The Commission on Human Rights (the ‘Commission’ for brevity), as the country’s national human rights institution (NHRI), issues this Advisory to provide its views on the matter of the impending legislation of enrolled bills SB No. 1083 / HB No. 6875, entitled “An Act to Prevent, Prohibit, and Penalize Terrorism, Thereby Repealing Republic Act No. 9372, Otherwise Known as the “Human Security Act of 2007.”

Terrorism has a direct impact on the enjoyment of the right to life, liberty, security and physical integrity. It threatens the dignity and security of human beings everywhere, endangers and takes innocent lives, creates an environment of fear and jeopardizes fundamental freedoms. These are just a few of the devastating effects on the rights and freedoms of the people.

As such the government has not only the right but a duty to formulate an effective counter-terrorism measures. However, it must be stressed that effective counter-terrorism measures and the protection of human rights are complementary and mutually reinforcing objectives which must be pursued together as part of the State’s duty to protect individuals within their jurisdiction.

On 8 September 2006, the United Nations General Assembly solemnly reaffirmed the centrality of respect for human rights to counter-terrorism measures as it unanimously adopted the United Nations Global Counter Terrorism Strategy, in its Resolution 60/288. One of the Pillars of the Strategy is respect for human rights which is understood to permeate in all other parts of the Strategy. Member States ensure that any measures taken to counter-terrorism comply with their obligations under international law, in particular human rights law, refugee and international humanitarian law.

Since the 11 September 2011 terrorist attack in the United States of America, there has been a proliferation of security and counter-terrorism policy and legislation measures throughout the world. This, in addition to the adoption of Security Council Resolution 1373 (2001), which reaffirms, among

1 A/RES/60/288, unanimously adopted by the UN General Assembly in 2006
others, the need to combat threats to international peace and security caused by terrorist acts.⁴

In many of these measures, there is a limitation set in the enjoyment of certain human rights to protect goods such as national security, or the right to life, physical integrity, and fundamental freedoms of others. Indeed, the protection of the right to life and other rights against violence by terrorist groups is in itself a human rights obligation.

Some of the most fundamental human rights are “absolute.” Such rights include the prohibitions on torture, slavery, and retroactive criminal laws. The absolute character of these rights means that it is not permitted to restrict these rights by balancing their enjoyment against the pursuit of a legitimate aim. In the words of Article 2 of the United Nations Convention Against Torture, “[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”

Most rights, however, are not absolute. States can limit the exercise of these rights for valid reasons, including the need of countering terrorism, as long as they respect several conditions. Human rights courts and treaty bodies have developed conditions to establish whether a measure limiting a non-absolute right is legitimate. These are:

1. Existence of a legal basis for the measure limiting the right.
2. Existence of legitimate aim or purpose, such as respect of the rights or reputations of others, the protection of national security, the maintenance of public order or public health or moral.
3. Measure/s limiting the rights should be necessary to achieve the legitimate aim. The existence and effectiveness of procedural safeguards will be a key aspect of the assessment whether the limitation of the right is proportional.
4. The measure respects the principle of equality and non-discrimination. Measures that limit rights in a discriminatory way will fail the test of proportionality. Therefore, the question of discrimination is generally considered one aspect of the necessity and proportionality test.

Only if all these conditions are met, will a restriction on a non-absolute right be permissible under international human rights law.⁵ Furthermore, as a matter of international law, a rule or provision of domestic law cannot justify failure to take a measure required by international law, nor taking of a measure prohibited by international law, including international human rights law. This is so regardless of whether the provisions of domestic law in question are constitutional in character or have some other form of special status in domestic law.⁶

⁵ https://www.unodc.org/documents/terrorism/Publications/Module_on_Human_Rights/Module_HR_and_CJ_responses_to_terrorism_ebook.pdf, last accessed June 16, 2020
⁶ Ibid
(a) **Overbroad and vague definition**

For any limitation of any non-absolute right, there must be a legal basis or prescription of a law. To be “prescribed by law”:

“(a) the law must be adequately accessible so that individuals have an adequate indication of how the law limits their rights; and

(b) the law must be formulated with sufficient precision so that individuals can regulate their conduct.”

Section 4 of the Anti-Terrorism Bill of 2020 defines terrorism when the acts are done with: (1) an intent to cause death or bodily harm or endanger a person’s life; (2) an intent to cause extensive destruction to the government or public facility or private property; (3) an intent to cause extensive damage to critical infrastructure. Terrorism is also committed by one who manufactures, possesses, acquires, transports uses explosive biological, nuclear, radiological, or chemical weapons; or release of such dangerous substances or causing fire floods or explosions.

At the very least, it is not even necessary for a death to occur as long as the qualifying circumstances exist. Under the proposed measure, it is enough that these intentional acts, by its “nature and context”, are done to (1) intimidate the general public or a segment thereof, (2) create an atmosphere or spread a message of fear, (3) to provoke or influence by intimidation the government or any of its international organization, or (3) seriously destabilize or destroy the fundamental political, economic, or social structures of the country, or (4) create a public emergency or seriously undermine public safety.

As a comparison, the Human Security Act (HSA) requires that the criminal acts specified therein creates an effect of sowing or creating widespread and extraordinary fear or panic, in order to coerce the government to give in to an unlawful demand. It is clear that the Anti-Terror Bill of 2020 intends to widen the effects of the acts enumerated qualifying it to terrorism, without necessarily requiring the element of coercing the government to do an unlawful demand. It dilutes the gravity of the offense such that if any political, social, or economic structure is merely intimidated or a segment of a population, the acts mentioned become terrorist acts punishable for life imprisonment without the benefit of parole or the benefits of Republic Act 10592.

Unfortunately, these qualifying circumstances leave an unbridled discretion on the part of law enforcement officers and do not give an adequate indication of how the law limits the rights of the people. Neither was it formulated with sufficient precision that individuals or groups may regulate

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7 As held, for example, by the European Court of Human Rights in Sunday Times v. United Kingdom, No 6538/74, Judgement of 26 April 1979, para. 49.

8 Section 4, Anti-Terrorism Bill.

9 Ibid.
their conduct. It creates a chilling effect on the free exercise of the right to petition the government for a redress of grievances. Notably, the Constitution has expressly and clearly prohibited any law to be passed abridging the freedom of speech, of expression, or of the press, or the right of the people to assemble and petition the government for a redress of grievances.\textsuperscript{10}

The exception provided is that any advocacy, protest, dissent, stoppage of work, industrial or mass action, and other similar exercises of civil and political rights are not terrorism unless the same are again intended to causes death or serious physical harm to a person, to endanger a person’s life, or to create a serious risk to public safety (emphasis is ours). There is an exemption to the exception which brings us back to the general rule that these valid and legitimate acts are at the risk of being considered terrorist acts.

As the exception and the exemption are all part of the definition of terrorism, therefore the burden of proof that the acts fall within the full definition of terrorism should remain with the law enforcers/prosecutors. They should be able to provide evidence falling under the exception to the exemption. They must prove that respondents have the intent to cause death, harm, or risk.

This vague and overbroad definition of “terrorism” violates the right to due process as it gives no fair notice of what specific acts to avoid. As it lacks the required “sufficient precision”, the definition also makes it difficult to distinguish an act of terrorism from ordinary crimes which are already punishable by the Revised Penal Code and other pertinent laws. This may lead, not only to filing and prosecution of offenses under the measure that should have been prosecuted as ordinary crimes, but also produces a chilling effect on the exercise of fundamental rights and freedoms guaranteed by the Constitution and international conventions.

Likewise, the vague definition can be abused and misused to target dissenters, critics of the government, civil society organizations, human rights defenders, journalists, minority groups, labor activists, indigenous peoples, and members of the political opposition, resulting to an unwarranted limitation and suppression on the right to organization, free speech, and right to privacy. The definition of terrorism in national laws must not be overly broad and vague. It must be precise and sufficiently tight to exclude members of the civil society and non-violent acts carried out in the exercise of fundamental freedoms.\textsuperscript{11}

**(b) Insufficient safeguards for the protection of civil and political rights**

Supporters and proponents of the proposed measure harps on the declaration of the policy found in Section 2 of the Anti-Terrorism Bill passed by both houses as sufficient safeguard for civil and political rights under the fundamental law which states:

SEC. 2. Declaration of Policy. — It is declared a policy of the State to protect life, liberty, and property from acts of terrorism,

\textsuperscript{10} Sec.4, Article III of the 1987 Constitution

\textsuperscript{11} https://www.unodc.org/e4j/en/terrorism/module-4/key-issues/defining-terrorism.html
to condemn terrorism as inimical and dangerous to the national security of the country and to the welfare of the people, and to make terrorism a crime against the Filipino people, against humanity, and against the law of nations.

In the implementation of the policy stated above, the State shall uphold the basic rights and fundamental liberties of the people as enshrined in the Constitution.

Nothing in this Act shall be interpreted as a curtailment, restriction or diminution of constitutionally recognized powers of the executive branch of the government. It is to be understood, however that the exercise of the constitutionally recognized powers of the executive department of the government shall not prejudice respect for human rights which shall be absolute and protected at all times. (Emphasis, supplied.)

Protection human rights as a policy, however, is not reflected in the many salient provisions of the bill. Worse, it deleted safeguards against abuse that are present in the Human Security Act of 2007.

(c) Threat and inciting to commit terrorism

Mere threat to commit terrorism is punishable under the proposed law and is meted with a penalty of 12 years imprisonment. The provision is vague as to what constitutes a threat to commit terrorism; it could give rise to various interpretations that may include a wide range of acts. This also lacks safeguard for people who, under certain circumstances, clearly cannot enact such threats and is just expressing dissent or opposition to a certain government measure, or petitioning the government for redress.

The Supreme Court, in Romualdez vs. COMELEC\textsuperscript{12}, held that “as a rule, a statute maybe said to be vague when it lacks comprehensible standards that men of common intelligence must necessarily guess at its meaning and differ as to its application.” It is unacceptable under the Constitution for the following reasons; 1) it violates due process for failure to accord persons, especially the parties targeted by it, fair notice of the conduct to avoid; 2) it leaves law enforcers unbridled discretion in carrying out its provisions and become an arbitrary flexing of the government muscle.\textsuperscript{13}

The crime of inciting to commit terrorism in Section 9 of the bill also shares the flaw found in Sec. 4 on the definition of terrorism and the employment of the phrase “tending to the same end” also adds further ambiguity to this new crime. This qualification can disproportionately limit the exercise of the right to free speech and freedom of expression as terrorist acts.

\textsuperscript{12} G. R. No. 167011, April 30, 2008
\textsuperscript{13} Id.
The incitement of others to commit acts of terrorism must be clear from the words uttered or writings, emblems and banners created. Otherwise, there is a clear violation of the freedom of expression, speech, or of the press, which is highly protected under Section 4 of the Bill of Rights. As it is, inciting to commit terrorism will cause a chilling effect on the exercise of free speech and discourage legal activity conducted in any form or platform, inside or outside the country because of the broad and vague definition of terrorism.

Prohibiting incitement to terrorism must, therefore, be limited to what is actually required to protect national security or public order. The provision, and how it is applied, must also be proportional, i.e., for each measure, one must determine whether, given the importance of the right or freedom, the impact of the measure on the enjoyment of that right or freedom is proportional to the importance of the objective being pursued by the measure and its potential effectiveness in achieving that objective.14

(d) Surveillance of “Suspected” Terrorist and Intercepting and Recording their Communications

The Commission is also concerned about the provision that allows law enforcement agencies to conduct surveillance on a person by mere “suspicion” of having committed any act of terrorism through the interception and recording of their private communications. This unwarranted and unscrupulous access to a person’s confidential information circumvents their right to privacy and may pave the way for ‘fishing expeditions’ by government authorities and evade the requirement of the right against unreasonable searches and seizures.15

Any authority of law to conduct surveillance or collection of data about a person must be to the extent not arbitrary, which in turn requires that the legislation must not be unjust, unpredictable or unreasonable. The law authorizing interference with privacy must specify in detail the precise circumstances in which the interference is permitted and must not be implemented in a discriminatory manner.16 This does not mean, however, that States enjoy an unlimited discretion to interfere with privacy, since any limitation on rights must be necessary to achieve legitimate purposes and be proportionate to those purposes. Regard must also be had to the obligation of States to protect against the arbitrary exercise of such authorizations.

While profiling and surveillance may be legitimate activities of the security sector to enforce the law and to prevent criminal and terrorist activities, they must be done strictly within the bounds of law to prevent possible abuse. They cannot and should not be used as an instrument to intimidate, harass, repress,

14 See, for example, “Australia: study on human rights compliance while countering terrorism” (A/HCR/4/26/Add.3); “Report of the independent expert on the protection of human rights and fundamental freedoms while countering terrorism, Robert K. Goldman” (E/CN.4/2005/103, paras. 8, 9 and 74); Human Rights Committee, general comment No 29, paras. 4-5; E/CN.4/2002/18, annex, paras. 4 (b), (e)-(g); Council of Europe, Guidelines…, Guideline III (para. 2); and Inter-American Commission on Human Rights, “Report on terrorism and human rights” (para. 51).
15 (Ople vs. Torres G.R. No. 127685 July 23, 1998)
16 See Human Rights Committee, views on communication No 35/1978, AumeeruddyCziffra and Others v. Mauritius, 9 April 1981 (A/36/40, annex XIII, para. 9.2 (b) 2 (i) 8)
and prevent anyone from exercising their fundamental rights. The security sector must be mindful of the provisions of Republic Act No. 10173 or the Data Privacy Act of 2012, as well as to ensure that all profiling and surveillance activities are above board, properly documented and authorized.

The Human Rights Committee, in its general comment No. 16 (1988), has explained that States must take effective measures to ensure that information concerning a person’s private life does not reach the hands of persons who are not authorized by law to receive, process and use it, and is never used for purposes incompatible with the International Covenant on Civil and Political Rights. Effective protection should include the ability of every individual to ascertain in an intelligible form what personal data are stored in automatic data files, and for what purposes, with a corresponding right to request rectification or elimination of incorrect data.

Attention must be brought on deleting the provisions of Sec. 9 of the Human Security Act (R.A. 9372), wherein a person subject of surveillance was provided with a right to be informed of the surveillance that will be conducted by the law enforcement authorities. Corollary to this right is the right to challenge the surveillance or interference as provided therein. Thus, the deletion of this safeguard leaves the person under surveillance with no redress on the intrusion of his or her right to privacy.

As an added safeguard, the Council of Europe’s Guideline on Human Rights and the fight against terrorism is instructive as it states:

“Within the context of the fight against terrorism, the collection and the processing of personal data by any competent authority in the field of State security may interfere with the respect for private life only if such collection and processing, in particular:

(i) Are governed by appropriate provisions of domestic law;
(ii) Are proportionate to the aim for which the collection and the processing were foreseen;
(iii) May be subject to supervision by an external independent authority.”

(e) Designation and Proscription of Terrorist Organization, Associations and Group of Persons.

Even before the Anti-Terror Act of 2020 came into the picture, red-tagging, labelling and branding of individuals and organizations as leftist, communist, and terrorist have been used to silence those who dissent and are critical of the government. This practice alone already constitutes a grave threat to the life, liberty, and security of these individuals and their families.

Red-tagging and labelling is a matter of serious concern that should not be taken lightly. Aside from its consequent delegitimization of dissent and public stigmatization, it is, more often than not, a prelude, or even an open invitation for anyone, to commit further atrocities against the person or organization tagged. This practice delegitimizes dissent, causes public stigma, and invites anyone to commit further atrocities against the person tagged. Through this
piece of legislation, the government is given unhampered authority to silence dissent.

Moreover, the discretion is given to the Anti-Terrorism Council (ATC) to designate an individual, groups of persons, organization or association as terrorist and freezing of their assets by the Anti-Money Laundering Council (AMLC) upon probable cause is highly problematic as it unduly delegates what should be exclusively the function of the judiciary. This gives the ATC an unbridled authority to label groups as terrorists resulting in the infringement of the constitutional right to join or form an organization for a purpose not contrary to law.

The provision on proscription in Sec. 26 of the bill is a matter of concern as it allows, upon application by the Department of Justice with the Court of Appeals, the preliminary proscription of any group of persons, organization or association without a full hearing. The Court, if it finds probable cause and finds the petition sufficient in form and substance, can issue within 72 hours a preliminary order of proscription declaring group of persons, organization or association as terrorists right away.

(f) Period of Detention In The Context of Counter-Terrorism Measures

All counter-terrorism measures, including those involving the deprivation of liberty, must comply fully with States' international human rights obligations. The protection and promotion of human rights while countering terrorism is both an obligation of States and a condition for an effective and sustainable counter-terrorism strategy.19

The prolonged detention of an individual suspected of committing terrorist acts or suspected to be a member of a terrorist organization for a period of 14 days - extendible for another 10 days - without judicial warrant and the denial of the right to post bail provided by the proposed law does not only violate the period of detention allowed by the Constitution, but may also constitute cruel, degrading, and inhuman treatment.

International standards prescribe that delays in bringing a person before the court must not exceed “a few days”, and “any delay longer than forty-eight (48) hours should be justified by exceptional circumstances.”20 It has treated delays of three or more days as violation of Article 9(3) of the International

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17 Section 25, Anti-Terrorism Bill.
18 In accordance with Section 11 of R.A. No. 10168 (An Act Defining The Crime Of Financing Of Terrorism, Providing Penalties Therefor And For Other Purposes) which states: “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.
19 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.
xxxDuring 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.”
Covenant on Civil and Political Rights.\textsuperscript{21} Detention will be considered arbitrary if the State party continues to detain an individual “beyond the period for which the State, thru its law enforcement officers, can provide an appropriate justification.\textsuperscript{22}

Worse, given the proposed extended period of detention, the approved bills absolve authorities from any ‘criminal liability for the delay in the delivery of detained persons to the proper judicial authorities’ despite the Constitutional guarantee of presumption of innocence and due process.

Supporters argue that the 1987 Constitution allows more than three (3) days of detention without a judicial warrant. They stress that Section 18, Article 7 of the Constitution\textsuperscript{23} is conditioned on the suspension of the privilege of the writ of habeas corpus; hence, when the privilege is not suspended, the detention without warrant can go beyond three days. This argument forgets that when the privilege of the writ is not suspended, the maximum period to detain a person without warrant is only 36 hours or one and a half (1/2) days as provided by Section 125 of the Revised Penal Code.\textsuperscript{24} Delay in the delivery of the detained person without warrant will be meted with imprisonment of the public officer or employee detaining the person.\textsuperscript{25}

Besides, Congress cannot interpret the clear provision of the Constitution and legislate its interpretation to prevent constitutional challenge and to exonerate public officers from criminal liability. When the Constitution states that “[D]uring the suspension of the privilege of the writ, any person thus arrested or detained shall be judicially charged within three days, otherwise he shall be released”, Congress is not allowed to legislate its interpretation that, in cases where the privilege is not suspended, detention can exceed more than three days. Besides, there is no constitutional basis for pegging the allowable number of days of detention to fourteen (14) and number of days for extension to ten (10). In \textit{Endencia v. David} (G.R. No. L-6355-56, August 31, 1953), the Court declared:

We have already said that the Legislature under our form of government is assigned the task and the power to make and enact laws, but not to interpret them. This is more true with regard to the interpretation of the basic law, the Constitution, which is not within the sphere of the Legislative department. If the Legislature may declare what a law means, or what a specific portion of the Constitution means, especially after the courts have in actual case ascertained its meaning by interpretation and applied it in a decision, this would surely cause confusion and instability in judicial

\textsuperscript{21} Omar Sharif Baban v. Australia, Human Rights Committee Communication No. 1014/2001, UN Doc CCPR/C/78/D/1014/2001 (2002), para. 7.2
\textsuperscript{22} Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/HRC/6/17/Add.2), para. 77.
\textsuperscript{23} “SECTION 18. xxx During the suspension of the privilege of the writ, any person thus arrested or detained shall be judicially charged within three days, otherwise he shall be released.”
\textsuperscript{24}Article 125. \textit{Delay in the delivery of detained persons to the proper judicial authorities. -} The penalties provided in the next preceding article shall be imposed upon the public officer or employee who shall detain any person for some legal ground and shall fail to deliver such person to the proper judicial authorities within the period of: twelve (12) hours, for crimes or offenses punishable by light penalties, or their equivalent; eighteen (18) hours, for crimes or offenses punishable by correctional penalties, or their equivalent and thirty-six (36) hours, for crimes, or offenses punishable by afflicting or capital penalties, or their equivalent. In every case, the person detained shall be informed of the cause of his detention and shall be allowed upon his request, to communicate and confer at any time with his attorney or counsel. (As amended by E.O. Nos. 39 and 272, Nov. 7, 1986 and July 25, 1987, respectively).
\textsuperscript{25} \textit{Ibid.} in relation to Article 124 of the Revised Penal Code.
processes and court decisions. Under such a system, a final court determination of a case based on a judicial interpretation of the law of the Constitution may be undermined or even annulled by a subsequent and different interpretation of the law or of the Constitution by the Legislative department. That would be neither wise nor desirable, besides being clearly violative of the fundamental, principles of our constitutional system of government, particularly those governing the separation of powers.

(g) Deleted Safeguards

The Commission commends the provision of Section 29 therein, requiring the law enforcement officer to furnish the Commission of the notice of detention of a person suspected of committing terrorism and all other information in relation thereto. However, we would like to emphasize on the safeguards that were removed that aims to further the protection and promotion of human rights, which includes;

a) The unhampered authority of the Commission on Human Rights to conduct unannounced and regular visits to places of detention of persons suspected of committing terrorism in line with its visitorial mandate under the Constitution to ensure that cruel, inhuman, and degrading treatment or punishment are not being carried out;

b) The provision under the Human Security Act of 2007 giving the Commission on Human Rights the concurrent jurisdiction to prosecute public officials, law enforcement officers and other persons for the violation of the civil and political rights of persons suspected of, or detained for the crime of terrorism and other offenses in relation thereto;

c) The automatic suspension of the law one month before and two months after the holding of any election to ensure that the law shall not be used against political opponents during elections;

d) The damages awarded to those persons acquitted, wrongfully arrested, detained or otherwise deprived of their liberty, most especially were eventually found innocent or the charges against them were dismissed; and

e) The Grievance Committee composed of the Ombudsman, the Solicitor General, and the undersecretary of the Department of Justice (DOJ) assigned to receive and evaluate complaints against the acts of the police and law enforcement officers in the implementation of the law.

The State has to adopt effective counter-terrorism measures in order to protect its sovereignty, national security and peace and order against the threat of terrorism. But this must be done without compromising everyone’s fundamental rights and freedoms. Effective counter-terrorism measures and the protection of human rights are complementary and mutually reinforcing objectives. They must be pursued together as part of the State’s duty to respect, protect, and fulfil human rights.
The Commission reiterates that while the government may legitimately take measures that put limitations on the exercise of certain rights, which include the right of association and assembly, right to free speech and expression, and the right to privacy and due process, these restrictions must be within, authorized, and prescribed by law, jurisprudence, and international human rights obligations.

Further, the Commission strongly urges the executive department headed by President Rodrigo Roa Duterte, to seriously look into the provisions of the Anti-Terror Act of 2020 and take into full consideration its implications to the exercise of fundamental rights and freedoms as well as the obligation to fulfill, promote, and protect human rights against abuses and exploitation.

**ISSUED** this 17th day of June 2020, Quezon City, Philippines.

JOSE LUIS MARTIN C. GASCON  
Chairperson

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