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I. Introduction

A free and vigorous press is both a pillar and a protector of a democratic society and is essential for the exercise of other fundamental freedoms. As the Court has long recognized, "freedom of the press"—a bedrock principle of both international and Philippine law—is "so inextricably woven into the right to free speech and free expression, that any attempt to restrict it must be met with "critical examination."[1]

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[1] *Chavez v. Gonzales et al.*, G.R. No. 168338 (15 February 2008).

Yet in recent years, the Philippines has seen a disturbing pattern where criminal charges—and in particular, defamation law—are weaponized to silence, intimidate, and imprison journalists and other citizens who dared to criticize or embarrass those in power. The prosecution and conviction of Maria Ressa and Reynaldo Santos Jr. for an article reporting on a matter of critical public interest—alleged corruption in the nation's highest court involving the nation's highest judicial officer—is both a glaring example of this abusive and dangerous pattern and a chance for this Court to correct course.

The lower courts in this case have applied Philippine defamation law in a manner that contravenes binding international human rights law and disregards this Court's own jurisprudence. This case presents a critical opportunity to ensure that the Philippines complies with its international legal obligations and reaffirms the critical role of the courts in enforcing the legal safeguards that protect freedom of the press.

II. Statement of Interest

Natalie L. Reid respectfully submits, on behalf of *amicus curiae*, her written observations in the case of *The People v. Reynaldo Santos Jr. and Maria A. Ressa* (the "***Case***").

Ms. Reid is a partner at Debevoise & Plimpton LLP ("***Debevoise & Plimpton***") and a co-chair of the firm's Public International Law practice. Her practice includes representation of parties before international, regional, and national courts and tribunals, including the International Court of Justice, the International Criminal Court, regional human rights courts, and UN human rights mechanisms. Additionally, Ms. Reid is external counsel to the pre-eminent press freedom organization Committee to Protect Journalists ("***CPJ***"), advising on a wide range of issues related to freedom of expression and human rights.

Debevoise & Plimpton has a robust media freedom practice, both internationally and domestically in the United States. The firm has acted on behalf of media outlets, press freedom organizations, and non-governmental organizations dedicated to safeguarding the right to free expression. Its attorneys frequently engage in strategic litigation on behalf of their clients in domestic and international fora. Debevoise attorneys also perform an advisory role, instructing their clients on matters of international human rights law and First Amendment law.

Ms. Reid submits her observations in this case at the request of CPJ, the International Center for Journalists ("***ICFJ***") and Reporters Without Borders, Inc. ("***RSF-USA***") (together, the "***Amici***"), all of which are independent, international non-profit organizations working in the area of press freedom and free expression.

CPJ[2] is an independent non-profit organization that defends the rights of journalists and works to ensure that press freedom is protected and strengthened as a fundamental right for free, just societies across the globe.[3] CPJ's work includes advocacy on behalf of journalists whose rights have been violated, and in support of laws and legal rulings that protect journalistic freedom. In performing its mission, CPJ collects information about individual cases where press freedom is threatened, issues public protests, and engages government officials on behalf of journalists who are under attack, in jail, or threatened with criminal or civil sanctions. CPJ's advocacy efforts also include *amicus* submissions in legal proceedings involving press freedom, including cases before the European Court of Human Rights, the Inter-American Court of Human Rights, the Inter-American Commission on Human Rights, and in domestic courts.

ICFJ[4] is an independent non-profit organization that serves the global community by producing rigorous, cutting-edge research about journalists at risk and news publishers facing existential threats (under commission from UN agencies and the UK Government, among other international entities).[5] It also provides expertise and resources on countering disinformation, the function of critical independent journalism in democratic contexts, online violence against journalists, and digital safety.[6] ICFJ also delivers extensive media development training, mentoring, fellowships, and financial support in investigative journalism, critical-issues reporting, media innovation, and financial sustainability. In 2021, ICFJ published a widely cited case study on the online violence campaign against Ms. Ressa, based on an analysis of hundreds of thousands of social media posts targeting Ms. Ressa and extensive qualitative research.[7]

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[2] In December 2023, Maria Ressa joined CPJ's Board of Directors, becoming one of its 29 Board members. The Board is a separate organ of CPJ that does not control or influence operational decisions. This includes the decision to submit *amicus* briefs, which was agreed upon by CPJ's President prior to Ms. Ressa joining the Board.

[3] 'What We Do,' Committee to Protect Journalists <www.cpj.org> accessed 9 May 2024.

[4] In May 2024, Maria Ressa was elected to ICFJ's Board of Directors, becoming one of its 31 Board members. The Board is a separate organ of ICFJ that does not control or influence operational decisions. This includes the decision to submit *amicus* briefs, which was agreed upon by ICFJ's President prior to Ms. Ressa joining the Board.

[5] 'Our Mission,' International Center for Journalists < https://www.icfj.org/about> accessed 9 May 2024.

[6] 'Our Research,' International Center for Journalists <https://www.icfj.org/our-work/our-research> accessed 9 May 2024.

[7] Julie Posetti et al., 'Maria Ressa: Fighting an Onslaught of Online Violence,' International Center for Journalists (March 2021) <https://www.icfj.org/our-work/maria-ressa-big-data-analysis> accessed 9 May 2024.

RSF-USA is the US affiliate of an independent international non-profit organization ("***RSF***") that defends the right of every human being to have access to free and reliable information.[8] RSF acts for the freedom, pluralism, and independence of journalism and defends those who embody these ideals. RSF advocates for press freedom throughout the world by monitoring and communicating on abuses committed against journalists and on all forms of censorship, including by publishing the annual World Press Freedom Index, which measures the state of press freedom in 180 countries. RSF also calls on governments, international organizations, and decision-makers to denounce any attack on the freedom of information, formulates legal recommendations to States, and acts for the adoption of more protective standards. In the exercise of its mandate, RSF regularly acts before national and international judicial or quasi-judicial bodies (including UN human rights organs) and regularly files *amicus* briefs in support of media freedom, including before (*i*) the French Constitutional Council, urging it to declare a law on intelligence services powers unconstitutional (2015); (*ii*) the European Court of Human Rights in *Sabuncu and others v. Turkey* (2017); (*iii*) a Turkish high criminal court in support of 18 journalists of the daily *Cumhuriyet* on trial for "assisting a terrorist organization" (2018); (*iv*) the United States' Ninth Circuit Court of Appeals in *WhatsApp v. NSO Group*, a civil suit brought against NSO Group for using WhatsApp's servers to infect user devices with Pegasus spyware (2020); and (*v*) the Judicial Court of Paris to support online news site *Mediapart* in its appeal of a gag order (2022).

Ms. Reid submits this *amicus* brief on her own initiative, in light of the significance and potential impact of the Supreme Court's decision—not just for the journalists involved in this case, but for the broader interests of journalists threatened by criminal defamation laws in the Philippines and around the world. Neither the Petitioners nor the Respondent, nor any other person outside of Debevoise & Plimpton, authored this *amicus* brief.

III. Statement of Facts[9]

A. The Rappler Article

On 29 May 2012, Rappler published an article linking a car used by the Chief Justice of the Supreme Court, Renato Corona, to a Filipino-Chinese businessman named Wilfredo Keng.[10] The article, entitled, "CJ

8 'RSF-USA,' Reporters Without Borders < https://rsf.org/en/rsf-usa> accessed 9 May 2024.

9 This brief Statement of Facts is included solely for ease of reference when considering the *Amici*'s legal submissions in Section IV, and is based on the publicly available docket in this case, along with other open-source material.

10 Reynaldo Santos Jr., 'CJ using SUVs of "controversial" businessmen,' Rappler (29 May 2012) <https://www.rappler.com/newsbreak/6061-cj-using-suvs-of-controversial-businessmen/> accessed 9 May 2024 (hereinafter "**2012 Rappler Article**").

[Chief Justice] using SUVs of 'controversial' businessmen," included a photograph of a black Chevrolet Suburban with license plates "ZWK-111"—which public records showed was registered to Mr. Keng—taken in the "basement of the Supreme Court building" in January 2011. The article then described various allegations about Mr. Keng's "alleged involvement in illegal activities," including quotations from a government intelligence report that Rappler obtained, which indicated that Mr. Keng was being surveilled by the Philippine National Security Council for alleged "human trafficking and drug smuggling."[11] No personal opinions about Mr. Keng were expressed, and claims in the article were couched in terms of allegations or unconfirmed facts.

While the connection between the Chief Justice and Mr. Keng may have been first reported in the Rappler article, the criminal allegations against Mr. Keng were hardly new. The smuggling allegations, in particular, had been widely publicized for years, including through a 2002 article in the *Philippine Star*.[12] In accordance with standard journalistic practice, Rappler provided both the Chief Justice and Mr. Keng with an opportunity to comment on the report. A lawyer for the Chief Justice explained that he had simply "rented" the "bullet-proof" Suburban for "security reasons."[13] Mr. Keng, for his part, admitted to owning a Suburban that carried the "ZWK-111" plates, though he denied owning the Suburban used by the Chief Justice in January 2011.[14]

The byline for the article indicates it was authored by Reynaldo Santos Jr., a Rappler reporter. Ms. Ressa was the CEO, Executive Editor, and co-founder of Rappler; she did not author or edit the article, and has stated publicly that she did not review it prior to publication.[15]

B. The Cybercrime Prevention Act of 2012

Soon after Rappler published the article, on 12 September 2012, then-President Benigno Aquino signed into law the Cybercrime Prevention Act

[11] *Id. See also* 'Timeline: Rappler's cyber libel case,' Rappler (14 February 2019) <https://www.rappler.com/newsbreak/iq/223460-timeline-cyber-libel-case/> accessed 9 May 2024. Note the Philippine Star removed this article from its site in 2019 after Keng "raised the possibility of legal action." *See* Aika Rey, 'Philstar.com takes down 2002 article on Wilfredo Keng,' Rappler (16 February 2019) < https://www.rappler.com/nation/223662-philippine-star-2002-article-wilfredo-keng-legal-action-threat/> accessed 13 May 2024.

[12] 2012 Rappler Article (citing 2002 *Philippine Star* article).

[13] 2012 Rappler Article.

[14] *Id.*

[15] *See* Christina Pazzanese, 'How an authoritarian wields social media: Nobel laureate Maria Ressa details Duterte tactics but says disinformation is a threat to democracy here too,' The Harvard Gazette (18 November 2021) <https://news.harvard.edu/gazette/story/2021/11/maria-ressa-warns-of-authoritarians-social-media-disinformation/> accessed 9 May 2024.

(Republic Act No. 10175) ("***CPA***"). Among other provisions, the CPA introduced the crime of "cyber libel," which enhances the criminal penalties for libel when it is "committed through a computer system or any other similar means which may be devised in the future." The libel provision incorporates the definition of libel found in Article 353 of the country's Revised Penal Code, and thus the elements of cyber libel under the CPA are as follows:

(a) "the allegation of a discreditable act or condition concerning another;

(b) publication of the charge;

(c) identity of the person defamed;

(d) the existence of malice;[16] and

(e) that the act "be committed through the use of a computer system or any similar means which may be devised in the future."[17]

The CPA is silent on the prescriptive period for cyber libel. Under the Revised Penal Code, however, libel carries a one-year prescription period, meaning that criminal charges must be brought within one year from the discovery of offending act by the offended party.[18] This was recently clarified by the Court in *Causing v. People*,[19] where it was emphasized that the CPA law did not create a new crime of cyber libel, and where it expressly overruled the decision in *Tolentino v. People*[20] declaring that cyber libel prescribes in 15 years.[21]

The CPA's overly broad and vague provisions, and its expansion of the powers of the State at the expense of the rights of its citizens, were widely criticized by Philippines civil society and the international community.[22] In response to 15 petitions submitted by critics of the law, the

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16 *Disini v. Secretary of Justice,* G.R. No. 203335 (18 February 2014) (citing *Vasquez v. Court of Appeals*, 373 Phil. 238 (1999)).

17 *People of The Philippines v. Reynaldo Santos Jr. and Maria Angelita Ressa*, No. R-MNL-19-01141-CR (15 June 2020) (summarizing these elements).

18 Revised Penal Code, Act No. 3815, as amended, art. 90 ("The crime of libel or other similar offenses shall prescribe in one year").

19 *Berteni Cataluña Causing v. People of the Philippines*, G.R. No. 258524 (11 October 2023).

20 *Wilbert Tolentino v. People of the Philippines*, G.R. No. 240310 (6 August 2018).

21 *Id.* (interpreting the Cybercrime Prevention Act, Rep. Act. No. 10175, § 6).

22 *See, e.g.*, Mong Palatino, 'Philippines: Anti-Cybercrime Law Threatens Media Freedom,' Global Voices (19 September 2012) <https://globalvoices.org/2012/09/19/philippines-anti-cybercrime-law-threatens-media-freedom/> accessed 9 May 2024 (quoting the National Union of Journalists of the Philippines as stating that the cyber libel provision "poses a threat not only against the media and other communicators but anyone in the general public who has access to a computer and the Internet"); 'A Restrictive Mindset: First Law Since

Supreme Court issued a temporary restraining order on 9 October 2012 to enjoin enforcement of the CPA pending the Court's constitutional review.[23] On 22 April 2014, the Court's judgment in *Disini v. Secretary of Justice*[24] upheld the constitutionality of most provisions of the Act, including most aspects of the cyber libel provision.

Both the text of the CPA's libel provision and its frequent use to impose criminal penalties on journalists and activists continue to draw widespread censure by human rights observers. Most notably, the cyber libel charges pursued by Philippine prosecutors violate international law in two respects: *first*, the law on its face arbitrarily imposes more severe penalties for online speech than offline speech, and, *second*, prosecutors' practice of treating an article as "continuously published," so long as it is still available online, has the pernicious effect of indefinitely extending the prescriptive period, placing journalists at risk of prosecution for libel "years after the posting of an article"[25]—undermining the very purpose of a prescriptive period, and greatly increasing the chilling effect of the cyber libel provision.

C. The Prosecution and Convictions for Cyber Libel

In October 2017, more than five years after the *Rappler* article was published, Mr. Keng filed a cyber libel complaint with the National Bureau of Investigation ("***NBI***") alleging that the article "contained malicious imputations of crimes, with bad intentions, purposely to malign, dishonor and discredit my character and good reputation."[26] A few months later, the

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2000 Affecting Cyberspace Communication,' Center for Media Freedom & Responsibility (18 September 2012) <https://cmfr-phil.org/statements/a-restrictive-mindset/> accessed 9 May 2024 ("It is a distinct possibility to which journalists and bloggers, ordinary citizen and anyone committed to free expression through whatever medium, should be alert, and must be prepared to combat."); 'Filipinos protest tough new cyber law,' Al Jazeera (3 October 2012) <https://www.aljazeera.com/news/2012/10/3/filipinos-protest-tough-new-cyber-law> accessed 9 May 2024 (Filipino journalist Alex Adonis describing the CPA as "so vague, so overbroad that [its provisions] can be applied arbitrarily on all users of social media"); *Adonis v. Philippines* (HRC, 26 April 2012), CCPR/C/103/D/1815/2008, at paras. 7.7–7.10, 8; Bob Dietz, 'Quick rethink on cybercrime law in Philippines,' CPJ (9 October 2012) <https://cpj.org/2012/10/quick-rethink-on-cybercrime-law-in-philippines/> accessed 9 May 2024.

[23] 'Cybercrime Law is Suspended by Philippine Courts,' BBC (9 October 2012) <https://www.bbc.com/news/world-asia-19881346> accessed 9 May 2024.

[24] *Disini v. Secretary of Justice,* G.R. No. 203335 (22 April 2014) (denying Motion for Reconsideration).

[25] *People v. Reynaldo Santos Jr. et al*, Regional Trial Court, Brief of *Amicus* Curiae Submission by David Kaye (June 2020).

[26] Artchil B. Fernandez, 'Court Weaponized,' Daily Guardian (20 June 2020) <https://dailyguardian.com.ph/court-weaponized/> accessed 9 May 2024 (quoting the Affidavit-Complaint of Wilfredo Keng dated 19 December 2017).

NBI's Cybercrime Division dismissed the complaint, finding that the one-year prescriptive period for libel under Article 91 of the Revised Penal Code had long since expired since the article's May 2012 publication.

In March 2018, however, following a supplemental affidavit from Mr. Keng, the NBI announced that it would renew the charges, stating that its earlier dismissal was "prematurely disclosed," and that, in fact, a "libelous article . . . is indubitably considered as a continuing crime until and unless [it] is removed or taken down."[27] NBI referred the charges to the Department of Justice ("***DOJ***") for prosecution. The DOJ also took the position that, because the CPA did not specifically provide a prescriptive period for cyber libel, it instead fell under Republic Act 3326, which provides a 12-year prescriptive period for "[v]iolations penalized by special acts" which do not provide their own prescriptive periods.[28] On 10 January 2019, Ms. Ressa and Mr. Santos were formally charged with cyber libel, later docked with the Regional Trial Court of Manila, Branch 46. On 13 February 2019, Ms. Ressa was arrested by the NBI Cybercrime Division and later released on bail.[29] On 15 February 2019, Mr. Santos voluntarily presented himself before the court and posted bail.[30]

On 15 June 2020, the Manila Regional Trial Court ("***RTC***") found Ms. Ressa and Mr. Santos guilty of cyber libel, sentencing each to a prison term of up to six years and fines of P400,000 in moral and exemplary damages.[31] In reaching this decision, the Court agreed with prosecutors that

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[27] Rambo Talabong, 'NBI claims initial ruling on Rappler cyber libel case "prematurely disclosed,"' Rappler (12 March 2018) <https://www.rappler.com/nation/197977-nbi-initial-ruling-cyber-libel-case-premature-disclosure/> accessed 9 May 2024; *see also* Christopher Lloyd Caliwan, 'NBI files cyber libel raps vs. Rappler,' Philippine News Agency (8 March 2018) < https://www.pna.gov.ph/articles/1027980> accessed 9 May 2024.

[28] An Act to Establish Periods of Prescription for Violations Penalized by Special Acts and Municipal Ordinances and to Provide When Prescription Shall Begin to Run, Rep. Act No. 3326, § 1 (4 December 1926). *See also People of The Philippines v. Reynaldo Santos Jr. and Maria Angelita Ressa*, No. R-MNL-19-01141-CR.

[29] 'Rappler CEO Maria Ressa arrested for cyber libel,' Rappler (13 February 2019), <https://www.rappler.com/nation/223411-maria-ressa-arrested-for-cyber-libel-february-2019/> accessed 9 May 2024; Lian Buan, 'Maria Ressa posts P100,000 bail for cyber libel,' Rappler (14 February 2019) <https://www.rappler.com/nation/223466-maria-ressa-posts-bail-cyber-libel-february-14-2019/> accessed 9 May 2024.

[30] 'Ex-Rappler writer posts bail for cyberlibel charge,' Philippines Star (15 February 2019) < https://www.philstar.com/headlines/2019/02/15/1893945/ex-rappler-writer-posts-bail-cyberlibel-charge> accessed 9 May 2024.

[31] *People of The Philippines v. Reynaldo Santos Jr. and Maria Angelita Ressa*, No. R-MNL-19-01141-CR.

the exceptional 12-year prescriptive period under Republic Act 3326 applied to cyber libel.[32]

The conviction turned on the court's finding that Ms. Ressa and Mr. Santos had acted with "malice in law" in publishing the article. Specifically, it found that Mr. Keng was a "private person" and "neither a public official nor a public figure," thus relieving the prosecution of their burden to prove *actual* malice under Philippine libel law; instead, the court could "presume[] the existence of malice from the defamatory character of the assailed statement."[33] The RTC further found that, "[i]n any case," the prosecution had established "malice in fact" by showing that "both accused [were] aware of the probable falsity" of the article, citing a certification Mr. Keng had furnished from the Philippines Drug Enforcement Agency clearing him of the smuggling charges.[34]

Ms. Ressa and Mr. Santos challenged their conviction in Philippine courts on several grounds. Among other arguments on appeal, they objected that the Cybercrime Prevention Act could not be applied retroactively to an article published in May 2012, long before the CPA took effect. In July 2022, the Court of Appeals denied their appeal, finding that the article had been "re-published" on 19 February 2014—the day after the Supreme Court upheld the CPA—when Rappler updated the article to fix a minor typographical error and modify the web address for certain images.[35]

In October 2022, the Court of Appeals denied Ms. Ressa and Mr. Santos's motion for reconsideration.[36] This *amicus* brief is submitted in support of their pending appeal to the Supreme Court.

D. Global Condemnation of the Convictions

The cyber libel charges against Ms. Ressa and Mr. Santos are part of a broader campaign of harassment against Ms. Ressa and Rappler. The Philippines Government has opened over 23 individual cases against Ms. Ressa and her Rappler colleagues, including spurious tax charges and a closure order from the Securities and Exchange Commission.[37] The tax

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32 *Id.*

33 *Id.*

34 *Id.*

35 *People of The Philippines v. Reynaldo Santos Jr. and Maria A. Ressa*, CA-G.R. CR No. 44991 (7 July 2022).

36 *People of The Philippines v. Reynaldo Santos Jr. and Maria A. Ressa*, CA-G.R. CR No. 44991 (10 October 2022) (motion for reconsideration denied).

37 'Maria Ressa and Rappler acquitted of four charges,' Public Media Alliance (18 January 2023) <https://www.publicmediaalliance.org/maria-ressa-rappler-acquitted-of-four-charges/> accessed 9 May 2024; 'Hold the Line Coalition urged Philippine president to keep Maria Ressa out of jail,' CPJ (18 October 2022) <https://cpj.org/2022/10/hold-the-line-coalition-urges-philippine-president-to-keep-maria-ressa-out-of-jail/> accessed 9 May 2024; 'CPJ calls on President-elect Marcos

charges were recently dismissed by the Court of Tax Appeals, which rejected the accusation that Ms. Ressa and Rappler were allegedly dealing in securities and owed taxes on that basis.[38] However, as of May 2024, two cases were still pending—the case at bar and the appeal on the closure of Rappler.

The UN, foreign governments, and a chorus of human rights experts have sharply criticized this campaign of harassment. Following the June 2020 convictions in this case, the Media Freedom Coalition of States—a group of over 50 countries—condemned "the various charges against Maria Ressa" and "the increasing restrictions on freedom of the press in the Philippines."[39] The U.S. Department of State expressed concern about the verdict and called for resolution of the case "in a way that reinforces . . . freedom of expression."[40] The European Union likewise stated that the conviction "raises serious doubts over the respect for freedom of expression as well as for the rule of law in the Philippines."[41]

Similarly, in 2022, UNESCO and ICFJ published a case study, which concluded that government-linked online violence campaigns specifically targeting Ms. Ressa "created an enabling environment for Ressa's persecution and prosecution in the Philippines."[42]

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to protect press freedom in the Philippines,' CPJ (23 May 2022) https://cpj.org/2022/05/cpj-calls-on-president-elect-marcos-to-protect-press-freedom-in-the-philippines/> accessed 9 May 2024; 'List: Cases vs Maria Ressa, Rappler directors, staff since 2018,' Rappler (updated 11 October 2022), <https://www.rappler.com/nation/223968-list-cases-filed-against-maria-ressa-rappler-reporters/> accessed 9 May 2024.

[38] *People of The Philippines v. Rappler Holdings Corporation and Maria A. Ressa*, CTA Crim. Cases Nos. O-679 to O-682 (18 January 2023).

[39] 'Statement by Media Freedom Coalition on situation in the Philippines,' U.K. Foreign & Commonwealth Office (9 July 2020) <https://www.gov.uk/government/news/statement-by-media-freedom-coalition-on-situation-in-the-philippines> accessed 9 May 2024. In the interest of full disclosure, Debevoise & Plimpton LLP, counsel for the Amici, note that Catherine Amirfar, the Co-Chair of the International Dispute and Public International Law Groups at Debevoise, also serves as the Co-Deputy Chair of the High Level Panel of Legal Experts on Media Freedom, the independent advisory body to the Media Freedom Coalition.

[40] Ned Price (@StateDeptSpox), X (formerly Twitter) (16 June 2020, 11:47 AM) <https://x.com/statedeptspox/status/1272918637767208971> accessed 24 May 2024.

[41] 'Philippines: Statement by the Spokesperson on the conviction of Maria Ressa and Reynaldo Santos' European Union External Action Service (16 June 2020) <https://www.eeas.europa.eu/eeas/philippines-statement-spokesperson-conviction-maria-ressa-and-reynaldo-santos_en> accessed 9 May 2024.

[42] Julie Posetti, et al., 'Maria Ressa: At the core of an online violence storm' in Julie Posetti and Nabeelah Shabbir (eds), *The Chilling: A Global Study of Online Violence Against Women Journalists* (IFCJ and UNESCO 2022), at 98 <https://www.icfj.org/our-work/chilling-global-study-online-violence-against-

The international scrutiny and criticism of this case continues to this day. Following her unsuccessful appeal in July 2022, the UN Special Rapporteur on Freedom of Opinion and Expression again condemned the Philippines government's "relentless attack against Maria Ressa for daring to speak truth to power."[43]

E. The Broader Context: Libel Prosecutions Weaponize the Law to Silence Journalists and Suppress Free Speech

The prosecution of Ms. Ressa and Mr. Santos is far from an isolated incident. At his second State of the Nation Address in 2017, then-President Rodrigo Duterte publicly mentioned and castigated Rappler, claiming falsely that it was "fully-owned by Americans" in violation of the Constitution.[44] In 2018, he referred to Rappler as a "fake news outlet."[45] President Duterte later banned Rappler reporters from covering his activities, saying that the social news site lies and twists statements.[46]

Under President Duterte, the Philippines suffered a marked erosion of press freedom and the targeted abuse of criminal law and the judicial system to silence critical reporting.[47] In addition to the campaign of harassment against Ms. Ressa and Rappler, his administration exploited laws relating to

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women-journalists > accessed 9 May 2024. *See also generally* Julie Posetti, et al., *Maria Ressa: Facing an Onslaught of Online Violence* (ICFJ 2021) <https://www.icfj.org/our-work/maria-ressa-big-data-analysis> accessed 9 May 2024.

[43] OHCHR, 'Philippines: UN expert slams court decision upholding criminal conviction of Maria Ressa and shutdown of media outlets' (14 July 2022) < https://www.ohchr.org/en/press-releases/2022/07/philippines-un-expert-slams-court-decision-upholding-criminal-conviction> accessed 9 May 2024.

[44] Rodrigo Roa Duterte, President of the Philippines, 'Second State of the Nation Address' (24 July 2017) <https://www.officialgazette.gov.ph/2017/07/24/rodrigo-roa-duterte-second-state-of-the-nation-address-july-24-2017/> accessed 9 May 2024.

[45] Pia Ranada, 'Duterte calls Rappler "fake news outlet,"' Rappler (16 January 2018), <https://www.rappler.com/nation/193806-duterte-fake-news-outlet/> accessed 9 May 2024.

[46] Pia Ranada, 'Duterte says he banned Rappler due to "twisted" reporting,' Rappler (2 March 2018) <https://www.rappler.com/nation/197230-duterte-rappler-ban-twisted-reporting/> accessed 9 May 2024.

[47] 'CPJ calls on President-elect Marcos to protect press freedom in the Philippines,' CPJ (23 May 2022) <https://cpj.org/2022/05/cpj-calls-on-president-elect-marcos-to-protect-press-freedom-in-the-philippines/> accessed 9 May 2024; Carlos H. Conde, World Press Freedom Index 2024: Philippines,' RSF (2024) <https://rsf.org/en/country/Philippines> accessed 9 May 2024; 'Philippines Activist Arrested for Cyber-libel,' Human Rights Watch (9 August 2022) <https://www.hrw.org/news/2022/08/09/Philippine-activist-arrested-cyber-libel> accessed 9 May 2024.

media ownership and taxation to target other journalists, and even ordered the closure of the country's largest TV news broadcaster.[48]

The Philippines has also become among the most dangerous countries in the world for journalists, with more than a dozen killed during President Duterte's six-year tenure alone.[49] President Duterte publicly encouraged this spate of assassinations, telling the media in 2016: "[j]ust because you're a journalist you are not exempted from assassination, if you're a son of a bitch. . . . Freedom of expression cannot help you if you have done something wrong."[50]

In June 2020, shortly after the convictions in this case, the UN High Commissioner for Human Rights issued a scathing report on the situation of human rights in the Philippines that found "numerous systematic human rights violations, including killings and arbitrary detention, persistent impunity and the vilification of dissent."[51] In particular, the High Commissioner situated the prosecution of Ms. Ressa and Mr. Santos as part of "'a pattern of intimidation' of independent news sources."[52] In response to the report, a group of 11 UN human rights experts decried "the staggering cost of the relentless and systematic assault on the most basic rights of Filipinos" by the government, including the "silencing of independent media, critics and the opposition."[53]

These developments are especially tragic in light of the Philippines's history as the oldest democracy in Southeast Asia, and the well-established role of its courts in protecting fundamental freedoms. More than 100 years

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48 'World Press Freedom Index 2024: Philippines,' RSF (2024) <https://rsf.org/en/country/Philippines> accessed 9 May 2024; 'CPJ calls on President-elect Marcos to protect press freedom in the Philippines,' CPJ (23 May 2022) https://cpj.org/2022/05/cpj-calls-on-president-elect-marcos-to-protect-press-freedom-in-the-philippines/> accessed 9 May 2024.

49 'CPJ online database,' CPJ <https://cpj.org/data/killed/> accessed 9 May 2024.

50 Robert Sawatzky, 'Duterte says killing of corrupt Philippines journalists justified,' CNN (1 June 2016), <https://www.cnn.com/2016/05/31/asia/philippines-duterte-journalists/index.html> accessed 9 May 2024. *See also* Mynardo Macaraig and Karl Malakunas, 'Outrage after Duterte justifies Philippines journalists' murders,' Agence France-Presse (1 June 2016) <https://sg.news.yahoo.com/philippines-duterte-endorses-killing-corrupt-journalists-155911312.html> accessed 9 May 2024 (quoting CPJ's Southeast Asia Representative: "What he has done with these irresponsible comments is give security officials the right to kill for acts that they consider defamation").

51 OHCHR, *Situation of human rights in the Philippines*, U.N. Doc A/HRC/44/22 (29 June 2020), at 1.

52 *Id.* at 12.

53 OHCHR, 'Philippines: UN human rights experts renew call for an on-the-ground independent, impartial investigation,' (25 June 2020) <https://www.ohchr.org/en/press-releases/2020/06/philippines-un-human-rights-experts-renew-call-ground-independent-impartial> accessed 9 May 2024.

ago, when this Court considered how Philippine libel law should be interpreted and applied, its seminal judgment in *United States v. Bustos* emphasized the freedoms of speech and of the press and underscored that rights "so sacred to the people of these Islands and won at so dear a cost, should now be protected and carried forward as one would protect and preserve the covenant of liberty itself."[54]

Today, however, the Philippines is ranked 134 out of 180 countries in RSF's World Press Freedom Index, and is in danger of plummeting further.[55] Despite a few positive developments, cyber libel prosecutions loom large. Indeed, as of May 2022, the Department of Justice had filed more than 3,700 cases of cyber libel under the CPA.[56] This includes several high-profile prosecutions of journalists and political dissidents for publishing content ranging from investigative journalism to mere social media posts, including for speech directed at government officials and other public figures.[57] Most recently, a Pasay City court convicted blogger Edward Angelo Dayao of cyber libel for publishing an article referring to former Senate president Vincente Sotto III as a "Malacanang lapdog."[58]

Globally, there has been an alarming rise in the abuse of the judicial system—often involving criminal defamation charges—to silence and intimidate journalists and other critics through threatened or actual imprisonment.[59] This trend is especially pronounced in Southeast Asia, where Myanmar,[60] Cambodia,[61] Vietnam,[62] Thailand,[63] and Malaysia[64] have

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[54] *United States v. Bustos*, G.R. No. L-12592 (8 March 1918).

[55] 'World Press Freedom Index 2024: Philippines,' RSF (2024) <https://rsf.org/en/country/philippines > accessed 9 May 2024 (citing "the government's targeted attacks and constant harassment of journalists and media outlets regarded as overly critical, especially since 2016").

[56] Carlos H. Conde, 'Philippines Activist Arrested,' Human Rights Watch (9 August 2022) <https://www.hrw.org/news/2022/08/09/Philippine-activist-arrested-cyber-libel> accessed 9 May 2024.

[57] *Id.*

[58] Gabriel Pabico Lalu, 'Pasay court finds blogger guilty of cyber libel for "lapdog" claims vs Sotto," Inquirer Online (14 July 2023) <https://newsinfo.inquirer.net/1801858/pasay-court-finds-blogger-guilty-of-cyber-libel-for-lapdog-claims-vs-sotto> accessed 18 May 2024.

[59] *The 'misuse' of the judicial system to attack freedom of expression: trends, challenges and responses*, CI-2022/WTR/4, UNESCO (December 2022) <https://unesdoc.unesco.org/ark:/48223/pf0000383832> accessed 9 May 2024.

[60] 'On 2-year anniversary of military coup, Myanmar's junta must stop persecuting journalists,' CPJ (31 January 2023) <https://cpj.org/2023/01/on-2-year-anniversary-of-military-coup-myanmars-junta-must-stop-persecuting-journalists/> accessed 18 May 2024 (noting that of the "at least 42 journalists behind bars" most were sentenced under "a broad, ill-defined anti-state provision that penalizes 'incitement' and 'false news'").

[61] *See, e.g.*, *State of Press Freedom in Cambodia*, OHCHR (August 2022) <https://www.ohchr.org/en/documents/reports/state-press-freedom-cambodia>

all wielded similarly vague and expansive "cybercrime," "incitement," or *lèse-majesté* laws to punish online speech by journalists and political dissidents. According to CPJ's most recent annual prison census, Asia remains the region with the highest number of journalists in jail.[65]

IV. Legal Submissions

Freedom of expression is widely recognized as a cornerstone of a free and democratic society, including by this Honorable Court.[66] While this freedom is not absolute, binding international human rights law recognizes only limited justifications for the restriction of speech, and provides that the potential imposition of any such constraints—including defamation laws—must be balanced against the rights and any public interests that are implicated by these restrictions.

Where criminal charges are at stake, fundamental principles of international law also require that the conduct to be sanctioned has been

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accessed 9 May 2024; 'Cambodia sentences journalist Youn Chhiv to 1 year in prison,' CPJ (1 October 2021) <https://cpj.org/2021/10/cambodia-sentences-journalist-youn-chhiv-to-1-year-in-prison/> accessed 9 May 2024.

[62] *See, e.g.*, 'Vietnam sentences journalist Nguyen Lan Thang to 6 years in prison,' CPJ (13 April 2023) <https://cpj.org/2023/04/vietnam-sentences-journalist-nguyen-lan-thang-to-6-years-in-prison/ > accessed 18 May 2024.

[63] 'World Press Freedom Index 2024: Thailand,' RSF (2024) <https://rsf.org/en/country/Thailand> accessed 9 May 2024 ("The possibility of a lèse-majesté charge, which is very broadly defined in article 112 of Thailand's penal code and is punishable by up to 15 years in prison, is a permanent threat hanging over every media outlet. Defamation and cybercrime laws are also systematically used to harass journalists, who – if prosecuted – are forced to incur exorbitant legal fees. The government has also imposed a 'code of conduct' under which it can suspend the licenses of media outlets that threaten 'public decency.').

[64] Chester Tay, 'The Edge former editor-in-chief charged with criminal defamation for reporting abnormal penny stocks surge,' The Edge (13 September 2022) <https://www.theedgemarkets.com/article/edge-former-editorinchief-charged-criminal-defamation-reporting-abnormal-penny-stocks-surge> accessed 9 May 2024.

[65] '2023 Prison Census,' CPJ (18 January 2024) <https://cpj.org/?p=346276> accessed 18 May 2024.

[66] *See, e.g.*, *United States v. Bustos,* G.R. No. L-12592; *Raffy T. Tulfo v. People of the Philippines*, G.R. No. 187113 (11 January 2021) ("Freedom of the press rests its philosophical basis within the larger scope of the right to free discussion and expression."); *Philippine Blooming Mills Employment Organization et al. v. Philippine Blooming Mills, Co. Inc.*, G.R. No. L-31195 (5 June 1973) ("The rights of free expression, free assembly and petition, are not only civil rights but also political rights essential to man's enjoyment of his life, to his happiness and to his full and complete fulfilment. Thru these freedoms the citizens can participate not merely in the periodic establishment of the government through their suffrage but also in the administration of public affairs as well as in the discipline of abusive public officers."). *See also Chavez v. Gonzales et al.*, G.R. No. 168338 (underscoring that "we have not wavered in the duty to uphold this cherished freedom" of the press, and "have struck down laws and issuances meant to curtail this right") (collecting cases).

prohibited by law at the time of commission, a critical safeguard against abusive prosecutions that is especially important when the judicial system is being exploited to restrict the exercise of protected rights.

These international obligations apply regardless of the provisions or practice in domestic law. However, where—as here—well-established domestic legal principles protecting fundamental freedoms reflect and implement international law, domestic courts may look to international legal instruments and jurisprudence to guide their own decisions and ensure compliance with the State's international obligations.[67]

A. Petitioners' Convictions for Cyber Libel Breach International Law Protections for Press Freedom

This section first outlines the obligations of the Philippines under binding international law with respect to the human rights implicated by the "cyber libel" charges against Ms. Ressa and Mr. Santos (*Section 1*). It then explains that the charges levied and upheld in this case fall far short of the standard for a lawful restriction on speech and thus contravene the international legal obligations of the Philippines (*Section 2*). Finally, it examines the global trend among liberal democratic states to abandon criminal defamation entirely, on the grounds that no imprisonment for this offense—let alone a draconian six-year sentence like that facing Ms. Ressa and Mr. Santos—could ever qualify as a valid restriction on speech (*Section 3*).

1. The Philippines Is Bound to Protect and Enforce the Freedoms of Expression, Information, and the Press

Freedom of expression is a fundamental right enshrined in binding international law. Article 19 of the International Covenant on Civil and Political Rights ("***ICCPR***"), to which the Philippines acceded in 1986, provides in no uncertain terms that "[e]veryone shall have the right to freedom of expression." This "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 of [their] choice."[68]

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[67] *See, e.g.*, *Chavez v. Gonzalez*, G.R. No. 168338 (citing "international covenants protecting freedom of speech and of the press"); *Ciriaco "Boy" Guingging v. Court of Appeals*, G.R. No. 128959, (30 September 2005) (stating that "[t]he right of free expression stands as a hallmark of the modern democratic and humane state," and noting that it is "enshrined in Article 19 of the United Nations Declaration of Human Rights"); *United States v. Bustos,* G.R. No. L-12592 (observing that freedom of speech is "cherished in democratic countries"); *Tulfo v. Philippines*, G.R. No. 187113 (same).

[68] Underscoring the universal nature of this fundamental freedom, multiple international and regional instruments also protect free speech in similar terms. *See* Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res

This freedom is fluid and expansive, extending into nearly every area of civil and political life. It also applies to any kind of medium over which speech is conveyed—a key focus of human rights jurisprudence in the digital age. As the former UN Special Rapporteur on Freedom of Opinion and Expression explained, there is "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."[69] The article published by Rappler accordingly benefits from this protection.

A corollary to freedom of expression that is embedded in Article 19 of the ICCPR is the fundamental right to access information. These rights are two sides of the same coin; not only do speakers have the right to *express* their views or convey information, but the public has a right to *receive* that information—especially where it concerns important public interests, such as allegations and investigations of government corruption.

A free press is vital to safeguarding both of these rights. As the UN Human Rights Committee has explained, a "free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights."[70] To guarantee freedom of expression and the full panoply of ICCPR rights, States must ensure "a free press and other media [are] able to comment on public issues without censorship or restraint and to inform public opinion."[71]

As a State Party to the ICCPR, the Philippines is bound to ensure that these rights—along with all other obligations contained within the Covenant—are guaranteed and protected under domestic law. These obligations are accordingly reflected in the Philippine Constitution, which

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217 A(III) (UDHR) art 19; European Convention on Human Rights, as amended (1950) Council of Europe Treaty Series 005 (ECHR) art 10(1); African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter) art 9; American Convention on Human Rights (22 November 1969) 1144 UNTS 123 (American Convention) art 13.

69 *Amicus* of David Kaye to the Regional Trial Court (June 2020).

70 UN Human Rights Committee, General Comment 34, U.N. Doc CCPR/C/GC/34 (12 September 2011), at 3-4 (hereafter, "***HRC General Comment 34***").

71 HRC General Comment 34. *See also, e.g.*, 'Declaration of Principles on Freedom of Expression and Access to Information in Africa,' African Commission on Human and Peoples' Rights (10 November 2019), at 8 <https://achpr.au.int/en/node/902> accessed 9 May 2024 (emphasizing "the key role of the media and other means of communication in ensuring full respect for the right to freedom of expression, promoting the free flow of information and ideas, assisting individuals in making informed decisions and facilitating and strengthening democracy"); 'Media Pluralism and Human Rights,' Council of Europe Commissioner for Human Rights, CommDH (2011) 43 (6 December 2011), at 4 ("Media pluralism is a necessary condition for freedom of speech and contributes to the development of informed societies where different voices can be heard.").

was drafted the year before the Philippines ratified the ICCPR,[72] and which prohibits the passing of any law that "abridge[s] the freedom of speech, of expression, or of the press."[73]

Protection of these rights on paper is not enough to comply with the international obligations of the Philippines; the rights must also be recognized and enforced by its courts. Such protection in practice would continue the recent jurisprudence of this Court, which has not just upheld these universal rights but also extolled their virtues as a pillar of democratic society, a tool to maintain government accountability, and an ally of public interest.

Notably, in its 2008 decision in *Chavez v. Gonzales*, the Court recognized that "[t]he scope of freedom of expression is so broad that it extends protection to nearly all forms of communication" and "covers myriad matters of public interest or concern embracing all issues, about which information is needed or appropriate, so as to enable members of society to cope with the exigencies of their period."[74] Just two years ago, the Court in *Tulfo v. Philippines* ("***Tulfo***") described freedom of the press as "the sharpest weapon in the fight to keep government responsible and efficient"; without it, "the government's mistakes would go unnoticed, their abuses unexposed, and their wrongdoings uncorrected."[75]

2. The Criminal Convictions Are Impermissible Restrictions on these Rights

The true measure of free expression is not the theoretical existence of fundamental guarantees but rather the government's rules and practices for limiting the scope of those freedoms. As the UN Human Rights Committee observed, "it is the interplay between the principle of freedom of expression

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72 'Status: International Covenant on Civil and Political Rights,' United Nations Treaty Collection (updated as of 9 May 2024) <https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND> accessed 9 May 2024.

73 Constitution of the Philippines (1987) art III, § 4 ("No law shall be passed abridging the freedom of speech, of expression, or of the press, or the right of the people peaceably to assemble and petition the government for redress of grievances.").

74 *See Chavez v. Gonzalez*, G.R. No. 168338 ("The constitutional protection assures the broadest possible exercise of free speech and free press for religious, political, economic, scientific, news, or informational ends, inasmuch as the Constitution's basic guarantee of freedom to advocate ideas is not confined to the expression of ideas that are conventional or shared by a majority.").

75 *Tulfo v. Philippines*, G.R. No. 187113. *See also The Philippines v. Reynaldo Santos Jr. and Maria A. Ressa*, CA-G.R. CR No. 44991 (7 July 2022) (acknowledging, but failing to give proper weight to, Supreme Court precedent that free expression is a "fundamental liberty" and "a hallmark of the modern democratic and humane state").

and such limitations and restrictions which determines the actual scope of the individual's right."[76]

International human rights instruments recognize *extremely limited* justifications for the lawful restriction of speech, such as national security, public health, and "respect of the rights or reputations of others."[77] Even in those cases, Article 19(3) of the ICCPR provides that such restrictions must satisfy three cumulative requirements: to be permissible, a restraint on free speech must be (*1*) provided by law; (*2*) imposed to protect a legitimate public interest; *and* (*3*) necessary to protect that interest.[78] The requirement of necessity further entails a proportionality analysis; any lawful restriction must be no greater than necessary to protect the cited interest.[79]

Defamation laws, such as the cyber libel provision in the CPA, fall squarely within this framework. While many jurisdictions recognize the need to *occasionally* limit freedom of expression to prevent injury to a private individual's public reputation, those laws must be narrowly tailored—that is, both necessary and proportionate—to protect the reputation of the individual at issue without infringing on broader and more important rights and interests, including the public's right to access information. Different jurisdictions strike this balance in different ways, though all involve balancing equities on both sides of the restriction.

For example, the European Court on Human Rights ("***European Court***") applies a rights-based balancing methodology in each case in which the right of freedom of expression is alleged to conflict with an individual's right to safeguard their public reputation.[80] This methodology is case-specific and varies according to the nature of both the speech and the alleged reputational harm, but always involves rigorous evaluation of the rights that are infringed in deterring or punishing defamatory speech.[81] Similarly, under U.S. law—in a line of authority given great weight in Philippine

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76 UN Human Rights Committee, General Comment 10, U.N. Doc CRC/C/GC/10 (29 June 1983).

77 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 19(3); *see also, e.g.*, ECHR art 10(2); American Convention art 13(2).

78 *See* HRC General Comment 34, paras. 21–36.

79 *Id.* para. 22; *see also* ICCPR art 5(1) ("Nothing in the present Covenant may be interpreted as implying for any State . . . any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.").

80 'Guide on Article 10 of the European Convention on Human Rights: Freedom of Expression," European Court of Human Rights (updated on 31 August 2022), § IV (The protection of the reputation or rights of others).

81 *See id.*

jurisprudence[82]—the government's ability to suppress speech is subject to a high level of scrutiny. Courts will evaluate whether the governmental interest in restricting publication outweighs both the interest in protecting free expression *and* the public's right to know, and place the burden of proof on the government, not the speaker.[83]

The Court's decisions recognize these international obligations and endorse this approach of careful calibration in assessing cases where these rights are implicated. In *Chavez v. Gonzales*, for example, the Court emphasized that even the risk of violation of laws aimed at protecting national security "cannot support suppression of free speech and free press."[84] In a nod to defamation law, the Court noted that there are other laws "which even if violated have only an adverse effect on a person's private comfort," and took pains to explain that:

> violation of law is just a factor, a vital one to be sure, which should be weighed in adjudging whether to restrain freedom of speech and of the press. The totality of the injurious effects of the violation to private and public interest must be calibrated in light of the *preferred status accorded by the Constitution and by related international covenants protecting freedom of speech and of the press*. . . . [T]he need to prevent [the] violation [of Philippine laws] cannot per se trump the exercise of free speech and free press, a preferred right whose breach can lead to greater evils.[85]

In this case, however, the "cyber libel" charge has been applied without due consideration for the fundamental rights and public interests at

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82 *See, e.g.*, *Guingging*, G.R. No. 128959 (reaffirming the "acceptance in this jurisdiction of the principles applied by the U.S. Supreme Court in cases such as *New York Times* and *Garrison*"; citing also *Curtis Publishing Co. v. Butts* and *Gertz v. Welch, Inc.*); *Chavez v. Gonzales et al.*, G.R. No. 168338, ns. 25, 26 (discussing the First Amendment to the U.S. Constitution); *see also Tulfo v. Philippines*, G.R. No. 187113; *Disini v. Secretary of Justice*, G.R. No. 203335 (11 February 2014).

83 *See New York Times v. United States*, 403 U.S. 713 (1971); *Board of Education v. Pico*, 457 U.S. 853, 867 (1982) (holding that "the right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom") (emphasis in original); *Griffin v. Bryant*, 30 F.Supp.3d 1139, 1157 (2014) ("The usual burden of proof in attacking the constitutionality of a statute is switched in the First Amendment context, so that the government 'bears the burden of establishing [the law's] constitutionality.'").

84 *Chavez v. Gonzalez*, G.R. No. 168338.

85 *Id.* (emphasis added). *See also Disini v. Secretary of Justice*, G.R. No. 203335.

stake.[86] As a result, it extends far beyond a necessary and proportionate restriction on free speech, in violation of Article 19(3) of the ICCPR.

First, the retroactive application of cyber libel charges to Ms. Ressa and Mr. Santos based on an article that was published *months before* that provision was signed into law and *years before* it took effect, is by definition not "provided by law." (Indeed, as discussed further below,[87] this violation of the rule against non-retroactivity is an independent breach of international law, and the assertion that the article was "republished" shortly after the CPA took effect does not withstand scrutiny.)

Second, even if the trial court was right that Mr. Keng "is a private individual and not a public figure,"[88] the actual content and context of the statements about him in the Rappler article confirm that there is no legitimate public interest in protecting his reputation that is sufficient to outweigh the substantial public interests implicated in the article. (As discussed further below, the court's conclusion about Mr. Keng's private status for purposes of libel law appears to be incorrect as a matter of Philippine law.[89])

The article in which the impugned statements about Mr. Keng appeared was focused on allegations of impropriety against the then-Chief Justice—the highest judicial officer in the country, who was, at the very time the article was written and published, subject to impeachment proceedings before the Senate.[90] Mr. Keng is mentioned in the article because of an apparent link between him and the Chief Justice, through evidence that the latter had used an "expensive vehicle" registered to Mr. Keng for transportation to the Supreme Court.[91] In covering this matter of legitimate public concern, Mr. Santos followed standard journalistic practices,

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[86] *See, e.g.*, *People of The Philippines v. Reynaldo Santos Jr. and Maria Angelita Ressa*, No. R-MNL-19-01141-CR. (asserting that "[t]here is no curtailment of the right to freedom of speech and of the press" in its finding of criminal liability, and that "what society expects is a responsible free press. It is in acting responsibly that freedom is given its true meaning"); *The Philippines v. Reynaldo Santos Jr. and Maria A. Ressa*, CA-G.R. CR No. 44991 (7 July 2022) ("[T]he observance of the strict implementation and imposition of penalties in the crime of cyberlibel is not aimed to curtail the guaranteed freedom of expression, but rather serves as a major deterrent to the damaging and defaming of a person's reputation that could be easily and successfully carried out at one's fingertips.").

[87] *See infra* Section IV.0.

[88] *People of The Philippines v. Reynaldo Santos Jr. and Maria Angelita Ressa*, No. R-MNL-19-01141-CR..

[89] *See infra* Section IV.0.

[90] *See* 2012 Rappler Article ("Even as the Corona impeachment trial comes to a close Tuesday, May 29, controversy continues to hound the Chief Justice. He appears to have a penchant for using vehicles registered under the names of controversial personalities.").

[91] *Id.*

including by citing his sources, most of which were either named individuals or already public information,[92] and by offering both the Chief Justice and Mr. Keng an opportunity to comment on the allegations, and including those comments in the article.[93]

As this Court has repeatedly held, there is a strong public interest in ensuring "that the people are kept abreast of government affairs," including "information on public officials' exercise of their official functions,"[94] such as whether "these officials . . . execute their mandate in a manner consistent with law, morals, and public policy."[95] A "vigilant press," the Court has underscored, helps ensure that "the government's mistakes [do not] go unnoticed, their abuses unexposed, and their wrongdoings uncorrected."[96] Indeed, the public interest in journalists' "deliver[ing] information on public matters" is so strong that mere inaccuracy or even "a degree of crudeness bordering on boorishness" is not sufficient to strip away the right to a free press.[97]

The trial court and the appellate court in this case failed to engage in an appropriate balancing of the public and private interests at stake. Whatever interest the government may have in protecting the reputation of private individuals, it cannot overcome the overwhelming public interest in receiving information about a topic of critical public concern—namely, allegations of corruption or other misconduct by a public official—especially where they are reported in accordance with standard journalistic practices. As this Court cogently explained in *Tulfo*, in expressing grave concerns about the constitutionality of criminalizing libel:

> In libel, the kinds of speech actually deterred are *more valuable than the State interest the law against libel protects*. The libel cases that have reached this Court in

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92 *Id.* (citing, among other sources, named individuals with knowledge of the allegations; Land Transportation Office ("***LTO***") records; a complaint filed with the LTO; documents from litigation involving Mr. Keng; and various news articles, including the 2002 Philippine Star report on the smuggling allegations).

93 *Id.* (quoting comments from a Supreme Court spokesman, the Chief Justice's lawyer, and Mr. Keng himself, as well as Keng's earlier denials with respect to the 2002 Philippine Star report on the smuggling allegations).

94 *Tulfo v. Philippines*, G.R. No. 187113; *see also Chavez*, at p. 8 ("The protection covers myriad matters of public interest or concern embracing all issues, about which information is needed or appropriate, so as to enable members of society to cope with the exigencies of their period.").

95 *Tulfo v. Philippines*, G.R. No. 187113.

96 *Id. See also* HRC General Comment 34, para 20 (explaining that the right to freedom of opinion and expression, especially about "public and political issues[,] . . . implies a free press and other media able to comment on public issues and to inform public opinion without censorship or restraint").

97 *Tulfo v. Philippines*, G.R. No. 187113.

> recent years generally involve notable personalities for parties, highlighting a propensity for the powerful and influential to use the advantages of criminal libel to silence their critics.[98]

Indeed, the Human Rights Committee has already found that the Philippines Government's use of criminal defamation against at least one journalist violated Article 19 of the ICCPR because, among other factors, the courts failed to consider the "public interest in the subject matter of [the broadcaster's] criticism."[99]

Finally, the "cyber libel" convictions of Ms. Ressa and Mr. Santos also fail the necessity and proportionality prongs of the Article 19 test, especially when civil penalties for defamation are readily available in the Philippines. As emphasized in *Tulfo*:

> [A]lternative legal remedies exist to address unwarranted attacks on a private person's reputation and credibility, such as the Civil Code chapter on Human Relations. Civil actions for defamation are more consistent with our democratic values since they do not threaten the constitutional right to free speech, and avoid the unnecessary chilling effect on criticisms toward public officials. The proper economic burden on complainants of civil actions also reduces the possibility of using libel as a tool to harass or silence critics and dissenters.[100]

In short, journalists are unable to do their jobs under the Damocles' sword of criminal liability. They have a duty to satisfy the public interest in being informed of public affairs, and must make daily and expeditious judgment calls about what information to report with an inherently limited set of facts. The prospect of facing criminal liability for allegedly misreporting facts—or worse yet, being punished for *accurate* reporting—will have a profound chilling effect, discouraging journalists from wading into the sensitive topics that often are the subjects of *greatest* public concern. This, in turn, undermines the public's right of access to information and erodes freedom of expression more generally—costs that are hugely disproportionate to the interest the libel charges are ostensibly protecting.[101]

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[98] *Tulfo v. Philippines*, G.R. No. 187113 (emphasis added). *See also id.* (quoting, with approval, Philippine Press Institute's Journalists' Code of Ethics provision requiring journalists to "refrain from writing reports which will adversely affect a private reputation *unless the public interest justifies it*") (emphasis added).

[99] *Adonis v. Philippines*, CCPR/C/103/D/1815/2008HRC, at para 7.9.

[100] *Tulfo v. Philippines*, G.R. No. 187113.

[101] *See Kaperzynski v. Poland*, App No. 43206/07 (ECtHR, 3 April 2012), para 70 (European Court holding that the "chilling effect that the fear of . . . sanctions has on the exercise of journalistic freedom of expression . . . which works to the detriment

3. With these Convictions and Continued Criminalization of Defamation, the Philippines Is Out of Step with Contemporary State Practice

The dangers outlined above are not unique to this case, nor to the Philippines. Indeed, the emerging global consensus is that criminal sanctions like imprisonment—let alone draconian sentences like the six years imposed on Ms. Ressa and Mr. Santos—are *never* necessary or proportionate to guarding against mere reputational injury. Contemporary state practice confirms that the prosecution of criminal defamation is increasingly seen as incompatible with international human rights law.

International human rights mechanisms have long rejected the criminal punishment of libel and defamation, and abhor sentences of imprisonment in particular.[102] In 2014, the African Court on Human and People's Rights ruled in *Lohé Issa Konaté v. Burkina Faso* that imprisonment for defamation constituted a disproportionate interference with the right to freedom of expression guaranteed under the African Charter on Human and People's Rights.[103] The UN Working Group on Arbitrary Detention has likewise held that the proper remedy for defamation "lie[s] in a civil libel claim rather than in criminal sanctions" because the former is the least intrusive measure "sufficient to achieve respect for the rights or reputations of others."[104] The UN Special Rapporteur on Freedom of Opinion and Expression has also called for criminal libel to be replaced by a civil libel regime, wherein prohibitions on defamation are enforced by private individuals and subject only to proportionate civil penalties.[105]

An increasing number of States have responded to this call and reformed their defamation laws. In Europe, most states have either repealed such laws, stopped prosecuting them, or at least eliminated the possibility of

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of society as a whole, is likewise a factor" in assessing "the proportionality, and thus the justification, of the sanctions imposed on media professionals").

[102] *See, e.g.*, HRC General Comment 34, para 47 ("imprisonment is never an appropriate penalty" for defamation); Working Group on Arbitrary Detention, Communication No. 75/2021, Opinion (2022), fn. 28 ("a fortiori no detention based on charges of defamation may ever be considered either necessary or proportionate").

[103] *Lohé Issa Konaté v. Burkina Faso*, App No. 004/2013 (ACHPR 5 December 2014), at 45.

[104] UN Human Rights Council, Working Group on Arbitrary Detention, Opinion No. 51/2017, U.N. Doc/ A/HRC/WGAD/2017/51 (13 October 2017), para 38.

[105] "Statement by Irene Khan, Special Rapporteur on the promotion and protection of freedom of opinion and expression at the 47th Session of the Human Rights Council," OHCHR (July 2, 2021) <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=27257&LangID=E> accessed 10 May 2024.

imprisonment.[106] Similar developments have occurred in Africa, with Zimbabwe,[107] Kenya,[108] Lesotho,[109] and Liberia[110] all scrapping their criminal defamation laws after the African Court's 2014 ruling. The same trend has also begun to take root in Asia and the Pacific region: New Zealand (1992), Sri Lanka (2002), Niue (2007), Timor-Leste (2009), Kyrgyzstan (2015), and the Maldives (2018) have all abolished criminal defamation.[111] In several instances, courts or lawmakers in these countries have expressly declared criminal defamation to be inherently disproportionate or to otherwise contravene basic constitutional rights to free speech and freedom of the press.[112]

The continued use of a vague and expansive libel provision to punish good-faith reporting on a topic of unquestionable public interest threatens to position the Philippines alongside some of the most repressive states in the region. International human rights mechanisms have widely condemned the use of the judicial system—whether through expansive "cybercrime" laws like the CPA or the application of draconian laws that have been on the books for decades—in countries like Myanmar, Cambodia, and Vietnam to punish online speech by journalists and political dissidents.[113]

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[106] *The 'misuse' of the judicial system to attack freedom of expression: trends, challenges and responses*, CI-2022/WTR/4, UNESCO (December 2022) <https://unesdoc.unesco.org/ark:/48223/pf0000383832> accessed 9 May 2024.

[107] 'Zimbabwe court rules criminal defamation unconstitutional,' International Press Institute (4 February 2016) <http://legaldb.freemedia.at/2016/02/04/zimbabwe-court-rules-criminal-defamation-unconstitutional/> accessed 10 May 2024.

[108] *Jacqueline Okuta & Anor v. AG & Others*, Petition No. 397 of 2016 (High Court of Kenya, 6 February 2017).

[109] 'Lesotho Constitutional Court declares criminal defamation unconstitutional,' CPJ (22 May 2018) <https://cpj.org/2018/05/lesotho-constitutional-court-declares-criminal-def/> accessed 10 May 2024.

[110] 'President George Weah signs new press freedom act which repeals libel,' IFEX (5 March 2019) <https://ifex.org/president-george-weah-signs-new-press-freedom-act-which-repeals-libel/> accessed 10 May 2024.

[111] *The 'misuse' of the judicial system to attack freedom of expression: trends, challenges and responses*, CI-2022/WTR/4, UNESCO (December 2022) <https://unesdoc.unesco.org/ark:/48223/pf0000383832> accessed 9 May 2024.

[112] *See, e.g.*, *Jacqueline Okuta & Anor v. AG & Others*, Petition No. 397 of 2016 (High Court of Kenya, 6 February 2017) ("The harmful and undesirable consequences of criminalizing defamation, *viz*. the chilling possibilities of arrest, detention and two years imprisonment, are manifestly excessive in their effect and unjustifiable in a modern democratic society."); 'Anti-defamation law repealed,' Maldives Independent (14 November 2018) <https://maldivesindependent.com/politics/anti-defamation-law-repealed-142649> accessed 10 May 2024 (noting that, during the debate on repealing the Maldives' criminal defamation law, "most lawmakers said it contravened the constitutional rights to free speech and press freedom").

[113] *See, e.g.*, *State of Press Freedom in Cambodia*, OHCHR (August 2022) <https://www.ohchr.org/en/documents/reports/state-press-freedom-cambodia>

In other cases, however, domestic courts—especially appellate courts, tasked with correcting the errors of first-instance courts—have overruled some of the most egregious abuses of criminal defamation law. For example, courts in Thailand have on more than one occasion dismissed charges brought against journalists even under its heavily criticized defamation and computer crime laws.[114]

This Court, too, has recognized the dangers and chilling effect of criminal defamation prosecutions, as well as the disproportionate nature of imprisonment for mere libel. As early as 2008, the Court noted an "emergent rule of preference for the imposition of fine[s] only rather than imprisonment in libel cases."[115] Accordingly, in *Sazon v. Court of Appeals*,[116] *Mari v. Court of Appeals*,[117] *Brillante v. Court of Appeals*,[118] and *Buatis v. People*,[119] the Court opted to impose only a fine, rather than imprisonment. More generally, the Court has urged lower courts to take into consideration "the peculiar circumstances of each case, [and] determine

accessed 9 May 2024, para 40 (noting that at least 23 journalists have been criminally prosecuted for disinformation, defamation or incitement as a result of their work since 2017); 'Increasing attacks on Cambodian media area a threat to democracy – UN human rights report,' OHCHR (3 August 2022) <https://www.ohchr.org/en/press-releases/2022/08/increasing-attacks-cambodias-media-are-threat-democracy-un-human-rights> accessed 10 May 2024 (calling for immediate end to Cambodia's use of "open-ended laws . . . to block information and punish unspecific crimes," in violation of Article 19 of the ICCPR and other human rights instruments).

114 *See, e.g.*, 'Supreme Court dismisses defamation lawsuit against reporter,' Prachatai (10 August 2022) <https://prachataienglish.com/node/9953> accessed 10 May 2024 (reporting on Thai Supreme Court decision upholding ruling that journalist "ha[d] the right to criticize or express opinions about the company in good faith and in the interest of the public as a citizen and as a journalist whose job is to report about labour rights"); 'Journalist Alan Morison and Colleague Acquitted of Defaming Thai Navy,' Fairfax Media (1 September 2015) <http://phuketwan.com/tourism/journalist-alan-morison-colleague-acquitted-defaming-thai-navy-23093/> accessed 10 May 2024. *See also* 'East Timor court drops premier's libel case against media,' Associated Press (1 June 2017) <https://apnews.com/article/6bbed8050a2844e9aa039a7f7f94f9c6> accessed 10 May 2024.

115 Reynato S. Puno, Chief Justice, 'Administrative Circular No. 08-2008,' Supreme Court of the Philippines (25 January 2008) <https://lawphil.net/courts/supreme/ac/ac_8_2008.html> accessed 10 May 2024.

116 *Sazon v. Court of Appeals*, G.R. No. 120715 (29 March 1996).

117 *Mari v. Court of Appeals*, G.R. No. 127694 (31 May 2000).

118 *Brillante v. Court of Appeals*, G.R. Nos. 118757 & 121571 (10 November 2005).

119 *Bautis v. People*, G.R. No. 142509 (24 March 2006).

whether the imposition of a fine alone would best serve the interests of justice."[120]

The prosecution of Ms. Ressa and Mr. Santos runs contrary to contemporary practice with respect to criminal defamation, and to the Court's prior guidance. It is both a glaring example of how libel prosecutions can be abused in practice, and an opportunity for the Philippines to correct course.

B. In this Case, the Lower Courts Failed To Apply Sufficient Safeguards against Abusive Libel Claims

The balancing of interests described above forms the core of any internationally lawful regime for the protection and promotion of freedom of expression and freedom of the press. While libel law can be a legitimate restriction on freedom of expression—when adequately balanced against the greater public interest in the rights to impart and receive information[121]—it is also ripe for abuse. As a result, international law and contemporary state practice have coalesced around certain safeguards that States should implement with respect to defamation laws and other restrictions on speech to prevent such abuse.

When dealing with allegations against journalists like Ms. Ressa and Mr. Santos whose job is to pursue the truth and report in good faith on matters of public concern, two key safeguards are especially crucial: (*1*) requiring a heightened level of mental culpability before imposing liability for defamation and (*2*) recognizing truth as an absolute defense to such claims.

These safeguards are not unknown in Philippine law, but the manner in which courts have interpreted and applied the CPA falls far short of the level of protection required under international law.

1. Libel Claims Involving Public Figures Require Proof of "Actual Malice"

The first safeguard against abusive claims applies in cases concerning alleged defamation of public officials or other public figures, and requires a showing of heightened mental culpability before liability may be imposed. Mere inaccuracies are insufficient; the speaker or author must have acted

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[120] Reynato S. Puno, Chief Justice, 'Administrative Circular No. 08-2008,' Supreme Court of the Philippines (25 January 2008) <https://lawphil.net/courts/supreme/ac/ac_8_2008.html> accessed 10 May 2024.

[121] *See, e.g.*, *Gertz v. Welch*, 418 U.S. 323, 342 (1974) ("Some tension necessarily exists between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury. . . . In our continuing effort to define the proper accommodation between these competing concerns, we have been especially anxious to assure to the freedoms of speech and press that breathing room essential to their fruitful exercise.") (internal quotation marks and citations omitted).

with specific harmful intent, with knowledge of the falsity of the statement, or with reckless disregard as to its truth or falsity—a standard described in many jurisdictions as "malice" or "actual malice." This Court has ensured that this requirement remains a part of Philippine libel law.[122]

As the Court has recognized, journalism often requires reporting negative and consequential remarks about individuals in the public eye, like Mr. Keng, which can naturally and justifiably affect an individual's reputation. This is an integral aspect of the public's right to information and a large part of why a free press is so essential to a functioning democracy. Journalists can demonstrate that they take this responsibility seriously by following standard journalistic practices—such as citing sources for any negative allegations, and providing the subjects of those allegations with opportunity to comment. In no circumstances should such journalists be punished for serving the public in good faith as providers of sensitive information.

Accordingly, international human rights bodies apply *mens rea* tests to allegations of defamation, especially where they are leveled against journalists. In its influential General Comment 34, the Human Rights Committee encouraged all States to include a "malice" requirement in their criminal defamation statutes, particularly in regards to public figures,[123] while the Inter-American Declaration of Human Rights states that journalists should not be sanctioned unless they either (*1*) acted "with a specific intent to inflict harm," (*2*) were "fully aware that false news was disseminated," or (*3*) "acted with gross negligence in efforts to determine the truth or falsity of such news" when reporting on public *and* private figures involved in matters of public interest.[124]

Many national courts apply this general approach, imposing a heightened burden of proof with respect to *mens rea* on defamation complaints brought by public figures. The United States Supreme Court case of *New York Times v. Sullivan* established the influential and oft-cited standard by requiring libel claims by individuals in the public domain or regarding matters of public importance to show that "the statement was made with 'actual malice'—that is, with knowledge that it was false or

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122 *See, e.g.*, *Guingging*, G.R. No. 128959 ("this Court has accepted the proposition that the actual malice standard governs the prosecution of criminal libel cases concerning public figures"); *Disini v. Secretary of Justice*, G.R. No. 203335 (reiterating that "the online dissemination of scathing, false, and defamatory statements against public officials and public figures" are "conditionally protected" "under the actual malice rule").

123 HRC, General Comment No. 34.

124 'Background and Interpretation of the Declaration of Principles,' Organization of the American States, Principle 10, <https://www.oas.org/en/iachr/expression/showarticle.asp?artID=132> accessed 10 May 2024.

reckless disregard of whether it was false or not."[125] That standard has been effectively adopted by numerous courts around the world, including the Inter-American Court, India, Pakistan, Taiwan, Argentina, Bosnia, Hungary, and Uruguay[126]—and has been cited with approval by Philippine courts.[127]

Indeed, the Court has repeatedly endorsed this *mens rea* requirement for libel claims brought by public persons, holding in *Tulfo* that "[u]nless the prosecution proves that the defamatory statements were made with *actual malice*—that is, 'with knowledge that it was false or with reckless disregard of whether it was false or not'—a criminal case for libel involving a public officer's exercise of official functions cannot prosper,"[128] and a libel complaint or indictment involving a "public figure" will likewise falter.[129] The Court extended this principle to cyber libel in *Disini*, holding that the CPA's presumption of malice was unconstitutional as applied to alleged defamation of public figures.[130]

To comply with international law—and with the decisions of this Court—the prosecution in this case should have been required to prove "actual malice" by the Petitioners, both because of the paramount public importance of the subject matter of the article, and because Mr. Keng is, in fact, a public figure. As explained in *Disini*, a person qualifies as a public figure when "by his accomplishments, fame, or mode of living, or by

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[125] *New York Times v. Sullivan*, 376 U.S. 254, 279–80 (1964); *see generally id.* at 279–283 (holding that this requirement is compelled by the "constitutional guarantees" of freedom of speech and of the press).

[126] *See* Kyu Ho Youm, '*New York Times v. Sullivan*: Impact on Freedom of the Press Abroad' (2004) 22 COMM. LAW. 14–16 (2004); *Kimel v. Argentina*, (Ser. C) No. 177 (IACtHR, 2 May 2008), para 41; *Donoso v. Panama*, 2009 (Ser. C) No. 193 (IACtHR, 27 January 2009), para 46; 'Uruguay,' IAPA (9 May 2013) <https://en.sipiapa.org/notas/1126437-uruguay> accessed 10 May 2024.

[127] *See, e.g.*, *Guingging*, G.R. No. 128959 (reaffirming the "acceptance in this jurisdiction of the principles applied by the U.S. Supreme Court in cases such as *New York Times* and *Garrison*"); *Tulfo v. Philippines*, G.R. No. 187113, at n. 110 (collecting cases).

[128] *Tulfo v. Philippines*, G.R. No. 187113 (quoting *Flor v. People of the Philippines*, 494 Phil. 439, 450 (2005) [Per J. Chico-Nazario, Second Division]).

[129] *See id.* ("The requisite of malice has evolved, there being a distinction between libel cases involving private persons and those involving public officers *and public figures*. Thus, whether the complainant is a private or *public person* is a factor that must be considered.") (emphases added); *id.* ("In [1988], . . . this Court extended the 'actual malice' requirement in libel cases involving public officers to 'public figures.' It decreed that owing to the legitimate interest of the public in his or her affairs the right of privacy of a 'public figure' is necessarily narrower than that of an ordinary citizen.") (internal citation and quotation marks omitted).

[130] *Disini v. Secretary of Justice*, G.R. No. 203335 ("The possibility of applying the presumed malice rule against this kind of libel hangs like a Damocles sword against the actual malice rule that jurisprudence established for the prosecution of libel committed against public officers and figures.").

adopting a profession or calling which gives the public a legitimate interest in his doings, his affairs, and his character, has become a 'public personage'."[131] Public figures can include individuals as wide ranging as "public officers, famous inventors and explorers, war heroes and even ordinary soldiers, an infant prodigy, and no less a personage than the Grand Exalted Ruler of a lodge. It includes, in short, anyone who has arrived at a position where public attention is focused upon him as a person."[132] Public figures also include anyone who thrusts themselves "into the 'vortex' of controversy," in the words of the U.S. Supreme Court, because their actions tend to be matters of public concern.[133]

Indeed, this Court has specifically found that businessmen, like Mr. Keng, may be public figures when they become involved in matters of public interest. In *Borjal v. Court of Appeals*, the Court found that a businessman who was executive director and spokesperson of a congressionally organized national conference on land transportation could properly be considered a public figure for purposes of libel law.[134] As the Court explained in that case, "if a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved . . . . The public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect and significance of the conduct, not the participant's prior anonymity or notoriety."[135]

Mr. Keng plainly qualifies as a public figure under this standard. Both before and after the Rappler article, Mr. Keng's business ventures and professional history have received considerable media attention.[136]

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[131] *Id.* (citing other Filipino caselaw). *See also Guingging*, G.R. No. 128959 (observing that Supreme Court precedent "clearly establishes that even non-governmental officials are considered public figures," and finding that a radio journalist was a "public figure" for the purposes of his libel complaint).

[132] *Ayer v. Capulong*, G.R. No. 82380 (29 April 1988) (citing Prosser and Keeton on Torts, 5th ed., pp. 854-863 (1984)).

[133] *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 162, (1967); *see also Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352 (1974) (same); *Biro v. Condé Nast*, 963 F. Supp. 2d 255 (2013); *Disini v. Secretary of Justice*, G.R. No. 203335 ("[I]n short," a 'public figure' includes "anyone who has arrived at a position where public attention is focused upon him as a person.").

[134] *Borjal v. Court of Appeals*, G.R. No. 126466 (14 January 1999).

[135] *Id.*

[136] *See, e.g.*, Suzanne Nam, 'The Philippine's 40 Richest,' Forbes (7 July 2010) https://www.forbes.com/2010/07/06/philippines-richest-henry-sy-wealth-philippines-10_land.html?sh=1e83753b1d3b> accessed 10 May 2024 (identifying Mr. Keng as 32nd richest person in the Philippines in 2010); Philip Bowring, 'Chinese-Filipino Businessman's Curious Mainland Links,' Asia Sentinel (1 July 2020) <https://www.asiasentinel.com/p/chinese-filipino-businessmans-curious> accessed 10 May 2024. *See also* 2012 Rappler Article (citing a previous investigative report regarding Mr. Keng in 2002).

Likewise, his alleged dealings with the impeached Chief Justice thrust him into the existing public controversy, warranting his treatment as a public figure for the purposes of his libel complaint.

2. In Any Event, Libel Cannot Be a Strict Liability Offense

Even as the *Disini* decision restored the "actual malice" requirement for defamation cases involving public persons, it left in place the CPA's presumption of malice for those involving private individuals.[137] This provision is flatly inconsistent with a regime that is truly protective of the "preferred rights" of freedom of speech and of the press:[138] it takes no account of whether broader issues of public importance are implicated, disregards the nature of investigative journalism, and makes it much easier for the government to restrict these fundamental rights.

In short, by lifting the burden from the prosecution of having to prove *mens rea* and permitting a finding of malice based solely on the content of the impugned statement, the CPA and lower court decisions treat cyber libel as a strict liability offense—exponentially increasing the chilling effect on journalists and ordinary citizens.[139]

This approach is also inconsistent with international law and out of step with State practice. Even for private figures, most States still require that some level of mental culpability is required for liability for defamation. While the balance courts strike may be different in each jurisdiction, the underlying principle of ensuring respect for freedom of the press remains the same. In *Gertz v. Robert Welch*, for example, when considering whether federal law prohibited state law actions for defamation, the United States Supreme Court underscored:

> We hold that, *so long as they do not impose liability without fault*, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual. This approach . . . recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields

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[137] *See Disini v. Secretary of Justice*, G.R. No. 203335

[138] *Chavez v. Gonzales et al.*, G.R. No. 168338.

[139] *See, e.g.*, *Adonis v. Philippines* (HRC, 26 April 2012), CCPR/C/103/D/1815/2008, para. 5.3 (noting petitioner's concern that "Philippine law has maintained criminal libel with imprisonment as a penalty, even though certain exceptions have been allowed, such as public interest and public figure exceptions. However, these exceptions have been implemented unevenly and have not prevented these cases from resulting in prosecutions that run counter to freedom of expression, as in the present case.").

the press and broadcast media from the rigors of strict liability for defamation.[140]

In other jurisdictions, including Australia, Belgium, Malaysia, and South Africa, liability for defamation of a private individual is likewise permissible only on a showing of fault, such as where the speaker failed to take reasonable precautions to ensure the accuracy of statements.[141] In 2022, this principle was also upheld in Thailand, where reporter Suchanee Cloitre had been sentenced to two years in prison for an allegedly defamatory tweet against a private company. Both the Court of Appeal and Supreme Court in that case found that the tweet was criticism and opinion made in good faith and in the public interest, and was accordingly not actionable as defamation under Thai law.[142]

The Rappler article at issue in this case likewise reflects responsible reporting by Mr. Santos. He identified (and quoted directly from) the sources for the allegations set out in the article, most of which had previously been publicly reported or disclosed elsewhere; he contacted Mr. Keng for comment on the specific fact relevant to the focus of the article, namely the assertion that Mr. Keng owned the vehicle in which the Chief Justice had been seen traveling in January 2011; and he both noted and linked to another article in which Mr. Keng denied one of the earlier allegations that had been reported by another media outlet.[143]

As to Ms. Ressa, there is no dispute that she played no role whatsoever in the reporting; she neither authored nor edited the article, and stands convicted and sentenced to several years' imprisonment solely by virtue of her position at Rappler—a particularly extreme form of strict liability targeting media organizations that is anathema to the fundamental human rights guarantees enshrined in this Court's case law.

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140 *Gertz v. Welch* , 418 U.S. at 347–348 (1974) (emphasis added). *See also Rittgers v. Hale*, 2018 WL 2364674, at 4 (D. Kan. 2018) (citing *Gertz*, at 347); *Montgomery v. Risen*, 197 F. Supp. 3d 219, 255 (D.C. Cir. 2017) (same); *Evans v. The First 48 et al.*, 2010 WL 4237232, at 2 (S.D.N.Y. 2010) (same).

141 *See, e.g.*, 'Defamation Law,' Arts Law Center (Australia) <https://www.artslaw.com.au/information-sheet/defamation-law/> accessed 10 May 2024;; Frederic Debusseré, 'Belgium Media-Law Guide,' Carter-Ruck, <https://www.carter-ruck.com/law-guides/defamation-and-privacy-law-in-belgium/> accessed 10 May 2024; Wong Chuh Wah, Wong Chun Keat, "Malaysia Media Law Guide, Carter-Ruck, <https://www.carter-ruck.com/law-guides/defamation-and-privacy-law-in-malaysia/> accessed 10 May 2024; Dario Milo, 'South Africa Media Law Guide,' Carter-Ruck, <https://www.carter-ruck.com/law-guides/defamation-and-privacy-law-in-south-africa/> accessed 10 May 2024.

142 'Supreme Court Dismisses Defamation Lawsuit Against Reporter,' Prachathai, (10 August 2022) <https://prachataienglish.com/node/9953> accessed 10 May 2024.

143 *See* 2012 Rappler Article.

3. Truth Must Be a Complete Defense to Libel

No journalist should be punished for accurate reporting. As this Court has observed, "in order to safeguard against fears that the public debate might be muted due to the reckless enforcement of libel laws, *truth has been sanctioned as a defence*, much more in the case when the statements in question address public issues or involve public figures."[144]

To be clear, journalists should benefit from the protection of *mens rea* requirements like the actual malice rule *in the first instance*, so they would not have to prove truth to avoid conviction.[145] As the U.S. Supreme Court warned in *New York Times v. Sullivan*:

> A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to . . . self-censorship. *Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred.* Even courts accepting this defense as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars. Under such a rule, *would-be critics of official conduct may be deterred* from voicing their criticism, even though it is believed to be true and *even though it is, in fact, true, because of doubt whether it can be proved in court or fear of the expense of having to do so*. They tend to make only statements which steer far wider of the unlawful zone. The rule thus dampens the vigor and limits the variety of public debate.[146]

Nevertheless, it is widely accepted that an internationally lawful defamation regime—which appropriately balances public and private interests with due consideration for human rights—recognizes truth as a complete defense to libel. The Human Rights Committee's General Comment 34 explains that *all* defamation laws—civil or criminal—"should include . . . the defence of truth."[147] The African Commission on Human and Peoples' Rights has likewise held that "no one shall be found liable for

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[144] *Guingging*, G.R. No. 128959 (emphasis added); *see also Tulfo v. Philippines*, G.R. No. 187113.

[145] *See Kasabova v. Bulgaria*, App No. 22385/03 (ECtHR, 19 April 2011), para 63 (confirming the primacy of the malice requirement, by holding that journalists do not have to prove the truth of their allegations if they can show that their reporting was done responsibly, in accordance with the ethics of journalism).

[146] *New York Times v. Sullivan*, 376 U.S. at 279.

[147] HRC General Comment 34, para 47.

true statements,"[148] while the European Court ruled that defendants must be given the opportunity to defeat a defamation claim by proving that there was "sufficient factual basis" for their statements.[149]

Many national courts have mirrored the approach taken by international courts, including by interpreting the definition of "truth" liberally. For example, Australia,[150] Canada,[151] Kenya, [152] and Malaysia[153] all recognize truth as an absolute defense, while in the United States, the defense extends both to statements that are *entirely* true and those that are found to be *substantially* true.[154] Thus, in *Masson v. New Yorker Magazine*, the U.S. Supreme Court held that a report about a public figure could not be deemed false unless it was a gross distortion of the facts that reflected a "material change" from source information.[155] In the United Kingdom, the Defamation Act 2013 similarly permits the defendant to defeat the claim by "show[ing] that the imputation conveyed by the statement complained of is substantially true."[156]

By contrast, in the Philippines, truth is not an absolute defense. In particular, under Article 361 of the Revised Penal Code, truth can only serve as a defense when accompanied by "good motives and for justifiable ends."[157] The lower courts applied this standard to the defendants, finding that "the accused must show that [s]he has a justifiable reason for the defamatory statement even if it was in fact true."[158] As such, the burden is

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[148] African Commission, 'Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa,' ACHPR/Res. 62 (XXII) 02 (22 October 2002).

[149] *Morice v. France*, App No. 29369/10 (ECtHR 23 April 2015), para 155.

[150] *See* Model Defamation Provisions (approved 27 July 2020), para. 26 ('Defence of contextual truth') (adopted by three Australian states into legislation so far).

[151] Canadian Criminal Code, R.S.C., 1985, c. C-46, 'Defences Against the Person and Reputation, Defamatory Libel, last amended 17 November 2022.

[152] *Joseph Njogu Kamunge v. Charles Muriuki Gachari*, Civil Appeal No. 42 of 2014 (High Court of Kenya, 25 May 2016). *See also* Kenyan Evidence Act, Chapter 80, revised 2012, § 107; Kiragu Kimani, Queenton Ochieng & Nimo Kering, 'Kenya Law Media Guide,' Carter-Ruck, <https://www.carter-ruck.com/law-guides/defamation-and-privacy-law-in-kenya> accessed 10 May 2024.

[153] *Institute of Commercial Management United Kingdom v New Straits Times Press (Malaysia) Bhd* (1993) 1 MLJ 408 ("It is, however, a *complete* defence to an action of libel and slander that the defamatory imputation is true.") (emphasis added).

[154] *Masson v. New Yorker Magazine,* 501 US 496, 497 (1991).

[155] *Id.*

[156] United Kingdom Defamation Act, 2013 c 26, § 2(1) ("It is a defence to an action for defamation for the defendant to show that the imputation conveyed by the statement complained of is substantially true.").

[157] Revised Penal Code, Act No. 3815, as amended, art 361.

[158] *The Philippines v. Reynaldo Santos Jr. and Maria A. Ressa*, CA-G.R. CR No. 44991 (7 July 2022).

not only shifted to the defendant; it is doubled: they must prove *both* the veracity of the statement *and* good motive and justifiable reason for making it. Neither the statute nor the decision of either lower court seeks to define "good motive" or "justifiable," and none recognize that ordinary journalistic standards generally satisfy these requirements—leaving reporters and media outlets vulnerable to the subjective interpretation of these criteria by different prosecutors and different courts in different cases.

The UN Human Rights Committee has already determined Article 361 to be incompatible with international law. In *Adonis v. The Philippines*, the Committee found that the article violated Article 19 of the ICCPR because, among other defects, it "admit[ed] no proof of truth as a defence except for very limited cases."[159] In upholding the constitutionality of this provision as applied in cases involving alleged defamation of private persons, the *Disini* decision gave short shrift to arguments invoking *Adonis* and its reliance on General Comment 34, asserting that "General Comment 34 does not say that the truth of the defamatory statement should constitute an all-encompassing defence," and that "the UNHRC did not actually enjoin the Philippines, as Petitioners urge, to decriminalize libel," instead "simply suggest[ing] that defamation laws be crafted with care to ensure that they do not stifle freedom of expression."[160]

Those conclusions misread *Adonis* and misapprehend the international legal obligations of the Philippines. In reaching its conclusion that "the sanction of imprisonment imposed on the author was incompatible with article 19, paragraph 3, of the [ICCPR]," the Committee was well aware that truth was available as a defence in Philippine courts—but only in "very limited cases," as explained by the petitioner journalist and confirmed by the State.[161] The Committee also accepted the petitioner's arguments that his conviction for libel breached the ICCPR because "there are less severe sanctions available," it did "not take into account the public interest as a defence," and it "presume[d] malice in the allegedly defamatory statements placing the burden of proof on the accused."[162] The Committee expressly advised the Philippines that it is "under an obligation *to take steps to prevent similar violations occurring in the future*, including by reviewing the relevant libel legislation."[163]

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159 *Adonis v. Philippines* (HRC, 26 April 2012), CCPR/C/103/D/1815/2008, paras.7.7, 7.10 (summarizing petitioner's submission on this issue, which was not disputed—and in fact implicitly confirmed—in the State's reply submission).

160 *Disini v. Secretary of Justice*, G.R. No. 203335.

161 *Adonis v. Philippines* (HRC, 26 April 2012), CCPR/C/103/D/1815/2008, paras. 3.3, 4.2, 7.7, 7.10.

162 *Id.* paras. 7.7, 7.10.

163 *Id.* para 9 (emphasis added). *See also id.* para. 10 (recalling that the Philippines "has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the

The Philippines has failed to comply with these obligations under the ICCPR. In finding Ms. Ressa and Mr. Santos guilty of cyber libel without adequate consideration of the accuracy of the Rappler article, the Regional Trial Court and the Court of Appeals punished journalists for an article untarnished by falsity, that instead simply reported facts of significant public importance, many of which were already in the public domain, to the Philippine public.

C. The Retroactive Application of the CPA To Convict the Petitioners Violates International Law.

The prosecution and convictions in this case are especially concerning because they misused criminal law to attack *two* pillars of a democratic society—a free press, and the rule of law itself. Specifically, by charging and convicting Ms. Ressa and Mr. Santos under a statute that *had not even been promulgated* at the time the article was published, the Philippine prosecutors and lower courts breached international law prohibiting the retroactive application of criminal laws.

The applicable general principle of international law—known as *nullum crimen sine lege*, *nulla poena sine lege* ("no crime without law, no penalty without law")—mandates that an individual cannot be retroactively found guilty of a crime if the law did not prohibit or punish the conduct when it was committed. As international judges have repeatedly explained, this rule is one of the "most sacred principles of criminal law"[164] because it enforces fundamental notions of justice and aims to prevent abuse of the State's police powers:

> Criminal behaviour can only be deterred if citizens are aware of the criminalising law prior to commission of the censured conduct. Since retroactive punishment cannot hinder an action or omission which has already occurred, it reflects arbitrary State intrusion in citizens' liberties and freedoms.[165]

State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective remedy when it has been determined that a violation has occurred").

[164] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion [1971] I.C.J. 16 (21 June), Separate Opinion of Vice-President Ammoun (identifying "the rule of nullum crimen sine lege" and "the non-retroactivity of penal laws and of penalties" as among "the most sacred principles of criminal law").

[165] *Maktouf and Damjanović v. Bosnia and Herzegovina*, App Nos. 2312/08 and 34179/08 (ECtHR, July 2013), Concurring Opinion of Judges Pinto de Albuquerque and Vučinić, para 2. *See also Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*, PCIJ Series A/B. No 65 (4 December 1935), at 57 ("[T]he fundamental rights of the individual . . . may indeed be restricted . . . in

The *nullum crimen*/non-retroactivity principle is accordingly enshrined in the ICCPR and other international treaties,[166] and reflected in the constitutions of many States, including the Philippines.[167] It extends both to provisions defining the offense and to those setting the penalties incurred.[168]

In this case, the undisputed facts establish that the prosecution and conviction of Ms. Ressa and Mr. Santos violated this fundamental principle:[169]

- The Rappler article was published on 29 May 2012.
- The CPA was signed into law more than three months later, on 12 September 2012. Enforcement of the law was enjoined, by a temporary restraining order issued by this Court, until after the motion for reconsideration was resolved in *Disini* on 22 April 2014—nearly two years after the Rappler article was published.
- On 19 February 2014, the day after the *Disini* judgment, Rappler staff updated the article by correcting a typographical error. As it

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the general public interest, but only in virtue of a law which must itself specify the conditions of such restriction, and, in particular, determine the limit beyond which an act . . . becomes a punishable offence. It must be possible for the individual to know, beforehand, whether his acts are lawful or liable to punishment.").

[166] ICCPR, art 15 ("No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed."); UDHR, art 11(2) ("No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed . . . ."); *see also* ECHR, art 7(1); African Charter, art 7(2); American Convention, art 9.

[167] Constitution of the Philippines (1987) , art III, § 22 ("*No ex post facto law* or bill of attainder shall be enacted.") (emphasis added). *See also, e.g.*, *Rao Shiv Bahadur Singh and Another vs The State of Vindhya Pradesh*, 1953 SCR 1188 (1953), at 1198 (Supreme Court of India, construing Article 20 of Indian Constitution, ruling that "[t]here can be no doubt as to the paramount importance of the principle that such *ex post facto* laws, which retrospectively create offences and punish them are bad as being highly inequitable and unjust."); *Weaver v. Graham*, 450 U.S. 24, 28–29 (1981) ("The *ex post* facto prohibition" in Article I of the U.S. Constitution forbids "enact[ing] any law which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed. . . . [F]or a criminal or penal law to be *ex post facto*[,] it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it.").

[168] *See, e.g.*, *Vasiliauskas v. Lithuania* , App No. 35343/05 (ECtHR, 20 October 2015), paras 165–166; *Jamil v. France*, App (ECtHR, 8 June 1995), paras 34–36; *M. v. Germany*, App No. 19359/04, (ECtHR, 17 July 2009), paras 123, 135–137; *Gurguchiani v. Spain*, App No. 16012/06, (ECtHR, 15 December 2009), paras 32–44.

[169] *See supra*, Sections III.A–III.C; *see also* 2012 Rappler Article.

appears on Rappler's website, there are two dates under Mr. Santos's byline: "Published 7:39 AM, May 29, 2012" And "Updated 5:42 PM, February 19, 2014.".

- On 10 January 2019, nearly seven years after the article was published, the Department of Justice formally charged Ms. Ressa and Mr. Santos with violating the CPA. No other provision of Philippine law was alleged to have been breached.

In short, there is neither dispute nor doubt that the statutory provision under which Ms. Ressa and Mr. Santos were prosecuted and convicted *did not exist* at the time the Rappler article was written and published—on its face, a blatant violation of the prohibition of *ex post facto* criminalization. The lower courts concluded, however, that there was no impermissible retroactive application in this case because the article was "re-published" on 19 February 2014 when the typographical error was corrected.[170]

This conclusion does not withstand scrutiny. The crux of a libel charge is that the author has made a "*public* and malicious imputation" of "a discreditable act or condition of another person"—that is what is meant by "*publication* of the charge."[171] But the Rappler article did not appear once in May 2012 and then again in February 2014; nor was the article substantively altered or shared with a new audience by virtue of the edit made on 19 February 2014.[172] Instead, the edit made on 19 February simply corrected a typographical error that was completely unrelated to the allegations against Mr. Keng that are the substance of his libel complaint. The article was continuously available to the exact same audience—any member of the public with internet access—since it was posted to Rappler's website in May 2012. The correction of the typographical error had no effect on the *public* nature of the impugned statements: they remained as available to anyone with internet access on 19 February 2014 as they had

[170] *People of The Philippines v. Reynaldo Santos Jr. and Maria Angelita Ressa*, No. R-MNL-19-01141-CR (15 June 2020); *The Philippines v. Reynaldo Santos Jr. and Maria A. Ressa*, CA-G.R. CR No. 44991 (7 July 2022).

[171] *Disini v. Secretary of Justice*, G.R. No. 203335 (emphases added).

[172] For both online and offline statements, U.S. courts will typically apply the single-publication rule, which presumes that a statement is only published once unless it has been (*i*) substantively altered or (*ii*) shared with a new audience. *See Yeager v. Bowlin*, 693 F.3d 1076, 1082 (9th Cir. 2012); *Shepard v. TheHuffingtonPost.Com, Inc.*, No. 12-4036, 2013 U.S. App. LEXIS 11490 (8th Cir. June 7, 2013); *Brimelow v. N.Y. Times Co.*, 2020 U.S. Dist. LEXIS 237463, at *20 (S.D.N.Y. Dec. 17, 2020); *Howlan v. Hireright Solutions, Inc.*, 2012 U.S. Dist. LEXIS 172842 (N.D.N.Y. Dec. 6, 2012). Courts have repeatedly held that minor changes to an already published online statement that do not substantially alter the allegedly defamatory content will not constitute republication. *See, e.g., Mullan v. Daniels*, No. 19-cv-4058-KAW, 2021 U.S. Dist. LEXIS 70871, at *21 (N.D. Cal. Jan. 29, 2021) (no republication where a phone number was added to a Facebook page); *Admissions Consultants, Inc. v. Google, Inc.*, No. 115190/07 (Sup. Ct. N.Y. Cty. Dec. 1, 2008) (no republication where a new message was added to a message board).

been on 18 February 2014—as available, in fact, as they have been every day since the article was published on 29 May 2012.

In other words, there was no new or different conduct occurring *after* the passage and entry into force of the CPA that could legitimately ground a prosecution for alleged defamation committed *before* the supposedly infringed provision even existed. The convictions in this case violate international law and cannot be rescued by sophistry.

In addition to violating the human rights of Ms. Ressa and Mr. Santos this transparently retroactive application of the CPA also has grave consequences for the future of public discourse in the Philippines. If journalists are unsure whether something they publish today could be prosecuted under a new law tomorrow, self-censorship will increase, sensitive topics will disappear from the media, and the public's right to access critical information will be infringed.

* * *

In his first months in office, President Ferdinand Marcos, Jr. championed the critical role of the press in "building an active citizenry—one that contributes to the development of our society."[173] This case—and the vicious campaign against Ms. Ressa, Rappler, and other members of the press of which it is a part—not only breaches the international obligations of the Philippines; it betrays the legacy celebrated and protected in *Bustos* and repeatedly reaffirmed by the Court for more than a century.

V. Conclusion

For these reasons and those set out in the Petitioners' submissions, the *Amici* respectfully urge the Court to reverse the decisions of the lower courts and overturn the convictions of Ms. Ressa and Mr. Santos.

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[173] Catherine S. Valente, 'Marcos vows protection of media under his govt,' The Manila Times (5 October 2022) <https://www.manilatimes.net/2022/10/05/news/marcos-vows-protection-of-media-under-his-govt/1861059> accessed 10 May 2024.