

# PEACE AGREEMENT BETWEEN THE GOVERNMENT OF INDONESIA AND THE FREE ACEH MOVEMENT: ITS NATURES AND CHALLENGES

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## Article Info

Received : 10/2/2016 | Received in revised form : 12/20/2017 | Accepted : 5/28/2018

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## Abstract

*This paper assesses the progress and challenges of peace agreement between the government of Indonesia and the Free Aceh Movement after the enactment of the Law on Aceh Government (LAG) 11/2006, particularly on the vulnerability status of MoU both in the national and international legal systems. The normative approach was used and data from local, national and international sources were analyzed to describe the recent implementation of MoU. Findings confirm that after 11 years, security in terms of the political aspect has been demonstrated, while economic and human rights-related issues remain unaddressed. Therefore, this paper argues that the legalization of MoU in international procedural system will ensure the compliance of agreement and strengthen sustainable peace in the Aceh-Indonesia context.*

**Keywords:** Peace Agreement (MoU), Free Aceh Movement (GAM), Government of Indonesia (GoI), International Law.

## Abstrak

*Paper ini ingin menelusuri kemajuan dan tantangan dari Perjanjian Damai antara pemerintah Indonesia dan Gerakan Aceh Merdeka (MoU Helsinki) setelah disahkannya Undang Undang tentang Pemerintahan Aceh nomor 11 Tahun 2006, terutama tentang persoalan kerawanan status hukum MoU baik dalam hukum nasional dan internasional. Dengan menggunakan pendekatan penelitian normatif isu ini dianalisa berdasarkan sumber data-data lokal, nasional dan internasional untuk mengungkapkan kondisi terkini dari pelaksanaan kesepakatan MoU Helsinki. Akhirnya setelah sebelas tahun MoU, paper ini mengkonfirmasi bahwa kondisi keamanan dan politik di Aceh cukup membaik, namun dalam bidang ekonomi dan hak asasi manusia masih dirasakan ketinggalan. Oleh Karena itu paper ini mengusulkan legalisasi MoU dalam prosedur hukum internasional, supaya terjaminnya kepatuhan terhadap perjanjian sekaligus mempertahankan perdamaian yang sudah dirintis antara Indonesia-Aceh.*

**Kata Kunci:** Perjanjian Damai (MoU), Gerakan Aceh Merdeka (GAM), Pemerintah Indonesia (GoI), dan Hukum Internasional.

## I. INTRODUCTION

The relationship between Aceh and the Republic of Indonesia has been a dynamic competition in terms of the political, economic, and cultural aspects for decades. Given that Aceh was a sovereign kingdom that voluntarily associated with the new unitary state of Indonesia in 1945, the Acehnese demanded autonomy during Sukarno's regime.<sup>1</sup> The failure of Indonesia to fulfill its promise, particularly the integration of Aceh into the province of North Sumatra, fueled tensions, which was explicitly expressed by Tgk. Daud Bereueh to support a Javanese Islamic rebellion in 1953,<sup>2</sup> which ended with a new promise of a special status for Aceh in 1959.<sup>3</sup> However, Indonesia was considered to have defied the agreement until a new movement for Aceh self-determination was declared on December 4, 1976 by Daud Bereueh's follower, Tgk. Hasan Tiro.<sup>4</sup>

Coming from modern legal education in Java and Columbia, Hasan Tiro has extended the argument for Aceh to be an independent state, challenging the Dutch colonialists for the illegal transfer of Aceh into Indonesia during the Round Table Conference at The Hague in 1949. Aceh was proven to not have evidently capitulated to the Dutch colony,<sup>5</sup> despite the decline of the Acehnese sultans and its successors, as a consequence of the repressive attacks by the Dutch during the colonial period.<sup>6</sup>

In the meantime, a similar policy was commanded under Suharto's regime (1967–1998). This repressive policy has become an inter-link to human rights violations over the years.<sup>7</sup> This situation attracted international attention, but Indonesia successfully concealed it behind the argument that it is an internal affair.<sup>8</sup> The struggle that contributed to suffering as a part of Indonesia generally ended with the peace agreement as established by the Helsinki Memorandum of Understanding (MoU) on August 15, 2005, which then manifested in the law concerning the governing of Aceh (LAG number 11/2006).<sup>9</sup>

Under this MoU, Aceh has more room to re-determine its political, economic, social,

<sup>1</sup> See complete analyses of Aceh rebellion in Nazaruddin Sjamsuddin, *The Republican Revolt, A study of the Acehnese Rebellion* (Singapore: Institute of South East Studies, 1985).

<sup>2</sup> See James T. Siegel, *The Rope of God* (Chicago: University of Michigan, 2000) p. 5-10.

<sup>3</sup> See Donal E. Weatherbee, "Indonesia, Political Drift and State Decay," *Brown Journal World Affairs* 1, no. 1 (2002): 23-33.

<sup>4</sup> "We, the people of Aceh, Sumatra, exercising our right of *self-determination*, and protecting our historic right of eminent domain to our fatherland, do hereby declare ourselves free and independent from all political control of the foreign regime of Jakarta and the alien people of the island of Java. Our fatherland, Aceh, Sumatra, had always been a free and independent Sovereign State since the world began..."(Aceh Proclamation 4 December 1976). See Tengku Hasan di Tiro, *The Price of Freedom: the unfinished diary* (Yogyakarta: 1984).

<sup>5</sup> See the example of self determination struggle before MOU, International Forum for Aceh, "An Analysis for *Self-determination* for Aceh." <http://Acehnet.tripod.com/determine.htm>, International Forum for Aceh, New York April 29, 2000, accessed on 3 March 2014.

<sup>6</sup> The role of Christian Snouck Hurgronje was being a part of the Dutch strategy to conclude the war and Indonesian ruler as well. See Siegel, *The Rope of God*.

<sup>7</sup> See some examples of human rights violations in Al-Chaidar. *Aceh Bersimbah Darah [Aceh Bathed by Blood]* (Jakarta: Pustaka Al-Kautsar, 2001); See also the history of Free Aceh movement in Isa Sulaiman, *Gerakan Aceh Merdeka [Aceh Freedom Movement]* (Jakarta:Pustaka Al-Kautsar, 2001).

<sup>8</sup> The lack of international support to GAM might be caused by the more consistent Indonesian diplomacy in the international sphere.

<sup>9</sup> Edward Aspinall, "The Helsinki Agreement: A more promising basis for peace in Aceh?" (Washington: East West Center, 2005) <http://www.eastwestcenter.org/fileadmin/stored/pdfs/PS020.pdf>, accessed on 23 October 2015.

and cultural status under the Indonesian system. However, several constraints to its implementations exist, which may pose a threat to sustaining peace and hindering some applications of the agreement.<sup>10</sup> Therefore, analyzing this issue would be essential for further peace and security in the Aceh and Indonesian context.<sup>11</sup>

## II. DEFINING THE MOU HELSINKI: NATURE, SCOPE, AND CONTENT

MoU Helsinki was understood as an agreement between the central government and the self-determination movement of GAM to establish a ceasefire together with new political, economic, and legal structures. The MoU sets out a variety of broad principles for a special autonomous government of Aceh and its relations with the national government, enshrined in the new Law on Aceh Government in 2006 (LAG).<sup>12</sup> The MoU includes provisions concerning political participation, human rights, the rule of law, and economic matters, as well as measures for the disarmament of GAM and its members, amnesty and reintegration into society, security arrangements, the establishment of the Aceh Monitoring Mission (AMM) (to be supervised by the European Union [EU] and the Association of Southeast Asian Nations [ASEAN]), and dispute settlement. The LAG includes many special authorities delegated from Indonesia that other provinces do not have, with the exception of six areas: foreign politics, external defense, national security, judicial system, monetary and fiscal matters, and certain issues on religion (Point 1.1.2 [a] MoU and Article 7 LAG). The LAG also gives Aceh the right to build relations and to participate in any international events in foreign countries in the arts, culture, and sports (Article 9 LAG).<sup>13</sup>

The MoU can be divided into two main parts. First, the short-term peace security maintenance activities include GAM's demobilization of all its 3,000 military troops and the handover of 840 arms. Meanwhile, the government of Indonesia (GoI) will withdraw all elements of non-organic troops and offer an unconditional amnesty to GAM prisoners in four stages from September 15 to December 31, 2005.<sup>14</sup> These activities are exclusively monitored by the AMM supported by the EU and the ASEAN.<sup>15</sup> In this sense, this part considered as dominantly influenced by international characters.

Second, legal means are transferred from the international level to the national legal system. Many articles in the MoU have to be transferred initially to the LAG for implementation. These articles provide a legal foundation for self-government

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<sup>10</sup> Edward Aspinall, "Peace without justice? The Helsinki peace process in Aceh," *Centre for Humanitarian Dialogue* 2008. <http://www.hdcentre.org/files/Justice%20Aceh%20final.pdf>, accessed on 23 October 2015.

<sup>11</sup> Christine Bell, "Peace Agreement :their nature and legal status," *American Journal of International Law* 100, no. 2 (April 2006): pp. 373-412.

<sup>12</sup> See Aspinall, "The Helsinki Agreement."

<sup>13</sup> Amrizal J. Prang, "Jika Self-Government (Aceh) Diatur Konstitusi [If Self-government (Aceh) regulated by the Constitution]," *Serambi Indonesia*, 4 February 2010, retrieved on 18 October 2011. See also scale degree of self-government in the United States in Alan Tauber, "Remnant of Past Trouble, Defining Self Government Among Territories", accessed from [www.ssrn.com](http://www.ssrn.com) on 20 December 2010.

<sup>14</sup> See, the Helsinki Memorandum of Understanding 15 August 2005, part Four on Security Arrangements.

<sup>15</sup> See the Helsinki Memorandum of Understanding 15 August 2005, part Five on the Establishment of the Aceh Monitoring Mission. See also D. Kingsbury, "Peace Processes in Aceh and Sri Lanka: a Comparative Assessment," *Security Challenge* 3, no. 2 (June 2007). D. Kingsbury, "A Mechanism to end conflict in Aceh," *Security Challenge* 1, no. 1 (2005).

infrastructures<sup>16</sup> and release some authority from the GoI, i.e., the establishment of a local party, Aceh reintegration agency, the election of a new head of administration and legislative, the redistribution of natural resources and revenue, and the establishment of three strategic institutions in terms of recovering and reintegrating peace and justice through the Truth and Reconciliation Commission (TRC), the Human Rights Court (HRC), and the Joint Claim Committee (JCC). In addition, the Wali Nanggroe Institution (WN) is established to retrieve and recover historical and cultural dignity after the confusion caused by the infiltration of Indonesian culture.

MoU Helsinki has a hybrid character, partly requiring direct application and being conditional to the establishment of LAG for the most part. After LAG, the meaning of MoU became unconsciously obscure. In its first part, the equal position seems obvious, but in other parts, the power of GAM disappears, as it becomes a local political party under the national system. Thus, the issue of who will formally represent GAM as an independent party in the MoU became unclear. In other words, under the MoU, both parties clearly exist and are equal. However, under LAG, only one party exists, that is, GoI.<sup>17</sup> Thus, the current meaning of MoU has been a historical archive, a symbol of peace without substantial meaning for application under the national system because of the lack of a legal form of peace agreement signed directly by the state party. The LAG is a transitional arrangement designed to lead to elections and a new constitutional assembly that would produce a new law for Aceh. Thus, we can argue that the LAG is the only living document nowadays.

This LAG comprises 40 chapters and 273 articles covering many essential issues derived from the MoU. Interestingly, in this law, the meaning of “self-government” set out in Article 1 Point (2) states that “Aceh is a legal community with its special nature and given an authority to self-government and carry out government and community interests’ affairs...” However, no clarification on this meaning has been provided thus far.

Hence, the MoU at the international level became a national law through the LAG 2006. In other words, the LAG became an essential pillar for Aceh’s autonomy under Indonesia’s unitary system. The status of LAG is considered under the hierarchy of the 1945 Indonesian Constitution and many aspects set out in LAG have been ruled in various regulations without any contradiction to the set out Constitution and other related regulations. It is then that the MoU is initially alienated in the national mainstream. The recent judicial reviews in the constitutional court (Mahkamah Konstitusi/MK) reflected such arguments.

The MoU has clearly mentioned the compliance of both parties to human rights values as written in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights in 1966. Both covenants are considered as law-making treaty following the Universal Declaration of Human Rights in 1948. The human rights approach is specifically mentioned in MoU for the establishment of the TRC and the HRC.<sup>18</sup> Another human rights issue is the economic right for ex-combatants and the right to dispose natural resources in land, air, and sea. No specific institution was identified for pursuing economic rights, such

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<sup>16</sup> See Agnes Sri Poerbasari, “the Problem of Self government in Aceh post the Helsinki Memorandum of Understanding,” working paper 2008.

<sup>17</sup> See the World Bank “The Aceh Peace Agreement, How Far Have We Come,” December 2006 at <http://www.worldbank.or.id>, accessed on 15 November 2011.

<sup>18</sup> See explanation of Desmond Tutu on the TRC in South Africa in Desmond Tutu, *No Future without Forgiveness* (London: Rider, 1999).

as the WN for recovering culture-related rights. However, the spirit of the MoU that refers to the fulfillment of human rights is less considered by both parties given that no human rights-related institutions have been established except TRC under Aceh Qanun.<sup>19</sup>

The MoU is a transitional process to end conflict with a new political arrangement.<sup>20</sup> The MoU crafted a language of compensation for GAM to be established as a local political party, changing the position of WN from being the top leader of GAM to being the top leader of a new special institution in the Aceh government through a social-cultural process. It also sets out conditions for the employment of mid-level GAM leaders and its members in the BRR agency (2006–2009), providing incentive for further cooperation and then continued by BRA for reintegration and economic compensation. Adversely, the MoU addresses both external and internal challenges to Indonesia's legitimacy through new modes of government and human rights protection.<sup>21</sup>

## II. CHALLENGES OF MOU AFTER THE ENACTMENT OF LAG 2006

### A. Obscure Status in International Law

MoU Helsinki is an agreement between parties to formally end a conflict.<sup>22</sup> This MoU is concluded between state and non-state actors (e.g., GAM) therefore falling outside the definition of a treaty, which is “an international agreement concluded between States in written form and governed by international law.”<sup>23</sup> As such, they fall outside the scope of the Vienna Convention on the Law of Treaties 1969 (VCLT).<sup>24</sup> Nevertheless, the fact that the VCLT does not apply to international agreements concluded between states and other subjects of international law does not affect “the legal force of such agreements” and “the application to them of any of the rules” set forth in the VCLT “to which they would be subject under international law independently of the Convention.”<sup>25</sup>

The restricted meaning of treaty as “between states” was then expanded or remedied in Article 3 of the Vienna Convention and the second Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations in 1986. Article 3 states the following:

“The fact that the present Convention does not apply to international agreements concluded between states and other subjects of international law or between such other subjects of international law, or to international agreements not in written

<sup>19</sup> Many basic rural reconstructions are considered weak given that many people in the west and south coast areas still use expired *rakits* (rafts) and bridges. This situation worsened when many death accidents occurred because of vulnerable infrastructure. See for example Serambi Indonesia, “Pembuatan Rakit Lamtuha Tersendat [Production of Rakit in Lamtuha Interrupted]” May 19, 2010, “Insiden Jembatan Gantung Terjadi lagi di Gayo Lues [Suspension Bridge Incident Happened again in Gayo Lues],” on 19 December 2010 at <http://serambinews.com/news>, accessed on 24 December 2010.

<sup>20</sup> Ruti G. Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2000), pp. 197-201.

<sup>21</sup> See Bell, “Peace Agreement,” p. 407.

<sup>22</sup> C. Bell, *Peace Agreements and Human Rights* (Oxford: Oxford University Press, 2000), pp. 19–35.

<sup>23</sup> Convention on the Law of Treaties, Vienna, 23 May 1969, UNTS Vol. 1155, Art. 2(1)(a) (hereinafter “VCLT”)

<sup>24</sup> VCLT Art. 1

<sup>25</sup> Art. 3(a) and 3(b), VCLT. See also Y. Bouthillier and J. F. Bonin, “Article 3” in *The Vienna Convention on the Law of Treaties: A Commentary: Volume I*, eds. O. Korten and P. Klein (Oxford: Oxford University Press, 2011), 66–76.

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

This concept opens a space for MoU to be considered as a legally binding international treaty under the terms of “subjects of international law.” However, this term also leaves a gray area concerning who can claim such status in international law system. Whether GAM can claim to be a subject of international law became a contested issue. The status of GAM as a belligerent in international subject was especially recognized under international humanitarian law.<sup>26</sup>

Article 26 of VCLT also confirmed the principle of *pacta sunt servanda*— that every agreement must be adhered to without exclusively referring to a treaty. Moreover, Article 27 states that national law cannot be used to justify the failure of an agreement. A useful detail to note is that the International Law Commission itself said in 1966. Likewise, the International Committee of the Red Cross, when commenting on Protocol I of the 1949 Geneva Conventions, presented the idea that unilateral acts of peoples fighting for self-determination made pursuant to Article 96.3 generate treaty rights and obligations applicable between such group and parties to the Protocol.<sup>27</sup>

As Higgins and Schachter, among others, have suggested, the application and interpretation of international law involve the promotion of common goals and international values.<sup>28</sup> Crawford similarly highlighted that “from the point of view of both domestic and international law, the formation, transformation, and dismemberment of States as a result of revolutions and wars create situations of fact which, to a large extent, cannot be met by the application of the normal rules of positive law.”<sup>29</sup> In this regard, Bell states,

*“Despite appearing to be legal agreements, substantive peace agreements are difficult to place within existing international legal categories as positively understood. Such classification is hampered by the limitations of the categories, especially their unsuitability with regard to accommodating the hybrid subject matter of peace agreements and their mix of state and non-state signatories.”*<sup>30</sup>

An important detail to realize is that the 1969 VCLT, while relevant, does not govern all international agreements that may give rise to legal obligations. Agreements that fall outside the VCLT definition of a “treaty” are regulated by customary international law. This idea is affirmed in the VCLT preamble, which provides that “the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention.”

The Special Court for Sierra Leone Appeals Chamber in the Kallon case found that

<sup>26</sup> See for example common article 3 of the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the field 1949.

<sup>27</sup> See Karl DeRouen Jr, et al. “Civil War Peace Agreement Implementation and State Capacity,” *Journal of Peace Research* 47, no. 3 (2010): 333-346.

<sup>28</sup> R. Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Oxford University Press, 2004), pp. 1-2.; Schachter, “The Place of Policy in International Law,” *Georgia Journal of International and Comparative Law* 2 (1972): pp. 5-8. [I]t is evident that the body of [legal] norms involves more than rules ... they embody policies and social values ... [t]heir function in the legal process is to express the ends to be attained).

<sup>29</sup> J. Crawford, *The Creation of States* (Oxford: OUP, 2007), p, 110.

<sup>30</sup> See Bell, “Peace Agreement,” p. 385.

the 1999 Lome Peace Agreement between the government and insurgent group was not a treaty under international law<sup>31</sup> but is rather an international agreement. The same situation can be said of the agreement signed in Mozambique in 1974 between Portugal and the Front for the Liberation of Mozambique, which has since been said to be binding under international law.<sup>32</sup> Bell notes that “rejecting the legal status of both the non-State group and the peace agreement may result in the argument that the state is bound while the non-State actors are not.”<sup>33</sup> Despite appearing to be a substantially legal peace agreement, MoU Helsinki is difficult to place within existing international legal categories because of the hybrid legal subject and signatories between state and non-state entities.

Despite the agreement’s lack of legal nature, compliance with the agreement affects the reputation of the involved parties. The term used for peace agreement mostly depends on the state’s strategy concerning reputation and domestic legal requirement. In Indonesia’s perspective, the term used is intended to be a soft law and temporary in nature because it is obliged to produce a new legal framework within the national legal system.<sup>34</sup>

Indonesia to some extent has successfully played this game, offering a prestigious position to GAM leader Hasan Tiro to head WN and its attributes. Hasan Tiro was considered too old. In fact, he passed away shortly after the MoU was signed and was notoriously replaced by Malik Mahmud, who represented Hasan Tiro in signing the MoU. This position is not historically proven and is a questionable offering from the GoI to the elite of GAM. Moreover, through the local party, many mid-level elites of the former GAM became a head of executive or legislature across Aceh. Given that peace agreements clearly create legally binding obligations, they fall somewhere in the middle of the spectrum, with treaties on one end and domestic law on another.<sup>35</sup>

The MoU was contested when the peace agreement moved toward implementation, as it was renegotiated to become a new agreement or interpretation, under which the main peace agreement gradually disappeared.<sup>36</sup> MoU Helsinki becomes prevalent in the first stage of implementation concerning disarmament given its use of a clear and specific language and the inclusion of a monitoring agency supervised by the EU and the ASEAN. In the following stages, when the LAG was established under the national system, the term “MoU” gradually disappeared because of its unclear status in the national system. This difficulty was described by Bell as “the presence of non-state signatories tends to take them outside international legal definition of “treaty” or “international agreement,” while the presence of multiple states parties tends to make them difficult to analyze as domestic legal documents.”<sup>37</sup> This expression occluded the legal status of MoU Helsinki and whether it is an international or a

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<sup>31</sup> Prosecutor v Morris Kallon and Brima Buzzy Kamara, Special Court for Sierra Leone, SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lom6 Accord Amnesty, at para. 42 (Appeals Chamber, 13 March 2004).

<sup>32</sup> J. Quingley, “The Israel-PLO Interim Agreements: Are they treaties?” *Cornell International Law Journal* 30 (1997): pp. 717-719.

<sup>33</sup> See Bell, “Peace Agreement,” p. 391.

<sup>34</sup> *Ibid.*, p. 385.

<sup>35</sup> See for example the Lusaka Ceasefire Agreement 1999, the Lome Agreement 1999, and the Dayton Peace Agreement 1995 in Alexia Solomou, “Comparing the Impact of the Interpretation of Peace Agreements by International Courts and Tribunals on Legal Accountability and Legal Certainty in Post-Conflict Societies,” *Leiden Journal of International Law* 27 (2014): p. 498.

<sup>36</sup> See Bell, “Peace Agreement,” pp. 378-379

<sup>37</sup> *Ibid.*, p. 378.

national agreement.<sup>38</sup>

## B. Uncertain Legal Status in the National System

After 11 years of existence (2005–2016), the MoU has posed some concerns on the political will of parties to adhere to the agreement, particularly from the central GoI, in terms of seriously implementing the agreement and its manifestation in the LAG 2006. This issue can be seen in several cases, such as the unsettled dispute on the Aceh flag, symbol, and hymn, in adherence to Articles 246 and 247 of LAG 2006, and Qanun Aceh No.3/2013 on Flag and Symbol of Aceh. The central government has rejected this Qanun because it is against Government Regulation (PP) No.77/ 2008 on Regional Symbol.

Thus, the current problem is whether to implementing Qanun according to the LAG or the MoU, contrary to existing common national legislations. This issue seems like a paradox when on the one hand, Aceh is considered a special autonomous region but is then evaluated based on regular national legislations on the other hand. This dilemma stagnated the implementation of the MoU and its manifestation of the LAG 2006, thereby giving rise to disputes on various point, such as WN referring to Articles 96 and 97 as an umbrella institution for the culture and customs of Aceh under Qanun No.8/ 2012. This issue affects the clarity of of Aceh's special status in the frame of Indonesian legal system. No definition is provided in the Indonesia legal system. The 1945 Constitution has yet defined what an international agreement is. It simply mentioned that DPR needs to consent to any international agreement made by the president, as stated in Article 11 of the Law 24/2000 on treaties:

*“(1) president with consent of the parliament (DPR) has the right to declare war, making peace, and sign treaties with other states; (2) in making any international agreement that widely and essentially affects the lives of people in that it poses a burden on the national budget and/or its effect on changing or making law, the president needs to have the prior consent of parliament (DPR).”*

Article 4(1) of the law number 24/2000 on treaties states that “the Government of Indonesia shall make a treaty with a state or more, international organization or other international law subject as agreed; and parties has obliged to fulfill those treaty with good faith.” Article 4(2) highlights that “state in making treaty, in this context represented by Indonesia government has to demonstrate national interests and under the principle for equality, mutual benefit and in accordance with the applicable national and international law.”

This law recognizes non-states as a party to a treaty with the GoI. However this consideration has flawed because no clear definition exists as to whether a treaty is a non-state subject of international law. Furthermore, the MoU was signed without the explicit formal consent of the DPR, although the DPR implicitly supported the MoU by not preventing the MoU and its manifestation of the development of the LAG 11/2006. The problem is the status of MoU is uncertain when the LAG 11/2006 was enacted even though the LAG does not represent the whole content of the MoU and even contradicts the MoU Helsinki in some parts.

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<sup>38</sup> The MoU Helsinki has followed the uncertain legal status and complexity of implementation of other peace agreements. For example, the peace agreements in Sierra Leone, Bosnia, and Sudan domestically depend on the willingness of each state concerned to implement their judgments. See Solomou, “Impact of the Interpretation of Peace Agreements,” pp. 495–517.



Thus, the MoU lacks a formal procedure to be called a treaty under Indonesian law given the lack of consent from the DPR. However, DPR consented to the material and substantial content of the MoU as a treaty, that is, the consent of the DPR in legislating the LAG 11/2006 as a substantial transformation and implementation of the MoU.

### 1. Decline of Power of LAG 2006 under Judicial Review

Several articles of LAG over the 1945 Constitution have come under judicial review, such as Article 256, which was nullified by the MK under the ruling No.35/PUU-VIII/2010, on the un-limitation of independent candidates for the Aceh government executive election, and the JR of Article 205 of UUPA concerning the approval of Aceh's governor on the election of the head of Aceh police by Yayasan Advokasi Rakyat Aceh (YARA).

The decline of LAG's power also contributed to potential nullification of several Aceh Qanun by the Ministry of Internal Affairs because they contradict national legislation. Many articles have been filed with the Constitutional Court, thereby reducing the legitimacy of MoU Helsinki. The JR occurred when the meaning of special autonomy was not yet clearly framed, given that it merely mentioned that subjects related to Aceh cover religion, education, customs, the role of Islamic ulama (Articles 16 [2] and 17 [2]), and special autonomy fund (Articles 179 [2c] and 183). The lack of a clear framework on special autonomy was reviewed in the MK, given that in the nullification of Article 256, MK stated, "MK will not eliminate the special autonomy in Aceh province, but concerning independent candidate for chief/vice executive election is not under specialty of Aceh Government in conformity with article 3 of the Law 44/1999 on the manifestation of specialty of Aceh Government."<sup>39</sup> Articles 67, 68, and 91, and 256 UUPA do not exclusively mention the independent candidate for executive election as part of Aceh's domain.<sup>40</sup> However, MK did not consider the LAG as a part of the domain of Aceh, referring to Article 18B of the Constitution.

Aceh was the first province that allowed independent candidates to become head of the executive branch (governor/vice governor or regent/vice of head district) of Aceh according to Law No.18/ 2001 and LAG 2006 before this law was applied nationally. It was also the first to appoint the head of the registration body of Aceh. Under Articles 110–111, the governor of Aceh has the power to assign the head of department of the registration body, as proposed by provincial secretary (Sekda). However, the central government via the Ministry for Internal Affairs insisted that the central government has the sole power under Article 83A Law 24/2013, as amended from Law 23/2006 on the designation of the official role of administration in the province and district levels. The manifestation of the MoU in the LAG is potentially reviewed against the 1945 Constitution in the Constitutional Court. If the ruling is not

<sup>39</sup> See point [3.13.6] MK Decision No.35/PUU-VIII/2010, stated : "...Mahkamah tidak menafikan adanya otonomi khusus di Provinsi Nanggroe Aceh Darussalam, namun calon perseorangan dalam pemilihan kepala dan wakil kepala daerah tidak termasuk dalam keistimewaan pemerintahan Aceh menurut Pasal 3 UU No.44/1999 tentang Penyelenggaraan Keistimewaan Provinsi Daerah Istimewa Aceh..[Loose translation: The court does not deny the existence of special autonomy in Nanggroe Aceh Darussalam province, however, the individual candidates in the election of regional leader and deputy regional leader is not within the specialty of Aceh government under Art. 3 Law No. 44/1999 on the Implementation of Aceh Special Region Province..."]

<sup>40</sup> Amrizal J. Prang, " Kesakralan' UUPA Terusik [The Sanctity of Law on Aceh Government is disturbed]", 4 August 2016, <http://aceh.tribunnews.com/2016/08/04/kesakralan-uupa-terusik?page=1>, accessed on 6 August 2016.

in favor of this situation, then the meaning of special autonomy as agreed under the MoU will gradually diminish.

The failure to establish the JCC has been brought to the national court by YARA; no results have been achieved yet.<sup>41</sup> YARA filed a petition against the parties involved in the process and signing of MoU Helsinki 2005, namely, the governor of Aceh; the President of Republic of Indonesia, Malik Mahmud (Wali Nanggroe); and Martii Ahtisaari, the chief of Crisis Management Initiative. The petition was filed because the agreement or “*wanprestasi*” was violated over point 3.2.6 of the MoU on the intentionally ignorant for the establishment of JCC.<sup>42</sup> According to YARA this commission is essential for the people of Aceh, particularly for reparation victims of conflict, and to ensure justice and dignity for the victims of the conflict in Aceh. This 30-year conflict left approximately 10,000 dead and destroyed many public facilities. However in the first hearing of the court, three of the defendants were absent. Only the first defendant, the governor of Aceh, was represented by his lawyers (Kamaruddin SH and M Nurdin SH). As a result, the proceeding was postponed for the following months. In this proceeding, YARA treated MoU as a civil agreement under the national legal system. However, Martii Ahtisaari, the facilitator who based in Helsinki, refused to attend the civil hearing, arguing that he was not a party to the MoU, and as a mediator, Crisis Management Initiative (CMI) completed its job with the signing of the MoU on December 15, 2005.<sup>43</sup> Martii argues that the role of mediator was to facilitate the agreement during the signing, while enforcement is the obligation of the parties involved.<sup>44</sup>

## 2. Marginalization of Conflict Victims’ Concerns

The emphasis on the importance of increasing economic capacity of the conflict-affected victims is part of the implementation of MoU Helsinki,<sup>45</sup> such as “to facilitate their reintegration into the community. The steps include the economic facilitation for the former combatants of GAM, political prisoners obtaining amnesty and affected community. Reintegration Fund under the authority of Aceh Government will be provided”; allocation “funds for the rehabilitation of public and private properties damaged or destroyed as a result of conflicts to be managed by Aceh Government”; and allocation “farmland and sufficient funding to Aceh Government aiming at facilitating the reintegration of former combatants of GAM into society and compensation for political prisoners and affected civilians.”<sup>46</sup>

The Aceh government was to ensure the following: a) All former combatants of GAM will receive an allocation of proper farmland, employment, or acceptable social security from the Aceh government if they are unable to work; b) all political prisoners obtaining amnesty will receive an allocation of proper farmland, employment, or acceptable social security from the Aceh government if they are unable to work, and

<sup>41</sup> HukumOnline, “YARA Gugat Para Pihak MoU Helsinki [YARA sues the parties of MoU Helsinki,” 05 February 2014, <http://www.hukumonline.com/berita/baca/lt52f26648c30b0/yara-gugat-para-pihak-mou-helsinki>, accessed 12 March 2016.

<sup>42</sup> This case register in the State Court (PN) of Banda Aceh under the registration number 06/pdt.G/2014/PN-BNA dated 5 February 2014.

<sup>43</sup> Serambi Indonesia, “Martii Ahtisaari Tolak Hadiri Sidang [Martii Ahtisaari Rejects to Attend the Proceeding],” 2 July 2016, <http://aceh.tribunnews.com/2016/07/02/martti-ahtisaari-tolak-hadiri-sidang>, accessed on 5 August 2016.

<sup>44</sup> *Ibid.*

<sup>45</sup> Peace Treaty between the Government of the Republic of Indonesia and Free Aceh Movement items 3.2.3, 3.2.4, and 3.2.5.

<sup>46</sup> *Ibid.*

c) all civilians who have suffered a demonstrable loss due to conflicts will receive an allocation of proper farmland, employment, or acceptable social security from the Aceh government if they are unable to work.<sup>47</sup>

The marginalization of victims from this implementation of MoU can be observed, given that no allocations of agricultural land have been made for former combatants and related victims of conflict. This blame for this oversight was not merely assigned to Jakarta but also to the Aceh government and the diminished legislative capacity to negotiate the MoU.<sup>48</sup> The vague establishment of the JCC also shows that the MoU is merely for the elite and not for victims, who are ordinary people who suffered during the conflict. Such victims have the right to proper compensation from this peace process. Disputes related to Aceh's flag, the degraded power of Aceh's legislative body from making "decisions" to simply being "considered in the oil and gas sector, and land administration are other issues that have yet to be resolved.

### 3. Localization of TRC under Qanun Aceh

The assertion about TRC in MoU Helsinki is published in the section of Human Rights, thus putting the process of uncovering the truth and reconciliation as an integral part of the enforcement of human rights values.<sup>49</sup> Therefore, the existing Law No. 27 of 2004 about TRC became a legal protection for the establishment of TRC in Aceh under LAG 11/2006. Under Law No. 27 of 2004, Article 1 (3) stated that TRC is an independent agency established to uncover the truth of severe human rights violations and to execute reconciliation.<sup>50</sup>

The establishment of TRC in Aceh is one of the enforcement processes of the supremacy of human rights, which is expected to be a way to restore trust and harmonious relations between the people of Aceh and the central government. It provides a comprehensive description of severe human rights violations that occurred,<sup>51</sup> as indicated by revealing the crime pattern and the broad scope of those involved, either the victims, perpetrators, or state institutions that allowed or contributed to the occurrence of the crimes.<sup>52 53</sup>

However, the Constitutional Court later decided that Law No, 27 of 2004 is against

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<sup>47</sup> *Ibid.*

<sup>48</sup> Iskandar Usman Al-Farlaky, "MoU Helsinki dan Pengingkaran [MoU Helsinki and the Denial]," *Tribun-News*, 25 Agustus 2016, <http://aceh.tribunnews.com/2016/08/25/mou-helsinki-dan-pengingkaran-jakarta>.

<sup>49</sup> See the Coalition of Disclosers on Aceh's Truths, *In the Name of Truth and Justice in Aceh, Formulation Record of Establishing KKR Aceh During 2007* (Jakarta: Coalition of Disclosers on Aceh's Truths: 2012), Accessed in <http://kontras.org/buku/kata%20pengantar%20aceh.pdf> on 5 January 2012.

<sup>50</sup> Rose Clark, Galuh Wandita, Samsidar, *Considering Victims: The Peace Process from a Transitional Justice Perspective* (Jakarta: Internationa lCenter for Transitional Justice (ICTJ) – Indonesia, 2008).

<sup>51</sup> See various confession stories in KKR in Jillian Edelstein, *Truth & Lies: Stories from the Truth and Reconciliation Commission in South Africa* (New York: New Press, 2001).

<sup>52</sup> Lihat Graeme Simson, "Tell No Lies, Claims No Easy Victories, A Brief Evaluation of South Africa's Truth and Reconciliation Commission" in *Commissioning The Past, Understanding South Africa's Truth and Reconciliation Commission*, eds. Deborah Posel and Graeme Simpson (South Africa: Witwatersrand university press, 2002), p. 220-247. See also Ministry of Laws and Human Rights of the Republic Indonesia, "Draft of Academic Papers in Revision of Law No. 27 of 2004 Regarding Truth and Reconciliation Commission (KKR)," p. 18.

<sup>53</sup> United Nations, General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, Resolution 60/147 (16 December 2005).

the 1945 Constitution and is not legally binding.<sup>54</sup> This situation is the main reason for the delay of the establishment of TRC in Aceh as mandated in LAG Articles 229-230. Therefore, the alternative is to form Qanun No. 17/2013 regarding the TRC in Aceh in accordance with the mandate of LAG Article 230, declaring that “further conditions regarding the procedures of election, members appointment, organization and administration, terms of office, and operational costs of Truth and Reconciliation Commission in Aceh are regulated by Aceh Qanun referring to the legislation.”<sup>55</sup> Qanun TRC Aceh can specifically regulate the filing process of reduced sentences, clemency, amnesty, abolition, and remission to the perpetrators of severe human rights violations before receiving the verdict from the HRC.<sup>56</sup> Under this Qanun, the TRC Aceh was recently established, and seven commissioners have been to the Aceh legislature on July 19, 2016.

However this local TRC may face challenges, such as the difficulty in coordinating between TRC with other national institutions, given that the potential parties involved in severe human rights violations are alleged to have powerful control on various levels either in the central/local government or the private sectors, leading to the difficulty in the disclosure of truths involving the state apparatus.<sup>57</sup> If the TRC can be established under national law (UU), then it would have more power in terms of scope and enforcement.<sup>58</sup>

The perpetrators of severe human rights violations in Aceh during the military emergency era are not only those who still live in Aceh, but also those reside outside Aceh. Not all these perpetrators violated human rights on their personal initiative but did so as part of a certain group or on the order of certain individuals. Therefore, exposing the perpetrators or who sent them is difficult without the support of the national/central government.<sup>59</sup>

### III. STRENGTHENING MOU HELSINKI

The peace agreement has been contested in international law in terms of legal status and its enforcement power. The issue originated from the involvement of the signature of non-state parties in the agreement, which remains vague in international legal system. The MoU is also questionable under the national system, given that it is not yet properly recognized as part of contracts or treaties.

Some argue that the non-state signatory can be regarded as equal to state signatories in terms of its “belligerent” status in international humanitarian law.

<sup>54</sup> Constitutional Court of the Republic of Indonesia, “Decision No. 006/PUU-IV/2006.”

<sup>55</sup> Indonesia, Undang-undang tentang Pemerintahan Aceh (Law on the Aceh Governance), UU No. 11 tahun 2006, LN No. 62 tahun 2006 TLN No. 4633 (Law No. 11 of 2006, SG No. 62 of 2006).

<sup>56</sup> See Hikmahanto Juwana, “Empowerment of Law Culture in Human Rights Protection in Indonesia; Human Rights in the Perspective of International Laws,” in *Human Rights, Nature, Concept, and Implication in the Perspective of Laws and Society*, ed. Muladi (Jakarta: Refika Aditama, 2005), pp. 70-75.

<sup>57</sup> Compared to Aryos Nevada, “Kontestasi Politik KKR Aceh [Political Contest of Aceh Truth and Conciliation Commission], *Journal Outlook* 015-08 (2011), accessed from <http://joutlook.com/journal/sospoldan-hukum.html> on 5 January 2012.

<sup>58</sup> See Claire Moon, *Narrating Political Reconciliation, South Africa’s Truth and Reconciliation Commission* (London: Lexington Books, 2008); See Desmond Tutu’s explanation about KKR in South Africa in Tutu, *No Future Without Forgiveness*.

<sup>59</sup> See Nashrun Marzuki and Adi Warsidi, eds. *The Fact Speaks: Uncovering Human Rights Violations in Aceh 1989 – 2005* (Banda Aceh: Coalition of NGO HAM Aceh, 2011).

However, no agreement has been reached as to how that title is earned and who qualifies for it. The status was developed to differentiate it from “insurgents,” who are rebels in a sovereign state. In any sense, the state has the legitimate power to decide whether a rebellion is considered an act of insurgency or belligerency, and many states will reluctant to declare them as belligerent.

However, Indonesia has implicitly categorized GAM as a belligerent. This recognition lacks legal basis, but Indonesia has successfully excluded the MoU from the formal line of international law, moving partly to regional organization power in a political manner and transforming it into the national system under the LAG 11/2006.

To strengthen the status and meaning of MoU as an international law agreement, some general understanding is needed. *First*, it should be refer to purposive approaches of international law as a normative grounded to the GAM under the principle of “self-determination of people” in Articles 1(2) and 55 of the United Nations (UN) Charter, and common Article 1 of the ICCPR and ICESCR, which clearly affirms the right of a group of people for self-determination in political, economic, social, and cultural aspects. It states that “all people have the right to self-determination. By virtue of that right they freely pursue their economic, social and culture.”

In addition, several UN General Assembly Resolutions strengthened those articles that a social movement to self-determination is a manifestation of the right of a people. Such understanding means that all people who seek self-determination are recognized normatively by international law. However, in practice, this recognition has been unclear in application. Only few people’s claims over self-determination have been supported by the UN. Such recognition would mostly depend on the capacity of the people for political diplomacy both internally with the main government and externally with other governments covering the UN stakeholder.

International humanitarian law offers limited recognition of people’s qualification as “belligerents” in terms of their entitlement to the obligation and right in the humanitarian law context. This recognition has no direct link to the recognition of people to self-determination, but merely concerns humanitarian issues in terms of responsibility during armed conflict and wars. In this context, the UN will take a broad view of this issue to determine whether the belligerent is pursuing self-determination or not. Some basic conditions to be a *belligerent* include the qualification of a prisoner of war in international humanitarian law (the 1949 Geneva Convention).<sup>60</sup>

An insurgent becomes a belligerent according to a conditionality under Article 1 of The Hague Convention in 1907.<sup>61</sup> This concept was reiterated in the 1949 Geneva Convention’s Articles 1, 2, and 3 on the subject of war hostage, which has to be protected in international humanitarian law.<sup>62</sup> The term “belligerent” was used to describe the character of non-international conflict according to Article 3 of the 1949

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<sup>60</sup> See Article 4 (2), Geneva Convention III 1949 that stated: “The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions: (a) To be commanded by a person responsible for his subordinates; (b) To have a fixed distinctive emblem recognizable at a distance, To carry arms openly; (c ) To conduct their operations in accordance with the laws and customs of war.”

<sup>61</sup> See article 1 of The Hague Convention 1907: “The laws, rights, and duties of wars apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions: 1. To be commanded by a person responsible for his subordinates; 2. To have a fixed distinctive emblem recognizable at a distance; 3. To carry arms openly; and 4. To conduct their operation in accordance with the laws and customs of war.”

<sup>62</sup> Article 4 (2), Geneva Convention 1949.

Geneva Convention,<sup>63</sup> which focuses on the need for similar treatment of the wounded on land and sea whether they are combatant prisoners or civil prisoners. Hence, the status of self-determination movement was legitimized under the international law and received similar protection under humanitarian law as in that of the State. The violation of this law then becomes a field of international criminal war. Under article 2(3) from Geneva Convention.<sup>64</sup> The usage of the term “power’ may refer to non-state party as self-determination movement as may be bound to the treaty.

The notion to distinguish between *belligerent* and *insurgent* might be based on the effort to nationalize the self-determination movement from international recognition. Being a belligerent required extra effort from diplomatic to political and military power both the national and international spheres. Economic interests, democratic justification, and religion to some extent would benefit such recognition. It is a controversial rule that depends on the political situation and the capacity of the group to gain international attention. Also, the strength of the diplomatic power of a state contributes to the weak ability of its separatist group being internationally recognizable.<sup>65</sup>

Even though CMI is a non-state actor, in practice, MoU Helsinki has attracted the EU and the ASEAN to serve as monitoring bodies; thus, they implicitly recognize the contested parties.<sup>66</sup> In this situation, whether the MoU is solely an Indonesian issue is difficult to say. Moreover, the representative of GAM has foreign citizenship; Hasan Tiro and Zaini Abdullah are Swedish, while Malik Mahmud is a Singaporean. Given this situation, the status of GAM is similar to that of a belligerent.

The recognition of GAM as a belligerent would automatically affect the legal status of the MoU Helsinki, that is, whether it would be considered an international or a national agreement. Prof. Hikmahanto Juwana insisted that MOU Helsinki is not an international agreement because GAM movement has not been recognized internationally; thus, GAM is considered merely *insurgent* instead of *belligerent*.<sup>67</sup>

<sup>63</sup> “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”...etc.

<sup>64</sup> It said that “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>65</sup> See M. Y. Aiyub Kadir, “The Application of the Law of Self-Determination in Postcolonial Context: A Guideline,” *East Asia Journal and International Law* 8, no. 1 (2016).

<sup>66</sup> See MoU Helsinki, Point 5.1. “An Aceh Monitoring Mission (AMM) will be established by the European Union and ASEAN contributing countries with the mandate to monitor the implementation of the commitments taken by the parties in this Memorandum of Understanding”. At the end it clearly mention that ‘ On behalf of the Government of the Republic of Indonesia, On behalf of the Free Aceh Movement’, to confirm both parties to a peace agreement.

<sup>67</sup> Hikmahanto Juwana, professor in international law, answered a question regarding the status of MoU Helsinki at public lecture at Law faculty, Syiah Kuala University on 1 June 2010.

However, if GAM is not considered a belligerent, then the GoI signed an agreement with a group of insurgents beyond its territory and facilitated by foreign party (CMI) supported by the EU and the ASEAN. This situation poses a complicated issue because Indonesia does not legally recognize separatist groups. Doing so is a serious violation to the unitary principle of Indonesia and is thus invalid and illegitimate. Such argument may potentially be used to jeopardize the current ongoing peace process. Thus, the legalization of MoU under international law is essential.

Initially, GAM was not recognized internationally. However, the fact that the MoU had been signed through the CMI and with the support of the EU and the ASEAN could be considered as a great achievement for GAM to be recognized as a *belligerent*. Moreover, this situation would be affected by the implementation of the MoU, which was monitored by the international communities. Aspinall mentioned that the UN should be a monitoring agency for the MoU implementation, but Indonesia seems hesitant to accept the UN because it would be considered an internationalization of GAM.<sup>68</sup> Hence, the status of a “belligerent” or an insurgent in international law may affect whether the MoU is considered a domestic agreement under national law or an international agreement under the international law of treaty.<sup>69</sup>

Regardless of the controversy about the exact meaning of insurgency, consensus exists that *insurgency* can developed into *belligerency*. McDougal and Reisiman stated that the difference was that the insurgent does not establish a territorial base, which involves effective control over the population.<sup>70</sup> Another term used for *insurgency* is *insurrection*, which has been described as a war of citizens against the state to obtain power in whole or in part.<sup>71</sup>

*Second*, the preamble of the 1945 Indonesian Constitution also highlighted that Indonesia shall “involve in maintaining world order under the principle of freedom, perpetual peace and social justice.”<sup>72</sup> Thus, the willingness of Indonesia and GAM to achieve peace would be a basis for the manifestation of the general goal of international law and Indonesia’s Constitution.

*Third*, GAM is a continuation of the war declared against the Dutch on March 26, 1873. One may say that this war has not concluded formally because no formal agreement of sovereignty transfer from the Aceh to the Dutch was made, given an unfinished guerrilla revolution on the ground. Consequently, Aceh remained a sovereign subject. In this context, the MoU rectified this missing link of the transfer of the territory of Aceh to the Dutch and from the Dutch to a new Indonesia in 1949. Thus, the existence of GAM as the continuation of Aceh sovereignty cannot be regard under the national Indonesian system. The status of Aceh should be included within the list of non-self-governing territories from Dutch occupation under the UN system, by which the people of Aceh have the right to self-determination, to associate with Indonesia.

Following the above arguments, to obtain more clarity on the legal status of MoU, this paper suggests that Indonesia seek advisory opinion from the ICJ through the UN General Assembly or Security Council, as stated in Article 96(1) of the UN charter:

<sup>68</sup> See Aspinall, *The Helsinki Agreement*, p. 47.

<sup>69</sup> Lihat R. P. Dhokalia, “Civil War in International Law,” *Indian Journal of International Law* 11 (1971): 225.

<sup>70</sup> McDougal and Reisiman, *International Law Essays* (New York: The Foundation Press, 1981), p. 522.

<sup>71</sup> Dhokalia, “Civil War in International Law.”

<sup>72</sup> See the preamble of 1945 Indonesian Constitution, paragraph 4.

“The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.” Article 96(2) provides that “other organs of the United Nations and Specialized Agencies, which may at any time be so authorized by the General Assembly, may also request the advisory opinions of the Court on legal question arising within the scope of their activities, as there is no explicit jurisprudence concerning such peace agreement.”

Jurisprudence exists from the ICJ advisory opinion on the request of the General Assembly to the ICJ on the interpretation of peace treaties with Bulgaria, Hungary, and Romania in 1950.<sup>73</sup> This question is with regard to the three states’ peace treaties. While for the issue on the involvement of non-states parties in peace agreement<sup>74</sup> such as the ICJ ruling on the Lusaka Agreement does not create a binding obligations in international law, but it creates obligations as between the parties. Meaning that, the secondary rules of international law, including the law on responsibility of states for wrongful acts, would therefore not apply to this agreement.<sup>75</sup> Thus, the ICJ effectively considered this issue as outside its jurisdiction because it is not part of international law, which it is mandated to apply. Equally, the Abyei arbitration examined in the Permanent Court of Arbitration based on<sup>76</sup> the 2005 Comprehensive Peace Agreement for the Sudan (CPA) was not considered a treaty<sup>77</sup> because it would impact the legal obligation to parties. The panel stated the CPA was an agreement “between the government of a sovereign state, on the one hand, and, on the other, a political party/movement, albeit one which those agreements recognize may or may not govern over a sovereign state in the near future.”<sup>78</sup>

However, a contention jurisprudence of the unilateral independent of Kosovo from Serbia exists; the Court legalized this non-state entity’s claim for independence on remedial grounds.<sup>79</sup> It can serve as a reference for non-state parties to be considered a party of the Court through the UN Security Council, the UN General Assembly, and other affiliated agencies.

Human rights-related institutions have been used by Indonesia in its formal report to the HR Committee or the Committee on ESCR. Indonesia can legalize the MoU in the international law system to strengthen the legal power of the MoU. Bell confirms that “...peace agreement legalization as an attempt to bridge an uneasy gap between the short-term and long term peace process goals and mechanism,” and “the legitimacy and the effectiveness of peace agreement legalization are related.”<sup>80</sup>

<sup>73</sup> See Summary of Judgment, Advisory Opinions and Orders of the ICJ, Interpretation of Peace Treaties with Bulgaria, Hungaria and Romania (First Phase) Advisory Opinion of 30 March 1950. And (second Phase) Advisory Opinions of 18 July 1950.

<sup>74</sup> See ICJ, “jurisdiction on the General Assembly request advisory opinions of the Court,” in <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=2&p3=1&organ=3>, accessed 5 March 2016.

<sup>75</sup> J. Combacau and D. Alland, “Primary’ and ‘Secondary’ Rules in the Law of State Responsibility Categorizing International Obligations,” *Netherlands Yearbook of International Law* (1985): p. 81.

<sup>76</sup> *Government of Sudan v the Sudan People’s Liberation Movement/Army*, Final Award at para 427 (Permanent Court of Arbitration 2009) [hereinafter ‘Abyei arbitration’] available at <http://www.pca-cpa.org/upload/files/Abyei%20Final%20Award.pdf>, accessed on 12 March 2014.

<sup>77</sup> See Scott P. Sheeran, “International Law, Peace Agreements and Self-determination: The case of Sudan,” *International and Comparative Law Quarterly* 60 (2011): p. 423.

<sup>78</sup> *Ibid.*

<sup>79</sup> International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 403.

<sup>80</sup> See Bell, “Peace Agreement,” p. 412.



#### IV. TOWARD INTERNATIONAL LAW OF PEACE

MoU Helsinki, which is one of the relatively successful peace agreements in international law among more than 300 peace agreements in the last 20 years,<sup>81</sup> continues to be faced with a problem: its lack of legality in international law. With the emergence of the UN charter, peace is the primary goal after World War II, but then when most peace processes were settled, the idea of pursuing and maintaining peace in the world has become sidelined.<sup>82</sup> However, when the UN was established and its agenda of decolonization was mostly completed, the UN demonstrated imbalanced treatment to conflict in postcolonial states (Third World).<sup>83</sup> Many conflicts in the Third World become internal affairs of a state.<sup>84</sup>

Rajagopal also highlighted the essential rule of law in the post-conflict setting in non-Western world, stating that “the rule of law is considered the surest guarantee against the re-emergence of conflicts and the basis for rebuilding post-conflict societies.”<sup>85</sup> International law has set out several standards on this peace agreement in terms of the UN guidelines, recommendation by the Secretary General, and the Security Council resolution.<sup>86</sup> This standard mostly concerns accountability for past human rights abuses without explaining the status of peace agreements.<sup>87</sup> Bell considered that an international law on peace would be an essential consideration in future development, given “...attempts to reconstruct societies in the wake of interstate conflict, as evidenced by the situation in Kosovo, Afghanistan, and Iraq.”<sup>88</sup> In this context, Indonesia can fill this gap to take into account conflict settlements in Third World states by developing and strengthening international law on peace agreements.

#### V. CONCLUSION

The essential meaning of MoU Helsinki in settling self-determination conflict has been demonstrated, despite many challenges. It is now a dynamic process in terms of political bargaining between the Aceh government and GoI. However, GAM, which has transformed into a local party, and the Aceh government have failed to redefine themselves after 11 years period of the MoU, particularly concerning Aceh's social, economic, and cultural status as part of essential element of its special autonomy status. A notable failure is its inability to establish victim-based human rights-related institutions, such as the HRC, JCC, and the nationally based TRC. Moreover, declining Aceh influence is observed, given the judicial review of articles of LAG in the Constitutional Court. Such uncertainty potentially degrades the spirit of peace in the Aceh context. Thus, the legalization of the MoU through the International law mechanism becomes an option to establish the MoU as an international agreement, simultaneously strengthening Aceh within the LAG of Indonesia's system.

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<sup>81</sup> See *Ibid.*, pp. 373-412.

<sup>82</sup> See *Ibid.*, pp. 373-412.

<sup>83</sup> See Kadir, “Self-determination in Postcolonial Context,”

<sup>84</sup> *Ibid.*

<sup>85</sup> Balakrishnan Rajagopal, “Invoking the Rule of Law in Post-conflict Rebuilding: A Critical Examination.” *William & Mary Law Review* 49, issue 4 (2008).

<sup>86</sup> See the rule of law and Transitional Justice in Conflict and Post-Conflict Societies, Report of the Secretary general, UN Doc.S/2004/616. Para.50, p. 17.

<sup>87</sup> Fen Osler Hamston, *Nurturing Peace: Why Peace Settlement succeed or failed* (Washington D.C: United States Institute of Peace, 1996).

<sup>88</sup> Bell, “Peace Agreement,” p. 374.

The lack of obvious international mechanisms of enforcement of the MoU in no way defeats the legal character of its undertakings. However, from a purposive aspect, peace is essential both in international and national laws. International law and the UN recognize that a peace agreement is an essential instrument in creating and maintaining peace in the world. Hence, the MoU should be understood as an instrument of international law in maintaining peace and security.

Equally under national legal system, peace is also recognized in the preamble of the 1945 Constitution, the Law 24/2000 on treaty, the historical ground of Aceh, and a tool to bind a political-economic relationship between Aceh and Indonesia. MoU Helsinki is a special treaty under the schema of the VCLT 1969, which merely governs treaties between states. It cannot be regarded as a national agreement because no formulation exists to recognize it under the national legal system.

While the factual circumstances and agreement are unusual, international law must be able to find a solution to this situation. A strong basis exists in positivist international law to suggest that the MoU gives rise to binding obligations for both parties. To deny the international legal character of the MoU would be to deny the efficacy of this agreement and the solution that it represents. A natural development is that the role of international law has become more important and pronounced. If the agreement cannot be effected under national law, then international law must be available for that purpose. The lack of legal status of the MoU would seed a new separatist movement, which would then fuel a new peace agreement. Thus, legalizing the MoU in international law would be essential for maintaining peace and security in the Indonesia–Aceh context.

## Bibliography

### Legal Documents

- Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field.* Geneva, 12 August 1949. UNTS Vol. 75, No. 970.
- Geneva Convention relative to the treatment of prisoners of war.* Geneva, 12 August 1949. UNTS Vol. 75, No. 972.
- Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land.* The Hague, 18 October 1907.
- Indonesia. The 1945 Constitution of the State of the Republic Indonesia.
- Indonesia. *Undang-undang tentang Pemerintahan Aceh (Law on the Aceh Governance)*. UU No. 11 tahun 2006, LN No. 62 tahun 2006, TLN No. 4633 (Law No. 11 of 2006, SG No. 62 of 2006).
- International Court of Justice. *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 403.
- International Court of Justice. *Interpretation of Peace Treaties (second phase), Advisory Opinion, I.C.J. Reports 1950*, p. 221.
- International Court of Justice. *Interpretation of Peace Treaties, Advisory Opinion, I.C.J. Reports 1950*, p. 65.
- Mahkamah Konstitusi Republik Indonesia. "Decision No. 006/PUU-IV/2006."
- Mahkamah Konstitusi Republik Indonesia. "Decision No. 35/PUU-VIII/2010."
- Memorandum of Understanding between the Government of the Republic of Indonesia and the Free Aceh Movement.* Helsinki, 15 August 2005.
- Permanent Court of Arbitration. *The Government of Sudan v. The Sudan People's Liberation Movement/Army.*
- Special Court for Sierra Leone. *Prosecutor v Morris Kallon and Brima Buzzy Kamara, Special Court for Sierra Leone, SCSL-2004-15- AR72(E) and SCSL-2004-16-AR72(E).*
- United Nations. Report of the Secretary general, UN Doc.S/2004/616.
- Vienna Convention on the Law of Treaties.* Vienna, 23 May 1969. UNTS Vol. 1155.

### Books

- Al-Chaidar. *Aceh Bersimbah Darah [Aceh Bathed by Blood]*. Jakarta: Pustaka Al-Kaustar, 2001.
- Aspinall, E. "The Helsinki Agreement: A more promising basis for peace in Aceh?" Washington: East West Center, 2005.
- Bell, C. *Peace Agreements and Human Rights*. Oxford: OUP, 2000.
- Bouthillier, Y., and J. F. Bonin, "Article 3" in *The Vienna Convention on the Law of Treaties: A Commentary: Volume I*, eds. O. Korten and P. Klein. Oxford: OUP, 2011.
- Clark, R., et. al. *Considering Victims The Aceh Peace Process From A Transitional Justice Perspective*. Jakarta: the International Center for Transitional Justice - Indonesia, 2008.
- Crawford, J., *The Creation of States*. Oxford: OUP, 2007.

- Edelstein, J. *Truth & Lies, Stories From The Truth and Reconciliation Commission In South Africa*. New York: the New Press, 2001.
- Hamston, F. O. *Nurturing Peace: Why Peace Settlement Succeed or Failed*. Washington DC: US Institute of Peace, 1996.
- Higgins, R. *Problems and Process: International Law and How We Use It* Oxford: OUP, 2004.
- Juwana, H., "Empowerment of Law Culture in Human Rights Protection in Indonesia; Human Rights in the Perspective of International Laws" in *Human Rights, Nature, Concept, and Implication in the Perspective of Laws and Society*, ed. Muladi Jakarta: Refika Aditama, 2005.
- Koalisi Pengungkap Kebenaran Aceh (Coalition of Disclosers on Aceh's Truths). *Demi Kebenaran dan Keadilan di Aceh, Catatan Ide Rumusan Komisi Kebenaran dan Rekonsiliasi Aceh Sepanjang 2007 [In the Name of Truth and Justice in Aceh, Formulation Record of Establishing KKR Aceh During 2007]*. Jakarta: Rinam Antartika, 2008.
- Marzuki, N., and Adi Warsidi, ed. *The Fact Speaks: Uncovering Human Rights Violations in Aceh 1989 – 2005*. Banda Aceh: Coalision of NGO HAM Aceh, 2011.
- McDougal and Reisiman. *International Law Essays*. New York: The Foundation Press, 1981.
- Moon, C. *Narrating Political Reconciliation, South Africa's Truth and Reconciliation Commission*. Lexington Books: London, 2008.
- Siegel, James T. *The Rope of God*. US: University of Michigan, 2000.
- Simson, G. "Tell No Lies, Claims No Easy Victories, A Brief Evaluation of South Africa's Truth and Reconciliation Commission" in *Commissioning The Past, Understanding South Africa's Truth and Reconciliation Commission*. eds. Deborah Posel and Graeme Simpson. South Africa: Witwatersrand University Press, 2002.
- Sjamsuddin, N. *The Republican Revolt, A study of the Acehnese Rebellion*. Singapore: Institute of South East Studies, 1985.
- Sulaiman, I. *Gerakan Aceh Merdeka*. Jakarta: Pustaka Al-Kautsar, 2001.
- Teitel, Ruti G. *Transitional Justice*. Oxford: OUP, 2000.
- Tiro, T. H. *The Price of Freedom: The Unfinished Diary*. Yogyakarta, 1984.
- Tutu, D. *No Future without Forgiveness*. London: Rider, 1999.

## Articles

- Aspinall, E. "Peace without justice? The Helsinki peace process in Aceh." Centre for Humanitarian Dialogue 2008, [http:// www.hdcentre.org/files/Justice%20Aceh%20final.pdf](http://www.hdcentre.org/files/Justice%20Aceh%20final.pdf). Accessed on 23 October 2015.
- Bell, Christine. "Peace Agreements: Their Nature and Legal Status." *The American Journal of International Law* 100 (2006): 373-412.
- Combacau, J. and D. Alland. "'Primary' and 'Secondary' rules in the law of State responsibility categorizing international obligations" *Netherlands Yearbook of International Law* 16 (1985): 81-109.
- DeRouen Jr, K., et al. "Civil War Peace Agreement Implementation and State Capacity," *Journal of Peace Research* 47, no. 3 (2010): 333-346.

- Dhokalia, R. P. "Civil Wars and International Law." *Indian Journal of International Law* 11 (1971): 219-378.
- Kadir, M. Y. Ayub. "The Application of the Law of Self-Determination in Postcolonial Context: A Guideline." *Journal of East Asia and International Law* 8, no. 1 (2016): 7-28.
- Kingsbury, D. "A Mechanism to end conflict in Aceh." *Security Challenge* 1 (2005): 73-88.
- Kingsbury, D. "Peace Process in Aceh and Sri Lanka: A Comparative Assessment." *Security Challenge* 3, no. 2 (2007): 93-112.
- Nevada, A. "Kontestasi Politik KKR Aceh." *Journal Outlook* 015-08 (2011). Accessed from <http://joutlook.com/journal/sospol-dan-hukum.html> on 5 January 2012.
- Prang, A. J. "Jika Self-Government (Aceh) diatur Konstitusi [If Self-government (Aceh) is regulated by the Constitution]." *Serambi Aceh*, 4 February 2010.
- Quingley, J. "The Israel-PLO Interim Agreements: Are they Treaties?" *Cornell International Law Journal* 30, no. 3 (1997): 717-740.
- Rajagopal, B. "Invoking the Rule of Law in Post-conflict Rebuilding: A Critical Examination." *William & Mary Law Review* 49, issue 4, (2008): 1347-1376.
- Schachter. "The Place of Policy in International Law." *Georgia Journal of International & Comparative Law* 2 (1972): 5-14.
- Sheeran, S. P. "International Law, Peace Agreements and Self-determination: The case of Sudan." *International and Comparative Law Quarterly* 60, no. 2 (2011): 423-458.
- Solomou, A. "Comparing the Impact of the Interpretation of Peace Agreements by International Courts and Tribunals on Legal Accountability and Legal Certainty in Post-Conflict Societies." *Leiden Journal of International Law* 27, no. 2 (2014): 495-517.
- Weatherbee, Donald E. "Indonesia: Political Drift and State Decay." *The Brown Journal of World Affairs* 9, no. 1 (2002): 23-33.

## Websites

- Al-Farlaky, I. U. "MoU Helsinki dan Peningkaran Jakarta [Helsinki MoU and Denial of Jakarta]." 25 August 2016, <http://aceh.tribunnews.com/2016/08/25/mou-helsinki-dan-peningkaran-jakarta>. Accessed 26 August 2016. Agreement: TheieYork: th
- Hukumonline. "'YARA Gugat Para Pihak MoU Helsinki [YARA sues the parties of Helsinki MoU]" 05 Februari 2014, <http://www.hukumonline.com/berita/baca/lt52f26648c30b0/yara-gugat-para-pihak-mou-helsink>. Accessed 1 March 2016. *SettlementWashingtonInternationalanInterpretatio*,
- Prang, A. J. "Kesakralan' UUPA Terusik [The Sancity of the Aceh Governance Law disturbed],, 4 Agustus 201 . <http://aceh.tribunnews.com/2016/08/04/kesakralan-uupa-terusik?page=1>, accessed on 6 August 2016.
- Serambi Indonesia. "'Martii Ahtisaari Tolak Hadiri Sidang [Martii Ahtisaari rejects to attend the proceeding]', 2 July 2016, <http://aceh.tribunnews.com/2016/07/02/martti-ahtisaari-tolak-hadiri-sidang>, accessed on 5 August 2016.

- Serambi Indonesi . "Pembuatan Rakit Lamtuha Tersendat [Production of Rafts in Lamtuha Distrupted],, 19 May 2010. <http://serambinews.com/news>. Accessed on 24 December 2010.
- Serambi Indonesia. "Insiden Jembatan Gantung Terjadi lagi di Gayo Lues [Suspension Bridge Incident in re-occurs in Gayo Lues]." 19 Decembe 2010 at <http://serambinews.com/news>, accessed on 24 December 2010. Self-determination: TheComparative Tauber, A. "Remnant of Past Trouble, Defining Self Government Among Territories." accessed from [www.ssrn.com](http://www.ssrn.com) on 20 December 2010.
- World Bank, "The Aceh Peace Agreement, How Far Have We Come." December 2006 at <http://www.worldbank.or.id>, accessed on 15 November 2011.

### **Unpublished Sources**

- Poerbasari, A. S. "The Problem of Self government in Aceh post the Helsinki Memorandum of Understanding." Working paper 2008.
- Ministry of Laws and Human Rights Republic Indonesia. "Draft of Academic Papers in Revision of Law No. 27 of 2004 regarding Truth and Reconcilliation Commission (KKR)."