

Philippines: The law on the use of landmines and the case of the NPA

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In the wake of the New People's Army (NPA) use of a landmine in the ambush of police Special Action Force (SAF) elements, resulting in eight of them killed, last 27 May 2013 in Allacapan, Cagayan, presidential deputy spokesperson Atty. Abigail Valte was quoted at a Malacañang press briefing as saying "It's very clear. It was a violation or against the law on the use of landmines." It is therefore relevant and worthwhile to look into this law. Yes, Virginia, there is a law on the use of landmines, even as it may seem ironic that law governs (or is supposed to govern) so savage an activity as warfare.

Indeed, it used to be the wisdom of the ages, articulated by Cicero, that *Silent leges inter arma* ("The laws are silent in the midst of arms"). But war, as among the worst occasions of inhumanity, has also occasioned *Inter Arma Caritas* ("In War, Charity") and among the best that has been created by humanity in terms of law: international humanitarian law (IHL), or the law of armed conflict, so as to protect its victims and to limit its methods and means (e.g. its weapons). Because "Even war has its limits." If war cannot be avoided because of, say, the failure of a peace process, then the next best thing is to "humanize" it or mitigate its adverse effects on the civilian population.

Typology of Landmines

Before we do go into the law on the use of landmines and the case of the NPA, particularly its recent Allacapan ambush of police SAF elements, it is essential *under the present state of the law*, esp. IHL, to point out the different types of landmines as these have bearing on the applicable law.

Landmines are munitions or explosive weapons, normally encased, and designed to be placed under, on or near the ground or other surface area (like a road) and to be exploded by the presence, proximity or contact of a person or a vehicle. The explosive blast with accompanying shrapnel or other projectiles is meant to kill or maim (especially to take out the legs of) walking persons, or to blow up, disable and destroy moving vehicles, usually also causing death or injury to those aboard them.

The typology of landmines that we emphasize here is of course not the only typology of landmines (there are military and technological typologies) but this is the one most important for purposes of the law. Our key typology has to do with two features:

A. According to intended target: whether personnel or vehicles -

1. Anti-personnel mine (APM) - with a relatively small explosive charge, given the intended target
2. Anti-vehicle mine (AVM) - with a big explosive charge, given the intended target

B. According to mode of triggering: whether by the victim or by command -

1. **Victim-activated** - caused by the victim's weight, pressure, or tripping of a wire, thus inherently indiscriminate "to whom it may concern"

2. **Command-detonated** - requires a person to be present, observing the landmine emplacement and manually detonating it, usually electrically, upon the approach of a moving target close to the emplacement

A third, though less legally important, feature may be presented as follows:

C. According to production process: whether manufactured or improvised -

1. **Conventional** (industrially manufactured) - subject to production standards

2. **Improvised** ("home-made") - not subject to industrial-type standards

Based on field findings, most, if not all, NPA landmines used and recovered are command-detonated and improvised. The NPA has in its arsenal and uses both APMs and AVMs. Its APMs are typically improvised command-detonated Claymore-type mines which are modeled after the U.S.-designed Claymore directional mine M18A1 with a concave-shaped casing with "front toward enemy." A very recent field verification mission in Compostela Valley, Mindanao by the non-governmental Philippine Campaign to Ban Landmines (PCBL) and its international humanitarian mine action partner Swiss Foundation for Mine Action (FSD, Fondation Suisse de Deminage) has found dual-purpose AP/AV mines of the NPA. The NPA had sometimes in the recent past referred to its landmines collectively as "command-detonated explosives" (CODEX or CDX).

The Allacapan Ambush

From the available media reported facts of the May 27 Allacapan ambush, it appears that the a 30-member unit of the NPA's Danilo Ben Command in western Cagayan detonated an **improvised command-detonated anti-vehicle mine (AVM)** at a marked Philippine National Police (PNP) Isuzu Elf van with 15 police elements of 24th Special Action Company of the SAF on board to initiate the ambush at around 8:30 a.m., with the landmine blast being followed by automatic rifle fire from an elevated portion of the road side. This scenario has been a *NPA ambush tactic trademark* for a good number of years already.

The landmine was placed in the middle of the road at the boundary of barangays Cataran and Centro West, about 2 kilometers from the Allacapan police station. It was set off using a 25-meter detonation cord (or electrical cable) as the police truck came. The blast was so powerful that it completely destroyed the truck and mangled the victims' bodies, as a photograph of the scene showed. The policemen defended themselves but eight of them were killed, while seven others who fought back were wounded, including by shrapnels. There were no reported civilian casualties. According to the police, the rebels made off with four special operations assault rifles, one M-16 assault rifle and seven short firearms of the policemen before fleeing to a mountainous village. The rebels said they took away 15 rifles and pistols from the ambush site.

Certain other circumstances of the ambush that have been noted are: that the SAF team was not on patrol operations when they were ambushed; that they were on their way to Allacapan town proper to see a PNP medical team to undergo electrocardiogram procedure; and that they were wearing not combat fatigues but police athletic uniforms of t-shirts and shorts. They had however been regularly patrolling the area where the ambush took place since they were deployed in Allacapan from Abra province in January.

This “statement of the facts” or “statement of the case” is based on media reports which cite mainly police sources. Further relevant facts and circumstances are certain to come up based on whatever available object, forensic, medico-legal, photographic, testimonial and other evidence. Without prejudice to this evidence being made available, it appears though that the key facts on which to apply the law in order to answer the possible violation question at hand have been basically established. So, we go now to the applicable law.

The Law on Landmines: International

The law on landmines as far as the Philippines is concerned has what we may consider **four components**, just like international humanitarian law (IHL) in general as far as the Philippines is concerned, **two international** components and **two national** components:

1. **Customary IHL** on landmines - in the nature of generally accepted principles of international law which are adopted as part of the law of the land
2. **Treaty IHL** on landmines - Landmine-related treaties ratified by and therefore binding on the Philippines
3. **National laws** implementing IHL and which deal with landmines
4. **Special agreements** on human rights and IHL, including on landmines, between the Philippine government (GRP before, GPH now) and rebel groups, like the National Democratic Front of the Philippines (NDFP) which represents the NPA.

An authoritative three-volume study published in 2005 by the International Committee on the Red Cross (ICRC) on Customary International Humanitarian Law has found **three specific customary IHL rules on landmines**:

Rule 81—When landmines are used, particular care must be taken to minimize their indiscriminate effects.

Rule 82 --- A party to the conflict using landmines must record their placement, as far as possible.

Rule 83— At the end of active hostilities, a party to the conflict which has used landmines must remove or otherwise render them harmless to civilians, or facilitate their removal.

These rules on the use of landmines are *premised on the type of landmine as being allowable or not banned*. But *customary IHL has itself not yet reached a rule on a banned type of landmine*. In other words, at the *customary IHL level*, landmines are allowable or legitimate weapons of war but their use is subject to these three rules - which may be said to be the minimum or “least common denominator” rules on landmine use. It goes without saying that the purpose of these rules is still the basic IHL purpose of civilian protection.

Treaty IHL on landmines as far as the Philippines is concerned involves **two IHL treaties** it has ratified, with their respective key norms, standards and undertakings:

1. The **1997 Anti-Personnel Mines Convention** (a.k.a. the “**Ottawa Treaty**”) -

— a **total ban or prohibition against victim-activated** (not command-detonated) **APMs**, i.e. a ban on their use, development, production, acquisition, stockpiling, retention and transfer under any circumstances; and

— an undertaking for the destruction of all such victim-activated APMs.

Note: the Ottawa Treaty itself does not use the qualifier “victim-activated” when it mentions APMs but that is the kind of APM subject of the treaty.

2. The **1996 Amended Protocol II on Mines, Booby-Traps and Other Devices** to the 1980 Conventional Weapons Convention —

— *a prohibition against directing all kinds of landmines and similar explosive devices on civilians* or civilian objects in all circumstances;

— a prohibition *against indiscriminate use* of these weapons;

— the taking of all feasible precautions, including effective advance warning, and protective measures when using these weapons, so as to protect civilians or exclude them from the effects of these weapons;

— the recording and retaining of information on, especially on the location of, these weapons; and

— the clearing, removing or destroying of these weapons without delay after the cessation of active hostilities

So, **it is clear in international law** that **only victim-activated anti-personnel mines (APMs) are banned** landmines, as provided by the above-said and oft-cited Ottawa Treaty which governs such landmines. **Command-detonated APMs and both victim-activated and command detonated anti-vehicle mines (AVMs) are not banned**, but only regulated or restricted as legitimate weapons of war. The regulation and restrictions are provided in the above-said 1996 Amended Protocol II and of course the aforesaid customary IHL rules on landmines.

The Law on Landmines: National

There is still no specific national law on landmines. The Philippine Campaign to Ban Landmines (PCBL) has been advocating a “**Philippines Landmines Bill**” since the 12th Congress (2001-04) but to no avail. This bill seeks to basically implement both the Ottawa Treaty and the 1996 Amended Protocol II as treaty obligations of the Philippines. It is about time that this long overdue law finally get passed in the coming 16th Congress (2013-16).

There is a new national law, however, that although not specifically referring to landmines, might be applicable to certain kinds of landmines. This new law is **R.A. No. 9851**, the “Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity” a.k.a. the “IHL Law” (since it was previously known as the “IHL Bill”). Among the “war crimes” defined and penalized in Sec. 4(c)(25)(iv) thereof is: “Employing means of warfare *which are prohibited under international law*, such as... Weapons, projectiles and materials and methods of

warfare which are of the nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict.” (underscoring supplied)

It is reasonable to interpret that quoted provision as **Philippine legal characterization of the use of victim-activated APMs**, which are totally banned by the Ottawa Treaty, as a **“war crime.”** R.A. No. 9851 thus **improves on the Ottawa Treaty** by not only banning victim-activated APMs but also treating their use as no less than a war crime. Of course, rebel groups like the NDFP, which place themselves outside the Philippine legal system, do not feel bound by national laws. It is different though when it comes to their special agreements with the government.

Special agreements between governments and rebel groups on IHL are actually sanctioned and encouraged by Common Article 3 of the four 1949 Geneva Conventions which have been the long-time main IHL treaties. Although such special agreements are strictly speaking not laws, as in statutes or legislative acts of Congress, still they may be likened to contracts which are treated in civil law as “the law between the parties.” The particular special agreement relevant to landmines is the 1998 GRP-NDFP **Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law** (CARHRIHL). Its relevant specific provision on landmines, under its Part III (Respect for Human Rights), Article 2, paragraph 15, reads fully as follows:

“This Agreement seeks to confront, remedy and prevent the most serious human rights violations in terms of civil and political rights, as well as to uphold, protect and promote the full scope of human rights and fundamental freedoms, including:

“15. The right not to be subjected to forced evacuations, food and other forms of economic blockades and indiscriminate bombings, shellings, strafing, gunfire and **the use of landmines.”** (boldface type supplied)

On the basis of this provision, the GPH asserts “that the use of landmines is prohibited under the CARHRIHL,” including their use against combatants. PCBL and this writer think otherwise, that the CARHRIHL does *not absolutely prohibit* the use of landmines. What is only prohibited under the quoted CARHRIHL provision is *the subjection of civilians or non-combatants to the use of landmines.*

In our view, the quoted CARHRIHL provision should be understood as referring to a right of the civilian population and civilians, not to a right of combatants of both sides. This is the clear context of par. 15 in its enumeration of actions, other than the use of landmines, that civilians should never be subjected to. But combatants are normally subject to say shellings, strafing, gunfire and even the use of landmines, and these are all legitimate acts of war as long as they conform to the rules of war. It would be absurd to exempt combatants from being subjected to such acts, including the use of landmines other than banned landmines.

This interpretation that par. 15 refers to civilians, not combatants, is reinforced by the similar provision under the CARHRIHL’s Part IV (Respect for International Humanitarian Law), Article 4, par. 4, which reads in full as follows: **“Civilian population and civilians** shall be treated as such and shall be **distinguished from combatants** and, together with their property, shall not be the object of attack. **They shall likewise be protected** against indiscriminate aerial bombardment, strafing, artillery fire, mortar fire, arson, bulldozing and other similar forms of destroying lives and property, **from the use of explosives as well as stockpiling near or in their midst**, and the use of chemical and biological weapons.” (boldface type supplied)

Actually, the CARHRIHL also makes a connection to relevant human rights and IHL treaties through its Part II, Article 4: “It is understood that the universally applicable *principles and standards* of

human rights and of international humanitarian law contemplated in this agreement *include those embodied in the instruments signed by the Philippines and deemed to be mutually applicable to and acceptable by both parties.*" (italics supplied)

Because both the GPH and the NDFP have made their respective unilateral declarations of adherence to the Ottawa Treaty, then its **key norm of a total ban on victim-activated anti-personnel mines (APMs) can be said to have also been incorporated by indirect reference into the CARHRIHL**. Because victim-activated APMs are totally banned by Ottawa Treaty which both the GPH and the NDFP adhere to, and its key norm can be said to have been incorporated into the CARHRIHL, then **even combatants, and not just civilians, have the right not to be subjected to the use of victim-activated APMs**. The right can be extended to all other types of landmines as far as civilians are concerned but not as far as combatants are concerned. **Combatants, in the natural course of war and under its current rules, can still be subjected to command-detonated APMs and to all types of anti-vehicle mines (AVMs).**

Was the law on landmines violated in the Allacapan Ambush?

The Office of the Presidential Adviser on the Peace Process (OPAPP) condemned the NPA's use of landmines in the Allacapan Ambush as a "gross violation of R.A. No. 9851... as well as the Ottawa Protocol." We did not come across any media report of the GPH or the PNP condemning the NPA use of landmines there as a violation of the CARHRIHL, unlike with other, earlier NPA landmining incidents. So, was the law on landmines, in its several forms, violated in the Allacapan Ambush?

Given that the NPA landmine used in the Allacapan Ambush was not only anti-vehicle but also command-detonated, we can outright eliminate the Ottawa Treaty as a term of reference because this covers only anti-personnel mines that are victim-activated. As for R.A. 9851, as discussed above, because of its reference to "Employing means of warfare which are *prohibited under international law*" as a "war crime," it also connects to the Ottawa Treaty which totally bans victim-activated APMs. Command-detonated APMs and both victim-activated and command detonated AVMs (like that used in the Allacapan Ambush) are *not yet similarly banned*. And so, R.A. 9851 can be eliminated as a term of reference in answering our question at hand.

Predictably, this is how NDFP Negotiating Panel Chairperson Luis Jalandoni views R.A. 9851: "The reference to the GPH Republic Act 9851, signed by the Gloria Arroyo regime on 11 December 2009, is not relevant. It does not bind the revolutionary movement and cannot supersede any provision of the Ottawa Treaty, which allows the use of command-detonated land mines." But it is not correct to say that "the Ottawa Treaty... allows the use of command-detonated land mines" - what is correct to say is that the Ottawa Treaty does not disallow command-detonated landmines, as in the first place this is *not the subject of the Ottawa Treaty*, its subject being only victim-activated APMs.

Since there appear to be no civilian casualties in the Allacapan Ambush that might indicate indiscriminate use of the NPA landmine or their failure to take all feasible precautions, and since there do not appear to be any other NPA landmine emplacements left behind because these were not removed by the retreating NPA unit, then there do not appear to be violations of the above-discussed customary IHL rules on landmines and of the 1996 Amended Protocol II which both govern the use of allowable landmines.

This leaves CARHRIHL as a possible term of reference for the question at hand. If you ask the GPH, they will say the NPA violated what they interpret as the CARHRIHL's absolute prohibition against the use of landmines, including against combatants. We think that there appears to be *no violation because no civilians were subjected to the use of landmines* which is to us the reasonable or correct interpretation of the relevant CARHRIHL provision.

Deputy presidential spokesperson Atty. Valte points to the ambushed policemen being in “athletic uniform,” not in combat fatigue, as they were on their way for a medical checkup (a police spokesperson added that they were not on patrol operations), *as if to say that they were not legitimate military targets for the NPA*. **This is no longer a landmines issue but a more basic IHL issue of whether or not the policemen were combatants** in the armed conflict between the GPH and the NDFP. In our view, those circumstances cited by Atty. Valte **do not change the essentially combatant character of the ambushed police SAF elements** as regular members of the armed forces (used as a generic term, not limited to the Armed Forces of the Philippines) of the GPH. These SAF elements have combat duties as the regular mobile force of the PNP often deployed for counter-insurgency (COIN) or internal security operations (ISO). As such, they can be said to be **legitimate military targets** of the NPA under IHL or the rules of war.

In the incident as reported, the ambushed SAF elements were well armed with assault rifles and some of them managed to defend themselves and fight back, presumably with their firearms. They had previously been regularly patrolling the area where the ambush took place since they were deployed in Allacapan last January. Patrol duties are considered direct participation in hostilities. In other words, they were not PNP personnel without combat duties. Their marked PNP vehicle which is presumably used for regularly patrolling the area is also a **legitimate military objective**.

Legally and Militarily Correct, But Not Necessarily So Politically and Morally

Having said all of the above, the NPA landmine ambush of police SAF elements in Allacapan last May 27 may have been legally (under IHL) and militarily correct but this is not necessarily so politically and morally. Indeed, *tactical actions on the ground have their political and strategic implications*. The NDFP’s Jalandoni says, “The use of command-detonated land mines deters enemy combatants from encroaching the territory of the people’s democratic government and harming the people with impunity.” The NPA may have won that Allacapan military engagement, nearly annihilating a 15-man enemy unit and gaining 12-15 firearms which may allow 12-15 new NPA recruits, while not suffering casualties of its own, but did it win or lose more hearts and minds of the people?

The NPA’s Danilo Ben Command (DBC) says that it had acted on behalf of the villagers who had asked for the withdrawal of the SAF unit. Really? As peace advocates elsewhere, particularly from as far as Negros, would say “Not in our name, please!” Can the villagers not be trusted enough or allowed to effectively wage their own campaign for the withdrawal of the SAF unit if that is really their desire. The DBC says the ambush was intended to compel the SAF to withdraw from Allacapan. Honestly, would such an ambush compel battle-tested special forces to withdraw? Wouldn’t such an ambush make them instead dig in and even get reinforcements – as the Philippine Army’s 21st Infantry Battalion has in fact already been deployed to help pursue the ambushers? In the end, it might be the NPA withdrawing from Allacapan to evade a military encirclement. And not only because of military pressure but also because of possible local community pressure due to a public backlash.

We have seen some public backlash in the cases of other NPA landmine incidents, notably those involving the “Samar 10” soldiers landmine ambush-killing on 14 December 2010 and the Maco, Compostela Valley landmine incident with civilian casualties on 13 February 2011. Witness now in Allacapan what Evelyn Pinated, mother of the slain SAF vehicle driver PO2 Elmark Rodney Pinated, understandably says: The “devils” took her son away, and she wants them crushed. “The (NPA) must stop these senseless killings. They are killing those who are serving our people,” she told reporters there. Elmark had married his girlfriend Grace only last October 8. She last talked to him over the

celphone on May 20, her birthday, when he greeted her.

Imagine how that human interest story is multiplied by the number of relatives, friends and acquaintances of those killed and maimed on all sides, including the NPA and civilians, and not just policemen and soldiers (like also the seven Marines killed in the most recent Abu Sayyaf ambush). Whichever side wins the war in the end, the social fabric would have been gravely torn apart (like a landmine blast does to a human body) and this would then become a drag to any reconstruction.

It will be recalled that during the dark years of the Marcos martial law dictatorship the NPA and/or its supporters used the vernacular term “demonyo” (devil), among others, to refer to their worst enemies, whether these were bad elements in the barrio, brutal soldiers-torturers, or deep penetration agents. How ironic (or karmic?) that this same term of non-endeartment is now being turned around/thrown back at the NPA. Also ironic is how the old NPA Maoist motto “Serve the People” is instead being applied to their adversaries in the uniformed services. Perhaps, the NPA should take pause and not simply dismiss this as a distraught grieving mother’s rantings. The DBC had to add insult to injury when it told the families of the slain policemen that “your relatives were instruments of the current [Aquino] administration.”

And that was part of DBC spokesperson Crispin Apolinario’s May 29 statement written in Filipino (translated by media) “send(ing) its apologies to the families who lost their loved ones in the engagement... We are saddened by the deaths, but this is part of our conflict...” Notwithstanding that it did not appear to violate IHL, including the law on the use of landmines, the DBC still saw it fit to apologize. What impelled this? Was it a sense that something was wrong somewhere? One does not normally apologize if no wrong was done.

It has been noted particularly by some Negros peace advocates (“N.P.A.” din if acronym-ized) that the NPA has lately been proffering apologies for such incidents, especially where civilians have been killed in the crossfire or otherwise of its intensified tactical offensives, like the La Castellana (Negros Occidental) Massacre or Incident of 27 January 2013 and the Mrs. Ruth Guingona convoy ambush in Alatagan, Misamis Oriental on 20 April 2013. Said one particularly indignant peace and human rights advocate, local columnist Benedicto Q. Sanchez of *Sun Star*-Bacolod: “Their magic formula of absolving themselves of criminal culpability is by way of apologies to the families of their victims, offer of indemnification and investigation of their ranks, and then castigating the military for failing to own up to its ‘blood debts’.” “Sorry” seems no longer to be the hardest word. But words are cheap.

To go back a bit more to law before we end, particularly to IHL, one of its fundamental principles is referred to as the **De Martens Clause**, what might be called a “fall back” principle, taken from the preamble of the 1907 Hague Convention IV on the laws and customs of war on land: “in cases not covered by the Regulations... the inhabitants and belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.” Note not only **civilized usages** and a **sense of humanity** but also the **public conscience** (thus, the bar of public opinion to some extent) as guides or “fall backs” in the absence of specific rules in situations of armed conflict. Incidentally, the Ottawa Treaty itself, in its prefatory clauses, credits the dictates of the global public conscience as an impetus for an international treaty totally banning victim-activated anti-personnel mines.

In the current situation of terminated peace talks and intensified armed conflict, as we said, it may be legally (under IHL) and militarily correct for the NPA to continue to use its command-detonated landmines but it should also **study well the impact of all these explosions on its political capital and moral ascendancy**. If the NDFP reaffirms, as it says it does, The Hague Joint

Declaration of 1992, particularly its paragraph 5.a. on “Specific measures of goodwill and confidence building to create a favorable climate for peace negotiations,” that it says it wants resumed, then **something like a moratorium or a calibrated reduction on the NPA use of command-detonated landmines might be reciprocated by something just as significant (say a moratorium or calibrated reduction on the AFP use of artillery fire and/or air strikes) on the GPH side** — both with a view to some forward movement in the peace process that both parties still avow commitment to.

But again, words are cheap. Concrete positive deeds would speak much louder. Hopefully louder than the landmine, artillery shell and aerial bomb explosions. Instead of an eye for an eye, **how about a moratorium on the use of one kind of explosive device in exchange for a moratorium on the use of another kind of explosive device?** We dare both sides to accept this challenge on a relatively “small matter” of weapons use – since they cannot seem to accept the bigger challenges of serious substantive peace talks and an accompanying negotiating climate-changing ceasefire.

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