

# Testing Constitutional Waters IX: The Constitutional Parameters of the Exercise of Executive Powers in Non-International Armed Conflict Situations

*Sedfrey M. Candelaria\**

*Ma. Carmel M. Baquilod\*\**

I. INTRODUCTION.....	352
II. REVIEW OF CONSTITUTIONAL POWERS IN TIMES OF EMERGENCY AND ARMED CONFLICT SITUATIONS.....	356
<i>A. State Principles</i>	
<i>B. The Powers of the President</i>	
II. NON-INTERNATIONAL ARMED CONFLICT IN THE PHILIPPINES ...	369
<i>A. History</i>	
<i>B. War Without Winners</i>	
III. RESPONSE OF THE GOVERNMENT .....	375
<i>A. Peace Process</i>	
<i>B. The Elusive Bangsamoro Nation</i>	
<i>C. No Right Solution for the Left</i>	
IV. LAWS RELATED TO ARMED CONFLICT .....	384
<i>A. The Anti-Subversion Law</i>	
<i>B. The Human Security Act</i>	
<i>C. Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity</i>	
V. THE PRESIDENT’S ACTIONS .....	391
VI. THE PRESIDENT’S DILEMMA.....	393
<i>A. Implications of the Peace Process</i>	
<i>B. Implications of Declaration of Martial Law</i>	
<i>C. The Lincolnian Dilemma</i>	
VII. CONCLUSION: THE PATH TO TRANSITIONAL JUSTICE.....	401

## I. INTRODUCTION

On 23 May 2017, the City of Marawi became the battleground of the vehement hostilities between the Armed Forces of the Philippines (AFP) and

the Maute Group.<sup>1</sup> These emerging extremists were believed to be supporters of the global terrorist group, Islamic State of Iraq and Syria (ISIS).

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\* '90 LL.M., University of British Columbia; '84 LL.B., Ateneo de Manila University School of Law. The Author is currently the Dean of the Ateneo de Manila University School of Law and is a professorial lecturer on Constitutional Law, Public International Law, Political Law Review, International Economic Law, Children's Rights Law, Indigenous Peoples' Rights Law, and Peace Process for the same university. He is a former member of the Government of the Republic of the Philippines (GPR) Negotiating Panel for talks with the Communist Party of the Philippines/New People's Army/National Democratic Front; former Chief Legal Consultant to the GRP Negotiating Panel for talks with the Moro Islamic Liberation Front; head of Research, Publication, and Linkages Office and the Department of Special Areas of Concern of the Philippine Judicial Academy of the Supreme Court of the Philippines; former head of the Indigenous Peoples' Desk of the Ateneo Human Rights Center; and President of the Court Appointed Special Advocates for Children/Guardians Ad Litem Foundation of the Philippines, Inc. The Author's previous works published in the *Journal* include *Testing Constitutional Waters VIII: Coming Full Circle: Executive Power and Judicial Consistency as Applied to Marcos v. Manglapus and Ocampo v. Enriquez*, 62 ATENEO L.J. 1 (2017); *Testing Constitutional Waters VII: Nationality, Citizenship, and Foundlings as Pronounced in Poe-Llamanzares v. Commission on Elections*, 61 ATENEO L.J. 29 (2016); *Testing Constitutional Waters VI: Developments in Treaty-Making and the Enhanced Defense Cooperation Agreement*, 61 ATENEO L.J. 1 (2016); *Testing Constitutional Waters V: The Proposed Bangsamoro Basic Law and the Primacy of the Sovereign Power of the State*, 59 ATENEO L.J. 1027 (2015); *Testing Constitutional Waters IV: Power of the Purse in Light of the Araullo and Belgica Rulings*, 59 ATENEO L.J. 317 (2014); *Walking the Line: The Philippine Approach to Church-State Conflict*, 58 ATENEO L.J. 842 (2014); *Testing Constitutional Waters III: Areas for Constitutional Reform in the System of Checks and Balances — Making Sense of P-Noy's Tuwid Na Landas*, 57 ATENEO L.J. 1 (2012); *A Review of Legal Education in the Philippines*, 55 ATENEO L.J. 567 (2010); *Testing Constitutional Waters II: Political and Social Legitimacy of Judicial Decisions*, 55 ATENEO L.J. 1 (2010); *Postscript to the Supreme Court MOA-AD Judgment: No Other Way but to Move Forward*, 54 ATENEO L.J. 269 (2009); *Consultation and the Courts: Reconfiguring the Philippine Peace Process*, 54 ATENEO L.J. 59 (2009); *An Overview of the International Legal Concept of Peace Agreements as Applied to Current Philippine Peace Processes*, 53 ATENEO L.J. 263 (2008); *The Juvenile Justice and Welfare Act of 2006: Changing Patterns and Responses for Juvenile Offending*, 52 ATENEO L.J. 293 (2007); *Legal Concept of Terrorism Under International Law and Its Application to Philippine Municipal Law*, 51 ATENEO L.J. 823 (2007); *Testing Constitutional Waters: Balancing State Power, Economic Development, and Respect for Human Rights*, 51 ATENEO L.J. 1 (2006); *Courts and Social Context Theory; Philippine Judicial Reform as Applied to Vulnerable Sectors*, 50 ATENEO L.J. 823 (2006); *The Philippines and the Convention on the Rights of a Child: Evaluating Compliance with Respect to International Standards for Procedural Rules Involving Children*, 49 ATENEO L.J. 1016 (2004); *Introducing the Indigenous Peoples*

whose goal was to establish an ISIS base in the Philippines.<sup>2</sup> What started as a government operation to capture leaders of the Abu Sayyaf and Maute Group turned into a five-month long war that has caused the devastation of the entire city, displacement of thousands of residents, and deaths of soldiers, militants, and civilians.<sup>3</sup> In no less than 24 hours after the start of the intrusion, President Rodrigo Roa Duterte (President Duterte) issued Proclamation No. 216, declaring a state of martial law and suspending the privilege of the writ of *habeas corpus* over the entire region of Mindanao.<sup>4</sup> This was to prevent the “deterioration of public order and safety in Marawi City ... and of the entire Island of Mindanao.”<sup>5</sup>

The war in Marawi is the most recent chapter in the dark history of non-international armed conflict situation in the Philippines. Non-international armed conflict is defined as

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*Rights Act*, 47 ATENEO L.J. 571 (2002); *The Rights of Indigenous Communities in International Law*, 46 ATENEO L.J. 273 (2001); *The Legal Characterization of the Asia-Pacific Economic Conference (APEC) and the Individual Action Plans in International Law*, 44 ATENEO L.J. 405 (2000); & *The IMF and the Philippines: Anatomy of a Third World Debt*, 36 ATENEO L.J. 18 (1992).

★★ '19 J.D. *cand.* Ateneo de Manila University School of Law. The Author is a Member of the Board of Editors of the *Ateneo Law Journal*. She was an Associate Lead Editor of the fourth issue of the *Journal's* 61st Volume.

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1. Joseph Hincks, *What the siege of a Philippine city reveals about the ISIS' deadly new front in Asia*, TIME, May 25, 2017, available at <http://time.com/marawi-philippines-isis> (last accessed Oct. 31, 2017).
2. Rommel C. Banlaoi, *The Maute Group and the rise of family terrorism*, available at <https://www.rappler.com/thought-leaders/173037-maute-group-rise-family-terrorism> (last accessed Oct. 31, 2017).
3. Agence France-Presse, *Marawi: City destroyed in Philippines' longest urban war*, PHIL. DAILY INQ., Oct. 19, 2017, available at <http://newsinfo.inquirer.net/939202/marawi-war-maute-terrorism-duterte-isnilon-hapilon-is-islamic-state> (last accessed Oct. 31, 2017).
4. Office of the President, *Declaring a State of Martial Law and Suspending the Privilege of the Writ of Habeas Corpus in the Whole of Mindanao*, Proclamation No. 216, s. 2017 (May 23, 2017).
5. Representative Edcel C. Lagman, et. al. v. Hon. Salvador C. Medialdea, et. al., G.R. No. 231658, July 4, 2017, at 31, available at <http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2017/july2017/231658.pdf> (last accessed Oct. 31, 2017).

a protracted armed violence between governmental authorities and organized armed groups or between such groups within that State; Provided, That such force or armed violence gives rise, or may give rise, to a situation to which the Geneva Conventions of 12 August 1949, including their common Article 3, apply.

...

It does not cover internal disturbances or tensions such as riots, isolated and sporadic acts of violence or other acts of a similar nature.<sup>6</sup>

For almost five decades, various Presidents, who served as Commanders-in-Chief, have been faced with the herculean task of resolving the problems with the insurgents who are based in the country. These include the established rebel groups such as the Moro Islamic Liberation Front and the Communist Party of the Philippines-New People's Army-National Democratic Front, and known terrorist groups, the Abu Sayyaf and the Maute Group. The Presidents employed different tactics to end the conflict with the rebels, either by engaging in peace talks or by exercising any of the emergency powers granted by the Constitution. However, to this day, such efforts remain unsuccessful in attaining peace, in light of the ever-changing political landscape of the country and unstable leadership on both sides.

This Article examines the powers bestowed upon the President in dealing with the predicament with insurgents and secessionists. Part I is this Introduction. Part II is a review of the provisions in the 1987 Constitution that expressly provide the emergency powers of the President, including the restrictions on such exercise as interpreted by various Supreme Court decisions. Part III is an account of the emergence of internal armed conflicts in the country. Part IV is a narration of the responses taken by past administrations. Part V presents a survey of the recently enacted laws related to armed conflicts. Part VI provides for a comparative study of the approaches of the President to the different rebel groups in the context of the peace process and the different laws. Part VI tackles the complexities of the exercise of the powers and their legal implications. Finally, the Article concludes with a discussion of transitional justice as a new legal framework that the President may use in achieving just and sustainable solutions to the conflict.

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6. An Act Defining And Penalizing Crimes Against International Humanitarian Law, Genocide And Other Crimes Against Humanity, Organizing Jurisdiction, Designating Special Courts, And For Related Purposes [Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity], Republic Act No. 9851, § 3 (c) (2009).

## II. REVIEW OF CONSTITUTIONAL POWERS IN TIMES OF EMERGENCY AND ARMED CONFLICT SITUATIONS

It is known that the 1987 Philippine Constitution serves as a reaction to the excesses and abuses of the Marcos Regime.<sup>7</sup> The 1986 Constitutional Commission put several safeguards to ensure that the Philippines remains a “democratic and republican State”<sup>8</sup> where “[s]overeignty resides in the people[,]”<sup>9</sup> and shall not be under any form of authoritarian rule.<sup>10</sup> Therefore, even if the country has one individual, the President, as Head of State, his or her powers are restricted by the existence of the three branches of government.<sup>11</sup> This is in accordance with what sovereign authority entails — a delegation by the Filipino people to “concrete persons in whose hands the powers of the government temporarily reside.”<sup>12</sup>

Despite this, the framers still provided the President with certain options for times when the country is in great peril. As early as the American occupation, the President was already equipped with “extraordinary powers to safeguard the integrity of the Philippines and to [e]nsure the tranquility of its inhabitants[.]”<sup>13</sup>

### A. State Principles

The emergency powers of the President are rooted in the State’s principles of “renunciation of war,”<sup>14</sup> the supremacy of civilian authority,<sup>15</sup> the

7. JOAQUIN G. BERNAS, S.J., *THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY* 903 (2009 ed.).

8. PHIL. CONST. art. II, § 1.

9. PHIL. CONST. art. II, § 1.

10. BERNAS, *supra* note 7, at 65.

11. PHIL. CONST. arts. II-IV. These are the legislative, executive, and judicial departments.

12. BERNAS, *supra* note 7, at 55.

13. An Act Declaring a State of Emergency and Authorizing the President to Promulgate Rules and Regulations to Safeguard the Integrity of the Philippines and to Insure the Tranquility of its Inhabitants, Commonwealth Act No. 600, § 1 (1940).

14. PHIL. CONST. art. II, § 2. The provision on “renunciation of war” came from the Kellogg-Briand Pact of 1928 that renounces only “wars of aggression.” JOAQUIN BERNAS, S.J., *FOREIGN RELATIONS IN CONSTITUTIONAL LAW* 21 (1995).

15. PHIL. CONST. art. II, § 3.

government's prime duty of serving and protecting the people,<sup>16</sup> the "maintenance of peace and order, the protection of life, liberty, and property, and the promotion of the general welfare."<sup>17</sup> In times of international or domestic conflict, the President has the option to exercise any of the powers defined by the Constitution, in the hope that it will be the least destructive response to antagonistic forces.

Civilian supremacy is emphasized by the fact that the President, who is a civilian, serves as the Commander-in-Chief.<sup>18</sup> An integral part of this provision is the police force, which "shall be national in scope and civilian in character."<sup>19</sup> The 1935 Constitution did not provide for an express declaration of civilian supremacy, and it was only in the 1973 Constitution that this clause was recognized as a State principle.<sup>20</sup> The second part of this provision, which first appeared in the 1987 Constitution, states that the "Armed Forces of Philippines is the *protector of the people* of the State [and] its goal is to secure the sovereignty of the State and the integrity of the national territory."<sup>21</sup> Fr. Joaquin G. Bernas, S.J. (Fr. Bernas), a prominent authority in Constitutional Law, explains that the phrase "protector of the people" is truly intended as a "corrective" measure to the abuses of the military during the Martial Law era.<sup>22</sup>

This, however, does not completely dispossess the military of participation in civilian affairs. In the case of *Integrated Bar of the Philippines v. Zamora*,<sup>23</sup> the Court recognized the need for military assistance in the "implementation and execution of certain traditionally 'civil' functions."<sup>24</sup> The Court enumerated activities<sup>25</sup> that have emulated "mutual support and

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16. PHIL. CONST. art. II, § 4.

17. PHIL. CONST. art. II, § 5.

18. PHIL. CONST. art. VII, § 18.

19. PHIL. CONST. art. XVI, § 6.

20. 1973 CONST. art. II, § 7 (superseded 1987).

21. PHIL. CONST. art. II, § 3 (emphasis supplied). See BERNAS, *supra* note 7, at 897.

22. BERNAS, *supra* note 7, at 65.

23. *Integrated Bar of the Philippines v. Zamora*, 338 SCRA 81 (2005).

24. *Id.* at 114.

25. These activities are:

- (1) Elections;
- (2) Administration of the Philippine National Red Cross;
- (3) Relief and rescue operations during calamities and disasters;
- (4) Amateur sports promotion and development;

cooperation”<sup>26</sup> between the military and police force which in no way derogates from civilian supremacy.<sup>27</sup>

In turn, civilians may also be required by law to render personal military or civil service in fulfillment of the duty of the government to serve and protect the State.<sup>28</sup> It is to be noted that prior to the 1987 Constitution, the prime duty of the government was *only* to defend the State.<sup>29</sup> The 1935 Constitution reads, “[t]he defense of the State is a prime duty of government, and in the fulfillment of this duty all citizens may be required by law to render personal military or civil service.”<sup>30</sup>

The 1973 Constitution acknowledges that this must be the duty of the people as well. It states, “[t]he defense of the State is a prime duty of the Government *and the people*, and in the fulfillment of this duty, all citizens may be required by law to render personal military or civil service.”<sup>31</sup>

The framers saw that there was an “inordinate emphasis on national security,” and they rephrased this provision in the 1987 Constitution to be more “people-centered than national security-centered.”<sup>32</sup> It now reads, “[t]he prime duty of the Government is *to serve and protect the people*. The

- (5) Development of the culture and the arts;
- (6) Conservation of natural resources;
- (7) Implementation of the agrarian reform program
- (8) Enforcement of customs laws;
- (9) Composite civilian–military law enforcement activities;
- (10) Conduct of licensure examinations;
- (11) Conduct of nationwide tests for elementary and high school students;
- (12) Anti-drug enforcement activities;
- (13) Sanitary inspections;
- (14) Conduct of census work;
- (15) Administration of the civil aeronautics board;
- (16) Assistance in installation of weather forecasting devices, [and;]
- (17) Peace and order policy formulation in local government units.

*Id.* at 114–18.

26. *Id.* at 118.

27. *Id.* at 114–18.

28. PHIL. CONST. art. II, § 4.

29. 1935 PHIL. CONST. art. II, § 2 (superseded 1973).

30. 1935 PHIL. CONST. art. II, § 2 (superseded 1973).

31. 1973 PHIL. CONST. art. II § 2 (superseded 1987) (emphasis supplied).

32. BERNAS, *supra* note 7, at 66.

Government may call upon the people to defend the State and, in the fulfillment thereof, all citizens may be required, under conditions provided by law, to render personal military or civil service.”<sup>33</sup>

As Fr. Bernas narrates, however, “[n]ational defense is placed merely as one of the modes of serving and protecting the people.”<sup>34</sup> The other modes are embodied in the next State principle, which gives importance on the “maintenance of peace and order, the protection of life, liberty, and property, and the promotion of the general welfare.”<sup>35</sup> This provision does not appear in previous versions of the Constitution. However, this State principle, as discussed in the case of *Pamatong v. Commission on Elections*,<sup>36</sup> is to be treated only as “a guideline for legislative or executive action.”<sup>37</sup>

### B. *The Powers of the President*

To fully realize these State principles, the President, as the head of the executive department,<sup>38</sup> is clothed with extraordinary powers by the Constitution, especially in times when there are threats to national security.<sup>39</sup> These include: (1) emergency powers delegated by Congress,<sup>40</sup> (2) calling-out powers,<sup>41</sup> (3) the power to suspend the privilege of the writ of *habeas corpus*,<sup>42</sup> (4) the power to declare martial law,<sup>43</sup> and (5) the power to enter into foreign relations.<sup>44</sup> This is also in consonance with the duty of the President to “ensure that the laws be faithfully executed.”<sup>45</sup>

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33. PHIL. CONST. art. II, § 4 (emphasis supplied).

34. BERNAS, *supra* note 7, at 66.

35. PHIL. CONST. art. II, § 5.

36. *Pamatong v. Commission on Elections*, 427 SCRA 96 (2004).

37. *Id.* at 101.

38. PHIL. CONST. art. VII, § 1.

39. PHIL. CONST. art. VII, § 18.

40. PHIL. CONST. art. VI, § 23 (2).

41. PHIL. CONST. art. VII, § 18.

42. PHIL. CONST. art. VII, § 18.

43. PHIL. CONST. art. VII, § 18.

44. PHIL. CONST. art. VII, § 21.

45. PHIL. CONST. art. VII, § 17.



### 1. Emergency Powers delegated by Congress

The 1935 Constitution states that the Congress has “the sole power to declare war.”<sup>46</sup> This phrase, in the amendments, now reads that the Congress has the “sole power to *declare the existence of a state of war*[.]”<sup>47</sup> and emphasizes the State principle of renunciation of aggressive war.<sup>48</sup> During this period, Congress may delegate to the President emergency powers which are “necessary and proper to carry out a declared national policy.”<sup>49</sup> Therefore, it is actually the President who has the power to make war. Put more illustratively, “[it is] the executive power which holds the sword of war.”<sup>50</sup>

The delegated powers are not specified in the current version, in contrast to the 1935 Constitution wherein the ability of the President to “promulgate rules and regulations”<sup>51</sup> was expressly provided. This, however, does not mean that the President can enact laws by himself or herself. The Supreme Court has stated that it is “anomalous” for the President to make laws, as it will result in the formation of two legislative bodies — the President and the Congress — which would perform the same work at the same time and may even contradict each other.<sup>52</sup>

The phraseology of both the 1973 and 1987 Constitutions, even without the above-mentioned clause, suggests a more expansive scope of the emergency powers. At present, the President may enact laws, but subject to very stringent conditions.<sup>53</sup> First, the Congress retains the power to withdraw such emergency powers through a resolution.<sup>54</sup> Fr. Bernas makes a notable distinction that the withdrawal must be done through a resolution and not a statute, as the latter needs the approval of the President, while the former does not.<sup>55</sup> Second, the period to exercise the emergency powers coincides with the current session of Congress, which means that the

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46. 1935 CONST. art. VI, § 15 (superseded 1973).

47. PHIL. CONST. art. VI, § 23 (1) (emphasis supplied).

48. BERNAS, *supra* note 7, at 772.

49. PHIL. CONST. art. VI, § 23 (2).

50. BERNAS, *supra* note 7, at 772-73 (citing Prize Cases, 2 U.S. 635, 668 (1862)).

51. 1935 PHIL. CONST. art. VI, § 16 (superseded 1973).

52. Araneta v. Dinglasan, 84 Phil. 368, 377 (1949).

53. PHIL. CONST. art. VI, § 23 (2).

54. PHIL. CONST. art. VI, § 23 (2).

55. BERNAS, *supra* note 7, at 774.

adjournment of the session ceases the emergency powers of the President.<sup>56</sup> Finally, the extent of the emergency powers is still heavily reliant on how the Congress formulates it.<sup>57</sup>

## 2. Calling-Out Powers

Article VII, Section 18 of the Constitution provides for the sequence of graduated powers of the President as Commander-in-Chief.<sup>58</sup> These have been reformulated by the framers by revising the “grounds for the activation of emergency powers, the manner of activating them, the scope of the powers, and review of presidential action.”<sup>59</sup> The first of these is the broad power to “call out such armed forces to prevent or suppress lawless violence, invasion[,] or rebellion.”<sup>60</sup>

The factual bases which would trigger the exercise of such power are fully discretionary on the part of the President.<sup>61</sup> This is clear from the deliberations of the Constitutional Commission, to wit —

[FR.] BERNAS. When he judges that it is necessary to impose martial law or suspend the privilege of the writ of *habeas corpus*, his judgment is subject to review. We are making it subject to review by the Supreme Court and subject to concurrence by the National Assembly. But when he exercises this lesser power of calling on the Armed Forces, when he says it is necessary, *it is my opinion that his judgment cannot be reviewed by anybody.*

...

MR. DE LOS REYES. So actually, if a President feels that there is imminent danger, the matter can be handled by the First Sentence: “The President ... may call out such Armed Forces to prevent or suppress lawless violence, invasion or rebellion.” So [if he] feel[s] that there is imminent danger of invasion or rebellion, instead of imposing martial law or suspending the [privilege of the] writ of *habeas corpus*, he must necessarily

56. PHIL. CONST. art. VI, § 23 (2) & BERNAS, *supra* note 7, at 774.

57. PHIL. CONST. art. VI, § 23 (2) & BERNAS, *supra* note 7, at 774.

58. 2 RECORD OF THE CONSTITUTIONAL COMMISSION: PROCEEDINGS AND DEBATES, NO. 42, at 409 (1986).

59. Representative Edcel C. Lagman, et. al. v. Hon. Salvador C. Medialdea, et. al., G.R. No. 231658, July 4, 2017, at 31, *available at* <http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2017/july/2017/231658.pdf> (last accessed Oct. 16, 2017) (citing JOAQUIN G. BERNAS S.J., THE INTENT OF THE 1986 CONSTITUTION WRITERS 456 (1995 ed.)).

60. PHIL CONST. art. VII, § 18, para. 1.

61. *Integrated Bar of the Philippines*, 338 SCRA at 107.

have to call the Armed Forces of the Philippines as their Commander-in-Chief. Is that the idea?

MR. REGALADO. *That does not require any concurrence by the legislature nor is it subject to judicial review.*<sup>62</sup>

The case of *Integrated Bar of the Philippines* also highlights the “vast intelligence network” the President has in gathering information, which may be highly classified or confidential, and which concerns the security of the country.<sup>63</sup> Thus, in times of emergency, “on-the-spot decisions” are made by the President in order to prevent the destruction of lives and property. To subject the same to the review of the judiciary or legislature is futile, as it will hinder the protection needed by the people from imminent danger.<sup>64</sup> Furthermore, a formal declaration of state of rebellion is not required to call out the armed forces.<sup>65</sup> Thus, the calling-out power is considered as the most “benign” among the powers of the President as Commander-in-Chief.<sup>66</sup>

### 3. The Power to Suspend the Privilege of the Writ of *Habeas Corpus*

Unlike the calling-out power, the power to suspend the writ of *habeas corpus* and the power to declare martial law in any part of the country are subject to very stringent conditions. It may only be exercised in instances of invasion or rebellion *and* when public safety requires it.<sup>67</sup> The 1987 Constitution also provides for a more important role for Congress and the Supreme Court on this matter. 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.*”<sup>68</sup> The Supreme Court also has the authority to review the “sufficiency of the factual basis” of such proclamation or suspension through an appropriate

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62. *Integrated Bar of the Philippines*, 338 SCRA at 109 (citing 2 RECORD, 1987 PHIL. CONST., at 409, 412)) (emphases supplied).

63. *Integrated Bar of the Philippines*, 338 SCRA at 111.

64. *Id.*

65. *Sanlakas v. Executive Secretary*, 421 SCRA 656, 678 (2004).

66. *See Sanlakas*, 421 SCRA at 669 & *Integrated Bar of the Philippines*, 338 SCRA at 135.

67. *See* PHIL. CONST. art. III, § 15 & art VII, § 18, para. 1.

68. PHIL. CONST. art. VII, § 18, para. 1 (emphasis supplied).

proceeding initiated by the citizens.<sup>69</sup> This power to review by the Court can be exercised independently from the power of the Congress to revoke as clarified by the case of *Lagman v. Medialdea*.<sup>70</sup> An explanation for these measures is that both powers involve the “curtailment and suppression of certain basic civil rights and individual freedoms[.]”<sup>71</sup> Thus, there is more assurance that the President will not be left with unrestrained exercise of these powers.

For instance, the general prohibition on the suspension of the privilege of the writ of *habeas corpus* is enshrined in the Bill of Rights.<sup>72</sup> *Habeas corpus* is defined as

a writ directed to the person detaining another and commanding him to produce the body of the prisoner at a certain time and place, with the day and cause of his caption and detention, to do, submit to, and receive what issue the court or judge awarding the writ shall consider in that behalf.<sup>73</sup>

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69. PHIL CONST. art. VII, § 18, para. 3. This is an iteration of the pronouncement in the case of *Lansang v. Garcia*, which states that the Court indeed has the authority to inquire into the existence of said factual bases in order to determine the constitutional sufficiency thereof. *Lansang v. Garcia*, 42 SCRA 448, 473 (1971).

70. Representative Edcel C. Lagman, et. al. v. Hon. Salvador C. Medialdea, et. al. G.R. No. 231658, July 4, 2017, at 29, available at <http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2017/july/2017/231658.pdf> (last accessed Oct. 16, 2017). The intent of the framers states

MS. QUESADA. But now, if they cannot meet because they have been arrested or that the Congress has been padlocked, then who is going to declare that such a proclamation was not warranted?

...

MR. REGALADO. May I also inform Commissioner Quesada that the judiciary is not exactly just standing by. A petition for a writ of *habeas corpus*, if the Members are detained, can immediately be applied for, and the Supreme Court shall also review the factual basis.

*Id.*

71. *Integrated Bar of the Philippines*, 338 SCRA at 110.

72. PHIL. CONST. art III, § 15.

73. BOUVIER'S LAW DICTIONARY 1400 (6th ed. 1856).

It is described as the “best and only sufficient defense of personal freedom[.]”<sup>74</sup> Therefore, there are only very special circumstances wherein the privilege of the writ of *habeas corpus* may be suspended. Both the 1935 and 1973 Constitutions enumerate four situations wherein such power may be exercised: “invasion, insurrection, or rebellion, or imminent danger thereof[.]”<sup>75</sup> The 1987 Constitution excluded insurrection and imminent danger as grounds for the suspension, limiting it only to instances of invasion or rebellion when public safety requires it.<sup>76</sup>

The 1987 Constitution also adds other safeguards to this power wherein the suspension “shall apply only to persons judicially charged for rebellion or offenses inherent in or directly connected with invasion[.]”<sup>77</sup> and that such person “arrested or detained shall be judicially charged within three days, otherwise he shall be released.”<sup>78</sup>

The purpose of the judicial charge, as Constitutional Commissioner Ambrosio B. Padilla explains, is to prevent the practices in the past wherein the period of detention of an individual is indefinite and is aggravated by the absence of any criminal charge and an understanding of the reason behind his or her confinement.<sup>79</sup>

#### 4. The Power to Declare Martial Law

As tackled recently in the case of *Lagman*, the declaration of martial law is essentially an exercise of police power which is usually lodged with the

74. *Lansang*, 42 SCRA at 519 (citing *Villavicencio v. Lukban*, 39 Phil. 778, 788 (1919)).

75. 1935 PHIL. CONST. art. VII, § 11 (2) (superseded 1973) & 1973 PHIL. CONST. art. VII, § 9 (superseded 1987).

76. PHIL. CONST. art. VII, § 18, para. 1. Fr. Bernas, in his book, explains that the concept of insurrection was outdated as “[it] was ... carried over from the Spanish and American campaigns against the Filipino *insurrectos*.” BERNAS, *supra* note 7, at 553. The ground of imminent danger, on the other hand, was prone to possible abuse by the President. With the broad scope of the calling-out power, the Constitutional Commission found it unnecessary to still include this ground in the proclamation of martial law or suspension of the privilege of the writ of *habeas corpus*. *Id.* at 554.

77. PHIL. CONST. art. VII, § 18, para. 5.

78. PHIL. CONST. art. VII, § 18, para. 6.

79. BERNAS, *supra* note 7, at 555 (citing 2 RECORD, 1987 PHIL. CONST., at 397-98).

Legislature.<sup>80</sup> With the assistance of the military, the President “ensure[s] public safety [ ] in place of government agencies which for the time being are unable to cope with the condition in a locality, which remains under the control of the State.”<sup>81</sup> The case of *David v. Macapagal-Arroyo*,<sup>82</sup> through the statements of Justice Vicente M. Mendoza, specifically enumerates what the President may do during the period of valid declaration of martial law period.<sup>83</sup> These are: “(a) arrests and seizures without judicial warrants; (b) ban on public assemblies; (c) take-over of news media and agencies and press censorship; and (d) issuance of Presidential Decrees.”<sup>84</sup>

Similar to the power to suspend the privilege of the writ of *habeas corpus*, there exist numerous restrictions on the exercise of the power to declare martial law in any part of the country. This, once again, is largely attributed to the unbridled discretion that former President Ferdinand E. Marcos (President Marcos) had during the 1972 Martial Law era.<sup>85</sup> The grounds for the declaration of martial law and suspension of the privilege of the writ of *habeas corpus* are similar, and both are subject to legislative and judicial review.<sup>86</sup> In the previous Constitutions, the period of effectivity of martial law was indefinite,<sup>87</sup> whereas the 1987 Constitution limits the period to 60 days, extendible only by Congress.<sup>88</sup> In contrast to the policy of President Marcos to issue Presidential Decrees with the force of law, the declaration of martial law neither deprives the Congress of its sole authority to legislate, nor suspends the operation of civil courts and the implementation of the Constitution.<sup>89</sup>

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80. *Lagman*, G.R. No. 231658, at 34.

81. *Id.* (citing JOAQUIN G. BERNAS, S.J., CONSTITUTIONAL STRUCTURE AND POWERS OF GOVERNMENT, NOTES AND CASES PART I, 473 (2001 ed.)).

82. *David v. Macapagal-Arroyo*, 489 SCRA 160 (2006).

83. *Id.* at 244.

84. *Id.*

85. See BERNAS, *supra* note 7, at 904.

86. PHIL. CONST. art. VII, § 18.

87. 1935 PHIL. CONST. art. VII, § 11, ¶ 2 (superseded 1973) & 1973 PHIL. CONST. art. VII, § 9 (superseded 1987).

88. PHIL. CONST. art. VII, § 18, para. 1.

89. PHIL. CONST. art. VII, § 18, para. 4. The declaration neither “authorize[s] 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.”

As part of the powers of the Commander-in-Chief, the President may also extend the tour of duty of members of the AFP beyond the prescribed three years, in times of war or national emergency.<sup>90</sup>

#### 5. The Power to Grant Amnesty

The President can also grant pardons, reprieves, commutation, parole, and amnesty, subject to certain restrictions.<sup>91</sup> A valid amnesty requires the concurrence of the majority of Congress,<sup>92</sup> and is a “grant of general pardon to a class of political offenders either after conviction or even before the charges are filed.”<sup>93</sup> It has the effect of completely extinguishing the criminal liability of the accused or convicted.<sup>94</sup>

#### 6. The Power to Enter into Foreign Relations

The power of the Philippines to enter into treaties or international agreements is lodged with the executive department subject to Senate concurrence.<sup>95</sup> The President, however, may also enter into executive agreements with other states without the need for legislative participation.<sup>96</sup>

In engaging in foreign relations, the President must always uphold “the sovereignty of the nation, the integrity of its territory, its interest, and the right of the sovereign Filipino people to self-determination.”<sup>97</sup> The other limitation set forth by the Constitution in relation to this power involves the entry of foreign troops and the establishment of foreign military bases and facilities.<sup>98</sup> Under this provision, there must be a formal treaty concurred in

90. PHIL. CONST. art. XVI, § 5, ¶ 7.

91. PHIL. CONST. art. XVII, § 19.

92. PHIL. CONST. art. XVII, § 19.

93. BERNAS, *supra* note 7, at 929.

94. An Act Revising the Penal Code and Other Penal Laws [REVISED PENAL CODE], Act. No. 3815, art. 89, ¶ 7 (1932).

95. PHIL. CONST. art. XVIII, § 4. At least two-thirds of all the members of the Senate must vote for the validity and effectivity of the treaty or international agreement. PHIL. CONST. art. XVIII, § 4.

96. *See, e.g.*, *Abaya v. Ebdane, Jr.*, 515 SCRA 720 (2007); *Bayan Muna v. Romulo*, 641 SCRA 244 (2011); & *Lim v. Executive Secretary*, 380 SCRA 739 (2002).

97. *Saguisag v. Ochoa*, 779 SCRA 241, 304 (2016).

98. PHIL. CONST. art. XVIII, § 25.

by the Senate.<sup>99</sup> The Congress may also require a national referendum and the other contracting State must also recognize the agreement as a treaty.<sup>100</sup>

### 7. Residual Powers

The Court has also recognized the legitimacy of powers exercised by the President that are not necessarily provided by the Constitution, but are in line with the nature of his position as head of the executive department.

This is illustrated in the case of *Marcos v. Manglapus*,<sup>101</sup> wherein then President Corazon C. Aquino (President Corazon Aquino) was confronted with the problem of “balancing the general welfare and the common good against the exercise of rights of certain individuals[.]”<sup>102</sup> in terms of barring the entry of former President Marcos and his family who are all Filipino citizens. The case elaborates the role of the President as the “protector of peace.”<sup>103</sup> It states —

The power of the President to keep the peace is not limited merely to exercising the [C]ommander-in-[C]hief 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 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.<sup>104</sup>

This existence of residual powers of the President opens a wide range of possibilities wherein the President can act on his or her own, even without an express authority provided for by the Constitution. An important condition is that the exercise of such is for the purpose of protecting the Filipinos.<sup>105</sup>

Therefore, the President also has the power to declare a state of rebellion,<sup>106</sup> or lawlessness. This is not expressly stated in the Constitution, but is correlated with the executive power of the President.<sup>107</sup> *Lagman*

99. PHIL. CONST. art. XVIII, § 25.

100. PHIL. CONST. art. XVIII, § 25.

101. *Marcos v. Manglapus*, 177 SCRA 668 (1989).

102. *Id.* at 694.

103. *Id.* at 682-83.

104. *Id.* at 694.

105. *Id.* at 693.

106. *Sanlakas*, 421 SCRA at 677.

107. *Id.*



affirmed the dissent of Justice Antonio T. Carpio (Justice Carpio) in the case of *Fortun v. President Macapagal-Arroyo*,<sup>108</sup> which dealt with the determination of the existence of probable cause in rebellion.<sup>109</sup> It states that “the President only needs to convince himself that there is probable cause or evidence showing that more likely than not a rebellion was committed or is being committed.”<sup>110</sup>

#### 8. The Power to Enter into Peace Agreements

Perhaps one of the most powerful residual powers of the President is the ability to conduct peace negotiations. Entering into peace agreements is believed to be a rather creative way of resolving conflicts with rebel groups, involving immunities in exchange for the cessation of hostilities. The Court elucidated on the leeway given to the President when it comes to the peace process —

Similarly, the President’s power to conduct peace negotiations is implicitly included in [his or her] powers as Chief Executive and Commander-in-Chief.

...

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 [are] required.

...

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 [he or she] must be given the leeway to explore, in the course of peace negotiations, solutions

108. *Fortun v. Macapagal-Arroyo*, 668 SCRA 504 (2012).

109. *Lagman*, G.R. No. 231658, at 53 (citing *Fortun*, 668 SCRA at 595 (J. Carpio, dissenting opinion)).

110. *Id.* Rebellion is to be understood by its definition in the Revised Penal Code.

Art. 134. Rebellion or insurrection. [ — ] *How committed.* [ — ] The crime of rebellion or insurrection is committed by rising publicly and taking arms against the Government for the purpose of removing from the allegiance to said Government or its laws, the territory of the Philippine Islands or any part thereof, of any body of land, naval or other armed forces, depriving the Chief Executive or the Legislature, wholly or partially, of any of their powers or prerogatives.

REVISED PENAL CODE, art. 134.

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 [he or she] considers viable, but [he or 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.<sup>111</sup>

Seen as an “extra-constitutional” remedy, the Court has always emphasized that the peace agreements must always be in accordance with the limitations set forth by the Constitution, and any proposed legislation must go through review by the Congress and the Court.<sup>112</sup> A more substantial discussion on the Philippine peace process will be provided later in this Article.

The 1987 Constitution has truly endowed the President with vast powers in order to fulfill his or her prime duty of serving and protecting the people at all times.

## II. NON-INTERNATIONAL ARMED CONFLICT IN THE PHILIPPINES

### A. History

At the forefront of the insurgent movement in the Philippines are two major groups: (1) Moro National Liberation Front (MNLF), together with its separatists, the Moro Islamic Liberation Front (MILF) and Abu Sayyaf Group (ASG), and the (2) Communist Party of the Philippines–New People’s Army–National Democratic Front (CPP-NPA-NDF).<sup>113</sup> The prolonged conflict between these groups and the Government of the Philippines is

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111. *Province of North Cotabato v. Government of the Republic of the Philippines*, Peace Panel on Ancestral Domain (GRP), 568 SCRA 402, 502 & 504 (2008).

112. *Id.* at 432 & 504.

113. Raymundo B. Ferrer & Randolph G. Cabangbang, *Non-International Armed Conflicts in the Philippines*, 88 INT’L LAW STUD. 263, 264 (2012). The Communist Party of the Philippines — New People’s Army (CPP-NPA-NDF) and Moro Islamic Liberation Front — Moro National Liberation Front (MILF-MNLF) are referred to as Maoist and Moro, respectively. *Id.*

characterized by firefights at the grass-roots level, rooted in clashes of ideologies and the struggle for self-determination.<sup>114</sup>

#### I. The MNLF, MILF, and ASG

The war in Mindanao dates back to the Spanish colonial times.<sup>115</sup> Leaders of the Moros<sup>116</sup> resisted the arrival of Christianity<sup>117</sup> and its imposed integration in the Philippines.<sup>118</sup> Though not as prevalent as a hundred years ago, the animosities among the various communities in the Southern Philippines continue to this day where prejudices and marginalization still exist.<sup>119</sup> The six elements of the conflict in Mindanao are: “economic marginalization and destitution, political domination, physical insecurity, threatened Moro and Islamic identity, a perception that government is the principal culprit[,] and a perception of hopelessness under the present order of things.”<sup>120</sup>

On 18 March 1968, roughly 27 young soldiers of Muslim faith were allegedly killed by their own superiors from the AFP, in the event now known as the “Jabidah Massacre.”<sup>121</sup> Although several cases of warfare

114. *Id.* at 264; Bangsamoro Development Agency, *Bangsamoro Development Plan*, at 6, available at <http://bangsamorodevelopment.org/wp-content/uploads/2015/05/BDPIR.pdf> (last accessed Oct. 31, 2017) [hereinafter *Bangsamoro Development Agency*]; & SOLIMAN M. SANTOS & PAZ VERDADES M. SANTOS, PRIMED AND PURPOSEFUL ARMED GROUPS AND HUMAN SECURITY EFFORTS IN THE PHILIPPINES 297 (2010 ed.).

115. *Bangsamoro Development Agency*, *supra* note 114, at 6.

116. The term *Moro* refers to the Muslim population in the Philippines. Encyclopedia Britannica, *Moro*, available at <https://www.britannica.com/topic/Moro> (last accessed Oct. 31, 2017).

117. Jamail A. Kamlian, *Ethnic and Religious Conflicts in Southern Philippines : A Discourse on Self-Determination, Political Autonomy and Conflict Resolution* (A Lecture presented at the Islam and Human Rights Fellow Lecture at School of Law, Emory University) at 2, available at <http://mindanaosj.org/wp-content/uploads/2014/05/Ethnic-and-Religious-Conflict-in-Southern-Philippines-by-Jamail-Kamlian.pdf> (last accessed Oct. 31, 2017).

118. *Id.*

119. *Id.* These groups are the Moros, Christian settlers, and the Lumads which refer to the indigenous peoples community in Mindanao.

120. Ferrer & Cabangbang, *supra* note 113, at 267.

121. See Marites Dañguilan Vitug & Glenda M. Gloria, *Jabidah and Merdeka: The Inside Story*, available at <https://www.rappler.com/newsbreak/24025-jabidah-massacre-merdeka-sabah> (last accessed Oct. 31, 2017) & *Bangsamoro Development Agency*, *supra* note 115, at 6. These young soldiers were killed

between the Moros and the military occurred prior to this incident,<sup>122</sup> many believe that this prompted the rise of the MNLF. The MNLF described the Jabidah massacre as a culmination of the oppression against the Moros.<sup>123</sup> Led by Nur Misuari, the MNLF used the anger of Moro youth at the killing of their fellows and recruited them as part of their quest for secession and an independent *Bangsamoro* nation.<sup>124</sup> The MNLF set forth a full-blown war against the GRP after the declaration of Martial Law in 1972,<sup>125</sup> with a set-up akin to a military organization.<sup>126</sup>

President Marcos then initiated a series of peace talks with the leadership of the MNLF, which saw the birth of the Tripoli Agreement in 1976.<sup>127</sup> The other members of the MNLF were not satisfied with the implementation of the Tripoli Agreement and chose to separate themselves from the MNLF to form the MILF.<sup>128</sup>

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while in training in Corregidor in order “to prevent a leak of the Philippine Government’s intent of fomenting unrest in Sabah.” *Id.*

122. Kamlian, *supra* note 117, at 5.

123. *Id.* at 6. The Moro National Liberation Front (MNLF) Manifesto states —

We, the five million oppressed [*Bangsamoro*] people, wishing to free ourselves from the terror, oppression, and tyranny of Filipino colonialism, that had caused us untold sufferings and miseries by criminally usurping our land, by threatening Islam through wholesale desecration of its places of worship and its Holy Book, [a]nd murdering our innocent brothers, sisters and folks in genocidal campaign of terrifying magnitude... [ ] Aspiring to have the sole prerogative of defining and chartering our national destiny in accordance with our own free will in order to ensure our future and that of our children[.]

*Id.*

124. *Bangsamoro* Development Agency, *supra* note 114. Their “struggle is principally a nationalist and territorial one, although religion has certainly served as a rallying call and focal point of resistance to the central government.” KUMAR RAMAKRISHNA & SEE SENG TAN, *AFTER BALI: THE THREAT OF TERRORISM IN SOUTHEAST ASIA* 112 (2003).

125. Ferrer & Cabangbang, *supra* note 113, at 268.

126. SANTOS & SANTOS, *supra* note 114, at 334.

127. *Id.*

128. *Id.* The founder of the MILF is Hashim Salamat who served as MNLF’s former Vice-Chairman.

In its battle for secession, the MILF grounds itself in the ideals of “radical Islamic revivalism or radical political Islamism,” but not strictly a “Jihadi Islamism.”<sup>129</sup> This is evidenced by the integration of Islamic scholars into its leadership.<sup>130</sup> Nevertheless, the group continued to carry out acts of terror that led to then President Joseph E. Estrada’s (President Estrada) declaration of “all-out war” against the group.<sup>131</sup>

Despite this fragmentation, the two groups later on cooperated with the GRP in the resumption of the negotiations, ceasefires, and reforms in legislations, in the hopes of achieving their sought-after independence. Aside from the creation of the Autonomous Region of Muslim Mindanao (ARMM), mandated by the 1987 Constitution,<sup>132</sup> the parties put forward variations of the *Bangsamoro* framework.

Not all members of the Muslim community agreed to the plans of action made by both the MILF and MNLF. Many believed that it had failed to achieve the *Bangsamoro*.<sup>133</sup> This led to the emergence of the fundamentalist terrorist group,<sup>134</sup> Abu Sayyaf.<sup>135</sup> Founded in the early 1990s by Abdujarak Janjalani, the ASG partakes in several criminal and lawless activities such as kidnappings and bombings.<sup>136</sup> The extremist behavior displayed by the ASG

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129. SANTOS & SANTOS, *supra* note 115, at 345-45.

130. *Id.* at 347 & Ferrer & Cabangbang, *supra* note 113, at 269.

131. Nathaniel R. Melican, Estrada stands by all-out war strategy vs MILF, PHIL. DAILY INQ., Jan. 27, 2015, available at <http://newsinfo.inquirer.net/668386/estrada-stands-by-all-out-war-strategy-vs-milf> (last accessed Oct. 31, 2017).

132. PHIL. CONST. art. X, § 15. The MNLF was hostile to the idea of the ARMM at first; the implementation of the ARMM was only fully realized during the Ramos presidency in 1996. See Kamlian, *supra* note 117, at 9.

133. Ferrer & Cabangbang, *supra* note 113, at 271.

134. *Id.* The Abu Sayyaf was listed as part of the list of terrorist groups by both the United States and Europe. It was allegedly linked to the global terrorist group, Al Qaeda International Terrorist Network and the Jemmah Islamiyah. *Id.*

135. Abu Sayyaf means “Bearer of the Sword.” Kamlian, *supra* note 117, at 10.

136. See, e.g., CBC News, Abu Sayyaf has 25-year record of kidnappings and bombings, available at <http://www.cbc.ca/news/world/abu-sayyaf-militants-1.3552346> (last accessed Oct. 31, 2017) & GMA News Online, Abu Sayyaf kidnappings, bombings and other attacks available at <http://www.gmanetwork.com/news/news/content/154797/abu-sayyaf-kidnappings-bombings-and-other-attacks/story> (last accessed Oct. 31, 2017).

is heavily condemned by both the MILF and MNLF, as it impedes the outcome of the peace talks for Mindanao.<sup>137</sup>

2. The Communist Party of the Philippines–New People’s Army–National Democratic Front (CPP–NPA–NDF)

Karl Marx and Freidrich Engels’ opus, “The Communist Manifesto[.]”<sup>138</sup> sparked a global revolution where large countries in the world and their leaders, as exemplified by China and Mao Zedong, adopted communist ideals in its governance.<sup>139</sup> Although the Philippines never recognized this type of government, thousands of Filipinos resonated with its message, giving rise to the “longest-running Maoist insurgency in the world[.]”<sup>140</sup> the CPP and its military arm, the NPA.

This rebel group, modeled after China’s Maoist movement, was established in 1968 by student activist Jose Maria Sison.<sup>141</sup> The goal was to “overthrow the Philippine government in favor of a new state led by the working class[,] and to expel [United States] influence from the Philippines,”<sup>142</sup> where a socialist state shall rise.<sup>143</sup> Its composition originally

137. BBC News, Guide to the Philippines Conflict, *available at* <http://www.bbc.com/news/world-asia-17038024> (last accessed Oct. 31, 2017).

138. KARL MARX & FRIEDRICH ENGELS, COMMUNIST MANIFESTO (1847). The book highlights the class struggle and largely criticizes the market structure of capitalism. Mao Zedong’s variation of communism focuses on empowering the laborers from the rural areas.

139. *See generally* Business Insider, How China went from communist to capitalist, *available at* <http://www.businessinsider.com/how-china-went-from-communist-to-capitalist-2015-10> (last accessed Oct. 31, 2017) & Fox Butterfield, Mao Tse-Tung: Father of Chinese Revolution, *available at* <http://www.nytimes.com/learning/general/onthisday/bday/1226.html> (last accessed Oct. 31, 2017).

140. Ferrer & Cabangbang, *supra* note 113, at 265.

141. Stanford University, Mapping Militant Organizations: Communist Party of the Philippines - New People’s Army, *available at* <http://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/149> (last accessed Oct. 31, 2017). The current CPP–NPA–NDF originated from the Maoist-oriented youth faction Partido Komunista ng Pilipinas. *Id.*

142. *Id.* (citing Communist Party of the Philippines, Program For A People’s Democratic Revolution, *available at* <http://www.bannedthought.net/Philippines/ CPP/1960s/ProgramForPeoplesDemRev-681226.pdf> (last accessed Oct. 31, 2017)).

143. Ferrer & Cabangbang, *supra* note 113, at 265.

began with college students from the metropolitan cities who were starting to resist the Marcos regime.<sup>144</sup> Their reach extends across the national territory with camps located in the rural areas.<sup>145</sup>

The CPP-NPA-NDF strongly expressed its opposition to the political landscape under President Corazon Aquino, whose election unseated President Marcos.<sup>146</sup> The group urged its members to fight both the AFP, and the United States in the 1990s.<sup>147</sup> The relationship of the CPP-NPA-NDF with the GRP remains to be unstable despite initial peace talks, due to the sheer number of political prisoners who are from the ranks of the rebel group. There are cases of individuals who were alleged members of the NPA were tortured and kidnapped by the military, even without proof of their membership.<sup>148</sup> And yet, the group has ties with some active party-list groups in Congress, such as *Bayan Muna*, *Gabriela*, and *Anakpawis*.<sup>149</sup>

#### *B. War Without Winners*

The current situation of non-international armed conflict in the Philippines is described as “particularly complex.”<sup>150</sup> The conflict groups are riddled with internal conflicts on “ideological orientation, political strategy, and ethnic allegiances, and [ ] on personality clashes.”<sup>151</sup> Disputes inside the rebel groups can either be “inter-communal[,] between political and ethnolinguistic groups[,]” or “inter-elite violence[,] *nido* or local clan feuds[.]”<sup>152</sup>

Using poverty and oppression as rhetoric,<sup>153</sup> the groups also maintain a formidable force that consists of militants who are also laborers and contributors of society, coining the term — “farmer[s] by day[,] [ ] guerilla

144. Stanford University, *supra* note 141.

145. *Id.*

146. SANTOS & SANTOS, *supra* note 114, at 21.

147. *Id.*

148. See, e.g., Philippine Daily Inquirer, *What Went Before: Abduction of UP students Karen Empeño and Sherlyn Cadapan*, PHIL. DAILY INQ., Dec. 17, 2011, available at <http://newsinfo.inquirer.net/112599/what-went-before-abduction-of-up-students-karen-empeno-and-sherlyn-cadapan> (last accessed Oct. 31, 2017).

149. SANTOS & SANTOS, *supra* note 114, at 264.

150. Ferrer & Cabangbang, *supra* note 113, at 263.

151. SANTOS & SANTOS, *supra* note 114, at 345.

152. *Bangsamoro* Development Agency, *supra* note 114, at 8.

153. See Ferrer & Cabangbang, *supra* note 113, at 264.

by night.”<sup>154</sup> This makes it more difficult for the Philippine military to distinguish between a combatant and a civilian.<sup>155</sup>

The failure of these belligerent groups to make amends within their own ranks and resolve hostilities with the GRP has cost the lives of thousands of Filipinos.<sup>156</sup> Many have lost homes and properties.<sup>157</sup> Children have also been recruited to take up arms instead of continuing their education.<sup>158</sup> It has impeded the development of the affected regions where the war zones remain to be the poorest regions in the country.<sup>159</sup> The upsurge of the “shadow economy” or “nonconformist economic activities” or prevalence of “illicit drug economy, illicit weapons, informal land markets, cross-border trade, informal credit provision, and kidnapping for ransom”<sup>160</sup> can also be attributed to the instability in the areas.<sup>161</sup>

### III. RESPONSE OF THE GOVERNMENT

Over the years, the Philippine government, past and present, have employed various approaches in resolving the situation of internal armed conflict in the country. These can be summarized into three policies:

- (1) ‘*Military victory*’ or crushing the armed groups in a decisive military manner;
- (2) ‘*Pacification*’ or making sure that the hostilities do not escalate but without seriously addressing the root causes of the problem; and

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154. Ferrer & Cabangbang, *supra* note 113, at 272.

155. *Id.*

156. *See* Ferrer & Cabangbang, *supra* note 113, at 272.

157. Internal Displacement Monitoring Centre & Norwegian Refugee Council, Global Report on Internal Displacement 2017, available at <http://www.internal-displacement.org/assets/publications/2017/20170522-GRID.pdf> (last accessed Oct. 31, 2017).

158. U.N. Secretary General, *Children and Armed Conflict*, ¶¶ 202–210, 70th Session of the General Assembly, U.N. Doc. A/70/836–S/2016/360 (Apr. 20, 2016).

159. Ferrer & Cabangbang, *supra* note 113, at 267.

160. Anna Louise Strachan, Conflict Analysis of Muslim Mindanao (A December 2015 Report from the Australian Government on the *Bangsamoro* Region) at 10, available at <http://www.gsdr.org/wp-content/uploads/2016/02/Conflict-AnalysisARMM.pdf> (last accessed Oct. 31, 2017).

161. *Id.* at 2.



- (3) ‘*Institutional change*’ or responding to the root causes of the conflict by seeking a transformation of Philippine society.<sup>162</sup>

The nature of the tension dictates the type of approach that the President decides to utilize. For example, “military victory” is illustrated when President Estrada declared war against the MILF<sup>163</sup> or when President Duterte declared martial law earlier this year.<sup>164</sup> But the hostilities with the MNLF, MILF and the CPP-NPA-NDF are usually tempered by the “pacification” and “institutional change” approaches with the implementation of the peace agreements.

#### A. Peace Process

Peace process is “a political process in which conflicts are resolved by peaceful means.”<sup>165</sup> This is achieved through the signing of peace treaties where, “agreement or contract [is] made by belligerent powers, in which they agree to lay down their arms, and by which they stipulate the conditions of peace and regulate the manner in which it is to be restored and supported.”<sup>166</sup>

The components of the peace process consist of a series of negotiations and documents<sup>167</sup> where the roots of the disputes, such as territory, security,

162. Camilo Miguel M. Montesa, *Is There a New Government Paradigm in Addressing Internal Armed Conflicts?*, 54 ATENEO L.J. 280, 281 (2009) (emphases supplied).

163. See Jun Mercado, *All-out war in Mindanao*, available at <http://www.gmanetwork.com/news/opinion/content/186572/all-out-war-in-mindanao/story> (last accessed Oct. 31, 2017) & Jerry Botial, *Erap wants all-out war vs separatist rebels in Mindanao*, PHIL. STAR, available at <http://www.philstar.com/headlines/739647/erap-wants-all-out-war-vs-separatist-rebels-mindanao> (last accessed Oct. 31, 2017).

164. Proclamation No. 216, s. 2017 (May 23, 2017).

165. Sedfrey M. Candelaria & Maria Luisa Isabel L. Rosales, *Consultation and the Courts: Reconfiguring the Philippine Peace Process*, 54 ATENEO L.J. 59, 62 (2009) (citing Harold H. Saunders, *Pre-negotiation and Circum-negotiation: Arenas of the Multilevel Peace Process in TURBULENT PEACE* 483–96 (Chester A. Crocker, Fen Osler Hampson & Pamela Aall, eds., 2001)).

166. Sedfrey M. Candelaria & Regina Ann L. Nonato, *An Overview of the International Legal Concept of Peace Agreements as Applied in Current Philippine Process*, 53 ATENEO L.J. 263, 266 (2008) (citing BLACK’S LAW DICTIONARY 1502 (6th ed. 1990)).

167. Nita Yawanarajah & Julian Ouellet, *Peace Agreements (An Essay in collaboration with United Nations Peacemaker Databank Policy Planning*

and economic reforms are addressed, and the protection of human rights and rule of law are upheld.<sup>168</sup>

Even when the peace process in the Philippines began as early as 1976, it was only in 2001 that a sitting President laid out a standard framework in the approach of peace process through the issuance of Executive Order No. 3.<sup>169</sup> For the pursuit of “a just comprehensive and enduring peace under the rule of law and in accordance with constitutional processes,”<sup>170</sup> President Gloria Macapagal-Arroyo institutionalized the methods to be used,<sup>171</sup> and provided for the creation of various offices that will take part in the negotiations and carry out implementation of the peace treaties.<sup>172</sup>

In the context of the insurgent groups in the Philippines who fight for secession and self-determination, peace agreements offer a non-violent way to “end violent conflicts by designing frameworks that aim to accommodate the competing demands of the conflict’s contenders.”<sup>173</sup> A cessation of hostilities or “ceasefire” is always the initial step in assuming the negotiations.

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Unit), *available at* [http://www.beyondintractability.org/essay/structuring\\_peace\\_agree](http://www.beyondintractability.org/essay/structuring_peace_agree) (last accessed Oct. 31, 2017).

168. *See* CHRISTINE BELL, *NEGOTIATING JUSTICE? HUMAN RIGHTS AND PEACE AGREEMENTS* 21 (2006 ed.).

169. Defining Policy and Administrative Structure for Government’s Comprehensive Peace Efforts, Executive Order No. 3, s. 2001 [E.O. No. 3, s. 2001] (Feb. 28, 2001).

170. *Id.* whereas cl. 1.

171. *Id.* § 4. Section 4 pertains to the six paths to peace. These are: (1) pursuit of social, economic, and political reforms, (2) consensus-building and empowerment for peace, (3) peaceful, negotiated settlement with the different rebel groups, (4) programs for reconciliation, reintegration into mainstream society and rehabilitation, (5) addressing concerns arising from continuing armed hostilities, and (6) building and nurturing a climate conducive to peace. *Id.*

172. *Id.* §§ 5-9. The agencies part of this are the: (1) Presidential Adviser on the Peace Process, (2) Government Peace Negotiating Panels, (3) National Program for Unification and Development Council, (4) National Amnesty Commission, (5) National Peace Forum and (6) Office of the Presidential Adviser on the Peace Process. *Id.*

173. CHRISTINE BELL, *ON THE LAW OF PEACE: PEACE AGREEMENTS AND THE LEX PACIFICATORIA* 107 (2008 ed.) [hereinafter BELL, *ON THE LAW OF PEACE*].

However, the series of negotiations had periodically been interrupted as political tensions overshadow the attainment of an accord between the secessionists and the government.

*B. The Elusive Bangsamoro Nation*

As earlier discussed, the first attempt to provide the MNLF with what they sought came in the form of the 1976 Tripoli Agreement under the Marcos presidency. It promised for an “establishment of autonomy in the Southern Philippines”<sup>174</sup> where the Muslims “shall have their own administrative system.”<sup>175</sup> The failure to fully implement such policy resulted to armed struggle by the MNLF and the newly-formed MILF. This continued on, even with the creation of the ARMM.<sup>176</sup> It was only 20 years later, in 1996, under the presidency of Fidel V. Ramos (President Ramos), that the MNLF reached a Final Peace Agreement with the government.<sup>177</sup> The MILF followed suit by signing the Agreement on General Cessation of Hostilities in 1997 and the General Framework of Agreement in 1998.<sup>178</sup>

The MNLF’s leader, Nur Misuari, served as ARMM’s first governor; however, his tenure was “marred with issues of corruption and mismanagement”<sup>179</sup> and as a consequence the MNLF’s influence declined.<sup>180</sup>

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174. Government of the Republic of the Philippines & the Moro National Liberation Front, *The Tripoli Agreement (An Agreement Between the Government of the Philippines and the Moro National Liberation Front)*, available at [http://www.seasite.niu.edu/tagalog/modules/modules/muslimmindanao/tripoli\\_agreement.htm](http://www.seasite.niu.edu/tagalog/modules/modules/muslimmindanao/tripoli_agreement.htm) (last accessed Oct. 31, 2017).

175. *Id.* Included in this proposed autonomous region are: Basilan; Sulu; Tawi-tawi; Zamboanga del Sur; Zamboanga del Norte; North Cotabato; Maguindanao; Sultan Kudarat; Lanao del Norte; Lanao del Sur; Davao del Sur; South Cotabato; and Palawan.

176. An Act Providing For An Organic Act For The Autonomous Region In Muslim Mindanao, Republic Act No. 6734 (1989).

177. See Ferrer & Cabangbang, *supra* note 113, at 269.

178. *Province of North Cotabato*, 568 SCRA at 433.

179. Leah Angela V. Robis, *The Sun Rises Anew in Mindanao: Towards Recognizing the Bangsamoro Nation Within the Context of the Philippine Republic*, 59 ATENEO L.J. 1117, 1122 (2015) (citing John Unson, *Nur Misuari as leader of the ARMM and MNLF*, PHIL. STAR. Sep. 11, 2013, available at <http://www.philstar.com/headlines/2013/09/11/1198131/nur-misuari-leader-armm-and-mnlf> (last accessed Oct. 31, 2017)).

180. *Id.*

As problems in the ARMM persisted with the interference of the MILF and ASG, President Estrada abandoned all peace negotiations and proclaimed an “all-out war” against the rebel groups as retaliation.<sup>181</sup>

A change in administration prompted the resumption of the talks with the MILF. Under President Macapagal-Arroyo’s term, the military offense against the MILF was suspended.<sup>182</sup> The GRP sought the assistance of the Malaysian government to “help convince the MILF to return to the negotiating table.”<sup>183</sup> This led to a series of renewed peace talks between the GRP and the MILF, including a new version of the Tripoli Agreement<sup>184</sup> that culminated to the scheduled signing of the Memorandum of Agreement on the Ancestral Domain Aspect (MOA-AD) of the GRP-MILF Tripoli Agreement in 2008. This was supposed to initiate the formation of the *Bangsamoro* Juridical Entity (BJE).<sup>185</sup>

Through fervent opposition from members of some of the provinces affected by the MOA-AD, the BJE was held as unconstitutional by the Supreme Court<sup>186</sup> for going against the State principle of national sovereignty and territorial integrity.<sup>187</sup> The Supreme Court was of the view that the BJE would grant *complete independence* from the State.<sup>188</sup>

The efforts of the GRP to replace the ARMM continued under President Benigno Simeon C. Aquino, III (President Aquino), who pushed to resume the negotiations. This formed, under the supervision of the executive department, the Framework Agreement on the *Bangsamoro* (FAB) and Comprehensive Agreement on the *Bangsamoro* (CAB), which “called for the creation of an autonomous political entity named *Bangsamoro*, replacing

181. Melican, *supra* note 131.

182. *Province of North Cotabato*, 568 SCRA at 434.

183. *Id.*

184. *Id.* The GRP-MILF Tripoli Agreement on Peace (Tripoli Agreement 2001) contain[s] the basic principles and agenda on the following aspects of the negotiation: Security Aspect, Rehabilitation Aspect, and Ancestral Domain Aspect. *Id.*

185. *Id.* at 445. The *Bangsamoro* Juridical Entity (BJE) is granted the authority and jurisdiction over the Ancestral Domain and Ancestral Lands of the *Bangsamoro*.

186. *Province of North Cotabato*, 568 SCRA at 480-82.

187. *Id.*

188. *Id.*

the ARMM.”<sup>189</sup> Unlike the MOA-AD, the Court upheld the validity of both the CAB and FAB in the recent case of *Philippine Constitution Association (PHILCONSA) v. Philippine Government (GPH)*,<sup>190</sup> as the CAB and FAB contained a requirement that a subsequent legislation must be passed in order to enact the peace agreements.<sup>191</sup> However, the *Bangsamoro* Basic Law, the integral part of these agreements, had not yet been passed in Congress by the time President Aquino’s term ended.<sup>192</sup> Still, President Duterte promises that a *Bangsamoro* “homeland” will be in effect by the end of his term and talks with the MILF will continue.<sup>193</sup>

The current FAB provides for “shared governance” between the central government and the *Bangsamoro* government.<sup>194</sup> It clothes the *Bangsamoro* government with powers on various aspects, such as wealth and revenue generation, justice institutions, territory, and enforcement of basic rights.<sup>195</sup>

An integral part of the enforcement of the FAB is “normalization,” in which “communities can return to conditions where they can achieve their desired quality of life[.]”<sup>196</sup> The main driver for normalization is ensuring human security. In line with this, President Aquino promised in 2014 to

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189. *Philippine Constitution Association (PHILCONSA) v. Philippine Government (GPH)*, G.R. No. 218406, Nov. 29, 2016, at 6, available at <http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2016/november2016/218406.pdf> (last accessed Oct. 31, 2017).

190. *Philippine Constitution Association (PHILCONSA) v. Philippine Government (GPH)*, G.R. No. 218406, Nov. 29, 2016, available at <http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2016/november2016/218406.pdf> (last accessed Oct. 31, 2017).

191. *Id.* at 11. CAB and FAB were recognized as “preparatory documents.”

192. Many allude the failure of Congress to pass the *Bangsamoro* Basic Law to the Mamamasapano incident. Albert F. Arcilla, Revisiting Mamasapano: A disaster for the BBL, available at <http://www.bworldonline.com/content.php?section=Nation&title=revisiting-mamasapano-a-disaster-for-the-bbl&id=122002> (last accessed Oct. 31, 2017).

193. Philip C. Tubeza, *Duterte vows Bangsamoro homeland in 3 years*, PHIL DAILY INQ., June 22, 2017, available at <http://newsinfo.inquirer.net/907592/duterte-vows-bangsamoro-homeland-in-3-years> (last accessed Oct. 31, 2017).

194. Framework Agreement on the *Bangsamoro*, at 3, available at <http://www.officialgazette.gov.ph/downloads/2012/10oct/20121012-Framework-Agreement-on-the-Bangsamoro.pdf> (last accessed Oct. 31, 2017).

195. *Id.* at 3-4.

196. *Id.* at 11.

grant amnesty to MILF rebels who had been charged with rebellion and related crimes, and pardon those already convicted, under the condition that the MILF will deactivate their arms.<sup>197</sup> This is embodied in the Annex on Normalization, which states that the “[g]overnment shall take immediate steps through amnesty, pardon[,] and other available processes towards the resolution of cases of persons charged with or convicted of crimes and offenses connected to the armed conflict in Mindanao.”<sup>198</sup>

### C. *No Right Solution for the Left*

While the peace agreements with the Moros branch out to areas such as socio-economic reforms and territory settlements, the agreements with the communist rebels are still in its early stages. At the outset of her term, President Corazon Aquino declared a ceasefire with the CPP-NPA-NDF and ordered the release of several of the political prisoners.<sup>199</sup> Peace talks with the rebel group were also begun.<sup>200</sup> These did not end well, as the NPA returned to its militant activities against the government.<sup>201</sup> From then on, the government has used a two-pronged approach in resolving the conflict with the CPP-NPA-NDF: “hard power[,]” or military offensive, and “soft power,” or socioeconomic development.<sup>202</sup>

Over “40 rounds of talks” have been conducted by the GRP with the CPP-NPA-NDF since 1986.<sup>203</sup> Out of this series of negotiations, there have been only two signed agreements: the Comprehensive Agreement to Respect Human Rights and International Humanitarian Law (CARHRIHL)<sup>204</sup> and the Joint Agreement on Safety and Immunity

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197. Nikko Dizon, Gov’t plans amnesty for MILF insurgents, *PHIL. DAILY INQ.*, Jan. 27, 2014, available at <http://newsinfo.inquirer.net/569627/ph-to-grant-amnesty-pardon-muslim-rebels> (last accessed Oct. 31, 2017).

198. Annex on Normalization, at 9, available at [http://peacemaker.un.org/sites/peacemaker.un.org/files/PH\\_140125\\_AnnexNormalization.pdf](http://peacemaker.un.org/sites/peacemaker.un.org/files/PH_140125_AnnexNormalization.pdf) (last accessed Oct. 31, 2017).

199. Stanford University, *supra* note 141.

200. *Id.*

201. Ferrer & Cabangbang, *supra* note 113, at 266.

202. *Id.*

203. Office of the Presidential Adviser on the Peace Process, Frequently Asked Questions on the GPH-CPP/NPA/NDF, available at <https://peace.gov.ph/cpp-npa-ndf/faqs> (last accessed Oct. 31, 2017).

204. Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law between the Government of the Republic of the Philippines

Guarantees (JASIG),<sup>205</sup> which were all formed under President Ramos' term.<sup>206</sup>

The current talks with the CPP-NPA-NDF have been narrowed down to the protection of human rights and the upholding of safeguards for those who are involved in the negotiations. JASIG enumerates several privileges granted to the CPP-NPA-NDF in order "to facilitate the peace negotiations, create a favorable atmosphere conducive to free discussion and free movement during the negotiations, and avert any incident that may jeopardize the peace negotiations."<sup>207</sup> Some of these are:

- (1) Free and unhindered passage in all areas of the Philippines, and in travelling to and from the Philippines in connection to their duties in the negotiations;
- (2) Right to issue documents of identification;
- (3) Freedom from surveillance, harassment, search, arrest, detention, prosecution, and interrogation, or any other similar punitive action due to any involvement or participation in the peace negotiations;

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and the National Democratic Front of the Philippines (An Agreement entered into between the Philippines and the National Democratic Front of the Philippines to bind each other to recognize and respect human rights), *available at* [http://peacemaker.un.org/sites/peacemaker.un.org/files/PH\\_980316\\_Comprensive%20Agreement%20on%20Respect%20of%20Human%20Rights.pdf](http://peacemaker.un.org/sites/peacemaker.un.org/files/PH_980316_Comprensive%20Agreement%20on%20Respect%20of%20Human%20Rights.pdf) (last accessed Oct. 31, 2017) [hereinafter CARHRIHL].

205. Joint Agreement on Safety and Immunity Guarantees, entered into by and between the Government of the Republic of the Philippines and the National Democratic Front of the Philippines, including the Communist Party of the Philippines and the New People's Army, *available at* <http://bulatlat.com/main/wp-content/uploads/peace-talks-documents/jasig.pdf> (last accessed Oct. 31, 2017). The immunity guarantees shall mean "that all duly accredited persons are guaranteed immunity from surveillance, harassment, search, arrest[,] or any other similar punitive actions due to any involvement or participation in the peace negotiations." [hereinafter JASIG].

206. Office of the Presidential Adviser on the Peace Process with the Support of the United Nations Development Programme, *Part 1: Overview of the GRP-NDF Peace Negotiations*, in THE GRP-NDF PEACE NEGOTIATIONS (Compendium of Documents) (2006). In entering into these agreements, President Ramos invoked its presidential power to negotiate with domestic entities, such as the CPP-NPA-NDF.

207. JASIG, *supra* note 205, at 1.

- (4) Suspension of prosecutions of criminal proceedings or processes including arrest and search, for acts committed prior to the effectivity of this Joint Agreement;
- (5) Exemption from passport cancellation; and
- (6) Freedom to return abroad after the termination of the Agreement.<sup>208</sup>

Furthermore, the CARHRIHL also provides the obligation on the government to repeal any of “subsisting repressive laws, decrees, or other executive issuances,”<sup>209</sup> which include General Order Nos. 66 and 67 (authorizing checkpoints and warrantless searches), Presidential Decree (P.D.) No. 1866 (allowing the filing of charges of illegal possession of firearms with respect to political offenses), and Executive Order No. 272 (lengthening the allowable periods of detention).<sup>210</sup> The government must also review the cases of “all prisoners or detainees who have been charged, detained, or convicted contrary to this doctrine, and shall immediately release them.”<sup>211</sup>

In three decades, no settlement was ever fully realized with the CPP-NPA-NDF. There still exists an active armed struggle despite the presence of the aforementioned agreements. A huge deterrent to the accomplishment of the agreements is the CCP’s stance on the release of political prisoners, which up to now has not been fully resolved. The ceasefire that was declared at the beginning of President Duterte’s term was also halted.<sup>212</sup>

Before the suspension of the ceasefire, the Duterte administration had actually initiated the resumption of negotiations with the CPP-NPA-NDF through the Oslo Talks.<sup>213</sup> This series of meetings aimed to affirm the agreements and setting of a timeline for the completion of agenda.<sup>214</sup> The

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208. *Id.* at 1-3.

209. CARHRIHL, *supra* note 204, art. 7.

210. *Id.*

211. *Id.* art. 6.

212. Karlos Manlupig, et. al., *Duterte terminates ceasefire with the Reds*, PHIL. DAILY INQ., Feb. 4, 2017, available at <http://newsinfo.inquirer.net/868131/duterte-terminates-ceasefire-with-reds> (last accessed Oct. 31, 2017).

213. Katerina Francisco, *The CPP-NPA-NDF and the Oslo talks*, available at <https://www.rappler.com/newsbreak/iq/143551-cpp-mpa-ndf-peace-talks> (last accessed Oct. 31, 2017).

214. *Id.*



CPP-NPA-NDF wanted a general amnesty proclamation for the release of over 500 political prisoners.<sup>215</sup>

#### IV. LAWS RELATED TO ARMED CONFLICT

Aside from the constitutional safeguards lodged in the President, the Philippine Congress has also enacted legislation to address the dangers that insurgent groups bring, particularly those carrying out acts of terrorism.

##### *A. The Anti-Subversion Law*

A controversial example was Republic Act (R.A.) No. 1700 or the “Anti-Subversion Law.”<sup>216</sup> Passed before the formation of the CPP-NPA-NDF as known today, the law defined the members of the “Communist Party of the Philippines”<sup>217</sup> to be those criminally liable for being an “organized conspiracy to overthrow the Government of the Republic of the Philippines for the purpose of establishing in the Philippines a totalitarian regime and place the Government under the control and domination of an alien power.”<sup>218</sup> This law was eventually repealed in 1992.<sup>219</sup>

Prior to its repeal, however, the main criticism against the Anti-Subversion Law was that it was a bill of attainder.<sup>220</sup> Under that law, the mere membership in the Communist Party of the Philippines “and/or its

215. *Id.*

216. An Act To Outlaw The Communist Party Of The Philippines And Similar Associations, Penalizing Membership Therein, And For Other Purposes, [Anti-Subversion Act], Republic Act No. 1700 (1957) (repealed 1992). This law was passed following the United States’ acts to combat communism during the Cold War era. Guillermo M. Canlas, Jr., *The Anti-Subversion Law and Subversion*, 46 PHIL. L.J. 721, 723 (1971).

217. Anti-Subversion Act, § 3. The term “Communist Party of the Philippines” shall mean and include the organizations now known as the Communist Party of the Philippines and its military arm, the Hukbong Mapagpalaya ng Bayan, formerly known as HUKBALAHAPS, and any successors of such organizations. *Id.*

218. *Id.* § 2.

219. An Act Repealing Republic Act Numbered One Thousand Seven Hundred, as Amended, Otherwise Known as the Anti-Subversion Act, Republic Act No. 7636 (1992).

220. *People v. Ferrer*, 48 SCRA 382, 393 (1972) (the case defines “bill of attainder” as a legislative act which inflicts punishment without trial — there is no judicial determination of guilt). Bills of attainder are expressly prohibited by the 1987 Constitution. *Id.* at 418 & PHIL. CONST. art. III, § 22.

successor or of any subversive association” was punishable.<sup>221</sup> This was therefore a possible avenue for prosecutors to indict dissenters.<sup>222</sup> The Court never declared such law unconstitutional — it was only through legislative action that the Anti-Subversion Law was repealed.

In the speech of President Ramos at the Signing of the Bill Repealing the Anti-Subversion Law, he emphasized the importance of providing a “political space” for the rebels and strengthening the government’s relations with them in order to achieve peace.<sup>223</sup> The President extended a hand of peace in this wise —

Even so, we are willing to sit and dialogue with them in the hope that we can put an end to the killing and the suffering; and bring back to civil society the young men and women [ ] — [ ] the cadres of the movement [ ] — [ ] who are also its sacrificial victims.

...

To these young Filipinos I say: You have fought long enough. You have proved your courage. Now, take the peace we offer: a peace with honor and justice, a peace that will enable you to take hold of your life again and rejoin the mainstream of Philippine society in the rebuilding of the nation.<sup>224</sup>

### *B. The Human Security Act*

As fear of international terrorist groups in the Philippines heightened,<sup>225</sup> due in no small part to an increased number of deaths attributed to bombings,<sup>226</sup> the country passed its first law to combat terrorism — R.A. No. 9372, or the

221. Anti-Subversion Act, § 4.

222. Canlas Jr., *supra* note 216, at 721.

223. President Fidel V. Ramos, Former President of the Philippines, At the Signing of the Bill Repealing the Anti-Subversion Law (Sep. 2, 1992) (transcript available at <http://www.officialgazette.gov.ph/1992/09/02/speech-of-president-ramos-at-the-signing-of-the-bill-repealing-the-anti-subversion-law> (last accessed Oct. 31, 2017)).

224. *Id.*

225. See Brent H. Lyew, *An Examination Of The Philippines’ Antiterror Law — Suaviter In Modo, Fortiter In Re*, 19 PAC. RIM L. & POL’Y J. 187, 189 (2010).

226. Human Rights Watch, Philippines: Extremist Groups Target Civilians, available at <https://www.hrw.org/news/2007/07/30/philippines-extremist-groups-target-civilians> (last accessed Oct. 31, 2017).

“Human Security Act of 2007.”<sup>227</sup> Before the enactment of this law, the only strategy to counter terrorism was through military offense, with aid from the United States military.<sup>228</sup> With the “unilateral power” given to the commanding officers to determine who the terrorists are, this strategy became the subject of numerous human rights violations.<sup>229</sup> Therefore, the Human Security Act emphasizes the need to strike a balance between effectively countering terrorism while still providing an absolute protection for human rights.<sup>230</sup>

Section 3 of the law defines the acts considered under terrorism, as follows —

Any person who commits an act punishable under any of the following provisions of the Revised Penal Code:

- (a) Article 122 (Piracy in General and Mutiny in the High Seas or in the Philippine Waters);
- (b) Article 134 (Rebellion or Insurrection);
- (c) Article 134-a (Coup d’ Etat), including acts committed by private persons;
- (d) Article 248 (Murder);
- (e) Article 267 (Kidnapping and Serious Illegal Detention);
- (f) Article 324 (Crimes Involving Destruction), or under
  - (1) [P.D.] No. 1613 (The Law on Arson);
  - (2) [R.A.] No. 6969 (Toxic Substances and Hazardous and Nuclear Waste Control Act of 1990);
  - (3) [R.A.] No. 5207, (Atomic Energy Regulatory and Liability Act of 1968);
  - (4) [R.A.] No. 6235 (Anti-Hijacking Law);

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227. An Act To Secure The State And Protect Our People From Terrorism [Human Security Act of 2007], Republic Act No. 9372 (2007).

228. Lyew, *supra* note 225, at 191.

229. *Id.* (citing James Petras & Robin Eastman-Abaya, Philippines: The Killing Fields of Asia, *available at* <http://petras.lahaine.org/articulo.php?c=1&more=1&p=1660> (last accessed Oct. 31, 2017) Reports from various human rights organizations showed that “at least 830 people [were] killed in an extrajudicial fashion, including 365 mostly left-leaning political and social activists, ... journalists, judges, and lawyers known to be sympathetic to leftist causes.” *Id.*

230. Human Security Act of 2007, § 2. Some of the safeguards the law provides are rigid procedure for surveillance, protection against wiretap communications, maximum period of detention and prohibition against torture. *Id.*

- (5) [P.D.] No. 532 (Anti-Piracy and Anti-Highway Robbery Law of 1974); and,
- (6) [P.D.] No. 1866, as amended (Decree Codifying the Laws on Illegal and Unlawful Possession, Manufacture, Dealing in, Acquisition or Disposition of Firearms, Ammunitions or Explosives)

thereby *sowing and creating a condition of widespread and extraordinary fear and panic among the populace*, in order to coerce the government to give in to an unlawful demand[.]<sup>231</sup>

The draft versions of the bill provided an enumeration of specific acts that would constitute terrorism.<sup>232</sup> However, the legislators later on took “extra caution” in defining terrorism so as not to aggravate the hostile conditions with the MNLF, MILF, and the CPP-NPA-NDF or affect the on-going peace negotiations at that time.<sup>233</sup> Thus, the law utilized the already existing crimes under the Revised Penal Code and other special penal laws, underlining the presence of two integral elements: (1) sowing and creating a condition of widespread and extraordinary fear and panic among the populace (2) in order to coerce the government to give in to an unlawful demand.<sup>234</sup>

The constitutionality of the Human Security Act of 2007 was challenged in the case of *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council*<sup>235</sup> where the petitioners alleged that the definition of the crime of terrorism was “intrinsically vague and impermissibly broad.”<sup>236</sup> They further

231. *Id.* § 3 (emphasis supplied).

232. Pelagio V. Palma, Jr., *The Problem of Excessive Human Rights Safeguards in a Counter-Terror Measure: An Examination of the Human Security Act of the Philippines*, 58 *ATENEO L.J.* 476, 479 (2013). The Article also provides for an extensive narration of the origins of the law from the Congressional deliberations and comparisons with the anti-terrorism laws of other countries such as the United States and United Kingdom.

233. *Id.* at 480.

234. Human Security Act of 2007, § 3. This is in accordance to the standards set forth in United Nations Security Council Resolution No. 1566 on threats to international peace and security caused by terrorist acts. Threats to International Peace and Security caused by Terrorist Acts, U.N. Doc. S/RES/1566 (Oct. 8, 2004).

235. *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council*, 632 *SCRA* 146 (2010).

236. *Id.* at 180.

posited that law enforcers were left with the discretion to determine the standards to measure the twin elements of terrorism as provided by law.<sup>237</sup> Other areas of concern<sup>238</sup> include: the power of regional trial courts to declare “[a]ny organization, association, or group of persons organized for the purpose of engaging in terrorism, or which, although not organized for that purpose, actually uses the acts to terrorize mentioned in this Act[,]” upon application by the Department of Justice;<sup>239</sup> the doubled period of detention without judicial supervision;<sup>240</sup> and the absence of the definition of an “actual or imminent terrorist attack.”<sup>241</sup> However, the Court could not find any defect in the law as the petitioners mistakenly applied the vagueness test to a penal statute.<sup>242</sup> Without an actual charge for violation of the Human Security Act, the law cannot be challenged on its face; thus, a limited vagueness analysis was “legally impermissible.”<sup>243</sup>

*C. Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity*

The body of law that regulates conduct during times of armed conflict is the International Humanitarian Law (IHL) as embodied in Article 2 of the 1949 Geneva Convention,<sup>244</sup> which states —

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

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237. *Id.* at 181.

238. Human Rights Watch, Philippines: New Terrorism Law Puts Rights at Risk, available at <http://pantheon.hrw.org/legacy/english/docs/2007/07/16/philip16404.htm> (last accessed Oct. 31, 2017).

239. Human Security Act of 2007, § 17.

240. *Id.* § 18.

241. *Id.* § 19.

242. *Southern Hemisphere Engagement Network, Inc.*, 632 SCRA at 191.

243. *Id.* at 189.

244. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, signed Aug. 12, 1949, 75 U.N.T.S. 135.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.<sup>245</sup>

Often compared with International Human Rights Law (IHRL), the two bodies of law are treated as complements of each other.<sup>246</sup> The distinction lies in that IHRL must be observed in both times of war and peace and that “emergency derogations from [IHRL] are possible, they are not from [IHL], because [IHL] applies precisely to those situations which are among those justifying the emergency derogations from human rights treaties.”<sup>247</sup>

Following the state principle of adopting generally accepted principles of international law as part of the law of the land,<sup>248</sup> the Philippines enacted R.A. No. 9851, “An Act Defining and Penalizing Crimes Against International Humanitarian Law, Genocide and Other Crimes Against Humanity, Organizing Jurisdiction, Designating Special Courts, and for Related Purposes”<sup>249</sup> in 2009. The punishable acts under this law are divided into three categories: war crimes or crimes against IHL, genocide, and other crimes against humanity.<sup>250</sup> No one is exempted from the applicability of the

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245. *Id.* art. 2.

246. See Alexander Orakhelashvili, *The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?*, 19 EUR. J. INT’L L. 161, 164 (2008) & Office of the United Nations High Commissioner for Refugees & International Criminal Tribunal for Rwanda, Expert Meeting on Complementarities between International Refugee Law, International Criminal Law and International Human Rights Law, *available at* <http://www.unhcr.org/protection/expert/4dd119889/agenda-expert-meeting-complementarities-international-refugee-law-international.html> (last accessed Oct. 31, 2017).

247. Orakhelashvili, *supra* note 246, at 165.

248. PHIL. CONST. art. II, § 2.

249. An Act Defining and Penalizing Crimes Against International Humanitarian Law, Genocide and Other Crimes Against Humanity, Organizing Jurisdiction, Designating Special Courts, and for Related Purposes [Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity], Republic Act No. 9851 (2009).

250. *Id.* §§ 4-6.

law; even government officials may be held criminally liable for violations of this act.<sup>251</sup>

The governing laws during periods of non-international armed conflict is determined by Article 3 of the 1949 Geneva Convention<sup>252</sup> and Section 4(b) of R.A. No. 9851 which provides —

- (b) In case of a non-international armed conflict, serious violations of common Article 3 to the four (4) Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including member of the armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause;

251. *Id.* § 9. However, this Section recognizes immunities or special privileges attached to the official capacity of a person such as that of the President.

252. Article 3 of the Geneva Convention provides —

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

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

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

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

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

Geneva Convention Relative to the Protection of Civilian Persons in Times of War art. 3, entered into force Oct. 21 1950, 75 U.N.T.S. 287.

- (1) Violence to life and person, in particular, willful killings, mutilation, cruel treatment and torture;
- (2) Committing outrages upon personal dignity, in particular, humiliating and degrading treatment;
- (3) Taking of hostages; and
- (4) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.<sup>253</sup>

There has been no petition yet filed before the Supreme Court questioning the provisions of R.A. No. 9851. But the challenge remains in effectively implementing the law where civilians are protected against the effects of the war and those who “fall into the hands of the adverse party are treated humanely.”<sup>254</sup> A particular difficulty in the Philippine situation of non-international armed conflict is that there is a thin line between the identity of the civilian and the militants.<sup>255</sup> This may pose some unfortunate consequences since under IHL, “civilians lose their protection from attacks if they directly participate in hostilities.”<sup>256</sup>

#### V. THE PRESIDENT’S ACTIONS

The peace process, or more significantly, *the lack thereof*, also affects the way the President responds in times when the insurgents commit overt acts of rebellion or terrorism.

In 2013, when the MNLF forces besieged Zamboanga City, President Aquino did not declare a state of emergency or exercise his power to declare martial law or suspend the privilege of the writ of *habeas corpus*.<sup>257</sup> He placed

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253. Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity, § 4 (b).

254. International Committee of the Red Cross in the Philippines, Interview with Richard Desgagne, available at <https://www.icrc.org/eng/assets/files/2011/philippines-newsletter-august-2011-icrc-eng.pdf> (last accessed Oct. 31, 2017).

255. Ferrer & Cabangbang, *supra* note 113, at 273.

256. International Committee of the Red Cross of the Philippines, *supra* note 255.

257. Kimberly Jane Tan, PNoy: No need to declare state of emergency in Zamboanga, available at <http://www.gmanetwork.com/news/news/nation/325792/pnoy-no-need-to-declare-state-of-emergency-in-zamboanga/story> (last accessed Oct. 31, 2017).



his confidence in the military commanders, his Cabinet members, and the city officials to handle the situation.<sup>258</sup> In a statement, President Aquino assured that the presence of the government forces was sufficient to defeat the hostile rebels.<sup>259</sup>

The Government Peace Panel also denied the allegations that it had ignored peace talks with Nur Misuari and the MNLF.<sup>260</sup> Amidst the standoff, the government actually continued to engage MNLF in negotiations as another way to defuse the situation.<sup>261</sup> However, the crisis ended after only 20 days, with a military victory and the surrender of some of the key MNLF officials responsible for the siege.<sup>262</sup>

After the crisis, the Department of Justice created a special panel of prosecutors to properly charge the perpetrators from the MNLF with rebellion and violation of R.A. No. 9851.<sup>263</sup> At that time, 100 members of the MNLF, including their leader, Misuari, were charged.<sup>264</sup> Currently, there is no news of any convictions.<sup>265</sup> In April 2017, Misuari was granted extended provisional liberty in order to “allow him to attend peace talk sessions with the government.”<sup>266</sup>

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258. Andrei Medina, *Timeline: Crisis in Zamboanga City*, available at <http://www.gmanetwork.com/news/news/regions/325855/timeline-crisis-in-zamboanga-city/story/> (last accessed Oct. 31, 2017).

259. Tan, *supra* note 257.

260. Kimberly Jane Tan, *Gov't panel denies disregarding Misuari, MNLF in peace process*, available at <http://www.gmanetwork.com/news/news/nation/326045/gov-t-panel-denies-disregarding-misuari-mnlf-in-peace-process/story/> (last accessed Oct. 31, 2017).

261. Medina, *supra* note 258.

262. *Id.*

263. Philstar.com, *DOJ creates panel to handle deadly Zamboanga siege case*, PHIL. STAR, Oct. 29, 2013, available at <http://www.philstar.com/headlines/2013/10/29/1250932/doj-creates-panel-handle-deadly-zamboanga-siege-case> (last accessed Oct. 31, 2017).

264. *Id.*

265. RJ Rosalado, *Evidence vs MNLF members in Zamboanga siege weak, lawyer says*, available at <http://news.abs-cbn.com/nation/regions/02/11/16/evidence-vs-mnlf-members-in-zamboanga-siege-weak-lawyer-says> (last accessed Oct. 31, 2017). From rebellion, some were charged with lesser offenses such as illegal assembly and sedition.

266. Carolyn O. Arguillas, *Misuari's temporary liberty ends April 27; MNLF working on extension*, available at <http://www.mindanews.com/peace->

In contrast, the government held a more aggressive stance against terrorist groups with whom there were no peace agreements. On the same day that the Maute group caused acts of violence and destruction in Marawi City in May 2017, President Duterte, exercising his powers as Commander-in-Chief under Article VII, Section 18, immediately issued Proclamation No. 216. This placed the entire Mindanao under martial law and suspended the privilege of the writ of *habeas corpus*.<sup>267</sup> In the factual report submitted to Congress, the President narrated the long-running conflict in Mindanao in recent years which he believed to be committed by the Maute Group and the Abu Sayyaf Group.<sup>268</sup> He stated that there was actual rebellion in Marawi that may spill over to other parts of Mindanao as well, and that public safety required the proclamation of martial law.<sup>269</sup>

Despite the many complaints that assailed the validity of such due to lack of factual bases for such declaration, the Court gave credence to the wisdom of the President in deciding when to invoke the extraordinary powers granted by the Constitution.<sup>270</sup>

In connection to this, the police force in Mindanao has been steadfast in arresting key members of the terrorist groups.<sup>271</sup> President Duterte has also been vocal about denying the Abu Sayyaf of any type of amnesty or inclusion in the Mindanao peace process.<sup>272</sup>

## VI. THE PRESIDENT'S DILEMMA

The current legal framework and mechanisms in addressing non-international armed conflict “are expressed and found in two main paradigms: Comprehensive Peace Process Paradigm and Counter-Insurgency

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process/2017/04/misuaris-temporary-liberty-ends-april-27-mnlf-working-on-extension/ (last accessed Oct. 31, 2017).

267. Proclamation No. 216, s. 2017, § 2.

268. *Lagman*, G.R. No. 231658, at 9.

269. *Id.*

270. *Id.* at 35.

271. Roel Pareño, 13 suspected Maute members arrested in Zamboanga del Sur hospital, PHIL. STAR, June 18, 2017, available at <http://www.philstar.com/nation/2017/06/18/1711230/13-suspected-maute-members-arrested-zamboanga-del-sur-hospital> (last accessed Oct. 31, 2017).

272. Pia Ranada, Duterte: No amnesty for Abu Sayyaf, available at <https://www.rappler.com/nation/147403-philippines-duterte-no-amnesty-abu-sayyaf> (last accessed Oct. 31, 2017).

Paradigm.”<sup>273</sup> There lies a conflict before the President in deciding which of the two paradigms to utilize.

While on the one hand, the Comprehensive Peace Process Paradigm seeks to go beyond the resolution of the issues that underlie and trigger armed violence and seeks a long-term and sustainable solution to the problem of internal conflict; on the other hand, the Counter-Insurgency Paradigm seeks only the destruction of the insurgency by addressing the symptoms and consequences of the conflict.<sup>274</sup>

Thus, in attempting to accommodate all the possible remedies to handle the rebel groups, the President is confronted by several barriers set by the peace agreements and the laws.

#### *A. Implications of the Peace Process*

The obligation to comply with the peace agreements, though not explicitly provided for in the 1987 Constitution, is ultimately lodged with the President through his or her mandated duty to “ensure that laws be faithfully executed.”<sup>275</sup> Therefore, the government is bound to uphold the actions and reforms it has promised to undertake. The main area of criticism in the existing peace agreements that the government has with the MNLF, MILF, and the CPP-NPA-NDF is the significance of the safety guarantees, immunities, and amnesty it has granted to the rebel groups while the peace talks are on-going.

The problem is illustrated in the case of Nur Misuari. Though the leader of the MNLF was charged with rebellion and violation of R.A. No. 9851 for the Zamboanga siege, the executive department did not fully exercise its prosecutorial powers in pursuing his conviction. Instead, he was granted provisional liberty to ensure his and the MNLF’s participation in the resumption of peace talks.<sup>276</sup> Another example is the case of *Ocampo v. Abando*,<sup>277</sup> where the Court affirmed the grant of bail given to members of the CPP-NPA-NDF who were allegedly involved in multiple murders as already absorbed in the crime of rebellion, and was further remanded to the

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273. Montesa, *supra* note 162, at 284.

274. *Id.*

275. PHIL. CONST. art. VII, § 17. This pertains to the faithful execution clause.

276. Arguillas, *supra* note 266.

277. *Ocampo v. Abando*, 715 SCRA 673 (2014).

lower courts.<sup>278</sup> The bail was granted despite the notion that the offenses were punishable by *reclusion perpetua*.<sup>279</sup>

These instances strengthened the perception that “[t]he logic of a peace agreement points towards compromise over accountability as necessary.”<sup>280</sup> In the past, peace panels considered the prosecution of the rebel leaders for crimes they had committed as a setback to the negotiations where their cooperation is vital to achieving proper settlements. The resort to approaches outside the legal framework bestowed upon these groups may also be due to the fact that the Constitution is neither recognized nor respected by the insurgents.<sup>281</sup> While many are of the belief that foregoing justice is a small price to pay for the long-lasting peace that the peace process promises, the practice of impunity will be more costly.<sup>282</sup>

This holds true especially when there are laws already set in place to hold the perpetrators liable. In the Philippine setting, R.A. No. 9851 already provides for the punishment of acts committed in situation of domestic armed conflicts.<sup>283</sup> In his concurring opinion in *Ocampo*, Justice Marvic Mario Victor F. Leonen (Justice Leonen) expressed the importance of upholding this law in light of the offenses allegedly committed by the members of the CPP-NPA-NDF.<sup>284</sup> He stated that if it was proved that the

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278. *Id.*

279. REVISED PENAL CODE, art. 134 & PHIL. CONST. art. III, § 13. The latter provides that —

SECTION 13. All persons, except those charged with offenses punishable by *reclusion perpetua* when evidence of guilt is strong, shall, before conviction, be bailable by sufficient sureties, or be released on recognizance as may be provided by law. The right to bail shall not be impaired even when the privilege of the writ of *habeas corpus* is suspended. Excessive bail shall not be required.

PHIL. CONST. art. III, § 13.

280. BELL, ON THE LAW OF PEACE, *supra* note 173, at 239.

281. Candelaria & Nonato, *supra* note 166, at 276.

282. See Sara Darehshori, Selling Justice Short: Why Accountability Matters (A Report for Human Rights Watch), available at [https://www.hrw.org/sites/default/files/reports/ijo709webwcover\\_3.pdf](https://www.hrw.org/sites/default/files/reports/ijo709webwcover_3.pdf) (last accessed Oct. 31, 2017).

283. Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity, §§ 4–6.

284. *Ocampo*, 716 SCRA at 709 (J. Leonen, concurring opinion).

CPP-NPA-NDF is responsible for the multiple murders then they should be prosecuted under IHL, and not rebellion.<sup>285</sup> Further, he explains —

Thus, all persons are protected in both times of war and peace. The protection accorded by human rights laws does not cease to apply when armed conflict ensues. Still, some ‘human rights’ are allowed to be derogated in times of ‘emergency which threatens the life of the nation.’ Nevertheless, provisions on the right to life, prohibition from torture, inhuman and degrading treatment, and slavery remain free from any derogation whatsoever, having acquired a *jus cogens* character.

We do not need to go further to determine whether these norms form part of ‘generally accepted principles of international law’ to determine whether they are ‘part of the law of the land.’ At minimum, they have been incorporated through statutory provisions.

R.A. No. 9851 defines and provides for the penalties of crimes against humanity, serious violations of IHL, genocide, and other crimes against humanity. This law provides for the non-prescription of the prosecution of and execution of sentences imposed with regard to the crimes defined in the Act. It also provides for the jurisdiction of the Regional Trial Court over the crimes defined in the Act.

These crimes are, therefore, separate from or independent from the crime of rebellion even if they occur on the occasion of or argued to be connected with the armed uprisings.<sup>286</sup>

Justice Leonon emphasizes the presence of documents signed by the CPP-NPA-NDF such as the CARHRIHL in which, together with the government, it had declared to uphold the recognition and protection of human rights even amidst the presence of conflict.<sup>287</sup> He adds —

Concomitantly, persons committing crimes against humanity or serious violations of international humanitarian law, international human rights laws, and [R.A.] No. 9851 must not be allowed to hide behind a doctrine crafted to recognize the different nature of armed uprisings as a result of political dissent. The contemporary view is that these can never be considered as acts in furtherance of armed conflict no matter what the motive. Incidentally, this is the view also apparently shared by the CPP[-]NPA[-]NDF and major insurgent groups that are part of the present government’s peace process.<sup>288</sup>

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285. *Id.*

286. *Id.* at 729-30.

287. *Id.* at 731.

288. *Id.* at 737-38.

*B. Implications of Declaration of Martial Law*

All said, the exercise of emergency powers, such as the declaration of martial law, may also have adverse effects on the on-going peace process.

In 1972, President Marcos grounded his declaration of martial law over the entire country on the imminent danger that the rise of the then Communist Party of the Philippines brought.<sup>289</sup> As history shows, the period of martial law, together with the suspension of the privilege of the writ of *habeas corpus*, brought about the suppression of the rights of members of the Communist Party, including those who were merely alleged to be part of the NPA. This period also saw the emergence of the Moro rebels as a countermeasure to the aggressive military forces. Therefore, the recent declaration of Martial Law in Mindanao by President Duterte has prompted doubts and fears from the stakeholders of the peace process.

The President, in declaring Proclamation No. 216, exercised the full extent of the powers of the Commander-in-Chief where military offense is encouraged with the grant of “blanket authority.”<sup>290</sup> Current members of the CPP-NPA-NDF, MILF, and MNLF have already voiced out their concern that this may lead to the commencement of new conflicts by the rebels and the government.<sup>291</sup> The fact that the scope of the declaration of martial law covers the entire Mindanao region may also aggravate the tensions among the military and the MILF, MNLF or the CPP-NPA-NDF outside of the city of Marawi.<sup>292</sup>

In fact, in the Operation Directive released by the Chief of Staff in connection with Proclamation No. 216, one of the key tasks involved in the mission against the local terrorist groups included the dismantling of the NPA together with “other terror-linked private armed groups, illegal drug

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289. Proclaiming a State of Martial Law in the Philippines, Proclamation No. 1081, s. 1972, whereas cl. para. 8.

290. Christian Esguerra, Martial law in Mindanao may harm peace process, scholar warns, available at <http://news.abs-cbn.com/focus/05/24/17/martial-law-in-mindanao-may-harm-peace-process-scholar-warns> (last accessed Oct. 31, 2017).

291. Delfin T. Mallari, Jr. & Nikko Dizon, *In declaring martial law in Mindanao, Duterte playing with fire, says Joma*, PHIL. DAILY INQ., May 25, 2017, available at <http://newsinfo.inquirer.net/899372/in-declaring-martial-law-in-mindanao-duterte-playing-with-fire-says-joma> (last accessed Oct. 31, 2017).

292. See *Lagman*, G.R. No. 231658, available at [http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2017/july2017/231658\\_sereno.pdf](http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2017/july2017/231658_sereno.pdf), at 49 (last accessed Oct. 31, 2017) (C.J. Sereno, dissenting opinion).

syndicates, peace spoilers[,] and other lawless armed groups.”<sup>293</sup> Another key task stated is to “[d]egrade armed capabilities of the NPA *to compel to remain in the peace process*.”<sup>294</sup> This directive, together with the other guidelines and issuances released after the proclamation, were all legal as pronounced by the Court in *Lagman*. Justice Mariano C. Del Castillo (Justice Del Castillo), in his *ponencia*, stated that “there is no need for the Court to determine the constitutionality of the implementing and/or operational guidelines, general orders, arrest orders and other orders issued after the proclamation for being irrelevant to its review,” and if the Court does exercise its power to review, “it would be deemed as trespassing” into the exclusive power of Congress to revoke the questioned orders or issuances.<sup>295</sup>

The implications of martial law on the current relations of the government with the rebel groups are elaborated in the dissents of *Lagman*. Justice Carpio stated a declaration of martial law or suspension of privilege of writ of *habeas corpus* has a “built-in trigger mechanism” that may limit the exercise of constitutional rights as *authorized by existing laws*.<sup>296</sup> This involves the rights of rebels during apprehension and detention, restrictions on privacy, take-over of privately-owned public utilities, and expansion of jurisdiction of military courts and agencies over civilians when civil courts are not able to function.<sup>297</sup> In the context of rebellion, Justice Carpio discussed that

in a state of martial law, trial courts can take judicial notice of the rebellion for the purpose of applying the continuing crime doctrine ... In contrast, without a declaration of martial law, the prosecution will have to prove the fact of rebellion to justify the arrest on the ground of continuing rebellion; trial courts cannot take judicial notice of the new rebellion for the purpose of automatically applying the continuing rebellion doctrine.<sup>298</sup>

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293. *Lagman*, G.R. No. 231658, available at [http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2017/july2017/231658\\_leonen.pdf](http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2017/july2017/231658_leonen.pdf), at 48 (last accessed Oct. 31, 2017) (J. Leonen, dissenting opinion).

294. *Id.* (emphasis supplied).

295. *Lagman*, G.R. No. 231658, at 44.

296. *Lagman*, G.R. No. 231658, available at [http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2017/july2017/231658\\_carpio.pdf](http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2017/july2017/231658_carpio.pdf), at 27 (last accessed Oct. 31, 2017) (J. Carpio, dissenting opinion).

297. *Id.* at 26–34.

298. *Id.* at 27.

This distinction is more relevant in situations when there is actual rebellion by new rebel groups compared to already established rebel movements such as that of the CPP-NPA-NDF.<sup>299</sup>

Chief Justice Maria Lourdes P.A. Sereno (Chief Justice Sereno), in her dissent, laid out the parameters for the implementation of martial law and the suspension of the privilege of the Writ of *Habeas Corpus* to determine the legality of the seemingly additional powers granted to the President for the duration of martial law.<sup>300</sup> Chief Justice Sereno agrees with Justice Carpio's contentions that restrictions on the enjoyment of constitutional rights are only enacted if there are already laws that allowed the State to renege on its promise to uphold the rights for the interests of national security, such as the Human Security Act. Furthermore, she states that the applicability of R.A. No. 9851 is not suspended during martial law. This law continues to hold both agents of the State and rebels liable for the commission of any of the punishable acts.<sup>301</sup>

However, the majority opinion in *Lagman* continues to recognize the “flexibility” accorded to the President in declaring martial law. In this case, one of the main issues concerned the territorial aspect of the declaration and the Court stated that

the President's duty to maintain peace and public safety is not limited only to the place where there is actual rebellion; it extends to other areas where the present hostilities are in danger of spilling over.

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The Court can only act within the confines of its power. For the Court to overreach is to infringe upon another's territory. Clearly, the power to determine the scope of territorial application belongs to the President.<sup>302</sup>

Thus, the President is capable of exercising any of the emergency powers over places where he or she believes is in danger of being the breeding ground of new rebels — which may coincidentally also be where the MILF, MNLF, or CPP-NPA-NDF operates. The brewing tensions among the rebel groups and the government persists even when a peace framework has already been established.

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299. *Id.* at 25.

300. *See Lagman*, G.R. No. 231658, available at [http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2017/july2017/231658\\_sereno.pdf](http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2017/july2017/231658_sereno.pdf), (last accessed Oct. 31, 2017) (C.J. Sereno, dissenting opinion).

301. *Id.* at 48.

302. *Lagman*, G.R. No. 231658, at 74-75.



### C. *The Lincolnian Dilemma*

During the American Civil War, United States President Abraham Lincoln was confronted by the question, “[m]ust a government of necessity be too strong for the liberties of its people, or too weak to maintain its own existence?”<sup>303</sup> The same dilemma is faced by the Philippine President in addressing the various interests involved in the resolution of non-international armed conflict.

The peace process is a double-edged sword. The President must abide by both the agreements set in the peace documents, as well as the provisions of the special laws holding the other side of the negotiating table accountable for the crimes they may have committed. Meanwhile, a sword of Damocles hangs over the agreements as one slip on either side can mean the end of the decades-long worth of negotiations. And in all of these, the challenge of upholding the rights of citizens is always present.

Whatever remedy or mechanism the President chooses to apply, the 1987 Constitution established safeguards to ensure that the exercise of presidential powers will not be subject to grave abuse.<sup>304</sup> The Court has practiced judicial review over such exercise throughout the years as exemplified by its decisions on the validity of the calling-out power,<sup>305</sup> MOA-AD and FAB on the *Bangsamoro*,<sup>306</sup> and most recently in the declaration of martial law in Mindanao.<sup>307</sup> With this, the legality of Presidential action is kept in place through the system of checks and balances.

However, a gray area remains in aspects where the exercise of the presidential power is left solely on the wisdom of the President. As illustrated in *Integrated Bar of the Philippines*<sup>308</sup> and most recently in *Lagman*, the Court reiterated the presumption of good faith and regularity on the part of the President when he decides to exercise any of the available emergency powers on the fact that the President “receives vital, relevant, classified, and live information which equip and assist him in making decisions.”<sup>309</sup> However,

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303. Raymundo A. Armovit, *Emergency Powers*, 29 PHIL. L.J. 686, 686 (1954).

304. See PHIL. CONST. art. VII, § 18, para. 3 & art. VIII, § 1, para. 2.

305. *Integrated Bar of the Philippines*, 338 SCRA at 135.

306. See *Province of North Cotabato*, 568 SCRA 402 & *Philippine Constitution Association (PHILCONSA)*, G.R. No. 218406.

307. See *Lagman*, G.R. No. 231658.

308. *Integrated Bar of the Philippines*, 338 SCRA at 111.

309. *Lagman*, G.R. No. 231658, at 67.

Justice Leonen, in his dissent in *Lagman*, argued that the process of obtaining the information and using it as basis for declarations must still undergo an “analytical process” and is not outside of the reach of courts to review.<sup>310</sup>

Still, it will ultimately be the President’s call on what to do based on what he or she deems fit to be the appropriate response. Justice Del Castillo stressed that “[t]he Constitution recognizes that any further curtailment, encumbrance, or emasculation of the presidential powers would not generate any good among the three co-equal branches, and to the country and its citizens as a whole.”<sup>311</sup> This may provide an explanation for why for over three decades, different presidents have employed different approaches to the situation of the rebels guided only by the objective of “just and comprehensive peace.”

#### VII. CONCLUSION: THE PATH TO TRANSITIONAL JUSTICE

It is undisputed that the human and other related costs of years of conflict with the MNLF, MILF, CPP-NPA-NDF, and the new breed of terrorist groups, have been devastating enough that reforms in the past strategies employed are called for. The emerging policy of transitional justice may provide an adequate solution where neither accountability nor genuine peace is compromised.

Professor Christine Bell proposes a “new law” of transitional justice where government action is facilitated by the principles of international law that serve as a regulatory mechanism.<sup>312</sup> Its main thrust frowns upon both blanket amnesty and comprehensive prosecution but rather is grounded on good faith of State action.<sup>313</sup> This allows for a certain level of amnesty “to facilitate the release, demilitarization[,] and demobilization of conflict-related prisoners and detainees.”<sup>314</sup> The period of ceasefire must be simultaneous with the development of quasi-legal mechanisms for accountability.<sup>315</sup>

The Philippines has slowly adopted the policy of transitional justice with the creation of the Transitional Justice and Reconciliation Commission

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310. *Lagman*, G.R. No. 231658, available at [http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2017/july2017/231658\\_leonen.pdf](http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2017/july2017/231658_leonen.pdf), at 56 (last accessed Oct. 31, 2017) (J. Leonen, dissenting opinion).

311. *Lagman*, G.R. No. 231658, at 71.

312. BELL, ON THE LAW OF PEACE, *supra* note 173, at 240.

313. *Id.*

314. *Id.*

315. *Id.*

under the Annex on Normalization of the FAB.<sup>316</sup> In its latest report, the recommendations for rebuilding the *Bangsamoro* includes the right to truth, right to reparation, duty of the State to investigate and prosecute the violators of IHRL and IHL related to the *Bangsamoro* conflict, and to ensure good governance and the rule of law.<sup>317</sup>

The concept of peace varies for each stakeholder in the internal armed conflict situation. For the Moros, peace is the establishment of the *Bangsamoro*; while for the CPP-NPA-NDF, peace may mean a drastic change in the economic system. The government also has its own interpretation of peace that must have the State principles as the foundation where human rights and social justice are upheld.<sup>318</sup> The President is burdened with the monumental task of balancing all the concerns of the stakeholders precisely at a time when the tensions reach its peak. Each President must ensure that in exercising any of the powers assumed by his or her office, the rule of law shall not be compromised and normalization is achieved.

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316. Annex on Normalization, *supra* note 198, at 8–9.

317. Transitional Justice and Reconciliation Commission, Report of the Transitional Justice and Reconciliation Commission, at 80–92, available at [http://www.tjrc.ph/skin/vii\\_tjrc/pdfs/report.pdf](http://www.tjrc.ph/skin/vii_tjrc/pdfs/report.pdf) (last accessed Oct. 31, 2017).

318. See Cristina J. Montiel, *Peace Negotiations as a Subjective Conversation Between Groups*, 54 ATENEO L.J. 287, 290 (2009).