

THE 1979 AMENDMENTS TO THE MILITARY BASES AGREEMENT OF 1947: STILL A QUESTION OF SOVEREIGNTY

RAOUL R. ANGANGCO *

JOSE PERPETUO M. LOTILLA *

On July 28, 1945, the Congress of the Philippines approved Joint Resolution No. 4, authorizing the President of the Philippines to negotiate with the President of the United States of America for the establishment of military bases, that was provided for in Joint Resolution of the Congress of the United States of America of June 29, 1944, authorizing the President of the United States of America to acquire and to retain such bases, with a view of insuring the territorial integrity of the Philippines, the mutual protection of the Philippines and the United States, and the maintenance of peace in the Pacific.

By the Treaty of General Relations between the Republic of the Philippines and the United States of America of July 4, 1946, which is generally referred to as the treaty that granted the independence to the Philippines, the United States agreed to "withdraw and surrender, and does hereby withdraw and surrender, all rights of possession, supervision, jurisdiction, control or sovereignty existing and exercised by the United States of America in and over the territory and the people of the Philippine Islands, *except the use of such bases, necessary appurtenances to such bases, and the rights incident thereto*, as the United States of America, by agreement with the Republic of the Philippines may deem necessary to retain for the mutual protection of the Republic of the Philippines and of the United States of America."¹ (Italics supplied)

Within a situation of almost total economic and military dependence on the United States, the Military Bases Agreement (from here on referred to as the Agreement) was entered into on March 14, 1947, by Philippine President Manuel Roxas and United States Ambassador Paul McNutt, and such took effect on March 26, 1947, by mutual agreement of the parties. Of the original 23 bases and reservations existing when independence was granted on July 4, 1946, only seven remain today, the rest having been restored to Philippine jurisdiction. The circumstances under which the bases were established enabled Washington to obtain from Manila the best possible terms for their use. Understandably, the Agreement later became a source

* Member, Student Editorial Board, Philippine Law Journal.

¹ Art. 1.

of irritants between the two countries, as the Philippines began to develop a measure of economic, military, and political self-confidence.²

In 1966, the Agreement was amended by cutting down to 25 years the unexpired portion of the original 99-year period, that is, up to 1991.

The question of sovereignty over the bases was raised as early as in the year 1934 by then President Manuel Quezon who expressed fears for true Philippine independence with the retention of military bases in the country. This was followed in 1954 by Claro M. Recto's vehement opposition to the American government's claim of "ownership rights" to the bases, as it was seeking title to them. The United States' claim was based on a legal opinion prepared by United States Attorney-General Herbert Brownell, Jr., that the "grant" of independence had been subject to certain reservations under American laws. Recto contended that American ownership of the bases would impair the territorial integrity and sovereignty of the Philippines, thus making her independence "incomplete."³

The prospect of renegotiation and readjustment of the terms of the Agreement gained headway after the resolution of the Vietnam war. This was particularly heightened by the Philippine government's anxiety about the lack of an automatic retaliation clause in the Mutual Defense Pact of August 30, 1951 with the United States in case of armed attack on the Philippines by another power, and an unclear definition of what areas of our territory would be covered by American protection in case of attack. Added to this was the increasing disquiet of some sectors of society who have through the years questioned the need of the bases, and the wisdom of the treaties that bound Philippine defense with the United States.⁴

The 1979 amendments to the Agreement were the outcome of talks between Philippine President Ferdinand Marcos and then United States President Gerald Ford who visited Manila in December of 1975. On December 7, 1975, at the conclusion of President Ford's state visit, a Joint Communique was issued by both heads of state, stating that negotiations on the subject of the United States' use of the bases should be conducted in the clear recognition of Philippine sovereignty.

Also, on May 4, 1978, at the conclusion of United States Vice-President Walter Mondale's official visit to the Philippines, a Joint Statement was issued by President Marcos and Vice-President Mondale wherein it was agreed that representatives of their governments would negotiate amendments to the Agreement reflecting certain principles.

In said negotiations, President Marcos chose the alternative of trying to attain the best possible terms while allowing the United States to operate

² *Old Accord Covered 23 American Bases*, Times Journal, January 8, 1979, p. 1.

³ CONSTANTINO, *THE MAKING OF A FILIPINO 199* (1969).

⁴ President Marcos' Foreign Policy Report during the opening session of the Batasang Pambansa, January 15, 1979, as published in Bulletin Today, January 17-19, 1979.

the bases, giving special stress to the need to recover full Philippine sovereignty over the bases, and to make sure that their continued existence in the country will serve not only American interests. In considering which alternative to pursue, he believed that three objectives had to be met, namely: sovereignty, security and economic modernization and development. On January 7, 1979, with the exchange of formal notes that took the form of executive agreements, confirming acceptance of amendments to the Military Bases Agreement of 1947, President Marcos asserts that the first of these objectives has been achieved by said amendments, and that the last two objectives have been secured by them.⁵

It is our intent to make a thorough study and analysis of this assertion.

The Concept of Sovereignty

Concepts serve to explain events and circumstances. Though in the abstract, concepts are essential for a clearer understanding of reality. So, in order to ascertain the effect of the Military Bases Agreement Amendments, an examination of the concept of sovereignty and its manifestation is needed. This examination of the concept of sovereignty shall be limited only to that aspect essential to the problem of state sovereignty in relation to foreign military bases.

States are conceived of as international persons having four (4) elements which are: people, territory, government and sovereignty.⁶

Sovereignty is a term first introduced by Jean Bodin in his *De La Republique* to mean "the absolute and perpetual power within a State."⁷ The use of the term was in the context of a France governed by a strongly centralized monarchy. Other writers thought of sovereignty as being limited by a constitution and by-laws.⁸ But during the sixteenth and seventeenth centuries, writers were agreed that sovereignty was indivisible.⁹ In the eighteenth century, the concept changed somewhat for the existence of half-sovereign states was recognized.¹⁰ This was prompted by the springing up of several not fully independent and sovereign states as a result of the Treaty of Westphalia ending the thirty (30) years war. Thus, sovereignty came to be considered as divisible. The nineteenth century saw the problem of divisibility of sovereignty as a major one.¹¹ Several writers defended the view that sovereignty is indivisible while others insisted upon its divisibility. However, in view of the existence of less than fully sovereign states, the argument was merely academic. In the twentieth century, the problem of sovereignty is in its relation to International Law. Some publicists maintain

⁵ *Ibid.*

⁶ 1 OPPENHEIM, INTERNATIONAL LAW 118 (1955).

⁷ *Ibid.*, p. 120.

⁸ *Ibid.*, p. 121.

⁹ *Idem.*

¹⁰ *Idem.*

¹¹ *Ibid.*, p. 122.

that the existence of International Law is at the expense of state sovereignty, while others think that International Law in fact strengthens state sovereignty because of the recognition of the sovereign equality of states.¹²

A survey of the development of the concept of sovereignty reveals that far from showing unanimity of opinions, international law writers have conflicting opinions.

Sovereignty is defined as "the possession of unlimited power to make laws"¹³ or "the supreme law creating and law enforcing authority independent of legal restraining."¹⁴ This authority is restricted to the state's own territory. Chief Justice Marshall's opinion in the *Schooner Exchange* case¹⁵ stresses this point: "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself." State sovereignty is therefore, indivisible because otherwise, it would not be absolute nor exclusive. No two entities can be sovereign within the same time and space.¹⁶

Traditionally, the concept of sovereignty had been confined to the legal sphere. Thus, Morgenthau says: "Sovereignty is not actual independence in political, military, economic or technological matters. The actual dependence of states in these matters and the actual, political, military and economic dependence of certain states upon others may make it difficult or impossible for certain states to pursue independent domestic and foreign policies but it does not affect their supreme legal authority within their own territories, that is, their sovereignty."¹⁷ Independence however does not mean freedom from international law but freedom from control by other states.¹⁸ In classical terms, state sovereignty is formal in nature. Thus, a test for sovereignty is whether a state looks up to an external institution for dictation in the making and enforcement of law.¹⁹

Sovereignty as a formal and legal concept only has not been received favorably by the new states which emerged after World War II. Contemporary views insist on effective sovereignty. This is because of new principles like sovereign "equality of states," non-intervention, and the right to self-determination of peoples,²⁰ which are against mere formal sovereignty.

¹² Djura Nincic, *The Problem of Sovereignty in the Charter and Practice of the UN*, 220 (1970).

¹³ Eastwood & Keaton, *The Austinian Theories of Law and Sovereignty*, 62 cited in CINCO, *PHILIPPINE POLITICAL LAW* 17 (1962).

¹⁴ SINCO, p. 17.

¹⁵ 7 Cranch 116 (1812).

¹⁶ Morgenthau, *The Problem of Sovereignty Reconsidered*, 48 COLUM. L. REV. 341-365 (1948).

¹⁷ *Idem*.

¹⁸ BRIERLY, *THE LAW OF NATIONS* 124 (1963).

¹⁹ Detmold, *Sovereignty: Aspects in Constitutional Law and Jurisprudence*, 4 ADELAIDE L. REV. 169 (1971).

²⁰ Nincic, *op. cit.*, *supra*, note 12 at 49.

State sovereignty is manifested in various ways, like the exercise of jurisdiction in criminal and civil cases, local administration, taxation, legislation and the exercise of police functions. The exercise by a state of its sovereignty over a piece of territory is considered a major factor in the resolution of questions concerning title. In the *Minquiers and Ecrehos* case,²¹ the International Court of Justice attached probative value to the acts which relate to the exercise of jurisdiction and local administration. The showing that British courts had exercised criminal jurisdiction over the *Ecrehos* during nearly a hundred years and had continued to exercise state functions thereafter led the court to conclude that sovereignty over the *Ecrehos* belonged to the United Kingdom.

Principles of international law govern the relations of nations with each other. Agreements in the form of treaties are usually concluded by states. The making of agreements is considered an exercise of state sovereignty. A problem arises however when treaty provisions appear to violate the sovereignty of the state, as in the case of a state which grants rights to another state to set up military bases on its soil under the exclusive control of the grantee.

The question of whether state sovereignty is violated by agreements granting rights to other states seemingly in violation of sovereignty had been considered before. The Permanent Court of International Justice saw treaties in derogation of sovereignty as valid on the ground that after all, entering into international agreements is an attribute of state sovereignty.²²

Most countries in the world have foreign military bases on their soil or grant harbor and airport facilities to foreign naval and air craft. These rights are considered by some to be derogations of sovereignty while others term them as merely treaty obligations which transfer jurisdiction but not sovereignty. We shall try to look at these practices to see if they are consonant with the concept of sovereignty.

The relations between the United States and Cuba over the Guantanamo Naval Base is illustrative of the problem of state sovereignty and the presence of a foreign military facility.

In Cuba, the United States Naval Base in Guantanamo was leased for ninety-nine (99) years with the payment of rent of \$2000 in gold every year by an agreement signed by the Presidents of both countries in 1903. The Agreement provided that "the United States shall exercise complete jurisdiction and control over and within said areas with the right to acquire (under conditions to be hereafter agreed upon by the two governments) for the public purposes of the United States any land or other property

²¹ Judgment of Nov. 17th, 1953: I.C.J. Reports 1953, at 47.

²² Publications of the P.C.I.J. Series A, no. 1, at 25.

therein by purchase or by exercise of eminent domain with full compensation to the owners thereof."²³

The Agreement between the United States and Cuba was characterized as a transfer of "territorial sovereignty."²⁴ It was noted that this type of agreement for lease of naval facilities for ninety-nine (99) years had been resorted to "as a means of securing control of territory without prejudicing the formal sovereignty of the lessor state." The sovereignty of the lessor state thereby becomes more nominal than real and constitutes a transfer of jurisdiction over territory.²⁵

The justification for transfer of sovereignty has been the power to make treaties. There has also been a denial of a transfer of sovereignty by characterizing the act as a transfer merely of jurisdiction. These defenses would not be tenable if we view sovereignty as essentially territorial supremacy. Nor can jurisdiction be distinguished from sovereignty. For if jurisdiction is but an attribute of sovereignty, once a transfer of jurisdiction occurs, there is a removal of an element of sovereignty and the sovereign state is left holding a hollow shell deprived of substance.

There is a contradiction in the theory that a state may agree to divest itself of certain aspects of its sovereignty and yet remain sovereign. Sovereignty is indivisible so that once a chip falls, the whole thing comes tumbling down.

A consideration of the concept of sovereignty as indivisible and absolute leads to no other conclusion than that a sovereign state cannot divest itself of any attribute of sovereignty without losing its sovereignty. Yet, the fact remains that in reality there are many agreements which violate state sovereignty but are still regarded as common practices in international legal relations. The comment of Morgenthau on this point is enlightening:²⁶

Of this contradiction between political reality and political preference, the belief in a divisible sovereignty is the ideological manifestation. The doctrine of the divisibility of sovereignty makes it intellectually feasible to reconcile not only what logic proves to be incompatible: to give up sovereignty while retaining it, but also what experience has shown to be irreconcilable under the conditions of modern civilization: national sovereignty and international order. Far from expressing a theoretical truth or from reflecting the actuality of political experience, the advice to give up "a part of national sovereignty" for the sake of the preservation of peace is tantamount to the advice to close one's eyes and dream that one can eat one's cake and have it too.

²³ Bishop, "International Law," 300, cited in *Brief Study of the Guantanamo Bay Problem* by R.L. Montague, 50 Ky. L.J. 459 (1962).

²⁴ Fenwick, "International Law" 367-368, cited in *Brief Study of the Guantanamo Bay Problem* by R.L. Montague, 30 Ky. L.J. 549 (1962).

²⁵ Agreement Between the United States and Cuba signed by the President of Cuba and the President of the United States in 1903.

²⁶ Morgenthau, *op. cit.*, *supra*, note 16.

Sovereignty today is no longer in terms of legal sovereignty only. Contemporary international law principles stress the concept of effective and not mere formal sovereignty. A state's relationship with another cannot be in terms only of legal equality on the surface and a structure of economic, political, military or technological dependence underneath. Such a relationship is condemned as neo-colonialist in nature. A patron-client relationship between states cannot validly stand in international law for this would violate the principles of sovereign equality of states, self-determination of peoples and non-intervention in the internal affairs of other states. State sovereignty is not confined to the legal framework because as experience has shown, there may be supreme law making authority as a facade to a combination of political, economic military or technological forces that direct and control the exercise of sovereignty.

Thus, under contemporary international law, there can be no distinction between formal and real sovereignty. State sovereignty as a concept must combine both.

The Military Bases Agreement of 1947, Prior to the 1979 Amendments

Article I of the Military Bases Agreement of 1947, entitled "Grant of Bases," provides:

1. The Government of the Republic of the Philippines... grants to the Government of the United States of America... 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.

Thus, under the Agreement, the United States was allowed to maintain a total of 23 military bases and reservations, even after the Philippines gained independence on July 4, 1946, which had been existing since the American occupation of the Philippines at the turn of the century.

The "Description of Rights" under Article III provides:

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.

and such is followed by an enumeration of other specific rights, power and authority, all in furtherance of American control over said bases. And in addition, the use of public services is provided for in Article VII:

It is mutually agreed that the United States may employ and use for United States military forces any and all public utilities, other services and facilities, airfields, ports, harbors, roads, highway, railroads, bridges, viaducts, canals, lakes, rivers and streams in the Philippines under conditions no less favorable than those that may be applicable from time to time to the military forces of the Philippines.

One of the major provisions of the Agreement is Article XIII which provides for the exercise of jurisdiction by the United States in the following manner:

1. The Philippines consents that the United States shall have the right to exercise jurisdiction over the following offenses:

(a) Any offense committed by any person within any base except where the offender and offended parties are both Philippines citizens (not members of the armed forces of the United States on active duty) or the offense is against the security of the Philippines;

(b) Any offense committed outside the bases by any member of the armed forces of the United States in which the offended party is also a member of the armed forces of the United States; and

(c) Any offense committed outside the bases by any member of the armed forces of the United States against the security of the United States.

2. The Philippines shall have the right to exercise jurisdiction over all other offenses committed outside the bases by any member of the armed forces of the United States.

4. If any offense falling under paragraph 2 of this Article is committed by any member of the armed forces of the United States

(a) while engaged in the actual performance of a specific military duty, or

(b) during a period of national emergency declared by either Government and the fiscal (prosecuting attorney) so finds from the evidence, he shall immediately notify the officer holding the offender in custody that the United States is free to exercise jurisdiction....

5. In all cases over which the Philippines exercises jurisdiction the custody of the accused, pending trial and final judgment, shall be entrusted without delay to the commanding officer of the nearest base, who shall acknowledge in writing that such accused has been delivered to him for custody pending trial in a competent court of the Philippines and that he will be held ready to appear and will be produced before said court when required by it....

The Agreement was to remain in force for a period of 99 years, or until the year 2046, but the two governments agreed to a reduction of the unexpired period to 25 years in a subsequent amendment, thereby fixing its duration only up to the year 1991.

From a careful examination of the abovesited provisions, it can be seen how the question of sovereignty easily came about, even before the actual Agreement was signed and put into effect. As earlier mentioned, as early as 1934, the then Senate President Manuel L. Quezon opposed the ratification of the Hare-Hawes-Cutting Law, the law that would grant independence to the Philippines after a period of ten years from the establishment of the Commonwealth, because of its provisions authorizing the establishment of American military bases in the Philippines even after independence, "for it destroyed the very essence of independent existence for the Philippines."²⁷ And indeed, in the Proclamation of Philippine Independence, it was recited that "Whereas the Act of Congress approved March 24, 1934, known as the Philippine Independence Act, directed that on the fourth day of July immediately following a ten-year transitional period leading to the independence of the Philippines, the President of the United States of America should by proclamation withdraw and surrender all rights of possession, supervision, jurisdiction, control or sovereignty of the United States of America in and over the territory and people of the Philippines *except certain reservations therein and thereafter authorized to be made. . . .*" (Italics supplied) At this point in time, political emancipation was foremost in the minds of the Filipino people, and Quezon saw the incompatibility of independence and the attainment of true political sovereignty for the Philippines with the presence of American military bases within its territory.

In the light of the foregoing discussion on the concept of sovereignty, it is highly questionable that the Philippines ever had sovereignty over these bases since their establishment in the early 1900's and at other times, and as such, it remains as a source of anxiety as to whether, in 1946, the Philippines had finally achieved complete political independence.

Article I of the Agreement refers to a "grant" of bases. The word "grant" is defined in law as "a conveyance" or "the instrument of such conveyance." It can also refer to "a present or gift." Therefore, the question of sovereignty is posed from the very start. If the Agreement were really meant to be a "conveyance" of bases, then clearly, the Philippines does not have sovereignty over such bases, since the territory covered would have been conveyed to a foreign government which therefore owns and controls such. Possibly to avoid this interpretation, the Agreement is considered as a mere lease, thus ownership remains in the Philippines. So, would it not have been better if Article I were entitled "Lease of Bases"? Or, was the term "lease" avoided so as to render the point of ownership and sovereignty equivocal to preserve American control over these "reserva-

²⁷ President Marcos' Foreign Policy Report, January 15, 1979, citing Quezon's book, "The Good Fight."

tions," as termed in the Proclamation of Philippine Independence cited above?²⁸

Besides, the word "lease" involves the payment of rent, which however was not provided for in the Agreement. Could it be that the word "lease" was avoided so as to avoid also the payment of rent? It is admitted however that the Philippines and the United States signed a separate accord, the Military Assistance Agreement of March 21, 1947, which provided for various forms of aid to the Philippine armed forces, possibly to take the place of rent. And yet, the concepts of rent and aid are obviously not the same. All the more it appears that the Agreement speaks of a "gratuitous conveyance, a gift," since no rent is provided for explicitly. If such were the fact, then it would be clearly in violation of the Constitution, since the Executive does not have such power to dispose of national territory. Not wishing to go into the constitutionality of said executive agreement at this point, the only intent here is to stress that the use of ambiguous terms in the very Agreement already raises the question of ownership and thereby the question of which government has sovereignty over the bases.

Safely assuming that the Agreement is not a conveyance, but a lease, in truth and in fact, nevertheless, the extent of the grant of "the right to retain the use of the bases," as stated in Article I, as manifested in the litany of rights, power and authority agreed upon to belong to the United States government, as provided in Article III, is effectively a surrender of Philippine sovereignty over the bases. With such rights and powers, the United States government has total control over the territory covered by these bases, regardless of the size of each base. And this may even extend outside said bases pursuant to Article VII which allows access to Philippine public services in the course of the United States military operations of which the Philippine government may not know anything about. In the words of Senator Recto: "The Agreement purported to insure the territorial integrity of the Philippines; but by granting America extra-territorial rights in the bases, we surrendered to her the power, the jurisdiction and the sovereignty of the Republic over portions of the national territory whose integrity is guaranteed by Article I of the Constitution. So the Agreement instead of insuring our territorial integrity, accomplished the very opposite of its declared purpose with the impairment of our territorial integrity."

In addition, there is still the major issue of de facto extraterritoriality that the Agreement gave the Americans under Article XIII. It raises the question of which government would have jurisdiction over American personnel involved in crimes inside or outside the base areas. The crux of the matter is that, as the Philippines had no jurisdiction over an American

²⁸ Refer to Rule 131 of our Revised Rules of Court: "Sec. 3. *Conclusive presumptions*.—The following are instances of conclusive presumptions: (b) The tenant is not permitted to deny the title of his landlord at the time of the commencement of the relation of landlord and tenant between them."

serviceman who committed a crime while in the performance of his military duty, still the right to determine whether said soldier was on official duty is reserved for the US base commander. Thus, the base commander's word alone could completely divest the Philippines and its courts of jurisdiction over the suspect American soldier in spite of proceedings undertaken by the Philippine fiscal.

"Over the years, the question of jurisdiction has provoked many angry protests from Filipinos resentful of the fact that American soldiers who shot or abused Filipinos could not be tried by Philippine courts. Even more galling is the American practice of suddenly transferring out of the country military personnel accused of committing crimes on or off the bases so as to place them beyond the reach of the country's courts in cases where these courts clearly have jurisdiction under the Bases Agreement. The question of jurisdiction has been the subject of prolonged negotiations but the United States continues to be reluctant to submit erring base personnel to Philippine justice."²⁹

From all the above considerations, there is grave doubt as to the status of Philippine sovereignty over the bases, by its very terms. Although uncertain of the socio-political conditions prevailing in 1947, it can safely be assumed that the Agreement was not negotiated on even terms, due to the dependence of the Philippines on the United States, especially since it was just after the War which left the country and its economy in ruins. Thus, it may even be contended that the United States never really intended to let the Philippines have complete sovereignty and independence at this time. "The United States' objective immediately after the war was to transform the Philippines from a colony to a neocolony. This meant continued domination of the economy, its retention as a market for American goods, a source of raw materials, and an open field for American investments. And to guarantee this control as well as to insure that the Philippines would serve as a convenient jumping-off point for any military operations the Americans might wish to initiate in Asia, the United States wanted to have military and naval bases on Philippine soil but existing outside Philippine sovereignty."³⁰

The Military Bases Agreement, As Amended

On January 7, 1979, the Philippines and the United States governments exchanged notes confirming acceptance of amendments to the Military Bases Agreement of 1947. The notes exchanged were the letter of US President Jimmy Carter to Philippine President Ferdinand Marcos; the letter of Philippine Foreign Minister Carlos P. Romulo to US Ambassador Richard Murphy; and the letter of US Secretary of State Cyrus Vance to Philippine

²⁹ CONSTANTINO & CONSTANTINO, *THE PHILIPPINES: THE CONTINUING PAST* 205 (1978).

³⁰ *Ibid.*, p. 193.

Foreign Minister Carlos P. Romulo. These were signed by Foreign Minister Romulo in behalf of the Philippine government and Ambassador Murphy in behalf of the United States government. The amendments which take the form of executive agreements between the two governments, took effect immediately, as per letter of Minister Romulo to Ambassador Murphy, although the documents had yet to be referred to the United States Congress for ratification.

The six-point amendments which have been agreed upon are expressed in the letter of Minister Romulo to Ambassador Murphy, namely:

1. The bases subject of the Agreement are Philippine military bases over which Philippine sovereignty extends, and that only the Philippine flag shall be flown singly at the bases;
2. Each base shall be under the command of a Philippine base commander;
3. The United States shall have the use of certain facilities and areas within the bases and shall have effective command and control over such facilities and over United States personnel, employees, equipment and material. Consistent with its rights and obligations under the 1947 Agreement, the United States shall be assured unhampered military operations involving its forces in the Philippines, and in implementation, the two governments have agreed on the attached implementing arrangements with annexes and accompanying maps;
4. The base areas shall be reduced from their erstwhile dimensions, and development of base lands subsequent to this Agreement, for other than military purposes, shall be accomplished in such a manner as to ensure that Philippine and United States military operations will remain unhampered and effective security of the bases will be maintained;
5. The Philippine government will provide for perimeter security over the bases; and
6. In every fifth anniversary year from the date of this modification and until the termination of the Agreement, there shall be begun and completed a complete and thorough review and reassessment of the Agreement, including its objectives, its provisions, its duration, and the manner of implementation, to assure that the Agreement continues to serve the mutual interest of both parties.

It is asserted that "from the above amendments, our people will note that full recognition is given, at last, to Philippine sovereignty over the bases, removing all the ambiguities and doubts that once attended this question."³¹ This, however, is an assertion that is still open to question.

At the outset, it must be noted that only Articles I and XXVI and Annexes A and B of the Agreement have been expressly superseded by these amendments. This means that the other provisions of the Agreement are

³¹ President Marcos' Foreign Policy Report, January 15, 1979.

still in full force and effect, unless any of these amendments are inconsistent with any of the provisions of the original, in which case these later amendments will prevail. Secondly, it is also worthy of mention that these amendments must be considered as a whole, together with the other provisions still in effect, in order to determine the real significance of the Agreement, as amended. Each amendment may not be significant in itself to be able to derive any solid conclusion.

Therefore, considering the amendments from these perspectives, we come to the conclusion that, in spite of such amendments, Philippine sovereignty over the bases still remains as a questionable issue.

First and foremost, the rights and powers of the United States over the bases, provided in Article III, have in no way been diminished. From the use of the terms "effective command and control" and "unhampered," it seems that American control has even been reaffirmed and buttressed. Besides, in implementation of "unhampered" US military operations involving its forces in the Philippines and effective command and control over US facilities within the bases, the amendments make mention of "attached implementing arrangements with annexes and accompanying maps" which have not been released for public dissemination (and which may never be released for security reasons). Thus, we may never know the actual extent of the United States' command and control, and leaves us with the question of which government effectively exercises sovereignty over the bases, notwithstanding explicit recognition of Philippine sovereignty.

Secondly, no formal changes have been made with regards to jurisdiction. It is only stated in the letter of Minister Romulo to Ambassador Murphy that "the parties also note the decision of the United States to retain accused personnel in the Philippines for a reasonable time, and to prevent their inadvertent departure, in order to provide opportunities for adequate discussions between the two governments relating to the jurisdictional question in official duty cases." There arise questions as to what is "a reasonable time" and who determines such, the Philippine base commander or the US commander or officer-in-charge of the US facilities. Similarly, there is now the question of who ultimately decides on the jurisdictional question of whether a US serviceman was on official duty when he committed the crime. There are only promises of discussions and no categorical pronouncements. The fact remains that the United States still has jurisdiction over said facilities and personnel as provided in Article XIII of the Agreement, depriving Philippine courts of its constitutional jurisdiction, thus remaining as a violation of Philippine sovereignty. Arrangements as to procedure provided in Minister Romulo's letter, as quoted above, merely evade the issue of sovereignty.

Thirdly, with the issues of effective control and jurisdiction unresolved, as explained above, the other amendments become meaningless in effect, and

even portray themselves as mere offers of appeasement or compromise to the complaining sectors of Philippine society. Naming the bases as "Philippine military bases" and the US military installations found in them as "US facilities within the Philippines base;" providing that only the Philippine flag shall be flown singly at the bases, that each shall be under the command of a Philippine base commander, and that the Philippine government will provide for perimeter security over the bases—these will not in any way resolve the issues of effective control and jurisdiction. How effective will be the command of the Philippine base commander as against the "effective command and control" of the US commander of the facilities within the bases? To what extent will be his knowledge of the military operations being undertaken within his base when the United States is granted "unhampered" military operations? And on jurisdiction, even assuming that it is the Philippine base commander who will determine the jurisdictional question in official duty cases, will he not be merely referring back to the US commander for information, who may or may not give him the true information for security reasons?

Furthermore, it appears that the Philippine government will be using its own resources for the perimeter security over the bases, thus manifesting an ironical situation—that the Philippine government itself is protecting American sovereignty over the bases. This and the fact that no rent was explicitly provided for again, as the revised Agreement was overshadowed by a letter dated January 4, 1979, received by President Marcos from US President Carter who promised to make his best effort to obtain appropriations totalling \$500 million for the next five fiscal years as military aid or assistance to the Philippines. Again, no contract of lease of territory is formally recognized as the Agreement is still free of rent.

Any or all of these will not affirm or confer Philippine sovereignty over bases. No doubt, and it is admitted, that the amendments have improved on the original Agreement and the Philippines is in a much better position to assert its sovereignty now than prior to the amendments. Nevertheless, much is still to be desired.

History, it seems, has not changed much, and even repeats itself. "When the stars and stripes were hauled down during the inaugural ceremonies on July 4, 1946," (as was done again here in the bases), "most Filipinos still premised their future on dependence on the United States."³²

The Doctrine of Auto-Limitation

The grant of military bases as a valid cession of territory and waiver of jurisdiction is mainly defended by Philippine courts through the doctrine of auto-limitation.

³² CONSTANTINO & CONSTANTINO, *op. cit.*, *supra*, note 29 at 193.

In the recent case of *People v. Gozo*,³³ a case involving one Loreta Gozo who was charged with a violation of Municipal Ordinance No. 4, s. of 1964, of Olongapo, Zambales, for failure to acquire a building permit prior to actual construction, the question of sovereignty rights was touched upon as it was the contention of the defendant that the ordinance did not apply to her on the pretext that her house was constructed within the naval base leased to the United States armed forces, and thus beyond Philippine jurisdiction. The judgment of conviction was affirmed on the ground that the Philippines still had "administrative jurisdiction" over the bases as an exercise of its sovereign rights. It cited the case of *People v. Acierto*,³⁴ quoting Justice Tuason in the following manner:

By the Agreement, it should be noted, the Philippine Government merely consents that the United States exercise jurisdiction in certain cases. The consent was given purely as a matter of comity, courtesy, or expediency. The Philippine Government has not abdicated its sovereignty over the bases as part of the Philippine territory or divested itself completely of jurisdiction over offenses committed therein. Under the terms of the treaty, the United States Government has prior or preferential but not exclusive jurisdiction of such offenses. The Philippine Government retains not only jurisdictional rights not granted, but also all such ceded rights as the United States Military authorities for reasons of their own decline to make use of. The first proposition is implied from the fact of Philippine sovereignty over the bases; the second from the express provisions of the treaty.³⁵

Such a view was reiterated in *Reagan v. Commissioner of Internal Revenue*,³⁶ involving William C. Reagan, at one time a civilian employee of an American corporation providing technical assistance to the United States armed forces in the Philippines. He disputed the payment of the income tax assessed on him by the Commissioner on an amount realized by him on a sale of his automobile to a member of the US Marine Corps, the transaction having taken place at the Clark Field Air Base at Pampanga, contending that the sale was made outside Philippine territory and therefore beyond Philippine jurisdictional power to tax. The Court of Tax Appeals and the Supreme Court affirmed the decision of the Commissioner on the ground that the sale took place on what is indisputably Philippine territory, finding words to the contrary in the cases of *Saura Import and Export Co. v. Meer*³⁷ and *Co Po v. Collector of Internal Revenue*³⁸ as mere obiter dictum, made for the purpose of thwarting attempts at tax evasion.

In the words of Justice Fernando in the Reagan case:

Nothing is better settled than that the Philippines being independent and sovereign, its authority may be exercised over its entire domain. There

³³ G.R. No. L-36409, October 26, 1973, 53 SCRA 476 (1973).

³⁴ 92 Phil. 534 (1953).

³⁵ *Ibid.*, at 542.

³⁶ G.R. No. L-26379, December 27, 1969, 30 SCRA 968 (1969).

³⁷ 88 Phil. 199 (1951).

³⁸ G.R. No. L-17303, August 31, 1962, 5 SCRA 1057 (1962).

is no portion thereof that is beyond its power. Within its limits, its decrees are supreme, its commands paramount. Its laws govern therein, and everyone to whom it applies must submit to its terms. That is the extent of its jurisdiction, both territorial and personal. Necessarily, likewise, it has to be exclusive. If it were not thus, there is a diminution of its sovereignty."

However, he goes on and states:

It is to be admitted that any state may, by its consent, express or implied, submit to a restriction of its sovereign rights. There may thus be a curtailment of what otherwise is a power plenary in character. That is the concept of sovereignty as auto-limitation, which, in the succinct language of Jellinek, 'is the property of a state-force due to which it has the exclusive capacity of legal self-determination and self-restriction.' A state then, if it chooses to, may refrain from the exercise of what otherwise is illimitable competence.

Its laws may as to some persons found within its territory no longer control. Nor does the matter end there. It is not precluded from allowing another power to participate in the exercise of jurisdictional right over certain portions of its territory. If it does so, it by no means follows that such areas become impressed with an alien character. They retain their status as native soil. They are still subject to its authority. Its jurisdiction may be diminished, but it does not disappear. So it is with the bases under lease to the American armed forces by virtue of the military bases agreement of 1947. They are not and cannot be foreign territory.³⁹

Still, in the earlier decision of *Dizon v. Philippine Ryukus Command*,⁴⁰ one Godofredo Dizon was convicted by a US General Court Martial for an offense committed at the main storage area of the Philrycom Engineer Depot, a US Army temporary installation covered by the Bases Agreement. In affirming the jurisdiction of the US General Court Martial, the Supreme Court declared through Justice Paras:

The rights thus granted are no less than those conceded by the rule of international law to 'a foreign army allowed to march through a friendly country or to be stationed in it, by permission of its government or sovereign.' . . . The jurisdiction granted to the United States under the Agreement may be wider than what is recognized by international law, but the fact remains that the lesser right is fundamentally as much a diminution of the jurisdiction of the Philippine courts as the greater right.⁴¹

Both the Reagan and Dizon decisions cited the leading case of *Schooner Exchange v. M'Faddon*,⁴² an 1812 US decision, thus:

The jurisdiction of the nation within its own 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,

³⁹ *Reagan v. Commissioner of Internal Revenue*, *op. cit.*, *supra*, note 36 at 973-974.

⁴⁰ 81 Phil. 286 (1948).

⁴¹ *Ibid.*, at 292.

⁴² 3 L. Ed. 287, 7 Cranch 116 (1812).

would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.⁴³

From the foregoing decisions, it is evident that the Supreme Court adheres to the doctrine of auto-limitation in sustaining the existence of Philippine sovereignty over the bases, even as the Philippine government has waived or surrendered its effective territorial control and jurisdiction over the same, the effect of which is the existence of *de facto* extraterritoriality. We now question the concept of extraterritoriality.

The doctrine of auto-limitation, and concomitantly, that of extraterritoriality, seems to be ultimately hinged on the pronouncement made in the Schooner Exchange case to the effect that a foreign army, allowed to march through a friendly country or be stationed in it, by permission of its government or sovereign, is exempt from the civil and criminal jurisdiction of the place.⁴⁴ The strength of such pronouncement is based on a claim that it is a principle of international law recognized by the Philippine government in accordance with its Constitution.⁴⁵ However, what is alleged to be a principle of international law in the Dizon case was merely an obiter dictum in the Schooner Exchange case as no foreign army was involved in any way in said case. "It seemed that the aura with which the army of liberation was surrounded was too dazzling to hide the acts of oppression committed by members thereof, and to have blinded the majority to the extent of brushing aside a 20th century constitution for the sake of a casual immaterial statement made in a decision rendered about the beginning of the 19th century."⁴⁶

As quoted in the Reagan case:

It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected,

⁴³ Reagan v. Commissioner of Internal Revenue, *op. cit.*, *supra*, note 36 at 974 and Dizon v. Phil. Ryukus Comman, *op. cit.*, *supra*, note 40 at 292.

⁴⁴ This same pronouncement was applied in two previous cases, namely, Raquiza v. Bradford, 75 Phil. 50 (1945) and Tubb v. Griess, 78 Phil. 249 (1947), and the same cases were cited by the majority opinion in the Dizon case. The more recent case of Baer v. Tizon, 57 SCRA 1 (1974) and 58 SCRA 3 (1974), also cites this statement made in the Schooner Exchange case. However, the Baer case does not deal squarely with the issue of sovereignty, but rather, it refers to the principle of sovereign immunity of a foreign power.

⁴⁵ Article II, section 3 of the 1973 Constitution, and similarly, Article II, section 3 of the 1935 Constitution.

⁴⁶ Dissenting opinion of Justice Perfecto in Dizon v. Philippine Ryukus Command, *op. cit.*, *supra*, note 40 at 297-298.

but ought not to control the judgment in a subsequent suit when the very point is presented for decision.⁴⁷

Thus, there seems to be no solid basis for the doctrine of auto-limitation as a principle of public international law, especially in the light of recent trends in the concept of sovereignty, as previously discussed.

However, assuming *arguendo* the strength of the said pronouncement as a basis for auto-limitation and extraterritoriality, we take our cue from the continuation of the principles laid down in the Schooner Exchange case itself, from where this contested pronouncement came. It states further:

All exceptions, therefore, to the full and complete power of a nation within its own territories, may be traced up to the consent of the nation itself. They can flow from no other legitimate source. This consent may be either express or implied.

The same statements were used to support a principle laid down in the 1954 case of *Brownell v. Sun Life Assurance Company*⁴⁸ to the effect that "a foreign law may have extraterritorial effect in a country other than the country of origin, provided the latter, in which it is sought to be made operative, gives its consent thereto."⁴⁹ Here, it was held that there was indeed consent with the ratification of or concurrence to the agreement between Philippine President Manuel Roxas and United States Commissioner Paul McNutt for the extension of the Philippine Property Act of 1946, passed by the US Congress on July 3, 1946, as implied from the acts of President Roxas and that of the Secretary of Foreign Affairs, as well as by the enactment of Republic Acts 7, 8 and 477.

Therefore, for a state to submit to a restriction of its sovereign rights, there must be consent by it, whether express or implied. And by consent, we mean "consent of the nation itself," the consent of the people, for it is the people who is the sovereign. "Sovereignty resides in the people and all government authority emanates from them."⁵⁰ Thus, only the sovereign people has the capacity of legal self-determination and self-restriction of its sovereign rights.

It is therefore submitted that consent to a limitation of sovereignty (as admitted by the very doctrine of auto-limitation) cannot be given by mere treaty or executive agreement, for such are not acts of the sovereign itself, and there is the need then for their ratification by the sovereign people, express or implied. Treaties and international executive agreements are concluded, not by the principals themselves, the people, but by their

⁴⁷ *Reagan v. Commissioner of Internal Revenue*, *op. cit.*, *supra*, note 36 at 978, quoting US Chief Justice Marshall.

⁴⁸ 95 Phil. 228 (1954).

⁴⁹ *Ibid.*, at 234.

⁵⁰ Art. II, section 1 of the CONST. (1973), and Art. II, section 1 of the CONST. (1935).

representatives or agents, and that, while the powers of the principals are unlimited, those of their representatives are limited. They are limited by the Constitution, which is the expression of the will of the people. The people may amend, or re-make the Constitution, or dispense with it entirely. The representatives of the people can go no further than that allowed by such Constitution. Our people did not deem it wise to grant the treaty-making agencies absolute powers.⁵¹

The Military Bases Agreement and its amendments must, therefore, be ratified by the Filipino people in the manner prescribed in the Constitution,⁵² for it contains provisions that are in derogation of the sovereignty of the Philippines over the bases, as an expression of the nation's consent, and with more reason if the Agreement violates the Constitution itself. As Philippine sovereignty is expressed and described in its Constitution, and the Agreement provides for restrictions upon that sovereignty, such as limitations on the judicial power vested in Philippine courts,⁵³ then logically, the Agreement contains provisions that violate the Constitution. And applying the questionable doctrine of auto-limitation, the Agreement must be "consented to" by the Filipino people through its ratification.⁵⁴ Further, the 1979 amendments, as such, must also be ratified in accordance with the 1973 Constitution for they preserve the restrictions on Philippine sovereignty over the bases.

However, it may be argued that there is no need for the ratification of these amendments to the Agreement by virtue of Article XIV, section 15 of the 1973 Constitution, which provides:

Any provision of Paragraph One, Section 14, Article VIII and of this Article notwithstanding, the Prime Minister may enter into international treaties or agreements as the national welfare and interest may require.

It may be reasonably safe to assume that the Prime Minister is still bound by the Constitution in executing such treaties and agreements, and those entered into that are in violation of the Constitution will require the consent of the sovereign people through ratification, as provided for.

The need for consent and ratification by the people is premised on the derogation of its sovereignty, applying the doctrines of auto-limitation and

⁵¹ Dissenting opinion of Justice Perfecto in *Dizon v. Philippine Ryukus Command*, *op. cit.*, *supra*, note 40 at 300.

⁵² Art. VIII, section 14 of the CONST. (1973), and Art. VII, section 10 of the CONST. (1935).

⁵³ Art. X of the CONST. (1973), and Art. VIII of the CONST. (1935). Arguably, there may be other Constitutional violations: of territorial integrity embodied in Article I, section 1 of the 1973 Constitution; limitations on other sovereign rights contained in Article XIV of the 1973 Constitution (The National Economy and the Patrimony of the Nation); and violations of human rights, the right to survive, and the right of total self-determination by a State.

⁵⁴ There may have already been an implied ratification of the original agreement through acquiescence after all these years since 1947.

extraterritoriality. As the 1979 amendments to the Agreement still reflect such a diminution of Philippine sovereignty over the bases, it is only our intent to point out that there still remains the crucial question of sovereignty, against the claim that "Philippine sovereignty shall reign authentic in both symbol and substance over the Philippine military bases."⁵⁵

Conclusion

An analysis of the 1979 Amendments to the Bases Agreement of 1947 leads us to conclude that the question of Philippine sovereignty over the bases has not been clearly resolved. In the light of the concept of indivisible and effective sovereignty, the question of Philippine sovereignty over the bases remains open.

It is therefore suggested that the Amendments be subjected to closer scrutiny and revised along the following lines:

1. There should be an explicit declaration of Philippine sovereignty over the Bases.
2. The Agreement should clearly state that the United States shall pay rent for the use of the Bases.
3. The powers of the Philippine Base Commander should be expressly listed down, specially the power to determine whether an American serviceman was acting in the performance of his duties when the crime was committed and the basis for reaching his decision.
4. The meaning of the terms "effective command and control over such facilities and over United States personnel, employees, equipment and material" should be clarified.
5. Article VII which allows access to Philippine public services and territory outside of the bases in the course of United States military operations should be removed for this provision is a flagrant violation of Philippine sovereignty.

It is feared, however, that despite revision of the Agreement along the lines suggested above, the nature of military operations does not permit a host state to ever obtain real, effective and complete control over foreign military facilities on its soil. At a time of ever increasing complexity in the conduct of military operations, no foreign power can afford to allow another state to achieve control over its forces even if these forces are stationed in a base located in the territory of that host state. If such is the case, then there can be no other conclusion but that the Philippines cannot have territorial sovereignty with the presence of a foreign military facility on its soil.

⁵⁵ Statement of Foreign Minister Carlos P. Romulo, quoted in *Bulletin Today*, January 8, 1979, p. 10.

