REPUBLIC OF THE PHILIPPINES
COURT OF APPEALS
MANILA

ELLEN T. TORDESILLAS, CHARMAINE DEOGRACIAS, ASHZEL HACHERO, JAMES KONSTANTIN GALVEZ, MELINDA QUINTOS DE JESUS, VERGEL O. SANTOS, YVONNE CHUA, BOOMA B. CRUZ, ED LINGAO, ROBY ALAMPAY, JESSICA SOHO, MARIA JUDEA PULIDO, MICHAEL FAJATIN, CONNIE SISON, RAWNNA CRISOSTOMO, J.P. SORIANO, GENA BALAORO, MICHELLE SEVA, LEILANI ALVIS, DANILO ARAO, LETICIA Z. BONIOL, ROWENA PARAAN, LOURDES SIMBULAN, IRIS C. GONZALES, MA. CRISTINA RODRIGUEZ, MARLON RAMOS, LEAH FLOR, MANOLITO C. GAYA, EREL A. CABATBAT, VINCENT CRISTOBAL, JESUS D. RAMOS, MICHAEL C. CARREON, ED DE GUZMAN, MA. AURORA FAJARDO, ELIZABETH JUDITH C. PANELO, ANGEL AYALA, NILO BACULO, THE CENTER FOR MEDIA FREEDOM AND RESPONSIBILITY (CMFR), REPRESENTED BY ITS DEPUTY DIRECTOR, DEAN LUIS V. TEODORO, THE NATIONAL UNION OF JOURNALISTS OF THE PHILIPPINES (NUJP), REPRESENTED BY ITS CHAIRMAN JOSE TORRES JR., THE PHILIPPINE CENTER FOR INVESTIGATIVE JOURNALISM (PCIJ) REPRESENTED BY ITS CO-FOUNDER AND CHAIRPERSON OF THE BOARD OF EDITORS, MARIA LOURDES MANGAHAS, AND THE PHILIPPINE PRESS INSTITUTE (PPI) , REPRESENTED BY ITS EXECUTIVE DIRECTOR, JOSE PAVIA,

Plaintiffs-Appellants

-versus-

HON. RONALDO PUNO, SECRETARY OF THE INTERIOR AND LOCAL GOVERNMENT, HON. RAUL GONZALES, SECRETARY OF JUSTICE, HON. GILBERTO C. TEODORO, SECRETARY OF NATIONAL DEFENSE, DIRECTOR GENERAL AVELINO RAZON, JR., CHIEF OF THE PHILIPPINE NATIONAL POLICE, DIRECTOR GEARY BARIAS, NATIONAL CAPITOL REGION POLICE OFFICE (NCRPO) CHIEF, CHIEF SUPERINTENDENT LUIZO TICMAN, CHIEF SUPERINTENDENT LEOCADIO SANTIAGO JR., PNP SPECIAL ACTION FORCE (SAF) DIRECTOR, SENIOR SUPERINTENDENT ASHER DOLINA, CHIEF, CRIMINAL INVESTIGATION AND DETECTION GROUP-NATIONAL CAPITAL REGION OFFICE (CIDG-NCRPO), MAJ. GEN. HERMOGENES ESPERON, CHIEF OF STAFF, ARMED FORCES OF THE PHILIPPINES,

Defendants-Appellees

CA GR CV NO. 91428
RTC CIVIL CASE NO. 08-086
For: Damages and Injunction with prayer for Preliminary Prohibitory Injunction and/or a Temporary Restraining Order

Pursuant to the

Notice of this Honorable Court,

Plaintiffs-Appellants

ELLEN T. TORDESILLAS, CHARMAINE DEOGRACIAS, ASHZEL HACHERO, JAMES KONSTANTIN GALVEZ, MELINDA QUINTOS DE JESUS, VERGEL O. SANTOS, YVONNE CHUA, BOOMA B. CRUZ, ED LINGAO, ROBY ALAMPAY, JESSICA SOHO, MARIA JUDEA PULIDO, MICHAEL FAJATIN, CONNIE SISON, RAWNNA CRISOSTOMO, J.P. SORIANO, GENA BALAORO, MICHELLE SEVA, LEILANI ALVIS, DANILO ARAO, LETICIA Z. BONIOL, ROWENA PARAAN, LOURDES SIMBULAN, IRIS C. GONZALES, MA. CRISTINA RODRIGUEZ, MARLON RAMOS, LEAH FLOR, MANOLITO C. GAYA, EREL A. CABATBAT, VINCENT CRISTOBAL, JESUS D. RAMOS, MICHAEL C. CARREON, ED DE GUZMAN, MA. AURORA FAJARDO, ELIZABETH JUDITH C. PANELO, ANGEL AYALA, NILO BACULO, THE CENTER FOR MEDIA FREEDOM AND RESPONSIBILITY (CMFR), REPRESENTED BY ITS DEPUTY DIRECTOR, DEAN LUIS V. TEODORO, THE NATIONAL UNION OF JOURNALISTS OF THE PHILIPPINES (NUJP), REPRESENTED BY ITS CHAIRMAN JOSE TORRES JR., THE PHILIPPINE CENTER FOR INVESTIGATIVE JOURNALISM (PCIJ) REPRESENTED BY ITS COFOUNDER AND CHAIRPERSON OF THE BOARD OF EDITORS, MARIA LOURDES MANGAHAS, AND THE PHILIPPINE PRESS INSTITUTE (PPI) , REPRESENTED BY ITS EXECUTIVE DIRECTOR, JOSE PAVIA

by counsel, most respectfully submit their

APPELLANTS' BRIEF

TABLE OF AUTHORITIES

PHILIPPINE JURISPRUDENCE **PAGE**

AMERICAN JURISPRUDENCE

RULINGS OF INTERNATIONAL TRIBUNALS OR BODIES **PAGE**

BOOKS

CONSTITUTIONAL RECORD

PHILIPPINE STATUTE

PHILIPPINE CONSTITUTION

TREATIES

SUBJECT INDEX

II. ASSIGNMENT OF ERRORS

III. STATEMENT OF THE CASE

This is an appeal from the Orders of the Court *a quo* dismissing a complaint for damages and the prayers for the issuance of preliminary prohibitory injunction filed by Plaintiffs-Appellants – individual journalists from various media outfits and professional organizations – against Defendants-Appellees, for violation of their constitutional right to free expression and a free press.

The case arose from what is now known as the November 29, 2007 Manila Pen siege, when scores of journalists covering the Magdalos and their allies who had holed up in the hotel to call for the resignation from office of Mrs. Gloria Macapagal-Arroyo were arrested by police, purportedly for violations of lawful orders. Subsequently, top officials of the government – including Defendants-Appellees in the instant case – issued a chorus of statements warning that similar conduct by media in similar situations will be similarly dealt with. Most notable of these official statements is an Advisory to media establishment warning of criminal prosecution for violation of lawful orders, issued by Defendant-Appellee, the Secretary of Justice.

In this case, Plaintiffs-Appellants *do not argue that at all times in all places and in all circumstances, the press have an absolute freedom to make their case before their public*, but that the press should be allowed to go unfettered as far as possible, given the preferred status of the ideals of freedom they express and embody under a democratic state. Under constitutional law and international law, the State has a positive duty to ensure and that limits to such freedom cannot be applied like a straight-jacket under the circumstances obtaining in this case, where the questioned public pronouncements of Defendants-Appellees – whether in the veiled threats made through press statements or in the Advisory issued by the Secretary of Justice – if not invalidated, or otherwise restrained and prohibited, "pose hazards to the freedom of the press of a dimension not confronted"[1] in this country since the ouster of the late strongman Ferdinand Marcos in 1986.

In particular, the Supreme Court's landmark rulings in *David v. Arroyo*[2] and more recently, *Chavez v. Gonzales*[3], underscore the need for judicial activism against such subterfuges designed to "skirt the Constitutional safeguards for the citizens' civil liberties"[4] in the name of *raison d'etat*. In the first case, the Supreme Court held that,

> **[i]t is that officious functionary of the repressive government who tells the citizen that he may speak only if allowed to do so, and no more and no less than what he is permitted to say on pain of punishment should he be so rash as to disobey**. Undoubtedly, the *The Daily Tribune* was subjected to these arbitrary

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To borrow a remarkable phrase from the opening statements in oral arguments before the US Supreme Court uttered by Columbia Law School professor Herbert Wechsler, counsel for the Plaintiff in the landmark case of *New York Times v. Sullivan* 376 U.S. 254 (1964). The phrase is quoted in ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT 129 (1991).

2 G.R. No. 171396, May 3, 2006.

3 G.R. No. 168338, Feb. 15, 2008.

4 Lacson v. Perez G.R. No. 147780. May 10, 2001, (J. *Kapunan,dissenting*).

> intrusions because of its anti-government sentiments. This Court cannot tolerate the blatant disregard of a constitutional right even if it involves the most defiant of our citizens. Freedom to comment on public affairs is essential to the vitality of a representative democracy. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. The motto should always be *obsta prince*.[5]

In the second case, the High Court addressed the unconstitutionality of press statements issued by a top official of government warning media of criminal consequences, saying that these cannot stand constitutional scrutiny, for the reason that: "[**a]ny act done, such as a speech uttered, for and on behalf of the government in an official capacity is covered by the rule on prior restraint."[6] [emphasis in the original].**

The acts of Defendants-Appellees – from their collective threats issued against journalists to the Advisory of the Secretary of Justice – unless these are held to be unconstitutional and enjoined for being an exercise of plain censorship or of prior restraint, hang like the proverbial Sword of Damocles over the head of members of the Press. This is because agents of the state can invoke at any time these pronouncements against any member of the press.

Such threats have a "chilling effect" on the exercise of Plaintiffs-Appellants' rights, these being declarations with ambiguous legal reach that breaches the zone of protection accorded to the citizen by the Bill of Rights. To the extent that the law is vague, it might have an *in terrorem* effect and deter persons from engaging in protected activities.

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5 G.R. No. 171396, May 3, 2006.

6 G.R. No. 168338, Feb. 15, 2008.

Indeed, the reaction of government to the Manila Peninsula standoff sparked by the Magdalo group and their supporters only set in bold relief how a government can take to absurd lengths measures it believes are necessary for political survival. Yet it does so only at the expense of hard-won constitutional rights and liberties. It is in times such as this that the forces of history appoint the courts to royal position as arbiters of freedom. They only abdicate from this sacred duty at the cost of the very freedom that, in the very first place makes our democratic way of life possible.

In the last few years, the press in the Philippines has been under a deathly siege; in fact the assailed acts and pronouncements of Defendants-Appellants follow an official policy trajectory first made pronounced by official indifference to a violent and deadly impunity directed at journalists and subsequently highlighted by what outside observers have noted as state-sanctioned measures meant to stifle even legitimate political dissent, and this, despite the state's obligations both under constitutional law and international law to ensure and protect free speech and a free press.

IV. SUMMARY OF PROCEEDINGS

1. On January 28, 2008, Plaintiffs-Appellant instituted the instant case before the Makati City Regional Trial Court by filing the **Complaint**[7] for "Damages and Injunction, with prayer for preliminary mandatory injunction and/or a Temporary Restraining Order." The complaint, docketed as Civil Case No. 08-086, was filed against herein Defendants-Appellees.

2. At the same time, Plaintiffs-Appellants filed an Urgent Motion before the Hon. Executive Judge of the Makati City Regional Trial Court, Winlove Dumayas, for the issuance of a 72-hour temporary restraining order.[8] Plaintiffs-Appellants also filed a motion praying that the case be set for a special raffle the next day, or at such time as the urgency of the matter requires. [9]

3. On the same day, the Hon.Executive Judge issued an Order granting the above Urgent Motion. The dispositive portion thus said: "Accordingly, pursuant to Supreme Court Administrative Circular No.20-95 and in order to maintain the status quo pending the raffle and assignment of the case to one of the branches of this Court, a 72-hour Temporary Restraining Order is hereby issued enjoining Defendants-Appellees Hon. Ronaldo Puno, Hon. Raul Gonzales, Hon. Gilberto C. Teodoro, Director General Avelino Razon, Jr., Director General Geary Barias, Chief Superintendent Luizo Ticman,

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7 Records, at 1-54.
8 Records, at 62-64.
9 Records, at 68-70.

Chief Superintendent Leocadio Santiago,Jr., Senior Superintendent Asher Dolina, Maj. Gen. Hermogenes Esperon, and all persons connected with said Defendants-Appellees, to refrain and desist from issuing threats of arrests or from implementing such threats, against Plaintiffs-Appellants and/or other members of the media, who are covering events similar to the Manila Pen standoff and ordering and maintaining the status quo between said parties until such time that the issues presented in the instant suit are resolved by the Court." [10]

4. The case was subsequently raffled off to the Court *a quo*, the sala of Judge Reynaldo M. Laigo, presiding judge of Branch 53 of the Makati City Regional Trial Court.

5. In an Order dated January 30,2008, the said Court *a quo* set the summary hearing on January 31, 2008 at 2 p.m. on the Plaintiffs-Appellants' application for temporary restraining order.[11]

6. On February 4, 2008, the statutory counsel for public respondents, the Office of the Solicitor General, filed a Memorandum (re: Application for Temporary Restraining Order).[12]

7. On February 13, 2008, Respondent-Appellee Teodoro filed a Motion to Dismiss on the ground, among other things, that the complaint states no cause of action.[13]

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10 Records, at 66-67.
11 Records, at 71-72.
12 Records, at 188-225.
13 Records, at 227-235.

8. On February 2, 2008, the Court *a quo* issued an Order, the dispositive portion of which states that: "WHEREFORE, premises considered, Plaintiffs-Appellants' application for a Temporary Restraining Order is denied. Let the Plaintiffs-Appellants' application for issuance of Preliminary Injunction be set for hearing on February 20, 2008, at 2 pm."[14]

9. On February 28, 1008, the Office of the Solicitor General filed a Motion to Dismiss the complaint on the ground of the Plaintiffs-Appellants alleged failure to state a cause of action and of the lack of merit in their complaint.[15]

10. On March 6, 2008, Plaintiffs-Appellants filed their Opposition to the Motion to Dismiss filed by Defendant-Appellee Teodoro.[16]

11. On March 27,2008, Plaintiffs-Appellants filed their Opposition to the Motion to Dismiss filed by the Office of the Solicitor General, counsel for the other Defendant-Appellees in the instant case .[17]

12. On April 5, 2008, Defendant-Appellee Teodoro filed an Omnibus Submission[18] [1) Supplement to Memorandum (re: Opposition to Plaintiffs-Appellants' Application for Preliminary Injunction) 2) Reply to Opposition (re: Defendant SND's

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14 Records, at 181-186.
15 Records, at 258-292.
16 Records, at 335-340.
17 Records, at 367-386.
18 Records, at 496-520.

Motion to Dismiss) and 3) Memorandum on the Inadmissibility of the Testimony of Dean Raul [R.]Pangalangan)].

13. On April 18, 2008, the Office of the Solicitor General filed a Memorandum[19] (In Opposition to Plaintiffs-Appellants' Application for Preliminary Prohibitory Injunction and to the Admission of the Expert Testimony of Dean Raul Pangalangan).

14. On May 16,2008, Plaintiffs-Appellants filed their Omnibus Memorandum[20] (On the Prayer for Preliminary Prohibitory Injunction).

15. On June 2, 2008, the Court *a quo* issued the assailed Order, the dispositive portion of which stated: "WHEREFORE, premises considered, the Plaintiffs-Appellants' application for a Writ of Preliminary Injunction is hereby DENIED. SO ORDERED."[21]

16. On June 2, 2008, Plaintiffs-Appellants filed their Motion for Reconsideration (in re: Order dated June 2, 2008).[22]

17. **However, without bothering to resolve the Motion for Reconsideration filed by Plaintiffs-Appellants on its Order dated June 2, 2008**, the Court *a quo* issued an Order dated June 20, 2008, the dispositive portion of which stated thus:

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19 Records, at 430-489.
20 Records, at 555-602.
21 Records, at 967-971.
22 Records, at 977-989.

"WHEREFORE, for reasons afore-stated, the complaint is hereby DISMISSED. SO ORDERED." Plaintiffs-Appellants- received a copy of the said Order on June 30, 2008.[23]

18. On July 4, 2008, the Office of the Solicitor General filed an Opposition to the Plaintiffs-Appellants' Motion for Reconsideration of the Court *a quo*'s Order denying their application for the issuance of a preliminary injunction.[24]

19. On July 11, 2008, Defendant-Appellee Teodoro filed a Motion to Strike [Plaintiffs-Appellants' Motion for Reconsideration (in re: Order dated 02 June 2008)].[25]

20. On July 14, 2008 Plaintiffs-Appellants filed a Notice of Appeal with *the Court a quo*. [26]

21. On July 15, 2008, the Court *a quo* issued its Order giving due course to Plaintiffs-Appellants' appeal.[27]

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[23] Records, at 972-976.
[24] Records, at 991-998.
[25] Records, at 999-1002.
[26] Records, at 1003-1004.
[27] Records ,at 1007.

V. STATEMENT OF MATERIAL DATES

22. On December 17, 2008 Plaintiffs-Appellants, through counsel, received an Order from this Honorable Court dated December 8, 2008 directing them to file their Appellant's Brief within 45 days from receipt thereof.[28] The last day of the period given to file the Brief fell on a Saturday, January 31, 2009.

23. Hence, Plaintiffs-Appellants had February 2, 2009 to file their Appellant's Brief. However, due to undersigned counsel's heavy workload as well the fact it needs more time to confer with the Plaintiffs-Appellants who come from different news organizations and journalists' associations, undersigned counsel, on February 2, 2009, asked for another thirty (30) days from January 31, 2009 or until March 2, 2009 to comply with the above order.[29]

24. On February 23, 2009, Plaintiffs-Appellants received notice of a Resolution dated February 17, 2009 granting their request for another 30 days or until March 2, 2009 to comply with the December 8, 2008 Order[30]

25. However Plaintiffs-Appellants were unable to submit the Brief within the extended period for the same reasons noted above. They subsequently filed a final motion for an extension of another twenty (20) days from March 2, 2009 or until March 22, 2009

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28 Records, at 36.
29 Records, at 37-41.
30 Records, at 42.

to do so.[31] March 22, 2009 being a Sunday, Plaintiffs-Appellants have until today, March 23,2009, to file the Appellants' Brief.

26. Hence, this Brief is filed on time.

VI. APPEALED DECISION

27. The dispositive portion of the appealed Order dated June 2, 2008 states:

> "WHEREFORE, premises considered, the plaintiff's application for a Writ of Preliminary Injunction is hereby DENIED."
>
> SO ORDERED."[32]

28. The dispositive portion of the appealed Order dated June 20, 2008 states:

> "WHEREFORE, for reasons afore-stated,the complaint is hereby DISMISSED.
>
> SO ORDERED."[33]

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31 Records, at 43-47.
32 Records, at 971.
33 Records, at 976.

VII. STATEMENT OF FACTS

40. On Nov. November 29, 2007, at around 10:00 a.m. Sen. Antonio Trillanes IV, Army Brigadier General Danilo Lim and members and sympathizers of the Magdalo Group walked out of the Makati City Regional Trial Court where their rebellion cases are being heard, and marched toward the nearby Manila Peninsula hotel, where they subsequently held a press conference calling for the ouster of Mrs. Gloria Macapagal-Arroyo as President of the Philippines.

41. Hundreds of journalists from local and foreign media, including many of the Plaintiffs-Appellants in this case, trooped to the hotel to cover what has become known as the Manila Peninsula standoff.

42. At around 2 p.m. of the same day, police tried to serve an arrest warrant issued by Judge Oscar Pimentel of the Makati City Regional Trial Court to the Magdalos at the hotel but were rebuffed. PNP-NCRPO Director Geary Barias subsequently announced that a police assault to arrest Sen. Trillanes, Gen. Lim and their supporters holed up at the hotel was forthcoming. He also issued an ultimatum for journalists to leave the hotel premises by three o'clock in the afternoon, which was however, not communicated to many, if not most of them, especially those who were inside the hotel.

43. Many of the journalists left the premises but a sizeable number chose to remain, including Plaintiffs-Appellants Tordesillas, Deogracias, Hachero, Galvez

44. As police carried out an operation against the Magdalos, they also took into custody the journalists who stayed behind, placing many of them in cuffs, and hauling them off to Camp Bagong-Diwa for "processing."

45. Police also seized equipment and video footage taken by television crew who covered the standoff. Police officers – led by Director Geary Barias, Chief Supt. Leocadio Santiago Jr., Chief Supt. Luizo Ticman and Senior Supt. Asher Dolina – did not inform the members of the media of their Miranda rights, nor did they inform them of the offenses for which they were being arrested.

46. In scope and effect, the treatment by police of media in their operation to retake the hotel was unprecedented. Officers ordered journalists to raise their arms in surrender, despite the fact that tear gas fumes SAF commandos had earlier deployed to flush out the Magdalos have yet to dissipate. Police treated the journalists as suspects in a crime, taking them into custody but without informing them what offense or crime they have committed and without providing them with a counsel of their own choice.

47. A little over a month later Defendant Raul Gonzales, Secretary of Justice, issued on Jan. 11, 2008, a so-called "Advisory" addressed to the Chief Executive Officers (CEOs) of media networks and press organizations, and printed in capital letters:

> PLEASE BE REMINDED THAT YOUR RESPECTIVE COMPANIES, NETWORKS OR ORGANIZATIONS MAY INCUR CRIMINAL LIABILITIES UNDER THE LAW, IF ANYONE OF YOUR FIELD REPORTERS, NEWS GATHERERS, PHOTOGGRAPHERS, CAMERAMEN AND OTHER MEDIA PRACTITIONERS WILL DISOBEY LAWFUL ORDERS FROM DULY AUTHORIZED GOVERNMENT OFFICERS AND PERSONNEL DURING EMERGENCIES WHICH MAY LEAD TO COLLATERAL DAMAGE TO PROPERTIES AND CIVILIAN CASUALTIES IN CASE OF AUTHORIZED POLICE OR MILITARY OPERATIONS.[34]

48. The issuance of the Advisory and its contents were extensively reported on and discussed in the media. Plaintiffs-Appellants manifest that they tried to obtain a certified true copy of the Advisory from the Department of Justice, only to be referred to the Presidential Management Staff (PMS) at the Malacanang Palace. However, officials of the PMS gave Plaintiffs-Appellants the runaround, and were referred back to the Department of Justice. In the end, they were unable to secure a certified true copy for submission to this Honorable Court because no one could tell in both offices where an official copy of the same could be obtained.[35] In any case, the issuance of the Advisory as well as what it purports to do were of public knowledge.

49. Respondent-Appellee Razon expressed support for Gonzalez' statement, saying that members of the media could be charged with obstruction of justice for failing

[34] See *DOJ: uncovered plot led to media restraint*, available at http://services.inquirer.net/print/print.php?article_id=111997. A copy of the news report was attached to the complaint as ANNEX G. Records, at 46-47.

[35] A copy of letter addressed to the Office of the Secretary of Justice requesting a certified true copy of the DOJ Advisory Opinion was attached as **ANNEX A** to the Memorandum. Records, at 123.

to heed police warnings.[36] As already stated in the complaint, this is apparently part of an official policy being implemented by the PNP which another top official has menacingly called "the final option."[37]

50. Respondent-Appellee Puno: "journalists who ignore police orders to leave a crime scene will be arrested and charged with obstruction of justice and willful disobedience to authority." [38]

51. Respondent-Appelle Teodoro chimed in with his noble contribution to the so-called cause of law and order, defending the arrest by police of journalists covering the police assault on the Manila Peninsula.[39]

52. Not to be outdone, the then AFP Chief of Staff, Respondent-Appellee Gen. Esperon issued a veiled threat that the military would go along with the PNP in investigating journalists "who blocked the enforcement of law."[40]

53. Plaintiffs-Appellants sum up the questions presented in the case below:

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[36]See PNP *chief backs Gonzalez memo on media coverage*, available at http://newsinfo.inquirer.net/breakingnews/nation/view_article.php?article_id=112256. A copy of the news report was attached as **ANNEX I** to the complaint. Records, at 49.

[37]See *PNP to use force to eject media from 'crisis situation*', available at http://newsinfo.inquirer.net/breakingnews/nation/view_article.php?article_id=112655 . A copy of the news report was attached as **ANNEX J** to the complaint. Records, at 50-51.

[38] See *The Pen or the Sword? ABS-CBN news execs claw at gov't officials in dialogue*, available at http://services.inquirer.net/print/print.php?article_id=105154. A copy of the news article was attached as ANNEX D to the complaint. Records at 39-40.

[39]See *Mediamen tagged, arrested as siege suspects*, available at http://www.abs-cbnnews.com/storypage.aspx?StoryId=100910. A copy of the news article was attached as **ANNEX F** to the complaint. Records, at 44-45.

[40] See *ABS-CBN plans to sue; PNP readies counter-suit*, available at http://newsinfo.inquirer.net/inquirerheadlines/nation/view_article.php?article_id=104158. A copy of the news article was attached as **ANNEX E** to the complaint Records, at 41-43.

VIII. ISSUES

I. **Whether or not the Trial Court committed reversible error in dismissing the complaint on the ground that Plaintiffs-Appellants have no cause of action against Defendants-Appellees.**

II. **Whether or not the Trial Court committed reversible error in denying Plaintiffs-Appellants-Appellants application for a temporary restraining order and for a preliminary prohibitory injunction.**

III. **Whether or not the Trial Court committed reversible error in denying the admissibility of the testimony of expert witness Dean Raul C. Pangalangan.**

IX. ARGUMENTS

I. The Trial Court committed reversible error in dismissing the complaint on the ground that Plaintiffs-Appellants have no cause of action against Defendants-Appellees.

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1. The questioned public pronouncements – including the DOJ Advisory – issued by Defendants-Appellees constitute acts of prior restraint proscribed by the Constitution under the Supreme Court's landmark rulings in *David v. Arroyo* and *Chavez v. Gonzales*.

54. Philippine jurisprudence on prior restraint clamped against free speech and a free speech has undergone a radical development under the Arroyo administration. It is no surprise because since Mrs. Arroyo rose to power in 2001, many media groups both local and international have noted the deterioration of press freedom in the country.[41]

55. In *David v. Arroyo,*[42] Petitioners challenged Mrs. Arroyo's issuance of Presidential Proclamation 1017 which declared a state of national emergency in the country and General Order No.5, following an alleged plot to topple her government by some segments of the dissatisfied military.

56. A relevant section of the holding of the Supreme Court is that dealing with how these two orders were implemented by agents of the state, notably the elements of

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41 Arguments developed in this section are owed in part to an unpublished paper by Gilbert Andres and Janice Lee, *Chavez v. Gonzales: Delineating and Expanding the Boundaries of Free Speech and the Free Press in a time of Executive abuse,* University of the Philippines College of Law (April 2008).

42 G.R. No. 171396, May 3, 2006.

the PNP's Criminal Investigation and Detection Group (CIDG), who raided the offices of the Daily Tribune for allegedly publishing anti-government material in aid of the brewing rebellion. CIDG operatives confiscated news stories by reporters, documents, pictures, and mock-ups of the *Daily Tribune's* Saturday issue. Authorities also posted uniformed policemen within the premises of the newspaper. The raid was followed by warnings issued by top officials of the Executive Department.

57. Presidential Chief of Staff Michael Defensor said that the raid was *meant to show a 'strong presence,' to tell media outlets not to connive or do anything that would help the rebels in bringing down this government."*

58. Officials of the PNP on the other hand, warned that it would take over any media organization that would not follow standards set by the government during the state of national emergency." Its Director General, Arturo Lomibao warned that if media do not follow government standards, that is, if they would contribute to instability in the government, or if they do not subscribe to what is in General Order No. 5 and Proc. No. 1017, police would take over their facilities.

59. National Telecommunications Commissioner Ronald Solis also contributed his own threat to media, saying the NTC will not hesitate to recommend the closure of any broadcast outfit that violates rules set out for media when national security is threatened.

60. Ninez Cacho-Olivares publisher of the *Tribune* newspaper, questioned the raid before the High Court as an "censorship" or "prior restraint." The Supreme Court held that the raid on the Tribune as well as the threats issued by top officials of government were unconstitutional for being an exercise of "plain censorship" or prior restraint. It held in the consolidated opinion in the case of *David v. Arroyo* thus:

> **It is that officious functionary of the repressive government who tells the citizen that he may speak only if allowed to do so, and no more and no less than what he is permitted to say on pain of punishment should he be so rash as to disobey**. Undoubtedly, the *The Daily Tribune* was subjected to these arbitrary

> intrusions because of its anti-government sentiments. This Court cannot tolerate the blatant disregard of a constitutional right even if it involves the most defiant of our citizens. Freedom to comment on public affairs is essential to the vitality of a representative democracy. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. The motto should always be *obsta prince*.[43]

61. In its discussion of this particular point, the High Court took the lessons of Martial Law seriously, first comparing what happened to the *Daily Tribune* with the fate of the *"Metropolitan Mail"* and *"We Forum"* – publications that were critical of the Marcos regime before ruling on whether the actions by the CIDG operatives were constitutional. It quoted its holding in *Burgos v. Chief of Staff*:

> As heretofore stated, the premises searched were the business and printing offices of the *"Metropolitan Mail"* and the *"We Forum"* newspapers. As a consequence of the search and seizure, **these premises were padlocked and sealed, with the further result that the printing and publication of said newspapers were discontinued.**
>
> **Such closure is in the nature of previous restraint or censorship abhorrent to the freedom of the press guaranteed under the fundamental law, and constitutes a virtual denial of Plaintiffs-Appellants' freedom to express themselves in print**[44][emphasis in the original].

62. Then it said, with respect to the predicament *Daily Tribune* found itself in because of the questioned presidential issuances:

> While admittedly, the *Daily Tribune* was not padlocked and sealed like the *"Metropolitan Mail"* and *"We Forum"* newspapers in the above case, yet it cannot be denied that the CIDG operatives exceeded their enforcement duties The search and seizure of materials for publication, the stationing of policemen in the vicinity of the *The Daily Tribune* offices **and the arrogant warning of gov-**

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43 G.R. No. 171396, May 3, 2006.
44 G.R. No. 64161, Dec. 26, 1984.

> **ernment officials to media, are plain censorship**[45] [emphasis supplied].

63. It is noteworthy that in this ruling, the High Court considered the arrogant warnings of executive officials along with the CIDG raid and occupation of the premises of the *Daily Tribune* as acts constituting plain censorship.

64. In *Chavez v. Gonzales*, the Supreme Court would even push the matter farther by ruling that even mere press statements made by government officials in their official functions constitute "content-based prior restrained" that violates the constitutional protection granted to free speech and expression.

65. In this second case, the Supreme Court held the following acts of Justice Secretary Gonzales as unconstitutional:

> 3. On June 8, 2005, Defendant Department of Justice (DOJ) Secretary Raul Gonzales warned reporters that those who had copies of the compact disc (CD) and those broadcasting or publishing its contents could be held liable under the Anti-Wiretapping Act. These persons included Secretary Bunye and Atty. Paguia. He also stated that persons possessing or airing said tapes were committing a continuing offense, subject to arrest by anybody who had personal knowledge if the crime was committed or was being committed in their presence.
>
> 4. On June 9, 2005, in another press briefing, Secretary Gonzales ordered the National Bureau of Investigation (NBI) to go after media organizations "*found to have caused the spread, the playing and the printing of the contents of a tape*" of an alleged wiretapped conversation involving the President about fixing votes in the 2004 national elections. Gonzales said that he was going to start with **Inq7.net**, a joint venture between the **Philippine Daily Inquirer and GMA7** television network, because by the very nature of the Internet medium, it was able to disseminate the contents of the tape more widely. He then expressed his intention of inviting the editors and managers of Inq7.net and GMA7 to a probe, and supposedly declared, "I [have] asked the NBI to conduct a tactical interrogation of all concerned."[46]

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45 G.R. No. 171396, May 3, 2006.

46 G.R. No. 168338, Feb. 15, 2008.

66. In the case of the NTC, the Supreme Court struck down as prior restraint a press statement issued by the Commission on June 11, 2005, which reads at length in this wise:

> NTC GIVES FAIR WARNING TO RADIO AND TELEVISION OWNERS/OPERATORS TO OBSERVE ANTI-WIRETAPPING LAW AND PERTINENT CIRCULARS ON PROGRAM STANDARDS
>
> xxx xxx xxx
>
> Taking into consideration the country's unusual situation, and in order not to unnecessarily aggravate the same, the NTC **warns** all radio stations and television network owners/operators that the conditions of the authorization and permits issued to them by Government like the Provisional Authority and/or Certificate of Authority explicitly provides that said companies shall not use [their] stations for the broadcasting or telecasting of false information or willful misrepresentation. Relative thereto, it has come to the attention of the [NTC] that certain personalities are in possession of alleged taped conversations which they claim involve the President of the Philippines and a Commissioner of the COMELEC regarding supposed violation of election laws.
>
> These personalities have admitted that the taped conversations are products of illegal wiretapping operations.
>
> Considering that these taped conversations have not been duly authenticated nor could it be said at this time that the tapes contain an accurate or truthful representation of what was recorded therein, it is the position of the [NTC] that the continuous airing or broadcast of the said taped conversations by radio and television stations is a continuing violation of the Anti-Wiretapping Law and the conditions of the Provisional Authority and/or Certificate of Authority issued to these radio and television stations. It has been subsequently established that the said tapes are false and/or fraudulent after a prosecution or appropriate investigation, the concerned radio and television companies are hereby **warned that their broadcast/airing of such false information and/or willful misrepresentation shall be just cause for the suspension, revocation and/or cancellation of the licenses or authorizations issued to the said companies.**
>
> In addition to the above, the [NTC] reiterates the pertinent NTC circulars on program standards to be observed by radio and television stations. NTC Memorandum Circular 111-12-85 explicitly

> states, among others, that "all radio broadcasting and television stations shall, during any broadcast or telecast, cut off from the air the speech, play, act or scene or other matters being broadcast or telecast the tendency thereof is to disseminate false information or such other willful misrepresentation, or to propose and/or incite treason, rebellion or sedition." The foregoing directive had been reiterated by NTC Memorandum Circular No. 22-89, which, in addition thereto, prohibited radio, broadcasting and television stations from using their stations to broadcast or telecast any speech, language or scene disseminating false information or willful misrepresentation, or inciting, encouraging or assisting in subversive or treasonable acts.
>
> **The [NTC] will not hesitate, after observing the requirements of due process, to apply with full force the provisions of said Circulars and their accompanying sanctions on erring radio and television stations and their owners/operators.** [47] (emphasis in the original)

67. That what are primarily at issue in *Chavez v. Gonzales* are mere press statements did not stop the Supreme Court from holding that such acts constituted content-based prior restraint. It declared thus:

> in resolving this issue, we hold that **it is not decisive that the press statements made by Defendants-Appellees were not reduced in or followed up with formal orders or circulars. It is sufficient that the press statements were made by Defendants-Appellees while in the exercise of their official functions**. Undoubtedly, Defendant Gonzales made his statements as Secretary of Justice, while the NTC issued its statement as the regulatory body of media.[48] [emphasis in the original].

68. Also, an important point is that the Supreme Court laid down a criterion to determine whether the act of an Executive official is tantamount to prior restraint: "**Any act done, such as a speech uttered, for and on behalf of the government in an official capacity is covered by the rule on prior restraint"**[49] **[emphasis in the original].**

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47 G.R. No. 168338, Feb. 15, 2008.
48 G.R. No. 168338, Feb. 15, 2008.
49 G.R. No. 168338, Feb. 15, 2008.

69. The Supreme Court arrived at this holding without seeing the need to thresh out the factual and legal contexts involved in the assailed acts of Sec. Gonzales and of the NTC. As Justice Dante Tinga's separate opinion would put it:

> It should be stressed that there are critical differences between the factual and legal milieu of the assailed act of the DOJ Secretary, on one hand, and that of the questioned conduct of the NTC, on the other. The act complained of the NTC consists in the issuance of a Press Release, while that of the DOJ Secretary is not encapsulated in a piece of paper but comprised in utterances which nonetheless were well documented by the news reports at that time. There is an element of caution raised in the Press Release in that it does not precisely sanction or threaten to immediately sanction the broadcast media for airing the *Garci* tapes, but it raises that possibility on the condition that "it has been subsequently established that the said tapes are false and/or fraudulent after a prosecution or appropriate investigation." No such suspensive condition is embodied in the assailed acts of the DOJ Secretary.
>
> And most critical in my view is the distinction between the NTC and the DOJ Secretary with respect to the breadth and reach of their ability to infringe upon the right to free expression. The NTC is a quasi-judicial regulatory body attached to the Department of Transportation and Communications exercising regulatory jurisdiction over a limited set of subjects: the broadcast media, telecommunications companies, etc. In the scope of its regulatory jurisdiction, it concededly has some capacity to impose sanctions or otherwise perform acts that could impinge on the right of its subjects of regulation to free expression, although the precise parameters of its legal authority to exercise such actions have not yet been fully defined by this Court.
>
> In contrast, the ability of the DOJ Secretary and the office that he heads to infringe on the right to free expression is quite capacious. Unlike the NTC whose power of injunction and sanction is limited to its subjects of regulation, the DOJ Secretary heads the department of government which has the premier faculty to initiate and litigate the prosecution of just about anybody.[50]

[50] G.R. No. 168338, Feb. 15, 2008.

70. In fact, Justice Minita Chico-Nazario, examining the factual milieu, at least, with respect to Sec. Gonzales, concluded that that there is a need to be cautious in giving legal significance to mere press statements:

> Neither should we give much merit to the statements made by Secretary Gonzales to the media that he had already instructed the National Bureau of Investigation (NBI) to monitor all radio stations and television networks for possible violations of the Anti-Wiretapping Law. **Secretary Gonzales is one of media's favorite political personalities, hounded by reporters, and featured almost daily in newspapers, radios, and televisions, for his "quotable quotes," some of which appeared to have been uttered spontaneously and flippantly. There was no showing that Secretary Gonzales had actually and officially ordered the NBI to conduct said monitoring of radio and television broadcasts, and that the NBI acted in accordance with said order. Which leads me to my next point.**
>
> **We should be judicious in giving too much weight and credence to press statements.** I believe that it would be a dangerous precedent to rule that press statements should be deemed an official act of the administrative agency or public official concerned. Press statements, in general, can be easily manufactured, prone to alteration or misinterpretation as they are being reported by the media, and may, during some instances, have to be made on the spot without giving the source much time to discern the ramifications of his statements. Hence, they cannot be given the same weight and binding effect of official acts in the form of, say, memorandum orders or circulars.[51] (emphasis supplied)

71. Yet the majority opinion brushed aside these reservations by proffering an expanded understanding of an "act" as a legal concept in relation to free speech and free press issues:

> **The concept of an "act" does not limit itself to acts already converted to a formal order or official circular. Otherwise, the non formalization of an act into an official order or circular will result in the easy circumvention of the prohibition on prior restraint.** The press statements at bar are acts that should be struck

[51] G.R. No. 168338, Feb. 15, 2008.

> down as they constitute impermissible forms of prior restraints on the right to free speech and press.[52] (emphasis in the original)

72. Why is this so? The import of the majority's rationale comes to sharper focus when viewed in relation to its finding that the assailed acts of the Respondents there actually created a chilling effect on media:

> There is enough evidence of **chilling effect** of the complained acts on record. The **warnings** given to media **came from no less** the NTC, a regulatory agency that can cancel the Certificate of Authority of the radio and broadcast media. They also came from the Secretary of Justice, the alter ego of the Executive, who wields the awesome power to prosecute those perceived to be violating the laws of the land. **After the warnings,** the KBP inexplicably joined the NTC in issuing an ambivalent Joint Press Statement. After the warnings, petitioner Chavez was left alone to fight this battle for freedom of speech and of the press. This silence on the sidelines on the part of some media practitioners is too deafening to be the subject of misinterpretation.[53] (emphasis in the original)

73. The questioned acts in the instant case are no different from those invalidated by the Supreme Court in *David v. Arroyo* and *Chavez v. Gonzales.* The police treatment of media in the wake of the Manila Peninsula standoff was clearly meant to intimidate, cow and muzzle the press. Official acts before, during and after the standoff indicate an official policy directed against some of the most sacred of rights of citizens in a democratic society such as ours.

74. In the instant controversy, police treated the journalists as suspects in a crime, taking them into custody but without informing them what offense or crime they have committed and without providing them with a counsel of their own choice.

75. Indeed, in one resounding chorus, the statements of the Secretary of Justice and other members of the President's cabinet, approved of the abusive, arbitrary and repressive manner in which policemen treated the journalists who were covering the

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52 G.R. No. 168338, Feb. 15, 2008.
53 G.R. No. 168338, Feb. 15, 2008.

Manila Peninsula standoff and threatened to unleash the same treatment against journalists in future news events of similar nature.

76. Perhaps, one of the most eloquent and explicit declarations about the purpose of the protections the Bill of Rights accorded to the citizen has been made by constitutional scholar Joaquin Bernas, S.J. who, in explaining the intent of the provisions found in the Bill of Rights of the 1987 Charter, said:

> First, the general reflections. The protection of fundamental liberties in the essence of constitutional democracy. Protection against whom? Protection against the state. The Bill of Rights governs the relationship between the individual and the state. Its concern is not the relation between individuals, between a private individual and other individuals. What the Bill of Rights does is to declare some forbidden zones in the private sphere inaccessible to any power holder.[54]

77. The pertinent portion of the Bernas sponsorship speech was later on quoted in a 1991 case, which though criminal in nature, and involving an issue of an unreasonable search and seizure, affirms that the protections found in the Bill of Rights are meant to limit the reach of the state and prevent it from abusing such power.[55]

78. There is no denying that the Defendants-Appellees are no ordinary men – no mere citizens talking in an "ambush interview" with media in the busy streets of Manila – no, they are all the President's men and together they brought the full weight of

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[54] Sponsorship speech of Commissioner Bernas, Record of Constitutional Commission, Vol. 1, p. 674, July 17, 1987.

[55] People of the Philippines vs. Marti, 193 SCRA 57 (1991). In this case, the accused sent four pack ages to his friend in Zurich, Switzerland through the Manila Packing and Export Forwarders. Before sending the packages, the proprietor, following standard procedure, opened the packages for final inspection, only to discover dried marijuana leaves inside the packages. Subsequently, the proprietor reported the matter to the National Bureau of Investigation (NBI). The NBI in due time prosecuted the accused, using the marijuana found in the packages as evidence against him. The accused sought to exclude the evidence, saying it violates the constitutional guarantees to his right as a citizen against unreasonable searches and seizure and to his rights to privacy of communication. Finding for the state, the Court, after quoting Bernas, was emphatic in stating that "(t)he constitutional proscription against unlawful searches and seizures therefore applies as a restraint directed only against government and its agencies tasked with the enforcement of law. Thus, it could be only be invoked against the State to whom the restraint against arbitrary and unreasonable exercise of power is imposed."

the Chief Executive's prosecutorial, police and military power to bear on protected speech.

79. They were men in the high places moving in a coordinated way, as if directed by one master waving her baton in the clutches of the dark, to intimidate, harass, cow, browbeat and repress the Press into meek submission. In Plaintiff-Appellant Vergel O. Santos' words said in open court, what we have here is that classic confrontation between "power" on the one hand, and "freedom" on the other.

80. Plaintiffs-Appellants speak here of no ordinary power; they speak of power wielded irresponsibly by those entrusted with the duty to rule justly. It is the power of the men and women in the high places brought to bear against the citizen, in violation of her rights under the Constitution.

2. The questioned public pronouncements and Advisory issued by Defendants-Appellees are constitutionally infirm for being content-restrictive acts with a "chilling effect" on protected speech.

81. In their submissions before the Court *a quo*, Defendants-Appellees contend that the questioned public pronouncements and the advisory are no more than harmless reminders of what is expected of Plaintiffs-Appellants as law-abiding citizens. In other words, according to them, these are nothing more than constitutionally-permissible content-neutral regulation.

82. But, as Dean Pangalangan said in his testimony before the same Court, the facts in this case are different. In this case, the acts in question, far from being content-neutral regulation, are, even when taken separately, content-restrictive acts with a "chilling effect" on protected speech.

83. Under ordinary circumstances, the invocation of Art. 151 of the Revised Penal Code would be innocent and the supposed reminder or regulation would be content-neutral. The order to vacate the premises of the Manila Peninsula on account of an impending police assault – lawful it may be – cannot prevail over political speech that the journalists were already exercising. As he stressed, the journalists "were already covering the incident in the legitimate exercise of their profession and that is why in the performance of their duty, they were already engaged in their own speech as media….so it is a special protection specific for the press" [TSN, on re-direct March 7, 2008, pp. 48-49][56].

84. He testified thus:

> The speech by the journalists here is legitimate public reporting, which in fact, is the most highly protected speech [.] That is why any curtailment of any political speech will be subjected to [heightened] judicial scrutiny [,] not just ordinary judicial scrutiny [,] which again is the ruling of the Supreme Court in the Chavez case through Chief Justice Puno. [TSN, on re-direct March 7, 2008, pp. 46-]. [57]

85. When pressed by the Court *a quo* with the point that the journalists, after all were not prevented from writing their stories, Dean Pangalangan brought up an important aspect of journalistic practice that suffers under the weight of the kind of regulation that Defendants-Appellees in this case want to impose on journalists:

> [T]he stories they write will depend on what they get to cover. So if the coverage is [constrained] even the writing will [similarly be constrained], they will have nothing to write, so it is part of the freedom of the press. That is why I go back to my initial statement, the way we formulated the Philippine constitution [.] [I]t is so specific, freedom of speech and of the press. To specify, while there is generic freedom of speech by everyone, there is a special protection for one sector, namely the press, they are singled out….(TSN, on re-direct, March 7, 2008, p. 54)[58]

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[56] Records, at 947-948.
[57] Records, at 945.
[58] Records, at 953.

86. *Malaya* reporter Ashzel Hachero explained under cross-examination the importance for the journalist of being there, come what may, as raw history unfolded:

> Q: You said that it was a big story, the peninsula incident was a big story?
> A: Yes.
> Q: And that is why you persisted and you insisted on covering because of the largeness of the story?
> A: Yes.
> Q: in going after the story, as a reporter, as a journalist, you exposed yourself to dangers, correct?
> A:You put yourself in dangerous situations, correct?
> Q: Sometimes, also, you necessarily have to not comply with what law enforcers order you to do, correct?
> A: No, we did [not] comply.
>
> ….
>
> Q: Notwithstanding your awareness of that warning, or that request or that order as the case maybe, you insisted [on] staying?
> A: Yes.
> Q: And you stayed notwithstanding the risk to your life and to your limb?
> A: Yes.
> Q: And as you said that was part of the risk of the job?
> A: Yes.[59]

87. Plaintiff-Appellant, Dean Luis V. Teodoro, for his part, asserts that the Gonzales advisory in fact singles out media in quite another way – in a way that severely restricts their freedoms. On cross-examination by the Hon. Solicitor General, who said that the advisory merely restates Art. 151 of the Revised Penal Code, and is therefore a "lawful reminder of what a journalist, not even a journalist, [but] of every citizen [,] to obey lawful orders from public officials," Plaintiff-Appellant Dean Teodoro, a veteran journalist and journalism educator, had this to say: "Well, it is specifically directed to the media, I think. So there's a difference there. It is not a reminder to all citizens that there is

[59] TSN, on Cross-Examination, Feb. 26, 2008, pp. 51-52., Records, at 885.

such a thing as Article 151. So it is specifically addressed to media"[TSN, on Cross-Examination, Feb. 20, 2008, pp. 37-38].[60]

88. This is also why Dean Pangalangan opined that though the Gonzales advisory was in fact issued more than a month and a half after the Manila Peninsula siege, it makes no difference; for it still qualifies as an unconstitutional act with "chilling effect" on speech. His point is that context matters in the proper appreciation of the true import of the advisory and here, it is clear that the advisory referred to the same incident, the Manila Peninsula siege , and it is therefore enough to send such an effect, "as it was issued in the light of a very specific incident." [TSN, on Re-direct Examination, Mar. 7, 2008, p. 45].[61]

89. Thus the color of content-neutrality in the Gonzales advisory or in the supposedly lawful order to vacate the Manila Peninsula premises or in the public pronouncements of the other Defendants-Appellees in this case must be stripped away and its true color exposed for what it is: a brazen and arrogant attack on the right of free speech and of the press, as well as of the right of access to information of the public served by the press.

90. As held in *Chavez v. Gonzales*, the mere issuance of these press statements already sends out a "chilling effect" on protected speech. There can be no other intent in such pronouncements as are the subject of this suit than to bamboozle, cow, intimidate and repress the media. These pronouncements, coupled with the rough handling by police authorities of journalists who chose to stay at the Manila Pen despite an impending police assault, were evidently intended to send a chilling effect on the free exercise of speech and of the press so vital in any democratic society.

91. All the acts of the Defendants-Appellees, taken individually, and taken together, constitute unconstitutional acts of prior restraint creating a chilling effect on the media's freedom of expression as well as on the public's right to know.

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[60] Records, at 871-872.
[61] Records, at 879.

92. In *Chavez v. Gonzales*, at issue were (1) a verbal order issued before media by the Secretary Gonzales directing National Bureau of Investigation (NBI) to go after media organizations "*found to have caused the spread, the playing and the printing of the contents of a tape*" – the Hello Garci tape.

93. On the surface, the NTC's " fair warning" as well as Secretary Gonzales' order state no more than this: a reminder that violations of the law would be dealt with accordingly. That is the same message Defendants-Appellees in the instant case purport to communicate to media, no more, no less.

94. Undeniably, Sec. Gonzales is a governmental functionary who, in the words of the Supreme Court in *Chavez v. Gonzales*, is "the alter ego of the Executive, who wields the awesome power to prosecute those perceived to be violating the laws of the land."[62]

95. The same can be said of the other Defendants-Appellees in this case: they are all the President's men who bring with them the terrible weight of the power of the Office of the Chief Executive against the ordinary citizen. When they make pronouncements in public about a matter of public interest, they do not exercise their right to free speech and expression as ordinary citizens; in fact, they express official policy with terrible if profound consequences on public life, as in this case.

96. It is for the same reason that the claim by Defendant Teodoro, Secretary of National Defense, that he was merely voicing an opinion on a matter of public interest as at best specious and at worst patronizing.

97. It should not therefore escape the notice of this Honorable Court that Defendant Gonzales and his co-Defendants-Appellees, despite the proscription of the Supreme Court in *David v. Arroyo* and *Chavez v. Gonzales*, have acted and continue to act

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[62] G.R. No. 168338 , Feb. 15, 2008.

contumaciously against the High Court's ruling; their individual and collective actuations smack of contempt towards the High Court and the sound administration of justice.

98. In fact, Defendants-Appellees' acts must be struck down void for overbreadth and vagueness. The modern American Supreme Court has repeatedly stressed the principle that "a governmental purpose to control or prevent activities constitutionally subject [to] regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."[63]

99. A law is void on its face for vagueness if persons of common intelligence must necessarily guess at its meaning and differ as to its application.[64]The more important aspect of the vagueness doctrine is not actual notice, but the other principal element of the doctrine—the requirement that legislatures place reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent arbitrary and discriminatory enforcement.[65]

100. It must be stressed that the questioned pronouncements are not statutory but issuances of high officers of the Executive Department, alter egos no less, of the President. Thus, the dangers associated with vagueness are more palpable when only the executive department is involved, as the President's alter egos need not, as in this case, promulgate guidelines for the enforcement of her own policy.

101. In *Chavez v. Gonzales*, as has already been discussed, the Supreme Court had this to say about acts of the same nature as the assailed pronouncements of Defendants-Appellees: "The concept of an "act" does not limit itself to acts already converted to a formal order or official circular. Otherwise, the non formalization of an act into an official order or circular will result in the easy circumvention of the prohibition

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63 NAACP v. Alabama, 357 US 449 (1958), 78 S.Ct. 1163, 2L.Ed.2d 1488 (1958).
64 Connally v. General Construction Co. 269 U.S. 385 (1926).
65 *See* Smith v. Goguen 415 U.S. 566 (1974).

on prior restraint. The press statements at issue are acts that should be struck down as they constitute impermissible forms of prior restraints on the right to free speech and press [underlining supplied].[66]

3. Under the totality of injurious effects test set in *Chavez v. Gonzales,* the unceremonious hauling off to prison camp of journalists who chose to remain at the Manila Peninsula Hotel despite a police notice to vacate was plain censorship.

102. Indeed, even assuming *arguendo* that authorities have established a police line at the Manila Pen and which line the media breached, under the holding of the High Court in *Chavez v. Gonzales*, police action against journalists constitute prior restraint and is therefore unconstitutional.

103. In the proceedings before the Court *a quo* it has been repeatedly suggested that a key issue in this case is whether or not the media violated the law when they refused to leave the premises of the Manila Peninsula despite a pending police assault. Yet the Supreme Court, in *Chavez v. Gonzales,* ruled that "**not every violation of a law will justify straitjacketing the exercise of freedom of speech and of the press**."[67]

104. It amplified the above holding in this wise:

> Our **laws are of different kinds** and doubtless, some of them provide norms of conduct which even if violated have only an adverse effect on a person's private comfort but does not endanger national security. There are laws of great significance but their violation, **by itself and without more**, cannot support suppression of free speech and free press. In fine, **violation of law is just a factor**, a vital one to be sure, which should be weighed in adjudging whether to restrain freedom of speech and of the press. The **totality of the injurious effects** of the violation to private and public interest must be calibrated in light of the preferred status accorded by the Constitution and by related international covenants protecting freedom of speech and of the press. In calling for a careful

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66 G.R. No. 168338, Feb. 15, 2008.

67 G.R. No. 168338 , Feb. 15, 2008.

> and calibrated measurement of the circumference of all these factors to determine compliance with the clear and present danger test, **the Court should not be misinterpreted as devaluing violations of law**. By all means, violations of law should be vigorously prosecuted by the State for they breed their own evil consequence. But to repeat, **the need to prevent their violation cannot per se trump the exercise of free speech and free press, a preferred right whose breach can lead to greater evils**.[68] [emphasis in the original].

105. The Supreme Court thus laid down an important test in *Chavez v. Gonzales* for the determination of the constitutional propriety of imposing prior restraint on free expression: the "totality of the injurious effects of the violation of the private and public interest" weighed against the "preferred status" granted by both the Philippine Constitution and international treaties protecting freedom of speech and of the press.

106. A content-based or content-restrictive regulation arises from the very subject matter of the utterance or speech. The strictest scrutiny is given content-based regulations because of its "inherent and invasive impact". The rationale for this is explained in *Police Department of Chicago v. Mosley*,[69] where the US Supreme Court stated:

> [A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open [citations omitted].

107. Here, apropos is the "clear and present danger" test, with the burden of proof of constitutionality resting upon the government. Thus, the government must show

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[68] Chavez v. Gonzales, G.R. No. 168338 , Feb. 15, 2008.

[69] 408 U.S. 92, 95-96 (1972).

several things: *First*, the type of harm the speech sought to be restrained would bring about is grave and imminent. The harm must be "a substantive and imminent evil that has taken the life of a reality already on ground."[70] *Second*, the regulation must also serve an important or substantial government interest, which is unrelated to the suppression of free expression.[71] *Third,* the incidental restriction on speech must be no greater than what is essential to the furtherance of that interest.[72] A restriction must not be so broad as to encompass more than what is required to satisfy the governmental interest. *Fourth*, the restrictions must be neither overbroad nor vague.[73]

108. On this test, the Defendants-Appellees' case falls. *First*, there is nothing in the facts to show that the government considered the Manila Peninsula standoff as an issue of public emergency. There was no formal declaration that such was the case as required by the International Covenant on Civil and Political Rights (ICCPR), if derogations of the State's human rights obligations are to be permitted.[74] The government all along considered it a subject of a mere police operation, as in fact, operatives of the PNP's Special Action Force carried out the assault. *Second*, the sweeping nature of the measure employed by the government directly and grievously impaired protected speech such that *Third*, it exceeded what is required to satisfy the specific governmental interest involved. Not only were the journalists arrested, they were cuffed and hauled off to prison camp without being told why there were being subjected to the highly invasive procedure. *Fourth*, the restrictions, because these lack the clear guidelines of a statute, are overbroad and vague that they invade the sphere of protected freedoms not only of the press but above all, of citizens.

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70 Iglesia ni Cristo v. Court of Appeals, 328 Phil. 893 (1996).

71 Adiong v. COMELEC, G.R. No. 103956, March 31, 1992, 207 SCRA 712, cited in ABS-CBN Broadcasting Corp. v. COMELEC, 380 Phil. 780, 795 (2000).

72 Adiong v. COMELEC, G.R. No. 103956, March 31, 1992, 207 SCRA 712, and Gonzales v. COMELEC*,* 137 Phil. 471 (1969), cited in *ABS-CBN Broadcasting Corp. v. COMELEC, 380 Phil. 780, 795 (2000).*

73 Iglesia ni Cristo v. Court of Appeals, 328 Phil. 893 (1996); *Gonzales v. COMELEC,* 137 Phil. 471 (1969); ABS-CBN Broadcasting Corp. v. COMELEC, 380 Phil. 780 (2000); Social Weather Stations v. COMELEC*,* G.R. No. 147571, May 5, 2001, 357 SCRA 496.

74 This is discussed extensively in arguments below.

109. Defendants-Appellees cite the case of *Branzburg v. Hayes*[75] to advance their contention that in this case, Plaintiffs-Appellants cannot claim the right to special access to a crime scene for their own enjoyment. In the first place, the factual circumstances are different: the journalists at the Manila Pen have been there before any public officer has had the opportunity to establish a police line. In fact, there was no such police line established from the time Sen. Trillanes and his group entered the Manila Peninsula and until after their arrest. In other words, they were already embedded in the thick of the action long before the police came.

110. Second, journalists may be barred from entering a police line but they may not be arrested for doing so. They may be excluded from a disaster scene but they may not be arrested and detained for breaching a police barrier to cover the event as it unfolds. As Dean Pangalangan explained to the Court *a quo* when asked about the question of the police line and the supposedly lawful order banning journalists from entering that line:

> A: Your honor, in this case, if [the] rationale is for the protection of the journalist [,] parallel to the example given earlier of a PHIVOLCS evacuation of a [volcanic] eruption….if the liberty is being curtailed for the sake of persons being ordered [to evacuate] then the persons are free to decide for themselves, what risk they are prepared to assume, if they [are] prepared to take the risk of losing life, I think that is their decision….
>
> COURT: Yes, in the same way that the law imposes a penalty if they disobey, so that is also a risk?
>
> A: Well, Your Honor, I am not aware of any person being arrested for refusing to vacate [the scene] of a volcanic eruption.
>
> COURT: Yes you may not be aware but there is law to that effect.[76]
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> ….

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75 408 U.S. 665 (1972). Cited in the Solicitor General's Memorandum, Records, at 459.

76 Records, at 949-950.

> A; What I am submitting, your Honor, is that there is precisely no one arrested. Precisely because the law itself recognizes that the purpose of the rule is [to] guarantee….to safeguard their own lives[;] it is for them to decide how much risk they are prepared to take.[77]

111. In this case, not only were journalists at the Manila Peninsula siege arrested, they were cuffed, hauled off to camp and for the most part kept in the dark by authorities about why they were being subjected to such a procedure.

112. Fourth – and this is the most important of all – none of these situations described in *Branzburg* actually purport to give authorities the right or license to do what the agents of the Defendants-Appellees in this case did to the journalists who covered the Manila Peninsula siege. In fact, Defendants-Appellees will search in vain in recent American jurisprudence for an instance where authorities arrested and detained *en mass* journalists covering a ground-breaking political event in progress. Such a thing is not done in a country or state that purports to be democratic and republican in origin and development. What the instant case clearly shows is abuse of power exercised at the expense of beloved constitutional freedoms. What happened at the Manila Peninsula is unprecedented in the annals of the press both here and abroad.

113. In fact, if the facts in the *Branzburg* case are closely examined, they do not at all apply in this case. In *Branzburg*, **a newspaper reporter refused to answer a grand jury's question concerning illegal drug traffic that he had personally observed, claiming that the first amendment gives a reporter the freedom not to disclose sources of information and to decide how much he will disclose of what he has come across in his work as a journalist**.

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[77] Records, at 951-952.

114. Evidently, the situation in *Branzburg* is worlds apart – inasmuch as at issue there was a matter of pre-trial discovery – from the instant case, where journalists have not only been barred from exercising their right to a free press but have even been unceremoniously carted off to police camp in cuffs, held against their will for many hours, and kept in the dark about why they were being treated that way by authorities.

115. The Supreme Court itself recognizes that sometimes breaches of one statute may be permitted to the degree that it allows the exercise of a preferred constitutional right. In the instant case, there is even no statute breached.

116. What exactly did the journalists violate? When they were cuffed and hauled off to camp to be processed, they were not even informed of what the violation was. Defendants-Appellees admit to that. It was only later, after such official treatment of journalists drew much flak from many quarters, that authorities began to justify it by saying that the journalists were in the way of the police operation.

117. Now Defendants-Appellees invoke PNP Memorandum Circular No. 2006-09-01 to press their case against the press. This is not even a statute passed by congress or an executive order issued by the Chief Executive. It is a mere memorandum circular issued by the PNP chief. It is now being used to justify warrantless arrests and prior restraint of media.

118. One thing is clear: the State may not engage in warrant-less arrests without legal grounds, and without the proper procedure of informing the arrested persons of their rights and the offense for which they are being arrested. Labeling these acts by another name, that is "processing" and subsuming it under a procedure in a PNP Circular does not make these acts acceptable or legal. It is illegal and arbitrary detention and illegal arrest no matter which rulebook or circular under which it was executed.

119. This right not to be deprived of liberty without due process is one constitutional and statutory right which is beyond cavil and the violation of which the pubic Defendants-Appellees must be held accountable and liable for damages.

120. In fact, there is nothing in the said Circular that gives any citizen any ground to reasonably conclude that the police, when implementing it, would be able to distinguish between who is a suspect and who is a witness.

121. The same Circular, it is apparent on its face, prescribes the same treatment for the two disparate classes of people: arrest both of them. And by the admissions of the Office of the Solicitor General, that precisely is what the police did in this case: they arrested members of the media covering the Manila Pen siege, in violation of their constitutional rights. Worse, they did not even inform the journalists why they were being arrested and herded off to camp like common criminals, their hands in cuffs.

122. The last time Plaintiffs-Appellants looked at our constitutional law, witnesses are not supposed to be arrested. Neither should the members of the media be placed under arrest for doing what they do best: covering a matter of public interest so that the public may be able to responsibly exercise their public right to be informed about matters that concern them.

123. This Circular should be struck down as unconstitutional for violating protected freedoms.

124. These freedoms are hard-won, a fact recognized by our own Supreme Court in the landmark consolidated cases of *Estrada v. Desierto et al*., and *Estrada v. Arroyo*, which discussed the fine distinctions between EDSA I and EDSA II. Plaintiffs-Appellants quote the case at length, because it is most apropos to the issues at hand:

> In fine, the **legal distinction** between EDSA People Power I and EDSA People Power II is clear. **EDSA I** involves the exercise of the **people power of revolution** which **overthrew the whole government**. **EDSA II** is an exercise of **people power of freedom of**

speech and freedom of assembly to petition the government for redress of grievances which **only affected the office of the President**. **EDSA I is extra constitutional** and the legitimacy of the new government that resulted from it cannot be the subject of judicial review, but **EDSA II is intra constitutional** and the resignation of the sitting President that it caused and the succession of the Vice President as President are subject to judicial review. **EDSA I presented political question; EDSA II involves legal questions.** A brief discourse on freedom of speech and of the freedom of assembly to petition the government for redress of grievance which are the **cutting edge of EDSA People Power II** is not inappropriate.

Freedom of speech and the right of assembly are treasured by Filipinos. Denial of these rights was one of the reasons of our 1898 revolution against Spain. Our national hero, Jose P. Rizal, raised the clarion call for the recognition of freedom of the press of the Filipinos and included it as among 'the reforms *sine quibus non.*' The **Malolos Constitution**, which is the work of the revolutionary Congress in 1898, provided in its Bill of Rights that Filipinos shall not be deprived (1) of the right to freely express his ideas or opinions, orally or in writing, through the use of the press or other similar means; (2) of the right of association for purposes of human life and which are not contrary to public means; and (3) of the right to send petitions to the authorities, individually or collectively.'

These fundamental rights were preserved when the United States acquired jurisdiction over the Philippines. In the instruction to the Second Philippine Commission of April 7, 1900 issued by President McKinley, it is specifically provided "that no law shall be passed abridging the freedom of speech or of the press or of the rights of the people to peaceably assemble and petition the Government for redress of grievances." The guaranty was carried over in the Philippine Bill, the Act of Congress of July 1, 1902 and the Jones Law, the Act of Congress of August 29, 1966.

Thence on, the guaranty was set in stone in our **1935 Constitution, and the 1973 Constitution.** These rights are now safely ensconced in section 4, Article III of the 1987 Constitution, *viz:*

'Sec. 4. No law shall be passed abridging the freedom of speech, of expression, or of the press, or the right of the people peaceably to assemble and petition the government for redress of grievances.'

The indispensability of the people's freedom of speech and of assembly to democracy is now self-evident. The reasons are well put by Emerson: first, freedom of expression is essential as a means of

> assuring individual fulfillment; second, it is an essential process for advancing knowledge and discovering truth; third, it is essential to provide for participation in decision-making by all members of society; and fourth, it is a method of achieving a more adaptable and hence, a more stable community of maintaining the precarious balance between healthy cleavage and necessary consensus.' **In this sense, freedom of speech and of assembly provides a framework in which the conflict necessary to the progress of a society can take place without destroying the society.'"**[78] [emphasis in the original, in-text citations omitted]

125. It may be true that where the general public is excluded on grounds of public policy, the reporter may also be barred.

126. *But only barred,* it must be stressed, *and not arrested, cuffed and hauled off to prison camp*. And yes, they may be barred from these proceedings – usually governmental in nature – but if by dint of journalistic enterprise, are still able to find their way into the proceedings and report on them, they cannot be subjected to prior restraint without a court order.

127. Yes, they may be criminally liable for reporting on what are say, state secrets that far outweigh the interest of the public in knowing about them, but that comes *after*, not *before.* In other words, they report on it at the risk of criminal prosecution. They do not get arrested and detained before they could even exercise their right to free expression and to a free press.

128. In the case of the Manila Peninsula standoff, it was a news event that, as it unfolded, was, by its very nature, an open invitation for journalists to cover. It is now a matter of public knowledge that in the first few crucial hours when authorities could have cordoned off the hotel and kept the public away, the police were not to be found.

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[78] G.R. Nos. 146710-15. March 2, 2001; G.R. No. 146738. Mar. 2, 2001.

129. Indeed , under the Rules of Court, when Defendants file a motion to dismiss on the ground that the Plaintiffs have no case or "cause of action" against them, they are deemed to have at least hypothetically admitted all the allegations in the complaint, and on the basis of such an admission, the court could render a valid judgment. This means that the Defendants-Appellants admitted that journalists who covered the Manila Pen incident and chose to remain there despite an impending police assault on the Magdalos were arrested, cuffed, and bundled out to be processed like common criminals without the benefit of being told why they were being subjected to such indignities; this also means that indeed, the journalists were prevented from doing their jobs. As held by the High Court in one case:

> Thus, in order to sustain a dismissal on the ground that the complaint states no cause of action, the insufficiency of the cause of action must appear on the face of the complaint, and the test of the sufficiency of the facts alleged in the complaint to constitute a cause of action is whether or not, admitting the facts alleged, the court could render a valid judgment upon the same in accordance with the prayer of the complaint. For the purpose, the motion to dismiss must hypothetically admit the truth of the facts alleged in the complaint.[79]

130. Under the facts and circumstances of this case, it is difficult to imagine how the case could be dismissed. It must be noted that when the Plaintiffs-Appellants first brought this case before the courts, the Executive Judge of the Makati City Regional Trial Court, the Hon. Winlove Dumayas, issued a three-day restraining order, an indication that he indeed found basis in the plaintiffs' claim of violated rights and continuing threats on such rights.

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[79] Consolidated Dairy Products v. Court of Appeals, GR No. 100401, August 24, 1992.

4. The questioned Acts of Defendants-Appellees violate Philippine state obligations under the International Covenant on Civil and Political Rights (ICCPR).

131. The Philippines is a party to the International Covenant on Civil and Political Rights (ICCPR), a multi-lateral treaty that, as a scholar would put it, is a "universal instrument which contains binding legal obligations for the States parties to it."[80] Art. 19 of the ICCPR provides fundamental protections to these citizens' rights.[81] Art. 21 of the ICCPR deals with the citizens' right to peaceful assembly.[82]The ICCPR obligates the Philippines to protect the fundamental rights of individuals, as well as the rights to be provided with adequate remedies for the violation of fundamental rights. Indeed, by virtue of its having ratified the ICCPR, the protections accorded by the treaty to civil liberties are now deemed part of the law of the land and citizens may demand redress before the local courts for violations of these rights. [83]

132. Art. II, Sec. 2 of the 1987 Constitution provides that "[t]he Philippines…adopts the generally accepted principles of international law as part of the law of

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80 DOMINICK MCGOLDRICK, THE HUMAN RIGHTS COMMITTEE, ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (1994). He stresses that there is now no doubt, following the ICCPR's adoption by more than 100 states in 1966 and ratification by 92 states (as of July 27, 1990), that the obligations it imposes on States Parties (especially those found in Art. 2) to "respect and ensure" the rights it protects are legally binding. *Id.*

81 See A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* on March 23, 1976. The Philippines signed the treaty on December 19, 1966 and ratified it on October 23, 1986. Article 19 of the ICCPR provides:

> .1. Everyone shall have the right to hold opinions without interference.
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice....

82 Art. 21 states:

> The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

83 *See* ICCPR, art 2(3), 993 U.N.T.S. 3; McCann and Others v. United Kingdom, Eur. Ct. of Hum. Rts. (Ser.A), No. 324 (1995), para. 161.

the land and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations." It has long been established that a treaty to which the Philippines is a party has the effect of binding law. As the Supreme Court has said in the case of *Tanada v. Angara*:

> One of the oldest and most fundamental rules in international law is *pacta sunt servanda* -- international agreements must be performed in good faith. "A treaty engagement is not a mere moral obligation but creates a legally binding obligation on the parties... A state which has contracted valid international obligations is bound to make in its legislations such modifications as may be necessary to ensure the fulfillment of the obligations undertaken.[84]

133. Or, as Art. 26 of the Vienna Convention on the Law of Treaties, to which the Philippines is a party, would put it: "every treaty in force is binding upon the parties to it and must be performed by them in good faith."[85]

134. The Human Rights Commission (HRC), commenting on the nature of Art. 2 obligation of States, stresses that the Covenant places an active obligation on States:

> The Committee considers it necessary to draw the attention of States parties to the fact that the obligation under the Covenant is not confined to the respect of human rights, but that the States parties have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction. This aspect calls for specific activities by the States parties to enable individuals to enjoy their rights...[86]

135. As Dean Pangalangan explained in his testimony, the phraseology of the ICCPR is such that states have the obligation not only to guarantee and respect the right of citizens to free expression and a free press; it demands of states to "ensure" re-

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84 G.R. No. 118295, May 2, 1997

85 Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679, drafted on May 23, 1969 and *entered into force* on January 27, 1980.

86 GC 4(13) paras. 2-3; Doc. A/36/40, at 109-110; also in Doc. CCPR/C/21.

spect, which means that the states are expected "to be pro-active, to be more active in promoting" these rights. (TSN, cross-examination, Mar. 7, 2008, at 35).

136. The ICCPR, while it recognizes the rights of states to declare a "state of emergency," when the life of the nation is threatened, has a clear cut procedure by which rights are protected and the imposition of such a state of emergency in the name of political survival or national security is regulated by the international community.

137. As a leading treatise on the human rights in states of emergencies put it in a passage we quote at length thus:

> The main aims of the drafters of the Covenant...was to provide for qualification for the public emergency which would not be open to abuses by States, rather than to list the concrete circumstances which would justify derogations. The qualification of the emergency that was approved ('threatening the life of the nation') means that the only emergency justifying derogations is an exceptional one which affects the whole nation. Therefore, less grave emergencies, even if accepted in municipal law, would not qualify for derogations under the treaties.
>
> The UN HR Committee has also considered that the public emergency justifying derogations must be one of an exceptional character and can only last as long as the life of the nation is actually threatened.

138. These protections have been incorporated into the ICCPR inasmuch as recent historical experience on the international plane has shown that "the gravest violations of fundamental human rights have occurred in the context of states of emergency."[87]

139. Under the Convention, a State which has declared such a state of emergency is duty-bound to notify the other States Parties through the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons why it has done so.[88] This notwithstanding, the Human Rights Commission's General

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87 GC 4(13) paras. 2-3; Doc. A/36/40, at 109-110; also in Doc. CCPR/C/21. at 1. See also R. Falk, *Responding to Severe Violations*, *in* JORGE L. DOMINGUEZ, ET AL., ENHANCING GLOBAL HUMAN RIGHTS 207-257 (1979).

88 Art. 4 (3), ICCPR

Comment on Art. 19 stresses that permissible restrictions on the exercise of freedom of expression "may not put in jeopardy the right itself." [89]

140. The acts assailed in the instant case before this Honorable Court are in derogation of the Philippines' obligations under the ICCPR to protect the civil liberties of its citizens. In this case, there was not even a declaration of a state of emergency that would justify any derogation of its obligations under the ICCPR. Agents of the state simply started rounding up journalists covering the standoff.

141. If indeed there was a big danger that lawlessness would result if it did not undertake such an extreme measure, under the ICCPR it was required to inform the Secretary-General of the United Nations that the necessity of the times called for certain derogations for the time being, until the state of emergency is lifted. Before that, a formal declaration of the existence of such an emergency is necessary. . Even so, under the same Convention, there are core freedoms which are not subject to derogation, or the "irreducible core" of human rights, namely the rights to life, the right to be protected against torture, cruel or inhuman punishment, the right to freedom from slavery, the right to freedom from imprisonment merely on the ground of inability to fulfill a contractual obligation , the right to due process of law, and the right to recognition everywhere as a person before the law.[90]

142. That there was no such declaration belies the assertion that derogations of these rights were called for in the instant case. As the Philippines has an obligation to ensure compliance with the terms of the ICCPR, the questioned acts of herein Defendants-Appellees were a violation of its treaty obligations.

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89 GC 10 (19), adopted by the HRC at its 461st meeting on 27 July 1983. Doc. A/38/40, at 109. Also in Doc. CCPR/C/21/Add.2..

90 *See* Art. 4(2).

5. Plaintiffs-Appellants have clearly and sufficiently shown injury-in-fact and thus have valid causes of action against the Defendants-Appellees.

143. The acts in question – the public pronouncements of Defendants-Appellees, including the Advisory – are threats directed not only at Plantiffs who were at the Manila Peninsula hotel but on the press or the media as a class of persons. These acts –invalidated by *David v. Arroyo* and *Chavez v. Gonzales* as unconstitutional prior restraint and plain censorship – are sweeping in scope and reach; by their very nature, their mere issuance already injures the press or the media as a class.

144. In fact, its chilling effect not only reaches journalists but the public in general. It is for this reason that Plaintiffs-Appellants argue that these pronouncements, and especially the advisory, should as well be struck down for over-breadth and vagueness.

145. In fact, because the rights being violated pertain to the public, anyone may seek relief before the courts for the protection of the same rights, as is the case of a vague law or a law characterized by over-breadth. That is in fact the logic in First Amendment cases: courts strike down overbroad laws for their chilling effect ***on the speech of others not present before the court***. [91] As Justice Mendoza of the Philippine Supreme Court put it thus:

> Indeed, "on its face" invalidation of statutes results in striking them down entirely on the ground that they might be applied to parties not before the Court whose activities are constitutionally protected. It constitutes a departure from the case and controversy requirement of the Constitution and permits decisions to be made without concrete factual settings and in sterile abstract contexts.[92]

146. In fact, because the rights being violated pertain to the public, anyone may seek relief before the courts for the protection of the same rights, as is the case of a

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91 Estrada v. Sandiganbayan, G.R. No. 148560, 19 November 2001, 369 SCRA 394, Justice Mendoza, concurring.

92 *Id.*

vague law or a law characterized by over-breadth. That is in fact the logic in First Amendment cases: courts strike down overbroad laws for their chilling effect ***on the speech of others not present before the court.***

147. Dean Raul C. Pangalangan has explained this in his affidavit as a matter of the *in terrorem* effect of the public pronouncements in question, deterring persons from engaging in protected activities. An unclear law, a law that does not draw bright lines, might regulate, or appear to regulate, more than is necessary, and thus deter or chill persons from engaging in protected activities.[93]

148. The arbitrary arrest and detention by police of journalists covering the Manila Peninsula standoff as well as the collective pronouncements of the Cabinet members herein impleaded as Defendants-Appellees are an invalid and unconstitutional exercise of prior restraint that recalls the Marcos regime's suppression of the freedom of the press. Such prior restraint not only curtails free expression and a free press; it also effectively cuts off the public from information that concerns and matters to them.

149. Indeed, the right to information is a public right where the real parties in interest are the public, or the citizens to be precise. For every right of the people recognized as fundamental, there is a corresponding duty on the part of those who govern to respect and protect that right. This is the essence of the Bill of Rights in a constitutional regime.

150. Yes, it may be that access to public proceedings is not a special prerogative of the press, as the basis of this is a common public right.

151. But Plaintiffs-Appellants claim this right not only for themselves. They invoke it too in the name of public interest. Plaintiff-Appellant Ellen O. Tordesillas, who, other than writing columns that see print in the newspaper *Malaya* and its tabloid sister

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[93] Affidavit dated March 6, 2008, Para. 14. Records, at 317.

Abante, also runs an on-line blog at ellentordesillas.com, testified to this fact during the summary hearing conducted by this Honorable Court last Jan. 21, 2008. [94]

152. In her testimony, Plaintiff-Appellant Tordesillas' said her blog –an interactive medium, where readers can comment on the writing for the day of the blog owner in real time – is one of the top Filipino blogs in the field of political commentaries. On the average, she gets a traffic of 11,000 hits per day – the print equivalent of 11,000 readers.[95]

153. She testified that on the day she was arrested and "processed" at Bicutan, she received many worried comments from her loyal readers asking about her well-being. If she is arbitrarily arrested while covering a newsworthy event, her loyal followers will be deprived of the information that they usually get from her blog, as well as from her articles that see print in *Malaya* and *Abante*. This was "chilling effect" plain and simple.[96]

154. This Plaintiff-Appellant Vergel O. Santos also explains in his affidavit:

> There is no greater damage done to the journalist than prior restraint such as what the Defendants-Appellees have done, and threaten to do again and again. Curtailment of press freedom is curtailment of the journalist's very livelihood. It strikes at the heart of what the profession is all about – free expression. Without the freedom to report on matters that concern the public, journalism cannot be. You prevent the press from doing its job, you do irreparable damage to public interest and to the common weal.[97]

155. The Supreme Court has explained the significance of this corollary right in these terms:

> The right to information is an essential premise of a meaningful right to speech and expression. But this is not to say that the right to information is merely an adjunct of and therefore restricted in

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94 Records, at 710.
95 Records, at 710.
96 Records, at 710.
97 Para. 25 at page 3. Records, at 77.

> application by the exercise of the freedoms of speech and of the press. Far from it. The right to information goes hand-in-hand with the constitutional policies of *full public disclosure * and honesty in the public service.* ** It is meant to enhance the widening role of the citizenry in governmental decision-making as well as in checking abuse in government. [emphasis in the original].[98]

156. Indeed, Plaintiffs-Appellants rights have already been violated. When journalists were subjected to an unconstitutional arrest and detention, their rights not only to due process but above all, to a free press were violated. Moreover, their arrest and detention by police authorities violated the public's right to information on matters that concern the public weal. This is not a situation of *damnum absque injuria*. What were violated were constitutional rights that pertain not only to individual journalists but to the public as well. The right to a free press and to free expression are public rights, so is the public right to information. Anyone can in fact bring suit against the state in this case, because what were injured and stand to be injured again are constitutional rights.

157. Statute – Art. 32 of the Civil Code – itself has provided an avenue for redress where constitutional rights of the nature involved in the instant case are concerned. The liability of public officers for violation of these rights is not merely with regard to those who may be directly responsible for the violation. *Aberca v. Ver*[99] states:

> Thus it is not the actor alone who must answer for damages under Article 32; the person indirectly responsible has also to answer for the damages or injury caused to the aggrieved party.

158. The **acts of the Defendants-Appellees supporting and ratifying the violations of press freedom and their continuing and intentional failure in their mandatory duty to aid and protect the petitioner's constitutional rights** constitute a breach of the Plaintiffs-Appellants' constitutional rights and warrant an award of **damages as laid down in Article 32 of the New Civil Code**.

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98 Valmonte v. Belmonte, G.R. No. 74930 Feb. 13, 1989.

99 160 SCRA 590 (1988).

159. In fact, even private individuals may be held liable for the violation of constitutional rights if they stood by and assented thereto or instigated the violation as held in *MHP Garments Inc. v. CA*.[100] Therefore there is a violation of Plaintiffs-Appellants' rights warranting damages, and therefore there is a cause of action, contrary to the claims laid down in the Motion to Dismiss.

160. It may be that in *Laird v. Tatum*,[101] the US Supreme Court had laid down a strict jurisdictional test that requires a private individual to show that he sustained or is in immediate danger of sustaining a direct injury as a result of a questioned governmental action before he can invoke judicial redress.

161. Our own jurisdiction however has a more liberal jurisdictional requirement when at issue is a constitutional right. As the Honorable Court held in the landmark case *of Francisco, Jr. et al v. House of Representatives*,

> When suing as a citizen, the interest of the petitioner assailing the constitutionality of a statute must be direct and personal. He must be able to show, not only that the law or government act is invalid, but also that he sustained or is in imminent danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers thereby in some indefinite way. It must appear that the person complaining has been or is about to be denied some right or privilege to which he is lawfully entitled or that he is about to be subjected to some burdens or penalties by reason of the statue or act complained of. ***In fine, when the proceeding involves the assertion of a public right, the mere fact that he is a citizen satisfies the requirement of personal interest.*** [102][emphasis supplied].

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100 236 SCRA 227.

101 408 U.S. 1 (1972).

102 Ernesto V. Francisco Jr., et al, v. House of Representatives, GR. No. 160261, Nov. 10, 2003.

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING PLAINTIFFS-APPELLANTS' APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND FOR A PRELIMINARY PROHIBITORY INJUNCTION.

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162. Where at issue is a public right, direct injury is taken to mean as synonymous with a violation of such right as pertains to a citizen. The importance to the citizen of judicial redress where a constitutional right is under attack comes to sharper focus in the context of a political situation where, as Plaintiff-Appellant Dean Teodoro testified, "certain statements and acts of certain government agencies suggest that anything can happen to journalists" [TSN, on re-direct examination Feb. 20, 2008, p. 65].

163. What is wrong in the first place, he said, is that in the Manila Pen siege, journalists have been arrested for simply being there – as "collateral damage":

> But what really happened was that is seems as if the government were [taking] out the media. Now that has certain consequences and one of the consequences is that: the next time such an incident happens, some journalists will be more careful in what they say….And they will be hesitant in doing their jobs.[103]
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> ….
>
> Then the information that the public needs will not get to the public of journalist[s] [hesitate] to get the information. Then there is likelihood that the information that is vital to the public cannot reach the public. I think we saw this during the Martial Law period and I'm old enough to have experience[d] the Martial Law period. (TSN, on re-direct examination Feb. 20, 2008, pp. 65-66).[104]

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[103] Records, at 805.

[104] Records, at 805-806.

164. It is indeed specious to say that as the advisory is directed only at the CEOs or executives of media organizations, it does not concern Plaintiffs-Appellants, nor have the Plaintiffs-Appellants shown that they occupy such positions of responsibility in their respective media organizations. In fact, whoever drafted the advisory shows deep familiarity with the workings of media organizations and how crippling or threatening the gate-keepers – the editors and the executives on top of the chain – can indeed send a chilling effect on everyone else down the line.

165. That the advisory was at all issued, that it at all exists, is by itself, threatening because, as Plaintiff-Appellant Santos testified, " it needed not be issued" [TSN, on cross-examination, Jan. 31, 2008, p. 25][105]. Behind the issuance of such an advisory in a general atmosphere where rights have become more and more restricted is an arbitrary exercise of power with a deft and devious psychological play foisted on the vulnerable. As this exchange between the witness and the cross-examiner further amplifies:

> Q: Is there anything threatening with that? [referring to the Gonzales advisory].
>
> A: Oh yes! the mere….fact that it was issued is a threat.
>
> Q: Is it not expected that all of us should obey lawful orders of any government official?
>
> A. Exactly we are. That's why I am surprised that it has to be put in an advisory such as that.
>
> Q: So what makes the advisory more threatening?
>
> A: The advisory by itself is threatening because it needed not be issued [TSN, on cross-examination, Jan. 31, 2008, pp. 24-25].[106]

166. Our very own Supreme Court understands too well the psychology behind this arbitrary and capricious power play. In the case of *David v. Arroyo*, it made this

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105 Records, at 670.
106 Records, at 669-670.

declaration on the matter of veiled threats such as those embodied in the Gonzales advisory and expressed in the public pronouncements of Defendants-Appellees:

> **It is that officious functionary of the repressive government who tells the citizen that he may speak only if allowed to do so, and no more and no less than what he is permitted to say on pain of punishment should he be so rash as to disobey**. Undoubtedly, the *The Daily Tribune* was subjected to these arbitrary intrusions because of its anti-government sentiments. This Court cannot tolerate the blatant disregard of a constitutional right even if it involves the most defiant of our citizens. Freedom to comment on public affairs is essential to the vitality of a representative democracy. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. The motto should always be *obsta prince*.[107]

167. Moreover, the context in which these questioned acts have been issued must be considered by the courts as the vital factor that makes the same threatening to journalists. As *Freedom House*, a respected international institution, would put it:

> []Recent increases in the harassment of journalists are integrally related to broader concerns about the declining condition of Philippine democracy.
>
> The widespread killing of journalists led Reporters Without Borders to declare that "after Iraq, the Philippines is the most dangerous country for journalists." According to the Committee to Protect Journalists, 32 reporters have been killed for their reporting in the 15 years between 1991 and 2006. Fewer than 10 percent of the cases have led to convictions. A recent government commission on media and activist killings points the finger at "local politicians, warlords, or big business interests" driven by a range of mainly local motives.
>
> A newer mode of media harassment comes from those close to the national leadership. In 2006, the president's husband, "First Gentleman" Jose Miguel Arroyo, filed libel suits against 43 journalists. The lawsuits seek a total of $1.4 million in damages for stories accusing him of involvement in vote rigging and corrupt actions; if convicted, the journalists could also face imprisonment for six months to six years. In response, 600 journalists and 30 supporting organizations have issued a petition urging the decriminalization of libel. A government attempt to charge other journalists with

[107] G.R. No. 171409, May 3, 2006.

> sedition in the wake of a February 2006 coup attempt was blocked by the Supreme Court. It is not clear to what extent these legal charges will intimidate or embolden the media, particularly given that libel and sedition laws have not in the past been an effective means of curbing media criticism of government officials. Combined with the killings, however, the legal charges must be viewed as a disturbing attack on one of the major bulwarks of Philippine democracy. [108]

168. In this context of media intimidation over the last two years since 2006, the press statements of the Defendants-Appellees as is the Advisory of the Secretary of Justice warning media organizations that they face criminal liabilities should their reporters not obey the orders of police authorities constitute prior restraint and must be taken together as of a piece.

169. But this is to argue that the warnings and advisories BEFORE journalists even do anything is a form of PRIOR restraint because they abridge their freedom to cover events of public interest EVEN BEFORE they actually cover anything. The Supreme Court's ruling in *David v. Arroyo* has apparently not dissuaded government from such an arrogant posturing against a vital institution in a democracy society.

170. Indeed, the issuance of the threat has already caused damage to the vibrant exchange of ideas fostered by an unfettered press. The mere issuance of such an advisory is a threat to the democratic order. Why? It treats the citizen as mere governmental stooge; its condescension reveals a patent mistrust on the part of public officials of the public and democratic functions of the press. It is, as Plaintiff-Appellant Santos himself states, yet another example of the classic tussle between power and freedom. When asked on cross-examination why it matters that the Secretary of National Defense is expressing an opinion and not an ordinary citizen, Plaintiff-Appellant Santos explains the world of a difference between the two situations:

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[108] available at http://www.freedomhouse.org/template.cfm?page=140&edition=8&ccrcountry=165&section=83&ccrpage=37.

> Q: So it is not a case sir, of a group of journalists who hold freedom of expression valuable have now sued the Secretary of National Defense on the ground that he exercised his right of expression by giving an opinion?
>
> A: Not it is not the case.
>
> Q: Why not, sir?
>
> A: Because it is a matter of who is making an opinion. If it happens to be a person in power, it becomes an issue between power and freedom. And it happened that the Secretary of National Defense is on the side of power in this case. And journalists [are] on the side of freedom. It is a case between power and freedom and its seems to me that the Constitution prefers [the] system [errs] on the side of freedom instead of power.[109]

171. In his discussion of the cross-examination of Plaintiff-Appellant Tordesillas, the Defendant Secretary of National Defense makes it appear that the witness agreed to the fact that without qualification, he had the right to express his opinion on the arrest of the journalists covering the Manila Peninsula.

172. In fact, early on, Plaintiff-Appellant Tordesillas already stated that if he were to express an opinion as a mere citizen of the Republic, he is certainly entitled to make such an opinion. However, it is different where he speaks as Secretary of National Defense, because as such, according to Ms. Tordesillas, "his opinion [weighs] more than just the opinion of a private person." [TSN, on cross-examination, Jan. 31, 2008, p 82].[110] *Thus, the Secretary of National Defense is not barred from sharing what he thinks of the issue with his wife in the privacy of the marital bed or in a phone call to his mother. Plaintiffs-Appellants do not and cannot take away his right to express his opinion within the confines of the private and the personal.*

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109 Records, at 685.
110 Records, at 727.

173. But it is clear that when the Defendant-Appellee Teodoro made his questioned pronouncements, he was doing so in public, as head of one of the country's most powerful executive office. It was not an opinion stated in the confidence of a private meeting, away from the microphones and video cameras of the press, but one clearly directed to the public.

174. Defendant-Appellee Teodoro claims to have merely exercised his freedom of expression. However this is too simplistic and unacceptable a claim, because he did not speak as a private citizen. His statement was an exercise of Executive Power, and as Plaintiff-Appellant Santos countered in his testimony before this Honorable Court, Defendant Teodoro's statements was unequivocal assent to the warrant-less arrest, cuffing, and hauling off of media to what is now the "most notorious camp" in the country.

175. With his words, he in fact made an official endorsement of such an arbitrary, unconstitutional, and unreasonable restraint directed at members of the media, with all its frightening consequences, given that he heads a department which exercises supervisory powers over the military establishment.

176. It would thus be pertinent to recall here the holding of the Supreme Court in *Chavez v. Gonzales* as to what constitutes an act proscribed as prior restraint: "**Any act done, such as a speech uttered, for and on behalf of the government in an official capacity is covered by the rule on prior restraint."**[111]

177. The acts of Defendants-Appellees – from their collective threats issued against journalists to the Advisory of the Secretary of Justice – unless these are held to be unconstitutional for being an exercise of plain censorship or of prior restraint, hang like the proverbial Sword of Damocles. Anytime, agents of the state can invoke these pronouncements against any member of the press. And as Plaintiffs-Appellants have repeat-

[111] G.R. No. 168338, Feb. 15, 2008.

edly stressed, "the value of the Sword of Damocles is that it hangs – not that it drops." This is because "[f]or every [person who tests] the limits of the statute, many more will choose the cautious path and not speak at all."[112]

178. Such threats have a "chilling effect" on the exercise of Plaintiffs-Appellants' rights, these being declarations with ambiguous legal reach that breaches the zone of protection accorded to the citizen by the Bill of Rights. To the extent that the law is vague, it might have an *in terrorem* effect and deter persons from engaging in protected activities. For, to repeat, an unclear law, that is, a law that does not draw bright lines, might regulate, or appear to regulate, more than is necessary, and thus deter or chill persons from engaging in protected activities.[113]

179. Plaintiffs-Appellants CMFR, PPI, PCIJ and NUJP likewise have a legitimate interest that suffers and stands to suffer in the face of official threats of arrest, inasmuch as theirs is a common concern for the rights and welfare of journalists. All three organizations are advocates of press freedom and the right of the public to information that concern them and that matter to them.

180. Plaintiffs-Appellants De Jesus, Santos, Chua, Cruz, Alampay, Arao, Paraan, Fajardo, Panelo, Ayala and Baculo and all the other individual journalists herein, as practicing journalists and advocates of press freedom and the right to information of the public on matters that concern their interest, face the continuing threat of arrest and prosecution while in the exercise of their professional duty.

181. For this reason, a preliminary prohibitory injunction is in order, if only to prevent any violation, or further violation, of Plaintiffs-Appellants' rights and to preserve such rights while the case is being heard. As the primordial role of the right of free expression and a free press in a democratic society cannot be gainsaid, the matter is un-

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112 Thurgood Marshall, J., in *Arnett v. Kennedy*, 416 U.S. 134 (1974). (*See also* J.B.L. Reyes, cited in *Ilagan v. Ponce Enrile*, G.R. No. 70748, 139 SCRA 349 (1985)

113 JOHN E. NOWAK AND RONALD ROTUNDA, CONSTITUTIONAL LAW, 1071 (2000, 6th Ed.)

questionably of extreme urgency. Plaintiffs-Appellants suffered and will suffer grave injustice and irreparable injury and thus pray of this Honorable Court to issue an order enjoining the Defendants-Appellees from issuing such threats, warnings, advisories, directives, or otherwise enforcing such threats, warnings, advisories and directives, while the instant case is being heard.

182. Under Rule 58, an applicant for a Writ of Preliminary Injunction is entitled to such relief demanded, when it is established that (a) he is entitled to the relief demanded, wherein whole or part of such relief consists in restraining the commission or continuance of the act or acts complained of, or in requiring the performance of act or acts, either for a limited period or perpetually; (b), the commission, continuance or non-performance of the act or acts complained of during the litigation would probably work injustice to the applicant; or (c), a party, court or agency is doing, threatening, or is attempting to do, or is procuring is suffering to be done, some act or acts probably in violation of the rights of the applicant respecting the subject of the action or proceeding, and tending to render the judgment ineffectual

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183. "[T]he value of the Sword of Damocles is that it hangs – not that it drops," observed a noted American jurist. "For every [person who tests] the limits of the statute, many more will choose the cautious path and not speak at all."[114] Nothing could be truer now than the case of members of the media –including the individual Plaintiffs in this case – in the wake of the threats made by Defendant-Appellees.

[114] Thurgood Marshall, J., in *Arnett v. Kennedy*, 416 U.S. 134 (1974). (*See also* J.B.L. Reyes, cited in *Ilagan v. Ponce Enrile*, G.R. No. 70748, 139 SCRA 349 (1985)

184. Such threats have a "chilling effect" on the exercise of Petitioners' rights, these being declarations with ambiguous legal reach that breaches the zone of protection accorded to the citizen by the Bill of Rights. To the extent that the law is vague, it might have an *in terrorem* effect and deter persons from engaging in protected activities. An unclear law, that is, a law that does not draw bright lines, might regulate, or appear to regulate, more than is necessary, and thus deter or chill persons from engaging in protected activities.[115]

185. Plaintiffs-Appellants organizations CMFR, PPI, PCIJ and NUJP likewise have a legitimate interest that suffers and stands to suffer in the face of official threats of arrest, inasmuch as theirs is a common concern for the rights and welfare of journalists. All three organizations are advocates of press freedom and the right of the public to information that concern them and that matter to them.

186. Plaintiffs-Appellants De Jesus, Santos, Chua, Cruz, Alampay, Arao, Paraan, Fajardo, Panelo, Ayala and Baculo and all the other individual journalists herein, as practicing journalists and advocates of press freedom and the right to information of the public on matters that concern their interest, face the continuing threat of arrest and prosecution while in the exercise of their professional duty.

187. For this reason, a preliminary mandatory injunction and/or a temporary restraining order is in order, if only to prevent any violation, or further violation, of

[115] JOHN E. NOWAK AND RONALD ROTUNDA, CONSTITUTIONAL LAW, 1071 (2000, 6th Ed.)

Plaintiffs' rights and to preserve such rights while the case is being heard. As the primordial role of the right of free expression and a free press in a democratic society cannot be gainsaid, the matter is unquestionably of extreme urgency.

188. Plaintiffs-Appellants suffered and will suffer grave injustice and irreparable injury and thus pray of this Honorable Court to issue *ex parte* a 60-day restraining order enjoining the Respondents-Appellees from issuing such threats, warnings, directives, or otherwise enforcing such threats, warnings and directives, and further ask that within the same period, the Honorable Court conduct a summary hearing to determine whether the issuance of a preliminary mandatory injunction is called for, under the circumstances. *By reason of the nature of the instant complaint and the causes of action on which it is founded, Plaintiffs pray for exemption from the filing of a mandatory injunction bond.*

III. The Trial Court committed reversible error in denying the admissibility of the testimony of expert witness Dean Raul C. Pangalangan.

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189. Dean Pangalangan testified as an expert in American constitutional law and international law, especially as these fields intersect with the issues of freedom of speech and of the press. Plaintiffs-Appellants do not purport to supplant the Court's judgment for that of Dean Pangalangan. He was presented merely to assist the Court *a quo* in ascertaining the law as it applies to the facts in the instant case.

190. Dean Pangalangan's testimony was particularly necessary in regard to American constitutional law on the right to free expression and to a free press (and its distillation in Philippine constitutional law) and in regard to the international law on these matters, especially the application of the International Covenant on Civil and Political Rights (ICCPR) on free speech and free expression. He was properly qualified and established as an expert in these fields.

191. In fact in American jurisdiction expert testimony may be admitted where the testimony proffered is that of one who has special knowledge and skill in regard to the existence and interpretation of foreign law.[116] An expert witness on foreign law is not even required to meet any special qualifications, and need not be admitted to practice in the country whose law is at issue and not even be an attorney.[117]

192. Based on the facts and circumstances, the US Supreme Court has stated that expert witnesses properly could testify as to what the law was in a foreign jurisdiction. See for example, *United States v. Wiggins,*[118],in which the Court stated that witnesses familiar with the customs and laws of a foreign jurisdiction may testify to those laws and customs, although the Court did not indicate whether these witnesses were experts.

193. The Court also indicated that since the testimony of the witnesses was in exact accordance with the published ordinances on the subject, the written law would be relied on. In *Ennis v. Smith,*[119]the Court stated that the unwritten law of a foreign jurisdiction may be proved by the testimony of experts.

194. Moving on to the issue of expert legal testimony on matters touching on domestic law, while it is true that in American law, the traditional rule excluding expert testimony on matters of domestic law continues to apply in most jurisdictions, dis-

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116 Trans Chemical Ltd. v. China Nat. Machinery Import and Export Corp**.** 161 F.3d 314 C.A.5 (Tex.),1998. December 08, 1998

117 In Re Johnson's Estate, 100 Call. App. 2d 73, 223 P.2d 105 (2d Dist. 1950).

118 39 U.S. 334, 10 L. Ed. 481 (1840).

119 55 U.S. 400, 14 How. 400, 14 L. Ed. 472 (1852).

tinction must be made between expert testimony sought to be admitted that merely interprets domestic law and where other considerations are in issue as when there are mixed questions of law or fact.

195. Thus an example of testimony regarding a mixed question is found in *United States v. Milton*,[120] in which the trial court permitted an expert to interpret transcripts of conversations among Defendants-Appellees charged with gambling violations. The expert classified the different types of betting involved and interpreted the Defendants-Appellees' role in the gambling organization. This testimony included both a factual explanation of what the Defendants-Appellees were doing and the legal conclusion that they were involved in an illegal gambling operation.

196. In fact, American Courts have also been receptive to admitting legal testimony where the subject matter is complex and the law is either so uncertain as to be vague. Expert legal testimony is not only covertly admitted as testimony on mixed questions of law and fact, but also openly permitted in many cases. Cases involving complicated statutes that are difficult to understand or interpret-such as complex tax and securities cases-have become an arena for presentation of expert legal testimony.

197. For example, the trial court in *United States v. Garber* [121]allowed conflicting expert testimony on the legal question of the taxability of the sale of blood antibodies under section 61 of the Internal Revenue Code. Similarly, in *Sharp v. Coopers & Lybrand*, the judge permitted a law professor specializing in federal income taxation to testify about the tax consequences of an oil drilling venture and about the meaning of the relevant Code provisions.[122]

198. Hence, the general rule that the opinion testimony of expert lawyers on legal questions, or that which would amount to a conclusion of law, is inadmissible cer-

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120 555 F.2d 1198 (5th Cir. 1977).

121 607 F.2d 92, 79-2 U.S. Tax Cas. (CCH) ¶9709, 44 A.F.T.R.2d (P-H) ¶79-6095 (5th Cir. 1979).

122 Sharp v. Coopers & Lybrand, 457 F. Supp. 879 (E.D. Pa. 1978) (No. 75-1313), *aff'd in part*, 649 F.2d 175 (3d Cir. 1981), *cert. denied*, 455 U.S. 938 (1982).

tainly admits of exceptions, even under American law and practice, from which much of Philippine law and practice on evidence derive.

199. Dean Pangalangan is also not precluded from expressing an opinion on factual matters over which he has no personal knowledge. Under our own rules, an expert is permitted to state his opinion on facts which do not come under his personal knowledge, provided that these are given to him hypothetically – that is, "they must assume the state of facts upon which his opinion is desired."[123] Thus, "where the facts are undisputed, they must also be included in the hypothetical question. Where the facts are disputed each party must assume in his hypothetical question any state of facts which he claims his evidence justified."[124]

200. The Court *a quo* in fact propounded questions to this effect on crucial points of the controversy, in particular in regard to whether or not under the current law – given the fact that journalists had been given a lawful order to vacate – they may be arrested for refusing to heed the order.[125]

201. Plaintiffs-Appellants argue that here is a situation where the expert witness is confronted with both issues of fact and issues of law: as for example, the factual side being whether the actuation of journalists covering the Manila hotel siege falls within the proscriptions of Art. 151 of the Revised Penal Code and the legal side being whether or not despite such proscription they are justified in disregarding it under some other law – in this case, the fundamental law of the land. It is a question that Dean Pangalangan has answered in the affirmative, citing current Philippine constitutional law.[126]

202. Also of import is Dean Pangalangan's testimony on the applicability of the ICCPR to the facts of the case. Current international law on free speech and free expression as elaborated in the ICCPR is a matter that is not ordinarily within the common knowledge of courts and lawyers. It requires special skill and training to become familiar

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123 RICARDO J. FRANCISCO, EVIDENCE 450 (1997 ed.). Of course the eminent Filipino treatise writer on procedure gleans much of his material from American precedents.

124 *Id.* at 450-451.

125 TSN, Clarificatory Questions, Mar. 7, 2008 pp. 49-54.Records, 948-953.

126 TSN, Clarificatory Questions, Mar. 7, 2008, pp. 49-50, see Records

with it. This fact the Court *a quo* has appreciated very well when it asked the expert witness a series of questions on when and how a state may derogate its obligations under the ICCPR on free speech and expression.[127]

203. Indeed, this case involves issues of first impression. None of the Defendants-Appellees have denied that it is unprecedented. The issues involved in this case assume complex proportions. An expert legal testimony may thus be admitted by this Honorable Court to assist it in the determination of applicable law on facts.

204. The objection is that the presentation of expert legal testimony usurps the function of the judge. But this is not necessarily the case. It is still this Honorable Court which must determine the applicable law and apply it to the facts of the case.

205. An expert's testimony regarding the proper interpretation of a law does not impinge upon either of these functions. This Honorable Court is free to give as much or as little weight to the expert's testimony as he feels is appropriate[128] - matters which are quite apart from the issue of admissibility. Neither does expert legal testimony invade the judge's function of determining the law, in the same way that expert testimony on an issue of fact does not encroach upon this Honorable Court's fact-finding role.[129]

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127 TSN, Clarificatory Questions, Mar. 7, 2008, pp. 42 -44. see Records

128 United States v. Ecker, 543 F.2d 178, 190 (D.C. Cir. 1976) ('[T]he court is under no obligation to accept the experts' opinions on questions of law . . ..'), *cert. denied*, 429 U.S. 1063 (1977); Dixon v. Jacobs, 427 F.2d 589, 600-01 (D.C. Cir. 1970); E. M. Stevens Corp. v. United States, 270 F. Supp. 25, 28 (Cust. Ct. 1967).

129 *See, e.g.*, Shore v. County of Mohave, 644 F.2d 1320, 1322-23 (9th Cir. 1981) (upholding use of expert medical testimony because 'there was little danger . . . that the court would have been unduly impressed by the expert's testimony or opinion. . . . [T]he court could have given it the weight it felt it deserved.').

IX. RELIEF

WHEREFORE, the premises considered, Plaintiffs-Appellants respectfully pray that this Honorable Court:

a) **DECLARE** that Respondents-Appellees are liable for violations of the Plaintiffs' constitutional rights under Art. 32 of the New Civil Code under the circumstances described above.

b) **FIND** the Respondents-Appellees liable to pay the Plaintiffs-Appellants in the aggregate (i) actual damages amounting to at least Five Hundred Thousand Pesos (Php 500,000.00); (ii) moral damages in the amount of Five Million Pesos (Php 5,000,000.00); (iii) and exemplary damages amounting to Four Million Five Hundred Thousand Pesos (Php 4,500,000.00);

c) **ISSUE** after due hearing, Permanent Writ of Injunction enjoining Respondents and/or their agents from issuing threats of arrest or from implementing such threats, against Plaintiffs and/or other members of the media, who are covering events similar to the Manila Pen standoff in the future.

d) **ISSUE**, upon the filing of this Brief, Writ of Preliminary Prohibitory Injunction and/or a Temporary Restraining Order against the Defendants and/or their agents and other instrumentalities, restraining them from further issuing the aforementioned threats or from implementing the same until such time that the issues presented in this instant suit are resolved by this Honorable Court.

In the alternative, Plaintiffs-Appellants respectfully pray that this Honorable Court

e) **REVERSE** the questioned Orders of the Court *a quo* dated June 2, 2008 and June 20, 2008;

f) **REINSTATE AND REMAND** the case to the Court *a quo* for trial on the merits, at the same time admitting the expert testimony of Dean Raul C. Pangalangan, and

g) **ISSUE UPON THE FILING OF THIS BRIEF**, a Writ of Preliminary Prohibitory Injunction and/or a Temporary Restraining Order against the Defendants and/or their agents and other instrumentalities, restraining them from further issuing the aforementioned threats or from implementing the same until such time that the issues presented in this instant suit are resolved by this Honorable Court.

Other just and equitable relief are likewise prayed for.

Makati City for Manila. 23 March, 2009

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EXPLANATION

Due to the shortage of messengerial services and lack of time this Appellants' Brief for Plaintiffs-Appellants-Appellants is being served to the other parties by registered mail in accordance with Section 11, Rule 13 of the Revised Rules of Court.

ROMEL REGALADO BAGARES

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X. APPENDICES

(Copy of the appealed Orders of the Regional Trial Court
of Makati City, Branch 56, dated June 2, 2008 (Appendix "A") and June 20, 2008
(Appendix "B")