

# **Danger in Dissent: Counterterrorism and Human Rights in the Philippines**

January 2022

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## ICJ LEGAL BRIEFING

### Danger in Dissent: Counterterrorism and Human Rights in the Philippines

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#### I. Introduction

Since President Rodrigo Duterte assumed office in June 2016, there has been a sharp deterioration in the operation of the rule of law and protection of human rights in the Philippines. The so-called “war on drugs” that has been a priority of Duterte’s administration has reportedly engendered thousands of deaths, many in the form of unlawful extrajudicial killings, ranging from 12,000 to 30,000.<sup>1</sup> In September 2021, the prosecutor of the International Criminal Court was given authority by the Court’s Pre-Trial Chamber to conduct an investigation for crimes against humanity concerning killings and other acts of violence arising from the drug war, from the time Duterte became president in 2016 until the effectivity of the Philippines’ withdrawal from the Rome Statute on 17 March 2019.<sup>2</sup> The Pre-Trial Chamber also authorized the investigation for crimes against humanity that may have been committed in the context of similar operations held in Davao City, Mindanao – of which Duterte was a former mayor – since November 2011, the year in which the Rome Statute took effect in the Philippines. The near-unprecedented withdrawal by the Philippines from the Rome statute is a signal that impunity, rather than justice, is emblematic of the fact impunity, rather than justice, is the prevailing response to gross human rights violations in the country.

Official vilification of suspected drug users form part of this “war on drugs” campaign. State authorities, including President Duterte himself, have repeatedly issued statements that expressly encourage the killing of persons involved in drug use or trafficking.<sup>3</sup>

This tactic of vilifying drug suspects and human rights defenders has extended to similar approaches towards human rights defenders and categorically branding them as “terrorists” and/or “communists” without substantial proof of any unlawful conduct, in a practice locally known as ‘red-tagging’.

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<sup>1</sup> International Criminal Court (ICC), Situation in the Republic of the Philippines, “Request for authorisation for an investigation pursuant to article 15(3)”, ICC-01/21 (14 Jun. 2021), para. 2, <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/21-7-Red>.

<sup>2</sup> ICC, Situation in the Republic of the Philippines, “Decision on the Prosecutor’s request for authorisation for an investigation pursuant to article 15(3) of the Statute,” <https://www.icc-cpi.int/Pages/item.aspx?name=PR1610>.

<sup>3</sup> See, for instance, Karen Lema, Manuel Mogato, ‘Philippines’ Duterte likens himself to Hitler, wants to kill millions of drug users’, Reuters 30 Sept. 2016), <https://www.reuters.com/article/us-philippines-duterte-hitler/philippines-duterte-likens-himself-to-hitler-%20wants-to-kill-millions-of-drug-users-idUSKCN1200B9>; Guardian, ‘Philippines president Rodrigo Duterte urges people to kill drug addicts’ (1 Jul. 2016), <https://www.theguardian.com/world/2016/jul/01/philippines-president-rodrigo-duterte-urges-people-to-kill-drug-addicts>.

## A. 'Red-Tagging'

Alongside the “war” waged against drug suspects, the rhetoric of “terrorism” against perceived threats by the State, serving as pretext for overwrought counterterrorism measures, has also gained traction.<sup>4</sup> Human rights defenders have been labeled as “terrorists” or “communists” by government officials such as members of the Armed Forces of the Philippines and the National Task Force to End Local Terrorist Armed Conflict (NTF-ELCAC), the government’s anti-communist task force, often without substantial basis and without due process of law in a practice locally known as ‘red-tagging’.<sup>5</sup> Labor leaders, human rights defenders, public interest lawyers, journalists, political opposition, religious groups and other targeted individuals deemed by government officials to be critics of the government have also been red-tagged.<sup>6</sup> Government authorities typically conflate the “communist” label with that of the “terrorist”, given the country’s history with communist insurgents and reinforced by the designation of the Communist Party of the Philippines and New People’s Army by the government as terrorist organizations in December 2020.<sup>7</sup> The practice of ‘red-tagging’ is not unique to the Duterte administration, but has been applied with greater intensity under the President’s term.<sup>8</sup>

Many of those red-tagged by State authorities are subsequently killed or injured by unidentified assailants, similar to some of the killings arising from Duterte’s “war on drugs”. According to local groups such as The National Union of People’s Lawyers (NUPL) and the Free Legal Assistance Group (FLAG), the Philippines has witnessed the highest number of recorded killings of lawyers – including judges and prosecutors – under the Duterte administration, higher than those from the previous five presidents combined, including killings during martial law under then-President Ferdinand Marcos.<sup>9</sup> According to the NGO Global Witness, the Philippines has become the “deadliest” country for environmental and land activists, many of whom have been slain with impunity.<sup>10</sup>

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<sup>4</sup> See, generally, UN Human Rights Council, *Situation of human rights in the Philippines*, UN Doc. A/HRC/44/22, 29 June 2020 (‘A/HRC/44/22’).

<sup>5</sup> Also known as “red-baiting”. See *Zarate v. Aquino*, G.R. No. 220028, Dissenting Opinion of J. Marvic Leonen (10 Nov. 2015) (incorporating the definition of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions of the term “red-baiting” as the “vilification”, ‘labeling’, or ‘guilt by association’ of various democratic organizations, stereotyped or caricatured by the military as communist groups, making them easy targets of government military or paramilitary units.”) See also UN Human Rights Council, Report of the Special Rapporteur on Extrajudicial, summary or arbitrary executions, Addendum: Mission to Philippines, UN Doc. A/HRC/8/3/Add.2, 16 April 2008, <https://digitallibrary.un.org/record/626743?ln=en>.

<sup>6</sup> Commission on Human Rights of the Philippines (CHR), Report on the Situation of Human Rights Defenders in the Philippines (Jul. 2020), <http://chr.gov.ph/wp-content/uploads/2020/07/CHRP-2020-Report-on-the-Situation-of-Human-Rights-Defenders.pdf>; CHR, Statement of CHR spokesperson, Atty Jacqueline Ann de Guia, on the red-tagging of a Mandaluyong city judge (17 Mar. 2021), <https://chr.gov.ph/statement-of-chr-spokesperson-atty-jacqueline-ann-de-guia-on-the-red-tagging-of-a-mandaluyong-city-judge/>; CHR, Statement of CHR spokesperson, Atty Jacqueline Ann de Guia, on the spate of red-tagging reports (22 May 2020), <https://chr.gov.ph/statement-of-chr-spokesperson-atty-jacqueline-ann-de-guia-on-the-spate-of-red-tagging-reports/>; CHR, Statement of CHR spokesperson, Atty Jacqueline Ann de Guia, on the community pantry initiative and profiling of its volunteers (20 Apr. 2021), <https://chr.gov.ph/statement-of-chr-spokesperson-atty-jacqueline-ann-de-guia-on-the-community-pantry-initiative-and-profiling-of-its-volunteers/>; CHR, Statement of CHR spokesperson, Atty Jacqueline Ann de Guia, on the erroneous list published by the Armed Forces of the Philippines naming alleged UP alumni who ‘joined’ the New People’s Army (25 Jan. 2021); Altermidya, On the red-tagging of Altermidya Network at the Dec. 1 senate hearing (1 Dec. 2020), <https://www.altermidya.net/on-the-incredulous-red-tagging-of-altermidya-network-at-the-dec-1-senate-hearing/>.

<sup>7</sup> Anti-Terrorism Council Resolution no. 12 (9 Dec. 2020), <https://www.officialgazette.gov.ph/downloads/2020/12dec/20201209-ATC-12-RRD.pdf>; See, e.g., Philippine News Agency, ‘DILG’s Independence Day wish: Communist terrorism-free PH’ (12 Jun. 2021), <https://www.pna.gov.ph/articles/1143527>; See also International Peace Observers’ Network (IPON), ‘Red Baiting: Civil Society under General Suspicion’ (2011), [https://ipon-philippines.org/wp-content/uploads/ObserverJournal/Observer\\_Vol.3\\_Nr.2\\_RedBaiting.pdf](https://ipon-philippines.org/wp-content/uploads/ObserverJournal/Observer_Vol.3_Nr.2_RedBaiting.pdf); *Zarate v. Aquino*, G.R. No. 220028, Dissenting Opinion of J. Marvic Leonen (10 Nov. 2015).

<sup>8</sup> See IPON, ‘Red Baiting: Civil Society under General Suspicion’ (2011).

<sup>9</sup> Kristine Joy Patag, ‘FLAG: 61 lawyers slain in Duterte’s term— higher than killings from Marcos to Aquino admins’, Philippine Star (15 Mar. 2021), <https://www.philstar.com/headlines/2021/03/15/2084441/61-lawyers-slain-duterte-term-higher-killings-marcos-aquino-administrations>; Jodesz Gavilan, ‘LIST: Judges, prosecutors, lawyers killed under Duterte gov’t.’, Rappler (8 Nov. 2018), <https://www.rappler.com/newsbreak/iq/list-judges-prosecutors-lawyers-killed-under-duterte-government>.

<sup>10</sup> Global Witness, ‘Defending Tomorrow’ (2020), <https://www.globalwitness.org/en/campaigns/environmental-activists/defending-tomorrow/>.

As of writing, there is no significant progress on effective investigation and accountability for such killings or any accountability for the red-tagging by government officials. This phenomenon has led various UN human rights experts to call for an independent international investigation into the general human rights situation in the Philippines separate from the pending ICC investigation.<sup>11</sup>

### Red-tagging of human rights defenders

On 10 August 2020, Anakpawis Chairperson and Kilusang Magbubukid ng Pilipinas Deputy Secretary-General Randy Echanis was killed in his home in Quezon City, Metro Manila. The 72-year-old agrarian reform advocate and peace consultant had been undergoing medical treatment when police forces raided his home in the early hours of the morning. According to Philippine's Commission on Human Rights, Echanis had been subjected to torture after examining his autopsy report: his body bore at least 15 wounds, with 12 of these on his back and incised, "meaning they were longer than they were deep, and were meant to 'cause pain'".<sup>12</sup> The impartiality of the findings of the Quezon City's police force's investigations has been sharply criticized by Anakpawis and the National Union of Peoples Lawyers, with the police claiming that there was "no forcible entry" into Echanis' home and that he may have been targeted for "allegedly having a tattoo affiliated with a criminal group".<sup>13</sup>

A week later on 17 August, Zara Alvarez, a human rights advocate affiliated with local rights group Karapatan, was shot to death by an unknown assailant in Bacolod City, Negros Occidental.<sup>14</sup> National Democratic Front peace consultant Randy Malayao had met a similar fate in 2019, when he was shot at close range while asleep inside a public bus in Nueva Vizcaya.<sup>15</sup> In August 2021, a year after Alvarez's death, it was reported that the Bacolod City police had still not identified the assailant of Alvarez, with the Bacolod City police director stating that a "special investigation task group" has been created to look into the case.<sup>16</sup>

Echanis, Alvarez, and Malayao were all included at one point in the Department of Justice's unverified "terrorist" list in a petition filed by it in February 2018 with the Regional Trial Court, labelling 656 individuals as "communists" and "terrorists".<sup>17</sup> The list included persons allegedly affiliated with "terrorist" groups, including former UN Special Rapporteur on the rights of indigenous peoples Victoria Tauli-Corpuz.<sup>18</sup> Though their names were later removed, Echanis, Malayao and

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<sup>11</sup> UN Human Rights Council, 'UN human rights experts call for independent probe into Philippines violations' (7 Jun. 2019), <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=24679&LangID=E>; A/HRC/44/22.

<sup>12</sup> Jamaine Punzalan and Chiara Zambrano, 'CHR: Peasant leader Echanis tortured to death', ABS-CBN News (21 Aug. 2020), <https://news.abs-cbn.com/news/08/21/20/chr-peasant-leader-echanis-tortured-to-death>. According to an OHCHR spokesperson, there were reports that he "suffered brutal treatment before he died, including blunt force trauma to the head and stab wounds"; see, OHCHR, 'Press briefing notes on Philippines' (21 Aug. 2020), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=26179&LangID=E>.

<sup>13</sup> Nick Aspinwall, 'Killing of Philippines Peace Consultant Sparks Scrutiny of Government Investigations', The Diplomat (14 Aug. 2020), <https://thediplomat.com/2020/08/killing-of-philippines-peace-consultant-sparks-scrutiny-of-government-investigations/>.

<sup>14</sup> Marchel P. Espina, 'Human rights activist shot dead in Bacolod City', Rappler (17 Aug. 2020), <https://www.rappler.com/nation/activist-zara-alvarez-shot-dead-august-17-2020/>.

<sup>15</sup> Raymon Dullana, 'Murdered activist Randy Malayao yearned for lasting peace', Rappler (2 Feb. 2019), <https://www.rappler.com/newsbreak/profile-randy-malayao>; CHR, Statement of CHR spokesperson, Atty Jacqueline Ann de Guia, on the killing Randy Malayao (30 Jan. 2019), <https://chr.gov.ph/statement-of-chr-spokesperson-atty-jacqueline-ann-de-guia-on-the-killing-randy-malayao/>.

<sup>16</sup> Marchel P. Espina, 'Cops still face blank wall on Zara Alvarez murder', DigiCast Negros (18 Aug. 2021), <https://digicastnegros.com/cops-still-face-blank-wall-on-zara-alvarez-murder/>; Marchel P. Espina, 'A year after Zara Alvarez's death, bells toll for elusive justice, peace in Negros', Rappler (17 Aug. 2021), <https://www.rappler.com/nation/a-year-after-zara-alvarez-death-bells-toll-for-elusive-justice-peace-negros/>.

<sup>17</sup> Human Rights Watch, 'Philippines Terrorist Petition Virtual Hit List' (8 Mar. 2018), <https://www.hrw.org/news/2018/03/08/philippines-terrorist-petition-virtual-hit-list>; Human Rights Watch, 'Two More Philippine Activists Murdered' (18 Aug. 2020), <https://www.hrw.org/news/2020/08/18/two-more-philippine-activists-murdered>.

<sup>18</sup> UN Human Rights Council, 'The Philippines: UN experts urge further action to remove names on Government's "terror list"' (20 Aug. 2018), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23466&LangID=E>.

Alvarez nevertheless still received threats on their life and personal security.<sup>19</sup> The so-called 'terror' list was reduced from 656 to eight persons in an amended petition filed by the DOJ in January 2019.<sup>20</sup>

### Red-tagging of local alternative media outlets

In July 2020, alternative media outlets Bulatlat, Altermidya, Kodao Productions, and Pinoy Weekly filed a complaint before the Commission on Human Rights of the Philippines, the country's national human rights institution, alleging violations of media freedoms, including those related to the rights to freedom of expression and access to information which are protected under Philippines and international law. The groups complained of being red-tagged by members of the Philippine National Police and NTF-ELCAC.<sup>21</sup> Under the 1987 Constitution, the Commission on Human Rights of the Philippines (CHR) has the powers to investigate "all forms of human rights violations involving civil and political rights" and determine appropriate the legal measures available for the protection of human rights.<sup>22</sup> Its mandate is focused on fact-finding and it is not a "quasi-judicial forum".<sup>23</sup>

In December, the same media outfits filed a complaint before the Office of the Ombudsman against NTF-ELCAC spokespersons Lorraine Badoy and Antonio Parlade Jr. and Executive Director Allen Capuyan,<sup>24</sup> reportedly calling for them to be investigated for "violating the Anti-Graft and Corrupt Practices Act for causing them undue injury, among others".<sup>25</sup> The government officials had previously labelled these media outfits as fronts for the CPP and NPA, which according to the journalists seriously impeded their work. The Office of the Ombudsman has the power to investigate and prosecute "any act or omission of any public officer or employee, office or agency, when such act or omission appears to be illegal, unjust, improper or inefficient".<sup>26</sup>

The ICJ was not aware of any publicly available updates on the outcome of this set of complaints filed to the CHR and the Office of the Ombudsman at the time of publication of this briefing paper. The ICJ also notes how the Office of the Ombudsman has not acted on complaints filed by other groups against officials of the NTF-ELCAC for alleged 'red-tagging': notably, it was reported in December 2021 that Karapatan, a Philippine human rights group, had urged the Office of the Ombudsman to act on its complaint that it filed in December 2020.<sup>27</sup>

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<sup>19</sup> Julia Mari Ornedo, 'Slain activist Alvarez received death threats for years – rights group', GMA News (24 Aug. 2020), <https://www.gmanetwork.com/news/news/nation/752704/slain-activist-alvarez-received-death-threats-for-years-rights-group/story/>; Jodee Agoncillo, 'Peace talks adviser to NDFP killed at home, Philippine Daily Inquirer (11 Aug. 2020), <https://newsinfo.inquirer.net/1319736/adviser-to-reds-killed>;

<sup>20</sup> Lian Buan, 'DOJ trims terror tag list from of Reds from over 656 to 8', Rappler (18 Jan. 2019), <https://www.rappler.com/nation/doj-terror-tag-list-communists-january-2019>.

<sup>21</sup> Emily Vital, 'Media outfits file complaints vs state agents over red-tagging, seizure of new magazine', Bulatlat (30 Jul. 2020), <https://www.bulatlat.com/2020/07/30/media-outfits-file-complaints-vs-state-agents-over-red-tagging-seizure-of-news-magazine/?tztc=1>.

<sup>22</sup> The LawPhil Project, 'Commission on Human Rights', <https://lawphil.net/administ/chr/chr.html>.

<sup>23</sup> Commission on Human Rights of the Philippines, *Inputs to the Working Group on Business and Human Rights on the role of national human rights institutions in facilitating access to effective remedy for business-related human rights abuses* (15 Jun. 2019), p. 3, [https://www.ohchr.org/Documents/Issues/Business/Remedy/Commission%20on%20Human%20Rights\\_Philippines.pdf](https://www.ohchr.org/Documents/Issues/Business/Remedy/Commission%20on%20Human%20Rights_Philippines.pdf).

<sup>24</sup> Kristine Joy Patag, 'Alternative media groups sue NTF-ELCAC over continued red-tagging', Philippine Star (18 Dec. 2020), <https://www.philstar.com/headlines/2020/12/18/2064762/alternative-media-groups-sue-ntf-elcac-over-continued-red-tagging>.

<sup>25</sup> Adrian Ayalin, 'Media orgs file raps vs anti-communist body over of red tagging', ABS-CBN News (18 Dec. 2020), <https://news.abs-cbn.com/news/12/18/20/media-orgs-file-raps-vs-anti-communist-body-over-of-red-tagging>.

<sup>26</sup> Congress of the Philippines, *Republic Act No. 6770: An Act Providing for the Functional and Structural Organization of the Office of the Ombudsman, and for Other Purposes*, Sec. 15(1), [https://lawphil.net/statutes/repacts/ra1989/ra\\_6770\\_1989.html](https://lawphil.net/statutes/repacts/ra1989/ra_6770_1989.html).

<sup>27</sup> Dempsey Reyes, 'Karapatan urges Ombudsman Martires to act on its complaint vs NTF-Elcac execs', Inquirer.net (5 Dec. 2021), <https://newsinfo.inquirer.net/1523844/ombudsman-urged-to-act-on-complaint-vs-ntf-elcac-execs/amp>.

Relatedly, in September 2020, Facebook took down 64 Facebook accounts, 32 Pages and 33 Instagram accounts under its “Coordinated Inauthentic Behavior” policy, which prohibits fake accounts that tend to manipulate engagement on the platform.<sup>28</sup> According to Facebook, the network “consisted of several clusters of connected activity that relied on fake accounts to evade enforcement, post content, comment and manage Pages”. This operation appeared to have accelerated between 2019 and 2020. They posted in Filipino and English about local news and events including domestic politics, military activities against terrorism, a pending anti-terrorism bill, criticism of communism, youth activists and opposition, the Communist Party of the Philippines and its military wing the New People’s Army, and the National Democratic Front of the Philippines.” Based on its internal investigation, Facebook found the fake accounts to be linked to the Philippine military and police.<sup>29</sup>

Similarly, in June 2021, Qurium Media Foundation, a Swedish digital forensic group, traced the distributed denial of service (DDoS) attacks against Karapatan, Bulalat, and Altermidya to computer networks operated by the Philippine Army and the Department of Science and Technology (DOST). The aim of the DDoS attacks was to block access to the websites of these alternative news media outlets and rights group.<sup>30</sup> The three groups denounced the attack for being politically motivated and State-sponsored, describing the DDoS attacks as an extension of the red-tagging by NTF-ELCAC. The DOST and the Philippine army denied any involvement in the DDoS attacks.<sup>31</sup> In September 2021, the CHR called on the government to “investigate such incidents and bring perpetrators to account”.<sup>32</sup>

#### Red-tagging of universities and students

In January 2021, AFP Deputy Chief of Staff for Operations and NTF-ELCAC spokesperson Antonio Parlade named 18 educational institutions that they alleged were recruitment sites for insurgents of the Communist Party of the Philippines-New People’s Army (CPP-NPA).<sup>33</sup> The NTF-ELCAC publicly named the institutions without providing any evidence to support the allegations. They included, among others, the University of the Philippines (the State university), The Polytechnic University of the Philippines, Far Eastern University, Ateneo de Manila University, University of Santo Tomas, Pamantasan ng Lungsod ng Maynila, De La Salle University, and University of Makati.

On 18 January 2021, the Department of National Defense (DND) unilaterally terminated the 1989 Accord between the DND and the University of the Philippines (UP-DND Accord). The UP-DND Accord regulates the entry of State security forces, such as the Armed Forces of the Philippines (AFP) and the Philippine National Police (PNP), into university premises in order to help protect academic freedom and the rights to freedom of expression and peaceful assembly. According to the DND, the UP-DND Accord was terminated to stop the alleged CPP-NPA recruitment occurring on-campus. Earlier in March 2020, students had initiated donation drives to help health workers at the Philippine General Hospital, but they were accused by State security forces of being members of the NPA. Students of the University of the Philippines in Cebu also protested the

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<sup>28</sup> Facebook, ‘Inauthentic Behavior’ (2021), <https://transparency.fb.com/policies/community-standards/inauthentic-behavior/>.

<sup>29</sup> Nathaniel Gleicher, ‘Removing Coordinated Inauthentic Behavior’, Facebook (22 Sep. 2020), <https://about.fb.com/news/2020/09/removing-coordinated-inauthentic-behavior-china-philippines/>.

<sup>30</sup> Qurium Media Foundation, ‘Attacks against media in the Philippines continue’ (2021), <https://www.qurium.org/alerts/philippines/attacks-against-media-in-the-philippines-continue/>.

<sup>31</sup> Ma. Cristina Arayata, ‘DOST belies involvement in alleged cyber attack on news sites’, Philippine News Agency (24 Jun. 2021), <https://www.pna.gov.ph/articles/1144854>; Krixia Subingsubing, ‘Cyberattacks on red-tagged news sites traced to DOST, Army’, Philippine Daily Inquirer, (24 Jun. 2021), <https://newsinfo.inquirer.net/1450227/cyberattacks-on-red-tagged-news-sites-traced-to-dost-army>.

<sup>32</sup> Krixia Subingsubing, ‘CHR urges probe of cyberattacks on rights groups’, Inquirer.net (6 Sep. 2021), <https://newsinfo.inquirer.net/1483778/chr-urges-probe-of-cyberattacks-on-rights-groups>.

<sup>33</sup> GMA News, ‘Parlade says top universities among 18 schools NPA recruitment is taking place’ (23 Jan. 2021), <https://www.gmanetwork.com/naa/news/nation/772920/top-universities-among-18-schools-npa-recruitment-is-taking-place/story/>.

enactment of the Anti-Terrorism Act upon its enactment in June 2020, but Cebu police violently dispersed the student protests in violation of the UP-DND Accord.<sup>34</sup>

DND Secretary Delfin Lorenzana defended the termination, claiming that the University of the Philippines had become a “safe haven for enemies of the state”.<sup>35</sup> This followed a similar set of unsubstantiated accusations launched in 2018, when the AFP named 18 schools that were allegedly involved in a plot to oust President Duterte, without offering any factual basis for the allegation. At that time, the AFP claimed that CPP members had been conducting activities on-campus to “incite students to rebel against the government” in order to establish a dictatorship akin to Cambodia’s Pol Pot, the leader of the Khmer Rouge regime responsible for mass atrocities during the 1970s.<sup>36</sup> The PNP at that time proposed to intervene and discuss with the aforementioned universities how they could help regarding the alleged CPP recruitment.<sup>37</sup>

Around the same time as the termination of the UP-DND Accord, the AFP also publicly identified on social media former student leaders of the University of the Philippines in a list the AFP identified as “some of the UP Students who became NPA (Dead or Captured)”. However, it is clear that some of the individuals on the list were never in fact members of the NPA.<sup>38</sup>

In response, some of the named universities issued a joint statement denouncing as baseless the red-tagging by State authorities.<sup>39</sup> After the DND’s unilateral termination of the UP-DND Accord, Congress proposed a bill to institutionalize the UP-DND agreement into law, in an effort to reverse the effects of the unilateral termination by the executive department.<sup>40</sup> As of writing, the proposed law had yet to be enacted.<sup>41</sup>

#### Red-tagging of COVID-19 civic initiatives

Ana Patricia Non was red-tagged in April 2021 for initiating a community pantry in her neighborhood of Maginhawa, Quezon City. Non set up the community pantry to provide food to Filipinos in need during the COVID-19 pandemic.<sup>42</sup> Soon after, the NTF-ELCAC commented on their social media account that such community pantries were being used to spread community propaganda. The

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<sup>34</sup> See, Eighteenth Congress of the Republic of the Philippines, Proposed Senate Resolution No. 616 (19 Jan. 2021), <https://legacy.senate.gov.ph/lisdata/34256310561.pdf>; Catalina Ricci Madarang, ‘UP students report being red-tagged over donation drive hotline’, Interaksyon (1 Apr. 2020), <https://interaksyon.philstar.com/trends-spotlights/2020/04/01/165528/up-students-report-being-red-tagged-over-donation-drive-hotline/>; CNN Philippines, ‘UP Cebu calls for immediate release of students, alumni arrested at protest against anti-terrorism bill’ (7 Jun. 2020), <https://cnnphilippines.com/news/2020/6/7/UP-Cebu-admin-statement-protesters-arrest.html>.

<sup>35</sup> Delfin Lorenzana on Twitter (19 Jan. 2021), [https://twitter.com/del\\_lorenzana/status/1351386051093307393?lang=en](https://twitter.com/del_lorenzana/status/1351386051093307393?lang=en).

<sup>36</sup> Priam Nepumoceno, ‘CPP recruiting students from 18 schools for ouster plot: AFP’, Philippine News Agency, <https://www.pna.gov.ph/articles/1049873>.

<sup>37</sup> Christopher Lloyd Caliwan, ‘PNP to talk to 18 schools named in CPP recruitment’, Philippine News Agency (4 Oct. 2018), <https://www.pna.gov.ph/articles/1050028>.

<sup>38</sup> University of the Philippines, Statement on the Red-Tagging of Former Student Leaders, Facebook (24 Jan. 2021), <https://www.facebook.com/OfficialUPDiliman/posts/statement-on-the-red-tagging-of-former-up-student-leadersfidel-r-nemenzochance11/3672647899479003/>.

<sup>39</sup> ‘Joint statement from Far Eastern University, De La Salle University, University of Santo Tomas and Ateneo de Manila University’ (24 Jan. 2021), <https://m.facebook.com/FarEasternUniversity/photos/4263366913679341/>.

<sup>40</sup> House of Representatives Eighteenth Congress, Committee Report No. 1195 on House Bill no. 10171 (9 Sep. 2021), [https://www.congress.gov.ph/legisdocs/first\\_18/CR01195.pdf](https://www.congress.gov.ph/legisdocs/first_18/CR01195.pdf).

<sup>41</sup> Ma. Reina Leanne Tolentino, ‘House recalls approval of UP-DND security bill’, The Manila Times (5 Oct. 2021), <https://www.manilatimes.net/2021/10/05/news/national/house-recalls-approval-of-up-dnd-security-bill/1817194>.

<sup>42</sup> As of writing, the Philippines ranks at the bottom in the world in terms of COVID-19 resilience: Bloomberg News, ‘Why the Philippines Became the Worst Place to be in COVID’, (29 Sep. 2021), <https://www.bloomberg.com/news/articles/2021-09-29/why-the-philippines-just-became-the-worst-place-to-be-in-covid>.

PNP and the Quezon City Police District released similar statements.<sup>43</sup> Non's community pantry was called "satanic" by Parlade,<sup>44</sup> and her alleged "communist" links were reported by State media.<sup>45</sup> In an interview, Parlade mentioned the involvement of communist groups in such initiatives. Out of fear for her safety, Non temporarily stopped the operation of the community pantry.<sup>46</sup> The incident caused a public backlash, sparking more support for community pantries.<sup>47</sup>

#### Efforts to prevent and punish 'red-tagging'

During the first half of 2021, various bills were introduced by members of Congress to address the prevalence of red-tagging by government officials.<sup>48</sup>

In particular, Senate Bill 2121, authored by Senate Minority Leader Franklin M. Drilon, aims to criminalize red-tagging and provide access to justice and remedies to victims of red-tagging. According to Drilon, the bill "seeks to fix the legal gaps, address impunity and institutionalize a system of accountability by criminalizing red-tagging and providing for penalties as deterrence thereto".<sup>49</sup>

Under the proposed Senate Bill 2121, the term "red-tagging" occurs when "any state actor, such as law enforcement agent, paramilitary, or military personnel ... labels, vilifies, brands, names, accuses, harasses, persecutes, stereotypes, or caricatures individuals, groups, or organizations as state enemies, left-leaning, subversives, communists or terrorists as a part of a counter-insurgency or anti-terrorism program or strategy." The bill would impose the penalty of imprisonment of 10 years and perpetual absolute disqualification to hold public office.<sup>50</sup> As of writing, the bill had not progressed further in Congress.

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<sup>43</sup> See e.g., Christopher Lloyd Caliwan, 'Don't use community pantries in anti-gov't. propaganda: PNP', Philippine News Agency (21 Apr. 2021), <https://www.pna.gov.ph/articles/1137516>; Ruth Abbey Gita-Carlos, 'Community pantries welcome but Reds taking advantage: NTF-ELCAC', Philippine News Agency (20 Apr. 2021), <https://www.pna.gov.ph/articles/1137446>; Catalina Ricci Madarang, 'QCPD's Facebook page deletes social media post that red-tags community pantries', Interaksyon (20 Apr. 2021), <https://interaksyon.philstar.com/trends-spotlights/2021/04/20/190122/qcpds-facebook-page-deletes-social-media-post-that-red-tags-community-pantries/>.

<sup>44</sup> Jairo Bolledo, 'Parlade likens rapid spread of community pantries to work of 'Satan'', Rappler (22 Apr. 2021), <https://www.rappler.com/nation/ntf-elcac-parlade-says-ana-patricia-non-same-satan>; Nick Aspinwall, 'Philippine General Criticized for Saying Community Pantries are the Work of 'Satan'', The Diplomat (23 Apr. 2021), <https://thediplomat.com/2021/04/philippine-general-criticized-for-saying-community-pantries-are-the-work-of-satan/>.

<sup>45</sup> Marita Moaje, 'Ex-rebel bares pantry organizer's link to commies', Philippine News Agency (22 Apr. 2021), <https://www.pna.gov.ph/articles/1137726>.

<sup>46</sup> Ramon Royandoyan, 'Communist, terrorist, satanic: how Duterte's trolls targeted a mutual aid movement', Rest of World (30 Apr. 2021), <https://restofworld.org/2021/communist-terrorist-satanic-how-dutertes-trolls-targeted-a-mutual-aid-movement/>; Josiah Antonio, 'Community pantry initiator fears for life after false red-tag claims', ABS-CBN News (20 Apr. 2021), <https://news.abs-cbn.com/news/04/20/21/community-pantry-initiator-fears-for-life-after-false-red-tag-claims>; ABS-CBN News, 'Maginhawa community pantry organizer halts operations; organizer cites red-tagging' (20 Apr. 2021), <https://news.abs-cbn.com/news/04/20/21/maginhawa-community-pantry-redtagging-covid-19>.

<sup>47</sup> Iya Gozum, 'Red-tagging of community pantry sparks uproar online', Rappler (20 Apr. 2021), <https://www.rappler.com/moveph/philippine-government-red-tagging-community-pantry-sparks-uproar-online>; Nikka Valenzuela, 'Despite 'red-tagging', community pantries rise to 350, says advocate', Philippine Daily Inquirer (22 Apr. 2021), <https://newsinfo.inquirer.net/1422156/despite-red-tagging-community-pantries-rise-to-350-says-advocate>; Catalina Ricci Madarang, 'Imagine the backfire': Community pantries raise more cash after red-tagging', Interaksyon (22 Apr. 2021), <https://interaksyon.philstar.com/trends-spotlights/2021/04/22/190271/community-pantries-raise-more-cash-after-red-tagging/>.

<sup>48</sup> See, e.g., Senate of the Philippines, Eighteenth Congress of the Republic of the Philippines, S. No. 2121, 'An Act Defining and Penalizing Red-Tagging'; <https://legacy.senate.gov.ph/lisdata/34790316231.pdf>; House of Representatives, Eighteenth Congress Republic of the Philippines, H.B. No. 9309, [https://www.congress.gov.ph/legisdocs/basic\\_18/HB09309.pdf](https://www.congress.gov.ph/legisdocs/basic_18/HB09309.pdf)

<sup>49</sup> Senate of the Philippines, 'Duterte urged to certify anti-red tagging bill' (28 Apr. 2021), [http://legacy.senate.gov.ph/press-release/2021/0428\\_drilon1.asp](http://legacy.senate.gov.ph/press-release/2021/0428_drilon1.asp).

<sup>50</sup> Senate of the Philippines, Eighteenth Congress of the Republic of the Philippines, S. No. 2121, 'An Act Defining and Penalizing Red-Tagging', <https://legacy.senate.gov.ph/lisdata/34790316231.pdf>.

## B. Anti-Terrorism Act of 2020<sup>51</sup>

In June 2020, The Anti-Terrorism Act of 2020 (ATA) was adopted into law after President Duterte certified the bill as urgent.<sup>52</sup> The ATA repealed The Human Security Act of 2007.<sup>53</sup> Soon after its enactment, 37 petitions were filed before the Supreme Court challenging its constitutionality.<sup>54</sup> Civil society groups expressed concern over the provisions of the ATA, particularly the overbroad definition of “terrorism” and related offences penalized by the statute. The new counter-terrorism legislation, they fear, could be used to further extend the practice of red-tagging.<sup>55</sup>

During the Supreme Court oral arguments on the petitions between February and May 2021, the arguments hinged on the lack of a universally agreed upon definition of terrorism under international law, which was used by the Government to justify the existing definition under the ATA. The passage of the law was also justified on the grounds that it was necessary to remove the Philippines from the ‘grey list’ of the intergovernmental Financial Action Task Force.<sup>56</sup> Both petitioners and respondents as well as members of the Supreme Court discussed comparative laws and UN Security Council resolutions such as UNSC Resolution 1373,<sup>57</sup> in scrutinizing the provisions of the ATA during the oral arguments. Significantly, there was no mention of the applicable definition of terrorism under international law.

In December 2021, the Supreme Court ruled that the majority of the ATA was constitutional, and only struck down two provisions in the law pertaining to the caveat to the exception to “terrorism” under section 4, and one of the modes of designating terrorist individuals, groups, organizations or associations under section 25.<sup>58</sup> This is discussed further in section II.C below. As of the time of writing, the full judgment was not yet available.

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<sup>51</sup> Congress of the Philippines, *Republic Act No. 11479: An Act to Prevent, Prohibit and Penalize Terrorism, Thereby Repealing Republic Act No. 9372, Otherwise Known as the “Human Security Act of 2007”* (‘ATA’), <https://www.officialgazette.gov.ph/downloads/2020/06jun/20200703-RA-11479-RRD.pdf>.

<sup>52</sup> Azer Parrocha, ‘Duterte certifies anti-terror bill as urgent’, Philippine News Agency (2020), <https://www.pna.gov.ph/articles/1104615>; Sofia Tomacruz, ‘Duterte certifies as urgent anti-terrorism bill feared to clamp down on basic rights’, Rappler (2020), <https://www.rappler.com/nation/duterte-certifies-urgent-tougher-anti-terrorism-bill>.

<sup>53</sup> See International Commission of Jurists, “Righting Wrongs: Criminal Law Provisions in the Philippines Related to National Security and their Impact on Human Rights Defenders” (2015), <https://www.icj.org/latest-icj-report-to-help-craft-a-new-criminal-code-in-the-philippines/>; See also, International Commission of Jurists, Submission of the International Commission of Jurists (ICJ) on the Proposed Amendments to the Human Security Act of 2007 (HSA) (2018), <https://www.icj.org/philippines-proposed-amendments-to-the-human-security-act-of-2007-a-license-for-human-rights-violations/>.

<sup>54</sup> Kristine Joy Patag, ‘Cheat sheet: Key issues raised at SC oral arguments on anti-terrorism law’, PhilStar (19 May 2021), <https://www.philstar.com/headlines/2021/05/19/2099121/cheat-sheet-key-issues-raised-sc-oral-arguments-anti-terrorism-law>.

<sup>55</sup> See for instance, Amnesty International, ‘Philippines: End Deadly Practice of Red-Tagging’ (2 Nov. 2020), <https://www.amnesty.org/en/wp-content/uploads/2021/05/ASA3532932020ENGLISH.pdf>; CIVICUS, ‘Activists and Journalists Targeted as Draconian Anti-Terror Law Challenged in the Philippines’ (22 Feb. 2021), <https://monitor.civicus.org/updates/2021/02/22/activists-and-journalists-targeted-draconian-anti-terror-law-challenged-philippines/>.

<sup>56</sup> Joann Villanueva, ‘Anti-Terrorism Act to Keep Philippines out of gray list’, Philippine News Agency (2020) <https://www.pna.gov.ph/articles/1114988>.

<sup>57</sup> UNSC Resolution 1373 was adopted unanimously by the UN Security Council in September 2001 in the aftermath of the 11 September attacks against the United States of America, and established a dedicated Counter-Terrorism Committee of the Council: UN Security Council, *Resolution 1373 (2001)*, UN Doc. S/RES/1373 (2001), 28 September 2001, [https://www.unodc.org/pdf/crime/terrorism/res\\_1373\\_english.pdf](https://www.unodc.org/pdf/crime/terrorism/res_1373_english.pdf).

<sup>58</sup> Lian Buan, ‘Supreme Court upholds most of anti-terror law, including 24-day detention’, Rappler (9 Dec. 2021), <https://www.rappler.com/nation/supreme-court-upholds-parts-anti-terrorism-law/>.

## Salient provisions of the ATA

### 1. Terrorism and Related Offences

Under the ATA, the crime of terrorism defined as one committed “by any person who, within or outside the Philippines, regardless of the stage of execution:

- (a) engaged 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... 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.” The last qualifier (“which are not intended to cause death or serious physical harm to a person, to endanger a person’s life, or to cause a serious risk to public safety”) was struck down by the Supreme Court as unconstitutional in its December 2021 ruling (see discussion below at section II.C).<sup>59</sup>

The ATA also punishes the following crimes: threat to commit terrorism;<sup>60</sup> planning, training, preparing, and facilitating the commission of terrorism;<sup>61</sup> conspiracy to commit terrorism;<sup>62</sup> proposal to commit terrorism;<sup>63</sup> and inciting to commit terrorism.<sup>64</sup> All these crimes rely on the

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<sup>59</sup> Lian Buan, ‘Supreme Court voids anti-terror law’s ‘killer’ caveat on ‘harmful’ dissent’, Rappler (9 Dec. 2021), <https://www.rappler.com/nation/supreme-court-voids-killer-caveat-anti-terror-law-harmful-dissent/>.

<sup>60</sup> Sec. 5, ATA (“Any person who shall threaten to commit any of the acts mentioned in Section 4 hereof shall suffer the penalty of imprisonment of twelve (12) years”).

<sup>61</sup> Sec. 6, ATA (“It shall be unlawful for any person to participate in the planning, training, preparation and facilitation in the commission of terrorism, possessing objects connected with the preparation for the commission of terrorism, or collecting or making documents connected with the preparation of terrorism, or collecting or making documents connected with the preparation of terrorism. Any person found guilty of the provisions of this Act shall suffer the penalty of life imprisonment without the benefit of parole and the benefits of Republic Act No. 10592.”)

<sup>62</sup> Sec. 7, ATA (“Any conspiracy to commit terrorism as defined and penalized under Section 4 of this Act shall suffer the penalty of life imprisonment without the benefit of parole and the benefits of Republic Act No. 10592.

There is conspiracy when two (2) or more persons come to an agreement concerning the commission of terrorism as defined in Section 4 hereof and decide to commit the same.”).

<sup>63</sup> Sec. 8, ATA (“Any person who proposes to commit terrorism as defined in Section 4 hereof shall suffer the penalty of imprisonment of twelve (12) years”); Sec. 3(g), ATA (“Proposal to Commit Terrorism is committed when a person who has decided to commit any of the crimes defined and penalized under the provisions of this Act proposes its execution to some other person or persons”).

<sup>64</sup> Sec. 9, ATA (“Any person who, without taking any direct part in the commission of terrorism, shall incite others to the execution of any of the acts specified in Section 4 hereof by means of speeches, proclamations, writings, emblems, banners or other representations tending to the same end, shall suffer the penalty of imprisonment of twelve (12) years”).

definition of “terrorism” under Section 4 of the act. Recruitment to and membership in a terrorist organization is also penalized.<sup>65</sup>

Providing material support to terrorists are punished under the Act.<sup>66</sup> It covers “any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (one or more individuals who may be or include oneself), and transportation.<sup>67</sup> Although the ATA provides a “humanitarian exemption” to the crime of providing material support, the exemption only covers activities undertaken by the International Committee of the Red Cross, the Philippine Red Cross, and other State-recognized impartial humanitarian partners or organizations in conformity with international humanitarian law.<sup>68</sup>

## 2. Surveillance and Government Requests for Data

Section 16 of the ATA authorizes a law enforcement agent or military personnel, upon written order of the Court of Appeals, to “secretly wiretap, overhear and listen to, intercept, screen, read, surveil, record or collect, with the use of any mode, form, kind or type of electronic mechanical or other equipment or device or technology now known or may hereafter be known to science or with the use of any other suitable ways and means for the above purposes, any private communications, conversation, discussion/s, data information, messages in whatever form, kind or nature, spoken or written” (a) between members of a judicially declared and outlawed terrorist organization as defined in the Act, (b) between members of a designated person as defined in The Terrorism Financing Prevention and Suppression Act of 2012; or (c) any person charged with or suspected of committing any of the crimes defined and penalized under the provisions of the ATA. Privileged information is not covered.<sup>69</sup>

For this purpose, the law enforcement agency or military personnel is obligated to file an ex-parte application with the Court of Appeals for the issuance of an order, “to compel telecommunications service providers and internet service providers to produce all customer information and identification records as well as call and text data records, content and other cellular or internet metadata of any person suspected of any of the crimes defined and penalized under the provisions of the Act”.<sup>70</sup> This could potentially justify governmental requests for data from social media companies concerning users of the platform.

The Court of Appeals can issue the order only if the ex-parte application has been duly authorized by the Anti-Terrorism Council, after examination under oath or affirmation of the applicant and the witnesses produced, and there is a finding of probable cause that a crime under the Act has been committed based on personal knowledge of facts and circumstances.<sup>71</sup>

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<sup>65</sup> Sec. 10, ATA.

<sup>66</sup> Sec. 12, ATA.

<sup>67</sup> Sec. 3(e), ATA.

<sup>68</sup> Sec. 13, ATA (emphasis supplied).

<sup>69</sup> Under Section 16, this covers communications between lawyers and clients, doctors and patients, journalists and their sources and confidential business correspondence.

<sup>70</sup> Sec. 16, ATA.

<sup>71</sup> Sec. 17, ATA.

Custody of any intercepted and recorded communication such as tapes, discs, other storage devices, recordings, notes, memoranda, summaries, excerpts and all copies thereof must be surrendered in a sealed package to the Court of Appeals within 48 hours after the expiration of the period fixed in the written order or the extension or renewal granted thereafter. The deposit must be accompanied by a joint affidavit of the applicant law enforcement agent or military personnel.<sup>72</sup> Any material secured in violation of the Act "cannot be used as evidence against anybody in any judicial, quasi-judicial, legislative, or administrative investigation, inquiry, proceeding or hearing."<sup>73</sup>

### 3. Designation, Proscription, Delisting

The ATC may designate an individual, groups of persons, organization or association, whether domestic or foreign, upon a finding of probable cause that the individual, groups of persons, organization or association commit or attempt to commit or conspire in the commission of the acts penalized by the Act (known as "local designees"). The ATC also "automatically adopts" pursuant to UNSC Resolution no. 1373, the United Nations Security Council Consolidated List of designated individuals and groups, as well as those who finance terrorism (known as "foreign designees").<sup>74</sup>

Furthermore, request for designations by other jurisdictions or supranational jurisdictions may be adopted by the ATC after determination that the proposed designee meets the criteria for designation of UNSCR no. 1373.<sup>75</sup> This provision was struck down by the Supreme Court as unconstitutional in its December 2021 ruling (see section II.C below).<sup>76</sup>

The Anti-Money Laundering Council can thereafter freeze the assets of such individuals and organizations pursuant to the Philippine Anti-Money Laundering Act (AMLA).<sup>77</sup>

Since the enactment of the ATA, the Anti-Terror Council has designated the following individuals and organizations as terrorists: (a) the CPP/NPA, in line with the designation of the group as a terrorist organization in 2017 under The Terrorism Financing Prevention and Suppression Act of

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<sup>72</sup> Sec. 20, ATA.

<sup>73</sup> Sec. 23, ATA.

<sup>74</sup> Sec. 25, ATA.

<sup>75</sup> Sec. 25, ATA.

<sup>76</sup> Lian Buan, 'SC voids anti-terror law power to designate terrorists based on other country's request', Rappler (9 Dec. 2021), <https://www.rappler.com/nation/supreme-court-voids-parts-designation-anti-terror-law/>.

<sup>77</sup> Sec. 11, AMLA ("The AMLC, either upon its own initiative or at the request of the ATC, is hereby authorized to issue an *ex parte* order to freeze without delay: (a) property or funds that are in any way related to financing of terrorism or acts of terrorism; or (b) property or funds of any person, group of persons, terrorist organization, or association, in relation to whom there is probable cause to believe that they are committing or attempting or conspiring to commit, or participating in or facilitating the commission of financing of terrorism or acts of terrorism as defined herein.

The freeze order shall be effective for a period not exceeding twenty (20) days. Upon a petition filed by the AMLC before the expiration of the period, the effectivity of the freeze order may be extended up to a period not exceeding six (6) months upon order of the Court of Appeals: *Provided*, That the twenty-day period shall be tolled upon filing of a petition to extend the effectivity of the freeze order.

Notwithstanding the preceding paragraphs, the AMLC, consistent with the Philippines' international obligations, shall be authorized to issue a freeze order with respect to property or funds of a designated organization, association, group or any individual to comply with binding terrorism-related Resolutions, including Resolution No. 1373, of the UN Security Council pursuant to Article 41 of the Charter of the UN. Said freeze order shall be effective until the basis for the issuance thereof shall have been lifted. During the effectivity of the freeze order, an aggrieved party may, within twenty (20) days from issuance, file with the Court of Appeals a petition to determine the basis of the freeze order according to the principle of effective judicial protection.

However, if the property or funds subject of the freeze order under the immediately preceding paragraph are found to be in any way related to financing of terrorism or acts of terrorism committed within the jurisdiction of the Philippines, said property or funds shall be the subject of civil forfeiture proceedings as hereinafter provided").

2012;<sup>78</sup> (b) Central Committee Members of the CPP/NPA,<sup>79</sup> comprising 19 individuals with their assets frozen for this purpose;<sup>80</sup> and (c) the National Democratic Front, the political arm of the CPP/NPA.<sup>81</sup> Notably, some NDFP consultants, as mentioned in the introduction to this report, were killed by unknown assailants after being “red-tagged”, months before the NDFP was even designated a “terrorist organization” under the ATA. Local human rights groups have raised concern that the climate of killing and impunity will worsen under the ATA.<sup>82</sup>

Significantly, there is no delisting procedure laid out under the ATA. The implementing rules and regulations (IRR) of the ATA sought to fill this gap. However, it is a settled principle under Philippine law that rules and regulations cannot extend or amend the law which they are promulgated to implement.<sup>83</sup> Under Rules 6.9 and 6.10 of the IRR, a designated party or its assigns or successors-in-interest may file a verified request for delisting before the ATC within 15 days from publication of the designation. However, no request for delisting may be filed within six months from the time of denial of a prior request. The request must be based on any of the following grounds: (i) mistaken identity; (ii) relevant and significant change of facts or circumstance; (iii) newly discovered evidence; (iv) death of a designated person; (v) dissolution or liquidation of designated organizations, associations, or groups of persons; or (vi) any other circumstance which would show that the basis for designation no longer exists. Requests for delisting of foreign designees must be accompanied by proof of delisting by the foreign jurisdictions or supranational jurisdiction.

Designation is without prejudice to the proscription of terrorist organizations, associations, or groups of persons under the ATA.<sup>84</sup> Proscription is the “declaration” of any group of persons, organization or association as a terrorist and outlawed group when such group commits the punishable acts under the ATA. Alternatively, they may be “organized for the purpose of engaging in terrorism” upon application of the Department of Justice before the authorizing division of the Court of Appeals, and with due notice and opportunity to be heard given to the concerned group. Such application for proscription must be accompanied by the authority of the ATC upon recommendation of the National Intelligence Coordinating Agency.<sup>85</sup>

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<sup>78</sup> Anti-Terrorism Council, Resolution no. 12, ‘Designating the Communist Party of the Philippines and the New People’s Army also known as Bagong Hukbong Bayan (CPP/NPA) as Terrorist Organizations, Associations, and/or Groups of Persons’ (2020), <https://www.officialgazette.gov.ph/downloads/2020/12dec/20201209-ATC-12-RRD.pdf>; Office of the President, Proclamation no. 374, ‘Declaring the Communist Party of the Philippines (CPP) - New People’s Army (NPA) as a Designated/Identified Terrorist Organization Under Republic Act No. 10168 (2017) <https://www.officialgazette.gov.ph/downloads/2017/12dec/20171205-PROC-374-RRD.pdf>.

<sup>79</sup> Anti-Terrorism Council, Resolution no. 17, ‘Designation of Central Committee Members of the Communist Party of the Philippines and the New People’s Army also known as Bagong Hukbong Bayan (CPP/NPA), which was Designated under Anti-Terrorism Council Resolution no. 12 (2020), as Terrorists dated 21 April 2021’ (2021), <https://www.officialgazette.gov.ph/downloads/2021/04apr/20210421-ATC-RESO-17-RRD.pdf>.

<sup>80</sup> Bangko Sentral ng Pilipinas, Circular Letter CL-2021-041, Anti-Money Laundering Council (AMLC) Resolutions No. TF-39 and TF-40, Series of 2021 (20 May 2021), <https://www.bsp.gov.ph/Regulations/Issuances/2021/CL-2021-041.pdf>; See Lian Buan, ‘Dissecting anti-terror law: Designation feared to reach beyond frozen assets’, Rappler (14 May 2021), <https://www.rappler.com/nation/designation-feared-reach-beyond-frozen-assets-anti-terrorism-law>.

<sup>81</sup> Anti-Terrorism Council, Resolution no. 21, ‘Designating the National Democratic Front (NDF) also known as the National Democratic Front of the Philippines (NDFP) as a Terrorist Organization/Association’ (2021), <https://www.officialgazette.gov.ph/downloads/2021/06jun/20210623-ATC-Resolution-21.pdf>.

<sup>82</sup> Al Jazeera, ‘Philippine president approves widely opposed anti-terror law’ (3 July 2020), <https://www.aljazeera.com/news/2020/7/3/philippine-president-approves-widely-opposed-anti-terror-law>.

<sup>83</sup> *Ople v. Torres*, G.R. No. 127685 (23 July 1998); *Commissioner of Internal Revenue v. Transfield Philippines, Inc.*, G.R. No. 211449 (16 Jan. 2019).

<sup>84</sup> Sec. 25, ATA.

<sup>85</sup> Sec. 26, ATA.

#### 4. Arrest and Detention

Law enforcement agents or military personnel, if duly authorized by the ATC in writing, can arrest and take custody in administrative detention of a person suspected of committing any of the acts punished under the ATA for a period of 14 calendar days. The 14-day detention period will be counted from the moment such suspect has been apprehended or arrested, detained, and taken into custody by the law enforcement agency or military personnel. The 14-day period may be extended to a maximum period of 10 calendar days if it is established that (i) further detention of the person/s is necessary to preserve evidence related to terrorism or complete the investigation; (ii) further detention of the person/s is necessary to prevent the commission of another terrorism and (iii) the investigation is being conducted properly and without delay.<sup>86</sup>

#### 5. Anti-Terrorism Council

The ATA established an Anti-Terrorism Council (ATC) to implement the Act. This includes conducting capacity building programs, a legal affairs program that “shall ensure respect for human rights and adherence to the rule of law as fundamental bases of the fight against terrorism”, adopting measures to prevent and counter the vaguely and broadly defined “violent extremism”,<sup>87</sup> and direct the speedy investigation and prosecution of crimes under the statute, among others.<sup>88</sup> The implementing rules and regulations of the ATA provide for express human rights guarantees.<sup>89</sup>

The members of the ATC are the following: (a) Executive Secretary, who serves as the Chairperson; (b) the National Security Adviser, who serves as the Vice Chairperson; (c) Secretary of Foreign Affairs; (d) Secretary of National Defense; (e) Secretary of Interior and Local Government; (f) Secretary of Finance; (g) Secretary of Justice; (h) Secretary of Information and Communications Technology; and (i) Executive Director of the Anti-money Laundering Council Secretariat.<sup>90</sup>

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<sup>86</sup> Sec. 29, ATA.

<sup>87</sup> According to Sec. 45(a) of the ATA, this includes “conditions conducive to the spread of terrorism”, including “ethnic, national, and religious discrimination; socio-economic disgruntlement; political exclusion; dehumanization of victims of terrorism; lack of good governance; and prolonged unresolved conflicts by winning the hearts and minds of the people to prevent them from engaging in violent extremism”.

<sup>88</sup> Secs. 45 and 46, ATA.

<sup>89</sup> Rule XI, Implementing Rules and Regulations, ATA.

<sup>90</sup> Sec. 45, ATA.

## II. Adverse Impacts of 'Red-tagging' on the Right to Freedom of Expression and Information Online and Other Rights

### A. In General

#### 1. The Philippines' international human rights obligations relevant to online expression

The Philippines is a party to most of the principal international human rights law treaties and must respect, protect and fulfill the rights guaranteed under those treaties, through implementation in its domestic law and practice. The treaties to which the Philippines is a party to are the ICCPR and its two Optional Protocols; the International Covenant on Economic, Social, and Cultural Rights (ICESCR); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and its Optional Protocol; the Convention on the Elimination of All Forms of Discrimination against Women and its Optional Protocol; the Convention on the Rights of the Child and the first two Optional Protocols; the International Convention on the Elimination of all Forms of Racial Discrimination; the Convention on the Elimination of all Forms of Discrimination against Women and its Optional Protocol; the International Convention on the Protection on the Rights of all Migrant Workers and their Families; and the Convention on the Rights of Persons with Disabilities.<sup>91</sup> With respect to international humanitarian law, the Philippines is party to the four Geneva Conventions and their three Additional Protocols.<sup>92</sup> From 1 November 2011 until 17 March 2019, the Philippines was also a party to the Rome Statute.<sup>93</sup>

Article II, Section 2 of the 1987 Philippine Constitution provides that the Philippines "adopts generally accepted principles of international law as part of the law of the land". Although this provision of the Constitution might appear to render the Philippines as monist legal system, such that no domestic legislation is needed for treaties to have the force of law in the Philippines, there is lack of clarity in this respect illustrated in judicial decisions. The recent controversial ruling of the Philippine Supreme Court in *Pangilinan v. Cayetano*, on the question of whether Senate concurrence is necessary for withdrawing from the Rome Statute, further confuses the applicable doctrine.<sup>94</sup>

### B. 'Red-Tagging'

#### 1. The international human rights law and standards applicable to the right to freedom of expression

Article 19(1) of the ICCPR provides that "everyone shall have the right to hold an opinion without interference". Article 19(2) provides that "everyone shall have right to freedom of expression; this right shall include freedom to seek, receive, and impart information and ideas of all kinds regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of [their] choice."

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<sup>91</sup> OHCHR, 'Ratification Status for Philippines', [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=137&Lang=EN](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=137&Lang=EN).

<sup>92</sup> International Committee of the Red Cross, *Treaties, State Parties and Commentaries: Philippines*, [https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp\\_countrySelected=PH](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=PH).

<sup>93</sup> Coalition for the International Criminal Court, 'The Philippines' membership in the ICC comes to an end' (15 Mar. 2019), <https://www.coalitionfortheicc.org/news/20190315/philippines-leaves-icc>.

<sup>94</sup> The Supreme Court did not decide the case on the merits on the basis of mootness, though it was accompanied by a lengthy obiter dictum discussing the treaty ratification process laid out in the 1987 Philippine Constitution. *Pangilinan v. Cayetano*, G.R. No. 239483, (21 July 2021), <https://sc.judiciary.gov.ph/20238/>

The authoritative interpretation of ICCPR article 19 is contained in General Comment 34 of the UN Human Rights Committee, the supervisory body of the ICCPR.<sup>95</sup> The Committee, along with the Human Rights Council and its independent experts have repeatedly affirmed that article 19 guarantees equally apply to online expression.<sup>96</sup>

While the right is not absolute, States may only take very limited measures to restrict the right and only under narrow conditions and circumstances. Article 19(3) provides exhaustively for such conditions are met:

1. The restriction must be provided by law (principle of legality);
2. The restriction must be necessary only for the following aims:
  - a. For respecting the rights and reputations of others;
  - b. For the protection of national security, or of public order, or of public health or morals;
3. The restriction must be necessary for one of the those aims (the principle of necessity);
4. The means used to restrict expression must be the least intrusive to achieve the aim (principle of proportionality); and
5. The restriction must not be discriminatory in purpose or affect (principle of non-discrimination).

The first requirement – that any restriction to the right to freedom of expression and opinion be set out in a law – must comply with the principle of legality. This means that such a law must be formulated with enough precision to: (i) enable individuals to ascertain and adjust their conduct; (ii) provide guidance to those charged with implementing the laws to ensure they can clearly identify which types of expression fall under restrictions and not exercise “unfettered discretion” in restricting freedom of expression; and (iii) not contravene other international human rights law or standards.<sup>97</sup>

Even when there is a legitimate aim to justify the restriction on the right to freedom of expression, the restriction must that which is necessary and proportionate to meet that aim, nothing more. The test of necessity entails that the limitations must not be imposed where protection can be provided through less restrictive measures, while the test of proportionality ensures that limitations are proportionate to their function, not overbroad and are the “least intrusive instrument amongst others to achieve their protective function.”<sup>98</sup>

The UN Declaration on Human Rights Defenders, adopted by the UN General Assembly by consensus resolution of all UN Member States, including the Philippines, affirms the defense of human rights as a right in itself. For this purpose, human rights defenders have the right to, among others, form associations and non-governmental organizations; meet or assemble peacefully; conduct their work individually or in association with others; exercise their lawful occupation, including providing legal assistance to those in need; and effective protection under national law in “reacting against or opposing, through peaceful means, acts or omissions attributable to the State that result in violations of human rights.”<sup>99</sup>

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<sup>95</sup> UN Human Rights Committee, *Article 19: Freedoms of opinion and expression*, UN Doc CCPR/C/GC/34, 12 December 2011 (‘CCPR/C/GC/34’).

<sup>96</sup> CCPR/C/GC/34, para 12; UN Human Rights Council, *The promotion, protection and enjoyment of human rights on the Internet*, UN Doc. A/HRC/38/L.10/Rev.1, 4 July 2018 (‘A/HRC/38/L.10/Rev.1’), p. 3. This was similarly affirmed in a Joint Declaration on Freedom of Expression and the Internet issued by four independent experts from the UN and regional systems covering questions of freedom of expression in June 2011: United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, *Joint Declaration on Freedom of Expression and the Internet*, 1 June 2011, para. 1a.

<sup>97</sup> CCPR/C/GC/34, paras. 25, 26.

<sup>98</sup> CCPR/C/GC/34, paras. 33-35.

<sup>99</sup> UN General Assembly, *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, UN Doc. A/RES/53/144, 8 March 1999.

## 2. Forms of expression prohibited under international law

Article 20 of the ICCPR expressly requires States to prohibit “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”. Article 20 is compatible with and complement Article 19 of the ICCPR, such that any law that restricts forms of expression under Article 20 must still comply with the principles of legality, legitimacy, necessity and proportionality prescribed by Article 19,<sup>100</sup> as well as the International Convention on the Elimination of All Forms of Racial Discrimination and the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility, or violence.<sup>101</sup>

Prohibition of expression does not necessarily entail criminalization. The Rabat Plan of Action prescribes that a clear distinction should be made among: expression that constitutes a criminal offence; expression that is not criminally punishable, but may justify a civil suit or administrative sanctions; and expression that does not give rise to criminal, civil or administrative sanctions, but still raises concern in terms of tolerance, civility and respect for the rights of others.<sup>102</sup> For speech to constitute a criminal offense, the Rabat Plan of Action enumerates six factors to consider:

- (a) Context. This refers to the social and political milieu against which expression is communicated.
- (b) Speaker. This refers to the “position or status” of the speaker in society, and the speaker’s standing to the audience.
- (c) Intent. Incitement to be a criminal offense requires intent. Negligence and recklessness are therefore not sufficient for an act to be an offense under Article 20 of the ICCPR. Mere distribution or circulation of the impugned content is not sufficient.
- (d) Content and form. This includes an analysis of the “degree to which the speech was provocative and direct, as well as the form, style, nature of arguments deployed in the speech or the balance struck between arguments deployed.”
- (e) Extent of the speech act. This includes elements such as the reach of the speech in question, its public nature, magnitude, frequency of dissemination, the size of the audience and their capability to act on the incitement.
- (f) Likelihood, including imminence. Although incitement is an inchoate crime and an underlying crime need not be committed for said speech to amount to a crime, there must nevertheless be “some degree of risk of harm”. The courts will have to determine whether “there was a reasonable probability that the speech would succeed in inciting actual action against the target group, recognizing that such causation should be rather direct.”<sup>103</sup>

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<sup>100</sup> CCPR/C/GC/34, paras. 50-52.

<sup>101</sup> *Report of the Special Rapporteur on the promotion and protection of the freedom of opinion and expression*, UN Doc. A/74/486, 9 October 2019 (‘A/74/486’), para. 57(b); Human Rights Council, *Annual report of the United Nations High Commissioner for Human Rights: Addendum*, UN Doc. A/HRC/22/17/Add.4 (‘Rabat Plan of Action’), 11 January 2013.

<sup>102</sup> Rabat Plan of Action, para. 20.

<sup>103</sup> Rabat Plan of Action, para. 29.

### 3. Human rights violated by 'red-tagging'

In addition to violating the right to freedom of expression and information in the online space (ICCPR, article 19), 'red-tagging' by government officials may, depending on application, violate any number of human rights, including the rights to life (ICCPR, article 6), liberty and security of the person (ICCPR, article 9), the right to a fair trial (ICCPR, article 14), and freedoms of association (ICCPR, article 22) and peaceful assembly (ICCPR, article 21).

The practice of 'red-tagging' has been routinely condemned by UN human rights experts for violating the rights of human rights defenders, civil society activists and social media users. In June 2020, the UN High Commissioner for Human Rights stated that the practice of government 'red-tagging' in the Philippines has been "a persistent threat to civil society and freedom of expression", noting how social media platforms, especially Facebook, has been used to "red-tag and to harass civil society and opposition politicians, with women particularly subjected to misogynistic comments".<sup>104</sup> In January 2021, several independent UN human rights experts called for the end of the practice of 'red-tagging', noting how "[h]uman rights defenders in the Philippines continue to be red-tagged, labelled as 'terrorists' and ultimately killed in attempts to silence them and delegitimize their human rights work". These experts include the Special Rapporteur on the situation of human rights defenders, Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Special Rapporteur on the rights of indigenous peoples, Special Rapporteur on extrajudicial, summary or arbitrary executions and the Working Group on Arbitrary Detention.<sup>105</sup>

Additionally, the proposed bill (Senate Bill 2121) criminalizing red-tagging, currently stalled in Congress, would not be sufficient on its face to protect human rights defenders against red-tagging, even if enacted. The Bill may not provide victims of 'red-tagging' with access to an effective remedy, including compensation and guarantees of non-repetition, as it focuses solely on sanctions for State actors engaging in 'red-tagging', including imprisonment of ten years and perpetual absolute disqualification to hold public office. Additionally, while the Bill requires State actors to respect human rights by not engaging in 'red-tagging' through the threat of criminal sanctions, the State's obligation to protect human rights goes beyond criminalizing the act of red-tagging. In particular, the State must also implement policy responses as part of a "larger toolbox" to promote a culture of "peace, tolerance and mutual respect among individuals, public officials and members of the judiciary."<sup>106</sup>

#### C. Counterterrorism and Human Rights

The underlying acts constituting the crime of terrorism under the ATA do not expressly correspond to crimes punished under Philippine law. This violates the principle of legality of offences in criminal law, sometimes expressed by the Latin phrase *nullum crimen sine lege* (no crime without law). It means that any offense must be established in law and defined precisely and unambiguously, so as to enable individuals to know what acts will make them criminally liable. The principle of legality is a general principle of law and a principle of the rule of law, applicable to any legislation enacted in a State. It is also reflected in article 15 of the ICCPR, which prohibits retroactive application of the criminal law.

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<sup>104</sup> A/HRC/44/22, paras. 49, 60.

<sup>105</sup> UN Human Rights Council, 'Philippines: Drop murder charge against indigenous rights defender, UN experts urge' (28 Jan. 2021), <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=26696&LangID=E>.

<sup>106</sup> Rabat Plan of Action, para. 35.

## 1. The model definition of “terrorism”

There is at present no universally agreed definition of terrorism, although many elements of a definition have been agreed in the course of the now stalled negotiations on a comprehensive convention on international terrorism.<sup>107</sup> These elements and those of other international treaties have been taken into account by the former UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (“UN Special rapporteur on Counterterrorism and Human Rights”), who presented to the UN Human Rights Council a model definition in 2010 that is consistent with international human rights law and standards. Notably, “not all acts that are crimes under national law or even international law are acts of terrorism [which] should be defined as such.”<sup>108</sup> The use of existing international treaties and conventions on terrorism to ascertain trigger-offences is not by itself sufficient to determine what is truly “terrorist” in nature.<sup>109</sup>

The model definition defines the crime of terrorism as “an action or attempted action where”:

### (a) The action:

- (i) Constituted the intentional taking of hostages; or
- (ii) Is intended to cause death or serious bodily injury to one or more members of the general population or segments of it; or
- (iii) Involved lethal or serious physical violence against one or more members of the general population or segments of it; and

### (b) The action is done or attempted with the intention of:

- (i) Provoking a state of terror in the general public or a segment of it; or
- (ii) Compelling a Government or international organization to do or abstain from doing something; and

### (c) The action corresponds to:

- (i) The definition of a serious offence in national law, enacted for the purpose of complying with international conventions and protocols relating to terrorism or with resolutions of the Security Council relating to terrorism; or
- (ii) All elements of a serious crime defined by national law.

Under the model definition, there is a limited set of overt acts that can constitute the crime of terrorism—intentional taking of hostages, death or serious bodily injury, and lethal or serious physical violence. Further, an important element is that such overt acts correspond to a crime under the national law of the State, or to all elements of a “serious crime” under the national law of the State.

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<sup>107</sup> An ad hoc Committee established under the sixth Committee of the UN General Assembly has continued the negotiations. See <https://legal.un.org/committees/terrorism/>. The draft of 2005 is available here: <https://www.ilsa.org/Jessup/Jessup08/basicmats/unterterrorism.pdf>.

<sup>108</sup> *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, UN Doc. E/CN.4/2006/98 (2005), para.39.

<sup>109</sup> *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, UN Doc. E/CN.4/2006/98 (2005), para. 35.

## 2. “Incitement to terrorism”

Under the model definition, the crime of “incitement to terrorism” is “an offence to intentionally and unlawfully distribute or otherwise make available a message to the public with the intent to incite the commission of a terrorist offence, where such conduct, whether or not expressly advocating terrorist offences, causes a danger that one or more such offences may be committed.” Content considered “terrorist” can only be unlawful when it constitutes incitement as set forth under Article 20 of the ICCPR, that is, expression must amount to incitement to discrimination, hostility, or violence.

As noted above, article 19(3) of the ICCPR provides that the right to freedom of expression may be legitimately subject to restrictions on a limited number of grounds, including national security. However, these restrictions must be necessary and proportionate to meeting the objectives of those grounds. They must be compatible with the ICCPR as a whole and, in particular, must not violate the principle of non-discrimination.<sup>110</sup> In line with the legal requirements of the ICCPR, the UN Secretary General, in 2008 emphasized that laws on ‘incitement to terrorism’ should comply with international protections of freedom of expression and should only allow for the criminal prosecution of direct incitement to terrorism. Laws should only penalize expression that directly encourages the commission of a crime, intended to result in criminal action, and is **likely to result** in criminal action.<sup>111</sup>

## 3. The ATA’s definition of “terrorism” is inconsistent with international human rights law and standards

The ATA’s definition of “terrorism” significantly departs from the model definition. Under the ATA, the definition of “terrorism” under section 4 refers to acts – death, serious bodily injury – instead of crimes (e.g., murder). This can effectively cover acts that lead to death or serious bodily injury that nevertheless does not constitute a crime such as murder or homicide. Further, section 4 of the ATA is replete with vague and imprecise terms, in contravention of the principle of legality, including “acts intended to cause extensive interference with, damage or destruction to critical infrastructure”; “to provoke or influence by intimidation the government”; and “seriously destabilize or destroy the fundamental political, economic or social structures of the country”. While there is an exception carved out for “advocacy, protest, dissent, stoppage of work, industrial or mass action, and other similar exercises of civil and political rights”, this exception applies only if these activities 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”. This so-called “exception to the exception” is also imprecisely crafted and prone to arbitrary interpretation.

Further, the definition of “inciting to commit terrorism” under section 9 of the ATA also appears vague and overbroad. Section 9 defines “inciting to commit terrorism” as inciting others to commit acts specified in section 4 “by means of speeches, proclamations, writings, emblems, banners or other representations”. This prohibition does not include a requirement that the “speeches, proclamations, writings, emblems, banners or other representations” will directly encourage the commission of a crime, are intended to result in criminal action, and are likely to result in criminal action, and is thus incompatible with international standards.

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<sup>110</sup> This is supported by paragraph 26 of General Comment no. 34 of the UN Human Rights Committee, which states that: “Laws restricting the rights enumerated in article 19, paragraph 2 ... must not only comply with the restrictions of article 19, paragraph 3 of the [ICCPR] but must also themselves be compatible with the provisions and objectives of the [ICCPR]. Laws must not violate the non-discrimination provisions of the [ICCPR]. Laws must not provide for penalties that are incompatible with the [ICCPR] ...” See CCPR/C/GC/34.

<sup>111</sup> UN General Assembly, *Protecting human rights and fundamental freedoms while countering terrorism: Report of the Secretary General*, UN Doc. A/63/337 (2008), para. 62.

A group of independent UN human rights experts has expressed serious concern about the vague and overbroad nature of the ATA. These experts include the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, the Working Group on Arbitrary Detention, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on the rights to freedom of peaceful assembly and of association, the Special Rapporteur on the situation of human rights defenders, the Special Rapporteur on minority issues, the Special Rapporteur on the right to privacy and the Special Rapporteur on freedom of religion or belief. In particular, the experts highlighted how the definition of terrorism and inciting to commit terrorism is “overbroad and vague” and “differ[s] from and [is] substantially broader than the model definition [of terrorism]”.<sup>112</sup>

As noted above, in December 2021, the Supreme Court issued a ruling that upheld the constitutionality of the majority of the ATA, including the vague and overbroad definitions of “terrorism” and “inciting to commit terrorism”. The Supreme Court did, however, strike down the qualifier to section 4 of the ATA (“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” for “being overbroad and violative of freedom of expression”).<sup>113</sup> As of the time of the preparation of this briefing paper, the full copy of the decision is not yet publicly available.

#### 4. Contravention of the right to due process

The ATA permits arrest and detention of any person suspected of committing terrorist acts for up to 24 calendar days without a judicial warrant, if authorized by the ATC under section 29. This provision is clearly non-compliant with procedural rights guaranteed under article 9(3) of the ICCPR. Article 9(3) provides that anyone “arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power”. The Human Rights Committee has elaborated that “promptly” means that “any delays longer than 48 hours must remain absolutely exceptional and be justified under the circumstances”.<sup>114</sup>

Detention without a judicial warrant for up to 24 days patently contravenes this standard. The ICJ notes with concern that the Supreme Court declined to strike down this section as unconstitutional in its ruling. This concern has also been expressed by other critics of the ATA.<sup>115</sup>

#### 5. The designation of terrorist organizations

The UN Special Rapporteur on Counterterrorism and Human Rights notes that States take varying approaches to the designation of terrorist groups. However, at minimum, the listing should involve independent judicial review of any domestic implementing measures pertaining to persons on the Consolidated List of the United Nations irrespective of the practice at the UN Security Council, as the sanction process of the UN Security Council is itself not free of due process concerns.<sup>116</sup> The following safeguards must be guaranteed:

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<sup>112</sup> Mandates of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; the Working Group on Arbitrary Detention; the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; the Special Rapporteur on the situation of human rights defenders; the Special Rapporteur on minority issues; the Special Rapporteur on the right to privacy and the Special Rapporteur on freedom of religion or belief, Reference: OL PHL 4/2020 (29 Jun. 2020) (‘OL PHL 4/2020’), <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25384>.

<sup>113</sup> Lian Buan, ‘Supreme Court voids anti-terror law’s ‘killer’ caveat on ‘harmful’ dissent’, Rappler (9 Dec. 2021), <https://www.rappler.com/nation/supreme-court-voids-killer-caveat-anti-terror-law-harmful-dissent/>.

<sup>114</sup> Human Rights Committee, *General comment no. 35: Article 9 (Liberty and security of person)*, UN Doc. CCPR/C/GC/35, 16 December 2014, para. 33.

<sup>115</sup> See for instance, Sebastian Strangio, ‘Philippine Supreme Court Upholds Majority of Controversial Anti-Terror Law’ The Diplomat (10 Dec. 2021), <https://thediplomat.com/2021/12/philippine-supreme-court-upholds-majority-of-controversial-anti-terror-law/>; Julie McCarthy, ‘Philippines’ high court upholds most of a terrorism law, but strikes down a key point’, NPR (12 Dec. 2021), <https://www.npr.org/2021/12/10/1062937692/philippines-supreme-court-rules-parts-of-the-countrys-terrorism-law-unconstituti>.

<sup>116</sup> A/HRC/16/51, Para. 33-35.

- (a) the need to establish, on reasonable grounds that the entity has knowingly carried out or participated in or facilitated a terrorist act;
- (b) procedures allowing the entity to apply for removal from such a list, together with rights of appeal or judicial review and an ability to make a fresh application for removal in the event of a material change of circumstances or the emergence of new evidence relevant to the listing;
- (c) periodic review of the list to determine whether reasonable grounds remain for entities to be listed; and
- (d) mechanisms allowing claims of mistaken identity to be dealt with speedily and making compensation available for persons wrongly affected.<sup>117</sup>

To summarize, the following constitute the core elements of best practices in designating terrorist groups:

- i. Sanctions against the individual or entity are based on reasonable grounds to believe that the individual or entity has knowingly carried out, participated in or facilitated a terrorist act;
- ii. The listed individual or entity is promptly informed of the listing and its factual grounds, the consequences of such listing and the matters in items (iii) to (vi) below;
- iii. The listed individual or entity has the right to apply for de-listing or non- implementation of the sanctions, and has a right to court review of the decision resulting from such application, with due process rights applying to such review, including disclosure of the case against him, her or it, and such rules concerning the burden of proof that are commensurate with the severity of the sanctions;
- iv. The listed individual or entity has the right to make a fresh application for de-listing or lifting of sanctions in the event of a material change of circumstances or the emergence of new evidence relevant to the listing;
- v. The listing of an individual or entity, and the sanctions resulting from it, lapse automatically after 12 months, unless renewed through a determination that meets the requirements of items 1 to 3 above; and
- vi. Compensation is available for persons and entities wrongly affected, including third parties 118

The powers granted to the ATC to designate individuals and groups as “terrorists” depart from the aforementioned best practices. As previously noted, there is no de-listing procedure specified under the ATA. There are also shortcomings with the de-listing procedure under the ATA’s implementing rules and regulations, including the prohibition on filing a request within six months from the time of a prior request, and the limited grounds under which a request for de-listing may be filed.<sup>119</sup> Section 25 is also silent on the duration of the ATC’s designations and whether an effective remedy is available to persons and entities wrongly affected by these designations under the ATA.

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<sup>117</sup> A/HRC/16/51, Para. 34.

<sup>118</sup> A/HRC/16/51, Practice 9.

<sup>119</sup> As previously noted, these are limited to: (i) mistaken identity; (ii) relevant and significant change of facts or circumstance; (iii) newly discovered evidence; (iv) death of a designated person; (v) dissolution or liquidation of designated organizations, associations, or groups of persons; or (vi) any other circumstance which would show that the basis for designation no longer exists.

## 6. Violations of the right to privacy through surveillance and government requests of data

As detailed above, the ATA contains several provisions that are inconsistent with the right to privacy, including section 16 of the ATA, which provides that individuals that are mere suspects may be secretly wiretapped and have their private data accessed with a written order from the Court of Appeals.

Under international law, the right to be informed is crucial in ensuring the observance of rights because no effective remedy for unlawful interference can be obtained unless notification of that interference is provided.<sup>120</sup> Article 17 of the ICCPR provides that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence and that everyone has the right to the protection of the law against such interference. Giving unfettered surveillance power to authorities may constitute an unlawful interference on human rights, including the right to privacy. The right to privacy may at times serve as a basis for the enjoyment of other rights protected in the ICCPR. Without this right, other rights, including the right to freedom of expression, association, and movement, may not be effectively exercised.<sup>121</sup>

Interferences with the right to privacy are also subject to the requirements of legality, necessity, proportionality and non-discrimination.<sup>122</sup> The broad surveillance powers granted by the ATA are incompatible with these requirements. As observed by several UN human rights experts in their communication to the Philippine government, the “broad scope of surveillance powers granted [by the ATA] does not align with the principle that any restriction upon a human right capable of limitation should be the least intrusive means possible and shall be necessary and proportionate to the benefit attained.”<sup>123</sup>

## 7. Online censorship under the ATA

The Philippine authorities have exerted improper pressure on social media companies to remove content that they consider problematic under the guise of countering terrorism.<sup>124</sup> While the ATA does not contain any specific provision on the takedown of online content, it is likely to engender a chilling effect that will prompt social media users to self-censor in order to avoid sanctions under the law through its vague and overbroad definitions.

Furthermore, the ATA extends the powers of the authorities to penalize social media platforms if they are found to be providing “material support to any material support to any terrorist individual or organization, association or group of persons committing any of the acts punishable as terrorism under the ATA, under section 12”. The term “material support” is in turn defined as “any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (one or more individuals who may be or include oneself), and

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<sup>120</sup> International Commission of Jurists, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and human rights* (2009) at page 72.

<sup>121</sup> Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, UN Doc. A/HRC/13/37 (2009) at para. 40.

<sup>122</sup> Human Rights Council, *Resolution adopted by the Human Rights Council on 7 October 2021, 48/4. Right to privacy in the digital age*, UN Doc. A/HRC/RES/48/4, 13 October 2021, para. 2; Human Rights Council, *The right to privacy in the digital age: Report of the United Nations High Commissioner for Human Rights*, UN Doc. A/HRC/48/31, 13 September 2021, paras. 6 – 11.

<sup>123</sup> OL/PHL 4/2020, pp. 6 – 7.

<sup>124</sup> At present, government officials, including President Duterte, have criticized or sought responses from Facebook for various content decisions affecting the Philippines. See, e.g., Bernadette Herrera, Open Letter to Facebook Regarding Deletion of Posts (31 Aug. 2021), <https://www.facebook.com/bhherrera/photos/pcb.3063165783906111/3063165390572817/>; RG Cruz, ‘Mike Defensor blocked from Facebook, seeks probe for ‘censorship’’, ABS-CBN (2 Aug. 2021); Philippine Star, ‘Duterte warns Facebook over pages taken down for ‘coordinated inauthentic behavior’ (29 Sep. 2020), <https://www.philstar.com/headlines/2020/09/29/2045917/duterte-warns-facebook-over-pages-taken-down-coordinated-inauthentic-behavior>.

transportation.” Social media platforms can fall under the category of “communications equipment” or service.

Although Section 12 excludes humanitarian activities such as those undertaken by the International Committee of the Red Cross, the Philippine Red Cross, and “other state-recognized impartial humanitarian partners or organizations in conformity with the International Humanitarian Law”,<sup>125</sup> the provision, as worded, is vague and arbitrary as it leaves to the State the determination which non-governmental organizations will be considered “impartial” for purposes of the law. This concern is exacerbated by the fact that human rights organizations such as the Philippine Red Cross had previously been subject to political harassment.<sup>126</sup>

#### **D. Role of Social Media Companies**

##### **1. Human rights responsibilities of social media companies**

States have an obligation under the ICCPR not only to respect human rights, but to protect people from impairment to their human rights by private actors, including business enterprises.<sup>127</sup> The UN Guiding Principles on Business and Human Rights (UNGPs), endorsed by the Human Rights Council, affirm also that business enterprises themselves have a responsibility to respect human rights in areas where they operate. This means that companies must “avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.”<sup>128</sup> This responsibility applies to all rights, including the rights to privacy, freedom of expression and information, and freedom of association. Companies must ensure that their product, service, or operations do not cause, contribute, or be directly linked to an adverse human rights impact, including putting in place “policies and due diligence processes” to ensure rights are respected.<sup>129</sup>

In order to meet this responsibility, companies should have in place policies and processes appropriate to their size and circumstances, including:

- (a) A policy commitment to meet their responsibility to respect human rights;
- (b) Conduct ongoing human rights due diligence to “identify, prevent, mitigate and account for” how they address their human rights impacts. This includes identifying and meaningfully engaging with stakeholders.
- (c) Processes to enable affected communities to seek remedy from adverse human rights impacts that companies have caused or contributed to.<sup>130</sup>

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<sup>125</sup> Sec. 13, ATA.

<sup>126</sup> Daphne Galvez, ‘Duterte wants COA to audit Gordon-led Philippine Red Cross’, Philippine Daily Inquirer, (3 Sep. 2021), <https://newsinfo.inquirer.net/1482819/duterte-wants-coa-to-audit-gordon-led-red-cross-accuses-senator-of-using-funds-in-previous-election-campaigns>; International Federation for Human Rights, ‘Slandorous comments against human rights NGOs’ (28 Mar. 2018), <https://www.fidh.org/en/issues/human-rights-defenders/philippines-slandorous-comments-against-human-rights-ngos>

<sup>127</sup> Human Rights Committee, *General Comment 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13/ (26 May 2004), para. 8.

<sup>128</sup> UNGPs, Principle 11.

<sup>129</sup> UNGPs, Principles 13-18.

<sup>130</sup> UNGPs, Principles 14-15.

## 2. Addressing red-tagging on social media platforms that incites discrimination, hostility or violence

Social media companies like Meta (including Facebook) have not taken sufficient steps to counter speech that incite discrimination, hostility or violence online, in order to prevent or mitigate adverse human rights impacts linked to their operations. This includes addressing content of their platforms that incite violence against human rights defenders through the practice of red-tagging in line with international human rights standards.

For instance, a human rights assessment conducted by Article One on the human rights impact of Meta's operations identified how Meta's platforms have expanded the "dissemination and reach of speech that incites hatred and violence", including through "the tactic of 'red-tagging' [human rights defenders] who have been critical of the administration's human rights abuses." Some 21 percent of its survey respondents reported that online harassment resulted in offline harm.<sup>131</sup> The assessment found that Meta's efforts to address incitement to violence, among other human rights issues, is still insufficient, with its efforts being a "band-aid solution".<sup>132</sup> The assessment concluded that Meta needed to increase its capacity to address red-tagging, including through "building awareness among local civil society of Meta's red-tagging policies, expanding the trusted partner program, and taking steps to review red-tagged content in a timely manner, consistent with the threat of life".<sup>133</sup> This finding is largely consistent with criticism that Meta has previously faced concerning its slow response to the use of its platforms to threats of and incitement to violence targeted at human rights defenders and journalists.<sup>134</sup>

In relation to the practice of red-tagging on its platforms, Facebook (which is now incorporated in Meta) stated in February 2021 that it removes content that "exposes the identity of someone who is alleged to be a member of an 'at-risk' group, where these allegations could lead to real life harm".<sup>135</sup> Additionally, in response to Article One's human rights assessment, in December 2021, Meta also indicated that they have made "several updates to [their] Community Standards and launched products and initiatives to better protect public figures, human rights defenders and journalists" against "online harassment, incitement or coordinated harassment".<sup>136</sup> Meta also indicated that it was working to expand their "Trusted Partner network", expand awareness of relevant policies and engage with the Philippine Commission on Human Rights and other local rights organizations in order to address the issue of red-tagging.<sup>137</sup>

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<sup>131</sup> Article One, *Assessing the Human Rights Impact of Meta's Platforms in the Philippines: Executive Summary for Meta* (2020), p. 7 ('Article One, HRIA of Meta'), [https://about.fb.com/wp-content/uploads/2021/12/Meta-Philippines\\_HRIA\\_Executive-Summary\\_Dec-2021.pdf](https://about.fb.com/wp-content/uploads/2021/12/Meta-Philippines_HRIA_Executive-Summary_Dec-2021.pdf).

<sup>132</sup> Article One, HRIA of Meta, p. 10.

<sup>133</sup> Article One, HRIA of Meta, p. 15.

<sup>134</sup> See, for instance, Julie Posetti, 'Journalists like Maria Ressa face death threats and jail for doing their jobs. Facebook must take its share of the blame', CNN (2 Jul. 2020), <https://edition.cnn.com/2020/06/30/opinions/maria-ressa-facebook-intl-hnk/index.html>.

<sup>135</sup> The Straits Times, 'Philippine critics in firing line of anti-communist misinformation war' (25 Feb. 2021), <https://www.straitstimes.com/asia/se-asia/philippine-critics-in-firing-line-of-anti-communist-misinformation-war>.

<sup>136</sup> Miranda Sissons, 'An Independent Assessment of Meta's Human Rights Impact in the Philippines', Meta (2 December 2021), <https://about.fb.com/news/2021/12/metass-human-rights-work-philippines/>.

<sup>137</sup> Meta, *Meta Response: Philippines Human Rights Impact Assessment* (Dec. 2021), p. 34, [https://about.fb.com/wp-content/uploads/2021/12/Meta-Response\\_Philippines-Human-Rights-Impact-Assessment.pdf](https://about.fb.com/wp-content/uploads/2021/12/Meta-Response_Philippines-Human-Rights-Impact-Assessment.pdf).

Meta's response, however, stopped short of implementing the Rabat Plan of Action's six-part test into their policies, with Meta citing that it was "operationally infeasible".<sup>138</sup> Further, Meta's response was conspicuously silent on its efforts to increase its capacity to review red-tagged content in a timely manner in line with human rights law and standards. The ICJ emphasizes the need for Meta and other social media companies to address red-tagging inciting violence in an efficacious manner consistent with the principles of legitimacy, legality, necessity, proportionality and non-discrimination, and the Rabat Plan of Action.

Additionally, while the ICJ was not able to locate any recent reports of social media companies removing content of individuals or organizations that have been 'red-tagged', it is still worth emphasizing the UNGPs apply to social media companies in their moderation of problematic content on their platform.<sup>139</sup> The UNGPs cover social media companies' moderation of "terrorist" content and their designation of "terrorist organizations" banned from their platform. These considerations were emphasized by the UN Special Rapporteur on Counterterrorism and Human Rights in 2018 when she wrote to Meta CEO (then Facebook) Mark Zuckerberg urging revision of Facebook's overbroad definition of "terrorism".<sup>140</sup> For instance, human rights impact assessments should be conducted prior to entering the market and periodically thereafter.<sup>141</sup>

Finally, social media platforms must push back to the extent possible against Government requests to remove user-generated content or acquire data of specific users, in the absence of a judicial order rendered by an impartial and independent civilian court or one that does not comply with international human rights law and standards. This applies to governmental requests for data they receive pursuant to Section 16 of the ATA. While Facebook's transparency reports in January to June 2021 indicate that it received 11 total requests from the Philippine government for user data, and 26 requests for users/accounts, the ICJ was unable to ascertain details of such requests, and whether they were carried out pursuant to the ATA.<sup>142</sup>

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<sup>138</sup> Meta, *Meta Response: Philippines Human Rights Impact Assessment* (Dec. 2021), p. 21, [https://about.fb.com/wp-content/uploads/2021/12/Meta-Response\\_Philippines-Human-Rights-Impact-Assessment.pdf](https://about.fb.com/wp-content/uploads/2021/12/Meta-Response_Philippines-Human-Rights-Impact-Assessment.pdf).

<sup>139</sup> See, e.g., BSR, *A Human Rights-Based Approach to Content Governance* [https://www.bsr.org/reports/A\\_Human\\_Rights-Based\\_Approach\\_to\\_Content\\_Governance.pdf](https://www.bsr.org/reports/A_Human_Rights-Based_Approach_to_Content_Governance.pdf) (March 2021).

<sup>140</sup> *Mandate of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, OL OTH 46/2018 (24 July 2018) [https://www.ohchr.org/Documents/Issues/Terrorism/OL\\_OTH\\_46\\_2018.pdf](https://www.ohchr.org/Documents/Issues/Terrorism/OL_OTH_46_2018.pdf)

<sup>141</sup> Although social media companies such as Facebook have commissioned HRIAs in the past, these were all done belatedly after their product had been associated with human rights violations in places such as Sri Lanka and Myanmar. Other companies like YouTube, Twitter, and Tiktok do not publish HRIAs, if any. See, e.g., Miranda Sissons, *An Update on Facebook's Human Rights Work in Asia and Around the World*, Facebook (12 May 2020), <https://about.fb.com/news/2020/05/human-rights-work-in-asia/>; Alex Warofka, *An Independent Assessment of the Human Rights Impact of Facebook in Myanmar*, Facebook (5 November 2018), <https://about.fb.com/news/2018/11/myanmar-hria/>.

<sup>142</sup> Meta, Philippines: Government Requests for User Data, <https://transparency.fb.com/data/government-data-requests/country/PH/>.

### III. Recommendations

While the State has the obligation to protect human rights from terrorist threats, it also has the duty to protect human rights in implementing measures to combat terrorism. As repeatedly affirmed by the UN General Assembly and the UN Security Council, all counter-terrorism measure must comply with international human rights law, international humanitarian law and refugee law. To the extent that any measures which may serve to limit rights are undertaken, they must comply with the principles of legality, non-discrimination, legitimate purpose, necessity and proportionality. National security is never an excuse for violating human rights.

To this end, the ICJ makes the following recommendations:

- a. National and local government officials, including members of the National Task Force to End Local Communist Armed Conflict, must refrain from labeling human rights defenders as “terrorists”. Any credible accusations of terrorist conduct must be pursued through the rule of law, pursuant cognizable charges, compliance with due process and the right to a fair trial by a competent independent and impartial court.
- b. The Department of Justice and Office of the Ombudsman should investigate and if warranted prosecute individual government officials who engage in red-tagging in proper administrative and criminal proceedings;
- c. Congress should amend the Anti-Terrorism Act of 2020 in order to conform with international human rights law and standards pursuant to obligations under the ICCPR. Definitions of terrorism should be adopted that are consistent with international standards, including the model definition developed by the UN Special Rapporteur on Counterterrorism and Human Rights.
- d. The Government must desist from imposing requirement on telecommunication and social media companies in respect of the conduct of persons online. Social media companies should consistently observe their responsibility to respect human rights, consistent with the UN Guiding Principles on Business and Human Rights, including, but not limited to, taking further steps and increasing capacity to address red-tagging on its platforms inciting discrimination, hostility or violence; engaging with civil society before implementing policies impacting human rights; and applying the principles of transparency and due process in the moderation of online content on the platform.

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