

Myth-making and Reality:
A Critical Examination of Human Rights-Compliant Counterterrorism
in the Philippines and Indonesia

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I hereby declare that this thesis is my original work.

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Abstract

This thesis explores the relationship between counterterrorism and human rights. Its primary contention is that the promotion of the ideal of human rights-compliant counterterrorism has undermined rather than strengthened human rights. Drawing on fieldwork-based case studies in the Philippines and Indonesia, the thesis demonstrates that greater recognition for the role of human rights in achieving security has not prompted a positive transformation of counterterrorism practices. Instead, proponents of counterterrorist action have been able to frame their action as a necessary, human rights-sensitive, and rational response to unnecessary, human rights-insensitive and irrational political violence. The challenge therefore is how to devise strategies to resist human rights abuses in the name of counterterrorism that do not entangle human rights in the perpetuation and legitimization of the counterterrorism agenda.

The thesis proceeds in eight chapters besides the Introduction. Chapter 1 sets the stage for analysis, introducing the normative discourse of human rights-compliant counterterrorism at the international level, and proposing a theoretical framework for analysing this discourse that draws from the insights of Critical Terrorism Studies and critical approaches to international law and human rights. Utilising this theoretical framework, I examine the extent to which counterterrorism practices undermined rather than advanced human rights in two case studies: the Philippines and Indonesia. Chapters 2, 3 and 4 develop the Philippine case study. Chapter 2 presents the local counterterrorism discourse during the government's alignment with the United States' "War on Terror", showing that the government characterised complex armed struggles as "terrorism" with devastating consequences for human rights. Chapter 3 analyses the responses of local human rights advocates to this counterterrorism discourse, describing how their resistance strategies cannot be reduced to a clamour for human rights-compliant counterterrorism. Chapter 4 shows how official policies have incorporated human rights-friendly rhetoric; and why despite this, they are failing to transform the practices of security forces that lead to extrajudicial killings and other serious abuses.

Chapters 5, 6 and 7 develop the Indonesian case study. Chapter 5 reviews the local counterterrorism discourse developed during the Suharto regime, showing that the threat of Islamic "terrorism" was likely fostered by it, benefiting the regime at the expense of human rights. Chapter 6 shows how, after the Bali bombing of 2002, Indonesia's approach to counterterrorism has incorporated human rights, much more than in the Philippines, and how local human rights advocates have accordingly adjusted their perception of the Islamic "terrorist" threat and the acceptability of counterterrorism. Chapter 7 analyses how Densus 88, the main counterterrorism actor, enjoys impunity for extrajudicial killings, demonstrating that the legal framework has failed to restrain serious abuses and in fact inoculated the counterterrorism agenda from further scrutiny. Chapter 8, the concluding chapter, brings together the main findings of the thesis and emphasises the need for more critical human rights scholarship and advocacy that are disentangled from the counterterrorism agenda.

List of Acronyms

AFP	Armed Forces of the Philippines
BIN	Badan Intelijen Negara (State Intelligence Agency, Indonesia)
CHR	Commission on Human Rights (Philippines)
CIA	Central Intelligence Agency (United States)
CPP	Communist Party of the Philippines
CTC	Counter-Terrorism Committee (United Nations Security Council)
DDII	Dewan Da'wah Islamiyah Indonesia (Indonesian Islamic Propagation Council)
Densus 88	Detasemen Khusus 88 (Special Detachment 88)
DPO	Daftar Pencarian Orang (List of Wanted Persons)
ELSAM	Lembaga Studi dan Advokasi Masyarakat (Institute for Policy Research and Advocacy)
EU	European Union
FPI	Front Pembela Islam (Islamic Defenders Front)
FTO	Foreign Terrorist Organisation
HRW	Human Rights Watch
HuMa	Perkumpulan untuk Pembaharuan Hukum Berbasis Masyarakat dan Ekologis (Community and Ecological Based Society for Law Reform)
IALAG	Inter-Agency Legal Action Group
JI	Jemaah Islamiyah
Karapatan	Karapatan Alliance for the Advancement of People's Rights
KomnasHAM	Komisi Nasional Hak Asasi Manusia (National Human Rights Commission, Indonesia)
KontraS	Komisi untuk Orang Hilang dan Korban Tindak Kekerasan (Commission for the Disappeared and Victims of Violence)
LBH	Lembaga Bantuan Hukum (Legal Aid Institute)
MILF	Moro Islamic Liberation Front
MMI	Majelis Mujahidin Indonesia (Indonesian Council of Holy Warriors)
MTC	Mindanao Truth Commission
NAPAS	National Papua Solidarity
NDF	National Democratic Front
NPA	New People's Army
NU	Nahdlatul Ulama (Revival of the Religious Scholars)
Persis	Persatuan Islam (Islamic Union)
PNP	Philippine National Police
TFDP	Task Force Detainees of the Philippines
TNI	Tentara Nasional Indonesia (Indonesian National Defense Forces)
TPM	Tim Pengacara Muslim
UNDP	United Nations Development Program
UNODC	United Nations Office of Drugs and Crime
USIP	United States Institute of Peace
VFA	Visiting Forces Agreement (United States-Philippines)
WALHI	Wahana Lingkungan Hidup Indonesia

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Preface

When I was still a lawyer at the non-government law office Public Interest Law Center, our organisation provided legal assistance to a group of 26 Muslim men who were accused by police of bombing a cinema in SM Megamall in Mandaluyong City on May 21, 2000. It was my first brush with counterterrorism. The police had arrested the men following a raid of the impoverished Muslim enclave of Maharlika village, Taguig City where they had resided. Police officials claimed the men were operatives of the Moro Islamic Liberation Front (MILF) trained in MILF camps in Mindanao. They were supposedly hiding in safe houses in Metro Manila and implementing secret orders from the MILF leadership to retaliate against the Manila government's overrunning of their base camp in Mindanao by bombing targets in Metro Manila.

The relatives and neighbours of the accused disputed this accusation, arguing that the men had been ordinary villagers unjustly framed by police, and that the raid defamed their community. Leaders of civil society organisations warned that rash accusations tended to arouse prejudice against the already marginalised Muslims in Metro Manila. In the ensuing legal proceedings, the police could not produce sufficient evidence to support their theory. Indeed, there was only one witness, a security guard, who identified only one of the 26 men as being in the vicinity of the site of the bombing at the time. Moreover, this witness gave a physical description that did not fit the suspect. Because the police's evidence had not been strong, we were able to obtain bail for the accused. The case was eventually dismissed by the court.

After SM Megamall, however, more bombings rocked Metro Manila and other parts of the country. The government claimed that these were terrorist events, though the cause or causes of these bombings have never been independently and credibly ascertained. The debunking of the police's theory in the SM Megamall bombing did not seem to matter. The civil society organisations that our law office worked with continued to caution against misusing the spectre of terrorism to advance government agendas that promoted war. But with every new bombing, especially after 9/11, the space for questioning the reality of terrorism seems to shrink more and more.

It was at this juncture that international human rights advocates began crafting arguments that states must respect human rights while countering terrorism. These arguments were designed to allow the continued promotion of human rights within an environment where counterterrorism appeared necessary. On the one hand, it secured a

space for human rights promotion within the context of counterterrorism. On the other hand, it tended to affirm a narrative of a world gripped by international terrorism that made counterterrorism an unquestioned imperative.

I began to reflect on the implications these ideas might have for places like the Philippines. How could the energy of the “War on Terror” be channelled into the beneficial promotion of human rights? How could the idea of human rights-compliant counterterrorism have more relevance than as a sand castle, beautiful to behold but built so close to the water that erodes it? This thesis represents my attempt to grapple with these questions.

Introduction

Can there be human rights-compliant counterterrorism? This question preoccupies many international lawyers and human rights advocates. Concerned by the scale of human rights abuses that have been perpetrated by counterterrorist operations in the pursuit of the 'War on Terror', they assert that counterterrorism activities can and should comply with international human rights law.¹ Through their advocacy, international lawyers and human rights activists have prompted judicial authorities to demand, and world leaders to pledge, that counterterrorist operations can be conducted in a more principled way.²

The proposition that counterterrorism should respect human rights is now so widely accepted that it is almost considered to be a matter of common sense. In 2006 the United Nations General Assembly adopted "The United Nations Global Counterterrorism Strategy",³ which seeks to articulate a global consensus on a human rights-compliant counterterrorism. The document dedicated one of the four pillars of its Plan of Action to "Measures to ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism".⁴ Both the UN General Assembly and Security Council regularly issue resolutions "concerning fighting terrorism in a manner consistent with human rights" of such a character that an argument has been made that "a general obligation to protect human rights in the context of counter-terrorism" is now "an

¹ For example, Commission on Human Rights, 'Human Rights: A Unifying Framework: Report of the United Nations High Commissioner for Human Rights and Follow-Up to the World Conference on Human Rights' <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G02/110/21/PDF/G0211021.pdf?OpenElement>> accessed 16 July 2014; Committee of Ministers of the Council of Europe, 'Guidelines on Human Rights and the Fight against Terrorism' <<https://www1.umn.edu/humanrts/instate/HR%20and%20the%20fight%20against%20terrorism.pdf>> accessed 20 April 2016; Hilary Charlesworth, 'Human Rights in the Wake of Terrorism' (2003) 82 Australian Law Reform Commission Reform Journal 26-29; Human Rights Watch, 'Hear No Evil, See No Evil: The UN Security Council's Approach to Human Rights Violations in the Global Counter-Terrorism Project (Human Rights Watch Briefing Paper)' <<http://www.hrw.org/legacy/background/un/2004/un0804/un0804.pdf>> accessed 12 July 2012; Paul Hoffman, 'Human Rights and Terrorism' (2004) 26 Human Rights Quarterly 932-955; Kofi Annan, 'A Global Strategy for Fighting Terrorism (Keynote Address to the Closing Plenary)' (2005) <<http://www.humanrightsvoices.org/site/documents/?d=268>> accessed 7 January 2016.

² For example, *Detainees in Guantanamo Bay, Cuba: Request for Precautionary Measures*, IACHR (2002), 41 ILM 532; *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Territories* [2004] ICJ Rep 136; *Saadi v Italy*, App No 37201/06, [2008] ECHR 179 (involvement in terrorism did not affect an individual's absolute rights under Article 3 of the European Convention on Human Rights against return or extradition to states in which the individual faced a "real risk" of torture, inhuman or degrading treatment).

³ UNGA Res 60/288 'The United Nations Global Counter-Terrorism Strategy' (8 September 2006) UN Doc A/RES/60/288.

⁴ *ibid.*, Annex IV.

emerging rule of customary international law” which binds states whether or not they are signatories to the relevant treaties.⁵ A typical statement of a UN agency working in the thematic area that has been called “promotion and protection of human rights while countering terrorism” declares:

The Terrorism Prevention Branch of UNODC believes that to effectively combat terrorism while respecting human rights and fundamental freedoms is not only possible but also necessary. Indeed, effective counter-terrorism measures [on the one hand] and respect for the rule of law, human rights and fundamental freedoms [on the other hand] are complementary and mutually reinforcing objectives which must be pursued together as part of States' duty to protect individuals within their jurisdiction.⁶

The United Nations Counter-Terrorism Committee has adopted a “pro-active policy on human rights” which entails that its Executive Directorate should take into account relevant human rights concerns in all of its activities.⁷ The consistency between counterterrorism measures and states' obligations under international law, particularly human rights law, is said to be “an essential part of a successful counter-terrorism effort”⁸

⁵ Joseph Isanga, ‘Counter-Terrorism and Human Rights: The Emergence of a Rule of Customary International Law from UN Resolutions’ (2008) 37 Denver Journal of International Law and Policy 233-257, 233. See, e.g., UNGA Res 56/160 ‘Human Rights and Terrorism’ (13 February 2002) UN Doc A/RES/56/160, para 6 (calling upon States to “take all necessary and effective measures, in accordance with relevant provisions of international law, including international human rights standards, to prevent, combat and eliminate terrorism... and ... strengthen, where appropriate, their legislation to combat terrorism”); UNGA Res. 57/219 ‘Protection of Human Rights and Fundamental Freedoms While Countering Terrorism’ (27 February 2003) UN Doc A/RES/57/219, para 1 (affirming that “States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights”); UNGA Res. 59/191 ‘Protection of Human Rights and Fundamental Freedoms While Encountering Terrorism’ (10 March 2005) UN Doc A/RES/59/191; UNSC Res. 1535 (26 March 2004) UN Doc S/RES 1535 (stating that States “must ensure that any measures taken to combat terrorism comply with all their obligations under international law and should adopt such measures in accordance with international law, in particular international human rights”); UNSC Res. 1566 (8 October 2004) U.N. Doc S/RES/1566 (reiterating much of UNSC Res. 1535); UNSC Res. 1624 (14 September 2005) U.N. Doc. S/RES/1624.

⁶ United Nations Office on Drugs and Crime, ‘Promoting and Protecting Human Rights and Fundamental Freedoms While Countering Terrorism’ <<https://www.unodc.org/unodc/en/terrorism/news-and-events/human-rights-while-countering-terrorism.html>> accessed 11 November 2015. The UN Office of the High Commissioner on Human Rights has also appointed a “Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism” since 2005.

⁷ UNSC Counter-Terrorism Committee, ‘Protecting Human Rights While Countering Terrorism’ <<http://www.un.org/en/sc/ctc/rights.html>> accessed 12 January 2016.

⁸ UNSC Res. 1963 (20 December 2010) UN Doc S/RES/1963, para 10.

and its importance is underlined in a number of Security Council resolutions and in the reports of the Counter-Terrorism Committee.⁹

The rhetoric of both counterterrorism and human rights institutions therefore suggests that the discourses of human rights and counterterrorism have begun to intersect. This thesis examines the extent to which this normative rhetoric surrounding human rights-compliant counterterrorism reflects reality. Instead of simply affirming that a human rights-compliant counterterrorism is necessary and possible, it poses an empirical question: what actually happens on the ground when human rights language is attached to counterterrorism? Does the rhetorical convergence of the human rights and counterterrorism agendas lead to a transformation in the practice of pursuing security so that counterterrorism is conducted in a more principled way? Or does this convergence trigger a diversity of effects, with some fitting the story of constructive transformation while others do not? To what extent does the rhetoric of human rights-compliant counterterrorism produce negative consequences for the protection of human rights? To examine these questions, I study counterterrorism and human rights in two specific locations, the Philippines and Indonesia. I look at how the governments in these countries developed discourses about countering the threat of terrorism, how local human rights advocates reacted, and how laws and policies changed to incorporate human rights concerns into counterterrorism measures. I then examine the effect of changes on counterterrorism practices.

1. Thesis objectives

The thesis has three research objectives:

- (1) To re-evaluate the local counterterrorism discourses in the Philippines and Indonesia;
- (2) To analyse local human rights' advocates' initiatives addressing the effects of counterterrorism measures, and elucidate their views on counterterrorism; and
- (3) To evaluate Philippine and Indonesian counterterrorism or (broader) security policies that incorporate human rights language.

⁹ UNSC Res. 1624 (n 4); UNSC Res. 1805 (20 March 2008) UN Doc S/RES/1805; UNSC Res. 1963 (20 December 2010) S/RES/1963; UNSC 'Report of the Counter-Terrorism Committee to the Security Council for its consideration as part of its comprehensive review of the Counter-Terrorism Committee Executive Directorate' (16 December 2005) UN Doc S/2005/200, Annex, para 13; UNSC 'Report of the Counter-Terrorism Committee to the Security Council for its consideration as part of its comprehensive review of the Counter-Terrorism Committee Executive Directorate' (18 December 2006) UN Doc S/2006/989, Annex, para 26, 27.

I decided to study two countries in order to generate a diversity of empirical observations and insights. I chose the Philippines and Indonesia because these are both conflict-prone countries with distinct local understandings of who or what groups are referred to by the term “terrorists” who should be countered. In both countries, local human rights advocates have addressed, in varying ways, violations arising from counterterrorism. The governments in these two countries have also developed a legal and human rights language to regulate their counterterrorism activities.

In this thesis, I provide a critical understanding of local counterterrorism discourses as anchored on political calculations that bring advantages to the state and marginalise its adversaries. This understanding re-adjusts attention from the violent activities of the alleged terrorists to the larger political and historical context in which the violence of the state and its adversaries are both located.

The thesis also examines local human rights initiatives and views about counterterrorism. In the Philippines, fieldwork research uncovered extensive information on several local human rights campaigns that addressed the effects of the “War on Terror”. Four different campaigns by Filipino human rights advocates are analysed in Chapter 3 and Chapter 4. In Chapter 3, three of these campaigns are analysed, focusing on the campaigners’ underlying attitudes towards the local discourse of counterterrorism. In Indonesia, fieldwork research obtained information on the views of mainstream human rights organisations as well as Muslim lawyers on counterterrorism (Chapter 6); as well as the investigations of the Komisi Nasional Hak Asasi Manusia (KomnasHAM) or the Indonesian National Human Rights Commission dealing with violations in the course of counterterrorism operations by police (Chapter 7).

I examine how a human rights language has been attached to counterterrorism in the Philippines and Indonesia. In fact, the intersection of human rights and counterterrorism discourses has taken place at different times in the two countries, occurring earlier in Indonesia (with the adoption of a legal framework for counterterrorism immediately after the Bali bombing of 2002) than in the Philippines (with a series of legal and policy developments taking place after 2006). It is possible to draw lessons from the two countries’ contrasting situations during the time gap between Indonesia’s and the Philippines’ adoption of a human rights language for counterterrorism and security, but the main goal of the study isn’t to illustrate causal relationships as such (for example, having a legal framework leads to x; lack of legal framework leads to y). Although the thesis does draw some comparative insights between the two cases, it is not primarily a comparative

study. Rather, the two countries' experiences are compared with the ideal or normative project of countering terrorism while respecting human rights. In particular, I evaluate the effect of the official incorporation of human rights language into the counterterrorism or security policies of the Philippines and Indonesia on the practice of military (Philippines) and police (Indonesia), the main counterterrorism actors in those countries.

2. The Central Argument

The central argument of this thesis is that efforts to promote human rights-compliant counterterrorism often serve to undermine rather than strengthen the protection of human rights. Advocacy for human rights-compliant counterterrorism involves human rights advocates in improving counterterrorism so that it is acceptable from a human rights perspective. The danger is that counterterrorism measures can work to simplify how conflict is seen and dealt with in places where the characterisation of sub-state violence as "terrorism" and the state's actions as "counterterrorism" should be challenged precisely for being superficial. That is to say, human rights advocates risk entrenching particular ways of characterising and responding to political violence that are assimilated under the rubric of "counterterrorism". At the same time, the promise that the attachment of a human rights language to counterterrorism can transform its practice may not be realised in any significant way.

Scott Poynting and David Whyte, writing within a critical tradition in terrorism studies, have described the way that counterterrorism aims to depoliticise political violence by distancing violence from its socio-economic context as well as from any background political and ideological conflict. What is "depoliticised" is not merely the violence of non-state actors deemed to be "terrorists", but also the violence of the state. Within the logic of counterterrorism, terrorist opponents of the state are "ideologically irrational and driven by fanaticism" whereas the state's own violent response to terrorism is "defensive, responsible, rational and unavoidable". The political calculation or ideological bias behind the state's violent response to "terrorists" are left hidden from view.¹⁰ Following the lead of Critical Terrorism Studies scholars, this thesis examines how human rights can facilitate the process of depoliticising counterterrorism. If the proponents of counterterrorist action can make a convincing claim that their actions are essentially respectful of human rights

¹⁰ Scott Poynting and David Whyte, *Counter-Terrorism and State Political Violence: The 'War on Terror' as Terror* (Routledge 2012) 9.

and therefore rational, then this enables them to frame their counterterrorist action as a necessary, human rights sensitive and rational response to unnecessary, human rights insensitive, irrational political violence. Moreover, this permits them to portray any human rights abuses perpetrated in the course of counterterrorist operations as unfortunate excesses rather than intentional consequences, by contrast with the consequences of terrorist acts, for which terrorists must be held fully accountable.

3. Methodology

3.1. Research question and sub-questions

The primary research question that this thesis examines is: What are the consequences of attaching a human rights language to counterterrorism in the Philippines and Indonesia? The question explores the normative project's actual pursuit in two different contexts, ascertaining the existence and nature of transformations that it enables or triggers.

I ask three secondary questions that relate to the three research objectives. The first secondary research question is: What political decisions or calculations are naturalised and what resulting abuses are glossed over in local counterterrorism discourses? I explore this question in Chapter 2 in relation to the Philippines and Chapter 5 in relation to Indonesia. In particular, I review the local sub-state actors whom government labelled "terrorists" and those actors' actions denounced by governments as "terrorism". This is a necessary preliminary task.

At the international level, resistance to abuses in the name of counterterrorism led to an engagement with the counterterrorism agenda that sought its transformation through the incorporation of human rights. (I discuss human rights advocates' engagement with the counterterrorism agenda in the international level in Chapter 1, Section 1.) The second secondary research question is: At the local level, how did human rights advocates resist abuses in the name of counterterrorism? Did resistance to abuses equate with or lead to accommodation of the counterterrorism discourse as in the international level? I discuss local advocates' initiatives and views in Chapters 3 and 4 (first section) in relation to the Philippines Chapters 6 and 7 in relation to Indonesia.

The third and final secondary research question is: How have governments incorporated human rights language in their counterterrorism and security initiatives and

what impact has this had on their counterterrorism practices? I discuss this question in Chapter 4 (second and third sections) in relation to the Philippines, and Chapter 6 (first section) and Chapter 7, in relation to Indonesia.

3.2. Empirical case studies and normative ideals

In “The Normative Case Study”, David Thacher explains that the two main uses to which case studies are put in the social sciences are to help identify causal relationships and mechanisms (“causal case study”) or to understand the worldview of people being studied (“interpretive case study”).¹¹ He has also argued, however, that case studies contribute towards illuminating, clarifying or critiquing “ideals we should pursue and obligations we should accept” (“normative case study”). Case study methodology can contribute to normative theory by identifying, through description of and reflection on aspects of reality, an ideal we have not named before, or which we were only dimly aware of and pursued at best inadvertently.¹² Case studies can also lead to a critique of a normative theory that we have taken for granted by generating dissonant observations and reflections, and so pave the way for its modification or replacement.¹³

The rationale for the normative case study lies in a view of knowledge, both scientific (knowledge about the world) and moral (knowledge of right and wrong), as forming, in the words of W.V.O. Quine, a “web” or “fabric” of beliefs or judgments.¹⁴ Within this web or fabric are beliefs or judgments of varying levels of abstraction. Each belief or judgment are always being tested against each other and against experience, and are revisable no matter their level of abstraction.¹⁵ Beliefs or judgments at every level of abstraction would have implications for beliefs and judgments at other levels. This means not only that our normative understandings (beliefs and judgements at an abstract level) entail beliefs or judgements in particular cases, but also that judgements about particular

¹¹ David Thacher, ‘The Normative Case Study’ (2006) 111 *American Journal of Sociology* 1631–1676, 1631–1632.

¹² *ibid* 1647 (commenting on Jacobs’ study of the vitality of cities).

¹³ *ibid* 1645–1646 (commenting on Selznick’s study of management’s role debunking the view that it is primarily a technical activity).

¹⁴ Willard van Orman Quine, *From a Logical Point of View* (2nd edn, Harper Torchbooks 1961) 42, 46.

¹⁵ In the words of Rawls, “By dropping and revising some [beliefs or judgments], by reformulating and expanding others, one supposes that a systematic organization can be found [among our beliefs or judgments]. Although in order to get started various judgments are viewed as firm enough to be taken provisionally as fixed points, there are no judgments on any level of generality that are in principle immune to revision.” John Rawls, ‘The Independence of Moral Theory’ in Samuel Freeman (ed), *Collected Papers* (Harvard University Press 1999) 289.

cases can expand normative understanding. This happens when judgments about particular cases are dissonant with our pre-existing normative understandings and thus create a disequilibrium that forces us to reconsider and possibly adjust our normative understandings.

This thesis aims to generate such creative moral tension and reflective disequilibrium by juxtaposing an established normative view (countering terrorism while respecting human rights) with dissonant cases. The presentation of the Philippines and Indonesia cases represent dissonant cases, which are contrasted with that established normative view.

3.3. Fieldwork

Fieldwork was undertaken in Indonesia and the Philippines in order to collect empirical data to examine the primary and secondary research questions. The thesis draws on interviews conducted with and documents obtained from human rights organisations and other actors pertaining to counterterrorism policy and operations during fieldwork in Indonesia and the Philippines. Prior to conducting fieldwork, ethics approval was obtained from the ANU.¹⁶ The appendices contain the basic questionnaire I used for the interviews as well as a list of all interviews.

Indonesian fieldwork was undertaken from June to August 2013 and in September 2015. This fieldwork took place primarily in the metropolitan area of Jakarta, although a brief trip was also made to Surabaya to gather data on the Tulungagung case. An Indonesian respondent was also interviewed in Melbourne. The Philippines fieldwork was undertaken in Manila and various cities in Mindanao from February to March 2014, in order to obtain the perspectives of human rights advocates from the national capital region and from a more peripheral area closer to the sites of armed conflict.

The fieldwork generated data that underpins analysis in Chapters 3 and 4 for the Philippines and Chapters 6 and 7 for Indonesia. Sections 1 and 2 of Chapter 3, pertaining to campaigns launched by human rights advocates in Basilan island and in Mindanao, were informed by interviews and rare documents produced by local actors in Mindanao. In Chapter 4, I make use of interviews to inform the discussion of judicial and policy changes after 2006. In Chapter 6, I report the divergent views of mainstream human rights

¹⁶ 'Abuses and Uses of Human Rights in the Context of Global Counter-Terrorism: Activist Perspectives from the Philippines and Indonesia' (Protocol 2013/117).

advocates and Muslim lawyers, which form the findings of my Indonesia fieldwork in 2013. In Chapter 7, on the investigations by KomnasHAM, I make use of fieldwork data obtained in 2015.

4. Overview

Following the Introduction, this thesis is presented in eight chapters.

Chapter 1 (“Theoretical Framework”) reviews how international lawyers and human rights advocates have engaged with the “War on Terror” at the international level and how this engagement resulted in the discourse of human rights-compliant counterterrorism at the United Nations (UN). I then draw on the insights of the theoretical literature of Critical Terrorism Studies (CTS) in the International Relations subfield of Terrorism Studies, as well as contemporary critical approaches to international law and human rights, in order to construct a theoretical framework to critically evaluate the theory and practice of human rights-compliant counterterrorism. On the one hand, CTS questions assumptions about counterterrorism.¹⁷ These assumptions remained unchallenged in the quest by international lawyers to ameliorate counterterrorism abuses. However, CTS scholars have not paid attention to international law and the use that human rights advocates have made of it in response to the “War on Terror”. On the other hand, critical approaches to international law and human rights,¹⁸ specifically Third World Approaches to International Law (TWAIL),¹⁹ suggest that international law and human rights can actually mask injustice and abuse. TWAIL scholars have focused on the ways that the “War on Terror” is altering fundamental international law norms like sovereignty and non-use of

¹⁷ Richard Jackson, *Writing the War on Terrorism: Language, Politics and Counter-Terrorism* (Manchester University Press 2005); Richard Jackson, Marie Breen Smyth and Jeroen Gunning (eds), *Critical Terrorism Studies: A New Research Agenda* (1st edn, Routledge 2009); Poynting and Whyte (n 8).

¹⁸ Marie-Bénédicte Dembour, *Who Believes in Human Rights?: Reflections on the European Convention* (Cambridge University Press 2006); Neil Stammers, *Human Rights and Social Movements* (Pluto Press 2009).

¹⁹ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2007); Antony Anghie and BS Chimni, ‘Third World Approaches to International Law and Individual Responsibility in Internal Conflicts’ (2003) 2 *Chinese Journal of International Law* 77 - 103; Makau Mutua and Antony Anghie, ‘What Is TWAIL?’ (2000) 94 *Proceedings of the Annual Meeting (American Society of International Law)* 31-40; Makau Mutua, ‘Savages, Victims, and Saviors: The Metaphor of Human Rights’ (2001) 42 *Harvard International Law Journal* 201-245; Makau Mutua, *Human Rights: A Political and Cultural Critique* (University of Pennsylvania Press 2002).

force in furtherance of a more explicit form of imperialism.²⁰ However, TWAIL scholars have not examined whether human rights-compliant counterterrorism is reconfiguring the “War on Terror” into a benign or neutral project. Even though both CTS and TWAIL scholars approach the “War on Terror” critically, they have worked independently of each other. The chapter develops a critical approach to the discourse of human rights-compliant counterterrorism that combine the insights of CTS and TWAIL, filling a gap in both literatures’ understanding of the role of international law and human rights in perpetuating as well as resisting the injustice of the “War on Terror”. The sceptical or critical attitude towards the discourse of human rights-compliant counterterrorism articulated in Chapter 1 can be opposed to the orthodox position, which is well stated in both constructivist International Relations and liberal legal scholarship. While the orthodox position celebrates the human rights turn in counterterrorism, hopeful of a transformation of counterterrorism practices, the sceptical position cautions that the human rights turn may simply serve as a veneer, making resistance to abuses harder to resist as the terrorism discourse is further entrenched.

The Philippine case study is developed in Chapters 2, 3 and 4. Chapter 2 (“Philippine Counterterrorism Discourse: the ‘War on Terror’ and Counterinsurgency”) explores the local meaning of terrorism and counterterrorism in the Philippines. It argues that terrorism does not represent a new problem and counterterrorism a new solution. Instead, the deployment of “terrorism” label primarily serves to reframe old foes of the state previously regarded as “insurgents” into “terrorists”. This has the consequence of intensifying abusive counterinsurgency practices. The problematic character of the original application of the “terrorist” label to the Abu Sayyaf group is also examined. The counterterrorism discourse expanded to cover the Moro Islamic Liberation Front (MILF) and the Communist Party of the Philippines-New People’s Army (CPP-NPA) as well. This development was facilitated by the international advocacy for counterterrorism associated with the United States-led “War on Terror”, even though the characterisation of these groups as terrorist was even more debatable than in the case of the Abu Sayyaf. The chapter presents the Philippines as a site in which the articulation of the counterterrorism

²⁰ Anghie (n 16) 273; Obiara Chinedu Okafor, ‘Globalism, Memory and 9/11: A Critical Third World Perspective’ in Fleur Johns, Richard Joyce and Sundhya Pahuja (eds), *Events: The Force of International Law* (Taylor & Francis 2010); Obiara Chinedu Okafor, ‘Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective’ (2005) 43 *Osgoode Hall Law Journal* 171-191, 172–173; Makau Mutua, ‘Terrorism and Human Rights: Power, Culture, and Subordination’ (2002) 8 *Buffalo Human Rights Law Review* 1-13, 1.

discourse directly correlates with escalation of serious human rights abuses, namely, extrajudicial killings and disappearances.

Chapters 3 and 4 analyse four advocacy campaigns pursued by Filipino human rights advocates and campaigners to address the expansion of terrorism discourse from Abu Sayyaf to MILF, the CPP-NPA and other leftist legal organisations and activists. Chapter 3 (“Promoting Human Rights While Rejecting Counterterrorism: Three Filipino Campaigns”) discusses how local advocates resisted abuses in the name of counterterrorism by rejecting the entrenchment of the counterterrorism discourse. Whereas the international organisation Human Rights Watch sought measures to improve counterterrorism in Mindanao, campaigners in Basilan island (addressing the impact of joint US-Philippine military exercises against the Abu Sayyaf) and mainland Mindanao (addressing “mysterious bombings” in Mindanao) have pursued a strategy of promoting respect for human rights while rejecting counterterrorism. Campaigners in Basilan and Mindanao focused on truth-seeking, thus gathering evidence that discredited the characterisation of local actors and acts as “terrorists” or “terrorism”. On the political front, campaigners defending CPP founder Jose Maria Sison employed a similar strategy. However, in an interesting twist, in their European litigation to remove Jose Maria Sison from the European Union's terrorist list, legal advocates encountered and made good use of a judicial terrain (the European Court of First Instance) already attuned to the international discourse of human rights-compliant counterterrorism. The Sison case thus reflected a pragmatic, ends-based advocacy campaign that rejected the counterterrorism discourse locally, whilst using it to its advantage internationally.

Chapter 4 (“The Extrajudicial Killings Campaign and the State’s Response: Failed Remedy, Changed Rhetoric, Continuing Practice”) discusses the campaign against extrajudicial killings of leftist activists, as well as the post-2006 legal developments instituted by the Philippine state in response to this campaign. Mediated by mainstream international human rights actors, most importantly the UN special rapporteur on extrajudicial killings Philip Alston, the campaign changed official Philippine policy to espouse human rights-compliant counterinsurgency and security more broadly. New judicial remedies (the writs of *amparo* and *habeas data*); the anti-terrorism law (the Human Security Act); specific legislation against enforced disappearances, torture and violations of international humanitarian law; and the new national security policy all intended to ameliorate abuses. They also resulted in greater recognition for the role of law and rights protection in the security context. However, they have been of very limited

actual benefit to victims of abuse. The chapter focuses on the experience of advocates with the *amparo* remedy and the impact of the new security strategy on civil society. It concludes, with respect to the *amparo* remedy, that the extent of complicity of the military and law enforcement in killings and disappearances is greater than has been imagined by the Supreme Court which crafted it. With respect to the new national security policy, it does not stop the targeting of “front” organisations and mass bases, which accounts for extrajudicial killings and disappearances. The new human rights rhetoric is best understood not as a harbinger of transformation of security but a substitute for genuine reforms.

The Indonesian case study is developed in Chapters 5, 6 and 7. Chapter 5 (“Indonesian Counterterrorism Discourse from Suharto to Bali”) examines the local meaning of terrorism and counterterrorism in Indonesia. The local counterterrorism discourse has a history that predates the “War on Terror”, thus the review undertaken in this chapter covers a broader temporal sweep than in Chapter 2. However, the aim of both chapters is similar, namely, to expose that counterterrorism is not a purely rational and technical endeavour against irrational violence. Parallel to the claim in Chapter 2 that counterinsurgency goals underpin the extension of the “War on Terror” and its rhetoric in the Philippines, I argue in this chapter that counterterrorism in Indonesia is related to the suppression of the Islamist project. The spectre of a revival of an Islamist challenge to the pluralist state that is raised in the staging of terrorist attacks blamed solely on networks of extremist or violent radical Islamists has historically been “useful” to the Indonesian government. This chapter recalls the history of repression of Islamism in Indonesia and emphasises the continuity of that history after the fall of Suharto. It argues that a revival of a radical Islamist challenge to the state is largely a self-serving fantasy of both extremists – who look to extreme violence to mask their emaciation – and proponents of counterterrorism.

Chapters 6 and 7 focus on contemporary counterterrorism in Indonesia and human rights’ entanglement with it. While Indonesia’s law-enforcement approach to counterterrorism shows greater recognition for the role of law and human rights in counterterrorism than in the Philippines’ rhetorically revamped but essentially war-like approach, the most serious human rights violations, killings and torture, are also part of the repertoire of counterterrorism in Indonesia. Chapter 6 (“Indonesia’s Legalised Counterterrorism: Divergent Domestic Reactions”) traces the development of Indonesia’s legal framework on counterterrorism and the ascendance of the police-led or law-

enforcement model of counterterrorism. It also presents the main themes that emerged from fieldwork interviews pertaining to the divergent views of mainstream human rights advocates and Muslim legal advocates. Just as the Indonesian government arrived at its own legalised approach to counterterrorism, in which a human rights language was prominent, mainstream human rights advocates also accommodated the counterterrorism discourse, particularly as applied to Muslim extremists. The views of mainstream human rights advocates contrasted sharply with those of Muslim lawyers, identified with advocacy for Muslim terrorist suspects, who hark back to a critique of the counterterrorism discourse already in evidence prior to the Bali bombing of 2002. I argue that accommodation of the counterterrorism discourse reflects the perception that the state has already arrived at the appropriate, legalised approach to counterterrorism which must be supported and promoted. This neutralises pressure for significant reforms in this area. It also marginalises advocacy against abuses towards suspected Muslim terrorists.

Chapter 7 (“Densus 88: Impunity for Extrajudicial Killings”) explores human rights violations by the special anti-terrorism unit of the Indonesian police Densus 88. Drawing on KomnashAM’s special reports released in 2010 and 2011 on the topic of human rights violations in the course of police counterterrorism operations, and interviews with advocates in two incidents which were investigated subsequently (the Tanah Runtuh and Tulungagung cases), the chapter illustrates the gravity of violations committed by police. Impunity for serious violations, including killings and torture, is clearly exhibited by the lack of any significant response by the police or the government to the investigations. I analyse the killings and torture in the course of police operations by asking whether these can be plausibly interpreted within the accommodationist frame of mainstream human rights actors or whether in fact the marginalised rejectionist stance has better resonance.

In Chapter 8 (“Conclusion: Towards a More Effective Human Rights Advocacy in the Face of Counterterrorism”), I recapitulate the key findings of the two case studies. I conclude that a more effective human rights advocacy will have to disentangle human rights from the perpetuation and legitimisation of the counterterrorism agenda. I offer some ideas as starting points for imagining what such a disentangled advocacy might look like.

Chapter 1

Theoretical Framework

Governments and non-governmental actors alike have converged on a consensus that counterterrorism and human rights must be pursued together. In this chapter, I introduce what I call the discourse of human rights-compliant counterterrorism which has gained currency in both counterterrorism and human rights circles at the international level. The discourse arose in reaction to the assertion during the “War on Terror” that counterterrorism objectives should not be undermined by international human rights law standards. The activism of international lawyers and human rights advocates was instrumental in raising awareness concerning the potentially devastating impact of counterterrorism on human rights. Their efforts and successes in convincing world leaders to synthesise human rights and counterterrorism norms have been theorised as demonstrating the “resilience” and “robustness” of human rights norms and institutions,¹ and as negating “the Schmittian-inspired claim” that the war on terror exposed the inherent bankruptcy of liberal legal ideas.² Yet, as I show below, the fusion of counterterrorism and human rights discourses in the rhetoric that affirms the necessity of “countering terrorism while respecting human rights” also invites scrutiny. From theoretical vantage points critical towards counterterrorism as well as human rights, one can raise the question: Does the synthesis of the counterterrorism and human rights discourses transform counterterrorism, or does it serve to promote the counterterrorism agenda at the expense of human rights?

In the first section of this chapter I trace the development of the discourse of human rights-compliant counterterrorism. I also describe how its significance has been underscored by authors of a constructivist or liberal bent. I then develop a critical appraisal of this discourse, drawing on the theoretical perspectives of Critical Terrorism Studies (Section 2) and certain critical approaches to human rights and international law (Section 3). Finally, I formulate a theoretical framework for critically evaluating the discourse of

¹ Rosemary Foot, ‘The United Nations, Counter Terrorism, and Human Rights: Institutional Adaptation and Embedded Ideas’ (2007) 29 *Human Rights Quarterly* 489-514, 489, 490; Fiona de Londras, *Detention in the ‘War on Terror’: Can Human Rights Fight Back?* (Cambridge University Press 2011) 6, 166–7, 212–3, 176.

² Jason Ralph, *America’s War on Terror: The State of the 9/11 Exception from Bush to Obama* (Oxford University Press 2013) 14.

human rights-compliant counterterrorism and explain the role played by the case studies in the critical examination I undertake in the thesis.

1. Defining the Discourse of Human Rights-Compliant Counterterrorism: “Countering Terrorism While Respecting Human Rights”

“Upholding human rights is not merely compatible with successful counter-terrorism strategy. It is an essential element.”³

The discourse of human rights-compliant counterterrorism emerged in the aftermath of the September 11, 2001 terrorist attacks on the World Trade Center and the Pentagon, as a shocked Bush Administration responded to what it perceived as an attack against the United States by declaring “War on Terror”. In order to wage this new war the U.S. administration pursued a strategy of taking forceful action against suspected terrorists affiliated with Al Qaeda and engineering swift acceptance and institutionalisation of its counterterrorism agenda domestically and internationally. As the counterterrorism measures that were adopted challenged or eschewed reference to human rights, international lawyers defended the continuing relevance and applicability of human rights law in the “War on Terror”. Among other things, their efforts led to the mainstreaming of human rights in the work of counterterrorism bodies. As human rights advocates became more confident in asserting their alternative vision of security against terrorism, they also elaborated a global “counterterrorism strategy” at the UN level based on ideas linking human rights and security.

1.1. Institutionalisation of the counterterrorism agenda

In the years immediately following the declaration of the “War on Terror” by United States President George W Bush in 2001, counterterrorism was decisively and speedily placed on the political and legal agendas of diverse countries and the international community as a whole.⁴ The “War on Terror” entailed actual deployment of military forces

³ Kofi Annan, ‘A Global Strategy for Fighting Terrorism (Keynote Address to the Closing Plenary)’ (2005) 7 <<http://www.humanrightsvoices.org/site/documents/?d=268>> accessed 7 January 2016.

⁴ Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press 2011); Marieke De Goede, ‘The Politics of Preemption and the War on Terror in Europe’ (2008) 14 *European Journal of International Relations* 161-185 (European leadership in preemptive counterterrorism); Rosemary Foot, ‘Collateral Damage: Human Rights Consequences of

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of the US and allied governments in theatres of conflict.⁵ Just as importantly, it also required the mobilisation of legislatures and lawyers in the design and justification of a raft of laws and regulations for the purpose of combatting terrorism.⁶ A broad range of non-legal institutions and actors, from the diplomatic to the financial, were also recruited to promote and enforce counterterrorist regulations on such matters as civil aviation, maritime transportation, customs and border controls, financial transactions, immigration, the use of the internet, police and judicial cooperation, weapons and materials associated with the production of weapons of mass destruction.⁷

Although it would subsequently attract criticism for its “unilateralism” in the 2003 Iraq war, immediately after the September 11 2001 attacks the US successfully mobilised existing multilateral institutions – most notably, the United Nations Security Council acting as a quasi-legislator - to advance its counterterrorism agenda globally. Barely two weeks after 9/11, the UN Security Council enacted Resolution 1373 (2001) which required states to implement a wide range of measures to combat terrorism such as asset freezing (paragraph 1), immigration restrictions and border control (paragraphs 2 (c), (d), (g), 3(f), (g)), cooperation in intelligence, law enforcement and extradition (paragraphs 2 (b), (f); 3(a), (b), (g)), and establishment of terrorist acts as serious criminal offenses in domestic law and regulations (paragraph 2 (e)).

The content of many of these obligations were spelled out in international conventions on the subject of terrorism previously adopted under the auspices of the General Assembly, previously, the chief forum for discussing this topic within the UN.⁸ But

Counterterrorist Action in the Asia-Pacific’ (2005) 81 *International Affairs* 411-425 (support for counterterrorism agenda in the Asia-Pacific); Beth Elise Whitaker, ‘Exporting the Patriot Act? Democracy and the “War on Terror” in the Third World’ (2007) 28 *Third World Quarterly* 1017-1032; Peter Romaniuk, ‘Institutions as Swords and Shields: Multilateral Counter-Terrorism Since 9/11’ (2010) 36 *Review of International Studies* 591-613 (role of multilateral institutions).

⁵ Alex Conte, *Security in the 21st Century: The United Nations, Afghanistan, and Iraq* (Ashgate 2005); Tom Lansford, Robert P Watson and Jack Covarrubias (eds), *America’s War on Terror* (2nd edn, Ashgate Publishing, Ltd 2013).

⁶ Roach (n 4); Whitaker (n 4).

⁷ Louise Amoore and Marieke De Goede, ‘Governance, Risk and Dataveillance in the War on Terror’ (2005) 43 *Crime, Law and Social Change* 149-173; Iain Cameron, ‘European Union Anti-Terrorist Blacklisting’ (2003) 3 *Human Rights Law Review* 225-256; Yee-Kuang Heng and Ken McDonagh, ‘The Other War on Terror Revealed: Global Governmentality and the Financial Action Task Force’s Campaign against Terrorist Financing’ (2008) 34 *Review of International Studies* 553-573; Penelope Mathew, ‘Resolution 1373-A Call to Pre-empt Asylum Seekers’ in Jane McAdam (ed), *Forced Migration, Human Rights and Security* (Hart Publishing 2008).

⁸ There were twelve (12) such pre-existing conventions, namely, Convention on Offences and Certain Other Acts Committed on Board Aircraft (signed 14 September 1963, entered into force 4 December 1969) 704 UNTS 10106; Convention for the Suppression of Unlawful Seizure of Aircraft (signed 16 December 1970, entered into force 14 October 1971) 860 UNTS 12325; Convention for the

Resolution 1373 did not merely restate pre-9/11 obligations under existing conventions. Instead, Resolution 1373, having been adopted by the Security Council under Chapter VII of the UN Charter, intended that counter-terrorism in its various modes outlined in the resolution become mandatory upon all member states whether or not they accepted the relevant conventions. Thus, operative paragraph 3 (d) of Resolution 1373 ordered UN member states to become parties to these conventions, speeding up the ratification process, and forcing accession by non-parties to these conventions. With respect to the 1999 Convention on the Financing of Terrorism (CTF), the convention has not yet entered into force by the time Resolution 1373 was issued. But Resolution 1373 has already made the obligation thereunder binding on all states.⁹

Furthermore, Resolution 1373 radically broadened the core obligation in the various terrorism conventions which commonly spoke of the obligation to “prosecute or extradite”. Resolution 1373 not only called on states to fully implement the relevant conventions, but pronounced that “additional measures” were needed “to complement international cooperation” (eighth preambular paragraph). The obligations to suppress recruitment of members of terrorist groups and eliminate supply of weapons to terrorists (paragraph 2 (a)) and to institute effective border control strategies (paragraph 2 (g)), for

Suppression of Unlawful Acts against the Safety of Civil Aviation (signed 23 September 1971, entered into force 26 January 1973) 974 UNTS 14118; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (adopted 14 December 1973, entered into force 20 February 1977) 1035 UNTS 15410; International Convention against the Taking of Hostages (adopted 17 December 1979, entered into force 3 June 1983) 1316 UNTS 205; Convention on the Physical Protection of Nuclear Material (signed 3 March 1980, entered into force 8 February 1987) 1456 UNTS 24631; Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (signed 24 February 1988, entered into force 6 August 1989) 1990 UNTS 474; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (done 10 March 1988, entered into force 1 March 1992) 1992 UNTS 222; Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (signed 10 March 1988, entered into force 1 March 1992) 1992 UNTS 304; International Convention for the Suppression of Terrorist Bombings (adopted 15 December 1997, entered into force 23 May 2001) 2149 UNTS 256; International Convention for the Suppression of the Financing of Terrorism (adopted 9 December 1999, entered into force 10 April 2002) (2000) 39 ILM 270; and Convention on the Marking of Plastic Explosives for the Purpose of Detection (signed 1 March 1991, entered into force 21 June 1998) 30 ILM 721. Two more counter-terrorism conventions were drawn up after 9/11, namely, International Convention for the Suppression of Acts of Nuclear Terrorism (adopted 13 April 2005, entered into force 7 July 2007) 44 ILM 815; and Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation (signed 10 September 2010) 50 ILM 144 (2011). In addition, there is a draft comprehensive convention on international terrorism which is still being negotiated by member states.

⁹ UNSC Res 1373, paras 1, 3 (d).

example, sought to supplement the said core obligation with extra-judicial, more administrative or executive-focused measures.

Finally, the Counter-Terrorism Committee was also established to monitor the implementation by states of the terms of the resolution. Boyle and Chinkin note that Resolution 1373 provided for “quick, universal and immediately binding obligations in a manner that no treaty negotiations or General Assembly resolution could replicate”.¹⁰ In the same vein, Byrnes remarked that compared with treaties, “‘executive’, ‘Great Power’ law-making through the UN Security Council” was a “more important” source of international law in this area.¹¹ Given its origin in Security Council quasi-legislation, the ensuing complex of international counterterrorism regulations is an “imposed” order, as opposed to “consensual” or “spontaneous”.¹²

Action by the European Union implementing the obligations under Resolution 1373 soon followed. Resolution 1373, paragraph 1 required states to freeze assets of terrorists but did not provide a list of organisations and individuals who were considered terrorists under the terms of the resolution. To effect the directive, the Council of the European Union, which represents the executive governments of the EU member states, adopted on December 27, 2001 Council Common Position No. 2001/930/CFSP and Common Position No. 2001/931/CFSP on the application of specific measures to combat terrorism. The former is a general measure on combating terrorism, while the latter was focused on asset freezing and provided an Annex in which was listed entities and individuals the Council considered subject to asset freezing pursuant to Resolution 1373, paragraph 1. The list is to be reviewed every six months and has been regularly amended by Council decision.¹³

1.2. Reaction of human rights lawyers

In political rhetoric, the counterterrorism agenda pursued as part of the “War on Terror” was presented as a matter of safeguarding and promoting “freedom” against irrational forces. However, the counterterrorism measures that were approved and undertaken in this period posed a direct challenge to the idea of human rights. Many

¹⁰ Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press 2007) 113.

¹¹ Andrew Byrnes, ‘More Law or Less Law? The Resilience of Human Rights Law and Institutions in the “War on Terror”’ in Miriam Gani and Penelope Mathew (eds), *Fresh Perspectives on the ‘War on Terror’* (Australian National University E-Press 2008) 131.

¹² Romaniuk (n 4) 596.

¹³ See, Cameron (n 7) 228–231.

practices employed by the United States and its supporters in the name of counterterrorism constituted encroachments on protected freedoms and would have previously been illegal. These included “enhanced interrogation techniques” against suspects which amounted to torture; “extraordinary rendition” which involves the capture of suspects, their transfer inter-state and detention in secret detention places; as well as “shoot-to-kill” orders. Practices such as the “extraordinary rendition” program and “secret detention centres” operated by intelligence services were previously not acknowledged and concealed from both the public and political institutions.¹⁴ When the existence of the abusive practices were not simply denied, proponents of the counterterrorism agenda often justified them through “extreme or distorted interpretations of law”,¹⁵ which included assertions that established human rights standards were inapplicable or should be reformed.¹⁶ Furthermore, the new counterterrorism regulations, e.g., those on asset-freezing to combat terrorist financing, initially did not include references to human rights safeguards.¹⁷

This situation provoked a swift, concerted and defensive response from international lawyers and human rights advocates. International legal scholars catalogued

¹⁴ Byrnes (n 11) 150–157.

¹⁵ *ibid* 129.

¹⁶ de Londras (n 1) 166, 175.

¹⁷ The provisions on asset-freezing under UNSC Res 1373 state:

“1. *Decides* that all States shall:

(a) Prevent and suppress the financing of terrorist acts;

...

(c) Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities;

(d) Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons”

While states were authorised to designate the persons and entities whose assets shall be frozen, the provision did not provide for any restriction or qualification of the states’ duty and power to freeze terrorist funds under UN Res 1373. In contrast, the asset-freezing regime established under UNSC Res 1267 targeted at Osama bin Laden, Al Qaeda and the Taliban incorporates a humanitarian exception to the freezing directive that allows the release of frozen funds necessary to pay for basic needs such as foodstuffs, rent or mortgage, medicines, etc. UNSC Res 1452 (20 December 2002) UN Doc S/RES/1452. Moreover, a delisting procedure has been established for the 1267 asset-freezing regime. UNSC Res 1730 (19 December 2006) UN Doc S/RES/1730.

and critiqued the numerous challenges posed by the War on Terror's counterterrorism policies and practices, pronouncing them to be illegal under international law in general and particularly under human rights law. The most commonly criticised practices associated with the US during this time pertained to the capture, detention, and treatment of suspected terrorists such as in Guantanamo prison. These abuses became the defining features of the "War on Terror" itself in the eyes of legal critics.

Some analysts argued that the classification of persons captured in the course of military counter-terrorism operations as "enemy combatants" violated international humanitarian law (IHL).¹⁸ Others asserted that secret and "pre-emptive" detention of terrorism suspects violated human rights law.¹⁹ Scholars argued that coercive interrogation practices involving "water boarding", stress positions and the like constitute torture²⁰ while "extraordinary rendition" violated the *non-refoulement* principle in refugee law²¹. Others argued that certain intelligence gathering and policing techniques ("terrorist profiling") could violate the racial discrimination principle in human rights law.²² Some analysts opined that the use of lethal force, e.g., the killing of Osama bin Laden by US forces on May 1, 2011, could violate the right to life-based protections within international humanitarian law or rules of engagement governing law enforcement.²³ Regarding trials

¹⁸ David Turns, 'Classification, Administration, and Treatment of Battlefield Detainees' in Ana María Salinas de Frías, Katja Samuel and Nigel White (eds), *Counter-Terrorism: International Law and Practice* (Oxford University Press 2012); Silvia Borelli, 'The Treatment of Terrorist Suspects Captured Abroad: Human Rights and Humanitarian Law' in Andrea Bianchi and Yasmin Naqvi (eds), *Enforcing International Law Norms Against Terrorism* (Hart Publishing 2004).

¹⁹ Sylvia Casale, 'Treatment in Detention' in Ana María Salinas de Frías, Katja Samuel and Nigel White (eds), *Counter-Terrorism: International Law and Practice* (Oxford University Press 2012); Penelope Mathew, 'Black Holes, White Holes, and Worm Holes: Pre-Emptive Detention in the "War on Terror"' in Miriam Gani and Penelope Mathew (eds), *Fresh Perspectives on the 'War on Terror'* (Australian National University E-Press 2008).

²⁰ Richard Pregent, 'Torture, Interrogation, Counter-Terrorism, and the Rule of Law' in Ana María Salinas de Frías, Katja Samuel and Nigel White (eds), *Counter-Terrorism: International Law and Practice* (Oxford University Press 2012).

²¹ Helen Duffy and Stephen A Kostas, "'Extraordinary Rendition': A Challenge for the Rule of Law' in Ana María Salinas de Frías, Katja Samuel and Nigel White (eds), *Counter-Terrorism: International Law and Practice* (Oxford University Press 2012); Cornelis (Kees) Wouters, 'Reconciling National Security and Non-Refoulement: Exceptions, Exclusions, and Diplomatic Assurances' in Ana María Salinas de Frías, Katja Samuel and Nigel White (eds), *Counter-Terrorism: International Law and Practice* (Oxford University Press 2012); Silvia Borelli, 'The Rendition of Terrorism Suspects to the United States: Human Rights and the Limits of International Cooperation' in Andrea Bianchi and Yasmin Naqvi (eds), *Enforcing International Law Norms Against Terrorism* (Hart Publishing 2004).

²² Daniel Moeckli, 'Anti-Terrorism Laws, Terrorist Profiling, and the Rights to Non-Discrimination' in Ana María Salinas de Frías, Katja Samuel and Nigel White (eds), *Counter-Terrorism: International Law and Practice* (Oxford University Press 2012).

²³ David Kretzmer and others, 'Use of Legal Force against Suspected Terrorists' in Ana María Salinas de Frías, Katja Samuel and Nigel White (eds), *Counter-Terrorism: International Law and Practice* (Oxford University Press 2012).

before military tribunals, scholars asserted that this fell short of the right to due process or fair trial in human rights law.²⁴ Similarly, other analysts argued that the abbreviated application of immigration law measures such as exclusion or expulsion in “national security” cases violated procedural safeguards under human rights and refugee laws;²⁵ and so on. Issues pertaining to matters besides the personal freedom or bodily integrity of terrorism suspects also gained attention. Scholars criticised the ‘financial war on terror’²⁶ or the freezing of assets and properties consequent to the executive proscription or labelling of foreign organisations as ‘terrorists’ as violating the right to fair trial.²⁷

For their part, proponents of forceful counterterrorism measures claimed that established human rights law was not an appropriate measure of their validity. In what Byrnes (2008) termed their “distorted legalism”²⁸, advocates of the new measures on the one hand disregarded established law and authoritative interpretations, whilst on the other creating elaborate justifications for why such extreme counterterrorist action was legally justifiable. Central to the arguments justifying these measures was the representation of the situation after 9/11 as an armed conflict that was unprecedented or epochal in character. In particular, terrorists, principally Al Qaeda operatives, were presented as a new kind of threat by virtue of their decentralised and flexible structure, the possibility of their access to nuclear and other weapons of mass destruction, and their extraordinary (religious and suicidal) zeal in pursuit of their destructive aims. On this basis, for example, the US argued that those detained as a result of its action in the “War on Terror” were

²⁴ Christopher Kannady, Peter Masciola and Michael Paradis, ‘The “Push-Pull” of the Law of War: the Rule of Law and Military Commissions’ in Ana María Salinas de Frías, Katja Samuel and Nigel White (eds), *Counter-Terrorism: International Law and Practice* (Oxford University Press 2012); Claudia Martin, ‘The Role of Military Courts in a Counter-Terrorism Framework: Trends in International Human Rights Jurisprudence and Practice’ in Ana María Salinas de Frías, Katja Samuel and Nigel White (eds), *Counter-Terrorism: International Law and Practice* (Oxford University Press 2012).

²⁵ Nuala Moles, ‘Restricted Immigration Procedures in National Security Cases and the Rule of Law: An Uncomfortable Relationship’ in Ana María Salinas de Frías, Katja Samuel and Nigel White (eds), *Counter-Terrorism: International Law and Practice* (Oxford University Press 2012); Mathew (n 7).

²⁶ Ibrahim Warde, *The Price of Fear: The Truth behind the Financial War on Terror* (1st edn, University of California Press 2008).

²⁷ Gabriele Porretto, ‘The European Union, Counter-Terrorism Sanctions against Individuals and Human Rights Protection’ in Miriam Gani and Penelope Mathew (eds), *Fresh Perspectives on the ‘War on Terror’* (Australian National University E-Press 2008); Russell Hogg, ‘Executive Proscription of Terrorist Organisations in Australia: Exploring the Shifting Border between Crime and Politics’ in Miriam Gani and Penelope Mathew (eds), *Fresh Perspectives on the ‘War on Terror’* (Australian National University E-Press 2008); Anna Gardella, ‘The Fight Against the Financing of Terrorism between Judicial and Regulatory Cooperation’ in Andrea Bianchi and Yasmin Naqvi (eds), *Enforcing International Law Norms Against Terrorism* (Hart Publishing 2004); Luca G Radicati di Brozolo and Mauro Megliani, ‘Freezing the Assets of International Terrorist Organizations’ in Andrea Bianchi and Yasmin Naqvi (eds), *Enforcing International Law Norms Against Terrorism* (Hart Publishing 2004).

²⁸ Byrnes (n 11) 129.

detained during an armed conflict; that IHL provided the *lex specialis* in that context; and that human rights law thus did not apply.²⁹ This provided the US with the justification or excuse to detain terrorism suspects practically indefinitely as long the “War on Terror” hasn’t been won or lost.³⁰

The United Kingdom employed a slightly different strategy to justify its counterterrorism policies and practice. It maintained that constraints on state action under human rights law should be relaxed and more liberal interpretations accepted. For example, in a case involving the extradition of a suspected terrorist convicted in absentia in Tunisia, the UK in a third-party intervention argued that the right against *refoulement* under Article 3 of the European Convention on Human Rights as previously interpreted in *Chahal v UK* should be “altered and clarified”, with the result that states should be permitted to weigh individual rights against the right of the state to be secure against terrorism.³¹

In response, the international law mainstream argued that established human rights law continued to be relevant even in the situation described by “War on Terror” proponents. In many different fora, a debate ensued over the applicability of human rights in the context of counterterrorism, and the mainstream position prevailed. International courts and human rights treaty bodies, perhaps unsurprisingly, reinforced the continuing relevance and applicability of human rights law and their previous interpretations and rulings. In its *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Territories*³², for example, the International Court of Justice reaffirmed its dictum in the *Advisory Opinion on the Legality of the Use or Threat of Nuclear Weapons*³³ that human rights law applied in both peacetime and during armed conflict, with the result that human rights law was declared to be relevant and applicable to the situation of extreme threat posed by terrorism. When the Inter-American Commission on Human Rights considered the detention of suspects in Guantanamo, the commission reiterated its earlier jurisprudence to reach a similar conclusion that “in situation of armed conflict, the

²⁹ *ibid* 143; Mathew (n 19) 164. The US also asserted that even “if human rights law applied, it has no extra-territorial application”, a view which intended to shield from scrutiny its actions in places such as Guantanamo. de Londras (n 1) 177.

³⁰ See, for example, the US position in *Detainees in Guantanamo Bay, Cuba: Request for Precautionary Measures*, IACHR (2002) in 41 ILM 532.

³¹ *Saadi v Italy*, App No 37201/06, [2008] ECHR 179, para 122.

³² [2004] 43 ILM 1009, paras. 105-9.

³³ 1996 ICJ Rep 226, para. 25.

protections under international human rights and humanitarian law may complement and reinforce each other”.³⁴

Human rights advocates eventually managed to convince the UN Security Council that counterterrorism activities should not violate human rights. Even during the deliberation on Resolution 1373, according to Foot, human rights NGOs vigorously pushed for the inclusion in Resolution 1373 of “a paragraph which stated that governments had to make sure that their anti-terrorist actions were in compliance with international humanitarian and human rights law”, but they were “rebuffed”.³⁵ The absence of specific reference to human rights law signalled to critics that the Council was giving “currency to the notion that the price of winning the global struggle against terrorism might require sacrificing fundamental rights and freedoms”.³⁶ In an effort to defend the Counter-Terrorism Committee’s (CTC) silence on human rights, its first chairman Jeremy Greenstock said testing whether state action complied with human rights was “outside the scope of the Counter-Terrorism Committee’s mandate”, although other organisations could “study States’ reports and take up their content in other forums”, including other UN bodies with human rights expertise.³⁷ This led UN Secretary General Kofi Annan to remark in a January 2002 speech to the Security Council that while the Council need not duplicate the role of human rights bodies, it should make sure the measures it promoted did not lead to the abuse of human rights by states. For Annan, there was no trade-off to be had between “effective action against terrorism and the protection of human rights. On the contrary... in the long term, we shall find that human rights, along with democracy and social justice, are one of the best prophylactics against terrorism.”³⁸ These remarks were followed by briefings, statements and other activities by which a working group formed by Annan and UN human rights bodies including the Office of the High Commissioner on Human Rights and the Human Rights Committee pressed the CTC to include a human rights component to its work.

In January 2003, the Security Council adopted Resolution 1456 which provided that states had to make sure that the counterterrorism measures they were taking complied with international law, “in particular international human rights law, refugee, and

³⁴Inter-American Court of Human Rights (n 29) 533.

³⁵ Foot, ‘The United Nations, Counter Terrorism, and Human Rights’ (n 1) 499.

³⁶ Robert K. Goldman quoted in *ibid* 496–497.

³⁷ UNSC 4453d meeting (18 January 2002) U.N. Doc. S/PV.4453, 5.

³⁸ *Ibid*, 3.

humanitarian law.”³⁹ This language was repeated in Resolution 1566 passed after the Beslan massacre in North Ossetia on September 1, 2004⁴⁰ and Resolution 1624 passed after the July 7, 2007 bombings in London⁴¹. By 2004, the appointment of a human rights expert to the body (Counter-Terrorism Executive Directorate) that assisted the CTC’s monitoring work was approved.⁴² In 2005 the United Nations Commission on Human Rights also decided to appoint a special rapporteur “on the promotion and protection of human rights and fundamental freedoms while countering terrorism”, reflecting the emergence of a new theme in the work of the human rights body. The Special Rapporteur has since produced valuable reports including “Ten areas of best practices in countering terrorism”, which was meant as “10 concrete models for wider adoption and implementation by Member States”.⁴³

1.3. Global Counterterrorism Strategy

As can be seen in the speeches and reports of Kofi Annan, Mary Robinson and others during this period,⁴⁴ the mainstreaming of human rights in the work of the CTC simultaneously involved the articulation of certain broader ideas about the importance of respecting human rights for the attainment of a better overall level of security against terrorists. Not only was it argued that human rights law continued to apply during the “War on Terror”, it was asserted furthermore that human rights was a necessary part of winning that war. This was because violating rights provided fodder for terrorists by

³⁹ SC Res 1456 (20 January 2003) UN Doc S/RES/1456 (2003), para. 6.

⁴⁰ UNSC Res. 1566 (8 October 2004) UN Doc S/RES/1566, sixth preambular para.

⁴¹ UNSC Res. 1624 (14 September 2005) UN Doc S/RES/1624, para. 4.

⁴² EJ Flynn, ‘The Security Council’s Counter-Terrorism Committee and Human Rights’ (2007) 7 Human Rights Law Review 371-384, 381. Human rights expert assistance was one recommendation of the Commission on Human Rights.

⁴³ UNGA ‘Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin’ (22 December 2010) UN Doc A/HRC/16/51.

⁴⁴ UNCHR ‘Human Rights: A Unifying Framework (Report of the United Nations High Commissioner for Human Rights and Follow-up to the World Conference on Human Rights)’ (27 February 2002) E/CN.4/2002/18 (Annexed to this report are the High Commissioner Mary Robinson’s proposed “further guidance” for submission of reports to the Counter-Terrorism Committee consisting of “criteria for balancing human rights protection and the combatting of terrorism”); UNSG ‘Secretary-General Offers Global Strategy for Fighting Terrorism in Address to Madrid Summit (Press Release)’ (10 March 2005) SG/SM/9757; UNGA ‘Uniting against terrorism: recommendations for a global counter-terrorism strategy (Report of the Secretary-General)’ (27 April 2006) A/60/825, 27 April 2006.

creating grievances that could be exploited for recruitment and mobilisation. According to Annan:

[C]ompromising human rights cannot serve the struggle against terrorism. On the contrary, it facilitates achievement of the terrorist's objective – by ceding to him the moral high ground, and provoking tension, hatred and mistrust of government among precisely those parts of the population where he is most likely to find recruits.⁴⁵

At the very least, therefore, Annan theorised, maintaining respect for human rights served to undercut terrorist recruitment by “dissuading disaffected groups from choosing terrorism as a tactic”.⁴⁶ Already in 2002, the UN High Commissioner for Human Rights Mary Robinson argued, “[a]n effective international strategy to counter terrorism should use human rights as its unifying framework.”⁴⁷ Firstly, she said, “terrorism is a threat to the most fundamental right, the right to life”⁴⁸ and must therefore be countered effectively. Secondly, in addressing the threat of terrorism, the promotion and protection of human rights play a central role. Robinson explicitly referred to the notion of security developed in the UN called “human security” which entailed “freedom from pervasive threats to rights”.⁴⁹

Robinson and Annan went on to outline a “counterterrorism strategy” in which human rights were prominently incorporated. In “Uniting against terrorism: recommendations for a global counter-terrorism strategy”, Annan laid down five elements of this strategy, namely:

- (1) Dissuading groups from resorting to terrorism or supporting it;
- (2) Denying terrorists the means to carry out an attack;
- (3) Deterring States from supporting terrorist groups;
- (4) Developing State capacity to prevent terrorism; and
- (5) *Defending human rights in the context of terrorism and counter-terrorism.*

Not only is the defence of human rights a substantive element of the strategy, Annan said “the defence of human rights is essential to the fulfilment of all aspects of a counter-terrorism strategy”.⁵⁰

Romanuik has observed that in substance, the new global counterterrorism strategy that Annan proposed to the General Assembly was “generally repetitive of

⁴⁵ Annan (n 3) 4.

⁴⁶ *ibid* 1.

⁴⁷ UNCHR (n 44) 4.

⁴⁸ *ibid*, 3.

⁴⁹ *Ibid*, 9.

⁵⁰ UNGA (n 44) para 5.

pronouncements in other UN fora”⁵¹ including the Security Council. For example, the second and third elements of the strategy basically consisted of the measures already promoted in Resolution 1373. Robinson called these measures “operational responses” to terrorism that were necessary but inadequate. What was new in the new global strategy was the emphasis on “structural responses”⁵² that she argued addressed the “root causes” of insecurity. These “structural responses” resembled the development and socio-economic measures that various bodies within the UN from the United Nations Educational, Scientific and Cultural Organization to the United Nations Development Program were already undertaking. Rosand, Millar and Ipe commented:

By enumerating a holistic approach to addressing terrorism, the Strategy represents a convergence of the global North’s post-11 September counterterrorism priorities with the development and socioeconomic agenda of the global South.⁵³

In the discussion of Annan’s proposal, the General Assembly fought over political issues that have also visited the discussion in the UN on a comprehensive definition of terrorism and that have been preventing UN member states from reaching an agreement. Negotiation on a comprehensive terrorism convention has been deadlocked over the definition of terrorism. On the one hand, member states from the Organisation of Islamic Conference (OIC) consistently insisted against Western states that there should be a distinction between terrorists and freedom fighters so that “national liberation movements” resisting foreign occupation wouldn’t be covered by the definition of terrorism. On the other hand, Western states insist that states be exempt from the coverage of the definition of terrorism.⁵⁴ In the discussion of Annan’s proposal, many global South countries sought to add recognition of foreign occupation among the “root causes” of terrorism, to which developed countries had objected.⁵⁵

⁵¹ Romaniuk (n 4) 591.

⁵² “37. The prevention of terrorism requires both operational and structural responses. The range of measures required of States under Council resolution 1373 (2001) are focused primarily on operational prevention. Structural prevention of terrorism requires a more comprehensive strategy that considers the root causes of insecurity and, therefore, conflict. In other words, it is not adequate to respond only to the apparent causes of violence; it is imperative to address the underlying conditions that lead individuals and groups to violence. There is no doubt that claims of domination, discrimination and denigration of groups and individuals are often the triggering factors.” UNCHR (n 44) 11.

⁵³ Eric Rosand, Alistair Millar and Jason Ipe, ‘Implementing the UN Global Counter-Terrorism Strategy in the Latin America and Caribbean Region’ (Center on Global Counterterrorism Cooperation 2008) 6 <http://globalcenter.org/wp-content/uploads/2008/09/latin_america.pdf> accessed 21 July 2014.

⁵⁴ Jörg Friedrichs, ‘Defining the International Public Enemy: The Political Struggle behind the Legal Debate on International Terrorism’ (2006) 19 *Leiden Journal of International Law* 69-91, 78-79.

⁵⁵ Eric Rosand, ‘The UN-Led Multilateral Institutional Response to Jihadist Terrorism: Is a Global Counterterrorism Body Needed?’ (2006) 11 *Journal of Conflict and Security Law* 399-427, 416.

Annan has also recommended that the UNDP's programs for building democratic governance capacities in member states incorporate concerns about terrorism.⁵⁶ However, some member states resisted this suggestion, fearing this might politicise the UNDP's programs on development.⁵⁷ Paragraph 8 of the resulting document recognised that member States disagreed "about whether terrorism can be traced to certain so-called 'root causes'". In order to transcend differences of views on this matter, Annan pragmatically dropped reference to "root causes" of terrorism, and used instead the phrase "conditions conducive to exploitation by terrorists". The phrase reemphasised member states agreement that terrorism was not justifiable under any circumstances but also recognised that terrorism did not occur "in a social or political vacuum" either.⁵⁸ The resulting General Assembly resolution restyled but essentially preserved Annan's "elements". Thus, with only some modifications, the General Assembly accepted Annan's proposal in a unanimous resolution in 2006 simply entitled "The United Nations Global Counterterrorism Strategy".⁵⁹ All of the aforementioned developments serve to underscore that counterterrorism and human rights are compatible. As illustrated, international lawyers and human rights advocates have argued for the notion or ideal of human rights-compliant counterterrorism in both legal and political fora. The convergence between counterterrorism and human rights is articulated in court decisions, and opinions of human rights bodies,⁶⁰ as well as in speeches and reports and resolutions, particularly in the new "global counterterrorism strategy" promoted by the UN.

In fact, so regular is the production of this sort of rhetoric at the UN that it has inspired the claim that a new law has been created. For example, Isanga argued that a "general obligation to protect human rights in the context of counter-terrorism" is now "an emerging rule of customary international law" which bind states whether or not they are signatories to the relevant treaties.⁶¹ He analyzed the tone and voting patterns of both the UN General Assembly and Security Council Resolutions "concerning fighting terrorism in a manner consistent with human rights". He concluded that the resolutions "support a

⁵⁶ UNGA (n 44) para 34.

⁵⁷ Rosand (n 55) 416.

⁵⁸ UNGA (n 44) para 8.

⁵⁹ UNGA Res. 60/288 'The United Nations Global Counter-Terrorism Strategy' (8 September 2006) UN Doc A/RES/60/288.

⁶⁰ IACHR (n 29); ECHR (n 30); ICJ (n 31).

⁶¹ *ibid.*

finding of *opinio juris*", that is, the belief by states that a course of action is legally obligatory.

[T]he language is of a strong, norm-creating character. Moreover, voting patterns show consistent support of a majority of States which cuts across both the Western democracies waging the 'War on Terror,' many of whom have approved of the language in one or more resolution, and the developing countries on the front lines.⁶²

1.4. "Resilience" of human rights

What is the significance of the discourse of human rights-compliant counterterrorism? From the point-of-view of its advocates, the discourse provides important recognition that counterterrorism activities must not violate human rights law. As it had previously been asserted aggressively that effective counterterrorism should not be hindered by human rights law, this recognition was seen as necessary and welcome. "Countering terrorism while respecting human rights" is understood as a (possibly gradual⁶³) reversal of what came before; in the words of Martin Scheinin, "the pendulum is already coming back".⁶⁴

Foot argues that this demonstrates that human rights norms are "resilient".⁶⁵ Human rights institutions, particularly at the UN level, have shown a degree of "autonomy", i.e., that they "do not solely reflect the preferences of major states".⁶⁶ This claim is significant in the context of International Relations (IR) theory. Social constructivists in IR oppose the realist claim that international law is epiphenomenal and international institutions do not exert any independent influence apart from powerful states. In the 1990s, social constructivists produced empirical works which sought to show that ideational factors and non-state actors mobilising transnationally had an impact.⁶⁷

⁶²ibid 248.

⁶³ "If it took ten years to turn the clock back by 60 or 200 years, it may take 30 years to repair the damage and to reach a situation where the commitment to respect the human rights of each and every human person in any situation is again universally accepted. But once that is achieved, we will not be in the same situation as before 9/11. We will be wiser than then, and conscious of the fact that much of the seeming universal acceptance of human rights was mere lip service." Martin Scheinin, 'Terrorism' in Daniel Moeckli and others (eds), *International Human Rights Law* (2nd edn, Oxford University Press 2014) 565.

⁶⁴ ibid; Martin Scheinin, 'Combating terrorism while protecting human rights' (10 November 2008) <http://www.regjeringen.no/en/dep/ud/kampanjer/refleks/innspill/menneskerettigheter/combating_terrorism.html?id=535383> accessed 15 August 2014.

⁶⁵ Foot, 'The United Nations, Counter Terrorism, and Human Rights' (n 1) 489; Byrnes (n 11).

⁶⁶ Foot, 'The United Nations, Counter Terrorism, and Human Rights' (n 1) 491.

⁶⁷ See, e.g., Audie Klotz, 'Norms Reconstituting Interests: Global Racial Equality and U.S. Sanctions Against South Africa' (1995) 49 *International Organization* 451-478; Audie Klotz, *Norms in International Relations: The Struggle Against Apartheid* (Cornell University Press 1999); Audie Klotz, 'Transnational Activism and Global Transformations: The Anti-Apartheid and Abolitionist

Sinclair characterised these works as “upbeat accounts of how groups of individuals have managed to rearticulate social norms and out-manoeuvre significantly more powerful opponents.”⁶⁸ In *The Power of Human Rights: International Norms and Domestic Change*, Risse, Ropp and Sikkink developed a theoretical framework (the so-called “spiral model”) explaining how international human rights norms affect state behaviour through a cascade of processes that begin with instrumental bargaining through to identity transformation.⁶⁹ The process of change is envisioned as proceeding in five sequential stages: (1) repression; (2) denial; (3) tactical concession; (4) prescriptive status; and (5) institutionalised rule-consistent behaviour. It is driven by three kinds of mechanisms: (a) instrumental adaptation to pressure/strategic bargaining; (b) argumentation/dialogue/persuasion; and (c) institutionalisation/habituation. At first, repressive states when confronted by domestic opposition engage in denial, but denial in turn creates a ‘boomerang effect’ whereby domestic actors are led to seek linkages with international actors. The transnational networks that they form exert pressure through naming and shaming, sometimes causing states to make tactical concessions in order to buy the appearance of international legitimacy. Gradually, governments get caught up in their own rhetoric by the logic of argumentation, and human rights norms begin to have binding effect. Finally, norms gain prescriptive status, penetrate institutions and guide routine behavior. The spiral model underlines the gradual nature of change, the role of discourse, and the importance of transnational networks of activists.⁷⁰

The advent of the “War on Terror” seems to have vindicated realism over constructivist readings of the relationship of power and norms, particularly since human rights norms which had been painstakingly developed were threatened by the most powerful states. Post-9/11 developments in human rights has provoked attempts to amend constructivist explanations of human rights change, but the resulting revisions have taken out the “upbeat” character from the new constructivist accounts. For example, the challenge to the highly legalised norm against torture put up by the Bush administration in

Experiences’ (2002) 8 *European Journal of International Relations* 49-76 (end of apartheid); Richard Price, ‘A Genealogy of the Chemical Weapons Taboo’ (1995) 49 *International Organization* 73-103; Richard Price, ‘Reversing the Gun Sights: Transnational Civil Society Targets Land Mines’ (1998) 52 *International Organization* 613-644 (chemical weapons ban); Thomas Risse, Stephen C Ropp and Kathryn Sikkink, *The Power of Human Rights: International Norms and Domestic Change* (Cambridge University Press 1999) (human rights).

⁶⁸ Adriana Sinclair, *International Relations Theory and International Law: A Critical Approach* (Cambridge University Press 2010) 12.

⁶⁹ Risse, Ropp and Sikkink (n 67) 17.

⁷⁰ *ibid* 22-32.

both practice and rhetoric has forced McKeown to revise the models of Risse, Ropp and Sikkink.⁷¹ McKeown simply added his own three-stage 'norm death series' to the model in order to account for how norms, like the norm against torture, which have previously been institutionalised and internalised become de-internalised. The trouble with the "spiral model" as constructivists themselves now acknowledge is that it did not foresee that human rights change is reversible, i.e., that "norm regress" was possible. Key to McKeown's account of "norm regress" is the role of "norm revisionists" who are certain elements of powerful liberal states who challenge internalised norms by changing understandings about the salience of the norm.⁷² Jetschke's comparative study of human rights in Indonesia and the Philippines also emphasise the ability of states to justify human rights violations and mobilise and persuade an international audience using the competing norm of state security. Also eschewing the implicit evolutionary progressivism in the "spiral" model, in Jetschke's account, what is emphasised is the indeterminacy of outcomes. There is a competition between norms, namely, between "human rights" and "state security"; and which norm prevails is determined by a transnational audience in a path-dependent process.⁷³

Despite this, Foot argues that human rights while embattled by the new emphasis on a reputation for effectiveness, and even ruthlessness, in counterterrorism, have been resistant and robust, at least at the international level.⁷⁴ International law and institutions, in which human rights norms had become "embedded" prior to 9/11, continue to matter because they "clearly make a difference as to whether the human rights norms retain an ability to constrain."⁷⁵

Only where human rights issues had established a reasonably firm domestic and international institutional foothold before September 11, 2001, does reputation built on concern for the protection of human rights retain an ability to constrain certain of the illiberal trends associated with the counterterrorist agenda.⁷⁶

⁷¹ Ryder McKeown, 'Norm Regress: US Revisionism and the Slow Death of the Torture Norm' (2009) 23 *International Relations* 5-25.

⁷² *ibid* 6.

⁷³ Anja Jetschke, *Human Rights and State Security: Indonesia and the Philippines* (University of Pennsylvania Press 2011) 4, 8.

⁷⁴ Rosemary Foot, 'Human Rights and Counterterrorism in Global Governance: Reputation and Resistance' (2005) 11 *Global Governance* 291-310; Rosemary Foot, 'Torture: The Struggle over a Peremptory Norm in a Counter-Terrorist Era' (2006) 20 *International Relations* 131-151; Foot, 'The United Nations, Counter Terrorism, and Human Rights' (n 1).

⁷⁵ Foot, 'Human Rights and Counterterrorism in Global Governance' (n 74) 302.

⁷⁶ *ibid* 291.

De Londras underscores that “classical realist predictions” that international human rights law would be shaped into the desired form by the most powerful governments in the aftermath of 9/11 did not materialise. “Rather than bend entirely to the will of the hegemon, international human rights law has shown a significant degree of normative resilience to these projections of panic.”⁷⁷ She explains that “normative resilience” seems to be greater in international institutions than in the executive and legislative spheres of the US and the UK because international institutions are “relatively insulated” from panic. De Londras points out “four insulating factors” that account for this, namely, (1) structural, that is, international law-making institutions are relatively slow moving; (2) situational, that is, “most international actors enjoy a cognitive distance from the site of the trauma that gave rise to the panic”; (3) constitutive, that is, “the potent impact of the ballot box is felt less keenly” by international lawmakers; and (4) constitutionalist, that is, deference to the political branches is less prominent in international law, and derogation from rights protection are more evidence-based than in the domestic system.⁷⁸

Foot’s and De Londras’ affirmations of the “normative resilience” of international human rights law find echoes in Ralph’s appraisal of the counterterrorism policies of US President Barack Obama.⁷⁹ Although Ralph’s main finding is that the war-like approach to Al Qaeda et.al. that arose in the War on Terror persists in the Obama administration’s policies, Ralph also emphasises the resistance to this approach put up by advocates of human rights law. Ralph rejects what he terms a “Schmittian-inspired critique” of international law that has emphasised that the permanency of the “state of exception” embodied by the “War on Terror” renders international law norms illusory. Liberal theory, particularly John Locke’s idea of ‘prerogative power’, allows that there may be situations in which a sovereign power may act to secure the common good without seeking prior legal permission, such as in emergencies threatening the survival of the state.⁸⁰ An emergency of this kind is a “state of exception”. In a “state of exception”, the sovereign’s action, though it departs from legality in ordinary times, is understood not to be abandoning law. On the contrary, insofar as such action ‘is directed at re-establishing or defending the

⁷⁷ de Londras (n 1) 166.

⁷⁸ *ibid* 203–212.

⁷⁹ Ralph (n 2).

⁸⁰ Iain Hampsher-Monk, *A History of Modern Political Thought: Major Political Thinkers from Hobbes to Marx* (Blackwell Publishing 1992) 107.

existing order', it is understood to be legal.⁸¹ In essence, Carl Schmitt's critique of international law holds that the "state of exception" in liberal theory⁸²

exposes the superficiality of the norm. Law can never truly rule because it is always contingent on the political. The ever present possibility that 'friends' will act in expedient ways towards their 'enemies' means human relations are in a permanent state of exception.⁸³

For some authors inspired by Schmitt,⁸⁴ the "War on Terror" illustrates a permanent state of exception in our time that allows the perpetual suspension of legal restraints on the global hegemon. Thus, the situation in which we live in today is essentially lawless and thoroughly governed by the global hegemon rather than by and through law. Ralph contended, however, that there was a "liberal alternative" which was "inclusionary to the extent it included terrorist suspects in the international legal regimes without characterizing them as friends".⁸⁵ Ralph emphasised that liberals resisted Bush's counterterrorism policies and rejected the characterisation of the conflict between the US and Al Qaeda as a "war". He concludes:

This belies the Schmittian-inspired claim that the war on terror was a quintessential liberal cosmopolitan war and it indicates, in theory at least, that an alternative approach to post-9/11 security is imminent in American liberalism.⁸⁶

Hence, for Ralph, as for Foot and De Londras, human rights is seen as enabling resistance to abuses and providing an alternative approach to counterterrorism.

2. Critical Terrorism Studies (CTS): questioning assumptions about counterterrorism

In this section and the next, I articulate the opposite position to that expounded in the preceding section, namely that the fusion of counterterrorism and human rights

⁸¹ Oren Gross, 'The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the "Norm-Exception" Dichotomy' (1999) 21 Cardozo Law Review 1825-1868, 1835.

⁸² Ralph (n 2) 4-5.

⁸³ *ibid* 5.

⁸⁴ For example, Louiza Odysseos, 'Crossing the Line? Carl Schmitt on the "Spaceless Universalism" of Cosmopolitanism and the War on Terror' in Louiza Odysseos and Fabio Petito (eds), *The International Political Thought of Carl Schmitt: Terror, Liberal War and the Crisis of Global Order* (Routledge 2007).

⁸⁵ Ralph (n 2) 15.

⁸⁶ *ibid* 14.

discourses engineered by international lawyers may not necessarily represent a reversal of what came before. While a halt and reversal of the downward recalibration of human rights are the aims of the discourse of human rights compliant counterterrorism, the result may be that the counterterrorism agenda is simply given a more respectable legal framework even as the practices remain essentially unchanged. Undoubtedly, mainstream legal scholars and advocates deploy international law to criticise and delegitimise a wide range of practices associated with the War on Terror, and to press for alternative approaches. But their efforts to secure the primacy of human rights may in fact lead to unintended consequences. In the present section, I develop the view that mainstream human rights law's engagement with counterterrorism does not go deep enough because it takes for granted many questionable assumptions about counterterrorism. In this regard, I consider some key themes from the academic movement called Critical Terrorism Studies (CTS), which represents another way of examining counterterrorism. In contrast to mainstream international human rights law, whose aspirations towards counterterrorism are limited to trying to ameliorate its excesses, CTS attempts to deconstruct the very concept of counterterrorism.

The study of terrorism, or more broadly, political violence, has been a relatively minor subfield within International Relations and Security Studies since the 1970s. Terrorism scholars have focused their attention on the causes of episodic outbreaks of terrorist violence against the state;⁸⁷ the history and organisational dynamics of non-state groups implicated in violence;⁸⁸ and appropriate state responses⁸⁹. Common themes in the early scholarship are an almost exclusive focus on non-state terrorists, the view that terrorism is essentially a strategy of the weak against the strong, and that (state) counterterrorism is fundamentally distinct from (non-state) terrorism.⁹⁰ An important exception to this tendency is the work of Michael Stohl and his associates George Lopez, Christopher

⁸⁷ e.g., Ted Gurr, *Why Men Rebel* (Princeton University Press 1970); David C Rapoport, *Assassination and Terrorism*. (Canadian Broadcasting Corp 1971); Martha Crenshaw Hutchinson, 'The Concept of Revolutionary Terrorism' (1972) 16 *The Journal of Conflict Resolution* 383-396; Brian Jenkins, 'International Terrorism: A New Kind of Warfare' (Rand Corporation 1974).

⁸⁸ e.g., Walter Lacquer, *A History of Terrorism* (Transaction Publishers 1977); Martha Crenshaw Hutchinson, *Revolutionary Terrorism: The FLN in Algeria, 1954-1962* (University of Stanford, Hoover Institution Press 1978).

⁸⁹ e.g., Paul Wilkinson, *Terrorism and the Liberal State* (McMillan Press 1977).

⁹⁰ Magnus Ranstorp, 'Mapping Terrorism Studies after 9/11: An Academic Field of Old Problems and New Prospects' in Richard Jackson, Marie Breen Smyth and Jeroen Gunning (eds), *Critical Terrorism Studies: A New Research Agenda* (1st edn, Routledge 2009) 19–22.

Mitchell, and David Carleton in the 1980s, which dealt squarely with state terrorism.⁹¹ Duvall and Stohl argued convincingly that strength rather than weakness could spur terrorism, i.e., the belief in one's own strength and capacity and the vulnerability of one's enemies causes powerful states to engage in terrorism.⁹² Their so-named "expected utility" model states that "states employ terrorism under two broad conditions: (a) when they calculate that it will achieve their goals more effectively than other policies – it has lower production costs than the alternatives; and (2) when they anticipate that the response costs of using terrorism will be lower than the costs of other strategies".⁹³ Powerful states may directly utilise terrorist tactics or indirectly through proxies. Their use of terrorist methods could either be a one-off operation, or so extensive that terrorism becomes a means of governance.⁹⁴ Terrorist methods could be used both within and outside their own borders. In the international plane, Stohl identified three broad forms of state terrorist behaviour, namely, (1) terrorist coercive diplomacy; (2) covert state terrorism; and (3) state-sponsored terrorism.⁹⁵

The onset of the "War on Terror" prompted a proliferation of "terrorism" discourses in politics, society and the academy, investing terrorism research with a new urgency. CTS emerged at this juncture as a revolt against a climate of obsession with the spectre of terrorism against Western states, characterised by biased conceptions of terrorism that authorise state violence. Traditional terrorism studies were regarded as complementing the War on Terror milieu by virtue of its orthodox views and its institutional connections with counterterrorism. When these terrorism researchers did pay attention to state terrorism, they focused exclusively on weak states as breeding grounds of non-state terrorism, or on states antagonistic to the West as sponsors of terrorism. CTS' critique of traditional terrorism studies was also embedded in a wider "third debate" in International Relations and Security Studies, in which proponents of post-modern and

⁹¹ For example, Christopher Mitchell and others, 'State Terrorism: Issues of Concept and Measurement' in Michael Stohl and George A Lopez (eds), *Government Violence and Repression: An Agenda for Research* (Greenwood Press 1986).

⁹² Raymond D Duvall and Michael Stohl, 'Governance by Terror' in Michael Stohl (ed), *The Politics of Terrorism* (Marcel Dekker 1983); Michael Stohl, 'Expected Utility and State Terrorism' in Tore Bjørgo (ed), *Root Causes of Terrorism: myths, reality and ways forward* (Routledge 2005) 202.

⁹³ Richard Jackson, 'Conclusion: Contemporary State Terrorism - towards a New Research Agenda' in Richard Jackson, Eamon Murphy and Scott Poynting (eds), *Contemporary state terrorism: theory and practice* (Routledge 2010) 228.

⁹⁴ Duvall and Stohl (n 92).

⁹⁵ Michael Stohl, 'The Superpowers and International Terrorism' in Michael Stohl and George A Lopez (eds), *Government Violence and Repression: An Agenda for Research* (Greenwood Press 1986); Stohl (n 92) 207–211.

critical theories and methodologies launched an assault against the “positivism” of the discipline.⁹⁶

A key proposition of CTS is that “terrorism” is socially constructed, i.e, that it is not a free-standing phenomenon or an objective truth, but a linguistic construction embedded in a discourse that serves specific political purposes. Richard Jackson expounds upon this thesis in his influential book *Writing the War on Terror: Language, Politics and Counter-terrorism*, in which he appeals for scholars to pay attention to the language and rhetorical techniques of “War on Terror” proponents and practitioners. “[T]he language of the ‘war on terrorism’ is not simply an objective or neutral reflection of reality,” says Jackson, but a “carefully constructed *discourse*”⁹⁷ that tends to induce societal acceptance of state violence against specific groups, immunise state authorities from criticism, enforce national unity and marginalise dissent. He goes on to argue that:

At the most basic level, the *practice* of counter-terrorism is predicated on and determined by the *language* of counter-terrorism. The language of counter-terrorism incorporates a series of assumptions, beliefs and knowledge about the nature of terrorism and terrorists. These beliefs then determine what kinds of counter-terrorism practices are reasonable or unreasonable, appropriate or inappropriate: if terrorists are assumed to be inherently evil, for example, then eradicating them appears apposite while negotiating with them appears absurd. The actual practice of counter-terrorism gives concrete expression to the language of counter-terrorism – in effect, it turns the initial words into reality.⁹⁸

In short, the language of counterterrorism is important because it does not merely describe the reality of terrorism, but it creates the specific social realities or practices. The turn to discourse analysis also illustrates the kind of “post-positivist” methodological innovations that CTS urges terrorism researchers to adopt. In an earlier work, Zulaika and Douglas railed against the language of counter-terrorism as well, its looseness and circularity (terrorists are irrational, and therefore counterterrorism is the only way to deal with them). In terms of methodology, they propose that terrorism researchers should engage in more ethnography of violent political groups (knowing them firsthand rather than assuming they are unknowable or that all we need to know about them is their irrationality), breaking the

⁹⁶ See, for example, Darryl SL Jarvis, *International Relations and the Third Debate: Postmodernism and Its Critics* (Greenwood Publishing Group 2002).

⁹⁷ Richard Jackson, *Writing the War on Terrorism: Language, Politics and Counter-Terrorism* (Manchester University Press 2005) 2, italics in the original.

⁹⁸ *ibid* 8–9.

taboo against talking or interacting with those labeled “terrorists”, in order to go beyond the referential circularity of counter-terrorism discourse.⁹⁹

Another important critical move is to challenge the dichotomy between terrorism and counterterrorism. Researching state terrorism, as well as the connection between state counter-terrorism and non-state terrorism, contributes towards this end. From the beginning, CTS defended the concept of “state terrorism”. The essential argument is that the term “terrorism” pertains to acts, with the actor or his status being unimportant. As long as the act is violent and instrumentalises the victim of violence in order to communicate a political message to another party, the act should be described/condemned as “terrorism”. Terrorism is not dependent on publicity; the message need only be communicated to the intended audience. For example, enforced disappearances committed by state agents are usually not publicised and in fact officially denied because another set of audiences, that is, the international community or liberal domestic supporters of the regime would not countenance them. Nevertheless CTS scholars would consider enforced disappearances terrorism if they communicate to the intended audience, that is, the terrorised enemies or domestic public the power of the state and the futility of resistance.¹⁰⁰

In fact, terrorist acts defined in such manner are often perpetrated by state agents; and state terrorism, particularly Western state terrorism, has historically been more lethal than non-state terrorism.¹⁰¹ CTS therefore committed itself to further researching and theorizing the aims, nature, causes and consequences of state terrorism alongside non-state terrorism. The volume on contemporary state terrorism edited by Richard Jackson, Eamon Murphy and Scott Poynting (2010) featured post-9/11 case studies that further substantiate Stohl et.al.’s “expected utility” model of the causes of state terrorism. The editors also suggested practical ways of addressing state terrorism, such as the updating of the “Political Terror Scale” project. The “Political Terror Scale” is a ranking (from 5 to 1) which allows a semblance of measurement of the extent of state terrorism experienced across countries and years based on data obtained from yearly country reports by Amnesty

⁹⁹ Joseba Zulaika and William A Douglass, *Terror and Taboo: The Follies, Fables, and Faces of Terrorism* (Routledge 1996).

¹⁰⁰ Richard Jackson, Eamon Murphy and Scott Poynting (eds), *Contemporary State Terrorism: Theory and Practice* (Routledge 2010) 4–5.

¹⁰¹ Alexander George, *Western State Terrorism* (Polity Press 1991); Edward S Herman and Gerry O’Sullivan, *The Terrorism Industry: The Experts and Institutions That Shape Our View of Terror* (Pantheon Books 1989).

International and the US State Department Country Reports on Human Rights Practices.¹⁰² They also suggested the creation of a database of state terrorism similar to the US Department of State's annual "Patterns of Global Terrorism" reports.¹⁰³ Thus, it seems that CTS scholars hoped to use the same labelling or stigmatisation techniques utilised by "War on Terror" proponents to counter or at least reduce state terrorism.

Besides drawing attention to the terrorism of the state, CTS questions whether counterterrorism should only be thought of as a response to terrorism, and therefore as occupying a different moral plane from that of terrorism. Scholars have already noted that forcible state actions have often preceded and not merely followed non-state terrorism; and that counterterrorism and terrorism can be linked in a mutual causal loop, in a "cycle of violence".¹⁰⁴ In the "War on Terror", military counterterrorism measures have been criticised as spurring rather than reducing non-state terrorism.¹⁰⁵ Poynting and Whyte further ask an almost taboo question even in critical studies of counterterrorism: can we take measures labelled as "counterterrorism" at face value, i.e., that their purpose is only and always to eliminate or mitigate terrorism? "[W]e might question," say Poynting and Whyte, "whether state terror rather than being some kind of unintended consequence of counterterrorism, might indeed be its originary purpose."¹⁰⁶ Thus, in an edited volume *Counter-Terrorism and State Political Violence: The 'War on Terror' as Terror*, CTS scholars examine forceful counterterrorism practices in the "War on Terror" itself as forms of state terrorism. In that volume, Poynting and Whyte also argue that contemporary counterterrorism policies aid state terrorism. These policies do so by presenting acts of violence as abstracted from their socio-economic context, as well as from any political or ideological struggle. What is "depoliticised" is not merely the violence of non-state actors deemed 'terrorism', but also the violence of the state:

In this logic, sub-state political violence in opposition to the state appears ideologically irrational and driven by fanaticism. State political violence is presented as defensive, responsible, rational and unavoidable, rather than being motivated by a particular ideological bias or political choice.¹⁰⁷

¹⁰² See, <http://politicalterroryscale.org/>.

¹⁰³ Jackson, Murphy and Poynting (n 100) 235.

¹⁰⁴ Andrew Silke, 'Fire of Iolous: The Role of State Counter-Measures in Causing Terrorism and What Needs to Be Done' in Tore Bjorgo (ed), *Root causes of terrorism: Myths, reality and ways forwards* (Routledge 2005) 113–115; See, also, L Donohue, 'In the Name of National Security: US Counterterrorist Measures, 1960-2000' (2001) 13 *Terrorism and Political Violence* 15–60.

¹⁰⁵ Tom Parker, 'Fighting an Antaeon Enemy: How Democratic States Unintentionally Sustain the Terrorist Movements They Oppose' (2007) 19 *Terrorism and Political Violence* 155–179.

¹⁰⁶ Scott Poynting and David Whyte, *Counter-Terrorism and State Political Violence: The 'War on Terror' as Terror* (Routledge 2012) 1–2.

¹⁰⁷ *ibid* 9.

Therefore, CTS leads to a deep questioning of counterterrorism policy's self-presentation in almost Manichean moral terms (as an affirmation of good over evil) and also as technical and technocratic. Counterterrorism is unseated from its moral high ground and subjected to the same interrogation as terrorism.

The role of international human rights law and institutions in counterterrorism has largely avoided CTS' scrutiny. This isn't surprising since in the mainstream of the International Relations (IR) discipline, the social constructivist school being the exception, law tends to be regarded as peripheral, particularly to issues involving national security.¹⁰⁸

A typical view of law in IR is expressed by Burke in these words:

"The practices of secrecy, intervention and executive power at work in these realms demonstrates that an enormous freedom of executive action is the rule (*not* the exception), a freedom that is legitimated only in the thinnest way by law and is rarely limited by it."¹⁰⁹

Nevertheless, the target of CTS' critique, viz., state-centred counterterrorism expertise/knowledge produced by "terrorism experts", shares similarities with the response of mainstream international law to counterterrorism. The discourse of human rights-compliant counterterrorism is largely state-centric in the sense criticised by CTS. The discourse assumes that "terrorism" is a threat to which states merely respond; there is, for example, no recognition of "state terrorism". There may be "excesses" in the form of human rights abuses in the course of counterterrorism; these excesses are recognised as "counter-productive", which is to say that they detract from the purpose of counterterrorism policy. But there is no recognition that counterterrorism policy's purpose may actually be to terrorise, which in turn may invite or produce additional acts of terrorism. The divide between terrorism and counterterrorism is neatly preserved in the discourse of human rights-compliant counterterrorism.

Moreover, human rights law is also an expert technical activity. The utilisation of human rights law to improve counterterrorism policy may thus represent an increased "depoliticisation"¹¹⁰ of counterterrorism. This is especially so when law is viewed as separate from or above politics. Law can therefore provide the camouflage needed to present counterterrorism as truly "defensive, responsible, rational and unavoidable"¹¹¹. In

¹⁰⁸ Sinclair (n 68) 7.

¹⁰⁹ Anthony Burke, *Beyond Security, Ethics and Violence: War against the Other* (Taylor & Francis 2006) 10.

¹¹⁰ Poynting and Whyte (n 106) 9.

¹¹¹ *ibid.*

Orwellian fashion, the incorporation of human rights protections into counterterrorism law and policy can permit technical counterterrorism experts to claim that proposed counterterrorism measures are “human rights-compliant”, hence inoculating them from further scrutiny.¹¹²

Unlike international law, CTS is largely deconstructive and appears to have no reform agenda of its own. Some of its proponents appear to support advancing a broad program of vanishing sub-state terrorism premised on ending (Western) state terrorism. “To end terrorism, end state terrorism” is an apt slogan that captures this sentiment.¹¹³ For Ken Booth, the rationale for CTS is the interpretation, marginalisation, delegitimisation, and elimination of acts of terror from the strategic toolkit of states and non-state actors alike.¹¹⁴ Some CTS scholars advocate specific forms of policy interventions such as developing tools (databases, scales) for state terrorism monitoring to “accompany” the existing tools intended for non-state terrorism developed by the traditional counterterrorism “experts” they criticise. Another significant CTS contribution is the exploration of “talking” with non-state terrorists in the post-9/11 climate as an alternative to terrorist blacklisting and military action.¹¹⁵ These specific CTS projects converge with “respecting human rights” and “addressing root causes of terrorism” (code for conflict resolution and transformation, and long-term “development”), which are prominent elements of international institutions’ counterterrorism strategy. Because there is little examination in CTS of the role of international law and institutions, CTS largely misses how their “alternatives” are also problematic. In the next section, I therefore turn to a critical examination of international law and human rights.

3. Third World Approaches to International Law (TWAIL): questioning assumptions about human rights and international law

Critiques of human rights provide additional conceptual resources for critically evaluating the potential of human rights-compliant counterterrorism. Human rights

¹¹² See, for a parallel argument regarding the use of the Canadian Charter of Rights and Freedom to inoculate Canada’s Anti-Terrorism Act from political scrutiny, W Wesley Pue, ‘Protecting Constitutionalism in Treacherous Times: Why “Rights” Don’t Matter’ in Miriam Gani and Penelope Mathew (eds), *Fresh Perspectives on the ‘War on Terror’* (Australian National University E Press 2008) 65–83, 57.

¹¹³ Fischer Dietrich and Johan Galtung, ‘To End Terrorism, End State Terrorism’ (2002) 7 *Journal of Futures Studies* 151-154.

¹¹⁴ Ken Booth, ‘The Human Faces of Terror: Reflections in a Cracked Looking-Glass’ (2008) 1 *Critical Studies on Terrorism* 65-79, 68.

¹¹⁵ Harmonie Toros, *Terrorism, Talking and Transformation : A Critical Approach* (Routledge 2012).

discourse has been critiqued from various theoretical and disciplinary perspectives, including Marxism,¹¹⁶ feminism,¹¹⁷ cultural relativism in Anthropology,¹¹⁸ and utilitarianism.¹¹⁹ According to Dembour, critiques have accompanied human rights since at least the eighteenth century with the emergence of the French Declarations of the Rights of Man. Critiques of human rights typically expose a gap between what human rights say and what they actually do, but vary in their assessments of whether this gap can be bridged.¹²⁰ “Practical critiques” explain the gap between human rights rhetoric and practice by pointing to practical impediments, such as the existence of a double standard, or the real challenges of poverty and environmental degradation. These critiques believe the gap can and must be bridged. In contrast, “conceptual critiques” doubt that such a gap can ever be bridged, and thus reject the idea of human rights as fundamentally flawed. For example, some critics argue that human rights cannot address issues of justice and equality because they “directly participate in sustaining power relationships”.¹²¹

In this section, I explore an area of scholarship that has come to be known as “Third World Approaches to International Law” (TWAIL). TWAIL scholars focus on the consequences of the colonial logic of international law, including human rights. The dominant theme of TWAIL scholarship is how this deeply entrenched logic of international law renders it an unlikely medium for articulating and realizing the aspirations of developing countries and peoples. The critical insights and methods of TWAIL provide a helpful foundation for developing a critique of the counterterrorism agenda that does not ignore or gloss over the shortcomings of human rights.

¹¹⁶ Karl Marx, ‘On the Jewish Question’ in David McLellan (ed), *Karl Marx: Selected Writings* (2nd edn, Oxford University Press 2000).

¹¹⁷ Charlotte Bunch, ‘Women’s Rights as Human Rights: Toward a Re-Vision of Human Rights’ (1990) 12 *Human Rights Quarterly* 486-498; Hilary Charlesworth, ‘What Are “Women’s Human Rights”?’ in Rebecca J Cook (ed), *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press 1994); Celina Romany, ‘Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law’ (1993) 6 *Harvard Human Rights Journal* 87-125; Gayle Binion, ‘Human Rights: A Feminist Perspective’ (1995) 17 *Human Rights Quarterly* 509-526.

¹¹⁸ Executive Board, American Anthropological Association, ‘Statement on Human Rights’ (1947) 49 *American Anthropologist* 539; R Panikkar, ‘Is the Notion of Human Rights a Western Concept?’ (1982) 30 *Diogenes* 75-102.

¹¹⁹ Jeremy Bentham, ‘Anarchical Fallacies. An Examination of the Declaration of the Rights of Man and the Citizen Decried by the Constituent Assembly of France’, *Selected Writings on Utilitarianism* (Wordsworth 2000).

¹²⁰ Marie-Benedicte Dembour, ‘Critiques’ in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (2nd edn, Oxford University Press 2014) 51.

¹²¹ *ibid* 55; Marie-Bénédicte Dembour, *Who Believes in Human Rights?: Reflections on the European Convention* (Cambridge University Press 2006) 4–6.

TWAIL represents a postcolonial sub-culture within the International Law discipline, as its primary concern is to document and deconstruct the consequences of Western colonialism for present-day international law. Like postcolonialism, TWAIL emphasises colonialism's epistemological consequences, which are often more insidious than its outward manifestations, such as military occupation, which may eventually cease without essentially changing the underlying relationship of subordination. The epistemological, social, political and economic legacies of colonialism are conceived as intertwined. A key TWAIL preoccupation is to identify how the logic of colonialism persists in the contemporary doctrines and institutions of international law. TWAIL scholarship interrogates how international law's key concepts, such as the "sovereign state" and "sovereign equality", were shaped by Western colonial power and how this power continues to be exercised upon the world through their application. TWAIL is not only a historical investigation that reveals the colonial origins of modern international law. More importantly, it is an account of how international law and institutions reproduce colonial relationships and consequences in the present day. As Gathii explains, "The rules of international law ... create a social and political entity: the post-colonial state..., the rules are constitutive of this entity; and not only, or merely, a reflection of Eurocentricity".¹²²

Although the term "TWAIL" dates from the 1990s¹²³, some legal scholars have long questioned the fairness of international law and sought to make international law more responsive to the interests of Third World states.¹²⁴ According to Anghie and Chimni, the early progenitors of TWAIL produced a scholarship with the following characteristics: (1) it criticised colonial international law for justifying the subjugation and oppression of non-European peoples by Western states; (2) it exhibited that pre-colonial non-Europeans had their own sophisticated understandings of international law, and that post-colonial states have distinctive contributions to make towards a truly international legal system; (3) it had faith in modern international law and institutions, particularly the UN, as vehicles for ushering a just world order through the collective diplomatic initiatives of post-colonial states; (4) it emphasised sovereign equality and non-intervention; and (5) it argued for a

¹²² James Gathii quoted in Madhav Khosla, 'The TWAIL Discourse: The Emergence of a New Phase' (2007) 9 *International Community Law Review* 291-304, 296.

¹²³ James Thuo Gathii, 'TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography' (2011) 3 *Trade, Law and Development* 26-64, 28.

¹²⁴ Anthonie Angie and B.S. Chimni, key proponents of TWAIL, identify some of the progenitors of TWAIL scholarship in George Abi-Saab, F. Garcia Amador, R.P. Anand, Mohamed Bedjaoui and Taslim O. Elias. Antony Anghie and BS Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts' (2003) 2 *Chinese Journal of International Law* 77-103, 79.

New International Economic Order (NIEO) in order to complete the liberation of newly independent states.¹²⁵

TWAIL scholars share with their predecessors the idea of the systematic unfairness of international law rules, but they have gone beyond their predecessors' assumptions. A crucial difference is the theoretical critique of modern international law¹²⁶, according to which colonialism is not seen merely as a historical circumstance external to international law and already overcome through its instrumentality, but rather as central to its formation and thus as carried forward into the present. In *Imperialism, Sovereignty and the Making of International Law*, Antony Anghie rejects the view that modern international law is the attempt to create order among sovereign states. Rather, he views the development of international law and institutions as "generated by problems relating to colonial order".¹²⁷ He argues that what drives international law is a "civilizing mission", a dynamic based on cultural difference ("dynamic of difference"), whereby two cultures are posited as different (on the basis of "civilisation", race, economic development, or predisposition to violence), one being regarded as "universal" and the other as "particular". Doctrines and techniques are then developed in order to "normalise" the aberrant culture and incorporate it into an order based on the "universal" culture's principles and norms. For example, the mandate system of the League of Nations and the trusteeship system of the United Nations were devices that constructed "sovereignty" in states that were regarded as "backward" and not yet capable of membership in international society. Thus, in this example, post-colonial state sovereignty fundamentally differs from Western state sovereignty, because whereas the latter is conceived as already perfected, the former needed to be fabricated through extensive interventions that, moreover, ensured their continued subordination for the foreseeable future. The "endless process of creating a gap between two cultures"¹²⁸ and then seeking to bridge that gap through legal doctrines, techniques, and apparatuses in order to create a single "universal" order, means that international law reproduces the inequalities and violence of the colonial project's "civilizing mission" notwithstanding formal guarantees of state equality.

TWAIL research is therefore more critical of the claim to universalism of international law and institutions, as well as of the possibilities of the post-colonial state,

¹²⁵ *ibid* 80–82.

¹²⁶ *ibid* 82.

¹²⁷ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2007) 6–7.

¹²⁸ *ibid* 4.

than earlier writers. The discourses and institutions of “development”¹²⁹, the use of force and humanitarian law, “good governance” and democratisation,¹³⁰ and human rights promotion¹³¹ stand out as objects of TWAIL criticism because they all imply some kind of “benevolent” intervention in the Third World. Moreover, TWAIL scholars identify less exclusively with the interests and agendas of Third World *states* in international fora and instead pay more attention to Third World *peoples*. This allows them to problematise Third World states’ undemocratic dealings with their own peoples while simultaneously tackling the unequal relationship between the Third World and the West.¹³² It also directs attention to “social movements” as vehicles for the (re)construction of international legal order from below, and a (re)conceptualisation of the making of international law as an interactive process involving not merely governance but resistance.¹³³

What is distinctive about TWAIL’s critique of human rights is the attention to how colonial relations are reproduced in Western human rights practice. In Makau Mutua’s 2001 essay “Savages, Victims and Saviors: The Metaphor of Human Rights”, the practices and techniques of the human rights regime centred on the United Nations, Western governments administering human rights as foreign policy, and international non-government organisations based in the West, are analysed as constituting a “civilizing mission”. Mutua notes that human rights discourse and practice normally target Third World countries for cultural and political change directed from the outside. While no country is free of human rights violations, Third World human rights problems are set out as more urgent or grave than in the West. These problems are more thoroughly documented, identified as characteristic of the cultures of Third World societies, and “corrected” through coercive techniques that essentially rely on the economic and military inequality between the West and the Third World. At the same time, the violations of economic, social and cultural rights that result from global capitalism and the structural inequalities between the West and the Third World are overlooked or ignored. Mutua’s analysis shares with the cultural relativist critique the idea that human rights discourse, as

¹²⁹ Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge University Press 2003); Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge University Press 2011).

¹³⁰ Anghie (n 127).

¹³¹ Upendra Baxi, *Human Rights in a Posthuman World: Critical Essays* (Oxford University Press 2007); Makau Mutua, ‘Savages, Victims, and Saviors: The Metaphor of Human Rights’ (2001) 42 *Harvard International Law Journal* 201-245.

¹³² Anghie and Chimni (n 124) 83 and citations therein.

¹³³ Rajagopal (n 128).

revealed in practice, is code for a particular Western vision of social and political order (viz., Western liberal democracy) dressed up as “universal” standards for all humankind. Human rights culture in the West is the horizon towards which the whole world should be made to converge. The messianic ethos in human rights echoes colonial discourses that justified the colonial project as saving the masses of helpless peoples in faraway lands from the barbarities of their own benighted cultures.

TWAIL’s new focus on “social movements” impacts its investigation of human rights practice. Going beyond critique, TWAIL writers have engaged in sociological or ethnographic studies of the human rights practice of community-based groups in the Third World. These studies emphasise how counter-hegemonic human rights practice selectively uses, reconstitutes and/or recombines human rights concepts with other normative languages or practices to improve Third World peoples’ lives.¹³⁴ TWAIL is rediscovering and giving new meanings to “legal pluralism” and human rights as social movement concepts, or as concepts shaped through people’s struggles.¹³⁵

TWAIL scholars have also focused their critical attention on the “War on Terror”.¹³⁶ The “War on Terror” appears to revise important international legal doctrines, including “self-defense”, on the basis of an encounter with an “other”, viz., the terrorist. This figure is identified with non-Western states and peoples, and therefore fits the argument of a “dynamic of difference” driving international legal change. But unlike TWAIL scholarship on development and human rights, which aimed to reveal how seemingly neutral international institutions and regimes perpetuate colonial order, the object of TWAIL writings on the War on Terror is the agenda of the single superpower state that appears bent on marginalizing international institutions and altering fundamental international law norms.¹³⁷ Anghie summarises the “War on Terror” paradigm in terms of three concepts, namely (1)

¹³⁴ *ibid* (chap 9 on the Working Women’s Forum); Balakrishnan Rajagopal, ‘The Role of Law in Counter-Hegemonic Globalization and Global Legal Pluralism: Lessons from the Narmada Valley Struggle in India’ (2005) 18 *Leiden Journal of International Law* 345-387 (on the Save the Narmada movement in India); Celestine Nyamu-Musembi and Samuel Musyoki, ‘Kenyan Civil Society Perspectives on Rights, Rights-Based Approaches to Development, and Participation’.

¹³⁵ Celestine I Nyamu, ‘How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries’ (2000) 41 *Harvard International Law Journal* 381-418; Celestine Nyamu-Musembi, ‘An Actor-Oriented Approach to Rights in Development’ (2005) 36 *IDS Bulletin* 41-51; see also, Neil Stammers, *Human Rights and Social Movements* (Pluto Press 2009).

¹³⁶ Anghie (n 127) chap. 6; Obiara Chinedu Okafor, ‘Globalism, Memory and 9/11: A Critical Third World Perspective’ in Fleur Johns, Richard Joyce and Sundhya Pahuja (eds), *Events: The Force of International Law* (Taylor & Francis 2010); Makau Mutua, ‘Terrorism and Human Rights: Power, Culture, and Subordination’ (2002) 8 *Buffalo Human Rights Law Review* 1-13.

¹³⁷ Khosla (n 122) 291, 300.

preemptive self-defense; (2) “rogue states”; and (3) democracy promotion to transform “rogue states”.¹³⁸ According to Anghie, the “War on Terror” introduces a new kind of “defensive imperialism”¹³⁹, which employs the language of “self-defense” and “national security”. The “other” is not merely “uncivilised” (as in 18th century International Law) or “underdeveloped” (as in the post-WWII International Law), but also dangerous, terroristic, posing a threat to the national security of the United States and other states.

In this “defensive imperialism”, Anghie explains, the established doctrine of self-defence is not merely radically expanded to allow pre-emptive strikes against terrorists. It also justifies, in tandem with doctrines and principles of human rights, humanitarian intervention and democracy, the neutralisation of states that support or harbour them and the transformation of states that promote certain forms of Islam that are considered dangerous.¹⁴⁰ “Democracy plays a crucial dual role in this process: it liberates the oppressed people of Islamic states and it creates law-abiding societies that would be allies rather than threats to the United States.”¹⁴¹ In constructing these new states and societies, the US essentially makes use of old imperialist techniques that is seen in the trusteeship system and that the US has employed in the Philippines and Puerto Rico to develop these countries’ capacity for “self-government”.¹⁴²

Anghie’s conception has similarities and differences from the mainstream conceptualisation. Like the mainstream, Anghie sees the “War on Terror” as departing from established international law, extending or violating its established principles, and aiming to displace or transform international law. However, unlike the mainstream, Anghie directs attention to the constant neo-colonial logic of international law and sees the new imperialism that the “War on Terror” aims to bring about as continuous with past practices. There is not merely a questioning of the “War on Terror” using established international law as a critical lens, but a simultaneous questioning of international law.

4. Critically Evaluating the Discourse of Human Rights-Compliant Counterterrorism

For liberal scholars, the development of the discourse of human rights-compliant counterterrorism shows that the UN system - particularly, international human rights law and institutions - has been able to resist being distorted by the “War on Terror” agenda of

¹³⁸ Anghie (n 127) 275.

¹³⁹ *ibid* 292.

¹⁴⁰ *ibid* 276.

¹⁴¹ *ibid* 277.

¹⁴² *ibid* 280, 288–289.

the hegemonic state. They present human rights-compliant counterterrorism as the alternative mode of pursuing counterterrorism that every state should support.

These propositions might imply that Anghie's prediction of a new imperialism should be tempered. Anghie himself appeared to have considered that international law and the UN system could resist this tendency. Towards the end of his chapter on the "War on Terror", Anghie remarked: "The crucial question remains, then, of whether international law and the UN system can resist this drive towards a new imperialism even while adapting to the new challenges facing the international community."¹⁴³ True, Anghie already noted that defensive imperialism may adopt a language that includes human rights. For example, he anticipated that the principles of human rights, combined with humanitarian intervention and democracy, could legitimise invasion and continuing intervention in "rogue states" to transform them into acceptable democracies.¹⁴⁴ But as with other TWAIL scholars, the focus of his concern was on how the "War on Terror" is altering international law, in particular, the fundamental norms of sovereignty and non-use of force. TWAIL scholars have so far failed to consider that the "War on Terror" might itself be transforming through its engagement with international law, particularly human rights.

In fact, the rhetoric of war in the context of counterterrorism has been scaled back, so that the very expression "War on Terror" has fallen out of fashion. This was prompted by the end of President George W. Bush's second term in 2009 and the election of President Barack Obama on a platform that included promises of reversing Bush's foreign policies. Already on July 7, 2005, when bombs were detonated aboard subway trains and a bus in Central London, the United Kingdom, a major supporter of the President GW Bush's Coalition of the Willing, avoided characterising the incident as an act of war. The UK's Director of Public Prosecutions denied that Britain was engaged in a "War on Terror", declaring that the attackers were better regarded not as warriors or soldiers but as ordinary criminals.¹⁴⁵ In the US, the term "War on Terror" has fallen out of favour among officials since Obama came to power.¹⁴⁶ In 2013, Obama promised an end to the indefinite mandate for the use of force.¹⁴⁷ However, analysts consider Obama to have continued

¹⁴³ *ibid* 309. It would appear that liberal scholars returned a positive answer to this question.

¹⁴⁴ *ibid* 303.

¹⁴⁵ Clare Dyer, 'There Is No War on Terror' *The Guardian* (24 January 2007).

¹⁴⁶ Scott Wilson and Al Kamen, "'Global War on Terror' is given new name' *The Washington Post* (25 March 2009) <<http://www.washingtonpost.com/wp-dyn/content/article/2009/03/24/AR2009032402818.html>> accessed 27 January 2016.

¹⁴⁷ Peter Bergen, 'Bush's War on Terror Is over - CNN.com' (*CNN*, 26 May 2013) <<http://www.cnn.com/2013/05/24/opinion/bergen-end-of-terror-war/index.html>> accessed 27 January 2016.

Bush's policies though some differences are notable. Klaidman called Obama's approach to counterterrorism a "hybrid" between Bush's war model and a law enforcement model.¹⁴⁸ Ralph emphasised that the US under Obama continued to argue that it was at war or in an armed conflict with terrorists. But he also noted that his 2010 National Security Strategy adopted a more cautious approach towards democracy promotion and a different approach towards international institutions as compared with Bush's.¹⁴⁹ Does international law's engagement with the counterterrorism agenda indicate that the new imperialism that Angie refers to has come to a dead-end, or at least encountered a serious road block? This is an important question to ask as it updates our understanding of the legacy of the "War on Terror" and its meaning for our time.

This thesis draws upon the insights of CTS and TWAIL scholars to construct a theoretical framework for critically evaluating the concept and consequences of human rights-compliant counterterrorism. As CTS scholars have argued, we should question the discourse of terrorism and we should problematise the presentation of state counterterrorism as occupying a different moral plane from sub-state terrorism. Not to do so risks treating human rights abuses by the state as less important than human rights abuses by non-state actors whom states condemn as terrorists. However, the discourse of human rights-compliant counterterrorism posits an alternative model of counterterrorism. The question that arises is whether human rights-compliant counterterrorism is truly an alternative. Even though it arose in resistance to the "War on Terror", the discourse of human rights-compliant counterterrorism may not really avoid the pitfalls of the "War on Terror" rhetoric that CTS scholars have pointed out. Firstly, it perpetuates the use of the label "terrorist", and applies the same only against opponents of the state. It confirms the right of the state to use deadly force against its enemies if needed, but denies the same against the latter. Secondly, it preserves the state's ability to present its violence as a necessary response to terrorism. This is because "counterterrorism" policies and measures are taken at face value, that is, that they are meant to address the threat of terrorism. The original wrong always emanates from terrorists. Counterterrorism is a response to that original wrong, and therefore its motivation is always regarded as beyond question, even though in the pursuit of counterterrorism, wrongs may also be committed.

¹⁴⁸ Daniel Klaidman, *Kill or Capture: The War on Terror and the Soul of the Obama Presidency* (Houghton Mifflin Harcourt 2012) 259.

¹⁴⁹ Ralph (n 2) 16, 19.

Attaching the qualification “human rights-compliant” to “counterterrorism” may appear to limit the state’s choices as to methods that can be legitimately employed in responding to terrorism, directing them to choose those that are human rights-friendly and that do not foment or cause further terrorism. In this manner, states can minimise human rights violations in the pursuit of counterterrorism. Amelioration of abuses in the pursuit of state security may or may not actually result from the state’s adoption of the discourse of human rights-compliant counterterrorism. But, the discourse provides the state added means to present counterterrorism operations as conceptually and causally distinct from terrorist attacks. In this sense, human rights-compliant counterterrorism reinforces rather than challenges the notion of counterterrorism as reactive or secondary to terrorism. It contributes to the entrenchment of the problematic state-centric and dichotomous discourse of terrorism and counterterrorism.

Reflecting on “resistance in the age of empire”, Nesiah lamented that international law and human rights vocabularies of resistance in the post-9/11 period “contribute to the production of legitimacy” for imperialist practices, even as they are deployed “to curb its excesses”.¹⁵⁰ Her analysis of the result of engagement with President GW Bush’s “regime change” policy though international law is instructive.¹⁵¹ Nesiah notes that critics of “regime change” relied on international law principles such as sovereignty and human rights to show that the policy was so blunt, excessive and simplistic that it could lead to greater tragedies. Rather than discounting “regime change” altogether, however, objections coached in the language of international law, “turn back on themselves” and result in the reworking, refinement and perfection of “regime change”.¹⁵² Because “regime change” policy was too indiscriminate, then “regime change” should be clarified in such a way that only truly illegitimate regimes are subjected to it. Reisman, who initially set out to criticise “regime change”, concluded that “regime change” can be reconciled with the principle of sovereignty if it was aimed at regimes “so despotic, violent, and vicious that those suffering under it cannot shake it off” and even if they pose no threat to the US.¹⁵³ If “regime change” doctrine relies too heavily on unilateral action by the lone superpower, then international lawyers ought to develop guidelines regarding its exercise “in

¹⁵⁰ Vasuki Nesiah, ‘Resistance in the Age of Empire: Occupied Discourse Pending Investigation’ (2006) 27 *Third World Quarterly* 903-922, 903.

¹⁵¹ George W Bush, ‘National Security Strategy of the United States of America’.

¹⁵² Nesiah (n 149) 910.

¹⁵³ W Michael Reisman, ‘Why Regime Change Is (Almost Always) a Bad Idea’ (2004) 98 *American Journal of International Law* 516-525, 516.

accordance with the venerable policies of necessity, proportionality, and discrimination”.¹⁵⁴ Starting out as critique of “regime change” as adventurist, the international law objections end up redeeming “regime change”, and allowing invasion and intervention to be packaged as the morally responsible thing to do.¹⁵⁵

The discourse of human rights-compliant counterterrorism is also a case in which a language of human rights was used to resist or temper abusive state practices. It could be critically examined by investigating the trajectory that this resistance or protest makes. At least two trajectories or paths can be conceived, corresponding to two main hypotheses examined in the thesis. In the first case, the discourse of human rights-compliant counterterrorism affords a meaningful resistance to abuses, and it effects a significant transformation in the way counterterrorism is conducted. In the second case, the discourse might signal resistance or protest at abuses but no transformation of state practice is forthcoming. It can then be examined if the lack of transformation is aided in some way by the discourse.

The critical evaluation that I undertake here analyses actual experience in two developing countries, the Philippine and Indonesia. The case studies provide, firstly, a necessary review or re-evaluation of the local counterterrorism discourse in these two countries. When we speak of countering terrorism in the Philippines and Indonesia, including human rights-compliant counterterrorism, we assume that terrorism is an objective phenomenon in these two countries. I investigate the basis of this assumption. How did local counterterrorism discourses develop and what function do these discourses serve? What does the entrenchment of state-centric and dichotomous discourses of terrorism and counterterrorism actually entail in these two countries?

Secondly, the case studies take into consideration the resonance of the discourse of human rights-compliant counterterrorism with local human rights initiatives and views. In the Philippine case study, I explore the possibility that local advocates’ strategies of resisting abuses in the name of counterterrorism may be different from the strategy adopted by international human rights advocates. Local advocates may have resisted the state’s move to depoliticise conflict as much as the violations of individual rights that result from the deployment of the discourse of terrorism.¹⁵⁶ By describing resistance strategies

¹⁵⁴ W Michael Reisman, ‘Assessing Claims to Revise the Laws of War’ (2003) 97 American Journal of International Law 82-90, 90.

¹⁵⁵ Nesiah (n 149) 912.

¹⁵⁶ The distinction here employed between local and international human rights strategies is absent from the analysis of the US examples in Nesiah’s essay. Nesiah (n 149). Nesiah dealt with three

that did not accommodate depoliticisation, the thesis reveals the service rendered by the discourse of human rights-compliant counterterrorism to the state. It also illustrates that accommodation to state-centric terrorism discourses was not the only way by which to resist the “War on Terror”. As the international approach displaces local strategies of this kind, the effect then is increased depoliticisation.

In the Indonesian case study, the contrast I describe is not between local and international but between mainstream and Islamic advocates’ approaches and attitudes towards the local discourse of terrorism. I explore the possibility that criticism of counterterrorism policy only goes to a certain extent because, while Islamic legal advocates reject official counterterrorism policy, it is perceived by mainstream advocates as human rights-compliant. As a result, pressure for reforms to address violations of human rights in the name of counterterrorism may be diffused or blocked. Questioning the announced goal of counterterrorism is simply beyond the pale, and human rights abuses against alleged terrorists are less pressing. This inquiry then illustrates an inoculating effect of the attachment of human rights language to counterterrorism.

Thirdly, the case studies investigate the impact of Philippine and Indonesian counterterrorism or broader security policies that incorporate human rights language. In the Indonesian case, the anti-terrorism law contains provisions expressly requiring the state to comply with human rights obligations while pursuing counterterrorism. In the Philippine case, the policies that articulate human rights-compliant counterterrorism are dispersed in new Supreme Court-issued rules and President Benigno Aquino III’s Internal Peace and Security Plan, among other documents. I examine whether the most serious human rights violations, namely, extrajudicial killings and torture, in the security context have been stemmed in any significant way in these countries. The investigation will therefore show whether the promise of human rights-compliant counterterrorism has materialised or on the contrary a transformation in state practice cannot be realistically expected.

examples of uses of international law and human rights to resist or protest intervention and occupation, namely, the exposure of torture at Abu Ghraib in the US; criticism of/ engagement with “regime change” doctrine also in the US; and invocations of self-determination in contesting Israel’s construction of a wall in the Occupied Territories at the International Court of Justice.

Chapter 2
Philippine Counterterrorism Discourse:
Counterinsurgency and the “War on Terror” in the Philippines

In 2010, the Dutch Ministry of Security and Justice engaged a team of researchers to identify and study “counter-terrorism strategies” in three diverse non-Western countries, viz., Indonesia, Algeria and Saudi Arabia. The researchers immediately confronted difficulties. “Counterterrorism strategies” supposedly aim to prevent or curtail “terrorism”.¹ The UN General Assembly defines “terrorism” as “criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes”.² This definition seems neutral and objective. However, the Dutch research team observed that many countries have counterterrorism strategies that are “highly ideologically charged” and “closely tied up with the interest of the state”.³ The label “terrorist” can be employed against state adversaries and critics with little regard for whether their violent activities are correctly categorised as terrorism defined in more neutral terms. In many instances the violent activities of such actors injure or kill innocent civilians, but the main target is the state. “[T]he state will then define itself as the defender of the general welfare, smearing all opponents with the brush of terrorism.”⁴ In such cases, the strategies that are developed to combat terrorism are bound up with local understandings of terrorism.

Indeed, just as terrorism is defined differently in different contexts, “counterterrorism” is pursued and promoted in a wide variety of ways. We must, therefore, begin our investigation into “human rights violations in the context of counterterrorism” by seeking to understand the local meaning of “counterterrorism”.

¹ In the European Union’s so-called 3PR model, “counterterrorism strategies” are classified as aiming to “prevent (individuals from turning to terrorism), protect (citizens and infrastructure by reducing vulnerability to attack), pursue (investigate terrorists and disrupt support networks) and respond (manage and minimize the consequences of an attack)” to “terrorism”. Roel Meijer, ‘Introduction’ in Roel Meijer (ed), *Counter Terrorism Strategies in Indonesia, Algeria and Saudi Arabia* (Netherlands Institute of International Relations ‘Clingendael’ 2012) 4 <http://english.wodc.nl/images/1806-volledige-tekst_tcm45-435986.pdf> accessed 4 June 2014.

² UNGA Res 49/60 ‘Measures to eliminate international terrorism’ (9 December 1994) UN Doc A/RES/49/60, para 3.

³ Meijer (n 1) 7.

⁴ *ibid.*

In this chapter, I argue that counterterrorism in the Philippines cannot be understood without reference to counterinsurgency, as counterterrorism renews pre-existing and well-established counterinsurgency. Rather than representing a reaction to terrorism, Philippine counterterrorism developed in response to material and political opportunities offered by international partnership with the United States in its global “War on Terror”. McCoy observes, “President Arroyo was the first Asian leader to enlist in America’s Coalition of the Willing and Washington reciprocated by making the Philippines its ‘second front’ in the global war on terror”.⁵ In a sense, counterterrorism therefore preceded terrorism, meaning that terrorists were not merely discovered or exposed but had to be created. This chapter describes how this was accomplished. At first, a small bandit group conveniently styled as “terrorists” served to justify counterterrorism operations with US troop involvement in the southwestern region of Mindanao. As Jetschke notes, the success of this experiment led the Philippine government to reframe old foes of the state, the Moro and communist “insurgents”, as “terrorists” as well in the hope of boosting its efforts to achieve decisive military victory over them.⁶ Philippine counterinsurgency operations thus received a shot in the arm from the US response to 9/11. And as a result, human rights violations previously associated with counterinsurgency have also intensified. A clear case in point is the rise of extrajudicial executions in the Philippines from 2001-2006. Human rights organisations have carefully documented this phenomenon, which coincide with the Philippine government’s response to then US President George W. Bush’s call for a global “War on Terror”.

If the government’s deployment of the terrorism frame against the MILF and the CPP-NPA has no compelling justification, then the resulting human rights violations cannot be said to be only unfortunate excesses or mistakes traceable to the idiosyncrasies of particular officials. Within the discourse of human rights-compliant counterterrorism, advocates caution the state against responding in an unprincipled manner, but take for granted that the threat of terrorism exists. It assumes that counterterrorism policy is only a response to terrorism. However, deploying the terrorism frame may be a strategic move on the part of the state because it opens channels to resources against adversaries. It also prevents further scrutiny of the causes and dynamics of the conflict. Once the state’s

⁵ Alfred W McCoy, *Policing America’s Empire: The United States, the Philippines, and the Rise of the Surveillance State* (Ateneo de Manila University Press 2011) 499.

⁶ Anja Jetschke, *Human Rights and State Security: Indonesia and the Philippines* (University of Pennsylvania Press 2011) 232–233.

ability to present its violence as counterterrorism is confirmed, possibilities of addressing human rights violation will already have been hindered.

The argument in the chapter proceeds as follows. First, I present the wave of extrajudicial killings targeting left-wing activists that swept the Philippines after 2001 under the administration of President Gloria Macapagal-Arroyo. This wave of killings is a compelling example of the violations that followed counterinsurgency policy “innovations”⁷ or “renewed counterinsurgency operations”⁸. These violations took place in the period when the Philippines participated in the US-led “War on Terror”. The rest of the chapter is devoted to showing that the renewal of counterinsurgency in this period was not coincidental.

In the second section, I examine the impact of the Philippine participation in the “War on Terror” on counterinsurgency practices, first against the MILF, then against the CPP-NPA. Hence, I trace the development of counterterrorism in the Philippines, particularly the reframing of the state’s conflict with “insurgents” in terms of “terrorism” and “counterterrorism”. In this exercise, I closely follow and revise the useful account made by Anja Jetschke of a “gradual expansion of counter-terrorism policies to legal political organizations”.⁹ Like Jetschke’s account, I explore the role of the Abu Sayyaf, the initial and main excuse for introducing the discourse of “terrorism”/ “counterterrorism” to the Philippines. Described as a “convenient enigma” because of its obscure origins and continuing utility for the counterterrorism project, the Abu Sayyaf, unlike the “insurgent” Moro and communist-led national democratic movements, is a small group engaged primarily in profitable crimes. The MILF has been accused of terrorism due to its links with the Abu Sayyaf and other similar gangs. But the Abu Sayyaf barely rates a mention in the reframing of the CPP-NPA as a “communist terrorist” movement. This renders the terrorist tagging of the CPP-NPA as needing explanation. In this regard, I contend that the reframing of the communists from “insurgents” to “terrorists” was even less plausible than accusations of terrorism against the MILF. Jetschke emphasised that in convincing others that the CPP-NPA were “terrorists”, the government relied on “confirming events”, that is, violent acts of the CPP-NPA such as the assassination of former comrades that confirmed the government’s narrative. In contrast to Jetschke’s account, I emphasise the importance

⁷ Philip Alston, ‘Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Addendum, Mission to the Philippines’ (2008) UN Doc A/HRC/8/3/Add.2 11.

⁸ Amnesty International, ‘Philippines: Political Killings, Human Rights and the Peace Process’ (2006) 28.

⁹ Jetschke (n 6) 233.

and persistence of Cold War legacies in explaining the reframing of the communist movement in terms of terrorism.

Thus, I present the extension of the government's counterterrorism policy from the Abu Sayyaf to the MILF and then the CPP-NPA as less and less plausible. Therefore, the chapter shows that there is no compelling justification for Philippine counterterrorism policy that developed during the Arroyo administration. This puts some of the most serious human rights violations of this period in proper perspective, as arising from decisions to deploy the terrorism frame against adversaries.

1. Extrajudicial Killings of Leftist Activists 2001-2006

On April 16, 2008, Philip Alston, the United Nations special rapporteur on extrajudicial, summary and arbitrary executions issued a report on extrajudicial killings in the Philippines. Within the five-year period that the report covered, local human rights organisations recorded over 800 cases of killings of members of mass-based organisations including workers' unions, peasant organisations, political parties of marginalised sectors (called party list groups) and other groups which belong to the Left of the political spectrum.¹⁰ As the killings intensified, the phenomenon attracted the attention initially of

¹⁰ In assessing the scale of the extrajudicial killings of leftist activists in this period, Amnesty International and Alston referred to and analysed a variety of sources. The local human rights organisation Karapatan had the longest list of victims (783 names as of 14 November 2006). Another local human rights organisation Task Force Detainees of the Philippines (TFDP) also maintained its own list of victims – 89 names as of 20 December 2006, 46 of which coincided with that of Karapatan. Alston (n 7) 30. Karapatan's and TFDP's lists are not contradictory but rather reflect the respective organisation's focus on different geographical areas and mass organisations. Karapatan and TFDP are associated with (now) rival networks of left-wing organisations which have a shared history. In the Karapatan list, where indicated, the political or organisational affiliation of victims is with any of the member organisations of the *Bagong Alyansang Makabayan* (BAYAN, New Patriotic Alliance). *ibid* 29. On the other hand, victims from *Kilusang para sa Pambansang Demokrasya* (KPD, Movement for National Democracy), a rival network to BAYAN, figure in TFDP's list. Amnesty International (n 8) 14. Hence, where they don't overlap, Karapatan's and TFDP's numbers must be added together.

The government acknowledged 122 killings as of May 2006 when it announced the creation of Task Force Usig, a body tasked to investigate the killings. *ibid* 18. The government's list makes use of apparently more limited set of criteria ("slain party list members/militants") which hasn't been made transparent. According to Alston, a huge chunk of Karapatan's list (461 names out of 783 names in the Karapatan list as of 14 November 2006) were considered by Task Force Usig as falling outside of their remit or not involving a crime, i.e., considered by them as having "died in legitimate encounters between the NPA and the AFP and PNP", while it was still then considering whether to acknowledge some 200 names in Karapatan's list.

local and national groups,¹¹ which then alerted international observers. A number of international fact-finding missions conducted in various parts of the country confirmed the reports by local organisations, making it harder for the government to deny that there was a strategy of extrajudicial killings.¹² By 2006, Amnesty International took up the issue of “political killings” in the Philippines, and in February 2007, following some controversy, Philip Alston visited the Philippines to conduct his investigations.

The killings were particularly alarming because unarmed civilians engaged in parliamentary struggle or open democratic politics were evidently “carefully selected and intentionally targeted”.¹³ As Alston put it, not only did the killings eliminate hundreds, they also “intimidated a vast number of civil society actors, and narrowed the country’s political discourse”,¹⁴ thus seriously curtailing Philippine democracy. “The aim has been to intimidate a much larger number of civil society actors, many of whom have, as a result, been placed on notice that the same fate awaits them if they continue their activism.”¹⁵

1.1. Departure from acknowledgment of distinction between legal and illegal leftist organisations

In explaining the killings, both Amnesty International and Alston underscore the government’s departure from an acknowledgement of a distinction between legal and illegal organisations and forms of struggle. The Philippine government, through its Armed

¹¹ Besides Karapatan and TFDP, the Philippines’ Commission on Human Rights (CHR), the Integrated Bar of the Philippines (IBP) and the Catholic Bishops’ Conference of the Philippines have expressed concerns about the killings. Amnesty International (n 8) 1.

¹² These included fact-finding missions by the Dutch Lawyers for Lawyers Foundation; the World Council of Churches (WCC) and the Christian Conference of Asia (CCA); Human Rights Now (Japan); the Philippines-Canada Task Force on Human Rights; a delegation of peasants and right to food campaigning organisations including La Via Campesina; and a Hong Kong-based campaign participated in by the Asian Human Rights Commission (AHRC) and the Hong Kong Bar Association. Dutch Lawyers for Lawyers Foundation, ‘Facts to Action: Report on the Attacks against Filipino Lawyers and Judges’ (2006); Pastoral Ecumenical Delegation to the Philippines, ‘Report of the Pastoral Ecumenical Delegation Visit to Eastern Visayas, July 15 to 18, 2005’ (20 July 2005); Fact Finding Mission of Human Rights Now to Philippines, ‘Report on Extrajudicial Killings and Enforced Disappearances in the Philippines’ (Human Rights Now 2008); Hong Kong Mission for Human Rights and Peace in the Philippines, July 23-28, 2006, ‘Mission Report on Extrajudicial Killings and Other Human Rights Abuses in the Philippines’ (2006); International Fact-Finding Mission, ‘Running Amok: Landlord Lawlessness and Impunity in the Philippines. Final Report of the 2-15 June 2006 International Fact-Finding Mission on Agrarian Reform Related Violations of Human Rights in the Philippines’ (2006); David Gibson, ‘Report on Attacks against Advocates in the Philippines’ (Lawyers’ Rights Watch Canada 2006).

¹³ Alston (n 7) 6.

¹⁴ *ibid.*

¹⁵ *ibid.*

Forces of the Philippines (AFP) and Philippine National Police (PNP), has been battling the Communist Party of the Philippines/New People's Army/National Democratic Front (CPP/NPA/NDF), an underground movement waging a guerrilla war under the banner of "national democracy", since the 1970s. Prior to 2001, the Philippine government instituted policies that created political space within the state for left-wing activist organisations sharing the "national democratic" ideology and program of reforms of the National Democratic Front (NDF) led by the Communist Party of the Philippines (CPP). On September 22, 1992, in an effort to revive negotiations for a peaceful settlement of armed conflict with the CPP-NPA and in keeping with an announced policy of "national reconciliation" under President Fidel Ramos (1992-98), Congress repealed the Anti-Subversion Act which previously made membership in the CPP illegal.¹⁶ In 1995, the Party List System Act was enacted implementing the provisions of the 1987 Constitution that 20 percent of the seats of the House of Representatives be allocated to representatives of marginalised sectors such as labour, peasant, urban poor, indigenous cultural communities, women, and the youth.¹⁷ These moves were intended to attract participation by leftist critics of government in parliamentary struggle and open democratic politics and away from armed struggle.¹⁸ This period also coincided with a dramatic decline in casualties related to counterinsurgency operations against the New People's Army,¹⁹ although human rights violations in the form of torture, disappearances and extrajudicial executions were still observed in militarised zones.²⁰

By 2001, the government's position on these state policies appeared to change, as a new emphasis on counterinsurgency gained ascendancy. Instead of encouraging the participation of left-wing organisations in parliamentary struggle and open democratic

¹⁶ Republic Act No. 1700 (Anti-Subversion Act); Republic Act No. 7636 (repealing the Anti-Subversion Act).

¹⁷ Republic Act No. 7941 (Party-List System Act).

¹⁸ The party list organisation Akbayan Citizens' Action Party, an umbrella coalition involving prominent former CPP and NDF leaders that rejected the leadership of CPP founder Jose Maria Sison, joined in the 1998 elections. By 2001, *Bayan Muna* (Country First), the first party-list organisation supported by "national democratic" BAYAN member organisations, joined as well, winning three seats, the maximum allowed to a party list group under the law. Over time, national democrats formed seven more party list groups representing organisations of workers, peasants, women, teachers, youth, migrant workers, and Moro people respectively.

¹⁹ According to the Human Development Network's "Philippine Human Development Report 2005", the number of combatants killed in armed encounters from 1986-2004 (by administration) were as follows: "President Corazon Aquino (1986-92) AFP – 735, NPA – 828; President Fidel Ramos (1992-98) AFP – 2, NPA – 2; President Joseph Estrada (1999-2001) AFP – 130; NPA – 90; and President Gloria Arroyo (2001- [2005]) AFP – 494, NPA – 484." Cited in Amnesty International (n 8) 16, n 68.

²⁰ *ibid* 6.

politics, the government rejected them as illegitimate. It publicly identified these organisations as “fronts” of the New People’s Army, the “political infrastructure” of the insurgency in the countryside, hence “enemies of the state”, and “legitimate targets” for “neutralisation”.²¹ From the viewpoint of counterinsurgency strategy, no line separated legal, above-ground organisations from armed, underground groups challenging the government. While not announced as formal policy in the form of statute, this policy shift against the legal Left can be discerned from documents of the Armed Forces of the Philippines²² and public pronouncements of military commanders and high-level civilian officials. A 2005 AFP treatise characterised the CPP/NPA/NDF’s armed struggle and left-wing groups’ parliamentary struggle as “complementary, interrelated and interactive”²³ and called for a counterinsurgency response that took this into account. Major General Jovito Palparan, the most vociferous of the military commanders, for example, described *Bayan Muna* as an “NPA front”, Karapatan and the women’s group Gabriela as “NPA recruiters”, and certain non-governmental organisations as “infiltrated and controlled by the CPP” and providing materials and shelter to the NPA.²⁴ In March 2006, echoing pronouncements by military commanders, National Security Adviser Norberto Gonzales declared a crackdown on “communist fronts” aiming at the destruction of the CPP-NPA by 2010. In her June 24, 2006 State of the Nation Address, President Gloria Macapagal-Arroyo herself applauded the efforts of the controversial Major General Palparan.²⁵

²¹ Amnesty International called this state of affairs the “resurgence of ‘red-labelling’”, referring to a counterinsurgency practice already blamed for human rights violations in the Ferdinand Marcos and Corazon Aquino presidencies from the 1970s to the 1990s. *ibid* 19.

²² The AFP documents cited by both AI and Alston were the *Trinity of War – Book III: The Grand Design of the CPP/NPA/NDF* (Northern Luzon Command, AFP, 2005) and *Knowing the Enemy: Are we missing the point?* (2005), a PowerPoint-based briefing presentation given by the AFP. In both documents, BAYAN member organisations were characterised as controlled by the corresponding member organisations of the underground National Democratic Front (NDF) or the CPP Central Committee. In addition, the AFP also draws up lists of names called “order of battle”, discussed further below.

²³ Amnesty International (n 8) 20 citing *Trinity of War – Book III: The Grand Design of the CPP/NPA/NDF*, Northern Luzon Command, AFP, 2005.

²⁴ *ibid* 20–21.

²⁵ Gloria Macapagal-Arroyo, ‘Sixth State of the Nation Address’ para 49

<<http://www.gov.ph/2006/07/24/gloria-macapagal-arroyo-sixth-state-of-the-nation-address-july-24-2006/>> accessed 25 January 2016.

1.2. Civil society-focused counterinsurgency operations

Alston argued that the Arroyo government's counterinsurgency strategy focused on civil society, and this accounted for extrajudicial killings. "[A] counterinsurgency focus on civil society leads to extrajudicial killings and tempts commanders to make such abuses routine and systematic".²⁶ A discussion of the "order of battle", an important counterinsurgency tool that lists leaders and members of civil society organisations targeted for "neutralisation", bears out this claim.

An "order of battle" is essentially a military intelligence document. It compiles names of individuals believed to be NPA fighters and the organisations and individual members actively supporting rebels as the "fronts" of the CPP-NPA in specific localities. It is meant to guide the work of military units, and also the police, in counterinsurgency.²⁷ Alston noted that in Central Luzon, the preparation of these lists typically involve the military establishing their presence in the *barangay*²⁸ or village. Soldiers would conduct door-to-door census for the purpose of identifying members of civil society and former or suspected NPA fighters. Sometimes the villagers would volunteer names to the military, but often, soldiers would use torture against those who were uncooperative, particularly those who were named by others.²⁹

When an "order of battle" is prepared, the military undertakes a campaign of vilification against the groups and individuals listed therein. The military will hold a *barangay* assembly called "Know Your Enemies" seminar and will make known therein the identities of those who are listed in the "order of battle". Military spokespersons will tell villagers that listed individuals should "surrender" to the military, or else grim consequences await them.³⁰ In the provinces of Tarlac and Bohol and parts of the Southern Tagalog region, posters or leaflets branding them as "communist terrorists" will be publicly displayed or disseminated if they refuse surrendering. Soldiers or paramilitary auxiliaries

²⁶ Alston (n 7) 10.

²⁷ An "order of battle" list that Alston has seen consisted of 110 pages and lists hundreds of groups and individuals. It is co-signed by senior military and police officials with a directive to "all members of the intelligence community ... to adopt and be guided by this update to enhance a more comprehensive and concerted effort against the CPP/NPA/NDF". *ibid* 9. The "order of battle" also ranks enemies according to their importance. Dutch Lawyers for Lawyers Foundation (n 12) 18.

²⁸ The *barangay* is the term for the smallest political-administrative unit in the Philippines.

²⁹ Alston (n 7) 11.

³⁰ *ibid*.

will put their houses under surveillance, and if the person flees the village, the house may be burned. Finally, individuals will begin to get abducted and killed.³¹

Many civil society leaders and active members, including lawyers, human rights workers and church people who were killed, were warned to stop working for their legal organisations, or from pursuing their activities, or risk their lives. Lawyer Juvy Magsino, for example, was told to stop working for Karapatan and from joining its fact-finding missions; while Expedito and Manuela Albarillo were told to stop campaigning for the party list *Bayan Muna*.³² The threats were sent through cell phone messages and calls, letters and parcels (for example, flowers for a funeral), or by being stalked by anonymous motorcycle-riding men.³³ The military will also sometimes use the local media, including local television, to make known that the person was subjected to surveillance.³⁴

A common feature of these extrajudicial killings is the use of anonymous assailants or death squads which result in official deniability. Amnesty International reports that the “predominant method of attack” is “shootings by unidentified assailants, mostly riding tandem on a motorcycle, who often obscure their identity with ‘bonnet’ face masks or helmets”.³⁵ Sometimes, the assailants are supported by other men riding in unmarked vehicles.³⁶ Thus, the actual killers will not proclaim their identities as military or auxiliary (paramilitary) forces, providing the military plausible deniability concerning responsibility for the killings or links to the killers.³⁷ While the identities of the assailants are hidden, the act of killing itself often would be put on display, consistent with the goal of communicating the message that grim consequences attend not “surrendering”. In fact, the killers in these cases will “strick[e] in broad daylight in public places”.³⁸

³¹ *ibid.* In the case of lawyer Pergentino Deri-On, his two cars were burned. Dutch Lawyers for Lawyers Foundation (n 12) 23.

³² Dutch Lawyers for Lawyers Foundation (n 12) 23; Fact Finding Mission of Human Rights Now to Philippines (n 12) 22–23.

³³ Dutch Lawyers for Lawyers Foundation (n 12) 23.

³⁴ *ibid* (case of lawyer Juvy Magsino).

³⁵ Amnesty International (n 8) 22.

³⁶ *ibid.*

³⁷ Alston declared that “[t]he military is in a state of denial” proffering to explain the killings through a communist internal purge theory which he found “strikingly unconvincing”. Alston (n 7) 2.

³⁸ Amnesty International (n 8) 22. “Given the ‘visibility’ of the killings, the killers seem to be very self-confident in getting away with it.” Dutch Lawyers for Lawyers Foundation (n 12) 24. Assailants escape unimpeded, even though there may have been police or military checkpoints or camps nearby or on the escape route. In the case of Juvy Magsino, she was killed only 500 meters away from a military camp. National Council of Churches in the Philippines, ‘Let the Stones Cry out: An Ecumenical Report on Human Rights in the Philippines a Call for Action’ (2007) 32.

Therefore, the killings are essentially only the culmination of concerted efforts to terrorise legal organisations and activists from functioning in the localities subject of these counterinsurgency operation. The fear generated would cause threatened individuals to “surrender” or go in hiding and targeted local organisations to close shop.³⁹ The military would only leave *barangays* which have been “cleared” of leftist activists, for other *barangays*. But this also only after the military has organised from among villagers listening posts, often armed, called Barangay Defense System (BDS) in Central Luzon, to “hold” the barangay for them. This includes regularly informing the military about the entry of strangers or visitors.⁴⁰

Hence, in this manner, extrajudicial killings of leftist activists and other forms of human rights violations such as torture and destruction of property are framed as part and parcel of military operations designed to counter armed rebels.

2. The Development of Philippine Counterterrorism and its Interface with Counterinsurgency

Why has counterinsurgency assumed ascendancy in the period 2001-2006, leading to the bloody consequences described above? The answer lies in the US’ “War on Terror”, the new norms of counterterrorism and the opportunities these have created for a renewal of counterinsurgency. Philippine participation in the US’ “War on Terror” started with the military campaign against the Abu Sayyaf group in southwestern Mindanao immediately after 9/11. But Philippine counterterrorism has since expanded to overlap with counterinsurgency against more established armed movements, namely the Moro and communist-led national democratic movements. Indeed, the Philippine government responded to opportunities offered by global counterterrorism by overlaying counterterrorism rhetoric on top of pre-existing counterinsurgency practices. Counterterrorism has thus provided a valuable vehicle for achieving the government’s counterinsurgency objectives.

³⁹ Alston (n 7) 11; Dutch Lawyers for Lawyers Foundation (n 12) 23.

⁴⁰ Alston (n 7) 11–12.

2.1. Jetschke: gradual expansion of counterterrorism policy

In this regard, Jetschke offers a succinct argument that is useful as a starting point. According to Jetschke, Philippine counterterrorism policy gradually expanded from the Abu Sayyaf, a tiny bandit group, to cover the government's protracted armed conflicts with the MILF and CPP-NPA, and eventually legal political organisations. In 1999, the Estrada administration used international norms against terrorism to categorise the Abu Sayyaf group as a terrorist organisation. This move allowed Estrada to access military equipment and expertise from the US to neutralise the Abu Sayyaf. The experience with the Abu Sayyaf encouraged the expansion of the government's counterterrorism policy:

The very initial success of the political strategy used to recategorize military operations against this group [Abu Sayyaf] then encouraged the government to extend the same strategy to other organizations, like the MILF and the Communist Party of the Philippines (CPP).⁴¹

In her book, *Human Rights and State Security: Indonesia and the Philippines*,⁴² Jetschke argues that the state's ability to successfully invoke international norms pertaining to state security is important in accounting for the persistence of massive human rights violations. Even as transnational campaigns draw international and domestic attention to a state's human rights violations in a process of "social sanctioning", states are "not helpless recipients of pressure based on norms". Instead, they are themselves capable of persuasively convincing audiences and deflecting responsibility for human rights violations by "invoking state security and by connecting this to internationally accepted standards".⁴³ Both transnational human rights campaigns and states invoking state security norms target external audiences such as other states, international organisations and the public opinion in other countries. These external audiences are crucial because their perception of the situation (whether the human rights violations are unjustifiable or represent unfortunate but necessary actions to defend the state) influences future state behaviour. In turn, events that tend to confirm or negate one or the other way of framing the situation are crucial because they influence the perception of external audiences.

⁴¹ Jetschke (n 6) 233.

⁴² Jetschke (n 6). Chapter 8 of this book is devoted to the link between counterterrorism and human rights violations in the Philippines in the period from 1999-2008.

⁴³ *ibid* 4.

In Jetschke's view, the patterns of human rights violations that took place in the Philippines in the period 1999-2008 (including, in particular, the extrajudicial killings) were facilitated by the new counterterrorism norms of this period.⁴⁴ She argues that the Philippine government skilfully used these counterterrorism norms in constructing a domestic discourse on terrorism that framed its adversaries as terrorists or linked to terrorism.⁴⁵ Aided by "confirming events", the Philippine government successfully convinced the United States and other Western governments to extend it material and diplomatic support against its adversaries.⁴⁶ Their supportive judgment, in turn, make it possible for human rights violations to continue.⁴⁷

In what follows, I examine the Philippine government's deployment of counterterrorism rhetoric against the Abu Sayyaf, the MILF and the NPA after 9/11. Jetschke has emphasised the (at least temporary) fit between "international counter-terrorism norms", on the one hand, and the government's actions against these organisations, on the other hand. She has also pointed to "confirming events" that tended to convince external audiences to agree with the government's characterisation of these organisations as terrorists, and to successfully deflect human rights pressures. As I argue below, however, her account needs to be revised as it unrealistically reduces all external actors to the role of "audience" and overplays "confirming events". The lack of correspondence between the counterterrorism frame and facts are greater than is recognised in her account, and some external actors, particularly the United States have played a more active role in the events than would a member of the "audience".

2.2. The Abu Sayyaf group

Jetschke follows most scholars in tracing the beginnings of Philippine counterterrorism to the government's response to a small⁴⁸ and enigmatic group called the

⁴⁴ *ibid* 232–233.

⁴⁵ *ibid* 233.

⁴⁶ *ibid* 234.

⁴⁷ *ibid*.

⁴⁸ According to background information on the group contained in the Statement of Reasons prepared by Australia's Department of the Attorney General for the purpose of the re-listing of the Abu Sayyaf as a terrorist organisation in 2013, the Abu Sayyaf's number is approximately 400. Australian National Security, 'Abu Sayyaf Group'

<<http://www.nationalsecurity.gov.au/Listedterroristorganisations/Pages/AbuSayyafGroup.aspx>> accessed 26 January 2016.

Abu Sayyaf based in southern Philippines.⁴⁹ The Abu Sayyaf group became prominent nationally in the 1990s when it was believed to have engaged in kidnappings and bombings, some of them quite sensational.⁵⁰ Early observers of the Abu Sayyaf, relying on interviews with the group's founder Abdurajak Abubakar Janjalani and his small body of writings, pointed out that the Abu Sayyaf had an ideology or political agenda based on "radical Islam" or "jihadism".⁵¹ While miniscule in size compared to the two established Moro armed groups MNLF and MILF, the Abu Sayyaf's emergence and spectacular violence provided the Philippine government with a basis to argue that Islamic terrorism with global connections threatened southwestern Mindanao.

In 2000, the Abu Sayyaf became internationally notorious after it launched kidnappings of European and Middle Eastern tourists and Malaysian staff in the resort island of Sipadan in Sabah, Malaysia who were taken across the border to the group's hideouts in Sulu, southern Philippines.⁵² In May 2001, the Abu Sayyaf's Dos Palmas kidnappings yielded three American victims, namely, the couple Gracia and Martin Burnham, as well as Guillermo Sobero, the last of whom was beheaded. According to

⁴⁹ Marites Danguilan Vitug and Glenda M Gloria, *Under the Crescent Moon: Rebellion in Mindanao* (Ateneo Center for Social Policy and Institute for Popular Democracy 2000) 211, 219–220 (on the origins of the Abu Sayyaf); Soliman M Santos and Octavio A Dinampo, 'Abu Sayyaf Reloaded: Rebels, Agents, Bandits, Terrorists (Case Study)' in Diana Rodriguez (ed), *Primed and Purposeful: Armed Groups and Human Security Efforts in the Philippines* (South-South Network for Non-State Armed Group Engagement and the Small Arms Survey 2010) 115–138; Charles O Frake, 'Abu Sayyaf: Displays of Violence and the Proliferation of Contested Identities among Philippine Muslims' (2008) 100 *American Anthropologist* 41–54; Mark Turner, 'Terrorism and Secession in the Southern Philippines: The Rise of the Abu Sayyaf' (1995) 17 *Contemporary Southeast Asia* 1–19.

⁵⁰ For example, in 1993 the burning of the provincial capitol of Basilan was blamed by national media on a "terrorist attack" by the Abu Sayyaf, although local realities suggested otherwise. See, Kit Collier, "'A Carnival of Crime': The Enigma of the Abu Sayyaf" in Patricio N Abinales and Nathan Gilbert Quimpo (eds), *The US and the War on Terror in the Philippines* (Anvil Publishing 2008) 157f. The Abu Sayyaf was also blamed for the sensational April 4, 1995 sacking of Ipil town in western Mindanao.

⁵¹ A Muslim cleric educated in Saudi Arabia, Janjalani also claimed credential as a former mujahid in the Afghan war against Soviet occupation. (He is supposed to have named the Abu Sayyaf group after a legendary Afghan mujahid Abdul Rasul Sayyaf). However, scholar Julkipli Wadi disputes Janjalani's Afghan war experience, having found no evidence of this claimed credential. Santos and Dinampo (n 49) 117. A leader of Abu Sayyaf, Abu Juhad justified kidnapping as "part of the revolution" or a form of jihad. Nathan Gilbert Quimpo, 'Dealing with the MILF and Abu Sayyaf: Who's Afraid of an Islamic State?' (1999) 3 *Public Policy* 38–62, 50. Applying a religious gloss on kidnappings, Abu Sayyaf leader Khadaffy Janjalani is also supposed to have said: "Philosophically, if it is allowed to kill the enemy, why not allow to just kidnap him? Religiously, no less than the Prophet of Islam gave the order to kidnap or seize the caravan of Abu Suffian." Santos and Dinampo (n 49) 128.

⁵² Thomas Fuller, '20 Kidnapped From Malaysian Resort Island' *New York Times* (25 April 2000) <http://www.nytimes.com/2000/04/25/news/25iht-malay.2.t_3.html> accessed 4 January 2016; Terry McCarthy, 'An Invasion of Paradise' [2000] *Time* <<http://content.time.com/time/magazine/article/0,9171,996834,00.html>> accessed 4 January 2016.

Abuza, this kidnapping incident, coupled with allegations that the Abu Sayyaf was linked to al Qaeda, provided “the *casus belli* for the U.S. military to reengage in the Philippines following the September 11, 2001 attacks by al Qaeda”.⁵³

By 2001, when US President Bush announced to the world that he would pursue terrorists wherever they might be found, the existence and operation of the Abu Sayyaf in the southern Philippines presented an opportunity for US-Philippine alliance on counterterrorism. The Abu Sayyaf was used as a justification for making the area the “second front” of the “War on Terror”.⁵⁴ Some 600 US forces were deployed to southwestern Mindanao in “joint military exercises” with Philippine troops in January 15, 2002, for the express purpose of aiding the Philippine government to rout out the Abu Sayyaf in Basilan.⁵⁵ Apart from US troops in “joint military exercises”, whose numbers are sometimes publicly disclosed at the launch of such exercises, undisclosed numbers of US Special Operations Forces (SOFs) have also been deployed, believed to have ranged from 160 to 350 at any given time since 2002.⁵⁶ The US government has called this campaign “Operation Enduring Freedom-Philippines”, a name that alludes to the US and NATO military occupation in Afghanistan, which began in October 2001.

2.2.1. Implausibility of “terrorist” frame as applied to the Abu Sayyaf

While it is undeniable that the Abu Sayyaf has committed horrendous acts of violence, its representation as a “terrorist threat” can be challenged from a local

⁵³ Zachary Abuza, *Balik-Terrorism: The Return of the Abu Sayyaf* (DIANE Publishing 2005) vii.

⁵⁴ Walden Bello, ‘A “Second Front” in the Philippines’ *The Nation* (18 March 2002) 18 <<http://www.tni.org/article/second-front-philippines>> accessed 23 October 2013.

⁵⁵ George Radics, ‘Terrorism in Southeast Asia: Balikatan Exercises in the Philippines and the US “War against Terrorism”’ (2004) 4 *Stanford Journal of East Asian Affairs* 115-127, 116; Herbert Docena, ‘Unconventional Warfare: Are US Special Forces Engaged in an “Offensive War” in the Philippines?’ in Patricio N Abinales and Nathan Gilbert Quimpo (eds), *The US and the War on Terror in the Philippines* (Anvil Publishing 2008) 46–83. The number of US troops rose “from the initial limit of 600 to over 2,500, the largest deployment of military personnel ever sent to the tiny island of Basilan”. Roland Simbulan quoted in Radics 117.

⁵⁶ Docena (n 55) 49–51. Because of constitutional restrictions on foreign military bases, troops and facilities on Philippine soil, US troops involvement in the military campaign against the Abu Sayyaf needed to be packaged as “joint military exercises” and “advise and training” instead of actual combat. However, evidence from US military personnel themselves who have deployed to the area as well as local witnesses show that US troop activities go beyond “advise and training” to at the very least providing aerial surveillance, defusing landmines, recovering casualties, and accompanying Philippine troops in ground action.

perspective.⁵⁷ The Abu Sayyaf has been depicted as a well-defined organisation⁵⁸ with a political agenda⁵⁹ anchored on an interpretation of Islamic beliefs, almost solely on the basis of official and military sources that have seldom and only recently been subjected to scrutiny. These sources have furthermore alleged that the group has “links” to the organisations Jemaah Islamiya (JI) and al Qaeda.⁶⁰ However, as Ugarte⁶¹ shows using key informants on the ground as well as written accounts of rescued victims of kidnappings, the Abu Sayyaf is less a sophisticated organisation capable of singlehandedly pulling off operations, than it is a fearsome label.

In his incisive investigation of the phenomenon of kidnappings in southern Mindanao, Ugarte claims that the kidnappings in the zone, which are routinely attributed to the Abu Sayyaf in the national media are in fact perpetrated by numerous groups, acting in cooperation with each other.⁶² Kidnapping operations in the zone thus constitute a much more complex phenomenon than is supposed. Besides the Abu Sayyaf, politicians, “kidnap-for-ransom-syndicates”, military men, as well as members of the MNLF and MILF, have been involved in heterogeneous alliances created to raise money from a kidnapping.⁶³ Hence, smaller gangs of three to four kidnappers will bring their victims to other bands of 30 to 40 men, such as the Abu Sayyaf or a rebel contingent, in order to receive immediate cash and relieve themselves of the costly responsibility of keeping the victims. To make a profit, the Abu Sayyaf will then negotiate for a higher ransom. The Abu Sayyaf is able to demand huge sums precisely because of its fearsome reputation.⁶⁴ Local key informants

⁵⁷ For a similar emphasis on local perspective, see Collier (n 50).

⁵⁸ For an account of the Abu Sayyaf’s organisational structure and dynamics based on military sources, both written and informal, see, Rommel Banlaoi, ‘The Abu Sayyaf Group and Terrorism in the Southern Philippines: Threat and Response’ in Patricio N Abinales and Nathan Gilbert Quimpo (eds), *The US and the War on Terror in the Philippines* (Anvil Publishing 2008) 113–149.

⁵⁹ The agenda is said to be the establishment of an “Islamic state” in Mindanao. Quimpo (n 51) 48–49; Santos and Dinampo (n 49) 119.

⁶⁰ Rohan Gunaratna, *Inside Al-Qaeda: Global Network of Terror* (Columbia University Press 2002); Zachary Abuza, ‘Tentacles of Terror: Al Qaeda’s Southeast Asian Network’ (2002) 24 *Contemporary Southeast Asia* 427–465; Maria Ressa, *Seeds of Terror: An Eyewitness Account of Al-Qaeda’s Newest Center of Operations in Southeast Asia* (Free Press 2003).

⁶¹ Eduardo F Ugarte, “‘In a Wilderness of Mirrors’: The Use and Abuse of the “Abu Sayyaf” Label in the Philippines’ (2010) 18 *South East Asia Research* 373–413.

⁶² *ibid.*

⁶³ “[While they are] rivals [] competing for ‘legitimacy’ and a share of the islands’ spoils (illegal logging, gun smuggling, etc.) ... such players also become allies, as they exploit their lateral linkages with each other and their vertical linkages with their own sponsors and subalterns to form temporary coalitions for specific ventures”. Eduardo F Ugarte, ‘The Phenomenon of Kidnapping in the Southern Philippines An Overview’ (2008) 16 *South East Asia Research* 293–341, 324.

⁶⁴ Eric Gutierrez memorably called the Abu Sayyaf “entrepreneurs of violence ... who use their reputation and capacity for violence as capital to gain relative security, power, and control in a

believe that the kidnappers' weapons are sourced directly from the military or via politicians. Often, politicians will instigate the kidnapping operation in order to raise campaign funds for forthcoming elections. Communications equipment such as satellite phones has been sighted in the possession of kidnappers as well, but as Gracia Burnham's written account of her own abduction attests, her Abu Sayyaf captors were technologically incompetent. This indicates that equipment may have been simply supplied to them by more sophisticated syndicates who were more established in the business of kidnapping. Thus, with respect to kidnappings, the Abu Sayyaf's capability is revealed to be dependent on other actors, including politicians, businessmen, and the military, i.e., the "strongmen" or the traditional wielders of power in the zone. The "threat" that the Abu Sayyaf is able to project in the zone actually benefits, rather than displaces, these more established wielders of power.

Especially following the death of its founder Abdurajak Janjalani in the late 1990s, the picture of the Abu Sayyaf as motivated by religious ideology has been widely discredited. On this point, even scholars like Abuza, who makes extensive use of military sources, cannot avoid agreeing. "They (Abu Sayyaf) were a well-armed criminal gang, but not an ideologically motivated political-religious organisation. The label *terrorism* was applied to them by both the U.S. and Philippine governments, but that had more to do with their brutality than their political agenda."⁶⁵ Santos and Dinampo⁶⁶ explain that individuals like Commander Robot and Nandi Uddih, with known association with local politicians as their henchmen, have managed to join the organisation and played prominent roles in representing the Abu Sayyaf in ransom negotiations. First-hand accounts by former kidnapping victims bolster the conclusion that profit was its main motivation.⁶⁷ A Catholic priest once taken hostage said he initially thought "they were really fundamentalists" who "were serious about their faith and always prayed and talked about defending Islam" but soon realised "they were out only to make money. They only used Islam as a front. It was easy for them to recruit followers because they offered huge sums to entice people to join

highly unstable area as well as the money, resources, and respect needed for self-perpetuation." Quoted in Santos and Dinampo (n 49) 126.

⁶⁵ Abuza, *Balik-Terrorism* (n 53) 8.

⁶⁶ Santos and Dinampo (n 49) 125, 127.

⁶⁷ Jose Torres Jr., *Into the Mountain: Hostaged by the Abu Sayyaf* (Claretian Publications 2001); Gracia Burnham and Dean Merrill, *In the Presence of My Enemies* (Tyndale House Publishers, Inc 2003); Roberto Aventajado and Teodoro Montelibano, *140 Days of Terror: In the Clutches of the Abu Sayyaf* (Anvil Publishing 2004).

them.”⁶⁸ Quite unlike a group that seeks publicity for its beliefs, the Abu Sayyaf has also converted opportunities to air their views through the media into straightforward fund-raising activities. In June 2008, for example, television journalist Ces Drilon, who sought to give the group opportunity to speak to media, was instead kidnapped along with two camera crew, and their guide Mindanao State University lecturer Octavio Dinampo in exchange for ransom.⁶⁹

Surprisingly, some Philippine scholars like Santos and Dinampo,⁷⁰ following Abuza,⁷¹ still employ the label “terrorist”, usually in combination with “bandit”, to characterise the Abu Sayyaf. This reflects a kind of analytical bias that privileges religious ideology as the real marker of the Abu Sayyaf. Even when other exhibited features such as monetary motivation clearly predominate, it is maintained thought that religious ideology has simply been dormant or latent, waiting to be expressed given the right opportunity. For example, Abuza argues that after 2002, the group “return[ed] to their roots as a separatist organization”⁷² and “reenter[ed] the arena of terrorism”⁷³ as reflected in a string of high-profile bombings and the targeting of Manila.⁷⁴ His theory is that successful counterterrorism operations killed or captured Abu Sayyaf leaders who emphasised commercial ventures such as kidnappings, giving way to new developments in the organisation, including a new leadership that sought stronger relationship with the more clearly religious and ideological MILF and JI. The argument is curious because the decline of the Abu Sayyaf and the very success of counterterrorism operations against its leaders are regarded as the cause of renewed terrorism (this time, in the form of bombings). The main problem with this theory, however, is that the authorship of these bombings claimed by the Abu Sayyaf is bitterly disputed. Disgruntled junior military officers, for example,

⁶⁸ Torres Jr. (n 67) 68 quoted in Santos and Dinampo 127. Rene Ciria-Cruz incisively remarks that the Abu Sayyaf are “known for brutality but not suicidal sacrifice.” Quoted in Peter Sales, ‘If You Can Keep Your Head When All About You are Losing Theirs! The Role of the Abu Sayyaf Group in the Campaign against Islamic Separatism in Mindanao’, *Asia Reconstructed: Proceedings of the 16th Biennial Conference of the Asian Studies Association of Australia, 2006* (Asian Studies Association of Australia (ASAA) Inc and the Research School of Pacific and Asian Studies, Canberra 2006) 3 <<http://ro.uow.edu.au/artspapers/1630>> accessed 28 December 2015.

⁶⁹ Ugarte (n 63) 330f; Santos and Dinampo (n 49) 133.

⁷⁰ Santos and Dinampo (n 49).

⁷¹ Abuza, *Balik-Terrorism* (n 53).

⁷² *ibid* 10.

⁷³ *ibid* 1.

⁷⁴ In this last claim of a return to terrorism, Abuza is aided by a string of bombings, including those of the Davao International Airport and Sasa Wharf in 2003 and the Superferry 14 passenger vessel in 2004, as well as a number of arrests for possession of explosives supposedly meant for targets such as shopping malls in Manila and the US Embassy.

alleged that the bombings of the airport and wharf in Davao City in 2003 (claimed by the Abu Sayyaf, but officially blamed by the Philippine government on the MILF) were planned by President Arroyo herself (contained in the so-called “Oplan Greenbase” documents) and executed by security forces through special orders.⁷⁵ While only circumstantial evidence could be produced to prove the charge, the suspicion was strong enough to compel the junior military officers to denounce the President in a mutiny.⁷⁶

2.3. The Moro Islamic Liberation Front (MILF)

This thesis does not provide a detailed discussion of the history and causes of the conflict between the Moros of southern Philippines and the Philippine state.⁷⁷ However, that the present Moro armed struggle is the starkest expression of this conflict, and the Moro Islamic Liberation Front (MILF) is now the “standard bearer” of the Moro cause against the Philippine government. In this conflict, the government has been perceived as the main culprit for the Moros’ economic destitution, their political subordination to Christian settlers and the threat to their Moro and Islamic identity.⁷⁸

In 2008, the Armed Forces of the Philippines estimated MILF armed strength at 11,769 fighters, making it the largest rebel army in the country.⁷⁹ The MILF emerged from the Moro National Liberation Front (MNLF) in 1977 that originally envisioned an independent “democratic and modern” state for the Moros.⁸⁰ Founded by then MNLF vice

⁷⁵ These allegations are further analysed in Chapter 3, section 2 on ‘mysterious bombings’ in Mindanao.

⁷⁶ Paul A Rodell, ‘The Philippines: Playing Out Long Conflicts’ in Chin Kin Wah and Daljit Singh (eds), *Southeast Asian Affairs 2004* (Institute of Southeast Asian Studies 2004) 185–204, 190.

⁷⁷ See, Michael Hawkins, *Making Moros: Imperial Historicism and American Military Rule in the Philippines’ Muslim South* (Northern Illinois University Press 2013); Peter Gordon Gowing, *Mandate in Moroland: The American Government of Muslim Filipinos, 1899-1920* (New Day Publishers 1988); Samuel K Tan, *The Filipino Muslim Armed Struggle, 1900-1972* (Filipinas Foundation 1977); Thomas M McKenna, *Muslim Rulers and Rebels: Everyday Politics and Armed Separatism in the Southern Philippines* (University of California Press 1998); Patricio N Abinales, *Orthodoxy and History in the Muslim-Mindanao Narrative* (Ateneo de Manila University Press and Flipside Publishing 2010).

⁷⁸ Mindanao academic Macapado Abaton Muslim identifies six key elements of the Moro problem as: economic marginalisation and destitution; political domination; physical insecurity; threatened Moro and Islamic identity; a perception that government is the principal culprit; and a perception of hopelessness under the present set-up. Macapado Abanton Muslim, *The Moro Armed Struggle in the Philippines: The Nonviolent Autonomy Alternative* (Office of the President and College of Public Affairs, Mindanao State University 1994) 52 f.

⁷⁹ Zachary Abuza, ‘The Moro Islamic Liberation Front at 20: State of the Revolution’ (2005) 28 *Studies in Conflict & Terrorism* 453-479, 462; Abinales (n 77) 136, n 49.

⁸⁰ ‘1974 Manifesto of the Moro National Liberation Front [on the] Establishment of the Bangsamoro Republik’ reprinted in W Kadir Che Man, *Muslim Separatism: The Moros of Southern Philippines and the Malays of Southern Thailand* (Ateneo de Manila University Press 1974) 189–190.

chairman Hashim Salamat, the word “Islamic” in its name signalled that the new organisation wished to pursue a more religious rather than secular nation-state.⁸¹ The MNLF, led by its chairman Nur Misuari entered into a drawn out process of negotiations with the Philippine government beginning in 1976, even as the MILF slowly built its army and support from the Moro masses. By 1996, Misuari signed a Final Peace Agreement with the Ramos administration and soon became governor of the newly established Autonomous Region of Muslim Mindanao (ARMM).

However, with the peace agreement not yet fully implemented, Misuari thereafter suffered a reversal of fortune, losing the governorship of the ARMM in subsequent elections. According to Santos, in 2001, criticisms over Misuari’s leadership style split the MNLF into four different factions, namely, Misuari; the Executive Committee-15 (EC 15) led by Cotabato City mayor Muslimin Sena; Alvarez Isnaji, who left the EC-15; and the Islamic Command Council.⁸²

2.3.1. Peace negotiations with the MILF and counterterrorism

Long overshadowed by the MNLF, the MILF started negotiations for a peaceful settlement of its conflict with the Philippine government in January 1997. At the end of 1999, with a ceasefire agreement in place, the newly-elected President Joseph Ejercito Estrada stunned observers by ordering the military to shell and overrun MILF’s bases, including its main base Camp Abubakar, causing massive internal displacement.⁸³ In his State of the Nation Address of July 24, 2000, Estrada justified his reversal of his predecessor Fidel Ramos’ policy of peace negotiations with the MILF by invoking the principle of

⁸¹ Other writers also point out that the two organisations have different ethnic allegiances (Maguindanaon for the MILF vs. Tausug for the MNLF) and leadership styles (consultative vs centralised). Soliman M Santos, ‘War and Peace on the Moro Front: Three Standard Bearers, Three Forms of Struggle, Three Tracks (Overview)’ in Diana Rodriguez (ed), *Primed and Purposeful: Armed Groups and Human Security Efforts in the Philippines* (South-South Network for Non-State Armed Group Engagement and the Small Arms Survey 2010) 58–90, 63; Abdulsiddik Abbahil, ‘The Bangsa Moro: Their Self-Image and Inter-Group Ethnic Attitudes’ (1984) 5 *Dansalan Quarterly* 197-250.

⁸² Soliman M Santos and Paz Verdades M Santos, ‘Moro National Liberation Front and Its Bangsamoro Armed Forces (MNLF-BAF)’ in Diana Rodriguez (ed), *Primed and Purposeful: Armed Groups and Human Security Efforts in the Philippines* (South-South Network for Non-State Armed Group Engagement and the Small Arms Survey 2010) 327–343, 330.

⁸³ Estrada attacked all “verified MILF camps”, which were ironically identified in the General Cession of Hostilities agreement of July 18, 1997 which accepted the then current battlefield status quo. Shamsuddin L Taya, ‘The Political Strategies of the Moro Islamic Liberation Front for Self-Determination in the Philippines’ (2007) 15 *Intellectual Discourse* 59-84, 70 <<http://journals.iium.edu.my/intdiscourse/index.php/islam/article/view/61>>; See Abuza, ‘The Moro Islamic Liberation Front at 20’ (n 79) 455 for a list of MILF camps.

territorial integrity.⁸⁴ But it is also significant to note, as Jetschke does, that Estrada's new policy of "all out war" was announced after a series of bombings in Zamboanga and in Davao in April and May 2000, attributed by the military to the Abu Sayyaf, as well as the Sipadan resort kidnapping of foreigners of June 2000. The demonstrations of a threat from Muslim groups in the south provided Estrada a receptive public, one that might be willing to accept escalating the conflict with the MILF.⁸⁵

After Estrada, counterterrorism against the Abu Sayyaf threatened to engulf counterinsurgency against the MILF. While Estrada's successor Gloria Macapagal-Arroyo restored peace negotiations and the ceasefire agreement with the MILF, at key junctures she, like Estrada, also sought the defeat or weakening of the MILF through military offensives. Her administration publicly accused the MILF of coddling or maintaining "links" with the Abu Sayyaf; the more obscure kidnap-for-ransom group called the Pentagon Gang⁸⁶; Jemaah Islamiyah (JI); and by extension the al Qaeda as well.⁸⁷ Especially in 2003, military attacks on the MILF were presented as logical extensions of operations against "terrorists and/or criminal elements".

Hence, counterterrorism played a key role in justifying military manoeuvres against the MILF, such as can clearly be observed in the multi-battalion attack on "Buliok Complex" of February 2003. The Buliok operation and other attacks around that time interrupted and derailed the peace negotiations. After the Philippine military overran Camp Abubakar in 2000, the MILF leadership settled in Buliok and surrounding barangays. Called the "Buliok Complex" by the Philippine military, it was the MILF's main base after Camp Abubakar fell in 2000. The area is part of the Liguasan Marsh which lies within the provinces of Sultan Kudarat, North Cotabato and Maguindanao in Central Mindanao,

⁸⁴ "He described Mindanao as an 'integral, inseparable, and organic part of the Philippines' and said the government had 'to neutralize the attempt of the Moro Islamic Liberation Front to amputate the southern parts of the country away from the organic whole and to convert them into an independent Muslim state.'" Jetschke (n 6) 239. "Then, in a speech on August 11, Estrada derided peace advocates in Mindanao as traitors and the previous Ramos administration, which had negotiated a peace deal with the MNLF, as a 'sucker,' which 'kept talking and let the problem grow until the Republic was in real mortal danger.'" ibid 240.

⁸⁵ Jetschke (n 6) 239.

⁸⁶ For a background on this group, see, Soliman M Santos and Paz Verdades M Santos, 'Pentagon Gang and Other Obscure Moro Armed Groups' in Diana Rodriguez (ed), *Primed and Purposeful: Armed Groups and Human Security Efforts in the Philippines* (South-South Network for Non-State Armed Group Engagement and the Small Arms Survey 2010) 393–403.

⁸⁷ International Crisis Group, 'Southern Philippines Backgrounder: Terrorism and the Peace Process' (2004) <<http://www.crisisgroup.org/en/regions/asia/south-east-asia/philippines/080-southern-philippines-backgrounder-terrorism-and-the-peace-process.aspx>> accessed 27 February 2015.

spanning some 220,000 hectares.⁸⁸ In February 11, 2003 during the Muslim religious holiday of Eid al-Adha (Feast of the Sacrifice), Philippine military begun the attack on the “Buliok Complex” which lasted nearly a week.

Philippine military and government officials initially justified the offensive as a hot pursuit operation against the Pentagon Gang and its leader Alonto Tahir. They were alleged by the military to have made Buliok complex a “safe haven”.⁸⁹ After denying that MILF was the target of the attack, the military a few days later admitted that the massive assault was indeed directed at the MILF. The military said it was precipitated by “the massing of MILF forces” in the area which it considered a “hostile” act.⁹⁰ Indeed, the Pentagon Gang had only been a pretext as the operation did not secure the capture of Pentagon Gang members.⁹¹ Rather, the operation forced the MILF to abandon its position in the Buliok Complex, and caused massive internal displacement of local residents.⁹²

In August and October 2003, the AFP also used the manhunt for Fathur Rahman Al-Ghozi, said to be an operative of JI, to justify conduct of military operations in MILF

⁸⁸ Rizal G Buendia, ‘The GRP-MILF Peace Talks: Quo Vadis?’ in Chin Kin Wah and Daljit Singh (eds), *Southeast Asian Affairs 2004* (Institute of Southeast Asian Studies 2004) 205–222, 220; Jose Jowel Canuday, *Bakwit: The Power of the Displaced* (Ateneo de Manila University Press and Flipside Publishing 2009) 64.

⁸⁹ The AFP chief-of-staff was quoted in a press conference the day before the start of the attack that soldiers “were in hot pursuit of certain lawless elements, principally the kidnap-for-ransom group and the people responsible for the bombing last December 24 in Sharif Aguak...” PDI Mindanao Bureau and Martin P Marfil, ‘Eyeball-to-Eyeball in Pikit: Government Troops Surround MILF Rebels’ *Philippine Daily Inquirer* (Manila, Philippines, 11 February 2003) A1, A16. The Defense Secretary Angelo Reyes reiterated the justification saying “We must emphasize that we are running after these lawless elements because this what the people of Mindanao want. The people of Mindanao are tired of conflict, they are tired of terrorist actions perpetrated by these lawless elements. There is a lot of noise against this offensive, but the silent majority of Christians and Muslims in Mindanao, to include the lumad, want to have this thing done and over with.” Jeffrey M Tupas and Martin P Marfil, ‘GMA: Resume Attacks’ *Philippine Daily Inquirer* (Manila, Philippines, 13 February 2003) A19.

⁹⁰ Dona Pazzibugan, ‘Military Admission: MILF, Not Pentagon Gang Real Target’ *Philippine Daily Inquirer* (Manila, Philippines, 18 February 2003) A1. The investigation of ceasefire violations prior to the Buliok attack made by the local civil society initiative monitoring the ceasefire agreement concluded: “[I]n the vast majority of cases, military assaults were launched in pursuit of criminals (kidnappers, cattle-rustlers) or terrorists (members of the Abu Sayyaf or Pentagon gang). ... [M]ilitary operations said to have been launched against terrorists or criminals, have engaged in battle recognized MILF forces that were found by investigators to have no evident connection with either a terrorist group or criminal syndicate.” Bantay Ceasefire, ‘Mindanao Grassroots Ceasefire Review and Assessment, January 6-12 & 18-19, 2003, Cotabato, Maguindanao, Lanao & Sultan Kudarat’ 4.

⁹¹ This was the observation of the editorial of the Philippine Daily Inquirer of February 14, 2003. Philippine Daily Inquirer, ‘Message Delivered’ *Philippine Daily Inquirer* (Manila, Philippines, 14 February 2003) A8. See also Abuza, ‘The Moro Islamic Liberation Front at 20’ (n 79) 456.

⁹² Canuday (n 88) 23.

positions in the Lanao provinces.⁹³ Al-Ghozi had escaped from a high-security cell at the Philippine National Police headquarters in Manila together with two alleged Abu Sayyaf members. The escape, furthermore, took place in July 14, 2003 while Australian Prime Minister John Howard was in Manila to discuss international cooperation on combatting terrorism and international crimes, causing embarrassment to President Arroyo's government. "Much was made of the reported MILF links with Al-Ghozi, and by extension with the Jemaah Islamiyah terror network in southeast Asia," remarked the civil society group Bantay Ceasefire (Ceasefire Monitor).⁹⁴

[Despite the formal ceasefire agreement,] there appears to be a new form of 'warfare' in Lanao ... We refer to government's all-out-support for the 'counter-terrorism' campaign of US President George Bush, which in Lanao took the form of old-style military operation with a new name – 'counter-terrorism'.⁹⁵

Leaders of the MILF were also charged with Philippine criminal law violations in relation to key "terrorist events", i.e., bombing incidents in 2003 and 2006, including the bombing of the airport and wharf in Davao City, which were concurrently blamed on the Abu Sayyaf and JI as well.⁹⁶ The International Crisis Group, whose report in 2004 systematically presented military allegations of MILF links to the Abu Sayyaf and JI, remarked that "the spectre of terrorism is haunting the southern Philippines peace process."⁹⁷

2.3.2. The United States as a factor in counterterrorism and peace negotiations with the MILF

After the United States gained a foothold in Mindanao in 2002 under the aegis of counterterrorism against the Abu Sayyaf, the US relationship clearly became a factor in the dynamics between the Philippine government and the MILF.⁹⁸ By invoking the spectre of

⁹³ Perseus Echeminada, 'Lawmaker Seeks Deeper Probe into Al-Ghozi Escape' *Philippine Star* (31 August 2003) <<http://www.philstar.com/headlines/219219/lawmaker-seeks-deeper-probe-al-ghozi-escape>> accessed 21 April 2016.

⁹⁴ Bantay Ceasefire, 'The Hunt for Al-Ghozi: An "Anti-Terror" Campaign That Terrorized Lanao? Bantay Ceasefire Field Monitoring, Lanao Del Norte & Sur, October 7-9, 2003' 8.

⁹⁵ *ibid* 4.

⁹⁶ Abuza, *Balik-Terrorism* (n 53) 10; Salah Jubair, *The Long Road to Peace: Inside the GRP-MILF Peace Process* (1st edn, Institute of Bangsamoro Studies 2007) 222.

⁹⁷ International Crisis Group (n 87) i.

⁹⁸ US troops were officially deployed to southwestern Mindanao under the terms of joint military exercises. Abuza claims that US special forces have been reported in the vicinity of MILF bases in

terrorism, the Philippine government sought to entangle the MILF in the global “War on Terror” as an adversary of the United States and, through this means, to pursue a decisive military defeat of the MILF. In response, the MILF escalated its attempt to settle the conflict through peaceful negotiations. Addressing the United States directly, the MILF professed renunciation of the Abu Sayyaf and JI (admitting previous contacts and non-formal personal relations with them).⁹⁹ The MILF also sought the support and involvement of the US in the peace negotiations between the Philippine government and the MILF.¹⁰⁰ The MILF believed that the Malaysian government, which played as host to the talks, could not really guarantee implementation of a lasting peaceful settlement, and that only the US could and had the incentive to do so.¹⁰¹ By directly approaching the US through these diplomatic manoeuvres, the MILF hoped to elude military defeat as well as advance a peaceful settlement.

A clear measure of the relative success of the MILF in resisting counterterrorism rhetoric is that it was not officially tagged by the United States as a “terrorist organization”. In contrast, the US government designated the Abu Sayyaf and CPP-NPA as “foreign terrorist organizations” (FTOs).¹⁰² Consistent with MILF strategy, the MILF did not break off

central Mindanao. Abuza, *Balik-Terrorism* (n 53) 472. It was also alleged that Abu Sayyaf leader Khadaffy Janjalani and his men disembarked on MILF bases. Abuza, ‘The Moro Islamic Liberation Front at 20’ (n 79) 17. “US electronic and aerial surveillance led to a series of air strikes in MILF-controlled areas of southern Maguindanao province, from November 2004 to April 2005. These were followed by a major AFP ground operation, Oplan Tornado, from July to October 2005.” International Crisis Group, ‘The Philippines: Counter-Insurgency vs. Counter-Terrorism in Mindanao’ (2008) 10.

⁹⁹ Jubair (n 96) 58–62.

¹⁰⁰ MILF chairman Salamat Hashim wrote US President George W Bush on January 20, 2003 explaining its position as a “national liberation movement” and “inviting and giving you the opportunity to assist in resolving this predicament of the Bangsamoro people”. (The letter and subsequent communications are reproduced in *ibid* 205–209.) The letter read:

“In view of the current global developments and regional security concerns in Southeast Asia, it is our desire to accelerate the just and peaceful negotiated political settlement of the Mindanao conflict, particularly the present colonial situation in which the Bangsamoro people find themselves.

“We are therefore appealing to the basic principle of American fairness and sense of justice to use your good offices in rectifying the error that continues to negate and derogate the Bangsamoro People’s fundamental right to seek decolonization under the United Nations General Assembly Resolution 1514 (XV) of 1960. For this purpose, we are amenable to inviting and giving you the opportunity to assist in resolving this predicament of the Bangsamoro People.”

Interviews with MILF officials revealed that Hashim’s letter to Bush was prompted by President Gloria Macapagal-Arroyo’s scheduled visit to the White House on May 17, 2003. Taya (n 83) 74–75.

¹⁰¹ Abuza, ‘The Moro Islamic Liberation Front at 20’ (n 79) 468.

¹⁰² The US Secretary of State designates FTOs under the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub L No 104-132 (1996). The Abu Sayyaf Group (ASG) was designated as FTO on October 8, 1997; while the CPP-NPA on August 9, 2002. See, United States Department of State,

peace negotiations with the Philippine government despite government attacks on its camps/positions such as Buliok.¹⁰³ On the contrary, the MILF skilfully used the peace negotiations in order to deflect counterterrorism pressure away from it. The ceasefire between the Philippine government and the MILF came to have a counterterrorism function under the rubric of “criminal interdiction”.¹⁰⁴ Abuza claims, based on interviews with MILF leaders, that some leaders “saw the links to JI as a card to be played at the negotiating table, whether vis-à-vis the GRP [Government of the Republic of the Philippines] or as a means to get the United States involved in the peace process”.¹⁰⁵

An agreement between the MILF and the Philippine government gave the MILF the opportunity to demonstrate its capability and willingness to cooperate on counterterrorism. The May 6, 2002 agreement on the Joint Interdiction of Unlawful Elements provided for a means that would allow the MILF and the Philippine military to cooperate and coordinate with each other in the “isolation and interdiction” of “lawless elements” within territories controlled by the MILF. Following the Buliok attack, the MILF made the implementation of this agreement a “cornerstone of their demands to resume the peace talks”.¹⁰⁶ In January 2005, pursuant to the agreement, the Ad Hoc Joint Action Group (AHJAG) was created.¹⁰⁷ During the mandate of the AHJAG, MILF chairman Ebrahim Al Haj Murad cooperated with the Philippine military in expelling Abu Sayyaf and JI leaders from MILF territory by not retaliating against AFP attacks in June 2005, and moreover, by sharing information about the exact location of Abu Sayyaf leader Kadaffy Janjalani.¹⁰⁸

Moreover, as sought by Hashim Salamat in his letter to President G.W. Bush of January 20, 2003, the United States did come to have a role in the peace negotiations through the United States Institute of Peace (USIP). To show his interest towards the MILF’s overture, in May 2003, President Bush declared during President Arroyo’s state visit to the United States that “the United States [would] provide diplomatic and financial support to a renewed peace process” if the MILF were to “abandon the path of violence ...

‘Chapter 6 Foreign Terrorist Organizations’ (United States Department Of State 2015) <<http://www.state.gov/j/ct/rls/crt/2014/239413.htm>> accessed 28 January 2016.

¹⁰³ As in the Buliok attack, the eruption of fighting caused the suspension of formal negotiations, but continuing back-channel talks allowed the resumption of formal negotiations.

¹⁰⁴ Santos (n 81) 79–80.

¹⁰⁵ Abuza, ‘The Moro Islamic Liberation Front at 20’ (n 79) 467.

¹⁰⁶ *ibid* 468.

¹⁰⁷ International Crisis Group (n 98).

¹⁰⁸ *ibid* 10–12.

and address its grievances through peaceful negotiations”.¹⁰⁹ According to Martin and Tuminez, USIP was enlisted instead of an official US government agency to play a “facilitating role in the Mindanao peace process ‘in coordination with the Government of Malaysia’” because the State Department was initially “unsure of the MILF’s commitment to the peace process and wondered whether, at some future time, the group might have to be designated as a foreign terrorist organization.”¹¹⁰ An appropriation of \$30 million “to further prospects of peace in Mindanao” was provided in the Emergency Wartime Supplemental Appropriations Act of 2003.¹¹¹ USIP received \$3 million from this fund.¹¹²

From 2003-2007, the USIP, lacking an official status in the formal negotiations between the Philippine government and the MILF, and resisted by the Malaysian government that was mediating the talks, worked informally with the Philippine and MILF negotiators through workshops and trainings. Workshops with international experts from such places as Canada and Bougainville on the “ancestral domain” issue were intended to “bring international knowledge and experience to bear on this key point in GRP-MILF negotiations.”¹¹³ USIP also worked to influence the media, national politicians, schools, NGOs which had been monitoring the ceasefire agreement, and religious leaders, and leaders of different Muslim ethnic groups.¹¹⁴

Prior to the engagement of the USIP, the US had also already been providing the Philippine government with “development assistance” targeted at “conflict-affected areas of Mindanao”. Most notably, the US Agency for International Development (USAID)’s “Growth with Equity in Mindanao” (GEM) project in the Autonomous Region of Muslim Mindanao (ARMM) is intended to bring about peace through infrastructure development (ranging from barangay-level road repairs to airport improvements), connecting high schools to the internet, and reintegration of former MNLF combatants, among other

¹⁰⁹ United States Office of the Press Secretary, ‘President Bush, President Arroyo Hold Joint Press Conference’ <<http://georgewbush-whitehouse.archives.gov/news/releases/2003/05/20030519-6.html>> accessed 28 January 2016.

¹¹⁰ G Eugene Martin and Astrid S Tuminez, ‘Toward Peace in the Southern Philippines A Summary and Assessment of the USIP Philippine Facilitation Project, 2003–2007’ (United States Institute of Peace 2008) Special Report 202 4.

¹¹¹ Public Law 108–11, 117 STAT 559, 575.

¹¹² In an apparent effort to provide material incentive to get the parties to an agreement, the remaining \$27 million was earmarked for anticipated “economic development activities in Mindanao” should a peace agreement be reached. However, no peace agreement was reached before the expiry of the appropriations in September 2004, and so this amount went to the USAID. Martin and Tuminez (n 110) 4.

¹¹³ *ibid* 6.

¹¹⁴ *ibid* 2.

operations. US Westpoint instructors Bodnar and Gwinn, calling them “monetary ammunition” in a counterinsurgency, remarked that “these sorts of projects most closely mirror those often developed and executed by military forces in a counterinsurgency or stability environment ... similar projects have been and continue to be implemented by American forces around the globe.”¹¹⁵

2.4. Communist Party of the Philippines-New People’s Army

The preceding discussion puts the terrorist tagging of the Communist Party of the Philippines-New People’s Army (CPP-NPA) in perspective. After packaging the menace posed by the Abu Sayyaf as “terrorism”, the Philippine government then attempted to drag the MILF into the counterterrorism war against the Abu Sayyaf – a war in which the US participates. The MILF has largely obviated this scenario, in part by involving the US instead in peace negotiations. The situation of the CPP-NPA is different. The US was already heavily invested in the Philippine government’s counterinsurgency war with the CPP-NPA long before 9/11, and counterterrorism rhetoric against it merely added “another thread to this skein of historical continuity”.¹¹⁶

The Communist Party of the Philippines (CPP) was established in December 26, 1968 and launched guerrilla warfare against the Philippine state in 1969 with the creation of the New People’s Army (NPA) under its control and direction.¹¹⁷ In 1973, the CPP led in the formation of the National Democratic Front (NDF) as a coalition of clandestine organisations opposed to “imperialism, feudalism and bureaucrat capitalism” and aiming to win the majority of the population to seize state power and implement a program of reforms called “national democracy with a socialist perspective”. During the period of authoritarian rule under President Ferdinand Marcos lasting from the proclamation of Martial Law in 1972 until his downfall in 1986, the CPP-NPA’s armed struggle for national democracy presented a viable and radical alternative to a generation of Filipinos deprived

¹¹⁵ Seth Bodnar and Jeremy Gwinn, “‘Monetary Ammunition’ in a Counterinsurgency” [2010] *Parameters* 1-12, 4.

¹¹⁶ McCoy (n 5) 499.

¹¹⁷ On the history of the CPP, see, Dominique Caouette, ‘Persevering Revolutionaries: Armed Struggle in the 21st Century, Exploring the Revolution of the Communist Party of the Philippines’ (Cornell University 2004); Armando Liwanag, ‘Brief Review of the History of the Communist Party of the Philippines’ <http://www.philippinerevolution.net/statements/19881226_brief-review-of-the-history-of-the-communist-party-of-the-philippines> accessed 28 January 2016; Kathleen Weekley, *The Communist Party of the Philippines, 1968-1993: A Story of Its Theory and Practice* (University of the Philippines Press 2001).

of genuine political participation. Starting with 60 fighters armed with 35 rifles in the 1970s, it is believed that the NPA grew to a peak of 25,000 fighters in 1986.¹¹⁸ The change in government from Marcos to Corazon Aquino in 1986, which saw the return of formal democracy and the opening up of political space, caused a split in the CPP-NPA. Internal organisational turmoil, coupled with the downfall of socialist regimes abroad, contributed to the CPP-NPA's spectacular decline in the 1990s.¹¹⁹ In response, Jose Maria Sison, the founding chairman of the CPP, led a "rectification movement" within the CPP-NPA which claimed credit for reversing this trend, steadily rebuilding the organisation and recapturing lost ground.¹²⁰

Unlike the Moro rebellion, the communist-led national democratic movement gained traction in every region and almost every province of the country.¹²¹ After Martial Law was formally lifted in 1981 and during the restoration of civil liberties in the post-Marcos period, the national democrats' emphasis on mass base building and "united front" work with sections of the elite opposed to Marcos and his successors also meant that the national democratic movement developed an above-ground dimension.¹²² As mentioned earlier, legal organisations that share national democratic ideology and program of reforms participate in open democratic processes. They are entitled to field candidates to represent them in local and national elections through the party-list groups *Bayan Muna*, *Anakpawis*, *Gabriela* and others.

¹¹⁸ Sison claimed that 14,000 of these were armed. Jose Maria Sison and Rainer Werning, *The Philippine Revolution: The Leader's View* (Crane Russak 1989) 106.

¹¹⁹ The military estimated that NPA strength dropped to 5,000 in 1995. Paz Verdades M Santos, 'The Communist Front: Protracted People's War and Counter-Insurgency in the Philippines (Overview)' in Diana Rodriguez (ed), *Primed and Purposeful: Armed Groups and Human Security Efforts in the Philippines* (South-South Network for Non-State Armed Group Engagement and the Small Arms Survey 2010) 17–42, 24. For a background on this period, see Patricio N Abinales, *The Revolution Falters: The Left in Philippine Politics After 1986* (South East Asia Program Publications, Cornell University 1996).

¹²⁰ Santos (n 119) 20, 23–24; International Crisis Group (n 98) 7–8.

¹²¹ This includes Mindanao. In fact, nearly 50% of its guerrilla fronts are based in Mindanao. 'Map I.i CPP-NPA guerrilla fronts by region, end 2008' in Diana Rodriguez (ed), *Primed and Purposeful: Armed Groups and Human Security Efforts in the Philippines* (South-South Network for Non-State Armed Group Engagement and the Small Arms Survey 2010) 12 (based on Armed Forces of the Philippines estimates).

¹²² Caouette (n 117) 279. In contrast, the MILF had no special organisations for "united front" work. Abinales (n 77) 131.

2.4.1. Peace negotiations with the CPP-NPA-NDF in the transition from Marcos to Aquino and the United States' role in "reformed" counterinsurgency

During the period of Martial Law under Marcos (1972-1986), the Philippine government's approach to the CPP-NPA was military-led, while the Philippine military was essentially bankrolled by US military assistance.¹²³ In the transition to the post-Marcos order, US involvement in Philippine counterinsurgency deepened further. According to Bello,¹²⁴ the US policy on the Marcos regime in its later years was determined in large part by the desire to counter what the US saw as the communist threat to its interests in the Philippines. Starting in 1983,¹²⁵ sections of the US government, principally the State Department, invested in an option of dumping Marcos, seen as ineffective in countering the insurgency, in favour of a "Third Force" or "centrist" alternative between Marcos and the communists.¹²⁶ The triumph of this "Third Force" strategy is reflected in US pressure coming to bear on the decision of Marcos to declare a snap election, and the eventual US backing for Corazon Aquino.

In the twilight of the Martial Law period, the US government formulated ideas about a more effective counterinsurgency strategy against the CPP-NPA. In 1984, US President Ronald Reagan called for an inter-agency review of US policy towards the

¹²³ Marcos' military solution is summarised in these terms by Bello (1987):

"[T]he regime continued to deal with the insurgency in a purely military fashion, employing conventional military tactics in battle, coupled with intimidation and repression of the guerrillas' actual and potential base. In engaging the NPA, the AFP oftentimes resorted to battlefield tactics that imposed collateral damage on the civilian population. These conventional 'encirclement and suppression' were carried out by big units – companies, multicompany task forces, or even battalions. They were patterned after U.S. Army 'search and destroy' tactics in Vietnam, based on mobility provided by expensive vehicles and on the employment of excessive and indiscriminate firepower. 'The AFP,' concluded a U.S. Senate Foreign Relations Committee report, 'is said to use violence indiscriminately and without regard to political consequences. They have the reputation of trying to bludgeon a community into submission if it is suspected of harbouring the NPA, and they tend to rely upon the example of massive firepower to influence people rather than on its selective application.'"

Walden Bello, *Creating the Third Force: U.S. Sponsored Low Intensity Conflict in the Philippines* (The Institute for Food and Development Policy 1987) 36–37. The Marcos military's methods of "zoning", flood blockades, and "free-fire zones" harked back to Vietnam, and earlier on, to the American campaign of occupation of the Philippines in 1899-1903. *ibid* 37. See, also, Carolina Hernandez, *Institutional Response to Armed Conflict: The Armed Forces of the Philippines* (2005) 5–10.

¹²⁴ Bello (n 123) 55.

¹²⁵ In 1983, opposition politician Benigno Aquino was assassinated, signifying Marcos' increasingly desperation to stem opposition to his unpopular rule.

¹²⁶ "By late 1985, the Pentagon was prepared to confirm the claim of the NDF ... that it has 'influence' over 10 million out of 55 million Filipinos." Bello (n 123) 55.

Philippines that would address the “worsening insurgency situation”.¹²⁷ The resulting inter-agency study recommended reforms pertaining to the Armed Forces of the Philippines (AFP).¹²⁸ The chief recommendation is the installation of a “professional, apolitical leadership” in the AFP. Secondly, it called for “improvement in dealing with military abuses” which were seen as one of the main reasons driving civilians to the arms of the NPA. Thirdly, the Philippine military had to improve “counter-propaganda” and “civic action capabilities”. The Americans saw socio-economic programs that improved the image of government in the eyes of civilians as “a necessary adjunct to military action”, and pushed for the integration of socio-economic programs and military operations in counterinsurgency. Fourthly, it also called for the reorientation of the Philippine military’s weaponry from high-tech items for external defense towards practical counterinsurgency weapons like trucks and field radios. Finally, it envisioned a more robust US training program for Filipino soldiers.¹²⁹ These ideas did not encompass the resolution of the conflict with the CPP-NPA through a negotiated political settlement. Instead, it was premised on continuing war with the CPP-NPA but with added non-military, socio-economic tools of “counter-propaganda” and “civic action”.

The US government’s ideas about counterinsurgency found better reception in the Aquino government.¹³⁰ At first, the new President experimented with peace negotiations with the CPP-NPA. President Aquino announced that she was interested in negotiations to address “the roots of the insurgency” which she identified as “the economic conditions of the people and the social structures that oppress them”.¹³¹ For this purpose, she also ordered the release of imprisoned leaders of the CPP including Jose Maria Sison (imprisoned since 1977). The government initiated a dialogue with the NDF, which represented the CPP-NPA. By December 1986, a 60-day ceasefire was agreed upon.¹³² But sections of the US government, particularly the Pentagon, were unconvinced with peace negotiations. US Assistant Secretary of Defense Richard Armitage remarked, “As a general

¹²⁷ Ronald Reagan, ‘National Security Study Directive No. 4-84. United States Policy Towards the Philippines’ 1.

¹²⁸ ‘National Security Study Directive’ reprinted in part in Daniel B Schirmer and Stephen Roskamm Shalom (eds), *The Philippines Reader: A History of Colonialism, Neocolonialism, Dictatorship and Resistance* (South End Press 1987) 321–326.

¹²⁹ *ibid*; Bello (n 123) 59–60.

¹³⁰ Bello (n 123) 59–62, 71.

¹³¹ Corazon C Aquino, ‘Speech of President Corazon Aquino at the University of the Philippines Graduation Rites’ (April 20, 1986).

¹³² Bernardo M Villegas, ‘The Philippines in 1986: Democratic Reconstruction in the Post-Marcos Era’ (1987) 27 *Asian Survey* 194–205, 197.

proposition, we support any program that would reduce bloodshed” but “at the end of the day, military action will be required to defeat the insurgency.”¹³³ They continued to push for the new kind of counterinsurgency strategy that they have been selling to Marcos in which military offensives were integrated with socio-economic programs. In what Bello called the Pentagon’s “strongest attack yet on the government’s peace efforts”,¹³⁴

Armitage opined:

“As with the Marcos regime before, the Aquino government has also regrettably failed to develop a comprehensive counterinsurgency plan that integrates military, political, economic and social programs. Marcos erroneously relied exclusively on military action. Some members of the Aquino administration believe that they can rely almost exclusively on symbolic political acts to cure the insurgency. They continue to cling to the forlorn hope that the insurgents will fade from the scene and that coordinated civil and military action will not be necessary.”¹³⁵

Peace talks with the CPP-NPA collapsed in January 1987 after the NDF withdrew from talks following the killing by government forces of unarmed peasants demonstrating for land reform near the presidential palace. Thereafter, the government resumed the counterinsurgency war, with the US playing direct roles. The new counterinsurgency approach adopted features that a US inter-agency group has recommended since 1985, particularly, the emphasis on civic action, propaganda and psychological warfare; US training of Philippine military personnel; and US assistance in battlefield communications and logistics.

There was also a parallelism between the periods of the Corazon Aquino and Gloria Arroyo administrations in terms of patterns of human rights violations. The Aquino administration exhibited contradictory tendencies. To repudiate authoritarianism, Aquino “linked up with [the] international human rights regime”, signing the country onto most UN

¹³³ Richard Armitage, ‘Statement to the Senate Foreign Relations Committee’ (3 June 1986) 10.

¹³⁴ Bello (n 123) 73. Jetschke also reports that there was reason to doubt the Aquino government’s commitment to a negotiated solution to the conflict with the CPP-NPA. “In July 1986, members of Aquino’s cabinet met with Robert Gates, the United States deputy director of central intelligence, to get moral and military support from the United States for a planned counterinsurgency campaign against the NPA. At this meeting Aquino emphasized that she preferred a military option to negotiations. Those at the meeting developed a consensus that, unlike the Communist Party of the Philippines, the NPA was a military problem that needed to be tackled by military means.... Aquino agreed with the thrust of the Gates briefing. ‘By integrating political, economic and civic action and military policies into an overall counterinsurgency strategy, inroads could be made in stopping CPP/NPA growth and later reducing the size of the insurgent numbers by consciously targeting certain groups to be weaned away.’ The Philippine military was united in its stance against negotiations.” Jetschke (n 6) 179.

¹³⁵ Richard Armitage, ‘Statement before House Subcommittee on Asian and Pacific Affairs’ (17 March 1987) 9.

human rights instruments and creating the Commission on Human Rights.¹³⁶ But human rights violations also soared, making the country a flashpoint for international human rights organisations. The violations that attracted the most attention were those committed in the context of counterinsurgency against the CPP-NPA. In particular, the government's employment of "vigilante groups" in counterinsurgency and their barbaric conduct towards civilians were condemned.¹³⁷ The "vigilantes" were anti-communist religious cults that engaged in macabre methods of violence, which included cannibalism, to strike fear in the hearts of communists and their sympathisers.¹³⁸ Reflecting the influence of the US doctrine of "low intensity conflict", the Armed Forces of the Philippines under Corazon Aquino developed the "AFP Broad Front Strategy", which proposed to target the "mass base support systems" of the CPP-NPA instead of NPA regular combatants. The CPP-NPA's mass base, explained an AFP official, "gives the CPP/NPA force maximum freedom of movement and limits severely government initiatives".¹³⁹ Thus, the AFP's battalions were proposed to be broken up into smaller groups to occupy NPA-controlled villages and convert them into government-loyal areas. In practice, confronting the CPP-NPA's mass base involved mobilisation of "vigilante groups", which often targeted members of legal, cause-oriented organisations.¹⁴⁰

2.4.2. From peace negotiations under Ramos to Arroyo's alignment with the "War on Terror"

Peace negotiations did not resume until 1992, when the Ramos administration announced a policy of "national reconciliation". The policy featured the repeal of the Anti-Subversion Law (hence making membership in the CPP no longer illegal. Before Ramos' term ended, the negotiating parties also concluded a Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law (CARHRIHL), the first of four

¹³⁶ Jetschke (n 6) 172. Attention was laid on some two hundred "vigilante groups" formed nationwide.

¹³⁷ Amnesty International, 'Philippines: Unlawful Killings by Military and Paramilitary Forces' (Amnesty International 1988).

¹³⁸ Jetschke (n 6) 171–198; David Kowalewski, 'Vigilante Counterinsurgency and Human Rights in the Philippines: A Statistical Analysis' (1990) 12 Human Rights Quarterly 246–264; Amnesty International (n 137); McCoy (n 5) 433–451.

¹³⁹ McCoy (n 5) 239.

¹⁴⁰ *ibid* 440.

substantive items that the parties identified as the agenda of the talks.¹⁴¹ Although the succeeding president Estrada signed the CARHRIHL in August 1998, he subsequently reverted to a policy of “all-out war” against the CPP-NPA, as with the MILF. After Estrada’s ouster, President Arroyo briefly held formal talks with the NDF in April and June 2001, but changed tack after 9/11.¹⁴²

As mentioned above, President Bush’s search for allies in his “War on Terror” opened material and political opportunities for President Arroyo. US military aid to the Philippines had flattened following the Philippine Senate’s decision to reject a treaty extending the lease for American military bases in the Philippines in 1992.¹⁴³ Between 1994 and 1998, the average amount of US military aid was only USD 1.6 million per annum. However, in 2001 Arroyo negotiated a package of USD 4.6 billion projected aid to rearm the Philippine military for a “robust defence partnership into the 21st century”. \$520 million of this military aid package was actually delivered in the course of seven years (2002–2009). The US also directed \$260 million in US development to Muslim Mindanao.¹⁴⁴ The infusion of money into the military undoubtedly meant that Arroyo could strengthen her relationship with the military, the institution from which she sought support to bolster her shaky, increasingly unpopular administration.¹⁴⁵

2.4.3. United States’ terrorist designation of the CPP-NPA

The advent of the US’ “War on Terror” also ushered in dramatic consequences for the counterinsurgency war with the CPP-NPA, including the reframing of the CPP-NPA as a “terrorist organization”. The US led this development on the international front. In August 2002, shortly after his visit to the Philippines, US Secretary of State Collin Powell

¹⁴¹ From 1995–1998, talks under the Ramos administration produced nine procedural accords, including the four-point agenda of the talks, as well as the CARHRIHL. The other items in the agenda are: socio-economic reforms, political and constitutional reforms, and disposition of forces and cessation of hostilities. Two more supplemental agreements were reached in 2001. National Democratic Front of the Philippines International Information Office, ‘Chronology of the Peace Negotiations between the GRP and the NDFP: 1988–2006’ <<http://www.ndfp.org/chronology-of-the-peace-negotiations-between-the-grp-and-the-ndfp-1988-2006/>> accessed 4 January 2016.

¹⁴² Public Interest Law Center, ‘Laws, Labels, Liberation: The Case of Jose Maria Sison’ (2004) 6–7 <http://www.josemariasison.org/legalcases/related/LLL_jmscase_290504.html> accessed 5 May 2015.

¹⁴³ Philip Shenon, ‘Philippine Senate Votes to Reject U.S. Bases Renewal’ *The New York Times* (16 September 1991) <<http://www.nytimes.com/1991/09/16/world/philippine-senate-votes-to-reject-us-base-renewal.html>> accessed 4 February 2016.

¹⁴⁴ McCoy (n 5) 511.

¹⁴⁵ *ibid.*

announced the designation of the “Communist Party of the Philippines/New People’s Army (CPP/NPA)” as a “Foreign Terrorist Organization” (FTO) under the terms of the 1996 Anti-Terrorism and Effective Death Penalty Act (AEDPA).¹⁴⁶ Jose Maria Sison, who had been negotiating for the NDF side, was also tagged as a “Specially Designated Global Terrorist” three days thereafter on the basis of belief that he leads the CPP-NPA. Thus, the CPP-NPA was officially classed as a terrorist organisation alongside the Abu Sayyaf, which had already been tagged as an FTO in 1997.¹⁴⁷ The government of the Netherlands, where the NDF negotiating panel was based, followed suit by placing the NPA and Sison in its terrorist blacklist on August 13, 2002. The Council of the European Union, as well as governments of the United Kingdom, Canada and Australia also designated the NPA and Sison as terrorists days later.¹⁴⁸ These listings did not merely follow the directive of the UN Security Council in its listing of entities linked to Al Qaeda, Osama bin Laden and the Taliban, as the NPA and Sison were not in the later list.¹⁴⁹ Rather, these were their own initiatives in compliance with the provision of UN Security Council Resolution 1373 to freeze the assets of “terrorists”.

The designations were more than symbolic acts. In addition to being a show of support to the Philippine government in the diplomatic realm, they had fatal consequences. The Philippine military updated its rhetoric by referring to the CPP-NPA not merely as “communist insurgents” but also as “communist terrorists”. More importantly, the international designations of the CPP and/or NPA, as well as Sison, as “terrorists” helped the Philippine government’s campaign to recast the entire national democratic movement – not merely the CPP-NPA but also an array of open, legal mass organisations which compose its organised mass base - as a kind of terrorist network. At the time of the designations by these Western governments in 2002, the Philippines had not enacted an anti-terrorism law, and therefore the Philippine government lacked a legal basis for making a similar move. Moreover, membership in the CPP had ceased to be illegal on September

¹⁴⁶ Pub L. No. 104-132 (1996). The AEDPA was a response to the Oklahoma City bombing of 1995. Ironically, despite the bombing having been committed by an American citizen, AEDPA was directed at “foreign terrorist organizations” (FTOs). The act empowered the Secretary of State to designate any entity in a list of FTOs defined as: (1) any foreign organisation; (2) that engages in any terrorist activity; (3) where such activity threatens the security of US nationals or the national security of the United States. “National security” was defined as “the national defense, foreign relations, or economic interests of the United States”. Designation as FTO results in: (1) seizure of assets of the organisation; and (2) criminalisation of the provision of “material support or resources” by any person to that organisation.

¹⁴⁷ United States Department of State (n 102).

¹⁴⁸ Public Interest Law Center (n 142) 19.

¹⁴⁹ UNSC 1267 (15 October 1999) S/RES/1267.

22, 1992 upon the repeal of the Anti-Subversion Law by Congress during the Ramos administration. The foreign designations gave the impression that Arroyo had international normative support (as it were, in lieu of domestic law) – the new international norms against terrorism – to justify (at least to international audiences) cracking down on groups or individuals that supported or were “linked” to the CPP-NPA.

Aquino therefore focused her attention on exposing “guerrilla-linked groups”, justifying this in terms of the need to cut down the NPA’s source of funding.¹⁵⁰ The military alleged that party list groups *Bayan Muna*, *Gabriela* and *Anakpawis* were channelling their congressional allowances to the CPP-NPA.¹⁵¹ Other well-known NGOs were also subjected to the same allegations of financing, as well as supporting, “terrorists” through political propaganda and other activities.¹⁵² “Given the prescriptions of the international terrorism financing convention,” Jetschke argues, “this claim was based on accepted norms.”¹⁵³ Under the prism of international anti-terrorism norms, otherwise legal activities of legal organisations assumed an illegal colouring. Human rights organisation and their work of documenting violations were not spared. Arroyo warned, “We shall not relent in the fight against terrorists and criminals hiding behind the veil of human rights advocacies or other seemingly deceptively legitimate political advocacies.”¹⁵⁴ As we have seen in the opening discussion of the extrajudicial killings of leftist activists from 2001-2006, this new way of approaching previously legitimate organisations and their activities and the prescription for their “neutralisation” explains the wave of violence that ensued.

Thus, as with the period of transition to a post-Marcos order, the ascendancy of counterinsurgency thinking within the Philippines in the Arroyo government was not simply a fortuitous event. It was enabled by US support, both normative and material. In 1987, when peace talks collapsed under Corazon Aquino’s watch, the ensuing counterinsurgency campaign was underpinned not only by US military aid but also by US thinking on “low intensity conflict”. Similarly, the brief peace talks in 2001 under Gloria Arroyo came to a sudden halt because the “War on Terror” made the counterinsurgency campaign that replaced peace talks materially attractive and normatively plausible.

¹⁵⁰ Jetschke (n 6) 250.

¹⁵¹ *ibid.*

¹⁵² *ibid.*

¹⁵³ *ibid.*

¹⁵⁴ Aurea Calica and Marichu Villanueva, ‘US: GI Medic Might Have Saved Abu Suspect’s Life’ *Philippine Star* (30 July 2002) <<http://www.philstar.com/headlines/170134/us-gi-medic-might-have-saved-abu-suspect-s-life>> accessed 4 February 2016.

3. Recapitulation and Tasks Ahead

This chapter examined the local meaning of “counterterrorism” in the Philippines by recovering some of the political and historical context that is erased when it is assumed that counterterrorism is a uniform universal phenomenon. As I have shown, following the constructivist argument of Jetschke, counterterrorism in the Philippines was not an unavoidable necessity, i.e., a necessary response to terrorism. Rather, it is a contingency that was consciously chosen for its material and political advantages to the state. The Philippine government also sought to overlay counterterrorism rhetoric on pre-existing counterinsurgency. While espousing the new counterterrorism discourse, the government continued to pursue old counterinsurgency goals with the increased resources afforded by partnership with the United States. The decisions to frame the criminal gang Abu Sayyaf as terrorists and then to dub the MILF and other associated Muslim groups as terrorist networks, along with the CPP-NPA and ideologically aligned legal mass organisations, were increasingly implausible. The differing American investments in counterinsurgency or peace negotiations against the MILF and CPP-NPA also proved to be a decisive factor in the fates of these organisations.

This chapter forms the background to the discussion in succeeding chapters on human rights advocates’ engagement with the ‘War on Terror’ in the Philippines. As will be argued, each expansion of the counterterrorism frame to cover the Abu Sayyaf, MILF and CPP-NPA caused or threatened serious human rights violations, to which advocates responded with a variety of strategies. The following two chapters critically examine instructive examples of these strategies.

How did counterterrorism and human rights interact with each other in the Philippines? Did human rights serve as a constraint on counterterrorism policies and practice? Did human rights language facilitate or inhibit human rights violations perpetrated in the name of counterterrorism? What impact did greater recognition of the need to respect the rule of law and human rights have counterterrorism (or state security) practices?

In the next two chapters, I explore these questions by examining four interrelated human rights campaigns addressing the impact of the “War on Terror” in the Philippines. The four campaigns are:

- (1) the campaign against joint US-Philippine military exercises in Basilan;
- (2) the campaign to expose the truth about “mysterious bombings” in Mindanao;

- (3) the campaign to get CPP founder Jose Maria Sison off the terrorist blacklist of the Council of the European Union; and
- (4) the campaign against extrajudicial killings and disappearances of legal left-wing activists.

In these four campaigns, local human rights organisations and advocates and their international supporters played key roles in making issues out of counterterrorism practices of the Philippine government and its foreign allies. In 2001, Arroyo allowed the presence of US troops in Basilan, an island province in Western Mindanao, in the name of counterterrorist cooperation against the Abu Sayyaf group. Hence, in the campaign against joint US-Philippine military exercises Basilan, campaigners addressed the question of whether the Abu Sayyaf were terrorists. In the period from April 2002 to February 2005, a series of bombings hit different parts of Mindanao (as well as Manila) in rapid succession. The government claimed these bombings illustrated the threat of terrorism not only from the Abu Sayyaf but also from the MILF. Campaigners in Mindanao reframed these bombings as “mysterious” and criticised government’s move to blame some of the bombing incidents on the MILF as unfounded. In October 2002, following US and Dutch listings, the Council European Union put the NPA and Jose Maria Sison in its own terrorist blacklist, greatly aiding the Philippine government in its counterinsurgency. Lawyers led a legal campaign to take Sison (though not the NPA) off the EU list, on the ground that no evidence existed that Sison committed any terrorist, indeed any criminal, offense. Starting in 2001, as related above, extrajudicial killings as well as disappearances of leaders and members of left-wing legal organisations increased during the period of Arroyo’s alignment with the US-led “War on Terror”. Human rights organisations campaigned to stop the killings.

I describe and analyse these four campaigns and their outcomes. The first three aforementioned campaigns are grouped together and discussed in Chapter 3. In Chapter 4, I discuss the campaign against extrajudicial killings and disappearances of legal left-wing activists and its impact on Philippine policy. In considering each campaign, I look for both transformative and preservative tendencies. I focus on their specific goals, and the content of the arguments campaigners raise, ascertaining where they lay the blame for human rights violations, and if and how they try to accommodate the legitimacy of counterterrorism. I am also interested in discovering discrepancies in patterns of engagement with counterterrorism among Filipino actors and mainstream international human rights actors.

Chapter 3

Promoting Human Rights While Rejecting Counterterrorism: Three Filipino Campaigns

This chapter examines local human rights advocates' views and initiatives on counterterrorism in the Philippines, and asks to what extent the discourse of human rights-compliant counterterrorism resonates with them. If local advocates' strategies of resisting abuses in the name of counterterrorism are different from the strategy adopted by international human rights advocates, then we can establish two propositions. First, developing the discourse of human rights-compliant counterterrorism is not the only way to advance human rights to resist the abuses in the "War on Terror". Second, the ascendance of the discourse of human rights-compliant counterterrorism may be silencing rather than aiding local human rights advocates.

I show below that as much as local advocates have documented and exposed violations of individual rights, they resisted the move of the Philippine government and supportive foreign governments to frame the Abu Sayyaf, MILF and CPP-NPA as "terrorist" threats. In other words, instead of "countering terrorism while respecting human rights" which was the slogan of UN-level advocates, Philippine advocates rejected "counterterrorism". They saw this critique as part of their efforts to stem the deterioration of the human rights situation. That is to say, they resisted escalating military operations by undermining the government's justification for these operations, that is, that the Abu Sayyaf, MILF and CPP-NPA posed a terrorist threat. While the discourse of human rights-compliant counterterrorism contributes to the advancement of the global counterterrorism agenda by improving it, the thrust of Filipino campaigning strategies is to oppose this agenda's extension to the Philippines. In this sense, Filipino strategies and the discourse of human rights-compliant counterterrorism worked at cross purposes.

1. The Campaign to Oppose Joint Military Exercises in Basilan

Human rights arguments formed an important component of efforts to oppose the "War on Terror" in the Philippines. These arguments articulated what was wrong with the "War on Terror" when other arguments based on sovereignty and non-intervention failed. However, human rights arguments by themselves did not rebut the claim that it was necessary to confront the Abu Sayyaf through military means. Hence, resistance to the "War on Terror" also necessitated showing that the government's approach to the Abu

Sayyaf did not work or was ineffective. The Abu Sayyaf were literally being aided by elements of the Philippine military and high government officials. They profited from the continued existence of the Abu Sayyaf, and hence, government efforts to quell the Abu Sayyaf threat was not serious. Instead of promoting a convergence between human rights and counterterrorism, human rights advocates continued to oppose the “War on Terror”, employing human rights arguments side by side with sceptical arguments against the counterterrorism project. The debate in Basilan and later in Mindanao echoed the debate between human rights and counterterrorism on the international plane. However, the result was quite different as the debate in the Philippines did not produce concordance.

1.1. Failure of sovereignty arguments before the Supreme Court

The arrival of American troops in southwestern Mindanao in 2001 was controversial in the Philippines. The controversy initially revolved around questions of sovereignty rather than lack of compliance with human rights. A provision in the 1987 Philippine Constitution, which had been adopted after the ouster of the Marcos regime in 1986, prohibited the presence of “foreign military bases, troops and facilities” unless covered by a treaty between the Philippines and another state. Moreover, the Constitutional provision prescribed a treaty which was recognised as such by the other contracting party.¹ In September 1991, the Philippine Senate rejected a proposed extension of permission for American military bases to remain on Philippine soil. But in May 1999, the Philippine Senate ratified the Republic of the Philippines-United States Visiting Forces Agreement (VFA) which allowed and governed the conduct of visiting US troops. The US regarded the VFA as an executive agreement not requiring US Senate ratification. In 2000, nationalists invoked Article XVIII, Section 25 of the Philippine Constitution in an attempt to invalidate the VFA for having failed to pass the constitutional requirement.² A dissenting Supreme Court justice decried the VFA as a “slur to our

¹ Art. XVIII, Sec. 25 of the 1987 Philippine Constitution provides: “After the expiration in 1991 of the Agreement between the Republic of the Philippines and the United States of America concerning Military Bases, foreign military bases, troops or facilities shall not be allowed in the Philippines except under a treaty duly concurred in by the Senate and, when the Congress so requires, ratified by a majority of the votes cast by the people in a national referendum held for that purpose, and recognized as a treaty by the other contracting state.” According to the Philippine Supreme Court, this provision “betray[s] a marked antipathy towards foreign military presence, or of foreign influence in general. Hence, foreign troops are allowed entry into the Philippines only by way of direct exception.” *Lim v Executive Secretary* [2002] Philippine Supreme Court G.R. No. 151445.

² *BAYAN v Zamora* [2000] Philippine Supreme Court G.R. No. 138570.

sovereignty”³ because the US Senate did not ratify it as a treaty. Moreover, the VFA sought to extend the same privileges, such as immunity from suit in Philippine criminal courts, to visiting personnel of US armed forces that were extended to Americans under the infamous 1947 Military Bases Agreement. Nevertheless, the Philippine Supreme Court did not invalidate the VFA.⁴

Despite the VFA, nationalists returned to the Supreme Court in 2001 to seek a halt of the deployment of US troops in Mindanao under the aegis of “joint military exercises” dubbed “Balikatan 02-1”.⁵ Balikatan 02-1 “war games” entailed the entry of US troops in the island of Basilan, the site of Philippine military operations against the Abu Sayyaf, hence a real combat zone. Lawyers argued that Balikatan 02-1 in Basilan island was not simply a “military exercise”, war games or combined training operations within the purview of the VFA, and were thus “treaty-less” and constitutionally disallowed.⁶ Rather, it was an actual “rescue and combat operation” given that authorities announced that the goal was to rescue hostages of the Abu Sayyaf and that American soldiers were to accompany Filipino troops in combat with the Abu Sayyaf and may fire back when attacked.⁷ “The Balikatan exercise allows a foreign military power to interfere in the protection of the Philippines’ internal security,” said one of the petitions.⁸ However, this legal effort proved insufficient. The Supreme Court did not invalidate the decision to allow a US troop presence in Mindanao. Though the court agreed with the petitioners that “US forces are prohibited from engaging in an offensive war in the Philippines”, it held that no direct evidence was provided as to what was actually happening on the ground and what the American troops were actually doing there. The court refused to conclude that the “Terms of Reference” governing the conduct of US troops under the Balikatan exercises had been breached.⁹ In any case, the court said this question of fact was not properly addressed to the Supreme Court, which could only review questions of laws.

³ Dissenting Opinion of J. Puno, *ibid.*

⁴ *ibid.*

⁵ Delon Porcalla, ‘SC Asked to Stop “Balikatan” Games’ *Philippine Star* (2 February 2002) <<http://www.philstar.com/headlines/149153/sc-asked-stop-balikatan-games>> accessed 4 February 2016.

⁶ Indybay, ‘Text of High Court Pleading Re: VFA, Balikatan’ <<https://www.indybay.org/newsitems/2002/01/27/1146051.php>> accessed 30 December 2015 (petition of BAYAN).

⁷ *ibid.*

⁸ *ibid.*

⁹ The “Terms of Reference” provided that “US participants shall not engage in combat, without prejudice to their right of self-defense” (I.8) and “At no time shall US Forces operate independently within RP territory.” (II.1.b.) See, *Lim v. Executive Secretary* (n 1) 2–3.

1.2. Human rights violations

On May 27, 2001, the Abu Sayyaf kidnapped foreign and Filipino guests at the Dos Palmas resort in Palawan. The military pursued the kidnappers into their hideouts in Basilan. In June 2001, the military laid siege on Lamitan town in Basilan but still failed to apprehend the kidnappers. In embarrassment, President Arroyo declared a “state of lawlessness” in the island of Basilan. Up to eleven battalions of the Philippine military were deployed, dominating the small island province. The military placed numerous checkpoints along the only road that connected Basilan’s towns to each other. On July 13, 2001, the Secretary of Justice issued a memorandum to the Armed Forces of the Philippines to arrest of “all members of the Abu Sayyaf Group, their conspirators, associates and agents”. Arrests were made on the strength of this blanket authority.¹⁰

The heavy handed manner by which arrests were made alarmed the regional office of the Commission on Human Rights (CHR). According to the report of the said CHR office, raids were conducted in Barangay Tabuk on July 13, 2001 at dawn while the villagers were still sleeping. Soldiers wearing bonnets barged into homes and made use of masked informers to identify suspects. All the male residents of the barangay were collected together. Then, informers whose faces were covered pointed out who were the persons they regarded as Abu Sayyaf members or sympathisers. The ones singled out were “immediately arrested, hogtied and blindfolded”. The military also searched their houses. Although some of villagers insisted to be shown arrest or search warrants, none was shown to them.¹¹ The CHR regional found these actuations to be “blatant human rights violations” and condemned the illegality of the raids. It recommended the filing of criminal charges against the military for warrantless arrests and physical injuries.

The human rights organisation Karapatan also conducted its own fact-finding mission on the situation in Basilan on September 2001. Its report featured cases of “brutal killings” and torture of suspected Abu Sayyaf.¹² From the testimony of relatives, ten

¹⁰ Department of Justice, Memorandum Circular No. 40 (July 13, 2001). Karapatan, ‘Basilan Under Siege: Report of the Fact-Finding on Human Rights Violations, Relief and Medical Mission, September 9-16, 2001, Basilan Province, Mindanao, Philippines’ (2001) 4. The DOJ Memorandum of July 13, 2001 signed by Secretary Hernando Perez authorised arrests based on “verified information”, a lower standard than that required by Rule 13, Section 5 of the Rules of Criminal Procedure which allowed warrantless arrests based on “personal knowledge” of the commission of a crime. Amnesty International, ‘Torture Persists: Appearance and Reality within the Criminal Justice System (Philippines)’ (Amnesty International 2003) ASA 35/001/2003 56.

¹¹ International Peace Mission, *Basilan: The Next Afghanistan?: Report of the International Peace Mission to Basilan, 23-27 March 2002* (Akbayan Citizens Action Party 2002) 19.

¹² Karapatan (n 10) 5, 10, 12.

persons were reported to have died at the hands of the military and the paramilitary Citizen Armed Force Geographical Unit (CAFGU) in the course of the military operation in Basilan. Moreover, they were brutally killed, since the bodies were found mutilated or showed signs of physical torture. For example, Banodin Ujajon, 45 years old, was found beheaded a month after being picked up by CAFGUs along with his two sons. The CAFGUs accuse his family of being Abu Sayyaf sympathisers. Banodin's son Al-Ikram believes his father's beheading was a "retaliation" for the beheadings committed by the Abu Sayyaf.¹³ The Karapatan fact-finding team visited 25 detainees held at the Basilan Provincial Jail on suspicion that they were Abu Sayyaf. It reported that all of them were tortured, documenting the same with written statements and pictures.¹⁴

Campaigners against US troops in Mindanao followed up on the findings of the CHR and Karapatan. As legal arguments that US military presence in Mindanao to counter the Abu Sayyaf constituted an unconstitutional foreign military intervention proved insufficient to prevent the deployment of US troops to Mindanao, protest efforts turned to documenting the realities on the ground. It was in this context that campaigners turned to human rights arguments to advance the goal of opposing the "War on Terror" in Mindanao. The networks of Akbayan and Bagong Alyansang Makabayan (BAYAN),¹⁵ who have challenged the VFA and Balikatan 02-1 in the Supreme Court, were soon mobilizing local human rights organisations and international activists to document and report on the impact of Balikatan 02-1 in Basilan in terms of rights violations. Two international fact-finding missions were launched in March and July 2002 in Basilan. The International Peace Mission launched in March 2002 trumpeted Basilan as the "prototype of impending US operations in its 'global war against terrorism'" and aimed first, "to look into officially denied reports of civilian casualties, arbitrary arrests, and displacements of affected civilians" and second, "to evaluate the conduct of the joint US and Philippine military exercises as well as its possible ramifications on the Moro separatist struggle".¹⁶ The

¹³ *ibid* 11.

¹⁴ *ibid* 12–13.

¹⁵ Bagong Alyansang Makabayan (BAYAN) and Akbayan are rival leftist coalitions of organisations of peasants, workers, and other marginalised sectors. They also have rival human rights organisations associated with them. The human rights organisation Karapatan (Alliance for the Advancement of People's Rights) is associated with BAYAN, while the Philippine Alliance of Human Rights Advocates (PAHRA) is associated with Akbayan.

¹⁶ International Peace Mission (n 11) 6. The International Peace Mission of March 2002 included prominent international anti-war activists who had earlier intended to launch a fact-finding mission to Afghanistan, but instead chose to investigate the conditions in Basilan. Leading the mission were Matti Wouri, former chairman of Greenpeace International and a Member of the European Parliament; Lee Rhiannon, a leader of the Australian Greens and a member of the Legislative Council

mission of July 2002 was called “International Solidarity Mission against US Armed Intervention in the Philippines” signalling a continuing focus on asserting Philippine sovereignty.¹⁷ Nevertheless, this latter mission also identified observance of human rights and international humanitarian law and the impact on peace negotiations as areas of concern.¹⁸

When the International Peace Mission arrived in Basilan in March 2002, the number of detainees held at the provincial jail on suspicion of being Abu Sayyaf members had increased. Of 113 detainees, 62 claimed they had been arrested without warrants and had been held for months without being charged.¹⁹ Many detainees also alleged that they had been tortured into confessions that they were Abu Sayyaf.²⁰ The International Solidarity Mission (ISM) of July 2002 underscored that aggressive raids on communities suspected of supporting the Abu Sayyaf had continued following the start of US troop involvement, which began in January 2002.²¹ A case that was highlighted up by national and international media was that of Buyong Buyong Isnijal, a farmer who was allegedly shot in the thigh by an African-American soldier in the course of a raid on his house in Barangay Canas in Tuburan town.²² The wife and mother of Isnijal gave testimony to the mission that a composite team of Filipino and American soldiers raided their house on July 25, 2002, that his captors took the wounded Isnijal to the hospital, but thereafter, left the family uninformed about his exact whereabouts.²³ In a subsequent CHR investigation, it was established that the American soldier was a certain Sgt. Reggie Lane, who was identified by a hospital doctor among 15 Filipino and 3 American soldiers who brought Isnijal to the Lamitan district hospital.²⁴ The witnesses who spoke to the ISM also reported that the raids had been preceded by “US spyplanes

of New South Wales; and Pierre Rousset, a leader of the European United Left and a Member of the European Parliament.

¹⁷ International Solidarity Mission Against U.S. Armed Intervention in the Philippines, July 24 -31, 2002, ‘Statement’ <<http://www.yonip.com/statement-of-the-international-solidary-mission-ism-against-u-s-armed-intervention-in-the-philippines/>> accessed 4 January 2016.

¹⁸ *ibid.*

¹⁹ International Peace Mission (n 11) 17.

²⁰ *ibid.*

²¹ International Solidarity Mission Against U.S. Armed Intervention in the Philippines, July 24 -31, 2002 (n 17).

²² Julie Alipala, ‘US Combat Role Reported First in 2002’ *Philippine Daily Inquirer* (29 August 2009) <<http://newsinfo.inquirer.net/inquirerheadlines/nation/view/20090829-222542/US-combat-role-reported-first-in-2002>> accessed 10 March 2015.

²³ *ibid.*

²⁴ *ibid.*

circling overhead for hours”, showing active provision of intelligence support to the raiding team.²⁵

In condemning the arrests as arbitrary, the missions gave credence to the allegation that many if not most of those arrested had been simple folk rather than members of the Abu Sayyaf. The “Free the Basilan 73” campaign, which grew out of the fact-finding mission of 2001, pressed for the release of 73 of the 75 local residents arrested in the course of 2001 and charged with kidnapping.²⁶ Campaigners argued that the 73 were plain civilians. Some of them could even prove that they or their relatives were in fact victims of the Abu Sayyaf’s criminal activities.²⁷ The IPM report suggested that among those arrested as Abu Sayyaf were victims of local internal quarrels who had nothing to do with terrorism. By relying on finger-pointing hooded informers,

“the military only allowed itself to be used – wittingly or unwittingly – for personal vendetta by warring powers in the province. Instead of taking their revenge personally, these elements would simply inform the military that their personal enemies have links to the Abu Sayyaf and these enemies would eventually be arrested without proper charges.”²⁸

The Karapatan report also argued that the “bounty system” of government advertised monetary rewards for the capture of Abu Sayyaf, had in certain cases motivated informers to denounce innocent individuals.²⁹

Campaigners also documented substantial displacement of communities due to the human rights consequences of military operations. On an island of only 61,546 households, the government’s Department of Social Welfare and Development reported that 13,421

²⁵ International Solidarity Mission Against U.S. Armed Intervention in the Philippines, July 24-31, 2002 (n 17).

²⁶ Kawagib, ‘Kawagib Moro Human Rights Calls for the Release of Basilan Detainees’ *MindaNews* (23 July 2008) <http://minda2010.timonera.com/index.php?option=com_content&view=article&id=4783:kawagib-moro-human-rights-calls-for-the-release-of-basilan-detainees&catid=83:press-releases&Itemid=247> accessed 5 February 2016; Satur Ocampo, ‘Justice Far off in Basilan’ *Philippine Star* (26 November 2011) <<http://www.philstar.com/opinion/751785/justice-far-basilan>> accessed 5 February 2016; Lyn V Ramo, ‘After Ramadan 11 behind Prison Bars, Basilan 73 Cry for Justice’ *Bulatlat* (9 August 2011) <<http://bulatlat.com/main/2011/08/09/after-11-ramadan-behind-prison-bars-basilan-73-cry-for-justice/>> accessed 5 February 2016.

²⁷ Amirah Lidasan, a leader of the Moro-Christian Peoples’ Alliance (MCPA) and a campaigner of the “Free the Basilan 73” campaign said that in choosing whom to include in their campaign, they intentionally avoided known leaders of the Abu Sayyaf. For example, Hector Janjalani who was captured earlier and held in Camp Bagong Diwa in Manila to which the Basilan 73 were eventually transferred was not included. E-mail from Amirah Lidasan to author (March 12, 2015).

²⁸ International Peace Mission (n 11) 18.

²⁹ Karapatan (n 10) 14.

families were displaced by the military operations against the Abu Sayyaf.³⁰ Karapatan charged that “mass displacement has become a standard consequence of military operations”; that looting by soldiers sometimes occurred on the evacuated properties; that evacuees were forced to stay with relatives or in evacuation centres for extended periods, causing hardship; and that schools had been interrupted by the conversion of school buildings into evacuation centres or military accommodation facilities.³¹

1.3. Limitations of human rights arguments

So far we have seen that exposing the human rights conditions in Basilan assumed crucial importance to the campaign to oppose the “War on Terror” in the Philippines after the Supreme Court ruled against the constitutional challenge to American troop deployment. Human rights arguments that civilians bore the brunt of the military operations against the Abu Sayyaf tended to reveal that the “militaristic approach” to the Abu Sayyaf took a heavy toll on civilian life. This focus on the human rights consequences of the “War on Terror” helped strengthen resistance efforts, albeit in the realm of political debate. However, this arena was also fraught with difficulties.

First, human rights arguments did not by themselves rebut the necessity to confront the Abu Sayyaf, whose atrocities were all too well known. Indeed, the Abu Sayyaf had committed such atrocious human rights violations against civilians, including in Basilan, that focusing on violations by the Philippine and US military who vigorously pursued them risked being perceived as misplaced or biased. Hence, President Arroyo criticised the International Peace Mission for not looking into Abu Sayyaf violations as well.³² So long as President Arroyo could maintain a reputation for fierceness against the Abu Sayyaf, critics of the military’s human rights record in Basilan could be dismissed as naïve or even worse, as “Abu Sayyaf lovers”.³³

Moreover, the design of American troop involvement in military counterterrorism operations in Mindanao presented a challenge to campaigners. There was evidence that

³⁰ *ibid* 8.

³¹ *ibid* 9–10.

³² At the public hearing of the House of Representatives’ Committee on Human Rights which was made to coincide with the second day of the IPM, alleged victims of the Abu Sayyaf presented themselves to the committee and “insisted on speaking, crowding out the witnesses [to violations by the military] whose narrations the [representatives] sought out in the first place. International Peace Mission (n 11) 10.

³³ BBC World Service, ‘Arroyo Calls US Critics “Terrorist Lovers”’ *BBC News* (8 February 2002) <<http://news.bbc.co.uk/2/hi/asia-pacific/1809222.stm>> accessed 4 January 2016.

American troops participated in actual combat operations, but it was difficult to connect to specific abuses.³⁴ The Americans planned their involvement to have “low visibility” as well as “sustainability”.³⁵ This was necessary as the US considered the “War on Terror” to be temporally open-ended. In contrast to Afghanistan and Iraq, where Americans deployed large occupation forces, in Basilan the US employed an “indirect approach”³⁶ that emphasised the need to operate through “indigenous armed forces”, i.e., the Philippine military, and to work through the local population to isolate and defeat “common enemies”, i.e., the Abu Sayyaf.³⁷ The key point is that the “political acceptability” of American military involvement in the country, particularly in the eyes of its “moderate Muslim community”,³⁸ was already factored into the calculation of its success. Thus, while American soldiers were aware that they were engaging in war in the Philippines, they sought to play background role from behind the frontline. As the controversial Terms of Reference provide, American troops were only supposed to act as advisers and trainers to Philippine soldiers in yearly, routine *Balikatan* military exercises, whose expressed aim was improving the Philippine military’s technical capacity for counterterrorism.³⁹

The American military was more visible in the area of community relations, where it sought to create a more favourable view of its presence in deprived villages. The US thus ran “focused civil-military operations” or “humanitarian and civic action projects”, which provided development assistance to build or repair infrastructure such as roads, bridges

³⁴ The single case of Buyung Buyung Isnijal uncovered by the ISM in 2002 was never officially investigated despite a Congressional resolution, and was quickly forgotten. Another eye witness account of American involvement in operations was not to be had until February 2008 with the testimony of Sandrawina Wahid, one of the survivors of a massacre in Maimbung, Sulu. E. San Juan Jr., ‘Abu Sayyaf and U.S. Intervention in the Philippines: Marginal Comments on the Bangsamoro Struggle for Self-Determination’ (2011) 1 *The Journal of Social Transformation* 117-136, 118.

³⁵ Gregory Wilson, ‘Anatomy of a Successful COIN Operation: OEF-Philippines and the Indirect Approach’ (2006) 86 *Military Review* 2-12, 2.

³⁶ *ibid* 4.

³⁷ *ibid*.

³⁸ *ibid* 3.

³⁹ According to Wilson, US special forces did accompany Filipino soldiers on combat operations but operated under restrictive rules of engagement:

“The tip of the US spear consisted of 160 SF [special forces] personnel and, later, 300 members of a Naval Construction Task Group. All US forces operated under restrictive rules of engagement. Once on Basilan, SF advisers deployed down to the battalion level and moved in with their Philippine counterparts in remote areas near insurgent strongholds. ... The SF teams played a key role in building AFP capacity by accompanying units (as advisers only) on combat operations.” *ibid* 6–7. “SF advisers initially were not allowed to accompany AFP units below the battalion level during operations, but after a lengthy mission review process (CONOPS), advisors were allowed to work at company level toward the end of the operation.” *ibid* 12, n 41. For an account of American roles in the rescue of the kidnapped American Gracia Burnham in Zamboanga del Norte, see also, CH Briscoe, ‘Rescuing the Burnhams: The Unspoken SOCPAC Mission’ (2004) 17 *Special Warfare* 46-51.

and airports.⁴⁰ A “psychological operations component” also developed strategies for addressing what the Americans perceived as “a decidedly anti-American bias” on the part of the Philippine media.⁴¹ These initiatives reveal that, just like human rights campaigners, the American military was prepared to do battle in the sphere of local public opinion.

1.4. Corruption and military collusion with the Abu Sayyaf

To demonstrate that the government is not solving the Abu Sayyaf problem, allegations of human rights violations needed to be bolstered with additional arguments. As reflected in the IPM and ISM reports, an additional criticism of the Basilan war was fashioned from detailed allegations of corruption and collusion between the Abu Sayyaf, the Philippine armed forces and government officials.

Father Cirilo Nacorda, a Catholic priest based in Lamitan, Basilan, who was kidnapped by the Abu Sayyaf in 1994, reported that in captivity, he witnessed his Abu Sayyaf captors negotiating with military officers for the delivery of weapons with the help of a local government official.⁴² Moreover, while he and his Abu Sayyaf captors were trekking in the mountains, they came upon Philippine soldiers who nevertheless conveniently ignored them, failing to halt them.⁴³ Further evidence of corruption and collusion came from the Congressional investigation of the so-called Lamitan siege of June 1, 2002 in which the Abu Sayyaf escaped unscathed from a military cordon of the Lamitan hospital in Basilan, where they had taken refuge with 20 hostages.⁴⁴ Witnesses related that an exchange of ransom money was effected through military officers during the siege; that soldiers were ordered to abandon the back door from which the Abu Sayyaf escaped; and

⁴⁰ Cherilyn A Walley, ‘Civil Affairs: A Weapon of Peace on Basilan Island’ (2004) 17 *Special Warfare* 30-35; Wilson (n 35) 6–7. The governor of Basilan Wahab Akbar, who defied a resolution of the Basilan provincial legislative board which opposed the joint military exercises, warmly welcomed American assistance to repair the 230-kilometer circumferential road in Basilan. He pronounced, as Americans brought road building equipment to his town, that “my dream is now starting to materialize... I know I can die 10 times and not be able to purchase this equipment for my people”. Quoted in Abinales (n 194) 94.

⁴¹ CH Briscoe, ‘Wanted Dead or Alive: Psychological Operations During Balikatan 02-1’ (2004) 17 *Special Warfare* 26-29, 27; Wilson (n 35).

⁴² Jose Torres Jr., *Into the Mountain: Hostaged by the Abu Sayyaf* (Claretian Publications 2001) 39–40.

⁴³ *ibid.*

⁴⁴ Thomas Fuller, ‘Philippine Armed Forces Helped Kidnapping Gang Escape, He Says : The Fighting Priest’ *The New York Times* (24 August 2001) <http://www.nytimes.com/2001/08/24/news/24iht-a1_20.html> accessed 9 February 2016; Mark Baker, ‘With God and a Gun on His Side’ *The Age* (2 March 2002) <<http://www.theage.com.au/articles/2002/03/01/1014704998112.html>> accessed 9 February 2016.

that a truck provided by the provincial government was used in the escape.⁴⁵ A similar scandal shook the administration of President Estrada when the German newspaper *Der Spiegel* alleged that a cabinet secretary close to Estrada had received part of the ransom money paid for hostages abducted by the Abu Sayyaf in Sipadan, Malaysia in April 2000.⁴⁶ These well-publicised allegations convinced parts of the public that the intractability of the Abu Sayyaf problem was partly due to corruption. The IPM built on this argument by suggesting that “the Abu Sayyaf may be resistant to a military solution”,⁴⁷ and proceeded to ask, “How can the Philippine military solve the Abu Sayyaf when it itself may be part of the problem?”⁴⁸ The suggestion was therefore that intensifying military operations in Basilan would be ineffectual without first addressing the problem of corruption and collusion with the Abu Sayyaf kidnappers.

While this argument gained traction as against the Philippine military and government officials, the American military seemed inoculated from its effects. In fact, since the Americans could present themselves as capable and committed to countering the Abu Sayyaf as “international terrorists”, in stark contrast to the inefficiency and corruption of the Philippine military and the Estrada government, the decision to involve Americans in the Basilan campaign appeared more justifiable or acceptable.⁴⁹ As Jetschke put it, “emerging evidence about the military’s corruption and inefficiency appeared to make American assistance the most rational solution”.⁵⁰ It was clear that in order to convince the public to support their goals, campaigners needed to refine their arguments, drawing upon new information demonstrating the deleterious effects of American involvement.

⁴⁵ Efren Danao, ‘Abu Sayyaf Allowed Romero to Escape after Ransom Payment’ *Philippine Star* (7 September 2001) <<http://www.philstar.com/headlines/132831/sayyaf-allowed-r-ii-escape-after-ransom-p>> accessed 9 February 2016.

⁴⁶ BBC News, ‘Estrada Denies German Ransom Allegations’ *BBC* (11 December 2000) <<http://news.bbc.co.uk/2/hi/asia-pacific/1065475.stm>> accessed 9 February 2016.

⁴⁷ International Peace Mission (n 11) 20.

⁴⁸ *ibid.*

⁴⁹ To the surprise of opponents, opinion polls in January and August 2002 showed that majority of Filipino respondents, including Muslims, supported the Balikatan exercises. Basilan representative Abdul Gani Salapuddin argued that if Americans could do the job of hunting down the Abu Sayyaf, “then it would be good as it would put an end to the demonization of Islam.” Patricio N Abinales, *Orthodoxy and History in the Muslim-Mindanao Narrative* (Ateneo de Manila University Press and Flipside Publishing 2010) 93–94.

⁵⁰ Anja Jetschke, *Human Rights and State Security: Indonesia and the Philippines* (University of Pennsylvania Press 2011) 241.

1.5. Finding

In the campaign to oppose the deployment of US troops in Basilan, the strategy of Filipino campaigners was discrepant with the discourse of human rights-compliant counterterrorism. The local campaigners were not merely aiming to get the Philippine and US armed forces to comply with human rights standards in their conduct of the operations. In fact, the Philippine and US governments touted that the rules of engagement governing the conduct of American troops in Basilan were restrictive and ensured that they did not commit human rights violations. This was part of the calculation to make American military presence “politically acceptable”. The campaigners rebutted this argument through the case of Buyung Buyung Isnijal who was allegedly shot by a team which included an American soldier. But more significantly, to the campaigners, averting human rights violations was not simply a question of strict enforcement of the rules of engagement. They raised the concern that the increased military presence in Mindanao in the name of counterterrorism was a precursor for escalation of conflict with the MILF and the CPP-NPA. This fear materialised when the MILF was later linked to the Abu Sayyaf, and attacks on the MILF were undertaken despite its ceasefire agreement with the government, resulting in massive displacement of communities.

Unlike the discourse of human rights-compliant counterterrorism, local campaigners did not concede that there was a credible “terrorist” threat which necessitated “counterterrorism”. The campaigners questioned the assumption that military operations simply aimed to counter the Abu Sayyaf. They argued that many individuals who were arrested allegedly for being Abu Sayyaf were not in fact Abu Sayyaf, but ordinary folks. Finally, they highlighted the Philippine military and government officials’ collusion with the kidnappers which showed lack of seriousness in the pursuit of the Abu Sayyaf.

2. The Campaign on “Mysterious Bombings” in Mindanao

In 2003, human rights organisations were hard at work documenting the impact of the “War on Terror” as it expanded from Basilan to Mindanao. The geographical shift gave critics new opportunities. Opponents had feared that Philippine alignment with the US’ “War on Terror” might decrease the prospects for peaceful settlement of armed conflict

with the MILF, thus increasing displacement of civilians and other human rights violations.⁵¹ This was already evident in February 2003, when the Department of Social Welfare and Development reported that 411,004 persons had been displaced from the provinces of Maguindanao, North Cotabato and Bukidnon as a result of fighting following the attack on the MILF's stronghold in the Buliok complex.⁵²

The threat of a total breakdown of peace negotiations and further escalation of the conflict between the Philippine government and the MILF in the name of counterterrorism raised the stakes for campaigners against American military involvement. As in Basilan, military operations in Mindanao against the MILF were being perpetrated in the name of counterterrorism. In response, campaigners not only continued exposing human rights violations, but also challenged the extension of the terrorism discourse to the MILF.

The terrorism discourse appeared to be confirmed by the rapid succession of bombings in Mindanao.⁵³ The biggest bombing in Mindanao targeted Davao City's international airport on March 4, 2003. It killed 21 people and injured 124. Barely a month later, another bombing destroyed Davao City's Sasa wharf on April 2, 2003, killing 16 dead and injuring 56. There were 36 bombing incidents in various parts of Mindanao from February 25, 2000 to May 18, 2007.⁵⁴ In addition, there were four bombing incidents in Manila from May 21, 2000 to February 27, 2004 that the government attributed to terrorists. The most devastating of these was the bombing of the passenger vessel "Superferry 14" just outside Manila Bay on February 27, 2004 which killed 116 people.⁵⁵ As Human Rights Watch note, altogether these bombings within a period of seven years claimed more casualties than bombings in Indonesia (including the 2003 Bali bombing) in the same period, or in Morocco, Spain, Turkey or Britain.⁵⁶

In response to the Davao airport and wharf blasts in 2003, President Arroyo declared a "State of Lawless Violence" in Davao city and the Davao provinces.⁵⁷ She further

⁵¹ Memories of the 2000 all-out war against the MILF under the Estrada administration was still fresh. Heightened confrontation in that last episode displaced some 932,000 persons in the Mindanao provinces of Maguindanao, North Cotabato, Lanao del Sur, and Lanao del Norte. More than a hundred died and 9,000 homes were destroyed in that war. Jose Jowel Canuday, *Bakwit: The Power of the Displaced* (Ateneo de Manila University Press and Flipside Publishing 2009) 23.

⁵² *ibid.*

⁵³ Human Rights Watch, 'Lives Destroyed: Attacks Against Civilians in the Philippines' (2007).

⁵⁴ *ibid* 2 (lists the incidents of bombings covering this period).

⁵⁵ *ibid.*

⁵⁶ *ibid* 3.

⁵⁷ Carlos H Conde, 'Blasts at Philippine Mosques Follow Bombing at Terminal' *New York Times* (4 April 2003) <<http://www.nytimes.com/2003/04/04/world/blasts-at-philippine-mosques-follow-bombing-at-terminal.html>> accessed 7 May 2015.

ordered the formation and deployment of Task Force Davao, comprising different units of the AFP, to pursue the perpetrators of the Davao blasts.⁵⁸ The police built a case against the MILF leadership who were blamed for the Davao airport bombing, accusing them of using a suicide bomber.⁵⁹ This was denied by the MILF.⁶⁰ Meanwhile, the Abu Sayyaf claimed responsibility for the Davao airport bombing,⁶¹ as well as the Super Ferry blast.⁶²

As will be seen below, the campaigners focused on questioning the dubious authorship of these bombings in order to overturn the discourse that Mindanao was gripped by Islamic terrorism.

2.1. The Mindanao Truth Commission

The convergence of concerns for human rights, the peaceful settlement of armed conflict, truth-seeking and terrorism, is illustrated in the so-called Mindanao Truth Commission (MTC), which was an unofficial private citizen's initiative that probed a spate of bombings in Mindanao in 2003.⁶³ The MTC arose from the Initiatives for Peace in Mindanao (InPeace Mindanao), which was initially a joint initiative of Mindanao-based religious and civil society leaders, who sought to respond collectively to the threat of escalating conflict in Mindanao. InPeace Mindanao circulated a "Manifesto for Peace" and held public forums across Mindanao to discuss "urgent peace issues".⁶⁴ It evolved into a

⁵⁸ Carlos Isagani T Zarate, 'Davao Gets Beating from Terrorists' *Philippine Daily Inquirer* (13 April 2003) A16; Joselle Badilla, 'Task Force Davao to Stay - Duterte' *Philippine Daily Inquirer* (29 December 2003) A18.

⁵⁹ BBC News, 'Manila Links MILF to Bomb' *BBC* (6 March 2003) <<http://news.bbc.co.uk/2/hi/asia-pacific/2824557.stm>> accessed 9 February 2016; CNN International, 'Airport Bomb: Islamic Group Blamed' (6 March 2003) <<http://edition.cnn.com/2003/WORLD/asiapcf/southeast/03/06/philippines.bomb/>> accessed 9 February 2016.

⁶⁰ BBC News (n 59).

⁶¹ Agence France-Presse, 'Abu Sayyaf Claim Responsibility for Blast' *Sydney Morning Herald* (5 March 2003) <<http://www.smh.com.au/articles/2003/03/05/1046826429975.html>> accessed 9 February 2016.

⁶² Christina Mendez and others, 'Sayyaf Owns up Ferry Blast' *Philippine Star* (1 March 2004) <<http://www.philstar.com/headlines/240839/sayyaf-owns-ferry-blast>> accessed 9 February 2016.

⁶³ A few other people's tribunal-type initiatives were launched by various civil society critics of the Arroyo administration throughout her term. In 2005, the group Bukluran para sa Katotohanan, which included Vice President Teofisto Guingona and other opposition politicians, launched the Citizen's Congress for Truth and Accountability as a venue to hear the body of evidence prepared for a failed impeachment complaint against President Aquino. In 2007, the Permanent People's Tribunal based in the Hague heard the petition of BAYAN, Karapatan and other groups against the Arroyo government for "crimes against humanity".

⁶⁴ Mindanao Truth Commission, 'Executive Summary Progress Report June 2003-March 2004' (2004) 3-4.

permanent forum for advocating peace negotiations and documenting human rights violations, in the context of the apparent shift in government policy from peace negotiations with the CPP-NPA and MILF to a military approach. The network of human rights organisations under the Karapatan banner affiliated with InPeace Mindanao. From May 2003, InPeace Mindanao adopted two major objectives:

“(1) The resumption of the Peace Negotiations between the GRP-NDFP and the GRP-MILF, and (2) Conduct of an Independent Fact Finding Mission on the ‘mystery’ bombings in Mindanao and the human rights violations in the island ensuing from militarization, international humanitarian law violations ensuing from AFP-MILF and AFP-NPA armed engagements.”⁶⁵

Making good on its second major call, InPeace Mindanao launched the Mindanao Truth Commission (MTC) on June 25, 2003 in Davao City. The MTC had a total of 23 commissioners, headed by Professor Robinson Montalba from the Ateneo de Davao University, with six lawyers, two bishops, two other academics, and religious leaders making up the rest. The MTC investigated thirty three (33) incidents of bombings on the island in the period from April 2002 to March 2004 which were considered to be “mysterious”.⁶⁶ These bombings killed 95 people and injured 490 others.⁶⁷ They targeted civilians in shopping malls, public markets, mosques, transport hubs and other public places.⁶⁸

The MTC set up regional investigating teams in five regions of Mindanao to identify prospective witnesses and gather information about the bombings, including on the human rights impact of the state’s response to the bombings. Over the course of five months, the MTC conducted seven fact-finding sessions in different public venues in four different Mindanao cities.⁶⁹ At these sessions it heard testimonies from invited witnesses and received documentary and other evidence. In total, forty six (46) persons gave testimony.⁷⁰ The MTC produced a report in March 3, 2004.⁷¹

⁶⁵ *ibid* 4.

⁶⁶ *ibid* 3.

⁶⁷ *ibid*.

⁶⁸ See also Human Rights Watch (n 53).

⁶⁹ Mindanao Truth Commission, ‘Executive Summary Progress Report June 2003 -March 2004’ (n 64) 6.

⁷⁰ *ibid*.

⁷¹ Mindanao Truth Commission, ‘Executive Summary Progress Report June 2003 -March 2004’ (n 64).

2.2. Human rights violations

The MTC report highlighted that the rush to implicate the MILF in the bombings had caused substantial human rights violations. It argued that the state had resorted to indiscriminate raids on Muslim communities in order to make arrests following the Davao airport and Sasa wharf bombings, and that these arrests had been illegally effected without judicial warrants, and had invariably led to cases of torture.⁷² The rush to implicate the MILF resulted in the gross inadequacy of evidence in the criminal cases that were filed.⁷³

In the Davao airport bombing, the police speculated that the bomber was Montaser Sudang, a 19 year-old man, who had been among the casualties in the said bombing. The police alleged that Montaser, his uncle Undungan Sudang and father Terso Sudang were members of the MILF. The latter two were also arrested and charged, alongside the MILF chairman Hashim Salamat and the rest of the MILF leadership, in connection with the bombing. However, while the prosecution produced documents which purported to show that the Sudangs were MILF members (supposedly MILF identity documents had been recovered by the AFP from an overrun MILF base), no evidence was provided that Montaser actually procured and planted the bomb.⁷⁴ Thus, the case against the Sudangs was dismissed by the court that tried the case for lack of evidence. Moreover, the MTC pointed out that the scene of the crime, which could have produced other and better leads and physical evidence, was quickly cleaned up by the Fire Marshall while the post-blast investigators from the police took a brief rest from investigation.⁷⁵

⁷² *ibid* 18–19; Mindanao Truth Commission, ‘Report of the Independent Fact Finding Mission on the Mindanao Bombings and Human Rights Violations’ (2004).

⁷³ Mindanao Truth Commission, ‘Report of the Independent Fact Finding Mission on the Mindanao Bombings and Human Rights Violations’ (n 72) V–82.

⁷⁴ The MTC noted that Montaser Sudang, moreover, was in the airport together with 27 of his relatives to welcome a cousin Tarhata who arrived from abroad; and even if he were a suicide bomber, it was simply unbelievable that he would use that very occasion to blow up the airport and imperil the lives of his own relatives. Mindanao Truth Commission, ‘Abridged Progress Report’ (2004) 3.

⁷⁵ “The hasty clean up of the Davao International Airport... should be accounted for by the Arroyo government but was sweepingly dismissed by the Maniwang Commission as a mere lapse in investigative procedure. The Maniwang Commission ... believed that the crime scene was hastily cleaned up in time for the opening of the airport by six o’clock in the morning after the explosion. The scene of the crime [however was] within the passenger reception area [which was] not essential to the departure and arrival of flights and the overall operations of the airport. No civilian or law enforcement unit has come forward to claim responsibility for the clean up and justify their actions. The possibility of a cover-up in the investigation is extremely high given the unexplained and unreasonable circumstances that have erased vital traces of the deadly blast.” Mindanao Truth Commission, ‘Report of the Independent Fact Finding Mission on the Mindanao Bombings and Human Rights Violations’ (n 72) V97.

In the case of the Sasa wharf bombing, the state's case against two youths, who were also charged alongside the MILF hierarchy, was no more compelling. It surfaced that the extrajudicial confessions by two youths Jimmy Balulao and Tohamie Bagundang, who had allegedly planted the bomb, had been secured following their torture by police.⁷⁶ The retractions of these confessions forced a reinvestigation of the case by the public prosecutor.⁷⁷

2.3. The theory that bombings were fabricated by state agents

Probably the most novel part of the work of the Commission was its examination of the theory that the bombings were staged by Philippine military officials as well as a possible state agent of the United States. This theory shattered the distinction between state agents and the terrorists they were supposedly pursuing, demonstrating in an explosive way that the dichotomy between terrorism and counterterrorism was a farce. The commissioners took the allegations in support of the theory seriously and built a case for pursuing an official investigation of the documentary evidence and of the implicated state agents.

2.3.1. Testimonies of junior military officers

While the documentation of human rights violations was a major part of the report, the MTC proceeded to explore the question whether the bombings were fabricated to implicate the MILF.⁷⁸ In this regard, the MTC considered the potential role of state agents, both Philippine and American, in fabricating the events. Public accusations of an AFP hand in the Mindanao bombings were first aired by a group of junior military officers identified with the so-called Oakwood mutiny. The Oakwood Seige involved the one-day occupation of a serviced apartment building in Makati City by a group of 321 armed Filipino soldiers in July 27, 2003. The soldiers disarmed the security guards and planted mines around the building. Thereafter, their leader Army Capt. Gerardo Gambala read a prepared

⁷⁶ Mindanao Truth Commission, 'Executive Summary Progress Report June 2003-March 2004' (n 64) 8; Mindanao Truth Commission, 'Report of the Independent Fact Finding Mission on the Mindanao Bombings and Human Rights Violations' (n 72) V82-V83.

⁷⁷ Mindanao Truth Commission, 'Report of the Independent Fact Finding Mission on the Mindanao Bombings and Human Rights Violations' (n 72) V82.

⁷⁸ Mindanao Truth Commission, 'Executive Summary Progress Report June 2003-March 2004' (n 64) 7.

statement entitled “Message to the Filipino People” to the media demanding the resignation of President Gloria Macapagal-Arroyo, Defense Secretary Angelo Reyes, and AFP Intelligence chief Victor Corpuz for staging bombings in Mindanao and selling arms to rebels.⁷⁹ The MTC devoted its first two sessions, in October 2003, to receiving sworn statements and documents from detained junior officers of the Philippine military who had participated in the Oakwood mutiny relayed through their lawyer Rafael Pulido.⁸⁰ The junior officers, Antonio Trillanes, Milo Maestrecampo, Jose Enrico Dingle and Kristopher Bryan Yasay, offered elaborate allegations of fabricated terrorism.⁸¹

Lt. Sgt. Trillanes alleged that on February 27, 2003 he had uncovered two documents from the Philippine presidential palace, namely, a Memorandum of Instructions dated 11 February 2003 by President Arroyo addressed to Defense Secretary Angelo Reyes, and “The President’s Four-Point Policy Framework in Addressing the Southern Philippine Secessionist/MILF Problem” signed by Executive Secretary Eduardo Ermita, which purportedly outlined President’s Arroyo’s overall plan for the handling of the conflict with MILF.⁸² The documents allegedly show that high government officials planned the occupation of the MILF’s Buliok complex, as well as the spate of bombings in Mindanao.⁸³ In relation to the Mindanao bombings in particular, the second document purportedly instructed that “the MILF must be made responsible” for the bombings.⁸⁴ Trillanes claimed that these moves were aimed at dislodging the MILF’s hold in the resource-rich area of Liguasan marsh in order to implement a joint Philippine-Malaysian resource extraction project in the said area.⁸⁵ He also claimed that they aimed to weaken the negotiating position of the MILF in the peace negotiations,⁸⁶ and to justify the continuation of American

⁷⁹ See, for example, Montesa ‘The Philippines in 2003: Troubles, None of Them New’ (2004) 44 *Asian Survey* 96–97; Rodell ‘The Philippines: Playing Out Long Conflicts’ in Chin Kin Wah and Daljit Singh (eds), *Southeast Asian Affairs 2004* (Institute of Southeast Asian Studies 2004) 187–190.

⁸⁰ Mindanao Truth Commission, ‘Report of the Independent Fact Finding Mission on the Mindanao Bombings and Human Rights Violations’ (n 72) IV1–IV9.

⁸¹ *ibid* IV1–IV2.

⁸² *ibid*.

⁸³ *ibid*.

⁸⁴ *ibid* IV6; Antonio Trillanes IV, ‘The GREENBASE Expose’

<<http://www.trillanes.com.ph/publications/policy-research-other-articles/the-greenbase-expose/>> accessed 30 December 2015.

⁸⁵ Trillanes IV (n 84).

⁸⁶ The purported documents referred to a military operation plan called “Oplan Greenbase”. “The formal talks with the MILF may resume provided the objective of OPLAN GREENBASE is completely accomplished in order that the Government can impose its will upon the MILF to accept ‘Enhanced Autonomy’ or face total pacification in the hands of the AFP.” (Memorandum of Instructions, February 11, 2003) “The Government’s high-value target in the implementation of OPLAN GREENBASE is to CAPTURE MILF CHAIRMAN HASHIM SALAMAT DEAD OR ALIVE. To this effect, the

counterterrorism assistance and joint military exercises with American troops in Mindanao.⁸⁷

While they were sensational pieces of evidence, Trillanes' documents were not the most persuasive. The presidential spokesperson has denied the authenticity of the said documents, a conclusion that was reiterated in a subsequent official investigation.⁸⁸ However, the MTC did not immediately brush aside the documents. It noted, as Trillanes did in his written analysis of the documents, that the documents were uncovered a few months before bombings took place in the places identified therein.⁸⁹ If they had been purely a forgery, then the fact that they had predicted the bombings and other events mentioned therein would have to be attributed to lucky guesses or coincidences. The MTC, therefore, called for further scrutiny of the documents.⁹⁰

The MTC made greater use of the testimonies of Maestrecampo, Dingle and Yasay. Corroborating Trillanes' allegations pertaining to the AFP's hand in bombings, scout rangers Capt. Maestrecampo, Lt. Dingle and Lt. Yasay gave sworn statements about a military order to bomb mosques.⁹¹ Capt. Maestrecampo alleged that as a company commander he was approached by his superior officer, Maj. Rene Paje, to form a special operations team to lob grenades and C-4 explosives at mosques in Madaum, Davao del Norte, but that he refused the order.⁹² Lt. Dingle also alleged that as a company commander, he was also approached by Maj. Paje for the same purpose; but unlike Capt. Maestrecampo, his subordinate 2nd Lt. Yasay said, Lt. Dingle did not disobey the order. Instead, Lt. Dingle and 2nd Lt. Yasay formed a special operations team in furtherance of Paje's instructions.

Yasay furthermore alleged that Paje instructed the team to "scrape off markings on the grenades we were going to use" and to "remove plastic wrappings of the C-4" to avoid identification, to prepare the company's civilian jeep for their use as a backup vehicle,

AFP must CAPTURE AND OCCUPY *Buliok Complex* and environs within a week of continuous, massive aerial and infantry attacks to permanently deprive the MILF and its leadership of setting up future guerrilla bases in the marsh and elsewhere in Mindanao." (The President's Four-Point Policy Framework) These documents are available online in *ibid*.

⁸⁷ *ibid*.

⁸⁸ Edith Regalado and Sammy Santos, 'Reyes, Corpus Cleared in Davao City Bombings' *Philippine Star* (5 March 2004) <<http://www.philstar.com/nation/241333/reyes-corpus-cleared-davao-city-bombings>> accessed 5 February 2016.

⁸⁹ Mindanao Truth Commission, 'Abridged Progress Report' (n 74) 10.

⁹⁰ *ibid*.

⁹¹ Mindanao Truth Commission, 'Report of the Independent Fact Finding Mission on the Mindanao Bombings and Human Rights Violations' (n 72) IV2–IV3.

⁹² *ibid* IV2.

removing all markings therefrom, and for the grenade thrower to use a motorcycle.⁹³ Paje supposedly gave assurances that the special operation would be protected by other teams and that they would not be arrested.⁹⁴ The final order to go ahead with the mission, however, supposedly did not come. Nevertheless, shortly after Yasay's team was formed, on April 3, 2003, four mosques in Davao City exploded in short succession, as a result of the handiwork of grenade throwers. In the first incident, witnesses reported that the perpetrators sped off to the downtown area, where joint police and military checkpoints were already set up along the roads because of the Sasa wharf explosion the day before. The MTC considered that the three officers' testimony constituted "substantial evidence that the AFP ordered a special operation to lob grenades at mosques", and concluded that the fact that the government lacked interest to prosecute Paje or initiate a criminal investigation against him, but instead promoted him, was "suspicious".⁹⁵ The commissioners included the filing of charges against Paje among its recommendations to the government.⁹⁶

2.3.2. Incident involving Michael Meiring

There were also indications of American involvement in the fabrication of terrorism in Mindanao. Authorities have actively hindered pursuing these leads. The MTC resisted efforts to downplay these facts, and instead highlighted them in its report. Suspicions of a US hand in the Mindanao bombings arose from the curious case of Michael Terrence Meiring.⁹⁷ Meiring, an American national, was nearly killed (he lost his leg) when

⁹³ *ibid* IV3.

⁹⁴ *ibid*.

⁹⁵ Mindanao Truth Commission, 'Abridged Progress Report' (n 74) 5.

⁹⁶ Mindanao Truth Commission, 'Executive Summary Progress Report June 2003-March 2004' (n 64) 20.

⁹⁷ Carolyn O Arguillas, 'The Meiring Mystery: "Affront to Philippine Sovereignty" (First Part)' *MindaNews* (30 May 2003); Carolyn O Arguillas, 'The Meiring Mystery: The "Second Coming" (Second of Three Parts)' *MindaNews* (31 May 2003); Carolyn O Arguillas, 'The Meiring Mystery: The Extradition That Never Was' *MindaNews* (1 June 2003) <<https://jewterror.wordpress.com/2003/06/01/the-meiring-mystery-the-extradition-that-never-was/>> accessed 8 May 2015; Dorian Zumel-Sicat, 'Treasure Hunter a Player in a More Absorbing Tale (First of Three Parts)' *The Manila Times* (29 May 2002) <http://web.archive.org/web/20020620012301/http://www.manilatimes.net/national/2002/may/29/top_stories/20020529top5.html> accessed 8 May 2015; Dorian Zumel-Sicat, 'Treasure Hunter Had White Supremacists for Associates (Second of Three Parts)' *The Manila Times* (30 May 2002) <http://web.archive.org/web/20021028074217/http://www.manilatimes.net/national/2002/may/30/top_stories/20020530top6.html> accessed 8 May 2015; Dorian Zumel-Sicat, 'Spies, Terrorists Attracted to Treasure Hunters' Circles (Conclusion)' *The Manila Times* (31 May 2002)

improvised explosive devices he had brought into his hotel room in Evergreen Hotel in Davao City exploded and caused a fire on May 16, 2002.⁹⁸ Meiring had been a guest at the hotel for 10 years⁹⁹ and has represented himself to hotel staff as a treasure hunter.¹⁰⁰ He told police that a grenade was lobbed into his room,¹⁰¹ but investigation revealed that the explosion emanated from materials contained in boxes that he had brought in the hotel.¹⁰² As a result, on May 22, 2002, he was charged by the city prosecutor with illegal possession of explosives and reckless imprudence in its handling.¹⁰³

The incident would have passed without inviting public attention, were it not for the fact that Meiring escaped the Philippine legal process, apparently with the help of US agencies under rather unusual circumstances that were publicly decried by the city mayor.¹⁰⁴ On May 30, the mayor of Davao City Rodrigo Duterte claimed before the Regional Peace and Order Council that “arrogant agents of the US Federal Bureau of Investigation” barged into the hospital room where Meiring was recuperating and, outsmarting Philippine police guarding him at the hospital by “showing their badges”, whisked him away from the country.¹⁰⁵ Mayor Duterte complained that Meiring was taken “without the knowledge of any police, military or government official in the city or region” and called the action of US officials an “affront to Philippine sovereignty”.¹⁰⁶ The escape was widely publicised in Mindanao newspapers and his case was also serialised in a national daily.¹⁰⁷ There was widespread speculation about Meiring’s true identity and

<http://web.archive.org/web/20020624062221/http://www.manilatimes.net/national/2002/may/31/top_stories/20020531top6.html> accessed 8 May 2015; Naomi Klein, ‘Stark Message of the Mutiny: Is the Philippine Government Bombing Its Own People for Dollars?’ *The Guardian* (15 August 2003) <<http://www.theguardian.com/Columnists/Column/0,5673,1019246,00.html>> accessed 8 May 2015; Mindanao Times, ‘Lack of Photographs May Delay Meiring’s Extradition: Official’ *Mindanao Times* (23 May 2005)

<<http://web.archive.org/web/20050505083849/http://www.mindanaotimes.com.ph/news/story.php?id=3969>> accessed 8 May 2015.

⁹⁸ Zumel-Sicat, ‘Treasure Hunter a Player in a More Absorbing Tale (First of Three Parts)’ (n 97); Arguillas, ‘The Meiring Mystery: “Affront to Philippine Sovereignty” (First Part)’ (n 97).

⁹⁹ Zumel-Sicat, ‘Treasure Hunter a Player in a More Absorbing Tale (First of Three Parts)’ (n 97).

¹⁰⁰ Arguillas, ‘The Meiring Mystery: “Affront to Philippine Sovereignty” (First Part)’ (n 97); Arguillas, ‘The Meiring Mystery: The “Second Coming” (Second of Three Parts)’ (n 97).

¹⁰¹ Arguillas, ‘The Meiring Mystery: The Extradition That Never Was’ (n 97).

¹⁰² Arguillas, ‘The Meiring Mystery: The “Second Coming” (Second of Three Parts)’ (n 97).

¹⁰³ *ibid.*

¹⁰⁴ Arguillas, ‘The Meiring Mystery: “Affront to Philippine Sovereignty” (First Part)’ (n 97).

¹⁰⁵ *ibid.*

¹⁰⁶ *ibid.*

¹⁰⁷ *ibid*; Arguillas, ‘The Meiring Mystery: The “Second Coming” (Second of Three Parts)’ (n 97);

Arguillas, ‘The Meiring Mystery: The Extradition That Never Was’ (n 97); Zumel-Sicat, ‘Treasure Hunter a Player in a More Absorbing Tale (First of Three Parts)’ (n 97); Zumel-Sicat, ‘Treasure Hunter

activities in Mindanao and it was reported that Meiring may have been covertly working for the US government.¹⁰⁸

The US Embassy denied any FBI role in Meiring's "departure", though it confirmed that FBI agents had travelled to Davao City purportedly to assist Philippine police investigation into the explosion at Evergreen Hotel.¹⁰⁹ Moreover, the US Vice Consul Michael Newbill settled the hospital bills.¹¹⁰ A year after the issuance of the warrant of arrest against Meiring, Philippine government authorities have still not asked for the extradition of Meiring to face criminal charges in Davao City.¹¹¹ This only contributed to the perception that information about a possible American role was being suppressed.

The MTC heard the testimony of respected journalist Carolyn Arguillas, editor-in-chief of the Mindanao News Service who reported on the Meiring case in the local press, who shared her research on the case.¹¹² Arguillas provided the MTC copies of court documents on the Meiring case, indicating the criminal charges brought against him, the warrant for his arrest, the sworn statements of witnesses.¹¹³ In its analysis of the Meiring case, the MTC noted that the Philippine government "lack[ed] the resolve" to extradite and prosecute Meiring.¹¹⁴ The MTC said that the theory that Meiring was a "CIA or American federal agent" was supported by unusual circumstances of his escape from Philippine legal process.¹¹⁵ The commissioners said they were "alarmed" that US officials have directly intervened in his escape, indicating that Meiring had such "influence" on or "value" to the US government.¹¹⁶ The thrust of MTC's findings in the Meiring case was thus to push the government to pursue the extradition of Meiring to the Philippines.

Had White Supremacists for Associates (Second of Three Parts)' (n 97); Zumel-Sicat, 'Spies, Terrorists Attracted to Treasure Hunters' Circles (Conclusion)' (n 97).

¹⁰⁸ Teddy Casino, 'Fast Forward' *BusinessWorld* (Manila, Philippines, 7 March 2003).

¹⁰⁹ Arguillas, 'The Meiring Mystery: "Affront to Philippine Sovereignty" (First Part)' (n 97).

¹¹⁰ Arguillas, 'The Meiring Mystery: The Extradition That Never Was' (n 97); Jun Bersamin, 'American Blast Victim in Davao Tagged as Terrorist' *ABS-CBN News* (27 September 2002).

¹¹¹ Arguillas, 'The Meiring Mystery: The Extradition That Never Was' (n 97). Two years later, prosecutors said Meiring's extradition was hindered by the fact that they could not produce his photograph. *Mindanao Times* (n 97).

¹¹² Mindanao Truth Commission, 'Report of the Independent Fact Finding Mission on the Mindanao Bombings and Human Rights Violations' (n 72) IV19.

¹¹³ *ibid* IV19-IV20.

¹¹⁴ Mindanao Truth Commission, 'Executive Summary Progress Report June 2003-March 2004' (n 64) 17.

¹¹⁵ *ibid*.

¹¹⁶ Mindanao Truth Commission, 'Abridged Progress Report' (n 74) 12.

2.3.3. MTC's assessment of the theory

The theory that some of the bombings may have been fabricated by state agents therefore has some evidentiary basis. If the evidence was not conclusive, this should not be held against its proponents, as the Philippine authorities have not shown any interest in pursuing inquiries that could further substantiate or, alternatively, rebut or discredit, the theory, such as by ordering the investigation of Paje or requesting the extradition of Meiring.¹¹⁷

The MTC's main contribution to public debate was to question the moral standing of the state in framing the MILF as a terrorist. This is evident from its finding that:

"In the course of the independent probe and having found insufficiency of solid evidence against the MILF, the MTC observes a shifting of evidence of culpability towards the Arroyo government. Here, the MTC's most encompassing statement is that the moral ascendancy of the Arroyo and the United States governments in their so-called 'war against terror' has crumbled under allegations of state-sponsored terrorism."¹¹⁸

In summary, the MTC did not concede that the bombings that hit Mindanao can simply be characterised as a rise in "terrorism" perpetrated by the Abu Sayyaf and/or MILF. The commissioners argued that characterising the bombings as "terrorism" was not an innocent move. Rather, it served to portray the MILF as illegitimate and justified the government in escalating war against it. The commissioners countered the government's "terrorism" rhetoric by challenging the government to investigate charges that bombings in Mindanao were fabricated by state agents, both Philippine and American.

¹¹⁷ Naomi Klien writing for the Guardian commented: "Local officials have demanded that Meiring return to face charges, to little effect. BusinessWorld, a leading Philippine newspaper, has published articles openly accusing Meiring of being a CIA agent involved in covert operations 'to justify the [recent] stationing of American troops and bases in Mindanao.' The Meiring affair has never been reported in the US press." Klein (n 97). Years after the incident, Mayor Duterte continues to reference the Meiring case. Ben O Tesiorna, 'Duterte to US: Yes I Have Ties with Vigilante Group, Just as You Have Ties with Terrorists' *CNN iReport* (13 September 2011) <<http://ireport.cnn.com/docs/DOC-673129>> accessed 8 May 2015.

¹¹⁸ Mindanao Truth Commission, 'Executive Summary Progress Report June 2003-March 2004' (n 64) 96.

2.4. Contrast with Human Rights Watch report

The pattern of engagement with counterterrorism evident in the MTC report can be contrasted with that of a subsequent report by Human Rights Watch (HRW) on the same topic.¹¹⁹ HRW's 2007 report entitled "Lives Destroyed: Attacks on Civilians in the Philippines" tackled the impact on civilians of "over 40 major bombings against civilians and civilian property" mostly in Mindanao since January 2000.¹²⁰ The HRW report concluded that the human rights violations had been perpetrated against civilians by terrorists and that the state had failed to bring terrorists to justice.¹²¹ The HRW report faulted the Philippine government for proceeding with prosecutions too slowly, although numerous suspects in bombing attacks had been arrested since 2000.¹²² The international group said that very few have been successfully brought to trial, and prosecutions in some cases have been delayed for more than four years.¹²³

The HRW report laid responsibility for the bombings on Islamic extremists from the Abu Sayyaf and the similarly marginal Rajah Solaiman Movement, since they had admitted responsibility for the bombings.¹²⁴ It emphasised the alleged links of these marginal groups to JI, "the violent Indonesian Islamist group responsible for the 2002 Bali bombings".¹²⁵ This stands in stark contrast with the MTC report which expressed doubt as to who the bombers really were. The MTC was struggling against the perception that Mindanao was gripped by terrorism; whereas HRW appeared to have already conceded this as established fact.

Importantly, the HRW report distanced itself from the claim that the government was responsible for bombings. HRW acknowledged that the belief that the Philippine government fabricated the bombings was widely held among "the Moro community, civil society, and opposition political movements" in Mindanao.¹²⁶ The perception that the Philippine government had concrete motivations for fabricating the bombings was widespread "throughout the Philippines".¹²⁷ However, HRW ignored the proponents of this

¹¹⁹ Human Rights Watch (n 53).

¹²⁰ *ibid* 1.

¹²¹ *ibid* 3, 26.

¹²² *ibid* 26.

¹²³ *ibid*.

¹²⁴ *ibid* 3, 24.

¹²⁵ *ibid* 3.

¹²⁶ *ibid* 27.

¹²⁷ *ibid*.

view, sidestepping their arguments by saying “no substantive evidence” supported them.¹²⁸ Instead, HRW offered a diagnosis of why “conspiracy theories” proliferated:

[T]he continued prevalence of these conspiracy theories about bombing attacks in the Philippines is attributable, at least in part, to the government’s failure to prosecute the perpetrators of attacks. Without the transparency of fair public trials, people in the southern Philippines are more likely to believe dubious claims—conspiracy theories that undermine their confidence in the government and make political reconciliation all the more difficult to achieve.¹²⁹

HRW’s broad dismissal of “conspiracy theories” seems to ignore efforts of the MTC to collect and critically examine evidence for fabricated terrorism. To HRW, the line between terrorism and counterterrorism in Mindanao appears to be clearly demarcated. The effective deployment of law against terrorists should help to refute the supposedly spurious conspiracy theories of the government’s critics and thus bolster the credentials of counterterrorism.

2.5. Impact of MTC report and implications of MILF’s diplomatic move

Overall, the impact of InPeace Mindanao’s truth-seeking was limited, as the issue it raised - whether or not the Philippine and United States governments could validly frame the MILF as a terrorist organisation - became moot by virtue of the MILF’s subsequent moves in the peace negotiations. By engaging the United States diplomatically in an effort to involve them in peace negotiations, the MILF acknowledged that it was necessary to demonstrate *to the United States* that it was not a terrorist organisation, that it was distinct from the Abu Sayyaf, and that it could become a partner in counterterrorism against the Abu Sayyaf and JI. This move has several important implications. First, the MILF implicitly recognised the US government’s power or claim of authority to determine whether or not the MILF was engaged in terrorism. This directly undercut the thrust of campaigning by InPeace Mindanao.

The MILF’s move also tended to marginalise criticism of American troop presence in Mindanao. The MILF appeared to acknowledge the legitimacy of counterterrorist operations against the Abu Sayyaf and JI (with American involvement) within territory that MILF controlled. This was so long as the MILF was not also targeted. This position

¹²⁸ *ibid.*

¹²⁹ *ibid.*

contradicted campaigners' claim that the Americans had no compelling reason to have their troops present in Mindanao. Also, the US was provided the opportunity to claim that its military presence in Mindanao did not negate peace negotiations, contrary to campaigners' fears.

2.6. Finding

In the campaign on "mysterious bombings" in Mindanao, the campaigner's strategy was again difficult to reduce into the discourse of human rights-compliant counterterrorism. Instead of accepting the threat of terrorism as given, campaigners directly challenged the view promoted by the government that Mindanao was gripped by terrorism. Not only did they highlight that evidence against the alleged MILF bombers was deficient, they also used new information that Philippine and US state agents may have had a role in fabricating bombings. Campaigners therefore continued the strategy of the Basilan campaign in suggesting that "terrorism", rather than threatening to the Philippine government, was beneficial to it because it justified increased military attacks on the MILF.

This section also considered the contrast between the thrusts of HRW's report on the bombings in Mindanao, on the one hand, and Filipino campaigning on "mysterious bombings", on the other hand. Consistent with the discourse of human rights-compliant counterterrorism, HRW's report reproduced government's view of the bombings and ignored rare but important evidence gathered by campaigners. It contributed to the suppression of dissident views by branding them as "conspiracy theories". Moreover, it hoped to bolster the credentials of counterterrorism through the prosecution of those arrested for the bombings. HRW's report illustrates the service that the discourse of human rights-compliant counterterrorism can accomplish for the state.

3. The campaign to remove Jose Maria Sison from the European Terrorist List

The last campaign considered in this chapter pertains to the case of Jose Maria Sison. This campaign was pursued not only in the political front, through debates in the media and the like, but in the legal front as well, as Sison pursued the legal remedy under the EU regulation that governed the blacklisting process.

3.1. Political consequences of terrorist listing

The risks that Filipino campaigners against the “War on Terror” faced as the terrorism discourse expanded to the CPP-NPA were similar to those addressed by campaigners in Mindanao, namely, the breakdown of peace talks with the communist-led NDF and escalation of war in the Philippines with its attendant human rights violations. The situation and reactions of the CPP-NPA and the peace negotiators of the NDF, however, differed from those of the MILF. In the expansion of counterterrorism to the CPP-NPA, the role of foreign states was much more obvious earlier on. On August 9, 2002, the United States government formally designated the CPP-NPA as a “foreign terrorist organization” and Jose Maria Sison as a “specially designated terrorist” under US laws, a fate avoided by the MILF.¹³⁰ The US designation caused a cascade of similar designations, first by the Netherlands on August 13, 2002¹³¹ and then by the Council of the European Union on October 28, 2002, and then other Western states, including Australia.

The designations of Jose Maria Sison as a “terrorist” by the Netherlands and the Council of the European Union under Dutch and EU laws were especially significant. Sison had been a long-time asylum seeker in the Netherlands and was playing a key role in the NDF’s peace negotiations with the Philippine government. These formal negotiations were taking place in Norway, with the Norwegian government acting as host.

Technically speaking, the designations were only meant to impose an asset freeze and a travel ban, and not a withdrawal of support for peace negotiations. In practice, however, the parties took this as signal to quickly wrap up peace negotiations with the NDF.

¹³⁰ The Office of Assets Control (OFAC) of the US Treasury Department included the CPP-NPA and Sison in its list on August 12, 2002.

¹³¹ The Netherlands claimed that the Dutch designation was made “upon the request of the United States”. Rainer Werning, ‘Joma Sison, a Victim of U.S. and Dutch Interests – Dutch Lawyer’ *Bulatlat* (Manila, Philippines, 3 September 2007) <<http://bulatlat.com/main/2007/09/03/joma-sison-a-victim-of-u-s-and-dutch-interests-%E2%80%93-dutch-lawyer/>> accessed 27 April 2015 (quoting text of Dutch Foreign Ministry website). Three leaked cables from the United States Embassy in the Hague discussed the Sison delisting case and provide a view into US-Netherlands cooperation in putting and maintaining Sison in the EU Council’s terrorist blacklist, viz., ‘Cable 09THEHAGUE636, Netherlands: Urgent Request for Support in EU’S Sison Case’ <<https://wikileaks.org/cable/2009/10/09THEHAGUE636.html>> accessed 4 January 2016; ‘Cable 09MANILA1219 No Basis for Removal of Jose Sison’s Terrorist Designation’ <<https://cablegatesearch.wikileaks.org/cable.php?id=09MANILA1219&q=jose%20maria%20sison>>; ‘Cable 09THEHAGUE309 Netherlands/Terrorism Finance: Urgent Request for Information to Support Sison Listing’ <<https://cablegatesearch.wikileaks.org/cable.php?id=09THEHAGUE309&q=jose%20maria%20sison>> accessed 4 January 2016.

The designations were carried out under regulations promoted by the United Nations Security Council under Resolution No. 1373 designed to combat terrorist financing by effecting freezing of financial assets held by the designated organisations and persons (and under US laws, criminalisation of material support to the designated organisations and persons).¹³² Under Article 25 of the United Nations Charter, member states must comply with obligations imposed by the Security Council, and the provision of Resolution No. 1373 on the freezing of assets of terrorists was obligatory in its language.¹³³ However, the Security Council did not specify who were the terrorists whose assets must be frozen. Hence, the listing of specific persons as terrorists subject to the asset freeze were essentially discretionary acts of these governments.¹³⁴ As Cameron pointed out, the decision to blacklist or not to blacklist is determined by political consideration.¹³⁵ Persons or groups committing acts that may fall within the definition of terrorism may not be blacklisted because an EU member state objects. Persons or groups committing much less serious acts may be blacklisted while others who commit more serious acts are not.¹³⁶

There are many criticisms levelled against the procedure that the EU Council has adopted for terrorist listing. The Parliamentary Assembly of the Council of Europe criticised the procedure for not incorporating “minimum procedural safeguards”.¹³⁷ These included notification of the affected persons of the reasons for their listing; the opportunity for such persons to be heard and to defend themselves; the ability of such persons to have their

¹³² The Common Position 2001/930/CFSP on combatting terrorism (OJ 2001 L 344, p. 90) and Common Position 2001/931/CFSP on the application of specific measures to combat terrorism (OJ 2001 L 344, p. 93) were adopted by the Council of the EU on 27 December 2001 in order to implement UN SC Res. 1373 (2001). Regulation (EC) No. 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combatting terrorism (OJ 2001 L 344, p. 70) provides for asset freezing and prohibition of material contribution to listed persons and entities. The original list to which the regulation applied is contained in Council Decision 2001/927/EC of 27 December 2001 (OJ 2001 L 344, p. 83). The CPP-NPA and Sison were first designated in the update of the list effected by the adoption of Common Position 2002/847/CFSP (OJ 2002 L 295, p.1). They were maintained in all subsequent updates of the list until Sison was delisted following the judgment of the Court of First Instance on 30 September 2009.

¹³³ UNSC Res. 1373 (28 September 2001) UN Doc S/RES/1373, para 1(c) (“shall freeze”).

¹³⁴ The European Court of First Instance held that the identification of persons subject to asset freeze under UNSC Res. 1373 entailed “a discretionary assessment” by the listing authority and involves the exercise of the relevant governments’ “own powers”. Case T-47/03 Sison v. Council of the European Union, Judgment of the Court of First Instance, July 11, 2007, 31, para. 154.

¹³⁵ Iain Cameron, ‘European Union Anti-Terrorist Blacklisting’ (2003) 3 Human Rights Law Review 225-256, 236.

¹³⁶ *ibid.*

¹³⁷ Parliamentary Assembly of the Council of Europe, ‘Resolution 1597 (2008) United Nations Security Council and European Union Blacklists’ para 5.1
<<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17618&lang=en>> accessed 10 February 2016.

listings reviewed by a court, and to be compensated for wrongful listings.¹³⁸ It proclaimed that the substantive criteria for listing persons were “vague” so that persons may be listed on “mere suspicion”.¹³⁹ It lambasted the procedure as “unworthy of international bodies such as the United Nations and the European Union.”¹⁴⁰ Numerous legal scholars share these criticisms.¹⁴¹ For example, Cameron pointed out that the EU procedure carries no requirement that the group directs their attacks on civilians or democratic governments.¹⁴² Thus, there is an inherent danger that the listing procedure will be abused to criminalise groups engaged in internal conflicts against illegitimate or oppressive governments.¹⁴³

In the specific listing of the CPP-NPA and Sison, the political consequences of being condemned a “terrorist” indubitably went beyond the expressed legal consequences. The CPP-NPA has no known bank account or other financial assets held in its own name and hence the asset freezing directive was best understood as a symbolic gesture. But, as Sison’s lawyers argued, the designations gave the Philippine government added leverage in the peace negotiations. Foreign Affairs Secretary Blas Ople is supposed to have said: “Once there is a peace agreement, I will request the European Union, the United States and other countries to delist [the rebels] as terrorists. If they sign, they will no longer be terrorists.”¹⁴⁴

The NDF negotiating panel alleged that the Philippine government used the designations in order to pressure the NDF to “capitulate” to a “final peace agreement”.¹⁴⁵

¹³⁸ *ibid.*

¹³⁹ *ibid* para 6.2.

¹⁴⁰ *ibid* para 7.

¹⁴¹ Dick Marty, ‘United Nations Security Council and European Union Blacklists’ (Parliamentary Assembly of the Council of Europe 2007) Report of the Committee on Legal Affairs and Human Rights Doc. 11454 <<http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=11749&lang=en>> accessed 10 February 2016; Ben Hayes, ‘Terrorising the Rule of Law: The Policy and Practice of Proscription’ (Statewatch 2005) Statewatch Analysis; Bill Bowring and Douwe Korff, ‘Terrorist Designation with Regard to European and International Law: The Case of the PMOI’ (International Conference of Jurists 2004); Cameron (n 135).

¹⁴² Cameron (n 135) 236.

¹⁴³ Hayes (n 141) 6.

¹⁴⁴ An observer remarked: “By opposing the inclusion of the MILF in the list of foreign terrorist organizations, the Philippines has used this as a ‘carrot’ to persuade MILF leaders to go back to the negotiating table, which resumed in early 2003. The same leverage was used vis-à-vis the communist rebels, but as a ‘stick’ than a ‘carrot’.” Noel M Morada, ‘Philippines: Security Context and Challenges’ (2004).

¹⁴⁵ Luis G Jalandoni, ‘Opposing Unjust Laws: NDFP Defends Sison in Peace Talks and at European Court’ (2004) <http://www.josemariasison.org/legalcases/related/lj_quebec_290504.html> accessed 5 May 2015; Public Interest Law Center, ‘Laws, Labels, Liberation: The Case of Jose Maria Sison’ (2004) <http://www.josemariasison.org/legalcases/related/LLL_jmscase_290504.html> accessed 5 May 2015; National Democratic Front of the Philippines, *The GRP-NDFP Peace*

Just as Filipino critics of the “War on Terror” feared for the MILF, the reframing of the CPP-NPA as a terrorism problem resulted in dimmer prospects for peace with the CPP-NPA. Talks came to a standstill in August 2004 over the issue of the CPP-NPA’s and Sison’s continued terrorist listing,¹⁴⁶ and by 2006, the Arroyo government started filing criminal charges against other individuals with key roles in the peace negotiations with the NDF before Philippine courts. The terrorist listing of the CPP-NPA painted it as lacking legitimacy and made a more militarily oriented approach to them more acceptable. It also affected legal organisations that were ideologically aligned with the reform agenda of the NDF, an issue which I discuss in the succeeding chapter.

3.2. Legal challenge to Sison’s listing

In this section, I examine how human rights were used in order to resist the expansion of counterterrorism to the CPP-NPA. I focus on campaigners’ efforts in getting Jose Maria Sison removed from the terrorist list of the Council of the European Union. As I relate below, Sison and the NDF negotiating panel, aided by an international group of lawyers and campaigning organisations, responded primarily through a legal challenge against the decision of the Council of the European Union to list Sison. Sison’s case was handled by a group of European and Filipino lawyers led by Belgian lawyer Jan Fermon and prominent Filipino human rights lawyer Romeo Capulong. The Sison campaign resulted in Sison’s removal from the list, and showed that governments had been lacking evidence of terrorism against him.

To begin with, a legal challenge against a decision of an instrumentality of the European Union in the EU’s judicial system was not an obvious choice as a site for resisting the expansion of counterterrorism to the CPP-NPA. As Sison’s lawyers, Jan Fermon and Mathieu Beys revealed, the CPP-NPA decided not to apply to the European Court for relief to remove them from the EU terrorist list. The CPP-NPA thought that “the revolutionary struggle in the Philippines was not be subject of the judgment of a Court established by an

Negotiations: Major Written Agreements and Outstanding Issues (NDFP Human Rights Monitoring Committee 2006) 82–98.

¹⁴⁶ See, National Democratic Front of the Philippines International Information Office, ‘Chronology of the Peace Negotiations between the GRP and the NDFP: 1988-2006’

<<http://www.ndfp.org/chronology-of-the-peace-negotiations-between-the-grp-and-the-ndfp-1988-2006/>> accessed 4 January 2016; Office of the Presidential Adviser on the Peace Process, ‘Highlights of the GPH-NDF Peace Negotiations’ <<http://opapp.gov.ph/cpp-npa-ndf/highlights>> accessed 4 January 2016.

imperialist institution as the European Union.”¹⁴⁷ It simply was not correct for an organisation that regarded itself as a revolutionary movement to come under the jurisdiction of a judicial body of a foreign power in this way. In any case, the legitimacy of the CPP-NPA’s revolution was a political question that was not capable of being addressed by a court of the European Union. This decision of the CPP-NPA provides an interesting contrast to the MILF’s strategy. Whereas, the MILF pragmatically sought a direct dialogue with the United States to prevent a terrorist designation, the CPP-NPA acted as if the US and allied governments’ determinations could be ignored and did not affect its status as a revolutionary organisation.

These considerations, however, did not affect Jose Maria Sison. Sison, unlike the CPP and NPA, was not an underground figure. Rather, he was a long-time resident of the Netherlands as an asylum-seeker. Moreover, as a result of having had to battle rejections of his asylum requests, he had become quite adept at invoking his individual human rights under Dutch and EU laws before the Dutch and European courts.¹⁴⁸ The impact upon him of the asset freeze was also real and not merely symbolic. It caused welfare support for himself to be frozen, preventing him from paying his rent, among other things.¹⁴⁹ Moreover, he considered the “terrorist” tag a smear to his reputation, and he argued that it amounted to an invitation to violence against his person.¹⁵⁰ Thus, Sison decided to launch a legal challenge against these measures for interfering unjustifiably in his exercise of individual human rights. At the same time, there was no way that Sison could be disassociated from the CPP-NPA. While the CPP-NPA was not party to Sison’s case and the question whether the CPP-NPA could be properly characterised as a “terrorist

¹⁴⁷ Jan Fermon and Matheiu Beys, ‘Challenging the Criminalization of Jose Maria Sison at the EU Level’ (2013) <<http://www.humanrightsphilippines.net/2013/07/challenging-the-criminalization-of-jose-maria-sison-at-the-eu-level/>> accessed 10 April 2015.

¹⁴⁸ Sison challenged the rejection by the Netherlands State Secretary of Justice of his asylum bid, winning twice before the Council of State, but finally losing before the Hague District Court in 1997. The negative decision is annotated in B.P. Vermeulen, ‘Annotation to Rb ‘S-Gravenhage (REK) 11 September 1997 (Sison III)’ [1997] *Rechtspraak Vreemdelingenrecht* (Immigration Law) 29-34; Pieter Boeles ‘Annotations on Sison Asylum Case’ [1997] *Jurisprudentie Vreemdelingenrecht* (Immigration Jurisprudence) 46-47; and Rodgers ‘A Question of Law or Politics: The Sison Family Asylum Case’ (1998) <<http://www.josemariasison.org/legalcases/Documents/06-REKOnAC1997/FECL56%20Question%20of%20Law%20or%20Politics.html>> accessed 5 May 2015. Sison has also filed a case before the European Court of Human Rights in 1998 also in relation to the rejection of his asylum application. Legal documents in Sison’s cases are usefully compiled and unofficially translated into English in the website < <http://www.josemariasison.org/legalcases/>>.

¹⁴⁹ Jan Fermon and others, ‘The Case of Prof. Jose Maria Sison: Labelling Dissent as “Terrorism” by the EU’ 2.

¹⁵⁰ Jose Maria Sison and Ninotchka Rosca, *Jose Maria Sison: At Home in the World : Portrait of a Revolutionary* (First Edition, Open Hand Publishing 2004) 1.

organization” was not considered by the court, the defense of the CPP-NPA’s legitimacy could not be avoided in the accompanying public campaigning. As Fermon and Beys revealed, the legal case of Sison could not bring up the argument that the CPP-NPA’s armed struggle was a revolutionary struggle that was incompatible with terrorism. However, raising this argument was “necessary” to their “work in public opinion”.¹⁵¹

The public campaigning was undertaken by a group of Sison’s political associates and friends in Europe. Dubbed the Committee Defend, this group launched in Amsterdam to raise awareness over Sison’s predicament and the implications of terrorist listing in the Philippines. Branches of the Committee Defend later formed in other cities in Europe, North America and Hong Kong.¹⁵²

3.2.1. Sison’s arguments

Sison’s petition to be delisted from the EU list was submitted on February 6, 2003 before the Luxembourg-based Court of First Instance of the European Court of Justice. He argued that his designation as a terrorist by the EU Council was taken in violation of fundamental rights which were recognised in the founding laws of the European Union. In particular, he argued that it violated the right to a fair trial, the rights of the defence and the presumption of innocence, to which he was entitled.¹⁵³ Sison maintained that by listing him as a terrorist, the EU Council accused him of the crime of terrorism and meted out punishment (freezing of his welfare benefits) without giving him any factual basis for such accusation.¹⁵⁴ This prevented him from defending himself from such accusation, and denied the court the opportunity to review the lawfulness of the Council’s decision.¹⁵⁵ He

¹⁵¹ Fermon and Beys (n 147) (unpaginated).

¹⁵² Coni Ledesma, ‘The International Campaign to Remove Professor Jose Maria Sison from “Terrorist” Listings’ (2004) <http://www.josemariasison.org/legalcases/related/coni_quebec_290504.html> accessed 6 May 2015.

¹⁵³ These rights relate to the obligation of the Council to state reasons for its regulations, directives and decisions under Article 253 EC (European Community Treaty). “As held in settled case-law, the Community institutions’ obligation under Article 253 EC to state the reasons on which a decision is based is intended to enable the Community judicature to exercise its power to review the lawfulness of the decision and the persons concerned to know the reasons for the measure adopted so that they can defend their rights and ascertain whether or not the decision is well founded (Case 24/62 Germany v Commission [1963] ECR 63, 69; Case C-400/99 Italy v Commission [2005] ECR I-3657, paragraph 22; Joined Cases T-346/02 and T-347/02 Cableuropa and Others v Commission [2003] ECR II-4251, paragraph 225).” Case T-47/03 Sison v. Council of the European Union, Judgment of the Court of First Instance, July 11, 2007, 28, para 137.

¹⁵⁴ *ibid*, 21, para 104.

¹⁵⁵ *ibid*, 21, para 104.

asked for the files or records containing the factual bases of his designation by the Council but the Council maintained the position that it was not legally obliged to accommodate his requests, and denied them.

Sison also alleged that at the time of his terrorist designation, he had never been formally accused of terrorism or any crime by a prosecutor or court anywhere in the world.¹⁵⁶ He pointed out that in the Philippines, two formal investigations, viz., for a bombing in 1971 resulting in multiple murders and for subversion activities which were initiated in 1981 and 1988, respectively, both resulted in dismissals in 1994 and 1998, the first for “lack of sufficient evidence” and the second because the Philippine anti-subversion law was repealed.¹⁵⁷ In the Netherlands, the Minister of Foreign Affairs, in reply to a parliamentary question put on August 16, 2002, stated that “the public prosecutor’s office was of the view that there was no basis for instigating a criminal investigation against [Sison].”¹⁵⁸ The clear suggestion was that there was no evidence that Sison had participated in any act of terrorism upon which the Council could have relied for its decision, and thus that he was being vilified and severely punished without legal justification.

Sison and his supporters raised several other arguments. For example, Sison and members of the NDF negotiating panel emphasised that far from advocating terrorism, Sison had been the chief political adviser to the NDF negotiating panel. In that capacity, he had been instrumental in seeking a peaceful settlement of the armed conflict between the Philippine government and the CPP-NPA. They thus argued that the EU Council’s decision was an abuse of power because its main purpose was to create an association between Sison and terrorism in the public mind and increase the Philippine government’s political leverage in the talks.¹⁵⁹ Sison’s lawyers also argued that the Council’s designation of him as a terrorist and the imposition of the asset freeze was tantamount to denunciation for a crime and application of a criminal penalty and thus that the Council had arrogated to itself a judicial role and powers in criminal matters that did not pertain to it.¹⁶⁰

The most effective argument, however, was Sison’s simple and bold statement that he was not the subject of any criminal investigation anywhere in the world. This provoked

¹⁵⁶ *ibid*, 15, para 74.

¹⁵⁷ *ibid*, para 75.

¹⁵⁸ *ibid*, 16, para 76.

¹⁵⁹ See, the statement of the position of the NDF panel on the terrorist designations of Sison and of the CPP and NPA in Jalandoni (n 145).

¹⁶⁰ Case T-47/03 Sison v. Council of the European Union, Judgment of the Court of First Instance, July 11, 2007, 24, para 116.

strong reactions from the governments who had initiated his terrorist designation as well as the scrutiny of the court to which he addressed his case. If there was evidence that Sison had participated in terrorism, what was preventing these governments from bringing criminal charges against Sison? Why did they resort to less than judicial, more politicised measures? Without evidence linking Sison to terrorism, why was he being designated a terrorist and subjected to counterterrorism measures?

3.2.2. Philippine and Dutch governments' response

Sison's provocation led governments and the court to attempt to shore up the integrity of the counterterrorism measures taken against him. The Philippine and Dutch authorities moved to bring new charges against Sison in their respective courts, which would have prevented Sison from claiming that he was not accused of any wrongdoing. Although Philippine authorities were not able to serve him summons, Sison was included in a 2006 indictment for rebellion which the crisis-ridden Arroyo government brought against a broad array of critics in response to what President Arroyo called a "conspiracy between the left and the right" against her government.¹⁶¹ However, the investigations were so tainted with irregularities that the Supreme Court ordered a halt thereof and the dismissal of charges against all 51 respondents.¹⁶²

The Dutch response came on August 28, 2007 when Dutch police arrested Sison in Utrecht.¹⁶³ The police also searched his office and at least seven other addresses in Utrecht and Abcoude, where some of Sison's close associates resided. The Dutch Public Prosecution Service announced that Sison was under investigation for ordering killings while on Dutch soil, an offense under Dutch law.¹⁶⁴ The case was founded on the fact that Romulo Kintanar and Arturo Tabara, both well-known former CPP-NPA leaders who had left the organisation, were killed by assassins in 2003 and 2006, and that the NPA claimed

¹⁶¹ See also, Romeo T Capulong, *Scope and Implications of the Supreme Court Decision in the 'Batasan Six' and Mass Leaders' Certiorari Petitions* (15 July 2007). For the political context, see discussion of Arroyo's declaration of a "State of Emergency" in Amnesty International 'Philippines: Political Killings, Human Rights and the Peace Process' (2006) 8–13.

¹⁶² Capulong (n 161).

¹⁶³ Mike Corder, 'Dutch Arrest Philippine Communist Leader' *USA Today* (August 2007) <http://usatoday30.usatoday.com/news/world/2007-08-29-1428978609_x.htm> accessed 10 February 2016.

¹⁶⁴ Openbaar Ministerie, 'Dutch Ministry of Justice's Official Statement on Joma Sison's Arrest: Philippine Communist Leader Apprehended to Face a Murder Charge' *GMA News Online* (28 August 2007) <<http://www.gmanetwork.com/news/story/58132/news/nation/dutch-ministry-of-justice-s-official-statement-on-joma-sison-s-arrest>> accessed 10 February 2016.

responsibility for these killings.¹⁶⁵ The official statement said a special unit of the New People's Army killed Kintanar as punishment for his so-called "crimes against the revolution and the people". As for Tabara, the Ministry said, the NPA accused him of being "a seasoned criminal and fanatic contra-revolutionist". The statement alleged that a special unit of the New People's Army said they attempted to arrest him and try him under the NPA's court. Tabara and his son in law resisted their capture and were killed as a result.¹⁶⁶ Sison was thus being charged under Dutch law on the basis that he was commanding the NPA, and was responsible for the NPA's decision to kill Kintanar and Tabara.¹⁶⁷ He was detained by the Dutch police for 17 days, during which time he was not allowed to contact family or friends except for his lawyer.¹⁶⁸ Luis Jalandoni, the chairman of the NDF negotiating panel, and whose residence was among those searched, decried the searches as a "fishing expedition", and said the police operation involved some 100 police officers seizing computers, files, papers and personal effects.¹⁶⁹

The Dutch move, however, also backfired. In 2007, the investigating judge, as well as the appeals court that affirmed his judgement, found that while the prosecutor referred to numerous indications that Sison during his exile in the Netherlands continued to have influence within the CPP, there was insufficient evidence specifically linking Sison to the killings.¹⁷⁰ Furthermore, the court commented that the witnesses' testimonies offered against Sison "contained a high degree of indefiniteness in time" and "cannot just simply be taken as reliable".¹⁷¹ Far from undermining Sison's claim that no evidence linked him to terrorism or indeed to any crime, the aggressive responses of the Philippine and Dutch governments, had the ironic effect of bolstering Sison's claim, and further highlighting the weakness of the EU Council's case against Sison.

¹⁶⁵ *ibid.*

¹⁶⁶ *ibid.*

¹⁶⁷ *ibid.*

¹⁶⁸ Bonifacio Ilagan, 'Committee DEFEND Philippines Letter to Dutch Ambassador' <<http://josemariasison.org/defend-philippines-letter-to-dutch-ambassador/>> accessed 10 February 2016.

¹⁶⁹ Theo Droog, 'Press Communique: International Campaign to Free Jose Maria Sison Launched'.

¹⁷⁰ Decision on appeal, LJN: BB4662, Gerechtshof 's-Gravenhage (Court of the Hague), 0975000606, October 3, 2007; Decision, LJN: BB3484, Rechtbank 's-Gravenhage (District Court of the Hague), 09.750006-06, September 13, 2007.

¹⁷¹ Decision on appeal, LJN: BB4662, Gerechtshof 's-Gravenhage (Court of the Hague), 0975000606, October 3, 2007

3.2.3. Response of the court: the 2007 decision

The challenge to the integrity of the terrorist designation posed by the claim that there was not sufficient evidence to link Sison to terrorism was not lost on the Court of First Instance. The court responded by ordering the Council of the European Union to delist Sison from the EU terrorist blacklist. It further required that future terrorist designations by the EU Council must inform the designated person of the evidence used against him or her and allowed his/her the right of response.¹⁷²

The decision of the court can be read as upholding Sison's individual rights, but also more broadly, aiming to improve the integrity of the EU's terrorist designation process. The court's legal reasoning in its judgment of July 11, 2007, in essence, reproduces the synthesis of human rights and counterterrorism that underpinned the approach of other international courts confronted with similar issues.¹⁷³ As mentioned, Sison has invoked, among other things, "rights to defence", which is to say, the right to be informed of the evidence used against him ("notice") and to have his views on such evidence heard ("hearing"), which are "fundamental rights" recognised in the law of the European Union.¹⁷⁴ The EU Council as well as the United Kingdom, which filed an intervention in favour of the EU Council, argued that the "rights of the defence" were not applicable in the context of the specific counterterrorism measures taken in this case.¹⁷⁵ The EU Council and the UK argued that "prior consultation" with the person whose funds were going to be frozen would render asset freeze "ineffective".¹⁷⁶ The UK also argued that "compelling reasons of national security" may justify governments' refusal to disclose the evidence for a person's involvement in terrorism.¹⁷⁷ As we have seen in Chapter 1, Section 1 of this thesis, similar arguments have been made by the US and the UK that established human rights law was not applicable in the context of counterterrorism.

Had the Court upheld the EU Council and UK government's positions, no government would have been obliged to inform a designated person of the basis for

¹⁷² Case T-47/03 Sison v. Council of the European Union, Judgment of the Court of First Instance, July 11, 2007, 31-32, para. 154-156.

¹⁷³ Slightly ahead of the Sison decision were the European court decisions in *Kadi v Council* (Case T-315/01), OJ 2005 C 281, and *OPMI v Council* (Case T-220/02), 2006 E.C.R. II-4665.

¹⁷⁴ See, Spaventa 'Fundamental Rights in the European Union' in Catherine Barnard and Steve Peers (eds), *European Union Law* (Oxford University Press 2014).

¹⁷⁵ Case T-47/03 Sison v. Council of the European Union, Judgment of the Court of First Instance, July 11, 2007, 26, para 128; 27, para 135.

¹⁷⁶ Ibid 26, para 127.

¹⁷⁷ *ibid.*

his/her terrorist designation. Instead, the court rejected the EU Council's and UK's argument and decided that the "rights of the defence" were indeed applicable in the context of a counterterrorist asset freeze, albeit tailored to the demands of counterterrorism. The court thus upheld both the imperative to counter terrorism as well as human rights, following the discourse of human rights-compliant counterterrorism. While the court understood that notification of the evidence prior to asset freezing jeopardised the effectiveness of the said measure and therefore ruled that it was not necessary, the court nevertheless required notification of evidence "concomitantly with or as soon as possible after" asset freezing.¹⁷⁸ The court saw this as a striking a "balance" between "observance of the fundamental rights of the persons included in the list at issue and the need to take preventive measures to combat international terrorism".¹⁷⁹ Since Sison was not provided any statement of the reasons for the decision concomitantly with or even at any time after the decision was made, his rights to defence were violated.¹⁸⁰ It also followed that his right to a judicial remedy is violated as without such statement of reasons for the decision, the court is not in a position to undertake judicial review of the lawfulness of the council's decision. The court therefore annulled the council decision of May 29, 2006.

3.2.4. Response of the EU Council to the 2007 decision

Up to this point, the decision of the European court was favourable to Sison, but the Sison campaign had not yet fully achieved its goal. The CFI had not decided that Sison was not a terrorist, rather that the EU Council had to give Sison notice and hearing. This decision gave Sison, but also the Philippine government, some leeway or room for interpretation for their own purposes. The Sison campaigners hailed the decision a victory.

¹⁸¹ But Arroyo's national security adviser and the presidential adviser on the peace process

¹⁷⁸ *ibid*, 36, para 176.

¹⁷⁹ *ibid*, 36, para 177. The Court also outlined other possible restrictions to the right to notice and hearing. The Court also held that "overriding consideration concerning security of the Community and its Member States, or the conduct of their international relations, may preclude the communication to the parties concerned of certain evidence adduced against them and, in consequence, the hearing of those parties with regard to such evidence". *ibid*, para 180.

¹⁸⁰ *ibid*, 46, para 214.

¹⁸¹ Norman Bordadora, 'Being off Europe's Terror List Elates CPP Founder Sison' *Philippine Daily Inquirer* (13 July 2007)

<<http://www.inquirer.net/specialreports/inquirerpolitics/view.php?db=1&article=20070713-76387>> accessed 4 May 2015.

were quick to downplay the implications of the European court decision, saying it merely pointed out a “procedural lapse” but that it didn’t mean that Sison would be delisted from the EU terrorist blacklist.¹⁸² As it turned out, Sison was again listed as a terrorist in a subsequent decision of the EU Council on May 30, 2006. This time, however, he was given a letter by the EU Council dated April 23, 2007 containing a “statement of reasons”, which informed Sison “that he could submit observations to the Council on the latter’s intention to continue to maintain him in the list and on the reasons stated in that regard, and any supporting documents, within a period of one month.”¹⁸³ The EU Council later argued that this decision following a new procedure corrected the previous mistake of omitting to give Sison notice and hearing.¹⁸⁴

3.2.5. Court’s judgment on EU Council’s 2007 listing of Sison

Sison therefore had to return to court and file a second case in order to review the sufficiency of the files or evidence that the EU Council revealed as the basis for its decision against him.¹⁸⁵ As it turned out, the EU Council’s evidence was very thin. The EU Council’s case was to suffer the same fate as that produced by the Philippine and Dutch governments’ earlier attempts in 2006 and 2007 to bring charges against Sison.

The EU regulation that governs the designation procedure, viz., Common Position 2001/931, provided in paragraph 1(4) that:

“The list in the Annex shall be drawn up on the basis of precise information or material in the relevant file which indicates that a decision has been taken by a competent authority in respect of the persons, groups and entities concerned, irrespective of whether it concerns the instigation of investigations or prosecution for a terrorist act, an attempt to perpetrate, participate in or facilitate such an act based on serious and credible evidence or clues, or condemnation for such deeds. ...”¹⁸⁶

From this provision the Court of First Instance had previously inferred, in the cases of *OMPI v Council I* (Case T-220/02), 2006 E.C.R. II-4665, paragraphs 117, 131, and *OMPI v Council II*

¹⁸² Paulo Romero, ‘Palace: Joma Still a Terrorist despite EU Ruling’ *Philippine Star* (13 July 2007) <<http://www.philstar.com/headlines/5477/palace-joma-still-terrorist-despite-eu-ruling>> accessed 4 May 2015.

¹⁸³ Case T-341/07 *Sison v Council*, Judgment of the Court of First Instance, September 30, 2009, para 4.

¹⁸⁴ *ibid*, para 57.

¹⁸⁵ *ibid*.

¹⁸⁶ Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism [2001] OJ L 344/93, para 1(4).

(Case T-284/08) 2008 ECR II-0000, paragraph 52, that the procedure actually involves two levels or stages. First, a national authority, usually a court, decides that a group or individual should be investigated or prosecuted on the basis of serious and credible evidence or ‘clues’ for a terrorism-related offense. Second, the Council decides that the group or individual should be included in the list on the basis of the fact that a national authority has taken the decision in the first stage.¹⁸⁷

The evidence relied on by the EU Council, however, were determinations/findings by the Dutch Secretary of State for Justice rejecting Sison’s asylum application, twice reversed by the Council of State, but finally affirmed by the Hague District Court.¹⁸⁸ Sison was denied asylum for various reasons, including that the Netherlands’ regard for good relations with the United States outweighed his individual interests, but Sison was also pronounced as being subject to a clear danger to his life if sent back to the Philippines.¹⁸⁹ The EU Council’s “statement of reasons” claimed that the Dutch authorities’ decisions to deny asylum to Sison rested on evidence that Sison “gave leadership – or has tried to give – to the armed wing of the CPP, the NPA, which is responsible for a number of terrorist attacks in the Philippines” and that he “maintains contacts with terrorist organizations throughout the world”.¹⁹⁰ However, the CFI thought otherwise. First, the court said the Dutch decisions did not concern the instigation of investigation or prosecution for acts of terrorism. Rather, they related to the lawfulness of the State Secretary’s rejection of Sison’s asylum application.¹⁹¹ Second, while it was true that the State Secretary studied the confidential file of the Netherlands internal security service that alleged that Sison was leading the NPA or was links to it, no investigation or prosecution for terrorism had been instigated against Sison as a result. There may have been indications in the intelligence dossier of Sison’s “possible involvement” with activities of the CPP-NPA, but it appeared that those indications were not serious or substantial enough to compel an investigation for a crime, much less for terrorism.¹⁹²

Learning from the facts of the Sison case, the court set a precedent for the EU Council. The national decision that the Council may invoke as basis for including a person in the terrorist list should relate to the imposition on that person of preventive or punitive

¹⁸⁷ Case T-341/07 Sison v Council, Judgment of the Court of First Instance, September 30, 2009, para 93.

¹⁸⁸ *ibid*, para 106.

¹⁸⁹ *ibid*.

¹⁹⁰ *ibid*, para 5.

¹⁹¹ *ibid*, para 113.

¹⁹² *ibid*, para 114.

measures “by reason of that person’s involvement in terrorism”.¹⁹³ A decision of national court that ruled “only incidentally and indirectly” on a person’s “possible involvement” in illegal acts, and which related to proceedings of civil nature only, could not be used as basis for terrorist listing.¹⁹⁴

This outcome was essentially a repeat of the Sison campaign’s victories in the Hague in 2007. Whereas the Dutch government thought it was enough to give basis for believing that Sison still was chairman or at least had a position of influence within the CPP-NPA to prove that he has a terrorist, the court had ruled that what was needed was to produce evidence that Sison had actually participated in a terrorist act. In other words, there could be no finding of guilt by mere association.

3.3. Outcome of the Sison campaign

Repeatedly, therefore, the frame that the Sison campaign offered – that there was no credible evidence linking Sison to terrorism, and that the governments that rushed to paint him as a terrorist did not have a case that could stand judicial scrutiny – was accepted and confirmed by the European Court. The success of the Sison campaign consists in showcasing that counterterrorism measures have been abused or misused to vilify the CPP founder and NDF consultant. With his legal victory, Sison’s right to his property was restored. It also defused pressure to remove Sison from the Netherlands and to transfer him to Philippines.

3.4. Finding

Like in the two previous campaigns, campaigners claimed that what was at stake in the branding of the CPP-NPA and Sison as “terrorists” was the prospects of a negotiated political settlement of the conflict. However, the campaign to get Sison removed from the EU terrorist blacklist appeared to have used dual strategies. In the political front, campaigners insisted that the CPP-NPA waged a “revolution” and had to be dealt with by the government politically, through peace negotiations, and not merely militarily; and therefore rejected the “terrorist” label for the group and for Sison. This was not an issue capable of being addressed in the courtroom. Nevertheless, Sison made good use of the

¹⁹³ *ibid*, para 111.

¹⁹⁴ *ibid*.

judicial terrain to obtain his removal from the European blacklist. In the legal front, Sison concentrated on his claim that the Philippine and Dutch governments had no evidence to try him for any crime, much less for terrorism. As a legal measure, his listing by the European Union as a terrorist was so grossly defective in that it did not follow the stated procedure. Though Sison's court case victory did not involve any pronouncements on the CPP-NPA, it helped expose the fact that the Council of the European Union abused the terrorist listing process. This helped advance the campaign in the political front. Foreign government supporters of the Philippine government contributed to the depoliticisation of CPP-NPA's armed struggle through terrorist listing. But the arguments of Sison's supporters in his law suit that his listing intended to create a political leverage in the peace negotiations between the Philippine government and the CPP-NPA tended to show that the EU's terrorist listing was politically motivated.

Sison's legal strategy interacted with the discourse of human rights-compliant counterterrorism but was not subsumed by it. This section has examined the language of the European Court of First Instance's judgment in the Sison case. The judgment was consistent with the discourse of human rights-compliant counterterrorism. The court's concern in strictly abiding by the stated procedure for terrorist listing and for respecting the right of defence of the person subject to asset freeze showed that the court thought that counterterrorism and human rights should be pursued together. Though the court's application of this reasoning eventually led to Sison's removal from the terrorist list, the court's preoccupation was to bolster the credibility of the EU Council's terrorist listing process. To the court, the terrorist listing process was legally defined and its abuse can be stemmed by perfecting the process through jurisprudential refinement, such as what it accomplished in the Sison decisions. In contrast, the Sison case campaigners exposed the political nature of terrorist listing.

4. Conclusion

This chapter advanced the critical evaluation of the discourse of human rights-compliant counterterrorism by revealing the discrepancy between it and the resistance strategies in three Philippine human rights campaigns. The common element in the strategies of these three campaigns is their insistence that "counterterrorism" measures had political aims that campaigners rejected. Hence, even as the rhetoric of "counterterrorism" was depoliticising, they exposed that "counterterrorism" measures

were political. Campaigners believed that promoting human rights required rejecting “counterterrorism”. In contrast, the discourse of human rights-compliant counterterrorism elides politics. It took the announced goal of counterterrorism measures for granted and hence participated in the depoliticisation of conflict.

This is not to deny that international advocates who resisted abuses through the development of the discourse of human rights-compliant counterterrorism did not help. In fact, as this chapter illustrated, the European Court’s approach of accommodating human rights in terrorist listing helped Sison to overturn his terrorist listing. However, this chapter suggests that the discourse of human rights-compliant counterterrorism also has a silencing effect. It channels human rights advocates’ efforts into improving or transforming counterterrorism efforts, discounting local human rights advocates critique of “counterterrorism”. Its potential trajectory can lead critics to the abandonment of critique and solidify or perfect counterterrorism policy.

Chapter 4

The Extrajudicial Killings Campaign and the Government's Response: Failed Remedy, Changed Rhetoric, Continuing Practice

This chapter discusses the campaign to stop extrajudicial killings and enforced disappearances of leftist activists, and it introduces the writ of *amparo* (providing a new legal remedy to human rights violations) and the national security policy *Oplan Bayanihan* of the Aquino Administration (featuring “adherence to human rights” and “addressing root causes” as cornerstones of counterinsurgency). The Philippines responded to this campaign with reforms and there was a decline in the number of reported killings and disappearances. But while the state response rhetorically aligned the country more with the international approach, the practices of killings and disappearances persist at an alarming rate.

Of the four Filipino campaigns examined in this thesis, the activist killings campaign can be seen as the most successful because it mobilised a broad transnational audience that managed to effect rhetorical changes from the Philippine state. At the peak of the campaign in 2007, local campaigners and international NGOs worked with the United Nations special rapporteur on extrajudicial, summary or arbitrary executions to press for recognition of limits to the counterterrorism/counterinsurgency campaign. The Arroyo government responded by making concessions, acknowledging that human rights violations had been committed and undertaking to investigate them. On the legal front, and supported by campaigners, the Philippine Supreme Court introduced an innovative judicial remedy of *amparo* to address rights violations.

When the succeeding Benigno Aquino administration came to power, it adopted seemingly bolder rhetorical changes. A new national security policy discontinued the “terrorism” discourse against the MILF and the CPP-NPA-NDF. It also acknowledged the need to adhere to human rights and to “address the root causes of insurgencies”. These judicial and policy developments, together with the enactment of the Human Security Act (2007)¹ defining the crime of “terrorism” under Philippine law, the Anti-Torture Act (2009),² the Anti-Enforced or Involuntary Disappearances Law (2012)³ and Philippine Act on Crimes Against Humanitarian Law, Genocide, and Other Crimes Against Humanity (2009),⁴ appear

¹ Republic Act No. 9372.

² Republic Act No. 9745.

³ Republic Act No. 10353.

⁴ Republic Act No. 9851.

to steer official rhetoric away from the unrestrained militaristic approach of the past, and provide a semblance of a human rights-friendly legal framework for undertaking counterinsurgency.

Jetschke and Becker paint an optimistic picture of the impact of the extrajudicial killings campaign on counterterrorist/counterinsurgency practices. Jetschke provides a constructivist account of the impact of the Philippine extrajudicial killings campaign, arguing that they established normative limits to counterterrorism in the Philippines.⁵ Becker draws specific lessons about the engagement of the UN independent expert in the extrajudicial killings issue, presenting Alston's Philippine visit and report as having positive though limited impact as reflected in the decrease of killings immediately after Alston's visit and report.⁶ In this chapter, I question the grounds for Jetschke and Becker's optimism. I highlight the problematic nature of the reforms adopted by the state in response to the campaign. My main contention is that, notwithstanding the adoption of new legal remedies to disappearances and killings, as well as policy pronouncements that appeared to resonate with the UN discourse of "countering terrorism while respecting human rights", there are scant grounds for expecting a transformation of security practices. This is because the underlying belief that counterinsurgency must address the subversive operation of enemies through legal organisations and activities persists. This continues to put leftist activists at risk of extrajudicial killings and enforced disappearances. Against the idea that more law and recognition of violations can by themselves constrain state behaviour and transform counterterrorism/counterinsurgency practices, the chapter illustrates how rhetorical changes attuning official discourse with international law are in fact used as substitutes for genuine reform.

1. The Campaign to Stop Extrajudicial Killings of Legal Activists

The expansion of the terrorism discourse to the CPP-NPA did not just affect well-known personalities in the peace negotiations such as Sison. As discussed in Chapter 2, in the counterterrorism-inflected counterinsurgency strategy that appeared after 2001, leaders and activists of mass-based organisations became legitimate targets of military operations, unprotected by their legal status. Hundreds of legal activists were caught up in

⁵ Anja Jetschke, *Human Rights and State Security: Indonesia and the Philippines* (University of Pennsylvania Press 2011) 252–255.

⁶ Jo Becker, *Campaigning for Justice: Human Rights Advocacy in Practice* (Stanford University Press 2013) 77–94.

intelligence profiling documents (called “orders of battle”) identifying them as “NPA fronts” and “enemies of the state”, and were accordingly abducted, tortured and/or killed by assassins, sending a chilling message to other legal activists and the communities they work with.

While being targeted themselves, local human rights organisations and advocates responded by documenting and publicising the phenomenon of extrajudicial killings and enforced disappearances of legal activists. Karapatan documented the highest number of cases and it attributed the “alarming pattern of killings and disappearances” to a state policy “aimed not only at silencing government critics and quelling dissent, but also at annihilating the country’s progressive people’s movement”.⁷ It drew specific attention to the career of General Jovito Palparan, who appeared to have left a trail of violations behind him, as each province where he was assigned subsequently experienced a surge of killings and disappearances of local activists. But efforts to investigate General Palparan and others implicated by witnesses proved fruitless prior to 2006. In 2003, the House of Representatives’ Committee on Civil, Political and Human Rights recommended the investigation of Palparan for violations in the Southern Tagalog region where he was assigned, and his temporary suspension from duty.⁸ But the Armed Forces of the Philippines ignored the recommendation, while a presidential task force on the case of Eddie Gumanoy and Eden Marcellana did not hold Palparan responsible.⁹

As the killings and disappearances intensified, the phenomenon attracted the attention of other local and national groups, including the Catholic Bishops Conference of the Philippines and the Integrated Bar of the Philippines, both of which issued statements of concern.¹⁰ In May 2006, in the first government move that acknowledged the existence of the problem, the Arroyo government formed Task Force Usig.¹¹ This interagency body within the Philippine National Police was tasked with investigating the killings of members of party list groups and journalists.¹² Task Force Usig however entered the public debate by

⁷ Karapatan, ‘2005 Human Rights Report’ (2005) 5.

⁸ Marie Hilao-Enriquez, ‘Statement to the Hearing of the Subcommittee for East Asian and Pacific Affairs, Senate Foreign Relations Committee of the 110th US Congress’ 4.

⁹ Independent Commission to Address Media and Activist Killings, ‘Report’ (2007) 29.

¹⁰ Catholic Bishops Conference of the Philippines ‘Let Us Keep Human Life Sacred’ <<http://cbcponline.net/v2/?p=529>> accessed 10 June 2015; Integrated Bar of the Philippines, ‘Statement of Concern’ <<https://news.google.com/newspapers?nid=2479&dat=20071217&id=nVM1AAAAIAAJ&sjid=YyUMA AAAIAAJ&pg=1480,16226816&hl=en>> accessed 10 June 2015.

¹¹ Philip Alston, ‘Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Addendum, Mission to the Philippines’ (2008) UN Doc A/HRC/8/3/Add.2 30.

¹² Human Rights Watch, ‘Scared Silent: Impunity for Extrajudicial Killings in the Philippines’ (Human Rights Watch 2007) 18.

impugning the credibility of Karapatan's list, underplaying the seriousness of the problem by suggesting that Karapatan has exaggerated the number of victims.¹³ Moreover, it blamed most of the killings on the CPP-NPA.¹⁴

From 2006, mainstream international actors began to increase pressure on the state to respond. Amnesty International (AI) took up the issue of "political killings" in the Philippines in a report published on August 15, 2006, which helped mobilise other governments and the UN.¹⁵ The AI report described the "repeated" reports of local human rights groups as "credible". Furthermore, it noted that heightened tension between President Arroyo and her leftist detractors had intensified the threat of further killings of leftist activists,¹⁶ and it called for urgent measures to be taken. Three days after the release of AI's report, President Arroyo tried to manage the situation by establishing the Melo Commission and inviting the United Nations special rapporteur on extrajudicial, summary and arbitrary executions Philip Alston to the Philippines to demonstrate her commitment to human rights.¹⁷

The Melo Commission, headed by the retired Supreme Court justice Jose A.R. Melo, was mandated to address killings of "media workers and left-wing activists".¹⁸ Karapatan, did not participate in proceedings of the Melo commission, fearing a whitewash.¹⁹ The commission relied on the evidence of the head of Task Force Usig Gen. Avelino Razon, the Armed Forces of the Philippines chief Gen. Hermogenes Esperon, Gen. Palparan, as well as information from the Commission on Human Rights, certain witnesses to killings of farmer-

¹³ Hong Kong Campaign for the Advancement of Human Rights in the Philippines, 'Save Filipino Lives, TF Usig Told' (2007) 3 *FHR For Human Rights* 7.

¹⁴ Human Rights Watch (n 12) 18.

¹⁵ Jetschke (n 5) 253.

¹⁶ "[T]he threat of further killings has intensified due to political developments during 2006. These include President Gloria Macapagal Arroyo's declaration of a week-long State of Emergency in late February and the continuing collapse of the peace process. Prospect for revival of peace negotiations dwindled further amid intensification of counterinsurgency operations, the direct transfer of names and addresses of NDF negotiators and others listed in a former safe-conduct agreement to an arrest warrant, and an announcement in June of the release of substantial additional funds to allow the armed forces to 'crush' the communist insurgency in certain areas within two years." Amnesty International, 'Philippines: Political Killings, Human Rights and the Peace Process' (2006).

¹⁷ Human Rights Watch (n 12) 18; Paulo Romero, 'UN Credits RP Openness on Unsolved Killings' *Philippine Star* (29 October 2007) <<http://www.philstar.com/headlines/24241/un-credits-rp-openness-unsolved-killings>> accessed 17 February 2016.

¹⁸ Human Rights Watch (n 12) 18.

¹⁹ Bulatlat, 'Melo Commission a "Whitewash," Victims' Kin Say' *Bulatlat* (7 October 2006) <<http://bulatlat.com/main/2006/10/07/melo-commission-a-%E2%80%98whitewash%E2%80%99-victims%E2%80%99-kin-say/>> accessed 17 February 2016; Independent Commission to Address Media and Activist Killings (n 9) 3.

activists in Davao City, and media groups.²⁰ The Melo Commission issued its report on January 22, 2007, concluding that there was no “sanctioned policy on the part of the military or its civilian superiors” to resort to killings.²¹ The report decried Karapatan’s non-participation in its proceedings, stating:

If these activist groups were indeed legitimate and not merely NPA fronts, as they have been scornfully tagged, it would have been to their best interest to display the evidence upon which they rely for their conclusion that the military is behind the killings. In fact, this refusal irresistibly lends itself to the interpretation that they do not have the necessary evidence to prove their allegations against the military.²²

The commission nevertheless concluded that “certain elements and personalities in the armed forces”, particularly Gen. Palparan, were responsible for killings “by allowing, tolerating and even encouraging the killings”.²³ President Arroyo initially prevented the public release of the Melo Commission’s findings until pressured by Alston’s recommendation to do so.²⁴

The intervention of the United Nations’ special rapporteur Philip Alston became a watershed in campaigning on the issue. Alston’s visit and report legitimated local human rights organisations’ claims and made it harder for the Philippine military and government to deny the seriousness of the killings and disappearances issue. Unlike the Melo Commission, Alston obtained the support of all local human rights organisations, including Karapatan. Local organisations advised Alston on the places to visit in the country and provided him with detailed case files regarding 271 extrajudicial killings.²⁵ His team interviewed witnesses to 57 incidents involving 96 killings.²⁶ Alston later remarked that the “incredibly detailed dossiers from NGOs on both the left and the right” that he received were “very sophisticated”, and enabled him to write a report that was more detailed than his previous reports. As a result of cooperation with all local organisations from across the

²⁰ Independent Commission to Address Media and Activist Killings (n 9) 4.

²¹ *ibid* 53.

²² *ibid*.

²³ *ibid*. In the course of the commission’s proceedings, the AFP chief of staff General Esperon said that command responsibility “does not include criminal liability of the superior if his men or subordinates commit an illegal act... The commander is responsible only for acts he authorized.” *ibid* 18. The commission’s report concluded this understanding contributed to the problem, and that the correct and applicable standard is that “command responsibility” includes the responsibility of a superior “for failing to prevent or punish” crimes committed by subordinates “of which he had actual or constructive knowledge”. *ibid* 62–66.

²⁴ Human Rights Watch (n 12) 19.

²⁵ Becker (n 6) 81.

²⁶ Alston (n 11) 65.

political spectrum, he said he “brought back three to four feet of files, and had a better database than anyone in the Philippines.”²⁷ Like Amnesty International, Alston found the vast majority of the cases he examined to be “entirely credible”, while finding that government allegations of misreporting or propaganda against Karapatan had done “very little to discredit the vast number” of reported cases.²⁸

The Alston report debunked the claims by the Philippine military that an internal “purge” within the CPP-NPA had caused the killings.²⁹ “The military is in a state of denial concerning the numerous extrajudicial executions in which its soldiers are implicated,” Alston concluded.³⁰ In clear terms, Alston’s report attributed the surge in killings to the military’s counterinsurgency strategy that focused on dismantling CPP-NPA front organisations within civil society. Accordingly, to eliminate extrajudicial executions from counterinsurgency operations, Alston recommended that the President “take concrete steps to put an end to those aspects of counterinsurgency operations which have led to the targeting” of civil society.³¹ These steps should include in particular instituting the principle of command responsibility as understood in international law, immediately directing all soldiers “to cease [] making public statements linking political or other civil society groups to those engaged in armed insurgencies”, and introducing transparency to the “orders of battle” and similar lists.³²

Significantly, Alston also shone a spotlight on other agencies of government, particularly, the criminal justice system and law enforcement, as having perpetuated impunity for the killings of leftist activists.³³ In contrast to other cases, e.g., those of journalists, in the cases involving leftist activists, there had been a zero conviction rate.³⁴ Some of the reasons for this have to do with failure of cooperation between police and prosecutors and an inadequate witness protection program.³⁵ But Alston’s report also drew attention to the fact that law enforcement officials actively participated in the

²⁷ Becker (n 6) 84–85.

²⁸ Alston (n 11) 26.

²⁹ The Melo Commission also did not find the “purge” theory believable for being unsubstantiated, noting that even General Palparan did not believe in it. Independent Commission to Address Media and Activist Killings (n 9) 54–55. Alston received and considered evidence from the AFP which he found “strikingly unconvincing”. Alston (n 11) 13.

³⁰ “Some military officers would concede that a few killings might have been perpetrated by rogue elements within the ranks, but they consistently and unequivocally reject the overwhelming evidence regarding the true extent of the problem.” Alston (n 11) 13.

³¹ *ibid* 23.

³² *ibid*.

³³ *ibid* 17–21.

³⁴ *ibid* 17.

³⁵ *ibid* 19.

counterinsurgency/counterterrorism focus on civil society by prioritizing the prosecution of “enemies of state” within leftist partylist groups and other organisations rather than tracking down or pursuing their killers.³⁶ Prosecutors had been encouraged to work alongside intelligence and military officers, as reflected in the functioning of Inter-Agency Legal Action Group (IALAG), an executive body that coordinated the “legal offensive” against leaders and members of the CPP-NPA and their “front organisations”.³⁷ The reluctance of the police to investigate the military for offenses committed against alleged CPP-NPA members may have been partly due to “solidarity fostered in the current cooperation in counterinsurgency operations”, opined Alston.³⁸ Accordingly, Alston challenged the government to end impunity for violations by achieving “convictions in a significant number of extrajudicial executions”.³⁹ He also recommended that IALAG be abolished.⁴⁰

With transnational pressure, government’s approach to the issue changed. Year after year prior to Alston’s visit, the number of killings and disappearances recorded by local human rights organisations have been increasing, reaching a peak in 2006 when more than 200 killings and close to 80 disappearances were recorded by Karapatan for that year. After Alston’s visit in February 2007, the recorded number of killings and disappearances began to diminish. Karapatan recorded 100 killings and 30 disappearances in 2007 and 90 killings and nine disappearances in 2008.⁴¹ President Arroyo begun referring to Palparan and military perpetrators as “killers”, while the AFP leadership started to profess “command responsibility”, creating its own human rights office with a mandate to investigate complaints against its members.⁴² Congress also legislated the principle of “command responsibility” in the new Anti-Torture Law, Anti-Enforced or Involuntary Disappearances Law, and the Philippine law on IHL.⁴³

2. The Failure of Legal Remedies: the writ of amparo

In this and the succeeding sections, I examine more closely changes in the post-2007 legal and security policy fields that were meant to transform security practices. The

³⁶ *ibid* 8, 18–19.

³⁷ Alston (n 11).

³⁸ *ibid* 19.

³⁹ *ibid* 24.

⁴⁰ *ibid*.

⁴¹ Karapatan, ‘2009 Year-End Report on the Human Rights Situation in the Philippines’ (2010) 3.

⁴² Jetschke (n 5) 254.

⁴³ Rep Act 9745, Sec 13; Rep Act 10353, Sec 14; Rep Act 9851, Sec 10.

changes seemingly recognise human rights limits to counterinsurgency, adding new layers of human rights rhetoric onto official discourse. However, as I argue below, the practice of targeting civil society remains unaffected by the changes.

In this section, I look at the writ of *amparo*. “Amparo” means “protection” in Spanish. The writ of *amparo* originated in Mexico in the 19th century, and was later adopted in the constitutions of almost every Latin American country.⁴⁴ The introduction of the writ of *amparo* into the Philippine judicial system was significant because it registered official recognition of the need to provide judicial remedies to protect the rights of persons at risk of being targeted by extrajudicial killings and enforced disappearances. Chief Justice Reynato Puno explains the intent of the writ of *amparo* in this manner:

“The writ of *amparo* serves both preventative and curative roles in addressing the problem of extralegal killings and enforced disappearances. It is preventative in that it breaks the expectation of impunity in the commission of these offenses; it is curative in that it facilitates the subsequent punishment of perpetrators as it will inevitably yield leads to subsequent investigation and action.”⁴⁵

The immediate origins of the remedy can be traced to the campaign against extrajudicial executions and enforced disappearances. The remedies were introduced into the judicial system by then Chief Justice Puno during the peak of campaigning. Following Alston’s visit in February 2007, Puno proposed a role for judges and lawyers in helping curb the killings during the National Consultative Summit on Extrajudicial Killings and Enforced Disappearances on July 16-17, 2007.⁴⁶ Thereafter, he spearheaded the adoption of the Rule on the Writ of Amparo, an unprecedented judicial innovation.⁴⁷ The Philippine Constitution in Art VIII, sec. 5(5) had provided the Supreme Court the power to adopt rules of judicial procedure to protect human rights without need for legislation, and the Rule on the Writ of Amparo was the first instance in which the court had invoked and exercised this power. As the guest of honour, Puno announced its drafting to the Founding Congress of

⁴⁴ *Secretary of National Defense v Manalo* [2008] Philippine Supreme Court No. 180906.

⁴⁵ *Roxas v Arroyo* [2010] Philippine Supreme Court G.R. No. 189155.

⁴⁶ Reynato Puno, ‘The View from the Mountaintop (Keynote Speech at the National Consultative Summit on Extrajudicial Killings and Enforced Disappearances—Searching for Solutions, Manila Hotel, July 16, 2007)’ <http://ca.judiciary.gov.ph/index.php?action=mnuactual_contents&ap=j5070> accessed 17 February 2016.

⁴⁷ The Rule on the Writ of Amparo, Philippines Supreme Court A.M. 07-9-12-SC, came out two months after on September 25, 2007, and came into effect at the 62nd anniversary of the United Nations on October 24, 2007. Felipe Enrique M Gozon Jr. and Theoben Jerdan C Orosa, ‘Watching the Watchers: A Look into the Drafting of the Writ of Amparo’ (2008) 82 Philippine Law Journal 8-28, 11.

the National Union of Peoples' Lawyers (NUPL) on September 16, 2007 in Cebu City.⁴⁸

Carlos Isagani Zarate said that lawyers of the NUPL and Karapatan helped popularise the new writs through trainings and primers, and filed a barrage of cases that forced the Office of the Solicitor General to form a special unit for *amparo* cases.⁴⁹

In the internal deliberation of the Supreme Court, Puno successfully suggested that the United Nations-endorsed standard on investigation⁵⁰ for extrajudicial executions and enforced disappearances be incorporated into the Rule on the Writ of Amparo⁵¹ effectively making such standard part of the right to life, liberty and security. Under the Rule on the Writ of Amparo, the court can establish that a violation existed and that respondents were "responsible" or at least "accountable" to conduct a thorough investigation.⁵² Significantly, the *amparo* rule included the requirement to specify "the steps or actions taken by the respondent to determine the fate or whereabouts of the aggrieved party and the person or persons responsible for the threat, act or omission."⁵³ On paper, *amparo* is a more sophisticated remedy, and in theory it should be harder to thwart or evade than the older writ of habeas corpus. Even if the body of the person is not produced, the court still undertakes or requires a thorough investigation and protection of the person and witnesses.⁵⁴ The court may order the inspection of particular places, and the production of objects or documents which constitute or contain evidence relevant to the investigation.⁵⁵ Moreover, the procedure is meant to be speedy.⁵⁶

⁴⁸ Reynato Puno, 'Message to the NUPL Founding Congress, September 16, 2007'.

⁴⁹ Interview 28.

⁵⁰ UN Manual on the Effective Protection and Investigation of Extrajudicial, Arbitrary and Summary Execution, ST/CSDHA/12-1991, Model Protocol for a Legal Investigation of Extrajudicial, Arbitrary and Summary Executions, available at <http://www.icrc.org>.

⁵¹ Gozon Jr. and Orosa (n 47) 23.

⁵² "Responsibility" and "accountability" are different from criminal culpability for the enforced disappearance, and are determined for purposes of imposing the appropriate remedies to preserve the life and restore the liberty and security of the disappeared. See *Razon v Tagitis*, Philippine Supreme Court decision, G.R. No. 182498, December 3, 2009, 606 SCRA 598, 663.

⁵³ Rule on the Writ of Amparo, Sec 9 (b).

⁵⁴ "[O]ur orders and directives relative to the writ are... not truly terminated until the extrajudicial killing or enforced disappearance is fully addressed by the complete determination of the fate and the whereabouts of the victim, by the production of the disappeared person and the restoration of his or her liberty and security, and in the proper case, by the commencement of criminal action against the guilty parties." *Razon v Tagitis* (n 52).

⁵⁵ Rule on the Writ of Amparo, Sec 14.

⁵⁶ Cheryl Daytec-Yañgot, 'The Writs of Habeas Corpus and Amparo: A Comparison of Remedies Against The Menaces of State Power' in Edre Olalia (ed), *Legal Remedies for Human Rights Violations: Studies on the Writs of Amparo, Habeas Corpus, and Habeas Data* (National Union of Peoples' Lawyers 2013) 68.

To supplement the protections afforded by the *amparo* remedy, the Supreme Court issued in January 2008 the Rule on the Writ of Habeas Data.⁵⁷ The writ of habeas data commands “the updating, rectification, suppression or destruction of the database or information or files kept by the respondent.”⁵⁸ Puno explained that if the investigation made by police or military is insufficient or if they try to “hide or disregard” relevant information that might solve the case, the writ can be used to obtain the said information. This is so that the families of the victims, especially those of the disappeared, will be aided in knowing about their relative’s fate.⁵⁹

While initially greeted with enthusiasm by campaigners, especially by lawyers, the new judicial remedies have proven ineffective in facilitating punishment for violators or breaking the expectation of impunity. As I relate below, extremely few victims were secured; hardly any perpetrator was brought to justice; and so violations continued at a still alarming rate.⁶⁰ In hindsight, it can be said that the expectation that the *amparo* remedy would contain the problem rested on the belief that the AFP would cooperate in tracking down and prosecuting the presumably few bad elements in its ranks. If the violations, as the Melo Commission put it, were not a “sanctioned policy on the part of the military or its civilian superiors”, and have only resulted from the misbehaviour by a few bad elements, then a crackdown on these wayward elements should be possible. Once found “responsible” or “accountable” by the court, the AFP should be willing to secure victims and bring wayward elements to justice in demonstration of respect for human rights. These assumptions were proven to be grossly unrealistic. As I will relate below, in a number of cases the court declared the AFP responsible or accountable for the violations, but the AFP refused to secure victims and prevented prosecution of offenders within its ranks. The framers of the new judicial remedy did not imagine that the extent of complicity in the violations could be wider than what the Melo Commission acknowledged.

⁵⁷ Philippines Supreme Court A.M. 08-1-16-SC, January 22, 2008.

⁵⁸ Rule on the Writ of Habeas Data, Sec. 6 (e).

⁵⁹ Leila Salaverria, ‘How Habeas Data Complements Writ of Amparo’ *Philippine Daily Inquirer* (3 February 2008) <<http://newsinfo.inquirer.net/inquirerheadlines/nation/view/20080203-116471/How-habeas-data-complements-writ-of-amparo>> accessed 15 May 2015.

⁶⁰ Karapatan recorded 229 extrajudicial killings and 26 enforced disappearances from the start of the Arroyo presidency in July 2010 to December 2014. Karapatan, ‘2014 Karapatan Year-End Report on the Human Rights Situation in the Philippines’ (Karapatan 2015).

The *amparo* remedy has only afforded relief to very few victims of violations. The earliest successes were in Western Mindanao in the separate cases of Ruwil Muñasque⁶¹ and Luicito Bustamante⁶² whose liberty was secured following applications for writs of *amparo*. But just as noteworthy as the positive result of the proceedings was the respondent military's audacious attempt to thwart the remedy, by getting the victims themselves to deny the violation in open court. Muñasque and Bustamante were produced in court but they testified that they were not being held against their will and that they preferred to be in military custody rather than to be released to their families who had applied for the writ of *amparo* in their behalf.⁶³ During the trial, Muñasque had to be declared a "hostile witness" by the petitioners' lawyer, who noted that Muñasque was "under duress and was mentally tortured" by his custodians.⁶⁴

Similarly, Bustamante testified, to the surprise of his family, that he was an NPA who voluntarily surrendered to the military; and that he feared being harmed by the NPA and thus preferred military custody.⁶⁵ Moreover, Bustamante appeared to have executed a written statement sworn before a prosecutor in Davao del Norte, although the statement was written in English, a language he did not understand.⁶⁶ The judge in his case ruled that he was free to go with whomever he wished, with the added proviso that the military should provide him protection in any case.⁶⁷ At the last minute, Bustamante chose to go with his mother Bebelita and revealed that he was tortured and intimidated into testifying in favour of his captors. He showed "cigarette burn marks on his neck and back and his severely scarred ankles, which days before had been tied with wires" and also recalled being severely beaten and forced to swallow his own feces during his captivity.⁶⁸

⁶¹ Muñasque was a local activist with Christian Youth Fellowship-United Church of Christ in the Philippines and Bayan Muna. The petitioners alleged that he was abducted by soldiers belonging to the 53rd Infantry Battalion in Zamboanga del Sur on October 24, 2007. Amnesty International, 'UA 295/07 Possible Enforced Disappearance / Fear for Safety'.

⁶² Two friends of Bustamante, a farmer, stated that they saw Bustamante being dragged and taken against his will by a paramilitary commander in Paquibato town. Germelina A Lacorte, 'Mother of Missing Youth Files Amparo Petition' *Davao Today* (9 November 2007) <<http://davaotoday.com/main/human-rights/mother-of-missing-youth-files-petition-for-writ-of-amparo/>> accessed 23 February 2016.

⁶³ Purple S Romero, 'Unprecedented Victories in Writ of Amparo Cases' (20 December 2007) <<http://archives.newsbreak-knowledge.ph/2007/12/20/unprecedented-victories-in-writ-of-amparo-cases/>> accessed 26 June 2014; Carlos Isagani T Zarate, 'Luicito's Amparo' *Philippine Daily Inquirer* (19 November 2007) <http://opinion.inquirer.net/inquireropinion/columns/view/20071119-101722/Luicito%92s_amparo> accessed 15 June 2015.

⁶⁴ Romero (n 63).

⁶⁵ Zarate (n 63).

⁶⁶ *ibid.*

⁶⁷ *ibid.*

⁶⁸ *ibid.*

But judges have not always seen through the attempt to thwart the remedy in this way as the similar cases of sisters Rose Ann and Fatima Gumanoy in Southern Luzon,⁶⁹ and Rubelyn Aba Gelacio and Rosbie Estoque Fundador in Negros Occidental,⁷⁰ appear to show. Like Muñasque and Bustamante, the Gumanoy sisters and Gelacio and Fundador also said they were opting for “voluntary custody” with the military, and that was apparently enough for the judges to conclude that the purpose of the *amparo* remedy was satisfied, ending the court’s protective intervention.⁷¹ In fact it could be contended that in the cases of Muñasque and Bustamante, when the *amparo* remedy worked, the writ of habeas corpus could have worked just as well since the bodies were produced in court. Clearly, the most important factor that determined whether victims were secured in these cases was whether the judges played a proactive role. Added judicial tools to curb the violations absent this factor amount to nothing.

Unfortunately, to devastating effect, the military respondents no longer produce the alleged victims in court at all. According to lawyer Isagani Zarate, a founder of the Union of Peoples’ Lawyers in Mindanao (UPLM) in Davao City who has handled various cases of *amparo* for families of the disappeared, the military has “learned lessons from the early cases” of Muñasque and Bustamante, avoiding any chance of victims being able to leave military custody through a court order.⁷²

The measures that the writ of *amparo* allows in terms of mobilizing respondents to produce or preserve evidence have not resulted in the ascertaining of the whereabouts and fate of the person. “No one has been surfaced because of *amparo*,” summarised lawyer Rachel Pastores, lawyer at the Public Interest Law Center (PILC), a law office that supports NDF peace negotiators and has considerable experience with handling *amparo* cases.⁷³ Pastores said that in actual practice, the respondents have gotten away with “token efforts” that steps have been taken to find the victim, but in truth no earnest investigation

⁶⁹ The Gumanoy sisters were daughters of peasant leader Eddie Gumanoy, of the Samahang Magbubukid ng Timog Katagalugan (Peasant Association of Southern Tagalog). Karapatan, ‘Abducted Daughters of Slain Peasant Leader Still in Military Custody’ (*Karapatan.org*) <<http://www.karapatan.org/node/175>> accessed 23 February 2016.

⁷⁰ GMA News.TV, ‘Judge Denies Amparo for 2 Alleged NPA “Amazons”’ (*GMA News Online*) <<http://www.gmanetwork.com/news/story/126401/news/regions/judge-denies-amparo-for-2-alleged-npa-amazons>> accessed 23 February 2016.

⁷¹ Karapatan, ‘2008 Year-End Report on the Human Rights Situation in the Philippines’ (2009) 22.

⁷² Interview No 28.

⁷³ Interview No 37.

is conducted.⁷⁴ “The military has the burden of showing that they take efforts to look for the person. But in truth, they don’t, and you cannot force them to.”⁷⁵

Lawyer Marie Yuvienco echoes this complaint. She says that the court’s issuance of the writ of *amparo* directing respondents to specify efforts taken to investigate specific cases of disappearances has only resulted in a lot of “pencil -pushing” on the part of military chain of command, generating written directives to subordinates to investigate but ending in further denials that the person is in their custody.⁷⁶ Illustrative of the lack of earnest efforts at investigation is the extraordinary case of the brothers Raymond and Reynaldo Manolo.⁷⁷ In this case, the petitioners were the victims of disappearance themselves, who after 18 months of captivity were able to escape from military custody and identify members of CAFGU and some of the soldiers (including General Palparan) who abducted and tortured them. They furthermore witnessed the violations against Sherilyn Cadapan, Karen Empeño and Manuel Merino while detained in the same place. But the investigation conducted by the military unit commander who had command of the six implicated CAFGU members absolved them based on their own statements that the Manolo brothers were NPA sympathisers who simply had a grudge against the CAFGU.⁷⁸

⁷⁴ *ibid.*

⁷⁵ *ibid.*

⁷⁶ Marie Francesca Therese J Yuvienco, ‘Servir Y Amparar - To Serve and Protect: Thoughts on the Efficacy of the Writ of Amparo’ (2011) 36 Integrated Bar of the Philippines Journal 54-76, 71. In the six *amparo* cases that reached the Supreme Court, Yuvienco said that the military chain of command’s response to the court’s directive to make a thorough investigation showed a pattern of perfunctory compliance. She summarised their response in the following manner:

“1. If the President of the Republic has been impleaded, he or she will claim immunity from suit;

“2. If the Secretary of Defense has been impleaded, he will depose that he does not directly engage in or command military operations; that, immediately upon receipt of the writ of *amparo*, he caused to be prepared a Memorandum Directive addressed to the Chief of Staff of the Armed Forces of the Philippines to conduct an investigation and to submit a report thereon;

“3. If the Chief of Staff of the AFP has been impleaded, he will depose that he received the directive of the Secretary of National Defense; that he has issued directive to all units of the AFP to establish the circumstances of the disappearance; that he had caused an investigation to be made and that he had submitted a report to higher headquarters; and that he will bring any personnel complicit in the disappearance to justice;

“4. if lower-ranked generals, colonels, majors, lieutenants and other officers and personnel have been impleaded, they will depose that they have received the directive from the Chief of Staff, and if they are ranked higher enough, that they have issued directives to subordinates to investigate the disappearance; that they have caused an investigation to be made and will submit a report to higher authorities; and that they will faithfully comply with the conditions of the writ.” *ibid* 70.

⁷⁷ *Secretary of Defense vs. Manalo*, Philippine Supreme Court decision, G.R. No. 180906, October 7, 2008.

⁷⁸ *ibid.*

Pastores complained that in practice petitioners are burdened with producing specific evidence identifying the perpetrators at the outset of the case, even though the *amparo* rule provides no such requirement. This follows from the fact that petitioners get absolutely no support from the military or the police with respect to gathering evidence against soldiers or paramilitary. Furthermore, Pastores also complained that many judges act as if the *amparo* remedy were a criminal case for kidnapping, dismissing petitions where no direct evidence identifying the actual abductors is presented. As a result, Pastores explains, her decision as a lawyer whether or not to file a petition for *amparo* depends on whether there are witnesses available to identify the actual abductors, which is rarely the case. Absent knowledge of the identity of the actual abductors, she said, it's no use making the AFP chief or an AFP commander a respondent in an *amparo* case. This was because the petitioner cannot expect them to do the investigation. The respondents themselves might be involved in the abduction. Assuming further that there are witnesses who could identify the actual abductors, the *amparo* remedy can still be defeated by having such witnesses disappeared. This has happened in the case of her client Leo Velasco.⁷⁹

Thus, in actual practice, the petitioners, instead of the respondents, are made to do the investigation of the disappearance or killing. Zarate concludes: "[T]he writ of *amparo* became useless. In fact, we hardly use it nowadays. Sparingly, very sparingly, if at all."⁸⁰

Even in those rare cases where petitioners, through their own efforts, have been able to gather evidence, courts can still be unwilling to step in. Zarate gives the example of his own *amparo* case to protect against a threat of disappearance filed in 2010, which was dismissed because the court did not accept a "leaked copy" of an Order of Battle document bearing his name as evidence that it existed.⁸¹ The *amparo* case of Jonas Burgos also stands out for the unusual amount of evidence obtained by the petitioner. This evidence included: eyewitnesses to the abduction; a car plate traced to a vehicle in the military's possession; and leaked copies of confidential Army reports which purported to show that Burgos was "apprehended" and "processed" by the military.⁸² Yet, despite all this evidence, the case has dragged on for years. The Supreme Court has had to order that the Commission on Human Rights (CHR) take over the investigation, as investigations by the Philippine National Police-Criminal Investigation and Detection Group (CIDG) and the AFP

⁷⁹ Interview 37.

⁸⁰ Interview 28.

⁸¹ *ibid.*

⁸² *Burgos vs. Esperon*, Philippine Supreme Court decision, G.R. No. 178497, February 4, 2014.

have been “less than complete” and “had significant lapses”.⁸³ While one of the eight abductors was identified and charged following the CHR’s report of March 15, 2011, the petitioner Edita Burgos, Jonas’ mother, thought the courts could have uncovered more evidence from the military’s possession and acted more quickly.⁸⁴ The judges’ unfamiliarity with the contents of the new rules was less the problem than their lack of appetite or aptitude for a proactive role.⁸⁵

Not only has the remedy of *amparo* been ineffective in facilitating punishment or breaking the expectation of impunity, it has even caused legal problems for some of the organisations targeted by the military. Pastores reports that *amparo* has been used to accuse Kabataan Partylist and Bayan Muna of facilitating recruitment of minors into the CPP-NPA, and Karapatan for hiding families or relatives of alleged rebels, on the theory that these were also instances of enforced disappearance or human rights violations.⁸⁶ Without guidance from the Supreme Court as to whether non-state agents can be made respondents in *amparo* cases, proponents of counterinsurgency have experimented with more *amparo* cases against leaders of targeted organisations.⁸⁷

Indeed, the “legal offensive” against “front” organisations and alleged leaders of the CPP-NPA within civil society continues, undeterred by repeated dismissals of the state’s court cases.⁸⁸ Years after the Arroyo government abolished IALAG in compliance with a recommendation of the Alston report, prosecutors continue to hound leaders of partylist and other legal mass organisations accusing them of criminal responsibility for illegal acts

⁸³ *ibid.*

⁸⁴ Interview 24.

⁸⁵ Edita Burgos related that she has been subjected to surveillance and harassment since pursuing legal remedies to surface her son Jonas. Interview 24. It is also possible that judges were similarly coerced or threatened.

⁸⁶ Pastores said military lawyers represented the petitioners. The *amparo* case against Karapatan was filed by the partylist organisation ANAD, a vocal advocate of counterinsurgency. The cases were eventually dismissed. Interview 37.

⁸⁷ See, discussion below on cases involving leaders and supporters of the “bakwit”.

⁸⁸ The biggest case involving the charge of rebellion filed in a Makati city court in April 21, 2006 against all five members of the House of Representatives belonging to the leftist partylist groups as well as Jose Maria Sison and scores of other aboveground and underground personalities, many unreachable by Philippine legal process, was ordered discontinued by the Supreme Court on June 1, 2007. See, *Ladlad vs. Velasco*, Philippine Supreme Court decision, G.R. No. 172070, June 1, 2007. The indictment alleged that legal organisations are “front organisations”. Their legal protest activities such as “mass actions/demonstrations/propaganda campaigns” and “fundraising activities” are “directly controlled and supervised” by armed and illegal organisations, “complement” illegal armed activities, or are themselves “rebellion activities”. All the accused leaders of legal organisations are also alleged to be members of CPP/NPA/NDF. See, Amended Information, *People v. Beltran*, Crim. Case No. 06-452, Regional Trial Court of Makati City Branch 137. Cases involving the allegation that leaders of leftist partylist groups are channelling funds to the CPP-NPA have also failed. Alston (n 11) 18, par. 48.

of the CPP-NPA-NDF, on the theory that legal and illegal leftist organisations form a seamless network.⁸⁹ Satur Ocampo, formerly a member of the House of Representatives representing the *Bayan Muna* partylist organisation, and a number of individuals who support the NDF as consultants in the peace negotiations, have been targeted in this way. On February 2007, prosecutors charge that Ocampo along with Randall Echanis, Rafael Baylosis and Vicente Ladlad, all prominent leftist leaders and consultants of the NDF in peace negotiations, were members of the Central Committee of the CPP.⁹⁰ They were indicted for alleged NPA killings of “suspected military informers” in Leyte, alongside 71 other named and unnamed persons allegedly members of the CPP-NPA-NDF.⁹¹ The energy for building cases against Ocampo and others contrasts sharply with the lethargy for investigating killings and disappearances of leftist activists. It also confirms that the government’s pursuit of civil society-focused counterinsurgency has barely diminished.

3. The Rhetoric of “Adherence to Human Rights” and “Addressing Root Causes” in Counterinsurgency: Oplan Bayanihan

Karapatan has always maintained that extrajudicial killings and disappearances were systemic or policy-driven rather than mere random incidents attributable to a few wayward elements within the AFP, as the Melo Commission had contended. This is reflected in Karapatan’s trenchant criticism of Oplan Bantay Laya, Arroyo’s operational plan for the AFP.⁹² After Benigno Aquino III assumed the presidency, he received flak for continuing on with *Oplan Bantay Laya* for the first six months of his term.⁹³ On December 22, 2010, however, the Aquino government released the AFP’s Internal Peace and Security Plan (IPSP), also called *Oplan Bayanihan*, which outlines the new president’s security policy

⁸⁹ Interview 37.

⁹⁰ See, *Ocampo vs. Abando*, Philippine Supreme Court decision, G.R. No. 176830, February 11, 2014.

⁹¹ *ibid.*

⁹² IBON Foundation, *Oplan Bantay Laya: The US-Arroyo Campaign of Terror and Counterinsurgency in the Philippines* (2010).

⁹³ GMA News.TV, ‘AFP Extends Battle Plan Linked to Extra-Judicial Killings’ (*GMA News Online*, 15 August 2010) <<http://www.gmanetwork.com/news/story/198625/news/nation/afp-extends-battle-plan-linked-to-extra-judicial-killings>> accessed 23 February 2016; Al Jacinto, ‘Communist Rebels Chide Aquino for Bantay-Laya Extension’ (*GMA News Online*, 1 September 2010) <<http://www.gmanetwork.com/news/story/199998/news/nation/communist-rebels-chide-aquino-for-bantay-laya-extension>> accessed 23 February 2016; Anne Marxze Umil, ‘Aquino’s Extension of Arroyo’s Dreaded Oplan Bantay Laya Draws Fire from Victims’ Kin’ *Bulatlat* (20 August 2010) <<http://bulatlat.com/main/2010/08/20/aquinos-extension-of-arroyos-dreaded-oplan-bantay-laya-draws-fire-from-victims%E2%80%99-kin/>> accessed 23 February 2016.

and is meant to guide the activities or operations of the AFP during his six-year term.⁹⁴ The document was formulated after a series of workshops among officials of the Department of Defense, Armed Forces of the Philippines, Commission on Human Rights, Office of the Presidential Adviser on Peace Process, civil society and academics.⁹⁵ In several respects, the IPSP reflects the Aquino government's response to the human rights campaigning around the "War on Terror" in the Philippines. First, it scales back official counterterrorism rhetoric, restoring the MILF and CPP-NPA to the status of "insurgencies", and reserves the label "terrorism" for the Abu Sayyaf and JI. Second, it grafts a human rights language onto official security policy.

Broadly, the IPSP claims to commit the security establishment to a "paradigm shift" in understanding and pursuing security, in which the importance of "adherence to human rights" is explicitly acknowledged. The plan is supposed to herald a conceptual shift by adopting the United Nations' concept of "human security", also referred to in the document as "people-centered security", and applies it to the country's internal armed conflicts.⁹⁶ The concept is defined in the document as follows:

"[H]uman security is freedom from fear and freedom from want. It is the state of being able to live with human dignity. More than the absence of violent conflict, human security means the protection and respect for human rights, good governance, access to economic opportunities, education and health care. The concept has several components: economic security, health security, environmental security, personal security, community security, and political security requiring the entire government bureaucracy, the private sector, and the civil society to collectively implement."⁹⁷

In its 1994 report, the United Nations Development Program (UNDP) first proposed the concept of "human security" as a new approach to security.⁹⁸ The UNDP argued that states have generally interpreted security narrowly to refer to the protection against threats to the state, and that there was a need to recognise the broader concept of "human security" which referred to the protection of people's individual freedom ("freedom from fear") and enhancement of their well-being

⁹⁴ Jules Maaten and Pauline Sanchez, 'Aquino Administration's Human Rights Direction: Traversing a Straight Path?' (2011) 3 *Observer: A Journal on threatened Human Rights Defenders in the Philippines* 12-15, 14.

⁹⁵ *ibid.*

⁹⁶ Armed Forces of the Philippines, 'Internal Peace and Security Plan' 25.

⁹⁷ *ibid* 25-26.

⁹⁸ United Nations Development Program, *Human Development Report: New Dimensions of Human Security* (UNDP 1994).

("freedom from want").⁹⁹ The new approach sparked debates among states and scholars alike regarding the scope of the concept of "human security" and how to operationalise the same in the context of specific countries.¹⁰⁰ In Southeast Asia, some scholars argue that the concept of "human security" remains marginal, confined to counter-discourses of non-government organisations.¹⁰¹ Although the Association of Southeast Asian Nations (ASEAN) has begun to espouse a rhetoric of a "people-centered" ASEAN, "a community of peoples", and has tried to implement this idea in the security sphere,¹⁰² certain member states view the term "human security" with suspicion.¹⁰³ As a result, the term is not used in the ASEAN Charter.¹⁰⁴ Instead, the ASEAN and certain member states prefer the term "comprehensive security", which admits the existence of a variety of security threats, including "non-traditional" ones such as health epidemics, terrorism, and climate change, but nonetheless threats to the political stability of the state.¹⁰⁵ Thus, seen from a regional perspective, Oplan Bayanihan's adoption of the term "human security" is a daring rhetorical move.

This implies, according to the document, that "security is no longer solely focused on ensuring the stability of the [Philippine] State" but that "[o]f equal concern ... is the safety and well-being of the Filipino people with human rights as the overarching frame".

¹⁰⁶ The idea is that adopting the human security concept allows for an understanding of national security as a shared goal among the AFP and the civilian branches of government as well as civil society. As such, the document highlights the importance of the involvement or support of "all stakeholders", meaning the different government agencies, non-governmental organisations and citizens in the so-called "whole-of-nation approach".¹⁰⁷ To underscore this point, the plan is made available to the public. Previous

⁹⁹ *ibid* 22.

¹⁰⁰ Andrew Mack, *The Human Security Report 2005: War and Peace in the 21st Century* (Oxford University Press 2005); Sverre Lodgaard, *Human Security: Concept and Operationalization* (Norwegian Institute of International Affairs 2000); Ramesh Thakur and Edward Newman, *New Millennium, New Perspectives: The United Nations, Security and Governance* (United Nations University Press 2000); Sabina Alkire, 'Concepts of Human Security' in Lincoln C Chen, Sakiko Fukada Parr and Ellen Seidensticker (eds), *Human Security in a Global World* (Harvard University Press 2003).

¹⁰¹ Mely Caballero-Anthony, 'Revisioning Human Security in Southeast Asia' (2004) 28 *Asian Perspective* 155-189, 155, 179.

¹⁰² Yukiko Nishikawa, 'Human Security in Southeast Asia: Viable Solution of Empty Slogan?' (2009) 40 *Security Dialogue* 213-236, 217.

¹⁰³ Amitav Acharya, 'Human Security: East versus West' (2001) 61 *International Journal* 442-460, 457-459.

¹⁰⁴ Nishikawa (n 103) 227.

¹⁰⁵ Acharya (n 104) 453-454.

¹⁰⁶ *Armed Forces of the Philippines* (n 97) 17.

¹⁰⁷ *ibid* 24.

operational plans for the AFP had been confidential documents.¹⁰⁸ There is, furthermore, a call for the AFP to engage directly in consultation and dialogue to forge partnerships with civil society organisations.¹⁰⁹

The framers of the IPSP also appear to recognise that addressing armed security threats involve addressing the “root causes” thereof, which are “structural problems”.

[I]nsurgency is largely driven by structural problems in Philippine society, such as unequal development, non-delivery of basic services, injustice, and poor governance – all of which are beyond the military purview.¹¹⁰

The “military solution” which was the decades-long strategy of previous governments, is acknowledged as “inadequate in effectively addressing armed security threats”.¹¹¹ Military operations simply “support” efforts by the civilian government to implement structural reforms “to win the peace”.¹¹² Combat military operations must therefore be “focused” on combatants, i.e., the “armed components of internal armed threat groups” as opposed to their “mass bases”.¹¹³ New emphasis is given to non-combat military operations such as civil-military operations and development-oriented activities.¹¹⁴

In more specific terms, the IPSP directs the AFP to approach different “armed security threats” differently. With respect to “terrorist groups”, which the document identifies as the Abu Sayyaf and Jemaah Islamiyah, the AFP should aim to defeat them through military operations, albeit after isolating them from other armed threat groups, foreign support, and their mass base, who are said to be co-ethnics and kin who provide them sanctuary.¹¹⁵ In glaring contrast, the AFP’s goal for the MILF, which is regarded as an “insurgency”, is “to achieve a negotiated political settlement and attain a just and lasting peace in Mindanao”.¹¹⁶ Under the so-called “primacy of the peace process” principle, the AFP should only conduct military operations “when necessitated by the security situation” and it should focus on peace building, rehabilitation and reconstruction activities.¹¹⁷

¹⁰⁸ Interview 43.

¹⁰⁹ Armed Forces of the Philippines (n 97) 25. Military-civil society dialogues are undertaken through a project of the Alternative Law Groups (ALG) and the Bantay Bayanihan (Bayahihan Watch), both headquartered at the Ateneo de Manila University campus in Quezon City. Interviews 41, 43 and 45.

¹¹⁰ *ibid* 1.

¹¹¹ *ibid*.

¹¹² *ibid* 45.

¹¹³ *ibid* 29.

¹¹⁴ *ibid* 24.

¹¹⁵ *ibid* 31–32.

¹¹⁶ *ibid* 31.

¹¹⁷ *ibid* 28.

Military operation should be “focused” on “rogue elements of the MILF who resort to atrocities”.¹¹⁸ Maintaining a “credible deterrent posture” is the main objective for the AFP in dealing with the MILF.¹¹⁹

The approach to the “communist insurgency” is strikingly different from the approach to the MILF. With respect to the “communist insurgency”, the envisioned end goal is not a negotiated political settlement but rather “to render their armed component, the New People’s Army (NPA), irrelevant and show the group the futility of their armed struggle”.¹²⁰ The peace negotiations with them noted but they are not regarded as the primary mode for addressing the root causes of the armed conflict. The main mechanism for ending the NPA’s armed struggle is “social pressure” which will supposedly come from a demonstration of the government’s sincerity in delivering development, social services, justice, good governance, etc., i.e., the root causes of the conflict. The NPA should be made to realise that the use of armed struggle to achieve its political agenda is “not acceptable to the Filipino people and to any civilized society”.¹²¹

Satur Ocampo, who headed the National Democratic Front (NDF) negotiating panel in the very first peace negotiations with the Philippine government in 1986, underscores that this interpretation of “addressing root causes” departs from previous understandings. He recalled that the term “addressing the root causes of the armed conflict” started with President Corazon Aquino, and it has been the framework of the peace negotiations with the NDF. Aquino used the term in a speech at the graduation exercises in the University of the Philippines in March 1986. There she called for negotiations and said she would seek to address the root causes of the armed conflict and war. The NDF proposed that to address the root causes of the armed conflict, there has to be “nationalist industrialisation”, respect for human rights, and other elements of its reform program. Ocampo said, under Benigno Aquino’s presidency, “addressing the root causes of the armed conflict” no longer referred to “structural transformation” of politics, the economy, etc. Rather, the government only sought to “address the root causes of conflict in the areas of conflict” primarily through “a combination of military offensives and peace and development operations”. “So that did away with [necessity of the] peace negotiations to address the root causes.”¹²²

¹¹⁸ *ibid* 31.

¹¹⁹ *ibid* 31, 28–29.

¹²⁰ *ibid* 30.

¹²¹ *ibid*.

¹²² Interview 27.

Oplan Bayanihan's stated approach to the CPP-NPA-NDF continued to focus on their mass base just as the previous counterinsurgency strategy did. Where the "communist insurgency" is concerned, "structural problems" are acknowledged to fuel insurgency but only by way of "perceptions", which implies that the perceptions are misguided. Communist insurgents are seen as exploiting these structural problems, i.e., peddling false perceptions of the government's role in the perpetuation of these problems, to recruit people to take up arms against the government and/or support the NPA.¹²³ Thus, undermining the hold of the NPA on their mass base requires influencing their perception of the government's efforts at addressing structural problems. "Non-combat military activities", which include "public information campaigns, civic action programs, development-related projects and collaborative activities with government and non-government stakeholders" in NPA strongholds, are supposed to accomplish this task.¹²⁴ They show armed combatants and their mass base alike "that the government is sincere in addressing the roots of conflict".¹²⁵ Therefore, "addressing root causes" actually masks a strategy of disavowing the necessity of peace negotiations with the CPP-NPA-NDF and reliance on countervailing positive images and messages about the government.

Furthermore, without a negotiated arrangement with the CPP-NPA-NDF, bringing development to mass bases in conflict areas necessitates removing the NPA ("armed security threats") in those areas by force as armed threats are seen as hindering the promotion of development in those areas.¹²⁶ Inevitably, therefore, "addressing root causes" also means an escalation of warfare. Although advised to be "accurate and precise" - meaning targeting only "armed insurgents" - in compliance with human rights and international humanitarian law, military combat operations must be "intensified and

¹²³ Human rights violations by the military are acknowledged albeit in the form of perceptions that also must be changed. Thus: "[T]he greatest hindrance to stronger civilian-military cooperation is the continued perception of human rights violations allegedly committed by military personnel." Armed Forces of the Philippines (n 97) 8.

¹²⁴ *ibid* 30.

¹²⁵ *ibid*.

¹²⁶ "It must be stressed that human security does not conflict with state security. These are in fact complementary concepts. The human security approach seeks to enhance human rights and promote human development efforts, the necessary conditions to create a peaceful and secure environment. On the other hand, ensuring state security means *removing armed threats that hinder the promotion of human security efforts*." *ibid* 26. It would appear that armed NPA presence is seen as a hindrance that must first be removed to bring human development to their mass base and promote their human rights.

relentless”.¹²⁷ “Focused military operations involve the use of combat operations and development activities.”¹²⁸

The prominent mention of “focused” operations, “non-combat” methods, the distinction between armed combatants and mass base, and the call for dialogue with civil society in Oplan Bayanihan appeared designed to suggest a transformation of military relations with civil society, so that legal organisations are not treated like combatants in the armed conflict with the CPP-NPA. However, in practice, one can identify two trends in military-civil society relations. On the one hand, certain non-governmental organisations, such as the Alternative Law Groups (ALG) and the Philippine Alliance of Human Rights Advocates (PAHRA), have welcomed Oplan Bayanihan’s call for dialogue on human rights and security and have cultivated improved relations with the military.¹²⁹ On the other hand, the relationship of the military to other leftist organisations remain conflictual. According to Atty. Marlon Manuel of the ALG, their affiliated civil society organisations have since October 2009 conducted a series of regional-level dialogues with middle-level officers of the AFP and the Philippine National Police (PNP) under the aegis of a joint project with the two institutions and the Commission on Human Rights.¹³⁰ The aim was simply to establish open communication lines between civil society organisations and the AFP and PNP, and in this, the project was successful.¹³¹ PAHRA’s chair Max de Mesa, who represents PAHRA on another project with the AFP called *Bantay Bayanihan* (Bayanihan Watch), explained that they joined the project because they regard the existence of open communication channels with certain officials as opportunities to promote human rights.¹³² De Mesa clarified, however, that open communication lines had not yet facilitated the resolution of even a single case that they have documented and brought to the attention of their contacts within the AFP.¹³³

¹²⁷ *ibid* 30.

¹²⁸ *ibid*.

¹²⁹ Interview 41, 45.

¹³⁰ Interview 41.

¹³¹ Alternative Law Groups, ‘Community-Based Dialogue Sessions on Human Rights Promotion and Protection between the Armed Forces of the Philippines and the Philippine National Police, and Civil Society Organizations and Local Communities’ (Alternative Law Group 2011) Initial Project Report. Manuel underlined that in their dialogues they try to break down barriers between civil society as presumed “defenders of human rights or victims of human rights violations” and the military and police as presumed “violators” by de-focusing from extrajudicial killings and enforced disappearances. This allows the military and police to cooperate in identifying human rights violations and discussing ways to jointly tackle them with civil society organisations.

¹³² Interview 45.

¹³³ *ibid*.

A more persistently conflictual relationship is evident between the AFP and other left-wing civil society groups, including Karapatan. In upland areas of believed NPA influence in northern Mindanao populated by non-Islamised indigenous peoples (*lumad*), military-civilian conflict is prevalent. Removing the armed threat of the NPA and bringing “development activities” to NPA mass bases in those areas would entail sharp conflict between legal organisations and communities, on the one hand, and the military, on the other hand. In the face of a resistant or non-cooperative mass base, the conceptual distinction in Oplan Bayanihan between the NPA and its mass base would quickly evaporate in practice, exposing leftist activists and community leaders to legal charges for being “fronts” of the NPA and/or the risk of extrajudicial killings.¹³⁴

Lumad communities have taken to evacuating from their upland villages and putting up makeshift camps in public spaces and shelters in cities and towns to protest military presence and activities in their villages and negotiate their withdrawal therefrom.¹³⁵ The protest phenomenon is simply called *bakwit* (evacuees).¹³⁶ The recorded complaints from evacuees provide a *bakwit* perspective on the military’s treatment of believed mass bases. These complaints reveal the systematic use by the military of intimidation and coercive action against civilians, including children. The allegations include that soldiers engage in heavy-handed tactics to gather intelligence about the NPA from unarmed civilians including children; the use of the communities’ children as guides in combat operations; threats to attack civilians if the NPA attacks the military; indiscriminate firing at houses and properties; the use of their schools and houses as military barracks or outposts; and disruption to farming and other livelihood activities, such as through the imposition of curfews.¹³⁷ The difficult trek from the mountains to cities and towns and the

¹³⁴ Kalipunan ng mga Katutubong Mamamayan ng Pilipinas (also called KATRIBU), an alliance of organisations of indigenous peoples, recorded an average of 20.16 extrajudicial killings of leftist activists in the indigenous peoples sector every year from 2001-2006 decreasing to 7.87 per year from 2007-2013. Kalipunan ng Katutubong Mamamayan ng Pilipinas, ‘Data on Human Rights Situation of Indigenous Peoples’.

¹³⁵ Interview 26. Inday Espina-Varona, ‘Filipino Indigenous Children Face Crisis’ *ABS-CBN News* (6 July 2015) <<http://www.abs-cbnnews.com/focus/07/06/15/filipino-indigenous-children-face-crisis>> accessed 16 July 2015.

¹³⁶ KATRIBU recorded in the period from June 2010 to August 2013, 16 such incidents of mass evacuations of Manobo, Matigsalog, Higaonon and Mamanwa tribes from 18 localities in Agusan del Sur, Agusan del Norte, Bukidnon, Surigao del Sur and North Cotabato, each involving more than twenty families, and sometimes reaching more than a hundred families. Similarly, Karapatan records 8 incidents from March to April 2014 in six villages in Talaingod, Davao del Norte, involving a total of more than 1,300 Manobos making the six-day trek to Davao City. *ibid*.

¹³⁷ KASALO-CARAGA, ‘Fact Sheet, June 13, 2010’ (Incident starting June 2, 2010 at Kicharao, Agusan del Norte resulting in the harrassment and evacuation of Mamanwa tribal people); Karapatan-Surigao del Sur, ‘Fact Sheet, September 3, 2010’ (Incident of August 7, 2010 at Marihatag, Surigao del Sur resulting in the harrassment and evacuation of Manobo tribal people); Karapatan-Surigao del

unliveable conditions in makeshift camps have also caused sufferings, and resulted in several deaths.¹³⁸

A local campaign in Davao City, dubbed “Save Our Schools” (SOS), draws specific attention to the shutting down of self-run schools and the plight of school children in militarised *lumad* villages.¹³⁹ According to the SOS network, which includes KATRIBU and Karapatan, there were 146 self-run schools in Mindanao that were established by the *lumad* themselves in their villages, despite the chronic lack of government investment in education and basic services.¹⁴⁰ The deployment of soldiers to these villages, which Oplan Bayanihan claims seeks to deliver basic services to NPA mass bases, has ironically, subjected 87 of these schools to disruption or “attack”.¹⁴¹ As a result, an estimated 5,000 *lumad* school children were prevented from going to the school.¹⁴² The military has alleged that one such school, which was owned by the local *lumad* organisation Salugpongan Ta’Tanu Igkanogon (Unite to Save the Ancestral Land) in Talaingod, Davao del Norte, and which was established with the help of civil society organisations was “run by the NPA”.¹⁴³ As a result, the provincial superintendent of schools recommended non-renewal of its license to operate and the construction instead of another school “utilizing the resources of

Sur, ‘Surigao Evacuees Increase to 218 Families as 29th IBPA Refuses to Leave Mountain Communities’; Karapatan-CARAGA, ‘Fact Sheet, June 30, 2010’ (Incident of June 6 and 30, 2011 at Esperanza, Agusan del Sur resulting in the killing of a Higaonon local leader and his neighbour by paramilitary); Center for Lumad Advocacy and Services, Inc., ‘Fact Sheet, March 17, 2011’ (Incidents of March 11 and 17, 2011 at Malapatan, Sarangani resulting in harassment and evacuation of Blaán tribal people); Karapatan-CARAGA, ‘Fact Sheet, May 20, 2011’ (Incident of May 20, 2011 at Kitcharao, Agusan del Norte resulting in evacuation of Mamanwa); Karapatan-Surigao del Sur, ‘Fact Sheet, June 29, 2011’ (Incident starting on May 5, 2011 at Marihatag and San Agustin, Surigao del Sur resulting in harassment, forced recruitment into paramilitary, forced labor, and evacuation of villagers); Karapatan-CARAGA, ‘Fact Sheet, February 28, 2012’ (Incident starting February 19, 2012 at Alegria, Surigao del Norte resulting in use of civilians as shields, and other violations of International Humanitarian Law).

¹³⁸ Kalipunan ng Katutubong Mamamayan ng Pilipinas, ‘The Human Rights Situation of Indigenous Peoples in the Philippines’ in Philippine UPR Watch (ed), *Submissions to the United Nations Human Rights Council (UNHCR) for the Universal Periodic Review (UPR) of the Philippines during the 13th UPR Session (May-June 2012)* (2012) 88.

¹³⁹ See, the blog “Bakwit Diaries”, <<http://bakwit.blogspot.com.au/>> which contains local and national news coverage of the “bakwit” in Davao City.

¹⁴⁰ Anne Marxze Umil, ‘Defend Lumad Schools, Our Beacons of Hope’ *Bulatlat* (30 October 2015) <<http://bulatlat.com/main/2015/10/30/defend-lumad-schools-our-beacons-of-hope/>> accessed 23 February 2016.

¹⁴¹ *ibid.*

¹⁴² Lira Dalangin-Fernandez, ‘Child Rights Groups Close Ranks to Save Lumad Schools’ (*InterAksyon.com*, 22 October 2015) <<http://www.interaksyon.com/article/119308/child-rights-groups-close-ranks-to-save-lumad-schools>> accessed 23 February 2016.

¹⁴³ Save Our Schools Network, ‘Tribal Chieftain Recounts – “They Told Us to Burn Our School”’ <<https://saveourschoolsnetwork.wordpress.com/2015/05/26/tribal-chieftain-recounts-they-told-us-to-burn-our-school/>> accessed 23 February 2016.

the military and using soldiers as para-teachers".¹⁴⁴ The Talaingod evacuees have protested this move by camping outside the regional office of the Department of Education (DepEd) in Davao City.¹⁴⁵ While the Salugpongan school eventually had its license renewed, the SOS campaigners allege that government education officials continue to allow or condone militarisation of schools.¹⁴⁶

Bakwit protests have sometimes prompted local negotiations to withdraw military troops from some villages permitting the *lumad* to return home.¹⁴⁷ In 2012, evacuees in Bukidnon returned home after the military made promises to arrest the main suspect in the killing of their village chief,¹⁴⁸ while evacuees from Kicharao, Agusan del Norte were persuaded to return in 2011 with the military's assurance to the municipal government that it was safe to return.¹⁴⁹ In more recent cases, however, the military has simply escalated the conflict with *lumad* leaders and legal organisations supporting the *bakwit* by criminalising their protest.¹⁵⁰ In these situations, the military appear to regard the conflict with civil society as an extension of the armed conflict with the NPA. Col. Romeo Brawner, spokesperson of the Eastern Mindanao Command of the AFP, called the *bakwit* protest a "tactic" of the CPP-NPA-NDF and claimed that the *lumad* are forced by the NPA to evacuate from their villages and to stay in evacuation centres which are "also controlled by the CPP-NPA-NDF".¹⁵¹ The *bakwit* are not seen as bona fide protestors; instead, NPA "front" organisations are suspected of coercing or manipulating them. This theory is developed in criminal charges for kidnapping and human trafficking which have been brought against leaders of leftist organisations, including Bayan and Karapatan in Davao City, who have

¹⁴⁴ NewsDesk, 'Education Exec Wants Tribal Schools Closed, Recommends Deployment of Military "Para-Teachers"' *NewsDesk.Asia* (28 May 2015) <<http://newsdesk.asia/education-exec-wants-tribal-schools-closed-recommends-deployment-of-military-para-teachers/>> accessed 18 July 2015.

¹⁴⁵ InterAksyon.com, 'Dinky "Oblivious" to Lumad Kids' Presence at Protest vs School Closures - Karapatan' (*InterAksyon.com*, 24 June 2015) <<http://www.interaksyon.com/article/112964/dinky-oblivious-to-lumad-kids-presence-at-protest-vs-school-closures---karapatan>> accessed 23 February 2016.

¹⁴⁶ Campaigners criticise the Education Secretary's Memorandum 221 which allows military presence in schools. Save Our Schools Network, 'Lumad Files Raps against DepEd Secretary Luistro' <<https://saveourschoolsnetwork.wordpress.com/about/>> accessed 23 February 2016.

¹⁴⁷ Walter I Balane, 'Bukidnon "bakwits" Return Home' *MindaNews* (2 August 2012) <<http://www.mindanews.com/top-stories/2012/08/02/bukidnon-bakwits-return-home/>> accessed 23 February 2016; Erwin Mascarinas, 'Agusan "bakwits" Return Home' *MindaNews* (19 November 2011) <<http://www.mindanews.com/top-stories/2011/11/19/agusan-%E2%80%98bakwits%E2%80%99-return-home/>> accessed 23 February 2016.

¹⁴⁸ Balane (n 148).

¹⁴⁹ Mascarinas (n 148).

¹⁵⁰ Zea Io Ming C Capistrano, 'Cafgu Files Charges vs IP Leaders' *Davao Today* (26 March 2015) <<http://davaotoday.com/main/politics/cafgu-files-charges-vs-ip-leaders/>> accessed 16 July 2015.

¹⁵¹ *ibid*.

supported the “bakwit” protest through campaigning, and the United Church of Christ in the Philippines (UCCP), which owns the premises of the Haran compound that have been used as a shelter for the evacuees from Talingod in Davao City.¹⁵² Ironically, the theory that the “bakwit” are victims has allowed petitions for writs of *amparo* and habeas corpus to be filed against *lumad* leaders and supportive legal organisations in connection with a “bakwit” protest.¹⁵³

4. Conclusion

This chapter has highlighted the problematic nature of human rights rhetoric in official discourse in the Philippines, as exhibited in the writ of *amparo* and Oplan Bayanihan. I have suggested that these measures, though appearing to advance official recognition of human rights in the context of counterinsurgency, have not actually made much difference in practice. Though designed to prevent and deter enforced disappearances and extrajudicial killings, the *amparo* remedy is almost always circumvented, belying a much wider extent of complicity in violations than has been officially admitted. Notwithstanding the profession of “adherence to human rights” and “addressing root causes”, principles which resonate with the United Nations global counterterrorism strategy, Oplan Bayanihan does not aim to transform the approach to the CPP-NPA. The underlying belief that counterinsurgency must target communist enemies operating through legal organisations and activities remains unchallenged. Moreover, extrajudicial killings and disappearances of leftist activists continue to occur. According to Karapatan, since Aquino took office in July 2010 to December 2014, there were 229 recorded extrajudicial killings, of which 106 victims had known organisational affiliation with legal left-wing organisations.¹⁵⁴

Recent policy shifts have not ushered in normative change. Rather, they have the effect of delaying to undertake change, continuing the denial of the necessity to undertake more serious actions. The interpretation of “addressing root causes” in reference to the “communist insurgency”, for example, denies the need for negotiations with the CPP-NPA over economic, social and political reforms. In this manner, though it restores the CPP-NPA

¹⁵² John Rizle L Saligumba, ‘Cases against Activists Lodged after IP’s Mass Evacuation’ *Davao Today* (11 July 2015) <<http://davaotoday.com/main/politics/cases-against-activists-lodged-after-ips-mass-evacuation/>> accessed 18 July 2015.

¹⁵³ Capistrano (n 151).

¹⁵⁴ Karapatan, ‘2014 Karapatan Year-End Report on the Human Rights Situation in the Philippines’ (n 60) 3, 42.

to the status of “insurgency”, Oplan Bayanihan’s approach to the CPP-NPA has the same effect as the designation of the CPP-NPA as a terrorist organisation. The continuation of practice of denying the legitimacy of left-wing activism, which we observe in the military’s denial that the *bakwit* protests against military abuses are genuine, elides the necessity to account for human rights violations against the *lumad*. The result is the perpetuation of impunity for abuses. This chapter therefore shows that alignment with the discourse of human rights-compliant counterterrorism can mask a continuing denial for the need to undertake serious reforms and a continuing impunity for abuses.

As we move on to the Indonesian case study, it is worth emphasising the key lessons from the Philippine case study. This thesis has provided a critical re-evaluation of the local discourse of terrorism in the Philippines after 9/11. In Chapter 2, I showed that the Philippine government labelled the MILF and the CPP-NPA “terrorists” in order to take advantage of opportunities afforded by alliance with the US’ “War on Terror” even though the terrorist label was not compelling. The appearance of countering terrorism allowed the Philippine government to advance a more aggressive policy against them as well as against legal left-wing organisations, resulting in grave human rights consequences. Given the problematic nature of the local terrorism discourse in the Philippines, Filipino human rights campaigners were more keen on promoting human rights by rejecting the labels “terrorism” and “terrorist” than in improving counterterrorism through the incorporation of human rights in counterterrorism policy. In Chapter 3, I provided an analysis of Filipino advocates’ initiatives, namely, the campaign against American troop presence in Basilan; the Mindanao Truth Commission; and the Sison delisting case, elucidating their rejection of the application of the terrorism discourse to the MILF and the CPP-NPA. Thus, the discourse of human rights-compliant counterterrorism represents a departure from the strategies that have been adopted by Filipino advocates. Finally, in this chapter, I had probed whether attaching a human rights language to Philippine counterterrorism has had transformative effect. After the height of campaigning against extrajudicial killings of left-wing activists, the Philippine government responded with policy reforms that sought to align the country to the discourse of human rights-compliant counterterrorism. I evaluated these post-2006 Philippine policies, showing that these policies have not resulted in a transformation of counterinsurgency practice towards the CPP-NPA and legal left-wing organisations. The Philippine case study thus argues against a transformative effect. Rather, it illustrates that the discourse of human rights-compliant counterterrorism can be deployed by government to create a semblance of change and to prolong undertaking

more serious reforms. By perpetuating a state of denial, the discourse may be contributing to conditions that breed impunity for abuses.

Chapter 5

Indonesian Counterterrorism Discourse from Suharto to Bali

[T]here remain individuals and Muslim groups who keep the idea of establishing an Islamic state in Indonesia alive. Depending on the political situation at certain times, these people can operate underground or openly in achieving their goals. They may also collaborate with certain unhappy military elements or even with other radical groups, which, in terms of ideology, are incompatible with theirs. ... Therefore one should be very careful in analysing radical groups. Some of them could genuinely be motivated by religious factors, but others could be 'engineered' radicals sponsored by certain individuals and groups for their own political ends.¹

At first glance, the rationality of counterterrorism policy in Indonesia seems beyond question. Unlike Western democracies or the UN Security Council, Indonesia did not rush into legislating counterterrorism policy immediately after 9/11. Rather, it did so only after an initial draft law was debated at length and only after the Bali bombings of October 12, 2002 illustrated the reality of the threat on Indonesian soil.² Careful police investigation revealed the Bali bombing to be the handiwork of a conspiracy of operatives acting out of religious zeal, identified with a clandestine organisation called Jemaah Islamiyah (JI).³ If foreign governments were involved in pressuring Indonesia to adopt a counterterrorism policy, it was because innocent foreign nationals, mostly Australians, were victims of the bombings. To deny the need for counterterrorism seems to exhibit extreme scepticism or foolish complacency.

In the search for ways to prevent similar terrorist incidents, international observers focused on the identities of individuals and organisations involved in the violence, the ideas and goals that motivate them, the internal workings of such organisations, and the networks in which these individuals and organisations circulate.⁴ Assessments of the

¹ Azyumardi Azra, 'Bali and Southeast Asian Islam: Debunking the Myths' in Kumar Ramakrishna and See Seng Tan (eds), *After Bali: The Threat of Terrorism in Southeast Asia* (World Scientific 2003) 49–50.

² Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press 2011) 143.

³ Greg Barton, *Jemaah Islamiyah: Radical Islam in Indonesia* (Singapore University Press 2005) chap 1.

⁴ International Crisis Group, 'Al-Qaeda in Southeast Asia: The Case of the "Ngruki Network" in Indonesia' (International Crisis Group 2002) Asia Report No. 43; International Crisis Group, 'Indonesia Backgrounder: How the Jemaah Islamiyah Terrorist Network Operates' (International Crisis Group 2002) Asia Report No. 43; International Crisis Group, 'Indonesia: Violence and Radical Muslims' (International Crisis Group 2001) Asia Briefing No. 10; Barton (n 3); Kumar Ramakrishna, "'Constructing" the Jemaah Islamiyah Terrorist: A Preliminary Inquiry' (2004) IDSS Working Paper

nature and seriousness of the terrorist threat draw upon profiling “terrorist organisations” such as JI and its offspring.⁵ There is intense interest, e.g., in whether Al Qaeda is “linked” to JI, whether JI has broader, regional goals, and whether it is involved in violence outside Indonesia, such as in the Philippines.⁶ Abuza provides a stern assessment of JI, painting it as the regional “affiliate” or “franchisee” of Al Qaeda and arguing that terrorists are capable of influencing the direction of Indonesian politics because of terrorism’s broader social base within Indonesia.⁷ The premise underlying many of these threat assessments is that violence arises from fanatical commitment to radical Islamic ideas and goals, which define terrorist organisations. In step with this understanding, Indonesian counterterrorism encompasses police operations aimed at apprehending JI and other operatives, as well as preventing the spread of their radical ideas.⁸

The problem with understanding terrorism in this manner is that it tends to identify the cause of violence in the psychological or ideological pathology of radical clerics and recruits.⁹ Terrorism thus seems to be inherent in the terrorists themselves, and little or no attention is paid to the wider political context in which they are embedded. Like chapter 2 on the Philippines, this chapter reinforces the need to pay greater attention to context and local meaning of practices. This context includes a history of state suppression or neutralisation of government opponents (or would-be opponents) who mobilise in the name of Islam. Once terrorism is contextualised within this history of suppression of “Islamism”, it will be more difficult to frame counterterrorism operations as a neutral and necessary reaction to terrorism (which in contrast, embodies all that is partial and unnecessary). Counterterrorism is not a neutral or a technical exercise. Rather, counterterrorism itself is also part of an intensely political struggle involving the identity of the state and the place of Islam in it.

No. 71; Elena Pavlova, ‘From a Counter-Society to a Counter-State Movement: Jemaah Islamiyah According to PUPJI’ (2007) 30 *Studies in Conflict & Terrorism* 777-800.

⁵ Barton (n 3); International Crisis Group, ‘Al-Qaeda in Southeast Asia’ (n 4); International Crisis Group, ‘Indonesia Backgrounder’ (n 4); International Crisis Group, ‘Indonesia: Violence and Radical Muslims - International Crisis Group’ (International Crisis Group 2001) Asia Briefing No. 10; Ramakrishna (n 4); Pavlova (n 4).

⁶ Zachary Abuza, ‘Tentacles of Terror: Al Qaeda’s Southeast Asian Network’ (2002) 24 *Contemporary Southeast Asia* 427-465; Maria Ressa, *Seeds of Terror: An Eyewitness Account of Al-Qaeda’s Newest Center of Operations in Southeast Asia* (Free Press 2003).

⁷ Abuza (n 6) 450-459 (on JI as Al Qaeda’s regional affiliate); Zachary Abuza, *Political Islam and Violence in Indonesia* (Taylor & Francis 2007) 2-3, 8 (on JI’s broader political clout).

⁸ Noorhaidi Hasan, ‘Towards a Population-Centric Strategy: The Indonesian Experience’ in Roel Meijer (ed), *Counter Terrorism Strategies in Indonesia, Algeria and Saudi Arabia* (Netherlands Institute of International Relations ‘Clingendael’ 2012) 28.

⁹ Natasha Hamilton-Hart, ‘Terrorism in Southeast Asia: Expert Analysis, Myopia and Fantasy’ (2005) 18 *The Pacific Review* 303-325, 316.

In this chapter, I discuss the Indonesian counterterrorism discourse developed by the Suharto regime and the re-emergence of the “terrorist threat” in 2000. Contemporary Indonesian counterterrorism, that is, post-2002 Bali bombing, is then addressed in Chapter 6. The examination in this chapter thus provides a necessary background to Chapter 6. I will argue that like the Arroyo government in Chapter 2, the Suharto regime did not simply discover, but in many senses created or fostered “terrorists”. Counterterrorism discourse bolstered Suharto’s hold on power, with devastating consequences for human rights. Moreover, the problematic conditions that allowed Suharto to foster “terrorism” have continued long after Suharto’s fall.

The argument in this chapter draws from John Sidel’s critical reassessment of the “Islamist threat” in Indonesia.¹⁰ Sidel’s argument provides historical and political context to the terrorist violence and enables a critique of counterterrorism that cannot be easily dismissed as a simple mode of denial or “conspiracy theory”. The argument is not that terrorism does not exist. Rather, it is that the fixation of counterterrorism on the belief that terrorist violence is caused by Islamic extremists who must be neutralised results in a distorted understanding of terrorism. There is a more complex pattern to terrorist violence that requires more than a shallow and circular assertion that terrorism is caused by terrorists. To understand why terrorism re-appeared after Suharto and why foreigners were targeted in Bali, it is as important to know the political and historical context of the violence as it is to point out who their immediate architects were.

Sidel joins Hamilton-Hart¹¹ in criticising the dominant current of studies of terrorist violence in Indonesia for promoting a one-sided and manipulated understanding of terrorism that favours the agenda of rigidly anti-Islamist forces. The dominant current relies heavily and largely uncritically on official or state sources, whose orientation is decidedly anti-Islamist, and whose security and intelligence services have a history of manipulation of information as well as torture and other human rights abuses.¹² The result is that orthodox terrorism studies on Indonesian groups like JI emphasise “alarmism” at the spectre of a rising “Islamist threat” that demands further surveillance, neutralisation and suppression.¹³ Within this dominant current of terrorism studies, the identification of JI or

¹⁰ Sidel has since extended his argument to the Southeast Asian region as a whole. John T Sidel, *The Islamist Threat in Southeast Asia: A Reassessment* (Institute of Southeast Asian Studies, East-West Center Washington 2007); John Sidel, ‘The Islamist Threat in South East Asia: Much Ado About Nothing?’ (2008) 39 *Asian Affairs* 339–351.

¹¹ Hamilton-Hart (n 9) 310–316 (on the tendency to use Islam and criticism of US policy as indications of terrorism).

¹² *ibid* 308–310 (on sources).

¹³ Sidel, ‘The Islamist Threat in South East Asia’ (n 10) 339.

similar radical Islamist groups, suffices to explain the pattern of terrorist violence. Beyond critique, Sidel offers an alternative picture of Indonesian Islamist forces in decline, retreat and disorientation, and an alternative explanation for the eruption of terrorism. In his view, terrorism signals not a rising “Islamist threat”, but rather Islamist insecurity. Islamist forces are in decline, divided, cut off from channels of government influence, and violence is employed in their name largely as a form of defense mechanism to defend against attacks, encroachments or rising social influence of non-Muslims or anti-Islamists.¹⁴ In short, terrorism evidences not the strength of radical religious ideas but the desperate denial of their weakness.

1. Indonesian Islamism, Radical Islamism, and Terrorism within a History of Repression

1.1. Definitions: “Islamist”; “Radical islamist”

Before proceeding, a few clarifications are in order pertaining to the words “Islamist” and “radical Islamist” in the Indonesian context. “Islamism”, as the word is used by scholars of Muslim societies today, is the conception or use of Islam as a political ideology or the basis of a political ideology, particularly by contemporary political movements.¹⁵ Muslims and “Islamists” are not the same. One is an “Islamist” only if one believes that Islam provides a blueprint for political action. Muslims can differ or disagree with Islamists, as when they see Islam primarily as a personal faith, or would disassociate Islam from political ideologies, particularly those they regard as illiberal or intolerant of other religions or faiths.¹⁶

When defined in this way, “Islamism” can encompass various forms of activism in pursuit of many different (specific or general) goals and with varying levels of drive or commitment.¹⁷ The varieties of “Islamism” have been categorised in two broad ways. First, they are classified according to how different their goals are from the status quo or

¹⁴ *ibid* 341.

¹⁵ Olivier Roy, *The Failure of Political Islam* (Harvard University Press 1994) 12–13; Graham E Fuller, *The Future of Political Islam* (Palgrave Macmillan 2003) xi–xii, 24; Bernhard Platzdasch, *Islamism in Indonesia: Politics in the Emerging Democracy* (Institute of Southeast Asian Studies 2009) xxvi.

¹⁶ “Islamism” seems to be preferred over “Islamic fundamentalism” because, in comparison with the later, it is able to obviate the pejorative connotation of being literalist in the interpretation of sacred texts and retrogressive or wishing to return or replicate the past. John L Esposito, *The Islamic Threat: Myth or Reality?* (Oxford University Press 1992) 7. As Fuller puts it, “Islamism” is “not so much theology as an ideology whose implications are not at all old-fashioned, but thoroughly modern” or forward-looking. Graham E Fuller, *Islamic Fundamentalism in the Northern Tier Countries: An Integrative View* (Rand Corporation 1991) 2.

¹⁷ Platzdasch (n 15) 6.

from Western-style liberal democracy. Those who aspire towards a liberal democratic political system are said to be “mainstream” while those that aspire towards a different political system such as an Islamic state are seen as “radical”. Second, they are classified according to the willingness of adherents to employ violent means, such as jihad or holy war, to pursue their goals. They are classed as “moderate” if they use only peaceful means; “militant” if more forceful means, such as mob or vigilante attacks, are employed; and “extremist” if they employ jihad or holy war. Thus, the terms used often to describe Islamism (“moderate”, “mainstream”, “radical”, “militant”, or “extremist”) are necessarily subjective, reflecting the observer’s own liberal bias and perception of Islamism as threatening in various degrees. For example, Barton calls “radical Islamists” those who would force what is claimed as shariah or Islamic law on society without regard for its consent. Here what Barton references by “radical” is the goal (introduction and application of shariah), and he takes this goal as problematic in itself as it “can lead to erosion of human rights, especially those of women”.¹⁸ He also criticises “radical Islamists” as acting “in the spirit of theocracy rather than democracy”.¹⁹

Abuza plots Islamic groups in Indonesia into a graph, one dimension of which represents the continuum of objectives, and the other that of tactics used by the groups.²⁰ Objectives range from maintaining Indonesia’s present political system of “secular, pluralist democracy”, on one end, to establishing a “regional caliphate” on the other end. Pursuing a “greater role for Islam”, “sharia for Muslims within pluralist democracy”, “sharia for Muslims in pluralist state but no democracy”, and “Islamic state” are arranged as different gradations from moderation to radicalism. The other dimension, the continuum of tactics, ranges from “no violence” at one end, through “protests”, “intimidation”, “mob violence/attacks on property” and “armed struggle/paramilitary activity for limited objective”, to “terrorism/paramilitary activity for revolution” at the other end. Abuza places the largest organisations and most organisations including Islamic political parties near the least threatening end of both the objectives and tactics dimensions, and simply calls them “political Islam”. He calls “militant” those organisations that engage in intimidation and attacks on property as a tactic to push for a “greater role for Islam”; and reserves the label “terrorist” for those who “use terrorist tactics to bring about a radical

¹⁸ Barton (n 3) 30.

¹⁹ *ibid.*

²⁰ Abuza (n 7) 10.

political and social realignment”.²¹ While these labels appear clear cut, they can be challenging to apply in view of Indonesia’s religious and political diversity and history of repression of Islamism.

1.2. Islam in Indonesian society and politics

As Indonesia is home to more Muslims than any other country in the world, it is unsurprising that Islam plays a large part in its social life.²² The two largest Muslim civil society organisations in the world are Indonesian organisations, namely, Nahdlatul Ulama (NU, Revival of the Religious Scholars), founded in 1926, and Muhammadiyah, founded in 1912, which are “giants in Indonesian Islam”.²³ NU, the somewhat larger of the two, has been estimated to have 30-40 million members, while Muhammadiyah has 25-30 million.²⁴ Thus, about one quarter of the Indonesian population belong to either NU or Muhammadiyah.²⁵ As Pringle notes, the two organisations’ presence are felt through their operation of several thousands of high schools and hundreds of colleges and universities, as well as hospitals and clinics all over the country. They each have affiliated organisations for women and youth.²⁶ Moreover, historically, Muhammadiyah, founded during the period of Dutch colonialism, championed so-called “reformist Islam” which promoted a progressive understanding of Islam that viewed the teachings and values of the Koran (stripped of the allegedly improper, locally derived practices) combined with modern Western-style education as indispensable for closing the gap between the secular West and their country.²⁷ Muhammadiyah’s detailed reform agenda, centred on education and building a literate Muslim citizenry, served and appealed to a mostly urban-based Muslim commercial class, which resented the Dutch for disadvantaging their commerce in favour of

²¹ *ibid* 8–11. Abuza departs from most political science accounts that emphasise the distinction between Islamist parties which do not support or condone violence and groups that do. He argues that both groups share a very long-term agenda and are mutually reinforcing. *ibid* 2–3. Radical Islamists are seen as making “gradual inroads” to the mainstream, and are “disproportionately powerful” as to tend to “set the agenda” of Islamist parties. *ibid* 9–11. Abuza’s analysis sits well with a war of civilisations perspective.

²² Pew Research Center Forum on Religion and Public Life, ‘Mapping the Global Muslim Population: A Report on the Size and Distribution of the World’s Muslim Population’ (Pew Research Center 2009) 4.

²³ Robert Pringle, *Understanding Islam in Indonesia: Politics and Diversity* (University of Hawai’i Press 2010) 114.

²⁴ *ibid*.

²⁵ *ibid* 115.

²⁶ *ibid*.

²⁷ Leslie H Palmier, ‘Modern Islam in Indonesia: The Muhammadiyah After Independence’ (1954) 27 *Pacific Affairs* 255-263, 261.

traditional aristocratic privileges.²⁸ Traditionalist NU emerged in reaction to and in competition with Muhammadiyah's reformism, as a bulwark of the "older, rural, land-owning clerical establishment rooted in the Islamic boarding schools (*pesantren*) of East and Central Java".²⁹

If the social picture in Indonesia suggests a vibrant Islamic presence, the political picture is different.³⁰ Islamic political parties have participated in politics since the federation of NU and Muhammadiyah in November 1943 in the Masyumi (Majelis Syuro Muslimin Indonesia – Consultative Council of Indonesian Muslims), sponsored by the Japanese occupying authorities in World War II. However, they compete with other political parties and leaders who, while also Muslim, maintain political identities separate from Islam.³¹ When Indonesian nationalism arose during the period of Dutch colonialism, its adherents were diverse in their identification with Islam. While some nationalists identified with either reformist or traditionalist Islam, other Muslims, like Sukarno, founder of the Partai Nasional Indonesia (PNI, Indonesian Nationalist Party) and Indonesia's first president, "chose to minimize religious distinctions and concentrate on forging national unity".³² Moreover, many Indonesian Muslims politically identified as communists as well, to the extent that before the PKI (Communist Party of Indonesia) was crushed in 1965, it was the largest communist party outside the Soviet Union and China.³³

When the 1945 Indonesian Constitution was drafted under Japanese occupation, Indonesians chose not to anoint Islam as the official state religion. Instead, a state philosophy was defined that embodied religious and moral values important to Islam, whilst avoiding specific reference to it.³⁴ Sukarno enunciated a set of five principles, called *pancasila*, which supposedly embody the common beliefs and aspirations of all religions and ethnicities that comprise the nation, to be incorporated in the preamble to the constitution.³⁵ The fifth principle of *pancasila* as originally drafted was "Belief in God

²⁸ *ibid* 256.

²⁹ Pringle (n 23) 57.

³⁰ The economic picture also reflects Muslim underrepresentation. An ethnic Chinese business class that is mostly Christian controls a disproportionate share of industries, with Muslim-owned companies remaining relatively insignificant. Muslim underrepresentation in the bureaucracy and military has also been a long-standing issue. Martin van Bruinessen, 'Islamic State or State Islam? Fifty Years of State-Islam Relations in Indonesia' in Ingrid Wessel (ed), *Indonesien am Ende des 20. Jahrhunderts* (Abera-Verlag 1996) 2.

³¹ MC Ricklefs, *A History of Modern Indonesia since c.1200* (Palgrave Macmillan 2008) 194.

³² Pringle (n 23) 58.

³³ Rex Mortimer, *Indonesian Communism Under Sukarno: Ideology and Politics, 1959-1965* (Equinox Publishing 2006) 19.

³⁴ Bruinessen, 'Islamic State or State Islam? Fifty Years of State-Islam Relations in Indonesia' (n 30) 2.

³⁵ Pringle (n 23) 68.

(*Ketuhanan*)” with no particular reference to Islam.³⁶ To this the drafting committee, following the objection of Masyumi, wanted to add the phrase “with the obligation for adherents of Islam to carry out Islamic law (*dengan kewajiban menjalankan syari’at Islam bagi pemeluk-pemeluknya*)” (now referred to as the Jakarta Charter).³⁷ The Japanese did not agree to the addition of the phrase, citing potential Christian objection and threat of secession.³⁸ However, as a gesture to Muslim leaders, the Japanese moved the fifth principle to first place and changed the wording to “Belief in a singular God Almighty (*Ketuhanan yang Maha Esa*)”.³⁹ Given that that origin of Indonesia is as state founded in the belief in one God albeit unspecified, Indonesia is not technically a secular state but a religious one. Nonetheless, it is not simply an Islamic state either, as is neighbouring Malaysia, which has a far smaller proportion of Muslims in the population.⁴⁰ Instead, the Indonesian constitution gives equal recognition and status to other monotheistic religions alongside Islam.⁴¹

1.3. The Darul Islam rebellion and marginalisation of Islamic parties

Indonesian Islamism found a more “radical” expression in the historic Darul Islam rebellion. In the 1950s, this so-called Darul Islam rebellion posed an important challenge to the fledgling Indonesian state. At its height, it commanded 15,000 to 20,000 soldiers.⁴² The rebellion also took a human toll and caused material destruction on a scale far bigger than the terrorist incidents being blamed on groups like JI today.⁴³ The rebellion started during the Indonesian revolution, when the Republican government of Sukarno, in the course of fighting with the returning Dutch forces, agreed with the Dutch to the unfavourable terms of the so-called Renville agreement of 1948, which called for

³⁶ *ibid* 69.

³⁷ *ibid*.

³⁸ *ibid*.

³⁹ *ibid*.

⁴⁰ Whether the constitutionalisation of religious law for Muslims would have amounted to making Indonesia an Islamic state is debatable, as it was not clear at the time the Jakarta Charter was proposed what this Islamic law consisted in apart from “praying, fasting, paying the alms tax and when possible making the Meccan pilgrimage”. Bruinessen, ‘Islamic State or State Islam? Fifty Years of State-Islam Relations in Indonesia’ (n 30) 4.

⁴¹ *ibid* 2.

⁴² Gregory Fealy, ‘Half a Century of Violent Jihad in Indonesia: A Historical and Ideological Comparison of Darul Islam and Jemaah Islamiyah’ in Marika Vicziany and David Wright-Neville (eds), *Islamic Terrorism in Indonesia: myths and realities* (Monash University 2005) 18.

⁴³ *ibid*.

Republican forces to withdraw from West to Central Java.⁴⁴ Muslim militias in West Java, led by Kartosuwirjo, broke with Sukarno's government on this score and created their own government "which recognized no legislation but the shari'a".⁴⁵ Beyond West Java, the rebellion spread to four other provinces, namely, Central Java, South Sulawesi, South Kalimantan and Aceh.⁴⁶ In August 7, 1949, Kartosuwirjo declared an "Indonesian Islamic State" (Negara Islam Indonesia, NII) with himself as *imam* or religious and political chief.⁴⁷ While the reasons for the rebellion were different in each province,⁴⁸ the rejection of the idea of the Pancasila-based Indonesian republic was a key point of unity.⁴⁹ With the military defeat of the Darul Islam rebellion, the identity of Indonesia as a multi-religious republic under Sukarno's rule was cemented.

In the 1960s, Sukarno instituted "Guided Democracy" and promoted a united front of nationalist, communist and religious parties called *Nasakom*. Motivated by its instinct for survival, NU played along. In contrast, Masyumi, which took a strong stand against Sukarno's collaboration with the PKI, and whose leaders were already suspected of links to the Darul Islam, was excluded from the coalition and its political fortunes declined after 1955.⁵⁰ In 1958, Masyumi leaders joined the so-called Outer Islands Rebellion, a US Central Intelligence Agency (CIA) ploy to overthrow Sukarno.⁵¹ When this too was crushed, Masyumi was banned.⁵²

The marginalisation of Islamic parties continued even after Suharto was replaced in the notorious 1965 *coup d'état* that destroyed the PKI. The NU and Masyumi participated in the mass killings of alleged communists of 1965-66 that empowered Suharto, but Suharto did not reward them for this act as might be expected. Instead, there was a steady decline of Islamic parties under Suharto's rule. Suharto engaged in a campaign of

⁴⁴ Martin van Bruinessen, 'Genealogies of Islamic Radicalism in Post-Suharto Indonesia' (2002) 10 *South East Asia Research* 117-154, 119.

⁴⁵ *ibid.*

⁴⁶ Cornelis van Dijk, *Rebellion under the Banner of Islam: The Darul Islam in Indonesia* (M Nijhoff 1981) 1.

⁴⁷ S Soebardi, 'Kartosuwirjo and the Darul Islam Rebellion in Indonesia' (1983) 14 *Journal of Southeast Asian Studies* 109-133, 121.

⁴⁸ Dijk (n 46) 340.

⁴⁹ The rebel government, however, never fully implemented shari'a law and its state apparatus remained rudimentary until the rebellion was eventually crushed with the capture and execution of Kartosuwirjo in 1962. Greg Fealy, 'Islamic Radicalism in Indonesia: The Faltering Revival?' (2004) 2004 *Southeast Asian Affairs* 104-121, 111; Fealy (n 42) 16.

⁵⁰ Liem Soei Liong, 'Indonesian Muslims and the State: Accommodation or Revolt?' (1988) 10 *Third World Quarterly* 869-896, 881.

⁵¹ James Mossman, *Rebels in Paradise: Indonesia's Civil War* (Cape 1961); Audrey Kahin, *Subversion as Foreign Policy: The Secret Eisenhower and Dulles Debacle in Indonesia* (New Press: WW Norton [distributor] 1995).

⁵² Liong (n 50) 881.

“depoliticisation” of Islam that sapped the capacity of Islamic parties to exert influence over state policies. First, Masyumi leaders, freed from prison, tried to return to the political scene, reformulated as the political party Parmusi (Partai Muslimin Indonesia, Indonesian Muslim Party) in the late 1960s. Suharto recognised Parmusi but considered the loyalty of its senior leaders to be suspect, so screened them out as candidates for election.⁵³ Nearly 75% of its candidates were rejected, and as a result, a Parmusi purged of its Masyumi identity garnered only 5.5% of the votes in the 1971 elections, or about a quarter of Masyumi’s vote (20.9%) in the 1955 election.⁵⁴

Suharto’s interference in the affairs of the Islamic parties escalated with his decision in 1973 to “simplify” the party system by merging all Islamic parties into the PPP (Partai Persatuan Pembangunan, United Development Party) and the nationalist and Christian parties into the PDI (Partai Demokrasi Indonesia, Indonesian Democratic Party), while maintaining GOLKAR as the regime’s own electoral machine.⁵⁵ According to Bruinessen, the forced merger of the Islamic parties was “calculated to weaken political Islam by exploiting internal conflicts and rivalries, and it was quite successful in this respect”.⁵⁶ The NU, which cooperated with Sukarno under “Guided Democracy”, maintained its previous strength, polling 18.67% of the popular vote in the 1971 elections, similar to its showing in 1955 (18.4%). But under the PPP, NU was emasculated. Suharto imposed Djaelani Naro, a long-time associate of one of his favoured generals Ali Murtopo, first as chairman of the Parmusi and then as president of the PPP, and Naro presided over the division of parliamentary seats to the various “streams” within the PPP that marginalised the NU.⁵⁷ In the face of these machinations, the NU in 1983 decided to withdraw from party politics altogether, leaving its followers to vote for any party.⁵⁸ As a result, the lone Islamic party’s share of the vote plunged to 16% in the 1987 elections (compared to the combined vote of Masyumi and NU of 39.3% in 1955).⁵⁹

Depoliticisation of Islam peaked in the mid-1980s, when Suharto turned *Pancasila* from a symbol of national harmony in diversity into an instrument to “stamp out all

⁵³ Cornelis van Dijk, ‘The Indonesian General Elections 1971–92’ (1992) 20 *Indonesia and the Malay World* 48–66, 53.

⁵⁴ Bruinessen, ‘Islamic State or State Islam? Fifty Years of State-Islam Relations in Indonesia’ (n 30) 8.

⁵⁵ *ibid.*

⁵⁶ *ibid* 7.

⁵⁷ *ibid* 8.

⁵⁸ *ibid*; Suzaina Kadir, ‘The Islamic Factor in Indonesia’s Political Transition’ (1999) 7 *Asian Journal of Political Science* 21–44, 26.

⁵⁹ Bruinessen, ‘Islamic State or State Islam? Fifty Years of State-Islam Relations in Indonesia’ (n 30) 8.

ideological alternatives and in fact all opposition to the regime.”⁶⁰ All mass organisations were required to adopt Pancasila as their “sole principle” (*azas tunggal*), or risk being declared illegal.⁶¹ The sole Muslim political party was required to renounce Islam as its principle to be replaced by Pancasila, to refrain from using the word “Islam” in its name and all Islamic symbols to identify it, and to open its membership to non-Muslims, so that henceforth all pretense that it still represented the political aspirations of Islam was lost.⁶² Islamists rightly felt that Suharto targeted them unfairly, in a deliberate strategy to decrease their political power, influence and agency. Suharto effectively closed channels within the political system for pursuing their goals; and henceforth, the state regarded Islamist goals inherently seditious.

The enfeeblement of Islamic parties gave rise to new, extra-parliamentary forms of Islamic political activism. The most prominent ex-Masyumi leaders, including Mohammed Natsir, a former prime minister, unable to return to politics, concentrated on missionary work (*dakwah*), forming the umbrella group Dewan Dakwah Islamiyah Indonesia (DDII). Study groups on campuses as well as in mosques, and religious gatherings known as *pengajian*,⁶³ became important forums to air political views critical of the regime. Young people flocked to mosques, often taking over their day-to-day operations, to seek outlets for their activism in the form of discussions, publishing of leaflets and periodicals and community work.⁶⁴ However, extra-parliamentary forms of Islamic activism were diverse in their ideas and methods of operation, with only some initiatives meriting a tag of “radical Islamism”. According to Bruinessen, DDII was a proponent of “an unlikely combination of attitudes” that blended “a belief in the superiority of Western style democracy over the neo-patrimonial forms of rule adopted by Sukarno and Suharto, an almost paranoid obsession with Christian missionary efforts as a threat to Islam, and an increasingly strong orientation towards the Middle East, notably Saudi Arabia.”⁶⁵ On the other hand, the most

⁶⁰ *ibid* 3.

⁶¹ *ibid* 13.

⁶² “No one regards the PPP as articulating any more the political aspirations of Islam. ... [T]here is no longer such a thing as a party representing political Islam in Indonesia.” TAPOL Indonesia, *Muslims on Trial* (TAPOL Indonesian Human Rights Campaign 1987) 11.

⁶³ *Pengajian* could refer to various kinds of religious gatherings including “Quran incantation sessions, small house meetings, gatherings at mosques or outdoor rallies”. Itinerant preachers draw crowds to these rallies held at or near the mosques. *ibid* 14.

⁶⁴ *ibid* 15.

⁶⁵ Bruinessen, ‘Genealogies of Islamic Radicalism in Post-Suharto Indonesia’ (n 44) 123. According to Sidel, with support from Saudi donors, DDII “nurtured” the proselytisation and educational efforts of much earlier established organisations Persatuan Islam (Persis) and Al-Irshad. John Thayer Sidel, *Riots, Pogroms, Jihad: Religious Violence in Indonesia* (Cornell University Press 2006) 204. Identified with descendants of Hadrami Arab immigrants, Persis and Al-Irshad were said to be “puritanical” in

prominent student organisation HMI (Himpunan Mahasiswa Islam, Islamic Student Federation) spawned famous architects of a “new liberal Muslim discourse” that was favoured during the New Order.⁶⁶ Nevertheless, this has not prevented Suharto from targeting HMI for the imposition of Pancasila as sole principle, achieved only after an extended fight.⁶⁷

The discussion in this section serves to underline the importance of political context in understanding what the words “extremist” or “radical” denote. As the opening quote from Azra hints, individuals who harbour Islamist aspirations will pursue these aspirations openly or underground depending on the opportunities offered by the political system. Thus, whether they will resort to “mainstream” or “extremist” means is also dictated by the political environment. As we have also seen in Suharto’s campaign to depoliticise Islam, the subversive or “radical” nature of Islamist aspirations is not inherent in these aspirations but is also a construct.

2. The Spectre of Terrorism in the 1970s and 80s

2.1. Komando Jihad and Terror Warman

Dovetailing with the general campaign to neuter political Islam, a terrorism discourse emerged in the 1970s and 80s which stigmatised and discredited all forms of Islamic dissent by linking them to violence. In the lead up to the 1977 election, which was also the year the Suharto regime proposed the program of indoctrination in Pancasila to the legislature, Admiral Sudomo, the head of Komkaptib (Internal Security Command), announced the discovery of a violent anti-government conspiracy dubbed Komando Jihad.⁶⁸ The group was supposedly responsible for a string of bombings that targeted a hospital, a mosque, a church (set off on Christmas day), a nightclub and a cinema in

the sense of standing opposed to “traditional religious practices and beliefs” (more so than Muhammadiyah) and in favour of “a literal reading of the Qur’an and authentic hadith”, but did not show much interest in political applications of Islam. Bruinessen, ‘Genealogies of Islamic Radicalism in Post-Suharto Indonesia’ (n 44) 125.

⁶⁶ Bruinessen, ‘Genealogies of Islamic Radicalism in Post-Suharto Indonesia’ (n 44) 124.

⁶⁷ TAPOL Indonesia (n 62) 13–14.

⁶⁸ R William Liddle, ‘Indonesia 1977: The New Order’s Second Parliamentary Election’ (1978) 18 Asian Survey 175–185, 181; David Jenkins, *Suharto and His Generals: Indonesian Military Politics, 1975–1983* (Cornell Modern Indonesia Project, Southeast Asia Program, Cornell University 1984) 58; June Chandra Santosa, ‘Modernization, Utopia and the Rise of Islamic Radicalism in Indonesia’ (PhD, Boston University 1996) 434.

Sumatra in late 1976.⁶⁹ Core members of Komando Jihad were also alleged to be veterans of the Darul Islam rebellion.⁷⁰ In June 1977, authorities arrested 700 people for involvement in “the Komando Jihad movement” organised in Aceh, North Sumatra, Riau, South Sumatra, Lampung, Jakarta, West Java, and East Java.⁷¹ The movement supposedly had a military structure led by a “war commander” and a “Messiah” and its long-term goal was an Islamic state.⁷² Thus, the Suharto regime used the Komando Jihad to remind audiences of a continuing threat of radical Islamism committed to bringing about an Islamic state through force.⁷³

However, very little is known about Komando Jihad apart from these official allegations. Jenkins has explored its origins in a special project of an Indonesian intelligence service faction led by Ali Murtopo.⁷⁴ As confirmed by members of Murtopo’s group, Murtopo cultivated relations with Darul Islam veterans with the intention of making them “useful” for the Suharto regime.⁷⁵ He has similarly cultivated relations with veterans of the 1958 Outer Islands rebellion, and was responsible for the release from military prisons of leading Masyumi politicians as well as prominent army officers who participated in that rebellion – some were later to assume positions within the army intelligence service. The leaders of Komando Jihad, including the son of Kartosuwirjo, the leader of the Darul Islam rebellion of the 1950s, were such Darul Islam veterans that Murtopo “wanted to use”.⁷⁶ Haji Ismail Pranoto, one of the main defendants in the Komando Jihad trials charged with setting up Komando Jihad commands in various parts of East Java, claimed during his trial that Murtopo had in fact “used” them in a “joint struggle against communists”. It was alleged that Murtopo’s agents had implanted among the veterans rumours of a communist comeback and had promised to arm them to fight the

⁶⁹ Santosa (n 68) 434.

⁷⁰ *ibid* 435.

⁷¹ *ibid*.

⁷² Jenkins (n 68) 58.

⁷³ The spectre of a Darul Islam revival was also raised in November 1977 when a ragtag secessionist movement formally called Aceh-Sumatra National Liberation Front (ASNLF) fatally shot an American construction worker and wounded another American employee in a natural gas project in Arun, prompting a military operation that led to the arrest of hundreds. Santosa (n 68) 436.

⁷⁴ Jenkins (n 68).

⁷⁵ “Although Ali had fought [the rebellion], it was explained, he was not vindictive towards his former enemies. He had an open mind and wanted to make use of the people who were available, while at the same time giving those people a chance to do something for the nation.” *ibid* 58.

⁷⁶ *ibid*.

communists.⁷⁷ As the court did not summon Murtopo to testify despite Pranoto's wishes,⁷⁸ Murtopo's role in the creation of Komando Jihad was never judicially examined. Whatever the actual facts might have been, the timing of Komando Jihad's "discovery" before the elections have led scholars to conclude that it was almost certainly an election ploy to tarnish the PPP.⁷⁹ This is bolstered by the fact that in the lead up to the 1982 elections, there was a recurrence of violent acts imputed to Muslims with a political agenda.

The so-called *Terror Warman* band was held responsible for a string of robberies and murders in 1978-81. *Terror Warman* appeared to be an offshoot of *Komando Jihad* and it was supposedly planning to assassinate the judge and prosecutor in Ismail Pranoto's case.⁸⁰ However, the group's leader, Musa Warman, was killed when police went to his hideout to arrest him in 1981, his responsibility was never fully substantiated.⁸¹

Authorities also claimed that the main culprit in an attack on a police station in Cicendo in 1980, which led to its burning, and the hijacking of a Garuda plane in 1981, was Imran bin Muhammad Zein, a preacher in Bandung.⁸² Imran had already attracted the attention of authorities for his strong criticism of Pancasila and established Muslim leaders, as well as his advocacy of direct social enforcement of Islamic religious obligations which sometimes led to acts of violence.⁸³ It was alleged that Imran, supposedly as *imam* to 189 persons sworn in as members of his congregation, ordered his followers to denounce Pancasila and the 1945 Constitution and to wage an armed struggle.⁸⁴ The hijackers were Imran's followers (including his brother), and their demands supposedly included the release of radical activists from Imran's group and Terror Warman, as well as the resignation of the Indonesian Vice President for corruption.⁸⁵ However, all but one of the six hijackers were killed when the Anti-Terror Unit of *Kopassandha* (red berets) stormed the plane. The sixth died later in custody, preventing a detailed investigation into their

⁷⁷ Intelligence agents had apparently used the fall of South Vietnam in 1975 to raise fears of communist infiltration across the border with Malaysia. International Crisis Group, 'Al-Qaeda in Southeast Asia' (n 4) 5.

⁷⁸ TAPOL Indonesia (n 62) 35.

⁷⁹ Jenkins (n 68) 59; Bruinessen, 'Islamic State or State Islam? Fifty Years of State-Islam Relations in Indonesia' (n 30) 13.

⁸⁰ Santosa (n 68) 437.

⁸¹ Prosecutors also linked *Terror Warman* to "Jemaah Islamiyah". International Crisis Group, 'Al-Qaeda in Southeast Asia' (n 4) 7-9.

⁸² Santosa (n 68) 439-440.

⁸³ Imran has preached pulling the hair of Muslim girls who do not wear the *jilbab* as "physical enforcement of Islamic laws". His followers have destroyed a prostitution house and beaten up sex workers. *ibid.*

⁸⁴ *ibid* 440.

⁸⁵ *ibid* 438, 442.

motives.⁸⁶ Imran was accused of “aiming to launch an Islamic revolution, of gathering militant forces, funds and arms towards the establishment of an ‘Islamic revolutionary council’”.⁸⁷ During his trial, there was evidence presented that showed Imran’s group had been infiltrated by army agents, but this evidence was never examined.⁸⁸ Imran’s group believed that Najamuddin, who had been active in the group, had been a government informant, but his real identity and role were never established as he was murdered by members of Imran’s group.⁸⁹

2.2. Tanjung Priok massacre and bombings

The chilling effect of the discourse of a radical Islamist threat in this period extended not only to the already defanged PPP but more importantly to extra-parliamentary forms of Islamism. This can be illustrated in the events following the famous Tanjung Priok massacre of September 12, 1984. Following the massacre, the Suharto regime jailed various kinds of Muslim critics of Suharto, from previously obscure preachers and simple folk to high-profile critics and politicians for alleged Islamic terrorist conspiracies.

The massacre started as a community protest around Islamic issues and grievances. The Jakarta dockland district of Tanjung Priok and especially its mosques, at the time of the massacre, was already a bustling site for preacher-led religious rallies protesting the “sole principle” law and deteriorating living conditions. When an army officer entered a local Muslim prayer-house (*mushollah*) without taking off his boots and blacked out wall posters (commenting on Muslim problems and announcing forthcoming rallies) pasted on the mushollah’s walls, using gutter-water for the purpose, the acts of desecration of a holy place caused agitation in the community. An angry man set fire to the soldier’s motorcycle in protest. He was subsequently arrested along with three others.

A few days after, a pre-scheduled religious rally turned into a march to the police station and the sub-district military command to demand the release of those arrested, participated in by some 1,500 local residents.⁹⁰ Troops fired upon the march, killing an

⁸⁶ *ibid* 442; TAPOL Indonesia (n 62) 16.

⁸⁷ Santosa (n 68) 442.

⁸⁸ TAPOL Indonesia (n 62) 16.

⁸⁹ Santosa (n 68) 441.

⁹⁰ For an account of the massacre, TAPOL Indonesia (n 62) 19, 107–111 (White Paper on the September 1984 Incident in Tanjung Priok); Peter Burns, ‘The Post Priok Trials: Religious Principles and Legal Issues’ [1989] Indonesia 61-88, 62–63.

estimated six hundred people according to surviving witnesses, although the exact number has never been ascertained because the government refused calls for independent investigation of the incident.⁹¹ However, the official version of events grossly understated the numbers killed, and excused the killings as having been provoked by the protestors, who were described as having been armed.⁹²

When prominent critics of Suharto (from the so-called Petition-of-50 group) challenged this version of events based on eyewitness accounts, more violence ensued including a series of bombings and fires that took place almost every month from October 1984 to July 1985 in various parts of the country.⁹³ The authorities regarded the violence as the handiwork of radical Islamists in retaliation for the Tanjung Priok massacre. These incidents included the bombing of the famous Borobudur temple.⁹⁴ Like the terrorist incidents in the years prior, these incidents revived the spectre of Islamic insurrection.

The regime initiated a series of complex and prolonged trials against the supposed culprits in an attempt to establish that there was a conspiracy between preachers, activists, and prominent critics of the Tanjung Priok massacre. Tapol, a human rights campaign organisation that was sympathetic to the defendants, argued that otherwise innocent connections were exaggerated into “a conspiracy of terrifying proportions”.⁹⁵ The prosecutions had sometimes imputed motives to individuals’ actions that they didn’t have, and often held individuals responsible for acts in which they had no participation.⁹⁶ Defendants’ lawyers alleged the existence and role of *agents provocateurs* from the Indonesian intelligence service in the violence, and decried the use of torture to extract confessions.⁹⁷ Tapol’s advocacy put in question the very existence of terrorists, espousing a counter-discourse to Suharto regime’s terrorism discourse. “[I]n Indonesia today,” wrote Tapol of the many questions clouding the prosecutions’ theory and of official terrorism

⁹¹ TAPOL Indonesia (n 62) 20. The dead and wounded were all taken to the army hospital in central Jakarta, and the dead, except for one, were buried by the military without the knowledge of their families. *ibid* 20–21.

⁹² The official account said no more than eight people were killed. Burns (n 90) 63.

⁹³ TAPOL Indonesia (n 62) 71–72.

⁹⁴ “More than any other incident, the bombing of the nine Borobudur stupas [on January 21, 1985] had shocked the press. Borobudur is the most impressive of the many pre-Islamic religious shrines scattered across the southern regions of Central Java. The bombing was taken as an attack against the symbolic heartland of the Java-centrist Indonesian state. [I]t was presented by many commentators as an act of retaliation by Muslim fundamentalists after the killings in Tanjung Priok...” *ibid* 81.

⁹⁵ *ibid* 87.

⁹⁶ *ibid*.

⁹⁷ *ibid*.

discourse, “the word terrorist has no more certainty of meaning than the word fundamentalist.”⁹⁸

In the late 1980s, a series of arrests and trials took place in Central Java in which it was alleged that a radical Islamic movement had taken root. The region had previously had a reputation for being least pious and adhering to syncretic forms of Islam.⁹⁹ These arrests and trials involved the so-called “usroh” movement whose alleged leader was Abu Bakar Ba’asyir. The trials alleged that the members had “supported the establishment of an Islamic state and schemed to undermine the lawful government.”¹⁰⁰ From the evidence submitted to the courts, however, the “usroh” movement appeared to be a network of close-knit groups of seven to 15 persons (“usroh” is the Javanised form of the Arabic word “usrah” which means “family”) established to support each other in living in accordance with Islamic laws and avoiding contact with non-Islamic institutions or customs.¹⁰¹ The movement was supposed to have taken root among students of an Islamic boarding school founded by Abdullah Sungkar and Ba’asyir called Pesantren Al-Mukmin or Pondok Ngruki (as it was located in Ngruki near Solo, Central Java) from which it fanned out to other areas.¹⁰² Drawing on the ideas of Hassan Al-Bana, the Egyptian thinker who founded the Muslim Brotherhood, Ba’asyir was supposed to have conceived of the “usroh” as the social basis for a future Islamic State. Bruinessen explains:

The struggle for an Islamic state, according to these ideas, was a step-by-step process in which the activist had first to engage in moral self-improvement, then to be part a ‘family’ (*usrah*) of like-minded people who guide, help, and control one another. These are steps towards the building of an Islamic community (*jama’ah Islamiyah*), which in turn is a precondition for the establishment of an Islamic state.¹⁰³

Defendants in the usroh trials typically said that the usroh was not organised for the purpose of violence and was not a continuation of the Darul Islam rebellion.¹⁰⁴ The military, however, regarded them as an “extremist movement” that engaged in discrediting

⁹⁸ *ibid.*

⁹⁹ Geertz famously analysed the “religion of Java” as syncretic Islam or Islam mixed with ancient pre-Islamic religious elements. Clifford Geertz, *The Religion of Java* (University of Chicago Press 1976) 153.

¹⁰⁰ TAPOL Indonesia (n 62) 92.

¹⁰¹ *ibid* 90.

¹⁰² *ibid* 93.

¹⁰³ M van Bruinessen, ‘The Violent Fringes of Indonesia’s Islam’ (2002) 11 *ISIM Newsletter* 7.

¹⁰⁴ TAPOL Indonesia (n 62) 94.

the government among the local population and creating discord.¹⁰⁵ During these trials, and in an earlier indictment against Ba'asyir and Abdullah Sungkar in 1978, authorities used the name "Jemaah Islam" and "Jemaah Islamiyah" to designate alleged underground organisations that the "usroh" constituted or fed into.¹⁰⁶

2.3. Jemaah Islamiyah and the continuing legacy of Suharto's counterterrorism discourse

After the Bali bombings of 2002, prosecutors revived the term "Jemaah Islamiyah" apparently to conjure the impression of a tight organisational structure and discipline among leaders and followers. This picture of JI may be an exaggeration. Indeed the repeated but unsuccessful efforts to prove that Ba'asyir had a hand in planning or executing terrorist operations has led to doubts about the prosecution's theory.¹⁰⁷ Even the research of the International Crisis Group (ICG), which is based partly on interrogation depositions and intelligence sources, could only suggest a hazy picture of JI as a loose network of individuals with shared intellectual or life experiences. From this picture, JI itself is less a functioning organisation that unleashes terrorist violence upon command of its leaders that it is alleged to be, and more a suspect community that occasionally produces individuals who engage in violence.¹⁰⁸

¹⁰⁵ *ibid* 91.

¹⁰⁶ International Crisis Group, 'Al-Qaeda in Southeast Asia' (n 4) 8.

¹⁰⁷ For eight years, the Indonesian government has been unsuccessful in convicting Basyir. Basyir was charged in 2003 with treason in connection with alleged involvement in the 2000 Christmas Eve bombings, and in 2004 with conspiracy to commit the 2002 Bali bombing and for various terrorism offenses in relation to the 2003 Marriott hotel bombing. BBC News, 'Abu Bakar Ba'asyir's Legal Saga' *BBC News* (13 June 2006) <<http://news.bbc.co.uk/2/hi/asia-pacific/3958391.stm>> accessed 3 April 2016. He was eventually acquitted of these charges. *ibid*; BBC News, 'Profile: Abu Bakar Ba'asyir' *BBC News* (16 June 2011) <<http://www.bbc.com/news/world-asia-pacific-10912588>> accessed 3 April 2016. In 2010, he was charged of inciting terrorism by supporting a jihadi training camp in Aceh; he was convicted of this charge in 2011, for which he is serving a 15-year sentence. Associated Press, 'Abu Bakar Bashir Sentenced to 15 Years on Terror Charges' *The Guardian* (16 June 2011) <<http://www.theguardian.com/world/2011/jun/16/abu-bakar-bashir-jailed-indonesia>> accessed 3 April 2016. Basyir contended in his defense that military training was compulsory on Muslims to train themselves to defend Islam and that his support for the Aceh training camp, which was limited to giving financial aid, was pursuant to his religious obligation. The Jakarta Post, 'Abu Bakar Ba'asyir Asks Court to Be Fair in Judging His Guilt' *The Jakarta Post* (9 February 2016) <<http://www.thejakartapost.com/news/2016/02/09/abu-bakar-ba-asyir-asks-court-be-fair-judging-his-guilt.html>> accessed 3 April 2016.

¹⁰⁸ In fact, the ICG's December 2002 report expressed doubt that Abu Bakar Ba'asyir was the mastermind of the Bali bombings saying his views on bombings, as reported by ICG sources, differed with those who undertook the Bali bombings. It goes to show that membership – or even indeed leadership – in the JI network did not directly translate to participation in actual bombings. International Crisis Group, 'Indonesia Backgrounder' (n 4) 2–4.

A more serious cause for scepticism towards the official theory of the JI organisation is that the so-called “Ngruki network”¹⁰⁹ has a long history of intelligence surveillance and infiltration. As Sidel relates, the Indonesia security services closely monitored the boarding school in Ngruki since the 1970s. As a result, its founders Abdullah Sungkar and Ba’asyir were arrested and imprisoned in the late 1970s and driven to exile in Malaysia in 1985. Afterwards, the caretakers of the boarding school allowed the security services to have “an active role in the management of the school”. Moreover, A.M. Hendropriyono, who was chief of Badan Intelijen Negeri (BIN), or the National Intelligence Agency in 2001- 2004, has a long history of personal connection with the Ngruki network. In 1989, then an army colonel, Hendropriyono led troops that massacred members of a community of religious believers established in the rural village of Lampung by graduates of the Ngruki boarding school. Later, he diligently sought to reconcile with the survivors and family members of the victims of the Lampung massacre as his career in government advanced. He offered them monetary aid, jobs in the government as well as his own private businesses, and also land while he was minister for transmigration in the late 1990s. These efforts meant that when he became the country’s intelligence chief, he had already fostered “a coterie of clients and informants from within the Ngruki network”.¹¹⁰ The connections that Hendropriyono developed help explain the numerous links (e.g., cell phone conversations) that police investigators, journalists, and other researchers discovered between Indonesian intelligence and army officers and some of the activists arrested and charged with the bombings of 2000-2004.¹¹¹ The allegation is serious because it shows that the infiltration is not merely a historical fact from a bygone era of military-backed authoritarianism that is no longer relevant. Rather, if the allegation is true this suggests that infiltration and manipulation persists in contemporary Indonesia.

In fact, Majelis Mujahidin Indonesia (MMI), a legal organisation established in 2000 which counterterrorism officials and scholars would often present as part of the network associated with JI, has been alleged by its senior leader Irfan Awwas to be infiltrated by Indonesian intelligence.¹¹² Awwas alleged that Haris, a member of the MMI’s management and who had unsuccessfully lobbied the membership to name the organisation “Jemaah

¹⁰⁹ International Crisis Group, ‘Al-Qaeda in Southeast Asia’ (n 4) 1.

¹¹⁰ Sidel, *Riots, Pogroms, Jihad* (n 65) 209.

¹¹¹ *ibid.*

¹¹² Irfan Awwas, ‘Badan Intelijen Dari Masa Ke Masa: Alat Negara Atau Memperalat Negara?’ <<https://serbasejarah.wordpress.com/2009/05/14/badan-intelijen-dari-masa-ke-masa-alat-negara-atau-memperalat-negara/>> accessed 29 March 2016.

Islamiyah” during its founding congress, was an intelligence agent.¹¹³ Furthermore, he alleged that Haris played a role in the conflict in Maluku, later a flashpoint for “terrorism” discussed in the succeeding section.¹¹⁴ Haris is also linked through his daughter’s marriage to Omar Al-Faruq, the Kuwaiti national alleged by the United States as an Al Qaeda operative whose capture and interrogation led to accusations that MMI leader Abu Bakar Basyir was also linked to Al Qaeda.¹¹⁵ Since the capture of Al-Faruq, Haris has disappeared.¹¹⁶ If true, these allegations would also suggest Indonesian intelligence’s continuing efforts to give “Jemaah Islamiyah” a demonstrable existence, and continuing preoccupation with fostering terrorist events. At the very least, they would suggest foreknowledge of terrorist incidents and responsibility for failing to stop them.

As we have seen, there has been considerable debate about whether the “Komando Jihad”, the “Terror Warman” gang, the conspiracies related to the Tanjung Priok massacre, and the “Jemaah Islamiyah” suggest, as the Indonesian government alleged in the related trials, the continuous existence of an underground network of radical Islamists which can be traced to the Darul Islam rebellion. As the quote from Azra in the opening of this chapter explains, it is likely that there were indeed religiously motivated individuals who would desire to commit terrorist acts. After all, the prevailing atmosphere of repression meant that Islamists who might otherwise openly or peacefully pursue their goals were pushed underground and towards the margins of acceptable behaviour. It is also likely that these individuals were manipulated by state agents to conjure the impression of a radical Islamic threat to the state, which would require Suharto’s regime to save it. The responsibility for the supposed terrorism of the 1970s and 80s have not been fully uncovered, thereby shrouding official claims in a cloud of doubt.

What is clear is that the spectre of a Darul Islam revival benefited the Suharto regime by discrediting resistance to his regime and justifying the prosecution of his various critics. “Terrorism” did not threaten Suharto’s hold on power as much as it strengthened it. As Jetschke points out, the threat of an Islamic uprising in Indonesia also allowed Suharto’s authoritarian regime to be viewed with more sympathy by Western audiences.¹¹⁷ An Islamic revolution seized power in Iran in 1979, replacing a pro-Western monarchy with a

¹¹³ *ibid.*

¹¹⁴ *ibid.*

¹¹⁵ *ibid*; Sapto Waluyo, ‘Indonesia’s Predicament on Counterterrorism Policy in the Era of Democratic Transition’ (UNISCI 2007) UNISCI Discussion Paper No 15 136.

¹¹⁶ Awwas (n 112); Waluyo (n 115) 136.

¹¹⁷ Anja Jetschke, *Human Rights and State Security: Indonesia and the Philippines* (University of Pennsylvania Press 2011) 76–79.

quasi-theocratic government that was representative but that was supervised by clerics led by a supreme religious leader.¹¹⁸ Suharto's efforts to prevent a resurgence of radical Islamism in Indonesia made his regime appear commendable and committed to rational or mainstream conceptions of what a state should be, even though his regime was authoritarian and undemocratic.

The foregoing discussion illustrates that the dichotomy between terrorism and counterterrorism can be challenged in the context of Indonesia's history. The picture of counterterrorism as distinct from and only a response to terrorism is unconvincing and ignores the rich pattern exhibited by historical events. The line separating terrorism from counterterrorism is blurred, as terrorists and the security services are linked. Prosecutors and courts have not only exposed "terrorists" but have likely played a more active role in their construction. Terrorism, understood as the threat of revived Islamic insurrection, was likely manufactured or encouraged by actors in order to give the Suharto regime the beneficial role of countering terrorism.

3. Terrorism as Despair and the "War on Terror"

3.1. Re-emergence of the spectre of terrorism after Suharto

After Suharto's fall, his successor B.J. Habibie undertook a political liberalisation of Indonesia which included the repeal of the "sole principle" law, allowing multiple parties to participate in free elections beyond the three parties recognised by the Suharto regime; decentralisation of government, giving provincial governments more power in running their affairs; a freer mass media; the release of Muslim political prisoners; and a referendum on the future of East Timor.¹¹⁹ Islamists were once again allowed to openly advocate for their goals within and outside of the political system. Many observers agree that Islamist political parties and civil society groups exhibit high levels of engagement with the political system, which have enabled them to make incremental gains.¹²⁰ While the changes in

¹¹⁸ HE Chehabi, 'Religion and Politics in Iran: How Theocratic Is the Islamic Republic?' (1991) 120 *Daedalus* 69-91, 76-77.

¹¹⁹ Harold A Crouch, *Political Reform in Indonesia After Soeharto* (Institute of Southeast Asian Studies 2010) 6, 21-28; Marco Bunte and Andreas Ufen, 'The New Order and Its Legacy: Reflections on Democratization in Indonesia' in Marco Bunte and Andreas Ufen (eds), *Democratization in Post-Suharto Indonesia* (Routledge 2008) 12-13.

¹²⁰ Julie Chernov Hwang, *Peaceful Islamist Mobilization in the Muslim World: What Went Right* (Palgrave Macmillan 2012) chap. 4; Anies Rasyid Baswedan, 'Political Islam in Indonesia: Present and Future Trajectory' (2004) 44 *Asian Survey* 669-690, 678; Sunny Tanuwidjaja, 'Political Islam and

terms of opening channels for political participation post-Suharto have been dramatic, fears of Islamic terrorism remained.

In 2000, the spectre of terrorism, which had lain dormant since the 1980s, re-emerged. That year, paramilitaries styled as “jihadis” under the aegis of Laskar Jihad were formed and mobilised in Maluku. There was already communal conflict between Christians and Muslims raging in Maluku and Poso before that, which was prompted by a host of complex reasons.¹²¹ The paramilitary mobilisation of jihadis from outside Maluku and Poso (mostly from Java) contributed to the heightening and prolongation of violence in both areas.¹²² In the same year, a conspiracy of Islamist extremists, allegedly the Jemaah Islamiyah, bombed 40 churches around the country on Christmas Eve.¹²³ Meticulous investigative work by the International Crisis Group revealed that the bombings in 2000 were part of a bombing campaign that peaked with the 2002 bombings in Bali targeting mostly foreign tourists. Since then, bombings were reduced to one incident per year since. Analysts emphasised the provenance of the latest jihadis and bombers in the same network of Darul Islam remnants that the Suharto regime blamed for the terrorism of the 1970s and 1980s.¹²⁴ After 9/11, analysts emphasised Indonesian extremists’ connections with a global

Islamic Parties in Indonesia: Critically Assessing the Evidence of Islam’s Political Decline’ (2010) 32 Contemporary Southeast Asia 29-49, 1–2, 41. Islamist parties unsuccessfully attempted to incorporate the Jakarta Charter into the Constitution, but succeeded in introducing an anti-pornography law as well as the requirement in Article 13(1) of the National Education Bill that schools provide religious instruction to students by teachers of their own faith. At the local level, Islamists have also succeeded in lobbying local governments to enact regulation pertaining to Koranic literacy and Islamic dress. Chernov Hwang 76–86. The onset of liberalisation also saw the emergence of Abuza’s “militant Islamists” who go beyond lobbying and peaceful methods but rather “push the boundaries of acceptable behaviour”, such as by using intimidation and attacks on property to force compliance with pre-existing laws implementing Islamic obligations (such as those against gambling and alcohol drinking during Ramadan) or to block resistance to new regulations. *ibid* 87.

¹²¹ According to the ICG, the conflict in Maluku was sparked by sporadic street fighting by local people in January 1999 and turned into inter-village attacks in March 1999. International Crisis Group, ‘Indonesia’s Maluku Crisis: The Issues’ (International Crisis Group 2000) Asia Briefing No. 2 2. The migration of commercially more adept Muslims into historically Christian-dominated Maluku in the last 30 years, heightening local economic disparities between Christians and Muslims, and the separation of North Maluku from Maluku province requiring a new governor, have been important factors in the conflict. *ibid* 4–5. In Poso, the initial causes have been similar to those in Maluku, with the urban rioting in 1998-2000 being clashes between “rival local political patronage networks”. Dave McRae, *A Few Poorly Organized Men: Interreligious Violence in Poso, Indonesia* (Brill 2013) 6; Human Rights Watch, ‘Breakdown: Four Years of Communal Violence in Central Sulawesi’ (Human Rights Watch 2002) 7–9.

¹²² International Crisis Group, ‘Indonesia: The Search for Peace in Maluku’ (International Crisis Group 2002) Asia Report No. 31 i, 2, 7; International Crisis Group, ‘Indonesia Backgrounder: Jihad in Central Sulawesi’ (International Crisis Group 2004) Asia Report No. 74 1.

¹²³ International Crisis Group, ‘Indonesia Backgrounder’ (n 4) 5.

¹²⁴ International Crisis Group, ‘Al-Qaeda in Southeast Asia’ (n 4); International Crisis Group, ‘Indonesia Backgrounder’ (n 4); International Crisis Group, ‘Indonesia’ (n 4).

jihadi movement and particularly with Al Qaeda, given that many of them had common experiences of undergoing jihadi trainings in Afghanistan and Pakistan and of being educated in universities in the Middle East before returning to Indonesia.¹²⁵

To Sidel, however, the radicalism of the actors behind the paramilitary mobilisation and bombing campaign did not suffice to explain why such particular forms of violence resurfaced starting in 2000. The decade-long gap when no terrorism took place is worth underlining. During this gap decade, there was no shortage of Islamists who espoused radical views. The network of organisations under Persatuan Islam (Persis) published trenchant criticisms of perceived *kristenisasi* or Christianisation of Indonesian politics and society and railed against Muslims' weakness. They attacked "the closet secularism" of Muslim intellectuals who looked to the West for inspiration. Persis and Al-Irsyad schools educated thousands of students and produced thousands of graduates in that decade, and yet not a single one of those students or graduates is known to have engaged in armed rebellion or jihad in that period. If their radical beliefs are what's causing Islamists' resort to extremist methods, why didn't the same radicalism result in terrorism before 2000?¹²⁶

In order to explain the resurgence of Islamist violence in 2000, it is necessary to consider the political and discursive context in which "radical Islamists" found themselves. That context also explains why jihad took the particular forms it did, namely, paramilitary mobilisation and bombing campaign, and why foreigners were later targeted.

In the 1990s, political Islam was all but crushed, and then avenues within the state and the public sphere for Muslim representation suddenly expanded, reversing its fortunes. The turning point was Suharto's endorsement of ICMI (Ikatan Cendekiawan Muslim Se-Indonesia, Association of Indonesian Muslim Intellectuals) in December 1990. Led by technology minister B.J. Habibie, ICMI pioneered an Islamic bank as well as a quality Muslim newspaper to rival the dominant Christian-owned ones.¹²⁷ While ICMI was dominated by bureaucrats, hitherto critics of Suharto associated with the banned Masyumi played important roles in it.¹²⁸ Suharto also appointed Muslims to economic ministries previously held by Christians and sacked Christian generals from the intelligence service

¹²⁵ International Crisis Group, 'Indonesia's Maluku Crisis: The Issues' (International Crisis Group 2000) Asia Briefing No. 2 2.

¹²⁶ Sidel, *Riots, Pogroms, Jihad* (n 65) 209.

¹²⁷ Robert W Hefner, 'Islam, State, and Civil Society: ICMI and the Struggle for the Indonesian Middle Class' [1993] *Indonesia* 1-35, 26.

¹²⁸ Bruinessen, 'Islamic State or State Islam? Fifty Years of State-Islam Relations in Indonesia' (n 30) 2; R William Liddle, 'The Islamic Turn in Indonesia: A Political Explanation' (1996) 55 *The Journal of Asian Studies* 613-634, 6.

and armed forces in favour of Muslim ones.¹²⁹ Scholars debate why Suharto turned for support in his final years in office to Islamists he previously persecuted.¹³⁰ The important thing to note here is that he did. The leadership of Habibie and allied Muslims, which was based on a claim to champion the Islamisation of society, negated the need for channeling Islamist sentiments through extremist methods.

Thus, notwithstanding the political liberalisation, the post-Suharto period was actually a period of “precipitous decline” of Islamist gains compared to the 1990s, which caused “disappointment if not despair” on the part of Islamists.¹³¹ Political liberalisation allowed Islamists to emerge from clandestine study groups to form political parties and contest elections once again starting in 1999. But their fractiousness and poor showing (the Islamist parties together polled less than 20% of the votes) and the greater appeal of secular nationalists (who won the plurality of votes, 34%) to both Muslim and non-Muslim voters in the 1999 election shattered illusions of actors seeking to unify Muslims under the banner of Islam.¹³² It is true that Islamist parties were consequential enough to form a coalition with Pancasila-based parties that catered to NU and Muhammadiyah constituencies that successfully prevented PDI-P’s Megawati Sukarnoputri from becoming president in 1999.¹³³ But even this proved to be a bane to them. The candidate they backed Abdurrahman Wahid quickly turned against them in favour of his long standing secular, liberal and Christian allies. By the following year, Wahid’s erstwhile Islamist supporters were already speaking of Wahid’s betrayal and seeking his removal from office.¹³⁴ Importantly, Wahid, a long-time advocate of the protection for religious minorities, opposed agitation for jihad in Maluku and Poso.¹³⁵

3.2. The call for jihad: Thalib and Basyir

According to Sidel, the call for “jihad” in 2000 was a call to “reassert and reawaken seemingly lapsed religious sensibilities and solidarities”, that is, to unite the nation’s Islamic

¹²⁹ Bruinessen, ‘Islamic State or State Islam? Fifty Years of State-Islam Relations in Indonesia’ (n 30) 2.

¹³⁰ Bruinessen, ‘Islamic State or State Islam? Fifty Years of State-Islam Relations in Indonesia’ (n 30); Hefner (n 127); Liddle (n 128).

¹³¹ Sidel, *Riots, Pogroms, Jihad* (n 65) 211.

¹³² *ibid* 134.

¹³³ Greg Barton, *Abdurrahman Wahid, Muslim Democrat, Indonesian President: A View from the Inside* (University of New South Wales Press 2002) 281.

¹³⁴ *ibid* 345.

¹³⁵ *ibid* 334.

majority population in the face of apparent indignities to their religion.¹³⁶ The call for jihad was publicly raised in a demonstration that launched Laskar Jihad in Jakarta in April 2000 by Ja'far Umar Thalib, the organisation's founder and leader.¹³⁷ The demonstration was attended by 100,000 people in the capital city's Senayan stadium.¹³⁸ In December 1999 and January 2000, armed Christian groups slaughtered Muslims in Maluku, arousing anger among many Indonesian Muslims.¹³⁹ At the public demonstration, Ja'far Umar Thalib referred to the massacre of Moluccan Muslims as a genocidal threat made possible by the indifference of the Wahid government, the media and the public towards the plight of their fellow Muslims. He proclaimed that jihad, or holy war, was justified, and announced that Laskar Jihad members, numbering in 10,000, were willing to do battle in support of Muslims in Maluku.¹⁴⁰ Thalib's pronouncements at the demonstrations echoed the sentiments previously expressed by him and his supporters and followers that Indonesian Christians under the banner of the organisation called Republic of South Moluccas threatened the dismemberment of Maluku from Indonesia.¹⁴¹ They charged that Netherlands-based leadership of the said group was in collusion with foreign Christian and/or Jewish powers and/or with communists.¹⁴²

Following the demonstration, Laskar Jihad marched to the presidential palace in order to warn the Wahid government that they will engage in jihad in Maluku if the government does not do more to help the Muslims.¹⁴³ President Wahid met their representatives led by Thalib, but the meeting went awry after the latter accused Wahid of siding with Christians in Maluku, and Wahid had them thrown out.¹⁴⁴ Thereafter, Thalib established recruitment centers in urban centers in the country to publicly recruit volunteer fighters to be sent to Maluku,¹⁴⁵ and trained them in a paramilitary training camp

¹³⁶ Sidel, *Riots, Pogroms, Jihad* (n 65) 212.

¹³⁷ Noorhaidi Hasan, 'Faith and Politics: The Rise of the Laskar Jihad in the Era of Transition in Indonesia' (2002) 73 *Indonesia* 145-169, 147.

¹³⁸ *ibid.*

¹³⁹ Christians attacked the Muslim minority in the Tobelo district of Halmahera island in Maluku, killing at least 500 Muslims. From December 26, 1999 to January 1, 2000, the more than 10,000 Muslims who survived the attack were expelled from the district. International Crisis Group, 'Indonesia: Overcoming Murder and Chaos in Maluku' (International Crisis Group 2000) ICG Asia Report No. 10 8.

¹⁴⁰ Hasan (n 137) 147.

¹⁴¹ *ibid* 161, 164.

¹⁴² *ibid.*

¹⁴³ *ibid* 148.

¹⁴⁴ *ibid.*

¹⁴⁵ Saiful Umam, 'Radical Muslims in Indonesia: The Case of Ja'far Umar Thalib and the Laskar Jihad' (2006) 6 *Explorations in Southeast Asian Studies* 1-26, 16.

in Bogor, in the outskirts of Jakarta,¹⁴⁶ and in a few cities in East and Central Java.¹⁴⁷

Although Wahid had ordered a naval blockade of the islands of Maluku in order to prevent Thalib's paramilitaries' arrival there, the navy did not stop them.¹⁴⁸ When the first batch of volunteer jihadi fighters arrived in Ambon, military men greeted them and issued them standard military weapons.¹⁴⁹ Military collusion with Laskar Jihad showed Wahid's lack of control over the military, greatly embarrassing and discrediting his leadership.¹⁵⁰ Laskar Jihad managed to get some 3,000 trained men into the conflict zone to engage in combat by September 2000.¹⁵¹

Laskar Jihad also mobilised the support of Salafi muftis, or Muslim legal experts authorised to issue opinions on religious matters, from Saudi Arabia and Yemen.¹⁵² Seven Salafi muftis issued fatwas, or legal positions, endorsing the lawfulness or obligatory nature of a defensive jihad in the context of Maluku, some subject to certain specific conditions.¹⁵³ For example, a Saudi mufti required that jihadi fighters first appoint a representative to meet and advise the country's ruler; only if the ruler rejects the fighters' suggestion are they allowed to rebel against him, and only if they have sufficient power.¹⁵⁴ Laskar Jihad's abortive meeting with Wahid and its setting up of a paramilitary training camp appear to address these conditions.

Thus, Thalib's jihad was premised on the rejection of the state's perceived inaction or unwillingness to perform its role to defend Muslims, and attempted to claim that role instead for the volunteer jihadi fighters mobilised under the Laskar Jihad banner. Furthermore, as Thalib claimed to be fighting against the Republic of South Moluccas, his jihad was designed not as a rebellion against the Indonesian state but as an attempt to preserve its territorial integrity.

In 2000, another organisation called Majelis Mujahidin Indonesia (MMI, Indonesian Council of Holy Warriors) led by Abu Bakar Basyir also called for jihad. MMI was established on August 7, 2000, on the anniversary of Kartosuwirjo's Darul Islam rebellion, in a public gathering in Yogyakarta attended by 1800 people from various Islamist

¹⁴⁶ Hasan (n 137) 147.

¹⁴⁷ Umam (n 145) 18.

¹⁴⁸ Barton (n 133) 306.

¹⁴⁹ Hasan (n 137) 148.

¹⁵⁰ Wahid's relationship with the intelligence service was particularly sour, to the extent that he did not listen anymore to reports of official intelligence agencies and instead relied on his own advisers from the academe and civil society. Waluyo (n 115) 125.

¹⁵¹ Hasan (n 137) 159.

¹⁵² *ibid* 165.

¹⁵³ *ibid* 165–166.

¹⁵⁴ *ibid* 165.

organisations.¹⁵⁵ MMI's main purpose was to unite Islamist organisations to rally for the implementation of shari'ah law for Indonesia.¹⁵⁶ MMI eventually evolved from a loose federation of organisations into a separate independent organisation with membership largely drawn from the network around the Ngruki *pesantren* established by Basyir.¹⁵⁷ Bashir's call for jihad involves resistance to "infidels", conceived as those who actively destroy or subjugate Islam or Indonesian Muslims as a collective.¹⁵⁸ As also expressed by Thalib in his justification for jihad in Maluku, the MMI sees that Indonesian Muslims as a group are being victimised by forces, including secular authorities, who are bent to ruin Islam, and therefore, Muslims have an individual duty to fight those perfidious forces to preserve their religion.¹⁵⁹ Hence, the premise for jihad is a situation in which Muslims are seen as weak, and the state has aided rather than hindered the decline in the position of Muslims. According to Basyir, his call for jihad encompasses the use of violence and martyrdom, albeit only allowed for those who have the capability and resources.¹⁶⁰

3.3. Context of bombing campaign

In comparison with the paramilitary mobilisation of Laskar Jihad, the bombing campaign attributed to JI would appear to suggest a heightening of the threat of Islamist extremists by turning to foreign targets. In fact, however, the turn to foreign targets only masked the reality that Islamist extremists have been even more marginalised. If under the Wahid government, Laskar Jihad had received support from elements of the military, under the succeeding Megawati government decisive action was taken against them. Authorities detained Thalib in May 4, 2002.¹⁶¹ The military moved to crush paramilitaries in Maluku and Poso, and the government enforced peace accords among the warring groups to formally end the conflict.¹⁶² Finally, the Laskar Jihad disbanded itself in October 2002.¹⁶³

¹⁵⁵ Umam (n 145) 9.

¹⁵⁶ Abuza (n 7) 79.

¹⁵⁷ Umam (n 145) 9.

¹⁵⁸ Scott Atran, 'The Emir: An Interview with Abu Bakar Ba'asyir, Alleged Leader of the Southeast Asian Jemaah Islamiyah Organization' (*Terrorism Monitor*, 16 December 2005) <http://www.jamestown.org/programs/tm/single/?tx_ttnews%5Btt_news%5D=562> accessed 3 April 2016.

¹⁵⁹ *ibid.*

¹⁶⁰ *ibid.*

¹⁶¹ Umam (n 145) 20.

¹⁶² McRae (n 121) 157; John Braithwaite and others, *Anomie and Violence: Non-Truth and Reconciliation in Indonesian Peacebuilding* (Australian National University E Press 2010) 252–253.

¹⁶³ On the dissolution of Laskar Jihad, Umam (n 145) 19–21.

Importantly, proponents of the US-led “War on Terror” turned against jihad-style paramilitaries and their supporters in Maluku and Poso, as well as Abu Bakar Basyir and Jemaah Islamiyah, on the basis of speculations that they were involved in giving Al Qaeda a presence in the country. Moreover, Megawati’s intelligence chief Hendropriyono claimed that Al Qaeda had trained in Poso.¹⁶⁴

The “War on Terror” thus greatly encouraged the crackdown on these targets in the name of counterterrorism. In November 2001, US Deputy Defense Secretary Paul Wolfowitz announced that “going after al-Qaeda in Indonesia is not something that should wait until after al-Qaeda has been uprooted in Afghanistan”.¹⁶⁵ Singapore led other governments in the region in raising the alarm over alleged Al Qaeda-linked terrorist threat to the region and identifying and labelling the network that posed the threat as “Jemaah Islamiyah”. Singapore’s Senior Minister Lee Kuan Yew charged, based on interrogation deposition of suspects detained in Singapore, that MMI founder Abu Bakar Basyir was the leader of JI which had presence in both Indonesia and Malaysia.¹⁶⁶ Although an Indonesian police team sent to interview detained suspected JI members in Singapore and Malaysia found no solid evidence to implicate Basyir for any crime, Basyir was nevertheless placed under tight watch by Indonesian security agents.¹⁶⁷

United States authorities put direct pressure on the Megawati government to arrest Basyir, on the strength of allegations obtained from the forcible interrogation of Omar Al-Farouq that Basyir had ties with Bin Laden.¹⁶⁸ It also later surfaced that the United States Ambassador to Indonesia Ralph Boyce suggested to Megawati that Basyir be subjected to extraordinary rendition, although this suggestion was rebuffed by Megawati. In a testimony before a Jakarta court, American Frederick Black Burks said he was the interpreter in a meeting between Megawati and an American delegation on September 12,

¹⁶⁴ Sukino Harisumarto, ‘Al Qaida Members Trained in Indonesia’ (*UPI.com*, 13 December 2001) <<http://www.upi.com/Archives/2001/12/13/Al-Qaida-members-trained-in-Indonesia/9111008219600/>> accessed 24 March 2016.

¹⁶⁵ *Far Eastern Economic Review*, ‘Interview: Paul Wolfowitz: Of Missiles and Terrorism’ *Far Eastern Economic Review* (8 November 2001) 22.

¹⁶⁶ International Crisis Group, ‘Al-Qaeda in Southeast Asia’ (n 4) 2.

¹⁶⁷ Tatik S Hafidz, ‘The War on Terror and the Future of Indonesian Democracy’ (IDSS, Nanyang Technological University 2003) Working Paper 46 11.

¹⁶⁸ Suspected Al Qaeda operative Omar Al-Farouq, a foreigner, was captured in Indonesia, and subjected to extraordinary rendition to a CIA facility in Afghanistan. He was forcibly interrogated for three months, involving sleep deprivation and other torture techniques. Although the Americans claimed Al-Farouq linked Basyir to Al Qaeda, they did little to convince a sceptical Indonesian public, as they refused to disclose further information. The Indonesian police which tried to build a case against Basyir was only allowed to present Al-Farouq with a questionnaire, “to which he only responded ‘yes’, ‘no’, and ‘no, I don’t remember’.” *ibid* 11–13.

2002. The delegation consisted of Ambassador Boyce, National Security Council official Karen Brooks and a CIA officer. According to Burks, the CIA official told Megawati that Basyir was responsible for the 2000 Christmas eve bombings and asked to “rendition” him to US officials. Burks said Megawati declined this request, saying Basyir was too popular for people not to notice his disappearance. Boyce will later acknowledge that the meeting took place but claimed that the US only pressured Indonesia to arrest Basyir not to subject him to rendition.¹⁶⁹

Singapore’s representative to the United Nations requested the inclusion of JI in the list of organisations affiliated with Al Qaeda which is maintained by the committee set up under Security Council Resolution 1267.¹⁷⁰ The Singaporean representative characterised JI as a “clandestine regional terrorist organisation” operating through branches in Indonesia, Malaysia, Singapore and southern Philippines and aiming to establish a “pan-Islamic state in Southeast Asia”.¹⁷¹ Other governments in the region soon participated in what appears to be a coordinated response. Malaysian authorities undertook arrests of Indonesian Muslim activists in June 2001,¹⁷² while Philippine authorities arrested Indonesian Muslim activists in January and March 2002, on allegations that they were JI members involved in terrorist activities.¹⁷³ Two of the three arrested in Manila in March 2002, Tamsil Linrung and Agus Dwikarna, had been active supporters of jihad in Maluku and Poso.¹⁷⁴

Thus, at the time of the Bali bombing in 2002, the climate of desperation confronting radical Islamists has become even more severe compared to when the bombing campaign started in 2000. As Sidel puts it, the bombing campaign turned to foreign targets in mid-2002 as a way of “forestalling if not foreclosing a belated acknowledgment and acceptance of defeat” of the Islamist project in Indonesia.¹⁷⁵ Ironically, the “War on Terror” gave the bombers the image of being organisationally linked to Al Qaeda, and thus a part of a growing international Islamist movement that threatens the United States. This exaggerated the nature of the threat they posed. By transposing

¹⁶⁹ Farah Stockman, ‘Cleric’s Trial Tests US Antiterror Fight’ *Boston Globe* (2 March 2005) <<http://search.proquest.com/docview/404941583?accountid=8330>>; BBC News, ‘US “Wanted Ba”asyir Detained’ *BBC News* (13 January 2005); The China Post, ‘U.S. Urged Bali Bombing Arrests: Interpreter’ *The China Post* (14 January 2005).

¹⁷⁰ International Crisis Group, ‘Indonesia Backgrounder’ (n 4) 1.

¹⁷¹ *ibid.*

¹⁷² Waluyo (n 115) 120.

¹⁷³ *ibid.*; International Crisis Group, ‘Al-Qaeda in Southeast Asia’ (n 4) 3.

¹⁷⁴ Sidel, *Riots, Pogroms, Jihad* (n 65) 213; International Crisis Group, ‘Al-Qaeda in Southeast Asia’ (n 4) 3.

¹⁷⁵ Sidel, *Riots, Pogroms, Jihad* (n 65) 215.

the bombings from the Indonesian political context onto an international stage dominated by conflict between the United States and Al Qaeda, the bombings lost their meaning as defensive mechanisms and appeared totally irrational or senseless.

4. Conclusion

This chapter presented a critical perspective on the counterterrorism discourse in Indonesia during the Suharto regime up to the 2002 Bali bombing. Indonesian counterterrorism is not simply a technical endeavour by security experts, nor objective management of threats from Islamic extremists, but rather it is part of an intensely political struggle. To begin with, radical Islamists have been pushed to the margins of Indonesian politics during the Suharto regime through a concerted campaign to depoliticise Islam, creating individuals willing to experiment with extreme methods. Moreover, the threat of a revival of Islamic insurrection was likely fostered by the regime in order precisely to give the regime the salutary role of rescuing the pluralist state from terrorism. Like in the Philippines during the Arroyo period, raising the spectre of terrorism and then responding thereto caused devastating consequences for human rights.

The problematic nature of counterterrorism during the Suharto period is illustrative also for the situation post-Suharto. The link between the supposed “terrorists” and elements of the security establishment that blurred the distinction between terrorism and counterterrorism had continued beyond Suharto’s fall. Since 2000, paramilitary mobilisations in Maluku and Poso and the bombings of churches and foreign targets demonstrated the reality that violent methods attracted radicalised Islamists more than ever before. But while this situation resulted from their weakness and further marginalisation, counterterrorism continued to be premised on fears of a growing threat posed by radical Islamists. The “War on Terror” only contributed to the exaggeration of the Islamist threat by reviving allegations about the existence of JI, now presented as linked to Al Qaeda.

Chapter 6

Indonesia's Legalised Counterterrorism: Divergent Domestic Reactions

In Chapter 5, I demonstrated that the prevailing counterterrorism discourse in Indonesia should be closely scrutinised. In this chapter, I show that in the post-2002 Bali bombing period, there has been a diminished appetite among mainstream human rights advocates to subject counterterrorism to such scrutiny. An important reason for this is that a human rights language has been attached to Indonesian counterterrorism through the enactment of Law No. 15/2003, the legal framework for counterterrorism, and the adoption of a police-led approach.

This chapter advances the central argument of the thesis by examining changes that have resulted from the attachment of a human rights language to counterterrorism in Indonesia. The chapter shows how the approach of local advocates towards counterterrorism has evolved. The second section of this chapter, subtitled “Divergent Reactions to Counterterrorism” is based on and reports data obtained from fieldwork in Indonesia in the period between June and August 2013. For this fieldwork, twenty-three (23) respondents from different organisations based in or around Jakarta were interviewed to elicit their views on human rights violations in the course of counterterrorism.¹ The interviews targeted organisations and individuals focused on promoting human rights and engaged in the issue of counterterrorism.²

¹ See questionnaire in Appendix 2.

² With respect to their organisational affiliation or work, respondents can be roughly divided into the following classification:

- (1) Organisations and individuals focused on promoting human rights
 - (1.1) Non-government organisations focused on civil and political rights (often simply referred to as “human rights organisations”) – 5 respondents
 - (1.2) Non-government organisations focused on environment and land rights, and a labor federation – 5 respondents (The views of these organisations were sought in order to ascertain whether human rights other than civil and political rights, e.g., economic, social and cultural rights, figured in discussions of human rights in the context of counterterrorism.)
 - (1.3) Komnas HAM – 2 respondents
 - (1.4) Academics affiliated with the University of Indonesia Human Rights Center – 3 respondents
 - (1.5) International non-government organisation focused on development, gender equality and women empowerment, and education – 1 respondent
- (2) Organisations and individuals engaged in the issue of counterterrorism
 - (2.1) Lawyers defending terrorism suspects – 3 respondents
 - (2.2) Organisation focused on “disengagement” of terrorism convicts – 1 respondent
 - (2.3) Campaigner and expert observer focused on conflict – 1 respondent
 - (2.4) Academic expert on Indonesian police – 1 respondent
 - (2.5) Reporter focused on counterterrorism – 1 respondent
 - (2.6) Politician – 1 respondent.

Indonesia provides a case study of counterterrorism that is more legalised than in the Philippines. The Philippine government engages in war against insurgents and struggles to create for that war the appearance of human rights compliance, whereas the Indonesian government instead claims to champion a law-enforcement approach that is supposedly different from a war-like approach to terrorism and is supposedly inherently law-governed and respectful of human rights. As I show later in this chapter, the reactions of local actors have also been different.

At first glance the differences between the Philippines and Indonesia with respect to their counterterrorism approaches appear enormous. First, Indonesia has had a legal framework for counterterrorism, i.e., Law No. 15/2003 on Combating Terrorism, since immediately after the 2002 Bali bombing, and has prosecuted and tried the perpetrators of the 2002 Bali bombing and other subsequent incidents under the said law.³ The law, furthermore, has the added virtue of explicitly recognising the applicability of human rights in the context of counterterrorism.⁴ Many observers stress that Indonesia did not adopt a more draconian law similar to the Internal Security Act in Malaysia and Singapore, thanks to the vigorous critical participation of human rights organisations in deliberations towards the anti-terrorism law.⁵ New rights, such as, the right of victims and heirs of victims of

³ Relying on different sets of government data, the Institute for Policy Analysis of Conflict (IPAC) estimates that since the 2002 Bali bombing, the police arrested and tried some 700 persons for terrorism offenses up to September 2013, with a near 100% conviction rate. Institute for Policy Analysis of Conflict, 'Prison Problems: Planned and Unplanned Releases of Convicted Extremists in Indonesia' (Institute for Policy Analysis of Conflict 2013) IPAC Report No. 2 6.

⁴ "According to Article 2 of the Law No.15/2003 on Combating Terrorism, eradication of criminal acts of terrorism shall be a set of policies and strategic steps to strengthen the public order and safety by remaining committed to upholding the law and human rights, non-discriminatory in nature in respect of ethnicity, race or groups." Republic of Indonesia, 'Fifth Report to the Counter-Terrorism Committee (CTC) of the United Nations Security Council Pursuant to Paragraph 6 Security Council Resolution 1373 (2001), S/2006/311' 17. There are also interesting contrasts with Western law as pointed out by legal comparativist Kent Roach: "Indonesia's new anti-terrorism law rejects the idea, prominent in the United Kingdom's Terrorism Act, that terrorism is a crime based on religious and political motives, and it explicitly embraces the principle of non-discrimination on the basis of politics and religion. Indonesia has also followed the more libertarian American example of not empowering the legislature or the executive to proscribe organizations and then making it a crime to support, associate, or be a member of such an officially designated organization." Kent Roach, 'Anti-Terrorism and Militant Democracy: Some Western and Eastern Responses' in András Sajó (ed), *Militant Democracy* (Eleven International Publishing 2004) 175.

⁵ Interview 22. Leonard Sebastian, 'The Indonesian Dilemma: How to Participate in the War on Terror Without Becoming a National Security State' in Kumar Ramakrishna and See Seng Tan (eds), *After Bali: The Threat of Terrorism in Southeast Asia* (World Scientific 2003) 368; Jawahir Thontowi, 'The Islamic Perspective on the War on Terrorism and Current Indonesian Responses' 24 ('middle way'); Zachary Abuza, 'Indonesian Counter-Terrorism: The Great Leap Forward' (*The Jamestown Foundation*, 14 January 2010) (unpaginated)

terrorism to compensation and/or restitution as well as the right to rehabilitation of those cleared of all legal charges by the court, were even provided for.⁶ In contrast, the Philippines only enacted legislation defining terrorism in 2007.⁷ Moreover, the Philippine anti-terrorism law is rarely used; even alleged members of the CPP-NPA who are prosecuted are not charged under that law but are instead charged with rebellion or common crimes under the criminal code.⁸ Second, in Indonesia, the police, particularly the special anti-terrorism unit called Detasemen Khusus 88 (Special Detachment 88), or simply “Densus 88”, is the main instrument of the state for counterterrorism, consistent with an approach that treats counterterrorism as law-enforcement. In the Philippines, in contrast, the main instrument of counterterrorism/counterinsurgency is the military, reflecting a “War on Terror” approach that features actual military operations with American troop involvement.

Sebastian and Abuza praise the aforementioned characteristics of Indonesian counterterrorism.⁹ They note that the country’s decision to commit to counterterrorism did not lead to a concentration of power and capacity in the Indonesian military, nor did the Indonesian government enact draconian laws similar to the Internal Security Act in Singapore and Malaysia.¹⁰ These characteristics appear to give Indonesian counterterrorism greater political legitimacy or acceptability. From the viewpoint of Abuza, Indonesia has been able to successfully develop a credible and effective counterterrorist force without imperilling its democratic gains. This is a unique achievement that distinguishes Indonesia from countries the world over.¹¹ Where Indonesia is seen as having achieved better results than the Philippines in defeating terrorists, a difficult enough contention to make in itself, it has been argued that the different outcomes can be

<http://www.jamestown.org/single/?no_cache=1&tx_ttnews%5Btt_news%5D=35910> accessed 4 April 2016.

⁶ Arts. 36 and 37, Law No. 15/2003. See, also, Lindsey ‘Indonesia’s New Anti-Terrorism Laws - Damned If You Do, Damned If You Don’t’ (*JURIST*, 30 October 2002)

<<http://jurist.org/forum/forumnew65.php>> accessed 7 August 2015.

⁷ Republic Act No. 9372 defines terrorism as a crime under Philippine law.

⁸ Interview 27. Satur Ocampo opined that it might be because Rep. Act No. 9372 provides more hurdles for prosecutors than the criminal code.

⁹ Sebastian (n 5) 363, 368; Abuza (n 5) (unpaginated).

¹⁰ Malaysia’s Internal Security Act of 1960 was enacted after the country gained independence in 1957. The law allows for detention without trial or criminal charges under certain circumstances. In 2012, the ISA was replaced and repealed by the Security Offences (Special Measures) Act 2012 which came into force on 31 July 2012. Amnesty International, ‘Malaysia: Human Rights Undermined: Restrictive Laws in a Parliamentary Democracy’ (Amnesty International 1999) ASA 28/006/1999. Malaysia’s ISA extended to Singapore on 16 September 1963 when Singapore was a state of the Federation of Malaysia, and was retained after its separation from Malaysia.

¹¹ Abuza (n 5) (unpaginated).

accounted for by the differences in the philosophical and operational approach to counterterrorism.¹²

However, as I show in chapter 7, these differences notwithstanding, serious human rights violations nonetheless continue to plague Indonesian counterterrorism. In particular, extrajudicial killings and torture remain part of the repertoire of counterterrorism in practice. While the scale of reported killings in Indonesia is lower than in the Philippines,¹³ the killings belie an approach to counterterrorism that is not dramatically more respectful of human rights than that in the Philippines. Indeed, impunity for serious violations persists in both approaches. Even in Indonesia, there remains room for the possibility of a killings program, albeit existing side-by-side with regular law enforcement.

Ironically, impunity for serious violations stems partly from the belief that Densus 88 essentially embodies the correct legal path to counterterrorism. Because of the perception that Indonesia has already got counterterrorism right, violations by Densus 88 have not attracted serious consideration. No transnational campaigning has been undertaken on the issue of Densus 88 killings that is comparable to the transnational mobilisation on extrajudicial killings of Filipino leftist activists. Campaigning on this issue has been confined to the domestic level, where the pressure for reform of Indonesian counterterrorism is divided between mainstream human rights and Muslim legal advocates.

The argument in this chapter proceeds as follows. First, I establish how Indonesia arrived at its own approach to counterterrorism, featuring Densus 88 as the lead agency which is identified with the legal framework. Second, I consider the different responses to the terrorism discourse in Indonesia after the establishment of the legal framework. I argue that two patterns of engagement with counterterrorism can be discerned. Among mainstream human rights advocates, the premise of legalised counterterrorism tends to be accepted, especially as counterterrorism resonates with anti-extremism. This contrasts with the fundamental questioning of counterterrorism by Muslim lawyers of the Tim Pengacara Muslim (TPM). This chapter prepares the stage for a consideration in Chapter 7 of the most divisive and controversial issue, namely, extrajudicial killings and torture by Densus 88. It shows that there is a deep division among possible opponents of abuses committed by Densus 88 that weakens the pressure for reform.

¹² Jonathan R Martin, 'Comparing Strategies for Countering Terrorism and Insurgency in Southeast Asia' (2011) 12 *Whitehead Journal of Diplomacy and International Relations* 103-117.

¹³ The scale of Densus 88 killings will be discussed in the next chapter.

1. An Indonesian Model Emerges: Legal framework and Densus 88

In the immediate aftermath of 9/11, the government of President Megawati Sukarnoputri showed inconsistency or lack of single-mindedness in pursuing the counterterrorism agenda pressed by the United States and allied regional governments, including Singapore and Malaysia. Unlike Arroyo, the Megawati did not immediately jump to join the United States in its War on Terror after 9/11. This was despite the fact that Megawati was the first foreign head of state to visit Washington after 9/11.¹⁴ Elements of her government, including the head of the National Intelligence Agency (BIN) Abdullah Mahmud Hendropriyono, and the Minister of Defence Matori Abdul Jalil, also advocated to Megawati the so-called “Musharraf scenario”, in which support for the US-led War on Terror would attract some debt relief and an end to the arms embargo imposed on the Indonesian military (TNI) since 1999 following human rights violations in East Timor.¹⁵ However, she did not seem to heed this advice. During her state visit to the US in September 2001, while Megawati offered condolences to victims of 9/11 and condemned terrorism, she stopped short of endorsing a retaliatory military response by the US.¹⁶ In return, the United States offered only non-military aid and equipment.¹⁷ On her return to Jakarta, prevailed upon by parliamentary leaders, Megawati moreover delivered a speech in mid-October 2002 in which she expressed her disapproval of the US invasion of Afghanistan.¹⁸

Singapore and Malaysia, which claimed they had uncovered “terrorist cells” of Jemaah Islamiyah in their countries and in Indonesia, criticised Indonesia’s “indecisiveness” in acting against alleged terrorists by failing to arrest Abu Bakar Basyir.¹⁹ Many observers point to Megawati’s delicate domestic political position as explaining her apparent

¹⁴ William Wise, *Indonesia’s War on Terror* (United States-Indonesia Society 2005) 25.

¹⁵ Tatik S Hafidz, ‘The War on Terror and the Future of Indonesian Democracy’ (IDSS, Nanyang Technological University 2003) Working Paper 46 2–3. The Leahy-Feingold Amendment of 1999 banned all military training and most equipment transfers. There were also US bans on military training under the International Military Education and Training funds (IMET) in 1992–1996; on light weapons in 1993; and heavy weapons and equipment in 1995 and 1996. Damien Kingsbury, ‘Australia’s Renewal of Training Links with Kopassus: A Critique’ (Strategic and Defence Studies Centre, ANU 2004) SDSC Working Paper 387 15, n. 4. An “Arroyo scenario” by which was meant inviting direct American troop involvement in counterterrorism operations in Indonesian soil was ruled out by Megawati’s advisers apparently for being too unpatriotic. Hafidz 8.

¹⁶ Wise (n 14) 26.

¹⁷ *ibid.*

¹⁸ *ibid.* 26, 28.

¹⁹ Jonathan T Chow, ‘ASEAN Counterterrorism Cooperation Since 9/11’ (2005) 45 *Asian Survey* 302–321, 309–310.

indecision towards alleged terrorists in the immediate aftermath of 9/11.²⁰ Megawati was catapulted to the presidency by a coalition with Islamist parties. Joining the US “War on Terror” would have angered these allies who considered the US’ action on Afghanistan and Iraq as aggressive and directed at Muslims.²¹ Moreover, popular opinion coalesced towards nationalist sentiments critical of American intervention in Indonesian affairs.²²

Nevertheless, Megawati was not altogether indifferent to external pressure. While she did not join the US-led Coalition of the Willing, Megawati coordinated with the United States to capture foreigners Omar Al-Farouq and Mahammad Saad Iqbal Madni, alleged by the US to be Al Qaeda operatives in Indonesia, and to quickly transfer them to US custody.²³ As discussed in Chapter 5, Megawati also moved to crush paramilitary mobilisation in Maluku and Poso, which had been an embarrassment to her predecessor Wahid’s administration. Importantly, in the aftermath of 9/11, Megawati also initiated a draft anti-terrorism legislation, which was widely opposed and was shelved until the government revived it after the 2002 Bali bombing.²⁴

Indonesian human rights advocates had contributed to the domestic efforts that restrained Megawati from exhibiting all-out support for the US’ counterterrorism agenda by resisting Megawati’s draft anti-terrorism law. The draft law, prepared by the Ministry of Justice and Human Rights, proposed that “terrorism” be treated as a “special criminal action” which required extraordinary measures. These measures included allowing investigators to have custody of a suspect for a period of 270 days without trial;²⁵ tap communications, keep a suspect under surveillance, and trespass property;²⁶ as well as deprive the suspect of the rights to an attorney, to remain silent, to bail, and to have contact with family or external parties during the investigation.²⁷ The draft law defined “terrorism” as a political crime based on a political motive.²⁸ Islamic parties, human rights

²⁰ Hafidz (n 15); Sebastian (n 5).

²¹ Leonard C Sebastian, ‘Indonesian State Responses to September 11, the Bali Bombings and the War in Iraq: Sowing the Seeds for an Accommodationist Islamic Framework?’ (2003) 16 *Cambridge Review of International Affairs* 429-446, 433.

²² Hafidz (n 15) 7.

²³ Kuwait-born Omar al-Farouq was captured on June 6, 2002 in Bogor near Jakarta, and was subjected to extraordinary rendition to a CIA facility in Afghanistan. Pakistani Mahammad Saad Iqbal Madni was captured on January 9, 2002 in Jakarta, and rendered to Egypt on the request of the CIA. Wise (n 14) 31–34.

²⁴ Sebastian (n 5) 361.

²⁵ art. 17 of the Draft Law on Anti-Terrorism cited in Bivitri Susanti, ‘National Security, Terrorism, and Human Rights in Indonesia’ (2002) 7–8.

²⁶ Arts. 18 and 20 of the Draft Law on Anti-Terrorism cited in *ibid* 8.

²⁷ Art. 19 of the Draft Law on Anti-Terrorism cited in *ibid*.

²⁸ Art. 1 of the Draft Law on Anti-Terrorism defined terrorism as “actions using violence with a political background or objective, in the form of: (1) actions that create danger for other people’s

organisations and civil society more broadly opposed the proposal on the ground that it may lead to suppression of legitimate dissent. The Partai Bulan Bintang (PBB) argued that, while the proposed bill was akin to the emergency legislation in the United States and the United Kingdom, there was no such urgency in Indonesia. Comparing the bill to the Anti-Subversion Law of the Suharto regime, all five Islamic parties in parliament warned that the authorities will likely use the law if passed to target Islamic leaders and activists, including Abu Bakar Basyir.²⁹ Abdul Hakim G. Nusantara, a human rights lawyer added that “[the] legal approach, especially [the] penal code, can never solve the problem of terrorism” anyway as terrorism can be a state tactic, while non-state terrorism “is, in fact, rooted in the problems of injustice” in the social sphere.³⁰

The Indonesian government’s reaction to the Bali bombing of 2002 was dramatically different from its reaction to 9/11. After the Bali bombing, the Indonesian government’s perceived apprehension gave way to certainty. The Bali bombing of 2002 appeared to confirm the dire warnings by foreign governments and domestic proponents of the “War on Terror” about the threat of terrorism from radical Islamists. The bombs targeted the Paddy’s Irish Bar and Sari Club, killing 202 people, mostly tourists from 21 nationalities.³¹ Unlike the violence in Maluku and Poso, it immediately paralysed the tourism industry, a major contributor to the national economy.³² The government was under pressure to respond decisively. This prompted the Indonesian government to develop an approach to counterterrorism that it could call its own.

The 2002 Bali bombing gave Megawati the justification not only to revive the proposed anti-terrorism bill, but also to implement it, with certain changes, in the form of interim laws.³³ Six days after the Bali bombing, while Parliament was in extended recess, Megawati signed Interim Law No. 1/2002 (PERPU 1/2002), defining and punishing acts of

life; (2) destruction of goods; (3) elimination of personal freedom; or (4) actions that create fear in the society”. There is no definition of what constitutes a “political background or objective”. *ibid* 6–7; Sebastian (n 5) 364.

²⁹ Devi Asmarani, ‘Muslims Oppose Jakarta Anti-Terror Bill’ *The Straits Times* (Singapore, 11 May 2002).

³⁰ Susanti (n 25) 9.

³¹ BBC News, ‘The 12 October 2002 Bali Bombing Plot’ *BBC News* (11 October 2012) <<http://www.bbc.com/news/world-asia-19881138>> accessed 6 April 2016.

³² International Crisis Group, ‘Impact of the Bali Bombings’ (International Crisis Group 2002) Asia Briefing No. 23 5 <<http://www.crisisgroup.org/en/regions/asia/south-east-asia/indonesia/B023-impact-of-the-bali-bombings.aspx>> accessed 6 April 2016.

³³ An interim law or *peraturan pengganti undang-undang (perpu)* is a form of legislation enacted by the President in emergency situations. A *perpu* is one level below a statute (*undang-undang*) in the hierarchy of Indonesian laws. Hikmahanto Juwana, ‘Anti-Terrorism Efforts in Indonesia’ in Victor V Ramraj and others (eds), *Global Anti-Terrorism Law and Policy* (Second Edition, Cambridge University Press 2012) 291, n. 2.

terrorism and related acts, as well as Interim Law No. 2/2002 (PERPU 2/2002), which sought to retroactively apply the provisions of the former to the Bali bombing incident.³⁴ With the 2002 Bali bombing, Megawati easily undercut the claim that there was no urgency to address the problem of terrorism. The intentional targeting of foreign tourists also underscored the necessity of Indonesia's acceding to international instruments pertaining to terrorism, as embodied in UN Security Council Resolution 1373.³⁵ The interim laws were subsequently ratified as Law No. 15/2003 and Law No. 16/2003, respectively, by the Indonesian legislature (DPR) at its next following sitting on April 4, 2003, in accordance with the Constitution.³⁶

Law 15/2003 departed from the draft anti-terrorism law in certain respects, but it still contained certain provisions that human rights organisations criticised at the time and consider problematic today. The definition of "terrorism" in Law 15/2003 did not refer anymore to a "political background or motivation", apparently in order to address the concern that the law would be used to curb political expression.³⁷ However, the provisions of Law 15/2003 still allowed for longer periods of arrest and detention than provided under the Indonesian Code of Criminal Procedure (Kitab Undang-undang Hukum Acara Pidana, KUHP);³⁸ permitted additional types of admissible evidence;³⁹ and approved the power to tap and intercept communication in terrorism cases.⁴⁰ An investigator may use any "intelligence report" as preliminary evidence.⁴¹ When the preliminary evidence is deemed adequate by the Head or Deputy Head of the District Court in a closed-door inquiry process, the investigator may arrest and further investigate any person suspected of

³⁴ On 23 July 2004, the Indonesian Constitutional Court declared the retroactive application of the anti-terrorism law to the Bali bombing incident as a violation of art. 28 (I) (1) ("the right not to be tried under a law with retroactive effect"), but did not strike down the previous convictions of the petitioners, saying the court's decision itself only applied prospectively. *ibid* 295–296; See also, Ross Clarke, 'Retrospectivity and the Constitutional Validity of the Bali Bombing and East Timor Trials' (2003) 5 *Asian Law* 1–32.

³⁵ See, PERPU 1/2002, considerations (b)–(e), discussed by Juwana (n 33) 291.

³⁶ The 1945 Indonesian Constitution provided in art. 22 that the Parliament may ratify or reject interim laws, but did not provide that Parliament may amend or modify provisions of interim laws. The understanding that Parliament may not amend or modify interim laws but may only ratify or reject them was codified in later laws governing the subject, namely, Law No. 10/2004 and Law No. 12/2011.

³⁷ Sebastian (n 5) 364.

³⁸ Arts. 28 (arrest), 25 (2) (detention).

³⁹ Art. 27.

⁴⁰ Art. 31.

⁴¹ Art. 26 (1). Juwana (n 33) 294; Simon Butt, 'Indonesian Terrorism Law and Criminal Process' (University of Melbourne Centre for Islamic Law and Society 2009) *Islam, Syari'ah and Governance Background Paper* (ARC Federation Fellowship) 16 <<http://papers.ssrn.com/abstract=1400506>> accessed 29 October 2013.

committing a terrorism offense based on such preliminary evidence for a maximum period of a week.⁴² Ordinarily, under the KUHAP, the arrested person must be released after a period of one day, unless he or she is formally detained.⁴³ The KUHAP allows detention up to 50 days under the order of a district attorney or 60 days under the order of a judge;⁴⁴ but Law 15/2003 allows detention up to 270 days.⁴⁵ Moreover, the investigator may be authorised by the Head of the District Court to intercept and tap a suspect's communications for a period of one year.⁴⁶ Because the law did not essentially differ from the draft law, Muslim parties continued to oppose ratification, with several critical members of Parliament staging a walkout when a decision came to a vote.⁴⁷ However, 220 members of Parliament, out of 266 present, voted in favour of ratification.⁴⁸

Notwithstanding legitimate concerns with the anti-terrorism law, a legal framework had been established. Just as importantly, the police emerged from the 2002 Bali bombing investigation as a credible actor who could, with international assistance, undertake the gathering of necessary evidence to lead to successful prosecutions.⁴⁹ This development was crucial. Giving the police, particularly Densus 88, the lead role in counterterrorism became acceptable, a formula that appeared to satisfy international and domestic audiences alike. Domestic actors' concerns that commitment to counterterrorism would threaten democratic gains by re-empowering the military were allayed, as the military was in fact bypassed. At the same time, foreign (especially American and Australian) governments could be satisfied that there was a counterterrorism force capable of neutralising threats to their interests.

Before Densus 88 was established to play the lead role in counterterrorism, there had been established anti-terrorism desks in different units of the police, military and intelligence services, none of which appeared to be the primary or lead actor.⁵⁰ In the police, there was the *Brigade Mobil* (Mobile Brigade) or Brimob. General I Made Mangku Pastika, who had been appointed to the national police headquarters, had possessed *carte*

⁴² Art. 28; Juwana (n 33) 294; Butt (n 41) 17 ff.

⁴³ Art. 19 (1), KUHAP; Butt (n 41) 13.

⁴⁴ Arts. 24 and 25, KUHAP.

⁴⁵ Art. 25 (2).

⁴⁶ PERPU 1/2003, arts. 30, 31 (1) (a)-(b); Juwana (n 33) 295.

⁴⁷ Sebastian (n 5) 363.

⁴⁸ *ibid.*

⁴⁹ Greg Barton, *Jemaah Islamiyah: Radical Islam in Indonesia* (Singapore University Press 2005) chap. 1. Sidney Jones said that public opinion surveys up to 2012 consistently reflect a dislike of the police. "But the one area where they are given high marks on – and they are very high marks ... - is in counterterrorism." Interview 22.

⁵⁰ Muradi, 'The 88th Densus AT: The Role and the Problem of Coordination on Counter-Terrorism in Indonesia' (2009) 2 *Journal of Politics and Law* 85-96.

blache to form the Anti-Terror and Bomb (ATB) Task Force, reporting directly to the national police chief.⁵¹ The ATB investigated the 2002 Bali bombing and coordinated with the multinational team. Emerging from this unit, in order to carry on the police investigations into other “terrorist networks” and incidents beyond Bali, Densus 88 was created on June 20, 2003 through a decree by then national police chief General Da’i Bachtiar (Decree No. 30/VI/2003).⁵² Combining intelligence and operational capabilities, and also assuming surveillance tasks over convicted prisoners in terrorism cases, Densus 88 quickly overshadowed the anti-terrorism desks in other agencies.

Western governments provided Densus 88 with specialised equipment and training. In fact, the formation of Densus 88 was made possible through the “additional funding” of US\$ 13 million from Australia and the United States.⁵³ The US Anti-Terrorism Assistance (ATA) program in Indonesia started in 2001 and was catalysed by the 2002 Bali bombing. Thirty graduates of the US program were assigned to the ATB Task Force and worked on the Bali bombings and J W Marriot cases. The formal establishment of Densus 88 (in March 2004) was slightly delayed to await funds from the ATA program as well as US Congressional authority to provide equipment. US\$ 20 million was spent on the Indonesian ATA from 2003-2005, only slightly decreasing in the following years.⁵⁴ According to Wise, the original plan was to grow Densus 88 into a force of 300 personnel, with 150 in Jakarta and 150 attached to regional police headquarters.⁵⁵ By 2009, Densus 88 had approximately 500 personnel, including 50-75 personnel assigned in regional headquarters.⁵⁶ Furthermore, the US funded a \$3.5 million counter-terrorism training facility east of Bogor at Megamendung, which was completed in October 2003. Australia funded a similar facility in Semarang.⁵⁷ According to Wise, Australian funding for Densus 88 focused on providing

⁵¹ Wise (n 14) 39.

⁵² Muradi (n 51) 86. Pastika was honoured in both Indonesia and Australia for the successful investigation of the 2002 Bali bombing, and then returned to Bali as regional police chief. “As Pastika moved on, General Baktiar signed ‘secret telegram No. 217/IV/2003’ directing the establishment of Directorate VI/Anti-Terrorist Bomb Unit in the Criminal Investigations Directorate at the National Police Headquarters. The directorate was ‘to be responsible for the development of strategy and policy, including the control of operational units in Indonesia.’ ... This entity became the core of Detachment 88...” under its first director Pranowo, who was also involved in the 2002 Bali bombing investigation. Wise (n 14) 39–40.

⁵³ Muradi (n 51) 86.

⁵⁴ So closely identified was the new police unit to the US ATA program that it is sometimes remarked that the “88” in Densus 88 stemmed from a mispronunciation of “ATA”. “The American trainers called it the ‘ATA’ detachment ... The Indonesians heard it as ‘88’.” Wise (n 14) 40. An alternative speculation is that 88 is a reference to the number of Australians killed in the 2002 Bali bombing.

⁵⁵ *ibid.*

⁵⁶ Muradi (n 51) 87.

⁵⁷ Wise (n 14) 67–69.

counter-terrorism intelligence training to the intelligence arm of the special unit.⁵⁸ Australia similarly assisted the National Intelligence Agency, BIN, and the financial intelligence unit, PPATK.⁵⁹

2. Views of Mainstream Human Rights Advocates

2.1. Counterterrorism did not target mainstream civil society

After Law No. 15/2003 came into effect, the fears that human rights organisations entertained did not all materialise. It was feared that the enactment of an anti-terrorism law would lead to criminalisation of legitimate dissent. However, police counterterrorist operations and prosecutions for terrorism did not appear to target civil society in general. Nor were Muslims indiscriminately targeted. Nonetheless, non-government organisations working with communities were clearly aware that the threat of terrorism might be used to advance other unrelated agendas detrimental to local communities. Deddy Rathi of *Wahana Lingkungan Hidup Indonesia* (Indonesian Forum for the Environment, WALHI) stated that his organisation's concern was "how to make [sure] social and economic issues [do] not become a terrorism issue."⁶⁰ WALHI and Perkumpulan untuk Pembaharuan Hukum Berbasis Masyarakat dan Ekologis (Society for Law Reform Based on Community and Ecology, HuMa), which are organisations focused on environmental and land rights issues, were particularly concerned about the potential criminalisation of protest by communities resisting corporations encroaching on their lands, resources or livelihood. At the time of my interviews with WALHI (June 2013) and HuMa (July 2013), the WALHI regional director in South Sumatra, Anwar Sadat, had recently been charged "as a provocateur of peasants against a state-owned company" and WALHI's Deddy Rathi and HuMa's campaigner Widiyanto made references to Sadat's case to underline this concern.⁶¹

⁵⁸ *ibid* 75.

⁵⁹ *ibid*.

⁶⁰ Interview 2.

⁶¹ Interviews 2 and 15. The arrest and charges were reported on internationally in calls for support by the Asian Human Rights Center (AHRC), Friends of the Earth UK, Amnesty International Australia, and East Timor and Indonesia Action Network (ETAN) in January to February 2013. According to Amnesty International, there has been an ongoing land dispute between farmers and a state owned plantation company in Ogan Ilir district, South Sumatra since 1982. The police have participated in the conflict, including by ordering villagers in Betung to leave their land, destroying a place of worship in Betung, and opening fire on a crowd of farmers killing a 12-year old boy and injuring four others in Limbang Jaya village on July 27, 2012. The arrest of Anwar Sadat, the WALHI director, along with his aide and at least 25 others came as a result of a protest action on January 29, 2013 by farmers before the regional police headquarters in which farmers demanded that the police not be involved in their land dispute with the state company. Violence attended the arrest, with Anwar

Respondents from HuMa were also concerned about the increased involvement of the military in managing socio-economic conflicts.⁶² According to Widiyanto of HuMa, the enactment of Law No. 7/2012 or the Social Conflict Management Law allows the police and military a greater role in the handling of “social conflicts”, which include tenurial conflicts. The law could thus have a substantial impact on civil society organisations in the future.⁶³ He speculated that the police might use the discourse of counterterrorism against indigenous peoples’ protest against palm oil and mining companies; but to date, he conceded that counterterrorism and tenurial conflicts remained distinct.⁶⁴ Anggalia Putri Pemasari of HuMa added that the Indonesian government’s counterterrorism strategy, which is led by the police, had not yet resulted in land grabbing and other land conflicts.⁶⁵ She said it had been the military rather than the police who had committed or facilitated land grabbing.⁶⁶

Thus, an opportunistic convergence of terrorism discourse with socio-economic issues doesn’t seem to have taken place. The respondent from WALHI said such a situation was more likely to have occurred in the years close to 9/11, when the “terrorist” label was applied more indiscriminately against Muslims more generally.⁶⁷ He believed that over the years, there had been changes in terms of people’s knowledge or perceptions of terrorism so that “if you use [the] terrorism issue, you must be clear” because people have associated the label “terrorists” with a very specific type of Muslim.⁶⁸ For example, the respondent from WALHI said that in 2006/7, in the wake of allegations by WALHI that the Australian mining company Newmont was illegally dumping mine tailings in Buyat Bay, North Sulawesi, an Australian senator branded WALHI’s former director Halik Muhammad a “terrorist” in a radio show.⁶⁹ The respondent said that this incident only created a stir for a couple of days, but was put to rest after the senator acknowledged his mistake, as people (including Australians) clearly saw that the terrorism accusation against Halik Muhammad was loose talk.⁷⁰

Sadat suffering blows and injuries in the head. Amnesty International, ‘Indonesia: Authorities Must Ensure Accountability for Police Violence in South Sumatra’

<<http://www.amnesty.org.au/news/comments/30965/>> accessed 5 April 2016.

⁶² Interviews 15 and 16.

⁶³ Interview 15.

⁶⁴ *ibid.*

⁶⁵ Interview 16.

⁶⁶ *ibid.*

⁶⁷ Interview 2.

⁶⁸ *ibid.*

⁶⁹ *ibid.*

⁷⁰ *ibid.*

When asked whether counterterrorism had had any effect on communities involved in land or resource conflicts, the respondents from HuMa said that they had not yet seen counterterrorism rhetoric or resources used systematically against communities resisting corporations.⁷¹ HuMa's Anggalia Putri Pemasari, however, noted that a possible exception to this is Papua, in which the mining giant Freeport operates.⁷² Therefore, the general impression is that counterterrorism's impact was limited to specific target groups, i.e., "terrorists", and civil society organisations such as WALHI and HuMa did not have to deal with the counterterrorism issue. The respondent from the labor federation Gabunganan Serikat Buruh Indonesia (GSBI), Emilia Yanti, related specific violations of workers' rights to strike and freedom of association and expression, in the form of threats, intimidation and outward violence from the police and military. She referred to these as forms of "terrorism" committed by the state.⁷³ However, regarding the impact of counterterrorism on workers' unions, she similarly reported that the charge of terrorism had not yet been used to repress union activities.⁷⁴

It is telling that respondents from mainstream human rights organisations often referred to counterterrorism's target group as "the terrorists" or "terrorist/terrorism community", implying that terrorists were a distinct or identifiable group apart from civil society. Thus, except in certain regions, counterterrorism operations and prosecutions were generally seen as focused rather than indiscriminate, and moreover, focused on the correct targets. This seems in accord with changes in general public perceptions about radical Islamic groups and personalities. As a result of police investigations into the 2002 Bali bombing and other bombings of high profile targets in Jakarta and Bali, it simply became harder to deny that "terrorist networks" existed and plotted violent attacks. The minute details of the activities of Jemaah Islamiyah (JI), Noordin MTop, Jamaah Ansharut Thauhid (JAT), etc., became the subject of everyday discourse in the media, and the threat of terrorism no longer appeared doubtful.

Mainstream human rights organisations Lembaga Bantuan Hukum (Legal Aid Institute, LBH), Komisi untuk Orang Hilang dan Korban Tindak Kekerasan (Commission for the Disappeared and Victims of Violence, KontraS), Lembaga Studi dan Advokasi

⁷¹ Interviews 15 and 16.

⁷² I discuss this case later in this section.

⁷³ She expressed sceptical views about the counterterrorism discourses similar to those propounded by Muslim lawyers discussed below. Interview 9.

⁷⁴ *ibid.*

Masyarakat (Institute for Policy Research and Advocacy, ELSAM) and WALHI echoed this perception in my interviews with their representatives. They largely acknowledged that terrorism was indeed a problem in Indonesia, i.e., a home-grown problem and not merely a foreign agenda.⁷⁵ Hence, they accept counterterrorism as a legitimate imperative for the Indonesian state, and also as a legitimate object of international cooperation with the United States and Australia.⁷⁶ To the interviewee from WALHI, counterterrorism was acceptable as long as it wasn't indiscriminately affecting Muslims in general, and thus remained focused on "terrorists", i.e., only those Muslims with extreme beliefs plotting violent actions.⁷⁷ Hence, in the view of respondents, the legitimacy of counterterrorism was dependent on whether counterterrorism remained focused on "terrorists". There was no further questioning of the category "terrorist".

2.2. Religious intolerance is a pressing concern

It is also significant that police operations and deradicalisation efforts targeted individuals or groups that appeared to espouse illiberal religious Muslim ideas. In this sense, counterterrorism actually resonated with some of the goals of mainstream human rights organisations, i.e., against religious intolerance. For example, a recent theme in human rights campaigning in Indonesia revolves around the issue of religious freedom. The immediate stimulus for this campaign was the wave of attacks on minority religious groups including Protestants and Catholics, Baha'i, Shia and Ahmadiyah. The Ahmadiyah view themselves as Muslims, but others regard them as deviations from Islam.⁷⁸ In 2005, the semi-official peak body for Islamic religious doctrine, the Majelis Ulama Indonesia (Indonesian Ulama Council, MUI), reiterated an earlier edict declaring that the Ahmadiyah deviated from Islamic doctrine by declaring Ahmadiyah founder Mira Ghulam Ahmad a "prophet".⁷⁹ This prompted attacks by Islamist organisations on the Ahmadiyah theology

⁷⁵ Interviews 2, 4, 7 and 8.

⁷⁶ *ibid.*

⁷⁷ Interview 2.

⁷⁸ For a background on the Ahmadiyah issue, see Plattdasch 'Religious Freedom in Indonesia: The Case of the Ahmadiyah' (Institute of Southeast Asian Studies 2011) <<http://www.iseas.edu.sg/documents/publication/ps22011R.pdf>> accessed 29 January 2014. For a background on the human rights campaign on religious freedom, see Human Rights Watch 'In Religion's Name: Abuses against Religious Minorities in Indonesia' (Human Rights Watch 2013) <http://www.hrw.org/sites/default/files/reports/indonesia0213_ForUpload_0.pdf> accessed 29 January 2014..

⁷⁹ Human Rights Watch (n 79) 36.

college in Bogor, and Ahmadiyah communities in other parts of the country.⁸⁰ In 2008, the Religious Affairs Minister and Attorney General signed a decree requiring Ahmadiyah to stop preaching its beliefs.⁸¹ This again prompted an increase in violence against Ahmadiyah, which included destruction of Ahmadiyah mosques, harassment and physical assault using stone, sticks and machetes, and even killings.⁸² The organisations that participated in the attacks include the Forum Umat Islam (Islamic People's Forum, FUI), Forum Komunikasi Muslim Indonesia (Indonesian Muslim Communication Forum, Forkami), Front Pembela Islam (Islamic Defenders Front, FPI), Hizbut-Tahrir Indonesia (HTI), and Gerakan Islam Reformis (Islamic Reformist Movement, Garis).⁸³

Human rights campaigners have also subsumed the denial of building permits for and closing down of Protestant and Catholic churches under the theme of religious intolerance.⁸⁴ In 2006, the Minister of Religious Affairs and the Minister of Home Affairs reaffirmed the policy adopted in 1969, which permitted regional governments to regulate the building of houses of worship.⁸⁵ In practice, regional governments have used this power to restrict the number of Christian churches in Muslim-majority areas, and to shut down "illegal churches" built without permit and to prevent the use of private homes as houses of worship.⁸⁶ Islamist groups have also participated in pressing regional governments not to issue permits and in preventing "illegal churches" and private houses of worship.⁸⁷ Islamist groups have conducted public demonstrations, and also engaged in intimidation and arson attacks.⁸⁸ As in the attacks against Ahmadiyah and Shia, the government has exerted little effort to prosecute or prevent these attacks, and has even been accused of coddling the FPI.⁸⁹ Crouch observed that local governments had used conflicts over places of worship as opportunities to gain the political support of Muslim voters influenced by radical Islamists.⁹⁰ Other observers charged that the police do not

⁸⁰ *ibid.*

⁸¹ *ibid* 37.

⁸² *ibid.*

⁸³ *ibid* 2–3; Halili and Bonar Tigor Naipospos, 'From Stagnation To Pick The New Hopes: The Condition of Freedom of Religion/Belief in Indonesia 2014' (Juwarti Hafsah tr, Pustaka Masyarakat Setara 2015) 34–36.

⁸⁴ Human Rights Watch (n 79) 50–70; Melissa Crouch, 'Implementing the Regulation on Places of Worship in Indonesia: New Problems, Local Politics and Court Action' (2010) 34 *Asian Studies Review* 403–419, 413–414; Halili and Naipospos (n 84) 201–211.

⁸⁵ Human Rights Watch (n 79) 34–35.

⁸⁶ *ibid* 33; Crouch (n 85) 405.

⁸⁷ Human Rights Watch (n 79) 50.

⁸⁸ *ibid* 54.

⁸⁹ *ibid* 72.

⁹⁰ Crouch (n 85) 415.

restrain the FPI allegedly because the latter serve as an “attack dog” for the police, that is by carrying out illegal acts for them.⁹¹

Mainstream human rights groups view these attacks as violations of the right to belief of the minority groups caused by religious intolerance. They criticise the Front Pembela Islam (FPI) and similar groups that undertake attacks on Ahmadiyah and others as “perpetrators” of human rights violations, alongside local governments and villagers who support them, as well as the police and national officials who appear to tolerate them.⁹² Illiberal Muslim groups have also turned against supporters of minority religious groups, including human rights organisations themselves, heightening the animosity between the two camps. In the so-called “Monas incident” of June 1, 2008, Front FPI and HTI, under the banner of Komando Laskar Islam (Islamic Defenders Command, KLI), physically assaulted activists from the National Alliance for Freedom of Religion (AKKBB). The latter were celebrating Pancasila day by highlighting the plight of the Ahmadiyah religious community.⁹³ The assault, which further illustrated intolerance, only served to alienate Islamist groups from mainstream human rights organisations and from the public in general.

Following the view that terrorism proceeds from extreme Islamic ideology, an interviewee from Lembaga Bantuan Hukum (LBH) suggested that religious intolerance was linked to terrorism and must therefore be addressed in a counterterrorism strategy.⁹⁴ According to LBH’s Muhamad Isnur, Head of Research and Development Division, in particular, counterterrorism strategy must address the proliferation of religious speech inciting hatred, such as those heard from FPI and other illiberal groups. To illustrate the connection, the interviewee mentioned the case of a perpetrator of a bombing targeting police in Cirebon in April 2011, who appeared to have previously been involved in an anti-Ahmadiyah attack in Cirebon in 2010.⁹⁵ He said the police’s apparent unwillingness to take action to prevent the proliferation of religious intolerance in public discourse, and other illiberal practices of certain Islamic groups like the FPI, was casting a shadow over the integrity of its counterterrorism strategy, particularly the seriousness of its deradicalisation

⁹¹ Human Rights Watch (n 79) 19; International Crisis Group, ‘Indonesia: “Christianisation” and Intolerance’ (International Crisis Group 2010) Asia Briefing No. 114 17.

⁹² Interviews 1, 4, 7 and 8.

⁹³ The Jakarta Post, ‘Hard-Liners Ambush Monas Rally’ *The Jakarta Post* (2 June 2008).

⁹⁴ Interview 8.

⁹⁵ The Cirebon case was also referred to in Human Rights Watch (HRW)’s “Letter to President Barack Obama Regarding his Visit to Indonesia and Human Rights Issues”, November 15, 2011, and was the subject of report by the International Crisis Group ‘Indonesia: From Vigilatism to Terrorism in Cirebon’ (International Crisis Group 2012) Asia Briefing No. 132.

efforts.⁹⁶ Thus, it would even appear that mainstream human rights advocates considered pushing for counterterrorism to cover a greater swathe of Islamic groups. The attacks on religious minorities are providing advocates of human rights more reason to distance themselves from radical Islamists, sustaining the broad community support for counterterrorism that the government enjoyed after the 2002 Bali bombing.

2.3. Criticism of counterterrorism operations in Poso

Mainstream human rights organisations, however, raise objections to the counterterrorism discourse when the targets have not been “terrorists”, i.e., of the recognised Islamic extremist kind.

According to respondent from KontraS, this has been the case in Poso and Papua.⁹⁷ Poso is one of the regions that saw communal fighting immediately after the downfall of Suharto in the late 1990s.⁹⁸ KontraS seeks to prevent Poso from reverting to communal fighting and focuses on the interest of victims of violence, many of whom, according to KontraS’ vice coordinator Syamsul Alam, still hold grudges and long for revenge.⁹⁹ According to KontraS, the local government has mismanaged reconstruction and development funds that international donors provided in support of the peace process in Poso. In particular, the failure to deliver development projects to certain groups of ex-combatants intended for their disengagement from violence, exacerbated the grudges and sense of injustice that ex-combatants still harboured.¹⁰⁰

KontraS acknowledges the claim of counterterrorism officials that “terrorists” from Java (i.e., Jemaah Islamiyah) operate there, recruiting and directing a few residents of Poso, especially prior to 2007. However, KontraS criticises the “repressive approach” of police counterterrorism in Poso, and warns that counterterrorism there actually “re-radicalises” people.¹⁰¹ Violations such as arbitrary arrest and torture, suffered at the hands of police, reignite feelings of revenge.¹⁰² Syamsul Alam claimed that the “new” terrorism in Poso is

⁹⁶ Interview 8.

⁹⁷ Interview 4.

⁹⁸ Gerry van Klinken, *Communal Violence and Democratization in Indonesia: Small Town Wars* (Routledge 2007); Dave McRae, *A Few Poorly Organized Men: Interreligious Violence in Poso, Indonesia* (Brill 2013).

⁹⁹ Interview 4.

¹⁰⁰ Komisi untuk Orang Hilang dan Korban Tindak Kekerasan, ‘Laporan Pemantauan KontraS: Temuan Lapangan Dari Poso-Sulawesi Tengah’ (KontraS 2012).

¹⁰¹ Interview 4.

¹⁰² *ibid.*

not about jihad or Islamic ideology of the “terrorists” of the 2002 Bali bombing, but a kind of throwback to the ill feelings of the 1990s communal conflict now directed at the police.¹⁰³ He further said that the people targeted and captured by Densus 88 in Poso “do not have a strong ideology” and are “not jihadists”.¹⁰⁴ For example, he cites the case of Basri, a tattooed rock musician who turned to violence to avenge the killing of his family.¹⁰⁵ KontraS believes that he was wrongly added by Densus 88 in the list of wanted persons for alleged involvement in Jemaah Islamiyah. He was captured in 2007 and suffered torture while in police detention. KontraS thinks that his confinement in prison together with “terrorists” with “radical ideologies” only strengthened his resolve to fight the police.

2.4. Concern over Densus 88 presence in Papua

In recent years, KontraS and National Papua Solidarity (NAPAS) were also concerned that counterterrorism resources had been channelled to fight non-Islamic Papuan pro-independence groups, resulting in a new pattern of repression in that area.¹⁰⁶ Respondent Zely Ariane, the coordinator of NAPAS, a solidarity group based in Jakarta, has worked to popularise the human rights situation in the Papuan provinces. According to her, Papuan activists believed that there had been a shift in Indonesia’s approach to Papuan separatism towards giving Densus 88 a role in the suppression of pro-independence groups.¹⁰⁷

This unprecedented development was exhibited in the separate killings of Mako Tabuni and Kelly Kwalik by Densus 88 personnel. Mako Tabuni was a prominent leader of the legal organisation Komite Nasional Papua Barat (West Papuan National Committee, KNPB) while Kelly Kwalik was a high-profile community leader who proclaimed himself a member of the armed separatist group Organisasi Papua Merdeka (Free Papua Movement, OPM). Mako Tabuni was attacked by masked men in unlabelled cars and then taken to the police hospital 20 minutes away, instead of to the nearest hospital.¹⁰⁸ Instead of being treated, he was apparently left to bleed to death and was subjected to further questioning at the hospital. Tabuni’s lawyer, his relatives, and activists including Andreas Harsono of

¹⁰³ *ibid.*

¹⁰⁴ *ibid.*

¹⁰⁵ *ibid.*

¹⁰⁶ Interviews 4 and 12.

¹⁰⁷ Interview 12.

¹⁰⁸ Australian Broadcasting Corporation, ‘Australia Faces Link to West Papua Torture’, *7.30 Report* (28 August 2012) <<http://www.abc.net.au/7.30/content/2012/s3578010.htm>> accessed 15 October 2015.

Human Rights Watch believe he died at the hands of a Densus 88 operation. The presence of Densus 88 in security operations in Papua has been underlined in an Australian news report in August 2012. In 2011, there was a video that surfaced showing what appeared to be a Densus 88 operation in Papua.¹⁰⁹ In the case of Kelly Kwalik, allegedly killed while sleeping, the Indonesian police acknowledged that Densus 88 was involved. In fact the Papuan police chief praised the work of Detachment 88 in the killing.¹¹⁰ These developments have created an opening for transnational mobilisation on the human rights situation in the Papuan provinces to increase pressure on the United States and Australia, which provide material support for Densus 88 in terms of weapons, training and technical capacity to undertake wiretaps, bomb detonation, and the like.¹¹¹

NAPAS has also observed a change in the Papuan political prisoners issue that appears to be in step with this shift in the government's approach to the independence movement. Human rights organisations have been campaigning around the fact that there are "political prisoners" in Papua, i.e., Papuans imprisoned for their political beliefs or their peaceful expression.¹¹² Before 2004/5, most of these prisoners were charged with the crime of treason or violation of the law banning the raising of the Papuan flag. More recently, however, the charges have related to ownership of guns, or to violent activities such as bombings, which can also be defined as terrorism under the anti-terrorism law.¹¹³ Victor Yiemo, the new leader of KNPB, says KNBP members have been arrested supposedly for making bombs in order to frame them as terrorists and justify Densus 88 involvement in Papua.¹¹⁴

Human rights advocates rightly pay critical attention to developments in Papua, and they make an important contribution by doing so. They are showing that the government has been unable to resist the temptation of using counterterrorism discourse to break the Papuan independence movement and mobilise support for state dominance in Papua. However, limiting criticism of the counterterrorism discourse only to Papua and

¹⁰⁹ *ibid.*

¹¹⁰ *ibid.*; See also, John Pakage and Farouk Arnaz, 'We Had to Kill Kelly Kwalik, Say Indonesia Police' *The Jakarta Globe* (17 December 2009) <<http://www.thejakartaglobe.com/archive/we-had-to-kill-kelly-kwalik-say-indonesia-police/>> accessed 28 January 2014.

¹¹¹ See, for example, John M Miller and Ed McWilliams *ETAN/WPAT: Suspend Training and Funding of Indonesian Police Unit Detachment 88* (29 September 2010) <<http://etan.org/news/2010/09d88.htm>> accessed 29 January 2014.

¹¹² Human Rights Watch, 'Indonesia: Prosecuting Political Aspirations - Indonesia's Political Prisoners' (2010) <http://www.hrw.org/sites/default/files/reports/indonesia0610webwcover_0.pdf> accessed 29 January 2014.

¹¹³ An important activist resource on this matter is the list of "political prisoners" and case summaries compiled by Papuans Behind Bars in <www.papuansbehindbars.org>.

¹¹⁴ Australian Broadcasting Corporation (n 109).

Poso tends to reinforce their acceptance that counterterrorism discourse could have a proper application, that is, towards Islamic extremists.

3. Views of Muslim Lawyers

While mainstream human rights advocates have not been particularly critical of Indonesian counterterrorism discourse, a group of Muslim lawyers view Indonesian counterterrorism practice in a completely different light. Tim Pengacara Muslim (Muslim Lawyers Team, TPM) is a group that emerged to represent terrorism suspects after the enactment of Law No. 15/2003. Unlike ELSAM, LBH and KontraS, which have effectively accommodated the counterterrorism discourse (except as applied to the conflicts in Poso and Papua), TPM continues the rejectionist rhetoric of the years previous to the 2002 Bali bombings.

3.1. Representation of defendants in terrorism cases

TPM has become quite prominent for offering *pro bono* legal representation to Muslims accused of terrorism. According to Wirawan Adnan, a senior lawyer who serves as an adviser to TPM lawyers, the TPM evolved from a committee of lawyers into a formal organisation with presence in different parts of the country.¹¹⁵ Its chairman Mahendradatta estimates that TPM has represented around 300 individuals accused of terrorism and that there are about fifty TPM lawyers actively handling cases.¹¹⁶ TPM has succeeded in carving a kind of niche legal practice defending terrorism suspects. TPM lawyers are also identified with legal radical Islamic organisations like FPI, having also acted as counsel for FPI members who get in trouble with the law. As revealed by the TPM chairman, however, FPI has decided to form its own group of in-house counsel, the Bantuan Hukum Front (BHF), after TPM declined to come under the FPI organisation.¹¹⁷ This might indicate a demand for Muslim lawyers who are less autonomous.

In contrast, mainstream human rights lawyers from LBH and KontraS have reported that they have been inactive in the legal representation of terrorism suspects. An interviewee from KontraS complained that suspected “terrorists” avoid mainstream human

¹¹⁵ Interview 19.

¹¹⁶ Interview 21.

¹¹⁷ *ibid.*

rights organisations, preferring to work with Islamic groups.¹¹⁸ KontraS and LBH offer legal representation for victims of human rights abuse, and campaigning often revolves around cases that they deal with directly. However, KontraS lawyers do not have a single client who is a victim of counterterrorism abuse outside of Poso.¹¹⁹ Senior LBH lawyer Adnan Buyung Nasution represented Abu Bakar Basyir in 2003 but, according to the LBH respondent, LBH has not represented him or others accused of terrorism since the establishment of TPM.¹²⁰

The TPM senior adviser said Islamic clients are naturally attracted to TPM lawyers because they are conversant in their Islamic views, particularly their concept of jihad.¹²¹ However, being a “Muslim lawyer”, explains the respondents from TPM, doesn’t imply mixing law and theology, but rather the opposite. Muslim individuals and organisations defended by TPM and other Muslim lawyers (terrorism suspects as well as groups like FPI) often have particular religious perspectives or interpretations for violent actions. In the courtroom, however, TPM lawyers do not defend clients on the basis of the Koran or Islamic beliefs, but on Indonesian law alone. TPM lawyers, he continues, do not comment on the different religious perspectives outside the courtroom as well. This is ostensibly because there are many different Islamic factions they deal with, and they try to avoid getting entangled in their religious differences.

3.2. Criticism of counterterrorism discourse

In my interviews, TPM respondents categorically rejected the legitimacy of counterterrorism. The senior adviser said TPM lawyers believe that alleged terrorist activities are a fabrication by police.¹²² Therefore, TPM’s self-perception of its role is to expose what lies behind the allegations. However, the TPM chairman emphasised that TPM lawyers have been “cut off from information” and so this role is hard if not almost impossible to fulfill.¹²³ Especially since 2010, the police have been preventing TPM lawyers

¹¹⁸ Interview 1.

¹¹⁹ *ibid.*

¹²⁰ Interview 8.

¹²¹ Interview 19. See discussion and sources in Chapter 5, Section 3. Calls for jihad were issued by the likes of Umar Ja’far Thalib and Abu Bakar Basyir at the start of the post-Suharto period. In their view, although subject to caveats or conditions, jihad encompassed the resort to violent methods and were not limited to peaceful struggle as interpreted by other Muslims.

¹²² *ibid.*

¹²³ Interview 21.

from having access to clients in their detention places.¹²⁴ TPM lawyers have only been able to confer with clients while in the courtroom.¹²⁵

Asked why the police would fabricate terrorism ten years after the Bali bombing, the senior adviser said that among TPM lawyers, three theories are popular. First, counterterrorism exists to defame Islam. This is supposedly borne out by the fact that only Muslims are ever accused of committing terrorism offenses.¹²⁶ Second, the perpetuation of a threat of terrorism justifies the organisational existence of Densus 88 and counterterrorism agencies, and therefore of continued material assistance from Western countries. And finally, the terrorism issue is a useful tool to distract public attention from more real or more important socio-economic problems, such as corruption, criminality and lack of basic government services.

The approach of TPM to counterterrorism thus differs considerably from those of mainstream human rights organisations. The two major differences are first, that TPM lawyers openly reject the need for counterterrorism; and second, they consider that Islamic ideas are under attack, including through deradicalisation.¹²⁷ The perception of Western interest in Indonesian counterterrorism also differs between the two groups.

3.3. Absence of a middle ground

Professor Heru Susetyo from the University of Indonesia (UI) and senior Muslim lawyer from Pusat Advokasi Hukum dan Hak Asasi Manusia (Indonesian Advocacy Center for Law and Human Rights, PAHAM) positioned himself and his organisation as occupying an “in between” orientation with respect to human rights law and Islam.¹²⁸ His interview further illustrates the tendency for Islamic and human rights advocacies to bifurcate. He confirms that mainstream human rights activists and radical Muslim activists tend to view each other’s discourses with suspicion. While he believes there is a lot of “common ground” in which the peaceful promotion of Islamic values, practices or institutions converge with the promotion of human rights, he finds that convergence between these two camps has been difficult to achieve. This is reflected in his own professional

¹²⁴ *ibid.*

¹²⁵ *ibid.*

¹²⁶ I have not been able to verify this factual claim with statistical data.

¹²⁷ The chairman of TPM lambasted the very idea of deradicalisation. In his opinion, counterterrorism should only deal with actions, and not with religious ideas or ideologies which are legally protected. He believes that what deradicalisation essentially does is to “tamper with Islam”. Interview 21.

¹²⁸ Interview 11.

development. Following his graduation from law school, he founded PAHAM together with other lawyers from UI in order to provide legal advocacy to victims of communal conflicts in the immediate post-Suharto years. While not intending to establish a niche in the defense of the rights of Muslims, he said, PAHAM lawyers attracted Muslim clients because of their own Islamic activist background. Thus, in the late 1990s, he participated in the representation of prominent cleric Jafar Umar Thalib, the leader of Laskar Jihad, and also Abu Bakar Basyir in 2003. However, he chose not to join TPM, and at the time of the interview, PAHAM's focus had shifted from counterterrorism to the persecution of the Muslim Rohingya people in Burma, the international litigation over the Freedom Flotilla incident, and the campaign against the ban on wearing the veil in some parts of the Indonesian civil service.

Unlike the TPM respondents, the respondent from PAHAM acknowledged that some Indonesian militants were targeting Westerners, saying that some of his own clients were such militants who had undergone combat training in Afghanistan, Pakistan and Saudi Arabia. Hence, he also acknowledged that Western countries had a legitimate interest in counterterrorist cooperation with Indonesia in order to prevent more of their own citizens from becoming victims. Nevertheless, he held the view that Densus 88 operations were losing popular support because of their abuse of power and the victimisation of ordinary people. He reported that Densus 88 had pursued ordinary people, arresting them and torturing or subjecting them to ill treatment, only to release them for lack of evidence. Furthermore, those who had been wrongfully arrested and whose rights had been violated had not received any compensation or reparation from the police, even for medical costs. Unfortunately, the advocacy for the rights of suspected terrorists has become marginalised in Indonesia. According to Heru Susetyo, since "the perpetrators are mostly coming from Islamic organisations" and their legal advocates "Muslim activists like TPM and PAHAM", the perception that is created is that such advocacy is part of an Islamic agenda, not a genuine human rights issue.¹²⁹

4. Conclusion

In this chapter, I traced the emergence of Indonesia's legalised approach to counterterrorism. I also showed the divergent reactions to the terrorism discourse after Law No. 1/2003 was enacted. Unlike the Philippines, Indonesia developed a police-led

¹²⁹ *ibid.*

counterterrorism approach that avoided direct participation of American or Western troops and even the country's own military forces in everyday operations. This approach would appear better suited to the official claim that Indonesian counterterrorism took human rights concerns into account. However, in reality, the legal framework for counterterrorism bypassed human rights advocates' objections to the original proposal.

Even though the text of the anti-terrorism legislation adopted after the 2002 Bali bombing contained provisions that human rights advocates found objectionable, by 2013 human rights organisations did not appear to question the necessity of counterterrorism. This reflects a change in perception of the broader public about the threat of radical Islam that was brought about by credible police work in the aftermath of the 2002 Bali bombing. Densus 88's identification with the legalised approach was made possible through the goodwill generated by the police in this period. As long as the police focused on the threat of violence posed by extremist Muslim networks and did not implicate Muslims indiscriminately, and as long as the evidence of criminal acts was established through the legal process, as was done in the investigation of the 2002 Bali bombing, mainstream human rights advocates were willing to accept the legitimacy of counterterrorism.

However, to a distinct set of legal advocates working directly with suspects apprehended by police, however, the fact that counterterrorism was police-led and not military-led did not matter. To the TPM, the terrorism discourse remained questionable and its credibility was compromised by the opportunism of its proponents. Where mainstream human rights had seen problems with counterterrorism, namely, in Poso and Papua, they have argued that targets had not been Muslim extremists, i.e., they had not really been jihadists or they had not been Muslims at all. TPM, on the other hand, offered its critique of the terrorism discourse precisely when they were directed against Muslim radicals or jihadists. The divergence between mainstream human rights and Muslim legal advocates is most clearly exhibited by the fact that in the legal representation of defendants in terrorism cases, TPM lawyers had completely displaced LBH and KontraS lawyers.

Although there would appear to be no lack of domestic critics of human rights abuses in the course of counterterrorism in Indonesia, the critics are in fact divided in regard to the question of the legitimacy of the terrorism discourse and the acceptability of countering terrorism. Therefore, there is also no consensus on what to do with Indonesian counterterrorism, i.e., whether a dialogue with police about human rights compliance is sufficient or rather its overthrow is needed. Also, as Heru Susetyo has remarked, the state

of affairs in which terrorism suspects are identified with radical Islamic ideology and with Islamic defenders has resulted in a kind of marginalisation of their issue as not a genuine human rights issue. This has only weakened pressure to hold the police to account for violations and undertake reforms.

Chapter 7

Densus 88: Impunity for Extrajudicial Killings

In this chapter, I expound on human rights violations committed by the main counterterrorism actor in Indonesia, the special anti-terrorism police unit Detasemen Khusus 88 (Densus 88).¹ Drawing upon KomnashAM's special reports released in 2010 and 2011 on the topic of human rights violations in the course of police counterterrorism operations, as well as additional documentary evidence and interviews with advocates in two incidents that KomnashAM investigated subsequently (the Tanah Runtuh and Tulungagung cases), I illustrate the gravity of violations committed by police. This evidence shows that there is impunity for serious violations, including killings and torture. This impunity is clearly exhibited in the lack of any significant response by the police and the government to the investigations.

The lesson that I draw from this is not only that in reality, the main actor tasked to pursue human rights-compliant counterterrorism is a human rights violator. I also ask why legal restraints on the killings by Densus 88 do not appear to work. The explanation that I propose is that the killings persist because Densus 88 is able to publicly justify them despite their illegality. This is because the killings are viewed as responding to threats to public security, that is, the killings counter terrorism. The irony is that it is also Densus 88 that pronounces on the existence, location and severity of terrorist threats, its authority on this matter being essentially unchallenged.

This chapter advances the central argument of the thesis by showing that adopting an approach to counterterrorism that is even more legalised than in the Philippines and that explicitly incorporates human rights has not prevented the regular commission of extrajudicial killings and other grave violations in Indonesia. Although the number of recorded extrajudicial killings by Densus 88 is smaller than those imputed to the Philippine military, nevertheless, the impunity with which they are committed are much the same in the two countries. Their different approaches to counterterrorism do not appear to make a difference in practice. The attachment of a human rights language to counterterrorism does not make counterterrorism practice dramatically more respectful of human rights. On the contrary, and ironically, the belief that Densus 88 embodies legal ideals (civilian supremacy, human rights) helps perpetuate impunity for violations.

This chapter also analyses the response of an important local human rights actor, namely, Indonesia's National Human Rights Commission or KomnashAM, as exhibited in its reports on Densus 88 operations. I show that KomnashAM's response is limited by an accommodationist position

¹ For more details on Densus 88, see Chapter 6, Section 1.

towards the counterterrorism discourse. In the final section, I use the Tulungagung case to reflect on how adopting an accommodationist frame has prevented human rights advocates from responding effectively to Densus 88 abuses, and why a more robust critique is needed.

1. Evidence of serious human rights violations: KomnasHAM reports of 2010 and 2011

Since it was first established, Densus 88 has undertaken hundreds of arrests on suspicion of terrorism. The Institute for Policy Analysis of Conflict (IPAC) estimated in 2013 that since the 2002 Bali bombing, there had been around 700 suspected terrorists arrested, most of whom had been brought to trial, with a near 100 per cent conviction rate.² This impressive record of arrests, however, was accompanied by an equally concerning record of killings. Indeed, while some of the persons believed responsible for the major terrorist bombing incidents, namely, Bali (2002), JW Marriot Hotel (2003) and the Australian embassy (2004), were captured alive and prosecuted for terrorism, others were killed by police. Among the most notorious of the suspects is Malaysian national Noordin M. Top. He was believed responsible for the bombings of JW Marriot Hotel (2003), the Australian embassy (2004), Bali (2005), and JW Marriot and Ritz-Carlton hotels (2009). Top was killed in a police operation on September 17, 2009 in Solo, along with three others.³ Others suspected of involvement in major terrorist bombings, including Dulmatin (Philippine ambassador's residence 2000; Christmas eve bombings 2000; Bali 2002) and Azahari Husin (Christmas eve bombings 2000; Marriot 2003; Australian embassy 2004), were also killed in different police operations.⁴ A tabulation of "Persons Killed by Indonesian Police in Operations" prepared by IPAC, shows that from August 2005 to February 2014, there were at least 46 separate operations or incidents that resulted in the deaths of suspected terrorists. Ninety one (91) names are included in the IPAC tabulation as having been killed.

These deaths did not cause any great public alarm, as those killed were believed to be armed and dangerous, and may well have maimed or killed police and others during the operation against them had they not been stopped. However, the circumstances of at least some of these

² Institute for Policy Analysis of Conflict, 'Prison Problems: Planned and Unplanned Releases of Convicted Extremists in Indonesia' (Institute for Policy Analysis of Conflict 2013) IPAC Report No. 2 6–7.

³ Agence France-Presse, 'Terror Mastermind Killed in Indonesia Raid' *The Sydney Morning Herald* (17 September 2009) <<http://www.smh.com.au/world/terror-mastermind-killed-in-indonesia-raid-20090917-ftaz.html>> accessed 15 February 2016.

⁴ Tom Allard, 'Bali Bomb Mastermind Killed in Shoot-Out' *The Sydney Morning Herald* (10 March 2010) <<http://www.smh.com.au/world/bali-bomb-mastermind-killed-in-shootout-20100310-py9n.html>> accessed 15 February 2016; Australian Associated Press, 'Azahari "Dead after Police Raid"' *The Sydney Morning Herald* (9 November 2005) <<http://www.smh.com.au/news/world/azahari-dead-after-police-raid/2005/11/09/1131407703698.html>> accessed 15 February 2016.

deaths raise questions about the extent to which the police had justification for the killings. Ibrohim, for example, was killed in an operation that was supposed to be targeting Noordin M. Top. This operation involved a 17-hour siege of the house in Temanggung, Solo where Top was said to be hiding. The whole seige was broadcast live on Indonesian television on August 7-8, 2009. When it was learned that the person killed in the operation was Ibrohim and not Top, the authorities emphasised that Ibrohim was also suspected to have been a participant in the Ritz Carlton Hotel bombing of 2009. He was the hotel's florist and he had allegedly taken advantage of his position to smuggle in explosives. Authorities justified the use of heavy fire power against the lone man in the Temanggung siege by alleging that he carried a bomb at the time of the police operation. But as the intelligence information that led to the Temanggung siege was faulty to begin with, the belated justification for killing instead of taking Ibrohim alive was dubious.⁵

On March 9, 2010 in Pamulang, South Tangerang, Densus 88 shot Dulmatin and two companions Ridwan and Hasan Noer, said to be his bodyguards. The police alleged that the suspects were armed and were killed in a shootout. However, a controversy was created in the media when witnesses to the killings Ridwan and Hasan Noer said they had not seen guns used by the targets, and that the targets were moreover shot at close range, ensuring their deaths.⁶ One witness said Ridwan was shot on the chest, fell on the witness' porch, and then was shot again at close range by police. Another witness said Hassan was pinned down on the ground and was shot while in that position.⁷

Even more concerning was an incident in Cawang, Jakarta on May 20, 2012, where three men were killed, two of whom have never been identified.⁸ In that incident, the police contended that Densus 88 officers shot a man after he physically resisted arrest.⁹ Two other persons, whom the first man was about to meet at that place, were beaten and shot to death after trying to escape from police.¹⁰ The Asian Human Rights Commission (AHRC) condemned this incident as "excessive

⁵ Australian Broadcasting Corporation, 'Top Still at Large', *PM with Mark Colvin* (12 August 2009) <<http://www.abc.net.au/pm/content/2008/s2654003.htm>> accessed 20 October 2015.

⁶ Hidayatullah, 'Saksi: Tersangka Ditembak Dari Jarak Dekat' *Hidayatullah.com* (11 March 2010) <<http://www.hidayatullah.com/berita/nasional/read/2010/03/11/42867/saksi-tersempak-ditembak-dari-jarak-dekat.html>> accessed 16 February 2016; Elin Yunita Kristanti and Zaky Al-Yamani, 'Saksi: Teroris Ditembak Di Kepala Saat Jatuh' (10 March 2010) <<http://nasional.news.viva.co.id/news/read/135252-warga-terduga-teroris-itu-ditembak-di-kepala>> accessed 16 February 2016.

⁷ Hidayatullah (n 6); Elin Yunita Kristanti and Zaky Al-Yamani (n 6).

⁸ Komisi Nasional Hak Asasi Manusia, 'Laporan Pemantauan Dan Penyelidikan Penanganan Tindak Terorisme' (KomnasHAM 2011) 58.

⁹ Dhanny Krisnady, 'Densus 88 Grebek Teroris Di Cawang Dan Cikampek' *Harian Online Kabar Indonesia* (12 May 2010) <<http://www.kabarindonesia.com/berita.php?pil=8&jd=Densus+88+Grebek+Teroris+di+Cawang+dan+Cikampek&dn=20100512194418>> accessed 16 February 2016.

¹⁰ Asian Human Rights Commission, 'An Open Letter to Chief of Indonesian National Police' <<https://www.ammado.com/nonprofit/108433/articles/15523>> accessed 23 October 2015.

use of force” given that all three men were unarmed and did not appear to have threatened public security at the time of their killings.¹¹ A witness said the bag one of the men was carrying turned out to contain only fruit.¹² Indeed, while the shooting took place on the same day as another operation in Cikampek that killed two suspects who were identified as Maulana and Saptono, the police has not been able to cite any allegation linking the Cawang men to these other suspects.¹³ They were buried by Densus 88 in coffins simply marked as “Mr. X-I/CWG/001” and “Mr. X-I/CWG/002”.¹⁴

According to Yodhisman Soratha, an investigator at KomnasHAM, the commission started to investigate the police’s counterterrorism operations in 2009 due to public concern caused by news reports of police excesses.¹⁵ The commission also began to receive written complaints, including from TPM, obliging it to act.¹⁶ An ad hoc team of KomnasHAM investigators prepared a progress report in 2010 covering thirteen (13) incidents involving the police’s reported counterterrorism operations in four provinces, including two operations targeting Noordin Top.¹⁷ In 2011, KomnasHAM released the special report on the theme of counterterrorism, which included the incidents covered by the 2010 report (except for two incidents which were deleted) and an additional six incidents. The 2011 report represents a limited but revealing sampling of police counterterrorism operations in six provinces, namely, Aceh, North Sumatra, Jakarta, Central Java, West Java and West Nusa Tenggara, in the period from August 2009 to June 2011. The report documents the impact of counterterrorism operations on rights through diverse sources of information, including statements of witnesses and written documents.¹⁸ The commission sought information first from media reports, and then from victims and their families, and also from the police.

Witnesses’ descriptions of the incidents to KomnasHAM invariably alleged that excessive force was used in police counterterrorism operations, often resulting in serious human rights violations. Not only did the police kill suspects (see Table 1), but they also subjected them to torture or ill treatment (see Table 2).

¹¹ *ibid.*

¹² Komisi Nasional Hak Asasi Manusia, ‘Laporan Pemantauan Dan Penyelidikan Penanganan Tindak Terorisme’ (n 8) 57.

¹³ *ibid* 55–58.

¹⁴ *ibid* 58–60.

¹⁵ Interview 3.

¹⁶ Interviews 3 and 17.

¹⁷ Komisi Nasional Hak Asasi Manusia, ‘Laporan Pemantauan Dan Penyelidikan Penanganan Tindak Terorisme’ (KomnasHAM 2010).

¹⁸ Komisi Nasional Hak Asasi Manusia, ‘Laporan Pemantauan Dan Penyelidikan Penanganan Tindak Terorisme’ (n 8).

1.1. Killings of persons against whom allegations of involvement in terrorism were made belatedly and were scant or purely speculative

The commission identified 17 victims who had been killed by counterterrorism operations in the period studied (See Table 1). Some victims, such as Noordin Top and Dulmatin, were facing detailed police allegations. The allegations against other victims, however, were drastically more scant and belated. For example, Abdullah bin Ismail, killed during the police's pursuit of the supposed terrorist training camp in Aceh ("Aceh camp") in February to March 2010, was alleged to be a suspected terrorist. However, the allegation was made by police only after he was killed, in an attempt to justify his death to his family. He was in fact first caught in a "sweeping" operation conducted by police for not bringing his national identification card (KTP) with him, taken to the police station, and then was allowed to go home to get it. Police said he did not come back and instead ran to the mountains. Eight days later, the police told his family that he was shot dead because he was suspected to be involved in terrorist activities. However, the circumstances of his killing were never fully divulged. It would appear that the reason he was alleged to be involved in terrorism was that he purportedly ran to the mountains where counterterrorism operations against alleged "Aceh camp" terrorists were taking place. Abdullah bin Ismail's case mirrors those of the two men in the Cawang incident of March 9, 2010 who were buried as "Mr. X-1" and "Mr. X-2", whom the police speculated had been conspirators with terrorists, a claim that appeared to have little or no supporting evidence.

In another case, that of Nur Iman, he was not alleged to be a terrorist at all, but a simple bystander who was a casualty in the incident involving the shooting of Sigit Qurdowi and Hendro Yunanto in Solo on May 15, 2011. Nonetheless, Densus 88 refused any responsibility for the death, suggesting he was hit by bullets coming from the guns of Sigit and Hendro, although it was contested whether these other suspects were even carrying guns at the time.

KomnasHAM reminded the police that their task starts prior to the stage of actual operation, i.e., with the investigation stage. Before the police can proceed to the next stage of investigation involving the arrest of the person, they are legally obliged to first conduct a search of information to establish sufficient initial evidence.¹⁹ Indonesian criminal procedural law requires, as a general rule, a warrant of arrest, which must state the reason for the arrest, a short description of the crime believed to be committed and its location.²⁰ This measure is intended to ensure protection of

¹⁹ *ibid* 103.

²⁰ Art 18 (1), Law No. 8/1981; Art 34, Law No. 39/1999.

human rights of the person to be arrested.²¹ KomnasHAM emphasised that killing suspects at the initial level of investigation is a violation of human rights, as well as the criminal procedural code, as it is not in compliance with the principle of presumption of innocence as well as the principle of non-self-incrimination.²²

Table 1. List of killings in counter-terrorism operations²³

No.	Name	Date and Place of Police Operation	Comments
1.	Ibrohim alias Boim	August 8, 2009, Temanggung, Solo	
2.	Noordin M. Top	September 17, 2009, Mojosongo, Solo	
3.	Bagus Budi Pranoto alias Urwah	September 17, 2009, Mojosongo, Solo	
4.	Hadi Susilo alias Adib	September 17, 2009, Mojosongo, Solo	
5.	Ario Sudarso alias Aji	September 17, 2009, Mojosongo, Solo	
6.	Abdullah bin Ismail	February 2010, Padang Tiji, Lamtamot, Aceh	The police has not informed the family of the exact date of the killing nor of the circumstances thereof, but the shooting is presumed part of the pursuit of "Aceh camp" participants conducted around February to March 2010.
7.	Dulmatin	March 9, 2010, Pamulang, Tangerang, Banten	
8.	Ridwan	March 9, 2010, Pamulang, Tangerang, Banten	
9.	Hasan Noer	March 9, 2010, Pamulang, Tangerang, Banten	
10.	unidentified	March 12, 2010, Mayjen Sutoyo Street, Cawang, Jakarta	The corpse was buried without being identified.
11.	unidentified	March 12, 2010, Mayjen Sutoyo Street, Cawang, Jakarta	The corpse was buried without being identified.
12.	Dani	October 19, 2010, Tanjung Balai, Medan, North Sumatra	Densus 88 said Dani appeared like he was about to take his weapon when he was

²¹ Komisi Nasional Hak Asasi Manusia, 'Laporan Pemantauan Dan Penyelidikan Penanganan Tindak Terorisme' (n 8) 117.

²² *ibid* 113.

²³ *ibid* 116.

			shot. There was in fact no gun fight. As no gun was found, the regional police chief said there was no link between this raid and the robbery of CIMB Niaga. ²⁴
13.	Deni, a.k.a. Deden	October 19, 2010, Tanjung Balai, Medan, North Sumatra	Similar situation as Dani.
14.	Sigit Qurdowi	May 15, 2011, Sukuharjo, Solo	TPM Solo said Sigit never left Solo for a long time, and was not officially in the list of wanted persons (DPO) suspected of terrorism when he was killed.
15.	Hendro Yunanto	May 15, 2011, Sukuharjo, Solo	TPM Solo said Hendro was a known Islamic activist with Laskar Misbah, a group similar to FPI.
16.	Nur Imam	May 15, 2011, Sukuharjo, Solo	A street vendor selling rice and light meals, he was a simple bystander.
17.	Untung Budi Santoso alias Khaidir	June 12, 2011, Soreang, Bandung	Died suddenly after Densus 88 captured him. The police doctor concluded that he died of cardiac arrest.

1.2. Torture and ill-treatment

KomnasHAM's reports did not have any particular discussion of torture and ill-treatment of terrorism suspects, and did not systematically report or analyse information thereon. However, many statements made by witnesses to the KomnasHAM team contained allegations that persons arrested during an operation had been manhandled while in police custody. In some instances, the beatings or violence were witnessed by children, and this circumstance caused KomnasHAM to

²⁴ Densus 88 later alleged that Alek, one of the eleven persons who were in the raided house but who escaped, has been injured in another operation against CIMB Niaga robbers. The robbery was believed to have been intended to raise funds for terrorism.

comment in the reports about the beating. KomnashAM underlined that exposing children to such show of violence was contrary to the rights of children protected under Indonesian law.²⁵

In Table 2, I extract the allegations from witnesses' statements which indicate torture or ill treatment. (See Table 2) In many of these cases, the witnesses were relatives who only had a limited opportunity to freely confer with the victims and/or observe their physical condition. Hence, the witnesses could not specify the extent of the injury or the exact methods used to torture the victims. In this regard, the statements of relatives pertaining to the torture of Abdul Hadim, Agung and Muhammad Jibril stand out for their detail. (Table 2, Nos. 4-6)

Table 2. Indications of Torture or Ill Treatment in Witnesses' Statements

No.	Main Target, Date and Place of Police operation	Persons arrested during operation	Witness statements indicating torture or ill-treatment	Comments
1.	Ibrohim, August 7, 2009, Temanggung, Solo	Brothers Aris and Indra Arif, and Muhamad Djahri (house owner)	According to Indra Arif, he and Aris were captured by six armed men shortly before the siege, and beaten by Densus 88 officers into saying that Noordin Top was in the house which they then proceeded to attack. Indra Arif said Aris' left hand was dysfunctional and cannot be moved after Aris was held by police.	Three days after their capture, Aris, Indra Arif and Djahri were taken to the Indonesian Police headquarters in Jakarta and presented to the President. Djahri was released following three further days of interrogation and after agreeing to sign a statement narrating the events as well as the assertion that Ibrohim carried a bomb inside the house. Aris and Indra Arif were legally charged; but Indra Arif was released before the court proceedings started.
2.	Noordin Top, September 17, 2009, Mojongoso, Solo	Puteri Munawaroh, wife of one of Top's companions	Puteri was pregnant at the time, and she was shot in the leg during the police operation.	Supriyanto, Puteri's brother-in-law, said although Puteri could be visited in detention, the police would not allow her

²⁵ Komisi Nasional Hak Asasi Manusia, 'Laporan Pemantauan Dan Penyelidikan Penanganan Tindak Terorisme' (n 8) 120.

				child to be taken therefrom.
3.	Heri Suranto, May 14, 2010, Surakarta	Heri Suranto	Siti Khotimah, the wife of Heri Suranto, said she met Heri for two hours under tight guard at the police station in Jakarta and saw that Heri's left face was bruised and his leg was injured.	Anis, the lawyer from TPM Solo who accompanied Siti to Jakarta was prevented from entering the police station because the police said another lawyer, Asluddin Hanjani supposedly from TPM Poso, has already been assigned to Heri.
4.	Abdul Hamid, May 13, 2010, Solo	Abdul Hamid	Eny Kustiah, wife of Abdul Hamid, said when Abdul was captured he was beaten in front of his pupils. When the family visited him in detention, they saw that he had wounds and some of his teeth were gone. Abdul said that the night when he was captured until the fourth day, he was badly beaten and called names. He had bruises all over his body including his genitalia, and he was shivering from the pain. His face was also covered with plastic. Abdul's feet were paralyzed. He was only allowed to go out of his cell once a week and could therefore not practice walking.	
5.	Several suspects, Klaten, Solo, January 25, 2011	Agung, 11 years old	Siti Lestari, mother of Agung, said that when the family visited Agung in	

			detention in Jakarta, they saw that his hands were bruised. They were told by police that Agung was mentally distressed, and would scream at night. He was later hospitalised for his mental condition for 22 days. Later, he was placed in an isolation room with no lights and water, and was always under strict supervision of two officers.	
6.	Ust. Abu Muhammad Jibril Abdul Rahman, Jakarta, August 25, 2009	Ust. Abu Muhammad Jibril Abdul Rahman	According to Abu Jibril, father of Muhammad Jibril, when they met on September 1, Muhammad Jibril had bruises under his eye, swollen head, wounds in hand and feet, and missing teeth, and he hadn't received any medication. Muhammad Jibril told him he was tortured for a week. Abu Jibril also said that he saw burn wounds in his wrists which may have been caused by electrocution. Soon after Muhammad Jibril's capture, he was sent to Densus 88 chief Gories Mere. He was forced to undress, and was molested by the officers.	Abu Jibril said after his son was captured he called the police on August 25, 2009 but he didn't get any answer with regard to the existence of his son. Family visits were limited. His lawyer was prevented from entering the detention center.
7.	Tanjung Balai, Medan, North	Ust. Khairal Ghazali (house owner)	Kartini Panggabean, wife of Ghazali, said	She did not know where Ghazali was

	Sumatra, October 19, 2010		Ghazali was beaten in front of his and his neighbor's children at the time of his arrest.	taken to after his arrest, as the authorities did not inform her. TPM later helped Kartini petition the Jakarta police, through the chief of KomnashAM, to see her husband.
8.	Abu Bakar Basyir, Tasikmalaya, August 8, 2010	Abu Bakar Basyir; Sartono, the driver of Basyir; Muslikha, Basyir's wife	Sartono, the driver of Basyir, and Widodo, spare driver who was also riding with them were beaten at the time of the arrest. According to Sartono, his beating caused his head to bleed. According to Muslikha, Basyir's wife who was riding with them at the time, Basyir was threatened with being shot with a gun.	Sartono was brought to Jakarta for interrogation where he was assigned to the lawyer Asluddin. Muslikha was taken to the police station where she was interrogated, her bag was searched and her phone was taken and it was never returned. She was not allowed access to her family, nor allowed to watch the TV report on her husband's arrest.

Families of victims also complained about the condition of the dead bodies of their relatives when they recovered them from the police. The condition of the corpse reveals either that it has been manhandled while alive, or that it has been desecrated or disrespected. The police have also caused delays in or prevented the burial of corpses in accordance with their religion. Supriyanto, brother of Hadi Susilo who was killed alongside Noordin Top, complained that Hadi Susilo's corpse showed that his nose was broken, his lips had blisters and there were scars from his neck to his chest.²⁶ Arif H and Ragil Susanto, who knew Susilo, said Susilo's body was not allowed by authorities to be buried until two weeks after he was killed, whereas under Islamic law the corpse should be buried immediately.²⁷ Moreover, after the body was recovered and a funeral arranged, the authorities caused a delay as they wanted the people not to bury the body in accordance with Islamic practice,

²⁶ Komisi Nasional Hak Asasi Manusia, 'Laporan Pemantauan Dan Penyelidikan Penanganan Tindak Terorisme' (n 17) 15.

²⁷ *ibid.*

but instead to reject the corpse.²⁸ They also commented that the face of the corpse was deformed, and the body from the chest down was not shown.²⁹ Only Supriyanto, Puteri Munawaroh and Muanas (TPM Jakarta) were allowed to see the whole body.³⁰

In the case of Yuki Mansyur who was killed in a Sept 19, 2010 operation, his brother Yudi Mansyur, said that when he saw Yuki's dead body, it was opened up from his chin to his belly bottom. The right part of his stomach was sewed up, his arm and head were disfigured. When his body was about to be buried, an officer intimidated people to reject his burial. And although a hole had already been dugged out, the police covered it up again so the burial wouldn't take place. As a result, Yuki was buried in another cemetery in Sukoharjo. The circumstances in which Yuki's corpse was found indicated that Densus 88 had treated the suspect, while alive and/or after he died, with extreme brutality. The prevention of burial according to Islamic practice was also unjustified as it interfered with the relatives' and friends' freedom to practice their religious belief in relation to the terrorist suspect's burial.

1.3. Other violations

Also revealing is the "orchestrated legal assistance"³¹ that Densus 88 extended to captured suspects. In many cases, Densus 88 assigned suspects a lawyer named Asluddin Hanjani to represent them during investigation and in court. Asluddin was presented to suspects as a TPM lawyer. However, TPM would later clarify that Asluddin was not a member of their group.³² Asluddin was the assigned lawyer to Aris, Heri Sutanto, Agung, and Sartono, who were captured in separate incidents. The orchestration of legal assistance by Densus 88 violated the suspects' right to obtain legal assistance from the counsel of their own choice.

A case involving aggressive treatment of children belonging to a suspected radical community received critical attention in the report. Munajib, who was shot and wounded during a counterterrorist operation in Sleman, Yogyakarta on March 20, 2007, complained that following the operation, his 11-year old son and his son's classmates at Pondok Pesantren Al-Husna were intimidated and subjected to surveillance by police.³³ Munajib said his son was beaten and was

²⁸ *ibid* 15–16.

²⁹ *ibid* 16.

³⁰ *ibid*.

³¹ Komisi Nasional Hak Asasi Manusia, 'Laporan Pemantauan Dan Penyelidikan Penanganan Tindak Terorisme' (n 8) 118.

³² 'Tim Pengacara Muslim Jakarta Bantah Temui Ghazali' *Tempo* (26 September 2010) <<http://www.tempo.co/index/2010/09/26/>> accessed 27 October 2015.

³³ Komisi Nasional Hak Asasi Manusia, 'Laporan Pemantauan Dan Penyelidikan Penanganan Tindak Terorisme' (n 8) 44.

brought to a cliff and threatened with death.³⁴ Other students of the school were still being interrogated by police during lunch breaks years later, and the school has been monitored, sometimes with a camera.³⁵ KomnasHAM noted that the intelligence activities of spying and interrogating directed at Pondok Pesantren Al-Husna school children had “created fear” and “terrorised people both physically and non-physically” and violated the right to security under Article 3 of the Indonesian Human Rights Act of 1999, which provides for the right to feel secure and to protection against coercion to do or not to do something.³⁶ Emphasising that children should be spared from violence, the commission made a specific reference to the human right of the child under article 58 (1) of the Indonesia Human Rights Act of 1999.³⁷

The commission also received statements that hint at possible disappearances, although these allegations were not further investigated. Witnesses in two separate incidents said their children were missing. Rohmad Puji Prabowo, a.k.a. Bejo, who was captured by Densus 88 in Gading Market, Solo on September 17, 2009 said he was with his five-year old son when he was forcibly taken into a car. His son was taken in another car. It is not clear whether the child was later released, or if he was mistreated or killed. Another statement involves the child Eko. Eko was a friend of the 11-year old child Agung, who was among those arrested during an operation against various terrorism suspects in Klaten, Solo on January 25, 2011. It appeared that Eko’s family believed his disappearance was related to the said counterterrorist operation. Eko’s family said Eko went missing from a hospital where he was confined after being injured at work. However, the family does not know how it happened as Eko was very ill when he disappeared.

1.4. Commission’s findings and conclusions

The commission found sufficient preliminary evidence that Densus 88 had committed a host of human rights violations, including extrajudicial killings. Accordingly, it recommended that the police investigate or examine the ranks of Densus 88 and provide legal sanctions against those who may have perpetrated or committed violations. The commission hoped that the investigation would have a deterrent effect and would help to prevent similar acts in the future.³⁸ It called for the “conduct of regular monitoring of the implementation of the functions, duties and authority of the

³⁴ *ibid.*

³⁵ *ibid.*

³⁶ *ibid* 119.

³⁷ *ibid* 120.

³⁸ *ibid* 127.

police, especially Densus 88 in the treatment of acts of terrorism”, recommending that the legislature use its power over the budget to similar effect.³⁹

The KomnasHAM report gathered important evidence of human rights violations in the course of counterterrorism. By bringing this evidence to the attention of the President, the legislative body and the national police headquarters, the report placed the question of Densus 88’s compliance with human rights squarely on the official agenda. This contributes towards the legitimisation of public criticism of Densus 88. However, the KomnasHAM report did not fundamentally challenge the premises of counterterrorism. Rather, the report aligned with the mainstream viewpoint on the legitimacy of counterterrorism and did not engage the critical viewpoint. On the kindest interpretation of Densus 88’s acts, the killings could suggest that the police has been too quick both to effect arrests and to use firearms during operations. An alternative interpretation, however, might question the assumption that operations were taken with good intentions, amounting to assassinations. KomnasHAM maintained an extremely charitable viewpoint towards Densus 88’s acts when it concluded that Densus 88 ignored its task to first establish sufficient initial evidence before attempting to make arrests.

Even if the killings committed during police operations were illegal and did not respect the already thin human rights protections built-in to the anti-terrorism law, this did not necessarily mean that the police was acting with ill intent. Their practice of shooting first before collecting the evidence for a proper warrant of arrest may have reflected over-eagerness or a lack of restraint, but some observers of Densus 88 do not question that its motive is to protect public security or safety.⁴⁰ This is reflected in the expression “shoot first policy” which was simultaneously critical of the illegality of the practice but also sympathetic towards assumed dilemmas that the police faced as they confronted terrorists.⁴¹ The critical viewpoint, however, questions this assumption. If the threat of terrorism has subsided, then the perception that it is an “extraordinary threat” as Law No. 15/2003 deemed it to be, could again be challenged and reviewed, and so too could the need for Densus 88. Hence, the decline in terrorism might actually create a need for authorities to exaggerate the threat of terrorism or otherwise manage perceptions so that they align with the

³⁹ *ibid* 126.

⁴⁰ Jim Della-Giacoma, ‘Indonesia’s Police: The Problem of Deadly Force’ (*Lowy Interpreter*, 18 June 2013) <<http://www.lowyinterpreter.org/post/2013/06/18/Indonesian-policing-dilemmas-Using-less-deadly-force.aspx>> accessed 15 February 2016; John McBeth, ‘Deep inside Indonesia’s Kill Zone’ *Asia Times* (31 October 2009) <http://www.atimes.com/atimes/Southeast_Asia/KJ31Ae01.html> accessed 15 February 2016 (suggests that killings are due to Densus 88’s lack of skill and proper equipment).

⁴¹ Tyler McBrien, ‘Jakarta’s Counterproductive Counterterrorism Approach’ <<http://thediplomat.com/2013/08/jakartas-counterproductive-counterterrorism-approach/>> accessed 4 June 2014; Human Rights First, ‘Densus 88 and the Asia Pivot’ (*Human Rights First*, 31 January 2013) <<http://www.humanrightsfirst.org/2013/01/31/densus-88-and-the-asia-pivot>> accessed 16 February 2016.

depiction of terrorism in the law. From this viewpoint, the killings may not arise from an insufficiently restrained desire to ensure public safety. Rather, they may be part of a strategy to increase public fear to justify Densus 88's continuing operations. None of this line of thinking was engaged in in the report. My interviews with KomnashAM had not delved into why this was so. It is possible that the commissioners thought that this question was beyond their remit, or they considered that their findings will be best received if they didn't criticise the basis or motivation for these counterterrorism operations. But it is also possible that the commission simply did not consider the critical position worth engaging with. However, clearly, the critical position needed to be engaged, and a vigorous investigation into whether the threat of terrorism has subsided is necessary.

All said, the KomnashAM report of 2011 was significant because it challenged Densus 88 to investigate and make those officers who committed violations of human rights law and legal procedure answerable. Henceforth, evidence of abuses having been laid as it were on the door of the police and the government, the failure to exact accountability from erring members of Densus 88 carried the implication that the unit committed serious violations with impunity.

2. The 2013 Investigation of Video Evidence Pertaining to the Tanah Runtuh Operation

In this section, I focus on how Densus 88 has come to enjoy such impunity for human rights violations. Siane Indriani, the commissioner of KomnashAM who focuses on the issue of human rights violations in the context of counterterrorism, reported that no member of Densus 88 had ever been punished or sanctioned for committing serious violations in the course of operations.⁴² Indeed, Densus 88 had continued to perpetuate violations despite these being publicly exposed.

Although the KomnashAM report of 2011 was submitted to the police, the President, and parliament, it remained largely confidential and was not publicised in the media.⁴³ However, in 2013, Densus 88 abuses became a national issue again following the leaking in 2013 of a video recording abuses committed in Tanah Runtuh, Poso.⁴⁴

The video clip was presented to the national police headquarters by Muhammadiyah chairman Din Syamsuddin, who was also the deputy chairman of the Indonesia Ulema Council (MUI),

⁴² Interview 47.

⁴³ Interview 17.

⁴⁴ Jakarta Post, 'Muslim Groups Want Densus 88 Dissolved over Rights Abuses' (1 March 2013) <<http://www.thejakartapost.com/news/2013/03/01/muslim-groups-want-densus-88-dissolved-over-rights-abuses.html>> accessed 12 December 2014; Jakarta Globe, 'Scrutiny Grows on Densus 88 Torture Video' *The Jakarta Globe* (7 March 2013) <<http://thejakartaglobe.beritasatu.com/news/scrutiny-grows-on-densus-88-torture-video/>> accessed 15 December 2014.

as well as representatives of NU, DDII and Persis.⁴⁵ The video appears to show Densus 88 uniformed men torturing a suspect, telling one suspect, “You are going to die, now *istighfar* [go ask for God’s mercy].”⁴⁶ It was not clear who took the video nor why it was made public (by posting it on the online video-sharing site Youtube) that moment. The Islamic groups who formally brought them to the attention of the police considered the video authentic and found the acts depicted therein deeply offensive, provocative and counterproductive. They argued that the video had the effect of provoking sympathy for the militants among the Muslims. Din Syamsuddin, in particular, denounced Densus 88 and called for an evaluation of the methods of the organisation.⁴⁷ He said that, if necessary, Densus 88 should be abolished or dissolved and replaced with another body that would pursue a different approach.⁴⁸

KomnasHAM picked up on the significance of the video as evidence of serious human rights violations. In 2013, the then newly-appointed commissioner Siane Indriani received the same video clip while she was conducting an investigation into allegations of extrajudicial killings and torture by Densus 88 in Kalora village in the town of Poso in Central Sulawesi. Local residents from Poso told her that this and similar videos had been circulating in Poso. Because the police initially denied the veracity of the video, KomnasHAM decided to verify the authenticity of the video clip in its 2013 investigation in Poso.⁴⁹

The commission concluded that the video depicted real events that took place in Tanah Runtuh village, Poso during a police operation in January 22, 2007.⁵⁰ The investigating team

⁴⁵ On the significance of NU and Muhammadiyah in Indonesian society and politics, see Chapter 5, subsection 1.2. DDII and Persis are considered to have non-mainstream Islamist views. MUI is a semi-official body on Islamic doctrine representing various strands of Islam in the country.

⁴⁶ Jakarta Post (n 45); Jakarta Globe (n 45) (describes the video as a 14-minute video); McBrien (n 41); Kate Lamb, ‘Indonesia’s Anti-Terror Squad Slammed for Alleged Rights Abuses’ (*Voice of America*, 4 March 2013) <http://www.voanews.com/content/indonesia_anti-terror_squad_slammed_for_alleged_rights_abuses/1614729.html> accessed 15 December 2014 (also voices the opinion that campaigning around the video was directed by radicals to undermine the government’s counterterrorism program).

⁴⁷ Jakarta Post (n 45).

⁴⁸ The Jakarta Post quoted him as saying, “Densus 88 should be evaluated, or dissolved if necessary. It could be replaced by another institution that promotes a different approach to combat terrorism together [with us] because terrorism is our common enemy.” *ibid*.

⁴⁹ Komisi Nasional Hak Asasi Manusia, ‘Laporan Tim Pemantauan Dugaan Penyiksaan Dalam Penanganan Peristiwa Tanah Runtu Dan Penyiksaan Terhadap Korban Salah Tangkap Tindak Pidana Terorisme Di Kalora, Poso’ (KomnasHAM 2013).

⁵⁰ Dave McRae considers the police operation on January 22, 2007 in Tanah Runtuh as particularly important in the context of the communal conflict in Poso, constituting a kind of turning point in that conflict. He writes: “Not until January 2007 did the state finally act conclusively to terminate this violence [continuing attacks on Christians following the Malino peace settlement of December 2001], when two police raids effectively dismantled the remaining jihadist networks in Poso.” Dave McRae, *A Few Poorly Organized Men: Interreligious Violence in Poso, Indonesia* (Brill 2013) 158. See also, International Crisis Group, ‘Jihadism in Indonesia: Poso on the Edge’ (International Crisis Group 2007) Asia Report N°127; International Crisis Group, ‘Indonesia: Tackling Radicalism in Poso’ (International Crisis Group 2008) Asia Briefing No. 75 (which argues that the

identified some of the persons who appeared in the video and took their testimonies and those of other witnesses in order to confirm the events shown and provide further context. It also produced a re-enactment of the incident at the exact location in the village where the event took place. Three persons, Wiwin and Tugiran (both interviewed in prison under the strict supervision of Densus 88) and Rasiman (who was already released from prison at the time of the interview) said the video depicted them, as well as Fachruddin (already dead) and Ridwan (imprisoned elsewhere), after they surrendered to the police following several hours of fire-fighting.⁵¹ Wiwin, whom the team interviewed in prison, said he was the person shown in the video walking from a nearby house with his arms up in the act of surrendering to police. As the video shows, he was directed by the police to undress to show that he was no longer armed, but was nevertheless still shot at by the police, wounding him in the chest. The rest of the video shows the five men with their hands tied behind their backs, huddled together lying on the ground, while police interrogated and verbally and physically abused them.

Rasiman, who was shown in the video among those huddled on the ground and with a wound on his right leg, explained that he was also shot by police while he was surrendering. The three further claimed that after they were collected in a backyard as shown on the video, they were brought together to the Poso police station and then to the provincial headquarters in Palu, where they continued to be interrogated and beaten. Wiwin said that despite his gunshot to the chest, he received medical attention only after his interrogation the following day. Fachruddin, who had no gunshot wound at the time of his arrest, died as a result of the beatings he received during his interrogation at the police station. Rasiman said that his corpse was in very bad shape.⁵² The investigation thus added to the commission's already substantial trove of evidence that Densus 88 had perpetrated torture and unjustified killings in the course of its counterterrorism operations.

If it has not been clear that Densus 88 enjoyed impunity for violations, after the investigation of the video in 2013, this conclusion can no longer be avoided. With KomnasHAM's confirmation that the video was authentic, it became the single most persuasive piece of evidence

operation concluded almost a year's unsuccessful efforts at a 'soft approach'). The Tanah Runtu operation which resulted in the killing and arrest of non-local jihadists and the locals they have trained is often credited with decisively ending post-Malino Declaration, jihadi-instigated attacks in Poso. The KomnasHAM findings shed new light on the operation by detailing the use of excessive force by police based on the video and testimonies of those arrested. The testimonies relating to the immediately preceding events which form the context of the operation also allege that police reneged on promises made in the course of negotiations with Ust. Adnan Arsal not to torture those who surrendered, thereby discouraging surrenders consistent with a 'soft approach', and provoking resistance to arrests.

⁵¹ Komisi Nasional Hak Asasi Manusia, 'Laporan Tim Pemantauan Dugaan Penyiksaan Dalam Penanganan Peristiwa Tanah Runtu Dan Penyiksaan Terhadap Korban Salah Tangkap Tindak Pidana Terorisme Di Kalora, Poso' (n 50) 8 (Wiwin), 9 (Tugiran), 10 (Rasiman).

⁵² *ibid* 11.

debunking Densus 88's official position that its conduct had been necessitated by self-defense. Furthermore, given that the video clearly showed the faces of at least some of the uniformed men, it should have been possible to identify, investigate and discipline at least some of the officers engaged in abusive conduct during the operation. However, the police did not take any steps towards this end.

How did Densus 88 manage to avoid accountability despite the mobilisation around the video by Islamic groups and KomnashAM? At first, Din Syamsuddin's call to evaluate, and if needed, abolish Densus 88 created a stir in the Indonesian legislature. After viewing the video, several members of the House of Representatives acknowledged that they were tired of repeated reports of abuses committed by Densus 88 and supported the move to abolish it.⁵³ However, the government and the police maintained that Densus 88 was still needed because terrorism still existed in different parts of the country, and in Poso in particular.⁵⁴ From the outset of the mobilisation by the Islamic groups, the police said the abolition of Densus 88 was not an option.⁵⁵ Ansyaad Mbai, then chief of the national counterterrorism coordinating body BNPT, said the disbandment of Densus 88 would be a mistake, a "victory to the terrorists", adding that "it is the terrorists who should be disbanded" not Densus 88.⁵⁶ Instructively, an us-or-them logic was supplemented with references to the fact that the Indonesian approach to counterterrorism embodied by Densus 88 already incorporated human rights and rule of law values. Ansyaad emphasised that Indonesia's approach to counterterrorism stood up well in comparison to those of other nations, stating:

Compare it with Yemen, which uses missiles, or Pakistan, which uses airplanes to eradicate terrorism. In Indonesia, [terrorists] are being prosecuted by police officers. The world has praised our efforts.⁵⁷

Hence, the idea of abolishing Densus 88 was dismissed as too radical, hasty and foolish.

The debate within KomnashAM was even more instructive. Despite its findings that serious violations were committed by Densus 88, KomnashAM was reluctant to recommend robust reform of the unit and its operations. Siane Indriani revealed that privately she concluded that Densus 88's approach in Poso was counterproductive, and needed to be replaced.⁵⁸ Densus 88 had engaged in wrongful arrests and torture so often that it had actually generated local hatred towards the police. The human rights organisation KontraS has already made a similar observation in Poso. According to

⁵³ Jakarta Globe (n 45).

⁵⁴ *ibid.*

⁵⁵ Jakarta Post (n 45).

⁵⁶ Jakarta Globe (n 45).

⁵⁷ *ibid.*

⁵⁸ Interview 47.

Syamsul Alam, police abuses towards ordinary Muslim folks in Poso were “re-radicalising” them, rekindling their feelings of hatred towards Christians generated during the inter-communal conflict of years past.⁵⁹ A KontraS fact-finding report into the causes of renewed violence in Poso concluded that most of the so-called radicals in Poso were ex-combatants in the inter-communal conflict who had been victims of atrocities. The recent “terrorist” attacks in Poso had not been directed at civilians, but targeted police.⁶⁰ Recent counterterrorist operations by Densus 88 had been taken in retaliation for attacks on police.⁶¹ (This observation echoed that made by Sydney Jones.⁶²) Instead of fostering security, these operations have only heightened fear in the community.⁶³ Given the complexity of the situation in Poso, the KontraS report concluded that, “Poso should not only be seen as a case of terrorism.”⁶⁴

Similarly, in Siane Indriani’s estimation, describing what takes place in Poso as terrorism was not helpful. Rather than terrorism, it is the dynamic between the police (who use abusive methods for repression), on the one hand, and local fighters (who act out of vengeance and/or hatred directed at the police), on the other hand, that defines the lingering conflict in Poso. The commissioner’s private views are inching towards the critical position in the sense that she was questioning whether the terrorism/counterterrorism discourse (viewing local fighters as simply terrorists and the police as simply engaged in suppressing terrorism instead of fomenting conflict) was not itself part of the problem.

Within the commission, she pushed for the recommendation to replace the police with the military as the lead agency to implement an alternative “persuasive approach” towards the remaining local fighters. This was a surprising position to take given the record of human rights abuse of the Indonesian military. However, Siane explained that the military might have more credibility in pursuing a dialogical approach, as opposed to the police’s “repressive approach”.⁶⁵ As it stands now, because Poso local fighters are considered terrorists, even local fighters who surrender to the military are turned over to Densus 88 (as the lead counterterrorism force) and are legally processed and imprisoned under the strict supervision of Densus 88.⁶⁶ In her estimation, the risk of torture and killings at the hands of Densus 88 acts to prevent local fighters from surrendering,

⁵⁹ Interview 4.

⁶⁰ Komisi untuk Orang Hilang dan Korban Tindak Kekerasan, ‘Laporan Pemantauan KontraS: Temuan Lapangan Dari Poso-Sulawesi Tengah’ (KontraS 2012) (unpaginated).

⁶¹ *ibid.*

⁶² Interview 22.

⁶³ Komisi untuk Orang Hilang dan Korban Tindak Kekerasan (n 61) (unpaginated).

⁶⁴ *ibid.*

⁶⁵ *ibid.*

⁶⁶ *ibid.*

thus perpetuating the conflict. If instead a more dialogical approach is taken, then fighters can be encouraged to surrender without fear of being tortured.⁶⁷

However, the majority of the commissioners considered that recommending the military to have the lead role in Poso was a step backward not forward. A commissioner who revealed that he was in the majority on this score said the recommendation tended to show “lack of sufficient appreciation for the principle of civilian supremacy”.⁶⁸ The perception was that the police embodied this legal principle and, for that reason, was preferable to the military. In the end, KomnasHAM did not recommend the abolition of Densus 88, instead proposing that the operations of Densus 88 should be more closely monitored to ensure stricter adherence to its rules of engagement and to human rights.⁶⁹ The Indonesian parliament endorsed this recommendation.⁷⁰ It did not, however, specify who would undertake such monitoring.

Thus, while pressure on the police to exhibit fidelity to human rights increased following the investigation of the leaked video evidence of abuses in Tanah Runtuh, it did not lead to anything more than minimal reforms. These reforms included reducing the number of Densus 88 officers, and placing all Densus 88 under direction of the national headquarters in Jakarta so that Densus 88 officers were no longer permanently assigned to provincial headquarters.⁷¹ The downsizing and centralisation of Densus 88 appear intended to ensure closer monitoring of Densus 88 operations by the chief of police and the President.

The reforms undertaken suggest that the abuses were caused by lower ranked officers acting on their own. This is a possibly unwarranted assumption given that Densus 88 is an elite organisation with strict vetting requirements for members, including lack of previous a record of human rights violations.⁷² According to Dr. Muradi, assignment to Densus 88 is a much sought after position; the senior leadership selects only the brightest and most capable police officers usually from the Mobile Brigade.⁷³ Furthermore, according to Hanibal Wijayanta, their identities are officially kept secret.⁷⁴ This suggests that Densus 88 is already a tightly supervised professional organisation. Moreover, in the case of Muhammad Jibril, the witness A bu Jibril alleged that the chief of Densus 88 Gories Mere was personally involved in Muhammad Jibril’s torture.⁷⁵ In the case of the

⁶⁷ *ibid.*

⁶⁸ Interview 50.

⁶⁹ Interview 47.

⁷⁰ Interview 18.

⁷¹ Interviews 10 and 48.

⁷² Interview 10.

⁷³ Interview 10.

⁷⁴ Interview 48.

⁷⁵ Komisi Nasional Hak Asasi Manusia, ‘Laporan Pemantauan Dan Penyelidikan Penanganan Tindak Terorisme’ (n 8) 54–55.

Tanah Runtuh operation which sparked the debate in parliament, KontraS has emphasised that it was a “centralised special operation”, with the directive for the operation emanating from the national police chief.⁷⁶ Officials from the national headquarters, namely, the chief and deputy chief of operations, were deployed to Poso to manage the operation.⁷⁷ The lack of inquiry has prevented ascertaining the extent of participation of higher ranked officers in violations. Furthermore, killings and torture continue to be reported after these reforms. Thus, it does not appear that closer supervision by itself sufficed to ensure that violations will be significantly stemmed.

3. The Tulungagung Case

In the preceding sections, I have discussed evidence of serious violations by Densus 88 that was collected by KomnasHAM and I have argued that Densus 88 enjoys impunity. I have also argued that an accommodationist position towards the counterterrorism discourse has underpinned KomnasHAM’s understanding of Densus 88’s violations until 2013 (as reflected in its reports of 2010, 2011 and 2013). I suggested that the accommodationist framing has narrowed the inquiry into these violations. Thus, while the inquiry concluded helpfully that serious violations were committed, it neglected to explain what these violations signify and what purpose they serve. Extrajudicial killings were thus counted as the unfortunate result of the “excessive use of force”, an illegal “shoot first policy”. However, the inquiry did not explore whether the killings might have been motivated by something other than their declared legitimate purpose, viz., the suppression of terrorism. This question would have been a bridge too far, an inquiry too radical to be engaged in.

Accordingly, the response to these violations was equally restrained, urging closer monitoring of Densus 88’s operations but not its abolition, nor an inquiry into whether terrorists continued to pose an extraordinary threat. In this last section, I explore the implications of the accommodationist position by reflecting on a counterterrorism operation in the town of Tulungagung. In many respects, there is nothing special about this town, unlike Poso or Papua for example, and the operation that took place there had the same significance as operations in other parts of the country. Yet it is precisely because of the ordinariness of the Tulungagung case that the reflection in this last section can be appreciated as having broader implications for Indonesian counterterrorism.

⁷⁶ Temuan KontraS, ‘Bentuk-Bentuk Pelanggaran Yang Dilakukan Oleh Kepolisian Dalam Operasi 22.11.22 Di Poso’ 6.

⁷⁷ *ibid* 7.

3.1. The ambush of terrorism suspects Rizal and Dayah

The Tulungagung case involves a Densus 88 operation in July 22, 2013 in the rural town of Tulungagung, East Java. The operation took place in front of the bus terminal, which resulted in the killing of two persons Rizal (also called Eko) and Dayah (also called Dayat or Hidayah) and the arrest of two others, Sapari and Mugi Hartanto, local leaders of Muhammadiyah. In many respects, the Tulungagung case was not novel. In fact, the killings therein exhibit the same pattern as those investigated by KomnasHAM in its 2010 and 2011 reports. At the time of the killings, there were no warrants of arrest against Rizal and Dayah, but the police later justified the killings by pointing to intelligence reports that Rizal and Dayah were suspected of involvement in terrorist networks.⁷⁸ Police also alleged that Densus 88 officers were shot at, and that Rizal carried explosive material in his bag.⁷⁹ Witnesses to the operation, however, said there was no exchange of fire, and that it was only Densus 88 that fired at the victims.⁸⁰ Siane Indriani, who led the KomnasHAM investigation into this case, ascertained from interviews with villagers that Rizal and Dayah had just alighted from Sapari's and Mugi's motorbikes and were simply standing on the side of the road when about ten men in plainclothes emerged from two cars and sprayed gunfire at them.⁸¹ According to Slamet Hariyanto, Rizal's bag supposedly containing mortar and the lone revolver supposedly recovered from Dayah were never presented, casting doubt on their existence.⁸²

Even if one assumes that the intelligence reports against Rizal and Dayah did exist, giving Densus 88 cause to suspect that Rizal and Dayah had committed or would commit a terrorist act, this did not give Densus 88 sufficient legal justification to kill them right away. As KomnasHAM emphasised in its 2011 report, Densus 88's legal obligation begins prior to the state of actual operation with the investigation of suspects, during which stage human rights law as well as the criminal procedure code require that a warrant of arrest must be secured. The conclusion is especially pertinent, as Siane Indriani argued, because according to villagers, Densus 88 appeared to have been conducting surveillance in the villages of Penjor and Gambiran in Tulungagung for at least three months prior to the operation. As such, the unit would have had many opportunities to obtain warrants and to arrest the suspects without killing them.⁸³

⁷⁸ Gilang Akbar Prambadi, 'Polri Jelaskan Peran Dua Teroris Tulungagung' *Republika.co.id* (Jakarta, 1 August 2013).

⁷⁹ *ibid.*

⁸⁰ 'KomnasHAM: Penembakan Terduga Teroris Tulungagung Langgar HAM' *KOMPAS.com* (4 August 2013).

⁸¹ *ibid.*

⁸² Interview 49.

⁸³ 'KomnasHAM: Penembakan Terduga Teroris Tulungagung Langgar HAM' (n 81).

Why does this kind of killings strategy persist, despite having been described as illegal? Why is Densus 88 still able to present these killings as legitimate despite their illegality? As I see it, the claim of legitimacy derives from the declared purpose of these killings, namely, the suppression of terrorism. The notion of human rights-compliant counterterrorism has not been able to change the fact that counterterrorism draws on sources of legitimacy that enable it to resist attempts to modify it by reference to the requirements of human rights. In fact, human rights advocates' accommodation of the terrorism/counterterrorism discourse has only helped to solidify rather than temper counterterrorism as a legitimate imperative.

In the Tulungagung case, the nature of the operation as an ambush or assassination was hardly concealed. The props to suggest that this was a shoot-out were scant - as against about ten armed Densus 88 officers, the supposed attackers had one lone pistol - and Densus 88 did not even bother to secure warrants of arrest before the operations were executed.⁸⁴ But Densus 88 did argue that Rizal and Dayah had been suspected of involvement in terrorism for a long time. It was alleged that Dayat was a fundraiser for the Poso group led by Santoso, and that the funds he collected were used to buy guns used for the military training of this group.⁸⁵ He is supposed to have been under surveillance since March 2012.⁸⁶ As for Rizal, it was alleged that he had been involved in a number of church bombings in Solo, Sukuharjo and Klaten in Central Java, and that he has been in hiding since 2011.⁸⁷ To be sure, involvement in terrorism, or more precisely, suspicion of involvement in terrorism, did not in itself constitute a valid legal justification for the killings. But, by invoking the spectre of terrorism, Densus 88 may not have been trying to construct a *legal* justification at all. Rather, the spectre of terrorism was used to justify the ambush beyond legality, or despite its illegality. The message seems to be: "So what if this was an ambush? They were terrorists."

Given that a mortar or projectile explosive was supposedly obtained from the suspects, the police could also have argued that a warrant of arrest need not be obtained because a terrorist act was about to be committed in their presence. But in fact they did not make this specific allegation. The explosive was only used to mark Rizal and Dayah as terrorists, as if that bare assertion was enough to justify their assassination. Within this, as it were, parallel structure of public justification, no allegation of specific acts of terrorism, past or future, need to be proven as against Rizal and Dayah.

In my view, therefore, putting a stop to these killings will require directly confronting their source of legitimacy in Densus 88's ability to narrate terrorism. Demonstrating that these killings are

⁸⁴ Interview 49.

⁸⁵ Gilang Akbar Prambadi (n 79).

⁸⁶ *ibid.*

⁸⁷ *ibid.*

contrary to law has achieved limited results. It might be a more effective strategy for human rights advocates to contest the claim that these killings were in fact taken to suppress terrorism.

3.2. The arrest and torture of Sapari and Mugi

The new element in the Tulungagung case pertains to the fact that Sapari and Mugi Hartanto, the two persons who were accompanying Rizal and Dayah at the time of the operation, were persons of good standing and reputation in their local community.⁸⁸ Their arrest and torture, following the shooting of Rizal and Dayat, prompted a successful mobilisation that highlighted their innocence, and accordingly obtained their release from the custody of Densus 88.⁸⁹ It also revealed Densus 88's reliance on questionable methods of intelligence gathering that undermined its credibility to pronounce on the facts, not only in this case but in other cases of alleged terrorism.

Following the fatal shooting of Rizal and Dayah, Sapari and Mugi were captured and brought to a Mobile Brigade facility used by Densus 88, held for six days and subjected to harsh interrogation that constituted torture⁹⁰, before being released for lack of evidence linking them to any offense. Sapari and Mugi were local leaders of Muhammadiyah, the second largest Muslim civil society organisation in the country. Sapari, furthermore, was a village chief.⁹¹ Slamet Hariyanto explained that Rizal, a preacher, first came to the village as a companion of a local resident who had recently returned to the village after spending an extended period of time elsewhere. Rizal then decided to stay and practice preaching in the village. Sapari, being the village chief, hosted Rizal, allowing him to live in his house. Dayah had been Rizal's guest, visiting him in the village for two nights. When Dayah was about to leave the village to return to his home, Sapari volunteered to take him to the bus terminal on his motorcycle. Sapari also asked his friend Mugi to drive a second motorcycle so that Rizal could come as well. This was how the four ended up together in the bus terminal that was the scene of the fatal shooting.⁹²

Slamet Hariyanto further explained that he was engaged as a lawyer and chief of Muhammadiyah's legal bureau in the nearby metropolitan city of Surabaya by Muhammadiyah's national chairperson Din Syamasuddin to provide legal assistance to Sapari and Mugi on the night of

⁸⁸ Interview 49.

⁸⁹ *ibid.*

⁹⁰ Sapari and Mugi were unharmed during the operation but at the time they were released, their bodies showed cigarette burn marks in different parts as well as wounds on their wrists and neck.

⁹¹ Sapari was supposed to have been interrogated as to why he did not report Rizal's presence in his village to the village chief, as under Indonesian practice, the presence of an outsider in the village for more than 24 hours has to be so reported. To this question, Sapari answered: "But I am the village chief!"

⁹² Interview 49.

July 22 when the operation took place.⁹³ However, he was prevented from seeing the two while in Densus 88 custody.⁹⁴ He demanded the release of Sapari and Mugi in accordance with the provision of article 28 of Law No. 15/2003 (Anti-Terrorism Law) which provides a maximum period of 7 days of arrest for the purpose of investigating suspects.⁹⁵ Six days after the operation, Sapari and Mugi were released as no evidence was produced against them. However, Densus 88 refused to issue them the *Surat Perintah Panghatian Pendidikan*, or the official declaration of the closure of investigation that would terminate their status as suspects in a criminal case.⁹⁶ After their release, Muhammadiyah then led a religious rally (*pengajian*) to demand an apology from the police for the wrongful arrests. The local chief of police, as an invited guest therein, spoke in the said rally, giving apologies and saying the arrests of Sapari and Mugi were a mistake.⁹⁷

In his interview, Slamet emphasised that Densus 88 did not coordinate with the local police in conducting the operation (they were not obliged to do so). Moreover, the unit did not make use of local sources of information, including local police intelligence, in investigating Sapari and Mugi or Rizal, who had resided in the village for a substantial period of time.⁹⁸ He opined that the torture of Sapari and Mugi could have been avoided if Densus 88 had sought intelligence from local police, who could have attested that Sapari and Mugi were persons in good standing.⁹⁹ The same could be said of Rizal. Had local knowledge been sought about Rizal, villagers and the local police would also have attested that Rizal was a person of good reputation and did not give cause for suspicion of fomenting violence in his preaching activities.¹⁰⁰

While there is no data on the number of cases of wrongful arrest by Densus 88, some respondents have opined that the Tulungagung case is not exceptional.¹⁰¹ Siane Indriani has also noted that allegations of torture figure in almost all of the scores of reported cases of human rights violations by Densus 88 that she has investigated as a human rights commissioner. If torture is as rampant as alleged, then this should lead to serious questioning about how much of the official narrative about terrorist networks and activities has been constructed through torture. How much of the official narrative is essentially trustworthy? How long can Densus 88 sustain its credibility?

⁹³ *ibid.*

⁹⁴ *ibid.*

⁹⁵ *ibid.*

⁹⁶ It appears that actual harm has resulted from their continuing official status as suspects in a terrorism case. Slamet Hariyanto reported that Mugi's son was terminated from his employment because of suspicion that his family were involved in terrorism. Interview 49.

⁹⁷ Interview 49. A video documentation of the rally provided to me by Slamet Hariyanto is on file.

⁹⁸ *ibid.*

⁹⁹ *ibid.*

¹⁰⁰ *ibid.*

¹⁰¹ Heru Susetyo also said as a lawyer, he has handled and knows of several cases of wrongful arrests by Densus 88. Interview 11.

4. Conclusion

This chapter has provided a critique of contemporary Indonesian counterterrorism, noted for its legal framework, by showing that in practice it leads to serious human rights violations. The chapter has demonstrated that a legal counterterrorism framework incorporating human rights can be adopted without this resulting in significant restraints in reality. Indonesia's human rights-friendly legal framework has not had a transformative effect. The country's main counterterrorism actor can show a record of effectiveness in making arrests and obtaining convictions in accordance with the legal framework. But, it also casts, as it were, a shadow record of killings, the seriousness of which authorities have refused to acknowledge, thus perpetuating the same.

The attachment of a human rights language to counterterrorism in Indonesia is better thought of as having an inoculating effect rather than a transformative effect. The idea that human rights and the rule of law are already correctly embodied in the country's approach to counterterrorism has acted to shield counterterrorism from more serious scrutiny. There is no transformative effect because attaching a human rights language does not result in challenging the legitimacy of counterterrorism operations. On the contrary, by taking for granted that counterterrorism operations are always motivated by public security, human rights advocates are cementing this claim of legitimacy and aiding in perpetuation of abuse.

This chapter therefore shows that the discourse of human rights-compliant counterterrorism has had limited impact, and in fact, retrogressive effect, on the respect for human rights. It points to the necessity of developing ways of disentangling the language of human rights from the counterterrorism agenda.

Chapter 8

Conclusion: Towards a More Effective Human Rights Advocacy in the Face of Counterterrorism

This thesis has demonstrated how the intersection of counterterrorism and human rights discourses has had a harmful effect on the promotion of human rights in two countries, the Philippines and Indonesia. International law scholars and international human rights advocates have so far assumed that the best way to advance human rights in the age of counterterrorism is to make sure that counterterrorism practices do not undermine human rights. The approach has led to the development of the discourse of human rights-compliant counterterrorism.

This thesis has sought to advance understanding of the relationship between counterterrorism and human rights by developing and applying a novel theoretical framework that draws upon critical approaches to both terrorism and international law. This framework emphasises the importance of paying close attention to the effects of new legal developments on counterterrorism on the ground. The case studies presented in this thesis demonstrate that contrary to the expectation in the mainstream international law scholarship, the synthesis of human rights with counterterrorism has not had a transformative effect on counterterrorism practices. Rather, it has had a detrimental effect on human rights. The implication of this finding is that the ideal of human rights-compliant counterterrorism should be either discarded or radically transformed itself, if it is to serve as a vehicle for the promotion and protection of human rights.

1. The Problematic Nature of Counterterrorism Discourses in the Philippines and Indonesia

Critical Terrorism Studies (CTS) scholars criticise the label “terrorism”, as used by states and orthodox terrorism studies scholars alike, as perpetuating dichotomous thinking. This means that terrorism is seen as emanating from the irrationality of sub-state actors who pose the original threat to human rights, while state counterterrorism is viewed as a rational phenomenon that merely reacts to terrorist threats to the enjoyment of human rights. Chapters 2 and 5 demonstrated the false dichotomy between terrorism and counterterrorism contained in the local counterterrorism discourses in the Philippines and Indonesia. In both cases, the discourse of human rights-compliant counterterrorism

facilitates human rights violations by helping create the illusion that counterterrorism does not fundamentally threaten human rights.

While there are differences between the counterterrorism discourses in the two countries, for example, in terms of the kinds of actors deemed “terrorists” by the state and the histories of repression involved, the counterterrorism discourses in these two countries are both deeply problematic and need to be interrogated. Critical questions include the extent to which the counterterrorism discourse has exacerbated the conflict situations where it had been applied, and why those conflict situations would not be better understood and addressed using other lenses. However, critically examining counterterrorism is not central to the discourse of human rights-compliant counterterrorism, which prioritises the goal of how to improve the practices of counterterrorism.

At the international level, the US and its supporters argued that robust counterterrorism measures, of the type employed to wage the “War on Terror”, were necessitated by the “newness” of the terrorist threat.¹ In both the Philippines and Indonesia, however, it is striking that the new “terrorists” were longstanding adversaries of the government, identifiable more by their familiarity rather than their “newness”. In the Philippines, the “terrorists” were the old “insurgents” – MILF and CPP-NPA. Indeed, scholars and advocates could not agree on whether the Abu Sayyaf, the *raison d’être* for the “War on Terror” in Mindanao, should be classified as terrorists or simply bandits. With respect to the MILF and the CPP-NPA, the label “terrorist” does not add any clarity to the nature of these organisations or the conflicts that they wage against the government. Rather, by adding the appellation “terrorist” to these movements, the Philippine government (and the governments of the US and other Western countries that designated the CPP-NPA a “terrorist organisation” under their laws) created the false impression that they were threatening in a new way. Yet these movements do not employ the methods that are typical of new terrorist organisations like Al Qaeda. Neither the MILF nor CPP-NPA were alleged to be engaged in or considering engaging in mass casualty attacks against civilians as a political tactic. Nor were they said to be seeking to amass or use weapons of mass destruction. Nevertheless, by conveying the false impression that it was dealing with “terrorist threats”, the Philippine government was able to escalate or renew its counterinsurgency war against the MILF and CPP-NPA. The United States and the Council

¹ Obiara Chinedu Okafor, ‘Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective’ (2005) 43 Osgoode Hall Law Journal 171-191.

of the European Union were instrumental in facilitating this development by providing material and normative or discursive support to the Philippine government. The result has been devastating for human rights. According to the local human rights organisation Karapatan, the one-sided war on left-wing activists had ballooned the number of extrajudicial killings to 1,206 and enforced disappearances to 206 under the Arroyo government alone.² Meanwhile, the escalation of military operations against the MILF during the Arroyo administration displaced civilians in the hundreds of thousands. In the Armed Forces of the Philippines' offensive against the MILF stronghold in Buliok Complex alone, 411,004 persons were displaced.³

In Indonesia, the "terrorists" were a ghost from the nation's past, even though they were portrayed as linked to more contemporary groups like Al Qaeda. They were supposedly extremist Islamists who sought to revive the Islamic rebellion of the 1950s and turn Indonesia into an Islamic state. While the attacks on civilians carried out in the name of this Islamist revival were indeed shocking, to understand this phenomenon as signifying the rise of a "terrorist threat" to the state oversimplifies and distorts political reality. Insofar as they were the handiwork of extremist Islamists, spectacular attacks on civilians, and particularly on foreigners such as in Bali in 2002, are better appreciated as signs of the failure and desperation of Islamist forces rather than of their strength. Moreover, there is credible evidence that intelligence officials of the Suharto regime aided in organising and mobilising marginalised Islamist communities to conjure a threat of Islamist rebellion.⁴ Furthermore, as Sidel notes, the historical links between intelligence officials and these networks continue after Suharto's fall.⁵ This is not to claim that terrorism is not real, but it does challenge the dichotomous thinking that creates a sharp division between terrorism and counterterrorism in Indonesia. If human rights violations arising from conflict are to be properly addressed, it is essential to unravel the labels "terrorism" and "counterterrorism" in Indonesia, as it is in the Philippines.

² Karapatan, '2010 Year-End Report on the Human Rights Situation in the Philippines' (Karapatan 2011) 16–17 <<https://www.scribd.com/doc/44443589/2010-Year-End-Report-on-the-Human-Rights-Situation-in-the-Philippines>> accessed 8 April 2016.

³ Jose Jowel Canuday, *Bakwit: The Power of the Displaced* (Ateneo de Manila University Press and Flipside Publishing 2009) 23.

⁴ For further details, see Chapter 5.

⁵ John Thayer Sidel, *Riots, Pogroms, Jihad: Religious Violence in Indonesia* (Cornell University Press 2006) 209.

2. Local Human Rights Advocates and the Improvement of Counterterrorism

At the international level, international human rights advocates managed to convince world leaders to pursue human rights-compliant counterterrorism, creating the impression that the conflict between the pursuit of counterterrorism and human rights promotion had been resolved. In the Philippines and Indonesia, by contrast, local human rights advocates have exposed the conflict between counterterrorism and human rights at the local level. In so doing, they have not necessarily sought to advance human rights by improving counterterrorism. Indeed, my examination of local human rights advocates' initiatives and perspectives on counterterrorism reveals a diversity of potential strategies to advance human rights in the face of counterterrorism. These strategies are not easily assimilated under the discourse of human rights-compliant counterterrorism. Hence, the discourse of human rights-compliant counterterrorism represents just one of several strategies for advancing human rights in the face of aggressive counterterrorism. Yet as this thesis illustrates, the dominance of the discourse of human rights-compliant counterterrorism threatens to eclipse alternative local strategies to advance and protect human rights in the face of robust counterterrorism operations.

In Chapter 3, I showed that Filipino advocates launched vigorous human rights campaigns around the "War on Terror" to expose the deleterious impact of counterterrorism measures on human rights. In doing so, they directly challenged the application of the label "terrorist" to Philippine actors, and questioned the government's use of counterterrorism discourse with respect to armed conflicts in the country. The improvement of counterterrorism was irrelevant to their concerns, in clear contrast with international actors, whose promotion of human rights-compliant counterterrorism conformed to the global counterterrorism agenda. In the campaign to resist US troop presence in Basilan, advocates argued that the Abu Sayyaf was not a "terrorist threat" and that the government's use of "counterterrorism" discourse was just a pretext for escalating war in Mindanao against the MILF and the CPP-NPA, and part of a calculated strategy to justify abandonment of peace negotiations with these groups. These human rights advocates also exposed violations of strict rules of engagement agreed upon by the Philippines and the US that supposedly ensured human rights compliance by US troops. At the same time, they also maintained that even if the rules of engagement had not been violated, that would not have made military operations acceptable.

This thesis revealed differences between local and international strategies with regards to the bombings in Mindanao, the subject of another important human rights campaign. Local advocates, acting through the Mindanao Truth Commission, contested the assumption that the bombings proved Mindanao was gripped by terrorism. They highlighted the government's rush to implicate the MILF without sufficient evidence as problematic and advocated the need to further scrutinise evidence suggesting the involvement of state agents in the bombings. In contrast, a report by Human Rights Watch (HRW) on the issue of bombings, while pressing the government to pursue prosecutions of "terrorists" who attacked civilians, did not call for greater scrutiny of state involvement in "terrorism" in Mindanao. Indeed, HRW dismissed the allegations of state involvement as conspiratorial thinking, thus undermining the position of local advocates.

In the campaign to remove Jose Maria Sison from the European Union (EU)'s terrorist blacklist, Sison's lawyers and Filipino campaigners exposed the fact that EU governments did not have evidence to show that Sison committed acts of terrorism, nor indeed any crime. Sison succeeded in convincing the European Court to delist him because his listing failed to respect the minimal human rights protections within the EU listing process. The EU Court's concern was that those human rights standards were credibly observed. The EU Council tried to present the EU terrorist designations of Sison and the NPA as merely implementation of legal obligations under UNSC Resolution 1373. However, the campaigners responded that the struggle waged by the CPP-NPA was legitimate and should be resolved peacefully through negotiations rather than through the application of counterterrorism measures that actually imperilled the peace negotiations. The strategies of Filipino advocates in these three key campaigns showed that there are various ways in which human rights advocates can advance human rights protection in the face of counterterrorism.

In Indonesia, it was the government that undertook steps towards synthesising human rights and counterterrorism. Indonesian counterterrorism policy is often praised as exhibiting progressive features, among them the existence of a legal framework contained in Law No. 15/2003 that explicitly respects human rights and does not concentrate power in the military.⁶ Indonesia could have adopted a dramatically more restrictive law, like the

⁶ Zachary Abuza, 'Indonesian Counter-Terrorism: The Great Leap Forward' (2010) (*The Jamestown Foundation*, 14 January 2010) <http://www.jamestown.org/single/?no_cache=1&tx_ttnews%5Btt_news%5D=35910> accessed 4 April 2016 (unpaginated); Leonard Sebastian, 'The Indonesian Dilemma: How to Participate in the War on Terror Without Becoming a National Security State' in Kumar Ramakrishna and See Seng Tan (eds), *After Bali: The Threat of Terrorism in Southeast Asia* (World Scientific 2003) 364.

Internal Security Act in Malaysia and Singapore, but because local human rights advocates vigorously participated in the deliberations over Indonesia's anti-terrorism law, it did not do so. However, in Chapter 4, I challenged the view that the Indonesian legal framework reflected local advocates' aims. Local advocates did not originally aim to improve counterterrorism in Indonesia to advance human rights. Prior to the Bali bombing of 2002, local human rights advocates actually joined Islamist parties to oppose the enactment of an anti-terrorism law on the ground that it was unnecessary. Law No. 15/2003, which was enacted after the Bali bombing, contained provisions that local advocates had objected to as excessively curtailing rights. Even today, local advocates would be loathe to associate themselves with these provisions, which they continue to see as vulnerable to abuse.

It is true, however, that local advocates changed their views after the Bali bombing. Both the Bali bombing itself and the police's successful prosecution of that case changed the balance of forces, weakening resistance to counterterrorism measures against alleged Islamist extremists. Whereas before the 2002 Bali bombing, both local human rights advocates and Islamists were sceptical of the necessity for robust counterterrorism, the local human rights advocates I interviewed in 2013 were willing to accommodate the counterterrorism discourse. They readily conceded that terrorism was a threat and that counterterrorism cooperation with foreign governments was a necessity. It helped that counterterrorism did not appear to repress Muslims nor civil society indiscriminately, but focused on alleged Islamist extremists. Moreover, radical Islamic organisations, like Front Pembela Islam, had attacked religious minorities and human rights advocates who defended these minorities. Mainstream human rights advocates did criticise counterterrorism measures in Poso and Papua. But their advocacy in those locations strengthened the perception that the government abused counterterrorism discourse only when Islamist extremists had not been the targets. The rejection of the counterterrorism discourse persisted primarily in the views of Muslim lawyers in Tim Pengacara Muslim (TPM) who defended suspected terrorists. The TPM maintained that despite being police-led and despite the existence of a legal framework, the counterterrorism discourse remained extremely problematic. The gap between the two camps has widened so much that the defense of human rights of suspected terrorists has been marginalised. This state of affairs is dramatically illustrated by the fact that mainstream human rights lawyers have been inactive in the defense of alleged members of Islamic terrorist networks, while the TPM has carved out a niche legal practice in this issue.

3. Human Rights-Friendly Policies and the Reality of Continuing Abuses

International advocates hoped that it might be possible to transform counterterrorism by developing a discourse of human rights-compliant counterterrorism. However, the Philippine and Indonesian case studies suggest that this expectation is unrealistic. In both countries, in different ways, the state reacted to human rights concerns in the context of counterterrorism and incorporated human rights language in their official laws and policies. However, the effect of this development on the practice of counterterrorism or, more generally, the pursuit of security, was far from transformative. Counterterrorism or security operations continue to result in serious human rights violations, including extrajudicial killings and torture. Instead of transforming counterterrorism, legal changes have legitimated robust counterterrorism practices that tend to undermine rather than advance human rights.

In the Philippines, there has been a surge of human rights legislation after 2006, in reaction to criticisms of the government's conduct of counterinsurgency/counterterrorism, particularly the killings and disappearances of left-wing activists. However, my examination of the new judicial remedy of *amparo* and the Internal Peace and Security Plan (Oplan Bayanihan) in Chapter 4 showed that while the rhetorical changes were dramatic, the practice of counterinsurgency remained largely unaffected. Extrajudicial killings and disappearances of left-wing activists continue to be features of counterinsurgency. The problem is not that there was insufficient legal or official recognition of the need to respect human rights in counterinsurgency, nor that there is a lack of judicial remedies for abuses. The principal problem is the continuing pervasive disrespect for existing rules by broad sections of the security establishment, if not necessarily by the military and police institutions themselves. While conceding that violations may have been committed by a few wayward elements, the state has not acknowledged any systemic complicity for the killings and disappearances. Nor has the government ceased denying the legitimacy of left-wing struggle or protest. Indeed, the government continues to support and employ the same counterinsurgency thinking that has given rise to the violations. Ultimately, the alignment of domestic policy with the international approach permitted the government to delay more serious reforms that would put an end to human rights violations.

In Indonesia, a legal framework for counterterrorism, Law No. 15/2003, explicitly incorporated human rights by providing that human rights law continued to apply in the context of counterterrorism, and even created new rights such as the right to rehabilitation

of those cleared of legal charges of terrorism. Moreover, a police-led or law enforcement approach to counterterrorism was pursued, which resulted in the arrest, trial and legal punishment of perpetrators of acts of terrorism. As mentioned, these features of Indonesian counterterrorism have often been praised⁷ and would appear to make Indonesia a model for countries like the Philippines, whose approach to counterterrorism is more war-like and less legalised. However, as the examination of the record of extrajudicial killings by Densus 88 in Chapter 7 revealed, the practice of counterterrorism in Indonesia is not dramatically different from the Philippines in terms of respect for human rights. The main counterterrorism actor, Densus 88, is tasked to respect human rights. Yet it commits extrajudicial killings as well as torture in the course of its operations, and it does so with impunity. The seriousness of Densus 88's record of violations has not been acknowledged by authorities, thus perpetuating impunity. Hence, just as the legal changes in the Philippines have not substantially altered security practices, nor has the Indonesian legal framework had the effect of restraining the most serious violations. I observed that killings have been publicly justified simply through reference to the claim that the victims were involved in terrorism and that the goal of operations was to counter terrorism. Killings against alleged terrorists continue to be committed, not for lack of guidance about the legal obligations of police during counterterrorism operations. Rather, these killings persist because the police could justify them despite their illegality, by drawing on, as it were, a parallel source of legitimacy beyond legality, that is, the counterterrorism discourse that police continue to expound unopposed.

Instead of constraining counterterrorism practice, the incorporation of human rights language into Indonesian counterterrorism helps promote the perception that Indonesia's counterterrorism approach embodies human rights and rule of law values. This perception, in turn, inoculates it from further scrutiny. Because Indonesia's approach to counterterrorism is thought to be necessary, rational and human rights-sensitive, violations committed in the course of counterterrorism operations are regarded ultimately as unintended, unfortunate excesses. Human rights violations, no matter how serious and counterproductive, never constitute grounds to discontinue or question the ground for counterterrorism. Thus, in both the Philippines and Indonesia, the attachment of a language of human rights to counterterrorism has not had a transformative effect. Rather,

⁷ Abuza (n 6); Sebastian (n 6); Jonathan R Martin, 'Comparing Strategies for Countering Terrorism and Insurgency in Southeast Asia' (2011) 12 Whitehead Journal of Diplomacy and International Relations 103-117.

human rights-compliant counterterrorism has emboldened and empowered counterterrorism actors to continue employing practices harmful to human rights.

4. Disentangling Human Rights Advocacy from the Counterterrorism Agenda

The findings of this thesis call into question the investment of optimism and energy into the notion that it is constructive to synthesise human rights and counterterrorism. They direct us to find or support approaches that will not be reduced to the promotion of counterterrorism at the expense of human rights.

Throughout the thesis, I underscored the importance of disentangling human rights advocacy from the promotion of the counterterrorism agenda, especially in places like the Philippines and Indonesia where complex ideological conflicts rage on. The discourses of terrorism and counterterrorism are state-affirming, but they profoundly disempower critics of the status quo. They create a bias in favour of state action, including the use of lethal force, against those deemed to be terrorists, who are always non-state actors. These discourses present state action as merely a reaction to an original unjustifiable wrong committed by terrorists. The notion of human rights-compliant counterterrorism reinforces this logic. It provides new language to represent state action as restrained, sound and rational.

What might human rights advocacy look like when disentangled from counterterrorism? How can such disentanglement be undertaken? This advocacy would resist dichotomous thinking with regard to terrorism and counterterrorism, and instead maintain and promote a healthy sceptical attitude towards the counterterrorism agenda. It would be more attentive to the political calculation behind the deployment by governments of the labels “terrorism” and “terrorists” against their adversaries. It would interrogate the use of these labels and contest the move by governments to hide behind the label “counterterrorism” to shield their own violence from scrutiny. International human rights advocates have so far argued justifiably that human rights violations are counterproductive, and that they tend to foment or aid terrorism rather than defeat it. But the label “counterterrorism” might be further interrogated. In fact, the persistence of serious human rights violations committed with impunity suggests that counterterrorism officials may actually prefer to pursue actions that are counterproductive. If human rights scholars and advocates drop the courtesy of assuming that counterterrorism is always

about promoting public security, they might broaden the horizons of their analyses and interventions.

A disentangled advocacy might be more supportive of initiatives to pursue the truth about atrocities against civilians, not only when the evidence points to extremist Islamists, but also, and more importantly, when they point to state agents. Extreme difficulty will likely be encountered in uncovering the full extent of state agents' involvement in manufacturing terrorist events, not only because evidence can be difficult to obtain, but also because governments will likely suppress such evidence. Yet this is all the more reason for international advocates to pursue such investigations.

This disentangled advocacy might also challenge state authorities' perpetual production of claims about terrorist networks and the threats they pose. Indeed, the constancy of officials' alarm over the terrorist threat despite supposed successes in counterterrorism, whether in terms of arrests and legal convictions made or in more military terms, is curious. It resurrects the spirit of the Bush administration's call for a perpetual "War on Terror", even after governments the world over had become more circumspect in describing their actions as war.

Assassinations of terrorism suspects and the use of torture are not only condemnable violations of individual rights that are counterproductive, but they also radically affect the epistemological status of claims made by counterterrorism officials. As such, human rights advocates are well positioned to expose exaggerations, falsities and fantasies in terrorist threat projections, which is a needed intervention. Jackson has underlined that counterterrorism officials are able to justify measures that would otherwise be considered costly, counterproductive and even bizarre because of the disconnection of terror from knowledge.⁸ In some advanced countries, terror is no longer simply a result of actual terrorist attacks, but a permanent condition of anticipating future attacks that are believed to be certain to come.⁹ Hence, counterterrorism officials and experts knowingly ignore what is known about past terrorist acts and the motivation of attackers. Having given up trying to understand "terrorists" and their motivations, yet remaining convinced that they will surely attack, counterterrorism officials and experts rely

⁸ Richard Jackson, 'The Epistemological Crisis of Counterterrorism' (2015) 8 *Critical Studies on Terrorism* 33-54, 35.

⁹ Joseba Zulaika, 'Drones, Witches and Other Flying Objects: The Force of Fantasy in US Counterterrorism' (2012) 5 *Critical Studies on Terrorism* 51-68, 57.

on imagination and fantasy to anticipate what “terrorists” might be able to do. In other words, their counterterrorism strategy proceeds from a “paranoid logic”.¹⁰

The use of the “terrorist” label tends to enforce silence around the articulation and examination of what “terrorists” want to say and the changes that they seek. The designations of diverse groups as “terrorist organisations”, while apparently only designed to combat the financing of terrorism, tends to operate like a taboo or restriction on who may talk and be listened to by governments, the international community and the public. For this reason, international human rights scholars and advocates should re-examine their fundamental position towards the idea of terrorist listing. A disentangled advocacy might extend the criticism of the listing procedure towards a broader rejection of taboos or restrictions on talking and listening to designated organisations.

It may be that the approach that I advocate is particularly suited to insurgent groups engaged in long-standing armed conflicts whose designation as terrorist organisations by the leading liberal democratic countries aid established governments in silencing them. Yet I would also urge that advocates take another look at the military approach that the world’s leading states have preferred to take against extremist groups like the Islamic State of Iraq and Syria (ISIS). Even in the face of ISIS, there is reason to advocate for the disentanglement of human rights promotion from the pursuit of counterterrorism. The videotaped beheadings, rapes, mass executions of disfavoured religious groups and other terroristic acts by ISIS in the territories it controls are revolting human rights violations. They seem to be only capable of being adequately described as pure evil, against which a war is surely justified. But it needs to be recalled that wars premised on similar condemnations in the past for Al Qaeda’s 9/11 attacks and the atrocities of the authoritarian regime of Saddam Hussein have prompted not only more terrorism but more vociferous forms of terrorism. ISIS itself would not have emerged today had Iraq not been so utterly destroyed and socially fragmented by the “War on Terror”. Given this experience, advocates should be more sceptical of, not more confident in the justifiability or rationality of pursuing an evidently perpetual war. Instead, they should invest more energy in forging a completely different approach that avoids the reproduction of the dichotomous discourse of counterterrorism.

I have argued that human rights are entangled in the legitimisation and perpetuation of the counterterrorism agenda in the Philippines and Indonesia, which in practice remains unreformed. Yet there is no reason why human rights advocacy cannot be recalibrated so

¹⁰ Jackson (n 8) 33.

as to avoid this trap. Like a matchstick, I offer this thesis to human rights advocates and scholars, in the hope of sparking a renewal of resistance to abuses in the name of counterterrorism.

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Appendix 1

List of Interviews

Interviews conducted in Indonesia in 2013:

1. Yati Andriyani, Head of Law and Human Rights Advocacy Division, Komisi untuk Orang Hilang dan Korban Tindak Kekerasan (KontraS), June 7, 2013, Jakarta
2. Deddy Rathi, Advocacy and Campaigns Department, Wahana Lingkungan Hidup Indonesia (WALHI), June 12 and 21, 2013, Jakarta
3. Yhodisman Soratha, Investigator, Komisi Nasional Hak Asasi Manusia (KomnasHAM), June 17, 2013, Jakarta
4. Syamsul Alam, Vice Coordinator, KontraS, June 19 and 27, 2013, Jakarta
5. Taufik Andrie, Head of Research, Yayasan Prasasti Perdamaian (YPP), June 20, 2013, Jakarta
6. Hadi Purnama, Professor and Director of Human Rights Institute, University of Indonesia Faculty of Law, June 25, 2013, Depok
7. Zainal Abidin, Deputy Director, Lembaga Studi dan Advokasi Masyarakat (ELSAM), June 26, 2013, Jakarta
8. Muhamad Isnur, Lawyer and Head of Research and Development Division, Lembaga Bantuan Hukum (LBH) Jakarta, July 1, 2013, Jakarta
9. Emelia Yanti, General Secretary, Gabungan Serikat Buruh Independen (GSBI), July 5, 2013, Jakarta
10. Muradi, Lecturer, Padjadjaran University, Bandung, July 8, 2013, Jakarta
11. Heru Susetyo, Professor, University of Indonesia Faculty of Law; and Chairperson, Pusat Advokasi Hukum dan Hak Asasi Manusia (PAHAM) Indonesia, July 12, 2013, Jakarta
12. Zely Ariane, Coordinator, National Papua Solidarity (NAPAS), July 16, 2013, Jakarta
13. Sapto Waluyo, Journalist and Executive Director, Center for Indonesian Reforms (CIR), July 17, 2013, Jakarta
14. Junaedi, University of Indonesia Faculty of Law, July 23, 2013, Depok
15. Widiyanto and Andiko, Perkumpulan untuk Pembaharuan Hukum Berbasis Masyarakat dan Ekologis (HuMa), July 23, 2013, Jakarta
16. Anggalia Putri Permatasari, HuMa, July 23, 2013, Jakarta
17. Sriyana, Head of Enforcement Administration Bureau, KomnasHAM, July 25, 2013, Jakarta

18. Almuzzammil Yusuf, Member of the Indonesian House of Representatives (Dewan Perwakilan Rakyat) and Chairman of Partai Keadilan Sejahtera (PKS), July 25, 2013, Jakarta
19. Wirawan Adnan, Senior Lawyer and Founding Member, Tim Pengacara Muslim (TPM), August 16, 2013, Jakarta
20. Sandra Hamid, Indonesia Country Representative, Asia Foundation, August 20, 2013, Jakarta
21. M. Mahendradatta, Chairperson, Tim Pengacara Muslim (TPM), August 20, 2013, Jakarta
22. Sydney Jones, Director, Institute for Policy Analysis of Conflict, August 22, 2013, Jakarta

Interviews conducted in the Philippines in 2014:

23. Cristina Palabay, Secretary General, Karapatan, February 3, 2014, Manila
24. Edita Burgos, Campaigner and Mother of Disappearance Victim Jonas Burgos, February 5, 2014, Manila
25. Amirah Lidasan, Spokesperson, Moro-Christian Peoples Alliance (MCPA) and President, Suara Bangsamoro, February 7 and 8 2014, Manila
26. Piya Macliing Malayao, Spokesperson, Kalipunan ng mga Katutubong Mamamayan (KAMP a.k.a. KATRIBU), February 7 2014, Manila
27. Satur Ocampo, Former Member of the Philippine House of Representatives; and President, Bayan Muna, February 10 2014, Manila
28. Carlos Isagani Zarate, Member of the Philippine House of Representatives (representing Bayan Muna partylist) and Founding Chairman, Union of People's Lawyers in Mindanao (UPLM), February 13 2014, Davao City
29. Dolphing Ogan, Chairperson, Kalumaran, February 14 2014, Davao City
30. Hanimay Suazo, Secretary General, Karapatan - South Mindanao Region, February 15 2014, Davao City
31. Joel Mahinay, Member, Free Legal Assistance Group (FLAG); and Founding Member, UPLM, February 15 2014, Davao City
32. Sis Noemi Degala, Executive Director, Sisters Association in Mindanao (SAMIN); and Commissioner, Mindanao Truth Commission, February 17 2014, Davao City
33. Bai Ali Indayla, Secretary General, Kawagib – Alliance for the Advancement of Moro Human Rights, February 18 2014, Davao City
34. Erwin Maarte, Tribal Leader, February 22 and 27, 2014, Malaybalay City, Bukidnon

35. Carl Cesar Rebuta, Associate Executive Director, Legal Rights and Natural Resources Center (LRC), February 27, 2014, Cagayan de Oro City
36. Roger Plana, Chairperson, Kalumbay; and Santiano Agdahan Jr, Chairperson, Kasilo, February 28 2014, Cagayan de Oro City
37. Rachel Pastores, Executive Director, Public Interest Law Center, March 4 2014, Manila
38. Marissa Dumajug Palo, Member of Secretariat, National Democratic Front Philippines (NDF) Section of the Joint Monitoring Committee, March 6, 2014, Manila
39. Jose Luis Martin "Chito" Gascon, Former Chairperson, Government of the Philippines (GPH) Section of the Joint Monitoring Committee, March 11, 2014, Manila
40. Jaime Arroyo GPHMC, Member of Secretariat, Government of the Philippines (GPH) Section of the Joint Monitoring Committee, March 11, 2014, Manila
41. Marlon Manuel, National Coordinator, Alternative Law Groups (ALG), March 13 2014, Manila
42. Edgardo Cabalitan and Sunshine Serrano, Task Force Detainees of the Philippines (TFDP), March 20 2014, Manila
43. Col. Roderick Parayno, Head, Armed Forces of the Philippines -Human Rights Office (AFP-HRO), March 21 2014
44. Fatemah Remedios Balbin, Lawyer, March 26 2014, Manila
45. Max de Mesa, Executive Director, Philippine Alliance of Human Rights Advocates (PAHRA), March 28 2014, Manila

Interviews conducted in 2015:

46. Noor Huda Ismail, Founder, Yayasan Prasasti Perdamaian (YPP), Melbourne, August 21, 2015
47. Siane Indriyani, Commissioner, KomnasHAM, September 14 and 16, 2015, Jakarta
48. Hanibal Wijayanta, Current Affairs Producer, AnTV, September 15, 2015, Jakarta
49. Slamet Hariyanto, Chairperson of Council for Law and Human Rights, Muhammadiyah – West Java Regional Board, September 17, 2015, Surabaya
50. M. Imdadun Rahmat, Commissioner, KomnasHAM, September 17, 2015, Surabaya
51. Shofwan Al Banna Choiruzzad, Lecturer, Department of International Relations, University of Indonesia, September 18, 2015, Depok

Appendix 2

List of Indicative Questions

1. How has post-9/11 counter-terrorism affected the human rights of people in the Philippines/Indonesia? (Please consider the entire period from September 11, 2001 up to the present. You may focus on specific periods if you like.)
 - (a) Is the impact of counter-terrorism limited to certain individuals who are suspected terrorists (e.g., radical Islamists associated with Jamaah Islamiya or Abu Sayaf) or are there impacts affecting the broader society?
 - (b) What has been the effect on ordinary people? On particular groups (e.g., Muslims, women, etc.)? In particular places?
2. In the past, the following aspects of globally coordinated counter-terrorism have been argued to affect "sovereignty" and human rights:
 - (a) US and Australian military assistance to Philippine and Indonesian armed forces or police (e.g., Detachment 88 of the Indonesian Police);
 - (b) extradition of suspects abroad (e.g., from the Indonesia to Australia, or from the Philippines to Indonesia);
 - (c) US armed intervention and joint US-Philippine military exercises in Mindanao;
 - (d) travel warnings issued by Western governments against Indonesia and the Philippines; and
 - (e) terrorist blacklisting of organizations engaged in peace talks with the Philippine government by the US, the EU and Australia.
 - How has your organisation reacted to these issues in public discussions? Please specify strategies used; positions taken in public discussions; public activities undertaken such as campaigns, legal cases, legislative advocacy, etc.
 - What do you think is meant by "sovereignty" in these contexts?
 - How is "sovereignty" related to respect or protection of human rights?
 - Can human rights be used to further "sovereignty"? How?
3. In the Philippines and Indonesia, what do you think are the most pressing human rights issues related to counter-terrorism today? (e.g., political killings of Filipino leftist activists?)
 - What has your organisation done or does it intend to do about these issues? Please specify positions taken in public discussions, public activities undertaken such as campaigns, legal cases, legislative advocacy, etc.
 - Have there been changes in your opinions/views about sovereignty and human rights?
 - Have there been changes in your strategies and goals?
 - Have there been changes in human rights organisations' capacities or opportunities compared to past issues? Please illustrate with concrete examples.
4. Looking at the different issues you have been involved with in the past until today, in which issue have you been most and least successful? Which of your goals have been achieved or not achieved? Why or why not?
5. Are you able to have any influence in how counter-terrorism is pursued by the government in your country? If so, how and when? If not, why not? Please illustrate with examples.

6. Are you able to influence the practice of counter-terrorism by Western governments, such as the US and Australia, in your country? If so, how and when? If not, why not? Please illustrate with examples.

7. Are you aware of the UN General Assembly resolution adopted in 2006 providing for a Global Counter-Terrorism Strategy?

(a) How is the strategy of "countering terrorism while respecting human rights" understood in your country? Have human rights protections been incorporated in counter-terrorism laws/policies? How?

(b) If there have been changes in counter-terrorism policies/laws, how are these changes translated in the practice of police or armed forces?

(c) If human rights protections have been incorporated in counter-terrorism policies/laws, who monitors the compliance of counter-terrorism authorities with human rights laws/standards? Are human rights organisations given any monitoring role? And how is this role performed?