
**STATEMENT BY ARTICLE 19, GLOBAL CAMPAIGN FOR FREE
EXPRESSION**

INTERNATIONAL LEGAL STANDARDS RELATING TO DEFAMATION

Thai Criminal Court
Black Case No. 3091/2546

B E T W E E N:

Shin Corporation Public Company Limited (Plaintiff)

A N D:

Ms. Supinya Klangnarong (1st Defendant)

and

Thai General Group Co., Ltd. (2nd Defendant)

and

Mr. Roj Ngamman (3rd Defendant)

and

Mrs. Kannika Viriyakul (4th Defendant)

and

Mr. Taweesin Satitrattanacheewin (5th Defendant)

August 2005

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United Nations Special Rapporteur on Freedom of Opinion and Expression, the Organisation for Security and Cooperation in Europe Representative on Freedom of the Media and the Organisation of American States Special Rapporteur on Freedom of Expression, Joint Declaration of 10 December 2002

Introduction

This case is based on a 16 July 2003 *Thai Post* article in which Supinya Klangnarong, the Secretary General of the Campaign for Popular Media Reform (CPMR), an advocacy non-governmental organisation (NGO), expressed certain views on matters of high public interest about the relationship between Shin Corporation Public Company Limited ('Shin Corp') and the Thai Prime Minister, Dr. Thaksin Shinawatra.¹ Remarks of this nature are accorded a particularly high degree of protection under international law relating to freedom of expression, which Thailand is bound to uphold. As such, this case raises important questions about freedom of expression and, in particular, the fundamental right of citizens and the press to express their opinions on matters of public concern.

The underlying facts are well-known and are not themselves disputed. These are that Shin Corp is a telecommunications company that, among other things, operates a national communications business under concession agreements with the Thai government; that Thaksin was the founder of Shin Corp and that, since he became Prime Minister, his family members have remained its major shareholders; that the government has enacted policies and revenue-sharing changes relating to telecommunication concessions (including those operated by Shin Corp); and that, from the time Thaksin and his Thai Rak Thai party assumed political power in 2001 until 2003, when the article in question was published, Shin Corp experienced a rapid growth in its revenue, net profits and stock price.

The key statements which appear to be subject to challenge from the 16 July 2003 *Thai Post* article are Supinya's opinion that the election of Thaksin as Prime Minister "help[ed] cement the business and political sectors," that the policies subsequently promulgated by the government have helped Shin Corp to grow and that, as Shin Corp grows, this will in turn strengthen the political power of the Thai Rak Thai party.

This Statement provides evidence of international and leading comparative standards relating to freedom of expression and defamation which are relevant to the specific defamation issues raised

¹ Supinya is the First Defendant; other defendants include the owner of the *Thai Post* and various individuals associated with it.

in this case. It is the result of a process of discussion both within ARTICLE 19 and with a number of other experts on international law relating to freedom of expression.

The Statement describes international law relating to freedom of expression. This is both formally binding on Thailand as a State Party to the *International Covenant on Civil and Political Rights* and provides authoritative guidance as to the interpretation of constitutional guarantees of freedom of expression, as well as the Thai criminal defamation laws.

It also notes the serious chilling effect criminal defamation laws can have on public debate on matters of public concern, and the disfavour with which they are viewed by international bodies and national authorities in democracies. As a result, such laws should, at the very least, be interpreted and applied stringently and narrowly.

The Statement presents three specific arguments that are relevant to the facts of this case. First, it argues that the challenged statements are expressions of opinion, not assertions of fact. As such, they benefit from a high level of protection under international law. Because Supinya's opinions are honestly and reasonably held, the Statement argues that they should not attract criminal defamation liability.

Second, even if some of the challenged statements were considered to be assertions of fact, under international law and in some national jurisdictions, the defendants would not be subject to liability unless the plaintiff proved that those statements were false. Requiring a defendant to prove the truth of their challenged statements is inconsistent with international standards relating to defamation, as well as basic principles of criminal law, according to which defendants benefit from the presumption of innocence until proven guilty.

Third, even if some of the challenged statements were considered to be assertions of fact, the Statement notes that international and many national courts would still absolve the defendants of guilt as long as they made the statements having a good-faith belief in their accuracy. International and national courts, including in many countries in the region, have ruled out criminal liability for publication of even inaccurate statements on matters of public concern

where the defendant honestly believed the statements to be true at the time they were made. A strict liability rule that does not allow for a defence of good faith will exert a chilling effect on freedom of expression, undermining the public interest in free discussion of matters of public concern.

The Statement also argues that these principles are, for the most part, consistent with Thai defamation law, which protects good-faith statements by way of fair comment on matters of public concern.

A finding that the defendants were guilty of criminal defamation in this case would run counter not only to the Constitution of the Kingdom of Thailand, but also to international and comparative laws on defamation, which recognise the right to freedom of expression, and value open public debate, especially on matters of public concern. It would exert a serious chilling effect on criticism of powerful companies like Shin Corp and suppress legitimate public discussion and debate on matters of public concern. Such a ruling would, as a result, seriously undermine core democratic values. Furthermore, a criminal conviction in this case would be grossly disproportionate, particularly since the civil libel action based on the same statements demonstrates that Shin Corp has an available and effective remedy that is far less restrictive of freedom of expression.

Statement of Interest

ARTICLE 19 is an international, non-profit human rights NGO, based in London but with offices in different regions of the world. It has an International Board, with representatives from all over the world, including from Burma, Hong Kong, India, Indonesia and Malaysia.

Taking its name from Article 19 of the *Universal Declaration of Human Rights*,² ARTICLE 19 works globally to protect and promote the right to freedom of expression. ARTICLE 19 is well known for its authoritative work in elaborating the implications of the guarantee of freedom of expression, including in the area of defamation. In July 2000, ARTICLE 19 published *Defining*

² UN General Assembly Resolution 217A(III), 10 December 1948.

Defamation: Principles on Freedom of Expression and Protection of Reputation (Defining Defamation),³ setting out the appropriate balance between the right to freedom of expression and the need to protect reputations. These Principles were the product of a long process of study, analysis and consultation.⁴

ARTICLE 19 has frequently engaged in litigation activities, sometimes providing *amicus curiae* briefs, sometimes representing clients directly, sometimes appearing as an expert witness and sometimes working with local lawyers to prepare briefs in national cases. Its briefs and statements present arguments based on relevant international and comparative standards with a view to assisting courts in elaborating the specific meaning of the guarantee of freedom of expression in the context of the case being considered, in a manner which best protects this fundamental right.

Many of the precedents and authoritative statements from international or other national jurisdictions presented in this Statement are not formally binding on Thailand. However, the guarantee of the right to freedom of expression in the Constitution of Thailand is broadly worded, so that there is wide scope for interpretation. Given the fundamental importance of this human right, and Thailand's international legal obligations, it is of the utmost importance that every effort be made to ensure that Thai defamation law is interpreted, to the extent possible, in a manner that respects freedom of expression. Jurisprudence from international judicial bodies, global and regional, and from national courts, as well as non-binding standard-setting documents, such as authoritative international declarations and statements, illustrate the manner in which leading judges and other experts have interpreted international and constitutional guarantees of freedom of expression. As such, they are authoritative evidence of generally accepted understandings of the scope and nature of all international guarantees of freedom of

³ (London: July 2000).

⁴ The principles were adopted by a group of highly recognised experts in the area of freedom of expression and protection of reputation, and they have been endorsed by all three special international mandates dealing with freedom of expression – the United Nations Special Rapporteur on Freedom of Opinion and Expression, the Organisation for Security and Cooperation in Europe Representative on Freedom of the Media and the Organisation of American States Special Rapporteur on Freedom of Expression – as well as a large number of other organisations and individuals. See the Joint Declaration of the mandates of 30 November 2000.

expression, many of which are cast in very similar terms,⁵ including those which are binding on Thailand. Furthermore, they provide persuasive guidance regarding interpretation of the guarantees of freedom of expression found in the Constitution of Thailand.

ARTICLE 19 is submitting this Statement to the Thai Criminal Court with a view to assisting it in its assessment of how, in the present case, to interpret the relevant provisions of Thai law in conformity with Thailand's international obligations and the guarantees of freedom of expression in the Constitution of Thailand.

Statement of Facts

Based on the public record, the following facts appear to be widely-known and undisputed by the parties in this case.

A. Shin Corp

Complainant Shin Corp is a telecommunications conglomerate that – through a portfolio of over 20 subsidiaries, associates, related companies and joint ventures (the ‘Shin Corp Group’) – owns and operates Thailand's largest internet service provider, largest mobile phone company, only satellite communications provider and a major national terrestrial TV station. As reported in Shin Corp's published financial statements, “[t]he Shin Corp Group has obtained concessions from government agencies...in Thailand”,⁶ pursuant to which Shin Corp pays fees to the Thai government and, in return, is granted the right to operate, and receive revenue from, national communication resources.⁷

Shin Corp (then called Shinawatra Computer and Communications PLC) was founded by Thaksin in the 1980s. After the January 2001 elections in which Thaksin was elected Prime Minister, and his Thai Rak Thai party was swept into power, Thaksin resigned from his positions

⁵ International courts frequently make reference to the decisions of other international courts when deciding human rights cases.

⁶ See www.shincorp.com, Shin Corporation Public Company Limited Consolidated and Company Financial Statements, 31 December 2004, Note 1.

⁷ Section 40 of Thailand's Constitution provides, in part: “Transmission frequencies for radio or television broadcasting and radio telecommunications are national communication resources for public interest.”

in the Shin Corp Group and transferred his shareholdings to other Shinawatra family members.⁸ As reported in Shin Corp's annual financial statements, "[t]he principal shareholder of the Company" has at all times remained "the Shinawatra family."⁹ Specifically, since the time Thaksin became Prime Minister in 2001, the three largest shareholders in Shin Corp have been the Prime Minister's daughter (Ms. Pintongte Shinawatra), the Prime Minister's son (Mr. Phantongtae Shinawatra) and the Prime Minister's brother-in-law (Mr. Bhanapot Damapong).¹⁰ Mr. Damapong also serves as Chairman of Shin Corp's Board of Directors.¹¹

Since Thaksin and the Thai Rak Thai party came to political power in January 2001, Shin Corp has continued to earn substantial revenues under its various government concession contracts. As reported in Shin Corp's annual financial statements, both Shin Corp's concession revenues and its resulting net profits increased very substantially from 2001 (when Thaksin became Prime Minister) through 2003 (when the article in question was published).¹² In January 2003, the Thai Ministry of Finance, with the support of the Prime Minister, changed the existing revenue sharing formula for mobile telecommunications concessions to provide that concessionaires (such as Shin Corp) would now pay 10% of their revenue as an excise tax instead of as a direct concession fee.¹³ During 2003, the stock market value of the five listed companies in the Shin Group almost tripled.¹⁴

Many observers both inside and outside Thailand have expressed the view that Shin Corp has experienced rapid economic growth as a result, in part, of the policies and decisions of the current government. For example, as reported by one Thai professor of economics:

⁸ P. Phongpaichat and C. Baker, *Thaksin: The Business of Politics in Thailand* (Chiang Mai: Silkworm Books, 2004), p. 198 (hereafter "*Thaksin*").

⁹ See Shin Corporation Public Company Limited Consolidated and Company Financial Statements for years 2001 (Note 29), 2002 (Note 29), 2003 (Note 29) and 2004 (Note 30). Available at www.shincorp.com.

¹⁰ See Annual and Quarterly Reports files for 2002, 2003 and 2004. Available at www.shincorp.com, under the heading Major Shareholders.

¹¹ See Investors Information, Annual and Quarterly Reports. Available at www.shincorp.com.

¹² Compare Shin Corporation Public Company Limited Consolidated and Company Financial Statements for year 2001 (reporting net profit of 2,820 million Baht), year 2002 (reporting net profit of 5,281 million Baht) and year 2003 (reporting net profit of 9,722 million Baht). Available at www.shincorp.com. Similarly, Shin Corp's net profit margin increased from 23% in 2001 to 47% in 2003. Available at www.shincorp.com, under Financial Highlights as of 31 December 2004.

¹³ See Shin Corporation Public Company Limited Consolidated and Company Financial Statements for year 2003, Note 1, available at www.shincorp.com, and Nophakhun Limsamarnphun, "Watchdog: Telecom Troubles for Prime Minister", *The Nation*, 26 January 2003.

¹⁴ See *Thaksin*, note 8, p. 224

Since Thaksin became prime minister, the market capitalization of the three main Shin listed companies (Shin, AIS, Satellite) had multiplied almost 2.5 times. Among its main competitors, Ucom's capitalization had stayed roughly flat, while TelecomAsia had halved.... The Shin group's success in overcoming this competition, maintaining market leadership, and managing the threats of liberalization had resulted in the group's two main listed companies (Shin Corporation and AIS) soaring ahead of the market in 2003 (fig 7.3). In the investment community, *hun thaksin* or "Thaksin shares" were a specific category, vaunted by most analysts and much favored by retail investors. By one estimate, no less than one-third of the market value of the *hun thaksin* could be attributed to the "premium" which investors attached to their special connections (Somkiat 2004). Certainly these companies were well managed and regularly received awards in recognition of this fact. But a string of governmental decisions in favor of Shin-connected companies – whether or not these decisions resulted from any direct intervention by Thaksin or anyone else – were added reason for investors to favor these companies' shares over alternatives.¹⁵

B. The Article in Suit

Supinya Klangnarong is the Secretary General of CPMR, a media advocacy NGO. In July 2003, Supinya published a paper in which she set forth at length the publicly-available facts about Shin Corp's financial performance and expressed her view that "[i]t is obvious that the prime minister's family that run telecommunications services see their profits skyrocket during two years of this government's term." In her paper, Supinya stated her view that, while "[p]artly this surely is an outcome from [Shin Corp] managers' ability," Shin Corp has also benefited from government policies "that support telecommunications capitals."

Thereafter, Supinya was interviewed by the *Thai Post*, which published an article on 16 July 2003. The *Thai Post* article reported on Supinya's paper and, based on the publicly available facts regarding Shin Corp's large increase in profits, quoted Supinya's views as follows:

"This kind of business works with concession, which means it deals with political power. Whoever secures the concession can maintain its rights and therefore its wealth forever. It also means you can earn endless profit from static capital investment by living off the fruit of the political power," said [Supinya]. She also stated that the five years that the Thai Rak Thai Party are in power, not only help the companies in the Shin Corp Group gain more profit, but also help cement the business and political sectors into one. Shin Corp's income will turn out to be the necessary capital that strengthens the Thai Rak Thai Party. These things will then become like a family business. In addition, people from politics, business and social welfare are all relatives.

¹⁵ *Thaksin*, note 8, p. 224.

In October 2003, Shin Corp instituted this criminal libel suit against Supinya and the owner, directors and editor of the *Thai Post*. In its complaint, Shin Corp alleges that the *Thai Post* article is defamatory and denies that Supinya's statements constitute "an expression of opinion." In July 2004, Shin Corp also filed a civil libel suit against Supinya and the *Thai Post* defendants in which it is seeking 400 million baht in damages (approximately \$10 million U.S.).

Freedom of Expression Principles

A. International Guarantees

The *International Covenant for Civil and Political Rights* (ICCPR)¹⁶ entered into force for Thailand on 29 January 1997. Article 19(2) of the ICCPR protects freedom of expression as follows:

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.

The ICCPR requires State Parties to take steps to ensure that its rights are respected. Article 2(2) of the ICCPR states:

Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

One of the ways in which compliance with the ICCPR is monitored is through the United Nations Human Rights Committee (Committee), a body of independent experts charged with providing authoritative interpretations of the ICCPR's provisions. It does this both in cases brought before it by individuals ("Communications") and in comments on the reports State Parties are required to submit to it on a regular basis ("Concluding Observations").¹⁷ Some of its

¹⁶ Adopted and opened for signature, ratification and accession by UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 3 January 1976

¹⁷ The Committee recently received Thailand's initial such report (CCPR/C/THA/2004/1), which Thailand publicly defended on 19 July 2005 (coincidentally the opening date of the trial in this case). On 28 April 2005, the Committee issued a "List of issues" to be taken up in connection with the consideration of this initial report. In a

general interpretations of Article 19, as well as its interpretations specifically relating to defamation, are directly relevant to the issues presented in this case.

International courts and bodies have repeatedly stressed the importance of freedom of expression in a democracy. At its very first session in 1946 the United Nations General Assembly declared:

Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.¹⁸

These views have been reiterated by all three regional judicial bodies dealing with human rights. The Inter-American Court of Human Rights has stated:

Freedom of expression is a cornerstone upon which the very existence of a democratic society rests.¹⁹

The African Commission on Human and Peoples' Rights has noted, in respect of Article 9 of the African Convention:

This Article reflects the fact that freedom of expression is a basic human right, vital to an individual's personal development, his political consciousness, and participation in the conduct of the public affairs of his country.²⁰

And the European Court of Human Rights has repeatedly stressed:

Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfillment. . . . [I]t is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness, without which there is no "democratic society."²¹

clear reference to the case, the Committee requested that Thailand inform it "about the status of ... suits filed against editors of the *Thai Post* and a media-reform campaigner by a corporation founded by the Prime Minister." CCPR/C/84/L/THA, para. 20. It is to be expected that the Concluding Observations that the Committee will issue shortly after the public hearing on the initial report will also contain some reference to this case.

¹⁸ Resolution 59(1), 14 December 1946.

¹⁹ *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5, para. 70.

²⁰ *Media Rights Agenda and Others v. Nigeria*, 31 October 1998, Communication Nos. 105/93, 130/94, 128/94 and 152/96, para. 54.

²¹ *Handyside v. the United Kingdom*, 7 December 1976, Application No. 5493/72, para. 49.

B. Restrictions

The right to freedom of expression is not absolute. Every system of international and domestic rights recognises carefully drawn and limited restrictions on freedom of expression in order to take into account the values of individual dignity and democracy. Article 19(3) of the ICCPR lays down the conditions under international law which any restriction on freedom of expression must meet:

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Restrictions must meet a strict three-part test.²² First, the interference must be provided for by law. This requirement will be fulfilled only where the law is accessible and “formulated with sufficient precision to enable the citizen to regulate his conduct.”²³ Second, the interference must pursue a legitimate aim. The list of aims in Article 19(3) of the ICCPR is exclusive in the sense that no other aims are considered to be legitimate as grounds for restricting freedom of expression. Third, the restriction must be necessary to secure one of those aims. The word “necessary” sets a high standard on the State to justify any restriction. The reasons given to justify the restriction must be “relevant and sufficient”.²⁴ Of particular importance here, “the requirement of necessity implies an element of proportionality to the aim pursued.”²⁵

C. Statements on Matters of Public Concern

It is well-established under international law that statements on matters of public concern deserve enhanced protection due to the key role they play in safeguarding democracy and the overall public interest. Courts around the world, international and national, are assiduous in protecting strong, even offensive, statements relating to political figures and other matters of

²² This test has been affirmed by the UN Human Rights Committee. See, *Mukong v. Cameroon*, views adopted 21 July 1994, Communication No. 458/1991, para. 9.7.

²³ *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, para. 49 (European Court of Human Rights).

²⁴ *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, paras. 39-40 (European Court of Human Rights).

²⁵ *Morais v. Angola*, 18 April 2005, Communication No. 1128/2002, para. 6.8 (UN Human Rights Committee).

public concern. Although the protection is afforded to the speaker, the *reason* why considerable latitude should be afforded to public debate on issues of public importance is because *the public is entitled to receive such information*.

The need for enhanced protection for statements on matters of public interest has been explicitly recognised in the specific context of defamation laws by the United Nations Special Rapporteur on Freedom of Opinion and Expression (UN Special Rapporteur), who stated that “defamation laws should reflect the importance of open debate about matters of public concern.”²⁶

The European Court of Human Rights has also upheld this principle, stating in a recent criminal defamation case that, “there is little scope . . . for restrictions on political speech or debates on questions of public interest.”²⁷ Just this year, in *Sokolowski v. Poland*, the Court reversed the criminal defamation conviction of a Polish national for writing an article suggesting that it was inappropriate for municipal councillors to elect themselves to paid positions on local election committees.²⁸ The conflict of interest overtones of this case bear a resemblance to the facts of present case. The Court held that the statement was entitled to a high level of protection, noting that the issue was an important one “which may give rise to a serious public discussion concerning the rules of conduct applicable to elected representatives of the local community.”²⁹

It is also well established that the activities of major corporations, such as Shin Corp, are a matter of public concern. For example, in a recent case, the European Court of Human Rights did not hesitate to find that enhanced freedom of expression considerations were very much in play in relation to McDonald’s, the multinational fast food restaurant chain, holding that criticism of its environmental and labour policies fell squarely within the scope of the enhanced protection for statements on matters of public concern.³⁰ The Hong Kong Court of Final Appeal, too, has

²⁶ *Promotion and protection of the right to freedom of opinion and expression*, 18 January 2000, E/CN.4/2000/63, para. 52. These Reports are official reports of the Special Rapporteur to the UN Commission on Human Rights.

²⁷ *Dichand and Others v. Austria*, 26 February 2002, Application No. 29271/95, para. 39.

²⁸ *Sokolowski v. Poland*, 29 March 2005, Application No. 75955/01.

²⁹ *Ibid.*, para. 45.

³⁰ *Steel and Morris v. United Kingdom*, 15 February 2005, Application No. 68416/01, para. 88. (“The Court must weigh a number of factors in the balance when reviewing the proportionality of the measure complained of. First, it notes that the leaflet in question contained very serious allegations on topics of general concern, such as abusive and immoral farming and employment practices, deforestation, the exploitation of children and their parents through aggressive advertising and the sale of unhealthy food. The Court has long held that “political expression”, including

recognised the fundamentally public role of certain private corporations, stating in a 2003 case: “Here, we have a prominent figure in the business community, vice-chairman of a public company [who sold his entire share in the company over the space of one week]. This is plainly a matter of public interest, and worthy of comment by persons in the media....”³¹

The media often play a key role in promoting public debate about matters of public concern and, as a result, courts and others have often referred to the need for special protection for the media. The Human Rights Committee, for example, in a case involving a criminal defamation conviction, held to violate Article 19, emphasised the “paramount importance, in a democratic society, of the right to freedom of expression and of a free and uncensored press or other media.”³² Moreover, given that it is the promotion of public debate on matters of public concern which is the touchstone here, everyone who furthers such debate should receive the same enhanced protection, including advocates like Supinya, a civil society activist. As the European Court of Human Rights stated in a case involving McDonalds, noted above:

The Government have pointed out that the applicants were not journalists, and should not therefore attract the high level of protection afforded to the press under Article 10. The Court considers, however, that in a democratic society even small and informal campaign groups, such as London Greenpeace, must be able to carry on their activities effectively and that there exists a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest such as health and the environment.³³

As these cases demonstrate, a broad range of comments attract the enhanced protection due to statements on matters of public concern, including allegations of abuse of political power or conflicts of interest with respect to business or other money-making ventures. Here, the gist of

expression on matters of public interest and concern, requires a high level of protection under Article 10. [cites omitted]”).

³¹ *Next Magazine Publishing Ltd v. Ma Ching Fat*, 5 March 2003, Final Appeal No. 5 of 2002, para. 36 (per Chan, PJ).

³² *Morais v. Angola*, note 25, para. 6.8. See also the Committee’s General Comment No. 25, para. 25, adopted on 12 July 1996. The jurisprudence of the European Court of Human Rights on this point is effectively identical to that of the Committee. Specifically, that Court has remarked on “the pre-eminent role of the press in a state governed by the rule of law”. *Castells v. Spain*, 23 April 1992, Application No. 11798/85, para. 43. See also the Inter-American Court of Human Rights, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 19, para. 34 (“It is the mass media that make the exercise of freedom of expression a reality”).

³³ *Steel and Morris v. United Kingdom*, note 30, para. 89. See also the 2005 Joint Declaration of the Special Rapporteurs for the African Commission on Human and Peoples’ Rights and the Organization of American States, 28 February 2005, noting: “All members of society must be free to discuss issues of public interest and participate freely in public debates without fear of reprisal ... in the form of ... judicial measures”.

the challenged statements is that the close relationship between Shin Corp and the Prime Minister's family constitutes an inappropriate overlapping of the telecommunications and political sectors. As such, they constitute comment on matters of the utmost public and political concern. The challenged statements are part of an ongoing public debate in Thailand. Regardless of one's views on the challenged statements, the point is to allow this very discussion to occur.

D. Criminal Defamation is Increasingly Discredited

Criminal defamation provisions represent severe restrictions on freedom of expression, attended as they are with the potential for harsh sanctions such as imprisonment and substantial fines. International bodies have repeatedly stressed the potential for abuse of these laws, in some cases calling for their repeal while in other cases simply holding them to be unjustified in the circumstances of a particular case. At a minimum, criminal defamation provisions – if they are to be retained at all – should be construed very narrowly and precisely, lest their employment lead to self-censorship by those who would speak and write on matters of public concern.

The UN Human Rights Committee has often commented on criminal defamation laws, welcoming their abolition where this has occurred,³⁴ calling for “review and reform [of] laws relating to criminal defamation,”³⁵ and expressing serious concerns about the potential for abuse of criminal defamation laws, particularly where expression on matters of public concern is at stake.³⁶ In an individual Communication, the Committee made it clear that criminal convictions for defamation tend to be disproportionate to any damage caused, stating that, “the severity of the sanctions imposed on the author [a prison sentence and a fine] cannot be considered as a

³⁴ For example in the case of Sri Lanka. See Concluding Observations on Sri Lanka, 1 December 2003, CCPR/CO/79/LKA, para. 17.

³⁵ Concluding Observations on Norway, 1 November 1999, CCPR/C/79/Add.112, para. 14.

³⁶ For example, in relation to Kyrgyzstan (“[The Committee] is especially concerned about the use of libel suits against journalists who criticize the Government. Such harassment is incompatible with the freedom of expression.... The State party should ensure that journalists can perform their profession without fear of being subjected to prosecution and libel suits for criticizing government policy or government officials. Journalists *and human rights activists* subjected to imprisonment in contravention of articles 9 and 19 of the Covenant should be released, rehabilitated and given compensation pursuant to articles 9.5 and 14.6 of the Covenant. [emphasis added]”). Concluding Observations on Kyrgyzstan, 24 July 2000, CCPR/C/69/KGZ, para. 20. The Committee has expressed similar concerns in a host of other Concluding Observations, including those relating to Iceland and Jordan (1994), Tunisia and Morocco (1995), Mauritius (1996), Iraq and Slovakia (1997) Zimbabwe (1998), Cameroon, Mexico, Morocco and Romania (1999), Azerbaijan, Guatemala and Croatia (2001), and Serbia and Montenegro (2004).

proportionate measure to protect ... the honour and the reputation of the President”³⁷

The UN Special Rapporteur on Freedom of Opinion and Expression has gone even further, calling on States to repeal all criminal defamation laws in favour of civil defamation laws in his 2000 and 2001 Reports to the UN Commission on Human Rights.³⁸ Every year, the Commission, in its resolution on freedom of expression, notes its concern with “increased abuse of legal provisions on defamation and criminal libel”.³⁹

The key problem with criminal defamation is the disproportionate sanctions which may ensue. It is clear that sanctions, even for statements found to be defamatory, must bear a “reasonable relationship of proportionality to the injury to reputation suffered” and this should be specified in national laws.⁴⁰ The UN Special Rapporteur has also observed: “Sanctions for defamation should not be so large as to exert a chilling effect on freedom of opinion and expression and the right to seek, receive and impart information; penal sanctions, in particular imprisonment, should never be applied.”⁴¹

A number of countries around the world – including Bosnia-Herzegovina (2002), Georgia (2004), Ghana (2001), Sri Lanka (2002) and the Ukraine (2001) – have repealed their criminal defamation laws altogether, and these countries have not experienced any noticeable increase in defamatory statements, either of a qualitative or quantitative nature, since then. Repeal of these

³⁷ *Morais*, note 25, para. 6.8.

³⁸ See *Promotion and protection of the right to freedom of opinion and expression*, 18 January 2000, note 26, para. 52 and *Promotion and protection of the right to freedom of opinion and expression*, 26 January 2001, UN Doc. E/CN.4/2001/64, para. 42.

³⁹ Resolution 2005/28, 19 April 2005, para. 3(a). Similar statements of concern have been articulated by many other international courts and bodies. The three special international mandates for promoting freedom of expression – the UN Special Rapporteur, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression – called on States to repeal their criminal defamation laws in their joint Declarations of November 1999, November 2000 and again in December 2002. See also Paragraph 10 of the Inter-American Commission on Human Rights’ *Declaration of Principles on Freedom of Expression*, adopted at the 108th Regular Session, 19 October 2000. The European Court of Human Rights has expressed the view that such laws are legitimate only where they are designed to protect public order, rather than reputations, as such. See *Castells*, note 32, para.46.

⁴⁰ *Tolstoy Miloslavsky v. the United Kingdom*, 13 July 1995, Application No. 18139/91, para. 49 (European Court of Human Rights).

⁴¹ *Promotion and protection of the right to freedom of opinion and expression*, 29 January 1999, UN Doc. E/CN.4/1999/64, para. 28. See also Principle XII of the African Commission on Human and Peoples’ Rights’ *Declaration of Principles on Freedom of Expression in Africa*, Adopted at the 32nd Session, 17-23 October 2002.

laws is being considered actively in other countries, such as Mongolia, Albania and Croatia. In some countries, such as France and Bulgaria, the law has specifically been amended to preclude the possibility of imprisonment for defamation.

Significantly, one finds very little criminal defamation *prosecution activity* in countries where democracy has taken firm root. For example, in Hong Kong, “[d]espite the availability of ... criminal sanctions, ... the criminal defamation statute is rarely, if ever, invoked.”⁴² Likewise, in Japan, criminal defamation prosecutions are uncommon, and even when such actions are brought, imposition of prison sentences or other penalties occurs only infrequently.⁴³ Again, in the Republic of Korea, “there has been a growing trend against [criminal] defamation actions.”⁴⁴ This is also the case in many European countries. There has, for example, been no successful attempt to bring a criminal prosecution for defamation in the United Kingdom for many years and no private actor has even attempted to do so for over 20 years.⁴⁵ The United States Supreme Court has invalidated state criminal defamation statutes at least twice,⁴⁶ observing that criminal defamation prosecutions have “virtual[ly] disappear[ed]” and noting that even as long ago as the 1800s, the justification for criminal defamation penalties had been “substantially eroded” by the preference for civil defamation actions.⁴⁷

The growing recognition of the illegitimacy of criminal defamation laws is based largely on the unacceptable chilling effect they have on expression on matters of public concern, as well as the adequacy of civil defamation remedies in redressing any harm to reputation. Indeed, Shin Corp itself seems very well aware of this, having instituted a civil suit against the defendant for the

⁴² Melissa K. Bauman, Note, “Defamation in Hong Kong and the People’s Republic of China: Potential Perils of Two Standards of Free Speech”, 15 *Hastings Int’l & Comp. L. Rev.* 671, p. 679 (1992).

⁴³ Ellen M. Smith, Note, “Reporting the Truth and Setting the Record Straight: An Analysis of U.S. and Japanese Libel Laws”, 14 *Mich. J. Int’l L.* 871, p. 882 (1993).

⁴⁴ Kyu Ho Youm, “Libel Law and the Press: U.S. and South Korea Compared”, 13 *UCLA Pac. Basin L.J.* 231, p. 247 (1995).

⁴⁵ Historical attempts include *Goldsmith v. Pressdram* [1977] QB 83, *Gleaves v. Deakin* [1980] AC 477 and *Desmonde v. Thorpe* [1982] 3 All ER 268. None of these cases have gone to trial because either the plaintiffs failed to obtain leave to proceed or the cases were discontinued.

⁴⁶ *Garrison v. Louisiana*, 379 U.S. 64, pp. 69-70 (1964) and also *Ashton v. Kentucky*, 384 U.S. 195 (1966) (invalidating criminal defamation statute as unconstitutional because of vagueness). See also *George E. Stevens*, “Criminal Libel After Garrison”, 68 *Journalism Q.* 522, pp. 526-27 (Fall 1991) (“[F]or the mass media criminal libel today is a largely unenforceable offense.... [P]rosecutors have long been reluctant to enforce [criminal libel] laws, and there is nothing to suggest that many are changing their minds.”)

⁴⁷ *Garrison*, *ibid.*, pp. 69-70

same statements that are in contention in this case, where it is demanding damages of 400 million baht. These problems with criminal defamation laws mean that, in applying criminal defamation provisions, courts should proceed with a most delicate touch, interpreting provisions in a liberal manner to the benefit of defendants and ensuring strict proportionality in any imposition of sanctions.

Point One: The Statements Challenged in this Case Should be Construed as Protected Opinions which Should Not Attract Criminal Liability

International courts, along with many national courts, have recognised that statements of opinion deserve a high degree of protection under the guarantee of freedom of expression. The statements being challenged in this case fall comfortably within the scope of what international and many national courts have defined as opinions. These courts would, in the circumstances of this case, not impose defamation liability for these statements.

A. Expressions of Opinion are Entitled to Enhanced Protection

It is well established that opinions are entitled to enhanced protection under the guarantee of freedom of expression and this has also been widely recognised in international law. This is so because of the fundamental role opinions play in a democratic society. Opinions embody the very essence of freedom of expression – the freedom to speak one’s mind – and are crucial to furthering public debate on matters of public interest. It may be noted that the right to hold opinions is absolutely protected under international law, so that no restrictions on this right are permitted.⁴⁸ Furthermore, while the truth or falsity of facts can be demonstrated, the truth of opinions is not susceptible of proof.⁴⁹ As a result, some latitude must be given to opinions to prevent defamation laws from exerting an unacceptable chilling effect on freedom of expression.

Recognising the important role of opinions in a democratic society, the three special international

⁴⁸ See Article 19(1) of the ICCPR.

⁴⁹ See *Promotion and Protection of the Right to Freedom of Opinion and Expression*, note 26, para. 52 (“defendants should never be required to prove the truth of opinions or value statements”) and *Lingens*, note 24, para. 46 (“The existence of facts can demonstrated, whereas the truth of value-judgments is not susceptible of proof.”)

mandates for promoting freedom of expression have stated: “No one should be liable under defamation law for the expression of an opinion.”⁵⁰ The United States Supreme Court has likewise stated: “Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.”⁵¹

The European Court of Human Rights has consistently demonstrated wide tolerance for statements of opinion, particularly relating to matters of public interest. In *Dichand and Others*, for example, the Court acknowledged the absence of hard proof for the impugned statements, as well as the strong language used, but still held that the statements were protected, stressing that the discussion was on a matter of important public concern:

It is true that the applications, on a slim factual basis, published harsh criticism in strong, polemical language. However, it must be remembered that the right to freedom of expression also protects information or ideas that offend, shock, or disturb.⁵²

In many jurisdictions, this higher standard of protection for statements of opinion is reflected in the defence of fair comment, a defence also found in section 329(3) of the Thai Penal Code. “Fair comment” is generally understood by courts around the world as being applicable to statements of opinion where “the views could honestly have been held by a fair-minded person on facts known at the time.”⁵³ Once it has been established that the statements in question were opinions, the standard to be met to bring this defence into play is a low one, which is generally satisfied unless the statement deals with the private life of someone who is not a public figure or it has been demonstrated that the defendant did not actually hold the view expressed. The defence also fails if the plaintiff proves the defendant acted maliciously.⁵⁴ In the United Kingdom, the House of Lords recently set out the standard for opinions, stating: “The true test is whether the opinion, however exaggerated, obstinate or prejudiced, was honestly held by the

⁵⁰ Joint Declaration of 30 November 2000. Similarly, Principles 1 and 10 of *Defining Defamation*, note 3, provide: “Everyone has the right to hold opinions without interference” and thus: “No one should be liable under defamation law for the expression of an opinion.”

⁵¹ *Gertz v. Welch, Inc.*, 418 U.S. 323, pp. 339-340 (1974). See also *Milkovich v. Lorain Journal*, 497 U.S. 1 (1990) (no defamation liability may be imposed on statements of opinion that are incapable of verification).

⁵² Note 27, paras. 51 and 52.

⁵³ Robertson and Nicol, *Media Law* (London: Penguin Books, 1992), p. 79.

⁵⁴ *Ibid.*, pp. 79-85.

person expressing it”.⁵⁵

In Hong Kong, the fair comment defence applies if the comment is on a matter of public interest, is recognisable as an opinion as opposed to a fact, has some basis in true facts which are contained in the publication or are sufficiently referred to, and is made honestly.⁵⁶ In addressing the fundamental democratic right to engage in fair comment, the Hong Kong Court of Final Appeal has stated:

The right of fair comment is a most important element in the freedom of speech. In a society which greatly values the freedom of speech and safeguards it by a constitutional guarantee, it is right that the courts when considering and developing the common law should not adopt a narrow approach to the defence of fair comment. The courts should adopt a generous approach so that the right of fair comment on matters of public interest is maintained in its full vigour.⁵⁷ (citations omitted)

Similarly, a Philippines court has held that “fair commentaries on matters of public interest are privileged and constitute a valid defense in an action for libel or slander.”⁵⁸

B. The Statements in this Case Should be Construed as Opinions which Represent Fair Comments

The statements at issue in this case would be held to be opinions by international and many national courts. The gist of these statements is that the close relationship between Shin Corp and the Prime Minister’s family constitutes an inappropriate overlapping of the telecommunications and political sectors, which has benefited both. As such, they represent a view Supinya holds, a view with which others may legitimately disagree, which by definition means that it cannot be a factual assertion. Factors which militate in favour of understanding these statements as opinions are the wide range of meaning that can be given to them, the fact that some of them are future predictions, their inherent generality and the broad definition international and national courts have given to what constitutes an opinion.

⁵⁵ *Reynolds v. Times Newspapers Ltd and others*, [1999] 4 All ER 609.

⁵⁶ *Albert Cheng and another v. Tse Wai Chin Paul*, [2000] HKCFA 88 (13 November 2000).

⁵⁷ *Ibid.*

⁵⁸ *Borjal v. Weceslao*, G.R. No. 12466 (14 January 1999).

In particular, Supinya's opinion that Shin Corp has benefited as a result of its relationship with the Prime Minister's family is a general assertion, incapable of being proven to be true or false. Similarly, her proffered hypothesis that "Shin Corp's income will turn out to be the necessary capital that strengthens the Thai Rak Thai party" constitutes a value judgment that, as the media conglomerate controlled by the Prime Minister's family increases its profits and power, this will redound to the political benefit of the Prime Minister's ruling party. It is inherently incapable of being proven to be true or false both because it is a prediction of what will happen in the future and because of its generality; benefit is an extremely broad notion.

It may be noted that courts have interpreted the term opinion very liberally and allowed the fair comment defence to be defeated only where it is clear that the defendant did not actually hold the views expressed. In *Sokolowski*, the European Court of Human Rights had to consider a statement to the effect that a local municipal councillor was "tak[ing] away" money from the local townspeople by electing himself to a paid position on a local election committee.⁵⁹ Finding that the statement constituted protected expression of opinion rather than a factual assertion, the court held: "A serious of accusation of theft cannot...be justifiably read into such a statement."⁶⁰ In an analogous fashion, the statements challenged in this case should not be understood as factual assertions of misconduct or illegality but rather as expressions of opinion on what Supinya views as a conflict of interest between Shin Corp and the Prime Minister and his party.

In *Feldek v. Slovakia*, the European Court held that the use by the applicant of the phrase "fascist past" should not be understood as factual statement that a person had participated in activities propagating fascist ideals. It explained that the term was a wide one, capable of encompassing different notions as to its content and significance, one of which was that the person participated as a member in a fascist organisation. On this basis, the value-judgment that that person had a 'fascist past' could fairly be made.⁶¹ In a similar vein, most of the challenged statements in this case are capable of sustaining broad meaning, many of which are opinions.

The challenged statements in this case are also a variety of political rhetoric, a form of speech for

⁵⁹ *Sokolowski*, note 28, para. 48.

⁶⁰ *Ibid.*

⁶¹ 12 July 2001, Application No. 29032/95.

which international and national courts have demonstrated a wide degree of tolerance. In the case of *Ukrainian Media Group v. Ukraine*, the European Court noted, in respect of a statements found by domestic courts to be defamatory, that “the publications contained criticism of the two politicians in strong, polemical, sarcastic language.”⁶² However, they were still deemed to be protected expressions on opinion.

In *Dichand and Others*, the applicants had published an article alleging that a national politician who also practiced as a lawyer had proposed legislation in parliament in order to serve the needs of his private clients. It may be noted that these allegations, like those of the present case, relate to a conflict of interest, but that they are far more specific in nature. Despite this, the European Court stressed that the statement constituted a value judgment rather than a factual allegation, and that it was “a fair comment on an issue of general public interest.”⁶³

The general facts on which the opinions expressed were based, which are referred to in the article and set forth in greater detail in a report Supinya wrote on behalf of her organisation, CPMR, (referenced in the article), are, as has been noted, widely known and appear to be undisputed. This bolsters the argument that Supinya did have an honest belief in the opinions expressed, as well as that the statements were fair comment.

The statements being challenged in this case would easily qualify as opinion based on the practice of the international and national courts outlined above. It also seems clear that Supinya did make these statements honestly, in the sense that they really are her views, as opposed to a gratuitous attack on the plaintiff.

Point Two: The Plaintiff Should Bear the Burden of Proving the Falsity of the Defendants’ Statements

If the court finds some of the challenged statements to be statements of fact, rather than statements of opinion, this raises the related question of whether the plaintiff must prove that the

⁶² 29 March 2005, Application No. 72713/01, para. 67.

⁶³ Note 27., para. 50.

statements are false to obtain a conviction or whether the onus is on the defendant to prove truth, if he or she wishes to rely on that defence.

In accordance with fundamental principles of criminal law, based on international and national human rights standards, an accused person in a criminal trial is presumed innocent until proven guilty.⁶⁴ This means that, in any criminal proceeding, the burden is on the plaintiff to prove his or her case beyond a reasonable doubt. The defendant, who is presumed innocent, is not required to prove or disprove any of the elements of the crime. As the UN Human Rights Committee has noted:

By reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt.⁶⁵

The U.S. Supreme Court has commented on the special implications of this presumption in cases involving freedom of expression:

Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the factfinder of his guilt. Where the transcendent value of speech is involved, due process certainly requires . . . that the State bear the burden of persuasion to show that the appellants engaged in criminal speech.⁶⁶

Section 33 of the Constitution of Thailand is consistent with this principle in that it mandates that “the accused in a criminal case shall be presumed innocent” and “shall not be treated as a convict” prior to a final judgment.⁶⁷ Requiring the plaintiff to prove the element of falsity in a criminal libel proceeding, therefore, would appear to be consistent not only with established international human rights principles but also with the Constitution of Thailand.

A number of standards point to the idea that, even in the context of civil defamation laws, the onus should be on the plaintiff to prove falsity, before liability may ensue and this reasoning applies with even more force to the criminal law context. Recognising the importance of

⁶⁴ See, for example, Article 14(2) of the ICCPR.

⁶⁵ UN Human Rights Committee General Comment 13, para. 7, 1984, HRI/GEN/1/Rev.6, p. 135 (2003).

⁶⁶ *Speiser v. Randall*, 357 U.S. 513, p. 526 (1958).

⁶⁷ 1997 Constitution of Thailand, Section 33.

maintaining an “open public debate of matters of general or specific interest,” the UN Special Rapporteur on Freedom of Opinion and Expression has stated: “The onus of proof of all elements should be on those claiming to have been defamed rather than on the defendant.”⁶⁸ This principle has been endorsed by the three special international mandates for promoting freedom of expression, who state in their Joint Declaration of 2000 that “the plaintiff should bear the burden of proving the falsity of any statements of fact on matters of public concern.”⁶⁹

National courts have also adopted this approach. In the landmark decision, *Philadelphia Newspapers, Inc. v. Hepps*, for example, the U.S. Supreme Court held that “a private-figure plaintiff must bear the burden of showing that the speech at issue is false before recovering damages for defamation.”⁷⁰ It reasoned that a contrary rule would deter defendants from voicing their criticism “because of the fear that liability will unjustifiably result. . . . [S]uch a ‘chilling’ effect would be antithetical to the First Amendment’s protection of true speech on matters of public concern.”⁷¹ The U.S. Supreme Court, for example, applied this rule in *Garrison v. Louisiana*.⁷²

An important reason for this rule, in addition to the general presumption of innocence, is the chilling effect of requiring the defendant to prove truth. As the Inter-American Commission on Human Rights has noted: “Even those laws which allow truth as a defense inevitably inhibit the free flow of ideas and opinions by shifting the burden of proof onto the speaker.”⁷³ In the United Kingdom, the House of Lords has also warned against the “chilling effect” that inevitably would result from requiring the defendant to prove truth, stating:

The threat of a civil action for defamation must inevitably have an inhibiting effect on

⁶⁸ *Promotion and Protection of the Right to Freedom of Opinion and Expression*, note 26, para. 52.

⁶⁹ Joint Declaration of 30 November 2000. See also *Defining Defamation*, note 3, Principle 7: “In cases involving statements on matters of public concern, the plaintiff should bear the burden of proving the falsity of any statements or imputations of fact alleged to be defamatory.”

⁷⁰ *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, p. 777 (1986).

⁷¹ *Ibid.* See also *New York Times Co. v. Sullivan*, 376 U.S. 254, p. 279 (1964) (“A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions – and to do so on pain of libel judgments virtually unlimited in amount – leads to . . . ‘self-censorship.’ . . . Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be provided in court or fear of the expense of having to do so.”)

⁷² Note 46.

⁷³ 1994 Annual Report of the Inter-American Commission on Human Rights, Part IV(B), p. 7.

freedom of speech. . . . What has been described as ‘the chilling effect’ induced by the threat of civil actions for libel is very important. Quite often the facts which would justify a defamatory publication are known to be true, but admissible evidence capable of proving those facts is not available. This may prevent the publication of matters which it is very desirable to make public.⁷⁴

The heavy onus on the State to justify any restriction on freedom of expression dictates that it be presumed that a statement is true until and unless the contrary is shown. This rule should at least apply to statements on matters of legitimate public interest, given the importance of open debate about them.

Section 330 of the Thai Penal Code places the burden of proving truth on the accused in a criminal defamation case and thus appears to be inconsistent with the presumption of innocence set forth in Section 33 of the Constitution of Thailand. In such cases, the Constitution of Thailand provides: “The provisions of any law, rule or regulation, which are contrary to or inconsistent with this Constitution, shall be unenforceable”⁷⁵ and that a person may raise constitutional “rights or liberties”⁷⁶ as a defence.

In this case, placing the burden on Shin Corp to prove falsity would be consistent with both international standards and Thai constitutional law. As noted above, these statements, which concern Thailand’s largest telecommunications conglomerate and its ties to the current government, particularly at a time when media reform in Thailand is a topic of general national and international interest, undoubtedly relate to a matter of public concern. Accordingly, they fall within the scope of the principles outlined above, placing the onus on the plaintiff to prove falsity for liability to ensue.

Point Three: Statements of Fact Made in the Good Faith Belief That They Were True Should Not Attract Sanction

Even if some of the challenged statements were deemed to be false statements of fact, under international law and in many national jurisdictions, the defendants would not be found guilty if

⁷⁴ *Derbyshire County Council v. Times Newspapers, Ltd. and Others*, [1993] A.C. 534, pp. 547-48.

⁷⁵ Section 6.

⁷⁶ Section 28.

they had a good-faith belief in the truth of their statements. This standard is reflected in a number of decisions by both international and national courts which, in general, preclude liability for the publication of statements, honestly believed to be true, on matters of public interest. Judicial recognition of this principle would be particularly appropriate in Thailand, where Section 329 of the Thai Penal Code expressly provides that “good faith” is a defence to a charge of criminal defamation. It would also be consistent with the presumption of innocence, discussed above, which is normally understood to require not only a wrong deed, but also mental responsibility for that deed.

When interpreting laws which specifically refer to good faith, courts have, for the most part, interpreted it to mean an honest belief in the accuracy of the statements made, rather than some broader notion of good faith.⁷⁷ In some cases, courts have gone even further, ruling out liability unless the defendant acted with reckless disregard for the truth, or had actual knowledge of falsity.

The values that underpin these decisions rest on the ideas that, at least in relation to matters of public concern, open debate must be promoted in the interest of the public’s right to know and that open debate is the best way for the truth to emerge. If an individual cannot make critical comments without being sure that he or she can prove that they are true, to the satisfaction of a court, taking into account the rules of evidence, open debate will be gravely fettered and many true allegations will be suppressed.

These decisions are also based on the belief that open social debate is the best way to address social issues. The allegations at issue in this case are the subject of wide debate both within Thailand and abroad. A 14 March 2004 article in the *New York Times*, for example, noted that, “companies on the Bangkok stock exchange in which the Shin Corporation, the Thaksin family’s company, owned significant holdings, did spectacularly better in 2003 than other listed companies”.⁷⁸ Suppressing open public debate on these matters within Thailand will simply fuel

⁷⁷ They have certainly not required the defendant to act in good faith towards the plaintiff, which would be quite unreasonable.

⁷⁸ Jane Perlez, “Bold Thai Leader Faces Growing Criticism”, *New York Times*, 14 March 2004. A 27 July 2005 MarketPlace radio show on American Public Media reported as follows:

rumours and speculation, rather than resolve the issue in a more appropriate manner.

Courts across Asia have held that a good faith belief in the truth of the challenged statements, or a related standard, is a full defence to defamation charges. In a landmark criminal defamation case, *Liu Tai-Ying v. Yuen Ying Chan*,⁷⁹ a district court in the Republic of China⁸⁰ dismissed criminal libel charges filed against two journalists who had reported that the business manager of the Kuomintang (KMT), the ruling party at the time, had offered to contribute \$15 million to U.S. President Bill Clinton's re-election campaign fund. The statements were based on allegations by a Taiwanese lobbyist who had originally stood by the truth of his statements but later stated that he had made a mistake.

Construing a Taiwanese criminal libel statute⁸¹ that provides a "good faith" defence for speech on matters of public concern, and that uses statutory language substantially similar to Section 329 of the Thai Penal Code, the court ruled that where a defendant,

has conducted reasonable investigation and verification and believes in the truthfulness of the report, such speech should be deemed to satisfy the..."good intent" criteria and should not be subjected to penalties under the criminal libel statute, even if it is later learned that the report does not correspond to the truth.⁸²

As noted above, the challenged statements in the present case are opinions. However, these opinions were, as also noted above, based on both thorough research conducted by Supinya and the well-known and undisputed facts set out earlier in this Statement. As a result, they were, like the statements in the *Liu Tai-Ying* case, based on reasonable investigation.

Significantly, the *Liu Tai-Ying* court stressed that such protection for discussion of public affairs is essential in a free society:

Baker says Thaksin has made countless policy changes in his own favor, like rewriting media ownership guidelines before his family company bought a TV station.

⁷⁹ *Liu Tai-Ying v. Yuen Ying Chan, Chung-Lian Hsieh and Wang Shu-Yuan*, Taipei Dist. Ct., Republic of China (Taiwan) (22 April 1997).

⁸⁰ The court's decision was affirmed on appeal.

⁸¹ Republic of China Criminal Code, Chapter XXVII, Article 311 ("A person who makes a statement with good intent under one of the following circumstances shall not be punished," and listing "fair comment on a fact subject to public criticism" as one of the circumstances where there will be no liability).

⁸² *Liu Tai-Ying*, note 79.

To strike a balance between the protection of personal reputation and the press freedom, Article 310 of the Penal Code specifies that there should be no penalty for speeches on matters that are subjects of public comment if such speech is made with good intent. Press freedom is the cornerstone of constitutional democracy and a free society. There is a direct correlation between press freedom and democracy, and there exist[s] a need to prevent the media from self-limitation or censorship for fear of libel liability, a situation that would deprive the public of its right to know. Therefore, the good intent provision under the above penal code must be strictly interpreted in order to guarantee the protection of press freedom under the constitution.⁸³

The Court concluded: “Full exploration of this issue should not be suppressed in a democracy, and full exploration requires some tolerance of alleged errors.”⁸⁴

Similarly, in Japan, the defamation provision of the Criminal Code has been interpreted to preclude criminal liability whenever the writer had a reasonable belief that statements made concerning a matter of public concern were true, even if that belief proves to be mistaken. As the Japanese Supreme Court held in *Kochi v. Japan*:

[E]ven if statements are not proved to be true, . . . criminal intent and a crime of defamation should not be deemed present . . . where the party mistakenly believed his statements were true and where there was sufficient reason for this mistaken belief in light of the concrete evidence presented.⁸⁵

Since *Kochi*, this defence has been reaffirmed by Japanese courts and has been applied to civil as well as criminal defamation actions, even though the Civil Code contains no specific “public concern” provision. Emphasising that “the freedom of expression, especially the freedom of expression relating to public matters, must be respected as a particularly important constitutional right in a democratic nation,” the Supreme Court has summarised the importance of a reporter’s mental state in assessing liability:

When an action constituting civil and criminal defamation is found to relate to matters of public interest, and to have been done solely for the benefit of the public and when the truth of the alleged facts is proved, the expression is not illegal. Even if the truth is not proved, when there is good reason for the perpetrator of the act to have mistakenly believed that the article

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ *Kochi v. Japan*, 23 Keishu 7, p. 259, Supreme Court, Grand Bench, 25 June 1969 (English translation at H. Itoh & L. Beer, *The Constitutional Case Law of Japan 1961-1970* (Seattle and London: University of Washington Press, 1978), pp. 175-178. See also *Yukan Wakayama Jiji*, 23 Keishu 975, Supreme Court, 25 June 1969.

was true, the foregoing act should be construed to be not malicious or negligent.⁸⁶

Courts in South Korea also take into account the mental state of the author of an allegedly defamatory statement. In that country, “it constitutes no unlawful act for a newspaper to publish a defamatory story for a public interest when the newspaper has a sufficient reason to believe it to be true.”⁸⁷ The court enunciating this rule noted that freedom of the press is the “foundation of democratic politics”⁸⁸ but can be chilled by overly restrictive defamation laws. This state of mind defence is applicable in both criminal and civil cases:

Under the Criminal and Civil Codes, when an injury to a person’s reputation relates to a matter of public concern and is only for the public interest, verification of the defamatory statement justifies the injury. Further, even when there is no proof as such, *the defamation cannot constitute an unlawful act if the defamer has sufficient reasons for believing his statement to be true.*⁸⁹

There can be little doubt that the challenged statements in this case were made for the public benefit.

Likewise, in 1995, the Court of Appeals of the Philippines overturned the criminal conviction of a journalist for the publication of an allegedly defamatory statement regarding former President Corazon Aquino on the basis that the defendant did not know that the statement was false or publish the statement with reckless disregard for the possibility that it was false.⁹⁰ This principle was recently extended by the Supreme Court of the Philippines to the law of civil defamation. The court affirmed the lower court’s dismissal of plaintiff’s claim for damages, stating that the statements at issue constituted “fair comment on matters of public interest” and were published

⁸⁶ *Hoppo Journal Co. v. Kozo Igrashi*, Case No. (0)-609 of 1981, Supreme Court, Grand Bench, 11 June 1986 (reprinted in General Secretariat, Supreme Court of Japan, Series of Prominent Judgments of the Supreme Court upon Questions of Constitutionality, No. 22 (1988)). See also Judgment of 23 June 1966, Saikosai Supreme Court, 20 Minshu 1118 (Japan) (rejecting civil defamation action brought by candidate for public office against newspaper, where reporters had grounds for reasonable belief in truth of story).

⁸⁷ Judgment of April 11, 1984, *Yi Ui-hyang v. Dong-A Ilbo-Sa*, Minsa Chibang Popwon, [Civil District Court] 82 Kahap 4734 (reprinted in Kungnae Ollon Kwangye Pallyechip, *Collection of Court Decisions on Korean Press*, pp. 229, 233]).

⁸⁸ *Ibid.* p. 234.

⁸⁹ Judgment of 11 October 1988, Taebopwon, 85 Taka 29 (reprinted in Kungnae Ollon Kwangye Pallyechip, *ibid.*, pp. 224, 227) (emphasis added).

⁹⁰ See Antonio C. Campo, “Archaic Libel Laws in RP”, *Filipino Reporter*, 21 (30 November 1995), and John Dikkenburg, *Aquino*, “Libel Case Rejected by Court”, *South China Morning Post*, 15 (19 November 1995). See also *U.S. v. Bustos*, G.R. No. L-12592 (8 March 1918).

“with good faith and reasonable care.”⁹¹

In a 1994 decision of the Supreme Court of India, *Rajagopal v. State of Tamil Nadu*, the Court held: “In the case of public officials, it is obvious, . . . the remedy of action for damages is simply not available with respect to their acts and conduct relevant to the discharge of their official duties.” As the Court explained:

This is so even where the publication is based upon facts and statements which are not true, unless the official establishes that the publication was made (by the defendant) with reckless disregard for truth. In such a case, it would be enough for the defendant (member of the press or media) to prove that he acted after a reasonable verification of the facts; it is not necessary for him to prove that what he has written is true.⁹²

The same principle has been widely recognised outside of Asia, particularly in the context of statements on matters of public concern. The European Court of Human Rights, for example, has held on numerous occasions that a strict liability rule that makes no room for good-faith errors in relation to statements of fact cannot be squared with the right to freedom of expression. In *Bladet Tromsø and Stensås v. Norway*, for example, the Court acknowledged that the statements alleging that a Norwegian seal hunting crew had used illegal methods of killing seals were inaccurate, but held that the press was entitled to rely on the contents of an official report in making those statements, without independently verifying the contents of the report.⁹³

In South Africa, a court has held that “a defamatory statement which relates to ‘free and fair political activity’ is constitutionally protected, even if false, unless the plaintiff shows that, in all the circumstances of its publication, it was unreasonably made.”⁹⁴ The defence was reaffirmed by the South African Supreme Court of Appeal in *National Media Ltd and others v. Bogoshi*, where the Court also elaborated eloquently on the reasons for it:

[W]e must not forget that it is the right, and indeed a vital function, of the press to make available to the community information and criticism about every aspect of public, political, social and economic activity and thus to contribute to the formation of public opinion. . . . [N]othing can be more chilling than the prospect of being mulcted in damages for even the

⁹¹ *Baguio Midland Courier v. Labo, Jr.*, G.R. No. 107566 (25 November 2004).

⁹² A.I.R. 1995 S.C. 264, p. 277.

⁹³ 9 July 1998, Application. No. 21980/93.

⁹⁴ *Holomisa v. Argus Newspapers Ltd.*, Supreme Court, Witwatersrand Local Division, 1996 (6) BCLR 836 (W).

slightest error.⁹⁵

The High Court of Australia confirmed that an author's mental state is a central area of inquiry in any defamation prosecution concerning political matters, noting that a "publication will not be actionable under the law relating to defamation if the defendant establishes that: (a) it was unaware of the falsity of the material published; (b) it did not publish the material recklessly, that is, not caring whether the material was true or false; and (c) the publication was reasonable in the circumstances."⁹⁶ The High Court emphasised:

[T]o require more of those wishing to participate in political discussion would impose impractical and, sometimes, severe restraint on commentators and others who participate in discussion of public affairs. Such a restraint would severely cramp that freedom of political discussion which is so essential to the effective and open working of modern government.⁹⁷

In the United States, an even more protective standard applies. In the landmark cases of *New York Times Co. v. Sullivan*⁹⁸ and *Curtis Publishing Co. v. Butts*,⁹⁹ the United States Supreme Court held that neither a public official nor a "public figure" (which would include a company like Shin Corp) plaintiff can recover for defamation unless he proves that a false defamatory statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not."¹⁰⁰ The Court recognised that inherent in democratic government lies "the principle that debate on public issues should be uninhibited, robust, and wide-open."¹⁰¹ Because "erroneous statement is inevitable in free debate," the Court declared, occasional errors "must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'"¹⁰² This principle was extended to criminal defamation laws in *Garrison v. Louisiana*.¹⁰³

The principle that errors made in good faith should be protected performs a vital democratic function. If advocates and journalists are dissuaded from discussing matters of public concern,

⁹⁵ *National Media Ltd and others v. Bogoshi*, 1998 (4) SA 1196, p. 1212.

⁹⁶ *Theophanous v. Herald & Weekly Times Ltd.* (1994), 124 A.L.R. 1.

⁹⁷ *Ibid.*

⁹⁸ 376 U.S. 254 (1964).

⁹⁹ 388 U.S. 130 (1967).

¹⁰⁰ *New York Times Co. v. Sullivan*, note 71, p. 280.

¹⁰¹ *Ibid.*, p. 271.

¹⁰² *Ibid.*, pp. 271-72 (quoting *NAACP v. Button*, 371 U.S. 415, p. 433 (1963)).

¹⁰³ Note 46.

democracy is the ultimate victim. When advocates stop expressing their views on controversial issues, the people, who may not have easy access to the same information, are less informed and thus less able to participate in matters of state. Yet some error is inevitable in vigorous debate on public affairs. To promote discussion on matters of public concern, it is essential to immunise statements made with a good-faith belief in their truth, even if that belief ultimately proves to be mistaken.

These principles apply to the challenged statements in this case, to the extent that they are found to be statements of fact. They relate to an important public and political issue and there is evidence that they were made with a good-faith belief in their truth. Since they were also based on solid research and well-known facts, it was also reasonable in all of the circumstances to make them.

Conclusion

The central statements which are subject to challenge under the Thai criminal defamation law in this case, essentially that the close relationship between Shin Corp and the Prime Minister's family constitutes an inappropriate overlapping of the telecommunications and political sectors, bear on a serious matter of considerable public interest. International and comparative law shows that courts and other authorities grant a high degree of protection to this category of statement, given the central role it plays in maintaining democracy and open public debate. This is particularly so where the speakers are, as in this case, those whose position in society includes disseminating information in the public interest. Furthermore, the general disfavour in which criminal defamation law is increasingly held suggests that particular care should be taken to interpret criminal defamation laws in a manner that renders them, to the extent possible, compatible with both constitutional and international guarantees of freedom of expression.

The challenged statements in this case fall comfortably into the class of statements considered to be opinions by international and many national courts, which benefit from a high degree of protection under the guarantee of freedom of expression. They represent Supinya's personal views on these matters, not statements which are subject to proof of truth, and they are based on

an underlying fact pattern that is both well researched and, in its essentials, undisputed. It is also clear that Supinya honestly holds these opinions. As such, these statements would be protected against defamation liability under international law and by many national courts.

Even if some of the challenged statements are deemed to be statements of fact, two further points follow. First, in line with the presumption of innocence, as well as principles of defamation law, international law places the burden on the prosecutor, to prove that these statements are false before any guilty verdict should be considered. Second, pursuant to international law, as well as the decisions of senior courts across the region and around the world, defendants should not be found guilty of defamation if it is established that they held a good-faith belief in the truth of their statements.

A finding of guilt in this case would represent a very serious setback for freedom of expression in Thailand. It would send a signal to all would-be critics of the government or powerful social actors such as Shin Corp that any criticism they dare to publish places them at risk of criminal penalties. The consequence is likely to be a serious chilling effect on freedom of expression, to the detriment of the Thai public as a whole, whose right to know will be undermined. A finding of innocence, on the other hand, would send a clear signal, both within Thailand and around the world, that the country's commitment to democracy and human rights remains strong, and that its leaders and powerful social actors must learn to tolerate the degree of criticism warranted by the important role they play in society.

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