THE GROUNDS UNDER INTERNATIONAL LAW FOR THE ABROGATION OF THE PHILIPPINE-UNITED STATES MILITARY BASES AGREEMENT

LITO A. MONDRAGON *

I. INTRODUCTION

Ever since the independence of the Philippines from the United States, there has been going on in the Philippines a continuing re-evaluation of the Philippine-American relationship. This is not surprising, in view of the changes in the Philippines and in the rest of Asia since World War II. Since then, Philippine relations with other Asian countries have radically changed. Filipinos have had more contacts with Asians in more than three decades of independence than they had in more than three centuries of Spanish and American occupation. This desirable development is encouraged and hastened especially by the present leadership when diplomatic relations with other countries, regardless of ideology and economic system, were established.

A re-evaluation of Philippine-American relations would necessarily include a re-examination of the relevance and validity of the Philippine-United States Military Bases Agreement.[1] The initial pact was made more than 30 years ago, right after the devastation of World War II, because of the desire of the Philippines to safeguard its newly won independence. Since then, however, the Philippines and its neighbors in Southeast Asia have been seeking ways to achieve peace, neutrality, and stability in the region.

These unfolding of events in the contemporary world have put into sharp focus the necessity of re-examining our relations with United States, specifically, the Military Bases Agreement *vis-a-vis* the international law doctrine of *Jus Cogens* and *Rebus Sic Stantibus*.

II. THE DOCTRINE OF "JUS COGENS"

Jus cogens or peremptory norm of general international law is defined as "a norm accepted and recognized by the international community of

* *Vice-Chairman*, Student Editorial Board, Philippine Law Journal, 1976-1977.

1 Agreement Between the Republic of the Philippines and the United States of America Concerning Military Bases, March 26, 1947, I-2 DFATS 144; 43 UNTS 271; TIAS 1775; I PTS 357.

states as a whole as a norm which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[2] *Jus cogens* is contrasted with *jus dispositivum*. *Jus dispositivum* is defined as "a rule of International Law which is capable of being modified by contrary contractual engagements."[3]

A. *The Origins of the Concept of Jus Cogens in International Law*

The concept of *jus cogens* is taken from municipal legal systems and its reception in international law shares the possible pitfalls inherent in municipal law analogies. While the idea was known in Roman law, the term *jus cogens* itself does not appear in its sources. The concepts of *ordre public* or public policy, which are known to the civil law and to the common law systems, do not entirely coincide with the concept of *jus cogens*. In the law of obligations (or the law of contracts) of the various jurisdictions *jus cogens* simply means rules the applications of which to a particular situation cannot be set aside by the will of the parties to a contract.[4]

The traditional municipal law terminology opposes *jus cogens*, which is absolute, ordering, prohibiting, to *jus dispositivum*, rules which yield to the will of the parties.[5]

The idea of making a provision on international *jus cogens* part of an official codification of the law of treaties originates in Lauterpacht's First Report on the Law of Treaties of 1953. He did not use the term of article, *jus cogens* or peremptory norm from which no derogation is permitted. He suggested a provision (Article 15 of his draft) that "a treaty, or any of its provisions, is void if its performance involves an act which is illegal under international law and if it is declared so to be by the International Court of Justice." In his "Comment" he made it clear that "the test was not inconsistency with customary international law pure and simple but inconsistency with such overriding principles of international law which may be regarded as constituting principles of international public policy." Lauterpacht's successors as Special Rapporteurs of the International Law Commission, Sir Gerald Fitzmaurice and Sir Humphrey Waldock, introduced the concept of consistency with a general rule or principle of international law having the character of *jus cogen*.[6]

While the proposal to include the concept in an official codification is hardly more than a dozen years old, in the literature of international law

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[2] Art. 53, Vienna Convention on the Law of Treaties, Open for signature May 23, 1969, U.N. DOC. A/CONF. 39/27, May 23, 1969; 63 AM. J. INT'L. L. 891 (1969).

[3] GAMBOA, A DICTIONARY OF INTERNATIONAL LAW AND DIPLOMACY 164 (1973).

[4] Schwelb, *Some Aspects of International Jus Cogens as Formulated by the International Law Commission*, 61 AM. J. INT'L. L. 948 (1967).

[5] *Ibid.*

[6] Fitzmaurice, *Third Report on the Law of Treaties*, 1958 I.L.C. YRBK. (II) 40; Waldock, *Second Report on the Law of Treaties*, 1963 I.L.C. YRBK. (II) 52 cited in Schwelb, *op. cit.*

the concept of an international *ordre public* has been advocated for a very long time.[7] Professor Alfred Verdross[8] traces the idea to the treatise of Emeric Vattel[9] and Christian Wolff.[10] back in 1758 and 1764 respectively.

A survey of both the older and the more recent literature shows, however, that the writings on the subject have been theoretical statements by learned authors, not substantiated by references to rulings of international courts or tribunals, to less authoritative state practice, or to diplomatic proceedings or correspondence.[11]

In the indeces of most systems, textbooks and digests of international law, the terms *jus dispositivum* and *jus cogens* are lacking. Only a few writers deal with it. They are found in the words of Kelsen,[12] Bin Cheng,[13] Schwarzenberger,[14] Dahm,[15] Quadri,[16] and Tunkin.[17]

B. *The Two Schools of Thought*

According to the general opinion of writers and jurists of international law, the power of states to conclude international treaties is in principle unlimited. They are in principle competent to enter into international agreements on any subject whatever. The problem arises, however, if, under general international law, there are exceptions in this principle. Hence, the question is whether all norms of general international law may be repealed by treaty provisions in relations among the contracting parties, or whether there are norms of general international law restricting the freedom of states to conclude treaties. In other words the question is whether all norms of international law have the character of *jus dispositivum* or if there exists some norms having the character of *jus cogens* too, from which no derogation is permitted by an agreement *inter partes*.[18]

The problem of international *jus cogens* can be stated in a simple question: Are there rules of international law which, by consent, individual subjects of international law may not modify?

In the modern positivist doctrine of international law no settled opinion can be found on this question. Only a few writers deal with it.

The situation is quite different in the natural law school of international law. It starts from the idea of a necessary law which all states are obliged

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[7] Schwelb, *op. cit.*, p. 949.
[8] Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 AM. J. INT'L. L. 56 (1966).
[9] LE DROIT DES GENS (1758).
[10] JUS GENTIUM (1764).
[11] Schwelb, *op. cit.*, p. 949.
[12] PRINCIPLES OF INTERNATIONAL LAW, 89, 323, 344 (1952).
[13] GENERAL PRINCIPLES OF LAW, 5, 393-394 (1953).
[14] INTERNATIONAL LAW, 352-353, 425-427 (1957).
[15] VOLKERRECHT 16, 443; 3 SCHWARZENBERGER, INTERNATIONAL LAW 60, 140 (1957).
[16] DIRITTO INTERNAZIONALE PUBLICO, 94-95 (3rd ed., 1960) cited in Verdross, *op. cit.*
[17] DAS VOLKERRECHT DER GEGENWART, 95-96 (1963) cited in Verdross, *op. cit.*
[18] Verdross, *op. cit.*, p. 55.

to observe. Christian Wolff and Emeric Vattel declare for instance, that nations cannot alter the law by agreement. A. W. Acffter says that all treaties are void whose object is physically or morally impossible.[19]

In the present-day theory of international law some writers of recognized competence maintain that general international law consists exclusively of non-compulsory norms, because states are always free to conclude treaties which may deviate *inter partes* from general international law. So the eminent Professor Charles Rousseau says that in international law the principle of public order is nearly non-existent in consequence of the individualistic structure of international law. He adds that the hypothesis of an illegal object of an international treaty is in practice without any interest. The eminent former professor and former Judge of the International Court, Gaetano Morelli, maintains that the norm regulating the creation of international law does not restrict the liberty of states in regard to the object of a treaty. Similarly, the leading Swiss professor of international law, Paul Guggenheim, asserts in his treatise on international law that treaties may have any object whatever. Particularly, he rejects, just as Morelli does, the idea that all treaties *contra bonos mores, i.e.,* against the public order of the international community, are null and void.[20] Of the same conviction is Professor Georg Schwarzenberger who expressly said that "International law on the level of unorganized international society does not know of any *jus cogens.*"[21]

On the other hand, other modern writers of international law defend the thesis that in general international law some rules having the character of *jus cogens* exist, and that all treaties which are at variance with such rules are null and void. This principle was recognized after the second world war, especially by eminent authors, Lord McNair,[22] Balladore Pallieri,[23] Kelsen[24] and G. Tunkin.[25] Of the same view is Professor Alfred Verdross who categorically stated that "in the field of general international law there are rules having the character of *jus cogens.*"[26] Egon Schwelb who also share the same view said, "the inclusion in an official world-wide codification of the Law of Treaties of provisions on the effect of peremptory norms of international law from which no derogation is permitted is very desirable on grounds of law as well as on grounds of international morality."[27]

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[19] *Ibid.*, p. 56.
[20] *Ibid.*, p. 56-57.
[21] Schwarzenberger, *International Jus Cogens,* 43 TEXAS L. REV. 476 (1965).
[22] MCNAIR, LAW OF TREATIES 213-214 (1961).
[23] DIRITTO INTERNATIONALE PUBLICO, 282 (8th ed., 1962) in Verdross, *op. cit.*, p. 57.
[24] *Ibid.*
[25] *Ibid.*
[26] Verdross, *loc. cit.*, 58; Verdross, *Forbidden Treaties in International Law,* 31 AM. J. INT'L. L. 571-577 (1937).
[27] Schwelb, *op. cit.*, p. 973.

C. *Codification of the Doctrine of Jus Cogens*

The International Law Commission tried to codify the doctrine of *jus cogens* in Article 37 of its 1963 draft convention on the Law of Treaties which later became Article 50 of the Final Draft Articles on the Law of Treaties. The Final Draft Articles on the Law of Treaties were presented by the International Law Commission to the General Assembly in 1966 and which the General Assembly has referred, as the basic proposal for consideration, to the international conference of plenipotentiaries.[28] This provision,[29] with a little modification,[30] became Article 53 of the Vienna Convention on the Law of Treaties.[31]

> TREATIES CONFLICTING WITH A PEREMPTORY NORM OF GENERAL INTERNATIONAL LAW (*JUS COGENS*)
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> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

The article spells out the consequences when a treaty conflicts with a rule of *jus cogens*: It says that the treaty is *void*. The article does not say which norms of general international law have the character of *jus cogens* and which have the character of *jus dispositivum*.[32] The Commission considered it to be the right course to have the full content of the rule to be worked out in state practice and in the jurisprudence of international tribunals.

Although some members of the Commission felt that there might be advantage in specifying, by way of illustration, some of the most obvious and best settled rules of *jus cogens* in order to indicate by these examples the general nature and scope of the rule contained in the article. Examples suggested included:

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[28] Gen. Assembly Res. 2166 (XXI) of Dec. 5, 1966 in 61 A.J.I.L. 946 (1967); also in Herbert W. Briggs, *Procedures For Establishing the Invalidity or Termination of Treaties Under the International Law Commission's 1966 Draft Articles on the Law of Treaties*, 61 AM. J. INT'L. L. 976 (1967).

[29] Article 50. Treaties conflicting with a peremptory norm of general international law (jus cogens). A treaty is void if it conflicts with a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

[30] The phrase "at the time of its conclusion" was an amendment proposed by the U.S. It was intended to make clear that a rule of *jus cogens* did not void a treaty retroactively. See Kearney & Dalton, *The Treaty of Treaties*, 64 AM. J. INT'L. L. 536 (1970).

[31] U.N. DOC. A/CONF. 39/27, May 23, 1969; 63 AM. J. INT'L. LAW 891 (1969).

[32] This article has been criticized: "It can be compared to a penal code which would provide that crimes shall be punished without saying which acts constitute crimes.... [It] amounts to a complete abdication of the legislative function. (Schwelb, *op. cit.*, p. 964).

a) a treaty contemplating an unlawful use of force contrary to the principles of the Charter;
b) a treaty contemplating the performance of any other act criminal under international law; and
c) a treaty contemplating or conniving at the commission of acts, such as trade in slaves, piracy or genocide, in the suppression of which every state is called upon to cooperate.[33]

Other members expressed the view that, if examples were given, it would be undesirable to appear to limit the scope of the article to cases involving acts which constitute crimes under international law; treaties violating human rights, the *equality of States* or the *principle of self-determination* were mentioned as other examples.

The Commission, however, decided against including any examples of rules of *jus cogens*.[34]

The International Law Commission's draft took a strictly legal position. There was not a word in it of either morals or equity, and no link was sought with the doctrine of natural law. But precisely because the Commission's draft was intended to be deeply rooted in the already existing positive law, it could not neglect the fact that, in contemporary international law, all rules of that law can no longer be placed on exactly the same level. The freedom of states in concluding treaties had already been restricted by the progressive development of international law. One can hardly imagine that any state or group of states, even in their *inter se* relations, would today be able legally to sanction acts of genocide or piracy, or abrogate the principle of the freedom of the high seas, or *contract out of observing any of the principles of the U.N. Charter*. This last statement is based not merely on the very character of these principles which must be observed by states in all aspects of their international relations, but also on an express provision of the Charter (Art. 103 of the U.N. Charter) which requires that, in any case of conflict between an obligation resulting from the Charter and an obligation resulting from any other source, priority be given to the former. Although cautiously worded, this provision clearly establishes for all members of the U.N. *a definite hierarchy of norms* which they are bound to observe.

Even though it may appear new to supporters of traditional doctrines, the provision of the Vienna Convention declaring void treaties which are contrary to a norm of international *jus cogens* is not an invention of either the International Law Commission or the Vienna Conference. It reflects a state of affairs which was slowly coming into being at a much earlier date and which, with the entry into force of the U.N. Charter, is *no longer*

[33] Report of the International Law Commission, covering the Work of its Fifteenth Session, May 6–July 12, 1963, U.N. General Assembly, 18th Sess., Official Records, Supp. No. 9 (A/5509) in 58 AM. J. INT'L. L. 264-5 (1964); also 61 AM. J. INT'L. L. 409-12 (1967).

[34] *Ibid.*

subject to any doubt.[35] (Italics supplied). Article 53 of the Vienna Convention on the Law of Treaties is a codification of the *lex lata* and not a case of development of the law *de lege ferenda*.

At any rate, for purposes of the present discussion, it is significant to note that of the 43 countries that have gone on record as favoring the concept of *jus cogens* as part of the draft, among them were the Philippines and United States.[36]

The Philippine Delegation considered that Articles 50 and 61 represented a break-through in the progressive development of international law.[37]

In the United States Government comments it was said that the concept embodied in these provisions (Articles 50 and 61) would, if properly applied, substantially further the rule of law in international relations.[38]

D. *Jus Cogens and the Charter of the United Nations*

The Charter of the U.N. does not say that all of its provisions are rules of *jus cogens*. It contains a few provisions which are clearly *jus dispositivum* and from which derogations are permitted.

However, most of the provisions of the Charter and, in particular, those which impose obligations on the Member States, are of an overriding character in relation to those flowing from other agreements:

> In the event of a conflict between the obligation of the Members of the U.N. under the present Charter and their obligation under any other international agreement, their obligations under the present Charter shall prevail.[39]

Lord McNair is of the opinion that those provisions of the Charter which purport to create legal rights and duties possess a constitutive or semi-legislative character, with the result that Member States cannot "contract out" of them or derogate from them by treaties made between them, and that any treaty whereby they attempted to produce this effect would be *void*.[40] Under this view the *provisions of the Charter creating rights and duties are therefore peremptory norms* as conceived in the draft of the Inter-

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[35] Nahlik, *The Grounds of Invalidity and Termination of Treaties*, 65 AM. J. INT'L. L. 744-5 (1971).

[36] 61 AM. J. INT'L. L. 960 (1967).

[37] Mr. Jimenez, 790th meeting in 61 AM. J. INT'L. L. 961 (1967).

[38] Comments by governments, Annex to 18th Sess., General Assembly, 21st Sess., Official Records, Supplement No. 9 (A/6309/Rev. 1) in 61 AM. J. INT'L. L. 962 (1967).

[39] Article 103, Charter of the United Nations in MAGALLONA, (ED.), *The Position of States in International Law*, 1 DOCUMENTS IN CONTEMPORARY INTERNATIONAL LAW 98 (1976).

[40] Lord McNair, *op. cit.*, p. 217 (1961). *But see* Sir Gerald Fitzmaurice, *Third* Report on the Law of Treaties, 1958 I.L.C. YRBK. (II) 43 in Schwelb, *loc. cit.*, 959, where Sir Gerald pointed out that Article 103 does not pronounce the invalidity of treaties between Member States conflicting wth the Charter, but only that in the

national Law Commission, or, at least, as far as Members of the United Nations are concerned.

Prof. Egon Schwelb even goes farther: "the most important provisions of the Charter are now considered to be peremptory norms of general international law, binding on Member and Non-Members alike".[41]

E. *Jus Cogens and the Military Bases Agreements Between the Philippines and the United Stattes*

Article 2 of the Charter of the United Nations provides:[42]

> The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.
>
> 1. The Organization is based on the principle of the *sovereign equality* of all its Members. (Underscoring supplied).

Jean Bodin defined sovereignty as the *absolute and perpetual power within a State,* subject only to divine law and the law of nature in the strictest sense of the terms; as modified by later writers, sovereignty means freedom from outside control in the conduct of internal and external affairs.[43] (Italics supplied).

National sovereignty is the fundamental assumption of the position of States in international law. It is the underlying doctrine of the *basic rights and duties of States.* Generally, then, such rights and duties consists essentially "of the exercise of sovereignty by individual States and the respect these States owe in turn to the exercise of sovereignty by others, within an international community governed by international law."[44] (Italics supplied).

It is clear from the foregoing that the principle of sovereign equality of states as enunciated in Article 2, paragraph 1 of the Charter of the United Nations is a "provision of the Charter creating rights and duties" and is therefore a "peremptory norm."

The next inquiry would therefore be: Does the Military Bases Agreement infringe the sovereignty of the Philippines?

An examination of the provisions of the Agreement is in order.

A reading of the Agreement would reveal that the United States

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event of a conflict the obligations under the Charter are to prevail. Sir Gerald's conclusion is that priority is to be given to the Charter, not that invalidity is to attach to a treaty which conflicts with it. The conflicting treaty may be unenforceable, if to enforce it involves a violation of the Charter, but is not void.

[41] Schwelb, *op. cit.*, p. 960.

[42] Magallona, *op. cit.*, p. 82.

[43] SALONGA, PUBLIC INTERNATIONAL LAW 73-74 (1974); *Cf.* 1 OPPENHEIM, INTERNATIONAL LAW; A TREATISE 118-119 (Lauterpacht, ed.)

[44] Magallona, *op. cit.*, p. 9.

armed forces have the right to direct use of the bases.[45] The United States armed forces are also allowed free access and movement in the country.[46] They are also given the "right to bring into the Philippines" not only members of the United States military forces but also U.S. nationals employed by the U.S. together with their families and technical personnel of *other nationalities* and it is "understood that no objection will be made to their travel to the Philippines as non-immigrants."[47] Furthermore, imports by U.S. for the bases are exempt from customs and other duties and Members of U.S. armed forces are not liable to pay income taxes and they may establish sales and services within the bases "free of all licenses, fees, sales, excise or other taxes, or imposts."[48] Notwithstanding these

[45] Article I. Grant of Bases. 1. The Government of the Republic of the Philippines (hereinafter referred to as the Philippines) grants to the Government of the United States of America (hereinafter referred to as the United States) the right to retain the use of the bases in the Philippines listed in Annex A attached hereto.

2. The Philippines agrees to permit the United States, upon notice to the Philippines, to use such of those bases listed in Annex B as the United States determines to be required by military necessity.

[46] Article IV. Shipping and Navigation. 1. It is mutually agreed that United States public vessels operated by or for the War or Navy Departments, the Coast Guard or the Coast and Geodetic Survey, and the military forces of the United States, military and naval aircraft and Government-owned vehicles, including armor, shall be accorded free access to and movement between ports and United States bases throughout the Philippines, including territorial waters, by land, air and sea. This right shall include freedom from compulsory pilotage and all toll charges. If, however, a pilot is taken, pilotage shall be paid for at appropriate rates. In connection with entrance into Philippine ports by United States public vessels appropriate notification under normal conditions shall be made to the Philippine authorities.

[47] Article XI. Immigration. 1. It is mutually agreed that the United States shall have the right to bring into the Philippines members of the United States military forces and the United States nationals employed by or under a contract with the United States together with their families, and technical personnel of other nationalities (not being persons excluded by the laws of the Philippines) in connection with the construction, maintenance, or operation of the bases. The United States shall make suitable arrangements so that such persons may be readily identified and their status established when necessary by the Philippine authorities. Such persons, other than members of the United States armed forces in uniform, shall present their travel documents to the appropriate Philippine authorities for visas, it being understood that no objection will be made to their travel to the Philippines as non-immigrants.

[48] Article V. Exemption from Customs and Other Duties. No import, excise, consumption or other tax, duty or impost shall be charged on material, equipment, supplies or goods, including food stores and clothing, for exclusive use in the construction, maintenance, operation or defense of the bases, consigned to, or destined for, the United States authorities and certified by them to be for such purposes.

Article XII. Internal Revenue Tax Exemption. 1. No member of the United States armed forces, except Filipino citizens, serving in the Philippines in connection with the bases and residing in the Philippines by reason only of such service, or his dependents, shall be liable to pay income tax in the Philippines except in respect of income derived from the Philippine sources.

2. No national of the United States serving in or employed in the Philippines in connection with the construction, maintenance, operation or defense of the bases and residing in the Philippines by reason only of such employment, or his spouse and minor children and dependent parents of either spouse, shall be liable to pay income tax in the Philippines except in respect of income derived from Philippine sources or sources other than the United States sources.

3. No person referred to in paragraphs 1 and 2 of this Article shall be liable to pay to the Government or local authorities of the Philippines any poll or residence tax, or any import or export duty, or any other tax on personal property imported for his own use; provided that privately owned vehicles shall be subject to payment

exemptions from taxes and other fees, the U.S. military forces have the right to use public services "under conditions no less favorable" than those that may be applicable to the "military forces of the Philippines."[49] They can also use land and coastal areas for periodic maneuvers and have the right to make topographic, hydrographic, and coast and geodetic surveys and aerial photographs in any part of the Philippines and waters adjacent thereto.[50] Without the consent of U.S., the Philippines cannot grant any

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of the following only; when certified as being used for military purposes by appropriate United States authorities, the normal license plate fee; otherwise, the normal license plate and registration fees.

4. No national of the United States, or corporation organized under the laws of the United States, resident in the United States, shall be liable to pay income tax in the Philippines in respect of any profits derived under a contract made in the United States with the Government of the United States in connection with the construction, maintenance, operation and defense of the bases, or any tax in the nature of a license in respect of any service or work for the United States in connection with the construction, maintenance, operation and defense of the bases.

Article XVIII. Sales and Services Within the Bases. 1. It is mutually agreed that the United States shall have the right to establish on bases, free of all licenses; fees; sales, excise or other taxes, or imposts; Government agencies, including concessions, such as sales commissaries and post exchanges, messes and social clubs, for the exclusive use of the United States military forces and authorized civilian personnel and their facilities. The merchandise or services sold or dispensed by such agencies shall be free of all taxes, duties and inspection by the Philippine authorities. Administrative measures shall be taken by the appropriate authorities of the United States to prevent the resale of goods which are sold under the provisions of this Article to persons not entitled to buy goods at such agencies and, generally, to prevent abuse of the privileges granted under this Article. There shall be cooperation between such authorities and the Philippines to this end.

2. Except as may be provided in any other agreements, no person shall habitually render any professional services in a base except to or for the United States or to or for the persons mentioned in the preceding paragraph. No business shall be established in a base, it being understood that the Government agencies mentioned in the preceding paragraph shall not be regarded as businesses for the purposes of this Article.

[49] Article VII. Health Measures Outside Bases. It is mutually agreed that the United States may construct, subject to agreement by the appropriate Philippine authorities, wells, water catchment areas or dams to insure an ample supply of water for all base operations and personnel. The United States shall likewise have the right, in cooperation with the appropriate authorities of the Philippines, to take such steps as may be mutually agreed upon to be necessary to improve health and sanitation in areas contiguous to the bases, including the right, under such conditions as may be mutually agreed upon, to enter and inspect any privately owned property. The United States shall pay just compensation for any injury to persons or damage to property that may result from action taken in connection with this Article.

[50] Article VI. Maneuver and Other Areas. The United States shall, subject to previous agreement with the Philippines, have the right to use land and coastal sea areas of appropriate size and location for periodic maneuvers, for additional staging areas, bombing and gunnery ranges, and for such intermediate airfields as may be required for safe and efficient air operations. Operations in such areas shall be carried on with due regard and safeguards for the public safety.

Article IX. Surveys. It is mutually agreed that the United States shall have the right, after appropriate notification has been given to the Philippines, to make topographic, hydrographic, and coast and geodetic surveys and aerial photographs in any part of the Philippines and waters adjacent thereto. Copies with title and triangulation data of any surveys or photomaps made of the Philippines shall be furnished to the Philippines.

base to any third power.[51] Moreover, U.S. sovereignty is not restricted within the territory of their bases.[52]

Each of the provisions *deadens* Philippine claim to sovereignty. Not only are the areas occupied by the bases virtually converted into American territory by the agreement, but the whole of the Philippines itself comes under American military might because of the strategic location and the sizes of the bases, and the American military strength contained in these bases.

The extra-territorial rights possessed by Americans negate the authority of Philippine courts to have jurisdiction over criminal cases involving Filipinos.[53] This is an example of how the bases agreement is an infringement of Philippine sovereignty. Americans reign supreme inside the bases.

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[51] Article XXV. Grant of Bases to a Third Power. 1. The Philippines agrees that it shall not grant, without prior consent of the United States, any bases or any rights, power, or authority whatsoever, in or relating to bases, to any third power.

[52] Article III. Description of Rights. 1. It is mutually agreed that the United States shall have the rights, power and authority within the bases which are necessary for the establishment, use, operation and defense thereof or appropriate for the control thereof and all the rights, power and authority within the limits of territorial waters and air space adjacent to, or in the vicinity of, the bases which are necessary to provide access to them, or appropriate for their control.

2. Such rights, power and authority shall include, *inter alia,* the right, power and authority:

(a) to construct (including dredging and filling), operate, maintain, utilize, occupy, garrison and control the bases;

(b) to improve and deepen the harbors, channels, entrances and anchorages, and to construct or maintain necessary roads and bridges affording access to the bases;

(c) to control (including the right to prohibit) in so far as may be required for the efficient operation and safety of the bases, and within the limits of military necessity, anchorages, moorings, landings, takeoffs, movements and operation of ships and water-borne craft, aircraft and other vehicles on water, in the air or on land comprising or in the vicinity of the bases;

(d) the right to acquire, as may be agreed between the two Governments, such rights of way, and to construct thereon, as may be required for military purposes, wire and radio communications facilities, including submarine and subterranean cables, pipe lines and spur tracks from railroads to bases, and the right, as may be agreed upon between the two Governments to construct the necessary facilities;

(e) to construct, install, maintain, and employ on any base any type of facilities, weapons, substance, device, vessel or vehicle on or under the ground, in the air or on or under the water that may be requisite or appropriate, including meteorological systems, aerial and water navigation lights, radio and radar apparatus and electronic devices, of any desired power, type of emission and frequency.

3. In the exercise of the above-mentioned rights, power and authority, the United States agrees that the powers granted to it will not be used unreasonably or, unless required by military necessity determined by the two Governments, so as to interfere with the necessary rights of navigation, aviation, communication, or land travel within the territories of the Philippines. In the practical application outside the bases of the rights, power and authority granted in this Article there shall be, as the occasion requires, consultation between the two Governments.

[53] Article XIII of the Agreement on criminal jurisdiction has been amended by the "Exchange of Notes Constituting an Agreement between the Republic of the Philippines and the United States of America Amending Article XIII of the Military Bases Agreement of 14 March 1947", August 10, 1965, IV PTS 951.

Under the "Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance With the Charter of the United Nations,"[54] "sovereign equality" of states includes "territorial integrity" which is "inviolable". Under the "Charter of Economic Rights and Duties of States,"[55] "relations among states" shall be governed by the principles of "sovereignty' and "territorial integrity" of States.

A sovereign state is one which has *full* control over every inch of its territory and over the affairs, within that territory. If a state does not have full control over certain parts of its territory, and over the affairs within those portions of its territory, then such a state is not sovereign in certain parts of the territory. If a state does not have full control over the whole of its territory then certainly that state is *not sovereign.*

We have clearly demonstrated from the foregoing discussion that the Military Bases Agreement violates Philippine sovereignty, which as we have shown earlier, is a "peremptory norm" or *jus cogens.* Therefore, the Military Bases Agreement, on this score, is *void* pursuant to Article 53 of the Vienna Convention of the Law of Treaties.

Moreover, the continued presence and operation of American bases in Philippine territory unduly exposes the Philippines to charges of acts of aggression by neighboring states. An act of aggression is illegal under the Charter of the United Nations. It is one of those rules having the character of *jus cogens.* Article I of the Charter of U.N. lists as one of the purposes of the United Nations the maintenance of international peace and security, and to that end, "to take effective collective measures . . . for the suppression of acts of aggression."

What constitute acts of aggression?

Article 1 of the "Definition of Aggression"[56] defines aggression as the "use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition."

Article 3 of the same document states that "any of the following acts . . . qualify as an act of aggression:

> (f) The action of a State in *allowing* its territory, which it has placed at the disposal of another State, to be used by that other States for perpetrating an act of aggression against a third State;"[57] (Italics supplied).

It will be noted that American bases have been used in countless occasions as staging areas for attacking other countries. During the Korean

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[54] Magallona, *op. cit.*, p. 27.
[55] *Idem*, 36.
[56] Magallona, *Law of Peaceful Co-Existence*, II Documents in Contemporary International Law 16 (1976).
[57] *Ibid.*, p. 17.

War, the bases were used as refuelling and maintenance stations for American ships and aircraft, and as supply depots. During the rightist *coup* against Sukarno, Allan Pope flew for the CIA a B-26 from Clark to help crush the Indonesian nationalist forces. In August 1964, U.S. planes were flown from Clark to bomb the Vietnamese country side including certain towns and cities.

Throughout the whole Vietnam War, the U.S. bases were continually launching bombers and battleships; refuelling, repairing and maintaining planes, ships, submarines, helicopters, etc.; serving as supply depots; and housing servicemen, the wounded as well as those on "rest and recreation". During the fall of the Thieu regime, American planes bearing retreating American forces and South Vietnamese "refugees" entered Philippine skies without permission, grossly insulting our territorial integrity. The latest documented case is the Mayaguez Incident when U.S. planes from Clark attacked Cambodian liberation forces. This accounting does not include undocumented uses of the facilities, like conducting espionage work in Southeast Asian countries including ours.[58]

Clearly, then, the continued presence and operation of the U.S. Military Bases in the Philippines is a patent violation of our obligations, which is of the character of *jus cogens,* under the Charter of the U.N.

Lastly, the presence of U.S. military bases on Philippine soil violates the right of the Philippines to self-determination — a right enshrined in Article 1 of the Charter of the U.N. As Foreign Secretary Carlos P. Romulo puts it, "the vestiges of extra-territoriality, the supreme anachronism in an age dedicated to the principle of self-determination, must go."[59]

Our foreign policy is moving towards a modification of our relations with socialist countries. We are one of the most outspoken advocates of the principle of an Asian zone of peace, freedom and neutrality. And also, there is our desire to be accepted in the non-aligned nations bloc. But the presence of the military bases deeply contradicts our foreign policy initiatives. Our country *cannot be neutral* with their presence. The U.S. bases in the Philippines are a threat to the peace in the region. The non-aligned nations bloc precisely declined to accept us due to the presence of the said bases. The presence of the bases has hampered the progressive development of our relations with some sectors of the world and hindered our freedom to maneuver among the perilous shoals of international politics.

To recapitulate, the Mutual Security and Military Bases Agrement with the United States is void under Article 53 of the Vienna Convention on the Law of Treaties, it being in derogation of the rules of *jus cogens*

[58] Coordinating Committee for the Abrogation of the R.P.-U.S. Military Bases Agreement, U.S. Military Bases for Whom? 13 (1976)
[59] Bulletin Today, April 27, 1976, p. 8.

or peremptory norms of general international law, namely: sovereignty, act of aggression, and self-determination.

III. The Doctrine of "Rebus Sic Stantibus"

The most popular definition of the doctrine of *"rebus sic stantibus"* ("so long as conditions remain the same") until the mid-30's had been based on the idea of a term (clausula) presumed to be found in every treaty. According to this view, the obligation of a treaty terminates when a change occurs in those circumstances that exist at the effective date of the agreement and whose continuance forms a tacit condition of the continuing validity of the treaty according to the implied intention or will of the parties. Any and all provisions might be absolute, but the treaty as a whole is always conditional. In other words, the function of the doctrine is to carry out the shared intention of the parties. When a change occurs in the circumstances that formed the cause, motive, or *raison d'etre* of the consent of the parties, the condition of *rebus sic stantibus* becomes operative, and the treaty obligation ceases to be binding.[60]

A. *Codification of the Doctrine of Rebus Sic Stantibus*

The doctrine of *rebus sic stantibus* is codified in Article 62 of the Vienna Convention on the Law of Treaties[61] (Art. 59 of I.L.C. Draft). It reads:

FUNDAMENTAL CHANGE OF CIRCUMSTANCE

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:
   (a) the existence of these circumstances constituted as essential basis of the consent of the parties to be bound by the treaty; and
   (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.
2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:
   (a) if the treaty establishes a boundary; or
   (b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.
3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

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[60] David, The Strategy of Treaty Termination 16 (1975).
[61] U.N. Doc. A/Conf. 39/27, May 23, 1969 in 63 Am. J. Int'l. L. 894-695 (1969).

It will be observed that the term *rebus sic stantibus* is nowhere found in the provision quoted. This was intentionally done by the International Law Commission. The Commission "decided that, in order to emphasize the objective characer of the rule, it would be better not to use the term *'rebus sic stantibus'* either in the text of the article or even in the title, and so avoid the doctrinal implication of that term."[62]

Article 62 incorporates a carefully phrased version of the doctrine of *rebus sic stantibus.* The principles expressed in Article 62 may be regarded as largely *reflecting existing international law* rather than as formulating a new norm.[63] As the Commentary to this article states: "Almost all modern jurists, however reluctantly, admit the existence in international law of the principle with which this article is concerned and which is commonly spoken of as the doctrine of *rebus sic stantibus.*"[64] The Commentary further said that "the evidence of the principle in customary law is considerable."[65]

It suffices for our purpose to cite one instance in which the United States invoked the principle of *rebus sic stantibus* to temporarily free itself from fulfilling its obligation under a treaty.

In August 1941, the United States suspended the performance of its obligation under the International Load Line Convention of 1930, a multilateral treaty, due to wartime conditions, although, at the time, United States was a non-belligerent. President Franklin D. Roosevelt proclaimed:

> Whereas the conditions envisaged by the Convention have been, for the time being, almost wholly destroyed, and the partial and imperfect enforcement of the Convention can operate only to prejudice the victims of aggression, whom it is the avowed purpose of the United States of America to aid; and
>
> Whereas it is an implicit condition to the binding effect of the Convention that those conditions envisaged by it should continue without such material change as has in fact occurred; and
>
> Whereas under *approved principles of international law* it has become, by reason of such *changed conditions,* the *right* of the United States of America to declare the Convention suspended and inoperative.[66] (Emphasis supplied)

This action of the President was supported by an opinion of the Acting Attorney General of the United States.[67]

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[62] Report of the International Law Commission, 18th Sess., Commentary (par. 7) on Art. 59 in Lissitzyn, *Treaties and Changed Circumstances,* 61 AM. J. INT'L. L. 913 (1967); also in Briggs, *Unilateral Denunciation of Treaties: The Vienna Convention and the International Court of Justice,* 68 AM. J. INT'L. L. 65 (1974).

[63] Kearney and Dalton, *The Treaty of Treaties,* 64 AM. J. INT'L. L. 542.

[64] 61 AM. J. INT'L. L. 428 (1967); 58 AM. J. INT'L. L. 284 (1964).

[65] 61 AM. J. INT'L. L. 429 (1967); 58 AM. J. INT'L. L. 284 (1964).

[66] Proclamation No. 2500, Aug. 9, 1941, 6 Fed. Reg. 3999 (1941) quoted in Lissitzyn, *op. cit.,* p. 908-909. The 1941 Proclamation was revoked as of January 1, 1946, by Proclamation No. 2675, December 21, 1945, 10 Fed. Reg. 15365 (1945).

[67] 40 Ops. Atty. Gen. 119 (1941) in Lissitzyn, *op. cit.,* 909-910.

B. *Rebus Sic Stantibus and the Military Bases Agreement Between the Philippines and the United States*

American bases were established in the Philippines by virtue of the "Agreement Between the Republic of the Philippines and the United States of America Concerning Military Bases" which was entered into on March 14, 1947.

The U.S. military bases were allowed to stay on even after the independence of the country on account of the trauma that had been inflicted on the country by the war and its desire to safeguard its newly-won independence. The Philippines had suffered greatly from war, invasion, occupation and liberation. It was the second most devastated country in the world, next only to Poland. Hence, the country resolved that it would not be repeated. Furthermore, it feared the threat of a resurgent Japan. The Philippines therefore sought the protection of the only power that could protect her — the United States. A protection that it felt could be extended only if it allowed the United States bases to remain in its soil.

Our Bases Agreement of 1947 was entered into at a time when the U.S. enjoyed a military superiority second to none. Consequently, America was indeed in a position to insure our territorial integrity as envisage in the Agreement.

In 1948, Soviet Russia, America's putative enemy, exploded her atomic bomb, thereby breaking America's exclusive monopoly of this dreadful weapon, and the result was to erode America's military supremacy. In 1956, Soviet Russia, in less than a year after America had exploded her hydrogen bomb succeeded in having her own, thereby eroding further America's military supremacy.

Red China, the once sleeping-giant has now arisen and in 1963 had exploded its own nuclear missile.

Not only has there been a change in the military might of the United States but the very structure of international relations has undergone a radical change since the entry into force of the Agreement.

With the rise of a powerful and assertive Soviet Union and the involvement of China and the Philippines on opposite sides in the Korean war, coupled with a domestic rebellion launched under the banner of communism, the Philippines' fear of aggression shifted from Japan to the socialist powers. The triumph of the communist forces in the northern half of Vietnam only magnified the threat.

The foundation of international relations then prevailing has been the sharp division of nations along ideological lines. The world turned on a bipolar axis; the points of the compass had only 2 directions — West, meaning Washington, D.C., and East, meaning Moscow.

But the schismatic differences between the Soviet Union and the People's Republic of China foreshadowed the destruction of two monolithic camps in perpetual confrontation with each other. This bi-polar world has been shattered forever. International relations turned full circle. Power ceased to be the exclusive preserve of two capitals. Power began to radiate from many centers.

In Asia, the once bi-polar balance of power was replaced by a four-power balance consisting of United States, Soviet Union, People's Republic of China and Japan.

Not only has there been a radical change in international relations but more importantly, Philippine foreign policy in the last few years saw a marked change from what it used to be since 1947. Philippine foreign policy has at last learned to accept the fact that the terms of our national existence must continue to be worked out with the rest of the world in terms of our national interest and not that of the United States.

In accordance with this policy we have normalized relations with the People's Republic of China, the Soviet Union, Cuba and all the socialist states of Europe, Kampuchea and recently with United Vietnam. Simultaneously, we have built closer ties with countries in Africa.

These profound changes in international relations and in the foreign policy of the Philippine government brings to mind the antiquated fundamental assumptions that went into the writing of the alliances that made the Philippines safe in the past. We cannot afford to passively wait for events to unfold before us. We must begin to make needed adjustments in our foreign policies in order to assure our *security* and *survival* in a highly uncertain world.

But we must place our acts of adjustments within the bounds of international legal order.

A reexamination of the Military Bases Agreement *vis-a-vis* the doctrine of *"rebus sic stantibus"* is, therefore, in order.

As was pointed out earlier, the international law principle of *rebus sic stantibus* allows a treaty to be terminated on the ground that the basic conditions upon which it was founded have essentially changed. This principle, as previously stated, is codified under Article 62 of the Vienna Convention on the Law of Treaties. However, under that article, there are certain conditions that must be fulfilled before it can be properly invoked.

Paragraph 9 of the Commentary enumerates the conditions under which a change of circumstances may be invoked as a ground for terminating a treaty or for withdrawing from a treaty, to wit:

> (1) the change must be of circumstances existing at the time of the conclusion of the treaty;

(2) that change must be a fundamental one;
(3) it must also be one not foreseen by the parties;
(4) the existence of those circumstances must have constituted an essential basis of the consent of the parties to be bound by the treaty; and
(5) the effect of the change must be radically to transform the scope of obligations still to be performed under the treaty.[68]

Are the changes we mentioned sufficient to warrant the termination or abrogation of the Military Bases Agreement? The answer to this query is in the *affirmative.* An examination of the reason for entering into the Agreement and a comparison of the circumstances obtaining at the time the Agreement was concluded from the circumstances obtaining at present would support this conclusion.

We already said that the Philippines entered into the Agreement because of fear of another invasion from a hostile foreign power, specifically, Japan and later Soviet Union and China. But this apprehension is now baseless since we already have diplomatic relations with these countries and we see no probable cause for them to commit acts of aggression against the Philippines. In fact, President Marcos stressed: "I repeat: I don't believe that there is any threat of external aggression . . . Is there any danger of any attack on the Philippines from outside? No, there is *none*, . . ."[69]

The danger that the country faces now is not external aggression but rather domestic rebellion. "Our most immediate danger is of course an expected rise in insurgency. Encouraged by the stunning, nay, dramatic triumph of their counterparts in Indo-China, domestic dissidents are fully expected to increase the tempo of their activities."[70] "And against these forms of danger, as Americans themselves readily admit, the presence of foreign military bases is of *no avail.*"[71]

The *raison d'etre* for the presence of U.S. Military Bases (which is expressed in the Preamble: "to promote their mutual security and to defend their territories and areas") being no longer present, it is therefore appropriate to terminate it.

We find present in these events all the conditions necessary for the application of the doctrine of *rebus sic stantibus,* to wit: that the change was of circumstances existing at the time of the conclusion of the treaty; that the change is a fundamental one; that it was not foreseen by the parties; that the existence of those circumstances constituted an essential basis of

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[68] 61 AM. J. INT'L. L. 433 (1961).
[69] 71 O.G. 3040-K. (May 26, 1975).
[70] Speech of President Marcos at the closing session of the National Business Conference, Development Bank of the Philippines Auditorium, May 23, 1975, 71 O.G. 3200 (June 2, 1975).
[71] Speech delivered by the Undersecretary of Foreign Affairs, Manuel Collantes, before the Rajah Soliman Rotary Club, April 26, 1976, *Bulletin Today,* April 27, 1976, p. 8.

the consent of the Philippines to be bound by the treaty and that the effect of the change was to radically transform the scope of obligations still to be performed under the treaty.

While the world has changed considerably since the writing of these agreements, altering the perspectives of commitments and even of interpretation of the provisions, there can be no doubt that *at the time,* our political leadership believed these alliances held good for the defense of our country. The nature of international relations at the time, the polarity of the forces of Communism and the forces of Free World, shaped these alliances and gave them validity.[72]

This must be so because the foreign bases in the Philippines are temporary in character.

They exist, in other words, for a specific purpose in a specific period of our history. They are *not meant to last in perpetuity,* or to linger beyond their period of mutual usefulness to the parties involved.[73]

IV. CONCLUSION

The foregoing discussion leads to the conclusion that there are grounds under international law to support an action of the Philippines to abrogate the Military Bases Agreement. That there are legal grounds, however, does not mean that our government should and must terminate the Agreement. There are other factors which must be taken into consideration. For no amount of legal justification can immediately and effectively solve or remedy the problem of oppressive and burdensome treaties. In some instances, political action would prove more effective and beneficial to the party adversely affected than judicial action. This is especially true in the international sphere where the judicial tribunal have no coercive power to enforce its decision. As Professor Brierly said, the problem of oppressive treaties is essentially political and, therefore, cannot be solved by existing laws or by manipulations of legal doctrines. The remedy is to be sought in political action.

Examples of political actions taken by our government to remedy this leonine agreement are the so-called Mendez-Blair Amendment [74] and the Serrano-Bohlen Amendment.[75] The Mendez-Blair Amendment revised the

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[72] Speech delivered by President Marcos during the AFP Traditional Testimonial Review, Camp Aguinaldo, September 10, 1975, 71 O.G. 6527 (October 6, 1975).

[73] Speech of President Marcos at the closing session of the National Business Conference, Development Bank of the Philippines Auditorium, May 23, 1975, 71 O.G. 3203 (June 2, 1975).

[74] See *supra,* note 53.

[75] Memorandum of Agreement between the Government of the Republic of the Philippines and the Government of the United States of America on the Operational Use of the United States in the Philippines for Military Combat Operations, the Duration and Termination of the Use of Military Bases, and Mutual Defense, October 12, 1959, III-3 DFATS 68; IV PTS 11.

provision on criminal jurisdiction so as to conform with the Philippines' right of sovereignty over the whole of its territory. The Serrano-Bohlen Amendment, on the other hand, reduced the duration of the Agreement from 99 to 25 years subject to renewal with the consent of both parties.[76]

At present, negotiations are going on between the Philippines and United States. The Philippines is advocating the deletion of the burdensome and odious provisions of the Agreement.

In this connection, it would not be amiss to state that these international law doctrines are not at all without significance or utility. The invocation of these doctrines might serve as an added leverage for the Philippines to obtain the desired amendments to the Agreement. It would do well to remind the United States that the Philippines have the legal option of terminating it. Admittedly, the Military Bases Agreement, as it now stands, serves the interest of the United States more than it serves the national interest of the Philippines.

[76] Article 1. paragraph b of the Amendment provides:

"Duration and Termination: Article XXIX of the Military Bases Agreement of 1949 will be amended in order to reduce the duration of the agreement from 99 to 25 years together with a proviso for renewal at the expiration of the 25-year period or earlier termination by mutual agreement of our two governments. The period of 25 years will commence from the date of signature of the formal documents giving effect to the agreements reached."

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