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[G.R. No. 183591, October 14, 2008]

THE PROVINCE OF NORTH COTABATO, DULY REPRESENTED BY GOVERNOR JESUS SACDALAN AND/OR VICE-GOVERNOR EMMANUEL PIÑOL, FOR AND IN HIS OWN BEHALF, PETITIONERS, VS. THE GOVERNMENT OF THE REPUBLIC OF THE PHILIPPINES PEACE PANEL ON ANCESTRAL DOMAIN (GRP), REPRESENTED BY SEC. RODOLFO GARCIA, ATTY. LEAH ARMAMENTO, ATTY. SEDFREY CANDELARIA, MARK RYAN SULLIVAN AND/OR GEN. HERMOGENES ESPERON, JR., THE LATTER IN HIS CAPACITY AS THE PRESENT AND DULY-APPOINTED PRESIDENTIAL ADVISER ON THE PEACE PROCESS (OPAPP) OR THE SO-CALLED OFFICE OF THE PRESIDENTIAL ADVISER ON THE PEACE PROCESS,RESPONDENTS.

G.R. NO. 183752

CITY GOVERNMENT OF ZAMBOANGA, AS REPRESENTED BY HON. CELSO L. LOBREGAT, CITY MAYOR OF ZAMBOANGA, AND IN HIS PERSONAL CAPACITY AS RESIDENT OF THE CITY OF ZAMBOANGA, REP. MA. ISABELLE G. CLIMACO, DISTRICT 1, AND REP. ERICO BASILIO A. FABIAN, DISTRICT 2, CITY OF ZAMBOANGA, PETITIONERS, VS. THE GOVERNMENT OF THE REPUBLIC OF THE PHILIPPINES PEACE NEGOTIATING PANEL (GRP), AS REPRESENTED BY RODOLFO C. GARCIA, LEAH ARMAMENTO, SEDFREY CANDELARIA, MARK RYAN SULLIVAN AND HERMOGENES ESPERON, IN HIS CAPACITY AS THE PRESIDENTIAL ADVISER ON PEACE PROCESS, RESPONDENTS.

G.R. NO. 183893

THE CITY OF ILIGAN, DULY REPRESENTED BY CITY MAYOR LAWRENCE LLUCH CRUZ, PETITIONER, VS. THE GOVERNMENT OF THE REPUBLIC OF THE PHILIPPINES PEACE PANEL ON ANCESTRAL DOMAIN (GRP), REPRESENTED BY SEC. RODOLFO GARCIA, ATTY. LEAH ARMAMENTO, ATTY. SEDFREY CANDELARIA, MARK RYAN SULLIVAN; GEN. HERMOGENES ESPERON, JR., IN HIS CAPACITY AS THE PRESENT AND DULY APPOINTED PRESIDENTIAL ADVISER ON THE PEACE PROCESS; AND/OR SEC. EDUARDO ERMITA, IN HIS CAPACITY AS EXECUTIVE SECRETARY. RESPONDENTS.

G.R. NO. 183951

THE PROVINCIAL GOVERNMENT OF ZAMBOANGA DEL NORTE, AS REPRESENTED BY HON. ROLANDO E. YEBES, IN HIS CAPACITY AS

PROVINCIAL GOVERNOR, HON. FRANCIS H. OLVIS, IN HIS CAPACITY AS VICE-GOVERNOR AND PRESIDING OFFICER OF THE SANGGUNIANG PANLALAWIGAN, HON. CECILIA JALOSJOS CARREON, CONGRESSWOMAN, 1ST CONGRESSIONAL DISTRICT, HON. CESAR G. JALOSJOS, CONGRESSMAN, 3RD CONGRESSIONAL DISTRICT, AND MEMBERS OF THE SANGGUNIANG PANLALAWIGAN OF THE PROVINCE OF ZAMBOANGA DEL NORTE, NAMELY, HON. SETH FREDERICK P. JALOSJOS, HON. FERNANDO R. CABIGON, JR., HON. ULDARICO M. MEJORADA II, HON. EDIONAR M. ZAMORAS, HON. EDGAR J. BAGUIO, HON. CEDRIC L. ADRIATICO, HON. FELIXBERTO C. BOLANDO, HON. JOSEPH BRENDO C. AJERO, HON. NORBIDEIRI B. EDDING, HON. ANECITO S. DARUNDAY, HON. ANGELICA J. CARREON AND HON. LUZVIMINDA E. TORRINO, PETITIONERS, VS. THE GOVERNMENT OF THE REPUBLIC OF THE PHILIPPINES PEACE NEGOTIATING PANEL [GRP], AS REPRESENTED BY HON. RODOLFO C. GARCIA AND HON. HERMOGENES ESPERON, IN HIS CAPACITY AS THE PRESIDENTIAL ADVISER OF PEACE PROCESS, RESPONDENTS.

G.R. NO. 183962

ERNESTO M. MACEDA, JEJOMAR C. BINAY, AND AQUILINO L. PIMENTEL III, PETITIONERS, VS. THE GOVERNMENT OF THE REPUBLIC OF THE PHILIPPINES PEACE NEGOTIATING PANEL, REPRESENTED BY ITS CHAIRMAN RODOLFO C. GARCIA, AND THE MORO ISLAMIC LIBERATION FRONT PEACE NEGOTIATING PANEL, REPRESENTED BY ITS CHAIRMAN MOHAGHER IQBAL, RESPONDENTS.

FRANKLIN M. DRILON AND ADEL ABBAS TAMANO, PETITIONERS-IN-INTERVENTION.

SEN. MANUEL A. ROXAS, PETITIONERS-IN-INTERVENTION.

MUNICIPALITY OF LINAMON DULY REPRESENTED BY ITS MUNICIPAL MAYOR NOEL N. DEANO, PETITIONERS-IN-INTERVENTION,

THE CITY OF ISABELA, BASILAN PROVINCE, REPRESENTED BY MAYOR CHERRYLYN P. SANTOS-AKBAR, PETITIONERS-IN-INTERVENTION.

THE PROVINCE OF SULTAN KUDARAT, REP. BY HON. SUHARTO T. MANGUDADATU, IN HIS CAPACITY AS PROVINCIAL GOVERNOR AND A RESIDENT OF THE PROVINCE OF SULTAN KUDARAT, PETITIONER-IN-INTERVENTION.

RUY ELIAS LOPEZ, FOR AND IN HIS OWN BEHALF AND ON BEHALF OF INDIGENOUS PEOPLES IN MINDANAO NOT BELONGING TO THE MILF, PETITIONER-IN-INTERVENTION.

CARLO B. GOMEZ, GERARDO S. DILIG, NESARIO G. AWAT, JOSELITO C. ALISUAG AND RICHALEX G. JAGMIS, AS CITIZENS AND RESIDENTS OF PALAWAN, PETITIONERS-IN-INTERVENTION.

MARINO RIDAO AND KISIN BUXANI, PETITIONERS-IN-INTERVENTION.

MUSLIM LEGAL ASSISTANCE FOUNDATION, INC (MUSLAF), RESPONDENT-IN-INTERVENTION.

MUSLIM MULTI-SECTORAL MOVEMENT FOR PEACE & DEVELOPMENT (MMMPD), RESPONDENT-IN-INTERVENTION.

D E C I S I O N

CARPIO MORALES, J.:

Subject of these consolidated cases is the **extent of the powers** of the President in pursuing the peace process. While the facts surrounding this controversy center on the armed conflict in Mindanao between the government and the Moro Islamic Liberation Front (MILF), the legal issue involved has a bearing on all areas in the country where there has been a long-standing armed conflict. Yet again, the Court is tasked to perform a delicate balancing act. It must uncompromisingly delineate the bounds within which the President may lawfully exercise her discretion, but it must do so in strict adherence to the Constitution, lest its ruling unduly restricts the freedom of action vested by that same Constitution in the Chief Executive precisely to enable her to pursue the peace process effectively.

I. FACTUAL ANTECEDENTS OF THE PETITIONS

On August 5, 2008, the Government of the Republic of the Philippines (GRP) and the MILF, through the Chairpersons of their respective peace negotiating panels, were scheduled to sign a Memorandum of Agreement on the Ancestral Domain (MOA-AD) Aspect of the GRP-MILF Tripoli Agreement on Peace of 2001 in Kuala Lumpur, Malaysia.

The MILF is a rebel group which was established in March 1984 when, under the leadership of the late Salamat Hashim, it splintered from the Moro National Liberation Front (MNLF) then headed by Nur Misuari, on the ground, among others, of what Salamat perceived to be the manipulation of the MNLF away from an Islamic basis towards Marxist-Maoist orientations.[1]

The signing of the MOA-AD between the GRP and the MILF was not to materialize, however, for upon motion of petitioners, specifically those who filed their cases before the scheduled signing of the MOA-AD, this Court issued a Temporary Restraining Order enjoining the GRP from signing the same.

The MOA-AD was preceded by a long process of negotiation and the concluding of several prior agreements between the two parties beginning in 1996, when the GRP-MILF peace negotiations began. On July 18, 1997, the GRP and MILF Peace Panels signed the Agreement on General Cessation of Hostilities. The following year, they

signed the General Framework of Agreement of Intent on August 27, 1998.

The Solicitor General, who represents respondents, summarizes the MOA-AD by stating that the same contained, among others, the commitment of the parties to pursue peace negotiations, protect and respect human rights, negotiate with sincerity in the resolution and pacific settlement of the conflict, and refrain from the use of threat or force to attain undue advantage while the peace negotiations on the substantive agenda are on-going.[2]

Early on, however, it was evident that there was not going to be any smooth sailing in the GRP-MILF peace process. Towards the end of 1999 up to early 2000, the MILF attacked a number of municipalities in Central Mindanao and, in March 2000, it took control of the town hall of Kauswagan, Lanao del Norte.[3] In response, then President Joseph Estrada declared and carried out an "all-out-war" against the MILF.

When President Gloria Macapagal-Arroyo assumed office, the military offensive against the MILF was suspended and the government sought a resumption of the peace talks. The MILF, according to a leading MILF member, initially responded with deep reservation, but when President Arroyo asked the Government of Malaysia through Prime Minister Mahathir Mohammad to help convince the MILF to return to the negotiating table, the MILF convened its Central Committee to seriously discuss the matter and, eventually, decided to meet with the GRP.[4]

The parties met in Kuala Lumpur on March 24, 2001, with the talks being facilitated by the Malaysian government, the parties signing on the same date the Agreement on the General Framework for the Resumption of Peace Talks Between the GRP and the MILF. The MILF thereafter suspended all its military actions.[5]

Formal peace talks between the parties were held in Tripoli, Libya from June 20-22, 2001, the outcome of which was the GRP-MILF Tripoli Agreement on Peace (Tripoli Agreement 2001) containing the basic principles and agenda on the following aspects of the negotiation: **Security** Aspect, **Rehabilitation** Aspect, and **Ancestral Domain** Aspect. With regard to the Ancestral Domain Aspect, the parties in Tripoli Agreement 2001 simply agreed "that the same be discussed further by the Parties in their next meeting."

A second round of peace talks was held in Cyberjaya, Malaysia on August 5-7, 2001 which ended with the signing of the Implementing Guidelines on the Security Aspect of the Tripoli Agreement 2001 leading to a ceasefire status between the parties. This was followed by the Implementing Guidelines on the Humanitarian Rehabilitation and Development Aspects of the Tripoli Agreement 2001, which was signed on May 7, 2002 at Putrajaya, Malaysia. Nonetheless, there were many incidence of violence between government forces and the MILF from 2002 to 2003.

Meanwhile, then MILF Chairman Salamat Hashim passed away on July 13, 2003 and he was replaced by Al Haj Murad, who was then the chief peace negotiator of the MILF. Murad's position as chief peace negotiator was taken over by Mohagher Iqbal. [6]

In 2005, several exploratory talks were held between the parties in Kuala Lumpur, eventually leading to the crafting of the draft MOA-AD in its final form, which, as

mentioned, was set to be signed last August 5, 2008.

II. Statement of the proceedings

Before the Court is what is perhaps the most contentious "consensus" ever embodied in an instrument - the MOA-AD which is assailed principally by the present petitions bearing docket numbers 183591, 183752, 183893, 183951 and 183962.

Commonly impleaded as respondents are the GRP Peace Panel on Ancestral Domain[7] and the Presidential Adviser on the Peace Process (PAPP) Hermogenes Esperon, Jr.

On July 23, 2008, the Province of North Cotabato[8] and Vice-Governor Emmanuel Piñol filed a petition, docketed as **G.R. No. 183591**, for Mandamus and Prohibition with Prayer for the Issuance of Writ of Preliminary Injunction and Temporary Restraining Order.[9] Invoking the right to information on matters of public concern, petitioners seek to compel respondents to disclose and furnish them the complete and official copies of the MOA-AD including its attachments, and to prohibit the slated signing of the MOA-AD, pending the disclosure of the contents of the MOA-AD and the holding of a public consultation thereon. Supplementarily, petitioners pray that the MOA-AD be declared unconstitutional.[10]

This initial petition was followed by another one, docketed as **G.R. No. 183752**, also for Mandamus and Prohibition[11] filed by the City of Zamboanga,[12] Mayor Celso Lobregat, Rep. Ma. Isabelle Climaco and Rep. Erico Basilio Fabian who likewise pray for similar injunctive reliefs. Petitioners herein moreover pray that the City of Zamboanga be excluded from the Bangsamoro Homeland and/or Bangsamoro Juridical Entity and, in the alternative, that the MOA-AD be declared null and void.

By Resolution of August 4, 2008, the Court issued a Temporary Restraining Order commanding and directing public respondents and their agents to cease and desist from formally signing the MOA-AD.[13] The Court also required the Solicitor General to submit to the Court and petitioners the official copy of the final draft of the MOA-AD,[14] to which she complied.[15]

Meanwhile, the City of Iligan[16] filed a petition for Injunction and/or Declaratory Relief, docketed as **G.R. No. 183893**, praying that respondents be enjoined from signing the MOA-AD or, if the same had already been signed, from implementing the same, and that the MOA-AD be declared unconstitutional. Petitioners herein additionally implead Executive Secretary Eduardo Ermita as respondent.

The Province of Zamboanga del Norte,[17] Governor Rolando Yebes, Vice-Governor Francis Olvis, Rep. Cecilia Jalosjos-Carreon, Rep. Cesar Jalosjos, and the members[18] of the *Sangguniang Panlalawigan* of Zamboanga del Norte filed on August 15, 2008 a petition for Certiorari, Mandamus and Prohibition,[19] docketed as **G.R. No. 183951**. They pray, *inter alia*, that the MOA-AD be declared null and void and without operative effect, and that respondents be enjoined from executing the MOA-AD.

On August 19, 2008, Ernesto Maceda, Jejomar Binay, and Aquilino Pimentel III filed

a petition for Prohibition,[20] docketed as **G.R. No. 183962**, praying for a judgment prohibiting and permanently enjoining respondents from formally signing and executing the MOA-AD and or any other agreement derived therefrom or similar thereto, and nullifying the MOA-AD for being unconstitutional and illegal. Petitioners herein additionally implead as respondent the MILF Peace Negotiating Panel represented by its Chairman Mohagher Iqbal.

Various parties moved to intervene and were granted leave of court to file their petitions-/comments-in-intervention. Petitioners-in-Intervention include Senator Manuel A. Roxas, former Senate President Franklin Drilon and Atty. Adel Tamano, the City of Isabela[21] and Mayor Cherrylyn Santos-Akbar, the Province of Sultan Kudarat[22] and Gov. Suharto Mangudadatu, the Municipality of Linamon in Lanao del Norte,[23] Ruy Elias Lopez of Davao City and of the Bagobo tribe, *Sangguniang Panlungsod* member Marino Ridao and businessman Kisin Buxani, both of Cotabato City; and lawyers Carlo Gomez, Gerardo Dilig, Nesario Awat, Joselito Alisuag, Richalex Jagmis, all of Palawan City. The Muslim Legal Assistance Foundation, Inc. (Muslaf) and the Muslim Multi-Sectoral Movement for Peace and Development (MMMPD) filed their respective Comments-in-Intervention.

By subsequent Resolutions, the Court ordered the consolidation of the petitions. Respondents filed Comments on the petitions, while some of petitioners submitted their respective Replies.

Respondents, by Manifestation and Motion of August 19, 2008, stated that the Executive Department shall thoroughly review the MOA-AD and pursue further negotiations to address the issues hurled against it, and thus moved to dismiss the cases. In the succeeding exchange of pleadings, respondents' motion was met with vigorous opposition from petitioners.

The cases were heard on oral argument on August 15, 22 and 29, 2008 that tackled the following principal issues:

1. Whether the petitions have become moot and academic

   (i) insofar as the *mandamus* aspect is concerned, in view of the disclosure of official copies of the final draft of the Memorandum of Agreement (MOA); and

   (ii) insofar as the *prohibition* aspect involving the Local Government Units is concerned, if it is considered that consultation has become *fait accompli* with the finalization of the draft;

2. Whether the constitutionality and the legality of the MOA is ripe for adjudication;

3. Whether respondent Government of the Republic of the Philippines Peace Panel committed grave abuse of discretion amounting to lack or excess of jurisdiction when it negotiated and initiated the MOA vis-à-vis ISSUES Nos. 4 and 5;

4. Whether there is a violation of the people's right to information on matters of public concern (1987 Constitution, Article III, Sec. 7) under a state policy of full disclosure of all its transactions involving public interest (1987 Constitution, Article II, Sec. 28) including public consultation under Republic Act No. 7160 (LOCAL GOVERNMENT CODE OF 1991)[;]

   If it is in the affirmative, whether *prohibition* under Rule 65 of the 1997 Rules of Civil Procedure is an appropriate remedy;

5. Whether by signing the MOA, the Government of the Republic of the Philippines would be BINDING itself

   a) to create and recognize the Bangsamoro Juridical Entity (BJE) as a separate state, or a juridical, territorial or political subdivision not recognized by law;

   b) to revise or amend the Constitution and existing laws to conform to the MOA;

   c) to concede to or recognize the claim of the Moro Islamic Liberation Front for ancestral domain in violation of Republic Act No. 8371 (THE INDIGENOUS PEOPLES RIGHTS ACT OF 1997), particularly Section 3(g) & Chapter VII (DELINEATION, RECOGNITION OF ANCESTRAL DOMAINS)[;]

   If in the affirmative, whether the Executive Branch has the authority to so bind the Government of the Republic of the Philippines;

6. Whether the inclusion/exclusion of the Province of North Cotabato, Cities of Zamboanga, Iligan and Isabela, and the Municipality of Linamon, Lanao del Norte in/from the areas covered by the projected Bangsamoro Homeland is a justiciable question; and

7. Whether desistance from signing the MOA derogates any prior valid commitments of the Government of the Republic of the Philippines. [24]

The Court, thereafter, ordered the parties to submit their respective Memoranda. Most of the parties submitted their memoranda on time.

III. Overview of the MOA-AD

As a necessary backdrop to the consideration of the objections raised in the subject five petitions and six petitions-in-intervention against the MOA-AD, as well as the two comments-in-intervention in favor of the MOA-AD, the Court takes an overview of the MOA.

The MOA-AD identifies the Parties to it as the GRP and the MILF.

Under the heading "Terms of Reference" (TOR), the MOA-AD includes not only four earlier agreements between the GRP and MILF, but also two agreements between

the GRP and the MNLF: the 1976 Tripoli Agreement, and the Final Peace Agreement on the Implementation of the 1976 Tripoli Agreement, signed on September 2, 1996 during the administration of President Fidel Ramos.

The MOA-AD also identifies as TOR two local statutes - the organic act for the Autonomous Region in Muslim Mindanao (ARMM)[25] and the Indigenous Peoples Rights Act (IPRA),[26] and several international law instruments - the ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries in relation to the UN Declaration on the Rights of the Indigenous Peoples, and the UN Charter, among others.

The MOA-AD includes as a final TOR the generic category of "compact rights entrenchment emanating from the regime of *dar-ul-mua'hada* (or territory under compact) and *dar-ul-sulh* (or territory under peace agreement) that partakes the nature of a treaty device."

During the height of the Muslim Empire, early Muslim jurists tended to see the world through a simple dichotomy: there was the *dar-ul-Islam* (the Abode of Islam) and *dar-ul-harb* (the Abode of War). The first referred to those lands where Islamic laws held sway, while the second denoted those lands where Muslims were persecuted or where Muslim laws were outlawed or ineffective.[27] This way of viewing the world, however, became more complex through the centuries as the Islamic world became part of the international community of nations.

As Muslim States entered into treaties with their neighbors, even with distant States and inter-governmental organizations, the classical division of the world into *dar-ul-Islam* and *dar-ul-harb* eventually lost its meaning. New terms were drawn up to describe novel ways of perceiving non-Muslim territories. For instance, areas like *dar-ul-mua'hada* (land of compact) and *dar-ul-sulh* (land of treaty) referred to countries which, though under a secular regime, maintained peaceful and cooperative relations with Muslim States, having been bound to each other by treaty or agreement. *Dar-ul-aman* (land of order), on the other hand, referred to countries which, though not bound by treaty with Muslim States, maintained freedom of religion for Muslims.[28]

It thus appears that the "compact rights entrenchment" emanating from the regime of *dar-ul-mua'hada* and *dar-ul-sulh* simply refers to all other agreements between the MILF and the Philippine government - the Philippines being the land of compact and peace agreement - that partake of the nature of a treaty device, "treaty" being broadly defined as "any solemn agreement in writing that sets out understandings, obligations, and benefits for both parties which provides for a framework that elaborates the principles declared in the [MOA-AD]."[29]

The MOA-AD states that the Parties "HAVE AGREED AND ACKNOWLEDGED AS FOLLOWS," and starts with its main body.

The main body of the MOA-AD is divided into four strands, namely, Concepts and Principles, Territory, Resources, and Governance.

A. **Concepts and Principles**

This strand begins with the statement that it is "the birthright of all Moros and all Indigenous peoples of Mindanao to identify themselves and be accepted as `Bangsamoros.'" It defines "**Bangsamoro people**" as the natives or original inhabitants of Mindanao and its adjacent islands including Palawan and the Sulu archipelago *at the time of conquest or colonization*, and their descendants whether mixed or of full blood, including their spouses.[30]

Thus, the concept of "Bangsamoro," as defined in this strand of the MOA-AD, includes not only "Moros" as traditionally understood even by Muslims,[31] but all indigenous peoples of Mindanao and its adjacent islands. The MOA-AD adds that the freedom of choice of indigenous peoples shall be respected. What this freedom of choice consists in has not been specifically defined.

The MOA-AD proceeds to refer to the "**Bangsamoro homeland**," the ownership of which is vested exclusively in the Bangsamoro people by virtue of their *prior* rights of occupation.[32] Both parties to the MOA-AD acknowledge that ancestral domain does **not** form part of the public domain.[33]

The Bangsamoro people are acknowledged as having the right to self-governance, which right is said to be rooted on ancestral territoriality exercised originally under the suzerain authority of their sultanates and the *Pat a Pangampong ku Ranaw*. The sultanates were described as states or "*karajaan/kadatuan*" resembling a body politic endowed with all the elements of a nation-state in the modern sense.[34]

The MOA-AD thus grounds the right to self-governance of the Bangsamoro people on the past suzerain authority of the sultanates. As gathered, the territory defined as the Bangsamoro homeland was ruled by several sultanates and, specifically in the case of the Maranao, by the *Pat a Pangampong ku Ranaw*, a confederation of independent principalities (*pangampong*) each ruled by datus and sultans, none of whom was supreme over the others.[35]

The MOA-AD goes on to describe the Bangsamoro people as "the `**First Nation**' with defined territory and with a system of government having entered into treaties of amity and commerce with foreign nations."

The term "First Nation" is of Canadian origin referring to the indigenous peoples of that territory, particularly those known as Indians. In Canada, each of these indigenous peoples is equally entitled to be called "First Nation," hence, all of them are usually described collectively by the plural "First Nations."[36] To that extent, the MOA-AD, by identifying the Bangsamoro people as "**the** First Nation" - suggesting its exclusive entitlement to that designation - departs from the Canadian usage of the term.

The MOA-AD then mentions for the first time the "**Bangsamoro Juridical Entity**" (BJE) to which it grants the authority and jurisdiction over the Ancestral Domain and Ancestral Lands of the Bangsamoro.[37]

B. **Territory**

The territory of the Bangsamoro homeland is described as the land mass as well as

the maritime, terrestrial, fluvial and alluvial domains, including the aerial domain and the atmospheric space above it, embracing the Mindanao-Sulu-Palawan geographic region.[38]

More specifically, the core of the BJE is defined as the present geographic area of the ARMM - thus constituting the following areas: Lanao del Sur, Maguindanao, Sulu, Tawi-Tawi, Basilan, and Marawi City. Significantly, this core also includes certain municipalities of Lanao del Norte that voted for inclusion in the ARMM in the 2001 plebiscite.[39]

Outside of this core, the BJE is to cover other provinces, cities, municipalities and barangays, which are grouped into two categories, Category A and Category B. Each of these areas is to be subjected to a plebiscite to be held on different dates, years apart from each other. Thus, Category A areas are to be subjected to a plebiscite not later than twelve (12) months following the signing of the MOA-AD.[40] Category B areas, also called "Special Intervention Areas," on the other hand, are to be subjected to a plebiscite twenty-five (25) years from the signing of a separate agreement - the Comprehensive Compact.[41]

The Parties to the MOA-AD stipulate that the BJE shall have jurisdiction over all natural resources within its "*internal* waters," defined as extending fifteen (15) kilometers from the coastline of the BJE area;[42] that the BJE shall also have "*territorial* waters," which shall stretch beyond the BJE internal waters up to the baselines of the Republic of the Philippines (RP) south east and south west of mainland Mindanao; and that within these *territorial* waters, the BJE and the "Central Government" (used interchangeably with RP) shall exercise **joint** jurisdiction, authority and management over all natural resources.[43] *Notably, the jurisdiction over the internal waters is not similarly described as "joint."*

The MOA-AD further provides for the **sharing** of minerals on the *territorial* waters between the Central Government and the BJE, in favor of the latter, through production sharing and economic cooperation agreement.[44] The activities which the Parties are allowed to conduct on the *territorial* waters are enumerated, among which are the exploration and utilization of natural resources, regulation of shipping and fishing activities, and the enforcement of police and safety measures.[45] *There is no similar provision on the sharng of minerals and allowed activities with respect to the internal waters of the BJE.*

C. **RESOURCES**

The MOA-AD states that the BJE is free to enter into any economic cooperation and trade relations with foreign countries and shall have the option to establish trade missions in those countries. Such relationships and understandings, however, are not to include aggression against the GRP. The BJE may also enter into environmental cooperation agreements.[46]

The *external* defense of the BJE is to remain the duty and obligation of the Central Government. The Central Government is also bound to "take necessary steps to ensure the BJE's participation in international meetings and events" like those of the ASEAN and the specialized agencies of the UN. The BJE is to be entitled to

participate in Philippine official missions and delegations for the negotiation of border agreements or protocols for environmental protection and equitable sharing of incomes and revenues involving the bodies of water adjacent to or between the islands forming part of the ancestral domain.[47]

With regard to the right of exploring for, producing, and obtaining all potential sources of energy, petroleum, fossil fuel, mineral oil and natural gas, the jurisdiction and control thereon is to be vested in the BJE "as the party having control within its territorial jurisdiction." This right carries the *proviso* that, "in times of national emergency, when public interest so requires," the Central Government may, for a fixed period and under reasonable terms as may be agreed upon by both Parties, assume or direct the operation of such resources.[48]

The sharing between the Central Government and the BJE of total production pertaining to natural resources is to be 75:25 in favor of the BJE.[49]

The MOA-AD provides that legitimate grievances of the Bangsamoro people arising from any unjust dispossession of their territorial and proprietary rights, customary land tenures, or their marginalization shall be acknowledged. Whenever restoration is no longer possible, reparation is to be in such form as mutually determined by the Parties.[50]

The BJE may **modify or cancel** the forest concessions, timber licenses, contracts or agreements, mining concessions, Mineral Production and Sharing Agreements (MPSA), Industrial Forest Management Agreements (IFMA), and other land tenure instruments granted by the Philippine Government, including those issued by the present ARMM.[51]

D. **Governance**

The MOA-AD binds the Parties to invite a multinational third-party to observe and monitor the implementation of the **Comprehensive Compact**. This compact is to embody the "details for the effective enforcement" and "the mechanisms and modalities for the actual implementation" of the MOA-AD. The MOA-AD explicitly provides that the participation of the third party shall not in any way affect the status of the relationship between the Central Government and the BJE.[52]

The "associative" relationship between the Central Government and the BJE

The MOA-AD describes the relationship of the Central Government and the BJE as "**associative**," characterized by shared authority and responsibility. And it states that the structure of governance is to be based on executive, legislative, judicial, and administrative institutions with defined powers and functions in the Comprehensive Compact.

The MOA-AD provides that its provisions requiring "amendments to the existing legal framework" shall take effect upon signing of the Comprehensive Compact and upon effecting the aforesaid amendments, with due regard to the **non-derogation of prior agreements** and within the stipulated timeframe to be contained in the

Comprehensive Compact. ***As will be discussed later, much of the present controversy hangs on the legality of this provision.***

The BJE is granted the power to build, develop and maintain its own institutions inclusive of civil service, electoral, financial and banking, education, legislation, legal, economic, police and internal security force, judicial system and correctional institutions, the details of which shall be discussed in the negotiation of the comprehensive compact.

As stated early on, the MOA-AD was set to be signed on August 5, 2008 by Rodolfo Garcia and Mohagher Iqbal, Chairpersons of the Peace Negotiating Panels of the GRP and the MILF, respectively. *Notably, the penultimate paragraph of the MOA-AD identifies the signatories as "the representatives of the Parties," meaning the GRP and MILF themselves, and not merely of the negotiating panels.*[53] In addition, the signature page of the MOA-AD states that it is "WITNESSED BY" Datuk Othman Bin Abd Razak, Special Adviser to the Prime Minister of Malaysia, "ENDORSED BY" Ambassador Sayed Elmasry, Adviser to Organization of the Islamic Conference (OIC) Secretary General and Special Envoy for Peace Process in Southern Philippines, and SIGNED "IN THE PRESENCE OF" Dr. Albert G. Romulo, Secretary of Foreign Affairs of RP and Dato' Seri Utama Dr. Rais Bin Yatim, Minister of Foreign Affairs, Malaysia, all of whom were scheduled to sign the Agreement last August 5, 2008.

Annexed to the MOA-AD are two documents containing the respective lists *cum* maps of the provinces, municipalities, and barangays under Categories A and B earlier mentioned in the discussion on the strand on TERRITORY.

IV. PROCEDURAL ISSUES

A. Ripeness

The power of judicial review is limited to actual cases or controversies.[54] Courts decline to issue advisory opinions or to resolve hypothetical or feigned problems, or mere academic questions.[55] The limitation of the power of judicial review to actual cases and controversies defines the role assigned to the judiciary in a tripartite allocation of power, to assure that the courts will not intrude into areas committed to the other branches of government.[56]

An actual case or controversy involves a conflict of legal rights, an assertion of opposite legal claims, susceptible of judicial resolution as distinguished from a hypothetical or abstract difference or dispute. There must be a contrariety of legal rights that can be interpreted and enforced on the basis of existing law and jurisprudence.[57] The Court can decide the constitutionality of an act or treaty only when a proper case between opposing parties is submitted for judicial determination.[58]

Related to the requirement of an actual case or controversy is the requirement of ripeness. A question is ripe for adjudication when the act being challenged has had a direct adverse effect on the individual challenging it.[59] For a case to be considered ripe for adjudication, it is a prerequisite that something had then been accomplished or performed by either branch before a court may come into the picture,[60] and the petitioner must allege the existence of an immediate or threatened injury to itself as

a result of the challenged action.[61] He must show that he has sustained or is immediately in danger of sustaining some direct injury as a result of the act complained of.[62]

The Solicitor General argues that there is no justiciable controversy that is ripe for judicial review in the present petitions, reasoning that

> The unsigned MOA-AD is simply a list of consensus points subject to further negotiations and legislative enactments as well as constitutional processes aimed at attaining a final peaceful agreement. Simply put, the MOA-AD remains to be a proposal that does not automatically create legally demandable rights and obligations until the list of operative acts required have been duly complied with. x x x
>
> x x x x
>
> In the cases at bar, it is respectfully submitted that this Honorable Court has no authority to pass upon issues based on hypothetical or feigned constitutional problems or interests with no concrete bases. Considering the preliminary character of the MOA-AD, there are no concrete acts that could possibly violate petitioners' and intervenors' rights since the acts complained of are mere contemplated steps toward the formulation of a final peace agreement. Plainly, petitioners and intervenors' perceived injury, if at all, is merely imaginary and illusory apart from being unfounded and based on mere conjectures. (Underscoring supplied)

The Solicitor General cites[63] the following provisions of the MOA-AD:

TERRITORY

x x x x

2. Toward this end, the Parties enter into the following stipulations:

x x x x

d. Without derogating from the requirements of prior agreements, the Government stipulates to conduct and deliver, using all possible legal measures, within twelve (12) months following the signing of the MOA-AD, a plebiscite covering the areas as enumerated in the list and depicted in the map as Category A attached herein (the "Annex"). The Annex constitutes an integral part of this framework agreement. Toward this end, the Parties shall endeavor to complete the negotiations and resolve all outstanding issues on the Comprehensive Compact within fifteen (15) months from the signing of the MOA-AD.

x x x x

GOVERNANCE

x x x x

7. The Parties agree that mechanisms and modalities for the actual implementation of this MOA-AD shall be spelt out in the Comprehensive Compact to mutually take such steps to enable it to occur effectively.

   Any provisions of the MOA-AD requiring amendments to the existing legal framework shall come into force upon the signing of a Comprehensive Compact and upon effecting the necessary changes to the legal framework with due regard to non-derogation of prior agreements and within the stipulated timeframe to be contained in the Comprehensive Compact.[64] (Underscoring supplied)

The Solicitor General's arguments fail to persuade.

Concrete acts under the MOA-AD are not necessary to render the present controversy ripe. In *Pimentel, Jr. v. Aguirre*,[65] this Court held:

> x x x [B]y the mere enactment of the questioned law or the approval of the challenged action, the dispute is said to have ripened into a judicial controversy even without any other overt act. Indeed, even a singular violation of the Constitution and/or the law is enough to awaken judicial duty.
>
> x x x x
>
> By the same token, when an act of the President, who in our constitutional scheme is a coequal of Congress, is seriously alleged to have infringed the Constitution and the laws x x x settling the dispute becomes the duty and the responsibility of the courts.[66]

In *Santa Fe Independent School District v. Doe,*[67] the United States Supreme Court held that the challenge to the constitutionality of the school's policy allowing student-led prayers and speeches before games was ripe for adjudication, even if no public prayer had yet been led under the policy, because the policy was being challenged as unconstitutional *on its face*.[68]

That the law or act in question is not yet effective does not negate ripeness. For example, in *New York v. United States,*[69]decided in 1992, the United States Supreme Court held that the action by the State of New York challenging the provisions of the Low-Level Radioactive Waste Policy Act was ripe for adjudication even if the questioned provision was not to take effect until January 1, 1996, because the parties agreed that New York had to take immediate action to avoid the provision's consequences.[70]

The present petitions pray for Certiorari,[71] Prohibition, and Mandamus. Certiorari and Prohibition are remedies granted by law when any tribunal, board or officer has acted, in the case of certiorari, or is proceeding, in the case of prohibition, without or

in excess of its jurisdiction or with grave abuse of discretion amounting to lack or excess of jurisdiction.[72] Mandamus is a remedy granted by law when any tribunal, corporation, board, officer or person unlawfully neglects the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station, or unlawfully excludes another from the use or enjoyment of a right or office to which such other is entitled.[73] Certiorari, Mandamus and Prohibition are appropriate remedies to raise constitutional issues and to review and/or prohibit/nullify, when proper, acts of legislative and executive officials.[74]

The authority of the GRP Negotiating Panel is defined by Executive Order No. 3 (E.O. No. 3), issued on February 28, 2001.[75] The said executive order requires that " [t]he government's policy framework for peace, including the systematic approach and the administrative structure for carrying out the comprehensive peace process x x x be governed by this Executive Order."[76]

The present petitions allege that respondents GRP Panel and PAPP Esperon drafted the terms of the MOA-AD without consulting the local government units or communities affected, nor informing them of the proceedings. As will be discussed in greater detail later, such omission, by itself, constitutes *a departure by respondents from their mandate under E.O. No. 3.*

Furthermore, the petitions allege that the provisions of the MOA-AD violate the Constitution. The MOA-AD provides that "any provisions of the MOA-AD requiring amendments to the existing legal framework shall come into force upon the signing of a Comprehensive Compact and upon effecting the necessary changes to the legal framework," implying an amendment of the Constitution to accommodate the MOA-AD. This stipulation, in effect, **guaranteed** to the MILF the amendment of the Constitution. *Such act constitutes another violation of its authority*. Again, these points will be discussed in more detail later.

As the petitions allege acts or omissions on the part of respondent that **exceed their authority**, by violating their duties under E.O. No. 3 and the provisions of the Constitution and statutes, the petitions make a *prima facie* case for Certiorari, Prohibition, and Mandamus, and an actual case or controversy ripe for adjudication exists. **When an act of a branch of government is seriously alleged to have infringed the Constitution, it becomes not only the right but in fact the duty of the judiciary to settle the dispute**.[77]

B. *Locus Standi*

For a party to have *locus standi*, one must allege "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."[78]

Because constitutional cases are often public actions in which the relief sought is likely to affect other persons, a preliminary question frequently arises as to this interest in the constitutional question raised.[79]

When suing as a *citizen*, the person complaining must allege that he has been or is

about to be denied some right or privilege to which he is lawfully entitled or that he is about to be subjected to some burdens or penalties by reason of the statute or act complained of.[80] When the issue concerns a public right, it is sufficient that the petitioner is a citizen and has an interest in the execution of the laws.[81]

For a *taxpayer*, one is allowed to sue where there is an assertion that public funds are illegally disbursed or deflected to an illegal purpose, or that there is a wastage of public funds through the enforcement of an invalid or unconstitutional law.[82] The Court retains discretion whether or not to allow a taxpayer's suit.[83]

In the case of a *legislator or member of Congress*, an act of the Executive that injures the institution of Congress causes a derivative but nonetheless substantial injury that can be questioned by legislators. A member of the House of Representatives has standing to maintain inviolate the prerogatives, powers and privileges vested by the Constitution in his office.[84]

An *organization* may be granted standing to assert the rights of its members,[85] but the mere invocation by the *Integrated Bar of the Philippines or any member of the legal profession* of the duty to preserve the rule of law does not suffice to clothe it with standing.[86]

As regards a *local government unit* (LGU), it can seek relief in order to protect or vindicate an interest of its own, and of the other LGUs.[87]

Intervenors, meanwhile, may be given legal standing upon showing of facts that satisfy the requirements of the law authorizing intervention,[88] such as a legal interest in the matter in litigation, or in the success of either of the parties.

In any case, the Court has discretion to relax the procedural technicality on *locus standi,* given the liberal attitude it has exercised, highlighted in the case of *David v. Macapagal-Arroyo,*[89]where technicalities of procedure were brushed aside, the constitutional issues raised being of paramount public interest or of transcendental importance deserving the attention of the Court in view of their seriousness, novelty and weight as precedents.[90] The Court's forbearing stance on *locus standi* on issues involving constitutional issues has for its purpose the protection of fundamental rights.

In not a few cases, the Court, in keeping with its duty under the Constitution to determine whether the other branches of government have kept themselves within the limits of the Constitution and the laws and have not abused the discretion given them, has brushed aside technical rules of procedure.[91]

In the petitions at bar, petitioners **Province of North Cotabato** (G.R. No. 183591) **Province of Zamboanga del Norte** (G.R. No. 183951), **City of Iligan** (G.R. No. 183893) and **City of Zamboanga** (G.R. No. 183752) and petitioners-in-intervention **Province of Sultan Kudarat, City of Isabela** and **Municipality of Linamon** have *locus standi* in view of the direct and substantial injury that they, as LGUs, would suffer as their territories, whether in whole or in part, are to be included in the intended domain of the BJE. These petitioners allege that they did not vote for their inclusion in the ARMM which would be expanded to form the BJE territory.

Petitioners' legal standing is thus beyond doubt.

In G.R. No. 183962, petitioners **Ernesto Maceda, Jejomar Binay** and **Aquilino Pimentel III** would have no standing as citizens and taxpayers for their failure to specify that they would be denied some right or privilege or there would be wastage of public funds. The fact that they are a former Senator, an incumbent mayor of Makati City, and a resident of Cagayan de Oro, respectively, is of no consequence. Considering their invocation of the transcendental importance of the issues at hand, however, the Court grants them standing.

Intervenors **Franklin Drilon** and **Adel Tamano**, in alleging their standing as taxpayers, assert that government funds would be expended for the conduct of an illegal and unconstitutional plebiscite to delineate the BJE territory. On that score alone, they can be given legal standing. Their allegation that the issues involved in these petitions are of "undeniable transcendental importance" clothes them with added basis for their personality to intervene in these petitions.

With regard to **Senator Manuel Roxas**, his standing is premised on his being a member of the Senate and a citizen to enforce compliance by respondents of the public's constitutional right to be informed of the MOA-AD, as well as on a genuine legal interest in the matter in litigation, or in the success or failure of either of the parties. He thus possesses the requisite standing as an intervenor.

With respect to Intervenors **Ruy Elias Lopez,** as a former congressman of the 3rd district of Davao City, a taxpayer and a member of the Bagobo tribe; **Carlo B. Gomez, et al.,** as members of the IBP Palawan chapter, citizens and taxpayers; **Marino Ridao,** as taxpayer, resident and member of the *Sangguniang Panlungsod* of Cotabato City**;** and **Kisin Buxani,** as taxpayer, they failed to allege any proper legal interest in the present petitions. Just the same, the Court exercises its discretion to relax the procedural technicality on *locus standi* given the paramount public interest in the issues at hand.

Intervening respondents **Muslim Multi-Sectoral Movement for Peace and Development,** an advocacy group for justice and the attainment of peace and prosperity in Muslim Mindanao; and **Muslim Legal Assistance Foundation Inc**., a non-government organization of Muslim lawyers, allege that they stand to be benefited or prejudiced, as the case may be, in the resolution of the petitions concerning the MOA-AD, and prays for the denial of the petitions on the grounds therein stated. Such legal interest suffices to clothe them with standing.

B. Mootness

Respondents insist that the present petitions have been rendered moot with the satisfaction of all the reliefs prayed for by petitioners and the subsequent pronouncement of the Executive Secretary that "[n]o matter what the Supreme Court ultimately decides[,] the government will not sign the MOA."[92]

In lending credence to this policy decision, the Solicitor General points out that the President had already disbanded the GRP Peace Panel.[93]

In *David v. Macapagal-Arroyo*,[94] this Court held that the "moot and academic"

principle not being a magical formula that automatically dissuades courts in resolving a case, it will decide cases, otherwise moot and academic, if it finds that (a) there is a grave violation of the Constitution;[95] (b) the situation is of exceptional character and paramount public interest is involved;[96] (c) the constitutional issue raised requires formulation of controlling principles to guide the bench, the bar, and the public;[97] and (d) the case is capable of repetition yet evading review.[98]

Another exclusionary circumstance that may be considered is where there is a voluntary cessation of the activity complained of by the defendant or doer. Thus, once a suit is filed and the doer voluntarily ceases the challenged conduct, it does not automatically deprive the tribunal of power to hear and determine the case and does not render the case moot especially when the plaintiff seeks damages or prays for injunctive relief against the possible recurrence of the violation.[99]

The present petitions fall squarely into these exceptions to thus thrust them into the domain of judicial review. The grounds cited above in *David* are just as applicable in the present cases as they were, not only in *David*, but also in *Province of Batangas v. Romulo*[100] and *Manalo v. Calderon*[101] where the Court similarly decided them on the merits, supervening events that would ordinarily have rendered the same moot notwithstanding.

Petitions not mooted

Contrary then to the asseverations of respondents, the non-signing of the MOA-AD and the eventual dissolution of the GRP Peace Panel did not moot the present petitions. *It bears emphasis that the signing of the MOA-AD did not push through due to the Court's issuance of a Temporary Restraining Order.*

Contrary too to respondents' position, the MOA-AD cannot be considered a mere "list of consensus points," especially given its **nomenclature**, the **need to have it signed or initialed** by all the parties concerned on August 5, 2008, and the **far-reaching Constitutional implications** of these "consensus points," foremost of which is the creation of the BJE.

In fact, as what will, in the main, be discussed, **there is a commitment on the part of respondents to amend and effect necessary changes to the existing legal framework for certain provisions of the MOA-AD to take effect**. Consequently, the present petitions are not confined to the terms and provisions of the MOA-AD, but to other **on-going** and **future** negotiations and agreements necessary for its realization. The petitions have not, therefore, been rendered moot and academic simply by the public disclosure of the MOA-AD,[102] the manifestation that it will not be signed as well as the disbanding of the GRP Panel not withstanding.

Petitions are imbued with paramount public interest

There is no gainsaying that the petitions are imbued with paramount public interest, involving a significant part of the country's territory and the wide-ranging political modifications of affected LGUs. The assertion **that the MOA-AD is subject to further legal enactments including possible Constitutional amendments more than ever provides impetus for the Court to formulate controlling**

principles to guide the bench, the bar, the public and, in this case, the government and its negotiating entity.

Respondents cite *Suplico v. NEDA, et al*.[103] where the Court did not "pontificat[e] on issues which no longer legitimately constitute an actual case or controversy [as this] will do more harm than good to the nation as a whole."

The present petitions must be differentiated from *Suplico*. Primarily, in *Suplico*, what was assailed and eventually cancelled was a stand-alone government procurement contract for a national broadband network involving a one-time contractual relation between two parties--the government and a private foreign corporation. As the issues therein involved specific government procurement policies and standard principles on contracts, the majority opinion in *Suplico* found nothing exceptional therein, the factual circumstances being peculiar only to the transactions and parties involved in the controversy.

The MOA-AD is part of a series of agreements

In the present controversy, the MOA-AD is a **significant part of a series of agreements** necessary to carry out the Tripoli Agreement 2001. The MOA-AD which dwells on the Ancestral Domain Aspect of said Tripoli Agreement is the third such component to be undertaken following the implementation of the Security Aspect in August 2001 and the Humanitarian, Rehabilitation and Development Aspect in May 2002.

Accordingly, even if the Executive Secretary, in his Memorandum of August 28, 2008 to the Solicitor General, has stated that "no matter what the Supreme Court ultimately decides[,] the government will not sign the MOA[-AD]," mootness will not set in in light of the terms of the Tripoli Agreement 2001.

Need to formulate principles-guidelines

Surely, the present MOA-AD can be renegotiated or another one will be drawn up **to carry out the Ancestral Domain Aspect of the Tripoli Agreement 2001**, in another or in any form, which could contain similar or significantly drastic provisions. While the Court notes the word of the Executive Secretary that the government "is committed to securing an agreement that is both constitutional and equitable because that is the only way that long-lasting peace can be assured," it is minded to render a decision on the merits in the present petitions to **formulate controlling principles to guide the bench, the bar, the public and, most especially, the government in negotiating with the MILF regarding Ancestral Domain**.

Respondents invite the Court's attention to the separate opinion of then Chief Justice Artemio Panganiban in *Sanlakas v. Reyes*[104] in which he stated thatthe doctrine of "capable of repetition yet evading review" can override mootness, "provided the party raising it in a proper case has been and/or continue to be prejudiced or damaged as a direct result of their issuance." They contend that the Court must have jurisdiction over the subject matter for the doctrine to be invoked.

The present petitions all contain prayers for Prohibition over which this Court exercises original jurisdiction. While G.R. No. 183893 (City of Iligan v. GRP) is a petition for Injunction and Declaratory Relief, the Court will treat it as one for

Prohibition as it has far reaching implications and raises questions that need to be resolved.[105] At all events, the Court has jurisdiction over most if not the rest of the petitions.

Indeed, the present petitions afford a proper venue for the Court to again apply the doctrine immediately referred to as what it had done in a number of landmark cases.[106] There is a reasonable expectation that petitioners, particularly the Provinces of North Cotabato, Zamboanga del Norte and Sultan Kudarat, the Cities of Zamboanga, Iligan and Isabela, and the Municipality of Linamon, will again be subjected to the same problem in the future as respondents' actions are capable of repetition, in another or any form.

It is with respect to the prayers for Mandamus that the petitions have become moot, respondents having, by Compliance of August 7, 2008, provided this Court and petitioners with official copies of the final draft of the MOA-AD and its annexes. Too, intervenors have been furnished, or have procured for themselves, copies of the MOA-AD.

V. SUBSTANTIVE ISSUES

As culled from the Petitions and Petitions-in-Intervention, there are basically two SUBSTANTIVE issues to be resolved, one relating to the manner in which the MOA-AD was negotiated and finalized, the other relating to its provisions, *viz*:

1. Did respondents violate constitutional and statutory provisions on public consultation and the right to information when they negotiated and later initialed the MOA-AD?

2. Do the contents of the MOA-AD violate the Constitution and the laws?

On the first Substantive issue

Petitioners invoke their constitutional **right to information on matters of public concern**, as provided in Section 7, Article III on the Bill of Rights:

> Sec. 7. The right of the people to information on matters of public concern shall be recognized. Access to official records, and to documents, and papers pertaining to official acts, transactions, or decisions, as well as to government research data used as basis for policy development, shall be afforded the citizen, subject to such limitations as may be provided by law.[107]

As early as 1948, in *Subido v. Ozaeta*,[108] the Court has recognized the statutory right to examine and inspect public records, a right which was eventually accorded constitutional status.

The right of access to public documents, as enshrined in both the 1973 Constitution and the 1987 Constitution, has been recognized as a self-executory constitutional right.[109]

In the 1976 case of *Baldoza v. Hon. Judge Dimaano*,[110] the Court ruled that access

to public records is predicated on the right of the people to acquire information on matters of public concern since, undoubtedly, in a democracy, the pubic has a legitimate interest in matters of social and political significance.

> x x x The incorporation of this right in the Constitution is a recognition of the fundamental role of free exchange of information in a democracy. There can be no realistic perception by the public of the nation's problems, nor a meaningful democratic decision-making if they are denied access to information of general interest. Information is needed to enable the members of society to cope with the exigencies of the times. As has been aptly observed: "Maintaining the flow of such information depends on protection for both its acquisition and its dissemination since, if either process is interrupted, the flow inevitably ceases." x x x[111]

In the same way that free discussion enables members of society to cope with the exigencies of their time, access to information of general interest aids the people in democratic decision-making by giving them a better perspective of the vital issues confronting the nation[112] so that they may be able to criticize and participate in the affairs of the government in a responsible, reasonable and effective manner. It is by ensuring an unfettered and uninhibited exchange of ideas among a well-informed public that a government remains responsive to the changes desired by the people. [113]

The MOA-AD is a matter of public concern

That the subject of the information sought in the present cases is a matter of public concern[114] faces no serious challenge. In fact, respondents admit that the MOA-AD is indeed of public concern.[115] In previous cases, the Court found that the regularity of real estate transactions entered in the Register of Deeds,[116] the need for adequate notice to the public of the various laws,[117] the civil service eligibility of a public employee,[118] the proper management of GSIS funds allegedly used to grant loans to public officials,[119] the recovery of the Marcoses' alleged ill-gotten wealth,[120] and the identity of party-list nominees,[121] among others, are matters of public concern. Undoubtedly, **the MOA-AD subject of the present cases is of public concern**, involving as it does the **sovereignty and territorial integrity of the State**, which directly affects the lives of the public at large.

Matters of public concern covered by the right to information include steps and negotiations leading to the consummation of the contract. In not distinguishing as to the executory nature or commercial character of agreements, the Court has categorically ruled:

> x x x [T]he right to information "***contemplates inclusion of negotiations leading to the consummation of the transaction***. " Certainly, a consummated contract is not a requirement for the exercise of the right to information. Otherwise, the people can never exercise the right if no contract is consummated, and if one is consummated, it may be too late for the public to expose its defects.
>
> Requiring a consummated contract will keep the public in the dark until the contract, which may be grossly disadvantageous to the government

> or even illegal, becomes *fait accompli*. This negates the State policy of full transparency on matters of public concern, a situation which the framers of the Constitution could not have intended. Such a requirement will prevent the citizenry from participating in the public discussion of any ***proposed*** contract, effectively truncating a basic right enshrined in the Bill of Rights. We can allow neither an emasculation of a constitutional right, nor a retreat by the State of its avowed "policy of full disclosure of all its transactions involving public interest."[122] (Emphasis and italics in the original)

Intended as a "*splendid symmetry*"[123] to the right to information under the Bill of Rights is the **policy of public disclosure** under Section 28, Article II of the Constitution reading:

> Sec. 28. Subject to reasonable conditions prescribed by law, the State adopts and implements a policy of full public disclosure of all its transactions involving public interest.[124]

The policy of full public disclosure enunciated in above-quoted Section 28 *complements* the right of access to information on matters of public concern found in the Bill of Rights. The right to information guarantees the right of the people to demand information, while Section 28 recognizes the duty of officialdom to give information even if nobody demands.[125]

The policy of public disclosure establishes a concrete ethical principle for the conduct of public affairs in a genuinely open democracy, with the people's right to know as the centerpiece. It is a mandate of the State to be accountable by following such policy.[126] These provisions are vital to the exercise of the freedom of expression and essential to hold public officials at all times accountable to the people.[127]

Whether Section 28 is self-executory, the records of the deliberations of the Constitutional Commission so disclose:

> MR. SUAREZ. And since this is not self-executory, this policy will not be enunciated or will not be in force and effect until after Congress shall have provided it.
>
> MR. OPLE. I expect it to influence the climate of public ethics immediately but, of course, the implementing law will have to be enacted by Congress, Mr. Presiding Officer.[128]

The following discourse, after Commissioner Hilario Davide, Jr., sought clarification on the issue, is enlightening.

> MR. DAVIDE. I would like to get some clarifications on this. Mr. Presiding Officer, did I get the Gentleman correctly as having said that this is not a self-executing provision? It would require a legislation by Congress to implement?
>
> MR. OPLE. Yes. Originally, it was going to be self-executing, but I accepted an amendment from Commissioner Regalado, so that the safeguards on national interest are modified by the clause "as may be

provided by law"

MR. DAVIDE. But as worded, **does it not mean that this will immediately take effect and Congress may provide for reasonable safeguards** on the sole ground national interest?

MR. OPLE. **Yes. I think so, Mr. Presiding Officer, I said earlier that it should immediately influence the climate of the conduct of public affairs** but, of course, Congress here may no longer pass a law revoking it, or if this is approved, revoking this principle, which is inconsistent with this policy.[129] (Emphasis supplied)

Indubitably, **the effectivity of the policy of public disclosure need not await the passing of a statute**. As Congress cannot revoke this principle, it is merely directed to provide for "reasonable safeguards." The complete and effective exercise of the right to information necessitates that its complementary provision on public disclosure derive the same self-executory nature. Since both provisions go hand-in-hand, it is absurd to say that the broader[130] right to information on matters of public concern is already enforceable while the correlative duty of the State to disclose its transactions involving public interest is not enforceable until there is an enabling law. Respondents cannot thus point to the absence of an implementing legislation as an excuse in not effecting such policy.

An essential element of these freedoms is to keep open a continuing dialogue or process of communication between the government and the people. It is in the interest of the State that the channels for free political discussion be maintained to the end that the government may perceive and be responsive to the people's will. [131] Envisioned to be corollary to the twin rights to information and disclosure is the design for feedback mechanisms.

MS. ROSARIO BRAID. Yes. And lastly, Mr. Presiding Officer, **will the people be able to participate? Will the government provide feedback mechanisms so that the people can participate and can react where the existing media facilities are not able to provide full feedback mechanisms to the government? I suppose this will be part of the government implementing operational mechanisms.**

MR. OPLE. Yes. I think through their elected representatives and that is how these courses take place. There is a message and a feedback, both ways.

x x x x

MS. ROSARIO BRAID. Mr. Presiding Officer, may I just make one last sentence?

I think when we talk about the feedback network, we are not talking about public officials but also network of private business o[r] community-based organizations that will be reacting. As a matter of fact, we will put more credence or credibility on the private network of volunteers and voluntary community-based organizations. So

I do not think we are afraid that there will be another OMA in the making. [132] (Emphasis supplied)

The imperative of a public consultation, as a species of the right to information, is evident in the "marching orders" to respondents. The mechanics for the duty to disclose information and to conduct public consultation regarding the peace agenda and process is manifestly provided by E.O. No. 3.[133] The preambulatory clause of E.O. No. 3 declares that there is a need to further enhance the contribution of civil society to the comprehensive peace process by institutionalizing the people's participation.

One of the three underlying principles of the comprehensive peace process is that it "should be community-based, reflecting the sentiments, values and principles important to all Filipinos" and "shall be defined not by the government alone, nor by the different contending groups only, but by all Filipinos as one community."[134] Included as a component of the comprehensive peace process is consensus-building and empowerment for peace, which includes "continuing consultations on both national and local levels to build consensus for a peace agenda and process, and the mobilization and facilitation of people's participation in the peace process."[135]

Clearly, E.O. No. 3 contemplates not just the conduct of a plebiscite to effectuate "continuing" consultations, contrary to respondents' position that plebiscite is "more than sufficient consultation."[136]

Further, E.O. No. 3 enumerates the functions and responsibilities of the PAPP, one of which is to "[c]onduct regular dialogues with the National Peace Forum (NPF) and other peace partners to seek relevant information, comments, recommendations as well as to render appropriate and timely reports on the progress of the comprehensive peace process."[137] E.O. No. 3 mandates the establishment of the NPF to be "the principal forum for the PAPP to consult with and seek advi[c]e from the peace advocates, peace partners and concerned sectors of society on both national and local levels, on the implementation of the comprehensive peace process, as well as for government[-]civil society dialogue and consensus-building on peace agenda and initiatives."[138]

In fine, E.O. No. 3 establishes petitioners' right to be consulted on the peace agenda, as a corollary to the constitutional right to information and disclosure.

PAPP Esperon committed grave abuse of discretion

The **PAPP committed grave abuse of discretion** when he **failed** to carry out the pertinent consultation. The furtive process by which the MOA-AD was designed and crafted **runs contrary to and in excess of the legal authority**, and amounts to a whimsical, capricious, oppressive, arbitrary and despotic exercise thereof.

The Court may not, of course, require the PAPP to conduct the consultation *in a particular way or manner*. It may, however, require him to comply with the law and discharge the functions *within the authority granted* by the President.[139]

Petitioners are not claiming a seat at the negotiating table, contrary to respondents'

retort in justifying the denial of petitioners' right to be consulted. Respondents' stance manifests the manner by which they treat the salient provisions of E.O. No. 3 on people's participation. Such disregard of the express mandate of the President is not much different from superficial conduct toward token provisos that border on classic lip service.[140] It illustrates a gross evasion of positive duty and a virtual refusal to perform the duty enjoined.

As for respondents' invocation of the doctrine of executive privilege, it is not tenable under the premises. The argument defies sound reason when contrasted with E.O. No. 3's explicit provisions on continuing consultation and dialogue on both national and local levels. **The executive order even recognizes the exercise of the public's right** even before the GRP makes its official recommendations or before the government proffers its definite propositions.[141] It bear emphasis that E.O. No. 3 seeks to elicit relevant advice, information, comments and recommendations from the people through dialogue.

AT ALL EVENTS, respondents effectively waived the defense of executive privilege in view of their unqualified disclosure of the official copies of the final draft of the MOA-AD. By unconditionally complying with the Court's August 4, 2008 Resolution, without a prayer for the document's disclosure *in camera*, or without a manifestation that it was complying therewith *ex abundante ad cautelam*.

Petitioners' assertion that the Local Government Code (LGC) of 1991 declares it a State policy to "require all national agencies and offices to conduct periodic consultations with appropriate local government units, non-governmental and people's organizations, and other concerned sectors of the community before any project or program is implemented in their respective jurisdictions"[142] is well-taken. The LGC chapter on intergovernmental relations puts flesh into this avowed policy:

> *Prior Consultations Required*. - No project or program shall be implemented by government authorities *unless* the consultations mentioned in Sections 2 (c) and 26 hereof are complied with, and prior approval of the sanggunian concerned is obtained: Provided, That occupants in areas where such projects are to be implemented shall not be evicted unless appropriate relocation sites have been provided, in accordance with the provisions of the Constitution.[143] (Italics and underscoring supplied)

In *Lina, Jr. v. Hon. Paño*,[144] the Court held that the above-stated policy and above-quoted provision of the LGU apply only to national programs or projects which are to be implemented in a particular local community. Among the programs and projects covered are those that are critical to the environment and human ecology including those that may call for the eviction of a particular group of people residing in the locality where these will be implemented.[145] **The MOA-AD is one peculiar program that unequivocally and unilaterally vests ownership of a vast territory to the Bangsamoro people,[146] which could pervasively and drastically result to the diaspora or displacement of a great number of inhabitants from their total environment.**

With respect to the indigenous cultural communities/indigenous peoples (ICCs/IPs),

whose interests are represented herein by petitioner Lopez and are adversely affected by the MOA-AD, the ICCs/IPs have, under the IPRA, the right to participate fully at all levels of decision-making in matters which may affect their rights, lives and destinies.[147] The MOA-AD, an instrument recognizing ancestral domain, failed to justify its non-compliance with the clear-cut mechanisms ordained in said Act, [148] which entails, among other things, the observance of the free and prior informed consent of the ICCs/IPs.

Notably, the IPRA does **not** grant the Executive Department or any government agency the power to delineate and recognize an ancestral domain claim *by mere agreement or compromise*. The recognition of the ancestral domain is the *raison d'etre* of the MOA-AD, without which all other stipulations or "consensus points" necessarily must fail. In proceeding to make a sweeping declaration on ancestral domain, without complying with the IPRA, which is cited as one of the TOR of the MOA-AD, **respondents clearly transcended the boundaries of their authority**. As it seems, even the heart of the MOA-AD is still subject to necessary changes to the legal framework. While paragraph 7 on Governance suspends the effectivity of all provisions requiring changes to the legal framework, such clause is itself invalid, as will be discussed in the following section.

Indeed, ours is an open society, with all the acts of the government subject to public scrutiny and available always to public cognizance. This has to be so if the country is to remain democratic, with sovereignty residing in the people and all government authority emanating from them.[149]

ON THE SECOND SUBSTANTIVE ISSUE

With regard to the provisions of the MOA-AD, there can be no question that they cannot all be accommodated under the present Constitution and laws. Respondents have admitted as much in the oral arguments before this Court, and the MOA-AD itself recognizes the need to amend the existing legal framework to render effective at least some of its provisions. Respondents, nonetheless, counter that the MOA-AD is free of any legal infirmity because any provisions therein which are inconsistent with the present legal framework will not be effective until the necessary changes to that framework are made. The validity of this argument will be considered later. For now, the Court shall pass upon how

The MOA-AD is inconsistent with the Constitution and laws as presently worded.

In general, the objections against the MOA-AD center on the extent of the powers conceded therein to the BJE. Petitioners assert that the powers granted to the BJE exceed those granted to any local government under present laws, and even go beyond those of the present ARMM. Before assessing some of the specific powers that would have been vested in the BJE, however, it would be useful to turn first to a general idea that serves as a unifying link to the different provisions of the MOA-AD, namely, the international law concept of *association*. Significantly, the MOA-AD explicitly alludes to this concept, indicating that the Parties actually framed its provisions with it in mind.

Association is referred to in paragraph 3 on TERRITORY, paragraph 11 on

RESOURCES, and paragraph 4 on GOVERNANCE. It is in the last mentioned provision, however, that the MOA-AD most clearly uses it to describe the envisioned relationship between the BJE and the Central Government.

> 4. **The relationship between the Central Government and the Bangsamoro juridical entity shall be associative characterized by shared authority and responsibility** with a structure of governance based on executive, legislative, judicial and administrative institutions with defined powers and functions in the comprehensive compact. A period of transition shall be established in a comprehensive peace compact specifying the relationship between the Central Government and the BJE. (Emphasis and underscoring supplied)

The nature of the ***"associative"*** relationship may have been intended to be defined more precisely in the still to be forged Comprehensive Compact. Nonetheless, given that there is a concept of "association" in international law, and the MOA-AD - by its inclusion of international law instruments in its TOR- placed itself in an international legal context, that concept of association may be brought to bear in understanding the use of the term "*associative*" in the MOA-AD.

Keitner and Reisman state that

> [a]n association is formed when **two states** of unequal power voluntarily establish durable links. In the basic model, **one state, the associate, delegates certain responsibilities to the other, the principal, while maintaining its international status as a state. Free associations represent a middle ground between integration and independence**. x x x[150] (Emphasis and underscoring supplied)

For purposes of illustration, the Republic of the Marshall Islands and the Federated States of Micronesia (FSM), formerly part of the U.S.-administered Trust Territory of the Pacific Islands,[151] are associated states of the U.S. pursuant to a Compact of Free Association. The currency in these countries is the U.S. dollar, indicating their very close ties with the U.S., yet they issue their own travel documents, which is a mark of their statehood. Their international legal status as states was confirmed by the UN Security Council and by their admission to UN membership.

According to their compacts of free association, the Marshall Islands and the FSM generally have the capacity to conduct foreign affairs in their own name and right, such capacity extending to matters such as the law of the sea, marine resources, trade, banking, postal, civil aviation, and cultural relations. The U.S. government, when conducting its foreign affairs, is obligated to consult with the governments of the Marshall Islands or the FSM on matters which it (U.S. government) regards as relating to or affecting either government.

In the event of attacks or threats against the Marshall Islands or the FSM, the U.S. government has the authority and obligation to defend them as if they were part of U.S. territory. The U.S. government, moreover, has the option of establishing and using military areas and facilities within these associated states and has the right to bar the military personnel of any third country from having access to these territories for military purposes.

It bears noting that in U.S. constitutional and international practice, free association is understood as an international association between sovereigns. The Compact of Free Association is a treaty which is subordinate to the associated nation's national constitution, and each party may terminate the association consistent with the right of independence. It has been said that, with the admission of the U.S.-associated states to the UN in 1990, the UN recognized that the American model of free association is actually based on an underlying status of independence.[152]

In international practice, the "*associated state*" arrangement has usually been used as a **transitional device** of former colonies on their way to full independence. Examples of states that have passed through the status of associated states as a transitional phase are Antigua, St. Kitts-Nevis-Anguilla, Dominica, St. Lucia, St. Vincent and Grenada. All have since become independent states.[153]

Back to the MOA-AD, it contains many provisions which are consistent with the international legal concept of *association*, specifically the following: the BJE's capacity to enter into economic and trade relations with foreign countries, the commitment of the Central Government to ensure the BJE's participation in meetings and events in the ASEAN and the specialized UN agencies, and the continuing responsibility of the Central Government over external defense. Moreover, the BJE's right to participate in Philippine official missions bearing on negotiation of border agreements, environmental protection, and sharing of revenues pertaining to the bodies of water adjacent to or between the islands forming part of the ancestral domain, resembles the right of the governments of FSM and the Marshall Islands to be consulted by the U.S. government on any foreign affairs matter affecting them.

These provisions of the MOA indicate, among other things, that the Parties **aimed to vest in the BJE the status of an *associated state* or, at any rate, a status closely approximating it**.

The concept of *association* is not recognized under the present Constitution

No province, city, or municipality, not even the ARMM, is recognized under our laws as having an "*associative*" relationship with the national government. Indeed, the concept implies powers that go beyond anything ever granted by the Constitution to any local or regional government. It also implies the recognition of the *associated entity* as a state. The Constitution, however, does not contemplate any state in this jurisdiction other than the Philippine State, much less does it provide for a transitory status that aims to prepare any part of Philippine territory for independence.

Even the mere concept animating many of the MOA-AD's provisions, therefore, already requires for its validity the amendment of constitutional provisions, specifically the following provisions of Article X:

> SECTION 1. The territorial and political subdivisions of the Republic of the Philippines are the **provinces, cities, municipalities, and barangays**. There shall be **autonomous regions** in Muslim Mindanao and the Cordilleras as hereinafter provided.
>
> SECTION 15. There shall be created autonomous regions in Muslim Mindanao and in the Cordilleras consisting of provinces, cities, municipalities, and geographical areas sharing common and distinctive

historical and cultural heritage, economic and social structures, and other relevant characteristics **within the framework of this Constitution and the national sovereignty as well as territorial integrity of the Republic of the Philippines .**

The BJE is a far more powerful entity than the autonomous region recognized in the Constitution

It is not merely an expanded version of the ARMM, the status of its relationship with the national government being fundamentally different from that of the ARMM. Indeed, **BJE is a state in all but name as it meets the criteria of a state laid down in the Montevideo Convention**,[154] namely, a permanent population, a defined territory, a government, and a capacity to enter into relations with other states.

Even assuming *arguendo* that the MOA-AD would not necessarily sever any portion of Philippine territory, **the spirit animating it** - which has betrayed itself by its use of the concept of *association* - **runs counter to the national sovereignty and territorial integrity of the Republic**.

The defining concept underlying the relationship between the national government and the BJE being itself contrary to the present Constitution, it is not surprising that many of the specific provisions of the MOA-AD on the formation and powers of the BJE are in conflict with the Constitution and the laws.

Article X, Section 18 of the Constitution provides that "[t]he creation of the autonomous region shall be effective when approved by a majority of the votes cast by the constituent units in a plebiscite called for the purpose, provided that **only provinces, cities, and geographic areas voting favorably in such plebiscite shall be included in the autonomous region**." (Emphasis supplied)

As reflected above, the BJE is more of a state than an autonomous region. But even assuming that it is covered by the term "autonomous region" in the constitutional provision just quoted, the MOA-AD would still be in conflict with it. Under paragraph 2(c) on TERRITORY in relation to 2(d) and 2(e), the present geographic area of the ARMM and, in addition, the municipalities of Lanao del Norte which voted for inclusion in the ARMM during the 2001 plebiscite - *Baloi, Munai, Nunungan, Pantar, Tagoloan and Tangkal* - are automatically part of the BJE without need of another plebiscite, in contrast to the areas under Categories A and B mentioned earlier in the overview. That the present components of the ARMM and the above-mentioned municipalities voted for inclusion therein in 2001, however, does **not** render another plebiscite unnecessary under the Constitution, precisely because what these areas voted for then was their inclusion in the ARMM, **not** the BJE.

The MOA-AD, moreover, would not comply with Article X, Section 20 of the Constitution

since that provision defines the powers of autonomous regions as follows:

> SECTION 20. Within its territorial jurisdiction and subject to the provisions of this Constitution and national laws, the organic act of autonomous regions shall provide for legislative powers over:
>
> (1) Administrative organization;
> (2) Creation of sources of revenues;
> (3) Ancestral domain and natural resources;
> (4) Personal, family, and property relations;
> (5) Regional urban and rural planning development;
> (6) Economic, social, and tourism development;
> (7) Educational policies;
> (8) Preservation and development of the cultural heritage; and
> (9) Such other matters as may be authorized by law for the promotion of the general welfare of the people of the region. (Underscoring supplied)

Again on the premise that the BJE may be regarded as an autonomous region, the MOA-AD would require an amendment that would expand the above-quoted provision. The mere passage of new legislation pursuant to sub-paragraph No. 9 of said constitutional provision would not suffice, since any new law that might vest in the BJE the powers found in the MOA-AD must, itself, comply with other provisions of the Constitution. It would not do, for instance, to merely pass legislation vesting the BJE with treaty-making power in order to accommodate paragraph 4 of the strand on RESOURCES which states: "The BJE is free to enter into any economic cooperation and trade relations with foreign countries: provided, however, that such relationships and understandings do not include aggression against the Government of the Republic of the Philippines x x x." Under our constitutional system, it is only the President who has that power. *Pimentel v. Executive Secretary*[155] instructs:

> In our system of government, the President, being the head of state, is regarded as **the sole organ and authority in external relations and is the country's sole representative with foreign nations.** As the chief architect of foreign policy, the President acts as the country's mouthpiece with respect to international affairs. Hence, **the President is vested with the authority to** deal with foreign states and governments, extend or withhold recognition, **maintain diplomatic relations, enter into treaties, and otherwise transact the business of foreign relations. In the realm of treaty-making, the President has the sole authority to negotiate with other states.** (Emphasis and underscoring supplied)

Article II, Section 22 of the Constitution must also be amended if the scheme envisioned in the MOA-AD is to be effected. That constitutional provision states: "The State recognizes and promotes the rights of indigenous cultural communities within the framework of national unity and development." (Underscoring supplied) An *associative* arrangement does not uphold national unity. While there may be a semblance of unity because of the associative ties between the BJE and the national government, the act of placing a portion of Philippine territory in a status which, in international practice, has generally been a *preparation for independence*, is certainly not conducive to **national** unity.

Besides being irreconcilable with the Constitution, the MOA-AD is also **inconsistent with prevailing statutory law, among which are R.A. No. 9054**[156] or the

Organic Act of the ARMM, and the **IPRA**.[157]

Article X, Section 3 of the Organic Act of the ARMM is a bar to the adoption of the definition of "Bangsamoro people" used in the MOA-AD. Paragraph 1 on Concepts and Principles states:

> 1. It is the birthright of **all Moros and all Indigenous peoples of Mindanao to identify themselves and be accepted as "Bangsamoros".** The Bangsamoro people refers to those who are **natives or original inhabitants of Mindanao and its adjacent islands** including Palawan and the Sulu archipelago at the time of conquest or colonization of its descendants whether mixed or of full blood. Spouses and their descendants are classified as Bangsamoro. The freedom of choice of the Indigenous people shall be respected. (Emphasis and underscoring supplied)

This use of the term Bangsamoro sharply contrasts with that found in the Article X, Section 3 of the Organic Act, which, rather than lumping together the identities of the Bangsamoro and other indigenous peoples living in Mindanao, clearly **distinguishes between Bangsamoro people and Tribal peoples**, as follows:

> "As used in this Organic Act, the phrase "indigenous cultural community" refers to **Filipino citizens residing in the autonomous region** who are:
>
> (a) **Tribal peoples**. These are citizens whose social, cultural and economic conditions distinguish them from other sectors of the national community; and
>
> (b) **Bangsa Moro people**. These are citizens who are **believers in Islam** and **who have retained some or all of their own social, economic, cultural, and political institutions**."

Respecting the IPRA, it lays down the prevailing procedure for the delineation and recognition of ancestral domains. The MOA-AD's manner of delineating the ancestral domain of the Bangsamoro people is a clear departure from that procedure. By paragraph 1 of Territory, the Parties simply agree that, subject to the delimitations in the agreed Schedules, "[t]he Bangsamoro homeland and historic territory refer to the land mass as well as the maritime, terrestrial, fluvial and alluvial domains, and the aerial domain, the atmospheric space above it, embracing the Mindanao-Sulu-Palawan geographic region."

Chapter VIII of the IPRA, on the other hand, lays down a detailed procedure, as illustrated in the following provisions thereof:

> SECTION 52. Delineation Process. -- The identification and delineation of ancestral domains shall be done in accordance with the following procedures:
>
> x x x x
>
> b) Petition for Delineation. -- The process of delineating a specific perimeter may be initiated by the NCIP with the consent of the ICC/IP

concerned, or through a Petition for Delineation filed with the NCIP, by a majority of the members of the ICCs/IPs;

c) Delineation Proper. -- The official delineation of ancestral domain boundaries including census of all community members therein, shall be immediately undertaken by the Ancestral Domains Office upon filing of the application by the ICCs/IPs concerned. Delineation will be done in coordination with the community concerned and shall at all times include genuine involvement and participation by the members of the communities concerned;

d) Proof Required. -- Proof of Ancestral Domain Claims shall include the testimony of elders or community under oath, and other documents directly or indirectly attesting to the possession or occupation of the area since time immemorial by such ICCs/IPs in the concept of owners which shall be any one (1) of the following authentic documents:

1) Written accounts of the ICCs/IPs customs and traditions;
2) Written accounts of the ICCs/IPs customs and traditions;
3) Pictures showing long term occupation such as those of old improvements, burial grounds, sacred places and old villages;
4) Historical accounts, including pacts and agreements concerning boundaries entered into by the ICCs/IPs concerned with other ICCs/IPs;
5) Survey plans and sketch maps;
6) Anthropological data;
7) Genealogical surveys;
8) Pictures and descriptive histories of traditional communal forests and hunting grounds;
9) Pictures and descriptive histories of traditional landmarks such as mountains, rivers, creeks, ridges, hills, terraces and the like; and
10) Write-ups of names and places derived from the native dialect of the community.

e) Preparation of Maps. -- On the basis of such investigation and the findings of fact based thereon, the Ancestral Domains Office of the NCIP shall prepare a perimeter map, complete with technical descriptions, and a description of the natural features and landmarks embraced therein;

f) Report of Investigation and Other Documents. -- A complete copy of the preliminary census and a report of investigation, shall be prepared by the Ancestral Domains Office of the NCIP;

g) Notice and Publication. -- A copy of each document, including a translation in the native language of the ICCs/IPs concerned shall be posted in a prominent place therein for at least fifteen (15) days. A copy of the document shall also be posted at the local, provincial and regional offices of the NCIP, and shall be published in a newspaper of general circulation once a week for two (2) consecutive weeks to allow other

claimants to file opposition thereto within fifteen (15) days from date of such publication: Provided, That in areas where no such newspaper exists, broadcasting in a radio station will be a valid substitute: Provided, further, That mere posting shall be deemed sufficient if both newspaper and radio station are not available;

h) Endorsement to NCIP. -- Within fifteen (15) days from publication, and of the inspection process, the Ancestral Domains Office shall prepare a report to the NCIP endorsing a favorable action upon a claim that is deemed to have sufficient proof. However, if the proof is deemed insufficient, the Ancestral Domains Office shall require the submission of additional evidence: Provided, That the Ancestral Domains Office shall reject any claim that is deemed patently false or fraudulent after inspection and verification: Provided, further, That in case of rejection, the Ancestral Domains Office shall give the applicant due notice, copy furnished all concerned, containing the grounds for denial. The denial shall be appealable to the NCIP: Provided, furthermore, That in cases where there are conflicting claims among ICCs/IPs on the boundaries of ancestral domain claims, the Ancestral Domains Office shall cause the contending parties to meet and assist them in coming up with a preliminary resolution of the conflict, without prejudice to its full adjudication according to the section below.

x x x x

To remove all doubts about the irreconcilability of the MOA-AD with the present legal system, a discussion of not only the Constitution and domestic statutes, but also of international law is in order, for

Article II, Section 2 of the Constitution states that the Philippines "adopts the
generally accepted principles of international law as part of the law of the land."

Applying this provision of the Constitution, the Court, in *Mejoff v. Director of Prisons*, [158] held that the Universal Declaration of Human Rights is part of the law of the land on account of which it ordered the release on bail of a detained alien of Russian descent whose deportation order had not been executed even after two years. Similarly, the Court in *Agustin v. Edu*[159] applied the aforesaid constitutional provision to the 1968 Vienna Convention on Road Signs and Signals.

International law has long recognized the right to self-determination of "peoples," understood not merely as the entire population of a State but also a portion thereof. In considering the question of whether the people of Quebec had a right to unilaterally secede from Canada, the Canadian Supreme Court in REFERENCE RE SECESSION OF QUEBEC[160] had occasion to acknowledge that "the right of a people to self-determination is now so widely recognized in international conventions that the principle has acquired a status beyond `convention' and is considered a general principle of international law."

Among the conventions referred to are the International Covenant on Civil and Political Rights[161] and the International Covenant on Economic, Social and

Cultural Rights[162] which state, in Article 1 of both covenants, that all peoples, by virtue of the right of self-determination, "freely determine their political status and freely pursue their economic, social, and cultural development."

The people's right to self-determination should not, however, be understood as extending to a unilateral right of secession. A distinction should be made between the right of internal and external self-determination. REFERENCE RE SECESSION OF QUEBEC is again instructive:

> "(ii) Scope of the Right to Self-determination
>
> 126. The recognized sources of international law establish that the **right to self-determination of a people is normally fulfilled through *internal* self-determination - a people's pursuit of its political, economic, social and cultural development within the framework of an existing state. A right to *external* self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises in only the most extreme of cases and, even then, under carefully defined circumstances.** x x x
>
> ***External* self-determination can be defined as in the following statement from the *Declaration on Friendly Relations, supra,* as**
>
> **The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a *people*** constitute modes of implementing the right of self-determination by *that people*. (Emphasis added)
>
> 127. **The international law principle of self-determination has evolved within a framework of respect for the territorial integrity of existing states.** The various international documents that support the existence of a people's right to self-determination also contain parallel statements supportive of the conclusion that the exercise of such a right must be sufficiently limited to prevent threats to an existing state's territorial integrity or the stability of relations between sovereign states.
>
> x x x x (Emphasis, italics and underscoring supplied)

The Canadian Court went on to discuss the exceptional cases in which the right to *external* self-determination can arise, namely, where a people is under colonial rule, is subject to foreign domination or exploitation outside a colonial context, and - less definitely but asserted by a number of commentators - is blocked from the meaningful exercise of its right to *internal* self-determination. The Court ultimately held that the population of Quebec had no right to secession, as the same is not under colonial rule or foreign domination, nor is it being deprived of the freedom to make political choices and pursue economic, social and cultural development, citing that Quebec is equitably represented in legislative, executive and judicial institutions within Canada, even occupying prominent positions therein.

The exceptional nature of the right of secession is further exemplified in the REPORT OF THE INTERNATIONAL COMMITTEE OF JURISTS ON THE LEGAL ASPECTS OF THE

AALAND ISLANDS QUESTION.[163] There, Sweden presented to the Council of the League of Nations the question of whether the inhabitants of the Aaland Islands should be authorized to determine by plebiscite if the archipelago should remain under Finnish sovereignty or be incorporated in the kingdom of Sweden. The Council, before resolving the question, appointed an International Committee composed of three jurists to submit an opinion on the preliminary issue of whether the dispute should, based on international law, be entirely left to the domestic jurisdiction of Finland. The Committee stated the rule as follows:

> x x x [I]n the absence of express provisions in international treaties, **the right of disposing of national territory is essentially an attribute of the sovereignty of every State. Positive International Law does not recognize the right of national groups, as such, to separate themselves from the State of which they form part by the simple expression of a wish**, any more than it recognizes the right of other States to claim such a separation. **Generally speaking, the grant or refusal of the right to a portion of its population of determining its own political fate by plebiscite or by some other method, is, exclusively, an attribute of the sovereignty of every State <u>which is definitively constituted</u>**. A dispute between two States concerning such a question, under normal conditions therefore, bears upon a question which International Law leaves entirely to the domestic jurisdiction of one of the States concerned. Any other solution would amount to an infringement of sovereign rights of a State and would involve the risk of creating difficulties and a lack of stability which would not only be contrary to the very idea embodied in term "State," but would also endanger the interests of the international community. If this right is not possessed by a large or small section of a nation, neither can it be held by the State to which the national group wishes to be attached, nor by any other State. (Emphasis and underscoring supplied)

The Committee held that the dispute concerning the Aaland Islands did not refer to a question which is left by international law to the domestic jurisdiction of Finland, thereby applying the exception rather than the rule elucidated above. Its ground for departing from the general rule, however, was a very narrow one, namely, the Aaland Islands agitation originated at a time when Finland was undergoing drastic political transformation. The internal situation of Finland was, according to the Committee, so abnormal that, for a considerable time, the conditions required for the formation of a sovereign State did not exist. In the midst of revolution, anarchy, and civil war, the legitimacy of the Finnish national government was disputed by a large section of the people, and it had, in fact, been chased from the capital and forcibly prevented from carrying out its duties. The armed camps and the police were divided into two opposing forces. In light of these circumstances, Finland was not, during the relevant time period, a "definitively constituted" sovereign state. The Committee, therefore, found that Finland did not possess the right to withhold from a portion of its population the option to separate itself - a right which sovereign nations generally have with respect to their own populations.

Turning now to the more specific category of <u>indigenous</u> peoples, this term has been used, in scholarship as well as international, regional, and state practices, to refer to groups with distinct cultures, histories, and connections to land (spiritual and otherwise) that have been forcibly incorporated into a larger governing society.

These groups are regarded as "indigenous" since they are the living descendants of pre-invasion inhabitants of lands now dominated by others. Otherwise stated, indigenous peoples, nations, or communities are culturally distinctive groups that find themselves engulfed by settler societies born of the forces of empire and conquest.[164] Examples of groups who have been regarded as indigenous peoples are the Maori of New Zealand and the aboriginal peoples of Canada.

As with the broader category of "peoples," indigenous peoples situated within states do not have a general right to independence or secession from those states under international law,[165] but they do have rights amounting to what was discussed above as the right to **internal** self-determination.

In a historic development last September 13, 2007, the UN General Assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples (UN DRIP) through General Assembly Resolution 61/295. The vote was 143 to 4, the Philippines being included among those in favor, and the four voting against being Australia, Canada, New Zealand, and the U.S. The Declaration clearly recognized the right of indigenous peoples to self-determination, encompassing the right to autonomy or self-government, to wit:

> **Article 3**
>
> Indigenous peoples have the right to **self-determination**. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> **Article 4**
>
> Indigenous peoples, in exercising their right to self-determination, have **the right to autonomy or self-government in matters relating to their internal and local affairs**, as well as ways and means for financing their autonomous functions.
>
> **Article 5**
>
> Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Self-government, as used in international legal discourse pertaining to indigenous peoples, has been understood as equivalent to "internal self-determination."[166] The extent of self-determination provided for in the UN DRIP is more particularly defined in its subsequent articles, some of which are quoted hereunder:

> **Article 8**
>
> 1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.
>
> 2. **States shall provide effective mechanisms for prevention of, and redress for:**

(a) **Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;**

(b) **Any action which has the aim or effect of dispossessing them of their lands, territories or resources;**

(c) **Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;**

(d) Any form of forced assimilation or integration;

(e) **Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.**

Article 21

1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.
2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

Article 26

1. **Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.**
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 30

1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.

2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 37

1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.

2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

Article 38

States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

Assuming that the UN DRIP, like the Universal Declaration on Human Rights, must now be regarded as embodying customary international law - a question which the Court need not definitively resolve here - the obligations enumerated therein do not strictly require the Republic to grant the Bangsamoro people, through the instrumentality of the BJE, the particular rights and powers provided for in the MOA-AD. Even the more specific provisions of the UN DRIP are general in scope, allowing for flexibility in its application by the different States.

There is, for instance, no requirement in the UN DRIP that States now guarantee indigenous peoples their own police and internal security force. Indeed, Article 8 presupposes that it is the State which will provide protection for indigenous peoples against acts like the forced dispossession of their lands - a function that is normally performed by police officers. If the protection of a right so essential to indigenous people's identity is acknowledged to be the responsibility of the State, then surely the protection of rights less significant to them as such peoples would also be the duty of States. Nor is there in the UN DRIP an acknowledgement of the right of indigenous peoples to the aerial domain and atmospheric space. What it upholds, in Article 26 thereof, is the right of indigenous peoples to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or

acquired.

Moreover, the UN DRIP, while upholding the right of indigenous peoples to autonomy, does not obligate States to grant indigenous peoples the near-independent status of an associated state. All the rights recognized in that document are qualified in Article 46 as follows:

> 1. **Nothing in this Declaration may be** interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or **construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.**

Even if the UN DRIP were considered as part of the law of the land pursuant to Article II, Section 2 of the Constitution, it would not suffice to uphold the validity of the MOA-AD so as to render its compliance with other laws unnecessary.

It is, therefore, clear that the MOA-AD contains numerous provisions that cannot be reconciled with the Constitution and the laws as presently worded. Respondents proffer, however, that the signing of the MOA-AD alone would not have entailed any violation of law or grave abuse of discretion on their part, precisely because it stipulates that the provisions thereof inconsistent with the laws shall not take effect until these laws are amended. They cite paragraph 7 of the MOA-AD strand on GOVERNANCE quoted earlier, but which is reproduced below for convenience:

> 7. The Parties agree that the mechanisms and modalities for the actual implementation of this MOA-AD shall be spelt out in the Comprehensive Compact to mutually take such steps to enable it to occur effectively.

Any provisions of the MOA-AD requiring amendments to the existing legal framework shall come into force upon signing of a Comprehensive Compact and upon effecting the necessary changes to the legal framework with due regard to non derogation of prior agreements and within the stipulated timeframe to be contained in the Comprehensive Compact.

Indeed, the foregoing stipulation keeps many controversial provisions of the MOA-AD from coming into force until the necessary changes to the legal framework are effected. **While the word "Constitution" is not mentioned in the provision now under consideration or anywhere else in the MOA-AD, the term "legal framework" is certainly broad enough to include the Constitution.**

Notwithstanding the suspensive clause, however, respondents, by their mere act of incorporating in the MOA-AD the provisions thereof regarding the associative relationship between the BJE and the Central Government, have already violated the Memorandum of Instructions From The President dated March 1, 2001, which states that the "negotiations shall be conducted in accordance with x x x the principles of the sovereignty and **territorial integrity** of the Republic of the Philippines." (Emphasis supplied) Establishing an associative relationship between the BJE and the Central Government is, for the reasons already discussed, a preparation for independence, or worse, an implicit acknowledgment of an independent status

already prevailing.

Even apart from the above-mentioned Memorandum, however, the MOA-AD is defective because the suspensive clause is invalid, as discussed below.

The authority of the GRP Peace Negotiating Panel to negotiate with the MILF is founded on E.O. No. 3, Section 5(c), which states that there shall be established Government Peace Negotiating Panels for negotiations with different rebel groups to be "appointed by the President as her official emissaries to conduct negotiations, dialogues, and face-to-face discussions with rebel groups." These negotiating panels are to report to the President, through the PAPP on the conduct and progress of the negotiations.

It bears noting that the GRP Peace Panel, in exploring lasting solutions to the Moro Problem through its negotiations with the MILF, was not restricted by E.O. No. 3 only to those options available under the laws as they presently stand. One of the components of a comprehensive peace process, which E.O. No. 3 collectively refers to as the "Paths to Peace," is the pursuit of social, economic, and political reforms which may require new legislation or even constitutional amendments. Sec. 4(a) of E.O. No. 3, which reiterates Section 3(a), of E.O. No. 125,[167] states:

> SECTION 4. The Six Paths to Peace. - The components of the comprehensive peace process comprise the processes known as the "Paths to Peace". These component processes are interrelated and not mutually exclusive, and must therefore be pursued simultaneously in a coordinated and integrated fashion. They shall include, but may not be limited to, the following:
>
> a. PURSUIT OF SOCIAL, ECONOMIC AND POLITICAL REFORMS. This component involves the **vigorous implementation of various policies, reforms, programs and projects aimed at addressing the root causes of internal armed conflicts and social unrest. This may require administrative action, new legislation or even constitutional amendments.**
>
> x x x x (Emphasis supplied)

The MOA-AD, therefore, may reasonably be perceived as an attempt of respondents to address, pursuant to this provision of E.O. No. 3, the root causes of the armed conflict in Mindanao. The E.O. authorized them to "think outside the box," so to speak. Hence, they negotiated and were set on signing the MOA-AD that included various social, economic, and political reforms which cannot, however, all be accommodated within the present legal framework, and which thus would require new legislation and constitutional amendments.

The inquiry on the legality of the "suspensive clause," however, cannot stop here, because it must be asked

whether the President herself may exercise the power delegated to the GRP Peace Panel under E.O. No. 3, Sec. 4(a).

The President cannot delegate a power that she herself does not possess. May the President, in the course of peace negotiations, agree to pursue reforms that would

require new legislation and constitutional amendments, or should the reforms be restricted only to those solutions which the present laws allow? The answer to this question requires a discussion of

the extent of the President's power to conduct peace negotiations.

That the authority of the President to conduct peace negotiations with rebel groups is not explicitly mentioned in the Constitution does not mean that she has no such authority. In *Sanlakas v. Executive Secretary*,[168] in issue was the authority of the President to declare a state of rebellion - an authority which is not expressly provided for in the Constitution. The Court held thus:

> "In her ponencia in *Marcos v. Manglapus*, Justice Cortes put her thesis into jurisprudence. There, the Court, by a slim 8-7 margin, upheld the President's power to forbid the return of her exiled predecessor. The rationale for the majority's ruling rested on the President's
>
> > . . . **unstated residual powers which are implied from the grant of executive power and which are necessary for her to comply with her duties under the Constitution. The powers of the President are not limited to what are expressly enumerated in the article on the Executive Department and in scattered provisions of the Constitution.** This is so, notwithstanding the avowed intent of the members of the Constitutional Commission of 1986 to limit the powers of the President as a reaction to the abuses under the regime of Mr. Marcos, for the result was a limitation of specific powers of the President, particularly those relating to the commander-in-chief clause, but not a diminution of the general grant of executive power.

Thus, **the President's authority to declare a state of rebellion springs in the main from her powers as chief executive and, at the same time, draws strength from her Commander-in-Chief powers.** x x x (Emphasis and underscoring supplied)

Similarly, the President's power to conduct peace negotiations is implicitly included in her powers as Chief Executive and Commander-in-Chief. As Chief Executive, the President has the general responsibility to promote public peace, and as Commander-in-Chief, she has the more specific duty to prevent and suppress rebellion and lawless violence.[169]

As the experience of nations which have similarly gone through internal armed conflict will show, however, peace is rarely attained by simply pursuing a military solution. Oftentimes, changes as far-reaching as a fundamental reconfiguration of the nation's constitutional structure is required. The observations of Dr. Kirsti Samuels are enlightening, to wit:

> x x x [T]he fact remains that a successful political and governance transition must form the core of any post-conflict peace-building mission. As we have observed in Liberia and Haiti over the last ten years, conflict cessation without modification of the political environment, even where state-building is undertaken through technical electoral assistance and

> institution- or capacity-building, is unlikely to succeed. On average, more than 50 percent of states emerging from conflict return to conflict. Moreover, a substantial proportion of transitions have resulted in weak or limited democracies.
>
> The design of a constitution and its constitution-making process can play an important role in the political and governance transition. Constitution-making after conflict is an opportunity to create a common vision of the future of a state and a road map on how to get there. The constitution can be partly a peace agreement and partly a framework setting up the rules by which the new democracy will operate.[170]

In the same vein, Professor Christine Bell, in her article on the nature and legal status of peace agreements, observed that the typical way that peace agreements establish or confirm mechanisms for demilitarization and demobilization is by linking them to **new constitutional structures** addressing governance, elections, and legal and human rights institutions.[171]

In the Philippine experience, the link between peace agreements and constitution-making has been recognized by no less than the framers of the Constitution. Behind the provisions of the Constitution on autonomous regions[172] is the framers' intention to implement a particular peace agreement, namely, the Tripoli Agreement of 1976 between the GRP and the MNLF, signed by then Undersecretary of National Defense Carmelo Z. Barbero and then MNLF Chairman Nur Misuari.

> MR. ROMULO. There are other speakers; so, although I have some more questions, I will reserve my right to ask them if they are not covered by the other speakers. I have only two questions.
>
> **I heard one of the Commissioners say that local autonomy already exists in the Muslim region**; it is working very well; it has, in fact, diminished a great deal of the problems. So, my question is: **since that already exists, why do we have to go into something new?**
>
> MR. OPLE. May I answer that on behalf of Chairman Nolledo. Commissioner Yusup Abubakar is right that **certain definite steps have been taken to implement the provisions of the Tripoli Agreement with respect to an autonomous region in Mindanao . This is a good first step, but there is no question that this is merely a partial response to the Tripoli Agreement itself and to the fuller standard of regional autonomy contemplated in that agreement, and now by state policy.**[173] (Emphasis supplied)

The constitutional provisions on autonomy and the statutes enacted pursuant to them have, to the credit of their drafters, been partly successful. Nonetheless, the Filipino people are still faced with the reality of an on-going conflict between the Government and the MILF. If the President is to be expected to find means for bringing this conflict to an end and to achieve lasting peace in Mindanao, then she must be given the leeway to explore, in the course of peace negotiations, solutions that may require changes to the Constitution for their implementation. Being uniquely vested with the power to conduct peace negotiations with rebel groups, the President is in a singular position to know the precise nature of their grievances

which, if resolved, may bring an end to hostilities.

The President may not, of course, unilaterally implement the solutions that she considers viable, but she may not be prevented from submitting them as recommendations to Congress, which could then, if it is minded, act upon them pursuant to the legal procedures for constitutional amendment and revision. In particular, Congress would have the option, pursuant to Article XVII, Sections 1 and 3 of the Constitution, to propose the recommended amendments or revision to the people, call a constitutional convention, or submit to the electorate the question of calling such a convention.

While the President does not possess constituent powers - as those powers may be exercised only by Congress, a Constitutional Convention, or the people through initiative and referendum - she may submit proposals for constitutional change to Congress in a manner that does not involve the arrogation of constituent powers.

In *Sanidad v. COMELEC*,[174] in issue was the legality of then President Marcos' act of directly submitting proposals for constitutional amendments to a referendum, bypassing the interim National Assembly which was the body vested by the 1973 Constitution with the power to propose such amendments. President Marcos, it will be recalled, never convened the interim National Assembly. The majority upheld the President's act, holding that "the urges of absolute necessity" compelled the President as the agent of the people to act as he did, there being no interim National Assembly to propose constitutional amendments. Against this ruling, Justices Teehankee and Muñoz Palma vigorously dissented. The Court's concern at present, however, is not with regard to the point on which it was then divided in that controversial case, but on that which was not disputed by either side.

Justice Teehankee's dissent,[175] in particular, bears noting. While he disagreed that the President may directly submit proposed constitutional amendments to a referendum, implicit in his opinion is a recognition that he would have upheld the President's action along with the majority had the President convened the interim National Assembly and coursed his proposals through it. Thus Justice Teehankee opined:

> "Since the Constitution provides for the organization of the essential departments of government, defines and delimits the powers of each and prescribes the manner of the exercise of such powers, and the constituent power has not been granted to but has been withheld from the President or Prime Minister, it follows that the President's questioned decrees proposing and submitting constitutional amendments directly to the people **(without the intervention of the interim National Assembly in whom the power is expressly vested)** are devoid of constitutional and legal basis."[176] (Emphasis supplied)

From the foregoing discussion, the principle may be inferred that the President - in the course of conducting peace negotiations - may validly consider implementing even those policies that require changes to the Constitution, but she may **not** unilaterally implement them **without the intervention of Congress, or act in any way as if the assent of that body were assumed as a certainty**.

Since, under the present Constitution, the people also have the power to directly

propose amendments through initiative and referendum, the President may also submit her recommendations to the people, not as a formal proposal to be voted on in a plebiscite similar to what President Marcos did in *Sanidad*, but for their independent consideration of whether these recommendations merit being formally proposed through initiative.

These recommendations, however, may amount to nothing more than the President's suggestions to the people, for any further involvement in the process of initiative by the Chief Executive may vitiate its character as a genuine "people's initiative." The only initiative recognized by the Constitution is that which truly proceeds from the people. As the Court stated in *Lambino v. COMELEC*:[177]

> "The Lambino Group claims that their initiative is the `people's voice.' However, the Lambino Group unabashedly states in ULAP Resolution No. 2006-02, in the verification of their petition with the COMELEC, that `ULAP maintains its unqualified support to the agenda of Her Excellency President Gloria Macapagal-Arroyo for constitutional reforms.' The Lambino Group thus **admits** that their `people's' initiative is an `**unqualified support to the agenda'** of the incumbent President to change the Constitution. This forewarns the Court to be wary of incantations of `people's voice' or `sovereign will' in the present initiative."

It will be observed that the President has authority, as stated in her oath of office, [178] only to preserve and defend the Constitution. Such presidential power does not, however, extend to allowing her to change the Constitution, but simply to recommend proposed amendments or revision. As long as she limits herself to recommending these changes and submits to the proper procedure for constitutional amendments and revision, her mere recommendation need not be construed as an unconstitutional act.

The foregoing discussion focused on the President's authority to propose **constitutional** amendments, since her authority to propose new **legislation** is not in controversy. It has been an accepted practice for Presidents in this jurisdiction to propose new legislation. One of the more prominent instances the practice is usually done is in the yearly State of the Nation Address of the President to Congress. Moreover, the annual general appropriations bill has always been based on the budget prepared by the President, which - for all intents and purposes - is a proposal for new legislation coming from the President.[179]

The "suspensive clause" in the MOA-AD viewed in light of the above-discussed standards

Given the limited nature of the President's authority to propose constitutional amendments, she **cannot guarantee** to any third party that the required amendments will eventually be put in place, nor even be submitted to a plebiscite. The most she could do is submit these proposals as recommendations either to Congress or the people, in whom constituent powers are vested.

Paragraph 7 on Governance of the MOA-AD states, however, that all provisions thereof which cannot be reconciled with the present Constitution and laws "shall

come into force upon signing of a Comprehensive Compact and upon effecting the necessary changes to the legal framework." This stipulation does not bear the marks of a suspensive condition - defined in civil law as a future and uncertain event - but of a term. It is not a question of **whether** the necessary changes to the legal framework will be effected, but **when**. That there is no uncertainty being contemplated is plain from what follows, for the paragraph goes on to state that the contemplated changes shall be "with due regard to non derogation of prior agreements and within the stipulated timeframe to be contained in the Comprehensive Compact."

Pursuant to this stipulation, therefore, it is **mandatory** for the GRP to effect the changes to the legal framework contemplated in the MOA-AD - which changes would include constitutional amendments, as discussed earlier. It bears noting that,

By the time these changes are put in place, the MOA-AD itself would be counted
among the "prior agreements" from which there could be no derogation.

What remains for discussion in the Comprehensive Compact would merely be the implementing details for these "consensus points" and, notably, the deadline for effecting the contemplated changes to the legal framework.

Plainly, stipulation-paragraph 7 on GOVERNANCE is **inconsistent with the limits of the President's authority to propose constitutional amendments**, it being a virtual guarantee that the Constitution and the laws of the Republic of the Philippines will certainly be adjusted to conform to all the "consensus points" found in the MOA-AD. Hence, it must be struck down as **unconstitutional**.

A comparison between the "suspensive clause" of the MOA-AD with a similar provision appearing in the 1996 final peace agreement between the MNLF and the GRP is most instructive.

As a backdrop, the parties to the 1996 Agreement stipulated that it would be implemented in two phases. **Phase I** covered a three-year transitional period involving the putting up of new administrative structures through Executive Order, such as the Special Zone of Peace and Development (SZOPAD) and the Southern Philippines Council for Peace and Development (SPCPD), while **Phase II** covered the establishment of the new regional autonomous government through amendment or repeal of R.A. No. 6734, which was then the Organic Act of the ARMM.

The stipulations on Phase II consisted of specific agreements on the structure of the expanded autonomous region envisioned by the parties. To that extent, they are similar to the provisions of the MOA-AD. There is, however, a crucial difference between the two agreements. While the MOA-AD **virtually guarantees that the "necessary changes to the legal framework" will be put in place**, the GRP-MNLF final peace agreement states thus: "Accordingly, these provisions [on Phase II] shall be **recommended** by the GRP to Congress for incorporation in the amendatory or repealing law."

Concerns have been raised that the MOA-AD would have given rise to a binding international law obligation on the part of the Philippines to change its Constitution in conformity thereto, on the ground that it may be considered either as a binding

agreement under international law, or a unilateral declaration of the Philippine government to the international community that it would grant to the Bangsamoro people all the concessions therein stated. Neither ground finds sufficient support in international law, however.

The MOA-AD, as earlier mentioned in the overview thereof, would have included foreign dignitaries as signatories. In addition, representatives of other nations were invited to witness its signing in Kuala Lumpur. These circumstances readily lead one to surmise that the MOA-AD would have had the status of a binding international agreement had it been signed. An examination of the prevailing principles in international law, however, leads to the contrary conclusion.

The Decision on Challenge to Jurisdiction: Lomé Accord Amnesty[180] (the Lomé Accord case) of the Special Court of Sierra Leone is enlightening. The Lomé Accord was a peace agreement signed on July 7, 1999 between the Government of Sierra Leone and the Revolutionary United Front (RUF), a rebel group with which the Sierra Leone Government had been in armed conflict for around eight years at the time of signing. There were non-contracting signatories to the agreement, among which were the Government of the Togolese Republic, the Economic Community of West African States, and the UN.

On January 16, 2002, after a successful negotiation between the UN Secretary-General and the Sierra Leone Government, another agreement was entered into by the UN and that Government whereby the Special Court of Sierra Leone was established. The sole purpose of the Special Court, an international court, was to try persons who bore the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since November 30, 1996.

Among the stipulations of the Lomé Accord was a provision for the full pardon of the members of the RUF with respect to anything done by them in pursuit of their objectives as members of that organization since the conflict began.

In the Lomé Accord case, the Defence argued that the Accord created an **internationally binding** obligation not to prosecute the beneficiaries of the amnesty provided therein, citing, among other things, the participation of foreign dignitaries and international organizations in the finalization of that agreement. The Special Court, however, rejected this argument, ruling that the Lome Accord is not a treaty and that it can only create binding obligations and rights between the parties in municipal law, not in international law. Hence, the Special Court held, it is ineffective in depriving an international court like it of jurisdiction.

> "37. In regard to the nature of a negotiated settlement of an internal armed conflict **it is easy to assume and to argue with some degree of plausibility, as Defence counsel for the defendants seem to have done, that the mere fact that in addition to the parties to the conflict, the document formalizing the settlement is signed by foreign heads of state or their representatives and representatives of international organizations, means the agreement of the parties is internationalized so as to create obligations in international law.**

x x x x

40. Almost every conflict resolution will involve the parties to the conflict and the mediator or facilitator of the settlement, or persons or bodies under whose auspices the settlement took place but who are not at all parties to the conflict, are not contracting parties and who do not claim any obligation from the contracting parties or incur any obligation from the settlement.

41. **In this case, the parties to the conflict are the lawful authority of the State and the RUF which has no status of statehood and is to all intents and purposes a faction within the state. The non-contracting signatories of the Lomé Agreement were moral guarantors of the principle that, in the terms of Article XXXIV of the Agreement, "this peace agreement is implemented with integrity and in good faith by both parties". The moral guarantors assumed no legal obligation.** It is recalled that the UN by its representative appended, presumably for avoidance of doubt, an understanding of the extent of the agreement to be implemented as not including certain international crimes.

42. An international agreement in the nature of a treaty must create rights and obligations regulated by international law so that a breach of its terms will be a breach determined under international law which will also provide principle means of enforcement. **The Lomé Agreement created neither rights nor obligations capable of being regulated by international law. An agreement such as the Lomé Agreement which brings to an end an internal armed conflict no doubt creates a factual situation of restoration of peace that the international community acting through the Security Council may take note of. *That, however, will not convert it to an international agreement which creates an obligation enforceable in international, as distinguished from municipal, law*.** A breach of the terms of such a peace agreement resulting in resumption of internal armed conflict or creating a threat to peace in the determination of the Security Council may indicate a reversal of the factual situation of peace to be visited with possible legal consequences arising from the new situation of conflict created. Such consequences such as action by the Security Council pursuant to Chapter VII arise from the situation and not from the agreement, nor from the obligation imposed by it. Such action cannot be regarded as a remedy for the breach. **A peace agreement which settles an internal armed conflict cannot be ascribed the same status as one which settles an international armed conflict which, essentially, must be between two or more warring States. The Lomé Agreement cannot be characterised as an international instrument.** x x x" (Emphasis, italics and underscoring supplied)

Similarly, that the MOA-AD would have been signed by representatives of States and international organizations not parties to the Agreement would not have sufficed to vest in it a binding character under international law.

In another vein, concern has been raised that the MOA-AD would amount to a unilateral declaration of the Philippine State, binding under international law, that it would comply with all the stipulations stated therein, with the result that it would have to amend its Constitution accordingly regardless of the true will of the people. Cited as authority for this view is *Australia v. France*,[181] also known as the Nuclear Tests Case, decided by the International Court of Justice (ICJ).

In the Nuclear Tests Case, Australia challenged before the ICJ the legality of France's nuclear tests in the South Pacific. France refused to appear in the case, but public statements from its President, and similar statements from other French officials including its Minister of Defence, that its 1974 series of atmospheric tests would be its last, persuaded the ICJ to dismiss the case.[182] Those statements, the ICJ held, amounted to a legal undertaking addressed to the international community, which required no acceptance from other States for it to become effective.

Essential to the ICJ ruling is its finding that the French government intended to be bound to the international community in issuing its public statements, *viz*:

> 43. It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. **When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration.** An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a quid pro quo nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made.
>
> 44. Of course, **not all unilateral acts imply obligation; but a State may choose to take up a certain position in relation to a particular matter with the intention of being bound-the intention is to be ascertained by interpretation of the act.** When States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for.
>
> x x x x
>
> 51. **In announcing that the 1974 series of atmospheric tests would be the last, the French Government conveyed to**

> **the world at large, including the Applicant, its intention effectively to terminate these tests. It was bound to assume that other States might take note of these statements and rely on their being effective. The validity of these statements and their legal consequences must be considered within the general framework of the security of international intercourse**, and the confidence and trust which are so essential in the relations among States. **It is from the actual substance of these statements, and from the circumstances attending their making, that the legal implications of the unilateral act must be deduced. The objects of these statements are clear and they were addressed to the international community as a whole, and the Court holds that they constitute an undertaking possessing legal effect.** The Court considers *270 that the President of the Republic, in deciding upon the effective cessation of atmospheric tests, gave an undertaking to the international community to which his words were addressed. x x x (Emphasis and underscoring supplied)

As gathered from the above-quoted ruling of the ICJ, public statements of a state representative may be construed as a unilateral declaration only when the following conditions are present: the statements were clearly addressed to the international community, the state intended to be bound to that community by its statements, and that not to give legal effect to those statements would be detrimental to the security of international intercourse. Plainly, unilateral declarations arise only in peculiar circumstances.

The limited applicability of the Nuclear Tests Case ruling was recognized in a later case decided by the ICJ entitled *Burkina Faso v. Mali*,[183] also known as the Case Concerning the Frontier Dispute. The public declaration subject of that case was a statement made by the President of Mali, in an interview by a foreign press agency, that Mali would abide by the decision to be issued by a commission of the Organization of African Unity on a frontier dispute then pending between Mali and Burkina Faso.

Unlike in the Nuclear Tests Case, the ICJ held that the statement of Mali's President was not a unilateral act with legal implications. It clarified that its ruling in the Nuclear Tests case rested on the peculiar circumstances surrounding the French declaration subject thereof, to wit:

> 40. In order to assess the intentions of the author of a unilateral act, account must be taken of all the factual circumstances in which the act occurred. For example, **in the Nuclear Tests cases, the Court took the view that since the applicant States were not the only ones concerned at the possible continuance of atmospheric testing by the French Government, that Government's unilateral declarations had `conveyed to the world at large, including the Applicant, its intention effectively to terminate these tests`** (I.C.J. Reports 1974, p. 269, para. 51; p. 474, para. 53). **In the particular circumstances of those cases, the French Government could not express an intention to be bound otherwise than by unilateral declarations. It is**

> **difficult to see how it could have accepted the terms of a negotiated solution with each of the applicants without thereby jeopardizing its contention that its conduct was lawful. The circumstances of the present case are radically different. Here, there was nothing to hinder the Parties from manifesting an intention to accept the binding character of the conclusions of the Organization of African Unity Mediation Commission by the normal method: a formal agreement on the basis of reciprocity.** Since no agreement of this kind was concluded between the Parties, the Chamber finds that there are no grounds to interpret the declaration made by Mali's head of State on 11 April 1975 as a unilateral act with legal implications in regard to the present case. (Emphasis and underscoring supplied)

Assessing the MOA-AD in light of the above criteria, it would not have amounted to a unilateral declaration on the part of the Philippine State to the international community. The Philippine panel did not draft the same with the clear intention of being bound thereby to the international community as a whole or to any State, but only to the MILF. While there were States and international organizations involved, one way or another, in the negotiation and projected signing of the MOA-AD, they participated merely as witnesses or, in the case of Malaysia, as facilitator. As held in the Lomé Accord case, the mere fact that in addition to the parties to the conflict, the peace settlement is signed by representatives of states and international organizations does not mean that the agreement is internationalized so as to create obligations in international law.

Since the commitments in the MOA-AD were not addressed to States, not to give legal effect to such commitments would not be detrimental to the security of international intercourse - to the trust and confidence essential in the relations among States.

In one important respect, the circumstances surrounding the MOA-AD are closer to that of *Burkina Faso* wherein, as already discussed, the Mali President's statement was not held to be a binding unilateral declaration by the ICJ. As in that case, there was also nothing to hinder the Philippine panel, had it really been its intention to be bound to other States, to manifest that intention by formal agreement. Here, that formal agreement would have come about by the inclusion in the MOA-AD of a clear commitment to be legally bound to the international community, not just the MILF, and by an equally clear indication that the signatures of the participating states-representatives would constitute an acceptance of that commitment. Entering into such a formal agreement would not have resulted in a loss of face for the Philippine government before the international community, which was one of the difficulties that prevented the French Government from entering into a formal agreement with other countries. That the Philippine panel did not enter into such a formal agreement suggests that it had no intention to be bound to the international community. On that ground, the MOA-AD may **not be** considered a unilateral declaration under international law.

The MOA-AD not being a document that can bind the Philippines under international law notwithstanding, respondents' almost consummated act of **guaranteeing amendments to the legal framework is, by itself, sufficient to constitute grave abuse of discretion**. The grave abuse lies not in the fact that they

considered, as a solution to the Moro Problem, the creation of a state within a state, but in their brazen **willingness to guarantee that Congress and the sovereign Filipino people would give their imprimatur to their solution**. Upholding such an act would amount to authorizing a usurpation of the constituent powers vested only in Congress, a Constitutional Convention, or the people themselves through the process of initiative, for the only way that the Executive can ensure the outcome of the amendment process is through an undue influence or interference with that process.

The sovereign people may, if it so desired, go to the extent of giving up a portion of its own territory to the Moros for the sake of peace, for it can change the Constitution in any it wants, so long as the change is not inconsistent with what, in international law, is known as *Jus Cogens*.[184] Respondents, however, may not preempt it in that decision.

SUMMARY

The petitions are ripe for adjudication. The failure of respondents to consult the local government units or communities affected constitutes a departure by respondents from their mandate under E.O. No. 3. Moreover, respondents exceeded their authority by the mere act of guaranteeing amendments to the Constitution. Any alleged violation of the Constitution by any branch of government is a proper matter for judicial review.

As the petitions involve constitutional issues which are of paramount public interest or of transcendental importance, the Court grants the petitioners, petitioners-in-intervention and intervening respondents the requisite *locus standi* in keeping with the liberal stance adopted in *David v. Macapagal-Arroyo*.

Contrary to the assertion of respondents that the non-signing of the MOA-AD and the eventual dissolution of the GRP Peace Panel mooted the present petitions, the Court finds that the present petitions provide an exception to the "moot and academic" principle in view of (a) the grave violation of the Constitution involved; (b) the exceptional character of the situation and paramount public interest; (c) the need to formulate controlling principles to guide the bench, the bar, and the public; and (d) the fact that the case is capable of repetition yet evading review.

The MOA-AD is a significant part of a series of agreements necessary to carry out the GRP-MILF Tripoli Agreement on Peace signed by the government and the MILF back in June 2001. Hence, the present MOA-AD can be renegotiated or another one drawn up that could contain similar or significantly dissimilar provisions compared to the original.

The Court, however, finds that the prayers for mandamus have been rendered moot in view of the respondents' action in providing the Court and the petitioners with the official copy of the final draft of the MOA-AD and its annexes.

The people's right to information on matters of public concern under Sec. 7, Article III of the Constitution is in *splendid symmetry* with the state policy of full public disclosure of all its transactions involving public interest under Sec. 28, Article II of the Constitution. The right to information guarantees the right of the people to demand information, while Section 28 recognizes the duty of officialdom to give

information even if nobody demands. The complete and effective exercise of the right to information necessitates that its complementary provision on public disclosure derive the same self-executory nature, subject only to reasonable safeguards or limitations as may be provided by law.

The contents of the MOA-AD is a matter of paramount public concern involving public interest in the highest order. In declaring that the right to information contemplates steps and negotiations leading to the consummation of the contract, jurisprudence finds no distinction as to the executory nature or commercial character of the agreement.

An essential element of these twin freedoms is to keep a continuing dialogue or process of communication between the government and the people. Corollary to these twin rights is the design for feedback mechanisms. The right to public consultation was envisioned to be a species of these public rights.

At least three pertinent laws animate these constitutional imperatives and justify the exercise of the people's right to be consulted on relevant matters relating to the peace agenda.

One, E.O. No. 3 itself is replete with mechanics for continuing consultations on both national and local levels and for a principal forum for consensus-building. In fact, it is the duty of the Presidential Adviser on the Peace Process to conduct regular dialogues to seek relevant information, comments, advice, and recommendations from peace partners and concerned sectors of society.

Two, Republic Act No. 7160 or the Local Government Code of 1991 requires all national offices to conduct consultations before any project or program critical to the environment and human ecology including those that may call for the eviction of a particular group of people residing in such locality, is implemented therein. The MOA-AD is one peculiar program that unequivocally and unilaterally vests ownership of a vast territory to the Bangsamoro people, which could pervasively and drastically result to the diaspora or displacement of a great number of inhabitants from their total environment.

Three, Republic Act No. 8371 or the Indigenous Peoples Rights Act of 1997 provides for clear-cut procedure for the recognition and delineation of ancestral domain, which entails, among other things, the observance of the free and prior informed consent of the Indigenous Cultural Communities/Indigenous Peoples. *Notably, the statute does not grant the Executive Department or any government agency the power to delineate and recognize an ancestral domain claim by mere agreement or compromise.*

The invocation of the doctrine of executive privilege as a defense to the general right to information or the specific right to consultation is untenable. The various explicit legal provisions fly in the face of executive secrecy. In any event, respondents effectively waived such defense after it unconditionally disclosed the official copies of the final draft of the MOA-AD, for judicial compliance and public scrutiny.

In sum, the Presidential Adviser on the Peace Process committed grave abuse of discretion when he failed to carry out the pertinent consultation process, as mandated by E.O. No. 3, Republic Act No. 7160, and Republic Act No. 8371. The

furtive process by which the MOA-AD was designed and crafted runs contrary to and in excess of the legal authority, and amounts to a whimsical, capricious, oppressive, arbitrary and despotic exercise thereof. It illustrates a gross evasion of positive duty and a virtual refusal to perform the duty enjoined.

The MOA-AD cannot be reconciled with the present Constitution and laws. Not only its specific provisions but the very concept underlying them, namely, the associative relationship envisioned between the GRP and the BJE, are **unconstitutional ,** for the concept presupposes that the associated entity is a state and implies that the same is on its way to independence.

While there is a clause in the MOA-AD stating that the provisions thereof inconsistent with the present legal framework will not be effective until that framework is amended, the same does not cure its defect. The inclusion of provisions in the MOA-AD establishing an associative relationship between the BJE and the Central Government is, itself, a violation of the Memorandum of Instructions From The President dated March 1, 2001, addressed to the government peace panel. Moreover, as the clause is worded, it virtually guarantees that the necessary amendments to the Constitution and the laws will eventually be put in place. Neither the GRP Peace Panel nor the President herself is authorized to make such a guarantee. Upholding such an act would amount to authorizing a usurpation of the constituent powers vested only in Congress, a Constitutional Convention, or the people themselves through the process of initiative, for the only way that the Executive can ensure the outcome of the amendment process is through an undue influence or interference with that process.

While the MOA-AD would not amount to an international agreement or unilateral declaration binding on the Philippines under international law, respondents' act of guaranteeing amendments is, by itself, already a constitutional violation that renders the MOA-AD fatally defective.

WHEREFORE, respondents' motion to dismiss is **DENIED**. The main and intervening petitions are GIVEN DUE COURSE and hereby GRANTED.

The Memorandum of Agreement on the Ancestral Domain Aspect of the GRP-MILF Tripoli Agreement on Peace of 2001 is declared contrary to law and the Constitution.

SO ORDERED.

Puno, C.J., Please see separate concurring opinion.
Quisumbing, J., concur.
Ynares-Santiago, J., see separate concurring opinion & concur with separate opinion of C.J. Puno.
Carpio, J., see concurring opinion.
Austria-Martinez, J., also concur were CJ's separate opinion.
Corona, J., share the dissent of Mr. Justice Tinga.
Azcuna, J., concur in a separate opinion.
Tinga, J., dissent from the result. See separate opinion.
Chico-Nazario, Velasco, Jr., Nachura, and *Brion, JJ.*, Pls. see dissenting opinion.
Reyes, J., certify that J. Reyes filed a separate opinion concurring with the majority.
Leonardo-De Castro, J., concurring and Please see dissenting opinion.

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[1] Eric Gutierrez and Abdulwahab Guialal, THE UNFINISHED JIHAD: THE MORO ISLAMIC LIBERATION FRONT AND PEACE IN MINDANAO IN REBELS, WARLORDS AND ULAMA: A READER ON MUSLIM SEPARATISM AND THE WAR IN SOUTHERN PHILIPPINES 275 (1999).

[2] Memorandum of Respondents dated September 24, 2008, p. 10.

[3] Memorandum of Respondents dated September 24, 2008, pp. 10-11.

[4] *Vide* Salah Jubair, THE LONG ROAD TO PEACE: INSIDE THE GRP-MILF PEACE PROCESS 35-36 (2007).

[5] Memorandum of Respondents dated September 24, 2008, p. 12.

[6] *Vide* Salah Jubair, THE LONG ROAD TO PEACE: INSIDE THE GRP-MILF PEACE PROCESS 40-41 (2007).

[7] Composed of its Chairperson, Sec. Rodolfo Garcia, and members, Atty. Leah Armamento, Atty. Sedfrey Candelaria, with Mark Ryan Sullivan as Secretariat head.

[8] Represented by Governor Jesus Sacdalan and/or Vice-Governor Emmanuel Piñol.

[9] *Rollo* (G.R. No. 183591), pp. 3-33.

[10] Supplement to Petition (with motion for leave) of August 11, 2008, *rollo* (G.R. No. 183591), pp. 143-162.

[11] *Rollo* (G.R. No. 183752), pp. 3-28.

[12] Represented by Mayor Celso L. Lobregat.

[13] *Rollo* (G.R. No. 183591), pp. 132-135; *rollo* (G.R. No. 183752), pp. 68-71.

[14] *Rollo* (G.R. No. 183591), pp. 130-131; *rollo* (G.R. No. 183752), pp. 66-67.

[15] *Rollo* (G.R. No. 183752), pp. 173-246.

[16] Represented by Mayor Lawrence Lluch Cruz.

[17] Represented by Governor Rolando Yebes.

[18] Namely, Seth Frederick Jaloslos, Fernando Cabigon, Jr., Uldarico Mejorada II, Edionar Zamoras, Edgar Baguio, Cedric Adriatico, Felixberto Bolando, Joseph Brendo Ajero, Norbideiri Edding, Anecito Darunday, Angelica Carreon, and Luzviminda Torrino.

[19] *Rollo* (G.R. No. 183951), pp. 3-33.

[20] *Rollo* (G.R. No. 183962), pp. 3- 20.

[21] Represented by Mayor Cherrylyn Santos-Akbar.

[22] Represented by Gov. Suharto Mangudadatu.

[23] Represented by Mayor Noel Deano.

[24] *Rollo* (G.R. No. 183591), pp. 451-453.

[25] R.A. No. 6734, as amended by R.A. 9054 entitled AN ACT TO STRENGTHEN AND EXPAND THE ORGANIC ACT FOR THE AUTONOMOUS REGION IN MUSLIM MINDANAO, AMENDING FOR THE PURPOSE REPUBLIC ACT NO. 6734, ENTITLED AN ACT OF PROVIDING FOR THE AUTONOMOUS REGION IN MUSLIM MINDANAO, AS AMENDED.

[26] R.A. No. 8371, AN ACT TO RECOGNIZE, PROTECT AND PROMOTE THE RIGHTS OF INDIGENOUS CULTURAL COMMUNITIES/INDIGENOUS PEOPLES, CREATING A NATIONAL COMMISSION ON INDIGENOUS PEOPLES, ESTABLISHING IMPLEMENTING MECHANISMS, APPROPRIATING FUNDS THEREFOR, AND FOR OTHER PURPOSES, October 29, 1997.

[27] Cesar Adib Majul, THE GENERAL NATURE OF ISLAMIC LAW AND ITS APPLICATION IN THE PHILIPPINES, lecture delivered as part of the Ricardo Paras Lectures, a series jointly sponsored by the Commission on Bar Integration of the Supreme Court, the Integrated Bar of the Philippines and the U.P. Law Center, September 24, 1977.

[28] Ibid., *vide* M.A. Muqtedar Khan Ph.D., IMMIGRANT AMERICAN MUSLIMS AND THE MORAL DILEMMAS OF CITIZENSHIP, http://www.islamfortoday.com/khan04.htm, visited on September 18, 2008, and Syed Shahabuddin, MUSLIM WORLD AND THE CONTEMPORARY IJMA' ON RULES OF GOVERNANCE - II, http://www.milligazette.com/Archives/2004/01-15May04-Print-Edition/0105200471.htm, visited on September 18, 2008.

[29] MOA-AD Terms of Reference.

[30] MOA-AD, Concepts and Principles, par. 1.

[31] A traditional Muslim historical account of the acts of Shariff Kabungsuwan is quoted by historian Cesar Adib Majul in his book, Muslims in the Philippines (1973):

> After a time it came to pass that Mamalu, who was the chief man next to Kabungsuwan, journeyed to Cotabato. He found there that many of the people had ceased to regard the teachings of the Koran and had fallen into evil ways. Mamamlu sent to Kabungsuwan word of these things.
>
> Kabungsuwan with a portion of his warriors went from Malabang to

> Cotabato and found that the word sent to him by Mamamlu was true. Then he assembled together all the people. Those of them, who had done evilly and disregarded the teachings of the Koran thenceforth, he drove out of the town into the hills, with their wives and children.
>
> **Those wicked one who were thus cast out were the beginnings of the tribes of the Tirurais and Manobos**, who live to the east of Cotabato in the country into which their evil forefathers were driven. And even to this day they worship not God; neither do they obey the teachings of the Koran . . . **But the people of Kabungsuwan, who regarded the teachings of the Koran and lived in fear of God, prospered and increased, and we Moros of today are their descendants.** (Citation omitted, emphasis supplied).

[32] Id., par. 2.

[33] Id., par. 3.

[34] Id., par. 4.

[35] Francisco L. Gonzales, Sultans of a Violent Land, in Rebels, Warlords and Ulama: A Reader on Muslim Separatism and the War in Southern Philippines 99, 103 (1999).

[36] The Charter of the Assembly of First Nations, the leading advocacy group for the indigenous peoples of Canada, adopted in 1985, begins thus:

> "WE THE CHIEFS OF THE INDIAN FIRST NATIONS IN CANADA HAVING DECLARED:
> THAT our peoples are the original peoples of this land having been put here by the Creator; x x x."

[37] Id., par. 6.

[38] MOA-AD, Territory, par. 1.

[39] Id., par. 2(c).

[40] Id., par. 2(d).

[41] Id., par. 2(e).

[42] Id., par. 2(f).

[43] Id., par, 2(g)(1).

[44] Id., par. 2(h).

[45] Id., par. 2(i).

[46] MOA-AD, Resources, par. 4.

[47] Ibid.

[48] Id., par. 5.

[49] Id., par. 6.

[50] Id., par. 7.

[51] Id., par. 9.

[52] MOA-AD, Governance, par. 3.

[53] "IN WITNESS WHEREOF, the undersigned, being the representatives of the Parties[,] hereby affix their signatures."

[54] *Vide* 1987 Constitution, Article VIII, Section 1.

[55] *Vide Muskrat v. US,* 219 US 346 (1911).

[56] *Flast v. Cohen,* 88 S.Ct. 1942, 1950 (1968).

[57] *Didipio Earth Savers' Multi-Purpose Association, Incorporated (DESAMA) v. Gozun*, G.R. No. 157882, March 30, 2006, 485 SCRA 286.

[58] *Vide U.S. v. Muskrat,* 219 U.S. 346, 357 (1902).

[59] *Guingona, Jr. v. Court of Appeals*, 354 Phil. 415, 427-428 (1998).

[60] *Francisco, Jr. v. House of Representatives,* 460 Phil. 830, 901-902 (2003) (citation omitted).

[61] *Vide Warth v. Seldin*, 422 US 490, 511 (1975).

[62] *Vide* id. at 526.

[63] Solicitor General's Comment to G.R. No. 183752, pp. 9-11.

[64] MOA-AD, pp. 3-7, 10.

[65] 391 Phil. 43 (2000).

[66] Id. at 107-108.

[67] 530 US 290 (2000).

[68] Id. at 292.

[69] 505 U.S. 144 (1992).

[70] Id. at 175.

[71] Although only one petition is denominated a petition for certiorari, most petitions pray that the MOA-AD be declared unconstitutional/null and void.

[72] *Vide* RULES OF COURT, Rule 65, Secs. 1 and 2.

[73] *Vide* RULES OF COURT, Rule 65, Sec. 3.

[74] *Tañada v. Angara,* 338 Phil. 546, 575 (1997).

[75] Entitled DEFINING POLICY AND ADMINISTRATIVE STRUCTURE FOR GOVERNMENT'S PEACE EFFORTS which reaffirms and reiterates Executive Order No. 125 of September 15, 1993.

[76] E.O. No. 3, (2001), Sec. 1.

[77] *Vide Tañada v. Angara,* supra note 74.

[78] *Baker v. Carr,* 369 U.S. 186 (1962).

[79] Vicente V. Mendoza , JUDICIAL REVIEW OF CONSTITUTIONAL QUESTIONS 137 (2004).

[80] *Francisco, Jr. v. The House of Representatives*, 460 Phil. 830, 896 (2003).

[81] *David v. Macapagal-Arroyo*, G.R. No. 171396, May 3, 2006, 489 SCRA 160, 223.

[82] *Kilosbayan, Inc. v. Morato*, 320 Phil. 171 (1995).

[83] *Macasiano v. NHA*, G.R. No. 107921, July 1, 1993, 224 SCRA 236.

[84] *Del Mar v. Phil. Amusement and Gaming Corp.,* 400 Phil. 307, 328-329 (2000) citing *Phil. Constitution Ass'n., Inc. v. Mathay, et al.,* 124 Phil. 890 (1966).

[85] *Vide NAACP v. Alabama*, 357 U.S. 449 (1958).

[86] *Francisco, Jr. v. The House of Representatives*, supra note 80.

[87] *Province of Batangas v. Romulo,* G.R. No. 152774, May 27, 2004, 429 SCRA 736.

[88] *Firestone Ceramics, Inc. v. Court of Appeals*, 372 Phil. 401 (1999) citing *Gibson v. Judge Revilla,* 180 Phil. 645 (1979).

[89] Supra note 81.

[90] *Integrated Bar of the Phils. v. Hon. Zamora*, 392 Phil. 618 (2000).

[91] *Tatad v. Secretary of Energy*, 346 Phil. 321 (1997).

[92] *Vide* Compliance of September 1, 2008 of respondents.

[93] *Vide* Manifestation of September 4, 2008 of respondents.

[94] Supra note 81.

[95] Id. citing *Province of Batangas v. Romulo*, supra note 87.

[96] Id. citing *Lacson v. Perez*, 410 Phil. 78 (2001).

[97] Id. citing*Province of Batangas v. Romulo*, supra note 87.

[98] Id. citing *Albaña v. Comelec*, 478 Phil. 941 (2004); *Chief Supt. Acop v. Guingona Jr.*, 433 Phil. 62 (2002); *SANLAKAS v. Executive Secretary Reyes*, 466 Phil. 482 (2004).

[99] *US v. W.T. Grant Co.,* 345 U.S. 629 (1953); *US v. Trans-Missouri Freight Assn*, 166 U.S. 290, 308-310 (1897); *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 43 (1944); *Gray v. Sanders,* 372 U.S. 368, 376 (1963); *Defunis v. Odegaard*, 416 U.S. 312 (1974).

[100] Supra note 87.

[101] G.R. No. 178920, October 15, 2007, 536 SCRA 290.

[102] *Chavez v. PCGG*, 366 Phil. 863, 871 (1999).

[103] G.R. No. 178830, July 14, 2008.

[104] Supra note 98.

[105] *Ortega v. Quezon City Government*, G.R. No. 161400, September 2, 2005, 469 SCRA 388.

[106] *Alunan III v. Mirasol,* 342 Phil. 476 (1997); *Viola v. Alunan III*, 343 Phil. 184 (1997); *Chief Superintendent Acop v. Guingona, Jr.,* supra note 98; *Roble Arrastre, Inc. v. Villaflor*, G.R. No. 128509, August 22, 2006, 499 SCRA 434, 447.

[107] CONSTITUTION, Article III, Sec. 7.

[108] 80 Phil. 383 (1948).

[109] *Legaspi v. Civil Service Commission*, G.R. No. L-72119, May 29, 1987, 150

SCRA 530.

[110] 162 Phil. 868 (1976).

[111] *Baldoza v. Dimaano*, supra at 876.

[112] *Legaspi v. Civil Service Commission*, supra note 109.

[113] *Chavez v. PCGG*, 360 Phil 133, 164 (1998).

[114] In *Legaspi v. Civil Service Commission*, supra note 109 at 541, it was held that:

In determining whether or not a particular information is of public concern there is no rigid test which can be applied. `Public concern' like `public interest' is a term that eludes exact definition. Both terms embrace a broad spectrum of subjects which the public may want to know, either because these directly affect their lives, or simply because such matters naturally arouse the interest of an ordinary citizen. In the final analysis, it is for the courts to determine on a case by case basis whether the matter at issue is of interest or importance, as it relates to or affects the public.

[115] Respondents' Comment of August 4, 2008, p. 9.

[116] *Subido v. Ozaeta*, supra note 108.

[117] *Tañada, et al. v. Hon. Tuvera, et al.*, 220 Phil. 422 (1985); *Tañada, v. Hon. Tuvera*, 230 Phil. 528 (1986).

[118] *Legaspi v. Civil Service Commission*, supra note 109.

[119] *Valmonte v. Belmonte*, *Jr.*, G.R. No. 74930, February 13, 1989, 170 SCRA 256.

[120] *Chavez v. PCGG*, supra note 113; *Chavez v. PCGG,* supra note 102.

[121] *Bantay Republic Act or BA-RA 7941 v. Commission on Elections*, G.R. 177271, May 4, 2007, 523 SCRA 1.

[122] *Chavez v. Public Estates Authority*, 433 Phil. 506, 532-533 (2002).

[123] *Vide* V Record, CONSTITUTIONAL COMMISSION 26-28 (September 24, 1986) which is replete with such descriptive phrase used by Commissioner Blas Ople.

[124] CONSTITUTION, Article II, Sec. 28.

[125] Bernas, Joaquin, The 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 100 (2003).

[126] *Vide* Bernas, Joaquin, THE INTENT OF THE 1986 CONSTITUTION WRITERS 155 (1995).

[127] *Vide* *Chavez v. Public Estates Authority*, supra note 122.

[128] V RECORD, CONSTITUTIONAL COMMISSION 25 (September 24, 1986).

[129] V RECORD, CONSTITUTIONAL COMMISSION 28-29 (September 24, 1986). The phrase "safeguards on national interest" that may be provided by law was subsequently replaced by "reasonable conditions," as proposed by Commissioner Davide [*vide* V RECORD, CONSTITUTIONAL COMMISSION 30 (September 24, 1986)].

[130] In *Chavez v. National Housing Authority*, G.R. No. 164527, August 15, 2007, 530 SCRA 235, 331, the Court stated:

x x x The duty to disclose covers only transactions involving public interest, while the duty to allow access has a broader scope of information which embraces not only transactions involving public interest, but any matter contained in official communications and public documents of the government agency. (Underscoring supplied)

[131] *Valmonte v. Belmonte, Jr.*, supra note 119.

[132] V RECORD, CONSTITUTIONAL COMMISSION 28, 30 (September 24, 1986).

[133] Supra note 55.

[134] EXECUTIVE ORDER NO. 3 (2001), Sec. 3 (a).

[135] EXECUTIVE ORDER NO. 3 (2001), Sec. 4 (b).

[136] Respondents' Memorandum of September 24, 2008, p. 44.

[137] EXECUTIVE ORDER No. 3 (2001), Sec. 5 (b), par. 6.

[138] EXECUTIVE ORDER No. 3 (2001), Sec. 8, see also Sec. 10.

[139] Cf. *Garcia v. Board of Investments*, G.R. No. 88637, September 7, 1989, 177 SCRA 374, 382-384 where it was held that the Omnibus Investment Code of 1987 mandates the holding of consultations with affected communities, whenever necessary, on the acceptability of locating the registered enterprise within the community.

[140] In their Memorandum, respondents made allegations purporting to show that consultations were conducted on August 30, 2001 in Marawi City and Iligan City, on September 20, 2001 in Midsayap, Cotabato, and on January 18-19, 2002 in Metro Manila. (Memorandum of September 24, 2008, p. 13)

[141] Cf. *Chavez v. Public Estates Authority*, supra note 120.

[142] REPUBLIC ACT No. 7160, Sec. 2(c).

[143] REPUBLIC ACT No. 7160, Sec. 27.

[144] 416 Phil. 438 (2001).

[145] Id.; *vide* *Alvarez v. PICOP Resources, Inc.*, G.R. No. 162243, November 29, 2006, 508 SCRA 498; Cf. *Bangus Fry Fisherfolk v. Lanzanas*, 453 Phil. 479 (2002).

[146] *Vide* MOA-AD "Concepts and Principles," pars. 2 & 7 in relation to "Resources," par. 9 where vested property rights are made subject to the cancellation, modification and review by the Bangsamoro Juridical Entity.

[147] REPUBLIC ACT No. 8371 or "THE INDIGENOUS PEOPLES RIGHTS ACT of 1997," Sec. 16.

[148] Id., Sec. 3 (g), Chapter VIII, *inter alia*.

[149] *Tañada v. Tuvera*, No. L-63915, December 29, 1986, 146 SCRA 446, 456.

[150] C.I. Keitner and W.M. Reisman, FREE ASSOCIATION: THE UNITED STATES EXPERIENCE, 39 Tex. Int'l L.J. 1 (2003).

[151] "The former Trust Territory of the Pacific Islands is made up of the Caroline Islands, the Marshall Islands, and the Northern Mariana Islands, which extend east of the Philippines and northeast of Indonesia in the North Pacific Ocean." (Ibid.)

[152] H. Hills, FREE ASSOCIATION FOR MICRONESIA AND THE MARSHALL ISLANDS: A POLITICAL STATUS MODEL, 27 U. Haw. L. Rev. 1 (2004).

[153] Henkin, et al., INTERNATIONAL LAW: CASES AND MATERIALS, 2nd ed., 274 (1987).

[154] Convention on Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19.

[155] G.R. No. 158088, July 6, 2005, 462 SCRA 622, 632.

[156] AN ACT TO STRENGTHEN AND EXPAND THE ORGANIC ACT FOR THE AUTONOMOUS REGION IN MUSLIM MINDANAO, AMENDING FOR THE PURPOSE REPUBLIC ACT NO. 6734, ENTITLED `AN ACT PROVIDING FOR THE AUTONOMOUS REGION IN MUSLIM MINDANAO,' AS AMENDED, March 31, 2001.

[157] AN ACT TO RECOGNIZE, PROTECT AND PROMOTE THE RIGHTS OF INDIGENOUS CULTURAL COMMUNITIES/INDIGENOUS PEOPLES, CREATING A NATIONAL COMMISSION ON INDIGENOUS PEOPLES, ESTABLISHING IMPLEMENTING MECHANISMS, APPROPRIATING FUNDS THEREFOR, AND FOR OTHER PURPOSES, October 29, 1997.

[158] 90 Phil. 70, 73-74 (1951).

[159] 177 Phil. 160, 178-179 (1979).

[160] 2 S.C.R. 217 (1998).

[161] 999 U.N.T.S. 171 (March 23, 1976).

[162] 993 U.N.T.S. 3 (January 3, 1976).

[163] *League of Nations Official Journal*, Special Supp. No. 3 (October 1920).

[164] Lorie M. Graham, RESOLVING INDIGENOUS CLAIMS TO SELF-DETERMINATION, 10 ILSA J. Int'l & Comp. L. 385 (2004). *Vide* S. James Anaya, SUPERPOWER ATTITUDES TOWARD INDIGENOUS PEOPLES AND GROUP RIGHTS, 93 Am. Soc'y Int'l L. Proc. 251 (1999): "In general, the term indigenous is used in association with groups that maintain a continuity of cultural identity with historical communities that suffered some form of colonial invasion, and that by virtue of that continuity of cultural identity continue to distinguish themselves from others."

[165] Catherine J. Iorns, INDIGENOUS PEOPLES AND SELF DETERMINATION: CHALLENGING STATE SOVEREIGNTY, 24 Case W. Res. J. Int'l L. 199 (1992).

[166] Federico Lenzerini, "SOVEREIGNTY REVISITED: INTERNATIONAL LAW AND PARALLEL SOVEREIGNTY OF INDIGENOUS PEOPLES," 42 Tex. Int'l L.J. 155 (2006). *Vide* Christopher J. Fromherz, INDIGENOUS PEOPLES' COURTS: EGALITARIAN JURIDICAL PLURALISM, SELF-DETERMINATION, AND THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, 156 U. Pa. L. Rev. 1341 (2008): "While Australia and the United States made much of the distinction between `self-government' and `self-determination' on September 13, 2007, the U.S. statement to the UN on May 17, 2004, seems to use these two concepts interchangeably. And, indeed, under the DRIP [Declaration on the Rights of Indigenous Peoples], all three terms should be considered virtually synonymous. Self-determination under the DRIP means `internal self-determination' when read in conjunction with Article 46, and `self-government,' articulated in Article 4, is the core of the `self-determination.'"

[167] DEFINING THE APPROACH AND ADMINISTRATIVE STRUCTURE FOR GOVERNMENT'S COMPREHENSIVE PEACE EFFORTS, September 15, 1993.

[168] 466 Phil. 482, 519-520 (2004).

[169] CONSTITUTION, Article VII, Sec. 18.

[170] Kirsti Samuels, POST-CONFLICT PEACE-BUILDING AND CONSTITUTION-MAKING, 6 Chi. J. Int'l L. 663 (2006).

[171] Christine Bell, Peace Agreements: THEIR NATURE AND LEGAL STATUS, 100 Am. J. Int'l L. 373 (2006).

[172] CONSTITUTION, Article X, Sections 15-21.

[173] III Record, Constitutional Commission, 180 (August 11, 1986).

[174] 165 Phil. 303 (1976).

[175] Id. at 412.

[176] Id. at 413.

[177] G.R. No. 174153, October 25, 2006, 505 SCRA 160, 264-265.

[178] CONSTITUTION, Art. VII, Sec. 5.

[179] Article VI, Section 25 (1) of the Constitution states as follows: "The Congress may not increase the appropriations recommended by the President for the operation of the Government as specified in the budget. The form, content, and manner of preparation of the budget shall be prescribed by law."

[180] *Prosecutor v. Kallon and Kamara* [Case No. SCSL-2004-15-AR72(E), SCSL-2004-16-AR72(E), March 13, 2004].

[181] 1974 I.C.J. 253, 1974 WL 3 (I.C.J.).

[182] M. Janis and J. Noyes, INTERNATIONAL LAW, CASES AND COMMENTARY, 3rd ed. 280 (2006).

[183] 1986 I.C.J. 554, 1986 WL 15621 (I.C.J.), December 22, 1986.

[184] *Planas v. COMELEC,* 151 Phil. 217, 249 (1973).

SEPARATE CONCURRING OPINION

PUNO, *C.J.*:

It is the duty of the government to seek a just, comprehensive and enduring peace with any rebel group but the search for peace must always be in accord with the Constitution. Any search for peace that undercuts the Constitution must be struck down. Peace in breach of the Constitution is worse than worthless.

I. Historical Roots

A historical perspective of our Muslim problem is helpful.

From time immemorial, an enduring peace with our Muslim brothers and sisters in Mindanao has eluded our grasp. Our Muslim problem exploded in March of 1968

when Muslim trainees were massacred by army officers at Corregidor. About 180 Muslim trainees had been recruited in the previous year as a part of a covert force named *Jabidah*,[1]allegedly formed
to wrest away Sabah from Malaysia. The trainees were massacred when they reportedly protested their unbearable training and demanded the return to their home.[2] The *Jabidah* Massacre fomented the formation of Muslim groups clamoring for a separate Islamic state. One of these groups was the Muslim Independence Movement (MIM), founded by the then Governor of Cotabato, Datu Udtog Matalam. [3] Another was the Nurul Islam, led by Hashim Salamat.

On September 21, 1972 Martial Law was declared by President Ferdinand E. Marcos. Among the reasons cited to justify martial law were the armed conflict between Muslims and Christians and the Muslim secessionist movement in the Southern Philippines.[4] The imposition of martial law drove some of the Muslim secessionist movements to the underground. One of them was the Moro National Liberation Front (MNLF) headed by Nur Misuari. In 1974, the MNLF shot to prominence, when the Organization of Islamic Conference (OIC) officially gave it recognition. During the 5th ICFM, they strongly urged "the Philippines Government to find a political and peaceful solution through negotiation with Muslim leaders, particularly with representatives of the MNLF in order to arrive at a just solution to the plight of the Filipino Muslims within the framework of national sovereignty and territorial integrity of the Philippines"; and recognized "the problem as an internal problem with the Philippine Government to ensure the safety of the Filipino Muslims and the preservation of their liberties in accordance with the Universal Declaration of Human Rights."[5]

In December 1976, the Philippine government and the MNLF under the auspices of the OIC started their peace negotiation in Tripoli, Libya. It bore its first fruit when on January 20, 1977, the parties signed the Tripoli Agreement in Zamboanga City in the presence of the OIC Representative.

President Marcos immediately implemented the Tripoli Agreement. He issued Presidential Proclamation No. 1628, "Declaring Autonomy in Southern Philippines." A plebiscite was conducted in the provinces covered under the Tripoli Agreement to determine the will of the people thereat. Further, the legislature enacted Batasang Pambansa Blg. 20, "Providing for the Organization of Sangguniang Pampook (Regional Legislative Assembly) in Each of Regions IX and XII." President Marcos then ordered the creation of Autonomous Region IX and XII.

In the meanwhile, the MNLF continued enhancing its international status. It was accorded the status of an **observer** in Tripoli, Libya during the 8th ICFM. In the 15th ICFM at Sana'a, Yemen, in 1984, the MNLF's status was further elevated from a mere `legitimate representative' to `**sole legitimate representative'** of the Bangsamoro people.[6]

In April 1977, the peace talks between the Government of the Republic of the Philippines (GRP) and MNLF Talks collapsed. Schism split the MNLF leadership. **The irreconcilable differences between Nur Misuari and Hashim Salamat led to the formation of the Moro Islamic Liberation Front (MILF), headed by Hashim Salamat.** Thus, the Maguindanao-led MILF, parted ways with the Tausug-

led MNLF.

In 1986, the People Power Revolution catapulted Corazon C. Aquino to the Presidency. Forthwith, she ordered the peace talks with the MNLF to resume. The 1987 Constitution was ratified by the people. It provided for the creation of the Autonomous Region of Muslim Mindanao through an act of Congress. But again the talks with the MNLF floundered in May 1987.[7] Be that as it may, it was during President Aquino's governance that a culture of peace negotiations with the rebellious MNLF and MILF was cultivated.[8] Thus, the Autonomous Region of Muslim Mindanao (ARMM) was created through Republic Act No. 6734. The law took effect on August 1, 1989.

Then came the presidency of President Fidel V. Ramos. He issued on September 15, 1993, Executive Order No., 125 (E.O. 125) which provided for a comprehensive, integrated and holistic peace process with the Muslim rebels. E.O. 125 created the Office of the Presidential Adviser on the Peace Process to give momentum to the peace talks with the MNLF.

In 1996, as the GRP-MNLF peace negotiations were successfully winding down, the government prepared to deal with the MILF problem. Formal peace talks started on January of 1997, towards the end of the Ramos administration. The Buldon Ceasefire Agreement was signed in July 1997[9] but time ran out for the negotiations to be completed.

President Joseph Estrada continued the peace talks with the MILF. The talks, however, were limited to cessation of hostilities and did not gain any headway. President Estrada gave both sides until December 1999 to finish the peace process. [10] They did not meet the deadline. The year 2000 saw the escalation of acts of violence and the threats to the lives and security of civilians in Southern Mindanao. President Estrada then declared an "all-out war" against the MILF.[11] He bowed out of office with the "war" unfinished.

Thereafter, President Gloria Macapagal Arroyo assumed office. Peace negotiations with the MILF were immediately set for resumption.
Executive Order No. 3, was issued "Defining Policy and Administrative Structure: For Government's Comprehensive Peace Efforts." On March 24, 2001, a General Framework for the Resumption of Peace Talks between the GRP and the MILF was signed. Republic Act No. 9054[12] was also enacted on March 31, 2001 and took effect on August 14, 2001 to strengthen and expand the Autonomous Region of Muslim Mindanao. Through the Organic Act of 2001, six municipalities in Lanao del Norte voted for inclusion in the ARMM.

On June 22, 2001, the ancestral domain aspect of the GRP-MILF Tripoli Agreement was signed in Libya. Several rounds of exploratory talks with the MILF followed. Unfortunately, on April 2, 2003, Davao was twice bombed. Again, the peace talks were cancelled and fighting with the MILF resumed. On July 19, 2003 the GRP and the MILF agreed on "mutual cessation of hostilities" and the parties returned to the bargaining table. The parties discussed the problem of ancestral domain, divided into four strands: concept, territory, resources, and governance.

On February 7, 2006, the 10th round of Exploratory Talks between the GRP and the

MILF ended. The parties issued a joint statement of the consensus points of the Ancestral Domain aspect of GRP-MILF Tripoli Agreement on Peace of June 22, 2001. The Joint Statement provides that:

"Among the consensus points reached were:

> · Joint determination of the scope of the Bangsamoro homeland based on the technical maps and data submitted by both sides;
>
> · Measures to address the legitimate grievances of the Bangsamoro people arising from the unjust dispossession and/or marginalization;
>
> · Bangsamoro people's right to utilize and develop their ancestral domain and ancestral lands;
>
> · Economic cooperation arrangements for the benefit of the entire Bangsamoro people."

On July 27, 2008, **a Joint Statement on the Memorandum of Agreement on Ancestral Domain (MOA-AD) was signed** by Chairperson Rodolfo C. Garcia on behalf of the GRP Peace Panel, and Mohagher Iqbal on behalf of the MILF Panel. In the Joint Statement, it was declared that the final draft of the MOA-AD has already been **initialed**. It was announced that "both sides reached a consensus to initial the final draft pending its **official** signing by the Chairmen of the two peace panels in early August 2008, in Putrajaya, Malaysia."[13]

The Joint Statement triggered the filing of the petitions at bar. These Petitions, sought among others, to restrain the signing of the MOA-AD. On August 4, 2008, a day before the intended signing of the initialed MOA-AD, this Court issued a Temporary Restraining Order stopping the signing of the MOA-AD. Several petitions-in-intervention were also filed praying for the same relief. On August 8, 2008 and September 1, 2008, the respondents through the Solicitor General, submitted official copies of the initialed MOA-AD to the Court and furnished the petitioners and petitioners-in-intervention with copies of the same.

All the petitions were heard by the Court in three separate days of oral arguments. In the course of the arguments, the Solicitor General informed the Court that the MOA-AD will not be signed "in its present form or any other form."[14] Thereafter, the government Peace Panel was dismantled by the President.

II. Petitions should be Decided on the Merits

The first threshold issue is whether this Court should exercise its power of judicial review and decide the petitions at bar on the merits.

I respectfully submit that the Court should not avoid its constitutional duty to decide the petitions at bar on their merit in view of their transcendental importance. The subject of review in the petitions at bar is the **conduct of the peace process with the MILF which culminated in the MOA-AD**. The constitutionality of the conduct of the **entire** peace process and not just the MOA-AD should go under the scalpel of judicial scrutiny. The review should not be limited to the initialed MOA-AD for it is **merely the product** of a constitutionally flawed process of negotiations with the

MILF.

Let us revisit the steps that led to the contested and controversial MOA-AD. Peace negotiations with the MILF commenced with the execution of ceasefire agreements. The watershed event, however, occurred in 2001, with the issuance of Executive Order No. 3[15] entitled "Defining Policy and Administrative Structure for Government's Comprehensive Peace Efforts." Government Peace Negotiating Panels were immediately constituted to negotiate peace with rebel groups, which included the MILF. **Significantly, Executive Order No. 3 provides that in the pursuit of social, economic and political reforms, administrative action, new legislation or even constitutional amendments may be required**.[16] Section 4 of Executive Order No. 3 states, *viz*:

> SECTION 4. The Six Paths to Peace. -- The components of the comprehensive peace process comprise the processes known as the "Paths to Peace". These component processes are interrelated and not mutually exclusive, and must therefore be pursued simultaneously in a coordinated and integrated fashion. They shall include, but may not be limited to, the following:
>
> > a. PURSUIT OF SOCIAL, ECONOMIC AND POLITICAL REFORMS. This component involves the vigorous implementation of various policies, reforms, programs and projects aimed at addressing the root causes of internal armed conflicts and social unrest. **This may require administrative action, new legislation or even constitutional amendments.**
> >
> > x x x x
> >
> > c. PEACEFUL, NEGOTIATED SETTLEMENT WITH THE DIFFERENT REBEL GROUPS. This component involves the conduct of face-to-face negotiations to reach peaceful settlement with the different rebel groups. It also involves the effective implementation of peace agreements. (Emphasis supplied)

Executive Order No. 3, was later amended by E.O. No. 555,[17] and was followed by the Tripoli Peace Agreement of 2001. The Tripoli Peace Agreement of 2001 became the basis for several rounds of exploratory talks between the GRP Peace Panel and the MILF. These exploratory talks resulted in the signing of the Joint Statements of the GRP and MILF peace panels to affirm commitments that implement the Tripoli Agreement of 2001, including the ancestral domain aspect. **The issuance of the Joint Statements culminated in the initialing of the MOA-AD**.[18]

It is crystal clear that the initialing of the MOA-AD is but the evidence of the government peace negotiating panel's assent to the terms contained therein. **If the MOA-AD is constitutionally infirm, it is because the conduct of the peace process itself is flawed**. It is the constitutional duty of the Court is to determine whether there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of the government peace negotiating panel **in the conduct of the peace negotiations with the MILF. The Court should not restrict its review on the validity of the MOA-AD which is but the end product of the flawed conduct of the peace negotiation with the MILF.**

Requirements of Ripeness and Mootness are not bars to review

In contending that this Court should refrain from resolving the merits of the petitions at bar, two principal defenses were deployed by the Solicitor General: the issues raised for resolution are not ripe for adjudication and regardless of their ripeness, are moot.

With due respect, the defenses cannot be sustained. To contend that an issue is not ripe for adjudication is to invoke prematurity;[19] that the issue has not reached a state where judicial intervention is necessary, hence, there is in reality no actual controversy. On the other hand, to urge that an issue has become moot concedes that judicial intervention was once proper but subsequent developments make further judicial action unnecessary. Together, mootness and ripeness act as a two-pronged pincer, squeezing the resolution of controversies within a narrow timeframe.[20]

First, the issues at bar are ripe for resolution. In **Ohio Forestry Ass'n Inc. v. Sierra Club**,[21] the following factors were identified as indicative of the ripeness of a controversy:

1. Whether delayed review would cause hardship to the plaintiffs;
2. Whether judicial intervention would inappropriately interfere with further administrative action;
3. Whether the Court would benefit from further factual development of the issues presented;

Underlying the use of the foregoing factors is **first**, the setting of a threshold for review and **second**, judicial application of the threshold to the facts extant in a controversy. I respectfully submit that **where a controversy concerns fundamental constitutional questions**, the threshold **must be adjusted** to allow judicial scrutiny, **in order that the issues may be resolved at the earliest stage before anything irreversible is undertaken under cover of an unconstitutional act.** Schwartz cites **one vital consideration** in determining ripeness, *viz*:

> In dealing with ripeness, one must distinguish between statutes and other acts that are **self-executing and those that are not. If a statute is self executing, it is ripe for challenge as soon as it is enacted**. For such a statute to be subject to judicial review, it is not necessary that it be applied by an administrator, a prosecutor, or some other enforcement officer in a concrete case.[22]

Although Schwartz employs the term "statute," he qualifies that the principle enunciated applies to other governmental acts as well.[23]

Prescinding from these parameters, **it is evident that the Court is confronted with a MOA-AD that is heavily laden with self-executing components**. Far from the representation of the Solicitor General, **the MOA-AD is not a mere collection of consensus points**,[24] still bereft of any legal consequence. The commitments made by the government panel under the MOA-AD can be divided into

(1) those which are **self-executory** or are immediately effective by the terms of the MOA-AD alone, (2) those with a period or which are to be effective within a stipulated time, and (3) those that are conditional or whose effectivity depends on the outcome of a plebiscite.

Let us cast an eye on the **self executory provisions** of the MOA-AD which will demolish the argument of the respondents that the issues in the petitions at bar are not ripe for adjudication.

The MOA-AD provides that "the Parties affirm that the core of the BJE shall constitute the present geographic area of the ARMM, including the municipalities of Baloi, Munai, Nunungan, Pantar, Tagoloan and Tangkal in the province of Lanao del Norte that voted for inclusion in the ARMM during the 2001 plebiscite."

The MOA-AD then proceeds to enumerate the powers that the BJE possesses within its area. The BJE is granted powers of governance which it can exercise without need of amendments to be made to the Constitution or existing law or without imposing any condition whatsoever.

The MOA-AD also gives the BJE the unconditional right to participate in international meetings and events, e.g., ASEAN meetings and other specialized agencies of the United Nations.[25] It grants BJE the right to participate in Philippine official missions and delegations that are engaged in the negotiation of border agreements or protocols for environmental protection, equitable sharing of incomes and revenues, in addition to those of fishing rights.[26] Again, these rights are given to the BJE without imposing prior conditions such as amendments to the Constitution, existing law or the enactment of new legislation.

Next, let us go to **provisions of the MOA-AD with a period** which will further demonstrate the lack of merit of respondents' posture that the petitions at bar are not ripe for adjudication. The MOA-AD provides that "without derogating from the requirements of prior agreements[27], the Government stipulates to conduct and deliver, within twelve (12) months
following the signing of the Memorandum of Agreement on Ancestral Domain, a plebiscite covering the areas as enumerated in the list and depicted in the map as Category A x x x the Parties shall endeavor to complete negotiations and resolve all outstanding issues on the Comprehensive Compact within fifteen (15) months from signing of the MOA-AD."[28] Once more, it is evident that no conditions were imposed with respect to the conduct of a plebiscite within twelve months following the signing of the MOA-AD. The provision starkly states that within twelve months, the government will conduct and deliver a plebiscite covering areas under Category A of the MOA-AD.

We now come to respondents' argument on **mootness**. In determining whether a case has been rendered moot, courts look at the development of events to ascertain whether the petitioner making the constitutional challenge is confronted with a **continuing harm or a substantial potential of harm**. Mootness is sometimes viewed as "the doctrine of standing set in a time frame: The requisite personal interest must exist at the commencement of the litigation and must continue throughout its existence."[29] Stated otherwise, an actual controversy must be extant at all stages of judicial review, not merely at the time the complaint is filed.

[30]

Respondents insist that the petitions at bar are moot for three reasons: (1) the petitioners North Cotabato and Zamboanga have already been furnished copies of the MOA-AD; (2) the Executive Secretary has issued a Memorandum that the government will not sign the MOA-AD and, (3) the GRP Peace Panel has been dissolved by the President.

These grounds are barren grounds. For one, the press statements of the Presidential Adviser on the Peace Process, Gen. Hermogenes Esperon, Jr., are clear that the MOA-AD will still be used as a **major reference** in future negotiations.[31] For another, the MILF considers the MOA-AD a "done deal," [32] hence, ready for implementation. On the other hand, the peace panel may have been temporarily dismantled but the structures set up by the Executive and their guidelines which gave rise to the present controversy remain intact. **With all these realities, the petitions at bar fall within that exceptional class of cases which ought to be decided despite their mootness because the complained unconstitutional acts are "capable of repetition yet evading review."**[33]

This **well-accepted exception to the non-reviewability of moot cases** was first enunciated in the case of **Southern Pacific Terminal Co. v. ICC.**[34]The United States Supreme Court held that a case is not moot where interests of a public character are asserted under conditions that may be immediately repeated, merely because the particular order involved has expired.

In the petitions at bar, one need not butt heads with the Solicitor General to demonstrate the numerous constitutional infirmities of the MOA-AD. There is no need to iterate and reiterate them. Suffice to stress that it is because of these evident breaches, that the MOA-AD requires the present Constitution to undergo radical revisions. Yet, the unblushing threat is made that the MOA-AD which shattered to smithereens all respect to the Constitution **will continue** to be a reference point in future peace negotiations with the MILF. In fine, the MOA-AD is a constitutional nightmare that will come and torment us again in the near future. It must be slain now. It is not moot.

Let us adhere to the orthodox thought that once a controversy as to the application of a constitutional provision is raised before this Court, it becomes a legal issue which the Court is hide-bound to decide.[35] Supervening events, whether contrived or accidental, cannot prevent the Court from rendering a decision if there is a grave violation of the Constitution has already been committed or the threat of being committed again is not a hypothetical fear.[36] It is the function of judicial review to uphold the Constitution at all cost or we forfeit the faith of the people.

III. The Deviation from the MNLF Model of Pursuing Peace with Rebels is Inexplicable

The MNLF model in dealing with rebels which culminated in the Peace Agreement of 1996, was free from any infirmity because it respected the metes and bounds of the Constitution. While the MNLF model is ostensibly based on the Tripoli Agreement of 1976, its implementation was in perfect accord with Philippine laws. The

implementation of the Tripoli Agreement of 1976 came in two phases: the first, under the legislative power of then President Marcos and the second, under the provisions of Article X of the 1987 Constitution and its implementing legislation, Republic Act No. 6734.[37]

Under President Marcos, autonomy in the affected provinces was recognized through Presidential Proclamation No.1628. It declared autonomy in 13 provinces and constituted a provisional government for the affected areas. The proclamation was followed by a plebiscite and the final framework for the autonomous region was embodied in Presidential Decree No.1618.

The establishment of the autonomous region under P.D. 1628 was **constitutionalized by the commissioners in the 1987 Constitution** as shown by the following exchange of views:

> MR. ALONTO: Madam President, I have stated from the start of our consideration of this Article on Local Governments that the autonomous region exists now in this country. There is a de facto existence of an autonomous government in what we call now Regions IX and XII. Region IX is composed of the provinces of Tawi-Tawi, Sulu, Basilan, Zamboanga City, Zamboanga del Sur and Zamboanga del Norte, including all the component cities in the provinces. Region XII is composed of the Provinces of Lanao del Norte, Lanao del Sur, Maguindanao, Sultan Kudarat and North Cotabato. This autonomous region has its central governmental headquarters in Zamboanga City for Region IX and in Cotabato City for Region XII. In fact, it is stated by Commissioner Ople that it has an executive commission and a legislative assembly.
> MR. DE CASTRO: Madam President.
>
> MR. ALONTO: These two regions have been organized by virtue of P.D. No. 1618 of President Marcos, as amended by P.D. No. 1843.
>
> MR. DE CASTRO: Madam President.
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> MR. ALONTO: If the Gentleman will bear with me, I will explain to him. That is why there is a de facto autonomous government existing in Mindanao
>
> MR. DE CASTRO: Madam President.
>
> THE PRESIDENT: May we please allow Commissioner Alonto to finish his remarks before any interruption?
>
> MR. DE CASTRO: Yes Madam President.
>
> MR. ALONTO: Madam President, this autonomous region is recognized by the present regime for the very reason that the present regime is now in the process of a negotiation with the Moro National Liberation Front. In a way, what we are doing is to give constitutional basis for the President of this country today to proceed with the negotiation with the Moro National Liberation Front.

THE PRESIDENT: Commissioner Uka is recognized.

MR. UKA: Madam President, not only that. President Corazon C. Aquino has appointed Mr. Albert Tugum as the Chairman of Region IX and Mr. Datu Zakaria Candau as chairman of Region XII. They are doing their work well right now. So there are two recognized autonomous regions. They have also a complete regional assembly as the legislative body. So, it is only a matter of putting this in the Constitution.

THE PRESIDENT: So, what is before the body is the proposed amendment on Line 11 of Section 1.

Commissioner de Castro is recognized.

MR. DE CASTRO: Madam President, if there is now an autonomous region in Mindanao and if, according to the Honorable Ople, this has the recognition of the central government, what then is the use of creating autonomous regions in Muslim Mindanao and going through the process of a plebiscite and enacting an organic act?

My amendment is simply to clarify the term "Muslim Mindanao." I really did not expect that this will go this far --- that it is being placed in the Constitution, that it is a fait accompli and that all we have to do here is say "amen" to the whole thing and it we do not say "amen," they will still continue to be autonomous regions. I insist on my amendment, Madam President.

MR. OPLE: May I provide more information to Commissioner de Castro on this matter.

First of all, we have to correct the misimpression that the autonomous regions, such as they now exist in Mindanao, do not enjoy the recognition of the central government. Secondly, may I point out that the autonomy existing now in Regions IX and XII is a very imperfect kind of autonomy. We are not satisfied with the legal sufficiency of these regions as autonomous regions and that is the reason the initiative has been taken in order to guarantee by the Constitution the right to autonomy of the people embraced in these regions and not merely on the sufferance of any existing or future administration. It is a right, moreover, for which they have waged heroic struggles, not only in this generation but in previous eras and, therefore, **what we seek is constitutional permanence for this right**.

May I also point out, Madam President, that the Tripoli Agreement was negotiated under the aegis of foreign powers. No matter how friendly and sympathetic they are to our country, this is under the aegis of the 42-nation Islamic Conference. Should our brothers look across the seas to a conclave of foreign governments so that their rights may be recognized in the Constitution? Do they have to depend upon foreign sympathy so that their right can be recognized in final, constitutional and durable form.

THE PRESIDENT: Commissioner Ople, the consensus here is to grant

autonomy to the Muslim areas of Mindanao?

MR. OPLE: Yes.(Emphasis supplied)[38]

Clearly, the mandate for the creation of the ARMM is derived principally from the 1987 Constitution. Thereafter, ARRM was given life by Republic Act No. 6734,[39] the Organic Act of the ARMM. Our executive officials were guided by and did not stray away from these legal mandates at the negotiation and execution of the Peace Agreement with the MNLF in 1996. Without ifs and buts, its Whereas Clauses affirmed our sovereignty and territorial integrity and completely respected our Constitution.[40]

In stark contrast, the peace process with the MILF draws its mandate principally from Executive Order No. 3. This executive order provided the basis for the execution of the Tripoli Agreement of 2001 and thereafter, the MOA-AD. **During the whole process, the government peace negotiators conducted themselves free from the strictures of the Constitution**. They played fast and loose with the do's and dont's of the Constitution. They acted as if the grant of executive power to the President allows them as agents to make agreements with the MILF in violation of the Constitution. They acted as if these violations can anyway be cured by committing that the sovereign people will change the Constitution to conform with the MOA-AD. They forgot that the Constitution grants power but also sets some impotence on power.

IV. The Exercise of Executive Power is Subject to the Constitution

Clearly, the respondents grossly misunderstood and patently misapplied the executive powers of the President.

The MILF problem is a problem of rebellion penalized under the Revised Penal Code.[41] The MILF is but a rebel group. It has not acquired any belligerency status. The rebellion of the MILF is recognized expressly by E.O. No. 3[42] as well as by E.O. No. 555.[43] The President's powers in dealing with rebellion are spelled out in Article VII, section 18 of the Constitution, *viz:*

> The President shall be the Commander-in-Chief of all armed forces of the Philippines and whenever it becomes necessary, he may call out such armed forces to prevent or suppress lawless violence, invasion or rebellion. In case of invasion or rebellion, when the public safety requires it, he may, for a period not exceeding sixty days, suspend the privilege of the writ of *habeas corpus* or place the Philippines or any part thereof under martial law. Within forty-eight hours from the proclamation of martial law or the suspension of the privilege of the writ of *habeas corpus*, the President shall submit a report in person or in writing to the Congress. The Congress, voting jointly, by a vote of at least a majority of all its Members in regular or special session, may revoke such proclamation or suspension, which revocation shall not be set aside by the President. Upon the initiative of the President, the Congress may, in the same manner, extend such proclamation or suspension for a period to be determined by the Congress, if the invasion or rebellion shall persist

and public safety requires it.

The Congress, if not in session, shall, within twenty-four hours following such proclamation or suspension, convene in accordance with its rules without need of a call.

The Supreme Court may review, in an appropriate proceeding filed by any citizen, the sufficiency of the factual basis of the proclamation of martial law or the suspension of the privilege of the writ of *habeas corpus* or the extension thereof, and must promulgate its decision thereon within thirty days from its filing.

A state of martial law does not suspend the operation of the Constitution, nor supplant the functioning of the civil courts or legislative assemblies, nor authorize the conferment of jurisdiction on military courts and agencies over civilians where civil courts are able to function, nor automatically suspend the privilege of the writ of *habeas corpus*.

The suspension of the privilege of the writ of *habeas corpus* shall apply only to persons judicially charged for rebellion or offenses inherent in, or directly connected with, invasion.

During the suspension of the privilege of the writ of *habeas corpus*, any person thus arrested or detained shall be judicially charged within three days, otherwise he shall be released.

These are the well crafted commander-in-chief powers of the President. They enumerate with exactitude the powers which the President should use in dealing with rebellion. They are graduated in degrees. The strongest of these powers is the power to declare martial law and worthy to note, its exercise is subject to restraints. But more important, all these commander-in-chief powers can only be used to quell the rebellion. They cannot be utilized to dismember the State or to create a state within our State and hand it over to the MILF rebels.

In dealing with the MILF rebellion, the President may, however, opt not to use force but negotiate peace with the MILF. Undoubtedly, the President as Chief Executive can negotiate peace with rebels, like the MILF. Article VII, section 1 of the Constitution vests in the President the entire panoply of executive power, to reach peace with rebels. **But undoubtedly too, the exercise of executive power to secure peace with rebels is limited by the Constitution.**

All these are due to the preeminent principle that our government is fundamentally one of limited and enumerated powers. As well stated in **Angara v. Electoral Commission,**[44] *viz*:

> But in the main, the Constitution has blocked out with deft strokes and in bold lines, allotment of power to the executive, the legislative and the judicial departments of the government. The overlapping and interlacing of functions and duties between the several departments, however, sometimes makes it hard to say just where the one leaves off and the other begins. In times of social disquietude or political excitement, the great landmarks of the Constitution are apt to be forgotten or marred, if

> not entirely obliterated. In cases of conflict, the judicial department is the only constitutional organ which can be called upon to determine the proper allocation of powers between the several departments and among the integral or constituent units thereof.

In fine, there is no power in the Constitution that can run riot. There is no power in the Constitution that is unbounded. There is no power in the Constitution that can be exercised if it will destroy the Constitution. For all powers in the Constitution are designed to preserve the Constitution.

In other words, the President as Chief Executive can negotiate peace with the MILF but it is peace that will insure that our laws are faithfully executed. The President can seek peace with the MILF but without crossing the parameters of powers marked in the Constitution to separate the other branches of government to preserve our democracy. For even in times of war, our system of checks and balances cannot be infringed.[45] More so in times where the only danger that faces the State is the lesser danger of rebellion.

Needless to stress, the power of the President to negotiate peace with the MILF is not plenary. While a considerable degree of flexibility and breadth is accorded to the peace negotiating panel, the latitude has its limits -
- the Constitution. The Constitution was ordained by the sovereign people and its postulates may not be employed as **bargaining chips** without their prior consent.

V. The Constitution as Compact of the People

The **question** may be asked: In the process of negotiating peace with the MILF, why cannot the Executive commit to do acts which are prohibited by the Constitution and seek their ratification later by its amendment or revision?

Many philosophical perspectives have been advanced in reply to this question. Yet, no theory has been as influential, nor has been as authoritative, as the social contract theory,[46] articulated by John Locke, *viz*:

> For when any number of men have, by the consent of every individual, made a community, they have thereby made that community one body, with a power to act as one body, which is only by the will and determination of the majority: for that which acts any community, being only the consent of the individuals of it, and it being necessary to that which is one body to move one way; it is necessary the body should move that way whither the greater force carries it, which is the consent of the majority: or else it is impossible it should act or continue one body, one community, which the consent of every individual that united into it, agreed that it should; and so every one is bound by that consent to be concluded by the majority. And therefore we see, that in assemblies, empowered to act by positive laws, where no number is set by that positive law which empowers them, the act of the majority passes for the act of the whole, and of course determines, as having, by the law of nature and reason, the power of the whole.[47]

The French philosopher, Jean Jacques Rosseau stressed the **non-derogability** of this social contract, *viz*:

> But the body politic or sovereign, deriving its existence only from the sanctity of the contract, can never bind itself, even to others, in anything that **derogates** from the original act, such as alienation of some portion of itself, or submission to another sovereign. To violate the act by which it exists would be to annihilate itself; and what is nothing produces nothing. [48]

Dean Vicente Sinco of the U.P. College of Law articulated these precepts in his seminal work, *Philippine Political Law, viz:*

> As adopted in our system of jurisprudence a constitution is a written instrument which serves as the fundamental law of the state. In theory, it is the creation of the will of the people, who are deemed the source of all political powers. It provides for the organization of the essential departments of government, determines and limits their powers, and prescribes guarantees to the basic rights of the individual.[49]
>
> xxxx
>
> Some authorities have also considered the constitution as a compact, an "agreement of the people, in their individual capacities, reduced to writing, establishing and fixing certain principles for the government of themselves." This notion expresses the old theory of the social contract obligatory on all parties and **revocable by no one individual or group** less than the majority of the people; otherwise it will not have the attribute of law.[50] (Emphasis supplied)

In sum, there is no power nor is there any right to violate the Constitution on the part of any official of government. No one can claim he has a blank check to violate the Constitution in advance and the privilege to cure the violation later through amendment of its provisions. Respondents' thesis of violate now, validate later makes a burlesque of the Constitution.

I vote to grant the petitions.

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[1] The formation of the commando unit was supposedly for a destabilization plan by the Marcos government aimed at Sabah. The young Muslim recruits were to be mobilized for operations against Sabah and subsequently claim it from Malaysia.

[2] T.J.S. George, *Revolt in Mindanao: The Rise of Islam in Philippine Politics* (1980) and Cesar Majul, *The Contemporary Muslim Movement in the Philippines* (1985), cited inThomas M. McKenna, *Muslim Rulers and Rebels, Everyday Politics and Armed Separatism in Southern Philippines,* p. 141 (1998).

[3] Thomas M. McKenna, *Muslim Rulers and Rebels, Everyday Politics and Armed Separatism in Southern Philippines,* p. 144 (1998).

[4] Ferdinand Marcos, "*Proclamation of Martial Law", Philippine Sunday Express* 1(141):5-8, cited in Thomas McKenna, *supra.,* at 156.

[5] Quoted in "Implementation of the Tripoli Agreement" jointly published by the Department of Foreign Affairs and the Ministry of Muslim Affairs, Manila, November 27, 1984, p. 36, cited in Abraham Iribani, Give Peace a Chance, The Story of the GRP-MNLF peace Talks, p. 15 (2006), at p. 36.

[6] From MNLF files, Nur Misuari, Chairperson of the MNLF, Address delivered before the Plenary Session of the 19th ICFM, held in Cairo, Egypt, July 31 to August 5, 1990, "The Tragedy of the Peace Process and What the 19th ICFM Can Do to Help," cited in Abraham Iribani, *Supra.,* note 5at p. 39.

[7] Abraham Iribani, *supra* note 5*,* at p. 43.

[8] Marites Danguilan Vitug and Glenda M. Gloria, *Under the Crescent Moon: Rebellion in Mindanao,* p. 141(2000).

[9] Id.at 146.

[10] Id.at 161.

[11] Memorandum of the Respondent Government of the Republic of the Philippines Peace Panel on the Ancestral Domain, September 26, 2008, p. 10.

[12] Republic Act No. 9054, An Act to Strengthen and Expand the Organic Act for the Autonomous Region in Muslim Mindanao, amending for the purpose Republic Act No. 6734, entitled 'an act providing for the autonomous region in Muslim Mindanao', as amended (2001).

[13] GRP-MILF Joint Statement on the Memorandum of Agreement on Ancestral Domain, July 27, 2008.

[14] Memorandum of the Solicitor General for the Respondents, September 26, 2008, p. 7.

[15] February 28, 2001.

[16] Executive Order No. 3, (2001), Sec. 4(a).

[17]Amending Sections 5(c) and 11 of Executive Order No. 3, s-2001, Defining the Policy and Administrative Structure for Government's Comprehensive Peace Efforts, August 3, 2006.

[18] Individually, these documents have been identified as terms of referents for the MOA.

[19] Schwartz, Bernard. *Constitutional Law* at p. 25 (1972).

[20] *Bowen v. Roy*, 476 U.S. 693, 722 (1976).

[21] 523 U.S. 726 (1998).

[22] Supra, note 18 at 25.

[23] Id. at 78.

[24] Memorandum for the Respondents Government of the Republic of the Philippines Peace Panel on the Ancestral Domain, 26 September 2008, p. 16.

[25] *Id.,* Resources, No. 4(b), p. 8.

[26] Memorandum of Agreement on Ancestral Domain Aspect of the GRP-MILF Tripoli Agreement of Peace of 2001*,* Territory, No. 2(f), p. 4.

[27] The Agreement for General Cessation of Hostilities dated July 18, 1997 Between the GRP and the MILF, and its Implementing Administrative and Operational Guidelines; The General Framework of Agreement of Intent Between the GRP and the MILF dated August 27, 1998; The Agreement on the General Framework for the Resumption of Peace Talks Between the GRP and the MILF dated March 24, 2001; The Tripoli Agreement on Peace Between the GRP and the MILF dated June 22, 2001; The Tripoli Agreement Between the GRP and the Moro National Liberation Front (MNLF) dated December 23, 1976 and the Final Agreement on the Implementation of the 1976 Tripoli Agreement Between the GRP and the MNLF dated September 2, 1996; Republic Act No. 6734, as amended by R.A. 9054, otherwise known as "An Act to Strengthen and Expand the Autonomous Region in Muslim Mindanao (ARMM)"; ILO Convention No. 169, in correlation to the UN Declaration on the Rights of the Indigenous Peoples, and Republic Act No. 8371 otherwise known as the Indigenous Peoples Rights Act of 1997, the UN Charter; the UN Universal Declaration on Human Rights, International Humanitarian Law (IHL), and internationally recognized human rights instruments.

[28] Memorandum of Agreement on Ancestral Domain, Territory, 2(d), p. 3.

[29] *United States parole Commission v. Geraghty*, 445 U.S. 388, 397 (1980) quoting Henry Monaghan, "Constitutional Adjudication: The Who and When," 82 Yale L.J. 1363, 1384 (1973).

[30] *Preiser v. Newkirk*, 422 U.S. 395, 401-02 (1975).

[31] Memorandum of Petitioners-Intervenors Franklin Drilon and Adel Tamano, September 18, 2008, p. 2.

[32] Id. at 13.

[33] *David v. Macapagal-Arroyo*, G.R. No. 171396, 489 SCRA 160, May 3, 2006.

[34] 219 U.S. 498 (1911).

[35] *Tanada v. Angara*, 338 Phil. 546, 574 (1997).

[36] *Chavez v. Public Estates Authority*, 433 Phil. 522 (2002).

[37] An Act Providing for an Organic Act for the Autonomous Region in Muslim Mindanao, August 1, 1989.

[38] III CONSTITUTIONAL RECORD 495-496.

[39] Republic Act 6734 was later amended by Republic Act 9504. The latter law took into account the terms of the Tripoli Agreement.

[40] 11th Whereas Clause.

[41] Article 134, Revised Penal Code.

[42] Sec. 4(c) provides for a "peaceful negotiated settlement" with the different **rebel** groups.

[43] Creating a government peace panel to deal with the MILF.

[44] G.R. No. 45081. July 15, 1936.

[45] *Ex Parte* Milligan 71 U.S. 2 (1866).

[46] Curtis, Michael M. *The Great Political Theories* at p. 360. This is with reference in particular to John Locke.

[47] Locke, John. Second Treatise on Civil Government. Chapter VII, Sec. 96. Accessible at http://www.constitution.org/jl/2ndtr08.txt. Last accessed October 8, 2008.

[48]Rosseau, Jean Jacques., The Social Contract Henry J. Tozer Translation, Ch. VI at pp. 20-21.

[49] Sinco, Vicente G. *Philippine Political Law*, at p. 66 10th ed. (1954).

[50] Id. at 66-67.

SEPARATE CONCURRING OPINION

YNARES-SANTIAGO, *J.:*

I join the majority opinion and concur in the views expressed in the *ponencia*. More particularly, I register my agreement in prohibiting respondents and their agents from signing and executing the Memorandum of Agreement on Ancestral Domain (MOA-AD), or any similar instruments. The said MOA-AD contains provisions which are repugnant to the Constitution and which will result in the virtual surrender of part of the Philippines' territorial sovereignty, which our people has spent decades fighting for and which scores of men in uniform have valiantly defended.

While the *ponencia* exhaustively discusses the grounds upon which the Court must invalidate and strike down the many questionable provisions of the MOA-AD, I wish to add some important points which, I hope, will serve to further highlight and underscore the serious constitutional flaws in the MOA-AD.

Only after certain quarters took notice and raised a clamor, and only after this Court has issued a temporary restraining order enjoining the signing of the MOA-AD, did respondents, through the Office of the Solicitor General and the Executive Secretary, openly declare that the MOA-AD or any similar instrument will not be signed by the GRP. On this basis, respondents assert that the petitions have become moot and academic. This, to my mind, was a mere afterthought. For were it not for the timely exposure of the MOA-AD in the public light, the signing thereof would have gone ahead as planned.

Furthermore, respondents' protestations that the petitions have become moot and academic in view of the disclosure and non-signing of the MOA-AD is unavailing, as it is well-recognized that mootness, as a ground for dismissal of a case, is subject to certain exceptions. In *David v. Pres. Arroyo*, [1] we held that the Court will decide cases, otherwise moot and academic, if: (1) there is a grave violation of the Constitution; (2) the situation is exceptional in character and paramount public interest is involved; (3) the constitutional issues raised requires formulation of controlling principles to guide the bench, the bar and the public; and (4) the case is capable of repetition yet evading review. To my mind, all of these circumstances are present in the cases at bar.

It is beyond cavil that these petitions involve matters that are of paramount public interest and concern. As shown by recent events, the MOA-AD has spawned violent conflicts in Mindanao and has polarized our nation over its real import and effects. The controversy over the agreement has resulted in unnecessary loss of lives, destruction of property and general discord in that part of our country. Strong reasons of public policy and the importance of these cases to the public demands that we settle the issues promptly and definitely, brushing aside, if we must, technicalities of procedure.

The petitions also allege that the GRP panel committed grave violations of the Constitution when it negotiated and agreed to terms that directly contravene the fundamental law. The basic issue which emerged from all the assertions of the parties is not only whether the MOA-AD should be disclosed or signed at all but, more significantly, whether the GRP panel exceeded its powers in negotiating an agreement that contains unconstitutional stipulations. Considering that it has been widely announced that the peace process will continue, and that a new panel may be constituted to enter into similar negotiations with the MILF, it is necessary to resolve the issue on the GRP panel's authority in order to establish guiding and controlling

principles on its extent and limits. By doing so, a repetition of the unfortunate events which transpired in the wake of the MOA-AD can hopefully be avoided.

There is also the possibility that an agreement with terms similar to the MOA-AD may again be drafted in the future. Indeed, respondents cannot prevent this Court from determining the extent of the GRP panel's authority by the simple expedient of claiming that such an agreement will not be signed or that the peace panel will be dissolved. There will be no opportunity to finally the settle the question of whether a negotiating panel can freely stipulate on terms that transgress our laws and our Constitution. It can thus be said that respondents' act of negotiating a peace agreement similar to the MOA-AD is capable of repetition yet evading review. [2]

The ultimate issue in these cases is whether the GRP panel went beyond its powers when it negotiated terms that contravene the Constitution. It is claimed that the panel stipulated on matters that were outside of its authority and under the exclusive prerogative of Congress. In other words, the constitutional as well as legal limits of executive authority in the drafting of a peace agreement have been squarely put in issue. This involves a genuine constitutional question that the Court has the right and duty to resolve.

Respondents insist that it is not necessary to discuss the constitutionality of each provision of the MOA-AD, because the latter is but a codification of consensus points which creates no rights and obligations between the parties. The MOA-AD allegedly has no legal effects, even if it is signed, because it is merely a preliminary agreement whose effectivity depends on subsequent legal processes such as the formulation of a Comprehensive Compact, the holding of a plebiscite, the amendment of laws by Congress as well as constitutional amendments. Consequently, it would be premature for the Court to pass upon the constitutional validity of the MOA-AD since it is neither self-executory nor is it the final peace agreement between the GRP and MILF.

A reading of the MOA-AD shows that its pertinent provisions on the basic concepts, territory, resources and governance of the Bangsamoro Juridical Entity (BJE) have been made to depend for its effectivity on "changes to the legal framework." Paragraph 7 on the provisions on Governance states:

> 7. The parties agree that the mechanisms and modalities for the actual implementation of this MOA-AD shall be spelt out in the Comprehensive Compact to mutually take such steps to enable it to occur effectively.
>
> Any provisions of the MOA-AD requiring amendments to the existing legal framework shall come into force upon signing of a Comprehensive Compact and upon effecting the necessary changes to the legal framework with due regard to non-derogation of prior agreements and within the stipulated timeframe to be contained in the Comprehensive Compact.

The provisions of the MOA-AD which require "amendments to the existing legal framework" include practically all the substantive terms of the document. It is not difficult to foresee that the material provisions of the MOA-AD will require either an amendment to the Constitution or to existing laws to become legally effective. Some of the required constitutional or statutory amendments are the following:

a) Article I, Section 1 [3] of the Constitution has to be amended to segregate the BJE territory from the rest of the Republic of the Philippines, as the MOA-AD delineates the Bangsamoro homeland under its paragraph 1 [4] on Territory;

b) Section 1, Article X [5] of the Constitution will have to include the BJE as among the five kinds of political subdivisions recognized under the fundamental law. The provision of an Autonomous Region for Muslim Mindanao (ARMM) will also have to be removed as the same is incorporated in the BJE per paragraph 2.c [6] of the MOA-AD provisions on Territory;

c) The provision in Section 15, Article X [7] of the Constitution which declares the creation of the ARMM "within the framework of this Constitution and the national sovereignty as well as territorial integrity of the Republic of the Philippines" must also be changed since there is no provision in the MOA-AD that subjects the BJE to the authority, territory and sovereignty of the Republic of the Philippines;

d) Section 16, Article X [8] of the Constitution which gives the President power to supervise autonomous regions will have to be amended since the MOA-AD does not provide for such supervision over the BJE;

e) Section 18, Article X [9] of the Constitution which requires personal, family and property laws of autonomous regions to comply with the Constitution and laws will have to be changed as the MOA-AD grants the BJE the power to make its own laws;

f) An overhaul of the various constitutional provisions relating to the Executive, Judicial and Legislative Departments as well as the independent constitutional commissions must be undertaken to accommodate paragraph 8 [10] of the MOA-AD provision on Governance which grants the BJE the power to create its own civil institutions;

g) Section 3, Article II of the Constitution which declares the Armed Forces of the Philippines as protector of the people and the State will have to be changed because the MOA-AD provides that the BJE shall have its own internal security force[11] and the AFP will only defend the Bangsamoro homeland against external aggression; [12]

h) Section 2, Article XII [13] of the Constitution must be changed to allow the BJE to manage, explore, develop, and utilize the natural resources within the Bangsamoro territory, pursuant to paragraphs 2.f[14] , g (1) [15] and h[16] on Territory and paragraphs 1 [17] and 2 [18] on Resources of the MOA-AD;

i) Section 21, Article VII [19] of the Constitution has to be amended to exempt the BJE from the ratification requirements of treaties and international agreements since it is given the power to enter into its own

economic and trade agreements with other countries;

j) The Bangsamoro homeland will have to be exempted from the power of the President to exercise general supervision of all local governments under Section 4, Article X[20] of the Constitution because the MOA-AD does not provide for any such stipulation;

k) Since the BJE will have its own laws, it is not subject to limitations imposed by Congress on its taxing powers under Section 5, Article X[21] of the Constitution;

l) R.A. No. 6734 and R.A. No. 9054, or the ARMM Organic Acts, have to be amended to allow for the existing ARMM to be included within the Bangsamoro homeland to be governed by the BJE;

m) The Bangsamoro people will have to be exempted from the application of R.A. No. 8371 or the Indigenous Peoples Rights Act (IPRA) insofar as the MOA-AD declares the Bangsamoro territory as ancestral domain and recognizes in the Bangsamoro people rights pertaining to indigenous peoples under the IPRA;

n) Existing laws which regulate mining rights and the exploitation of natural resources will also have to exempt the BJE from its coverage, as the MOA-AD grants the BJE the power to utilize, develop and exploit natural resources within its territory as well as the authority to revoke or grant forest concessions, timber licenses and mining agreements; and

o) The BJE will also have to be exempted from existing agrarian statutes as the BJE is empowered to enact its own agrarian laws and program under paragraph 2.e[22] on Resources.

From the foregoing, it is clear that the substantive provisions of the MOA-AD directly contravene the fundamental law and existing statutes. Otherwise, it would not be necessary to effect either statutory or constitutional amendments to make it effective. Moreover, as correctly pointed out by petitioners, the GRP panel exceeded its authority when it categorically undertook to make these statutory and constitutional changes in order to fully implement the MOA-AD.

Paragraph 7 of the MOA-AD on Governance states that provisions therein which require amendments to the existing legal framework shall come into force upon signing of the Comprehensive Compact and upon effecting the necessary changes to the legal framework. These "necessary changes" shall be undertaken "with due regard to **non-derogation of prior agreements** and within the **stipulated timeframe to be contained in the Comprehensive Compact**."

The language of the aforesaid paragraph 7 on Governance, in relation to paragraph 2 (d) on Territory, indicates that the GRP panel committed itself to cause the necessary changes to the legal framework within a stipulated timeframe for the MOA-AD to become effective. Paragraph 2(d) on Territory reads:

2. Toward this end, the Parties enter into the following stipulations:

x x x x

> d. Without derogating from the requirements of prior agreements, the Government stipulates to conduct and deliver, using all possible legal measures, within twelve (12) months following the signing of the MOA-AD, a plebiscite covering the areas as enumerated in the list and depicted in the map as Category A attached herein (the Annex). The Annex constitutes an integral part of this framework agreement. Toward this end, the Parties shall endeavor to complete the negotiations and resolve all outstanding issues on the Comprehensive Compact within fifteen (15) months from the signing of the MOA-AD.

Pursuant to the above, the GRP panel bound itself to "complete the negotiations and resolve all outstanding issues on the Comprehensive Compact within fifteen (15) months from the signing of the MOA-AD." On the other hand, it is explicitly provided in paragraph 7 on Governance that the Comprehensive Compact shall contain a stipulated timeframe within which to effect the necessary changes to the legal framework. In other words, the GRP panel undertook to change the legal framework within a contemplated period to be agreed upon within fifteen (15) months from the signing of the MOA-AD.

It should also be noted that, in accordance with paragraph 2 (a)[23] on Territory, the GRP panel committed itself "to the **full and mutual implementation** of this framework agreement on territory." To fully realize the MOA-AD stipulations on territory, it would be necessary to effect both statutory and constitutional amendments as well as complete negotiations on the Comprehensive Compact. The plebiscite envisioned under paragraph 2 (c) on Territory, for instance, would require not only an amendment of the ARMM Organic Acts, but also a constitutional amendment that would allow for the very creation of the BJE. Thus, the full implementation of the territory provisions of the MOA-AD presupposes changes in the legal framework, which the GRP panel guaranteed under paragraph 7 on Governance.

Additionally, paragraph 7 on Governance provides that necessary changes to the legal framework shall likewise be effected "with due regard to non-derogation of prior agreements." This can only mean that any change to the legal framework should not diminish or detract from agreements previously entered into by the parties. It also implies that provisions of prior agreements are already final and binding, as these serve as take-off points for the necessary changes that will be effected to fully implement the MOA-AD.

In my opinion, the MOA-AD is intended to be included among the prior agreements whose terms cannot be decreased by any of the changes that are necessary for it to come into force. More specifically, by the time the Comprehensive Compact shall have prescribed the timeframe for effecting these changes, the MOA-AD shall have become a prior agreement that is subject to the non-derogation clause found in paragraph 7 on Governance. This signifies that any change in the legal framework should adapt to the terms of the MOA-AD. The latter becomes the parameter of any statutory or constitutional amendments which are necessary to make the MOA-AD effective.

As such, it cannot be denied that the GRP panel committed itself to the full

implementation of the MOA-AD by effecting changes to the legal framework. Respondents cannot deny this by saying that the parties further undertook to negotiate a Comprehensive Compact or a final peace agreement. Although it may be conceded that the parties have yet to enter into a Comprehensive Compact subsequent to the signing of the MOA-AD, the nature of this compact shows that the MOA-AD was intended as the controlling document for the essential terms of the Comprehensive Compact. Paragraphs 3 and 7 of the MOA-AD provisions on Governance invariably describe the Comprehensive Compact as merely embodying **details** for the **effective enforcement** and **actual implementation** of the MOA-AD. Thus, the Comprehensive Compact will simply lay down the particulars of the parties' final commitments, as expressed in the assailed agreement.

Consequently, paragraph 7 on Governance in relation to paragraph 2 (a) on Territory contradict respondents' assertion that the MOA-AD is merely a preparatory agreement devoid of any real effects. The language employed in these provisions do not support respondents' contention that the MOA-AD is just a reference for future negotiations or consists of mere proposals that are subject to renegotiation. The words used in these provisions are categorical in stating that the GRP panel committed itself to the full implementation of the MOA-AD by effecting changes to the legal framework within a stipulated timeframe. In other words, these are definite propositions that would have to be undertaken under the agreement of the parties.

The foregoing discussion demonstrates that the MOA-AD is not merely a draft of consensus points that is subject to further negotiations between the GRP panel and the MILF. The language of the MOA-AD shows that the GRP panel made a real and actual commitment to fully implement the MOA-AD by effecting the necessary amendments to existing laws and the Constitution. The GRP panel's obligation to fully implement the provisions on Territory and to effect these "necessary changes" is in itself not dependent on any statutory or constitutional amendment. It is only subject to a timeframe that will be specified in the Comprehensive Compact, per stipulation of the parties.

At this point, it is worth noting that the MOA-AD cannot even be subjected to subsequent legal processes, such as a plebiscite or statutory and constitutional amendments. The MOA-AD cannot be validated by any of these means considering that the GRP panel does not even have the power to make these legal processes occur. This is because the panel is not authorized to commit to statutory and constitutional changes to fully implement the MOA-AD. Thus, it is not legally possible to undertake these legal processes under the circumstances provided in the agreement.

To emphasize, the GRP panel had neither power nor authority to commit the government to statutory and constitutional changes. The power to amend laws and to cause amendments or revisions to the Constitution belongs to Congress and, to a certain extent, the people under a system of initiative and referendum. Only Congress and the people have the competence to effect statutory and constitutional changes in the appropriate manner provided by law. The GRP panel, as a mere organ of the Executive branch, does not possess any such prerogative.

In the matter of legislation, it is settled that the power of Congress under Article VI, Section 1[24] of the Constitution is plenary and all-encompassing. The legislature alone determines when to propose or amend laws, what laws to propose or amend,

and the proper circumstances under which laws are proposed or amended. As held in *Ople v. Torres*:[25]

> ... **Legislative power** is "the authority, under the Constitution, to make laws, and to alter and repeal them." The Constitution, as the will of the people in their original, sovereign and unlimited capacity, has vested this power in the Congress of the Philippines. The grant of legislative power to Congress is broad, general and comprehensive. The legislative body possesses plenary power for all purposes of civil government.

Similarly, the power to amend or revise the Constitution also pertains to Congress in the exercise of its constituent functions. The same power is also reserved to the people under a system of initiative, pursuant to Article XVII[26] of the Constitution. In *Lambino v. COMELEC*,[27] the Court stated that there are three modes of amending the Constitution under Article XVII. The first mode is through Congress, acting as a constituent assembly, upon three-fourth's vote of all its Members; the second mode is through a constitutional convention created under a law passed by Congress; and the third mode is through a people's initiative. Nowhere in the Constitution does it state that the Executive or any of its organs can effect constitutional changes, as assumed by the GRP panel under the MOA-AD.

Notwithstanding the apparent lack of power or authority, the GRP panel undertook to effect changes to the Constitution and to statutes in order to fully implement the MOA-AD. In doing so, the GRP panel pre-empted Congress by determining, firsthand, the wisdom of effecting these changes as well as the nature of the required amendments to laws and the Constitution. It encroached upon the exclusive prerogative of Congress by assuming to exercise a discretion that it did not possess. It thus exceeded its authority and acted without jurisdiction.

It should have been evident to the GRP panel that it could not bargain away laws enacted by Congress or the people's sovereign will as expressed in the Constitution. Apart from the fact that it had no power to do so, its acts were in clear disregard of the instructions of the President as stated in the *Memorandum of Instructions From the President dated March 1, 2001*. The President clearly directed therein that "(t)he negotiations shall be conducted in accordance with the mandates of the Philippine Constitution, the Rule of Law, and the principles of sovereignty and territorial integrity of the Republic of the Philippines." The GRP panel did otherwise and failed to act in accordance with this directive.

The GRP panel derives its authority from the Chief Executive, whose sworn duty is to faithfully execute the laws and uphold the Constitution. In negotiating the terms of the MOA-AD, however, the GRP panel violated our Constitution and our laws by subscribing to stipulations that could very well lead to their emasculation. The GRP panel agreed to illegal and unconstitutional concessions and guaranteed the performance of a prestation that it could not deliver. This constitutes manifest grave abuse of discretion amounting to lack or excess of jurisdiction.

It is beyond question that the MOA-AD is patently unconstitutional. Had it been signed by the parties, it would have bound the government to the creation of a separate Bangsamoro state having its own territory, government, civil institutions and armed forces. The concessions that respondents made to the MILF would have given the latter leverage to demand that the Bangsamoro homeland be recognized

as a state before international bodies. It could insist that the MOA-AD is in fact a treaty and justify compliance with its provisions, under the international law principle of *pacta sunt servanda*. The sovereignty and territorial integrity of the Philippines would have been compromised.

For these reasons, I vote to grant the petitions. Respondents must be prohibited and permanently enjoined from negotiating, executing and entering into a peace agreement with terms similar to the MOA-AD. Although respondents have manifested that the MOA-AD will not be signed "in its present form or in any other form," the agreement must nonetheless be declared unconstitutional and, therefore, void *ab initio*, to remove any doubts regarding its binding effect on the Republic. Under no circumstance could the MOA-AD acquire legitimacy and force against the entire nation, and no less than a categorical declaration to this effect should put the issue to rest.

I so vote.

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[1] G.R. No. 171396, May 3, 2006, 489 SCRA 160, 214-215.

[2] *Alunan v. Mirasol*, 342 Phil. 467, 476-477 (1997).

[3] Article I, Section 1. The national territory comprises the Philippine Archipelago, with all the islands and waters embraced therein, and all other territories over which the Philippines has sovereignty or jurisdiction, consisting of its terrestrial, fluvial and aerial domains, including its territorial sea, the seabed, the subsoil, the insular shelves, and other submarine areas, the waters around, between, and connecting the islands of the archipelago, regardless of their breadth and dimensions, form part of the internal waters of the Philippines.

[4] 1. The Bangsamoro homeland and historic territory refer to the land mass as well as the maritime, terrestrial, fluvial and alluvial domains, and the aerial domain, the atmospheric space above it, embracing the Mindanao-Sulu-Palawan geographic region. However, delimitations are contained in the agreed Schedules (Categories).

[5] Article X, Section 1. The territorial and political subdivisions of the Republic of the Philippines are the provinces, cities, municipalities and barangays. There shall be autonomous regions in Muslim Mindanao and the Cordillera as hereinafter provided.

[6] The provision states:

c. The parties affirm that the core of the BJE shall constitute the present geographic area of the ARMM, including the municipalities of Baloi, Munai, Nunungan, Pantar, Tagoloan and Tangkal in the province of Lanao Del Norte that voted for inclusion in the ARMM during the 2001 plebiscite.

[7] Section 15. There shall be created Autonomous Regions in Muslim Mindanao and in the Cordilleras consisting of provinces, cities, municipalities and geographic areas sharing common and distinctive historical and cultural heritage, economic and social structures, and other relevant characteristics within the framework of this

Constitution and the national sovereignty as well as territorial integrity of the Republic of the Philippines.

[8] Article X, Section 16. The President shall exercise general supervision over autonomous regions to ensure that the laws are faithfully executed.

[9] Article X, Section 18. The Congress shall enact an organic act for each autonomous region with the assistance and participation of the regional consultative commission composed of representatives appointed by the President from a list of nominees from multisectoral bodies. The organic act shall define the basic structure of government for the region consisting of executive department and legislative assembly. Both of which shall be elective and representative of the constituent political units. The organic acts shall likewise provide for special courts with personal, family, and property law jurisdiction consistent with the Constitution and national laws. x x x

[10] Paragraph 8, Governance. The parties agree that the BJE shall be empowered to build, develop and maintain its own institutions, inclusive of civil service, electoral, financial and banking, education, legislation, legal, economic, and police and internal security force, judicial system and correctional institutions, necessary for developing a progressive Bangsamoro society, the details of which shall be discussed in the negotiation of the Comprehensive Compact.

[11] *Id*.

[12] Paragraph 4, Resources. The BJE is free to enter into any economic cooperation and trade relations with foreign countries: provided, however, that such relationships and understandings do not include aggression against the Government of the Republic of the Philippines; provided, further that it shall remain the duty and obligation of the Central Government to take charge of external defense. Without prejudice to the right of the Bangsamoro juridical entity to enter into agreement and environmental cooperation with any friendly country affecting its jurisdiction.

[13] Article XII, Section 2. All lands of the public domain, waters, minerals, coal, petroleum and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna and other natural resources are owned by the State. With the exception of agricultural lands, all other natural resources shall not be alienated. The exploration, development, and utilization of natural resources shall be under the full control and supervision of the State. x x x

[14] Paragraph 2.f., Territory. Internal Waters:

The BJE shall have jurisdiction over the management, conservation, development, protection, utilization and disposition of all natural resources, living and non-living, within its internal waters extending fifteen (15) kilometers from the coastline of the BJE area.

[15] Paragraph 2.g(1), Territory. Territorial Waters: (1) The territorial waters of the BJE shall stretch beyond the BJE internal waters up to the Republic of the Philippines (RP) baselines southeast and southwest of Mainland Mindanao. Beyond the fifteen

(15) kilometers internal waters, the Central Government and the BJE shall exercise joint jurisdiction, authority and management over areas and all natural resources x x x.

[16] Paragraph 2.h., Territory. Sharing of Minerals on Territorial Waters: Consistent with paragraphs 5 and 6 of the provisions on Resources, all potential sources of energy, petroleum in situ, hydrocarbon, natural gas and other minerals, including deposits or fields found within territorial waters, shall be shared between the Central Government and the BJE in favor of the latter through production sharing agreement or economic cooperation agreement.

[17] Paragraph 1, Resources. The BJE is empowered with authority and responsibility for the land use, development, conservation and disposition of the natural resources within the homeland. Upon entrenchment of the BJE, the land tenure and use of such resources and wealth must reinforce their economic self-sufficiency. x x x

[18] Paragraph 2, Resources. The Bangsamoro People through their appropriate juridical entity shall, among others, exercise power or authority over the natural resources within its territorial jurisdiction:

1. To explore, exploit, use or utilize and develop their ancestral domain and ancestral lands within their territorial jurisdiction, inclusive of their right of occupation, possession, conservation, and exploitation of all natural resources found therein;
2. x x x
3. To utilize, develop, and exploit its natural resources found in their ancestral domain or enter into joint development, utilization, and exploitation of natural resources, specifically on strategic minerals, designed as commons or shared resources, which is tied up to the final setting of appropriate institutions;

To revoke of grant forest concessions, timber license, contracts or agreements in the utilization and exploitation of natural resources designated as commons or shared resources, mechanisms for economic cooperation with respect to strategic minerals, falling within the territorial jurisdiction of the BJE; x x x

[19] Article VII, Section 21. No treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all Members of the Senate.

[20] Article X, Section 4. The President of the Philippines shall exercise general supervision over local governments. x x x

[21] Article X, Section 5. Each local government unit shall have the power to create its own sources of revenues and to levy taxes, fees, and charges subject to such guidelines and limitations as the Congress may provide, consistent with the basic policy of local autonomy. Such taxes, fees and charges shall accrue exclusively to the local government.

[22] Paragraph 2.e, Resources states that the BJE shall have the power: e. To enact agrarian laws and programs suitable to the special circumstances of the Bangsamoro people prevailing in their ancestral lands within the established territorial boundaries of the Bangsamoro homeland and ancestral territory within the competence of the

BJE; x x x

[23] Paragraph 2.a, Territory states:

a. The GRP and MILF as the Parties to this Agreement commit themselves to the full and mutual implementation of this framework agreement on territory with the aim of resolving outstanding issues that emanate from the consensus points on Ancestral Domain.

[24] Article VI, Section 1. The legislative power shall be vested in the Congress of the Philippines which shall consist of a Senate and a House of Representatives, except to the extent reserved to the people by the provision on initiative and referendum.

[25] 354 Phil. 948, 966 (1998).

[26] Article XVII – Amendments or Revisions

Sec. 1. Any amendment to, or revision of, this Constitution may be proposed by:

(1) The Congress, upon a vote of three-fourths of all its Members, or

(2) A constitutional convention.

Sec. 2. Amendments to this Constitution may likewise be directly proposed by the people through initiative x x x.

[27] G.R. No. 174153, October 25, 2006, 505 SCRA 160, 247.

SEPARATE CONCURRING OPINION

CARPIO, J.:

If this Court did not stop the signing of the Memorandum of Agreement on Ancestral Domain (MOA-AD), this country would have been dismembered because the Executive branch would have committed to amend the Constitution to conform to the MOA-AD. The MOA-AD gives to the Bangsamoro Juridical Entity (BJE) the attributes of a state, with its own people, territory, government, armed forces, foreign trade missions, and all other institutions of a state,[1] under the BJE's own basic law or constitution.[2]

Usurpation of the Powers of Congress and the People

The initialed MOA-AD between the Government of the Republic of the Philippines (GRP) and the Moro Islamic Liberation Front (MILF) is **patently unconstitutional**. The Executive branch's commitment under the MOA-AD to amend the Constitution to conform to the MOA-AD violates Sections 1 and 4, Article XVII of the Constitution.

The Executive branch **usurps** the sole discretionary power of Congress to propose amendments to the Constitution as well as the exclusive power of the sovereign people to approve or disapprove such proposed amendments. Sections 1 and 4, Article XVII of the Constitution provide:

> Section 1. Any amendment to, or revision of, this Constitution may be proposed by:
> (1) The Congress, upon a vote of three-fourths of all its Members; or
> (2) A constitutional convention.
>
> Section 4. Any amendment to, or revision of, this Constitution under Section 1 hereof shall be valid when ratified by a majority of the votes cast in a plebiscite which shall be held not earlier than sixty days nor later than ninety days after the approval of such amendment or revision.

Indisputably, the Executive branch has no power to commit to the MILF that the Constitution shall be amended to conform to the MOA-AD. Such commitment is a grave abuse of discretion amounting to lack or excess of jurisdiction.[3]

The MOA-AD states, in paragraph 2(a) on Territory, that "**the Parties to this Agreement commit themselves to the full and mutual implementation of this framework agreement**." The MOA-AD further states, in paragraph 7 on Governance, that:

> Any provisions of the MOA on Ancestral Domain requiring amendments to the existing legal framework shall come into force upon signing of a comprehensive compact and upon effecting the necessary changes to the legal framework with **due regard to non derogation of prior agreements** and within the stipulated timeframe to be contained in the Comprehensive Compact. (Emphasis supplied)

The Executive branch commits to implement fully the MOA-AD by amending the "existing legal framework," impliedly referring to the Constitution. The Executive branch further commits that **such constitutional amendments shall not derogate from prior GRP-MILF agreements**. At the time of the constitutional amendments, the MOA-AD will be a prior agreement, along with several other GRP-MILF agreements.[4]

The phrase "due regard to non-derogation of prior agreements" means there shall be no deviation from previous GRP-MILF agreements. The word "due" means a right to something, as in something that is "due" a person. This is the same usage of the word "due" in the phrase "***due*** process of law," which means one's right to legal process. The word "regard" means attention or observance. "Non-derogation" means no deviation. Thus, "due regard to non-derogation of prior agreements" simply means observance of what the MILF is entitled under previous GRP-MILF agreements, to which there shall be no deviation.

The phrase "due regard" means mandatory observance and not discretionary observance. When one speaks of "due regard for the law," one intends mandatory observance of the law. The same is true for "due regard to non-derogation of prior agreements," which means mandatory observance of non-derogation of previous agreements. The following pronouncements of the Court reveal the mandatory nature of the phrase "due regard":

> The least this Court can do under the circumstances is to make clear to all and sundry, especially to members of police forces, that the authority conferred on them to maintain peace and order should be exercised with **due regard** to the constitutional rights, most especially so of those who belong to the lower-income groups. If in a case like the present, the full force of the penal statute is not felt by the perpetrator of the misdeed, then the law itself stands condemned. This we should not allow to happen.[5] (Emphasis supplied)
>
> Entrapment is allowed when it is undertaken with **due regard** to constitutional and legal safeguards. It has repeatedly been accepted as a valid means of arresting violators of the Dangerous Drugs Law.[6] (Emphasis supplied)

The phrase "due regard" is commonly found in international treaties and conventions, like the *United Nations Convention on the Law of the Sea* (UNCLOS) where the phrase appears at least 16 times. The phrase "due regard" as used in UNCLOS is explained as follows:

> **[T]he requirement of "due regard" is a qualification of the rights of States** in exercising the freedoms of the high seas. **The standard of "due regard" requires all States**, in exercising their high seas freedoms, to be aware of and consider the interests of other States in using the high seas, and **to refrain from activities that interfere with the exercise by other States of the freedom of the high seas**. As the ILC [which prepared drafts of the 1958 LOS Conventions], stated in its Commentary in 1956, "**States are bound to refrain from any acts that might adversely affect the use of the high seas by nationals of other States**." The construction in paragraph 2 recognizes that all States have the right to exercise high seas freedoms, and balances consideration for the rights and interests of all states in this regard.[7] (Emphasis supplied)

The phrase "due regard," as used in the *Convention on International Civil Aviation*, is understood as giving rise to "a **duty** of `due regard' upon operators of state aircraft, and thus, upon military aircraft, for the safety of the navigation of civil aircraft."[8] Thus, "**the `due regard' rule remains the principal treaty obligation imposed upon States** for the regulation of the flight of military aircraft applicable during times of peace and armed conflict."[9]

The Chairman of the MILF and its highest-ranking official, Al Haj Murad Ebrahim, candidly admitted that the MILF's understanding is that the Constitution shall be amended to conform to the MOA-AD. In an ABS-CBN television interview aired nationwide on 20 August 2008, and widely reported in the newspapers, MILF Chairman Murad stated:

> It may be beyond the Constitution but the Constitution can be amended and revised to accommodate the agreement. **What is important is during the amendment, it will not derogate or water down the agreement because we have worked this out for more than 10 years now**.[10] (Emphasis supplied)

During the oral arguments, Atty. Sedfrey Candelaria, principal counsel to the GRP Panel, when asked about this statement, did not dispute that MILF Chairman Murad made the statement. Atty. Candelaria simply told the Court that MILF Chairman Murad "did not sit in the negotiating table."[11]

Clearly, under the MOA-AD, the Executive branch assumes the **mandatory obligation** to amend the Constitution to conform to the MOA-AD. During the oral arguments, Atty. Sedfrey Candelaria admitted that the implementation of the MOA-AD requires "**drastic changes**" to the Constitution.[12] As directed by Justice Antonio T. Carpio, Atty. Candelaria undertook to submit to the Court a listing of all provisions in the Constitution that needed amendment to conform to the MOA-AD.[13] In their Memorandum dated 24 September 2008, respondents stated: "In compliance with the said directive, the constitutional provisions that may be affected, as relayed by Atty. Sedfrey Candelaria, are the following -- Sections 1, 5, 18, 20 and 21 of Article X under Local Autonomy."[14] **This listing is grossly incomplete**. A more thorough scrutiny shows that the "drastic changes" are amendments to the following provisions of the Constitution:

1. Article 1 on the National Territory.[15] During the oral arguments, Atty. Sedfrey Candelaria stated that this provision would have to be amended to conform to the MOA-AD.[16]

2. Section 3, Article II on the role of the Armed Forces of the Philippines as "protector of the people and the State."[17] Under the MOA-AD, the AFP's role is only to defend the BJE against external aggression.[18]

3. Article III on the Bill of Rights. The MOA-AD does not state that the Bill of Rights will apply to the BJE. The MOA-AD refers only to "internationally recognized human rights instruments"[19] such as the United Nations Universal Declaration on Human Rights, International Humanitarian Law, and the United Nations Declaration on the Rights of Indigenous Peoples. No reference is made to the Bill of Rights or even to the Constitution.

4. Section 1, Article VI on the Legislative Department.[20] Legislative power shall no longer be vested solely in the Congress of the Philippines. Under the MOA-AD, the BJE shall "***build, develop and maintain its own institutions***" [21] like a legislature whose laws are not subordinate to laws passed by Congress.[22]

5. Section 1, Article VII on executive power.[23] Executive power shall no longer be vested exclusively in the President of the Philippines. The BJE shall have its own Chief Executive who will **not** be under the supervision of the President.[24]

6. Section 16, Article VII on the President's power to appoint certain officials, including military officers from the rank of colonel or naval captain, with the consent of the Commission on Appointments.[25] All public officials in the BJE, including military officers of any rank in the BJE internal security force, will be appointed in accordance with the BJE's own basic law or constitution.

7. Section 17, Article VII on the President's control over all executive departments.[26] The President will not control executive bureaus or offices in the BJE, like foreign trade missions of the BJE.

8. Section 18, Article VII on the President as "Commander-in-Chief of **all** armed forces of the Philippines."[27] Under the MOA-AD, the President will not be the Commander-in-Chief of the BJE's internal security force. The BJE's internal security force will not be part of the AFP chain of command.

9. Section 21, Article VII on the ratification of treaties and international agreements by the Senate.[28] This will not apply to the BJE which, under the MOA-AD, has the power to enter into economic and trade treaties with other countries.[29]

10. Section 1, Article VIII on judicial power being vested in **one** Supreme Court.[30] Since the BJE will have "**its own** x x x **judicial system**,"[31] the BJE will also have its own Supreme Court.

11. Section 2, Article VIII on the power of Congress to define and apportion the jurisdiction of lower courts.[32] Under the MOA-AD, Congress cannot prescribe the jurisdiction of BJE courts.

12. Section 5(2), Article VIII on the power of the Supreme Court to review decisions of lower courts and to promulgate rules of pleadings and practice in all courts.[33] Under the MOA-AD, the BJE will have its own judicial system. Decisions of BJE courts are not reviewable by the Supreme Court.

13. Section 5(6), Article VII on the power of the Supreme Court to appoint **all** officials and employees in the Judiciary.[34] This power will not apply to courts in the BJE.

14. Section 6, Article VIII on the Supreme Court's administrative supervision over **all** courts and their personnel.[35] Under the MOA-AD, the Supreme Court will not exercise administrative supervision over BJE courts and their personnel.

15. Section 9, Article VIII on the appointment by the President of **all** judges in the Judiciary from nominees recommended by the Judicial and Bar Council.[36] This provision will not apply to courts in the BJE.

16. Section 11, Article VIII on the power of the Supreme Court to discipline judges of **all** lower courts.[37] This power will not apply to judges in the BJE.

17. Section 1(1), Article IX-B on the power of the Civil Service Commission to administer the civil service.[38] Under the MOA-AD, the BJE will have "**its own** x x x **civil service**"[39] The Civil Service Commission will have no jurisdiction over the BJE's civil service.

18. Section 2(1), Article IX-C on the power of the Commission on Elections to enforce and administer **all** election laws.[40] Under the MOA-AD, the BJE will

have "**its own** x x x **electoral system**."[41] The Commission on Elections will have no jurisdiction over the BJE's electoral system.

19. Section 2(1), Article IX-D on the power of the Commission on Audit to examine and audit **all** subdivisions, agencies and instrumentalities of the Government.[42] Under the MOA-AD, the BJE can "**build, develop and maintain its own institutions**"[43] without limit. The BJE can create its own audit authority. The Commission on Audit will have no jurisdiction over the BJE or its subdivisions, agencies or instrumentalities.

20. Section 1, Article X on the political subdivisions of the Philippines.[44] A new political subdivision for the BJE will have to be created.

21. Section 4, Article X on the power of the President to exercise general supervision over **all** local governments.[45] Under the MOA-AD, this provision will not apply to the BJE.

22. Section 5, Article X subjecting the taxing power of local governments to limitations prescribed by Congress.[46] Under the MOA-AD, the BJE shall have "**its own** x x x **legislation**."[47] The BJE's taxing power will not be subject to limitations imposed by national law.

23. Section 6, Article X on the "just share" of local government units in national taxes.[48] Since the BJE is in reality independent from the national government, this provision will have to be revised to reflect the independent status of the BJE and its component cities, municipalities and barangays vis-à-vis other local government units.

24. Section 10, Article X on the alteration of boundaries of local government units, which requires a plebiscite "in the political units affected."[49] Under paragraph 2(d) on Territory of the MOA-AD,[50] the plebiscite is only in the barangays and municipalities identified as expansion areas of the BJE. There will be no plebiscite "in the political units affected," which should include all the barangays within a city, and all municipalities within a province.

25. Section 15, Article X on the creation of autonomous regions within the framework of the Constitution, national sovereignty and territorial integrity of the Philippines.[51] This will have to be revised since under the MOA-AD the BJE has all the attributes of a state.

26. Section 16, Article X on the President's power to exercise general supervision over autonomous regions.[52] This provision will not apply to the BJE, which is totally independent from the President's supervision.

27. Section 17, Article X which vests in the National Government residual powers, or those powers which are not granted by the Constitution or laws to autonomous regions.[53] This will not apply to the BJE.

28. Section 18, Article X which requires that personal, family and property laws of autonomous regions shall be consistent with the Constitution and national laws.[54] This will not apply to the BJE which will have its own basic law or constitution.[55]

29. Section 20, Article X on the legislative powers of autonomous regional assemblies whose laws are subject to the Constitution and national laws.[56] This provision will not apply to the BJE.

30. Section 21, Article X on the preservation of peace and order within autonomous regions by the local police as provided in national laws.[57] Under the MOA-AD, the BJE shall have "**its own** x x x **police**"[58] to preserve peace and order within the BJE.

31. Section 2, Article XII on State ownership of all lands of the public domain and of all natural resources in the Philippines.[59] Under paragraph 3 on Concepts and Principles of the MOA-AD,[60] **ancestral domain, which consists of ancestral lands and the natural resources in such lands, does not form part of the public domain**. The ancestral domain of the Bangsamoro refers to land they or their ancestors continuously possessed since time immemorial, excluding the period that their possession was disrupted by conquest, war, civil disturbance, force majeure, other forms of usurpation or displacement by force, deceit or stealth, or as a consequence of government project, or any voluntary dealings by the government and private parties. Under paragraph 1 on Concepts and Principles of the MOA-AD,[61] the Bangsamoro people are the Moros and all indigenous peoples of Mindanao, Sulu and Palawan. Thus, the ancestral domain of the Bangsamoro refers to the lands that *all the peoples in Mindanao, Sulu and Palawan possessed before the arrival of the Spaniards in 1521*. **In short, the ancestral domain of the Bangsamoro refers to the entire Mindanao , Sulu and Palawan**. This negates the Regalian doctrine in the 1935, 1973 and 1987 Constitutions.

32. Section 9, Article XII on the establishment of an independent economic and planning agency headed by the President.[62] This agency is the National Economic and Development Authority. Under the MOA-AD, the BJE will have its own economic planning agency.

33. Section 20, Article XII on the establishment of an independent monetary authority, now the *Bangko Sentral ng Pilipinas*.[63] Under the MOA-AD, the BJE will have its own financial and banking authority.[64]

34. Section 4, Article XVI on the maintenance of "**a regular force** necessary for the security of the State."[65] This provision means there shall only be **one** "Armed Forces of the Philippines" under the command and control of the President. This provision will not apply to the BJE since under the MOA-AD, the BJE shall have "**its own x x x internal security force**"[66] which will not be under the command and control of the President.

35. Section 5(6), Article XVI on the composition of the armed forces, whose officers and men must be recruited proportionately from all provinces and cities as far as practicable.[67] This will not apply to the BJE's internal security force whose personnel will come only from BJE areas.

36. Section 6, Article XVI on the establishment of one police force which shall be national in scope under the administration and control of a national police commission.[68] The BJE will have "**its own** x x x **police**"[69] which is a **regional police force** not administered or controlled by the National Police Commission.

The Executive branch thus guarantees to the MILF that the Constitution shall be drastically overhauled to conform to the MOA-AD. The Executive branch completely disregards that under the Constitution the sole discretionary power to propose amendments to the Constitution lies with Congress, and the power to approve or disapprove such proposed amendments belongs exclusively to the people.

The claim of respondents that the phrase "prior agreements" does not refer to the MOA-AD but to GRP-MILF agreements prior to the MOA-AD is immaterial. Whether the prior agreement is the MOA-AD or any other GRP-MILF agreement prior to the constitutional amendments, any commitment by the Executive branch to amend the Constitution without derogating from such prior GRP-MILF agreement would still be unconstitutional for the same reason -- usurpation by the Executive branch of the exclusive discretionary powers of Congress and the Filipino people to amend the Constitution.

Violation of Constitutional Rights of Lumads

Under the MOA-AD, the Executive branch also commits to incorporate all the Lumads in Mindanao, who are non-Muslims, into the Bangsamoro people who are Muslims. There are 18 distinct Lumad groups in Mindanao with their own ancestral domains and their own indigenous customs, traditions and beliefs. The Lumads have lived in Mindanao long before the arrival of Islam and Christianity. For centuries, the Lumads have resisted Islam, a foreign religion like Christianity. To this day, the Lumads proudly continue to practice their own indigenous customs, traditions and beliefs.

Suddenly, without the knowledge and consent of the Lumads, the Executive branch has **erased their identity** as separate and distinct indigenous peoples. The MOA-AD, in paragraph 1 on Concepts and Principles, provides:

> **It is the birthright of** all Moros and **all Indigenous peoples of Mindanao to identify themselves and be accepted as "Bangsamoros**". The Bangsamoro people refers to those who are natives or original inhabitants of Mindanao and its adjacent islands including Palawan and the Sulu archipelago at the time of conquest or colonization and their descendants whether mixed or of full native blood. Spouses and their descendants are classified as Bangsamoro. The freedom of choice of the indigenous people shall be respected. (Emphasis supplied)

The declaration that it is the "**birthright of** x x x **all Indigenous peoples of Mindanao to identify themselves and be accepted as `Bangsamoros'**" is cultural genocide. It erases by a mere declaration the identities, culture, customs, traditions and beliefs of 18 separate and distinct indigenous groups in Mindanao. The "freedom of choice" given to the Lumads is an empty formality because **officially from birth they are already identified as Bangsamoros**. The Lumads may freely practice their indigenous customs, traditions and beliefs, but they are still identified and known as Bangsamoros under the authority of the BJE.

The MOA-AD divests the Lumads of their ancestral domains and hands over possession, ownership and jurisdiction of their ancestral domains to the BJE. In paragraphs 2, 3 and 6 on Concepts and Principles, the MOA-AD gives ownership over the Bangsamoros' ancestral domain to the Bangsamoro people, defines the ancestral domain of the Bangsamoros, and vests jurisdiction and authority over such ancestral domain in the BJE, thus:

> 2. It is essential to lay the foundation of the Bangsamoro homeland in order to address the Bangsamoro people's humanitarian and economic needs as well as their political aspirations. Such territorial jurisdictions and geographic areas being the natural wealth and patrimony represent the social, cultural and political identity and pride of all the **Bangsamoro people**. **Ownership of the homeland is vested exclusively in them** by virtue of their prior rights of occupation that had inhered in them as sizeable bodies of people, delimited by their ancestors since time immemorial, and being the first politically organized dominant occupants.
>
> 3. x x x Ancestral domain and ancestral land refer to those **held under claim of ownership, occupied or possessed, by themselves or through the ancestors of the Bangsamoro people**, communally or individually x x x.
>
> x x x x
>
> 6. Both Parties agree that **the Bangsamoro Juridical Entity (BJE) shall have the authority and jurisdiction over the Ancestral Domain and Ancestral lands,** including both alienable and non-alienable lands encompassed within their homeland and ancestral territory, as well as the delineation of ancestral domains/lands of the Bangsamoro people located therein. (Emphasis supplied)

After defining the Bangsamoro people to include all the Lumads, the MOA-AD then defines the ancestral domain of the Bangsamoro people as the ancestral domain of ***all*** the Bangsamoros, which now includes the ancestral domains of all the Lumads. The MOA-AD declares that exclusive ownership over the Bangsamoro ancestral domain belongs to the Bangsamoro people. The MOA-AD vests jurisdiction and authority over the Bangsamoros' ancestral domain in the BJE. Thus, the Lumads lost not only their separate identities but also their ancestral domains to the Bangsamoros and the BJE.

The incorporation of the Lumads as Bangsamoros, and the transfer of their ancestral domains to the BJE, without the Lumads' knowledge and consent,[70] violate the Constitutional guarantee that the "State **recognizes and promotes the rights of**

indigenous cultural communities within the framework of national unity and development."[71] The incorporation also violates the Constitutional guarantee that the "State, subject to the provisions of this Constitution and national development policies and programs, shall **protect the rights of indigenous cultural minorities to their ancestral lands** to ensure their economic, social, and cultural well-being." [72]

These Constitutional guarantees, as implemented in the Indigenous Peoples' Rights Act of 1997, grant the Lumads "the right to participate fully, if they so chose, **at all levels of decision-making in matters which may affect their rights, lives and destinies**."[73] Since the Executive branch kept the MOA-AD confidential until its publication in the *Philippine Daily Inquirer* on 4 August 2008, the day before its scheduled signing in Kuala Lumpur, Malaysia, there could have been no participation by the 18 Lumad groups of Mindanao in their incorporation into the Bangsamoro. This alone shows that the Executive branch did not consult, much less secure the consent, of the Lumads on their rights, lives and destinies under the MOA-AD. In fact, representatives of the 18 Lumad groups met in Cagayan de Oro City and announced on 27 August 2008, through their convenor Timuay Nanding Mudai, that "**we cannot accept that we are part of the Bangsamoro**."[74]

The incorporation of the Lumads, and their ancestral domains, into the Bangsamoro violates the Constitutional and legislative guarantees recognizing and protecting the Lumads' distinct cultural identities as well as their ancestral domains. The violation of these guarantees makes the MOA-AD **patently unconstitutional**.

The incorporation of the Lumads, and their ancestral domains, into the Bangsamoro without the Lumads' knowledge and consent also violates Article 8 of the *United Nations Declaration on the Rights of Indigenous Peoples*.[75] Section 8 of the Declaration states:

> Article 8.
>
> 1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.
> 2. States shall provide effective mechanisms for prevention of, and redress for:
>
> (a) **Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities**;
> (b) **Any action which has the aim or effect of dispossessing them of their lands, territories or resources**;
>
> (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;
> (d) Any form of forced assimilation or integration;
> (e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them. (Emphasis supplied)

The provisions of Article 8 were designed to prevent **cultural genocide** of indigenous peoples. This will happen if the Lumads are identified from birth as Bangsamoros and their ancestral domains are absorbed into the ancestral domain of

the Bangsamoros.

There is another provision in the MOA-AD that could prove oppressive to the Lumads, and even invite conflicts with Christians. The MOA-AD, in paragraph 4 on Territory, **empowers the BJE to establish political subdivisions within the Bangsamoro ancestral domain,** as follows:

> All territorial and geographic areas in Mindanao and its adjacent islands including Palawan and the Sulu archipelago that have been declared recognized, and/or delineated as ancestral domain and ancestral land of the Bangsamoro people as their geographical areas, inclusive of settlements and reservations, **may be formed or constituted into political subdivisions of the Bangsamoro territorial jurisdictions** subject to the principles of equality of peoples and mutual respect and to the protection of civil, political, economic, and cultural rights in their respective jurisdictions.

Thus, the BJE can create political subdivisions -- barangays and municipalities -- within the Bangsamoro ancestral domain. Under the MOA-AD, the Bangsamoro ancestral domain includes the ancestral domains of the Lumads. The BJE can create barangays and municipalities in areas that are presently the ancestral domains of the Lumads. **The BJE can station its police and internal security force in these areas. Many of these areas -- the present ancestral domains of the Lumads -- are located within provinces, cities and municipalities where Christians are the majority**.

There are obvious possible adverse ramifications of this power of the BJE to create political subdivisions within provinces, cities and municipalities **outside of the BJE territory**. The creation by the BJE of such political subdivisions will alter the boundaries of the affected provinces, cities and municipalities, an alteration that, under the Constitution, requires an act of Congress and a plebiscite in the affected political units.[76] The Executive branch must conduct widespread consultations not only with the Lumads, but also with the Christians who, under the MOA-AD, will be affected by the creation of such BJE political subdivisions within their provinces, cities and municipalities.

Petitions Present Justiciable Controversy

The claim of respondents that the MOA-AD, not having been signed but merely initialed, does not give rise to an actual controversy cognizable by the Court, is gravely erroneous. **The MOA-AD has two features: (1) as an instrument of cession of territory and sovereignty to a new state, the BJE; and (2) as a treaty with the resulting BJE, governing the associative relationship with the mother state,[77] the Philippines, whose only important role in the relationship is "to take charge of external defense**."[78] Justice Vicente V. Mendoza, a former member of this Court and a recognized authority on constitutional law, states:

> It is indeed true that the BJE is not fully independent or sovereign and indeed it is dependent on the Philippine government for its external defense and only lacks foreign recognition, at least at the present time. **Nonetheless it is a state as the Philippines was a state during the**

> **Commonwealth period, which was not a part of the territory of the United States although subject to its sovereignty. As a state, it was a signatory to several treaties and international agreements, such as the Charter of the United Nations of January 1, 1942, and a participant in several conferences such as that held in Bretton Woods, New Hampshire, on July 1-22, 1944, on the GATT .** As the U.S. Supreme Court noted in *Hooven & Allison Co. v. Evatt*, the adoption of the 1935 Constitution prepared the way for the complete independence of the Philippines and the government organized under it had been given, in many aspects, by the United States "the status of an independent government which has been reflected in its relation as such with the outside world." Similarly, the Supreme Court of the Philippines held in *Laurel v. Misa* that "the Commonwealth of the Philippines was a sovereign government although not absolute."[79] (Emphasis supplied)

Thus,**once the MOA-AD is signed**, the MILF, as the acknowledged representative of the BJE, can exercise the rights of the BJE as a state.

The MILF, on behalf of the BJE, can then demand that the Philippines comply, under the principle of *pacta sunt servanda,* with the express terms of the MOA-AD requiring the Philippines to amend its Constitution to conform to the MOA-AD. Under the 1969 *Vienna Convention on the Law of Treaties*, the Philippines cannot invoke its internal law, including its Constitution, as justification for non-compliance with the MOA-AD, which operates as a treaty between the GRP and the BJE.[80] Thus, under international law, the Philippines is obligated to amend its Constitution to conform to the MOA-AD, **whether Congress or the Filipino people agree or not**.

If this Court wants to prevent the dismemberment of the Philippines, a dismemberment that violates the Constitution, the Court should not wait for the GRP Panel to sign the MOA-AD. Once the MOA-AD is signed, international law steps in resulting in irreversible consequences extremely damaging to the sovereignty and territorial integrity of the Philippines. **No subsequent ruling or order of this Court can undo this terrible damage, or put back a dismembered Philippines.** The initialed MOA-AD already contains definitive and settled propositions between the GRP and the MILF, and all that is lacking are the signatures of the GRP and MILF representatives to make the MOA-AD a binding international agreement.[81] Under these circumstances, the petitions certainly present an actual justiciable controversy of transcendental importance to the nation.

The forum for the resolution of any dispute between the GRP and the MILF under a signed MOA-AD will not be this Court but the International Court of Justice (ICJ), which is not bound to respect the Philippine Constitution. The MILF, under the sponsorship of any member of the Organization of Islamic Conference (OIC)[82] that recognizes the compulsory jurisdiction of the ICJ,[83] can bring the dispute to the ICJ. The OIC Special Envoy for the Peace Process in Southern Philippines, Ambassador Sayed Elmasry, who is also the Secretary-General of the OIC, is **a signatory to the MOA-AD**. Above the space reserved for his signature are the words "**ENDORSED BY**."

A party to the Statute of the ICJ, like the Philippines, is bound by the ICJ's determination whether the ICJ has jurisdiction over a dispute.[84] In deciding the

issue of jurisdiction, the ICJ may or may not follow past precedents in the light of special circumstances of the case before it. The Philippines will be risking dismemberment of the Republic in the hands of an international tribunal that is not bound by the Philippine Constitution.

More importantly, the BJE, represented by the MILF and endorsed by the OIC, may apply to be a party to the Statute of the ICJ and accept the compulsory jurisdiction of the ICJ.[85] A State that recognizes the compulsory jurisdiction of the ICJ has the right to sue before the ICJ any State that has accepted the same compulsory jurisdiction of the ICJ.[86] The fact that the BJE has **all the attributes of a state**, with the acknowledged power to enter into international treaties with foreign countries, gives the BJE the status and legal personality to be a party to a case before the ICJ.[87] In fact, by agreeing in the MOA-AD that the BJE, on its own, can enter into international treaties,[88] the Philippines admits and recognizes the international legal personality of the BJE, with the capacity to sue and be sued in international tribunals.

In short, for this Court to wait for the signing of the MOA-AD before assuming jurisdiction will allow an international tribunal to assume jurisdiction over the present petitions, risking the dismemberment of the Republic.

It is providential for the Filipino people that this Court issued the Temporary Restraining Order enjoining the signing of the MOA-AD in the nick of time on 4 August 2008. When the Court issued the TRO, the members of the GRP Panel were already on their way to Malaysia to sign the MOA-AD the following day, 5 August 2008, before representatives of numerous states from the OIC, Europe, North America, ASEAN and other parts of Asia. Indeed, public respondents should be thankful to this Court for saving them from inflicting an ignominious and irreversible catastrophe to the nation.

Petitions Not Mooted

The claim of respondents that the present petitions are moot because during the pendency of this case the President decided not to sign the MOA-AD, "in its present form or in any other form,"[89] is erroneous. Once the Court acquires jurisdiction over a case, its jurisdiction continues until final termination of the case.[90] The claim of respondents that the President never authorized the GRP Panel to sign the MOA-AD[91] is immaterial. If the GRP Panel had no such authority, then their acts in initialing and in intending to sign the MOA-AD were in grave abuse of discretion amounting to lack or excess of jurisdiction, vesting this Court jurisdiction over the present petitions to declare unconstitutional such acts of the GRP Panel.

Needless to say, the claim that the GRP Panel had no authority to sign the MOA-AD is a grave indictment of the members of the GRP Panel. At the very least this shows that the members of the GRP Panel were acting on their own, without following the instructions from the President as clearly laid down in the *Memorandum of Instructions From The President dated 1 March 2001*, which states in part:

> This Memorandum prescribes the guidelines for the Government Negotiating Panel (GPNP) for the peace negotiation process with the Moro Islamic Liberation Front (MILF):

1. **The negotiations shall be conducted in accordance with the mandates of the Philippine Constitution, the Rule of Law, and the principles of the sovereignty and territorial integrity of the Republic of the Philippines**.|

2. The negotiation process shall be pursued in line with the national Comprehensive Peace Process, and shall seek a principled and peaceful resolution of the armed conflict, **with neither blame nor surrender, but with dignity for all concerned**.
3. The objective of the GPNP is to attain a peace settlement that shall:

    a. Contribute to the resolution of the root cause of the armed conflict, and to societal reform, particularly in Southern Philippines;
    b. Help attain a lasting peace and comprehensive stability in Southern Philippines under a meaningful program of autonomy for Filipino Muslims, consistent with the Peace Agreement entered into by the GRP and the MNLF on 02 September 1996; and
    c. Contribute to reconciliation and reconstruction in Southern Philippines.

    4. The general approach to the negotiations shall include the following:

    a. Seeking a middle ground between the aspirations of the MILF and the political, social and economic objectives of the Philippine Government;
    b. Coordinated Third Party facilitation, where needed;
    c. **Consultation with affected communities and sectors**. (Emphasis supplied)

Indisputably, the members of the GRP Panel had clear and precise instructions from the President to follow Philippine constitutional processes and to preserve the national sovereignty and territorial integrity of the Philippines.[92] The members of the GRP Panel failed to follow their basic instructions from the President, and in the process, they recklessly risked the near dismemberment of the Republic.

Glaring Historical Inaccuracy in the MOA-AD

The MOA-AD likewise contains a glaring historical inaccuracy. The MOA-AD declares the Bangsamoro as the single "First Nation."[93] The term "First Nations" originated in Canada.[94] The term refers to indigenous peoples of a territory, with the assumption that there are one or more subsequent nations or ethnic groups, different from the indigenous peoples, that settled on the same territory. Thus, in Canada, the United States, Australia and New Zealand, the white Europeans settlers are the subsequent nations belonging to a different ethnic group that conquered the indigenous peoples. In Canada, there is not a single First Nation but more than 600 recognized First Nations, reflecting the fact that the indigenous peoples belong to various "nation" tribes.

In Mindanao, the Lumads who kept their indigenous beliefs, as well as those who

centuries later converted to either Islam or Christianity, belong to the same ethnic Malay race. Even the settlers from Luzon and Visayas belong to the same ethnic Malay race. Declaring the Bangsamoros alone as the single "First Nation" is a historical anomaly. If ethnicity alone is the criterion in declaring a First Nation, then all peoples of Mindanao belonging to the Malay race are the First Nations. If resistance to foreign beliefs is the criterion in declaring a First Nation, then the 18 Lumad groups in Mindanao are the First Nations.

When asked during the oral arguments why the MOA-AD declares the Bangsamoros as the single "First Nation," the Solicitor General answered that "the MILF requested that they be considered a First Nation."[95] The GRP Panel should not readily agree to include in the text of the agreement, an official document, anything that the MILF Panel wants. Claims to historicity must be verified because historical inaccuracies have no place in a peace agreement that resolves a dispute rooted to a large extent in historical events.

The Cost of Reparation Could Bankrupt the National Government

The MOA-AD recognizes that the Bangsamoro's ancestral domain, homeland and historic territory cover the entire Mindanao, Sulu and Palawan areas.[96] While the MOA-AD recognizes "vested property rights,"[97] other than licenses or contracts to exploit natural resources which are revocable at will by the BJE, the MOA-AD requires the Government to provide "**adequate reparation**" to the Bangsamoro for the "unjust dispossession of their territorial and proprietary rights, customary land tenures, or their marginalization."[98] Such unjust dispossession includes not only the lands taken from the Bangsamoro since the arrival of the Spaniards in 1521, but also all the natural resources removed from such lands since 1521. In short, the Government must pay compensation to the BJE for all titled private lands, as well as all natural resources taken or extracted, in Mindanao, Sulu and Palawan.

If the lands are still State owned -- like public forests, military and civil reservations, public school sites, public parks or sites for government buildings -- the Government must return the lands to the BJE. The MOA-AD further states, "Whenever restoration is no longer possible, the GRP shall take effective measures or adequate reparation collectively beneficial to the Bangsamoro people, in such quality, quantity and status to be determined mutually by both Parties."

The cost of reparation could bankrupt the Government. The Executive branch never consulted Congress, which exercises exclusively the power of the purse, about this commitment to pay "adequate reparation" to the BJE, a reparation that obviously has a gargantuan cost. Of course, under Philippine law Congress is not bound by this commitment of the Executive branch. Under international law, however, the Philippines is bound by such commitment of the Executive branch.

There is no Disarmament under the MOA-AD

Respondents have repeatedly claimed during the oral arguments that the final comprehensive peace agreement will lead to the disarmament of the MILF.[99] However, paragraph 8 on Governance of the MOA-AD allows the BJE "**to build, develop and maintain its own** x x x **police and internal security force**." Clearly, the BJE's internal security force is separate from its police. The obvious

intention is to constitute the present MILF armed fighters into the BJE's internal security force. In effect, there will be no disarmament of the MILF even after the signing of the comprehensive peace agreement.

The BJE can deploy its internal security force not only within the "core"[100] BJE territory, but also outside of the core BJE territory, that is, in ancestral lands of the Lumads that are located in Christian provinces, cities and municipalities. Under paragraphs 1 and 3 on Concepts and Principles of the MOA-AD, the Lumads and all their ancestral lands in Mindanao, Sulu and Palawan are made part of the BJE. **Thus, the MOA-AD even allows the MILF to station permanently its MILF armed fighters within Christian provinces, cities and municipalities outside of the core BJE territory**.

Duty to Preserve Territorial Integrity and National Sovereignty

Under the *United Nations Declaration on the Rights of Indigenous Peoples*, which is one of the documents referred to in the Terms of Reference of the MOA-AD, the right to self-determination of indigenous peoples does not mean a right to dismember or impair the territorial integrity or political unity of a sovereign and independent State like the Philippines. Article 46 of the Declaration states:

> Article 46
> 1. **Nothing in this Declaration may be interpreted** as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed **as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States**. (Emphasis supplied)

Under international law, every sovereign and independent State has the inherent right to protect from dismemberment its territorial integrity, political unity and national sovereignty. The duty to protect the territorial integrity, political unity and national sovereignty of the nation in accordance with the Constitution is not the duty alone of the Executive branch. Where the Executive branch is remiss in exercising this solemn duty in violation of the Constitution, this Court, in the appropriate case as in the present petitions, must step in because every member of this Court has taken a sworn duty to defend and uphold the Constitution.

A Final Word

No one will dispute that the nation urgently needs peace in Mindanao. The entire nation will truly rejoice if peace finally comes to Mindanao. The Executive branch must therefore continue to pursue vigorously a peaceful settlement of the Moro insurgency in Mindanao. No nation can progress and develop successfully while facing an internal armed conflict.[101]

However, any peace agreement that calls for amendments to the Constitution, -- **whatever the amendments may be, including the creation of the BJE --** must be subject to the constitutional and legal processes of the Philippines. The constitutional power of Congress to propose amendments to the Constitution, and the constitutional power of the people to approve or disapprove such amendments,

can never be disregarded. The Executive branch cannot usurp such discretionary sovereign powers of Congress and the people, as the Executive branch did when it committed to amend the Constitution to conform to the MOA-AD.

There must also be proper consultations with all affected stakeholders, where the Constitution or existing laws require such consultations. The law requires consultations for a practical purpose -- to build consensus and popular support for an initiative, in this case the peace agreement. Consultations assume greater importance if the peace agreement calls for constitutional amendments, which require ratification by the people. A peace agreement negotiated in secret, affecting the people's rights, lives and destinies, that is suddenly sprung on the people as a *fait accompli*, will face probable rejection in a plebiscite.

In short, a peace agreement that amends the Constitution can be lasting only if accepted by the people in accordance with constitutional and legal processes.

Accordingly, I vote to **GRANT** the petitions and declare the MOA-AD **UNCONSTITUTIONAL**.

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[1] Paragraph 8 on Governance of the MOA-AD provides: "The Parties agree that the **BJE shall be empowered to build, develop and maintain its own institutions, inclusive of**, **civil service, electoral, financial and banking, education, legislation, legal, economic, and police and internal security force, judicial system and correctional institutions**, necessary for developing a progressive Bangsamoro society the details of which shall be discussed in the negotiation of the Comprehensive Compact." (Emphasis supplied)

[2] Paragraph 6 on Governance of the MOA-AD provides: "The modalities for the governance intended to settle the outstanding negotiated political issues are deferred after the signing of the MOA-AD.

The establishment of institutions for governance in a Comprehensive Compact, together with its modalities during the transition period, shall be fully entrenched and established in the **basic law of the BJE**. The Parties shall faithfully comply with their commitment to the associative arrangements upon entry into force of a Comprehensive Compact." (Emphasis supplied)

[3] Section 1, Article VIII of the Constitution provides: "The judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law.

Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government."

[4] Some of these agreements are mentioned in the Terms of Reference of the MOA-AD. In their Compliance dated 22 September 2008, respondents included the following agreements not mentioned in the Terms of Reference: (1) Implementing

Guidelines on the Humanitarian, Rehabilitation and Development Aspects of the GRP-MILF Tripoli Agreement on Peace of 2001 dated 7 May 2002; and (2) Implementing Guidelines on the Security Aspect of the GRP-MILF Tripoli Agreement on Peace of 2001 dated 7 August 2001.

[5] *People v. Gumahin*, 128 Phil. 728, 757 (1967).

[6] *People v. Padasin*, 445 Phil. 448. 455 (2003).

[7] George K. Walker, DEFINING TERMS IN THE 1982 LAW OF THE SEA CONVENTION IV: THE LAST ROUND OF DEFINITIONS PROPOSED BY THE INTERNATIONAL LAW ASSOCIATION (AMERICAN BRANCH) LAW OF THE SEA COMMITTEE, California Western International Law Journal, Fall 2005, citing the Commentary of John E. Noyes in the Consolidated Glossary of Technical Terms Used in the United Nations Convention on the Law of the Sea, published by the International Hydrographic Organization (IHO) Technical Aspects of the Law of the Sea Working Group.

[8] Michel Bourbonniere and Louis Haeck, MILITARY AIRCRAFT AND INTERNATIONAL LAW: CHICAGO OPUS 3, Journal of Air Law and Commerce, Summer 2001.

[9] Id.

[10] http://222.abs-cbnnews.com/topftthehour.aspx?StoryId=128834.

[11] TSN, 29 August 2008, pp. 190-191 and 239.

[12] Id. at 297.

[13] Id. at 296-298.

[14] Memorandum of Respondents dated 24 September 2008, p. 56.

[15] Article I on the Constitution provides: "The national territory comprises the Philippine archipelago, with all the islands and waters embraced therein, and all other territories over which the Philippines has sovereignty or jurisdiction, consisting of its terrestrial, fluvial, and aerial domains, including its territorial sea, the seabed, the subsoil, the insular shelves, and other submarine areas. The waters around, between, and connecting the islands of the archipelago, regardless of their breadth and dimensions, form part of the internal waters of the Philippines."

[16] TSN, 29 August 2008, p. 276.

[17] Section 3, Article II of the Constitution provides: "Civilian authority is, at all times, supreme over the military. **The Armed Forces of the Philippines is the protector of the people and the State. Its goal is to secure the sovereignty of the State and the integrity of the national territory**." (Emphasis supplied)

[18] Paragraph 4 on Resources of the MOA-AD provides: "**The BJE is free to enter**

into any economic cooperation and trade relations with foreign countries: provided, however, that such relationships and understandings do not include aggression against the Government of the Republic of the Philippines; **provided, further that it shall remain the duty and obligation of the Central Government to take charge of external defense**. Without prejudice to the right of the Bangsamoro juridical entity to enter into agreement and environmental cooperation with any friendly country affecting its jurisdiction, it shall include:

a. **the option to establish and open Bangsamoro trade missions in foreign countries with which it has economic cooperation agreements**; and
b. the elements bearing in mind the mutual benefits derived from Philippine archipelagic status and security.

And, in furtherance thereto, **the Central Government shall take necessary steps to ensure the BJE's participation in international meetings and events, e.g. ASEAN meetings and other specialized agencies of the United Nations**. **This shall entitle the BJE's participation in Philippine official missions and delegations that are engaged in the negotiation of border agreements or protocols for environmental protection, equitable sharing of incomes and revenues, in the areas of sea, seabed and inland seas or bodies of water adjacent to or between islands forming part of the ancestral domain, in addition to those of fishing rights.**" (Emphasis supplied)

[19] Paragraph 6 on Terms of Reference of the MOA-AD provides: "ILO Convention No. 169, in correlation to the **UN Declaration on the Rights of the Indigenous Peoples**, and Republic Act No. 8371 otherwise known as the Indigenous Peoples Rights Act of 1997, the **UN Charter; the UN Universal Declaration on Human Rights**, **International Humanitarian Law (IHL)**, **and internationally recognized human rights instruments**." (Emphasis supplied)

[20] Section 1, Article VI of the Constitution provides: "**The legislative power shall be vested in the Congress of the Philippines** which shall consist of a Senate and a House of Representatives, except to the extent reserved to the people by the provision on initiative and referendum." (Emphasis supplied)

[21] Paragraph 8 on Governance of the MOA-AD, *see* note 1.

[22] Section 20, Article X of the Constitution provides: "Within its territorial jurisdiction and **subject to the provisions of this Constitution and national laws**, the organic act of autonomous regions shall provide for legislative powers over:

(1) Administrative organization;
(2) Creation of sources of revenues;
(3) Ancestral domain and natural resources;
(4) Personal, family, and property relations;
(5) Regional urban and rural planning development;
(6) Economic, social, and tourism development;
(7) Educational policies;
(8) Preservation and development of the cultural heritage; and

(9) Such other matters as may be authorized by law for the promotion of the general welfare of the people of the region. (Emphasis supplied)

[23] Section 1, Article VII of the Constitution provides: "The executive power shall be vested in the President of the Philippines."

[24] Section 4, Article X of the Constitution provides: "**The President of the Philippines shall exercise general supervision over local governments**. Provinces with respect to component cities and municipalities, and cities and municipalities with respect to component barangays shall ensure that the acts of their component units are within the scope of their prescribed powers and functions." (Emphasis supplied)

[25] Section 16, Article VII of the Constitution provides: "**The President shall nominate and, with the consent of the Commission on Appointments, appoint** the heads of the executive departments, ambassadors, other public ministers and consuls, or **officers of the armed forces from the rank of colonel or naval captain**, and other officers whose appointments are vested in him in this Constitution. He shall also appoint all other officers of the Government whose appointments are not otherwise provided for by law, and those whom he may be authorized by law to appoint. The Congress may, by law, vest the appointment of other officers lower in rank in the President alone, in the courts, or in the heads of departments, agencies, commissions, or boards." (Emphasis supplied)

[26] Section 17, Article VII of the Constitution provides: "The President shall have control of all the executive departments, bureaus, and offices. He shall ensure that the laws be faithfully executed."

[27] Section 18, Article VII of the Constitution provides: "The President shall be the Commander-in-Chief of **all armed forces of the Philippines** and whenever it becomes necessary, he may call out such armed forces to prevent or suppress lawless violence, invasion or rebellion. x x x." (Emphasis supplied)

[28] Section 21, Article VII of the Constitution provides: "No treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate."

[29] See note 18.

[30] Section 1, Article VIII of the Constitution provides: "The judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law."

[31] See note 1.

[32] Section 2 of Article VIII provides: "**The Congress shall have the power to define, prescribe, and apportion the jurisdiction of various courts** but may not deprive the Supreme Court of its jurisdiction over cases enumerated in Section 5 hereof.

No law shall be passed reorganizing the Judiciary when it undermines the security of tenure of its Members." (Emphasis supplied)

[33] Section 5(2), Article VIII of the Constitution provides: "**The Supreme Court shall have the following powers**:

(1) Exercise original jurisdiction over cases affecting ambassadors, other public ministers and consuls, and over petitions for certiorari, prohibition, mandamus, quo warranto, and habeas corpus.
(2) **Review, revise, reverse, modify, or affirm on appeal or certiorari, as the law or the Rules of Court may provide, final judgments and orders of lower courts in**:

(a) All cases in which the constitutionality or validity of any treaty, international or executive agreement, law, presidential decree, proclamation, order, instruction, ordinance, or regulation is in question.
(b) All cases involving the legality of any tax, impost, assessment, or toll, or any penalty imposed in relation thereto.
(c) All cases in which the jurisdiction of any lower court is in issue.
(d) All criminal cases in which the penalty imposed is reclusion perpetua or higher.
(e) All cases in which only an error or question of law is involved.

(3) Assign temporarily judges of lower courts to other stations as public interest may require. Such temporary assignment shall not exceed six months without the consent of the judge concerned.
(4) Order a change of venue or place of trial to avoid a miscarriage of justice.
(5) **Promulgate rules concerning the protection and enforcement of constitutional rights, pleading, practice, and procedure in all courts**, the admission to the practice of law, the Integrated Bar, and legal assistance to the underprivileged. Such rules shall provide a simplified and inexpensive procedure for the speedy disposition of cases, shall be uniform for all courts of the same grade, and shall not diminish, increase, or modify substantive rights. Rules of procedure of special courts and quasi-judicial bodies shall remain effective unless disapproved by the Supreme Court.
(6) **Appoint all officials and employees of the Judiciary in accordance with the Civil Service Law**." (Emphasis supplied)

[34] Id.

[35] Section 6, Article VIII of the Constitution provides: "The Supreme Court shall have administrative supervision over all courts and the personnel thereof."

[36] Section 9, Article VIII of the Constitution provides: "**The Members of the Supreme Court and judges of lower courts shall be appointed by the President from a list of at least three nominees prepared by the Judicial and Bar Council for every vacancy**. Such appointments need no confirmation.

For the lower courts, the President shall issue the appointments within ninety days from the submission of the list." (Emphasis supplied)

[37] Section 11, Article VIII of the Constitution provides: "The Members of the Supreme Court and judges of lower courts shall hold office during good behavior until they reach the age of seventy years or become incapacitated to discharge the duties of their office. **The Supreme Court en banc shall have the power to discipline judges of lower courts, or order their dismissal** by a vote of a majority of the Members who actually took part in the deliberations on the issues in the case and voted thereon." (Emphasis supplied)

[38] Section 1(1), Article IX-B of the Constitution provides: "**The Civil Service shall be administered by the Civil Service Commission** composed of a Chairman and two Commissioners who shall be natural-born citizens of the Philippines and, at the time of their appointment, at least thirty-five years of age, with proven capacity for public administration, and must not have been candidates for any elective position in the elections immediately preceding their appointment." (Emphasis supplied)

[39] See note 1.

[40] Section 2(1), Article IX-C of the Constitution provides: "**The Commission on Elections shall exercise the following powers and functions**:

(1) **Enforce and administer all laws and regulations relative to the conduct of an election**, plebiscite, initiative, referendum, and recall." (Emphasis supplied)

[41] See note 1.

[42] Section 2(1), Article IX-D of the Constitution provides: "**The Commission on Audit shall have the power, authority, and duty to examine, audit, and settle all accounts pertaining to the revenue and receipts of, and expenditures or uses of funds and property, owned or held in trust by, or pertaining to, the Government, or any of its subdivisions, agencies, or instrumentalities**, including government-owned or controlled corporations with original charters, and on a post-audit basis: (a) constitutional bodies, commissions and offices that have been granted fiscal autonomy under this Constitution; (b) autonomous state colleges and universities; (c) other government-owned or controlled corporations and their subsidiaries; and (d) such non-governmental entities receiving subsidy or equity, directly or indirectly, from or through the Government, which are required by law or the granting institution to submit to such audit as a condition of subsidy or equity. However, where the internal control system of the audited agencies is inadequate, the Commission may adopt such measures, including temporary or special pre-audit, as are necessary and appropriate to correct the deficiencies. It shall keep the general accounts of the Government and, for such period as may be provided by law, preserve the vouchers and other supporting papers pertaining thereto." (Emphasis supplied)

[43] See note 1.

[44] Section 1, Article X of the Constitution provides: "The territorial and political subdivisions of the Republic of the Philippines are the provinces, cities, municipalities, and barangays. There shall be autonomous regions in Muslim Mindanao and the Cordilleras as hereinafter provided."

[45] Section 4, Article X of the Constitution provides: "**The President of the Philippines shall exercise general supervision over local governments**. Provinces with respect to component cities and municipalities, and cities and municipalities with respect to component barangays shall ensure that the acts of their component units are within the scope of their prescribed powers and functions." (Emphasis supplied)

[46] Section 5, Article X of the Constitution provides: "**Each local government unit shall have the power to create its own sources of revenues and to levy taxes, fees, and charges subject to such guidelines and limitations as the Congress may provide**, consistent with the basic policy of local autonomy. Such taxes, fees, and charges shall accrue exclusively to the local governments." (Emphasis supplied)

[47] See note 1.

[48] Section 6, Article X of the Constitution provides: "Local government units shall have a just share, as determined by law, in the national taxes which shall be automatically released to them."

[49] Section 10, Article X of the Constitution provides: "No province, city, municipality, or barangay may be created, divided, merged, abolished, or its boundary substantially altered, except in accordance with the criteria established in the Local Government Code and **subject to approval by a majority of the votes cast in a plebiscite in the political units directly affected**." (Emphasis supplied)

[50] Paragraph 2(d) on Territory of the MOA-AD provides. "Without derogating from the requirements of prior agreements, the Government stipulates to conduct and deliver, using all possible legal measures, within twelve (12) months following the signing of the MOA-AD, **a plebiscite covering the areas enumerated in the list and depicted in the map as Category A attached herein** (the "Annex")." (Emphasis supplied)

[51] Section 15, Article X of the Constitution provides: "There shall be created autonomous regions in Muslim Mindanao and in the Cordilleras consisting of provinces, cities, municipalities, and geographical areas sharing common and distinctive historical and cultural heritage, economic and social structures, and other relevant characteristics **within the framework of this Constitution and the national sovereignty as well as territorial integrity of the Republic of the Philippines**." (Emphasis supplied)

[52] Section 16, Article X of the Constitution provides: "The President shall exercise general supervision over autonomous regions to ensure that the laws are faithfully executed."

[53] Section 17, Article X of the Constitution provides: "All powers, functions, and responsibilities not granted by this Constitution or by law to the autonomous regions shall be vested in the National Government."

[54] Section 18, Article X of the Constitution provides: "The Congress shall enact an organic act for each autonomous region with the assistance and participation of the regional consultative commission composed of representatives appointed by the President from a list of nominees from multisectoral bodies. The organic act shall define the basic structure of government for the region consisting of the executive department and legislative assembly, both of which shall be elective and representative of the constituent political units. **The organic acts shall likewise provide for special courts with personal, family, and property law jurisdiction consistent with the provisions of this Constitution and national laws.**

The creation of the autonomous region shall be effective when approved by majority of the votes cast by the constituent units in a plebiscite called for the purpose, provided that only provinces, cities, and geographic areas voting favorably in such plebiscite shall be included in the autonomous region."

[55] See note 2.

[56] See note 22.

[57] Section 21, Article X of the Constitution provides: "**The preservation of peace and order within the regions shall be the responsibility of the local police agencies which shall be organized, maintained, supervised, and utilized in accordance with applicable laws**. The defense and security of the regions shall be the responsibility of the National Government." (Emphasis supplied)

[58] See note 1.

[59] Section 2, paragraph 1, Article XII of the Constitution provides: "**All lands of the public domain**, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, **and other natural resources are owned by the State**. With the exception of agricultural lands, all other natural resources shall not be alienated. The exploration, development, and utilization of natural resources shall be under the full control and supervision of the State. The State may directly undertake such activities, or it may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations or associations at least sixty per centum of whose capital is owned by such citizens. Such agreements may be for a period not exceeding twenty-five years, renewable for not more than twenty-five years, and under such terms and conditions as may be provided by law. In cases of water rights for irrigation, water supply, fisheries, or industrial uses other than the development of water power, beneficial use may be the measure and limit of the grant." (Emphasis supplied)

[60] Paragraph 3 on Concepts and Principles of the MOA-AD provides: "Both Parties acknowledge that **ancestral domain does not form part of the public domain but encompasses** ancestral, communal, and customary lands, maritime, fluvial and alluvial domains **as well as all natural resources therein** that have inured or vested ancestral rights on the basis of native title. **Ancestral domain** and ancestral land refer to those held under claim of ownership, occupied or **possessed,** by themselves or through the ancestors of the Bangsamoro people, communally or

individually **since time immemorial continuously to the present, except when prevented by war, civil disturbance, force majeure, or other forms of possible usurpation or displacement by force, deceit, stealth, or as a consequence of government project or any other voluntary dealings entered into by the government and private individuals, corporate entities or institutions**." (Emphasis supplied)

[61] Paragraph 1 on Concepts and Principles of the MOA-AD provides: "**It is the birthright of all Moros and all Indigenous peoples of Mindanao to identify themselves and be accepted as "Bangsamoros**". **The Bangsamoro people refers to those who are natives or original inhabitants of Mindanao and its adjacent islands including Palawan and the Sulu archipelago at the time of conquest or colonization of its descendant**s whether mixed or of full blood. Spouses and their descendants are classified as Bangsamoro. The freedom of choice of the Indigenous people shall be respected." (Emphasis supplied)

[62] Section 9, Article XII of the Constitution provides: "**The Congress may establish an independent economic and planning agency headed by the President**, which shall, after consultations with the appropriate public agencies, various private sectors, and local government units, recommend to Congress, and implement continuing integrated and coordinated programs and policies for national development.

Until the Congress provides otherwise, the National Economic and Development Authority shall function as the independent planning agency of the government." (Emphasis supplied)

[63] Section 20, Article XII of the Constitution provides: "**The Congress shall establish an independent central monetary authority,** the members of whose governing board must be natural-born Filipino citizens, of known probity, integrity, and patriotism, the majority of whom shall come from the private sector. They shall also be subject to such other qualifications and disabilities as may be prescribed by law. The authority shall provide policy direction in the areas of money, banking, and credit. It shall have supervision over the operations of banks and exercise such regulatory powers as may be provided by law over the operations of finance companies and other institutions performing similar functions.

Until the Congress otherwise provides, the Central Bank of the Philippines, operating under existing laws, shall function as the central monetary authority." (Emphasis supplied)

[64] See note 1.

[65] Section 4, Article XVI of the Constitution provides: "The Armed Forces of the Philippines shall be composed of a citizen armed force which shall undergo military training and serve, as may be provided by law. **It shall keep a regular force necessary for the security of the State**." (Emphasis supplied)

[66] See note 1.

[67] Section 5(6), Article XVI of the Constitution provides: "The officers and men of

the regular force of the armed forces shall be recruited proportionately from all provinces and cities as far as practicable."

[68] Section 6, Article XVI of the Constitution provides: "The State shall establish and maintain **one police force, which shall be national in scope and civilian in character, to be administered and controlled by a national police commission**. The authority of local executives over the police units in their jurisdiction shall be provided by law." (Emphasis supplied)

[69] See note 1.

[70] *Philippine Daily Inquirer*, 27 August 2008; see also *http://newsinfo.inquirer.net/inquirerheadlines/ nation/view/20080827-157044/Respect-our-domain-lumad-tell-Moro-rebs*.

[71] Section 22, Article II of the Constitution provides: "The State recognizes and promotes the rights of indigenous cultural communities within the framework of national unity and development."

[72] Section 5, Article XII of the Constitution provides: "The State, subject to the provisions of this Constitution and national development policies and programs, shall protect the rights of indigenous cultural communities to their ancestral lands to ensure their economic, social, and cultural well-being.

The Congress may provide for the applicability of customary laws governing property rights or relations in determining the ownership and extent of ancestral domain."

[73] Section 16 of the Indigenous Peoples' Rights Act of 1997 (RA No. 8371) provides: "*Right to Participate in Decision-Making.* -- ICCs/IPs have the right to participate fully, if they so choose, **at all levels of decision-making in matters which may affect their rights, lives and destinies** through procedures determined by them as well as to maintain and develop their own indigenous political structures. Consequently, the State shall ensure that the ICCs/IPs shall be given mandatory representation in policy-making bodies and other local legislative councils." (Emphasis supplied)

[74] See note 70; TSN, 29 August 2008, p. 183.

[75] Adopted overwhelmingly by the United Nations General Assembly by a vote of 143-5 on 13 September 2007. Those who voted against were the United States, Canada, Australia and New Zealand.

[76] Section 10, Article X of the Constitution provides: "No province, city, municipality, or barangay may be created, divided, merged, abolished, **or its boundary substantially altered**, except in accordance with the criteria established in the Local Government Code and subject to approval by a majority of the votes cast in a plebiscite in the political units directly affected." (Emphasis supplied)

[77] Justice Vicente V. Mendoza (ret.), *The Legal Significance of the MOA on the Bangsamoro Ancestral Domain*, lecture delivered at the College of Law, University of

the Philippines on 5 September 2008.

[78] Paragraph 4 on Resources of the MOA-AD; see note 18.

[79] See note 77.

[80] Article 27 of the 1969 Vienna Convention on the Law of Treaties provides: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

[81] **The initialing of the MOA-AD did not bind the GRP to the MOA-AD**. The initialing was merely intended by the parties to authenticate the text of the MOA-AD. Article 12, 2(a) of the 1969 Vienna Convention on the Law of Treaties states that "the initialing of a text constitutes a signature of the treaty when it is established that the negotiating States so agreed."

[82] The Malaysia Foreign Minister, the Special Adviser to the Malaysian Prime Minister, and the Secretary of Foreign Affairs of the Philippines are witnesses to the MOA-AD.

[83] The Philippines, as a member of the United Nations, is *ipso facto* a party to the Statute of the International Court of Justice (Article 93[1], United Nations Charter). The Philippines signed on 18 January 1972 the Declaration Recognizing the Jurisdiction of the ICJ as Compulsory. At least 10 members of the Organization of Islamic Conference have also signed the Declaration.

[84] Article 36(6) of the Statute of the ICJ provides: "In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court."

[85] Article 93(2) of the Charter of the United Nations provides: "A state which is not a Member of the United Nations may become a party to the Statute of the International Court of Justice on conditions to be determined in each case by the General Assembly upon the recommendation of the Security Council."

[86] Article 36(2) of the Statute of the International Court of Justice provides:

ARTICLE 36
1. x x x
2. The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

a. the interpretation of a treaty;
b. any question of international law;
c. the existence of any fact which, if established, would constitute a breach of an international obligation;
d. the nature or extent of the reparation to be made for the breach of an international obligation.

[87] Article 34(1) of the Statute of the ICJ provides: "Only states may be parties in cases before the Court."

[88] See note 18.

[89] Memorandum of Respondents dated 24 September 2008, p. 7.

[90] *People v. Vera*, G.R. No. 26539, 28 February 1990, 182 SCRA 800, 809.

[91] TSN, 29 August 2008, pp. 154-155.

[92] The President's Memorandum of Instructions dated 8 September 2003 reiterated verbatim paragraph 1 of the Memorandum of Instructions from the President dated 1 March 2001.

[93] Paragraph 4 on Concepts and Principles of the MOA-AD provides: "Both Parties acknowledge that the right to self-governance of the Bangsamoro people is rooted on ancestral territoriality exercised originally under the suzerain authority of their sultanates and the Pat a Pangampong ku Ranaw. The Moro sultanates were states or karajaan/kadatuan resembling a body politic endowed with all the elements of nation-state in the modern sense. As a domestic community distinct from the rest of the national communities, they have a definite historic homeland. **They are the "First Nation" with defined territory and with a system of government having entered into treaties of amity and commerce with foreign nations**. The Parties concede that the ultimate objective of entrenching the Bangsamoro homeland as a territorial space is to secure their identity and posterity, to protect their property rights and resources as well as to establish a system of governance suitable and acceptable to them as distinct dominant people." (Emphasis supplied)

[94] *See* Story of the Assembly of First Nations, http://www.afn.ca/article.asp?id=59.

[95] TSN, 29 August 2008, pp. 718 and 721.

[96] Paragraphs 1 and 3 on Concepts and Principles of the MOA-AD; see notes 49 and 50; Paragraph 1 on Territory of the MOA-AD provides: "The Bangsamoro homeland and historic territory refer to the land mass as well as the maritime, terrestrial, fluvial and alluvial domains, and the aerial domain, the atmospheric space above it, embracing the Mindanao-Sulu-Palawan geographic region. However, delimitations are contained in the agreed Schedules (Categories)."

[97] Paragraph 7 on Concepts and Principles of the MOA-AD provides: "Vested property rights upon the entrenchment of the BJE shall be recognized and respected subject to paragraph 9 of the strand on Resources."

[98] Paragraph 7 on Resources of the MOA-AD provides: "**The legitimate grievances of the Bangsamoro people arising from any unjust dispossession of their territorial and proprietary rights, customary land tenures, or their marginalization shall be acknowledged**. Whenever restoration is no longer possible, the GRP shall take effective measures or adequate reparation collectively

beneficial to the Bangsamoro people, in such quality, quantity and status to be determined mutually by both Parties." (Emphasis supplied)

[99] TSN, 29 August 2008, p. 704.

[100] Paragraph 2(c) on Territory of the MOA-AD provides: "The Parties affirm that the core of the BJE shall constitute the present geographic area of the ARMM, including the municipalities of Baloi, Munai, Nunungan, Pantar, Tagoloan and Tangkal in the province of Lanao del Norte that voted for inclusion in the ARMM during the 2001 plebiscite."

[101] Paul Collier calls internal armed conflicts "**development in reverse**." *Development and Conflict*, Centre for the Study of African Economies, Department of Economics, Oxford University, 1 October 2004.

SEPARATE CONCURRING AND DISSENTING OPINION

LEONARDO-DE CASTRO, *J.*:

I vote to consider the cases moot and academic considering the manifestation in the Memorandum, dated September 24, 2008, filed by the Office of the Solicitor General (OSG) that:

> "x x x The Executive Department has repeatedly and categorically stated that **the MOA-AD will not be signed in its present form or in any other form**. The Chief Executive has in fact gone to the extent of dissolving the Government of the Republic of the Philippines (GRP) Panel and has decided to take on a different tack and launch talks, no longer with rebels or rebel groups, but with more peace-loving community-based groups. x x x"[1]

This development renders unnecessary a detailed analysis of each of the stipulations contained in the said MOA-AD, which have grave constitutional implications on the sovereignty, territorial integrity and constitutional processes of the Republic of the Philippines, all of which are non-negotiable when viewed in the context of the nature of the internal conflict it seeks to address and the state of our nation today.

I believe this is a prudent move on the part of the Executive Department. By the very essence of our republican and democratic form of government, the outcome of our constitutional processes, particularly the legislative process and the constituent process of amending the constitution, cannot be predetermined or predicted with certainty as it is made to appear by the consensus points of the MOA-AD. Consequently, it is beyond the authority of any negotiating panel to commit the implementation of any consensus point or a legal framework which is inconsistent with the present Constitution or existing statutes.

Moreover, our constitutional processes are well-defined by various provisions of the Constitution. The establishment of a political and territorial "space" under a so-called

Bangsamoro Juridical Entity (BJE) is nowhere to be found in the 1987 Constitution, which provides for the country's territorial and political subdivisions as follows:

> "The territorial and political subdivisions of the Republic of the Philippines are the provinces, cities, municipalities, and barangays. There shall be autonomous regions in Muslim Mindanao and the Cordilleras as hereinafter provided."[2]

In the case of the autonomous regions, their creation is the shared responsibility of the political branches of the government and the constituent units affected. The Constitution is explicit in this regard, to wit:

> "The **Congress** shall enact an organic act for each autonomous region **with the assistance and participation of the regional consultative commission composed of representatives appointed by the President** from a list of nominees from multisectoral bodies. The organic act shall define the basic structure of government for the region consisting of the executive department and legislative assembly, both of which shall be elective and representative of the constituent political units. The organic acts shall likewise provide for special courts with personal, family, and property law jurisdiction consistent with the provisions of this constitution and national law.
>
> The creation of the autonomous region shall be effective when approved by majority of the votes cast by the constituent units in a plebiscite called for the purpose, provided that only provinces, cities, and geographic areas voting favorably in such plebiscite shall be included in the autonomous region."[3] (Emphasis supplied)

If the establishment of autonomy requires the joint participation of Congress, the President, and of the people in the area affected, **from the inception of the process of creation of an autonomous region**, with more reason, the creation of the BJE - an entity intended to have its own basic law to be adopted in accordance with an "associative arrangement" - which would imply, in legal terms, semi-independence if not outright independence - cannot be negotiated without the participation of Congress and consultations with the people, residing not only in the area to be placed under the BJE but also in the rest of our country. Even with the participation of Congress and the consultation with stakeholders, the **process at the onset** must conform and explicitly be subject to our Constitution. This is specially important as the unsigned MOA-AD stipulates a definite framework that threatens to erase, through the "policies, rules and regulations" and basic law of the BJE, the objective existence of over four hundred (400) years of development and progress of our people by unsettling private voluntary agreements and undoing the official acts of our government institutions performed pursuant to the Constitution and the laws in force during the said long period in our history, within the identified areas, to be carved out of a substantial portion of the national territory, and with only the "details", the "mechanisms and modalities for actual implementation" to be negotiated and embodied in a Comprehensive Compact. To my mind, this alarming possibility contemplated in the MOA-AD may be the cause of chaos and even greater strife for our brothers in the south, rather than bring about the intended peace.

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[1] OSG Memorandum (September 24, 2008), pp. 7-8.

[2] Article X, Section 2, 1987 Constitution.

[3] Article X, Section 18, 1987 Constitution.

CONCURRING AND DISSENTING OPINION

BRION, *J.*:

The Petitions for Mandamus

I concur with the *ponencia's* conclusion that the *mandamus* aspect of the present petitions has been rendered moot when the respondents provided this Court and the petitioners with the official copy of the final draft of the Memorandum of Agreement on Ancestral Domain (*MOA-AD*).[1]

The Petitions for Prohibition

I likewise concur with the *implied conclusion* that the "non-signing of the MOA-AD and the eventual dissolution of the Government of the Republic of the Philippines (GRP) panel mooted the prohibition aspect of the petitions," but disagree that the exception to the "moot and academic" principle should apply. The *ponencia* alternatively claims that the petitions have not been mooted. I likewise dissent from this conclusion.

a. The *Ponencia* and the Moot and Academic Principle.

As basis for its conclusion, the *ponencia* cites *David v. Macapagal-Arroyo*[2] for its holding that "`the moot and academic' principle not being a magical formula that automatically dissuades courts in resolving a case, it [the Court] will decide cases, otherwise moot and academic, if it feels that (a) there is a grave violation of the Constitution;[3] (b) the situation is of exceptional character and paramount public interest is involved;[4] (c) the constitutional issue raised requires formulation of controlling principles to guide the bench, the bar and the public;[5] and (d) the case is capable of repetition yet evading review."[6]

In further support of its position on the mootness issue, the *ponencia* additionally cites the American ruling that "once a suit is filed and the doer voluntarily ceases the challenged conduct, it does not automatically deprive the tribunal of power to hear and determine the case and does not render the case moot especially when the plaintiff seeks damages or prays for injunctive relief against the possible recurrence of the violation."[7]

b. The Context of the "Moot and Academic" Principle.

The cited *David v. Macapagal-Arroyo* defines a **"moot and academic" case** to be

"one that ceases to present a justiciable controversy by virtue of supervening events, so that a declaration thereon would be of no practical use or value." It goes on to state that "generally, courts decline jurisdiction over such cases and dismiss it on the ground of mootness."[8] This pronouncement traces its current roots from the express constitutional rule under the second paragraph of Section 1, Article VIII of the 1987 Constitution that "[j]udicial power includes the duty of the courts of justice to settle *actual controversies* involving rights which are legally demandable and enforceable..." This rule, which can conveniently be called the traditional concept of judicial power, has been expanded under the 1987 Constitution to include the power "to determine whether or not there has been grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government."

Whether under the traditional or the expanded concept, judicial power must be based on an *actual justiciable controversy* at whose core is the existence of a case involving rights which are legally demandable and enforceable. Without this feature, courts have no jurisdiction to act. Even a petition for declaratory relief[9]- a petition outside the original jurisdiction of this Court to entertain - must involve an actual controversy that is ripe for adjudication.[10] In light of these requirements, any exception that this Court has recognized to the rule on mootness (as expressed, for example, in the cited *David v. Macapagal-Arroyo*) is justified only by the implied recognition that a continuing controversy exists.

Specifically involved in the exercise of judicial power in the present petitions is the Court's power of judicial review, *i.e.,* the power to declare the substance, application or operation of a treaty, international agreement, law, presidential decree, proclamation, order, instruction, ordinance, or regulation unconstitutional.[11] A first requisite for judicial review is that there be an "actual case" calling for the exercise of judicial power. Fr. Joaquin Bernas, S.J., an eminent constitutional law expert, comments in this regard that -

> This is a manifestation of the commitment to the adversarial system. Hence, the Court has no authority to pass upon issues of constitutionality through advisory opinions and it has no authority to resolve hypothetical or feigned constitutional problems or friendly suits collusively arranged between parties without real adverse interests. *Nor will the Court normally entertain a petition touching on an issue that has become moot because then there would no longer be a `flesh and blood' case for the Court to resolve.*" [Citations deleted, emphasis supplied.][12]

Other than the rule on actual case and standing (which aspect this separate opinion does not cover), jurisprudence holds that this Court will not touch upon the issue of constitutionality *unless it is unavoidable* or *is the very* ***lis mota***.[13] As will be discussed in refuting the *ponencia*'s various positions, this rule finds special application in the present case in light of the political sensitivity of the peace talks with the MILF and the issues it has placed on the agenda, namely, peace and order in Mindanao and the MILF's aspirations for freedom.

My disagreement with the *ponencia* on the application of the exceptions to the mootness principle of *David v. Macapagal-Arroyo* is essentially based on how the mootness principle and its exceptions should be applied. While the mootness

principle is "not a magical formula that automatically dissuades courts in resolving cases," so also should the exceptions not be considered magical formulas that should apply when the Court is minded to conduct a review despite the mootness of a petition. In other words, where an issue is moot on its face, the application of any of the exceptions should be subjected to a strict test because it is a deviation from the general rule. The Court should carefully test the exceptions to be applied from the perspectives both of legality and practical effects, and show by these standards that the issue absolutely requires to be resolved.

I do not believe that the exceptions were so tested and considered under the *ponencia.*

c. The Ponencia's Positions Refuted

i. Mootness and this Court's TRO

A first point the *ponencia* stresses with preeminence in its discussion of the mootness issue is the observation that "the signing of the MOA-AD did not push through due to the court's issuance of a Temporary Restraining Order." The implication, it seems, is that the intervening events subsequent to the filing of the petition and the issuance of the temporary restraining order (*TRO*) - specifically, the respondents' commitment that the MOA-AD shall not be signed in its present form or in any other form,[14] and the President's act of dissolving the GRP negotiating panel[15] - had no effect on the petitions because the signing of the MOA-AD had by then been stopped by our TRO. *I find this a disturbing implication as the petitions for prohibition presented live controversies up to and beyond the issuance of this Court's TRO; they were rendered moot only by the above mentioned intervening events.* By these intervening and unequivocal acts, the respondents effectively acknowledged that the MOA-AD should indeed not be signed as demanded by the petition. Thus, the TRO from this Court only immediately ensured that the MOA-AD would not be signed until this Court had spoken on the constitutional and statutory grounds cited by the petitions, but it was the respondents' acts that removed from controversy the issue of whether the MOA-AD should be signed or not. *In simpler terms, after the respondents declared that the MOA-AD would not be signed, there was nothing left to prohibit and no rights on the part the petitioners continued to be at risk of violation by the MOA-AD*. Thus, further discussion of the constitutionality of the MOA-AD now serves no useful purpose; as the discussion below will show, there may even be a considerable downside for our national interests if we inject another factor and another actor in the Mindanao conflict by ruling on the unconstitutionality of the MOA-AD.

ii. Mootness and Constitutional Implications

The *ponencia* posits as well that the MOA-AD has not been mooted because it has far-reaching constitutional implications and contains a commitment to amend and effect necessary changes to the existing legal framework. The same reason presented above suffices to defuse the *ponencia*'s fear about the adverse constitutional effects the MOA-AD may bring or might have brought: *without a signed MOA-AD none of these feared constitutional consequences can arise.*

From another perspective, what the *ponencia* appears to fear are the constitutional violations and adverse consequences of a *signed and effective* MOA-AD. These fears,

however, are relegated to the realm of speculation with the cancellation of the signing of the MOA-AD and the commitment that it shall not be signed in its present or any other form. Coupled with the subsequent dissolution of the GRP negotiating panel, **the government could not have communicated and conveyed any stronger message, *short of totally scuttling the whole peace process*, that it was not accepting the points covered by the aborted MOA-AD**. Government motivation for disavowing the aborted agreement is patently evident from Executive Order No. 3 that outlines the government's visions and intentions in the conduct of peace negotiations. That the GRP negotiating panel came up with a different result is a matter between the Executive and the negotiating panel and may be the immediate reason why the Executive's response was to forthwith dissolve the negotiating panel.

iii. GRP Obligation to Discuss Ancestral Domain

A consistent concern that runs through the *ponencia* is that the Philippines is bound under the GRP-MILF Tripoli Agreement on Peace signed by the government and the MILF in June 2001 to have an agreement on the Bangsamoro ancestral domain. This concern led the *ponencia* to conclude that the government decision not to sign the MOA-AD will not render the present petitions moot. In other words, the MOA-AD will recur and hence should be reviewed now.

A basic flaw in this conclusion is its unstated premise that the Philippines is *bound to come to an agreement* on ancestral domain, thereby equating the *commitment to discuss* this issue with the *obligation to have an agreement*. To quote the *ponencia's* cited Tripoli Agreement of June 2001,[16] the provision on Ancestral Domain Aspect reads:

> 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." [Emphasis supplied.]

Under these terms, it is plain that the GRP's commitment extends *only to the discussion* of the ancestral domain issue. The agreement to discuss, however, does not bind the GRP to come to an agreement; the GRP is merely bound *to try to reach an agreement or compromise.* Implicit in this commitment is that the Philippines can always say "no" to unacceptable proposals or walk away from the discussion if it finds the proposed terms unacceptable. This option has not been removed from the Philippines under any of the duly signed agreements on the Mindanao peace process. **I believe that this is the message that should come out in bold relief, not the *ponencia's* misreading of the June 2001 agreement.**

With the present MOA-AD effectively scuttled, the parties are back to the above quoted agreement under which the GRP bound itself to discuss ancestral domain with the MILF as part of the overall peace process. If the *ponencia's* fear relates to the *substance of these future talks*, these matters are not for this Court to rule upon as they belong to the realm of policy - a matter for other branches of government other than the Judiciary to determine. This Court can only speak with full force and authority on ripe, live, and actual controversies involving violations of constitutional or statutory rights.[17] As a rule, courts look back to past actions, using the

Constitution, laws, rules and regulations as standards, to determine disputes and violations of constitutional, and statutory rights; the legislature and the executive, on the other hand, look forward to address present and future situations and developments, with their actions limited by existing constitutional, statutory and regulatory parameters that the courts are duty-bound to safeguard. Thus, if this Court can speak at all on the substance of future talks, this can only be by way of a reminder that the government's positions can only be within constitutional and statutory parameters and subject to the strict observance of required constitutional and statutory procedures if future changes to the constitution and to current statutes are contemplated.

iv. Mootness and Paramount Public Interest

In justifying the application of the exception on the basis of paramount public interest, the *ponencia* noted that the MOA-AD involved a significant part of the country's territory and wide-ranging political modifications for affected local government units. It also claimed that the need for further legal enactments provides impetus for the Court to provide controlling principles to guide the bench, the bar, the public and the government and its negotiating entity.[18]

Unfortunately, the *ponencia's* justifications on these points practically stopped at these statements. Suprisingly, it did not even have an analysis of what the paramount public interest is and what would best serve the common good under the failed signing of the MOA-AD. We note, as a matter of judicial experience, that almost all cases involving constitutional issues filed with this Court are claimed to be impressed with public interest. It is one thing, however, to make a claim and another thing to prove that indeed an interest is sufficiently public, ripe, and justiciable to claim the attention and action of this Court. It must be considered, too, that while issues affecting the national territory and sovereignty are sufficiently weighty to command immediate attention, answers and solutions to these types of problems are not all lodged in the Judiciary; more than not, these answers and solutions involve *matters of policy* that essentially rest with the two other branches of government under our constitutional system,[19] with the Judiciary being called upon only where disputes and grave abuse of discretion arise in the course applying the terms of the Constitution and in implementing our laws.[20] Where policy is involved, we are bound by our constitutional duties to leave the question for determination by those duly designated by the Constitution - the Executive, Congress, or the people in their sovereign capacity.

In the present case, the peace and order problems of Mindanao are essentially matters for the Executive to address,[21] with possible participation from Congress and the sovereign people as higher levels of policy action arise. Its search for solutions, in the course of several presidencies, has led the Executive to the peace settlement process. As has been pointed out repetitively in the pleadings and the oral arguments, the latest move in the Executive's quest for peace - the MOA-AD - would have not been a good deal for the country if it had materialized. This Court, however, seasonably intervened and aborted the planned signing of the agreement. The *Executive, for its part, found it wise and appropriate to fully heed the signals from our initial action and from the public outcry the MOA-AD generated; it backtracked at the earliest opportunity in a manner consistent with its efforts to avoid or minimize bloodshed while preserving the peace process.* At the moment,

the peace and order problem is still with the Executive where the matter should be; the initiative still lies with that branch of government. The Court's role, under the constitutional scheme that we are sworn to uphold, is to allow the initiative to be where the Constitution says it should be.[22] We cannot and should not interfere unless our action is *unavoidably necessary* because the Executive is acting beyond what is allowable, or because it has failed to act in the way it should act, under the Constitution and our laws.

My conclusion is in no small measure influenced by two basic considerations.

First, the failure to conclude the MOA-AD as originally arranged by the parties has already resulted in bloodshed in Mindanao, with blood being spilled on all sides, third party civilians included. Some of the spilled blood was not in actual combat but in terror bombings that have been inflicted on the urban areas. To date, the bloodletting has showed no signs of abating.

Lest we become confused in our own understanding of the issues, the problems confronting us may involve the socio-economic and cultural plight of our Muslim and our indigenous brothers, but at core, they are peace and order problems. Though others may disagree, I believe that socio-economic and cultural problems cannot fully be addressed while peace and order are elusive. Nor can we introduce purely pacific solutions to these problems simply because we are threatened with violence as an alternative. *History teaches us that those who choose peace and who are willing to sacrifice everything else for the sake of peace ultimately pay a very high price; they also learn that there are times when violence has to be embraced and frontally met as the price for a lasting peace. This was the lesson of Munich in 1938 and one that we should not forget because we are still enjoying the peace dividends the world earned when it stood up to Hitler.*[23] In Mindanao, at the very least, the various solutions to our multi-faceted problems should come in tandem with one another and **never out of fear of threatened violence**.

Rather than complicate the issues further with judicial pronouncements that may have unforeseen or unforeseeable effects on the present fighting and on the solutions already being applied, this Court should exercise restraint as the fears immediately generated by a signed and concluded MOA-AD have been addressed and essentially laid to rest. Thus, rather than pro-actively act on areas that now are more executive than judicial, we should act with calibrated restraint along the lines dictated by the constitutional delineation of powers. Doing so cannot be equated to the failure of this Court to act as its judicial duty requires; as I mentioned earlier, we have judicially addressed the concerns posed with positive effects and we shall not hesitate to judicially act in the future, as may be necessary, to ensure that the integrity of our constitutional and statutory rules and standards are not compromised. If we exercise restraint at all, it is because the best interests of the nation and our need to show national solidarity at this point so require, in order that the branch of government in the best position to act can proceed to act.

Second, what remains to be done is to support the government as it pursues and nurses the peace process back to its feet after the failed MOA-AD. This will again entail negotiation, *not along the MOA-AD lines as this recourse has been tried and has failed*, but along other approaches that will fully respect our Constitution and existing laws, as had been done in the 1996 MNLF agreement. In this negotiation, the Executive should be given the widest latitude in exploring options and initiatives

in dealing with the MILF, the Mindanao peace and order problem, and the plight of our Muslim brothers in the long term. It should enjoy the full range of these options - *from changes in our constitutional and statutory framework to full support in waging war, if and when necessary* - subject only to the observance of constitutional and statutory limits. In a negotiation situation, the worse situation we can saddle the Executive with is to wittingly or unwittingly telegraph the Executive's moves and our own weaknesses to the MILF through our eagerness to forestall constitutional violations. We can effectively move as we have shown in this MOA-AD affair, but let this move be at the proper time and while we ourselves observe the limitations the Constitution commonly impose on all branches of government in delineating their respective roles.

v. The Need for Guidelines from this Court

The cases of *David v. Macapagal-Arroyo*, *Sanlakas v. Executive Secretary,* and *Lacson v. Perez* presented a novel issue that uncovered a gray area in our Constitution: in the absence of a specific constitutional provision, does the President have the power to declare a state of rebellion/national emergency? If the answer is in the affirmative, what are the consequences of this declaration?

David v. Macapagal-Arroyo answered these questions and went on to further clarify that a declaration of a state of national emergency did not necessarily authorize the President to exercise emergency powers such as the power to take over private enterprises under Section 17, Article XII of the Constitution. Prior to this case, the correlation between Section 17, Article XII and the emergency powers of the President under Section 23 (2), Article VI has never been considered.

In contrast, the present petitions and the intervening developments do not now present similar questions that necessitate clarification. Since the MOA-AD does not exist as a legal, effective, and enforceable instrument, it can neither be illegal nor unconstitutional. For this reason, I have not bothered to refute the statements and arguments about its unconstitutionality. I likewise see no reason to wade into the realm of international law regarding the concerns of some of my colleagues in this area of law.

Unless signed and duly executed, the MOA-AD can only serve as unilateral notes or a "wish list" as some have taken to calling it. If it will serve any purpose at all, it can at most serve as an indicator of how the internal processes involving the peace negotiations are managed at the Office of the President. But these are matters internal to that Office so that this Court cannot interfere, not even to make suggestions on how procedural mistakes made in arriving at the aborted MOA-AD should be corrected.

To be sure, for this Court to issue guidelines relating to unapplied constitutional provisions would be a useless exercise worse than the "defanging of paper tigers" that Mr. Justice Dante O. Tinga abhorred in *David v. Macapagal-Arroyo*.[24] In terms of the results of this exercise, the words of former Chief Justice Artemio Panganiban in *Sanlakas v. Executive Secretary* are most apt - "nothing is gained by breathing life into a dead issue."[25]

vi. The "Capable of Repetition but Evading Review" Exception

The best example of the "capable of repetition yet evading review" exception to mootness is in its application in *Roe v. Wade,*[26] the U.S. case where the American Supreme Court categorically ruled on the legal limits of abortion. Given that a fetus has a gestation period of only nine months, the case could not have worked its way through the judicial channels all the way up to the US Supreme Court without the disputed pregnancy being ended by the baby's birth. Despite the birth and the patent mootness of the case, the U.S. Supreme Court opted to fully confront the abortion issue because it was a situation clearly capable of repetition but evading review - the issue would recur and would never stand effective review if the nine-month gestation period would be the Court's only window for action.

In the Philippines, we have applied the "capable of repetition but evading review" exception to at least two recent cases where the Executive similarly backtracked on the course of action it had initially taken.

The earlier of these two cases - *Sanlakas v. Executive Secretary*[27] - involved the failed Oakwood mutiny of July 27, 2003. The President issued Proclamation No. 427 and General Order No. 4 declaring a "state of rebellion" and calling out the armed forces to suppress the rebellion. The President lifted the declaration on August 1, 2003 through Proclamation No. 435. Despite the lifting, the Court took cognizance of the petitions filed based on the experience of May 1, 2001 when a similar "state of rebellion" had been imposed and lifted and where the Court dismissed the petitions filed for their mootness.[28] The Court used the "capable of repetition but evading review" exception "to prevent similar questions from re-emerging ... and to lay to rest the validity of the declaration of a state of rebellion in the exercise of the President's calling out power, the mootness of the petitions notwithstanding."

The second case (preeminently cited in the present *ponencia*) is *David v. Macapagal-Arroyo*. The root of this case was Proclamation No. 1017 and General Order No. 5 that the President issued in response to the conspiracy among military officers, leftist insurgents of the New People's Army, and members of the political opposition to oust or assassinate her on or about February 24, 2006. On March 3, 2006, exactly one week after the declaration of a state of emergency, the President lifted the declaration. In taking cognizance of the petitions, the Court justified its move by simply stating that "the respondents' contested actions are capable of repetition."

Despite the lack of extended explanation in *David v. Macapagal-Arroyo*, the Court's actions in both cases are essentially correct because of the history of "emergencies" that had attended the administration of President Macapagal-Arroyo since she assumed office. Thus, by the time of *David v. Macapagal-Arroyo*, the Court's basis and course of action in these types of cases had already been clearly laid.

This kind of history or track record is, unfortunately, not present in the petitions at bar and no effort was ever exerted by the ponencia to explain why the exception should apply. Effectively, the *ponencia* simply textually lifted the exception from past authorities and superimposed it on the present case without looking at the factual milieu and surrounding circumstances. Thus, it simply assumed that the Executive and the next negotiating panel, or any panel that may be convened later, will merely duplicate the work of the respondent peace panel.

This assumption is, in my view, purely hypothetical and has no basis in fact in the way *David v. Macapagal-Arroyo* had, or in the way the exception to mootness was justified in *Roe v. Wade*. As I have earlier discussed,[29] the *ponencia's* conclusion made on the basis of the GRP-MILF Peace Agreement of June 2001 is mistaken for having been based on the wrong premises. Additionally, the pronouncements of the Executive on the conduct of the GRP negotiating panel and the parameters of its actions are completely contrary to what the *ponencia* assumed.

Executive Order No. 3 (entitled *Defining Policy and Administrative Structure for Government's Comprehensive Peace Efforts*) sets out the government's visions and the structure by which peace shall be pursued. Thus, its Section 2 states The Systematic Approach to peace; Section 3, The Three Principles of the Comprehensive Peace Process; Section 4, The Six Paths to Peace; and Section 5(c)the Government Peace Negotiating Panels.[30] The Memorandum of Instructions from the President dated March 2001 to the Government Negotiating Panel, states among others that:

> 1. The negotiations shall be conducted in accordance with the mandates of the Philippine Constitution, the Rule of Law, and the principles of the sovereignty and territorial integrity of the Republic of the Philippines.
>
> 2. The negotiation process shall be pursued in line with the national Comprehensive Peace Process, and shall seek a principled and peaceful resolution of the armed conflict, with neither blame nor surrender, but with dignity for all concerned.
>
> x x x
>
> 4. The general approach to the negotiations shall include the following:
>
> a. Seeking a middle ground between the aspirations of the MILF and the political, social and economic objectives of the Philippine Government;
> b. Coordinated Third Party Facilitation, where needed;
> c. Consultations with affected communities and sectors.[31]

Under these clear terms showing the Executive's vision on how the peace process and the negotiations shall proceed, I believe that it is fallacious to assume that any renewed negotiation with the MILF will entail a repetition of the discarded MOA-AD. Understandably, it may be asked why the MOA-AD turned out the way it did despite the negotiating panel's clear marching orders. The exact answer was never clarified during the oral arguments and I can only speculate that at some point, the negotiating panel lost its bearings and deviated from the clear orders that are still in force up to the present time. As I mentioned earlier,[32] this may be the reason why the negotiating panel was immediately dissolved. What is important though, for purposes of this case and of the peace and order situation in Mindanao, is that the same marching orders from the Executive are in place so that there is no misunderstanding as to what that branch of government seeks to accomplish and how it intends this to be done.

The fact that an issue may arise in the future - a distinct possibility for the *ponencia*

- unfortunately does not authorize this Court to render a purely advisory opinion, *i.e.*, one where a determination by this Court will not have any effect in the "real world". A court's decision should not be any broader than is required by the precise facts. Anything remotely resembling an advisory opinion or a gratuitous judicial utterance respecting the meaning of the Constitution must altogether be avoided. [33] At best, the present petitions may be considered to be for declaratory relief, but that remedy regrettably is not within this Court's original jurisdiction, as I have pointed out earlier.[34]

Finally, let me clarify that the likelihood that a matter will be repeated does not mean that there will be no meaningful opportunity for judicial review[35] so that an exception to mootness should be recognized. For a case to dodge dismissal for mootness under the "capable of repetition yet evading review" exception, two requisites must be satisfied: (1) the duration of the challenged action must be too short to be fully litigated prior to its cessation or expiration; and (2) there must be reasonable expectation that the same complaining party will be subjected to the same action again.[36]

The time constraint that justified *Roe v. Wade,* to be sure, does not inherently exist under the circumstances of the present petition so that judicial review will be evaded in a future litigation. As this Court has shown in this case, we can respond as fast as the circumstances require. I see nothing that would bar us from making a concrete ruling in the future should the exercise of our judicial power, particularly the exercise of the power of judicial review, be justified.

vii. The Right to Information

The petitions for *mandamus* essentially involved the demand for a copy of the MOA-AD based on the petitioners' right to information under Section 7, Article III of the 1987 Constitution. In light of the commonly-held view that the *mandamus* aspect of the petitions is now moot, focus now shifts to the right to consultation (an aspect of the constitutional right to information and as guaranteed under the Indigenous People's Rights Act[37] and the Local Government Code)[38] that the petitioners now capitalize on to secure the declaration of the nullity of the MOA-AD.

I note in this regard though that it is not so much the lack of consultations that the petitioners are rallying against, but the possibility under the MOA-AD's terms that they may be deprived of their lands and properties without due process of law (*i.e.,* that the lumads' ancestral domains will be included in and covered by the Bangsamoro Juridical Entity [*BJE*] without the benefit of prior consultations).[39] Thus, the equation they present to this Court is: lack of consultations = deprivation of property without due process of law.

The short and quick answer to this proprietary concern is that the petitioners' claim is premature. With the MOA-AD unsigned, their fears need not materialize. But even with a signed MOA-AD, I do not believe that the immediate deprivation they fear and their due process concerns are valid based alone on the terms of this aborted agreement. Under these terms, the MOA-AD's execution and signing are but parts of a series of acts and agreements; its signing was not be the final act that would render its provisions operative. The MOA-AD itself expressly provides that the mechanisms and modalities for its implementation will still have to be spelled out in

a Comprehensive Compact and will require amendments to the existing legal framework. This amendatory process, under the Constitution, requires that both Congress and the people in their sovereign capacity be heard. Thus, the petitioners could still fully ventilate their views and be heard even if the MOA-AD had been signed.

It is in the above sense that I doubt if the *ponencia's* cited case - *Chavez v. PEA*[40] - can serve as an effective authority for the *ponencia's* thesis: that the process of negotiations as well as the terms of the MOA-AD should have been fully disclosed pursuant to the people's right to information under Section 7, Article III and the government's duty to disclose under Section 28, Article II of the Constitution. The *Chavez* case dealt with a commercial contract that was perfected upon its signing; disclosure of information pertaining to the negotiations was therefore necessary as an objection *after the signing* would have been too late. As outlined above, this feature of a commercial contract does not obtain in the MOA-AD because subsequent acts have to take place before the points it covers can take effect. But more than this, the contract involved in *Chavez* and the purely commercial and proprietary interests it represents cannot simply be compared with the MOA-AD and the concerns it touched upon - recognition of a new juridical entity heretofore unknown in Philippine law, its impact on national sovereignty, and its effects on national territory and resources. If only for these reasons, I have to reject the *ponencia's* conclusions touching on the right to information and consultations.

My more basic disagreement with the *ponencia's* treatment of the right to information and the duty of disclosure is its seeming readiness to treat these rights as stand-alone rights that are fully executory subject only to the safeguards that Congress may by law interpose.

In the first place, it was not clear at all from the *ponencia's* cited constitutional deliberations that the framers intended the duty of disclosure to be immediately executory. The cited deliberation recites:

> MR. DAVIDE: I would to get some clarifications on this. Mr. Presiding Officer, did I get the Gentleman correctly as having said that this is not a self-executory provision? It would require a legislation by Congress to implement?
>
> MR. OPLE: Yes. Originally, it was going to be self-executing, but I accepted an amendment from Commissioner Regalado, so that the safeguards on national interests are modified by the clause "as may be provided by law."
>
> MR. DAVIDE: But as worded, does it not mean that this will immediately take effect and Congress may provide for reasonable safeguards on the sole ground of national interest?
>
> MR. OPLE: Yes. I think so, Mr. Presiding Officer, I said earlier that it should immediately influence the climate of the conduct of public affairs but, of course, Congress here may no longer pass a law revoking it, or if this is approved, revoking this principle, which is inconsistent with this policy. [41]

In my reading, while Mr. Davide was sure of the thrust of his question, Mr. Ople was equivocal about his answer. In fact, what he actually said was that his original intention was for the provision to be self-executing, but Mr. Regalado introduced an amendment. His retort to Mr. Davide's direct question was a cryptic one and far from the usual Ople reply - that the right should immediately influence the climate of public affairs, and that Congress can no longer revoke it.

Mr. Ople's thinking may perhaps be better understood if the exchanges in another deliberation - on the issue of whether disclosure should extend to the negotiations leading to the consummation of a state transaction - is considered. The following exchanges took place:

> MR. SUAREZ: And when we say `transactions' which should be distinguished from contracts, agreements, or treaties or whatever, does the Gentleman refer to the steps leading to the consummation of the contract, or does he refer to the contract itself?
>
> MR. OPLE: The `transactions' used here, I suppose is generic and therefore, it can cover both steps leading to a contract and already a consummated contract, Mr. Presiding Officer.
>
> MR. SUAREZ: This contemplates inclusion of negotiations leading to the consummation of the transaction.
>
> MR. OPLE: *Yes,* ***subject only to reasonable safeguards on the national interest***. [42]

Thus, even if Mr. Ople did indeed mean that the constitutional provisions on the right to information and the duty of disclosure may immediately be effective, these provisions have to recognize, other than those expressly provided by Congress, "reasonable safeguards on the national interest." In constitutional law, this can only refer to safeguards inherent from the nature of the state transaction, the state interests involved, and the power that the state may bring to bear, specifically, its police power. Viewed in this light, the duty to disclose the various aspects of the MOA-AD should not be as simplistic as the *ponencia* claims it to be as this subject again opens up issues this Court has only began to deal with in the Neri petition[43] and the JPEPA controversy.[44] Of course, this is not the time nor the case for a full examination of the constitutional right to information and the government's duty to disclose since the constitutionality of the MOA-AD is a dead issue.

As my last point on a dead issue, I believe that the *ponencia* did not distinguish in its discussion between the disclosure of information with respect to the *peace process in general* and the *MOA-AD negotiation in particular*. I do not believe that these two matters can be interchanged and discussed from the prisms of information and disclosure as if they were one and the same. The peace process as embodied in E.O. No. 3 relates to the wider government effort to secure peace in Mindanao through various offices and initiatives under the Office of the President interacting with various public and private entities at different levels in Mindanao. The peace negotiation itself is only a part of the overall peace process with specifically named officials undertaking this activity. Thus, the consultations for this general peace process are necessarily wider than the consultations attendant to the negotiations proper that has been delegated to the GRP Negotiating Panel. The dynamics and

depth of consultations and disclosure with respect to these processes should, of course, also be different considering their inherently varied natures. This confusion, I believe, renders the validity of the *ponencia's* discussions about the violation of the right to information and the government's duty of disclosure highly doubtful.

Conclusion

The foregoing reasons negate the existence of grave abuse of discretion that justifies the grant of a writ of prohibition. I therefore vote to **DISMISS** the consolidated petitions.

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[1] Respondents' Compliance dated August 7, 2008.

[2] G.R. 171396, May 3, 2006, 489 SCRA 161.

[3] Citing *Batangas v. Romulo*, 429 SCRA 736 (2004).

[4] Citing *Lacson v. Perez*, 357 SCRA 756 (2001).

[5] Citing *Province of Batangas*, *supra* note 3.

[6] Citing *Albana v. Comelec*, 435 SCRA 98 (2004); *Acop v. Guingona*, 383 SCRA 577 (2002); *Sanlakas v. Executive Secretary*, 421 SCRA 656 (2004).

[7] *Ponencia,* p. 32.

[8] *Supra* note 2, p. 214

[9] The cause of action in the present petition filed by the City of Iligan in G.R. No. 183893.

[10] See: *Delumen v. Republic*, 94 Phil. 287 (1954); *Allied Broadcasting Center, Inc. v. Republic*, G.R. No. 91500, October 18, 1990, 190 SCRA 782; *Mangahas v. Hon. Judge Paredes*, G.R. No. 157866¸ February 14, 2007, 515 SCRA 709.

[11] CONSTITUTION, Article VIII, Section 4(2).

[12] The 1987 Constitution of the Republic of the Philippines, *A Commentary* (2003 ed.), p. 938.

[13] *Lis mota* means the cause of the suit or action, 4 Campb.; *Moldex Realty, Inc. v. HLURB*, G.R. No. 149719, June 21, 200, 525 SCRA 198.

[14] Respondents' Compliance dated September 1, 2008 citing the Executive Secretary's Memorandum dated August 28, 2008.

[15] Respondents' Manifestation dated September 4, 2008 citing the Executive

Secretary's Memorandum dated September 3, 2008.

[16] Whose full title is *"Agreement on Peace between the Government of the Republic of the Philippines and the Moro Islamic Liberation Front."*

[17] See: *Badoy v. Ferrer*, G.R. No. L-32546, October 17, 1970, 35 SCRA 285; *Kilosbayan v. Garcia*, G.R. No. 113375, May 5, 1994, 232 SCRA 110.

[18] *Ponencia*, p. 33.

[19] See: *La Bugal-B'laan Tribal Association, Inc. v. Ramos*, G.R. No. 127882, December 1, 2004, 445 SCRA 1; *Abakada Guro Party List v. Ermita*, G.R. No. 168056, September 1, 2005, 469 SCRA 1.

[20] *NHA v. Reyes*, G.R. No. L-49439, June 29, 1983, 123 SCRA 245.

[21] CONSTITUTION, Article VII, Sections 1 and 18.

[22] See: *Fariñas v. Executive Secretary*, G.R. No. 147387, December 10, 2003, 417 SCRA 503.

[23] In 1938, Prime Minister Neville Chamberlain triumphantly returned to London from a peace agreement with Adolf Hitler in Munich, Germany. The Prime Minister then triumphantly announced that that he has been assured **"peace for our time."** Hitler started the Second World War on September 1, 1939.

[24] *Supra*, note 2, p. 282-283.

[25] G.R. 159085, February 3, 2004, 421 SCRA 656, 682.

[26] 410 U.S. 113 (1973).

[27] *Supra* note 24, p. 665.

[28] *Lacson v. Perez*, G.R. No. 147780, May 10, 2001, 357 SCRA 757.

[29] See: pp. 6 - 7 of this Concurring and Dissenting Opinion.

[30] **Section 2.** ***The Systematic Approach to Peace.*** The government shall continue to pursue a comprehensive, integrated and holistic approach to peace that is guided by the principles and processes laid down in this Executive Order. These shall provide the framework for the implementation, coordination, monitoring and integration of all government peace initiatives, and guide its partnership with civil society in the pursuit of a just and enduring peace.

Section 3. ***The Three Principles of the Comprehensive Peace Process.*** The comprehensive peace process shall continue to be governed by the following underlying principles:

a. A comprehensive peace process should be community-based, reflecting the sentiments, values and principles important to all Filipinos. Thus, it shall be defined not by the government alone, nor by the different contending groups only, but by all Filipinos as one community.

b. A comprehensive peace process aims to forge a new social compact for a just, equitable, humane and pluralistic society. It seeks to establish a genuinely pluralistic society, where all individuals and groups are free to engage in peaceful competition for predominance of their political programs without fear, through the exercise of rights and liberties guaranteed by the Constitution, and where they may compete for political power through an electoral system that is free, fair and honest.

c. A comprehensive peace process seeks a principled and peaceful resolution to the internal armed conflicts, with neither blame nor surrender, but with dignity for all concerned.

Section 4. *The Six Paths to Peace.* The components of the comprehensive peace process comprise the processes known as the "Paths to Peace". These components processes are interrelated and not mutually exclusive, and must therefore be pursued simultaneously in a coordinated and integrated fashion. They shall include, but may not be limited to, the following:

1. PURSUIT OF SOCIAL, ECONOMIC AND POLITICAL REFORMS. This component involves the vigorous implementation of various policies, reforms, programs and projects aimed at addressing the root causes of internal armed conflicts and social unrest. This may require administrative action, new legislation, or even constitutional amendments.
2. CONSENSUS-BUILDING AND EMPOWERMENT FOR PEACE. This component includes continuing consultations on both national and local levels to build consensus for a peace agenda and process, and the mobilization and facilitation of people's participation in the peace process.
3. PEACEFUL, NEGOTIATED SETTLEMENT WITH THE DIFFERENT REBEL GROUPS. This component involves the conduct of face-to-face negotiations to reach peaceful settlement with the different rebel groups. It also involves the effective implementation of peace agreements.
4. PROGRAMS FOR RECONCILIATION, REINTEGRATION INTO MAINSTREAM SOCIETY AND REHABILITATION. This component includes programs to address the legal status and security of former rebels, as well as community-based assistance programs to address the economic, social and psychological rehabilitation needs of former rebels, demobilized combatants and civilian victims of the internal armed conflicts.
5. ADDRESSING CONCERNS ARISING FROM CONTINUING ARMED HOSTILITIES.

   This component involves the strict implementation of laws and policy guidelines, and the institution of programs to ensure the protection of non-combatants and reduce the impact of the armed conflict on communities found in conflict areas.

6. BUILDING AND NURTURING A CLIMATE CONDUCIVE TO PEACE.

This component includes peace advocacy and peace education programs, and the implementation of various confidence-building measures.

Section 5. ***Administrative Structure.*** The Administrative Structure for carrying

out the comprehensive peace process shall be as follows:

C. GOVERNMENT PEACE NEGOTIATING PANELS. There shall be established Government Peace Negotiating Panels (GPNPs) for negotiations with different rebel groups, to be composed of a Chairman and four (4) members who shall be appointed by the President as her official emissaries to conduct negotiations, dialogues, and face-to-face discussions with rebel groups.

They shall report to the President, through the PAPP, on the conduct and progress of their negotiations. The GPNPs shall each be provided technical support by a Panel Secretariat under the direct control and supervision of the respective Panel Chairman. They shall be authorized to hire consultants and to organize their own Technical Committees to assist in the technical requirements for the negotiations.

Upon conclusion of a final peace agreement with any of the rebel groups, the concerned GPNP shall be dissolved. Its Panel Secretariat shall be retained in the Office of the Presidential Adviser on the Peace Process (OPAPP) for the purpose of providing support for the monitoring of the implementation of the peace agreement.

[31] President Arroyo's Memorandum of Instructions dated March 1, 2001; Paragraph 1 above, was reiterated in the President's Memorandum of Instruction dated September 8, 2003.

[32] See p. 6 of this Concurring and Dissenting Opinion.

[33] Van Alstyne, W., *Judicial Activism and Judicial Restraint*. http://novelguide.com/a/discover/eamc_03/ eamc_03_01379.html, last visited October 12, 2008.

[34] See p. 3 of this Concurring and Dissenting Opinion.

[35] *State of North Dakota v. Hansen*, 2006 ND 139.

[36] *Hain v. Mullin*, 327 F.3d 1177, 1180 (10th Cir. 2003) citing *United States v. Seminole Nation*, 327 F.3r 939 10th Cir. 2002.

[37] R.A. 8371.

[38] R.A. 7160.

[39] Petition filed by the Province of North Cotabato in G.R. No. 186591, p. 24-25; Memorandum filed the Province of North Cotabato, p. 71.

[40] G.R. No. 133250, July 9, 2002, 384 SCRA 152.

[41] Cited at p. 40 of the *Ponencia*; Record of the Constitutional Commission, Vol. V, pp. 28-29.

[42] Record of the Constitutional Commission, Vol. V, pp. 24 -25.

[43] *Neri v. Senate Committee,* G.R. No. 180643, March 25, 2008.

[44] *Akbayan v. Aquino,* G.R. No. 170516, July 16, 2008.

SEPARATE OPINION

AZCUNA, *J.:*

I agree with the *ponencia* but I hold the view that, had the MOA-AD been signed as planned, it would have provided a basis for a claim in an international court that the Philippines was bound by its terms at the very least as a unilateral declaration made before representatives of the international community with vital interests in the region.

Whether the case of *Australia v. France*[1] or that of *Burkina Faso v. Mali,*[2] is the one applicable, is not solely for this Court to decide but also for the international court where the Philippines could be sued. While we may agree that the Philippines should not be considered bound, the international court may rule otherwise. There is need to consult the people before risking that kind of outcome.

On this point, Martin Dixon and Robert McCorquodale, in their **Cases and Materials on International Law**, observe:

> **B. Unilateral statements**
> *Nuclear Test Cases (Australia v. France and New Zealand v. France)*
> Merits
> ICJ Rep. 1974 253, International Court of Justice
>
> Australia and New Zealand brought proceedings against France arising from nuclear tests conducted by France in the South Pacific. Before the Court had an opportunity to hear in full the merits of the case, statements were made by French authorities indicating that France would no longer conduct atmospheric nuclear tests. The court held by nine votes to six that, due to these statements by France, the claim of Australia and New Zealand no longer had any object and so the Court did not have to decide the issues in the case.
>
> It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an

> intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a *quid pro quo* nor any subsequent acceptance of the declaration, not even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made....
>
> x x x
>
> NOTES:
>
> 1. It is very rare that a Court will find that a unilateral statement will bind a State. In *Frontier Dispute Case (Burkina Faso v. Mali)* 1986 ICJ Rep 554, a Chamber of the International Court of Justice held that a statement by the President of Mali at a press conference did not create legal obligations on Mali, especially as `The Chamber considers that it has a duty to show even greater caution when it is a question of a unilateral declaration not directed to any particular recipient.' (para. 39).[3]

Finally, precedents are not strictly followed in international law, so that an international court may end up formulating a new rule out of the factual situation of our MOA-AD, making a unilateral declaration binding under a new type of situation, where, for instance, the other party is not able to sign a treaty as it is not yet a State, but the declaration is made to a "particular recipient" and "witnessed" by a host of sovereign States.

As to the rest, I concur.

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[1]1974 I.C.J. 253.

[2]1986 I.C.J. 554.

[3]Pp. 59-61, emphasis supplied.

SEPARATE OPINION

Tinga, *J.*:

As a matter of law, the petitions were mooted by the unequivocal decision of the Government of the Philippines, through the President, not to sign the challenged Memorandum of Agreement on Ancestral Domain (MOA-AD). The correct course of action for the Court is to dismiss the petitions. The essential relief sought by the petitioners-a writ of prohibition under Rule 65-has already materialized with the Philippine government's voluntary yet unequivocal desistance from signing the MOA-AD, thereby depriving the Court of a live case or controversy to exercise jurisdiction

upon.

At the same time, I deem it impolitic to simply vote for the dismissal the cases at bar without further discourse in view of their uniqueness in two aspects. At the center is an agreement and yet a party to it was not impleaded before it was forsaken. And while the unimpleaded party is neither a state nor an international legal person, the cases are laden with international law underpinnings or analogies which it may capitalize on to stir adverse epiphenomenal consequences.

According to news reports, the Moro Islamic Liberation Front (MILF) has adopted the posture that as far as it is concerned, the MOA-AD is already effective, and there may be indeed a tenuous linkage between that stance and the apparent fact that the MOA-AD, though unsigned, bears the initials of members of the Philippine negotiating panel, the MILF negotiating panel and the peace negotiator of the Malaysian government. These concerns warrant an extended discussion on the MOA-AD, even if the present petitions are moot and academic.

I.

It is a bulwark principle in constitutional law that an essential requisite for a valid judicial inquiry is the existence of an actual case or controversy. A justiciable controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree that is conclusive in character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.[1] The exercise of the power of judicial review depends upon the existence of a case or controversy. Consequently, if a case ceases to be a lively controversy, there is no justification for the exercise of the power, otherwise, the court would be rendering an advisory opinion should it do so.[2]

We held in *Gancho-on v. Secretary of Labor*:[3]

> It is a rule of universal application, almost, that courts of justice constituted to pass upon substantial rights will not consider questions in which no actual interests are involved; they decline jurisdiction of moot cases. And where the issue has become moot and academic, there is no justiciable controversy, so that a declaration thereon would be of no practical use or value.There is no actual substantial relief to which petitioners would be entitled and which would be negated by the dismissal of the petition.

In the recent ruling in *Suplico v. NEDA*,[4] the President officially desisted from pursuing a national government project which was challenged before this Court. The Court was impelled to take mandatory judicial notice[5] of the President's act, and consequently declare the pending petitions as moot and academic. The Court, through Justice Reyes, held:

> Concomitant to its fundamental task as the ultimate citadel of justice and legitimacy is the judiciary's role of strengthening political stability indispensable to progress and national development.Pontificating on issues which no longer legitimately constitute an actual case or controversy will do more harm than good to the nation as a whole.Wise

> exercise of judicial discretion militates against resolving the academic issues, as petitioners want this Court to do.This is especially true where, as will be further discussed, the legal issues raised cannot be resolved without previously establishing the factual basis or antecedents.
>
> Judicial power presupposes actual controversies, the very antithesisof mootness.In the absence of actual justiciable controversies or disputes, the Court generally opts to refrain from deciding moot issues.Where there is no more live subject of controversy, the Court ceases to have a reason to render any ruling or make any pronouncement.
>
> ***Kapag wala nang buhay na kaso, wala nang dahilan para magdesisyon ang Husgado.***[6]

The live controversy relied upon by the petitions was the looming accession by the Philippine government to the MOA-AD, through a formal signing ceremony that was to be held at Kuala Lumpur, Malaysia, on 5 August 2008. This ceremony was prevented when the Court issued a Temporary Restraining Order on 4 August 2008, yet even after the TRO, it appeared that the Government then was still inclined to sign the MOA-AD after the legal obstacles had been cleared. However, on 1 September 2008, the Government through the Office of the Solicitor General, filed a Compliance, manifesting the pronouncement of Executive Secretary Ermita that " [n]o matter what the Supreme Court ultimately decides[,] the government will not sign the MOA." This declared intent was repeated in a Manifestation dated 4 September 2008, and verbally reiterated during the oral arguments before this Court.

In addition, the President herself publicly declared, as recently as on 2 October 2008, that regardless of the ruling of the Supreme Court on these petitions, her government will not sign the MOA-AD, "in the light of the recent violent incidents committed by MILF lawless groups."[7] Clearly following *Suplico* the Court has no choice but to take mandatory judicial notice of the fact that the Government will not sign or accede to the MOA-AD and on this basis dismiss to the petitions herein.

Thus, the Court is left with petitions that seek to enjoin the Government from performing an act which the latter had already avowed not to do. There is no longer a live case or controversy over which this Court has jurisdiction. Whatever live case there may have been at the time the petitions were filed have since become extinct.

Admittedly, there are exceptions to the moot and academic principle. The fact that these exceptions are oft-discussed and applied in our body of jurisprudence reflects an unbalanced impression, for most petitions which are rendered moot and academic are usually dismissed by way of unsigned or minute resolutions which are not published in the Philippine Reports or the Supreme Court Reports Annotated. Still, the moot and academic principle remains a highly useful and often applied tool for the Court to weed out cases barren of any current dispute. Indeed, even with those exceptions in place, there is no mandatory rule that would compel this Court to exercise jurisdiction over cases which have become academic. For the exceptions to apply, it would be necessary, at bare minimum, to exhibit some practical utilitarian value in granting the writs of prohibition sought. Otherwise, the words of the Court would be an empty exercise of rhetoric that may please some ears, but would not have any meaningful legal value.

A usual exception to the moot and academic principle is where the case is capable of repetition yet evading review. A recent example where the Court applied that exception was in *Sanlakas v. Executive Secretary*,[8] which involved the power of the President to declare a state of rebellion. Therein, the Court decided to exercise jurisdiction "[t]o prevent similar questions from re-emerging."[9] It was clear in *Sanlakas* that the challenged act, the declaration by the President of a state of rebellion was a unilateral act that was clearly capable of repetition, it having actually been accomplished twice before.

Contrast that situation to this case, where the challenged act is not a unilateral act that can be reproduced with ease by one person or interest group alone. To repeat the challenged act herein, there would have to be a prolonged and delicate negotiation process between the Government and the MILF, both sides being influenced by a myriad of unknown and inconstant factors such as the current headlines of the day. Considering the diplomatic niceties involved in the adoption of the MOA-AD, it is well-worth considering the following discussion on the complexity in arriving at such an agreement:

> The making of an international agreement is not a simple single act. It is rather a complex process, requiring performance of a variety of different functions or tasks by the officials of a participating state.
>
> Among the functions which must be distinguished for even minimal clarity are the following: (1) the formulation of rational policies to guide the conduct of negotiations with other states; (2) the conduct of negotiations with the representatives of other states; (3) the approval of an agreement for internal application within the state, when such internal application is contemplated; (4) the approval of an agreement for the external commitment of the state; (5) the final utterance of the agreement as the external commitment of the state to other states. [10]

Assuming that the act can be repeated at all, it cannot be repeated with any ease, there being too many cooks stirring the broth. And further assuming that the two sides aree able to negotiate a new MOA-AD, it is highly improbable that it would contain exactly the same provisions or legal framework as the discarded MOA-AD.

II.

Even though the dismissal of these moot and academic petitions is in order in my view, there are nonetheless special considerations that warrant further comment on the MOA-AD on my part.

As intimated earlier, the MILF has adopted the public position that as far as it is concerned, the MOA-AD has already been signed and is binding on the Government. To quote from one news report:

> "The MILF leadership, which is the Central Committee of the MILF, has an official position. that the memorandum of agreement on the Bangsamoro Ancestral Domain has been signed," said Ghadzali Jaafar, MILF vice chairman for political affairs.

xxx

> Jaafar said the MILF considers the MOA binding because its draft agreement was "initialed" last July 27 in Kuala Lumpur by Rodolfo Garcia, government chief negotiator; Mohagher Iqbal, MILF chief negotiator; Hermogenes Esperon, presidential adviser on the peace process, and Datuk Othman bin Abdulrazak, chief peace facilitator for the Malaysian government.
>
> "Our position is that after initialing, both parties initialed the MOA, that is a signing," Jaafar said.
>
> Jaafar said the scheduled signing yesterday in Kuala Lumpur was merely "ceremonial and a formality, in a way to announce to all throughout the world that a memorandum of agreement has been signed but actually the signing, actual signing was done."
>
> "So it's a done deal as far as the MILF is concerned," he said.
>
> Jaafar said the MILF and the government set a ceremonial signing of the MOA "because this is a very important document."
>
> "We want to be proud of it we want to announce it throughout the world that there is a memorandum of agreement between the Moro Islamic Liberation Front and the government of the Republic of the Philippines."
>
> He said the MILF expects the government to abide by the MOA "because this agreement is binding on both parties."[11]

It appears that the persons who initialed the MOA-AD were Philippine Presidential Peace Adviser Hermogenes Esperon, Jr., Philippine government peace negotiator Rodolfo Garcia, MILF chief negotiator Mohagher Iqbal, and Datuk Othman bin Abdulrazak, chief peace facilitator of the Malaysian government.[12]

The MILF is not a party to these petitions, and thus its position that the MOA-AD was in fact already signed through the initials affixed by representatives of the Philippine and Malaysian governments and the MILF has not been formally presented for the Court for adjudication. In an earlier submission to the Court, I discussed the position of the MILF from the following perspective:

> There is the danger that if the petitions were dismissed for mootness without additional comment, it will be advocated by persons so interested as to make the argument that the intrinsic validity of the MOA-AD provisions has been tacitly affirmed by the Court. Moreover, the unqualified dismissal of the petitions for mootness will not preclude the MILF from presenting the claim that the MOA-AD has indeed already been signed and is therefore binding on the Philippine government. These concerns would especially be critical if either argument is later presented before an international tribunal, that would look to the present ruling of this Court as the main authority on the status of the MOA-AD under Philippine internal law.

The use of municipal law rules for international judicial and arbitral procedure has been more common and more specific than any other type of application.[13] The International Court of Justice has accepted *res judicata* as applicable to international litigation.[14] The following observations by leading commentators on international law should give pause for thought:

> It is clear that, in general, judicial decisions (of national tribunals) in cases involving international law, domestic as well as international, can and will be cited for their persuasiveness by parties to an international legal dispute, the decisions of courts and other tribunals often being seen to affirm or announce a treaty-based rule or interpretation, a tenet of customary international law, or a general principle of law, international or domestic. **Judicial decisions are seen as trustworthy evidence of what the law really is on a given subject**; and this point is verified by most of the leading international adjudicative and arbitral decisions that have helped to lay the foundations of, and otherwise articulate, the substance of international law.[15] (Words in parenthesis and emphasis supplied)

Thus, in my earlier submission, I stated that should this matter ever be referred to an international tribunal for adjudication, it is highly probable that a ruling based on mootness alone without more would be taken as an indicative endorsement of the validity of the MOA under Philippine law. That misimpression should be rectified for purposes that transcend the ordinary adjudicative exercise, I stressed.

Firstly, is the MILF correct when it asserted that the MOA-AD may already be considered as binding on the Philippine government?

Reference to the initialed but unsigned copy of the MOA-AD is useful.[16] There are three distinct initials that appear at the bottom of each and every page of the 11-page MOA-AD: that of Garcia and Esperon for the Philippine negotiating panel, and that of Iqbal for the MILF. Page 11, the signature page, appears as follows:

> IN WITNESS WHEREOF, the undersigned being the representatives of the Parties hereby affix their signatures.
>
> Done this 5th day of August, 2008 in Kuala Lumpur, Malaysia.
>
> | FOR THE GRP | FOR THE MILF |
> |---|---|
> | (unsigned)
RODOLFO C. GARCIA
Chairman
GRP Peace Negotiating Panel | (unsigned)
MOHAGHER IQBAL
Chairman}
MILF Peace Negotiating Panel |
>
> WITNESSED BY:
>
> (unsigned)
> DATUK OTHMAN BIN ABD RAZAK
> Special Adviser to the Prime Minister
>
> ENDORSED BY:

(unsigned)
AMBASSADOR SAYED ELMASRY

Adviser to Organization of the Islamic Conference (OIC) Secretary General and Special Envoy for Peace Process in Southern Philippines

IN THE PRESENCE OF:

(unsigned) DR. ALBERTO G. ROMULO DATO' SERI UTAMA Secretary of Foreign Affairs Republic of the Philippines	(unsigned) DR. RAIS BIN YATIM Minister of Foreign Affairs Malaysia

Initialed by

Sec. Rodolfo Garcia (initialed)

Mohagher Iqbal (initialed)

Sec. Hermogenes Esperon (initialed)

Witnessed by:

Datuk Othman bin Abd Razak (initialed)

Dated 27 July 2008

Two points are evident from the above-quoted portion of the MOA-AD. *First*, the affixation of signatures to the MOA-AD was a distinct procedure from the affixation of initials to the pages of the document. Initialization was accomplished on 27 July 2008, while signature was to have been performed on 5 August 2008. The initialing was witnessed by only one person, Razak, while the signing of the MOA-AD was to have been witnessed by the respective heads of the Foreign Affairs departments of the Philippines and Malaysia. Clearly, signing and initialing was not intended to be one and the same.

Second, it is unequivocal from the document that the MOA-AD was to take effect upon the affixation of signatures on 5 August 2008 in Kuala Lumpur, Malaysia, and not through the preliminary initialing of the document on 27 July 2008.

Under our domestic law, consent of the parties is an indispensable element to any valid contract or agreement.[17] The three stages of a contract include its negotiation or preparation, its birth or perfection, and its fulfillment or consummation. The perfection of the contract takes place only upon the concurrence of its three essential requisites - consent of the contracting parties, object certain which is the subject matter of the contract, and cause of the obligation which is established.[18] Until a contract is perfected, there can be no binding commitments arising from it, and at any time prior to the perfection of the contract, either negotiating party may stop the negotiation.[19]

Consent is indubitably manifested through the signature of the parties. That the

Philippine government has not yet consented to be bound by the MOA-AD is indubitable. The parties had agreed to a formal signature ceremony in the presence of the Secretary of Foreign Affairs, the *alter ego* of the President of the Philippines. The ceremony never took place. The MOA-AD itself expresses that consent was to manifested by the affixation of signatures, not the affixation of initials. In addition, the subsequent announcement by the President that the Philippine Government will not sign the MOA-AD further establishes the absence of consent on the part of the Philippines to the MOA-AD. Under domestic law, the MOA-AD cannot receive recognition as a legally binding agreement due to the absence of the indispensable requisite of consent to be bound.

Nonetheless, it is unlikely that the MILF or any other interested party will seek enforcement of the MOA with the Philippine courts. A more probable recourse on their part is to seek enforcement of the MOA before an international tribunal. Could the Philippines be considered as being bound by the MOA under international law?

Preliminarily, it bears attention that Justice Morales has exhaustively and correctly debunked the proposition that the MOA-AD can be deemed a binding agreement under international law, or that it evinces a unilateral declaration of the Philippine government to the international community that it will grant to the Bangsamoro people all the concessions stated in the MOA-AD. It would thus be improper to analyze whether the MOA-AD had created binding obligations through the lens of international law or through an instrument as the Vienna Convention on the Law of Treaties, as it should be domestic law alone that governs the interpretation of the MOA-AD.

Nonetheless, even assuming that international law principles can be utilized to examine that question, it is clear that the MILF's claim that the MOA-AD is already binding on the Philippine government will not prevail.

The successful outcome of negotiation of international agreements is the adoption and authentication of the agreed text.[20] Once a written text is agreed upon and adopted, it is either signed, or initialed and subsequently signed by the diplomats and then submitted to the respective national authorities for ratification.[21] Once a treaty has been adopted, the manner in which a state consents to be bound to it is usually indicated in the treaty itself.[22] Signature only expresses consent to be bound when it constitutes the final stage of a treaty-making process.[23]

Reisman, Arsanjani, Wiessner & Westerman explain the procedure in the formation of international agreements, including the distinction between initialing and signing:

> Treaties are negotiated by agents of states involved. Usually, once the agents agree on a text, the authenticity of this agreed-upon mutual commitment is confirmed by the agents placing their initials on the draft agreement ("initialing"). Their principals, usually the heads of state or their representatives, then sign the treaty within a time period specified in the treaty, and submit it to internal processes, usually legislative authorities, for approval. Once this approval is secured, the heads of state express the consent of their state to be bound by depositing an instrument of ratification with the depositary power (in the case of a multilateral treaty) or with the other state party (in the case of a bilateral

> treaty). In the case of a multilateral treaty not signed in time, a state can still validly declare its consent to be bound by submitting an instrument of accession.[24]

This discussion is confirmatory that initialing is generally not the act by which an international agreement is signed, but a preliminary step that confirms the authenticity of the agreed-upon text of the agreement. The initialing of the agreement reflects only the affirmation by the negotiating agents that the text of the prospective agreement is authentic. It is plausible for the negotiating agents to have initialed the agreement but for the principal to later repudiate the same before signing the agreement.

Article 12(2)(a) of the Vienna Convention on the Law of Treaties does provide that "the initialing of a text constitutes a signature of the treaty when it is established that the negotiating States so agreed." At bar, it is evident that there had been no agreement that the mere initialing of the MOA-AD would constitute the signing of the agreement. In fact, it was explicitly provided in the MOA-AD that the signing of the agreement would take place on a date different from that when the document was initialed. Further, a formal signing ceremony independent of the initialing procedure was scheduled by the parties.

The fact that the MOA-AD reflects an initialing process which is independent of the affixation of signatures, which was to be accomplished on a specific date which was days after the MOA-AD was initialed, plainly indicates that the parties did not intend to legally bind the parties to the MOA through initialing. There is no cause under international law to assume that the MOA-AD, because it had been initialed, was already signed by the Philippine Government or the MILF even.

III.

The position of the MILF that the MOA-AD already creates binding obligations imposable on the Government cannot ultimately be sustained, even assuming that the initialing of the document had such binding effect. That position of the MILF supposes that the provisions of the MOA-AD are intrinsically valid under Philippine law. **It takes no inquiry at great depth to be enlightened that the MOA-AD is incongruous with the Philippine Constitution**.

The Constitution establishes a framework for the administration of government through political subdivisions. The territorial and political subdivisions of the Republic of the Philippines are the provinces, cities, municipalities, and barangays.[25] In addition, there shall be autonomous regions in Muslim Mindanao and the Cordilleras, in accordance with respective organic acts enacted by Congress.[26] The Constitution has adopted decentralization as a governing principle with respect to local government rule, and this especially holds true with respect to the autonomous regions. As we explained in *Disomangcop v. DPWH*:[27]

> Regional autonomy is the degree of self-determination exercised by the local government unit vis-à-vis the central government.
>
> In international law, the right to self-determination need not be understood as a right to political separation, but rather as a complex net of legal-political relations between a certain people and the state

> authorities. It ensures the right of peoples to the necessary level of autonomy that would guarantee the support of their own cultural identity, the establishment of priorities by the community's internal decision-making processes and the management of collective matters by themselves.
>
> If self-determination is viewed as an end in itself reflecting a preference for homogeneous, independent nation-states, it is incapable of universal application without massive disruption. However, if self-determination is viewed as a means to an end--that end being a democratic, participatory political and economic system in which the rights of individuals and the identity of minority communities are protected--its continuing validity is more easily perceived.
>
> Regional autonomy refers to the granting of basic internal government powers to the people of a particular area or region with least control and supervision from the central government.
>
> The objective of the autonomy system is to permit determined groups, with a common tradition and shared social-cultural characteristics, to develop freely their ways of life and heritage, exercise their rights, and be in charge of their own business. This is achieved through the establishment of a special governance regime for certain member communities who choose their own authorities from within the community and exercise the jurisdictional authority legally accorded to them to decide internal community affairs.
>
> In the Philippine setting, regional autonomy implies the cultivation of more positive means for national integration. It would remove the wariness among the Muslims, increase their trust in the government and pave the way for the unhampered implementation of the development programs in the region. xxx[28]

At the same time, the creation of autonomous regions does not signify the establishment of a sovereignty distinct from that of the Republic, as it can be installed only "within the framework of this Constitution and the national sovereignty as well as territorial integrity of the Republic of the Philippines."[29]

At present, the constitutional mandate of local autonomy for Muslim Mindanao has already been implemented. Republic Act No. 6734 (R.A. 6734), entitled*"An Act Providing for An Organic Act for the Autonomous Region in Muslim Mindanao*,"was enacted and signed into law on 1 August 1989.The law contains elaborate provisions on the powers of the Regional Government and the areas of jurisdiction which are reserved for the National Government. The year 2001 saw the passage of Republic Act No. 9054, entitled "An Act to Strengthen and Expand the Organic Act for the Autonomous Region in Muslim Mindanao, Amending for the Purpose

Republic Act No. 6734, entitled An Act Providing for the Autonomous Region in Muslim Mindanao, as Amended." Rep. Act No. 9054 contains detailed provisions on the powers of the Regional Government and the retained areas of governance of the National Government.

Nothing prevents Congress from amending or reenacting an Organic Act providing for an autonomous region for Muslim Mindanao, even one that may seek to accommodate the terms of the MOA-AD. Nonetheless, the paramount requirement remains that any organic act providing for autonomy in Mindanao must be in alignment with the Constitution and its parameters for regional autonomy.

The following provisions from Article X of the Constitution spell out the scope and limitations for the autonomous regions in Mindanao and the Cordilleras:

> Sec. 18. The Congress shall enact an organic act for each autonomous region with the assistance and participation of the regional consultative commission composed of representatives appointed by the President from a list of nominees from multisectoral bodies. The organic act shall define the basic structure of government for the region consisting of the executive department and legislative assembly, both of which shall be elective and representative of the constituent political units. The organic acts shall likewise provide for special courts with personal, family, and property law jurisdiction consistent with the provisions of this Constitution and national laws.
>
> The creation of the autonomous region shall be effective when approved by majority o the votes cast by the constituent units in a plebiscite called for the purpose, provided that only provinces, cities, and geographic areas voting favorably in such plebiscite shall be included in the autonomous region.
>
> Sec. 20. Within its territorial and subject to the provisions of this Constitution and national laws, the organic act of autonomous regions shall provide for legislative powers over:
>
> (1) Administrative organization;
> (2) Creation of sources of revenues;
> (3) Ancestral domain and natural resources;
> (4) Personal, family, and property relations;
> (5) Regional urban and rural planning development;
> (6) Economic, social, and tourism development;
> (7) Educational policies;
> (8) Preservation and development of the cultural heritage; and
> (9) Such other matters as may be authorized by law for the promotion of the general welfare of the people of the region.
>
> Sec. 21. The preservation of peace and order within the regions shall be the responsibility of the local police agencies which shall be organized, maintained, supervised, and utilized in accordance with applicable laws. The defense and security of the regions shall be the responsibility of the National Government.

The autonomous regional government to be established through the organic act consists of the executive and legislative branches of government, both of which are elective. With respect to the judicial branch, the Constitution authorizes the organic acts to provide for special courts with jurisdiction limited over personal, family and property law. The scope of legislative powers to be exercised by the autonomous

legislative assembly is limited to the express grants under Section 20, Article X. The national government retains responsibility over the defense and security of the autonomous regions. In addition, under Section 17, Article X, "[a]ll powers, functions, and responsibilities not granted by this Constitution or by law to the autonomous regions shall be vested in the National Government."

The MOA-AD acknowledges that the Bangsamoro Juridical Entity (BJE) shall have authority and jurisdiction over the territory defined in the agreement as the ancestral domain of the Bangsamoro people. For the BJE to gain legal recognition under the Constitution, it must be identifiable as one of the recognized political subdivisions ordained in the Constitution. That is not the case. In fact, it is apparent that the BJE would have far superior powers than any of the political subdivisions under the Constitution, including the autonomous regional government for Muslim Mindanao.

The powers of government extended to the BJE are well in excess than that which the Constitution allocates to the autonomous regional government for Muslim Mindanao. For example, it was agreed upon in the MOA that:

> [T]he BJE shall be empowered to build, develop and maintain its own institutions, inclusive of, civil service, electoral, financial and banking, education, legislation, legal, economic, and police and internal security force, judicial system and correctional institutions, necessary for developing a progressive Bangsamoro society...[30]

Under the Constitution, the extent through which the autonomous regional government could establish a judicial system was confined to the extent of courts with jurisdiction over personal, property and family law.[31] Obviously, the MOA-AD intends to empower the BJE to create a broader-based judicial system with jurisdiction over matters such as criminal law or even political law. This provision also derogates from the authority of the constitutional commissions, most explicitly the Civil Service Commission (CSC) and the Commission on Elections (COMELEC). The CSC administers the civil service, which embraces all branches, subdivisions, instrumentalities, and agencies of the Government.[32] Yet the MOA-AD would empower the BJE to build, develop and maintain its own civil service. The BJE is likewise authorized to establish its own electoral institutions. Yet under the Constitution, it is the COMELEC which has the exclusive power to enforce and administer election laws.[33]

Much of the MOA-AD centers on agreements relating to the exploitation of the economic resources over the proposed Bangsamoro homeland. The BJE is vested with jurisdiction, power and authority over land use, development, utilization, disposition and exploitation of natural resources within that territory. To that end, the BJE is empowered "to revoke or grant forest concessions, timber license, contracts or agreements in the utilization and exploitation of natural resources."[34] One provision of the MOA-AD makes it certain that it is the BJE which has exclusive jurisdiction in the exploitation of natural resources, particularly those utilized in the production of energy:

> Jurisdiction and control over, and the right of exploring for, exploiting, producing and obtaining all potential sources of energy, petroleum, in situ, fossil fuel, mineral oil and natural gas, whether onshore or offshore,

> is vested in the Bangsamoro juridical entity as the party having control within its territorial jurisdiction, provided that in times of national emergency, when public interest so requires, the Central Government may, during the emergency, for a fixed period and under reasonable terms as may be agreed by both Parties, temporarily assume or direct the operations of such strategic resources.[35]

These powers, which are unavailable to any of the political subdivisions, are reserved under the Constitution to the Republic as the owner of all lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources.[36]

As a corollary to the BJE's power over the exploitation of natural resources, the MOA-AD accords it freedom "to enter into any economic cooperation and trade relations with foreign countries," including "the option to establish and open Bangsamoro trade mission in foreign countries with which it has economic cooperation agreements."[37] Such a "freedom" is contrary to the long-established principle that "[i]n our system of government, the President, being the head of state, is regarded as the sole organ and authority in external relations and is the country's sole representative with foreign nations."[38]

The MOA-AD even assures that "the Central Government shall take necessary steps to ensure the Bangsamoro juridical entity's participation in international meetings and events, e.g. ASEAN meetings and other specialized agencies of the United Nations."[39] These terms effectively denote a concession on the part of the Republic of the Philippines of a segregate legal personality to the BJE before international fora.

It bears reminder that regional autonomy under Article X of the Constitution remains "within the framework of this Constitution and the national sovereignty as well as territorial integrity of the Republic of the Philippines". These provisions of the MOA-AD are extra-constitutional and diminish national sovereignty as they allocate to the BJE powers and prerogatives reserved under the Constitution to the State. Clearly, the framework of regional government that premises the MOA-AD is unworkable within the context of the Constitution.

IV.

A member of the GRP Peace Panel, Atty. Sedfrey Candelaria, had admitted to the Court during the oral arguments held on 29 August 2008 that the implementation of the MOA-AD would require amendments to the Constitution. That admission effectively concedes that the MOA-AD is inconsistent with the Constitution, and thus cannot acquire valid status under Philippine law.

It was evident thought on the part at least of the Philippine negotiating panel, that the price for peace in Mindanao involved in part, the amendment of the Philippine Constitution. There is nothing theoretically wrong with that notion, but because that choice is the most fundamental one the sovereign people can adopt, any binding commitment to enact charter change undertaken by an agent of government must be intensely scrutinized.

Any legally binding commitment to amend the Constitution can only come from the political institutions and the sovereign people who are empowered by the charter to amend the Constitution. The President nor any other member or office of the executive branch does not have the power to effect changes to the Constitution even if he wanted to in the paramount interest of the country and of the people. Any commitment to any entity on the part of the President or his political appointees to amend the Constitution is inherently *ultra vires*, because the Executive Branch does not have the innate power to effectuate such changes on its own. Neither does the President have the power to bind to positive action those whom the Constitution entrusts the power to amend the charter, namely; the Congress, the delegates to a constitutional convention, and the electorate.

Constitutional order cannot be sacrificed for expediency, even if in the name of peace in Mindanao. Assuming that the executive branch has in good faith become intractably convinced that it is necessary to amend the Constitution in order to obtain lasting peace in Mindanao, the consequent step should not be to make promises it has no power alone to keep, hoping against hope that the Congress and the voters would ultimately redeem the promises. Since constitutional amendments are involved, the ability of the executive branch to undertake any legally binding commitment to amend the Constitution can only be recognized, if at all, with the prior appropriate authorization of Congress, acting with the specified majorities provided in Section 1(1), Article XVII of the Constitution.[40] Under such a mechanism, any constitutionally-oriented concessions offered by the Philippine government would contemporaneously bear the preliminary seal of approval by the people or institutions authorized to propose amendments to the Constitution, subject to final ratification by the people through a plebiscite.

The Government would have been spared of the embarrassment and outcry had it acted with more prudence by first securing the necessary political mandate to undertake charter change for the benefit of Mindanao, instead of acting brashly and rashly by acceding at the outset to the undertaking without consulting the Congress or the people. In the end, the issuance of the TRO by this Court proved highly providential, as even the Government wound up seeing the proverbial light before it was too late.

With the foregoing qualifications, I vote to dismiss the petitions and register my dissent from the result reached by the majority.

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[1] I. CRUZ. CONSTITUTIONAL LAW (2007 ed.), at 23. See ALSO R. MARTIN, PHILIPPINE CONSTITUTIONAL LAW (1954 ed.), at 56-57.

[2] V. MENDOZA, JUDICIAL REVIEW OF CONSTITUTIONAL QUESTION: CASES AND MATERIALS (2004 ed.), at 107.

[3] 337 Phil. 654, 658 (1997).

[4] G.R. No. 178830, 14 July 2008. Available at http://www.supremecourt.gov.ph/jurisprudence /2008/july2008/178830.htm.

[5] Under Section 1, Rule 129 of the Rules of Court. "*Judicial Notice,when mandatory.* -A court shall take judicial notice,without introduction of evidence, of the existence and territorial extent of states, their political history, forms of government and symbols of nationality, the law of nations, the admiralty and maritime courts of the world and their seals, the political constitution and history of the Philippines,the official acts of thelegislative,executiveand judicial departments of the Philippines, the laws of nature, the measure of time, and the geographical divisions."

[6] Supra note 4.

[7] "*MOA-AD will not be signed by gov't regardless of what SC decides on the issue - PGMA*". From "The Official Website of the Government of the Philippines" (http://www.gov.ph/news/?i=22392), dated 3 October 2008.

[8] G.R. No. 159085, 159103, and 159196, 3 February 2004, 421 SCRA 656.

[9] Id. at 665.

[10] W.M. Reisman, M. Arsanjani, S. Wiessner & G. Westerman, *International Law in Contemporary Perspective* (2004 ed.), at 1280.

[11] V. Reyes, "MILF: Pact a donedeal after initialing," *Malaya* (6 August 2008) at http://www.malaya.com.ph/aug06/news3.htm (last visited, 11 October 2008).

[12] "*Govt: Initials do not make draft MOA on ancestral domain a done deal* ".GMANews.Tv, at http://www.gmanews.tv/story/111830/Govt-Initials-do-not-make-draft-MOA-on-ancestral-domain-a-done-deal (last visited, 11 October 2008).

[13] B. WESTON, R. FALK, H. CHARLESWORTH & A. STRAUSS, *INTERNATIONAL LAW AND WORLD ORDER: A PROBLEM-ORIENTED COURSEBOOK* (4th ed), at 144; words in parenthesis supplied.

[14] Id., citing EFFECT OF AWARDS MADE BY THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL, 1956 ICJ 53 (Advisory Opinion).

[15] Id. at 151.

[16] See Annex "B" to Petition in G.R. No. 183893.

[17] See CIVIL CODE, Art. 1318.

[18] J. VITUG, III CIVIL LAW: OBLIGATIONS AND CONTRACTS (2003 ed.), at 108-109.

[19]Id. at 109.

[20]J. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* (6th ed.), at 582.

[21] A. CASSESE, *INTERNATIONAL LAW* (2nd ed.), at 172.

[22] S. MURPHY, *PRINCIPLES OF INTERNATIONAL LAW* (2006 ed.), at 68.

[23] M. FITZMAURICE, "THE ANATOMY OF A TREATY," IN *INTERNATIONAL LAW (Oxford)*, ed. by M.Evans.

[24] Supra note 10 at 1280-1281.

[25] Const., Art. X, Sec..

[26] Const., Sect. 15, in relation with Art. X, Sec. 1.

[27] G.R. No. 149848, 25 November 2004, 444 SCRA 203.

[28] Id. at 230-231.

[29] Id. at 229; citing Const., Art. X, Sec. 15. *See*also IIIRecord235, 12 August 1986:

> MR. NOLLEDO. As I already stated, these autonomous regions are established within the framework of our national sovereignty. And in answer to the question of Commissioner Bengzon this morning that should there be rebels against the government, whether this will prevent the President from sending armed forces to suppress the rebellion, I said, "No, because of the expression `within the framework of national sovereignty.'" We are not granting sovereignty to the autonomous region. That is why the term "power of autonomous region" was appropriately used because as an accepted principle in constitutional law, sovereignty is indivisible. That is why we also maintain the provision in both Committee Report Nos. 21 and 25 that the President of the Philippines has supervisory power over autonomous regions to see to it that laws are faithfully executed. So, I find no inconsistency between the powers to be granted to autonomous regions and the sovereignty of the Republic of the Philippines.

[30] MOA-AD, Governance, Par. 8.

[31] See Const., Art. X, Sec. 18.

[32] See Const., Art. IX-B, Sec. 2(1) in relation to Sec. 1(1).

[33] Const., Art. IX-C, Sec. 2(1).

[34] MOA-AD, Resources, Par. 2(d).

[35] MOA-AD, Resources, Paragraph 5.

[36] See Art. XII, Sec. 2 which also provides "The exploration, development, and

utilization of natural resources shall be under the full control and supervision of the State."

[37] MOA-AD, Resources, par. 4.

[38] *Pimentel, Jr. v. Office of the Executive Secretary*, G.R. No. 158088, 6 July 2005, 462 SCRA 622, 632; citing I. Cortes, *The Philippine Presidency: A Study of Executive Power* (1966), p. 187. "[T]he President is vested with the authority to deal with foreign states and governments, extend or withhold recognition, maintain diplomatic relations, enter into treaties, and otherwise transact the business of foreign relations. In the realm of treaty-making, the President has the sole authority to negotiate with other states." Id.

[39] Id.

[40]"Any amendment to, or revision of, this Constitution may be proposed by:

(1) The Congress, upon a vote of three-fourths of all its members xxx"

SEPARATE OPINION

CHICO-NAZARIO, *J.*:

The piece of writing being assailed in these consolidated Petitions is a peace negotiation document, namely the **Memorandum of Agreement on the Ancestral Domain Aspect of the GRP-MILF Tripoli Agreement of Peace of 2001** (MOA). The Solicitor General explained that this document, prepared by the joint efforts of the Government of the Republic of the Philippines (GRP) Peace Panel and the Moro Islamic Liberation Front (MILF) Peace Panel, was merely a codification of consensus points reached between both parties and the aspirations of the MILF to have a Bangsamoro homeland.[1] Subsequently, the Solicitor General moved for the dismissal of the consolidated cases at bar based on changed circumstances as well as developments which have rendered them moot, particularly the Executive Department's statement that it would no longer sign the questioned peace negotiation document.[2] Nonetheless, several parties to the case, as well as other sectors, continue to push for what they call a "complete determination" of the constitutional issues raised in the present Petitions.

I believe that in light of the pronouncement of the Executive Department to already abandon the MOA, the issue of its constitutionality has obviously become moot.

The rule is settled that no question involving the constitutionality or validity of a law or governmental act may be heard and decided by the court unless there is compliance with the legal requisites for judicial inquiry, namely: that the question must be raised by the proper party; that there must be an actual case or controversy; that the question must be raised at the earliest possible opportunity;

and, that the decision on the constitutional or legal question must be necessary to the determination of the case itself. But the most important are the first two requisites.[3]

For a court to exercise its power of adjudication, there must be an actual case or controversy -- one which involves a conflict of legal rights, an assertion of opposite legal claims susceptible of judicial resolution; **the case must not be moot or academic or based on extra-legal or other similar considerations** not cognizable by a court of justice. A case becomes moot and academic when **its purpose has become stale**.[4] An action is considered "moot" when it no longer presents a justiciable controversy because the **issues involved have become academic or dead** or when the matter in dispute has already been resolved and hence, one is not entitled to judicial intervention unless the issue is likely to be raised again between the parties. Simply stated, there is nothing for the court to resolve as the determination thereof has been overtaken by subsequent events.[5]

Such is the case here.

The MOA has not even been signed, and will never be. Its provisions will not at all come into effect. The MOA will forever remain a draft that has never been finalized. It is now nothing more than a piece of paper, with no legal force or binding effect. It cannot be the source of, nor be capable of violating, any right. The instant Petitions, therefore, and all other oppositions to the MOA, have no more leg to stand on. They no longer present an actual case or a justiciable controversy for resolution by this Court.

An actual case or controversy exists when there is a conflict of legal rights or an assertion of opposite legal claims, which can be resolved on the basis of existing law and jurisprudence. A justiciable controversy is distinguished from a hypothetical or abstract difference or dispute, in that the former involves a definite and concrete dispute touching on the legal relations of parties having adverse legal interests. A justiciable controversy admits of specific relief through a decree that is conclusive in character, whereas an opinion only advises what the law would be upon a hypothetical state of facts.[6]

For the Court to still rule upon the supposed unconstitutionality of the MOA will merely be an academic exercise. It would, in effect, only be delivering an opinion or advice on what are now hypothetical or abstract violations of constitutional rights.

In *Abbas v. Commission on Elections*,[7] the 1976 Tripoli Agreement and Republic Act No. 6734 (the Organic Act for the Autonomous Region in Muslim Mindanao) were challenged for purported violations of the provisions of the Constitution on freedom of religion. The Court held therein that it should not inquire into the constitutionality of a peace agreement which was already consummated (the 1976 Tripoli Agreement) and an Organic Act which was already passed into law (R.A. No. 6734) just because of potential conflicts with the Constitution. Then, with more reason should this Court desist from ruling on the constitutionality of the MOA which is unsigned, and now entirely abandoned, and as such, cannot even have any potential conflict with the Constitution.

The Court should not feel constrained to rule on the Petitions at bar just because of

the great public interest these cases have generated. We are, after all, a court of law, and not of public opinion. The power of judicial review of this Court is for settling real and existent dispute, it is not for allaying fears or addressing public clamor. In acting on supposed abuses by other branches of government, the Court must be careful that it is not committing abuse itself by ignoring the fundamental principles of constitutional law.

The Executive Department has already manifested to this Court, through the Solicitor General, that **it will not sign the MOA in its present form or in any other form**. It has declared the same intent to the public. For this Court to insist that the issues raised in the instant Petitions cannot be moot for they are still capable of repetition is to totally ignore the assurance given by the Executive Department that it will not enter into any other form of the MOA in the future. The Court cannot doubt the sincerity of the Executive Department on this matter. The Court must accord a co-equal branch of the government nothing less than trust and the presumption of good faith.

Moreover, I deem it beyond the power of this Court to enjoin the Executive Department from entering into agreements similar to the MOA in the future, as what petitioners and other opponents of the MOA pray for. Such prayer once again requires this Court to make a definitive ruling on what are mere hypothetical facts. A decree granting the same, without the Court having seen or considered the actual agreement and its terms, would not only be premature, but also too general to make at this point. It will perilously tie the hands of the Executive Department and limit its options in negotiating peace for Mindanao.

Upon the Executive Department falls the indisputably difficult responsibility of diffusing the highly volatile situation in Mindanao resulting from the continued clashes between the Philippine military and Muslim rebel groups. In negotiating for peace, the Executive Department should be given enough leeway and should not be prevented from offering solutions which may be beyond what the present Constitution allows, as long as such solutions are agreed upon subject to the amendment of the Constitution by completely legal means.

Peace negotiations are never simple. If neither party in such negotiations thinks outside the box, all they would arrive at is a constant impasse. Thus, a counsel for one of the intervenors who assert the unconstitutionality of the MOA[8] had no choice but to agree as follows:

> ASSOCIATE JUSTICE QUISUMBING: Well, we realize the constitutional constraints of sovereignty, integrity and the like, but isn't there a time that surely will come and the life of our people when they have to transcend even these limitations?
>
> DEAN AGABIN: Yes, we have seen it happen in several instances, Your Honor.
>
> x x x
>
> ASSOCIATE JUSTICE QUISUMBING: And in pursuit of that purpose, the Supreme Court cannot look beyond the horizon and look for more satisfying result?

DEAN AGABIN: Well, if you mean by looking beyond the horizon, it would mean a violation of the provisions of the Constitution, then it should not be, Your Honor.

ASSOCIATE JUSTICE QUISUMBING: In some part, we have gone to Malaysia. We have gone to the OIC, and we have even gone to Libya.

DEAN AGABIN: Yes, Your Honor. But in all these, we have always insisted on preserving the territorial integrity of the country.

ASSOCIATE JUSTICE QUISUMBING: And this dicta or [dogma] is unassailable forever. There cannot be an exception.

DEAN AGABIN: It is unassailable under the present Constitution, Your Honor.

ASSOCIATE JUSTICE QUISUMBING: But, at least, you can also agree that the Constitution ought to be changed in order for a country to fulfill its internal obligation as a matter of necessity.

DEAN AGABIN: Yes, if the people so will it, your Honor.

ASSOCIATE JUSTICE QUISUMBING: You remember how the emperor of Japan lost his divinity? They just changed their Constitution, isn't it?

DEAN AGABIN: Yes, it was enforced upon him by Mr. McArthur, and they have no choice.

ASSOCIATE JUSTICE QUISUMBING: Isn't that a very good example of thinking outside the box? That one day even those who are underground may have to think. But frankly now Dean, before I end, may I ask, is it possible to meld or modify our Constitutional Order in order to have some room for the newly developing international notions on Associative Governance Regulation Movement and Human Rights?

DEAN AGABIN: Yes. It is possible, Your Honor, with the consent of the people.

ASSOCIATE JUSTICE QUISUMBING: And, therefore, we vote it to a referendum or any consultation beforehand?

DEAN AGABIN: If there is such a proposal for or amendment or revision of the Constitution, yes, Your Honor.

ASSOCIATE JUSTICE QUISUMBING: So, either initiative or CHA-CHA or CON-AS?

DEAN AGABIN: Yes, Your Honor.[9]

It must be noted that the Constitution has been in force for three decades now, yet, peace in Mindanao still remained to be elusive under its present terms. There is the possibility that the solution to the peace problem in the Southern Philippines lies beyond the present Constitution. Exploring this possibility and considering the necessary amendment of the Constitution are not *per se* unconstitutional. The Constitution itself implicitly allows for its own amendment by describing, under Article XVII, the means and requirements therefor. In *Tan v. Macapagal*,[10] where petitioners claim that the Constitutional Convention was without power to consider, discuss, or adopt proposals which seek to revise the Constitution through the adoption of a form of government other than the form outlined in the then governing Constitution, the Court ruled that:

> [A]s long as any proposed amendment is still unacted on by [the Convention], there is no room for the interposition of judicial oversight. Only after it has made concrete what it intends to submit for ratification may the appropriate case be instituted. Until then, the Courts are devoid of jurisdiction. x x x.

At this point, there is far from a concrete proposed amendment to the Constitution which the Court can take cognizance of, much less render a pronouncement upon.

At most, the Court can only exhort the Executive Department to keep in mind that it must negotiate and secure peace in Mindanao under terms which are most beneficial for the country as a whole, and not just one group of Muslim insurgents. Transparency and consultation with all major players, which necessarily include affected local government units and their constituents, are essential to arrive at a more viable and acceptable peace plan. The nature and extent of any future written agreements should be clearly established from the very beginning, and the terms thereof carefully drafted and clearly worded, to avoid misunderstandings or misconstructions by the parties and the public. If a document is meant to be a list of consensus points still subject to further negotiations, then it should just simply state so.

As a final note, I find it necessary to stress that the Court must not allow itself to be mired in controversies affecting each step of the peace process in Mindanao. It is not within the province or even the competence of the Judiciary to tell the Executive Department exactly what and what not, how and how not, to negotiate for peace with insurgents. Given this kind of situation where war and peace hang in the balance, where people's lives are at stake, and the Executive Department, under its residual powers, is tasked to make political decisions in order to find solutions to the insurgency problem, the Court should respect the political nature of the issues at bar and exercise judicial restraint until an actual controversy is brought before it.

In view of the foregoing, I vote for the **GRANT** of the Motion to Dismiss filed by the Solicitor General and, accordingly, for the **DISMISSAL** of the Petitions at bar for being **MOOT** and **ACADEMIC**.

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[1] Respondent's Manifestation and Motion, 19 August 2008.

[2] Id.

[3] *Joya v. Presidential Commission on Good Government*, G.R. No. 96541, 24 August 1993, 225 SCRA 568, 575.

[4] Id.

[5] *Santiago v. Court of Appeals*, G.R. No. 121908, 26 January 1998, 285 SCRA 16, 22.

[6] *Guingona, Jr. v. Court of Appeals*, 354 Phil. 415, 426 (1998).

[7] G.R. Nos. 89651 & 89965, 10 November 1989, 179 SCRA 287.

[8] Dean Pacifico Agabin is the counsel for Intervenor Manuel A. Roxas III.

[9] TSN, pp. 603-611.

[10] 150 Phil. 778, 785 (1972).

SEPARATE OPINION

REYES, R.T., *J.*:

Nemo dat quod non habet. You cannot give what you do not have. ***Hindi mo maibibigay ang hindi sa iyo***.

This maxim forcefully applies in these consolidated petitions and petitions-in-intervention for mandamus and prohibition which in the main seek the nullification of the Memorandum of Agreement on Ancestral Domain (MOA-AD) entered into between the Government of the Republic of the Philippines (GRP Panel) and the Moro Islamic Liberation Front (MILF).

The issues may be compressed as follows: (1) whether the petitions and petitions-in-intervention have become moot due to supervening events; and (2) whether the MOA-AD is constitutional.

I. The petitions and petitions-in-intervention have become moot due to supervening events. However, they should be decided given the exceptional circumstances, following well known precedents.

During the August 29, 2008 oral arguments before the Court, the Solicitor General manifested that the MOA-AD will not be signed "in its present form or in any other form."[1] The August 28, 2008 memorandum of the Executive Secretary also says that "the government will not sign" the MOA-AD.[2] Due to these statements, the petitions and petitions-in-intervention have clearly become moot.

Be that as it may, the Court is not precluded from passing judgment on them. It is hornbook doctrine that courts will decide cases, otherwise moot, when (1) there is a grave violation of the Constitution; (2) the exceptional character of the situation and the paramount public interest involved demand; (3) the constitutional issue raised requires formulation of controlling principles to guide the bench, the bar, and the public; and (4) the case is capable of repetition yet evading review.[3]

Let me cite a few examples.

In *Javier v. Commission on Elections*,[4] petitioner Evelio B. Javier was assassinated on February 11, 1986 before his petition to the Court could be decided. In his petition, Javier argued that the proclamation of his rival, Arturo F. Pacificador, was void because it was made only by a division and not by the Commission on Elections *en banc* as required by the 1973 Constitution. The new Solicitor General moved for the dismissal of the petition on the ground of mootness in view of supervening events. The Court refused, saying:

> The abolition of the Batasang Pambansa and the disappearance of the office in dispute between the petitioner and the private respondent - both of whom have gone their separate ways - could be a convenient justification for dismissing this case. But there are larger issues involved that must be resolved now, once and for all, not only to dispel the legal ambiguities here raised. The more important purpose is to manifest in the clearest possible terms that **this Court will not disregard and in effect condone wrong on the simplistic and tolerant pretext that the case has become moot and academic**.
>
> The Supreme Court is not only the highest arbiter of legal questions but also the conscience of the government. The citizen comes to us in the quest of law but we must also give him justice. The two are not always the same. There are times we cannot grant the latter because the issue has been settled and decision is no longer possible according to the law. But **there are also times when although the dispute has disappeared, as in this case, it nevertheless cries out to be resolved. Justice demands that we act then, not only for the vindication of the outraged right, though gone, but also for the guidance of and as a restraint on the future**.[5] (Emphasis supplied)

In *Salonga v. Cruz-Paño*,[6] the Court had already deliberated on the case, a consensus on the judgment of the Court had been reached, and a draft *ponencia* was circulating for concurrences and separate opinions, if any. However, on January 18, 1985, respondent Judge Rodolfo Ortiz granted the motion of respondent City Fiscal Sergio Apostol to drop the subversion case against petitioner. In accordance with the instructions of the Minister of Justice, the prosecution reevaluated its evidence and decided the exclusion of petitioner as one of the accused in the information filed under the questioned resolution.

However, this did not prevent the Court from deciding the merits of the petition. In doing so, the Court reasoned that "[t]he setting aside or declaring void, in proper cases, of intrusions of State authority into areas reserved by the Bill of Rights for the individual as constitutionally protected spheres where even the awesome powers of Government may not enter at will is not the totality of the Court's function." It "also

has the **duty to formulate guiding and controlling constitutional principles, precepts, doctrines, or rules. It has the symbolic function of educating bench and bar on the extent of protection given by constitutional guarantees**."[7] Similarly, *Dela Camara v. Enage*,[8] *Gonzales v. Marcos*,[9] and *Aquino , Jr., v. Enrile*[10] were decided under the same aegis.

In *David v. Macapagal-Arroyo*,[11] the Solicitor General moved for the dismissal of the consolidated petitions on the ground of mootness. It was argued that because the President had already lifted her declaration of state of national emergency, there was no longer an actual case or controversy. The Court was not convinced, saying that "**[t]he "moot and academic" principle is not a magical formula that can automatically dissuade the courts in resolving a case**."[12] It then proceeded to declare unconstitutional major parts of the declaration of state of national emergency by the President.

Just recently, in *Manalo v. Calderon*,[13] "[n]otwithstanding the mootness of the issues on restrictive custody and monitoring of movements of petitioners," the Court opted to resolve the petition for *habeas corpus*, due to "**(a) the paramount public interest involved, (b) their susceptibility of recurring yet evading review, and (c) the imperative need to educate the police community on the matter**."

The petitions and petitions-in-intervention call for a similar or analogous treatment by the court, due to their transcendental importance and in the national interest.

II. The MOA-AD is unconstitutional.

The GRP Panel went beyond their marching orders from the President.

The March 1, 2001 Memorandum of Instructions from the President,[14] which prescribes the guidelines for the GRP Panel in negotiating with the MILF, partly states:

1. *The negotiations shall be conducted in accordance with the Mandates of the Philippine Constitution, the Rule of Law, and the principles of the sovereignty and territorial integrity of the Republic of the Philippines*.

2. The negotiation process shall be pursued in line with the national Comprehensive Peace Process, and shall seek the principled and peace resolution of the armed conflict, *with neither blame nor surrender, but with dignity for all concerned*.

3. The objective of the GPNP is to attain a peace settlement that shall:

    a. Contribute to the resolution of the root cause of the armed conflict, and to societal reform, particularly in Southern Philippines;

    b. Help attain a lasting peace and comprehensive stability in Southern Philippines under a meaningful program of autonomy for Filipino Muslims, consistent with the Peace Agreement entered into by the GRP and the

MNLF on 02 September 1996; and

c. Contribute to reconciliation and reconstruction in Southern Philippines.

4. The general approach to the negotiations shall include the following:

a. Seeking a middle ground between the aspirations of the MILF and the political, social and economic objectives of the Philippine Government;

b. Coordinated Third Party facilitation, where needed;

c. *Consultation with affected communities and sectors*. (Emphasis supplied)

In an apparent compliance with the Directive of the President, the MOA-AD mentions the following documents as terms of reference, to wit:

1. The Agreement for General Cessation of Hostilities dated July 18, 1997 Between the GRP and the MILF, and its Implementing Administrative and Operational Guidelines;

2. The General Framework of Agreement of Intent Between the GRP and the MILF dated August 27, 1998;

3. The Agreement on the General Framework for the Resumption of Peace Talks Between the GRP and the MILF dated March 24, 2001;

4. The Tripoli Agreement on Peace Between the GRP and the MILF dated June 22, 2001;

5. The Tripoli Agreement Between the GRP and the Moro National Liberation Front (MNLF) dated December 23, 1976 and the Final Agreement on the Implementation of the 1976 Tripoli Agreement Between the GRP and the MNLF dated September 2, 1996;

6. Republic Act No. 6734, as amended by R.A. 9054, otherwise known as "An Act to Strengthen and Expand the Autonomous Region in Muslim Mindanao (ARMM)";

7. ILO Convention No. 169, in correlation to the UN Declaration on the Rights of the Indigenous Peoples, and Republic Act No. 8371 otherwise known as the Indigenous Peoples Rights Act of 1997, the UN Charter, the UN Universal Declaration on Human Rights, International Humanitarian Law (IHL), and internationally recognized human rights instruments; and

8. Compact rights entrenchment emanating from the regime of dar-ul-mua'hada (or territory under compact) and dar-ul-sulh (or territory under peace agreement) that partakes the nature of a treaty device. For the purpose of this Agreement, a "treaty" is defined as any solemn agreement in writing that sets out understandings, obligations, and benefits for both parties which provides for a framework that elaborates the principles declared in the Agreement.

Curiously missing in the enumeration, however, is the Constitution. The omission could only mean that **the parties intended the MOA-AD not to be bound by the fundamental law. The Constitution is supposed to be the one to conform to the MOA-AD, and not the other way around**.[15]

There can be no doubt as to the marching orders by the President. In negotiating with the MILF, the GRP Panel should use the Constitution as the parameter. Too, the preservation of the territorial integrity of the Republic of the Philippines should be maintained at all times. The GRP Panel, however, appears to have failed to follow those instructions.

The commitment of the GRP Panel to the MILF to change the Constitution to conform to the MOA-AD violates the doctrine of separation of powers.

Under the present constitutional scheme, the President is a mere bystander as far as the process of constitutional amendment or revision is concerned. The President is deprived of any participation because the Constitution[16] only allows three political agents, namely: (1) the Congress, upon a vote of three-fourths of all its members; (2) a constitutional convention;[17] and (3) the people through initiative upon a petition of at least twelve (12) *per centum* of the total number of registered voters, of which every legislative district must be represented by at least three *per centum* of its registered voters.

Thus, since the President is bereft of any power in effecting constitutional change, the GRP Panel, who acts under the imprimatur of the President, cannot commit to the MILF that the Constitution will be amended or revised in order to suit the MOA-AD. That would be a violation of the doctrine of separation of powers. *Nemo potest facere per alium quod non potest facere per directum*. No one is allowed to do indirectly what he is prohibited to do directly. ***Sinuman ay hindi pinapayagan na gawin nang di tuwiran ang ipinagbabawal na gawin nang tuwiran***.

The MOA-AD contains numerous provisions that appear unconstitutional.

Respondents claim that the contents of the MOA-AD are mere concession points for further negotiations. The MILF, however, publicly announced that the MOA-AD is already a "done deal" and its signing a mere formality.[18]

I find both claims of respondents and the MILF difficult to swallow. Neither position is acceptable. The GRP Panel has not presented any proof to buttress its point that, indeed, the parties intended the MOA-AD to be mere concession points for further negotiations. The MILF have not also shown proof to support its claim. In this regard, **the MOA-AD should be interpreted according to its face value**.

Having said that, let me point out the defects of the MOA-AD.

First **.** The MOA-AD creates a new political subdivision, the so-called Bangsamoro Juridical Entity (BJE). This is not permitted by the Constitution, which limits the political subdivisions of the Republic of the Philippines into provinces, cities, municipalities, barangays and autonomous regions.[19]

Worse, the BJE also trenches on the national sovereignty and territorial integrity of

the Republic of the Philippines.[20] This is so because pursuant to the MOA-AD: (1) The Bangsamoro homeland and historic territory is clearly demarcated;[21] (2) The BJE is given the authority and jurisdiction over the Ancestral Domain and Ancestral lands. This includes both alienable and non-alienable lands encompassed within their homeland and ancestral territory,[22] specified "internal waters"[23] as well as "territorial waters";[24] (3) The declared ultimate objective of entrenching the Bangsamoro homeland as a territorial space is "to secure their identity and posterity, to protect their property rights and resources as well as to establish a system of governance suitable and acceptable to them as a distinct dominant people. The Parties respect the freedom of choice of the indigenous peoples;"[25] and (4) The BJE is empowered "to build, develop and maintain its own institutions, inclusive of, civil service, electoral, financial and banking, education, legislation, legal, economic, and police and internal security force, judicial system and correctional institutions, necessary for developing a progressive Bangsamoro society, x x x."[26] Otherwise stated, respondents agreed to create a BJE out of the national territory of the Republic, with a distinct and separate system of government from the Republic of the Philippines.[27]

Notably, the United Nations Declaration on the Rights of Indigenous Peoples, while recognizing the rights of indigenous peoples to self-determination, does not give them the right to undermine the territorial integrity of a State.[28]

Second. The creation of the BJE is prohibited even assuming that the MOA-AD only attempts to create the BJE as an autonomous region. Only Congress is empowered to create an autonomous region.[29]

In fact, RA Nos. 6734[30] and 9054,[31] the laws creating and expanding the ARMM, have already been passed by Congress. As a result of these Organic Acts, the provinces of Lanao del Sur, Maguindanao, Sulu and Tawi-Tawi and the City of Marawi voted to comprise the ARMM territory under the control of the Regional Government of the ARMM. In the case of the MOA-AD, no implementing law is provided to implement its terms. What it purports to do, instead, is to provide for structures of government within the MOA-AD itself. It also obligates the GRP Panel to "conduct and deliver" a plebiscite "within twelve (12) months following the signing of the MOA-AD."[32]

Third. The MOA-AD creates the Bangsamoro Homeland as an ancestral domain. However, there is non-compliance with the procedure laid down under RA No. 8371, otherwise known as the Indigenous Peoples Rights Act (IPRA). True, Article II, Section 22 of the 1987 Constitution recognizes the rights of all indigenous peoples. [33] This, however, cannot be used in the MOA-AD as a blanket authority to claim, without sufficient proof, a territory spanning an entire geographical region, the entire Mindanao-Sulu-Palawan geographic region.[34]

Indeed, Chapter VIII of the IPRA provides for stringent requirements and strict process of delineation for recognition of ancestral domains, thus:

> SEC. 51. *Delineation and Recognition of Ancestral Domains*. - Selfâ€`delineation shall be the guiding principle in the identification and delineation of ancestral domains. As such, the ICCs/IPs concerned shall

have a decisive role in all the activities pertinent thereto. The Sworn Statement of the Elders as to the scope of the territories and agreements/pacts made with neighboring ICCs/IPs, if any, will be essential to the determination of these traditional territories. The Government shall take the necessary steps to identify lands which the ICCs/IPs concerned traditionally occupy and guarantee effective protection of their rights of ownership and possession thereto. Measures shall be taken in appropriate cases to safeguard the right of the ICCs/IPs concerned to land which they may no longer be exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities, particularly of ICCs/IPs who are still nomadic and/or shifting cultivators.

SEC. 52. *Delineation Process*. - The identification and delineation of ancestral domains shall be done in accordance with the following procedures:

x x x x

(b) *Petition for Delineation*. - The process of delineating a specific perimeter may be initiated by the NCIP with the consent of the ICC/IP concerned, or though a Petition for Delineation filed with the NCIP, by a majority of the members of the ICCs/IPs.
(c) *Delineation Proper*. - The official delineation of ancestral domain boundaries including census of all community members therein, shall be immediately undertaken by the Ancestral Domains Office upon filing of the application by the ICCs/IPs concerned. Delineation will be done in coordination with the community concerned and shall at all times include genuine involvement and participation by the members of the communities concerned.
(d) *Proof Required*. - Proof of Ancestral Domain Claims shall include the testimony of elders or community under oath, and other documents directly or indirectly attesting to the possession or occupation of the area since time immemorial by such ICCs/IPs in the concept of owners which shall be any one (1) of the following authentic documents:

1) Written accounts of the ICCs/IPs customs and traditions;
2) Written accounts of the ICCs/IPs political structure and institution;
3) Pictures showing long term occupation such as those of old improvements, burial grounds, sacred places and old villages;
4) Historical accounts, including pacts and agreements concerning boundaries entered into by the ICCs/IPs concerned with other ICCs/IPs;
5) Survey plans and sketch maps;
6) Anthropological data;
7) Genealogical surveys;
8) Pictures and descriptive histories of traditional communal forests and hunting grounds;
9) Pictures and descriptive histories of traditional landmarks such as mountains, rivers, creeks, ridges, hills, terraces and the like; and
10) Write-ups of names and places derived from the native dialect of the community.

(e) *Preparation of Maps*. - On the basis of such investigation and the findings of fact based thereon, the Ancestral Domains Office of the NCIP shall prepare a perimeter map, complete with technical descriptions, and a description of the natural features and landmarks embraced therein.
(f) *Report of Investigation and Other Documents*. - A complete copy of the preliminary census and a report of investigation, shall be prepared by the Ancestral Domains Office of the NCIP.
(g) *Notice and Publication*. - A copy of each document, including a translation in the native language of the ICCs/IPs concerned shall be posted in a prominent place therein for at least fifteen (15) days. A copy of the document shall also be posted at the local, provincial and regional offices of the NCIP, and shall be published in a newspaper of general circulation once a week for two (2) consecutive weeks to allow other claimants to file opposition thereto within fifteen days (15) from date of such publication: *Provided*, That in areas where no such newspaper exist, broadcasting in a radio station will be a valid substitute; *Provided*, *further*, That mere posting shall be deemed sufficient if both newspaper and radio station are not available.
(h) *Endorsement to NCIP*. - Within fifteen (15) days from publication, and of the inspection process, the Ancestral Domains Office shall prepare a report to the NCIP endorsing a favorable action upon a claim that is deemed to have sufficient proof. However, if the proof is deemed insufficient, the Ancestral Domains Office shall require the submission of additional evidence; *Provided*, That the Ancestral Domains Office shall reject any claim that is deemed patently false or fraudulent after inspection and verification: *Provided*, *further*, That in case of rejection, the Ancestral Domains Office shall give the applicant due notice, copy furnished all concerned, containing the grounds for denial. The denial shall be appealable to the NCIP. *Provided*, *furthermore*, That in cases where there are conflicting claims among ICCs/IPs on the boundaries of ancestral domain claims, the Ancestral Domains Office shall cause the contending parties to meet and assist them in coming up with a preliminary resolution of the conflict, without prejudice to its full adjudication according to the Section below.

The MOA-AD is problematic when read in conjunction with the IPRA because it does not present any proof or specific reference that all the territories it enumerates accurately represent the "ancestral domains" of the Bangsamoro Homeland. The MOA-AD assumes that these territories are included in the Bangsamoro Homeland as ancestral domains, without proof or identification of native title or other claim of ownership to **all** the affected areas.

Section 3(g) of the IPRA[35] also requires that there be a "free and informed prior consent" by the indigenous peoples concerned to be exercised through consultations before any decision relating to their ancestral domain is made. This rule not only guarantees the right to information[36] of the people in these areas, but also the right of the indigenous peoples to "free and informed prior consent" as an element of due process.[37] Obviously, respondents did not conduct the required consultation before negotiating the terms of the MOA-AD. Otherwise, no petitions and petitions-in-intervention would have been filed in the first place.

Fourth **.** Under the MOA-AD, the BJE is vested with jurisdiction, powers and

authority over land use, development, utilization, disposition and exploitation of natural resources within the Bangsamoro Homeland.[38] In doing so, respondents in effect surrendered to the BJE ownership and gave it full control and supervision over the exploration, development, utilization over the natural resources which belong to the State. This is in clear contravention of the **Regalian Doctrine** now expressed under Article XII, Section 2 of the 1987 Constitution, thus:

> All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State. With the exception of agricultural lands, all other natural resources shall not be alienated. The exploration, development, and utilization of natural resources shall be under the full control and supervision of the State. The State may directly undertake such activities, or it may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations or associations at least sixty *per centum* of whose capital is owned by such citizens. Such agreements may be for a period not exceeding twenty-five years, renewable for not more than twenty-five years, and under such terms and conditions as may be provided by law. In cases of water rights for irrigation, water supply fisheries, or industrial uses other than the development of water power, beneficial use may be the measure and limit of the grant.
>
> The State shall protect the nation's marine wealth in its archipelagic waters, territorial sea, and exclusive economic zone, and reserve its use and enjoyment exclusively to Filipino citizens.
>
> The Congress may, by law, allow small-scale utilization of natural resources by Filipino citizens, as well as cooperative fish farming, with priority to subsistence fishermen and fish-workers in rivers, lakes, bays, and lagoons.
>
> The President may enter into agreements with foreign-owned corporations involving either technical or financial assistance for large-scale exploration, development, and utilization of minerals, petroleum, and other mineral oils according to the general terms and conditions provided by law, based on real contributions to the economic growth and general welfare of the country. In such agreements, the State shall promote the development and use of local scientific and technical resources.
>
> The President shall notify the Congress of every contract entered into in accordance with this provision, within thirty days from its execution.

Fifth . The MOA-AD also grants to the BJE powers to enter into any economic cooperation and trade relations with foreign countries. It compels the Republic of the Philippines to ensure the BJE's participation in international meetings and events, participation in Philippine official missions and delegations engaged in the negotiation of, among others, border agreements, sharing of incomes and revenues.[39] Thus, by assenting to install an *intra* sovereign political subdivision independent of the single sovereign state that is the Republic of the Philippines, respondents

violated not only the Constitution, Article V, Section 2 of RA No. 6734,[40] but also the unitary system of government of the Republic of the Philippines.

Sixth. Article 1, Section 1 of the 1987 Constitution provides:

> The national territory comprises the Philippine archipelago, with all the islands and waters embraced therein, and all other territories over which the Philippines has sovereignty or jurisdiction, consisting of its terrestrial, fluvial and aerial domains, including its territorial sea, the seabed, the subsoil, the insular shelves, and other submarine areas. The waters around, between, and connecting the islands of the archipelago, regardless of their breadth and dimensions, form part of the internal waters of the Philippines.

Without the benefit of any factual determination, the MOA-AD dismembers parts of Mindanao, turning it into a geographical dalmatian. It creates a Bangsamoro Homeland with a specified land mass, maritime, terrestrial, fluvial and alluvial dominions, (with definite internal[41] and territorial[42] waters), aerial domain, atmospheric space,[43] and even distinct "territorial waters" within the RP baselines.[44]

Seventh. The MOA-AD grants to the BJE plenary power to undo executive acts and delegate to the BJE the authority to revoke existing proclamations, issuances, policies, rules and guidelines, forest concessions, timber licenses, contracts or agreements in the utilization of natural resources, mining concessions, land tenure instruments.[45] **This constitutes an undue delegation of executive power**. The President may delegate its executive power only to local government units or an administrative body attached to the executive department.[46] **The delegation of power to the BJE, on the other hand, is delegation of executive power to an entirely different juridical entity that is not under its supervision or control**. That is impermissible.

Eighth. The MOA-AD empowers the BJE to build, develop, and maintain its own institutions. This includes civil service, electoral, financial and banking institutions, education, legislation, legal, economic, police, internal security force, and judicial system.[47] This is anathema to several provisions of the Constitution, namely: (1) the authority of the Commission on Elections to administer all election laws in the Philippines;[48] (2) that there shall only be one police force, national in scope to be administered and controlled by the National Police Commission;[49] (3) that the defense of the Republic shall belong exclusively to the Armed Forces of the Philippines;[50] (4) that judicial power shall be vested in one Supreme Court and in such other inferior courts as may be established by law;[51] (5) that there shall only be one independent central monetary authority, the Bangko Sentral ng Pilipinas;[52] and (6) that there shall be one independent economic planning agency.[53]

All told, respondents appear to have committed grave abuse
abuse of discretion in negotiating and initialing the MOA-AD.

Grave abuse of discretion has been traditionally understood as

implying such capricious and whimsical exercise of judgment

as is equivalent to lack of jurisdiction, or, in other words where

the power is exercised in an arbitrary or despotic manner.[54] The definition has been expanded because now, grave abuse of discretion exists when there is a contravention of the Constitution, the law and jurisprudence.[55]

Negotiate within the Constitutional bounds

During the American Civil War, the Union had to win the Confederates and bring them back to the fold. It was the bloodiest war the United States ever had. But what made the war most pathetic is that it was fought by countrymen, people who called themselves brothers. With the recent hostilities in the South, I hope the day will not come for a full-scale civil war in this land we all proudly call Home. It is our solemn duty to avert that war.

The aborted MOA-AD is a setback to the government. But the setback is only temporary, not a permanent one. The path to peace is long. But it can be travelled. On one hand, the government should be commended in its effort to bring lasting peace to the South. On the other hand, it needs to be reminded that any negotiation it enters into, even in the name of peace, should be within the parameters of the Constitution.

WHERFORE, I vote to **GRANT** the petitions and petitions-in-intervention and to strike down the MOA-AD as **UNCONSTITUTIONAL**.

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[1] TSN, August 29, 2008, p. 14. "The Executive Department has decided and [is] stating for the record that the MOA-AD will not be signed in its present form or in any other form."

[2] Annex "A"; Compliance of the Office of the Solicitor General September 1, 2008.

> "The MOA that was originally presented was a step in crafting a final peace agreement. By design, any MOA as part of a final peace agreement undergo a thorough review as part of our constitutional processes since the MOAs will be part of the enabling law by Congress and a plebiscite to implement the entire agreement. The action by the Supreme Court is consistent with that process. Moving forward, we are committed to securing an agreement that is both constitutional and equitable because that is the only way that long lasting peace can be assured.
>
> "No matter what the Supreme Court ultimately decides **the government will not sign the MOA**. In light of the recent violent incidents committed by MILF Lawless Goups, the President has refocused all peace talks from one that is centered on dialogues with rebels to one authentic dialogues with the communities, with DDR as the context of our engagements with all armed groups." (Emphasis supplied)

[3] *Lacson v. Perez,* G.R. No. 147780, May 10, 2001, 357 SCRA 756; *Province of Batangas v. Romulo,* G.R. No. 152774, May 27, 2004, 429 SCRA 736; *Albaña v. Commission on Elections,* G.R. No. 163302, July 23, 2004, 435 SCRA 98, *Acop v. Guingona, Jr.,* G.R. No. 134855, July 2, 2002, 383 SCRA 577; *Sanlakas v. Executive Secretary,* G.R. No. 159085, February 3, 2004, 277 SCRA 409.

[4] G.R. Nos. L-68379-81, September 22, 1986, 144 SCRA 194.

[5] *Javier v. Commission on Elections,* id. at 197-198.

[6] G.R. No. L-59524, February 18, 1985, 134 SCRA 438.

[7] *Salonga v. Cruz-Paño,* id. at 463. (Emphasis supplied.)

[8] G.R. No. L-32951-2, September 17, 1971, 41 SCRA 1.

[9] G.R. No. L-31685, July 31, 1975, 65 SCRA 624.

[10] G.R. No. L-35546, September 17, 1974, 59 SCRA 183.

[11] G.R. Nos. 171396, 171409, 171485, 171483, 171400, 171489 & 171424, May 3, 2006, 489 SCRA 160.

[12] *David v. Macapagal-Arroyo,* id. at 214. (Emphasis supplied.)

[13] G.R. No. 178920, October 15, 2007.

[14] Paragraph 1 of the Memorandum of Instructions from the President dated March 1, 2001 is reiterated *in toto* in the Memorandum of Instructions from the President dated September 8, 2003. Respondent Esperon admitted this when he stated during the oral arguments that "indeed the Memorandum of Instructions was issued on 1 March 2001 to the Presidential Adviser, to the Chairman of the Peace Negotiating Panel thru the Presidential Adviser on the Peace Process. And since then, it has also been revised on September 8, 2003 containing the same paragraph one which reads that the negotiation shall be conducted in accordance with the mandates of the Philippine Constitution, the Rule of Law, and the Principles of Sovereignty and Territorial Integrity of the Republic of the Philippines." (TSN, August 15, 2008, pp. 342-343).

[15] Noteworthy is the statement of Al Haj Murad Ebrahim, the Chairman of the MILF, thus: "It may be beyond the Constitution but the Constitution can be amended and revised to accommodate the agreement. *What is important is during the amendment, it will not derogate or water down the agreement because we have worked this out for more than 10 years now*. (visited September 25, 2008). (Emphasis supplied)

[16] Constitution (1987), Art. XVII, Sec. 1. Any amendment to, or revision of, this Constitution may be proposed by:

1. The Congress, upon a vote of three-fourths of all its Members; or
2. A constitutional convention.

Sec. 2. Amendments to this Constitution may likewise be directly proposed by the people through initiative upon a petition of at least twelve per centum of the total number of registered voters, of which every legislative district must be represented by at least three per centum of the registered voters therein. No amendment under this section shall be authorized within five years following the ratification of this Constitution nor oftener than once every five years thereafter.

The Congress shall provide for the implementation of the exercise of this right.

Sec. 3. The Congress may, by a vote of two-thirds of all its Members, call a constitutional convention, or by a majority vote of all its Members, submit to the electorate the question of calling such a convention.

Sec. 4. Any amendment to, or revision of, this Constitution under Section 1 hereof shall be valid when ratified by a majority of the votes cast in a plebiscite which shall be held not earlier than sixty days nor later than ninety days after the approval of such amendment or revision.

Any amendment under Section 2 hereof shall be valid when ratified by a majority of the votes cast in a plebiscite which shall be held not earlier than sixty days nor later than ninety days after the certification by the Commission on Elections of the sufficiency of the petition.

[17] Constitution (1987), Art. XVII, Sec. 3. "The Congress may, by a vote of two-thirds of all its Members, call a constitutional convention, or by a majority vote of all its Members, submit to the electorate the question of calling such a convention."

[18] http:// www.tribune. net.ph/headlines/20080806hed2.html (visited September 27, 2008).

[19] Constitution (1987), Article X, Section 1. "The territorial and political subdivisions of the Republic of the Philippines are the provinces, cities, municipalities, and barangays. There shall be autonomous regions in Muslim Mindanao and the Cordilleras as hereinafter provided."

[20] Id., Sec. 15. "There shall be created autonomous regions in Muslim Mindanao and in the Cordilleras consisting of provinces, cities, municipalities, and geographical areas sharing common and distinctive historical and cultural heritage, economic and social structures, and other relevant characteristics within the framework of this Constitution and the national sovereignty as well as territorial integrity of the Republic of the Philippines."

[21] MOA-AD, Territory, par. 1. "The Bangsamoro homeland and historic territory refer to the land mass as well as the maritime, terrestrial, fluvial and alluvial domains, and the aerial domain, the atmospheric space above it, embracing the Mindanao-Sulu-Palawan geographic region. x x x."

[22] Id., Concepts and Principles, par. 6. "Both Parties agree that the Bangsamoro

Juridical Entity (BJE) shall have the authority and jurisdiction over the Ancestral Domain and Ancestral lands, including both alienable and non-alienable lands encompassed within their homeland and ancestral territory, as well as the delineation of ancestral domain/lands of the Bangsamoro people located therein."

[23] Id., Territory, par. 2(f). "The BJE shall have jurisdiction over the management, conservation, development, protection, utilization and disposition of all natural resources, living and non-living, within its internal waters extending fifteen (15) kilometers from the coastline of the BJE area."

[24] Id., Territory, par. 2(g). "(1) The territorial waters of the BJE shall stretch beyond the BJE internal waters up to the Republic of the Philippines (RP) baselines south east and south west of mainland Mindanao. Beyond the fifteen (15) kilometers internal waters, the Central Government and the BJE shall exercise joint jurisdiction, authority and management over areas and all natural resources, living and non-living contained therein. The details of such management of the Territorial Waters shall be provided in an agreement to be entered into by the Parties.

"(2) The boundaries of the territorial waters shall stretch beyond the 15-km. BJE internal waters up to the Central Government's baselines under existing laws. In the southern and eastern part of the BJE, it shall be demarcated by a line drawn from the Maguling Point, Palimbang, Province of Sultan Kudarat up to the straight baselines of the Philippines. On the northwestern part, it shall be demarcated by a line drawn from Little Sta. Cruz Island, Zamboanga City, up to Naris Point, Bataraza, Palawan. On the western part of Palawan, it shall be demarcated by a line drawn from the boundary of Bataraza and Rizal up to the straight baselines of the Philippines.

"The final demarcation shall be determined by a joint technical body composed of duly-designated representatives of both Parties, in coordination with the appropriate Central Government agency in accordance with the above guidelines."

[25] Id., Governance, par. 2.

[26] Id., par. 8.

[27] Id., Concepts and Principles, par. 4. "Both Parties acknowledge that the right to self-governance of the Bangsamoro people is rooted on ancestral territoriality exercised originally under the suzerain authority of their sultanates and the Pat a Pangampong ku Ranaw. The Moro sultanates were states or karajaan/kadatuan resembling a body politic endowed with all the elements of nation-state in the modern sense. As a domestic community distinct from the rest of the national communities, they have a definite historic homeland. They are the "First Nation" with defined territory and with a system of government having entered into treaties of amity and commerce with foreign nations. The Parties concede that the ultimate objective of entrenching the Bangsamoro homeland as a territorial space is to secure their identity and posterity, to protect their property rights and resources as well as to establish a system of governance suitable and acceptable to them as a distinct dominant people.

[28] United Nations Declaration on the Rights of Indigenous Peoples, Article 46 (1)

"*Nothing in this Declaration may be interpreted* as implying for any State, people, group or person any right to engage in any activity to perform any act contrary to the Charter of the United Nations or construed *as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States*. (Emphasis supplied)

[29] Constitution (1987), Art. X, Sec. 18. "The Congress shall enact an organic act for each autonomous region with the assistance and participation of the regional consultative commission composed of representatives appointed by the President from a list of nominees from multi-sectoral bodies. The organic act shall define the basic structure of government for the region consisting of the executive department and legislative assembly, both of which shall be elective and representative of the constituent political units. The organic acts shall likewise provide for special courts with personal, family, and property law jurisdiction consistent with the provisions of this Constitution and national laws.

"The creation of the autonomous region shall be effective when approved by majority of the votes cast by the constituent units in a plebiscite called for the purpose, provided that only provinces, cities, and geographic areas voting favorably in such plebiscite shall be included in the autonomous region."

[30] Passed on August 1, 1989. "An Act Providing for an Organic Act for the Autonomous Region in Muslim Mindanao."

[31] Passed on March 31, 2001. "An Act to Strengthen and Expand the Organic Act for the Autonomous Region in Muslim Mindanao, Amending for the Purpose Republic Act 7634, Entitled "An Act Providing for the Autonomous Region in Muslim Mindanao, As Amended."

[32] MOA, Territory, par. 2(d). "Without derogating from the requirements of prior agreements, the Government stipulates to conduct and deliver, using all possible legal measures, within twelve (12) months following the signing of the MOA-AD, a plebiscite covering the areas as enumerated in the list and depicted in the map as Category A attached herein (the "Annex"). The Annex constitutes an integral part of this framework agreement. Toward this end, the Parties shall endeavour to complete the negotiations and resolve all outstanding issues on the Comprehensive Compact within fifteen (15) months from the signing of the MOA-AD."

[33] "The State recognizes and promotes the rights of indigenous cultural communities within the framework of national unity and development."

[34] MOA-AD, Concepts and Principles, par. 2. "It is essential to lay the foundation of the Bangsamoro homeland in order to address the Bangsamoro people's humanitarian and economic needs as well as their political aspirations. Such territorial jurisdictions and geographic areas being the natural wealth and patrimony represent the social, cultural and political identity and pride of all the Bangsamoro people. Ownership of the homeland is vested exclusively in them by virtue of their prior rights of occupation that had inhered in them as sizeable bodies of people, delimited by their ancestors since time immemorial, and being the first politically organized dominant occupants."

Id., par. 3. "Both Parties acknowledge that ancestral domain does not form part of the public domain but encompasses ancestral, communal, and customary lands, maritime, fluvial and alluvial domains as well as all natural resources therein that have inured or vested ancestral rights on the basis of native title. Ancestral domain and ancestral land refer to those held under claim of ownership, occupied or possessed, by themselves or through the ancestors of the Bangsamoro people, communally or individually since time immemorial continuously to the present, except when prevented by war, civil disturbance, force majeure, or other forms of possible usurpation or displacement by force, deceit, stealth, or as a consequence of government project or any other voluntary dealings entered into by the government and private individuals, corporate entities or institutions."

[35] IPRA, Sec. 3(g). *"Free and Prior Informed Consent* - as used in this Act shall mean the consensus of all members of the ICCs/IPs to; be determined in accordance with their respective customary laws and practices, free from any external manipulation, interference and coercion, and obtained after fully disclosing the intent and scope of the activity, in a language an process understandable to the community."

[36] Constitution (1987), Art. 3, Sec. 7. "The right of the people to information on matters of public concern shall be recognized. Access to official records, and to documents and papers pertaining to official acts, transactions, or decisions, as well as to government research data used as basis for policy development, shall be afforded the citizen, subject to such limitations as may be provided by law."

[37] Id., Sec. 1. "No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws."

[38] MOA-AD, Resources, par. (1). "The BJE is empowered with authority and responsibility for the land use, development, conservation and disposition of the natural resources within the homeland. Upon entrenchment of the BJE, the land tenure and use of such resources and wealth must reinforce their economic self-sufficiency. Among the purposes or measures to make progress more rapid are:

> a. Entry into joint development, utilization, and exploitation of natural resources designed as commons or shared resources, which is tied up to the full setting of appropriate institution, particularly affecting strategic minerals;
> b. Stimulation of local economy by a range of mechanism, in particular the need to address unemployment and improvement of living conditions for the population in the BJE;
> c. Intensification of measures needed to uproot the cause of poverty in the BJE through responsible harnessing and development of its natural resources; and
> d. Undertaking program review of public services, industrial or trade-related and agrarian-related issues in situations of different sectors of the society in the BJE, which acquire communal character deriving from the special nature of their industry.

Id., par. 2. "The Bangsamoro People through their appropriate juridical entity shall, among others, exercise power or authority over the natural resources within its territorial jurisdiction:

a. To explore, exploit, use or utilize and develop their ancestral domain and ancestral lands within their territorial jurisdiction, inclusive of their right of occupation, possession, conservation, and exploitation of all natural resources found therein;
b. To conserve and protect the human and natural environment for their sustainable and beneficial enjoyment and their posterity;
c. To utilize, develop, and exploit its natural resources found in their ancestral domain or enter into a joint development, utilization, and exploitation of natural resources, specifically on strategic minerals, designed as commons or shared resources, which is tied up to the final setting of appropriate institution;
d. To revoke or grant forest concessions, timber license, contracts or agreements in the utilization and exploitation of natural resources designated as commons or shared resources, mechanisms for economic cooperation with respect to strategic minerals, falling within the territorial jurisdiction of the BJE;
e. To enact agrarian laws and programs suitable to the special circumstances of the Bangsamoro people prevailing in their ancestral lands within the established territorial boundaries of the Bangsamoro homeland and ancestral territory within the competence of the BJE; and
f. To use such natural resources and wealth to reinforce their economic self-sufficiency.

Id., par. 5. "Jurisdiction and control over, and the right of exploring for, exploiting, producing and obtaining all potential sources of energy, petroleum, in situ, fossil fuel, mineral oil and natural gas, whether onshore or offshore, is vested in the BJE as the party having control within its territorial jurisdiction, provided that in times of national emergency, when public interest so requires, the Central Government may, during the emergency, for a fixed period and under reasonable terms as may be agreed by both Parties, temporarily assume or direct the operations of such strategic resources."

[39] MOA-AD, Resources, par. 4. "The BJE is free to enter into any economic cooperation and trade relations with foreign countries: provided, however, that such relationships and understandings do not include aggression against the Government of the Republic of the Philippines; provided, further that it shall remain the duty and obligation of the Central Government to take charge of external defense. Without prejudice to the right of the Bangsamoro juridical entity to enter into agreement and environmental cooperation with any friendly country affecting its jurisdiction, it shall include:

a. The option to establish and open Bangsamoro trade missions in foreign countries with which it has economic cooperation agreements; and
b. The elements bearing in mind the mutual benefits derived from Philippine archipelagic status and security.

And, in furtherance thereto, the Central Government shall take necessary steps to ensure the BJE's participation in international meetings and events, e.g., ASEAN meetings and other specialized agencies of the United Nations. This shall entitle the BJE's participation in Philippine official missions and delegations that are engaged in the negotiation of border agreements or protocols for environmental protection, equitable

sharing of incomes and revenues, in the areas of sea, seabed and inland seas or bodies of water adjacent to or between islands forming part of the ancestral domain, in addition to those of fishing rights.

[40] Republic Act No. 6734, Art. V, Sec. 2. The Autonomous Region is a corporate entity with jurisdiction in all matters devolved to it by the Constitution and this Organic Act as herein enumerated:

(1) Administrative organization;
(2) Creation of sources of revenues;
(3) Ancestral domain and natural resources;
(4) Personal, family and property relations;
(5) Regional, urban and rural planning development;
(6) Economic, social, and tourism development;
(7) Educational policies;
(8) Preservation and development of the cultural heritage;
(9) Powers, functions and responsibilities now being exercised by the departments of the National Government except:

(a) Foreign affairs;
(b) National defense and security;
(c) Postal service;
(d) Coinage, and fiscal and monetary policies;
(e) Administration of justice;
(f) Quarantine;
(g) Customs and tariff;
(h) Citizenship;
(i) Naturalization, immigration and deportation;
(j) General auditing, civil service and elections;
(k) Foreign trade;
(l) Maritime, land and air transportation and communications that affect areas outside the Autonomous Region; and
(m) Patents, trademarks, trade names, and copyrights; and

(10) Such other matters as may be authorized by law for the promotion of the general welfare of the people of the Region.

[41] MOA-AD, Territory, par. 2(f). "The BJE shall have jurisdiction over the management, conservation, development, protection, utilization and disposition of all natural resources, living and non-living, within its internal waters extending fifteen (15) kilometers from the coastline of the BJE area."

[42] Id., par. 2(g). "

"(1) The territorial waters of the BJE shall stretch beyond the BJE internal waters up to the Republic of the Philippines (RP) baselines south east and south west of mainland Mindanao. Beyond the fifteen (15) kilometers internal waters, the Central Government and the BJE shall exercise joint jurisdiction, authority and management over areas and all natural resources, living and non-living contained therein. The details of such management of the Territorial Waters shall be provided in an agreement to be entered into by the Parties.

"(2) The boundaries of the territorial waters shall stretch beyond the 15-km. BJE

internal waters up to the Central Government's baselines under existing laws. In the southern and eastern part of the BJE, it shall be demarcated by a line drawn from the Maguling Point, Palimbang, Province of Sultan Kudarat up to the straight baselines of the Philippines. On the northwestern part, it shall be demarcated by a line drawn from Little Sta. Cruz Island, Zamboanga City, up to Naris Point, Bataraza, Palawan. On the western part of Palawan, it shall be demarcated by a line drawn from the boundary of Bataraza and Rizal up to the straight baselines of the Philippines.

"The final demarcation shall be determined by a joint technical body composed of duly-designated representatives of both Parties, in coordination with the appropriate Central Government agency in accordance with the above guidelines "

[43] Id., par. 1. "1. The Bangsamoro homeland and historic territory refer to the land mass as well as the maritime, terrestrial, fluvial and alluvial domains, and the aerial domain, the atmospheric space above it, embracing the Mindanao-Sulu-Palawan geographic region. x x x."

[44] Id., par 2(g). "(1) The territorial waters of the BJE shall stretch beyond the BJE internal waters up to the Republic of the Philippines (RP) baselines south east and south west of mainland Mindanao. Beyond the fifteen (15) kilometers internal waters, the Central Government and the BJE shall exercise joint jurisdiction, authority and management over areas and all natural resources, living and non-living contained therein. The details of such management of the Territorial Waters shall be provided in an agreement to be entered into by the Parties.

"(2) The boundaries of the territorial waters shall stretch beyond the 15-km. BJE internal waters up to the Central Government's baselines under existing laws. In the southern and eastern part of the BJE, it shall be demarcated by a line drawn from the Maguling Point, Palimbang, Province of Sultan Kudarat up to the straight baselines of the Philippines. On the northwestern part, it shall be demarcated by a line drawn from Little Sta. Cruz Island, Zamboanga City, up to Naris Point, Bataraza, Palawan. On the western part of Palawan, it shall be demarcated by a line drawn from the boundary of Bataraza and Rizal up to the straight baselines of the Philippines.

"The final demarcation shall be determined by a joint technical body composed of duly-designated representatives of both Parties, in coordination with the appropriate Central Government agency in accordance with the above guidelines."

[45] MOA-AD, Resources, pars. 8. "All proclamations, issuances, policies, rules and guidelines declaring old growth or natural forests and all watersheds within the BJE as forest reserves shall continue to remain in force until otherwise modified, revised or superseded by subsequent policies, rules and regulations issued by the competent authority under the BJE.

Id., par. 9. "Forest concessions, timber licenses, contracts or agreements, mining concessions, Mineral Production and Sharing Agreements (MPSA), Industrial Forest Management Agreements (IFMA), and other land tenure instruments of any kind or nature whatsoever granted by the Philippine Government including those issued by the present ARMM shall continue to operate from the date of formal entrenchment of

the BJE unless otherwise expired, reviewed, modified and/or cancelled by the latter."

[46] Nachura, Antonio B., Outline in Political Law, 2002 ed., p. 51.

[47] MOA, Governance, par. 8. "The Parties agree that the BJE shall be empowered to build, develop and maintain its own institutions, inclusive of, civil service, electoral, financial and banking, education, legislation, legal, economic, and police and internal security force, judicial system and correctional institutions, necessary for developing a progressive Bangsamoro society, the details of which shall be discussed in the negotiation of the Comprehensive Compact."

[48] Constitution (1987), Art. IX(C), Sec. 2 (1). "The Commission on Elections shall exercise the following powers and functions:

"1. Enforce and administer all laws and regulations relative to the conduct of an election, plebiscite, initiative, referendum, and recall."

[49] Id., Art. XVI, Sec. 6. "The State shall establish and maintain one police force, which shall be national in scope and civilian in character, to be administered and controlled by a national police commission. The authority of local executives over the police units in their jurisdiction shall be provided by law."

[50] Id., Art. XVI, Sec. 4. "The Armed Forces of the Philippines shall be composed of a citizen armed force which shall undergo military training and serve as may be provided by law. It shall keep a regular force necessary for the security of the State."

[51] Id., Art. VIII, Sec. 1. "The judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law.

"Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government."

[52] Id., Art. XII, Sec. 20. "The Congress shall establish an independent central monetary authority, the members of whose governing board must be natural-born Filipino citizens, of known probity, integrity, and patriotism, the majority of whom shall come from the private sector. They shall also be subject to such other qualifications and disabilities as may be prescribed by law. The authority shall provide policy direction in the areas of money, banking, and credit. It shall have supervision over the operations of banks and exercise such regulatory powers as may be provided by law over the operations of finance companies and other institutions performing similar functions.

"Until the Congress otherwise provides, the Central Bank of the Philippines operating under existing laws, shall function as the central monetary authority."

[53] Id., Art. XII, Sec. 9. "The Congress may establish an independent economic and

planning agency headed by the President, which shall, after consultations with the appropriate public agencies, various private sectors, and local government units, recommend to Congress, and implement continuing integrated and coordinated programs and policies for national development. Until the Congress provides otherwise, the National Economic and Development Authority shall function as the independent planning agency of the government."

[54] *Esguerra v. Court of Appeals,* G.R. No. 119310, February 3, 1997, 267 SCRA 380, citing *Alafriz v. Noble,* 72 Phil. 278, 280 (1941); *Leung Ben v. O'Brien,* 38 Phil. 182 (1918); *Salvador Campos y Cia v. Del Rosario,* 41 Phil. 45 (1920); *Abad Santos v. Province of Tarlac,* 38 Off. Gaz. 830; *Tavera Luna, Inc. v. Nable,* 38 Off. Gaz. 62; *San Sebastian College v. Court of Appeals,* G.R. No. 84401, May 15, 1991, 197 SCRA 138; *Sinon v. Civil Service Commission,* G.R. No. 101251, November 5, 1992, 215 SCRA 410; *Bustamante v. Commission on Audit,* G.R. No. 103309, November 27, 1992, 216 SCRA 134, 136; *Zarate v. Olegario,* G.R. No. 90655, October 7, 1996, 263 SCRA 1.

[55] G.R. Nos. 147062-64, December 14, 2001, 372 SCRA 462, 493.

D I S S E N T I N G O P I N I O N

VELASCO, JR., *J.*:

It is a well-settled canon of adjudication that an issue assailing the constitutionality of a government act should be avoided whenever possible.[1] Put a bit differently, courts will not touch the issue of constitutionality save when the decision upon the constitutional question is absolutely necessary to the final determination of the case, *i.e.,* the constitutionality issue must be the very *lis mota* of the controversy.[2] It is along the line set out above that I express my dissent and vote to dismiss the consolidated petitions and petitions-in-intervention principally seeking to nullify the Memorandum of Agreement on Ancestral Domain (MOA-AD) **proposed** to be entered into by and between the Government of the Republic of the Philippines (GRP) and the Moro Islamic Liberation Front (MILF).

Non-Joinder of MILF: Fatal

The Rules of Court requires all actions to be brought by or against the real party interest. The requirement becomes all the more necessary with respect to indispensable parties. For:

> Indispensable parties are those with such interest in the controversy that a final decree would necessarily affect their rights so that courts cannot proceed without their presence. All of them must be included in a suit for an action to prosper or for a final determination to be had.[3]

As it were, the MILF was not impleaded in this case except in G.R. No. 183962. But it would appear that MILF, doubtless a real party in interest in this proceedings, was not served a copy of and asked to comment on the petition in G.R. No. 183962.

Significantly, when queried during the oral arguments on the non-inclusion of the MILF, the petitioners feebly explained that *first*, they could not implead the MILF because they did not know where it could be served with summons; and *second,* they feared that impleading the MILF would be futile as the group does not acknowledge the Court's jurisdiction over it.

The importance of joining the MILF in this case cannot be over-emphasized. While the non-joinder of an indispensable party will generally not deprive the court of jurisdiction over the subject matter, the only prejudice to the winning party being the non-binding effect of the judgment on the unimpleaded party, the situation at bar is different. Here, the unimpleaded party is a party to the proposed MOA-AD no less and the prospective agreement sought to be annulled involves ONLY two parties--the impleaded respondent GRP and the MILF. The obvious result is that the Court would not be able to fully adjudicate and legally decide the case without the joinder of the MILF--the other indispensable party to the agreement. The reason is simple. The Court cannot nullify a prospective agreement which will affect and legally bind one party without making said decision binding on the other contracting party. Such exercise is not a valid, or at least an effective, exercise of judicial power for it will not peremptorily settle the controversy. It will not, in the normal course of things, write *finis* to a dispute. [4] Such consequent legal aberration would be the natural result of the non-joinder of MILF. A court should always refrain from rendering a decision that will bring about absurdities or will infringe Section 1, Article 8 of the Constitution which circumscribes the exercise of judicial power.

Prematurity and Mootness

The MOA-AD is but a proposal on defined consensus points. The agreement has remained and will remain a mere proposal as the GRP has put off its signing permanently.[5] The parties to the MOA do not have, in short, the equivalent of, or what passes as, a perfected and enforceable contract. As things stand, the line dividing the negotiation stage and the execution stage which would have otherwise conferred the character of obligatoriness on the agreement is yet to be crossed. In a very real sense, the MOA-AD is not a document, as the term is juridically understood, but literally a piece of paper which the parties cannot look up to as an independent source of obligation, the binding prestation to do or give and the corollary right to exact compliance. Yet, the petitioners would have the Court nullify and strike down as unconstitutional what, for all intents and purposes, is a non-existent agreement. Like a bill after it passes third reading or even awaiting the approval signature of the President, the unsigned draft MOA-AD cannot plausibly be the subject of judicial review, the exercise of which presupposes that there is before the court an actual case or, in fine, a justiciable controversy ripe for adjudication. A justiciable controversy involves a definite and concrete dispute touching on the legal relations of parties who are pitted against each other due to their demanding and conflicting legal interests.[6] And a dispute is ripe for adjudication when the act being challenged has had direct adverse effect on the person challenging it and admits of specific relief through a decree that is conclusive in character. As aptly observed in *Tan v. Macapagal,*[7]for a case to be considered ripe for adjudication, it is a prerequisite that something had been accomplished by either branch of government before a court may step in. In the concrete, the Court could have entered the picture if the MOA-AD were signed. For then, and only then, can we say there is a consummated executive act to speak of.

As opposed to justiciable controversy, academic issues or abstract or feigned problems only call for advices on what the law would be upon a **hypothetical** state of facts.[8] Were the Court to continue entertain and resolve on the merits these consolidated petitions, the most that it can legally do is to render an advisory opinion,[9] veritably binding no one,[10] but virtually breaching the rule against advisory opinion set out, if not implied in Section 1, Article VIII charging "courts of justice [the duty] to **settle actual controversies** involving rights which are legally demandable and enforceable."

Prescinding from and anent the foregoing considerations, it can categorically be stated that what the petitions are pressing on the Court are moot and academic questions. An issue or a case becomes moot and academic when it ceases to present a justiciable controversy so that a determination thereof would be without practical use and value.[11] In such cases, there is no actual substantial relief to which the petitioner would be entitled to and which would be negated by the dismissal of the petition.[12] To be sure, the mootness of a case would not, in all instances, prevent the Court from rendering a decision thereon.[13] So it was that in a host of cases, we proceeded to render a decision on an issue otherwise moot and academic. *Dela Camara v. Enage*,[14] *Gonzales v. Marcos*,[15] *Lacson v. Perez* [16] *Albania v. COMELEC*,[17] *Acop v. Guingona II* [18] and *David v. Macapagal-Arroyo,*[19] among other cases, come to mind. *David* lists the exceptions to the rule on mootness, thus:

> The "moot and academic" principle is not a magical formula that can automatically dissuade the courts in resolving a case. Courts will decide cases, otherwise moot and academic, if: first, there is a grave violation of the Constitution; second, the exceptional character of the situation and the paramount public interest is involved; third, when constitutional issue raised requires formulation of controlling principles to guide the bench, the bar, and the public; and fourth, the case is capable of repetition yet evading review.

A perusal of the cases cited, however, readily reveals that the subject matters thereof involved jusiticiable controversies. In *Dela Camara*, for example, there was the challenged order approving an application for bail bond but at an excessive amount. The case was rendered moot by the issuance of a subsequent order reducing the amount. In *Gonzales*, the petition questioning the validity of the creation of the CCP Complex by then President Marcos *via* a executive order which was viewed as a usurpation of legislative power was mooted by the issuance of a presidential decree upon the declaration of martial law. In *Lacson*, assailed was the issuance of Proclamation No. 36 declaring a state rebellion; in *Albania*, the petition to nullify the decision of the COMELEC annulling the proclamation of petitioner as municipal mayor was rendered moot by the election and proclamation of a new set of municipal officers; in *Acop*, the petition to exclude two police officers from the Witness Protection Program was rendered moot by the fact that the coverage of the two officers under the program was terminated; and in *David*, the petition challenging the validity of Presidential Proclamation (PP) 1017 declaring a state of emergency was rendered moot by the issuance of PP 1021 declaring that the state of national emergency has ceased.

The element of justiciable controversy is palpably absent in the petitions at bar. For,

as earlier explained, there is really no MOA-AD to speak of since its perfection or effectivity was aborted by supervening events, to wit: the TRO the Court issued enjoining the Kuala Lumpur signing of the MOA and the subsequent change of mind of the President not to sign and pursue the covenant. To repeat, there is, from the start, or from the moment the first petition was interposed, no actual justiciable controversy to be resolved or dismissed, the MOA-AD having been unsigned. Be that as it may, there can hardly be any constitutional issue based on actual facts to be resolved with finality, let alone a grave violation of the Constitution to be addressed. Surely the Court cannot reasonably formulate guiding and controlling constitutional principles, precepts, doctrines or rules for future guidance of both bench and bar based on a non-existing ancestral domain agreement or by anticipating what the executive department will likely do or agree on in the future in the peace negotiating table.

Some of my esteemed colleagues in the majority have expressed deep concern with the ramifications of a signed MOA-AD. Needless to stress, their apprehension as to such ramifications is highly speculative. Thus, judicial inquiry, assuming for the nonce its propriety, has to come later, again assuming that the peace instrument is eventually executed and challenged. At its present unsigned shape, the MOA-AD can hardly be the subject of a judicial review.

The allegations of unconstitutionality are, for now, purely conjectural. The MOA-AD is only a part of a lengthy peace process that would eventually have culminated in the signing of a Comprehensive Compact. Per my count, the MOA-AD makes reference to a Comprehensive Compact a total of eight times. The last paragraph of the MOA-AD even acknowledges that, before its key provisions come into force, there would still be more consultations and deliberations needed by the parties, *viz:*

> Matters concerning the details of the agreed consensus [point] on Governance not covered under this Agreement shall be deferred to, and discussed during, the negotiations of the Comprehensive Compact.

Separation of Powers to be Guarded

Over and above the foregoing considerations, however, is the matter of separation of powers which would likely be disturbed should the Court meander into alien territory of the executive and dictate how the final shape of the peace agreement with the MILF should look like. The system of separation of powers contemplates the division of the functions of government into its three (3) branches: the legislative which is empowered to make laws; the executive which is required to carry out the law; and the judiciary which is charged with interpreting the law.[20] Consequent to the actual delineation of power, each branch of government is entitled to be left alone to discharge its duties as it sees fit.[21] Being one such branch, the judiciary, as Justice Laurel asserted in *Planas v. Gil*,[22] "will neither direct nor restrain executive [or legislative action]." Expressed in another perspective, the system of separated powers is designed to restrain one branch from inappropriate interference in the business,[23] or intruding upon the central prerogatives,[24] of another branch; it is a blend of courtesy and caution, "a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other."[25] But this is what the petitioners basically seek: through the overruling writs of the Court, to enjoin the Philippine Peace Negotiating Panel, or its equivalent, and

necessarily the President, from signing the proposed MOA-AD and from negotiating and executing in the future similar agreements. The sheer absurdity of the situation where the hands of executive officials, in their quest for a lasting and honorable peace, are sought to be tied lest they agree to something irreconcilable with the Constitution, should not be lost on the Court.

Under our constitutional set up, there cannot be any serious dispute that the maintenance of the peace, insuring domestic tranquility[26] and the suppression of violence are the domain and responsibility of the executive.[27] Now then, if it be important to restrict the great departments of government to the exercise of their appointed powers, it follows, as a logical corollary, equally important, that one branch should be left completely independent of the others, independent not in the sense that the three shall not cooperate in the common end of carrying into effect the purposes of the constitution, but in the sense that the acts of each shall never be controlled by or subjected to the influence of either of the branches.[28]

Favorably accommodating the petitioners under the premises cannot but be viewed as a indirect attempt on the part of the Court to control and dictate on the peace prerogatives of the executive branch, and in the process unduly impairing that branch in the performance of its constitutional duties. It will distort the delicate balance of governance which the separation of powers seeks to safeguard.

One Last Word

The Executive Secretary has categorically declared that the government will not sign the MOA-AD,[29] which, as couched, may indeed be constitutionally frail or legally infirm. But the more important point is that the challenged agreement is an unsigned document without effect and force whatsoever. It conveys no right to and imposes no correlative obligation on either negotiating party. As an unsigned writing, it cannot be declared unconstitutional, as some of my colleagues are wont to do.

Accordingly, I vote to **DENY** the petitions. The factual and legal situations call for this disposition.

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[1] *Angara v. Electoral Commission*, 63 Phil. 139 (1936).

[2] *People v. Vera*, 65 Phil. 50 (1937).

[3] *DBM v. Kolonwel Trading,* G.R. Nos. 175608, 175616, June 8, 2007.

[4] *Valenzuela v. Court of Appeals*, 363 SCRA 779; *Metropolitan Bank and Trust Co., v. Alejo*, 364 SCRA 812 (2001).

[5] Per statement made by Solicitor General Agnes Devanadera during the Oral Arguments on August 28, 2008.

[6] *Guingona v. Court of Appeals*, G.R. No. 125532. July 10, 1998, citing cases.

[7] 43 SCRA 77, cited in De Leon, Philippine Constitutional Law, Vol. II, 2004 ed., p. 434.

[8] *Guingona v. Court of Appeals,* G.R. No. 125532. July 10, 1998, citing Cruz, Philippine Political Law, 1955 ed., pp. 241-42; *John Hay People's Alterntive Coalition v. Lim*, G.R. No. 119775, October 24, 2003.

[9] *Ticzon v. Video Post Manila, Inc.* G.R. No. 136342. June 15, 2000, citing *Bacolod-Murcia Planters' Association, Inc. v. Bacolod-Murcia Milling Co., Inc.,* 30 SCRA 67, 68-69, October 31, 1969.

[10] See Bernas, *The 1987 Constitution of the Republic of the Philippines: A Commentary,* 1996 Ed.

[11] *Philippine Airlines v. Pascua*, 409 SCRA 195.

[12] *Vda. De Davao v. Court of Appeals*, 426 SCRA 91 (2004), citing cases.

[13] *Ticzon v. Video Post Manila, Inc., supra,* citing *ABS-CBN Broadcasting Corporation v. Comelec*, GR No. 133486, January 28, 2000; *Salonga v. Cruz-Pano*, 134 SCRA 438, February 18, 1985.).

[14] 41 SCRA 1.

[15] 65 SCRA 624.

[16] 357 SCRA 756.

[17] 435 SCRA 98.

[18] 383 SCRA 577, citng *Viola v. Alunan III, 276 SCRA 501.*

[19] G.R. Nos. 171396, 171409, 171485, 171483, 171400, 171489, 171424, May 3, 2006, 489 SCRA 160.

[20] Black's Law Dictionary, 6th ed., p. 1305.

[21] *Tan v. Macapagal*, 43 SCRA 677.

[22] 67 Phil. 62.

[23] *Younstown Sheet & Tube Co. v. Sawyer*, 343 US 528, 635 (1952).

[24] *U.S. Munoz-Flores*, 495 US 385.

[25] *Buckley v. Valeo*, 424 US 1.

[26] *Marcos v. Manglapus*, 177 SCRA 668.

[27] Sec. 18, Art. VII of the Constitution charges the President, as Commnader in Chief of the Armed Forces of the Philippines, the duty of preventing or suppressing lawless violence, invasion or rebellion.

[28] *O'Donaghue v. US*, 289 U.U. 516 (1933).

[29] Compliance dated September 1, 2008 of respondents.

DISSENTING OPINION

NACHURA, *J.*:

I respectfully dissent from the *ponencia* of Justice Carpio Morales, even as I agree with its holding that the MOA-AD is not an international agreement or unilateral declaration binding on the Philippines under international law.

Statement of the Case

We are confronted with various petitions assailing the constitutionality of the Memorandum of Agreement on Ancestral Domain (MOA-AD) between the respondent Government of the Republic of the Philippines Peace Panel (GRP),[1] and the Moro Islamic Liberation Front (MILF),[2] to wit:

1. a petition for Prohibitionand Mandamus with prayer for the issuance of a Writ of Preliminary Injunction and Temporary Restraining Order (TRO) docketed as G.R. No. 183591, filed by the province of North Cotabato[3] against respondents GRP, Gen. Hermogenes Esperon, Jr.,[4] and Secretary Eduardo Ermita,[5] enjoining this Court to: (a) compel respondents to disclose the contents of the MOA-AD, (b) prohibit respondents from formally signing the MOA-AD, or, in the alternative, (c) declare the initialed MOA-AD as unconstitutional;
2. a petition for Prohibition and Mandamus with urgent prayer for the issuance of a Writ of Preliminary Injunction and/or Temporary Restraining Order docketed as G.R. No. 183752 filed by the City Government of Zamboanga, *et al.,*[6] against respondents (except Sec. Ermita), enjoining this Court to: (a) compel respondents to disclose the contents of the MOA-AD, (b) prohibit respondents from signing the MOA-AD, (c) exclude the City of Zamboanga from being part of the Bangsamoro Juridical Entity (BJE), subject-matter of the MOA-AD, or, should the MOA-AD be signed, (d) declare it as null and void.
3. 3. a petition for Injunction and/or Declaratory Relief with prayer for the issuance of a Writ of Preliminary Injunction and/or Temporary Restraining Order docketed as G.R. No. 183893 filed by the City of Iligan[7] against respondents, enjoining this Court to: (a) enjoin respondents from signing the

MOA-AD, or, in the alternative, from implementing the same, and (b) declare the MOA-AD as unconstitutional;

4. a petition for *Certiorari*, Mandamus and Prohibition with prayer for issuance of Writ of Injunction and/or Temporary Restraining Order docketed as G.R. No. 183951 filed by provincial government of Zamboanga Del Norte,[8] Rep. Cecilia Jalosjos Carreon,[9] Rep. Cesar G. Jalosjos,[10] and Seth Frederick Jalosjos, Fernando R. Cabigon, Jr. Uldarico Mejorada II, Edionar Zamoras, Edgar J. Baguio, Cedric Adriatico, Felixberto Bolando, Joseph Brendo Ajero, Norbideiri Edding, Anecito Darunday, Angelica Carreon, and Luzviminda Torrino[11] against respondents (except Sec. Ermita), enjoining this Court to: (a) declare the MOA-AD as null and void and without operative effect, and (b) restrain respondents from executing the MOA-AD.
5. a petition for Prohibition filed by Ernesto Maceda, Jejomar Binay, and Aquilino L. Pimentel III against respondents (except Gen. Esperon and Sec. Ermita) and the MILF Peace Negotiating Panel,[12] enjoining this Court to: (a) prohibit and permanently enjoin respondents from formally signing the MOA-AD or any other agreement derive therefrom or with terms similar thereto as well as from executing any of its provisions, and (b) nullify the MOA-AD for being contrary to the Constitution and the laws;
6. a petition-in-intervention for Prohibition filed by Hon. Marino Ridao and Kisin Buxani, residents of Cotabato City, lodged with the petitions of the Province of Cotabato and the City of Zamboanga in G.R. Nos. 183591 and 183752, enjoining this Court to: (a) prohibit respondents from signing the MOA-AD, (b) declare the MOA-AD as null and void, or, in the alternative, (c) exclude all the thirty-seven (37) *barangays* of Cotabato City from the coverage of the BJE territory;
7. a petition-in-intervention for Prohibition, Mandamus and Injunction filed by the Municipality of Linamon,[13] enjoining this Court to: (a) permanently restrain respondents from signing the MOA-AD, or (b) permanently restrain respondents from implementing the initialed MOA-AD, if and when the MILF insists on its enforcement, and (c) declare the MOA-AD as unconstitutional.
8. a petition-in-intervention for Prohibition filed by the City Government of Isabela, Basilan Province,[14] enjoining this Court to: (a) prohibit respondents from signing the MOA-AD, in the alternative, (b) declare the MOA-AD as null and void, and (c) exclude all the forty-five (45) *barangays* of the City of Isabela from the BJE territory;
9. a petition-in-intervention for Prohibition filed by the province of Sultan Kudarat, [15] enjoining this Court to: (a) prohibit respondents from signing the MOA-AD, (b) declare the MOA-AD as null and void, and (c) exclude the two hundred fourteen (214) *barangays* of Sultan Kudarat Province from the BJE territory;
10. a petition-in-intervention for Prohibition filed by members of the bar Carlos Gomez, Gerardo Dilig, Nesario Awat, Joselito Alisuag, and Richalez Jagmis, all from Puerto Princesa City, Palawan, enjoining this Court to: (a) prohibit respondents from implementing the MOA-AD which they had signed with the MILF Peace Negotiating Panel, in the alternative, (b) declare the MOA-AD as null and void, and (c) exclude the Province of Palawan and the Municipalities of Bataraza and Balabac from the BJE territory;
11. a petition-in-intervention for Prohibition filed by Ruy Elias Lopez as a member of the Bagobo tribe of indigenous people living in Mindanao, enjoining this Court to: (a) permanently enjoin respondents from signing the MOA-AD, and,

in the alternative, (b) declare the MOA-AD as unenforceable against other indigenous peoples;

12. a petition-in-intervention for *Mandamus* and Prohibition filed by Senator Manuel Roxas, enjoining this Court to: (a) direct respondents to publicly reveal or disclose the contents of the MOA-AD, including all documents pertinent, related, attached thereto, and order respondents to furnish petitioner-in-intervention Sen. Roxas with the draft and/or final, complete, official, and initialed copies of said MOA-AD, and (b) command respondents from acting on and signing and implementing the MOA-AD; and
13. a petition-in-intervention for Prohibition filed by former Senator Franklin Drilon and Atty. Adel Tamano, enjoining this Court to prohibit and permanently enjoin respondents from further signing, executing, and entering into the MOA-AD or any other agreement with terms similar to the MOA and/or from proceeding or implementing the MOA-AD.

These cases have been consolidated and jointly heard on oral argument by the Court.

In all, the main petitions and the petitions-in-intervention bewail the lack of public consultation and invoke violation of the people's right to information[16] in the drafting of the MOA-AD. The numerous petitions pray for the following reliefs:

1. To prevent the signing of, and, in the alternative, implementation of the initialed, MOA-AD;

2. To be furnished copies of the MOA-AD grounded on their right to information on matters of public concern;

3. To exclude certain cities and *barangays* from the BJE territory;

4. To declare the MOA-AD as unconstitutional riddled as it is with constitutional infirmities; and

5. As regards Intervenor Lopez, to declare the MOA-AD unenforceable against indigenous peoples.

The Facts

Before anything else, however, the difficult facts leading to this *cause celebre*.

The advent of the 1987 Constitution captured and reflected our nation's quest for true and lasting peace in Muslim Mindanao. The new constitution included authority for the creation of an Autonomous Region of Muslim Mindanao (ARMM).[17] This trailblazing legal framework was actually catalyzed, as early as 1976, with the signing of the Tripoli Agreement in Libya between the GRP and the MNLF.

On August 1, 1989, Congress passed and approved Republic Act 6734 entitled "An Act Providing for an Organic Act for the Autonomous Region in Muslim Mindanao." Out of the thirteen (13) provinces and nine (9) cities subjected to a plebiscite conducted on November 19. 1989, only four (4) provinces voted for their inclusion in the ARMM, namely: Provinces of Maguindanao, Lanao Del Sur, Sulu and Tawi-Tawi.

Then, on September 2, 1996, the almost elusive pursuit of peace appeared to be within reach--the GRP and the MNLF entered into and signed a total and final peace agreement implementing the 1976 Tripoli Agreement entitled "The Final Agreement on the Implementation of the 1976 Tripoli Agreement between the Government of the Republic of the Philippines and the Moro National Liberation Front." Consistent thereto, on March 31, 2001, Congress amended the first Organic Act (R.A. 6734) and enacted R.A. 9054 for the expansion of the ARMM. The plebiscite for the ratification of the amended Organic Act conducted on August 14, 2001 resulted in the addition of Basilan Province and Marawi City to the original four (4) provinces comprising the ARMM.

Peace was almost at hand, but not quite. The MILF, a break-away faction of the MNLF, wanted a separate peace. It rejected the final peace agreement between the GRP and the MNLF, and continued their armed hostilities. Once again, in the quest for lasting peace, the GRP initiated peace talks with the MILF. On July 18, 1997, the Agreement on the General Cessation of Hostilities was signed between the GRP and the MILF Peace Panels. Next, on August 27, 1998, the General Framework of Agreement of Intent was signed by both parties at the Dawah Center, Crossing Simuay, Sultan Kudarat, Maguindanao.

All these agreements, notwithstanding, at the end of 1999 to 2000, the MILF fortified its stronghold in forty-six (46) camps, attacked a number of municipalities in Central Mindanao, and took control of the town hall of Kauswagan, Lanao Del Norte. Government responded by twice declaring an "all-out war" against the MILF. On April 30, 2000, the MILF unilaterally suspended the GRP-MILF Peace Talks and, likewise, declared an all-out war against the GRP and ordered an all-out offensive on Armed Forces of the Philippines (AFP) camps all over Mindanao. Various attempts at a peace settlement were unsuccessful.

On February 28, 2001, President Arroyo issued Executive Order No. 3 defining the policy and administrative structure for the government's comprehensive peace effort, in relevant part:

> **Section 3.** ***The Three Principles of the Comprehensive Peace Process.*** The comprehensive peace process shall continue to be governed by the following underlying principles:
>
> a. A comprehensive peace process should be community-based, reflecting the sentiments, values and principles important to all Filipinos. Thus, it shall be defined not by the government alone, nor by the different contending groups only, but by all Filipinos as one community.
>
> b. A comprehensive peace process aims to forge a new social compact for a just, equitable, humane and pluralistic society. It seeks to establish a genuinely pluralistic society, where all individuals and groups are free to engage in peaceful competition for predominance of their political programs without fear, through the exercise of rights and liberties guaranteed by the Constitution, and where they may compete for political power through an electoral system that is free, fair and honest.

c. A comprehensive peace process seeks a principled and peaceful resolution to the internal armed conflicts, with neither blame nor surrender, but with dignity for all concerned.

Section 4. ***The Six Paths to Peace.*** The components of the comprehensive peace process comprise the processes known as the "Paths to Peace." These components processes are interrelated and not mutually exclusive, and must therefore be pursued simultaneously in a coordinated and integrated fashion. They shall include, but may not be limited to, the following:

a. PURSUIT OF SOCIAL, ECONOMIC AND POLITICAL REFORMS. This component involves the vigorous implementation of various policies, reforms, programs and projects aimed at addressing the root causes of internal armed conflicts and social unrest. This may require administrative action, new legislation, or even constitutional amendments.

b. CONSENSUS-BUILDING AND EMPOWERMENT FOR PEACE. This component includes continuing consultations on both national and local levels to build consensus for a peace agenda and process, and the mobilization and facilitation of people's participation in the peace process.

c. PEACEFUL, NEGOTIATED SETTLEMENT WITH THE DIFFERENT REBEL GROUPS. This component involves the conduct of face-to-face negotiations to reach peaceful settlement with the different rebel groups. It also involves the effective implementation of peace agreements.

d. PROGRAMS FOR RECONCILIATION, REINTEGRATION INTO MAINSTREAM SOCIETY AND REHABILITATION. This component includes programs to address the legal status and security of former rebels, as well as community-based assistance programs to address the economic, social and psychological rehabilitation needs of former rebels, demobilized combatants and civilian victims of the internal armed conflicts.

e. ADDRESSING CONCERNS ARISING FROM CONTINUING ARMED HOSTILITIES. This component involves the strict implementation of laws and policy guidelines, and the institution of programs to ensure the protection of non-combatants and reduce the impact of the armed conflict on communities found in conflict areas.

f. BUILDING AND NURTURING A CLIMATE CONDUCIVE TO PEACE. This component includes peace advocacy and peace education programs, and the implementation of various confidence-building measures.

In addition thereto, President Arroyo issued Memorandum of Instructions to the GRP Peace Panel providing the General Guidelines on the Peace Talks with the MILF.

On April 3, 2001, as a consequence of the signing of the Agreement on the General Framework for the Resumption of Peace Talks between the GRP and the MILF on

March 24, 2001, in Kuala Lumpur, Malaysia, the MILF suspended all military actions in their areas of operation.

Subsequently, two (2) rounds of Formal Peace Talks occurred in June 20-22, 2001 and August 5-7, 2001, respectively, with the latter resulting in the signing of the Implementing Guidelines on the Security Aspect of the GRP-MILF Tripoli Agreement on Peace of 2001 and effectively placing the parties on a cease-fire status. This agreement contained three (3) strands, specifically: (1) the Security Aspect; (2) Humanitarian, Rehabilitation and Development Aspects; and (c) the Ancestral Domain Aspect. And as previously stated, R.A. 9054 amending the Organic Act was ratified with the inclusion of Basilan Province and Marawi City in the ARMM.

Yet, incidences of violence and violation of the cease-fire pact by the MILF continued to occur. On July 19, 2003, the GRP and the MILF once again agreed to a cessation of hostilities and resume peace talks. In connection therewith, on September 2, 2003, President Arroyo issued Memorandum of Instructions to the GRP Peace Panel, *i.e.*, Revised General Guidelines on the Peace Talks with the Moro Islamic Liberation Front.

Therefrom, the continuation of several rounds of previously held exploratory talks was held on June 20-21, 2005 at Kuala Lumpur, Malaysia and resulted in the forging of clear parameters and principles to be pursued on the Governance Strand (Aspect) of the Ancestral Domain. This was followed by another round of Exploratory Talks on September 15-16, 2005 also in Kuala Lumpur, Malaysia, where both panels adopted the points on the same strand/aspect of Ancestral Domain provided in the Peace Agreement of 2001 between the GRP and the MILF.

The peace process finally culminated in the drafting of the subject MOA-AD intended to be signed in Kuala Lumpur, Malaysia on August 5, 2008.

News report began to appear on the contents of the MOA-AD and its scheduled signing on August 5, 2008. Main petitioners, except petitioners in G.R. No. 183962, all scrambled to procure a copy of the draft of this MOA-AD. Inability to secure copies thereof and a categorical response from respondent GRP, prompted the filing of these petitions. On the eve of the scheduled signing, by Resolution dated August 4, 2008, we issued a Temporary Restraining Order commanding and directing respondents and their agents to cease and desist from formally signing the MOA-AD. We likewise required the Office of the Solicitor General (OSG) to submit to the Court and petitioners the official copy of the final draft of the MOA-AD. On August 8, 2008, the OSG filed its Compliance with our Resolution.

Meanwhile, outbreak of violence occurred in some of the herein petitioner local government units. Oral arguments were held on August 15, 22, & 29, 2008. On August 19, 2008, the OSG filed a Manifestation and Motion to Dismiss the petitions on the ground that the Executive Department has declared it will thoroughly review MOA-AD and pursue further negotiations addressing all objections hurled against said document. The OSG's motion was greatly opposed by the petitioners.

On August 28, 2008, the Executive Department pronounced that it would no longer sign the MOA-AD. On the last day of the oral arguments, Madame Solicitor General, on interpellation, declared that the Executive Department, specifically, respondent Sec. Ermita has declared that the MOA-AD "will not be signed in this form, or in any

other form." Moreover, on September 3, 2008, President Arroyo dissolved the GRP Peace Panel. Finally, in compliance to the Court's directive upon termination of the oral arguments, the parties' submitted their respective Memoranda.

Petitioners and petitioners-in-intervention maintain that despite the supervening events and foregoing declarations and acts of the Executive Department, there remains a justiciable controversy, a conflict of legal rights by the parties that ought to be adjudicated by this Court. They asseverate that, supervening events notwithstanding, the cases at bench have not been mooted, or, even if so, the issues they raised fall within the exceptions to the moot and academic principle. Consequently, even with the dissolution of the GRP Peace Panel and the positive and unequivocal declaration by the Executive Department that the MOA-AD will not be signed in this form or in any other form, the constitutionality of the MOA-AD may still be ruled upon.

At the other end of the spectrum, however, the OSG is adamant that this contentious MOA-AD is, in fact, only a codification of "consensus points" and does not, in any way, create rights and obligations that must be declared infirm, and thus, is not ripe for adjudication by this Court. Furthermore, the OSG insists that the petitions and petitions-in-intervention must be dismissed on the ground of mootness, supervening events having rendered the assailed MOA-AD inexistent and all the reliefs prayed for satisfied and fulfilled. In addition, the OSG argues that a ruling by this Court on the constitutionality of the MOA-AD violates the doctrine of separation of powers as the negotiation of the MOA-AD is embraced in the President's powers and in the nature of a political question, outside the pale of judicial review.

The Issues

From the pleadings and as delineated on oral arguments, the issues raised are both procedural and substantive, namely

1. Procedural

   (i) Whether petitioners and petitioners-in-intervention have *locus standi*;

   (ii) Whether the petitions and petitions-in-intervention continue to present a justiciable controversy still ripe for adjudication; and

   (iii) Whether the petitions and petitions-in-intervention have become moot and academic.

2. Substantive

   (i) Whether the MOA-AD is unconstitutional;

   (ii) Whether the GRP Peace Panel (respondents) committed grave abuse of discretion amounting to lack or excess of jurisdiction when it negotiated and initialed the MOA-AD.

I submit that because of supervening events, the petitions and petitions-in-intervention are no longer ripe for adjudication and that these cases have been rendered moot and academic. Accordingly, the petitions should be dismissed.

I. PROCEDURAL

i. *Locus Standi*

Our pronouncements in *David v. Macapagal-Arroyo*[18] are instructive:

> The difficulty of determining *locus standi* arises in **public suits**.Here, the plaintiff who asserts a public right in assailing an allegedly illegal official action, does so as a representative of the general public. He may be a person who is affected no differently from any other person. He could be suing as a stranger, or in the category of a citizen, or taxpayer. In either case, he has to adequately show that he is entitled to seek judicial protection. In other words, he has to make out a sufficient interest in the vindication of the public order and the securing of relief as a citizen or taxpayer.
>
> x x x x
>
> However, to prevent just about any person from seeking judicial interference in any official policy or act with which he disagreed with, and thus hinders the activities of governmental agencies engaged in public service, the United State Supreme Court laid down the more stringent **direct injury test** in *Ex Parte Levitt*, later reaffirmed in *Tileston v. Ullman.* The same Court ruled that for a private individual to invoke the judicial power to determine the validity of an executive or legislative action, **he must show that he has sustained a direct injury as a result of that action, and it is not sufficient that he has a general interest common to all members of the public.**
>
> This Court adopted the **direct injury test** in our jurisdiction. In *People v. Vera*, it held that the person who impugns the validity of a statute must have **a personal and substantial interest in the case such that he has sustained, or will sustain direct injury as a result**. The *Vera* doctrine was upheld in a litany of cases, such as, *Custodio v. President of the Senate*, *Manila Race Horse Trainers Association v. De la Fuente*, *Pascual v. Secretary of Public Works* and *Anti-Chinese League of the Philippines v. Felix.*
>
> However, being a mere procedural technicality, the requirement of *locus standi* may be waived by the Court in the exercise of its discretion. This was done in the **1949 Emergency Powers Cases,** *Araneta v. Dinglasan*, where the **transcendental importance** of the cases prompted the Court to act liberally. Such liberality was neither a rarity nor accidental. In *Aquino v. Comelec*, this Court resolved to pass upon the issues raised due to the **far-reaching implications** of the petition notwithstanding its categorical statement that petitioner therein had no personality to file the suit. Indeed, there is a chain of cases where this liberal policy has been observed, allowing ordinary citizens, members of Congress, and civic

> organizations to prosecute actions involving the constitutionality or validity of laws, regulations and rulings.
>
> x x x x
>
> By way of summary, the following rules may be culled from the cases decided by this Court. Taxpayers, voters, concerned citizens, and legislators may be accorded standing to sue, provided that the following requirements are met:
>
> > (1) the cases involve constitutional issues;
> >
> > (2) for **taxpayers**, there must be a claim of illegal disbursement of public funds or that the tax measure is unconstitutional;
> >
> > (3) for **voters**, there must be a showing of obvious interest in the validity of the election law in question;
> >
> > (4) for **concerned citizens**, there must be a showing that the issues raised are of transcendental importance which must be settled early; and
> >
> > (5) for **legislators**, there must be a claim that the official action complained of infringes upon their prerogatives as legislators.

The test we have laid down is whether the party has alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult questions.[19] When an individual sues as a citizen, he must allege that he has been or is about to be subjected to some burdens or penalties by reason of the statute or act complained of.[20] When the issue concerns a public right, it is sufficient that the petitioner is a citizen and has an interest in the execution of the laws.[21]

The petitioners and petitioners-in-intervention claim *locus standi* with their invocation of the transcendental importance of the issues involved and their assertion of public rights to information and to consultation.

Considering that the Court has discretion to relax this procedural technicality, and given the liberal attitude it has adopted in a number of earlier case, we acknowledge the legal standing of the petitioners herein.

ii. *Ripeness for Adjudication*

A mandatory requirement for the Court's exercise of the power of judicial review is the existence of an actual case or controversy. An actual case or controversy is a conflict of legal rights, an assertion of opposite legal claims which can be resolved on the basis of existing law and jurisprudence.[22] The controversy must be definite and concrete, bearing upon the legal relations of parties who are pitted against each

other due to their adverse legal interests.[23]

But it is not enough that the controversy exists at the outset. To qualify for adjudication, it is necessary that the actual controversy be extant at all stages of review, not merely at the time the complaint is filed.[24] This is to say that the case is ripe for judicial determination.

In *Guingona v. Court of Appeals*,[25] we had occasion to declare:

> Closely related to the requirement of "actual case," Bernas continues, is the second requirement that the question is "ripe" for adjudication. A question is ripe for adjudication when the act being challenged has had a direct adverse effect on the individual challenging it. Thus, in *PACU v. Secretary of Education*, the Court declined to pass judgment on the question of the validity of Section 3 of Act No. 2706, which provided that a private school may be opened to the public, it must first obtain a permit from the secretary of education, because *all the petitioning schools had permits to operate and were actually operating, and none of them claimed that the secretary had threatened to revoke their permit*.
>
> In *Tan v. Macapagal*, the Court said that Petitioner Gonzales "had the good sense to wait" until after the enactment of the statute [Rep. Act No. 4913(1967)] requiring the submission to the electorate of certain proposed amendments to the Constitution [Resolution Nos. 1 and 3 of Congress as a constituent body (1967)] before he could file his suit. It was only when this condition was met that the matter became ripe for adjudication; prior to that stage, the judiciary had to keep its hands off.
>
> The doctrine of separation of powers calls for each branch of government to be left alone to discharge its duties as it sees fit. Being one such branch, the judiciary, Justice Laurel asserted, "will neither direct nor restrain executive [or legislative action] x x x." The legislative and the executive branches are not allowed to seek advice on what to do or not to do; thus, judicial inquiry has to be postponed in the meantime. Before a court may enter the picture, a prerequisite is that something has been accomplished or performed by either branch. Then *may it* pass on the validity of what has been done but, then again, only "when x x x properly challenged in an appropriate legal proceeding."

In the case at bench, there is no gainsaying that at the time of the filing of the initial petitions up to the issuance by this Court of the Temporary Restraining Order, there was an actual extant controversy. The signing of the MOA-AD in Malaysia had been scheduled; several foreign dignitaries were invited to grace the ceremony. The timeliness of the exercise of power by the Court may have prevented a possible constitutional transgression. It was so timely an exercise of judicial review over an actual controversy by the Court such that it may have provided the impetus sufficient for the Executive Department to "review" its own acts, and to decided, subsequently, to abort the entire MOA-AD.

However, supervening events effectively eliminated the conflict of rights and opposite legal claims. There is no longer an actual case or controversy between the parties. The GRP Peace Panel, respondents in these consolidated cases, has been

disbanded by the President, along with the resounding declaration that "the MOA-AD will not be signed in its present form, or in any other form." The Memorandum issued by Executive Secretary Ermita to the Solicitor General is unequivocal: "No matter what the Supreme Court ultimately decides, the government will not sign the MOA."

The subsequent events were sufficient to alter the course of these judicial proceedings. The President's decision not to sign the MOA-AD may even be interpreted as a rectification of flawed peace negotiations by the panel. But to this Court, it is clearly a supervening event that affects the ripeness of the case for adjudication. With an abandoned and unsigned MOA-AD and a dissolved peace Panel, any purported controversy has virtually disappeared. Judicial review cannot be exercised where the incipient actual controversy does not remain extant until the termination of the case; this Court cannot provide reliefs for controversies that are no longer there.

After the *mandamus* aspect of the initial petitions had been satisfied, what remains are basically the petitions for *certiorari* and prohibition.[26] The reliefs prayed for include the declaration of nullity of the MOA-AD and the prohibition on the members of the Peace Panel from signing the MOA-AD.

These reliefs are unavailing, because the peace Panel has been dissolved and, by the nature of things, rendered permanently unable to sign any agreement. On the other hand, the MOA-AD sought to be nullified does not confer any rights nor imposes any duties. It is, as of today, non-existent.

In *Montesclaros v. COMELEC*,[27] we held that a proposed bill is not subject to judicial review, because it is not a law. A proposed bill creates no right and imposes no duty legally enforceable by the Court. A proposed bill having no legal effect violates no constitutional right or duty. The Court has no power to declare a proposed bill constitutional or unconstitutional because that would be in the nature of rendering an advisory opinion on a proposed act of Congress. This ruling finds a parallel in a proposed agreement to be entered into by the Executive Department which has been aborted, unsigned, and "will not be signed in its present form or in any other form."

iii. ***Mootness***

A moot and academic case is one that ceases to present a justiciable controversy by virtue of supervening events, so that a declaration thereon would be of no practical value. Generally, courts decline jurisdiction over such case, or dismiss it on ground of mootness.[28]

Thus, in *Gonzales v. Narvasa*,[29] where the constitutionality of the creation of the Preparatory Commission on Constitutional Reform (PCCR) was questioned, the Court dismissed the petition because by then, the PCCR had ceased to exist, having finished its work and having submitted its recommendations to then President Estrada. In *Abbas v. COMELEC*,[30] we refused to rule on a perceived potential conflict between provisions of the Muslim Code and those of the national law.

However, it is axiomatic that courts will decide cases, otherwise moot and academic,

if: *first*, there is a grave violation of the Constitution; *second*, the exceptional character of the situation and the paramount public interest involved; *third*, when the constitutional issue raised requires formulation of controlling principles to guide the bench, the bar and the public; or *fourth*, when the case is capable of repetition yet evasive of review.[31]

As to the first exception, there is no violation of the Constitution that will justify judicial review despite mootness, because the MOA-AD has not been signed - and will not be signed. The eminent Justice Antonio T. Carpio, in his separate opinion, even as he expressed fears of numerous "drastic changes" in the Constitution, acknowledges that these will take place only IF the MOA-AD will be signed. The scholarly ponencia concludes with the finding that the MOA-AD is unconstitutional, obviously referring to its provisions. So does the separate opinion of Justice Ruben T. Reyes. But, to repeat, the MOA-AD is, as of today, non-existent. Thus, as it is, these dreaded constitutional infractions are, at best, anticipatory, hypothetical or conjectural.

Neither will the second exception apply. The issue of paramount public interest will arise only IF the MOA-AD is signed. With the Peace Panel dissolved, and with the unequivocal pronouncement of the President that the MOA-AD will not be signed, there is no occasion to speak of the exceptional or extraordinary character of the controversy as would render the case ripe for resolution and susceptible of judicial determination.

Given the events that led to the issuance by the Court of a TRO in order to stop the signing of the MOA-AD in Malaysia on August 5, 2008, it would appear that there is a need for the Court to formulate controlling principles, precepts and rules to guide the bench, the bar and the public - particularly a peace negotiating panel - in future peace talks. However, a scrutiny of the factual antecedents of this case reveals that no such imperative exists.

It is well to note that Executive Order No. 3, which created the GRP Peace Panel, explicitly identifies the Constitution as the basic legal framework for the peace negotiations. It states that the GRP Peace Panel was created with the primary objective to attain "*a just, comprehensive and enduring peace under a rule of law and in accordance with constitutional processes*,"[32] with "*a need to further enhance the contribution of civil society to the comprehensive peace process by institutionalizing the people's participation*."[33] The same Executive Order provides sufficient standards to guide the GRP Peace Panel in the performance of its avowed work.

Then, there is the March 1, 2001 Memorandum of Instructions from the President, followed by the Memorandum of Instructions dated September 8, 2003. Common to the instructions is the provision that the negotiation shall be conducted "*in accordance with the mandate of the Constitution, the Rule of Law, and the Principles of Sovereignty and Territorial Integrity of the Republic of the Philippines*." These are adequate guidelines for the GRP Peace panel; it would be superfluous for the Court to issue guidelines which, presumably, will be similar to the ones already in existence, aside from possibly trenching on the constitutional principle of separation of powers.

If the respondents-members of the GRP Peace Panel, in the conduct of the negotiation, breached these standards or failed to heed the instructions, it was not for lack of guidelines. In any event, the GRP Peace Panel is now disbanded, and the MOA-AD unsigned and "not to be signed." There is no necessity for this Court to issue its own guidelines as these would be, in all probability, repetitive of the executive issuances.

The fourth exception, that the issue is "*capable of repetition yet evasive of review*," is likewise inapplicable in this case. In this connection, we recall *Sanlakas v. Reyes*, [34] where the Court dismissed the petitions which assailed as unconstitutional Proclamation No. 427, declaring a state of rebellion, and General Order No. 4, after the President had issued Proclamation no. 435 declaring that the state of rebellion had ceased to exist.

Apart from the brilliant ponencia of Justice Dante O. Tinga, particularly illuminating is the separate opinion of Chief Justice Artemio V. Panganiban when he wrote:

> While the Petitions herein have previously embodied a live case or controversy, they now have been rendered extinct by the lifting of the questioned issuances. Thus, *nothing is gained by breathing life into a dead issue.*
>
> Moreover, without a justiciable controversy, the Petitions have become pleas for declaratory relief, over which the Supreme Court has no *original* jurisdiction. Be it remembered that they were filed directly with this Court and thus invoked its original jurisdiction.
>
> On the theory that the "state of rebellion" issue is "capable of repetition yet evading review," I respectfully submit that the question may indeed still be resolved even after the lifting of the Proclamation and Order, **provided the party raising it in a proper case has been and/or continue to be prejudiced or damaged as a direct result of their issuance.**
>
> In the present case, petitioners have not shown that they have been or continue to be directly and pecuniarily prejudiced or damaged by the Proclamation and Order. Neither have they shown that this Court has original jurisdiction over petitions for declaratory relief. I would venture to say that, perhaps, if this controversy had emanated from an *appealed* judgment from a lower tribunal, then this Court may still pass upon the issue on the theory that it is "capable of repetition yet evading review," and the case would not be an *original* action for declaratory relief.
>
> **In short, the theory of "capable of repetition yet evading review" may be invoked only when this Court has jurisdiction over the subject matter. It cannot be used in the present controversy for declaratory relief, over which the Court has no *original* jurisdiction.**

Given the similar factual milieu in the case at bench, I submit that judicial review of the instant controversy cannot be justified on the principle that the issue is "capable of repetition yet evasive of review."

II. SUBSTANTIVE

I respectfully submit that the Court should view this case from the perspective of executive power, and how it was actually exercised in the formulation of the GRP Peace Panel until the challenged MOA-AD was crafted in its present abandoned form.

The President is the Chief Executive of the Republic and the Commander-in-Chief of the armed forces of the Philippines.

Section 1, Article VII of the Philippine Constitution provides: "*The executive power shall be vested in the President of the Philippines*." Additionally, Section 18, Article VII, states:

> Sec. 18. The President shall be the Commander-in-Chief of all armed forces of the Philippines and whenever it becomes necessary, he may call out such armed forces to prevent or suppress lawless violence, invasion or rebellion. In case of invasion or rebellion, when the public safety requires it, he may, for a period not exceeding sixty days, suspend the privilege pf the writ of *habeas corpus* or place the Philippines or any part thereof under martial law. Within forty-eight hours from the proclamation of martial law or the suspension of the privilege of the writ of *habeas corpus*, the President shall submit a report in person or in writing to the Congress. The Congress, voting jointly, by a vote of at least a majority of all its Members in regular or special session, may revoke such proclamation or suspension which revocation shall not be set aside by the President. Upon the initiative of the President, the Congress may, in the same manner, extend such proclamation or suspension for a period to be determined by the Congress, if the invasion or rebellion shall persist and public safety requires it.

In *Sanlakas v. Reyes*,[35] we held that the above provision grants the President, as Commander-in-Chief, a sequence of graduated powers, to wit: (1) the calling out power, (2) the power to suspend the privilege of the writ of *habeas corpus*, and (3) the power to declare martial law. Thus:

> In the exercise of the latter two powers, the Constitution requires the concurrence of two conditions, namely, an actual invasion or rebellion, and that public safety requires the exercise of such power. However, as we observed in *Integrated Bar of the Philippines v. Zamora*, "[t]hese conditions are not required in the exercise of the calling out power. The only criterion is that `whenever it becomes necessary,' the President may call the armed forces `to prevent or suppress lawless violence, invasion or rebellion.'"

Implicit in these is the President's power to maintain peace and order. In fact, in the seminal case of *Marcos v. Manglapus*,[36] we ruled:

> [T]his case calls for the exercise of the President's powers as protector of the peace. The power of the President to keep the peace is not limited merely to exercising the commander-in-chief powers in times of emergency or to leading the State against external and internal threats to its existence. The President is not only clothed with extraordinary powers

> in times of emergency, but is also tasked with extraordinary powers in times of emergency, but is also tasked with attending to the day-to-day problems of maintaining peace and order and ensuring domestic tranquility in times when no foreign foe appears on the horizon. Wide discretion, within the bounds of law, in fulfilling presidential duties in times of peace is not in any way diminished by the relative want of an emergency specified in the commander-in-chief provision. For in making the President commander-in-chief the enumeration of powers that follow cannot be said to exclude the President's exercising as Commander-in-Chief powers short of the calling of the armed forces, or suspending the privilege of the writ of *habeas corpus* or declaring martial law, in order to keep the peace, and maintain public order and security.

Undoubtedly, then, the President has power to negotiate peace with the MILF, and to determine in what form and manner the peace process should be conducted.

In the exercise of this power, the President issued Executive Order No. 3, where she mapped out the principles to be followed in the comprehensive peace process: (a) community-based and defined by all Filipinos as one community, (b) a new social compact establishing a genuinely pluralistic society, and (c) a principled and peaceful resolution to the internal armed conflicts.[37] In Section 4 thereof, the president identified the 6 paths to peace, with processes being interrelated and not mutually exclusive, and must be pursued simultaneously in a coordinated and integrated fashion: (a) pursuit of social, economic and political reforms, (b) consensus-building and empowerment for peace, (c) peaceful, negotiated settlement with the different rebel groups, (d) programs for the reconciliation, reintegration into mainstream society and rehabilitation, (e) addressing concerns arising from continuing armed hostilities, and (f) building and nurturing a climate conducive to peace.

Executive Order No. 3, together with the Memorandum of Instructions of March 1, 2001 and the Memorandum of Instructions of September 8, 2003, constitutes the mandate of the GRP Peace panel. It was within the parameters of this mandate that the GRP Peace panel was to negotiate with the MILF and arrive at a Comprehensive Peace Agreement. It was pursuant to these strictures that the MOA-AD was crafted, initialed and scheduled for signing.

Even as the petitioners and petitioners-in-intervention roundly condemn the MOA-AD, as currently worded, to have violated constitutional and statutory principles - and assail the GRP Peace Panel for having acted with grave abuse of discretion because of its failure to abide by its mandate - it is noteworthy they do not raise any question about the validity of Executive Order No. 3 and the Instructions issued by the President.

Considering the events that have supervened since the filing of the initial petition and the issuance by this Court of a TRO, it is suggested that the angle of vision for the discussion of the substantive issues in this case should be from the perspective of the relief/s that this Court can grant the parties, taking into account their respective prayers. These are:

1. Mandamus.

a) Three petitions and two petitions-in-intervention praying for a writ of

mandamus, to compel the production of the official copy of the MOA-AD, the petitioners invoking their right to information. These petitions are now mooted, because the requested documents have already been produced.

b) Two respondents-intervenors who pray that the Executive Department be directed to sign the MOA-AD and to continue with the peace negotiations. With the definite pronouncement of the President that the MOA-AD will not be signed in its present form or in any other form, this prayer cannot be granted, because the Court cannot compel a party to enter into an agreement.

2. Declaratory Relief. - One petition for declaratory relief which may not be granted because the Court has no original jurisdiction over petitions for declaratory relief.[38]

3. *Certiorari* and Prohibition. One petition for *certiorari* and twelve petitions for prohibition, including the petitions-in-intervention, seek a declaration of nullity of the MOA-AD (for being unconstitutional), a writ of *certiorari* against the members of the GRP Peace Panel for having acted with grave abuse of discretion, and a writ of prohibition to prevent the signing of the MOA-AD.

There's the rub. Because the MOA-AD will not be signed "in its present form, or in any other form," *certiorari* will not lie. The Court cannot review an inexistent agreement, an unborn contract that does not purport to create rights or impose duties that are legally demandable. Neither will the remedy of prohibition lie against a GRP Peace Panel that no longer exists. *To do so would be to flog a dead horse.*

The ponencia would wish to get around this inescapable truth by saying: "*The MOA-AD not being a document that can bind the Philippines under international law notwithstanding, respondents' almost consummated act of guaranteeing amendments to the legal framework is, by itself, sufficient to constitute grave abuse of discretion.*"

With due respect, I beg to disagree. Grave abuse of discretion can characterize only consummated acts (or omissions), not an "almost (but not quite) consummated act."

Chief Justice Panganiban, in his separate opinion in *Sanlakas*, writes: "*The first requirement, the existence of a live case or controversy, means that the existing litigation is ripe for resolution and susceptible of judicial determination, as opposed to one that is conjectural or anticipatory, hypothetical or feigned.*"

It is not the province of this Court to assume facts that do not exist.

It is for the foregoing reasons that I respectfully register my dissent. I vote to **DENY** the petitions.

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[1] Represented by Secretary Rodolfo Garcia, Atty. Leah Armamento, Atty. Sedfrey Candelaria, Ryan Mark Sullivan.

[2] Breakaway group of the Moro National Liberation Front.

[3] Represented by Governor Jesus Sacdalan and/or Vice-Governor Emmanuel Piñol, for and in his own behalf.

[4] In his capacity as Presidential Adviser on the Peace Process.

[5] In his capacity as Executive Secretary.

[6] Represented by the City Mayor of Zamboanga, Celso Lobregat. Other petitioners are Rep. Isabelle Climaco, District 1 of Zamboanga City and Rep. Erico Basilio A. Fabian, District 2, City of Zamboanga.

[7] Represented by City Mayor Lawrence Lluch Cruz.

[8] Represented by Gov. Rolando E. Yebes and Vice-Governor Francis H. Olvis.

[9] 1st Congressional District.

[10] 3rd Congressional District.

[11] Members of the Sangguniang Panlalawigan of Zamboanga del Norte Province.

[12] Represented by its Chairman Mohagher Iqbal.

[13] Represented by Mayor Noel Deano.

[14] Represented by Mayor Cherrylyn Santos-Akbar.

[15] Represented by Gov. Suharto Mangudadatu.

[16] Article III, Section 7 of the Constitution:

Sec. 7. The right of the people to information on matters of public concern shall be recognized. Access to official records and to documents and papers pertaining to official acts, transactions, or decisions, as well as government research data used as basis for policy development shall be afforded the citizen, subject to such limitations as may be provided by law.

[17] Article X, Sections 15, 18 and 19 of the Constitution:

Sec. 15. There shall be created autonomous regions in Muslim Mindanao and in the Cordilleras consisting of provinces, cities, municipalities, and geographical areas sharing common and distinctive historical and cultural heritage, economic and social structures, and other relevant characteristics within the framework of this Constitution and the national sovereignty and territorial integrity of the Republic of the Philippines.

Sec. 18. The Congress shall enact an organic act for each autonomous region with

the assistance and participation of the regional consultative commission composed of representatives appointed by the President from a list of nominees from multi-sectoral bodies. The organic act shall define the basic structure of the government for the region consisting of the executive department and legislative assembly, both of which shall be elective and representative of the constituent political units. The organic act shall likewise provide for special courts with personal, family and property law jurisdiction consistent with the provisions of this Constitution and national laws.

The creation of the autonomous region shall be effective when approved by majority of the votes cast by the constituent units in a plebiscite called for the purpose, provided that only provinces, cities, and geographic areas voting favorably in such plebiscite shall be included in the autonomous region.

Sec. 19. The first Congress elected under this Constitution shall, within eighteen months from the time of organization of both Houses, pass the organic acts for the autonomous regions in Muslim Mindanao and the Cordilleras.

[18] G.R. No. 171396, May 3, 2006, 489 SCRA 160.

[19] *Province of Batangas v. Romulo*, G.R. No. 152772, May 27, 2004.

[20] *Francisco v. House of Representatives*, 460 Phil. 830, 896 (2003).

[21] Supra note 18.

[22] *Guingona v. Court of Appeals*, G.R. No. 125532, July 10, 1998.

[23] *John Hay People's Alternative Coalition v. Lim*, G.R. No. 119775, October 24, 2003.

[24] *Davis v. Federal Election Commission*, 128 S. Ct. 2759 (2008), citing *Arizonians for Official English v. Arizona*, 117 S. Ct. 1055.

[25] Supra note 22.

[26] The records show pleadings filed by two Respondents-in-Intervention, namely: the Muslim Legal Assistance Foundation, inc. and the Consortium of Bangsamoro Civil Society, represented by its Chairman Guiamel M. Alim, and Bangsamoro Women Solidarity Forum, represented by its Chair Tarhata M. Maglangit. In their respective memorandum, these two intervenors uniformly pray for the lifting of the temporary restraining order issued by this Court, and to require the Executive Department to fulfill its obligation under the MOA-AD and continue with the peace talks with the MILF with the view of forging a Comprehensive Compact.

[27] G.R. No. 152295, July 9, 2002.

[28] *David v. Macapagal-Arroyo*, supra note 18.

[29] G.R. No. 140635, August 14, 2000.

[30] G.R. No. 89651, November 10, 1989, 179 SCRA 287.

[31] *David v. Macapagal-Arroyo*, supra note 18.

[32] 1st WHEREAS clause, E.O. No. 3.

[33] Last WHEREAS clause, E.O No. 3.

[34] G.R. No. 159085, February 3, 2004, 421 SCRA 656.

[35] Supra note 34.

[36] G.R. No. 88211, September 15, 1989, 177 SCRA 668.

[37] Section 3, E.O. No. 3.

[38] Panganiban, Separate Opinion, *Sanlakas v. Reyes*, supra note 34.
