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## Contesting Subjects: International Legal Discourses on Terrorism and Indigenous Peoples' Human Rights

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### Abstract

International legal discourses clash in violent ways within the state. For example, the international discourse on human rights identifies some individuals who oppose state-sanctioned projects as Indigenous peoples while the international discourse about terrorism may identify them as terrorists. These clashes are occurring throughout the world, particularly surrounding extractive resource projects, but this article considers one example from the Philippines where some B'laan individuals and communities oppose the Tampakan Copper–Gold Mine, and examines how various actors identify those individuals and communities. It explores how some identify them as Indigenous peoples while others identify them as terrorists. In highlighting the violent effects of international law, it investigates how discourse inhibits appreciation of violent erasures and the continuing coloniality of extractive resource development.

**Keywords:** Human Rights; Terrorism; Indigenous peoples; Subjectivity; Identification; Philippines

In 2017, President Duterte of the Philippines, designated the New People's Army (the NPA), the military arm of the Communist Party of the Philippines (CPP), a terrorist organization.<sup>1</sup> Duterte then identified 600 NPA or CCP individuals as members, funders, or supporters, which included: Indigenous rights advocates, the United Nations (UN) Special Rapporteur for the Rights of Indigenous Peoples, Victoria Tauli-Corpuz, and a former member of the UN Permanent Forum on Indigenous Issues.<sup>2</sup> Duterte's terrifying misrecognition of UN actors and others who support Indigenous peoples' rights as terrorists (or supporters of terrorism) demonstrates a clash of two international

<sup>1</sup> President of the Philippines, "Proclamation No. 374" (2016), online: Official Gazette <http://www.officialgazette.gov.ph/downloads/2017/12dec/20171205-PROC-374-RRD.pdf>; Pia RANADA, "Duterte Signs Proclamation Labelling CPP-NPA as Terrorist Group" *Rappler* (5 December 2017), online: Rappler <<https://www.rappler.com/nation/190457-duterte-proclamation-communist-party-philippines-new-peoples-army-terrorist-group>>.

<sup>2</sup> "When you are Labelled a Terrorist Because you Defend your People's Right – Interview with Joan Carling" IWGIA (August 2018), online: IWGIA <<https://www.iwgia.org/en/philippines/3272-terrorist-accusations-against-joan-carling>>; Jhoanna BALLARAN, "Human Rights Group Slams DOA 'Severely Defective' List of 'Terrorists'" *Inquirer* (March 2018), online: Inquirer <<https://newsinfo.inquirer.net/974003/human-rights-group-slams-doj-severely-defective-list-of-terrorists>>.

legal discourses.<sup>3</sup> One international legal discourse is about terrorism while the other is about human rights. When international law clashes within the state, it can (partially) synthesize to support state interests.

This article investigates how international law on counterterrorism clashes with international law on human rights, particularly Indigenous peoples' human rights, as both become enmeshed in "liberal and neoliberal discourses of democracy and security".<sup>4</sup> Examining how international law is enacted within the nation state demonstrates, as Eslava and Pahuja note, that "making and remaking the state is a project of international law".<sup>5</sup> The synthesis of international legal discourses is investigated through a case study on Indigenous resistance to a natural resource development project, the Tampakan Copper-Gold Mine Project (Tampakan mine), as one example of Indigenous resistance leading to Duterte's designation of the CPP-NPA as a terrorist organization. As Indigenous resistance did not comply with state-approved processes of dispute resolution, that resistance could be identified as a threat to national peace and security, or as terrorism. On the other hand, human rights advocates attempt to identify this resistance according to the international human rights of Indigenous peoples. As both discourses draw on international law to promote a version of national security and democratic state building, both discourses create subjects to advocate for a form of supposedly legitimate state-sanctioned violence.<sup>6</sup> Both discourses uphold their vision of a peaceful and secure state, externalize violence elsewhere, and inhibit recognition that they are involved in reconstructing violent institutions. One way of making visible the inhibiting effects of discourse is to excavate how they selectively emphasize characteristics of individuals to construct them as legally identifiable subjects. In constructing these subjects as objects of state concern, it reproduces the conditions of exclusion. These discourses partially synthesize within state discourse to legitimate the (re)creation of the non-state, illegitimately violent Other.<sup>7</sup>

I am not claiming that human rights, Indigenous rights, or Indigenous peoples' advocates are wrong or misguided. The argument presented here builds on the notion that international human rights law is powerful because it is driven by its excess, or by the inability to be completely or fully defined.<sup>8</sup> When Indigenous peoples' human rights become discourse within neoliberal state legal systems that are heavily invested in counterterrorism measures and extractive natural resources projects, a type of "slow violence",<sup>9</sup> state actors can adopt and invest in it. Even if advocates intend to use international human rights to draw attention to state violence, injustice, exclusions, and hierarchical formations, when international human rights becomes discourse it "accepts the state as the necessary venue for democratization" and "augments state power".<sup>10</sup> That discourse helps the state uphold, regulate, and define legitimate

<sup>3</sup> For "complementary logic", see Pauline WAKEHAM, "Reconciling 'Terror': Managing Indigenous Resistance in the Age of Apology" (2012) 36(1) *American Indian Quarterly* 1 at 2.

<sup>4</sup> *Ibid.*, at 9 (discussing the discourses of reconciliation and terror in Canada).

<sup>5</sup> See Luis ESLAVA and Sundhya PAHUJA, "The State and International Law: A Reading from the Global South" (2020) 11(1) *Humanity* 118, at 118.

<sup>6</sup> Robert M. COVER, "Violence and the Word" (1986) 95 *Yale Law Journal* 1601.

<sup>7</sup> See generally Edward SAID, *Orientalism* (London: Penguin, 2003).

<sup>8</sup> Kathryn MCNEILLY, *Human Rights and Radical Social Transformation: Futurity, Alterity, Power* (London: Routledge, 2019) at 15–34.

<sup>9</sup> See Rob NIXON, *Slow Violence and the Environmentalism of the Poor* (Cambridge, Massachusetts: Harvard University Press, 2011); Nick ESTES, *Our History is the Future* (London: Verso, 2019) at 167; Pauline WAKEHAM, "The Slow Violence of Settler Colonialism: Genocide, Attrition, and the Long Emergency of Invasion" (2021) *Journal of Genocide Research*, DOI: 10.1080/14623528.2021.1885571.

<sup>10</sup> Judith BUTLER, "Competing Universalities" in Judith BUTLER, Ernesto LACLAU, and Slavoj ZIZEK, eds., *Contingency, Hegemony, Universality: Contemporary Dialogues on the Left* (London and New York: Verso, 2000), 176.

“Indigenous peoples” actions as it further erases sub-state tribal and native self-identities.<sup>11</sup> State investment in these discourses is never totally captured, and neither is the erasure discussed here. It indicates that some powerful institutions will be able to successfully (if temporarily) capture the excess or surplus values in violent ways that help remake the state.

The next section, Part I, provides some background on how international law was involved in the creation of the Philippines. It introduces and analyses the controversies and violence surrounding the Tampakan mine. Part II then considers how international laws clash within state discourse. Part III evaluates how some B’laan individuals and communities, those who can be identified as “Lumads”, became identified as “Indigenous peoples” or “terrorists” when they opposed the development of the Tampakan mine.<sup>12</sup> Part IV then analyses how these clashing international laws have been synthesized within state discourse. This article ends with final remarks suggesting that there is no clear legal solution, but paying attention to the violence in the system and the plasticity of identity suggests that alternative forms of alliance may be strengthened.

## I. The International Legal Construction of the Philippines

The creation of the Philippines as a state involved an international treaty.<sup>13</sup> Following the Spanish-American War, the Spanish empire entered into the *Treaty of Paris* with the United States. In that instrument, the Spanish ceded and sold the colony of the Philippines to the United States.<sup>14</sup> The Americans then suppressed the Filipino independence movement, quelled the anti-imperialist insurgency, and established the Insular Government of the Philippines.<sup>15</sup> Following the Second World War, the Philippines gained independence.<sup>16</sup> Despite the Philippines’ political independence, American citizens retained parity rights equivalent to the rights of Filipino citizens. This enabled capitalized and industrialized American mining firms to dominate the Philippines’ mining sector.<sup>17</sup> In 1966, Ferdinand Marcos became president. He initiated the “Filipinization” of the mining industry, which furthered the capitalization of natural resources (primarily for Marcos’s benefit).<sup>18</sup> At this time the CPP was formed, along with its military branch, the NPA.<sup>19</sup>

<sup>11</sup> Patrick WOLF, “Settler Colonialism and the Elimination of the Native” (2006) 8(4) *Journal of Genocide Research* 387.

<sup>12</sup> International Council on Metals and the Environment, *Mining and Indigenous Peoples: Case Studies* (Ottawa: The International Council on Metals and the Environment, 1999) at v.

<sup>13</sup> Alvin A. CAMBA, “Philippine Mining Capitalism: The Changing Terrains of Struggle in the Neoliberal Mining Regime” (2016) 9(1) *Austrian Journal of South-East Asian Studies* 69; Paul A. KRAMER, *The Blood of Government: Race, Empire, the United States, & the Philippines* (Chapel Hill: University of North Carolina Press, 2006); David BRODY, *Visualizing American Empire: Orientalism and Imperialism in the Philippines* (Chicago: University of Chicago Press, 2010).

<sup>14</sup> *Treaty of Peace (Treaty of Paris)*, 10 December 1898, 30 Stat 1754, Treaty Series 343 (Spain-United States of America), art. III.

<sup>15</sup> See Rebecca TINIO MCKENNA, “Igorot Squatters and Indian Wards: Toward an Intra-imperial History of Land Dispossession” (2019) 18(2) *Journal of the Gilded Age and Progressive Era* 221 at 223–4.

<sup>16</sup> *Treaty of General Relations between the United States of America and the Republic of the Philippines*, 4 July 1946, 61 Stat 1174 (entered into force 22 October 1946).

<sup>17</sup> Salvador P. LOPEZ, *Isles of Gold: A History of Mining in the Philippines* (Singapore, New York: Oxford University Press, 1992) at 236.

<sup>18</sup> *Ibid.*, at 278; Rene E. OFRENEO, “Failure to Launch: Industrialisation in Metal-Rich Philippines” (2009) 14(2) *Journal of the Asia Pacific Economy* 194 at 199.

<sup>19</sup> Mapping Militants Project, “Communist Party of the Philippines-New People’s Army” *Stanford University* (24 August 2015), online: Stanford University <<http://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/149>>; US Department of State, “Foreign Terrorist Organisation: Redesignation of Communist

According to the United States Department of State, the CPP-NPA “seeks to overthrow the Philippine government in favor of a new state led by the working class and to expel US influence from the Philippines”.<sup>20</sup> It has been active since the 1960s. However, as a result of the CPP-NPA’s recent actions, the Philippines has recently adopted counterterrorism laws that are consistent with international anti-terrorism laws that conflict with human rights, especially Indigenous peoples’ rights. The creation and recreation of the state enabled that.

In 1986, the People Power Revolution overthrew the Marcos regime and instituted democratic practice through the passage of the 1987 Constitution.<sup>21</sup> While it is claimed that “Lumad” and other Indigenous populations “were not colonized”,<sup>22</sup> the 1987 Constitution made them subjects of the state and explicitly “recognizes and promotes the rights of indigenous cultural communities *within the framework of national unity and development*” (emphasis added).<sup>23</sup> It recognizes their rights within the state framework to legitimate the state and its legal institutions. The state system also embraced the Regalian doctrine, which is the domestic analogue of permanent sovereignty over natural resources.<sup>24</sup> The Constitution mentions “indigenous cultural communities”, but not “Indigenous peoples” or “Lumads”. As subjects of the state, they can claim rights through state-based processes. Commentators have criticized laws for centralizing state power. Part of the problem is that when states recognize Indigenous rights, or grant rights to indigenous cultural communities, the state and its legal disciplinary system are legitimized.<sup>25</sup> Legal systems are violent hierarchies that rely on institutions that inhibit the appreciation of violence.<sup>26</sup> They are also exclusionary. Those who cannot self-identify as “indigenous cultural communities”, or refuse to use the state-sanctioned legal processes, risk becoming viewed as the non-state, illegitimate, and violent Other.

Following the 1987 Constitution, the government “embraced sweeping liberal economic reforms as a way of catching up with the country’s neighboring Asian tigers”.<sup>27</sup> It embraced neoliberal governance to make the Philippines an “attractive investment destination [] and [a] legitimate player [] in the global economy”.<sup>28</sup> Subsequent governments passed the 1995 Mining Act<sup>29</sup> and the Indigenous Peoples Rights Act of 1997 (IPRA)<sup>30</sup> to shape and legitimate state-sanctioned processes of subjection, coercion, and restraint.

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Party of the Philippines/New People’s Army (9 August 2004), online: US Department of State <<https://2001-2009.state.gov/r/pa/prs/ps/2004/35046.htm>>.

<sup>20</sup> Mapping Militants Project, *supra* note 19 at “Organizational Overview”.

<sup>21</sup> “The Constitution of the Republic of the Philippines” *Official Gazette* (1987), online: Official Gazette <<https://www.officialgazette.gov.ph/constitutions/1987-constitution/>>

<sup>22</sup> John Willem SMITH, *The Challenge of sustainable local development at the site of the Tampakan Copper Project in the Philippines* (PhD Thesis, London School of Economics and Political Science, 2006) at 73.

<sup>23</sup> Official Gazette, *supra* note 21 at art. II, s. 22. See Reynato S. PUNO, *The IPRA: Indigenous Peoples and their Rights* (2008) cited in OXFAM, “Free Prior and Informed Consent in the Philippines: Regulations and Realities” *Oxfam* (September 2013) at 4, online: Oxfam <<https://www.oxfamamerica.org/static/media/files/fpic-in-the-philippines-september-2013.pdf>>.

<sup>24</sup> *Ibid.*, Official Gazette, at art. XII, ss. 1, 2.

<sup>25</sup> Cover, *supra* note 6; Stephen YOUNG, *Indigenous Peoples, Consent and Rights: Troubling Subjects* (London: Routledge, 2020).

<sup>26</sup> Cover, *supra* note 6 at 1609, fn. 20.

<sup>27</sup> Camba, *supra* note 13 at 70, 76.

<sup>28</sup> *Ibid.*, at 70.

<sup>29</sup> An Act Instituting a New System of Mineral Resources Exploration, Development, Utilization, and Conservation, Republic Act No. 7942, Philippine Mining Act, 3 March 1995 (*Mining Act*).

<sup>30</sup> Republic Act No. 8371 and the Indigenous Peoples Rights Act, 1997 (*IPRA*). The Long Title states “An Act to Recognize, Protect and Promote the Rights of Indigenous Cultural Communities/Indigenous People, Creating a National Commission of Indigenous People, Establishing Implementing Mechanisms, Appropriating Funds Therefore, and for Other Purposes”; Camba, *supra* note 13 at 76.

The Mining Act makes it the state's "responsibility" to "promote" the "rational exploration, development, utilization and conservation" of mineral resources with support from "the private sector" to "enhance national growth" while safeguarding "the environment" and "rights of affected communities".<sup>31</sup> It also guarantees that indigenous cultural communities must consent to mining activities.<sup>32</sup> The IPRA and its regulations bolster the consent requirements.<sup>33</sup> Its drafters drew inspiration from the 1993 United Nations Draft Declaration on the Rights of Indigenous Peoples and the International Labour Organization's Convention No. 169.<sup>34</sup> As Justice Cuno notes, the "IPRA amalgamates the Philippine category of ICCs [indigenous cultural communities] with the international category of IPs [Indigenous peoples]".<sup>35</sup> It regulates those individuals and communities as "indigenous cultural communities/Indigenous peoples (ICCs/IPs)".<sup>36</sup> It provides ICCs/IPs with property rights and procedural safeguards, such as the right to free, prior, and informed consent.<sup>37</sup>

Because the state was influenced by international law on Indigenous peoples, commentators writing from an international legal perspective uphold the IPRA as significant for Indigenous peoples internationally.<sup>38</sup> However, some domestic commentators are more sceptical about the state-based processes. Camba argues that when the IPRA created the National Commission on Indigenous Peoples (NCIP), it provided experts with decision-making powers that favoured extractive development in ways that bypassed democratic processes.<sup>39</sup> Others claim that the NCIP reserves to the state: powers to title; to identify

<sup>31</sup> *Mining Act*, *supra* note 29 at s. 2.

<sup>32</sup> *Ibid.*, at s. 16.

<sup>33</sup> IPRA, *supra* note 30 at s. 15; Brigitte HAMM, Anne SCHAX, and Christian SCHEPER, "Human Rights Impact Assessment of the Tampakan Copper-Gold Project, Mindanao, Philippines" *Misereor* (2013) at 18, online: [https://www.misereor.org/fileadmin/user\\_upload\\_misereororg/publication/en/extractive\\_industries/study-human-rights-impact-assessment-tampakan-copper-gold-project-2013.pdf](https://www.misereor.org/fileadmin/user_upload_misereororg/publication/en/extractive_industries/study-human-rights-impact-assessment-tampakan-copper-gold-project-2013.pdf) [Human Rights Impact Assessment]; *Report of the Special Rapporteur, Rodolfo Stavenhagen, on the situation of human rights and fundamental freedoms of indigenous people*, Commission on Human Rights, UN Doc. E/CN.4/2003/90/Add.3/ (2003), paras. 30-8 [Stavenhagen Report]; Camba, *supra* note 13 at 76-8 (notes that both the IPRA and Mining Act were, until 2011, under the Department of Energy and Natural Resources, which was charged with environmental protection as well as resource exploitation permitting).

<sup>34</sup> *Cruz v. Secretary of Environment and Natural Resources* GR No 135385, 6 December 2000, Separate Opinion of Puno J., at s. V, online: [http://www.lawphil.net/judjuris/juri2000/dec2000/gr\\_135385\\_2000.html](http://www.lawphil.net/judjuris/juri2000/dec2000/gr_135385_2000.html). The Philippines has not ratified ILO Convention No. 169.

<sup>35</sup> *Ibid.*

<sup>36</sup> IPRA, *supra* note 30; see Nestor T. CASTRO, "Three Years of the Indigenous Peoples Rights Act: Its Impact on Indigenous Communities" (2000) 15(2) *Kasarinlaw* 35 at 37. In the Filipino literature on "indigenous cultural communities/indigenous peoples", the abbreviation "ICCs/IPs" is common, as demonstrated in the following quote. I employ the same abbreviation in this chapter to refer to those regulated under the IPRA.

<sup>37</sup> National Commission on Indigenous Peoples Administrative Order No. 1 Series of 1998, Rules and Regulations Implementing Republic Act No. 8371. Otherwise known as the "Indigenous Peoples' Rights Act of 1997", rule III, pt. II, s. 8 (Right to Resolve Conflicts According to Customary Laws).

<sup>38</sup> See, for example, Marcus COLCHESTER and Maurizio FARHAN FERRARI, "Making FPIC Work: Challenges and Prospects for Indigenous Peoples" *Forest Peoples Programme* (June 2007) at 11-12, online: <https://www.forestpeoples.org/sites/default/files/publication/2010/08/fpicsynthesisjun07eng.pdf> (also acknowledging its pitfalls and criticisms); Cathal DOYLE and Jill CARINO, "Making Free Prior & Informed Consent a Reality: Indigenous Peoples and the Extractive Sector" *Indigenous Peoples Links* (2013) at 58, online: <https://www.ecoesuit.com/wp-content/uploads/2014/09/Making-FPIC-a-Reality-Report.pdf> (also acknowledging its pitfalls and criticism); Cathal DOYLE, *Indigenous Peoples, Title to Territory, Rights and Resources: The Transformative Role of Free Prior and Informed Consent* (New York: Routledge, 2015) at 195, 248; Daniel BARSTOW MAGRAW and Lauren BAKER, "Globalization, Communities and Human Rights: Community-Based Property Rights and Prior Informed Consent" (2007) 35 *Denver Journal of International Law and Policy* 413 at 425-7.

<sup>39</sup> Camba, *supra* note 13.

and demarcate lands; to approve mining grants;<sup>40</sup> to manipulate processes in favour companies and the government,<sup>41</sup> and operates primarily to legitimate the IPRA to ICCs/IPs.<sup>42</sup> The IPRA grants rights as it facilitates natural resource exploitation, which is consistent with neoliberalism.<sup>43</sup> Additionally, the ability to claim these rights requires compliance with state-sanctioned processes.

These laws require discipline and the processes are violent, but when implemented through institutions, recognition of that violence is “inhibited”, or only partially recognized by those who enact it.<sup>44</sup> This is not necessarily, or always, “bad”: those who comply with the law may legitimate their interest alongside the neoliberal state. Because the IPRA and state law facilitate natural resource exploitation, those who challenge the law or refuse to submit to forms of state-sanctioned violence have various options. They can return to international law; specifically, they can rely on international human rights law. If they refuse to use that discourse, they can be identified as threats to state legitimacy. They may, in fact, be identified as terrorists. Although there are many examples of this from within the Philippines, Indigenous resistance to the Tampakan mine exemplifies how international law on terrorism and Indigenous peoples’ rights has been deployed to identify those who oppose its development. If ever developed, the Tampakan mine will be in Mindanao, the southernmost Philippine Island. It was first proposed in the mid-1990s, and at that time some touted it as the future of mining consultation of Indigenous communities.<sup>45</sup> Today, it is the epicentre for allegations that the state and developers are involved in extra-judicial killings, funding paramilitary activities, and other human rights abuses.<sup>46</sup>

In the 1990s, the Western Mining Corporation (Western) began exploring the Tampakan region and in 1993, confirmed that a mine could be viable.<sup>47</sup> Western engaged in agreement making with provinces, municipalities, councils, and leaders of the B’laan communities. In 1998, a geographer for Western, Stephen Davis, published an article on agreements among Western and B’laan communities.<sup>48</sup> He claimed that Western entered into multiple agreements with traditional B’laan leaders in ways that mirrored traditional B’laan agreement making.<sup>49</sup> Davis also asserted that if the development proceeded a

<sup>40</sup> Jose Mencio MOLINTAS, “The Philippine Indigenous Peoples’ Struggle for Land and Life: Challenging Legal Texts” (2004) 21 *Arizona Journal of International and Comparative Law* 269 at 288.

<sup>41</sup> International Working Group for Indigenous Affairs, *The Indigenous World 2015* (Copenhagen, 2015) at 258; Marya SALAMAT, “Indigenous Peoples’ Groups Decry Use of IPRA and NCIP for Development Aggression” *Bulatlat* (12 August 2011), online: <http://bulatlat.com/main/2011/08/12/indigenous-peoples%E2%80%99-groups-decry-use-of-ipra-and-ncip-for-development-aggression/>.

<sup>42</sup> Augusto B. GATMAYTAN, “Philippine Indigenous Peoples and the Question for Autonomy: Negotiated or Compromised?” in Augusto B. GATMAYTAN, ed., *Negotiating Autonomy: Case Studies on Philippine Indigenous Peoples’ Land Rights* (Legal Rights and Natural Resources Center – Kasama as Kalikaan, 2007) 1 at 19–25.

<sup>43</sup> See Riza OLCHONDRÁ, “Chamber of Mines Applaud Aquino Policy: Signal to all Investors” *Inquirer* (10 July 2012), online: <http://business.inquirer.net/70132/chamber-of-mines-applauds-aquino-policy-signal-to-all-investors>. This is consistent with neoliberalism, see Marjo LINDROTH and Heidi SINEVAARA-NISKANEN, *Global Politics and Its Violent Care for Indigeneity: Sequels to Colonialism* (Cham, Switzerland: Palgrave Macmillan, 2018); Marjo LINDROTH, “Indigenous Rights as Tactics of Neoliberal Governance: Practices of Expertise in the United Nations” (2014) 23(3) *Social and Legal Studies* 341.

<sup>44</sup> Cover, *supra* note 6 at 1615.

<sup>45</sup> International Council on Metals and the Environment, *supra* note 12 at v.

<sup>46</sup> *Preliminary note on the visit of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, Human Rights Council, Philip ALSTON, UN Doc. A/HRC/4/20/Add.3 (2007), para. 8.

<sup>47</sup> Smith, *supra* note 22 at 82.

<sup>48</sup> Stephen L. DAVIS, “Engaging the Community at the Tampakan Copper Project: A Community Case Study in Resource Development with Indigenous People” (1998) 22(4) *Natural Resources Forum* 233.

<sup>49</sup> *Ibid.*, at 239; Smith, *supra* note 22 at 15.

“small number of people [would be] potentially affected” and Western would obtain their “informed consent” and provide “fair compensation”.<sup>50</sup> It was promising.

John Smith’s fieldwork from the early 2000s questioned Davis’s account. According to Smith, there was increasing dissatisfaction with the proposed development and the agreements. Smith surmised that “the company might be seeking B’laan customs to fit with mining practices rather than the other way around”.<sup>51</sup> He explained that increasing dissatisfaction with the development was a “smokescreen for deeper political machinations” and, perhaps, it was a “tacit reflection of left-wing opposition to the state strategy of top-down development by means of multi-national corporate investment in exchange for rights to land, minerals, etc.”<sup>52</sup> A major difference between Smith’s and Davis’s accounts (aside from Davis’s employment) is that Smith’s fieldwork occurred after some B’laan communities had become the named plaintiffs in a class action lawsuit against Western.

*La Bugal-B’Laan Tribal Association v. Ramos* (*Ramos*) started in 1997, and lasted until 2004.<sup>53</sup> The plaintiffs argued that Western’s agreement with the state gave a foreign company control of natural resources in contravention of the Regalian doctrine and the 1987 Constitution.<sup>54</sup> The Supreme Court initially sided with the plaintiffs.<sup>55</sup> As proceedings were underway, however, Western sold its interests to a corporation organized under Filipino law, Sagittarius Mines Incorporated (SMI).<sup>56</sup> Because a Filipino company extracting Filipino natural resources would be consistent with Filipino sovereignty, the Court reversed its decision.<sup>57</sup> Even though *Ramos* turned on a narrow constitutional issue about foreign ownership of state resources,<sup>58</sup> it did not necessarily protect local communities or prevent international interests from benefitting at their expense.

The failure of state-sanctioned legal processes to stop the development inspired a range of anti-mining actions,<sup>59</sup> including state-sanctioned legal discourse, international human rights law, and Indigenous resistance. Even if imperialism, colonialism, and international law had been formative for the Philippines, as *Ramos* was being decided, international law and terrorist activities were influencing the state in new ways.

## II. International law in state discourse

Before *Ramos* was decided in 2004, the Philippines was caught in a wave of terrorist activity. It involved international law on terrorism. Following 9/11, President Bush of the

<sup>50</sup> Davis, *supra* note 48 at 240.

<sup>51</sup> Smith, *supra* note 22 at 86, 88.

<sup>52</sup> *Ibid.*

<sup>53</sup> *La Bugal-B’Laan Tribal Association v Ramos*, 1 December 2004, GR No 127882 (SC) [*Ramos*].

<sup>54</sup> Robert GOODLAND and Clive WICKS, *Philippines: Mining or Food?* (The Working Group on Mining in the Philippines, 2009) at 110–12.

<sup>55</sup> *La Bugal-B’Laan Tribal Association v Ramos*, 27 January 2004, GR No 127882. The first opinion was issued in January and the second, cited *Ramos*, *supra* note 53, in December 2004.

<sup>56</sup> *Ramos*, *supra* note 53. The holders of the original agreements were Filipino companies, Sagittarius, Tampakan Mining Corp, and Southcot Mining Corp, as pointed out in the earlier trial.

<sup>57</sup> *Ibid.*

<sup>58</sup> Alan Kee-Jin TAN, “All that Glitters: Foreign Investment in Mining Trumps the Environment in the Philippines” (2005) 23(1) *Pace Environmental Law review* 183.

<sup>59</sup> Shay CULLEN, “The Rights of the Indigenous Peoples to their Ancestral Lands is Sacred” *MAC /20: Mines and Communities* (18 October 2006), online: *MAC/20: Mines and Communities* <http://www.minesandcommunities.org/article.php?a=3603>, citing [www.preda.org](http://www.preda.org), Father Shay Cullen’s mission website; Goodland and Wicks, *supra* 54 at 112, fn. 12; *Human Rights Impact Assessment*, *supra* note 33 at 8; Committee on the Elimination of All Forms of Racial Discrimination, “Philippines Indigenous Peoples ICERD Shadow Report for the consolidated fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, and twentieth Philippine ICERD periodic reports” (August 2009) at 71, online: CEFRD <[https://www.ecoi.net/en/file/local/1004453/470\\_1263142270\\_pip-philippines75.pdf](https://www.ecoi.net/en/file/local/1004453/470_1263142270_pip-philippines75.pdf)> [*Shadow Report*].

United States declared a “War on Terror, leading the US Federal Government to designate the NPA as a terrorist organization”.<sup>60</sup> While terrorism had been discussed but never universally defined in international law,<sup>61</sup> the UN Security Council began passing resolutions to set standards for state-based counterterrorism measures.<sup>62</sup> In 2004, the UN Security Council adopted a resolution on Iraq, enabling a “multinational force” to “take all necessary measures to contribute to the maintenance of security and stability in Iraq”, including “preventing and deterring terrorism”.<sup>63</sup> The US spearheaded that multinational force with a “coalition of the willing”. The Philippines was a member of the coalition. It remains an ally of the US even though the US had colonized the Philippines and, in 2002, President Macapagal-Arroyo of the Philippines allowed US troops to “conduct joint training exercises” with their armed forces on Filipino soil.<sup>64</sup> However, the Philippines’ willingness changed when the Islamic Army of Iraq kidnapped an overseas Filipino worker in 2004. Despite US objections, President Macapagal-Arroyo accepted their demands and withdrew from the coalition of the willing.<sup>65</sup>

After changing its approach to international counterterrorism, an anti-terror bill was introduced in the Philippines’ House of Representatives, which became the 2007 Human Security Act (HSA).<sup>66</sup> Critics of the HSA claimed that President Macapagal-Arroyo used it to appease the US “as her alliance with the Americans was key to keeping herself in power”.<sup>67</sup> The UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms, Martin Scheinin, and Human Rights Watch both questioned whether the HSA’s overly broad definition of “terrorism” threatened human rights.<sup>68</sup> Despite concerns, in another report, Human Rights Watch claimed that violent Islamist groups had caused over 1,700 casualties in the Philippines since 2000.<sup>69</sup> It asserted that the Philippines must bring the perpetrators to justice. The HSA provided a basis for doing so. Notwithstanding the many criticisms of that legislation, “the police and military have never attempted to use” it because its

<sup>60</sup> US Department of State, “Foreign Terrorist Organization: Redesignation of Communist Party of the Philippines/New People’s Army” (9 August 2004).

<sup>61</sup> United Nations Office on Drugs and Crime, “E4J University Module Series: Counter-Terrorism” (July 2018), online: UNODC <<https://www.unodc.org/e4j/en/terrorism/module-4/key-issues/defining-terrorism.html>>.

<sup>62</sup> See *UN Security Council Resolution 1368*, 4370th meeting, UN Doc. S/RES/1368 (12 September 2001); *UN Security Council Resolution 1373*, 4385th meeting, UN Doc. S/Res/1373 (28 September 2001); *UN Security Council Resolution 1566*, 5053rd meeting, UN Doc. S/RES/1566 (8 October 2004); “CTC 20th Anniversary” UNSC (2021), online: UNSC <<https://www.un.org/securitycouncil/ctc/>>; “About us” *UN Security Council* (2021), online: UN Security Council <<https://www.un.org/securitycouncil/ctc/content/about-us-0>>.

<sup>63</sup> *UN Security Council Resolution 1546*, 4987th meeting, UN Doc. S/RES/1546 (8 June 2004), at para. 10.

<sup>64</sup> Pauline EADIE, “Philippines Overseas Foreign Workers (OFWs), Presidential Trickery and the War on Terror” (2011) 25(1) *Global Society* 29 at 29.

<sup>65</sup> *Ibid.*

<sup>66</sup> H. HARRY and L. ROQUE Jr., “The Human Security Act and the IHL Law of the Philippines: of Security and Insecurity” in Victor V. RAMRAJ, Michael HOR, Kent ROACH, and George WILLIAMS, eds., *Global Anti-Terrorism Law and Policy*, 2nd ed. (Cambridge: Cambridge University Press, 2012), 310 at 310, fn. 2.

<sup>67</sup> Pauline E. EADIE, “Legislation for Terrorism: The Philippines’ Human Security Act 2007” (2011) 2(3) *Journal of Terrorism Research* 24 at 28, 30.

<sup>68</sup> “UN Special Rapporteur Calls for Changes to the Philippines’ Human Security Act” *United Nations Human Rights Office of the High Commissioner* (12 March 2007), online: Office of the High Commissioner <<https://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=1844>>; “Philippines: New Terrorism Law Puts Rights at Risk” *HRW* (17 July 2007), online: HRW <<https://www.hrw.org/news/2007/07/17/philippines-new-terrorism-law-puts-rights-risk>>. See also Harry and Roque, *supra* note 66.

<sup>69</sup> Human Rights Watch, “Lives Destroyed: Attacks Against Civilians in the Philippines” (July 2007) at 3, online: HRW <[https://www.hrw.org/reports/2007/philippines0707/philippines\\_lives\\_destroyed.pdf](https://www.hrw.org/reports/2007/philippines0707/philippines_lives_destroyed.pdf)>.

safeguard provisions stringently penalized wrongful accusations or detention.<sup>70</sup> That safeguard would later be removed in 2020.

As the Philippines addressed the War on Terror, UN actors became more directly involved in advocating for Indigenous peoples' rights in the Philippines. Many treated ICCs/IPs as if they were already subjects of international legal discourse called "Indigenous peoples". International legal discourse on Indigenous people's rights had influenced the IPRA, but the failure of state law to prevent the development of the Tampakan mine was seen as undermining Indigenous peoples' rights. Accordingly, the first UN Special Rapporteur on the Rights of Indigenous Peoples, Rodolfo Stavenhagen, addressed the mine development. He identified and legitimated the B'laan as Indigenous peoples, asserted that Western infringed their rights, and said they had not consented because "their leaders were tricked by the authorities into signing agreements which they could not fully understand and which would have not benefitted them".<sup>71</sup> As the IPRA was inspired by international law, the B'laan appear like Indigenous peoples for purposes of the international legal discourse. While trickery and deceit in obtaining B'laan consent may have been involved, the form of Stavenhagen's narrative is problematic. According to Makau Mutua, human rights advocacy depends on this savages-victims-saviours metaphor, which reproduces a colonial pattern that justifies intervention.<sup>72</sup> Even without Stavenhagen intending it, his discourse constructs the "leaders" as victims and dupes for international human rights law purposes. Human rights advocates then positioned themselves as saviours by reconstructing state legality in accordance with human rights, even though the Philippines's IPRA had adopted some of the most protective rights for ICCs/IPs, and legal processes had authorized the Tampakan mine as protecting national interests as it derogated from ICC/IP rights. The problem that Mutua pointed out is that, even if this appears to be helpful advocacy, it reproduces a "damning metaphor".<sup>73</sup> Doing so upholds the state as a neutral, passive, or empty vessel, and seeks to reconstruct the state in accordance with Western liberal values that undercuts different forms of agency, planning, and organization.

In 2007, the UN General Assembly endorsed the *UN Declaration on the Rights of Indigenous Peoples* (UNDRIP). The following year, Robert Goodland and Clive Wicks used the B'laan's resistance to the Tampakan mine as a case study in their report titled *Philippines: Mining or Food?*<sup>74</sup> For them, the B'laan are simply Indigenous peoples. They write, "[t]here are 33,000 people in the municipality of Tampakan, including the La Bugal B'laan Indigenous Peoples who used to be hunter-gatherers and fishers".<sup>75</sup> They argue that if Indigenous peoples' rights had been respected, a sustainable approach to food security would have been followed. To support their argument, they cite Stavenhagen's reports, the IPRA and UNDRIP.<sup>76</sup> It was an example of how human rights advocates use international legal discourse to promote national security and development.

A sustainable development approach is, in my view, far preferable to capitalist resource extraction. But it is a normative claim about the way law, institutions, or human rights should work. It invests in the excess of human rights to reinvest in the state system as though the state is a neutral, passive, and empty vessel to reconstruct for promoting

<sup>70</sup> Ronald U. MENDOZA, Rommel G. ONG, Dion L. ROMANO, and Bernadette P. TORNO, "Counterterrorism in the Philippines: Review of Key Issues" (2021) 15(1) *Perspectives on Terrorism* 49 at 55.

<sup>71</sup> *Stavenhagen Report*, *supra* note 33 at para. 34.

<sup>72</sup> Makau MUTUA, "Savages, Victims, and Saviors: The Metaphor of Human Rights" (2001) 42(1) *Harvard International Law Journal* 201.

<sup>73</sup> *Ibid.*

<sup>74</sup> Goodland and Wicks, *supra* note 54.

<sup>75</sup> *Ibid.*, at 107.

<sup>76</sup> *Ibid.*, at xviii.

Western liberal democratic values, as well as their violent institutions. That is to say, Goodland and Wicks' suggestion is consistent with Mutua's critique. There are two other issues. International human rights law was not the only form of opposition or resistance to the Tampakan mine, nor was it the other international law that could be invoked. As resistance to the mine continued, those who supported its development could draw on the international law on terrorism and counterterrorism. That is where we begin to see a clash and then a synthesis of international legal discourses.

In 2008, the NPA attacked the Tampakan mine's base camp.<sup>77</sup> In response, SMI hired a private security firm and partnered with local governments and police to create a task force.<sup>78</sup> The Philippine Department of National Defense considered deploying soldiers to "foreign-backed mining projects for protection from communist attacks".<sup>79</sup> Investors and rights advocates both warned against increasing militarization. The investors urged the government to maintain "peace and order".<sup>80</sup> Eliezer Billanes, a human rights and anti-mining advocate, warned that militarization would increase the "displacement of indigenous peoples and more human rights violations".<sup>81</sup> Unfortunately, Billanes was murdered. As a "man of unity" and a "vocal critic of the multinational mining company"<sup>82</sup> who opposed "development aggression",<sup>83</sup> the Alliance for Genuine Development explained that the National Security Council and military forces "tried to harass" him, bribe him, and eventually killed him to "'finish off' the insurgency in [this] area".<sup>84</sup> They called it a "chilling warning to all those who are involved in the opposition to mining" because it was an "extra-judicial killing promoted by high-ranking agents of the government" to "horrify the mass activists and environmentalists".<sup>85</sup> Those are accusations that government agents had failed to employ legitimate state-sanctioned means of national security. Today, we might retrospectively construe those claims as allegations as a type of "state terrorism".<sup>86</sup>

Resistance to the mine could be viewed as a contest over who had the authority to control that territory. Those who use international legal discourse on human rights assert that Indigenous peoples have that legitimate authority. As a discourse involving international law, it reinvests in the legitimacy of the state as the authority and guarantor of rights. When states have already delineated and upheld their processes of contestation

<sup>77</sup> Bong S. SARMIENTO, "Critics Nix Deployment of Soldiers in Mining Site", *Inside Mindanao* (19 October 2008) (on file with author).

<sup>78</sup> KITACO was named for the local government units of Kiblawan, Tampakan, and Columbio.

<sup>79</sup> Sarmiento, *supra* note 77.

<sup>80</sup> Goodland and Wicks, *supra* note 54 at 120; Sarmiento, *supra* note 77.

<sup>81</sup> Sarmiento, *supra* note 77.

<sup>82</sup> Soccsksargends – Alliance for Genuine Development, "Agenda on the Facts and Story Behind the Death of Eliezer 'Boy' Billanes" *Mindaneos* (27 March 2009), online: <http://www.mindaneos.com/state-ments/2009/03/27/soccsksargends-agenda-on-the-facts-and-story-behind-the-death-of-eliezer-qboyq-billanes;/MAC/20>; Mines and Communities, "Another Mining Advocate Assassinated in Mindanao, Philippines" *Kalikasan PNE* (10 March 2009), online: <http://www.minesandcommunities.org/article.php?a=9106>. Also see "The Facts and Story Behind the Death of Eliezer 'Boy' Billanes" *Piplinks* (5 April 2009), online: <http://www.piplinks.org/extra-judicial+killings+.html>.

<sup>83</sup> "Philippines Church Condemns Anti-Mining Activist Murder" *CathNews* (9 March 2009), online: <https://cathnews.com/cathnews/9271-philippines-church-condemns-anti-mining-activist-murder>.

<sup>84</sup> Soccsksargends – Alliance for Genuine Development, *supra* note 82. Close attention to the discourse will show that those in support of Indigenous resistance refer to this violence as an "insurgency", while the state refers to it in terms of rebellion or terrorism. See Steven T. ZECH and Michael GABBAY, "Social Network Analysis in the Study of Terrorism and Insurgency: from Organization to Politics" (2016) 18 *International Studies Review* 214.

<sup>85</sup> *Ibid.*

<sup>86</sup> See Asafa JALATA, *Phases of Terrorism in the Age of Globalization: From Christopher Columbus to Osama Bin Laden* (New York: Palgrave Macmillan, 2016) at 30–1, 33–47.

as legitimate, human rights organizations can argue that state agents are acting beyond those boundaries, decry that violence, and advocate for a return to some boundaries. It upholds human rights as non-violent, but preserves legalized forms of institutionalized violence in ways that advocates hope will work better for Indigenous peoples. One non-governmental organization (NGO) submitted a call for evidence of human rights abuses to the United Kingdom's Joint Committee on Human Rights.<sup>87</sup> Another NGO made a shadow submission to the UN Committee on the Elimination of Racial Discrimination (CERD), which described human rights abuses and argued that the law had "evolved into a highly discriminatory set of rules ... which are not in conformity with the customs, laws and traditional practices of indigenous communities".<sup>88</sup> CERD responded by criticizing extrajudicial "executions", "disappearances and detention", and internal displacement due to armed conflict. It noted that the application of the Regalian doctrine and the Mining Act were contrary to the IPRA and other Indigenous human rights.<sup>89</sup>

This shows how human rights are upheld as non-violent correctives to illegitimate uses of violence, which includes previously legitimate uses of state law such as the Mining Act. In identifying the state as acting illegitimately (even if it was acting legally), they argue that the state should implement law consistently with international human rights law, which upholds human rights as something exceeding what liberal-democratic states have already created through law. It retains and reinvests in state-based national security, which is a form of institutionalized violence. It identifies some forms of state-sanctioned actions as violent and decries that violence as illegitimate. Even if it is attempting to change institutional manifestations of violence, it misrecognizes that discourse on human rights will clash and synthesize with pre-existing state interests. If they are successful in persuading state actors to adopt that discourse, powerful state institutions will be able to successfully (but temporarily) capture the excess values of that discourse in violent institutions that remake the state. It will continue to exclude the non-state, illegitimate violent Other. Amidst these discourses, Daguil Capion emerged alongside more violence.

In 2009, local media interviewed B'laan leader, Pilo Capion, who had previously worked for and supported the mine.<sup>90</sup> It also reported that he changed his mind when roads were constructed without "prior consent".<sup>91</sup> Pilo's brother, Daguil,<sup>92</sup> and his grandfather said they consented because they were "promised the heavens ... But ... they were not told about the project's ill effects."<sup>93</sup> In 2011, four SMI employees were murdered,<sup>94</sup> and in 2012, Daguil Capion claimed responsibility for murdering two SMI security guards.<sup>95</sup> Then the Armed Forces of the Philippines Brigade (Brigade) murdered Daguil

<sup>87</sup> Working Group on Mining in the Philippines (WGMP), "The Impact of UK-Based Mining Companies on the Philippines, Particularly Focusing on the Right to Food" (16 December 2009), online: WGMP <<https://publications.parliament.uk/pa/jt200910/jtselect/jtrights/5/5we35.htm>>.

<sup>88</sup> *Shadow Report*, *supra* note 59 at 9.

<sup>89</sup> *Consideration of Reports Submitted by State Parties Under article 9 of the Convention, Concluding Observations of the Committee on the Elimination of Racial Discrimination, Philippines*, Committee on the Elimination of Racial Discrimination, UN Doc. CERD/C/PHL/CO/20 (2009), at paras. 13–35.

<sup>90</sup> Romer S. SARMIENTO, "Discontent in a Mining Wilderness" *Business World* (15 November 2009), online: *Business World* <http://www.piplinks.org/Tampakan+project+of+Sagittarius.html>.

<sup>91</sup> *Ibid.*

<sup>92</sup> The story writes Daguil as "Dagil".

<sup>93</sup> Sarmiento, *supra* note 90.

<sup>94</sup> Edwin ESPEJO, "Tampakan Mine Operator Seeks Tighter Security Due to Attacks" *Rappler* (27 July 2012), online: *Rappler* <<https://www.rappler.com/business/industries/tampakan-mine-operator-seeks-tighter-security-due-to-attacks>>.

<sup>95</sup> *Ibid.*

Capion's wife, Juvy, and their two children.<sup>96</sup> The Brigade claimed it was pursuing Capion.<sup>97</sup> Witnesses claimed that he was not there and that Juvy and her children were unarmed.<sup>98</sup> The violence escalated. In 2013, government forces killed Capion's brother, Kitari, and claimed that Capion's group had fired upon them.<sup>99</sup> Those forces killed two more B'laan members,<sup>100</sup> which they attempted to justify as an act done while in pursuit of Capion.<sup>101</sup> Media outlets reported that Capion had joined the CPP-NPA.<sup>102</sup> When this was reported, various actors could identify him, according to their discourses to support their visions for the state.

### III. Identifying a Subject as an Object for discourse

As Capion was identified through media reports, he was constructed as a subject and object of different international laws. One discourse identifies him as a threat to peace and as a terrorist for aligning with the NPA. The Other identifies him as a defender of Indigenous peoples' rights and struggles to explain his violence or association with the NPA. This section explores how Capion was identified according to these different discourses, which ended up synthesized within state-sanctioned discourse.

One discourse identified him as a violent bandit, which aligns with a discourse on terrorism. Those who disparage Daguil Capion's violence view him as a criminal. This discourse previews how state actors and supporters would later use a discourse on terrorism against Capion, B'laan, or other Indigenous peoples. Local media reported that the Kiblawan Mayor, Marivic Diamante, called Capion a "bandit" and offered a reward for his capture, "which translates into a shoot-to-kill order".<sup>103</sup> It was also reported that the "military... said Capion was a bandit who resorted to armed robbery after he was denied work in the company".<sup>104</sup> Whether the specific allegations are true is less relevant than the attempts to identify him as a "bandit" or a "fugitive".<sup>105</sup> They attempt to identify him as an illegitimate, violent Other, who cannot be tolerated in a secure and peaceful democratic state. Although they advocate for peace and order, they misrecognize that advocacy helps justify the state's violence or terrorism against Indigenous peoples, Lumads, and the B'laan.

The second international legal discourse involves the human rights of Indigenous peoples. Commentators who use this discourse identify Daguil Capion as a traditional B'laan elder and leader. They emphasize his role in the B'laan community or Capion family

<sup>96</sup> *Human Rights Impact Assessment*, *supra* note 33 at 54.

<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid.*

<sup>99</sup> Aquiles Z. ZONIO and Orlando DINOY, "B'laan Leader Capion Confirms Brother Killed in Clash with Soldiers" *Inquirer* (31 January 2013), online: *Inquirer* <<https://newsinfo.inquirer.net/350539/blaan-leader-capion-confirms-brother-killed-in-clash-with-soldiers>>; *Human Rights Impact Assessment*, *supra* note 33 at 54.

<sup>100</sup> Bong S. SARMIENTO, "2 Dead in Fresh Violence at Tampakan Mine Site – Military", *Mindanews* (23 August 2013), online: *Mindanews* <http://www.mindanews.com/top-stories/2013/08/23/2-dead-in-fresh-violence-at-tampakan-mine-site-military/>.

<sup>101</sup> *Ibid.*

<sup>102</sup> Edwin ESPEJO, "NPA's Latest Recruit: Fugitive Tribal Leader", *Rappler* (24 April 2013), online: *Rappler* <<http://www.rappler.com/nation/27334-fugitive-tribal-leader-joins-npa>>; rigmakasar, "Daguil Capeon Interview" *YouTube* (April 2013), online: *YouTube* <<https://www.youtube.com/watch?v=CAclcUCaUEc>>.

<sup>103</sup> Raymund VILLANUEVA, "Probe Reveals Massacre of Blann Family 'Premeditated'", *Bulatlat* (19 November 2012), online: *Bulatlat* <<http://bulatlat.com/main/2012/11/19/probe-reveals-massacre-of-blaan-family-%E2%80%98premeditated%E2%80%99/>>.

<sup>104</sup> Edwin ESPEJO, "Anti-mining Tribe Leader's Wife, 2 Sons Killed in 'Encounter'" *Rappler* (18 October 2012), online: *Rappler* <<https://www.rappler.com/nation/anti-mining-tribe-leaders-wife-2-sons-killed-in-encounter>>.

<sup>105</sup> Espejo, *supra* note 102.

rather than the individual to identify him as a representative of Indigenous peoples. For instance, Raymund Villanueva wrote:

[f]or a *fulong*, a well-respected B'laan clan elder, however, Daguil is not a bandit ... The Capions initially supported SMI-Xstrata, including Daguil, who was employed by the mining company as a community relations staff for three years starting in 2005 ... [but] [t]he clan had a falling-out with the company when it ordered the Capions to leave their land, which SMI-Xstrata wanted to buy ... [T]he Capions said they are just following and enforcing their customary laws against violators of their ancestral domain. 'When it comes to our land, our laws, and not of outsiders, apply,' the *fulong* said.<sup>106</sup>

Villanueva de-emphasizes the individual to emphasize traditional laws and identities. On this account, "Daguil" is replaced with a collective or traditional status of "fulong" so that he is a legitimate defender of his traditional territory, a *pangayo*.<sup>107</sup>

Identifying Capion in this way is not wrong. However, when the international legal discourse on human rights is upheld as non-violent correctives to illegitimate uses of violence, it becomes difficult to explain Capion's violence and association with the NPA. For example, a human rights impact assessment of the Tampakan mine explains that the NPA "capitaliz[ed] on the resentment felt primarily by indigenous community members towards SMI to recruit new members".<sup>108</sup> They expressed concerns that the Philippines' "military has often legitimized its operations by tagging Indigenous communities as supporters of the NPA".<sup>109</sup> They also acknowledged that "the NPA and some indigenous community members are contributing to an increase in violence".<sup>110</sup> They correctly placed the responsibilities and burden on the state, but they treated the NPA as distinct from "indigenous community members". In a footnote they write:

It has to be noted that the indigenous community members on Mindanao who resort to violence are at times members of the NPA. At the same time, they are often labelled as insurgents of the NPA even if they act independently. It is not always possible to clearly establish affiliation from the outside.<sup>111</sup>

This discourse seeks to uphold the NPA as violent "insurgents" instead of as terrorists, and Indigenous peoples as aligned with human rights. It is not clear from the outside (or perhaps from any "inside") who is affiliated with what political movement, or whether labels are correctly applied, because acts of recognition and designation are partial and particular. Individuals and communities can claim identities, but others remain involved in their construction, identification, and contestation through discourse.

One effect of identifying Capion and others as Indigenous peoples for human rights purposes is that subjecting them to discourse also makes them an object. It can undercut their agency, even if the intention is to support their agency. Identifying them as a subject produces them as victims for inclusion within the legitimate authority of state-sanctioned

<sup>106</sup> Villanueva, *supra* note 103.

<sup>107</sup> Sarmiento, *supra* note 100; Edwin ESPEJO, "Survivors of Capion Killings 'Hijacked'" *Rappler* (22 October 2012), online: <http://www.rappler.com/nation/14663-survivors-of-capion-killings-hijacked>.

<sup>108</sup> *Human Rights Impact Assessment*, *supra* note 33 at 29.

<sup>109</sup> *Ibid.*, at 15 (citing *Summary prepared by the Office of the High Commission for Human Rights in accordance with paragraph 5 of the Annex to Human Rights Council resolution 16/21*, Human Rights Council, UN Doc. A/HRC/WG.6/13/PHL/3, (2012) at para. 120.

<sup>110</sup> *Ibid.*, at xvii, 54, 55.

<sup>111</sup> *Ibid.*, at 54, fn. 47.

discourse. This was seen when Stavenhagen noted that Indigenous peoples' "leaders were tricked by the authorities into signing agreements"<sup>112</sup> As mentioned above, the form of this narrative<sup>113</sup> constructs Indigenous peoples as victims who must be protected from the savages, the "bad" state cultures who have illegally and wrongly implemented the law. Then human rights defenders and NGOs help states protect victims through the implementation of the rule of law and democratic institution building, which only occurs through respecting and protecting human rights. Admittedly, Capion and other B'laan might be victims of state violence or terror,<sup>114</sup> but it is not clear that Capion invoked international human rights law or sought assistance from human rights advocates or defenders. Instead, defenders of human rights used international legal discourse to identify him and other B'laan as Indigenous peoples so human rights either should have worked or will work better next time.

As an example, First Peoples Worldwide wrote:

[a]fter learning about potential benefits and downsides to the mine, community members were initially split in their opinions; however, as the violent encounters between community members and the company have continued, more and more B'laan villagers now oppose the mine. Proper consultation and negotiations on the behalf of Glencore-Xstrata could have prevented numerous deaths, injuries, protests, and project delays.<sup>115</sup>

In this discourse, the law's "implementation leaves much to be desired".<sup>116</sup> On this view, "proper" consultation and negotiation would have worked better, and it leaves unaddressed any problems with the construction of ICCs/IPs or Indigenous peoples as state subjects.

While there are significant criticisms of state law and its implementation,<sup>117</sup> the excesses of international human rights can always suggest that the implementation could otherwise have been better.<sup>118</sup> Advocating for a form of state-based national security that arises through sustainable development, or food security, or protecting Indigenous peoples' rights can be presented as a normatively preferable course of action. It probably is when the only other option is extractive capitalism. However, the discourse does not question or confront whether constructing individuals and communities as ICCs/IPs or as Indigenous peoples and subjecting them to legal regimes they do not control (re) constitutes the problem that human rights advocates argue against. Human rights advocates recognize that implementing the law is problematic, but misrecognize that they are

<sup>112</sup> Stavenhagen, *supra* note 33 at para. 34.

<sup>113</sup> Mutua, *supra* note 72.

<sup>114</sup> Wakeham, *supra* note 3.

<sup>115</sup> First Peoples Worldwide, "Victims of B'laan Massacre Call on UN to Intervene in Violent Struggle Over Mine" (14 November 2013) (on file with author).

<sup>116</sup> Rosa Cordillera A. CASTILLO and Fatima ALVAREZ-CASTILLO, "The Law is not Enough: Protecting Indigenous Peoples' Rights Against Mining Interests in the Philippines" in R. WYNBERG, D. SCHROEDER, and R. CHENNELLIS, eds., *Indigenous Peoples, Consent and Benefit Sharing: Lessons from the San Hoodia Case* (Dordrecht, New York: Springer, 2009), 272; International Working Group for Indigenous Affairs, *supra* note 41 at 258.

<sup>117</sup> Castro, *supra* note 36; Cheryl L. DAYTEC-YANGOT, "FPIC: A Shield or Threat to Indigenous Peoples' Rights?" Indigenous Peoples Foundation for Education and Environment (undated) at 10, online: <<https://www.un-redd.org/sites/default/files/2021-09/Indigenous%20Peoples%20Experiences%20on%20Free%2C%20Prior%20and%20Informed%20Consent%3A%20A%20Collection%20of%20Case%20Studies%28Philippines%29.pdf>>; Ann Loreto TAMAYO, "Legislation Not Necessarily a Guarantee to the Exercise of FPIC in Philippines" Institute of Ecology and Action Anthropology (2012) at 14, online: 1Library <<https://1library.net/document/zg90816q-legislation-necessarily-guarantee-exercise-fpic-philippines.html>>; Salamat, *supra* note 41.

<sup>118</sup> McNeilly, *supra* note 8 at ch. 2.

advocating for the (re)imposition of legality that is bound to institutionally structured violent subjection. It conforms, once again, to Mutua's savages-victims-saviours metaphor that replicates a colonial form.

More could be said about both these discourses.<sup>119</sup> They are not the same or equivalent, but "both discourses have mutually influenced each other while also being shaped by complex ideological investments in liberal and neoliberal discourses of democracy and security".<sup>120</sup> When international law becomes used within the state, it reasserts and legitimates a legal basis for the state. Additionally, each identification is partial and particular: every act of recognition is also a misrecognition.<sup>121</sup> International legal discourses on terrorism will emphasize illegitimate violence because terrorism is typically (but not always) aligned with killing civilians or non-combatants.<sup>122</sup> As such, that discourse will identify Capion as a bandit and a terrorist. It helps justify state violence in reasserting a supposedly legitimate control of its territory (and over Indigenous communities). The discourse on human rights is also selective. It decries state violence as illegitimate because it emphasizes Capion as a representative of Indigenous peoples so that the state should protect his land rights. Because it selectively emphasizes what appears pro-democratic and non-violent, it has trouble explaining Capion's use of violence while maintaining his agency. In this way, Capion becomes subject to discourse in ways that advance the identifier's legal projects for a democratic state.

As both discourses recognize/misrecognize individuals and communities to advocate for legal changes, both underestimate their relation to and uses of law as institutionally bound and, therefore, apparently legitimate the use of violence.<sup>123</sup> The construction of the state through colonialism and the continuous maintenance of its borders, jurisdictions, and laws are violent and exclusionary actions that (re)create the illegitimate, non-state Other.<sup>124</sup> In some circumstances, when the Other refuses to use the legitimized state-sanctioned means of violent contestation, they risk becoming bandits, outlaws, or non-state terrorists.<sup>125</sup> With a presumption of legitimacy, the state and its actors misrecognize its law as violent, and itself as monopolizing violence over a territory.<sup>126</sup> As much as Capion, some other B'laan, and media reporters accuse the government and the developers of perpetrating state terrorism, their challenge to the state's territorial claim also makes them terrorists (according to the state).

Similarly, those who recognize/misrecognize Capion as an Indigenous person fail to see that they are constructing him to advocate for a version of state-based national security. To their immense credit, they attempt to support Capion and people like him. They also misrecognize his violence and the NPA's more radical aims. Instead of upholding his violence as directed at anti-imperialism, anti-capitalism, and, perhaps, the neoliberal-democratic form of the state, they identify him as an Indigenous person for international

<sup>119</sup> Discourses on terrorism, see, e.g., Stuart ELDEN, *Terror and Territory: The Spatial Extent of Sovereignty* (Minnesota: University of Minnesota Press, 2009); Jalata, *supra* note 86; A. Dirk MOSES, "Genocide and the Terror of History" (2011) 17(4) *Parallax* 90.

<sup>120</sup> Wakeham, *supra* note 3 at 9.

<sup>121</sup> For more on misrecognition see, e.g., Avril BELL, *Relating Indigenous and Settler Identities: Beyond Domination* (New York: Palgrave Macmillan, 2014) at ch. 6 (discussing Taylor, Tully, and Kymlicka); Glen COULTHARD, "Subjects of Empire: Indigenous Peoples and the 'Politics of Recognition' in Canada" (2007) 6 *Contemporary Political Theory* 437; Elizabeth POVINELLI, *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism* (Durham, North Carolina: Duke University Press, 2002).

<sup>122</sup> See Jeff GOODWIN, "A Theory of Categorical Terrorism" (2006) 84(4) *Social Forces* 2027 at 2031.

<sup>123</sup> Cover, *supra* note 6.

<sup>124</sup> Said, *supra* note 7; see also Lindsay BALFOUR, "Framing Redress after 9/11: Protest, Reconciliation and Canada's War on Terror Against Indigenous Peoples" (2014) 34(1) *Canadian Journal of Native Studies* 25.

<sup>125</sup> Jalata, *supra* note 86 at 15.

<sup>126</sup> Elden, *supra* note 119 at xxx.

human rights law purposes. In calling out aspects of state violence, they undercut Capion's agency and his violence. If they assert that Indigenous peoples should have legitimate control of their territory, they advocate for state-sanctioned rights. Using international law as discourse reinvests in national security, development, and the state as legitimate.<sup>127</sup> It re-justifies state violence, albeit through legal processes for rights, which reasserts the state's supposedly legitimate control of its territory and Indigenous peoples. In failing to recognize the violence inherent in the state's legal institutions, human rights advocates cannot recognize their role in promoting the presumption of state legitimacy and the way the state is violently (re)creating an illegitimate, non-state Other.

Both discourses advocate for the maintenance of law, which cannot recognize that the law's legitimacy is maintained through continuous violent contestation and exclusion.<sup>128</sup> Their advocacy misidentifies their violence and that these two discourses operate as "complementary logics".<sup>129</sup> In this way, the discourses clash in recognizing the same individuals in different ways. When synthesized within state discourse, this discourse remakes the state as it constructs the violent, illegitimate, non-state Other.

#### IV. Analysing Synthesis

Capion's opposition to the Tampakan mine is only one example in the Philippines of opposition to resource extraction projects or hydropower dams.<sup>130</sup> As terrorist activities and Indigenous resistance to natural resources projects continued, the discourses drawing on international law continued to clash. In time, they became partially synthesized in state-sanctioned law, policy, and discourse.

In 2012 the Philippines adopted the Terrorism Financing Prevention and Suppression Act. It sought to implement the state's commitments under the International Convention for the Suppression of the Financing of Terrorism and "other binding terrorism related resolutions".<sup>131</sup> Under that Act, President Duterte designated the CPP-NPA a terrorist organization in 2017, largely due to their opposition to natural resource development projects.<sup>132</sup> Then, in March 2018, President Duterte identified 600 individuals as supporters of the NPA (or other terrorist organizations). These included the UN Special Rapporteur for the Rights of Indigenous Peoples, Victoria Tauli-Corpuz, Joan Carling, a former member of the UN Permanent Forum on Indigenous Issues, and others.<sup>133</sup> An NGO explains that Tauli-Corpuz:

<sup>127</sup> See *United Nations Declaration on the Rights of Indigenous Peoples*, 13 September 2007, GA Res. 61/295, UN Doc. A/RES/61/295 [UNDRIP], at art. 46.

<sup>128</sup> See Elden, *supra* note 119 at xxx.

<sup>129</sup> See Wakeham, *supra* note 3 at 2.

<sup>130</sup> For example: Karlson LAPNITEN, "The River Will Bleed Red: Indigenous Filipinos Face Down Dam Projects" *Mongabay* (26 February 2021), online: <https://news.mongabay.com/2021/02/the-river-will-bleed-red-indigenous-filipinos-face-down-dam-projects/>; Nick STREET, "Sapi's Struggle: Indigenous Resistance to Cultural Assimilation in the Philippines" *University of Southern California* (27 January 2021), online: USC <<https://crcc.usc.edu/sapis-struggle-indigenous-resistance-to-cultural-assimilation-in-the-philippines/>>; Sarah Bestang DEKDEKEN, "The Indigenous World 2020: Philippines" *IWGA* (11 May 2020), online: [IWGA <https://www.iwgia.org/en/philippines/3608-iw-2020-philippines.html>](https://www.iwgia.org/en/philippines/3608-iw-2020-philippines.html); "Cultural Survival Stands in Solidarity with Indigenous Leaders in the Wake of Unfounded Terrorist Accusation in the Philippines" *Cultural Survival* (9 March 2018), online: [Cultural Survival <https://www.culturalsurvival.org/news/cultural-survival-stands-solidarity-indigenous-leaders-wake-unfounded-terrorist-accusations>](https://www.culturalsurvival.org/news/cultural-survival-stands-solidarity-indigenous-leaders-wake-unfounded-terrorist-accusations) (noting that Tauli-Corpuz helped organized Indigenous communities against the Chico River Hydroelectric Dam and other natural resource projects).

<sup>131</sup> Republic Act No. 10168 (20 June 2012), An Act Defining the Crime of Financing of Terrorism, Providing Penalties Therefor and For Other Purposes, SEC. 2.

<sup>132</sup> President of the Philippines, *supra* note 1.

<sup>133</sup> IWGIA, *supra* note 2; Ballaran, *supra* note 2.

called the allegations, ‘baseless, malicious and irresponsible’ ... Human rights organizations have charged the Philippines army with harassing and killing the Indigenous Lumad people on Mindanao Island who have been caught in the middle of a communist insurgency.<sup>134</sup>

It is terrifying. This phrasing also makes “Indigenous Lumad people” into victims who are “caught in the middle” between the state and communists. It appears inconceivable that any individual or community who might be identified as “Indigenous Lumad people” could be violent or choose to align with leftists, communists, or the state.<sup>135</sup> In doing so, it preserves the notion that human rights are peaceful and non-violent. In locating violence elsewhere, this inhibited discourse misrecognizes how it constructs the Other as the illegitimate violent actor. It is powerful, useful, and fits within state discourse. It enables Duterte and his ilk to agree that Indigenous peoples are not terrorists and continue to pursue their interests.

That occurred after President Duterte issued Executive Order 70 in December 2018 to create a “national task force to end local communist armed conflict” and promote a “whole-of-nation” approach “through intensified development and other peace-building initiatives”.<sup>136</sup> This “whole-of-nation” approach influences attempts at erasing native identity as it echoes the 1987 Constitution’s recognition and promotion of “indigenous cultural communities *within the framework of national unity and development*” (emphasis added).<sup>137</sup> As the Indigenous Working Group for Indigenous Affairs explains, the “Department of Education ordered the closure of 55 Lumad schools ... [grounded] on baseless claims of the government that the ... schools are teaching students to rebel”.<sup>138</sup> The government targeted “Lumads” as “rebels”, not “Indigenous peoples”. In upholding a discourse on “Indigenous peoples” and denouncing the term “Lumad”, the state adopted the preferred international legal discourse on Indigenous peoples’ rights. As international legal discourses on terrorism and Indigenous peoples synthesized, state actors agreed that Indigenous peoples were not terrorists/communists, but targeted the same people who they (re)identified as “Lumads”.

The government then passed the Anti-Terrorism Act of 2020 to replace the HSA.<sup>139</sup> It retained an expansive definition of terrorism, created an anti-terrorism council, allowed warrantless arrests, and removed safeguards against wrongful accusation and detention. At the UN, the Minister and Legal Adviser of the Philippine Mission, Angela Ponce, said it strictly adhered to “relevant Security Council resolutions, including Resolutions 1373 and 2178, and to the UN Global Counter-Terrorism Strategy”.<sup>140</sup> Amnesty International

<sup>134</sup> Terri HANSEN, “UN, Human Rights Experts, Indigenous Leaders Condemn Philippines for Placing Special Rapporteur on ‘Terrorist Hit List’” *Cultural Survival* (10 March 2018), online: Cultural Survival <<https://www.culturalsurvival.org/news/un-human-rights-experts-indigenous-leaders-condemn-philippines-placing-special-rapporteur>>.

<sup>135</sup> Joanna Patricia Kintanar CARINO, “I am an Activist for Indigenous Peoples’ Rights, not a Terrorist” *Cordillera Peoples Alliance* (10 March 2018), online: CPA <<https://www.cpaphils.org/joanna-statement.html>>.

<sup>136</sup> President of the Philippines, “Executive Order No 70” *Official Gazette* (4 December 2018), at s. 2, online: Official Gazette <<https://www.officialgazette.gov.ph/downloads/2018/12dec/20181204-EO-70-RRD.pdf>>.

<sup>137</sup> Official Gazette, *supra* note 21 at art. II, s. 22. See Reynato S. PUNO, *The IPRA: Indigenous Peoples and their Rights* (2008) cited in OXFAM, “Free Prior and Informed Consent in the Philippines: Regulations and Realities” (September 2013) at 4, online: Oxfam <<https://www.oxfamamerica.org/static/media/files/fpic-in-the-philippines-september-2013.pdf>>.

<sup>138</sup> Dekdeken, *supra* note 130.

<sup>139</sup> “Republic Act No 11479, An Act to Prevent, Prohibit, and Penalize Terrorism” *Official Gazette* (2 July 2020), online: Official Gazette <<https://www.officialgazette.gov.ph/2020/07/03/republic-act-no-11479/>>.

<sup>140</sup> “PH Condemns Terrorism, Cites 2020 Anti-Terrorism Act as Valued Tool in Fight Against It as UNGA Sixth Committee Opening” *Philippine Department of Foreign Affairs* (15 October 2020), online: DFA <<https://dfa.gov.ph/>>

and other groups maintain that it is overly broad and enables the government to accuse human rights defenders of “terrorism” or “communism” without basis or due process.<sup>141</sup> The Philippines Supreme Court has ruled that most of the Act is “not unconstitutional”, although it found that two provisions unconstitutionally constrain the civil right to protest.<sup>142</sup> Following the 2020 Act, the NCIP passed a resolution denouncing the use of the word “Lumad” to refer to “Indigenous peoples”.<sup>143</sup> It explained that “Lumad” is not an “indigenous word” and its “emergence and continued use is marred by its association with the ... NPA ... whose ideologies are not consistent with the cultures, practices, and beliefs of ICC/IPs”.<sup>144</sup> The words and identity “Indigenous peoples” are also not indigenous, but identities can change and be duplicated. It shows that “Indigenous peoples” can be defined, delineated, and synthesized to support state interests.

The state’s actions placed advocates in a defensive position. When advocates reassert discourse involving the international human rights law of Indigenous peoples to criticize the state, no matter how nuanced, precise, or accurate they are, the state can appropriate the discourse in ways advocates never intended. As an example, Gatmaytan explains that the term “Lumad” arose from the “pioneering pastoral work of the Catholic Church in Mindanao” to refer to pan-Mindanao aboriginal peoples of the island.<sup>145</sup> Since the emergence of that term “the indigenous communities of Mindanao themselves ... gradually adopted or appropriated the name ‘Lumad’ as a way of asserting a shared identity or location”.<sup>146</sup> When the state “banned” the identifier “Lumad”, it revealed, as Gaspar noted, the “idiocy of our public servants in the NCIP”. However, he continues, “this is no laughing matter for it shows us how seriously misinformed the NCIP powers-that-be are in terms of the history of the Lumad Social Movement”.<sup>147</sup> The NCIP might be “ignorant”, “misinformed”, or even “idiots”, but they can (partially) appropriate discourse for their purposes.

Gatmaytan explains this, critiques the state, and redeploys discourse from international law:

the state seeks to control how people think by controlling how people use language. It seeks to persuade people that using the name ‘Lumad’ is to be associated somehow with the CPP-NPA ... In doing this, the NCIP has arrogated unto itself the power to determine who the indigenous peoples are, and how they are to be called. But this right belongs not to the NCIP, nor even to the Philippine state—which is

[dfa-news/news-from-our-foreign-service-posts/update/27947-ph-condemns-terrorism-cites-2020-anti-terrorism-act-as-valued-tool-in-fight-against-it-at-unga-sixth-committee-opening](https://www.dfa.gov.ph/news-from-our-foreign-service-posts/update/27947-ph-condemns-terrorism-cites-2020-anti-terrorism-act-as-valued-tool-in-fight-against-it-at-unga-sixth-committee-opening).

<sup>141</sup> “Anti-Terrorism and Human Rights” *Amnesty International* (no date provided) online: Amnesty International <<https://www.amnesty.org.ph/campaigns/anti-terrorism-and-hr/>>; International Commission of Jurists, “Danger in Dissent: Counterterrorism and Human Rights in the Philippines” *International Commission of Jurists* (January 2022), online: ICJ <[https://www.icj.org/wp-content/uploads/2022/01/ICJ\\_PhilippinesRedTagging\\_270122.pdf](https://www.icj.org/wp-content/uploads/2022/01/ICJ_PhilippinesRedTagging_270122.pdf)>.

<sup>142</sup> *Calleja v Executive Secretary*, GR No. 252578 (7 December 2021) online: Supreme Court of the Philippines <<https://sc.judiciary.gov.ph/24410/>>; “Media Briefer” *Supreme Court of the Philippines* (26 April 2022) online: Supreme Court of the Philippines <<https://sc.judiciary.gov.ph/26426/>>.

<sup>143</sup> Carolyn O. ARGUILLAS, “The IP Struggle Continues as NCIP Red-tags and Bans use of ‘Lumad,’ the Collective Word for Mindanao IPs Since the Late 1920s” *Mindanews* (20 March 2021), online: Mindanews <<https://www.mindanews.com/top-stories/2021/03/the-ip-struggle-continues-as-ncip-red-tags-and-bans-use-of-lumad-the-collective-word-for-mindanao-ips-since-the-late-1970s/>>.

<sup>144</sup> *Ibid.*

<sup>145</sup> Augusto B. GATMAYTAN, “ANALYSIS: Notes on the NCIP Resolution on ‘Lumad’” *Mindanews* (25 March 2021), online: Mindanews <<https://www.mindanews.com/mindaviews/2021/03/analysis-notes-on-the-ncip-resolution-on-lumad>>.

<sup>146</sup> *Ibid.*

<sup>147</sup> Arguillas, *supra* note 143.

historically responsible for much of the injustices and inequities suffered by indigenous peoples—but to the indigenous peoples themselves. *Indigenous peoples have the right to self-asciption, which is itself rooted in their fundamental right to self-determination. They have the right to determine, among other things, their own name or names.*<sup>148</sup> (Emphasis added.)

Indigenous peoples have the right to self-asciption and self-determination, and it is incumbent upon the state and the NCIP to protect and respect those rights. Even though it is obvious that Gatmaytan is writing about “Lumads”, the subjects that have self-determination are Indigenous peoples. It is not his intention, but Gatmaytan’s discourse reaffirms the state’s claim that Lumads must identify as Indigenous peoples to have the protections of the state and the right to argue against the state’s policies or laws.<sup>149</sup> He argues against how the state implemented these laws with a discourse that supports the NCIP’s claim that the primary means of legal protection is predicated on identification as “Indigenous peoples”. Even if he is arguing that Indigenous peoples have rights to self-determination, this discourse within the state calls forth state powers to protect, define, and delineate that right, among other rights. Gatmaytan uses human rights to further state-sanctioned manners of contestation and constructs individuals, like Capion, as representatives of Indigenous peoples which undercut their affiliation with the NPA.

Gatmaytan is trying to support Lumads and Indigenous peoples however they choose to identify. Even if he is clear about that and places the blame on the state and state actors, the state and state actors can use his discourse to support their interests. It may further the erasure or criminalization of Lumads, but not Indigenous peoples. Gatmaytan uses international legal discourse in state-sanctioned terminology because, not only is it internationally accepted, it is safer. If Gatmaytan fails to advocate in a state-sanctioned manner or challenges the state in non-state sanctioned way, then he can become identifiable as a terrorist, a non-democratic actor, and an illegitimate violent non-state Other.

## V. Final Remarks – A Way Out or Plastic Identities?

Where does this leave us? Which way do we turn? How can international law help? One way of attempting to dispense with this clash is to point out that the Philippines’ approach to defining terrorist activity is too broad. To support such a view, the 1987 *UN General Assembly Resolution 42/159* differentiates terrorists from those “peoples under colonial and racist regimes and other forms of alien domination and uphold[s] the legitimacy of their struggle”.<sup>150</sup> It recognizes “the inalienable right to self-determination”, and it is now clear that Indigenous peoples have a right to (internal) self-determination.<sup>151</sup> The state’s promotion of natural resource exploitation on B’laan ancestral lands, along with its criminalization of “Lumads”, demonstrate present-day coloniality. However, that return to international law – within a law review article – produces a normative argument about what the state should do.<sup>152</sup> It is my view that the state should adhere to that resolution. But that argument does not address the context of Resolution 42/159, which

<sup>148</sup> Gatmaytan, *supra* note 145; Arguillas, *supra* note 143.

<sup>149</sup> See Wakeham, *supra* note 3 at 2.

<sup>150</sup> *Measures to Prevent International Terrorism*, 7 December 1987, GA Res. 42/159, UN Doc. A/RES/42/159.

<sup>151</sup> UNDRIP, *supra* note 127 at arts. 3–4; see e.g., Catherine J. IORNS, “Indigenous Peoples and Self-Determination: Challenging State Sovereignty” (1992) 24(2) *Case Western Reserve Journal of International Law* 199.

<sup>152</sup> See Pierre SCHLAG, “Normative and Nowhere to Go” (1990–1991) 43 *Stanford Law Review* 167.

has always faced practical problems.<sup>153</sup> Also, the subsequent “War on Terror” has made it more acceptable, but not beyond controversy, that any perceived threat to national interests is potentially identifiable as “terrorism”. It is also less clear whether Resolution 42/159 protects individuals or communities – even if they assert or claim rights of self-determination – if they are violent and resist state-sanctioned processes for claiming rights or adjudication.

Instead of suggesting a normative or political argument, it is worth noting that identity and subject formation, like rights, are mutable and plastic. The excesses can lead to new formations and alliances. Attending to violence within state legalities and the ways that international law influences discourse in constructing that violence also suggests the possibility of delinking subject formation from those institutions. Within neoliberal states that prioritize counterterrorism and natural resource exploitation, powerful institutions will be able to successfully (if temporarily) capture the excesses or surplus values in violent ways that remake the state. Those constructions and captures are never total. Support for Indigenous resistance is crucial in defending against exploitative regimes, but it is not enough to assert that the state should adopt Indigenous peoples’ rights. Many human rights advocates are pursuing social, economic, and racial justice for minoritized groups. Furthermore, rights-based discourse can be problematic. Where a state, such as the Philippines, has recognized rights and legitimates violence through its legal institutions, any non-state sanctioned use of violence can be identified as an illegitimate use. When the state identifies and targets illegitimate uses of violence, it provides state actors with an opportunity to reassert state claims to legitimate violence. There are alternative forms of allied action. However, if we are inhibited from seeing the violence in these systems, it is uncertain we can see those alternatives or the plasticity of identity to make them legitimate.

Those who resist state-sanctioned natural resource projects, such as Daguil Capion, might be identifiable according to discourses in international law. They can align with the military branches of the communist party, human rights NGOs, environmental organizations, or others. They might use whatever platform or discourse is available to express their agency and opposition. They might not assert human rights. How individuals and communities are identified is not, however, of their own construction. While Capion might be a terrorist and be a representative of Indigenous peoples, the acts of identification nevertheless subject him to discourses.

Within state discourse, international law clashes and synthesizes. The Philippines is unique, but it is not the only place where these international legal discourses are overlapping. The United States of America, Canada, and Brazil have all adopted counterterrorism strategies that target “eco-extremists” alongside Indigenous peoples.<sup>154</sup> While international legal discourse on human rights is a powerful tool for advocacy, it can clash with other international legal discourses that, when combined in the state, remove, negate, and undermine more radical challenges and forms of alliance. While international human rights law retains the possibilities of radical, egalitarian futurity,<sup>155</sup> advocacy for state reform occurs through violent contests that remake the borders of legitimate contestation as it externalizes its violence.

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<sup>153</sup> See Wakeham, *supra* note 3 at 8–9.

<sup>154</sup> Paul WAPNER, “Thresholds of Injustice: Challenging the Politics of Environmental Postponement” in Judith SHAPIO and John-Andrew MCNEISH, eds., *Our Extractive Age: Expressions of Violence and Resistance* (Routledge, 2021), 59; also ESTES, *supra* note 9; Wakeham, *supra* note 3 at 10–23.

<sup>155</sup> McNeilly, *supra* note 8 at ch. 2.

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