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AN EXAMINATION OF THE PHILIPPINES' ANTI-TERROR LAW—*SUAVITER IN MODO, FORTITER IN RE*¹

Brent H. Lyew[†]

Abstract: The Philippines is rife with competing struggles for rights of self-determination and international terrorist networks. For years, the Philippine government prosecuted suspected terrorists without an anti-terror law. The absence of an express criminal violation for acts of terrorism led to a blurred distinction between punishing terrorists and punishing secessionists. Responding to public outcry that the Philippine government was violating human rights by punishing secessionists unjustly, the United Nations conducted an investigation. This investigation led to the placement of the Philippine government on the United Nations' human rights watch list. The Philippine legislature, shortly thereafter, passed the Human Security Act of 2007 ("HSA"). This law codified the acts punishable as crimes of terrorism. Since the HSA's passage, five prominent advocacy groups petitioned the Philippine Supreme Court to strike down the anti-terror law as unconstitutional for being overly vague and unjustly intruding on individual rights. This comment analyzes the lawfulness of the HSA.

I. INTRODUCTION

Terrorism plagues the Philippines. On May 23, 1976, six hijackers took control of a commercial airliner and, after demands were not met, detonated grenades that exploded the plane on a runway in the Philippines.² This hijacking was one of the Philippines' earliest terror attacks that incurred international reverberations.³ International terrorists soon after infiltrated the Philippines and established operational networks.⁴ Attacks escalated⁵ In 1991, terrorists attempted to bomb the United States' ("U.S.") embassy in

[†] Juris Doctor expected 2010. The author would like to thank the editors of the Pacific Rim Law & Policy Journal and Prof. Joel Ngugi for his guidance in the development of this comment.

¹ Latin for: "Gently in manner, strongly in deed." OXFORD LATIN DICTIONARY (P.G.W. Glare ed. 1982). Letter from Lord Chesterfield to his son, in Henry Belfield, Lord Chesterfield's Letters To His Son and Godson, Selected, at 125-26 (1897) ("The suaviter in modo alone would degenerate and sink into a mean, timid complaisance and passiveness, if not supported and dignified by the fortiter in re, which would also run into impetuosity and brutality, if not tempered and softened by the suaviter in modo: however, they are seldom united.")...

² Aviation Safety Network, *Hijacking Description: 23 May 1976*, <http://aviation-safety.net/database/record.php?id=19760523-1> (last visited Oct. 8, 2009).

³ See ROMULO C. SUPAPO, U.S.-PHILIPPINE SECURITY RELATIONS: ITS IMPLICATIONS FOR THE GLOBAL WAR ON TERRORISM 2 (2004), <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA424307&Location=U2&doc=GetTRDoc.pdf> (last visited Oct. 8, 2009).

⁴ *Id.* at 5.

⁵ See Esaquito P. Manalo, *The Philippine Response to Terrorism: The Abu Sayyaf Group*, Naval Post Graduate School 1 (Dec. 2004) (unpublished master's thesis, Naval Postgraduate School), <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA429991&Location=U2&doc=GetTRDoc.pdf> (last visited Oct. 8, 2009).

Manila,⁶ and since 2000, terrorist acts in the Philippines have killed or injured more than 1,700 people.⁷ The attacks included bombings of “buses carrying workers, food markets where people were shopping, airports where relatives were waiting for loved ones, and ferry boats carrying families.”⁸ The Philippine government responded to the growing terrorist problem with military force. No law, however, identified the acts that incurred terrorist liability, nor specified the manner in which the acts were punishable.⁹ The Philippine government’s fight against terrorists without an anti-terror law led to many complaints of human rights abuses.¹⁰

After the United Nations (“U.N.”) substantiated complaints of human rights abuses,¹¹ the Philippine legislature attempted an about-face by enacting the Human Security Act of 2007 (“HSA”).¹² The HSA made specific acts punishable as acts of terrorism and gave courts the authority to determine when a suspect’s actions qualified as acts of terrorism.¹³ Shortly after the HSA’s passage, five prominent advocacy groups petitioned the

⁶ SUPAPO, *supra* note 3, at 2.

⁷ *Philippines: Extremist Groups Target Civilians, More Than 1,700 Killed and Injured in Bombings and Kidnappings*, HUMAN RIGHTS WATCH, July 29, 2007, <http://www.hrw.org/en/news/2007/07/29/philippines-extremist-groups-target-civilians> (last visited Oct. 8, 2009).

⁸ Carlos H. Conde, *400 Killed by Terrorism in Philippines since 2000, Report Says*, N.Y. TIMES, July 30, 2007, available at <http://www.nytimes.com/2007/07/30/world/asia/30iht-philis.4.6902202.html>.

⁹ See Manalo, *supra* note 5, at 12-13, 23-24.

¹⁰ See Aileen Estoquia, *Critics Warn President vs Rushing Anti-Terror Bill*, BULATLAT, May 15, 2005, available at <http://www.bulatlat.com/news/5-14/5-14-atb.htm>; see also Cher S. Jimenez, *Deadly Dirty Work in the Philippines*, ASIA TIMES ONLINE, Feb. 13, 2007, http://www.atimes.com/atimes/Southeast_Asia/IB13Ae01.html (last visited Oct. 8, 2009) (explaining that “[p]olitical killings in the Philippines have escalated into a full-blown international issue.”).

¹¹ U.N. Human Rights Council, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, ¶¶ 30-33, U.N. Doc. A/HRC/8/3/Add.2, 37 (April 16, 2008) (prepared by Philip Alston) [hereinafter U.N. Human Rights Council on the Promotion and Protection of All Human Rights].

¹² Official Website of the Office of the Solicitor General – Republic of the Philippines, *OSG Defends Human Security Act*, <http://www.osg.gov.ph/default.asp?id=40&ACT=5&content=87&mnu=40> (last visited Oct. 8, 2009).

¹³ KENNETH PEREIRE, INT’L CTR. FOR POLITICAL VIOLENCE AND TERRORISM RESEARCH, ANALYSIS AND REVIEW OF THE PHILIPPINES HUMAN SECURITY ACT 2007 (Mar. 16, 2007), available at <http://www.pvtr.org/pdf/Legislative%20Response/revisedPhilippines%20CT%20LAW2007newi.pdf>; see also Annie Rose A. Laborte, *Supreme Court Justice Speaks on the Anti-Terrorism Law*, SUP. CT. OF THE PHIL. COURT NEWS FLASH, (May 9, 2007), available at <http://sc.judiciary.gov.ph/news/courtnews%20flash/2007/05/05090702.php> (Supreme Court Justice Angelina Sandoval-Gutierrez explaining that the HSA requires the Court to ponder: “[t]o whom and to what acts is the law directed” and whether “the law is a potent tool to fight terrorism or to curtail fundamental freedom.”).

Philippine Supreme Court to strike down the law.¹⁴ These groups argue that the Philippine Supreme Court should nullify the HSA because it is unconstitutionally vague and violative of individual rights.¹⁵ The Philippine Supreme Court has yet to rule on these cases.

This comment analyzes the constitutionality of the HSA. Part II provides a historical background of terrorism in the Philippines and observes the Philippine government's responses that led to the passage of the HSA. Part III examines whether the HSA is unconstitutionally vague in its definition of a punishable terrorist act, and Part IV explores whether the HSA impermissibly infringes on individual rights. Last, Part V examines policy considerations.

II. THE HSA IS THE PHILIPPINES' SOLUTION TO STOPPING TERRORISM WHILE CURBING GOVERNMENTAL ABUSE OF POWER

For years, the Philippine government used its military to quell revolutionary factions.¹⁶ As terrorist networks grew and became increasingly problematic, the Philippine government used its military to fight concurrently against secessionists and terrorists.¹⁷ This response led to the U.N. taking action and the Philippine government passing the HSA, a law that distinguished between acts of secession and acts of terrorism.

A. *Muslim Secessionism in Mindanao Set the Stage for the Incursion of International Terrorists*

Violent struggle for secession in the Philippines provided fertile ground for the embedment of international terrorists. At the turn of the twentieth century, the U.S. took control of the Philippines and occupied it under the Treaty of Paris.¹⁸ After establishing sovereignty,¹⁹ the U.S. pushed for a policy that encouraged Christian settlers from Luzon and Visayas, the northern and central regions of the Philippines, to colonize the agricultural

¹⁴ Gemma Bagayaua, *5 Petitions Ask Court to Nullify Anti-Terror Law*, NEWS BREAK, Sept. 10, 2007, [available at](http://www.newsbreak.com.ph/index.php?option=com_content&task=view&id=3696&Itemid=88889005) http://www.newsbreak.com.ph/index.php?option=com_content&task=view&id=3696&Itemid=88889005.

¹⁵ *Id.*

¹⁶ Reuters AlertNet, *Long-Running Muslim and Communist Insurgencies*, REUTERS ALERT NET, Apr. 12, 2008, [available at](http://www.alertnet.org/db/crisisprofiles/PH_SEP.htm?v=in_detail) http://www.alertnet.org/db/crisisprofiles/PH_SEP.htm?v=in_detail.

¹⁷ See Manalo, *supra* note 5, at 12-13, 23-24, 28-30.

¹⁸ Ricardo A. David Jr., *The Causes and Prospect of the Southern Philippines Secessionist Movement 3* (Dec. 2003) (unpublished master's thesis, Naval Postgraduate School), <http://www.nps.edu/academics/sigs/nsa/publicationsandresearch/studenttheses/theses/David03.pdf> (last visited Oct. 8, 2009).

¹⁹ *Id.* at 40-42.

lands in Mindanao, the predominately Muslim southern region of the Philippines.²⁰

This land settlement policy has caused conflict since 1898.²¹ The policy diluted the existing aboriginal people's land ownership.²² The original Mindanaons, known as the Moros, resented the land settlement policy²³ and since 1898, have fought for independence.²⁴ By the late 1960s, the Moros began to form militias to fight the northern Christian settlers.²⁵ This conflict, still ongoing, has cost approximately 160,000 lives.²⁶

As the Moros and other Filipino Muslims fought for rights of self-determination in Mindanao,²⁷ the political structure deteriorated, which permitted incursion of international terrorists.²⁸ Using military force to fight the rebelling Muslim militias,²⁹ the Philippine government's use of tactical offensives displaced over two million persons.³⁰ These military offensives catalyzed a growth of socio-economic and political grievances that led to an unstable social climate.³¹ This instability, coupled with "weak political institutions, decentralized politics, poor resources, and . . . endemic corruption [in the government],"³² made Mindanao an ideal environment for the settlement of international terrorists.³³ Terrorist groups, such as Al-Qa'ida,³⁴ flocked to the aid of the suppressed insurgent militias and established the Mindanao region as an operation base.³⁵

²⁰ *Id.*

²¹ *Id.*

²² *See id.* at 40-42.

²³ *Id.* at 66.

²⁴ *See David, supra* note 18, at 40-42.

²⁵ *Id.* at 59-60.

²⁶ *See Reuters AlertNet, supra* note 16.

²⁷ *See David, supra* note 18, at 41-42, 49-50.

²⁸ *See Reuters AlertNet, supra* note 16.

²⁹ *Id.*

³⁰ *Id.*

³¹ *See SUPAPO, supra* note 3, at 5.

³² *See Manalo, supra* note 5, at 17-18.

³³ *Id.*

³⁴ Al-Qa'ida is an "international terrorist network" that was "[e]stablished around 1988 by bin Laden." Al-Qa'ida's "current goal is to establish a pan-Islamic Caliphate throughout the world by working with allied Islamic extremist groups to overthrow regimes it deems 'non-Islamic' and expelling Westerners and non-Muslims from Muslim countries." Global Security, *Al-Qaeda* (2006), <http://www.globalsecurity.org/military/world/para/al-qaida.htm> (last visited Sept. 26, 2009).

³⁵ *See Preeti Bhattacharji, Terrorism Havens: Philippines*, COUNCIL ON FOREIGN RELATIONS (2008), available at <http://www.cfr.org/publication/9365/> (explaining that the U.S. State Department considers the southern Philippines a "terrorist safe haven," and Al-Qa'ida operates in the Philippines through a handful of regional and local organizations); *see also Zachary Abuza, Balik Terrorism: The Return of the Abu Sayyaf*, STRATEGIC STUDIES INSTITUTE (2005), available at <http://www.strategicstudiesinstitute.army.mil/pubs/print.cfm?q=625> (explaining the Mindanao region is a base for terrorist operations).

B. *The Philippine Government's Use of Military Force to Fight Terrorism Made the HSA a Necessity*

The Philippine government's use of broad military force to fight its terrorist problem eventually led to U.N. action and the Philippine's adoption of the HSA. In 2006, the Philippine government scheduled thirty-seven joint exercises with the U.S. military to fight terrorism.³⁶ These exercises included Balikatan—a bilateral military operation precisely aimed at rooting out international terrorists.³⁷ The military offensives produced some victories that slowed the growing terrorist footprint,³⁸ but the Philippine government's application of military force without an anti-terror law permitted abuses of power.³⁹

These abuses spurred many complaints of human rights violations.⁴⁰ Until the passage of the HSA, military commanders had unilateral authority to determine which persons to target as terrorists.⁴¹ Human rights groups contend military commanders abused their discretion and estimate during President Macapagal-Arroyo's administration⁴² “at least 830 people [were] killed in an extrajudicial fashion, including 365 mostly left-leaning political and social activists, . . . journalists, judges, and lawyers known to be sympathetic to leftist causes.”⁴³ These extrajudicial killings were not all caused exclusively by the Philippine government's fight against terrorism, but they were “committed by death squads . . . [that] operate[d] under the protective umbrella of regional [Mindanao] military commands” aimed at stopping terrorism.⁴⁴

A commission led by former Philippine Supreme Court Justice Jose Melo confirmed that members of the military were responsible for the “majority” of the extrajudicial killings.⁴⁵ A formal U.N. investigation

³⁶ See Bhattacharji, *supra* note 35.

³⁷ *Id.*

³⁸ See CIA World Fact Book, *Philippines* (2008), available at <https://www.cia.gov/library/publications/the-world-factbook/geos/rp.html>.

³⁹ See Jimenez, *supra* note 10.

⁴⁰ See Bhattacharji, *supra* note 35.

⁴¹ Mouloud Boumghar, Frédéric Ceuppens & Nabeel Rajab, INTERNATIONAL FACT-FINDING MISSION: TERRORISM AND HUMAN RIGHTS IN THE PHILIPPINES, FIGHTING TERROR OR TERRORIZING? 9-10 (International Federation for Human Rights Apr. 2008), available at <http://www.fidh.org/IMG/pdf/ph493a.pdf>.

⁴² President Macapagal-Arroyo “was sworn in as the 14th President of the Philippines on January 20, 2001.” AsianInfo.org, *Confusion and Hope, Politics in the Philippines* (2008), http://www.asianinfo.org/asianinfo/issues/gloria_macapagal.htm (last visited Oct. 25, 2009).

⁴³ See Jimenez, *supra* note 10.

⁴⁴ James Petras and Robin Eastman-Abaya, *Philippines: The Killing Fields of Asia* (2006), <http://petras.lahaine.org/articulo.php?c=1&more=1&p=1660> (last visited Oct. 25, 2009).

⁴⁵ See Jimenez, *supra* note 10.

subsequently affirmed the Melo Commission's findings,⁴⁶ and as a result, the U.N. placed the Philippine government on its human rights watch list.⁴⁷ The Philippine government then enacted the HSA to protect its people's "basic rights and fundamental liberties" while continuing its fight against terrorism.⁴⁸ The HSA codified the specific acts punishable as crimes of terrorism, delegated authority to the courts to determine when acts qualified as being punishable, and made other certain acts also punishable as abuses of governmental power.⁴⁹

C. *Advocacy Groups Petitioned the Philippine Supreme Court to Strike the HSA for Being Unconstitutionally Vague*

Dubious of the law and deeply afraid of the far-reaching and unfettered power of the government as experienced by the alleged officially sanctioned extrajudicial killings, five prominent advocacy groups⁵⁰ petitioned the Philippine Supreme Court to strike the HSA.⁵¹ Under writs of certiorari for prohibition and mandamus,⁵² these advocacy groups argue the

⁴⁶ See U.N. Human Rights Council, *supra* note 11.

⁴⁷ Nikko Dizon, *PNP: Extrajudicial killings fell by 83% in 2007*, PHILIPPINE DAILY INQUIRER, Jan. 14, 2008, <http://newsinfo.inquirer.net/breakingnews/nation/view/20080114-112184/PNP-Extrajudicial-killings-fell-by-83-in-2007> (last visited Oct. 25, 2009).

⁴⁸ An Act to Secure the State and Protect Our People from Terrorism ("Human Security Act"), Rep. Act 9372 § 3 (2007) (Phil.), available at http://www.ops.gov.ph/records/ra_no9372.htm.

⁴⁹ AQUILINO Q. PIMENTEL JR., THE MAKING OF THE HUMAN SECURITY ACT OF 2007 39 (2007).

⁵⁰ The five prominent advocacy groups were: (1) Bagong Alyansang Makabayan or New Patriotic Alliance, "a nationwide alliance of people's organizations with members from the ranks of workers, farmers, youth, women, urban poor, indigenous peoples, church people, [and] human rights defenders" (Petition for Writ of Certiorari, *Bayan v. Gloria Macapagal-Arroyo*, 6 (July 17, 2007), available at http://www.icj.org/IMG/Phil_petition.pdf); (2) the Integrated Bar of the Philippines (Petition for Writ of Certiorari, *Integrated Bar of the Philippines v. Eduardo Ermita* (Aug. 2007), available at http://newsbreak.com.ph/index.php?option=com_remository&Itemid=88889273&func=startdown&id=114); (3) the Southern Hemisphere Engagement Network Inc., which works toward the "constructive engagement of rebel groups in peace processes, human rights, international humanitarian law, and other areas of human security" (Petition for Writ of Certiorari, *Southern Hemisphere Engagement Network Inc. v. Anti-Terrorism Council*, 4 (2007), available at http://www.icj.org/IMG/Phil_SC_Petition.pdf); (4) Kilusang Mayo Uno, which "operates as a labor center espousing genuine, militant, and nationalist trade unionism" (Petition for Writ of Certiorari, *Kilusang Mayo Uno v. Eduardo Ermita*, 3 (July 2007), available at http://newsbreak.com.ph/index.php?option=com_remository&Itemid=88889273&func=startdown&id=111); and (5) KARAPATAN, an independent human rights organization involved in documenting and providing legal support to victims of human rights abuses (Petition for Writ of Certiorari, *Karapatan v. Gloria Macapagal-Arroyo*, 9 & 13 (Aug. 6, 2007), available at http://newsbreak.com.ph/index.php?option=com_remository&Itemid=88889273&func=showdown&id=113).

⁵¹ See Bagayaua, *supra* note 14.

⁵² Philippine Rule of Civil Procedure 65, the writ of certiorari for prohibition and mandamus, authorizes the Philippine Supreme Court to nullify the HSA based on a grave abuse of discretion by Philippine lawmakers. See R. Civ. P. 65, Certiorari, Prohibition and Mandamus (1997) (Phil.), available at <http://www.chanrobles.com/specialcivilactions.htm#RULE%2065>.

HSA is a legitimization for the Philippine government to continue violating constitutionally protected individual rights.⁵³ The Philippine Supreme Court has not accepted any of these cases.⁵⁴ The Court's refusal to rule on the HSA permitted the anti-terror law to gain notoriety as "one of the [Philippines'] most controversial laws passed in this decade—if not in this century."⁵⁵

III. THE HSA'S DEFINITION OF TERRORISM IS CONSTITUTIONALLY VIABLE

At the heart of the five petitions before the Philippine Supreme Court is criticism that the HSA contains an overly vague definition of terrorism.⁵⁶ The HSA defines a terrorist act by listing a set of specific acts incorporated from other statutes and presidential decrees, and requires that these acts create "a condition of widespread and extraordinary fear and panic among the populace, in order to coerce the government to give in to an unlawful demand."⁵⁷ Some of the acts listed are piracy, coup d'état, murder, kidnapping, arson, hijacking, and the unlawful possession of a firearm.⁵⁸ The petitioners characterize this definition as overly vague and made so with intent to permit continued arbitrary punishment of "legitimate expressions of political dissent and social protest."⁵⁹ This section analyzes whether the HSA's definition of a punishable act of terrorism is unconstitutionally vague.

A vagueness challenge to a statute proceeds in one of two ways: 1) a court can examine whether the statute is vague on its face; or 2) a court can examine the statute as it is applied in a particular case that involves a specific set of facts.⁶⁰ The Philippine Constitution also incorporates international law into Philippine domestic law,⁶¹ so the Philippine Supreme Court may also analyze the HSA against international norms. This section examines the HSA's definition under all three possible analyses: Part A

⁵³ *Id.*

⁵⁴ Tetch Torres, *Supreme Court Asked to Declare Anti-Terror Law Unconstitutional*, INQUIRER.NET, Sept. 19, 2007, http://newsinfo.inquirer.net/breakingnews/nation/view_article.php?article_id=89449 (last visited Oct. 25, 2009).

⁵⁵ Alexander Remollino, *Juan Ponce Enrile: Martial Law Architect, HSA Sponsor*, WORLD PROUT ASSEMBLY (July 24, 2007), http://www.worldproutassembly.org/archives/2007/07/juan_ponce_enri.html (last visited Oct. 25, 2009).

⁵⁶ See Bagayaua, *supra* note 14.

⁵⁷ An Act to Secure the State and Protect Our People from Terrorism ("Human Security Act"), Rep. Act 9372 § 3 (2007) (Phil.).

⁵⁸ *Id.*

⁵⁹ BAGONG ALYANSANG MAKABAYAN, *THE ANTI-TERRORISM ACT: RECIPE FOR UNDECLARED MARTIAL LAW 3* (2007), available at <http://www.bayan.ph/downloads/primerHSA.pdf>.

⁶⁰ RUFUS RODRIGUEZ, *THE CRIME OF PLUNDER IN THE PHILIPPINES* 363 (2002).

⁶¹ CONST. (1987), Art. III § 2 (Phil), available at <http://www.chanrobles.com/philsupremelaw2.html>.

examines whether the definition is facially unconstitutional; Part B explores an applied challenge; and Part C determines whether the HSA's definition violates international law.

A. *The HSA's Vagueness Does Not Render It Facially Unconstitutional*

The five petitions before the Philippine Supreme Court disputing the HSA's vagueness are all facial challenges. As facial challenges, the petitioners lack factual cases where a trier of fact may determine whether the law provided adequate notice to a suspected violator of the prohibited action.⁶² The petitioners accordingly argue the HSA is unconstitutional in every application.⁶³ Four of the five complaints contend the HSA's definition of terrorism is unlawfully vague and petition the Philippine Supreme Court to strike the HSA using the void-for-vagueness doctrine.⁶⁴ Subpart 1 explains why the Philippine Supreme Court will most likely not apply the void-for-vagueness doctrine; Subpart 2 explains why the HSA passes the void-for-vagueness test even if the Court applies the void-for-vagueness doctrine; and Subpart 3 examines why the Court would uphold the HSA despite some vagueness in the law's definition of terrorism.

1. *The Void-For-Vagueness Doctrine Is Inapplicable to the HSA*

The void-for-vagueness doctrine is limited in its scope of application. The doctrine provides "that what makes a statute susceptible to [void-for-vagueness] is an enactment either forbidding or requiring the doing of an act that men of common intelligence must necessarily guess at its meaning and differ as to its application."⁶⁵ The petitioners argue the Philippine Supreme

⁶² See, e.g., Petition for Writ of Certiorari and Prohibition at 7, *Southern Hemisphere Engagement Network Inc. v. Anti-Terrorism Council*, G.R. No. 178552 (July 16, 2007). (Phil.), available at http://www.icj.org/IMG/Phil_SC_Petition.pdf.

⁶³ *Id.*

⁶⁴ Accord Petition for Writ of Certiorari and Prohibition, *Bayan v. Gloria Macapagal-Arroyo*, (July 16, 2007). (Phil.), available at http://www.icj.org/IMG/Phil_petition.pdf; Petition for Writ of Certiorari and Prohibition, *Kilusang Mayo Uno v. Eduardo Ermita*, (July 2007). (Phil.), available at http://newsbreak.com.ph/index.php?option=com_remository&Itemid=88889273&func=startdown&id=111; Petition for Writ of Certiorari and Prohibition, *Karapatan v. Gloria Macapagal-Arroyo*, (Aug. 6, 2007). (Phil.) available at http://newsbreak.com.ph/index.php?option=com_remository&Itemid=88889273&func=showdown&id=113; Petition for Writ of Certiorari, *Integrated Bar of the Philippines v. Eduardo Ermita*, (Aug. 2007). (Phil.), available at http://newsbreak.com.ph/index.php?option=com_remository&Itemid=88889273&func=startdown&id=114.

⁶⁵ *Ermita-Malate Hotel and Motel Operators Assn., Inc. v. City Mayor of Manila*, G.R. No. L-24693, 20 SCRA 849. (July 31, 1967). (Phil.), available at http://www.chanrobles.com/scdecisions/jurisprudence1967/jul1967/gr_l-24693_1967.php (*Connally v. General Construction Company*, 269 U.S. 385, 391 (1926)).

Court should apply the void-for-vagueness doctrine to strike the HSA for two reasons. First, the petitioners argue the doctrine applies because the HSA restricts freedom of speech.⁶⁶ The second argument lobbies the Philippine Supreme Court to expand the void-for-vagueness doctrine's application to criminal statutes because it is the best test to determine statutory unconstitutional vagueness.⁶⁷

The petitioners find support in Philippine Supreme Court's dissents.⁶⁸ In the 2001 case of *Estrada v. Sandiganbayan*, Justice Kapunan argued in a dissent that a vagueness challenge to a penal statute should be allowed because an unconstitutionally vague penal statute involves a "deprivation of liberty, and even life, which inarguably, are rights as important as, if not more than, free speech."⁶⁹ In the 2004 case of *Romualdez v. Sandiganbayan*, Justice Tinga, also in a dissent, noted "'the void-for-vagueness doctrine' must not only apply to free-speech cases but also, if not with greater force, to penal statutes."⁷⁰ These dissents, however, are overshadowed by the majority opinions.

The likelihood is that the Philippine Supreme Court will follow its precedent and not apply the void-for-vagueness doctrine. The Court's case law currently restricts the void-for-vagueness doctrine to free-speech cases, and the HSA is not speech limiting legislation. The Philippine Supreme Court's most recent address of whether the void-for-vagueness doctrine applies to penal statutes was in the 2008 case of *Carlos Romualdez and Erlinda Romualdez, v. Commission on Elections and Dennis Garay*. Here, the Philippine Supreme Court refused to apply the void-for-vagueness doctrine to criminal statutes, reasoning that an overextension of the doctrine "would result in a mass acquittal of parties whose cases may not have even reached the courts."⁷¹ The Court explained, "[s]uch invalidation would constitute a departure from the usual requirement of 'actual case and controversy' and permit decisions to be made in a sterile abstract context

⁶⁶ Petition for Writ of Certiorari, *Integrated Bar of the Philippines v. Eduardo Ermita*, 15 (Aug. 2007). (Phil.), available at http://newsbreak.com.ph/index.php?option=com_remository&Itemid=88889273&func=startdown&id=114.

⁶⁷ See Petition for Writ of Certiorari and Prohibition, *Kilusang Mayo Uno v. Eduardo Ermita*, 30-31 (July 2007). (Phil.), available at http://newsbreak.com.ph/index.php?option=com_remository&Itemid=88889273&func=startdown&id=111.

⁶⁸ *Id.*

⁶⁹ *Joseph Estrada v. Sandiganbayan*, G.R. No. 148560 (S.C., Nov. 19, 2001). (Phil.) (Kapunan, J., dissenting), available at <http://sc.judiciary.gov.ph/jurisprudence/2001/nov2001/148560.htm>.

⁷⁰ *Alfredo Romualdez v. Sandiganbayan*, G.R. No. 152259 (S.C., July 29, 2004). (Phil.), available at http://www.lawphil.net/judjuris/juri2004/jul2004/gr_152259_2004.html.

⁷¹ *Carlos Romualdez and Erlinda Romualdez, v. Comm'n on Elections and Dennis Garay*, G.R. No. 167011 (S.C., Dec. 11, 2008). (Phil.), available at <http://sc.judiciary.gov.ph/jurisprudence/2008/december2008/167011.htm>.

having no factual concreteness.”⁷² Thus, unless the Court diverges from its precedent, it will not apply the void-for-vagueness doctrine to the HSA.

2. *The HSA Would Pass the Test Set Out Under the Void-For-Vagueness Doctrine*

Assuming the Philippine Supreme Court applies the void-for-vagueness doctrine, the HSA is nevertheless within constitutional limits. The void-for-vagueness doctrine makes the HSA unconstitutional only if it is vague “in all its possible applications.”⁷³ In the 2004 case of *Alfredo Romualdez v. Sandiganbayan*, the Philippine Supreme Court explained that an unconstitutionally vague law “lacks comprehensible standards that men of common intelligence must necessarily guess at its meaning and differ in its application.”⁷⁴ Four years later, in *Romulo Neri v. Senate Committee on Accountability of Public Officers and Investigations*, the Philippine Supreme Court provided that a law is void for vagueness when it fails to give “fair notice of the conduct to avoid, and it leaves law enforcers unbridled discretion in carrying out [the law’s] provisions.”⁷⁵ The HSA does not meet these criteria.

Contrary to the petitioners’ arguments, the HSA passes the void-for-vagueness test because it is not vague “in all its possible applications.”⁷⁶ The HSA defines an act of terrorism by enumerating a finite list of criminal acts that are already punishable in the Revised Penal Code, Presidential Decrees, or Republic Acts, and requires that the action create “a condition of widespread and extraordinary fear and panic among the populace, in order to coerce the government to give in to an unlawful demand.”⁷⁷ This definition permits a court to punish a violator so long as the violative act (*actus reus*) is one of the HSA’s enumerated punishable acts, the violator possessed the specific intent (*mens rea*) “to coerce the government to give in to an unlawful demand,” and there existed the attendant circumstances of

⁷² *Id.*

⁷³ *Randolf David v. Gloria Macapagal-Arroyo*, G.R. No. 171396 (S.C., Mar. 3, 2006). (Phil.), available at <http://sc.judiciary.gov.ph/jurisprudence/2006/may2006/G.R.%20No.%20171396.htm>.

⁷⁴ *Alfredo Romualdez v. Sandiganbayan*, G.R. No. 152259 (S.C., July 29, 2004). (Phil.), available at http://www.lawphil.net/judjuris/juri2004/jul2004/gr_152259_2004.html.

⁷⁵ *Romulo Neri v. Senate Comm. on Accountability of Public Officers and Investigations*, G.R. No. 180643 (S.C., Sept. 4, 2008). (Phil.), available at http://www.lawphil.net/judjuris/juri2008/sep2008/gr_180643_lq_2008.html.

⁷⁶ *Randolf David v. Pres. Gloria Macapagal-Arroyo*, G.R. No. 171396 (S.C., May 3, 2006). (Phil.), available at <http://sc.judiciary.gov.ph/jurisprudence/2006/may2006/G.R.%20No.%20171396.htm>.

⁷⁷ An Act to Secure the State and Protect Our People from Terrorism (“Human Security Act of 2007”), Rep. Act 9372, § 3 (Mar. 9, 2007) (Phil.), available at http://www.ops.gov.ph/records/ra_no9372.htm Human Security Act, Rep. Act 9372 § 3.

“widespread and extraordinary fear and panic among the populace.”⁷⁸ While not drawing a bright line that distinctly demarks which acts are punishable, the HSA requires the judiciary to determine when the requisite intent and attendant circumstances exist to make the violative act a punishable act of terrorism. This requirement dispels the petitioners’ challenged vagueness.

Using the plain meaning rule to interpret the HSA’s definition of a punishable terrorist act,⁷⁹ the words’ meanings do not seem confusing to “men of common intelligence” in all possible applications.⁸⁰ An ordinary reading suggests the HSA forbids certain acts aimed at creating “a state of danger, panic, fear, or chaos to the general public or segment thereof [done to coerce or intimidate] the government to do or refrain from doing an act.”⁸¹ While individual terms within the HSA’s definition are subject to interpretation—narrow or broad—the entire definition, when read as a whole, manifests comprehensible notice to an ordinary reader. The cumulative effect therefore does not deprive an ordinary reader of fair notice in every possible application. While the HSA is not void-for-vagueness because the terms are sufficiently defined, the Court may also examine the HSA to determine whether the HSA is so vague that the law cannot accomplish its purpose.

3. *The Prospect of Abuse Does Not Warrant Invalidation*

Apart from the void-for-vagueness test, the Philippine Supreme Court may also analyze whether the HSA’s definition of terrorism is so vague that it impedes the law’s purpose. The HSA also passes this inquiry. In the 2006 case of *Randolf David v. Pres. Gloria Macapagal-Arroyo*, the Philippine Supreme Court held “[t]he validity of a statute or ordinance is to be determined from its general purpose and its efficiency to accomplish the end desired.”⁸² The Court concluded “courts are not at liberty to declare statutes invalid although they may be abused in the manner of application.”⁸³ The HSA makes clear that its purpose is to “protect life, liberty, and property

⁷⁸ *Id.*

⁷⁹ *Republic of the Philippines v. Carlito Lacap*, G.R. No. 158253 (S.C., Mar. 2, 2007). (Phil.), available at <http://sc.judiciary.gov.ph/jurisprudence/2007/march2007/158253.htm>. (characterizing the plain meaning rule in statutory interpretation as: “if the statute is clear, plain, and free from ambiguity, it must be given its literal meaning and applied without interpretation”).

⁸⁰ *Carlos Romualdez, v. Comm’n on Elections and Dennis Garay*, G.R. No. 167011 (S.C., Dec. 11, 2008). (Phil.), available at <http://sc.judiciary.gov.ph/jurisprudence/2008/december2008/167011.htm>.

⁸¹ See PEREIRE, *supra* note 13, at 1.

⁸² *Randolf David v. Pres. Gloria Macapagal-Arroyo*, G.R. No. 171396 (S.C. May 3, 2006). (Phil.), available at <http://sc.judiciary.gov.ph/jurisprudence/2006/may2006/G.R.%20No.%20171396.htm>.

⁸³ *Id.*

from acts of terrorism.”⁸⁴ The HSA’s definition of terrorism accomplishes this purpose because it provides notice that courts can punish specific acts as crimes of terrorism if the violator possessed the necessary criminal intent, and the required attendant circumstances existed. Therefore, despite allegations that the Philippine government may be apt to abuse the HSA,⁸⁵ such propensity does not warrant invalidation. While the HSA is likely constitutional on its face, it may be challenged as unconstitutional when applied to a specific set of facts. The following section explores an as-applied challenge.

B. In an As-Applied Challenge, the HSA May Be Unconstitutionally Vague If Wrongly Applied

Absent a factual case in which the Philippine Supreme Court may determine the lawfulness of the HSA’s application, a case study is used here to test an as-applied challenge. This examination shows that the lawfulness of an as-applied challenge to the HSA is dependent on the facts of the situation. The test case is a recent Philippine criminal case.

The case of Edgar de la Cruz Candule began on March 21, 2008.⁸⁶ Police arrested Candule for illegal possession of a firearm.⁸⁷ Candule alleges police tortured him during his arrest and incarceration, which caused him to admit he owned the pistol seized and was a member of the Communist Party of the Philippines-New People’s Army (“CPP-NPA”).⁸⁸ On April 1, 2008, the prosecuting attorney amended Candule’s charge to include a violation of the HSA.⁸⁹ The prosecutor charged Candule with violating the HSA for:

[O]penly professing himself as a member of the New People’s Army (NPA) and advocating the overthrow of the

⁸⁴ An Act to Secure the State and Protect Our People from Terrorism (“Human Security Act”), Rep. Act 9372 § 2 (2007) (Phil).

⁸⁵ NERI JAVIER COLMENARES, OUTLINE OF CRITIQUE OF THE ANTI-TERRORISM LAW KNOWN AS THE HUMAN SECURITY ACT OF 2007 1 (2007), available at <http://www.bayan.ph/downloads/CODAL%20critique%20of%20the%20Anti-terrorism%20Law.pdf>.

⁸⁶ *Aeta Recounts Nightmarish Encounter with the Philippines’s Anti-Terrorism Law*, PINOY PRESS, Oct. 9, 2008, <http://www.pinoypress.net/2008/10/09/an-aeta-nightmarish-encounter-with-philippines-terrorism-law/> (last visited Oct. 25, 2009).

⁸⁷ *Id.*

⁸⁸ *Id.* The Communist Party of the Philippines-New People’s Army is an internationally recognized terrorist organization. NORIYUKI GATAGIRI, CENTER FOR DEFENSE INFORMATION, IN THE SPOTLIGHT: THE COMMUNIST PARTY OF THE PHILIPPINES (CPP) (2002), <http://www.cdi.org/terrorism/cpp.cfm> (last visited Oct. 3, 2009).

⁸⁹ See *Aeta Recounts Nightmarish Encounter with the Philippines’s Anti-Terrorism Law*, *supra* note 86.

legitimate government by force of arms using unlicensed firearms and ammunitions and by inciting others to commit acts of rebellion thereby sowing and creating a condition of widespread and extraordinary fear and panic among the populace in order to coerce the government to give in to their demands.⁹⁰

Applying the HSA's definition of terrorism to Candule's case, the HSA makes clear which acts it prohibits. It is well established in the "Philippines [that] no act is a crime unless it is made so by statute."⁹¹ The Philippine Supreme Court has required specificity in criminal statutes but has also given wide latitude to the Philippine Congress.

In adjudicating vagueness challenges, the Philippine Supreme Court has required a high threshold of unconstitutional vagueness for it to strike down a law. In the en banc case of *In re: Arsenio Gonzales v. Comm'n on Elections*, the Philippine Supreme Court held that a criminal law may be struck if it "suffers from [a] fatal constitutional infirmity of vagueness."⁹² *Arsenio Gonzales* shows the vagueness threshold to be a high bar; the Philippine Supreme Court determined that the law challenged was vague, but the Court nevertheless upheld the law because other Filipino laws defined the vague terms.⁹³ Also, in the 2000 case of *Sajul v. Sandiganbayan*, the Philippine Supreme Court reinforced its *Dans v. People* holding that a penal statute is constitutional as long as it answers "the basic query [of] '[w]hat is the violation.'"⁹⁴ The Court in *Sajul* provided, "[a]nything beyond this, the 'hows' and the 'whys,' are evidentiary matters, which the law cannot possibly disclose in view of the uniqueness of every case."⁹⁵

Applying the law to the HSA as applied in Candule's situation, the Philippine Supreme Court would have to determine whether the HSA punishes the actions of owning a firearm and associating with the CPP-NPA. The HSA is clear on this point. The HSA does punish unlawful possession

⁹⁰ *Id.*

⁹¹ Norma Dizon-Pamintuan v. People of the Philippines, G.R. No. 111426, (S.C. July 11, 1994). (Phil.) (citing *United States v. Luling*, 34 Phil. 725, 728 (1916)), available at http://www.lawphil.net/judjuris/juri1994/jul1994/gr_111426_1994.html.

⁹² *In re: Arsenio Gonzales v. Comm'n on Elections*, G.R. No. L-27833 (S.C. Apr. 18, 1969). (Phil.), available at http://www.lawphil.net/judjuris/juri1969/apr1969/gr_l-27833_1969.html.

⁹³ *Id.*

⁹⁴ See RODRIGUEZ, *supra* note 60, at 243 (citing *Sajul v. Sandiganbayan*, G.R. No. 135294 (S.C. Nov. 20, 2000). (Phil.)).

⁹⁵ *Id.*

of a firearm, but only when the act accompanies the required attendant circumstances, and the perpetrator possessed the required specific intent.⁹⁶

The HSA does not prohibit owning a firearm or associating with the CPP-NPA. The evidence does not clearly support the charge that Candule used the pistol to create “a condition of widespread and extraordinary fear and panic among the populace.”⁹⁷ Any vagueness contained in differing interpretations of the HSA’s wording, “widespread and extraordinary fear and panic among the populace,”⁹⁸ seem evidentiary—a matter of the “hows” and “whys” rather than the “whats.”⁹⁹

Additionally, there is no evidence that Candule possessed the required specific criminal intent. Candule’s membership in the CPP-NPA does not suffice to prove that while possessing the firearm he intended “to coerce the government to give in to an unlawful demand.”¹⁰⁰ The “basic query [of] ‘[w]hat is the violation’”¹⁰¹ is therefore clear: the HSA is not prohibitive of Candule’s actions because his possession of the firearm did not accompany the requisite attendant circumstances. Other permeations of the facts, however, may substantiate that Candule did possess the required specific intent. Therefore, the constitutionality of the HSA in an as-applied challenge hinges on the facts of the case. Nevertheless, indicia of definitional vagueness in the HSA do not frustrate the law’s purpose. Because Philippine domestic law incorporates international law, the following section analyzes the HSA’s definitional vagueness against international standards.

C. *The HSA’s Definitional Vagueness Does Not Unconstitutionally Violate International Law*

The Philippine Supreme Court may also conduct an analysis of the HSA in light of international law as integrated by the Philippine Constitution.¹⁰² Article II of the Constitution states the Philippines “adopts the generally accepted principles of international law as part of the law of

⁹⁶ An Act to Secure the State and Protect Our People from Terrorism (“Human Security Act”), Rep. Act 9372 § 3 (2007) (Phil.) (referencing in part Presidential Decree No. 1866, as amended (Decree Codifying the Laws on Illegal and Unlawful Possession, Manufacture, Dealing in, Acquisition or Disposition of Firearms, Ammunitions or Explosives)).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ See RODRIGUEZ, *supra* note 60, at 243 (citing Sajul v. Sandiganbayan, G.R. No. 135294 (S.C. Nov. 20, 2000). (Phil.)).

¹⁰⁰ An Act to Secure the State and Protect Our People from Terrorism (“Human Security Act”), Rep. Act 9372 § 3 (2007) (Phil.).

¹⁰¹ See RODRIGUEZ, *supra* note 60, at 243 (citing Sajul v. Sandiganbayan, G.R. No. 135294 (S.C. Nov. 20, 2000). (Phil.)).

¹⁰² CONST. (1987), Art. II § 2, (Phil), available at <http://www.chanrobles.com/article2.htm>.

the land and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations.”¹⁰³ In the 1949 Philippine Supreme Court case of *Kuroda v. Jalandoni*, Chief Justice Moran interpreted Article II to incorporate into Philippine law the Hague Convention, the Geneva Conventions, and the “significant precedents of international jurisprudence.”¹⁰⁴ The analysis here examines the international legal disagreement on the definition of terrorism, evaluates the HSA with regard to the most widely accepted international conventions, and finds that the HSA comports.

International law lacks a consensual definition of which acts comprehensively constitute acts of terrorism.¹⁰⁵ The fundamental impediment to defining terrorism is a general disagreement on whether acts related to rebellions or insurgencies are acts of terrorism.¹⁰⁶ This impasse is apparent in the October 2008 report of the Chairman of the Working Group on Terrorism and in the March 2008 conclusion of the U.N. General Assembly's Ad Hoc Committee on Measures to Eliminate International Terrorism.¹⁰⁷ Both groups concluded without agreement.¹⁰⁸ The definitional disagreement on whether acts of terrorism include acts related to rebellions or insurgencies manifests principally between the Arab and the Western world's uncompromising positions. The Arab Convention for the Suppression of Terrorism and the Convention of the Organization of the Islamic Conference on Combating International Terrorism believes the definition of terrorism does not include acts related to struggles for liberation and self-determination.¹⁰⁹ Contrarily, Western countries oppose absolute exclusion and believe acts of terrorism should encompass greater inclusivity.¹¹⁰

¹⁰³ CONST. (1987), Art. II § 2, (Phil.), available at <http://www.chanrobles.com/article2.htm>.

¹⁰⁴ *Kuroda v. Jalandoni*, G.R. No. L-2662, (S.C. Mar. 26, 1949). (Phil.), available at http://www.lawphil.net/judjuris/juri1949/mar1949/gr_l-2662_1949.html.

¹⁰⁵ ROBERT P. BARNIDGE, JR., NON-STATE ACTORS AND TERRORISM, APPLYING THE LAW OF STATE RESPONSIBILITY AND THE DUE DILIGENCE PRINCIPLE 50 (2007).

¹⁰⁶ *There Is No U.N. Definition of Terrorism*, STRAIGHT U.N. FACTS (Eye on the UN/Project of the Hudson Institute New York and the Touro College Institute for Human Rights, New York, N.Y.), 2005, <http://www.eyeontheun.org/facts.asp?l=1&p=61> (last visited Oct. 3, 2009).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Tarjuman Ul Quran, *Islam and the West: Who is the Terrorist?* (Khuram Murad trans., 1995), THE MODERN RELIGION, http://www.themodernreligion.com/terror/terrorism_who.htm (last visited Nov. 22, 2009).

The USA PATRIOT Act's definition of terrorism exemplifies a broad inclusion of most violent acts.¹¹¹ Under the USA PATRIOT Act, a domestic terrorist is any person who engages within the territorial jurisdiction of the U.S. in illegal "acts dangerous to human life" with the purpose to "(i) intimidate or coerce a civilian population; (ii) influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping."¹¹² Broadly, the USA PATRIOT Act includes as acts of terrorism all illegal "acts dangerous to human life" performed to influence the U.S. government.¹¹³

Despite the stalemate between the East and the West, the U.N. has promulgated some guidance. A 2004 U.N. report suggested the definition of terrorism should include as elements: the use of force against civilians; the use of force to intimidate civilians; or the use of force "to compel a [g]overnment or an international organization to do or abstain from doing an act."¹¹⁴ This report also stated that such a definition should include provisions from the Geneva Conventions and the U.N. Security Council Resolution 1566.¹¹⁵ The Geneva Conventions explicitly prohibit acts or threats of violence aimed at spreading terror among a civilian population.¹¹⁶ The U.N. Security Resolution 1566 explicitly provides that the purpose of a terrorist act is "to provoke a state of terror in the general public or in a group of persons or particular persons, [or to] intimidate a population or compel a government or an international organization to do or to abstain from doing any act."¹¹⁷ Additionally, a 2005 report by the U.N. Secretary-General Kofi Annan also provided guidance. The Secretary-General's report "proposed to define terrorism as 'any action . . . intended to cause death or serious bodily harm to civilians or non-combatants with the purpose of intimidating a

¹¹¹ See *How the USA PATRIOT Act Redefines "Domestic Terrorism,"* ACLU, Dec. 6, 2002, <http://www.aclu.org/natsec/emergpowers/14444leg20021206.html> (last visited Oct. 3, 2009).

¹¹² *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001*, Pub. L. No. 107-56, 115 Stat. 376, § 802 (codified as amended in section 18 U.S.C. 2331(5)) (2001) (USA PATRIOT Act).

¹¹³ See *How the USA PATRIOT Act Redefines "Domestic Terrorism,"* *supra* note 111.

¹¹⁴ U.N. Gen. Assem. Rep., *Follow-up to the Outcome of the Millennium Summit*, ¶ 164, U.N. Doc. A/59/565 (Dec. 2, 2004), available at <http://www.un.org/secureworld/report.pdf> [hereinafter U.N. Gen. Assem. Rep., Millennium Summit].

¹¹⁵ *Id.*

¹¹⁶ See Article 13 §2 of the United Nations Protocol Relating to the Protection of Victims of Non-International Armed Conflicts: Geneva Conventions, Aug. 12, 1949, [1977], available at <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/d67c3971bcff1c10c125641e0052b545> [hereinafter U.N. Non-International Armed Conflicts Protocol, art 13 §2].

¹¹⁷ S.C. Res. 1566, 2, U.N. Doc. S/RES/1566 (Oct. 8, 2004), available at <http://www.cfr.org/content/publications/attachments/SC1566.pdf>.

population or compelling a government or an international organization to do or abstain from doing any act.”¹¹⁸

The HSA's definition of a punishable terrorist act complies with these guidelines. The HSA's required attendant circumstances of “sowing and creating a condition of widespread and extraordinary fear and panic among the populace” and its mens rea requirement “to coerce the government to give in to an unlawful demand”¹¹⁹ conform to the 2004 U.N. report, which suggests the definition of terrorism should prohibit the use of force against civilians, the use of force to intimidate civilians, or the use of force “to compel a [g]overnment . . . to do or abstain from doing an act.”¹²⁰ The HSA's definition also conforms with the Geneva Conventions because the law prohibits acts or threats of violence aimed at spreading terror among the Philippine population;¹²¹ comports with the U.N. Security Resolution 1566 because the law prohibits coercion of the Philippine government;¹²² and is congruent with the Secretary General Kofi Annan's 2005 proposed definition.¹²³ Therefore, the HSA's definition of a terrorist act satisfies the widely accepted provisions of international law. The following section examines the HSA's substantive measures.

IV. THE HSA SURVIVES SUBSTANTIVE CHALLENGES

The second most prominent complaint against the HSA is it unconstitutionally infringes on individual rights.¹²⁴ This section explores the constitutionality of the HSA's detention and search and seizure provisions. The petitioners argue the authority granted to law enforcers in the HSA to detain suspected terrorists, limit confined individuals' access to cell phones and email, and to search and seize suspected terrorists' communications and

¹¹⁸ Claire Applegarth, *UN Adopts Nuclear Terrorism Convention; Treaty Seven Years in the Making*, ARMS CONTROL ASSOCIATION, May 2005, http://www.armscontrol.org/act/2005_05/NuclearTerrorismConvention (last visited Oct. 4, 2009).

¹¹⁹ An Act to Secure the State and Protect Our People from Terrorism (“Human Security Act”), Rep. Act 9372 § 3 (2007) (Phil.).

¹²⁰ See U.N. Gen. Assem. Rep., Millennium Summit, *supra* note 114.

¹²¹ See U.N. Non-International Armed Conflicts Protocol, art 13 §2, *supra* note 116.

¹²² See S.C. Res. 1566, *supra* note 117.

¹²³ See Applegarth, *supra* note 118.

¹²⁴ See Petition for Writ of Certiorari, *Bayan v. Gloria Macapagal-Arroyo*, (July 17, 2007). (Phil.), available at http://www.icj.org/IMG/Phil_petition.pdf; Petition for Writ of Certiorari, *Kilusang Mayo Uno v. Eduardo Ermita*, (July 2007). (Phil.), available at http://newsbreak.com.ph/index.php?option=com_remository&Itemid=88889273&func=startdown&id=111; Petition for Writ of Certiorari, *Integrated Bar of the Philippines v. Eduardo Ermita*, (Aug. 2007). (Phil.), available at http://newsbreak.com.ph/index.php?option=com_remository&Itemid=88889273&func=startdown&id=114.

financial property unjustly abridges constitutional liberties. Part A analyzes the HSA against the Philippine jurisprudence's three-part test of due process. Part B then examines the legality of the HSA's measures in light of international law as interpreted by the Philippine Supreme Court.

A. *For an Invasive Statute to Be Constitutional, It Must Pass the Due Process Three-Prong Test*

The chief complaint is the HSA violates the constitutional right of due process.¹²⁵ The due process clause of the Philippine Constitution protects against governmental deprivation of "life, liberty, or property without due process of law."¹²⁶ A noted authority on Philippine constitutional law, J. Isagani Cruz, wrote, "[d]ue process is a guaranty against any arbitrariness [from] the government . . . [and] the law [that] unreasonably deprives a person of his life, liberty, or his property."¹²⁷ To determine whether a law unconstitutionally curtails due process, the Philippine Supreme Court adopted a three-part test: 1) the problem the law cures must affect the "interests of the public generally"; 2) "the means adopted must be reasonably necessary for the accomplishment of the [law's] purpose and not unduly oppressive"; and 3) "[a] reasonable relation must exist between the purposes of the police measure and the means employed for [the law's] accomplishment."¹²⁸

I. *As Terrorism Afflicts All Filipinos, the HSA Affects the Interests of the General Public*

In punishing acts of terrorism, the HSA succeeds in the first prong of the due process test: the problem addressed affects the general interests of the public. Terrorism is a malignancy that afflicts the Filipino society as a whole.¹²⁹ Terrorist attacks are not symptomatic of private interests, but comprise an indiscriminate plague that has included murder in Filipino markets, on public-transportation, and in other public meeting places.¹³⁰

¹²⁵ See COLMENARES, *supra* note 85, at 4.

¹²⁶ Petition for Writ of Certiorari, *Kilusang Mayo Uno v. Eduardo Ermita*, 23 (July 2007). (Phil.), available at http://newsbreak.com.ph/index.php?option=com_remository&Itemid=88889273&func=startdown&id=111.

¹²⁷ *Id.*

¹²⁸ *City of Manila v. Perfecto Laguio, Jr.*, G.R. No. 118127, (S.C. Apr. 12, 2005). (Phil.), available at http://www.lawphil.net/judjuris/juri2005/apr2005/gr_118127_2005.html.

¹²⁹ See Conde, *supra* note 8.

¹³⁰ *Id.*

Reinforcing this conclusion, section two of the HSA provides that terrorism is “a crime against [all] the Filipino people.”¹³¹ Thus, because the HSA is a law passed to curb a societal ill, it passes the first criterion of the due process test.

2. *The HSA's Preventative Detention, House Arrest, and Search and Seizure Measures Are Reasonably Necessary and Not Overly Oppressive*

The HSA also passes the second part of the due process test: its means are reasonably necessary and not overly oppressive. The petitioners find fault with the HSA's provisions that authorize preventative detention; house arrest; and search and seizure. Subpart a) analyzes whether the HSA's preventative detention provisions are reasonably necessary and not overly oppressive; Subpart b) examines the HSA's house arrest provisions; Subpart c) tests the HSA's search and seizure measures; and Subpart d) looks at the HSA's built-in punishments and protections that curb potential abuse.

a. *Preventative Detention*

First, the petitioners contend the HSA's authorization for law enforcers to present a terror suspect to a judge for formal charging three days after arrest is unconstitutional.¹³² To stop a terrorist attack, however, law enforcers may have to travel to remote locations on distant islands, and transportation delays may slow the delivery of a suspect to judicial authorities for formal charging.¹³³ Because of this reality, the HSA's authorization of a three-day detention before presentment for charging seems reasonably necessary.

The HSA's delayed presentment does not seem overly oppressive. First, the narrowness of codifying an express limit of three days explicitly cabins the duration of oppression. Second, the HSA requires law enforcers to present a person suspected of the crime of terrorism to a judge in the jurisdiction where the arrest occurred before subjecting that person to

¹³¹ An Act to Secure the State and Protect Our People from Terrorism (“Human Security Act”), Rep. Act 9372 § 2 (2007) (Phil.).

¹³² See *Petition for Writ of Certiorari, Integrated Bar of the Philippines v. Eduardo Ermita*, 39-40 (Aug. 2007). (Phil.), available at http://newsbreak.com.ph/index.php?option=com_remository&Itemid=88889273&func=startdown&id=114.

¹³³ “The Philippines is an archipelago of 7,107 islands. It stretches from the south of China to the northern tip of Borneo.” Government of the Philippines, *Philippines: General Information* (2007), <http://web.archive.org/web/2007102221129/http://www.gov.ph/aboutphil/general.asp> (last visited Oct. 5, 2009).

custodial confinement.¹³⁴ Third, the HSA explicitly requires that this judge determine whether the law enforcers misused their power and whether national security concerns merit custodial confinement.¹³⁵ Cumulatively, these conditions keep the harshness of the HSA's detention measure within reasonable limits.

b. House Arrest

Second, the petitioners argue the HSA's authorization for house arrest and restricted communication, despite little evidence of guilt, is unconstitutional.¹³⁶ After a prosecutor formally charges a suspect with the crime of terrorism, the HSA permits a court to confine the defendant to house arrest and to restrict his or her access to electronic communications.¹³⁷ Because many will die if a terrorist attack is successful and the recipients of electronic communications are difficult to vet, confining an accused to his or her home without access to electronic communications while the case is pending seems reasonably necessary to stop a suspected attack. The existence of strong or weak evidence does not detract from the criticality of this measure.

The narrowness of the HSA's authorization for house arrest with restricted communication also limits undue oppression. While the HSA allows for a lower burden of proof to justify the implementation of this measure, the anti-terror law requires judicial determination to execute the procedure.¹³⁸ This judicial oversight and required authorization serve to limit undue oppression from political bias. Furthermore, the HSA demands that restrictions cease "upon the acquittal of the accused or of the dismissal of the case."¹³⁹ This durational cap, bounded by standard trial procedures, places a firm ceiling on the scope of oppression. Therefore, the HSA's provisions that authorize house arrest with restricted access to electronic communications seem reasonably necessary and not overly oppressive.

¹³⁴ An Act to Secure the State and Protect Our People from Terrorism ("Human Security Act"), Rep. Act 9372 § 18 (2007) (Phil.).

¹³⁵ *Id.*

¹³⁶ See Petition for Writ of Certiorari, *Integrated Bar of the Philippines v. Eduardo Ermita*, 39-40 (Aug. 2007). (Phil.), *available at* http://newsbreak.com.ph/index.php?option=com_remository&Itemid=88889273&func=startdown&id=114.

¹³⁷ An Act to Secure the State and Protect Our People from Terrorism ("Human Security Act"), Rep. Act 9372 § 26 (2007) (Phil.).

¹³⁸ *See id.*

¹³⁹ *See id.*

c. *Search and Seizure*

Third, the petitioners assert the HSA unconstitutionally permits arbitrariness and undue oppression because it authorizes law enforcers to conduct wiretaps and to examine or seize an individual's financial assets.¹⁴⁰ The HSA specifically requires a court of appeals to approve a search and seizure of a suspected terrorist's communications and monetary assets.¹⁴¹ This process is distinguishable from that in Executive Order 626-A, which was found unconstitutional in *Ynot v. Intermediate Court of Appeals*.¹⁴²

Ynot v. Intermediate Court of Appeals involved police confiscation of the petitioner's carabaos¹⁴³ because the petitioner violated Executive Order 626-A.¹⁴⁴ Executive Order 626-A prohibited the transport of carabaos between provinces.¹⁴⁵ The Philippine Supreme Court concluded the application of the law was overly oppressive because Executive Order 626-A allowed for "violation[s] [to] have been pronounced not by the police only but by a court of justice."¹⁴⁶ The Court held "[d]ue process [was] violated because the owner of the property confiscated [was] denied the right to be heard in his defense and [was] immediately condemned and punished."¹⁴⁷

The HSA is distinguishable from Executive Order 626-A because the HSA does not allow police autonomously to condemn a violator. The HSA demands that an appellate court judge determine the reasonableness of a search or seizure before police execution.¹⁴⁸ Therefore, because the HSA relies on the independent and impartial discretion of a senior judicial officer to ensure that invasive procedures are not overly oppressive before police execution, the HSA, unlike Executive Order 626-A, is within constitutional limits.

¹⁴⁰ DR. GIOVANNI TAPANG, SAMAHAN NG NAGTATAGUYOD NG AGHAMAT TEKNOLOHIYA PARA SA SAMBAYAN, *INTRUDING INTO EVERYONE'S PRIVACY: THE HUMAN SECURITY ACT USHERS IN BIG BROTHER* (2007), available at <http://www.bayan.ph/downloads/Intruding%20into%20Everyone%27s%20Privacy%20by%20Dr.%20Tapang.pdf>.

¹⁴¹ An Act to Secure the State and Protect Our People from Terrorism ("Human Security Act"), Rep. Act 9372 §§ 8, 27 (2007) (Phil.).

¹⁴² *Restituto Ynot v. Intermediate Appellate Court*, G.R. No. 74457, (S.C. Mar. 20, 1987). (Phil.), available at http://www.lawphil.net/judjuris/juri1987/mar1987/gr_74457_1987.html.

¹⁴³ A carabao is a water buffalo. RANDOM HOUSE UNABRIDGED DICTIONARY 311 (2d ed. 1993).

¹⁴⁴ *Restituto Ynot v. Intermediate Appellate Court*, G.R. No. 74457, (S.C. Mar. 20, 1987). (Phil.), available at http://www.lawphil.net/judjuris/juri1987/mar1987/gr_74457_1987.html.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ An Act to Secure the State and Protect Our People from Terrorism ("Human Security Act"), Rep. Act 9372 §§ 8 & 27 (2007) (Phil.).

d. *The HSA Intrinsicly Protects Against Undue Oppression*

The HSA also provides explicit duties for and punishments on government officials, which limit the law from being used in an overly oppressive manner. Before enactment of the HSA, the military was the government's main tool to eradicate terrorism.¹⁴⁹ Unlike the military, which had few checks on its decision-making outside the chain-of-command, the HSA empowers police through a limited grant of power. Thirty of the HSA's sixty-two provisions limit police discretion, which in turn limits the potential for misuse of power and undue oppression.¹⁵⁰ The legislative history provides that the rationale supporting the limited grant of power was "to discourage [government] accusations . . . [and to] help compel the authorities to make certain that . . . [o]nly charges . . . backed [with] solid evidence [would] be used as [the] basis for the detention of persons accused of terrorism."¹⁵¹

The HSA's specific punishments and protections include, *inter alia*, a monetary sanction "of P500,000 for every day in detention of a person falsely accused of terrorism;"¹⁵² a ten- to twelve-year imprisonment sentence on law enforcers who fail to notify judicial authorities as prescribed;¹⁵³ and protected privileged communications between "lawyers and clients, doctors and patients, journalists and their sources, and confidential business correspondence."¹⁵⁴ The HSA also created a legal grievance committee to receive and evaluate complaints against law enforcers;¹⁵⁵ created a congressional oversight committee to review the law one year after its implementation;¹⁵⁶ and delegated authority to the Commission on Human Rights to give the highest priority to investigating and prosecuting civil and political rights violations.¹⁵⁷ Therefore, while the HSA grants expanded authority to law enforcers in the areas of preventative detention, house arrest, and search and seizure, the HSA forestalls potential undue oppression by explicitly providing significant protections to suspected lawbreakers and

¹⁴⁹ See Bhattacharji, *supra* note 35.

¹⁵⁰ See PIMENTEL, *supra* note 49, at 39.

¹⁵¹ *Id.* at 216.

¹⁵² Press Release, Philippine Information Agency, Gov't to Implement Human Security Act With Respect To Civil Liberties, Constitution (July 11, 2007), available at <http://pia.gov.ph/?m=12&r=NCR&y=07&mo=04&fi=p070711.htm&no=14>.

¹⁵³ An Act to Secure the State and Protect Our People from Terrorism ("Human Security Act"), Rep. Act 9372 § 18 (2007) (Phil.).

¹⁵⁴ *Id.* § 7.

¹⁵⁵ *Id.* § 56.

¹⁵⁶ *Id.* § 59.

¹⁵⁷ *Id.* § 55.

witnesses from governmental misuse of power.¹⁵⁸ The following section examines prong three of the due process test.

3. *A Reasonable Relation Exists Between the Purposes of the HSA and the Means Adopted*

The HSA also passes the last prong of the due process test: The HSA's preventative detention, house arrest, and search and seizure measures are reasonably related to the law's purpose. Subpart a) analyzes whether the HSA's preventative detention provisions are reasonably related to the purpose of stopping terrorism; Subpart b) examines the HSA's house arrest provisions; and Subpart c) looks at the HSA's search and seizure measures.

a. *Preventative Detention*

First, preventative detention of a terror suspect is not a prima facie unconstitutional deprivation of an individual's right to travel. The Philippine Constitution provides that "the right to travel [shall not] be impaired except in the interest of national security, public safety, or public health."¹⁵⁹ Stopping a terrorist attack falls under this ambit. The Revised Penal Code, since its inception in 1930, has also authorized preventative detention.¹⁶⁰ With increase in the severity of the crime and punishment, the Revised Penal Code has authorized increasing preventative detention times.¹⁶¹ As a terrorist act is a crime of immense severity, the history of preventative detention in Revised Penal Code shows a longstanding practice that supports the reasonableness of the HSA's three-day preventative detention.¹⁶²

b. *House Arrest*

Second, the HSA permits a court to confine a suspected terrorist to house arrest without access to electronic communications.¹⁶³ It is widely

¹⁵⁸ See PEREIRE, *supra* note 13, at 2.

¹⁵⁹ CONST. (1987), Art. III § 6 (Phil), available at <http://www.chanrobles.com/article3.htm>.

¹⁶⁰ See An Act Revising the Penal Code and Other Penal Laws, Act No. 3815, Art. 125 (1930), available at <http://www.chanrobles.com/revisedpenalcodeofthephilippinesbook2.htm> (permitting preventive suspension for up to twelve hours for crimes punishable by light penalties, eighteen hours for crimes punishable by correctional penalties, and thirty-six hours for crimes punishable by afflictive or capital penalties).

¹⁶¹ *Id.*

¹⁶² See Ricardo R. Blancaflor, *Human Security Act, Anti-Terror Council Rebutts FLAG Claims*, INQUIRER (Manilla), July 27, 2007, available at http://opinion.inquirer.net/inquireropinion/talkofthetown/view_article.php?article_id=79271.

¹⁶³ An Act to Secure the State and Protect Our People from Terrorism ("Human Security Act"), Rep. Act 9372 § 26 (2007) (Phil.).

known that electronic communications may be used to trigger the detonation of an explosive device.¹⁶⁴ In November 2007, four people, including two Philippine congressmen, died from a bomb packed with nails that was detonated from afar by a cell phone.¹⁶⁵ Therefore, limiting a suspected terrorist's ability to detonate a blast seems reasonably related to stopping a suspected attack.

c. *Search and Seizure*

Sources of domestic and international law manifest the reasonableness of the relation between the HSA's search and seizure authorizations and fighting terrorism. The HSA permits law enforcers who have court authorization to search and seize a suspected terrorist's financial assets.¹⁶⁶ Other sources of Philippine and international law that permit similar invasive measures illustrate that a limited and court authorized intrusion into a suspected terrorist's financial matters is reasonably related to stopping a terrorist attack.¹⁶⁷ For example, the Philippine Anti-Money Laundering Act of 2001 ("AMLA") allows government officials to examine and freeze bank deposits to prevent the crime of money laundering, a known source of financing for terrorist activities.¹⁶⁸ Also, the Association of Southeast Asian Nations ("ASEAN") Regional Forum, which manages collective Southeast Asian regional anti-terrorism measures, called upon member countries¹⁶⁹ to adhere to its Statement on Measures Against Terrorist Financing.¹⁷⁰ This ASEAN dictate required member countries to search and seize terrorists' financial assets as a means to effectively fight terrorism.¹⁷¹ Additionally, the Financial Action Task Force, an inter-governmental organization, "recognized as the international standard setter for anti-money laundering (AML) efforts," finds that money laundering is fundamentally linked to

¹⁶⁴ See Blancaflor, *supra* note 162.

¹⁶⁵ Nancy Reyes, *Philippine Bomb Was IED Detonated By Cell Phone*, ALL NEWS, Nov. 14, 2007, <http://www.bloggernews.net/111690> (last visited Sept. 20, 2009).

¹⁶⁶ An Act to Secure the State and Protect Our People from Terrorism ("Human Security Act"), Rep. Act 9372 §§ 27-29 (2007) (Phil.).

¹⁶⁷ See Blancaflor, *supra* note 162.

¹⁶⁸ *Id.*

¹⁶⁹ The Philippines is a member of ASEAN. Association of Southeast Asian Nations homepage for the Philippines, <http://www.aseansec.org/4746.htm> (last visited Oct. 3, 2009).

¹⁷⁰ H. E. Mr. HOR Namhong, Chairman, Ass'n of Southeast Asian Nations, Statement at Tenth Meeting of ASEAN Regional Forum (June 18, 2003), available at <http://www.aseansec.org/14845.htm>.

¹⁷¹ Association of Southeast Asian Nations, *ARF Statement on Measures Against Terrorist Financing* (July 30, 2002), available at <http://www.aseansec.org/12658.htm> (requiring the freezing of terrorists' financial assets).

funding terrorists.¹⁷² Accordingly, it is reasonable that the HSA permits law enforcers, after a judge has weighed the intrusion against the suspect's right of privacy and granted authorization, to identify the character of financial assets and to seize these assets if they would likely support terrorist activities.

The HSA also authorizes wiretaps.¹⁷³ The Philippine Republic Act Number 4200, also known as the Anti-Wire Tapping Law ("AWTL"), supports the reasonableness of the HSA's authorization for law enforcers to conduct wiretaps on suspected terrorists.¹⁷⁴ Since 1965, the AWTL has permitted Philippine governmental authorities, when authorized by a court order, to wiretap a suspect in order to stop a crime "against national security."¹⁷⁵ The longevity of this practice illustrates its reasonable relation to stopping a crime against national security. Likewise, the HSA's near identical authorization is reasonably related to stopping a terrorist attack—a crime against national security. Next, the HSA's substantive police measures are analyzed against the Philippine Supreme Court's interpretation of international law.

B. The Philippine Supreme Court Is Likely to Find the HSA's Measures Lawful Under International Law

Prominent skeptical voices such as Amnesty International and the International Commission of Jurists ("ICJ") voiced concern that the HSA may violate the International Covenant on Civil Political Rights ("ICCPR").¹⁷⁶ The ICCPR, a multilateral treaty that the Philippines ratified

¹⁷² PAUL ALLEN SCHOTT, *Money Laundering and Terrorist Financing: Definitions and Explanations*, in REFERENCE GUIDE TO ANTI-MONEY LAUNDERING AND COMBATING THE FINANCING OF TERRORISM I-3, I-5 (2nd ed. 2006).

¹⁷³ An Act to Secure the State and Protect Our People from Terrorism ("Human Security Act"), Rep. Act 9372 § 7 (2007) (Phil.).

¹⁷⁴ See Blancaflor, *supra* note 162.

¹⁷⁵ An Act to Prohibit and Penalize Wire Tapping and Other Related Violations of the Privacy of Communication, and For Other Purposes, Rep. Act No. 4200, Rep. Act No. 1965 § 3 (June 19, 1965) (Phil.), available at http://www.lawphil.net/statutes/repacts/ra1965/ra_4200_1965.html.

¹⁷⁶ Letter from Gerald Staberock, Dir. Global Sec. and Rule of Law Programme, to Philippine Letter to Philippine Senate from the International Commission of Jurists (Nov. 3, 2006), available at http://www.bayan.ph/downloads/campaign/campaign%20international/sr_nov6_06_ICJ%20letter%20to%20the%20senate.htm; see also Amnesty International, *Philippines: Submission to the UN Universal Periodic Review*, AI Index: ASA 35/006/2007, (Nov. 28, 2007), available at <http://asiapacific.amnesty.org/library/Index/ENGASA350062007> (expressing concern for the HSA permitting abuse of power).

in 1986,¹⁷⁷ memorializes the protection of fundamental human rights.¹⁷⁸ In a letter to the Philippine Senate, the Director of the ICJ's Global Security and Rule of Law Programme posited that the HSA's surveillance provisions may not contain enough safeguards to protect against violation of the ICCPR's Article 17.¹⁷⁹ Article 17 protects against arbitrary privacy intrusions by providing, "[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, or correspondence, nor to unlawful attacks on his honour and reputation."¹⁸⁰ Because Article II of the Philippine Constitution states the Philippines "adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations,"¹⁸¹ the Philippine Supreme Court may conduct an analysis of the HSA with regard to international law.¹⁸² Based on precedential Philippine case law related to the ICCPR, the Philippine Supreme Court is likely to find the HSA in good standing. This section first explains the legal construct behind analyzing Philippine Supreme Court case law to understand international law, then examines two precedential Philippine cases, and finds the HSA lawful.

The theory of international legal pluralism provides the construct to examine how the Philippine Supreme Court would most likely analyze the HSA against international law. A pluralist understanding of international law helps to explain the phenomenon that various supreme courts may interpret the same concept differently.¹⁸³ A pluralistic view of international law recognizes that just as "the simplest legal regimes are constituted by a plurality of decision-making institutions,"¹⁸⁴ the global stage is likewise comprised of various countries that interpret legal concepts differently. The pluralist viewpoint requires distinction between the law as applied in a sovereign land by the sovereign's courts and a "single global law that

¹⁷⁷ The Philippines is a member of the ICCPR. See Universal Human Rights Index of United Nations Documents, *Philippines*, <http://www.universalhumanrightsindex.org/hrsearch/search.do?accessType=country®ionCountry=country&orderBy=category&countries=128&lang=en> (last visited Oct. 3, 2009).

¹⁷⁸ See International Covenant on Civil and Political Rights, art. 19, Dec. 16, 1966, 999 U.N.T.S. 171 (1966), available at <http://www2.ohchr.org/English/law/ccpr.htm>.

¹⁷⁹ See Staberock, *supra* note 176, § 5.

¹⁸⁰ See International Covenant on Civil and Political Rights, *supra* note 178, art. 17.

¹⁸¹ CONST. (1987), Art. III § 2 (Phil.), available at <http://www.chanrobles.com/philsupremelaw2.html>.

¹⁸² CONST. (1987), Art. VIII § 5(2) (Phil.), available at <http://www.chanrobles.com/philsupremelaw2.html>.

¹⁸³ Jacques Vanderlinden, *What Kind of Law Making in a Global World? The Case of Africa*, 67 LA. L. REV. 1043, 1058 (2007).

¹⁸⁴ Roderick A. Macdonald, *Metaphors of Multiplicity: Civil Society, Regimes and Legal Pluralism*, 15 ARIZ. J. INT'L & COMP. L. 69, 77 (1998).

‘embraces the totality of a group of items.’¹⁸⁵ In light of this difference, this section analyzes the HSA with regard to the Philippine Supreme Court’s interpretation of the ICCPR.

Two Philippine Supreme Court cases suggest the Philippine Supreme Court would interpret the ICCPR to support a subordination of individual liberties for reasons of national security.¹⁸⁶ In both cases, petitioners asked the Philippine Supreme Court to strike laws based on alleged transgression of international law. The first case, *Ferdinand E. Marcos v. Raul Manglapus*, involved a law that restricted personal travel.¹⁸⁷ The Philippine Supreme Court held that while Article 12 of the ICCPR protects the “right to liberty of movement and freedom to choose his residence,” such rights may be restricted by laws that “are necessary to protect national security, public order, public health or morals . . .” or the separate rights and freedom of others.¹⁸⁸ The second case, *Bayan v. Eduardo Ermita*, was a challenge to a statute that restricted individuals’ right to assemble.¹⁸⁹ In *Ermita*, the Philippine Supreme Court held the right of peaceful assembly is both guaranteed and limited.¹⁹⁰ Finding support in Article 19 of the ICCPR, which allows a nation state to deny assembly “on grounds of clear and present danger to public order, public safety, public convenience, public morals or public health,” the Philippine Supreme Court concluded that a law limiting the right to assemble for reason of national security was “not a violation of the right but a valid restriction of its exercise.”¹⁹¹ Both these cases demonstrate that the Philippine Supreme Court concluded the ICCPR permits the restriction of protected liberties to ensure the maintenance of national security and public order.¹⁹²

¹⁸⁵ See Vanderlinden, *supra* note 183.

¹⁸⁶ *Ferdinand Marcos v. Raul Manglapus*, G.R. No. 88211, 177 SCRA 668 (S.C. Sept. 15, 1989). (Phil.), available at http://www.lawphil.net/judjuris/juri1989/sep1989/gr_88211_1989.html; *Bayan v. Eduardo Ermita*, G.R. No. 169838 (S.C. Apr. 25, 2006). (Phil.), available at http://www.lawphil.net/judjuris/juri2006/apr2006/gr_169838_2006.html.

¹⁸⁷ *Marcos v. Raul Manglapus*, G.R. No. 88211, 177 SCRA 668 (S.C. Sept. 15, 1989). (Phil.), available at http://www.lawphil.net/judjuris/juri1989/sep1989/gr_88211_1989.html.

¹⁸⁸ *Ferdinand Marcos v. Raul Manglapus*, G.R. No. 88211, 177 SCRA 668 (S.C. Sept. 15, 1989). (Phil.), available at http://www.lawphil.net/judjuris/juri1989/sep1989/gr_88211_1989.html.

¹⁸⁹ *Bayan v. Eduardo Ermita*, G.R. No. 169838 (S.C. Apr. 25, 2006). (Phil.), available at http://www.lawphil.net/judjuris/juri2006/apr2006/gr_169838_2006.html.

¹⁹⁰ *Id.*

¹⁹¹ Justice Adolfo S. Azcuna, J. of the Sup. Ct. of the Phil., Constitutional Standards For Civil, Political & Socio-Economic Rights, Address Before the Fifth Conference of Asian Constitutional Court Judges (Oct. 10, 2007), at 15, available at <http://www.court.go.kr/home/english/introduction/pdf/03.pdf>.

¹⁹² *Ferdinand Marcos v. Raul Manglapus*, G.R. No. 88211, 177 SCRA 668 (S.C. Sept. 15, 1989). (Phil.), available at http://www.lawphil.net/judjuris/juri1989/sep1989/gr_88211_1989.html; *Bayan v. Eduardo Ermita*, G.R. No. 169838 (S.C. Apr. 25, 2006). (Phil.), available at http://www.lawphil.net/judjuris/juri2006/apr2006/gr_169838_2006.html.

Manglapus and *Ermita* support the argument that a reasonable subordination of privacy under the HSA to prevent acts of terrorism is also justified by the need to protect national security. In *Manglapus* and in *Ermita*, the Philippine Supreme Court restricted individuals' rights of liberty of movement and assembly,¹⁹³ which are no less important than the right of privacy. However, in Articles 12 and 19, the ICCPR specifically provides that movement and assembly may be restricted for reasons of national security.¹⁹⁴ Article 17, conversely, protects individuals' privacy from "arbitrary or unlawful interference" from the government, but does not, like Articles 12 and 19, provide for the express exception of national security.¹⁹⁵ The HSA nevertheless complies with Article 17 because the anti-terror law requires before-the-fact judicial authorization.¹⁹⁶ The before-the-fact judicial authorization in the HSA forestalls arbitrary or unlawful interference, while facilitating protection of the Philippine national security. Therefore, *Manglapus* and *Ermita* illustrate that if the Philippine Supreme Court employs its previous analyses, it will interpret the HSA's restriction on individual liberties as in conformance with the letter and spirit of the ICCPR. The following section examines policy considerations of the HSA.

V. THE HSA IS GOOD POLICY BECAUSE IT STRENGTHENS DEMOCRATIC IDEALS

Most national anti-terror laws have been part of a larger political effort to create a broad international response to fighting terrorism.¹⁹⁷ In the wake of the September 11th attacks in the U.S., the U.N. Security Council passed Resolution 1373, which required criminalization of terrorist acts and terrorist financing.¹⁹⁸ Most countries enacted new laws or modified current ones to largely permit political branches of government to determine the

¹⁹³ Ferdinand Marcos v. Raul Manglapus, G.R. No. 88211, 177 SCRA 668 (S.C. Sept. 15, 1989). (Phil.), available at http://www.lawphil.net/judjuris/juri1989/sep1989/gr_88211_1989.html; Bayan v. Eduardo Ermita, G.R. No. 169838 (S.C. Apr. 25, 2006). (Phil.), available at http://www.lawphil.net/judjuris/juri2006/apr2006/gr_169838_2006.html.

¹⁹⁴ See International Covenant on Civil and Political Rights, *supra* note 178, arts. 12, 19.

¹⁹⁵ *Id.* art. 17.

¹⁹⁶ An Act to Secure the State and Protect Our People from Terrorism ("Human Security Act"), Rep. Act 9372 §§ 8- & 27 (2007) (Phil.).

¹⁹⁷ Declan McCullagh, *Report: Anti-terror efforts pinch privacy*, CNET NEWS, Sept. 3, 2002, available at <http://news.cnet.com/2100-1023-956286.html>.

¹⁹⁸ VICTOR V. RAMRAJ, MICHAEL HOR, KENT ROACH, GLOBAL ANTI-TERRORISM LAW AND POLICY 133 (2005); S.C. Res. 1373, U.N. Doc. S/RES/1373, (Sept. 28, 2001), available at <http://www.cfr.org/content/publications/attachments/1373.pdf>.

proper balance between individual liberty and collective security.¹⁹⁹ The HSA did not follow this trend. Rather, the HSA innovatively required Philippine courts to supervise and to ensure lawful practices by agents of the political branches of government.

In drafting the HSA, the Philippine lawmakers abstained from defining terrorism and instead listed which acts may be punishable under certain circumstances as acts of terrorism.²⁰⁰ By defining a punishable terrorist act as requiring the existence of “widespread and extraordinary fear and panic among the populace, in order to coerce the government to give in to an unlawful demand,”²⁰¹ the HSA granted the Philippine judiciary sole discretion to decide which acts are punishable under terrorist liability. Assuming that Philippine judges are impartial and insulated from political bias, the HSA’s allocation of adjudicative decision-making to the judiciary and away from the political branches, in theory, adheres to the doctrine of the separation of powers. This structure strengthens the compartmentalization of power within the Philippine government and provides for a legal check on executive abuse of power.

The HSA also serves democratic ideals through the reviewability of the judicial process. In 2008, the Philippine Supreme Court ruled on the supremacy of the writs of amparo and habeas data.²⁰² The Court declared that the writ of amparo is “a remedy available to any person whose right to life, liberty and security is violated or threatened with violation by an unlawful act . . . of a public official . . . [regarding] extralegal killings and enforced disappearances.”²⁰³ The writ of habeas data also applies to all aggrieved parties “whose right to privacy in life, liberty or security is violated or threatened by an unlawful act . . . of a public official . . . engaged in the gathering, collecting or storing of data or information regarding the person, family, home, and correspondence of the aggrieved party.”²⁰⁴ Unlike the secrecy surrounding the pre-HSA extrajudicial killings, the HSA makes

¹⁹⁹ Ronald K. Noble, Sec’y Gen., INTERPOL, Keynote Address at Prosecuting Terrorism: The Global Challenge (June 4, 2004), available at <http://www.interpol.com/public/ICPO/speeches/SG20040604.asp?HM=1>. <http://www.interpol.int/public/ICPO/speeches/SG20040604.asp>.

²⁰⁰ See PIMENTEL, *supra* note 49, at 58.

²⁰¹ An Act to Secure the State and Protect Our People from Terrorism (“Human Security Act”), Rep. Act 9372 § 3 (2007) (Phil.).

²⁰² Reynato Puno, *The Writ of Habeas Data*, PHILIPPINE E-LEGAL FORUM, Feb. 23, 2008, <http://jlp-law.com/blog/writ-of-habeas-data-by-chief-justice-reynato-puno/> (last visited Nov. 1, 2009).

²⁰³ Armano Canlas v. Napico Homeowners Ass’n., G.R. No. 182795 (S.C. June 5, 2008). (Phil.), available at http://www.lawphil.net/judjuris/juri2008/jun2008/gr_182795_2008.html.

²⁰⁴ Republic of the Philippines Supreme Court, En Banc, A.M. No. 08-1-16-SC, *Rule on the Writ of Habeas Data*, (Jan. 22, 2008), available at http://119.111.101.4/judjuris/juri2008/jan2008/am_08_1_16_sc_2008.html.

the prosecution of terrorists a transparent matter that proceeds under the supervision of the Philippine judiciary. Also, actions executed under the HSA do not trump the writs of amparo or habeas data, so individual liberties may always be aggrieved through judicial recourse. This opportunity for review strengthens the democratic ideal of “a government of the people, by the people.”²⁰⁵

VI. CONCLUSION

Challenged with enduring struggles for secession and growing terrorist networks, the Philippine Congress drafted the HSA to distinguish between punishing terrorists and punishing secessionists. To punish a person under the HSA, a court must decide precisely when the actus reus accompanied the requisite attendant circumstances and whether there existed the required specific intent. The HSA accomplishes its purpose of safeguarding the Philippine people from terrorist acts by expressly enumerating which actions are punishable, while allowing the judiciary to be the impartial bearer of the sword.

The HSA is beneficial for Philippine democracy because it pivoted the country’s anti-terrorism policy toward the protection of human rights. The Philippine legislature crafted the HSA in part to curb governmental abuse: thirty of the HSA’s sections expressly punish governmental overreaching. Philippine Senator Pimentel reflected on the HSA’s dual purpose in his note that when read separately, sections of the HSA “may cause an intense societal anxiety,” but when read as a whole, “the readers may well find that there are remedies embedded in the Act that uphold the people’s human rights and civil liberties and afford them some defense from an oppressive government.”²⁰⁶ Thus, the HSA strengthens Philippine democracy because it facilitates the curbing of terrorism through the judiciary’s ensuring that the law is applied *suaviter in modo, fortiter in re*—gently in manner, strongly in deed.

²⁰⁵ President Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863), available at <http://showcase.netins.net/web/creative/lincoln/speeches/gettysburg.htm>.

²⁰⁶ See PIMENTEL, *supra* note 49, at x.