

**Republic of the Philippines
National Capital Judicial Region
REGIONAL TRIAL COURT
Branch 46**

Criminal Case No. R-MNL-19- 01141-CR

**PEOPLE OF THE PHILIPPINES
*Plaintiff,***

=versus-

**REYNALDO SANTOS JR.,
MARIA ANGELITA RESSA, and
RAPPLER, INC.,
*Accused.***

**BRIEF OF AMICI CURIAE SUBMISSION BY DAVID KAYE, UNITED NATIONS
SPECIAL RAPPORTEUR ON THE RIGHT TO FREEDOM OF OPINION
AND EXPRESSION**

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I. INTRODUCTION

The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, submits this brief as *amicus curiae* to the Supreme Court of the Philippines.¹ The case before this Court concerns criminal charges filed by the Philippines government against Maria Ressa, a journalist and co-founder of Rappler.com.²

It is customary to emphasize in the context of *amicus* filings that any submission by the Special Rapporteur is provided on a voluntary basis without prejudice to, and should not be considered as a waiver, express or implied, of the privileges and immunities of the United Nations, its officials and experts on missions, pursuant to the 1946 Convention on the Privileges and Immunities of the United Nations. Authorization for the positions and views expressed by the Special Rapporteur, in full accordance with his independence, was neither sought nor given by the United Nations, the Human Rights Council, the Office of the High Commissioner for Human Rights, or any of the officials associated with those bodies.

II. THE INTEREST OF THE SPECIAL RAPPORTEUR IN THE RESOLUTION OF THIS MATTER

The International Covenant on Civil and Political Rights (“ICCPR”), which the Philippines ratified on October 23, 1986, establishes the obligations of State parties to respect and ensure the right to freedom of opinion (Article 19(1)) and the right to freedom of expression (Article 19(2)). The Human Rights Council, the central human rights institution of the United Nations (“U.N.”), has affirmed that freedom of opinion and expression is “essential for the enjoyment of other human rights and freedoms and constitutes a fundamental pillar for building a democratic society and strengthening democracy.”³ As a State party, the Philippines is bound to uphold these obligations “in good faith” and may not invoke “the provisions of its internal law as justification for its failure to perform a treaty.”⁴

U.N. Human Rights Council resolution 7/36, Section 3(c), mandates the Special Rapporteur to “make recommendations and provide suggestions on ways and means to better promote and protect the right to freedom of opinion and expression in all its manifestations.”⁵ Under the mandate, these recommendations are based on an analysis of international human rights law, including relevant jurisprudence, standards, and international practice, as well as

¹ The Special Rapporteur would like to thank Samira Abrar, Sonja Larondelle-Jordan, and Dylan Gera in their role as student advocates with the University of California Irvine School of Law International Justice Clinic, for their assistance with the preparation of the brief.

² Maria Ressa is a journalist and author and serves as co-founder and chief executive officer of Rappler.com. According to information received by his office, the Special Rapporteur understands that, on March 1, 2018, the Department of Justice (“Department”) of the Philippines recommended Ressa and others for prosecution. The Department has accused Ressa of “cyberlibel” under section 4, paragraph (c), sub-paragraph (4) of the Cybercrime Prevention Act of 2012. The accusations stem from an allegedly defamatory article published via Rappler’s website on May 29, 2012. The Department alleges that because the article is still available on the internet, the statute of limitations continues to run. The penalty for “cyberlibel” under the Philippine’s penal code is a prison sentence ranging from four years, two months, and one day to eight years.

³ Human Rights Council Res. 23/L.5, at ¶2, U.N. Doc. A/HRC/23/L.5 (April 9, 2014).

⁴ Vienna Convention on the Law of Treaties arts. 26-27, May 23, 1969 1155 U.N.T.S. 331.

⁵ Human Rights Council Res. 7/36 at ¶3(c), U.N. Doc. A/HRC/7/36 (Mar. 28, 2008).

relevant regional and national laws, standards, and practices. The laws and practices at issue in this case raise critical issues concerning their compatibility with international human rights law and the degree to which they infringe upon fundamental rights to freedom of opinion and expression.

III. THE PHILIPPINES' OBLIGATIONS TO GUARANTEE THE RIGHT TO FREEDOM OF OPINION AND EXPRESSION.

Article 19(1) of the International Covenant on Civil and Political Rights (“ICCPR”) protects the right to “hold opinions without interference.” Article 19(2) of the ICCPR provides for the freedom of expression and states that this right shall include the “freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media or his [or her] choice.” Article 19(3) states that specific conditions must be met before a state imposes restrictions on this freedom. Specifically, the restrictions must be provided by law and may only be enacted for “respect of the rights or reputations of others” or the protection of “national security [...] public order [or] public health or morals.” In addition, any restrictions must conform to the boundaries of necessity and proportionality.

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

- a. *Restrictions must be provided by law.* Any restriction “must be made accessible to the public” and formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly.” In addition, the restriction “must not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution.”
- b. *Restrictions must only be imposed to protect legitimate aims, which are limited to those specified under article 19(3).* The terms “rights...of others” under article 19(3)(a) includes “human rights as recognized in the Covenant and more generally in international human rights law.”
- c. *Restrictions must be necessary to protect legitimate aims.* The requirement of necessity implies an assessment of the proportionality of restrictions, with the aim of ensuring that restrictions “target a specific objective and do not unduly intrude upon the rights of targeted persons.”⁶ Any interference with third parties’ rights must also be limited and justified. The restrictions must further be “the least intrusive instrument among those which might achieve the desired result.”⁷

⁶ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, U.N. Doc. A/HRC/29/32 (May 22, 2015).

⁷ U.N. Doc. CCPR/C/GC/34 at ¶22 (Sep. 12, 2011).

IV. THE PROTECTION OF JOURNALISTS IS PARTICULARLY IMPORTANT FOR GUARANTEEING THE RIGHTS TO FREEDOM OF OPINION AND EXPRESSION.

The repression of journalists and media freedom throughout the world is a topic of concern and presents a serious impediment to the freedom of opinion and expression. Journalism is an activity and profession that “constitutes a necessary service for any society, and provides individuals and society as a whole with the necessary information” to allow them to develop their own thoughts and opinions. As such, the protection of journalists is essential for guaranteeing the right to freedom of expression and opinion.⁸

Journalistic expression, especially expression about public and political issues, is particularly protected by the right to freedom of expression as guaranteed by Article 19. The U.N. Human Rights Committee’s General Comment 34 to Article 19 of the International Covenant on Civil and Political Rights recognizes that “journalists are frequently subjected to [...] threats, intimidation and attacks” because of their work and, for this reason, must be afforded protection under the ICCPR. Further, General Comment No. 34 states that “the penalization of a media outlet [...] or journalist solely for being critical” of the government can never be considered as a necessary restriction on freedom of expression.⁹

The Human Rights Committee has determined that a free, uncensored, and unhindered press “constitutes one of the cornerstones of a democratic society,” and that States are required to “take all necessary steps to foster the independence of [...] new media and to ensure access of individuals thereto.”¹⁰ (CCPR/C/GC/34 at para. 13.)

The importance of the freedom of expression of journalists is further highlighted in Human Rights Council Resolution 21/12 on safety of journalists adopted on 27 September 2012, which “condemns in the strongest terms all attacks and violence against journalists, such [...] arbitrary detention, as well as intimidation and harassment” and “calls upon States to ensure accountability through the conduct of impartial, speedy and effective investigations into such acts falling within their jurisdiction, and to bring to justice those responsible and to ensure that victims have access to appropriate remedies.”¹¹

Moreover, the United Nations General Assembly adopted Resolution 68/163, which “[c]alls upon states to promote a safe and enabling environment for journalists to perform their work independently, and without undue influence.” The Resolution by the General Assembly further urges Members of the United Nations to “do their utmost to prevent violence against journalists and media workers” and “condemns unequivocally all attacks and violence against journalists [...] such as torture, enforced disappearances and arbitrary detention, as well as intimidation and harassment in both conflict and non-conflict situations.”¹²

⁸ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, U.N. Doc. A/HRC/20/17 (June 4, 2012).

⁹ *Id.* at ¶23

¹⁰ *Id.* at ¶13

¹¹ H.R.C. Res. 21/12 (Oct. 9, 2012).

¹² G.A. Res. 68/163 (Feb. 21, 2014).

In addition, the Human Rights Council has recently condemned unequivocally measures which “intentionally prevent or disrupt access to [...] information online and offline, which undermine the work of journalists in informing the public, including measures to [...] block or take down media websites.” In the same Resolution, the Human Rights Council calls upon states to “ensure that defamation and libel laws are not misused [...] to illegitimately or arbitrarily censor journalists and interfere with their mission of informing the public.”¹³ (See discussion, *infra*, section **V**).

V. THE PHILIPPINES’ LAWS GOVERNING DEFAMATION INFRINGE ON THE RIGHTS TO FREEDOM OF OPINION AND EXPRESSION.

A. Defamation laws must be narrowly tailored in order to guarantee the rights to freedom of opinion and expression.

Defamation concerns communications about the reputation of another person. Former UN Special Rapporteur on Freedom of Opinion and Expression, Ambeyi Ligabo, has defined defamation as “an intentional false communication that injures another person’s reputation, being the communication without the consent of the allegedly defamed person.”¹⁴ Libel is defamation communicated in writing.

In discussing defamation issues, it is important to give particular priority to the right to criticize, which

is a fundamental part of freedom of expression and of the correct functioning of a democratic society, especially on matters of public interest. Of course, this exercise can also involve criticism of individuals, particularly States’ high-ranking officials and political personalities.¹⁵

Although defamation laws are not *per se* contrary to the right of freedom of expression, human rights law seeks to constrain the situations in which defamation may be an available legal action because of the risk of interference with the right to freedom of expression. A major concern expressed in human rights law commentary is the criminalization of defamation and libel.

The Human Rights Council has expressed continuing concerns with respect to the “abuse of legal provisions on defamation and criminal libel.”¹⁶ The Human Rights Committee urges States to “consider the decriminalization of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is

¹³ H.R.C. Res. 39/6 (Oct. 5, 2018).

¹⁴ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Ambeyi Ligabo, Civil and Political Rights, Including the Question of Freedom of Expression, UN. Doc. E/CN.4/2006/55, ¶45, 30 December 2005

¹⁵ *Id.* at ¶47

¹⁶ Human Rights Council RES 12/16, Freedom of Opinion and Expression, UN. Doc. A/HRC/RES/12/16, at ¶3, 12 October 2009

never an appropriate penalty.”¹⁷ The Committee recommends that in dealing with defamation cases, “a public interest in the subject matter of the criticism should be recognized as a defense.”¹⁸

Of particular concern is the use of defamation laws by States, government officials and private actors in a way that prevents criticism of public figures. A number of national, regional and international courts have held that, in defamation cases, a public figure gets less legal protection, because being a public figure by choice, and voluntarily involved in public matters, draws and demands public scrutiny.¹⁹ The Human Rights Committee has also noted that,

in circumstances of public debate concerning public figures in the political domain and public institutions, the value placed by the Covenant upon uninhibited expression is particularly high. Thus, the mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties, albeit public figures may also benefit from the provisions of the Covenant. Moreover, all public figures, including those exercising the highest political authority such as heads of state and government, are legitimately subject to criticism and political opposition [...] laws should not provide for more severe penalties solely on the basis of the identity of the person that may have been impugned. States parties should not prohibit criticism of institutions, such as the army or the administration.”²⁰

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

In addition, States often lack public interest defenses in their defamation laws. The U.N. Special Rapporteur on Freedom of Opinion and Expression has noted that:

Particularly with respect to public figures, national laws should be careful to ensure that any respondent in a defamation case may raise a public interest defense, and even untrue statements made in error and without malice should not be rendered unlawful or subject to penalty.²¹

The above discussion is not theoretical. Many countries around the world are abusing defamation laws to infringe on the rights to freedom of expression. For example:

[J]ournalists and writers are regular targets of defamation prosecutions or civil lawsuits. In Angola, for instance, the Government charged and convicted an author of criminal defamation upon publication of a book on conflict diamonds and corruption in the

¹⁷ Human Rights Committee, General Comment No. 34, CCPR/C/GC/34, at ¶47, 12 September 2011 (*quoting* concluding observations on Italy (CCPR/C/ITA/CO/5); concluding observations on the Former Yugoslav Republic of Macedonia (CCPR/C/MKD/CO/2)

¹⁸ *Id.*

¹⁹ See discussion, *infra*, section A.1.

²⁰ U.N. Doc. CCPR/C/GC/34 at ¶ 38 (12 Sept. 2011)

²¹ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, promotion and protection of the right to freedom of opinion and expression, UN. Doc. A/71/373 at ¶ 34, 6 September 2016

country. Honduran officials have reportedly intimidated journalists and human rights defenders on charges of defamation. In Tajikistan, while the Government has eliminated criminal penalties for defamation in most cases (but not for defamation of the President), government officials may still bring civil defamation lawsuits against journalists or publishers.²²

In light of these threats, the Special Rapporteur has called on governments to “refrain from introducing new norms which will pursue the same goals as defamation laws under a different legal terminology such as disinformation and dissemination of false information.”²³

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

The European Court of Human Rights (“ECtHR”) and Inter-American Court of Human Rights (“IACtHR”) in particular have developed a number of principles to resolve the problems that typically arise in defamation cases. These principles have been embraced by other treaty bodies and Special Rapporteurs. These principles include:

- True statements in general enjoy greater protection than false statements²⁴
- Demanding the proof of opinions and value judgments, however, is not compatible with freedom of expression as opinions cannot be judged according to the standard of right and wrong with the consequence that proving their veracity is an impossible task²⁵
- Statements on issues of public interest also enjoy greater protection²⁶
- Politicians and public figures must tolerate greater criticism because they knowingly lay themselves open to public scrutiny²⁷

The African Commission on Human and Peoples’ Rights condemns using criminal defamation laws against journalist and the media, emphasizing that: “Criminal defamation laws constitute a serious interference with freedom of expression and impedes on the role of the media as a watchdog, preventing journalists and media practitioners to practice their profession without fear and in good faith”²⁸

²² *Id.*

²³ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Ambeyi Ligabo, Implementation of General Assembly Resolution 60/251, UN. Doc. A/HRC/4/27, ¶82, 2 January 2007

²⁴ Principle 12 (1) ACommHPR Declaration; Grote and Wenzel, ¶119)

²⁵ Report of UN Special Rapporteur A Hussain [18 January 2000] para. 52; Lingens v Austria [ECtHR] Series A No 103, ¶46

²⁶ Herrera-Ulloa v Costa Rica para. 127; Oberschlick v Austria [ECtHR] Series A No 204, ¶58

²⁷ Rights Agenda and Constitutional Rights Project v Nigeria, ¶ 74; Principle 12 ACommHPR; Castells v Spain [ECtHR] Series A No 236, ¶46; Feldek v Slovakia [ECtHR] Reports 2001-VIII ¶74

²⁸ African Commission: “Resolution 169 on Repealing Criminal Defamation Laws in Africa” 48th Ordinary, ACHPR/Res.169(XLVIII)10. The East African Court of Justice has reprehended unjustifiable content restriction and held that “government should not determine what ideas or information should be placed in the market place,” and that any restriction “must be proportionate and reasonable” and not “arbitrary, unfair or based on irrational considerations.” Burundian Journalists Union v Attorney-General of the Republic of Burundi EACJ Reference 7 of

In summary, using defamation laws in vexatious ways discussed above deter journalists in acting as “public watchdog” on government accountability and in providing forums for public debate on matters of public concern.²⁹ This in turn affects the public’s access to information on matters of public interest and concern.

B. The Philippines’ laws governing defamation raise serious concerns pertaining to the rights to freedom of opinion and expression.

Despite the clear statement from international human rights bodies above, the Philippines criminalizes defamation. Under the country’s Revised Penal Code, and affirmed in the Cybercrime Prevention Act of 2012, libel is defined as “a public and malicious imputation of a crime, or of a vice or defect, real or imaginary, or any act, omission, condition, status or circumstance tending to cause dishonor, discredit or contempt of a natural or juridical person, or to blacken the memory of one who is dead.”³⁰ The law also penalizes crimes against honor, libel and slander.³¹

The Human Rights Committee has found the Revised Penal Code and the Cybercrime Prevention Act contrary to human rights law. In the concluding observations on the fourth periodic report of the Philippines, the UN Human Rights Committee declared Philippines’ criminalization of libel “incompatible” with the freedom of expression clause in the International Covenant on Civil and Political Rights. The Committee stated that it “regrets that the Cybercrime Prevention Act of 2012, . . . , criminalizes libel over the Internet (arts. 2 and 19).”³²

The view of the Human Rights Committee stated above was in response to the imprisonment of the Filipino radio journalist Alex Adonis in 2007. The Committee affirmed that Philippines is “under an obligation to take steps to prevent similar violations occurring in the future, including by reviewing the relevant libel legislation.”³³ However, Philippines did not take any step to address the issue in light of the Committee’s decision.

The Cybercrime Prevention Act, *inter alia*, further extends the criminal defamation provisions into the online realm, and into “any other similar means which may be devised in the future.”³⁴

2013, available

at: <http://www.mediadefence.org/sites/default/files/files/20150515%20EACJ%20Burundi%20Press%20Law%20judgment.pdf>.

²⁹ Erla Hlynisdottir v. Iceland (no. 2), Appl. No. 54125/10, ¶57

³⁰ See The Revised Penal Code of The Philippines (Act No. 3815) Article 353, available at https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/PHL_revised_penal_code.pdf

³¹ *Id.* length of incarceration, see articles 355, 358, and 359

³² Concluding observations on the fourth periodic report of the Philippines, UN. Doc. CCPR/C/PHL/CO/4 at ¶21 (13 November 2012)

³³ Alexander Adonis v. The Philippines, Communication No. 1815/2008, U.N. Doc. CCPR/C/103/D/1815/2008/Rev.1 (2012)

³⁴ The Philippines Republic Act (R.A.) 10175, the Cybercrime Prevention Act of 2012, sec. 4(c)(4)

In light of the above, penal sanctions under the Revised Penal Code of the Philippines and the current Cybercrime Prevention Act raise serious concerns under the State's obligation to protect the right to freedom of expression under Article 19 of the ICCPR.

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

A. Online speech is an exercise of freedom of expression protected under Article 19(2).

It is a longstanding, international principle recognized by the UN General Assembly, the Human Rights Council, the Human Rights Committee, and State bodies that the rights afforded to persons offline must also be protected online.³⁵ This principle applies in particular to the right to freedom of expression in Article 19 of the ICCPR, which explicitly states that it is applicable regardless of frontiers and through any media of one's choice.³⁶

Article 19(2) was broadly drafted to accommodate future advances in technology such as online journalism: States parties chose to adopt the general phrase "through any other media of his choice," as opposed to an enumeration of then-existing media.³⁷ The UN General Assembly, the Human Rights Council, and the Human Rights Committee have further provided that permissible restrictions on online speech must be the same as those offline.³⁸ As stated in the Human Rights Committee's General Comment 34, "paragraph [19]2 protects all forms of expression and the means of their dissemination" which includes the means of "electronic and internet-based modes of expression."³⁹ Therefore, the article published on Rappler.com is expressive activity protected under Article 19(2).

Based on these tenets, the international principles on defamation stated above, including the narrow permissible restrictions on freedom of expression for defamation purposes allowed by Article 19(3), apply equally to online journalists and media sources. Accordingly, as discussed below, the Philippines' Cyber Libel law raise serious concerns under international law by not only (1) narrowly defining and punishing online defamation beyond the permissible scope

³⁵ See, e.g. H.R.C. Res. 32/13, The Promotion, Protection and Enjoyment of Human Rights on the Internet, ¶ 1 (July 18, 2016) available at <https://documents-ddsny.un.org/doc/UNDOC/GEN/G16/156/90/PDF/G1615690.pdf?OpenElement>; G.A. Res. 68/167, The Right to Privacy in the Digital Age, ¶3 (Jan. 21, 2014) available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N13/449/47/PDF/N1344947.pdf?OpenElement>; Human Rights Council Res. 26/13, The Promotion, Protection and Enjoyment of Human Rights on the Internet, ¶ 1 (July 14, 2014) available at https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/32/13; Council of Europe CM/Rec (2014) (Apr. 16, 2014) available at https://www.coe.int/en/web/freedom-expression/committee-of-ministers-adopted-texts/-/asset_publisher/aDXmrol0vvsU/content/recommendation-cm-rec-2014-6-of-the-committee-of-ministers-to-member-states-on-a-guide-to-human-rights-for-Internet-users-adopted-by-the-committee-of-101_INSTANCE_aDXmrol0vvsU_viewMode=view/.

³⁶ H.R.C. Res. 32/13 (July 18, 2016); see also G.A. Res. 68/167 (Jan. 21, 2014).

³⁷ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, U.N. Doc. A/HRC/29/32 at ¶26 (May 22, 2015) ("2015 Report").

³⁸ See G.A. Res. 68/167, at ¶3 (Jan. 21, 2014); A/HRC/26/13 at ¶1 (July 14, 2014); H.R.C. Res. 32/13, The Promotion, Protection and Enjoyment of Human Rights on the Internet, ¶ 1 (June 27, 2016); U.N. Doc. CCPR/C/GC/34 (Sep. 12, 2011).

³⁹ U.N. Doc. CCPR/C/GC/34 at ¶12 (Sep. 12, 2011).

allowed by Article 19, but also by (2) running counter to the widespread consensus among global legal bodies and experts that the same rules that apply to offline speech apply to sources of information and ideas on the internet.

B. Laws that protect online speech are of particular importance to ensuring freedom of expression.

In a Resolution adopted on July 18, 2016 on the Promotion, Protection and Enjoyment of Human Rights on the Internet, the Human Rights Council emphasized that “the exercise of human rights, in particular the right to freedom of expression, on the Internet is an issue of increasing interest and importance, as the rapid pace of technological development enables individuals all over the world to use new information and communications technology.”⁴⁰ The Council stressed the “importance of building confidence and trust in the Internet, not least with regard to the freedom of expression . . . so that the potential of the Internet as . . . an enabler for development and innovation can be realized, with full cooperation between Governments, civil society, the private sector, the technical community and academia.”⁴¹

The Special Rapporteur has previously emphasized the importance of internet freedom: “the Internet is an important and related tool in the promotion of human rights and an effective means to disseminate information on civil, cultural, economic, political and social rights and violations of them.”⁴² Without access to information, “corruption flourishes, press freedom is compromised, and powerful private actors can effectively buy secrecy even for information that reveals serious threats to public health and safety.”⁴³ Additionally, the internet can serve as a powerful tool against “reducing global inequality and the marginalization of both people and nations.”⁴⁴

However, to reap these benefits, State restriction on online speech, as with offline speech, must adhere strictly to the conditions of Article 19(3) of the ICCPR. For over 20 years, the Special Rapporteur has reminded “[S]tates that they must also ensure that there is adequate and unfettered social and political space in which the new technologies can be developed in a self-regulating environment and where the exercise and enjoyment of the rights to expression, opinion, information, association and assembly can flourish. In the absence of freedom from excessive regulation and adequate space for expression, participation and action, the results of research will have no meaning and genuine participation, progress and human development will not happen.”⁴⁵

⁴⁰ H.R.C. Res. 32/13 at 2 (18 July 2016).

⁴¹ *Id.*

⁴² UN Special Rapporteur on Freedom of Opinion and Expression, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2001/64 at ¶59 (2001); *see also* UNDP Human Development Report 2000 available at http://hdr.undp.org/sites/default/files/reports/261/hdr_2000_en.pdf.

⁴³ UNDP Human Development Report 2000.

⁴⁴ *Id.*

⁴⁵ UN Doc. E/CN.4/2001/64 at ¶69 (2001).

C. Cyber laws that have stricter regulations for online expression, like the Philippines' Cybercrime Prevention Act of 2012, violate Article 19.

Cyber laws like the Philippines' Cybercrime Prevention Act that impose enhanced penalties for online defamation over offline defamation restrict the right to freedom of expression and are subject to the narrow requirements of Article 19(3).

Under the Article 19(3) requirement of legality, it is not enough that restrictions on freedom of expression are formally enacted as domestic laws or regulations. Restrictions must also be sufficiently clear, accessible and predictable.⁴⁶

The Article 19(3) requirement of necessity implies an assessment of the proportionality of restrictions, with the aim of ensuring that restrictions “target a specific objective and do not unduly intrude upon the rights of targeted persons.”⁴⁷ The ensuing interference with third parties' rights must also be limited and “justified in light of the interest supported by the intrusion.”⁴⁸ Finally, the restrictions must be “the least intrusive instrument among those which might achieve the desired result.”⁴⁹ It follows that “[a]ny restrictions on the operation of websites, blogs or any other internet-based, electronic or other such information dissemination system . . . are only permissible to the extent that they are compatible with [Article 19(3) of the ICCPR].”⁵⁰ The Human Rights Council has also “[c]ondemn[ed] unequivocally measures to intentionally prevent or disrupt access to or dissemination of information online in violation of international human rights law and call[ed] on all States to refrain from and cease such measures.”⁵¹

Additionally, the Human Rights Council frequently refers to the weight attached to freedom of expression in a democratic society. The restriction must be required by a compelling State interest which clearly outweighs the social need for protecting freedom of expression and has to be proportional to the purpose pursued by the State.⁵² Without appropriate limits, government restrictions on online speech deter individuals from exercising the freedom of expression for fear of unwarranted penalties, such as high civil fees, criminal charges, or imprisonment. In the digital context, the Special Rapporteur has urged States to repeal similar laws that overregulate the freedom expression online.⁵³

⁴⁶ See *Id.* at ¶25.

⁴⁷ 2015 Report at ¶35 (22 May 2015).

⁴⁸ *Id.*

⁴⁹ *Id.* (quoting Human Rights Committee, general comment No. 27 CCPR/C/21/Rev.1/Add.9 (1999) on freedom of movement, ¶ 14).

⁵⁰ U.N Doc. CCPR/C/GC/34 at ¶ 43 (12 Sept. 2011).

⁵¹ H.R.C. Res. 32/13 at ¶10 (18 July 2016).

⁵² See U.N Doc. CCPR/C/GC/34 at ¶34 (“For instance, the value placed by the Covenant upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain.”).

⁵³ See *e.g.* OL PAK 13/2015 at 3

<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=22604>;
UA SAU 13/2014

<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=17761>;
UA G/SO 214 (67-17) THA 1/2014

<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=18185>;

The Cybercrime Prevention Act of 2012 presents concerns that it is neither sufficiently clear nor predictable. Its potential application to individuals years after the posting of an article, under the guise of online continuous publication, raises particular concerns under the right to freedom of expression. Such application may significantly chill freedom of expression by not clearly delineating to either authorities or online writers when a violation of the law has occurred. It also serves to restrict online expression in the Philippines much more than offline expression.

Moreover, the Cybercrime Prevention Act of 2012 regulates the online space more severely than the widely held defamation principles for offline speech stated in section two.⁵⁴ For example, the law penalizes criticism of public figures and imposes higher civil and/or criminal penalties than is the case for offline defamation.⁵⁵ Additionally, as stated above, it is widely recognized that the chilling effect these restrictions cause on freedom of expression outweigh the state purpose to protect the rights or reputations of public figures. In light of the additional importance of low online regulation to protect the internet as a tool for realizing other protected rights, the Cybercrime Prevention Act of 2012 appears disproportionate to its stated goals.

“Continuous publication,” deployed as an argument to extend the statute of limitations in the online context, unduly penalizes online speech more harshly than print media. The Philippines’ authorities’ interpretation of internet publication as “continuous” to create more severe regulations of online speech go against the tenets of Article 19.⁵⁶

Because its current cyber-libel laws effectively extend the statute of limitations for allegedly libelous content posted to the internet indefinitely, the law may impermissibly stifle freedom of expression. The criminalization of defamation has itself been criticized by the United Nations as impermissibly restricting freedom of expression except in the most egregious of circumstances. In particular, such indefinite extension of legal jeopardy seems neither necessary nor proportionate under Article 19.

VII. CONCLUSION

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<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=22689>; see also Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, U.N. Doc. A/HRC/38/35 at ¶65 (April 6, 2018) (“States should repeal any law that criminalizes or unduly restricts expression, online or offline.”); UN Doc. E/CN.4/2001/64 at ¶59 (2001).

⁵⁴ See *infra* Section II: Defamation.

⁵⁵ *Id.*

⁵⁶ Many states adhere to a “single publication” doctrine, which provides that the statute of limitations for an alleged defamation crime on the internet begins running once the content has first been publicly published. The Delhi High Court of India, for instance, has adopted a “single publication rule” in regard to alleged defamatory content posted on the internet. The court found that if the mere presence of alleged defamatory material on a website amounted to a continuous cause of action, the entire purpose of a statute of limitations would be irrelevant. The Court did note that a fresh cause of action might arise in the case of explicit “republication.” *Khawar Butt v. Asif Nazir Mir*. CS(OS) 290/2010. <https://globalfreedomofexpression.columbia.edu/cases/khawar-butt-v-asif-nazir-mir/>

Journalistic expression, including expression about public and political issues, is especially protected by the right to freedom of expression as guaranteed by Article 19 of the ICCPR. In addition, under international law, defamation laws must be narrowly tailored in order to guarantee the rights to freedom of opinion and expression. Criminalizing defamation and using these laws in to deter journalists from acting as a “public watchdog” on government accountability and in providing forums for public debate on matters of public concern is contrary to the intent and purpose of Article 19. Online speech is an exercise of freedom of expression protected under Article 19(2), and restriction on online speech should not be more strict or limiting than offline speech.