NOTE

A CONTINUING MENDICANCY: THE SUPREME COURT'S ROLE IN LEGITIMATING UNITED STATES MILITARY PRESENCE IN THE PHILIPPINES

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A bankrupt administration must necessarily have a foreign policy of mendicancy; and it is inevitable that it should invite foreign intervention to do what it cannot do for itself. When a government cannot count on the united support of its own people, then it must unavoidably have recourse to the support of a foreign power.

Claro M. Recto

I. INTRODUCTION

On April 17, 1951, Don Claro M. Recto[1] delivered a speech that would become one of the classics of Philippine nationalist literature. The speech, entitled "*A Mendicant Foreign Policy*"[2] was an attack on the country's subservience to U.S dictates.

In the speech, Recto recognized a fundamental rule in foreign policy: "that the objective of any foreign policy is national interest."[3] This is the basis for his assertion that "American interest is and must be the primordial objective of [American] foreign policy."[4] Recto pointed out that Philippine foreign policy does not follow this rule. Recto claims that the reason for this is the belief among

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[1] For a biography of Recto, see RENATO CONSTANTINO, THE MAKING OF A FILIPINO (1969).

[2] *See* CLARO RECTO, *A Mendicant Foreign Policy*, in RENATO CONSTANTINO, VINTAGE RECTO 63 (1986). The speech was delivered before the graduating class of the University of the Philippines. It created a controversy when then Philippine President Elpidio Quirino opposed the choice of Recto as commencement speaker, forcing U.P. President Bienvenido Gonzales to resign.

[3] *Id.* at 71.

[4] *Id.* at 72.

Filipinos that there is an identity of American and Filipino interests. Such belief leads Filipinos to follow the tide of American policies, to the point of subordinating the country's own interests to that of the American's.[5]

The choice of Recto as a starting point for an analysis of the renewed U.S. military presence in the country might be criticized as outdated. Ultimately, the question would lie on whether or not there have been significant changes in Philippine society during the past fifty years that would merit a breaking off from the analysis of Recto. The author does not think so.

Many of the conditions that existed during Recto's time are still with us. There is a cloud of war looming in the horizon, brought about by a seemingly perpetual war on terrorism.[6] There is a government that jumps at the opportunity to provide help to a superpower even before a formal request has been made.[7] There is thus a need to reintroduce Recto into today's consciousness.

Renato Constantino, writing in 1969, had this to say of Recto:

> Recto's relevance to the present lies not so much in the continuing validity of his nationalist premises as in his contribution to the forward march of history. His class position and his colonial upbringing, it is true, delayed and circumscribed his development. But his courageous attempt to break away from the colonial condition was itself a great single effort which contributed to today's relative enlightenment.[8]

Constantino's observations made more than forty years ago are still relevant today. Recto, in a way, contributed much towards enriching Philippine legal history on matters involving foreign intervention in the country. Sadly, there is a lack of legal history materials focusing on Recto as a valid subject of legal scholarship.

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[5] *Id.*

[6] Much of Recto's nationalism was in the context of the Cold War between the U.S.S.R. and the United States. Today, the conflict is between the US and Islamic radicals. Particularly, the US has been targetting Iraq, labelling it as one of the Axis of Evil. *See The President's State of the Nation Address*, <http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html> last visited March 14, 2003.

[7] Recto's criticisms were geared towards then President Elpidio Quirino, the architect of foreign policy in his time. Today, it is President Gloria Macapagal Arroyo who bears the burden of foreign policy in the country. As the architect of foreign policy, she has placed the Philippines "squarely on the side of the U.S.-led coalition poised to strike at Iraq." As National Security Adviser Roilo Golez mentioned, "The National Security Council has determined that it is in the national interest of the Philippines to provide political and moral support to efforts to rid Iraq of weapons of mass destruction." *See* Carlito Pablo, *Palace Backs US War vs. Iraq*, PHILIPPINE DAILY INQUIRER, March 19, 2003. <http://www.inq7.net/nat/2003/mar/19/nat_2-1.htm> last visited March 19, 2003.

[8] RENATO CONSTANTINO, THE MAKING OF A FILIPINO 296 (1969).

Mendicancy, as an attribute of Philippine foreign policy, has been ascribed more on the executive, rather than the other branches of government. This arises out of the role that the President plays in foreign relations[9] as set forth in the constitution. The president is "the only power to speak and listen as a representative of the nation. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude, and Congress itself is powerless to invade it."[10] This over-reliance on the president is misplaced. The constitution itself restricts the acts of the executive and allows for checks and balances to ensure that the constitutional mandate is followed.

This paper will show that mendicancy is not entirely a disease of the executive. In the constitutional scheme we have adopted, the Supreme Court itself has a hand in deciding whether to legitimate mendicant policies or not.[11] This paper will look into the actions of the Supreme Court when it decides on issues concerning that specific branch of foreign affairs which has been continuously with us throughout our history as an independent nation. The paper will focus on how the Supreme Court rules when U.S.-Philippine military relations are involved. This paper seeks to answer the question, that while criticisms have been hurled against the executive for entering into mendicant policies, should not the Supreme Court, as the final arbiter of constitutionality, be as much to blame for making beggars of us all?

II. A MENDICANT PAST

By the turn of the century, America's imperial ambitions had found early fulfillment in the Philippines. During this period, American foreign policy was based on the Monroe Doctrine. Originally, the doctrine embodied American opposition to European colonization in the Western Hemisphere and intervention in the affairs of newly established Western republics.[12] The policy has as one of its underlying principle the nonintervention by any nation in the affairs of another.[13] Its underlying basis is the equality of all states.

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[9] For a discussion on the role of the Philippine President on foreign affairs *see* IRENE CORTES, THE PHILIPPINE PRESIDENCY: A STUDY OF EXECUTIVE POWER (1966).

[10] United States v. Curtis Wright Corp. 299 U.S. 304 (1934).

[11] Dean Irene Cortes mentioned that the Supreme Court has a function entirely alien to external affairs. *See* IRENE CORTES, THE PHILIPPINE PRESIDENCY: A STUDY OF EXECUTIVE POWER 188 (1966).

[12] FRANK TANNENBAUM, THE AMERICAN TRADITION IN FOREIGN POLICY 58 (1955).

[13] *Id.* at 58.

The Monroe doctrine was crafted as a guiding principle on how the United States would deal with its neighbors in the Western Hemisphere.[14] Through time, however, the doctrine was expanded to include all independent states.[15] The doctrine is important in order to understand American colonial politics at the turn of the century. As the basis of the doctrine is the equality of all states, American acts make it seem that the doctrine does not apply to the Philippines.

United States President William McKinley himself admitted the quandary of the Americans as to the fate of the Philippines. He felt that the Philippines could not be given back to Spain but at the same time the country should not be a prey to other nations. He felt the Filipinos then were incompetents when it came to governance.[16] The solution to his quandary came one night, when, according to McKinley, "I went down on my knees and prayed Almighty God for light and guidance ... and one night it came to me ... that there was nothing left for us to do but to take them all, and to educate the Filipinos, and uplift and civilize and Christianize them."[17] Thus the beginning of the "Benevolent Assimilation" and aggressive American imperialism.

A. AMERICAN COLONIAL PERIOD (1898 - 1946)

The signs of mendicancy were already apparent during the early years of the Republic. General Emilio Aguinaldo had promised cooperation with Admiral George Dewey in America's fight with Spain.[18] Aguinaldo and the leaders of the Revolution believed that the United States's tradition of republicanism and adherence to its constitution would prevent it from occupying foreign territory.[19] They sought the help of the American consul in Hongkong in the acquisition of

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[14] Then U.S. Secretary of State Henry Clay's proposal was for a "joint declaration of the several American States, each, however, acting for and binding only itself, that within the limits of their respective territories no new European colony will hereafter be allowed to be established." *Id.* at 59.

[15] Theodore Roosevelt added what was known as the "Roosevelt corollary" to the Monroe Doctrine. According to this "corollary," intervention in the Carribean is justified in the case of "chronic wrongdoing, or an impotence which results in a general loosening of the ties of civilized society." The Roosevelt corollary was subsequently repudiated during the early years of the 20th century, when the U.S. Department of State released a memorandum that restated the proposition of the Monroe Doctrine. The memorandum stated that the Doctrine is "aimed at the protection of the Latin-American countries against the threat of intervention and colonization from Europe, [and] that it does not give any warrant for United States intervention in Latin America." *Id.*

[16] *Id.* at 88.

[17] *Id.*

[18] RENATO CONSTANTINO, A PAST REVISITED 208 (1974).

[19] ONOFRE D. CORPUZ, 2 THE ROOTS OF THE FILIPINO NATION 343 (1989).

arms.[20] An American ship, the *McCulloch,* brought Aguinaldo back to the country from exile. Upon arrival in Cavite, Aguinaldo had a conference with Dewey on board the latter's flagship.[21]

Believing that the Americans did not have any colonial ambitions in the country, Aguinaldo declared independence from Spain. The Declaration of Philippine Independence read in Kawit, Cavite on June 12, 1898, reads "under the protection of the Mighty and Humane North American Nation, we proclaim and solemnly declare, in the name and by the authority of the inhabitants of all these Philippine Islands, that they are and have the right to be free and independent . . ."[22] Thus, while proclaiming independence from Spain, the so-called revolutionary leaders sought to place the country under the protectorate of the United States, a relationship that continues to this day.[23]

The seeds of mendicancy were transplanted to the Supreme Court with the appointment of Cayetano Arellano as the first Chief Justice. Arellano was a member of the *ilustrados,* who, prior to being a part of Aguinaldo's government was a member of the Consultative Assembly created on May 9, 1898 by the Spanish Governor-General[24] as a body to help win the people's support for Spain against the Americans.[25] In just a short span of years, Arellano went from being a Spanish appointed official in the Consultative Assembly, to a member of Aguinaldo's government and ultimately, Chief Justice of the Supreme Court established by the Americans in the country.[26]

Recto himself was aware that the people considered Arellano a traitor.[27]

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[20] Aguinaldo gave Rounseville Wildman, the U.S. Consul in Hongkong, PhP50,000 for the purchase of 2,000 rifles and 200,000 rounds of ammunition. This shipment of arms was consummated. However, a second shipment worth PhP67,000 did not push through and Wildman neither returned nor accounted for the money given him by Aguinaldo. *See* TEODORO AGONCILLO, HISTORY OF THE FILIPINO PEOPLE 191 (1990).

[21] *Id.* at 192.

[22] CONSTANTINO, *supra* note 15 at 211.

[23] Constantino notes that Aguinaldo's mendicancy is a legacy that he bequeths succeeding generations of leaders. *See id.* at 231.

[24] CORPUZ, *supra* note 19 at 279.

[25] The Spaniards had hoped that the *Asamblea Consultativa* would win the people's support in the fight against the Americans. *See id.* at 277.

[26] CONSTANTINO, *supra* note 18 at 238-239 (1974).

[27] *See* CONSTANTINO, THE MAKING OF A FILIPINO 34 (1969). Recto however, was unable to publicly express this sentiment in order not to offend the sensibilities of people who admired Arellano. Recto himself was also an ardent admirer of Arellano. One of his undelivered speeches when he died had Arellano as a subject. In it he acknowledged that Arellano was neither a reformer nor a revolutionary, neither an activist nor a militant. For Recto, Arellano was a patriot in the sense that the latter exhibited the qualities of a good citizen. *See* CLARO RECTO, *Cayetano S. Arellano in* NICK JOAQUIN, THE RECTO VALEDICTORY 47 (1985).

Arellano was one of the founders of the Partido Federal which advocated the annexation of the country by the Americans.[28] No doubt, Arellano was a good jurist. But it was primarily his pro-American sympathies that led to his appointment as Chief Justice of the Supreme Court.

The period from 1898 to 1946 can be considered as the setting up of the trenches of U.S. military presence in the country. As a conquering nation, the United States was accorded all the rights under international law to have military forces stationed in the country. President McKinley had ordered the military occupation of the archipelago on May 19, 1898 and sent General Merritt as the military governor of the islands to establish a military government.[29] McKinley proclaimed that one of the purposes of the military administration was to prove to the Filipinos "that the mission of the United States is one of benevolent assimilation."[30] The first "U.S. base" was set up in Parañaque, where U.S troops landed after Dewey's victory. It was aptly named Camp Dewey.[31]

B. MILITARY BASES PERIOD (1947 - 1991)

The second mendicant phase of U.S.-Philippine relations started with the granting of Philippine independence and the inauguration of the Third Republic. In his inaugural speech as president, Manuel Roxas allied the country with the nation that had just granted her independence.

> [W]e cannot but place our trust in the good intentions of the nation which has been our friend and protector for the past 48 years. To do otherwise would be to foreswear all faith in democracy, in our future, and in ourselves.[32]

The Philippines, thus, had the rare irony of declaring independence twice, and in both cases invoking the protection of the United States. It was, in addition, an anomalous independence. The independence of the country was proclaimed by U.S. President Harry Truman "*in accord with and subject to the reservations provided for in the applicable statutes of the United States.*"[33]

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[28] CONSTANTINO, *supra* note 18 at 244-245.

[29] CORPUZ, *supra* note 19 at 361.

[30] *Id.* at 373.

[31] *Id.* note 19 at 379.

[32] MARCIAL LICHAUCO, ROXAS 248 (1952).

[33] Proclamation of Independence by Harry Truman, as cited in MERLIN MAGALLONA, *U.S. Military Bases and Philippine Sovereignty* in THE UNITED STATES MILITARY BASES IN THE PHILIPPINES: ISSUES AND SCENARIOS 48 (1986).

As a first step towards the close cooperation that Roxas envisioned the country would have with the United States, the Military Bases Agreement was negotiated and signed by both countries.

1. R.P.-U.S. Military Bases Agreement of 1947

The Military Bases Agreement was signed on March 14, 1947. Under the agreement, "the U.S. was granted the use of 23 bases and reservations throughout the Philippines 'free of rent' for 99 years."[34] The members of the U.S. armed forces were allowed to serve on Philippine military installations and vice-versa. They were exempt from income and other taxes in the country. Likewise, materials, equipment, supplies and goods brought by them for official use were exempt from any charges. U.S. vessels and aircraft were allowed free access and movement within Philippine territory.[35] U.S. authorities were also granted jurisdiction over U.S. personnel for offenses not related to the security of the Philippines.[36]

Initially, the Americans claimed ownership over the U.S. bases. U.S. Attorney-General Herbert Brownell asserted that the Americans retained titles to the lands occupied by the bases. In support of his contention, Brownell argued that the Philippine Independence Act conferred on the United States the right to set up such bases. He also cited the Joint Resolution No. 93 of the U.S. Congress of June 29, 1944 where titles to the property were reserved for the U.S. These titles, he claimed, remained with the Americans as no transfer thereof was provided in the 1947 Bases Agreement.[37]

It took the case of *Brownell v. Sun Life Insurance*[38] to debunk these assertions. The Supreme Court held in that case that an act, passed by the U.S. Congress, and which contain a provision giving it force and effect after the granting of Philippine independence, could only be effective if the Philippines gave its consent thereto.

> The jurisdiction of the nation within its territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an

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[34] PATRICIA ANN PAEZ, THE BASES FACTOR: REALPOLITIK OF RP-US RELATIONS 15 (1985). The term of the agreement was subsequently reduced to 25 years during the 1966 revision of the MBA. *See* ALFREDO BENGZON, A MATTER OF HONOR: THE STORY OF THE 1990-91 RP-US BASES TALK 28 (1997).

[35] *Id.* at 15-16.

[36] *Id.* at 16.

[37] *Id.* at 86.

[38] G.R. No. L-5731. 95 Phil. 228 (1954).

> investment of that sovereignty to the same extent in that power which would impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.[39]

For Recto, the *Brownell* case had the effect of a legal declaration of independence.[40] Recto believed, contrary to Attorney-General Brownell's position, that the law governing the U.S. Bases was the U.S.-R.P. Treaty of General Relations which provided that "the U.S. withdrew and surrendered to the Philippines all rights of possession, supervision, jurisdiction, control and sovereignty existing and exercised by the United States in and over the territory of and people of the Philippines except the use of such bases."[41] In addition, the fact that the Americans were paying rent under the Military Bases Agreement would confirm such view.[42]

The rents paid by the Americans under the Military Bases Agreement became a prime fodder for mendicants in government. Roxas himself believed, and correctly at that, that the United States would generously extend financial assistance to the country in exchange for the agreement. On the same month as the signing of the agreement, the U.S. released $25 million in war damage payments and loans to the country.[43]

American largesse was the primary motivating factor for Philippine mendicancy in relation to the bases. It was reported in 1977 that the bases pumped an estimated $260 million each year into the Philippine economy.[44] President Marcos, knowing the importance of the bases to the Americans, negotiated hefty financial aid packages from the U.S. in exchange for the use of the lands.[45]

2. R.P.-U.S. Mutual Defense Treaty of 1951

A Mutual Defense Treaty (MDT) between the Philippines and the United States was also signed in 1951. The MDT provided for mutual assistance between

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[39] *Id.*

[40] Recto further urged the Filipinos to follow up the Court decision with a formal declaration of independence. "The Brownell issue was for him a graphic lesson which should impress upon Filipinos the need to assert their independence and defend it against encroachments so that it may be more than just a 'grant' by proclamation of an American president." *See* RENATO CONSTANTINO, THE PHILIPPINES: THE CONTINUING PAST 284 (1978).

[41] PAEZ, *supra* note 34 at 86.

[42] *Id.*

[43] *Id.* at 14.

[44] *Id.* at 163.

[45] *Id.* at 47. During the 1976 negotiations on the bases, Marcos wanted a $2 billion package, which the U.S. delegation led by Henry Kissinger rejected and instead offered half the amount.

the two countries in case of armed attacks, which are deemed to include an armed attack on the metropolitan territory of either country, or on the island territories under its jurisdiction in the Pacific Ocean, its armed forces, public vessels or aircraft in the Pacific.[46] The MDT is in force indefinitely,[47] and still binds both countries today.

3. Abrogating the Military Bases Agreement

On September 16, 1991, the Philippine Senate decided not to extend the Military Bases Agreement by a vote of 12-11. Exploratory talks began on May 14, 1990[48] while formal negotiations started on September 18, 1990.[49] The U.S. wanted to extend the bases agreement for another ten years, with compensation at the rate of $203 million each year.[50] The Executive Department accepted this offer, signing the Treaty on August 27, 1991.[51] It was up to the Senate to give its concurrence.

On September 10, 1991, President Corazon Aquino led a rally at the Luneta to support the treaty. Evidently, this was a move to pressure the senators to vote for the treaty. The rally amounted to nothing. On September 16, 1991, the Senate voted 12-11 to terminate the agreement and rejected any extension. Senator Salonga, in explaining his vote which sealed the fate of the U.S. Bases in the country, said,

> September 16, 1991 may well be the day when we in the Senate found the soul, the true spirit of this nation because we mustered the courage and the will to declare the end of foreign military presence in the Philippines and help pave the way to lasting peace here and in the world.[52]

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[46] Mutual Defense Treaty Between the Republic of the Philippines and the United States of America, art. 5.

[47] Mutual Defense Treaty Between the Republic of the Philippines and the United States of America, art. 8.

[48] ALFREDO BENGZON, A MATTER OF HONOR: THE STORY OF THE 1990-91 RP-US BASES TALK 63 (1997).

[49] JOVITO SALONGA, THE SENATE THAT SAID NO 208 (1995).

[50] *Id.* at 212.

[51] BENGZON, *supra* note 48 at 255.

[52] SALONGA, *supra* note 49 at 279.

III. A CONTINUING MENDICANCY

A. VISITING FORCES PERIOD (1998 - PRESENT)

1. International Law Basis For Stationing Foreign Forces Abroad

Early international law theories posited that whenever a state allows foreign troops to enter its territories, the sovereign state waives its right to exercise absolute sovereignty over such foreign troops. This principle has been extended – giving effect to international agreements concerning the stationing of foreign troops abroad – to mean that whenever an independent state agrees to allow the establishment of foreign bases within its territory, such state waives its right to exercise jurisdiction over the foreign base.

The legal basis for an independent state's waiver of jurisdiction in favor of foreign troops stationed in the former's territory is generally traced back to the case of *Schooner Exchanger v. McFaddon*.[53] In an opinion penned by Chief Justice Marshall in 1812, the United States Supreme Court, while declaring that "the jurisdiction of the nation within its own territory is necessarily exclusive and absolute" and "susceptible of no limitation not imposed by itself," at the same time held that "a sovereign is understood to cede a portion of his territorial jurisdiction where he allows the troops of a foreign prince to pass through his dominions."

The principle enunciated in the *Schooner Exchange* case is also known as the principle of the law of the flag. This is strongly supported by the United States, and has been invoked several times to claim exclusive jurisdiction over U.S. troops stationed abroad. The U.S. argument supporting the principle of the law of the flag has been summarized as follows:

> Strong grounds of convenience and necessity prevent the exercise of jurisdiction over a foreign organized military force which, with the consent of the territorial sovereign, enters its domain. Members of the force who there commit offences are dealt with by the military or other authorities of the State to whose service they belong, unless the offenders are voluntarily given up.[54]

Other cases usually cited in support of the law of the flag principle are the case of the *Deserters of Casablanca*[55], decided by the Permanent Court of Arbitration in

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[53] 7 Cranch 116, February 24, 1812.

[54] SERGE LAZAREFF, STATUS OF MILITARY FORCES UNDER CURRENT INTERNATIONAL LAW 11 (1971).

[55] May 22, 1909, as cited in LAZAREFF, *id.* at 12.

1909, and the U.S. cases of *Coleman v. Tennessee*[56] and *Tucker v. Alexandroff*.[57]

In contrast to the law of the flag, the idea of concurrent jurisdiction "resulted from a compromise designed to strengthen the system of collective security... The rationale for concurrent jurisdiction arrangements in other parts of the world is additionally supported by the unpopularity of extraterritorial rights and the reaction against anything tainted with colonialism."[58] According to this principle, both the sending and receiving states have exclusive jurisdiction over violations of their own laws, but not the laws of the other state. If an offense violates both states' laws, priorities in the exercise of jurisdiction would come into play.[59] The principle of concurrent jurisdiction "reflected the new interdependency among nations which arose after World War II." It can be found, for one, in the U.S.-Philippines Agreement signed on March 1947.[60]

The U.S.-Philippines agreement of 1947, though a model of an agreement using the principle of concurrent jurisdiction, "gives much power to the Sending State."[61] The agreement gives the United States jurisdiction over offenses committed within its bases in the territory, although in 1953, this was amended to exclude offenses committed by Philippine nationals. It also gives the U.S. exclusive jurisdiction in times of war. In 1965, further amendments were made which resulted in the U.S. having exclusive jurisdiction only over offenses not punishable under the territorial laws of the Philippines. All other offenses fall under the concurrent jurisdiction of both states, with priority to the U.S. for offenses committed solely against the property or security of the United States or for those committed on duty, with the U.S. authorities having the prerogative to declare whether an offense was committed on duty or not. However, the minutes of the negotiations explicitly stated that the authorities of the Philippines will waive their primary right to exercise jurisdiction upon U.S. request except only where they determine that it is of particular importance that jurisdiction be exercised by the Philippines.[62]

The signing of the NATO Status of Forces Agreement (SOFA) in 1951 "made the concept of concurrent jurisdiction over military forces abroad an inter-

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[56] 97 U.S. 509, as cited in LAZAREFF, *id.* at 16.

[57] 182 U.S. 424, as cited in LAZAREFF, *id.*

[58] JOSEPH ROUSE AND GORDON BALDWIN, *The Exercise of Criminal Jurisdiction Under the NATO Status of Forces Agreement* 51 AJIL 29 (1957), as cited in LAZAREFF, *id.*

[59] ROUSE AND BALDWIN, *supra* note 58 at 103.

[60] DIETER FLECK, THE HANDBOOK OF THE LAW OF VISITING FORCES 101 (2001).

[61] LAZAREFF, *supra* note 54 at 42.

[62] *Id.* at 41-42.

national norm, and the customary concept of exclusive jurisdiction, the exception."[63] The NATO SOFA was characterized as a good compromise between the law of the flag of the sending state and the principle of territorial sovereignty of the receiving state.[64] "This instrument has furnished both a precedent and a model for settling these questions of jurisdiction and immunity on a consensual basis. A number of other agreements entered into by the United States for the maintenance and operation of overseas bases have followed closely the jurisdictional arrangements in the Agreement."[65] It has also been said that the conclusion of the NATO SOFA laid to rest the misconceptions and misreadings of the *Schooner Exchange* doctrine.[66] This development was deemed to have been approved by the U.S. Supreme Court when, in 1956, it ruled in *Wilson v. Girard*[67] that "a sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its border, unless it expressly or implicitly consents to surrender its jurisdiction."[68]

As it now stands, the international law norm governing agreements involving the stationing of foreign troops abroad follows the principle of concurrent jurisdiction.[69]

2. The Development of the R.P.-U.S. Visiting Forces Agreement

After the last American serviceman left Subic Naval Base after the termination of the Military Bases Agreement, representatives of both the Philippine government and the United States government met to negotiate a new agreement that will define U.S.-Philippine military relations. On July 18, 1997, U.S. Defense Deputy Assistant Secretary for Asia Pacific Kurt Campbell met with Philippine Foreign Affairs Undersecretary Rodolfo Severino, Jr. to discuss and negotiate such an agreement.[70] The result of such negotiations is the "Agreement Between the Government of the Republic of the Philippines and the Government of the United States of America Regarding the Treatment of United States Armed Forces Visiting the Philippines," more popularly known as the Visiting Forces Agreement (VFA). President Fidel Ramos approved the VFA, which was respectively signed by Foreign Affairs Secretary Domingo Siazon and United States Ambassador to the Philippines

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[63] ROUSE AND BALDWIN, *supra* note 58 at 101.

[64] *Id.* at 4-5.

[65] GERALD DRAPER, CIVILIANS AND THE NATO STATUS OF FORCES AGREEMENT 34 (1966).

[66] RICHARD ERICKSON, *Status of Forces Agreements: A Sharing of Sovereign Prerogative*, 37 A.F.L. REV. 137 (1994).

[67] 354 U.S. 524 (1956).

[68] *Id.* at 529.

[69] ROUSE AND BALDWIN *supra* note 58 at 103.

[70] Bayan v. Zamora, G.R. No. 138570, 342 SCRA 449, 464-465 (2000).

Thomas Hubbard on February 10, 1998.[71] President Joseph Estrada, who replaced President Ramos after the 1998 presidential elections, ratified the VFA on October 5, 1998.[72] The Philippine Senate then gave its concurrence to the agreement on May 27, 1999 and the VFA entered into force on June 1, 1999.[73]

B. TREATIES AND THE CONSTITUTION

In analyzing the Supreme Court decisions concerning the Visiting Force Agreement, an understanding of Philippine practice regarding treaties is needed.

There are two schools of thought concerning Philippine treaty practice. The first school of thought deals with the primacy of the Constitution over any international agreement entered into by the Philippines. In *In re: Petition of Arturo Efren Garcia for admission to the Philippine Bar without taking the examination*,[74] the Supreme Court, in an obiter dictum, said that the executive branch in negotiating the bilateral treaty with Spain involving reciprocal recognition of foreign academic degrees and licenses could not have circumvented the rules of the Philippine Constitution granting exclusive power to the Supreme Court to regulate admission to the bar. In *Abbas v. Commission on Elections*,[75] the petitioners charged that the law providing for the Autonomous Region in Muslim Mindanao conflicts with the Tripoli Agreement signed by the Philippines and Libya in 1976. The Supreme Court speaking through Justice Irene Cortes found it "neither necessary nor determinative of the case to rule on the nature of the Tripoli Agreement and its binding effect on the Philippine Government whether under public international or internal Philippine law."[76] In *Ichong v. Hernandez*[77] the Supreme Court held that the provisions of a treaty are always subject to qualification or amendment by a subsequent law, or that it is subject to the police power of the state. The Supreme Court also held in *Gonzales v. Hechanova*[78] that

> As regards the question whether an international agreement may be invalidated by our courts, suffice it to say that the Constitution of the Philippines has clearly settled it in the affirmative by providing, in Section 2 of Article VIII thereof, that the Supreme Court may not be deprived "of its jurisdiction to review, revise, reverse, modify, or affirm on appeal, certiorari, or writ of error as the law or the rules of court may provide, final judgments

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[71] *Id.* at 465.
[72] *Id.*
[73] *Id.* at 469.
[74] 112 Phil. 884 (1961).
[75] G.R. No. 89651, 179 SCRA 287 (1989).
[76] *Id.* at 294.
[77] G.R. No. L-7995. 101 Phil 1155 (1957).
[78] G.R. No. L-21897. 9 SCRA 230 (1963).

> and decrees of inferior courts in – (1) All cases in which the constitutionality or validity of any treaty, law, ordinance, or executive order or regulation is in order." In other words, our Constitution authorizes the nullification of a treaty, not only when it conflicts with the fundamental law, but, also, when it runs counter to an act of Congress.[79]

On the other hand, there are Supreme Court decisions that do not affirm the primacy of national law over international law. In *Philip Morris, Inc. v. Court of Appeals*[80] the Supreme Court mentioned that "the fact that international law has been made part of the law of the land does not by any means imply the primacy of international law over national law in the municipal sphere. Under the doctrine of incorporation as applied in most countries, rules of international law are given a standing equal, not superior, to national legislation."[81] The Court then mentioned that by the principle of *pacta sunt servanda*, a treaty is favored over municipal law. Similarly, in the case of *Tañada v. Angara*,[82] the Supreme Court cited the rule on *pacta sunt servanda* whereby international agreements must be performed in good faith. The Court explained that by joining the community of nations, the Philippines necessarily surrendered a part of its sovereignty under the concept of *auto-limitation.*

> By their inherent nature, treaties really limit or restrict the absoluteness of sovereignty. By their voluntary act, nations may surrender some aspects of their state power in exchange for greater benefits granted by or derived from a convention or pact. After all, states, like individuals, live with coequals, and in pursuit of mutually covenanted objectives and benefits, they also commonly agree to limit the exercise of their absolute rights.[83]

These contending schools of thought play a role in the Supreme Court's decisions involving the R.P.-U.S. Visiting Forces Agreement.

C. LEGITIMATING U.S. MILITARY PRESENCE

1. The case of *Bayan v. Zamora*

The first case involving the Visiting Forces Agreement was *Bayan v. Zamora*.[84] On October 5, 1998, President Joseph Estrada ratified the VFA. The

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[79] Gonzales v. Hechanova, G.R. No. L-21897, 9 SCRA 230, 242 (1963).
[80] G.R. No. 91332, 224 SCRA 576 (1993).
[81] *Id.*
[82] G.R. No. 118295, 272 SCRA 18 (1997).
[83] *Id.* at 66.
[84] G.R. 138570, 342 SCRA 449 (2000).

Senate gave its concurrence[85] to the agreement on May 27, 1999 and on June 1, 1999, the VFA officially entered into force. Petitioners in this case are legislators, nongovernmental organizations, citizens and taxpayers who assail the constitutionality of the agreement.

The Supreme Court, in this case, discarded the strict application of the *locus standi* doctrine by invoking the paramount importance and the constitutional significance of the issues raised in the petitions.[86]

In ruling for the constitutionality of the VFA, the Supreme Court laid down three requisites by which to interpret section 25, article XVIII of the Constitution. These requisites are that "(a) it must be under a *treaty*; (b) the treaty must be *duly concurred in by the Senate* and, when so required by Congress, ratified by a majority of the votes cast by the people in a national referendum; and (c) *recognized as a treaty* by the other contracting state."[87]

The Supreme Court held that "the phrase *'recognized as a treaty'* meant that the other contracting party *accepts or acknowledges* the agreement as a treaty. To require the other contracting state, the United States of America in this case, to submit the VFA to the United States Senate for concurrence pursuant to its Constitution, is to accord strict meaning to the phrase."[88]

This paragraph in the Supreme Court decision is an abdication of sovereignty, a clear case of a mendicant attitude towards a foreign power. A treaty is entered into by nations in order to govern their relations. It deals with a broad range of subjects. When a nation enters into a treaty, it is presumed that it does so with its own paramount interest in mind. Thus, when the Constitution states that a treaty must be *recognized* as such by the other contracting state, the constitutional mandate must be interpreted strictly. This is particularly true when the treaty involves a subject, in this case involving foreign military troops, which is of a controversial and highly-polarizing nature.

The second point that needs to be raised is the ruling of the Supreme Court that "it is inconsequential whether the United States treats the VFA only as an executive agreement because, under international law, an executive agreement is as

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[85] 1987 CONST., art. 7, sec. 21. "No treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate."

[86] Bayan v. Zamora, G.R. 138570, 342 SCRA 449, 480 (2000).

[87] *Id.* at 486.

[88] *Id.*

binding as a treaty."[89]

This ruling is a deviation from the original position of the Framers of the Constitution on the matter of whether any agreement related to foreign military bases, troops, or facilities should be recognized as a treaty or otherwise. The Records of the Constitutional Commission clearly shows that any such agreement must be in the form of a treaty recognized as such by the other contracting state and, in the case of the U.S., submitted to the U.S. Senate for concurrence. Thus,

> MR. SUAREZ. Thank you for the clarification. The other point is that the proposal requires recognition of this treaty by the other contracting nation. How would that recognition be expressed by that other contracting nation? That is in accordance with their constitutional or legislative process, I assume.
>
> FR. BERNAS. As Commissioner Romulo indicated, since this certainly would refer only to the United States, because it is only the United States that would have the possibility of being allowed to have treaties here, then we would have to require that the Senate of the United States concur in the treaty because under American constitutional law, there must be concurrence on the part of the Senate of the United States to conclude treaties.[90]

Clearly, what the Framers had in mind was a treaty recognized as such by the United States, and validly concurred in by the U.S. Senate. Concurrence by the U.S. Senate is particularly required because international agreements entered into by the United States are not only in the nature of treaties but also in the nature of the so-called congressional-executive agreements and sole executive agreements which are just as binding as a treaty, but with less stringent procedural requirements. Under a treaty, the U.S. Senate's concurrence, through a vote of two-thirds of its members, is needed by the U.S. President, under the Treaty Clause of the U.S. Constitution, while in congressional-executive agreements, only a majority of both Houses in the U.S. Congress is needed to ratify the foreign policy initiatives of the U.S. President.[91]

Granted that, according to the Supreme Court, under international law "there is no difference between treaties and executive agreements in their binding effect upon states concerned, as long as the negotiating functionaries have remained

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[89] *Id.*

[90] IV Records of the Constitutional Commission 781.

[91] BRUCE ACKERMAN AND DAVID GOLOVE, *Is Nafta Constitutional*, 108 HARV. L. REV. 799 (1995). The article deals with the evolution of American international agreements, from the monopoly of the Senate in concurring with the acts of the U.S. president, to the modern and less stringent requirements of congressional-executive agreements. Under the former, the concurrence of two-thirds of the U.S. Senate is required while under the latter, only a majority of both Houses is required to have valid and effective international agreements entered into by the U.S. President.

within their powers."[92] What the Supreme Court failed to consider is the fact that the procedural requirements of treaties and executive agreements are different.

Justice Puno's dissent, on the other hand, clearly distinguishes between treaties and other international agreements. Justice Puno explains that distinguishing between treaties and other international agreements is important.

> The different types of executive agreements bear distinctions in terms of constitutional basis, subject matter, and legal effects in the domestic arena.[93] x x x In U.S. practice, a 'treaty' is only one of four types of international agreements, namely: Article II treaties, executive agreements pursuant to a treaty, congressional-executive agreements, and sole executive agreements."[94]
>
> These executive agreements which have grown to be the primary instrument of U.S. foreign policy may be classified into three types, namely:
>
> (1) *Treaty-authorized executive agreements*, i.e., agreements made by the President pursuant to authority conferred in a prior treaty;
> (2) *Congressional-executive agreements*, i.e., agreements either (a) negotiated by the President with prior Congressional authorization or enactment or (b) confirmed by both Houses of Congress after the fact of negotiation; and
> (3) *Presidential or sole executive agreements*, i.e., agreements made by the President based on his exclusive presidential powers, such as the power as commander-in-chief of the armed forces pursuant to which he conducts military operations with U.S. allies, or his power to receive ambassadors and recognize foreign governments.[95]

Justice Puno then explains that the VFA is a mere sole executive agreement and that the Supreme Court "*will be standing on unstable ground if it places a sole executive agreement like the VFA on the same constitutional plateau as a treaty. Questions remain and the debate continues on the constitutional basis as well as the legal effects of sole executive agreements under U.S. law.*"[96]

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[92] Bayan v. Zamora, G.R. 138570, 342 SCRA 449 (2000).
[93] *Id.* at 508.
[94] *Id.* at 506.
[95] *Id.* at 508.
[96] *Id.* at 520.

> Often the treaty process will be used at the insistence of other parties to an agreement because they believe that a treaty has greater 'dignity' than an executive agreement, because its constitutional effectiveness is beyond doubt, because a treaty will 'commit' the Senate and the people of the United States and make its subsequent abrogation or violation less likely.[97]

This statement is precisely the point of the Framers of the Constitution when they insisted that the other party must recognize such an agreement as a treaty. What the Framers wanted to avoid was the "unacceptable asymmetry" between the Philippines and the United States where the former recognized the U.S Military Bases Agreement as a treaty but the latter did not.

> MR. OPLE. I was very keen to put this question because I had taken the position from the beginning – and this is embodied in a resolution filed by Commissioners Natividad, Maambong and Regalado – that it is very important that the government of the Republic of the Philippines be in a position to terminate or abrogate the bases agreement as one of the options. And the reason we have put this forth is that we do not believe in merely a renegotiation of the existing bases agreement if it comes to that. We believe that this is flawed from the beginning, which is not the same thing as saying that it is a nullity. But I think we have acknowledged starting at the committee level that the bases agreement was ratified by our Senate; it is a treaty under Philippine law. But as far as the Americans are concerned, the Senate never took cognizance of this and, therefore, it is an executive agreement. That creates a wholly unacceptable asymmetry between the two countries. Therefore, in my opinion, the right step to take, if the government of our country will deem it in the national interest to terminate this agreement or even to renegotiate it, is that we must begin with a clean slate; we should not be burdened by the flaws of the 1947 Military Bases Agreement. I think that is a very important point. I am glad to be reassured by the two Gentlemen that there is nothing in these proposals that will bar the Philippine government at the proper time from exercising the option of abrogation or termination.[98]

It is clear that the Framers had in mind a treaty that is concurred in by the U.S. Senate, in this particular case. When the Supreme Court ruled that the VFA is valid, it closed its eyes on the further constitutional requirement under section 25, article XVIII, that the other cntracting state must recognize the same as a treaty. This requirement was precisely put in place to avoid the "unacceptable asymmetry" explained by Commissioner Ople during the formulation of the said constitutional provision. In ruling the way it did, the Supreme Court has placed us back to the

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[97] LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 224 (1996), as cited in Justice Puno's dissenting opinion, *id.* at 520.

[98] IV Records of the Constitutional Commission 780.

situation under the U.S. Military Bases Agreement where we allowed the United States to disregard our constitutional provisions. To refuse to rule on such a matter, when the Constitution explicitly requires it, makes the Supreme Court a tool of mendicancy.

Another point that the decision raised is that no grave abuse of discretion attended the President's signing of the VFA and the Senate's subsequent ratification. Explaining the role of the executive in entering into treaties, the Supreme Court stated that

> By constitutional fiat and by the intrinsic nature of his office, the President as head of State, is the sole organ and authority in the external affairs of the country. In many ways, the President is the chief architect of the nation's foreign policy; his "dominance in the field of foreign relations is (then) conceded. Wielding vast powers and influence, his conduct in the external affairs of the nation, as Jefferson describes, is *'executive altogether.'*[99]

Similarly, the Supreme Court explained the role of the Senate in the following manner,

> As to the power to concur with treaties, the Constitution lodges the same with the Senate alone. Thus, once the Senate performs that power, or exercises its prerogative within the boundaries prescribed by the Constitution, the concurrence cannot, in like manner, be viewed to constitute an abuse of power, much less grave abuse thereof. Corollarily, the Senate, in the exercise of its discretion and acting within the limits of such power, may not be similarly faulted for having simply performed a task conferred and sanctioned by no less than the fundamental law.[100]

The Supreme Court then declared that there was no showing of grave abuse of discretion to warrant the exercise of judicial power. The Court further adds that such being the case, the Supreme Court "is then without power to conduct an incursion and meddle with such affairs purely executive and legislative in character and nature."[101]

The Supreme Court misappreciates its role in foreign policy affairs. Courts do not "stand in the shadows where our interaction with other nations is

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[99] Bayan v. Zamora, G.R. 138570, 342 SCRA 449, 494 (2000).
[100] *Id.* at 496.
[101] *Id.* at 497.

implicated."[102] It is a co-equal branch of government vested with the power of reviewing the constitutionality of all government actions. As such, even treaties and international agreements may be looked into by the Supreme Court, both as to matters of substance and as to matters of procedure.

In this case, the Supreme Court o looked into the procedural requirements of the Constitution in determining whether a treaty was validly ratified. It did not look into the substance of the issue. Certainly, procedural rules may have been followed in the negotiations, the Presidential ratification and the Senate concurrence on the agreement. But compliance with mere procedural rules does not make an unconstitutional agreement constitutional.

The more telling argument against the Supreme Court ruling in *Bayan v. Zamora* is that it allowed a mere sole executive agreement on the part of the U.S. to supplant Philippine constitutional provisions. To understand why this is so, one has to look into the contentious debates in public international law on the interface between constitutional law and international law. The debates are essential in order to understand the reason why the Supreme Court refuses to rule on the substantive issues of cases involving foreign treaties and executive agreements.[103] By outlining the debates' major points, the author hopes to convince the reader that the Supreme Court simply followed the wrong appreciation of our constitution vis-à-vis international law. The author also hopes to show that the 1987 Constitution, compared with the previous constitutions, limits, rather than unqualifiedly authorizes, the foreign policy prerogative of the Executive.

One side of the debate looks into the monistic interpretation of international law vis-à-vis constitutional law. For monists, both municipal law and international law form part of a single system of law with international law at the apex. Constitutions and legislations, for monists, must take into account the supremacy of international law.[104]

On the other hand, "[d]ualists insisted that international law and national law are distinct legal systems and have no jurisprudential relationship."[105]

International law is incorporated under section 2, article II of our

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[102] PETER SPIRO, *Treaties, Executive Agreements, and Constitutional Method*, 79 TEXAS L. REV. 961 (2001).

[103] *Tanada v. Angara*, G.R. 118235. 272 SCRA 18 (1997).

[104] LOUIS HENKIN, *General Course on Public International Law*, 216 RECUEIL DES COURS 25, 89-90 (1989-IV).

[105] *Id.* at 90.

Constitution. This gives the impression that since the efficacy of international law in our country is created by the Constitution, it follows that the Constitution is supreme over the former. In actual judicial practice, this does not seem to be the case. The Supreme Court has refused to rule on the substance of international agreements when called upon to do so. By doing so, it allows international agreements to amend the Constitution.

The case of *Tañada v. Angara*,[106] a leading case in Court interpretation of international agreements vis-à-vis constitutional law, is a case in point. In the said case, the General Agreement on Tariffs and Trade (GATT) was ratified by the President and concurred in by the Senate. In ruling that the GATT does not contravene the Constitution, the Supreme Court cited the rule of *pacta sunt servanda* whereby international agreements must be performed in good faith. The Court then explained that by joining the community of nations, the Philippines necessarily surrendered a part of its sovereignty under the concept of *auto-limitation.*

It has long been settled in Philippine constitutional law, that the final authority to decide the constitutionality of laws is the Supreme Court.[107] As the final interpreter, it is the duty and the responsibility of the Supreme Court to decide with finality whether a provision of the constitution is a rule of fundamental importance.[108]

Thus, the Supreme Court has a role in determining whether treaties and executive agreements are valid and binding. The Supreme Court is tasked with determining the "constitutionality of a treaty, international or executiv agreement."[109] The Supreme Court is also tasked with determining "whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government."[110]

It may be said that when the executive and the legislature have given their consent, the international agreement is already valid and effective. Full consent of the sovereign, however, is obtained when no opposition to such an agreement has

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[106] G.R. 118295. 272 SCRA 18 (1997).

[107] *Angara v. Electoral Commission*, 63 Phil. 139 (1936).

[108] The term "fundamental importance" is itself a problematic concept. It implies that each provision of the Constitution is weighed against other constitutional provisions, thereby creating a dichotomy between important and not-so-important provisions. It implies that some provisions may be rendered superfluous. A more proper interpretation would be that each constitutional provision is itself "fundamentally important" and must be obeyed with equal deference.

[109] CONST., art. 8, sec. 4, par. 2.

[110] CONST., art. 8, sec. 1.

arisen which would give the Supreme Court a chance to rule on its constitutionality. In our scheme of government, full consent is given when all three branches of government are in agreement as to the subject. That full consent is obtained only when the Supreme Court has given its assent to the treaty can be gleaned from the ruling in *Gonzales v. Hechanova*[111] where the Supreme Court held that,

> As regards the question whether an international agreement may be invalidated by our courts, suffice it to say that the Constitution of the Philippines has clearly settled it in the affirmative by providing, in Section 2 of Article VIII thereof, that the Supreme Court may not be deprived "of its jurisdiction to review, revise, reverse, modify, or affirm on appeal, certiorari, or writ of error as the law or the rules of court may provide, final judgments and decrees of inferior courts in – (1) All cases in which the constitutionality or validity of any treaty, law, ordinance, or executive order or regulation is in order." In other words, our Constitution authorizes the nullification of a treaty, not only when it conflicts with the fundamental law, but, also, when it runs counter to an act of Congress.[112]

The Supreme Court, however, refused to take such a position in *Bayan v. Zamora*. As it explained in *Tañada v. Angara*, to strike down Senate Resolution No. 97 "would constitute grave abuse in the exercise of our own judicial power and duty."[113] In *Bayan v. Zamora*, the Supreme Court misappreciated its constitutional role vis-à-vis questions of Presidential ratification and Senate concurrence of international agreements. It chooses, to use the words of one writer, "to stand in the shadows where our interaction with other nations is implicated."[114]

With the ruling in *Tañada*, it is easy to understand why the Supreme Court ruled the way it did in *Bayan v. Zamora*. The ruling in the latter case is consistent with that in the former. It does not, however, remove doubts as to the validity of such an action. What the Court did was to abdicate a constitutionally granted power to review all acts of the State, including those involving treaties and international agreements.

One other factor in the decision of *Bayan v. Zamora* is worth explaining Magallona is of the opinion that the general policy of the Constitution is against foreign military presence in the country. The general rule is that "foreign military bases, troops, or facilities shall not be allowed in the Philippines." The exceptions to the rule are (1) that it shall be under a treaty subject to concurrence by the Senate; (2)

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[111] G.R. No. L-21897. 9 SCRA 230 (1963).
[112] *Id.*
[113] *Tañada v. Angara*, G.R. No. 118295, 272 SCRA 18, 81 (1997).
[114] SPIRO, *supra* note 102.

that it shall be ratified by a majority of the votes cast by the people in a national referendum held for the purpose, if the Congress provides for this additional requirement; and (3) that it shall be recognized as a treaty by the other state party.[115] In addition, the treaty must conform to three sets of constitutional standards, namely (1) that it must have the requisites provided in section 25, article XVIII; (2) that the features of foreign military presence it provides must not contradict the constitutional principles and policies on peace and amity with all nations, as well as those relating to the conduct of foreign relations and to the nuclear weapon-free regime; and (3) that being derogatory of the fundamental orientation of the Constitution, it must be justified as a highly exceptional case, subject to the further condition that being permitted by a constitutional provision of a transitory character, it must necessarily be short-lived in its duration.[116]

All these additional standards were not met by the Visiting Forces Agreement. The third standard is to the point. Under Article 9 of the VFA, the agreement shall remain in force until the expiration of 180 days from the date on which either party gives the other party notice in writing that it desires to terminate the agreement. The Supreme Court did not address this issue. It is clear, however, that the duration of the VFA is not short-lived. It is subject only to a notice in writing by one of the parties to terminate the agreement. Neither is the VFA an exceptional case that would warrant the presence of foreign military troops in the country.

Recent events, furthermore, justify the suspicion that the VFA is but a tool to perpetuate U.S. military presence in the country. The case of *Lim v. Executive Secretary*[117] would bear this out.

2. The case of *Lim v. Executive Secretary*

Lim v. Executive Secretary involved the R.P.-U.S. military exercises, known as Balikatan, held in Basilan Island in Mindanao. The exercises are a simulation of joint military maneuvers pursuant to the Mutual Defense Treaty, a bilateral defense agreement entered into by the Philippines and the United States in 1951. On January 2002, personnel from the United States armed forces arrived in the country to take part in these exercises.

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[115] MERLIN MAGALLONA, *The New Bases Treaty: Political and Legal Issues*, 1 INTERNATIONAL LAW ISSUES IN PERSPECTIVES 176 (1996).

[116] *Id.* at 177.

[117] G.R. No. 151445, April 11, 2002.

The exercises were held amid the backdrop of a campaign against terror conducted by the U.S. The United States had just suffered a devastating terrorist attack which occurred on September 11, 2001. The World Trade Center and the Pentagon had been hit by hijacked planes, causing loss of lives and damage to property. The U.S. suspected the Al-Qaeda group of Osama bin-Laden to be behind the attacks.

One group operating inside the Philippines, the Abu Sayyaf Group, is suspected to have links to Al-Qaeda. The group holds Basilan as a stronghold. For this reason, the U.S. and Philippine governments wanted the exercises to be held in Basilan, where the U.S. would be able to assist the Philippine military in stopping the terrorist activities of the Abu Sayyaf.

Pursuant to these exercises, a Terms of Reference (TOR) was drafted which provided for the conduct of the activities of the Balikatan. The TOR prohibited the establishment of permanent basing structures and further prohibited the U.S. participants to engage in combat, without prejudice to their right of self-defense.

The Supreme Court, in determining whether the Balikatan is contemplated by the Visiting Forces Agreement, found that the terminology employed in the VFA is itself a source of the problem. "The VFA permits United States personnel to engage, on an impermanent basis, in 'activities,' the exact meaning of which was left undefined. The expression is ambiguous, permitting a wide scope of undertakings subject only to the approval of the Philippine government."[118]

The Court then justified the ambiguity as intentional on both parties.

> In our view, it was deliberately made that way to give both parties a certain leeway in negotiation. In this manner, visiting U.S. forces may sojourn in Philippine territory for purposes other than military. As conceived, the joint exercises may include training on new techniques of patrol and surveillance to protect the nation's marine resources, sea search-and-rescue operations to assist vessels in distress, disaster relief operations, civic action projects such as the building of school houses, medical and humanitarian missions, and the like.
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> Under these auspices, the VFA gives legitimacy to the current Balikatan exercises. It is only logical to assume that "Balikatan 02-1," a "mutual antiterrorism advising, assisting and training exercise," falls under the umbrella of sanctioned or allowable activities in the context of the agreement. Both the history and intent of the Mutual Defense Treaty and the VFA

> support the conclusion that combat-related activities – as opposed to combat itself – such as the one subject of the instant petition, are indeed authorized.[119]

It is helpful to recall that one of this article's criticisms of the case of *Bayan v. Zamora* dealt with the non-use by the Supreme Court of its power to nullify a treaty that conflicts with the Constitution. In contrast with *Bayan v. Zamora,* the Supreme Court in *Lim v. Executive Secretary* acknowledged the primacy of municipal law over international law.

In coming up with this position, the Court first cited *Philip Morris, Inc. v. Court of Appeals*[120] where it was mentioned that "the fact that international law has been made part of the law of the land does not by any means imply the primacy of international law over national law in the municipal sphere. Under the doctrine of incorporation as applied in most countries, rules of international law are given a standing equal, not superior, to national legislation."[121] The Court then mentioned that by the principle of *pacta sunt servanda,* a treaty is favored over municipal law.

The Court also cited *Ichong v. Hernandez*,[122] where it was held that the provisions of a treaty are always subject to qualification or amendment by a subsequent law, or that it is subject to the police power of the state. Finally, the Supreme Court reiterated its ruling in *Gonzales v. Hechanova*[123] where the Court held that the Constitution authorizes the nullification of a treaty, not only when it conflicts with the fundamental law, but also when it runs counter to an act of Congress.

In *Bayan v. Zamora,* the Court refused to exercise the power to review the contents of the Visiting Forces Agreement. Instead, the Court focused on whether the procedural requirements of valid ratification and concurrence were met. In contrast to *Bayan v. Zamora,* the *Lim v. Executive Secretary* case acknowledged the power of the Court to nullify treaties which run counter to the Constitution.

To acknowledge a power is one thing; to exercise it is another matter. In *Lim v. Executive Secretary,* the Court, while acknowledging it had the power to rule on the constitutionality of an international agreement, refused to exercise the constitutionally-granted power. The Court refused to look into the question of whether American troops are actively engaged in combat alongside Filipino soldiers. Such a

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[119] *Id.*
[120] G.R. No. 91332, 224 SCRA 576 (1993).
[121] *Id.*
[122] G.R. No. L-7995, 101 Phil 1155 (1957).
[123] G.R. No. L-21897, 9 SCRA 230 (1963).

question, according to the Court, is a question of fact which the Court is "understandably loath to do."[124]

Engaging in combat, in modern warfare, is not limited to shooting or firing back at the enemy. Information gathering, analysis, distribution and other activities may fall under the criteria of combat activities. The field of battle has long expanded beyond the jungles of guerilla warfare and into the comforts of computerized command centers. It would do well for the Supreme Court to define what engaging in combat means in the modern age. This is especially true with the Balikatan exercises which are held in the context of an ongoing "War on Terrorism," the parameters of which are still being continuously debated in the international arena. Any information obtained from the fields of Basilan, under Balikatan 02-1, to the confines of Sulu, under a new Balikatan reportedly being negotiated by Philippine and U.S. authorities,[125] is a vital addition to the arsenal of warfare on the part of the United States. Yet, the Supreme Court refuses to acknowledge that, in this particular case and context, the training and similar activities conducted under the Balikatan are in themselves combat activities.

IV. CONCLUSION

The Supreme Court must not stand mute and silent when called upon to defend the Constitution from attacks either domestic or foreign. This should especially be so when an international instrument such as the Visiting Forces Agreement is derogative of the fundamental law of the land. The Court must be ever vigilant of attempts to subvert the spirit and purpose of the Constitution.

Neither must the Supreme Court allow itself to reinforce and legitimate a mendicant foreign policy. The Court must, in the exercise of its powers, ensure that the Philippines is liberated not only from the shackles of foreign military presence, but also from the malaise of a mendicant legal system. In doing so, the Court will not only empower the people but will liberate them as well.

One is led to the conclusion that in legitimating U.S. military presence in the country, the Supreme Court is ultimately legitimating a mendicant foreign policy.

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[124] G.R. No. 151445, April 11, 2002.

[125] A news report quoted White House spokesperson Ari Fleischer as saying that U.S. Forces will be engaged in combat operations in Sulu. *See* Lira Dalangin, *Reyes to meet Rumsfeld on exact role of US troops*, PHIL. DAILY INQUIRER, February 26, 2003. <http://www.inq7.net/brk/2003/feb/26/brkpol_11-1.htm> last visited March 14, 2003.

All his life, Recto has been one of the foremost critics of our mendicant foreign policy. Fifty years after delivering his classic speech on our mendicant foreign policy, the country still finds itself trapped in such a malaise. It is apt then, that we conclude in the words of Recto:

> Yet, though we may feel the deepest admiration and respect for the American people, for their sense of fairness and their spirit of self-criticism, their love of liberty and justice, their patriotic pride, their deep and constant concern for their world destiny, and their thoroughness in the enforcement of their rights, still we should not believe, and I think it is wrong for us to believe and to act as if we believed, that American policy can ever have any objective other than the security, welfare, and interest of the American people.[126]

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[126] CLARO RECTO, *A Mendicant Foreign Policy*, in RENATO CONSTANTINO, VINTAGE RECTO 69 (1986).