

PILC legal opinion on the VFA

A REVIEW OF THE AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF THE PHILIPPINES AND THE GOVERNMENT OF THE UNITED STATES OF AMERICA REGARDING THE TREATMENT OF UNITED STATES ARMED FORCES VISITING THE PHILIPPINES

(Otherwise known as the Visiting Forces Agreement or "VFA")

PREFATORY

This study is mainly a legal review of the textual provisions of the Visiting Forces Agreement or "VFA" that has been submitted to the Philippine Senate for ratification. No attempt to incorporate the historical and political context of the Agreement has been made in this paper. Notwithstanding, the authors believe that a meaningful analysis can only be accomplished if it is related to existing critiques on the Agreement's political and social implications.

The provisions of the so-called "VFA II" which purportedly grant reciprocal rights to the Philippines has not been considered in this study. Finally, the term "Agreement" here is used in its generic or loose sense, as the executive branch treats the VFA as a treaty while its U.S. counterpart treats it as a mere executive agreement.

I. BROAD, UNLIMITED, UNCONSTITUTIONAL

At the outset, it must be noted that the VFA has no duration, or provides for no definite term. Hence, if approved or ratified in its present form, the Agreement will be in effect for as long as the governments (executive branch) of both parties favor it, i.e., for as long as the Philippine president favors or submits to U.S. interests, the VFA shall remain in effect for an indefinite period of time.

It is equally significant to observe at first instance that the VFA does not specify the number of troops that would be allowed entry into the Philippines. Neither is there any obligation that the number of allowable troops would be limited in an implementing agreement. In sum, this gratuitously requires the Filipino nation to just surrender to the unchecked discretion of its government officials or to merely submit to the wholesale prerogative of the U.S. on the matter. As it stands, the Agreement practically allows from one soldier to a million soldiers to enter the Philippines i.e., an infinite and undetermined number since there is no stipulation to this effect. Under the VFA, the power to control such numbers and the monitoring authority of the Philippine government is removed. There is also no categorical provision that defines the scope of the areas of Philippine territory that U.S. troops and personnel may "visit." Likewise, the "activities" which U.S. military and civilian personnel may undertake in the Philippines is conspicuously undefined.

Therefore, the VFA, in duration, is indefinite; in number of troops allowed, theoretically infinite; and in application, broad.

More fundamentally, the VFA is constitutionally infirm on several grounds:

(1) Article II, Section 2 of the Philippine Constitution provides:

"The Philippines renounces war as an instrument of national policy, adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation and amity with all nations."

The VFA, which both resurrects and perpetuates previous military agreements with the U.S., makes a mockery of this state policy of renouncing war, particularly those of an offensive nature. The very intent and purpose apparent in the subtext of the Agreement is anathema to this constitutional provision.

(2) Moreover, Article II, Sections 7 and 8 provide as state policies the following:

"The State shall pursue an independent foreign policy. In its relations with other states the paramount consideration shall be national sovereignty, territorial integrity, national interest, and the right to self-determination."

x x x

"The Philippines, consistent with the national interest, adopts and pursues a policy of freedom from nuclear weapons in its territory."

As will be shown hereunder, even a textual reading of the Agreement would show that it is patently contrary to these state policies. The VFA virtually reduces these otherwise primordial considerations as secondary to the United States' foreign policy, practice and interest.

More significantly, the VFA is another monumental testament to unabashed foreign power arrogance when it deliberately did not include any provision that would respect or ensure the prohibition against the possession, control, manufacture, use, transit and custody of nuclear weapons within Philippine territory by the so-called visiting forces.

(3) Furthermore, Article XVIII, Section 25 of the Constitution is explicit:

"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."

The aforementioned provision expressly lays down four requirements for foreign military troops, facilities, or bases to be allowed in the Philippines:

- (a) Only under a treaty
- (b) duly ratified by the Senate and
- (c) should Congress require, ratified in a national referendum, and
- (d) recognized as a treaty by the other contracting state.

Since the U.S. counterpart in this case has made it clear that the U.S. government does not consider the VFA a treaty but a mere executive agreement, as far as the Philippines is concerned, the VFA (even if ratified by the Senate) is constitutionally infirm.

(4) Finally, the Constitution in Article VI, Section 28 (4) states:

“No law granting any tax exemption shall be passed without the concurrence of a majority of all the Members of the Congress.”

The VFA unduly grants certain tax exemptions, discussed hereunder, and hence requires the concurrence of majority of both houses of Congress voting jointly; without which, such stipulations are constitutionally infirm.

II. UNWELCOME VISITORS

The Visiting Forces is defined in Article 1 of the Agreement:

“Art. 1. Definitions. As used in this Agreement, ‘United States personnel’ means United States military and civilian personnel temporarily in the Philippines in connection with activities approved by the Philippine government.

“Within this definition:

“1. The term ‘military personnel’ refers to military members of the United States Army, Navy, Marine Corps, Air Force, and Coast Guard.

“2. The term ‘civilian personnel’ refers to individuals who are neither nationals of nor ordinarily resident in the Philippines and who are employed by the United States armed forces or who are accompanying the United States armed forces, such as employees of the American Red Cross and the United Services Organization.”

Article 1 aforequoted defines only U.S. personnel. In other portions of the Agreement (e.g., Article VI on waiver of claims for damage to property or person of civilian personnel, both Philippine and U.S.) where the term “civilian personnel” is used, the reference is both to Philippine and U.S. personnel, but the Philippine counterpart of the term remains undefined, hence, ambiguous and therefore broad. The implications will be discussed hereunder.

Also, the definition of “military personnel” in said article is too broad to include personnel used for both overt and covert operations, i.e., to include CIA personnel, Seal personnel, spies, and undercover operators.

The definition of U.S. “civilian personnel” (those “who are accompanying the United States armed forces”) is similarly too broad to include anybody, from technicians to teachers, scholars to smugglers.

Again, the VFA does not stipulate any obligation on the part of the U.S. to inform the Philippines how many and who will be entering the country. The Philippines will not, as a matter of right, be given any list of personnel that would be coming in.

III. U.S. ARROGATION

Article II of the Agreement stipulates:

“Art. II. It is the duty of the United States personnel to respect the laws of the Republic of the Philippines x x x The Government of the United States shall take all measures within its authority to ensure that this is done.”

In the Philippines, it is the Philippine government that has the authority to enforce the laws of the land. This is an essential aspect of sovereignty. The stipulation that the “Government of the United States shall take all measures within its authority to ensure that this (respect for the law) is done” is, at best, being presumptuous, at worst, an arrogation by the U.S. unto itself of the authority to enforce the laws in this country.

IV. UNCONTROLLED ENTRY OF TROOPS

Article III of the Agreement reads:

“Art. III. Entry and Departure.

x x x

“2. United States military personnel shall be exempt from passport and visa regulations upon entering and departing the Philippines.

“3. The following documents only, which shall be required in respect of United States military personnel who enter the Philippines:

“(a) personal identity card issued by the appropriate United States authority showing full name, date of birth, rank or grade and service number (if any), branch of service and photographs; and

“(b) individual or collective document issued by the appropriate United States authority, authorizing the travel or visit and identifying the individual or group as United States military personnel.

x x x”

The authority to control who shall enter the country is another aspect of sovereignty. It is meant to protect the integrity of the territory and to safeguard the welfare of the populace. This control is exercised through the government’s department of foreign affairs, the immigration bureau, and the various branches of the police force and intelligence agencies. Under the VFA, however, the visiting U.S. military and civilian personnel, whoever or however many they are, are exempted from passport and visa regulations. All the visiting forces need are an ordinary I.D. and a piece of paper certifying that they are authorized to travel or visit (the Agreement does not even specify what “appropriate U.S. authority” would certify this). They can practically come and go as they please.

In practical terms, this means that since they are exempt from visa requirements and it is the "appropriate U.S. authority" which certifies that they are authorized to travel to the Philippine, none of our immigration police, intelligence agents, or any police forces could control their entry through our airports and seaports, i.e., it is the U.S. which issues their "visas" (certifications) to travel to the Philippines. In effect, the Philippine government is "delegating" to a foreign country the authority to issue "visas" (certifications) to nationals of that country to travel to the Philippines. This kind of "delegation" is heretofore innominate and unknown.

The foregoing, therefore, is more than a grant of a special privilege, it is a derogation of Philippine sovereignty. As such, it is very dangerous: the Philippines surrenders the power (and the mechanism by which this power is exercised) to control and determine how many U.S. forces are coming in and who these U.S. forces are. Under the aforementioned stipulations, the U.S. could land a hundred thousand troops and we would not have any authority to control their number or to stop and check their entry.

V. REQUESTING FOR A RIGHT

Article III, par. 5 of the Agreement provides:

"Art. III (5). If the Government of the Philippines has requested the removal of any United States personnel from its territory, the United States authorities shall be responsible for receiving the person concerned within its own territory or otherwise disposing of said person outside of the Philippines."

To make the absence of control over entry of U.S. troops worse, under this stipulation, the Philippine government cannot deport any alien who entered the country under the VFA and whom it may have determined as undesirable. Under the aforementioned stipulation, the Philippine government may request, and if the Philippine government "has requested" the removal of any U.S. personnel (e.g., "please cause the removal of this soldier, etc."), it is the U.S. authorities who shall be responsible for "receiving the person within its own territory" or "otherwise disposing of said person outside of the Philippines" (e.g., "he is not anymore with us;" "he has been removed, etc.").

Not only can we not know, control, and determine who and how many are coming in, the Philippines cannot by itself deport any undesirable alien who has entered under the VFA—the Philippines has to make a request to the U.S.

VI. BEYOND INSPECTION

Article III, par. 3 (c) of the Agreement stipulates:

"Art. III (3) (c). the commanding officer of a military aircraft or vessel shall present a declaration of health, and when required by the cognizant representative of the Government of the Philippines, shall conduct a quarantine inspection and will certify that the aircraft or vessel is free from quarantinable diseases. Any quarantine inspection x x x shall be conducted by the Unites States commanding officer x x x"

This is the only stipulation in the Agreement on inspection of any military aircraft, vessel, or cargo, coming in under the VFA. As aired by many sectors, the main concern here is the entry of nuclear weapons, arms, devices of control, chemicals, and other weapons of war.

Under the aforementioned stipulation, 1) the Philippines does not have the right to inspect, it is the commanding officer of the aircraft or vessel who is authorized to inspect the aircraft, vessel, or cargo, and 2) the commanding officer shall certify only as to quarantinable diseases; he/she shall not certify as to the absence or presence of chemicals, nuclear arms, weapons, or parts thereof, devices of control, etc.; he/she shall not be obliged to answer any questions as to the contents of the aircraft/ship/cargo.

The U.S. counterpart has said that we should "just trust them".

It is not a matter of trust, it is a matter of law and of state policy. As forecited, the Constitution in Article II , Section 7 categorically provides that: "The Philippines, consistent with the national interest, adopts and pursues a policy of freedom from nuclear weapons in its territory."

The Philippines therefore has the right to ensure that this state policy is observed by ensuring that nuclear weapons are not brought in.

VII. UNHAMPERED MOBILITY

Article IV of the Agreement provides:

"Art. IV. Driving and Vehicle Registration.

"1. Philippine authorities shall accept as valid, without test or fee, a driving permit or license issued by the appropriate United States authority to United States personnel for the operation of military or official vehicles.

"2. Vehicles owned by the Government of the United States need not be registered, but shall have appropriate markings."

Filipinos and all others in the Philippines are required to undergo a driving test, apply for a license, and pay all the fees before they could drive. Vehicles are required to be registered every year before they are allowed on the roads. Under the aforementioned stipulation, U.S. personnel who are in the country under the VFA can drive without a license as long as they have a "permit or license" issued by the "appropriate United States authority". Vehicles owned by the U.S. government on the other hand need not be registered. Note that the Agreement says "Vehicles owned by the Government of the United States", and not just vehicles detailed to the U.S. military. This means that any vehicle, whoever is using it, as long as the vehicle is owned by the U.S. government, shall be exempt from registration.

Parenthetically, the purpose of the law requiring a license before anybody could drive is public safety: The lives of pedestrians and passengers are in the hands of the person behind the wheel, hence, the state in exercise of its police power is the only

authority who can determine who shall and shall not drive. The licensing requirement is also a mechanism for the government to have a file of all persons allowed to drive for more efficient crime detection/prevention. On the other hand, the requirement for registration is a system for more efficient crime detection.

Under the aforementioned stipulation, the Philippine government abdicates this responsibility over public safety.

The stipulation therefore is meant not just for comfort and convenience of the U.S. personnel, but for ensuring that the mobility of U.S. personnel visiting under the VFA is unhampered and for preventing the Philippine government from being able to monitor or track their movements, number, and even identities.

VIII. INUTILE CRIMINAL JURISDICTION

The 13-page Agreement devotes 5 1/2 pages to "Criminal Jurisdiction" (or almost half of the entire text), or the jurisdiction of the Philippine government and the U.S. military authorities over offenses committed within Philippine territory by U.S. personnel, whether these are in the performance of official duties or not.

In Article V par. 1 (a) and (b), the VFA seems to establish concurrent jurisdiction or overlapping jurisdiction over offenses punishable both under Philippine law and under U.S. "criminal and disciplinary jurisdiction". However, this supposed concurrent jurisdiction is taken away in succeeding paragraphs.

Article V par. 1 (a) and (b) on a supposed concurrent or overlapping jurisdiction, stipulates:

"Art. V. Criminal Jurisdiction.

"1. Subject to the provisions of this article:

"(a). Philippine authorities shall have jurisdiction over United States personnel with respect to offenses committed within the Philippines and punishable under the law of the Philippines.

" (b). United States military authorities shall have the right to exercise within the Philippines all criminal and disciplinary jurisdiction conferred on them by the military law of the United States over United States personnel in the Philippines."

However, paragraphs 3 (a) and 3 (b) remove whatever concurrent jurisdiction the Philippine government has over offenses punishable by Philippine law, and establishes exclusive jurisdiction by U.S. military authorities over such offenses, as follows:

"3. In cases where the right to exercise jurisdiction is concurrent, the following rules shall apply:

" (a). Philippine authorities shall have the primary right to exercise jurisdiction over all offenses committed by United States personnel, except in cases provided for in paragraphs 1(b), 2(b), and 3(b) of this Article."

Paragraphs 1(b), 2(b), and 3(b) are as follows:

" 1(b). United States military authorities shall have the right to exercise within the Philippines all criminal and disciplinary jurisdiction conferred on them by the military law of the United States over United States personnel in the Philippines."

x x x

" 2(b). United States authorities exercise exclusive jurisdiction over United States personnel with respect to offenses, including offenses relating to the security of the United States, punishable under the laws of the United States, but not under the laws of the Philippines."

x x x

" 3(b). United States military authorities shall have the primary right to exercise jurisdiction over United States personnel subject to the military law of the United States in relation to:

" (1) Offenses solely against the property or security of the United States or offenses against the property or person of United States personnel; and

" (2) Offenses arising out of any act or omission done in performance of official duty."

This means that U.S. military authorities have exclusive jurisdiction over offenses punishable under Philippine law as long as these are also punishable under the "criminal and disciplinary jurisdiction" conferred upon U.S. authorities by military law, and of offenses arising out of performance of official duty. But succeeding paragraphs also give U.S. military authorities exclusive jurisdiction over offenses arising from acts not in the performance of official duties, as will be shown later.

The Philippine government is left only with exclusive jurisdiction over offenses that are not punishable under the criminal and disciplinary jurisdiction of U.S. military authorities. But even this is taken away by the following stipulation:

" 3 (d). Philippine authorities will, upon request by the United States, waive their primary right to exercise jurisdiction except in cases of particular importance to the Philippines. If the Government of the Philippines determines that the case is of particular importance, it shall communicate such determination to the United States authorities within twenty (20) days after Philippine authorities receive the United States request."

In other words, whatever little exclusive jurisdiction the Philippine government has is made possible by grace of U.S. military authorities, i.e., only in instances where the U.S. military authority does not request waiver of the primary right of exclusive jurisdiction.

Worse, whether an act constitutes performance of official duty (therefore exclusively cognizable by the U.S. military authorities) is not a matter of evidence, but a matter of simple certification of such "fact" on the part of the U.S. military authorities, as follows:

"3(e). When the United States military commander determines that an offense charged by authorities of the Philippines against United States personnel arises out of an act or omission done in the performance of official duty, the commander will issue a certificate setting forth such determination. This certificate x x x will constitute sufficient proof of performance of official duty x x x".

Hence, it is really entirely a matter of will on the part of U.S. military authorities whether an act constitutes performance of official duty, i.e., it is matter of will on the part of U.S. military authorities whether they will or they would want to take exclusive cognizance of such offense. The certification by the U.S. military commander is, by and of itself - independent of contrary evidence - "sufficient proof" of performance of official duty.

Moreover, in instances when the Philippine government, by grace of the U.S. military authorities (i.e., the U.S. does not request waiver), exercises its exclusive jurisdiction, it has no power to detain any U.S. personnel who commit such offenses, as follows:

"Art. V, par. 6. The custody of any United States personnel over whom the Philippines is to exercise jurisdiction shall immediately reside with United States military authorities, if they so request, from the commission of the offense until completion of all judicial proceedings. x x x United States military authorities shall, upon formal notification x x x, make such personnel available x x x."

And to add insult to injury, if the trial is not over in one year, the U.S. military authority has no more obligation to produce the accused in court, as follows:

" 6. x x x In the event Philippine judicial proceedings are not completed within one year, the United States shall be relieved of any obligations under this paragraph. x x x."

And finally, there is a catch-all stipulation in this Article which gives U.S. military authorities the right to exercise exclusive jurisdiction not only for offenses arising from acts in the performance of official duty but also for offenses arising from acts not in the performance of official duties. While there is no way rape or child molestation can be certified to as performance of official duty, however, under this stipulation, U.S. military authorities can exercise exclusive jurisdiction.

This is paragraph 8 of the same Article which stipulates that when the U.S. military authority has already taken cognizance of an act which constitutes a violation of its rules of discipline (broad as to include any act which constitutes breach of discipline), and the sentence has been remitted, suspended, or pardoned, the Philippine government cannot anymore hold the U.S. personnel for trial for the same offense; as follows:

" 8. When the United States personnel have been tried in accordance with the provisions of this article and have been acquitted or have been convicted and are serving or have served their sentence, or have had their sentence remitted or suspended, or have been pardoned, they may not be tried again for the same offense in the Philippines. x x x."

By way of summary, under this entire Article, whether the offense be estafa, rape, homicide through reckless imprudence, murder, physical injuries, etc., the Philippine government cannot hold for trial, let alone penalize, any U.S. personnel who is in the Philippines under the Visiting Forces Agreement.

In other words, the section on "Criminal Jurisdiction," through a devious attempt at legal sophistry, removes from the jurisdiction of Philippine courts a certain class of persons (U.S. military and civilian personnel) and effectively grants them wholesale immunity. This class of persons, under the VFA, is unlimited in number, and unidentified.

IX. OFFICIOUS WAIVER OF CLAIMS

Article VI of the Agreement stipulates:

"Art. VI par. 1. Except for contractual arrangements, x x x, both governments waive any and all claims against each other for damage, loss, or destruction of property of each other's armed forces or for death or injury to their military and civilian personnel arising from activities to which this agreement applies."

This is obviously in the nature of a quitclaim, i.e. a relinquishment of the right to hold another person/entity responsible or liable for injuries/future injuries.

It is not clear whether this quitclaim is only for the government or whether the government is quitting-claim for and on behalf of any and all Philippine personnel who may be injured or killed. In other words, is this a waiver also on behalf of individuals who may be injured or killed?

Under Philippine civil law, any waiver of claims for future damages is proscribed for being against public policy. Although this applies only to persons governed by municipal or local law, nevertheless, it reflects the public policy in this jurisdiction. In any case, this quitclaim is in the VFA, and if the Agreement becomes a valid treaty, it becomes part of the law of the land.

This means that if any death or injury happens to any Philippine military or civilian personnel, the U.S. government or any of its personnel cannot be held liable even for damages.

Philippine "civilian personnel" has not been defined in this Agreement. Is it analogous to the definition of U.S. civilian personnel in Article 1, paragraph (2)? Article 1 paragraph 2 refers to those who are visiting, i.e., it does not apply to Philippine civilian personnel because it states that "nationals of nor ordinarily resident", i.e., those who are sojourning. Philippine civilian personnel. Therefore, for being undefined in this Agreement, it can range from auxiliary services of the Philippine

military (e.g. Red Cross), to reserve forces (e.g. CMT cadets), government employees remotely connected to defense of the country or enforcement of the laws (e.g. barangay captains, immigration personnel, traffic policemen), to government employees in general as long as they are civilian, to civilians in general.

Since this is a quitclaim, if any of those persons stated above suffers any damage to property, physical injuries, mental/emotional damage, or dies/is killed, he/she cannot recover damages from the U.S. government nor sue to recover damages from the U.S. government or any U.S. personnel.

The right to recover damages or to sue to recover damages, is a personal right. The government in this Agreement is waiving on behalf of these individuals the right to recover damages or to sue to recover damages. Its validity is dubious.

It is submitted that the right to recover damages or to sue to recover damages is a property right; hence, the government cannot deprive people of this property right by officiously entering into a quitclaim on their behalf.

X. ONEROUS TAX EXEMPTIONS

Article VII of the Agreement further reads:

“Art. VII par. 1. United States Government property, equipment, materials, supplies, and other property imported into or acquired in the Philippines by or on behalf of the United States armed forces in connection with activities to which this agreement applies; shall be free of all Philippine duties, taxes, and other similar charges. The exemptions provided in this paragraph shall also extend to any duty, or tax, or other similar charges which would otherwise be assessed upon such property after importation into, or acquisition within, the Philippines. x x x”

The foregoing constitutes exemptions under our tax laws. The power to tax (and to make exemptions therefor) is an essential aspect of sovereignty, inherently legislative and therefore non-delegable unless the Constitution itself allows the delegation [as in when Congress is allowed to authorize the President to fix tariff rates, import and export quotas, etc. (Art. VI Sec. 28 (2)); or when the local government can create its own sources of revenues; or as an incident of the emergency powers of the President (Art. VI, Sec. 23 (3))].

Since taxation is the source of revenue of government and its lifeblood, “no law granting any tax exemption shall be passed without the concurrence of a majority of all the members of Congress” (Art. VI, Sec. 28 (4)). And based on jurisprudence, any doubt as to the applicability of a tax exemption is resolved against the exemption.

This stipulation therefore cannot be valid unless majority of all members of both houses of Congress voting jointly approves the exemption. Otherwise, it does not meet with the requirements of the Constitution.

Second, since the stipulation exempts property, equipment, materials, and supplies being brought in by U.S. personnel, from duties, taxes, and other charges, there is

no duty to declare; and the stipulation opens the door to smuggling and to the bringing in of pernicious materials/objects/commodities.

XI. TOKENISM

Finally, Article VIII of the Agreement stipulates:

" Art. VIII, Movement of Vessels and Aircraft

"1. Aircraft operated by or for the United States armed forces may enter the Philippines upon approval of the Government of the Philippines in accordance with procedures stipulated in implementing arrangements.

"2. Vessels operated by or for the United States armed forces may enter the Philippines upon approval of the Government of the Philippines. x x x."

This stipulation is a token; but then, it is not. Note that the stipulation does not say "No U.S. military aircraft/vessel may enter without the approval of the Philippine government", it says U.S. military aircraft/vessel may enter upon approval by the Philippine government. The stipulation allows for a wholesale approval or a blanket approval of entry of all aircraft/vessels for, say, one year or five years. Since the stipulation is too general and we have not seen the implementing arrangements, (neither is there any limitation in this Agreement that would set the parameters for any implementing arrangements), the Agreement requires the nation to undeservingly trust the government official that would be tasked with approving the entry of such aircraft/vessels.

Based on all the foregoing, it is the position of the Public Interest Law Center (PILC) that this onerous, servile, illegal, and unconstitutional Agreement be rejected in toto for being utterly prejudicial to the interests of the Filipino people.

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