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G.R. No. 231658 – REPRESENTATIVES EDCEL C. LAGMAN, TOMASITO S. VILLARIN, GARY C. ALEJANO, EMMANUEL A. BILLONES, AND TEDDY BRAWNER BAGUILAT, JR., *petitioners v.* HON. SALVADOR C. MEDIALDEA, EXECUTIVE SECRETARY; HON. DELFIN N. LORENZANA, SECRETARY OF THE DEPARTMENT OF NATIONAL DEFENSE AND MARTIAL LAW ADMINISTRATOR; AND GEN. EDUARDO AÑO, CHIEF OF STAFF OF THE ARMED FORCES OF THE PHILIPPINES AND MARTIAL LAW IMPLEMENTOR, *respondents.*

G.R. No. 231771 – EUFEMIA CAMPOS CULLAMAT, VIRGILIO T. LUNCUNA, ATELINANA U. HIJOS, ROLAND A. COBRADO, CARL ANTHONY D. OLALO, ROY JIM BALANGHIG, RENATO REYES, JR., CRISTINA E. PALABAY, AMARYLLIS H. ENRIQUEZ, ACT TEACHERS' REPRESENTATIVE ANTONIO L. TINIO, GABRIELA WOMEN'S PARTY REPRESENTATIVE ARELE D. BROSAS, KABATAAN PARTY-LIST REPRESENTATIVE SARAH JANE I. ELAGO, MAE PANER, GABRIELA KRISTA DALENA, ANNA ISABELLE ESTEIN, MARK VINCENT D. LIM, VENCER MARI CRISOSTOMO, JOVITA MONTES, *petitioners v.* PRESIDENT RODRIGO DUTERTE, EXECUTIVE SECRETARY SALVADOR MEDIALDEA, DEFENSE SECRETARY DELFIN LORENZANA, ARMED FORCES OF THE PHILIPPINES CHIEF OF STAFF LT. GENERAL EDUARDO AÑO, PHILIPPINE NATIONAL POLICE DIRECTOR-GENERAL RONALD DELA ROSA, *respondents.*

G.R. No. 231774 – NORKAYA S. MOHAMAD, SITTIE NUR DYHANNA S. MOHAMAD, NORAISAH S. SANI, ZAHIRA P. MUTI-MAPANDI, *petitioners v.* EXECUTIVE SECRETARY SALVADOR C. MEDIALDEA, DEPARTMENT OF NATIONAL DEFENSE (DND) SECRETARY DELFIN N. LORENZANA, DEPARTMENT OF THE INTERIOR AND LOCAL GOVERNMENT (DILG) SECRETARY (OFFICE-IN-CHARGE) CATILINO S. CUY, ARMED FORCES OF THE PHILIPPINES (AFP) CHIEF OF STAFF GEN. EDUARDO M. AÑO, PHILIPPINE NATIONAL POLICE (PNP) CHIEF DIRECTOR GENERAL RONALD M. DELA ROSA, NATIONAL SECURITY ADVISER HERMOGENES C. ESPERON, JR., *respondents.*

Promulgated:

July 4, 2017

DISSENTING OPINION

LEONEN, *J.*:

I dissent.

I cannot agree to granting the President undefined powers of martial law over the entire Mindanao region. My reading of the Constitution is that we should be stricter, more precise, and more vigilant of the fundamental rights of our people.

Terrorism merits calibrated legal and political responses executed by the decisive and professional actions of our coercive forces. The Constitution, properly read in the context of all its provisions and in the light of our history, does not allow a vague declaration of martial law which contains no indication as to who it actually empowers and what fundamental rights will be suspended or bargained. Terrorism does not merit a vague declaration of martial law and in a wide undefined geographical area containing other localities where no act of terrorism exists.

Terrorists will win when we suspend the meaning of our Constitution due to our fears. This happens when through judicial interpretation, we accord undue and unconstitutional deference to the findings of facts made by the President or give him a blank check in so far as the implementation of martial law within the whole of Mindanao.

The group committing atrocities in Marawi are terrorists. They are not rebels. They are committing acts of terrorism. They are not engaged in political acts of rebellion. They do not have the numbers nor do they have the sophistication to be able to hold ground. Their ideology of a nihilist apocalyptic future inspired by the extremist views of Salafi Jihadism will sway no community especially among Muslims.

The armed hostilities were precipitated by government's actions to serve a judicial warrant on known terrorist personalities. Many of them already had pending warrants of arrests for the commission of common crimes. They resisted, fought back, and together with their followers, are continuing to violently evade arrest.

The timely action of government, with a judicially issued warrant, disrupted their plans.

In order to establish their terrorist credentials and to sow fear, they commit acts which amount to murder, mutilation, arson, and use and

possession of illegal firearms, ammunition, and explosives among others. They are also able to magnify our basest fears through two means. First, they project themselves as capable of doing barbaric acts in the name of misguided religious fervor founded on a nihilistic apocalyptic future. Second, when they succeed in creating an aura of invisibility either by our unquestioned acceptance of their claim of community support or simply because law enforcement has not been professional or sophisticated enough to meet the demands of these terrorist threats.

The actual acts of the criminal elements in Marawi are designed to slow down the advance of government forces and facilitate their escape. They are not designed to actually control seats of governance. The provincial and city governments are existing and are operating as best as they could under the circumstances. They are not rendered inutile such that there is now a necessity for the military to take over all aspects of governance. Civilians are also helping recover other civilians caught in the crossfire as well as attend to the wounded and the thousands displaced. Even as we decide this case, a masterplan for the rehabilitation of Marawi is in the works.

At no time was there any doubt that our armed forces would be able to quell the lawlessness in Marawi.

There is no rebellion that justifies martial law. There is terrorism that requires more thoughtful action.

The Constitution does not only require that government alleges facts, it must show that the facts are sufficient. The facts are sufficient when (a) it is based on credible intelligence and (b) taken collectively establishes that there is actual rebellion and that public safety requires the suspension of the privilege of the writ of Habeas Corpus and the exercise of defined powers within the rubric of martial law. We cannot use the quantum of evidence that is used by a prosecutor or a judge. We have to assume what a reasonable President would do given the circumstances.

The facts presented are not sufficient to reasonably conclude that the armed hostilities and lawless violence happening in Marawi City is "for the purpose of removing from the allegiance to said Government or its laws, the territory of the Philippine Islands or any part thereof, of any body of land, naval or other armed forces, or of depriving the Chief Executive or the Legislature, wholly or partially, of any of their powers or prerogatives."[1]

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[1] REV. PEN. CODE, art. 134.

Based on the facts inferred by the respondents from their intelligence sources, the perpetrators of the atrocities are not numerous or have sufficient resources or even community support to hold any territory. Extremist beliefs by those who adhere to Salafist Jihadism are alien to most cultures in Mindanao. It is a bastardization of Islam as this is understood.

Neither do the facts show convincingly that "public safety" requires martial law. Respondents did not show how the available legal tools magnified by the call out of the armed forces would not be sufficient. Public safety is always the aim of the constitutional concept of police power. Respondents failed to show what martial law would add.

Martial law is not the constitutionally allowed solution to terrorism. It is an emergency grant of power in cases where civilian authority has been overrun due to actual hostilities motivated by a demonstrable purpose of actually seizing government. As an emergency measure, the capability and commitment of the lawless group must also be shown.

Martial law in the past has been used as a legal shortcut: in the guise of perceived chaos, to install a strongman undermining the very principle of our Constitutional order. The Constitution allows us now to take pause through judicial review and not be beguiled by authoritarianism due to our frustrations of government.

Unlike the previous versions, the present Constitution provides for the limitations for the declaration of martial law. Therefore, any declaration must clearly articulate the powers that would be exercised by the President as Commander-in-Chief. It cannot now just be a declaration of a state of Martial Law. Otherwise, it would be unconstitutionally vague. It would not be possible to assess the sufficiency of the facts used as basis to determine "when public safety requires it." "It" refers to the powers that are intended to be exercised by the President under martial law.

The scope of Martial law as contained in Proclamation No. 216 issued last May 23, 2017 expands with every new issuance from its administrators. Proclamation No. 1081 of 1972, which ironically was more specific, evolved similarly. Martial law as proclaimed is vague, thus unconstitutional.

General Order No. 1 issued by the President expands martial law by instructing the Armed Forces of the Philippines to "undertake all measures to prevent and suppress all acts of rebellion ***and lawless violence in the whole of Mindanao***, including any and all acts in relation thereto, in connection therewith, or in furtherance thereof." ***All acts of lawless violence throughout Mindanao, even if unrelated to the ongoing hostilities in Marawi, have been included in the General Order.***

The second paragraph of Article 3 of General Order No. 1 orders the Armed Forces' "arrest of persons and/or groups who have committed, are committing, or attempting to commit" both rebellion and any other kind of lawless violence.

The vagueness of Proclamation No. 216 hides its real intent. Thus, Operational Directive for the Implementation of martial law issued by the Chief of Staff of the Armed Forces of the Philippines orders his forces to: ***"dismantle the NPA, other terror-linked private armed groups, illegal drug syndicates, peace spoilers and other lawless armed groups."***

Arresting illegal drug syndicates and "peace spoilers" under martial law also unduly expands Proclamation No. 216. ***The factual bases for the declaration of Martial Law as presented by the respondents do not cover these illegal acts as rationale for its proclamation. They do not also fall within the concept of "rebellion."*** It is made possible by a vague and overly broad Proclamation.

Due to the lack of guidance from Proclamation No. 216, the Armed Forces of the Philippines as implementor of martial law defines it as the taking over of civilian government:

> "Martial Law. ***The imposition of the highest-ranking military officer (the President being the Commander-in-Chief) as the military governor or as the head of the government. It is usually imposed temporarily when the government or civilian authorities fail to function effectively or when either there is near-violent civil unrest*** or in cases of major natural disasters or during conflicts or cases of occupations, where the absence of any other civil government provides for the unstable population."[2] (Emphasis supplied)

Even by their own definition, the armed forces do not seem to believe martial law to be necessary. Certainly, no civilian government in Mindanao is failing to function.

The presentation of facts made by the respondents who bear the burden in these cases was wanting. Many of the facts presented by the respondents are simply allegations. Most are based on inference contradicted by the documents presented by the respondents themselves.

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[2] OSG Memorandum, Annex 4 of Annex 2, Rules of Engagement (ROE) for Operational Directive 02-17, p. 12.

Respondents did not exert any effort to either show their sources or the cogent analysis of intelligence information that led to their present level of confidence with respect to the cogency of their interpretation. Even the sources of the respondents show the lack of credibility of some of their conclusions.

Even with a charitable view that all the bases of the factual allegations are credible, the facts as presented by the parties are still not sufficient to justify the conclusion that martial law, as provided in Proclamation No. 216, General Order No. 1, and in the Operational Directive of the Chief of Staff of the Armed Forces of the Philippines (AFP), should be declared and that it cover the entire Mindanao Region. None of the directives also specifies which island or island groups belong to Mindanao.

Elevating the acts of a lawless criminal group which uses terrorism as tactic to the constitutional concept of rebellion acknowledges them as a political group. Rebellion is a political crime. We have acknowledged that if rebels are able to capture government, their rebellion, no matter how brutal, will be justified.

Also, by acknowledging them as rebels, we elevate their inhuman barbarism as an "armed conflict of a non-international character" protected by International Humanitarian Law. We will be known worldwide as the only country that acknowledges them, not as criminals, but as rebels entitled to protection under international law.

Hostilities and lawless violence and their consequences can be addressed by many of the prerogatives of the President as Chief Executive and Commander-in-Chief. In my view, there is no showing that martial law has become necessary for the safety of entire Mindanao.

Martial law creates a false sense of security. Terrorism cannot be rooted out with military force alone. Military rule, authoritarianism, and an iron hand do not substitute for precision, sophistication, and professionalism in our law enforcement. The false sense of security will disappoint. It is that disappointment that will foster the creation of more terrorists and more chaos.

For these reasons, Proclamation No. 216 issued in Russia on May 23, 2017 along with all other issuances made pursuant to this declaration should be declared unconstitutional.

The declaration that Proclamation No. 216 as unconstitutional will not affect the ongoing military operations in Marawi pursuant to Proclamation

No. 55. The latter proclamation is not an issue in this case and the proportionate response to the violence being committed by the criminals would be to use the appropriate force.

There is no doubt that even without martial law, legal tools already exist to quell the hostilities in Marawi and to address terrorism.

Upholding Proclamation No. 216 is based on extravagant and misleading characterizations of the events fraught with many dangers to our liberties.

I

The present petitions are justiciable. I concur that the petitions are the "appropriate proceedings" filed by "any citizen" which appropriately invokes sui generis judicial review contained in the Constitution. However, in addition to the remedy available in Article VII, Section 18 of the Constitution, any proper party may also file a Petition invoking Article VIII, section 1. The remedies are not exclusive of each other. Neither does one subsume the other.

Furthermore, the context and history of the provisions on judicial review point to a more heightened scrutiny when the Commander-in-Chief provision is used.

As the Commander-in-Chief provision, Article VII, Section 18 of the 1987 Constitution establishes the parameters of the proclamation of martial law and the suspension of the privilege of the writ of *habeas corpus*. It prescribes limited instances when the President may resort to these extraordinary remedies. Section 18 likewise gives the two (2) other branches their respective roles to counterbalance the President's enormous power as Commander-in-Chief:

> Section 18. The President shall be the Commander-in-Chief of all armed forces of the Philippines and whenever it becomes necessary, he may call out such armed forces to prevent or suppress lawless violence, invasion or rebellion. In case of invasion or rebellion, when the public safety requires it, he may, for a period not exceeding sixty days, suspend the privilege of the writ of *habeas corpus* or place the Philippines or any part thereof under martial law. Within forty-eight hours from the proclamation of martial law or the suspension of the privilege of the writ of *habeas corpus*, the President shall submit a report in person or in writing to the Congress. The Congress, voting jointly, by a vote of at least a majority of all its Members in regular or special session, may revoke such proclamation or suspension, which revocation shall not be set aside by the President. Upon the initiative of the President, the Congress may, in the same manner,

> extend such proclamation or suspension for a period to be determined by the Congress, if the invasion or rebellion shall persist and public safety requires it.
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> The Congress, if not in session, shall, within twenty-four hours following such proclamation or suspension, convene in accordance with its rules without need of a call.
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> The Supreme Court may review, in an appropriate proceeding filed by any citizen, the sufficiency of the factual basis of the proclamation of martial law or the suspension of the privilege of the writ of *habeas corpus* or the extension thereof, and must promulgate its decision thereon within thirty days from its filing.
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> A state of martial law does not suspend the operation of the Constitution, nor supplant the functioning of the civil courts or legislative assemblies, nor authorize the conferment of jurisdiction on military courts and agencies over civilians where civil courts are able to function, nor automatically suspend the privilege of the writ of *habeas corpus*.
>
> The suspension of the privilege of the writ of *habeas corpus* shall apply only to persons judicially charged for rebellion or offenses inherent in, or directly connected with, invasion.
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> During the suspension of the privilege of the writ of *habeas corpus*, any person thus arrested or detained shall be judicially charged within three days, otherwise he shall be released.

The Government posits that the "appropriate proceeding" referred to in Article VII, Section 18 is a petition for *certiorari* as evidenced by Article VIII, Section 1, which states:[3]

> Section 1. The judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law.
> Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.

The Government further argues that by correlating Section 1 and Section 5(1)[4] of Article VIII, a petition for *certiorari* becomes the sole "appropriate remedy" referred to under Article VII, Section 18 as it is the only "logical, natural and only recourse."[5]

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3 OSG Memorandum, pp. 28–29.

4 CONST., art. VIII, sec. 5 provides:
Section 5. The Supreme Court shall have the following powers:
(1) Exercise original jurisdiction over cases affecting ambassadors, other public ministers and consuls, and over petitions for certiorari, prohibition, mandamus, quo warranto, and habeas corpus.

5 OSG Memorandum, p. 30.

I concur with the ponencia in holding that respondents are mistaken.

The power of judicial review is the Court's authority to strike down acts of the executive and legislative which are contrary to the Constitution. This is inherent in all courts, being part of their power of judicial review.[6] Article VIII, Section 1 includes, but does not limit, judicial power to the duty of the courts to settle actual controversies and determine whether or not any branch or instrumentality of the Government has committed grave abuse of discretion.

Traditionally, *Angara v. Electoral Commission*[7] clarifies that judicial review is not an assertion of the superiority of the judiciary over other departments. Rather, it is the judiciary's promotion of the superiority of the Constitution:

> The Constitution is a definition of the powers of government. Who is to determine the nature, scope and extent of such powers? The Constitution itself has provided for the instrumentality of the judiciary as the rational way. And when the judiciary mediates to allocate constitutional boundaries, it does not assert any superiority over the other departments; it does not in reality nullify or invalidate an act of the legislature, but only asserts the solemn and sacred obligation assigned to it by the Constitution to determine conflicting claims of authority under the Constitution and to establish for the parties in an actual controversy the rights which that instrument secures and guarantees to them. This is in truth all that is involved in what is termed "judicial supremacy" which properly is the power of judicial review under the Constitution.[8]

The traditional concept of judicial review or "that the declaration of the unconstitutionality of a law or act of government must be within the context of an actual case or controversy brought before the courts,"[9] calls for compliance with the following requisites before a court may take cognizance of a case:

> (1) there must be an actual case or controversy calling for the exercise of judicial power; (2) the person challenging the act must have the standing to question the validity of the subject act or issuance; otherwise stated, he must have a personal and substantial interest in the case such that he has sustained, or will sustain, direct injury as a result of its enforcement; (3) the question of constitutionality must be raised at the earliest opportunity;

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6 *Angara v. Electoral Commission,* 63 Phil 139, 156–157 (1936) [Per J. Laurel, En Banc].
7 63 Phil.139 (1936) [Per J. Laurel, En Banc].
8 Id. at 158.
9 See J. Brion's concurring opinion in *Villanueva v. Judicial and Bar Council,* G.R. No. 211833 April 7, 2015, 755 SCRA 182, 217–218 [Per J. Reyes, En Banc].

and (4) the issue of constitutionality must be the very *lis mota* of the case.[10]

Despite adherence to its traditional jurisdiction, the Court has also embraced and acted on a more articulated jurisdiction provided for under Article VIII, Section 1 of the 1987 Constitution.[11] In emphasizing the Court's jurisdiction, the 1987 Constitution broadened the Court's power of judicial review from settling actual controversies involving legally demandable and enforceable rights, to determining if a Government branch or instrumentality has committed grave abuse of discretion amounting to lack or excess of jurisdiction.[12] By deliberately increasing the Court's power of judicial review, the framers of the 1987 Constitution intended to prevent courts from seeking refuge behind the political question doctrine to avoid resolving controversies involving acts of the Executive and Legislative branches, as what happened during martial law under President Ferdinand Marcos.[13]

The Constitution further provides for a stricter type of judicial review in Article VII, Section 18. It mandates the Supreme Court to review "in an appropriate proceeding the sufficiency of the factual basis of the proclamation of martial law or the suspension of the writ of *habeas corpus* or the extension thereof."[14]

The "appropriate proceeding" referred to under Article VII, Section 18 cannot simply be classified under the established types of judicial power, since it does not possess any of the usual characteristics associated with either traditional or expanded powers of judicial review.

"Appropriate proceeding" under the martial law provision is a *sui generis* proceeding or in a class by itself, as seen by how it is treated by the 1987 Constitution and the special mandate handed down to the Supreme Court in response to the President's declaration of martial law or the suspension of the privilege of the writ of *habeas corpus*.

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[10] *Biraogo v. The Philippine Truth Commission of 2010*, 651 Phil. 374, 438 (2010) [Per J. Mendoza, En Banc], citing *Senate of the Philippines v. Ermita*, 522 Phil. 1, 27 (2006) [Per J. Carpio Morales, En Banc] and *Francisco v. House of Representatives*, 460 Phil. 830, 842 (2003) [Per J. Carpio Morales, En Banc].

[11] *Belgica v. Ochoa*, 721 Phil. 416, 526–527 (2013) [Per J. Perlas-Bernabe, En Banc]; *Spouses Imbong v. Ochoa*, 732 Phil. 1, 120–121 (2014) [Per J. Mendoza, En Banc]; *Araullo v. Aquino*, 737 Phil. 457, 524–525 (2014) [Per J. Bersamin, En Banc].

[12] *Estrada v. Desierto,* 406 Phil 1, 42–43 (2001) [Per J. Puno, En Banc].

[13] See Justice Marvic M.V.F. Leonen's concurring opinion in *Belgica v. Ochoa*, 721 Phil 416, 670-671 (2013) [Per J. Perlas-Bernabe, En Banc], citing I RECORDS OF THE CONSTITUTIONAL COMMISSION (1986) No. 27.
" [T]he role of the judiciary during the deposed regime was marred considerably by the circumstance that in a number of cases against the government, which then had no legal defense at all, the Solicitor General set up the defense of political questions and got away with it."

[14] CONST., art. VII, sec. 18.

An indicator that the Court's authority under the martial law provision is distinct from its more recognized power of judicial review is that it can be found in Article VII (Executive) and not Article VIII (Judiciary) of the 1987 Constitution. It emphasizes the additional role of the Supreme Court which should assume a vigilant stance when it comes to reviewing the factual basis of the President's declaration of martial law or suspension of the privilege of the writ of *habeas corpus*. A similar though not identical role is vested on Congress in the same Commander-in-Chief provision. The Constitution expects both Houses to check on the wisdom of the President's proclamation since they have been given a blanket authority to revoke the proclamation or suspension.

Traditionally, the Court is not a trier of facts.[15] However, under Article VII, Section 18, the Court is tasked to review the sufficiency of the factual basis for the President's proclamation of martial law within thirty (30) days from the time the petition is filed.

The rule on standing is also significantly relaxed when the provision allows "any citizen" to question the proclamation of martial law. This is in stark contrast with the requirement under the Rules of Court that "every action must be prosecuted or defended in the name of the real party in interest."[16] Justice Antonio Carpio asserted in his dissent in *Fortun v. Macapagal-Arroyo*[17] that the deliberate relaxation of *locus standi* was designed to provide immediate relief from the possible evils and danger of an illegal declaration of martial law or suspension of the writ:

> It is clear that the Constitution explicitly clothes "**any citizen**" with the legal standing to challenge the constitutionality of the declaration of martial law or suspension of the writ. The Constitution does not make any distinction as to who can bring such an action. As discussed in the deliberations of the Constitutional Commission, the "citizen" who can challenge the declaration of martial law or suspension of the writ need not even be a taxpayer. This was deliberately designed to arrest, without further delay, the grave effects of an illegal declaration of martial law or suspension of the writ, and to provide immediate relief to those aggrieved by the same. Accordingly, petitioners, being Filipino citizens, possess legal standing to file the present petitions assailing the sufficiency of the factual basis of Proclamation No. 1959.[18] (Emphasis in the original)

The jurisprudential principle respecting the hierarchy of courts[19] does not apply. The provision allows any petitioner to seek refuge directly with

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[15] *Pascual v. Burgos*, G.R. No. 171722, January 11, 2016, 778 SCRA 189, 204 [Per J. Leonen, Second Division].

[16] RULES OF COURT. Rule 3, sec. 2.

[17] 684 Phil 526 (2012) [Per J. Abad, En Banc].

[18] Id. at 586, citing BERNAS, THE INTENT OF THE 1986 CONSTITUTION WRITERS 474 (1995 ed.).

[19] *Diocese of Bacolod v. Commission on Elections*, 751 Phil. 301, 329–330 (2015) [Per J. Leonen, En Banc].

this Court. Nonetheless, the hierarchy of courts doctrine is not an iron-clad rule.[20]

It is true that Article VIII, Section 5 provided for instances when the Court exercises original jurisdiction:

> Section 5. The Supreme Court shall have the following powers:
> 1) Exercise original jurisdiction over cases affecting ambassadors, other public ministers and consuls, and over petitions for certiorari, prohibition, mandamus, *quo warranto*, and *habeas corpus*.

However, the enumeration in Article VIII, Section 5 is far from exclusive as the Court was also endowed with original jurisdiction under Section 1 of the same article and over the *sui generis* proceeding under Article VII, Section 18.

Notwithstanding the *sui generis* proceeding, a resort to a petition for *certiorari* pursuant to the Court's jurisdiction under Article VIII, Section 1 or Rule 65 is also proper to question the properiety of any declaration or implementation of the suspension of the writ of Habeas Corpus or martial law.

The jurisdiction of the Court in Article VIII, section 1 was meant "to ensure the potency of the power of judicial review to curb grave abuse of discretion by 'any branch or instrumentalities of government[.]'"[21] It was a reaction to the abuses of martial law under President Marcos, ensuring that the courts will not evade their duty on the ground of non-justiciability for being a political question.[22] *Association of Medical Clinics for Overseas Workers, Inc. v. GCC Approved Medical Centers Association*[23] instructed that in a petition for *certiorari* filed directly with the Court, the petition must reflect a *prima facie* showing of grave abuse of discretion in order to trigger this Court's jurisdiction to determine whether a government agency or instrumentality committed grave abuse of discretion.[24]

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20 *Roque, Jr. et al. v. Commission on Elections,* 615 Phil. 149, 201 (2009) [Per J. Velasco, En Banc].

21 *Francisco v. The House of Representatives,* 460 Phil. 830, 883 (2003) [Per J. Carpio Morales, En Banc].

22 See J. Leonen's Concurring Opinion in *Belgica v. Ochoa*, 721 Phil 416, 670–671 (2013) [Per J. Perlas-Bernabe, En Banc], citing I RECORDS OF THE CONSTITUTIONAL COMMISSION (1986), No. 27.

23 *Association of Medical Clinics for Overseas Workers, Inc. v. GCC Approved Medical Centers Association, Inc.*, G.R. Nos. 207132 & 207205, December 6, 2016, <http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2016/december2016/207132.pdf> [Per J. Brion, En Banc].

24 Id. at 12.

Grave abuse of discretion is present "when an act is (1) done contrary to the Constitution, law, or jurisprudence or (2) executed whimsically, capriciously or arbitrarily, out of malice, ill will, or personal bias."[25]

However, Article VII, Section 18 provides specific requirements for the President to exercise his Commander-in-Chief powers and declare martial law. Absent those requirements, it is beyond question that the assailed proclamation should be stricken down for being constitutionally infirm.

II

The text as well as the evolution of doctrines corrected by the text of the Constitutional provision reveals an approach which shows a demonstrable mandate for the Supreme Court not to give full deference to the discretion exercised by the Commander in Chief. The provision requires a heightened and stricter mode of review.

As a mere spectator and silent witness, the Court has been given limited participation as an active participant when it comes to determining the sufficiency of the factual basis for the proclamation of martial law and suspension of the privilege of the writ of *habeas corpus*.

Even before the 1935 Constitution, the Court in *Barcelon v. Baker*[26] has already been faced with the question of whether the President's exercise of the Commander-in-Chief powers is subject to judicial review. Section 5, paragraph 7 of the Philippine Bill of 1902 stated:

> That the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion, insurrection, or invasion the public safety may require it, in either of which events the same may be suspended by the President, or by the Governor, with the approval of the Philippine Commission, whenever during such period the necessity for such suspension shall exist.

In *Barcelon v. Baker,*[27] the Court limited its review of the suspension of the privilege of the writ of *habeas corpus* in Batangas to two (2) questions: (1) whether Congress was authorized to confer upon the President

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[25] *Ocampo v. Enriquez*, G.R. Nos. 225973, 225984, 226097, 226116, 226117, 226120 & 226294, November 8, 2016 <http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2016/november2016/225973.pdf> 15 [Per J. Peralta, En Banc], citing *Almario, et al. v. Executive Secretary, et al.*, 714 Phil. 127, 169 (2013) [Per J. Leonardo-De Castro, En Banc].

[26] 5 Phil 87 (1905) [Per J. Johnson, En Banc].

[27] Id.

or the Governor-General the authority to suspend the privilege of the writ of *habeas corpus* and if the authority was indeed conferred; and (2) whether the Governor-General and the Philippine Commission acted within the authority conferred upon them.[28]

Barcelon ruled that the factual basis upon which the Governor-General and Philippine Commission suspended the privilege of the writ was beyond judicial review being exclusively political in nature:

> In short, the status of the country as to peace or war is legally determined by the political (department of the Government) and not by the judicial department. When the decision is made the courts are concluded thereby, and bound to apply the legal rules which belong to that condition. The same power which determines the existence of war or insurrection must also decide when hostilities have ceased – that is, when peace is restored. In a legal sense the state of war or peace is not a question *in pais* for courts to determine. It is a legal fact, ascertainable only from the decision of the political department.[29]

The Court in *Barcelon* reasoned out that each branch of government is presumed to be properly dispensing its distinct function and role within the framework of government, thus, "No presumption of an abuse of *these discretionary powers* by one department will be considered or entertained by another."[30]

After *Barcelon* came *Montenegro v. Castañeda*,[31] where the President once again suspended the privilege of the writ of *habeas corpus*. This time, the 1935 Constitution was already in effect and Article VII, Section 10(2) of the 1935 Constitution stated:

> Section 10
>
> . . . .
>
> (2) The President shall be commander-in-chief of all armed forces of the Philippines, and, whenever it becomes necessary, he may call out such armed forces to prevent or suppress lawless violence, invasion, insurrection, or rebellion. In case of invasion, insurrection, or rebellion or imminent danger thereof, when the public safety requires it, he may suspend the privilege of the writ of habeas corpus, or place the Philippines or any part thereof under Martial Law.

Montenegro served as a strong reiteration of the political question doctrine:

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28 Id. at 96.
29 Id. at 107.
30 Id. at 115.
31 91 Phil 882 (1952) [Per J. Bengzon].

> [I]n the light of the views of the United States Supreme Court thru, Marshall, Taney and Story quoted with approval in Barcelon vs. Baker (5 Phil., 87, pp. 98 and 100) the authority to decide whenever the exigency has arisen requiring the suspension belongs to the President and "his decision is final and conclusive" upon the courts and upon all other persons.[32]

The policy of non-interference in *Barcelon,* as repeated in *Montenegro v. Castañeda,*[33] was reversed unanimously[34] by the Court in *In the Matter of the Petition for Habeas Corpus of Lansang v. Garcia.*[35] *Lansang* clarified that the Court "has the authority to inquire into the existence of said factual bases in order to determine the constitutional sufficiency therefor."[36] The Court asserted that the President's power to suspend the privilege was limited and conditional, thus, the courts may inquire upon his adherence and compliance with the Constitution:

> Indeed, the grant of power to suspend the privilege is neither absolute nor unqualified. The authority conferred by the Constitution, both under the Bill of Rights and under the Executive Department, is limited and conditional. The precept in the Bill of Rights establishes a general rule, as well as an exception thereto. What is more, it postulates the former in the *negative*, evidently to stress its importance, by providing that "(t)he privilege of the writ of *habeas corpus* shall *not* be suspended . . ." It is only by way of *exception* that it permits the suspension of the privilege "in cases of invasion, insurrection, or rebellion" — or, under Art. VII of the Constitution, "imminent danger thereof" — "when the public safety requires it, in any of which events the same may be suspended wherever during such period the necessity for such suspension shall exist." For from being full and plenary, the authority to suspend the privilege of the writ is thus circumscribed, confined and restricted, not only by the prescribed setting or the conditions essential to its existence, but, also, as regards the time when and the place where it may be exercised. These factors and the aforementioned setting or conditions mark, establish and define the extent, the confines and the limits of said power, beyond which it does not exist. And, like the limitations and restrictions imposed by the Fundamental Law upon the legislative department, adherence thereto and compliance therewith may, within proper bounds, be inquired into by courts of justice. Otherwise, the explicit constitutional provisions thereon would be meaningless. Surely, the framers of our Constitution could not have intended to engage in such a wasteful exercise in futility.[37]

Nonetheless, the Court upheld President Marcos' suspension of the privilege of the writ of *habeas corpus* under Proclamation Nos. 889 and 889-

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32 Id. at 887.
33 91 Phil 882 (1952) [Per J. Bengzon].
34 *In the Matter of the Petition for Habeas Corpus of Lansang et al. v. Garcia*, 149 Phil. 547, 585–586 (1971) [Per C.J. Concepcion, En Banc].
35 149 Phil. 547 (1971) [Per C.J. Concepcion, En Banc].
36 Id. at 585–586.
37 Id. at 586.

A, ruling that the existence of a rebellion[38] and that public safety[39] necessitated the suspension of the privilege of the writ of *habeas corpus* were sufficiently proven by the Government.

A year after President Marcos suspended the writ, or on September 21, 1972, he proceeded to place the entire country under martial law by virtue of Proclamation No. 1081. Portions of Proclamation No. 1081 read:

> NOW, THEREFORE, I, FERDINAND E. MARCOS, President of the Philippines by virtue of the powers vested upon me by Article VII, Section 10, Paragraph (2) of the Constitution, do hereby place the entire Philippines as defined in Article I, Section 1 of the Constitution under martial law and, in my capacity as their Commander-in-Chief, do hereby command the Armed Forces of the Philippines, to maintain law and order throughout the Philippines, prevent or suppress all forms of lawless violence as well as any act of insurrection or rebellion and to enforce obedience to all the laws and decrees, orders and regulations promulgated by me personally or upon my direction.
>
> In addition, I do hereby order that all persons presently detained, as well as all others who may hereafter be similarly detained for the crimes of insurrection or rebellion, and all other crimes and offenses committed in furtherance or on the occasion thereof, or incident thereto, or in connection therewith, for crimes against national security and the law of nations, crimes against public order, crimes involving usurpation of authority, rank, title and improper use of names, uniforms and insignia, crimes committed by public officers, and for such other crimes as will be enumerated in orders that I shall subsequently promulgate, as well as crimes as a consequence of any violation of any decree, order or regulation promulgated by me personally or promulgated upon my direction shall be kept under detention until otherwise ordered released by me or by my duly designated representative.[40]

On September 22, 1972, President Marcos issued General Order No. 2 and this became the basis for the arrest and detention of the petitioners in the consolidated petitions of *In the Matter of the Petition for Habeas Corpus of Aquino et al v. Ponce Enrile.*[41] Petitioners in *Aquino* were arrested and detained "for being participants or having given aid and comfort in the conspiracy to seize political and state power in the country and to take over the Government by force."[42]

The majority in *Aquino* ruled that the constitutional sufficiency of the declaration of martial law was purely political in nature, therefore, not

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38 Id. at 591.
39 Id. at 598–599.
40 *In the Matter of the Petition for Habeas Corpus of Benigno S. Aquino Jr. et al. v Enrile*, 158-A Phil. 1, 45 (1974) [Per C.J. Makalintal, En Banc].
41 Id.
42 Id. at 49.

justiciable. The *ponente,* Chief Justice Makalintal, also added that the issue of justiciability was rendered moot[43] by the affirmative result of the general referendum of July 27-28, 1973, which posed this question to the voters: "Under the (1973) Constitution, the President, if he so desires, can continue in office beyond 1973. Do you want President Marcos to continue beyond 1973 and finish the reforms he initiated under martial law?"[44]

While some of the members of the Court disagreed and insisted that the issue was justiciable, they nonetheless joined the majority in dismissing the petitions on the ground that President Marcos did not act arbitrarily when he declared martial law pursuant to the 1935 Constitution:

> Arrayed on the side of justiciability are Justices Castro, Fernando, Teehankee and Muñoz Palma. They hold that the constitutional sufficiency of the proclamation may be inquired into by the Court, and would thus apply the principle laid down in Lansang although that case refers to the power of the President to suspend the privilege of the writ of *habeas corpus*. The recognition of justiciability accorded to the question in Lansang, it should be emphasized, is there expressly distinguished from the power of judicial review in ordinary civil or criminal cases, and is limited to ascertaining "merely whether he (the President) has gone beyond the constitutional limits of his jurisdiction, not to exercise the power vested in him or to determine the wisdom of his act." The test is not whether the President's decision is correct but whether, in suspending the writ, he did or did not act arbitrarily. Applying this test, the finding by the Justices just mentioned is that there was no arbitrariness in the President's proclamation of martial law pursuant to the 1935 Constitution; and I concur with them in that finding. The factual bases for the suspension of the privilege of the writ of *habeas corpus*, particularly in regard to the existence of a state of rebellion in the country, had not disappeared, indeed had been exacerbated, as events shortly before said proclamation clearly demonstrated. On this Point the Court is practically unanimous; Justice Teehankee merely refrained from discussing it.[45]

The President's Commander-in-Chief powers under the 1935 Constitution were merely repeated under the 1973 Constitution, particularly in Article VII, Section 11:

> SEC. 11. The President shall be commander-in-chief of all armed forces of the Philippines and, whenever it becomes necessary, he may call out such armed forces to prevent or suppress lawless violence, invasion, insurrection, or rebellion. In case of invasion, insurrection, or rebellion, or imminent danger thereof, when the public safety requires it, he may suspend the privilege of the writ of habeas corpus, or place the Philippines or any part thereof under martial law.

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43 Id. at 49–50.
44 Id.
45 Id. at 47–48.

Nine (9) years after the *Aquino* ruling, *In the Issuance of the Writ of Habeas Corpus for Parong et al v. Enrile*[46] reverted to the ruling of political question and non-justiciability expounded on in *Barcelon* and *Montenegro*:

> In times of war or national emergency, the legislature may surrender a part of its power of legislation to the President. Would it not be as proper and wholly acceptable to lay down the principle that during such crises, the judiciary should be less jealous of its power and more trusting of the Executive in the exercise of its emergency powers in recognition of the same necessity? Verily, the existence of the emergencies should be left to President's sole and unfettered determination. His exercise of the power to suspend the privilege of the writ of *habeas corpus* on the occasion thereof, should also be beyond judicial review. Arbitrariness, as a ground for judicial inquiry of presidential acts and decisions, sounds good in theory but impractical and unrealistic, considering how well-nigh impossible it is for the courts to contradict the finding of the President on the existence of the emergency that gives occasion for the exercise of the power to suspend the privilege of the writ. For the Court to insist on reviewing Presidential action on the ground of arbitrariness may only result in a violent collision of two jealous powers with tragic consequences, by all means to be avoided, in favor of adhering to the more desirable and long-tested doctrine of "political question" in reference to the power of judicial review.
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> Amendment No. 6 of the 1973 Constitution, as earlier cited, affords further reason for the reexamination of the Lansang doctrine and reversion to that of *Barcelon vs. Baker* and *Montenegro vs. Castaneda*.[47]

In his dissent, Justice Claudio Teehankee emphasized that *Lansang* recognized and deferred to the President's wisdom in determining the necessity of the suspension of the privilege of the writ of *habeas corpus*. Notwithstanding this recognition, the Court in *Lansang* acted within the scope of its power of judicial review when it established "the constitutional confines and limits of the President's power."[48] The Court's exercise of judicial review was not meant to undermine the correctness or wisdom of the President's decision, but rather to ensure that "the President's decision to suspend the privilege not suffer from the constitutional infirmity of arbitrariness."[49]

However, barely six (6) days later, the Court promulgated *In the Matter of the Petition for Habeas Corpus of Morales, Jr. v. Enrile*[50] which reiterated[51] *Lansang*. *Morales* held that the power of judicial review necessitated that the Court must look into "every phase and aspect of

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46 206 Phil. 392 (1983) [Per J. De Castro, En Banc]. (Note: This case is more commonly referred to as *Garcia-Padilla v. Enrile.*)
47 Id. at 431–432.
48 Id. at 453–454.
49 Id. at 454.
50 206 Phil. 466 (1983) [Per J. Concepcion, Jr., En Banc].
51 Id. at 496.

petitioner's detention . . . up to the moment the court passes upon the merits of the petition" because only then can the court be satisfied that there was no violation of the due process clause.[52]

The pliability of the past Courts under martial law as declared by Ferdinand E. Marcos through the convenient issues of justiciability or non-justiciability was finally laid to rest in the 1987 Constitution when the Court was directed by Article VII, Section 18 to review the sufficiency of the factual basis of the declaration or suspension, thus, making the issue justiciable and within the ambit of judicial review. Furthermore, the Court was mandated to promulgate its decision within thirty (30) days from the filing of an appropriate proceeding by any citizen.

David v. Senate Electoral Tribunal[53] points out that legal provisions oftentimes result from the re-adoption or re-calibration of existing rules, with the resulting legal provisions meant to address the shortcomings of the previously existing rules:

> Interpretation grounded on textual primacy likewise looks into how the text has evolved. Unless completely novel, legal provisions are the result of the re-adoption — often with accompanying re-calibration — of previously existing rules. Even when seemingly novel, provisions are often introduced as a means of addressing the inadequacies and excesses of previously existing rules.
>
> One may trace the historical development of text: by comparing its current iteration with prior counterpart provisions, keenly taking note of changes in syntax, along with accounting for more conspicuous substantive changes such as the addition and deletion of provisos or items in enumerations, shifting terminologies, the use of more emphatic or more moderate qualifiers, and the imposition of heavier penalties. The tension between consistency and change galvanizes meaning.[54]

The expansion of judicial review from 1905 all the way to 1987 shows the unmistakable intent of the Constitution for the Judiciary to play a more active role to check on possible abuses by the Executive. Furthermore, not only was the Court given an express grant to review the President's Commander-in-Chief powers, it was also denied the discretion to decline exercising its power of judicial review.[55] Thus, as it stands, the Court is duty bound to carefully and with deliberate intention, scrutinize the President's exercise of his or her Commander-in-Chief powers. The express grant

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[52] Id.

[53] *David v. Senate Electoral Tribunal,* G.R. No. 221538, September 20, 2016 < http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2016/september2016/221538.pdf> [Per J. Leonen, En Banc].

[54] Id.

[55] See Separate Opinion of J. Puno in *Integrated Bar of the Philippines v. Zamora,* 392 Phil. 618, 666–667 (2000) [Per J. Kapunan, En Banc].

likewise implies that the Court is expected to step in when the minimum condition materializes (i.e. an appropriate proceeding filed by any citizen) and review the sufficiency of the factual basis which led to the declaration or suspension.

Unlike the Court which is empowered to strike out a proclamation of martial law or suspension of the privilege of the writ of *habeas corpus* only on the ground of lack of sufficient factual basis, the Congress is given a much wider latitude in its power to revoke the proclamation or suspension, with the President powerless to set aside or contest the said revocation.

The framers also intended for the Congress to have a considerably broader review power than the Judiciary and to play an active role following the President's proclamation of martial law or suspension of the privilege of the writ of *habeas corpus*. Unlike the Court which can only act upon an appropriate proceeding filed by any citizen, Congress may, by voting jointly and upon a majority vote, revoke such proclamation or suspension. The decision to revoke is not premised on how factually correct the President's invocation of his Commander-in-Chief powers are, rather, Congress is permitted a wider latitude in how it chooses to respond to the President's proclamation or suspension. While the Court is limited to reviewing the sufficiency of the factual basis behind the President's proclamation or suspension, Congress does not operate under such constraints and can strike down the President's exercise of his Commander-in-Chief powers as it pleases without running afoul of the Constitution.

With its veto power and power to extend the duration of martial law upon the President's initiative and as a representative of its constituents, Congress is also expected to continuously monitor and review the situation on the areas affected by martial law. Unlike the Court which is mandated to promulgate its decision within thirty (30) days from the time a petition questioning the proclamation is filed, Congress is not saddled with a similar duty. While the Court is mandated to look into the sufficiency of the factual basis and whether or not the proclamation was attended with grave abuse of discretion, Congress deals primarily with the wisdom behind the proclamation or suspension. Much deference is thus accorded to Congress and is treated as the President's co-equal when it comes to determining the wisdom behind the imposition or continued imposition of martial law or suspension of the writ.

The Supreme Court cannot shirk from its responsibility drawn from a historical reading of the context of the provision of the Constitution through specious procedural devices. As experienced during the darker Marcos Martial Law years, even magistrates of the highest court were not immune from the significant powerful and coercive hegemony of an authoritarian. It is in this context that this Court should regard its power. While it does not

substitute its own wisdom for that of the President, the sovereign has assigned it the delicate task of reviewing the reasons stated for the suspension of the writ of habeas corpus or the declaration of martial law. This Court thus must not be deferential. Its review is not a disrespect of a sitting President, it is rather its own Constitutional duty.

III

History shows that there can be many variants of martial law. Under the present constitution, the President must be clear as to which variant is encompassed in Proclamation No. 216. Otherwise it would be too vague that it will violate the fundamental right to due process as well as evading review under Article VII Section 18 of the Constitution.

The President is both the Chief Executive and the Commander-in-Chief. He is responsible for the preservation of peace and order, as well as the protection of the security of the sovereignty and the integrity of the national territory, and all the inherent powers necessary to fulfil said responsibilities reside in him.

As the Chief Executive, the President controls the police, and his role is civilian in character.[56] Thus, as Chief Executive, the President's peace and order efforts are focused on preventing the commission of crimes, protecting life, liberty, and property, and arresting violators of laws.[57]

Article VII, Section 18 designates the President as the Commander-in-Chief of all the armed forces of the Philippines, and the command, control, and discipline of the armed forces are all under his authority. Relevant to this are several other provisions in the Constitution.

Article II, Section 3 of the Constitution provides:

> Section 3. Civilian authority is, at all times, supreme over the military. The Armed Forces of the Philippines is the protector of the people and the State. Its goal is to secure the sovereignty of the State and the integrity of the national territory.

Article VII, Section 16 provides:

> Section 16. The President shall nominate and, with the consent of the Commission on Appointments, appoint the heads of the executive

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[56] Article XVI, Section 6 and Article X, Section 21of the Constitution.
[57] Rep. Act No. 4864, sec. 7 or the The Police Act of 1966.

> departments, ambassadors, other public ministers and consuls, or officers of the armed forces from the rank of colonel or naval captain, and other officers whose appointments are vested in him in this Constitution . . .

Article XVI, Section 4 provides:

> Section 4. The Armed Forces of the Philippines shall be composed of a citizen armed force which shall undergo military training and serve, as may be provided by law. It shall keep a regular force necessary for the security of the State.

The President was called the "guardian of the Philippine archipelago" in *Saguisag v. Ochoa, Jr.*:[58]

> The duty to protect the State and its people must be carried out earnestly and effectively throughout the whole territory of the Philippines in accordance with the constitutional provision on national territory. Hence, the President of the Philippines, as the sole repository of executive power, is the guardian of the Philippine archipelago, including all the islands and waters embraced therein and all other territories over which it has sovereignty or jurisdiction. These territories consist of its terrestrial, fluvial, and aerial domains; including its territorial sea, the seabed, the subsoil, the insular shelves, and other submarine areas; and the waters around, between, and connecting the islands of the archipelago, regardless of their breadth and dimensions.
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> To carry out this important duty, the President is equipped with authority over the Armed Forces of the Philippines (AFP), which is the protector of the people and the state. The AFP's role is to secure the sovereignty of the State and the integrity of the national territory. In addition, the Executive is constitutionally empowered to maintain peace and order; protect life, liberty, and property; and promote the general welfare. In recognition of these powers, Congress has specified that the President must oversee, ensure, and reinforce our defensive capabilities against external and internal threats and, in the same vein, ensure that the country is adequately prepared for all national and local emergencies arising from natural and man-made disasters.[59]

While the President is both the Chief Executive and the Commander-in-Chief, the President's role as a *civilian* Commander-in-Chief was emphasized in *Gudani v. Senga*:[60]

> The vitality of the tenet that the President is the commander-in-chief of the Armed Forces is most crucial to the democratic way of life, to civilian supremacy over the military, and to the general stability of our representative system of government. The Constitution reposes final

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58 G.R. Nos. 212426 & 212444, January 12, 2016, 779 SCRA 241 [Per C.J. Sereno, En Banc].
59 Id. at 301–302.
60 530 Phil. 399 (2006) [Per J. Tinga, En Banc].

> authority, control and supervision of the AFP to the President, a civilian who is not a member of the armed forces, and whose duties as commander-in-chief represent only a part of the organic duties imposed upon the office, the other functions being clearly civil in nature. Civilian supremacy over the military also countermands the notion that the military may bypass civilian authorities, such as civil courts, on matters such as conducting warrantless searches and seizures.
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> Pursuant to the maintenance of civilian supremacy over the military, the Constitution has allocated specific roles to the legislative and executive branches of government in relation to military affairs. Military appropriations, as with all other appropriations, are determined by Congress, as is the power to declare the existence of a state of war. Congress is also empowered to revoke a proclamation of martial law or the suspension of the writ of *habeas corpus*. The approval of the Commission on Appointments is also required before the President can promote military officers from the rank of colonel or naval captain. Otherwise, on the particulars of civilian dominance and administration over the military, the Constitution is silent, except for the commander-in-chief clause which is fertile in meaning and implication as to whatever inherent martial authority the President may possess.
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> The commander-in-chief provision in the Constitution is denominated as Section 18, Article VII, which begins with the simple declaration that "[t]he President shall be the Commander-in-Chief of all armed forces of the Philippines . . ." Outside explicit constitutional limitations, such as those found in Section 5, Article XVI, the commander-in-chief clause vests on the President, as commander-in-chief, absolute authority over the persons and actions of the members of the armed forces. Such authority includes the ability of the President to restrict the travel, movement and speech of military officers, activities which may otherwise be sanctioned under civilian law.[61]

The President exercises the powers inherent to the positions of Chief Executive and Commander-in-Chief at all times. As a general principle, his execution of these powers is not subject to review. However, the powers provided under Article VII, Section 18, are extraordinary powers, to be exercised in extraordinary times, when the ordinary powers as Commander-in-Chief and Chief Executive will not suffice to maintain peace and order. Article VII, Section 18 constitutionalized the actions the President can take to respond to cases of invasion, rebellion, and lawless violence, but these are exceptions to the ordinary rule of law.

These powers have been characterized as having a graduated sequence, from the most benign, to the harshest. The most benign of these extraordinary powers is the calling out power, whereby the President recedes as Chief Executive and law enforcement functions take a back seat to the urgent matter of addressing the matter of lawless violence, invasion, or

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[61] Id. at 420–422.

rebellion. As the most benign of the powers, it is the power that the President may exercise with the greatest leeway; he may exercise it at his sole discretion. The distinctions between the amount of presidential discretion and the great leeway accorded to the President's calling out power of the army, were elaborated upon in *Kulayan v. Tan*:[62]

> The power to declare a state of martial law is subject to the Supreme Court's authority to review the factual basis thereof. By constitutional fiat, the calling-out powers, which is of lesser gravity than the power to declare martial law, is bestowed upon the President alone. As noted in *Villena*, "(t)here are certain constitutional powers and prerogatives of the Chief Executive of the Nation which must be exercised by him in person and no amount of approval or ratification will validate the exercise of any of those powers by any other person. Such, for instance, is his power to suspend the writ of *habeas corpus* and proclaim martial law[.]["]
>
> Indeed, while the President is still a civilian, Article II, Section 3 of the Constitution mandates that civilian authority is, at all times, supreme over the military, making the civilian president the nation's supreme military leader. The net effect of Article II, Section 3, when read with Article VII, Section 18, is that a civilian President is the ceremonial, legal and administrative head of the armed forces. The Constitution does not require that the President must be possessed of military training and talents, but as Commander-in-Chief, he has the power to direct military operations and to determine military strategy. Normally, he would be expected to delegate the actual command of the armed forces to military experts; but the ultimate power is his. As Commander-in-Chief, he is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual.
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> In the case of *Integrated Bar of the Philippines v. Zamora*, the Court had occasion to rule that the calling-out powers belong solely to the President as commander-in-chief:
>
> > **When the President calls the armed forces to prevent or suppress lawless violence, invasion or rebellion, he necessarily exercises a discretionary power solely vested in his wisdom.** This is clear from the intent of the framers and from the text of the Constitution itself. The Court, thus, cannot be called upon to overrule the President's wisdom or substitute its own. However, this does not prevent an examination of whether such power was exercised within permissible constitutional limits or whether it was exercised in a manner constituting grave abuse of discretion. In view of the constitutional intent to give the President full discretionary power to determine the necessity of calling out the armed forces, it is incumbent upon the petitioner to show that the President's decision is totally bereft of factual basis.

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62 690 Phil. 70 (2012) [Per J. Sereno, En Banc].

There is a clear textual commitment under the Constitution to bestow on the President full discretionary power to call out the armed forces and to determine the necessity for the exercise of such power.

Under the foregoing provisions, Congress may revoke such proclamation or suspension and the Court may review the sufficiency of the factual basis thereof. However, there is no such equivalent provision dealing with the revocation or review of the President's action to call out the armed forces. The distinction places the calling out power in a different category from the power to declare martial law and the power to suspend the privilege of the writ of *habeas corpus*, otherwise, the framers of the Constitution would have simply lumped together the three powers and provided for their revocation and review without any qualification.

That the power to call upon the armed forces is discretionary on the president is clear from the deliberation of the Constitutional Commission:

> FR. BERNAS.
>
> It will not make any difference. I may add that **there is a graduated power of the President as Commander-in-Chief. First, he can call out such Armed Forces as may be necessary to suppress lawless violence; then he can suspend the privilege of the writ of *habeas corpus*, then he can impose martial law. This is a graduated sequence.**
>
> When he judges that it is necessary to impose martial law or suspend the privilege of the writ of *habeas corpus*, his judgment is subject to review. We are making it subject to review by the Supreme Court and subject to concurrence by the National Assembly. But when he exercises this lesser power of calling on the Armed Forces, when he says it is necessary, it is my opinion that his judgment cannot be reviewed by anybody.
>
> . . . .
>
> MR. REGALADO.
>
> That does not require any concurrence by the legislature nor is it subject to judicial review.

The reason for the difference in the treatment of the aforementioned powers highlights the intent to grant the President the widest leeway and broadest discretion in using the power to call out because it is considered as the lesser and more benign power compared to the power to suspend the privilege of the writ of *habeas corpus* and the power to impose martial law, both of which involve the curtailment and suppression of certain basic civil rights and individual freedoms, and thus necessitating safeguards by Congress and review by this Court.

> . . . **Thus, it is the unclouded intent of the Constitution to vest upon the President, as Commander-in-Chief of the Armed Forces, full discretion to call forth the military when in his judgment it is necessary to do so in order to prevent or suppress lawless violence, invasion or rebellion.**
>
> In the more recent case of *Constantino, Jr. v. Cuisia*, the Court characterized these powers as exclusive to the President, precisely because they are of exceptional import:
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> > These distinctions hold true to this day as they remain embodied in our fundamental law. There are certain presidential powers which arise out of exceptional circumstances, and if exercised, would involve the suspension of fundamental freedoms, or at least call for the supersedence of executive prerogatives over those exercised by co-equal branches of government. The declaration of martial law, the suspension of the writ of *habeas corpus*, and the exercise of the pardoning power, notwithstanding the judicial determination of guilt of the accused, all fall within this special class that demands the exclusive exercise by the President of the constitutionally vested power. The list is by no means exclusive, but there must be a showing that the executive power in question is of similar *gravitas* and exceptional import.[63] (Emphasis in the original, citations omitted)

The other two extraordinary powers may be reviewed by Congress and the Judiciary, as they involve the curtailment and suppression of basic civil rights and individual freedoms.

The writ of habeas corpus was devised as a remedy to ensure the constitutional protection against deprivation of liberty without due process. It is issued to command the production of the body of the person allegedly restrained of his or her liberty.

The suspension of the privilege of the writ of habeas corpus is simply a suspension of a remedy. The suspension of the privilege does not make lawful otherwise unlawful arrests, such that all detentions, regardless of circumstance, are legal. Rather, the suspension only deprives a detainee of the remedy to question the legality of his detention.

In *In re Salibo v. Warden*,[64] this Court explained that while the privilege may be suspended, the writ itself could not be suspended.

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[63] Id. at 90–93.
[64] 755 Phil. 296 (2015) [Per J. Leonen, Second Division].

Called the "great writ of liberty[,]" the writ of habeas corpus "was devised and exists as a speedy and effectual remedy to relieve persons from unlawful restraint, and as the best and only sufficient defense of personal freedom." The remedy of habeas corpus is extraordinary and summary in nature, consistent with the law's "zealous regard for personal liberty."

Under Rule 102, Section 1 of the Rules of Court, the writ of habeas corpus "shall extend to all cases of illegal confinement or detention by which any person is deprived of his liberty, or by which the rightful custody of any person is withheld from the person entitled thereto." The primary purpose of the writ "is to inquire into all manner of involuntary restraint as distinguished from voluntary, and to relieve a person therefrom if such restraint is illegal." "Any restraint which will preclude freedom of action is sufficient."

The nature of the restraint of liberty need not be related to any offense so as to entitle a person to the efficient remedy of habeas corpus. It may be availed of as a post-conviction remedy or when there is an alleged violation of the liberty of abode. In other words, habeas corpus effectively substantiates the implied autonomy of citizens constitutionally protected in the right to liberty in Article III, Section 1 of the Constitution. Habeas corpus being a remedy for a constitutional right, courts must apply a conscientious and deliberate level of scrutiny so that the substantive right to liberty will not be further curtailed in the labyrinth of other processes.

In *Gumabon, et al. v. Director of the Bureau of Prisons*, Mario Gumabon (Gumabon), Blas Bagolbagol (Bagolbagol), Gaudencio Agapito (Agapito), Epifanio Padua (Padua), and Paterno Palmares (Palmares) were convicted of the complex crime of rebellion with murder. They commenced serving their respective sentences of *reclusion perpetua.*

While Gumabon, Bagolbagol, Agapito, Padua, and Palmares were serving their sentences, this court promulgated *People v. Hernandez* in 1956, ruling that the complex crime of rebellion with murder does not exist.

Based on the *Hernandez* ruling, Gumabon, Bagolbagol, Agapito, Padua, and Palmares filed a Petition for Habeas Corpus. They prayed for their release from incarceration and argued that the *Hernandez* doctrine must retroactively apply to them.

This court ruled that Gumabon, Bagolbagol, Agapito, Padua, and Palmares properly availed of a petition for habeas corpus. Citing *Harris v. Nelson*, this court said:

[T]he writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action. . . . The scope and flexibility of the writ — its capacity to reach all manner of illegal detention — its ability to cut through barriers of form and procedural mazes — have always been emphasized and jealously guarded by courts and lawmakers. The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected.

In *Rubi v. Provincial Board of Mindoro*, the Provincial Board of Mindoro issued Resolution No. 25, Series of 1917. The Resolution ordered the Mangyans removed from their native habitat and compelled them to permanently settle in an 800-hectare reservation in Tigbao. Under the Resolution, Mangyans who refused to establish themselves in the Tigbao reservation were imprisoned.

An application for habeas corpus was filed before this court on behalf of Rubi and all the other Mangyans being held in the reservation. Since the application questioned the legality of deprivation of liberty of Rubi and the other Mangyans, this court issued a Writ of Habeas Corpus and ordered the Provincial Board of Mindoro to make a Return of the Writ.

A Writ of Habeas Corpus was likewise issued in *Villavicencio v. Lukban*. "[T]o exterminate vice," Mayor Justo Lukban of Manila ordered the brothels in Manila closed. The female sex workers previously employed by these brothels were rounded up and placed in ships bound for Davao. The women were expelled from Manila and deported to Davao without their consent.

On application by relatives and friends of some of the deported women, this court issued a Writ of Habeas Corpus and ordered Mayor Justo Lukban, among others, to make a Return of the Writ. Mayor Justo Lukban, however, failed to make a Return, arguing that he did not have custody of the women.

This court cited Mayor Justo Lukban in contempt of court for failure to make a Return of the Writ. As to the legality of his acts, this court ruled that Mayor Justo Lukban illegally deprived the women he had deported to Davao of their liberty, specifically, of their privilege of domicile. It said that the women, "despite their being in a sense lepers of society[,] are nevertheless not chattels but Philippine citizens protected by the same constitutional guaranties as are other citizens[.]" The women had the right "to change their domicile from Manila to another locality."

The writ of habeas corpus is different from the final decision on the petition for the issuance of the writ. It is the writ that commands the production of the body of the person allegedly restrained of his or her liberty. On the other hand, it is in the final decision where a court determines the legality of the restraint.

Between the issuance of the writ and the final decision on the petition for its issuance, it is the issuance of the writ that is essential. The issuance of the writ sets in motion the speedy judicial inquiry on the legality of any deprivation of liberty. Courts shall liberally issue writs of habeas corpus even if the petition for its issuance "on [its] face [is] devoid of merit[.]" Although the privilege of the writ of habeas corpus may be suspended in cases of invasion, rebellion, or when the public safety requires it, the writ itself may not be suspended.[65]

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[65] Id. at 311–316.

The Constitution does not spell out what martial law is, or the powers that may be exercised under a martial law regime. It only states what martial law is *not*, and cannot accomplish. The concept does not have a precise meaning in this jurisdiction. We have no legal precedent because President Ferdinand Marcos created an aberration of martial law in 1972. Thus, a historical approach at the concept may be edifying.

The Early History of Martial Law in England from the Fourteenth Century to the Petition of Right[66] discusses the beginnings of martial law in England from 1300 to 1628:

> The term martial law refers to a summary form of criminal justice, exercised under direct or delegated royal authority by the military or police forces of the Crown, which is independent of the established processes of the common law courts, the ecclesiastical courts, and the courts which administered the civil law in England. Martial law is not a body of substantive law, but rather summary powers employed when the ordinary rule of law is suspended. "It is not law," wrote Sir Matthew Hale, "but something rather indulged than allowed as a law... and that only in cases of necessity."
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> . . . .
>
> From the beginnings of summary procedure against rebels in the reign of Edward I until the mid-sixteenth century, martial law was regarded in both its forms as the extraordinary usages of war, to be employed only in time of war or open rebellion in the realm, and never as an adjunct of the regular criminal law. Beginning in the mid-1550s, however, the Crown began to claim the authority to expand the hitherto carefully circumscribed jurisdiction of martial law beyond situations of war or open rebellion and into territory which had been the exclusive domain of the criminal law . . .

In the American case of *Duncan v. Kahanamoku,*[67] martial law was defined as the "exercise of the military power which resides in the Executive Branch of Government to preserve order, and insure the public safety in domestic territory in time of emergency, when other branches of the government are unable to function or their functioning would itself threaten the public safety."[68] In *Ex Parte Milligan,*[69] Justice Davis noted a limit on this power, that "martial rule can never exist where the courts are open and in the proper and unobstructed exercise of their jurisdiction."[70]

Thus, martial law arises out of necessity, in extraordinary times, when the civilian government in an area is unable to maintain peace and order,

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66 J.V. Capua *The Early History of Martial Law in England from the Fourteenth Century to the Petition of Right*, 36 CAMBRIDGE L.J. 152 (1977).

67 327 U.S. 304 (1946) [Per J. Stone] citing *Luther v. Borden,* 48 U.S. (7 How.) 1 (1849) [Per J. Taney].

68 Id.

69 *Ex Parte Milligan,* 71 U.S. (4 Wall.) 2 (1866) [Per J. Davis]

70 Id.

such that the military must step in and govern the area until the civilian government can be restored. Its imposition is dependent on the inability of civil government agencies to function. It takes on different forms, as needed.

Prior to the martial law conceived under the 1987 Constitution, martial law had been declared three (3) times in the Philippines.

In 1896, the provinces of Manila, Laguna, Cavite, Batangas, Pampanga, Bulacan, Tarlac, and Nueva Ecija were declared to be in a state of war and under martial law because of the open revolution of the Katipunan against Spain.[71] The proclamation declaring martial law stated:

> The acts of rebellion of which armed bodies of the people have been guilty during the last few days at different points of the territory of this province, seriously disturbing public tranquillity, make it imperative that the most severe and exemplary measures be taken to suppress at its inception an attempt as criminal as futile.[72]

The first article declared a state of war against the eight (8) provinces, and the following nine (9) articles described rebels, their acts, and how they would be treated.[73]

The Philippines was placed under martial law during the Second Republic by virtue of Proclamation No. 29 signed by President Jose P. Laurel on September 21, 1944. It cited the danger of invasion being imminent and the public safety so requiring it as the justification for the imposition of the same.[74] The proclamation further declared that:

> 1. The respective Ministers of State shall, subject to the authority of the President, exercise direct supervision and control over all district, provincial, and other local governmental agencies in the Philippines when performing functions or discharging duties affecting matters within the jurisdiction of his Ministry and may, subject to revocation by the President, issue such orders as may be necessary therefor.
>
> 2. The Philippines shall be divided into nine Military Districts, seven to correspond to the seven Administrative Districts created under Ordinance No. 31, dated August 26, 1944; the eight, to compromise the City of Manila; and the ninth, the City of Cavite and the provinces of Bulacan, Rizal, Cavite, and Palawan.

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71 *Evolution of the Revolution,* PRESIDENTIAL MUSEUM AND LIBRARY <http://malacanang.gov.ph/7824-evolution-of-the-revolution/> (last accessed on June 22, 2017).

72 Ambeth Ocampo, *Martial Law in 1896.* PHILIPPINE DAILY INQUIRER, December 18, 2009, <https://www.pressreader.com/philippines/philippine-daily-inquirer/20091218/283180079571432> (last accessed June 22, 2017).

73 Id.

74 Proc. No. 29 (1944).

3. The Commissioners for each of said Administrative Districts shall have command, respectively, of the first seven military districts herein created, and shall bear the title of Military Governor; and the Mayors and Provincial Governors of the cities and provinces compromised therein shall be their principal deputies, with the title of deputy city or provincial military governor, as the case may be. The Mayor of the City of Manila shall be Military Governor for the eight Military District; and the Vice-Minister of Home Affairs, in addition to his other duties, shall be the Military Governor for the ninth Military District.

4. All existing laws shall continue in force and effect until amended or repealed by the president, and all the existing civil agencies of an executive character shall continue exercising their agencies of an executive character shall continue exercising their powers and performing their functions and duties, unless they are inconsistent with the terms of this Proclamation or incompatible with the expeditions and effective enforcement of the martial law herein declared.

5. It shall be the duty of the Military Governors to suppress treason, sedition, disorder and violence; and to cause to be punished all disturbances of public peace and all offenders against the criminal laws; and also to protect persons in their legitimate rights. To this end and until otherwise decreed, the existing courts of justice shall assume jurisdiction and try offenders without unnecessary delay and in a summary manner, in accordance with such procedural rules as may be prescribed by the Minister of Justice. The decisions of courts of justice of the different categories in criminal cases within their original jurisdiction shall be final and unappealable. *Provided, however,* That no sentence of death shall be carried into effect without the approval of the President.

6. The existing courts of justice shall continue to be invested with, and shall exercise, the same jurisdiction in civil actions and special proceedings as are now provided in existing laws, unless otherwise directed by the President of the Republic of the Philippines.

7. The several agencies of the Government of the Republic of the Philippines are hereby authorized to call upon the armed forces of the Republic to give such aid, protection, and assistance as may be necessary to enable them safely and efficiently to exercise their powers and discharge their duties; and all such forces of the Republic are required promptly to obey such call.

8. The proclamation of martial law being an emergency measure demanded by imperative necessity, it shall continue as long as the need for it exists and shall terminate upon proclamation of the President of the Republic of the Philippines.

The next day, Proclamation No. 30 was issued, which declared the existence of a state of war in the Philippines. The proclamation cited the attack by the United States and Great Britain in certain parts of the Philippines in violation of the territorial integrity of the Republic, causing death or injury to its citizens and destruction or damage to their property.

The Proclamation also stated that the Republic entered into a Pact of Alliance[75] with Japan, based on mutual respect of sovereignty and territories, to safeguard the territorial integrity and independence of the Philippines.[76]

The traditional concept of martial law changed in 1972. On September 21, 1972, the Philippines was again placed under martial law upon President Ferdinand Marcos' issuance of Proclamation No. 1081. It read:

> NOW, THEREFORE, I, FERDINAND E. MARCOS, President of the Philippines, by virtue of the powers vested upon me by Article VII, Section 10, Paragraph (2) of the Constitution, do hereby place the entire Philippines as defined in Article I, Section 1 of the Constitution under martial law and, in my capacity as their commander-in-chief, do hereby command the armed forces of the Philippines, to maintain law and order throughout the Philippines, prevent or suppress all forms of lawless violence as well as any act of insurrection or rebellion and to **enforce obedience to all the laws and decrees, orders and regulations promulgated by me personally or upon my direction**.
>
> In addition, I do hereby order that all persons presently detained, as well as all others who may hereafter be similarly detained for the crimes of insurrection or rebellion, and all other crimes and offenses committed in furtherance or on the occasion thereof, or incident thereto, or in connection therewith, for crimes against national security and the law of nations, crimes against public order, crimes involving usurpation of authority, rank, title and improper use of names, uniforms and insignia, crimes committed by public officers, and for such other crimes as will be enumerated in Orders that **I shall subsequently promulgate**, as well as crimes as a consequence of any violation of **any decree, order or regulation promulgated by me personally or promulgated upon my direction shall be kept under detention until otherwise ordered released by me or by my duly designated representative**.[77] (Emphasis supplied)

The next day, on September 22, 1972, President Marcos promulgated General Order Nos. 1 to 6, detailing the powers he would be exercising under martial law.

General Order No. 1 gave President Marcos the power to "govern the nation and, direct the operation of the entire Government, including all its agencies and instrumentalities, in [his] capacity and . . . exercise all the powers and prerogatives appurtenant and incident to [his] position as such Commander-in-Chief of the Armed Forces of the Philippines."[78]

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[75] *Dr. Jose P. Laurel as President of the Second Philippine Republic,* PRESIDENTIAL MUSEUM AND LIBRARY <http://malacanang.gov.ph/5237-dr-jose-p-laurel-as-president-of-the-second-philippine-republic/#_edn7> (last accessed July 3, 2017).

[76] Proc. No. 30 (1944).

[77] Proc. No. 1081 (1972).

[78] Gen. Order No. 1 (1972).

General Order No. 2 ordered the arrest of several individuals.[79] The same was followed by General Order No. 3, which stated that "all executive departments, bureaus, offices, agencies, and instrumentalities of the National Government, government-owned or controlled corporations, as well as governments of all the provinces, cities, municipalities, and barrios throughout the land shall continue to function under their present officers and employees and in accordance with existing laws." However, General Order No. 3 removed from the jurisdiction of the judiciary the following cases:[80]

> 1. Those involving the validity, legality or constitutionality of Proclamation No. 1081 dated September 21, 1972, or of any decree, order or acts issued, promulgated or [performed] by me or by my duly designated representative pursuant thereto. (As amended by General Order No. 3-A, dated September 24, 1972).
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> 2. Those involving the validity, legality or constitutionality of any rules, orders or acts issued, promulgated or performed by public servants pursuant to decrees, orders, rules and regulations issued and promulgated by me or by my duly designated representative pursuant to Proclamation No. 1081, dated Sept. 21, 1972.
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> 3. Those involving crimes against national security and the law of nations.
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> 4. Those involving crimes against the fundamental laws of the State.
>
> 5. Those involving crimes against public order.
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> 6. Those crimes involving usurpation of authority, rank, title, and improper use of names, uniforms, and insignia.
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> 7. Those involving crimes committed by public officers.

General Order No. 4 imposed the curfew between the hours of 12 midnight and 4 o'clock in the morning wherein no person in the Philippines was allowed to move about outside his or her residence unless he or she is authorized in writing to do so by the military commander-in-charge of his or her area of residence. General Order No. 4 further stated that any violation of the same would lead to the arrest and detention of the person in the

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[79] Gen. Order No. 2 (1972).
[80] Gen. Order No. 3 (1972).

nearest military camp and the person would be released not later than 12 o'clock noon the following day.[81]

General Order No. 5 ordered that

> all rallies, demonstrations, and other forms of group actions by persons within the geographical limits of the Philippines, including strikes and picketing in vital industries such as companies engaged in manufacture or processing as well as in the distribution of fuel, gas, gasoline, and fuel or lubricating oil, in companies engaged in the production or processing of essential commodities or products for exports, and in companies engaged in banking of any kind, as well as in hospitals and in schools and colleges, are strictly prohibited and any person violating this order shall forthwith be arrested and taken into custody and held for the duration of the national emergency or until he or she is otherwise ordered released by me or by my designated representative.[82]

General Order No. 6 imposed that "no person shall keep, possess, or carry outside of his residence any firearm unless such person is duly authorized to keep, possess, or carry such firearm and any person violating this order shall forthwith be arrested and taken into custody . . ."[83]

Martial law arises from necessity, when the civil government cannot maintain peace and order, and the powers to be exercised respond to that necessity. However, under his version of martial law, President Marcos placed all his actions beyond judicial review and vested in himself the power to "legally," by virtue of his General Orders, do anything, without limitation. It was clearly not necessary to make President Marcos a dictator to enable civil government to maintain peace and order. President Marcos also prohibited the expression of dissent, prohibiting "rallies, demonstrations . . . and other forms of group actions" in the premises not only of public utilities, but schools, colleges, and even companies engaged in the production of products of exports.[84] Clearly, these powers were not necessary to enable the civil government to execute its functions and maintain peace and order, but rather, to enable him to continue as self-made dictator.

President Marcos' implementation of martial law was a total abuse and bastardization of the concept of martial law. A reading of the powers President Marcos intended to exercise makes it abundantly clear that there was no public necessity that demanded the President be given those powers. Thus, the 1987 Constitution imposed safeguards in response to President Marcos' implementation of martial law, precisely to prevent similar abuses

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81 Gen. Order No. 4 (1972).
82 Gen. Order No. 5 (1972).
83 Gen. Order No. 6 (1972).
84 Gen. Order No. 5 (1972).

in the future and to ensure the focus on public safety requiring extraordinary powers be exercised under a state of martial law.

Martial law under President Marcos was an aberration. We must return to the original concept of martial law, *arising from necessity*, declared because civil governance is no longer possible in any way. The authority to place the Philippines or any part thereof under martial law is not a definition of a power, but a declaration of a status – that there exists a situation wherein there is *no capability for civilian government to continue*. It is a declaration of a condition on the ground, that there is a vacuum of government authority, and by virtue of such vacuum, military rule becomes necessary. Further, it is a temporary state, for military rule to be exercised until civil government may be restored.

This Court cannot dictate the parameters of what powers the President may exercise under a state of martial law to address a rebellion or invasion. For this Court to tell the President exactly how to govern under a state of martial law would be undue interference with the President's powers. There may be many different permutations of governance under a martial law regime. It takes different forms, as may be necessary.

However, while this Court cannot state the parameters for the President's martial law, this Court's constitutional role implicitly requires that the President provide the parameters himself, upon declaring martial law. The proclamation must contain the powers he intends to wield.

This Court has the power to determine the sufficiency of factual basis for determining that public safety requires the proclamation of martial law. The President evades review when he does not specify how martial law would be used.

It may be assumed that any rebellion or invasion will involve arms and hostility and, consequently, will pose some danger to civilians. It may also be assumed that, in any state of rebellion or invasion, the executive branch of government will have to take some action, exercise some power, to address the disturbance, via police or military force. For so long as the President does not declare martial law or suspend the privilege of the writ of habeas corpus to address a disturbance to the peace, this Court does not have the power to look at whether public safety needs that action.

But if the President does declare martial law or suspends the privilege, this Court does have the power to question whether public safety requires the declaration or the suspension.

In conducting a review of the sufficiency of factual basis for the proclamation of martial law, this Court cannot be made to imagine what martial law is. The President's failure to outline the powers he will be exercising and the civil liberties that may be curtailed will make it impossible for this Court to assess whether public safety requires the exercise of those powers or the curtailment of those civil liberties.

It is not sufficient to declare "there is martial law." Because martial law can only be declared when public safety requires it, it is the burden of the President to state what powers public safety requires be exercised.

IV

I disagree with the proposed ponencia's view that the vagueness of a Presidential Proclamation on martial law can only be done on grounds of alleged violation of freedom of expression. Rather, the vagueness of a declaration of martial law is, in my view unconstitutional as it will evade review of the sufficiency of facts required by the constitutional provision.

We need to distinguish between our doctrines relating to acts being void for vagueness and those which are void due to overbreadth.

The doctrine of void for vagueness is a ground for invalidating a statute or a governmental regulation for being *vague*. The doctrine requires that a statute be sufficiently explicit as to inform those who are subject to it what conduct on their part will render them liable to its penalties.[85] In *Southern Hemisphere v. Anti-Terrorism Council*:[86]

> A statute or act suffers from the defect of vagueness when it lacks comprehensible standards that men of common intelligence must necessarily guess at its meaning and differ as to its application. It is repugnant to the Constitution in two respects: (1) it violates due process for failure to accord persons, especially the parties targeted by it, fair notice of the conduct to avoid; and (2) it leaves law enforcers unbridled discretion in carrying out its provisions and becomes an arbitrary flexing of the Government muscle.[87]

In *People of the Philippines v. Piedra*,[88] the Court explained that the rationale behind the doctrine is to give a person of ordinary intelligence a fair notice that his or her contemplated conduct is forbidden by the statute or

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[85] *People of the Philippines v.Piedra,* 403 Phil. 31 (2001) [Per J. Kapunan, First Division].
[86] 646 Phil. 452 (2010) [Per J. Carpio Morales, En Banc].
[87] Id. at 488.
[88] 403 Phil. 31 (2001) [Per J. Kapunan, First Division].

the regulation.[89] Thus, a statute must be declared void and unconstitutional when it is so indefinite that it encourages arbitrary and erratic arrests and convictions.[90]

In *Estrada v. Sandiganbayan,*[91] the Court limited the application of the doctrine in cases where the statute is "*utterly vague on its face*, i.e. that which cannot be clarified by a saving clause or construction."[92] Thus, when a statute or act lacks comprehensible standards that men of common intelligence must necessarily guess its meaning and differ in its application, the doctrine may be invoked:[93]

> Hence, it cannot plausibly be contended that the law does not give a fair warning and sufficient notice of what it seeks to penalize. Under the circumstances, petitioner's reliance on the "void-for-vagueness" doctrine is manifestly misplaced. The doctrine has been formulated in various ways, but is most commonly stated to the effect that a statute establishing a criminal offense must define the offense with sufficient definiteness that persons of ordinary intelligence can understand what conduct is prohibited by the statute. It can only be invoked against that specie of legislation that is utterly vague on its face, *i.e.*, that which cannot be clarified either by a saving clause or by construction.
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> A statute or act may be said to be vague when it lacks comprehensible standards that men of common intelligence must necessarily guess at its meaning and differ in its application. In such instance, the statute is repugnant to the Constitution in two (2) respects — it violates due process for failure to accord persons, especially the parties targeted by it, fair notice of what conduct to avoid; and, it leaves law enforcers unbridled discretion in carrying out its provisions and becomes an arbitrary flexing of the Government muscle. But the doctrine does not apply as against legislations that are merely couched in imprecise language but which nonetheless specify a standard though defectively phrased; or to those that are apparently ambiguous yet fairly applicable to certain types of activities. The first may be "saved" by proper construction, while no challenge may be mounted as against the second whenever directed against such activities. With more reason, the doctrine cannot be invoked where the assailed statute is clear and free from ambiguity, as in this case.[94]

In *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council,*[95] the Court clarified that the void for vagueness doctrine may only be invoked in *as-applied* cases. The Court explained:

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89 Id. at 47.
90 Id. at 47–48.
91 421 Phil 290 (2001) [Per J. Belosillo, En Banc].
92 Id. at 352.
93 Id. at 351–352.
94 Id. at 352.
95 646 Phil. 452 (2010) [Per J. Carpio- Morales, En Banc].

> found vague *as a matter of due process* typically are invalidated only 'as applied' to a particular defendant."[96]

However, in *Disini v. Secretary of Justice,*[97] the Court extended the application of the doctrine even to facial challenges, ruling that "when a penal statute encroaches upon the freedom of speech, a facial challenge grounded on the void-for-vagueness doctrine is acceptable."[98] Thus, by this pronouncement the void for vagueness doctrine may also now be invoked in facial challenges as long as what it involved is freedom of speech.

On the other hand, the void for overbreadth doctrine applies when the statute or the act "offends the constitutional principle that a governmental purpose to control or prevent activities constitutionally subject to state regulations may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."[99]

In *Adiong v. Commission on Elections,*[100] the Court applied the doctrine in relation to the Due Process Clause of the Constitution. Thus, in *Adiong,* the Commission on Elections issued a Resolution prohibiting the posting of decals and stickers not more than eight and one-half (8 ½) inches in width and fourteen (14) inches in length *in any place, including mobile places whether public or private* except in areas designated by the COMELEC. The Court characterized the regulation as void for being "so broad," thus:

> Verily, the restriction as to where the decals and stickers should be posted is so broad that it encompasses even the citizen's private property, which in this case is a privately-owned vehicle. In consequence of this prohibition, another cardinal rule prescribed by the Constitution would be violated. Section 1, Article III of the Bill of Rights provides "that no person shall be deprived of his property without due process of law."
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> > Property is more than the mere thing which a person owns, it includes the right to acquire, *use,* and dispose of it; and the Constitution, in the 14th Amendment, protects these essential attributes.
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> > Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property. . . Property consists of the free use, enjoyment, and disposal of a person's acquisitions

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96 Id. at 492.
97 727 Phil. 28(2014) [Per J. Abad, En Banc].
98 Id. at 327.
99 *Adiong v. Commission on Elections*, G.R. No. 103956, March 31, 1992, 207 SCRA 712, 719 [Per Gutierrez, Jr., En Banc].
100 G.R. No. 103956, March 31, 1992, 207 SCRA 712 [Per Gutierrez, Jr., En Banc].

> use, and dispose of it. The Constitution protects these essential attributes of property. . . Property consists of the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land.[101] (Citations omitted)

In *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council,*[102] the Court held that the application of the overbreadth doctrine is limited only to free speech cases due to the rationale of a facial challenge. The Court explained:

> By its nature, the overbreadth doctrine has to necessarily apply a facial type of invalidation in order to plot areas of protected speech, inevitably almost always under situations not before the court, that are impermissibly swept by the substantially overbroad regulation. Otherwise stated, a statute cannot be properly analyzed for being substantially overbroad if the court confines itself only to facts as applied to the litigants.[103]

The Court ruled that as regards the application of the overbreadth doctrine, it is limited only to "a facial kind of challenge and, owing to the given rationale of a facial challenge, applicable only to free speech cases."[104]

The Court's pronouncements in *Disini v. Secretary of Justice*[105] is also premised on the same tenor. Thus, it held:

> Also, the charge of invalidity of this section based on the overbreadth doctrine will not hold water since the specific conducts proscribed *do not intrude into guaranteed freedoms like speech.* Clearly, what this section regulates are specific actions: the acquisition, use, misuse or deletion of personal identifying data of another. There is no fundamental right to acquire another's personal data.
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> . . . .
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> But this rule admits of exceptions. *A petitioner may for instance mount a "facial" challenge to the constitutionality of a statute even if he claims no violation of his own rights under the assailed statute where it involves free speech on grounds of overbreadth or vagueness of the statute.* The rationale for this exception is to counter the "chilling effect" on protected speech that comes from statutes violating free speech. A person who does not know whether his speech constitutes a crime under an overbroad or vague law may simply restrain himself from speaking in order to avoid being charged of a crime. The overbroad or vague law thus chills him into silence.[106] (Emphasis supplied, citations omitted)

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101 Id. at 720–721.
102 646 Phil. 452 (2010) [Per J. Carpio- Morales, En Banc].
103 Id. at 490.
104 Id.
105 727 Phil. 28 (2014) [Per J. Abad, En Banc].
106 Id. at 308–328.

It is true that in his Dissenting Opinion in *Estrada v. Sandiganbayan,*[107] Justice V.V. Mendoza expressed the view that "the overbreadth and vagueness doctrines then have special application *only to free speech cases*. They are inapt for testing the validity of penal statutes."[108]

However, the Court already clarified in *Southern Hemisphere Engagement Network, Inc., v. Anti-Terrorism Council,*[109] that the primary criterion in the application of the doctrine is not whether the case is a freedom of speech case, but rather, whether the case involves an as-applied or a facial challenge. The Court clarified:

> The confusion apparently stems from the interlocking relation of the *overbreadth and vagueness* doctrines as grounds for a *facial* or *as-applied* challenge against a penal statute (under a claim of violation of due process of law) or a speech regulation (under a claim of abridgement of the freedom of speech and cognate rights).
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> *To be sure, the doctrine of vagueness and the doctrine of overbreadth do not operate on the same plane.*
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> . . . .
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> The allowance of a facial challenge in free speech cases is justified by the aim to avert the chilling effect on protected speech, the exercise of which should not at all times be abridged. As reflected earlier, this rationale is inapplicable to plain penal statutes that generally bear an *in terrorem* effect in deterring socially harmful conduct. In fact, the legislature may even forbid and penalize acts formerly considered innocent and lawful, so long as it refrains from diminishing or dissuading the exercise of constitutionally protected rights.[110]

The Court then concluded that due to the rationale of a facial challenge, the overbreadth doctrine is applicable only to free speech cases. Thus:

> By its nature, the overbreadth doctrine has to necessarily apply a facial type of invalidation in order to plot areas of protected speech, inevitably almost always under situations not before the court, that are impermissibly swept by the substantially overbroad regulation. Otherwise stated, a statute cannot be properly analyzed for being substantially overbroad if the court confines itself only to facts as applied to the litigants.
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[107] 421 Phil. 290 (2001) [Per J. Bellosillo, En Banc].
[108] Id. at 354.
[109] 646 Phil. 452 (2010) [Per J. Carpio- Morales, En Banc].
[110] Id. at 488.

> In restricting the overbreadth doctrine to free speech claims, the Court, in at least two cases, observed that the US Supreme Court has not recognized an overbreadth doctrine outside the limited context of the First Amendment, and that claims of facial overbreadth have been entertained in cases involving statutes which, by their terms, seek to regulate only spoken words. In *Virginia v. Hicks,* it was held that rarely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or speech-related conduct. Attacks on overly broad statutes are justified by the "transcendent value to all society of constitutionally protected expression."[111] (Emphasis in the original)

As regards the application of the void for vagueness doctrine, the Court held that vagueness challenges must be examined in light of the specific facts of the case and not with regard to the statute's facial validity.[112] Notably, the case need not be a freedom of speech case as the Court cited previous cases where the doctrine was applied:

> In this jurisdiction, the void-for-vagueness doctrine asserted under the due process clause has been utilized in examining the constitutionality of criminal statutes. In at least three cases, the Court brought the doctrine into play in analyzing an ordinance penalizing the non-payment of municipal tax on fishponds, the crime of illegal recruitment punishable under Article 132 (b) of the Labor Code, and the vagrancy provision under Article 202 (2) of the Revised Penal Code. Notably, the petitioners in these three cases, similar to those in the two *Romualdez* and *Estrada* cases, were actually charged with the therein assailed penal statute, unlike in the present case.[113]

From these pronouncements, it is clear that what is relevant in the application of the void-for-vagueness doctrine is not whether it is a freedom of speech case, but rather whether it violates the Due Process Clause of the Constitution for failure to accord persons a fair notice of which conduct to avoid; and whether it leaves law enforcers unbridled discretion in carrying out their functions.

Proclamation No. 216 fails to accord persons a fair notice of which conduct to avoid and leaves law enforcers unbridled discretion in carrying out their functions.

Proclamation No. 216 only declared two (2) things, namely, the existence of a state of martial law and the suspension of the privilege of the writ of habeas corpus:

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[111] Id. at 490–491.

[112] *Southern Hemisphere Engagement Network, Inc., v. Anti-Terrorism Council*, 646 Phil. 452, 492–493 (2010) [Per J. Carpio- Morales, En Banc].

[113] Id.

> NOW, THEREFORE, I, RODRIGO ROA DUTERTE, President of the Republic of the Philippines, by virtue of the powers vested in me by the Constitution and by law, do hereby proclaim, as follows:
>
> SECTION 1. There is hereby declared a state of martial law in the Mindanao group of islands for a period not exceeding sixty days, effective as of the date hereof.
>
> SECTION 2. The privilege of the writ of habeas corpus shall likewise be suspended in the aforesaid area for the duration of the state of martial law.

General Order No. 1 did not provide further guidelines as to what powers would be executed under the state of martial law.

The proclamation that the privilege of the writ of habeas corpus has been suspended is a clear act that needs no further explication. A declaration of a state of martial law is not so clear. It is comparable to congress passing a law that says, "Congress has passed a law," without providing the substance of the law itself. The nation is left at a loss as to how to respond to the proclamation and what conduct is expected from its citizens, and those implementing martial law are left unbridled discretion as to what to address, without any standards to follow. Indeed, it was so vague that the Operations Directive of the Armed Forces, for the implementation of martial law in Mindanao, includes as a key task the dismantling not only of rebel groups, but also *illegal drug syndicates*, among others.[114] The dismantling of illegal drug syndicates has no discernible relation to rebellion, but Proclamation No. 216 and General Order No. 1 had no guidelines or standards to follow for their implementation, leaving law enforcers unbridled discretion in carrying out their functions.

Worse, General Order No. 1 directs law enforcement agencies to arrest persons committing unspecified acts and impliedly imposes a gag order on media:

> Section 3. Scope and Authority. The Armed Forces of the Philippines shall undertake all measures to prevent and suppress all acts of rebellion and lawless violence in the whole of Mindanao, including any and all acts in relation thereto, in connection therewith, or in furtherance thereof, to ensure national integrity and continuous exercise by the Chief Executive of his powers and prerogatives to enforce the laws of the land and to maintain public order and safety.
>
> Further, the AFP and other law enforcement agencies are hereby ordered to immediately arrest or cause the arrest of persons and/or groups who have committed, are committing, or attempting to commit the above-mentioned acts.

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[114] OSG Memorandum, Annex 3, pp. 3–6 and 9.

. . . .

> Section 6. Role of Other Government Agencies and the Media. All other government agencies are hereby directed to provide full support and cooperation to attain the objectives of this Order.
>
> The role of the media is vital in ensuring the timely dissemination of true and correct information to the public. Media practitioners are therefore requested to exercise prudence in the performance of their duties so as not to compromise the security and safety of the Armed Forces and law enforcement personnel, and enable them to effectively discharge their duties and functions under this Order.

Thus, it appears that Proclamation No. 216 and General Order No. 1 not only authorize, but command, law enforcers to ***immediately arrest*** persons who have committed, are committing, or attempting to commit, any and all acts in relation to rebellion and lawless violence in Mindanao, without any guidelines for the citizens to determine what conduct they may be arrested for.

Admittedly, an arrest pursuant to General Order No. 1 is not in issue here. In *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council*,[115] the Court held that the void for vagueness doctrine may only be invoked in *as-applied* cases. The Court explained:

> While *Estrada* did not apply the overbreadth doctrine, it did not preclude the operation of the vagueness test on the Anti-Plunder Law *as applied* to the therein petitioner, finding, however, that there was no basis to review the law "on its face and in its entirety." It stressed that "statutes found vague *as a matter of due process* typically are invalidated only 'as applied' to a particular defendant."[116]

However, in *Disini v. Secretary of Justice*,[117] the Court extended the application of the doctrine even to facial challenges, in cases where a penal statute attempts to encroach on freedom of speech.[118] Here, General Order No. 1 orders law enforcement agencies to immediately arrest persons who have committed, are committing, or are attempting to commit "any and all acts in relation" to "all acts of rebellion and lawless violence in the whole of Mindanao." This description of the acts meriting arrest under General Order No. 1 is so vague that it could easily be construed to cover any manner of speech. This renders an invocation of the void-for-vagueness doctrine proper, even in a facial challenge such as this.

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[115] 646 Phil. 452 (2010) [Per J. Carpio- Morales, En Banc].
[116] Id. at 492.
[117] 727 Phil. 28 (2014) [Per J. Abad, En Banc].
[118] Id. at 121–122.

Section 6 of General Order No. 1 is also void as prior restraint. In *Chavez v. Gonzales*,[119] this Court explained the concept of prior restraint:

> *Prior restraint refers to official governmental restrictions on the press or other forms of expression in advance of actual publication or dissemination.* Freedom from prior restraint is largely freedom from government censorship of publications, whatever the form of censorship, and regardless of whether it is wielded by the executive, legislative or judicial branch of the government. Thus, it precludes governmental acts that required approval of a proposal to publish; licensing or permits as prerequisites to publication including the payment of license taxes for the privilege to publish; and even injunctions against publication. Even the closure of the business and printing offices of certain newspapers, resulting in the discontinuation of their printing and publication, are deemed as previous restraint or censorship. Any law or official that requires some form of permission to be had before publication can be made, commits an infringement of the constitutional right, and remedy can be had at the courts.[120]

That General Order No. 1 does not explicitly punish any acts of media will not save it from being declared as prior restraint. In *Babst v. National Intelligence Board*, [121] this Court recognized that under certain circumstances, suggestions from military officers have a more coercive nature than might be immediately apparent:

> Be that as it may, it is not idle to note that ordinarily, an invitation to attend a hearing and answer some questions, which the person invited may heed or refuse at his pleasure, is not illegal or constitutionally objectionable. Under certain circumstances, however, such an invitation can easily assume a different appearance. Thus, where the invitation comes from a powerful group composed predominantly of ranking military officers issued at a time when the country has just emerged from martial rule and when the suspension of the privilege of the writ of habeas corpus has not entirely been lifted, and the designated interrogation site is a military camp, the same can easily be taken, not as a strictly voluntary invitation which it purports to be, but as an authoritative command which one can only defy at his peril, especially where, as in the instant case, the invitation carries the ominous warning that "failure to appear . . . shall be considered as a waiver . . . and this Committee will be constrained to proceed in accordance with law." Fortunately, the NIB director general and chairman saw the wisdom of terminating the proceedings and the unwelcome interrogation.

As in *Babst v. National Intelligence Board*,[123] the "request" that media "exercise prudence in the performance of their duties so as not to compromise the security and safety of the Armed Forces and law

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[119] 545 Phil. 441 (2008) [Per J. Puno, En Banc].
[120] Id. at 491–492.
[121] 217 Phil. 302 (1984) [Per J. Plana, En Banc].
[122] Id. at 312.
[123] 217 Phil. 302 (1984) [Per J. Plana, En Banc].

enforcement personnel"[124] can easily be taken as an authoritative command which one can defy only at his peril, particularly under a state of martial law, and especially where law enforcement personnel have been ordered to immediately arrest persons for committing undefined acts.

V

Additionally, the broad scope of a declaration of martial law is no longer allowed under the present Constitution. Article VII, section 18 requires that:

. . . .

> The Supreme Court may review, in an appropriate proceeding filed by any citizen, the sufficiency of the factual basis of the proclamation of martial law or the suspension of the privilege of the writ of *habeas corpus* or the extension thereof, and must promulgate its decision thereon within thirty days from its filing.
>
> A state of martial law does not suspend the operation of the Constitution, nor supplant the functioning of the civil courts or legislative assemblies, nor authorize the conferment of jurisdiction on military courts and agencies over civilians where civil courts are able to function, nor automatically suspend the privilege of the writ of *habeas corpus*.

While clear about what martial law does not include, it does not define what the President will want to actually do as a result of the proclamation. A broad declaration of martial law therefore will not be sufficient to inform. It will thus immediately violate due process of law.

Furthermore, it would be difficult if not impossible to determine the sufficiency of the facts to determine when "public safety requires" martial law if the powers of martial law are not clear.

The confusion about what the Court was reviewing was obvious during the oral arguments heard in this case. The Solicitor General was unable to clearly delineate the powers that the President wanted to exercise. Neither was this amply covered in his Memorandum. In truth, the scope of martial law is larger than what was presented in the pleadings.

The *fallo* in Proclamation No. 216 of May 23, 2017 simply provides:

> **NOW, THEREFORE, I, RODRIGO ROA DUTERTE,** President of the Republic of the Philippines, by virtue of the powers

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[124] Gen. Order No. 1 (2017), sec. 6.

vested in me by the Constitution and by law, do hereby proclaim, as follows:

SECTION 1. There is hereby declared a state of martial law in the Mindanao group of islands for a period not exceeding sixty days, effective as of the date hereof.

SECTION 2. The privilege of the writ of habeas corpus shall likewise be suspended in the aforesaid area for the duration of the state of martial law.

General Order No. 1 also issued by the President revises the scope of the Proclamation:

Section 3. Scope and Authority. The Armed Forces of the Philippines shall undertake all measures to prevent and suppress all acts of rebellion and lawless violence in the whole of Mindanao, including any and all acts in relation thereto, in connection therewith, or in furtherance thereof, to ensure national integrity and continuous exercise by the Chief Executive of his powers and prerogatives to enforce the laws of the land and to maintain public order and safety.

Further, the AFP and other law enforcement agencies are hereby ordered to immediately arrest or cause the arrest of persons and/or groups who have committed, are committing, or attempting to commit the above-mentioned acts.

Section 4. Limits. The Martial Law Administrator, the Martial Law Implementor, the Armed Forces of the Philippines, and other law enforcement agencies shall implement this Order within the limits prescribed by the Constitution and existing laws, rules and regulations.

More specifically, a state of martial law does not suspend the operation of the Constitution, nor supplant the functioning of the civil courts or legislative assemblies, nor authorize the conferment of jurisdiction on military courts and agencies over civilians where civil courts are able to function. During the suspension of the privilege of the writ of *habeas corpus*, any person arrested or detained by virtue thereof shall be judicially charged within three days; otherwise he shall be released.

Section 5. Protection of Constitutional Rights. In the implementation of this Order, the constitutional rights of the Filipino people shall be respected and protected at all times. The Commission on Human Rights is hereby enjoined to zealously exercise its mandate under the 1987 Constitution, and to aid the Executive in ensuring the continued protection of the constitutional and human rights of all citizens.

The Departments of Social Welfare and Development, Education, and Health, among others, shall exert all efforts to ensure the safety and welfare of all displaced persons and families, especially the children.

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> **Section 6. Role of Other Government Agencies and the Media.** All other government agencies are hereby directed to provide full support and cooperation to attain the objectives of this Order:
>
> The role of the media is vital in ensuring the timely dissemination of true and correct information to the public. Media practitioners are therefore requested to exercise prudence in the performance of their duties so as not to compromise the security and safety of the Armed Forces and law enforcement personnel, and enable them to effectively discharge their duties and functions under this Order.
>
> **Section 7. Guidelines**. The Martial Law Administrator may issue further guidelines to implement the provisions of this Order, subject to the limits set forth in the Constitution and other relevant laws, rules, and regulations.

The General Order expands the scope of martial law to include lawless violence and is vague as to the other offense which are "in relation thereto, in connection therewith, or in furtherance thereof."

Disturbingly and perhaps pursuant to the President's General Order, the Chief of Staff's Operational Directive annexed in the OSG's Memoranda shows the true scope of martial law:

> **2. Mission:**
>
> The AFP enforces Martial Law effective 23 May 2017 to destroy the Local Terrorist Groups (Maute, ASG, AKP and BIFF) and their support structures in order to crush the DAESH-inspired rebellion and to restore law and order in the whole of Mindanao within sixty (60) days.
>
> **3. Execution:**
>
> **A. Commanders Intent:**
>
> The purpose of this operations is to ensure that normalcy is restored, and the security and safety of the people and communities are assured throughout Mindanao within sixty (60) days where civil authorities, government, non-government and private institutions are able to discharge their normal functions and the delivery of basic services are unhampered.
>
> The following are the Key Tasks for this operation:
>
> 1) Destroy the Local Terrorist Groups (Maute, ASG, AKP and BIFF) and their support structures.
> 2) ***Dismantle the NPA, other terror-linked private armed groups, illegal***

drug syndicates, peace spoilers and other lawless armed groups.

3) ***Arrest all target threat personalities and file appropriate cases within the prescribed time frame.***
4) ***Degrade armed capabilities of the NPA to compel them to remain in the peace process.***
5) Clear LTG-affected areas.
6) Enforce curfews, establish control checkpoints and validate identification of persons as necessary.
7) Insulate and secure unaffected areas from extremist violence.
8) Implement the Gun Ban and confiscate illegal firearms and disarm individuals not authorized by the government or by law to carry firearms.
9) Secure critical infrastructures and vital installations.
10) Dominate the information environment
11) Protect innocent civilians.
12) Restore government services.

In the implementation of Martial Law, AFP troops shall always adhere to the imperatives to the Rule of Law, respect for Human Rights and International Humanitarian Law.

At the end of this operation, the armed threat groups are defeated and rendered incapable of conducting further hostilities; the spread of extremist violence is prevented; their local and international support is severed; the AFP is postured to address other priority areas; and normalcy is restored wherein the government has full exercise of governance and delivery of basic services are unhampered.

B. Concept of Operations:

I will accomplish this by employing two (2) Unified Commands to conduct the decisive operations and other UCs to conduct the shaping operations. One (1) UC enforces Martial Law in Region 9 and ARMM to destroy the Local Terrorist Groups (Maute, ASG, AKP and BIFF) and their support structures in order to crush the DAESH-inspired rebellion and to restore law and order in the whole of Mindanao within sixty (60) days; and one (1) UC enforces Martial Law in Regions 10, 11, 12 and 13 to dismantle Local Terrorist Groups, private

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> armed groups, illegal drug syndicates, peace spoilers and other lawless elements in order to maintain law and order and prevent spread of extremist violence. All other UCs outside Mindanao conducts insulation and security operations in their respective JAO to prevent spill-over of extremist violence.
>
> The CSAFP is the designated Martial Law Implementer with Commanders, WMC and EMC concurrently designated as the Deputy Martial Law Implementers for their respective JAOs. They shall establish direct coordination with the Local Chief Executives and counterpart PNP officials for the implementation of the Martial Law in respective JAOs. This set up maybe cascaded to the AORs of subordinate unit Commanders.
>
> The AFP shall take the lead in the restoration of peace and order and law enforcement operations with the active support of the Philippine National Police.
>
> Significant to this operation is the ability of the AFP forces to immediately contain the outbreak of violence at specific areas in Mindanao.
>
> Critical to this is the early detection and continuous real time monitoring of the enemy's intention, plans and movements, with the public's support and community cooperation.
>
> Decisive to this operation is the destruction of the DAESH-inspired Rebellion. [125] (Emphasis supplied)

The scope of martial law now includes degrading the capabilities of the New People's Army or the Communist Party of the Philippines, illegal drugs, and other lawless violence. The facts which were used as basis to include these aspects of governance were never presented to Congress through the President's report or to this Court.

The Operational Directive for the Implementation of Martial Law however, has another definition for martial law, thus:

> 12. Martial Law. The imposition of the highest-ranking military officer (the President being the Commander-in-Chief) as the military governor or as the head of the government. It is usually imposed temporarily when the government or civilian authorities fail to function effectively or when

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[125] OSG Memorandum, Annex 3 of Annex 2, Operations Directive 02-2017.

> either there is near-violent civil unrest or in cases of major natural disasters or during conflicts or cases of occupations, where the absence of any other civil government provides for the unstable population.[126]

This definition emphasizes the taking over of civil government albeit temporarily. This is different from the provision in General Order No. 1 which focuses on arrests and illegal detention or in the first part of the same Operational Directive which involves the neutralization of armed elements whether engaged in rebellion, lawless violence, or illegal drugs.

The government's concept of martial law, from the broad provisions of Proclamation No. 216 therefore partakes of different senses. Rightly so, the public is not specifically guided and their rights are put at risk. This is the ghost of martial law from the Marcos era resurrected. Even Proclamation No. 1081 of September 21, 1972 was more specific than Proclamation No. 216. Yet, through subsequent executive issuances, the scope of martial law became clearer: it attempted to substitute civilian government even where there was no conflagration. It was nothing but an attempt to replace democratically elected government and civilian law enforcement with an iron hand.

For this alone, Proclamation No. 216, General Order No. 1 as well as the Operational Directive should be declared unconstitutional for being vague and for evading review of its factual basis.

VI

Even assuming that the declaration is not unconstitutionally vague, it is the government's burden to prove that there are sufficient facts to support the declaration of martial law. Respondents have not discharged that burden.

This Court should assume that the provisions of the Constitution should not be unworkable and therefore we should not clothe it with an interpretation which will make it absurd. Article VII, section 18 allows "any citizen" to file the "appropriate proceeding."

Certainly, petitioners should not be assumed to have access to confidential or secret information possessed by the respondents. Thus, their burden of proof consists of being able to marshal publicly available and credible sources of facts to convince the Court to give due course to their petition. For this purpose, petitioners are certainly not precluded from

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[126] OSG Memorandum, Annex 4 of Annex 2, Rules of Engagement (ROE) for Operational Directive 02-17, p. 12.

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credible sources of facts to convince the Court to give due course to their petition. For this purpose, petitioners are certainly not precluded from referring to news reports or any other information they can access to support their petitions. To rule otherwise would be to ignore the inherent asymmetry of available information to the parties, with the Government possessing all of the information needed to prove sufficiency of factual basis.

Again owing to its *sui generis* nature, these petitions are in the nature of an exercise of a citizen's right to require transparency of the most powerful organ of government. It is incidentally intended to discover or smoke out the needed information for this Court to be able to intelligently rule on the sufficiency of factual basis. The general rule that "he who alleges must prove"[127] finds no application here in light of the government's monopoly of the pertinent information needed to prove sufficiency of factual basis.

As it is, a two-tiered approach is created where petitioners have no choice but to rely on news reports and other second-hand sources to support their prayer to strike down the declaration of suspension because of their lack of access to the intelligence reports funded by taxpayers. At this point, the burden of evidence shifts to the government to prove the constitutionality of the proclamation or suspension and it does this by presenting the actual evidence, not just conclusions of fact, which led the President to decide on the necessity of declaring martial law.

It bears stressing that what is required of this Court is to look into the sufficiency of the factual basis surrounding Proclamation No. 216, hence, determining the quantum of evidence to be used, like substantial evidence, preponderance of evidence, or proof beyond reasonable doubt, becomes immaterial. I cannot agree with the ponencia therefore that the standard of evidence is probable cause similar to either the prima facie evidence required of a prosecutor or the finding that will validate a judge's issuance of a warrant of arrest or search warrant.

Rather, this Court must put itself in the place of the President and conduct a reassessment of the facts as presented to him. The Constitution requires not only that there are facts that are alleged. It requires that these facts are sufficient.

Sufficiency can be seen in two (2) senses. The first sense is that the facts as alleged and used by the President is credible. This entails an examination of what kinds of sources and analysis would be credible for the President as intelligence information. The second sense is whether the facts

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[127] *Joson v. Mendoza*, 505 Phil. 208, 219 (2005) [Per J. Chico-Nazario, Second Division].

(b) public safety requires the use of specific powers under the rubric of martial law allowable by our Constitution.

Necessarily, this Court will not have to weigh which between the petitioner and the respondents have the better evidence. The sufficiency of the factual basis of the declaration of martial law does not depend on the asymmetry of information between the petitioner and the respondent. It depends simply on whether the facts are indeed sufficient.

However, despite the clear wording of the Constitution as regards what is expected of the Court and the minimal trigger put in place to initiate the Court's involvement, the government intends to create an absurd situation by asserting that petitioners cannot refer to news reports to support their claim of factual insufficiency. The government claims that news reports are unreliable for being hearsay in character and that they might even be manipulated by the Armed Forces of the Philippines as part of its tactic of psychological warfare or propaganda.[128]

This is specious argumentation to say the least. Furthermore, that the information used by the petitioners quoting government sources amounts to psychological warfare or propaganda is only an allegation in the Memorandum of the Solicitor General. It is not supported by any of the affidavits annexed to his Memorandum.

VII

It is the mandate of this Court to assess the facts in determining the sufficiency of the factual basis of the proclamation of martial law and the suspension of the privilege of the writ of habeas corpus.[129] Intelligence information relied upon by the President are credible only when they have undergone a scrupulous process of analysis.

To be sufficient, the facts alleged by the respondents cannot be accepted as per se accurate and credible. Banking on this presumption would be tantamount to a refusal of this Court to perform its mandate under the Constitution. Article VII, Section 18 of the Constitution [130] is extraordinary in the sense that it compels this Court to act as a fact-finding body to determine whether there is sufficient basis to support a declaration of martial law or a suspension of the privilege of the writ of habeas corpus.

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[128] OSG Memorandum, pp. 51–55.
[129] CONST., art. VII, sec. 18.
[130] CONST., art. VII, sec. 18.

Insisting on a deferential mode of review suggests that this Court is incapable of making an independent assessment of the facts. It also implies that this Court is powerless to overturn a baseless and unfounded proclamation of martial law or suspension of the privilege of the writ of habeas corpus. Although some may consider the duty imposed in Article VII, Section 18 of the Constitution as a heavy burden, it is one that this Court must willingly bear to ensure the survival of our democratic processes and institutions. The mandate imposed under the Constitution is so important that to blindly yield to the wisdom of the President would be to commit a culpable violation of the Constitution.[131]

The bases on which a proclamation of martial law or the suspension of the privilege of the writ of habeas corpus are grounded must factually be correct with a satisfactory level of confidence at the time when it is presented. Any action based on information without basis or known to be false is arbitrary.

The role of validated information for decision-making is vital. It serves as the foundation from which policy is crafted.

The President, in exercising the powers of a Commander-in-Chief under Article VII, Section 18 of the Constitution, cannot be expected to personally gather intelligence information. The President will have to rely heavily on reports given by those under his or her command to arrive at sound policy decisions affecting the entire country.

It is imperative, therefore, that the reports submitted to the President be sufficient and worthy of belief. The recommendation or non-recommendation of the President's alter-egos regarding the imposition of martial law or the suspension of the privilege of the writ of habeas corpus would be indicative of the sufficiency of the factual basis.

Reports containing intelligence information should be shown to have undergone a rigorous process to ensure their veracity and credibility. Good intelligence requires that information gathered by intelligence agencies is collected and subsequently analyzed.[132] Cogent inferences are then drawn from the analyzed facts after which judgments are made.[133]

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[131] CONST., art. XI, sec. 2 provides:
Section 2. The President, the Vice-President, the Members of the Supreme Court, the Members of the Constitutional Commissions, and the Ombudsman may be removed from office, on impeachment for, and conviction of, culpable violation of the Constitution[.]

[132] *See* Background to "Assessing Russian Activities and Intentions in Recent US Elections": The Analytic Process and Cyber Incident Attribution, DEPARTMENT OF NATIONAL INTELLIGENCE, January 6, 2017 <https://www.dni.gov/files/documents/ICA_2017_01.pdf> 1 (last visited June 28, 2017).

[133] Id.

The Rules on Evidence find no application in testing the credibility of intelligence information. This Court will have to examine the information gathered by intelligence agencies, which collect data through five (5) Intelligence Collection Disciplines, namely: (1) Signals Intelligence (SIGINT); (2) Human Intelligence (HUMINT); (3) Open-Source Intelligence (OSINT); (4) Geospatial Intelligence (GEOINT); and (5) Measurement and Signatures Intelligence (MASINT).[134]

Signals Intelligence (SIGINT) refers to the interception of communications between individuals[135] and "electronic transmissions that can be collected by ships, planes, ground sites, or satellites."[136]

Human Intelligence (HUMINT) refers to information collected from human sources [137] either through witness interviews or clandestine operations.[138]

By the term itself, Open-Source Intelligence (OSINT) refers to readily-accessible information within the public domain.[139] Open-Source Intelligence sources include "traditional media, Internet forums and media, government publications, and professional or academic papers."[140]

Newspapers and radio and television broadcasts[141] are more specific examples of Open-Source Intelligence sources from which intelligence analysts may collect data.

Geospatial Intelligence (GEOINT) pertains to imagery of activities on earth.[142] An example of geospatial intelligence is a "satellite photo of a foreign military base with topography[.]"[143]

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134 Eric Rosenbach and Aki J. Peritz, *Confrontation or Collaboration? Congress and the Intelligence Community*, BELFER CENTER, <http://www.belfercenter.org/sites/default/files/files/publication/intelligence-basics.pdf> 4–5 (visited June 29, 2017).

135 Id. at 4.

136 *Intelligence Branch*, FEDERAL BUREAU OF INVESTIGATION, <https://www.fbi.gov/about/leadership-and-structure/intelligence-branch> (visited June 29, 2017).

137 Eric Rosenbach and Aki J. Peritz, *Confrontation or Collaboration? Congress and the Intelligence Community*, BELFER CENTER <http://www.belfercenter.org/sites/default/files/files/publication/intelligence-basics.pdf> 4 (last visited June 29, 2017).

138 *Intelligence Branch*, FEDERAL BUREAU OF INVESTIGATION, <https://www.fbi.gov/about/leadership-and-structure/intelligence-branch> (last visited June 29, 2017).

139 Eric Rosenbach and Aki J. Peritz, *Confrontation or Collaboration? Congress and the Intelligence Community*, BELFER CENTER <http://www.belfercenter.org/sites/default/files/files/publication/intelligence-basics.pdf> 4 (last visited June 29, 2017).

140 Id.

141 *Intelligence Branch*, FEDERAL BUREAU OF INVESTIGATION, <https://www.fbi.gov/about/leadership-and-structure/intelligence-branch> (visited June 29, 2017).

142 Eric Rosenbach and Aki J. Peritz, *Confrontation or Collaboration? Congress and the Intelligence Community*, BELFER CENTER <

Lastly, Measures and Signatures Intelligence (MASINT) refers to "scientific and highly technical intelligence obtained by identifying and analyzing environmental byproducts of developments of interests, such as weapons tests."[144] Measures and Signatures Intelligence has been helpful in "identify[ing] chemical weapons and pinpoint[ing] the specific features of unknown weapons systems."[145]

The analysis of information derived from the five (5) Intelligence Collection Disciplines involves the application of specialized skills and the utilization of analytic tools from which inferences are drawn.[146]

By way of example, the Central Intelligence Agency of the United States created the Office of National Estimates in the 1950s to "provide the most informed intelligence judgments on the effects a contemplated policy might have on American national security interests."[147] The Office of National Estimates generates National Intelligence Estimates consisting of analyzed information.[148] National Intelligence Estimates consider questions such as "[w]hat will be the effects of . . . ?[,] [w]hat are the probable developments in . . . ?[,] [w]hat are the intentions of . . . ?[,] [and] [w]hat are the future military capabilities of . . . ?"[149] As a result of analysis, the Office of National Estimates arrives at opinions or judgments that are "likely to be the best-informed and most objective view the decision-maker can get."[150]

That there are no facts that have absolute truth in intelligence can be seen through an example. Recently, a declassified report[151] of three (3) intelligence agencies in the United States was released and made public. The report extensively discussed the methodology or analytic process that intelligence agencies utilize to arrive at assessments that adhere to well-established and refined standards.[152]

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http://www.belfercenter.org/sites/default/files/files/publication/intelligence-basics.pdf> 4 (visited June 29, 2017).

143 Id. at 5.

144 Id. at 5.

145 *Intelligence Branch*, FEDERAL BUREAU OF INVESTIGATION, <https://www.fbi.gov/about/leadership-and-structure/intelligence-branch> (visited June 29, 2017).

146 Background to "Assessing Russian Activities and Intentions in Recent US Elections": The Analytic Process and Cyber Incident Attribution, DEPARTMENT OF NATIONAL INTELLIGENCE, January 6, 2017 <https://www.dni.gov/files/documents/ICA_2017_01.pdf> 1 (last visited June 28, 2017).

147 Chester L. Cooper, *The CIA and Decision-Making*, 50 FOREIGN AFF. 223, 224 (1972).

148 Id.

149 Id.

150 Id.

151 Background to "Assessing Russian Activities and Intentions in Recent US Elections": The Analytic Process and Cyber Incident Attribution, DEPARTMENT OF NATIONAL INTELLIGENCE, January 6, 2017 <https://www.dni.gov/files/documents/ICA_2017_01.pdf> 1 (last visited June 28, 2017).

152 Id.

Intelligence analysts determined the reliability and quality of different sources of information[153] and ascribed levels of confidence.[154] A high level of confidence indicates that the assessment is based on high-quality information. On the other hand, a moderate level of confidence indicates that the assessment is backed by information that is "credibly sourced and plausible."[155] A low level of confidence indicates that the information is unreliable. It also signifies that the information cannot support a strong inference.[156]

Aside from determining the reliability of their sources, intelligence analysts also distinguished between information, assumptions, and their own judgments.[157] This distinction is important so that established facts are not muddled with mere assumptions.

Moreover, intelligence analysts used "strong and transparent logic."[158] The utilization of these standards ensures that there is appropriate basis to back up the assessments or judgments of intelligence agencies.[159]

Evidently, the factual basis upon which the proclamation of martial law or the suspension of the privilege of the writ of habeas corpus is founded cannot just be asserted. The information must undergo an analytical process that would show sound logic behind the inferences drawn. The respondents should show these analyses by indicating as far as practicable their sources and the basis of their inferences from the facts gathered. Thereafter, the respondents should have indicated the levels of confidence they have on their conclusions.

VIII

The government's presentation of facts and their arguments of their sufficiency are wanting.

First, there are factual allegations that find no relevance to the declaration of martial law and the suspension of the privilege of the writ of habeas corpus. Second, there are facts that have been contradicted by Open-Source Intelligence sources. Lastly, there are facts that have absolutely no basis as they are unsupported by credible evidence.

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153 Id. at 1.
154 Id. at 13.
155 Id.
156 Id.
157 Id. at 1.
158 Id.
159 Id.

There are factual allegations contained in Proclamation No. 216 dated May 23, 2017 and in the Report of President Duterte to Congress dated May 25, 2017 that are patently irrelevant to the imposition of martial law and suspension of the privilege of the writ of habeas corpus in Mindanao.

The Zamboanga siege arose out of the Moro National Liberation Front's (MNLF) protest against what they deemed to be the "government's failure to fulfill the provisions of the peace agreement that the MNLF signed with the Ramos administration in 1996."[160] On September 9, 2013, 500 members of the MNLF led by Nur Misuari stormed Zamboanga City in an attempt to derail the peace plan between the government and the Moro Islamic Liberation Front (MILF).[161] The clash between the MNLF and government forces, which lasted for three (3) weeks, killed "19 government forces[,] 208 rebels, and dislocated 24,000 families."[162]

On the other hand, the Mamasapano incident was an encounter between the Philippine National Police Special Action Force (PNP-SAF) and members of the MILF, BIFF, and other private armed groups.[163]

On January 25, 2015, two (2) units of the PNP-SAF carried out an operation in Mamasapano, Maguindanao to capture international terrorist Zulkifli bin Hir, known as "Marwan," and Abdul Basit Usman,[164] a Filipino bomb maker.[165] The 84th PNP-SAF Company was tasked to capture Marwan while the 55th PNP-SAF Company served as the blocking force.[166] Although Marwan was killed, 44 members of the PNP-SAF died during the clash, which was characterized as a case of *pintakasi*.[167]

The Zamboanga siege and the Mamasapano clash, cited by the President in his Report to Congress dated May 25, 2017, are incidents that neither concern nor relate to the alleged ISIS-inspired groups. Moreover,

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160 Carmela Fonbuena, *Zamboanga siege: Tales from the combat zone,* RAPPLER, September 13, 2014<http://www.rappler.com/newsbreak/68885-zamboanga-siege-light-reaction-battalion> (last visited June 27, 2017).

161 Id.

162 Id.

163 Ina Reformina, *DOJ indicts 88 over Mamasapano carnage,* ABS-CBN NEWS, August 15, 2016 <http://news.abs-cbn.com/news/08/15/16/doj-indicts-88-over-mamasapano-carnage> (last visited June 27, 2017).

164 Cynthia D. Balana, *Mamasapano clash: What happened according to the military*, INQUIRER.NET, February 7, 2015 <http://newsinfo.inquirer.net/671126/mamasapano-clash-what-happened-according-to-the-military> (last visited July 3, 2017).

165 Frances Mangosing, *Its official: MILF killed Basit Usman – AFP,* PHILIPPINE DAILY INQUIRER, May 6, 2015 <http://newsinfo.inquirer.net/689608/its-official-milf-killed-basit-usman-afp> (last visited July 3, 2017).

166 Cynthia D. Balana, *Mamasapano clash: What happened according to the military*, INQUIRER.NET, February 7, 2015 <http://newsinfo.inquirer.net/671126/mamasapano-clash-what-happened-according-to-the-military> (last visited July 3, 2017).

167 Ina Reformina, *DOJ indicts 88 over Mamasapano carnage,* ABS-CBN NEWS, August 15, 2016 <http://news.abs-cbn.com/news/08/15/16/doj-indicts-88-over-mamasapano-carnage> (last visited June 27, 2017).

there is no direct or indirect correlation between these incidents to the alleged rebellion in Marawi City.

There are also disputed factual allegations. These disputes could have been settled by the respondents by showing their processes to validate the information used by the President. This Court cannot disregard and gloss over reports from newspapers. As earlier mentioned, newspapers are considered Open-Source Information (OSINT) from which intelligence information may be gathered.

Proclamation No. 216 dated May 23, 2017	
Factual Allegations	**Verification**
Maute Group attack on the military outpost in Butig, Lanao del Sur in February 2016.[168]	Omar Maute and his brother Abdullah led a terrorist group in raiding a detachment of the 51st Infantry Battalion in Butig town. According to reports received by the Armed Forces Western Mindanao Command, around 42 rebels were killed. On the other hand, three soldiers died and eleven were injured.[169]
Mass jailbreak in Marawi City in August 2016.[170]	50 heavily-armed members of the Maute Group raided the local jail in the southern city of Marawi. The raid led to the escape of 8 comrades of the Maute Group who were arrested a week ago and twenty other detainees. The 8 escaped prisoners were arrested after improvised bombs and pistols were found in their van by soldiers manning an army checkpoint.[171] Police Chief Inspector Parson Asadil said that the jailbreak was a rescue operation for the release of the recently arrested members including their leader Hashim Balawag Maute.[172]
The Maute Group "[took] over a hospital in Marawi City, Lanao del Sur."[173]	Amai Pakpak Medical Center Chief Dr. Armer Saber (Dr. Saber) stated that the

[168] Proc. No. 216 (2017).

[169] Alexis Romero, *3 soldiers killed, 11 hurt in Lanao del Sur clash,* THE PHILIPPINE STAR, February 26, 2016 <http://www.philstar.com/nation/2016/02/26/1557058/3-soldiers-killed-11-hurt-lanao-del-sur-clash > (last visited June 28, 2017)

[170] Proc. No. 216 (2017).

[171] Agence France-Presse, *Muslim extremists stage mass jailbreak in Marawi City,* INQUIRER.NET, August 28, 2016 <http://newsinfo.inquirer.net/810455/muslim-extremists-stage-mass-jailbreak-in-marawi-city > (last accessed June 28, 2017).

[172] Bobby Lagsa, *Terror leader escapes in Lanao del Sur jailbreak,* RAPPLER, August 28, 2016 < http://www.rappler.com/nation/144405-prionsers-escape-jail-raid-lanao-del-sur> (last accessed June 28, 2017).

[173] Proc. No. 216 (2017).

	hospital was "not taken over by the Maute Group."[174] Dr. Saber said that two Maute armed men went to the hospital to seek treatment for their injured comrade. When the armed men were inside the facility, Senior Inspector Freddie Solar, intelligence unit chief of the Marawi City Police, together with other policemen, came to the hospital to have his wife treated for appendicitis. The policemen were held hostage by the Maute fighters and thereafter, Senior Inspector Solar was shot.[175] Saber stressed that the only incident when gunshots were fired was during the shootout where Solar was killed.[176] Moreover, the Maute members left the hospital the following day.[177] Health Secretary Paulyn Ubial belied the reports stating that "the Maute insurgents abducted and held hostage at least 21 health personnel of the APMC." He declared that "all government hospitals in Mindanao are operational and fully secured by the Armed Forces of the Philippines (AFP)."[178] AFP Public Affairs Office Chief Marine Colonel Edgard Arevalo and Philippine National Police Spokesman Senior Superintendent Dionardo Carlos denied the reports that Amai Pakpak Medical Center was taken over by the Maute Group.[179] They stated that members of the Maute Group only sought medical assistance for a wounded comrade.[180]
The Maute Group "established several checkpoints within the City."[181]	The Maute Group "reportedly blocked several checkpoints in the vicinity."[182]

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174 Jigger J. Jerusalem, *Hospital in Marawi not taken over by Maute –medical center chief,* INQUIRER.NET, May 28, 2017 <http://newsinfo.inquirer.net/900299/hospital-in-marawi-not-taken-over-by-maute-medical-center-chief> (last accessed June 28, 2017).

175 Id.

176 Gerry Lee Gorit, *Marawi City hospital not overrun – official,* THE PHILIPPINE STAR, May 29, 2017 < http://www.philstar.com/headlines/2017/05/29/1704661/marawi-city-hospital-not-overrun-official> (last accessed June 28, 2017).

177 Jigger Jerusalem, *Hospital in Marawi not taken over by Maute –medical center chief,* INQUIRER.NET, May 28, 2017 <http://newsinfo.inquirer.net/900299/hospital-in-marawi-not-taken-over-by-maute-medical-center-chief> (last accessed June 28, 2017).

178 Gerry Lee Gorit, *Marawi City hospital not overrun – official,* THE PHILIPPINE STAR, May 29, 2017 < http://www.philstar.com/headlines/2017/05/29/1704661/marawi-city-hospital-not-overrun-official> (last accessed June 28, 2017).

179 Janvic Mateo, *FACT CHECK: Inconsistencies in Duterte's martial law report,* THE PHILIPPINE STAR, May 31, 2017 <http://www.philstar.com:8080/headlines/2017/05/31/1705369/fact-check-inconsistencies-dutertes-martial-law-report> (last accessed June 28, 2017).

180 Id.

181 Proc. No. 216 (2017).

The Maute Group "burned down certain government and private facilities and inflicted casualties on the part of the government."[183]	United Church of Christ in the Philippines, the operator of Dansalan College confirmed that the school was burned on the night of May 23, 2017.[184] Other schools said to have been burned were only damaged during the clash between the military and the Maute Group.[185] Marawi City School Division Assistant Superintendent Ana Alonto said Mambuay Elementary School, Raya Madaya 1 Elementary School, and Raya Madaya 2 Elementary School were damaged by bombs.[186] Department of Education Assistant Secretary Tonisito Umali said there were no reports of the Marawi Central Elementary Pilot School burning. Aside from Dansalan College, the City Jail and St. Mary's Church were also burned that day.[187]
The Maute Group "started flying the flag of the Islamic State of Iraq and Syria (ISIS) in several areas."[188]	ISIS flags were raised on top of at least two (2) vehicles roaming Marawi City[189] and on some mosques and buildings where members of the Maute Group positioned themselves.[190]

President's Report Relative to Proclamation No. 216	
Factual Allegations	**Verification**

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182 Ver Marcelo, *Gov't forces, Maute group clash in Marawi City,* CNN PHILIPPINES, May 23, 2017, < http://cnnphilippines.com/news/2017/05/23/marawi-city-clash.html > (last accessed June 28, 2017).

183 Proc. No. 216 (2017).

184 Janvic Mateo, *FACT CHECK: Inconsistencies in Duterte's martial law report,* THE PHILIPPINE STAR, May 31, 2017, <http://www.philstar.com:8080/headlines/2017/05/31/1705369/fact-check-inconsistencies-dutertes-martial-law-report> (last accessed June 28, 2017).

185 Id.

186 Id.

187 *3 fires break out in Marawi as clashes rage,* RAPPLER, May 23, 2017 < http://www.rappler.com/nation/170738-fires-marawi-city-maute-attack> (last accessed June 28, 2017).

188 Proc. No. 216 (2017).

189 *Maute Group waves ISIS black flag on Marawi streets,* RAPPLER, May 23, 2017, < http://www.rappler.com/nation/170729-marawi-city-black-flag-maute> (last accessed June 28, 2017).

190 John Unson, *Maute group frees 107 inmates amid clashes in Marawi City,* THE PHILIPPINE STAR, May 24, 2017 <http://www.philstar.com/headlines/2017/05/24/1703188/maute-group-frees-107-inmates-amid-clashes-marawi-city> (last accessed June 28, 2017).

Davao (night-market) bombing (by either the Abu Sayyaf Group or ISIS-backed Maute group)[191]	According to the Philippine army, four (4) suspects in the Davao City night market bombing were reportedly members of the Dawla Islamiya Fi Cotabato – Maute Group.[192]
Bombings in Cotabato (by either the Abu Sayyaf Group or ISIS-backed Maute group)[193]	According to Director of the North Cotabato Provincial Police, they were certain that "the New People's Army was behind the roadside bombing and . . . was not in any way connected to the ongoing strife in Marawi City."[194]
Bombings in Sultan Kudarat (by either the Abu Sayyaf Group or ISIS-backed Maute group)[195]	Before the incident, text messages circulated containing warnings about an alleged plot by the Bangsamoro Islamic Freedom Fighters (BIFF) to set-off bombs in Tacurong City, Koronadal, General Santos, Cotabato, Midsayap, North Cotabato, and Davao City.[196]
Bombings in Basilan (by either the Abu Sayyaf Group or ISIS-backed Maute group)[197]	Investigators are convinced that "Abu Sayyaf bandits are behind the attack."[198]
May 23, 2017 – Government operation to capture Isnilon Hapilon – "confronted with armed resistance which escalated into open hostility against the government." The Maute Group took control of Marawi City to establish a *wilayah* in Mindanao.[199]	Armed Forces of the Philippines spokesperson Brigadier General Restituto Padilla said, "the on-going clash in Marawi City, Lanao Del Sur is aimed at neutralizing Abu Sayyaf leader Isnilon Hapilon, who was spotted along with an estimated 15 followers in the area."[200]
At 1400H on May 23, 2017 – "Members of Maute Group and [Abu Sayyaf Group] along with their sympathizers,	Spokesperson of 1st Infantry Division of the Army, Lt. Col. Jo-Ar Herrera, said the gun battle erupted at 2 p.m. in Barangay

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191 President's Report to Congress, p. 3.

192 CNN Philippines Staff, *Four more suspects in Davao City bombing arrested*, CNN PHILIPPINES, October 29, 2016 <http://cnnphilippines.com/regional/2016/10/29/Davao-City-bombing-suspects-arrested.html> (last accessed on June 27, 2017).

193 President's Report to Congress, p. 3.

194 John Unson, *Cop hurt in North Cotabato roadside bombing*, THE PHILIPPINE STAR, May 26, 2017 <http://www.philstar.com/nation/2017/05/26/1703828/cop-hurt-north-cotabato-roadside-bombing> (last accessed June 27, 2017).

195 President's Report to Congress, p. 3.

196 Edwin Fernandez, *8 hurt in Tacurong twin explosions,* INQUIRER.NET, April 17, 2017<http://newsinfo.inquirer.net/889856/8-hurt-in-tacurong-twin-explosions> (last accessed June 27, 2017)

197 President's Report to Congress, p. 3.

198 John Unson, *Basilan mayor survives roadside bomb attack,* THE PHILIPPINE STAR, February 4, 2017 <http://www.philstar.com/nation/2017/02/04/1669016/basilan-mayor-survives-roadside-bomb-attack> (last accessed June 27, 2017).

199 President's Report to Congress, p. 3.

200 Ruth Abbey Gita, et al., *Troops, Maute group clash in Marawi City; 3 dead, 12 injured,* SUNSTAR PHILIPPINES, May 23, 2017 <http://www.sunstar.com.ph/cagayan-de-oro/local-news/2017/05/25/troops-maute-group-clash-marawi-city-3-dead-12-injured-543446> (last accessed June 27, 2017).

commenced their attack on various facilities."[201]	Basak, Malulut, Marawi.[202] It was the military who initiated a "surgical operation" following the reports on the presence of Maute Group fighters from the residents.[203] Armed Forces of the Philippines Spokesman Brigadier General Restituto Padilla stated that it was the AFP and PNP who initiated the operation in Marawi having received reliable information regarding the location of Hapilon and a number of his cohorts.[204]
At 1600H on May 23, 2017, 50 armed criminals assaulted Marawi City Jail, which was being managed by the Bureau of Jail Management and Penology. The Maute Group "forcibly entered the jail facilities, destroyed its main gate and assaulted on-duty personnel[,] BJMP personnel were disarmed, tied, and/or locked inside the cells"[205]	Governor Mujiv Hataman of the Autonomous Region in Muslim Mindanao stated that the "Maute gunmen simultaneously stormed the Malabang District Jail and the Marawi City Jail . . . disarmed guards[,] and freed a total of 107 inmates."[206]
The Group "took cellphones, personnel-issued firearms . . . two [2] prisoner vans and private vehicles."[207]	Governor Hataman stated that the group "took one [1] government vehicle used in transporting detainees from the jail to the court."[208]
At 1630H the power supply in Marawi City was "interrupted and sporadic gunfights were heard and felt everywhere[,] [b]y evening, power outage had spread citywide."[209]	As of 6:30 p.m. on May 25, 2017, the Department of Energy, citing a report of the National Grid Corporation of the Philippines, stated that "a tower along the tie line between Agus 1 and 2 hydropower plant in Lanao del Sur was toppled because of a felled tree."[210] The grid

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201 President's Report to Congress, p. 4.

202 Francis Wakefield, *Maute, ASG gunmen clash with troops in Marawi; 5 soldiers wounded*, MANILA BULLETIN, May 24, 2017 <http://news.mb.com.ph/2017/05/23/maute-asg-gunmen-clash-with-troops-in-marawi-5-soldiers-wounded/> (last accessed June 27, 2017).

203 Audrey Morallo, *AFP: Marawi clashes part of security operation, not terrorist attack,* THE PHILIPPINE STAR, May 23, 2017 <http://www.philstar.com/headlines/2017/05/23/1702885/afp-marawi-clashes-part-security-operation-not-terrorist-attack> (last accessed June 27, 2017).

204 Francis Wakefield, *Maute, ASG gunmen clash with troops in Marawi; 5 soldiers wounded*, MANILA BULLETIN, May 24, 2017 < http://news.mb.com.ph/2017/05/23/maute-asg-gunmen-clash-with-troops-in-marawi-5-soldiers-wounded/> (last accessed June 27, 2017).

205 President's Report to Congress, p. 4.

206 John Unson, *Maute group frees 107 inmates amid clashes in Marawi City,* THE PHILIPPINE STAR, May 24, 2017 <http://www.philstar.com/headlines/2017/05/24/1703188/maute-group-frees-107-inmates-amid-clashes-marawi-city> (last accessed June 27, 2017).

207 President's Report to Congress, p. 4.

208 John Unson, *Maute group frees 107 inmates amid clashes in Marawi City,* THE PHILIPPINE STAR, May 24, 2017 <http://www.philstar.com/headlines/2017/05/24/1703188/maute-group-frees-107-inmates-amid-clashes-marawi-city> (last accessed June 27, 2017).

209 President's Report to Congress, p. 4.

210 *DOE: Power supply in Marawi cut,* SUNSTAR, May 25, 2017 <http://www.sunstar.com.ph/manila/local-news/2017/05/25/doe-power-supply-marawi-cut-543897> (last accessed June 27, 2017).

	disturbance caused the power outage in Marawi City.[211]
From 1800H to 1900H on May 23, 2017, the Maute Group "ambushed and burned the Marawi Police Station." They also took a patrol car. Meanwhile, a member of the Philippine Drug Enforcement Unit was killed. The Maute Group facilitated escape of at least 68 inmates.[212]	Marawi City Mayor Majul Gandamra (Mayor Gandamra) disputed reports that the local police station and city jail were burned. According to Mayor Gandamra: "*[h]indi po totoo na na-takeover nila ang* police station *at ang . . .* city jail."[213] Mayor Gandamra contacted the chief of police who said that the police station and city jail were not occupied.[214] Mayor Gandamra also declared that no government facilities or offices were occupied.[215]
On the evening of May 23, 2017, "at least three (3) bridges in Lanao del Sur, namely Lilod, Bangulo, and Sauiaran, fell under the control of these groups."[216]	"The Mapandi Bridge that leads to the center of Marawi City remained in the control of the Maute group, and an ISIS flag remains there a week after the terrorists laid siege on the city."[217]
On the evening of May 23, 2017, the Maute Group burned: (1) Dansalan College Foundation; (2) Cathedral of Maria Auxiliadora; (3) Nun's quarters in the church; and (4) Shia Masjid Moncado Colony. The group took hostages.[218]	Mayor Gandamra confirmed that a fire had taken place in Dansalan College: "*[m]erong* structure *doon na nasunog po, hindi ho lahat* [There was a structure burned, but not all]."[219] Bishop Edwin Dela Peña said the Maute group torched the Cathedral of Our Lady of Help of Christians: "*[k]inuha nila 'yung aming pari, saka 'yung aming* secretary, *'yung dalawang* working student *tapos parokyano namin na nag-novena lang kahapon.*"[220] The Cathedral of Our Lady of Help of Christians is also

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211 Id.

212 President's Report to Congress, p. 4.

213 Regine Cabato, *Marawi Mayor: Police station, city jail not burned,* CNN PHILIPPINES, May 24, 2017 <http://cnnphilippines.com/news/2017/05/24/marawi-mayor-police-station-city-jail-not-burned.html> (last accessed June 27, 2017).

214 Frances Mangosing, *No takeover of gov't facilities in Marawi by Abus, Maute – mayor,* INQUIRER.NET, May 23, 2017 <http://newsinfo.inquirer.net/898833/no-takeover-of-govt-facilities-in-marawi-says-mayor> (last accessed June 27, 2017).

215 Id.

216 President's Report to Congress, p. 4.

217 Chiara Zambrano, *Maute terrorists still control key Marawi City bridges,* ABS-CBN NEWS, May 31, 2017 <http://news.abs-cbn.com/news/05/30/17/maute-terrorists-still-control-key-marawi-city-bridges> (last accessed June 27, 2017).

218 President's Report to Congress, p. 5.

219 Regine Cabato, *Marawi Mayor: Police station, city jail not burned,* CNN PHILIPPINES, May 24, 2017 <http://cnnphilippines.com/news/2017/05/24/marawi-mayor-police-station-city-jail-not-burned.html> (last accessed June 27, 2017).

220 Patricia Lourdes Viray, *Bishop: Maute burned Marawi cathedral, abducted priest,* THE PHILIPPINE STAR, May 24, 2017 <http://www.philstar.com/headlines/2017/05/24/1703149/bishop-maute-burned-marawi-cathedral-abducted-priest> (last accessed June 27, 2017).

the church; and (4) Shia Masjid Moncado Colony. The group took hostages.[218]	burned, but not all]."[219] Bishop Edwin Dela Peña said the Maute group torched the Cathedral of Our Lady of Help of Christians: "*[k]inuha nila 'yung aming pari, saka 'yung aming* secretary, '*yung dalawang* working student *tapos parokyano namin na nag-novena lang kahapon.*"[220] The Cathedral of Our Lady of Help of Christians is also known as the Cathedral of Maria Auxiliadora.[221]
"About five (5) faculty members of Dansalan College Foundation [were] reportedly killed by the lawless groups."[222]	United Church of Christ in the Philippines' Executive Director Rannie Mercado told the Philippine Star that there were no confirmed reports regarding the alleged death of school personnel.[223]
"Senator Ninoy Aquino College Foundation and the Marawi Central Elementary Pilot School" were burned.[224]	In a phone interview, the Division Assistant Superintendent of Marawi City Schools Division Ana Alonto "denied a report that a public school was among the buildings burnt by the terrorists." She stated that "it was the barangay outpost that was seen burning in a photo circulating online."[225] Furthermore, Department of Education Assistant Secretary Umali said they did not receive any report of damage at the Central Elementary Pilot School.[226] According to a source on the ground of the Philippine Star, he saw the "Senator Benigno Aquino College Foundation

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218 President's Report to Congress, p. 5.

219 Regine Cabato, *Marawi Mayor: Police station, city jail not burned,* CNN PHILIPPINES, May 24, 2017 <http://cnnphilippines.com/news/2017/05/24/marawi-mayor-police-station-city-jail-not-burned.html> (last accessed June 27, 2017).

220 Patricia Lourdes Viray, *Bishop: Maute burned Marawi cathedral, abducted priest,* THE PHILIPPINE STAR, May 24, 2017 <http://www.philstar.com/headlines/2017/05/24/1703149/bishop-maute-burned-marawi-cathedral-abducted-priest> (last accessed June 27, 2017).

221 *Prelature of Marawi,* CATHOLIC BISHOP CONFERENCE OF THE PHILIPPINES <http://www.cbcponline.net/marawi/html/parishes.html> (last accessed July 3, 2017).

222 President's Report to Congress, p. 5.

223 Janvic Mateo, *FACT CHECK: Inconsistencies in Duterte's martial law report,* THE PHILIPPINE STAR, May 31, 2017 <http://www.philstar.com:8080/headlines/2017/05/31/1705369/fact-check-inconsistencies-dutertes-martial-law-report> (last accessed June 27, 2017).

224 President's Report to Congress, p. 5.

225 Janvic Mateo, *DepEd: Opening of classes in Marawi to push through,* THE PHILIPPINE STAR, May 24, 2017 <http://www.philstar.com/nation/2017/05/24/1703412/deped-opening-classes-marawi-push-through> (last accessed June 27, 2017).

226 Janvic Mateo, *FACT CHECK: Inconsistencies in Duterte's martial law report,* THE PHILIPPINE STAR, May 31, 2017 <http://www.philstar.com:8080/headlines/2017/05/31/1705369/fact-check-inconsistencies-dutertes-martial-law-report> (last accessed June 27, 2017).

They also "held the hospital's employees hostage and took over the PhilHealth office[.]"[230]	hospital was not overrun by terrorists.[231] Dr. Saber's statement was corroborated by the PNP Spokesman, Senior Superintendent Dionardo Carlos who said that the terrorists only went there to seek medical assistance for a wounded member. They did not take over the hospital.[232] The hospital employees were "only asked to provide medical assistance[.]"[233]
"Lawless armed groups . . . ransacked the Land [B]ank of the Philippines and commandeered one of its armored vehicles."[234]	In a statement, the Land Bank of the Philippines (Land Bank) clarified that the Land Bank Marawi City Branch was not ransacked. It merely sustained some damage from the ongoing clash. According to Land Bank, the photo circulating on Facebook is not the Land Bank Marawi Branch but "an image of the closed Land Bank [Mindanao State University Extension Office] that was slightly affected in 2014 by a fire that struck the adjacent building."[235] Land Bank also confirmed that an armored vehicle was seized. However, it clarified that the vehicle was owned by a third-party provider and that it was empty when it was taken.[236]

IX

Third, the factual bases cited by respondents in their pleadings seem to be mere allegations. The sources of these information and the analyses to vet them were not presented.

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230 President's Report to Congress, p. 5.

231 Gerry Lee Gorit, *Marawi City hospital not overrun—official,* THE PHILIPPINE STAR, May 29, 2017 <http://www.philstar.com/headlines/2017/05/29/1704661/marawi-city-hospital-not-overrun-official> (last accessed June 27, 2017).

232 Janvic Mateo, *FACT CHECK: Inconsistencies in Duterte's martial law report,* THE PHILIPPINE STAR, May 31, 2017 <http://www.philstar.com:8080/headlines/2017/05/31/1705369/fact-check-inconsistencies-dutertes-martial-law-report> (last accessed June 27, 2017).

233 Id.

234 President's Report to Congress, p. 5.

235 Janvic Mateo, *FACT CHECK: Inconsistencies in Duterte's martial law report,* THE PHILIPPINE STAR, May 31, 2017 <http://www.philstar.com:8080/headlines/2017/05/31/1705369/fact-check-inconsistencies-dutertes-martial-law-report> (last accessed June 27, 2017).

236 Id.

In their Consolidated Comment and Memorandum, respondents assert that the Abu-Sayyaf Group from Basilan (ASG Basilan), the Ansarul Khilafah Philippines (AKP) or the Maguid Group, the Maute Group (Maute Group) from Lanao del Sur, and the Bangsamoro Islamic Freedom Fighters (BIFF) are ISIS-inspired[237] or ISIS-linked.[238] They also assert that these groups "formed an alliance . . . to establish a *wilayah*, or Islamic province, in Mindanao."[239]

Respondents failed to show their sources to support the inference that the ASG Basilan, AKP, Maute Group, and BIFF are indeed linked to the ISIS and that these groups formed alliances. Respondents' only basis is Isnilon Hapilon's "symbolic *hijra*."[240] Respondent also relies heavily on the ISIS newsletter, Al Naba, which allegedly announced the appointment of Isnilon Hapilon as an emir.[241]

These allegations neither explain nor conclusively establish the nature of the links of the four (4) groups to the ISIS. The ISIS newsletter, Al Naba, cannot be considered as a credible source of information. It is a propaganda material, which provides skewed information designed to influence opinion.[242]

Individually, these groups have undergone splits and are fragmented into different factions. Their stability and solidarity is unclear.

The Abu-Sayyaf Group was organized sometime in 1991 by Abdurajak Janjalani.[243] Abdurajak Janjalani's brother, Khadaffy Janjalani, took over the group upon Abdurajak's death in 1998. When Khadaffy died, "Radullon" Sahiron took over as the group's commander.[244]

The split within the Abu-Sayyaf Group began when one of the group's top commanders, Abu Sulaiman, died in 2007. Each subcommand was left to operate independently. Eventually, the Abu-Sayyaf Group became "highly factionalised kidnap-for-ransom groups."[245]

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237 Consolidated Comment, p. 5.
238 OSG Memorandum, p. 5.
239 Id.
240 Id. at 7.
241 Id.
242 Harold D. Lasswell, *The Theory of Political Propaganda*, 21 AMERICAN POLITICAL SCIENCE REVIEW 627 (1927), also available in <https://www.jstor.org/stable/1945515?seq=1#fndtn-page_scan_tab_contents> (last visited July 3, 2017).
243 Institute for Policy Analysis of Conflict, *Pro-Isis Groups in Mindanao and their Links to Indonesia and Malaysia,* Report No. 33, October 25, 2016, <http://file.understandingconflict.org/file/2016/10/IPAC_Report_33.pdf> 3 (last accessed June 30, 2017).
244 Id. at 4.
245 Id.

In May 2010, Isnilon Hapilon returned to Basilan and united the Basilan members of the Abu-Sayyaf Group. This officially marked the split between the Abu-Sayaff Basilan group from the Abu-Sayaff Sulu group, headed by Radullan Sahiron, and other Abu-Sayyaf subcommands.[246]

The two main factions of the Abu-Sayyaf Group are headed by leaders that do not share the same ideology. Radullan Sahiron only trusted fellow Tausugs and believed that foreign fighters had no place within his group. On the other hand, Isnilon Hapilon welcomed outsiders. Isnilon Hapilon was characterized as someone who "liked anything that smelled foreign, especially anything from the Middle East," a sentiment not shared by Radullan Sahiron.[247]

The Bangsamoro Islamic Freedom Fighters was founded by Ameril Umbra Kato.[248] Ameril Umbra Kato appointed Esmael Abu bakar alias Kumander Bungos as his successor much to the disappointment of Ameril Umbra Kato's relative, Imam Minimbang alias Kumander Kagi Karialan.[249]

During his leadership, Kumander Bungos aligned the Bangsamoro Islamic Freedom Fighters with the Maute Group.[250] This was opposed by Kumander Kagi Karialan.[251]

In July 2016, Kumander Kagi Karialan, together with a number of Bangsamoro Islamic Freedom Fighter clerics, broke from the group.[252]

Ansarul Khilafa Philippines (AKP) was led by Mohammad Jaafar Maguid alias Tokboy. Although no major split occurred within Ansarul Khilafa Philippines, the stability of the group is presently unclear due to the death of Tokboy on January 5, 2017.[253]

The ideological divergence within the ASG and the BIFF as well as the vacuum in the leadership of the AKP creates serious doubt on the

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246 Id.
247 Id. at 4.
248 Id. at 18.
249 Id. at 18–19.
250 Id. at 19.
251 Id. at 19.
252 Id. at 19.
253 *Philippines kills leader of Islamic linked militant group in clash,* REUTERS, January 5, 2017 <http://www.reuters.com/article/us-philippines-security-idUSKBN14P17I> (accessed June 30, 2017); OSG Memorandum, p. 8.

strength of their entire group's allegiance to the ISIS and their alleged ties with each other.

Aside from the failure to present their sources to support the factual bases cited in Proclamation No. 216 dated May 23, 2017 and the Report of President Duterte dated May 25, 2017, there is also absolutely no factual basis for the dismantling and arrest of illegal drug syndicates and peace spoilers.[254] The inclusion of illegal drug syndicates and peace spoilers unjustifiably broadens the scope of martial law. There has been no evidence presented in this case that would explain their inclusion in the Operational Directive for the Implementation of Martial Law.

X

Fourth, the documents presented to this court containing intelligence information have not been consistent. It shows that the presentation and interpretation of the facts have changed from one which showed the variability in the groups reported to a simplification of the terrorist groups to show the impression that the groups are solidly united. In other words, the presentation of the facts and their interpretation changed to accommodate a version that would support martial law.

The most unreliable form of intelligence information is one which has been tweaked and changed to suit the perspective of the policy maker. For purposes of its assessment of the sufficiency of the facts to support Proclamation No. 216, the credibility of the information will also depend on the extent of independence of the organization gathering and analyzing intelligence.

Among the documents presented to the court was the Chief of Staff's Operational Directive in the Implementation of Martial Law. Annex B of that report pertained to the intelligence backdrop of Operational Plan "Southern Shield" dated 25 May 2017. Their confidential document provided clear insights on the strengths and weaknesses of the various terror groups.[255]

On the other hand, the affidavit of the Chief of Staff of the Armed Forces of the Philippines to support the Memorandum of the OSG simply states:

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[254] OSG Memorandum, Annex 3 of Annex 2, Operations Directive 02-2017.

[255] Appendix 1 (Joint Intelligence Estimate) to Annex B – Intelligence Support Plan to Operations Directive 02–2017. Confidential Intelligence Document, which cannot be quoted in full but made available to all the Justices by the respondents.

> 12. Sometime on or about August in the year 2014, the AFP received intelligence reports that a number of local rebel groups from Mindanao ha[s] pledged their allegiance to ISIS. These groups include the Abu-Sayyaf Group from Basilan, the Ansarul Khilafah Philippines (also known as "The Maguid Group") from Saranggani and Sultan Kudarat, the Maute Group from Lano del Sur, and the Bangsamoro Islamic Freedom Fighters from Maguindanao;
>
> . . . .
>
> 24. As proof of this unification, the ISIS-linked rebel groups had consolidated in Basilan to pledge allegiance to ISIS sometime on June 22, 2016. On the first week of January 2017, a meeting among these rebel groups was supposed to take place in Butig, Lanao del Sur for the purpose of declaring their unified pledge of allegiance to the ISIS and re-naming themselves as the Da'wahtul Islamiyah Waliyatul Mashriq (DIWM). This was, however, preempted by the death of Mohammad Jaafar Maguid (also known as Tokboy), as then leader of the Maguid Group, coupled with the conduct of series of military operations in the area[256]

Notably, the affidavit fails to emphasize several important key points which put into question the conclusion relating to the strengths of the alleged coalition between the four (4) groups. It puts into question their capability to execute the feared rebellion.

First, not all members of the ASG (especially the group of Sahiron in Sulu) as well as the members of the BIFF have expressed their intent to be inspired or affiliated with the ISIS.[257]

Second, many of the kidnappings in Southern Philippines can be attributed to the non-ISIS linked or affiliated ASG in Sulu. From January 2017 to May 2017, six (6) incidents involving 16 individuals should have been attributed to the non-ISIS affiliated ASG. Forty-two (42) of the violent incidents perpetrated by the ASG are attributed to the non-ISIS Sulu group. Of its estimated 446 personnel, AFP's intelligence reports that 168 personalities were neutralized from January to May of 2017.

Third, the Basilan-based ASG which is reported to be led by Hapilon is composed of only about 108 members as of 2016. In its own report, the AFP claims that this ASG is "incapable of sustaining prolonged armed confrontation in view of its limited supply of ammunition and firearms." They also have "a low level of discipline" and are prone to "insubordination and infighting brought about by envy and personal differences within the

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[256] OSG Memorandum Annex 2, Affidavit, General Eduardo M. Ano, Chief of Staff AFP, p. 3–5.

[257] Institute for Policy Analysis of Conflict, *Pro-Isis Groups in Mindanao and their Links to Indonesia and Malaysia,* Report No. 33, October 25, 2016, <http://file.understandingconflict.org/file/2016/10/IPAC_Report_33.pdf> 2 (last accessed June 30, 2017).

group." This ISIS inspired ASG has members "motivated purely by financial considerations." They are vulnerable to "rido or clan wars between ASG elements and other armed threat groups in Mindanao."

Fourth, the Maute group is composed of about 263 members as of the end of 2016. However the "figures have changed with the identification of new personalities and neutralization of members as a result of focused military operations (FMO)." Intensified operations have targeted this group since February of 2016. The military intelligence reports consider that the "Maute Group has limited support base which is mostly concentrated in Butig, its stronghold."

Fifth, the third member terrorist group of the alleged coalition is the Maguid Group or the Ansar al-Khilafah Philippines (AKP). As of the end of 2016 the military reports that it has only 7 identified members with 12 firearms. Its leader Mohammad Jaafar Maguid, otherwise known as "Tokboy," together with his foreign ally and his wife had already been killed. The AFP acknowledges that this group is obviously "beset with decreasing manpower and lack of direction from a leader."

It was the death of Tokboy which prevented an alleged meeting of all four terrorist groups inspired by ISIS in January of this year.

With this intelligence information, it is difficult to sustain the conclusion that the ISIS-inspired groups are able to wage actual rebellion that will threaten a province or even the entirety of Mindanao. Clearly, they are capable of isolated atrocities. However, to the extent that they can sustain a rebellion threatening even the existence of any local government is a difficult conclusion to believe.

In other words, even before the Marawi hostilities, law enforcers, including the armed forces were already degrading their capability.

Respondent through the OSG and in the Memorandum also belatedly cite 20 "ISIS cell groups," which, allegedly, coordinated with the ASG Basilan, AKP, Maute Group, and the BIFF.[258] The alleged "ISIS cell groups" are the following:

1. Ansar Dawiah Fi Filibbin
2. Rajah Solaiman Islamic Movement
3. Al Harakatul Islamiyah Battalion
4. Jama'at Ansar Khilafa
5. Ansharul Khilafah Philippines Battalion

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[258] OSG Memorandum, p. 6.

6. Bangsamoro Justice Movement
7. Khilafah Islamiya Mindanao
8. Abu Sayyaf Group (Sulu faction)
9. Syuful Khilafa Fi Luzon
10. Ma'rakah Al-Ansar Battalion
11. Dawla Islamiyyah Cotabato
12. Dawlat Al Islamiyah Waliyatul Masrik
13. Ansar Al-Shariyah Battalion
14. Jamaah al-Tawid wal Jihad Philippines
15. Abu Duhanah Battalion
16. Abu Khubayn Battalion
17. Jundallah Battalion
18. Abu Sadr Battalion
19. Jamaah Al Muhajirin wal Anshor
20. Balik-Islam Group[259]

However, respondents failed to show any evidence that would establish links and relationships between and among these groups to support the conclusion that these groups are indeed "ISIS cell groups" and that these groups are coordinating attacks with the ASG Basilan, AKP, Maute Group, and the BIFF. For instance, the Sulu faction of the Abu-Sayyaf Group does not share the same ideology as the Basilan faction.[260] This listing of twenty groups are not present in any of the presentations or documents presented to the Court during the oral arguments in these cases.

Respondents cite atrocities that have been committed by rebel groups before May 23, 2017.[261] Unfortunately, they did not identify which group was involved in each particular incident. Hence, the enumerated atrocities cannot be attributed to all four (4) ISIS-inspired groups.

The underlying evidence[262] cited in respondents' Memorandum are unprocessed and are ad hoc pieces of information. Although the Memorandum did mention incidents that were directly attributable to the Abu-Sayyaf Group and the Bangsamoro Islamic Freedom Fighters,[263] it failed to indicate which particular faction was involved. Furthermore, it included acts of violence committed by the New People's Army in Batangas and Samar[264] and those committed by the Abu Sayyaf Group in Bohol.[265]

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259 Id.
260 Institute for Policy Analysis of Conflict, *Pro-Isis Groups in Mindanao and their Links to Indonesia and Malaysia* <http://file.understandingconflict.org/file/2016/10/IPAC_Report_33.pdf> 3–4 (last accessed June 30, 2017).
261 OSG Memorandum pp. 8-11.
262 OSG Memorandum, Annex 9 of Annex 2, Significant Atrocities in Mindanao Prior to the Marawi City Incident.
263 Id.
264 Id.
265 Id.

XI

Fifth, it is possible that the critical pieces of information have been taken out of context. The inferences made as to the affiliation of the alleged Maute group with ISIS leave much to be desired. Context was not properly explained.

The OSG lays down the following backdrop to contextualize the events of May 23, 2017 as acts of rebellion: (1) ISIS leader Abu Bakr al-Baghdadi has established an Islamic State in Syria and Iraq;[266] (2) Muslims around the world join the Islamic State by pledging allegiance to al-Baghdadi, and this pledge is an obligation to unify under al-Baghdadi's caliphate;[267] (3) ISIS' plan consists of "impos[ing] its will and influence worldwide";[268] (4) ISIS carries out this plan by capturing and administering territories;[269] (5) ISIS, which has been called the "world's wealthiest organization," finances the leaders of these territories, for the proper administration of said territories;[270] (6) ISIS' notoriety and its finances attracted local rebel groups, namely, the Abu-Sayyaf Group from Basilan ("ASG-Basilan"), Ansarul Khilafah Philippines ("AKP"), the Maute Group, and the Bangsamoro Islamic Freedom Fighters ("BIFF"), who previously operated separately, to pledge their allegiance to ISIS;[271] (7) Because of this pledge of allegiance, these groups have now unified as one alliance (the "ISIS-linked rebel groups");[272] (8) Hapilon, leader of ASG-Basilan, was appointed as the *emir*, or the leader of all ISIS forces in the Philippines;[273] (9) Hapilon embarked on a "pilgrimage" to unite with the ISIS-linked rebel groups, which the OSG called a "symbolic *hijra*," as a step towards establishing an administered territory, for ISIS approval or recognition.[274]

The OSG links this "pilgrimage" to the five (5) steps for establishing an ISIS-recognized Islamic province,[275] and claims that the ISIS-linked rebel groups have already accomplished the third step in the establishment of an ISIS-recognized Islamic province when Hapilon was appointed *emir*.[276] The ISIS-linked rebel groups, together with "ISIS cell groups," have conducted many violent activities to dismember the country.[277]

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266 OSG Memorandum, p. 4.
267 Id.
268 Id.
269 Id.
270 Id.
271 Id. at 5–6.
272 Id. at 6.
273 Id. at 7.
274 Id. at 7–8.
275 Id.
276 Id. at 8.
277 Id. at 5–6.

This is advocated by the OSG as the proper context to interpret the events of May 23, 2017. Thus, when government troops faced heavy assault at around 2 o'clock in the afternoon, the perpetrators were identified as the ISIS-linked rebel groups:

> 29. At 2:18pm, the government troops from the 51st Infantry Battalion were faced with heavy assault from the rebel groups in the vicinity of the Amai Pakpak Medical Center. Four (4) government troopers were wounded in the encounter.
>
> 30. The ISIS-linked local rebel groups launched an overwhelming and unexpectedly strong offensive against government troops. Multitudes, about five hundred (500) armed men, rampaged along the main streets of Marawi and swiftly occupied strategic positions throughout the city. Snipers positioned themselves atop buildings and began shooting at government troops. The ISIS-linked local rebel groups were also equipped with rocket-propelled grenades ("RPG") and seemingly limitless ammunition for high-powered assault rifles.
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> . . . .
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> 34. In their rampage, the rebel groups brandished the black ISIS flag and hoisted it in the locations that they occupied. An ISIS flag was recovered by the 51st Infrantry Battalion in the vicinity of the Amai Pakpak Medical Center, where the troops had an armed encounter with the rebels. Another ISIS flag was captured by the 103rd Brigade in Barangay Basak, which was under the control of the rebel groups.[278]

Further, the act of flying the ISIS flag was interpreted, in Proclamation No. 216, as an overt act of attempting to remove part of Mindanao from the allegiance to the Philippine Government:

> WHEREAS, today, 23 May 2017, the same Maute terrorist group has taken over a hospital in Marawi City, Lanao del Sur, established several checkpoints within the City, burned down certain government and private facilities and inflicted casualties on the part of Government forces, and started flying the flag of the Islamic State of Iraq and Syria (ISIS) in several areas, thereby openly attempting to remove from the allegiance to the Philippine Government this part of Mindanao and deprive the Chief Executive of his powers and prerogatives to enforce the laws of the land and to maintain public order and safety in Mindanao, constituting the crime of rebellion[.]

To assess the sufficiency of the factual basis for finding that rebellion exists in Mindanao, it is essential to contextualize the acts supposedly suggestive of rebellion, in relation to the culture of the people purported to have rebelled.

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[278] Id. at 12–13.

This Court must consider, who are Isnilon Hapilon and the Maute brothers? What is their relationship to ISIS? Are the ideologies of Hapilon, the Maute brothers, and ISIS compatible? What is their relationship to the people of Marawi? What is the history of armed conflict within Mindanao?

Ignoring the cultural context will render this Court vulnerable to accepting any narrative, no matter how far-fetched. A set of facts which should be easily recognized as unrelated to rebellion may be linked together to craft a tale of rebellion which is convincing only to those unfamiliar with the factual background in which the story is set. Blindly accepting a possibly far-fetched narrative of what transpired in Marawi leading up to and including the events of May 23, 2017 and ignoring the cultural context will have its own consequences. The public will accept this far-fetched narrative as reasonable or the truth, when it could be nothing but "fake news." In turn, the government may be inadvertently doing a service for Maute Group and ISIS projecting them as bigger than what they really are.

It must be understood that there is no single homogenous monolithic Islam. There are many fundamental differences in beliefs and practices between and among Muslims. The ISIS brand of Islam is unabashedly medieval:

> Virtually every major decision and law promulgated by the Islamic State adheres to what it calls, in its press and pronouncements, and on its billboards, license plates, stationery, and coins, "the Prophetic methodology," which means following the prophecy and example of Muhammad, in punctilious detail.[279]

ISIS have been described as following Salafi-jihadis. For Salafists, the Quran is a direct and literal instruction from God:

> Salafis encourage a strict constructionist reading of the Quranic verses and prophetic traditions and downplay the role of human interpretive capacity and extratextual rationality . . .
>
> Contemporary Salafism makes claims concerning the permissibility and necessity of *takfir* (declaring a Muslim to be outside the creed, the equivalent of excommunication in Catholicism). Salafis believe Muslims can be judged to have committed major transgressions that put them outside the Islamic faith . . .
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> . . . .
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> The issue of *takfir* has become relevant because many jihadi Salafis today argue that existing Muslim regimes rule according to secular

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[279] Graeme Wood, *What ISIS Really Wants,* THE ATLANTIC, March 2015 < https://www.theatlantic.com/magazine/archive/2015/03/what-isis-really-wants/384980/> (last accessed July 3, 2017).

> laws. Thus, because they violate God's sovereignty, they no longer can be considered Muslim. Consequently, it is permissible to reject them and rebel against them until they repent and apply Islamic law or are removed from power. Many jihadi Salafis declare democratic regimes to be un-Islamic because sovereignty is vested in human beings and popular will, not God and his divine will . . . *Takfir* also is invoked against any person working for the "apostate" regimes or the occupation, including police and security services, translators, manual workers, and anyone giving aid or comfort to the occupiers.[280]

Thus, ISIS takes the position that many "Muslims" are marked for death as apostates, having done acts that remove them from Islam:

> These include, in certain cases, selling alcohol or drugs, wearing Western clothes or shaving one's beard, voting in an election – even for a Muslim candidate – and being lax about calling other people apostates. Being a Shiite, as most Iraqi Arabs are, meets the standard as well, because the Islamic State regards Shiism as innovation, and to innovate on the Koran is to deny its initial perfection . . . This means roughly 200 million Shia are marked for death. So too are the heads of state of every Muslim country, who have elevated man-made law above Sharia by running for office or enforcing laws not made by God.
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> Following *takfiri* doctrine, the Islamic State is committed to purifying the world by killing vast numbers of people . . . Muslim "apostates" are the most common victims. Exempted from automatic execution, it appears, are Christians who do not resist their new government.
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> . . . .
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> Leaders of the Islamic State have taken emulation of Muhammad as strict duty, and have revived traditions that have been dormant for hundreds of years. "What's striking about them is not just the literalism, but also the seriousness with which they read these texts," [Princeton scholar Bernard Haykel, the leading expert on ISIS theology] said.[281]

ISIS is extremely and fundamentally ideological and Muslims whose practices are inconsistent with ISIS' are apostates.

In contrast, the Maute Group began as a private militia, known primarily for their extortion activities. It was founded by scions of a political clan who regularly fielded candidates for local elections. It was only in 2015 that the group pledged allegiance to ISIS.[282] The ASG-Basilan, which is a faction of the Abu Sayyaf Group, also used to engage in

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[280] HAFEZ, MOHAMMED M., SUICIDE BOMBERS IN IRAQ: THE STRATEGY AND IDEOLOGY OF MARTYRDOM, pp. 68–70.

[281] Graeme Wood, *What ISIS Really Wants,* THE ATLANTIC, March 2015 < https://www.theatlantic.com/magazine/archive/2015/03/what-isis-really-wants/384980/> (last accessed July 3, 2017).

[282] Franco, J., *The Maute Group - New Vanguard of IS in Southeast Asia*, RSIS COMMENTARY (2017).

kidnappings and extortion until it declared its allegiance to ISIS. Rather than being bound by ideology, its members are:

> [B]ound together by ethnicity; family ties; loyalty to the leadership; and a strong desire for revenge, given the number of their relatives killed by police and military. Many children of 'martyrs', referred to as *ajang-ajang* (children) or *anak iluh* (orphans), are reported to be among the most militant.[283]

Anyone can pledge allegiance to ISIS. But this pledge does not imply any reciprocity or support from ISIS itself. Thus there are ISIS inspired groups wanting to affiliate but their oaths of affiliation may only be just that. Logistical support from ISIS now bearing the brunt of a multinational assault in Iraq and Syria may not be that forthcoming.

Moreover, among the core beliefs and driving forces of ISIS is that they will bring about the apocalypse:

> In fact, much of what the group does looks nonsensical except in light of a sincere, carefully considered commitment to returning civilization to a seventh-century legal environment, and ultimately to bringing about the apocalypse.
>
> . . . .
>
> [T]he Islamic State's immediate founding fathers . . . saw signs of the end times everywhere. They were anticipating, within a year, the arrival of . . . a messianic figure destined to lead the Muslims to victory before the end of the world . . .
>
> . . . .
>
> Now that it has taken Dabiq, the Islamic State awaits the arrival of an enemy army there, whose defeat will initiate the countdown to the apocalypse. Western media frequently miss references to Dabiq in the Islamic State's videos, and focus instead on lurid scenes of beheading . . .[284]

ISIS ideology, as salafi-jihadis, is fundamentally nihilistic and apocalyptic, and if properly lived by its alleged adherents, it would naturally alienate the Muslim population in many areas in Mindanao.

It bears noting that ISIS leaders consider "emulation of Muhammad as strict duty." They are therefore relentlessly Koranic. However, Hapilon was not even a fluent speaker of Arabic at the time he was supposedly recognized as *emir* of ISIS forces in the Philippines. His religious

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[283] Institute for Policy Analysis of Conflict, *Pro-Isis Groups in Mindanao and their Links to Indonesia and Malaysia* <http://file.understandingconflict.org/file/2016/10/IPAC_Report_33.pdf> 2 (last accessed June 30, 2017).

[284] Graeme Wood, *What ISIS Really Wants,* THE ATLANTIC, March 2015 < https://www.theatlantic.com/magazine/archive/2015/03/what-isis-really-wants/384980/> (last accessed July 3, 2017).

knowledge was likewise reported to be limited.[285] His allegiance to ISIS is conjectured to be motivated by his desire to be part of a Middle Eastern organization, as he "has always liked anything that smelled foreign, especially anything from the Middle East."[286]

Among the overt acts supposedly done by Hapilon to show his relationship with ISIS, as well as the relationship of the ISIS-linked rebel groups with ISIS, was a "symbolic *hijra*":

> 15. On December 31, 2016, Hapilon and about thirty (30) of his followers, including eight (8) foreign terrorists, were surveilled in Lanao del Sur. According to military intelligence, Hapilon performed a symbolic *hijra* or pilgrimage to unite with the ISIS-linked groups in mainland Mindanao. This was geared towards realizing the five (5)-step process of establishing a *wilayah*, which are: *first*, the pledging of allegiance to the Islamic State; *second*, the unification of all terrorist groups who have given *bay'ah* or their pledge of allegiance; *third*, the holding of consultations to nominate a *wali* or a governor of a province; *fourth*, the achievement of consolidation for the caliphate through the conduct of widespread atrocities and uprisings all across Mindanao; and *finally*, the presentation of all of these to the ISIS leadership for approval or recognition.[287]

The OSG Memorandum, in turn, cites *Hijra Before Isis,*[288] which discusses the history of *hijrah* in Islam:

> In order to disseminate their views to a wider constituency the Islamic State began in 2014 publishing an English-language magazine called *Dabiq*. The magazine is produced in glossy format with a colorful layout and careful design. Judging from the flawless English of every article, the authors (all of whom are anonymous) are native English speakers. *Dabiq's* third issue, **dedicated to *hijra*, calls on Muslims to migrate to Syria and participate in the creation of the Islamic State** . . .
>
> . . . .
>
> Although the third issue of *Dabiq* opens and closes with attacks on US foreign policies, the core of this issue is its seven-part case for why Muslim believers must perform *hijra*. Mindful of its English readership, the magazine contrasts *hijra*, a practice that prioritizes piety over pleasure, to the consumerist orientation of American society. One chapter, entitled

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[285] Institute for Policy Analysis of Conflict, *Pro-Isis Groups in Mindanao and their Links to Indonesia and Malaysia* <http://file.understandingconflict.org/file/2016/10/IPAC_Report_33.pdf> 7 (last accessed June 30, 2017).

[286] Institute for Policy Analysis of Conflict, *Pro-Isis Groups in Mindanao and their Links to Indonesia and Malaysia* <http://file.understandingconflict.org/file/2016/10/IPAC_Report_33.pdf> 4 (last accessed June 30, 2017).

[287] OSG Memorandum, p. 7.

[288] Rebecca Gould, *Hijra Before ISIS,* THE MONTREAL REVIEW (2015), < http://www.themontrealreview.com/2009/Hijra-before-ISIS.php > (last accessed July 3, 2017).

"Modern Day Slavery" notes that the "modern day slavery of employment, work hours, wages . . . leaves the Muslim in a constant feeling of subjugation to a kāfir [infidel] master." In order to overcome the servitude that is part and parcel of everyday life in industrialized societies, Muslims must migrate to the new Caliphate, the authors argue, where they can live and work under Muslim masters. In this new Caliphate, "there is no life without jihad. And there is no jihad without hijrah." As if to reinforce that *hijra* never ends, the third issue concludes with a citation from the *hadith*, the storehouse of sacred sayings that is a major source of authority in Islamic law: "there will be hijrah after hijrah."

Just as, according to the theologians of ISIS, there will be *hijra* after *hijra*, so too was there *hijra* long before its violent reconfiguration by ISIS. *Hijra* marks the beginning of Islam as a religion, when Muhammad and his followers migrated from Mecca to Medina in 622 in order to preserve their community. The migrants knew that, so long as they continued to reside in Mecca, they would [be] hated by local non-Muslims, and have reason to fear for their lives. Muhammad and his followers were invited to resettle in Medina at just the right moment.

In addition to signifying the general obligation to migrate, *hijra* refers to the Prophet's departure for Medina. Accordingly, it stands for the beginning of the Islamic calendar. In keeping with this beginning, Muslims are encouraged to migrate to lands under Muslim rule when migration will strengthen the community of faith. The Prophet's *hijra* is a case in point. Against his will, Muhammad migrated in order for Islam to have a stable base and for Muslims to have freedom of worship. With his migration, *hijra* became relevant in perpetuity to all believers.

After the migration to Medina, Islam acquired a political foundation. While Islam became a religion of the community as well as of the individual believer, *hijra* became a story through which Muslims remembered their beginnings. *Hijra* acquired new life in early modernity, with the systematic expulsions of Muslims, first from Islamic Spain in 1492 (the same year that Columbus discovered America), and later from colonial empires that wanted Muslim lands without Muslims living there. These later expulsions—from Spain and Russia especially—changed the meaning of *hijra* in Muslim cultural memory. The concept became inflected not just by the pressure to migrate, as during Muhammad's lifetime, but by an ultimatum from the state: leave or you will be slaughtered.

Although the Prophet's *hijra* is not narrated in the Quran, this sacred book is structured around this event in that it is divided into revelations Muhammad received in Medina and those he received while residing in Mecca. Wherever and whenever in Islamic history there are stories of despair and sacrifice, as well as of courage and of victory, *hijra* casts its shadow. *Hijra* is at once the penultimate origin story and a climactic denouement to any traumatic experience.

Hijra is an answer to a universal predicament faced by all believers—how to be pious in an impious world—and an attempt to move beyond the constraints of everyday life. *Hijra* reconciles the dictates of faith with the dictates of the state, and the impulses of the heart with

external constraints. More than a physical action, *hijra* responds to the inability of our dreams to approximate our realities with the injunction to create a better world in lands under Muslim rule. At its most meaningful, *hijra* resolves the contradiction between the worlds we desire and the lives we live.

. . . .

The Islamic State's merger of violence with post-national consciousness is unique, and *hijra* is one of the most basic strategies underlying its vision. *Hijra* as understood by the Islamic state marks a break in the fabric of time. It has the blessings of antiquity, but pursues a more cosmopolitan vision of human belonging than pre[-]modern precedents. It opposes the crass materialism of American culture, as well as the cowardly subservience of US client states in the Middle East. *Hijra* is compelling, persuasive, and uniquely able to solicit a profound sense of emotional belonging.

While its critique of American materialism goes some distance towards explaining the appeal of the Islamic State's rhetoric to prospective migrants, the conception of *hijra* that animates publications like *Dabiq* relies on a selective reordering [of] the historical record. The Islamic State's rhetoric, for example, suppresses the fact that, for most of Islamic history, Muslims have peacefully co-habited with Jews, Christians, Hindus, and Zoroastrians, and followers of many other non-Muslim religious creeds. Such co-habitation was enshrined into Islamic law, not always on equitable terms, but as a guiding assumption for over a thousand years. It has always been a presumption of normative Islamic law that Muslims must live alongside their non-Muslim counterparts. Only in modernity was the dream of an Islamic State populated exclusively by Muslims, and with all non-Muslims living under the threat of extermination, envisioned.

Meanwhile, *hijra* today is used in a very different sense: to signify migration for the purpose of jihad. This was not the normative meaning of *hijra* before modernity. ISIS' crude and contrived medievalism shows how mythical re[-]fashionings of the past can justify many forms of oppression in the present. The contemporary usages of hijra demonstrate how the past is mediated to the present. These usages reveal a rift between the past understood as an object of knowledge and a past which exists for the sake of the present.

In the sense evoked by millions of Muslims over the long course of Islamic history, *hijra* is the perpetual movement between memory and forgetting. *Hijra* is the turn to narrative to keep the past—and ourselves—alive in the present. *Hijra* is what we do when, like Palestinians and Chechens today, and like the Muslims and Jews of Islamic Spain, we have been dispossessed. *Hijra* is how we create homes for ourselves amidst the perpetual homelessness of exile and displacement that is part of the modern condition.

Hijra is useful to the Islamic State insofar as it encourages believers to cut their ties with the past. However, *hijra* has for most of its history meant much more than the rejection of the past. As a form of storytelling, and an ethical mode of remembering, *hijra* holds the past accountable to the present. *Hijra* indexes distances between past and present, not their convergence. For all these reasons, *hijra* far exceeds

> and ultimately confounds ISIS' remit. *Hijra*'s appeal to memory, and its grounding in prior forms of life, are nuances that the ideologues of ISIS, in their uncritical appeals to the force of the new, would very much like us to forget.[289]

Later, the OSG mentions *hijrah* again, in support of its contention that the ISIS-linked rebel groups is attempting to "carv[e] out their own territory called a *wilayah*":[290]

> 206. On December 31, 2016, Hapilon and about thirty (30) of his followers from Basilan, including eight (8) foreign terrorists, were spotted in Lanao del Sur. Hapilon and his cohorts performed a symbolic *hijra*, which is the holy voyage of Prophet Muhammad and his followers from Mecca to Medina. The purpose of this is to further the unification goals for all rebel groups in Mindanao.[291]

Here, however, the OSG cites an intelligence report as basis for the assertion that the *hijrah* was intended to "further the unification goals for all rebel groups in Mindanao." But, the intelligence report says only:

> Following the symbolic *hijra* of Isnilon HAPILON, the DAESH endorsed Amir for Southeast Asia, and his followers from Basilan to Butig, Lanao del Sur, he was joined by members of local terrorist groups such as the Maute and Maguid groups. These were done in a bid to unite DAESH-inspired groups in compliance with the five-step process of establishing a *wilayat* in Mindanao.[292]

The source relied upon by the OSG does not explain what a "symbolic *hijrah*" is and how it is a step in establishing an ISIS-recognized Islamic province within the Philippines. Rather, the OSG source[293] states that, in relation to *hijrah*, ISIS "calls on Muslims to **migrate to Syria,**" which is the opposite of establishing an ISIS-recognized Islamic Province in the Philippines. Indeed, it appears that ISIS expressly focuses on bringing fighters to Syria:

> [M]ost jihadist groups' main concerns lie closer to home. That's especially true of the Islamic State, precisely because of its ideology. It sees enemies everywhere around it, and while its leadership wishes ill on the United States, the application of Sharia in the caliphate and the expansion to contiguous lands are paramount. Baghdadi has said as much directly: in November he told his Saudi agents to "deal with the

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289 Id.
290 OSG Memorandum, p. 69.
291 Id. at 65.
292 OSG Comment, Annex 3, p. 1.
293 Rebecca Gould, *Hijra Before ISIS,* THE MONTREAL REVIEW (2015), < http://www.themontrealreview.com/2009/Hijra-before-ISIS.php > (last accessed July 3, 2017).

> *rafida* [Shia Muslims] first . . . then *al-Sulul* [Sunni Muslim supporters of the Saudi monarch] . . . before the crusaders and their bases."
>
> The foreign fighters (and their wives and children) have been travelling to the caliphate on one-way tickets: they want to live under true Sharia, and many want martyrdom. Doctrine, recall, requires believers to reside in the caliphate if it is at all possible for them to do so. One of the Islamic State's less bloody videos shows a group of jihadists burning their French, British, and Australian passports. This would be an eccentric act for someone intending to return to blow himself up in line at the Louvre or to hold another chocolate shop hostage in Sydney.
>
> A few "lone wolf" supporters of the Islamic State have attacked Western targets, and more attacks will come. But most of the attackers have been frustrated amateurs, unable to immigrate to the caliphate because of confiscated passports or other problems. Even if the Islamic State cheers these attacks – and it does in its propaganda – it hasn't yet planned and financed one.[294]

Using Arabic words like *hijra* without any attempt to explain it and naming it an overt act of establishing an Islamic province within the Philippines creates unnecessary ambiguity when what is needed is clarity. It is an act of othering and discourages even the attempt to understand. Such tactics make it all the more necessary for this Court to give proper attention to the culture being invoked to ensure that its interpretation of the facts presented is properly arrived at.

Just as there is no monolithic "Islam," the so-called ISIS-linked rebel groups are just as varied in their principles and ideologies or lack thereof. However, in the cultural phenomenon of "pintakasi," when an enemy enters a community, everyone in the community joins the fight. This common phenomenon resulted in the deaths of many government troops in a botched government operation now known as the Mamasapano Incident, which was an attempt to arrest a foreign terrorist. "Pintakasi" was discussed in a Senate Hearing on the Mamasapano Incident, as summarized in the Committee Report:

> Intelligence in the possession of the PNP prior to the launch of *Oplan Exodus* indicated that there were more than 1,000 hostile troops at or near the target area where Marwan and Usman were believed to be hiding. Yet the PNP-SAF deployed only 392 personnel for the entire operation where almost a quarter of them are positioned to guard the MSR that was so far away from the actual theatre of action.

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[294] W Graeme Wood, *What ISIS Really Wants*, THE ATLANTIC, March 2015 < https://www.theatlantic.com/magazine/archive/2015/03/what-isis-really-wants/384980/> (last accessed July 3, 2017).

> In addition, the PNP-SAF mission planners were informed of the possibility of a *pintakasi*, a practice common among Muslim armed groups where groups normally opposed to each other would come together and fight side by side against a common enemy or an intruding force, as described by ARMM Governor Mujiv Hataman ("Governor Hataman") in this testimony before the Committees. Governor Hataman described the bloody encounter as a case of *Pintakasi*, a jargon for collective work or *bayanihan*.[295]

Even assuming that the facts alleged to have occurred on May 23, 2017 are true, these facts may have been linked together, ignoring the cultural context, to create a false narrative by the storyteller.

The facts presented show that there was, indeed, armed confrontation in Marawi City. However, this must be interpreted taking the context into consideration. Without this due consideration, this Court risks misreading the facts, reinforcing a false and dangerous narrative in the minds of the people, and acting as a platform for forces that thrive on image and terror magnified through news reports and social media.

XII

Taking the facts in their proper context, there may be acts of terrorism but not necessarily rebellion. The facts also establish that the Maute group are no more than terrorists who committed acts of violence in order to evade or resist arrest of their leaders.

Terrorism is a pre-meditated, politically-motivated violence perpetrated against non-combatant targets by sub-national groups or clandestine agents.[296] It is motivated by political, religious, or ideological beliefs and is intended to instill fear and to coerce or intimidate governments or societies in the pursuit of goals that are usually political or ideological.[297] Terrorists plan their attack to draw attention to their cause, thus, the mode and venue of attacks are deliberately chosen to generate the most publicity.[298]

The United Nations[299] defines terrorism as:

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[295] Comm. Report No. 120, dated March 15, 2015, p. 50.

[296] 22 U.S. Code section 2656f (D)(2)

[297] United States Department of Defense, *DOD Dictionary of Military and Associated Terms* 238 (June 2017), <http://www.dtic.mil/doctrine/new_pubs/dictionary.pdf> (last accessed July 3, 2017).

[298] François Lopez, *If Publicity is the Oxygen of Terrorism – Why Do Terrorists Kill Journalists?*, 10 PERSPECTIVES ON TERRORISM, <http://www.terrorismanalysts.com/pt/index.php/pot/article/view/490/html> (last accessed on June 30, 2017)

[299] UN General Assembly Resolution 49/60, Measures to Eliminate International Terrorism (1994).

> 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 are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.

However, the United Nations member states still have not come to an agreement on a single definition of terrorism. The majority of definitions of terrorism have been written by government agencies, making them inherently biased as the government is deliberately excluded from the definition of terrorism.[300]

The concept of terrorism requires an objective element which is the use of serious violence against persons as a means of terrorist action.[301] The subjective element includes the motives and intention of the perpetrators.[302] The subjective element is traced back to the roots of terrorism in the French Revolution to create a climate of terror and fear within the population or parts of the population.[303] But with respect to the modern definition of terrorism, the element of fear and insecurity is only a sufficient subjective element but not a necessary requirement, implying that if the intention of intimidating the population is present, the intention of coercing the government is not a necessary additional requirement.[304]

On the other hand, rebellion is an act of armed resistance to an established government or leader. Conflicts between liberation movements and an established government present a unique form of conflict which would involve both guerrilla and regular armed warfare.[305] International law distinguishes between 3 categories or stages of challenges to established state authority, on an ascending scale, (1) rebellion, (2) insurgency, and (3) belligerency.[306]

Insurgency is of a more serious nature than rebellion in that some scholars are of the opinion that the conferring of the status as "insurgents" brings them out of the scope of municipal law and onto the international law forum.[307] Insurgency would constitute a civil disturbance which is usually

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300 Arizona Department of Emergency and Military Affairs, *Various Definitions of Terrorism,* <https://dema.az.gov/sites/default/files/Publications/AR-Terrorism%20Definitions-BORUNDA.pdf> (last accessed July 3, 2017).

301 Christian Walter, *Defining Terrorism in National and International Law* 5 (2003). <https://www.unodc.org/tldb/bibliography/Biblio_Terr_Def_Walter_2003.pdf>

302 Id.

303 Id.

304 Id. at 6-7.

305 Noelle Higgins, *The Application of International Humanitarian Law to Wars of National Liberation,* JOURNAL OF HUMANITARIAN ASSISTANCE 2 (2004).

306 Id. at 6.

307 Id. at 7.

confined to a limited area of the territory of the state and is supported by a minimum degree of organization.[308] Under the material field of application test, a dissident armed group can claim the status of insurgent only when it is under responsible command and exercises such control over a part of its territory as to enable it to carry out sustained and concerted military operations.[309]

Belligerency is the final category of a challenge to an established government recognized by international law.[310] The *Institut de Droit International,* in the Resolution on Insurrection adopted in 1900 laid down the necessary criteria for a state of belligerency to be recognized: (1) insurgents had occupied a certain part of the State territory, (2) established a government which exercised the rights inherent in sovereignty on that part of territory, and (3) if they conducted the hostilities by organized troops kept under military discipline and complying with the laws and customs of war.[311]

Article 134 of the Revised Penal Code defines rebellion:

> [t]he crime of *rebellion or insurrection* is committed by rising publicly and taking arms against the government for the purpose of removing from the allegiance to said Government or its laws, the territory of the Republic of the Philippines or any part thereof, of any body of land, naval or other armed forces, or depriving the Chief Executive or the Legislature, wholly or partially, of any of their powers or prerogatives.[312]

The elements of rebellion can be summarized as follows:

> *[F]irst*, that there be (a) *public uprising* and (b) *taking arms* against the government; *second*, that the purpose of the uprising or movement is either (a) to remove from the allegiance to said government or its laws (1) the territory of the Philippines or any part thereof; or (2) any body of land, naval or other armed forces; or (b) to deprive the Chief Executive or Congress, wholly or partially, of any of their powers or prerogatives.[313]

In contrast, the crime of terrorism has 3 elements, (1) the predicate crime committed, (2) the effect of the perpetration of the crime (to sow and

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[308] Id. at 8.

[309] Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 1 (1977).

[310] Noelle Higgins, *The Application of International Humanitarian Law to Wars of National Liberation,* JOURNAL OF HUMANITARIAN ASSISTANCE 9 (April 2004) <http://sites.tufts.edu/jha/files/2011/04/a132.pdf>

[311] Id.

[312] REV. PEN. CODE, art. 134.

[313] See Justice Angelina Sandoval-Guttierez' Dissenting Opinion in *Lacson v. Perez,* 410 Phil. 78, 123 (2001) [Per J. Melo, En Banc].

create widespread and extraordinary fear), and (3) the purpose of which is to coerce the government to give in to an unlawful demand.

The difference between terrorists and rebels boils down to their intention. Terrorists use fear and violence to advance their agenda or ideology, which may or may not be political in nature. While rebels use violence as a form of strategy to obtain their goal of destabilizing or overthrowing the government in order to gain control over a part of or the entire national territory. If rebels succeed in overthrowing the government, then they install themselves as the ruling party and their status is legitimized.

Under Republic Act 9372, otherwise known as the Human Security Act of 2007, rebellion is punished as a form of terrorism:

> Section 3. Terrorism – Any person who commits an act punishable under any of the following provisions of the Revised Penal Code:
>
> a. Article 122 (Piracy in General and Mutiny in the High Seas or in the Philippine Waters);
> b. **Article 134 (Rebellion or Insurrection)**;
> c. Article 134-a (Coup d' Etat), including acts committed by private persons;
> d. Article 248 (Murder);
> e. Article 267 (Kidnapping and Serious Illegal Detention);
> f. Article 324 (Crimes Involving Destruction), or under
> g. Presidential Decree No. 1613 (The Law on Arson);
> h. Republic Act No. 6969 (Toxic Substances and Hazardous Nuclear Waste Control Act of 1990);
> i. Republic Act No. 6235 (Anti-Hijacking Law);
> j. Presidential Decree No. 532 (Anti-Piracy and Anti-Highway Robbery Law of 1974); and
> k. Presidential Decree No. 1866, as amended (Decree Codifying the Laws on Illegal and Unlawful Possession, Manufacture, Dealing in, Acquisition or Disposition of Firearms, Ammunitions, or Explosives)
>
> Thereby sowing and creating a condition of widespread and extraordinary fear and panic among the populace, in order to coerce the government to give in to an unlawful demand shall be guilty of the crime of terrorism and shall suffer the penalty of forty (40) years of imprisonment without the benefit of parole as provided for under Act No. 4103, otherwise known as the Indeterminate Sentence Law, as amended. (Emphasis supplied)

In its broader sense, rebellion falls under terrorism because of its resort to violence, which in turn creates widespread fear and panic, to attain its goals of overthrowing the government. However, not all acts of terrorism can qualify as rebellion. Certainly, the acts of terrorism committed by the Maute Group and their allies, after the attempted service of warrants of arrests against their leaders and the disruption of their plans while trying to

escape, is not rebellion in the context of Article 134 of the Revised Penal Code. It is certainly not the kind of rebellion that warrants martial law.

XIII

The danger of mischaracterizing the protagonists in the Marawi incident is that this Court will officially accord them with a status far from who they really are – common local criminals.

Rebellion is a political crime with the ultimate objective of overthrowing or replacing the current government. The acts comprising rebellion, no matter how violent or depraved they might be, are not considered separately from the crime of rebellion:

> In short, political crimes are those directly aimed against the political order, as well as such common crimes as may be committed to achieve a political purpose. The decisive factor is the intent or motive. If a crime usually regarded as common, like homicide, is perpetrated for the purpose of removing from the allegiance to the Government the territory of the Philippine Islands or any part thereof, then it becomes stripped of its "common" complexion, inasmuch as, being part and parcel of the crime of rebellion, the former acquires the political character of the latter.[314]

Enrile v. Amin[315] held that the crime of rebellion consists of many acts and described it as a vast movement of men and a complex net of intrigues and plots, including other acts committed in furtherance of the rebellion even when the crimes in themselves are deemed absorbed in the crime. Furthermore, *Enrile* posits that the theory of absorption in rebellion cases must not be confined to common crimes but also to offenses under special laws perpetrated in furtherance of the political offense.[316]

People v. Lovedioro[317] ruled that the elements of rebellion, including political motive, must be clearly alleged in the Information. Nonetheless, "[t]he burden of demonstrating political motive falls on the defense, motive, being a state of mind which the accused, better than any individual knows."[318]

Being a political crime, the law has adopted a relatively benign[319] attitude when it comes to rebellion. *People v. Hernandez* remarked that the

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[314] *People v. Hernandez*, 99 Phil 515, 535-536 (1956) [Per J. Concepcion, En Banc].
[315] 267 Phil. 603 (1990) [Per J. Gutierrez, Jr., En Banc]
[316] Id. at 610–611.
[317] 320 Phil. 481 (1995) [Per J. Kapunan, First Division].
[318] Id. at 489.
[319] Id.

deliberate downgrading of the penalty or treatment of rebellion in the law can be chalked up to the recognition that rebels are usually created by "social and economic evils" in our society:

> Thus, the settled policy of our laws on rebellion, since the beginning of the century, has been one of decided leniency, in comparison with the laws enforce during the Spanish regime. Such policy has not suffered the slightest alteration. Although the Government has, for the past five or six years, adopted a more vigorous course of action in the apprehension of violators of said law and in their prosecution the established policy of the State, as regards the punishment of the culprits has remained unchanged since 1932. It is not for us to consider the merits and demerits of such policy. This falls within the province of the policy-making branch of the government[,] the Congress of the Philippines.[320]

Despite the law's benign attitude towards the local terrorist groups, by characterizing them as rebels, we risk giving the impression that what are mere sporadic or isolated acts of violence during peacetime, which are considered law enforcement problems, have been transformed to ***a non-international armed conflict covered under International Humanitarian Law.***[321]

International Humanitarian Law applies during an armed conflict. An armed conflict is defined as (1) any use of force or armed violence between States (international armed conflict), or (2) a protracted armed violence between governmental authorities and organized armed groups, or between such groups within that State (non-international armed conflict).[322]

Rebellion may be considered (a) an international armed conflict if it is waged by a national liberation movement, (b) a non-international armed conflict if the fighting is protracted and it is committed by an organized armed group that has control of territory under Additional Protocol II, or (c) a law enforcement situation outside the contemplation of International Humanitarian Law if there is no armed conflict as defined by the Geneva

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320 *People v. Hernandez*, 99 Phil 515, 549 (1956) [Per J. Concepcion, En Banc].

321 *What is International Humanitarian Law?*, International Committee on Red Cross, <https://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf> (last accessed July 3, 2017).

322 Rep. Act No. 9851, sec. 3 (c) provides:
Section 3.
....
(c) "Armed conflict" means any use of force or armed violence between States or a protracted armed violence between governmental authorities and organized armed groups or between such groups within that State: Provided, That such force or armed violence gives rise, or may give rise, to a situation to which the Geneva Conventions of 12 August 1949, including their common Article 3, apply. Armed conflict may be international, that is, between two (2) or more States, including belligerent occupation; or non-international, that is, between governmental authorities and organized armed groups or between such groups within a state. It does not cover internal disturbances or tensions such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

Convention, and if the rebels are not members of an organized armed group, as defined by Additional Protocol II.

Under Additional Protocol II, organized armed groups are those that (a) are under a responsible command and (b) exercise such control over a part of their territory as to enable them to (c) carry out sustained and concerted military operations and to implement this Protocol.[323]

The situation in Mindanao is not one waged by a national liberation movement that would call into application the rules during an international armed conflict. At present, the Philippines is not occupied by a foreign invader or colonist; neither is it being run by a regime that seeks to persecute an entire race. The combatant status applies only during an international armed conflict. Because there is no international armed conflict here, those who take up arms against the government are not considered combatants. As a consequence, they are not immune for acts of war and do not have prisoner-of-war status.

The armed hostilities in Marawi, if at all, may be considered a non-international armed conflict if the Maute group falls under the category of "organized armed group" and if the fighting may be considered "protracted" under Additional Protocol II.

Assuming there is a non-international armed conflict, those who directly participate in hostilities in Mindanao are considered unlawful fighters, not combatants. As unlawful fighters, they are not immune from prosecution for their acts of war. They also do not enjoy prisoner-of-war status; they are merely war detainees.

Finally, if there is no protracted armed violence by an organized armed group, then the rebellion is an entirely law enforcement situation. Article 1(2) of Additional Protocol II states that situations of riots, internal disturbances and "isolated and sporadic acts" of violence are outside the concerns of International Humanitarian Laws.[324] When there is no armed conflict, there is only a law enforcement situation. The use of force is limited and the participants in the violence are liable for common crimes.

The terrorists responsible for the armed hostilities in Marawi cannot be considered rebels. It is true that they may have discussed the possibility of a caliphate. Yet, from all the evidence presented, they are incapable of actually holding territory long enough to govern. Their current intentions do not appear to be to establish a government in Marawi. In all the

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[323] Additional Protocol II, art. 1, para. 1.
[324] Rep. Act No. 9851, sec. 3(c).

presentations of the respondents, it was clear that government was able to disrupt the terrorists and the hostilities that resulted were part of the defensive posture of those involved in the terror plot. The armed hostilities in Marawi are not the spark that would supposedly lead to conflagration and the burning down of the entirety of Mindanao due to rebellion.

The Maute Group are terrorists, pure and simple. They are not rebels within the constitutional meaning of the term, neither is there armed conflict as understood under International Humanitarian Law.

XIV

Declaring Proclamation No. 216 and related issuances as unconstitutional will not have an effect on Proclamation No. 55.

Although embodied in the same section, the calling out power of the President is in a different category from the power to proclaim martial law and suspend the privilege of the writ of *habeas corpus.*

Integrated Bar of the Philippines v. Zamora[325] classified the calling out power of the President as "no more than the maintenance of peace and order and promotion of the general welfare."[326]

The calling out power of the President can be activated to prevent or suppress lawless violence, invasion, or rebellion. Among the three Commander-in-Chief powers mentioned in Article VII, Section 18, the calling out power is the most benign compared to the suspension of the privilege of the writ of *habeas corpus* and the proclamation of martial law.[327]

Additionally, unlike the proclamation of martial law or suspension of the privilege of the writ of *habeas corpus* which must concur with the twin requirements of actual invasion or rebellion and necessity of public safety, no such conditions are attached to the President's calling out power. The only requirement imposed by the Constitution is that "whenever it becomes necessary [the President] may call out such armed forces to prevent or suppress lawless violence, invasion, or rebellion."[328]

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325 392 Phil. 618 (2000) [Per J. Kapunan, En Banc].
326 Id. at 636.
327 Id. at 643.
328 CONST., art. VII, sec. 18.

Integrated Bar of the Philippines [329] emphasized that the full discretionary power of the President to call out the armed forces is evident in the President's power as Commander-in-Chief under Article VII, Section 18. The lack of Legislative and Judicial review of the calling out power likewise reinforces the President's full discretion when it comes to calling out the armed forces to maintain peace and order.[330]

Clearly, this Court's ruling on the petitions questioning Proclamation No. 216 will not affect or will have no bearing on Proclamation No. 55 or the declaration of a state of national emergency on account of lawless violence in Mindanao. The calling out order of the President pursuant to Proclamation No. 55 will still be in effect even if this Court ends up striking down Proclamation No. 216 due to lack of constitutionality.

Declaring Proclamation No. 216 as unconstitutional therefore will have no effect on the ongoing military operations in the remaining barangays in Marawi. Neither will it have any effect on military operations ongoing in other parts of the country including Mindanao as a result of Proclamation No. 55.

XVI

The words we choose can have violent consequences.

Characterizing or labeling events on the basis of the categories that law provides is quintessentially a legal act. It is not a power granted to the President alone even as Commander-in-Chief. It is the power wielded by this country's judiciary with finality. Through that power entrusted to us by the sovereign Filipino people, we temper the potentials of force. We ensure the protection of rights which embed our societies' values; the same values, which the terrorists may want us to deny or destroy.

I acknowledge the hostilities in Marawi and the valiant efforts of our troops to quell the violence. I acknowledge the huge pain and sacrifice suffered by many of our citizens as they bear the brunt of violent confrontations. I share the suffering of those who, in moments of callous reaction by members of a majority of our society influenced by a postcolonial culture of intolerance, have to live through the stigma of undeserved stereotypes. To be Muslim has never meant complicity with the misguided acts of fanatics who appropriate religion for irrational selfish ends.

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[329] 392 Phil. 618 (2000) [Per J. Kapunan, En Banc].
[330] Id. at 640–642.

With due respect to my colleagues, I cannot join them in their acceptance of the President's categorization of the events in Marawi as equivalent to the rebellion mentioned in Article VII, Section 18. In conscience, I do not see the situation as providing for the kind of necessity for the imposition of martial law in Marawi, as well as throughout the entire Mindanao.

Rather, I read the situation as amounting to acts of terrorism, which should be addressed in a decisive but more precise manner. The military can quell the violence. It can disrupt many of the planned atrocities that may yet to come. It can do so as it had on many occasions in the past with the current legal arsenal that it has.

In my view, respondents have failed to show what additional legal powers will be added by martial law except perhaps to potentially put on the shoulders of the Armed Forces of the Philippines the responsibilities and burdens of the entire civilian government over the entire Mindanao region. I know the Armed Forces of the Philippines to be more professional than this narrative.

I honor the sacrifices of many by calling our enemy with their proper names: terrorists capable of committing atrocious acts. They are not rebels desirous of a viable political alternative that can be accepted by any of our societies. With their plans disrupted and with their bankrupt fanaticism for a nihilist apocalypse, they are reduced to a fighting force violently trying to escape. They are not a rebel group that can hope to achieve and hold any ground.

As terrorists, they should be rooted out through the partnership produced by the eyes and ears of our communities and the swift decisive hand of our coercive forces. They cannot be found and kept in check by a false sense of security created by the narrative of martial law.

History teaches us that to rely on the iron fist of an authoritarian backed up by the police and the military to solve our deep-seated social problems that spawn terrorism is fallacy. The ghost of Marcos' Martial Law lives within the words of our Constitution and rightly so. That ghost must be exorcised with passion by this Court whenever its resemblance reappears.

Never again should this court allow itself to step aside when the powerful invoke vague powers that feed on fear but could potentially undermine our most cherished rights. Never again should we fall victim to a false narrative that a vague declaration of martial law is good for us no matter the circumstances. We should have the courage to never again clothe authoritarianism in any disguise with the mantle of constitutionality.

The extremist views of religious fanatics will never take hold in our communities for so long as they enjoy the fundamental rights guaranteed by our constitution. There will be no radicals for so long as our government is open and tolerant of the activism of others who demand a more egalitarian, tolerant and socially just society.

We all need to fight the long war against terrorism. This needs patience, community participation, precision, and a sophisticated strategy that respects rights, and at the same time uses force decisively at the right time and in the right way. The terrorist wins when we suspend all that we believe in. The terrorist wins when we replace social justice with disempowering authoritarianism.

We should temper our fears with reason. Otherwise, we succumb to the effects of the weapons of terror. We should dissent – even resist – when offered the farce that martial law is necessary because it is only an exclamation point.

For these reasons, I dissent.

ACCORDINGLY, I vote to grant the Petitions. Proclamation No. 216 of May 23 2017, General Order No. 1 of 2017, and all the issuances related to these Presidential Issuances are unconstitutional.

MARVIC M.V.F LEONEN
Associate Justice