# CHARACTERIZING PEACE PROCESS INSTRUMENTS AND AGREEMENTS WITH INSURGENT GROUPS IN THE PHILIPPINES

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**Abstract**

The author proposes to examine the process of drafting peace process instruments and agreements (leading to final peace agreements) within the context of the Philippine experience on armed conflict situations involving mainly the Moro National Liberation Front (MNLF) and the Moro Islamic Liberation Front (MILF), and the Communist Party of the Philippines/New People's Army/ National Democratic Front (CPP/NPA/NDF).

Part Two of the article reviews the practice of states in peace negotiations as propounded by Christine Bell in her pivotal study on *lex pacificatoria*, as a framework in understanding the characterization of peace agreements under international law.

Part Three briefly narrates the historical background of the armed conflicts in the Philippines involving the Moro and communist insurgent groups. A chronology of the relevant peace process instruments and agreements illustrates the expanse of experience of negotiating panels in crafting these agreements.

Part Four inquires into the constitutional concerns addressed by the Supreme Court in leading case law involving key agreements entered into by the Philippine government negotiators with the MNLF, the MILF, and the CPP/NPA/NDF, respectively. The legal characterization by the Supreme Court of the separate agreements with the three groups is instructive insofar as the legal

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consequences or implications of these agreements are concerned under municipal law and international law.

The author concludes the article with some insights and recommendations derived from the experience in constitutional challenges to peace instruments and agreements which may have a practical impact on the further pursuit of peace negotiations or implementation of signed peace agreements.

## I. Introduction

The practice of entering into and signing peace agreements is not foreign to the Philippine setting. Armed conflicts on two main fronts, i.e., Moro and Communist insurgents, had provided the avenue for the conduct of peace negotiations and processes which resulted in agreements, the legal characterization of which reached unprecedented challenges before the Philippine Supreme Court.

This paper inquires into the specific intricacies of entering into and signing peace agreements. Part II provides an understanding of the legal characterization of a peace agreement under international law in the context of what a leading commentator on the subject now refers to as "*lex pacificatoria*" or the law of peace.[1] Part III is a chronology on the Philippine peace processes and signed instruments. Part IV highlights constitutional challenges before the Philippine Supreme Court on peace process related incidents and agreements. Some insights and recommendations are provided by the author in the concluding section of this article.

## II. State Practice on Peace Agreements

### A. *Concept of a Treaty as Applied to Peace Processes*

Article I of the Vienna Convention on the Law of Treaties (VCLT) states that the VCLT "applies to treaties between States." Article 2, paragraph 1(a) defined a treaty as "an international agreement concluded between States in written form and governed by international law."

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[1] CHRISTINE BELL, ON THE LAW OF PEACE (2008).

Article 2 of the VCLT does not exactly define "State" and avoids a dogmatic view regarding the question of statehood and sovereignty.[2] Of specific interest to our inquiry is Article 3 of the VCLT which provides:

> The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, shall not affect:
>
> (a) The legal force of such agreements;
> (b) The application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention.
> (c) The application of the Convention to the relations of States as between themselves under international agreements to which other subjects of international law are also parties.

Agreements with national liberation movements, armed opposition movements and indigenous peoples have been dealt with in the course of drafting the VCLT.

Insofar as a national liberation movement is concerned, it has been observed that "[if] it is internationally recognized that the national liberation movement represents a people entitled to self-determination (e.g. the PLO for the people of Palestine), international practice confirms the international agreement-making capacity of the liberation movement, acting on behalf of the people."[3] The implication of the observation is to capacitate national liberation movements under Article 96, paragraph 3 of the 1977 Additional Protocol I of the Geneva Conventions by unilaterally declaring the four Geneva Conventions of 1949 and its Protocol I of 1977 applicable in the conflict, thus, generating reciprocal treaty relations between the liberation movement and the parties to the Geneva Conventions.[4]

There is a prevalence of agreements apropos of armed opposition groups in several states marred with civil war in the form of ceasefire, peace and amnesty

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[2] VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 24-25 (Oliver Dorr & Kirsten Schmalenbach, eds, 2nd Ed) (2018)

[3] *Id.*, at 74.

[4] *Id.,* at 75.

agreements.[5] Some authors have proposed "international agreement-making capacity of civil war factions, at least if they have achieved the *de facto* administration of a specific territory," although recent international jurisprudence has held to the contrary.[6] The difficulty in characterizing the legal nature of agreements with armed opposition groups is evident in the manner that the parties have avoided "any references to a possible international character in order to cloak the plain conflict of interest."[7]

A third category of agreements relevant to our inquiry involves historic treaties between colonizing states with indigenous peoples. The initial acceptance by States from the seventeenth century to the second half of the nineteenth century on the legal bindingness of these treaties under international law was finally rebutted at the close of the nineteenth century as expressed by Max Huber in the 1928 Island of Palmas arbitral award.[8] Some view these agreements as contracts under national law as held in a Canadian Federal Court in *Pawis v. The Queen*.[9] Grammond, on the other hand, characterized these as "treaties *sui generis*."[10]

## *B. The Discourse on Peace Agreements in International Law*

### *1. Process, Form and Content*

The inherent political character of a peace process often determines the nature, form and content of the process. Non-starter issues, such as, legal personality of non-state actors, non-recognition of a State's constitution or ceasefire before any peace talks, could lead to rough and protracted negotiations.

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[5] *Id.*

[6] *Id.,* at 76-77 (citing McNair (1961) at 680; Neff (1995) at 41; Cassese (2004) at 1134-1135). The contrary view is found in the decision of the Special Court for Sienna Leone (Appeals Chamber) on 13 March 20043 related to the Lomé Agreement between Sierra Leone and the Revolutionary United Front (RUF) signed on 7 July 1996.

[7] *Id.,* at 77.

[8] *Id.,* at. 77-78 (citing Brownlie (1992) at. 8-9; Grotius (1646/1964 II, p. 397; de Victoria (1532/1964), at 120; Soder (1955) at. 80-94; Bull (1992) at. 65, 80-83; Higgins (1992) at 267, 278; Island of Palmas Case (Netherlands v. United States) 2 RIAA 829, 831 1928); and, Cayuga Indians (Great Britain v. United States ) 6 RIAA 173, 176, 179 (1928)).

[9] *Id.,* at 78 (citing Pawis v. The Queen (1979), 102 D.L.R (3rd) 602, 607 (Can.)).

[10] *Id.,* at 78 (citing Grammond (1994) at p. 57)).

Bell recognizes that agreements signed with non-state parties appear to fall outside the strict definition of a treaty.[11] However, as earlier discussed, "non-state signatories can be argued to be 'subjects of international law' based on international law's recognition of such groups, in particular through humanitarian law."[12] Citing the International Law Commission's suggestion on Draft Article 3 of the Law of Treaties, Bell pointed out that the "phrase other subjects of international law referred, *inter alia*, to insurgent communities to which a measure of recognition has been accorded."[13] But this was not eventually carried into the final text of the VCLT.

The traditional subject-object dichotomy which limits negotiating parties' choice of form of peace agreement may be approached applying Rosalyn Higgins' understanding of an international legal system as a particular decision-making process, according to Bell.[14] This, however, remains unhelpful "in deciding definitively whether or not a peace agreement is a binding international agreement."[15]

Therefore, a distinct legal form needs to arise out of a peace process to assure enforcement in the event of non-compliance by any of the parties to the agreement.

### *2. In Search of Legal Characterization: Lex Pacificatoria*

The marginal application of the general principles of the VCLT to peace agreements constrains the negotiating parties to seek creative ways in order to push a process forward unhindered by the "non-starter" issues. The present writer envisions the "two legal regimes" which may operate simultaneously but intersect at various stages of the negotiations, specifically when the parties arrive at a decision to sign peace instruments or agreements of a substantive character entailing either unilateral or mutual assumption of obligations with definitive legal consequences, enforceable even before the judicial system of the State party.

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[11] Bell, *supra* note 1, at 129.

[12] *Id.,* at 130.

[13] *Id.*

[14] *Id.,* at 135.

[15] *Id.,* at 135-136.

In this regard, Bell proffers a developing law or a set of normative expectations called "*lex pacificatoria* or the law of the peacemakers."[16] This is an attempt to address the characterization of peace agreements with a positive law status founded on framed obligations falling within recognizable traditional legal categories.[17] To do this, two (2) alternative ways may be adopted by the parties. One is to locate the agreement in a domestic legal realm, i.e., the Constitution; and, the other is by way of domestic legislation. In terms of the first mode, Bell believes that peace agreements are a hybrid, addressing the external position of the state on the international realm and the internal constitutional structure of the state.[18] Domestic legislation, on the other hand, legalizes unilateral commitments or pre-commitments.[19]

Under Bell's theory of *lex pacificatoria*, a useful interpretative technique in peace agreements is "constructive ambiguity"[20] in the language of the agreement to allow parties to sign in, although more precise language may be necessary under certain circumstances, such as transitional institutions entailing governance or exercise of constitutional powers.[21] Areas with strongest disagreement, for example, clashes of constitutional vision, often become the forum for applying constructive ambiguity.[22]

Bell reasons out that due to "the peace agreement's hybrid nature, international law's assumptions of a separate international and domestic sphere do not fit."[23]

Finally, it is crucial to emphasize the role of judicial bodies in relation to the peace process. The deliverables of negotiating parties could either be supported or derailed by magistrates who have to decide on constitutional challenges on the peace process and agreements arising therefrom. In such cases, traditional constructs of judicial review in most jurisdictions may pose serious

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[16] *Id.* at 219.
[17] *Id.* at 141-142.
[18] *Id.* at 149-154.
[19] *Id.*
[20] *Id.* at 162.
[21] *Id.* at 163.
[22] *Id.* at 173.
[23] *Id.* at 218.

hurdles as courts examine political and legal questions embedded in peace instruments and agreements.[24]

It does matter, therefore, whether or not the courts view an agreement as either an international agreement or a mere contract under municipal law. Applicable interpretative tools and techniques depend on the nature of the agreement under examination. Bell's pointed perspective on the role of courts is highly instructive:

> To be sure, in many situations the role of courts and tribunals will be marginal to an agreement's success or failure: they are likely to be ineffective in sustaining an agreement in the face of fundamental and violent dissent. However… courts and tribunals have the capacity to extend and develop the agreement's meaning where they find it to be part of the legal framework. More negatively, they have the capacity to terminate an agreement's operation even in the face of political chances to sustain it.[25]

*Lex pacificatoria*, to say the least, provides negotiating parties and other stakeholders in the peace process with definitive parameters to go by in the course of decision-making. The experience of states engaged in past and present peace process reveals the extent to which these norms of peacemakers had gained a foothold in the mindset of peace negotiators. Philippine peace processes are illustrative of the surgical applications of these norms.

## III. Chronology of Philippine Peace Process Instruments and Agreements

In more than forty (40) years since the Philippines engaged in peace process with armed opposition groups under various administrations, peace instruments and agreements had taken shape in the context of the immediate concerns of the armed opposition groups. Several factors also affect both process and content of peace negotiations, including the necessity of facilitation by third parties.

What unfolds in this chronology of peace process instruments and agreements is a two-fold realization, namely: (1) third party facilitation provides

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[24] *Id.* at 141.

[25] *Id.* at 141-142.

an enabling environment for continuity of a process; and, (2) the features of Philippine peace instruments and agreements reflect similar experiences of negotiating panels in other armed conflict situations.

The uniformity of the process and its instruments is highly discernible drawing from other countries' experiences. Thus, a stage-function classification has been conveniently availed of by negotiating panels in our case. One will identify familiar documents classified as pre-negotiation, ceasefires, substantive/framework agreements, and implementation mechanisms. Philippine peace process experience reveals attempts at sequencing talks and adoption of agreements, but extraneous circumstances have from time to time derailed this neat attempt at sequencing. The result is the typical stop-start nature of peace negotiations influenced by socio-political events which may even trigger formal legal challenges to the peace process through judicial adjudication. As the succeeding section will show, constitutional litigation had even reached the highest court of the land.

### *A. The Moro Front (MNLF & MILF)*

The war in Mindanao, the southern island of the Philippines, dates back to Spanish colonial times when Moro leaders resisted the arrival of Christianity and their imposed integration to the Philippines. Animosity among various communities in the Southern Philippines continues to this day. Decades of economic marginalization of predominantly Muslim settlements attributed to historical prejudices evidenced by their lack of effective participation in governance, and had caused widespread dissatisfaction among the Moros which fueled secessionist movements. Two predominant groups emerged in separate historical periods. The first was the Moro National Liberation Front (MNLF), and the second was the Moro Islamic Liberation Front (MILF).

The MNLF is a group of Muslims organized on Pulau Pangcor, trained abroad, and identified with secessionist movements such as Darul Islam and Muslim Independence Movement (MIM). Nur Misuari was in the first group trained and was named chairman. There is another Islamic separatist organization that is based in Southern Philippines, known as the Moro Islamic Liberation Front (MILF). The MILF originated from the separatist group of the MNLF in the 1970s, led by Hashim Salamat, who tried to take control from Misuari. When the attempt failed, they named their group a New MNLF, which completely separated from the

MNLF. In 1984, to completely distinguish the New MNLF, they changed its name to Moro Islamic Liberation Front (MILF) and emphasized that its focus is Islamic. The MNLF first entered into peace talks with President Ferdinand E. Marcos in 1976 and signed the Tripoli Agreement. Unimpressed by the implementation of the Tripoli Agreement, the MILF under the leadership of Hashim Salamat posed a secessionist stance under the ideals of radical Islamic revivalism.

1. *Moro National Liberation Front* (*MNLF*)

The 1976 Tripoli Agreement was signed on December 23, 1976 in Tripoli, Libya by Carmelo C. Barbero, representing the Government of the Republic of the Philippines, and Professor Nur Misuari, representing the Moro National Liberation Front. There was third party participation by the Quadripartite Ministerial Commission Members of the Islamic Conference and the Secretary General of the Organization of the Islamic Conference. There was a proposal for the establishment of an autonomy in the southern part of the Philippines defining the Muslim autonomous territory, a judicial system of Muslim Laws (Shariah), and the establishment of an autonomous government with its own economic system, including an Islamic Bank.

The 1996 Final Agreement on the Implementation of the 1976 Tripoli Agreement between the Government of the Republic of the Philippines and the Moro National Liberation Front with the participation of the Organization of Islamic Conference Ministerial Committee of the Six and the Secretary General of the Organization of Islamic Conference or the "Jakarta Accord" was signed on September 2, 1996 in the City of Manila, Philippines, by Ambassador Manuel T. Yan as Chairman of the GRP Peace Panel, and Professor Nur Misuari, Chairman of the MNLF Panel. This was a culmination of the series of peace agreements between the GRP and the MNLF for the full implementation of the 1976 Tripoli Agreement.

*2. Moro Islamic Liberation Front* (*MILF*)

The Agreement on General Cessation of Hostilities was signed on July 18, 1997 in Cagayan de Oro City by Ambassador Fortunato U. Abat, Chairman of the GRP Panel, and Ghazali Jaafar, Chairman of the MILF Panel. The Agreement

formalized the commitment of the GRP and the MILF for a general cessation of hostilities and to agree to continue the formal peace talks.

The Agreement on the Rules and Procedures on the Conduct of the Formal Peace Talks between the GRP and MILF Peace Panels was signed on December 17, 1999 by Usec. Orlando V. Soriano, GRP Panel Chairperson, and Aleem Abdulaziz Mimbantas, MILF Panel Chairperson. The Agreement in its entirety provides for the rules and procedures regarding the conduct of the formal peace talks between the Government (GRP) and the Moro Islamic Liberation Front (MILF). This includes the composition, mandate, guiding principles, conduct of panel negotiations, media coverage procedures, general provisions on confidentiality, amendments to the rules and procedures, and its effectivity.

The Agreement on Safety and Security Guarantees was signed on March 9, 2000 in Cotabato City where the GRP extended safety and security guarantees to MILF members who were directly and principally involved in the GRP-MILF Peace Talks from restraint, search, seizure, and harassment on their persons and property in connection with their participation or involvement in the peace talks, except in cases of commission of common crimes such as crimes against persons, chastity, property, and other similar offenses.

The Agreement on Peace between the Government of the Republic of the Philippines and the Moro Islamic Liberation Front or the "Tripoli Agreement of Peace" was signed on June 22, 2001 by Jesus G. Dureza, Chairman of the GRP Peace Panel, and Al Haj Murad Ebrahim, Chairman of the MILF Peace Panel, where the parties resumed peace talks and agreed on the aspects of security, rehabilitation, ancestral domain, and activation of committees to ensure full implementation of the agreements between the parties.

The Memorandum of Agreement on the Ancestral Domain Aspect of the GRP-MILF Tripoli Agreement of Peace of 2001 was initialed before the set signing on August 5, 2008 in Kuala Lumpur, Malaysia by Rodolfo C. Garcia, Chairman of the GRP Peace Panel, and Mohagher Iqbal, Chairman of the MILF Peace Negotiating Panel. The Agreement stipulated on the authority and jurisdiction of the Bangsamoro Judicial Entity (BJE) over Ancestral Domain and ancestral lands, including both alienable and non-alienable lands encompassed within their homeland and ancestral territory, as well as the delineation of ancestral domain/lands of the Bangsamoro people. This Agreement was eventually challenged and declared unconstitutional by the Supreme Court in 2008.

The Framework Agreement on the Formation of the International Contact Group for the GRP-MILF Peace Process was signed on September 15, 2009 in Kuala Lumpur, Malaysia by Rafael E. Seguis, Chairman of the GRP Peace Panel, and Mohagher Iqbal, Chairman of the MILF Negotiating Peace Panel. The formation of an International Contact Group (ICG) is ad-hoc in nature and issue-specific in its engagement, consistent with an international dimension. This consists of interested countries accompanying the peace process preferably drawn from the Organization of the Islamic Conference (OIC) and the European Union (EU), as well as accredited International Non-Governmental Organization (INGO) to be invited by the Parties in consultation with the Third Party Facilitator.

An Agreement on the Civilian Protection Component of the International Monitoring Team (IMT) was signed on October 27, 2009 in Kuala Lumpur, Malaysia where the parties agreed to expand the mandate of the IMT to include civilian protection, and for the parties to refrain from intentionally attacking or targeting non-combatants and civilian properties against the dangers arising from armed conflict situations.

The GRP-MILF Decision Points on Principles as of April 2012 was signed on April 24, 2012 in Kuala Lumpur, Malaysia by Marvic M.V.F. Leonen (now Associate Justice of the Supreme Court) as representative of the GPH, and Mohagher Iqbal, representative of the MILF Negotiating Peace Panel. The parties agreed on the principles affecting the new autonomous political entity (NPE), such as power-sharing and wealth-sharing between the National Government and the new autonomous political entity, defense and security, foreign policy, economic aspects and trade, citizenship and naturalization, postal service, strengthening and expanding the jurisdiction of Shari'ah courts, creation of third party monitoring and evaluation mechanisms, and the guarantee of the basic rights of the citizens.

The Framework Agreement on the Bangsamoro (FAB) was signed on October 15, 2012 in Kuala Lumpur, Malaysia by Marvic M.V.F. Leonen (now Associate Justice of the Supreme Court), then Chairman of the GPH, and Mohagher Iqbal, Chairman of the MILF Negotiating Peace Panel. The FAB establishes the Bangsamoro as the new autonomous political entity to replace the Autonomous Region in Muslim Mindanao (ARMM), providing for the creation of a Basic Law and the definition of the Bangsamoro identity, the addition of basic rights to govern the entity, an electoral system, powers to be devolved, shared, or

reserved between the Central Government and the Bangsamoro Government, the territory, and a transition period to implement the Agreement.

The Annex on Transitional Arrangements and Modalities to the Framework Agreement on the Bangsamoro was signed on February 27, 2013 in Kuala Lumpur, Malaysia. The Annex established the Transitional Commission tasked to draft and ratify the Bangsamoro Basic Law, work on proposals to amend the Constitution, and the creation of the Bangsamoro Transition Authority (BTA), a Third Party Monitoring Team (TPMT), and a Joint Normalization Committee (JNC).

The Annex on Power-Sharing to the Framework Agreement on the Bangsamoro was signed on December 8, 2013 in Kuala Lumpur, Malaysia by Prof. Miriam Coronel-Ferrer, GPH Panel Chair, and Mohagher Iqbal, Chairman of the MILF Peace Panel. The Agreement forms part of the FAB which defines the Reserved, Concurrent and Exclusive powers of the Central Government and the Bangsamoro Government, provides for the mechanisms of Intergovernmental Relations that will govern the relations between the Central Government and the Bangsamoro Government, and other matters pertaining to power sharing.

The Comprehensive Agreement on the Bangsamoro (CAB) was signed on March 27, 2014 in the City of Manila by Prof. Miriam Coronel-Ferrer, GPH Panel Chair, and Mohagher Iqbal, Chairman of the MILF Peace Panel. This Agreement is the final peace Agreement underlining the overall peace process between the GPH and the MILF. The Parties listed the previous agreements which constitute a part of the CAB, and acknowledged the roles of the international community and civil society organizations that provided support throughout the process and provided principles of implementation that will be pursued for the Agreements.

### *B. Communist Party of the Philippines/New People's Army/ National Democratic Front*

The longest-running Maoist insurgency in the world found its roots in 1968 when student activist Jose Maria Sison established the movement. Historical accounts consider the current CPP-NPA as having originated from the Maoist oriented youth faction Partido Komunista ng Pilipinas. In terms of objective, the communist insurgents aim to overthrow the Philippine government in favor of a new state led by the working class, and to expel US influence from the Philippines where a socialist state shall rise.

Formal peace talks with the Communist Party of the Philippines – New People's Army – National Democratic Front (CNN) dragged on for 25 years. In the Hague Joint Declaration 1992, both negotiating panels agreed to work for the adoption of the four substantive agreements to attain a just and lasting peace, namely: Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law (CARHRIHL); Comprehensive Agreement on Social and Economic Reforms (CASER); Comprehensive Agreement on Political and Constitutional Reforms (PCR); and End of Hostilities (EOH). Only CARHRIHL had been signed in 1998.

1. *Communist Party of the Philippines/ New People's Army/ National Democratic Front*

The Hague Joint Declaration was signed on September 1, 1992 in The Hague, Netherlands by Jose V. Yap, representative of the GPH, and Luis Jalandoni, representative of the National Democratic Front of the Philippines (NDFP). This served as the beginning of the peace negotiations between the Government and the NDFP to resolve armed conflict and the institution of reforms that would eliminate the root causes of the armed conflict.

The Joint Agreement on Safety and Immunity Guarantees (JASIG) was signed on February 24, 1995 in Nieuwegein, The Netherlands, which provided immunity guarantees to all duly accredited persons from surveillance, harassment, search, arrest, detention, prosecution and interrogation, or any other similar punitive actions due to any involvement or participation in the peace negotiations.

The Joint Agreement on the Formation, Sequence and Operationalization of the Reciprocal Working Committees (RWCs) was signed on June 26, 1995 at Brussels, Belgium by Howard Q. Dee, Chairperson of the GRP Panel, and Luis G. Jalandoni, Chairperson of the NDFP Panel. The Agreement provided for the formation and operationalization of the following Reciprocal Working Committees (RWCs), namely Human Rights and International Humanitarian Law, Socio-Economic Reforms, Political and Constitutional Reforms, and End of Hostilities and Disposition of Forces. A Supplemental Agreement was signed on March 18, 1997 which provided for the conduct of work and reasonable time frame of the RWCs.

The Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law (CARHRIHL) was signed on March 16, 1998 in

The Hague, The Netherlands. The Agreement provided for measures and mechanisms to ensure compliance of the parties to the principles of international humanitarian law and the parties' obligation to respect human rights. It 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.

### C. *Cordillera Bodong Administration-People's Liberation Army* (*CBA-CPLA*)

The Joint Memorandum of Agreement or the 1986 Mt. Data Peace Accord or "Sipat" was signed on September 13, 1986 in Mt. Data Hotel, Bauko, Mountain Province. The Ceasefire Agreement signified a partnership of cooperation, trust and respect between the Government and the CBA-CPLA, and their commitment to a cessation of hostilities.

The 2011 Memorandum of Agreement Towards the Final Disposition of Arms and Forces of the CBA-CPLA and its Transformation into a Potent Socio-Economic Unarmed Force which was signed on July 4, 2011, is a Closure Agreement signed by the GRP and the CBA-CPLA to culminate the 1986 Mt. Data Peace Accord. It focuses on five (5) main components that aim to pursue lasting peace, progress and development in Cordillera, namely: Disposition of Arms and Force, Economic Reintegration, Community Development, Inter-municipal and Inter-barangay Development Projects, and Documentation of the CBA-CPLA struggle.

### *D. Rebolusyonaryong Partido ng Manggagawa-Pilipinas/Revolutionary Proletarian Army/Alex Bongcayao Brigade* (*RPM-P/RPA/ABB*

The Peace Agreement between the Government of the Republic of the Philippines and the Rebolusyonaryong Partido ng Manggagawa-Pilipinas/ Revolutionary Proletarian Army/Alex Bongcayo Brigade (GPH-RPM-P/RPA/ABB) was signed on December 6, 2000 in Quezon City where the parties agreed to a cessation of hostilities, to provide means and confidence-building measures, release political prisoners, and the provision of a Development Fund for the implementation of development projects to address poverty in areas identified by the RPM-P/RPA/ABB and the rehabilitation of its members.

The Clarificatory Implementing Document (CID) to the 2000 Peace Agreement of the GPH-RPM-P/RPA/ABB) was signed on July 19, 2019 in Quezon City. The CID mandated the Office of the Presidential Adviser on the Peace Process (OPAPP), together with partner agencies, to implement the three-year Normalization Plan from 2019-2021. It has five components, namely: Disposition of Arms and Forces (DAF) and Security Arrangements; Social and Economic Reintegration of the RPM-P/RPA/ABB-TPG/KAPATIRAN; Release of the remaining Alleged Political Offenders (APOs); Transformation of the RPM-P/RPA/ABB-TPG into a civilian organization engaging in socio-economic and political activities; and Community Peace Dividends.

## IV. Selected Philippine Case Law on Peace Agreements

### A. *On Muslim Mindanao: Territory and Distribution of Powers*

#### 1. *Datu Firdausi I.Y. Abbas v. Commission on Elections, et al. , G.R. No. 89651, November 10, 1989*

*Firdausi v. COMELEC* was the first occasion when the issue of the nature of a peace agreement was raised. It will be recalled that on December 23, 1976, the Tripoli Agreement was signed by the respective representatives of the Government of the Republic of the Philippines and the Moro National Liberation Front (MNLF). The Agreement provided for "the establishment of Autonomy in Southern Philippines within the realm of the sovereignty and territorial integrity of the Republic of the Philippines" and included thirteen (13) provinces comprising the "areas of autonomy." These provinces were enumerated in a law, Republic Act No. 6734, entitled "An Act Providing for an Organic Act for the Autonomous Region in Muslim Mindanao."

Petitions were filed to stop a plebiscite scheduled to implement the law pursuant to the Tripoli Agreement based on two arguments, namely: (a) that R.A. 6734 violates the Constitution; and, (b) certain provisions of R.A. No. 6734 conflict with the Tripoli Agreement.

Of specific interest to the inquiry of this author is the second issue wherein petitioners premised their arguments on the assumption that the Tripoli Agreement is part of the law of the land.

The Solicitor General asserted that the Tripoli Agreement is neither a binding treaty, not having been entered into by the Republic of the Philippines with a sovereign state and ratified according to the provisions of the 1973 or 1987 Constitutions, nor a binding international agreement.

The Court did not find it necessary nor determinative of the case to rule on the nature of the Tripoli Agreement and its binding effect on the Philippine Government whether under public international law or internal Philippine law. It recognized that it is the Constitution itself that provides for the creation of an Autonomous Region in Muslim Mindanao, thus, the standard of any inquiry into the validity of R.A. No. 6734 would therefore be what is provided in the Constitution.

However, the Court further opined that even for the sake of argument that the Tripoli Agreement is a binding treaty or international agreement, it would then constitute part of the law of the land, but only as internal law, it would not be superior to R.A. No. 6734. Thus, if at all, R.A. No. 6734 would be amendatory of the Tripoli Agreement, being a subsequent law, applying established principles on treaty interpretation vis-à-vis municipal law and statutory construction.

1. *The Province of North Cotabato, et al. v. The Government of the Republic of The Philippines Peace Panel on Ancestral Domain* (*GRP*) *et al.*, G.R. No. 183591, G.R. No. 183752, G.R. No. 183893, G.R. No. 183951, G.R. No. 183962, October 14, 2008

The first attempt by the GRP and the Moro Islamic Liberation Front (MILF) to sign a major substantive agreement mapping out the territorial parameters of a proposed Bangsamoro Juridical Entity (BJE) and delineating BJE's powers, among others, suffered a different fate than the 1976 Tripoli Agreement entered into with the MNLF.

In order to break the peace process impasse between the GRP and MILF, representatives of both negotiating parties finalized the Memorandum of Agreement on the Ancestral Domain (MOA-AD) Aspect of the GRP-MILF Tripoli Agreement on Peace of 2001 in Kuala Lumpur, Malaysia. The draft MOA-AD was "initialed" by the negotiating panels several weeks before the scheduled formal signing on August 5, 2008 in Kuala Lumpur, Malaysia.

A few days before the signing of the MOA-AD, petitions were filed seeking a Temporary Restraining Order (TRO) to stop the GRP from signing the MOA-AD.

The Court immediately issued the TRO even as the negotiating panels, stakeholders, international observers, diplomatic representatives, and Malaysian facilitators were already on site for the signing ceremony.

What unfolded during the oral arguments in this case was an unprecedented demonstration of the inter-play between the three separate powers of the government in the context of a discourse on the nature of a peace process and legal characterization of the MOA-AD. It will be observed that the Court did not mince words this time in its examination of the binding character of the MOA-AD.

From the viewpoint of international law, the majority opinion declared that the use of the term "associative relationship" of the BJE with the national government is characteristic of the "associated State" arrangement typically used as a transitional device of former colonies on their way to full independence. According to the Court, the MOA-AD is filled with the international legal concept of association, particularly the BJE's capacity to enter into economic and trade relations, the commitment of the Central Government to ensure the BJE's participation in the ASEAN and the specialized UN agencies, and the continuing responsibility of the Central Government over external defense.

Moving on to the legal characterization of the MOA-AD, the Court stated "that the MOA-AD would have been signed by representatives of States and international organizations not parties to the Agreement would not have sufficed to vest in it a binding character under international law." In its assessment of the MOA-AD implications under international law, the Court emphasized that the MOA-AD would not have amounted to a unilateral declaration on the part of the Philippine State to the international community. Reading the mind of the GRP Panel, the Court clarified that the Philippine Panel did not draft the same with the clear intention of being bound thereby to the international community as a whole or to any State, but only to the MILF. It referred to the example of the Lomé Accord case which pronounced that the mere fact that in addition to the parties to the conflict, the peace settlement is signed by representatives of states and international organizations does not mean that the agreement is internationalized so as to create obligations in international law.

In concluding its discussion on the nature of the MOA-AD, the Court referred to it as a contract.

Finally, the Court is not unmindful of the extent of the discretion that the GRP Panel may exercise in the course of negotiating contexts of an agreement. It

found that Executive Order No. 3, defining the scope of the powers of negotiating panels, refers to the pursuit of social, economic, and political reforms which may require new legislation or even constitutional amendments. This authorized the panels to "think outside the box".

In the end, one gathers from this case that the ultimate challenge to negotiators is how to arrive at a clear legal form and precise language of the agreement. On this point, the Court's opinion bears emphasis:

> Paragraph 7 on Governance of the MOA-AD states, however, that all provisions thereof which cannot be reconciled with the present Constitution and laws 'shall come into force upon signing of a Comprehensive Compact and upon effecting the necessary changes to the legal framework.' This stipulation does not bear the marks of a suspensive condition—defined in civil law as a future and uncertain event—but of a term. It is not a question of whether the necessary changes to the legal framework will be effected, but when. That there is no uncertainty being contemplated is plain from what follows, for the paragraph goes on to state that the contemplated changes shall be 'with due regard to non-derogation of prior agreements and within the stipulated time frame to be contained in the Comprehensive Compact.

The effect of this judgment on future negotiations is primarily to provide negotiators with a legal compass to go by in undertaking binding commitments. Doors were never closed towards the peace process. This simply confirms what Bell described as the stop-start nature of peace agreements which means that "the judicial role is likely to be fundamentally tested by capacity to act outside the Constitution."[26]

> 1. *Philippine Constitution Association* (*PHILCONSA*)*, et al. v. Philippine Government* (*GPH*)*,* G.R. No. 218406, G.R. No. 218761, G.R. No. 204355, G.R. No. 218407, G.R. No. 204354, November 29, 2016

[26] *Id.* at 152.

After the MOA-AD judgment, the full resumption of formal peace negotiations between the Government and MILF had to wait for the next administration, i.e., the Aquino presidency. On October 15, 2012, the Framework Agreement on the Bangsamoro (FAB) was signed in Kuala Lumpur this time between the newly constituted Government Negotiating Peace Panel and the MILF Negotiating Peace Panel. By March 27, 2014, the two panels had signed the Comprehensive Agreement on the Bangsamoro (CAB) which was the Final Peace Agreement.

Between 2012 and 2015, several petitions had been filed with the Court assailing the constitutionality of the CAB, including the FAB and its Annexes.

After the Aquino administration, the new president, Rodrigo Roa Duterte, issued Executive Order No. 08 providing for the functions of the Bangsamoro Transition Commission, which include drafting proposals for a Bangsamoro Basic Law to be submitted to Congress, and recommending to Congress or the people proposed amendments to the 1987 Philippine Constitution.

In the present case, the Court found no actual case or controversy requiring a full-blown resolution of the issues raised by the petitioners, unlike in the previous case on the MOA-AD. It emphasized that the CAB, including the FAB, mandated the enactment of the Bangsamoro Basic Law in order for such peace agreement to be implemented. Congress is expected to seriously consider the CAB and the FAB but Congress is not bound by such agreements . Without the passage of the Bangsamoro Basic Law, those peace agreements cannot be implemented.

The Court proceeded to characterize the CAB and the FAB as "preparatory documents that can 'trigger a series of acts' that may lead to the exercise by Congress of its power to enact an organic act for an autonomous region under Section 18, Article X of the Constitution." Citing provision I(c) of the Annex on Transitional Arrangements and Modalities, the Court outlined the subsequent acts as follows: the proposed Basic Law shall be submitted to the Office of the President and the President shall submit the proposed Basic Law to Congress as a legislative proposal which the President shall certify as urgent.

### *B. On the Responsibility of Insurgents: The Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law*

*1. Saturnino C. Ocampo, et al. vs. Hon. Ephrem S. Abando, et al., G.R. No. 176830, G.R. No. 185587, G.R. No. 185636, G.R. No. 190005, February 11, 2014*

Individual criminal responsibility and international responsibility of insurrectional movement are recognized principles under international humanitarian law. Additional Protocol II to the Geneva Conventions of 1949, which contemplates individual criminal responsibility, applies to situations of internal armed conflict.[27] The application of these principles to Philippine municipal law was succinctly illustrated in the case of *Ocampo v. Abando* within the context of an agreement signed between the peace negotiating panels of the Government and the Communist Party of the Philippines/New People's Army/ National Democratic Front (CPP/NPA/NDF) in 1998. The Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law (CAHRIHL) provides for measures and mechanisms to ensure compliance to the principles of international humanitarian law and human rights by both parties.

In *Ocampo v. Abando*, petitioners who were alleged to be members of the Central Committee of the CPP/NPA/NDF, were accused of multiple murder by alleged relatives of victims of "Operation Venereal Disease" launched by members of the CPP/NPA/NDF to purge their ranks of suspected military informers. Petitioners asserted that they have a pending criminal charge of rebellion and that the acts raised in their petitions should be dismissed because they were deemed to be affected by the political offense doctrine, in which case, crimes, such as murder, are already absorbed by the charge of rebellion when committed as a necessary means and in connection with or in furtherance of rebellion. The Court's majority opinion dismissed the consolidated petitions and ordered the trial court to proceed with the pending case for multiple murder.

In a separate concurring opinion by Justice Marvic M.V.F. Leonen, he clarified that there are certain acts which have been committed on the occasion of a rebellion which should no longer be absorbed in that crime. He referred to Republic Act No. 9851 of 2009 (An Act Defining and Penalizing Crimes Against International Humanitarian Law, Genocide and Other Crimes Against Humanity, Organizing Jurisdiction, Designating Special Courts, and For Related Purposes).

Justice Leonen cited unilateral undertakings by the NDF to adhere to Article 3 common to the Geneva Conventions and Protocol II, namely: (1) Declaration of Adherence to International Humanitarian Law, dated August 15,

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[27] James Crawford, STATE RESPONSIBILITY: THE GENERAL PART, at 80 (Cambridge Studies in International and Comparative Law, Ser. No. 100, 2013).

1991; and, (2) Declaration of Undertaking to Apply the Geneva Conventions of 1949 and Protocol 1 of 1977, dated July 5, 1996. Finally, he highlighted the relevance of CAHRIHL as a peace instrument which provides a clear list of rights and duties that the parties must observe, such as, humane treatment of persons involved in the conflict, whether hors de combat or a civilian.

By way of concluding his opinion, J. Leonen observed that the CPP/NPA/NDF and major insurgent groups that are part of the peace process adhere to the view that acts, such as, crimes against humanity or serious violations of international humanitarian law, international human rights law, and R.A. No. 9851, can never be considered as acts in furtherance of armed conflict no matter the motive.

## V. Conclusion

The sustainability of a peace process, including implementation of peace agreements, in the context of the Philippine experience, is a function of several factors which test the tenacity of negotiating parties.

Distracters during the conduct of peace negotiations may come in the form of periodic armed encounters in the absence of a ceasefire while peace talks are going on. Even if a ceasefire exists, violations of ceasefire terms stall the talks. Different approaches have been applied by the two big armed opposition groups. The communist insurgents have never entered into any form of prolonged ceasefire. Another form of distracter is putting across the negotiating table issues which impact one party's advocacy or status. This is illustrated by the government's signing of the Visiting Forces Agreement with the United States, or the terrorist listing of leaders of the armed opposition group. Both issues also contributed to suspension of talks.

The protracted nature of a peace process is also vulnerable to changes of leadership in government. Consistency of membership in the negotiating panel of the armed opposition group provides a "fulltime" focus on the negotiations. Perspectives of government negotiators may be affected by political strategies of a new leadership.

In the selected case law discussed by the present writer, it is evident that the Philippine Supreme Court had expressed different attitudes towards specific peace agreements which were constitutionally challenged by several petitioners. Were these differences attributable to the underlying political climate under the

different administrations? Sensitivity of judicial leadership to extraneous circumstances surrounding adoption, signing or implementation of peace agreements could shape adjudication, specially judicial reasoning. Creativity may be seen in the manner that the Court resolved the temporary liberty of alleged communist leaders who were tapped as consultants in the ongoing peace negotiations. It was not in the usual procedural line of granting bail or temporary liberty. But the Court considered the application of a peace process procedural instrument to allow identified consultants to attend peace negotiations. On another occasion, the Court practically "terminated" a peace process by declaring the Memorandum of Agreement on Ancestral Domain as initialed by the Government Panel and the Moro Islamic Liberation Front unconstitutional. In Abbas and PHILCONSA, the Court was not so minded to touch the peace agreements in question.

The Philippine peace processes were benefitted with third party hosts and facilitators. Indonesia and Malaysia were privy to the two Moro peace processes. In the case of the talks with communists, Netherlands and Norway played pivotal roles in getting the negotiating parties into prolonged discussions to save the peace process.

Finally, the matter of confidentiality of peace negotiations and drafting of peace agreements had been directly challenged by some stakeholders within the perspective of the right of the citizens to information on matters of public concern. At which stage of the peace process should the "public" be allowed to participate? Are peace agreements purely executive in character without legislative imprimatur?

In sum, a peace agreement is, indeed, a by-product of a process of political decision making to resolve an armed conflict. Its legal bindingness is only as effective as the political will and resolve of the negotiating parties.