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How Does the Humanitarian Law Apply in Internal Conflict?: An Enduring Question of Compliance and Complexity

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Introduction

Security Sector Reform (SSR), which aims to enhance the effectiveness and accountability of the military and civilian security institutions,¹ gives premium to human rights in the conduct of military operations. In so doing, security institutions, especially the military, are made answerable for any act or omission in violation of the ethical principles of the International Humanitarian Law (IHL) in armed conflict.²

The UN Millenium Report in 2000 emphasized that, “a new understanding of the concept of security is evolving”—one which does not only call for the defense of the territory, but also the protection of individuals and communities.³ Human security or the security of people and social groups was emphasized by the UN especially in the context of intra-state conflicts and “privatisation of wars” in “failing states”. With the celebration of the IHL Month in August 2013, greater emphasis was given to enhancing the implementation of IHL and human rights under the framework of human security.

In the Philippines, the government adopts humanitarian principles as a matter of policy in the 1987 Constitution. However, certain treaties and international agreements on humanitarian law need ratification by Congress. For instance, the Philippine Senate and the House of Representatives in 2009 enacted Republic Act (RA) 9851—also known as the “Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity,” in a move to make IHL part of Philippine laws. Such act by Congress has etched on stone the adherence of the Philippine government to IHL.

The IHL is applicable in two types of “sustained” armed conflict, which are: (1) International

Armed Conflict (IAC); and, 2) Non-International Armed Conflict (NIAC). In both types, armed conflicts are not merely sporadic and temporary; they are chronic.⁴ The insurgents, which threaten the internal security in the Philippines, are what the IHL refers to as non-state armed groups (NSAGs). The latter are driven by political ideology, secessionism, religious fundamentalism, and/or plain extortionary gains as well as power trip in the guise of dogmatic revolution.⁵ This study focuses on the applicability of the IHL on the protracted armed insurgency in the country, the type of which falls under the NIAC.

In its campaign against NIAC, the Armed Forces of the Philippines (AFP) crafted in December 2010 the Internal Peace and Security Plan (IPSP), or more popularly known as the IPSP *Bayanihan*. As one of the parties to the conflict, the AFP is behooved to faithfully comply with the IHL and RA 9851 in its counter-insurgency campaign. It is imperative therefore that the IPSP *Bayanihan* be compliant with IHL principles. However, there are issues and concerns raised in the security sector on the applicability of the IHL in the Philippine experience with NIAC.

This paper attempts to evaluate the adoption of the IHL principles in the Philippines in the light of its comprehensive counterinsurgency plan known as the IPSP *Bayanihan*. Specifically, the study looks into the principles of IHL and the salient provisions of RA 9851 vis a vis the IPSP *Bayanihan* as the military plan to counter NIAC. The paper unravels thematic issues on the applicability or non-applicability, implementation, and compliance of security actors to the IHL. The study in the end reflects on the perceived gaps and incongruence in the implementation of humanitarian law in the context of counterinsurgency in the Philippines.

This study focuses on the applicability of the International Humanitarian Law on the protracted armed insurgency in the Philippines, the type of which falls under the Non-International Armed Conflict.

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The International Humanitarian Law or IHL: Concepts and Principles

The IHL is a set of rules contained in treaties and/or conventions agreed upon by signatory countries, which govern armed conflicts whether international or non-international. It seeks to limit the effects of war or armed conflicts, and restricts the means and methods of warfare. The origins can be traced back to ancient civilizations and religions when wise men of India and China discussed the laws of war some five thousand years ago.⁶ At the heart of IHL is the protection afforded to persons who are not or are no longer participating in hostilities. Under RA 9851, persons that must be protected in armed conflict include the following⁷:

- “(1) a person wounded, sick or shipwrecked, whether civilian or military;
- (2) a prisoner of war or any person deprived of liberty for reasons related to an armed conflict;
- (3) a civilian or any person not taking a direct part or having ceased to take part in the hostilities in the power of adverse party;
- (4) a person who before the beginning of hostilities, was considered a stateless person or refugee under the relevant international instruments accepted by the parties to the conflict concerned or under the national legislation of the state of refuge or state of residence;
- (5) a member of the medical personnel assigned exclusively to medical purposes or to the administration of medical units or to the operation of or administration of medical transports; or,
- (6) a member of the religious personnel who is exclusively engaged in the work of their ministry and attached to the armed forces of a party to the conflict, its medical units or medical transports, or noncombatant military personnel carrying out functions similar to religious personnel.”

Under the same law⁸ the following are the sources of IHL: (1) the 1948 Genocide Convention; (2) The 1949 Geneva Conventions I-IV, their 1977 Additional Protocols I and II and their 2005 Additional Protocol III; (3) the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, its First Protocol, and its 1999 Second Protocol; (4) the 1989 Convention on the Rights of the Child and its 2000 Optional Protocol on the Involvement of Children in Armed Conflict; (5) the rules and principles of customary international law; (6) the judicial decisions of international courts and tribunals; (7) relevant and applicable international human rights instruments; (8) other relevant international treaties and conventions ratified or acceded to by the Republic of the Philippines; and (9) teachings of the most highly qualified publicists and authoritative commentaries on the foregoing sources as subsidiary means for the determination of rules of international law.

Within the established framework of international law, RA 9851 specifically enumerates war crimes—which are either international or non-international, and other serious violations of the laws and customs applicable in armed conflict. It must be kept in mind that IHL is applicable to both state and non-state security actors that must adhere to the IHL principles of distinction, precaution, and proportionality.

The Internal Peace and Security Plan *Bayanihan* or the IPSP *Bayanihan*

The IPSP *Bayanihan*, an open document, is the AFP’s military plan which advocates a paradigm shift in terms of how it deals with internal and external security threats. It puts forward two strategic imperatives, which are: (1) adherence to human rights, IHL, and the rule of law; and, (2) involvement of all sectors and stakeholders. Significantly, the principle behind the counterinsurgency operations of the AFP has shifted from defeating the enemy to “winning the hearts and minds” of the people in a democracy. This has been the populist principle in counterinsurgency plans and pacification campaigns of the British and American forces in Vietnam, Iraq, and Afghanistan, among others. Like in all modern counterinsurgency plans, the IPSP *Bayanihan* has the primary objective of *winning the peace* rather than simply defeating the enemy. Under the IPSP, the AFP, as a major actor in promoting human security, crafted a people-centered security strategy that is founded on broad-based consultations and engagements with key stakeholders.⁹

The AFP pursues its two-pronged objective of reducing internal armed threats “to a level that they can no longer threaten the stability of the state and civil authorities,” as well as of ensuring the safety and well-being of the Filipino people. With this, the AFP needs to function effectively in addressing conflicts, especially in a security environment that is complex and uncertain. Thus, the IPSP *Bayanihan* provides for “broad strokes of the strategy to attain internal peace and security,”¹⁰ which shall be supplemented by policy issuances.

Nevertheless, the broadness of the whole-of-nation approach by the military in its internal security plan leaves much discretion on how to execute it on the ground by different stakeholders, both government and non-government. Because of its generally stated principles, the IPSP document is open not only to different interpretations, but also to incongruent implementation especially of its rules-based adherence to human rights. While the IHL is a popular ideological imperative, how this can be enforced consistently to all parties concerned in insurgency operations seems to be a problem.

Some Thematic Issues on the IHL Principles and Implementation

Under the IHL, there are several principles on the protection of the civilian population which all parties to the internal conflict must adhere to. However, as articulated in different fora¹¹ on security sector reform in the Philippines, there are perceived incongruence of the IHL when it comes to its application in the field.

On the principle of distinction

One of the principles of IHL is the principle of distinction. It requires parties to a conflict to distinguish at all times and under all circumstances between combatants and military objectives, and between civilians and civilian objects. Accordingly, civilians are protected as long as they do not directly take part in hostilities. However, a common concern for parties to the armed conflict is how to define general concepts in the humanitarian law such as the meaning of “protected civilians,” “combatant and non-combatant areas,” and “military objectives,” among others. While most European countries have already understood these concepts in specific terms, it will take a longer time for the Philippines to fully comprehend and delineate the same.

Sitaraman (2009), in “Counterinsurgency, War on Terror and the Laws of War,” propounded on the incongruence between laws of armed conflict and counterinsurgency, under the principle of distinction.¹² He argued that this strategy is largely based on the conventional warfare where battles are fought by “armies of professional soldiers” using the “kill-capture” strategy in which the final objective is to destroy the enemy.

Moreover, insurgencies operate as social systems which are caused by multidimensional factors in society, a condition that makes internal armed conflicts unconventional. Modern counterinsurgency requires securing the civilian community from insurgents and cutting their line of support from the community. In a complex security environment, these insurgents, at times, are non-combatants that perform non-military operations to advance their revolutionary cause and other interests. The unconventional war of counterinsurgency requires “preventing insurgents from spreading propaganda and developing support within the population.”¹³ Given this complexity, the principle of distinction under the IHL might prove harder to apply on the ground.

On the principles of precaution and proportionality

The principle of precaution obliges parties to an armed conflict to spare non-combatants and/or

protected properties from attack. Precaution involves minimizing incidental loss of lives or injuries of non-combatants as well as damage to protected properties; and, avoiding military operations in non-combatant areas.

The principle of proportionality, on the other hand, involves the “exercise of discretion by the attacking force.”¹⁴ Under this principle, the harm to or loss of non-combatant’s life or damage to protected properties resulting from an attack must be proportional and not excessive in relation to military advantage. Sassòli (2011), in his paper on “Introducing a Sliding-scale of Obligations to Address the Fundamental Inequality between Armed Groups and States,” wrote that the purported equality of state and non-state actors under IHL is a misnomer. According to him, it is ‘unrealistic’ to expect non-state actors to comply with IHL principles that might lessen their military advantage as their only chance of avoiding total defeat.¹⁵ For instance, it might be inevitable for insurgents to attack “soft targets,”¹⁶ and thus, discard the principles of precaution and proportionality to advance their military objectives.

On the exaction of compliance

With the adaption of RA 9851, all parties to the armed conflict must strictly adhere to the principles of distinction, precaution and proportionality. A law gives rise to both rights and obligations. When a certain right is violated under a particular law, an obligation can be exacted from the party violating it. Along this line, there were issues which need to be addressed as regards the implementation of the humanitarian law in the Philippines, particularly on exacting rights and obligation.

The IHL demands mutual engagement between the state and the NSAGs. The issue of non-compliance to IHL by non-state armed groups, is a persistent issue articulated by the AFP as well as the police. To note, uniformed personnel are easily identified when they violate RA 9851, compared to the NSAGs whose very nature of outlawed operations defies the rule of law.

How to bring a party under the law is therefore an issue. It would be difficult to get the NSAGs to cooperate and submit themselves to the authorities they actually rebel against. Some military officers, on the other hand, may cover up under the cloak of the exigency of national security in the performance of their duty. In both tendencies, the behaviors of parties in conflict constitute a security complex.

It must be taken into account that since the enactment of RA 9851 in 2009, there has been no documented prosecution of cases in court. This fact can be related to several reasons such as lack of awareness

on the existence of the said law, lack of confidence in the speedy resolution of cases, and limited competence of the courts in litigating violations of the humanitarian law.¹⁷ There is also reluctance to bring violators to court knowing that the rebels will not subject themselves under the jurisdiction of government.

Conclusion

The study at the outset posits that adherence to international humanitarian law or IHL is an essential constitutive element of Security Sector Reform or SSR, especially in a developing country whose government is party to internal conflict. The need to enshrine the ethical principles of the IHL in conflict areas is an advocacy to ensure that the inherent right of a state to engage in a war to defend its people, territory, and sovereignty is governed by rules of conduct. In a security complex where armed conflicts are real, the management of violence under the IHL framework is called for by civilized states and the international system.

Working against this legalistic backdrop, the study looks into the salient provisions and principles of the IHL; the Republic Act (RA) 9851, otherwise known as the Act on Crimes Against International Law, Genocide, and Other Crimes Against Humanity; as well as the Internal Peace and Security Plan (IPSP) in the Philippines. A review of these policy documents unravels perceived gaps in the comprehension and application of internationally agreed principles on humanitarian law in the context of the protracted insurgency in the Philippines.

To ensure that the IHL principles are incorporated in the domestic system, states are encouraged to adopt the humanitarian law through legislation.¹⁸ The enactment of RA 9851 gives teeth to the enforcement of the IHL by making it part of national statutes. This shows the growing commitment and maturity of government, particularly the security sector, to adhere to the principles of IHL.

The state, as the party to non-international conflict or NIAC, has the responsibility to protect human rights in conflict situations. This is one of the core principles upheld in the comprehensive approach to security sector reform in democratic nations. To resolve the systemic problem of insurgency, especially in underdeveloped societies, all parties to the conflict must abide to national and international humanitarian laws. Details and protocol suited to the complexities on the ground must be crafted in order to make IHL work for all parties involved in armed conflicts. All stakeholders must be involved, most especially the dissident elements that take up arms as an option to revolutionize what they believe is an unjust system of government.

Aside from the State and rebel groups, it must be taken into account that the primary stakeholders in a security dilemma are the civilian populace and the communities. In this regard, the vigilance and involvement of civil society and international organizations are needed to ensure that the rule of law and human security are respected. The participation of all concerned will help in understanding the principles and provisions of the law for the faithful compliance by security actors on the ground. The intensive campaign of government, civil society, and the international community for the IHL will aid in the effective monitoring and prosecution of the violations of the humanitarian law.

The Philippines etched on stone a national law which would make violators liable not only under the Philippine court but also under the international court of justice. Nevertheless, the Philippines as a democratic nation would still uphold the protection of human rights both in times of war and peace even if RA 9851 had not been legislated. Enacting an enabling law is a landmark; but implementing it with due prosecution of violators is a milestone that will signify national commitment towards the protection of human rights in conflict areas in the country.

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This policy brief is edited by Ananda Devi D Almase, DPA. The views expressed in the policy brief do not necessarily reflect the views of the National Defense College of the Philippines. The readers are free to reproduce copies or quote any part provided proper citations are made. For comments and suggestions, please email charisse.ndcp@gmail.com

¹ Transformation: A Security Sector Reform Reader, International Center for Innovation, Transformation and Excellence in Governance (INCITEGOV), (2012), pp. 11

² According to the International Committee on the Red Cross (ICRC), international human rights law seeks to protect individuals at times of war and peace alike while international humanitarian law applies in situations of armed conflicts. The two are complementary as both strive to protect the lives, health and dignity of individuals.

³ Transformation: A Security Sector Reform Reader, International Center for Innovation, Transformation and Excellence in Governance (INCITEGOV), (2012), pp. 14

⁴ Fajura, Nestor (2013), IHL Principles: Distinction, Proportionality and Precaution presented during the Training on International Humanitarian Law, Department of Foreign Affairs in Pasay City on 29 August.

⁵ Armed Forces of the Philippines Internal Peace and Security Plan (IPSP) (2010), pp. 1

⁶ Advisory Service on International Humanitarian Law, International Committee on the Red Cross (2004)

⁷ Section 4a, Chapter III: Crimes Against International Humanitarian Law, Genocide And Other Crimes Against Humanity RA 9851 or the Republic Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity, 2009

⁹ Armed Forces of the Philippines Internal Peace and Security Plan (IPSP) (2010), pp. 3

¹⁰ Ibid, pp. 37

¹¹ Operational Law Course conducted by the National Defense College of the Philippines, Friedrich Ebert Stiftung and the German Armed Forces Command and General Staff College on 1-5 July 2013; and Training on International Humanitarian Law conducted by the Department of National Defense, the Department of Foreign Affairs and the Foreign Service Institute on 29-30 August 2013.

¹² Sitaraman, Ganesh (2009). Counterinsurgency, War on Terror and the Laws of War. Virginia Law Review. 95, Issue 7.

¹³ Ibid, pp. 26

¹⁴ Ibid, pp. 32

¹⁵ Sassóli, Marco (2011). Introducing a Sliding-scale of Obligations to Address the Fundamental Inequality between Armed Groups and States. International Review of the Red Cross, Volume 93 Number 882, pp. 427

¹⁶ Ibid, pp. 428

¹⁷ Roque, Harry (2013), IHL: The Way Forward, lecture presented during the Training on International Humanitarian Law, Department of Foreign Affairs in Pasay City, 30 August.

¹⁸ Jean-Marie Henckaerts and Louise Doswald-Beck (2009), Customary International Humanitarian Law, Volume I: Rules, Cambridge University Press, The Edinburgh Building, Cambridge, CB2 8RU, UK.