

SUBMISSION OF THE INTERNATIONAL COMMISSION OF JURISTS (ICJ) ON THE PROPOSED AMENDMENTS TO THE HUMAN SECURITY ACT 2007 (HSA)

25 June 2018

I. Vague and overbroad definition of acts of terrorism

1. In 2015, the ICJ noted in its analysis of the Human Security Act (HSA) that the vague definition of acts of terrorism under Section 3 thereof is incompatible with international law as it prevents individuals from knowing whether their actions constitute terrorist acts under the law.¹ Vague and overbroadly defined provisions in criminal law violates the principle of legality of offences and is inconsistent with Article 15 of the International Covenant on Civil and Political Rights (ICCPR).²
2. In 2007, the UN Special Rapporteur on human rights and counter-terrorism transmitted a communication to the Government of the Philippines expressing concern regarding the definition of 'terrorism' under the HSA, emphasizing that it must be consistent with the principle of legality of offences in criminal law.³
3. The principle of legality of offences in criminal law is sometimes expressed by the Latin phrase *nullum crimen sine lege* (no crime without law). It means that any offense must be established in law and defined precisely and unambiguously, so as to enable individuals to know what acts will make them criminally liable. The

¹ International Commission of Jurists, "Counter-Terrorism Laws of the Philippines: The Human Security Act (HSA) and the Terrorism Financing Prevention and Suppression Act (TFPSA)" in *Righting Wrongs: Criminal Law Provisions in the Philippines related to National Security and their Impact on Human Rights Defenders*, pp. 36, available at <https://www.icj.org/wp-content/uploads/2015/03/Philippines-Criminal-Law-Provisions-Publications-Report-2015-ENG.pdf>

² The Philippines became a State Party to the International Covenant on Civil & Political Rights (hereinafter, ICCPR) in 1986.

³ *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, UN Doc. A/HRC/6/17/Add. 1 (2007), para. 66.

principle of legality is both inherent and explicit in Article 15 of the ICCPR.

4. The principle of legality and the other elements of Article 15 of the ICCPR were established as safeguards against arbitrary prosecution, conviction, and punishment. They aim to ensure that individuals will not be prosecuted for acts they could not foresee as punishable.
5. We note that Article 15 of the ICCPR is a right from which no derogation is lawful, thus the Government of the Philippines has the absolute obligation to respect it without restriction even during times of public emergency.
6. The current proposed amendments to the definition of what constitutes acts of terrorism (proposed **Section 4**) do not in any way address the abovementioned concerns. The Bill merely adopts the definition under the present law and then adds four new constituent crimes.⁴
7. Acts of terrorism under the Bill are defined merely by linking them to acts that are already punishable under the Philippines' Revised Penal Code and other domestic laws. These acts include those under Article 134 on rebellion and insurrection, which as the ICJ has previously stressed, stand to violate the principle of legality, given the vagueness and over-breadth of the definition of these crimes.⁵

II. Three cumulative conditions to define the specificity of terrorist crimes

8. There is indeed an absence of a universal, comprehensive, and precise definition of "terrorism" under international law.⁶ In a 2005 report, the UN Special Rapporteur on human rights and counter-terrorism noted that in the absence of a comprehensive definition, certain regional and international bodies link the term "terrorist acts" to existing conventions or treaties, using acts defined in these conventions or treaties as "triggers" in determining what conduct should be characterized as "terrorist."⁷ However, "not all acts that are crimes under national law or even international law are acts of

⁴ Presidential Decree No. 1866 (Decree Codifying the Laws on Illegal and Unlawful Possession, Manufacture, Dealing in, Acquisition or Disposition of Firearms, Ammunitions or Explosives) as amended; Republic Act No. 9208 (Anti-Trafficking in Persons Act of 2003); Republic Act No. 9165 (Comprehensive Dangerous Drugs Act of 2002); and Republic Act No. 10175 (Cybercrime Prevention Act of 2012).

⁵ *Supra* note 1 at page 36.

⁶ *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, UN Doc. E/CN.4/2006/98 (2005), para. 50.

⁷ *Ibid.* at para. 35.

terrorism [which] should be defined as such.”⁸ The use of existing international treaties and conventions on terrorism to ascertain trigger-offences is not by itself sufficient to determine what is truly “terrorist” in nature.⁹

9. To provide legal criteria, the UN Special Rapporteur on human rights and counter-terrorism noted that at the national level, there are **three cumulative conditions** to define the specificity of terrorist crimes. These are:

First, the means used by the perpetrator against the general population or segments of it, which can be described as “deadly” or constitutes “serious violence,” or the taking of hostages;

Second, the intent of the perpetrator, which is to “cause fear among the population” or “the destruction of public order” or “to compel the [g]overnment or an international organization to do or refrain from doing something”;

Third, the aim must be to “further an underlying political or ideological aim.”¹⁰

According to the UN Special Rapporteur, it is only when these three conditions are met, can an act be criminalized as a terrorist act.¹¹

10. We therefore recommend that the definition of what constitutes acts of terrorism under the HSA be amended to take into account the abovementioned three cumulative conditions.

III. ‘Incitement to terrorism’ and the right to freedom of expression

11. **Section 5(B)** of the Bill penalizes ‘incitement to terrorism.’ Any person proven guilty of committing **directly or indirectly** the act of ‘incitement to terrorism’ may be imposed the penalty of life imprisonment.

⁸ *Ibid.* at para. 39.

⁹ *Ibid.* at para. 35.

¹⁰ *Supra* note 1 at page 35.

¹¹ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, UN Doc. A/HRC/6/17/Add.1 (2007), para. 67.

12. The Philippines can legitimately, and indeed should, criminalize incitement to acts of terrorism, as it is part of its legal duty to protect its people against of terrorism.¹² In fact, the UN Security Council, in its Resolution 1624, identified incitement to terrorism as conduct that is contrary to the purposes and principles of the UN and thus called upon States to adopt measures to prohibit and prevent it.¹³ The ICJ supports incitement provisions that are properly formulated cognizant of international human rights laws and standards.
13. Freedom of expression is protected under Article 19 of the ICCPR, to which the Philippines is a party.¹⁴ While Article 19(3) states that the right to freedom of expression may be legitimately subject to restrictions on a limited number of grounds, including national security, these restrictions must be **necessary** and **proportionate** to meeting the objectives of those grounds. They must be compatible with the ICCPR as a whole and, in particular, must not violate the principle of non-discrimination.¹⁵
14. In line with the legal requirements of the ICCPR, the UN Secretary General, in 2008 emphasized that laws on 'incitement to terrorism' should comply with international protections of freedom of expression and **should only allow for the criminal prosecution of direct incitement to terrorism**. Laws should only penalize speech that directly encourages the commission of a crime,

¹² International Commission of Jurists, *Legal Commentary to the ICJ Berlin Declaration on Counter-Terrorism, Human Rights, and the Rule of Law* (2008), page 76.

¹³ UN Security Council, Resolution 1624, UN Doc. S/Res/1624 (2005), para. 1, available at <http://unscr.com/en/resolutions/doc/1624>

¹⁴ Article 19 of the ICCPR:

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.
3. 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.

¹⁵ This is supported by paragraph 26 of General Comment no. 34 of the UN Human Rights Committee, which states that: "Laws restricting the rights enumerated in article 19, paragraph 2 ... must not only comply with the restrictions of article 19, paragraph 3 of the [ICCPR] but must also themselves be compatible with the provisions and objectives of the [ICCPR]. Laws must not violate the non-discrimination provisions of the [ICCPR]. Laws must not provide for penalties that are incompatible with the [ICCPR] ..." See General Comment No. 34, *Article 19: Freedoms of opinion and expression*, UN Doc. CCPR/C/GC/34.

intended to result in criminal action, and is **likely to result** in criminal action.¹⁶

15. We note that prosecutions for incitement to acts of terrorism, by their nature, interfere with the right of freedom of expression, and will often impact political expression. It is important therefore that provisions in the law penalizing incitement to acts of terrorism meet the requirements of criminal law principles.
16. Following the principle of legality of offences in criminal law, laws penalizing incitement to acts of terrorism must be sufficiently and clearly formulated for individuals to foresee to a reasonable extent the application of the law and to regulate their conduct to avoid breaching the law.¹⁷
17. This limitation is supported by other international standards addressing the questions, particularly the *Johannesburg Principles on National Security, Freedom of Expression and Access to Information*. In accordance with these principles, incitement to terrorism should be a criminal offence only when there is a subjective intention to incite acts of terrorism, and where such speech concerned causes the commission of an act of terrorism or an imminent risk of an attack.¹⁸
18. The ICJ stresses that **Section 5(B) on inciting to terrorism is inconsistent with the principle of legality** as it does not define at all what acts would be penalized under this provision. Furthermore, Section 5(B) penalizes both direct and indirect incitement, which is contrary to Principle 6 of the *Johannesburg Principles*¹⁹, that there should be a **“direct and immediate”** link between the expression and the likelihood or occurrence of violence.
19. Thus, if adopted in its current form, Section 5(B) would undermine the guarantees to freedom of expression under the ICCPR. Freedom

¹⁶ UN General Assembly, *Protecting human rights and fundamental freedoms while countering terrorism: Report of the Secretary General*, UN Doc. A/63/337 (2008), para. 62.

¹⁷ See Principle 3 of the Berlin Declaration, available at <https://www.icj.org/the-berlin-declaration-the-icj-declaration-on-upholding-human-rights-and-the-rule-of-law-in-combating-terrorism/>

¹⁸ *Ibid.* at page 78.

¹⁹ Principle 6 of the *Johannesburg Principles on National Security, Freedom of Expression and Access to Information* (hereinafter, *Johannesburg Principles*), available at <https://www.article19.org/data/files/pdfs/standards/joburgprinciples.pdf> provide:

“Expression may be punished as a threat to national security only if a government can demonstrate that:

- (a) The expression is intended to incite imminent violence;
- (b) It is likely to incite such violence; and
- (c) There is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

of expression applies not only to the flow of "information" or "ideas" that is received favorably or with indifference, or as regarded as inoffensive. Freedom of expression covers all kinds of expression, including that which some people might find disturbing or even offensive. Article 19(2) of the ICCPR "requires States parties to guarantee the right to freedom of expression, including the right to seek, receive and impart information and ideas of all kinds regardless of frontiers."²⁰ This paragraph even embraces "expression that may be recognized as deeply offensive."²¹

IV. 'Glorification of terrorism' and freedom of expression

20. Under **Section 5(F)** of the Bill on 'glorification of terrorism', any person found guilty to have directly or indirectly 'encouraged, justified, honored, or otherwise induced the commission of terrorist acts by proscribed or designated individuals or organizations' shall be imposed the penalty of ten (10) years of imprisonment.
21. Again, this provision gives rise to concerns regarding legality, necessity, and proportionality.
22. In this connection, the UN Secretary-General stated that "[i]ncitement must be separated from glorification."²² He clearly said that incitement may be legally prohibited but **glorification may not.**²³
23. Similarly, the Inter-American Commission on Human Rights has pointed out that "laws that broadly criminalize the public defense (*apologia*) of terrorism or of persons who might have committed terrorist acts, without considering the element of incitement 'to lawless violence or to any other similar action,' are incompatible with the right to freedom of expression."²⁴
24. Statements that applaud or 'glorify' terrorism, past acts of terrorism, or publicly defend terrorism – **without going so far as to incite or promote the commission of terrorist acts** – might offend the sensitivities of individual persons and society, particularly the victims of terrorist acts.²⁵ However, these types of speech are not in themselves incompatible with the principles of democracy and

²⁰ UN Human Rights Committee, General Comment No. 34, Article 19: Freedoms of opinion and expression, CCPR/C/GC/34, 12 September 2011, para. 11.

²¹ *Ibid.*

²² U.N. Secretary-General, *Report of the Secretary-General on The Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, U.N. Doc. A/63/337 (2008) at para. 61.

²³ *Ibid.*

²⁴ *Supra* note 12 at page 78.

²⁵ *Supra* note 22.

hence, cannot be considered to be jeopardizing the integrity or the national security of a country.

V. Access to remedy, the right to be informed, and the right to privacy

25. Under the existing HSA, persons who have been subjected to surveillance have “the right to be informed of the acts done by the law enforcement authorities or to challenge, if he or she intends to do so, the legality of the interference” before the courts.²⁶ The Bill proposes to remove this guarantee under proposed **Section 10**.
26. Furthermore, it is stated in the existing HSA that if there is a written application before the court to open sealed materials that have been gathered from the surveillance and have been deposited with the court, all parties concerned – including the person or organization subjected to the surveillance – are required to be notified.²⁷ The Bill also proposes to remove these guarantees under proposed **Sections 14 and 15**.
27. The Bill likewise proposes to delete those parts under the HSA, which imposes sanctions upon law enforcement officers or judicial authorities who are found to have violated this notification requirement. (See proposed **Sections 14 & 15**)
28. The right to be informed is crucial in ensuring the observance of rights because no effective remedy for unlawful interference can be obtained unless notification of that interference is provided.²⁸ Article 17 of the ICCPR provides that everyone has the right to the protection of the law against such interference.
29. Moreover, giving unfettered surveillance power to authorities may constitute an unlawful interference on human rights, including the right to privacy. The right to privacy may at times serve as a basis for the enjoyment of other rights enshrined in the ICCPR. Without this right, other rights, including the right to freedom of expression, association, and movement, may not be effectively exercised.²⁹
30. The removal of safeguards will provide these State agents the unbridled opportunity to violate human rights protected not only by

²⁶ Section 9 of the Human Security Act of 2007.

²⁷ Sections 13 & 14 of the Human Security Act of 2007.

²⁸ International Commission of Jurists, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and human rights* (2009) at page 72.

²⁹ Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, UN Doc.A/HRC/13/37 (2009) at para. 40.

international human rights law but also by Philippine laws. Removing these safeguards will codify impunity in Philippine criminal law.

VI. Order of proscription and right to due process

31. Proposed **Section 17** of the Bill provides that any individual, organization, association or group of persons who violate Sections 4 (on terrorism), 5(A) (on conspiracy to commit terrorism), 5(B) (on inciting to terrorism), 5(C) (on recruitment to terrorist organization), 5(D) (providing material support to terrorists or terrorist organizations) or 5(E) (on foreign terrorist fighters), and any individual, organization or group of persons organized for the purpose of engaging in terrorism shall be declared a terrorist and/or outlawed organization, association, or group upon an *ex parte* application of the Department of Justice before a regional trial court. The subjects of the application are not required to be given due notice and the opportunity to be heard.
32. While targeted sanctions against individuals, organizations or groups suspected of involvement in terrorist activities may be an effective tool in a State's efforts to combat terrorism, such procedures may impose serious interferences on the exercise of human rights. States must ensure that measures are taken so that a transparent listing and de-listing process is in place, based on clear criteria, and with an appropriate, explicit and uniform applied standard of evidence, as well as an effective, accessible and independent mechanism of review for the individuals and States concerned.³⁰
33. Minimum standards, like the right to be informed and the right to be heard must still be observed. This is in accord with the right to due process which is also enshrined in the Bill of Rights of the Philippine Constitution.³¹
34. Guaranteeing due process rights, including the rights of individuals suspected of terrorist activity, is also critical in ensuring that anti-terrorism measures are effective, respect the rule of law and are seen to be fair.³²

³⁰ Office of the United Nations High Commissioner for Human Rights, *Human Rights, Terrorism and Counter-terrorism Fact Sheet No. 32*, p. 39. <https://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf> (Accessed 13 June 2018).

³¹ See Article III, Section 1 of the 1987 Philippine Constitution which provide: "No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws."

³² Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism, UN Doc. A/HRC/16/50 (2010), para. 28.

VII. Giving the military responsibility for countering terrorism

35. The Bill gives the military responsibility in countering terrorism in the performance of a policing function. (See proposed **Sections 8, 9, 10, 11, 12, 13, 18, 19, and 24**)
36. The Bill gives military personnel authority to apply for judicial authorization to place a person or organization under surveillance. Furthermore, military personnel also have the authority to arrest and detain persons suspected of having committed any of the offenses under this law.
37. Placing responsibility upon the military the task of countering terrorism together with law enforcement may lead to the privileging of purely military concerns at the expense of seeking alternative options and even solutions.³³
38. Furthermore, the military and police have fundamentally different approaches and roles in discharging their primary tasks. On the one hand, the military's *raison d'être* is countering a hostile opponent through the use of force, including lethal force. Police or law enforcement officers, on the other hand, have as their main task protecting the public, including human rights protection. In so doing, the police must adhere to a law enforcement framework, where the use of lethal force may only be justified when strictly unavoidable to prevent the taking of life.³⁴

VIII. Period of detention without a warrant and unlawful deprivation of the right to liberty

39. Under proposed **Section 18** of the Bill, anyone suspected of having committed acts under this law may be arrested without a judicial warrant and detained for a period of thirty (30) days, excluding

³³ *Supra* note 28 at page 31.

³⁴ Article 6(1) of the ICCPR provides, "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." See also Principle 9 of the UN Basic Principles on the use of force and firearms by law enforcement officials: "Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life." See also the 2013 Report of the UN Special Rapporteur on extrajudicial, summary, or arbitrary executions, wherein it was noted that armed forces in Mexico who were given law enforcement duties as part of the country's crusade against drug cartels were frequently unable to shed their military paradigm, thereby leading to numerous human rights violations. (UN Doc. A/HRC/26/36/Add, para. 21)

Saturday, Sunday, and public holidays. Section 18 further provides that law enforcement or military personnel responsible will not be subjected to any criminal liability for the delay in the delivery of the arrested person to the proper judicial authorities.

40. Meanwhile, proposed **Section 19** explicitly provides that in the event of an actual or imminent terrorist attack, 'suspects' may be detained for more than thirty (30) days even if not presented before the proper judicial authorities. This section also explicitly mentions that the arresting or detaining military or law enforcement personnel shall not be liable under Article 125 of the Revised Penal Code on the delay in the delivery of detained persons to the proper judicial authorities.³⁵
41. Article 9 of the ICCPR recognizes and protects the right to liberty and the right not to be arbitrarily deprived of liberty.³⁶ Any deprivation of liberty must conform to the following general principles: legality, legitimacy, necessity, proportionality, and the protection of human rights.
42. Detention for investigation purposes without the filing of criminal charges, as provided in Sections 18 and 19 of the proposed Bill,

³⁵ Article 125 of the Revised Penal Code of the Philippines: *Delay in the delivery of detained persons to the proper judicial authorities.* –The penalties provided in the next preceding articles shall be imposed upon the public officer or employee who shall detain any person for some legal ground and shall fail to deliver such person to the proper judicial authorities within the period of twelve (12) hours, for crime or offenses punishable by light penalties, or their equivalent; eighteen (18) hours for crimes or offenses punishable by correctional penalties, or their equivalent, and thirty-six (36) hours, for crimes or offenses punishable by afflictive or capital penalties, or their equivalent.

In every case, the person detained shall be informed of the cause of his detention and shall be allowed, upon his request, to communicate and confer at any time with his attorney or counsel.

³⁶ Article 9 of the ICCPR:

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

constitutes arbitrary deprivation of liberty and is incompatible with international human rights law. As required under Article 9(3) of the ICCPR, “any person arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power.”³⁷ Moreover, this “requirement applies in all cases without exception and does not depend on the choice or ability of the detainee to assert it.”³⁸

43. Prolonged detention without being presented to judicial authorities “may also jeopardize the presumption of innocence under article 14, paragraph 2” of the ICCPR.³⁹
44. The delay in delivering a case to trial must be “assessed in the circumstances of each case, taking into account the complexity of the case, the conduct of the accused during the proceeding and the manner in which the matter was dealt with by the executive and judicial authorities.”⁴⁰
45. What constitutes ‘prompt’ delivery may vary depending on objective circumstances. But delays should not exceed a few days from the time of arrest.⁴¹ In view of the Human Rights Committee, “**48 hours is ordinarily sufficient to transport the individual and to prepare for the judicial hearing.**”
46. Detention pending trial should be based on an “individualized determination that it is reasonable and necessary taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime.”⁴² The relevant factors that must be clearly laid out in law must not include overly vague and expansive standards such as ‘public security.’⁴³
47. The ICJ urges that in order to meet the requirement of promptness set out in Article 9(3) of the ICCPR, the thirty (30)-day period under Sections 18 and 19 of the proposed Bill **should be reduced to 48 hours or less.**
48. The proposed amendments also do not reference anywhere how persons detained under this provision can challenge the lawfulness

³⁷ UN Human Rights Committee, General Comment No. 35, Article 9: Liberty and security of persons, CCPR/C/GC/35, 16 December 2014, para. 32.

³⁸ *Ibid.*

³⁹ *Ibid.* at para. 37.

⁴⁰ *Ibid.*

⁴¹ *Ibid.* at para. 33.

⁴² *Ibid.* at para. 38.

⁴³ *Ibid.*

of their detention.⁴⁴ It is a general principle of law, and one contained in Article 9(4) of the ICCPR, that all detained persons have the right to challenge the lawfulness of their detention at any point before a judicial authority.

49. Detainees have the right to bring proceedings challenging their detention from the moment of their arrest. They also have the right to appear in person before the court. Their physical presence ensures that they are given the “opportunity for inquiry into the treatment that they received in custody and facilitates immediate transfer to a remand detention center if continued detention is ordered.”⁴⁵

⁴⁴ *Ibid* at para. 34.

⁴⁵ *Ibid*.