

An Overview of the International Legal Concept of Peace Agreements as Applied to Current Philippine Peace Processes

Sedfrey M. Candelaria*

Regina Ann L. Nonato**

I. INTRODUCTION.....	264
II. CONCEPT OF A PEACE TREATY	266
III. PROBLEMATIC SITUATIONS	270
A. Belligerency	
B. Constitutional Framework	
IV. MODELS.....	277
A. Sudan	

* '90 L.L.M., University of British Columbia; '84 LL.B., Ateneo de Manila University School of Law. The author is the Associate Dean for Student Affairs and a professorial lecturer on Constitutional Law, Public International Law, Political Law Review, International Economic Law, Children's Rights Law, and Indigenous Peoples' Rights at the Ateneo de Manila University School of Law. He is also a member of the GRP (Government of the Republic of the Philippines) Negotiating Panel for talks with the CPP/NPA/NDF (Communist Party of the Republic of the Philippines/New People's Army/National Democratic Front); Head of the Research and Linkages Office and the Department of Special Areas of Concern of the Philippine Judicial Academy, Supreme Court of the Philippines; Head of the Children's Rights and Indigenous People's Desk, Ateneo Human Rights Center; and, President of the CASA/GAL Foundation of the Philippines, Inc. The author's previous works published in the Journal include *The Rights of Indigenous Communities in International Law*, 46 ATENEO L.J. 273 (2001); *Introducing the Indigenous Peoples' Rights Act*, 47 ATENEO L.J. 571 (2002); *The Legal Characterization of the Asia-Pacific Economic Conference (APEC) and the Individual Action Plans in International Law*, 44 ATENEO L.J. 405 (2000); and, *The IMF and the Philippines: Anatomy of a Third World Debt*, 36 ATENEO L.J. 18 (1992). He is also the co-author of *The Juvenile Justice and Welfare Act of 2006: Changing Patterns and Responses for Juvenile Offending*, 52 ATENEO L.J. 293 (2007); *Legal Concept of Terrorism under International Law and Its Application to Philippine Municipal Law*, 51 ATENEO L.J. 4 (2007); *Testing Constitutional Waters: Balancing State Power, Economic Development and Respect for Human Rights*, 51 ATENEO L.J. 1 (2006); *Courts and Social Context Theory: Philippine Judicial Reform as Applied to Vulnerable Sectors*, 50 ATENEO L.J. 823 (2006); and, *The Philippines and the Convention on the Rights of the Child: Evaluating Compliance with Respect to International Standards for Procedural Rules Involving Children*, 49 ATENEO L.J. 1016 (2005).

** '10 J.D. cand., Ateneo de Manila University School of Law; Member of the Board of Editors, *Ateneo Law Journal*.

Cite as 53 ATENEO. L.J. 263 (2008).

<i>B. Ireland</i>	
<i>C. Canada</i>	
<i>D. Nepal</i>	
V. PHILIPPINE CASE STUDIES.....	283
<i>A. CPP/NPA/NDF</i>	
<i>B. MILF</i>	
VI. CONCLUSION.....	294

I. INTRODUCTION

The United Nations (UN) defines major wars as “military conflicts inflicting 1,000 battlefield deaths per year.”¹ In the past, the different parts of the globe were no strangers to armed conflicts. Though there were early attempts to outlaw war such as in the Hague Convention II,² in the Covenant of the League of Nations,³ and in the Kellogg-Briand Pact for the Renunciation of War,⁴ it was only after World War II that more effective legal instruments on preventing wars and hostilities were formulated. One of these is the UN Charter, which explicitly outlaws war stating that: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations and the Geneva Conventions.”⁵

Protocol I to the 1949 Geneva Convention defined armed conflicts as those in which “peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination.”⁶ Protocol II to the 1949 Geneva Convention defined non-international armed conflicts as those

which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its

-
1. GlobalSecurity.org, *The World at War*, available at <http://www.globalsecurity.org/military/world/war/index.html> (last accessed Sep. 3, 2008) [hereinafter *The World at War*].
 2. Hague Convention on the Limitation of Employment of Force for Recovery of Contract Debts, Oct. 18, 1907, 36 Stat. 2241.
 3. Covenant of the League of Nations, Preamble.
 4. General Treaty for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 94 L.N.T.S. 57 [hereinafter *Kellogg-Briand Pact*].
 5. U.N. Charter art. 2, ¶ 4.
 6. Geneva Convention for the Additional Protocol on the Protection of Victims of International Armed Conflicts, art. 1, June 8, 1977, 1125 U.N.T.S. 3.

territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.⁷

There were 10 major wars in 1965.⁸ In 2000, nations were either consumed in armed conflicts or were building up an uncertain peace such that as of mid-2005, there were eight continuing major wars, “with as many as two dozen ‘lesser conflicts’ ongoing with varying degrees of intensity.”⁹ Such conflicts were mostly civil or intrastate wars caused by “racial, ethnic, or religious animosities as by ideological fervor,” whose victims are mostly civilians or non-combatants.¹⁰

Aside from the fact that smaller ethnic confrontations and civil wars have become more prevalent, a huge number of “small arms and light weapons used in them constitutes a new threat to peace.”¹¹ In Europe, the “weakening or even collapse of state structures, and in particular the dissolution of the Soviet Union, has led to a greater availability of small arms and light weapons.”¹² In Central America, large numbers of small arms and light weapons remain “available for acquisition by criminal gangs and armed groups, despite the encouraging results from several programs for the collection and destruction of arms.”¹³ In Africa, which is the continent currently most afflicted by war, the “uncontrolled availability of small arms and light weapons is not only fuelling various internal conflicts but is also exacerbating violence and criminality.”¹⁴ Since 1960, Africa has experienced more than 20 major civil wars; countries within Africa which have recently suffered serious armed conflicts are Rwanda, Somalia, Angola, Sudan, Liberia, and Burundi.¹⁵

Amidst the persisting wars and hostilities, which have caused massive economic and social damage to the countries, different solutions have been tried and used to diminish or possibly end such armed conflicts. It is said that “[t]he laws of armed conflict remain in effect until the conflict is

7. Geneva Convention for the Additional Protocol on the Protection of Victims of Non-International Armed Conflicts, art. 1, ¶ 1, June 8, 1977, 1125 U.N.T.S. 609.

8. The World at War, *supra* note 1.

9. *Id.*

10. *Id.*

11. Ministry of Foreign Affairs of Japan, Armed Conflicts Around the World, available at <http://www.mofa.go.jp/policy/un/disarmament/weapon/conflict.html> (last accessed Sep. 3, 2008).

12. *Id.*

13. *Id.*

14. *Id.*

15. The World at War, *supra* note 1.

terminated.”¹⁶ One of the clearest methods of terminating an armed conflict is by means of a peace treaty or peace agreement.¹⁷

This Article will discuss the concept and essence of peace agreements in light of the existing and current models. It will examine the present Philippine situation, as well as the problems the Philippines faces in trying to achieve peace within the country. Lastly, this Article introduces the principles of shared sovereignty as an emerging conflict resolution approach between a state and sub-state entity.

II. CONCEPT OF A PEACE TREATY

A peace treaty is an “agreement or contract made by belligerent powers, in which they agree to lay down their arms, and by which they stipulate the conditions of peace and regulate the manner in which it is to be restored and supported.”¹⁸ Apart from being a source of international obligations, treaties have been utilized at a national level to transfer territory, settle disputes, protect human rights, and regulate commercial relations.¹⁹

Peace agreements, as presently applied, are often used as a mode to end hostilities between a state and a non-state entity due to secessionist struggles or problems. This is especially so at a time when non-state entities are standing firm in their demands for self-determination as they incessantly fight for independence.

Self-determination is closely intertwined with the right to independence. At present, self-determination has come to mean one of three things:

- (1) independence for new states emerging from the collapse of communism (e.g., Ukraine or Slovenia);
- (2) independence for homogenous sub-units within nation-states (e.g., Quebec or Eritrea); or
- (3) greater internal autonomy for smaller identity groups within existing states (e.g., Aaland Islands under Finland or Faeroe Islands under Denmark).²⁰

In international law, an entity’s right to self-determination covers two important rights:

16. JOAQUIN G. BERNAS, S.J., *An Introduction to Public International Law* 383 (1st ed. 2002) [hereinafter BERNAS, PIL].

17. *Id.* at 383-84.

18. BLACK’S LAW DICTIONARY 1502 (6th ed. 1990).

19. BERNAS, PIL, *supra* note 16, at 25.

20. Michael J. Kelly, *Political Downsizing: The Re-Emergence of Self-Determination, and the Movement Toward Smaller, Ethnically Homogenous States*, 47 DRAKE L. REV. 209, 221 (1999).

- (1) the right to freely determine their political status and freely pursue their economic, social and cultural development; and
- (2) the right to freely dispose of the natural wealth and resources for their own ends without prejudice to any obligations arising out of international cooperation.²¹

Self-determination is supported by international law and embodied in international instruments such as the Charter of the United Nations, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. The great urge of peoples to determine their own economic, social, and cultural development causes opposition or hostilities within a state or nation. Therefore, peace agreements are relevant, particularly at the national level, in trying to resolve these hostilities.

Most peace agreements have one common feature — they are used as a means to an end, which is to attain peace, by leading towards building a positive momentum for a final and comprehensive settlement. Peace agreements are generally “contracts intended to end a violent conflict, or to significantly transform a conflict, so that it can be more constructively addressed.”²² There are various types of peace agreements, each with their own distinct purpose.

The United Nations uses the following classifications to differentiate the various types of peace agreements:

Ceasefire Agreements – These typically short-lived agreements are “military in nature” and are used to temporarily stop a war or any armed conflict for an “agreed-upon timeframe or within a limited area.”²³

Pre-Negotiation Agreements – These agreements “define how the peace will be negotiated” and serve to “structure negotiations and keep them on track” in order to reach its goal of ending the conflict.²⁴

Interim or Preliminary Agreements – These agreements are undertaken as an “initial step toward conducting future negotiations,” usually seen as “commitments to reach a negotiated settlement.”²⁵

Comprehensive and Framework Agreements – Framework Agreements are agreements which “broadly agree upon the principles and agenda upon

21. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

22. Nita Yawanarajah & Julian Ouellet, *Peace Agreements*, available at http://www.beyondintractability.org/essay/structuring_peace_agree/ (last accessed Sep. 3, 2008).

23. *Id.*

24. *Id.*

25. *Id.*

which the substantive issues will be negotiated” and are usually accompanied by Comprehensive Agreements which “address the substance of the underlying issues of a dispute,” seeking to find the “common ground between the interests and needs of the parties to the conflict, and resolve the substantive issues in dispute.”²⁶

Implementation Agreements – These agreements “elaborate on the details of a Comprehensive or Framework Agreement” to facilitate the implementation of the comprehensive agreement.²⁷

As to its components, most peace agreements address three main concerns: procedure, substance, and organization.²⁸ The procedural components provide for the methods that establish and maintain peace such that they delineate the *how* of a peace process.²⁹ These include the setting up of schedules and institutions that “facilitate the implementation of substantive issues such as elections, justice, human rights and disarmament.”³⁰ The substantive components provide for the changes to be made after the peace agreement is reached such as political, economic, and social structural changes that are needed to “remedy past grievances and provide for a more fair and equitable future.”³¹ The organizational or institutional components are mechanisms intended to “promote the peace consolidation efforts”³² such that they address the *who* aspect of the agreement.³³

The components of peace agreements are illustrated in the following:

SUBJECTS	PROCEDURE	SUBSTANCE
NORTH KOREA & SOUTH KOREA	The leaders of North Korea and South Korea agreed to set up the first regular freight train service for half a century, linking the two countries divided by a heavily fortified border. ³⁴ They also agreed to hold	Both parties agree to formally end the 1950-1953 Korean War, which technically is still going on because a peace treaty has yet to be signed. ³⁶ North Korea would also have to give up all its nuclear weapons as part of their

26. *Id.*

27. *Id.*

28. Yawonarajah & Ouellet. *supra* note 22.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. North Korea and South Korea Peace Agreement, available at <http://warsigns.isins.com/2007/10/04/north-korea-and-south-korea-peace-agreement/> (last accessed Sep. 3, 2008).

	meetings with the ministers and defense officials, and to establish a cooperation zone around a contested sea border on the west of the Korean peninsula. ³⁵	deal. ³⁷
INDONESIAN GOVERNMENT & REBELS FROM THE FREE ACEH MOVEMENT	There will be disarmament by the rebels which will be overseen by a joint European and ASEAN monitoring team, as well as by the pro-government militias in Aceh. ³⁸ A human rights court and a truth and reconciliation commission will also be established. ³⁹	Both parties signed a peace deal intended to end their nearly 30-year conflict. ⁴⁰ Under the agreement, the rebels have agreed to set aside their demand for full independence, accepting instead a form of local self-government and the right to eventually establish a political party. ⁴¹ In turn, the Indonesian government has agreed to “release political prisoners and offer farmland to former combatants to help them reintegrate into civilian life.” ⁴²
NEPALESE GOVERNMENT & NEPAL MAOISTS	There will be disarmament by the Maoist Combatants, which will be monitored by the United Nations, as well as by the Nepali Army. ⁴³ Both parties also agreed to form a transitional government and to hold elections for a constituent assembly to	A Comprehensive Peace Agreement was signed by the Chairman of the Communist Party of Nepal and the Prime Minister of Nepal to end 11 years of civil war. ⁴⁵ The agreement provided for the progressive restructuring

36. *Id.*35. *Id.*37. *Id.*38. British Broadcasting Corporation, Aceh Rebels Sign Peace Agreement, *available at* <http://news.bbc.co.uk/1/hi/world/asia-pacific/4151980.stm> (last accessed Sep. 3, 2008).39. *Id.*40. *Id.*41. *Id.*42. *Id.*43. Revolutionary Communist Party, USA, Nepal Maoists and Government Sign Peace Agreement, *available at* <http://rwor.org/a/072/nepalagree-en.html> (last accessed Sep. 3, 2008).

	establish a new constitution and governmental system. ⁴⁴	of the state to resolve existing problems in the country, based on class, caste, religion and sex. ⁴⁶
--	---	--

It can be gleaned then that although the main goal of peace agreements is to achieve peace or to end hostilities between or among parties, each and every peace agreement varies as to its procedural and substantive components. Peace agreements adopt various measures in addressing their own respective dilemmas and each has its own distinct way of enabling the parties involved in the agreement to cooperate and comply with the agreed terms to ensure the success of the measures adopted.

III. PROBLEMATIC SITUATIONS

A. Belligerency

Belligerency is the “existence of a state of war between a state’s central government and a portion of that state.”⁴⁷ It exists when

a portion of the state’s territory is under the control of an insurgent community seeking to establish a separate state and the insurgents are in *de facto* control of a portion of the state’s territory and population, have a political organization able to exert such control and maintain some degree of popular support, and conduct themselves to the laws of war.⁴⁸

Such state of waging war has both objective and subjective standards to consider. As to the objective aspect, Sir Hersch Lauterpacht summarizes the conditions for recognition of belligerency in international law:

First, there must exist within the State an armed conflict of a general (as distinguished from a purely local) character; second, the insurgents must occupy and administer a substantial portion of national territory; third, they must conduct the hostilities in accordance with the rules of war and through organized armed forces acting under responsible authority; fourthly, there must exist circumstances which make it necessary for outside States to define their attitude by means of recognition of belligerency.⁴⁹

Traditional international law requires that certain factual conditions be met before outside states may accord recognition of belligerent status to

45. *Id.*

44. *Id.*

46. *Id.*

47. JORGE R. COQUIA & MIRIAM DEFENSOR SANTIAGO, INTERNATIONAL LAW AND WORLD ORGANIZATIONS 63 (4th ed. 2005).

48. *Id.*

49. E.H. Riedel, *Recognition of Belligerency*, 4 E.P.I.L. 47, 49 (2000).

factions challenging the incumbent government.⁵⁰ Just as in an inter-state conflict where an outside state is given the option to either join with one of the belligerents against the other or to remain strictly neutral, an internal conflict situation which complies with the objective standards, may also be placed in essentially the same footing as a war between independent foreign states, thus, giving rise to definite rights and obligations under international law.⁵¹

Although the Law of Nations provides that only full sovereign states possess the legal qualification to become belligerents,⁵² whenever a state which lacked the legal qualification to make war actually makes war, it is considered a belligerent, and all the rules of International Law pertaining to warfare apply to it.⁵³ Thus, there is a significant distinction between legal qualification under the rules of International Law and the actual power to make war. Such distinction explains the fact that insurgents, especially those who persistently fight for independence and autonomy, may become a belligerent power through recognition.⁵⁴

As to the subjective standards of belligerency, it pertains to the concerns and perhaps fears of the negotiating party, such as the government. It has also been suggested to include the existence of a circumstance, which would create an impact beyond its national borders, affecting third states whether in a direct or indirect manner, making it necessary for them to react and define its attitude to the conflict. The subjective standard of belligerency also concerns the equality or inequality in the relations of the parties to a conflict such that the legal status of parties to an inter-state conflict are equal in relation to each other, while the legal status of parties to an intrastate conflict are fundamentally unequal.⁵⁵ Furthermore,

[i]n the case of a purely internal armed conflict, the authorities in power are the legitimate Government, and their acts are in defense of their legitimacy; their opponents are the insurgents, whose acts will be punishable as rebellion, treason or the like under the municipal law in force. This legal inequality will only disappear to the extent that the insurgents succeed in

50. D.P. O'CONNELL, 1 INTERNATIONAL LAW, 161-63 (1965).

51. *Id.*

52. L. OPPENHEIM, 2 INTERNATIONAL LAW: A TREATISE, DISPUTES, WAR AND NEUTRALITY 196 (1944).

53. *Id.* at 87.

54. *Id.*

55. Mailyn Vallesteros Matamis, Asserting Belligerent Status under International Law: The Case of the CPP/NPA/NDP and the Moro Islamic Liberation Front (MILF) (2000) (unpublished J.D. thesis, Ateneo de Manila University) (on file with the Professional Schools Library, Ateneo de Manila University).

obtaining from the legitimate Government their recognition as a belligerent party.⁵⁶

There is no doubt that both objective and subjective standards will have an impact or implication on the constitutional framework and laws. For example, in the Philippine context, there is the complexity of being sued as a rebel when committing belligerent acts. Engaging in war against the forces of government and committing serious violence in the furtherance of said war is one of the means by which rebellion may be committed.⁵⁷ This statement implies that everything that war connotes such as the resort to arms, requisition of property and services, restraint of liberty, damage to property, physical injuries and loss of life, constitute only one crime — that of rebellion. Consequently, there is no complex crime of rebellion with murder and other common crimes, since every other crime is absorbed by rebellion. However, things would be more complex if political motivation is to be considered. If the killing, robbing, and other common crimes committed during rebellion were done for private purposes or profit, without any political motivation, the crimes would be separately punished.⁵⁸

In addition to the objective and subjective standards of belligerency, it is also important to note that there are legal restraints on belligerents, even on armed opposition groups. International bodies have consistently affirmed the applicability of Common Article 3 and Protocol II to armed opposition groups as a matter of treaty law and customary law.⁵⁹ Common Article 3 of the Geneva Conventions provides:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

- (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

56. *Id.* (citing FRITS KALSHOVEN, *THE LAW OF WARFARE* 13 (1973)).

57. 2 LUIS B. REYES, *THE REVISED PENAL CODE: CRIMINAL LAW* 88 (16th ed. 2006).

58. *Id.* (citing *People v. Geronimo*, 100 Phil. 90 (1956)).

59. LIESBETH ZEGVELD, *THE ACCOUNTABILITY OF ARMED OPPOSITION GROUPS IN INTERNATIONAL LAW* 9 (2002).

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment; and
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavor to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.⁶⁰

Protocol II is an amendment to the Geneva Conventions such that it extends the essential rules of the law of armed conflicts to internal wars, but making it applicable to a smaller range of internal conflicts than Common Article 3.

International bodies such as the UN Security Council and the UN Commission on Human Rights, in the context of various internal conflicts, have customarily called upon all parties to the hostilities, namely the government armed forces and armed opposition groups to observe and respect the applicable provisions of international humanitarian law, including Common Article 3 of the Geneva Convention and Protocol II of the Protocols.⁶¹ Even if one of the parties refuses to apply or comply with its obligations under Common Article 3 or Protocol II, it does not affect their obligations under such Article or Protocol, since the “applicability of these norms does not depend on reciprocity.”⁶²

The fact that the Geneva Conventions and Protocol II are international agreements concluded between states poses a question as to how armed opposition groups become bound by such rules.

60. Geneva Convention relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 75 U.N.T.S. 135.

61. ZEGVELD, *supra* note 59, at 11.

62. *Id.* at 25 (citing INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 37 (J.S. Pictet ed., 1958)).

Such armed opposition groups have neither ratified nor acceded to these treaties, neither have they become parties to the Geneva Conventions or Protocol II.⁶³ Thus, armed opposition groups actually “derive their rights and obligations contained in Common Article 3 and Protocol II through the state on whose territory they operate,”⁶⁴ such that upon ratification of the Geneva Conventions and Protocol II by the territorial state, “armed opposition groups operating on such territory become automatically bound by the relevant norms laid down therein.”⁶⁵

It is important at this point to distinguish armed opposition groups from national liberation movements. Though both are entities that cannot become a party to the Geneva Conventions and the Protocols, national liberation movements, unlike armed opposition groups, “only become subject to the additional Protocol I on an equal footing with a High Contracting Party if they make a special declaration to this effect.”⁶⁶ Also, the former is considered to fight in an international conflict while the latter is a party to an internal conflict.⁶⁷

Having established the application and relevance of the Geneva Conventions and Protocols to armed opposition groups, the question then to ask is who can be held accountable when such norms are violated or when there is failure to prevent or redress such violations.

The first and lowest level of accountability for acts of armed opposition groups relates to the leaders of such armed opposition groups.⁶⁸ Because their role as leaders is essential in ensuring observance of international norms by their subordinates, they can be held criminally liable for acts committed by their subordinates,⁶⁹ particularly in three major areas — war crimes, crimes against humanity, and genocide.⁷⁰ It has even been said that at present, “serious violations of Common Article 3 and of Protocol II entail,

63. ZEGVELD, *supra* note 59, at 14.

64. *Id.* at 15 (citing The Secretary General, *Report of the Secretary General on Respect for Human Right in Times of Armed Conflict in the Context of the Objectives and Action of the United Nations in the field of Human Rights*, ¶ 171, delivered to the 24th Session of the Commission on Human Rights, U.N. Doc. A/7720 (Nov. 20, 1969)); see also S-S. JUNOD, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 1345 (Y. Sandoz, et al. eds., 1987).

65. ZEGVELD, *supra* note 59, at 15.

66. *Id.* at 17-18.

67. *Id.* at 18.

68. *Id.* at 97.

69. *Id.*

70. *Id.* at 99.

both as a matter of treaty and customary law, individual criminal responsibility of leaders of armed opposition groups.”⁷¹

The most challenging level of accountability pertains to the accountability of the armed opposition group itself. This would then imply that such armed opposition groups are to be subjected to international law or otherwise said, to be regarded as international legal entities.⁷² In *Prosecutor v. Tadic*,⁷³ the International Criminal Tribunal of Yugoslavia defined the minimum conditions for accountability of armed opposition groups under Common Article 3 as follows:

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. Two requirements follow from the Tribunal’s statement. First, armed opposition groups must carry out protracted hostilities. Second, these groups must be organized.⁷⁴

It can be seen from the foregoing that the traditional distinction between international and internal conflicts for the application of substantive international criminal law has been largely abolished.⁷⁵ This has not only eliminated the division between state agents and members of armed opposition groups,⁷⁶ but also poses repercussions in the shaping up of peace agreements, both internationally and domestically. This is especially crucial nowadays when the state of war between the government and insurgents is increasingly becoming more widespread around the world.

B. Constitutional Framework

The Constitution is the supreme written law of the land. It is presented primarily as “both a grant and a limitation of governmental authority,” establishing, defining, and distributing among the different branches the fundamental powers of the government.⁷⁷

Although there is an obligation on the part of both citizens and non-citizens to respect the Constitution of a State, a problematic situation arises when a definite group of individuals decides not to recognize the

71. ZEGVELD, *supra* note 59, at 100.

72. *Id.* at 134.

73. *Prosecutor v. Tadic*, ICTY-IT-94-1, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction (Oct. 2, 1995).

74. ZEGVELD, *supra* note 59, at 135.

75. *Id.* at 99.

76. *Id.* at 110.

77. JOAQUIN G. BERNAS, S.J., *THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY* xxxvii (2003 ed.).

Constitution in the first place, putting their interests and claims above all else. This is the situation that negotiating parties, particularly the government of a certain state, is usually forced to deal with in the process of any peace negotiation or implementation.

Many believe that the negotiation process as well as the implementation of any peace agreement cannot be exempted from the processes required by the Constitution. However, some insurgents do not recognize the Constitution and do not want the peace agreement to be subjected to the constitutional process. This poses a problem between the negotiating parties. By insisting on solving a problem within the constitutional framework, the government, had already “consigned to doom any chance of ending the conflict.”⁷⁸

Although the Constitution remains to be the basic law of a State, it seems that the Constitution, in one way or the other, contributes to the conflicts between a state government and a non-state entity, generating feelings of alienation and deprivation that become the core grievance of insurgents asserting their right to self-determination.⁷⁹ It is even argued that the constitutional framework can be considered a “*bona fide* spoiler of peace negotiations and a hindrance to the full implementation” of peace agreements.⁸⁰ It is important then to examine and re-examine what role, if any, present and future constitutions should play in the resolution of intrastate or inter-state conflicts.

The doctrine of incorporation has an important role to play in the process of peace negotiations. In the case of treaties entered into by the Philippines, “they become part of the law of the land when concurred in by the Senate in accordance ... [with] the Constitution which sets down the mechanism for transforming a treaty into binding municipal law.”⁸¹ In other words, treaties become part of Philippine law by ratification.⁸² Customary law and provisions of treaties that have become part of customary law, also become part of domestic law through the incorporation theory.⁸³ With this,

78. Zainudin Malang, *Examining the Nexus Between Philippine Constitutions and the Mindanao Conflict: Roots and Solutions*, in *AUTONOMY & PEACE REV.: A QUARTERLY PUBLICATION OF THE INSTITUTE FOR AUTONOMY AND GOVERNANCE*, Oct.-Dec. 2007, at 11-12.

79. *Id.* at 12-13.

80. Benedicto R. Bacani, *Charter Change for Mindanao Peace in Charter Change*, in *AUTONOMY & PEACE REV.: A QUARTERLY PUBLICATION OF THE INSTITUTE FOR AUTONOMY AND GOVERNANCE*, Oct.-Dec. 2007, at 7 [hereinafter Bacani, *Charter Change*].

81. BERNAS, PIL, *supra* note 16, at 57.

82. *Id.* at 58.

83. *Id.* at 57-58.

the Philippine Courts can make use of international law to settle domestic problems.

Since the parties in a peace process are usually confronted with problems pertaining to an existing constitutional framework, the incorporation of international treaties is significant and helpful in trying to reach a compromise between the negotiating parties. Looking at it in the Philippine context,

[t]he government is reportedly anchoring big political concessions to the MILF [Moro Islamic Liberation Front] on international treaties, particularly the International Covenant on Civil and Political Rights and the United Nations Declaration on the Rights of Indigenous People, both of which recognize the right of all peoples and minority groups to self-determination. These rights include the right to freely determine their political status; the right to freely pursue their economic, social and cultural development; the right to freely dispose natural wealth and resources; and the right to autonomy or self-government in internal and financial affairs. It is legally feasible to invoke international treaties as bases for allowing greater self-determination to the Moro people since our constitution recognizes treaties as part of Philippine laws.⁸⁴

Indeed, in the current world where non-state entities stand firm in their demands for self-determination, the goal of reaching a comprehensive settlement by peace agreements is not only a long process, but a challenging one as well. Despite the aspirations of achieving peace through peace negotiations and agreements, the implementation process of such agreements is no easier than its formulation process. Problems with regard to belligerency and constitutional framework may make the whole process more difficult, contributing to the slow progress of peace negotiations.

IV. MODELS

In light of recent state practice, the “sovereignty first” doctrine is slowly being supplemented by a new conflict resolution approach called earned sovereignty.⁸⁵ This emerging conflict resolution approach may be characterized as encompassing six elements — three core elements and three optional elements.⁸⁶

The first core element is shared sovereignty wherein the “state and sub-state entity may both exercise sovereign authority and functions over a defined territory.”⁸⁷ The second core element is institution building which is

84. Bacani, *Charter Change*, *supra* note 80, at 8.

85. James R. Hooper & Paul R. Williams, *Earned Sovereignty: The Political Dimension*, 31 *DENV. J. INT’L L. & POL’Y* 355, 356 (2004).

86. *Id.*

87. *Id.*

“utilized during the period of shared sovereignty prior to the determination of final status” and where the sub-state entity “undertakes to construct institutions for self-government and to build institutions capable of exercising increasing sovereign authority and functions.”⁸⁸ The third core element is the “eventual determination of the final status of the sub-state entity and its relationship to the state,” which is done either by a referendum or by negotiated settlement between the state and sub-state entity, often with international mediation.⁸⁹ It is important to note that the determination of the final status for the sub-state entity involves the “consent of the international community in the form of international recognition.”⁹⁰

As to the optional elements, the first is phased sovereignty, which entails the “accumulation by the sub-state entity of increasing sovereign authority and functions over a specified period of time prior to the determination of final status.”⁹¹ The second one is conditional sovereignty, wherein the sub-state entity is “required to meet certain benchmarks before it may acquire increased sovereignty.”⁹² Lastly, there is constrained sovereignty, which involves “continued limitations on the sovereign authority and functions of the new state.”⁹³

The struggle for conflict resolution, particularly the formulation and implementation of peace agreements, has become a significant turning point for some countries. The Northern Ireland Good Friday Accords is one of the instances which shows shared sovereignty between states and sub-state entities seeking autonomy or independence.⁹⁴ This is also exemplified in Canada where Quebec, one of the sub-state national societies in a developed liberal democracy, has both reasserted its national distinctiveness and demanded recognition of its constitutional terms.⁹⁵ These and other countries will be discussed briefly in this section.

A. Sudan

Sudan achieved independence from the British–Egyptian administration on 1 January 1956 under a provisional constitution. In the process of granting Sudan’s independence, the civil service and administration were placed

88. *Id.*

89. *Id.*

90. *Id.*

91. Hooper & Williams, *supra* note 85.

92. *Id.*

93. *Id.*

94. *Id.* at 361.

95. Stephen Tierney, *Reframing Sovereignty? Sub-state National Societies and Contemporary Challenges to the Nation-State*, 54 I.C.L.Q. 161 (2005).

mainly in Northern Sudanese hands, largely excluding the Southern Sudanese from government.⁹⁶ This led to several mutinies and civil wars by the Southern Sudanese who aimed for regional autonomy or outright secession, which eventually led to the creation of the Southern Sudan Liberation Movement in 1971.⁹⁷

Since 1993, the leaders of Eritrea, Ethiopia, Uganda, and Kenya have pursued a peace initiative for Sudan under the support of the Intergovernmental Authority for Development (IGAD).⁹⁸ The IGAD initiative promulgated the 1994 Declaration of Principles that aimed to “identify the essential elements necessary to a just and comprehensive peace settlement.”⁹⁹ However, no peace settlement was ever reached.

In June 2002, a new round of peace negotiations began under IGAD.¹⁰⁰ The Government of the Republic of Sudan and the Sudan People’s Liberation Movement or the Sudan People’s Liberation Army met in Machakos, Kenya from 18 June 2002 through 20 July 2002 as part of their ongoing peace process.¹⁰¹ It was through this venue that the parties decided on the principles of governance, the transitional process, the structures of government, as well as on the right to self-determination for the people of South Sudan, and on state and religion.¹⁰² Such agreed principles are laid out in a peace agreement called the Machakos Protocol.¹⁰³

The Agreement contains three parts: Part A (Agreed Principles), Part B (The Transition Process), and Part C (Structures of Government). Part A of the Machakos Protocol highlights that a referendum on self-determination will be held in the South, which will offer a choice between secession and a united Sudan. Specifically, it provides that “the people of South Sudan have the right to self-determination, *inter alia*, through a referendum to determine

96. GlobalSecurity.org, Sudan - First Civil War, *available at* <http://www.globalsecurity.org/military/world/war/sudan-civil-war1.htm> (last accessed Sep. 3, 2008).

97. *Id.*

98. GlobalSecurity.org, Sudan Peace Process 1993-2002, *available at* <http://www.globalsecurity.org/military/world/war/sudan-peace-process.htm> (last accessed Sep. 3, 2008).

99. *Id.*

100. *Id.*

101. Machakos Protocol, July 20, 2002, Preamble ¶ 1, *available at* http://www.usip.org/library/pa/sudan/sudan_machakos07202002_toc.html (last accessed Sep. 3, 2008.)

102. United Nations Mission in Sudan, Comprehensive Peace Agreement, *available at* <http://www.unmis.org/English/cpa.htm> (last accessed Sep. 3, 2008).

103. Machakos Protocol, *supra* note 101.

their future status.”¹⁰⁴ Part B of the Protocol highlights that there will be a six-year interim period, after which a referendum will be held. Specifically, it provides that

[a]t the end of the six year Interim Period there shall be an internationally monitored referendum, organized jointly by the GOS [Government of Sudan] and the SPLM/A [Sudan People’s Liberation Movement/Army], for the people of South Sudan to: confirm the unity of the Sudan by voting to adopt the system of government established under the Peace Agreement; or to vote for secession.¹⁰⁵

Part C highlights that the “National Constitution of the Sudan shall be the Supreme Law of the land”¹⁰⁶ and that “[t]here shall be a National Government which shall ... take into account the religious and cultural diversity of the Sudanese people.”¹⁰⁷ It also provides for “[v]eto power by the South over certain legislative and executive actions.”¹⁰⁸ Taken as a whole, the Machakos Protocol is no doubt a precursor to a full agreement.¹⁰⁹

B. Ireland

In 1886, Northern Ireland, which was settled by a majority of Protestants, separated from the South, which was comprised mostly of Catholics. It became an integral part of the United Kingdom in 1920.¹¹⁰ From 1966 to 1969, riots and street fighting occurred between the Protestants and Catholics, the former fearing that the Catholics might attain a local majority while the latter being firm in demonstrating for civil rights.¹¹¹

The Irish Republican Army (IRA), which was outlawed in recent years, continued with its goal of ending the partition of Ireland, such that it wanted to “eject the British and unify Northern Ireland with the Irish Republic to the south.”¹¹² The first formal peace talks began in 6 October 1997, with representatives from eight major Northern Irish political parties.¹¹³ The

104. *Id.* at Part A (Agreed Principles) 1.3.

105. *Id.* at Part B (The Transition Process) 2.5.

106. *Id.* at Part C (Structure of Government) 3.1.1.

107. *Id.* at Part C (Structure of Government) 3.2.1.

108. *Id.*

109. Machakos Protocol, *supra* note 101, Part C (Structure of Government) 3.2.1.

110. Northern Ireland, available at <http://www.infoplease.com/ipa/A0108101.html> (last accessed Sep. 3, 2008).

111. *Id.*

112. *Id.*

113. *Id.*

negotiations eventually led to the landmark settlement called the Good Friday Agreement¹¹⁴ of 10 April 1998.

The Agreement contains three main parts: Strand One (Democratic Institutions in Northern Ireland), Strand Two (North/South Ministerial Council), and Strand Three (British-Irish Council), each part with its own annexes. The Agreement actually starts with the “Declaration of Support” section, followed by the “Constitutional Issues” section. It highlights that the people of Northern Ireland are entitled to a “referendum on unification with Ireland after seven years.”¹¹⁵ It also provides for the “creation of the Northern Ireland Assembly, which would be able to absorb the sovereign functions and authority to be devolved from the United Kingdom.”¹¹⁶ It recognizes the exercise of the people’s right to self-determination as well as the “legitimacy of whatever choice is freely exercised by a majority of the people of Northern Ireland with regard to its status.”¹¹⁷

It can be gleaned from the provisions of the Agreement that it did not only call for Protestants to share political power with the minority Catholics, but it also gave the Republic of Ireland a voice in Northern Irish affairs.¹¹⁸ In turn, Catholics were to suspend aiming for a united Ireland, which was not the only underlying principle of IRA, but was also written into the Irish Republic’s Constitution.¹¹⁹

C. Canada

Quebec’s distinctiveness, it being a province in which majority of its inhabitants are culturally and linguistically distinct from the rest of Canada, stems from its French origins.¹²⁰ In 1608, Quebec was settled by the French and in 1759, it was conquered by the British.¹²¹ In 1763, Great Britain acquired formal sovereignty over it under the Treaty of Paris.¹²² When

114. Agreement between the Government of the United Kingdom of Britain and Northern Ireland and the Government of Ireland on 10 Apr. 1998, *available at* <http://www.nio.gov.uk/agreement.pdf> (last accessed Sep. 3, 2008) [hereinafter Good Friday Agreement].

115. Paul R. Williams & Francesca Jannotti Pecci, *Earned Sovereignty: Bridging the Gap Between Sovereignty and Self-Determination*, 40 STAN J. INT’L L. 347, 358 (2004).

116. *Id.* at 364.

117. Good Friday Agreement, *supra* note 114, Constitutional Issues I (i).

118. Northern Ireland, *supra* note 110.

119. *Id.*

120. Kelly, *supra* note 20 at 256.

121. *Id.*

122. *Id.* (citing ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES 248 (1995)).

Quebec became part of Canada in 1867 under the British North America Act, it started harboring aspirations for self-determination.¹²³

Secessionist struggles between the federal government and the secessionist-minded province of Quebec arose in the context of democratic constitutional federations.¹²⁴ Both parties have been making concessions and compromises and vigorously negotiating the issue for a number of years; consequently, both violence and threat of violence have been minimized.¹²⁵ Thus, it was proclaimed in a 1996 Reference regarding the Secession of Quebec that regardless of whether the province ultimately decides to secede, Quebec has articulated its willingness to consider proposals granting it “new cultural and political rights and autonomy without secession.”¹²⁶ Canada, on the other hand, has expressed its willingness to “let Quebec secede peacefully if an agreement cannot be reached.”¹²⁷

D. Nepal

In 1990, Nepal, a small South Asian nation landlocked between India and China, underwent a dramatic political transition from a traditional kingdom to a modern constitutional monarchy.¹²⁸ This transition to democracy resulted in the formation of several leftist political parties, one of which was the Communist Party of Nepal (CPN).¹²⁹ Nepal has been faced with a guerilla war by such Maoist rebels.¹³⁰

Although insurgency in Nepal has existed for almost five decades, it only burst into the open with the declaration of “people’s war” on 13 February 1996 by the Communist Party, the “most radical offshoot of the leftwing spectrum in Nepali politics.”¹³¹ The CPN’s aim is to “end the Nepalese monarchy and replace it with a Maoist people’s republic, as well as an end to Indian imperialism, capitalist exploitation, the caste system, and ethnic,

123. *Id.*

124. Lawrence M. Frankel, *International Law of Secession: New Rules for New Era*, 14 HOUSE J. INT’L L. 521, 541-42 (1992).

125. *Id.* at 542.

126. *Id.*

127. *Id.*

128. GlobalSecurity.org., *Insurgency in Nepal*, available at http://www.globalsecurity.org/military/world/war/nepal_insurgency.htm (last accessed Sep. 3, 2008) [hereinafter GlobalSecurity.org, *Insurgency in Nepal*].

129. *Id.*

130. GlobalSecurity.org., *United People’s Front; People’s War Group (PWG) Nepal; Communist Party of Nepal (Maoist)*, available at <http://www.globalsecurity.org/military/world/para/upf.htm> (last accessed Sep. 3, 2008) [hereinafter GlobalSecurity.org, *United People’s Front*].

131. THOMAS A. MARKS, *INSURGENCY IN NEPAL V* (2003).

religious, and linguistic exploitation.”¹³² It entered into several cease-fire agreements with the government, but did not really prosper; thus, Maoist insurgents continue to carry out attacks on Nepali security forces, government facilities, and even civilians in most parts of the country.¹³³

On 7 November 2006, the government and rebels reached an agreement for a peace deal that would have the rebels disarm under the supervision of the United Nations and then join a transitional government, which was officially signed on November 28 of the same year.¹³⁴ By December 11, the “peace process was in danger of falling apart as rebels had not yet been allowed into the government.”¹³⁵ In response, the rebels said that the “peace process would be ‘at risk’ if a new government was not formed within one week.”¹³⁶ On 13 December 2006, proceedings seemed back on track as the government and rebels started talking and negotiating on a possible new constitution.¹³⁷ Once again, the main issue of contention was the “status of the monarchy under a new government.”¹³⁸ Although the talks were inconclusive, the parties agreed to extend the period for the talks.¹³⁹

V. PHILIPPINE CASE STUDIES

The Philippines is no stranger to armed conflicts, secessionist struggles, and peace agreements. This section will discuss selected issues arising from the peace negotiations and agreements between the Government of the Republic of the Philippines (GRP) and the Communist Party of the Philippines/New People’s Army/National Democratic Front (CPP/NPA/NDF), as well as the government’s peace negotiations with the Moro Islamic Liberation Front (MILF).

A. CPP/NPA/NDF

1. Historical Background

The Communist Party of the Philippines (CPP) was formed on 26 December 1968 in Alaminos, Pangasinan and was founded by Jose Maria

132. GlobalSecurity.org, United People’s Front, *supra* note 130.

133. *Id.*

134. GlobalSecurity.org, Insurgency in Nepal, *supra* note 128.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

Sison.¹⁴⁰ The CPP started as a small core group and gradually increased in number in 1980 when it led a successful campaign against the Marcos government by conducting “rallies and mass actions which created doubt in the citizens’ mind concerning the effectiveness of the Marcos government in its counter-insurgency operations.”¹⁴¹

The CPP is “ideologically Maoist” and has been fighting a “protracted people’s war” through its armed wing, the New People’s Army (NPA) since 1969.¹⁴² It heads the broad revolutionary front organization, the National Democratic Front (NDF),¹⁴³ which was formally established in 1973.¹⁴⁴ The NPA is CPP’s military arm while the NDF is its politico-diplomatic arm.¹⁴⁵

The CPP/NPA/NDF believe that the basic problems in the Philippines are a result of the prevalence of foreign imperialism (particularly the United States), feudalism, and bureaucrat capitalism in the social structure; thus, they aim “to unite the Filipino people against all anti-imperialist forces and to overthrow the government that is influenced by foreigners.”¹⁴⁶ These prevailing systems, according to the Party, are the roots of oppression, exploitation, and injustice that characterize Philippine society.¹⁴⁷ Hence, it is the party’s belief that genuine reforms can only be achieved if the structure itself is completely changed and the existing government is overthrown by means of a violent revolution.¹⁴⁸

2. GRP-NDF Peace Negotiations and the Theory of Two Legal Regimes

NDF entered into cease-fire negotiations with the Aquino administration, which took effect on 10 December 1986.¹⁴⁹ The exploratory talks between the GRP and the CPP/NPA/NDF “began shortly after President Ramos’

140. *Communist Party of the Philippines*, in WIKIPEDIA, available at http://en.wikipedia.org/wiki/Communist_Party_of_the_Philippines (last accessed Sep. 3, 2008).

141. Orlando Buenaventura, *The Communist Party of the Philippines/National Democratic Front Network Abroad*, available at <http://www.globalsecurity.org/military/library/report/1989/BOG.htm> (last accessed Sep. 3, 2008).

142. *Communist Party of the Philippines*, *supra* note 140.

143. *Id.*

144. Buenaventura, *supra* note 141.

145. Edmundo Garcia, *Resolution of Internal Armed Conflict in the Philippines*, in *WAGING PEACE IN THE PHILIPPINES* 85 (Garcia & Hernandez eds., 1988).

146. *Id.*

147. *Id.*

148. Buenaventura, *supra* note 141.

149. Office of the Presidential Adviser on the Peace Process with the Support of the United Nations Development Programme, Part 1: Overview of the GRP-NDF Peace Negotiations, in *The GRP-NDF Peace Negotiations (Compendium of Documents)* 1 (2006) [hereinafter GRP-NDF].

first State of the Nation Address (SONA) in July 1992,”¹⁵⁰ which eventually resulted in the attainment of five procedural agreements,¹⁵¹ paving the way for the opening of the first round of formal negotiations held on 26 June 1995 in Brussels.¹⁵² After almost a year of suspension due to the fact that the CPP/NPA/NDF failed to appear in the June 26 session, the “Brussels talks was followed by 15 rounds of both formal and informal meetings which resulted in the completion of five more agreements¹⁵³ from June 1996 to March 1998.”¹⁵⁴ One of the five agreements was the Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law (CARHRIHL).¹⁵⁵

150. *Id.* at 2.

151. *Id.* at 2-3. The five procedural agreements are:

- a. Hague Joint Declaration;
- b. Breukelen Joint Statement;
- c. Joint Agreement on Safety and Immunity Guarantees (JASIG);
- d. Joint Agreement on the Ground Rules of the Formal Meetings; and
- e. Joint Agreement on Reciprocal Working Committees (RWCs).

152. Roselle C. Tenefrancia, CARHRIHL: A Breed of Its Own 2 (unpublished paper on the characterization of CARHRIHL as a legal document) (on file with author).

153. GRP-NDF, *supra* note 149, at 3. The five more agreements referred to are:

- a. Additional Implementing Rules Pertaining to the Documents of Identification;
- b. Supplemental Agreement to the Joint Agreement on the Formation, Sequence and Operationalization of the Reciprocal Working Committees (RWCs);
- c. Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law (CARHRIHL);
- d. Additional Implementing Rules of the Joint Agreement on Safety and Immunity Guarantees (JASIG) Pertaining to the Security of Personnel and Consultation in Furtherance of the Peace Negotiations; and
- e. Joint Agreement in Support of Socioeconomic Projects of Private Development Organizations and Institutes.

154. GRP-NDF, *supra* note 149, at 3.

155. 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, Mar. 16, 1998, *available at* <http://www.philippine-revolution.net/cgi-bin/ndf/ptoks.pl?>

From 1 September 1992 to 16 March 1998, the two negotiating panels had signed a total of ten agreements.¹⁵⁶ The first one of these agreements, which serves as the basis of the CARHRIHL is the Hague Joint Declaration signed by the parties on 1 September 1992.¹⁵⁷ The Hague Declaration

enumerated the substantive agenda that shall be included in the peace negotiations, which lists down the following four agenda: (1) human rights and international law; (2) socio-economic reforms; (3) political and constitutional reforms; and, (4) end of hostilities and disposition of forces. CARHRIHL was a product of this declaration, and thus far, the only substantive agenda that has been covered.¹⁵⁸

The GRP enters the CARHRIHL through the executive powers of the President. Under the Philippine Constitution, the President has the power to negotiate treaties and international agreements.¹⁵⁹ It follows that “[t]he power to negotiate international agreements necessarily implies the power to negotiate agreements with domestic entities, such as the CPP/NPA/NDF in the case of CARHRIHL.”¹⁶⁰ However, since the CARHRIHL is neither a treaty nor an international agreement, the provision under the Philippine Constitution that “[n]o treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the members of the Senate,”¹⁶¹ does not apply. Hence, it is not subject to the approval of Congress. This is so because the CARHRIHL is “not a final and binding agreement between the parties,” but rather a temporary agreement.¹⁶² It is only “one of the substantive agenda in order to reach a final peace agreement between the two parties.”¹⁶³

As to the role of the Philippine Judiciary over any controversy involving the CARHRIHL, the political question doctrine becomes relevant. Justice Concepcion in *Tañada v. Cuenco*¹⁶⁴ defined political questions as “those questions which, under the Constitution, are to be decided by the people in their sovereign capacity, or in regard to which full discretionary authority has

id=carhrihl;fn=19980316;la=eng (last accessed Sep. 3, 2008) [hereinafter CARHRIHL].

156. Tenefrancia, *supra* note 152.

157. *Id.* at 3.

158. *Id.*

159. JOAQUIN BERNAS, S.J., *THE 1987 PHILIPPINE CONSTITUTION: A COMPREHENSIVE REVIEWER* 326 (2006 ed.).

160. Tenefrancia, *supra* note 152, at 4.

161. PHIL. CONST. art. VII, § 21.

162. Tenefrancia, *supra* note 152, at 5.

163. *Id.*

164. *Tañada v. Cuenco*, 103 Phil. 1051 (1965).

been delegated to the legislative or executive branch of the government.”¹⁶⁵ Applying the political questions doctrine, the ongoing political negotiation, including any matter involving the CARHRIHL provisions and their implementation, remain within the realm of the Executive Power.¹⁶⁶ Since the provisions of the CARHRIHL have not achieved the status of enforceability, the CARHRIHL being a temporary agreement, any controversy that may arise in the interpretation of such provisions cannot be a valid subject of judicial review and does not fall under the powers of the judiciary to settle.¹⁶⁷

There is no doubt that the CARHRIHL is a major product of the peace negotiations between the GRP and CPP/NPA/NDF, and thus, a consequence of a political act.¹⁶⁸ However, is the CARHRIHL a treaty or an enforceable agreement as between the parties? It has been the basic premise in a treaty that the parties are considered to be states as can be gleaned from its definition under the Vienna Convention, which defines a treaty as “an international agreement concluded between States in written form and governed by international law.”¹⁶⁹ In the case of the peace negotiations between the GRP and CPP/NPA/NDF, only the GRP is a state-party while the CPP/NPA/NDF is not. Thus, the CARHRIHL does not fall under the coverage of the Vienna Convention, and “any agreement that the GRP and CPP/NPA/NDF enters into cannot be considered as a treaty, by the very fact that it is not an agreement between states.”¹⁷⁰

Being a domestic peace process, international law is not applicable in the peace negotiation between the GRP and CPP/NPA/NDF, except only to serve as a basis or standard in the conduct of the negotiations and with regard to the basic rights, such as those embodied in the CARHRIHL, which international principles impose on states and individuals.¹⁷¹ All of the parts or sections of the CARHRIHL from the Preamble to its Final Provisions actually include provisions recognizing respect and application of principles of international law, particularly international humanitarian law. Examples of such provisions are: “The Parties are aware that the prolonged armed conflict in the Philippines necessitates the application of the principles of

165. *Id.* at 1067.

166. Tenefrancia, *supra* note 152, at 5.

167. *Id.*

168. *Id.*

169. Vienna Convention on the Law of Treaties, art. 2, May 23, 1969, 115 U.N.T.S. 331.

170. Tenefrancia, *supra* note 152, at 7.

171. *Id.* (citing Christine Bell, *Peace Agreements: Their Nature and Legal Status*, 100 AM. J. INT'L L. 373 (2006)).

human rights and principles of international humanitarian law”¹⁷² and “In the exercise of their inherent rights, the Parties shall adhere to and be bound by the principles and standards embodied in international instruments on human rights.”¹⁷³

Despite the signing of CARHRIHL by the GRP and CPP/NPA/NDF which confirms that both parties approved of its contents, implications exist as to the enforcement and implementation of the document itself. Under the soft law theory, the “non-treaty agreements may be ‘enforced’ by the creation of control mechanisms to which the parties voluntarily submit and the results of which have a bearing on public opinion.”¹⁷⁴ Enforcement is exacted merely by international and internal political pressure.¹⁷⁵ Moreover, if an agreement is to be considered soft law, “the same document cannot be considered as a source of law effective beyond the system that the parties have created.”¹⁷⁶ Thus, if, at most, the CARHRIHL is to be considered soft law, its enforcement cannot be compelled by either party in any court of law, whether domestic or international.¹⁷⁷

As far as the GRP implementation of human rights laws and international humanitarian law is concerned, it is clear that

it being a signatory to international instruments already provides them legal compulsion to comply with its obligations under international law. However, it still needs to be reiterated that the authority under which the GRP enters into negotiations with the CPP/NPA/NDF emanates from the constitutional and legal framework of the GRP as a sovereign state. Hence, the implementation of [the] obligations it undertook in CARHRIHL shall be subject to the same constitutional and legal framework.¹⁷⁸

It is important to note that despite the absence of a clear categorization of the CARHRIHL as a legal and enforceable document between the parties, a provision in the Preamble of the CARHRIHL clearly shows that both parties have committed themselves to stand by the principles emanated in the agreement.¹⁷⁹ The provision states: “The parties ... *realizing* the necessity and significance of assuming separate duties and responsibilities for upholding, protecting, and promoting the principles of human rights and the

172. CARHRIHL, *supra* note 155, at Part I, art. 6.

173. *Id.* at Part III, art. 1.

174. Tenefrancia, *supra* note 152, at 8 (citing Hartmutt Hillgenberg, *A Fresh Look at Soft Law* 10 E.J.I.L. 499, 515 (1999)).

175. Tenefrancia, *supra* note 152, at 8

176. *Id.*

177. *Id.*

178. *Id.* at 10.

179. *Id.*

principles of international law”¹⁸⁰ This is without a doubt a step forward for the peace process. It implies that the parties have to individually implement the provisions of the agreement until a final peace agreement is concluded.¹⁸¹

From the foregoing, it is clear that the CARHRIHL is a combination of a preliminary agreement and a comprehensive agreement. It is a temporary agreement, one of the immediate aims of which is “to complete a final peace agreement.”¹⁸² At the same time, it is a document recognized and respected by both parties, with the end goal of achieving just and lasting peace.

Another agreement of crucial importance in the success of the peace negotiations between the GRP and the CPP/NPA/NDF is the Joint Agreement on Safety and Immunity Guarantees (JASIG),¹⁸³ which was entered into by both parties in 1995. The JASIG consists of three main parts: Safety Guarantees, Immunity Guarantees, and General Provisions. Safety guarantees here mean that

all duly accredited persons as defined herein in possession of documents of identification or safe conduct passes are guaranteed free and unhindered passage in all areas in the Philippines, and in traveling to and from the Philippines in connection with the performance of their duties in the peace negotiations.¹⁸⁴

Thus, the documents of identification issued by each party containing the official seal of the issuing party and other requirements as provided for by the Joint Agreement shall be respected and recognized as safe conduct passes. The immunity guarantees shall mean “that all duly accredited persons are guaranteed immunity from surveillance, harassment, search, arrest or any other similar punitive actions due to any involvement or participation in the peace negotiations.”¹⁸⁵ The primary purpose of these guarantees is undoubtedly to “facilitate the peace negotiations, create a favorable atmosphere conducive to free discussion and free movement during the

180. CARHRIHL, *supra* note 155, at Part VI, art. 1 (emphasis supplied).

181. Tenefrancia, *supra* note 152, at 10.

182. *Id.* at 11.

183. Joint Agreement on Safety and Immunity Guarantees, entered into by and between the Government of the Republic of the Philippines and the National Democratic Front of the Philippines, including the Communist Party of the Philippines and the New People’s Army, Feb. 24, 1995, *available at* <http://www.philippinerevolution.net/cgi-bin/ndf/ptoks.pl?id=jasig;fn=19950224;la=eng> (last accessed Sep. 3, 2008).

184. *Id.*

185. *Id.*

peace negotiations, and avert any incident that may jeopardize the peace negotiations.”¹⁸⁶

B. MILF

1. Historical Background

The MILF was formed in 1977 “when Hashim Salamat, supported by ethnic Maguindanaos from Mindanao, split from the Moro National Liberation Front (MNLF), advocating a more moderate and conciliatory approach toward the government.”¹⁸⁷ In January 1987, the MNLF signed a peace agreement with the GRP where the MNLF relinquished its goal of independence for Muslim regions by accepting the government’s offer of autonomy.¹⁸⁸ However, the MILF, the next largest faction, refused to accept or recognize the peace agreement¹⁸⁹ and vowed to keep fighting for complete secession from the Philippines.

The MILF’s objective is to establish an independent state and government implementing the Shari’ah Islamic Law,¹⁹⁰ claiming at the same time that the Koran is their constitution. Thus, the MILF, in addition to its non-recognition of the Philippine Constitution, also emphasizes the role of Islam in its struggle for autonomy and self-determination.

2. GRP-MILF Peace Negotiations

Peace talks between the GRP and MILF started on 7 January 1997,¹⁹¹ which basically concerned the general cessation of hostilities and the setting of an agenda for formal peace talks.¹⁹² Formal peace talks between the MILF and

186. *Id.*

187. GlobalSecurity.org, Moro Islamic Liberation Front, *available at* <http://www.globalsecurity.org/military/world/para/milf.htm> (last accessed Sep. 3, 2008) [hereinafter GlobalSecurity.org, Moro Islamic Liberation Front].

188. *Id.*

189. *Id.*

190. Zachary Abuza, The Moro Islamic Liberation Front (MILF) and Security in Southeast Asia, *available at* http://www.usip.org/fellows/reports/2005/0609_abuza.html (last accessed Sep. 3, 2008).

191. GRP-MILF Peace Talks Still Hangs in the Balance, *available at* <http://www.luwaran.com/modules.php?nmae=News&file=articles&sid=761> (last accessed Aug. 20, 2008).

192. *See* Abhoud Syed M. Lingga, Paper presented at the SEACSN Conference 2004: Issues and Challenges for Peace and Conflict Resolution in Southeast Asia: The Mindanao Peace Process: Needing a New Formula (Jan. 12-15, 2004), *available at* http://www.msumain.edu.ph/mindanaojournal/pdf/mj2_2005.pdf (last accessed Sep. 3, 2008).

the government began in April 2004.¹⁹³ The GRP-MILF exploratory talks have three main items on the agenda: (1) security, (2) rehabilitation, and (3) ancestral domain.¹⁹⁴ Prior to the September 2006 exploratory talks, the GRP and MILF had already signed and implemented agreements on the first two items — security and rehabilitation.¹⁹⁵ However, there were problems addressing the item on ancestral domain.

The Philippine-MILF agreement, as the MILF envisions it, should “constitute a separate homeland for over four million Muslims in Mindanao, also home to about 17 million mostly Christian Filipinos.”¹⁹⁶ Because of this issue regarding the scope of the Moro’s ancestral domain, peace talks have been stalled since December 2007.¹⁹⁷ The MILF claimed that the Philippine government “completely disregarded the agreement on the ancestral domain and insisted again that the granting of a homeland to Muslims in Mindanao would solely be done through constitutional processes which the rebel group previously opposed. But the Philippine Constitution prohibits the dismembering of the country.”¹⁹⁸ They added that the “stance of the government peace panel virtually jeopardized the integrity of the peace process, and to continue with the talks would turn it into a circus.”¹⁹⁹

At present, the GRP-MILF peace talks are “shaky” and there is “apprehension” because of the build-up of military firepower in Mindanao and the withdrawal of Malaysia from the International Monitoring Team, which has been watching over the ceasefire between the Philippine military and the MILF since peace negotiations began in 2004.²⁰⁰

Though it may seem that there is no progress in the negotiations, both the GRP and the MILF continue to strive for peace and commit themselves to resolve the conflict in Mindanao. However, Murad Ebrahim, the secluded leader of the MILF, said: “[i]f the peace process fails as a result of the GRP’s dilly-dallying and spoiling, we are left with no choice, but to seek other means of achieving our objective. Should that happen, the government is to blame for failing to settle the conflict through diplomatic means.”²⁰¹

193. GlobalSecurity.org, Moro Islamic Liberation Front, *supra* note 187.

194. Malang, *supra* note 78, at 11.

195. *Id.*

196. Al Jacinto, *MILF: We Stand Firm on Self-Determination*, THE SUNDAY TIMES, May 4, 2008, at A2.

197. *Id.* at A1.

198. *Id.* at A2.

199. *Id.*

200. *Id.* at A1-2.

201. *Id.* at A2.

It can be gleaned from the foregoing that territory and self-determination are major topics of the ongoing peace negotiations between the Government and the MILF. Attempts to resolve the Mindanao conflict using the time and tested constitutional formula of the past and present have been a dismal failure.²⁰² This is probably why agreed upon frameworks for negotiations between the GRP and MILF are currently referring to a new formula in pursuing a peaceful resolution to the Bangsamoro issue.²⁰³

One of the agreements of crucial importance in the peace negotiations between the GRP and the MILF is the Memorandum of Agreement on the Ancestral Domain Aspect of the GRP-MILF Tripoli Agreement on Peace of 22 June 2001.²⁰⁴ This Memorandum of Agreement consists five main parts: Terms of Reference, Concepts and Principles, Territory, Resources, and Governance which includes intergovernmental relations and transitory mechanisms. Its contents basically highlight the need to observe international humanitarian law and respect internationally recognized human rights instruments, the holding of a plebiscite within six months following the signing of the Memorandum of Agreement on Ancestral Domain, the sharing of minerals and resources, as well as to have a shared sovereign authority and responsibility as part of its transitory mechanisms.²⁰⁵

It can be observed that the GRP-MILF agreement, particularly the Memorandum of Agreement on Ancestral Domain, is patterned after the Machakos Protocol of Sudan. Not only did both Agreements contain the same flow or parts (Agreed Principles, Transition Process, and Government Structure), but both also particularly highlighted the call for a one-time memorandum or referendum after the expiration of the six year interim or transition period. The Machakos Protocol provided for a referendum for the people of South Sudan to determine their future status, while the Memorandum of Agreement on Ancestral Domain provided for a plebiscite to resolve issues on ancestral domain, particularly as to the Bangsamoro homeland of the Moros. This common feature of holding a referendum to determine the will of the people affirms that the right to self-determination is a basic human right — one that must be respected since it is central in the negotiation and peace process.

202. Malang, *supra* note 78, at 23.

203. *Id.*

204. Memorandum of Agreement on the Ancestral Domain Aspect of the GRP-MILF Tripoli Agreement on Peace, entered into by and between the GRP and the MILF, June 22, 2001, *available at* <http://www.abs-cbnnews.com/images/news/newspics/downloads/MOA%20On%20Ancestral%20Domain.pdf> (last accessed Sep. 3, 2008).

205. *Id.*

In addition to the provision on referendum, the Draft Memorandum pertaining to the Bangsamoro Juridical Entity is similar to the Machakos Protocol in the aspect of recognizing and giving importance to the people's freedom of religion as well as protection against discrimination. It also cannot be denied that both are similar in ensuring the success and credibility of the referendum as can be deduced from the fact that both the Draft Memorandum and the Machakos Protocol provide that the referendum be conducted by a neutral third party or that it be internationally monitored. Specifically, the Draft Memorandum provides that the empowerment of the Bangsamoro juridical entity shall embody "[t]he monitoring of the operational and actual implementation of the comprehensive compact by a multinational led third party monitoring team."²⁰⁶ The Machakos Protocol provides that "[a]t the end of the six (6) year Interim Period there shall be an internationally monitored referendum, organized jointly by the GOS [Government of Sudan] and the SPLM/A [Sudan People's Liberation Movement/Army]."²⁰⁷

It has been suggested that any negotiated mechanism for Moro self-determination will succeed only when the Government recognizes the "Moros' right to craft and approve their own region's organic law or state constitution and to hold a credible referendum after a certain period under a negotiated mechanism where the Moros can freely accept or reject the arrangement."²⁰⁸ This is actually in line with the current draft of the GRP-MILF agreement, which closely exemplifies the principle of shared sovereignty.

In most instances, "shared sovereignty occurs between states and sub-state entities seeking autonomy or independence."²⁰⁹ Since the MILF has been persistently fighting for its right to self-determination and the Government has undergone its own failures and flaws in the past as to its peace process with the MILF, the relevance of shared sovereignty now plays a major role in the peace negotiations between the parties. Shared sovereignty may be achieved by amending or changing some provisions of the Philippine Constitution in order to "strengthen Moro self-rule,"²¹⁰ or perhaps even by adding some provisions. The whole section of the

206. *Id.* at Governance 1 (f).

207. Machakos Protocol, *supra* note 101, at Part B (The Transition process) 2.5.

208. Benedicto R. Bacani, *The ARMM: A Mechanism for the Self-Determination or Co-optation?*, in *AUTONOMY & PEACE REV.: A QUARTERLY PUBLICATION OF THE INSTITUTE FOR AUTONOMY AND GOVERNANCE*, Oct.-Dec. 2005, at 7, 13 [hereinafter Bacani, *ARMM*].

209. Hooper & Williams, *supra* note 85, at 361.

210. Bacani, *ARMM*, *supra* note 208, at 14.

Constitution on autonomy for Mindanao²¹¹ must be “revisited and when called for set aside to give way to a constitutional entrenchment for the new mechanism for self-rule.”²¹² Accordingly, the greatest challenge by far in the ongoing peace talks is harnessing public support to the settlement and obtaining the commitment of the nation’s leaders in supporting changes to the Constitution and existing laws in order to accommodate a working mechanism for self-determination.²¹³

VI. CONCLUSION

Surveying the history and evolution of peace negotiations, it seems that the institution of peace settlements with regard to sub-state entities, particularly on socio-ethnic and cultural issues, is a growing phenomenon. In the Philippines, the communist insurgency and the MILF’s firmness on self-determination remain one of the most challenging and debilitating problems of society. These do not only continue to threaten the country’s political and economic stability, but have also shown that peace negotiations may be hindered by the irreconcilable claims and politico-juridical mindsets of the parties.

Though the road to peace negotiations may be difficult and challenging especially on the part of the government as the negotiating party, the principle of shared sovereignty is recently being accepted at the international level as an emerging conflict resolution approach between a state and sub-state entity. Shared sovereignty has become more acceptable, both nationally and internationally, such that the sharing of power by insurgents with the existing government may not only reduce the hostilities within the state, but may also gradually achieve the peace long hoped for.

A peace agreement is not the end but the “beginning of a continuing process of finding ways to address grievances of people and in discovering meanings to their aspirations.”²¹⁴ It should “not limit the explorations of new ideas and creative ways, but should open the vista of thinking to work further for the people’s security and well-being.”²¹⁵ Furthermore, the success of an agreement is not just based on its substantive provisions, but also on various external factors, such as the political will of the parties.²¹⁶ In the end, the pursuit of peace negotiations and agreements cannot be taken for

211. PHIL. CONST. art. X.

212. Bacani, *ARMM*, *supra* note 208, at 15.

213. *Id.*

214. Abhoud Syed M. Lingga, *The Aceh Peace Process and Lessons for Mindanao*, in *AUTONOMY & PEACE REV.: A QUARTERLY PUBLICATION OF THE INSTITUTE FOR AUTONOMY AND GOVERNANCE*, Oct.-Dec. 2007, at 89.

215. *Id.*

216. Hooper & Williams, *supra* note 85, at 357.

granted, especially when the issue of peace affects everyone directly and indirectly. This ideal way of resolving armed conflicts — through the principle of shared sovereignty — particularly when dealing with secessionist disputes should be encouraged and fostered to achieve lasting peace.