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G.R. No. 212426 - RENE A.V. SAGUISAG, WIGBERTO E. TAÑADA, FRANCISCO "DODONG" NEMENZO, JR., SR. MARY JOHN MANANZAN, PACIFICO A. AGABIN, ESTEBAN "STEVE" SALONGA, H. HARRY L. ROQUE, JR., EVALYN G. URSUA, EDRE U. OLALIA, DR. CAROL PAGADUAN-ARAULLO, DR. ROLAND SIMBULAN, and TEDDY CASIÑO, *Petitioners*, v. EXECUTIVE SECRETARY PAQUITO N. OCHOA, JR., DEPARTMENT OF DEFENSE SECRETARY VOLTAIRE GAZMIN, DEPARTMENT OF FOREIGN AFFAIRS SECRETARY ALBERT DEL ROSARIO, JR., DEPARTMENT OF BUDGET AND MANAGEMENT SECRETARY FLORENCIO ABAD, and ARMED FORCES OF THE PHILIPPINES CHIEF OF STAFF GENERAL EMMANUEL T. BAUTISTA, *Respondents*.

G.R. No. 212444 - BAGONG ALYANSANG MAKABAYAN (BAYAN), REPRESENTED BY ITS SECRETARY GENERAL RENATO M. REYES, JR., BAYAN MUNA PARTY-LIST REPRESENTATIVES NERI J. COLMENARES AND CARLOS ZARATE, GABRIELA WOMEN'S PARTY-LIST REPRESENTATIVES LUZ ILAGAN AND EMERENCIANA DE JESUS, ACT TEACHERS PARTY-LIST REPRESENTATIVE ANTONIO L. TINIO, ANAKPAWIS PARTY-LIST REPRESENTATIVE FERNANDO HICAP, KABATAAN PARTY-LIST REPRESENTATIVE TERRY RIDON, MAKABAYANG KOALISYON NG MAMAMAYAN (MAKABAYAN), REPRESENTED BY SATURNINO OCAMPO AND LIZA MAZA, BIENVENIDO LUMBERA, JOEL C. LAMANGAN, RENATO CONSTANTINO, JR., RAFAEL MARIANO, SALVADOR FRANCE, ROGELIO M. SOLUTA, and CLEMENTE G. BAUTISTA, *Petitioners*, v. DEPARTMENT OF DEFENSE (DND) SECRETARY VOLTAIRE GAZMIN, DEPARTMENT OF FOREIGN AFFAIRS SECRETARY ALBERT DEL ROSARIO, EXECUTIVE SECRETARY PAQUITO N. OCHOA, JR., ARMED FORCES OF THE PHILIPPINES CHIEF OF STAFF GENERAL EMMANUEL T. BAUTISTA, DEFENSE UNDERSECRETARY PIO LORENZO BATINO, AMBASSADOR LOURDES

YPARRAGUIRRE, AMBASSADOR J. EDUARDO MALAYA, DEPARTMENT OF JUSTICE UNDERSECRETARY FRANCISCO BARAAN III, and DND ASSISTANT SECRETARY FOR STRATEGIC ASSESSMENTS RAYMUND JOSE QUILOP AS CHAIRPERSON AND MEMBERS, RESPECTIVELY, OF THE NEGOTIATING PANEL FOR THE PHILIPPINES ON EDCA, ***Respondents.***

KILUSANG MAYO UNO, REPRESENTED BY ITS CHAIRPERSON ELMER LABOG, CONFEDERATION FOR UNITY, RECOGNITION AND ADVANCEMENT OF GOVERNMENT EMPLOYEES (COURAGE), REPRESENTED BY ITS NATIONAL PRESIDENT FERDINAND GAITE, NATIONAL FEDERATION OF LABOR UNIONS-KILUSANG MAYO UNO, REPRESENTED BY ITS NATIONAL PRESIDENT JOSELITO USTAREZ, NENITA GONZAGA, VIOLETA ESPIRITU, VIRGINIA FLORES, and ARMANDO TEODORO, JR.,

Petitioners-in-Intervention

RENE A.Q. SAGUISAG, JR.,

Petitioner-in-Intervention

Promulgated:

January 12, 2016

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CONCURRING AND DISSENTING OPINION

LEONARDO-DE CASTRO, *J.*:

> "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, 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." x x x.[1]

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[1] The Schooner Exchange *vs.* McFaddon and Others, 3 Law. ed., 287, 293; cited in *Dizon v. Commanding General of the Phil. Ryukus Command, U.S. Army*, 81 Phil. 286, 292 (1948).

I concur with the disposition of the procedural issues but not with the arguments and conclusions reached as to the substantive issues.

The focus of the present controversy, as mentioned by the Honorable Chief Justice is the application of Section 25, Article XVIII of the Constitution which reads:

> ARTICLE XVIII
> TRANSITORY PROVISIONS
>
> SEC. 25. After the expiration in 1991 of the Agreement between the Republic of the Philippines and the United States of America concerning Military Bases, foreign military bases, troops, or facilities shall not be allowed in the Philippines except under a treaty duly concurred in by the Senate and, when the Congress so requires, ratified by a majority of the votes cast by the people in a national referendum held for that purpose, and recognized as a treaty by the other contracting State.

Section 25, Article XVIII bans foreign military bases, troops, or facilities in Philippine territory, unless the following requisites are complied with: (1) the presence of foreign military bases, troops, or facilities should be allowed by a **treaty**; (2) the treaty must be **duly concurred in by the Philippine Senate** and, when Congress so requires, such treaty should be ratified by a majority of the votes cast by the Filipino people in a national referendum held for that purpose; and (3) such treaty should be **recognized as a treaty by the other contracting party**.[2]

Couched in negative terms, Section 25, Article XVIII embodies a prohibition: "foreign military bases, troops, or facilities ***shall not be allowed*** in the Philippines," unless the requisites in the said section are met.

In *BAYAN v. Zamora*,[3] the Court held that Section 25, Article XVIII covers three different situations: a treaty allowing the presence within the Philippines of (a) foreign military bases, or (b) foreign military troops, or (c) foreign military facilities, such that a treaty that involves any of these three standing alone falls within the coverage of the said provision.

BAYAN v. Zamora likewise expounded on the coverage of the two provisions of the Constitution – Section 21, Article VII and Section 25, Article XVIII – which both require Senate concurrence in treaties and international agreements. The Court stated:

> Section 21, Article VII deals with treaties or international agreements in general, in which case, the concurrence of at least two-thirds (2/3) of all the Members of the Senate is required to make the subject treaty, or international agreement, valid and binding on the part of the Philippines. This provision lays down the general rule on treaties or

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2 *BAYAN (Bagong Alyansang Makabayan) v. Zamora*, 396 Phil. 623, 654-655 (2000).
3 Id. at 653.

international agreements and applies to any form of treaty with a wide variety of subject matter, such as, but not limited to, extradition or tax treaties or those economic in nature. All treaties or international agreements entered into by the Philippines, regardless of subject matter, coverage, or particular designation or appellation, requires the concurrence of the Senate to be valid and effective.

In contrast, Section 25, Article XVIII is a special provision that applies to treaties which involve the presence of foreign military bases, troops or facilities in the Philippines. Under this provision, the concurrence of the Senate is only one of the requisites to render compliance with the constitutional requirements and to consider the agreement binding on the Philippines. Section 25, Article XVIII further requires that "foreign military bases, troops, or facilities" may be allowed in the Philippines only by virtue of a treaty duly concurred in by the Senate, ratified by a majority of the votes cast in a national referendum held for that purpose if so required by Congress, and recognized as such by the other contracting state.

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Moreover, it is specious to argue that Section 25, Article XVIII is inapplicable to mere transient agreements for the reason that there is no permanent placing of structure for the establishment of a military base. On this score, the Constitution makes no distinction between "transient" and "permanent." Certainly, we find nothing in Section 25, Article XVIII that requires *foreign troops or facilities* to be stationed or placed *permanently* in the Philippines.

It is a rudiment in legal hermeneutics that when no distinction is made by law the Court should not distinguish — *Ubi lex non distinguit nec nos distinguire debemos*.

In like manner, we do not subscribe to the argument that Section 25, Article XVIII is not controlling since no foreign military bases, but merely foreign troops and facilities, are involved in the VFA. Notably, a perusal of said constitutional provision reveals that the proscription covers "*foreign military bases, troops, or facilities.*" Stated differently, this prohibition is not limited to the entry of troops and facilities without any foreign bases being established. The clause does not refer to "*foreign military bases, troops, or facilities*" collectively but treats them **as separate and independent subjects**. The use of comma and the disjunctive word "or" clearly signifies disassociation and independence of one thing from the others included in the enumeration, such that, the provision contemplates three different situations — a military treaty the subject of which could be either (a) foreign bases, (b) foreign troops, or (c) foreign facilities — any of the three standing alone places it under the coverage of Section 25, Article XVIII.

To this end, the intention of the framers of the Charter, as manifested during the deliberations of the 1986 Constitutional Commission, is consistent with this interpretation:

> MR. MAAMBONG. I just want to address a question or two to Commissioner Bernas. This formulation

> speaks of three things: foreign military bases, troops or facilities. My first question is: *If the country does enter into such kind of a treaty, must it cover the three-bases, troops or facilities or could the treaty entered into cover only one or two?*
>
> FR. BERNAS. *Definitely, it can cover only one. Whether it covers only one or it covers three, the requirement will be the same.*
>
> MR. MAAMBONG. *In other words, the Philippine government can enter into a treaty covering not bases but merely troops?*
>
> FR. BERNAS. *Yes.*
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> MR. MAAMBONG. I cannot find any reason why the, government can enter into a treaty covering only troops.
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> FR. BERNAS. Why not? Probably if we stretch our imagination a little bit more, we will find some. We just want to cover everything.[4] (Citations omitted.)

Furthermore, the wording of Section 25, Article XVIII also provides an indubitable implication: **foreign military bases, troops and facilities have ceased to be allowed in the Philippines after the expiration in 1991 of the Military Bases Agreement; thereafter, the same can only be re-allowed upon the satisfaction of all the three requirements set forth in the Section 25, Article XVIII.**

The legal consequence of the above provision with respect to the Military Bases Agreement (March 14, 1947), the Mutual Defense Treaty (August 30, 1951), the Visiting Forces Agreement (February 10, 1998), and the Enhanced Defense Cooperation Agreement ([EDCA] April 28, 2014) can be appreciated by an examination of the respective rights and obligations of the parties in these agreements.

Effect of Section 25, Article XVIII of the Constitution on the Military Bases Agreement, the Mutual Defense Treaty, the Visiting Forces Agreement, and the Enhanced Defense Cooperation Agreement

On July 4, 1946, the United States recognized the independence of the Republic of the Philippines, thereby apparently relinquishing any claim of sovereignty thereto. However, on March 14, 1947, the Philippines and the United States entered into a **Military Bases Agreement** (MBA) which

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[4] Id. at 650-654.

granted to the United States government the right to *retain*[5] the use of the bases listed in the Annexes of said agreement.[6] Within said bases, the United States was granted "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."[7] The term of the original agreement was "for a period of ninety-nine years subject to extension thereafter as agreed by the two Governments."[8] In 1966, the parties entered into the Ramos-Rusk Agreement, which reduced the term of the Military Bases Agreement to 25 years from 1966, or until 1991.

On August 30, 1951, the Philippines and the United States entered into the **Mutual Defense Treaty** (MDT), whereby the parties recognized that "an armed attack in the Pacific area on either of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common dangers in accordance with its constitutional process."[9] The treaty

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5 The Court explained in *Nicolas v. Romulo* (598 Phil. 262, 279-280 [2009]) that:
"[U]nder the Philippine Bill of 1902, which laid the basis for the Philippine Commonwealth and, eventually, for the recognition of independence, the United States agreed to cede to the Philippines all the territory it acquired from Spain under the Treaty of Paris, plus a few islands later added to its realm, except certain naval ports and/or military bases and facilities, which the United States retained for itself.

This is noteworthy, because what this means is that Clark and Subic and the other places in the Philippines covered by the RP-US Military Bases Agreement of 1947 were not Philippine territory, as they were excluded from the cession and retained by the US.

x x x x

Subsequently, the United States agreed to turn over these bases to the Philippines; and with the expiration of the RP-US Military Bases Agreement in 1991, the territory covered by these bases were finally ceded to the Philippines."

6 Military Bases Agreement (March 14, 1947), Article I, which provides:
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.
3. The Philippines agrees to enter into negotiations with the United States at the latter's request, to permit the United States to expand such bases, to exchange such bases for other bases, to acquire additional bases, or relinquish rights to bases, as any of such exigencies may be required by military necessity.
4. A narrative description of the boundaries of the bases to which this Agreement relates is given in Annex A and Annex B. An exact description of the bases listed in Annex A, with metes and bounds, in conformity with the narrative descriptions, will be agreed upon between the appropriate authorities of the two Governments as soon as possible. With respect to any of the bases listed in Annex B, an exact description with metes and bounds, in conformity with the narrative description of such bases, will be agreed upon if and when such bases are acquired by the United States.

7 Id., Article III(1).

8 Id., Article XXIX.

9 Articles IV and V of the Mutual Defense Treaty (August 30, 1951) provides:
ARTICLE IV
Each Party recognizes that an armed attack in the Pacific Area on either of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common dangers in accordance with its constitutional process.

provided that it "shall remain in force indefinitely," although either party "may terminate it one year after notice has been given to the other Party."[10] It bears pointing out that there is no explicit provision in the MDT which authorized the presence in the Philippines of military bases, troops, or facilities of the United States.

In 1986, during the early stages of the deliberations of the Constitutional Commission, and in view of the impending expiration of the MBA in 1991, the members of the Commission expressed their concern that the continued presence of foreign military bases in the country would amount to a derogation of national sovereignty. The pertinent portion of the deliberations leading to the adoption of the present Section 25, Article XVIII is quoted as follows:

> FR. BERNAS. My question is: Is it the position of the committee that the presence of foreign military bases in the country under any circumstances is a derogation of national sovereignty?
>
> MR. AZCUNA. It is difficult to imagine a situation based on existing facts where it would not. However, in the abstract, it is possible that it would not be that much of a derogation. I have in mind, Madam President, the argument that has been presented. Is that the reason why there are U.S. bases in England, in Spain and in Turkey? And it is not being claimed that their sovereignty is being derogated. Our situation is different from theirs because we did not lease or rent these bases to the U.S. The U.S. retained them from us as a colonial power.
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> FR. BERNAS. So, the second sentence, Madam President, has specific reference to what obtains now.
>
> MR. AZCUNA. Yes. It is really determined by the present situation.
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> FR. BERNAS. Does the first sentence tolerate a situation radically different from what obtains now? In other words, if we understand sovereignty as auto-limitation, as a people's power to give up certain goods in order to obtain something which may be more valuable, would it be possible under this first sentence for the nation to negotiate some kind of a treaty agreement that would not derogate against sovereignty?
>
> MR. AZCUNA. Yes. For example, Madam President, if it is negotiated on a basis of true sovereign equality, such as a mutual ASEAN defense agreement wherein an ASEAN force is created and this ASEAN force is a foreign military force and may have a basis in the member

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Any such armed attack and all measures taken as a result thereof shall be immediately reported to the Security Council of the United Nations. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.
ARTICLE V
For the purpose of Article IV, an armed attack on either of the Parties is deemed to include an armed attack on the metropolitan territory of either of the Parties, or on the island territories under its jurisdiction in the Pacific or on its armed forces, public vessels or aircraft in the Pacific.

[10] Mutual Defense Treaty (August 30, 1951), Article VIII.

> ASEAN countries, this kind of a situation, I think, would not derogate from sovereignty.
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> MR. NOLLEDO. Madam President, may I be permitted to make a comment on that beautiful question. I think there will be no derogation of sovereignty if the existence of the military bases as stated by Commissioner Azcuna is on the basis of a treaty which was not only ratified by the appropriate body, like the Congress, but also by the people.
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> I would like also to refer to the situation in Turkey where the Turkish government has control over the bases in Turkey, where the jurisdiction of Turkey is not impaired in anyway, and Turkey retains the right to terminate the treaty under circumstances determined by the host government. I think under such circumstances, the existence of the military bases may not be considered a derogation of sovereignty, Madam President.
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> FR. BERNAS. Let me be concrete, Madam President, in our circumstances. **Suppose they were to have this situation where our government were to negotiate a treaty with the United States, and then the two executive departments in the ordinary course of negotiation come to an agreement. As our Constitution is taking shape now, if this is to be a treaty at all, it will have to be submitted to our Senate for its ratification. Suppose, therefore, that what was agreed upon between the United States and the executive department of the Philippines is submitted and ratified by the Senate, then it is further submitted to the people for its ratification and subsequently, we ask the United States: "Complete the process by accepting it as a treaty through ratification by your Senate as the United States Constitution requires," would such an arrangement be in derogation of sovereignty?**
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> MR. NOLLEDO. **Under the circumstances the Commissioner just mentioned, Madam President, on the basis of the provision of Section 1 that "sovereignty resides in the Filipino people," then we would not consider that a derogation of our sovereignty on the basis and expectation that there was a plebiscite.**[11] (Emphasis supplied.)

As a safeguard against the derogation of national sovereignty, the present form of Section 25, Article XVIII was finalized by the Commission and ratified by the Filipino people in 1987.

On September 16, 1991, the Senate rejected the proposed Treaty of Friendship, Cooperation and Security, which would have extended the presence of US military bases in the Philippines. Nevertheless, the defense and security relationship between the Philippines and the United States continued in accordance with the MDT.[12]

Upon the expiration of the MBA in 1991, Section 25, Article XVIII came into effect. The presence of foreign military bases, troops or facilities

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11 IV RECORD OF THE CONSTITUTIONAL COMMISSION, pp. 661-662.

12 *BAYAN v. Zamora*, supra note 2.

in the country can only be allowed upon the satisfaction of all three requirements set forth in Section 25, Article XVIII.

On February 10, 1998, the Philippines and the United States entered into the Visitng Forces Agreement (VFA), which required the Philippines to facilitate the admission of **United States personnel,**[13] a term defined in the same treaty as "United States military and civilian personnel **temporarily** in the Philippines **in connection with activities approved by the Philippine Government.**"[14]

United States Government equipment, materials, supplies, and other property imported into the Philippines in connection with activities to which the VFA applies, while **not expressly stated** to be *allowed into the Philippines* by the provisions of the VFA, were nevertheless declared to be free from Philippine duties, taxes and similar charges. Title thereto was also declared to remain with the United States.[15]

The VFA expressly allowed the importation into the Philippines of reasonable quantities of personal baggage, personal effects, and other property for the personal use of United States personnel.[16] The VFA likewise expressly allowed the entry into the Philippines of (1) aircraft operated by or for the United States armed forces upon approval of the Government of the Philippines in accordance with procedures stipulated in implementing arrangements; and (2) vessels operated by or for the United States armed forces upon approval of the Government of the Philippines, in accordance with international custom and practice and such agreed implementing arrangements as necessary.[17]

The VFA also provided for the jurisdiction over criminal and disciplinary cases over United States personnel with respect to offences committed within the Philippines.[18]

The VFA further stated that the same shall remain in force until the expiration of 180 days from the date on which either party gives the other party notice in writing that it desires to terminate the agreement.[19]

Subsequently, the constitutionality of the VFA was questioned before the Court in the aforementioned October 10, 2000 case of *BAYAN v. Zamora*,[20] and again in the February 11, 2009 case of *Nicolas v. Romulo*.[21] In both cases, the Court held that Section 25, Article XVIII of the

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13 Visiting Forces Agreement (February 10, 1998), Article III.
14 Id., Article I.
15 Id., Article VII.
16 Id., Article VII.
17 Id., Article VIII.
18 Id., Article V.
19 Id., Article IX.
20 Supra note 2.
21 Supra note 5.

Constitution is applicable, but the requirements thereof were nevertheless complied with. In *Nicolas*, however, the implementing *Romulo-Kenney Agreements* of December 19 and 22, 2006 concerning the custody of Lance Corporal Daniel J. Smith, who was charged with the crime of rape, were declared not in accordance with the VFA.

Thereafter, on April 28, 2014, the governments of the Philippines and the United States entered into the assailed EDCA.

The EDCA

Under the EDCA, the Philippines by mutual agreement with the United States, shall provide the United States forces the access and use of portions of Philippine territory. United States forces are "the entity comprising United States personnel and all property, equipment, and materiel of the United States Armed Forces present in the territory of the Philippines." These portions of Philippine territory that will be made available to the US are called "Agreed Locations," which is a new concept defined under Article II(4) of the EDCA as:

> 4. "Agreed Locations" means facilities and areas that are provided by the Government of the Philippines through the AFP and that the United States forces,[22] United States contractors, and others as mutually agreed, shall have the **right to access and use** pursuant to this Agreement. Such Agreed Locations may be listed in an annex to be appended to this Agreement, and may further be described in implementing arrangements. (Emphasis supplied.)

Aside from the right to access and to use the Agreed Locations, the United States may undertake the following types of activities within the Agreed Locations: security cooperation exercises; joint and combined training activities; humanitarian and disaster relief activities; and such other activities that as may be agreed upon by the Parties."[23] Article III(1) of the EDCA further states in detail the activities that the United States may conduct inside the Agreed Locations:

> 1. With consideration of the views of the Parties, the Philippines hereby authorizes and agrees that United States forces, United States contractors, and vehicles, vessels, and aircrafts operated by or for United States forces may conduct the following activities with respect to Agreed Locations: **training; transit; support and related activities; refueling of aircraft; bunkering of vessels; temporary maintenance of vehicles, vessels, and aircraft; temporary accommodation of personnel; communications; prepositioning of equipment, supplies, and materiel;**

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22 "United States forces" means the entity comprising United States personnel and all property, equipment and materiel of the United States Armed Forces present in the territory of the Philippines. [Enhanced Defense Cooperation Agreement, Article II(2).]

23 Enhanced Defense Cooperation Agreement, Article I(3).

> **deploying forces and materiel; and such other activities as the Parties may agree.** (Emphasis supplied.)

The United States may access and use the Agreed Locations without any obligation on its part to pay any rent or similar costs.[24]

In addition to the right to access and to use the Agreed Locations and to conduct various activities therein, the United States, upon request to the Philippines' Designated Authorities,[25] can further temporarily access public land and facilities (including roads, ports, and airfields), including those owned or controlled by local governments, and to other land and facilities (including roads, ports, and airfields).[26]

The United States is also granted operational control of Agreed Locations to do construction activities, make alterations or improvements of the Agreed Locations.[27] All buildings, non-relocatable structures, and assemblies affixed to the land in the Agreed Locations, including [those] altered or improved by United States forces, remain the property of the Philippines. Permanent buildings constructed by the United States forces become the property of the Philippines, once constructed, but shall be used by the United States forces until no longer required.[28]

Incidental to the access and use of the Agreed Locations, the US is granted the use of water, electricity and other public utilities,[29] as well as the use of the radio spectrum in relation to the operation of its own telecommunications system.[30]

As to the management of the Agreed Locations, the United States forces are authorized to exercise all rights and authorities within the Agreed Locations that are necessary for their operational control or defense, including taking appropriate measures to protect United States forces and United States contractors. The United States should coordinate such measures with appropriate authorities of the Philippines.[31]

The United States is authorized to preposition and store defense equipment, supplies, and materiel ("prepositioned materiel"), including but not limited to, humanitarian assistance and disaster relief equipment,

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24 Id., Article III(3).

25 Id., Article II(5) states:
5. "Designated Authorities" means, respectively, the Philippine Department of National Defense, unless the Philippines otherwise provides written notice to the United States, and the United States Department of Defense, unless the United States otherwise provides written notice to the Philippines.

26 Id., Article III(2).

27 Id., Article III(4).

28 Id., Article V(4).

29 Id., Article VII(1).

30 Id., Article VII(2).

31 Id., Article VI(3).

supplies and material, at Agreed Locations.[32] The prepositioned materiel of the United States forces shall be for the exclusive use of United States forces, and full title to all such equipment, supplies and materiel remains with the United States.[33] United States forces and United States contractors[34] shall have unimpeded access to Agreed Locations for all matters relating to the prepositioning and storage of defense equipment, supplies, and materiel, including delivery, management, inspection, use, maintenance, and removal of such equipment, supplies and materiel.[35] The United States forces and United States contractors shall retain title to all equipment, materiel, supplies, relocatable structures, and other movable property that have been imported into or acquired within the territory of the Philippines by or on behalf of United States forces.[36]

Considering the presence of US armed forces: military personnel, vehicles, vessels, and aircrafts and other defensive equipment, supplies, and materiel in the Philippines, for obvious military purposes and with the obvious intention of assigning or stationing them within the Agreed Locations, said Agreed Locations, for all intents and purposes, are considered military bases and fall squarely under the definition of a military base under Section 2, Presidential Decree No. 1227, otherwise known as "*Punishing Unlawful Entry into Any Military Base in the Philippines*," which states:

> SECTION 2. The term "military base" as used in this decree means **any military, air, naval, or coast guard reservation, base, fort, camp, arsenal, yard, station, or installation in the Philippines**. (Emphasis supplied.)

In the same vein, Article XXVI of the 1947 RP-US Military Bases Agreement (MBA) defined a military base as "areas named in Annex A and Annex B and such additional areas as may be acquired for military purposes pursuant to the terms of this Agreement."[37]

Considering further that the United States armed forces stationed in the Philippines, as well as their relocatable structures, equipment and

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32 Id., Article IV(1).

33 Id., Article IV(3).

34 Id., Article II defines United States contractors as:

> 3. "United States contractors" means companies and firms, and their employees, under contract or subcontract to or on behalf of the United States Department of Defense. United States contractors are not included as part of the definition of United States personnel in this Agreement, including within the context of the VFA.

35 Id., Article IV(4).

36 Id., Article V(3).

37 Annexes A and B referred to under the MBA included the following military bases in the Philippines, namely: Clark Field Air Base, Pampanga; Mariveles Military Reservation, POL Terminal and Training Area, Bataan; Camp John Hay Leave and Recreation Center, Baguio; Subic Bay, Northwest Shore Naval Base, Zambales Province, and the existing Naval reservation at Olongapo and the existing Baguio Naval Reservation; Cañacao-Sangley Point Navy Base, Cavite Province; Mactan Island Army and Navy Air Base; Florida Blanca Air Base, Pampanga; Camp Wallace, San Fernando, La Union; and Aparri Naval Air Base, among others. (Military Bases Agreement [March 14, 1947].)

materiel are owned, maintained, controlled, and operated by the United States within Philippine territory, these Agreed Locations are clearly overseas military bases of the US with RP as its host country.

The EDCA provided for an initial term of ten years, which thereafter shall continue in force automatically, unless terminated by either party by giving one year's written notice through diplomatic channels of its intention to terminate the agreement. [38]

Interestingly, the EDCA has similar provisions found in the 1947 MBA:

Military Bases Agreement (March 14, 1947)	**Enhanced Defense Cooperation Agreement (April 28, 2014)**
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.	Article III: AGREED LOCATIONS 4. The Philippines hereby grants the United States, through bilateral security mechanisms, such as the MDB and SEB, **operational control** of Agreed Locations for construction activities and authority to undertake such activities on, and **make alterations and improvements** to, Agreed Locations. x x x. Article VI: SECURITY 3. United States forces are authorized to exercise **all rights and authorities** within Agreed Locations that are **necessary for their operational control or defense** x x x.
Article III: DESCRIPTION OF RIGHTS 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;	Article III: AGREED LOCATIONS 4. The Philippines hereby grants the United States, through bilateral security mechanisms, such as the MDB and SEB, **operational control** of Agreed Locations **for construction activities** and authority to undertake such activities on, and **make alterations and improvements** to, Agreed Locations. x x x.

[38] Enhanced Defense Cooperation Agreement, Article XII(4).

Article III: DESCRIPTION OF RIGHTS 2. Such rights, power and authority shall include, *inter alia*, the right, power and authority : x x x x (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 waterborne craft, aircraft and other vehicles on water, in the air or on land comprising or in the vicinity of the bases;	Article III: AGREED LOCATIONS 5. The Philippine Designated Authority and its authorized representative shall have access to the entire area of the Agreed Locations. Such access shall be provided promptly **consistent with operational safety and security requirements in accordance with agreed procedures developed by the Parties.** Article IV: EQUIPMENT, SUPPLIES, AND MATERIEL 4. United States forces and United States contractors shall have **unimpeded access** to Agreed Locations for all matters relating to the **prepositioning and storage of defense equipment, supplies, and materiel, including delivery, management, inspection, use, maintenance, and removal** of such equipment, supplies and materiel.
Article III: DESCRIPTION OF RIGHTS 2. Such rights, power and authority shall include, *inter alia*, the right, power and authority: x x x x (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.	Article III: AGREED LOCATIONS 1. With consideration of the views of the Parties, the Philippines hereby authorizes and agrees that United States forces, United States contractors, and vehicles, vessels, and aircraft operated by and for United States forces **may conduct the following activities with respect to Agreed Locations:** training; transit; support and related activities; **refueling of aircraft; bunkering of vessels;** temporary maintenance of vehicles, vessels, and aircraft; temporary accommodation of personnel; communications; **prepositioning of equipment, supplies, and materiel**; **deploying forces and materiel**; and such other activities as the Parties may agree. Article IV: EQUIPMENT, SUPPLIES, AND MATERIEL 1. The Philippines hereby authorizes the United States forces, x x x to **preposition and store defense**

	equipment, supplies, and materiel ("prepositioned materiel") x x x. x x x x 3. **The prepositioned materiel of the United States forces shall be for the exclusive use of the United States forces**, and full title to all such equipment, supplies, and materiel remains with the United States. United States forces shall have **control over** the access to and disposition of **such prepositioned materiel** and shall have the unencumbered right to remove such prepositioned materiel at any time from the territory of the Philippines. (Emphases supplied.)

The EDCA is not a mere implementing agreement of the MDT or the VFA

As can be seen in the above table of comparison, **these EDCA provisions establishes military areas similar to that in the Military Bases Agreement**, and for that reason alone, the EDCA is far greater in scope than both the Mutual Defense Treaty and the Visiting Forces Agreement. The EDCA is not a mere implementing agreement of either the MDT or the VFA.

The EDCA is **an international agreement** that **allows the presence in the Philippines of foreign military bases, troops and facilities**, and thus requires that the three requisites under Section 25, Article XVIII be complied with. The EDCA must be submitted to the Senate for concurrence.

The majority opinion posits, *inter alia*, that the President may enter into an **executive agreement** on foreign military bases, troops, or facilities if: (a) it "is not the **principal agreement that first allowed their entry or presence in the Philippines**," or (b) it merely aims to implement an existing law or treaty. Likewise, the President alone had the choice to enter into the EDCA by way of an executive agreement or a treaty. Also, the majority suggests that executive agreements may cover the matter of foreign military forces if it involves detail adjustments of previously existing international agreements.

The above arguments fail to consider that Section 25, Article XVIII of the Constitution covers three distinct and mutually independent situations: the presence of foreign military bases or troops or facilities. The grant of

entry to foreign military troops does not necessarily allow the establishment of military bases or facilities.[39]

Generally, the parties to an international agreement are given the freedom to choose the form of their agreement.

International agreements may be in the form of: (1) treaties, which require legislative concurrence after executive ratification; or (2) executive agreements, which are similar to treaties, except that they do not require legislative concurrence and are usually less formal and deal with a narrower range of subject matters than treaties. Under Article 2 of the Vienna Convention on the Law of Treaties, a treaty is defined as an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.[40]

In the 1961 case of *Commissioner of Customs v. Eastern Sea Trading*,[41] the Court had occasion to state that "[i]nternational agreements involving political issues or changes of national policy and those involving international arrangements of a permanent character usually take the form of treaties. But international agreements embodying adjustments of detail carrying out well-established national policies and traditions and those involving arrangements of a more or less temporary nature usually take the form of executive agreements."

In the more recent case of *Bayan Muna v. Romulo*,[42] the Court expounded on the above pronouncement in this wise:

> The categorization of subject matters that may be covered by international agreements mentioned in *Eastern Sea Trading* is not cast in stone. **There are no hard and fast rules on the propriety of entering, on a given subject, into a treaty or an executive agreement as an instrument of international relations. The primary consideration in the choice of the form of agreement is the parties' intent and desire to craft an international agreement in the form they so wish to further their respective interests.** Verily, the matter of form takes a back seat when it comes to effectiveness and binding effect of the enforcement of a treaty or an executive agreement, as the parties in either international agreement each labor under the *pacta sunt servanda* principle.
>
> As may be noted, almost half a century has elapsed since the Court rendered its decision in *Eastern Sea Trading*. Since then, the conduct of foreign affairs has become more complex and the domain of international law wider, as to include such subjects as human rights, the environment, and the sea. x x x Surely, the enumeration in *Eastern Sea Trading* cannot circumscribe the option of each state on the matter of which the

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39 *BAYAN v. Zamora*, supra note 2 at 653.
40 Id. at 657.
41 113 Phil. 333, 338 (1961).
42 656 Phil. 246, 271-272 (2011).

international agreement format would be convenient to serve its best interest. As Francis Sayre said in his work referred to earlier:

> x x x It would be useless to undertake to discuss here the large variety of executive agreements as such concluded from time to time. Hundreds of executive agreements, other than those entered into under the trade-agreement act, have been negotiated with foreign governments. x x x. They cover such subjects as the inspection of vessels, navigation dues, income tax on shipping profits, the admission of civil air craft, custom matters and commercial relations generally, international claims, postal matters, the registration of trademarks and copyrights, etc. x x x. (Citations omitted.)

However, it must be emphasized that while in the above case, the Court called attention to "one type of executive agreement which is a **treaty-authorized** or a **treaty-implementing** executive agreement, which necessarily would cover the same matter subject of the underlying treaty," still, the Court cited the special situation covered by Section 25, Article XVIII of the Constitution which explicitly prescribes the form of the international agreement. The Court stated:

> But over and above the foregoing considerations is the fact that — **save for the situation and matters contemplated in Sec. 25, Art. XVIII of the Constitution — when a treaty is required,** the Constitution does not classify any subject, like that involving political issues, to be in the form of, and ratified as, a treaty. What the Constitution merely prescribes is that treaties need the concurrence of the Senate by a vote defined therein to complete the ratification process.[43] (Emphasis supplied, citation omitted.)

Clearly, the Court had since ruled that when the situation and matters contemplated in Sec. 25, Article XVIII obtains, *i.e.*, when the subject matter of an international agreement involves the presence of foreign military bases, troops or facilities, a treaty is required and that the same must be submitted to the Senate for the latter's concurrence. In *BAYAN v. Zamora*,[44] the Court held that Section 25, Article XVIII, like Section 21, Article VII, embodies a phrase in the negative, *i.e.*, "shall not be allowed" and therefore, the concurrence of the Senate is indispensable to render the treaty or international agreement valid and effective.

What the majority did is to carve out exceptions to Section 25, Article XVIII when none is called for.

As previously discussed, the language of Section 25, Article XVIII is clear and unambiguous. The cardinal rule is that the plain, clear and unambiguous language of the Constitution should be construed as such and

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43 Id. at 273.

44 Supra note 2.

should not be given a construction that changes its meaning.[45] The Court also enunciated in *Chavez v. Judicial and Bar Council*[46] that:

> The Constitution evinces the direct action of the Filipino people by which the fundamental powers of government are established, limited and defined and by which those powers are distributed among the several departments for their safe and useful exercise for the benefit of the body politic. The Framers reposed their wisdom and vision on one *suprema lex* to be the ultimate expression of the principles and the framework upon which government and society were to operate. Thus, in the interpretation of the constitutional provisions, the Court firmly relies on the basic postulate that the Framers mean what they say. **The language used in the Constitution must be taken to have been deliberately chosen for a definite purpose. Every word employed in the Constitution must be interpreted to exude its deliberate intent which must be maintained inviolate against disobedience and defiance. What the Constitution clearly says, according to its text, compels acceptance and bars modification even by the branch tasked to interpret it.** (Emphasis supplied; citation omitted.)

The majority opinion posits that the EDCA is consistent with the content, purpose and framework of the MDT and the VFA. As such, the majority argues that the EDCA may be in the form of an executive agreement as it merely implements the provisions of the MDT and the VFA.

I disagree. Compared closely with the provisions of the MDT and the VFA, the EDCA transcends in scope and substance the subject matters covered by the aforementioned treaties. Otherwise stated, the EDCA is an entirely new agreement unto itself.

The MDT in relation to the EDCA

We noted in *Lim v. Executive Secretary*[47] that the MDT has been described as the "core" of the defense relationship between the Philippines and its traditional ally, the United States. The aim of the treaty is to enhance the strategic and technological capabilities of our armed forces through joint training with its American counterparts.

As explicitly pronounced in its declaration of policies, the MDT was entered into between the Philippines and the United States in order to actualize their desire "to declare publicly and formally their sense of unity and their common determination to **defend themselves against external armed attack**"[48] and "further to strengthen their present efforts to **collective defense** for the preservation of peace and security pending the development of a more comprehensive system of regional security in the Pacific area."[49]

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45 *Soriano III v. Lista*, 447 Phil. 566, 570 (2003).
46 G.R. No. 202242, April 16, 2013, 696 SCRA 496, 507-508.
47 430 Phil. 555, 571-572 (2002).
48 Mutual Defense Treaty, Preamble, paragraph 3.
49 Id., Preamble, paragraph 4.

Under Article II of the MDT, the parties undertook "separately and jointly by self-help and mutual aid" to "maintain and develop their individual and collective capacity to resist armed attack."[50] Article III thereof states that the parties to the treaty shall "consult together from time to time regarding the implementation of [the] Treaty and whenever in the opinion of either of them the territorial integrity, political independence or security of either of the Parties is threatened by external armed attack in the Pacific."[51]

Moreover, Article IV states that the individual parties to the treaty "recognizes that an armed attack in the Pacific area on either of the Parties would be dangerous to its own peace and safety and declares that **it would act to meet the common dangers in accordance with its constitutional process.**"[52] This provision highlights the need for each party to follow their respective constitutional processes and, therefore, the MDT is not a self-executing agreement. It follows that if the Philippines aims to implement the MDT in the manner that the majority opinion suggests, such implementation must adhere to the mandate of Section 25, Article XVIII of the Constitution.

Also, under the above article, the parties are thereafter obligated to immediately report to the Security Council of the United Nations the occurrence of any such armed attack and all the measures taken as result thereof. Said measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.[53] Article V of the treaty explained that "an armed attack on either of the Parties is deemed to include an armed attack on the **metropolitan territory** of either of the Parties, or on the **island territories under its jurisdiction in the Pacific** or on **its armed forces, public vessels or aircraft** in the Pacific."[54]

Under Article VIII of the treaty, the parties agreed that the treaty shall remain in force indefinitely and that either party may terminate it one year after notice has been given to the other party.[55]

Clear from the foregoing provisions is that the thrust of the MDT pertains to the furtherance of the avowed purpose of the parties thereto of maintaining and developing their individual and collective capacity to resist external armed attack **only** in the metropolitan territory of either party or in their island territories in the Pacific Ocean. **Accordingly, the territories of the parties other than those mentioned are not covered by the MDT.**

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50 Id., Article II.
51 Id., Article III.
52 Id., Article IV, first paragraph.
53 Id., Article IV, second paragraph.
54 Id., Article V.
55 Id., Article VII.

Conspicuously absent from the MDT are specific provisions regarding the presence in Philippine territory – whether permanent or temporary – of foreign military bases, troops, or facilities. The MDT did not contemplate the presence of foreign military bases, troops or facilities in our country in view of the fact that it was already expressly covered by the MBA that was earlier entered into by the Philippines and the United States in 1947. Moreover, the MDT contains no delegation of power to the President to enter into an agreement relative to the establishment of foreign military bases, troops, or facilities in our country. The MDT cannot also be treated as allowing an exception to the requirements of Section 25, Article XVIII of the Constitution, which took effect in 1987. As explained above, the reference to constitutional processes of either party in the MDT renders it obligatory that the Philippines follow Section 25, Article XVIII of the Constitution.

Indeed, the MDT covers defensive measures to counter an armed attack against either of the parties' territories or armed forces but there is nothing in the MDT that specifically authorizes the presence, whether temporary or permanent, of a party's bases, troops, or facilities in the other party's territory even during peace time or in mere anticipation of an armed attack.

On the other hand, the very clear-cut focal point of the EDCA is the authority granted to the United States forces and contractors to have unimpeded access to so-called Agreed Locations – which can be anywhere in the Philippines – and to build there military facilities and use the same to undertake various military activities. The very wording of the EDCA shows that it undoubtedly deals with the presence of foreign military bases, troops, and facilities in Philippine territory.

Thus, contrary to the posturing of the majority, the presence of foreign military bases, troops, or facilities provided under the EDCA cannot be traced to the MDT. Moreover, the general provisions of the MDT cannot prevail over the categorical and specific provision of Section 25, Article XVIII of the Constitution.

As will be further highlighted in the succeeding discussion, the EDCA creates new rights, privileges and obligations between the parties thereto.

The VFA in relation to the EDCA

With respect to the VFA, the EDCA likewise surpasses the provisions of the said former treaty.

The VFA primarily deals with the subject of allowing elements of the United States armed forces to **visit** the Philippines **from time to time** for the purpose of conducting activities, approved by the Philippine government, in

line with the promotion and protection of the common security interests of both countries.

In the case of *BAYAN v. Zamora*,[56] the Court ruled that the VFA "defines the treatment of United States troops and personnel visiting the Philippines," "provides for the guidelines to govern such visits of military personnel," and "defines the rights of the United States and the Philippine government in the matter of criminal jurisdiction, movement of vessel and aircraft, importation and exportation of equipment, materials and supplies."

We likewise reiterated in *Lim v. Executive Secretary*,[57] that:

> The VFA provides the "regulatory mechanism" by which "United States military and civilian personnel **[may visit] temporarily** in the Philippines in connection with activities approved by the Philippine Government." It contains provisions relative to entry and departure of American personnel, driving and vehicle registration, criminal jurisdiction, claims, importation and exportation, movement of vessels and aircraft, as well as the duration of the agreement and its termination. It is the VFA which gives continued relevance to the MDT despite the passage of years. Its primary goal is to facilitate the promotion of optimal cooperation between American and Philippine military forces in the event of an attack by a common foe.

To a certain degree, the VFA is already an amplification of the MDT in that it allows the presence of **visiting** foreign troops for cooperative activities in peace time. Thus, in line with the mandate of Section 25, Article XVIII of the Constitution, the VFA is embodied in a treaty concurred in by the Senate.

In particular, the coverage of the VFA is as follows:

1) The admission of United States personnel and their departure from Philippines in connection with activities covered by the agreement, and the grant of exemption to United States personnel from passport and visa regulations upon entering and departing from the Philippines;[58]

2) The validity of the driver's license or permit issued by the United States, thus giving United States personnel the authority to operate military or official vehicles within the Philippines;[59]

3) The rights of the Philippines and the United States in matters of criminal jurisdiction over United States

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56 Supra note 2 at 652.
57 Supra note 47 at 572.
58 Visiting Forces Agreement, Article III.
59 Id., Article IV.

personnel who commit offenses within the Philippine territory and punishable under Philippine laws;[60]

4) The importation and exportation of equipment, materials, supplies and other property, by United States personnel free from Philippine duties, taxes and similar charges;[61]

5) The movement of United States aircrafts, vessels and vehicles within Philippine territory;[62] and

6) The duration and termination of the agreement.[63]

In contrast, the EDCA specifically deals with the following matters:

1) The authority of the United States forces to access facilities and areas, termed as "Agreed Locations," and the activities that may be allowed therein;[64]

2) The grant to the United States of operational control of Agreed Locations to do construction activities and make alterations or improvements thereon;[65]

3) The conditional access to the Agreed Locations of the Philippine Designated Authority and its authorized representative;[66]

4) The storage and prepositioning of defense equipment, supplies and materiel, as well as the unimpeded access granted to the United States contractors to the Agreed Locations in matters regarding the prepositioning, storage, delivery, management, inspection, use, maintenance and removal of the defense equipment, supplies, and materiel; and the prohibition that the preposition materiel shall not include nuclear weapons;[67]

5) a) The ownership of the Agreed Locations by the Philippines, b) the ownership of the equipment, materiel, supplies, relocatable structures and other moveable property imported or acquired by the United States, c) the ownership and use of the buildings, non-relocatable

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60 Id., Article V.
61 Id., Article VII.
62 Id., Article VIII.
63 Id., Article IX.
64 Enhanced Defense Cooperation Agreement, Article II.
65 Id., Article III(4).
66 Id., Article III(5).
67 Id., Article IV.

structures, and assemblies affixed to the land inside the Agreed Locations;[68]

6) The cooperation between the parties in taking measures to ensure protection, safety and security of United States forces, contractors and information in Philippine territory; the primary responsibility of the Philippines to secure the Agreed Locations, and the right of the United States to exercise all rights and authorities within the Agreed Locations that are necessary for their operational control or defense;[69]

7) The use of water, electricity and other public utilities;[70]

8) The use of the radio spectrum in connection with the operation of a telecommunications system by the United States;[71]

9) The authority granted to the of the United States to contract for any materiel, supplies, equipment, and services (including construction) to be furnished or undertaken inside Philippine territory;[72]

10) The protection of the environment and human health and safety, and the observance of Philippine laws on environment and health, and the prohibition against the intentional release of hazardous waste by the United States and the containment of thereof in case a spill occurs;[73]

11) The need to execute implementing arrangements to address details concerning the presence of United States forces at the Agreed Locations and the functional relations between the United States forces and the AFP with respect to the Agreed Locations;[74] and

12) The resolution of disputes arising from the EDCA through consultation between the parties.[75]

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68 Id., Article V.
69 Id., Article VI.
70 Id., Article VII(1).
71 Id., Article VII(2).
72 Id., Article VIII.
73 Id., Article IX.
74 Id., Article X.
75 Id., Article XI.

Initially, what is abundantly clear with the foregoing enumeration is that the EDCA is an entirely new creation. The provisions of the EDCA are not found in or have no corresponding provisions in the VFA. They cover entirely different subject matters and they create new and distinct rights and obligations on the part of the Philippines and the United States.

Furthermore, as to the nature of the presence of foreign military troops in this country, the VFA is explicit in its characterization that it is an agreement between the governments of the Philippines and the United States regarding the treatment of United States Armed Forces **visiting** the Philippines. The Preamble of the VFA likewise expressly provides that, "noting that **from time to time** elements of the United States armed forces may **visit** the Republic of the Philippines"[76] and "recognizing the desirability of defining the treatment of United States personnel **visiting** the Republic of the Philippines"[77] the parties to the VFA agreed to enter into the said treaty. The use of the word visit is very telling. In its ordinary usage, to visit is to "stay temporarily with (someone) or at (a place) as a guest or tourist" or to "go to see (someone or something) for a specific purpose."[78] Thus, the word visit implies the temporariness or impermanence of the presence at a specific location.

On the other hand, under the EDCA, United States forces and United States contractors are permitted to stay in the Agreed Locations to undertake military activities therein **without any clear limitation as to the duration of their stay**. Moreover, they are given unimpeded access to Agreed Locations to conduct different activities that definitely were not contemplated under the VFA.

The Court's ruling in *Lim v. Executive Secretary*[79] provides some insights as to the scope of activities germane to the intention of the VFA. Thus:

> The first question that should be addressed is whether "Balikatan 02-1" is covered by the Visiting Forces Agreement. To resolve this, it is necessary to refer to the VFA itself. Not much help can be had therefrom, unfortunately, since the terminology employed is itself the source of the problem. The VFA permits United States personnel to engage, on an impermanent basis, in "**activities**," the exact meaning of which was left undefined. The expression is ambiguous, permitting a wide scope of undertakings subject only to the approval of the Philippine government. The sole encumbrance placed on its definition is couched in the negative, in that United States personnel must "abstain from any activity *inconsistent with the spirit of this agreement, and in particular, from any political activity*." All other activities, in other words, are fair game.

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76 Visiting Forces Agreement, Preamble, third paragraph.

77 Id., fifth paragraph.

78 http://www.oxforddictionaries.com/us/definition/american_english/visit. Accessed on December 14, 2015, 5:30 P.M.

79 Supra note 47 at 572-575.

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> After studied reflection, it appeared farfetched that the ambiguity surrounding the meaning of the word **"activities"** arose from accident. In our view, it was deliberately made that way to give both parties a certain leeway in negotiation. In this manner, visiting US forces may sojourn in Philippine territory for purposes other than military. As conceived, the joint exercises may include training on new techniques of patrol and surveillance to protect the nation's marine resources, sea search-and-rescue operations to assist vessels in distress, disaster relief operations, civic action projects such as the building of school houses, medical and humanitarian missions, and the like.
>
> Under these auspices, the VFA gives legitimacy to the current Balikatan exercises. It is only logical to assume that "Balikatan 02-1," a "mutual anti-terrorism advising, assisting and training exercise," falls under the umbrella of sanctioned or allowable activities in the context of the agreement. **Both the history and intent of the Mutual Defense Treaty and the VFA support the conclusion that *combat-related* activities — as opposed to *combat* itself — such as the one subject of the instant petition, are indeed authorized**. (Emphases supplied, citations omitted.)

The above discussion clearly shows that the VFA was intended for non-combat activities only.

In the instant case, the OSG averred that the entry of the United States forces into the Agreed Location is borne out of "military necessity."[80] Military necessity means the necessity attending belligerent military operations that is held to justify all measures necessary to bring an enemy to complete submission excluding those (as cruelty, torture, poison, perfidy, wanton destruction) that are forbidden by modern laws and customs of war.[81]

In the instant case, some of the activities that the United States forces will undertake within the Agreed Locations such as prepositioning of defense equipment, supplies and materiel, and deploying of forces and materiel are actual military measures supposedly put into place in anticipation of battle. To preposition means "to place military units, equipment, or supplies at or near the point of planned use or at a designated location to reduce reaction time, and to ensure timely support of a specific force during initial phases of an operation."[82] On the other hand, materiel is defined as "all items necessary to equip, operate, maintain, and support military activities without distinction as to its application for administrative or combat purposes."[83] Also, to deploy means "to place or arrange (armed forces) in battle disposition or formation or in locations appropriate for their

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80 *Rollo* (G.R. No. 212444), p. 481.

81 Webster's Third New International Dictionary [1993].

82 http://www.dtic.mil/doctrine/new_pubs/jp4_0.pdf. Accessed on December 11, 2015, 11:48 A.M.

83 http://www.dtic.mil/doctrine/new_pubs/jp4_0.pdf. Accessed on December 11, 2015, 11:48 A.M.

future employment."[84] Deployment also means "the rotation of forces into and out of an operational area."[85]

The EDCA likewise allows the construction of permanent buildings, which the United States forces can utilize until such time that they no longer need the use thereof. The construction of permanent buildings, including the alteration or improvement by the United States of existing buildings, structures and assemblies affixed to the land, are certainly necessary not only for the accommodation of its troops, bunkering of vessels, maintenance of its vehicles, but also the creation of the proper facilities for the storage and prepositioning of its defense materiel. This grant of authority to construct new buildings and the improvement of existing buildings inside the Agreed Locations – which buildings are to be used indefinitely – further evinces the permanent nature of the stay of United States forces and contractors in this country under the EDCA. This is a far cry from the temporary visits of United States armed forces contemplated in the VFA.

Moreover, aside from agreements that the Philippines and the United States may subsequently enter into with respect to the access of the United States forces in the Agreed Locations on a "rotational basis,"[86] and other activities that the United States may conduct therein,[87] the EDCA also contains provisions requiring the execution of further "implementing arrangements" with regard to description of the Agreed Locations,[88] "[funding] for construction, development, operation and maintenance costs at the Agreed Locations,"[89] and "additional details concerning the presence of the United States forces at the Agreed Locations and the functional relations between the United States forces and the AFP with respect to Agreed Locations."[90]

Article II(4) of the EDCA states that the Agreed Locations shall be provided by the Philippine Government **through the AFP**. What is readily apparent from said article is that the AFP is given a broad discretion to enter into agreements with the United States with respect to the Agreed Locations. The grant of such discretion to the AFP is without any guideline, limitation, or standard as to the size, area, location, boundaries and even the number of Agreed Locations to be provided to the United States forces. As there is no sufficient standard in the EDCA itself, and no means to determine the limits of authority granted, the AFP can exercise unfettered power that may have grave implications on national security. The intervention of the Senate through the constitutionally ordained treaty-making process in defining the new national policy concerning United States access to Agreed Locations

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84 Webster's Third New International Dictionary [1993].
85 http://www.dtic.mil/doctrine/new_pubs/jp1_02.pdf. Accessed on December 11, 2015, 12:36 P.M.
86 Enhanced Defense Cooperation Agreement, Article I(1)(b).
87 Id., Article III(1).
88 Id., Article II(4).
89 Id., Article III(6).
90 Id., Article X(3).

enunciated in the EDCA, which has never been before expressly or impliedly authorized, is **imperative** and **indispensible** for the validity and effectivity of the EDCA.

The above distinctions between the EDCA and the VFA, therefore, negate the OSG's argument that the EDCA merely involves "adjustments in detail" of the VFA. To my mind, the EDCA is the general framework for the access and use of the Agreed Locations by the United States forces and contractors rather than an implementing instrument of both the MDT and the VFA.

As stated above, Section 25, Article XVIII contemplates three different situations: a treaty concerning the allowance within the Philippines of (a) foreign military bases, (b) foreign military troops, or (c) foreign military facilities, such that a treaty that involves any of these three standing alone would fall within the coverage of the said provision. The VFA clearly contemplates *only* visits of foreign military troops.

The VFA, which allows the presence of the units of the United States military troops, cannot by any stretch of the imagination include any arrangement that practically allows the establishment of United States military *bases* or *facilities* in the so-called Agreed Locations under the EDCA. Thus, the EDCA goes far-beyond the arrangement contemplated by the VFA and therefore it necessarily requires Senate concurrence as mandated by Section 25, Article XVIII of the Constitution. In the same vein, the initial entry of United States *troops* under the VFA cannot, as postulated by the ponencia, justify a "treaty-authorized" presence under the EDCA, since the presence contemplated in the EDCA also pertains to the establishment of foreign military *bases* or *facilities*, and not merely visiting troops.

The argument that the entry of the United States bases, troops and facilities under the EDCA is already allowed in view of the "initial entry" of United States troops under the VFA glaringly ignores that the entry of visiting foreign military troops is distinct and separate from the presence or establishment of foreign military bases or facilities in the country under Section 25, Article XVIII of the Constitution.

To reiterate, the EDCA is entirely a new treaty, separate and distinct from the VFA and the MDT. Hence, it must satisfy the requirements under Section 25, Article XVIII of the Constitution. The Senate itself issued Resolution No. 105 on November 10, 2015, whereby it expressed its "definite stand on the non-negotiable power of the Senate to decide whether a treaty will be valid and effective depending on the Senate concurrence" and resolved "that the RP-US EDCA [is a] treaty [that] requires Senate concurrence in order to be valid and effective."

Incidentally, with respect to the VFA, there is a difference of opinion whether or not the same is an implementing agreement of the MDT, as the latter does not confer authority upon the United States President (or the Philippine President) to enter into an executive agreement to implement said treaties. Still, in *Nicolas v. Romulo*,[91] the Court noted that even if the VFA was treated as an implementing agreement of the MDT, the VFA was submitted to the Senate for concurrence.

By no means should this opinion be construed as one questioning the President's intention and effort to protect our national territory and security. However, in the case of *Tawang Multi-purpose Cooperative v. La Trinidad Water District*,[92] the Court said:

> There is no "reasonable and legitimate" ground to violate the Constitution. The Constitution should never be violated by anyone. Right or wrong, the President, Congress, the Court, x x x have no choice but to follow the Constitution. **Any act, however noble its intentions, is void if it violates the Constitution.** This rule is basic.
>
> In *Social Justice Society*, the Court held that, "In the discharge of their defined functions, the three departments of government have no choice but to yield obedience to the commands of the Constitution. Whatever limits it imposes must be observed." In *Sabio*, the Court held that, "the Constitution is the highest law of the land. It is 'the basic and paramount law to which x x x all persons, including the highest officials of the land, must defer. No act shall be valid, however noble its intentions, if it conflicts with the Constitution.'" In *Bengzon v. Drilon*, the Court held that, "the three branches of government must discharge their respective functions within the limits of authority conferred by the Constitution." In *Mutuc v. Commission on Elections*, the Court held that, "**The three departments of government in the discharge of the functions with which it is [sic] entrusted have no choice but to yield obedience to [the Constitution's] commands. Whatever limits it imposes must be observed.**" (Emphases supplied, citations omitted.)

A final word. While it is true that the Philippines cannot stand alone and will need friends within and beyond this region of the world, still we cannot offend our Constitution and bargain away our sovereignty.

Accordingly, I vote to grant the consolidated petitions.

Teresita Leonardo de Castro

TERESITA J. LEONARDO-DE CASTRO
Associate Justice

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91 Chief Justice Reynato S. Puno and Justice Carpio submitted stirring dissenting opinions which assail the constitutionality of the VFA on its being unenforceable due to the absence of ratification by the US Senate.

92 661 Phil. 390, 406 (2011).