THE CONSTITUTIONALITY PETITIONS ON THE ANTI-TERRORISM ACT OF 2020: AN UNFORTUNATE LACK OF INTERNATIONAL LAW DISCOURSE ON BOTH SIDES

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Abstract

The thirty-seven Petitions questioning the constitutionality of the new Philippine Anti-Terrorism Act (ATA) before the Supreme Court, as well as the Comments thereon by the Office of the Solicitor General to a lesser extent, while understandably abundantly discussing the standard constitutionality issues of vagueness, overbreadth, violations of the Bill of Rights and of the separation of powers, unfortunately largely miss to argue from the perspective of international law as this relates to Philippine constitutional law. This article focuses on the arguments regarding the ATA Section 4 definition of Terrorism in general or as a concept, the ATA's "heart" which inevitably bears on other Sections. The true constitutionality issues and arguments should not be limited to those standard ones, as a fuller constitutionality discussion is best when also enlightened by international law. This article concludes by venturing how international law would bear on the Court's constitutionality discussion and its result.

"The Philippines… adopts the generally accepted principles of international law as part of the law of the land…"
—1987 Philippine Constitution, Art. II, Sec. 2

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> "It is declared a policy of the State to protect life, liberty, and property from terrorism, to condemn terrorism as inimical and dangerous to the national security of the country and to the welfare of the people, and to make terrorism a crime against the Filipino people, against humanity, and against The Law of Nations."
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> — The Anti-Terrorism Act of 2020, Sec. 2. *Declaration of Policy*

The thirty-seven petitions questioning the constitutionality of Republic Act No. 11479, the new Anti-Terrorism Act ("ATA") of 2020, before the Supreme Court of the Philippines, make the ATA, in the words of former Chief Justice Artemio V. Panganiban, "the most assailed law in memory under the 1987 Constitution."[1] This constitutionality litigation has understandably generated very much public and media attention, as it should. The said petitions as well as the Comments thereon by the Office of the Solicitor General ("OSG") to a lesser extent, while understandably mainly and even abundantly discussing the standard constitutionality issues of vagueness, overbreadth, violation of the Bill of Rights, and violation of separation of powers, unfortunately miss for the most part to argue from the perspective of international law as this relates to Philippine constitutional law. This article focuses on the said constitutionality litigation's arguments and counter-arguments on the ATA Section 4 definition of Terrorism in general or as a concept, which has been described as the "meat," "heart," or "core" of the ATA, and which thus inevitably bears on other sections as well.

I. Representative Sample of Twenty-Three Petitions

Aside from the said focus on the ATA Section 4 definition of Terrorism, this article is limited to a representative sample of twenty-three of the more prominent among the total thirty-seven petitions and to the OSG comments thereon, all coming in 2020. It does not cover the oral arguments and the memorandums submitted in 2021, much less the ensuing Supreme Court Decision. The said twenty-three petitions are the following in their number sequence of filing (these numbers will be used for reference purposes), with some identification of the lead petitioner/s and counsel/s indicated:

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[1] Artemio V. Panganiban, *ATA, the most assailed law in memory*, PHILIPPINE DAILY INQUIRER, Nov. 29, 2020, at A7.

1. G.R. No. 252578 (Atty. Howard M. Calleja, et al.)
2. G.R. No. 252579 (Rep. Edcel C. Lagman)
3. G.R. No. 252580 (Dean Melecio S. Sta. Maria, et al.)
   Counsel: Far Eastern University – Institute of Law
4. G.R. No. 252585 (Bayan Muna Party-List, et al.)
   Counsel: Atty. Maneeka Asistol Sarza, et al.
7. G.R. No. 252624 (Atty. Cristian S. Monsod, et al.)
   Counsel: Ateneo Human Rights Center ("AHRC")
8. G.R. No. 252646 (SANLAKAS)
   Counsel: Dean J.V. Bautista
11. G.R. No. 252733 (BAYAN, et al.)
    Counsel: National Union of People's Lawyers ("NUPL")
12. G.R. No. 252736 (Justice Antonio T. Carpio, et al.)
    Counsel: Atty. Luisito V. Liban, et al.
13. G.R. No. 252741 (Ma. Ceres P. Doyo, et al.)
    Counsel: Free Legal Assistance Group ("FLAG")
14. G.R. No. 252747 (National Union of Journalists of the Philippines)
    Counsel: Atty. Evalyn G. Ursua, et al.
16. G.R. No. 252759 (Atty. Algamar A. Latiph, et al.)
    Counsel: Atty. Musa I. Malayang, et al.
17. G.R. 252765 (The Alternate Law Groups, Inc.)
    Counsel: Atty. Marlon J. Manuel, et al.
18. G.R. No. 252767 (Bishop Broderick S. Pabillo, et al.)
    Counsel: Public Interest Law Center ("PILC")
23. G.R. No. 252903 (Concerned Lawyers for Civil Liberties, et al.)
    Counsel: Dean Pacifico A. Agabin, et al.
24. G.R. No. 252904 (Beverly Longid, et al.)
    Counsel: Atty. Antonio G.M. La Viña, et al.
25. G.R. No. 252905 (Center for International Law, Inc.)
    Counsel: Atty. Joel R. Butuyan, et al.
26. G.R. No. 252916 (Main T. Mohammad, et al.)
    Counsel: Ateneo Legal Services Center
30. G.R. No. 253100 (Philippine Bar Association)
    Counsel: Atty. Luis A. Vera Cruz, Jr., et al.
31. G.R. No. 253118 (Balay Rehabilitation Center, Inc., et al.)
    Counsel: Atty. Cristina S. Sevilla, et al.

32. G.R. No. 253124 (Integrated Bar of the Philippines, et al.)
Counsel: Atty. Jose Anselmo I. Cadiz, et al.
35. G.R. No. 253264 (Pagkakaisa ng Kababaihan para sa Kalayaan, et al.)
Counsel: Atty. Virginia Lacsa Suarez, et al.
36. G.R. No. 254191 (Anak Mindanao Party-List, et al.)
Counsel: Atty. Jamar M. Kulayan, et al.
37. G.R. No. 253420 (Haroun Alrashid Alonto Lucman, Jr., et al.)
Counsel: Ateneo [de Davao] Legal Services Office, et al.

This representative sample of twenty-three (out of the total thirty-seven) petitions were chosen for their representativeness in terms of sectors as well as of lawyers' groups represented or acting as counsel, taking into consideration also the stature and track record of individual counsels. It is notable that Bangsamoro and indigenous peoples perspectives are among those represented in certain petitions. There is a good mix of mainstream and activist petitioners and counsels. Some are what may be called the proverbial "usual suspects" in constitutionality litigations against government acts and issuances. Admittedly, in the mix, there can be said to be a significant or multiple representation of open and legal national-democratic organizations and counsels. Some would consider that to be to their credit.

To compare things with the antecedent constitutionality litigation on the Human Security Act ("HSA") of 2007, the case of *Southern Hemisphere Engagement Network, Inc. vs. Anti-Terrorism Council*[2] (an unavoidable and recurrent theme of comparison in the thirty-seven anti-ATA petitions and the OSG comments thereon), there were only six petitions there—four of which had nat-dem lead petitioners (KMU, BAYAN, KARAPATAN and BAYAN-Southern Tagalog), one of which had the IBP as lead petitioner, and one of which had the NGO Southern Hemisphere Engagement Network, Inc. and this author as petitioners, the latter also as lead counsel.[3] At least five other counsels in *Southern Hemisphere*—Attys. Remigdio D. Saladero (KMU), Edre U. Olalia (NUPL), Clara Rita A. Padilla, Pacifico A. Agabin (CLCL), and Neri Javier Colmenares (NUPL)—are also counsels (the latter four are themselves also petitioners) in the current constitutionality

[2] Southern Hemisphere Engagement Network, Inc. vs. Anti-Terrorism Council, 632 SCRA 146 (2010).

[3] With co-counsel Atty. Vicente Dante P. Adan of San Jose, Camarines Sur. He passed away due to COVID-19 last May 1, 2021. This article is in honor of him.

litigation against the ATA. On the other hand, the lone individual public respondent in both *Southern Hemisphere* and the current ATA constitutionality litigation, to be likely referred to as "*Calleja vs. Executive Secretary*," is Gen. Hermogenes C. Esperon, Jr., then as Armed Forces Chief of Staff and now as National Security Adviser.

II. ATA Section 4 Definition of Terrorism

"Section 4 is the core of R.A. 11479.
All the acts penalized in the succeeding sections
depend on the definition of terrorism."
— Bishop Pabillo Petition 18

"Section 4… is the core and anchor of the Anti-Terrorism Act
– this law cannot stand alone without Section 4."
— Philippine Bar Association Petition 27

As earlier indicated as a limitation of this article, we thus focus on the constitutionality litigation regarding Section 4 of the ATA of 2020, where terrorism is defined or conceptualized as follows:

> Section 4. *Terrorism.*––Subject to Section 49 of this Act, terrorism is committed by any person who, within or outside the Philippines, regardless of the stage of execution:
>
> (a) Engages in acts intended to cause death or serious bodily injury to any person, or endangers a person's life;
> (b) Engages in acts intended to cause extensive damage or destruction to a government or public facility, public place or private property;
> (c) Engages in acts intended to cause extensive interference with, damage or destruction to critical infrastructure;
> (d) Develops, manufactures, possesses, acquires, transports, supplies or uses weapons, explosives or of biological, nuclear, radiological or chemical weapons; and

(e) Release of dangerous substances, or causing fire, floods or explosions.

when the purpose of such act, by its nature and context, is to intimidate the general public or a segment thereof, create an atmosphere or spread a message of fear, to provoke or influence by intimidation the government or any international organization, or seriously destabilize or destroy the fundamental political, economic, or social structures of the country, or create a public emergency or seriously undermine public safety, shall be guilty of committing terrorism and shall suffer the penalty of life imprisonment without the benefit of parole and the benefits of Republic Act No. 10592, otherwise known as "An Act Amending Articles 29, 94, 97, 98 and 99 of Act No. 3815, as amended, otherwise known as the Revised Penal Code". *Provided,* That, terrorism as defined in this section shall not include advocacy, protest, dissent, stoppage of work, industrial or mass action, and other similar exercises of civil and political rights, which are not intended to cause death or serious physical harm to a person, to endanger a person's life, or to create a serious risk to public safety.

Section 49 pertains to Extraterritorial Application, while R.A. 10592 is what is commonly known as the "Expanded Good Conduct Time Allowance ["GCTA"] Law." These are not material for purposes of the discussion in this article.

In the 2020 Implementing Rules and Regulations ("IRR") of the ATA, the above definition is broken down by Rule 4.3 into two elements—acts and purposes, as follows:

Rule 4.3. Elements of the crime of terrorism

There is terrorism when the following elements concur:

a. engagement in any of the following *acts*, regardless of the stage of execution:

    i. acts intended to cause death or serious bodily injury to any person, or to endanger a person's life;

ii. acts intended to cause extensive damage or destruction to a government or public facility, public place, or private property;
iii. acts intended to cause extensive interference with, damage, or destruction to critical infrastructure;
iv. developing, manufacturing, possessing, acquiring, transporting, supplying, or using weapons or explosives intended to cause a disproportionate amount of damage, or of biological, nuclear, radiological, or chemical weapons; or
v. releasing of dangerous substances, or causing fire, floods, or explosions; and

b. the *purpose* of engagement in any of the acts under paragraph

(a) of this Rule, by its nature and context, is to:

i. intimidate the general public or a segment thereof;
ii. create an atmosphere or spread a message of fear;
iii. provoke or influence by intimidation the government or any international organization;
iv. seriously destabilize or destroy the fundamental political, economic, or social structures of the country; or
v. create a public emergency or seriously undermine public safety.

x x x

And there is also this IRR breakdown of "acts not considered terrorism," which includes a proviso:

Rule 4.4. Acts not considered terrorism

When not intended to cause death or serious physical harm to a person, to endanger a person's life, or to create a serious risk to

public safety, the following activities shall not be considered acts of terrorism:

a. advocacy;
b. protest;
c. dissent;
d. stoppage of work;
e. industrial or mass action;
f. creative, artistic, and cultural expressions; or
g. other similar exercises of civil and political rights.

If any of the acts enumerated in paragraph (a) to (g) of Rule 4.4, however, are intended to cause death or serious physical harm to a person, to endanger a person's life, or to create a serious risk to public safety, and any of the purposes enumerated in paragraph (b) under Rule 4.3 is proven in the engagement in the said act, the actor/s may be held liable for the crime of terrorism as defined and penalized under Section 4 of the Act. The burden of proving such intent lies with the prosecution arm of the government.

III. The Constitutionality Issues vs. the ATA Definition of Terrorism

The particular constitutionality issues raised against the ATA Section 4 Definition of Terrorism in our representative sample of twenty-three petitions may be tabulated as follows:

CONSTITUTIONALITY ISSUE (1987 Constitution)	PETITIONS RAISING THE ISSUE (By Petition Number earlier abovesaid)
1. Violation of the Due Process Clause (Article III, Section 1)	1, 3, 11, 16, 17, 18, 24, 27, 31, 37 (10 Petitions)
1.1 Void for Vagueness	1, 2, 3, 4, 8, 11, 12, 14, 15, 16, 17, 18, 23, 24, 31, 32, 35, 36, 37 (19 Petitions)
1.2 Void for Overbreadth	1, 2, 3, 4, 7, 11, 12, 15, 17, 23, 24, 25, 27, 31, 32, 35, 37 (17 Petitions)

2. Violation of Fundamental Freedoms or "First Amendment" Rights (Article III, Sections 4, 8 & 12[2])	(total of 11 Petitions, see below from 2.1 to 2.7)
2.1 Freedom of Speech	3, 4, 7, 8, 11, 15, 16, 25, 32, 37
2.2 Freedom of Expression	3, 4, 7, 11, 25, 32
2.3 Freedom of the Press	3, 4
2.4 Freedom of Assembly	3, 4, 7, 11, 25
2.5 Freedom of Petition	3, 4, 11, 25
2.6 Freedom of Association	11
2.7 Freedom from Torture	31
3. Violation of the Equal Protection Clause (Article III, Section 1)	31 (1 Petition)
4. Violation of the State Policy of Protection of the Youth (Article II, Section 13)	31 (1 Petition)
5. Undue Delegation of Legislative Power (Principle of Separation of Powers)	7, 15 (2 Petitions)

The above-tabulated constitutionality issues understandably constitute the bulk of the issues against the ATA Section 4 Definition of Terrorism in our representative sample of twenty-three petitions questioning the constitutionality of the ATA before the Supreme Court. This litigation will naturally either succeed or fail, rise or fall, on these issues, practically the standard constitutionality issues. Actually, one petition in the said sample, the Main Mohammad, et al. Petition 26 by the Ateneo Legal Services Center, did not raise grounds against Section 4, but did so against Sections 25, 29, 36, 34, 12, and 10, in that order of discussion.

At any rate, the Supreme Court Advisory on Nov. 20, 2020 for the oral arguments to be held in Jan. 2021, limited the discussion of the ATA Section 4 definition of terrorism this way:

> Whether Section 4 defining and penalizing the crime of "terrorism" is void for vagueness or overbroad in violation of the constitutional rights to due process, free speech and expression, to be informed of the nature and cause of accusation, and non-detention solely by reason of political beliefs.

The clear main points of contention here are [1] primarily, void for vagueness and overbreadth; and [2] secondarily, violation of the "First Amendment"[4] fundamental freedoms of speech, expression, the press, assembly and petition. The OSG of course traversed these constitutional issues, but we are not covering in this article the abundant arguments and counter-arguments in the pending constitutionality litigation before the Supreme Court. Our stated focus here is on the international law aspect of that litigation, particularly in the pleadings.

There is not much, perhaps understandably, invocation of international law against the ATA Section 4 definition of terrorism among the twenty-three petitions considered here. In fact, some of the international references made are, strictly speaking, not international law *per se* but rather reports, statements, and the like. We tabulate these too as follows:

INTERNATIONAL LAW ISSUE (or International Reference Used)	PETITIONS RAISING THE ISSUE (By Petition Number earlier abovesaid)
1. Principle of Legality	11, 3 (2 Petitions)
2. UN Resolutions, Reports, Statements	(total of 6 Petitions, see below from 2.1 to 2.7)
2.1 UN Security Council Resolutions 1566 & 1373	11
2.2 UN Secretary-General Kofi Anan Statements on August	32, 18, 4

[4] From the U.S. Constitution: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." This is equivalent to Sections 5 and 4 of Article III of the 1987 Philippine Constitution.

28, 3008, January 20, 2003 and on another occasion	
2.3 UN Special Rapporteur Fionnuala Ni Aolain statement at a webinar on June 26, 2020	11
2.4 UN Office of the High Commissioner for Human Rights Michelle Bachelet Report on the Human Rights Situation in the Philippines, dated June 4, 2020, and statement on June 30, 2020	11, 4, 24
2.5 UN High Commissioner for Human Rights Sergio Vieira de Mello statement on terrorism	4
2.6 UN Special Rapporteur Philip Alston Report on Extrajudicial Executions in the Philippines, dated April 16, 2008	4
2.7 UN OHCHR Fact Sheet 32	2
3. Inter-American Court of Human Rights ("IACHR") jurisprudence	17 (1 Petition)
	(grand total of 8 Petitions)

There are thus considerably much less, and understandably so, international law issues and the petitions raising them against the ATA Section 4 Definition of Terrorism than the constitutional issues and the petitions raising them. The BAYAN, et al. Petition 11 by the NUPL stands out as the lone petition raising substantial international law issues and references. We however do not include here the ample citations by many petitions of American jurisprudence because these relate more to the aforesaid main constitutional issues. In fact, American constitutional jurisprudence is treated practically as part of Philippine

constitutional jurisprudence, understandably because of the American roots of Philippine constitutional law (but that is another comparative law matter).

One petition, the Beverly Longid, et al. Petition 24 by Atty. Antonio G.M. La Viña, et al. notably invokes the right to self-determination ("RSD") of the indigenous peoples as well as of the Bangsamoro people, albeit against the ATA in general, not specifically against its Section 4 Definition of Terrorism. But with regards to RSD, Petition 24 invokes not international law instruments but rather the 1987 Constitution's Article II, Section 7: "The State shall pursue an independent foreign policy. In its relations with other states the paramount consideration shall be national sovereignty, territorial integrity, national interest, and the right to self-determination." This speaks more to the RSD of the Philippine State in its foreign relations with other states, rather than to "the right of self-determination" of "all peoples" under both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.[5]

IV. The Raised International Law Issues in More Detail

For a better idea of the international law issues and references against the ATA Section 4 Definition of Terrorism in only eight (or about 1/3) out of the twenty-three petitions as tabulated above, we present them now in sufficient detail.

The Dean Sta. Maria, et al. Petition 3 by the FEU-Institute of Law, as part of its void for vagueness and overbreadth argument against Section 4, invokes "the principle of legality of criminal law," not of international law. It quotes Prof. Jerome Hall's 1937 article "*Nulla Poena Sine Lege*" in the *Yale Law Journal*: "… Employed as *nullum crimen sine lege*, the prohibition is that no conduct shall be held criminal unless it is specifically described in the behavior circumstance element of a penal statute."

It is the BAYAN, et al. Petition 11, also as part of its void for vagueness argument against Section 4, that invokes the principle of legality in international law terms. It quotes the UN Office of the High Commissioner for Human Rights ("OHCHR") Michelle Bachelet Report on the Human Rights Situation in the Philippines, dated June 4, 2020, to the effect that "The vague definitions in the Anti-Terrorism Act may violate the principle of legality." The footnote 130 (in p.

[5] In both international covenants, it comes under Part I, Article 1, par. 1.

56) to this states that "The principle of legality is found in paragraph 15 of General Comment No. 35 on Article 9 of the International Covenant on Civil and Political Rights (Liberty and Security of a Person). The said paragraph 15 is also quoted in footnote 120 at the bottom of p. 50 of Petition 11, thus:

> 15. To the extent that States parties impose security detention (sometimes known as administrative detention or internment) not in contemplation of prosecution on a criminal charge, the Committee considers that such detention presents severe risks of arbitrary deprivation of liberty. Such detention would normally amount to arbitrary detention as other effective measures addressing the threat, including the criminal justice system, would be available. If, under the most exceptional circumstances, a present, direct and imperative threat is invoked to justify the detention of persons considered to present such a threat, the burden of proof lies on States parties to show that the individual poses such a threat and that it cannot be addressed by alternative measures, and that burden increases with the length of the detention. States parties also need to show that detention does not last longer than absolutely necessary, that the overall length of possible detention is limited and that they fully respect the guarantees provided for by article 9 in all cases. Prompt and regular review by a court or other tribunal possessing the same attributes of independence and impartiality as the judiciary is a necessary guarantee for those conditions, as is access to independent legal advice, preferably selected by the detainee, and disclosure to the detainee of, at least, the essence of the evidence on which the decision is taken.

Unfortunately, however, one does not see here any presentation of the principle of legality in international law terms. Aside from this dissonance, it appears that Petition 11 did not really mean to invoke the principle of legality, it just so happened to be mentioned in the quote from UN High Commissioner for Human Rights Bachelet on "the vague definitions in the Anti-Terrorism Act." We shall thus go back to the principle of legality further below.

Aside from the abovesaid Bachelet Report, there are other UN resolutions, reports, and statements invoked or cited among the seven petitions which raise

international law issues and references in the discussion of Section 4. It is again the BAYAN, et al. Petition 11 which makes reference to UN Security Council Resolutions ("UNSCRs") 1566 and 1373. UNSCR 1566 (2004), "while not expressly framed as a definition" of terrorism, is a "resolution generically defining it."[6] UNSCR 1373 (2001) "required States, under Chapter VII" of the UN Charter, "to suppress terrorism," especially terrorist financing, and also required states to "establish such terrorists acts as serious criminal offenses in domestic laws with proportionate penalties."[7]

Petition 11 starts by quoting remarks of Fionnuala Ni Aolain, UN Special Rapporteur on the promotion of and protection of human rights and fundamental freedoms while countering terrorism, during the webinar of Ecumenical Voice for Peace entitled "#NoLockdownonRights, UN Human Rights Report on the Philippines and Trends amid the Pandemic" on June 26, 2020. Aolain cited UNSCR 1566 under which states were reminded to, among others, "ensure that any measures taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law." Petition 11 then mentions that UNSCR 1566 affirmed UNSCR 1373, "which Sen. Lacson has been invoking to justify the vague and overbroad provisions of RA 11479." However, the working definition of terrorism in UNSCR 1566 is not quoted or discussed in the said petition. We shall go back to UNSCR 1566 further below.

Petition 11 extensively quoted Aolain's webinar remarks, including this notable passage:

> And as I have said, I think there are grave concerns about the breadth and scope of the terms of terrorism, terrorists, and terrorist activities as used in the legislation. They are certainly broader than the model definition of terrorism that has been advanced by my predecessors Martin Scheinin and Ben Emmerson over almost 20 years. The definitions also seem inconsistent with UN Security Council Resolution 1566 which provides a narrow and agreed

[6] Ben Saul, *Definition of "Terrorism" in the UN Security Council: 1985-2004*, 4(1) CHINESE J. INT'L L. 141, 164(2005).

[7] *Id.* at 156, citations omitted.

> definition of terrorism. And the definition in the Act also appears to go far beyond with what is envisaged by the broadly ratified Terrorism Suppression Convention, So, by all of those measures of international law the definitions of terrorism contained in this legislation seem to go beyond international law's accepted boundaries. (underscoring supplied)

This is of course Aolain's international legal opinion, although webinar remarks can hardly be considered authoritative. But just like with UNSCR 1566, Petition 11 does not quote or discuss the mentioned "model definition of terrorism" and the one in the "Terrorism Suppression Convention."[8]

The official statements of the UN Secretary General ("UNSG") are of course of some international weight. The Bishop Pabello, et al. Petition 18 by the PILC, in its void for vagueness argument against Section 4, cites the UNSG Kofi Anan's Aug. 28, 2008 policy statement on "The Protection of Human Rights and Fundamental Freedoms While Countering Terrorism," as follows: "… the adoption of any overly vague or broad definition of the term terrorism could lead to criminalization of conduct that does not constitute terrorism as such." He further cautioned that there is a danger in definitions that hamper "the legitimate non-violent and peaceful exercise of fundamental rights and freedoms."

As part of its Prefatory, not as part of its discussion of Section 4, the IBP, et al. Petition 32 by Atty. Jose Anselmo I. Cadiz, et al. cites the Statement of UNSG Anan at the UNSC Ministerial Meeting on Terrorism on Jan. 20, 2003 where he cautioned that the war on terrorism also brings with it "collateral damage," specifically, "damage to the presumption of innocence, to precious human rights, to the rule of law, and to the very fabric of democratic governance." Unfortunately, and surprisingly, none of the petitions cite UNSG Anan's paraphrasing of the definition of terrorism in the *Report of the UN High Level Panel on Threats, Challenges and Change* on December 2, 2004 made in his keynote address to the International Summit on Democracy, Terrorism and Security on March 10, 2005 in Madrid. We shall go back to this further below.

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[8] It is not clear which particular "Terrorism Suppression Convention" was referred to by Aolain but the closest appears to be the 1999 International Convention for the Suppression of the Financing of Terrorism.

The Rep. Lagman Petition 2 argues that the vagueness and overbreadth of Section 4 are "compounded by the deletion of the inculpatory element of political motive which is internationally prescribed." For this point, it cites the OHCHR Fact Sheet 32 stating that "Terrorism is commonly understood to refer to acts of violence that target civilians in the pursuit of political or ideological aims." But of course, a fact sheet, even if from the OHCHR, is not usually considered of high authoritative level. Petition 2 contends in its pars. 97-98 (p. 26) that the political or ideological motive indicated by the element "to coerce the government to give in to an unlawful demand" found in the HSA Section 3 Definition of Terrorism has been deleted from the ATA Section 4 Definition of Terrorism. But this is misleading because the ATA Section 4 actually contains the element "to provoke or influence by intimidation the government or any international organization" which arguably amounts to the HSA Section 3 element "to coerce the government to give in to an unlawful demand."

Finally, there is the ALG Petition 17 by Atty. Marlon J. Manuel, et al. which cited, as part of its void for vagueness argument against Section 4, certain jurisprudence from the Inter-American Court of Human Rights ("IACHR"). First cited was *Castillo Petruzzi, et al. vs. Peru* (May 30, 1999), where the IACHR "considers that crimes must be classified and described in precise and unambiguous language that narrowly defines the punishable offense, thus giving full meaning to the principle of *nullum crimen nulla poena sine lege praevia* in criminal law. And then next cited was *Cantoral-Benavides vs. Peru* (2000), citing *Petruzzi*, where the IACHR passed upon the legal effect of the similarity of the newly decreed crimes of terrorism and "treason against the fatherland," and held that:

> 157. In defining the crimes, it is necessary to keep the principle of criminal legality in mind; in other words, a clear definition of the illegal conduct, which sets forth its elements and makes it possible to distinguish it from non-punishable behavior or illegal activities punishable with non-criminal measures. Ambiguity in the definition of the crime creates doubt and gives authorities discretion, which is particularly undesirable when establishing the criminal liability of individuals and imposing sentences that have a serious impact on fundamental rights such as life or liberty.

Note that the quoted passage from *Cantoral-Benavides* mentions "the principle of criminal legality," rather than simply the international law principle of legality. Petition 17 then goes on to say that the Philippine Supreme Court "has in the past adopted findings and conclusions of the IACHR and made it part of the law of the land"—but unfortunately without citing the corresponding Philippine jurisprudence referred to.[9]

All told, the international law discourse (including the predominant lack of it) in our representative sample of twenty-three petitions, even if admittedly for a constitutionality litigation, is somewhat disappointing, given the high caliber of the lead counsels for these petitions, not to mention some legal luminary petitioners.

V. International Law Aspects in the OSG Comments

We shall no longer deal here with the OSG counter-arguments on the constitutionality arguments against the ATA Section 4 Definition of Terrorism in the sample of twenty-three petitions—though such constitute the bulk of the argumentation thereon—as this is not the focus of this article, which is on the international law aspects of this constitutionality litigation.

As it is, the OSG comment dated July 17, 2020 (and for that matter its Supplemental comment dated Aug. 24, 2020) does not directly address the international law issues or references raised in the only eight petitions which raised them, as tabulated two sections above, except the argument in Petition 2 against the deletion from Section 4 of the inculpatory element of "political motive" which is internationally prescribed, citing the OHCHR Fact Sheet 32. The OSG counter-argues that "the words in Section 4 were in fact largely patterned from international standards defining terrorism." This then becomes the springboard for the OSG to present five such international standards. In particular, the OSG presents four international definitions of terrorism, highlighting certain elements thereof to argue that "the influence of these definitions on the wording of Section 4 is undeniable… the provision is well-couched in international standards." The five international legal instruments cited in the OSG comment are the following:

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[9] A quick google search resulted in negative findings of Philippine jurisprudence referring to the IACHR.

1. The Appeals Chamber of the (UN-created) Special Tribunal for Lebanon 2011 ruling on the definition of "transnational terrorism" under customary international law;
2. The 1998 Arab Convention for the Suppression of Terrorism definition of terrorism;
3. UNSCR 1566 (2004) definition of terrorism;
4. 2004 UN (High Level Panel on Threats, Challenges and Change) Report definition of terrorism; and
5. European Union (EU) 2002 Framework Decision on Combatting Terrorism definition of terrorism.

We shall try to tabulate this now (not done in the OSG comment) for easier comparison between the ATA Section 4 and the five international legal instruments cited in the OSG comment.

ATA Section 4 Definition of Terrorism: Elements	International Standards per OSG Comment (boldface supplied by this)
A. engagement in any of the following <u>*acts*</u>, regardless of the stage of execution	– "the perpetration of a criminal act… or threatening of such act" (Special Tribunal of Lebanon or STL) – "Any act or threat of violence, whatever its motives or purposes" (Arab Convention for the Suppression of Terrorism or (ACST) – "criminal acts, including against civilians" (UNSCR 1566)

1. acts intended to cause death or serious bodily injury to any person, or to endanger a person's life	– "such as murder, kidnapping, hostage-taking" (STL) – "by harming them, or placing their lives, liberty or security in danger" (ACST) – "committed with intent to cause death or serious bodily injury, or taking of hostages" (UNSCR 1566) – "any act intended to cause death or serious bodily harm to civilians or non-combatants" (UN High-Level Panel Report 2004)
2. acts intended to cause extensive damage or destruction to a government or public facility, public place, or private property	– "such as… arson, and so on" (STL) – "seeking to cause damage to the environment or to public or private installations or property" (ACST)
3. acts intended to cause extensive interference with, damage, or destruction to critical infrastructure	– "such as… arson, and so on" (STL) – "seeking to cause damage to the environment or to public or private installations or property" (ACST)
4. developing, manufacturing, possessing, acquiring, transporting, supplying, or using weapons or explosives intended to cause a disproportionate amount of damage, or of biological, nuclear, radiological, or chemical weapons	
5. releasing of dangerous substances, or causing fire, floods, or explosions	– "such as… arson, and so on" (STL) – "seeking to cause damage to the environment or to public or private installations or property" (ACST)
	– "or to occupying or seizing them (public or private installations or property)" (ACST)

	– "or seeking to jeopardize natural resources" (ACST)
	– "when the act involves a transnational element" (STL)
B. the ***purpose*** of engagement in any of the acts under paragraph (a) of this Rule, by its nature and context, is to:	– "… whatever its motives or purposes, that occurs in the advancement of an individual or collective criminal agenda" (ACST) – "given their nature or context, may seriously damage a country or an international organization where committed with the aim of:" (EU 2002 Framework Decision)
1. intimidate the general public or a segment thereof	– "the intent to spread fear among the population (which would generally entail the creation of public danger)" (STL) – "seeking to sow panic among people, causing fear" (ACST) – "intimidate a population" (UNSCR 1566) – "with the purpose of intimidating a population" (UN High-Level Panel Report 2004) – "seriously intimidating a population" (EU 2002 Framework Decision)
2. create an atmosphere or spread a message of fear	– "the intent to spread fear among the population (which would generally entail the creation of public danger)" (STL) – "seeking to sow panic among people, causing fear" (ACST) – "with the purpose to provoke a state of terror in the general public

	or in a group of persons or particular persons" (UNSCR 1566)
3. provoke or influence by intimidation the government or any international organization	– "or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it" (STL) – "or compel a government or an international organization to do or to abstain from doing any act" (UNSCR 1566) – "or compelling a government or an international organization to do or abstain from doing any act" (UN High-Level Panel Report 2004) – "or unduly compelling a Government or international convention or international organization to perform or abstain from performing any act" (EU 2002 Framework Decision)
4. seriously destabilize or destroy the fundamental political, economic, or social structures of the country	– "or seriously destabilizing or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization" (EU 2002 Framework Decision)
5. create a public emergency or seriously undermine public safety	

It appears from this tabulation that the ATA Section 4 act no. 4 (on use, etc. of disproportionately damaging and certain banned weapons and explosives) and purpose no. 5 (create a public emergency or seriously undermine public safety) have no equivalent in the international standards per the OSG comment.

The famous/infamous "double negative" proviso at the end of the ATA Section 4 Definition of Terrorism ["*Provided,* That, terrorism as defined in this

section shall not include advocacy, protest, dissent, stoppage of work, industrial or mass action, and other similar exercises of civil and political rights, which are not intended to cause death or serious physical harm to a person, to endanger a person's life, or to create a serious risk to public safety."] also does not appear to have an equivalent in the major international law definitions of terrorism. To some, this proviso is progressive for civil liberties and further clarifies what is not terrorism (as in the oft-quoted slogan "activism is not terrorism, terrorism is not activism"), but to most anti-ATA petitions, it is regressive for (potentially in practice) limiting civil liberties and adds to the vagueness and overbreadth of Section 4, with the Rep. Lagman Petition 2 referring to it as "a killer proviso." We shall leave this constitutional issue to the constitutionality litigation.

The five international standards cited by the OSG comment are of course not the only international standards for the definition of terrorism but by quoting them and emphasizing "the (undeniable) influence of these definitions on the wording of Section 4," the heavy volume of fire from the anti-ATA petitions as to its Section 4 Definition of Terrorism being allegedly void for vagueness and overbreadth is somehow parried. Stated otherwise, the OSG is in effect counter-arguing that if this wording is acceptable to the international community, then it should be acceptable to the Philippines.

The OSG comment, as we said, paid particular attention to counter-arguing against the Rep. Lagman Petition 2 which argued against the ATA Section 4 Definition of Terrorism because of its alleged "deletion of the inculpatory element of political motive which is internationally prescribed," according to the OHCHR Fact Sheet 32 which states that "Terrorism is commonly understood to refer to acts of violence that target civilians in the pursuit of political or ideological aims." The OSG comment counter-argues by citing the article of H.B. Lazreg on "The debate over what constitutes terrorism" in *The Conversation* to the effect that the Special Tribunal for Lebanon 2011 ruling on the definition of "transnational terrorism" under customary international law "did show a continuing slant *vis-à-vis* the world's understanding of terrorism—from purpose-based to effect-based. Incidents like the October 2017 mass shooting at a music festival in the United States of America, killing at least 59 and injuring as many as 527—an act devoid, from all appearances, of any political motive—trigger constant conversation on the shift in what acts are terroristic."

The Special Tribunal for Lebanon ruling on the definition of "transnational terrorism" under customary international law was however criticized by

international law academic Ben Saul in an international law journal article "Legislating from a radical Hague: The United Nations Special Tribunal for Lebanon invents an international crime of transnational terrorism."[10] This Saul article is cited in Filipino international law consultant Chad Patrick Osorio's lead article in the 2018 Institute of International Legal Studies book *Perspectives on Terrorism in the Philippine Context*[11] to the effect that the said STL ruling is "a premature declaration of an existence of a customary norm, because its [terrorism's] very definition has not yet been pinned down, as seen in the multiple resolutions, instruments, and documents of the UN and its various agencies working on the problem of terrorism."

Incidentally, the above-said Osorio article is cited in par. 72 (pp. 27-28) of the CLCL Petition 23 but on another point, one about the following elements for a definition of "terrorism," thus:

a) the use of violence thru acts
b) the rationale for the violence
c) production of a state of terror, and
d) treat the question of whether or not one cannot be considered a "terrorist" absent one of the elements.

Sadly, however, this enumeration of elements is nowhere found in the Osorio article.

All told, as we indicated early on, the OSG comment, to its fair credit, much more than the anti-ATA Petitions, at least in the Section 4 Definition of Terrorism argumentation, shows more appreciation or availment of international law, in this constitutionality litigation before the Supreme Court. But there is still so much more to be said on the international law aspects of the terrorism definition issue.

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[10] Ben Saul, *Legislating from a radical Hague: The United Nations Special Tribunal for Lebanon invents an international crime of transnational terrorism*, 24 LEIDEN J. INT'L L. 677 (2011).

[11] Chad Patrick Osorio, *Tackling Terrorism in the Philippines: Legal Policies Addressing this Non-Traditional Security Threat*, *in* MARWIL N. LLASOS AND MODESTA APESA H. CHUNGALAO (EDS.), PERSPECTIVES ON TERRORISM IN THE PHILIPPINE CONTEXT 1-30 (Institute of International Legal Studies, University of the Philippines, 2018).

VI. The Most Acceptable International Law Definitions of Terrorism

Aside from the definitions of terrorism in UNSCR 1566 of October 2004 on Threats to international peace and security caused by terrorist acts and in the *UN Secretary-Genera's High-Level Panel Report on Threats, Challenges and Change, A more secure world: our shared responsibility* on Dec. 2, 2004, two of the five international standards for the definition of terrorism cited by the OSG comment, there are at least three other sources of what are considered among the most acceptable international law definitions of terrorism:

1. UN General Assembly ("UNGA") Resolution 49/60 on Measures to eliminate international terrorism, adopted on Dec. 9, 1994, par. 3;
2. International Convention for the Suppression of the Financing of Terrorism ("ICSFT") adopted on Dec. 9, 1999, Article 2, 1(a) & (b); and
3. Draft UN Comprehensive Convention on International Terrorism ("CCIT"), as at June 2018, Article 2, also referred to as "the model definition of terrorism"

Let us proceed now to simply present the core definitions of terrorism in the five international legal instruments mentioned, in chronological order: (boldface and underscoring supplied in the quoted definitions)

[1] **UNGA Resolution 49/60** (1994) —

> 3. **Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes** are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them;

[2] **ICSFT** (1999) —

> Article 2
>
> 1. Any person commits an offence within the meaning of this Convention if that person 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:

(a) **An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex**; or
(b) **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.**

[Note: The annex referred to in (a) lists 9 international conventions and protocols relating to terrorism. There are lately said to be 19 UN counter-terrorism instruments.]

[3] **UNSCR 1566** (1994) —

3. *Recalls* 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, and calls upon all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature;

[4] ***UN Secretary-General's High-Level Panel Report* on December 2, 2004** —

164. That definition of terrorism should include the following elements:

(a) Recognition, in the preamble, that State use of force against civilians is regulated by the *Geneva Conventions* and other instruments, and, if of sufficient scale, constitutes a war crime by the persons concerned or a crime against humanity;
(b) **Restatement that acts under the 12 preceding anti-terrorism conventions are terrorism**, and a declaration that they are a crime under international law; and restatement that terrorism in time of armed conflict is prohibited by the *Geneva Conventions* and *Protocols*;
(c) **Reference to the definitions contained in the 1999 *International Convention for the Suppression of the Financing of Terrorism* and Security Council resolution 1566 (2004);**
(d) **Description of terrorism as "any action**, in addition to actions already specified by the existing conventions on aspects of terrorism, the *Geneva Conventions* and Security Council resolution 1566 (2004), **that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an 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."**

[5] **Draft CCIT —**

Article 2.

1. Any person commits an offence within the meaning of the present Convention if that person, **by any means, unlawfully and intentionally, causes:**

(a) **Death or serious bodily injury to any person**; or
(b) **Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or to the environment**; or

> (c) **Damage to property, places, facilities or systems referred to in paragraph 1 (b) of the present article resulting or likely to result in major economic loss;**
>
> **when the purpose of the conduct, 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.**

We need not tabulate again the above five most acceptable international law definitions vis-à-vis the ATA Section 4 Definition of Terrorism to see from a quick perusal and comparison that the latter hews well enough to the former. And if this is indeed so, it effectively takes the wind out of the sails of the void from vagueness and overbreadth constitutionality argument against Section 4, including its adoption of the international law instrument phrase "by its nature or context" (mentioned in three of the five most acceptable international law definitions)—even this phrase did not escape the "void from vagueness and overbreadth" (over-?) scrutiny of the anti-ATA petitions.

Of the above-quoted five international legal instruments, the ICSFT (1999), being an international convention or treaty, thus a direct source of public international law,[12] and ratified by the Philippines,[13] is most binding on the Philippines. Besides, it has been already transformed into domestic legislation as R.A. No. 10168, the Terrorism Financing Prevention and Suppression Act of 2012 ("TFPSA")—which strangely or ironically has not been subjected to constitutionality litigation. It adopts in its Section 3(j)(2) definition of terrorist acts the exact same wording as the above quoted Article 2, par. 1(b) of the ICSFT:

> 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

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[12] Statute of the International Court of Justice, Article 38(a), Apr. 18, 1946, 993 T.S. 25; *see also* JOVITO R. SALONGA AND PEDRO L. YAP, PUBLIC INTERNATIONAL LAW (Regina Publishing Company, 4th Ed., 1974), p. 63; EDGARDO L. PARAS, INTERNATIONAL LAW AND WORLD ORGANIZATIONS 35 (Rex Book Store, 1980).

[13] *See* J. EDUARDO MALAYA, ET AL., PHILIPPINE TREATIES INDEX 1946-2010 183 (Foreign Service Institute, 2010).

> compel a government or an international organization to do or to abstain from doing any act.

Ben Saul's previously cited international law journal article on the "Definition of 'Terrorism' in the UN Security Council: 1985-2004" provides an excellent UN system context for the five international legal instruments we cited and quoted for the most acceptable international law definitions of terrorism, and we now quote extensively the relevant passages from this article: (citations omitted)

> Within the UN system, the question of terrorism was largely consigned to the General Assembly prior to 2001, reflecting the structural dichotomy between the Assembly as "the soft UN" and the [Security] Council as the "hard UN."[14]....
>
> xxx
>
> ... Since then [11 September 2001], the Council has imposed binding, quasi-legislative measures against terrorism in general, unconnected to specific incidents, and unlimited in time. The Council has also regarded "any" act of terrorism as a threat to peace and security, regardless of its severity, or international effects. Yet the Council failed to define terrorism until late 2004, despite using it as an operative legal concept with serious consequences for individuals and entities. For three years, States could unilaterally define terrorism and assert universal jurisdiction over it (encouraged by the Counter-Terrorism Committee), despite wide divergences in national definitions. The Council's 2004 definition raises other problems, since it is non-binding (allowing States to preserve unilateral definitions) and potentially conflicts with multilateral treaty negotiations on defining terrorism.[15]
>
> xxx

[14] Saul, *supra* note 6, at 141.

[15] *Id*. at 142.

> The [UNSCR 1566] definition of "terrorism" provides explicit guidance to States (and the working group and CTC) on the meaning of terrorism, and may also exert pressure on the General Assembly to break the impasse on the Draft Comprehensive Convention. It presents a relatively narrow definition, limited to ats constituting sectoral offences (typically serious violence endangering life or property, and requiring an international element), which are *also* intended to create terror, intimidate a population, or coerce a government or organization. It thus combines elements of the definitions in the General Assembly's 1994 Declaration on Measures to Eliminate International Terrorism, and the 1999 Terrorist Financing Convention. It is, however, at variance with the definitions proposed in art. 2(1) of the current Draft Comprehensive Convention and by the UN High-Level Panel in late 2004. While both of those proposals refer to intimidation and coercion (as in SC Res 1566), neither of the proposed definitions cover acts aimed solely to provoke terror.[16]
>
> The definition in Res 1566 does not require a political or other motive, thus encompassing private acts which terrorize, intimidate or coerce. Consequently, some of the distinctiveness of terrorism, as *political* violence, is lost.[17] ....

It is clear from this that there is presently no universally agreed definition of terrorism yet within the UN system. At the same time, despite that, and following the 9/11 terrorist attacks in the U.S., UNSCR 1373 (2011) required states, under Chapter VII of the UN Charter,[18] to among others "establish such terrorist acts as serious criminal offenses in domestic laws with proportionate penalties."

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[16] *Id.* at 165.

[17] *Id.*

[18] The UN Charter's Chapter VII is on "Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression." Under Article 39 thereof, "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." Article 25 of Chapter V on "The Security Council" provides that "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

In the absence of a universally agreed definition of terrorism, recourse to guidance for national legislation is available from the most acceptable international law definitions of terrorism, despite some differences or specific nuances among them. The definition of terrorism in UNSCR 1566 was specifically meant to, among others, assist states with their domestic legislation obligation under UNSCR 1373. Stated otherwise, if we might add, the absence of a universally agreed definition of terrorism does not automatically support the void for vagueness and overbreadth argument against the ATA Section 4 Definition of Terrorism.

It is instructive to understand the absence so far of a universally agreed definition of terrorism. One particularly excellent resource, the United Nations Office of Drugs and Crime ("UNODC") "Defining Terrorism Module" (July 2018),[19] indicates "most of the Draft Convention [CCIT] text now having been agreed. What remains elusive, however, is reaching final agreement on a definition of terrorism due to disagreement regarding exceptions to prosecution, such as acts perpetrated during liberations wars…" The said UNODC Module elaborates further on the remaining primary obstacles which relate to permissible exceptions to the CCIT's scope:

> … One remaining hurdle is how to define terrorism and terrorist offences, particularly with respect to self-determination as well as those of struggles and groups. A primary tension here has been between those States and other actors, which wish for the Draft Convention to be made comprehensive in reach with no exceptions, even for those who engaged in armed self-determination struggles; and those States and entities which do not regard such persons and groups, when engaged in what those States consider to be legitimate self-determination struggles, to be terrorists.
>
> Another sticking point has been trying to reach agreement regarding the scope of the Convention, with respect to the activities of State armed forces when engaged in fighting non-State actors engaged in armed self-determination struggles as well as those of State armed forces. A particular concern here has been to ensure that

[19] United Nations Office on Drugs and Crime, *Defining terrorism* (n.d.), https://www.unodc.org/e4j/en/terrorism/module-4/key-issues/defining-terrorism.html.

> any definition of terrorism developed for criminal justice purposes does not confuse the existing regime applicable to situations of armed conflict or other situations when international humanitarian law applies, especially since this regime has clear provisions dealing with terrorist means and methods of warfare. Issues regarding so called State sponsorship of terrorism are an unspoken, but lingering, source of contention….

There are several interesting international law angles here to tease out, especially those involving international humanitarian law, which we shall do so further below, but we go back first to one principle of international law invoked notably in the BAYAN, et al. Petition 11 in its void from vagueness and overbreadth argument against the ATA Section 4 Definition of Terrorism—the principle of legality—which the abovesaid UNODC Module also highlights in endorsing the Draft CCIT.

VII. On the Principle of Legality and "Part of the Law of the Land"

The UNODC "Defining Terrorism Module" endorses the Draft CCIT as a guide for national legislation on and definition of terrorism in this way:

> This in turn has the potential to bring further clarity to national definitions of terrorism and therefore increased rule of law certainty in domestic criminal justice systems, consistent with **the principle of legality as provided for in article 15 of the International Covenant on Civil and Political Rights** (ICCPR), which requires that any criminal offence and its related punishment is predictable and accessible. Ambiguously worded national counter-terrorism legislation has been, and continues to be, a cause of significant concern to many, including the United Nations Human Rights Committee (CCPR/C/RUS/CO/6, para. 7 and para. 26), as well as the Special Rapporteur on promoting and protecting human rights and fundamental freedoms while countering terrorism. Some of the primary concerns are captured in the following observations which, whilst made in relation to one State, are of broader significance:

> The vaguely defined crime of collaboration [with terrorist organizations] runs the risk of being extended to include behaviour that does not relate to any kind of violent activity and the vagueness of certain provisions on terrorist crimes in the … Penal Code carries with it the risk of a 'slippery slope,' i.e., the gradual broadening of the notion of terrorism to acts that do not amount to, and do not have sufficient connection to, acts of serious violence against members of the general population. (General Assembly, Human Rights Council report A/HRC/10/3/Add.2, paras. 9 and 52). (boldface supplied, underscoring in the original)

Indeed, the BAYAN, et al. Petition 11 cites Special Rapporteur Fionnuala Ni Aolain and High Commissioner for Human Rights Michelle Bachelet on their critical preliminary assessments, among others, of the definition of terrorism and other terrorist acts in the Anti-Terrorism Bill before it became the ATA of 2020. But beyond such statements, we must go to the international law sources or references themselves. Mention was already made of the ICCPR as a source or reference for the principle of legality. While Petition 11 erroneously cited "paragraph 15 of General Comment No. 35 on Article 9" of the ICCPR, the correct citation indicated by the UNODC Module is Article 15 of the ICCPR:

> 1. **No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed.** If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.
>
> 2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations. (boldface supplied)

The boldface passage in the above-quoted par. 1 is rendered with the following slightly different wording as Rule 101 of customary international humanitarian law (IHL):

> No one may be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time it was committed; nor may a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed.

The 2005 customary IHL rules study of the International Committee of the Red Cross ("ICRC"),[20] which listed 161 rules in six areas of concern, indicate the above-quoted Rule 101 or the principle of legality to be derived or reflected in the following provisions of the main IHL treaties, the 1949 Geneva Conventions and their 1977 Additional Protocols:

1. Third Geneva Convention, Article 99, first paragraph;
2. Fourth Geneva Convention, Article 67;
3. Additional Protocol I, Article 75(4)(c); and
4. Additional Protocol II, Article 6(2)(c).

The said ICRC customary IHL study further comments:

> The principle of legality, including the prohibition on imposing a heavier penalty than that applicable at the time of the commission of the offence, is set forth in the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child and the regional human rights conventions.[21] **It is specifically listed as non-**

[20] JEAN-MARIE HENCKAERTS AND LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: VOLUME I RULES 371-372 (Cambridge University Press, 2005).

[21] International Covenant on Civil and Political Rights, art. 15(1), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; Convention on the Rights of the Child, art. 40(2)(a), Nov. 20, 1989, 1577 U.N.T.S. 3; European Convention on Human Rights, art. 7(1), Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR]; American Convention on Human Rights, art. 9, Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter ACHR]; African Charter on Human and Peoples' Rights, art. 7(2), June 27, 1981, 1520 U.N.T.S. 217.

derogable in the International Covenant on Civil and Political Rights and the European and American Conventions on Human Rights,[22] **while the Convention on the Rights of the Child and the African Charter on Human and Peoples' Rights do not allow for the possibility of derogation.** In addition, the International Covenant on Civil and Political Rights and the American Convention on Human Rights specify that if, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit from this.[23] **The principle of legality is also contained in other international instruments.**[24]

The principle of legality has been interpreted by the European Court of Human Rights as embodying the principle that only the law can define a crime and prescribe a penalty and the principle that criminal law must not be extensively construed to an accused's detriment, for instance by analogy. This requires that the offence be clearly defined in law, so that "the individual can know from the wording of the relevant provision and, if need be, with the assistance of the court's interpretation of it, what acts and omissions will make him liable."[25] The European Court of Human Rights has stated that the principle of legality allows courts to gradually clarify the rules of criminal liability through judicial interpretation from case to case, "provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen."[26] **The Inter-American Court of Human Rights has also stressed that the principle of legality requires that crimes be classified and described in "precise and unambiguous language that narrowly defines the punishable offence."**[27] (boldface supplied, footnotes included)

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[22] ICCPR, *supra* note 21, art. 4; ECHR, *supra* note 21, art. 15(2); ACHR, *supra* note 21, art. 27.

[23] ICCPR, *supra* note 21, art. 15(1); ACHR, *supra* note 21, art. 9.

[24] *See e.g.*, G.A. Res. 217 A (III) (Universal Declaration on Human Rights), art. 11 (Dec. 10, 1948); EU Charter of Fundamental Rights, art. 49.

[25] European Court of Human Rights, *Kokkinakis v. Greece*.

[26] European Court of Human Rights, *S. W. v. UK*.

[27] Inter-American Court of Human Rights, *Castillo Petruzzi and Others case*.

Note that the above last footnote citation of the Inter-American Court of Human Rights, *Castillo Petruzzi and Others case* had been also cited in the ALG Petition 17. Given this abundant international law affirmation and elaboration of the principle of legality, it is safe to say that this is a generally accepted principle of international law. As such, it is "adopted… as part of the law of the land" under the incorporation clause in Article II, Section 2 of the Philippine Constitution. For some reason, the ICCPR Article 15(1) was not reflected in the Philippine Constitution's Article III Bill of Rights—unlike a number of ICCPR Articles like Article 14 on the (civil/human) rights of the accused.

But is the international law principle of legality more than just "part of the law of the land"? Might it not also be part of the Constitution which is part of the law of the land, or stated otherwise, part of the fundamental law of the land?

Note the ICRC customary IHL study commentary on the ICCPR and other major international treaties' treatment of the principle of legality as "non-derogable." As such, it may even be considered a *jus cogens* norm of international law. *Jus cogens* or peremptory norms of international law are defined in Article 53 of the 1969 Vienna Convention on the Law of Treaties as: "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Among the peremptory norms in present-day international law are: prohibition of the use or threat of aggressive armed force; the right of dependent peoples to self-determination; and the prohibition under all circumstances, including war and national emergency, of slavery, genocide, severe discrimination, taking of hostages, collective punishment, torture, mass extermination, arbitrary killings and summary executions.[28] "The basic rules of international humanitarian law" are included in a non-exhaustive list of peremptory norms of general international law (*jus cogens*) that the International Law Commission has referred to as having that status.[29] The principle of legality, as embodied in Article 15 of the ICCPR, is not included in that list.

The point we are getting at is this: if the generally accepted principles of international law are adopted as part of the law of the land, then the *jus cogens*

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[28] LAURI HANNIKAINEN, PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW: HISTORICAL DEVELOPMENT, CRITERIA, PRESENT STATUS 717-718 (Finnish Lawyers' Publishing Company, 1988).

[29] International Law Commission, *Peremptory norms of general international law*, UNITED NATIONS, 146-47 (n.d.), https://legal.un.org/ilc/reports/2019/english/chp5.pdf.

and other high norms of international law may be deemed adopted as part of the fundamental law of the land, of the Constitution. In fact, it has already been pointed out by a Philippine expert in international law, Prof. Merlin M. Magallona, that certain generally accepted principles of international law are already part of the Constitution. The fundamental principle of the Pact of Paris (or the Kellog-Briand Pact) of 1928 on renouncing war as an instrument of national policy is also in our Constitution, Art. II, Sec. 2, in fact together there with the incorporation clause. Another is the principle of sovereign immunity which is embodied in our Constitution, Art. XVI, Sec. 3 ("The state may not be sued without its consent."), as affirmed in *U.S.A. vs. Guinto* (182 SCRA 645) and *Holy See vs. Rosario* (238 SCRA 524).[30]

Surely, there have to be generally accepted principles of international law, even if not *jus cogens* norms, that are so fundamental that their incorporation into Philippine law should accord them not just ordinary legal but constitutional status. The first thing that comes to mind in this regard are human rights as defined in the International Bill of Rights (i.e., the Universal Declaration and the two International Covenants). Are these not of the same level as the Philippine constitutional Bill of Rights (Art. III) and Art. XIII on Social Justice and Human Rights? If so, then the principle of legality, as embodied in Article 15 of the ICCPR, can be accorded constitutional status. In this regard, this principle of legality is not only an international law argument as invoked in only two (in our sample of twenty-three) anti-ATA petitions; it is also a constitutional law argument—but which neither of those two petitions framed it to be in arguing against the ATA Section 4 Definition of Terrorism. This could have reinforced the predominantly void for vagueness and overbreadth arguments of the anti-ATA petitions against Section 4.

VIII. Revisiting *Kuroda vs. Jalandoni* and the Geneva Conventions of 1949

At this point in our discussion, it is instructive to revisit the 1949 case of *Kuroda vs. Jalandoni*[31] involving Executive Order No. 68 establishing military commissions to try Japanese war criminals. We shall, however, focus here only on

[30] MERLIN M. MAGALLONA, AN INTRODUCTION TO INTERNATIONAL LAW IN RELATION TO PHILIPPINE LAW 43 (Merlin M. Magallona, 2nd ed., 1999).

[31] Kuroda v. Jalandoni, 83 Phil. 171 (1949).

two key passages from the Decision penned by the venerable Chief Justice Manuel V. Moran, interpreting and applying the incorporation clause of the then 1935 Philippine Constitution:

> Article 2 of our Constitution provides in its section 3, that –
>
> "The Philippines renounces war as an instrument of national policy, and adopts the generally accepted principles of international law as part of the law of the nation."
>
> In accordance with the generally accepted principles of international law of the present day, **including the Hague Convention, the Geneva Convention and significant precedents of international jurisprudence established by the United Nations**, all those persons, military or civilian, who have been guilty of planning, preparing or waging a war of aggression and of the commission of crimes and offenses consequential and incidental thereto, in violation of the laws and customs of war, of humanity and civilization, are held accountable therefor. Consequently, in the promulgation and enforcement of Executive Order No. 68, the President of the Philippines has acted in conformity with **the generally accepted principles and policies of international law which are part of our Constitution.**
>
> xxx
>
> Petitioner argues that respondent Military Commission has no justification to try petitioner for acts committed in violation of the Hague Convention and the Geneva Convention because the Philippines is not a signatory to the first and signed the second only in 1947. It cannot be denied that **the rules and regulations of the Hague and Geneva Conventions form part of and are wholly based on the generally accepted principles of international law**. In fact, these rules and principles were accepted by the two belligerent nations, the United States and Japan, who were signatories to the two Conventions. **Such rules and principles, therefore, form part of the law of our nation even if the Philippines was not a signatory to the**

> **conventions embodying them, for our Constitution has been deliberately general and extensive in its scope and is not confined to the recognition of rules and principles of international law as contained in treaties to which our government may have been or shall be a signatory.** (boldface supplied)

Certain points in these passages merit deeper examination. The most significant or far-reaching point for possible supplemental interpretation or clarification by the present Supreme Court: the *Kuroda* pronouncement on "the generally accepted principles and policies of international law **which are part of our Constitution.**" (boldface supplied) At first glance, this seems a slip of the pen of the ponente. But on deeper examination, the ponente, a venerable Chief Justice no less, must have been careful and deliberate in his choice of words.

The above-quoted *Kuroda* pronouncement does not mean that all "the generally accepted principles and policies [note: policies, not just principles] of international law" are "part of our Constitution." But we submit that some generally accepted principles of international law—such as the basic rules of IHL—are part of our Constitution, or may be deemed or ruled part of it, or given constitutional status. To repeat, the phrase "part of the law of the land" in the incorporation clause includes the Constitution because it is in fact part of the law of the land as the highest or fundamental law of the land.

Now, among the basic rules of IHL, in fact considered customary IHL Rule 2 is that "Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited."[32] This is the essence of terrorism and of any acceptable definition of it. Recall also that in the fourth of the five most acceptable international law definitions of terrorism—the UN Secretary-General's High-Level Panel Report on December 2, 2004—the first listed element thereunder is:

> (e) Recognition, in the preamble, that State use of force against civilians is regulated by the *Geneva Conventions* and other instruments, and, if of sufficient scale, constitutes a war crime by the persons concerned or a crime against humanity.

[32] Henckaerts and Doswald-Beck, *supra* note 20, 8-11.

Without prejudice to later teasing this out further below, we present here the specific provisions in the 1949 Geneva Conventions and their 1977 Additional Protocol, all ratified by the Philippines (and also deemed incorporated in Philippine law by the above-quoted *Kuroda* ruling) which deal with terrorism:

> [1] [**Fourth**] ***Geneva Convention*** *Relative to the Protection of Civilian Persons in Time of War of August 12, 1949*, **Article 33, first paragraph** – "… Collective penalties and likewise **all measures of intimidation or of terrorism are prohibited.**" (boldface supplied)
>
> [2] 1977 ***Additional Protocol II*** *Relating to the Protection of Victims of Non-International Armed Conflicts*, **Article 4, paragraph 2(d)** – prohibits **"acts of terrorism."** (boldface supplied)
>
> [3] 1977 ***Additional Protocol I*** *Relating to the Protection of Victims of International Armed Conflicts*, **Article 51, paragraph 2**, and ***Protocol II***, **Article 13, paragraph 2** (both of identical text) – "The civilian population as such, as well as individual **civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population** are prohibited." (boldface supplied)

On the above-quoted last sentence ("Acts or threats of violence…"), this is the instructive authoritative international legal commentary thereon:

> … the Conference wished to indicate that **the prohibition covers acts intended to spread terror**; there is no doubt that acts of violence related to a state of war almost always give rise to some degree of terror among the population and sometimes also among the armed forces. It also happens that attacks on armed forces are purposely conducted brutally in order to intimidate the enemy soldiers and persuade them to surrender. This is not the sort of terror envisaged here. **This provision is intended to prohibit acts of violence the primary purpose of which is to spread terror among the civilian population without offering substantial military advantage.** It is interesting to note that threats of such acts are also prohibited. This calls to mind some of the proclamations made in the

> past threatening the annihilation of civilian populations.[33] (boldface supplied)

Now, the above-quoted Philippine-ratified treaty provisions are binding on the Philippines, even more than customary international law, because of the fundamental international law principle of *pacta sunt servanda* (treaties must be observed in good faith)[34]—itself ruled by the Supreme Court to be a generally accepted principle of international law adopted as part of the law of the land.[35] It is also among the general principles of law as applied by international courts and tribunals.[36] "(T)he general principles of law recognized by civilized nations" are in fact among the sources of international law under Article 38(1)(c) of the ICJ Statute. All told, *pacta sunt servanda* may be argued to even partake of a constitutional status—akin to the Philippine Constitution Bill of Rights Article III, Section 10: "No law impairing the obligation of contracts shall be passed."

In addition, international treaty observance is an integral part of the Philippine state policy of international cooperation pursuance to its Constitution Article II, Section 2: "The Philippines… adheres to the policy of peace, equality, justice, freedom, cooperation and amity with all nations." It is notable—in a more negative sense—that the OSG did not invoke this and *pacta sunt servanda* in its comment when counter-posing the terrorism definitions in five international legal instruments against the void for vagueness and overbreadth arguments of the anti-ATA petitions.

The Philippines is bound to perform or observe in good faith the international treaties on terrorism which it has ratified, including the definitions therein, especially for the purpose of criminalizing (i.e., defining and penalizing) terrorism in our domestic implementing legislation against this which is among

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[33] YVES SANDOZ, CHRISTOPHE SWINARSKI, AND BRUNO ZIMMERMAN (EDS.), COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 618 (Martinus Nijhoff Publishers, 1987).

[34] Also embodied in the 1969 Vienna Convention on the Law of Treaties, art. 26 on *Pacta sunt servanda*: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

[35] See La Chemise Lacoste vs. Fernandez (129 SCRA 373), Agustin vs. Edu (88 SCRA 195), Tañada vs. Angara (272 SCRA 18), and Bayan vs. Zamora (342 SCRA 449 [2000]) with the same lead petitioner as that in the herein subject Petition 11.

[36] BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 112-114 (Cambridge University Press, 2006).

the most serious crimes of concern to the international community. In criminalization, definition, aside from penalization, is basic. No definition, no crime. Wrong definition, wrong crime.

As far as the general definition or concept of terrorism is found in the Geneva Conventions and in customary IHL rules, the Philippines is bound as a matter of the incorporation clause, under the Constitution's Article II, Section 2 and the *Kuroda* ruling. Apart from this national jurisprudence, there is much international jurisprudence affirming the customary international law status of the whole Geneva Conventions because of their overwhelming international acceptance.[37] Verily, *Kuroda* was well ahead of its time, a real credit to Philippine jurisprudence and in its appreciation of international law.

The current ATA constitutionality litigation before the Supreme Court could, if not ought to, be the occasion for a new *Kuroda*. The subject ATA in its Section 2 Declaration of Policy itself states:

> It is declared a policy of the State to protect life, liberty, and property from terrorism, to condemn terrorism as inimical and dangerous to the national security of the country and to the welfare of the people, and to make terrorism a crime against the Filipino people, against humanity, and against the law of nations. (underscorings supplied)

So, it must be asked: How come then that the current ATA constitutional litigation lacks attention to international law aspects on both sides of the litigation? In fact, there is also lack of attention by them not only to *Kuroda* but to other, more recent, Philippine jurisprudence bearing on the definition of terrorism and bearing a more international law perspective. And this does not include *Southern Hemisphere* which did not permit itself even "a limited vagueness analysis of the definition of terrorism in RA 9372."

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[37] *See e.g.,* the UN Secretary-General's Report to the Security Council preparatory to the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY), New York, 3 May 1993, particularly paragraphs 37-44, pursuant to paragraph 2 of Security Council resolution 808 (1993).

IX. More Recent Philippine Jurisprudence Bearing on the Definition of Terrorism

At this point, we see fit to also revisit the "much maligned" Dissenting Opinion of Associate Justice Dante O. Tinga in the "much applauded" case of *Prof. Randolf S. David vs. Pres. Gloria Macapagal-Arroyo*,[38] one of a trilogy "In Defense of Liberty."[39] Given the foregoing discussion, it was Mr. Justice Tinga in that landmark case who showed the best appreciation of the general sense of international law as to what constitutes terrorism, contrary to notions that it is "still an amorphous and vague concept" and "at best fraught with ambiguity." Quoting Tinga:

> … Terrorism has a widely accepted meaning that encompasses many acts already punishable by our general penal laws. There are several United Nations and multilateral conventions on terrorism,[40] as well as declarations made by the United Nations General Assembly denouncing and seeking to combat terrorism.[41] There is a general sense in international law as to what constitutes terrorism, even if no precise definition has been adopted as binding on all nations.[42]

In this quote's first footnote (actually footnote 53 in the Dissenting Opinion), Mr. Justice Tinga mentions a new anti-terrorism convention—the

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[38] Prof. Randolf S. David vs. Pres. Gloria Macapagal-Arroyo, G.R. No. 171409, May 3, 2006 concerning Presidential Proclamation No. 1017 (PP 1017) declaring a state of national emergency on Feb. 24, 2006.

[39] From the title of the Supreme Court Public Information Office publication *The Supreme Court Speaks: In Defense of Liberty*, featuring three "Landmark Decisions on the Constitutionally Enshrined Liberty of the Filipino People" on the issues of EO 464, CPR and BP 880, and PP 1017.

[40] Originally, Tinga footnote 53: "To name a few, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (1973); International Convention for the Suppression of Terrorist Bombings (1997); International Convention for the Suppression of the Financing of Terrorism (1999); the International Convention for the Suppression of Acts of Nuclear Terrorism (2005). See 'United Nations Treaty Collection – Conventions on Terrorism,' http://untreaty.un.org/ English/Terrorism.asp (visited, 30 April 2006)."

[41] Originally, Tinga footnote 54: "See e.g., Resolution No. 49/60, Adopted by the United Nations General Assembly on 17 February 1995."

[42] At page 33 of the original loose-leaf Dissenting Opinion of Tinga, J., also at pp. 209-10 of the afore-cited publication *The Supreme Court Speaks: In Defense of Liberty*.

International Convention for the Suppression of Acts of Nuclear Terrorism (2005)—which is naturally not among "the preceding 12 anti-terrorism conventions" referred to by the UN High Level Panel in its above-quoted Report of Dec. 2004.

The majority opinion/decision in *David vs. Macapagal-Arroyo* makes reference to the "definitional predicament" regarding terrorism,[43] quoting extensively from the Mar. 12, 2002 Supreme Court Centenary Lecture of Austrian Professor Hans Koechler on "The United Nations, the International Rule of Law, and Terrorism,"[44] as cited in the Dissenting Opinion of Justice Kapunan in *Lim vs. Executive Secretary*.[45] But the *David vs. Macapagal-Arroyo* Decision/majority opinion does not quote Justice Kapunan's own paragraph after quoting Koechler, and so we quote now Justice Kapunan's said paragraph in *Lim vs. Executive Secretary*:

> **Koechler adds, however, that this failure to distinguish between terrorist acts and acts of national liberation did not prevent the international community from arriving at an implicit or "operative" definition.** For example, in Article [5] of the International Convention for Suppression of Terrorist Bombings, terrorist acts are referred to as "criminal acts…, in particular where they are intended or calculated to provoke a state of terror in the general public or in a group of persons or particular persons" that are under no circumstances justifiable [by] considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature." (boldface and bracketed portions supplied)

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[43] At pp. 61-63 (loose-leaf version); also at pp. 154-56 of the afore-cited publication *The Supreme Court Speaks: In Defense of Liberty*. The Decision's crucial observation made in 2006 that "no law has been enacted" yet to define and penalize terrorism is what actually gave impetus to the enactment of the first Philippine anti-terrorism law, Republic Act No. 9372, the Human Security Act of 2007.

[44] Published among others in HANS KOECHLER MANILA LECTURES 2002: TERRORISM AND THE QUEST FOR A JUST WORLD ORDER 1-28 (Foundation for Social Justice, 2002).

[45] Lim vs. Executive Secretary, G.R. No. 151445, Apr. 11, 2002, 380 SCRA 739, Dissenting Opinion, 7 (loose-leaf version).

In fact, Koechler, in that same 2002 Supreme Court Centenary Lecture, proposed what he called a comprehensive or unified approach, which is not far from the terrorism definitional elements recommended by the UN High Level Panel two years later. According to Koechler, in a universal and at the same time unified system of norms, ideally to be created as an extension of existing legal instruments, there should be corresponding sets of rules (a) penalizing deliberate attacks on civilians or civilian infrastructure in wartime (as covered by the Geneva Conventions), and (b) penalizing deliberate attacks on civilians in peacetime (covered by the twelve or now more anti-terrorist conventions). He says, "Such a harmonization of the basic legal rules related to politically motivated violent acts against civilians would make it legally consistent also to include the term 'state terrorism' in the general definition of terrorism."

This actually touches on such questions, including definitional ones, of the relationship between terrorism, on one hand, and war crimes, crimes against humanity, genocide, rebellion, and even common crimes like murder, arson and kidnapping, on the other hand. Some discussion of this may seem like a digression but it is quite instructive precisely because it bears on definitions and the related matter of distinctions, and as may also have bearing on vagueness or clarity.

X. Terrorism vis-à-vis War Crimes, Crimes Against Humanity, Genocide, Rebellion, and Common Crimes

We had already quoted above this passage on the definition of terrorism from the Report of the UN High Level Panel on Threats, Challenges and Change on Dec. 2, 2004: "164. That definition of terrorism should include the following elements: (a) Recognition, in the preamble, that State use of force against civilians is regulated by the *Geneva Conventions* and other instruments, and, if of sufficient scale, constitutes a war crime by the persons concerned or a crime against humanity;…" (underscorings supplied)

UNSG Kofi Anan, in endorsing the said UN High Level Panel Report and its indicative definition of terrorism, made the following remarks in his keynote address to the International Summit on Democracy, Terrorism and Security on Mar. 10, 2005 in Madrid:

> For too long the moral authority of the UN in confronting terrorism has been weakened by the spectacle of protracted

> negotiations. But the report of the High-Level Panel offers us a way to end these arguments. We do not need to argue whether States can be guilty of terrorism, because deliberate use of force by States against civilians is already clearly prohibited under international law. As for the right to resist occupation, it must be understood in its true meaning. It cannot include the right to deliberately kill or maim civilians. (underscorings supplied)

Then, we have the afore-cited Judgement of the Special Tribunal for Lebanon in 2011, which had controversially found that since at least 2005, a definition of "transnational terrorism" has existed within customary international law. But the Tribunal had also stated, among others, that the necessary substantive (objective and subjective) elements for two other classes of terrorist criminal conduct also existed within international law: war crimes committed in the course of international or non-international armed conflict; and those acts crossing the threshold to constitute crimes against humanity, whether perpetrated during peace time or armed conflict.[46]

In international practice, in addition to terrorism crimes established by the universal instruments against terrorism, which must be incorporated by states parties to them into domestic criminal legislation, it may be possible to prosecute some terrorist offences as core international crimes whether sourced in customary international law or codified within treaty texts such as the 1998 Rome Statute of the International Criminal Court. The core international crimes of particular relevance here are crimes against humanity, war crimes, and genocide.[47]

And so, both conceptually and more likely in legal practice, there is bound to be some confusion between terrorism, on one hand, and crimes against humanity, war crimes and genocide, on the other hand. To start with, the subject ATA in its Section 2 Declaration of Policy itself speaks of "… and to make terrorism a crime against the Filipino people, against humanity, and against the law of nations." (underscorings supplied) This places on the level of state policy a confusion between terrorism and crimes against humanity. This might then

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[46] UNODC, *Defining Terrorism Module* (July 2018), https://www.unodc.org/e4j/en/terrorism/module-4/key-issues/defining-terrorism.html.

[47] UNODC, *Core International Crimes Module* (July 2018), https://www.unodc.org/e4j/en/terrorism/module-4/key-issues/core-international-crimes.html.

support the void for vagueness and overbreadth argument of the anti-ATA petitions.

But let us try to sort out this confusion. Terrorism and crimes against humanity have each their distinct international legal frameworks. That for terrorism was much discussed above. Unlike terrorism and for that matter war crimes and genocide which have long-time multilateral treaty-based definitions,[48] crimes against humanity developed largely as a matter of customary international law until its multilateral treaty definition in the Rome Statute, which also has the latest international criminal law definitions of war crimes and genocide.[49] These all represent different legal frameworks dealing with different criminal phenomena which have come to the fore of global attention at different eras and contexts. We are now still in the post-9/11 era of international terrorism and counter-terrorism (and the newer era of climate change and global pandemics).

Terrorism must be given its just due in terms of a specific legal framework to address it, in the same way that common crimes like murder, political offenses like rebellion, war crimes, crimes against humanity, and genocide have their respective specific legal frameworks. Murder committed in furtherance of rebellion is absorbed by the latter.[50] But rebellion does not absorb war crimes, crimes against humanity, genocide and terrorism even if committed in furtherance of rebellion.[51]

That the emerging international law on terrorism makes use of the international law on war crimes, particularly for terrorism during armed conflict, does not change those differences in legal frameworks. We might say by analogy in these pandemic times that each disease or diagnosis has its corresponding treatment or medicine. That is why we should not confuse different classes of crimes—lest we take the wrong legal action, like when common crimes are charged for what are really political offenses.

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[48] War crimes defined in the 1947 *Geneva Conventions* and 1977 *Additional Protocols*, and genocide defined in the 1948 Genocide Convention.

[49] *See* Timothy L.H. McCormack and Sue Robertson, *Jurisdictional Aspects of the Rome Statute for the New International Criminal Court*, 23(3) MELBOURNE U. L. REV. 635, 651 (1999).

[50] In Philippine jurisprudence, this is known as the political offense doctrine, as articulated in the landmark case of People vs. Hernandez, 99 Phil. 515 (1956).

[51] Per Concurring Opinion of Justice Marvic Mario Victor F. Leonen in Ocampo vs. Abando, G.R. No. 176830, Feb. 11, 2014, as to the R.A. 9851 crimes of war crimes, genocide, and other crimes against humanity as exceptions to the political offense doctrine.

During the 112th Assembly of the Inter-Parliamentary Union ("IPU") held in Manila on Mar. 31 to Apr. 8, 2005, it passed a Resolution on "The Role of Parliaments in the Establishment and Functioning of Mechanisms to Provide for the Judgment and Sentencing of War Crimes, Crimes Against Humanity, Genocide and Terrorism, with a View to Avoiding Impunity." Note how terrorism is distinct from and not subsumed under or absorbed by war crimes, crimes against humanity and genocide. In the Philippines, the latter three international crimes are already the subject of Republic Act No. 9851, the Philippine Act on Crimes Against International Humanitarian Law, Genocide and Other Crimes Against Humanity,[52] while terrorism is now covered by the questioned ATA (previously, the now repealed Human Security Act of 2007).

Crimes against humanity ("CAH"), as defined in the Rome Statute's Article 7, deals with about 11 kinds of acts, including murder, rape, torture, enforced disappearance, and forcible displacement, (and this is the key chapeau or qualification:) "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." It sounds similar to the emerging international legal definition of terrorism but there are some different elements. CAH does not include such definitional elements of terrorism as the "purpose… to intimidate a population [or "to spread terror among the civilian population"], or to compel a government or an international organization to do or abstain from doing any act." As far as attacks directed against any civilian population, CAH involves a high threshold that these attacks are "widespread and systematic," a qualification not necessarily obtaining in terrorism.

Terrorism, CAH, genocide, and common crimes can be committed both in peace time and in war time. But war crimes and rebellion are, by their nature, committed only in the context of an armed conflict, mainly non-international (or internal) armed conflict in the case of rebellion. All these crimes are separate and distinct from each other, with different elements, including intent and purpose, and are not mutually exclusive (except when rebellion absorbs certain common crimes like murder in its furtherance). In other words, a given incident of armed violence may, repeat may, partake of more than one kind of crime, depending on the circumstances where the elements of the crime obtain in the incident. And

[52] The author happened to be the main drafter of the then-called "IHL Bill" before it was passed into this law. R.A. 9851 was enacted even before the Philippines ratified the Rome Statute and then eventually withdrew from it.

thus, more than one kind of crime may be charged based on that one incident, even on just one incident.

The question of the particular relationship between terrorism and rebellion has come up in the course of the public (not necessarily pleading) discourse around the ATA and its constitutionality litigation in the Supreme Court.

XI. Terrorism and Rebellion: "Are CPP-NPA rebels terrorists?"

In the BAYAN, et al. Petition 11 against the ATA for unconstitutionality, there is a footnote 117 in p. 47 relating to par. 115 that reads: "Section 4 of the assailed law does away with the concept of 'predicate crimes,' which had been used—at least in part—to define terrorism under Section 3 of the HSA." We shall to the repealed Human Security Act Section 3 Definition of Terrorism shortly below. But for now, we deal with the reference made in the said footnote 117: "*See* Antonio T. Carpio, 'Are CPP-NPA rebels terrorists?,' *Philippine Daily Inquirer*, July 16, 2020…" Ironically, no reference to this is made in the Justice Carpio, et al., Petition 12 itself! It is of course no secret that the Communist Party of the Philippines-New People's Army ("CPP-NPA") is among the main, if not the main, target of the ATA. Justice Carpio in his said *Inquirer* column piece (not in his petition) makes this argument:

> … under the ATA rebels are not terrorists and cannot be declared as terrorists. First, in defining terrorism the ATA deleted all the predicate crimes, like rebellion and coup d'etat, listed in the definition of terrorism in the Human Security Act of 2007 (HSA). The crime of terrorism in the ATA is now a separate and distinct stand-alone crime, unlike in the HSA where the predicate crimes, like rebellion and coup d'etat, were the means of committing the crime of terrorism. In *Lagman v. Medialdea*, the Supreme Court ruled that under the HSA rebellion is absorbed in terrorism because rebellion is one of the predicate crimes of terrorism. This is no longer the case since the ATA has repealed and replaced the HSA.
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> x x x
>
> There can be no dispute that the ATA does not criminalize as terrorism acts that constitute rebellion. If the acts constitute rebellion, then the crime committed will be rebellion and not

> terrorism. The intent of rebels is to remove any territory or military force of the Philippines from allegiance to the Government or its laws, or to deprive the President or Congress of any of their powers. The intent of terrorists is to intimidate the public and the Government, create fear, or destabilize the political, economic, and social structure of the country.
>
> CPP-NPA rebels, whose intent is clearly rebellion, are not terrorists under the ATA, and consequently they, individually or as a group, cannot be proscribed as terrorists under the ATA.

It is interesting to note that the CPP found that "Justice Carpio's article is a sharp legal instrument that exposes a gaping hole in the Duterte regime's plan of using the ATA against the CPP and the revolutionary cause."[53] We hope that Justice Carpio has not thereby been "red-tagged."

But actually, contrary to Justice Carpio's interpretation of *Lagman vs. Medialdia*,[54] is its ruling to the effect that "Terrorism neither negates nor absorbs rebellion:"

> Besides, there is nothing in Art. 134 of the RPC [for rebellion] and RA 9372 [for terrorism] which states that rebellion and terrorism are mutually exclusive of each other or that they cannot co-exist together. RA 9372 does not expressly or impliedly repeal Art. 134 of the RPC. **And while rebellion is one of the predicate crimes of terrorism, one cannot absorb the other as they have different elements.** (boldface supplied, footnote omitted)

While rebellion was one of the predicate crimes of terrorism under the RA 9372 or HSA Section 3 Definition of Terrorism, it is not so under the ATA Section 4 Definition of Terrorism which does away with the concept of "predicate crimes." That rebellion is no longer a predicate crime of terrorism under the ATA, it simply does not follow that the CPP-NPA as undoubtedly rebels can no longer be considered terrorists under the ATA nor be proscribed as terrorists thereunder,

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[53] Marco Valbuena, *On Justice Carpio's opinion asserting that CPP/NPA are not terrorists under ATA*, PHILIPPINE REVOLUTION WEB CENTRAL (July 20, 2020), https://cpp.ph/ statements/on-justice-carpios-opinion-asserting-that-cpp-npa-are-not-terrorists-under-ata/.

[54] Lagman vs. Medialdia, G.R. No. 231658, July 4, 2017,

contrary to Justice Carpio's opinion. It depends on whether the elements of terrorism or the requirements for proscription as terrorists under the ATA would obtain in the case of the CPP-NPA in a proper case for that purpose. That result cannot be ruled out simply because the ATA did away with rebellion as a predicate crime of terrorism. As two distinct crimes, with more reason that a ruling that CPP-NPA rebels are also terrorists or that the CPP-NPA as a rebel group is terrorist cannot be ruled out. It would and should depend on the evidence and of course on a fair application of the law, not on its brute weaponization. And if rebellion does not absorb war crimes, crimes against humanity and genocide committed purportedly in furtherance thereof, then similarly rebellion does not absorb terrorism or terrorist acts committed purportedly in furtherance thereof.

Incidentally, the lead petitioner in *Lagman vs. Medialdia* is the same lone petitioner in the Rep. Lagman Petition 2 in our subject anti-ATA constitutionality litigation—among the "usual suspects," as they say, for such litigation.

XII. On the HSA Model of "Predicate Crimes"

Many of the anti-ATA petitions, in assailing its Section 4 Definition of Terrorism as "void for vagueness," invariably contrasted it unfavorably with the HSA Section 3 Definition of Terrorism which enumerated 12 predicate crimes (six felonies and six special offenses) to more clearly or precisely define the conduct or acts part (the other part being the intent or purpose part) of the crime of terrorism. To recall, the HSA Section 3 Definition of Terrorism:

> SEC. 3. *Terrorism.*—Any person who commits an act punishable under any of the following provisions of the Revised Penal Code:
>
> a. Article 122 (Piracy in General and Mutiny in the High Seas or in the Philippine Waters);
> b. Article 134 (Rebellion or Insurrection);
> c. Article 134-a (Coup d' Etat), including acts committed by private persons;
> d. Article 248 (Murder);
> e. Article 267 (Kidnapping and Serious Illegal Detention);
> f. Article 324 (Crimes Involving Destruction), or under

1. Presidential Decree No. 1613 (The Law on Arson);
2. Republic Act No. 6969 (Toxic Substances and Hazardous and Nuclear Waste Control Act of 1990);
3. Republic Act No. 5207, (Atomic Energy Regulatory and Liability Act of 1968);
4. Republic Act No. 6235 (Anti-Hijacking Law);
5. Presidential Decree No. 532 (Anti-Piracy and Anti-Highway Robbery Law of 1974); and,
6. 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)

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 an unlawful demand shall be guilty of the crime of terrorism and shall suffer the penalty of forty (40) years of imprisonment, without the benefit of parole as provided for under Act No. 4103, otherwise known as the Indeterminate Sentence Law, as amended.

It was the above-quoted phrase "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 an unlawful demand" in this definition of terrorism that was assailed as void for vagueness and overbreadth in *Southern Hemisphere* but which the Decision therein purposedly made no substantive ruling thereon.

As for the HSA model of predicate crimes, this is not the only way to go in the definition of the most serious crimes of concern to the international community. The non-enumeration of predicate crimes does not necessarily render a definition of such crimes as void for vagueness. We need look only at certain key examples from R.A. 9851 (which was admittedly patterned after the Rome Statute though it was not yet ratified by the Philippines at the time R.A. 9851 was enacted, nothing wrong with that):

Section 4. *War Crimes.*—For the purpose of this Act, "war crimes" or "crimes against International Human Humanitarian Law" means:

(a) In case of an international armed conflict, grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under provisions of the relevant Geneva Convention:

(1) Willful killing;
(2) Torture or inhuman treatment, including biological experiments;
(3) Willfully causing great suffering, or serious injury to body or health;
(4) Extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly;
(5) Willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
(6) Arbitrary deportation or forcible transfer of population or unlawful confinement;
(7) Taking of hostages;
(8) Compelling a prisoner a prisoner of war or other protected person to serve in the forces of a hostile power; and
(9) Unjustifiable delay in the repatriation of prisoners of war or other protected persons.

x x x

Section 5. *Genocide.*—(a) For the purpose of this Act, "genocide" means any of the following acts with intent to destroy, in whole or in part, a national, ethnic, racial, religious, social or any other similar stable and permanent group as such:

(1) Killing members of the group;

(2) Causing serious bodily or mental harm to members of the group;
(3) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(4) Imposing measures intended to prevent births within the group; and
(5) Forcibly transferring children of the group to another group.

(b) It shall be unlawful for any person to directly and publicly incite others to commit genocide.

x x x

Section 6. *Other Crimes Against Humanity*.—For the purpose of this act, "other crimes against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) Willful killing;
(b) Extermination;
(c) Enslavement;
(d) Arbitrary deportation or forcible transfer of population;
(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
(f) Torture;
(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, sexual orientation or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime defined in this Act;

(i) Enforced or involuntary disappearance of persons;
(j) Apartheid; and
(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

x x x

To be sure, many of the terms used in the above-quoted provisions of R.A. 9851 are defined in its Section 3, but the point of this example is that the conduct or acts part of a definition of a crime of international concern like war crimes, genocide and crimes against humanity need not be by way of enumerating specific domestic criminal statutes or provisions like the HSA did. But the OSG has overlooked this counter-argument that has international law references.

XIII. Conclusion

Based on the foregoing discussion of the ATA's constitutionality litigation arguments and counter-arguments on the ATA Section 4 definition of Terrorism in general or as a concept, it is likely that Supreme Court will not significantly deal with international law as it bears on the constitutionality discussion or result, one way or the other. And this would be largely because the case counsels themselves unfortunately miss for the most part to argue from the perspective of international law as this relates to Philippine constitutional law, preferring the trodden-path of the usual constitutionality arguments like void for vagueness and overbreadth. Whatever the result, may there be some lessons learned of more and better international law consciousness.[55]

Our fearless forecast is that the constitutionality ATA Section 4 definition of Terrorism will be upheld as a general concept that is in accord with the most accepted international law definitions of terrorism. But although Section 4 is the "meat," "heart," or "core" of the ATA, and thus inevitably bears on other Sections as well, these other sections which operationalize the general concept will likely

[55] Perhaps the kind exemplified in the essays in MERLIN M. MAGALLONA, THE PHILIPPINE CONSTITUTION AND INTERNATIONAL LAW (U.P. Law Complex, 2013).

encounter rougher sailing through the Supreme Court gauntlet where the devil is in the details. There are Sections 5 to 12 concerning other specific offenses of terrorism, including Section 10 membership in a terrorist organization which include those designated as such by the UNSC. For these sections, the Section 4 definition of terrorism is not the only parameter.

There are also Sections 25 to 28 on designation and proscription of terrorist organizations. Designation involves automatically adopting the UNSC Consolidated List of designated terrorist individuals and organizations. That designation already being given, there is no more application or interpretation of the Section 4 definition of Terrorism to be done. In the current ATA constitutionality litigation, this is likely to involve tension between the "paramount consideration" of "national sovereignty" in foreign relations under the Constitution's Article II, Section 7, on one hand, and the state policy of "cooperation… with all nations" under the Constitution's Article II, Section 2, especially with the United Nations and its Security Council with its binding Resolutions like UNSCR 1373, on the other hand. This actually came out, for one, in the Justice Carpio, et al. Petition 12's discussion of Section 25 at p. 68 where it described the UNSC as "not a judicial body, whether in Philippine or international law." But we are no longer discussing this as being outside our self-limited scope of Section 4. The point is that there is more to the *operational* definition of terrorism than that found in Section 4.

Our educated guess is that the Supreme Court will uphold the constitutionality of the ATA and Section 4 as a whole but will strike down some other sections or parts of sections as unconstitutional using mainly the standard parameters for this like vagueness, overbreadth, violation of the Bill of Rights and violation of separation of powers, with minimal reference to international law. The latter lack unfortunately misses out on a fuller constitutionality discussion that is informed, enriched and enlightened by international law.