

# **The GRP-MILF Memorandum of Agreement on Ancestral Domain – A New Formula in the Resolution of the Mindanao Conflict**

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Much has been written and said these past few weeks regarding the Memorandum of Agreement on Ancestral Domain (MOA-AD), the signing of which was aborted by a Temporary Restraining Order issued by the Supreme Court on August 4. Unfortunately, most of the comments and observations appear to be based on a misunderstanding of the MOA-AD as well as ignorance of the circumstances surrounding the formulation of this proposed agreement.

This series of articles hopes to shed light on the background and objectives of the MOA-AD as well as the process it went through, in the hope that with a more informed understanding, Philippine policy makers and the general public will be able to exercise better judgment regarding the desirability and need for such an agreement.

## **Historical Background**

However, before delving into the MOA-AD itself, it is necessary to briefly touch on the historical background of the so-called Mindanao problem.

It has been often pointed out that long before Christianity was brought to the Philippines by the Spaniards, Islam had already spread throughout much of the archipelago now known as the Philippines. And at least one century before the Philippines came to be as a political entity, Islamic States already existed in this archipelago.

The Spanish colonial regime in the Philippines is reckoned from the arrival of Miguel Lopez de Legazpi in these islands in 1565. However, if one considers the fact that the formation of the Philippine nation did not take place overnight and did not become a political reality until a century or even two after Legazpi's arrival, then the Islamic States here preceded by well over a century the establishment of the Philippine nation.

It should likewise be pointed out that to this day many Muslims in the Philippines still resent the fact that their people and their territories were sold by the Spanish colonial government to the Americans under the Treaty of Paris of 1898 when Spain had never really colonized their territories, had no effective control over their people and therefore had no authority to hand them over to the Americans for incorporation into the Philippine State.

While this has been pointed out many times in the past, it is believed that this reality has not sunk into the consciousness of the majority of Filipinos. Many Christian Filipinos do not realize – or refuse to accept – the fact that many “Moros” see the central Philippine Government as a distant and even “foreign” power. Putting it another way, among many Moros, the sense of being Filipino, of being part of a Philippine nation, is secondary to their being Muslims and Tausugs or Maranaos or Maguindanaoans or Yakans or Samals or whatever tribal roots they may have.

This however is a basic fact that must be understood and realized if one is to appreciate why the secessionist movement in the South has persisted for so long and why it has not lent itself to traditional solutions. This is why innovative approaches are needed if a *modus vivendi* is to be arrived at and peace achieved in the South.

This is the context within which the negotiations between the Government of the Republic of the Philippine (GRP) and the Moro Islamic Liberation Front (MILF) must be seen.

### **A Torturous Path**

The discussions between the GRP and the MILF actually date back to 1997 when then President Fidel V. Ramos sent emissaries to the Chairman of the MILF, Amir-ul Mujahideen As-Shaykh As-Shaheed Salamat bin Hashim, offering to talk peace following the conclusion of the Final Peace Agreement between the GRP and the Moro National Liberation Front the previous year. During these initial discussions an understanding was reached that the MILF would not raise the issue of independence during the talks so long as the GRP in turn would not invoke the issue of sovereignty and territorial integrity under the Philippine Constitution. It was thus agreed by the Parties that the main agenda of the projected peace talks would be the “resolution of the Bangsamoro problem”.

This initial attempt to talk peace was marred by offensives launched by the AFP, and it was not until late 1999 that the GRP and MILF Panels finally agreed on the rules and procedures for the conduct of formal peace talks. But then again the talks did not get off the ground because of President Estrada’s all-out war against the MILF in 2000. The ouster of Estrada in early 2001 revived hopes of peace because of newly installed President Gloria Macapagal Arroyo’s declaration of a policy of “all-out peace”. As soon as she assumed as President, President Arroyo immediately sent emissaries to contact Chairman Salamat Hashim for “one-on-one” peace talks.

This did not push through due to some security reasons, coupled with the reluctance on the part of the Moro Front leadership to resume the peace talks in view of their doubts regarding the sincerity of the Philippine government as a

consequence of the recent 2000 “all-out-war”. President Arroyo sought the assistance of former Prime Minister Mahathir of Malaysia to persuade and convince the MILF leadership to return to the peace negotiating table. Mahathir immediately dispatched emissaries to talk to the late Chairman, assuring the latter of the sincerity of President Arroyo to resolve the Mindanao conflict. The Governments of Malaysia and Libya offered to mediate or facilitate the GRP-MILF Peace Talks.

Exploratory talks were held shortly thereafter. During these exploratory talks held on March 24, 2001 at Kuala Lumpur, Malaysia, the GRP and MILF representatives agreed, among others, that the agenda to be taken up during the resumption of the GRP-MILF formal peace talks would be on three aspects, namely: security, rehabilitation and ancestral domain, preparatory to negotiations on the substantive political aspects of the peace talks.

The resumption of the formal talks between the GRP and MILF was held on June 20-22, 2001 in Tripoli, Libya. After two days of stormy sessions, the Parties reached an Agreement that is known as the GRP-MILF Tripoli Agreement on Peace of June 22, 2001. This agreement is regarded as the “mother agreement” along with the Framework Agreement on the Resumption of the GRP-MILF Peace Talks entered into by the Parties on March 24, 2001 at Kuala Lumpur, Malaysia. These two agreements laid down the concepts and principles to be pursued by the Parties during the peace talks, and modalities and agenda of the peace talks.

During the continuation of the peace negotiations in Kuala Lumpur, Malaysia in 2001 and 2002, the Parties entered into implementing guidelines on security and rehabilitation and humanitarian aspects. Discussions on ancestral domain were deferred for succeeding talks on account of this topic being complex and contentious. The Parties were scheduled to resume negotiations on ancestral domain during the early months of 2003 but the talks were suspended, having been overtaken by another “all-out-war” launched by the Philippine military and police on February 11, 2003 against the MILF at the Chairman’s temporary headquarters at Buliok, Pagalungan, Maguindanao and Pikit, North Cotabato. As if to add insult to injury, the day chosen for the attack was a day of obligation, the celebration of the Islamic Feast of *Eidul-Adha* (Feast of Sacrifice) marking the end of the pilgrimage season at Mecca, Kingdom of Saudi Arabia, on the lame pretext of running after alleged ‘kidnap-for-ransom gangs’ who allegedly sought refuge at the Buliok Islamic center. The military assault turned out to be “Oplan Black Rain” – to get Chairman Hashim ‘dead or alive’ at any cost. When the armed conflict spread Mindanao-wide a new truce was signed by the Parties on July 15, 2003 in order to restart the aborted peace talks.

Prior to this exploratory talks were again held in June 2003, during which the Parties agreed on the need to strengthen the ceasefire mechanism by the activation of the Ceasefire Committee on the Cessation of hostilities (CCCH) as

well as the constitution of the Adhoc Joint Action Group (ADJAG) on the isolation and interdiction of kidnap-for-ransom gangs (KFRs), lost command and criminal syndicates operating or seeking refuge within MILF controlled communities and/or spheres of influence to avoid and prevent accidental encounters between MILF forces and the government military and police.

Meantime, the resumption of the formal peace talks remained suspended. In order to normalize the situation, the Parties were busy negotiating the obstacles while the Government of Malaysia was preoccupied in the conduct of back channeling to put the peace process back on track. The Parties likewise reiterated their appeal to the Government of Malaysia to immediately constitute and lead an International Monitoring Team (IMT) to monitor and oversee the implementation of the GRP-MILF ceasefire agreement and all agreements entered into by the Parties, including rehabilitation and development programs in the conflict-affected areas of Mindanao and Sulu.

Talks proceeded on an on-again/off-again manner. Discussions on the first two aspects, security and rehabilitation, yielded some positive results. On the security side, the activation of the Ceasefire Committee on the Cessation of Hostilities (CCCH) and the fielding of the International Monitoring Team (IMT) have managed to minimize the level of violence in the field. Rehabilitation efforts, on the other hand, led to the establishment of the Bangsamoro Development Agency (BDA) in June 2002 as the MILF's project implementation body to determine, lead and manage the rehabilitation and development projects in conflict-affected areas.

Despite all the obstacles encountered – a detailed listing of which will not be enumerated here – the two Panels still managed to hammer out some agreements. These draft agreements were subjected to consultations with the respective constituencies of the parties. Thus, for example, the MILF conducted a General Consultation on May 29-31, 2005 at Camp Darapanan, Sultan Kudarat, Maguindanao, to seek a new and fresh mandate from the Bangsamoro people in the on-going peace negotiations with the Government of the Republic of the Philippines (GRP). Ambassadors, diplomatic representatives and foreign dignitaries were invited as special guests, particularly from Libya, Brunei and Japan who managed to attend, as well as officials from the Office of the President who graced the program on the opening day.

During the plenary session held on the last day, the respective heads of delegation “unanimously endorsed and approved (adopted) the draft resolution presented by the MILF Panel Chair on the Peace Negotiation, granting new and fresh mandate to the MILF to continue with the peace negotiation with the Government of the Republic of the Philippines (GRP), through the facilitation-mediation of the Government of Malaysia, towards a comprehensive, just and lasting political settlement of the Mindanao conflict and the Bangsamoro problem.” This 3-day General Consultation was attended by 2,934,065 registered

delegates coming from all over Mindanao, Sulu archipelago and Palawan, including representatives from the Indigenous peoples and some Christian Filipino migrant-settlers. In addition, the MILF held a series of peace advocacy and public consultations all over Mindanao.

The government Peace Negotiating Panel also conducted and held separate and joint public consultations and peace advocacy all over Mindanao, particularly with the Filipino migrant-settlers.

After the Parties finally agreed on the content of the MOA-AD in November of 2007, they agreed to still meet in December in Kuala Lumpur, Malaysia to finalize and initial the draft MOA-AD and for the Parties to prepare and be ready for the scheduled signing of the finalized draft agreement (MOA-AD) by the first week of January 2008. But something went wrong. The GRP Panel came up with a different or modified version deviating from the text of the consensus points after it was allegedly reviewed by the Philippine Government's cluster cabinet on national security. The MILF Peace Panel which was furnished an advance copy of the GRP version by the Malaysian Secretariat found the same unacceptable. As a result, they declined to meet with the GRP Peace Panel during the scheduled meeting in December of 2007 in Kuala Lumpur, Malaysia.

In order to reconcile the opposing positions of the Parties, the Malaysian Facilitator Datuk Uthman bin Abdul Razak, Special Adviser to the Malaysian Prime Minister's Office, conducted another shuttle diplomacy in late January 2008. The MILF side thought that the GRP had agreed to adopt the MILF Panel's draft MOA-AD based on the consensus points. But subsequently in February 2008, information was received by the MILF Peace Panel through the Malaysian Facilitator that the GRP had decided to have the draft MOA-AD first reviewed by a panel of legal experts to study and ascertain whether or not the draft agreement would meet a constitutional test if challenged before the High Court. It took the government more than 100 days to conduct the 'due diligence review' of the draft MOA-AD.

Executive meetings were held in June and July between the Parties to discuss the draft MOA-AD. A new deadlock could have occurred during the meeting of the Parties last July in view of disagreements on some new points raised by the GRP Peace Panel. But the prompt and the timely arrival of Presidential Adviser on the Peace Process Secretary Hermogenes Esperon, Jr. in Kuala Lumpur, Malaysia on July 27, 2008 to assist in resolving the issue was a welcome development. The Parties finally resolved the deadlock by coming up with a mutually agreed solution with the assistance of the Malaysian Facilitator. Preparatory to the signing ceremonies, the Chairs of both Peace Panels, together with Secretary Esperon and the Malaysian Facilitator affixed their initials on each and every page of the MOA-AD document while the schedules of annexes were initialed by the heads of their respective Secretariats. It was

thought that the formal signing scheduled last August 5, 2008 would have pushed through. Unfortunately, news came from Manila early in the evening of August 4 that the Philippine Supreme Court had issued a temporary restraining order (TRO) to the Philippine Government to desist from proceeding with the signing of the MOA-AD as scheduled.

The news of the TRO was like a bombshell that dropped from the sky. It was a diplomatic debacle. Philippine Foreign Secretary Alberto Romulo, the Foreign Minister of Malaysia, the Ambassadors of the United States, Australia and Japan to the Philippines who were invited had arrived to witness the signing of the MOA-AD, as well as the OIC Ambassador to the Philippines. Members of the civil society and NGOs who were invited to witness the signing ceremonies left for Manila the next day after being disappointed on the sudden turn of events.

### **A New Approach to Conflict Resolution**

The Framework Agreement on the Resumption of the GRP-MILF Peace Talks of March 24, 2001 and the GRP-MILF Tripoli Agreement on Peace of June 22, 2001 laid down the modalities and direction of the GRP-MILF Peace Talks. Under the March 24, 2001 Kuala Lumpur Accord, the Parties had agreed, among others, to create an atmosphere conducive to the resumption of the peace negotiation; that relief, rehabilitation and development efforts in the conflict-affected areas should go hand in hand with the peace negotiations; that respect for and implementation of all past agreements be pursued; that the stalled peace talks be resumed until the Parties reach a negotiated political settlement of the Bangsamoro problem; and that the Parties commit themselves to negotiate with sincerity and mutual trust, justice and freedom, and respect for the identity, culture and aspirations of all people of Mindanao.

The Tripoli Agreement on Peace of June 22, 2001, on the other hand, stipulates, among others, the following:

#### **“A. SECURITY ASPECT**

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1. All past agreements of the Parties shall be implemented in accordance with the Agreement on the General Framework for the Resumption of the Peace Talks signed in Kuala Lumpur, Malaysia on 24 March 2001 for the progressive resolution of the Bangsamoro problem with honor, justice and integrity for all sectors of society.
2. The negotiation and peaceful resolution of the conflict must involve consultations with the Bangsamoro people free of any imposition in order to provide chances of success and *open new formulas that permanently*

*respond to the aspirations of the Bangsamoro people for freedom. (Italics supplied)*

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## B. REHABILITATION ASPECT

1. The observance of international humanitarian law and respect for internationally recognized human rights instruments and the protection of evacuees and displaced persons (and) in the conduct of their relations reinforce the Bangsamoro people's fundamental right to determine their own future and political status.

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## C. ANCESTRAL DOMAIN ASPECT

On the aspect of ancestral domain, the Parties, in order to address the humanitarian and economic needs of the Bangsamoro people and preserve their social and cultural heritage and inherent rights over their ancestral domain, agree, that the same be discussed further by the Parties in their next meeting. “

During one of the exploratory talks between the Parties in Kuala Lumpur, Malaysia, it was decided by the Parties upon suggestion by the Malaysian Facilitator to modify the modality of the peace negotiation through the exploratory type of negotiations – a shift from the formal and adversarial type to the informal and conciliatory mode. This new mode of negotiation worked effectively in fast tracking the peace talks. In addition, the Parties agreed to constitute their respective Technical Working Groups (TWGs) to discuss and thresh out the strands on Ancestral Domain which was subdivided into strands on Concepts, Territory, Resources and Governance. The modality on the discussions of the strands on the aspect on ancestral domain which commenced in 2005 were modeled after the modality pursued in the Belfast Agreement between Northern Ireland and the British Government that made use of the strand model.

The consensus points reached by the GRP and MILF TWG joint meetings on each strand were submitted to both Panels for approval and adoption during the plenary sessions. The initial consensus outputs arrived at during the joint TWG sessions were hailed by both Parties as breakthroughs in the peace negotiations between the GRP and MILF. After the consensus points on the various strands were concluded by the Parties, the same were translated into a matrix format for further discussion and fine-tuning and thereafter, the agreed final output were translated into a text format denominated as the draft Memorandum of Agreement on Ancestral Domain (MOA-AD).

The final output crafted into a Memorandum of Agreement between the Parties has been the product of long years and thousands of hours of hard work and negotiations by both Sides. Each time consensus was reached by the negotiating Parties, a joint statement specifying in general terms the major consensus points reached and agreed upon was issued and signed. Protocols were strictly observed just like in diplomatic negotiations in the conduct of the peace talks between the Parties. Sensitive matters taken up were not released to the media preparatory to the conclusion of the negotiations to avoid distortion or premature public debate, which is a standard practice in diplomatic negotiations.

This explains the reason why details on the consensus points were withheld for release to the media to avoid premature public debate or discussions, not until the conclusion of the peace talks. “Confidentiality” was a built-in modality in the agreed protocols being observed by the Parties in the peace process, as in diplomatic negotiations. However, the “spoilers” of the peace process could hardly wait to disrupt the on-going peace talks by demanding public transparency from the negotiating Parties. Towards this end, the Parties during exploratory talks in 2005 agreed to undertake joint public consultations and advocacy with their respective constituencies in order to generate popular support to the peace process. As pointed out earlier, these public consultations were held, with the MILF, for example, holding a 3-day General Consultation from May 29-31, 2005 in Camp Darapanan, Sultan Kudarat, Maguindanao, attended by close to 3 million people from all over Mindanao, aside from holding other public forums elsewhere. The Philippine Government likewise held their consultations.

### **What is the MOA-AD All About?**

The MOA-AD is a document embodying the concepts and principles on

- a) the restoration and recognition of the ancestral rights of the Bangsamoro people over what is left and remains of their ancestral territory which they had been deprived through colonial aggression that started centuries back, and
- b) resolution of their legitimate grievances on account of injustices inflicted on their Bangsamoro identity, political sovereignty, landlessness, self-governance and integral development.

The MOA-AD is not yet the Comprehensive Compact which will be taken up through the resumption of the formal negotiations within a period of one year from the signing of the MOA-AD that will put flesh on the agreed points in this agreement. The Compact will contain the negotiated political settlement with respect to political structure, configuration of the Bangsamoro Juridical Entity (BJE), associative arrangements and power-sharing between the BJE and the Central Government, details on wealth and revenue sharing, resolution of

unresolved issues under the MOA-AD, demilitarization, transition mechanism, and general amnesty for former MILF combatants, among others.

Following is a discussion of some of the key issues covered by the MOA-AD.

## **1. Terms of Reference**

This part of the document lays down in detail the legal framework or legal regime within which the agreement has been formulated. One comment raised by critics is that the MOA-AD does not mention the Philippine Constitution of 1987 as being among its TOR. This needs to be clarified.

Preparatory to the start of the peace talks in 1997, an understanding was reached between the government emissaries sent by former President Fidel V. Ramos and the late Chairman Salamat Hashim that the MILF would agree to enter into peace negotiations with the Philippine Government provided that the latter would not invoke the issue of sovereignty and territorial integrity under the Philippine Constitution while, on the other hand, the MILF would not raise the issue on independence. It was thus agreed by the Parties that the main agenda of the projected peace talks would be the “resolution of the Bangsamoro problem”.

During the initial meeting of the Peace Panels, the GRP side asked their counterpart to submit a list of the ‘talking points’. The MILF Peace Panel first submitted nine (9) talking points which were later clustered into six (6) agenda items. These were subsequently narrowed down into three (3) aspects during the Tripoli talks in 2001 with the understanding that all the other agenda items would be taken up simultaneously. Preparatory to the start of the Tripoli talks, the GRP Peace Panel raised anew the Philippine Constitution as the framework of the negotiation to which the MILF Peace Panel objected, arguing that the Philippine Constitution would be too limited and narrow a framework for negotiation. The MILF Panel instead suggested that international law should be the framework of negotiation because the Philippine Constitution equally adopts the generally accepted principles of international law and. The Moro Front did not mean that the GRP should violate its own Constitution. Rather, the MILF being a revolutionary organization, it would naturally prefer to negotiate within the purview and coverage of international humanitarian law and the law of nations. This has been the standard practice in peace negotiations and international peace agreements. In other words, the GRP-MILF peace negotiation is extra-constitutional and not necessarily unconstitutional.

Legal scholar and writer Soliman M. Santos, Jr. disagrees with the view that the MOA-AD is unconstitutional. He says that “[To] seek constitutional change and reform (e.g., shift to federalism) has not been usually treated as unconstitutional, except it seems when it has to do with the Moro question. In

fact, it is even normal for peace processes, as shown by the experience of many countries, to seek and effect constitutional change and reform as needed for a negotiated political settlement.” (See Soliman M. Santos, Jr., “Negotiating beyond the Constitution, not unconstitutional.”)

The fact that the MOA-AD cited as among its TOR Republic Act 6734, as amended by Republic Act 9054, otherwise known as “An Act to Strengthen and Expand the Autonomous Region in Muslim Mindanao (ARMM)”, and Republic Act 8371, otherwise known as the Indigenous Peoples Rights Act of 1997, only goes to show that there is no attempt to violate the Philippine Constitution and the domestic laws. On the contrary, there is a clear intent on the part of the Parties to the MOA-AD to reconcile its terms with the existing legal framework relevant to the peace process, and includes the Constitutional framework.

The principle of **Compact rights** is not a new paradigm in Philippine jurisprudence. In the early case of *Rubi vs. Provincial Board of Mindoro* (37 Phil. 660, 1919), penned by Justice George Malcolm, the most respected American Justice in the Philippine Supreme Court during the American colonial period, he cited the landmark U.S. case of *Worcester vs. Georgia* (6 Pet. 515, 1832), where the U.S. Supreme Court Chief Justice John Marshall, the first luminary of American jurisprudence, defined the U.S. Indian relations (i.e. the Cherokee Nation) as based on entrenched treaty rights, in that it “is governed by treaty”. The U.S. Supreme Court in *Worcester* defined treaty as “a compact formed between two nations or communities, having the right of self-government.” The treaty relations between the Cherokee Nation and the U.S. Federal Government, was in the nature of a “*constitutional compact*”. This has given rise to the principle of “*constitutional negotiation*” in peace agreements as observed in other countries which can be applicable to the on-going GRP-MILF Peace negotiations.

Chief Justice Puno in his separate opinion in *Cruz vs. Secretary of Environment and Natural Resources* (GR. 135385, December 6, 2000), which dismissed the petition questioning the constitutionality of the IPRA law has cited the *Worcester* case. The principle laid down in *Worcester* is therefore still good case law and can be considered to be legally binding.

Putting it another way, the Mindanao problem has existed for centuries. It is in one sense an intractable problem, one that does not lend itself to conventional solutions. It is therefore necessary to look for innovative solutions, and if those solutions require an amendment of the Philippine Constitution then it should be considered as an option. After all, the MILF has already agreed to drop its demand for independence or secession from the Republic. That in itself is a major concession on the part of the Moro Front. The question then remains to explore options under which the Bangsamoro can still be considered to be part of the Republic without at the same time sacrificing the legitimate aspirations of the

Bangsamoro people for recognition of their unique identity and their ability to live under a regime of laws consistent with their culture and religious beliefs.

In order to ensure the acceptability of any peace agreement entered into between the government and the MILF by the *Ulama* (Islamic clerics/scholars) who are deemed the guardians of the *Shari'a* (Islamic law), the regime of *dar-ul-mua'hada* (territory under compact) and *dar-ul-sulh* (territory under peace agreement) have been included in the Terms of Reference (TOR). It is a built-in compact device that allows a blending of an Islamic paradigm and Western legal models. Seen in this light, it should be seen that there is nothing unconstitutional about the MOA-AD and its Terms of Reference (TOR).

## **2. Concepts and Principles**

Paragraph 1 which recognizes the identity of the Moros and all Indigenous Peoples as Bangsamoros should be seen to be legally acceptable. There is nothing unconstitutional about it. Besides, it grants indigenous peoples the freedom of choice.

Paragraph 2 which lays down the foundation of a Bangsamoro homeland is both historically and constitutionally defensible. In *Cariño vs. Insular Government* (1909 case), the U.S. Supreme Court recognized the ancestral land rights of the inhabitants of Benguet. The rule that was laid down in *Cariño* equally applies to the Moro population of Mindanao and Sulu for being similarly situated during the American regime.

Paragraph 3 which acknowledges that the ancestral domain and ancestral lands of the Bangsamoro people do not form part of the public domain (*juria regalia*) is constitutionally unassailable. It conforms also to the opinion of Chief Justice Puno in *Cruz vs. DENR* (December 2000).

Paragraph 5 on "Parity of esteem . . . in the political community" conforms with the Constitutional provisions on the Bill of Rights, and therefore cannot be said to be unconstitutional.

Paragraph 6 devolving the power of delineation of the Bangsamoro ancestral domain to the BJE is not different from the powers devolved to the ARMM and the National Commission on Indigenous People (NCIP) over ancestral lands.

Paragraph 7 recognizing and respecting vested property rights subject to paragraph 9 on Resources has assured adequate safeguards on the vested property rights of non-Bangsamoros who may be situated within the territorial jurisdiction of the BJE.

## **3. Territory**

The details of the Framework Agreement on Territory will still have to be taken up in the Comprehensive Compact. The stipulations here will still have to be further threshed out in detail. It should be emphasized that those areas identified under Category A territory enumerates the Barangays and villages contiguous to the ARMM area **which have a majority Moro population**. It is furthermore provided that a plebiscite would be held twelve (12) months following the signing of the MOA-AD in these areas falling under Category A.

It should be pointed out that these areas identified under the Annex "Category A" voted to be included into the ARMM during the plebiscite held in 2001. However, because this plebiscite was held on the basis of Provinces and Cities and not on the basis of villages and Barangays, they were unfortunately not included in what was subsequently proclaimed as the ARMM. The Organic Law (RA 9054) creating the ARMM disregarded the terms of the GRP-MNLF Final Peace Agreement of September 2, 1996 which referred to villages and geographic areas.

The areas covered under Category B and reflected on the map and list attached are designated as "Special Intervention Areas" consisting of conflict-affected areas outside the BJE. The areas under Category B shall be the subject of special socio-economic and cultural affirmative action implemented by the Central Government pending the conduct of a plebiscite not earlier than twenty-five (25) years from the signing of the Comprehensive Compact. Certainly the conduct of the plebiscite over the additional areas to become part of the BJE area of jurisdiction is a well-recognized democratic process and cannot therefore be considered to be unconstitutional.

The conduct of the plebiscite is the most formal way of popular consultation. Moreover, the areas reflected on Annex Category B are subject to further negotiations pending the conduct of plebiscite not earlier than twenty-five (25) years from the signing of the Comprehensive Compact. During this rather lengthy period the residents of these areas can assess the progress (or lack of it) under the BJE-governed areas – the current ARMM and those Category A villages/Barangays who vote to be included – and can subsequently decide whether they wish to be governed in a similar manner. This should be a totally acceptable and legally defensible procedure.

#### **4. Internal Waters and Territorial Waters**

Internal waters and territorial waters form part of the Bangsamoro natural wealth and resources. The Moros, particularly those inhabiting the Sulu archipelago are mainly dependent on the sea as a major source of their livelihood since time immemorial. The Mindanao and Sulu seas have been their by-ways and highways in their trading activities with other Asian countries.

With respect to internal waters the BJE will have exclusive authority within fifteen (15) kilometers from the shoreline. This is based on the extent of municipal waters under the Fisheries Code. Beyond the 15 km limit, the BJE and the Central Government will have joint control and jurisdiction up to the Philippine baseline. This is not prohibited under the Philippine Constitution but before it could be fully implemented, this would require an enabling law passed by Congress.

## **5. Resources**

The principle of wealth-sharing adopted in the MOA-AD was patterned after the Machachos Protocol of South Sudan and the Sudan Central Government. Wealth and revenue sharing between the Central government and the BJE is not unconstitutional. The ARMM Organic Law (R.A. 9054) contains a provision on resource and revenue sharing. The other stipulations on natural resources are similarly found in R.A. 8371 (IPRA Law of 1997). The IPRA law was upheld as constitutional by the High Court.

Participation by the BJE in trade missions, Asian trade and even taking part in international bodies of the United Nations is not expressly prohibited by national law, neither is it prohibited by the Constitution. One need only look at the participation of local government units in the EAGA (East ASEAN Growth Area). The national government even encourages active participation of local governments in the EAGA to stimulate border trade and economic activity with the ASEAN neighboring countries. Moreover, it should be noted that trade with other Asian countries has been the preoccupation of the Bangsamoros since time immemorial.

However, present circumstances have disrupted the traditional trading activities of the Bangsamoro people, resulting in economic difficulties. The relatively free trade of the region in the past has been restricted by legal regimes which effectively put a stop to it. Moreover, because of limitations of capital resources on the part of Moro businessmen, the opportunities opened up by such schemes as EAGA are instead being exploited by big-time Filipino capitalists and entrepreneurs. It is hoped that the BJE, once established, will level the playing field by allowing access to the financing required to enable Moro businessmen and entrepreneurs to likewise avail of these opportunities in ASEAN trade.

## **6. Governance**

Paragraph 1 of the section on Governance of the MOA-AD is a reiteration of the stipulated terms in the GRP-MILF Tripoli Agreement on Peace of June 22, 2001, a well recognized principle in peace negotiations, i.e., popular consultation and search for a new formula. The principle of popular consultation can lead to the conduct of a plebiscite or referendum, a direct exercise of sovereign will and power on the part of the inhabitants of the territory affected.

There are two competing concepts of sovereignty, namely: state sovereignty based on mutual recognition of states as sovereign entities in their own right; and secondly, national sovereignty based on the principle that individual ethnic groups have a right to self-determination. The Philippine Constitution, on the other hand, speaks of popular sovereignty that resides in the people. Liberally construed, it may also involve or extend to ethnic sovereignty under the concept of 'peoples' based on the UN Charter, Universal Declaration of Human Rights, UN General Assembly Resolutions and the two International Covenants on Civil and Political Rights, and Social, Economic and Cultural Rights.

An emerging formula in international peace agreements and resolution of sovereignty-based disputes is the "earned sovereignty approach" which has become an accepted model among international lawyers, peace mediators and peace advocates. The approach of earned sovereignty as developed in recent state practice is designed to create an opportunity for resolving sovereignty-based conflicts by providing for the managed devolution of sovereign authority and function from a state to a sub-state entity. "The authority and functions may include the power to collect taxes, control the development of natural resources, conduct local policing operations, maintain a local army or defense force, enter into international treaties on certain matters (e.g., trade and commerce, or culture like the conduct of annual pilgrimage [haj] missions), maintain representative offices abroad, and participate in some form in international bodies." (Paul R. Williams, Michael P. Scharf and James R. Hooper, "Resolving Sovereignty-Based Conflicts: The Emerging Approach of Earned Sovereignty", *Denver Journal of International Law & Policy*, Vol. 31.3, pp. 349-354).

The BJE model has adopted the "earned sovereignty approach" in modified form under the MOA-AD, the details of which will be discussed during the negotiations on the Comprehensive Compact. The devolved powers to the sub-state entity (i.e., BJE) by the parent state (Central Government) are known as "shared powers and authority". The MOA-AD denominated the relationship between the BJE and Central Government as an "associative relationship". In some constitutions of the European type this relationship is characterized as "federative" particularly in a unitary system. Under the Federal system of the German Constitution, this is known as the principle of "subsidiarity", a concept long adopted by the Catholic Church.

What is unconstitutional in proposing constitutional reform of the Philippine unitary system if it will go a long way in resolving the Mindanao conflict and the Bangsamoro people's aspiration for a meaningful self-rule that is short of having full independence from the Philippine State? The acknowledgment of the Philippine Central Government in the MOA-Ad is an assurance that the Bangsamoro people are not intending to secede from the Philippine territory. The Bangsamoro people only desire a definition of their own homeland over

which they will have the right, in association with the Central Government, to set up a governance system in accordance with their own way of life, manage and control their own natural resources, chart their own development in accordance with their own peculiar needs with less external interference from the Central Government and become self-reliant without having to depend on dole-outs from the Central Government. The unitary constitution of the Kingdom of Spain has recognized its historic communities and regions by granting them regional autonomous states, such as Galicia, Andalusia, Cataluña and the Basque Country.

### **The Moro Perspective**

Why can't the Philippine State, a former colony of Spain, emulate its former colonial master who, despite having a unitary system, readily granted a special form of autonomy approximating that of autonomous self-governing regional states to a number of its communities? From the viewpoint of many in Mindanao the refusal of the Philippine Government is likely due to the fact that Imperial Manila, the capital of a highly centralized and corrupt system of government which is under the control of vested economic and political elites, is too greedy and selfish to share political and economic power with the regions, much less the historic peoples and communities, poor peasants and labor. Nothing has changed. Moroland continues to remain under colonial occupation by a colonial army. Its oppressed native peoples have remained poor and impoverished. Their rich natural resources are being exploited and enjoyed by outsiders.

The rich and vast wealth and natural resources of Mindanao, the Sulu Archipelago and Palawan constitute the milking cow of the Filipino political elites, vested Filipino business groups and favored multi-national corporate interests, and its native peoples are virtual hostage nations under a post World War II neo-colonialist Philippine regime. Under this system the proposal to shift to a federal system can never succeed.

The situation is no different, for example, from that of Christian communities in Luzon or the Visayas who host power plants or mining companies but who in the process are left undeveloped and neglected. The same kind of resentment that these Christian communities feel at these "outside" capitalists, often multinational companies with their big business partners from Manila, exploiting their natural resources is felt by the Moros or Mindanao.

### **Options**

The Bangsamoro people are now pushed to the wall and the only option left, **in lieu of an armed struggle (Jihad)**, should the MOA-AD be rejected by the High Court and the Filipino people and the peace process becomes a circus, is to revert to the original goal of independence and mount a campaign for

decolonization under the auspices of the United Nations and the International Court of Justice, seeking an Advisory Opinion on the status of the Moro homeland similar to that of Western Sahara. East Timor and Kosovo are recent success stories that have inspired the Bangsamoro people's aspiration for freedom and self-determination.

Being a former colony of the United States Government whose mandate over Moroland remains unfulfilled when the former hastily turned over the Bangsamoro territories to the Philippines without their prior plebiscitary consent (refer to the letter of late Chairman Salamat Hashim to US President George Bush dated January 20, 2003), the Bangsamoro people could mount a lobby with the US Congress for the decolonization of Moroland, parallel to the case of East Timor. In this case, this former colony of Portugal, through the intercession of former United Nations Secretary General Kofi Anan, sought the consent of Indonesia for the conduct of a UN-supervised referendum among the East Timorese to cast their vote and decide whether they wished to remain under an autonomous arrangement within the central government of Indonesia or they wished to become an independent country.

This can be another peaceful option available to the Bangsamoro people should the on-going peace process fail. The present UN Secretary General has already expressed alarming concern over the increasing humanitarian disaster in Mindanao. The timely intercession of the UN is a welcome development. The European Union (EU) has also recently expressed deep concern over the alarming humanitarian dimension of the Mindanao conflict.

This kind of development has led to the rise and birth of East Timor and Kosovo into full statehood and eventual independence. There is no doubt that the MILF and the BJE are an emerging *de facto* government and quasi-state, respectively. Very soon it could become a full state and join the family of nations like East Timor and Kosovo should the Philippine government back out of the on-going peace process which aims to arrive at a negotiated political settlement of the Mindanao conflict and the Bangsamoro problem under existing and available political framework. Students of history they are well aware of how new nations were born.

Prior to the outbreak of the Filipino revolution against the colonial rule of Spain, the Indio-turned Filipino nationalist leaders were merely demanding more representation under the Spanish Cortes in Spain but this aspiration was declined. Thus leaders like Andres Bonifacio, Apolinario Mabini and Emilio Aguinaldo opted to fight for independence from Spain. They succeeded but Filipino independence was hijacked by America. The Algerian nationalists were earlier demanding autonomy from France but the French colonialists blocked their demands by military force. Thus, the Algerian revolution broke out and French President Charles de Gaul was prompted to eventually grant Algerian independence.

Similarly, the Bangsamoro people through the MILF which has served as the true vanguard of the Bangsamoro struggle, has only demanded a clear definition of their ancestral homeland and a meaningful self-governance still to be defined under a proposed comprehensive compact, but the Filipino political elites and vested economic interest groups, including some sectors of the Catholic Church, have blocked the signing of the MOA-AD and moved to have it struck down by the Philippine Supreme Court. The Filipino people should learn the lessons of history and should realize what the next chapter in the Mindanao conflict could be if this legitimate struggle for recognition of the Bangsamoro identity and the rectification of the injustices of the past is ignored.

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