

# PERSISTENT RED-TAGGING IN THE PHILIPPINES AS VIOLATION OF THE PRINCIPLE OF DISTINCTION IN INTERNATIONAL HUMANITARIAN LAW\*

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## ABSTRACT

Red-tagging by state forces is a strategy employed in the context of the longstanding conflict between the Philippine government and the Communist Party of the Philippines-New People's Army (CPP-NPA). As a result, left-leaning and dissenting individuals and groups—who take no active part in hostilities—become targets of attacks and acts of violence. This Article examines how the conflict between the Philippine government and the CPP-NPA may be classified as a Common Article 3 non-international armed conflict (“NIAC”) where international humanitarian law (“IHL”) finds application. By making the finding that Common Article 3 may apply in this context, the Article theorizes that red-tagging violates the principle of distinction in IHL through the targeting of civilians and the deliberate blurring of lines between combatants and civilians performing no combat functions. Finally, it proposes a turn to human rights law, civil remedies, and protective writs as a remedy for civilians being targeted through red-tagging.

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## INTRODUCTION

International humanitarian law (“IHL”) imposes as a fundamental duty on parties to a conflict that of distinguishing between the civilian population and combatants, and between civilian objects and military objectives at all times.<sup>1</sup> More commonly known as the principle of distinction, this doctrine is one of the pillars of the law on targeting. Its status as customary international law has been established.<sup>2</sup> The concept is also domesticated in Philippine municipal law.

The longstanding conflict between the Philippine government and the New People’s Army (NPA), the armed wing of the Communist Party of the Philippines (CPP), presents a context where the principles of IHL finds application, including the principle of distinction. To preface, the Philippines leads in Southeast Asia as having the most ratifications of treaties relating to IHL, including the Geneva Conventions and Additional Protocols I and II.<sup>3</sup>

In recent years, the United Nations identified “red-tagging” as a human rights issue in the Philippines.<sup>4</sup> In the 2020 report on the situation of human rights in the Philippines, red-tagging is identified as a decades-long practice that threatens fundamental rights.<sup>5</sup> Justice Marvic Mario Victor Leonen of the Supreme Court observed that the practice creates a “chilling effect in dissent[.]” making it “easy for military and paramilitary units to silence or cause untold human rights abuses.”<sup>6</sup>

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<sup>1</sup> The codification of the principle may be found in Articles 48, 51(2), and 52(2) of Additional Protocol I and Article 13(2) of Additional Protocol II.

<sup>2</sup> The study of the International Committee of the Red Cross (ICRC) on international humanitarian law (IHL) identifies the Principle of Distinction between Civilians and Combatants as a rule of customary IHL, stated as follows: “Rule 1. The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.” *available at* [https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1\\_rul\\_rule1](https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1_rul_rule1). [Hereinafter, “*Customary IHL*”].

<sup>3</sup> *Philippines: more protection for victims of international armed conflicts*, INTERNATIONAL COMMITTEE OF THE RED CROSS WEBSITE, *at* <https://www.icrc.org/en/doc/resources/documents/news-release/2012/philippines-news-2012-03-06.htm>

<sup>4</sup> U.N. High Commissioner for Human Rights, *Situation of human rights in the Philippines*, ¶ 49, U.N. Doc. A/HRC/44/22 (June 29, 2020), *available at* <https://www.ohchr.org/Documents/Countries/PH/Philippines-HRC44-AEV.pdf>.

<sup>5</sup> *Id.*

<sup>6</sup> *Zarate v. Aquino* [hereinafter “*Zarate*”], G.R. No. 220028, November 10, 2015, at 1 (Leonen, J., *dissenting*). This pinpoint citation refers to the copy of this dissenting opinion uploaded to the Supreme Court Website.

Red-tagging involves the labelling of left-leaning individuals or groups as communists or “front organizations” for armed movements.<sup>7</sup> It is a practice that has resulted in deaths, disappearances, and arrests of individuals who themselves are civilians not participating in hostilities,<sup>8</sup> as well as threats to destroy civilian infrastructures such as schools.<sup>9</sup> With evidence pointing to state forces engaging in red-tagging activities that expose civilians and civilian objects to attacks, there is a need to examine whether such acts potentially violate the principle of distinction in the conduct of hostilities.

The first part of the Article looks at the key points in the conflict between the Philippine government and the CPP-NPA-National Democratic Front (“NDF”) and the applicability of IHL. The second part fleshes out the principle of distinction in IHL and how it is possibly violated through acts of arbitrarily labelling civilians as communist rebels. By way of recommendation, the final part of the Article presents as viable tools the protective writs of *amparo* and *habeas data* for the protection of red-tagged civilians.

## I. THE COMMUNIST INSURGENCY IN THE PHILIPPINES AS NIAC

### A. Old scars, new wounds in the Philippine communist insurgency

Considered as the longest-running communist insurgency in Southeast Asia, the CPP and its armed wing, the NPA, have been in a protracted armed conflict with the Government of the Republic of the Philippines (“GRP”) since 1969.<sup>10</sup> Attempts at ending the conflict were launched at different points in time under various administrations, yet an end to the communist struggle remains to be elusive. Consequently, thousands

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<sup>7</sup> UN Human Rights Council, *Preliminary Note on the Visit of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, to the Philippines (12-21 February 2007)*, ¶ 8, U.N. Doc. A/HRC/4/20/Add.3 (Mar. 22, 2007), available at <https://www.refworld.org/docid/462390f62.html>.

<sup>8</sup> See generally INTERNATIONAL COMMISSION OF JURISTS, *DANGER IN DISSENT: COUNTERTERRORISM AND HUMAN RIGHTS IN THE PHILIPPINES (2022)*, available at [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>9</sup> See Niña Diño, *Dwindling numbers: Lumad schools continue to suffer closures, attacks during pandemic*, RAPPLER, Sept. 18, 2020, at <https://www.rappler.com/moveph/lumad-schools-continue-to-suffer-closures-attacks-coronavirus-pandemic/>.

<sup>10</sup> Renato Cruz De Castro, *The chronic threat of insurgent groups in the Philippines*, in *TERRORISM AND INSURGENCY IN ASIA: A CONTEMPORARY EXAMINATION OF TERRORIST AND SEPARATIST MOVEMENTS*, 147, 149 (Benjamin Schreer & Andrew T.H. Tan eds., 2019).

among the ranks of the CPP-NPA became casualties of the armed conflict against the government.<sup>11</sup>

The CPP, an offshoot of the Partido Komunista ng Pilipinas (“PKP”), carries with it a Maoist ideology and is still led by its founder Jose Maria Sison, who is currently in exile. The origins of the NPA can be traced to Sison’s meeting with Bernabe Buscayno in 1968, then a young *Huk* commander.<sup>12</sup> From then on, the NPA began recruiting young people from the urban centres to go to the countryside.<sup>13</sup>

In 1973, the NDF was established to “refocus on the strategy of a ‘united front’” and to organize and build political alliances.<sup>14</sup> Now stylized as the National Democratic Front of the Philippines (NDFP), the organization describes itself as the “revolutionary united front organization of the Filipino people fighting for national freedom and for the democratic rights of the people.”<sup>15</sup> Structurally, the CPP and NPA are members of the NDFP.<sup>16</sup> The name “CPP-NPA-NDF” has been used by the Philippine government to “refer to the whole entity formed by the interconnected CPP-NPA and NDF.”<sup>17</sup>

The CPP-NPA-NDF were among the groups that heavily resisted the imposition and implementation of martial law under the regime of President Ferdinand Marcos, Sr. from 1972 to 1986. After the ouster of Marcos from power, the newly installed government initiated peace talks with the CPP and NPA. Soon enough, the peace talks broke down as Marcos’s successor, President Corazon Aquino, launched an all-out offensive against the NPA.<sup>18</sup>

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<sup>11</sup> Prashanth Parameswaran, *What’s Next for the Philippines Communist Insurgency Under Duterte?*, DIPLOMAT, Mar. 31, 2021, at <https://thediplomat.com/2020/03/whats-next-for-the-philippines-communist-insurgency-under-duterte/>.

<sup>12</sup> PATRICIO ABINALES & DONNA AMOROSO, STATE AND SOCIETY IN THE PHILIPPINES, 202 (2005); Patricio Abinales, *Jose Maria Sison and the Philippine revolution: A critique of an interface*, 8 KASARINLAN 7, 24 (1992).

<sup>13</sup> *Id.*

<sup>14</sup> INTERNATIONAL CRISIS GROUP, THE COMMUNIST INSURGENCY IN THE PHILIPPINES: TACTICS AND TALKS 5 (2011).

<sup>15</sup> *About the NDF*, NATIONAL DEMOCRATIC FRONT OF THE PHILIPPINES WEBSITE, at <https://liberation.ndfp.org/about-ndfp-2/>.

<sup>16</sup> *Member Organizations*, NATIONAL DEMOCRATIC FRONT OF THE PHILIPPINES WEBSITE, at <https://liberation.ndfp.org/member-orgs/>.

<sup>17</sup> Stanford University, *Mapping Militant Organizations: Communist Party of the Philippines—New Peoples’ Army*, at [https://stanford.edu/group/mappingmilitants/cgi-bin/groups/print\\_view/149](https://stanford.edu/group/mappingmilitants/cgi-bin/groups/print_view/149) (last modified Aug. 24, 2015).

<sup>18</sup> RAYMUNDO B. FERRER & RANDOLPH G. CABANGBANG, *Non-International Armed Conflicts in the Philippines*, in NON-INTERNATIONAL ARMED CONFLICTS IN THE TWENTY-FIRST CENTURY, 263, 266 (Watkin Kenneth & Andrew J. Norris eds., 2012).

The CPP-NPA itself has been accused of committing atrocities, including the numerous “purges” and extrajudicial killings among its ranks.<sup>19</sup>

To this date, no comprehensive peace agreement has been signed between the Philippine government and the CPP-NPA-NDF. In his first State of the Nation Address in 2016, President Rodrigo Duterte addressed the CPP-NPA-NDF: “That is why I reach out to all of you today [...] to the CPP/NPA/NDF, let us end these decades of ambushes and skirmishes. We are going nowhere, and it is getting bloodier by the day.”<sup>20</sup> A month following this pronouncement, President Duterte declared a unilateral ceasefire with the communist rebels.

However, less than a year after declaring the unilateral ceasefire with the CPP-NPA, President Duterte lifted such declaration, stating that “[p]eace with the communists cannot be achieved in our generation.”<sup>21</sup> The deterioration of the relations between President Duterte’s administration and the CPP-NPA-NDF reached its boiling point when the CPP-NPA was declared a terrorist organization by the government.<sup>22</sup> Following the recommendation for proscription, President Duterte continued his public verbal attacks against the communist groups. In one instance, the president ordered soldiers to shoot women communist rebels in the vagina.<sup>23</sup>

Decades of hostilities between the GRP and the CPP-NPA have affected many people, especially those living in the countryside where hostilities persist. On the one hand, civilians and civilian industries—especially those living away from the cities—are affected as the CPP-NPA continues to employ underhanded tactics such as targeting non-governmental

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<sup>19</sup> See Philip Alston (Special Rapporteur), Rep. on Extrajudicial, Summary or Arbitrary Executions, U.N. Doc. A/HRC/11/2/Add.8 (Apr. 29, 2009).

<sup>20</sup> Rodrigo Roa Duterte, *First State of the Nation Address, July 25, 2016*, OFFICIAL GAZETTE, available at <https://www.officialgazette.gov.ph/2016/07/25/rodrigo-roa-duterte-first-state-of-the-nation-address-july-25-2016/>

<sup>21</sup> *From Presidential Spokesperson Ernie Abella on GRP lifting unilateral ceasefire agreement with CPP-NPA, 04 Feb. 2017*, PRESIDENTIAL COMMUNICATIONS OPERATIONS OFFICE WEBSITE, available at <https://pcoo.gov.ph/from-presidential-spokesperson-ernie-abella-on-grp-lifting-unilateral-cease-fire-agreement-with-cpp-npa-04-feb-2017/>.

<sup>22</sup> *Duterte declares CPP-NPA a terrorist group*, PRESIDENTIAL COMMUNICATIONS OPERATIONS OFFICE WEBSITE, available at [https://pcoo.gov.ph/news\\_releases/duterte-declares-cpp-npa-terrorist-group/](https://pcoo.gov.ph/news_releases/duterte-declares-cpp-npa-terrorist-group/).

<sup>23</sup> Hannah Ellis-Petersen, *Philippines: Rodrigo Duterte orders soldiers to shoot female rebels ‘in the vagina’*, GUARDIAN, Feb. 13, 2018, at <https://www.theguardian.com/world/2018/feb/13/philippines-rodrigo-duterte-orders-soldiers-to-shoot-female-rebels-in-the-vagina>.

assets in order to shore up its resources.<sup>24</sup> On the other, the counterinsurgency operations of the Philippine government's armed forces have resulted in numerous human rights violations, by the accounts of observers.<sup>25</sup>

### **B. Red-tagging as terrorist-tagging: implication of the Anti-Terror Law of 2020**

In recent times, the Philippine government has employed the name "Communist Terrorist Groups" ("CTG") to describe the CPP-NPA.<sup>26</sup> This shift in nomenclature highlights the characterization of the CPP-NPA as a terrorist organization which bears importance in the context of Republic Act No. 11479, or the Anti-Terrorism Act of 2020 ("ATA of 2020"), imposing hefty penalties for various acts of terrorism.

During the oral arguments on the constitutionality of the ATA of 2020 before the Supreme Court of the Philippines, National Security Adviser Hermogenes Esperon presented an unverified and unauthenticated video that red-tagged various progressive groups as communist-terrorists affiliated with the CPP-NPA-NDF.<sup>27</sup>

Notably, the Supreme Court of the Philippines granted legal standing to petitioners who are constant targets of red-tagging to challenge the ATA of 2020 on the basis of credible threat of injury.<sup>28</sup> However, with the highly complex decision of the Supreme Court in the petitions docketed as *Calleja v. Executive Secretary*, much of the ATA of 2020 remained intact, including the power of the State to designate who are terrorists.

In practice, the ATA of 2020 has already been utilized to designate the CPP-NPA-NDF as a terrorist organization and its central committee members as terrorists under said law.<sup>29</sup> The legal consequences of such designation include permissible surveillance<sup>30</sup> and freezing of assets.<sup>31</sup> Persons who are red-tagged are at greater risk of being designated, even if the

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<sup>24</sup> See Nathan Gilbert Quimpo, 'Revolutionary Taxation' and the Logistical and Strategic Dilemmas of the Maoist Insurgency in the Philippines, 1 J. ASIAN SECURITY & INT'L AFF. 263 (2014).

<sup>25</sup> See Jennifer C. Franco, *Again, They're Killing Peasants in the Philippines: Lawlessness, Murder, and Impunity*, 39 CRITICAL ASIAN STUD. 315 (2007).

<sup>26</sup> See for instance, Dep't of Soc. Wel. & Dev. Mem. Circ. No. 003-20 (2020) or the Revised Guidelines in the Implementation of Executive Order No. 70, Series of 2018.

<sup>27</sup> *Calleja v. Exec. Sec'y*, G.R. No. 252578, Dec. 7, 2021.

<sup>28</sup> *Id.*

<sup>29</sup> See ATC Res. Nos. 12 (2020), 17 (2021), 21 (2021), and 28 (2022).

<sup>30</sup> Rep. Act No. 11479 (2020), § 16.

<sup>31</sup> § 36.

designation is based on erroneous and misleading information and/or arbitrary acts of government agents. Moreover, under the counterterrorism regime of the ATA of 2020, certain acts of dissension run the risk of being construed as inciting to terrorism<sup>32</sup> or even preparatory activities to terrorism.<sup>33</sup>

The ATA of 2020, therefore, amplifies the danger of the practice of red-tagging.

### **C. The application of IHL in the communist insurgency in the Philippines**

With peace between the GRP and the CPP-NPA still beyond reach, the communist insurgency persists as a non-international armed conflict (“NIAC”) under the framework of IHL. The conflict between the Philippine government and the CPP-NPA meets the intensity and organization requirement, which makes it classifiable as a NIAC.

A conflict may be classifiable as a NIAC if it comes under Common Article 3 of the Geneva Conventions of 1949 (Common Article 3) or Article 1 of Additional Protocol II (“AP II”). AP II presents the more restrictive definition of what constitutes a NIAC than Common Article 3.<sup>34</sup> Article 1 of AP II is explicit that it “develops and supplements” Common Article 3 “without modifying its existing conditions of applications.”

Guidance can be found in the interlocutory decision in *Prosecutor v. Tadić*<sup>35</sup> of the International Criminal Tribunal for the Former Yugoslavia (ICTY) as to what counts as a NIAC under Common Article 3:

[W]e find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is

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<sup>32</sup> § 9.

<sup>33</sup> § 6.

<sup>34</sup> International Committee of the Red Cross, *How is the term “Armed Conflict” Defined in International Humanitarian Law?* (March 2008), at <https://www.icrc.org/en/doc/resources/documents/article/other/armed-conflict-article-170308.htm>

<sup>35</sup> *Prosecutor v. Tadić*, Case No. IT-94-1, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction (Int’l. Crim. Trib. for the Former Yugoslavia Oct. 2, 1995)

reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.<sup>36</sup>

The test set out in *Tadić* has been consistently applied in the ICTY. In sum, the assessment of two criteria considered in classifying a conflict under Common Article 3 hinges on: “(i) the intensity of the conflict and (ii) the organisation of the parties.”<sup>37</sup>

*Prosecutor v. Haradinaj*<sup>38</sup> describes the indicative factors relevant to examining the criteria of “intensity”:

Trial Chambers have relied on indicative factors relevant for assessing the “intensity” criterion, none of which are, in themselves, essential to establish that the criterion is satisfied. These indicative factors include the number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and calibre of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones. The involvement of the UN Security Council may also be a reflection of the intensity of a conflict.<sup>39</sup>

The conflict between the Philippine government’s armed forces and the CPP-NPA satisfies the intensity requirement. Hostilities are approaching its sixth decade, and has “outlasted martial law and four democratically elected governments.”<sup>40</sup> Government reports as of late 2021 indicate that the Philippine Army has recovered from the NPA high-powered firearms and military equipment such as grenade launchers and machine guns. Hundreds of NPA troops have also been reported by the government as “neutralized” during clashes in “four regions, 12 provinces, 72 municipalities, and 1,681 barangays (local villages)” in the island of Mindanao alone.<sup>41</sup>

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<sup>36</sup> *Id.* at ¶ 70.

<sup>37</sup> *Prosecutor v. Fatmir Limaj*, Case No. IY-03-66-T, Judgment, ¶ 84 (Int’l. Crim. Trib. for the Former Yugoslavia Nov. 30, 2005).

<sup>38</sup> *Prosecutor v. Haradinaj* [hereinafter “*Haradinaj*”], Case No. IT-04-84-T, Judgment of Trial Chamber I, (Int’l. Crim. Trib. for the Former Yugoslavia Apr. 3, 2008).

<sup>39</sup> *Id.* at ¶ 49.

<sup>40</sup> International Crisis Group, *supra* note 14, at 29.

<sup>41</sup> Richelyn Gubalani, *Troops expand outreach to counter NPA influence*, PHILIPPINE NEWS AGENCY, Nov. 17, 2021, at <https://www.pna.gov.ph/articles/1160086>.



*Hardinaj* also includes the indicative factors relevant to “organization:”

State governmental authorities have been presumed to dispose of armed forces that satisfy this criterion. As for armed groups, Trial Chambers have relied on several indicative factors, none of which are, in themselves, essential to establish whether the “organization” criterion is fulfilled. Such indicative factors include the existence of a command structure and disciplinary rules and mechanisms within the group; the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits and military training; its ability to plan, coordinate and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and use military tactics; and its ability to speak with one voice and negotiate and conclude agreements such as cease-fire or peace accords.<sup>42</sup>

The CPP-NPA has controlled territory at various points in time through “shadow governments” operating in barangays or local villages.<sup>43</sup> Through barangay revolutionary councils or “political leadership cadre formally affiliated with the CPP party branch,” a form of political and military organization is able to influence local villages.<sup>44</sup> Cadres are leading members of the CPP, leading its “revolutionary work,” which includes NPA operations.<sup>45</sup> In terms of recruitment, the Philippine government—through the National Task Force to End Local Communist Armed Conflict (NTF-ELCAC)—insists that recruitment to the CPP-NPA-NDF continues.<sup>46</sup>

Another relevant indicator with respect to *organization* is that there have been previous agreements between the Philippine government and the CPP-NPA with respect to the enforcement of IHL. Signed in 1998, the Comprehensive Agreement for Respect for Human Rights and International Humanitarian Law (“CARHRIHL”) is the key instrument containing the distinct duties and responsibilities of the Philippine government and the CPP-

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<sup>42</sup> *Hardinaj*, ¶ 60.

<sup>43</sup> Michael A. Rubin, *Rebel Territorial Control and Civilian Collective Action in Civil War: Evidence from the Communist Insurgency in the Philippines*, 64 J. CONFLICT RESOL., 459, 468 (2019).

<sup>44</sup> *Id.* at 469.

<sup>45</sup> Paz Verdades M. Santos, *The Communist Front: Protracted People’s War and Counter-insurgency in the Philippines (Overview)*, in PRIMED AND PURPOSEFUL: ARMED GROUPS AND HUMAN SECURITY EFFORTS IN THE PHILIPPINES, 17, 39 (Diana Rodriguez, ed., 2010).

<sup>46</sup> Lade Jean Kabagani, *Ex-rebel bared how CPP-NPA-NDF ‘tentacles’ work*, PHIL. NEWS AGENCY, July 6, 2021, at <https://www.pna.gov.ph/articles/1146171>.

NPA-NDF.<sup>47</sup> Throughout the document, references are made to principles and doctrines of IHL as found in the Geneva Conventions and its Additional Protocols, and to international human rights law. As a legal instrument, CARHRIHL eludes traditional legal classification. It cannot be categorized as a treaty, for it does not meet the basic definition under the Vienna Convention on the Law of Treaties that treaties must be agreements between states.<sup>48</sup> Instead, the CARHRIHL is a product of political negotiations between parties to an armed conflict.

Thus, satisfying the “intensity” and “organization” elements, the conflict between the Philippine government and the CPP-NPA merits the application of Common Article 3, including the protections of persons taking no active part in the hostilities. Parenthetically, the application of Common Article 3 to the communist insurgency in the Philippines has been noted in the concurring opinion of Justice Leonen in *Ocampo v. Abando*.<sup>49</sup>

## II. BREACHING THE PRINCIPLE OF DISTINCTION

### A. The treatment of protected persons under Common Article 3

Having discussed the applicability of IHL in the conflict in the Philippines between the government and the CPP-NPA, the actual implementation of IHL rules and doctrines can now be examined. IHL, as a field of substantive law, mostly finds application in times of conflict, even when other rules such as international human right treaties are applicable.<sup>50</sup>

Among the many rules that may be found in the body of IHL are the key principles on the law of targeting. In IHL, only military objectives—consisting of both persons and objects—may be the lawful object of attacks.<sup>51</sup> Attacks must not be directed against civilians.<sup>52</sup> Additionally, international armed conflicts (“IACs”) and NIACs “distinguish essentially the same

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<sup>47</sup>Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law between the Government of the Republic of the Philippines and the National Democratic Front of the Philippines, pmbl., Mar. 16, 1998.

<sup>48</sup> Roselle C. Tenefrancia, *A Breed of Its Own: A Legal Characterization of the Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law (CARHRIHL)*, 4 ASIA-PACIFIC Y.B. INT’L HUMANITARIAN LAW 282, 292 (2008-2011).

<sup>49</sup> *Ocampo v. Abando*, G.R. No. 176830, 715 SCRA 673, 719, Feb. 11, 2014 (Leonen, J., concurring).

<sup>50</sup> Christopher Greenwood, *Historical Development and Legal Basis*, in THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS, 1, 13 (Dieter Fleck ed., 2008).

<sup>51</sup> IAN HENDERSON, THE CONTEMPORARY LAW OF TARGETING 43 (2009).

<sup>52</sup> *Customary IHL*, Rule 1.

categories of persons.” The class of protected persons includes peaceful civilians.<sup>53</sup>

In NIACs that are classifiable as Common Article 3 conflicts, protection is afforded “to all persons ‘taking no active part in the hostilities’ against arbitrary exercise of power by the parties to the conflict including violence to life and person, murder and extra-judicial execution.”<sup>54</sup> Common Article 3, by its wording, presupposes “a concept of civilian comprising individuals ‘who do not bear arms’ on behalf of a party to the conflict.”<sup>55</sup> To this end, civilians being a class of protected persons finds anchor in Common Article 3. In applying the principle of distinction in NIACs falling under Common Article 3, the class of protected persons the provision implies must not then be the object of attacks.

## **B. Support in other areas of substantive law**

Indeed, the principle of distinction has already attained the status of a *jus cogens* norm under IHL.<sup>56</sup> With its status as customary law, the principle of distinction is thus included in the body of “generally accepted principles of international law,” which is part of the Philippines’ law of the land.<sup>57</sup>

Violation of the principle of distinction is also punishable as a war crime under the regime of the International Criminal Court (ICC). Article 8(c) of the Rome Statute of the ICC penalizes “serious violations of article 3 common to the four Geneva Conventions of 12 August 1949,” including committing acts of “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture” against persons taking no active parts in the hostilities.

While the Rome Statute of the ICC provides a framework for the international prosecution of war crimes resulting from a violation of Article 8(c), this provision cannot apply to the Philippines as it is no longer a party to

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<sup>53</sup> Nils Melzer, *The Principle of Distinction Between Civilians and Combatants*, in THE OXFORD HANDBOOK OF INTERNATIONAL LAW IN ARMED CONFLICT 296, 309 (Andrew Clapham & Paola Gaeta, eds., 2014).

<sup>54</sup> *Id.* at 308.

<sup>55</sup> INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW, 28 (2009). [Hereinafter “ICRC Interpretive Guidance.”]

<sup>56</sup> Stefan Oeter, *Methods and Means of Combat*, in THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS, 119, 189 (Dieter Fleck ed., 2008).

<sup>57</sup> CONST. art. II, § 2.

this treaty by virtue of the withdrawal on March 17, 2018.<sup>58</sup> However, relevant provisions of the Rome Statute have been domesticated into municipal law through the enactment of Republic Act (R.A.) No. 9851, or the *Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity*. Specifically, Section 4(b) of R.A. No. 9851 reproduces Article 8(c) of the Rome Statute. Section 4(c) likewise punishes “[o]ther serious violations of the laws and customs applicable in armed conflict, within the established framework of international law” including “intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities.” Thus, even granting the effects of the Philippines’ withdrawal from the ICC, such acts that violate the principle of distinction by targeting or committing violence against persons taking no active part in hostilities are still punishable on Philippine soil.

In sum, the principle of distinction and its prohibition on targeting persons taking no active part in hostilities is recognized and enforceable domestically in the Philippines in two prongs. First, the Philippines recognizes customary law as part of the law of the land through its Constitution’s incorporation clause.<sup>59</sup> As the principle of distinction forms part of customary IHL, it can be said that it is deemed incorporated in Philippine law. Second, R.A. No. 9851 penalizes acts that target persons taking no active part in hostilities. It is against this context that civilians and civilian objects ought to be granted protection from acts that make them vulnerable to attack. Their status as protected persons and objects must be mandatorily observed under IHL, as it is applied in the conflict between the Philippine government and the CPP-NPA.

There is literature, which observes that the “distinction between participation to the war effort or mere allegiance to a party to the conflict, as opposed to direct participation in hostilities” can be “very slippery.”<sup>60</sup> The relevance of the principle of distinction arises in discussing when perceived sympathizers, or those who share ideological similarities with the CPP-NPA,

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<sup>58</sup> International Criminal Court, *ICC Statement on The Philippines’ notice of withdrawal: State participation in Rome Statute system essential to international rule of law*, available at <https://www.icc-cpi.int/news/icc-statement-philippines-notice-withdrawal-state-participation-rome-statute-system-essential>.

<sup>59</sup> See *Poe v. COMELEC*, G.R. No. 221697, 786 SCRA 1, 144 Mar. 8, 2016. “On the other hand, generally accepted principles of international law, by virtue of the incorporation clause of the Constitution, form part of the laws of the land even if they do not derive from treaty obligations. Generally accepted principles of international law include international custom as evidence of a general practice accepted as law, and general principles of law recognized by civilized nations.”

<sup>60</sup> Camille Marquis Bissonnette, *The Definition of Civilians in Non-International Armed Conflicts*, 7 J. INT’L. HUMANITARIAN LEG. STUD. 129, 144 (2016).

lose their protections, and thus can be the legitimate target of attacks. The discussion becomes more complex if one involves the “revolving door” problem of having persons directly participating in hostilities return to civilian life for a prolonged period of time, with the possibility of re-engaging in hostilities. Customary IHL points to a resolution: In case of doubt, civilian status must be presumed.<sup>61</sup>

These observations notwithstanding, the principle of distinction should remain to be in force as a matter of law. This principle, already demonstrated as applicable internationally and in municipal law, cannot be overridden by conceptual strain. It is for this reason that acts from state forces that breach the principle of distinction may be examined as violations of IHL. NIACs are often asymmetrical, with the state’s armed forces enjoying technical and tactical superiority.<sup>62</sup>

### **C. Red-tagging as violation of the principle of distinction and the law of targeting**

In its essence, red-tagging within the context of the Philippines is the act of labelling individuals or groups as communists or terrorists with purported affiliation to CPP-NPA-NDF. As red-tagging serves to attach the status of being a communist rebel to an individual, civilians who are red-tagged are almost inevitably placed in the crosshairs of an attack. Intentionally targeting in this manner civilians and civilian groups taking no active part in the hostilities may constitute a violation of the principle of distinction.

To an extent, red-tagging may be comparable to so-called “signature strikes” through drone warfare in other forms of conflict, in that persons who bear certain signatures or “defining characteristics associated with terrorist activity” are targeted.<sup>63</sup> Signature strikes are heavily based on “behavioural profiling” and depends on surveillance of patterns of social life.<sup>64</sup> In combat, there are “distinct signatures” that must be established to determine the

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<sup>61</sup> *Customary IHL*, Rule 10: “In the light of the foregoing, it is clear that, in case of doubt, a careful assessment has to be made under the conditions and restraints governing a particular situation as to whether there are sufficient indications to warrant an attack. It cannot automatically be assumed that any object that appears dubious may be subject to lawful attack.”

<sup>62</sup> Trevor A. Keck, *Not All Civilians Are Created Equal: The Principle of Distinction, The Question of Direct Participation in Hostilities and Evolving Restraints on the Use of Force in Warfare*, in 211 *MILITARY L. REV.* 115 (2012).

<sup>63</sup> Kevin Jon Heller, ‘One Hell of a Killing Machine’: *Signature Strikes and International Law*, 11 *J. INT’L. CRIM. JUST.*, 89, 90 (2013).

<sup>64</sup> Christopher Coker, *Targeting in Context* in *TARGETING: THE CHALLENGES OF MODERN WARFARE*, 13 (Paul A.L. Ducheine et al. eds., 2016).

legality of an attack.<sup>65</sup> On the other hand, there are also reports of signature strikes upon civilians who do not directly participate in hostilities, based on legally inadequate signatures such as *conspiring with known militants*.<sup>66</sup> This type of attack is a violation of IHL.

An assessment of legality under IHL is merited in the case of red-tagging, where having left-leaning beliefs and delivering political dissent are automatically equated to membership in so-called communist terrorist groups. For while red-tagging might not immediately nor ultimately result in a violent attack, there is already a violation of the law of targeting. After all, the law of targeting “covers the whole targeting process: the selection of targets, their prioritization, planning, execution, and post-attack assessment.”<sup>67</sup> The principle of distinction is its foundation.<sup>68</sup> Thus, even at the level of target selection, red-tagging civilians who do not perform continuous combat functions is not legally justifiable.

There are various examples of state-sanctioned red-tagging done out in the open. In November 2019, for instance, a deputy chief of staff of the Armed Forces of the Philippines (AFP) came before Congress with a list of organizations allegedly financing and supporting communist terrorist groups.<sup>69</sup> In 2018, the Department of Justice (DOJ) filed a proscription case under the Human Security Act, containing a list of over 600 names to be declared as terrorists, including CPP founder Sison.<sup>70</sup> Individuals on the list also included former lawmakers, a United Nations special rapporteur, and other human rights defenders and indigenous leaders.<sup>71</sup>

As a threat to the civilian population, the deadly consequence of cases of red-tagging in the Philippines is not mere conjecture. Human rights activist Zara Alvarez, whose name was originally included in the DOJ list, was brutally killed in August 2020.<sup>72</sup> Another human rights defender, Honey Mae Suazo,

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<sup>65</sup> Heller, *supra* note 63, at 94.

<sup>66</sup> *Id.*

<sup>67</sup> Nicholas Tsagourias, *Targeting in International Humanitarian Law*, OXFORD BIBLIOGRAPHIES, available at <https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0142.xml>.

<sup>68</sup> Michael N. Schmitt & Eric Widmar, *The Law of Targeting*, in TARGETING: THE CHALLENGES OF MODERN WARFARE 124 (Paul A.L. Ducheine et al. eds., 2016).

<sup>69</sup> See H. Comm. Daily Bull. 33, 18<sup>th</sup> Cong., 1<sup>st</sup> Sess., 12 (2019).

<sup>70</sup> Carmela Fonbuena, *PH seeks terrorist tag for Joma Sison, 648 others*, RAPPLER, at <https://www.rappler.com/nation/197764-philippines-terrorist-tag-communist-rebels/>.

<sup>71</sup> Christopher Loyd Caliwan, *DOJ to pursue petition tagging CPP, NPA as terrorist groups*, PHILIPPINE NEWS AGENCY, at <https://www.pna.gov.ph/articles/1040100>.

<sup>72</sup> Lian Buan, *Human rights activist shot dead in Bacolod City*, RAPPLER, at <https://www.rappler.com/nation/activist-zara-alvarez-shot-dead-august-17-2020>.

formerly a member of the group Karapatan, had gone missing since 2019. Prior to her disappearance, she was linked by Brig. Gen. Antonio Parlade of the AFP to the CPP-NPA.<sup>73</sup> Aside from red-tagging individuals, President Duterte also identified *Lumad* (indigenous peoples) schools to be instrumental in the teaching of subversive and communist ideas to children and has threatened to bomb them.<sup>74</sup>

President Duterte established, through Executive Order No. 70, series of 2018, the NTF-ELCAC as part of the government's "whole of nation approach" against the communist insurgency. On social media, the online accounts of NTF-ELCAC have engaged in the red-tagging of individuals and groups. Such posts have been shared by the accounts of other government agencies.<sup>75</sup> A social media account of the NTF-ELCAC also categorically identified various organizations as "established by the CPP-NPA-NDF disguising themselves."<sup>76</sup> It appears then that the government's primary task force relating to the communist insurgency has in its menu of strategies the linking of civilians to communist rebels.

The AFP and the Philippine National Police (PNP) have similarly engaged in online practices that would count as red-tagging. For instance, Kabataan Party-list Representative Sarah Elago came before the National Bureau of Investigation to report AFP and PNP social media pages red-tagging her and her party.<sup>77</sup> Kabataan Party-list is part of the progressive Makabayan bloc in Congress, whose members have historically been linked to the CPP-NPA-NDF as front organizations.<sup>78</sup>

To reiterate, the principle of distinction is enforceable and operates in the Philippines as part of customary IHL and IHL principles domesticated

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<sup>73</sup> Mart Sambalud, "Rights group calls for surfacing of former spokesperson", INQUIRER.NET, at <https://newsinfo.inquirer.net/1190505/rights-group-calls-for-surfacing-of-former-spokesperson>.

<sup>74</sup> Duterte threatens to bomb lumad schools, PHILSTAR.COM, at <https://www.philstar.com/headlines/2017/07/25/1721634/duterte-threatens-bomb-lumad-schools>.

<sup>75</sup> Pauline Macaraeg, *Gov't platforms being used to attack, red-tag media*, RAPPLER, at <https://www.rappler.com/newsbreak/investigative/government-platforms-being-used-attack-red-tag-media>.

<sup>76</sup> See NTF-ELCAC (@ntfelcac), TWITTER (May 29, 2020, 11:37 PM), <https://twitter.com/ntfelcac/status/1266393289432813568>.

<sup>77</sup> Nikka G. Valenzuela, *Youth rep files complaint on Red-tagging, threats*, INQUIRER.NET, at <https://newsinfo.inquirer.net/1308005/youth-rep-files-complaint-on-red-tagging-threats>.

<sup>78</sup> Gabriel Pabico Lalu, *Makabayan insists: We're not CPP-NPA members, we don't recruit fighters*, INQUIRER.NET, at <https://newsinfo.inquirer.net/1365422/makabayan-insists-were-not-cpp-npa-members-we-dont-recruit-fighters>.

in Philippine law. Red-tagging as part of the methods employed by the state armed forces conflates continuous combat function with, at best, ideological affinity with the CPP-NPA-NDF. It also flips the presumption of civilian status without any basis. Red-tagging may then be characterized as a violation of the principle of distinction.

In the cases reported in mainstream media, it becomes apparent that the subjects of red-tagging are civilians who espouse progressive views. The *Interpretive Guidance* of the International Committee of the Red Cross (ICRC) suggests that it is crucial to make a distinction between the organized armed group of a non-state party to a conflict from “supportive segments” of the civilian population.<sup>79</sup> It must be noted, though, that the ICRC study’s key features “have proven highly controversial.”<sup>80</sup> Nevertheless, its articulation of continuous combat function is a useful descriptive tool—as opposed to having a strict legal definition—that describes the activities of belligerents in a NIAC.

Moreover, espousing similar ideological leanings, which may include doing propaganda work, for instance, still does not strip such persons of protected status. Thus, persons who “may accompany organized armed groups and provide substantial support to a party to the conflict” do not assume continuous combat function for the purposes of applying the principle of distinction.<sup>81</sup> Even assuming that a link exists between above-ground organizations and the non-state armed group, they cannot be made legitimate targets if they only perform political or humanitarian—as opposed to combat—functions.

Furthermore, justification by the Philippine government of red-tagging on the basis of the alleged front organizations’ recruitment of minors to the armed struggle<sup>82</sup> is contrary to IHL. First, there is already a penal statute available in domestic law that provides for, among others, the punishment and prosecution of recruitment of children in situations of armed conflict.<sup>83</sup> More importantly, as articulated by the ICTY in *Prosecutor v. Kupreškić*, the *tu quoque* defence justifying retaliatory action on the civilian population does not

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<sup>79</sup> ICRC *Interpretive Guidance*, *supra* note 55, at 32.

<sup>80</sup> Michael Schmitt, *Deconstructing direct participation in hostilities: the constitutive elements*, 42 N.Y.U. J. INT’L L. & POL. 697, 698 (2010).

<sup>81</sup> ICRC *Interpretive Guidance*, *supra* note 55, at 35.

<sup>82</sup> Aaron Recuenco, *Gapay names UP, PUP as among the schools with NPA recruitment*, MANILA BULLETIN, available at <https://mb.com.ph/2020/09/23/gapay-names-up-pup-as-among-the-schools-with-npa-recruitment/>.

<sup>83</sup> See Rep. Act No. 11188 (2018), or the Special Protection of Children in Situations of Armed Conflict Act.



apply to situations of armed conflict owing to the non-derogable character of IHL.<sup>84</sup> There is simply no military necessity to justify the targeting of members of the civilian population who, at best, are ostensibly left-leaning or simply expressing dissent.

While it may be stated that NIACs present a more difficult field of application for the principle of distinction, the factual milieu is clear: Civilians are the ones being red-tagged, not individuals who perform continuous combat functions. Civilians, because of the very fact of red-tagging, become more vulnerable to attacks and acts of violence than in ordinary circumstances. The net result is a rebuke of the goal of IHL to reduce human suffering in conflict.

### III. REMEDIES TO RED-TAGGING: RELIEFS UNDER PHILIPPINE AND INTERNATIONAL LAW

#### A. Protections under human rights law and civil remedies

Violations of the principle of distinction brought about by red-tagging also qualify as violations of human rights. The guarantee and full protection of human rights are set out in the Philippine Constitution, including the right to life, liberty, and security.<sup>85</sup> Red-tagging may also constitute a violation of the International Covenant on Civil and Political Rights (ICCPR), to which the Philippines is a state-party. Red-tagging resulting in “being killed, injured, illegally arrested, charged with trumped-up cases, or otherwise put in harm’s way” have been observable in the Philippines, resulting in the Commission on Human Rights of the Philippines making a finding that “red-tagging [human rights defenders] constitutes a grave threat to their lives, liberty, and security.”<sup>86</sup> Further, applying human rights framework as an additional lens of analysis “allows for a wider range of accountability mechanisms” for state and non-state armed groups alike.<sup>87</sup>

While R.A. 9851 penalizes the targeting of persons taking no active part in hostilities, this law is a penal statute, thus requiring proof beyond reasonable doubt to make violators accountable. Given the slow grind of

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<sup>84</sup> Prosecutor v. Kupreškić, Case No. IT-95-16-T, Trial Judgment, ¶ 511 (Int’l. Crim. Trib. for the Former Yugoslavia Jan. 14, 2000).

<sup>85</sup> CONST. art. II, § 11; art. III, § 1.

<sup>86</sup> COMMISSION ON HUMAN RIGHTS OF THE PHILIPPINES, REPORT ON THE SITUATION OF HUMAN RIGHTS DEFENDERS IN THE PHILIPPINES (2020).

<sup>87</sup> ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS, 285 (2006).

criminal prosecution in the Philippines, seeking accountability by way of filing criminal charges, while an available recourse, may not always be the speediest or the most fruitful relief. Criminal prosecution may not be able to immediately deflect the imminent harms produced by red-tagging.

Three rights are identifiable as threatened and potentially violated by red-tagging practices of state agents: the right to life, the right to liberty, and the right to security. These rights are found in the constitutionally embedded Bill of Rights. Furthermore, as the Philippines is a state party to the ICCPR and a signatory to the Universal Declaration on Human Rights (UDHR), protection is also granted under international law. Notably, the Supreme Court said that “Filipinos as human beings are proper subjects of the rules of international law laid down in the [ICCPR].”<sup>88</sup> And while the UDHR is a non-binding instrument, the Supreme Court has considered the declaration in deciding several cases.<sup>89</sup>

In General Comment No. 36 to Article 6 of the ICCPR, the United Nations Human Rights Committee stated that “States parties must respect the right to life. This entails the duty to refrain from engaging in conduct resulting in arbitrary deprivation of life.”<sup>90</sup> This right encompasses life in its entirety and all its aspects. The state’s obligation to respect this right extends to “foreseeable threats and life-threatening situations that can result in loss of life.”<sup>91</sup> The *Alston Report* has already established the pattern that is manifest in the killings of activists and human rights defenders in the Philippines. The special rapporteur noted that the killings are intimately linked to the state’s programmatic attempt to dismantle “purported CPP front groups.”<sup>92</sup>

Meanwhile, a wide range of acts is considered to be some form of deprivation of the right to liberty, a right also guaranteed by the ICCPR and the Bill of Rights. Such acts include detention prior to sentencing or imprisonment after conviction.<sup>93</sup> The right to liberty is one such right that may be lawfully limited by the state. However, violations of the right to liberty arise when there is an absence or lack of due process involved in such

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<sup>88</sup> Republic vs. Sandiganbayan, G.R. No. 104768, 407 SCRA 10, 58, July 21, 2003.

<sup>89</sup> *Id.*

<sup>90</sup> UN Human Rights Comm., *General comment no. 36, Article 6: right to life*, ¶ 7, CCPR/C/GC/36 (Sep. 3, 2019), available at <https://www.refworld.org/publisher,HRC,GENERAL,,5e5e75e04,0.html>

<sup>91</sup> *Id.*

<sup>92</sup> UN Human Rights Council, *supra* note 7, ¶ 12.

<sup>93</sup> UN Human Rights Comm., *General comment No. 35, Article 9 (Liberty and security of person)*, ¶ 5, CCPR/C/GC/35 (Dec. 16, 2014), available at <https://www.refworld.org/docid/553e0f984.html>

deprivation. Enforced disappearances, an “aggravated form of arbitrary detention,”<sup>94</sup> is likewise criminalized by a special penal law in the Philippines.<sup>95</sup> Again, with the observation that red-tagging sometimes leads to illegal arrests and threats, it is reasonable to assert that these practices must be put to a halt.

Finally, the right to security is recognized as a distinct right. According to the Supreme Court, the right to security of a person is essentially the freedom from fear or threat.<sup>96</sup> The right to security is the guarantee of bodily and psychological integrity or security.<sup>97</sup> The United Nations Human Rights Committee echoes this conception of the right to security, even going as far as saying that states are “to take appropriate measures in response to death threats against persons in the public sphere, and more generally to protect individuals from foreseeable threats to life or bodily integrity proceeding from any governmental or private actors.”<sup>98</sup> Threats or violations to the right of security arise from the dangerous practice of red-tagging. Harassment, intimidation, or coercion result from being labelled as enemies of the state in a very public context. Taken cumulatively, these acts degrade the quality of a person’s sense of security.

At the heart of the civil and political rights regime of the 1987 Constitution is the protection guaranteed to individuals against the state.<sup>99</sup> International human rights instruments are part of the law of the land. These are state policies and hard law enforceable in the Philippines. Hence, when state institutions or its agents encroach on zones of protected freedoms and actively endanger the safety of citizens, this activates the legal remedies that can be invoked to thwart or abort imminent harms.

Victims of red-tagging may also seek recourse under civil law for violations of civil and political rights. Specifically, Article 32 of the Civil Code of the Philippines is a viable independent civil action for “it deals with the infringement of a person’s civil rights.”<sup>100</sup> Public officers may certainly be liable for damages under this provision if, for instance, the basis of red-tagging

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<sup>94</sup> *Id.*, ¶ 17.

<sup>95</sup> *See* Rep. Act No. 10153 (2012), or the Anti-Enforced or Involuntary Disappearance Act of 2012.

<sup>96</sup> *Sec’y of Nat’l Defense vs. Manalo*, G.R. No. 180906, 568 SCRA 1, 52, 54, Oct. 7, 2008.

<sup>97</sup> *Id.* at 54.

<sup>98</sup> *UN Human Rights Comm.*, *supra* note 93, ¶ 9.

<sup>99</sup> *People vs. Marti*, G.R. No. 81561, 193 SCRA 57, Jan. 18, 1991.

<sup>100</sup> Gemmo B. Fernandez, Isabel L. Guidote, Raphael Lorenzo A. Pangalangan, & Ruby Rosselle L. Tugade, *The Philippines: Civil Vindications for Uncivilized Wrongs* in CIVIL REMEDIES AND HUMAN RIGHTS IN FLUX 277 (Ekaterina Aristova & Ugleša Grušić, eds., 2022).

is an exercise of one of the enumerated freedoms like speech or of the press, or an assertion of the right to liberty, security, and association. This civil remedy covers some ground and may be the recourse of one who is red-tagged and whose constitutional rights are violated.

## B. Protective writs as appropriate reliefs

The protective writs of *amparo* and *habeas data* were adopted by the Supreme Court precisely to address state impunity and provide a speedy relief for those whose rights to life, liberty, and security are violated or threatened. The jurisprudential pronouncements made in *Zarate v. Aquino* is indicative of the inclinations of the Supreme Court when it comes to the application of the writs of *amparo* and *habeas data* to cases where the factual allegations involve red-tagging.

In *Zarate*, the Supreme Court denied the petition on the rationale that “mere membership in said organization is not an actual threat that entitles one to the writ of *amparo*.”<sup>101</sup> The Supreme Court further reiterated that only actual threats, assessed on an individual basis, may trigger the issuance of the writ.<sup>102</sup> At face value, the rationale in *Zarate* appears to be consistent with the line of cases involving invocations of these extraordinary writs—that there must be a violation or a threat of violation to one’s life, liberty, and security through an unlawful act or omission.

These parameters would not necessarily bar a future petition on the basis of threats arising from red-tagging. A petition for the issuance of these writs must be crafted in such a way that individual circumstances are presented demonstrating the threat from red-tagging. As for the unlawful act or omission, one may specifically allege the relevant provisions of R.A. 9851, on the violation of the laws and customs applicable in armed conflict. There is room, therefore, to argue for a judicial outcome different from that in *Zarate*.

Furthermore, Justice Leonen’s dissenting opinion in *Zarate* could lend wisdom to a subsequent petition: “*Amparo* does not come into existence as a relevant preventive device only when there is the certainty of an offense committed.”<sup>103</sup> If threats to the rights of life, liberty, and security are exhibited to be sufficient and certain for the individual, there could be a window for the

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<sup>101</sup> *Zarate*, at 5. This pinpoint citation refers to the copy of this resolution uploaded to the Supreme Court Website.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 11 (Leonen, J., *dissenting*). This pinpoint citation refers to the copy of this dissenting opinion uploaded to the Supreme Court Website.

court to grant the protective reliefs sought. The patterns of abuse and violation from cases of red-tagging, as experienced by a petitioner, could supply the needed factual basis.

Within the context of Latin America where the protective writ originated, an *amparo* proceeding “seeks to restore the enjoyment of the plaintiff’s injured right, reestablishing the situation existing when the right was harmed, by eliminating or suspending, if necessary, the detrimental act or fact.”<sup>104</sup> To give full effect to the remedy, the Supreme Court must necessarily stand by the writ’s intended purpose and liberal interpretation if it is to make it an effective tool in combatting state impunity.

The writ of *habeas data* can also be sought as a remedy for civilians who are the subject of red-tagging. The writ protects the right to privacy in life, liberty, or security when there is an unlawful act or omission pertaining to the “gathering, collecting or storing of data or information regarding the person, family, home and correspondence of the aggrieved party.”<sup>105</sup> When red-tagging entails prior collection and surveillance on a person, there should be grounds for the application of this writ.

The Supreme Court promulgated the rules on *amparo* and *habeas data* at a time when extrajudicial killings and enforced disappearances imputed to state agents were rampant.<sup>106</sup> To deny applications for the protective writs on the reasoning that the harms brought about by red-tagging are not certain or imminent would be to defeat their historical purpose. After all, the essence of the protection of rights should be to prevent their ultimate violation. Moreover, the use of these protective writs to cover cases of red-tagging presents an opportunity to turn the courts into viable sites for the protection of civilians under IHL. It remains to be seen, however—perhaps in a future case with the proper factual circumstances—how the Supreme Court will resolve a relevant petition for protective writs.

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<sup>104</sup> ALLAN-RANDOLPH BREWER CARÍAS, CONSTITUTIONAL PROTECTION OF HUMAN RIGHTS IN LATIN AMERICA: A COMPARATIVE STUDY OF AMPARO PROCEEDINGS 275 (2008).

<sup>105</sup> HABEAS DATA WRIT RULE, § 1.

<sup>106</sup> Pola Lia Celina L. Lamarca, *The Tunnel before the Light: The Role of Amparo in the Philippine Framework of Human Rights*, 90 PHIL. L.J. 629, 630 (2017).

## CONCLUSION

Those engaged in armed conflict have duties and rights attached to their functions. IHL speaks to the requirement on parties to an armed conflict to maintain considerations of humanity whenever they engage in belligerent conduct. As a field of substantive law, it has time and again served its purpose of diminishing suffering in conflict. The imperative to follow IHL rules, including the principle of distinction, has practical and immediate implications. The principle of distinction in IHL is crucial to achieve its primary aims of regulating conflict and providing for the humane treatment of those involved.

Red-tagging is a persistent problem within the non-international armed conflict between the Philippine government and the Communist Party of the Philippines, together with its armed wing. It threatens legally guaranteed human rights and takes civilians outside the ambit of protection of IHL. Red-tagging civilians as communist rebels has resulted in violence upon the life and person of civilians. Thus, to address the violations that result from red-tagging, a turn to human rights law may be necessary. With the Philippines' legal guarantees for the full protection of human rights, its present legal framework may provide remedies to violations resulting from red-tagging.

The distinction carved by IHL between direct participants in hostilities and civilians taking no such part is crucial to achieve its primary aims of regulating conflict and providing for the humane treatment of those involved. Civilians enjoy immunities and protections under IHL, even in situations of conflict that are of non-international character. They possess no duty to distinguish themselves. Thus, when a party to the conflict actively blurs the distinction, endangering civilians, this results in a breach of IHL. These violations have no place in conflict, and do not advance its resolution.