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## **Legislating for Terrorism: The Philippines' Human Security Act 2007**

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### *Introduction*

In February 2007 the Philippine Senate passed the Human Security Act (HSA) otherwise known as Republic Act No. 9372: An Act to Secure the State and Protect our People From Terrorism. Philippine Senate Minority Leader Aquilino Q. Pimentel Jr. was heavily involved in the final drafting of the HSA. He gave it its final name shortly before the Senate Chamber passed it into law. Previously the Act had been known by various titles including 'An Act to Deter and Punish Acts of Terrorism and for Other Purposes' (Senate Bill No. 2137) and 'An Act to Define and Punish the Crime of Terrorism, the Crime of Conspiracy to Commit Terrorism, and the Crime of Proposal to Commit Terrorism, and for Other Purposes (Senate Bill No. 2187). Thus the Human Security Act exists as an instrument of counter terrorism as opposed to human security policy.

This article will outline why the Philippines is a significant topic of research in relation to the 'War on Terror' and the legislation designed to counter and manage terrorism. The influence of the United States' PATRIOT Act (Providing Appropriate Tools Required to Intercept and Obstruct Terrorism) on the crafting of the HSA and the extent to which the influence of the Patriot Act on the HSA is contested in the Philippines will be examined. In order to allow for a succinct comparison to be made in this short article analysis will be limited to the legislative dimensions of the PATRIOT Act and the HSA in relation to surveillance and redress. In turn, the legislative provisions on surveillance will be assessed against the constitutions of the US and the Philippines respectively. It will be argued that the HSA was designed to be at one and the same time a sop to the US and unworkable in practice. The legislation of the HSA has, at the time of writing, never been used in court, successfully or otherwise, to prosecute those suspected of terrorist activity in the Philippines. The reasons for this will be examined in what follows.

### *The Philippines, Terrorism and the United States*

Reporting in 2007, Human Rights Watch stated that more than 1,700 civilians had been killed in the Philippines by Islamic extremists since 2000[1]. Estimates vary, but this figure signifies a marked increase on previous years. Markets and transport networks have been attacked, including the bombing of passenger ship, Superferry 14, in Manila Bay in February 2004 that resulted in 116 deaths. Civilians have also been kidnapped and executed. The geography and the political landscape of the Philippines make it a 'fertile breeding ground for al-Qaeda'[2]. Malaysia, Brunei and Indonesia, all states with large Muslim populations, lie to the south west of

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the Philippines. South East Asia is made up of a vast series of islands meaning that borders are porous and the opportunity for ‘back door’ movement is considerable. Domestic organizations designated as ‘terrorist’ by the United States (US) active in the Philippines include the Abu Sayyaf Group (ASG) and the New People’s Army (NPA). The latter is the military wing of the Communist Party of the Philippines (CPP). Also active in the Philippines, and more broadly in South East Asia, is Jemaah Islamiya (JI). The Moro National Liberation Front (MNLF) and its splinter group the Moro Islamic Liberation Front (MILF) are often referred to as ‘terrorist’ groups by the media but they are not designated as such by the US. The Philippines is a democracy and is characterized by a vibrant civil society. Therefore the political landscape, in theory at least, is much less repressive than the Middle East. In reality a minority of elite families dominate political life in the Philippines[3], corruption is rife[4], extra judicial killings are common[5] and poverty is endemic[6].

The Philippines is a significant case study as it is one among several close allies of the US in the so-called global war on terrorism[7]. In fact it has been dubbed the ‘second front’ of the War on Terror. The archipelago’s close relationship with the US can be traced back at least as far as the Spanish-American War (1899-1902) [8]. This relationship has been predominantly politically and economically beneficial for the Philippines’ government, despite the fact that the relationship has been one of tutelage as opposed to equal partnership. The religious affiliation of the Philippines is predominantly Catholic however there is a significant Muslim population in the southern islands of the archipelago including Mindanao.

## *Counter-terror Legislation: The PATRIOT Act and the HSA*

When the PATRIOT Act was signed into Law on 26 October 2001 Bush claimed that it ‘upholds and respects the civil liberties guaranteed by our Constitution’. James Bovard describes this claim as ‘ludicrous’[9]. A central bone of contention was change to the law on searches. The Act granted the authorities increased rights of surveillance and secret access to business and personal records where ‘the government demonstrates the records concerned are sought for an authorized investigation to obtain foreign intelligence information not concerning a U.S. person or to protect against international terrorism or clandestine intelligence activities’[10]. This section arguably contradicts the US Fourth Amendment which reads ‘The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by an oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized’. The key issue here is what constitutes *unreasonable*. The element of surprise is essential for a terrorist attack so at what point is it reasonable to conduct a search? Once the intentions of the ‘terrorist’ are clear it may be too late. However preemptive surveillance may infringe civil liberties.

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Title II of the PATRIOT Act is entitled ‘Enhanced Surveillance Procedures’. Since 1978 the Foreign Intelligence Surveillance Act (FISA) has governed the monitoring of international communications by federal agents. However post 9/11 US government lawyers stated that FISA restricted ‘the speed and agility’[11] necessary for the early detection of terrorist activity. The statement came in the wake of President George W. Bush’s admission in 2005 that the National Security Agency (NSA) had been monitoring international communications without adhering to the provisions of FISA. FISA was sorely in need of updating not least because of the technological advances made in communications since 1978. For instance if a court order was granted to wiretap under FISA, the authorization would only cover a specific phone. Mobile phones and the Internet have obviously rendered this approach obsolete. The PATRIOT Act now allows for “roving surveillance authority” – making it legal for agents to follow one suspect, whatever instrument he or she uses’[12]. This update to FISA legislation (Under Section 206 of the PATRIOT Act) brought the law covering intelligence operations into line with the law on criminal investigations that had allowed for roving wiretaps since 1986. The law on email surveillance has also been updated. By their very nature emails (and phone calls for that matter) travel across many legal jurisdictions, under the PATRIOT Act emails can now be traced nationally whereas under FISA legal jurisdiction had not gone beyond the local. Arguably this was just the law catching up with technology and according to Etzioni ‘anybody who sees a civil rights violation here should have his or her vision checked’[13].

Sections seven to sixteen of the HSA deal with the surveillance, interception and recording of communications. Section seven details that:

a police or law enforcement official and the members of his team may, upon a written order of the Court of Appeals, listen to, intercept and record, with the use of any mode, form, kind or type of electronic or other surveillance equipment or intercepting and tracking devices, or with the use of any other suitable ways and means for that purpose, any communication, message, conversation, discussion, or spoken or written words between members of a judicially declared and outlawed terrorist organization, association, or group of persons or of any person charged with or suspected of the crime of terrorism or conspiracy to commit terrorism[14].

Article III, Section 3 (2) of the Philippines’ Constitution reads: ‘The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures of whatever nature and for any purpose shall be inviolable, and no search warrant or warrant of arrest shall issue except upon probable cause to be determined personally by the judge after examination [...]’. This wording is virtually identical to that of the United States’ Constitution. However the ‘roving’ nature of surveillance now makes the idea of security in a house or building obsolete, as surveillance is no longer defined geographically under the PATRIOT Act or

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the HSA. Legal space is now mobile, as people as opposed to specific pieces of telecommunications equipment, have become the referent object of the law.

Section sixteen of the HSA outlines the penalties for malicious interceptions and/or recordings:

Any police or law enforcement personnel who, not being authorized to do so by the authorizing division of the Court of Appeals, tracks down, taps, listens to, intercepts, and records in whatever manner or form any communication, message, conversation, discussion, or spoken or written word of a person charged with or suspected of the crime of terrorism or the crime of conspiracy to commit terrorism shall be guilty of an offense and shall suffer the penalty of ten (10) years and one day to twelve (12) years of imprisonment[15].

The HSA lists a series of penalties for law enforcement personnel if they do not follow the statutes of the HSA. These penalties take the form of lengthy prison sentences. Importantly the individual personnel or their direct superiors are held accountable not the agency as a whole. From this one can tentatively suggest that the HSA is designed to penalize rogue individuals as opposed to non-performing agencies.

The provisions of the PATRIOT Act are more complex than the HSA and are written in the form of updates to both FISA and the United States Code. Section 204 adds 'electronic' communications to the existing United States Code provisions on 'wire and oral' communications. Persons aggrieved by the statutes of the PATRIOT Act may pursue monetary damages against the US under Section. The amount awarded can be no less than \$10,000, however if they are successful then the department or agency responsible for the violation has to pay the damages out of its departmental budget. There is a similar provision in Section 50 of the HSA that states:

Upon acquittal, any person who is accused of terrorism shall be entitled to the payment of damages in the amount of Five Hundred Thousand Pesos (P500,000.00) for every day that he or she has been detained or deprived of liberty or arrested without a warrant as a result of such an accusation. The amount of damages shall be automatically charged against the appropriations of the police agency or the Anti-Terrorism Council that brought or sanctioned the filing of the charges against the accused[16].

As with the PATRIOT Act the responsibility for compensation lies with the agency causing the grievance or making the arrest as opposed to the state. However whilst disciplinary action against 'officers or employees' of the US is raised under Section 223 of the PATRIOT Act there is only provision for initiating proceedings as opposed to the specification of penalties as in the HSA.

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## *Critics of the HSA*

Critics argue that the HSA was ‘a response to the call of the United States to its allied nations – the “Coalition of the Willing” [17]– to enact anti-terror measures in the wake of the 9/11 attacks in 2001’[18]. Bobby Tuazon of the think tank Centre for People’s Empowerment in Governance (CenPEG) commented that ‘the beginnings of the Human Security Act can be traced to 9/11 and the PATRIOT Act’[19]. However, Senator Juan Ponce Enrile, one of the original architects of the HSA, flatly denied this. He stated that ‘nothing was copied from the PATRIOT Act’[20]. Tuazon also stated that the Act was important for President Gloria Macapagal-Arroyo (GMA) as her alliance with the Americans was key to keeping herself in power. In the years running up to the passing of the HSA the GMA presidency was rocked by a series of scandals, mostly notably the ‘Hello Garci’ affair. GMA was allegedly caught on tape discussing vote tampering in the 2004 presidential elections with Election Commissioner Virgilio Garcillano[21]. Maria Ela Atienza of the Third World Studies Centre, University of the Philippines echoed Tuazon’s concerns. She commented that ‘the Human Security Act was important for the stability of GMA’[22]. Atienza, who had been working on a UNDP funded project to map human security in the Philippines, noted her researchers had to explain to interviewees that they were not involved in the HSA or HSA related fieldwork. This was necessary as the term human security led respondents to be suspicious that her team was ‘looking for terrorists’. This became a major threat to her project.

The final version of the HSA is a watered down version of earlier drafts. Nevertheless there have been various criticisms of the Act. It is claimed that the Act is unconstitutional[23] and that it ‘is a move to get continued US support for the Arroyo administration and a move to suppress the most effective critics of the administration’[24]. It is also argued that the Act will ‘curtail the rights of Filipinos’[25]. Also the definition of terrorism used in the Act ‘is so broad and vague that it could be used to curtail legitimate acts of protest’[26]. The Act states that a terrorist is anyone that commits an offence under various provisions of the Revised Penal Code ‘thereby sowing a condition of widespread and extraordinary fear and panic among the populace, in order to coerce the government to give in to an unlawful demand’[27]. Despite these criticisms the Supreme Court of the Philippines rejected a consolidated petition[28] submitted by six left wing groups, including BAYAN, the South-South Network (SSN) for Non-State Armed Group Engagement and the human rights group Karapatan, which claimed that the Act was unconstitutional. The petition was rejected on the grounds that the Act has never been used against the groups in question[29]. In the course of its findings the Supreme Court noted that:

For a concerned party to be allowed to raise a constitutional question, it must show that (1) it has personally suffered some actual or threatened injury as a result of the allegedly illegal conduct of the government, (2) the injury is fairly traceable to the challenged action, and (3) the injury is likely to be redressed by a favorable action[30].

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Others argue that there are ‘booby traps in the bill’[31] which make it legally and practically difficult to use. Senator Pimentel did not deny this. He stated that ‘the HSA, without refinement, would have given too much power to law enforcement’[32]. He also claimed that he was not disappointed that the Act had never been used. Booby traps might include the threat of long custodial sentences for any police or law enforcement personnel who do not have the correct authority to intercept communications, examine bank accounts or who do not present those arrested under the Act to the judicial authorities within three days. However the biggest booby trap may well be the aforementioned Section 50. The authorities have to pay anyone detained yet not successfully convicted under the Act somewhere in the region of £7, 200 per day. At first glance this seems like a means to deter unsubstantiated arrests under the Act but critics[33] argue that this may not deter individuals, as compensation will come from public funds not their own pockets. However in a country where the average family income per annum was £2,494 in 2006[34] this amount would surely garner caution in both individuals and the authorities. However, at the time of writing, the pros and cons of the Act remain untested, as the law has never been used.

## *Criminal Acts and Acts of Terror*

Senator Pimentel claims that the name of the HSA was influenced by Senator Jamby Madrigal as she argued that ‘security and human rights are not alternatives; they go hand in hand. Respect for human rights is the route to security, not an obstacle to it’[35]. He also stated that the naming of the act would ‘add a new dimension to human security’[36]. Such sentiments are laudable and reasonable however the HSA is not a policy tool for securing humans as understood by the UNDP it is a counter-terrorism bill. By articulating terrorism as activity that creates ‘extraordinary and widespread fear’ the authors of the bill elevated crimes such as piracy, murder and arson to the rank of threats to national security. In turn this allows for emergency measures, beyond the run of politics, to be taken by the state and the security services to counter the threat. Therefore legislation that is framed as social security is actually concerned with national security. However evidence also suggests that the critics that have argued that the Act allows for the security services to ride roughshod over human rights and civil liberties in the Philippines are mistaken. Largely because the Act has never been used. Indeed the United Nations Office on Drugs and Crime argues that ‘Many notorious attacks on civilians that by their nature or context suggest a purpose to intimidate a population or to coerce a Government have been successfully prosecuted without the need to use anti-terrorism laws or to prove a specific terrorist intent’[37]. In support of this claim they cite successful prosecutions of those who have committed acts that have intimidated a population or coerced a government without the use of anti-terrorist legislation. Among those they cite are the perpetrators of the kidnapping of the Martin and Gracia Burnham[38] and the Superferry 14 bombing.

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## *Conclusion*

So why did the Philippines government draw up legislation that, according to critics, is unusable? Arguably the Act was drawn up to appease the US who were pushing for legislation similar to the PATRIOT Act to be enacted in countries more or less allied with them in the War on Terror. The architects of the HSA have denied that the PATRIOT Act was used as a model. However, the legislation on surveillance and the penalties for its misuse at least look suspiciously similar. Interview evidence revealed statements indicating that President Gloria Macapagal Arroyo was in thrall of the US and eager to do its' bidding; one such comment was 'our President is a puppet'[39]. Others have argued that 'the most significant threat of all for the Philippines and the wider region is the possibility of international terrorism and domestic insurgency becoming ever more closely interwoven and mutually reinforcing'[40]. Note that domestic groups are referred to as insurgents, not terrorists. The difference is subtle but significant and under the HAS, insurgents who create widespread and extraordinary fear and panic in order to bring unlawful pressure to bear on the government qualify as terrorists. Various Islamic elements in the Southern Philippines have been pushing for autonomy in the region for decades and the political and geographical character of the country has proven to be an attractive refuge for international terrorist groups such as JI and al-Qaeda. Practically and legally it is extremely difficult to differentiate between rebels, bandits, insurgents and kidnappers on the one hand and terrorists on the other. Consequently it may be pragmatic for the Philippines to prosecute offenders as criminals as opposed to terrorists.

A dichotomy seems to exist whereby security threats in the Philippines from groups such as the NPA and the ASG are articulated as terrorist threats but dealt with as criminals in law. However the distinction between terrorism and crime is sometimes mutable. Over time the political identity of the ASG 'has been subordinated to the quest for profit'[41], the tipping point for change being the death of its founder Abdurajik Abubaker Janjalani. The HSA has been hailed as repressive by civil rights groups, however it has never been used. Ironically criminals and crime seem to be articulated as terrorists and terrorism by the Philippines government however this has not been tested in court. There is the inclination to inflate the insurgent threat to the level of 'emergency' and thus a threat to national security but a lack of desire to follow the designation of this threat through under the law. A tentative conclusion might be that the Philippines has a vested interest in designating its insurgent terrorists as this facilitates the continued engagement of the US in the region. However the legal treatment of insurgents as criminals rather than terrorists means that those arrested are more obviously subject to domestic law. The HSA is also domestic law but bear in mind that the PATRIOT Act is openly designed to 'deter and punish terrorist acts in the United States and *around the world* (my emphasis), to enhance law enforcement investigatory tools, and for other purposes'. Therefore by using criminal as opposed

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to terrorist legislation the Philippines authorities define law breaking as a domestic matter and beyond the remit of US legislation. The idea of terrorism extends as far as written legislation but not the enactment of this legislation.

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