

Philippines - On the New Anti-Terrorism Bill/Law: Some Initial Notes

Monday 8 June 2020, by [SANTOS Soliman, Jr](#) (Date first published: 8 June 2020).

These are only some initial notes relevant to, not a comprehensive assessment of, the new Anti-Terrorism Bill (ATB, Senate Bill No. 1083/ House Bill No. 6875) poised to be passed as “The Anti-Terrorism Act of 2020” (ATA) which would repeal R.A. No. 9372, the Human Security Act of 2007 (HSA).

1. Much concerns have been raised not only in Congress but also in various media about the ATB passing soon into the ATA, be these concerns in terms of its substantive content, its legislative process, its timing, its prioritization amidst a pandemic lockdown and, perhaps most importantly, its likely significant consequences for Philippine democracy, fundamental freedoms, civil liberties and human rights, especially about the Sec. 29 Detention Without Judicial Warrant of Arrest on mere suspicion of committing terrorist acts or of membership in a proscribed terrorist organization. We need not repeat, for the most part, those raised concerns which are serious. If only to give just **due to these serious concerns**, which are **not limited to issues of constitutionality**, the prudent thing now would be for the Congress leadership to withhold transmitting the ATB to the President for him to sign it into law but instead **reopen legislative deliberations** (like was done for the ABS-CBN franchise renewal) OR, IF the ATB has already been transmitted to the President, for him to veto it purposively to reopen legislative deliberations. It will not do for him to merely not sign it, as it would then automatically lapse into law 30 days from transmittal to him.

2. **In the meantime, the HSA will still be there as the existing anti-terrorism law** which is the domestic law which primarily addressees terrorism, **aside from** R.A. No. 10168, **The Terrorism Financing Prevention and Suppression Act of 2012** (TFPSA). It is interesting to note that the TFPSA makes reference to the HSA such as when it comes to designated terrorist organizations and persons. However, while the ATB would repeal the HSA, it would not repeal the TFPSA which the ATB in fact reiterates in Secs. 16, 35 and 36 when it comes to surveillance of suspects and interception of communications, and to investigation and freezing of bank deposits, related to the financing of terrorism. So, even without an ATA, there will still be an anti-terrorism law which is the HSA. As it is, there has not been much implementation experience of this 2007 anti-terrorism law, not much cases filed, hardly any jurisprudence on it and no congressional oversight review that would ordinarily be the basis for the amendment and especially repeal of the HSA.

3. **The only Supreme Court Decision on the HSA** that I am personally aware of, as the lead individual petitioner, is that in *Southern Hemisphere Engagement Network, Inc. vs. Anti-Terrorism Council*, 632 SCRA 146 (2010), which dismissed several petitions, including those of KMU, BAYAN, KARAPATAN et al., questioning the constitutionality of the HSA immediately after its passage, declining to rule on this on procedural grounds basically of un-ripeness for adjudication. The Decision practically required that the petitioners must first be charged with violation of the HSA so that they may be said to have legal standing in an actual controversy and only then can the Court take cognizance of the case. My old friends Atty. Edre U. Olalia of the National Union of Peoples' Lawyers and Rep. Carlos Isagani Zarate of the Bayan Muna party-list group who have announced

their intentions to challenge the ATA's constitutionality upon its signing by the President should take that requirement into consideration.

It may be also interesting to note that there is a pending (?) February 2018 Petition by the Department of Justice (DOJ) against the Communist Party of the Philippines (CPP) and New People's Army (NPA) for **their proscription as terrorist organizations** under Sec. 17 of the HSA docketed as Case No. R-MNL-18-00925-CV before RTC Branch 19 Manila. I am not aware of any successful service of summons to the respondents CPP and NPA which have no permanent address, much less of any entry of appearance by any counsels for respondents and their submission of a Comment. If the HSA is repealed shortly, that proceeding would no longer proceed. If ever, a new Petition for proscription of the CPP and NPA as terrorist organizations, this time under Sec. 26 of the ATA, would have to be filed. And again, there will be interesting questions of service of summons, appearance of counsels for respondents and their Comment against the Petition. Or it could be a default Order of Proscription?!?

4. Unlike the HSA which has only Sec. 17 on Proscription of Terrorist Organizations involving proceedings before a competent Regional Trial Court (RTC), the ATA would have Sec. 25 on Designation of Terrorist Individuals and Organizations, and Sec. 26 on Proscription of Terrorist Organizations. Under the ATA Sec. 25 on **Designation**, there are basically **three modes**, all unilateral by the **Anti-Terrorism Council** (ATC, with the Executive Secretary as Chairperson and the National Security Adviser as Vice-Chairperson) and with no court proceedings:

a. The ATC shall automatically adopt the United Nations Security Council (UNSC) Consolidated List of designated terrorist individuals and organizations.

b. The ATC may adopt requests for designations by other jurisdictions after determination that it meets the criteria in UNSC Resolution 1373.

c. The ATC may designate an individual or organization upon a finding of probable cause that the latter commits, or attempts or conspires to commit, acts defined and penalized under the ATA Secs. 4 to 12.

Under the ATA Sec. 26 on Proscription, this is upon application by the DOJ before the authorizing Division of the Court of Appeals against organizations which commit the same acts under the ATA Secs. 4 to 12, or which are organized for the purpose of engaging in terrorism. The application must be with the authority of the ATC upon recommendation of the National Intelligence Coordinating Agency (NICA) which shall be the Secretariat of the ATC. The Court shall give due notice and opportunity to be heard to the organization sought to be declared as terrorist. Under Sec. 27, the Court shall issue a Preliminary Order of Prescription within 72 hours from the filing of the application where it has determined that probable cause exists on the basis thereof.

Aside from the different procedures for designation under the ATA Sec. 25 (unilateral by the ATC and covering both individuals and organizations) **and for proscription** under Sec. 26 (with court proceedings and covering only organizations), it is not so clear **whether there are different implications or consequences** between *designated* terrorist organizations and *proscribed* terrorist organizations.

5. It is interesting to note that there is an existing **Presidential Proclamation No. 374** dated 5 December 2017 **"declaring the CPP-NPA as an entity designated and/or identified as a terrorist organization pursuant to Section 3(e)(1) of RA No. 10168"** [the TFPSA]. It cites as basis for this that "on 09 August 2002, the United States of America (USA) designated the CPP-NPA as a foreign terrorist organization (FTO) and to date continues to include the CPPA-NPA in its list of

FTOs” and also “Article VII, Section 17 of the Constitution [which] provides that the President shall ensure that the laws are faithfully executed.” The obvious questions are: given this, would a designation or proscription of the CPP-NPA as a terrorist organization under the ATA Secs. 25 or 26 still be necessary? And would Presidential Proclamation No. 374 be already sufficient basis to apply the rest of the ATA to the CPP-NPA?

6. While we are at it, we might as well bring into the discussion the “twin” **Presidential Proclamation No. 360** dated 23 November 2017 “**declaring the termination of peace negotiations with the National Democratic Front (NDF)-CPP-NPA and all its adjuncts and organizational units.**” It cites as basis for this that “in spite of the best efforts exerted by this Administration, the NDF-CPP-NPA failed to show its sincerity and commitment in pursuing genuine and meaningful peace negotiations as it engaged in acts of violence and hostilities...” and also “Executive Order No. 292 (s. 1987) [the Revised Administrative Code] provides that the President may, by way of proclamation, declare a status or condition of public moment or interest.” Obviously, the stated basis did not include the declaration of the CPP-NPA as a terrorist organization, for the proclamation of which came 12 days later. But the latter declaration can be reasonably expected to be an additional impediment to the resumption of peace talks, an important concern expressed by a close family friend Filomeno S. Sta. Ana III of the Action for Economic Reforms.

In theory, the conventional wisdom is that “we do not negotiate with terrorists.” But in practice, it happens. Even after Proclamations Nos. 360 and 374 in late 2017, there have been *urong-sulong* or *atras-abante* [1] peace talks resumption explorations (currently, it is *urong* or *atras*) and actual short-term ceasefires on the local communist armed conflict front up until the end of April 2020, including attempted “Local Peace Engagements” with local units of the “Communist Terrorist Groups” (CTGs) at the local level pursuant to Presidential **Executive Order No. 70 dated 4 December 2018 on the “Whole-of-Nation Approach in Attaining Inclusive and Sustainable Peace and... to End the Local Communist Armed Conflict.”** In other words, terrorist designation in itself is not a decisive counter-factor against peace negotiations. There are other, more decisive factors, like lack of trust and confidence and the politico-military situation. Perhaps the best recent counter-example to the said conventional wisdom is the breakthrough agreement between the U.S. and the Afghan Taliban, a U.S.-designated FTO, for peace in Afghanistan. Negotiating with so-called “terrorists” (just like successfully done with the Moro Islamic Liberation Front once tagged as “terrorist”) may soon become the “new normal.”

7. Speaking of so-called “Islamist terrorist organizations,” like say the most notorious Abu Sayyaf Group (*Al-Harakatul Al-Islamiyyah*) or the remnants of the Maute Group (*Daula Islamiya fi Ranao*), I doubt whether there will be any real fuss about their designation or proscription under the ATA or under whatever purported legal basis. It seems different as far as the current strong critical voices against the ATA are concerned, whereby **there is even an expectation that the ATA is primarily intended against the CPP-NPA “and all its adjuncts and organizational units.”** Let us not kid each other about this. The CPP-NPA is the first to admit that expectation, given the most recent Presidentially declared “all-out war” against them, “you S.O.B.s... [English translation, with much of the bile lost in the translation].”

Those current strong critical voices who are not CPP-NPA “and all its adjuncts and organizational units,” because of their serious concerns about the ATA’s likely significant consequences for Philippine democracy, fundamental freedoms, civil liberties and human rights, are perhaps well aware of German Lutheran pastor **Martin Niemoller’s famous 1946 post-war confession:** “They came first for the Communists, and I didn’t speak up because I wasn’t a Communist. Then they came for the Jews, and I didn’t speak up because I wasn’t a Jew. Then they came for the trade unionists, and I didn’t speak up because I wasn’t a trade unionist. Then they came for the Catholics, and I

didn't speak up because I was a Protestant. Then they came for me, and by that time no one was left to speak up." If a communist revolution can swallow its own children, so can a fascist dictatorship.

8. The mention of the Abu Sayyaf Group, the Maute Group and the CPP-NPA in the same breath brings us to the **definition of terrorism**, especially its legal definition, which should be the basis for the designation or proscription of terrorist organizations. The current strong critical voices against the ATA contend that the definition of terrorism in Sec. 4 of the ATA is over-broad or vague (constitutional issues to be raised) such as to endanger even what are truly non-terrorist organizations and individuals. **The key to the ATA Sec. 4 definition** is not the five enumerated acts (a) to (e) in the first part of the Section (e.g. "Engages in acts intended to cause death or serious bodily injury to any person, or endangers a person's life") but rather the **"purpose of such act, by its nature and context" which may be any of the following that would make it terrorism:**

> "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 of its international organization (sic)"

> "seriously destabilize or destroy the fundamental political, economic or social structures of the country"

> "create a public emergency"

> "seriously undermine public safety"

These formulations appear to be in accord with the UN's 2004 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."

From my own earlier study of the matter, **I had in 2002 come up with this proposed core legal definition of terrorism:** "the systematic employment by states, groups or individuals of acts or threats of violence or use of weapons deliberately targeting the civilian population, individuals or infrastructure for the primary purpose of spreading terror or extreme fear among the civilian population in relation to some political or quasi-political objective and undertaken with an intended audience." You will see at the outset that the concept that **states are just as capable of committing terrorist acts as are non-state armed groups**. And so, if the Philippine government, particularly Congress, is truly sincere in suppressing terrorism in all its forms or sources, including state terrorism, **I challenge it to incorporate this concept in our anti-terrorism law**. Of course, this would need more legislative as well as public deliberation and , yes, debate, for which reasonable time should be given.

But going back to the ATA Sec. 4 definition of terrorism, **to its credit, it makes clear** that it "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." (underscorings supplied) This is a clear improvement over the HSA definition of terrorism.

9. While non-state armed groups or rebel groups are capable of committing terrorist acts,

not all such groups are *ipso facto* terrorist organizations. It depends on their conduct of armed hostilities, on whether or not its acts of armed violence meet the elements of terrorism, as discussed above, especially in terms of deliberately targeting the civilian population, individuals or infrastructure for the primary purpose of spreading terror or extreme fear among the civilian population in relation to some political or quasi-political objective. The group's track record on this must be fairly examined. Only if there is a clear and consistent *pattern, plan or policy* (in short, something *systematic*) of terrorist acts or methods by the group would it be justified to designate it as a "terrorist organization." One terrorist act does not necessarily make a terrorist organization, unless the act is based on a policy of employing terrorist acts (for example, a policy of suicide-bombing targeting innocent civilians, or a policy of reprisal aerial bombing or artillery/tank shelling targeting the civilian mass base of the enemy).

As I said, there would likely be not much fuss when it comes to designation or proscription of the Abu Sayyaf Group or the remnants of the Maute Group as terrorist organizations. They may even welcome it as some sort of perverse badge of honor. But there would likely be much fuss when it comes to the CPP-NPA, also because of the possible impact on those who might be deemed its accessories or its support or front organizations in case it is designated or proscribed as a terrorist organization under the ATA. The CPP-NPA will definitely oppose any further designation or proscription of it as a terrorist organization under the ATA. It will likely again cite, among others, what it had previously **dishonestly** referred to as a United Nations Development Program (UNDP) report in 2005 that stated "In fairness to the CPP-NPA's historical record of armed struggle, it has not, as a policy - and has not generally in practice - engaged in terrorism or acts of terrorism by deliberately targeting civilians." This did not come from a UNDP report but from the *Philippine Human Development Report 2005: Peace, Human Security and Human Development in the Philippines* done by the independent local academe-based NGO Human Development Network (HDN) with only the cooperation support of the UNDP; it is not a UNDP report as the CPP-NPA made it out to be. At any rate, the quoted HDN statement was only one, albeit informed, view as of 2005. The ATA itself in its Sec. 27 provides that a Permanent Order of Proscription shall be valid for only 3 years, after which a review shall be made on whether it is to be extended or lifted. **Because of the serious implications of designation or proscription of terrorist organizations under the ATA, this process must be characterized by fairness, perhaps academic-like or judicial-like rigor, and indubitable historical evidence.**

10. At this point, there should be no issue about terrorism being among the most serious crimes of concern to the international community as a whole, including the Philippines which has its international obligations to cooperate in its suppression. **Terrorism violates the basic right to life and the fundamental freedom from fear. The May-October 2017 Marawi Siege and the January 27, 2019 Jolo Cathedral Bombing are still fresh wounds to remind us of this. There should be no issue about the need for a domestic law defining and penalizing terrorism. This was among the rulings in the Supreme Court Decision in David vs. Arroyo, 489 SCRA 160 (2006). Thus, the HSA of 2007.**

11. Comes now the ATA of 2020 to replace the HSA in our statute books. **To somehow counter-balance the current strong critical voices against the ATA,** another friend Prof. Rommel C. Banlaoi of the Philippine Institute for Peace, Violence and Terrorism Research, proffers what he admits to be a **"very unpopular" view of "progressive provisions" in the ATA.** Foremost to him is its Sec. 2 Declaration of Policy, particularly these aspects:

> "... to make terrorism a crime against the Filipino people, against humanity, and against the law of nations."

> "In the implementation of the policy stated above, the State shall uphold the basic rights and

fundamental liberties of the people as enshrined in the Constitution.”

> “The State recognizes that the fight against terrorism requires a comprehensive approach, comprising political, economic, diplomatic, military and legal means duly taking into account the root causes of terrorism...”

> “Such measures shall include conflict management and post-conflict peacebuilding, addressing the roots of conflict...”

“... shall not prejudice respect for human rights which shall be absolute and protected at all times.”

ATA provisions to ensure respect for human rights include Secs. 17 & 19 on Judicial Authorization by the authorizing division of the Court of Appeals, Sec. 23 on inadmissibility or exclusion of evidence secured in violation of pertinent provisions, Sec. 24 on penalty of 10 years imprisonment for law enforcement agents or military personnel for unauthorized surveillance and making available to the aggrieved party any information maliciously procured, Sec. 29 on written notification of the judge nearest the place of apprehension of the latter’s details, Sec. 30 on rights of a person under custodial detention, Sec. 31 on penalty of 10 years imprisonment for violations of the rights of a detainee, Sec. 33 on no torture or coercion in investigation and interrogation with reference to R.A. No. 9745 or the Anti-Torture Act of 2009, Sec. 37 on penalty of 4 years imprisonment for malicious or unauthorized examination of bank accounts, Sec. 41 on penalty of 4 years imprisonment for unauthorized revelation of classified information, Sec. 43 on penalty of 6 years imprisonment for furnishing false evidence, forged documents or spurious evidence, Sec. 47 on the Commission on Human Rights to “give the highest priority to the investigation and prosecution of violations of civil and political rights of persons in relation to the implementation of this Act,” Sec. 48 on ban on extraordinary rendition to another country, and Sec. 51 on protection of most vulnerable sectoral groups.

There is, however, **a dearth of ATA provisions that flesh out its declared policy of a “comprehensive approach**, comprising political, economic, diplomatic, military and legal means,” except for the latter which constitutes the meat of the ATA. There is nothing that fleshes out in particular “Such measures... [as] conflict management and post-conflict peacebuilding, addressing the roots of conflict... duly taking into account the root causes of terrorism...” This dearth warrants the reopening of legislative deliberations in order to address it.

12. In the final analysis, only implementation and practice will tell whether “the basic rights and fundamental liberties of the people as enshrined in the Constitution” would be upheld, and whether “respect for human rights, which shall be absolute and protected at all times,” would not be prejudiced, pursuant to the ATA’s declared policy. The general and historical experience in the Philippines has been that the law and its implementation two, sometimes very, different things. The difference may be attributed to the criminal justice system and its several pillars, most crucially that of law enforcement led by the police. And in the particular case of the ATA, it is “law enforcement agents or military personnel” who would be the front-liners in its implementation. Given particularly the recent experience of this administration’s “war against drugs,” **it should not be seen as asking too much that a certain necessary measure or level of police reform be achieved first before passing or implementing the ATA. Let this be our counter-part to the call for police reform in the U.S. now arising from the killing of George Floyd**, one too many among Blacks who have lost their lives in the brutal hands of predominantly White policemen, as a function of systemic racism.

Both police and military personnel who will be assigned to ATA implementation work, such as surveillance of suspects, interception and recording of communications, filing of written applications

with the authorizing division of the Court of Appeals, custody of intercepted and recorded communications, joint affidavits for this purpose, written notifications of the judge nearest the place of apprehension, informing detained persons of their rights, maintaining an official custodial logbook, and filing of the appropriate cases before the Public Prosecutor's Office, will need some special training for this. There is no ATB provision for this as well as for the special training of designated specific divisions of the Court of Appeals or certain branches of the RTC as anti-terror courts to handle ATA cases. As a rule, the Implementing Rules and Regulations cannot fill the substantive gaps in the law itself.

And so, all told, the better part of anti-terror valor is some prudence. To reiterate our call, reopen legislative deliberations on the ATB for a better and more socially acceptable ATA, and for the necessary institutional preparation for its implementation, in the interest of Philippine democracy, fundamental freedoms, civil liberties, human rights, and the right fight against terrorism.

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Naga City, 8 June 2020

P.S.

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Footnotes

[1] meaning "hesitant" "vacillating" ...