

**Righting Wrongs:  
Criminal Law Provisions in the Philippines  
related to National Security and their Impact on  
Human Rights Defenders**

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<b>I. INTRODUCTION</b>	5
<b>II. HUMAN RIGHTS DEFENDERS, THEIR RIGHTS, THEIR ROLE IN SOCIETY, AND THE CHALLENGES THEY FACE</b>	7
<b>III. THE PHILIPPINE LEGAL FRAMEWORK</b>	9
<b>IV. LAWS LIMITING FREEDOM OF EXPRESSION OF HUMAN RIGHTS DEFENDERS</b>	11
A. Laws in the Philippines limiting freedom of expression	11
B. Examples of cases limiting the freedom of expression of human rights defenders in the Philippines	13
C. International standards on freedom of expression	14
D. Analysis of provisions in the light of international standards on the right to freedom of expression	16
a. Article 154 of the RPC (unlawful use of means of publication and unlawful utterances)	16
b. Criminal libel provisions in the RPC and the Cybercrime Prevention Act	17
E. Recommendations	19
<b>V. THE PRINCIPLE OF LEGALITY AND THE PROVISIONS ON REBELLION AND SEDITION</b>	20
A. The crimes of rebellion and sedition in Philippine law and jurisprudence	20
B. Cases of rebellion and sedition filed against human rights defenders	21
C. The principle of legality and international law regarding rebellion and sedition laws	22
D. Recommendations	23
<b>VI. THE RIGHT TO PEACEFULLY ASSEMBLE: THE LAWS ON ILLEGAL ASSEMBLIES</b>	24
A. Batas Pambansa 880 (B.P. 880) and Article 146 of the RPC on illegal assemblies	24
B. B.P. 880 and Article 146 of the RPC are inconsistent with international standards safeguarding the right to freedom of peaceful assembly	25
C. Recommendations	27
<b>VII. THE RIGHT TO FREEDOM OF ASSOCIATION: ARTICLE 147 OF THE RPC</b>	29
A. Article 147 on illegal associations	29
B. Article 147 vis-à-vis international standards on freedom of association	29
C. Recommendation	30
<b>VIII. COUNTER-TERRORISM LAWS OF THE PHILIPPINES: THE HUMAN SECURITY ACT (HSA) AND THE TERRORISM FINANCING PREVENTION AND SUPPRESSION ACT (TFPSA)</b>	31
A. The Human Security Act (HSA)	31
B. Terrorism Financing Prevention and Suppression Act (TFPSA)	34
C. Analysis of the HSA and TFPSA provisions in the light of international standards:	34
a. Vague and overbroad definitions of terrorism	35
b. Sharing information with other States' intelligence agencies	37
c. Unlawful authority of the Commission on Human Rights of the Philippines (CHRP) and length of detention under the HSA	38
D. Recommendations	40
<b>IX: CONCLUSION AND RECOMMENDATIONS</b>	41



## **RIGHTING WRONGS: CRIMINAL LAW PROVISIONS IN THE PHILIPPINES RELATED TO NATIONAL SECURITY AND THEIR IMPACT ON HUMAN RIGHTS DEFENDERS**

### **I. INTRODUCTION**

Following the attacks in the United States of America on 11 September 2001, many countries all over the world declared “national security” as a priority on their agendas and adopted counter-terrorism legislation or re-examined and strengthened their existing laws related to national security. Indeed, as the UN Security Council has repeatedly underscored, it is the responsibility of the State to adopt measures to protect people from terrorist acts, in a manner that is consistent with its obligations under international law, in particular human rights, refugee and international humanitarian law.<sup>1</sup> Unfortunately, as observed by the UN Special Representative of the Secretary-General on the situation of human rights defenders, laws related to national security have been used to persecute human rights defenders and hinder them from pursuing their work promoting and protecting human rights. More often than not, the scope of these laws exceeds the legitimate objective of strengthening security. Many of these laws use vague and imprecise definitions that allow varying interpretations, unduly limit judicial review, and infringe upon other guarantees for the protection of human rights.<sup>2</sup>

In the Philippines, the principal counter-terrorism legislation that criminalizes acts of terrorism is the Human Security Act (HSA),<sup>3</sup> which was adopted after the 9/11 attacks. The Terrorism Financing Prevention and Suppression Act (TFPSA), which was adopted in 2012, criminalizes providing funds that contribute to acts of terrorism.<sup>4</sup> Prior to the enactment of the HSA and the TFPSA, the Philippines already had national-security laws, many of which are included in the Revised Penal Code (RPC),<sup>5</sup> which was originally enacted under the American colonial government. Over the years, the Philippines has accumulated a large and complex body of criminal laws ranging from provisions in the RPC and special penal laws to those promulgated by various presidents in the form of Executive Orders or Presidential Decrees. A number of these laws have been criticized as being detached from present day realities, as well as not being consistent with fundamental principles of international human rights law. The RPC, in particular, has been described in the bill proposing its amendment as defining “archaic” crimes and has been “largely ineffective in addressing organized crime, transnational crime, and cybercrime.”<sup>6</sup> The enactment of special penal laws has also been described in the bill proposing amendments as “unsystematic”, thereby creating difficulties and confusion among justice sector workers.<sup>7</sup>

Thus, in April 2011, the Government of the Philippines initiated a process to review and revise the country’s criminal laws. To this end, the Department of Justice constituted the Criminal Code Committee,<sup>8</sup> which is mandated to develop a new Criminal Code of the Philippines that is “updated, modern, simplified, responsive, and truly Filipino.” It is intended that the new Criminal Code reflect international best practices and be anchored in human rights.<sup>9</sup> In drafting this new Criminal Code, the Committee is to engage in a process that is “inclusive and consultative” and which includes activities such as consultations and

1 UN Security Council Resolution 2178, UN Doc. S/RES/2178 (24 September 2014), preambular paragraph 7.

2 Report of the UN Special Representative of the Secretary-General on the situation of human rights defenders, UN Doc. E/CN.4/2005/101 (13 December 2004), para. 37.

3 An Act to Secure the State and Protect our People from Terrorism, Republic Act No. 9372, Thirteenth Congress (2007) [hereinafter Human Security Act or HSA].

4 The Terrorism Financing Prevention and Suppression Act of 2012, Implementing Rules and Regulations of Republic Act No. 10168, Fifteenth Congress (2012) [hereinafter TFPSA].

5 An Act Revising the Penal Code and other Penal Laws, Act No. 3815 (1930) [hereinafter RPC].

6 Explanatory Note of House Bill No. 2300, An Act Instituting the Philippine Penal Code of Crimes to Further Strengthen the Criminal Justice System, Repealing for the Purpose Book One of Act No. 3815, As Amended, Otherwise Known as The Revised Penal Code of the Philippines and Other Special Laws on Crimes (2013).

7 *Ibid.*

8 The Criminal Code Committee members are representatives from the Senate, House of Representatives, Supreme Court, Philippine Judicial Academy, and the Philippine Judges Association, Office of the Solicitor General, the Office of the Government Corporate Counsel, the National Bureau of Investigation, the Bureau of Immigration, Bureau of Corrections, the National Prosecution Service, the Philippine National Police, and the Public Attorney’s Office, the Philippine Association of Law Schools, Transparency International, the Integrated Bar of the Philippines, and the Philippine Bar Association. (See Republic of the Philippines Department of Justice, Executive Summary: Criminal Code Committee, p. 3. [http://www.doj.gov.ph/files/ccc/CCC\\_executive\\_summary.pdf](http://www.doj.gov.ph/files/ccc/CCC_executive_summary.pdf))

9 *Ibid.* at p. 2.

discussions with various stakeholders.<sup>10</sup> The draft developed through this process will be submitted to the Philippine Congress. According to officials of the Department of Justice, they hope to have “concrete and verifiable results” from this process before 2016.<sup>11</sup>

This report aims to contribute to the process of crafting a new Criminal Code of the Philippines that is anchored in and consistent with respect for human rights. It focuses on existing penal laws enacted in the name of national security, many of which have been used against human rights defenders to unduly limit their right to promote and protect human rights or whose mere existence casts a chilling effect on the work of human rights defenders. This report examines these laws in the light of international human rights standards, and accordingly makes recommendations for the amendment of provisions or their repeal.

The laws related to national security discussed in this report have been found to be used in a manner that is detrimental to the work of human rights defenders, particularly those who criticize government practices or policies that are detrimental to human rights or expose abuses committed by public officers. Some of the laws discussed in this report have not been used or rarely used against human rights defenders, but as mentioned above, their very existence casts a chilling effect on the work of promoting and protecting human rights. The current endeavor of updating Philippine criminal laws provides the Government of the Philippines with the opportunity to ensure that the country’s laws related to the protection of national security are consistent with international human rights standards. The Government of the Philippines must ensure that its laws related to national security do not infringe upon human rights or the work of human rights defenders.

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<sup>10</sup> *Ibid.* at p. 3.

<sup>11</sup> Republic of the Philippines Department of Justice, “House starts Public Hearings on the New Code of Crimes”, 20 September 2013. <http://doj.gov.ph/news.html?title=House%20starts%20Public%20Hearings%20on%20the%20New%20Code%20of%20Crimes&newsid=223> (Accessed August 2014).



## II. HUMAN RIGHTS DEFENDERS, THEIR RIGHTS, THEIR ROLE IN SOCIETY, AND THE CHALLENGES THEY FACE

Human rights defenders in the Philippines have faced a variety of challenges and have been subjected to harassment, unlawful arrest and detention, torture, extrajudicial killings, and enforced disappearances because of their work. Human rights defenders have also faced unfounded criminal charges usually brought against them by public officers whose abuses the defenders have exposed. In some cases, numerous criminal charges have been filed against human rights defenders, with the apparent intention of keeping them in detention.

In 2012 and 2013, the UN Special Rapporteur on the situation of human rights defenders, expressed serious concern regarding the persistent challenges faced by human rights defenders in the Philippines, "including extrajudicial killings, threats and intimidation, arbitrary arrest, and detention."<sup>12</sup> The UN Human Rights Committee, the body of independent experts mandated by the International Covenant on Civil and Political Rights (ICCPR) to monitor the implementation of its provisions by State Parties, expressed its concern that human rights defenders in the Philippines are often subjected to surveillance by law enforcement personnel and recommended that the government "take appropriate measures to protect the rights of human rights defenders" and "ensure that any surveillance programmes for purposes of State security" are compatible with the ICCPR.<sup>13</sup>

The Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (UN Declaration on Human Rights Defenders), adopted by the UN General Assembly in 1998<sup>14</sup>, describes human rights defenders as "individuals, groups, and associations" who "contribute to the effective elimination of all violations of human rights and fundamental freedoms of peoples and individuals."<sup>15</sup> The UN Declaration on Human Rights Defenders sets out and is based on rights and principles that, at the time of its adoption, were already enshrined in legally-binding treaties, such as the ICCPR, to which the Philippines is a party. It serves to clarify and emphasize the duties of States to promote and protect the rights of human rights defenders. Adopted by consensus by the General Assembly, it represents a commitment by States "to acknowledge, promote and protect the work and rights of human rights defenders."<sup>16</sup>

The UN Declaration on Human Rights Defenders is the first international instrument that clarifies that the defense of human rights is a right in itself. It expressly provides that all persons have the right "to strive for the protection of human rights and fundamental freedoms at the national and international levels."<sup>17</sup> It also enumerates rights of those people who do so -- human rights defenders -- such as the right to form associations and non-governmental organizations<sup>18</sup>, to meet or assemble peacefully<sup>19</sup>, to freely seek, obtain, and hold information about human rights<sup>20</sup>, hold opinions on the observance, both in law and practice, of all human rights and fundamental freedoms and, through these and other appropriate means, to draw public attention to those matters,<sup>21</sup> and the right to publish and disseminate to others views and information on all human rights<sup>22</sup>. Human rights defenders also have the right, individually and with others, to submit to governmental bodies and agencies and organizations concerned with public affairs criticism and proposals for improving their functioning and to draw attention to any

12 Report of the Special Rapporteur on the situation of human rights defenders, Addendum, UN Doc. A/HRC/19/55/Add.2 (2012), para. 292, Report of the Special Rapporteur on the situation of human rights defenders, Addendum, UN Doc. A/HRC/22/47/Add.4 (2013) para 340.

13 Human Rights Committee, Concluding observations on the fourth periodic report of the Philippines, UN Doc. CCPR/C/PHL/CO/4 (2012), para. 15.

14 The Declaration on Human Rights Defenders was adopted by the UN General Assembly, through Resolution A/RES/53/144, 8 March 1999. <http://www.ohchr.org/Documents/Issues/Defenders/Declaration/declaration.pdf> (Accessed August 2014).

15 Fourth preambular paragraph of the Declaration on Human Rights Defenders.

16 Report of the Special Representative of the Secretary General on human rights defenders, UN Doc. E/CN.4/2001/94, 26 January 2001, para. 2. <http://www.humanrights-defenders.org/wp-content/uploads/2010/04/G0110638-UNSRHRD2001-EN.pdf> (Accessed August 2014).

17 Article 1 of the UN Declaration on Human Rights Defenders.

18 Article 5(b) of the UN Declaration on Human Rights Defenders.

19 Article 5(a) of the UN Declaration on Human Rights Defenders.

20 Article 6(a) of the UN Declaration on Human Rights Defenders.

21 Article 6(c) of the UN Declaration on Human Rights Defenders.

22 Article 6(b) of the UN Declaration on Human Rights Defenders.

aspect of their work that may impede the realization of human rights,<sup>23</sup> and to make complaints about official policies and acts relating to human rights and to have such complaints reviewed.<sup>24</sup>

The Office of the United Nations High Commissioner for Human Rights (OHCHR) describes human rights defenders, as any group or individual who promotes or advocates for respect of a human right, whether working locally or internationally, on a single subject or many, through any number of methods. Importantly, human rights defenders must always recognize the universality of human rights and employ nonviolence in their advocacy.<sup>25</sup>

In considering whether or not a person is a human rights defender, one must look at the activity undertaken by the person. Other considerations, such as whether or not the person is being paid for his or her work or belongs to a civil society organization, are not determinative.<sup>26</sup>

The Special Representative to the UN Secretary-General on the situation of human rights defenders has highlighted the pivotal role of human rights defenders in strengthening the preservation of democracy and its components.<sup>27</sup> The Special Representative underscored that the presence of human rights defenders and the extent to which they are able to conduct their activities freely indicate the level of democratization of a State. Their work is also a motor for its further development.<sup>28</sup>

Despite the fact that they play a pivotal role in society, human rights defenders face challenges in some countries. While their experiences vary widely across countries and regions, in many areas, their rights to freedom of association have been suppressed by overt and covert government actions. The UN Special Rapporteur on the situation of human rights defenders has noted that many governments use limitations on the formation and registration of associations, as well as criminal sanctions for unregistered activities, to hinder human rights activities.<sup>29</sup> Groups of human rights defenders in certain countries have also been denied the ability to solicit, receive or utilize funds.<sup>30</sup>

Human rights defenders around the world have also often been harassed by executive and judicial agents or censored through the use of slander laws or other regulations banning "extremism".<sup>31</sup> Moreover, some government entities have monitored and supervised the activities of some human rights defenders.<sup>32</sup>

23 Article 8(2) of the UN Declaration on Human Rights Defenders.

24 Article 9(3) of the UN Declaration on Human Rights Defenders.

25 Office of the High Commissioner for Human Rights, Fact Sheet No. 29: Human Rights Defenders, Geneva, 2004, pp. 2-5, 9-10. <http://www.ohchr.org/Documents/Publications/FactSheet29en.pdf> (Accessed August 2014).

26 *Ibid.* at pp. 6-8.

27 Report of the Special Representative of the Secretary-General on the situation of human rights defenders, UN Doc. E/CN.4/2003/104 (2003), para. 47.

28 *Ibid.* at para. 48.

29 Report of the Special Rapporteur on the situation of human rights defenders, UN Doc. A/64/226 (2009), paras. 50-56.

30 Report of the Special Rapporteur on the situation of human rights defenders, UN Doc. A/64/226 (2009), para. 55.

31 *Ibid.* at para. 56.

32 *Ibid.* at paras. 55, 93.

### III. THE PHILIPPINE LEGAL FRAMEWORK

The Philippine Constitution, which took effect in 1987, is the fundamental law of the land and “deemed written in every statute and contract”. Under the doctrine of constitutional supremacy, if a law or contract violates any norm of the Constitution, that law or contract whether promulgated by the legislative or by the executive branch or entered into by private persons for private purposes, is null and void and without any force or effect.<sup>33</sup>

The Revised Penal Code or Act No. 3815, (RPC) which took effect in 1932, is the main source of criminal laws in the country. At the time the RPC was adopted, the Insular Government of the Philippine Islands governed the country. The Insular Government was a civilian administration under the Bureau of Insular Affairs, a division of the United States War Department. In 1935, the Government of the Commonwealth of the Philippines was established.<sup>34</sup> In 1946, the Philippines became an independent Republic. No substantial amendments to the Revised Penal Code have been made since its adoption. Thus, many of the crimes defined therein, including rebellion, insurrection, and sedition still mainly reflect elements of acts of armed resistance against American rule. The Penal Code, therefore, has been widely viewed as “outdated and archaic”.<sup>35</sup>

Other criminal law provisions that remain in force in the country are set out in additional acts of the legislature, presidential decrees, or executive orders punishing offenses.<sup>36</sup>

The Philippines is party to and thus obligated to implement a number of international human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR)<sup>37</sup> and its two Optional Protocols;<sup>38</sup> the International Covenant on Economic, Social, and Cultural Rights (ICESCR);<sup>39</sup> the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and its Optional Protocol;<sup>40</sup> the Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and its Optional Protocol;<sup>41</sup> the Convention on the Rights of the Child (CRC)<sup>42</sup> and two of its three Optional Protocols;<sup>43</sup> the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW);<sup>44</sup> the Convention on the Rights of Persons with Disabilities (CRPD);<sup>45</sup> and the Convention on the Elimination of All Forms of Racial Discrimination (CERD).<sup>46</sup>

Under Section 2 of Article II of the 1987 Philippine Constitution, generally accepted principles of international law are adopted as part of the law of the land. But in practice, there is a lack of clarity of the status of treaties ratified by the Philippines in its domestic law. The Supreme Court has been inconsistent in its application of norms embodied in treaties to which the Philippines is a State Party in its judicial reasoning and interpretation. In some cases, it has rendered decisions referring to provisions in treaties. For

33 *Manila Prince Hotel v. Government Service Insurance System, et al.*, G.R. No. 122156, 3 February 1997.

34 Franklin D. Roosevelt: “Proclamation 214-Establishment of the Commonwealth of the Philippines,” 14 November 1935. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. <http://www.presidency.ucsb.edu/ws/index.php?pid=14980> (Accessed 13 September 2013).

35 Explanatory Note of House Bill No. 2300, An Act Instituting the Philippine Penal Code of Crimes to Further Strengthen the Criminal Justice System, Repealing for the Purpose Book One of Act No. 3815, As Amended, Otherwise Known as The Revised Penal Code of the Philippines and Other Special Laws on Crimes (2013).

36 Justice Rodolfo G. Palattao, *The Revised Penal Code Made Easy*, Central Book Supply, Inc., Manila, Second Edition, 2005, p. 3.

37 Ratified in 1986.

38 The Philippines ratified the First Optional Protocol, which grants authority to the Human Rights Committee to consider individual complaints, in 1989, and the Second Optional Protocol, aiming at the abolition of the death penalty, in 2007.

39 Ratified in 1974. The Philippines, however, has not yet ratified its Optional Protocol, which grants the Committee on Economic, Social, and Cultural Rights jurisdiction to consider complaints that the authorities have violated one of more of the Philippines’ obligations under the Covenant.

40 Ratified CEDAW in 1981 and the Optional Protocol to CEDAW (granting authorization to the CEDAW to consider complaints) in 2003.

41 Acceded to CAT in 1986 and its Optional Protocol, (authorizing visits to places where people are deprived of liberty by the SPT and a National Preventive Mechanism) in 2012.

42 Ratified in 1990.

43 The Philippines ratified the Optional Protocol on the Involvement of Children in Armed Conflict in 2003, and the Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography in 2002. It has not yet ratified the Third Optional Protocol on a Communications Procedure, granting the Committee on the Rights of the Child jurisdiction to consider complaints that the authorities have failed to implement one or more of their obligations under the Convention on the Rights of the Child or its two Optional Protocols.

44 Ratified in 1995.

45 Ratified in 2008. The Philippines has yet to ratify the Optional Protocol, which allows for individual complaints to be submitted to the Committee on the Rights of Persons with Disabilities by individuals and groups of individuals, or by a third party on behalf of individuals and groups of individuals, alleging that their rights have been violated under the CRPD.

46 Ratified in 1967.

instance, in the case *Ang Ladlad v. Commission on Elections*, the Court explicitly recognized the principle of non-discrimination in Article 26 of the ICCPR, as it relates to the right to electoral participation. The Court also referred to the Human Rights Committee's decision in the case of *Toonen v. Australia*, wherein the Committee expressed the view that the prohibition of discrimination on grounds of "sex" in Article 26 should be construed to include a prohibition of discrimination on grounds of "sexual orientation".<sup>47</sup> By contrast, in *Lumanog and Santos v. People of the Philippines*, the Supreme Court explicitly rejected the Human Rights Committee's finding that the eight-year delay in the disposition of the criminal defendants' appeal violated the right "to be tried without undue delay" set out in Article 14(3)(c) of the ICCPR.<sup>48</sup>

The Human Rights Committee, in its Concluding Observations on the fourth periodic report on the implementation of the ICCPR by the Philippines in 2012, expressed concern "at the lack of clarity on the status of the [ICCPR] in domestic law." It noted that although courts have on several occasions referred to provisions of the ICCPR in their decisions, it is often argued by State authorities before the Supreme Court that the ICCPR cannot be considered part of the law of the land without the need of a law enacted by legislature.<sup>49</sup>

<sup>47</sup> *Ang Ladlad LGBT Party v. Commission on Elections*, G.R. No. 190582, 8 April 2010.

<sup>48</sup> *Lumanog and Santos v. People of the Philippines*, G.R. No. 182555, 7 September 2010.

<sup>49</sup> Human Rights Committee, Concluding Observations on the fourth periodic report of the Philippines, UN Doc. CCPR/C/PHL/CO/4 (2012), para 5.

## IV. LAWS LIMITING FREEDOM OF EXPRESSION OF HUMAN RIGHTS DEFENDERS

The right to freedom of speech and expression is guaranteed in Article 3, Section 4 of the Constitution, as well as under Article 19 of the ICCPR.

The discussion below highlights how Article 154 of the RPC, Articles 353 to 355 of the RPC, Articles 358 to 362 of the RPC, and Section 4(c)(4) of the Cybercrime Prevention Act restrict freedom of expression in a manner that is inconsistent with the Philippines' obligations under international human rights law. It also illustrates how these laws have been used to stifle the peaceful expression of political dissent and unduly limit human rights defenders in their work demanding accountability from government officials and other organs of society.

### A. Laws in the Philippines limiting freedom of expression

Article 154 (on the unlawful use of means of publication and unlawful utterances) of the RPC prohibits (a) publishing or causing to be published any material that is false news and which may endanger public order or damages the interest or the credit of the state; (b) encouraging disobedience to the law or to the duly constituted authorities, or praising any illegal act; (c) maliciously publishing or causing to be published any official document without proper authority or before such document has been officially published; and (d) printing or publishing books, pamphlets or periodicals anonymously or by using a pseudonym. For a conviction under this provision, it is not necessary for the prosecution to prove that the act caused actual public disorder or actual damage to the credit of the State. Persons convicted under this provision may be imprisoned from one to six months or may be ordered to pay a fine not exceeding Php200 (approximately US\$4.50).<sup>50</sup>

Persons interviewed by ICJ cannot recall Article 154 having been used to unduly limit the right to freedom of expression of human rights defenders. Nevertheless, groups interviewed by the ICJ believe that the existence of this provision casts a chilling effect on free speech and expression.<sup>51</sup>

On the other hand, libel is defined in Article 353 of the RPC as a "public and malicious imputation of a crime, or of a vice or defect, real or imaginary." The same provision goes on to define libel as "any act or omission, condition, status, or circumstance tending to cause dishonor, discredit, or contempt of a natural or juridical person, or to blacken the memory of one who is dead." The elements of libel are: (a) the allegation of a discreditable act or condition concerning another; (b) publication of the charge; (c) the victim must be identified or identifiable; and (d) existence of malice.<sup>52</sup> Malice is presumed in every defamatory imputation,<sup>53</sup> except when the statement made was a "private communication made by any person to another in the performance of any legal, moral, or social duty",<sup>54</sup> and when the statement is a "fair and true report" of any judicial, legislative, or official proceeding, provided that the author did not give any comments of remarks thereon.<sup>55</sup>

Article 355 (on libel by means of writing or similar means) of the RPC punishes libel committed by means of writing, printing, lithography, engraving, radio, phonograph, painting, theatrical exhibition, cinematographic exhibition, or any similar means. Persons convicted of libel under this provision may be imprisoned for six months to four years or ordered to pay a fine ranging from Php200 (approximately US\$4.50) to Php6,000 (approximately US\$134).<sup>56</sup>

50 As of December 2014, the average daily minimum wage in the Philippines is Php300 to Php350 (approximately US\$6 to US\$7) (See the Philippines' Department of Labor and Employment's table of minimum wage rates by sector and region, as of 11 December 2014: <http://www.bles.dole.gov.ph/publications/current%20labor%20statistics/statistical%20tables/pdf/tab24.pdf>)

51 ICJ Interview with Cristina Ellazar Palabay, Secretary General of Karapatan, Quezon City, 30 July 2013; ICJ Interview with the Philippine Alliance of Human Rights Advocates (PAHRA), Quezon City, 30 July 2013; ICJ Interview with Atty. Ricardo A. Suñiga III of FLAG, Quezon City, 1 August 2013.

52 *Vasquez v. Court of Appeals*, G.R. No. 118971, 15 September 1999.

53 Article 354 of the RPC.

54 Article 354(1) of the RPC.

55 Article 354(2) of the RPC.

56 As of December 2014, the average daily minimum wage in the Philippines is Php300 to Php350 (approximately US\$6 to US\$7) (See the Philippines' Department of Labor and Employment's table of minimum wage rates by sector and region, as of 11 December 2014: <http://www.bles.dole.gov.ph/publications/current%20labor%20statistics/statistical%20tables/pdf/tab24.pdf>)

Article 357 (on prohibited publication of acts referred to in the course of official proceedings), punishes specifically reporters, editors or managers of newspapers or magazines who “publish facts connected with the private life of another and offensive to the honor, virtue, and reputation of said person”, even though said publication is made “in connection with or under the pretext that it is necessary in the narration of any judicial or administrative proceedings wherein such facts have been mentioned.” Persons convicted under this provision may be imprisoned for one to six months or ordered to pay a fine ranging from Php200 (approximately US\$4.50) to Php2,000 (approximately US\$44), or both. This provision is known commonly as the “Gag Law”.

Persons convicted of making a defamatory remark orally may be punished under Article 358 of the RPC (on slander) and may be imprisoned for a term ranging from four months to two years or order to pay a fine not exceeding Php200 (approximately US\$4.50). Acts that cast dishonor, discredit, or contempt upon another person but are not described in the provisions above are punishable under Article 359 (on slander by deed). Persons convicted under Article 359 may be imprisoned from four months to two years or ordered to pay a fine not exceeding Php200 (approximately US\$4.50).

Courts have the discretion to determine whether or not a particular statement is libelous or defamatory.<sup>57</sup> On several occasions, the Supreme Court has held that it does not matter what the writer of the alleged libel meant; what matters is what those words meant to in the minds of “persons of reasonable understanding, discretion and candor, taking into consideration the surrounding circumstances which were known to the hearer or the reader.”<sup>58</sup> Libel is committed once the libelous material has been communicated to a third person, regardless of whether or not the defamed person has read or heard the said statement.<sup>59</sup>

In 2008, the Supreme Court issued guidelines for judges, advising that in imposing penalties for libel, preference should be on imposing a fine instead of imprisonment.<sup>60</sup>

The Cybercrime Prevention Act was signed into law on 12 September 2012, but its implementation was suspended by a temporary restraining order by the Supreme Court on 9 October 2012<sup>61</sup> following 15 petitions from civil society groups and human rights defenders. The petitions alleged that the Act would, among other things, inhibit freedom of expression as Section 4(c)(4), which penalizes libel committed online, does not protect websites hosting user comments, and other provisions violate the right of privacy by permitting warrantless real time collection of traffic data.<sup>62</sup> On 18 February 2014, the Court ruled that Section 4(c)(4) of the Act is constitutional “only insofar as the cybercrime law penalizes the author of the libelous statement or article”, and that the provision on libel in the Act will be unconstitutional “only where it penalizes those who simply receive the statement or react to it.”<sup>63</sup>

57 *Madrona Sr. v. Rosal*, G.R. No. L-39120, 21 November 1991.

58 *People v. Encarnacion* (CA), 48 Official Gazette 1817 (1952).

59 *Alonzo v. Court of Appeals*, G.R. No. 110088, 1 February 1995.

60 Administrative Circular No. 08-2008, Guidelines in the observance of a rule of preference in the imposition of penalties in libel cases, 25 January 2008.

61 Lorenz Niel Santos, “Supreme Court issues TRO on Anti-Cybercrime Act”, *InterAksyon.com*, 9 October 2012. <http://www.interaksyon.com/article/45096/supreme-court-issues-tro-on-anti-cybercrime-act> (Accessed August 2014).

62 *National Union of Journalists of the Philippines et. al. v. the Executive Secretary, et. al.*, G.R. No. 203453, 2012. <http://sc.judiciary.gov.ph/microsite/cybercrime/203453.php> (Accessed August 2014); The temporary restraining order was extended indefinitely on 5 February 2013. Christine O. Avendaño and Leila B. Salaverria, “SC extends indefinitely suspension of cyberlaw,” *Philippine Daily Inquirer*, 6 February 2013 <http://technology.inquirer.net/22795/sc-extends-tro-on-cyber-law> (Accessed August 2014).

63 *Disini, et. al. v. Secretary of Justice, et. al.*, G.R. No. 203335, 18 February 2014.



## B. Examples of cases limiting the freedom of expression of human rights defenders in the Philippines

From 2003 to 2006 alone, under the administration of President Gloria Macapagal-Arroyo, at least 43 journalists were reportedly charged under the criminal libel provisions of the RPC.<sup>64</sup> A more recent example of criminal libel in the RPC being used against a human rights defender is the case of Esperlita Garcia. Esperlita Garcia, is the president of the Gonzaga Alliance for Environmental Protection and Preservation, a group that strongly opposed black sand mining activities undertaken by Chinese companies in the town of Gonzaga, in the province of Cagayan. The local government allegedly allowed the Chinese contractors to conduct magnetite extractions or black sand mining in the town.<sup>65</sup> Esperlita Garcia was arrested on 19 October 2012 on the basis of a complaint by the town's mayor, Carlito Pentecostes Jr. in reference to her alleged account on Facebook of how a peaceful assembly of people protesting the mining activities was ordered by the mayor to be dispersed.<sup>66</sup> Esperlita Garcia was released from custody on the day of her arrest, after posting bail amounting to Php10,000 (approximately US\$229).<sup>67</sup>

The Philippines is known to be one of the most dangerous places in the world for journalists.<sup>68</sup> The Committee to Protect Journalists (CPJ), an international independent non-profit organization that promotes press freedom, reported that as of 2014, 76 journalists have been killed in the Philippines since 1992.<sup>69</sup> Sixty-two percent (62%) of these journalists were writing on political issues and were most likely targeted for their work exposing abuses perpetrated by public officials in the country.<sup>70</sup> It should be noted that 34 of the 76 journalists killed between 1992 and 2014 died during the Maguindanao massacre as part of the convoy that accompanied the Mangudadatu family. On 23 November 2009, 57 people, including 34 journalists, were ambushed and brutally killed allegedly upon the orders of the Ampatuan family, the political rivals of the Mangudadatus.<sup>71</sup> Journalists, are considered to be human rights defenders when "they report on human rights abuses and bear witness to acts that they have seen."<sup>72</sup>

Criminal libel provisions under the RPC have been commonly used in the country to silence journalists from exposing abuses committed by public officers. A number of journalists who have reported on acts of graft and corruption by public officials have been accused of libel. As mentioned earlier, from 2003 to 2006 alone, during the administration of President Gloria Macapagal-Arroyo, at least 43 journalists were charged under the criminal libel provisions of the RPC.<sup>73</sup> The UN Special Rapporteur on the situation of human rights defenders noted in her report that restrictions imposed on media and press freedom "can foster a climate of intimidation, stigmatization, violence and self-censorship" and causes a "chilling effect" on the work of journalists.<sup>74</sup>

In March 2010, a complaint for criminal libel was filed against Marites Vitug, a well-known journalist. The complaint was filed by Supreme Court Justice Presbitero Velasco, Jr., who claimed that Marites Vitug insinuated in her online article, "SC justice in partisan politics?", that he had breached the Code of Judicial Conduct by engaging in partisan politics to support his son's campaign for a seat in Congress representing the province of Marinduque.<sup>75</sup> The article was alleged to have insinuated that Justice Velasco used his influence over local officials in Marinduque to support the candidacy of his son.<sup>76</sup>

64 License to libel, *The PCIJ Blog*, 21 September 2006. <http://pcij.org/blog/2006/09/21/license-to-libel> (Accessed 23 January 2015).

65 Julliane Love de Jesus, "Mayor's assassination linked to black sand mining controversy", *Philippine Daily Inquirer*, 21 April 2014. <http://newsinfo.inquirer.net/596156/mayors-assassination-linked-to-black-sand-mining-controversy> (Accessed August 2014).

66 Melvin Gascon, "Cagayan antimining leader arrested over Facebook post", *Inquirer Technology*, 21 October 2012. <http://technology.inquirer.net/19226/cagayan-antimining-leader-arrested-over-facebook-post> (Accessed August 2014).

67 Melvin Gascon, "Arrest sparks over cybercrime law", *Inquirer.net*, 23 October 2012. <http://technology.inquirer.net/19290/arrest-of-anti-mining-activist-renews-debate-over-cybercrime-law> (Accessed August 2014).

68 Reporters Without Borders, *10 Most Dangerous Places for Journalists*, 21 December 2011. [http://en.rsf.org/the-10-most-dangerous-places-for-21-12-2011\\_41582.html](http://en.rsf.org/the-10-most-dangerous-places-for-21-12-2011_41582.html) (Accessed August 2014).

69 Committee to Protect Journalists, *76 Journalists Killed in Philippines Since 1992/Motive Confirmed*. <http://cpj.org/killed/asia/philippines> (Accessed August 2014).

70 *Ibid.*

71 Emily Rauhala, "It's been five years since the Maguindanao massacre and the perpetrators are still free", *Time.com*, 21 November 2014. <http://time.com/3598796/its-been-five-years-since-the-maguindanao-massacre-and-the-perpetrators-are-still-free/> (Accessed 23 January 2015).

72 *Ibid.*

73 License to libel, *The PCIJ Blog*, 21 September 2006. <http://pcij.org/blog/2006/09/21/license-to-libel> (Accessed 23 January 2015).

74 Margaret Sekaggya, Report of the Special Rapporteur on the situation of human rights defenders, UN Doc. A/HRC/19/55 (2011), para. 120.

75 "SC justice files libel against veteran journalist", *ABS-CBN.com*, 15 March 2010. <http://www.abs-cbnnews.com/nation/03/14/10/sc-justice-files-libel-case-vs-veteran-journalist> (Accessed August 2014).

76 Sophia Dedace, "Veteran journalist Vitug answers SC justice's libel raps", *GMA News Online*, 27 April 2010. <http://www.gmanetwork.com/news/story/189458/news/nation/veteran-journalist-vitug-answers-sc-justice-s-libel-raps> (Accessed August 2014).

In 2011, a second complaint for libel was filed against Marites Vitug by Justice Velasco.<sup>77</sup> The second complaint was based on her book, "Shadow of Doubt: Probing the Supreme Court", which was published in 2010. In the book, Marites Vitug wrote about reasons raised by people who opposed Justice Velasco's nomination to the post of Court Administrator in 2001 and then to the Supreme Court in 2002, 2003, and 2006.<sup>78</sup> In 2012, Justice Velasco filed an affidavit of desistance, which caused the dismissal of both cases.

Another example of libel used against a journalist because of his work exposing abuses alleged to have been committed by a public officer is the case of Edgardo Maliza, a correspondent for the newspaper *Gold Star Daily*, published in Cagayan de Oro City. On 4 March 2011, Edgardo Maliza was arrested on libel charges based on a complaint of Ernesto Adobo, who was then regional director for the Department of Environment and Natural Resources (DENR). Edgardo Maliza wrote two articles alleging that Ernesto Adobo misused a Certificate of Lumber Origin (CLO)<sup>79</sup> issued by the Community Environment and Natural Resources Officer (CENRO) to a businessman from Butuan City. Ernesto Adobo was reported to have allegedly used that CLO to transfer a set of lumber different from the one indicated on the CLO.<sup>80</sup> Edgardo Maliza was subsequently released after posting bail amounting to Php10,000 (approximately US\$229).<sup>81</sup>

### C. International standards on freedom of expression

Enjoyment of the right to freedom of expression, guaranteed under Article 19 of the ICCPR, is not only a fundamental freedom in itself but its respect is also essential for the enjoyment of other rights, including the following rights: right to privacy; freedom of thought; the right to freedom of assembly and association; the right to participate in public affairs; and the right of minorities to enjoy their culture, religion and language.<sup>82</sup>

As the Human Rights Committee has also highlighted, freedom of expression is a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights.<sup>83</sup> The right to freedom of expression includes among other things, commentary on public affairs, discussion of human rights, and political discourse.<sup>84</sup>

The authorities' respect and protection of the right to freedom of expression is indispensable for human rights defenders to be able to undertake their work in promoting and protecting human rights. The UN Declaration on Human Rights Defenders, clarifies that all persons have the right "to know, seek, obtain, receive, and hold information about all human rights and fundamental freedoms."<sup>85</sup> All persons have the right to "freely publish, impart or disseminate to others views, information and knowledge on all human rights and fundamental freedoms."<sup>86</sup>

77 Sophia Dedace, "Prosecutor summons SC justice, journalist on defamation suit", *GMA News Online*, 26 May 2011. <http://www.gmanetwork.com/news/story/221710/news/nation/prosecutor-summons-sc-justice-journalist-on-defamation-suit> (Accessed August 2014).

78 Purple Romero, "SC Justice files second case vs. journalist", *Newsbreak*, 16 May 2011. <http://archives.newsbreak-knowledge.ph/2011/05/16/sc-justice-files-second-case-vs-journalist> (Accessed August 2014).

79 Bureau of Forest Development (BFD) Circular No. 10-83 requires that all lumber transported or shipped must be issued a Certificate of Lumber Origin (CLO) "to pinpoint accountability and responsibility for shipment of lumber and to have uniformity in documenting the origin thereof." Lumber transported or shipped without CLOs would be presumed as coming from illegal sources and therefore may be subject to confiscation.

80 Center for Media Freedom of Responsibility, *Reporter arrested on libel charge*, 8 March 2011. <http://www.cmfr-phil.org/2011/03/08/reporter-arrested-on-libel-charges> (Accessed August 2014).

81 Nicole Managbanag and Joey Nacalaban, "Oro reporter nabbed for libel", *SunStar Cagayan de Oro*, 5 March 2011. <http://www.sunstar.com.ph/cagayan-de-oro/local-news/2011/03/05/oro-reporter-nabbed-libel-143149> (Accessed August 2014).

82 Human Rights Committee General Comment 34 on Article 19: Freedoms of opinion and expression, UN Doc CCPR/C/GC/34 at para. 4.

83 Human Rights Committee General Comment 34 on Article 19: Freedoms of opinion and expression, UN Doc CCPR/C/GC/34 at para. 3.

84 Human Rights Committee General Comment 34 on Article 19: Freedoms of opinion and expression, UN Doc CCPR/C/GC/34 at para. 11.

85 Article 6(a) of the UN Declaration on Human Rights Defenders.

86 Article 6(b) of the UN Declaration on Human Rights Defenders.



With respect to journalists, the Human Rights Committee opined that “a free uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression.” It is necessary to have “free communication of information and ideas about public and political issues between citizens, candidates and elected representatives.” The public has the corresponding right to receive media output.<sup>87</sup>

Principle 1(a) of the Global Principles on National Security and the Right to Information (Tshwane Principles) provides that everyone has the right to seek, receive, use, and impart information held by or on behalf of public authorities, or to which public authorities are entitled by law to have access.<sup>88</sup>

The right to freedom of expression carries with it special duties and responsibilities and may be restricted in certain exceptional circumstances. In accordance with international human rights law, restrictions and limitations to the right to freedom of expression must be exceptions to the rule and must be kept to the minimum necessary; this will ensure, among other things that the aim of safeguarding other human rights under international human rights law may still be pursued.<sup>89</sup> Article 19 (3) of the ICCPR requires states parties, including the Philippines, to ensure that all restrictions to freedom of expression are (a) provided by law; and (b) necessary for the respect and reputation of others or for the protection of national security, public order, public health or morals. Furthermore, Article 20(2) of the ICCPR also clarifies that “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”

To comply with the requirement in paragraph 3 of Article 19 of the ICCPR that restrictions to freedom of expression be “provided by law”, laws that restrict freedom of expression “must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly.” These laws must be accessible to the public and should not give “unfettered discretion for the restriction of freedom of expression on those charged with its execution.”<sup>90</sup>

Furthermore, to be consistent with paragraph 3 of Article 19 of the ICCPR, any restrictions or limitations to the right to freedom of expression must be necessary to ensure protection of the rights and reputation of others or for the protection of national security, public order, public health or morals.<sup>91</sup> Restrictions or limitations must be proportionate to the protection of one of these interests;<sup>92</sup> and be no more restrictive than is required for the achievement of that aim.<sup>93</sup> “Restrictions may only be applied for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.”<sup>94</sup> Furthermore, when a State imposes restrictions on the exercise of freedom of expression, it cannot put in jeopardy the right itself.<sup>95</sup>

The authorities must ensure that laws limiting the exercise of freedom of expression for the purpose of protecting national security restrict only expression that is (a) intended to incite imminent violence and (b) is likely to incite such violence; and that (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.<sup>96</sup>

87 Human Rights Committee General Comment No. 34 on Article 19: Freedoms of opinion and expression, UN Doc. CCPR/C/GC/34 at para. 13.

88 The Global Principles on National Security and the Right to Information (hereinafter Tshwane Principles), available at <http://www.opensocietyfoundations.org/sites/default/files/global-principles-national-security-10232013.pdf> (Accessed October 2014).

89 Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, UN Doc. A/HRC/14/23 (2010), para. 77.

90 Human Rights Committee, General Comment No. 34, UN Doc. CCPR/C/GC/34 (2011) at para. 25.

91 Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, UN Doc. A/HRC/14/23 (2010) at para. 79(g)(iii).

92 Human Rights Committee, General Comment No. 34, UN Doc. CCPR/C/GC/34 (2011) at para. 34.

93 Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, UN Doc. A/HRC/14/23 (2010) at para. 79(g)(iv).

94 Human Rights Committee, General Comment No. 34, UN Doc. CCPR/C/GC/34 (2011) at para. 22.

95 Human Rights Committee, General Comment No. 34, UN Doc. CCPR/C/GC/34 (2011) at para. 21.

96 Principle 6 of the Johannesburg Principles on National Security, Freedom of Expression and Access to Information, UN Doc. E/CN.4/1996/39 (1996).

The Human Rights Committee has clarified that truth should be a defense in defamation cases as should a public interest in the subject of the criticism. Defamation laws should not be applied to forms of expression that are not, of their nature, subject to verification. Laws should not punish or render unlawful those comments that are untrue yet have not been published with malice, particularly where they concern public figures.<sup>97</sup>

Calls have been made by the Human Rights Committee and UN special procedures to decriminalize defamation. Specifically, the Human Rights Committee stated that States Parties should consider decriminalization of defamation. If criminal law is applied, it should only be countenanced in the most serious cases and imprisonment is never an appropriate penalty.<sup>98</sup> The Working Group on Arbitrary Detention echoed an earlier call made by the UN Special Rapporteur on freedom of expression and opinion that “jail sentences and disproportionate fines should totally be excluded for offences such as defamation.” It further emphasized that offences such as defamation should be dealt with under civil, not criminal, law.<sup>99</sup>

The UN Special Rapporteur on freedom of opinion and expression has clarified that civil penalties for defamation should not be so heavy as to cast a chilling effect on freedom of expression; instead they should be proportionate to the actual harm caused and the law should give preference to non-pecuniary remedies, including apology, rectification and clarification.<sup>100</sup>

#### **D. Analysis of provisions in the light of international standards on the right to freedom of expression**

In examining Article 154 of RPC and the criminal libel provisions in Philippine law (both in the RPC and the Cybercrime Prevention Act), it is necessary to evaluate whether the provisions themselves and their implementation constitute lawful, necessary and proportionate limitations or restrictions to the right to freedom of expression within the framework of international human rights standards.

##### **a. Article 154 of the RPC (unlawful use of means of publication and unlawful utterances)**

Article 154 of RPC is both vague and overbroad and can inhibit the distribution of a very wide range of information.

The criminalization of publication of “false news” which may “endanger the public order or cause damage to the interest or credit of the State” in Article 154(1) is so broad and imprecise that it may be used to punish and have a chilling effect on the publication of news based on confidential sources or information that is difficult to verify. It fails to adhere to the principle of legality and thus the requirement that a restriction on the right to freedom of expression be prescribed by law. Due to the broadness and imprecision of Article 154(1), it cannot be said to be necessary and proportionate for the protection of national security.

Likewise, Article 154(2) of the RPC that criminalizes publications deemed to encourage disobedience of the law or duly constituted authorities risks repressing and penalizing people who engage in legitimate political discussions that question the correctness of certain criminal laws. Further, in criminalizing words that are considered to “justify” an illegal act, it outlaws the advocacy of even peaceful civil disobedience. It thus does not meet the requirements for permissible restrictions to the right to freedom of expression under Article 19 of the ICCPR.

<sup>97</sup> Human Rights Committee, General Comment No. 34, UN Doc. CCPR/C/GC/34 (2011) at para. 47.

<sup>98</sup> Human Rights Committee, General Comment No. 34, UN Doc. CCPR/C/GC/34, para. 47.

<sup>99</sup> *Mr. Abdul Kareem Nabil Suliman Amer v. Egypt*, Working Group on Arbitrary Detention, Opinion No. 35/2008, U.N. Doc. A/HRC/13/30/Add.1 at 146 (2010) para. 36.

<sup>100</sup> Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, UN Doc. A/HRC/14/23 (2010) at para. 83.

Article 154(3) of the RPC criminalizes and represses publication of pending legislation or proclamations, including declarations of martial law before they are officially published, which could prevent the public from learning about and deliberating or commenting on draft laws before they are passed and published.<sup>101</sup> It thus cannot be said to be necessary and proportionate for the protection of national security.

By prohibiting the publication of anonymous material, Article 154(4) suppresses a wide range of legitimate speech, without a requirement of any showing of harm to any individual or interest or any malicious intent, solely because the speaker/writer chooses to remain anonymous including when the individual seeks to protect their privacy including for example, with the aim of protection against reprisals. The repressive impact of this provision must be considered in the context of the Philippines where, given the high rate of extrajudicial killings, enforced disappearances, torture and harassment of human rights defenders and journalists,<sup>102</sup> some individuals desire to remain anonymous when speaking out or writing about human rights issues. This provision thus is not a necessary and proportionate restriction of freedom of expression for the protection of national security.

Therefore, the provisions of Article 154 are inconsistent with the Philippines' obligation under the ICCPR to respect and protect freedom of expression as its provisions are not precise enough to enable individuals to know how to regulate their conduct accordingly and allows unfettered discretion by law enforcement in its execution.<sup>103</sup> It is not "concrete, clear, and unambiguous"<sup>104</sup> and is thus inconsistent with the principle of legality. Its provisions are also overbroad, criminalizing legitimate speech and suppressing political discussion and peaceful dissent.

Furthermore, Article 154 of the RPC cannot be justified as a legitimate and necessary measure to protect national security or public order. As mentioned above, laws limiting the exercise of freedom of expression on the grounds of protecting national security should punish only (a) expression that is intended to incite imminent violence; and that (b) is likely to incite such violence; in circumstances in which (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.<sup>105</sup>

The retention of Article 154 of the RPC in the criminal law of the Philippines in its current form is not consistent with Philippines obligations under Article 19 of the ICCPR.

### **b. Criminal libel provisions in the RPC and the Cybercrime Prevention Act**

Criminal defamation laws have significant potential of being abused to limit criticism and stifle public debate that is necessary in a democratic society. The constant threat of criminal sanctions, including imprisonment, casts a chilling effect upon individuals, including in particular human rights defenders whose work includes exposing human rights abuses perpetrated by persons in authority. Thus, as mentioned above, the Human Rights Committee and other human rights bodies have called for the decriminalization of libel.

As demonstrated by the cases described above, a substantial number of criminal libel cases have been brought against human rights defenders and journalists by public officers who they have alleged to have committed abuses in office, or have been involved in graft and corruption.

101 One author notes that any publication of President Marcos' suspension of the writ of *habeas corpus* before its declaration on 21 September 1972 would have violated Art. 154. Rodolfo G. Palattao, *The Revised Penal Code Made Easy, Book II, supra* note 39, at p. 103.

102 Report of the Special Rapporteur on the situation of human rights defenders: Observations on communications transmitted to Governments and replies received, UN Doc. A/HRC/19/55/Add.2 (2012) at para 292.

103 Human Rights Committee General Comment 34 on Article 19: Freedoms of opinion and expression, UN Doc CCPR/C/GC/34 at para. 25.

104 Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, UN Doc. A/HRC/14/23 (2010) at para. 79(d).

105 Principle 6 of the Johannesburg Principles on National Security, Freedom of Expression and Access to Information, UN Doc. E/CN.4/1996/39 (1996).

This practice is inconsistent with the resolution of the UN Human Rights Council calling on States to refrain from imposing restrictions on the exercise of the right to freedom of expression on “discussion of government policies and political debate” and “government activities and corruption in government”.<sup>106</sup> Furthermore contrary to the guidance of the Human Rights Committee, the laws do not adequately ensure that truth or a public interest in the subject of the criticism are recognized as defenses; and that such provisions are not applied to forms of expression that are not, of their nature subject to verification.<sup>107</sup> An uncensored press is crucial to ensure the enjoyment of political rights.<sup>108</sup> States not only must respect freedom of expression, but they also must ensure that private persons or entities do not impair the right.<sup>109</sup>

Article 19 of the ICCPR was crafted with the vision to include and to accommodate future technological advancements that individuals may use to exercise their right to freedom of expression, including the Internet.<sup>110</sup> The Human Rights Council has affirmed that the same rights guaranteed under Article 19 offline are also protected online.<sup>111</sup> The expansion of the Internet has enabled “individuals all over the world to use new information and communications technologies”.<sup>112</sup> The Human Rights Committee has taken notice of the impact the Internet has had on communication and information sharing and has advised that “States parties should take all necessary steps to foster the independence of these new media”. The Human Rights Committee also held that any restrictions on electronic and Internet media must be compatible with Article 19(3).<sup>113</sup>

Section 6 of the Cybercrime Prevention Act provides that acts of libel committed through the Internet shall be punishable by one degree higher than the penalty provided in the RPC, thereby raising the penalty to imprisonment from six to nine years.<sup>114</sup> This provision is out of line with calls for the decriminalization of libel and the clarification by the Human Rights Committee that imprisonment is never an appropriate penalty for libel.

Furthermore, the Act provides for extraterritorial application when damage is done to a person in the Philippines,<sup>115</sup> thereby placing human rights defenders and NGOs in danger of sanctions for allegedly libelous statements made before regional or international human rights mechanisms when reporting on concerns about the country’s or its officials’ respect for human rights guarantees.

106 Human Rights Council, Resolution on freedom of opinion and expression, UN Doc. A/HRC/RES/12/16 (2009), para. 5(p)(i).

107 Human Rights Committee General Comment 34, UN Doc. CCPR/C/GC/34, para 47.

108 Human Rights Committee General Comment 34, UN Doc. CCPR/C/GC/34, paras. 13, 20.

109 *Ibid.* at para. 7.

110 Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, UN Doc. A/HRC/17/27 (2011), para. 21.

111 Human Rights Council, Resolution on the promotion, protection and enjoyment of human rights on the Internet, UN Doc. A/HRC/20/L.13 (2012), Preamble.

112 *Ibid.* at para. 1.

113 Human Rights Committee General Comment 34, UN Doc. CCPR/C/GC/34, at paras. 14, 43.

114 Violations of Article 355 of the RPC are punishable by *prision correccional* in its minimum and medium periods or a fine ranging from P200 to P6,000. One degree higher than *prision correccional* is *prision mayor*, which has a period of between six years and one day to twelve years. See Article 27 of the RPC.

115 Section 21 of the Cybercrime Protection Act.

## E. Recommendations

1. The Government of the Philippines must either repeal Article 154 of the RPC or at a minimum, it may amend it in a manner which ensures that its only restrictions on freedom of expression are: (a) necessary to safeguard national security, public order, public health or morals, or respect for the rights of others; (b) proportionate, using the least intrusive means available; and (c) limited to speech presenting a "clear and present danger " to one of such interests. The laws setting out such restrictions must be precise and clear. Measures must also be adopted to ensure that prosecutorial discretion is not abused and that this provision is never utilized to suppress the exercise of the right to freedom of expression including by journalists and human rights defenders.
2. Building on the recommendations of the Supreme Court to judges in 2008 that in imposing penalties for libel, preference should be given to imposing a fine instead of imprisonment, and consistent with those of international human rights bodies, the Government of the Philippines should also repeal all criminal defamation laws, including those set out in Articles 353 to 355, Articles 358 to 362 of the RPC and Section 4(c)(4) of the Cybercrime Prevention Act. The law should be amended to make civil liability proceedings the sole form of redress for complaints of damage to reputation.<sup>116</sup> In so amending the law, measures must be taken to ensure that civil liability cannot be imposed in a manner that unduly restricts the exercise of the right to freedom of expression. In keeping with the clarification of the Human Rights Committee, truth and public interest in the subject of the criticism must be recognized as defenses. Statements made against public figures that may be erroneous but made without malice should not be actionable.<sup>117</sup> As recommended by the UN Special Rapporteur on Freedom of Expression, civil liability should include non-pecuniary remedies, such as apology, rectification and clarification and the law must ensure that financial awards are strictly proportionate to the actual harm suffered, and not to punish the person responsible for the harm.<sup>118</sup>

<sup>116</sup> Report of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, UN Doc. A/HRC/14/23 (2010) at para. 83.

<sup>117</sup> Human Rights Committee General Comment 34, UN Doc. CCPR/C/GC/34, para 47.

<sup>118</sup> Report of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, UN Doc. A/HRC/14/23 (2010), para 83.

## V. THE PRINCIPLE OF LEGALITY AND THE PROVISIONS ON REBELLION AND SEDITION

The crimes of rebellion, inciting to rebellion, sedition, and inciting to sedition set out in Articles 134 and 138, and Articles 139 to 142 of the RPC, criminalize a wide range of activities, including activities legitimately undertaken by human rights defenders in the course of their work. In the past, the provisions criminalizing rebellion, inciting to rebellion, sedition, and inciting to sedition have been used to prosecute human rights defenders, especially those perceived to be linked with armed insurgent groups. The ICJ received information that in recent years, however, there has been a significant decrease in the use of these provisions against human rights defenders.<sup>119</sup> Despite the significant decrease in their use, based on the analysis of these provisions set out below, which indicates that they are inconsistent with international human rights standards, the ICJ considers that lawmakers should repeal these provisions altogether.

### A. The crimes of rebellion and sedition in Philippine law and jurisprudence

Rebellion under Article 134 of the RPC is described as “rising publicly and taking arms” for the purpose of either removing the entire country or any part thereof from allegiance to the Government or its laws, or depriving the President or legislature, wholly or partially, any of their powers or prerogatives.<sup>120</sup> The Supreme Court explains that this crime is invariably committed by several persons and not just a single individual.<sup>121</sup> This is a political crime. It requires clear proof of the accused’s motivation. In the absence of proof by the prosecution that the acts were committed for the purpose of either removing the entire country or any part thereof from allegiance to the Government or its laws, or depriving the President or legislature, wholly or partially, any of their powers or prerogatives, the individual may only be convicted, upon proof beyond reasonable doubt, for the underlying crimes committed (e.g. murder, arson, etc.) and not the crime of rebellion.<sup>122</sup>

Under Article 139 of the RPC, the crime of sedition is committed by a group of persons who, publicly and tumultuously and by force, intimidation, or other illegal means: (a) prevent the promulgation or execution of any law or the holding of any popular election; (b) prevent the national or local government or any public officer from freely exercising functions, or the execution of an administrative order; (c) inflict an act of hate or revenge upon the person of any public officer or employee; (d) commit, for any political or social end, any act of hate or revenge against private persons or any social class; and (e) despoil, for political or social ends, any person or the local or national government of all or part of its properties.<sup>123</sup> The term “tumultuous” is defined under Philippine law as a situation wherein the disturbance is caused by at least four persons.<sup>124</sup> Unlike in the crime of rebellion, the principle of absorption does not apply in sedition. Therefore, if in the process of committing the crime of sedition, other crimes such as murder or homicide are committed, those responsible may be charged separately for these crimes.<sup>125</sup>

Under Article 142 (on inciting to sedition), persons who, without taking any direct part in the crime of sedition, incite others to accomplish any act which constitutes sedition as described under Article 139, may be imprisoned from four to six years or imposed a fine not exceeding Php2,000 (approximately US\$44). The incitement to commit sedition may be done through speeches, writings, drama, or emblems.

While the crime of rebellion has been characterized by the Supreme Court in several cases as a political crime, the Court said that sedition may or may not be of a political nature. In distinguishing between the two crimes, the Supreme Court explained that the element of public uprising in rebellion must be directed against the government, while in sedition, it is directed against the execution of a law, a particular public officer, or the holding of an election.<sup>126</sup>

119 ICJ Interview with Cristina Ellazar Palabay, Secretary General of Karapatan, Quezon City, 30 July 2013; ICJ Interview with the Philippine Alliance of Human Rights Advocates (PAHRA), Quezon City, 30 July 2013; ICJ Interview with Atty. Ricardo A. Suñiga III of FLAG, Quezon City, 1 August 2013.

120 Article 134 of the RPC.

121 *Ladlad v. Velasco*, G.R. No. 172070-72, 172074-76 & 175013, 1 June 2007.

122 *People v. Lovedioro*, G.R. No. 112235, 29 November 1995.

123 Article 139 of the RPC.

124 Article 251 of the RPC.

125 Rodolfo G. Palattao, *The Revised Penal Code Made Easy*, supra note 39, at p. 78.

126 *People v. Umali*, G.R. No. L-5803, 29 November 1954.

In 2010, a bill was filed in Congress to repeal the provisions on sedition of the RPC.<sup>127</sup> The Philippines would have precedents to follow in repealing its sedition laws. Both the United Kingdom and New Zealand have abolished their sedition laws, the former with the Coroners and Justice Act of 2009 and the latter with the Crimes (Repeal of Seditious Offences) Amendment Act of 2007.<sup>128</sup> A British Law Commission paper from 1977 outlines many of the reasons for abolishing sedition as a crime, including that any party found guilty of sedition is also guilty of non-political crimes, such as incitement to violence or criminal conspiracy.<sup>129</sup> Therefore, preserving sedition as a separate offence creates an undue risk of politically motivated prosecutions.<sup>130</sup>

## B. Cases of rebellion and sedition filed against human rights defenders

The most recent well-known charges of rebellion were brought in 2006, against parliamentarians belonging to left-leaning opposition groups that regularly criticize the human rights record of the government.

On 24 February 2006, President Arroyo issued Proclamation No. 1017, wherein it was alleged that the political opposition from both extreme left groups represented by the National Democratic Front, the Communist Party of the Philippines (CPP), and the New People's Army (NPA), and the extreme right, represented by "military adventurists", conspired to bring down the government. The Proclamation also stated that the acts of these conspirators are "hurting the Philippine State", "adversely affecting the economy", and "constitute a clear and present danger to the safety and integrity of the Philippine State and of the Filipino people."<sup>131</sup> By virtue of this Proclamation, President Arroyo ordered the Armed Forces of the Philippines (AFP) and the Philippine National Police (PNP) "to immediately carry out the necessary actions and measures to suppress and prevent acts of terrorism and lawless violence."<sup>132</sup>

The next day, on 25 February 2006, Crispin Beltran, a leader of the group Kilusang Mayo Uno (KMU) and a parliamentarian, was arrested without a warrant by police officers. He was brought to Camp Crame, the national headquarters of the PNP, where a preliminary investigation was conducted based on an affidavit filed by the arresting officers who claim that they heard Crispin Beltran give a speech on 24 February 2006 that amounted to incitement to sedition under Article 142 of the RPC.<sup>133</sup> A preliminary investigation is a proceeding conducted for the purpose of determining whether there are grounds to engender a well-founded belief that a crime cognizable by the Regional Trial Court has been committed and that the respondent is probably guilty thereof, and should be held for trial.<sup>134</sup>

On 27 February 2006, Crispin Beltran was again brought back to Camp Crame and subjected to a second preliminary investigation, this time for the crime of rebellion.<sup>135</sup> Crispin Beltran was not allowed to post bail. Hence, he was immediately detained that day, on remand pending trial. Due to the state of his health, however, he was held in the hospital, where he stayed for 15 months.<sup>136</sup>

The PNP's Criminal Investigation and Detection Group (CIDG) also filed complaints on 25 February 2006 against 51 persons alleged to be members of the CPP, including five parliamentarians belonging to left-leaning opposition groups: Satur Ocampo, Teodoro Casiño, Joel Virador, Liza Maza, and Rafael Mariano.<sup>137</sup> The complaints filed before prosecutors alleged that the persons named committed acts of rebellion, as

127 An Act repealing the Provisions on Sedition under Article 139, 140, 141, and Article 142 of Act No. 3815, Otherwise known as the Revised Penal Code, House Bill 00196, Fifteenth Congress. <http://www.congress.gov.ph/download/?d=billstext#> (Accessed August 2014).

128 Coroners and Justice Act of 2009, s. 2(3)(73)(a). <http://www.legislation.gov.uk/ukpga/2009/25/section/73> (Accessed August 2014); Crimes (Repeal of Seditious Offences) Amendment Bill. [http://www.parliament.nz/en-nz/pb/legislation/bills/00DBHOH\\_BILL7948\\_1\\_crimes-repeal-of-seditious-offences-amendment-bill](http://www.parliament.nz/en-nz/pb/legislation/bills/00DBHOH_BILL7948_1_crimes-repeal-of-seditious-offences-amendment-bill) (Accessed August 2014).

129 The Law Commission, *Treason, Sedition and Allied Offences (Working Paper No. 72)*, paras. 76-78. <http://www.bailii.org/ew/other/EWLC/1977/c72.pdf> (Accessed August 2014).

130 *Ibid.*

131 Proclamation 1017, Proclamation declaring a State of National Emergency, 24 February 2006.

132 General Order No. 5, Directing the Armed Forces of the Philippines in the face of national emergency, to maintain public peace, order and safety and to prevent and suppress lawless violence, 24 February 2006.

133 *Beltran v. People of the Philippines*, G.R. Nos. 172070-72, 1 June 2007.

134 Rule 112 of the Rules of Court of the Philippines.

135 *Beltran v. People of the Philippines*, G.R. Nos. 172070-72, 1 June 2007.

136 "Beltran sees longer hospital arrest due to unpaid 1M bill", *GMA News Online*, 3 June 2007. <http://www.gmanetwork.com/news/story/44873/news/nation/beltran-sees-longer-hospital-arrest-due-to-unpaid-p1m-bill> (Accessed August 2014).

137 "Court junks rebellion case, tells 'Batasan 5' to go home", *GMA News Online*, 4 May 2006. <http://www.gmanetwork.com/news/story/5420/news/nation/court-junks-rebellion-case-tells-batasan-5-to-go-home> (Accessed August 2014).



defined under Article 134 of the RPC. To evade arrest, the five parliamentarians sought refuge in the offices of the House of Representatives, also known as *Batasan*, the parliamentary seat of the country.<sup>138</sup> The parliamentarians later became known as the *Batasan Five*.

On 1 June 2007, the rebellion charges against Crispin Beltran and 48 others, including other politicians and human rights defenders, were dismissed by the Supreme Court. The Court ruled that there was no probable cause to indict Crispin Beltran for rebellion. With respect to the case against the other persons charged, including the *Batasan Five*, the Supreme Court held that their right to a preliminary investigation, which is a substantive right as it forms part of due process in criminal justice, was violated.<sup>139</sup> It should be noted that in its judgment on this case, the Supreme Court implicitly admonished the Department of Justice for allowing its prosecutors to be “prostituted, wittingly or unwittingly, for political ends.”<sup>140</sup>

Article 142 of the RPC, criminalizing inciting to sedition has also been used to suppress critical voices of human rights defenders, particularly journalists. For example, on 14 February 2007, *Daily Tribune* publisher Ninez Cacho-Olivares was charged with inciting to sedition for publishing an article alleging that the army willfully engaged in illegal activities and followed illegal orders from the President.<sup>141</sup> Charges against Ninez Cacho-Olivares were subsequently dropped.

### C. The principle of legality and international law regarding rebellion and sedition laws

Respect for the principle of legality in criminal law, which is sometimes expressed by the Latin phrase *nullum crimen sine lege* (no crime without law), as alluded to above required 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. It also prohibits the imposition of criminal sanctions for acts that were not criminal under national or international law at the time of their commission, and the increase of the penalty for a crime with retroactive effect. It is both inherent and explicit in Article 15 of the ICCPR which, among other things prohibits, retroactivity and guarantees that “no one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense, under national or international law, at the time it was committed”.

The principle of legality and the other elements of Article 15 of the ICCPR are safeguards against arbitrary prosecution, conviction, and punishment.<sup>142</sup> Among other things they aim to ensure that individuals will not be prosecuted for acts they could not foresee as punishable. Significantly, Article 15 of the ICCPR is a non-derogable right, thus the authorities’ obligation to respect it in full applies even in times of emergency.<sup>143</sup>

Because they can be overbroadly applied or used arbitrarily to detain and prosecute individuals, vague laws violate the principle of legality inherent in Article 15 of the ICCPR. They can also violate the States’ obligations under Article 9 of the ICCPR, which requires states to respect and protect the rights to liberty and security of the person, and the prohibition of arbitrary detention.<sup>144</sup> The Human Rights Committee noted that “[t]he substantive grounds for arrest or detention must be prescribed by law, and should be defined with sufficient precision to avoid overly broad or arbitrary interpretation or application”.<sup>145</sup> Furthermore, the Human Rights Committee opined that overly broad sedition laws can endanger freedom of expression guaranteed under Article 19 of the ICCPR,<sup>146</sup> and noted that invoking national security and sedition laws to prosecute journalists and human rights defenders is incompatible with Article 19 (3) of

<sup>138</sup> *Ibid.*

<sup>139</sup> *Ibid.*

<sup>140</sup> *Vicente P. Ladlad, et al v. State Prosecutor, et al*, G.R. Nos. 172070-72, G.R. Nos. 172074-76, and G.R. No. 175013, 1 June 2007.

<sup>141</sup> Committee to Protect Journalists, *Attacks on the Press in 2007 - Philippines*, February 2008. <http://www.refworld.org/docid/47c5677a2.html> (Accessed August 2014); “Newspaper trio in Philippines face sedition charges”, *Taipei Times*, 16 Feb. 2007. <http://www.taipetimes.com/News/world/archives/2007/02/16/2003349246> (Accessed August 2014).

<sup>142</sup> *Pietraroia v. Uruguay*, Communication No. 44/1979, U.N. Doc. CCPR/C/OP/1 at 76 (1984), paras. 13.2 and 17.

<sup>143</sup> Article 4 (2) of the International Covenant on Civil and Political Rights (ICCPR).

<sup>144</sup> Human Rights Committee, General Comment No. 35 on Article 9 (Liberty and security of person), UN Doc. CCPR/C/GC/35, (advance unedited version) para. 22; see also Human Rights Committee, Concluding Observations of the Human Rights Committee on Algeria, UN Doc. CCPR/C/79/Add.95 (1998), para. 11.

<sup>145</sup> Human Rights Committee, General Comment No. 35 on Article 9 (Liberty and Security of Person), UN Doc. CCPR/C/GC/35, (advance unedited version) para 22.

<sup>146</sup> Human Rights Committee, Concluding Observations of the Human Rights Committee on Hong Kong, U.N. Doc. CCPR/C/79/Add.117 (1999), para. 18.



the ICCPR.<sup>147</sup> The maintenance of vague and overbroad national security laws, especially those like inciting to rebellion and inciting to sedition, can likewise have a chilling effect on the exercise of the rights to freedom of assembly (Article 21 of the ICCPR), and freedom of association (Article 22 of the ICCPR), and the right to take part in public affairs (Article 25 of the ICCPR).

The ICJ notes that the language set out in Article 138 of the RPC, criminalizing incitement to rebellion, does not require intent and has possible wide application to speech not intended to incite but which may be alleged to have incited others. Article 138 could also be used to punish the exercise of and have a chilling effect on the rights to freedom of expression and freedom of assembly due to its prohibition of speech that encompasses any of Article 134's vaguely proscribed acts.

#### **D. Recommendations**

1. The Government of the Philippines should repeal Article 134 (on rebellion) and Article 138 (on inciting to rebellion) of the RPC.
2. The Government of the Philippines should also adopt the proposal to repeal Articles 139 to 142 on sedition and inciting to sedition, which was made under the 15<sup>th</sup> Congress.
3. At a minimum, Articles 134 (on rebellion), Article 138 (on inciting to rebellion), and the provisions on sedition from Articles 139 to 142 of the RPC must be substantially amended in a manner that conforms to the principle of legality and the rights of freedom of expression, freedom of association and the right to participate in public affairs, guaranteed in international law. The wording of the laws must be precise enough to allow individuals to foresee what actions are unlawful and in a manner that will reduce the possibility of arbitrary application of the laws, including against human rights defenders, or the violation of the rights to freedom of expression, freedom of association, and the right to participate in public affairs.

<sup>147</sup> Human Rights Committee, General Comment 34 on Article 19: Freedoms of opinion and expression, CCPR/C/GC/34 (2011), para. 30.

## VI. THE RIGHT TO PEACEFULLY ASSEMBLE: THE LAWS ON ILLEGAL ASSEMBLIES

The right to peacefully assemble and to petition the government for redress of grievances is guaranteed in Article III, Section 4 of the Constitution. The Supreme Court interprets this as the right of the people to meet peaceably for consultation and discussion of matters of public concern.<sup>148</sup> On several occasions, the Court has hailed the right to peaceably assemble and to petition the government for redress of grievances as “the very basis of a functional democratic polity” and therefore, enjoy “primacy in the realm of constitutional protection.”<sup>149</sup>

### A. Batas Pambansa 880 (B.P. 880)<sup>150</sup> and Article 146 of the RPC on illegal assemblies

The ICJ received information that local government officials often deny applications for a permit to assemble, forcing the organizers to either resort to time consuming and costly judicial appeals, which are often unsuccessful, or to decide to proceed with the assembly without a permit and risk potential arrest and prosecution under B.P. 880. When protests without a permit do occur, police personnel have used B.P. 880 as a pretext to disperse the assembly. One group documented that between July 2010 and April 2013, there were allegedly 2,781 dispersals by law enforcement of public assemblies and gatherings throughout the country.<sup>151</sup>

B.P. 880 is most often used by law enforcement as a justification to disperse peaceful public assemblies organized and attended by human rights defenders. Under this law, groups planning to undertake a public assembly must file an application for a permit with the office of the mayor of the city or municipality where the assembly is planned to take place.<sup>152</sup> The application must be made in writing and must state the names of the leaders or the organizers, purpose of the assembly, date, time, duration, place or streets that shall be utilized by the assembly, and the number of persons expected to attend.<sup>153</sup> The application must be filed at least 5 working days before the event.<sup>154</sup> The office of the mayor must acknowledge receipt thereof in writing<sup>155</sup> and must act on said application within 2 working days from the date of its filing. Failure to act on the application means that the permit is deemed granted.<sup>156</sup>

As a general rule, all applications for a permit must be granted, except when there is “convincing evidence that the public assembly will create a clear and present danger to public order, public safety, public convenience, public morals, or public health.”<sup>157</sup> If the mayor believes that there is the existence of an “imminent and grave danger of a substantive evil” that necessitates the denial of the application, he shall immediately inform the applicants.<sup>158</sup> The mayor’s action on the application thereafter shall be served on the applicant within 24 hours.<sup>159</sup> If the application is denied, the applicants may challenge the decision before a court.<sup>160</sup> A mayor or an official acting in his behalf found to have arbitrarily or unjustifiably denied a permit may be imprisoned from six months to six years.<sup>161</sup>

The constitutionality of B.P. 880 has been challenged on several occasions over the years. In a recent and notable case, the Supreme Court upheld the law’s constitutionality, on grounds that it is “not an absolute ban of public assemblies but a restriction that simply regulates the time, place, and manner of the assemblies.”<sup>162</sup> The Court clarified that an application for a permit under B.P. 880 may only be denied on the ground of clear and present danger to public order, public safety, public convenience, public morals

148 *Reyes v. Bagatsing*, G.R. No. L-65366, 9 November 1983.

149 *Bayan, Karapatan, Kilusang Magbubukid ng Pilipinas (KMP) and Gabriela v. Eduardo Ermita*, G.R. No. 169838, April 2006

150 Batas Pambansa Blg. 880, An Act Ensuring the Free Exercise by the People of their Right Peaceably to Assemble and Petition the Government and for Other Purposes (1985) [hereinafter B.P. 880].

151 Karapatan, “Violations of Civil & Political Rights under the Noynoy Aquino Government (July 2010-April 2013)” in *Karapatan Monitor*, Jan-Apr. 2013, p. 1.

152 Section 4 of B.P. 880.

153 Section 5(a) of B.P. 880.

154 Section 5(c) of B.P. 880.

155 Section 5(d) of B.P. 880.

156 Section 6(b) of B.P. 880.

157 Section 6(a) of B.P. 880.

158 Section 6(3) of B.P. 880.

159 Section 6(4) of B.P. 880.

160 Section 6(6) of B.P. 880.

161 Sections 13(b) and 14(b) of B.P.880.

162 *Bayan, Karapatan, Kilusang Magbubukid ng Pilipinas (KMP) and Gabriela v. Eduardo Ermita*, G.R. No. 169848, May 2006..

or public health, which is a recognized exception under the Universal Declaration of Human Rights and the ICCPR.<sup>163</sup> In its judgment the Court also expressed the view that B.P. 880 does not violate Article 19 of the ICCPR (guaranteeing the right to freedom of expression) since the law is content-neutral, with the “time, place and manner” restriction thereon limited to the “clear and present danger standard” and espouses a “maximum tolerance” policy.<sup>164</sup> Significantly, the Court noted however that Section 15 of the law, requiring every municipality to establish “freedom parks” where peaceful assemblies may proceed without a permit, was not being implemented. The Court thus ruled that in cities where no such “freedom parks” exist, no permits shall be required for public assemblies.<sup>165</sup>

Four years later, in *Integrated Bar Association v. Atienza*, the Supreme Court again upheld the constitutionality of B.P. 880 but clarified that municipal governments could not arbitrarily deny permits under B.P. 880 without the authorities citing a specific reason for the denial.<sup>166</sup>

Article 146 of the RPC, on the other hand, defines the offence of illegal assemblies. The provision penalizes organizers and leaders of, and participants in public assemblies attended by armed persons for the purpose of committing criminal acts or any meeting where participants thereof are incited to commit treason, rebellion, sedition, or assault upon a public officer or his representative. Those convicted of being leaders or organizers of illegal assemblies may be punished by 6 to 8 years’ imprisonment. Individuals convicted solely as participants (i.e., for being present at such an assembly) may be imposed the penalty of imprisonment of 6 months, if they are unarmed. If they are found to be armed, they may be imprisoned for 6 years. If a participant is found to be carrying an unlicensed firearm, the law presumes that he or she intended to commit illegal acts, and makes that individual punishable as a leader of such an assembly.

In 1972, when President Ferdinand Marcos declared martial law, acts described in Article 146 were considered political crimes. Human rights defenders who organized or participated in public assemblies were charged under this provision. Persons who were charged under this provision were then prosecuted before military tribunals, pursuant to General Order No. 12.<sup>167</sup> Charges under Article 146, however, are no longer tried before military tribunals. Furthermore, the ICJ has not received information that indicates that human rights defenders continue to be prosecuted under this provision.

### **B. B.P. 880 and Article 146 of the RPC are inconsistent with international standards safeguarding the right to freedom of peaceful assembly**

The right to assemble peacefully is enshrined in Article 21 of the ICCPR. While this right may be limited, restrictions must be (a) provided by and in conformity with the law; (b) imposed only in the interests of protecting national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others; and (c) must be “necessary in a democratic society” for achieving one of these purposes.<sup>168</sup>

A close examination of Article 146 of the RPC and B.P. 880 reveal that they are inconsistent with international standards on the right to peaceful assembly.

Article 146 is vague and overbroad. One of the types of assemblies defined as illegal under this provision is “any meeting in which the audience is incited to the commission of crime of treason, rebellion or insurrection, sedition or assault upon a person in authority or any of his agents.” As mentioned above, the provisions criminalizing rebellion and sedition and incitement to rebellion and sedition under the RPC describe acts that are imprecisely defined. These provisions, therefore, risk broad interpretation or arbitrary interpretation or application.

<sup>163</sup> *Ibid.*

<sup>164</sup> *Ibid.*

<sup>165</sup> *Ibid.*

<sup>166</sup> *Integrated Bar Association v. Atienza*, G.R. No. 175241, 24 February 2010.

<sup>167</sup> General Order No. 12, 30 September 1972. [http://www.lawphil.net/executive/genor/go1972/genor\\_12\\_1972.html](http://www.lawphil.net/executive/genor/go1972/genor_12_1972.html) (Accessed August 2014).

<sup>168</sup> Article 21 of the ICCPR; *Viktor Korneenko and Others v. Belarus*, Human Rights Committee Communication No. 1274/2004, UN Doc. CCPR/C/88/D/1274/2004 (2006), para. 7.3 (noting any restrictions on the right to freedom of association requires these elements).

Furthermore, under Article 146, any person found to be carrying an unlicensed firearm while attending an illegal assembly described under this provision shall be presumed to be the leader or organizer of the said meeting. It shall also be presumed, insofar as the said person is concerned, that the said meeting is for the purpose of committing acts punishable under the RPC. This is inconsistent with the principle of presumption of innocence expressly guaranteed under the 1987 Constitution (“in all criminal prosecutions, the accused shall be presumed innocent until the contrary is proved<sup>169</sup> The right of all persons charged with a criminal offence to the presumption of innocence is also embodied in Article 14 of the ICCPR.

B.P.880, which requires prior authorization of assemblies, is also inconsistent with the right to freedom of peaceful assembly. The UN Special Rapporteur on the rights to freedom of peaceful assembly and association has clarified that prior authorization should not be necessary. In particular, the UN Special Rapporteur clarified that the law should not require previous authorization by authorities. At most, it should require (not unduly bureaucratic) notification, so as allow the authorities to facilitate the exercise of the right to peaceful assembly and to take measures to protect public safety and public order and the rights and freedoms of others<sup>170</sup>

The fact that under Article 15 of B.P. 880, public assemblies without a permit may take place in designated “freedom parks” does not justify a permit requirement for assemblies which are intended to be held elsewhere to meet their objective and/or reaching a target audience. It should be noted that the freedom parks in most places do not provide access to significant audiences and are difficult to identify. Thus a restriction of assemblies to only such parks would be a disproportionate restriction of the right to peaceful assembly, in cases in which it would undermine the object and purpose of the assembly’s reaching a target audience. <sup>171</sup>

Furthermore Section 12 of B.P. 880, which permits the dispersal of a public assembly that is held without a permit, when such is required, also contravenes international standards safeguarding the right to peaceful assembly. In particular the UN Special Rapporteur has clarified that even if a public assembly held is without notification, it should not be automatically dispersed. In the absence of any unlawful conduct by the participants during the demonstration, dispersal of the demonstration would be a disproportionate restriction on the right to freedom of assembly. <sup>172</sup>

Sections 13(a) and 14(1) of B.P. 880, punishing organizers of assemblies that take place without permits with one month and one day to six months imprisonment solely for organizing such an assembly are inconsistent with international standards. Among other things, the UN Special Rapporteur has stated that organizers of assemblies held without a permit should not be subject to criminal or administrative sanctions such as fines or imprisonment for failure to notify the authorities. Nor should either organizers of or participants in an assembly be subject to punishment solely for illegal actions caused by other participants of assemblies they organized, or participated in.<sup>173</sup> This would be a violation of the principle of individual criminal responsibility and the prohibition of collective punishment.

Interviews with human rights defenders reveal that applications for permits filed pursuant to B.P. 880 are often denied on the ground that the public assembly would cause serious traffic congestion. This, for example, was the case when the left-leaning political group *Bayan*<sup>174</sup> applied for a permit to hold a rally during President Aquino’s fourth State of the Nation Address in July 2013. Bayan’s application was reportedly denied by the Quezon City Government, because of the “serious traffic problem” it would

<sup>169</sup> Article III, Section 14(2) of the 1987 Constitution

<sup>170</sup> Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, UN Doc. A/HRC/20/27 (2012) at paras. 28, 90.

<sup>171</sup> Ibid. at para 40.

<sup>172</sup> Ibid. at para 29 .

<sup>173</sup> Ibid. at paras 29, 93.

<sup>174</sup> Bagong Alyansang Makabayan (Bayan), or New Patriotic Alliance, is an alliance made up primarily of organizations of workers and peasants that, among other activities, promotes socio-economic relief and rehabilitation projects, advocates on behalf of human rights victims of the Marcos and Arroyo administrations, and supports all efforts promoting world peace. Bayan, “What is Bayan?”, *Bayan*. <http://www.bayan.ph/site/about/> (Accessed August 2014).

cause.<sup>175</sup> This denial was upheld by the trial court.<sup>176</sup> As the UN Special Rapporteur noted, prohibition should be a measure of last resort and that “the free flow of traffic should not automatically take precedence over freedom of peaceful assembly”. Authorities should take measures to facilitate the exercise of the right, such as rerouting vehicular and/or pedestrian traffic.<sup>177</sup>

The ICJ was also informed that on several occasions, law enforcement officers dispersed assemblies and indiscriminately charged participants under B.P. 880, then failed to show up in court to press the charges. It has also been reported to the ICJ that prosecutors pursue charges against protestors, even when law enforcement officers show no interest in appearing for the trial. Furthermore, to date, no mayors or officers acting in behalf of these mayors have been prosecuted under Sections 13(b) and 13(d) of B.P. 880 for arbitrarily denying permits or obstructing peaceful assemblies.

The consistent disregard by local government officials, law enforcement, and prosecutors of B.P. 880’s protective provisions and the Supreme Court rulings in *Bayan et. al v. Ermita et. al.* and *Integrated Bar Association v. Atienza* currently interferes with individuals’ enjoyment of their right to freedom of assembly in the Philippines, and seriously impedes the ability of persons to advocate for the promotion and protection of human rights.

The only oversight of decisions of mayors on applications for permits under B.P. 880, which is judicial review, is failing. Judicial appeals can be costly and time consuming,<sup>178</sup> and the continued failure of judges to correct local governments’ improper application of the law demonstrate that courts are not applying B.P. 880 in accordance with its provisions or in a manner that is consistent with respect for freedom of peaceful assembly as guaranteed under the ICCPR. The UN Special Rapporteur on the rights to freedom of peaceful assembly and of association has cautioned against interpreting restrictions arbitrarily, and advised that officials in charge of issuing authorizations should be subject to regular oversight.<sup>179</sup>

## C. Recommendations

1. The Government of the Philippines must revise Article 146 of the RPC and B.P. 880, as neither is compatible with international human rights law. In crafting a new law that would constitute a lawful restriction on the right to peaceably assemble, the Government should ensure that the presumption of the new law is in favor of holding peaceful assemblies and such presumption should be established in a clear and explicit manner.<sup>180</sup> There should be no requirement of prior authorization to assemble, but at most a notification procedure, ideally only for large meetings that may interfere with pedestrian or vehicular traffic, so as to allow for rerouting of cars and pedestrians.<sup>181</sup> The law must not subject participants or organizers of public protests to criminal or administrative liability, solely for failing to notify authorities of the meeting. The law and its implementation must also be revised to ensure that organizers and participants are not held responsible or liable for the violent conduct of others in the course of an assembly.<sup>182</sup>

175 Tetch Torres-Tupas, “Bayan presses bid to hold rally near Batasan complex”, *Inquirer.net*, 18 July 2013. [http://www.inquirer.net/sona-2013/article?nav\\_pid=447733](http://www.inquirer.net/sona-2013/article?nav_pid=447733) (Accessed August 2014).

176 Dennis Carcamo, “Bayan to push through with rally on SONA day”, *Philstar.com*, 19 July 2013. <http://www.philstar.com/nation/2013/07/19/988621/bayan-push-through-rally-sona-day> (Accessed August 2014).

177 Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, UN Doc. A/HRC/20/27 (2012) at paras. 39 and 41.

178 The Supreme Court’s decision in *Integrated Bar Association v. Atienza* was issued on 24 February 2010, over three and a half years after the IBP submitted its application and planned to hold its rally. *Integrated Bar Association v. Atienza*, G.R. No. 175241, 24 February 2010.

179 Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, UN Doc. A/HRC/20/27 (2012) at paras. 20, 44.

180 Report of the Special Rapporteur on the rights to freedom of assembly and association, UN Doc. A/HRC/20/27 (2012) at para. 88.

181 *Ibid.* at paras. 28, 90.

182 *Ibid.* at paras. 29, 84(c), 93.

2. Law enforcement officers must be instructed and trained to respect the right of individuals to peacefully assemble, in a manner that is consistent with the respect for the right guaranteed in the ICCPR. Any law enforcement officer who violates the right to peacefully assemble should be held accountable, and victims of violations should have the right to an effective remedy and redress.<sup>183</sup>
3. Law enforcement officers' response to unlawful assemblies must be consistent with respect for human rights; this requires, among other things, that they must respect the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials. Thus, the authorities must ensure that law enforcement officials receive regular and continuing training on the use of force that is consistent with these Principles. Law enforcement officials who use excessive or otherwise unlawful force must be held to account. Consistent with these Principles, in cases of unlawful assemblies that are non-violent, law enforcement officers should avoid the use of force altogether. When that is not practicable or in the event of the outbreak of violence, any force used must be restricted to the minimum necessary, and must be proportionate.<sup>184</sup> In the policing of violent assemblies, law enforcement officers may use firearms only in self- defense or in defense of others against the imminent threat of death or serious injury or to prevent the perpetration of a particularly serious crime involving a grave threat to life, and only when less dangerous means are not practicable. In any event, the intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.

<sup>183</sup> *Ibid.* at para. 84(i-j).

<sup>184</sup> Principle 13 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the 8<sup>th</sup> United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990. <http://www.ohchr.org/EN/ProfessionalInterest/Pages/UseOfForceAndFirearms.aspx> (Accessed August 2014).

## VII. THE RIGHT TO FREEDOM OF ASSOCIATION: ARTICLE 147 OF THE RPC

The right of persons “to form unions, associations, or societies for purposes not contrary to law” is guaranteed in Article III, Section 8 of the Constitution.

### A. Article 147 on illegal associations

Article 147 establishes a punishment of two to four years’ imprisonment and a fine not exceeding Php1,000 (approximately US \$22.00) on individuals convicted for being founders, directors, and presidents of associations formed with the aim of committing crimes under the RPC or committing acts contrary to “public morals”. Those convicted solely for being members of illegal associations under Article 147 are punishable with imprisonment from one to six months.<sup>185</sup>

This law does not appear to have been used since the 1970s, during the Marcos administration. There is a concern however that Article 147 may be used in the future against the leaders of human rights organizations or associations perceived to be committing acts that are, for instance, contrary to public morals. This concern is rooted in the fact that recently, lesbian, gay, bi-sexual and trans-gender (LGBT) persons have been subjected to arrest and prosecution under Article 200 of the RPC for the crime of grave scandal,<sup>186</sup> one of the crimes against public morals referred to in Article 147. In his most recent report, the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association noted with concern that “public morality” laws have been used selectively against those promoting the rights of LGBT persons.<sup>187</sup> These types of laws encourage stigmatization and discrimination of LGBT persons and should therefore be abolished.

### B. Article 147 vis-à-vis international standards on freedom of association

The defense of human rights is often carried out collectively, necessitating individuals to work together and associating with each other. Hence, the right to freedom of association is one of the rights included in the UN Declaration on Human Rights Defenders, which emphasizes that everyone has the right, individually and in association with others, at the national and international levels “to form, join and participate in non-governmental organizations, associations or groups.”<sup>188</sup> The right to freedom of association is guaranteed under Article 22 of the ICCPR, which states that “everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.” While the ICCPR recognizes that states may impose restrictions on the right to freedom of association, it requires that such restrictions be: prescribed by law and “necessary in a democratic society in the interest of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights of freedoms of others.”<sup>189</sup>

The right to freedom of association, including the right to form and join associations concerned with political and public affairs, is also an important adjunct to Article 25 of the ICCPR, which guarantees the right to participate in public affairs.<sup>190</sup> The UN Special Rapporteur on freedom of assembly and association also emphasized that associations should enjoy the rights to express opinion, disseminate information, engage with the public, and advocate before governments and international bodies for human rights, for the purpose of, among others, advocating changes in the law, including changes in the Constitution. The UN Special Rapporteur has noted that the establishment of associations that espouse minority or dissenting views may sometimes lead to tensions, but he nevertheless emphasizes that the State must still ensure that everyone can peacefully express his views without fear of reprisal or retribution.<sup>191</sup>

185 The term “contrary to public morals” refers to those crimes under Title 6 of the RPC, which include gambling (Article 195), illegal betting on horse races (Article 198), illegal cockfighting (Article 199), grave scandal (Article 200), and vagrancy and prostitution (Article 202).

186 Human Rights Committee, Concluding Observations on the Fourth Periodic Report submitted by the Philippines, UN Doc. CCPR/C/PHL/CO/4 (2012), para. 10.

187 Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, UN Doc. A/HRC/26/29 (2014), para. 30.

188 Article 5(a) of the UN Declaration on Human Rights Defenders.

189 Article 22(2) of the ICCPR.

190 Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, UN Doc. A/HRC/20/27 (2012) at para. 73.

191 Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, UN Doc. A/HRC/20/27 (2012) at para 64.



The Special Representative of the UN Secretary-General on the situation of human rights defenders, clarified that an “association” refers to any group of individuals or any legal entity brought together in order to collectively act, express, promote, pursue or defend a field of common interests.<sup>192</sup> It also refers to civil society organizations, clubs, cooperatives, non-governmental organizations, political parties, trade unions, or even groups on the Internet.<sup>193</sup>

States have the positive obligation to establish and maintain an enabling environment for all persons, including human rights defenders, to enjoy the right to freedom of association.<sup>194</sup> Human rights defenders should be able to associate with each other without fear of being subjected to threats, acts of intimidation, persecution, and stigmatization.

Indeed, the right to freedom of association may be subject to restrictions, but these restrictions must be prescribed by law and necessary and proportionate to the pursuit of one of the legitimate aims set out in Article 22 of the ICCPR.

In the Philippines, penalizing organizers or founders of an association, as is provided for in Article 147 of the RPC, would be tantamount to forcing the dissolution of the association itself. Such a punishment may not be proportionate in all cases. According to the UN Special Rapporteur on freedom of assembly and association, the involuntary dissolution or suspension of an association is the severest type of restriction and should only be allowed where there is “clear and imminent danger resulting in a flagrant violation of national law, in compliance with international human rights law. It should be strictly proportional to the legitimate aim pursued and used only when softer measures would be insufficient”<sup>195</sup> Furthermore, authorities must ensure that no person is subject to criminal prosecution and punishment for the lawful exercise of the right to freedom of association.<sup>196</sup>

The ICJ also notes with concern that Article 147 criminalizes and allows for the imprisonment of individuals convicted solely for being members of an illegal association, without proof that the individual has engaged in any act or omission that contravenes any other provision of domestic laws that are in compliance with international law.

Furthermore, Article 147 criminalizes the founders or members of associations that are formed for the purpose of the commission of acts criminalized under the RPC. As discussed earlier, provisions in the RPC, criminalizing libel, sedition, and rebellion, are vague and broad, and constitute violations of the principle of legality. Thus, the prosecution of individuals who are suspected of founding or leading or being members of organizations alleged to have been formed for the purpose of committing such acts would be inconsistent with the requirement that lawful restrictions on the right to freedom of association be prescribed by law which is clear so as to enable individuals to know what acts will make them criminally liable.

### C. Recommendation

Article 147 of the RPC should be revised in a manner to ensure that it is consistent with the principle of legality and the right of all individuals, without discrimination, to enjoy freedom of association. The prohibition of associations in the new law should extend only to those that present a “clear and imminent danger resulting in a flagrant violation of domestic laws” that are themselves consistent with international human rights standards. The law must ensure that suspension or involuntary dissolution of an association is a measure of last resort, which is sanctioned by an independent and impartial court. Furthermore, Article 147 should be revised so that it does not criminalize membership in the absence of active unlawful conduct beyond affirmation of membership.

192 Report of the Special Representative of the Secretary General on the situation of human rights defenders, UN Doc. A/59/401 (2004) at para 46.

193 Report of the Special Rapporteur on the rights to freedom of assembly and association, UN Doc. A/HRC/20/27 (2012) at para 52.

194 Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, UN Doc. A/HRC/20/27 (2012), para. 63.

195 Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, UN Doc. A/HRC/20/27 (2012) at para. 75.

196 Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, UN Doc. A/HRC/20/27 (2012) at para. 84(c).



## VIII. COUNTER-TERRORISM LAWS OF THE PHILIPPINES: THE HUMAN SECURITY ACT (HSA) AND THE TERRORISM FINANCING PREVENTION AND SUPPRESSION ACT (TFPSA)

The Human Security Act (HSA) is the Philippines' principal counter-terrorism legislation and criminalizes acts of terrorism. The Terrorism Financing Prevention and Suppression Act (TFPSA), on the other hand, criminalizes providing funds that contribute to acts of terrorism. The two laws are not part of the RPC, but they are the principal counter-terrorism legislation of the Philippines that criminalize acts of terrorism. These two laws form part of the body of criminal laws in the country, which the ICJ believes should be considered for amendments by the Government of the Philippines.

### A. The Human Security Act (HSA)

The Human Security Act was enacted in 2007. It defines an act of terrorism as any act that is penalized in other Philippine criminal laws<sup>197</sup> done with the intent of "sowing and creating" "widespread and extraordinary fear and panic" among the general public, for the purpose of forcing the government to give in to an unlawful demand.<sup>198</sup> Persons found guilty of committing terrorism and those found to have conspired to commit terrorism<sup>199</sup> shall be imprisoned for a period of 40 years, while accomplices shall be imprisoned from 17 to 20 years.<sup>200</sup>

The HSA permits surveillance of communications between members of an organization that has been declared by a judge to be a "terrorist organization" or of any person charged with or suspected of the crime of terrorism or conspiracy to commit terrorism. The law itself emphasizes that surveillance is not allowed of privileged communications between lawyers and clients, doctors and patients, and journalists and their sources.<sup>201</sup>

Surveillance may only be conducted after a written authorization issued by a division of the Court of Appeals specifically designated to do so. The written order may only be granted upon a finding of probable cause on the basis of a written application of a police or law enforcement officer who has been authorized to do so by the Anti-Terrorism Council.<sup>202</sup> A written court order may authorize the conduct of surveillance for a period of up to 30 days, and may be extended once for another 30 days.<sup>203</sup> The written order of the Court of Appeals, the application from the law enforcement officer, and the authorization from the Anti-Terrorism Council<sup>204</sup> are considered classified information. However, the subject of surveillance has the right to be informed of the acts done by the law enforcement authorities after the fact and the right to challenge the legality of the surveillance.<sup>205</sup>

The law includes a sanction against law enforcement officers who conduct surveillance on persons, without having the authority. Those convicted are subject to punishment of ten to twelve years' imprisonment.<sup>206</sup>

All tapes, discs, and recordings, including all excerpts and summaries thereof, as well as written notes or memoranda gathered from authorized surveillance shall be turned over to the Court of Appeals within

197 Article 122 (Piracy in General and Mutiny in the High Seas or in the Philippine Waters), Article 134 (Rebellion or Insurrection), Article 134(a)(Coup d'Etat), Article 248 (Murder), Article 267 (Kidnapping and Serious Illegal Detention), Article 324 (Crimes Involving Destruction), Presidential Decree No. 1613 (The Law on Arson), Republic Act No. 6969 (Toxic Substances and Hazardous and Nuclear Waste Control Act of 1990), Republic Act No. 5207 (Atomic Energy Regulatory and Liability Act of 1968), Republic Act No. 6235 (Anti-Hijacking Law), Presidential Decree No. 532 (Anti-Piracy and Anti-Highway Robbery Law of 1974), and Presidential Decree No. 1866, as amended (Decree Codifying the Laws on Illegal and Unlawful Possession, Manufacture, Dealing in, Acquisition or Disposition of Firearms, Ammunition or Explosives).

198 Section 3 of the Human Security Act.

199 Section 4 of the Human Security Act.

200 Section 5 of the Human Security Act.

201 Section 7 of the Human Security Act.

202 Section 8 of the Human Security Act.

203 Section 10 of the Human Security Act.

204 The members of the Anti-Terrorism Council are: (1) The Executive Secretary, who acts as its Chairperson, (2) the Secretary of Justice, who acts as its Vice-Chairperson, (3) the Secretary of Foreign Affairs, (4) the Secretary of National Defense, (5) the Secretary of the Interior and Local Government, (6) the Secretary of Finance, and (7) the National Security Advisor. (See Section 53 of the HSA)

205 Section 9 of the Human Security Act.

206 Section 16 of the Human Security Act.

48 hours after the period fixed in the written order. All recordings made (in whatever form) and excerpts and summaries thereof and notes or memoranda are required to be placed in a sealed package and accompanied by a joint affidavit of the applicant law enforcement officer and members of his or her team.<sup>207</sup> No duplicate copies may be made of the materials gathered from the surveillance.<sup>208</sup> The sealed package and the contents therein deposited with the Court of Appeals are deemed classified information, and “shall absolutely not be admissible and usable as evidence against anybody in any judicial, quasi-judicial, legislative, or administrative investigation, inquiry, proceeding, or hearing”.<sup>209</sup> The sealed package may only be opened and the contents therein divulged upon a written order from the Court of Appeals. The written order may only be granted after a written application from the Department of Justice (DOJ), which has to show that it has been authorized in writing to do so by the Anti-Terrorism Council. The person subject of the surveillance shall be notified of the application in writing. The law enforcement officer who fails to notify the subject of the surveillance shall suffer the penalty of 6 to 8 years’ imprisonment.<sup>210</sup>

Any information gathered from the surveillance is inadmissible as evidence against anybody in any judicial, quasi-judicial, legislative, or administrative investigation, inquiry, proceeding, or hearing.<sup>211</sup>

Any charge against the subject of the surveillance related to the surveillance must be brought within 30 days after the termination of the period of surveillance set out in the written order of the Court of Appeals. If no case is filed within the 30-day period, the subject of the surveillance must be notified of the surveillance. If the subject is not notified, the law enforcement officer may be subject to a penalty of imprisonment from 10 to 12 years.<sup>212</sup>

Immediately after apprehending or arresting a person as a result of the authorized surveillance, law enforcement officers shall notify in writing a judge of the court nearest the place of apprehension or arrest. However, in contravention of Article 9(3) of the ICCPR, law enforcement officers are not required to bring the arrested person promptly before the competent judicial authorities to be charged. They may detain the person for a period of up to three days prior to presenting him before a judge.<sup>213</sup> Within a period of three days, law enforcement officers must present the person arrested before any judge nearest the place of the arrest. The judge has the duty to ascertain the identity of the law enforcement officers, the person arrested, and the reason for the arrest. The judge also has the duty to check for signs or indications of torture – whether physical or psychological – of the arrested person. The judge shall make a written report on this matter.<sup>214</sup> A law enforcement officer who fails to bring an arrested person before the proper judicial authorities within a period of three days shall be subject, upon conviction, to ten to twelve years’ imprisonment.<sup>215</sup> In situations where there is an actual or imminent terrorist attack, detention of the person arrested may be extended for more than three days upon the written approval of a judge or the Commission on Human Rights of the Philippines (CHRP).<sup>216</sup>

Immediately upon his arrest, the person arrested shall be informed of his or her rights as required under Section 12(1) of the Constitution to remain silent and to counsel.<sup>217</sup> The law explicitly states that no torture, coercion, or any form of cruel, inhuman, or degrading treatment, shall be inflicted upon the detained person during investigation or interrogation.<sup>218</sup> Any law enforcement officer found guilty of violating the rights of the accused as provided in the law shall be subject to a term of imprisonment of ten to twelve years.

207 Section 11 of the Human Security Act.

208 Section 12 of the Human Security Act.

209 Section 15 of the Human Security Act.

210 Section 13 of the Human Security Act.

211 Section 15 of the Human Security Act.

212 Section 10 of the Human Security Act.

213 Section 18 of the Human Security Act.

214 Section 18 of the Human Security Act.

215 Section 20 of the Human Security Act.

216 Section 19 of the Human Security Act.

217 Section 21 of the Human Security Act . Article III, Section 12(1) of the Philippine Constitution provides: *Any person under investigation for the commission of an offense shall have the right to be informed of his right to remain silent and to have competent and independent counsel preferably of his own choice. If the person cannot afford the services of counsel, he must be provided with one. These rights cannot be waived except in writing and in the presence of counsel.*

218 Section 24 of the Human Security Act.

The law also allows the proscription of terrorist organizations or groups. The Department of Justice may file an application to declare an organization as a “terrorist and outlawed organization” before a competent Regional Trial Court. The organization or group must be given due notice of the application and the opportunity to be heard by the court.<sup>219</sup>

The constitutionality of the HSA was challenged in 2010 before the Supreme Court. The petitioners alleged among other things, that the definition of terrorism was overbroad and vague, thereby inhibiting free speech.<sup>220</sup> The Supreme Court, however, denied the petition on grounds that the petitioners lacked standing to challenge the law.<sup>221</sup>

As of December 2014, there have only been 3 cases filed under the HSA: the case of Edgar Candule, a youth activist from the Aeta indigenous tribe;<sup>222</sup> the case of five individuals in Nueva Ecija;<sup>223</sup> and that of Jun Guevarra, Abu Basir, and Khenny Mamogkat.<sup>224</sup> To date, there have been no convictions under the HSA.<sup>225</sup>

The case against Edgar Candule exemplifies the dangers of the HSA’s unclear definition of terrorism. On 21 March 2008, Edgar Candule, a member of the Aeta indigenous tribe and a youth activist, was arrested by the Philippines National Police (PNP) without a warrant or authorization from the Anti-Terrorism Council at his friend’s house in Butolon while eating breakfast. He was subsequently held at Camp Conrado S. Yap for three days, where he was reportedly questioned without legal counsel, punched in the chest, electrocuted, forced to admit he owned a pistol and ammunition allegedly seized from the house where he was arrested, and threatened with death when he denied being a member of the NPA.<sup>226</sup> The PNP charged Edgar Candule with terrorism under Section 3 of the HSA, based on allegations of the underlying crimes of illegal possession of a firearm and rebellion, referencing the pistol and so called “subversive documents” found in the house.

On 20 October 2010, Edgar Candule’s lawyers filed a motion to dismiss with Branch 69 of the Zambales Regional Trial Court and a corollary prayer that he be compensated under Section 50 of the HSA.<sup>227</sup> The Regional Trial Court granted the motion to dismiss due to the failure of the prosecution to prove that Edgar Candule was spreading “widespread and extraordinary fear and panic among the populace”.<sup>228</sup> The court, however, was silent on the prayer for compensation. Hence, the lawyers of Edgar Candule filed an appeal with the Court of Appeals on the prayer for compensation under Section 50 of HSA. There is no decision yet on this by the Court of Appeals.<sup>229</sup>

219 Section 17 of the Human Security Act.

220 *Southern Hemisphere Engagement Network, Inc., et. al. v. the Anti-Terrorism Council, et. al.*, G.R. No. 178552, 5 October 2012.

221 The petitioners lacked standing because they were not charged with the crime, there was no demonstrable threat of prosecution for a constitutionally protected act, and facial challenges against criminal statutes on vagueness or over-breadth grounds were unsustainable. *Ibid.* The Supreme Court, *en banc*, denied a motion for reconsideration. “SC affirms own ruling upholding Human Security Act”, *GMA News Online*, 9 January 2011. <http://www.gmanetwork.com/news/story/210155/news/nation/sc-affirms-own-ruling-upholding-human-security-act> (Accessed August 2014).

222 Philippines Desk, Asian Human Rights Commission, “Unsolved killings, disappearances, torture & arbitrary arrests”, in *Article 2*, Vol. 11 No. 2-3, June-Sept. 2012, pp. 86-87. <http://www.article2.org/pdf/v11n0203.pdf> (Accessed August 2014); Renato M. Reyes, Jr., “Amendments to terror law will make it much worse”, *Like a Rolling Stone*, 17 August 2011. <http://natoreyes.wordpress.com/2011/08/17/amendments-to-terror-law-will-make-it-much-worse/> (Accessed August 2014).

223 *Philippines v. Dilamon et al.*, Crim. Case No. 20394, Reg’l Trial Ct., Third Judicial Region, Cabanatuan City, Philippines, 31 March 2012.

224 Jun Guevarra, Abu Basir, and Khenny Mamogkat are accused of being associated with the Al Khobar Group and of perpetrating a bombing that injured eight people. See Malu Cadelina Manar, “Suspected bomber arrested in Cotabato”, *GMA News Online*, 2 April 2009. <http://www.gmanetwork.com/news/story/155299/news/regions/suspected-bomber-arrested-in-cotabato> (Accessed August 2014); Atty. Vicente S. Aquino, Executive Director of Anti-Money Laundering Council Secretariat and Assistant Governor of Bangko Sentral ng Pilipinas, *Combating Terrorism Financing – the Philippine Experience*, slideshow for the Special Meeting of the UN Counter-Terrorism Committee with Member States and Relevant International and Regional Organizations, 20 Nov. 2012, slide 17. [https://www.un.org/en/sc/ctc/specialmeetings/2012/docs/philippines-1373%20presentation%20\(11.20.12\).pdf](https://www.un.org/en/sc/ctc/specialmeetings/2012/docs/philippines-1373%20presentation%20(11.20.12).pdf) (Accessed August 2014).

225 ICJ Interview with Assistant Secretary Geronimo Sy of the Philippines’ Department of Justice, Manila, 31 July 2013.

226 Philippines Desk, Asian Human Rights Commission, “Unsolved killings, disappearances, torture & arbitrary arrests,” at p. 87.

227 Section 50 of the HSA permits individuals acquitted of terrorism charges “payment of damages in the amount of Five hundred thousand pesos for every day that he or she has been detained or deprived of liberty or arrested without a warrant as a result of such an accusation,” with the payment deducted from the appropriations of the law enforcement agency that filed the charges.

228 *Ibid.*

229 ICJ Interview with Cristina Ellazar Palabay, Secretary General of Karapatan, Karapatan office, Quezon City, 30 July 2013.

## B. Terrorism Financing Prevention and Suppression Act (TFPSA)

The Terrorism Financing Prevention and Suppression Act (TFPSA) was signed into law in 2012. This law was passed with a view to fulfilling the country's obligations under the International Convention for the Suppression of the Financing of Terrorism (ICTSF), requiring States to identify and investigate funding of terrorism and to hold those responsible criminally liable. The ICTSF requires States to establish criminal offences for persons who:

Art. 2 (1) ...by any means, directly or indirectly, unlawfully and willfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:

An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or

Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.<sup>230</sup>

The TFPSA criminalizes the financing of acts of terrorism as well as the financing of "terrorist organizations". The act of financing terrorism is also considered a predicate offense to money laundering under the Anti-Money Laundering Act.

The TFPSA appears to incorporate the definition of "terrorist acts" set out in the HSA. However, it adds to this definition by stating that a terrorist act is also any act which constitutes an offense under the law and is within the scope of the nine treaties which are set out in the Annex to the ICTSF, to which the Philippines is a party.<sup>231</sup>

Human rights defenders and groups interviewed by the ICJ reported no explicit impact so far of the TFPSA on their ability to raise funds or functioning, although some expressed concern that it may make independent funding more difficult to obtain due to donor apprehension of being prosecuted under this law. The ICJ also received information that banks were beginning to require more details about transactions, especially from foreign institutions, but so far, these additional requirements do not affect the operations of human rights defenders' organizations.

## C. Analysis of the HSA and TFPSA provisions in the light of international standards:

States have the duty under international law to protect people from terrorist acts committed by non-State actors in a manner that respects and protects human rights. Such acts impair the enjoyment of human rights. States also have the obligation to prosecute and punish all perpetrators of terrorist acts, in a manner that is consistent with human rights.<sup>232</sup> These obligations are implicit in the obligations of the state under Article 2(1) of the ICCPR, to respect and ensure the rights guaranteed in the ICCPR to all individuals within its territory and subject to its jurisdiction, without distinction.<sup>233</sup>

<sup>230</sup> Article 4 of the International Convention for the Suppression of the Financing of Terrorism.

<sup>231</sup> Section 3(3)(j)(3) of the TFPSA states that a terrorist act is "any act which constitutes an offence under this Act that is within the scope of any of the following treaties of which the Republic of the Philippines is a State Party: (a) 1970 Convention for the Suppression of Unlawful Seizure of Aircraft; (b) 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; (c) 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; (d) 1979 International Convention against the Taking of Hostages; (e) 1980 Convention on Physical Protection of Nuclear Material; (f) 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; (g) 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; (h) 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf; (i) 1997 International Convention for the Suppression of Terrorist Bombings.

<sup>232</sup> International Commission of Jurists, *Legal Commentary to the ICJ Berlin Declaration: Counter-Terrorism, Human Rights, and the Rule of Law*, Human Rights and Rule of Law Series No. 1, Geneva, 2008, at p. 5.

<sup>233</sup> Human Rights Committee General Comment 31 on the Nature of the General Legal Obligation of States Parties to the Covenant, UN Doc, CCRP/C/21/Rev.1/Add. 13 (2004) para 8.

The nature of terrorist acts does not permit states to disregard their obligations under international human rights law, including in particular in relation to non-derogable rights.<sup>234</sup> As the UN Security Council and other bodies have emphasized, States must, in carrying out their obligations to protect people from terrorist acts and to prevent and suppress financing of terrorism, take measures and use means that are consistent with international human rights, refugee and humanitarian law.<sup>235</sup>

#### a. Vague and overbroad definitions of terrorism

International human rights bodies and mechanisms and national human rights groups have expressed concern about the definition of terrorism in the HSA. Human rights groups in the Philippines consider that the vague and overbroad definition of terrorism under the act, with all of its entailed consequences, threatens human rights defenders' lawful exercise of their rights to freedom of expression, association, assembly, and to take part in public affairs.

There remains no internationally agreed definition of terrorism. The existing anti-terrorism conventions do not contain a comprehensive definition of the term "terrorism", nor do the resolutions of United Nations bodies. However, United Nations Security Council Resolution 1566 recalled that:

"criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious, or other similar nature."<sup>236</sup>

The absence of a universal, comprehensive, and precise definition of "terrorism" presents a problem in protecting human rights while countering terrorism.<sup>237</sup> In his 2005 report, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (the UN Special Rapporteur on human rights and counter-terrorism) noted that, in the absence of a comprehensive definition, some regional and international bodies link the term "terrorist acts" to existing conventions or treaties, using the acts defined in these conventions or treaties as "triggers" in determining what conduct should be characterized as "terrorist".<sup>238</sup> However, as the UN Special Rapporteur pointed out, "not all acts that are crimes under national law or even international law are acts of terrorism or should be defined as such."<sup>239</sup> He thus emphasized that the use of existing international treaties and conventions on terrorism to ascertain trigger-offences is not by itself sufficient to determine what truly is "terrorist" in nature.<sup>240</sup>

The UN Special Rapporteur on human rights and counter-terrorism considered that at the national level, the specificity of terrorist crimes can be properly defined by the presence of three cumulative conditions.

- *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 doing or refraining from doing something.
- *Third*, the aim, which must be to "further an underlying political or ideological aim."

234 International Commission of Jurists, *Legal Commentary to the ICJ Berlin Declaration: Counter-Terrorism, Human Rights, and the Rule of Law*, Human Rights and Rule of Law Series No. 1, Geneva, 2008 at p. 6.

235 E.g., Security Council resolution 1456 (2003), para 6, Security Council resolution 2178(2014) preambular para 7.

236 UN Security Council Resolution 1566 (2004), UN Doc. S/RES/1566 (2004).

237 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.

238 *Ibid.* at para. 35.

239 *Ibid.* at para. 38.

240 *Ibid.* at para. 35.

The UN Special Rapporteur on human rights and counter-terrorism considered that it is only when these three conditions exist that an act may be criminalized as a terrorist act.<sup>241</sup>

The HSA defines terrorism by linking to acts that are punishable under the RPC and other domestic laws, including acts under Article 134 on rebellion and insurrection, which, as has been highlighted earlier, violate the principle of legality in criminal law, given the vagueness and broadness of the definitions of these crimes.

This concern was also highlighted by the UN Special Rapporteur on human rights and counter-terrorism in his communication to the Government of the Philippines in 2007. He expressed concern regarding the definition of “terrorism” under the HSA, explaining that the principle of legality in criminal law “implies that the requirement of criminal liability is limited to clear and precise provisions in the law”, to ensure that the law shall not be subjected to arbitrary interpretation and thereby broaden the scope of proscribed conduct.<sup>242</sup>

Crimes that are defined so ambiguously that they may cover a wide range of acts of different gravities and are punished with disproportionate penalties, violate the rule of proportionality enshrined by Article 15 of the ICCPR.<sup>243</sup>

The HSA’s vague definition of terrorism is incompatible with international law, as it prevents individuals from knowing whether their actions constitute terrorists acts under the law and this does not conform to the principle of legality and infringes upon Article 15 of the ICCPR.

Furthermore, as noted by the UN Special Rapporteur, the definition of what constitutes terrorism under the HSA is overbroad as it is not consistent with the first of the three cumulative conditions he set out, which is the condition that the crime committed is with “deadly” or “serious violence” against members of the general population or segments of it, given that the crimes it refers to do not all necessarily involve serious or deadly violence or hostage taking.<sup>244</sup> For instance, the elements of Article 134 (on rebellion) do not require that such public uprising or taking arms against the government is “deadly” or causes “serious violence” against members of the general population or segments of it.

Moreover, the definition of terrorism under the HSA does not meet the third cumulative condition specified by the UN Special Rapporteur in that it does not require that the criminal act be carried out with the aim of “furthering an underlying political or ideological aim”.

The TFPSA, meanwhile, in defining what constitutes “terrorist acts”, incorporates the vague and overbroad definition of the HSA.

In addition, the TFPSA definition is linked to treaties that have been ratified by the Philippines that do not fulfill the three cumulative criteria set out by the UN Special Rapporteur on human rights and counter-terrorism. For instance, the TFPSA defines as “terrorist acts” those acts under the 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf,<sup>245</sup> a treaty which describes offences that are committed on fixed platforms and determines which State Party may establish jurisdiction over these offences. Not all the acts described in this Protocol satisfy the three cumulative conditions set out by the UN Special Rapporteur. First, the acts prohibited in this Protocol may be executed without using means that are deadly or constitutes serious violence. Second, the acts

241 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.

242 *Ibid.* at para. 66.

243 UN Special Rapporteur on the independence of judges and lawyers, Report on the mission to Peru, UN Doc. E/CN.4/1998/39/Add.1 (1998), para. 129; Human Rights Committee, Comments on Egypt, UN Doc. CCPR/C/79/Add.23 (1993), para. 8. The UN Special Rapporteur on counter-terrorism and human rights defenders also expressed concern that the punishment of 40 years imprisonment without parole under the HSA, applicable to all crimes within section 3 in an undifferentiated manner could result in disproportionate punishment in some cases and limited judicial discretion to take into consideration a defendant’s acts and circumstances. 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) at para. 70.

244 Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism: Communication with Governments, UN Doc. A/HRC/6/17/Add.1 (2007) at para. 69.

245 Section 3(3)(h) of the TFPSA.



in this Protocol may be committed without the intent of causing fear among the population, destroying public order, or compelling the government or an international organization to do or refraining from doing something. Finally, the purpose of persons who undertake the acts prohibited under this Protocol may not necessarily be for the furtherance of a political or ideological aim.

It should be emphasized that it is important for the Philippines to have a precise definition of the term “terrorism” and that such definition is confined to conduct that is of a genuine terrorist nature, meeting the three cumulative conditions specified by the UN Special Rapporteur on human rights and counter-terrorism.<sup>246</sup> Domestic laws on terrorism must clearly set out what elements of the crime make it an act of terrorism. Furthermore, where particular offences are linked to “terrorist acts”, such as in the HSA and TFP SA, there must be a clear definition of those acts.<sup>247</sup>

In 2012, the Human Rights Committee recommended that the Philippines ensure the HSA defines terrorist crimes with enough precision to allow persons to regulate their conduct.<sup>248</sup>

Given that the TFP SA definition incorporates the HSA definition and also incorporates by reference treaties that do not meet the three criteria specified by the UN Special Rapporteur on human rights and counter-terrorism, it is overbroad and must also be redrafted in a manner that is consistent with international human rights law, in particular with the principle of legality, Article 15 of the ICCPR, and the respect for the rights of freedom of association and expression of human rights defenders and others.

#### **b. Sharing information with other States’ intelligence agencies**

Both the HSA and TFP SA accord increased surveillance powers to Philippine authorities who, like authorities in many other States, have claimed that these increased surveillance powers are necessary to improve their ability to prevent and investigate acts of terrorism. Many States like the Philippines also consider that cooperation with other countries’ intelligence agencies is a necessity in counter-terrorism operations. Thus, many countries share with each other information gathered from surveillance activities.<sup>249</sup> The Anti-Terrorism Council (ATC), which is tasked to implement the HSA, has the specific mandate to “establish and maintain coordination with and cooperation and assistance of other nations in the struggle against international terrorism.”<sup>250</sup>

The HSA includes several safeguards which aim to prevent abuses of human rights in relation to surveillance powers. For instance, all intercepted and recorded communications must be deposited with the Court of Appeals<sup>251</sup> and cannot be unsealed without judicial approval.<sup>252</sup> The person under surveillance has the right to be informed of the surveillance after the fact and to challenge its legality before the court.<sup>253</sup> Law enforcement authorities who fail to deliver a detained suspect to the competent judicial authorities within three days of their arrest may face the penalty of imprisonment from 10 to 12 years,<sup>254</sup> and any law enforcement officer found to have violated the rights of a detainee shall suffer the penalty of 10 to 12 years of imprisonment.<sup>255</sup> The HSA expressly prohibits torture or coercion to be employed upon detained persons during investigation and interrogation,<sup>256</sup> and any person found guilty of using such means shall be subject to 12 to 20 years’ imprisonment.<sup>257</sup>

246 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) at para. 42.

247 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) at para. 46.

248 Human Rights Committee, Concluding observations on the fourth periodic report of the Philippines, UN Doc. CCPR/C/PHL/CO/4 (2012) at para. 8.

249 Report of the 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. 20.

250 Section 54(7) of the Human Security Act.

251 Section 11 of the Human Security Act.

252 Section 14 of the Human Security Act.

253 Section 9 of the Human Security Act.

254 Section 20 of the Human Security Act.

255 Section 22 of the Human Security Act.

256 Section 24 of the Human Security Act.

257 Section 25 of the Human Security Act, para. 1.

Another safeguard in the HSA is that persons who have been accused of terrorism and subsequently acquitted shall be awarded damages amounting to Php500,000 (approximately US\$11,428) for every day of detention or deprivation of liberty or arrest without a warrant as a result of such accusation. The award of damages shall be released automatically within 15 days from the date of the acquittal of the accused.<sup>258</sup> Persons found responsible for delaying the release of awarded damages to the individual acquitted of the crime of terrorism face a penalty of 6 months imprisonment.<sup>259</sup>

Furthermore, there is a ban on extraordinary rendition under Section 57 of the HSA, which states that “no person suspected or convicted of the crime of terrorism shall be subjected to extraordinary rendition to any country unless his or her testimony is needed for terrorist-related police investigations or judicial trials in the said country and unless his or her human rights, including the right against torture, and the right to counsel, are officially assured by the requesting country and transmitted accordingly and approved by the Department of Justice.”

It is unclear, however, whether all these safeguards extend to the Government’s cooperation with foreign States.

According to the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, intelligence-sharing with authorities of a foreign State should be based on national law, which shall include “criteria for the purposes for which intelligence may be shared, the entities with which it may be shared, and the procedural safeguards that apply to intelligence sharing.”<sup>260</sup>

Not extending the safeguards built into the domestic law to cooperation with intelligence services of other States or other actors may subsequently endanger fundamental rights, including the right to privacy.<sup>261</sup> The right to privacy in itself serves as a basis for other rights. Without the right to privacy, other rights would not be effectively enjoyed. For instance, the rights of freedom of expression, association, and movement all require respect for the right to privacy<sup>262</sup>

### **c. Unlawful authority of the Commission on Human Rights of the Philippines (CHRP) and length of detention under the HSA**

Another area of concern in the HSA, which was also raised by the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism,<sup>263</sup> is the authority given to the Commission on Human Rights of the Philippines (CHRP), the national human rights institution (NHRI) of the country, with regards to detention of persons. Under the HSA, in the event of an actual or imminent terrorist attack, the detention of a suspect for more than three days must be approved by either a judge or an official of the CHRP.<sup>264</sup> It is noted that the CHRP has never utilized this power under this provision.<sup>265</sup>

258 Section 50 of the Human Security Act, para. 1.

259 Section 50 of the Human Security Act, para. 2.

260 Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism, including on their oversight, UN Doc. A/HRC/14/46 (2010), para. 45.

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

262 *Ibid.* at para. 33.

263 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) at para. 71.

264 Article 19 of the Human Security Act.

265 ICJ Interview with Atty. Jacqueline Mejia, Executive Director of the Philippines Commission on Human Rights, and Atty. Karen Dumpit, Director of the Philippines Commission on Human Rights, Philippines Commission on Human Rights, 1 August 2013.



The CHRP, was created under the 1987 Constitution,<sup>266</sup> and its powers and functions are laid out in Executive Order No. 163.<sup>267</sup> Although the Sub-Committee on Accreditation of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights has given the CHRP an “A rating”, which means that it fully complies with the Paris Principles, the set of international standards which frame and guide the work of NHRIs, it is not perceived to be independent by civil society organizations in the country.<sup>268</sup>

The CHRP is neither a court nor a body that exercises judicial power.<sup>269</sup> Hence, review by the CHRP of a person’s detention on any ground is inconsistent with the requirement set out in Article 9(3) of the ICCPR, that any person arrested or detained on a criminal charge must be brought promptly before a judge or other officer authorized by law to exercise judicial power.

The Government of the Philippines, in its response to the UN Special Rapporteur’s concerns regarding the power of the CHRP under Section 19 of the HSA, stated that the CHRP is an independent office and “not composed of members of the executive branch”.<sup>270</sup> However, it must be emphasized that independent and impartial judicial oversight of detention is essential since it serves to safeguard the right to liberty and, in criminal cases, the presumption of innocence. Furthermore, judicial oversight aims to prevent human rights violations, including torture or other ill-treatment, arbitrary detention and enforced disappearance.

It cannot be emphasized enough that it is necessary for the judge or judicial authority to examine whether there are sufficient legal reasons for the arrest or detention, and to order release if not; to safeguard the well-being of the detainee; and to prevent violations of the detainee’s rights. Furthermore, if the initial detention or arrest was lawful, the judge or judicial authority shall assess whether the individual should be released from custody and if any conditions should be imposed, or in criminal cases, whether remand in detention pending trial is necessary and proportionate.<sup>271</sup>

Moreover, in order to meet the requirement of promptness set out in Article 9(3) of the ICCPR and in view of the heightened risk of arbitrary detention or ill-treatment in such cases, the requirement to bring an arrested or detained person before a judge within 3 days under Sections 18 and 19 of the HSA must be reduced. The UN Human Rights Committee has clarified in its General Comment 35, adopted in October 2014, that “delays should not exceed a few days from the time of arrest”. In the view of the Committee, 48 hours is ordinarily sufficient to transport the individual and to prepare for the judicial hearing. Any

<sup>266</sup> Article XIII, Sections 17 to 19 of the 1987 Constitution.

<sup>267</sup> Section 3 of Executive Order No. 163:

The Commission on Human Rights shall have the following powers and functions:

- Investigate, on its own or on complaint by any party, all forms of human rights violations involving civil and political rights;
- Adopt its operational guidelines and rules of procedure, and cite for contempt for violations thereof in accordance with the Rules of Court;
- Provide appropriate legal measures for the protection of human rights of all persons within the Philippines, as well as Filipinos residing abroad and provide for preventive measures and legal aid services to the under-privileged whose human rights have been violated or need protection;
- Exercise visitatorial powers over jails, prisons or detention facilities;
- Establish a continuing program of research, education and information to enhance respect for the primacy of human rights;
- Recommend to the Congress affective measures to promote human rights and to provide for compensation to victims of violations of human rights or their families;
- Monitor the Philippine Government’s compliance with international treaty obligations on human rights;
- Grant immunity from prosecution to any person whose testimony or whose possession of documents or other evidence is necessary or convenient to determine the truth in any investigation conducted by it or under its authority;
- Request the assistance of any department, bureau, office, or agency in the performance of its functions;
- Appoint its officers and employees in accordance with law; and
- Perform such other duties and functions as may be provided by law.

<sup>268</sup> Philippine Alliance of Human Rights Advocates (PAHRA), *Submission in Response to the Questionnaire on National Human Rights Institution and Human Rights Defenders*, 2012, p. 2. <http://www.ohchr.org/Documents/Issues/Defenders/AnswersNHRI/NGOs/Philippines-PAHRA.pdf> (Accessed August 2014). The president nominates and appoints the CHR commissioners, who appoint the CHR officers; Executive Order No. 163, Declaring the Effectivity of the Creation of the Commission on Human Rights as Provided for in the 1987 Constitution, Providing Guidelines for the Operation Thereof, and for other Purposes, 5 May 1987. Philippines Constitution article 13 section 18(10); Also of concern is the CHR’s fiscal autonomy (See Human Rights Committee, Concluding observations on the fourth periodic report of the Philippines, UN Doc. CCPR/C/PHL/CO/4 (2012) at para. 7)

<sup>269</sup> See *Cariño v. Commission on Human Rights*, G.R. No. 96681, 2 December 1991 (“The Court declares the Commission on Human Rights. . . was not meant by the fundamental law to be another court or quasi-judicial agency in this country). The Commission on Human Rights’ powers are delineated in the Constitution of the Philippines Art. XIII, Sec. 18.

<sup>270</sup> 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) at para. 88.

<sup>271</sup> Amnesty International, Fair Trial Manual, 2nd edition, Chapter 5.1, available at <http://www.amnesty.org/en/library/info/POL30/002/2014/en>.

delay longer than forty-eight hours must remain absolutely exceptional and be justified under the circumstances.<sup>272</sup>

#### **D. Recommendations**

1. The definition of terrorism in Section 3 of HSA must be amended in order to conform with international standards, including the principle of legality. In keeping with the recommendations of human rights bodies and mechanisms it should only criminalize acts by the perpetrators against the population that are deadly or involve serious violence or hostage taking, used with the intent to cause a state of terror in the general public or to destroy public order or to compel a government or an international organization to do or to abstain from doing any act, with the aim of furthering an underlying political or ideological aim.
2. Section 3.a.12(a) of the TFPSA must be amended so that the TFPSA's definition of terrorist acts is narrowed and linked only to laws and provisions of treaties that meet the criteria set out by the UN Special Rapporteur on human rights and counter-terrorism.
3. The Government of the Philippines should consider amending the HSA so that it includes a provision expressly stating that the safeguards on human rights embedded in the HSA and other laws in the Philippines shall extend to cooperation with intelligence services of other States.
4. Section 19 of the HSA should be amended so that the Commission on Human Rights of the Philippines (CHRP) has no authority to approve the extension of detention of persons suspected to have committed acts of terrorism. Section 19 should require independent and impartial judicial oversight of detention.
5. In order to meet the requirement of promptness set out in Article 9(3) of the ICCPR, the requirement to bring an arrested or detained person before a judge within three days under Sections 18 and 19 of the HSA should be reduced to 48 hours or less.

<sup>272</sup> Human Rights Committee General Comment 35, UN Doc. CCPR/C/GC/35, para 33.

## **IX: CONCLUSION AND RECOMMENDATIONS**

The process of updating the Philippines' criminal laws provides the Congress of the Philippines with an opportunity to ensure that the Philippines' laws on national security crimes and law enforcement practices conform to international standards. In order for the Philippines to fulfill its obligations under international law to protect all persons within its jurisdiction and subject to its effective control, in the context of ongoing threats from insurgencies and terrorism, in a manner that is consistent with human rights law, it must ensure that its national security laws do not infringe upon human rights or the work of human rights defenders.

While many of the RPC's outdated national security laws are not currently being enforced, as long as they remain law, their vague and overbroad provisions may be enforced in the future in violation of human rights law and they continue to have a chilling effect on the work of human rights defenders.

With a view to ensuring that the process of amending the Revised Penal Code meets the intended aim of reflecting international best practices and being anchored in human rights, the ICJ recommends the following:

### **On Articles 154, 358 to 355, and Section 4(c)(4) of the Cybercrime Prevention Act:**

1. The Government of the Philippines must either repeal Article 154 of the RPC or at a minimum, it may amend it in a manner which ensures that its only restrictions on freedom of expression are: (a) necessary to safeguard national security, public order, public health or morals, or respect for the rights of others; (b) proportionate, using the least intrusive means available; and (c) limited to speech presenting a "clear and present danger " to one of such interests. The laws setting out such restrictions must be precise and clear. Measures must also be adopted to ensure that prosecutorial discretion is not abused and that this provision is never utilized to suppress the exercise of the right to freedom of expression including by journalists and human rights defenders.
2. Building on the recommendations of the Supreme Court to judges in 2008 that in imposing penalties for libel, preference should be given to imposing a fine instead of imprisonment, and consistent with those of international human rights bodies, the Government of the Philippines should also repeal all criminal defamation laws, including those set out in Articles 353 to 355, Articles 358 to 362 of the RPC and Section 4(c)(4) of the Cybercrime Prevention Act. The law should be amended to make civil liability proceedings the sole form of redress for complaints of damage to reputation. In so amending the law, measures must be taken to ensure that civil liability cannot be imposed in a manner that unduly restricts the exercise of the right to freedom of expression. In keeping with the clarification of the Human Rights Committee, truth and public interest in the subject of the criticism must be recognized as defenses. Statements made against public figures that may be erroneous but made without malice should not be actionable. As recommended by the UN Special Rapporteur on Freedom of Expression, civil liability should include non-pecuniary remedies, such as apology, rectification and clarification and the law must ensure that financial awards are strictly proportionate to the actual harm suffered, and not to punish the person responsible for the harm.

### **On Articles 134, 138, 139 to 142 of the RPC:**

1. The Government of the Philippines should repeal Article 134 (on rebellion) and Article 138 (on inciting to rebellion) of the RPC.
2. The Government of the Philippines should also adopt the proposal to repeal Articles 139 to 142 on sedition and inciting to sedition, which was made under the 15<sup>th</sup> Congress.

3. At a minimum, Articles 134 (on rebellion), Article 138 (on inciting to rebellion), and the provisions on sedition from Articles 139 to 142 of the RPC must be substantially amended in a manner that conforms to the principle of legality and the rights of freedom of expression, freedom of association and the right to participate in public affairs, guaranteed in international law. The wording of the laws must be precise enough to allow individuals to foresee what actions are unlawful and in a manner that will reduce the possibility of arbitrary application of the laws, including against human rights defenders, or the violation of the rights to freedom of expression, freedom of association, and the right to participate in public affairs.

**On Article 146 of the RPC and Batas Pambansa 880:**

1. The Government of the Philippines must revise Article 146 of the RPC and B.P. 880, as neither is compatible with international human rights law. In crafting a new law that would constitute a lawful restriction on the right to peaceably assemble, the Government should ensure that the presumption of the new law is in favor of holding peaceful assemblies and such presumption should be established in a clear and explicit manner. There should be no requirement of prior authorization to assemble, but at most a notification procedure, ideally only for large meetings that may interfere with pedestrian or vehicular traffic, so as to allow for rerouting of cars and pedestrians. The law must not subject participants or organizers of public protests to criminal or administrative liability, solely for failing to notify authorities of the meeting. The law and its implementation must also be revised to ensure that organizers and participants are not held responsible or liable for the violent conduct of others in the course of an assembly.
2. Law enforcement officers must be instructed and trained to respect the right of individuals to peacefully assemble, in a manner that is consistent with the respect for the right guaranteed in the ICCPR. Any law enforcement officer who violates the right to peacefully assemble should be held accountable, and victims of violations should have the right to an effective remedy and redress.
3. Law enforcement officers' response to unlawful assemblies must be consistent with respect for human rights; this requires, among other things, that they must respect the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials. Thus, the authorities must ensure that law enforcement officials receive regular and continuing training on the use of force which is consistent with these Principles. Law enforcement officials who use excessive or otherwise unlawful force must be held to account. Consistent with these Principles, in cases of unlawful assemblies that are non-violent, law enforcement officers should avoid the use of force altogether. When that is not practicable or in the event of the outbreak of violence, any force used must be restricted to the minimum necessary, and must be proportionate. In the policing of violent assemblies, law enforcement officers may use firearms only in self- defense or in defense of others against the imminent threat of death or serious injury or to prevent the perpetration of a particularly serious crime involving a grave threat to life, and only when less dangerous means are not practicable. In any event, the intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.

**On Article 147 of the RPC:**

Article 147 of the RPC should be revised in a manner to ensure that it is consistent with the principle of legality and the right of all individuals, without discrimination, to enjoy freedom of association. The prohibition of associations in the new law should extend only to those that present a "clear and imminent danger resulting in a flagrant violation of domestic laws" that are themselves consistent with international human rights standards. The law must ensure that suspension or involuntary dissolution of an association is a measure of last resort, which is sanctioned by an independent and impartial court. Furthermore, Article 147 should be revised so that it does not criminalize membership in the absence of active unlawful conduct beyond affirmation of membership.

**On provisions in the Human Security Act (HSA) and the Terrorism Financing Prevention and Suppression Act (TFPSA):**

1. The definition of terrorism in Section 3 of HSA must be amended in order to conform with international standards, including the principle of legality. In keeping with the recommendations of human rights bodies and mechanisms it should only criminalize acts by the perpetrators against the population that are deadly or involve serious violence or hostage taking, used with the intent to cause a state of terror in the general public or to destroy public order or to compel a government or an international organization to do or to abstain from doing any act, with the aim of furthering an underlying political or ideological aim.
2. Section 3.a.12(a) of the TFPSA must be amended so that the TFPSA's definition of terrorist acts is narrowed and linked only to laws and provisions of treaties that meet the criteria set out by the UN Special Rapporteur on human rights and counter-terrorism.
3. The Government of the Philippines should consider amending the HSA so that it includes a provision expressly stating that the safeguards on human rights embedded in the HSA and other laws in the Philippines shall extend to cooperation with intelligence services of other States.
4. Section 19 of the HSA should be amended so that the Commission on Human Rights of the Philippines (CHRP) has no authority to approve the extension of detention of persons suspected to have committed acts of terrorism. Section 19 should require independent and impartial judicial oversight of detention.
5. In order to meet the requirement of promptness set out in Article 9(3) of the ICCPR, the requirement to bring an arrested or detained person before a judge within three days under Sections 18 and 19 of the HSA should be reduced to 48 hours or less.



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