

Philippines - War and Law: Shooting-To-Kill Armed Rebels

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The lawyer President and Commander-in-Chief's verbal order for soldiers (AFP) to shoot armed rebels (NPA) on sight makes for interesting legal discourse, including for academic purposes, were it not more importantly a real life-and-death matter. The lawyer Vice-President has weighed in that the shoot-to-kill (STK) order is illegal, contrary to the Constitution, presumably its due process clause, as well as criminal procedure that allows a citizen's (warrantless) arrest as the mode of suppression when a person when has committed, is actually committing, or is attempting to commit a crime in one's presence.

The lawyer Presidential Spokesperson (and Presidential Adviser on Human Rights) has replied on two levels of law. On the level of international humanitarian law (IHL), he said that armed rebels in a non-international armed conflict like that between the NPA and the AFP are legitimate military targets. On the level of criminal law, he said that armed rebels are committing the crime of rebellion which involves taking arms against the government. But he threads on dangerous ground when he conflates those two levels of law by (reportedly) saying that communists who took up arms against the government are legitimate military targets since they are committing a crime. He was later quoted as saying "I assure you, no armed NPA will surrender to authorities. The options are to shoot them or [allow] our men in uniform to be shot by them... If there's a war, all those involved [presumably referring to combatants] can be fired at..."

IHL does allow, during armed conflict, attacks directed against military targets, including combatants of both the state armed forces and anti-state organized armed groups, but this is not absolute and has certain limits. Among these are the fundamental IHL principles of military necessity and humanity as applicable under the circumstances, as pointed out in various guidance materials of the International Committee of the Red Cross (ICRC). It may be possible to neutralize the military threat posed through capture or other non-lethal means or options without additional risk to the operating forces or the surrounding civilian population. The armed rebel, or for that matter armed soldier, must be given the opportunity to surrender, depending on the circumstances. It cannot be presumed a priori that "no armed NPA will surrender to authorities," because it has in fact happened. And any lethal self-defense can be justified only in the face of armed resistance.

On the level of criminal law and procedure, particularly where there is no armed encounter involved, perpetrators (like a rebel merely bearing arms) of the crime of rebellion are not to be treated as legitimate military targets but as suspects - in which case, they may not be deprived of life or liberty without due process of law, which due process is mainly the function of criminal procedure. This procedure does not contemplate the abuse of the worn-out excuse of *nanlaban*. This level of law is largely (at least conceptually) one of law enforcement or a police matter, as they say, not a military matter. It is dangerous to conflate these two matters, as the NPA is unfortunately doing under the CPP's "People's Democratic Government."

Given those two levels of law brought out (and we haven't even dealt with the potentially complicating special criminal law on anti-terrorism), and some possible conflict of laws situations in the President's foreseen coming (actually already arrived) "virulent" AFP-NPA encounters, it is time

for all concerned to think through this legal situation. We have hardly scratched the surface of this in this limited space, and there is more work yet to do in preparing for the worst.

Unless, hoping against hope, we can still somehow rise from the “virulent” abyss we have just fallen into. If there are to be no more lost loved ones like Josephine Anne Lapiras and PO1 Joeffel Odon (how many times have we said this sort of hope over the years), the leaders of both sides will have to find it in their hearts and minds to see the need to at least try to stop that fall by way of a reasonable ceasefire accompanying reasonable peace talks. With more sincerity.

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P.S.

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