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Philippines: actions against Rappler, Inc. threaten Freedom of Expression

The ICJ today expressed concern about the impacts on freedom of expression of a decision by the Securities and Exchange Commission (SEC) that would shut down Rappler, an online news source in the Philippines.

On 11 January, after a year-long investigation, the SEC of the Philippines revoked the Certificate of Incorporation of Rappler, Inc.

The ICJ is concerned that the decision to target Rappler may have been retaliatory and politically motivated.

The investigation was initiated by a letter transmitted by the Solicitor General to the SEC requesting the latter to investigate allegations of foreign ownership of Rappler, Inc.

"The cancellation of the Certificate of Incorporation of Rappler, Inc. constitutes a significant restriction on freedom of expression," said Emerlynne Gil, ICJ's Senior International Legal Adviser.

"The Courts must give rigorous scrutiny both to the specific basis the authorities offer for the decision concerning Rappler, Inc., and the scope and application of the foreign equity provision more generally, including an inquiry whether the law is being applied in a proportionate and non-discriminatory manner," she added.

If such restrictions on freedom of expression are enforced with the actual aim of punishing or preventing critical political expression, or are enforced only against some political or other opinions and not others, this would violate the rights to freedom of expression and non-discrimination under the Philippine Constitution and international human rights law, the ICJ adds.

Further, under international human rights law any restriction on freedom of expression must be limited to what is necessary and proportionate both in relation to the legitimate aim it pursues and in relation to its impacts.

For instance, it would not be consistent with international human rights law to prohibit all foreign ownership of mass media or mass-media-owning entities, unless the government was able to demonstrate that the same legitimate aim could not reasonably be achieved by prohibiting only majority foreign ownership.

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Background:

The SEC based its decision on its findings that Rappler, Inc. violated the foreign equity restriction provision in the 1987 Philippine Constitution, which provides that "ownership and management of mass media shall be limited to citizens of the Philippines, or to corporations, cooperatives or associations, wholly-owned and managed by such citizens."

The investigation was apparently initiated in December 2016 by a letter transmitted by the Solicitor General to the SEC requesting the latter to investigate allegations of foreign ownership of Rappler, Inc. This request followed statements in which President Duterte had publicly expressed displeasure at the way the online site was reporting about his administration.

The SEC found that in 2015 Rappler, Inc. issued Philippine Depositary Receipts (PDRs) to Omidyar Network, an entity based in the United States. According to the SEC, these PDRs contained a provision that required Rappler, Inc. to seek approval from Omidyar Network on corporate matters.

The SEC viewed this specific provision as amounting to giving Omidyar Network the same legal and economic rights originally reserved to shareholders. Thus, the SEC said that this is tantamount to giving Omidyar Network, a foreign entity, "some degree of control" over Rappler, Inc., in violation of the constitutional provision.

Rappler, Inc. subsequently announced that they would exhaust all legal remedies to challenge the SEC decision, including seeking recourse before domestic courts.

The UN Human Rights Committee is the expert body mandated to interpret and apply the International Covenant on Civil and Political Rights, a key human rights treaty to which the Philippines has been party since 1986. In its General comment No. 34 on the right on freedom of opinion and expression under article 19 of the Covenant, the Committee emphasized that "restrictions must be applied only for those purposes for which they were prescribed" and that "the penalization of a media outlet, for being critical of the government or the political social system espoused by the government can never be considered to be a necessary restriction of freedom of expression."

The Committee also emphasized that laws providing for restrictions on freedom of expression "must not violate the non-discrimination provisions of the Covenant"; the Covenant prohibits discrimination on grounds including "political or other opinion" in relation to the application and enforcement of restrictions on freedom of expression (articles 2(1) and 19).

The Committee further specified 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.

And that:

> The principle of proportionality must also take account of the form of expression at issue as well as the means of its dissemination. 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.

And further:

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