for the UNITED NATIONS SPECIAL RAPPORTEUR ON THE PROMOTION AND PROTECTION OF THE RIGHT TO FREEDOM OF OPINION AND OF EXPRESSION - IRENE KHAN TO APPEAR as AMICUS CURIAE;
2. TO ISSUE AN ORDER CONSIDERING and ADMITTING the AMICUS CURIAE BRIEF of Irene Khan;
3. TO FURNISH MOVANT-IN-INTERVENTION with copies of all pleadings, motions, papers, processes etc. regarding the instant case at the address stated hereunder and/or by electronic means.
4. ISSUE SUCH OTHER RELIEFS just and equitable as may be warranted by the circumstances of the herein proceedings.

RESPECTFULLY SUBMITTED.

June 5, 2023.

City of Makati for Manila, Philippines.

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OFFICE OF THE SOLICITOR GENERAL

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NOTICE OF HEARING

THE CLERK OF COURT

SUPREME COURT OF THE PHILIPPINES

Padre Faura Street, Ermita Manila

OFFICE OF THE SOLICITOR GENERAL

134 Amorsolo Street, Legaspi Village, Makati City

Greetings!

Please submit the foregoing MOTION for the consideration and approval of the Honorable Court upon receipt hereof or as soon as counsel may be heard.

RODEL A. TATON



Annex 'A'



SPECIAL POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS:

I, IRENE KHAN, of legal age, citizen of Bangladesh and the United Kingdom, with address at Rangs Waterfront, House 1, Road 15, Gulshan, Dhaka 1212, Bangladesh. I AM THE UNITED NATIONS SPECIAL RAPPORTEUR ON THE PROMOTION AND PROTECTION OF THE RIGHT TO FREEDOM OF OPINION AND EXPRESSION. In the performance of my mandate as Special Rapporteur I am accorded certain privileges and immunities as expert on mission for the United Nations pursuant to the Convention on the Privileges and Immunities of the United Nations, adopted by the United Nations General Assembly on 13 February 1946. My written intervention is submitted to the Supreme Court of the Philippines on a voluntary basis without prejudice to, and should not be considered as a waiver, express or implied, of the privileges and immunities of the United Nations, its officials and experts on mission, pursuant to the 1946 Convention on the Privileges and Immunities of the United Nations, to which the Philippines is a Party since 28 October 1947.

Authorization for the positions and views expressed as Special Rapporteur, in full accordance with the independence afforded to my mandate, were neither sought nor given by the United Nations, the United Nations Human Rights Council, the Office of the United Nations High Commissioner for Human Rights, or any of the officials associated with those bodies.

I have named, constituted and appointed ATTY. RODEL A. TATON or any representative of TATON LAW OFFICE with office address at Unit 1014 Madison Square Condominium, 2574 Taft Avenue Malate Manila, to be my true and lawful Attorney-in-Fact for me and in my name, place and stead to do and perform the following acts and things, to wit:

1. To represent me in my written submission of an Amicus Brief in the case pending before the Supreme Court of the Philippines, in **G.R. No. 263584 entitled REYNALDO SANTOS JR., MARIA ANGELITA RESSA, and RAPPLER, INC. v. People of the Philippines ;**

HEREBY GIVING AND GRANTING unto my said Attorney-in-

I. INTRODUCTION

The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Irene Khan (herein the “Special Rapporteur”), submits this brief as amicus curiae to the Supreme Court of the Philippines.¹

The case before this Court concerns the final appeal against Maria Ressa’s conviction for ‘cyberlibel’ and sentence of over six years’ imprisonment. Maria Ressa, a journalist and 2021 Nobel Peace Prize Laureate, serves as the co-founder and Chief Executive Officer of Rappler.com.² In June 2020, Ms. Ressa and her co-defendant were convicted and each sentenced to up to six years’ imprisonment by the Regional Trial Court for the crime of ‘cyberlibel’, pursuant to section 4(c)(4) of the Cybercrime Prevention Act of 2012.² In July 2022, the Court of Appeals upheld Ms. Ressa’s conviction and increased her sentence to 6 years, 8 months and 20 days imprisonment.³ In October 2022, the Court of Appeals declined to reconsider its decision.⁴

The Special Rapporteur is an independent expert appointed by the United Nations Human Rights Council to gather all relevant information regarding violations of the right to freedom of opinion and expression, and make recommendations and provide suggestions on ways to better promote and protect the right to freedom of opinion and expression.⁵

In the performance of her mandate, the Special

¹ The Special Rapporteur would like to acknowledge the pro bono assistance of Anthony Jones of 4 New Square Chambers and her external Senior Legal Advisor Paige Morrow in preparing this amicus curiae brief.

² *People of the Philippines vs. Reynaldo Santos, Jr., and Maria Angelita Ressa and Rappler, Inc.*, Criminal Case No. R-MNL-1101141-CR, Regional Trial Court Branch 46 (June 15, 2020).

³ *People of the Philippines vs. Reynaldo Santos, Jr., Maria Angelita Ressa and Rappler*, CA-G.R. CR NO. 44991 (Court of Appeals, July 7, 2022).

⁴ *People of the Philippines vs. Reynaldo Santos, Jr., Maria Angelita Ressa and Rappler*, CA-G.R. CR NO. 44991, Notice of Resolution of the Court of Appeals (October 10, 2022).

⁵ Human Rights Council Res. 7/36 at sec. 3(c), UN Doc. A/HRC/6/36 (March 28, 2008), as extended by Human Rights Council Resolution 43/4, UN Doc. A/HRC/RES/43/4 (June 30, 2020).

Rapporteur is accorded certain privileges and immunities as expert on mission for the United Nations pursuant to the Convention on the Privileges and Immunities of the United Nations, adopted by the United Nations General Assembly on 13 February 1946.

This intervention is submitted to the Supreme Court of the Philippines on a voluntary basis without prejudice to, and should not be considered as a waiver, express or implied, of the privileges and immunities of the United Nations, its officials and experts on missions, pursuant to the 1946 Convention on the Privileges and Immunities of the United Nations, to which the Philippines is a Party since 28 October 1947. Authorization for the positions and views expressed by the Special Rapporteur, in full accordance with her independence, was neither sought nor given by the United Nations, the Human Rights Council, the Office of the High Commissioner for Human Rights, or any of the officials associated with those bodies.

UN Human Rights Council Resolution 7/36, Section 3(c), mandates the Special Rapporteur to “make recommendations and provide suggestions on ways and means to better promote and protect the right to freedom of opinion and expression in all its manifestations.”⁶ Under the mandate, these recommendations are based on an analysis of international human rights law, including relevant jurisprudence, standards, and international practice, as well as relevant regional and national laws, standards, and practices. The laws and practices at issue in this case raise critical issues concerning their compatibility with international human rights law and the degree to which they infringe upon fundamental rights to freedom of opinion and expression.

The purpose of this *amicus curiae* brief is to provide the Court with the international and regional legal standards as they apply to freedom of expression, especially regarding its application to the law of defamation. The Special Rapporteur is concerned that the law in the Philippines fails

⁶ Human Rights Council, Res. 7/36 at para. 3(c), U.N. Doc. A/HRC/7/36 (March 28, 2008).

to adequately protect the right to freedom of expression under Article 19 of the International Covenant on Civil and Political Rights (ICCPR), to which the Philippines is a party. In particular, the Cybercrime Prevention Act raises serious concerns that it limits the ability of journalists to expose, document and address issues of important public interest, thereby violating the right to receive and impart information.

The Special Rapporteur respectfully submits that this appeal raises questions of great public interest in relation to freedom of expression, and she will address the following points:

(a) The obligation of the Philippines under international law to guarantee the right to freedom of opinion and expression, and the permissible restrictions of the right under the International Covenant on Civil and Political Rights (“ICCPR”);

(b) The critical need to protect journalists as part of the obligation to ensure adequate protection for freedom of opinion and expression;

(c) The principle that rights protected online must receive equivalent protection to those guaranteed offline;

(d) The principle that defamation should be decriminalised and in any event a prison sentence should never be imposed;

(e) The international standards which require the right to truth and public interest as defences in civil and criminal defamation proceedings;

(f) The principle that defamation law should not be used to prevent criticism of public figures;

(g) The prohibition of retroactive criminalisation as a matter of international law.

II. THE PHILIPPINES’ OBLIGATION UNDER INTERNATIONAL LAW TO GUARANTEE THE RIGHT TO FREEDOM OF EXPRESSION

The ICCPR, which the Philippines ratified on October 23, 1986, establishes the obligations of State parties to respect and ensure the right to freedom of opinion and expression. As a State party, the Philippines is bound to uphold these obligations “in good faith” and may not invoke “the provisions of its internal law as justification for its failure to perform a treaty.”⁷

Article 19(1) of the ICCPR protects the right to “hold opinions without interference.” Article 19(2) of the ICCPR provides for the freedom of expression and states that this right shall include the “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 or his [or her] choice.” Article 19(3) states that specific conditions must be met before a state imposes restrictions on this freedom.

The Human Rights Council, the primary human rights institution of the United Nations, has affirmed that freedom of opinion and expression is “essential for the enjoyment of other human rights and freedoms and constitutes a fundamental pillar for building a democratic society and strengthening democracy.”⁸ Freedom of opinion and expression is recognized in human rights law as particularly important, since it provides the mechanism by which other rights, such as political participation, may be exercised.⁹ As the Human Rights Committee put it in its General Comment 34 to Article 19 of the ICCPR, “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 ... Freedom of expression is a necessary condition for the realization of the principle of transparency and accountability that are, in turn, essential for the promotion and protection of human rights.”¹⁰

⁷ Vienna Convention on the Law of Treaties arts. 26-27, May 23, 1969 1155 UNTS 331. The Philippines ratified the Vienna Convention on November 15, 1972.

⁸ Human Rights Council, Res. 23/L.5, at para. 2, UN Doc. A/HRC/23/L.5 (April 9, 2014).

⁹ HRC, *Gauthier v Canada*, UN Doc. CCPR/C/65/D/633/1995, para. 13.4; and HRC, *Aduayom, Diasso and Dabou v Togo*, UN Doc. CCPR/C/57/D/422-4/1990, para. 7.4.

¹⁰ HRC, General Comment 34, UN Doc. CCPR/C/GC/34 (September 12, 2011), para. 2.

Any restrictions to the right of freedom of opinion and expression pursuant to Article 19(3) must be provided by law and may only be enacted for “respect of the rights or reputations of others” or the protection of “national security [...] public order [or] public health or morals.” In addition, any restrictions must conform to the boundaries of necessity and proportionality.

Article 19(3) has established a three-part test for permissible restrictions on freedom of expression:

- a. *Restrictions must be provided by law.* Any law restricting freedom of expression must be “formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly” and “must not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution.”
- b. *Restrictions must only be imposed to protect legitimate aims, which are limited to those specified under article 19(3).* Respect for the rights and reputation of others is a legitimate aim to restrict freedom of expression but any restriction on this basis “must be construed with care.”¹¹
- c. *Restrictions must be necessary to protect legitimate aims.* It is critical to assess the proportionality of restrictions, with the aim of ensuring that restrictions “target a specific objective and do not unduly intrude upon the rights of targeted persons.”¹² Any interference with third parties’ rights must also be limited and justified. The restrictions must further be “the least intrusive instrument among those which might achieve the desired result.”¹³

¹¹ *Id.*, para. 26.

¹² Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, UN Doc. A/HRC/29/32 (May 22, 2015).

¹³ General Comment 34, *supra* note 9, para. 22 (September 12, 2011).

The Human Rights Committee has consistently reminded States parties that “when a State party imposes restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself” and “the relation between the right and restriction and between the norm and exception must not be reversed.”¹⁴ The State bears the burden of showing that it has met all conjunctive requirements.¹⁵

Cyber defamation laws like the Philippines’ Cybercrime Prevention Act restrict the right to freedom of expression and are subject to the narrow requirements of Article 19(3). Under the Article 19(3) requirement of legality, it is insufficient that restrictions on freedom of expression are formally enacted as domestic laws or regulations. Restrictions must also be sufficiently clear, accessible and predictable.¹⁶

The Article 19(3) requirement of necessity implies an assessment of the proportionality of restrictions, with the aim of ensuring that restrictions “target a specific objective and do not unduly intrude upon the rights of targeted persons.”¹⁷ The ensuing interference with third parties’ rights must also be limited and “justified in light of the interest supported by the intruder.”¹⁸

Finally, the restrictions must be “the least intrusive instrument among those which might achieve the desired result.”¹⁹ It follows that “[a]ny restrictions on the operation of websites, blogs or any other internet-based, electronic or other such information dissemination system . . . are only permissible to the extent that they are compatible with [Article 19(3) of the ICCPR].”²⁰ The Human Rights Council

¹⁴ HRC, *Lydia Cacho v Mexico*, UN Doc. CCPR/C/123/D/2767/2016, para. 10.5.

¹⁵ See e.g. General Comment 34, supra note 9, para. 27.

¹⁶ See *Id.* at para. 25.

¹⁷ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, UN Doc. A/HRC/29/32 at para. 26 (May 22, 2015) at para. 35.

¹⁸ *Id.*

¹⁹ *Id.* (quoting HRC, General Comment 27, UN Doc. CCPR/C/21/Rev.1/Add.9 (November 2, 1999) on freedom of movement, para. 14).

²⁰ General Comment 34, supra note 9, para. 43.

has also “[c]ondemn[ed] unequivocally measures to intentionally prevent or disrupt access to or dissemination of information online in violation of international human rights law and call[ed] on all States to refrain from and cease such measures.”²¹

Additionally, the Human Rights Council frequently refers to the weight attached to freedom of expression in a democratic society. The restriction must be required by a compelling State interest which clearly outweighs the social need for protecting freedom of expression and must be proportional to the purpose pursued by the State.²² Without appropriate limits, government restrictions on online speech deter individuals from exercising the freedom of expression for fear of unwarranted penalties, such as high civil fees, criminal charges, or imprisonment.

III. THE PROTECTION OF JOURNALISTS IS CRITICAL TO GUARANTEE THE RIGHT TO FREEDOM OF OPINION AND EXPRESSION.

The repression of journalists and media freedom presents a serious impediment to the freedom of opinion and expression. Journalism is an activity and profession that “constitutes a necessary service for any society, and provides individuals and society as a whole with the necessary information” to allow them to develop their own thoughts and opinions. The protection of journalists is therefore essential for guaranteeing the right to freedom of expression and opinion.²³

Journalistic expression, especially expression about public and political issues, is particularly protected by the right to freedom of expression as guaranteed by Article 19. The Human Rights Committee’s General Comment 34 recognizes that “journalists are frequently subjected to [...] threats, intimidation and attacks” because of their work

²¹ Human Rights Council, Res. 32/13, UN Doc. A/HRC/RES/32/13, para. 10 (July 18, 2016).

²² See General Comment 34, *supra* note 9, para. 34 (“For instance, the value placed by the Covenant upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain.”).

²³ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, UN Doc. A/HRC/20/17 (June 4, 2012).

and, for this reason, must be afforded protection under the ICCPR. Further, General Comment 34 states that “the penalization of a media outlet [...] or journalist solely for being critical” of the government can never be considered as a necessary restriction on freedom of expression.²⁴

The Human Rights Committee has determined that a free, uncensored, and unhindered press “constitutes one of the cornerstones of a democratic society,” and that States are required to “take all necessary steps to foster the independence of [...] new media and to ensure access of individuals thereto.”²⁵

The importance of the right to freedom of expression of journalists is further highlighted in Human Rights Council Resolution 51/9 on safety of journalists adopted on October 6, 2022, which “condemns unequivocally” not only “all attacks, reprisals and violence against journalists and media workers, such as [...] arbitrary detention, expulsions, intimidation, threats and harassment”²⁶ but also “measures in violation of international human rights law aiming to or that intentionally prevent or disrupt access to or the dissemination of information online and offline, which undermine the work of journalists in informing the public, including through practices such as Internet shutdowns or measures to unlawfully or arbitrarily restrict, block or take down media websites...”²⁷

Moreover, the United Nations General Assembly adopted Resolution 68/163, which “[c]alls upon states to promote a safe and enabling environment for journalists to perform their work independently, and without undue influence.” The Resolution by the General Assembly further urges Members of the United Nations to “do their utmost to prevent violence against journalists and media workers” and “condemns unequivocally all attacks and violence against journalists [...] such as torture, enforced disappearances and arbitrary detention, as well as

²⁴ *Id.* at para. 23.

²⁵ *Id.* at para. 13.

²⁶ Human Rights Council, Res. 51/9, UN Doc. A/HRC/RES/51/9 (October 6, 2022), para. 1.

²⁷ *Id.* at para. 5.

intimidation and harassment in both conflict and non-conflict situations.”²⁸

The Special Rapporteur has underscored the importance of journalism as a public good, due to the “societal relevance of independent, free and pluralistic news media – as a pillar of democracy, a tool to support accountability and transparency, and a means to sustain open deliberation and encourage the exchange of diverse views.” The media “by virtue of their function and the public interest in disclosure, [...] are entitled to specific legal protection. States are obliged not only to refrain from arbitrary restraints, but also to put in place legislative and regulatory measures in line with international human rights standards to enable journalists to carry out their work safely and without hindrance.”²⁹

Defamation liability is well-recognized as one way in which restriction and disruption to journalists’ free exercise of their rights may be manifested. Accordingly, the Human Rights Council has recently called upon States to “ensure that defamation and libel laws are not misused, in particular through criminal sanctions, to illegitimately or arbitrarily censor journalists and interfere with their mission of informing the public, and where necessary to revise and repeal such laws, in compliance with States’ obligations under international human rights law.”³⁰

IV. THE RIGHTS AFFORDED TO PERSONS OFFLINE MUST ALSO BE PROTECTED ONLINE.

It is a longstanding, international principle recognized by the UN General Assembly, the Human Rights Council, the Human Rights Committee, and State bodies that the rights afforded to persons offline must also be protected online.³¹ This principle applies to the right to freedom of

²⁸ General Assembly, Res. 68/163, UN Doc. A/RES/68/163 (February 21, 2014).

²⁹ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Irene Khan, UN Doc. A/HRC/50/29 at para. 26 (April 20, 2022).

³⁰ Res. 51/9, supra note 27, para.11(h).

³¹ See, e.g. Human Rights Council, Res. 32/13, UN Doc. A/HRC/RES/31/13, para. 1; General Assembly, Res. 68/167, UN Doc. A/RES/68/167, para. 3 (January 21, 2014); and Human Rights Council, Res. 26/13, UN Doc. A/HRC/RES/26/13 1 (July 14, 2014).

expression in Article 19 of the ICCPR, which explicitly states that it is applicable regardless of frontiers and through any media of one's choice.³²

Article 19(2) was broadly drafted to accommodate future advances in technology such as online journalism: States parties adopted the general phrase “through any other media of his choice,” without enumerating then-existing media.³³ The UN General Assembly, the Human Rights Council, and the Human Rights Committee have further provided that permissible restrictions on online speech must be the same as those offline.³⁴ As stated in the Human Rights Committee's General Comment 34, “paragraph [19]2 protects all forms of expression and the means of their dissemination” which includes the means of “electronic and internet-based modes of expression.”³⁵ In the digital context, the Special Rapporteur has urged States to repeal laws that overregulate freedom of expression online.³⁶

In a Resolution adopted on July 18, 2016 on the Promotion, Protection and Enjoyment of Human Rights on the Internet, the Human Rights Council emphasized that “the exercise of human rights, in particular the right to freedom of expression, on the Internet is an issue of increasing interest and importance, as the rapid pace of technological development enables individuals all over the world to use new information and communications technology.”³⁷ The Council stressed the “importance of building confidence and trust in the Internet, not least with regard to the freedom of expression . . . so that the potential

³² Res. 32/13, *supra* note 33; see also Res. 68/167, *supra* note 33.

³³ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, UN Doc. A/HRC/29/32 at para. 26 (May 22, 2015).

³⁴ See Res. 68/167, *supra* note 33 at para. 3; Res. 26/13, *supra* note 33 at para. 1; Res. 32/13, *supra* note 33, para. 1.

³⁵ General Comment 34, *supra* note 9, para. 12.

³⁶ See e.g. OL PAK 13/2015; UA SAU 13/2014; UA SGP 1/2015. See also Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Irene Khan, UN Doc. A/HRC/47/25, para. 88 (April 13, 2021) (“States [...] should refrain from restricting freedom of expression online or offline except in accordance with the requirements of articles 19 (3) and 20 (2) of the International Covenant on Civil and Political Rights, strictly and narrowly construed.”).

³⁷ Res. 32/13, *supra* note 33, para. 2 (July 18, 2016).

of the Internet as . . . an enabler for development and innovation can be realized, with full cooperation between Governments, civil society, the private sector, the technical community and academia.”³⁸

The Special Rapporteur has previously emphasized the importance of internet freedom: “the Internet is an important and related tool in the promotion of human rights and an effective means to disseminate information on civil, cultural, economic, political and social rights and violations of them.”³⁹ Without access to information, “corruption flourishes, press freedom is compromised, and powerful private actors can effectively buy secrecy even for information that reveals serious threats to public health and safety.”⁴⁰ Additionally, the internet can serve as a powerful tool against “reducing global inequality and the marginalization of both people and nations.”⁴¹

It is therefore self-evident that State restrictions on online speech, as with offline speech, must adhere strictly to the conditions of Article 19(3) of the ICCPR. For over 20 years, the Special Rapporteur has reminded “[S]tates that they must also ensure that there is adequate and unfettered social and political space in which the new technologies can be developed in a self-regulating environment and where the exercise and enjoyment of the rights to expression, opinion, information, association and assembly can flourish. In the absence of freedom from excessive regulation and adequate space for expression, participation and action, the results of research will have no meaning and genuine participation, progress and human development will not happen.”⁴²

Based on these tenets, the narrow permissible restrictions on freedom of expression for defamation

³⁸ *Id.*

³⁹ UN Special Rapporteur on Freedom of Opinion and Expression, Promotion and protection of the right to freedom of opinion and expression, UN Doc. E/CN.4/2001/64, para. 59 (February 13, 2001).

⁴⁰ UNDP, Human Development Report 2000, available at: <https://hdr.undp.org/system/files/documents/hdr2000enpdf.pdf>.

⁴¹ *Id.*

⁴² E/CN.4/2001/64, supra note 41, para. 69.

purposes allowed by Article 19(3), apply equally to online journalists and media sources. Accordingly, as elaborated below, the Philippines' Cybercrime Prevention Act of 2012 raises serious concerns under international law by not only (1) narrowly defining and punishing online defamation beyond the permissible scope allowed by Article 19(3), but also by (2) running counter to the widespread consensus among global legal bodies and experts that the same rules that apply to offline speech apply to sources of information and ideas on the internet. The Cybercrime Prevention Act of 2012 regulates the online space more severely than the widely held defamation principles for offline speech by, for example, penalizing criticism of public figures and imposing higher civil and/or criminal penalties than for offline defamation.⁴³

V. DEFAMATION SHOULD BE DECRIMINALISED AND IN ANY EVENT A PRISON SENTENCE SHOULD NEVER BE IMPOSED

The Human Rights Committee has affirmed that States should decriminalise defamation and, to the extent that it remains in the law, “the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty.”⁴⁴

As well, the UN Human Rights Council has expressed concerns with respect to the “abuse of legal provisions on defamation and criminal libel,”⁴⁵ and urged States to “ensure that defamation and libel laws are not misused [...] to illegitimately or arbitrarily censor journalists and interfere with their mission of informing the public.”⁴⁶

The Human Rights Committee urges States to “consider the decriminalization of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and

⁴³ *Id.*

⁴⁴ General Comment 34, *supra* note 9, para. 47.

⁴⁵ Human Rights Council Res. 12/16, UN Doc.A/HRC/RES/12/16, para. 3 (October 12, 2009).

⁴⁶ Human Rights Council Res. 39/6 (October 5, 2018), paras. 11-12..

imprisonment is never an appropriate penalty.”⁴⁷ Given the chilling effect on free speech of criminal prosecution, the Committee has called on States “to ensure that all journalists and human rights defenders are able to exercise their right to freedom of expression in their activities, including by decriminalizing the offences of defamation and calumny ...”.⁴⁸

In a report to the Human Rights Council on “Disinformation and freedom of opinion and expression”, the Special Rapporteur affirmed that:

“Criminal law should be used only in very exceptional and most egregious circumstances of incitement to violence, hatred or discrimination. Criminal libel laws are a legacy of the colonial past and have no place in modern democratic societies. They should be repealed.”⁴⁹

Similarly, in a report to the Human Rights Council on “Reinforcing media freedom and the safety of journalists in the digital age”, the Special Rapporteur reaffirmed that:

“States should repeal criminal defamation and seditious libel laws and laws criminalizing the criticism of State institutions and officials. Criminalization of speech (other than in the most egregious cases of incitement to violence and hatred) is disproportionate, gags journalism and damages democratic discourse and public participation.”⁵⁰

Regional human rights bodies have also noted that defamation laws can pose serious threat to freedom of expression.

The European Court of Human Rights held in *Flinkilä and Others v Finland*,⁵¹ which concerned privacy issues

⁴⁷ General Comment 34, supra note 9, para. 47.

⁴⁸ *Lydia Cacho v Mexico*, supra note 14, para. 11.

⁴⁹ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Irene Khan, UN Doc. A/HRC/47/25 (April 13, 2021), para. 89.

⁵⁰ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, UN Doc. A/HRC/50/29 (April 20, 2022), para. 111.

⁵¹ *Flinkilä and Others v Finland* [2010] ECHR 446.

arising from reporting on an incident leading to the conviction of a public servant, that the sanctions of fines and damages were excessive. In that case, the Court found that there was a clear public interest in the reporting, that the incident had already been publicized in the media, and repeating it did not *ipso facto* cause equivalent damage or suffering.⁵² Regarding sanctions on the press in particular, the European Court held in *Bladet Tromsø and Stensaas v Norway* that the “most careful scrutiny on the part of the Court is called for when...the measures taken or sanctions imposed by the national authority are capable of discouraging the participation of the press in debates over matters of legitimate public concern.”⁵³ In the same vein, the European Court held in *Cumpănă and Mazăre v Romania* that it is necessary to “exercise the utmost caution where the measures taken or sanctions imposed by national authorities are such as to dissuade the press from taking part in the discussion of matters of legitimate public concern.”⁵⁴

In the African human rights system, Principle 22(1) of the Principles on Freedom of Expression in Africa calls on states to review all criminal restrictions on content to ensure that they serve a legitimate interest in a democratic society.⁵⁵ The African Commission on Human and Peoples’ Rights also condemns using criminal defamation laws against journalist and the media, emphasizing that: “Criminal defamation laws constitute a serious interference with freedom of expression and impedes on the role of the media as a watchdog, preventing journalists and media practitioners to practice their profession without fear and in good faith.”⁵⁶

Similarly, the African Court on Human and Peoples’ Rights held in *Konaté v Burkina Faso* that imprisonment for

⁵² *Id.* para. 56.

⁵³ *Bladet Tromsø and Stensaas v Norway* [1999] ECHR 29; (2000) 29 EHRR 125, para. 64.

⁵⁴ *Cumpănă and Mazăre v Romania* [2004] ECHR 692; (2005) 41 EHRR 14, para. 111.

⁵⁵ African Commission, Declaration of Principles on Freedom of Expression and Access to Information in Africa, Adopted at 65th Ordinary Session (November 10, 2019).

⁵⁶ African Commission: “Resolution 169 on Repealing Criminal Defamation Laws in Africa” 48th Ordinary Session, ACHPR/Res.169(XLVIII)10.

defamation violates the right to freedom of expression, and that criminal defamation laws should only be used in restricted circumstances.⁵⁷ Subsequently, the ECOWAS Court affirmed that criminal defamation and libel laws should be repealed in *Federation of African Journalists and Others v The Gambia* which recognised that the criminal laws on libel, sedition and false news disproportionately interfere with the rights of Gambian journalists and directed that The Gambia “immediately repeal or amend” these laws in line with its obligations under international law.⁵⁸ These decisions have been followed by the East African Court of Justice in ordering repeal of criminal defamation provisions in Tanzania,⁵⁹ and by the Supreme Court of Kenya⁶⁰ and the Constitutional Court of Lesotho in striking down domestic criminal defamation statutes.⁶¹

To similar effect, the Inter-American Court of Human Rights has clearly stated that criminal prosecutions for the exercise of the right to freedom of expression may only be brought in exceptional cases where there is an absolute necessity to resort to such measures.⁶² In *Kimel v Argentina*, the Inter-American Court explained that criminal proceedings will usually be an unnecessary and disproportionate response to expression because criminal law “is the most restrictive and harshest means to establish liability for an illegal conduct.”⁶³ The Inter-American Commission on Human Rights has taken the view that:

“the threshold of State intervention with respect to freedom of expression is necessarily higher [than in respect of other rights] because of the critical role political dialogue plays in a democratic society. The Convention requires that this threshold be raised even higher when a State brings to bear the coercive power of its criminal justice system to curtail expression.

⁵⁷ *Konate v. Burkina Faso*, Application No. 4 of 2013, [2018] ACHPR 10 (4 October 2013).

⁵⁸ *Federation of African Journalists v. Republic of the Gambia*, EWC/CCJ/JUD/04/18.

⁵⁹ *Media Council of Tanzania v Attorney General* (Reference No. 2 of 2017).

⁶⁰ *Okuta v Attorney General* [2017] eKLR (Petition No. 397 of 2016).

⁶¹ *Peta v Minister of Law, Constitutional Affairs and Human Rights* CC 11/2016.

⁶² *Kimel v Argentina*, Judgment of May 2, 2008, ser. C No. 177, para. 78.

⁶³ *Id.*, para. 76.

Considering the consequences of criminal sanctions and the inevitable chilling effect they have on freedom of expression, criminalization of speech can only apply to those exceptional circumstances where there is an obvious and direct threat of lawless violence.”⁶⁴

Under the Philippines Revised Penal Code, and affirmed in the Cybercrime Prevention Act of 2012, libel is defined as “a public and malicious imputation of a crime, or of a vice or defect, real or imaginary, or any act, omission, condition, status or circumstance tending to cause dishonor, discredit or contempt of a natural or juridical person, or to blacken the memory of one who is dead.”⁶⁵ The law also penalizes crimes against honor, libel and slander.”⁶⁶ The Cybercrime Prevention Act also extends the criminal defamation provisions into the online realm, and into “any other similar means which may be devised in the future.”⁶⁷

⁶⁴ Inter-American Commission on Human Rights, Annual Report, Ref OEA/Ser. L/V.88 (1994), p211.

⁶⁵ See The Revised Penal Code of The Philippines (Act No. 3815) Article 353, available at https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/PHL_revised_penal_code.pdf

⁶⁶ *Id.* length of incarceration, see articles 355, 358, and 359

⁶⁷ The Philippines Republic Act (R.A.) 10175, the Cybercrime Prevention Act of 2012, sec. 4(c)(4).

The maximum prison sentence for the offence of cyberlibel is 8 years.⁶⁸ In affirming Ms. Ressa and her co-defendant's criminal conviction, and increasing her sentence to nearly 7 years' imprisonment, the Philippines Court of Appeals held that the trial court was 'correct in imposing the penalty of imprisonment... considering the seriousness of the crime of libel'.⁶⁹ The Court of Appeals considered it 'worthy and relevant to point out that the conviction of the accused-appellants for the crime of cyberlibel... is not geared towards the curtailment of the freedom of speech, or to produce an unseemingly chilling effect on the users of cyberspace that would possibly hinder free speech'.⁷⁰

However, the Human Rights Committee has found the Revised Penal Code and the Cybercrime Prevention Act contrary to human rights law. In the concluding observations on the fourth periodic report of the Philippines, the UN Human Rights Committee declared Philippines' criminalization of libel "incompatible" with the freedom of expression clause in the International Covenant on Civil and Political Rights. The Committee stated that it "regrets that the Cybercrime Prevention Act of 2012 [...] criminalizes libel over the Internet (arts. 2 and 19)."⁷¹

The view of the Human Rights Committee stated above was in response to the imprisonment of the Filipino radio journalist Alex Adonis in 2007. The Committee affirmed that Philippines is "under an obligation to take steps to prevent similar violations occurring in the future, including by reviewing the relevant libel legislation."⁷² However, the Philippines did not take any step to address the issue in light of the Committee's decision.

⁶⁸ See *People of the Philippines vs. Reynaldo Santos, Jr., Maria Angelita Ressa and Rappler*, CA-G.R. CR NO. 44991 (Court of Appeals, July 7, 2022), 17.

⁶⁹ See *People of the Philippines vs. Reynaldo Santos, Jr., Maria Angelita Ressa and Rappler*, CA-G.R. CR NO. 44991 (Court of Appeals, July 7, 2022), 33.

⁷⁰ *People of the Philippines vs. Reynaldo Santos, Jr., Maria Angelita Ressa and Rappler*, CA-G.R. CR NO. 44991, Notice of Resolution of the Court of Appeals (October 10, 2022).

⁷¹ Concluding observations on the fourth periodic report of the Philippines, UN Doc. CCPR/C/PHL/CO/4, para. 21 (November 13, 2012).

⁷² HRC, *Alexander Adonis v The Philippines*, UN Doc. CCPR/C/103/D/1815/2008/Rev.1 (April 26, 2012)

To summarise, criminal defamation laws are an inappropriate means of limiting the freedom of the press. Using defamation laws in vexatious ways can deter journalists from acting as “public watchdog” on government accountability and in providing forums for public debate on matters of public concern.⁷³ This in turn affects the public’s access to information on matters of public interest and concern. In light of the above, penal sanctions under the Revised Penal Code of the Philippines and the current Cybercrime Prevention Act raise serious concerns with respect to the State’s obligation to protect the right to freedom of expression under Article 19 of the ICCPR.

VI. INTERNATIONAL DEFAMATION STANDARDS REQUIRE THE AVAILABILITY OF THE DEFENCES OF TRUTH AND PUBLIC INTEREST

Criminal defamation laws which fail to allow a defence of truth and public interest are not a proportionate measure for the purposes of Article 19(3), ICCPR and under international human rights law. The Human Rights Committee recommends that all defamation laws, including criminal defamation, should include the defences of truth and “public interest in the subject matter.”⁷⁴ More specifically, “[d]efamation laws must be crafted with care to ensure that they comply with [the right to freedom of expression], and that they do not serve, in practice, to stifle [it]. All such laws, in particular penal defamation laws, should include such defences as the defence of truth.”⁷⁵

Moreover, the Human Rights Committee has stated that a “public interest in the subject matter of the criticism should be recognized as a defence [to defamation] and “At least with regard to comments about public figures, consideration should be given to avoiding penalizing or otherwise rendering unlawful untrue statements that have been published in error but without malice

Indeed, the failure to allow for a truth defence in a

⁷³ *Erla Hlynisdottir v Iceland (No. 2)* [2014] ECHR 1119, para. 57.

⁷⁴ General Comment 34, supra note 9, para. 47.

⁷⁵ *Id.*

criminal defamation case has been considered as “*an aggravating factor*” by the Human Rights Committee in reaching its conclusion on the violation of Article 19.⁷⁶

At the regional court level, the European Court of Human Rights (“ECtHR”) and Inter-American Court of Human Rights (“IACtHR”) have developed several principles to resolve the issues that typically arise in defamation cases. These principles have been embraced by other treaty bodies and Special Rapporteurs. These principles include:

- True statements in general enjoy greater protection than false statements⁷⁷
- Demanding the proof of opinions and value judgments, however, is not compatible with freedom of expression as opinions cannot be judged according to the standard of right and wrong with the consequence that proving their veracity is an impossible task⁷⁸
- Statements on issues of public interest enjoy greater protection⁷⁹
- Politicians and public figures must tolerate greater criticism because they knowingly lay themselves open to public scrutiny.⁸⁰ In this respect, the European Court has stated that “the dominant position that those in power occupy makes it necessary for them to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the alleged criticisms of their adversaries.”⁸¹

⁷⁶ HRC, *Marques de Morais v Angola*, UN Doc. CCPR/C/83/D/1128/2002, para. 6.8 (March 29, 2005).

⁷⁷ Declaration of Principles, supra note 59, Principle 21.

⁷⁸ Report of UN Special Rapporteur Abid Hussain, UN Doc. E/CN.4/2000/63, para. 52 (January 18, 2000); and *Lingens v Austria* [1986] ECHR 7; (1986) 8 EHRR 407, para. 46.

⁷⁹ *Herrera-Ulloa v Costa Rica* (Judgment of July 2, 2004) ser. C No. 107, para. 127.

⁸⁰ *Oberschlick v Austria* [1991] ECHR 30, paras 58-59; *Media Rights Agenda and Others v Nigeria*, Comm. Nos. 105/93, 128/94, 130/94 and 152/96 (1998), para. 74; Declaration of Principles, supra note 59, Principle 21.

⁸¹ *Kuliš v Poland* [2008] ECHR 210, para. 45. See also *Ceylan v Turkey* [1999] ECHR 44,

Article 354 (2) of the Philippines' Revised Penal Code provides that defamatory statements are presumed to be malicious except where they constitute '[a] fair and true report, made in good faith... of any other act performed by public officers in the exercise of their functions'. However, the Court of Appeals held in its October 2022 decision that the 'exceptions afforded to a qualifiedly privileged article under Article 354(2) of the Revised Penal Code, cannot be applied in favor of the accused-appellants'.⁸²

The Court of Appeals made this finding on the alleged basis that Ms. Ressa and Rappler did not publish a clarificatory article and that the businessman referenced in the article, Mr. Wilfredo Keng, is 'not a public figure' within the ambit of Article 354(2). The Court of Appeals does not address whether the impugned article, which reported on the impeachment trial of Chief Justice Corona, who was impeached, tried and found guilty by the Senate for failing to disclose his assets, constituted a public interest story.

VII. DEFAMATION LAW SHOULD NOT BE USED TO PREVENT CRITICISM OF PUBLIC FIGURES

Of particular concern is the use of defamation laws by States, government officials and private actors in a way that prevents criticism of public figures. As set out above, a number of national, regional and international courts have held that, in defamation cases, a public figure is entitled to less legal protection, because being a public figure by choice, and voluntary involved in public matters, draws and demands public scrutiny. The Human Rights Committee has also noted that:

"in circumstances of public debate concerning public figures in the political domain and public institutions, the value placed by the Covenant upon uninhibited expression is particularly high. Thus, the mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the

para. 34.

⁸² *People of the Philippines vs. Reynaldo Santos, Jr., Maria Angelita Ressa and Rappler*, CA-G.R. CR NO. 44991, Notice of Resolution of the Court of Appeals (October 10, 2022), 11.

imposition of penalties, albeit public figures may also benefit from the provisions of the Covenant. Moreover, all public figures, including those exercising the highest political authority such as heads of state and government, are legitimately subject to criticism and political opposition [...] laws should not provide for more severe penalties solely on the basis of the identity of the person that may have been impugned. States parties should not prohibit criticism of institutions, such as the army or the administration.”⁸³

In addition, the UN Special Rapporteur on Freedom of Opinion and Expression has noted that:

“Particularly with respect to public figures, national laws should be careful to ensure that any respondent in a defamation case may raise a public interest defense, and even untrue statements made in error and without malice should not be rendered unlawful or subject to penalty.”⁸⁴

As such, the use of defamation law to deter reporting on public figures is strongly disfavored under international law.

VIII. INTERNATIONAL LAW PROHIBITS RETROSPECTIVE CRIMINALISATION / EX POST FACTO LAWS

The principle of legality or *nullum crimen, nulla poena sine lege* is recognized as a fundamental human right and an essential component of criminal justice under customary international law and general principles of international law.⁸⁵ The rule of non-retroactivity requires that the conduct in question be criminalized by a source of law that was

⁸³ General Comment 34, supra note 9, para. 38.

⁸⁴ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, UN Doc. A/71/373, para. 34 (September 6, 2016).

⁸⁵ See e.g. K.S. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge University Press, 2010), at 3, 8–9; M. Boot, *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (Intersentia, 2002), at 365–369.

previously applicable to the individual, and sufficiently accessible and foreseeable to him/her.⁸⁶ This principle ensures that individuals have fair notice of the consequences of committing a crime, and are protected from state arbitrariness.

Many states adhere to a “single publication” doctrine, which provides that the statute of limitations for an alleged defamation crime on the internet begins running once the content has first been publicly published. The Delhi High Court of India, for instance, has adopted a “single publication rule” in regard to alleged defamatory content posted on the internet. The court found that if the mere presence of alleged defamatory material on a website amounted to a continuous cause of action, the entire purpose of a statute of limitations would be irrelevant.

In the present instance, the proceedings arise out of an alleged violation of the Cybercrime Prevention Act of 2012, which was signed into law on September 12, 2012 and became effective on October 9, 2012.⁸⁷ However, the impugned article was published on May 29, 2012, over three months *before* the passing of the Act, meaning that the authorities have retroactively applied the Act to criminalise Ms. Ressa’s conduct. The Court of Appeals finding is premised on the article being ‘republished’ on Rappler’s website on February 19, 2014. On this date, an amendment was made to the online article to correct a typographical error.

The Cybercrime Prevention Act of 2012 presents concerns that it is neither sufficiently clear nor predictable. Its potential application to individuals years after the posting of an article, under the guise of online continuous publication, raises particular concerns. “Continuous publication,” deployed as an argument to extend the statute of limitations in the online context, unduly penalizes online

⁸⁶ M. Cherif Bassiouni, ‘Principles of Legality in International and Comparative Criminal Law’, in M. Cherif Bassiouni (ed.), *International Criminal Law: Sources, Subjects and Contents* (Brill, 2008), at 89; K.S. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge University Press, 2010), at 352.

⁸⁷ See *People of the Philippines vs. Reynaldo Santos, Jr., Maria Angelita Ressa and Rappler*, CA-G.R. CR NO. 44991 (July 7, 2022), 15.

speech more harshly than print media. The Philippines' authorities' interpretation of internet publication as "continuous" to create more severe regulations of online speech goes against the tenets of Article 19.

Because its current cyber-libel laws effectively extend the statute of limitations for allegedly libelous content posted to the internet indefinitely, the law may impermissibly stifle freedom of expression.

IX. CONCLUSION

Journalistic expression, including expression about public and political issues, is especially protected by the right to freedom of expression as guaranteed by Article 19 of the ICCPR. In addition, under international law, defamation laws must be narrowly tailored to guarantee the rights to freedom of opinion and expression. The criminalization of defamation has itself been criticized by the United Nations as impermissibly restricting freedom of expression except in the most egregious of circumstances. Criminalizing defamation and using these laws in to deter journalists from acting as a "public watchdog" on government accountability and in providing forums for public debate on matters of public concern is contrary to the intent and purpose of Article 19. The reputations of others can be assured appropriately and proportionately by the civil laws of defamation.

Online speech is an exercise of freedom of expression protected under Article 19(2), and restriction on online speech should not be stricter or more limiting than offline speech. It is widely recognized that the chilling effect these restrictions cause on freedom of expression outweigh the state purpose to protect the rights or reputations of individuals. In light of the additional importance of low online regulation to protect the internet as a tool for realizing other protected rights, the Cybercrime Prevention Act of 2012 appears disproportionate to its stated goals.



VERIFICATION

I, IRENE KHAN, of legal age, citizen of Bangladesh and the United Kingdom, with address at Rangs Waterfront, House 1, Road 15, Gulshan, Dhaka 1212, Bangladesh. Currently, **I AM THE UNITED NATIONS SPECIAL RAPPORTEUR ON THE PROMOTION AND PROTECTION OF THE RIGHT TO FREEDOM OF OPINION AND EXPRESSION**, do hereby depose and state the following:

1. I am an intervenor and seeks to submit an Amicus Curiae Brief in the case pending before the Supreme Court of the Philippines, in **G.R. No. 263584 entitled REYNALDO SANTOS JR., MARIA ANGELITA RESSA, and RAPPLER, INC. v. People of the Philippines;**
2. In the performance of my mandate as Special Rapporteur, I am accorded certain privileges and immunities as expert on mission for the United Nations pursuant to the Convention on the Privileges and Immunities of the United Nations, adopted by the United Nations General Assembly on 13 February 1946. My intervention is submitted to the Supreme Court of the Philippines on a voluntary basis without prejudice to, and should not be considered as a waiver, express or implied, of the privileges and immunities of the United Nations, its officials and experts on mission, pursuant to the 1946 Convention on the Privileges and Immunities of the United Nations, to which the Philippines is a Party since 28 October 1947. Authorization for the positions and views to be expressed as Special Rapporteur, in full accordance with the independence afforded to my mandate, were neither sought nor given by the United Nations, the United Nations Human Rights Council, the Office of the United Nations High Commissioner for Human Rights, or any of the officials associated with those bodies.;
3. I have caused the preparation of the foregoing;
4. This instant written intervention is not filed to harass, cause unnecessary delay, or needlessly increase the cost of litigation.

IN WITNESS WHEREOF, I have hereunto affixed my signature this

13 of February in Divonne-les-Bains, France
2023

IRENE KHAN

Affiant

SUBSCRIBED AND SWORN TO by the Principal whose name and personal circumstances are stated above appeared in person before me this 13th day of February '23 in Divonne-les-Bains, presented the