Brief of Amicus Curiae submitted by the International Bar Association's Human Rights Institute in the case of

People of the Philippines v. Maria Ressa and Reynaldo Santos Jr.

before the Supreme Court of the Philippines

2 April 2024

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I. Introduction

Pursuant to Rule 138, section 36, of the Rules of Court in the Philippines, the International Bar Association's Human Rights Institute (hereafter 'IBAHRI'), requests acceptance by the Honourable Supreme Court of the Philippines as Amicus Curiae, to submit the Independent Expert Reports, prepared by three duly appointed experts, to assist in the determination of the case of Maria Ressa.

The International Bar Association, established in 1947, is the world's leading organisation of international legal practitioners, bar associations and law societies. It has a membership of over 80,000 individual lawyers, and 190 bar associations and law societies, spanning over 170 countries. The IBA is an ECOSOC accredited institution. The IBAHRI, an autonomous and financially independent entity, works with the global legal community to promote and protect human rights and the independence of the legal profession worldwide. Pursuant to its aims to promote, protect and enforce human rights under a just rule of law, and for the world-wide adoption and implementation of standards and instruments relating to human rights accepted and enacted by the community of nations, the IBAHRI also provides Secretariat to the High Level Panel of Legal Experts on Media Freedom.

The Director of the IBAHRI is Baroness Helena Kennedy of the Shaws, King's Counsel, a distinguished British Jurist and life peer in the UK House of Lords. The IBAHRI's Co-Chairs are Anne Ramberg Dr Jur hc, former General Secretary of the Swedish Bar Association, and Mark Stephens CBE, former President of the Commonwealth Lawyers Association.

II. Interests of the IBAHRI in this case

The IBAHRI has been following this important case as it has serious legal implications for media freedom nationally and internationally. The role of the media is currently under serious threat globally and the Court's decision will carry great weight. As such, the IBAHRI seeks to assist the Court in this decision through the provision of a set of opinions from three distinguished jurists.

The IBAHRI commissioned the legal opinion of three independent experts ('The Independent Experts') to address three areas of law that this decision before the Supreme Court relates to: (a) US First Amendment principles and case law; (b) international law and; (c) Filipino law. The IBAHRI commissioned each Independent Expert to provide their opinion on the matters of law concerned in the case, and required each Independent Expert to first comply with the provisions indicated below:

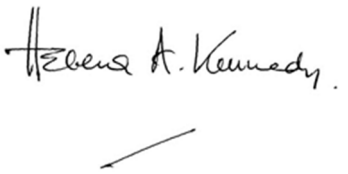
1. Independent Experts are required to ensure their opinion assists the Supreme Court of the Philippines, with matters in their expertise, to dispose of the proceedings in a just and accurate manner.
2. The Independent Experts will not serve the exclusive interest of any of the parties to the proceedings. The Independent Experts will provide objective, impartial and independent opinions on the basis of their expertise.
3. The Independent Experts will confine their opinions to matters material to the proceedings and which lie within their expertise. The Independent Experts will set out the facts, literature and material that they have relied on in forming their opinions. The Independent Experts should indicate if their opinion is provisional, or qualified, or where they consider that further information is required to express their opinion without qualification.

The first opinion was commissioned by the IBAHRI from its author Theodore J. Boutrous to provide an assessment of how the criminal charges levied against Ms. Ressa would be analysed under the First Amendment to the United States Constitution, which is substantially similar to Article III, Section 4 of the Philippine Constitution.

The second opinion was commissioned by the IBAHRI from its author Elizabeth Wilmshurt CMG KC to provide an assessment of the compatibility of the Court of Appeals' judgement, and the first instance Regional Trial Court judgement with international law.

The third opinion was commissioned by the IBAHRI from its author Justice Adolfo Azcuna to provide an assessment of the compatibility of the Court of Appeals' judgement, and the first instance Regional Trial Court judgement with Filipino law.

The IBAHRI humbly submits this brief, and the attached commissioned Independent Expert opinions, as Amicus Curiae to the Supreme Court of the Philippines. This brief and the legal opinions are offered in the spirit of collegiality and respect in its effort to assist the Honourable Supreme Court in its decision in the case of Maria Ressa.



Baroness Helena Kennedy LT KC
Director of the IBA's Human Rights Institute

London, 2 April 2024

Independent Expert Opinion of Theodore J. Boutrous Jr.

I. Introduction

A. Qualifications

I am a partner in the Los Angeles office of Gibson, Dunn & Crutcher LLP and have extensive experience litigating cases involving the First Amendment and the law of libel. The International Bar Association's Human Rights Institute ('IBAHRI') has retained me to provide my expert opinion on whether the criminal prosecution and sentencing of journalist Maria Ressa comports with United States law. I have also addressed the conviction of her colleague Reynaldo Santos Jr. to the extent the same principles govern their two cases.

I received my Bachelor of Science degree from Arizona State University in 1984 and my law degree, *summa cum laude*, from the University of San Diego School of Law in 1987, where I was valedictorian and editor-in-chief of the *San Diego Law Review*. I joined Gibson, Dunn & Crutcher LLP in 1987, and over the past 35 years I have represented clients in federal and state courts across the nation in a wide variety of cases. I have argued more than 180 appeals—including before the Supreme Court of the United States, nearly every federal court of appeals, and 10 different state supreme courts (including 14 arguments in the California Supreme Court)—and handled a multitude of other complex civil, constitutional, and criminal matters. In recognition of my work, the *Los Angeles Daily Journal* in 2021 named me a "Top Lawyer of the Decade," and *The American Lawyer* named me the Litigator of the Year Grand Prize Winner for 2019. I am a member of the American Law Institute and a fellow of the American Academy of Appellate Lawyers.

I have extensive experience handling cases implicating the First Amendment, libel laws, and freedom of the press. I have represented numerous news and media organisations including the *New York Times*, *Wall Street Journal*, *Washington Post*, *Los Angeles Times*, NBC, ABC, CNN, Fox News, the Associated Press, *USA Today*, MSNBC, and more. I played a leading role in overturning the largest libel verdict in U.S. history, a $222 million verdict against the *Wall Street Journal*, in *MMAR Group v. Dow Jones & Co.*[1] I was also lead counsel for NBCUniversal and MSNBC anchor Rachel Maddow in the defamation suit *Herring Networks, Inc. v. Maddow*,[2] in which I obtained dismissal and collected an award of over $500,000 in costs and attorneys' fees for my clients. I recently filed an amicus brief for the Reporters Committee for Freedom of the Press and 32 media organizations in *Planet Aid, Inc. v. Reveal*,[3] where the federal appeals court affirmed dismissal of libel claims. In addition, I brought successful First Amendment and due process claims on behalf of CNN reporter Jim Acosta and magazine correspondent Brian Karem against former President Donald Trump and other White House officials to restore Mr. Acosta's and Mr. Karem's improperly revoked press credentials. I also represented Mr. Karem in the U.S. Court of Appeals for the D.C. Circuit, which upheld our position that reporters have First Amendment and due process rights in government-issued press passes.[4] Further, I defeated on First Amendment grounds an attempt by former President Trump's brother to block the publication of Mary Trump's now-bestselling book about her uncle, the former president.

My First Amendment and media law work has received numerous accolades. In 2019, I received the First Amendment Award from the Hugh M. Hefner Foundation, as well as the Distinguished Leadership Award from PEN America for my leadership in advancing First Amendment rights and protecting freedom of expression. In 2020, I was honoured with the Freedom of the Press Award from the Reporters Committee for Freedom of the Press. *The National Law Journal* named me one of the "100 Most Influential Lawyers in America" and described me as "a media law star." *The Hollywood Reporter* featured me in "Power Lawyers: Hollywood's Top 100 Attorneys," in both 2021 and 2022, commenting that "[w]hen issues of free speech are in play, Boutrous is the attorney on speed dial." I am a member of the advisory board of the International Women's Media Foundation and was

[1] 187 F.R.D. 282 (S.D. Tex. 1999).

[2] 8 F.4th 1148 (9th Cir. 2021).

[3] 44 F.4th 918 (9th Cir. 2022).

[4] *Karem v. Trump*, 960 F.3d 656 (D.C. Cir. 2020).

its 2015 Leadership Honoree. I also served on the Board of Directors of the Women's Media Foundation for over a decade, including serving a term as its co-chair. I currently serve on the advisory board of Reveal for the Center of Investigative Reporting and the steering committee of the Reporters Committee for Freedom of the Press.

I frequently comment on First Amendment and media law issues. My articles include "Trump's Lawsuit Against Bolton Will Fail," *Washington Post* (June 17, 2020); "Why Trump's Frivolous Libel Lawsuit Against the New York Times is Dangerous," *Washington Post* (Feb. 29, 2020); "A First Amendment Blind Spot," *Wall Street Journal* (May 27, 2014); "A Radical Departure on Press Freedom," *Wall Street Journal* (May 23, 2013); "A Killer's Notebook, a Reporter's Rights," *New York Times* (Apr. 9, 2013); and "Broadcast 'Indecency' on Trial," *Wall Street Journal* (Jan. 17, 2012).

B. Assignment

The IBAHRI retained me as an independent expert to consider how the criminal charges levied against Ms. Ressa would be analysed under the First Amendment to the United States Constitution, which is substantially similar to Article III, Section 4 of the Philippine Constitution. Consideration of First Amendment principles is especially appropriate in this case because Ms. Ressa is a dual citizen of the United States and the Philippines.

The IBAHRI instructed me to render an objective, impartial, and independent opinion. As an independent expert, I do not serve the exclusive interest of any party to the proceedings, but instead seek to assist the Supreme Court of the Philippines in disposing of this case in a just and legally sound manner. My opinion is confined to matters within my expertise. I am providing this expert opinion on a *pro bono* basis, without compensation from IBAHRI or any other party or amicus.

C. Documents Considered

To prepare this report, I and attorneys working under my supervision reviewed Mr. Santos's article, "CJ Using SUVs of 'Controversial' Businessmen," both as originally published in *Rappler* on May 29, 2012, and as updated on February 19, 2014; the trial and appellate court opinions in this case; and United States case law and scholarship on the First Amendment and the law of libel.

My analysis and conclusions to date are based on the information available when this report was submitted on 27 October 2022. I reserve the right to amend my report and may modify, refine, or revise my opinions if new information becomes available.

II. Summary of Expert Opinions

The following is a summary of my opinions:

1. The First Amendment of the United States Constitution embodies a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[5] In recognition of that commitment, U.S. courts over the past century have developed a rich body of case law limiting the use of civil and criminal libel claims as a sword that could threaten free and open debate.
2. The First Amendment would forbid the criminal prosecution of Ms. Ressa and Mr. Santos on the facts presented at trial (even assuming it would ever permit such prosecutions at all). It is inconceivable that these journalists would have been charged, much less convicted, in the United States for publishing a news article on a topic of significant public concern.
3. Criminal libel laws are virtually a dead letter in the United States. The vast majority of states have repealed their criminal libel laws or allowed them to remain largely unenforced. Many state courts have struck down criminal libel statutes as unconstitutional, and even in the small minority of states in which such laws remain on the books, there is almost no chance of a criminal libel prosecution for a member of the press reporting on an issue of public concern, as *Rappler* did here. At most, Ms. Ressa and Mr. Santos could theoretically have faced a civil

[5] *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

claim for damages in the United States—and even this would all but surely fail on the merits for multiple reasons.

4. The First Amendment imposes numerous hurdles on plaintiffs seeking to recover for allegedly libellous speech. For example, in cases involving speech on a matter of public concern, the First Amendment places the burden on the plaintiff to prove that the publication was false. Truth stands as an absolute bar to recovery—even if the defendant published the speech at issue out of hatred or contempt for the plaintiff. Here, however, the Court of Appeals of Manila absolved the prosecutor of the burden of proving falsity, instead placing the burden on the defendants to prove the statements were true. Additionally, the First Amendment forbids imposing strict liability for speech on a matter of public concern, as the Court of Appeals did here, and instead requires the plaintiff to adduce some evidence of fault. Because Ms. Ressa played no role in writing, reviewing, or publishing the *Rappler* article at issue, she bears no personal fault for the publication—and a criminal conviction in the absence of fault flagrantly violates the First Amendment.
5. In addition, had they been brought in the United States, the libel claims with respect to Wilfredo Keng would be subject to the demanding "actual malice" standard. Mr. Keng is a public figure. As one of the Philippines' richest men, he is a frequent subject of news coverage, and he thrust himself into a public controversy surrounding the impeachment proceedings of former Chief Justice Renato C. Corona. Because Mr. Keng is a public figure and the publication at issue addressed a matter of public concern, the First Amendment would require Mr. Keng (or a prosecutor acting on his behalf) to prove actual malice—that is, knowledge of falsity or reckless disregard of the truth of the publication.
6. The evidence presented at their trial came nowhere close to meeting that standard. With respect to Ms. Ressa, the Court of Appeals simply relied on the fact that Ms. Ressa serves as the editor of *Rappler*, without identifying any evidence at all that she acted with actual malice. With respect to Mr. Santos, the Court of Appeals held that he supposedly failed to adequately investigate the allegations against Mr. Keng or present his side of the story. But U.S. law is clear that a mere failure to investigate or to write a balanced news account does not suffice to prove actual malice.
7. The Court of Appeals sustained the criminal convictions even though the law under which Ms. Ressa and Mr. Santos were prosecuted, the Cybercrime Prevention Act of 2012, did not take effect until *after* the article was published. The Court concluded that these defendants republished the article, and thus came within bounds of the Cybercrime Prevention Act, when *Rappler* corrected a single typographical error in 2014. In the United States, such minor corrections that do not change the substance of the article do not constitute a republication that triggers defamation liability anew. Even more concerning, the criminal sentences imposed in this case for speech that predated the cybercrime law would violate multiple provisions in the U.S. Constitution—not only the First Amendment, but also the Due Process Clause of the Fifth and/or Fourteenth Amendments and the Ex Post Facto Clauses of Article I, §§ 9, 10.
8. For all of these reasons, it is my opinion that the convictions of Ms. Ressa and Mr. Santos would violate the First Amendment, which is substantially identical to Article III, Section 4 of the Philippine Bill of Rights. The Supreme Court of the Philippines should vacate their convictions.

III. Expert Opinion

A. Criminal Libel Laws Have Been Repealed or Invalidated in 38 U.S. States and Territories and Are Rarely Enforced in Others

From the perspective of an American lawyer or judge, the criminal prosecutions of Ms. Ressa and Mr. Santos for publishing a news article on a topic of significant public concern are a shocking outlier. Criminal libel laws are essentially a dead letter in the United States, where civil claims for damages are the predominant mechanism for securing a plaintiff's interest in his personal reputation.[6]

[6] Throughout this report, I rely on libel opinions issued in the civil context. This is by necessity because criminal libel cases are exceedingly rare (and arguably unconstitutional) in the United States. Additionally, the Supreme

Over the past century, the great majority of states have either repealed their criminal libel laws or allowed them to remain largely unenforced. Moreover, many state courts have struck down criminal libel statutes as "antithetical to their state constitutions" or to the First Amendment.[7] Though such laws remain on the books in a small minority of states, the concept of a criminal libel prosecution is exceedingly rare in the United States today—and virtually unheard of for a member of the press reporting on an issue of public concern.[8] The demise of criminal libel prosecutions traces back to the U.S. Supreme Court's landmark case in *New York Times v. Sullivan*,[9] which held that a public official cannot recover damages in a *civil* defamation suit "unless he proves that the statement was made with 'actual malice,'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[10] Later that year, the Supreme Court held that the same "actual malice" standard "limits state power to impose *criminal* sanctions for criticism of the official conduct of public officials."[11] The Court explained that "[w]here criticism of public officials is concerned, we see no merit in the argument that criminal libel statutes serve interests distinct from those secured by civil libel laws, and therefore should not be subject to the same limitations."[12] In subsequent cases, the Court extended these protections for reporting on public officials to cover reporting on public figures as well.[13]

Importantly, the Court also placed *truthful* publications beyond the reach of civil *or* criminal libel laws, at least where they involved topics of public concern: "Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned."[14] The Court specifically rejected an argument that truth could immunize a publication from liability only if it were made "with good motives and for justifiable ends."[15] The First Amendment protects truthful speech even if the publisher is motivated by "ill will" or "hatred" for the subject of his article.[16] "[W]here the criticism is of public officials and their conduct of public business, the interest in private reputation is overborne by the larger public interest, secured by the Constitution, in the dissemination of truth."[17]

In *Garrison*, the Supreme Court recognised that criminal libel prosecutions had already—by 1964—largely fallen out of favour throughout the United States, commenting that "[c]hanging mores and the virtual disappearance of criminal libel prosecutions lend support to the observation that under modern conditions, when the rule of law is generally accepted as a substitute for private physical measures, it can hardly be urged that the maintenance of peace requires a prosecution for private defamation."[18] The Court also cited the proposed official draft of the Model Penal Code of the American

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Court recognised in *Garrison v. Louisiana*, 379 U.S. 64 (1964), that the standards applied in criminal libel cases are at least as exacting as those that apply in civil cases. *Id.* at 67.

[7] Gregory C. Lisby, *No Place in the Law: The Ignominy of Criminal Libel in American Jurisprudence*, 9 Comm. L. & Pol'y 433, 477 (2004); *see also, e.g.*, *Gottschalk v. Alaska*, 575 P.2d 289, 296 (Alaska 1978) (striking down criminal libel statute as vague and overbroad).

[8] *See* Lisby, *supra* note 7, at 486 ("[T]he crime of libel today may indeed be a largely unenforceable offense."); *see also* Samantha Barbas, *The Press and Libel before* New York Times v. Sullivan, 44 Colum. J.L. & Arts 511, 515 (2021).

[9] 376 U.S. 254 (1964).

[10] *Ibid.* at 279–80.

[11] *Garrison v. Louisiana*, 379 U.S. 64, 67 (1964) (emphasis added).

[12] *Ibid.*

[13] *See Greenbelt Co-op. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 11 (1970) ("And the constitutional prohibition in this respect is no different whether the plaintiff be considered a 'public official' or a 'public figure.'").

[14] *Garrison*, 379 U.S. at 74; *see also Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) ("[S]tate action to punish the publication of truthful information seldom can satisfy constitutional standards" (internal quotation marks omitted)); A. Jay Wagner & Anthony L. Fargo, *Criminal Libel in the Land of the First Amendment: Special Report for the Int'l Press Institute*, at 24–25 (Int'l Press Inst., rev. and reissued 2015).

[15] *Garrison*, 379 U.S. at 70–73.

[16] *Ibid.* at 73, 78.

[17] *Ibid.* at 72–73.

[18] 379 U.S. at 69 (internal quotation marks omitted).

Law Institute[19]—specifically, its lack of a criminal libel provision—in support of the "modern consensus" that there was little need for criminal libel statutes.[20] With respect to the propriety of criminal libel statutes, the Model Penal Code provided:

> It goes without saying that penal sanctions cannot be justified merely by the fact that defamation is evil or damaging to a person in ways that entitle him to maintain a civil suit. Usually, we reserve the criminal law for harmful behaviour which exceptionally disturbs the community's sense of security … It seems evident that personal calumny falls in neither of these classes in the U.S.A., that it is therefore inappropriate for penal control, and that this probably accounts for the paucity of prosecutions and the near desuetude of private criminal libel legislation in this country.[21]

By recognising the rarity of criminal libel prosecutions and imposing constitutional standards on criminal libel statutes, the Supreme Court signalled its disfavour of criminal liability for speech concerning public figures and matters of public concern. Indeed, *Garrison* has been recognised as the decision that "deal[t] a death blow to criminal defamation in the United States."[22] Not long after *Garrison*, the Supreme Court considered the constitutionality of common law criminal libel—that is, judge-made criminal law not enshrined in a statute—in *Ashton v. Kentucky*.[23] There, the defendant was charged with and convicted of "the offense of criminal libel," which was committed "by publishing a false and malicious publication which tends to degrade or injure" the alleged victims.[24] The trial court had further explained that criminal libel was "defined as any writing calculated to create disturbances of the peace, corrupt the public morals, or lead to any act, which, when done, is indictable."[25] The Supreme Court reversed the conviction, holding that the elements of the common law crime of libel were too indefinite and uncertain that it could not be enforced consistent with the First Amendment.[26] The *Ashton* decision "effectively eliminated common law libel" in the United States.[27] Together, *Garrison* and *Ashton* impose strict requirements on criminal libel, if it is to exist at all. Criminal libel laws must be enacted via statute and may punish speech concerning public figures only if it consists of a "knowing or reckless falsehood."[28]

Since *Garrison* and *Ashton*, "criminal libel has largely evaporated in the United States," and the vast majority of state courts to have considered criminal libel statutes have found them unconstitutional.[29] In response to these judicial decisions, a handful of states have redrafted their criminal libel laws to incorporate the "actual malice" standard (that is, they have added a requirement of knowledge or reckless disregard for the falsity of a defamatory statement), but most have not re-

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[19] The Model Penal Code is "an effort by the American Law Institute to suggest universal standards for U.S. criminal law." Wagner & Fargo, *supra* note 14, at 22. Since its first publication, it has "played an important part in the widespread revision and codification of the substantive criminal law of the United States." Model Penal Code, The American Law Institute, https://www.ali.org/publications/show/model-penal-code/.

[20] *Garrison*, 379 U.S. at 69–70.

[21] *Ibid.* (quoting Model Penal Code, Tent. Draft No. 13, 1961 § 250.7, cmts. at 44).

[22] Jane E. Kirtley & Casey Carmody, *Criminal Defamation: Still an "Instrument of Destruction" in the Age of Fake News*, 8 J. Int'l Media & Ent. L. 163, 166 (2019–2020).

[23] 384 U.S. 195 (1966)

[24] *Ibid.* at 197 (internal quotation marks omitted).

[25] *Ibid.* at 198 (internal quotation marks omitted).

[26] *Ibid.* at 198–201.

[27] Eric P. Robinson, *Criminal Libel*, The First Amendment Encyclopaedia (2009), https://www.mtsu.edu/first-amendment/article/941/criminal-libel.

[28] *Garrison*, 379 U.S. at 73.

[29] Jens David Ohlin, *Wharton's Criminal Law* § 39.1 (16th ed. 2022); *see also* Robinson, *supra* ("The criminal defamation laws in 38 states and territories have either been repealed or struck down as unconstitutional."); Eugene Volokh, *What Cheap Speech Has Done: (Greater) Equality and Its Discontents*, 54 U.C. Davis L. Rev. 2303, 2313–15 (2021).

enacted their laws to conform to constitutional standards.[30] Thus, in virtually all American jurisdictions today, libel exists as a purely civil cause of action.

At present, there is no federal statute criminalizing libel,[31] and there are only thirteen state criminal libel laws still in effect.[32] But even in states that have criminal libel statutes on the books, such laws are rarely enforced. And "on the rare occasions that individuals are charged, district attorneys have declined to prosecute, and even when cases are brought, courts have dismissed them on constitutional grounds."[33] The few prosecutions that do occur tend to "involve disputes between private individuals,"[34] such as "defamation by a former lover, . . . trivial revenge scenarios, rumour mongering, [and] libeling of competing businesses."[35] Journalists and media outlets are rarely the subject of these prosecutions.[36] In short, in the few instances where criminal libel prosecutions do exist, they are largely confined to private disputes between private individuals over private issues—a far cry from the prosecution of members of the institutional press for reporting on a public figure with respect to a matter of public concern.

Stated simply, the criminal prosecution of Ms. Ressa and Mr. Santos for informing the public that Mr. Keng allowed the Chief Justice to use a sport utility vehicle would not have taken place in the United States. At most, *Rappler* and its journalists might have faced a civil defamation suit for damages—and, for the reasons articulated below, such a suit would almost surely be dismissed on the merits.

B. The First Amendment Forbids Strict Liability for Defamation

Beyond the issues with imposing criminal liability on Ms. Ressa and Mr. Santos, the lower courts' decisions also violate the First Amendment because they impose strict liability for speech on a matter of public concern—a concept utterly inimical to the U.S. Constitution.

The First Amendment embodies a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[37] But with this vigorous public debate comes the "inevitable" possibility that publishers will make factual errors.[38] Far from punishing every inadvertent misstep, the Supreme Court has instructed that some misstatements must be tolerated "if the freedoms of expression are to have the 'breathing space' that they need to survive."[39] The Court has struck a balance between the public interest in free speech and the personal interest in reputation by barring imposition of strict liability for libel claims touching on matters of public concern. A strict liability regime would "run the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press"[40] and exert "an undoubted 'chilling' effect on speech related

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[30] *See* Ohlin, *supra* note 29; *see also* Volokh, *supra* note 29, at 2314–15; *I.M.L. v. State*, 61 P.3d 1038, 1045 (Utah 2002) (striking down criminal libel statute because it contained no "actual malice" requirement).

[31] Kirtley & Carmody, *supra* note 22, at 166–67.

[32] *See* Frank D. LoMonte & Paola Fiku, *Thinking Outside the Dox: The First Amendment and the Right to Disclose Personal Information*, 91 UMKC L. Rev. 1, 41 (2022)

[33] Committee to Protect Journalists, *Criminal Defamation Laws in North America* (2016). The U.S. Court of Appeals for the Fourth Circuit held only this year that plaintiffs were likely to succeed in their ongoing challenge to North Carolina's 90-year-old criminal libel statute.. *Grimmett v. Freeman*, 59 F.4th 689, 690 (4th Cir. 2023). The Court held that the law likely violated the First Amendment because it did not require prosecutors to "show—or even allege—a 'derogatory' statement was false." Accordingly, the court of appeals vacated the lower court's order denying a preliminary injunction.

[34] Kirtley & Carmody, *supra* note 22, at 169.

[35] Wagner & Fargo, *supra* note 14, at 28.

[36] *Ibid.* at 27–28.

[37] *N.Y. Times*, 376 U.S. at 270.

[38] *Ibid.* at 271.

[39] *Ibid.* at 271–72 (citation and ellipsis omitted).

[40] *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

to public figures that does have constitutional value."[41] For that reason, "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters."[42]

To safeguard vigorous public debate on topics of public concern, the Supreme Court has imposed two constitutional rules relevant here. *First*, when a libel claim is based on media reports on matters of public interest, the First Amendment requires that the plaintiff—not the media defendant—bear the burden of proving that the publication is false.[43] Thus, while the cases sometimes describe truth as an absolute "defence" to a libel claim, that formulation is not strictly accurate. Instead, falsity is an essential element of a libel claim for which the injured party bears the burden of proof. Allocating the burden of proof to the plaintiff means that, in "instances when the factfinding process [is] unable to resolve conclusively whether the speech is true or false," then the libel claim must fail.[44]

Second, for speech on matters of public concern, the First Amendment bars imposition of defamation liability without a showing of fault.[45] The applicable standard of fault depends on whether the speech at issue concerns a "public" or "private" figure. Speech about public figures—a category that includes not just political leaders, but a wide variety of prominent persons—and matters of public concern receives the highest level of constitutional protection.[46] Such speech requires the plaintiff to prove "actual malice"—that is, the statements were made with knowledge of falsity or at least "a high degree of awareness of probable falsity."[47] Further, the plaintiff has the burden of proving actual malice with "convincing clarity," a more exacting standard of proof than applies in a typical civil case.[48] Where speech touches on public figures and matters of public concern, "[m]ere negligence does not suffice."[49]

Even when the speech concerns a *private* figure, the First Amendment forbids imposition of "liability without fault" if the speech touches on matters of public concern.[50] In such cases, the plaintiff must prove at least negligence in order to recover actual damages for injury to his reputation.[51] If a private figure wishes to recover presumed or punitive damages for speech on issues of public concern, however, then he must satisfy the highest constitutional fault standard—actual malice.[52]

The criminal conviction of Ms. Ressa and Mr. Santos violates these fundamental First Amendment principles. At the outset, the Court of Appeals in Manila erroneously placed the burden on Ms. Ressa and Mr. Santos to prove both that the publication concerning Mr. Keng was truthful and that *Rappler* had "justifiable reasons" for publishing it.[53] In the United States, however, the First Amendment flips that burden of proof, requiring the injured party to prove the publications was false.[54] If the plaintiff cannot carry his burden of proving falsity, then the First Amendment forbids imposition of criminal or civil sanctions—full stop. Evidence that the publication was made out without "good motives or justifiable ends" in no way diminishes the First Amendment protections for truthful speech.[55]

Ms. Ressa's conviction would also violate the First Amendment bar on strict liability for speech on matters of public concern. This bar on strict liability means that a plaintiff must show that *each*

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[41] *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988).

[42] *Gertz*, 418 U.S. at 341.

[43] *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986).

[44] *Ibid.*; *see also id.* at 778 ("requiring the plaintiff to show falsity will insulate from liability some speech that is false, but unprovably so").

[45] *Gertz*, 418 U.S. at 347.

[46] *Ibid.* at 351–52; *Connick v. Myers*, 461 U.S. 138, 145 (1983).

[47] *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 667 (1989) (ellipsis omitted).

[48] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 244 (1986).

[49] *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1991).

[50] *Gertz*, 418 U.S. at 347.

[51] *Ibid.* at 347–48.

[52] *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 756 (1985).

[53] Court of Appeals at 21.

[54] *See Phila. Newspapers*, 475 U.S. at 776.

[55] *Garrison*, 379 U.S. at 70–73; *see also* p. 8, *supra*.

defendant had the required state of mind as to the truth or falsity of the publication.[56] Editors who sit at the top of the masthead but played no role in conceiving, editing, or approving the particular news article at issue cannot be held liable for the errors of their subordinates. Here, however, the Court of Appeals upheld Ms. Ressa's criminal conviction even though she indisputably "does not deal with the daily operations of Rappler and does not involve herself with the stories to be published."[57] Although Ms. Ressa "consult[s] with the other editors" on controversial stories,[58] the trial record contains no evidence that she ever consulted on the article concerning Mr. Keng. In effect, the Court of Appeals held her strictly liable for a news article she had no role in editing, approving, or publishing. The appellate court's conclusion that "[Ms.] Ressa cannot simply avoid liability by claiming that she was not involved in the editing or publication of the subject article"[59] turns the First Amendment protections for such speech on their head.

C. The Court of Appeals' Decision on Actual Malice Does Not Comport with U.S. Law

As explained above, U.S. courts apply the highest possible constitutional protections to speech regarding public figures and matters of public concern.[60] In such cases, a libel plaintiff must prove with convincing clarity, that each defendant acted with "actual malice," that is, with a state of mind amounting to knowledge of falsity or recklessness.[61] Here, the Court of Appeals of Manila held that Mr. Keng was a private figure and, even if he was not, that the prosecutor satisfied the actual malice standard.[62] Both of those conclusions are inconsistent with the strong protections the United States affords to news reporting on topics of public concern.

1. Mr. Keng Qualifies as a Public Figure to Whom the Actual Malice Standard Applies

U.S. courts would deem Mr. Keng a public figure. Public figures include those who "have assumed roles of especial prominence in the affairs of society" and have therefore "voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them."[63] The U.S. Supreme Court affords robust protection to speech concerning public figures because the "citizenry has a legitimate and substantial interest in the conduct" of these individuals, and "freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of public officials."[64]

The Supreme Court has recognised two types of public figures: (1) all-purpose public figures who have achieved "pervasive fame or notoriety" and must therefore satisfy the actual malice standard in all cases and (2) limited purpose public figures who are "drawn into a particular public controversy" and must satisfy the actual malice standard with respect to speech concerning that controversy.[65] In both categories, public figures are those who have placed themselves in a position to draw "closer public scrutiny" and therefore "must accept certain necessary consequences of that involvement in public

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[56] *See N.Y. Times*, 376 U.S. at 287 (limiting liability to the "persons in the . . . organization having responsibility for the publication").

[57] *People of the Philippines v. Reynaldo Santos Jr. and Maria Ressa,* CA-G.R. CR. No. 44991, at 8.

[58] *Ibid.*

[59] *Ibid.* at 27.

[60] *See Gertz*, 418 U.S. at 351–52; *Connick*, 461 U.S. at 145.

[61] *See N.Y. Times*, 376 U.S. at 279–80; *see also Anderson*, 477 U.S. at 244.

[62] *People of the Philippines v. Reynaldo Santos Jr. and Maria Ressa,* CA-G.R. CR. No. 44991, at 20–21.

[63] *Gertz*, 418 U.S. at 345; *see also Hustler Magazine*, 485 U.S. at 51 ("[T]he First Amendment is bound to produce speech that is critical of . . . public figures who are intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.").

[64] *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 15 (1990) (internal quotation marks omitted).

[65] *Gertz*, 418 U.S. at 351.

affairs."[66] Because of their social or political prominence, public figures typically have greater access to "channels of effective communication" than a private figure would and may therefore engage in counter-speech to blunt the impact of an allegedly defamatory publication.[67] For these reasons, the Supreme Court has required public figures to satisfy the exacting actual malice standard,[68] before imposing defamation liability on a media defendant.

Public figures are "numerous," and the category includes "athletes, business people, dilettantes, anyone who is famous or infamous because of who he is or what he has done."[69] Courts have routinely found prominent businessmen to be public figures, especially when they have invited attention and forged relationships with political figures. In *Rebozo v. Washington Post Co.*,[70] for example, a federal appeals court concluded that a businessman who was a personal friend to President Nixon and played "a substantial role" in his "financial affairs" qualified as a public figure.[71] Similarly, in *Tavoulareas v. Piro*,[72] another federal appeals court held that the plaintiff, the chief executive of a large, multinational corporation, was a limited purpose public figure because he had thrust himself into the public debate on issues affecting business.[73] Among other factors, the court found it important that the plaintiff had a direct line of communication to company shareholders, to whom he could present his own side of the story.[74] And in *Peterson v. Gannett Co.*,[75] the court similarly held that a "well-known technology entrepreneur" was a limited-purpose public figure based on his national profile and relationship with "significant political and business personalities."[76]

Mr. Keng is a quintessential public figure. He is a prominent businessman and a regular subject of news coverage regarding his businesses and other public-facing activities. *Forbes* has ranked him as "one of the Philippines' Top 40 Richest individuals," and the *Daily Tribune* has discussed his "massive fortune."[77] He "is or was, at some point," the president of numerous important companies, including "Century Peak Metal Holdings Corp., Century Hua Guang Smelting, Inc., Colony Investors (SPV-AMC), Inc., Good Earth Plaza, U-Need Shopping Center, Carriedo Plaza, and Balikbayan Shopping Mall, *among others*."[78] As a prominent business leader, Mr. Keng has access to multiple channels of communication through which he may respond to *Rappler*'s coverage of his relationship with the former Chief Justice—channels that include other publications that already cover his business activities and the platforms afforded by companies themselves.[79]

At a minimum, Mr. Keng qualifies as a limited purpose public figure. To be classified as a limited purpose public figure, an individual must "voluntarily inject[]" himself into a public controversy—that is, he must "engage[] in a course of conduct that foreseeably put[s] [himself] at risk of public scrutiny with respect to a limited range of issues."[80] Multiple U.S. courts have held that, where a plaintiff voluntarily associates with "high officials" or other high-profile individuals, he has "engaged in conduct that he knew markedly raised the chances that he would become embroiled in a public

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[66] *Ibid.* at 344; *see also Waldbaum v. Fairchild Publ'ns, Inc.*, 627 F.2d 1287, 1294–95 (D.C. Cir. 1980) ("When someone steps into the public spotlight, . . . he must take the bad with the good.").

[67] Gertz, 418 U.S. at 344.

[68] *Milkovich*, 497 U.S. at 20; *St. Surin v. Virgin Islands Daily News, Inc.*, 21 F.3d 1309, 1317 (3d Cir. 1994).

[69] *Cepeda v. Cowles Magazines & Broad., Inc.*, 392 F.2d 417, 419 (9th Cir. 1968).

[70] 637 F.2d 375 (5th Cir. 1981).

[71] *Ibid.* at 379.

[72] 817 F.2d 762 (D.C. Cir. 1987).

[73] *Ibid.* at 773, 775.

[74] *Ibid.* at 774–75.

[75] 2020 WL 1935520 (D. Ariz. Apr. 22, 2020).

[76] *Ibid.* at *6 (internal quotation marks omitted).

[77] *People of the Philippines v. Reynaldo Santos Jr. and Maria Ressa,* No. R-MNL-19-01141-CR, at 7.

[78] *Ibid.* at 7–8 (emphasis added).

[79] *Tavoulareas*, 817 F.2d at 774–75.

[80] *Planet Aid, Inc. v. Reveal*, 44 F.4th 918, 926 (9th Cir. 2022).

controversy."[81] These include *Hourani v. Psybersolutions, LLC*,[82] which held that a businessman became a limited purpose public figure by virtue of his close relationship with a "wealthy, powerful, and famous" person with ties to the Kazakhstan government, and *Rosanova v. Playboy Enters., Inc.*,[83] which held that, by associating with organised crime, the plaintiff "was bound to invite attention and comment" with respect to those relationships.

Here, Mr. Keng thrust himself into the public controversy surrounding former Chief Justice Renato C. Corona by allegedly lending him an expensive sport utility vehicle for both official and personal use.[84] By providing favours to a high-ranking public official that could foreseeably result in public scrutiny, Mr. Keng "assumed the risk" that his name would be associated with a scandal enveloping the Chief Justice. And while Mr. Keng asserted that he is "low-key, private, and intentionally stay[s] out of the limelight,"[85] that characterization, even if true, is irrelevant: Regardless of whether Mr. Keng attempts to maintain a "low-key" profile as a general matter, he is a public figure for the "limited purpose" of his dealings with the former Chief Justice. Even if he "d[oes] not wish to be publicly identified in connection with" the Chief Justice, "his preference does not guide" the legal conclusion that he is a public figure.[86] Indeed, to the extent Mr. Keng or the Chief Justice sought to avoid public scrutiny, that makes their relationship all the more newsworthy. The Philippine public has a right to understand the personal and financial entanglements of their public officials—including the relationships those officials would prefer to keep "low-key."

2. This Case Indisputably Involves Speech on a Matter of Public Concern

Not only is Mr. Keng a public figure, but the *Rappler* article at issue unquestionably involved a topic of substantial public concern—a personal favour the Chief Justice received from a businessman with a questionable background. The U.S. Supreme Court has embraced a broad definition of what constitutes speech on matters of "public concern." This category encompasses not only speech about politics or public officials, but any speech "relating to any matter of political, social, or other concern to the community," as well as any matter that "'is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.'"[87] In a United States court, there would be no dispute that the *Rappler* article at issue satisfies this capacious standard.

Speech on public issues "occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection."[88] "The First Amendment affords the broadest protection" to this speech so as "to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[89] "For speech concerning public affairs is more than self-expression; it is the essence of self-government."[90] "And self-government suffers when those in power suppress competing views on public issues 'from diverse and antagonistic sources.'"[91] Because the article in question involved public figures and issues of substantial public concern, the "special protection" afforded to this speech,[92] includes the actual malice standard.

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[81] *Clyburn v. News World Commc'ns, Inc.*, 903 F.2d 29, 33 (D.C. Cir. 1990).

[82] 164 F. Supp. 3d 128, 143 (D.D.C. 2016).

[83] 411 F. Supp. 440, 445 (S.D. Ga. 1976).

[84] *People of the Philippines v. Reynaldo Santos Jr. and Maria Ressa,* No. R-MNL-19-01141-CR, pgs. 4, 9.

[85] *People of the Philippines v. Reynaldo Santos Jr. and Maria Ressa,* CA-G.R. CR. No. 44991, at 7.

[86] *See Norris v. Bangor Pub. Co.*, 53 F. Supp. 2d 495, 505 (D. Me. 1999).

[87] *Snyder v. Phelps*, 562 U.S. 443, 453 (2011) (citation omitted); *see also Bartnicki*, 532 U.S. at 525 (illegally intercepted conversation was matter of public concern because it "would have been newsworthy" if made in a public arena or overheard by a third party).

[88] *Connick*, 461 U.S. at 145 (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)).

[89] *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995).

[90] *Garrison*, 379 U.S. at 74–75.

[91] *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 777 n.12 (1978) (citation omitted).

[92] *Connick*, 461 U.S. at 145.

3. The Actual Malice Standard Requires a High Degree of Awareness the Article Was Probably False, Which the Prosecutor Failed to Prove

"Actual malice" is a term apt to breed confusion.[93] In the libel context, actual malice refers *not* to spiteful feelings a journalist holds for his subject, but to the mental state that must be proven "before a State may constitutionally permit public [figures] to recover for libel in actions brought against publishers."[94] The U.S. Supreme Court has defined actual malice to mean "knowledge" that a publication was false or at least a "reckless disregard of whether it was false or not."[95] Recklessness does not refer here to a heightened form of negligence. Indeed, not even "an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers" suffices to show actual malice.[96] Recklessness in the libel context refers instead to the defendant's "high degree of awareness of probable falsity."[97]

Actual malice is a "subjective" standard,[98] requiring proof that the defendant proceeded to publish in the face of "serious doubts as to the truth of his publication."[99] In essence, the actual malice standard punishes "deliberate falsification."[100] This demanding standard creates "breathing space" for speech on matters of public concern,[101] by insulating publishers from liability for inadvertent or even negligent errors and punishing only speech that the publisher knew to be false.[102] To further protect speech interests, the Supreme Court requires actual malice to be proven by clear and convincing evidence—a more demanding standard than typically applies in civil actions.[103]

The Court of Appeals of Manila paid lip service to the actual malice standard, acknowledging that the prosecutor in Ms. Ressa and Mr. Santos's case must "prove that the author made the defamatory statement knowing it was false."[104] But the court then held that the prosecutor had satisfied that burden of proof with evidence that the U.S. Supreme Court has repeatedly held is insufficient to satisfy the exacting actual malice standard.

In the United States, "failure to investigate will not alone support a finding of actual malice."[105] Nor is actual malice shown with evidence that a reporter relied on "statements made by a single source" that "reflect only one side of the story."[106] The actual malice standard imposes "no duty to corroborate [a] defamatory allegation" by interviewing multiple sources,[107] and "no obligation to seek comment" from the subject of his news report.[108] Indeed, even if the subject of a critical news report contests the allegations against him, a journalist is not required to accept that person's "denials . . . as conclusive,

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[93] *See Tavoulareas*, 817 F.2d at 807–08 (Ginsburg, J., concurring).

[94] *Cantrell v. Forest City Publ'g Co.*, 419 U.S. 245, 251–52 (1974).

[95] *N.Y. Times*, 376 U.S. at 280; *see also Counterman v. Colorado*, 143 S. Ct. 2106, 2115 (2023) (reaffirming *N.Y. Times* "actual malice" standard).

[96] *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 664–65 (1989).

[97] *Ibid.* at 667 (ellipsis omitted).

[98] *Ibid.* at 688; *see also Counterman*, 143 S. Ct. at 2116 (reasoning that an objective standard "would discourage the 'uninhibited, robust, and wide-open debate that the First Amendment is intended to protect'" (quoting *N.Y. Times*, 376 U.S. at 270)).

[99] *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

[100] *Ibid.*

[101] *N.Y. Times*, 376 U.S. at 272; *see also Counterman*, 143 S. Ct. at 2115 ("That rule is based on fear of 'self-censorship'—the worry that without such a subjective mental-state requirement, the uncertainties and expense of litigation will deter speakers from making even truthful statements" (quoting *N.Y. Times*, 376 U.S. at 270)).

[102] *See St. Amant*, 390 U.S. at 732.

[103] *See Anderson*, 477 U.S. at 244.

[104] *People of the Philippines v. Reynaldo Santos Jr. and Maria Ressa,* CA-G.R. CR. No. 44991, at 20.

[105] *Harte-Hanks*, 491 U.S. at 692.

[106] *N.Y. Times Co. v. Connor*, 365 F.2d 567, 576 (5th Cir. 1966).

[107] *Jankovic v. Int'l Crisis Grp.*, 822 F.3d 576, 590 (D.C. Cir. 2016).

[108] *Spacecon Specialty Contractors, LLC v. Bensinger*, 713 F.3d 1028, 1043 (10th Cir. 2013).

or prefer them over apparently creditable accusations."[109] "[S]uch denials are so commonplace in the world of polemical charge and countercharge that, in themselves, they hardly alert the conscientious reporter to the likelihood of error."[110] Charges of biased or one-sided reporting do not, without more, come close to satisfying the demanding actual malice standard.[111]

Because actual malice turns on whether the reporter subjectively had a "high degree of awareness of probable falsity,"[112] the fact that a statement was previously published in a reputable source tends to negate an inference of actual malice. Federal appeals courts have repeatedly held that a "good faith reliance on previously published reports in reputable sources . . . precludes a finding of actual malice as a matter of law."[113] "As long as the sources of [allegedly] libellous information appeared reliable, and the defendant had no doubts about its accuracy," there is "insufficient" evidence to support a finding of actual malice.[114]

The Court of Appeals of Manila's ruling as to actual malice violates these principles in virtually every respect. *First*, the court upheld Ms. Ressa's conviction even though the prosecutor failed to introduce a scintilla of evidence that she had "a high degree of awareness" that Mr. Santo's report was "probabl[y] fals[e]."[115] Just the opposite: the Court of Appeals concluded that she could be convicted and jailed for cyber libel even though she knew nothing about the article at the time of publication. In the Court of Appeals' view, "proof of knowledge of and participation in the publication of the offending article *is not required*, if the accused has been specifically identified as the . . . 'printer/publisher' of the publication."[116] Not only is this holding at war with the actual malice standard; it violates First Amendment's prohibition on strict liability for speech on matters of public concern.[117]

Second, the Court of Appeals of Manila held that actual malice had been shown because Ms. Ressa and Mr. Santos failed to prove "they took the necessary actions to verify the allegations against Keng before publishing the subject article."[118] Not only did the Court of Appeals improperly place the burden on Ms. Ressa and Mr. Santos to prove the adequacy of their investigation; it erred in concluding that the thoroughness of that investigation is relevant to the actual malice inquiry at all. "[A] finding of actual malice cannot be predicated merely on a charge that a reasonable publisher would have further investigated before publishing."[119] The standard requires proof that defendants subjectively believed their publication to be false - proof that is entirely absent here.[120]

The lone evidence that these defendants supposedly knew the article to be false was that they failed to publish a clarification after Mr. Keng demanded—two years after the initial publication—that

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[109] *Ibid.*

[110] *Harte-Hanks*, 491 U.S. at 691 n.37.

[111] *See ibid.* at 665–66; *Palin v. N.Y. Times Co.*, 940 F.3d 804, 814 (2d Cir. 2019) (requiring "more than sheer political bias" to prove actual malice).

[112] *Harte-Hanks*, 491 U.S. at 667 (ellipsis omitted).

[113] *Liberty Lobby, Inc. v. Dow Jones & Co., Inc.*, 838 F.2d 1287, 1297 (D.C. Cir. 1988); *see also, e.g.*, *Berisha v. Lawson*, 973 F.3d 1304, 1313 (11th Cir. 2020) (defendant's "reliance on . . . many independent sources, alone, should defeat any claim of actual malice"); *Rosanova v. Playboy Enters., Inc.*, 580 F.2d 859, 862 (5th Cir. 1978) ("[S]ubjective awareness of probable falsity . . . cannot be found where, as here, the publisher's allegations are supported by a multitude of previous reports upon which the publisher reasonably relied.").

[114] *Ryan v. Brooks*, 634 F.2d 726, 734 (4th Cir. 1980).

[115] *Harte-Hanks*, 491 U.S. at 667.

[116] *People of the Philippines v. Reynaldo Santos Jr. and Maria Ressa,* CA-G.R. CR. No. 44991, at 27 (emphasis added).

[117] *See* pp. 12–15, *supra*.

[118] *People of the Philippines v. Reynaldo Santos Jr. and Maria Ressa,* CA-G.R. CR. No. 44991, at 21; *see also People of the Philippines v. Reynaldo Santos Jr. and Maria Ressa,* No. R-MNL-19-01141-CR, at 19 (finding that Mr. Santos "did not bother to verify with any law enforcement agency whether Keng is actually involved in any of the aforementioned crimes before publishing the article").

[119] *Herbert v. Lando*, 781 F.2d 298, 308 (2d Cir. 1986).

[120] *See N.Y. Times*, 376 U.S. at 279–80.

Rappler publish "a fair and well-balanced report that also includes his side of the story."[121] But allegations that the media defendant's report was biased, one-sided, or failed to convey a certain person's perspective do not suffice to show actual malice.[122] That is all the more true where the alleged "inaccuracies [were] brought to the attention of the publisher after publication."[123] A publisher's "refusal to correct or retract its story" after new facts come to light does not support a finding of actual malice at the time of publication—the only relevant date.[124] As a matter of U.S. law, Mr. Keng's untimely demand that *Rappler* publish a more balanced news account is irrelevant to the actual malice inquiry.

Far from demonstrating actual malice, the record in this case supports an inference that Mr. Santos subjectively believed his article to be true.[125] Mr. Santos's source for the allegedly defamatory allegation that Mr. Keng was involved with "human trafficking and drug smuggling" and "a murder case for which he was 'never jailed'" was a government intelligence report. Mr. Santos further relied on an article in the *Philippine Star* for the allegation that Mr. Keng engaged in "smuggling fake cigarettes." The fact that these allegations previously appeared in reputable sources undermines any suggestion that Mr. Santos (or anyone else at *Rappler*) understood them to be false.[126]

Indeed, quite apart from the First Amendment protections for the article in question, two common law doctrines in the United States would have entitled Ms. Ressa and Mr. Santos to rely on these previous publications. The fair report privilege precludes liability for publishing fair and accurate accounts of official reports, actions, or proceedings dealing with matters of public concern, even when those reports contain false or defamatory statements.[127] This privilege covers a variety of government reports and proceedings, including intelligence reports and investigative materials.[128] Had *Rappler* published its article in the United States, this privilege would have shielded Ms. Ressa and Mr. Santos from liability for repeating the allegations of Mr. Keng's criminal activity that appeared in the National Security Council report cited in his article.

Some U.S. jurisdictions also provide for the "wire service" defence, under which a media organization is not liable for defamation if it reiterates facts previously published in a recognisable and reliable news source.[129] Where the original article does not contain any factual errors on its face, other news organizations generally have no duty to independently verify the information before republishing it.[130] "Imposing such a duty on local publishers would result in 'apprehensive self-censorship' that is repugnant to the first amendment."[131] As with the fair report privilege, the wire service defence would have allowed Ms. Ressa and Mr. Santos to repeat the allegations in the *Philippine Star* without independently confirming their accuracy.

D. *Rappler*'s Correction of a Typo in February 2014 Is Not a "Republication" that Triggers the Cybercrime Prevention Act

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[121] *People of the Philippines v. Reynaldo Santos Jr. and Maria Ressa,* CA-G.R. CR. No. 44991, at 22.

[122] *See* pp. 20–22, *supra*.

[123] *Herbert*, 781 F.2d at 309.

[124] *Fairfax v. CBS Corp.*, 2 F.4th 286, 295 (4th Cir. 2021); *see also McFarlane v. Sheridan Square Press, Inc.*, 91 F.3d 1501, 1515 (D.C. Cir. 1996) (finding "no authority . . . for the proposition that a publisher may be liable for defamation because it fails to retract a statement upon which grave doubt is cast after publication").

[125] Ms. Ressa had no relevant state of mind because she did not know about the article prior to publication.

[126] *See Liberty Lobby*, 838 F.2d at 1297.

[127] *See* Restatement (Second) of Torts § 611 (1977); *Reuber v. Food Chem. News, Inc.*, 925 F.2d 703, 713 (4th Cir. 1991); *see also Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 840 (1978) (recognising that this common law privilege has constitutional underpinnings).

[128] *See, e.g.*, *Medico v. Time, Inc.*, 643 F.2d 134, 140 (3d Cir. 1981) (fair report privilege applies to articles summarizing FBI documents that identify plaintiff as a member of an organized crime family).

[129] *See Winn v. Associated Press*, 903 F. Supp. 575, 579 (S.D.N.Y. 1995), *aff'd*, 104 F.3d 350 (2d Cir. 1996).

[130] *Winn v. United Press Int'l*, 938 F. Supp. 39, 44 (D.D.C. 1996).

[131] *Brown v. Courier Herald Publ'g Co.*, 700 F. Supp. 534, 537 (S.D. Ga. 1988).

Ms. Ressa and Mr. Santos's criminal convictions under the Cybercrime Prevention Act of 2012 would not stand in the United States because this law did not even take effect until after the publication of the *Rappler* article at issue. There is no dispute in this case that the article concerning Mr. Keng was published on May 29, 2012, months before the Cybercrime Prevention Act was enacted on October 9, 2012.[132] But both the trial court and Court of Appeals nonetheless applied this statute to Ms. Ressa and Mr. Santos because *Rappler* updated the article in February 2014 to correct a single typographical error, while leaving the substance—including the statements about Mr. Keng—intact. The ruling that this single, non-substantive change made two years after its publication could expose Ms. Ressa and Mr. Santos to criminal liability is flatly at odds with U.S. law.

In determining whether publication of an allegedly defamatory statement triggers the limitations period for libel, U.S. courts apply the "single publication rule." Under the this rule, "any mass communication that is made at approximately one time—such as a television broadcast or a single 'edition of a book, newspaper, or periodical'—is construed as a single publication of the statements it contains, thereby giving rise to only one cause of action as of the moment of initial publication, no matter how many copies are later distributed."[133] The single publication rule applies with equal force to statements published online, so as not to inhibit the "open, pervasive dissemination of information and ideas over the Internet, which is, of course, its greatest beneficial promise."[134]

The U.S. courts developed the "doctrine of republication" as "[a]n exception to the single publication rule."[135] This doctrine provides that "[r]epublishing material (for example, the second edition of a book), editing and reissuing material, or placing it in a new form that includes the allegedly defamatory material, resets the statute of limitations."[136] The "touchstone" of the republication doctrine is whether "the speaker has affirmatively reiterated [the allegedly defamatory statement] in an attempt to reach a new audience that the statement's prior dissemination did not encompass."[137] Thus, in the context of Internet publications, courts have held that "adding substantive material" to the allegedly defamatory statement on "an already published website" may give rise to a new defamation claim.[138] Merely "linking, adding unrelated content, or making technical changes to an already published website" does not.[139] "Websites are constantly linked and updated," and "[i]f each link or technical change were an act of republication, the statute of limitations would be retriggered endlessly and its effectiveness essentially eliminated."[140] "A publisher would remain subject to suit for statements made many years prior, and ultimately could be sued repeatedly for a single tortious act the prohibition of which was the genesis of the single publication rule."[141]

Here, the sole basis for finding that publication of the *Rappler* article triggered the Cybercrime Prevention Act was the correction of a single typographical error in February 2014, nearly two years after the article was originally published. The Court of Appeals reasoned that "[i]n determining whether there is a republication, it is not necessary whether the corrections made therein [were] substantial or not, as what matters is that the very exact libellous article was again published on a later date."[142] That ruling directly conflicts with United States law, under which "a statement on a website is not republished

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[132] *People of the Philippines v. Reynaldo Santos Jr. and Maria Ressa,* CA-G.R. CR. No. 44991, at 15.

[133] *Clark v. Viacom Int'l Inc.*, 617 F. App'x 495, 502–03 (6th Cir. 2015); *see also, e.g.*, *Lokhova v. Halper*, 995 F.3d 134, 142 (4th Cir. 2021); *In re Phila. Newspapers, LLC*, 690 F.3d 161, 174 (3d Cir. 2012), *as corrected* (Oct. 25, 2012); *Oja v. U.S. Army Corps of Eng'rs*, 440 F.3d 1122, 1132 (9th Cir. 2006); Restatement (Second) of Torts § 577A, cmt. c.

[134] *Oja*, 440 F.3d at 1132.

[135] *Phila. Newspapers*, 690 F.3d at 174.

[136] *Ibid.*; *see also* Restatement (Second) of Torts § 577A, cmt. d.

[137] *Clark*, 617 F. App'x at 505.

[138] *Phila. Newspapers*, 690 F.3d at 175.

[139] *Ibid.*

[140] *Ibid.*

[141] *Ibid.*

[142] *People of the Philippines v. Reynaldo Santos Jr. and Maria Ressa,* CA-G.R. CR. No. 44991, at 23.

unless the [allegedly defamatory] statement *itself* is substantively altered or added to, or the website is directed to a new audience."[143] Non-substantive changes to an allegedly defamatory article—such as the correction of a single typographical error—do not trigger the republication doctrine.[144] Here, correcting a single typo two years after the article's original publication date could not have possibly altered the substance of the allegedly defamatory statements about Mr. Keng, nor directed the article to a new audience.[145]

Further, the retroactive application of this criminal statute to Ms. Ressa and Mr. Santos for a news report published in May 2012 violates "[e]lementary notions of fairness enshrined in our constitutional jurisprudence," which "dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose."[146] The U.S. Constitution forbids the passage of *ex post facto* laws that retroactively criminalise an act that was innocent when done.[147] In addition, both the Due Process Clause of the Fifth and Fourteenth Amendments and the First Amendment separately require the "invalidation of laws" that do not provide fair notice of "conduct that is forbidden or required."[148] This principle "raises special First Amendment concerns because of its obvious chilling effect on free speech."[149] Because the Cybercrime Prevention Act was not in effect at the time the *Rappler* article was published in May 2012, the publication could not possibly have been a crime at that time. The imposition of criminal liability thus flatly contravenes the constitutional bar on *ex post facto* laws and due process and First Amendment protections against laws imposed without notice.

IV. Conclusion

The criminal convictions of Maria Ressa and Reynaldo Santos Jr. are dramatically inconsistent with United States law, which provides robust protections for speech on public figures and matters of public concern. These convictions threaten to chill vital speech necessary to preserve free and open debate in a democratic society. For the reasons articulated above, the Supreme Court of the Philippines should vacate these convictions.

Dated: 27 October 2022

GIBSON, DUNN & CRUTCHER LLP

By: Theodore J. Boutrous

/s/ Theodore J. Boutrous

[143] *Yeager v. Bowlin*, 693 F.3d 1076, 1082 (9th Cir. 2012) (emphasis added).

[144] *See, e.g.*, *Leisten v. CBS Broad., Inc.*, No. 2:21-cv-00974-CCW, 2022 WL 1091914, at *3 (W.D. Pa. Apr. 12, 2022) ("[E]ven if there are minor or technical corrections to the internet content as time goes on, so long as there is not substantive editing of the content such that it becomes a 'new' story, the single publication rule will apply."); *see also Clark*, 617 F. App'x at 507 ("[A]n online statement is not republished every time that its window dressing is altered.").

[145] *See Yeager*, 693 F.3d at 1082.

[146] *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996).

[147] *See Collins v. Youngblood*, 497 U.S. 37, 42 (1990); U.S. Const. art. I, §§ 9, 10.

[148] *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012); *see also Shaffer v. Heitner*, 433 U.S. 186, 217 (1977) (Stevens, J., concurring) ("The Due Process Clause affords protection against 'judgments without notice.'").

[149] *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 871–72 (1997).

Independent Expert Opinion of Elizabeth Wilmshurt CMG KC

I. Introduction

A. Qualifications

Qualified as a solicitor, I am a distinguished Fellow of Chatham House (the Royal Institute of International Affairs) and an Academic Expert member of Doughty Street Chambers. Formerly, I acted as a legal adviser in the United Kingdom diplomatic service between 1974 and 2003. Between 1994 and 1997, I was the Legal Adviser to the UK mission to the United Nations in New York. During this time, I took part in the negotiations for the establishment of the International Criminal Court. I founded the International Law programme at Chatham House and was a Visiting Professor in International Criminal Law at University College London. In 2022, I was appointed an honorary King's Counsel, awarded to those who have made a major contribution to the law of England and Wales, outside practice in the courts.

My experience has been in public international law generally, and among other areas I have worked on issues in international human rights, international criminal law, the law of the United Nations and its organs, and international humanitarian law.

B. Assignment

The IBAHRI retained me as an independent expert to provide an assessment of the compatibility of the Court of Appeals' judgment, People v Reynaldo Santos Jr and Maria Ressa (7 July 2022) and the first instance Regional Trial Court judgment (15 June 2020) with international law.

The IBAHRI instructed me to render an objective, impartial, and independent opinion. As an independent expert, I do not serve the exclusive interest of any party to the proceedings, but instead seek to assist the Supreme Court of the Philippines in disposing of this case in a just and legally sound manner. My opinion is confined to matters within my expertise. I am providing this expert opinion on a *pro bono* basis, without compensation from IBAHRI or any other party or amicus.

C. Documents Considered

To prepare this report I reviewed Mr. Santos's article, "CJ Using SUVs of 'Controversial' Businessmen", the trial and appellate court opinions in this case; relevant international instruments and case law.

My analysis and conclusions to date are based on the information available when this report was submitted on 27 October 2022. I reserve the right to amend my report and may modify, refine, or revise my opinions if new information becomes available.

I. Expert Opinion

1. Relevant treaties or other sources of international law and their application to the Philippines

Freedom of expression is essential for any society and constitutes one of the foundation stones for every free and democratic society.[150] It is protected by numerous international agreements and other instruments of international law.

The International Covenant on Civil and Political Rights, 1966 (ICCPR) sets out a wide range of civil and political human rights.[151] States Parties to the treaty have agreed to respect these rights and to ensure them to all individuals within their territory and subject to their jurisdiction. The Philippines ratified the ICCPR on 23 October 1986 and is bound by its provisions.

[150] UN Human Rights Committee General Comment 34, U.N Doc. CCPR/C/GC/34, at 1.

[151] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

The ICCPR builds on the Universal Declaration of Human Rights (UDHR), which was adopted by the United Nations General Assembly in 1948. Although adopted as a declaration rather than a treaty, many of its provisions have become part of customary international law over the years, having been reaffirmed in international fora and incorporated in international and domestic law. The Philippines, like all other states in the world, is therefore obliged to respect those provisions. (It is noteworthy that the Philippines was a member of the United Nations Human Rights Commission, which was responsible for drafting the UDHR in the early days of the UN.)

The Philippines, as a Member of the Association of Southeast Asian Nations (ASEAN), has agreed to act in accordance with the Principles laid down in ASEAN's Charter of 2007, principles which include 'respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice.'[152] The references to human rights in the ASEAN Charter are supplemented by the Human Rights Declaration adopted on 18 November 2012 (the ASEAN Human Rights Declaration) by the ASEAN heads of state and government, including the then President of the Philippines.. The ASEAN Human Rights Declaration sets out a wide range of human rights which each government is committed to promote and protect and, in addition, affirms all the civil and political rights in the UDHR. The ASEAN Human Rights Declaration is made binding on ASEAN members, including the Philippines, by Article 2(1) of the ASEAN Charter.[153]

All of these instruments of international law contain a provision requiring states to ensure freedom of expression. States differ in the manner in which they incorporate international human rights instruments into their law but, however that is achieved, it is clear that the state and the organs of the state are bound to comply with the international instruments. Domestic law, or the failure of domestic law, cannot justify a state's failure to comply with a treaty.[154]

So far as the law of the Philippines is concerned, human rights are protected in the Constitution of 1987 (the 1987 Constitution) by virtue of Article III, entitled 'Bill of Rights'. Further, the 1987 Constitution has adopted 'the generally accepted principles of international law' as part of the law of the Philippines.[155]

2. The Philippines' obligations to guarantee freedom of expression and the right to a fair trial under international law

A. The Philippines' obligations to protect freedom of expression

The international instruments mentioned above all require the Philippines to protect freedom of expression.

Article 19 of the ICCPR provides that everyone has 'the right to freedom of expression' which includes 'freedom to seek, receive and impart information and ideas of all kinds, … either orally, in writing or in print, in the form of art, or through any other media of his choice.' States may only impose restrictions on this right if they are provided by law and necessary for respect of the rights or reputations of others, for the protection of national security or of public order or of public health or morals.

The UDHR provides in its Article 19:

[152] ASEAN Charter (signed 20 November 2007, entered into force December 2008), art. 2.2.

[153] 'ASEAN Member States reaffirm and adhere to the fundamental principles contained in the declarations, agreements, conventions, concords, in treaties and other instruments of ASEAN.'

[154] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 U.N.T.S. 331.

[155] Article II, section 2.

> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

The rights to freedom of opinion and expression are also upheld by General Principle 23 of the ASEAN Human Rights Declaration, which states that 'every person has the right to freedom of opinion and expression, including freedom to hold opinions without interference and to seek, receive and impart information, whether orally, in writing or through any other medium of that person's choice.'

It can be seen that the wording of these instruments is very similar. The ICCPR goes into more detail in stating which restrictions on the right are permitted. While Article 19(3) provides for restrictions on freedom of expression, those restrictions are subject to strict tests. They must be 'provided by law' and necessary for one of the purposes set out in the Article: for respect of the rights or reputations of others, for the protection of national security or of public order or of public health or morals. The restrictions are subject to the requirements of necessity and proportionality.[156]

Assistance in interpreting the extent of the freedom of expression can be sought from the case law of international courts, interpreting either the ICCPR or other international agreements with equivalent effect, and from the United Nations Human Rights Committee, a body of independent experts established by the ICCPR, which monitors compliance of the ICCPR by its States Parties and assists with the interpretation of that treaty. By the 'General Comments' of the Committee and its caselaw, it has built up what the International Court of Justice has called a substantial body of interpretative case law.[157]

The Committee has provided guidance on the interpretation and application of Article 19 of the ICCPR in its General Comment No. 34.

To meet the requirement that a restriction is 'provided by law', national legislation imposing restrictions must be sufficiently clear, accessible, and predictable,[158] and the restriction must be necessary to meet one of the legitimate objectives listed in Article 19(3) ICCPR and proportionate to the interest affected.[159]

The case of *Marques de Morais v Angola*, before the UN Human Rights Committee, gives guidance on the need for necessity and proportionality in assessing the compatibility of restrictive measures with Article 19(3) of the ICCPR. In that decision, which found a violation of Article 19 in the arrest, detention and conviction of a journalist for defamation, it was stated: 'the requirement of necessity implies an element of proportionality, in the sense that the scope of the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect.'[160] In that case it was decided that because of the paramount importance of the right to freedom of expression and of a free and uncensored press, the severity of the sanctions imposed on the journalist could not be considered as a proportionate measure to protect public order.

As the international case law puts it, a restriction on freedom of expression 'must be proportionate to the legitimate interest that justifies it and must be limited to what is strictly necessary to achieve that objective. It should interfere as little as possible with effective exercise of the right to freedom of expression.'[161]

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[156] See below.

[157] *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo*) 2010 ICJ Rep, at 66.

[158] General Comment 34 (n 1), at 25.

[159] *Ibid*., at 33-35.

[160] *Marques de Morais v Angola* (UNHRC, 29 March 2005), U.N. Doc. CCPR/C/83/D/1128/2002, at 6.8.

[161] See *Herrera-Ulloa v Costa Rica* (IACtHR, 2 July 2004), para. 123, which concerned Article 13 of the American Convention on Human Rights, the equivalent provision to Article 19, ICCPR; similar statements can be found in much of the relevant international caselaw.

The UN Human Rights Committee too has emphasised that 'restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected… The principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law.'[162]

Defamation laws, which on their face restrict the right to freedom of expression, have to be justified under Article 19(3) of the ICCPR and its tests of necessity and proportionality. The UN Human Rights Committee in its General Comment No. 34 emphasises that '[d]efamation laws must be crafted with care to ensure that they comply with paragraph 3 [of Article 19], and that they do not serve, in practice, to stifle freedom of expression.'[163]

B. Discussion of matters of public interest is afforded greater protection

The press has an essential function in a democratic society: to inform people of their rights and of matters of public concern. As was said by the European Court of Human Rights (ECtHR), a democratic society has an interest 'in enabling the press to exercise its vital role of "public watchdog" in imparting information of serious public concern.'[164]

There are greater protections under human rights law for defendants, particularly journalists, accused of defamatory statements against persons with public functions and activities, in order to ensure that the press can continue their vital work. As was said by the UN Human Rights Committee, 'in circumstances of public debate concerning public figures in the political domain and public institutions, the value placed by the [ICCPR] upon uninhibited expression is particularly high.'[165]

Caselaw on the relevant international instruments shows that politicians and public figures must tolerate greater criticism because they inevitably lay themselves open to close scrutiny by both journalists and the public at large, and they must display a greater degree of tolerance.[166] As such, 'the mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties.'[167] In *Adonis v The Philippines*, the UN Human Rights Committee also found that 'a public interest in the subject matter of the criticism should be recognised as a defence.'[168] This was considered especially so, in that the charges of defamation related to a public official.

C. Online publication

The Philippines' obligations to uphold freedom of expression apply equally to publications online. All three international instruments provide that the right to freedom of expression applies irrespective of the media used by the individual making a statement.

This was also affirmed in the 2018 UN Human Rights Council resolution on 'The promotion, protection and enjoyment of human rights on the Internet', which provided that 'the same rights that people have offline must also be protected online, in particular freedom of expression, which is applicable regardless of frontiers and through any media of one's choice, in accordance with Article 19

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[162] UN Human Rights Committee, General Comment 27, U.N. Doc CCPR/C/21/Rev.1/Add.9, at 14 – 15.

[163] General Comment 34 (n 1), at 47.

[164] *Erla Hlynsdottir v Iceland* (no. 2), ECtHR Appl. No. 54125/10, para. 57. The case concerned the application of Article 10 of the European Convention on Human Rights, the equivalent provision to Article 19 of the ICCPR.

[165] General Comment 34 (n 1), at 34 and 38.

[166] *Oberschlick v Austria* app no 20834/92 (ECtHR, 1 July 1997), at 29.

[167] *Ibid*.

[168] *Adonis v The Philippines* (HRC, 26 April 2012), CCPR/C/103/D/1815/2008, at 7.9.

of the UDHR and ICCPR.'[169] Further, as indicated in General Comment No. 34, '[a]ny restrictions on the operation of websites, blogs or any other internet-based, electronic or other such information dissemination system . . . are only permissible to the extent that they are compatible with [Article 19(3) of the ICCPR].'[170]

State Parties to the ICCPR, in short, are under an obligation to protect freedom of expression by means of media publishing online, as they would offline. The requirements of necessity and proportionality apply to defamation laws for online publications, as they do offline.

D. The Philippines' obligations to uphold the right to a fair trial

The right to a fair and public hearing by an independent and impartial tribunal is protected by all the international agreements on human rights.

The ICCPR provides in Article 14:

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; (c) To be tried without undue delay; (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court; (g) Not to be compelled to testify against himself or to confess guilt.

Article 15 of the ICCPR provides that '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. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed.'[171] This provision ensures that no one is able to be charged *ex post facto*. This is also provided in Article 11 of the UDHR[172] and the ASEAN Human Rights Declaration has similar wording.[173]

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[169] UNHRC, 'The promotion, protection and enjoyment of human rights on the Internet' UN Doc A/HRC/38/L.10/Rev.1 (4 July 2018), 4.

[170] General Comment 34 (n 1) at 43.

[171] ICCPR (n 2), art. 15.

[172] Article 11of the UDHR provides: '1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence. 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. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.'

[173] The ASEAN Human Rights Declaration provides that 'every person charged with a criminal offence shall be presumed innocent until proven guilty according to law in a fair and public trial, by a competent, independent and impartial tribunal, at which the accused is guaranteed the right to defence. (2) No person shall be held guilty of

The international obligations of the Philippines thus require that the courts of the Philippines ensure a fair hearing of criminal charges. They require, among other things, that an individual is not to be charged with an act which at the time of action was not criminal or was subject to a lesser penalty, and that an individual is not compelled to testify against themselves.

3. The compatibility of criminal penalties for libel with the Philippines' obligations to respect the right to freedom of expression.

The Appeal Court upheld the conviction of Maria Ressa and Reynaldo Santos Jr as guilty of cyber-libel under Section 4(c)4 of Republic Act No 10175, the Cybercrime Prevention Act 2012 and their sentencing with imprisonment of up to six years, extended to six years and eight months, and ordered each to pay 200,000 pesos (circa USD 3,400) in moral damages, and 200,000 pesos (circa USD 3,400) in exemplary damages to Wilfredo Keng. The court found no corporate liability for Rapper Inc.[174]

A. Criminal penalties for defamation

The right to freedom of expression is not an absolute right. As Article 19 of the ICCPR states: the exercise of the right 'carries with it special duties and responsibilities. It may therefore be subject to certain restrictions.' But any such restriction has to be justified by the provisions of Article 19(3), as interpreted in the international case law. As indicated above, any such restriction must be 'provided by law', necessary for one of the purposes set out in the Article and proportionate to that purpose.

The imposition of criminal penalties in cases of defamation constitutes the most serious and restrictive form of interference with freedom of expression. In light of the difficulty of justifying criminal sanctions under international human rights law, there have been calls by international bodies to decriminalise defamation.

For example, the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression declared in 2002 that 'criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.'[175] In 2010, the African Commission on Human and Peoples' Rights (ACHPR) adopted a resolution calling upon State parties to the African Charter to repeal criminal defamation laws, emphasising that 'criminal defamation laws constitute a serious interference with freedom of expression and impedes on the role of the media as a watchdog, preventing journalists and media practitioners to practise their profession without fear and in good faith.'[176]

The UN Human Rights Committee explained in General Comment No. 34 that 'State parties should consider the decriminalisation of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases.'[177]

In line with such statements, international courts have ruled against the imposition of criminal penalties for defamation except in exceptional cases. For example, in a 2021 case before the Inter American Court of Human Rights (IACtHR), *Palacio Urrutia et al v The Republic of Ecuador*, the Court considered the application of Article 13 of the American Convention on Human Rights, which contains terms similar to the ICCPR. The IACtHR found that criminal sanctions for defamation 'generated a chilling effect that inhibited the circulation of ideas and information' and pointed out that criminal prosecution is the most restrictive measure on freedom of expression and its use in a democratic

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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, and no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed'.

[174] *People of the Philippines v Reynaldo Santos Jr. and Maria Ressa* CA-G.R. CR No. 44991 (PH).

[175] Joint Declaration, International Mechanisms Protecting Freedom of Expression (2002). <www.oas.org/en/iachr/expression/showarticle.asp?artID=87>

[176] ACHPR Res. 169 (XLVII) 10 (24 November 2010).

[177] General Comment No. 34 (n 1), at 23.

society 'must be exceptional and reserved for those eventualities in which it is strictly necessary to protect the fundamental legal interests from attacks that damage or endanger them.'[178]

In another case, the IACtHR emphasised that the possibility of imposing criminal sanctions 'should be carefully analysed, pondering the extreme seriousness of the conduct of the individual who expressed the opinion, his actual malice, the characteristics of the unfair damage caused, and other information which shows the absolute necessity to resort to criminal proceedings as an exception. At all stages the burden of proof must fall on the party who brings the criminal proceedings.'[179]

It is noteworthy that in its concluding observations on the fourth periodic report of the Philippines, the UN Human Rights Committee stated: 'The Committee recalls its General Comment No. 34 (2011) on freedoms of opinion and expression and urges the State party [the Philippines] to consider the decriminalisation of defamation. The Committee reiterates its position therein that the application of criminal law in defamation cases should only be countenanced in the most serious of cases and that imprisonment is never an appropriate penalty.'[180]

This statement of the UN Human Rights Committee that imprisonment is never an appropriate penalty for defamation takes some support from decisions of international courts in numerous cases, only a few of which are mentioned here. The basis of the rulings is that restrictions on the freedom of expression protected by the various international agreements must be strictly necessary and proportionate to the purpose for which the restrictions were imposed and that custodial sentences will not meet these tests except where additional factors, or offences, are present, such as incitement to violence or hate speech.

The African Court on Human and Peoples' Rights (AfCHPR) considered the issue in a case related to the sentencing of a journalist to 12 months' imprisonment and a substantial fine and damages for writing an article on a State Prosecutor's alleged links to criminal activity. In that case, *Lohé Issa Konaté v Burkina Faso*, the AfCHPR found that Burkina Faso had violated Article 19 of the ICCPR and had failed to show that imprisonment was a necessary limitation to freedom of expression under Article 19(3).[181]

The ECtHR held in *Cumpănă and Mazăre v Romania*, a case involving journalists imprisoned for three months and barred from journalistic activity for one year, that journalistic expression in the context of a debate on a matter of legitimate public interest presented no justification for the imposition of a prison sentence.[182] The Court stated that 'the imposition of a prison sentence for a press offence will be compatible with journalists' freedom of expression as guaranteed by Article 10 of the Convention only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence.'

In a series of cases before the IACtHR, certain sentences of imprisonment for defamation were held by the Court to be contrary to the right to freedom of expression as being disproportionate to the interest protected.[183]

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[178] *Palacio Urrutia et al v The Republic of Ecuador* (IACtHR, 24 November 2021), para. 117. This follows a line of cases before the IACtHR including *Álvarez Ramos v Venezuela* (IACtHR 30 August 2019): 'under the terms of the Convention, the publication of an article of public interest concerning a public official cannot be considered a criminal offence', at 129.

[179] *Kimel v Argentina* (IACtHR, May 2, 2008) para. 78; see also *Trisant Donoso v Panama*, Series C, No. 193 (2009), at 120.

[180] Concluding observations on the fourth periodic report of the Philippines CCPR/C/PHL/CO/4, (13 November 2012), at 21.

[181] *Lohé Issa Konaté v Burkina Faso* app no 004/2013 (ACtHPR, 5 December 2014), at 163.

[182] *Cumpănă and Mazăre v Romania* App no 33348/96 (ECtHR, 17 December 2004), at 116.

[183] *Herrera-Ulloa v Costa Rica* (IACtHR,2 July 2004) Series C, No. 107, paras. 124-135; *Canese v Paraguay*, (IACtHR, 31 August 2004), Series C, No. 111, paras. 104-107; *Palamara Iribarne* v *Chile* (IACtHR,22 November 2005), Series C, No. 135, paras. 79,88.; *Álvarez Ramos v Venezuela. Preliminary Objection, Merits,*

In a case before the UN Human Rights Committee in relation to the Philippines, *Adonis v The Philippines,* relating to alleged libel committed by Filipino journalist Alexander Adonis about a congressman, the Committee held that the sentence of imprisonment on the charge of defamation was incompatible with the Philippines' obligations under Article 19(3) of the ICCPR.[184] The Committee reiterated General Comment No. 34 that states should consider decriminalising defamation and that imprisonment as a penalty for defamation was never appropriate.[185] The Committee ruled that the Philippines was obliged to prevent similar violations under the ICCPR from recurring, 'including by reviewing the relevant libel legislation.'[186]

The same standards apply to the imposition of restrictions for online publication. As explained in General Comment No. 34, restrictions on online speech are subject to the same requirements under Article 19(3), as for print publication.[187]

It should be noted that during its Universal Periodic Review before the UN Human Rights Committee, the Philippines government stated that 'the Philippine Supreme Court has adopted a policy whereby libel convictions should be punished only with a fine. There is also a pending bill to decriminalise libel.'[188]

B. The imposition of civil sanctions and pecuniary fines

In this case, both defendants were ordered to pay 200,000 pesos (circa USD 3,400) in moral damages, and 200,000 pesos (circa USD 3,400) in exemplary damages, to Wilfredo Keng.

Restrictions on freedom of expression must not only serve a legitimate purpose – one of the purposes set out in Article 19(3) of the ICCPR – and they must also be proportionate to that end. Pecuniary awards must be strictly proportionate to the actual harm caused.[189] In interpreting the relevant international instruments protecting freedom of expression, the caselaw of the international courts shows that awards of damages can themselves amount to a disproportionate restriction on freedom of expression.

The ECtHR has delivered judgments relevant to these issues. For example, it affirmed that 'unpredictably large' awards of damages are considered capable of having a chilling effect on the press and therefore 'require the most careful scrutiny.'[190] The Court has noted that pecuniary fines must be assessed with regard to procedural fairness and proportionality, in line with the incomes and resources of the defendants.[191] The Court overturned the imposition of fines against the editor of a web-based media site for alleged defamation against a public figure, arguing that even though the fines were not

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Reparations and Costs (IACtHR 30 August 2019), Series C No. 38); *Palacio Urrutia et al v The Republic of Ecuador* (IACtHR, 24 November 2021).

[184] *Adonis v The Philippines* (HRC, 26 April 2012), CCPR/C/103/D/1815/2008, para. 7.10. In light of the above, the Committee considers that, in the present case, the sanction of imprisonment imposed on the author was incompatible with Article 19, at para. 3, of the Covenant.

[185] *Ibid*, at 7.9.

[186] *Ibid.*

[187] General Comment No. 34 (n 1).

[188] Report of the Working Group on the Universal Periodic Review - Philippines A/HRC/21/12 (9 July 2012), at 25.

[189] *Palacio Urrutia et al v The Republic of Ecuador* (IACtHR, 24 November 2021). See also the Joint Declaration of the International Mechanisms Protecting Freedom of Expression (2002) which affirmed that 'civil sanctions for defamation should not be so large as to exert a chilling effect on freedom of expression, and should be designed to restore the reputation harmed, not to compensate the plaintiff or to punish the defendant'.

[190] *Independent News and Media and Independent Newspapers Ireland Limited v Ireland*, App. No. 28199/15 (ECtHR, 15 June 2017).

[191] *McVicar v UK*, App no. 46311/99 (ECtHR, 7 May 2002).

too high and no criminal sanctions were imposed '[a]ny undue restriction on freedom of expression effectively entails a risk of obstructing or paralysing future media coverage of similar questions.'[192]

In *Lohé Issa Kinaté v Burkina Faso,* discussed above, the AfCHPR, as well as ruling against the imposition of a sentence of imprisonment, concluded that the use of a heavy fine and order to pay damages was excessive and disproportionate and therefore contrary to the ICCPR.[193]

In the case of *Palacio Urrutia et al v The Republic of Ecuador*, the IACtHR, as well as coming close to repudiating criminal sanctions for defamation altogether, stated that 'the fear of a disproportionate civil sanction can clearly be as intimidating and inhibiting for the exercise of freedom of expression as a criminal sanction.'[194]

4. **The compatibility of the upholding of the conviction in the case of *People v Reynaldo Santos Jr and Maria Ressa* with the Philippines' obligations under international law.**

A. Freedom of expression

The right to freedom of expression carries with it 'special duties and responsibilities' and accordingly certain restrictions may be imposed provided that those restrictions meet the requirements of international human rights law. The question is whether the application of criminal law to convict and sentence Reynaldo Santos Jr and Maria Ressa met those requirements.

The application of the criminal law is the most severe of restrictions on freedom of expression and the international caselaw shows that if it can be used at all it is only justifiable in the most severe or exceptional of cases – of which this is clearly not one. In this case, where malice was not proven, it is all the more inappropriate to apply criminal sanctions.

Further, the discussion of an individual in the public view on a matter of public interest by journalists receives special protection under the law on freedom of expression. While the trial court found Wilfredo Keng to be a private person, regarding him as 'neither a public official nor a public figure', international human rights law gives special protection to publications on matters of public concern. The ECtHR has ruled that there is no justification for distinguishing between political discussion and other matters of public concern for this purpose. 'Whilst the press must not overstep the bounds set, inter alia, for "the protection of the… reputations of others", it is nevertheless incumbent on it to impart information and ideas on matters of public interest. Not only does it have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog".'[195] The report on Wilfredo Keng, in its context, was a matter of public importance; it involved public officials and was on a matter of public concern.

To convict and sentence for criminal libel, without proof of malice, on a matter of public concern, in a publication by journalists, presents a restriction on the right to freedom of expression, which does not meet the test of necessity for the protection of the reputations of others and is disproportionate to the purpose for which the restriction is imposed. The use of the criminal law in such circumstances cannot possibly come within the exception of grave or exceptional circumstances. The conviction and its upholding on appeal therefore impose restrictions contrary to Article 19(2) and (3) of the ICCPR and the relevant provisions of other international instruments.

B. Fair trial rights

The article was published on the Rappler website on 29 May 2012. This was updated on 9 February 2014 to correct a minor spelling mistake. The defendants were charged with cyber-libel and arrested on 13 February 2019. The Cybercrime Prevention Act was passed on 12 September 2012.

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[192] *Olafsson v Iceland,* App. No. 58493/13 (ECtHR, 21 February 2017).

[193] *Lohé Issa Konaté v Burkina Faso,* App No 004/2013 (ACtHPR, 5 December 2014), at 168-170.

[194] *Palacio Urrutia et al v The Republic of Ecuador* (IACtHR, 24 November 2021) at 125.

[195] *Thorgeir Thorgeirson v Iceland*, App No. 13778/8 (ECtHR, 25 June 1992), at 64, 63.

However, the enforcement of the law was disrupted by a Temporary Restraining Order issued in the context of the case of *Disini v Secretary of Justice,* which was in force until 22 April 2014. Insofar as the criminalisation for defamatory speech was by an article under legislation enacted only three months after the publication of the article, the use of the law *ex post facto* would be contrary to the ICCPR and other international instruments.

The trial court considered it to their detriment that Maria Ressa and Reynaldo Santos Jr did not stand as witnesses in the trial. As previously indicated, international law provides that no one can be 'compelled to testify against themselves.'[196] This is reflected in the 1987 Constitution of the Philippines.[197] No defendant in a criminal trial can be compelled to take the stand as a witness.

C. Duties of the courts

The international obligations of a state involve all organs or branches of that state – the executive, the legislature and the judiciary. It is by means of the actions of all these organs that a state's obligations can be complied with.[198]

5. Conclusions

As the UN Human Rights Committee has emphasised, a free unhindered press is essential in any society to ensure freedom of opinion and expression and the enjoyment of other human rights.[199]

On the basis of international human rights law, I conclude that, as regards the conviction and sentencing of Maria Ressa and Reynaldo Santos Jr:

1. The conviction of Maria Ressa and Reynaldo Santos Jr represents a criminal sanction for libel, without proof of malice, on a matter of public concern, in a publication by journalists, and as such imposes a restriction on freedom of expression contrary to Article 19(2) and (3) of the ICCPR and other relevant international instruments.
2. The trial and conviction also raise fair trial concerns under Article 14 of the ICCPR and other international instruments to which the Philippines is a party.
3. The sentence of imprisonment is contrary to Article 19(2) and (3) of the ICCPR and the other international instruments to which the Philippines is a party, as being disproportionate. In order to show that the awards of moral damages and exemplary damages are not disproportionate and also contrary to Article 19 of the ICCPR, it would need to be shown that the sums are not excessive in relation to all the circumstances.
4. Until the legislation criminalising defamation is repealed, as recommended by the UN Human Rights Committee, or recognised to be unconstitutional as not meeting the protections of the constitutional Bill of Rights, the courts of the Philippines should interpret and apply the law as far as possible compatibly with the international obligations of the Philippines. The obligation to respect the freedom of expression is binding on the State as a whole and on all branches of the State – executive, legislative and judicial.

Dated: 27 October 2022

By: Elizabeth Wilmshurst CMG KC

/s/ Elizabeth Wilmshurt CMG KC

[196] Article 14(3)(g) ICCPR (n 6), and equivalent instruments.

[197] 'No person shall be compelled to be a witness against himself' 1987 Constitution (PH), Article III, Section 17.

[198] General Comment No. 34 (n 1), at 7.

[199] General Comment 34 (n 1), at 13.

Independent Expert Opinion of Justice Adolfo Azcuna

A. Qualifications

In 2002, Justice Azcuna was appointed Associate Justice of the Supreme Court of the Philippines, and upon his retirement therein he was appointed Chancellor of the Philippine Judicial Academy.

In 2014, he was elected as one of the five new commissioners by the International Commission of Jurists, a non-governmental organisation defending human rights and the rule of law worldwide since 1952.

B. Assignment

The IBAHRI retained Justice Azcuna as an independent expert to provide an assessment of the compatibility of the Court of Appeals' judgment, People v Reynaldo Santos Jr and Maria Ressa (7 July 2022) and the first instance Regional Trial Court judgment (15 June 2020), with Filipino law.

The IBAHRI instructed him to render an objective, impartial, and independent opinion. As an independent expert, he does not serve the exclusive interest of any party to the proceedings, but instead seeks to assist the Supreme Court of the Philippines in disposing of this case in a just and legally sound manner. His opinion is confined to matters within his expertise. He is providing this expert opinion on a *pro bono* basis, without compensation from IBAHRI or any other party or amicus.

C. Documents Considered

His analysis and conclusions are based on the information available when this report was submitted on 24 October 2022. He reserves the right to amend his report and may modify, refine, or revise his opinions if new information becomes available.

II. Expert Opinion

Following a complaint filed with the National Bureau of Investigation on January 10, 2018, by one Wilfredo Keng, an Information was filed with the Regional Trial Court of Manila, alleging the crime of Cyber Libel under Republic Act No. 10175, as follows:

> "That on or about 19 February 2014, the above named accused, did then and there willfully, unlawfully and knowingly re-publish an article entitled 'CJ Using SUVs of Controversial Businessman' quoted hereunder:
>
> 'Shady past?
>
> At the time we were tracing the registered owner of the Chevrolet in early 2011, we got hold of an intelligence report that detailed Keng's past. Prepared in 2002, it described Keng as a "naturalized Filipino citizen" whose exact birthdate is unknown. In the report, he was also identified as bearing the alias "Willy," using a surname also spelled as "Kheng."
>
> The report stated that Keng had been under surveillance by the National Security Council for alleged involvement in illegal activities, namely "human trafficking and drug smuggling." He is supposedly close to lawmakers and had contacts with the US embassy at the time.
>
> The document also said Keng was involved in a murder case for which he was "never jailed." It could be referring to the death of Manila Councilor Chia Go in 2002 where Keng had been identified as a mastermind. Go was also the architect of Keng's Reina Regente condominium residence in Binondo, Manila.

> According to a 2002 Philippine Star report, Keng was also accused of smuggling fake cigarettes and granting special investors residence visas to Chinese nationals for a fee. Keng has denied his involvement in this illegal transaction, saying it's easy to get visas to the Philippines.'
>
> In the website of Rappler, Inc. with malicious intent and evil motive of attacking, injuring and impacting the reputation of one Wilfredo D. Keng, with residence at Carriedo Street, Manila, within the jurisdiction of this Honorable Court, as a businessman, and as a private citizen, thereby exposing him to public hatred, contempt, ridicule, discredit and dishonor.
>
> CONTRARY TO LAW."

Defendants MARIA RESSA and REYNALDO SANTOS, JR. appeared, assisted by counsel, but did not enter a plea during the arraignment. The court entered a plea of not guilty for them.

After the case was referred to mediation and after mediation efforts failed, the case proceeded to trial.

During the trial, the following transpired, *inter alia*:

The parties agreed on some matters, among which were:

5. That the Article specified in the Information was published on the website of Rappler, Inc. on May 29, 2012;

6. That the said Article was updated on February 9, 2014;

Subsequently, evidence for the prosecution and evidence for the defense were presented.

After trial, the Regional Trial Court, through Judge Rainelda H. Estacio-Montesa, rendered its Decision on June 15, 2020, in Criminal Case No. R-MNL-19-01141-CR, as follows:

> WHEREFORE, premises considered, judgment is hereby rendered finding accused **REYNALDO SANTOS, JR.** and **MARIA ANGELITA RESSA GUILTY** beyond reasonable doubt for Violation of Section 4(c)(4) of Republic Act No. 10175 or the Cybercrime Prevention Act of 2012 and are each hereby sentenced to suffer the indeterminate penalty of imprisonment ranging from **SIX (6) MONTHS** and **ONE (1) DAY of *prision correccional* as MINIMUM to SIX (6) YEARS of *prision correccional* as MAXIMUM.**
>
> Both accused **REYNALDO SANTOS, JR**. and **MARIA ANGELITA RESSA** are, likewise, ordered to pay private complainant Wilfredo Keng, jointly and severally, the following:
>
> 1. **TWO HUNDRED THOUSAND PESOS (Php200,000.00)** as and by way of **MORAL DAMAGES**.
>
> 2. **TWO HUNDRED THOUSAND PESOS (Php200,000.00)** as and by way of **EXEMPLARY DAMAGES**.
>
> As to the corporate liability of **RAPPLER INCORPORATED**, the Court is hereby finds **NO CORPORATE LIABILITY** under Section 9 of Republic Act No. 10175.

The Motion of the United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression for Leave to File Amicus Curiae Brief filed by David Kaye thru Felix J. Mariñas is only NOTED.

SO ORDERED."

Defendants, after their motion for reconsideration was denied in an Order dated July 24, 2020, appealed to the Court of Appeals.

The Court of Appeals, in C.A.-G.R. No. 44991, on July 7, 2022, rendered its Decision, the dispositive portion of which stated:

WHEREFORE, the appeal is **DENIED**. The Decision dated June 15, 2020 of the Regional Trial Court (RTC) Branch 46, Manila in Criminal Case No. R-MNL-19-01141-CR, finding accused-appellants Reynaldo Santos, Jr., and Maria A. Ressa guilty beyond reasonable doubt for violation of Section 4(c)(4) of Republic Act No. 10175, otherwise known as the Cybercrime Prevention Act of 2012 is **AFFIRMED** with **MODIFICATION** insofar as both accused-appellants Reynaldo Santos, Jr., and Maria A. Ressa are sentenced to suffer the indeterminate penalty of imprisonment ranging from six (6) months and one (1) day of *prision correccional* in its minimum period, as minimum, to six (6) years , eight (8) months and twenty (20) days of *prision mayor* in its minimum period, as maximum.

SO ORDERED.

Subsequently, the Court of Appeals rendered a Resolution dated October 10, 2022, denying defendants-appellants' Motion for Reconsideration, the dispositive part of which reads:

In conclusion, it [is] worthy and relevant to point out that the conviction of the accused-appellants for the crime of cyberlibel punishable under the Cybercrime Law is not geared towards the curtailment of the freedom of speech, or to produce an unseemingly chilling effect on the users of cyberspace that would possibly hinder free speech. On the contrary, We echo the wisdom of the Supreme Court in the *Disini* case that the purpose of the law is to safeguard the right of free speech, and to curb, if not totally prevent, the reckless and unlawful use of the computer systems as a means of committing the traditional criminal offense, to wit:

x x x

The constitutional guarantee against prior restraint and subsequent punishment, the jurisprudential requirement of "actual malice," and the legal protection afforded by "privilege communications" all ensure that protected speech remains to be protected and guarded. As long as the expression or speech falls within the protected sphere, it is the solemn duty of courts to ensure that the rights of the people are protected.

WHEREFORE, the motion for reconsideration is **DENIED**.

SO ORDERED."

There is now a plan to go to the Supreme Court on a Petition for Review of the Court of Appeals Decision and Resolution.

I have been requested by the International Bar Association Human Rights Institute (IBAHRI) to prepare and submit an Independent Expert Report on the Maria Ressa case.

The following facts are salient:

The original "publication" on the matter was in the website of Rappler on May 29, 2012.

At that time, the Cybercrime Prevention Act of 2012 (Republic Act No. 10175) had not yet been approved, such approval having been on September 12, 2012.

Accordingly, the crime, if any, committed through such digital publication was that of libel under Art. 353 in relation to Art. 355 of the Revised Penal Code. This crime had a prescriptive period of one year.

There has been no prosecution for the crime of libel under the Revised Penal Code on the basis of the digital article within one year and even up to now.

The prosecution was for the new crime of cyber libel, under Republic Act No. 10175, approved as stated on September 12, 2012, on the footing that a new act of publication took place, a republication, per the Information, on February 9, 2014.

The parties, as stated agreed, to repeat, as follows:

5. That the Article specified in the Information was published on the website of Rappler, Inc. on May 29, 2012;

6. That the said Article was updated on February 9, 2014;

Now, the crux of this case lies on the nature of the so-called "update" done on February 9, 2014. What precisely is this "updated" article that makes it **different** from the May 29, 2012 article that was published earlier?

Fortunately for Maria Ressa and Reynaldo Santos, Jr., and unfortunately for the prosecution, as the trial judge observed, there was absolutely NO EVIDENCE on what was the alleged change made in the original article of May 29, 2012 that makes the "updated" February 9, 2014 article **different from it**. All the evidence on the matter, stated the trial judge, were HEARSAY, and thus cannot be considered.

Said the trial court in its decision:

> "The defense, in its attempt to contest that there was republication (sic) of the article, maintained that the same was merely updated because there was a correction of an alleged typographical error. Hofileña, however, failed to adduce evidence indicating the error she was referring to. She failed to substantiate her testimony with documentary evidence, making it self-serving and deserving of scant consideration from this (c)ourt.
>
> In any case, the testimony of Hofileña regarding said typographical error is hearsay. It is striking that the defense did not present Accused Santos Jr. being the author of the subject article, to confirm the existence of the typographical error. They also did not present the reporter who allegedly corrected such error.
>
> In presenting witness Hofileña, the defense did not adduce any evidence to establish her personal involvement in the writing of the article or in updating it. This makes her testimony on the correction of the typographical error and updating of the article hearsay. As such, said testimony is inadmissible."

Accordingly, the two articles must be deemed THE SAME.

If so, then the article as originally posted on May 29, 2012, must be governed by the law then prevailing, namely, the Revised Penal Code, INCLUDING THE PRESCRIPTIVE PERIOD of one year thereunder.

It cannot be brought under the ambit of the New Cybercrime Prevention Act approved only on September 12, 2012, as the bedrock principle embodied in our Constitution is that an act must be governed by the criminal law in force at the time it is committed. NO EX POST FACTO LEGISLATION SHALL BE ENACTED (Art. III, Sec. 22, Philippine Constitution).

Furthermore, the crime under the Revised Penal Code is DIFFERENT from the crime under Republic Act No. 10175.

Libel is a different crime from cyber libel.

The instant prosecution is for the crime of cyber libel for an act that was only libel when it was committed. The consequences are enormous, both in terms of the different elements, penalties and the prescriptive periods that are provided respectively.

From the records of this case, there is no way, no evidentiary way, of telling the difference between the May 29, 2012 publication and the February 9, 2014 publication. NO COPY OF THE MAY 29, 2012 PUBLICATION WAS ADDUCED.

Considering the standard presumption that things stay the same, and in light of the doctrine of the Supreme Court in the *Disini* case that a digital posting differs substantially from a print publication and the finding of the Court of Appeals pursuant thereto, in its Resolution of October 10, 2022, that a digital article STAYS POSTED CONTINUOUSLY unlike a printed article, then the February 9, 2014 article in the absence of competent evidence, must be deemed the same as the May 29, 2012 article.

Finally, the prosecution was not without means to prove that the two articles were different. From the tools of digital forensics, which any decent forensics investigator should know, it should have presented evidence of the forensic image of the first (May 29, 2012) article accompanied by its **hash value** (the string of unique characters that only that precise article can generate) and compare it with the forensic image of the February 9, 2014 article and the correspondent **hash value** of the said article. If the two articles were different, their **hash values** would be different. NO SUCH EVIDENCE WAS PRESENTED.

As it is, moreover, there is absolutely no evidence of how the original article appears, whether visually or forensically, as all the prosecution presented was the February 9, 2014 article.

There is therefore nothing to support the prosecution's allegation that the February 9, 2014 article is a new act of libel falling under the new cyber libel case, as there is no showing that said article IS NOT THE SAME AS THE ALREADY PRESCRIBED May 29, 2012 article that naturally remains in the digital realm.

As succinctly stated by the Court of Appeals in its Resolution of October 10, 2022:

> By the same token, We cannot simply disregard that the stark distinction between traditional publication and online publication, on the matter of permanence in circulation of a defamatory article, warrants the different prescriptive period provided for the crimes of cyberlibel and traditional libel. As it is, in the instance of libel through traditional publication, the libelous article is only released and circulated once – which is on the day when it was published. However, such is not the case for online

publication wherein upon release of the defamatory article on cyberspace, the commission of such offense is continuous since the such article remains therein in perpetuity unless taken down from all online platforms where it was published, or when another article retracting or clarifying such defamatory article is published.

What then was the update if not a change in the content? Again, it has to do with the nature of a digital post. A digital post has both a data part which is the content we view, and a metadata part which we do not see but which records or carries information about the post, such as how many viewers have seen it so far and even how many repeat viewers (the so-called unique visitors) have seen it so far. An update of the metadata will not change the data and is thus not a republication of the article.

Since there is no evidence of any change in the data, the update must be taken to refer to the metadata of the post which contains the record of the history of a digital post as it remains in the digital realm continuously.

The convictions should be **REVERSED** and **SET ASIDE** and the defendants-appellants **ACQUITTED**.

RESPECTFULLY SUBMITTED.

October 24, 2022.

JUSTICE (Ret.) ADOLFO S. AZCUNA
IBP Lifetime Member No. 03913
IBP Manila IV Chapter
Roll of Attorney No. 17854
Exempt from MCLE
140 CRM Ave., BF Homes Almanza Dos
Las Piñas City 1750

NOTE

Disini I

Disini v. Secretary of Justice, G.R. Nos. 203335, et al., February 18, 2014.

Disini II

Disini v. Secretary of Justice, G.R. Nos. 203335, et al., April 22, 2014.